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## Gun Control Through Tort Law

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Richard C. Ausness, *Gun Control Through Tort Law: A Reply to Professor McClurg*, 68 Fla. L. Rev. Forum 89 (2017).

## GUN CONTROL THROUGH TORT LAW

*Richard C. Ausness* \*

### INTRODUCTION

I have been asked to respond to an article by Professor Andrew Jay McClurg that recently appeared in the *Florida Law Review*.<sup>1</sup> In this article, the author, a longtime advocate of firearms regulation,<sup>2</sup> argues that owners and commercial sellers of firearms who negligently fail to secure them against theft should be held liable when persons are killed or injured by firearms used in the commission of a crime.<sup>3</sup>

In the past, believing that existing federal and state laws were inadequate to halt the spread of gun-related deaths and injuries, proponents of stricter gun control measures proposed a number of tort liability theories to supplement these laws. I will briefly review some of these theories in order to provide a background for my discussion of Professor McClurg's proposal. In the early days, when the emphasis was on controlling cheap handguns known as "Saturday Night Specials," gun control advocates urged that these firearms be subjected to strict products liability.<sup>4</sup> However, the strict liability approach usually failed because plaintiffs were unable to prove that the handguns in question were defective.<sup>5</sup> Proponents of gun control then endorsed a broad risk-utility or product category liability theory, which characterized products as defective if their overall social costs outweighed their social benefits.<sup>6</sup>

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

2. See, e.g., ANDREW JAY MCCLURG & BRANNON P. DENNING, GUNS AND THE LAW: CASES, PROBLEMS AND EXPLANATION (2016); GUN CONTROL AND GUN RIGHTS (Andrew Jay McClurg, David B. Kopel & Brannon P. Denning eds. 2002); Andrew Jay McClurg, *In Search of the Golden Mean in the Gun Debate*, 58 HOWARD L.J. 779 (2015); 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 (2013).

3. See McClurg, *supra* note 1, at 47.

4. See Andrew Jay McClurg, *Strict Liability for Handgun Manufacturers: A Reply to Professor Oliver*, 14 U. ARK.-LITTLE ROCK L.J. 511, 525 (1992).

5. See, e.g., *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1210–11 (N.D. Tex. 1985); *Mavilia v. Stoeger Indus.*, 574 F. Supp. 107, 111 (D. Mass. 1983); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1044 (Fla. Dist. Ct. App. 2001).

6. See Carl Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 9 (1995); Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429, 1454 (1994); Michael J. Toke, Note, *Categorical Liability for Manifestly Unreasonable Designs: Why the Comment d Caveat Should Be Removed from the Restatement (Third)*, 81 CORNELL L. REV. 1181, 1185 (1996).

After some initial successes,<sup>7</sup> this theory was also rejected.<sup>8</sup> Finally, some gun control proponents urged courts to treat handgun use as an ultrahazardous or abnormally dangerous activity,<sup>9</sup> but this suggestion was not particularly well received either.<sup>10</sup>

Recently, the focus has shifted from cheap handguns to military-style assault rifles.<sup>11</sup> This, in turn, has led gun control advocates to recast existing liability theories such as negligent entrustment and public nuisance and to formulate new ones such as negligent marketing. Negligent entrustment imposes liability on one who supplies a product to another when he or she has reason to suspect that the recipient will not be able to use it safely.<sup>12</sup> Another theory is public nuisance,<sup>13</sup> which allows

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7. See *Kelly v. R.G. Indus., Inc.*, 497 A.2d 1143, 1147 (Md. 1985); see also *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 114 (La. 1986); *O'Brien v. Muskin Corp.*, 463 A.2d 298, 306 (N.J. 1983).

8. See *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1533–34 (11th Cir. 1986); *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326, 1327 (9th Cir. 1986); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1273–74 (5th Cir. 1985); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 773 (D.N.M. 1987), *aff'd*, 843 F.2d 406 (10th Cir. 1988); *Richardson v. Holland*, 741 S.W.2d 751, 754 (Mo. Ct. App. 1987). Many commentators were also critical. See, e.g., Harvey M. Grossman, *Categorical Liability: Why the Gates Should Be Kept Closed*, 36 S. TEX. L. REV. 385, 398 (1995); James A. Henderson, Jr. & Aaron Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1266–67 (1991).

9. See John L. Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, 34 HASTINGS L.J. 529, 537, 544, 547 (1983); Andrew Jay McClurg, *Handguns as Products Unreasonably Dangerous Per Se*, 13 U. ARK.-LITTLE ROCK L.J. 599, 601, 603, 604 (1991); Andrew O. Smith, Comment, *The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369, 370 (1987).

