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THE SECOND AMENDMENT RIGHT TO BE NEGLIGENT

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Abstract

Only two constitutional rights—the First and Second Amendments—have a realistic capacity, through judicial interpretation or legislative action or inaction, to confer a "right to be negligent" on private citizens; that is, a right to engage in objectively unreasonable risk-creating conduct without legal consequences. In the First Amendment context, for example, the Supreme Court, in *New York Times v. Sullivan* and its progeny, expressly embraced a right to be negligent in defaming public officials and public figures to protect speech. This Article asserts that through both common and statutory law, the United States has enshrined a *de facto* Second Amendment right to be negligent in many aspects of making, distributing, and possessing firearms, the only legal product designed to inflict what the tort system is designed to prevent.

Explaining that it is a microcosm of a much larger issue, this Article focuses on one area: allowing access to guns by criminals through theft. Hundreds of thousands of guns are stolen each year from individuals and commercial sellers. By definition, they all go directly to criminals. A substantial percentage of guns used in crime were previously stolen. Nevertheless, the common law has conferred near complete immunity on gun owners and sellers who fail to secure guns from theft when they are subsequently used to cause harm. This occurs despite frequent judicial pronouncements that the risk of firearms demands the highest degree of care in their use and keeping. To accomplish this result, courts ignore or mischaracterize fundamental scope of liability principles, rarely even reaching the question of whether reasonable care was exercised.

On the statutory front, not only have Congress and most states failed to mandate firearms security measures, Congress has—in the name of the Second Amendment—given express protection of the right to be negligent, most prominently in the form of the Protection of Lawful Commerce in Arms Act. The Act immunizes manufacturers and sellers

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of guns from most tort claims, including claims against commercial firearms licensees for negligent security leading to theft.

This Article argues that this government-endorsed lack of responsibility results in the under-deterrence of risky conduct that, with reasonable alterations, could avoid substantial intentional and accidental injury costs.

INTRODUCTION

Only two federal constitutional rights—the First and Second Amendments—have the realistic capacity, through judicial interpretation or legislative action, to confer a "right to be negligent" on private citizens; that is, a right to engage in objectively unreasonable, risk-creating conduct without legal consequences.[1] In the First Amendment context,

1. "Realistic capacity" means as a practical matter under existing principles of law. In response to a draft of this Article, Professor Eugene Volokh constructed four creative hypotheticals to challenge my assertion that only the First and Second Amendments have the capacity, through judicial interpretation, to confer a right to be negligent on private actors. *See* E-mail from Eugene Volokh, Gary T. Schwartz Professor of Law, UCLA Sch. of Law, to author (Mar. 31, 2015, 23:56 CST) (on file with author). Each hypothetical involved injuries inflicted by a third-party criminal actor as a consequence, at least in part, of an asserted "negligent" act. Those acts were, respectively: a man invoking his Fourth Amendment rights in response to a police request to read his email, a woman getting an abortion, a woman entering into a lesbian relationship, and a property owner failing to institute a state-of-the-art security system that employed race and sex profiling. Each hypothetical contained facts assuming that the subsequent criminal harm was a foreseeable consequence of the act in question. Professor Volokh conceded it was unlikely any of the acts would result in tort liability but asserted that such results would occur at least in part because of constitutional considerations. For space considerations and because my assertion is not essential to the thesis of this Article, the hypotheticals and detailed

for example, the U.S. Supreme Court, in *New York Times Co. v. Sullivan* and its progeny, expressly endorsed a right to be negligent in defaming public officials and public figures to protect free speech.[2] This Article asserts that, through both common and statutory law,[3] the United States has enshrined a de facto Second Amendment right to be negligent regarding many aspects of making, distributing, and possessing firearms, the only legal product designed to inflict what the tort system is intended to prevent: death and injury to human beings.[4] "Right to be negligent," as used herein, refers to government-sanctioned behavior that fails rational applications of risk–utility balancing—the dominant test for assessing the reasonableness of conduct and risks under U.S. tort law.[5] A consequence

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discussion of them are omitted here. They are, however, worth reading and pondering and are available on request (Professor Volokh has given permission).

My reply questioned whether the hypotheticals involved cognizable negligent acts under existing principles of tort law. *See* E-mail from author, to Eugene Volokh, Gary T. Schwartz Professor of Law, UCLA Sch. of Law (Apr. 1, 2015, 10:37 CST) (on file with author). While the definition of what constitutes unreasonable conduct is, of course, amorphous, it seems unlikely (and no relevant cases exist of which I am aware) that invoking a constitutional right, having an abortion, engaging in a lesbian relationship, or failing to build race and sex profiling into a property security system would be seen as objectively unreasonable acts that fail a risk–utility balancing analysis. Additionally, even if one or more of the hypothesized acts were considered to be negligent, traditional scope of liability principles would most likely preclude liability because the hypothesized criminal acts were not what made the original act negligent in the first place, at least absent the unusual facts assumed in the hypotheticals. Nevertheless, Professor Volokh's point is theoretically accurate, which prompted me to add the qualifier "realistic" to the sentence in text.

2. 376 U.S. 254, 279–88 (1964) (imposing the high hurdle of the "actual malice" test in defamation actions brought by public officials, which requires plaintiffs to prove the defendant knew the statements were false or published them in reckless disregard of whether they were true or false); *see also* St. Amant v. Thompson, 390 U.S. 727, 730–31 (1968) (holding that proving "reckless disregard" under the actual malice test requires evidence that the defendant subjectively "entertained serious doubts as to the truth of" the statements and noting that this is a higher standard than an objective test of reasonableness); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 163–64 (1967) (Warren, C.J., concurring) (extending the actual malice test to public figures).

3. "Statutory law" refers both to affirmative statutory protections for negligent conduct and the omission of statutes or regulations mandating safe conduct.

4. This Article refers to "guns" and "firearms" generally, but the clear focus is on handguns, the firearm of choice for committing homicide. Handguns were used in 5782 deaths (68%) of the 8454 firearm homicides in 2013 for which the type of firearm could be determined. *Uniform Crime Reports: Crime in the United States 2013 Expanded Homicide Data Table 8*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2009-2013.xls (last visited Aug. 16, 2015).

5. Negligence under tort law is assessed by balancing the risks of conduct—both the foreseeability of the risk manifesting itself in harm and the severity of the harm should it occur—against the burden of eliminating or substantially reducing the risk. The standard is captured in the definition of negligence in the *Restatement (Third) of Torts*:

of this government-endorsed (and, in some situations, enforced) lack of responsibility is the under-deterrence of behavior that, with reasonable alterations, could avoid significant intentional and accidental injury costs.[6]

To allow in-depth examination, this Article focuses on only one aspect of the issue: preventing access to guns by criminals through theft.[7] Hundreds of thousands of guns are stolen each year from individuals and commercial sellers.[8] By definition, all stolen guns go directly to criminals. A large percentage of guns used in crime were previously stolen.[9] Nevertheless, despite frequent judicial pronouncements that the magnitude of the risk presented by firearms demands the highest degree of care in their use and keeping,[10] the common law has conferred near complete immunity on gun owners and sellers who fail to act reasonably to secure guns from theft when the guns are subsequently used to inflict

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> A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 3 (AM. LAW INST. 2010). The standard is an iteration of Judge Learned Hand's formula for negligence in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), where Judge Hand said conduct is negligent if the burden of avoiding a risk is less than the probability of the risk times the severity of the harm. *Id.* at 173 ("[I]t serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B is less than PL.").

6. *See infra* notes 205–32 and accompanying text.

7. Preventing unauthorized access to firearms is an area in which I have a longstanding interest. *See generally* Andrew J. McClurg, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 CONN. L. REV. 1189 (2000) [hereinafter McClurg, *Armed and Dangerous*] (arguing for recognition of a "negligent storage" claim under tort law when one fails to act reasonably to secure a firearm that is subsequently acquired and used to cause harm by an unauthorized user); Andrew J. McClurg, *The Public Health Case for the Safe Storage of Firearms: Adolescent Suicides Add One More "Smoking Gun,"* 51 HASTINGS L.J. 953 (2000) (arguing for safe gun storage laws as a way to reduce adolescent suicides); Andrew J. McClurg, *Child Access Prevention Laws: A Common Sense Approach to Gun Control*, 18 ST. LOUIS U. PUB. L. REV. 47 (1999) [hereinafter McClurg, *Child Access Prevention Laws*] (arguing for the adoption and enforcement of laws criminalizing the negligent storage of firearms in situations where a minor acquires the gun and uses it to cause harm). Parts of this Article are drawn from these prior works.

8. BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEPT. OF JUSTICE, 2012 SUMMARY: FIREARMS REPORTED LOST AND STOLEN 5–6 (2013), https://www.atf.gov/file/11846/download [hereinafter 2012 ATF STOLEN GUNS REPORT] (finding that 183,660 firearms were reported stolen in 2012); *see infra* notes 34–43 and accompanying text.

9. *See infra* notes 50–52 and accompanying text.

10. *See infra* notes 101–05 and accompanying text.

harm.[11] Accomplishing that result requires courts to ignore or mischaracterize fundamental scope of liability principles. Courts rejecting liability in theft cases rarely even reach the question of whether the defendants acted reasonably, choosing instead to hide behind the avoidance mechanisms of "no duty" or "no proximate cause."

On the statutory front, Congress and most state legislatures have not only declined to pass laws aimed at reducing gun thefts, Congress has given explicit protection to the right to be negligent in securing firearms in the form of the Child Safety Lock Act of 2005[12] and, more prominently, the Protection of Lawful Commerce in Arms Act (PLCAA).[13] The former immunizes individual gun owners from suit in theft cases if they employ childproofing devices such as trigger locks that do not deter theft,[14] while the latter bars all claims for negligent security against licensed firearms dealers.[15]

Thieves are but one type of unauthorized, dangerous firearms user. Each year, hundreds of minors are killed and thousands more injured in accidental shootings.[16] Hundreds more die using a gun to commit

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11. *See infra* Part II.
12. 18 U.S.C. § 922(z)(1) (2012).
13. 15 U.S.C. §§ 7901–7903 (2012).
14. *See infra* notes 75–79, 155–64 and accompanying text.
15. *See infra* notes 196–201 and accompanying text.
16. Data collected by the National Vital Statistics System showed 591 unintentional firearm deaths in 2011. Kenneth D. Kochanek et al., *Deaths: Final Data for 2011*, NAT'L VITAL STAT. REP., July 27, 2015, at 41 tbl.10, http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_03.pdf (listing number of deaths by age from 113 selected causes). *But see* Michael Luo & Mike McIntire, *Children and Guns: The Hidden Toll*, N.Y. TIMES (Sept. 28, 2013), http://www.nytimes.com/2013/09/29/us/children-and-guns-the-hidden-toll.html (reviewing hundreds of child firearm deaths and concluding that "accidental shootings occurred roughly twice as often as the records indicate, because of idiosyncrasies in how such deaths are classified by the authorities").

The gun debate tends to focus on deaths, but most shooting victims do not die. In 2012, 17,362 persons were injured in nonfatal, unintentional shootings. *See* Web-Based Injury Statistics Query and Reporting System (WISQARS), *Nonfatal Injury Reports 2001–2013*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html (select "Unintentional" for intent of injury option, "Firearm" for cause of injury option, and "2012 to 2012" for "Year(s) of Report"; then follow "Submit Request" hyperlink).

In terms of context, 2010 data for sixteen states showed that 32.1% of accidental shooting deaths occurred while the victim was "playing with" the firearm. Sharyn E. Parks et al., *Surveillance for Violent Deaths—National Violent Death Reporting System, 16 States, 2010*, MORBIDITY & MORTALITY WKLY. REP. SURVEILLANCE SUMMARIES, Jan. 17, 2014, at 1, 33 tbl.23, http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6301a1.htm. Hunting or showing a gun to others each comprised 13.6% of accidental deaths. *Id.* Regarding the known circumstances of injury, 38.3% died as a result of unintentionally pulling the trigger and 13.6% died because they thought the gun was unloaded or could not fire because the magazine was disengaged. *Id.* Nearly 45% (44.4%) of the accidental shooting deaths were unsatisfactorily classified simply as "[o]ther mechanism of injury." *Id.*

suicide.[17] Most deaths in both categories result from accessing unsecured guns in the home.[18] While access to guns by minors residing in gun-owning households is not directly addressed in this Article, much of the discussion applies to them. Although courts have shown a greater willingness to impose legal responsibility on gun owners in home access cases than in traditional theft cases, several decisions have protected the right to be negligent in the former situation.[19]

The concentration in this Article on gun thefts is a microcosm of a much larger issue. The right to be negligent permeates every level of the U.S. gun market and culture, from manufacture to end use. Manufacturers benefit from it enormously, principally in the form of the PLCAA. Subject to some narrow exceptions, the PLCAA bars all actions against gun manufacturers for harm caused by the criminal misuse of a firearm,[20] including negligent marketing and distribution claims for failing to act reasonably to monitor, train, or terminate corrupt or negligent dealers, even though they are known to be the principal conduits of guns used in

17. Suicide is the third leading cause of death for fifteen to twenty-four year olds. CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, SUICIDE: FACTS AT A GLANCE 2 (2012), http://www.cdc.gov/violenceprevention/pdf/suicide-datasheet-a.pdf. In 2010, suicides comprised six of every ten firearm deaths. *See* Drew DeSilver, *Suicides Account for Most Gun Deaths*, PEW RESEARCH CTR. (May 24, 2013), http://www.pewresearch.org/fact-tank/2013/05/24/suicides-account-for-most-gun-deaths/. In the same year, 375 persons ages seventeen and younger and 1752 persons ages eighteen to twenty-four committed suicide with a gun. D'Vera Cohn et al., *Gun Homicide Rate Down 49% Since 1993 Peak; Public Unaware*, PEW RESEARCH CTR. 42 (May 7, 2013), http://www.pewsocialtrends.org/files/2013/05/firearms_final_05-2013.pdf (tabulating CDC's WISQARS results in a table titled "Firearm Suicide Deaths, by Age, 1981–2010").

18. *See* GEO STONE, SUICIDE AND ATTEMPTED SUICIDE: METHODS AND CONSEQUENCES 12 (1999) (stating that 90% of all suicide attempts by adolescents occur in the home); Parks et al., *supra* note 16, at 11 (finding that 67% of the accidental firearms deaths included in the study occurred in a house or apartment).

19. *See, e.g.*, Smith v. Brooks, 545 S.E.2d 135, 135–36 (Ga. Ct. App. 2001) (affirming summary judgment for the defendant parents of minor child who accidentally shot his friend because the plaintiffs failed to show the child had a known proclivity for misusing firearms in the home); France v. Lambert, No. CA-8197, 1990 WL 187081, at *2 (Ohio Ct. App. Nov. 26, 1990) (affirming summary judgment for the parents of minor who accidentally shot his friend with his parents' gun because it was not foreseeable that the son would violate house rules by having a friend over when his parents were not home); Hughes v. Brown, 36 Va. Cir. 444, 449–50 (Va. Cir. Ct. 1995) (upholding summary judgment for the defendant father whose son shot and injured a friend with his father's gun because there was no previous indication that the father's instructions regarding firearm safety and handling had been disobeyed).

20. *See* 15 U.S.C. § 7903(5)(A) (2012) (defining a "qualified civil liability action," which is banned by the Act, as "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, *resulting from the criminal or unlawful misuse* of a qualified product by the person or a third party" (emphasis added)).

crimes, or "crime guns."[21] The PLCAA also precludes products liability design defect claims arising from volitional acts that are classified as unlawful, even in cases of accidental shootings that could have been prevented by a feasible alternative design.[22] Because no federal gun

21. No laws or regulations require gun makers to track their products or monitor their retail dealers, even though it is well-known that overtly corrupt or "look the other way" dealers funnel large numbers of guns into the hands of illegal, unauthorized users. A 2000 report by the Bureau of Alcohol, Tobacco and Firearms analyzing 1530 firearms trafficking investigations from 1996 through 1998, determined that corrupt firearms licensees were associated with more than 40,000 guns diverted into the illegal market, nearly half of the total number of trafficked firearms involved in the investigations. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, DEP'T OF TREASURY, FOLLOWING THE GUN: ENFORCING FEDERAL LAWS AGAINST FIREARMS TRAFFICKERS ix–x (2000). A 1995 report found that nearly 50% of traced crime guns in a particular year came from less than 1% of the nation's firearms licensees. *See* GLENN L. PIERCE ET AL., NE. UNIV., THE IDENTIFICATION OF PATTERNS IN FIREARMS TRAFFICKING: IMPLICATIONS FOR FOCUSED ENFORCEMENT STRATEGIES 11 & tbl.5 (1995) (showing that 49.4% of 121,110 crime guns in the study were traced back to federal firearms licensees comprising less than 1% of the total number of licensed gun sellers). Gun advocates respond that the latter figure is partly explained by the fact that a majority of firearms are sold by large retailers, which comprise only a small percentage of total licensees. *See generally* Gary Kleck & Shun-Yung Kevin Wang, *The Myth of Big-Time Gun Trafficking and the Overinterpretation of Gun Tracing Data*, 56 UCLA L. REV. 1233 (2009) (analyzing data regarding how criminals obtain guns and attacking the "myth" that large numbers of crime guns originate in large-scale gun-trafficking operations by licensed firearms dealers).

