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## Strict Liability Upon Gunowners (SLUG): A Proposed Balanced Approach

David Louis

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## COMMENT

### STRICT LIABILITY UPON GUNOWNERS (SLUG): A PROPOSED BALANCED APPROACH

DAVID LOUIS\*

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## I. INTRODUCTION

As a nation, we remain in a perpetual state of conflict over the status and utility of firearms in society.<sup>1</sup> Although meritorious arguments exist on both sides of the conflict, strong position-based—as opposed to issue-based—arguments prevent any action on issues affecting everyone.<sup>2</sup> No matter the viewpoint, there is one issue both sides of the aisle can agree on: irresponsible gun owners should be held accountable when their conduct falls below the expected standard concerning general public health and

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1. See Jamie Ducharme, *More Americans Than Ever Support Stricter Gun Control Laws, Poll Finds*, TIME (Feb. 20, 2018), <http://time.com/5167216/americans-gun-control-support-poll-2018/> [<https://perma.cc/VF2J-GLBT>] (“Those in favor of stricter gun legislation outnumber those opposed by a measure of more than two-to-one . . . . The split, however, was more even among gun owners, with 50% in favor and 44% not, according to the poll.”); see also *Quinnipiac University Poll*, POLLING REP. (2018), <http://www.pollingreport.com/guns.htm> [<https://perma.cc/YNQ7-THXR>] (polling with the question, “Do you think it is more important to protect gun rights or control gun violence?”). Thirty-eight percent responded to the Quinnipiac poll saying it is more important to protect gun rights, and fifty-seven percent felt the implementation of gun controls measures to prevent gun violence is most important. *Id.*; see also *Policies on Guns*, CONST. RIGHTS FOUND. 1 (2012), [http://www.crf-usa.org/images/pdf/gun\\_policies.pdf](http://www.crf-usa.org/images/pdf/gun_policies.pdf) [<https://perma.cc/46ZH-F663>] (“Americans have highly conflicting views on gun laws . . . . [T]he public splits 44 percent in favor of stricter gun laws, 43 percent in favor of keeping gun laws as they are now, and 11 percent in favor of making our gun laws less strict.”).

2. See ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 4–5 (Bruce Patton ed., 3d ed. 2011) (“When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so. Your ego becomes identified with your position. You now have a new interest in ‘saving face’—in reconciling future action with past positions—making it less and less likely that any agreement will wisely reconcile the parties’ original interests.”).

safety.<sup>3</sup> More specifically, an agreement may be found in holding accountable persons who, by their careless and apathetic management, allow their firearm to become lost or stolen, and later used to injure or kill another.

This Comment argues for the inclusion of a strict liability approach, directly targeting irresponsible gun owners<sup>4</sup> in a manner that appeals to the interest of both viewpoints within the American gun debate. Part II will discuss the associated risks accompanying stolen or lost firearms and their impact on society at large. Part III will discuss how victims of gun violence lack a mode of redress against irresponsible gun owners within existing tort law. This section will describe how the principles of strict liability and negligence, in their current forms, are incapable of addressing irresponsible gun owners whose actions, or lack thereof, permit their firearms to be later used to kill or harm another. Part IV will argue that the categories of strict liability must be expanded to include a theory tailored to addressing irresponsible gun owners. This section will discuss how the addition of the strict liability theory will deter irresponsible gun ownership and provide a mode of redress for victims consistent with public policies, yet also provide adequate defenses for responsible gun owners. Part V will propose a model rule imposing strict liability on gun ownership in general, and Part VI will discuss the limitations of liability and defenses designed to protect the fundamental right to keep and bear arms.

## II. THE PUBLIC RISK ASSOCIATED WITH STOLEN OR LOST FIREARMS

The experience of gun ownership is deeply woven into the fabric of our American culture. This is so much the case that one in three people keep

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3. See S.H. Blannelberry, *Should Negligent Gun Owners Be Prosecuted to the Fullest Extent of the Law?*, GUNSAMERICA DIG. (May 5, 2015), <https://www.gunsamerica.com/digest/should-negligent-gun-owners-be-prosecuted-to-the-fullest-extent-of-the-law/> [https://perma.cc/AYE7-4PGJ] (stating the primary method for resolving the problem of an “irresponsible gun owner is not to deny them of their Second Amendment rights but to educate them on the proper way to handle firearms. Turn an irresponsible gun owner into a responsible gun owner.”). The Blannelberry article goes on to mention that part of the education process, believed by many, includes holding them responsible for the death and injuries resulting from their negligence. “It’s a persuasive argument on many levels and therefore has resonance to folks on either side of the gun divide.” *Id.*; see also Eric Liu, *Keep Your Guns, but Take Responsibility*, CNN, <https://www.cnn.com/2013/12/11/opinion/liu-gun-responsibility/index.html> [https://perma.cc/XR94-AVEB] (“Gun responsibility isn’t gun control . . . . A gun responsibility agenda respects the Second Amendment right to bear arms. It also demands that the right be exercised with the level of responsibility that a functioning society applies to any public health or safety issue.”).

4. This Comment uses the term “irresponsible gun owner” to define an individual who loses or, through their lack of reasonable care, allows their firearm to be stolen. Subsequent to its loss or theft, the firearm is used by a third party to kill or injure another.

one or more firearms for either self-protection, sport, or part of a private collection.<sup>5</sup> While the experience of gun ownership has been reported to benefit many individuals,<sup>6</sup> the burden falls on the public at large.<sup>7</sup> Since 2000, the United States has manufactured an average of 5,450,408 firearms annually for domestic use and imported another 2,812,432 to keep pace with demand.<sup>8</sup> For perspective, in 2015, the United States population was about 321 million, and the total number of firearms available and in circulation in the United States was estimated to range between 265–357 million—nearly one or more firearm per person.<sup>9</sup> The following year, 2016, the United States made an additional 16,258,394 firearms available to the domestic

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5. See Kim Parker et al., *America's Complex Relationship with Guns*, PEW RES. CTR. (June 22, 2017), <http://www.pewsocialtrends.org/2017/06/22/the-demographics-of-gun-ownership/> [https://perma.cc/4LG5-ALV8] (“About four-in-ten adults (42%) report that there is a gun in their household, with three-in-ten saying they personally own a gun and 11% saying they don’t own a gun but someone else in their household does.”).

6. See *A Factual Look at Guns in America*, AM. GUN FACTS, <https://americangunfacts.com/> [https://perma.cc/2PHW-RB3D] (stating “[e]very year, guns are used over 80x more often to protect a life than to take one!”). It was reported that three out of five felons surveyed stated “they won’t mess with an armed victim.” *Id.*

7. See *Gun Violence is a Public Health Crisis*, AM. PUB. HEALTH ASS’N 1, [https://www.apha.org/-/media/files/pdf/factsheets/160317\\_gunviolence\\_factsheet.ashx](https://www.apha.org/-/media/files/pdf/factsheets/160317_gunviolence_factsheet.ashx) [https://perma.cc/64XG-ZFLE] (“In the United States, gun violence is a major public health problem and a leading cause of premature death.”).

8. See *Firearms Commerce in the United States Annual Statistical Update 2018*, U.S. DEP’T OF JUST. BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES 1–5 (2018), <https://www.atf.gov/resource-center/docs/undefined/firearmscommercestatisticalupdate20185087-24-18pdf/download> [https://perma.cc/RL9J-LKRN] [hereinafter *Firearms Commerce in the United States*] (listing in Exhibit 1 the number of firearms produced in the United States by year from 1986 to 2016. Exhibits 2 and 3 list the number of firearms exported and imported, respectively, by the United States in a similar fashion to Exhibit 1).

9. *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015*, AM. FACT FINDER (Dec. 2015) [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP\\_2017\\_PEPANNRES&src=pt](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2017_PEPANNRES&src=pt) [https://perma.cc/LM6X-XH4J]. See Tom Kertscher, *Which is Higher: The Number of People, or the Number of Guns, in America?*, POLITIFACT (Feb. 20, 2018, 1:45 PM), <https://www.politifact.com/wisconsin/statements/2018/feb/20/kevin-nicholson/which-higher-number-people-or-number-guns-america/> [https://perma.cc/367Z-9MJT] (“The estimate: 265 million civilian guns in the United States, as of when the survey was taken, in January 2015. Meanwhile, the U.S. population at that time, according to the U.S. Census Bureau, was about 320 million.”); see also Alexis Rhiannon, *How Many Guns Are There in America? The Statistics Are Staggering*, BUSTLE (Oct. 2, 2017), <https://www.bustle.com/p/how-many-guns-are-there-in-america-the-statistics-are-staggering-2746615> [https://perma.cc/AF7X-RY4E] (estimating “the number of firearms nationwide at 357 million . . . . That means that four years ago, there were already 40 million more guns than there were people in this country.”).

market through manufacturing and importation.<sup>10</sup> Within the same year, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) stated that Federal Firearm Licensees (FFL)<sup>11</sup> reported a total of 18,394 lost or stolen firearms that year alone.<sup>12</sup> That number, coupled with between 237,000 and 600,000 stolen firearms per year<sup>13</sup>—not including firearms negligently lost—indicated an environment conducive for the acquisition of

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10. See *Firearms Commerce in the United States*, *supra* note 8 (reporting that the U.S. manufactured 11,497,441 firearms—excluding the number of firearms produced to support the military—and imported 5,137,771 firearms. Subtracting the number of firearms exported by the U.S., we are left with 16,258,394 firearms made available in the U.S. in 2016).

11. See *Types of Federal Firearms Licenses (FFLs)*, DEP'T OF JUST. BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES (June 14, 2018), <https://www.atf.gov/resource-center/infographics/types-federal-firearms-licensees-ffls> [<https://perma.cc/3RBJ-R8ZM>] (stating a Federal Firearm Licensee is “[a]n individual who is licensed to engage in the business of manufacturing, importing and/or dealing in firearms.”); see also *Fact Sheet-Federal Firearms and Explosive Licenses by Types*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES (May, 2019), <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-federal-firearms-and-explosives-licenses-types> [<https://perma.cc/NFD8-TS2A>] (indicating the existence of 134,738 Federal Firearms Licensees as of 2017).

12. See *FFL Thefts/Losses United States*, U.S. DEP'T JUST. BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES, <https://www.atf.gov/resource-center/docs/undefined/osii508fflthefts-lossescy16pdf/download> [<https://perma.cc/JPW8-X32V>] (revealing that in 2016, a total of 2,555 reports were filed by Federal Firearm Licensees disclosing incidents of theft or loss totaling in 18,394 missing firearms). Of the 18,394 lost or stolen firearms, 9,113 were reported lost and 9,281 reported stolen. *Id.*; see *ATF Releases 2016 Summary of Firearms Reported Lost and Stolen from FFLs*, DEP'T OF JUST. BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Apr. 11, 2017), <https://www.atf.gov/news/pr/atf-releases-2016-summary-firearms-reported-lost-and-stolen-ffls> [<https://perma.cc/PM3T-8SPG>] (“Firearms are considered lost when an FFL takes a firearm into its inventory and later cannot account for the disposition of the firearm from its inventory during an inventory reconciliation . . . . Stolen firearms are broken down into three reporting categories: larceny, burglary and robbery.”) Of the stolen firearms, burglary accounts for the lions share at 7,488, larceny at 1,423, and robbery with 340. *Id.* In 2017, the number of reports filed by Federal Firearm Licensees rose to 2,576 for a total of 21,535 lost or stolen firearms. *Federal Firearms Licensee (FFL) Theft/Loss Report*, U.S. DEP'T OF JUST. BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES, <https://www.atf.gov/resource-center/docs/report/theftdatausa2017pdf/download> [<https://perma.cc/9EGY-DEFS>].

13. See Brennan Weiss, *Criminals Steal More than 237,000 Guns from Legal American Gun Owner Every Year*, BUS. INSIDER (Nov. 20, 2017, 10:37 AM), <https://www.businessinsider.com/criminals-steal-guns-from-legal-gun-owners-2017-11> [<https://perma.cc/7UBN-D6C9>] (“In 2016, more than 237,000 guns were reported stolen in the US, a more than 68% increase from 2005 . . . . One estimate from the nonpartisan think-tank Center for American Progress puts the number of stolen guns per year at 380,000.”); see also Brian Freskos, *Up to 600,000 Guns are Stolen Every Year in the US—That’s One Every Minute*, GUARDIAN WKLY., (Sept. 21, 2016, 7:30 AM), <https://www.theguardian.com/us-news/2016/sep/21/gun-theft-us-firearm-survey> [<https://perma.cc/E96T-GWU2>] (“Privately owned firearms are stolen in America with alarming frequency: between 300,000 and 600,000 every year, according to . . . researchers at Harvard and Northeastern universities.”).

firearms by those who should not have access to a firearm, including children,<sup>14</sup> mentally ill individuals,<sup>15</sup> and criminals.<sup>16</sup>

Between 1979–1997, guns were responsible for the deaths of more Americans than “the combined number of mortalities for every war since 1775.”<sup>17</sup> In 2016, the Centers for Disease Control and Prevention reported firearms were directly linked to 38,551 deaths, an increase of over 2,000 firearm-related deaths since the previous year.<sup>18</sup> Of those deaths, 11,004

14. See Frances Baxley & Matthew Miller, *Parental Misperceptions About Children and Firearms*, 160 ARCHIVES PEDIATRIC ADOLESCENT MED. 542, 546 (2006) (“Among the 66% of all of the parents living in homes with firearms who reported that their children had not handled a household gun, 22% were contradicted by their children’s reports.”); see also *Child Access Prevention*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/child-consumer-safety/child-access-prevention/> [https://perma.cc/DBF2-35WC] (stating “73% of children under age 10 living in homes with guns reported knowing the location of their parents’ firearms, and 36% admitted that they had handled the weapons.”).

15. See Grant Duwe & Michael Rocque, *Op-Ed: Actually, There is a Clear Link Between Mass Shootings and Mental Illness*, L.A. TIMES (Feb. 23, 2018, 4:15 AM), <http://www.latimes.com/opinion/op-ed/la-oe-duwe-rocque-mass-shootings-mental-illness-20180223-story.html> [https://perma.cc/83EX-ZBPX] (“According to our research, at least 59% of the 185 public mass shootings that took place in the United States from 1900 through 2017 were carried out by people who had either been diagnosed with a mental disorder or demonstrated signs of serious mental illness prior to the attack.”).