10. See, e.g., *Shipman*, 791 F.2d at 1534; *Moore*, 789 F.2d at 1328; *Perkins*, 762 F.2d at 1268; *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1205 (7th Cir. 1984); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530, 531 (S.D. Ohio 1987), *aff'd*, 849 F.2d 406 (6th Cir. 1988); *Armijo*, 656 F. Supp. at 775, *aff'd*, 843 F.2d 406 (10th Cir. 1988); *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 563 (Del. Super. Ct. 1989); *Kelley*, 497 A.2d at 1147; *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661, 664–65 (Wash. Ct. App. 1988). *Contra Richman v. Charter Arms Corp.*, 571 F. Supp. 192, 208 (E.D. La. 1983).

11. See *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 152 & nn.2–3 (Cal. Dist. Ct. App. 1999), *rev'd*, 28 P.3d 116 (Cal. 2001). These cases involved the TEC-9 and the TEC-DC9. These military-style semi-automatic weapons were designed to accept fifty-round magazines and were equipped with "barrel shrouds" that facilitated spray fire. In addition, the barrels were threaded in order to accept silencers or flash suppressors. The weapons were compact and could be easily broken down and concealed. Furthermore, they were fitted with a "Hell Fire" trigger mechanism that enabled them to be fired more rapidly than other semi-automatic weapons. Finally, the TEC-DC9 could be easily converted to fire like an automatic weapon. See *id.* at 154–55.

12. See McClurg, *supra* note 1, at 10 (citing the RESTATEMENT (SECOND) OF TORTS § 390 (AM. LAW INST. 1965)).

13. See Bhowmik et al., *A Sense of Duty: Retiring the "Special Relationship" Rule and Holding Gun Manufacturers Liable for Negligently Distributing Guns*, 4 J. HEALTH CARE L. & POL'Y 42, 58 (2001); John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Experience*,

states and cities to recover from gun manufacturers for health care, law enforcement and other expenses incurred by the government because of the defendant's irresponsible marketing practices.<sup>14</sup> This theory has been accepted in some states<sup>15</sup> and rejected in others.<sup>16</sup> Negligent marketing is a novel theory that emerged during this period.<sup>17</sup> Negligent marketing seeks to impose liability for promotional and marketing practices that facilitate access to guns by criminals and other unsuitable persons.<sup>18</sup> However, so far courts have been reluctant to hold gun manufacturers or sellers liable under this theory.<sup>19</sup>

In contrast, Professor McClurg's liability proposal is more traditional and narrowly focused than the approaches discussed above. In the first place, because it is based on negligence, this liability theory requires that the defendant be at fault in some way. Second, it does not affect gun manufacturers at all, but instead imposes liability on gun owners and sellers when they fail to secure their weapons properly and when this failure enables criminals to steal guns and injure third parties while committing violent crimes. However, I am skeptical about whether the imposition of tort liability is the best solution to the problem of gun violence.

## I. TORT LIABILITY AND THE SECOND AMENDMENT

Professor McClurg correctly points out that court and legislative bodies have generally refused to impose tort liability on owners or

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52 S.C. L. REV. 287, 301 (2001); David Kairys, *The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 CONN. L. REV. 1175, 1180 (2000).

14. See 2 DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PROD. LIAB. § 10:9 (4th ed. 2016); Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825, 870 (2004).

15. See, e.g., *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 251 (E.D.N.Y. 2005); *White v. Smith & Wesson*, 97 F. Supp. 2d 816, 819 (N.D. Ohio 2000); *District of Columbia v. Beretta U.S.A. Corp.*, 872 A.2d 633, 637 (D.C. 2005); *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1249 (Ind. 2003); *James v. Arms Tech Inc.*, 820 A.2d 27, 50 (N.J. Super. Ct. App. Div. 2003); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1140 (Ohio 2002).

16. See, e.g., *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F.3d 415, 420–21 (3d Cir. 2002); *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540–41 (3d Cir. 2001); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1044 (Fla. Dist. Ct. App. 2001); *Smith & Wesson Corp. v. City of Atlanta*, 543 S.E.2d 16, 19 (Ga. 2001).

17. See Richard C. Ausness, *Tort Liability for the Sale of Non-Defective Products: An Analysis and Critique of the Concept of Negligent Marketing*, 53 S.C. L. REV. 907, 912 (2002).

