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## Child Access Prevention Laws: A Common Sense Approach to Gun Control

Andrew J. McClurg

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**CHILD ACCESS PREVENTION LAWS: A COMMON SENSE  
APPROACH TO GUN CONTROL**

ANDREW J. MCCLURG\*

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\* Nadine H. Baum Distinguished Professor of Law, University of Arkansas at Little Rock School of Law. E-mail: ajmclurg@ualr.edu. My thanks to Professor Mary Pat Treuthart, Gonzaga University School of Law, for her always helpful editing comments. I am grateful to Julie Shambarger Mitchell for her outstanding research assistance.

## I. INTRODUCTION

Three days after a schoolyard shooting in Jonesboro, Arkansas left four students and a teacher dead,<sup>1</sup> John Lott<sup>2</sup> published an op-ed piece in the *Wall Street Journal* that began by noting the failure of gun control laws to prevent the tragedy.<sup>3</sup> As a resident of Arkansas, I was intrigued to learn how gun control could fail in a state notoriously lacking in gun control laws. After all,

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1. On March 24, 1998, Andrew Golden and Mitchell Johnson, ages 11 and 13 respectively, shot and killed four students and a teacher and wounded eleven others at the Westside Middle School in Jonesboro, Arkansas. See J.R. Moehringer, *Boys Sentenced for Arkansas School Murders*, L.A. TIMES, Aug. 12, 1998, at A1; see also John Schwartz, *Boys' Ambush at Ark. School Leaves 5 Dead; Suspects are 11 and 13; 11 Wounded*, WASH. POST, Mar. 25, 1998, at A01. The boys, wearing camouflage and carrying multiple handguns and rifles, hid in a wooded area behind the school and ambushed their teachers and classmates as they exited the school in response to a false fire alarm. See Schwartz, *supra*, at A01. Police apprehended the boys while they were running toward a white van parked a half-mile from the school. See *id.* The van contained additional guns and ammunition. See *id.*

In August 1998, Golden and Mitchell were sentenced to an indefinite stay in a youth detention camp. See Moehringer, *supra*, at A1. However, under Arkansas law, they must be released when they turn eighteen. See *id.*

A wrongful death suit has been filed by the families of two of the shooting victims against the two assailants, Golden's parents (Dennis Golden and Pat Golden), Mitchell's parents (Scott Johnson and Gretchen Woodard), Golden's grandfather (Douglas Golden) and the manufacturers of the two rifles used to carry out the assault. See Complaint, Mitchell K. Wright, as Personal Representative of the Estate of Shannon D. (Williams) Wright; and Renee Brooks, as Personal Representative of the Estate of Natalie D. Brooks vs. Andrew Golden, Mitchell Johnson, Scott Johnson, Gretchen Woodard, Dennis Golden, Pat Golden, Remington Arms Co., Inc., John Doe, and John Doe, Inc., as Successors In Interest of Universal Firearms, Case No. Civ-98-394(B) (Cir. Ct. of Craighead County, Arkansas, filed Aug. 10, 1998) [hereinafter Westside Shooting Complaint] (copy on file with author). The complaint alleges Golden and Mitchell took three handguns that belonged to Golden's father and stole four handguns and three rifles from the home of Golden's grandfather. See *id.* at 6, ¶¶ 25, 26. Two of the rifles were used in the shootings. See *id.* at 11, ¶¶ 43, 44. The complaint asserts claims of negligent supervision and training by the assailants' parents (see *id.* at 8, ¶ 37, 13, ¶ 51), negligent storage of firearms by Golden's grandfather (see *id.* at 10, ¶¶ 38, 39) and negligence and strict liability claims against the gun manufacturers for failing to furnish trigger locks or incorporate them into the rifles. See *id.* at 11-13, ¶¶ 45-50. In the interest of full disclosure, I have provided minimal assistance to plaintiffs' counsel, Bobby McDaniel of McDaniel & Wells, Jonesboro, Arkansas, in the litigation.

2. John Lott is the Olin Fellow of Law and Economics at the University of Chicago. He has been called the "latest darling of gun advocates" for his prolific advocacy against gun control and for concealed weapons laws. See M.W. Guzy, *Soft Logic of Hard Facts On Guns*, ST. LOUIS POST-DISPATCH, July 22, 1998, at B7. I faced Lott in a gun control debate at the Federalist Society's Inaugural Faculty Division Conference in New Orleans on January 7, 1999. I found him to be knowledgeable and pleasant. We simply disagree.

3. See John R. Lott, Jr., *The Real Lesson of the School Shootings*, WALL ST. J., Mar. 27, 1998, at A14. Lott went on to suggest that schools would be safer places if teachers carried concealed weapons that could be used to foil mass shootings. See *id.*

Handgun Control, Inc. gives Arkansas a grade of “D” on its state-by-state report card for laws protecting children from guns.<sup>4</sup>

According to Lott, gun control laws failed in Jonesboro because both state<sup>5</sup> and federal<sup>6</sup> law makes it illegal to bring guns to school, yet Mitchell Johnson and Andrew Golden, the two boys convicted in the shootings, did it anyway. Syllogistically refined, Lott’s argument can be reduced to something like this:

Gun control laws make it illegal to bring guns to school.

Murderous children sometimes bring guns to school.

Therefore, gun control laws do not work.

In 1992, I published *The Rhetoric of Gun Control*<sup>7</sup> identifying and analyzing fallacious reasoning used by both sides in the gun control debate. Six years later, logical fallacies are still prevalent in this emotional arena. Before taking Lott to task, I confess that I still catch myself resorting to some of the defective reasoning I have condemned when trying to convince audiences that our nation’s gun policies are misguided.

Lott is guilty of committing the “straw man” fallacy. This fallacy occurs when one attempts to refute an opponent’s argument by distorting it, so that the argument met is not the real argument at all, but only a straw man that can be easily knocked down.<sup>8</sup> Lott, of course, is absolutely correct that laws prohibiting the carrying of guns to school are not a solution to gun violence, just as criminal laws prohibiting murder, rape and robbery are not a solution to those transgressions since, to use Lott’s words, they are “not work[ing] as intended.”<sup>9</sup>

The problem with Lott’s argument is that I have never heard anyone—certainly not anyone seriously involved in the gun debate—contend that criminal sanctions for carrying guns to school would prevent school shootings. To the contrary, the mere heaping on of criminal penalties is just the kind of lukewarm response to gun violence that advocates of meaningful gun control bemoan.<sup>10</sup> By attacking an argument no one was advancing, Lott guaranteed himself a slam-dunk victory.

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4. Handgun Control, Inc. grades states’ gun laws on a scale of A, B, C, D, or F. See Matt Bai, *Targeting Gun Makers*, NEWSWEEK, Apr. 13, 1998, at 37.

5. ARK. CODE ANN. 6-21-608(b) (Michie 1999).

6. 18 U.S.C. 3922(8) (Supp. IV 1992).

7. Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53 (1992).

8. For more on the straw man fallacy, see DAVID L. ALLEN & JANE C. PARKS, *ESSENTIAL RHETORIC* 111-12 (1969); PIERRE SCHLAG & DAVID SKOVER, *TACTICS OF LEGAL REASONING* 22-23 (1986).

9. Lott, *supra* note 3, at A14.

10. Cf. *Push for crime laws ‘harmful’ at times*, ARK. DEMOCRAT-GAZETTE, Feb. 16, 1999, at 3A (report by task force chaired by former U.S. Attorney General Edwin Meese concluded Congress sometimes passes “misguided, unnecessary and harmful” anti-crime laws in response to highly publicized criminal incidents; notes that more than 40 percent of federal criminal laws enacted since Civil War were passed after 1970).