Prior to the PLCAA, negligent distribution claims took two basic forms: (1) oversupplying markets with weak gun laws with far more guns than could be consumed by residents in the area, knowing that large numbers of the guns were being diverted to the illegal market; and (2) failing to monitor and train retailers to detect and terminate those who were either intentionally or negligently participating in straw purchases or other transactions that diverted guns to criminals. *See* TIMOTHY D. LYTTON, SUING THE GUN INDUSTRY 8–11 (2006) (summarizing negligent marketing and distribution claims).

22. In *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009), a minor accidentally shot and killed his friend while playing with his father's semiautomatic handgun, believing the gun to be unloaded because the magazine was removed, *id.* at 745, a common type of gun accident. The court held that the PLCAA barred a design defect claim against Beretta, manufacturer of the gun, for failing to incorporate a device known as a magazine disconnect safety that prevents semiautomatic pistols from firing when the magazine is removed. *Id.* at 750, 765. Beretta conceded that the accident would not have occurred had a magazine disconnect been incorporated and that the device would add $10, at most, to the cost of a $500 handgun. *Id.* at 749. The PLCAA bars products liability suits "where the discharge of the product was caused by a volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v). While conceding that the boy "accidentally shot and killed his friend," *Adames*, 909 N.E.2d at 745, the court held that the claim fell under the ban because the shooter volitionally pulled the trigger and was subsequently adjudged delinquent in juvenile court for reckless discharge of a firearm. *Id.* at 763. Many gun accidents involve reckless conduct by minors or young adults. *See* GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 321 (1997) (concluding that fatal gun accidents commonly involve adolescents and young adults and usually involve reckless behavior). One study found that 20.3% of adults surveyed did not think a semiautomatic handgun could be fired with the magazine removed, while another 14.5% said they did not know. Jon S. Vernick et al., *"I Didn't Know the Gun Was Loaded": An Examination of Two Safety Devices that Can Reduce the Risk*

safety design regulations exist,[23] the absence of a threat of tort liability leaves gun manufacturers with little incentive to implement safer gun designs, such as personalized gun technology that would prevent unauthorized users from operating a firearm.[24] A separate article dedicated to manufacturers and the right to be negligent could be written.

That the right to be negligent is derived from deference to Second Amendment rights is directly shown by the PLCAA. The PLCAA begins with a statement of "Findings," the first of which states: "The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed."[25] No other consumer product receives federal immunity from tort liability.[26]

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of Unintentional Firearm Injuries, 20 J. PUB. HEALTH & POL'Y 427, 430 (1999). Among respondents who believed either that the pistol could not be discharged or did not know if it could be discharged, 28% lived in a gun-owning household. *Id.*

23. Federal law imposes no safety requirements for domestic handgun designs. *See* Jon S. Vernick & Stephen P. Teret, *A Public Health Approach to Regulating Firearms as Consumer Products*, 148 U. PA. L. REV. 1193, 1196–97 (2000) (discussing the fact that no federal agency has the authority to impose firearm design standards). The Consumer Product Safety Commission (CPSC), the agency charged with regulating the safety of most consumer products, is prohibited by federal law from imposing any safety regulation on firearms or ammunition. Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, § 3(e), 90 Stat. 503 (1976) ("The Consumer Product Safety Commission shall make no ruling or order that restricts the manufacture or sale of firearms, firearms ammunition, or components of firearms ammunition, including black powder or gunpowder for firearms."). As it is often said, the CPSC can regulate toy guns but not real ones. *E.g.*, *Protect Children, Not Guns: The Truth About Guns*, CHILDREN'S DEFENSE FUND (July 2013), http://www.childrensdefense.org/library/data/state-data-repository/the-truth-about-guns.pdf.

24. "Smart gun" technology has been feasible for many years as suggested by the now-forgotten, defunct settlement agreement by Smith & Wesson reached in the government plaintiff litigation in 2000, in which Smith & Wesson agreed to do the following: (1) within two years, to equip each handgun with an internal lock that could be operated only by a key, combination, or other mechanism unique to the gun; (2) to commit 2% of annual revenues to developing personalized technology; and (3) within three years, to use its best efforts to incorporate personalized technology in every new handgun design. ANDREW J. MCCLURG ET AL., GUN CONTROL & GUN RIGHTS 348–49 (2002). Colt's Manufacturing Co. (Colt) once saw smart guns as a potential major growth area in the market. Stephen T. Teret & Adam D. Mernit, *Personalized Guns: Using Technology to Save Lives*, *in* REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 173, 177 (Daniel W. Webster & Jon S. Vernick eds., 2013). A 1999 internal memo noted that "remarkable progress was being made" in smart gun technology. *Id.* The memo came to light during discovery in a lawsuit against Colt. *Id.* Shortly thereafter, Colt and other gun makers discontinued work on personalized guns. *Id.*

25. 15 U.S.C. § 7901(a)(1); *see also* Ileto v. Glock, 565 F.3d 1126, 1140 n.10 (9th Cir. 2009) (upholding the constitutionality of the PLCAA by taking "note that Congress . . . included findings and statements of purpose related to its interest in protecting individuals' Second Amendment right to bear arms").

26. The only industry other than the gun industry to receive broad statutory immunity from civil lawsuits is the childhood vaccine industry. In 1986, Congress passed the National Childhood Vaccine Injury Act, setting up a compensation program to promote the development of disease

The tie to the Second Amendment from legislative *inaction* and the state of the common law is less direct, but in stolen gun cases, the nexus is reasonably inferable because of the absence of other plausible explanations for giving a free pass to gun possessors to exercise unreasonable care in safeguarding the most dangerous product.[27] While it is true that courts have always been reluctant to impose tort liability on an original negligent actor for a subsequent criminal act, as discussed in Part II, they have done so in numerous contexts where the risk of a criminal act is what made the original act negligent in the first place.[28] One explanation for the paucity of direct references to the Second Amendment in firearms cases is that until the Supreme Court decided *McDonald v. City of Chicago* in 2010,[29] courts correctly assumed that the Second Amendment had no application to state tort law.[30] By that point, the PLCAA, prohibiting most suits, was already well-entrenched.

One might argue that the immunity from responsibility for harm caused with stolen guns is a necessary byproduct of protecting a constitutional right, similar to the First Amendment protection of negligent conduct in defamation actions by public officials and figures,

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vaccines after a wave of lawsuits drove some small vaccine companies out of business, causing vaccine shortages. National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (1986) (codified as amended in scattered sections of U.S.C.). But unlike the PLCAA, the Vaccine Act set up a separate no-fault compensation fund for persons injured by vaccines funded by an excise tax on vaccine sales. *See* Betsy J. Grey, *The Plague of Causation in the National Childhood Vaccine Injury Act*, 48 HARV. J. ON LEGIS. 343, 352 (2011). Compensation claims are heard by a special court. *Id.* at 354–55 (discussing the compensation system under the Vaccine Act). If a claimant is dissatisfied with the court's award or if the court dismisses the claim, the claimant is permitted to pursue a regular tort action. *Id.* at 355.

27. It is reasonable to characterize firearms in these terms because guns, at least handguns, are the only legal product for which the intended purpose and primary utility is to kill or injure human beings. *See* Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 453 (1999). Thus, comparisons to other dangerous products, such as automobiles, alcohol, or baseball bats, are inapt because their primary purposes and utilities are, respectively, transportation, recreation, and the national pastime. *See id.* Professor Robert Rabin offered the distinction that one "uses" a handgun to cause harm, whereas one "abuses" products such as alcohol in causing harm. *Id.*

28. *See infra* notes 113–16 and accompanying text.

29. 561 U.S. 742, 790 (2010) (incorporating the Second Amendment into the Due Process Clause of the Fourteenth Amendment and making it binding on the states).

30. *See, e.g.*, City of New York v. Beretta U.S.A. Corp., 401 F. Supp. 2d 244, 293 (E.D.N.Y. 2005) (noting in a public nuisance action against several gun manufacturers that the Second Amendment has no application to the states and citing early Supreme Court precedent to that effect); NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 462 (E.D.N.Y. 2003) (stating in a lawsuit asserting numerous claims against several gun manufacturers that "[t]his is a case invoking state tort law; the Second Amendment limits only the powers of the federal government"); Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1317–18 (E.D.N.Y. 1996) (explaining in a negligent marketing action against several gun manufacturers that "the Supreme Court has held that the Second Amendment limits only the power of Congress" and does not inhibit state tort law).

but a crucial distinction exists. Most restrictions on speech run afoul of the First Amendment, but nothing in the history nor jurisprudence of the Second Amendment suggests, much less guarantees, a privilege by gun sellers and owners to act unreasonably in securing firearms from theft.

Part I of this Article explores the scope of the risk of stolen guns and the burden of safely securing firearms from theft. Part II analyzes how the law, through both inaction and affirmative legislative and common law actions, has given its imprimatur to negligently safeguarding from access by thieves. Part III asserts that the trickle-down effect of this imprimatur is under-deterrence of unreasonable, dangerous conduct and a mindset among many gun owners that rejects suggestions of legal responsibility to exercise reasonable care in securing firearms.

I. STOLEN GUNS: RISKS AND BURDENS

Unauthorized access to firearms assumes two basic forms: traditional theft and access by persons, usually minors, living in the gun owner's home. The distinction between the two categories blurs in situations where an older minor or young adult who lives in or has access to a relative's home removes a gun from the premises and uses it for an intentional criminal act.[31] This Article focuses on traditional thefts,[32] but

31. *See, e.g.*, Jones v. Secord, 684 F.3d 1, 3–4 (1st Cir. 2012) (granting summary judgment to the gun owner in action alleging negligence in failing to properly secure gun and timely report its theft by his grandson who used it to kill three people); Bridges v. Parrish, 742 S.E.2d 794, 796 (N.C. 2013) (declining to hold parents of adult son liable for negligently storing handgun when son retrieved the gun from their home and used it to shoot his girlfriend); Estate of Heck *ex rel.* Heck v. Stoffer, 786 N.E.2d 265, 266 (Ind. 2003) (reversing the trial court's dismissal of action against parents of an adult fugitive felon who retrieved defendants' gun from their home and used it to fatally shoot a police officer).

32. Related to negligent firearms security is the theory of negligent entrustment, which is not part of this Article. The *Restatement (Second) of Torts* defines the doctrine of negligent entrustment as follows:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

RESTATEMENT (SECOND) OF TORTS § 390 (AM. LAW INST. 1965).

An essential element of a negligent entrustment claim is affirmatively supplying the chattel to the unfit user. *See id.* Thus, the claim does not encompass thefts. Some courts, however, have recognized that constructive entrustment can occur in situations where the defendant permitted access to the chattel to a dangerous user under circumstances where the defendant knew or should have known the person would find and misuse the chattel. *See, e.g.*, Foster v. Arthur, 519 So. 2d 1092, 1095 (Fla. Dist. Ct. App. 1988). In *Foster*, the defendant's roommate took her gun, which

much of the reasoning applies equally to access by minors in the household. Importantly, the same measures necessary to prevent unauthorized access to guns by thieves would also preclude unauthorized access to guns by minors, preventing many gun accidents and suicides.[33]

Gun thefts occur primarily through residential and vehicle burglaries, but also in large numbers from retail gun sellers.[34] As is true of so much data in the gun debate,[35] pinning down the number of stolen guns is an elusive quest. Survey research by Professors Philip Cook and Jens Ludwig estimated that roughly 600,000 guns are stolen in noncommercial thefts annually[36] (an average of approximately 1600 guns a day). The U.S. Department of Justice's Bureau of Justice Statistics estimated, based on its annual National Crime Victimization Survey, that 232,400 firearms were stolen each year from 2005 through 2010 in household burglaries or other property crimes[37] (an average of approximately 635 a day).

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she kept under her mattress for self-protection, and used it to shoot the plaintiff. *Id.* at 1093. She never gave the roommate permission to use the gun, and, in fact, denied that she had disclosed its whereabouts to him. *See id.* In upholding a claim against the defendant grounded in negligent entrustment, the court said: "Consent to use a firearm need not be expressly given . . . . It may be given indirectly through the conduct of the gun owner, such as when, under certain circumstances, he provides the opportunity for another person to use the gun." *Id.* at 1094. The court found sufficient evidence in the defendant's knowledge of her roommate's violent past and the fact that he knew she owned a gun to put her on notice that he might appropriate the gun with harmful results. *Id.* at 1095. Because there was no evidence that the defendant actually entrusted the firearm to the roommate, even by passive acquiescence, *Foster* would have been better analyzed as a case of negligent storage, rather than negligent entrustment. *See* Herland v. Izatt, 345 P.3d 661, 663, 674 (Utah 2015) (holding in a negligent entrustment case where plaintiff's decedent shot herself with defendant's handgun while intoxicated at a party in his home that a duty would exist if the defendant committed either "(1) directly supplying or handing a gun to another, (2) placing the gun within reach of another, or (3) consenting (either explicitly or implicitly) to the use of the gun by another").

33. *See supra* notes 16–17.

34. *See* Kleck & Wang, *supra* note 21, at 1293. Much less frequently, guns are stolen in transit from commercial shippers. *Reporting of In-Transit Loss and Theft of Firearms*, NAT'L SHOOTING SPORTS FOUND. (2015), http://www.nssf.org/factsheets/PDF/ReportingOfIntransit.pdf. Guns stolen in transit are not specifically addressed in this Article, but the same arguments would apply in the event negligence contributed to such a theft.

35. Current, reliable firearms data and research are woefully lacking in most areas due in large part to actions by Congress. *See* Andrew Jay McClurg, *Firearms Policy and the Black Community: Rejecting the "Wouldn't You Want a Gun If Attacked?" Argument*, 45 CONN. L. REV. 1773, 1798–1800 (2013) (tracing how Congress terminated government funding of firearms research back in the 1990s).

36. *See* PHILIP J. COOK & JENS LUDWIG, U.S. DEP'T OF JUSTICE, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 7 (1997), https://www.ncjrs.gov/pdffiles/165476.pdf.

37. LYNN LANGTON, U.S. DEP'T OF JUSTICE, FIREARMS STOLEN DURING HOUSEHOLD BURGLARIES AND OTHER PROPERTY CRIMES, 2005–2010, at 1 (2012), http://www.bjs.gov/content/pub/pdf/fshbopc0510.pdf.

Pursuant to an executive action issued by President Barack Obama in the wake of the Sandy Hook Elementary School mass shooting in Newtown, Connecticut,[38] the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) compiled a report on stolen and lost guns for 2012, finding that 173,675 guns were reported to the National Crime Information Center (NCIC) as stolen or lost from individuals.[39] The report noted that "the statistics in this report likely reveal only a fraction of the problem," due mostly to the lack of any mandate that individuals report stolen guns to law enforcement or that law enforcement agencies report stolen guns to the NCIC.[40] Mandatory reporting of stolen guns would hold gun owners more accountable for securing them, enable better data collection, solve more crimes, and prevent some crimes from occurring; yet only ten states and the District of Columbia have laws requiring an individual to report a stolen firearm.[41]

In addition to gun thefts from individuals, thousands of guns are stolen each year from federal firearms licensees (FFLs). Federal regulations require FFLs to report stolen or lost guns to ATF within forty-eight hours of the observed theft or loss.[42] In 2012, FFLs reported 16,667 stolen or lost firearms.[43] Handguns were by far the most common type of firearm reported stolen or lost.[44] The 2012 report included 377 burglaries involving the theft of 4340 guns and 662 shoplifting incidents involving the theft of 1304 firearms.[45] The actual figures are likely much higher because stolen or missing guns often are not discovered unless and until ATF inspects the records of an FFL.[46] Historically, ATF has inspected

38. *Now Is the Time: The President's Plan to Protect Our Children and Our Communities by Reducing Gun Violence*, WHITE HOUSE 2, 7 (Jan. 16, 2013), http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf.