18. See Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability Is Dead, Long Live Negligence*, 19 SETON H. LEGIS. J. 777, 778–79 (1995).

19. See *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999); *Merrill v. Navegar, Inc.*, 28 P.3d 116, 124, 125 (Cal. 2001); *Riordan v. Int'l Armament Corp.*, 477 N.E.2d 1293, 1294, 1296 (Ill. App. Ct. 1985); *Linton v. Smith & Wesson*, 469 N.E.2d 339, 340 (Ill. App. Ct. 1984); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661, 664, 665 (Wash. Ct. App. 1988).

commercial sellers of firearms.<sup>20</sup> For example, no federal or state law requires gun owners to securely store their weapons to prevent theft from homes or motor vehicle.<sup>21</sup> Furthermore, while the Federal Bureau of Alcohol, Firearms and Tobacco (AFT) has issued detailed recommendations to commercial sellers regarding the proper storage of firearms, none of these recommendations are mandatory.<sup>22</sup>

Moreover, as Professor McClurg observes, courts have also been reluctant to impose tort liability on either gun owners or commercial sellers for failing to secure firearms against theft.<sup>23</sup> Although courts have declared firearms to be dangerous and have urged owners to exercise the highest degree of care when storing and using them,<sup>24</sup> they usually stop short of holding gun owners and commercial sellers liable for negligent storage of firearms by invoking “those wayward twins of different mothers, duty and proximate cause, along with their shady cousin, foreseeability.”<sup>25</sup> *Valentine v. On Target, Inc.*<sup>26</sup> is illustrative of the duty analysis. In that case, an unknown assailant used a gun stolen from the defendant gun store to murder the decedent.<sup>27</sup> The court accused the plaintiff of seeking to impose a duty on the defendant to protect the world at large from criminal activity—a duty which it felt would impose a “tremendous burden” on gun dealers while providing only a hypothetical benefit to the public.<sup>28</sup>

Courts also rely on proximate cause (or the lack thereof) to protect gun owners and sellers from liability. When a court decides a case on proximate cause grounds, it usually considers whether the defendant’s negligent conduct was a foreseeable cause of the plaintiff’s injury. In such

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20. See McClurg, *supra* note 1, at 4–6.

21. See *id.* at 17. Congress did enact the Child Safety Lock Act in 2005, which requires gun makers and sellers to furnish a secure storage or safety device to prevent children from gaining access to firearms. See 18 U.S.C. § 921 (34) (A), (B), (C) (2012). However, this statute is concerned with preventing harm to children rather than preventing the theft of firearms. See McClurg, *supra* note 1, at 18. In addition, about twenty-five states have enacted child access prevention (CAP) laws, which impose criminal liability on gun owners who negligently store their firearms if this enables a child to obtain access to a weapon and cause him to himself or another. See *id.* at 18–19.

22. See *id.* at 19–20. Moreover, only nine states and the District of Columbia impose security requirements on gun dealers. *Id.* at 20 n.91.

23. See *id.* at 23; see also *Jones v. Secord*, 684 F.3d 1, 3–4 (1st Cir. 2012); *Bridges v. Parish*, 742 S.E.2d 794, 796 (N.C. 2013).

24. See *Bridges v. Dahl*, 108 F.2d 228, 229 (6th Cir. 1939); *Reida v. Lund*, 96 Cal. Rptr. 102, 105 (Ct. App. 1971); *Jacobs v. Tyson*, 407 S.E.2d 62, 64 (Ga. Ct. App. 1991); *Long v. Turk*, 962 P.2d 1093, 1096 (Kan. 1998); *Estate of Strever v. Cline*, 924 P.2d 666, 671 (Mont. 1996); *Stoelting v. Hauck*, 159 A.2d 385, 389 (N.J. 1960); *Luttrell v. Carolina Mineral Co.*, 18 S.E.2d 412, 417 (N.C. 1942).

25. McClurg, *supra* note 1, at 23 (citations omitted).

26. 727 A.2d 947 (Md. 1999).