What gun control proponents want to see are meaningful laws that constitute a serious, good-faith effort by our elected representatives to reduce firearm casualties in America. One of the best choices currently being debated is known as a Child Access Prevention (CAP) law.<sup>11</sup> CAP laws, also called “safe storage laws,” impose criminal penalties for the negligent storage of a firearm if a child gains access to the gun and uses it to kill or injure himself or another person.<sup>12</sup> Fifteen states already have such laws<sup>13</sup> and twin bills for a national CAP law have been introduced in the United States Senate<sup>14</sup> and House of Representatives.<sup>15</sup>

This article argues in favor of CAP laws, analyzes the state statutes and compares them to the proposed federal bills,<sup>16</sup> and calls on Congress to make passage of a federal CAP law a high priority.

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11. See *infra* notes 75-140 and accompanying text for an analysis of 15 state CAP laws and proposed federal CAP law.

12. See *id.*

13. See *infra* notes 75-89 for citations to all fifteen state CAP statutes. CAP laws are pending in five other states: Massachusetts, Illinois, New York, Missouri and South Carolina. See Charlotte Faltermayer, *What Is Justice For A Sixth-Grade Killer*, TIME, Apr. 6, 1998, at 36.

14. S. 2185, 105th Cong., 2d Sess. (1998).

15. H.R. 4073, 105th Cong., 2d Sess. (1998).

16. The proposed federal CAP laws are just one part of a much larger proposed act called The Children’s Gun Violence Prevention Act of 1998, which comprehensively addresses firearm safety issues involving children. The act includes the following separate titles:

(1) The Children’s Firearm Safety Act of 1998 (Title I). S. 2185 §§ 101-102; H.R. 4073 §§ 101-102. Title I would prohibit the manufacture or import of “unsafe handguns,” defined as handguns capable of accidental discharge when dropped from a height of one meter (S. 2185 §101(2)(A); H.R. 4073 § 101(2)(A)) and handguns “without a child resistant trigger mechanism reasonably designed to prevent a child who has not attained 5 years of age from operating the weapon when it is ready to fire.” S. 2185 § 101(2)(B); H.R. 4073 § 101(2)(B). The statute defines several acceptable safety mechanisms. S. 2185 §101(2)(B)(i)-(ii); H.R. 4073 § 101(2)(B)(i)-(ii). Title I also requires the Consumer Product Safety Commission, in consultation with the Bureau of Alcohol, Tobacco and Firearms (ATF), to conduct a study to determine how the safety of handguns can be improved to prevent their unauthorized use by children under age eighteen. S. 2185 § 102(a); H.R. 4073 § 102(a).

(2) The Children’s Firearms Age Limit Act of 1998 (Title II). S. 2185 §§ 201-202; H.R. 4073 §§ 201-202. Title II extends the juvenile ban on handguns to include semiautomatic assault weapons (S. 2185 § 201; H.R. 4073 § 201) and increases the penalties for transferring handguns and semiautomatic assault weapons to children. S. 2185 § 202; H.R. 4073 § 202.

(3) The Children’s Firearm Dealer’s Responsibility Act of 1998 (Title III). S. 2185 §§ 301-303; H.R. 4073 §§ 301- 303. Title III provides for revocation of the license of any firearms dealer who willfully sells a firearm to a child under age eighteen (S. 2185 § 301; H.R. 4073 § 301) and requires the Secretary of the Treasury, acting through the Director of ATF, to establish minimum safety and security standards for safeguarding the storage of firearms at gun shops. S. 2185 § 303(a); H.R. 4073 § 303(a).

(4) The Children’s Firearm Access Prevention Act of 1998 (Title IV). S. 2185 §§ 401-402; H.R. 4073 §§ 401-402. Title IV is the CAP law or safe storage law analyzed throughout this article.

## II. THE CASE FOR CAP LAWS

By giving gun owners an incentive in the form of criminal (and, I will argue, civil<sup>17</sup>) liability to act responsibly in safeguarding their weapons, a federal CAP law would reduce firearm deaths and injuries of all types. Although CAP laws are touted primarily as a means of reducing accidental shootings by children, they also can be expected to prevent some intentional third-party shootings and suicides. In 1995, the most recent year for which figures are available, 440 children were killed in accidental shootings, 1,430 children committed suicide using a firearm and 3,280 children and teenagers were murdered with firearms.<sup>18</sup> An eye-opening survey conducted by the Harvard School of Public Health found that twenty-five percent of middle and high school children have actually *handled* a gun without adult supervision.<sup>19</sup> An estimated ninety percent of accidental shootings by children are linked to

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(5) The Children's Firearm Injury Surveillance Act of 1998 (Title V). S. 2185 §§ 501-502; H.R. 4073 §§ 501-502. Title V authorizes the Secretary of Health and Human Services to make grants available for gathering information concerning fatal and nonfatal firearm injuries to children under the age of twenty-one, including information regarding mortality, morbidity, disability, the type and characteristic of the firearm used in the shooting, the relationship of the victim to the perpetrator and the time and circumstances of the shooting. S. 2185 § 502(a)-(b); H.R. 4073 § 502(a)-(b).

(6) The Children's Firearm Education Act of 1998 (Title VI). S. 2185 §§ 601-605; H.R. 4073 §§ 601-605. Title VI provides for the issuance of grants to educate children about matters such as the effects of gun violence and how to identify and avoid dangerous situations in which guns are involved. S. 2185 § 602(a)-(b); H.R. 4073 § 602(a)-(b).

(7) The Children's Firearm Tracking Act of 1998 (Title VII). S. 2185 § 701; H.R. 4073 § 701. Title VII would make grants available to facilitate the tracing of firearms used by juveniles and the prosecution of persons who illegally traffic firearms to persons under age twenty-four. S. 2185 § 701(b)(1); H.R. 4073 § 701(b)(1).

The House bill was introduced by Representative Carolyn McCarthy. H.R. 4073. McCarthy ran for Congress on a pro-gun control platform after her husband was killed and son seriously injured by mass killer Colin Ferguson in the 1993 Long Island train shootings. *See An Election, Yes, But Congressional Races, Not Really; Some Hard Words In the 4<sup>th</sup> District*, N.Y. TIMES, Nov. 1, 1998, at 14LI-10 (mentioning made-for-television movie about McCarthy's experience); *see also* Liz Trotta, *Racial hatred suspected in N.Y. rampage*, WASH. TIMES, Dec. 9, 1993, at A1 (describing mass shooting incident on New York commuter train that left five persons dead and 18 wounded). The Senate bill was introduced by Senator Ted Kennedy. S. 2185.

17. *See infra* notes 155-71 and accompanying text.

18. *See* Dianne R. Stepp, *School Watch; Students signing 'no-guns' pledge; Safety issue: Parents of many middle school pupils will get copies of the promise about gun safety during their next teacher conference*, ATLANTA CONST., Oct. 15, 1998, at 4JG. I have attempted to avoid burdening this article with too many statistics because I believe statistics are overused in the gun debate and far too often misleading. *See* Andrew J. McClurg, *Hold Your Fire*, A.B.A. J., Feb. 1999, at 14 (parodying use of statistics in gun control debate).

19. *See* Linda Matchan, *Learning to Live with Guns*, BOSTON GLOBE, July 2, 1995, at 1.

unlocked, loaded guns in the home.<sup>20</sup> Common sense dictates that when guns are kept secured from unauthorized users, children and others are unable to use them to cause harm either accidentally or intentionally.