39. *See* 2012 ATF STOLEN GUNS REPORT, *supra* note 8, at 4.

40. *Id.* at 2.

41. *See* CONN. GEN. STAT. § 53-202g (2015); D.C. CODE § 7-2502.08 (2015); DEL. CODE. ANN. tit. 11, § 1461 (2015); 720 ILL. COMP. STAT. 5/24-4.1 (2015); MD. CODE ANN., PUB. SAFETY § 5-146 (West 2015); MASS. GEN. LAWS ANN. ch. 140, § 129C (West 2015); MICH. COMP. LAWS ANN. § 28.430 (West 2015); N.J. STAT. ANN. § 2C:58-19 (West 2015); N.Y. PENAL LAW § 400.10 (McKinney 2015); OHIO REV. CODE ANN. § 2923.20(A)(5) (West 2015); 11 R.I. GEN. LAWS § 11-47-48.1 (West 2015). Many individuals choose not to report stolen guns. Explanations include: The stolen gun may have been illegal to begin with; the victim might have been carrying the gun illegally (for example, in a car while lacking a permit); she may be uncertain whether she was violating any laws in storing or carrying the gun; she may worry about liability or other legal ramifications; or she might be embarrassed or concerned about being stigmatized.

42. 27 C.F.R. § 478.39a (2014).

43. 2012 ATF STOLEN GUNS REPORT, *supra* note 8, at 4.

44. *Id.* at 10 tbl.4.

45. *Id.* at 10 tbl.3.

46. *Id.* at 3; *see also* Fred Schulte, *ATF's Struggle to Close Down Firearms Dealers; Modest Resources, Restrictive Rules Allow Troubled Outlets to Stay Open for Years*, CTR. PUB.

only a small percentage of FFLs on an annual basis due to inadequate funding by Congress and other hindrances.[47] A report by the Justice Department's Office of the Inspector General found that between 2007 and 2012, more than 58% of FFLs had not been inspected for five or more years.[48] Even with increased inspection efforts under the Obama Administration, in 2012, ATF inspected fewer than one in five FFLs.[49]

By definition, all stolen guns go directly to criminals. Not surprisingly, stolen guns are a primary source of guns used in crime. In interviews with incarcerated felons, 32% of the participants said they acquired their most recent firearm through theft.[50] The felons who reported stealing guns had stolen, on average, about thirty-nine guns each.[51] Analyzing data pertaining to how criminals obtain guns, criminologist Professor Gary Kleck and Dr. Shun-Yung Kevin Wang concluded that "[t]heft is central to criminal gun acquisition" and that "[m]ost gun theft is a by-product of residential burglary and other thefts from private owners."[52] More data is needed, but Congress—a powerful protector of the right to be negligent—began attaching the Tiahrt Amendment to appropriations bills in 2003, which bars ATF from releasing crime gun tracing data to the public and bans its admissibility in state and federal judicial proceedings.[53]

Guns are profitable, desirable items for thieves. Stolen guns are untraceable, making them valuable to those who intend to use them in

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INTEGRITY (May 19, 2014, 12:19 PM), http://www.publicintegrity.org/2013/02/01/12117/atfs-struggle-close-down-firearms-dealers (detailing an inspection of a Pennsylvania gun store in 2010 in which the owner of a gun shop could not account for 3000 firearms that he had bought or sold in recent years).

47. *See* Schulte, *supra* note 46 (explaining how congressionally imposed limitations on inspections and funding hinder ATF's ability to inspect and shut down law-breaking firearms licensees).

48. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF ATF'S FEDERAL FIREARMS LICENSEE INSPECTION PROGRAM ii (2013).

49. *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, *Fact Sheet—FFL Compliance Inspections* (Feb. 2013), https://www.atf.gov/file/4796/download (stating that ATF conducted 13,100 compliance inspections of 69,000 FFLs in 2012).

50. JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 183 tbl.9.1 (expanded ed. 1994) (containing a well-known study based on interviews with 2000 prisoners).

51. *Id.* at 198 (estimating the average number of guns stolen by felons based on survey responses).

52. Kleck & Wang, *supra* note 21, at 1293.

53. *See* Colin Miller, *Lawyers, Guns, and Money: Why the Tiahrt Amendment's Ban on the Admissibility of ATF Trace Data in State Court Actions Violates the Commerce Clause and the Tenth Amendment*, 2010 UTAH L. REV. 665, 667–68, 676–82 (2010) (explaining how, in 2003, Congress began attaching the Tiahrt Amendment to appropriations acts and arguing that the ban on admitting gun-tracing data as evidence in state courts violates the Commerce Clause and the Tenth Amendment).

crime.[54] They are also attractive to people who are legally prohibited from purchasing guns from licensed dealers.[55] Consequently, they are prime candidates to enter the secondary illegal gun market. As one judge said bluntly: "The notion that it is not foreseeable that a stolen handgun will be used in violent crime is simply nonsense."[56]

The burden on individuals of securing firearms from thieves has three components, while the burden on commercial sellers has two. The two burdens individuals and retailers share are the effort and financial investment required to safely secure firearms from theft. For individuals, the third burden is the concern that a secured firearm will be unavailable for self-defense when needed. This has long been a rallying cry by gun rights activists against safe gun storage requirements despite the absence of a single credible report of a person being injured because of an inability to access a properly secured gun.[57] Even the National Rifle Association

54. *See* Valentine v. On Target, Inc., 727 A.2d 947, 956 (Md. 1999) (Raker, J., concurring) ("Stolen guns are particularly attractive to people who intend to commit violent crimes with handguns because they are untraceable, an important characteristic to felons, and enjoy a potentially quick turnover.").

55. *See id.* (noting that "under federal and state law, felons are unable to buy handguns legitimately from a licensed retail merchant"); *see also* 18 U.S.C. § 922(g)(1) (2012) (listing categories of prohibited gun purchasers, which include any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year").

56. *Valentine*, 727 A.2d at 956.

57. In 2000, gun rights proponent John Lott wrote an op-ed piece arguing that requiring safe gun storage "would likely greatly increase deaths resulting from crime." *See* John R. Lott, Jr., *Childproof Gun Locks: Bound to Misfire*, WALL ST. J. (July 16, 1997, 12:01 AM), http://www.wsj.com/articles/SB868999224281620000. I noted in response that not a single reported case could be located in which a gun owner suffered harm because of an inability to access a securely stored gun. McClurg, *Armed and Dangerous*, *supra* note 7, at 1213. Shortly thereafter, gun rights activists began citing to a 2000 incident involving a pitchfork-wielding man who attacked and murdered two children when their parents were not home. *See Man in Pitchfork Slaying Identified*, L.A. TIMES (Aug. 25, 2000), http://articles.latimes.com/2000/aug/25/news/mn-10333. Some gun proponents have argued that a fourteen-year-old sibling in the house at the time could have prevented the attack if her parents' gun had not been locked up, *see, e.g.*, Erich Pratt, *When Gun Safety Locks Kill,* GUN OWNERS AM. (Sept. 29, 2008), http://gunowners.org/sk0404.htm, placing them in the remarkable position of advocating leaving unsecured firearms accessible to unsupervised children.

Other than the pitchfork case, research located only two reported incidents in which an inability to fire or access a gun supposedly contributed to preventing a person from using a gun in self-defense. One situation involved a home invasion allegedly set up by a relative in which a woman attempted to fire her husband's gun at an intruder who had killed her husband. Jamie Satterfield, *Vickie Graves Says She Tried to Shoot Intruder, Gun Wouldn't Go Off*, KNOXVILLE NEWS SENTINEL (Feb. 9, 2011, 12:00 AM), http://www.knoxnews.com/news/local-news/vickie-graves-shoot-intruder-testify-bill. The woman said the gun would not fire due to unspecified safety mechanisms in the gun. *Id.* The other incident involved a Texas prosecutor killed during a home invasion. Selwyn Crawford, *Slain Kaufman DA's Children Say His Guns Were out of Reach the Night He Died*, DALL. MORNING NEWS (Apr. 8, 2013, 11:04 PM),

(NRA) advises: "Store guns so they are not accessible to unauthorized persons."[58] *Guns and Ammo*, the venerable gun magazine, states that "[m]odern firearms are powerful tools that experienced shooters understand need to be treated with respect" and that "it's very important to store them properly."[59] Organizations as diverse as ammunition manufacturers and pediatrics groups recommend storing guns both unloaded and locked.[60]

Superficially, it could be argued that the Supreme Court's 2008 decision in *District of Columbia v. Heller*[61] precludes government-enforced safe gun storage. *Heller* held that the Second Amendment protects an individual right to possess a firearm in the home for self-defense and struck down the District of Columbia's handgun ban.[62] The Court also invalidated a restriction that any firearm in a home be kept at all times "unloaded and disassembled or bound by a trigger lock or

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http://www.dallasnews.com/news/crime/headlines/20130408-children-say-mclelland-put-his-guns-away-before-he-died.ece. According to his son, the victim "kept a gun 'in every room of his house'" but had "gathered up all his guns and put them away in a bag" for a party the night before "so that his guests didn't stumble across them." *Id.*

Assuming, against reason and the facts, that all three of the above cases were meritorious examples of the pitfalls of safe gun storage, they occurred over a period of years in which millions of unsecured guns were stolen in household burglaries and many thousands of minors died in accidental shootings and adolescent suicides using their parents' guns. *See supra* notes 16–17, 36–37 and accompanying text. During the same period, tens of millions of household burglaries occurred in which no one reported an injury because of an inability to access a securely stored gun. *See* SHANNON CATALANO, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: VICTIMIZATION DURING HOUSEHOLD BURGLARY 1 (2010), http://www.bjs.gov/content/pub/pdf/vdhb.pdf (estimating that 3.7 million household burglaries occur each year).

58. *NRA Gun Safety Rules*, NRA PROGRAMS & SERVS., http://training.nra.org/nra-gun-safety-rules.aspx (last visited Jan. 7, 2016). The full passage states:

> Store guns so they are not accessible to unauthorized persons. Many factors must be considered when deciding where and how to store guns. A person's particular situation will be a major part of the consideration. Dozens of gun storage devices, as well as locking devices that attach directly to the gun, are available. However, mechanical locking devices, like the mechanical safeties built into guns, can fail and should not be used as a substitute for safe gun handling and the observance of all gun safety rules.

Id.

59. B. Gil Horman, *G&A Basics: How to Store Your Gun*, GUNS & AMMO (Oct. 16, 2012), http://www.gunsandammo.com/home-featured/ga-basics-how-to-store-your-gun/ (emphasis omitted).

60. *See* Mark D. Polston & Douglas S. Weil, *Unsafe by Design: Using Tort Actions to Reduce Firearm-Related Injuries*, 8 STAN. L. & POL'Y REV. 13, 14 (1997) (citing recommendations by Sporting Arms and Ammunition Manufacturers' Institute and American Academy of Pediatrics that guns be stored unloaded and locked).

61. 554 U.S. 570 (2008).

62. *Id.* at 635.

similar device"[63] on the basis that the prohibition rendered the right to self-defense meaningless.[64] But as subsequent cases have held, laws that preserve a right to immediate self-defense by requiring safe storage whenever the gun is not under the control of the owner do not run afoul of *Heller*.[65]

It is not the goal of this Article, nor would it be possible, to articulate what reasonable care requires under all circumstances with regard to firearm security. As the circumstances change, the amount of required care changes.[66] As a general observation, apart from keeping the gun under one's immediate control, a sturdy, non-portable gun safe is the most secure option for preventing unauthorized access.[67] Today, there are nearly as many types and styles of gun safes as there are types of guns.[68] Many safes provide quick-pad combination or biometric locks, activated by hand or fingerprint recognition, allowing quick access.[69] Many small

63. *Id.* at 630.

64. *Id.*

65. *See* Jackson v. City & County of San Francisco, No. C 09-2143 RS, 2012 WL 3580525, at *1 (N.D. Cal. Aug. 17, 2012) (upholding a San Francisco ordinance requiring handguns that are "not under direct, personal control" within the home to have trigger locks or be stored in locked containers); Commonwealth v. Reyes, 982 N.E.2d 504, 506 (Mass. 2013) (upholding the same statute, concluding that "the statute is neither impermissibly vague nor violative of [the defendant's] right to self-defense"); Commonwealth v. McGowan, 982 N.E.2d 495, 496 (Mass. 2013) (upholding a Massachusetts statute requiring firearms not under the owner's control to be stored in a locked container or equipped with a safety device that renders the firearm operable only by the authorized user).

66. *See infra* note 101 and accompanying text.

67. *See* Horman, *supra* note 59 ("Simply stated, gun safes are the most secure gun storage option available to the average gun owner.").

68. Review websites such as GunSafeReviewsGuy.com and GunSafeAdvisor.com offer useful information about the many different types of gun safes available. *Honest Gun Safe Reviews,* GUN SAFE REVIEWS GUY, http://gunsafereviewsguy.com/ (last visited Jan. 7, 2016); *The Ultimate Gun Safe Buying Guide*, GUN SAFE ADVISOR, http://www.gunsafeadvisor.com/ (last visited Aug. 22, 2015). There appears to be a general consensus among safe reviewers regarding some of the top brands, although not necessarily the particular model. *See, e.g.*, *Best Gun Safe*, GUN SAFE REVIEWS GUY, http://gunsafereviewsguy.com/buyers-guide/best-gun-safe/ (last visited Aug. 23, 2015) (recommending the AMSEC BF gun safe); *Total Security in a Small Space—Best Gun Safes for Apartments*, GUN SAFE ADVISOR, http://www.gunsafeadvisor.com/total-security-in-a-small-space-best-gun-safes-for-apartments/ (last visited Aug. 23, 2015) (recommending the AMSEC DV652 Defense Vault). Across review sites, reviewers warn customers to not let cost deter them from investing in a high-quality gun safe. *See* Marc Weber Tobias*, Unsafe Gun Safes Can Be Opened by a Three-Year Old*, FORBES (July 27, 2012, 11:32 AM), http://www.forbes.com/sites/marcwebertobias/2012/07/27/unsafe-gun-safes-can-be-opened-by-a-three-year-old/ (describing dangers of unsecure gun safes and the ways in which they can be easily circumvented).

69. *See generally What to Look For in a Gun Safe*, GUN SAFE REVIEWS GUY, http://gunsafereviewsguy.com/ (last visited Aug. 23, 2015) (discussing different features of gun safes); *The Ultimate Gun Safe Buying Guide*, *supra* note 68.

safes are designed to be permanently mounted or secured with a cable.[70] No safe is foolproof, but reasonable care does not require foolproof measures. Alternatively, a gun owner concerned about not being able to obtain quick access to a handgun can keep the gun under his immediate control.[71]

For commercial sellers, the burden of securing guns is lower in one regard and higher in another. It is lower because the immediate self-defense burden is absent. It is higher because, with so many guns in one place, the magnitude of the risk demands more extensive security measures. In terms of specifics, as detailed in Part II, ATF makes detailed recommendations to firearms licensees regarding proper gun security,[72] while nine states and the District of Columbia impose specific security measures on gun sellers by statute.[73]

II. THE LAW'S IMPRIMATUR OF THE RIGHT TO BE NEGLIGENT

Having explored the risks of stolen guns and the burdens of reducing the risks, this Part explores the Article's thesis that the law, through both inaction and affirmative action, has created a de facto right to be negligent in failing to secure access to firearms by unauthorized users.

A. *Imprimatur Through Inaction*

A principal means by which the law has given its imprimatur to unreasonable conduct with regard to gun security is through the failure to affirmatively demand reasonable conduct via statutes or regulations.

Guns in Homes. No federal or state law mandates that guns in homes or vehicles be securely stored to prevent theft.[74] In 2005, Congress passed the

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70. *See Gun Safe Buyer's Guide*, GUN SAFE REVIEWS GUY, http://gunsafereviewsguy.com/buyers-guide/ (last visited Aug. 21, 2015).