16. 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.”) see also *Gun Laws vs. Gun Death*, SAFEHOME.ORG, <https://www.safehome.org/resources/gun-laws-and-deaths/> [https://perma.cc/JX3L-C8M3] (“Homicide makes up about one-third of all firearm-related deaths. Firearms were used in nearly 72 percent of murders nationwide in 2015.”); see also Christopher Ingraham, *Guns in America: For Every Criminal Killed in Self-defense, 34 Innocent People Die*, WASH. POST (June 19, 2015, 12:34 PM), [https://www.washingtonpost.com/news/work/wp/2015/06/19/guns-in-america-for-every-criminal-killed-in-self-defense-34-innocent-people-die/?utm\\_term=.b99f6a99180a](https://www.washingtonpost.com/news/work/wp/2015/06/19/guns-in-america-for-every-criminal-killed-in-self-defense-34-innocent-people-die/?utm_term=.b99f6a99180a) [https://perma.cc/WYY2-699T] (stating for every 1 “justifiable” gun homicide in 2012, there were 34 criminal gun homicides, 78 gun suicides, and twice as many accidental gun deaths.).

17. See Ingrid M. Evans & Allen Rostron, *Litigating Against the Firearm Industry*, 84 AM. JURIS. TRIALS 109, § 1 (2018) (“Guns are the cause of a tragic and avoidable public health crisis in the United States. Shooting deaths and injuries have reached epidemic proportions with over 28,000 deaths per year. . . . [M]ore Americans were killed with guns from 1979–1997 than the combined number of mortalities for every war since 1775.”).

18. See Sherry L. Murphy et al., *Deaths: Final Data for 2015*, 66 NAT’L VITAL STAT. REP. 1, 12 (2017) (“In 2015, 36,252 persons died from injury by firearms in the United States. . . . In 2015, the age-adjusted death rate for injury by firearms for the total population increased significantly, by 7.8% from 10.3 in 2014 to 11.1 in 2015[.]”); see also *Firearm Mortality by State*, CTR. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/nchs/pressroom/sosmap/firearm\\_mortality/firearm.htm](https://www.cdc.gov/nchs/pressroom/sosmap/firearm_mortality/firearm.htm) [https://perma.cc/AM8G-K3JC] (last updated Jan. 10, 2018) (listing firearm-associated deaths and death rates by state).

were murder victims.<sup>19</sup> In addition to the havoc and severe emotional distress irresponsible gun ownership places on victims, families, and communities,<sup>20</sup> it also leaves an estimated annual \$229 billion bill on the doorsteps of American taxpayers.<sup>21</sup> In comparison, the Department of Defense's 2017 fiscal year budget to provide military healthcare to all of its 9.4 million beneficiaries<sup>22</sup> only cost \$48.8 billion.<sup>23</sup> "By definition, all stolen guns go directly to criminals."<sup>24</sup> This creates a cyclical pattern, as

19. See *Murder Victims by Weapon, 2012–2016*, U.S. DEP'T JUST., <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/expanded-homicide-data-table-4.xls> [<https://perma.cc/JJA9-9UBN>] (listing the number of homicides in the United States by instrumentality and year, with firearms accounting for 11,004 homicides in 2016, 9,778 in 2015, and 8,312 in 2014).

20. See John Woodrow Cox & Steven Rich, *Scarred by School Shootings*, WASH. POST (MAR. 25, 2018), [https://www.washingtonpost.com/graphics/2018/local/us-school-shootings-history/?utm\\_term=.ab645ceb2e4a](https://www.washingtonpost.com/graphics/2018/local/us-school-shootings-history/?utm_term=.ab645ceb2e4a) [<https://perma.cc/C9MX-RMT'Z>] ("More than 187,000 students have been exposed to gun violence at school since Columbine . . . . Many are never the same."); see also Edwin Rios, *Children Pay the Price for America's Addiction to Gun Violence*, MOTHER JONES (Mar. 9, 2018, 6:00 AM), <https://www.motherjones.com/crime-justice/2018/03/children-pay-the-price-for-americas-addiction-to-gun-violence/> [<https://perma.cc/E4XM-68JH>] ("In the last two decades, more than 150,000 kids at more than 170 elementary, middle, and high schools have experienced a shooting on campus. A new report . . . suggests those kids, as well as those who encounter gun violence in their daily lives, continue to suffer the consequences for decades.").

21. See *All Costs from Columbine High Shooting may Reach \$50 Million, Top Official Says*, DESERET NEWS (May 6, 1999 12:00 AM), <https://www.deseretnews.com/article/695310/All-costs-from-Columbine-High-shooting-may-reach-50-million-top-official-says.html> [<https://perma.cc/U7MS-NP6T>] ("It could cost \$50 million to repair damage to Columbine High School."); Aimee Picchi, *Can the U.S. Afford the Massive Cost of Gun Violence?*, CBS NEWS (Oct. 4, 2017, 5:00 AM), <https://www.cbsnews.com/news/las-vegas-shooting-gun-violence-economic-costs/> [<https://perma.cc/DY6W-KE9C>] ("[G]un violence . . . ripple[s] through the economy in the form of lost wages, medical bills, higher taxes for law enforcement and lower property values, among other factors. Some estimates put the total annual tab of shootings at well over \$100 billion, while others put it even higher."); see also *Statistics on the Costs of Gun Violence*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/costs-of-gun-violence-statistics/> [<https://perma.cc/RSH5-4MNQ>] ("Researchers conservatively estimate that gun violence costs the American economy at least \$229 billion every year, including \$8.6 billion in direct expenses such as for emergency and medical care. Gun violence costs more than \$700 per American every year . . . .").

22. See *Patients by Beneficiary Category*, MIL. HEALTH SYS., <https://health.mil/I-Am-A/Media/Media-Center/Patient-Population-Statistics/Patients-by-Beneficiary-Category> [<https://perma.cc/4Z3V-9TKK>] (listing the 9.4 million beneficiaries by type: 1.37 million active duty service members; 1.71 million active duty family members; 170,000 National Guard and Reserve members; 750,000 family members of National Guard and Reserve members; 3.18 million retirees and family member under the age of 65; and 2.24 million retirees and family members 65 years of age and over).

23. Arthur Kellerman, *Rethinking the United States' Military Health System*, HEALTH AFF., (Apr. 27, 2017), <https://www.healthaffairs.org/doi/10.1377/hblog20170427.059833/full/> [<https://perma.cc/L76Z-BTU3>].

24. See Andrew J. McClurg, *The Second Amendment Right to be Negligent*, 68 FLA. L. REV. 1, 13 (2016) [hereinafter McClurg, *Right to be Negligent*] ("By definition, all stolen guns go directly to criminals.



there is also an understanding that most criminals obtain guns from legal owners who wish to arm themselves against criminals.<sup>25</sup> If the need for a gun is self-defense,<sup>26</sup> it would, therefore, be logical to also keep firearms out of the hands of criminals by eliminating the source, or in the very least minimizing criminals' ability to acquire firearms.<sup>27</sup>

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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.”); *Crime and Guns*, GUN FACTS, <http://www.gunfacts.info/gun-control-myths/crime-and-guns/#note-93-41> [<https://perma.cc/4BN6-Z4VZ>] (“93% of guns used in crimes are obtained illegally.”); Benjamin Hayes, *Stolen Guns: Why You Should Worry*, CRIME REP. (Sept. 10, 2013), <https://thecrimereport.org/2013/09/10/2013-09-stolen-guns-why-you-should-worry/> [<https://perma.cc/SHT2-TQVP>] (“Every time a gun is stolen[,] an armed criminal is created”).

25. See Andrew J. McClurg, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 CONN. L. REV. 1189, 1207 (2000) [hereinafter McClurg, *Armed and Dangerous*] (“It is estimated that 80% of stolen guns are taken from private residences. Burglaries occur in the U.S. at the rate of at least 2.5 million per year. All gun owners know or should know that guns in their homes are prime targets for thieves.”); *Gun Theft from Legal Owners is on the Rise, Fueling Violent Crime*, NBC NEWS (Nov. 21, 2017, 4:12 PM), <https://www.nbclosangeles.com/news/local/Southern-California-Stolen-Guns-Investigation-458881373.html> [<https://perma.cc/A764-SRN3>] [hereinafter *Gun Theft from Legal Owners*] (“Hundreds of thousands of firearms stolen from legal owners are flowing each year into underground markets—and the numbers are on the rise. Those weapons, stolen from homes and vehicles, often end up in the hands of people prohibited from having guns.”); Tom Knighton, *How Do Criminals Get Guns Despite Gun Law? This is One Way*, BEARING ARMS (July 24, 2018, 4:00 PM), <https://bearingarms.com/tom-k/2018/07/24/criminals-get-guns-despite-gun-laws-one-way/> [<https://perma.cc/CQN5-TN5M>] (“The fact is, gun laws keep guns out of the [wrong] hands *legally*. . . . So instead, [criminals] steal guns from people who aren’t prohibited. They buy guns from others who have stolen the firearms. They obtain them outside of the law in any way they can.”).

26. See Samantha Raphelson, *How Often Do People Use Guns in Self-Defense?*, NPR (Apr. 13, 2018, 3:51 PM), <https://www.npr.org/2018/04/13/602143823/how-often-do-people-use-guns-in-self-defense> [<https://perma.cc/NQ6E-GKH7>] (“The only way to stop a bad guy with a gun is a good guy with a gun. It’s a common refrain touted by gun rights advocates, who argue that using guns in self-defense can help save lives.”).

27. See McClurg, *Armed and Dangerous supra* note 25 (“It is estimated that 80% of stolen guns are taken from private residences. Burglaries occur in the U.S. at the rate of at least 2.5 million per year. All gun owners know or should know that guns in their homes are prime targets for thieves.”); *Gun Theft from Legal Owners, supra* note 25 (“Hundreds of thousands of firearms stolen from legal owners are flowing each year into underground markets—and the numbers are on the rise. Those weapons, stolen from homes and vehicles, often end up in the hands of people prohibited from having guns.”); see also Knighton, *supra*, note 25 (“The fact is, gun laws keep guns out of [the wrong] hands *legally*. . . . So instead, [criminals] steal guns from people who aren’t prohibited. They buy guns from others who have stolen the firearms. They obtain them outside of the law in any way they can.”).

### III. VICTIMS OF GUN VIOLENCE LACK A MODE OF REDRESS AGAINST IRRESPONSIBLE GUN OWNERS

The fundamental purpose of tort law is to provide “a vehicle of legal redress for victims of physical injury or damage to property.”<sup>28</sup> For most victims of gun violence, where an irresponsible gun owner is a pivotal player in the sequence of events leading to their tragic misfortune, this goal falls short.<sup>29</sup> Presently, tort law is divided into three major categories: “actions for intentionally inflicted injury [intentional torts]; actions based on failure to exercise care [negligence and recklessness]; and actions in which liability is imposed without regard to the actor’s state of mind or exercise of care [strict liability] . . . . Outside these three categories, there is no tort liability.”<sup>30</sup> Strict liability and negligence are the categories relevant to the issue of addressing irresponsible gun ownership.<sup>31</sup>

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28. See JOHN C. P. GOLDBERG ET AL., *TORT LAW RESPONSIBILITIES AND REDRESS* 810 (Erwin Chemerinsky et al. eds., 2004) (“Tort law consists of the rules and principles that define the right conduct, as well as the circumstances under which a victim can obtain redress, and the form that such redress may take.”); see also VINCENT R. JOHNSON, *STUDIES IN AMERICAN TORTS* 3 (5th ed. 2013) [hereinafter JOHNSON, *AMERICAN TORTS*] (“In general, tort law is a vehicle of legal redress for victims of physical injury or damage to tangible property.”); Michael R. McCurdy & Jason B. Robinson, *Tort Law in the United States*, FAIRFIELD WOODS (Dec. 2010), <https://www.fwlaw.com/news/186-tort-law-united-states> [<https://perma.cc/4B3V-LCW6>] (“[T]he primary purpose of tort law is to compensate individuals or entities that suffer personal or property damage because of another’s wrongful conduct and, when possible, enjoin continuing misconduct.”).

29. See Ray Sanchez, *Texas School Shooter’s Family Likely Not Liable Under Gun Access Law*, CNN (May 22, 2018, 6:59 PM), <https://www.cnn.com/2018/05/22/us/texas-school-shooting-safe-storage-law/index.html> [<https://perma.cc/MS7E-UMFS>] (stating “[t]he 17-year-old who allegedly shot and killed 10 people and wounded 13 others at a Texas high school used his father’s legally owned shotgun and revolver during the rampage . . . . [The father] wouldn’t discuss how his son came to acquire the weapons used in [the] attack . . . .”).

30. See JOHNSON, *AMERICAN TORTS* *supra* note 28, at 10–11 (“In modern tort law, there are three overarching categories of tort liability . . . . A given course of injurious conduct may give rise to a claim falling within one or more of these categories. Outside of these three categories there is no tort liability.”); see also *Types of Torts*, USLEGAL, <https://torts.uslegal.com/types-of-torts/> [<https://perma.cc/2G6C-7RK7>] (last visited Nov. 2, 2019) (describing three types of tort: intentional torts, negligence, and strict liability).

31. See RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 2018) (“The word ‘intent’ is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”); DAN B. DOBBS ET AL., *THE LAW OF TORTS* 4 (2nd ed. 2011) (“Intentional wrongs entail at least an intent on the part of the defendant to engage in conduct that the law regards as wrongful. The intentional tort defendant—the tortfeasor—is commonly consciously aware of his wrongdoing.”); *Comparing Intentional Torts and Negligence in Personal Injury*, ASK ADAM S. KUTNER, <https://www.askadamskutner.com/personal-injury/comparing-intentional-torts-and-negligence-in-personal-injury/> [<https://perma.cc/S6XJ-WGJU>] (stating simply the differences between intentional

### A. *Strict Liability*

Although many theories of strict liability<sup>32</sup> have been employed in an attempt to compensate those injured in suits against firearm manufacturers and distributors, most cases have been unsuccessful.<sup>33</sup> There remains, however, no direct vehicle under any theory of strict liability in American tort law for victims or their surviving family members to be made whole against an irresponsible gun owner.<sup>34</sup> Of the three common strict liability approaches, the “abnormally dangerous activities doctrine” is the only one broad enough to potentially allow a cause of action against gun owners, as the other two address very specific issues: wild animals and products liability.<sup>35</sup>

Abnormally dangerous activities as discussed in the Restatement (Second) of Torts “is founded upon a policy . . . that imposes upon anyone who for

tort and negligence “is that an intentional tort occurs when someone acts on purpose, while negligence happens when someone isn’t careful enough. In an intentional tort, an actor might not plan all of the damages that occur, but they intend their actions that result in the losses or injuries.”).