Although other factors were at work in Jonesboro (most notably two disturbed young minds), the fact remains that if the guns the boys used to shoot their classmates and teachers had been safely stored in a gun safe or with trigger locks, they could not have been employed for criminal purposes. Indeed, the wrongful death suit filed by two of the victims' families alleges that the boys tried to steal other guns from a locked gun vault owned by Andrew Golden's father, but were unsuccessful.<sup>21</sup>

Our nation's response to mass shooting incidents of this kind is basically a non-response. We wring our hands and say "how terrible." We call for tougher penalties for criminals. However, we do nothing to address the source of the problem: ready access to 223 million privately-owned firearms.<sup>22</sup>

Other industrialized countries react much differently to gun-related tragedies. When Thomas Hamilton used two handguns in 1996 to kill sixteen children in Dunblane, Scotland, the British Parliament responded with legislation to ban all handguns over .22 caliber and to require that remaining guns be stored in heavily fortified shooting clubs.<sup>23</sup> In 1997, the House of Commons extended the ban to all handguns.<sup>24</sup>

Within twelve days after Australian Martin Bryant killed thirty-five persons in the "Port Arthur Massacre" using an American-made assault weapon, Australia's federal, state and territorial governments agreed to ban the possession and sale of all semiautomatic assault weapons, require gun registration and permits, create a twenty-eight day waiting period for weapons purchases, require firearms training by first-time applicants and impose minimum standards for the safe storage of guns and ammunition.<sup>25</sup> Prime

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20. See Adrienne T. Washington, *Unlocked guns are an open door to tragedy*, WASH. TIMES, Dec. 1, 1998, at C2.

21. See Westside Shooting Complaint *supra* note 1, at 6, ¶ 25.

22. Private citizens in the U.S. own approximately 223 million firearms, including 77 million handguns. See Mark D. Polston & Douglas S. Weil, *Unsafe By Design: Using Tort Actions To Reduce Firearm-Related Injuries*, 8 STAN. L. & POL'Y REV. 13, 14 (1997). Approximately 41% of all American households contain a firearm. See *id.*

23. See Carl Honore, *Britain's New Anti-Gun Law Could Silence Firing Ranges*, PATRIOT LEDGER, Feb. 17, 1997, at 18.

24. The House of Commons overwhelmingly (384-181) passed a bill on June 11, 1997 imposing a total ban on all handguns. See Fred Barbash, *Britain to ban ownership of all handguns*, SEATTLE TIMES, June 12, 1997, at A1. Under the law, British citizens are required to surrender their handguns in return for government compensation. See *id.* Rifles and shotguns may still be owned and possessed, if approved and licensed by the police. See *id.*

25. See Jeff Brazil & Steve Berry, *Australia's Answer To Carnage: A Strict Law*, L.A. TIMES, Aug. 27, 1997, at A1.

Minister John Howard said his most effective line in amassing public support for the law was “I don’t want Australia to go down the American path.”<sup>26</sup>

From many discussions with persons who are fond of guns, I have come to appreciate the reasons why many reasonable persons oppose confiscatory gun regulations like those imposed in Britain and Australia. However, I am unable to fathom why any reasonable person would object to a law requiring the safe storage of firearms.

CAP laws are a reasonable and feasible way to reduce all variety of gun tragedies that result from guns getting into the hands of unauthorized users. They do not constitute “gun confiscation.” They are not, as a newspaper editorial asserted, “a cynical attempt to cancel a constitutionally guaranteed right.”<sup>27</sup> Basically, a CAP law says to gun owners: You own a dangerous instrumentality that can be used to instantly end a human life. You must store it in a reasonably safe way. If you fail to do so and a child or other unauthorized user<sup>28</sup> gains possession of it and uses it to inflict harm, you will be held responsible.

As a teacher of law school courses in Torts and Products Liability, I view firearms in large part from a product safety standpoint. Every day in America courts allow juries to pass judgment on conduct that presents far less risk than leaving loaded firearms in places readily accessible to children.<sup>29</sup> Why would we *not* want to structure our laws to encourage persons to act prudently in safeguarding the most dangerous product legally available?

Although state CAP laws provide for criminal rather than civil liability, they apply a negligence test as the standard for liability. CAP laws criminalize the failure to act as a reasonable person in storing a firearm.<sup>30</sup>

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26. *See id.*

27. *Another Misguided Anti-Gun Bill; Owning A Gun Would Become Too Hazardous A Right*, SYRACUSE HERALD-JOURNAL, July 22, 1998, at A8.

28. Though aimed at children, CAP laws would have a beneficial ripple effect on gun violence in general. Proper gun storage would keep guns away from other unauthorized users, such as criminals and potential suicide victims. *See infra* notes 51-74 and accompanying text.

29. Examples supporting this proposition are as plentiful and diverse as the range of human experience. *See, e.g.,* *Larue v. Nat’l Union Elec. Corp.*, 571 F.2d 51 (1<sup>st</sup> Cir. 1978) (manufacturer liable when 11-year-old boy rode on vacuum cleaner as if it were toy car and got penis stuck in fan blades); *Jiminez v. Sears, Roebuck & Co.*, 482 P.2d 681 (Cal. 1971) (jury could conclude reasonable care required warning that ladder should not be used on soft ground); *Butz v. Werner*, 438 N.W.2d 509 (N.D. 1989) (warning should have been given of hazards involved in riding on an inner tube—marketed as the “Super Tube”—being pulled behind a boat, including: tube should not be pulled above a certain speed, tube would accelerate and arc around corners, riders would have no control over speed, and rider’s vision would be impaired by the spray of tube); *Ellington v. Coca Cola Bottling Co.*, 717 P.2d 109 (Okla. 1986) (woman who allegedly found piece of Good-N-Plenty candy in bottle of Coca-Cola and thought it was a worm entitled to recover damages for emotional distress).

30. Negligence and reasonableness standards are commonplace in criminal codes. A review of the Arkansas Code (selected because it is my state of residence) found that “negligence” and

Accordingly, Judge Learned Hand's classic formula for negligence provides a useful measuring stick for assessing the appropriateness of sanctioning gun owners who unreasonably allow unauthorized users to gain access to their guns. In *United States v. Carroll Towing Co.*,<sup>31</sup> Judge Hand laid down the

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"reasonableness" standards are employed in defining a wide variety of criminal offenses. *See e.g.*, ARK. CODE ANN. § 2-17-204 (Michie 1996) (misdemeanor to negligently violate statute that requires a license to issue warehouse receipts for grain); ARK. CODE ANN. § 3-4-405(a) (Michie 1996) (negligently allowing prostitutes or narcotics sellers in places where alcohol is served violates alcohol permit law); ARK. CODE ANN. § 4-99-110(c) (Michie 1996) (persons who control telephone solicitors who unlawfully solicit purchasers for a company not properly registered with state are guilty of misdemeanor unless they prove they "did not know and in the exercise of reasonable care could not have known" of existence of facts giving rise to liability); ARK. CODE ANN. § 5-3-402 (Michie 1997) (person who "knows or reasonably could expect" that one with whom he conspires is conspiring or will conspire with a third person is guilty of conspiring with the third person); ARK. CODE ANN. § 5-10-14(a)(4)A (Michie 1997) (person commits manslaughter if during the course of a felony he or an accomplice negligently causes the death of another person); ARK. CODE ANN. § 5-10-105(b)(1) (Michie 1997) (person commits negligent homicide if he negligently causes the death of another person); ARK. CODE ANN. § 5-13-203(a)(3) (Michie 1997) (person commits battery in the third degree if he negligently causes physical injury to another using a deadly weapon); ARK. CODE ANN. § 5-26-305(a)(3) (Michie 1997) (person commits domestic battery in the third degree if he negligently causes injury to a family or household member using a deadly weapon); ARK. CODE ANN. § 5-36-105(a)(3) (Michie 1997) (person commits theft of property by mistake if, with the purpose of depriving another of property, he fails to take "reasonable" measures to restore the property to a person entitled to it); ARK. CODE ANN. § 5-37-523(a)(2) (Michie 1997) (packagers of strawberries guilty of false representation if label or exposed surface does not "reasonably" represent size, quality and quantity of strawberries); ARK. CODE ANN. § 5-38-205 (Michie 1997) (person commits offense of impairing operation of a vital public facility if, having no "reasonable ground" to believe he has a right to do so, knowingly causes a substantial interruption or impairment of facility operations); ARK. CODE ANN. § 5-38-301 (Michie 1997) (person commits arson if he starts fire with purpose of damaging any property if the act negligently creates a risk of death or serious physical injury to another); ARK. CODE ANN. § 5-38-303(a) (Michie 1997) (person commits offense of failing to report or control a fire if he "fails to act in a reasonable manner" in controlling or reporting fire); ARK. CODE ANN. § 5-60-101 (Michie 1997) (person commits abuse of a corpse if he physically mistreats a corpse "in a manner offensive to person of reasonable sensibilities"); ARK. CODE ANN. § 9-9-502 (Michie 1997) (misdemeanor for employer to negligently allow employee to disclose confidential adoption information); ARK. CODE ANN. § 12-12-504 (Michie 1997) (misdemeanor to negligently fail to report suspected child maltreatment).