27. See *id.* at 948.

28. See *id.* at 951.

cases, courts often conclude that the actions of third party criminals are unforeseeable and, therefore, break the chain of causation, thereby relieving the defendant of liability.<sup>29</sup> For example, in *Romero v. National Rifle Association*,<sup>30</sup> a gun stolen from the NRA's national headquarters was used to murder the decedent during a robbery.<sup>31</sup> Affirming a decision for the defendant, the federal court of appeals declared that the events were so "extraordinary and unforeseeable" that they constituted a superseding cause.<sup>32</sup>

According to Professor McClurg, when courts invoke principles of proximate cause and duty in stolen gun cases without considering the reasonableness of the defendant's conduct, they are essentially concluding that public policy does not require gun owners and sellers to exercise reasonable care to prevent gun thefts.<sup>33</sup> Professor McClurg also believes that these decisions reflect a view that imposing liability on gun owners and sellers in these cases will have a chilling effect on gun ownership and thereby raise Second Amendment concerns.<sup>34</sup> However, Professor McClurg persuasively argues that "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."<sup>35</sup>

## II. THE ARGUMENT FOR TORT LIABILITY

There are two aspects to Professor McClurg's argument for tort liability. First, he contends that the aggregate social harm (deaths and injuries) attributable to gun theft justifies measures to coerce, or at least to encourage, gun owners and sellers to take more precautions to prevent theft. Second, the imposition of tort liability will have a sufficient deterrent effect to achieve this goal.

### A. *Costs and Benefits*

#### 1. The Benefits of Reducing Gun Deaths and Injuries

Professor McClurg's cost-benefit analysis requires a reasonably accurate calculation of both costs and benefits. Although it seems a bit

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29. See *Romero v. Nat'l Rifle Ass'n of Am., Inc.*, 749 F.2d 77, 80–81 (D.C. Cir. 1984); *Estate of Strever*, 924 P.2d at 674; *Louria v. Brummett*, 916 S.W.2d 929, 930–31 (Tenn. Ct. App. 1995).

30. 749 F.2d 77 (D.C. Cir. 1984).

31. See *id.* at 78.

32. See *id.* at 80–81.

33. See McClurg, *supra* note 1, at 24.

34. See *id.* at 29–30 (discussing *McGrane v. Cline*, 973 P.2d 1092, 1095 (Wash. Ct. App. 1999) and *Holden v. Johnson*, No. CV010811660 WL 1153739 (Conn. Super. Ct. Apr. 15, 2005)).

35. *Id.* at 10.

strange to frame it this way, the “benefits” of imposing tort liability on gun owners and sellers would be the reduction in the costs of deaths and injuries caused by stolen guns that would result if they were subjected to tort liability. In order to ascertain that figure, we must determine: (1) what these aggregate costs are; and (2) how much they would be reduced if the tort liability option were chosen. Unfortunately, neither of these figures are easy to determine.

Professor McClurg observes that more than 30,000 deaths<sup>36</sup> and 80,000 nonfatal injuries<sup>37</sup> are caused each year by firearms. Although some of these deaths and injuries are accidental, others result from either self-inflicted gunshots or homicides.<sup>38</sup> According to one survey, as many as 600,000 guns may have been stolen each year from private residences through burglaries and other property crimes.<sup>39</sup> In addition, thousands of guns are stolen from commercial sellers as the result of shoplifting and burglaries.<sup>40</sup> Many of these stolen guns are no doubt used to commit violent crimes resulting in deaths or injuries.<sup>41</sup> Nevertheless, while many of these deaths and injuries committed by criminals involve stolen firearms,<sup>42</sup> we cannot be sure what the actual numbers are.<sup>43</sup> Moreover, even if we could obtain an accurate estimate of these deaths and injuries, we would have to “monetize” them in order to balance them with the cost side of the equation.

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36. *Id.* at 21 (citing 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](http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_04.pdf)).

37. *Id.* at 38 (citing Web-Based Injury Statistics Query and Reporting System (WISQARS), *Nonfatal Injury Reports 2001–2013*, CTRS. FOR DISEASE CONTROL & PREVENTION).

38. *See id.* at 21 n.97.

39. *See id.* at 11 (citing 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>).

40. *See id.* at 12 (citing BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEPT. OF JUSTICE, 2012 SUMMARY: FIREARMS REPORTED LOST AND STOLEN 10 tbl.3 (2013), <https://www.atf.gov/file/11846/download>).

41. *See id.* at 14.

42. *See id.* at 13–14 and accompanying notes.

43. Professor McClurg cites a study that concluded that about 61% of all gun-related deaths in 2010 were the result of suicides and 35% were the result of homicides. *Id.* at 21 n.97 (citing 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](http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_04.pdf)). The reason that the suicide death rate is so high is because of the lethality of guns as a suicide method. In fact, guns are the most lethal form of suicide, with an 82 percent success rate. *See Lethality of Suicide Methods*, HARVARD SCH. OF PUB. HEALTH, <https://www.hsph.harvard.edu/means-matter/means-matter/case-fatality/> (last visited Feb. 16, 2017). This also suggests that a high percentage of non-fatal gun injuries result from criminal acts.