32. See JEFFEREY L. HARRISON, *LAW AND ECONOMICS IN A NUTSHELL* 196 (6th ed. 2016) (“Strict liability means that a party is liable for damage caused by her activity even if there is no showing of negligence . . . . The decision that a party will be strictly liable . . . amounts to an assignment of a right to others to be free of the consequences of that activity or to be compensated.”).

33. See Shaun R. Bonney, *Using the Courts to Target Firearm Manufacturers*, 37 *IDAHO L. REV.* 167, 168 (2000) (“Prior to 1998, claims against firearm manufacturers had been largely unsuccessful. These early suits sought to hold firearm manufacturers liable under traditional tort theories—strict products liability, strict liability for abnormally dangerous activities, and negligence.”); Timothy A. Bumann, *A Products Liability Response to Gun Control Litigation*, 19 *SETON HALL LEGIS. J.* 715, 715 (1995) (“Over the past two decades the industry has turned back the tide of suits alleging negligence *per se*, absolute or defectless ‘strict liability’ and ‘ultrahazardous activities.’”).

34. See *Jupin v. Kask*, 849 N.E.2d 829, 842 (Mass. 2006) (stating “‘there [are] no Massachusetts case[s] imposing strict liability for the unsafe storage of firearms.’ Indeed, we are not aware of, and have not been pointed to, any jurisdiction that imposes such liability on similar facts. Even were this not so, . . . such storage is [not] ultrahazardous . . .”).

35. See RESTATEMENT (SECOND) OF TORTS § 519 (AM. LAW INST. 2018) (“One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.”); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 20 (AM. LAW INST. 2018) (“An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.”). See also RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 22 (AM. LAW INST. 2018) (“An owner or possessor of a wild animal is subject to strict liability for physical harm caused by the wild animal.”); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (AM. LAW INST. 2018) (“One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.”); Bonney, *supra* note 33, at 170 (stating ultrahazardous activities, today “broadened in the Restatement (Second) of Torts” as abnormally dangerous activity, is a reluctantly adopted “strict liability [concept] . . . born in English Courts.”).

his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur.”<sup>36</sup> The first prong of Restatement (Second) Torts § 519 allocates liability to “[o]ne who carries on an abnormally dangerous activity . . . for harm to the person, land[,], or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.”<sup>37</sup> The second prong limits the assignment of strict liability only “to the kind[s] of harm, the possibility of which makes the activity abnormally dangerous.”<sup>38</sup> Among the six factors used to determine whether an activity is abnormally dangerous, Restatement (Second) of Torts § 520(d) is particularly relevant as it focuses the inquiry to the common usage of the activity, in this case, gun ownership within society.<sup>39</sup> “For an activity to be abnormally dangerous, not only must it create a danger of physical harm to others but the danger must be an abnormal one. In general, abnormal dangers arise from activities that are in themselves unusual[.]”<sup>40</sup> Similarly, Restatement (Third) of Tort § 20(b) instructs “[a]n activity is abnormally dangerous [when] the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors, and the

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36. RESTATEMENT (SECOND) OF TORTS § 519 cmt. d (AM. LAW INST. 2018).

37. See RESTATEMENT (SECOND) OF TORTS § 519 (AM. LAW INST. 2018) (“One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land[,], or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.”); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 20 (AM. LAW INST. 2018) (“An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.”).

38. See RESTATEMENT (SECOND) OF TORTS § 519 (AM. LAW INST. 2018) (“This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.”).

39. The Restatement (Second) of Torts lists the factors to be considered in determining whether an activity is abnormally dangerous:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 520(d) (AM. LAW INST. 2018). Within the Restatement (Third) of Torts, an activity is expressly barred as an abnormally dangerous activity if it is one of common usage. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 20(b) (AM. LAW INST. 2018).

40. See RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (AM. LAW INST. 2018) (“In determining whether the danger is abnormal, the factors listed in Clauses . . . of this Section are all to be considered, and are all of importance. Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability.”).

activity is not of common usage.”<sup>41</sup> It is further explained within the section, “[a]n activity is plainly common . . . if it is carried on by a large fraction of the people in the community.”<sup>42</sup> With Restatement (Second) of Torts § 520(d) in mind, in 2016, it was estimated that over one-third of United States households reported owning one or more firearms, and as of 2018, Americans owned 45% of the 857 million guns available worldwide.<sup>43</sup> These estimates paint gun ownership in the United States as nearly as common as pet ownership.<sup>44</sup> It is very likely, as it has been routinely found in lawsuits against firearm manufacturers and distributors, that firearm ownership, in general, will be considered a “common activity that poses no abnormally high risk to the public.”<sup>45</sup> Simply stated, as a mode of redress against irresponsible gun ownership, a pursuit under abnormally dangerous activities is not a viable option. Therefore, in conjunction with the other two strict liability approaches—wild animal or product liability—there remains no direct vehicle under any theory of strict liability in tort law for victims or their surviving family members to be made whole against an irresponsible gun owner.

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41. RESTATEMENT (THIRD) OF TORTS § 20(b) (AM. LAW INST. 2018).

42. RESTATEMENT (THIRD) OF TORTS § 20 cmt. j (AM. LAW INST. 2018).

43. See Dyfed Loesche, *The Armed States of America*, STATISTA (Oct. 4, 2017), <https://www.statista.com/chart/11340/percentage-of-households-in-the-united-states-owning-one-or-more-firearms/> [<https://perma.cc/U2FE-6356>] (listing yearly percentage of firearm ownership by household, gender, and age groups); Alex Yablon, *Just How Many Guns do Americans Actually Own?*, VICE (June 25, 2018, 1:46 PM), [https://www.vice.com/en\\_us/article/bj3485/how-many-guns-are-there-in-america](https://www.vice.com/en_us/article/bj3485/how-many-guns-are-there-in-america) [<https://perma.cc/L4RZ-S9BD>] (estimating in 2018, “that American civilians own 393 million guns, both legally and otherwise . . . of [the] worldwide (civilian) total of 857 million firearms.”).

44. See Taylor Cox, *American Gun Ownership, By the Numbers*, BENZINGA (Oct. 9, 2017, 12:59 PM), <https://www.benzinga.com/general/education/17/10/10152165/american-gun-ownership-by-the-numbers> [<https://perma.cc/C3H5-XJ87>] (“Thirty-nine percent of American households report owning at least one gun. To put that in context, that’s more than the number of households that own a cat, while just slightly below the number of households that own a dog . . .”).

45. See *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1534 (11th Cir. 1986) (stating in relation to the application of strict liability upon gun manufacturers and distributors, “[i]t is clear that the ultrahazardous activity doctrine is inapposite to these facts under Florida law.”). *Miller v. Civil Constructors, Inc.*, 651 N.E.2d 239, 245 (Ill. App. Ct. 1995) (“The use of guns or firearms, even though frequently classified as dangerous or even highly dangerous, is not the type of activity that must be deemed ultrahazardous . . . . [T]he use of firearms is a matter of common usage and the harm posed comes from their misuse rather than from their inherent nature alone.”); see also TIMOTHY D. LYTTON ET AL., *SUING THE GUN INDUSTRY* 6 (Timothy D. Lytton ed., 2006) (“[C]ourts have rejected this theory, holding that the manufacture and sale of firearms—approximately 4.5 million new guns each year—is a common activity that poses no abnormally high risk to the public.”).

B. *Negligence*

Principally, a negligence<sup>46</sup> cause of action places the burden of proof upon the victim to demonstrate: 1) a duty owed to them by another, 2) that the other person breached that duty, 3) that breach was the legal cause of harm or suffering endured by the victim, and 4) that harm and suffering can be legally compensated.<sup>47</sup> The duty owed to others is reasonable care.<sup>48</sup> The level of care one owes another rises in direct proportion to the level of risk one takes.<sup>49</sup> “The greater the danger, the greater the care which must be exercised.”<sup>50</sup> As explained in Restatement (Second) of Torts:

[I]f the act involves a risk of death or serious bodily harm, and particularly if it is capable of causing such results to a number of persons, the highest attention and caution are required even if the act has a very considerable utility. Thus[,] those who deal with *firearms*, explosives, poisonous drugs, or high tension electricity are required to exercise the closest attention and the most careful precautions, not only in preparing for their use but in using them.<sup>51</sup>

The issue analyzed here arises in suits initiated by a victim of gun violence against a gun owner who negligently lost or failed to secure their firearm, which later came into the possession of a child or criminal who used it to commit the act of violence. In these circumstances, it is nearly impossible for the victim to demonstrate the elements required for a *prima facie*

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46. See RESTATEMENT (SECOND) OF TORTS § 282 (AM. LAW INST. 2018) (“[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.”).

47. See RESTATEMENT (SECOND) OF TORTS § 328A (AM. LAW INST. 2018) (listing the four elements the plaintiff has the burden of proving for an action in negligence); VINCENT R. JOHNSON, *MASTERING TORTS* 77 (5th ed. 2013) (“Negligence is conduct which poses an unreasonable risk of harm to others. A cause for action for negligence is frequently described as having four elements: duty, breach, causation, and damages.”).

48. See RESTATEMENT (SECOND) OF TORTS § 298 cmt. a (AM. LAW INST. 2018) (“The word “care” denotes not only the attention which is necessary to perceive danger, but also the caution required to avert it once it is perceived.”).

49. See *id.* at cmt. b (“The care required is always reasonable care. This standard never varies, but the care which it is reasonable to require of the actor varies with the danger involved in his act, and is proportionate to it. The greater the danger, the greater the care which must be exercised.”).

50. *Id.*

51. *Id.* (emphasis added).

negligence<sup>52</sup> action.<sup>53</sup> Often the victim in this unfortunate situation is far removed by time and location from the acts or omissions of the negligent gun owner.<sup>54</sup>

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52. See *Negligence*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/negligence> [<https://perma.cc/49NL-8LX9>] (“Four elements are required to establish a prima facie case of negligence: [First,] the existence of a legal duty that the defendant owed to the plaintiff[, second,] . . . defendant’s breach of that duty[, third] . . . plaintiff’s sufferance of an injury[, and lastly] . . . proof that defendant’s breach caused the injury . . .”).

53. See *Smith v. Brooks*, 545 S.E.2d 135, 135–36 (Ga. Ct. App. 2001) (affirming summary judgment against the plaintiff, mother of a ten-year-old boy, whom was shot and wounded accidentally with a .22 rifle while visiting the home of his friend, because the plaintiffs “failed to show . . . [defendant] made available a dangerous instrumentality to their son and that [defendant] knew of a proclivity on the part of his son for engaging in the specific dangerous activity”); *Finocchio v. Mahler*, 37 S.W.3d 300, 304 (Mo. Ct. App. E.D. 2000) (affirming summary judgment against plaintiff, the mother of descendant daughter, who was shot and killed by a juvenile who had stolen a gun from the defendant’s house. Defendant “stored . . . [a Smith & Wesson 9mm semiautomatic handgun] in the top drawer of dresser in the master bedroom under some clothes. The dresser drawer was not locked.” The defendant was aware his thirteen-year-old daughter would have a friend over while she was home alone, and defendant was aware of the juvenile’s propensity to steal items from the home. The court held the plaintiff “failed to demonstrate that she could establish the element of proximate cause”); *Estate of Strever v. Cline*, 924 P.2d 666, 674 (Mont. 1996) (affirming judgment in favor of defendant, who left a “Ruger 22-caliber semiautomatic pistol and ammunition” in the cab of his pickup truck along with Bushnell binoculars, micro cassette recorder, and a Fujica camera, that was later stolen by a group of young boys, including the deceased eleven-year-old. Reasoning that although the defendant owed the deceased eleven-year-old a duty to “store his firearm and ammunition in a safe and prudent manner,” the duty owed to the deceased eleven-year-old was “superseded by the independent intervening criminal and grossly negligent acts of others”); *France v. Lambert*, No. CA-8197, 1990 WL 187081, at \*1–2 (Ohio Ct. App. Nov. 26, 1990) (affirming summary judgment against Plaintiff, father of decedent son who accessed the Defendants’ .44 Magnum Ruger Black Hawk while in defendants’ house. The defendants owned a .44 Magnum, which was “kept on a shelf in an unlocked closet in the . . . bedroom, along with ammunition.” In addition to the Ruger, “the . . . [defendants] owned sixteen other firearms. These firearms were kept in various places in the home, and none of these places were locked.” Reasoning that the “record does not demonstrate a breach of legal duty toward . . . [plaintiff’s child]. Neither does it support a finding that the injury was foreseeable to the . . . [defendant]”); *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).

54. See *Ambrosio v. Carter’s Shooting Center, Inc.*, 20 S.W.3d 262, 269 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (noting in the span of time between the theft of a firearm from a negligent store keeper and its use in a murder, “at least two weeks after the gun was stolen, [the murder] occurred in a different county, and was committed by someone other than the original thief. From the time the gun was stolen, the gun changed hands at least four times.”); Gregor Aisch & Josh Keller, *How Gun Trafficker Get Around State Gun Law*, N.Y. TIMES (Nov. 13, 2015), <https://www.nytimes.com/interactive/2015/11/12/us/gun-traffickers-smuggling-state-gun-laws.html> [<https://perma.cc/4LBB-235W>] (stating “[a]bout 50,000 guns are found to be diverted to criminals across state lines every year, federal data shows, and many more are likely to cross state lines

For example, consider a plaintiff who sustains injuries from a random act of gun violence in San Antonio, Texas. A police investigation reveals that the firearm used to injure the plaintiff was purchased illegally in Louisiana three months prior from an unlicensed dealer. The firearm came into the possession of the unlicensed dealer through a series of illegal transactions stemming from its disposition from its original owner, a resident of Long Island, New York, six months earlier. Alternatively, consider a plaintiff who is the parent of a twelve-year-old child who was shot and wounded while sleeping over at a neighborhood friend's house. The child was shot accidentally by another twelve-year-old who wanted to show off their parents'—here defendant's—firearm.