In *State v. Wilchinski*, 700 A.2d 1 (Conn. 1997), the defendant was convicted of violating the Connecticut CAP law after his 14-year-old son retrieved a loaded, unsecured Ruger .357 revolver from beneath a dresser and accidentally shot his playmate in the face, killing him. *See id.* at 3. The defendant mounted several constitutional challenges to the CAP law, including an argument that the statute impermissibly criminalizes conduct that is merely unreasonable. *See id.* The court rejected all of the challenges and upheld the constitutionality of the statute. *See id.* With respect to the argument that it is improper to criminalize violation of a reasonable person standard, the court noted that the Connecticut criminal code is "replete with references to reasonable conduct." *Id.* at 9.

31. *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

following formula for adjudging whether conduct is negligent: If the burden of avoiding a risk of injury (B) is less than the probability of the risk manifesting itself in injury (P) times the gravity of the injury if it does occur (L),<sup>32</sup> an actor is negligent for failing to take action to protect against the risk.<sup>33</sup> In algebraic terms, if  $B < P \times L$ , an actor is negligent.<sup>34</sup>

The burden (B) of safely securing firearms is the sum of three components: (1) The financial cost of a safety device such as a gun safe or trigger lock;<sup>35</sup> (2) the physical and mental effort required to keep the gun secure (*i.e.*, remembering and taking the time to lock and unlock the firearm in a safe storage container or to remove and install a trigger lock each time the product is used); and (3) the reduced utility of the gun for self defense purposes. The monetary cost ranges from five dollars for a trigger lock<sup>36</sup> to several hundred dollars for a large-capacity gun safe capable of storing numerous firearms.<sup>37</sup> The physical and mental effort required to keep a gun secure is small. At worst, it is an annoying, minor inconvenience. The time required to lock and unlock a firearm is less than that required to stop at a red light, a similarly common sense safety restriction the law requires us to abide by numerous times each day. The reduced utility of a secured gun for self-defense purposes caused by the extra seconds it might take to retrieve the gun in an emergency is, I argue below,<sup>38</sup> nonexistent.

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32. To my knowledge, no one has ever explained why Judge Hand used “L” rather than “I” to represent what he called “the injury.” See *id.* at 173. Perhaps he was thinking in terms of “loss.”

33. See *id.*

34. See *id.*

35. In the near future, a third option will be a safety investment in a firearm equipped with “smart gun” technology, which is technology that prevents firearms from being discharged by anyone other than the authorized user. See *infra* note 116 (discussing smart gun technology). Smart gun technology currently is expected to add from \$200 to \$300 to the price of a firearm. See Leslie J. Nicholson, *Smart Guns Touted As Tools To Avert Tragedies; New Weapons Are Designed To Fit Owner*, ARIZ. REPUBLIC, July 3, 1998, at A33. However, this figure can be expected to decline, especially if the tort system or government regulation generates competition by creating demand for the technology. Prototype airbags in automobiles cost \$20,000. See Scott Shane, *Taking Aim at the Gun as Threat to Public Health*, BALTIMORE SUN, May 29, 1994, at 1A. Now they cost about \$200. See *id.*

36. See Matt Bai, *Targeting Gun Makers: Tired of Sparring with the NRA, Victims and Gun-Control Lobbyists Have Begun to Sue the Industry*, NEWSWEEK, Apr. 13, 1998, at 37 (quoting Bobby McDaniel, lawyer for the Jonesboro victims, stating that a five dollar trigger lock could have prevented the tragedy).

37. See AMERICAN RIFLEMAN, OFFICIAL J. OF THE NAT’L RIFLE ASS’N OF AMERICA, Nov./Dec. 1997, at 63 (advertisement for gun safe “Ranked #1 in *Gun Test* ‘90 & ‘91,” weighing 500 pounds and costing \$749.95). The monetary cost of safe storage would be nonexistent if gun owners simply kept their firearms in locked closets or drawers. However, I believe CAP laws would be more effective if structured to encourage gun owners to use safe storage devices specifically designed for securing firearms.

38. See *infra* notes 142-54 and accompanying text.

On the other side of the equation, (P), the probability of guns being used to kill or inflict serious injury (either intentionally, accidentally or by suicide) and (L), the gravity of the resulting injury, are substantial. The human cost of firearms in America is staggering: 34,040 deaths in 1996<sup>39</sup> and an estimated 100,000 non-fatal injuries annually.<sup>40</sup>

In monetary terms, the economic impact of firearm violence measured by health costs and lost wages is tremendous. A commentator recently assembled these relevant statistics:

In 1990, firearm injuries cost society approximately \$20.4 billion. A 1992 study estimated the overall cost of firearm-related injury and death at \$63.4 billion . . . . The CDC [Centers for Disease Control and Prevention] estimates the average cost per firearm fatality at \$373,000, the highest of any injury-related death. While public sources finance approximately twenty-eight percent of the cost of all injuries, approximately eighty percent of the economic cost of treating firearm injuries is financed by taxpayers.<sup>41</sup>

These costs do not take into account many other losses stemming from gun violence, including: (1) the mental and physical pain and suffering of victims, relatives and friends; (2) the lost productivity of victims and the family members who care for them; (3) funeral costs; (4) police and judicial resources; and (5) the substantial psychological insecurity we all suffer from living in a gun-infested society.

Any reasoned cost-benefit analysis supports the conclusion that gun owners who fail to take reasonable steps to secure their weapons have acted wrongly and should be subject to legal sanctions.

### III. CAP LAWS CAN BE EXPECTED TO WORK

The benefit from CAP laws is clear and direct. By keeping guns out of the hands of unauthorized users, CAP laws should prove effective at reducing all types of gun violence: accidental shootings, intentional third-party shootings and suicides.

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39. See Roberto Suro, *Cities Plan Legal Assault On Makers of Handguns; Tobacco Lawsuits Viewed as Model*, WASH. POST, Dec. 23, 1998, at A1. The most recent full year for which figures are available is 1996.

40. See Polston & Weil, *supra* note 22, at 14 (citing estimate of 99,000 non-fatal injuries in 1992).

41. Benjamin Bejar, Note, *Wielding the Consumer Protection Shield: Sensible Handgun Regulation In Massachusetts A Paradigm for National Model?*, 7 B.U. PUB. INT. L.J. 59, 65-66 (1998).

A. *Accidental Shootings.*

Florida was the first state to pass a CAP law in 1989.<sup>42</sup> The next year accidental shootings plummeted fifty percent.<sup>43</sup> While post hoc, ergo propter hoc<sup>44</sup> reasoning is treacherous, such a dramatic decline suggests a correlation between the CAP law and the reduction in unintentional shootings.

More reliable evidence that CAP laws reduce accidental firearm deaths comes from an article published in the October 1997 issue of the *Journal of the American Medical Association* (JAMA).<sup>45</sup> A study by two physicians of the effects of CAP laws in twelve states concluded that “unintentional firearm-related deaths among children younger than 15 years were 23% lower than expected.”<sup>46</sup> Again, one needs be careful of post hoc logic. It is certainly possible that causes other than CAP laws contributed to the lower death rates.