71. *See* MASSAD AYOOB, GUN SAFETY IN THE HOME 66–70 (Corrina Peterson ed., 2014) (discussing the two options for safe firearms storage in the home as either keeping the gun in a safe or under the immediate control of the owner).

72. *See infra* notes 88–89 and accompanying text.

73. *See infra* note 91 and accompanying text.

74. Among states, only Massachusetts has a mandatory safe storage law of broad applicability and even that law would not necessarily protect guns from theft. *See* MASS. GEN. LAWS ANN. ch. 140, § 131L(a) (West 2015) ("It shall be unlawful to store or keep any firearm . . . in any place unless such weapon is secured in a locked container or equipped with a tamper-resistant mechanical lock or other safety device, properly engaged so as to render such weapon inoperable by any person other than the owner or other lawfully authorized user."). Three states—California, Connecticut, and New York—mandate safe gun storage in specific circumstances. *See* CAL. PENAL CODE § 25135 (West 2015) (mandating safe gun storage if firearm owner knows or has reason to know that a co-dweller is prohibited by state or federal law from possessing a firearm); CONN. GEN. STAT. ANN. § 29-37i (West 2015) (requiring safe storage of loaded guns if another resident is ineligible to possess a firearm under state or federal law or "poses a risk of imminent personal injury to himself or herself or to other individuals"); N.Y. PENAL LAW § 265.45 (McKinney 2015) (mandating safe gun storage if a firearm

Child Safety Lock Act of 2005, which requires all gun makers and sellers to furnish a "secure gun storage or safety device"[75] with the sale of any handgun.[76] Gun makers and sellers comply with the law by supplying an inexpensive childproofing trigger lock or cable lock, often accompanied by a hard plastic case with predrilled holes for a padlock, all of which can be easily defeated.[77] Use of the supplied device is not mandated by the law, but if it is used, the Act confers tort immunity on the gun owner for harm resulting from theft by a criminal misuser,[78] despite the fact that the safety devices are childproofing measures, not theft deterrent devices.[79]

At least twenty-five states have some form of a Child Access Prevention law,[80] commonly called a CAP law.[81] These laws do not mandate safe

owner lives with one who has been convicted of a felony, adjudicated as a mental defective or committed to a mental institution, or convicted of domestic violence).

75. 18 U.S.C. § 921(a)(34) (2012). See *infra* note 155 for full statutory definition.

76. 18 U.S.C. § 922(z)(1) (making it unlawful for any importer, manufacturer, or dealer to sell or transfer a handgun without a secure gun storage or safety device as defined in 18 U.S.C. § 921(a)(34)).

77. *See* Marc Weber Tobias, *The Lockdown: Gun Locks—Unsafe at Any Caliber*, ENGADGET (June 13, 2007, 1:08 PM), http://www.engadget.com/2007/06/13/the-lockdown-gun-locks-unsafe-at-any-caliber/ (showing photos of both types of locks and discussing how they can be easily thwarted even by children); *see also* Alex Blate, *Project ChildUnsafe: Gun Safety Fail*, YOUTUBE (Dec. 31, 2012), https://www.youtube.com/watch?v=1U0CHhDm8EY (demonstrating how to unlock a cable gun lock in less than ten seconds using a piece of metal from a windshield wiper insert and other simple tools); mmatt, *Trigger Lock Removal with a Screwdriver*, YOUTUBE (July 15, 2011), https://www.youtube.com/watch?v=P397UsoyNBc (demonstrating how to remove a trigger lock with a small screwdriver and asserting that an eleven-year-old boy with an imagination could figure out how to remove one). Trigger locks and cable locks are the two types of basic gun locks. Horman, *supra* note 59. Both of them are childproofing locks, not theft deterrent locks. *See id.* Trigger locks, as the name suggests, are affixed around the trigger to prevent it from being pulled. *Id.* Cable locks are used primarily in semiautomatic handguns. The cable is looped through the barrel or the grip where the magazine is inserted and locked with a padlock or combination lock. *Id.*

78. 18 U.S.C. § 922(z)(3) (granting tort immunity in state and federal courts for one who uses a "secure gun storage or safety device" as defined in 18 U.S.C. § 921(a)(34) in the event someone gains unauthorized access to the gun and criminally misuses it).

79. *See supra* note 77 and accompanying text.

80. *See* CONN. GEN. STAT. ANN. §§ 53a-217a, 29-37i (West 2015); D.C. CODE ANN. § 7-2507.02 (West 2015); DEL. CODE ANN. tit. 11, § 1456 (West 2015); FLA. STAT. ANN. § 790.174 (West 2015); GA. CODE ANN. § 16-11-101.1 (West 2015); HAW. REV. STAT. ANN. §§ 134-10.5, 707-714.5 (West 2015); 720 ILL. COMP. STAT. ANN. 5/24-9 (West 2015); IOWA CODE ANN. § 724.22(7) (West 2015); KY. REV. STAT. ANN. § 527.110 (West 2015); MD. CODE ANN., CRIM. LAW § 4-104 (West 2015); MASS. GEN. LAWS ANN. ch. 140, § 131L (West 2015); MINN. STAT. ANN. § 609.666 (West 2015); MO. ANN. STAT. § 571.060 (West 2015); NEV. REV. STAT. ANN. § 202.300 (West 2015); N.H. REV. STAT. ANN. § 650-C:1 (2015); N.J. STAT. ANN. § 2C:58-15 (West 2015); N.C. GEN. STAT. ANN. § 14-315.1 (West 2015); 2014 Okla. Sess. Law Serv. 193; 18 PA. STAT. AND CONS. STAT. ANN. § 6110.1 (West 2015); 11 R.I. GEN. LAWS ANN. § 11-47-60.1 (West 2015); TENN. CODE ANN. § 39-17-1320 (West 2015); TEX. PENAL CODE ANN. § 46.13 (West 2015); UTAH CODE ANN. § 76-10-509.5 (West 2015); VA. CODE ANN. § 18.2-56.2 (West 2015); WIS. STAT. ANN. § 948.55 (West 2015).

81. *See, e.g.*, McClurg, *Child Access Prevention Laws*, *supra* note 7, at 61–69 (exploring the details of state CAP laws).

firearm storage but rather make it a crime, usually a misdemeanor,[82] for a gun owner to negligently store a loaded firearm in the event a child (protected ages vary by state) gains access to the weapon and uses it to cause harm to herself or another.[83] CAP laws typically include a list of defenses, including a "safe storage" defense.[84] The law is not violated if the gun was stored with a trigger lock or in a gun safe or other lockbox.[85] While no data exists, anecdotally, prosecutors rarely pursue charges under CAP laws. In cases where a gun owner's child has been killed, prosecutors are perhaps understandably reluctant to add more pain and misery.[86]

Retail Gun Dealers. Acknowledging it is well-known that thieves target gun stores searching for vulnerabilities,[87] ATF makes extensive recommendations to FFLs for properly securing and handling guns.[88] These include detailed recommendations for structural security, inventory security, employee screening, safe business practices, customer safety, and disaster preparedness.[89] But none of ATF's recommendations

82. *See id.* at 63. The statutes do not provide for civil liability. *Id.* at 53. *But see* CONN. GEN. STAT. ANN. § 52-571g (West 2015) (imposing strict liability "when a minor or, a resident of the premises who is ineligible to possess a firearm under state or federal law or who poses a risk of imminent personal injury to himself or herself or to other individuals, obtains a firearm . . . and causes the injury or death of such minor, resident or any other person").

83. McClurg, *Child Access Prevention Laws*, *supra* note 7, at 50, 61.

84. *Id.* at 64.

85. *Id.*

86. *Id.* at 68–69.

87. BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP'T OF JUSTICE, SAFETY AND SECURITY INFORMATION FOR FEDERAL FIREARMS LICENSEES 8 (2010) [hereinafter ATF'S RECOMMENDATIONS TO FFLS] ("Experience has shown that in many instances, the thieves spend a considerable amount of time evaluating these businesses to determine and capitalize on their vulnerabilities.").

88. *See id.* at 8–15 (offering detailed recommendations for securing firearms in retail establishments).

89. The ATF guidance includes recommendations regarding the following: *Structural Security* (evaluate business location, door and window locks, windows and doorjambs, other unsecured openings such as window air conditioner openings, walls and ceilings, exterior lighting and surrounding structures, shrubs and trees, and front windows and entrance; obtain and evaluate an alarm system and protect alarm codes; evaluate need for a video camera system, installation of a remotely activated electronic security entrance, and store layout during business hours and after business hours, including a "best business practice" recommendation "to remove all firearms from display cases and racks and place them in a gun vault at night"); *Inventory Security* (conduct periodic physical inventories, accurately record physical inventory, require two-party inventories, protect inventory records, keep timely acquisition and disposition records, examine firearms shipments to determine accuracy, and keep display cases locked at all times); *Employee Screening* (institute an employee background screening, require proof of identity, and discuss questions with local police or ATF); *Safe Business Practices* (show only one firearm at a time to a customer, disable display firearms, do not leave a customer who is handling a firearm unattended, keep ammunition stored separately from firearms and out of reach of customers, do not meet with

have the force of law. They merely provide "guidance" and "ideas."[90]

Only nine states and the District of Columbia have laws imposing security requirements on gun retailers.[91] As an example, California, which has among the nation's strictest gun laws, requires that during non-business hours, gun sellers must store firearms in a secure facility that is part of the premises, secure firearms with a locked hardened steel rod or cable through the trigger guard of the firearm that is shielded from the use of a bolt-cutter, or store firearms in a locked fireproof safe or vault on the licensee's business premises.[92]

A comparative indicator of how society tolerates conduct by firearms dealers that increases the risk of guns being stolen or otherwise diverted to criminal users can be found by examining Colorado's laws regarding recreational marijuana. While the federal government and forty-one states (including Colorado) have declined to mandate security measures for retail gun dealers, the Colorado Constitution and regulations adopted pursuant thereto require security measures for recreational marijuana retailers.[93] ATF only recommends conducting background checks on

customers after hours or off site, and wipe down all countertops and doors each night (because it is easier to capture fingerprints from a clean surface in the event of a break-in), do not leave counter and safe keys in the cash register at night, ship firearms in a way that requires signatures or recording of transfers, provide safety and security training for employees, familiarize employees with firearms laws, record a description of suspicious persons and their vehicles, post theft warning notices in conspicuous locations, request assistance of local law enforcement authorities, strictly control firearms at gun shows, and do not advertise that business is unprotected, such as by leaving a sign or voicemail message that business is closed); *Customer Safety* (insist on complete firearms safety, recommend safe storage methods, provide customers with ATF Publication 3312.8, Personal Firearms Record, so they can record information about their firearms in the event of theft or loss); and *Disaster Preparedness* (prepare a disaster plan to protect business inventory and the public from the risk of firearms theft in the event of an impending disaster). *Id.*

90. ATF'S RECOMMENDATIONS TO FFLS, *supra* note 87, at 8.

91. *See* ALA. CODE § 13A-11-79 (2015); CAL. PENAL CODE § 26890(a)–(b) (West 2015); CONN. GEN. STAT. ANN. § 29-37d (West 2015); D.C. CODE ANN. § 7-2504.07 (West 2015); MASS. GEN. LAWS ANN. ch. 140, § 123 (West 2015); MINN. R. 7504.0200–.0400 (2015); MINN. STAT. ANN. § 624.7161(2)–(3) (West 2015); N.J. ADMIN. CODE §§ 13:54-3.11, 13:54-6.1 to -6.5 (2015); N.J. STAT. ANN. § 2C:58-2(a) (West 2015); 18 PA. STAT. AND CONS. STAT. ANN. § 6113 (West 2015); R.I. GEN. LAWS ANN. § 11-47-40(b) (West 2015); W. VA. CODE ANN. § 61-7-10(a)(1) (West 2015).

92. CAL. PENAL CODE § 26890.

93. Part 5 of Amendment 64, which legalized recreational marijuana, addresses the "Regulation of marijuana" and required the Department of Revenue to develop safety regulations in categories, including "(IV) Security requirements for marijuana establishments" and "(V) Requirements to prevent the sale or diversion of marijuana and marijuana products to persons under the age of twenty-one." COLO. CONST. art. XVIII, § 16(5) (West, Westlaw through Nov. 2014 amendments); *see also* 1 COLO. CODE REGS. § 212-2 R 305 (2015) (imposing security standards for retail and cultivation marijuana facilities, including continuous alarm monitoring, minimum lock standards, limited access areas, and perimeter fencing).

employees of FFLs,[94] but Colorado requires them for all owners and employees of marijuana retailers.[95] Colorado also imposes an inventory control model known as MITS (Marijuana Inventory Tracking System) in which legal marijuana must be tracked from "seed to sale" to prevent diversion of legal marijuana into the illegal market.[96]

Guns result in more than 30,000 deaths annually.[97] A 2014 study by German researchers claims to have documented "the first [two] cases of fatal cannabis smoking."[98] Other evidence shows little threat of physical harm from marijuana use.[99] For a variety of reasons, it makes good sense to have security requirements for the marijuana industry designed to prevent theft or diversion of marijuana into the criminal market, but good sense, as well as rational risk–utility balancing, also demands security requirements in the distribution and sale of firearms to prevent access by illegal users.

B. *Imprimatur Through Action*

Both the common law and statutory law have bolstered the right to be negligent in allowing guns to get into the hands of dangerous, unauthorized users. Most of the discussion below focuses on the common law. As referenced in the Introduction, statutory protection of the right to

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94. *See supra* note 89 (discussing ATF's recommendation for background checks for employees of FFLs).

95. 1 COLO. CODE REGS. § 212-2 R 201(E)(1) (2015) (stating that license applicants "must be comprised of individuals . . . [w]hose criminal history background checks establish they are all of Good Moral Character").

96. *See id.* at R 309 (specifying that it is "essential to regulate, monitor, and track all Retail Marijuana to eliminate diversion, inside and outside of the state, and to ensure that all marijuana grown, processed, sold and disposed of in the Retail Marijuana market is transparently accounted for").

97. Sherry L. Murphy et al., *Deaths: Final Data for 2010*, NAT'L VITAL STAT. REP., May 8, 2013, at 1, 11, 83 tbl.18, http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_04.pdf (showing that in 2010, 31,672 persons died from firearm injuries, accounting for 17.5% of all U.S. injury deaths, and that 61.2% of the deaths were the result of suicides and 35.0% were the result of homicides). These figures have been relatively stable for several years. Sherry L. Murphy et al., *Deaths: Final Data for 2012*, NAT'L VITAL STAT. REP., Aug. 13, 2015, at 1, 10, http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_09.pdf.

98. Benno Hartung et al., *Sudden Unexpected Death Under Acute Influence of Cannabis*, 237 FORENSIC SCI. INT'L e11, e11 (2014).

99. *See* Daniel Fuster et al., *No Detectable Association Between Frequency of Marijuana Use and Health or Healthcare Utilization Among Primary Care Patients Who Screen Positive for Drug Use*, 29 J. GEN. INTERNAL MED. 133, 136 (2013) (concluding that there is no association between frequency of marijuana use and healthcare utilization and stating the study results "suggest that the frequency of marijuana use among patients who screen positive for drugs in primary care may not be associated with identifiable negative health outcomes"). To die from marijuana alone, one would have to ingest a dose of 1000 times the normal dose. Robert S. Gable, *The Toxicity of Recreational Drugs*, 94 AM. SCIENTIST 206, 207 (2006).

be negligent from the PLCAA primarily benefits gun manufacturers and distributors by barring most suits against them.[100] Manufacturers and distributors are outside the scope of this Article. Thus, statutory analysis of the right to be negligent in this Section is limited to the tort immunity provision of the Child Safety Lock Act of 2005 and a provision of the PLCAA that has been interpreted to prohibit lawsuits against gun retailers for negligent security resulting in theft and subsequent criminal harm.

A logical starting point of a common law tort analysis is the oft-repeated judicial principle that the magnitude of the danger presented by firearms requires one handling or caring for them to exercise the highest degree of care.[101] The *Restatement (Second) of Torts* states that "those who deal with firearms . . . are required to exercise the closest attention and the most careful precautions, not only in preparing for their use but in using them."[102] In the context of negligent storage, the New Jersey Supreme Court stated that "firearms are so inherently dangerous . . . that a person of ordinary prudence in the exercise of reasonable care will take cautious preventive measures commensurate with the great harm that may ensue from the use of the gun by someone unfit to be entrusted with it."[103] A California appellate court said that "a person dealing with a [handgun] is held to the highest standard of due care, even a slight deviation from which may constitute negligence in the safeguarding of

100. *See supra* notes 20–24 and accompanying text.