In both examples, the plaintiffs would be required to prove that the defendants: 1) owed a duty, 2) the defendants breach that duty, 3) the defendants breach was the legal cause of harm, and 4) the plaintiffs harm can be legally compensated.<sup>55</sup> Although both plaintiffs could succeed on the first element, arguing defendants owed a duty to “exercise the closest attention and the most careful precautions,”<sup>56</sup> the second element would, however, prove difficult to establish due to the plaintiffs' distance, whether geographically or temporally, from the defendant gun owner acts or omissions that led to the harm. The plaintiff in the first example is removed from the defendant's act or omission by nine months and 1,800 miles. In the second example, the plaintiff, despite living in the same neighborhood as the defendant, would still not know, let alone be able to prove, precisely what negligent actions or omissions the gun owner committed.

This was the issue in *Smith v. Brooks*, a case very similar to the second example, except it was not a sleepover, and the wounded child was ten years old.<sup>57</sup> The court in *Smith*, affirming summary judgment against the plaintiff,

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undetected.” The article provides examples of this statistic describing instances where “[a] handgun used in the killing of two Brooklyn officers last year was traced to a pawnshop just south of Atlanta. A revolver used in a fatal shooting of an officer in Queens in May was traced to a roadside pawnshop, also in Georgia, about 100 miles from Atlanta. And a handgun used to kill an officer in East Harlem last month was traced to South Carolina.”); Philip Cook, *How Dangerous People Get Their Guns in America*, CBS NEWS (Oct. 3, 2017, 11:19 AM), <https://www.cbsnews.com/news/gun-sales-how-dangerous-people-get-weapons/> [<https://perma.cc/DAQ9-9EME>] (“If a gun ends up in criminal use, it is usually after several more transactions.”).

55. RESTATEMENT (SECOND) OF TORTS § 328A (AM. LAW INST. 2018).

56. See RESTATEMENT (SECOND) OF TORTS § 298 cmt. b (AM. LAW INST. 2018) (stating “those who deal with firearms, explosives, poisonous drugs, or high tension electricity are required to exercise the closest attention and the most careful precautions, not only in preparing for their use but in using them”).

57. *Smith v. Brooks*, 545 S.E.2d 135, 135–36 (Ga. Ct. App. 2001).



stated the plaintiff failed to show that the defendant “made available a dangerous instrumentality to his son and that [defendant] knew of a proclivity on the part of his son for engaging in the specific dangerous activity.”<sup>58</sup>

In these circumstances, the victim lacks articulable facts to prove the elements necessary to pursue a negligence-based cause of action.<sup>59</sup> Thus, as a consequence, an irresponsible gun owner is, in essence, immune from liability.<sup>60</sup> This de facto immunization runs afoul of several important public policies regarding tort law and the general perceptions of fairness.<sup>61</sup>

58. *Id.*

59. The evidentiary doctrine of *res ipsa loquitur*, in certain cases, would “[permit] a jury to infer that a plaintiff’s injury was caused by defendant’s carelessness even when the plaintiff presents no evidence of particular act or omissions on the part of the defendant that might constitute carelessness.” GOLDBERG, *supra* note 28, at 204. The plaintiff, however, will still be required to prove the defendant had and maintained exclusive control over the instrumentality. *Id.* at 205. “Read literally, the ‘exclusivity’ prong would require plaintiff to establish that the defendant exercised such a degree of physical control over the instrumentality or events that led to plaintiff’s injury that it is impossible to suppose any other actor contributed to it.” *Id.*

60. *See* Hall v. McBryde, 919 P.2d 910, 912 (Colo. App. 1996) (affirming the trial court’s conclusion that defendant mother did not owe a duty of care to a neighbor child that was accidentally shot by her son); Ambrosio v. Carter’s Shooting Center, Inc., 20 S.W.3d 262, 269 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (stating “appellants failed to provide summary judgment proof raising a fact issue as to how appellee’s failure to safely maintain its guns was a substantial factor in bringing about the injury which would not otherwise have occurred.”). In the *Hall* case, the son had retrieved a loaded gun from under his parent’s mattress to shoot at a moving vehicle. *Hall*, 919 P.2d at 912. A stray bullet from the gun penetrated a neighbor’s house and struck the neighbor child in the abdomen. *Id.* at 12–13. The court reasoned that since the neighbor child did not present or possess any evidence to show the defendant mother had knowledge that defendant father stored a loaded gun under their mattress, she did not owe the requisite duty of care to the neighbor child. Regarding the *Ambrosio* case, despite facts indicating foreseeability, such as the fact that defendant was aware that its guns were “susceptible to theft, that guns had been stolen from its stores over the years, and one its stolen guns was used in another murder,” the court went on to deem the foregoing facts as “immaterial.” *Ambrosio*, 20 S.W.3d at 269.

61. *See* DOBBS ET AL., *supra*, note 31 at 22. (“Tort law often takes policy and utility into account as well as the rights or fairness or corrective justice. Policy and utility questions ask what is good for society as a whole.”); JOHNSON, AMERICAN TORTS *supra* note 28, at 7–9 (listing several policy concerns often observed in tort law); *see also* Tom Harvey, *If You Let Your Guns Get Stolen, You’re a Menace to Society*, HUFFINGTON POST (Oct. 25, 2013, 2:30 PM), [https://www.huffingtonpost.com/tom-harvey/if-you-let-your-guns-get-\\_b\\_4155975.html](https://www.huffingtonpost.com/tom-harvey/if-you-let-your-guns-get-_b_4155975.html) [<https://perma.cc/98M7-HTFB>] (“The possibility that a stolen gun will result in the owner being identified and being held responsible for negligence is a strong incentive to improve storage practices.”); Dahlia Lithwick, *Leave your Gun Out, Go to Jail*, SLATE (Oct. 12, 2015, 10:30 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/10/gun\\_accidents\\_why\\_are\\_parents\\_who\\_leave\\_loaded\\_weapons\\_lying\\_around\\_never.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/10/gun_accidents_why_are_parents_who_leave_loaded_weapons_lying_around_never.html) [<https://perma.cc/Q6AY-7XWE>] (“Someone needs to be responsible when children kill children with unsecured guns.”).

Additionally, the de facto immunity enjoyed by irresponsible gun owners is bolstered by two additional hurdles their victims must overcome. The first of which are courts, as a general practice, refuse to hold gun owners accountable 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.”<sup>62</sup> Second, Congress, with its 2005 enactment of the Protection of Lawful Commerce in Arms Act (PLCAA), conferred extensive protection to legal firearm handlers in general.<sup>63</sup> PLCAA, while barring firearm-related suits against gun manufacturers for criminal misuse by a third party, negligent marketing and distribution, and product liability for design defect,<sup>64</sup> brought with it the Child Safety Lock Act of 2005.<sup>65</sup> The Child Safety Lock Act provides an express grant of

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62. See *Holden v. Johnson*, No. CV010811660, 2005 WL 1153739, at \*1 (Conn. Super. Ct. Apr. 15, 2005) (concluding “that the commission of a murder with a stolen gun extinguishes any potential liability of the gun owner”). In the *Holden*, case, defendant gun owner was not found liable despite findings that the gun owner permitted access to the loaded gun by leaving it on a dresser in his bedroom, where his underage daughter knew the location of the gun and was given permission to enter the room to retrieve money held on the same dresser as the visible gun. *Id.* “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, along with their shady cousin, foreseeability.” McClurg, *Right to be Negligent*, *supra* note 24, at 23.

63. 15 U.S.C.A. § 7902(a)–(b) (2018) (“A qualified civil liability action may not be brought in any Federal or State court . . . . A qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending.”); 15 U.S.C.A. § 7903(5)(A) (2018) (defining a qualified civil liability action as “a civil action or proceeding or an administrative proceeding . . . against a manufacturer or seller of a qualified product, or a trade association, for damages . . . or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . .”).

64. See 15 U.S.C.A. § 790(b)(1) (2018) (stating one of the purposes of PLCAA is to “prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.”). See McClurg, *Right to be Negligent*, *supra* note 24, at 6–7 (“Subject to some narrow exceptions, the PLCAA bars all actions against gun manufacturers for harm caused by the criminal misuse of a firearm, including negligent marketing and distribution claims for failing to act reasonably to monitor, train, or terminate corrupt or negligent dealers . . .”).

65. See Audrey Stucko, *Open Letter to Federal Firearms Licensees Child Safety Lock Act of 2005*, U.S. DEPT OF JUST. BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES (Apr. 21, 2006), <https://www.atf.gov/firearms/docs/open-letter/all-fpls-apr2006-open-letter-child-safety-lock-act-2005/download> [<https://perma.cc/6QRM-LNK5>] (“Public Law 109-92 . . . the Protection of Lawful Commerce in Arms Act [PLCAA], was enacted October 26, 2005. Section 5 of Public Law 109-92, cited as the Child Safety Lock Act of 2005 (CSLA), amended the Gun Control Act by adding Section 922(z) to 18 U.S.C.”).

immunity to any gun owner who is in lawful possession of a handgun and uses a secure gun storage or safety device<sup>66</sup> to control access to the firearm.<sup>67</sup> While the Child Safety Lock Act is a step in the right direction in mitigating firearm access to children,<sup>68</sup> it fails to deter firearm theft.<sup>69</sup> From the perspective of a party injured due to firearm violence or negligence, there is a narrow window in which recovery is possible. Essentially, as long as a gun owner places a trigger lock on their weapon, the gun owner is free to act negligently without limitation, and the injured party is prohibited from any compensation against the gun owner. Where the gun

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66. The statute setout explaining:

The term “secure gun storage or safety device” means—(A) a device . . . designed to prevent the firearm from being operated without first deactivating the device; (B) . . . 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 unlocked only by means of a key, a combination, or other similar means.

18 U.S.C.A. § 921(a)(34) (2018).

67. See 18 U.S.C.A. § 922(z)(3)(A) (2018) (“Notwithstanding any other provision of law, a person who has lawful possession and control of a handgun, and who uses a secure gun storage or safety device with the handgun, shall be entitled to immunity from a qualified civil liability action.”).

68. See *Innocents Lost*, EVERYTOWN FOR GUN SAFETY (June 2014) <https://everytownresearch.org/documents/2015/04/innocents-lost.pdf> [<https://perma.cc/U8VT-KCQ3>] (referencing Child Access Prevention (CAP) laws where a study of hospital discharge data revealed that “[CAP laws] were associated with a 32 percent decline in nonfatal gun injuries among children 18 and under, and a 64 percent reduction in self-inflicted gun injuries. The authors estimated that CAP laws prevented 829 injuries in 2001, saving \$37 million in avoided medical costs.”).

69. See McClurg, *Right to be Negligent*, *supra* note 24, at 18 (“[T]he Act confers tort immunity on the gun owner for harm resulting from theft by a criminal misuser, despite the fact that the safety devices are childproofing measures, not theft deterrent devices.”); see also Baker’s Safe and Lock, *How Safe is you Safe? Watch Thieves Break into a Cheap Safe!*, YOUTUBE (Mar. 14, 2014), <https://www.youtube.com/watch?v=-RlwGkO0hxE> [<https://perma.cc/MV9V-TU46>] (“Many of the large ‘big box’ retail stores are forcing safe manufacturers to make cheaper and cheaper safes so they can drop the price on them. However, a cheap safe isn’t safe at all.”); LockPickingLawyer, *[461] Gun Cable Locks Attacked with Hand Cutters*, YOUTUBE (May 04, 2017), [https://www.youtube.com/watch?v=\\_tOjrAsg49M](https://www.youtube.com/watch?v=_tOjrAsg49M) [<https://perma.cc/BE7E-CPXG>] (demonstrating three of four gun cable locks easily cut with standard wire and bolt cutters); Indiana Magnum, *How to Remove a Trigger Lock Without the Key*, YOUTUBE (Nov. 27, 2015), <https://www.youtube.com/watch?v=F5RjMvzdErA> [<https://perma.cc/J23H-PPKS>] (“Lost your key for a trigger lock? Just drill it off. It only takes about 30 seconds.”); *On Trigger Locks*, DONATH, <http://www.donath.org/Rants/OnTriggerLocks/> [<https://perma.cc/QC9W-92VR>] (last visited Jan 5, 2019) (“Trigger locks . . . do not prevent theft or meddling. A thief won’t care if there’s a lock, as he can quickly steal the locked weapon, and spend some quality time with a hacksaw later.”); Splatteredmoon, *Easiest Way to Remove Master Lock Trigger Lock Using Only a Screw Driver Save Your Money*, YOUTUBE (Jan. 22, 2014), <https://www.youtube.com/watch?v=hKfYCCeH0Y4> [<https://perma.cc/UMV2-N6CV>] (“You can remove the lock . . . while on the firearm by sneaking in through the trigger guard in between rubber pad and lock if you lose your key.”).

owner does not minimally comply with the Child Safety Lock Act, the injured party must be aware of the acts or omissions of the irresponsible gun owner that resulted in the injury. Even where the injured party is able to piece together the injurious chain of events set in motion by an irresponsible gun owner, a court will most likely not award compensation if a third-party actor is also—but subsequent to the gun owner’s negligence—involved in the injury. In these cases, courts usually rule against compensation due to the plaintiff’s inability to establish proximate causation or by holding acts of third parties to supersede the negligent acts of the irresponsible gun owner.<sup>70</sup>

#### IV. EXPAND THE CATEGORIES OF STRICT LIABILITY TO INCLUDE A THEORY ADDRESSING IRRESPONSIBLE GUN OWNERS

As a matter of national policy, irresponsible gun owners should not remain immune to the destruction their carelessness or apathetic conduct imposes on the public. It is time to expand the limited categories of strict liability to include a theory addressing irresponsible gun owners. The adoption of a new theory of strict liability specifically addressing gun ownership can serve three functions: incentivizing responsible gun ownership, allowing a mode of redress for victims consistent with public policies, and providing adequate defenses for responsible gun owners.