However, the authors offered several reasons for attributing the reduced death rates to the CAP laws: (1) the effect was strongest among those specifically covered by the laws—children;<sup>47</sup> (2) the effect was strongest for the outcome the laws were designed to prevent—unintentional shootings;<sup>48</sup> (3) the states with CAP laws are from all regions of the country and do not appear to share a set of common features other than that they all have safe storage laws;<sup>49</sup> and (4) the overall estimated change in mortality was based on a comparison within each state before and after the law took effect, so that differences between the CAP law states and other states cannot account for the results.<sup>50</sup>

While not conclusive, this evidence strongly suggests what common sense tells us: when guns are kept locked up, children are not able to use them as frequently to kill themselves or others accidentally.

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42. See Charles Hurt & Mark Puls, *Guns and kids: Nation plays blame game after Jonesboro: Some cite society's 'romance' with weapons*, DETROIT NEWS, Apr. 5, 1998, at A1. See *infra* note 78 for citation to Florida statute.

43. See Bill Duryea, *Fully Responsible, Nearly Destroyed*, ST. PETERSBURG TIMES, June 28, 1998, at 1F.

44. This latin phrase translates to “after this, therefore because of this” and refers to the logical fallacy of thinking that a later event was caused by an earlier event simply because it happened after the earlier event. See WEBSTER'S NEW WORLD DICTIONARY 1054 (3d ed. 1988).

45. Peter Cummings & Frederick P. Rivara, *State Gun Safe Storage Laws and Child Mortality Due to Firearms*, 278 J.A.M.A. 1084 (1997).

46. *Id.* at 1085. The authors studied states in which a CAP law had been in effect for at least one year from 1990 through 1994.

47. See *id.*

48. See *id.*

49. See *id.*

50. See *id.* at 1085-86.

*B. Intentional Third-Party Shootings.*

Although aimed primarily at preventing accidental shootings by children, CAP laws would also prevent some intentional shootings, by both children and adults. Unauthorized users acquire millions of guns by theft.<sup>51</sup> The FBI's *National Crime Victimization Survey Report* estimates that 5,482,720 burglaries occurred in 1994.<sup>52</sup> From 1985 to 1994, an annual average of 274,000 firearms were reported stolen to the FBI.<sup>53</sup> By definition, all stolen guns fall into the wrong hands. If CAP laws motivated only half of all gun owners to securely store their firearms, criminals would have roughly 137,000 fewer guns at their disposal each year.<sup>54</sup>

Large numbers of stolen guns are used in crimes. Precise figures are unavailable because firearms tracing in the United States has historically been meager. However, tracing received a major boost in 1995 when President Clinton launched the Youth Crime Gun Interdiction Initiative (YOGI).<sup>55</sup> YOGI set up a national database to trace guns confiscated at crime scenes for the purpose of determining the original sources of guns used in crime.<sup>56</sup> The program began in 1995 with seventeen cities and has since been expanded to twenty-seven cities.<sup>57</sup> Under the program, the Bureau of Alcohol, Tobacco and Firearms (ATF) attempts to trace all confiscated guns back to the original buyer.<sup>58</sup> In February 1999, the ATF released a tracing analysis of 76,260 guns used in crimes in the twenty-seven cities by persons ages eighteen to twenty-four during the past three years. The study found that 35 percent of the guns had been stolen from private residences or gun dealers.<sup>59</sup>

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51. The FBI's National Crime Information Center contained more than two million reports of stolen guns as of March 1995. See MARIANNE W. ZAWITZ, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, GUNS USED IN CRIME, NCJ-148201, at 3 (1995).

52. See CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1994, A NATIONAL CRIME VICTIMIZATION SURVEY REPORT, BUREAU OF JUSTICE STATISTICS, at 58.

53. See Zawitz, *supra* note 51, at 3.

54. This figure is not precisely accurate, since several guns may be stolen from one negligent owner.

55. See Mark Johnson, *In Memphis, armed youths see 'the gun people'; Police start cracking down, tracking down firearm sales*, SUNDAY GAZETTE MAIL, Sept. 27, 1998, at 8A.

56. See *id.*

57. See *id.*

58. See *id.* The number of tracing requests received by the ATF jumped from 80,042 in 1995 to 194,235 in 1997. See *id.*

59. Debbi Wilgoren, *Report Traces Guns Used in Crimes; D.C. Offenders Increasingly Getting Weapons From Beyond Area*, WASH. POST, Feb. 22, 1999, at B01. The study determined that half of the traced guns were purchased from licensed dealers in "straw" transactions in which persons acting as intermediaries purchased the guns and gave them to others. See *id.* In releasing the report, the Clinton administration called for 10 more cities to be included in the YOGI program. See *id.*

Moreover, the United States Department of Justice has collected the following figures concerning stolen gun use:

- The 1991 Survey of State Prison inmates showed 9% of inmates who had possessed guns acquired them through theft; 10% had stolen at least one gun and 11% had sold or traded one stolen gun.<sup>60</sup>
- Studies of adult and juvenile offenders by the Virginia Department of Criminal Justice Services in 1992-93 found 15% of adult offenders and 19% of juvenile offenders had stolen guns; 16% of adults and 24% of juveniles had kept a stolen gun; and 20% of adults and 30% of juveniles had sold or traded a stolen gun.<sup>61</sup>
- A sampling survey of juvenile inmates in four states found more than 50% had stolen at least one gun and 24% had stolen their most recently possessed handgun.<sup>62</sup>

In the Jonesboro case, Mitchell Johnson and Andrew Golden obtained the rifles they used in the killings by breaking into their grandfather's house.<sup>63</sup> Had the guns been secured in a gun safe or with trigger locks, the two killers would have been unable to use the guns in the shootings. I am not suggesting shifting responsibility from the guilty to the innocent. The two boys are murderers. I support punishing them and all other violent criminals severely. However, the law has long recognized that an event may have more than one legal cause.<sup>64</sup>

Gun advocates might label the suggestion that they owe a duty to protect their weapons against theft from burglars as extreme. However, that is only because our national mindset has traditionally been overwhelmingly lax with regard to the safety and care we expect from possessors of firearms. Israel is often touted by pro-gun forces as an example of a country with high firearm density that has been successful in keeping firearm violence rates among its citizens low. However, private gun ownership in Israel is more restrictive than in the United States. Israeli law requires that gun owners report stolen weapons to the police within twenty-four hours of the theft.<sup>65</sup> Even then, owners are subject to prosecution for a misdemeanor offense of "negligence in keeping a firearm."<sup>66</sup>

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60. See Zawitz, *supra* note 51, at 3.

61. See *id.*

62. See *id.*

63. See Westside Shooting Complaint, *supra* note 1, at 6, ¶ 26.

64. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.12, 280 (2d ed. 1986) (stating there may be more than one legal cause under criminal law).

65. See Abraham N. Tennenbaum, *Israeli Gun Laws and Their Impact* (a paper presented at the 1991 meeting of the American Society of Criminology), reprinted in GUN CONTROL (David L. Bender et al. eds. 1992), at 248.

66. See *id.*

With more than five million burglaries occurring annually,<sup>67</sup> it is easily foreseeable that a person will break into a house and steal firearms. Gun owners have an obligation to secure their firearms to keep them away from dangerous persons.