101. As in all negligence cases, the required standard of conduct with regard to firearms is reasonable care under the circumstances. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 32, at 175 (West 5th ed. 1984). Although the standard of care is static under negligence law, the amount of necessary care varies with the circumstances. Using firearms as an example, the *Restatement (Third) of Torts* explains the distinction:

> While judicial opinions sometimes say that an actor who engages in a particularly dangerous activity—for example, the supplying of electricity, or the handling of gasoline or firearms—is subject to a "high degree of care," this language implies no departure from the general approach set forth in this Section [regarding the normal standard of care]. Rather, it signifies that given the great magnitude of the risk, the balancing approach imposes on the actor an obligation of great precautions.

RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL AND EMOTIONAL HARM § 3 cmt. f (AM. LAW. INST. 2010); *see also* KEETON ET AL., *supra*, § 34, at 208 ("The amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater, the actor is required to exercise caution commensurate with it. Those who deal with instrumentalities that are known to be dangerous . . . must exercise a great amount of care because the risk is great. They may be required to take every reasonable precaution suggested by experience or prudence." (footnotes omitted)).

102. RESTATEMENT (SECOND) OF TORTS § 298 cmt. b (AM. LAW INST. 1965).

103. Stoelting v. Hauck, 159 A.2d 385, 387, 389, 396 (N.J. 1960) (reviewing jury verdict against parents of fifteen-year-old girl for negligent storage of a pistol used by the girl to shoot the plaintiff and reversing the verdict on other grounds).

such a dangerous instrument."[104] Numerous other courts have made similar pronouncements.[105] As discussed below, rarely in the annals of law has such a universally recognized principle been honored so largely in the breach.

1. Thefts from Individuals

Courts have generally refused to hold gun owners liable for harm, either accidental or intentionally inflicted, caused by a third-party actor using a stolen gun, regardless of whether the gun was unreasonably stored or secured. The tools they use to accomplish this result—that is, to elevate the right to be negligent—are those wayward twins of different mothers, duty and proximate cause,[106] along with their shady cousin, foreseeability. Both duty and proximate cause are pure policy determinations[107] and are two ways of asking the same question: as a matter of fairness and public policy, should the law extend tort liability

104. Reida v. Lund, 18 Cal. App. 3d 698, 704 (Ct. App. 1971) (citation omitted).

105. *See, e.g.*, Bridges v. Dahl, 108 F.2d 228, 229 (6th Cir. 1939) (stating that the utmost caution must be exercised by those in possession and control of dangerous instrumentalities such as firearms and explosives); Long v. Turk, 962 P.2d 1093, 1096 (Kan. 1998) (characterizing a handgun as a dangerous instrumentality requiring the highest degree of care in safeguarding); Estate of Strever v. Cline, 924 P.2d 666, 671 (Mont. 1996) (stating that a firearm is a dangerous instrumentality requiring a higher degree of care in use and handling); Luttrell v. Carolina Mineral Co., 18 S.E.2d 412, 417 (N.C. 1942) (stating that those having possession and control of dangerous instrumentalities such as firearms and explosives owe the highest degree of care and that utmost caution must be exercised in their care and custody); Jacobs v. Tyson, 407 S.E.2d 62, 64 (Ga. Ct. App. 1991) (classifying a firearm as an "inherently dangerous instrumentality" that imposes on users a duty to employ "exceptional precautions to prevent injury" and distinguishing firearms from other products that are capable of being used to inflict harm, such as knives and golf clubs, because of the unusual dangers presented by firearms (emphasis omitted) (quoting Glean v. Smith, 156 S.E.2d 507, 509 (1967))).

106. This Article uses the term "proximate cause" to refer to scope of liability issues because it is the term most often used by courts. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM 6 Spec. Note (AM. LAW. INST. 2010) (explaining that while previous *Restatements of Torts* did not mention the term "proximate cause," it is the term most often used by judges, lawyers, and legal scholars). The *Restatement (Third) of Torts* refers to the concept as "Scope of Liability," which "more accurately describes the concerns of [the applicable chapter]: Tort law does not impose liability on an actor for all harm factually caused by the actor's tortious conduct." *Id.*

107. As Judge William Andrews famously said about proximate cause in his dissent in *Palsgraf v. Long Island Railroad*, "What we . . . mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." 162 N.E. 99, 103 (N.Y. Ct. App. 1928) (Andrews, J., dissenting). Similarly, Dean William Prosser observed about duty that it "is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection" and is merely "a shorthand statement of a conclusion, rather than an aid to analysis in itself." KEETON ET AL., *supra* note 101, § 53.

in the particular circumstances at issue?[108]

Invoking proximate cause and duty as immunity shields in stolen gun cases—without ever reaching the issue of the reasonableness of the defendant's conduct—amounts to a judicial declaration that public policy does not support requiring gun owners and sellers to act reasonably to secure guns from theft. While, for reasons suggested earlier, the cases do not directly invoke the Second Amendment,[109] it is the most viable explanation underlying the refusal to evaluate the reasonableness of conduct leading to gun thefts.

To the extent anything resembling a legal test exists for determining the existence of a tort duty or proximate cause, it is "reasonable foreseeability" of the harm.[110] In the context of criminal acts, section 302B of the *Restatement (Second) of Torts* provides: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal."[111] Section 448 specifically addresses proximate cause, providing that criminal acts by third persons are generally considered superseding causes "unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime."[112]

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108. *See* KEETON ET AL., *supra* note 101, § 53 ("[T]he question of what is 'proximate' and that of duty are fundamentally the same: whether the interests of the plaintiff are to be protected against the particular invasion by the defendant's conduct."). The intertwining of duty and proximate cause is so complete that, as the Prosser and Keeton hornbook observes, it is possible to restate every question involving proximate cause in terms of whether the defendant owed a duty to protect the plaintiff from the harm that occurred. *See id.* § 42.

109. *See supra* notes 29–30 and accompanying text.

110. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. e (AM. LAW INST. 2010) ("Currently, virtually all jurisdictions employ a foreseeability (or risk) standard for some range of scope of liability issues in negligence cases.").

111. RESTATEMENT (SECOND) OF TORTS § 302B (AM. LAW INST. 1965). A comment to this section states that "[n]ormally the actor has much less reason to anticipate intentional misconduct" than merely negligent conduct. *Id.* § 302B cmt. d. However, another comment clarifies that a reasonable person is required to anticipate and guard against even criminal misconduct "where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account." *Id.* § 302B cmt. e. The *Restatement (Third) of Torts* collapsed the sections from the *Restatement (Second) of Torts* relating to liability for negligent acts that facilitate harm, including criminal harm, by third parties into a section titled "Conduct That Is Negligent Because of the Prospect of Improper Conduct by the Plaintiff or a Third Party." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 19 (AM. LAW INST. 2010). Section 19 provides: "The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party." *Id.*

112. *Id.* § 448.

For the obvious policy reason that it seems unfair to hold an actor who was merely negligent responsible for another's intentional criminal act, courts traditionally have been more likely to treat criminal acts as superseding causes than other types of intervening forces. Nevertheless, as the above *Restatement* sections and a large body of case law indicate,[113] liability is appropriate when the criminal act was within the scope of the original risk. Liability is commonly imposed in the area of inadequate security on business premises that facilitates a criminal attack,[114] against defendants who leave keys in automobiles when the vehicles are stolen and involved in crashes,[115] and in a diverse array of other situations where an original negligent actor created a risk of a subsequent criminal act.[116]

Significantly, the advent of comparative responsibility brought on by the abrogation of joint and several liability in most states has substantially undermined the fairness rationale for holding that criminal acts facilitated by negligence are superseding causes, so much so that the *Restatement (Third) of Torts* suggests that a separate body of law for intervening and superseding causes is no longer needed.[117] Because fact finders in most states are now asked to apportion responsibility among multiple defendants on a percentage basis, it is no longer a concern that a less-

113. *See supra* notes 110–12 and accompanying text.

114. *See, e.g.*, Silva v. Showcase Cinemas Concessions of Dedham, Inc., 736 F.2d 810, 812–13 (1st Cir. 1984) (holding that the defendant's failure to adequately patrol premises was the proximate cause of the plaintiff's stabbing); Kroger Co. v. Knox, 98 So. 3d 441, 442–43 (Miss. 2012) (reasoning that a business has a duty to exercise reasonable care in securing its parking lot against the criminal actions of third parties if "an atmosphere of violence exist[ed] on the premises"); Posecai v. Wal-Mart Stores, Inc., 752 So. 2d 762, 768 (La. 1999) (reasoning that if the foreseeability and gravity of harm are high, a business has a duty to protect patrons from the criminal actions of third parties in the parking lot); McClung v. Delta Square, Ltd., 937 S.W.2d 891, 902 (Tenn. 1996) (holding that businesses have a duty to take reasonable steps to protect customers from criminal attacks in parking lots if the criminal acts are reasonably foreseeable).

115. *See generally* Thomas G. Fischer, Annotation, *Liability for Personal Injury or Property Damage Caused by Unauthorized Use of Automobile Which Had Been Parked with Keys Removed from Ignition*, 70 A.L.R.4th 276 (2000) (showing a collection of cases with this issue).

116. *See, e.g.*, Britton v. Wooten, 817 S.W.2d 443, 451–52 (Ky. 1991) (holding that even if the spark that ignited trash left to accumulate next to building was intentional, the resulting fire could be found to be foreseeable); Garceau v. Engel, 210 N.W. 608, 608 (Minn. 1926) (holding the defendant who leased space in the plaintiff's jewelry store was liable for leaving a key in the door when she went on vacation, resulting in a burglary); Christensen v. Epley, 585 P.2d 416, 419, 422 (Or. Ct. App. 1978) (holding that the defendant who took a dangerous juvenile into custody could be liable for failing to restrain him when a stabbing death occurred after he escaped).

117. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 34 cmt. a (AM. LAW INST. 2010) ("Were it not for the long history of intervening and superseding causes playing a significant role in limiting the scope of liability, this Section [pertaining to intervening and superseding causes] would not be necessary.").

culpable actor will be held responsible for the entirety of the harm.[118]

Meanwhile, a review of existing case law demonstrates the elaborate lengths to which courts have gone to avoid placing responsibility on gun owners to secure from theft the only legal consumer product designed to kill people. Chronologically and perhaps symbolically, an appropriate point of departure is *Romero v. National Rifle Ass'n of America, Inc.*, an action asserting negligence in failing to secure a gun that was stolen in a burglary from the organization's national headquarters and used to murder plaintiff's decedent in a robbery.[119] A jury returned a verdict for the plaintiff, but the trial court granted the NRA's motion for judgment notwithstanding the verdict.[120] In affirming the judgment notwithstanding the verdict, the court of appeals concluded that the events were too "extraordinary and unforeseeable," opining that it would require a "prophecy" to have predicted their occurrence.[121] No prophecy would have been required, however, had the court not misapplied fundamental scope of liability principles. The court suggested that reasonable foreseeability could be established only if the defendant could have foreseen each of the following events:

> [1] Lowe's [the NRA employee] storage of the weapon, [2] a burglary of the annex, [3] a search of Lowe's desk, [4] discovery of his hidden closet key, [5] a search of the closet, [6] discovery of the gun and ammunition, [7] use of the gun in a robbery, [8] Gonzalez'[s] [the victim] resistance to the robbery, [9] and the ultimate murder of Gonzalez by someone not a party to the original burglary.[122]

But the foreseeability question is not narrowly tailored to whether the actor could foresee *this happening*, *then that*, *then this*, *then that*, etc. It is basic "hornbook law"[123] that "[i]f the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable."[124] The

118. *See id.*

119. 749 F.2d 77, 78 (D.C. Cir. 1984).

120. *Id.* at 78–79.

121. *Id.* at 80–81.

122. *Id.*

123. As Professor Dan Dobbs explains in his Torts hornbook: "The defendant is liable for harms he negligently caused so long as a reasonable person in his position should have recognized or foreseen the general kind of harm the plaintiff suffered. He is not ordinarily relieved of liability merely because the manner of injury or its details were unforeseeable." DAN B. DOBBS, THE LAW OF TORTS § 189 (West 2000).

124. RESTATEMENT (SECOND) OF TORTS § 435(1) (AM. LAW INST. 1965). The *Restatement (Third) of Torts* omits a specific provision of this type, but explains in a comment:

relevant foreseeability question is whether the harm that resulted was within the scope of the original risk. The *Restatement (Third) of Torts* defines "scope of liability" (i.e., proximate cause) in precisely these terms: "An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."[125] Another way to frame the question is to ask whether the harm that occurred (a criminal harm with a stolen gun) is part of the risk that made an actor's conduct (failing to adequately secure a gun from theft) negligent in the first place.[126]

Romero is certainly disputable on the facts. It is not a clear-cut case of negligent conduct. But the case is important for adopting a flawed legal analysis that became a "go to" method for disposing of stolen gun cases. A more extreme case applying the same reasoning is *Strever v. Cline*, where the Montana Supreme Court relieved a gun owner of liability for leaving a loaded handgun in an unlocked vehicle on a public street.[127] Inside the vehicle in plain view were several items likely to attract the attention of thieves, including a radar detector, binoculars, fishing rod,

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> Mechanisms [i.e., the manner in which harm results] are important so long as they bear, in a general and reasonable way, on the risks that were created by the tortious conduct in the circumstances that existed at the time. Beyond that, details of the causal forces that concurred to cause the harm and their individual or combinational foreseeability are unimportant to the inquiry on the scope of liability.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. o (AM. LAW INST. 2010). In other words, the specific manner in which a harm occurred is important only in determining whether the harm that resulted was part of the risk that made the original conduct negligent.

125. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 (AM. LAW INST. 2010).

126. *See id.* § 29 cmt. b ("Courts should craft instructions that inform the jury that, for liability to be imposed, the harm that occurred must be one that results from the hazards that made the defendant's conduct tortious in the first place."). An illustration illuminates the relevant scope of the risk inquiry:

> Richard, a hunter, finishes his day in the field and stops at a friend's house while walking home. His friend's nine-year-old daughter, Kim, greets Richard, who hands his loaded shotgun to her as he enters the house. Kim drops the shotgun, which lands on her toe, breaking it. Although Richard is negligent for giving Kim his shotgun, the risk that makes Richard negligent is that Kim might shoot someone with the gun, not that she would drop it and hurt herself (the gun was neither especially heavy nor unwieldy). Kim's broken toe is outside the scope of Richard's liability, even though Richard's tortious conduct was a factual cause of Kim's harm.

Id. § 29 cmt. d, illus. 3.

127. 924 P.2d 666, 667–68 (Mont. 1996).

and case of cassette tapes.[128] Some boys entered the pickup truck and stole several of the items then returned looking for more items to steal.[129] Under the driver's seat they found a bag containing a .22 caliber semiautomatic pistol and ammunition.[130] As one of the boys attempted to remove the loaded magazine from the gun, it discharged, killing the eleven-year-old victim.[131]

The court rejected liability on the basis that the sequence of events leading to the shooting was not sufficiently foreseeable to satisfy proximate cause.[132] As in *Romero*, the court erred in focusing on the foreseeability of the precise chain of events rather than the general foreseeable risk of leaving a loaded gun in an unlocked vehicle on a public street.[133] The court considered it significant that the boys came back to the vehicle *twice*.[134] Who could have predicted that? And the shooter had smoked marijuana.[135] Who could have known? The shooter was also waving the gun around recklessly.[136] Actually, that aspect of the incident was all too foreseeable, as many fatal gun accidents involve minors behaving recklessly.[137] But it is all beside the point because those were the wrong questions. The relevant question was whether someone being shot with a stolen gun is within the scope of the risk of leaving a loaded handgun in an unlocked vehicle on a public street.[138]

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128. *Id.* at 668.

129. *Id.*

130. *Id.*

131. *Id.* at 667.

132. *Id.* at 674. Judicial willingness to decide the question of foreseeability, which is usually a jury question, in stolen gun cases represents perhaps another tentacle of the right to be negligent.