##### A. *Incentivizing Responsible Gun Ownership*

Instituting a new theory of strict liability to address a specific issue of public concern is not a new concept. We have traditionally endorsed a similar cause of action for keepers of wild animals since the mid-1800s.<sup>71</sup> The Restatement (Third) of Torts: Physical & Emotional Harm § 22 assigns strict liability to “an owner or possessor of a wild animal . . . for physical

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70. See e.g., *Finocchio v. Mahler*, 37 S.W.3d 300, 304 (Mo. Ct. App. E.D. 2000) (holding the plaintiff “failed to demonstrate that she could establish the element of proximate cause”); *Estate of Strever v. Cline*, 924 P.2d 666, 674 (Mont. 1996) (holding the duty owed to the deceased eleven-year-old was “superseded by independent intervening criminal and grossly negligent acts of others”).

71. See *Cong. & Empire Spring Co. v. Edgar*, 99 U.S. 645, 654 (1878) (“Though the owner [has] no particular notice that the animal ever did any such mischief before, yet if the animal be of the class that is *ferae naturae* the owner is liable to an action of damage if it get[s] loose and [does] harm.”); *Decker v. Gammon*, 44 Me. 322, 327–28 (Me. 1857) (“[O]wner[s] of wild beasts, or beasts that are in their nature vicious, [are], *under all circumstances*, liable for injuries done by them. It is not necessary . . . to allege that the owner knew them to be mischievous, for he is conclusively presumed to have such knowledge . . .”); GOLDBERG, *supra* note 28 at 810 (“[A] long line of English precedents imposed liability without fault on owners of wild animals . . . . Strict liability for wild animals continues today.”).

harm caused by the wild animal.”<sup>72</sup> The Restatement grounds the assignment of strict liability to an owner of a wild animal for several reasons, two of which—incentivizing responsible conduct and the unusualness of the activity—are particularly relevant to gun ownership.<sup>73</sup>

The Restatement (Third) of Torts: Physical & Emotional Harm § 22 emphasizes that the imposition of strict liability can serve as an instrument to incentivize reasonable conduct.<sup>74</sup> “Strict liability gives the owner or possessor of the wild animal an incentive to consider whether removing the wild animal might be the wiser strategy . . . . [T]he defendant with a wild animal typically knows of the risk in a way that reinforces the rationale for strict liability.”<sup>75</sup> Additionally, “animals do not have a conscience, and those who choose to keep them as pets have a duty to restrain them to avoid harm.”<sup>76</sup> Due to the lack of historical data surrounding the need for American jurisprudence to adopt a strict liability approach to wild animals, we are limited to a contemporary analysis. In the current landscape, the chance of being killed by an animal in the United States, irrespective of ownership, is approximately 1 in 1.6 million.<sup>77</sup> For firearms, on the other hand, the lifetime odds are 1 in 315.<sup>78</sup> Generally, in the United States, it is

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72. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 22(a) (AM. LAW INST. 2018).

73. Comment d of the restatement explains:

The rationale for strict liability continues with the point that wild animals are inherently dangerous. It also relies on the point that owning wild animals is an unusual activity, engaged in by a few, which imposes on others significant risks that are themselves unusual and distinctive . . . . Strict liability gives the owner or possessor of the wild animal an incentive to consider whether removing the wild animal might be the wiser strategy. As noted in Comment c, the defendant with a wild animal typically knows of the risk in a way that reinforces the rationale for strict liability.

*Id.* cmt. d.

74. *Id.*

75. *Id.*

76. *Strict Liability*, JUSTIA, <https://www.justia.com/injury/negligence-theory/strict-liability/> [<https://perma.cc/EMP9-3NBC>].

77. See Alex Nowrasteh, *More Americans Die in Animal Attacks than in Terrorist Attacks*, CATO INST. (Mar. 8, 2018, 12:07 PM), <https://www.cato.org/blog/more-americans-die-animal-attacks-terrorist-attacks> [<https://perma.cc/DM47-G9RV>] (“The annual chance of being killed by an animal was 1 in 1.6 million per year from 2008 through 2015.”).

78. See Dave Mosher & Skye Gould, *The Odds That A Gun Will Kill the Average American May Surprise You*, BUS. INSIDER (Oct. 29, 2018, 11:34 AM), <https://www.businessinsider.com/us-gun-death-murder-risk-statistics-2018-3> [<https://perma.cc/5URV-F7ES>] (listing lifetime odds by cause of death for the average American, explaining that in the U.S., there is “roughly 1-in-315 lifetime chance

legal to import exotic animals for personal gain and enjoyment.<sup>79</sup> Between 2008 and 2015, only 1,610 people died due to animal-related causes,<sup>80</sup> and since 1990, where a person owned or controlled the animal, there were approximately 2,000 reported exotic animal attacks and escapes.<sup>81</sup> In the latter instance, only eighty-eight resulted in human fatalities within the two decades.<sup>82</sup> Comparatively, between 237,000 and 600,000 firearms are stolen per year, not including the number of firearms negligently lost.<sup>83</sup> Furthermore, murders as a result of firearms in 2016 alone exceeded 11,000.<sup>84</sup> Objectively, the same undergirding rationale for incentivizing

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of death from gun violence . . . . The chance of dying from gun violence overall is about 50% greater than the lifetime risk of dying while riding inside a car, truck, or van . . . .”).

79. See *Disease Threat from Exotic Pets Could Rival Terrorist Attack*, FOX NEWS (Nov. 27, 2006), <https://www.foxnews.com/story/disease-threat-from-exotic-pets-could-rival-terrorist-attack> [<https://perma.cc/MB4W-94DM>] (“Demand for such wildlife is booming as parents try to get their kids the latest pets fancied by Hollywood stars and zoos and research scientists seek to fill their cages. More than 650 million critters . . . were imported legally into the United States in the past three years . . . .”); Timm Kroeger, *Economic Impacts of Live Wild Animal Imports in the United States*, DEFENDERS WILDLIFE (JULY 2007), [https://defenders.org/publications/impacts\\_of\\_live\\_wild\\_animal\\_imports\\_to\\_the\\_united\\_states.pdf](https://defenders.org/publications/impacts_of_live_wild_animal_imports_to_the_united_states.pdf) [<https://perma.cc/6VB6-7SFZ>] (“The U.S. legally imports several hundred million individual . . . live wild animals each year, and over one thousand tons of additional wild animals imported in bulk.”).

80. See Erin Blakemore, *The Deadliest Animals in America, Ranked*, POPULAR SCI. (Mar. 28, 2018), <https://www.popsoci.com/deadliest-animals-in-america-ranked> [<https://perma.cc/KX8Y-2QPW>] (“A total of 1,610 people—4.8 people per 10 million—died of animal-related causes every year between 2008 and 2015.”).

81. See *Search Exotic Incidents Database*, BORN FREE USA, [https://www.bornfreeusa.org/?post\\_type=exotic\\_incidents&category=HI&datefrom=1990&dateto=2018&s=](https://www.bornfreeusa.org/?post_type=exotic_incidents&category=HI&datefrom=1990&dateto=2018&s=) [<https://perma.cc/3MCK-KWMZ>] (listing reported incidents involving exotic animals such as attacks, escapes, and resulting deaths and injuries). See Blythe Copeland, *6 Tragic Stories of Exotic Pets Ownership Gone Wrong*, TREEHUGGER (Jan. 11, 2012), <https://www.treehugger.com/endangered-species/6-tragic-stories-exotic-pet-ownership-gone-wrong.html> [<https://perma.cc/DT28-7KPJ>] (“Zanesville, Ohio’s Terry Thompson made national headlines when he released a horde of wild animals that he and his wife kept on their property, and then killed himself—leaving the gruesome task of trying to control endangered Bengal tigers, monkeys, lions, wolves, baboons, and more.”).

82. See *Search Exotic Incidents Database*, *supra* note 81 (reporting, among many unfortunate incidents such as “[a] baby was mauled to death by a wolf/dog hybrid belonging to his parents . . . . A camel trampled two people to death at a farm in Texas . . . [and a] 2-year-old girl was strangled by 12-ft-long Burmese python. The snake escaped from the family’s glass aquarium overnight and attacked the child.”).

83. See Freskos, *Up to 600,000 Guns are Stolen*, *supra* note 13 (same); see also Weiss, *supra* note 13 (same).

84. See *Murder Victims by Weapon*, *supra* note 19 (listing murders by year and by instrument used, indicating the leading choice of weapon for murder was the firearm from 2012–2016, during which the total murders attributed to firearms was 46,445).

responsible conduct for those who choose to own a wild animal would be considerably more compelling when applied to gun owners.

Additionally, the Restatement (Third) of Torts: Physical & Emotional Harm § 22 “relies on the point that owning wild animals is an unusual activity, engaged in by a few, which imposes on others significant risks that are themselves unusual and distinctive.”<sup>85</sup> This assertion is likely to be true in a historical context, yet today this is simply not the trend with regard to ownership of wild animals. Currently, the United States imports over several hundred million wild animals every year in support of its legal, economic demand for exotic animals.<sup>86</sup> However, due to lack of regulation and oversight of exotic pet ownership, it is difficult to ascertain a true accounting of the total number of exotic animals within United States borders;<sup>87</sup> a number made more elusive by the fact the bulk of the exotic pets are sold and traded on the black market and, unlike firearms, exotic animals can and have been bred for profit.<sup>88</sup> In comparison, since 2000, the United States has made available, through both manufacturing and importation, on average fewer than 9,000,000 firearms per year.<sup>89</sup> Like laws controlling gun ownership, laws governing ownership of wild animals vary significantly by jurisdiction.<sup>90</sup> Today, with regard to exotic pet ownership laws, only “20 states have what can be called ‘comprehensive bans.’”<sup>91</sup>

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85. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 22 cmt. d (AM. LAW INST. 2018).

86. See Kroeger, *supra* note 79 (“The U.S. legally imports several hundred million individual . . . live wild animals each year, and over one thousand tons of additional wild animals imported in bulk.”).

87. Lauren Slater, *Wild Obsession: The Perilous Attraction of Owning Exotic Pets*, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.com/magazine/2014/04/exotic-pets/> (last visited Dec. 17, 2019); see Sarah Emerson, *Why Rich People Are Obsessed with Owning Exotic Animals*, VICE (Sept. 26, 2016), [https://www.vice.com/en\\_us/article/qkix93/rich-people-are-obsessed-with-owning-exotic-animals](https://www.vice.com/en_us/article/qkix93/rich-people-are-obsessed-with-owning-exotic-animals) [<https://perma.cc/86T6-7QKA>] (“There’s nobody keeping track of how many exotic animals are in the United States. All anyone can do is estimate . . .”).

88. Matthew G. Liebman, *Detailed Discussion of Exotic Pet Laws*, ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/article/detailed-discussion-exotic-pet-laws> [<https://perma.cc/L36M-4GJM>]; *Animals in Captivity*, BORN FREE USA, <https://www.bornfreeusa.org/campaigns/animals-in-captivity/exotic-pets/> [<https://perma.cc/F4GY-BDZH>].

89. See *Firearms Commerce in the United*, *supra* note 8, at 1, 3, 5 (2018) (same).

90. See *Gun Laws by State the Complete Guide - 2018*, GUNS TO CARRY, <https://www.gunstocarry.com/gun-laws-state/> [<https://perma.cc/RQ3Z-JB49>] (stating “[g]un laws in the US vary considerably between states”).

91. See *Map of Private Exotic Pet Ownership Laws*, MICH. ST. U., <https://www.animallaw.info/content/map-private-exotic-pet-ownership-laws> [<https://perma.cc/64GB-WKUM>] (“These laws may outright ban the ownership of wild or exotic animals as pets or only allow those animals to be kept under certain licenses not including pet or private possession (i.e., for educational or scientific purposes).”).

Exotic pets are partially banned in thirteen states.<sup>92</sup> Fourteen states “permit private ownership of exotic animals under a licensure or permit scheme.”<sup>93</sup> The remaining states do not have regulations addressing private exotic pet ownership, or if regulations do exist, they are minimal.<sup>94</sup> It is estimated that one in ten households in the United States owns at least one exotic pet (a gross under-estimation due to lack of oversight and regulation) as opposed to gun ownership, where the rate of ownership is one in three.<sup>95</sup>

Further, although it is difficult to estimate the total number of exotic pets owned by Americans, within the physical borders of the United States, it is estimated that there are over 7,000 tigers.<sup>96</sup> More tigers exist in the United States than exist in the wild, and 5,000 of those tigers are privately owned.<sup>97</sup> If ownership of a wild animal is to be considered an unusual activity enjoyed by a few, then gun ownership should share in that distinction. A strict liability approach on gun ownership, as applied in a like fashion to possessors of wild animals, can serve to incentivize responsible conduct from gun owners, as gun owners should “typically know of the risk in a way that reinforces the rationale for strict liability.”<sup>98</sup>

#### B. *Creating a Mode of Redress for Victims Consistent with Public Policies*

As previously explained in Part III of this Comment, American tort law, as it is currently delivered, does not provide for an adequate mode of redress

92. *See id.* (indicating “[t]hirteen . . . states have partial bans on exotic pets . . .”).

93. *Id.*

94. *See id.* (showing some “states do not have a statutory or regulatory scheme . . .”).

95. *See* Emily Sweeney, *One in 10 American Households has an Exotic Pet*, BOS. GLOBE (Sept. 21, 2014, 12:00 AM), <https://www.bostonglobe.com/metro/regionals/south/2014/09/20/one-american-households-has-exotic-pet/rMW8UJciKYQbTCo7TFMSOM/story.html> [<https://perma.cc/2H7K-KAGZ>] ([A]pproximately 1 in 10 American households owns an exotic pet.”); Parker et al., *supra* note 5 (same).

96. *See* Corrine Henn, *There is an Exotic Pet Epidemic in the U.S.! These 10 Awesome Sanctuaries Are Working to End This*, ONE GREEN PLANET, <https://www.onegreenplanet.org/animalsandnature/wild-animal-sanctuaries-in-the-united-states/> [<https://perma.cc/YU9V-JLVR>] (“Rough estimates [of exotic animals kept as pets] find that as many as 7,000 tigers are currently being kept as pets in U.S. backyards . . . that is more than the number of tigers that exist in the wild!”).