### C. *Suicides.*

Safe storage of firearms would also reduce suicides. Suicide is the fifth leading cause of death among children ages five to fourteen and the third leading cause of death among children ages fifteen to twenty-four.<sup>68</sup> Since firearms provide the quickest, easiest and most certain means of killing one's self, it is not surprising they are used in sixty-one percent of all suicides.<sup>69</sup> Only a firearm grants an instant means to end life to a brooding teenager sitting at home in a temporary fit of despair because his girlfriend broke up with him.<sup>70</sup>

A person truly dedicated to the idea of suicide may be able to find another method by which to commit the act, but suicidal thoughts are often transitory, especially in youths.<sup>71</sup> Experts point to the "deadly combination of impulse and means" as a cause of many teen suicides.<sup>72</sup> Studies show that many suicidal teenagers, unlike older adults, lack a real determination to end their lives. "The urge may well be with them for five minutes and then subside, as if it were a childish threat to run away from home. That can be five minutes too long if a gun is in reach."<sup>73</sup> Preventing access to firearms by suicidal children would be likely to prevent some suicides.<sup>74</sup>

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67. See *supra* note 52 and accompanying text.

68. See Jennifer Brett, *Stopping Suicide: Education is key, widow says*, ATLANTA CONST., Nov. 19, 1998, at 12JM.

69. See *id.*

70. See, e.g., Jim Auchmutey, *Living With Death; Reading and recting to the warning signs*, ATLANTA CONST., Oct. 12, 1998, at C09 (describing incident where teenage girl, upset over breakup with boyfriend, shot herself in head with gun kept next to boyfriend's bed).

71. See Virginia Anderson, *Teenage suicide catastrophic, not romantic; Double tragedy: The deaths of two Carroll County students should remind people of the danger of romanticizing death and suffering, experts say*, ATLANTA CONST., Jan. 10, 1999, at 12F ("teenagers—and some adults—see suicide as a temporary solution to an immediate pain").

72. Auchmutey, *supra* note 70, at 1C.

73. *Id.* (discussing views of Mark Rosenberg, director of the Centers for Disease Control National Center for Injury Prevention and Control). Rosenberg notes that almost all of the increase in teen suicides is attributable to firearms. See *id.*

74. See *id.* (quoting Alan Berman, director of the American Association of Suicidology: "No one is saying get rid of all the guns, but if we just stored them safely, we could prevent a lot of suicides.").

#### IV. ANALYSIS OF STATE CAP LAWS AND COMPARISON TO PROPOSED FEDERAL BILLS

Fifteen states have CAP laws: California,<sup>75</sup> Connecticut,<sup>76</sup> Delaware,<sup>77</sup> Florida,<sup>78</sup> Hawaii,<sup>79</sup> Iowa,<sup>80</sup> Maryland,<sup>81</sup> Minnesota,<sup>82</sup> Nevada,<sup>83</sup> New Jersey,<sup>84</sup> North Carolina,<sup>85</sup> Rhode Island,<sup>86</sup> Texas,<sup>87</sup> Virginia<sup>88</sup> and Wisconsin.<sup>89</sup>

##### A. Operative Provision.

The state CAP laws are similar to one another in their core provisions. Most of the statutes make it a crime for a gun owner to store a loaded firearm in a manner in which he knows or reasonably should know a child may gain access to the weapon. If a child does gain access to the gun and uses it to inflict injury or death upon herself or another person, the gun owner is criminally responsible.<sup>90</sup> The proposed federal bills use similar language, making it an offense for a gun owner who “knows, or reasonably should know, that a juvenile is capable of gaining access to the firearm without the permission of a parent or legal guardian of the juvenile” to allow the juvenile to obtain access to the firearm, if the juvenile uses it to cause death or serious bodily harm or exhibits it in a public place.<sup>91</sup>

Nevada’s statute is an aberration.<sup>92</sup> Although included in lists of state CAP laws, the Nevada statute is not a criminal safe storage statute, but a civil liability statute concerned with the negligent entrustment of firearms to minors. The statute imposes parental liability for the negligence or willful misconduct

75. CAL. PENAL CODE §12035 (West 1992 & Supp. 1998).

76. CONN. GEN. STAT. ANN. § 29-37i (West 1990 & Supp. 1998).

77. DEL. CODE ANN. tit. 11, §1456 (1995).

78. FLA. STAT. ANN. § 784.05 (West 1992 & Supp. 1998).

79. HAW. REV. STAT. § 134-10.5 (1993).

80. IOWA CODE § 724.22 (1993).

81. MD. ANN. CODE art. 27, § 36K (1992).

82. MINN. STAT. ANN. § 609.666 (1987 & Supp. 1998).

83. NEV. REV. STAT. § 41.472 (1996).

84. N.J. STAT. ANN. § 2C:58-15 (West 1995).

85. N.C. GEN. STAT. § 14-315.1 (1993 & Supp. 1997).

86. R.I. GEN. LAWS §11-47-60.1 (1994 & Supp. 1997).

87. TEX. PENAL CODE ANN. § 46.13 (West 1995 & Supp. 1997).

88. VA. CODE ANN. §18.2-56.2 (Michie 1996).

89. WIS. STAT. § 948.55 (1996).

90. The proposed federal bills are broader, subjecting gun owners to penalties if the minor uses the gun to cause death or bodily injury or exhibits it in a public place. *See supra* note 16 at (4). North Carolina’s statute is also more expansive, making it a crime to allow a minor to gain access to a firearm if the minor causes death or injury, possesses it illegally, exhibits it in a public place in a careless, angry or threatening manner or uses it in the commission of a crime. *See* N.C. GEN. STAT. § 14-315.1(a) (1-4).

91. *See supra* note 16 at (4).

92. *See* NEV. REV. STAT. § 41.472.

of a child in the use of a firearm if the parent has allowed the child to use the firearm: (1) knowing the minor has been convicted of a prior criminal offense or adjudicated delinquent; (2) knowing the minor has a propensity for violent acts; (3) or knowing or having reason to know the minor intends to use the firearm unlawfully.<sup>93</sup>

All of the state CAP statutes except for Hawaii's<sup>94</sup> expressly limit liability to *loaded* firearms. North Carolina's statute provides for criminal prosecution where the firearm was left "in a condition that the firearm can be discharged,"<sup>95</sup> which reasonably could be construed to include unloaded guns stored with ammunition.

Limiting responsibility to loaded firearms is an unwarranted restriction. A firearm left unloaded next to a box of ammunition is just as dangerous as an already loaded gun to most unauthorized users above the age of toddler. Experts as diverse as the American Academy of Pediatrics and the Sporting Arms and Ammunitions Manufacturers' Institute recommend that guns be stored unloaded and kept separate from ammunition.<sup>96</sup> The proposed federal bills prudently take a stronger approach than the state CAP laws in covering any "loaded firearm, *or an unloaded firearm and ammunition for the firearm.*"<sup>97</sup>

#### B. Class Protected.

The definition of "minor" or "child"—that is, the class intended to be protected by CAP laws—varies from state to state. At the low end of the age spectrum, the Iowa, Virginia and Wisconsin statutes cover only children under fourteen years of age.<sup>98</sup> The CAP laws in California, Connecticut, Florida, Hawaii, Maryland, New Jersey and Rhode Island apply to children under sixteen years of age.<sup>99</sup> The Texas statute applies to children under seventeen.<sup>100</sup> The statutes in Minnesota, Nevada and North Carolina apply to

93. See NEV. REV. STAT. § 41.472(1)(a)-(c).

94. See HAW. REV. STAT. § 134-10.5. The Hawaii statute states, "No person shall store or keep any firearm . . . if the person knows . . . that a minor is likely to gain access to the firearm." *Id.* The language "any firearm" implies that the statute includes loaded and unloaded firearms.

95. N.C. GEN. STAT. § 14-315.1(a)(1).

96. See Polston & Weil, *supra* note 22, at 14.

97. See *supra* note 16 at (4) (emphasis added).

98. See IOWA CODE ANN. § 724.22(7); VA. CODE ANN. § 18.2-56.2(A); WIS. STAT. § 948.55(1).

99. See CAL. PENAL CODE § 12035(a)(3); CONN. GEN. STAT. ANN. § 29-37i(2); FLA. STAT. ANN. § 784.05(4); HAW. REV. STAT. § 134-10.5(2); MD. ANN. Code art. 27 § 36K(a)(3); N.J. STAT. ANN. § 2C:58-15(c); R.I. GEN. LAWS § 11-47-60.1(B).