133. The court explained:

> Here, not only were there two intervening criminal acts (two thefts from Susanj's vehicle), but there was also an intervening grossly negligent act (Cline, high on marijuana, waving the stolen gun around with his finger on the trigger, then trying to unload the weapon). Accordingly, on these facts, we conclude that reasonable minds could come to but one conclusion—that the series of intervening acts which included two criminal acts and one grossly negligent act was reasonably unforeseeable and, thereby, cut off all liability on the part of Susanj for Robert Strever's unfortunate death.

Id. at 674.

134. *See id.*

135. *Id.*

136. *Id.*

137. *See* KLECK, *supra* note 22, at 321 (asserting that most fatal gun accidents involve adolescents and young adults engaging in reckless behavior).

138. For other stolen gun cases involving similar reasoning, see *James v. Wilson*, 95 S.W.3d 875, 885 (Ky. Ct. App. 2002) (concluding that the homeowner was not liable when a high school student stole the homeowner's gun and ammunition and then used the gun to murder three students at school because "[t]he law does not view as foreseeable the intentional criminal acts of a third

A case suggesting the unstated infiltration of the Second Amendment in this area is *McGrane v. Cline*.[139] The gun used to commit the murder was either stolen from the defendants' home by a friend of their sixteen-year-old daughter or given to the assailant by the daughter who was left alone for the weekend while the parents were out of town.[140] The parents left the gun unlocked in their master bedroom.[141] The court refused to impose a duty even though it insisted that firearm thefts from homes are readily foreseeable[142] but punted the case by concluding without elaboration that "there are too many issues of legitimate public debate concerning the private ownership and storage of firearms."[143] As already explained, however, there is no legitimate debate regarding the proper storage of firearms. All experts agree that guns should be securely stored to keep them out of the hands of unauthorized users.[144] That leaves the court's vague reference to debate over the "private ownership" of firearms, which inescapably implicates the Second Amendment.

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party when considering the position of the gun owner from whom the weapon is stolen") and *Finocchio v. Mahler*, 37 S.W.3d 300, 303–04 (Mo. Ct. App. 2000) (finding no proximate cause in reckless shooting by a teenager with gun stolen from a friend's house, which was stored unlocked in a dresser drawer in the parents' bedroom, because "the chain of causation included three acts over which the owner had no control").

139. 973 P.2d 1092 (Wash. Ct. App. 1999).

140. *Id.*

141. *Id.* at 1093–94.

142. *See id.* at 1094–95 ("[B]urglary is an all too common occurrence today, particularly in urban and suburban settings, and . . . firearms are frequently stolen during a burglary.").

143. *Id.* at 1095. The court also noted, as have other courts, that the defendant parents had instructed their children not to enter their bedroom where the gun was kept and never to touch guns. *Id.* at 1094. If children could be counted on to follow parental instruction at all times, the world would be a much safer place. Unfortunately, as is common knowledge to anyone who has ever been a child or parent, children frequently do not follow parental instructions. Studies show that children are drawn to firearms and do not follow instructions to stay away from them. In one study, twenty-nine groups of boys ages eight to twelve were placed in a room with some toys. Geoffrey A. Jackman et al., *Seeing Is Believing: What Do Boys Do When They Find a Real Gun?*, 107 PEDIATRICS 1247, 1247–48 (2001). Concealed in a cabinet was a .38 caliber semiautomatic handgun disabled from firing but equipped with a radio frequency device that would indicate to researchers watching from the next room if and when the trigger was pulled. *Id.* at 1248. The boys were told that they could play with the toys on top of the cabinet and could exit the room at any time if they had questions or a problem, but they were not told to explore the room or open any cabinets. *Id.* Nearly three-fourths of the groups opened the cabinet and found the gun within fifteen minutes. *Id.* at 1249. More than three-fourths of the groups that found the gun played with it. *Id.* Roughly half of the groups that handled the gun pulled the trigger. *Id.* More than 90% of the boys who handled the gun and pulled the trigger had received some form of previous gun safety instruction. *Id.* at 1248. Only one of the twenty-one groups that found the gun left the room to inform an adult. *Id.*

144. *See supra* notes 58–60 and accompanying text.

Another case leaving little explanation for the holding other than deference to the Second Amendment is *Holden v. Johnson*,[145] where a Connecticut court became the first to be squarely faced with a properly framed scope of liability argument. The defendant regularly kept a loaded semiautomatic handgun in his bedroom in a dresser next to a tray containing loose change.[146] His daughter had a friend, Carl Johnson, with a criminal record, who regularly visited the premises.[147] According to the complaint, the daughter "would, on occasion, retrieve change from the aforesaid tray, including retrieval of change to provide bus money to Carl Johnson[,] and [the daughter] was aware of the presence of said gun in the dresser and of Carl Johnson's interest in the gun."[148] Johnson stole the gun during a visit and used it a week later to brutally murder the plaintiff's decedent.[149]

The court declined to impose liability because the defendant gun owner had no knowledge of Johnson's dangerous propensities.[150] Plaintiff argued that was the wrong question, asserting, in line with the above discussion, "that the proper focus of the court's attention should be whether the general risk was foreseeable-that is, whether the failure to properly store a firearm will create a foreseeable risk that the firearm will be stolen by a criminal and used for a criminal purpose."[151] The court did not dispute the argument, saying only that it was "hesitant to accept the . . . argument because, in effect, it would impose civil liability on every gun owner who fails to properly store a gun that is stolen and then used for criminal purposes," and was "not persuaded that society is prepared to extend the duties of gun owners that far."[152] When a court rejects tort liability in a gun case not because of principles of tort law but because of what the court believes society is prepared to accept, it is hard to escape the conclusion that the court is deferring to notions of perceived Second Amendment rights.

145. No. CV010811660, 2005 WL 1153739 (Conn. Super. Ct. Apr. 15, 2005).

146. *Id.* at *3.

147. *Id.* at *1.

148. *Id*. at *2.

149. *Id.* at *1–2. The complaint alleged that Johnson and another man acted in concert to abduct the victim and "force[] him at gunpoint to surrender the keys to his vehicle, reveal his PIN number for automatic banking transactions, reenter his vehicle and accompany [them] as a prisoner while [they] withdrew cash from his bank account, and exit the vehicle," at which point "[o]ne or both said defendants thereupon shot plaintiff's decedent in the head, despite his pleas for his life, killing him and leaving him in a ditch by the highway on-ramp." *Id.* at *1.

150. *Id.* at *4.

151. *Id.* at *6. The plaintiff relied on the argument as I had articulated it in a previous article. *Id.* at *6 n.1 (discussing plaintiff's reliance on McClurg, *Armed and Dangerous*, *supra* note 7).

152. *Id.* at *6.

Legislation also protects the right of individuals to act negligently in securing firearms. In 2005, as part of the PLCAA[153] and to advance similar goals of protecting the gun industry and gun rights,[154] Congress passed the Child Safety Lock Act, which requires gun makers and sellers to furnish a "secure gun storage or safety device"[155] with the sale of any handgun.[156] While on the surface the Act would appear to be a meaningful step toward promoting firearms security, it in fact represented another advancement of the Second Amendment right to be negligent. As previously discussed, gun makers and sellers usually comply with the Act by providing easily thwarted childproofing locks not designed to prevent or deter theft.[157] Nevertheless, if a gun owner opts to use the device (which is not mandated), the Act provides absolute tort immunity in state and federal courts for criminal harm caused by an unauthorized user who gains access to the firearm.[158]

Thus, if *A* buys a handgun accompanied by an external trigger lock and uses the trigger lock, he is statutorily protected from liability as a matter of law in the event *B* steals the gun, removes the trigger lock, and criminally misuses the gun, without any opportunity for a fact finder to evaluate whether use of a trigger lock is a reasonable means to protect guns from theft. Illustrating this point is *Estate of Arrington v. Michael*,

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153. *See* Open Letter from Audrey Stucko, Deputy Assistant Dir., Bureau of Alcohol, Tobacco, Firearms and Explosives, to Federal Firearms Licensees—Child Safety Lock Act of 2005 (Apr. 21, 2006), https://www.atf.gov/press/releases/2006/04/042106-openletter-ffl-child-safety-locks.html (notifying federal firearms licensees that "Public Law 109-92 (119 Stat. 2095), the Protection of Lawful Commerce in Arms Act, was enacted October 26, 2005," and that section 5 of the law is the Child Safety Lock Act of 2005).

154. In addition to promoting safe gun storage and preventing unauthorized access to firearms, a stated purpose of the Act was "to avoid hindering industry from supplying firearms to law abiding citizens for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting." Pub. L. No. 109-92, § 5(b), 119 Stat. 2095 (2005).

155. "[S]ecure gun storage or safety device" is defined as:

> (A) a device that, when installed on a firearm, is designed to prevent the firearm from being operated without first deactivating the device;
> (B) a device incorporated into the design of the firearm that is designed to prevent the operation of the firearm by anyone not having access to the device; or
> (C) a safe, gun safe, gun case, lock box, or other device that is designed to be or can be used to store a firearm and that is designed to be unlocked only by means of a key, a combination, or other similar means.

18 U.S.C. § 921(a)(34) (2012).

156. *Id.* § 922(z)(1) (making it unlawful for any importer, manufacturer, or dealer to sell or transfer a handgun without a secure gun storage or safety device as defined in *id.* § 921(a)(34)).

157. *See supra* notes 75–79 and accompanying text.

158. 18 U.S.C. § 922(z)(3) (granting tort immunity in state and federal courts for one who uses a "secure gun storage or safety device" as defined in 18 U.S.C. § 921(a)(34) in the event someone gains unauthorized access to the gun and criminally misuses it).

where the U.S. Court of Appeals for the Third Circuit held that the defendant, a police officer, was immune from suit under the Child Safety Lock Act because he affixed a trigger lock to a gun in his bedroom even though he left a key to the trigger lock in the same room.[159] His son, who had a violent criminal history and was the subject of a restraining order,[160] took the gun and used it to murder his former partner.[161] The plaintiff argued that a reasonable jury could find that storing the key near the lock was the "equivalent of not using the lock,"[162] but the court held the matter was purely a question of law[163] and that using the trigger lock conferred immunity under the Act.[164]

2. Thefts from Commercial Sellers

Thousands of firearms are stolen each year from FFLs through both shoplifting and burglaries.[165] In the first six months of 2014, thieves shoplifted nine assault rifles and another firearm in three separate incidents from the same Walmart Supercenter in Cordova, Tennessee, a suburb of Memphis.[166] News reports, which include surveillance video, indicate assault rifles were plucked out of freestanding display cases on the open floor

159. 738 F.3d 599, 606 (3d Cir. 2013). A week before the murder, the son came to the victim's apartment and threatened to "cut her up" if she called the police, but she did so anyway. *Id.* at 602. Despite knowing of this incident, the defendant left his service weapon in his home, where the son maintained a room, and went on vacation to Florida. *Id.* at 601–02. The gun was stored in a locked bedroom with a trigger lock affixed to it. *See id.* at 602–03. Ammunition for the gun was hidden in a duffle bag in the same room. *Id.* at 603. The key to the trigger lock was stored in a dresser in the same room. *Id.* Prior to leaving on vacation, the defendant left a note behind for his son pleading with him to turn himself in, offering to pay him a $1500 bonus if he did so and explaining he would get a "courtesy break" because the defendant was a police officer. *Id.* at 602. He also left behind a copy of the victim's affidavit of the protective order violation. *Id.* After reading the affidavit, the son broke down the bedroom door and found the gun, ammunition, and the key to the trigger lock. *Id.* at 603. He used the gun to shoot the victim to death. *Id.*

160. The son had a long criminal record and history of violence against the victim. *Id.* at 601. He was subject to a protective order to stay away from her. *Id.* His father knew of this violent record, but allowed the son to live with him. *Id.*

161. *Id.* at 603.

162. *Id.* at 606.

163. *Id.* at 605.

164. *Id.* at 606–07.

165. *See supra* notes 43–49 and accompanying text.

166. *See* George Brown, *Gun Thieves Hit Same Memphis Walmart for Third Time This Year*, NEWS CHANNEL 3 (June 3, 2014, 3:05 PM), http://wreg.com/2014/06/03/gun-thieves-hit-same-memphis-walmart-for-third-time-this-year/ (reporting that two assault rifles were stolen from the Cordova, Tennessee, Walmart on Jan. 27, 2014, seven others on Feb. 11, and one more on May 28, and listing the nine stolen assault rifles as three Colt M4 Carbines, a Diamond Back DB-15, a DPM Panther Arms A-5, a Sigsauer 522, a Bushmaster XM15-e2s, and a Sigsauer Sigm400).

while the store was open.[167] It is uncertain how the thieves were able to access the display cases, but one news report stated about the second theft: "According to a police report, a manager told officers that the gun [display] case was new and the keys were stuck to the back of the gun case."[168] As any merchant, including, no doubt, Walmart, can well attest, shoplifting is highly foreseeable.[169]

Burglaries of gun stores are also common. An internet search for "gun store burglaries" turns up several incidents. A break-in at a gun store in Salina, Kansas resulted in the loss of more than 100 guns and a large quantity of ammunition.[170] Thieves took forty guns in a burglary of a Mississippi gun store.[171] A gun store in Dacula, Georgia was "cleaned . . . out" hours after a shipment of sixty-five guns had arrived and were put on display.[172]

Rational risk–utility analysis commands the exercise of an extremely high amount of care on the part of commercial sellers to secure guns from theft, both during and after business hours. They maintain large inventories of firearms in one place and, as previously discussed, firearms are prime targets for thieves.[173] The probability of guns being stolen is high and the gravity of the potential harm is multiplied by the large number of guns collected in one place. When a burglar enters a car or

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167. *See id*.; *see also* Jason Miles, *Half Dozen Guns Stolen from Walmart*, WMC ACTION NEWS 5 (Feb. 14, 2014, 5:03 AM), http://www.wmcactionnews5.com/story/24721323/half-dozen-guns-stolen-from-walmart (reporting that "six 'assault' rifles were swiped from one of the glass displays, plus a seventh weapon").

168. *Did They Use a Key? 9 Guns Stolen from Walmart Gun Safe*, LOCAL MEMPHIS (Feb. 27, 2014, 10:17 PM), http://www.localmemphis.com/story/d/story/did-they-use-a-key-9-guns-stolen-from-walmart-gun/61243/dlCYfBmYhka6AcBJwTVvyQ.

169. The National Association for Shoplifting Prevention offers these statistics: annual shoplifting losses exceed $13 billion, one in eleven Americans is a shoplifter, and "[m]ore than 10 million people have been caught shoplifting in the last five years." *The Shoplifting Problem in the Nation*, NAT'L ASS'N FOR SHOPLIFTING PREVENTION, http://www.shopliftingprevention.org/what-we-do/learning-resource-center/ (last visited Dec. 21, 2014).

170. *Large Number of Guns and Ammo Taken in Burglary*, SALINA POST (Apr. 15, 2014), http://salinapost.com/2014/04/15/large-number-of-guns-and-ammo-taken-in-burglary/ (reporting that "100–120 handguns, 8–20 semi-automatic rifles, 8–12 knives, and nearly $5,000 in ammunition" were stolen from Cleve's Marine and Sporting Goods).

171. Angela Williams, *2 Charged in Gun Store Burglary*, WAPT NEWS (Aug. 19, 2014, 8:12 AM), http://www.wapt.com/news/central-mississippi/2-charged-in-gun-store-burglary/27610462 (describing the arrest of two men for burglarizing a gun store in Kosciusko, Mississippi and including an embedded video showing the men prying open locked glass cases).

172. Kristi Reed, *$75,000 Worth of Guns Stolen During Big Gun Armory Burglary*, DACULA PATCH (Jan. 1, 2013), http://patch.com/georgia/dacula/75-000-worth-of-guns-stolen-during-big-gun-armory-burglary#.VASQ3tF0ycx (explaining that the burglars "entered the store by smashing the front door glass, reaching through the bars and unlocking the door," but also quoting the owner as stating that he had a double-keyed lock on the door until the fire marshal required him to replace the inside lock with a twist lock).

173. *See supra* notes 54–56 and accompanying text.

home, he usually does not know in advance whether a gun will be found. When thieves target gun stores, it is because they are specifically intent on stealing guns.