97. *See id.* (“The number of wild animals kept as exotic pets in the U.S. is astounding.”); *The Dangers of Keeping Exotic Pets*, BORN FREE USA (2018), <https://www.bornfreeusa.org/campaigns/animals-in-captivity/the-dangers-of-keeping-exotic-pets/> [<https://perma.cc/XQS4-Z3LW>] (“An estimated 5,000 tigers alone are held by private individuals.”).

98. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 22 cmt. d (AM. LAW INST. 2018) (“Strict liability gives the owner or possessor of the wild animal an incentive to consider whether removing the wild animal might be the wiser strategy. . . . [T]he defendant with a wild animal typically knows of the risk in a way that reinforces the rationale for strict liability.”).



for victims of gun violence where an irresponsible gun owner's carelessness or apathy is a precipitating factor in the violence committed by a third party.<sup>99</sup>

The purpose of tort law is to restore someone who has been injured as a result of the wrong of another to the condition they were prior to the injury by awarding them monetary damages which will pay for medical expenses, lost wages and compensate for physical and mental pain and suffering as a result of their injuries.<sup>100</sup>

In adopting a strict liability approach addressing irresponsible gun ownership, we create a mode of redress consistent with at least four public policies: first, deterring future accidents; second, allocating losses to those who benefit from dangerous activities; third, fully compensating accident victims; and lastly, fostering predictability in human affairs.<sup>101</sup>

99. See McClurg, *Right to be Negligent*, *supra* note 24, at 4–5 (2016) (remarking “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 harm.”).

100. Ted Babbit, *Why Tort Law is So Important*, PALM BEACH POST (Dec. 10, 2017, 12:01 AM), <https://www.palmbeachpost.com/marketing/why-tort-law-important/xSNBNudY1nilmLLzAnaSGJ/> [<https://perma.cc/PT8V-9T2R>].

101. Vincent R. Johnson discusses these existing policies in more detail:

Liability should be used to deter accidents. The deterrence principle recognizes that tort law is concerned not only with fairly allocating past losses, but also with minimizing the cost of future accidents. According to this principle, tort rules should discourage persons from engaging in those forms of conduct which pose an excessive risk of personal injury or property damage. . . .

Those who benefit from dangerous activities should bear resulting losses. Certain activities . . . entail a serious risk of harm to third persons even if care is exercised by the actor. According to this principle, fairness requires that those who benefit from engaging in such conduct should bear the resulting losses, even in the absence of fault . . . .

Tort law should foster predictability in human affairs. The idea here is that persons should not be forced to act at their peril, uncertain as to what the law requires of them or what they may expect from others. . . . [T]ort rules should provide clear notice to the type of conduct that is expected in particular circumstances; that standards should not be unnecessarily subjective, if objective standards are feasible . . . .

There is a strong public interest in ensuring that accident victims obtain the financial resources needed to overcome the injuries that they have sustained. Proponents of this view argue that tort rules should be crafted and applied with an eye towards this goal, even if that means diminished respect for the fault or proportionality principles or other tort policies.

The first and second policy concerns can be analyzed through a purely economic lens.

The ‘prophylactic’ factor of preventing future harm has been quite important in the field of torts . . . . When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm.<sup>102</sup>

The policy of deterrence acknowledges that within the law of torts, there must be a balance between the principles of equitable allocation of past losses and the need to minimize the cost of future accidents.<sup>103</sup> In accordance with the policy of deterrence, “tort rules should discourage persons from engaging in those forms of conduct which pose an excessive risk of personal injury or property damage.”<sup>104</sup> The policy of allocating losses to those who benefit from dangerous activities is rooted in fairness. “[F]airness requires that those who [enjoy the] benefit [of dangerous activities] should bear [the] resulting losses.”<sup>105</sup> The underlying rationale is that when promoters of dangerous activities are forced to account for the potential cost of harm to another, they are more “likely to make decisions . . . that are not only personally beneficial, but [also] socially responsible.”<sup>106</sup> From an economic standpoint, gun violence in the United States, in conservative estimates, cost taxpayers at least \$229 billion per year or \$12.8 million per day.<sup>107</sup> American taxpayers cover roughly eighty-seven

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JOHNSON, AMERICAN TORTS *supra* note 28, at 7–10.

102. See PROSSER & KEETON ON TORTS 25 (W. Page Keeton et al. eds., 5th Ed. 1984) (“Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive [to prevent].”).

103. See DOBBS ET AL., *supra* note 31, at 29 (“The idea of deterrence is not so much that an individual, having been held liable for a tort, would thereafter conduct himself better. It is rather the idea that all persons, recognizing potential tort liability, would tend to avoid conduct that could lead to tort liability.”); JOHNSON, AMERICAN TORTS *supra* note 28, at 8 (“[T]he policy of deterrence may favor placing the threat of liability on the party best situated to avoid the loss, or, as some might say, the cheapest cost avoider . . .”).

104. *Id.* at 7–8.

105. See *id.* at 8 (stating the principle is better understood as a policy that dangerous “activities ‘must pay its own way.’ What this means is that the law should force actors to ‘internalize’ the cost that their endeavors inflict on third persons.”).

106. *Id.*

107. See Natasha Bertrand, *A Breakdown of the \$229 Billion Gun Violence Tab That American Taxpayers Are Paying Every Year*, BUS. INSIDER (Apr. 24, 2015, 11:00 AM), <https://www.businessinsider.com/gun-violence-costs-america-more-than-229-billion-every-year-2015-4> [<https://perma.cc/G5ZL-76WF>] (“American taxpayers pay roughly \$12.8 million every day to

percent of the estimated cost for long-term medical and disability care for victims, long-term prison cost, legal fees, mental health care, emergency services, police investigations, and security enhancements, to name a few expenses.<sup>108</sup> For perspective, on December 14, 2012, “Adam Lanza used his mother’s weapons, including a .223-calibre semi-automatic rifle, in the massacre at Sandy Hook Elementary School.”<sup>109</sup> That incident resulted in twenty-six lives—twenty children and six faculty members—being taken on that day in Newtown, Connecticut.<sup>110</sup> Besides the enduring of mental and emotional distress experienced by citizens of Newtown, they also incurred the cost of \$50 million to rebuild the elementary school.<sup>111</sup> The Santa Fe Texas Independent School District, meanwhile, has spent \$2.1 million of its own tax dollars to overhaul its security infrastructure and on emergency renovations in response to a high school mass shooting event.<sup>112</sup> The mass shooter, 17-year-old Dimitrios Pagourtzis Jr., acquired the two guns used in the event from his father,<sup>113</sup> although it remains unclear if the father *knew*

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cover the costs of gun-related deaths and injuries—and that is a conservative estimate . . .”); Michelle Singletary, *The Enormous Economic Cost of Gun Violence*, WASH. POST (Feb. 22, 2018, 6:26 AM), [https://www.washingtonpost.com/news/get-there/wp/2018/02/22/the-enormous-economic-cost-of-gun-violence/?utm\\_term=.caf9082cb026](https://www.washingtonpost.com/news/get-there/wp/2018/02/22/the-enormous-economic-cost-of-gun-violence/?utm_term=.caf9082cb026) [<https://perma.cc/6LBW-X8HC>] (“Researchers conservatively estimate that gun violence costs the American economy at least \$229 billion every year, including \$8.6 billion in direct expenses such as for emergency and medical care . . .”) (internal quotation marks omitted) (quoting *Gun Violence Statistics*, GIFFORDS L. CNTR., <https://lawcenter.giffords.org/facts/gun-violence-statistics/> [<https://perma.cc/PH35-H6NV>]).

108. See Bertrand, *supra* note 107 (listing governmental expenditure in response to gun violence).

109. Michael R. Sisak, *How U.S. Mass Shooters Got Their Guns*, CANOE, (Feb. 16, 2018, 7:33 PM), <https://canoe.com/news/crime/how-u-s-mass-shooters-got-their-guns> [<https://perma.cc/K8RG-T3CS>].

110. See Mary Ellen Godin, *Take a Look at the New \$50 Million Sandy Hook Elementary School in Newtown, Connecticut*, BUS. INSIDER (July 29, 2016, 7:55 PM), <https://www.businessinsider.com/sandy-hook-elementary-new-school-newtown-connecticut-2016-7> [<https://perma.cc/A37J-S4NC>] (showing the extent of damage and number of lives lost during the Sandy Hook Elementary massacre).

111. See *id.* (“The old school was demolished in 2013, a few months after the killings. Since then, students and faculty have used a vacant school in nearby Monroe while officials planned and built the 86,000-square-foot replacement with state aid.”).

112. See Shelby Webb, *Santa Fe Looks to Legislature for Mounting Security Cost After Mass Shooting*, HOUS. CHRON. (Oct. 2, 2018, 1:27 PM) <https://www.houstonchronicle.com/news/houston-texas/houston/article/Santa-Fe-looks-to-Legislature-for-mounting-13282469.php> [<https://perma.cc/HW8W-TDXJ>] (explaining efforts taken in response to a school shooting within a Texas school district).

113. See Brittney Martin et al., *Overwhelming Grief: 8 Students, 2 Teachers Killed in Texas High School Shooting*, WASH. POST (May 20, 2018, 8:50 AM), [https://www.washingtonpost.com/news/post-nation/wp/2018/05/19/ten-killed-in-texas-high-school-shooting-were-mostly-students-police-say-suspect-confessed/?utm\\_term=.1f96afaa92aa](https://www.washingtonpost.com/news/post-nation/wp/2018/05/19/ten-killed-in-texas-high-school-shooting-were-mostly-students-police-say-suspect-confessed/?utm_term=.1f96afaa92aa) [<https://perma.cc/3LXT-M8C2>] (revealing

that Dimitrios had taken the guns.<sup>114</sup> It is clear, however, that without additional state financial assistance, the Santa Fe Independent School District “would be left contemplating a tax rate hike or classroom cuts to keep up with security and mental health demands.”<sup>115</sup> These two examples serve to highlight where local or state governments can raise funds, primarily through taxing the public at large, to absorb the financial impact of gun violence. Private citizens do not have that luxury.

On average, victims or their families, incur a debt of \$5,254 per emergency room visit for acts of gun violence, and if the victim survives and requires an overnight hospital stay, the price can exceed \$95,000.<sup>116</sup> About a third of those victims will be discharged and transferred to a rehabilitation facility for follow up care, tacking on additional costs averaging over \$179,000.<sup>117</sup> The application of strict liability upon irresponsible gun owners makes logical and practical sense economically. By observing the policy of allocating losses to the persons who benefit from the dangerous activity, who are also the cheapest cost avoiders, we also further both the policy of deterrence and the policy of ensuring victims are fully compensated.<sup>118</sup> Once it is known that gun ownership “must pay its own way,” would-be irresponsible gun owners may be prompted to consider the potential costs associated with their proposed course of action and take the

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information about the shooter and the manner by which he obtained the weapons used in the mass shooting).

114. *See id.* (“The two guns used in the shooting belong to Pagourtzis’s father, according to Gov. Greg Abbott (R), who said it was unclear if the father knew his son had taken them.”).

115. *See* Webb, *supra* note 112 (“[W]ithout legislative action, Santa Fe and other school systems would be left contemplating a tax rate hike or classrooms cuts to keep up with security and mental health demands.”).

116. *See* Jessica Glenza, *Cost of Gun Violence: Hospital Charges for 100,000 Shot Annually Reach \$2.8bn*, GUARDIAN (Oct. 2, 2017, 4:00 PM), <https://www.theguardian.com/world/2017/oct/02/cost-of-gun-violence-hospital-expenses-johns-hopkins-study> [https://perma.cc/BCH8-4DY8] (“Patients pay a high price for being shot. On average, those treated in emergency departments incurred \$5,254 in charges. If they stayed in hospital overnight, charges were far higher—\$95,887 on average . . . . About a third . . . were discharged to another medical facility and incurred costs of \$179,565 on average.”); Faiz Gani, *The Price of Gun Violence*, HEALTH AFFAIRS (Nov. 2, 2017), <https://www.healthaffairs.org/doi/10.1377/hblog20171031.874550/full/> [https://perma.cc/J75Q-H8PB] (“The total individual financial burden for a gunshot victim is estimated to be more than \$160,000 per patient. Yet this figure is likely an underestimate because it does not account for the long-term care required by many patients, such as physical rehabilitation and mental health services.”).

117. Glenza, *supra* note 116.

118. *See* JOHNSON, AMERICAN TORTS *supra* note 28, at 7–8 (“Only, when those costs are taken into account, it is argued, are actors [of dangerous activities] likely to make decisions about activities and precautions that are not only personally beneficial, but socially responsible.”).

necessary “precautions that are not only personally beneficial but [are] also socially responsible.”<sup>119</sup> In the event a gun owner does not act in a socially responsible manner, a strict liability approach can ensure all victims have a viable cause of action wherein they can receive the “financial resources needed to overcome their injuries,” as supported by the third policy concern.<sup>120</sup>

The third policy concern—accident victims should be fully compensated—is a chief policy concern that is the bedrock of American tort law.<sup>121</sup> Seemingly, however, despite its importance within tort law, it is not regularly contemplated when addressing victims of gun violence where an irresponsible gun owner is a link in the chain of events leading to the injury.<sup>122</sup> Lack of predictability may be the issue. The fourth policy that the law should foster predictably in human affairs, pairs closely with the third and argues “that a system that awards compensation on a regular, predictable, and consistent basis is preferable to one in which doctrinal and administrative vicissitudes render the availability of compensation a matter

119. *Id.* at 8.

120. *See id.* at 9–10 (“There is a strong public interest in ensuring that accident victims obtain the financial resources needed to overcome the injuries they have sustained.”).