## 2. The Costs of Tort Liability

Even if the benefits of tort liability could be determined with reasonable certainty, the analysis would not be complete without considering what the cost of tort liability would be. This cost could be significant because the imposition of tort liability would potentially affect *all* gun owners and sellers and result in inconvenience and out-of-pocket expenses to secure their weapons against theft. Another potential cost is the inability of gun owners to immediately access their weapons to defend against robberies and burglaries.<sup>44</sup> As in the case of benefits, the cost side of the equation must be monetized so that both costs and benefits can be compared using the same metrics. Unfortunately, as is the case with benefits, many of the costs of tort liability cannot be accurately monetized.

## 3. The Deterrent Effect of Tort Law

Finally, there is the question of whether tort law would actually deter negligent conduct on the part of gun owners and sellers.<sup>45</sup> Professor McClurg relies on what he calls an “economic deterrence model” to support his argument for tort liability.<sup>46</sup> As he points out, tort rules are intended to encourage actors to expend resources on safety up to the point where the marginal cost of safety equals the marginal reduction in accident costs.<sup>47</sup> Tort liability forces actors to internalize the social costs of their activities and, thereby, gives them an incentive to avoid incurring these costs by engaging in safer conduct.<sup>48</sup> In other words, individuals and business entities who are “rational actors” will seek to avoid liability by investing in safety and thereby reducing accident costs. But will they?

Unfortunately, not everyone behaves according to the rational actor model. Professor Stephen Sugarman examined the effect of tort liability on human behavior in an influential article entitled *Doing Away with Tort Law*.<sup>49</sup> First, Professor Sugarman pointed out that “[s]elf-preservation instincts, market forces, personal morality and governmental regulation combine to control unreasonably dangerous actions independently of tort law.”<sup>50</sup> Furthermore, he identified a number of factors that weakened the

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44. *See id.* at 41.

45. If tort law does not significantly deter negligent conduct, gun-related deaths and injuries will not be reduced as much as predicted. If this occurred, the benefit side of the risk-utility equation would be correspondingly reduced.

46. *See id.* at 38.

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

48. *See* Richard J. Pierce, Jr., *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1289 (1980).

49. *See* Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985).

50. *Id.* at 561.

deterrent effects of tort liability for particular individuals. For example, he observed that many people were ignorant of the liability rules that affected them.<sup>51</sup> In addition, both individuals and organizations often suffered from what Professor Sugarman refers to as “incompetence.”<sup>52</sup> On an individual level, this means inattention or lapses in judgment; at the organizational level, it means the inability to formulate a strategy to limit exposure to liability or to implement it throughout the organization’s structure.<sup>53</sup> According to Professor Sugarman, the deterrent effect of tort law was further weakened by the fact that people often disregarded the threat of liability.<sup>54</sup> Another factor was the fact that some people were willing to take chances, even though they realized that they are placing others at risk, when they believed that these risks were necessary to achieve some important goal.<sup>55</sup> Furthermore, some people were not deterred by tort liability because they felt that the risk of being held liable was very low.<sup>56</sup> Finally, some people were not deterred by tort liability because they were judgment proof or because they were protected by liability insurance.<sup>57</sup>

### III. REGULATION AS AN ALTERNATIVE TO TORT LIABILITY

If the benefits of reduced deaths and injuries from stolen guns resulting from the threat of tort liability do not clearly outweigh the costs of imposing such liability on gun owners and sellers, perhaps we should consider whether some of these benefits can be achieved more cheaply by imposing certain theft prevention measures by regulation instead of relying on tort liability.

There are a number of reasons why government regulation is likely to be cheaper and more efficient than tort liability.<sup>58</sup> First of all, regulatory standards are easier to understand *ex ante* because they are usually specific.<sup>59</sup> In contrast, tort rules tend to be open-ended and contextual in nature.<sup>60</sup> In the case of federal regulations, another advantage is they

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51. *See id.* at 565–67.

52. *Id.* at 561, 568.

53. *See id.* at 568–69.

54. *See id.* at 569.

55. *See id.* at 570.

56. *See id.*

57. *See id.* at 571–74.

58. *See* W. Kip Viscusi et al., *Deterring Inefficient Pharmaceutical Litigation: An Economic Rationale for the FDA Regulatory Compliance Defense*, 24 SETON HALL L. REV. 1437, 1468 (1994).