Nevertheless, with few exceptions, courts have shielded commercial gun sellers from responsibility for failing to safeguard their inventories from theft when stolen guns are used to inflict injury in a criminal attack. They accomplish this result in one of two ways: first, by traveling down the same wrong scope of liability path described above by demanding foreseeability of the precise chain of events,[174] and, second, by distorting the nature and breadth of the duty entailed in practicing reasonable gun security.[175]

Louria v. Brummett[176] is an example of the former error. Two minors stole two shotguns from a K-Mart store and used the guns to shoot a deputy sheriff.[177] The victim sued K-Mart, alleging a failure to take proper measures to secure the guns from theft.[178] In holding that the alleged negligent storage was not a proximate cause of the shooting because the resulting crime was unforeseeable,[179] the court stated:

> The minors committed their first crime by breaking into and stealing guns from K-Mart. . . . Secondly, the minors the following day broke into the Shinlever School. Finally, after resisting arrest, the minors shot and wounded officer Louria. For K-Mart to be liable, they would have had to foreseen a crime upon a crime . . . .[180]

One judge concurred because he felt bound by precedent but recognized that the court's view of foreseeability was too restrictive.[181]

Analyzing foreseeability at the correct level of abstraction brings a different result, as seen in *Pavlides v. Niles Gun Show, Inc.*, in which a shooting victim sued the operator of a gun show.[182] Four teenagers paid admission and twice entered the defendant's gun show despite a policy prohibiting unsupervised minors.[183] The boys stole several handguns, which, according to one of them, was "easy" because they were "just laying around" on tables.[184] They used one of the guns to shoot the

174. *See supra* notes 123–38 and accompanying text.
175. *See infra* notes 189–95 and accompanying text.
176. 916 S.W.2d 929 (Tenn. Ct. App. 1995).
177. *Id.* at 929.
178. *Id.* at 930.
179. *Id.* at 931.
180. *Id.* at 930–31.
181. *Id.* at 931 (Franks, J., concurring).
182. 637 N.E.2d 404, 407 (Ohio Ct. App. 1994).
183. *Id.* at 406.
184. *Id.* at 407.

plaintiff, leaving him paralyzed.[185] The court found that the defendant owed a duty to prevent unsupervised minors from entering a gun show where unsecured firearms are displayed and that the proximate cause chain was not severed by the intervening criminals' acts.[186] The court framed the scope of the risk question accurately, asking: "Should the defendants have foreseen that children who successfully steal a firearm and purchase suitable ammunition at its gun show would use the loaded firearm in the pursuit of criminal activity?"[187] Reasonable minds, the court said, could answer this question affirmatively.[188]

A Maryland case arising from a retail gun theft skewed the analysis in a different fashion—by exaggerating the nature of the burden and duty in negligent storage cases. In *Valentine v. On Target, Inc*., two men stole several handguns from a retail gun dealer.[189] Two months later, an unknown assailant used one of the guns to murder plaintiffs' decedent.[190] A wrongful death action asserted that the gun store owed a duty to exercise reasonable care in displaying handguns to prevent theft.[191] The majority analyzed the issue in terms of duty (noting correctly that there is no significant difference between a duty and proximate cause analysis[192]) but rejected liability based on a red herring. The court characterized the duty as one to protect the "world at large" from criminals and concluded that such a broad duty would impose a "tremendous burden" on gun sellers while providing only a "hypothetical benefit to the public."[193]

Certainly, a duty to protect the world at large from criminals would impose an enormous burden with only a small chance of success, but that is not the relevant duty in negligent gun security cases. The duty is close-fitting and narrowly contained: the duty to safeguard a dangerous instrumentality. Possessors of firearms, whether they are individuals or commercial entities, are far and away the most efficient cost-avoiders in the equation.[194] A concurring judge in *Valentine* highlighted the court's defective reasoning on this point, stating that liability would not entail an

185. *Id.*
186. *See id.* at 409–10.
187. *Id.* at 410.
188. *Id.*
189. 727 A.2d 947, 948 (Md. Ct. App. 1999).
190. *Id.*
191. *Id.*
192. *Id.* at 949.
193. *Id.* at 951.
194. *See* Herland v. Izatt, 345 P.3d 661, 674 (Utah 2015) (indicating that public policy supports placing injury costs on the party "best situated to take reasonable precautions to avoid injury" and that in unauthorized access to firearm cases, imposition of a duty on the gun owner is justified because "the burden on gun owners to properly restrict access to their firearms is relatively slight" as compared to the risk).

indefinite duty to protect society from harm but "would merely impose upon a store owner a duty to exercise ordinary care in the storage and display of handguns held out for sale to the public."[195]

Any potential for the common law regarding the obligations of commercial gun sellers to evolve was cut off in 2013 when the Alaska Supreme Court held in *Estate of Kim ex rel. Alexander v. Coxe* that the PLCAA categorically bars claims of negligent security against FFLs for harm resulting from a stolen gun.[196] While the impact of *Coxe* could be downplayed on the basis that it is a decision of a single state supreme court, the court's opinion appears to be a correct interpretation of the PLCAA.

The estate of a man killed with a rifle taken from a Juneau gun store sued the store and owner alleging negligent security.[197] The defendants moved for summary judgment, asserting that the PLCAA immunized the defendants from negligent security claims.[198] The court agreed, holding that the PLCAA bars all claims against gun manufacturers, distributors, and retail FFLs resulting from the criminal misuse of a firearm, subject to the six exceptions enumerated in the PLCAA.[199] "A plain reading of [the Act]," the court said, "supports a prohibition on general negligence actions—including negligence with concurrent causation."[200] Concluding that firearm thefts do not fall under any of the statutory exceptions, the court said that in a bolded subheading: "Theft of a firearm does not support liability under claims excepted from the PLCAA."[201]

The implications of the holding are large. Assume the following hypothetical:

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195. *Valentine*, 727 A.2d at 954–55 (Raker, J., concurring) (agreeing with the result because there was no evidence as to how the guns were stored); *see also* Kimbler v. Stillwell, 717 P.2d 1223, 1224–25 (Or. Ct. App. 1986) (reversing dismissal of the complaint in a case in which a shotgun stolen from a store in a burglary was used to murder plaintiff's decedent, disagreeing with the trial court ruling that the plaintiff sought to impose a broad duty on the defendant to prevent criminal acts by third parties, and stating that "[d]efendant's duty . . . is that of a merchant to display merchandise in a safe manner").

196. 295 P.3d 380, 384 (Alaska 2013).

197. *Id.* at 385.

198. *Id.*

199. *See id.* at 388; *see also* 15 U.S.C. § 7903(5)(A) (2012) (defining a prohibited "qualified civil liability action" as including any claim against a manufacturer or seller of guns for damages resulting from the unlawful misuse of a gun, subject to six enumerated exceptions).

200. *Coxe*, 295 P.3d at 386; *see also id.* at 388 ("In light of the PLCAA's text and legislative history, Congress's purpose and intent was to bar any qualified civil liability action not falling within a statutory exception. Our conclusion is supported by other courts that have held the PLCAA bars simple negligence claims.").

201. *Id.* at 393. A factual dispute existed as to whether the gun was acquired by sale or through theft. The court remanded the case for a determination of whether the rifle was stolen or sold. *Id.* at 392–93.

> Joe is a federally licensed firearms dealer who operates a gun store with an inventory of 350 firearms, most of which are handguns. The firearms are not secured either during or after hours. Many of the guns are in unlocked glass display cases, plainly visible through the outside windows. The store has no alarm system. On a Friday afternoon, Joe flips the "Open" sign to "Closed," locks the door, and goes home. That night thieves remove an unsecured window air conditioning unit, enter through the opening, and steal 150 handguns, several of which begin showing up at crime scenes within a few months.

Joe would bear no legal responsibility for the injuries under the *Coxe* holding even assuming he acted unreasonably in securing the inventory.[202] Change the facts. Anxious to get home after a long week, Joe simply forgets to lock the door when closing the store. The thieves open the unlocked door, walk in, and clean the store out. Liability? Not under the PLCAA and *Coxe*. Change the facts again. Joe gets drunk and leaves the door wide open when he leaves for the night. Liability? It would not appear so. While Joe's conduct under these facts arguably constitutes gross negligence or recklessness, the PLCAA contains no exception to immunity for such conduct.

Gun thefts from retailers are an example of how the PLCAA connects up the "Imprimatur through Inaction" and "Imprimatur through Action" threads of the right to be negligent. The primary exception to immunity from suit under the PLCAA is known as the "predicate exception," defined as an action in which a manufacturer or seller "knowingly violated a state or federal statute applicable to the sale or marketing" of firearms and the violation was a proximate cause of the harm.[203] Statutes imposing premises and operational security requirements on retail gun sellers most likely would qualify as statutes "applicable to the sale or marketing" of firearms; thus, violations of such statutes could give rise to a claim under the predicate exception. As noted, however, as of this writing, only nine states and the District of Columbia have such statutes.[204]

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202. ATF recommends that firearms dealers secure window air conditioning units in cages. *See* ATF'S RECOMMENDATIONS TO FFLS, *supra* note 87, at 9 ("Evaluate other unsecured openings. Does your premises have air conditioning units in open windows or a hole in an exterior wall? These units are easily removed, and many theft entries are made in this way.").

203. 15 U.S.C. § 7903(5)(A)(iii). The exception is called the predicate exception because the violation of an applicable statute is a necessary predicate for maintaining an action.

204. *See supra* note 91 and accompanying text.

III. THE TRICKLE-DOWN EFFECT OF THE RIGHT TO BE NEGLIGENT

Part II explained how the absence of legal requirements for firearms security at both the federal and state level, as well as affirmative protections of negligent conduct by courts and the federal Child Safety Lock Act and PLCAA, have created a de facto right to be negligent, rooted in the Second Amendment, in protecting firearms from theft. This final Part suggests that the trickle-down effect of this state of the law is the under-deterrence of reasonable conduct and a societal mindset that it is permissible to act irresponsibly in keeping and safeguarding firearms.

Risk–utility analysis is grounded in the economic deterrence model of tort law. To achieve optimal deterrence, the deterrence model holds that tort liability rules are (or should be) designed to induce actors to expend resources on safer behavior up to the point where the marginal cost of increased safety exceeds the marginal reduction in injury costs.[205] In theory, economically efficient tort rules deter risky behavior that is not cost-justified. If actors are required to internalize the costs of their negligent conduct, they will be incentivized to invest effort and money in safer conduct at appropriate levels.[206]

Gun makers, gun sellers, and gun owners, however, have never been required to internalize the costs of harm caused by guns, with the result that they are grossly under-deterred from investing in safer manufacturing, distribution, or possession practices. Those costs are enormous. Much has been written about them.[207] In short, they include more than 30,000 lives lost each year;[208] roughly 80,000 annual nonfatal intentional and unintentional injuries;[209] lost productivity and earnings of

205. *See* William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 865–72 (1981).

206. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 16–17 (1987).

207. *See generally* PHILIP J. COOK & JENS LUDWIG, GUN VIOLENCE: THE REAL COSTS (2002) (detailing the repercussions of gun violence).

208. *See supra* note 97.

209. Data tabulated from the National Center for Injury Prevention and Control's Web-Based Injury Statistics Query and Reporting System (WISQARS) showed 64,034 violence-related nonfatal gunshot injuries in 2012. *See* Web-Based Injury Statistics Query and Reporting System (WISQARS), *Nonfatal Injury Reports 2001–2013*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html (select "Violent-Related" for intent of injury option, "Firearm" for cause of injury option, and "2012 to 2012" for "Year(s) of Report"; then follow "Submit Request" hyperlink). In the same year, an additional 17,362 persons were injured in nonfatal unintentional shootings. *Id.* (select "Unintentional" for intent of injury option, "Firearm" for cause of injury option, and "2012 to 2012" for "Year(s) of Report"; then follow "Submit Request" hyperlink).

gunshot victims;[210] extraordinary medical costs borne largely by the government (and, hence, taxpayers);[211] lost quality of life;[212] costs of administering the criminal justice system and incarcerating gun criminals;[213] police and emergency services;[214] fear;[215] and grief.[216]

The deterrence model has been subject to decades of critique by those who assert that a variety of practical factors make it impossible to achieve

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210. Professors Philip J. Cook and Jens Ludwig estimated the lost lifetime earnings and value of household services of each fatal gunshot victim to be between $460,000 and $580,000 after adjusting the value downward to account for the fact that most firearms victims are of low socioeconomic status and educational attainment. COOK & LUDWIG, *supra* note 207, at 77.

211. A study of 2010 emergency department visits and hospital admissions for shooting victims estimated the direct annual costs of medical treatment for firearms injuries to be $629 million per year. EMBRY M. HOWELL & PETER ABRAHAM, URBAN INST., THE HOSPITAL COSTS OF FIREARMS ASSAULTS 4 tbl.1 (2013). The study found that victims of firearm assaults are disproportionately uninsured, with the result that most of the treatment cost for their injuries is shifted to taxpayers. *Id.* at 5. Only 16% of the treatment costs were covered by private insurance, while 52% of costs were covered by government insurance, such as Medicaid, and 28% were incurred by persons who were uninsured. *Id.* at 6 fig.7.

212. The Pacific Institute for Research and Evaluation, an independent nonprofit organization that provides research through grants or contracts to a long list of state and federal government agencies, estimated the total cost of gun violence in 2010 to be as high as $174 billion. Ted R. Miller, *The Cost of Firearm Violence*, CHILDREN'S SAFETY NETWORK (Dec. 2012), http://www.childrenssafetynetwork.org/sites/childrenssafetynetwork.org/files/TheCostofGunViolence.pdf. The study estimated the societal cost of a single fatal firearms assault to exceed $5 million, the largest portion of which was for lost quality of life. *Id.* The estimated cost per fatal firearm assault broke down as follows:

> Work Loss: $1,552,381
> Medical Care: $28,741
> Mental Health: $10,883
> Emergency Transport: $544
> Police: $2,119
> Criminal Justice: $395,221
> Insurance Claims Processing: $2,361
> Employer Cost: $8,980
> Quality of Life (pain and suffering, and loss of enjoyment of life for shooting victims and their families): $3,093,750
> Total Cost Per Fatal Firearm Assault: $5,094,980

Id.

213. *Id.*

214. *Id.*

215. *See generally* Mark Warr, *Fear of Crime in the United States: Avenues for Research and Policy*, *in* 4 MEASUREMENT & ANALYSIS OF CRIME & JUSTICE 451, 452 (David Duffee ed., 2000), https://www.ncjrs.gov/criminal_justice2000/vol_4/04i.pdf (study of crime fear quoting an assertion by the President's Commission on Law Enforcement and Administration of Justice that "[t]he most damaging of the effects of violent crime is fear and that fear must not be belittled").

216. *See* Andrew Jay McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 9–11 (2005) (discussing studies showing the disabling effects of grief resulting from the traumatic death of a loved one).

optimal deterrence.[217] But as Professor Gary Schwartz observed, critics have often ignored the crucial distinction between the "strong deterrence" model and the "modest deterrence" model,[218] which could be renamed as the "it works perfectly" and "it works, but not perfectly" models. While conceding that optimal deterrence may be impossible to achieve, Professor Schwartz conducted a sector-by-sector analysis (e.g., automobile accidents, medical malpractice, and products liability) of available data and information, and concluded there is adequate support for the effectiveness of the modest deterrence model.[219]

Reviewing criticisms of the deterrence model catalogued by Professor Schwartz, it appears likely that in the context of stolen guns, the prospect of tort liability would deter gun owners and gun sellers from unreasonable conduct with respect to firearms gun security. First, gun storage and security measures, or lack thereof, are the consequence of conscious choices. Access to unsecured guns does not usually result from acts of momentary inadvertence, which, as critics note, are unlikely to be deterred by the threat of tort liability.[220] Second, the critique that tort law is not a "necessary cause" to deterring risky conduct because people can be expected to act with due care out of moral obligation[221] is not strong with respect to a significant segment of gun sellers and owners. Firearms storage studies[222] and theft data[223] demonstrate that a substantial percentage of gun owners do not feel or exercise a moral responsibility to secure guns from unauthorized users.

Third, the critique that tort law is not a "sufficient cause" for deterrence because individual tortfeasors do not feel the effects of liability due to liability insurance[224] does not apply. Liability insurance rarely enters the picture in gun theft cases, in large part because the law so strongly favors gun sellers and owners that few lawsuits are ever brought. If homeowner insurers were on the hook for injuries resulting from negligent gun security, it would very likely enhance the deterrent impact of the threat of tort liability. In an article about mandatory liability insurance for gun owners, Professors Stephen Gilles and Nelson Lund

217. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 381–87 (1994) (discussing common criticisms of the economic deterrence model).