121. *See Carey v. Phipus*, 435 U.S. 247, 257 (1978) (“[O]ver the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights.”); JOHNSON, AMERICAN TORTS *supra* note 28, at 10 (“Proponents of this view [accident victims should be fully compensated,] argue that tort rules should be crafted and applied with an eye towards this goal, even if that means diminished respect for the fault or proportionality principles or other tort policies.”); *Tort*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/tort> [<https://perma.cc/6QYL-2XZZ>] (“The primary aims of tort law are to provide relief to injured parties for harms caused by others, to impose liability on parties responsible for the harm, and to deter others from committing harmful acts.”); *Tort Law Versus Criminal Law*, ROSS FELLER CASEY, <https://www.rossfeller Casey.com/newsletters/tort-law-versus-criminal-law/> [<https://perma.cc/V23U-YC2J>] (“The focus of tort law is what the victim can do about the financial harm the victim has suffered.”).

122. *See, e.g., Jordan v. Lamar*, 510 So.2d 648, 648–649 (Fla. Dist. Ct. App. 1987) (affirming final judgment for the defendant, who lent his revolver to his friend, and the friend used the firearm to kill his wife after an argument); *Bridges v. Parrish*, 731 S.E.2d 262, 268 (N.C. Ct. App. 2012) (concluding the “plaintiff failed to establish that defendants owed her a duty,” regardless of the fact that defendants allowed their son access to their firearm, despite their personal knowledge of their son’s previous drug and weapons charges, and violent pattern of behavior towards women). *But see Williams v. Bumpass*, 568 So.2d 979, 982 (Fla. Dist. Ct. App. 1990) (affirming judgment against the defendant for negligent entrustment of a firearm when she handed a gun to another that was later used to injure the plaintiff); *Prater v. Burns*, 525 S.W.2d 846, 850 (Tenn. Ct. App. 1975) (reversing the trial court’s judgment against the plaintiff, stating “[w]here there is a negligent entrustment of a weapon to a minor, the subsequent discharge of the weapon by the minor which injures another is not such an independent intervening act as will break the chain of causation between the parent’s negligence and the injury which occurred.”).

of chance.”<sup>123</sup> In essence, straightforward bright-line rules are preferable because they provide notice to all of “what the law requires of them or what they may expect of others.”<sup>124</sup> Strict liability, concerning irresponsible gun ownership, would provide for consistency in the law as well as transmit a normative message for all of what is required of gun owners.

C. *Provide Adequate Defenses to Strict Liability for Responsible Gun Owners*

“Gun responsibility isn’t gun control. It isn’t about ‘controlling’ people or banning ownership of guns or confiscating weapons.”<sup>125</sup> The controlling purpose of instituting a strict liability approach is to deter irresponsible conduct by transmitting a normative message of what society expects from its gun owners.<sup>126</sup> The resultant purpose, in the event a gun owner’s actions are found to be irresponsible, of a strict liability approach will ensure victims are compensated for their losses consistently and predictably.<sup>127</sup> Neither the controlling nor resultant purpose is devised to eliminate or curtail an individual’s right to keep and bear arms.

The assignment of strict liability, in general, is traditionally only limited by the scope of the activity, the plaintiff’s assumption of the risk, or the plaintiff’s comparative fault.<sup>128</sup> Where there exists a strong public policy

123. See JOHNSON, AMERICAN TORTS *supra* note 28, at 10 (“A corollary to the compensation principle is the argument that a system that awards compensation on a regular, predictable, and consistent basis is preferable to one in which doctrinal and administrative vicissitudes render the availability of compensation a matter of chance.”).

124. See *id.* at 8 (“The idea here is that persons should not be forced to act at their peril, uncertain as to what the law requires of them or what they may expect of others.”).

125. See Liu, *supra* note 3 (“Gun responsibility isn’t gun control. . . . But neither is it about treating the gun issue as if it were only a matter of rights—as if everything else, from the safety of our children to the lethality of everyday crime to the reduction of gun suicides or accidents, were irrelevant.”).

126. See JOHNSON, AMERICAN TORTS *supra* note 28, at 8 (explaining “the policy of deterrence may favor placing the threat of liability on the party best suited to avoid the loss . . . or taking fault on the part of all such persons into account in determining damages, so that all relevant actors have an incentive to avoid causing losses.”).

127. See *id.* at 8–10 (expressing the importance of both a public policy promoting the recovery of compensation needed by accident victims to overcome their injuries, and one that promotes a “system that awards compensation on a regular, predictable, and consistent basis”).

128. See RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 24 cmt. a (AM. LAW INST. 2018) (limiting the scope to exclude “plaintiff[s] who voluntarily comes into contact with or approaches the defendant’s animal or activity in order to secure some benefit that contact or proximity to the animal or the activity provides.”); RESTATEMENT (SECOND) OF TORTS § 519 cmt. e (AM. LAW INST. 2018) (“[A]pplies only to harm that is within the scope of the abnormal risk that is the basis of the liability. One who carries on an abnormally dangerous activity is not under strict liability for every possible harm that may result from carrying it on.”); RESTATEMENT (SECOND) OF TORTS

consideration, however, as seen in product liability suits, the short list of available defenses can be expanded.<sup>129</sup> A defendant engaged in a commercial enterprise may be strictly liable for the harm caused to persons or property as a result of the sale or distribution of a defective product.<sup>130</sup> Defendants of a commercial enterprise, however, are not unprotected. In addition to the traditional defenses,<sup>131</sup> the defendants in a product liability suit can also enjoy additional defenses, such defenses as plaintiff's misuse,<sup>132</sup> plaintiff's disregard of

§ 523 (AM. LAW INST. 2018) (“The plaintiff’s assumption of the risk of harm from an abnormally dangerous activity bar his recovery for the harm.”); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 25 cmt. c (AM. LAW INST. 2018) (“Under this Section, whenever plaintiffs fail to exercise reasonable care in order to protect themselves from harm, the rule of comparative responsibility applies.”); RESTATEMENT (SECOND) OF TORTS § 524 cmt. b (AM. LAW INST. 2018) (“[The plaintiff] is barred by his contributory negligence when he intentionally and unreasonably subjects himself to a risk of harm from the abnormally dangerous activity, of which he knows.”).

129. See JOHNSON, AMERICAN TORTS *supra* note 28, at 9 (stating as a matter of public policy “[t]ort law should facilitate economic growth and the pursuit of progress. . . . There is continuing concern that tort liability not be so readily imposed that industrial creativity is stifled, that entrepreneurship is chilled, that professionals are unwilling to render important services, or that American businesses are globally uncompetitive.”).

130. See RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 1 (AM. LAW INST. 2018) (“One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.”); *id.* § 5 (“One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated . . .”); *id.* § 6(a) (“A manufacturer of a prescription drug or medical device who sells or otherwise distributes a defective drug or medical device is subject to liability for harm to persons caused by the defect.”); *id.* § 7 (“One engaged in the business of selling or otherwise distributing food products who sells or distributes a food product that is defective under § 2, § 3, or § 4 is subject to liability for harm to persons or property caused by the defect.”); *id.* § 8 (“One engaged in the business of selling or otherwise distributing used products who sells or distributes a defective used product is subject to liability for harm to persons or property caused by the defect . . .”); RESTATEMENT (SECOND) OF TORTS § 402A(1) (AM. LAW INST. 2018) (“One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . .”).

131. See KENNETH S. ABRAHAM ET AL., THE FORMS AND FUNCTIONS OF TORT LAW 211 (3rd ed. 2007) (noting “[m]ost of the defenses to products liability actions are the same defenses available in other negligence and strict liability cases.” Among them are contributory or comparative negligence and assumption of the risk).

132. *Jurado v. W. Gear Works*, 619 A.2d 1312, 1318 (N.J. 1993) (“[M]isuse contemplates two kinds of conduct. . . . [First,] [w]hen a plaintiff is injured while using the product for a purpose that is not objectively foreseeable, the injury does not establish that the product is defective. . . . [Second,] [a] product is not in a defective condition when it is safe for normal handling or consumption.” (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. h (AM. LAW INST. 1965)); *Bendorf v. Volkswagenwerk Aktiengesellschaft*, 540 P.2d 835, 845 (N.M. Ct. App. 1975) (Sutin, J., specially concurring) (“The great weight of authority throughout the country holds that product misuse by the

warnings,<sup>133</sup> state of the art defense,<sup>134</sup> and subsequent alterations defense<sup>135</sup> to list a few.<sup>136</sup> That logic can be extended to a strict liability approach addressing irresponsible gun ownership. Just as defendants in a commercial enterprise suit, defendants in a strict liability gun ownership suits should be afforded an expanded list of available defenses. The policy of furthering individual constitutional rights, specifically the right to self-defense, would be the primary bedrock for affording any supplementary defenses.<sup>137</sup> “[C]itizens must be permitted to use [arms] for the core lawful purpose of self-defense.”<sup>138</sup> Therefore, to protect responsible gun owners and their right to self-defense, there is an obligation to also include robust defenses to a strict liability approach to gun ownership, beyond those traditionally observed.

#### V. PROPOSED MODEL RULE IMPOSING STRICT LIABILITY ON IRRESPONSIBLE GUN OWNERS

Based on the text of Restatement (Third) of Torts: Physical & Emotional Harm § 22, this Comment proposes a model rule for imposing strict liability on irresponsible gun owner to state: An owner or possessor of a firearm is

plaintiff that was unforeseeable by the defendant-manufacturer constitutes contributory negligence in a Section 402A liability action.”)

133. *Walk v. Case Co.*, 318 N.Y.S.2d 598, 599 (N.Y. App. Div. 1971) (holding “there can be no recovery under the facts of this case. Appellant’s operation of the machine in a manner contrary to the instructions given for its use, was clearly both an assumption of the risk and a misuse of the product, and bars his recovery as a matter of law.”).

134. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (AM. LAW INST. 2018) (“There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous.”); PAUL SHERMAN, PRODUCT LIABILITY FOR THE GENERAL PRACTITIONER 267 (1981) (“[T]he defense requires only that the manufacturer apply the leading edge of scientific knowledge in the development, design, warning, or manufacture of a product.”).

135. *See* RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (AM. LAW INST. 2018) (“[I]t is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.”); SHERMAN, *supra* note 134, at 268–69 (1981) (stating that “[s]ubsequent alteration as a defense [is] derive[d] from the requirement of § 402A that the plaintiff establish that the [defective] product was intended to, and did, reach the user or consumer without substantial alteration or change in condition.”).

136. *See* SHERMAN, *supra* note 134, at 256–81 (listing defenses in product liability).

137. *See* *Peruta v. California*, 137 S. Ct. 1995, 1999–2000 (2017) (Thomas, J., dissenting) (“For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense.”).

138. *McDonald v. City of Chicago*, 561 U.S. 742, 767–68 (2010).



subject to strict liability for physical harm caused by the firearm.<sup>139</sup> For this model rule, a firearm is to be defined by the jurisdiction hearing the particular case at issue. In a similar fashion to § 22, as long as the instrument is classified as a firearm, there will be no need for the plaintiff to prove the danger posed by the firearm, nor should it be required from the plaintiff to prove a duty owed by the defendant.<sup>140</sup> To illustrate, Father keeps a revolver beneath his mattress for protection. Father invites the Neighbor's son over for a play date with Father's son. While Father's son plays hide-and-seek with Neighbor's son, they stumble across Father's revolver. The Neighbor's son is shot and injured by the Father's son. The Neighbor will not have to prove the revolver was dangerous, nor prove the Father owed her a duty to store the revolver in a more secure location. The Father is strictly liable for the injuries sustained by the Neighbor's son unless any limitations on liability or available defenses apply. The scope of liability is justified by the "characteristic harms" that firearms cause.<sup>141</sup> Strict liability will not apply if the harm the plaintiff incurs is not a product of the risks posed by firearms.<sup>142</sup> Thus, if a criminal merely used a stolen firearm to smash open a window to gain access to a dwelling and does not further use the firearm to injure a plaintiff, the original owner of the firearm is not liable. At first glance, the scope of this proposed model rule would seem to include all gun owners and not just the irresponsible ones. This is necessary to ensure all victims have a means of redress, specifically those removed from the irresponsible acts of a gun owner.<sup>143</sup> The protection for responsible gun owners is provided by the limitations of liability and defenses defined below.

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139. *Cf.* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 22(a) (AM. LAW INST. 2018) ("An owner or possessor of a wild animal is subject to strict liability for physical harm caused by the wild animal.").

140. *See id.* at cmt. c ("So long as a category of animals is wild, there is no requirement that the plaintiff prove the defendant's knowledge of the danger posed by the particular animal.").

141. *See id.* at cmt. f (expressing strict liability upon owners of wild animals "is justified because of the characteristic harms that are caused by wild animals.").

142. *See id.* at cmt. f ("If the harm the plaintiff incurs is not a product of the risks posed by wild animals, then the strict liability set forth in this Section does not apply.").

143. *See* Hall v. McBryde, 919 P.2d 910, 912 (Colo. App. 1996) (affirming a trial court conclusion that Defendant Mother did not owe a duty of care to a neighbor child who was accidentally shot by her son. The court reasoned since the neighbor child did not present or possess any evidence to show the Defendant Mother had knowledge that Defendant Father stored a loaded gun under their mattress, she did not owe the neighbor child a duty); Ambrosio v. Carter's Shooting Center, Inc., 20 S.W.3d 262, 269 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (determining likelihood of foreseeability was "immaterial.").

VI. LIMITATIONS OF LIABILITY AND DEFENSES TO STRICT LIABILITY  
ON IRRESPONSIBLE GUN OWNERS

In a similar fashion to abnormally dangerous activities and wild animal strict liability, strict liability of gun ownership should, at a minimum, be limited in scope and comparative responsibility by sections 24 and 25 of the Restatement (Third) of Torts.<sup>144</sup> Nevertheless, to best effectuate a policy of safeguarding constitutional rights, defenses such as reporting lost or stolen firearms and defenses made expressly by federal and state legislatures are necessary.<sup>145</sup> These additional defenses are what narrows the scope of the strict liability approach to target irresponsible gun owners.