59. *See* James A. Henderson, Jr., *Manufacturers’ Liability for Defective Product Design: A Proposed Statutory Reform*, 56 N.C. L. REV. 625, 638 (1978).

60. *See* Richard C. Ausness, *The Case for a “Strong” Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1262 (1996).

apply uniformly throughout the country.<sup>61</sup> Furthermore, regulatory agencies typically have a number of effective enforcement powers to enable them to enforce their rules and regulations,<sup>62</sup> while the tort system relies almost entirely on private individuals for enforcement.<sup>63</sup> In addition, when viewed broadly as a mechanism for risk control, the “overhead” costs of a regulatory approach are likely to be less than the costs of tort liability.<sup>64</sup> While the costs of government regulation include the cost of maintaining an agency staff, as well as the cost of formulating and enforcing regulations, the costs of tort liability not only include the cost of determining applicable tort law safety standards,<sup>65</sup> but also the cost of defending and adjudicating damage claims.<sup>66</sup>

If a regulatory route is chosen, an obvious place to start would be a statutory authorization for the ATF to convert some or all of its existing recommendations into binding regulations on gun sellers.<sup>67</sup> Regulation of gun owners at the federal level would be more problematic. Although a federal gun safety law aimed at individual gun owners would no doubt be more effective than state regulation, it would raise Second Amendment concerns and would probably also generate considerable opposition from the NRA and the rest of the “gun lobby.” Therefore, a more practical approach would be to modify state CAP laws, currently found in at least twenty-five states,<sup>68</sup> and impose specific theft-prevention obligations on gun owners.<sup>69</sup> In fact, it might be possible for interested parties, including

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61. See Victor E. Schwartz & Liberty Mahshigian, *A Permanent Solution for Product Liability Crises: Uniform Federal Tort Law Standards*, 64 DENV. U. L. REV. 685, 692 (1988).

62. See Paul Dueffert, Note, *The Role of Regulatory Compliance in Tort Actions*, 26 HARV. J. ON LEGIS. 175, 177 (1989).

63. For example, the deterrent effect of tort law is weakened because many injured parties fail to sue. See Robert A. Prentice & Mark E. Roszkowski, “*Tort Reform*” and the Liability “*Revolution*”: *Defending Strict Liability in Tort for Defective Products*, 27 GONZ. L. REV. 251, 259 (1991–1992).

64. See W. Kip Viscusi et al., *Deterring Inefficient Pharmaceutical Litigation: An Economic Rationale for the FDA Regulatory Compliance Defense*, 24 SETON HALL L. REV. 1437, 1450 (1994).

65. See Victor E. Schwartz & Liberty Mahshigian, *A Permanent Solution for Product Liability Crises: Uniform Federal Tort Law Standards*, 64 DENV. U. L. REV. 685, 692 (1988).

66. See Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 363–64 (1984). Both plaintiffs and defendants bear these costs. According to one estimate, the overhead costs of tort litigation are almost fifty cents on every dollar spent to pay claims. See JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 69 (1986).

67. See BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP’T OF JUSTICE, SAFETY AND SECURITY INFORMATION FOR FEDERAL FIREARMS LICENSEES 8–15 (2010) (discussed in McClurg, *supra* note 1, at 19 n.89).

68. See McClurg, *supra* note 1, at 18 n.80.

69. Professor McClurg points out that current CAP laws do not require specific safety measures, but merely make it a crime to negligently store a loaded firearm in a way that enables

the NRA and other gun-oriented organizations, to formulate a uniform gun safety law, which, if adopted, would help to avoid the problem of disparate regulations at the state level.

#### CONCLUSION

Professor McClurg rightly points out that many gun owners and sellers do not take adequate measures to protect against theft. This failure contributes to gun-related deaths and injuries because stolen firearms are often used in the commission of other crimes. Professor McClurg laments the fact that current laws and court decisions have immunized gun owners and sellers from liability in such cases and he proposes to remedy the situation by imposing tort liability on those who negligently fail to safeguard their weapons against theft. While this proposal has some merit, a tort liability regime may not have a significant deterrent effect and will be costly to administer. Consequently, I have suggested that a regulatory approach should be considered instead. Existing ATF recommendations could be made mandatory on commercial gun sellers at the federal level, while gun safety measures could be enforced against individual gun owners under state law.

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a child to gain access to the weapon and cause harm to himself or another person. *See id.* at 18–19.