218. *Id.* at 387–89.

219. *Id.* at 422–23.

220. *See id.* at 385–86 (discussing the argument that tort liability does not deter inadvertent negligence).

221. *Id.* at 382–83 (discussing the argument that society can rely on moral obligations to deter risk-creating conduct).

222. *See infra* notes 237–42 and accompanying text (discussing firearms storage studies).

223. *See supra* notes 34–49 and accompanying text (discussing firearms theft data).

224. *See* Schwartz, *supra* note 217, at 382–83.

(while arguing that mandatory coverage for intentional shootings would be unconstitutional) noted that the benefits of mandatory insurance would include educating gun owners about safe storage and giving them an incentive in the form of lower premiums to follow safe storage practices.[225] Similar responses would be likely to follow the availability of non-mandatory liability insurance *if* a realistic possibility of liability existed. Currently, homeowner insurers do not even seek information about gun ownership or storage practices from policy applicants, although they do inquire about other household risks, such as animals, swimming pools, and trampolines.[226] In some states, insurers are statutorily barred from denying coverage for firearms liability or charging higher premiums based on household firearm possession.[227]

Another criticism of the deterrent model is that concern for personal safety is a sufficient deterrent to engaging in risk-creating conduct,[228] but that concern is also absent with respect to firearms security practices. Professor Schwartz pointed out that the concern for personal safety is a strong motivating factor mostly in the area of transportation.[229] Most people drive safely primarily because they do not want to suffer the consequences of an accident, not because of a fear of tort liability. While concern about family safety motivates many, but by no means all, gun owners to responsibly secure their firearms, gun owners do not take steps to safely secure guns out of a concern for self-preservation. To the contrary, one of the principal arguments against safe gun storage is that a securely stored gun will not be readily available when needed for self-protection.[230]

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225. *See* Stephen G. Gilles & Nelson Lund, *Insurance as Gun Control?*, REGULATION, Fall 2013, at 38, http://object.cato.org/sites/cato.org/files/serials/files/regulation/2013/9/regv36n3-1n.pdf.

226. An insurance industry expert consulted for this Article, regarding whether insurance companies inquire about firearms on homeowner policy application forms, surveyed a number of agents, company executives, and consultants and reported back that, with one exception, none had seen such a question from a liability perspective. The exception was an insurer that asked about assault weapons until, reportedly, the NRA complained to the state insurance department. Email from Bill Wilson, Director, Virtual Univ., Indep. Ins. Agents & Brokers of Am., to Andrew Jay McClurg, (July 11, 2014, 9:34 CST) (on file with author).

227. *E.g.*, FLA. STAT. § 626.9541(g)(4) (2015) (classifying as "unfair discrimination" denying coverage or charging a higher premium to lawful firearms owners); GA. CODE ANN. § 33-24-30.1 (2015) (prohibiting insurance companies from excluding or denying coverage because the insured, insured's family member, or insured's employee lawfully keeps or carries firearms on the insured's property).

228. Schwartz, *supra* note 217, at 383 (discussing the argument that risky conduct is sufficiently deterred by a concern for personal safety).

229. *Id.*

230. *See supra* note 57 and accompanying text.

Finally, the deterrence model is critiqued on the basis that many individuals act without knowledge that their conduct could subject them to a lawsuit.[231] My involvement in the firearms policy debate for more than two decades has taught me that no group of Americans is more in tune with or knowledgeable about their issue realm than gun owners, in large part because of the effective job that the blogosphere and gun lobbying organizations do in getting the word out about developments, legal and otherwise, in the area. Knowledge of the existence of potential tort liability for harm caused with stolen guns would likely be disseminated quickly and in a saturated fashion.

Accordingly, there are reasons to believe a credible threat of tort liability would incentivize lawful gun owners and sellers to exercise reasonable care in keeping guns out of the hands of thieves. Similarly, an affirmative mandate of reasonable gun security practices in the form of legislative or regulatory rules could be expected to have a deterrent effect on lawful gun owners and sellers, as most could be expected to follow the law.[232] But in the topsy-turvy world of guns in America, the legal system has essentially abandoned the deterrence model as a means for promoting safe conduct in securing the most dangerous product. As seen throughout this Article, the law imposes almost no expectations on the most efficient cost-avoider—gun possessors.

A byproduct of this state of affairs is a lax attitude by many gun owners toward their responsibility for safeguarding firearms from theft. Anecdotally, in many discussions regarding safe firearms storage, in class discussions, at presentations, and informally, I am frequently surprised by the low degree of obligation many gun owners feel toward protecting guns from access by unauthorized users. Many of these discussions occur in my law school firearms policy seminar course. Most of the students who enroll in the course are strong believers in gun rights. They are intelligent, reasonable, and responsible people, except, for some of them, when it comes to firearms security. As an example, during a class discussion of the *Holden* case, where the gun owner left a loaded pistol in a dresser, which was stolen by his daughter's friend and used for murder,[233] a student spoke up and said, "I leave my loaded gun on top of my nightstand so I can get to it in hurry." The comment led to a colloquy along the following lines:

> Me: Like, including right now, when you're in class?
>
> Student: Uh-huh.

231. *See* Schwartz, *supra* note 217, at 386–87.

232. Obviously, criminals and other illegal gun owners would be unlikely to be deterred either by the threat of tort liability or affirmative legislative duties.

233. *See supra* notes 145–52 and accompanying text.

> Me: Do you have roommates?
>
> Student: Yes.
>
> Me: Do they bring friends over?
>
> Student: Yes.
>
> Me: Have units in your apartment building ever been burglarized?
>
> Student: All the time. That's one reason I have the gun.
>
> Me: Don't you think it's risky to leave a loaded handgun laying around in plain view? Maybe even negligent?[234]

One empirical indicator of the trickle-down impact on the right to be negligent is simply the massive number of guns stolen each year, as discussed in Part I.[235] Unfortunately, without more data, there is no way of knowing whether gun thefts are going up, down, or staying the same. Nor, given the fact that many stolen guns are never reported,[236] can comparisons be drawn to thefts of other valuable products, such as automobiles, which presumably get reported in nearly all instances.

A stronger empirical indicator can be found in the dismal patterns of firearms storage in households documented by numerous studies.[237] Most of the studies involve surveys of parents conducted at pediatrics

234. To the student's credit, she told me later in the semester that she was looking into buying a gun safe. It is important to emphasize that many gun owners are highly responsible. Following a class discussion similar to the one recounted in the text, I stopped by the law school security desk to talk with the campus police officer. One of my students had mentioned that the officer is a champion marksman whose picture hangs prominently on the wall of one of the largest gun stores in Memphis. I asked the officer her views on safe gun storage, not knowing what to expect as a response. She launched into a passionate argument about the high degree of responsibility gun owners bear to protect guns from theft, offering as an example a recent vacation trip to Florida. She explained that she had lawfully transported her handgun there by plane and rented a car on arrival. Like many states, Florida has a reciprocity statute honoring handgun carry permits from other states. *See* FLA. STAT. § 790.015 (2015) (allowing nonresidents to carry a concealed weapon if, among other restrictions, the nonresident is from a state that honors Florida's concealed weapon laws and licenses). The officer's personal vehicle in Memphis is equipped with a secure gun lockbox bolted to the trunk. The rental car, of course, had no such lockbox. She explained that before entering any premises prohibiting the carrying of firearms, she used her police handcuffs—"and not the ones with a universal key that many people could have"—to secure the gun, via the trigger guard, to the vehicle's chassis in the locked trunk. Relating this story to my students, some were surprised by what they saw as "extraordinary care." I disagreed, expressing the opinion that, given the magnitude of the risk, it was "reasonable care under the circumstances."

235. *See supra* notes 35–37 and accompanying text.

236. *See supra* notes 38–41 and accompanying text.

237. *See generally* McClurg, *Armed and Dangerous*, *supra* note 7, at 1190–1200 (discussing ten studies of gun storage practices).

clinics.[238] While the findings vary, studies have found that as many as 50% of all handguns are stored unlocked,[239] that ammunition is stored unlocked in approximately one-third of households,[240] and that as many as 1.6 million children live in a home with at least one loaded and unlocked firearm.[241] A 2007 national study determined that just over one-third of parents in households with guns and children stored their guns safely.[242] Because the studies are survey-based, it is reasonable to believe they understate the magnitude of the deficiencies in household storage practices because many respondents presumably would not want to confess to strangers that they store guns or ammunition in ways that endanger children.

Behavioral law and economics theory may also suggest that the right to be negligent with respect to firearms security has crept into the public psyche. In their groundbreaking article, *A Behavioral Approach to Law and Economics*, the authors hypothesized that in determining the probability of events in making negligence determinations, juries are subject to hindsight bias.[243] This occurs because jurors are required to assess the probability that a particular harm would follow from the defendant's act already knowing that the harm did in fact occur.[244] The result is that jurors may overestimate the probability of harm in conducting a cost–benefit analysis of the defendant's conduct, leading to the imposition of too much tort liability.[245] The same phenomenon presumably would affect judges as well in ruling on dispositive motions such as motions for dismissal, summary judgment, or directed verdict.

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238. The gun lobby has fought, with some success, to prohibit doctors from asking patients about gun ownership. *See* James Hamblin, *The Question Doctors Can't Ask*, ATLANTIC (Aug. 11, 2014, 9:01 AM), http://www.theatlantic.com/health/archive/2014/08/doctors-cant-ask-about-guns/375566/ (discussing a Florida statute that prohibits doctors from inquiring about gun ownership or discussing gun safety with patients, a lawsuit by Florida physicians challenging the statute as a First Amendment violation, the decision of a federal district court declaring the statute unconstitutional, and the 2–1 decision by the U.S. Court of Appeals reversing the district court and upholding the statute).

239. *See* Yvonne D. Senturia et al., *Children's Household Exposure to Guns: A Pediatric Practice-Based Survey*, 93 PEDIATRICS 469, 471 (1994).

240. *See id.* (stating that 32% of gun owners reported storing ammunition unlocked).

241. Gail Stennies et al., *Firearm Storage Practices and Children in the Home, United States, 1994*, 153 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 586, 588 (1999).

242. Robert H. DuRant et al., *Firearm Ownership and Storage Patterns Among Families with Children Who Receive Well-Child Care in Pediatric Offices*, 119 PEDIATRICS e1271, e1275 & tbl.2 (2007) (reporting these figures and citing studies).

243. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1523–24 (1998).

244. *Id.* at 1523.

245. *Id.* at 1524.

But in the area of harm resulting from access to unsecured firearms, the case law belies these assumptions. Consider *Gordon v. Hoffman*, where the Minnesota Supreme Court refused to overturn a jury verdict that found no liability on the part of a gun owner who left an unsecured, loaded rifle in a house occupied only by his fifteen-year-old daughter and several unrelated younger children (ages five through thirteen) for whom she was babysitting.[246] The fifteen-year-old removed the loaded rifle from a closet, assuming it to be unloaded, to show it to the other children.[247] She then left the room and in a struggle between two boys for possession of the rifle, the gun discharged, killing plaintiff's five-year-old child.[248] Although the trial record was incomplete, the court said the jury apparently believed that the defendant was negligent but that the "negligence was not a direct cause" of the injury.[249] Such a conclusion would be curious inasmuch as Minnesota, like all states, has long recognized that foreseeable intervening causes, even criminal acts, do not break the chain of causation.[250]

Given that the jurors not only knew such a harm had happened in the case before them but were most likely aware that such incidents happen regularly (they occur hundreds of times each year[251]), the jurors certainly did not appear to be overestimating probability. They either underestimated it or possibly did not care about it one way or another based on a belief that people should not bear a responsibility to lock up their guns. In either situation, it is difficult to defend the verdict under any rational cost–benefit analysis. How could one *not* be held responsible for leaving a loaded, accessible firearm in a house full of unsupervised children? The risk that made the conduct negligent is exactly what happened. As a dissenting justice observed, "It is hard to imagine a more volatile or potentially disastrous situation than that created by this defendant."[252]

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246. 303 N.W.2d 250, 250–52 (Minn. 1981).

247. *Id.* at 250–51.

248. *Id.* at 251.

249. *Id.* at 252.

250. *See, e.g.*, Raleigh v. Indep. Sch. Dist., 275 N.W.2d 572, 574, 576 (Minn. 1978) (finding no error in the jury verdict for the student victim against the school district because a fellow student's misconduct in slitting the victim's wrist was foreseeable when school district, aware of existing racial tensions, failed to exercise ordinary care in supervising the students attending a documentary movie); State Farm Mut. Auto. Ins. Co. v. Grain Belt Breweries, Inc., 245 N.W.2d 186, 189–90 (Minn. 1976) (reversing the trial court's grant of judgment notwithstanding the verdict to a corporation whose stolen truck was involved in an accident because the jury could have found that theft was a foreseeable result of an employee leaving the keys in the truck's ignition in a high crime rate area).

251. *See supra* note 16 and accompanying text.

252. *Gordon*, 303 N.W.2d at 253 (Otis, J., dissenting).

Other examples of juries returning victories for defendants in cases involving objectively unreasonable gun security exist,[253] and this Article has discussed several cases where judges acted similarly. While the cases do not empirically prove anything, they certainly do not suggest, as behavioral law and economics theory would predict, that juries or judges are overestimating probabilities of harm in unauthorized gun access situations with the result of imposing more liability.

CONCLUSION

This Article has explored the disheartening level of responsibility that the law, and through it, the American public, have come to accept from individual gun owners and retail gun sellers to safeguard firearms from theft. Despite the fact that hundreds-of-thousands of guns are stolen each year[254] and that a high percentage of crime guns are the product of theft,[255] the U.S. legal system is bankrupt of tools to deter dangerous, unreasonable firearms security. The law imposes virtually no obligation on the most efficient cost-avoider in the equation: possessors of firearms. Cases have been discussed in which judges and juries refused to hold responsible even grossly negligent defendants who left, with deadly results, loaded handguns unguarded, unlocked, and readily accessible to criminals and other unauthorized users.

That these conditions are the result of unwarranted deference to expansive views of the Second Amendment can be seen not only in the absence of legislation (except in a small number of states) mandating firearms security,[256] but also in federal legislation, such as the PLCAA and the Child Safety Lock Act, that affirmatively protects—expressly in the name of the Second Amendment—negligent conduct that facilitates gun thefts.[257] Common law courts have been just as deferential. This Article showed how, in case after case, courts have distorted fundamental scope of liability principles to avoid imposing legal responsibility commensurate with the risk of possessing firearms to safeguard them from thieves.[258]

253. *See* Blackwell v. Cantrell, 315 S.E.2d 29, 30, 32 (Ga. Ct. App. 1984) (affirming the jury verdict finding no negligence for grandparents who kept a loaded pistol in a dresser drawer in their bedroom, which their grandchildren accessed with the result that one grandchild shot the other); Oldham v. Nerolich, 452 N.E.2d 225, 226 (Mass. 1983) (affirming the jury verdict finding no negligence for the landowner whose nephew and eleven-year-old friend, playing on the porch, entered the landowner's unlocked house and found a loaded rifle in the closet with the result that the nephew shot his friend).

254. 2012 ATF STOLEN GUNS REPORT, *supra* note 8, at 5–6; *see supra* notes 34–43 and accompanying text.

255. *See supra* notes 50–52 and accompanying text.

256. *See supra* notes 91–92 and accompanying text.

257. *See supra* notes 12–15, 153–64, 196–201 and accompanying text.

258. *See supra* notes 119–52 and accompanying text.

As explained in the Introduction, the issue of stolen guns is just a sliver of a much larger issue. As a nation, our legal system has made the irrational, not simply unwise, choice to confer near complete immunity from responsibility on those who make, purvey, and possess the only legal product designed and intended to kill and injure people. This Article explained how rather than seeking optimal deterrence of injury-causing behavior, U.S. law may have the perverse effect of actually encouraging it.

During the writing of this Article, a lawyer sought my counsel in a case in which his client was shot with a stolen assault rifle. An employer had allowed an employee to keep the firearm, unsecured, on the employer's premises. A co-employee with a violent felony record stole the gun and used it in the shooting. The lawyer contacted me after a hearing on a motion for summary judgment, explaining that he was baffled by the cold reception he received from the trial judge. "I don't understand it. Is it me or the law?" he asked. "It's the law," I said. "I call it the Second Amendment right to be negligent."