A. *Reporting Lost or Stolen Firearms*

An obligation to report lost or stolen firearms has proven to be instrumental in reducing illegal gun trafficking, “making it easier for law enforcement to ensure that deadly weapons do not make their way into dangerous people’s hands. From preventing straw purchases<sup>146</sup> to disarming prohibited persons,<sup>147</sup> reporting laws protect citizens by making

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144. This Comment does not provide an analysis as to the applicability of comparative responsibility or scope of liability with regard to a strict liability approach to gun ownership, as they are applied—or not—between the fifty states in too varying a degree. See MORTON F. DALLER, TORT LAW DESK REFERENCE FIFTY-STATE COMPENDIUM 17, 123, 207 (2019) (identifying, in regard to the application of comparative fault, Alaska’s adoption of a pure comparative model, Colorado adopting a modified comparative model, and the District of Columbia’s lack of applicable strict liability theories.) As to assumption of the risk, there are states that apply it, incorporate it in comparative responsibility, or abolish it altogether. *Id.*

145. Although the Comment only adds two additional defenses—reporting lost or stolen firearms and defenses made expressly by federal and state legislative bodies—the addition of others defenses would be proper if the defense itself protects responsible conduct expected of a legal gun owner by the public.

146. See John Bocker, *Beware the Straw Purchase!*, NAT’L SHOOTING SPORTS FOUND. (Apr. 23, 2018), <https://www.nssf.org/beware-the-straw-purchase/> [https://perma.cc/8YHL-UUS8] (“A straw purchase is any purchase in which a second person agrees to acquire a firearm *for someone who is ineligible to purchase the firearm for himself*. A straw purchaser can be identified as a person with a clean background who purchases firearms specifically on behalf of a person prohibited from purchasing a firearm . . .”).

147. A prohibited person is a person “who legally owned a gun” and since fell “into a prohibited category, such as after a serious criminal conviction or domestic violence restraining order.” See *Reporting Lost & Stolen Firearms*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/gun-owner-responsibilities/reporting-lost-stolen-firearms/> [https://perma.cc/UQ3G-ZFHE] (explaining “it is crucial that law enforcement remove the firearm from [prohibited persons’] possession. However, when required to relinquish firearms, a prohibited offender or abuser may falsely claim that his or her gun was previously lost or stolen. Mandatory reporting laws provide a check against this behavior.”).

sure illegal firearm transfers don't fall through the cracks."<sup>148</sup> Additionally, an obligation to report incentivizes gun owners to be more responsible with their firearms and "help protect rightful gun owners from unwarranted criminal accusations when a gun that was lost or stolen from them is later recovered at a crime scene."<sup>149</sup> Despite the mentioned benefits of a mandatory reporting requirement and their overwhelming public support,<sup>150</sup> the trend among states is toward the contrary: reporting lost or stolen firearms is not a compulsory duty, nor is it required federally.<sup>151</sup> Therefore, in the United States, the vast majority of lost or stolen firearms go unreported.<sup>152</sup>

[S]tates without lost or stolen reporting laws are the source of more than 2.5 times as many crime guns recovered in other states as states with a lost or stolen reporting requirement. States without lost or stolen reporting laws also sell 30% more "short time-to-crime guns," meaning guns that are recovered from crime scenes within two years of their initial purchase.<sup>153</sup>

Currently, only eleven states require gun owners to report lost or stolen firearms to law enforcement officials.<sup>154</sup> Even among those states, rarely is the reporting requirement ever enforced.<sup>155</sup>

148. *Id.*

149. *See id.* ("In addition to reducing illegal gun crime, reporting laws may make gun owners more accountable for their weapons.")

150. *See Lost & Stolen Reporting: Why SB 1366 Matters*, GIFFORDS L. CTR. (Apr. 10, 2012), <https://lawcenter.giffords.org/lost-stolen-reporting-why-sb-1366-matters/> [<https://perma.cc/LM2Z-XANU>] ("The public overwhelmingly supports laws requiring the reporting of lost or stolen firearms. A nationwide poll in 2011 found that 94% American surveyed, including 94% of gun owners, favor laws to require the reporting of lost or stolen firearms.")

151. *See* Max Siegelbaum, *Only 11 States Require Gun Owners to Report Stolen Weapons to Police*, TRACE (Nov. 20, 2017), <https://www.thetrace.org/2017/11/stolen-guns-reporting-requirements/> [<https://perma.cc/RDT5-HWGD>] (stating there are no federal requirements compelling a gun owner to file a police report if their firearm becomes lost or stolen).

152. *See Reporting Lost & Stolen Firearms*, *supra* note 147 (outlining the majority of lost or stolen firearms are never reported to law enforcement, significantly hindering law enforcement efforts to trace the source of crime guns and to prevent weapons from falling into dangerous hands. Many of these stolen guns are used to commit subsequent crimes).

153. *Reporting Lost & Stolen Firearms*, *supra* note 147.

154. *See* Siegelbaum, *supra* note 151 ("States with mandatory loss/theft reporting laws [are] California, Connecticut, Delaware, District of Columbia, Illinois, Maryland (handguns and assault weapons only), Massachusetts, Michigan (thefts only), New Jersey, New York, Ohio, and Rhode Island.")

155. *See id.* ("In New York, there have been a total of 11 arraignments for violations of the [reporting] law statewide over the past five years. Illinois had fewer than 10 arrests in the same time

Providing a defense to strict liability where a gun owner reports a lost or stolen firearm not only incentivizes the responsible conduct of reporting, it also aids law enforcement efforts in tracking and recovering the missing firearm to ensure it remains out of the hands of a prohibited user.<sup>156</sup> To obtain the benefits of the lost or stolen firearm defense, the gun owner, within a reasonable time of discovering that their firearm is missing, must report the lost or stolen firearm to law enforcement officials with relevant information surrounding the loss or theft.<sup>157</sup> A reasonable time is determined by the jurisdiction hearing the suit or within one week from the time of discovery, whichever is shorter.<sup>158</sup> Relevant information provided in the report must be sufficient enough to reasonably aid police officers in tracking the lost or stolen weapon and must include the firearm's serial number.<sup>159</sup> The defense provided by the report should apply to any crime or injury committed with the lost or stolen firearm that occurs subsequent to the gun owner's report, assuming the owner was not also a participant in the subsequent crime or injury.

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period. Connecticut filed 19 charges, but none resulted in a conviction. Rhode Island had just four charges for its law.”).

156. See *The Effects of Lost or Stolen Firearm Reporting Requirements*, RAND CORP., (Mar. 2, 2018) <https://www.rand.org/research/gun-policy/analysis/lost-or-stolen-firearms.html> [<https://perma.cc/JKK2-AL2A>] (“[T]ime[ly] reporting of gun losses or thefts may aid law enforcement gun-tracing efforts and increase criminal prosecutions of illegal users or traffickers of stolen firearms, potentially reducing the stock of firearms among prohibited possessors.”).

157. See *What to Do When Your Guns and Ammo are Stolen*, SECOND AMEND. SPORTS (Oct. 21, 2016), <https://www.secondamendsports.com/guns-and-ammo-stolen/> [<https://perma.cc/58ZQ-VBZG>] (listing information to have prepared in the event a gun owner's firearm is stolen, such as the firearm serial number, make and model, the year of manufacture, any “unique identifying accessories, marks, or modifications,” and the location of purchase).

158. Of the states that require a gun owner or possessor of firearms to report a lost or stolen firearm, the allowable duration between discovery and reporting to law enforcement officers ranges from twenty-four hours to one week. See *Lost & Stolen Firearms: State by State*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/state-law/50-state-summaries/lost-stolen-firearms-state-by-state/> [<https://perma.cc/9VGC-WFUL>] (listing lost or stolen firearm requirements by state after discovery: Maryland, seventy-two hours after discovery; New Jersey, thirty-six hours; New York twenty-four hours; California, forty-eight hours; Connecticut, seventy-two hours; Delaware, one week; Illinois, seventy-two hours; Rhode Island, twenty-four hours. “Ohio requires that a firearm owner report ‘forthwith’ the loss or theft of any firearm in the person’s possession or under the person’s control.”).

159. See *What to Do When Your Guns and Ammo Are Stolen*, *supra* note 157 (“The first and most important piece of information you need documented about your gun is the serial number. . . . Other information you want to have documented and ready includes: make, model, year of manufacture, unique identifying accessories, marks, or modifications, [and] where and when you purchased or transferred it . . .”).

B. *Defenses Made Expressly by Federal and State Legislatures*

The burden of strict liability must give way to statutory defenses when expressly made.<sup>160</sup> An example can be drawn from the Child Safety Lock Act of 2005. Although the Child Safety Lock Act of 2005 is by no means a deterrence to firearm theft,<sup>161</sup> it does, manifest an intent by the legislature to immunize gun owners who comply with its mandates.<sup>162</sup> Consequently, in suits where a legal gun owner complies with the Child Safety Lock Act by the mere use of a trigger lock mechanism, any imposition of strict liability to gun ownership would be improper.<sup>163</sup> Even if the firearm was stored negligently and subsequently stolen by the gun owner's child, so long as a trigger lock was correctly installed on the firearm, the gun owner incurs no liability. Where the gun owner is not in compliance with the Child Safety Lock Act, however, there is no congressional intent that would hinder holding an irresponsible gun owner strictly liable for conduct falling below what is expected by the public. In a similar fashion to the Child Safety Lock Act, a few states enacted various forms of Child Access and Prevention (CAP) laws.<sup>164</sup> Texas, for example, states that "[a] person commits an offense if a child<sup>165</sup> gains access to a readily

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160. See *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.").

161. See McClurg, *Right to be Negligent*, *supra* note 24, at 18 ("[T]he Act confers tort immunity on the gun owner for harm resulting from theft by a criminal misuser, despite the fact that the safety devices are childproofing measures, not theft deterrent devices.").

162. See 18 U.S.C. § 922(z)(3)(A) (2012) ("Notwithstanding any other provision of law, a person who has lawful possession and control of a handgun, and who uses a secure gun storage or safety device with the handgun, shall be entitled to immunity from a qualified civil liability action.").

163. See *id.* (same).

164. See German Lopez, *Child Access Laws Can Prevent Accidental Shootings. 22 States Don't Have Them*, VOX (Oct. 19, 2015, 2:40 PM), <https://www.vox.com/2015/10/19/9568881/guns-child-access-laws> [<https://perma.cc/R26W-AS5D>] ("28 states have child access prevention laws in place. Half these states specifically penalize people who leave guns around children in a careless, reckless, or negligent manner. The other 14 states have weaker laws that prohibit knowingly *giving* a child a gun or require that certain circumstances be met . . . ."); *The Effect of Child-Access Prevention Laws*, RAND CORP. (MAR. 2, 2018), <https://www.rand.org/research/gun-policy/analysis/child-access-prevention.html> [<https://perma.cc/7GGK-6ST9>] ("Child-access prevention (CAP) laws allow prosecutors to bring charges against adults who intentionally or carelessly allow children to have unsupervised access to firearms. CAP laws aim to reduce unintentional firearm injuries and deaths . . . chiefly by reducing children's access to stored guns . . . .").

165. TEXAS PENAL CODE. § 46.13(a)(1) ("'Child' means a person younger than 17 years of age.").

dischargeable<sup>166</sup> firearm and the person with criminal negligence: (1) failed to secure<sup>167</sup> the firearm; or (2) left the firearm in a place to which the person knew or should have known the child would gain access.”<sup>168</sup> In the form of an affirmative defense, section 46.13(c) of the Texas Penal Code offers a list of four circumstances in which a gun owner would be free of criminal liability.<sup>169</sup> The first affirmative defense is available when at the time the child gains access to the gun owner’s firearm, the child was under the supervision of another person “older than 18 years of age and was for hunting, sporting, or other lawful purposes.”<sup>170</sup> Second, the child’s actions “consisted of a lawful defense” of people or property.<sup>171</sup> Third, the child gained access to the firearm by entering property in violation of the law.<sup>172</sup> Per the fourth and final condition, the child’s access to the firearm must have “occurred during a time when the actor was engaged in an agricultural enterprise.”<sup>173</sup> Just as it would be improper to impose strict liability where a gun owner has met the conditions for immunity pursuant to the Child Safety Lock Act of 2005, it would be equally improper in Texas to apply strict liability, where the gun owner has satisfied any of the conditions listed in § 46.13(c) of the Texas Penal Code and is successful in raising the condition as an affirmative defense.

## VII. CONCLUSION

Notwithstanding any individual position concerning general gun ownership, holding irresponsible gun owners accountable for their conduct—if it falls below the expected standards concerning general public health and safety in a functioning society—is an appropriate extension of existing tort law. Guns, generally, have benefited individuals throughout history, specifically in the arena of self-defense. Along with the benefits of

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166. *Id.* § 46.13(a)(2) (“‘Readily dischargeable’ firearm means a firearm that is loaded with ammunition, whether or not a round is in the chamber.”).

167. *Id.* § 46.13(a)(3) (“‘Secure’ means to take steps that a reasonable person would take to prevent the access to a readily dischargeable firearm by a child, including but not limited to placing a firearm in a locked container or temporarily rendering the firearm inoperable by a trigger lock or other means.”).

168. *Id.* § 46.13(b).

169. *See id.* § 46.13(c) (listing affirmative defenses to prosecution).

170. *Id.* § 46.13(c)(1).

171. *Id.* § 46.13(c)(2).

172. *See id.* § 46.13(c)(3) (showing affirmative defense for a child that enters “property in violation of this code.”).

173. *Id.* § 46.13(c)(4).

gun ownership arises significant public health costs and economic burden. The fundamental purpose of tort law is to provide a means of redress for those who sustain an injury or property damage from the acts of another.

Where the victims of firearm violence are removed from the irresponsible acts or omissions of a gun owner, and those irresponsible acts or omissions enabled a third-party actor to acquire the firearm used to injure the victim, the fundamental purpose of tort law becomes frustrated. This frustration can be eliminated by the adoption of a strict liability approach to gun ownership. A strict liability approach to gun owners can ensure that all victims of gun violence have access to the courts while also protecting the constitutional rights of gun owners.

Currently, strict liability in tort law provides no avenue for redress against irresponsible gun ownership, as its causes of action are primarily limited to abnormally dangerous activities, products liability, and those who harbor wild animals. Negligence, on the other hand, provides for many causes of action for redress, but as a principle, negligence places the burden on victims to prove the elements for a negligent cause of action. This burden is an insurmountable impediment where victims of firearm violence attributed to a lost or stolen gun—detached by time and location from the act or omission of an irresponsible gun owner—would necessarily lack articulable evidence to show negligence. A strict liability approach would ensure fairness, further public policies, and incentivize responsible conduct from gun owners.