100. See TEX. PENAL CODE ANN. § 46.13(a)(1).

children under eighteen.<sup>101</sup> The Delaware statute contains no express age limit, referring only to “minors.”<sup>102</sup>

Again, the proposed federal bills take a wiser approach than most of the state statutes, applying to children under age eighteen.<sup>103</sup> Federal law prohibits the sale of any firearm to a person under eighteen,<sup>104</sup> reflecting a legislative judgment (as if common sense were not enough) that the unsupervised use of firearms by persons under eighteen years old is a bad idea. Eighteen is an appropriate age limitation for a CAP law.

### C. Penalties.

In all but three states, violations of CAP laws are misdemeanors.<sup>105</sup> Only California, Connecticut, and Florida classify violations as felonies.<sup>106</sup> As noted, the Nevada statute is a civil liability statute.<sup>107</sup> The proposed federal bills would also treat violations as misdemeanors, authorizing a maximum penalty of not more than one year imprisonment, a \$10,000 fine, or both.<sup>108</sup> The difference in penalties may be significant because the JAMA study<sup>109</sup> concluded that safe storage laws with felony penalties “appeared to have a stronger effect” in reducing unintentional shootings than those providing for only misdemeanor penalties.<sup>110</sup> This conclusion makes good logical sense if one accepts the basic precept of criminal punishment that greater penalties result in greater deterrence.<sup>111</sup>

101. See MINN. STAT. ANN. § 609.666(1)(b); NEV. REV. STAT. § 41.472(1); N.C. GEN. STAT. § 14-315.1(d).

102. See DEL. CODE ANN. tit. 11, § 1456(a). A review of the Delaware code did not disclose any general definition of “minor.”

103. See *supra* note 16, at (4).

104. Eighteen is the minimum age to purchase a long-gun (*i.e.*, rifle or shotgun); twenty-one is the minimum age to purchase a handgun. See 18 U.S.C. § 922(b)(1) (Supp. 1998).

105. See DEL. CODE ANN. tit. 11, § 1456(c); HAW. REV. STAT. § 707-714.5(3); IOWA CODE ANN. § 724.22(7); MD. ANN. CODE art. 27 § 36K(e); MINN. STAT. ANN. § 609.666(2); NEV. REV. STAT. § 41.472(1); N.J. STAT. ANN. § 2C:58-16(a)-(b); N.C. GEN. STAT. § 14-315.1(a)(ii); R.I. GEN. LAWS § 11-47-60.1(B); TEX. PENAL CODE ANN. § 46.13(d); VA. CODE ANN. § 18.2-56.2(B); WIS. STAT. § 948.55(2).

106. See CAL. PENAL CODE § 12035 (d)(1); CONN. GEN. STAT. ANN. § 53a-217a(c); FLA. STAT. ANN. § 784.05(3).

107. See *supra* notes 92-93 and accompanying text.

108. See *supra* note 16 at (4).

109. See Cummings & Rivara, *supra* note 45.

110. See *id.* at 1086.

111. See Kent Greenawalt, *Punishment*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1336, 1340-41 (1983) (“Knowledge that punishment will follow crime deters people from committing crimes . . . . [G]eneral deterrence was very much a matter of affording rational self-interested persons good reasons not to commit crimes. With a properly developed penal code, the benefits to be gained from criminal activity would be outweighed by the harms of punishments . . . . To deter an offender from repeating his actions, a penalty should be severe enough to outweigh in his

#### D. Defenses.

Responsible gun owners have nothing to fear from CAP laws. One is subject to prosecution under a CAP law only if she acts *unreasonably* in allowing a child to gain access to a firearm.<sup>112</sup> CAP laws are not strict liability statutes. Persons who conform their conduct to an objective standard of reasonableness in connection with the storage of their guns will not run afoul of CAP laws.

As a teacher of tort law who appreciates all too well the vagaries of negligence analysis, I confess that—were I a gun owner—I might be uneasy about the potential for criminal sanctions based on a hindsight application of the variable “reasonable person” standard. However, CAP laws provide several explicit, reliable defenses to gun owners that should allay this concern.

Most importantly, many state CAP statutes create a “safe storage” defense for gun owners who keep their firearms secured either in a safe storage box, such as a gun safe,<sup>113</sup> or with a trigger lock.<sup>114</sup> The proposed federal bills include a similar defense. They would not apply if the gun was installed with “a device that . . . is designed to prevent the firearm from being operated without first deactivating or removing the device”<sup>115</sup> or was kept in “a safe, gun safe, gun case, lock box, or other device that is designed to be or can be used to store a firearm and that is designed to be unlocked only by means of a key, a combination, or other similar means.”<sup>116</sup>

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mind the benefits of the crime.”); LAFAVE & SCOTT, *supra* note 60, §1.5, 25 (magnitude of threatened punishment is a factor in deterrence).

112. See *supra* notes 90-91 and accompanying text.

113. See CAL. PENAL CODE § 12035(c)(2); CONN. GEN. STAT. ANN. § 29-37i(1); DEL. CODE ANN. tit. 11, § 1456(b)(1); FLA. STAT. ANN. § 784.05(3)(a); HAW. REV. STAT. § 134-10.5(1); IOWA CODE ANN. § 724.22(7); N.J. STAT. ANN. § 2C:58-15(a)(1); R.I. GEN. LAWS § 11-47-60.1(C)(2); WIS. STAT. § 948.55(4)(a).

114. See CAL. PENAL CODE § 12035(c)(4); FLA. STAT. ANN. § 784.05(3)(a); IOWA CODE ANN. § 724.22(7); N.J. STAT. ANN. § 2C:58-15(a)(3); R.I. GEN LAWS § 11-47-60.1(C)(4); WIS. STAT. § 948.55(4)(b).

115. See *supra* note 16 at (4).

116. *Id.* The federal bills include a third safety option protecting gun owners from legal responsibility. The proposed federal CAP law would not apply if the gun is equipped with “a device incorporated into the design of the firearm that is designed to prevent the operation of the firearm by anyone not having access to the device.” *Id.* This provision is a reference to so-called “smart gun” technology; that is, design features in firearms that would “personalize” guns to make it impossible for anyone other than authorized users to discharge them. Smart gun technology is currently available. In 1994, the National Institute of Justice bestowed a grant upon Sandia Laboratories of New Mexico to review fourteen competing technologies for personalizing firearms. See J. Taylor Buckley, “Smart Guns”: A Safe Alternative?, USA TODAY, Sept. 18, 1996, at 5B. At least 100 patents already have been issued for smart gun technology. See Nicholson, *supra* note 35, at A33.

Colt Manufacturing Company, one of the nation’s most venerable gun manufacturers, deserves credit for pursuing smart gun technology. Colt has almost completed a second prototype

Gun owners who adhere to one of these simple, reasonable means for safeguarding their firearms can avoid being subject to a post hoc analysis of whether their conduct was “reasonable.” If, for example, children managed to break into a properly secured gun safe and retrieve a firearm, the gun owner would not be responsible for any harm that ensued.

A troublesome question is whether a safe storage defense should confer absolute immunity from prosecution or whether the defense should be unavailable where the gun owner negligently stores the key or combination to a trigger lock or gun safe, allowing a child to gain access to the gun despite the security precaution. Negligent storage of the key or combination is nearly as bad as no locked storage at all. For example, a locked gun safe with a key sitting on top of it provides little protection to anyone. Under tort law, gun owners may be found liable for negligently concealing the means for accessing a secured gun.<sup>117</sup>

As a matter of public policy, it may be a worthwhile tradeoff to make compliance with a statutorily approved safe storage method an absolute, bright line defense for gun owners. Immunity in such situations would have at least two advantages. First, the safe storage defense has the most direct connection to advancing the goal of CAP laws: encouraging gun owners to keep their

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of a personalized gun for use by law enforcement officers. See Gordon Witkin, *Childproofing Guns A Novel Legal Strategy Focusing On Safety Poses A Threat To Manufacturers*, U.S. NEWS & WORLD REP., June 22, 1998, available in 1998 WL 8126880. Sixteen percent of murdered police officers are killed with their own weapons. See *id.*

The prototype relies on the weapon’s ability to recognize radio waves sent by a transponder worn by the authorized user. See *id.* Former Colt President Ron Stewart wrote in a firearms industry publication that gun manufacturers should “take the high ground and pre-empt the next strike [by pro-gun control forces].” *Id.* “If we can send a motorized computer to Mars,” Stewart said, “then certainly we can advance our technology to be more childproof.” *Id.* Current Colt president Steven Sliwa recently stated that developing and marketing a smart gun was his highest priority. See Melissa Healy, ‘Smart’ Weapon Shoots Holes In Gun Rift, L.A. TIMES, Oct. 22, 1998, at A1.

Although it will probably be several years before personalized guns are generally available to the public, they hold great promise to reduce gun-related deaths and injuries by unauthorized users. By making it a defense to own a gun that incorporates “smart gun” technology, the proposed federal CAP law would give gun manufacturers an incentive to develop and implement the technology. Currently, gun manufacturers have little incentive to make their products safer because the Consumer Products Safety Commission, the only federal agency that regulates the safety of consumer products, is expressly prohibited by statute from regulating firearms. See 15 U.S.C. § 2052(a)(1)(E) (1994) (excluding firearms from the definition of consumer products).

117. See, e.g., *Reida v. Lund*, 96 Cal. Rptr. 102 (Cal. Ct. App. 1971) (reversing summary judgment for defendant parents where 16-year-old son retrieved Mauser military rifle from locked cabinet with key kept in location known to son and used rifle to kill motorists on highway); *Seabrook*; *Spivey v. Sheeler*, 514 S.W. 2d 667, 672-73 (Ky. Ct. App. 1974) (reasonable persons could find negligence in storing .25 caliber pistol in locked gun cabinet where son had access to key and used gun to accidentally shoot playmate).

weapons under lock and key. Second, an absolute defense would appease the concerns of responsible gun owners by giving them a concrete, reliable way to ensure protection from prosecution. An absolute immunity would protect some gun owners who do not deserve protection; *i.e.*, those who negligently store the means for accessing their locked guns. However, that is a regrettable side effect of all bright line rules.

State CAP laws include several other defenses for gun owners. The most commonly listed defense, included in eleven statutes,<sup>118</sup> is the “illegal entry” defense, which protects gun owners where a child gains access to a firearm as a result of a burglary or other unlawful entry. The federal bills do not expressly include an illegal entry defense, but confer largely the same protection by making it a defense if the gun owner “has no reasonable expectation, based on objective facts and circumstances, that a juvenile is likely to be present on the premises on which the firearm is kept.”<sup>119</sup> Thus, a gun owner without children and lacking reason to believe children will be on the premises could not be prosecuted if a minor burglarized the owner’s house and stole an unsecured firearm.

The “illegal entry” defense gives more protection to gun owners than they need or deserve.<sup>120</sup> With more than five million burglaries annually,<sup>121</sup> gun thefts are readily foreseeable events. More than a quarter million firearms are reported stolen each year.<sup>122</sup> Because gun owners know or should know that firearms are prime targets for foreseeable thieves, it is reasonable to expect them to take precautions against theft by storing their guns safely. Safe storage laws should be structured to give all gun owners, even those without children, an incentive to keep their guns locked up. Adequate protection against unwarranted criminal liability is afforded to gun owners by the “safe storage” defense included in many state statutes and the proposed federal CAP law, which confers immunity from prosecution if the gun was properly stored in a lock box or with a trigger lock installed.<sup>123</sup>

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118. See CAL. PENAL CODE § 12035(c)(1); DEL. CODE ANN. tit. 11, § 1456(b)(2); FLA. STAT. ANN. § 784.05(3)(b); HAW. REV. STAT. § 707-714.5(2); MD. ANN. CODE art. 27 § 36K(c)(2); MINN. STAT. ANN. § 609.666(3); N.J. STAT. ANN. § 2C:58-15(b)(2); N.C. GEN. STAT. § 14-315.1(c); R.I. GEN. LAWS § 11-47-60.1(C)(1); TEX. PENAL CODE ANN. § 46.13(c)(3); WIS. STAT. § 948.55(4)(e).

119. See *supra* note 16 at (4).

120. See *supra* notes 51-66 and accompanying text (discussing foreseeability of gun thefts and number of stolen guns used for criminal purposes).

121. See *supra* note 52 and accompanying text.

122. See *supra* note 53 and accompanying text.

123. See *supra* notes 113-17 and accompanying text (discussing safe storage defense incorporated into several state CAP laws and proposed federal law).

Perhaps the most ill-advised defense to a CAP law violation, which is incorporated in six state statutes,<sup>124</sup> is what can be called the “close proximity” defense. The California statute is representative. It states that no criminal responsibility shall result from a child gaining access to a firearm in instances where “[t]he firearm is carried on the person or within such a close proximity thereto so that the individual can readily retrieve and use the firearm as if carried on the person.”<sup>125</sup> The purpose of such an exception is assumably to facilitate the use of guns for self-defense by allowing them to be carried on one’s person or kept unlocked in an easily accessible location such as a bedside table.

This defense undermines the very purpose of safe storage statutes. An exception that encourages gun owners to leave unlocked loaded guns lying around the house or in automobiles is an unwise one. It will predictably lead to more gun tragedies because even the most careful gun owners are not going to be attentive one hundred percent of the time.<sup>126</sup> As argued below, keeping guns locked up at all times does not undermine the ability of a gun owner to use a firearm effectively for self-defense.<sup>127</sup> The proposed federal CAP laws prudently omit a “close proximity” exception.

Other miscellaneous defenses recognized by state cap laws include: (1) where the gun owner is a law enforcement officer, member of the armed forces or national guard and the child obtains the firearm during, or incidental to, the performance of these official duties (four states);<sup>128</sup> (2) where the injury inflicted by the child occurs during a hunting or sporting accident (two states);<sup>129</sup> (3) where the child uses the weapon in self-defense or defense of others (two states);<sup>130</sup> and (4) where the minor has passed a firearm safety

124. See CAL. PENAL CODE § 12035(c)(3); CONN. GEN. STAT. ANN. § 29-37i(2); HAW. REV. STAT. § 134-10.5(2); N.C. GEN. STAT. § 14-315.1(b); R.I. GEN. LAWS § 11-47-60.1(C)(3); WIS. STAT. § 948.55(4)(c).

125. CAL. PENAL CODE § 12035(c)(3).

126. As one newspaper columnist observed:

[P]eople get busy. Once the newness of carrying a gun wears off, the firearm becomes commonplace. . . . Most of us spend a relatively small percentage of our time repelling armed marauders. The rest of the day is devoted to earning a living, grocery shopping, getting the kids to soccer practice and satisfying the innumerable demands of daily life. During this hectic swirl, the gun becomes just one more item – like your car keys or eye glasses – to be mislaid, lost or forgotten.

Guzy, *supra* note 2, at B7.

127. See *infra* notes 142-54 and accompanying text.

128. See CAL. PENAL CODE § 12035(c)(5); FLA. STAT. ANN. § 784.05(3)(d); MD. ANN. CODE art. 27 § 36K(c)(3); WIS. STAT. § 948.55(4)(d).

129. See DEL. CODE ANN. tit. 11, § 1456(b)(3); FLA. STAT. ANN. § 784.05(3)(c).

130. See R.I. GEN. LAWS § 11-47-60.1(C)(5); TEX. PENAL CODE ANN. § 46.13(c)(2).

course (one state).<sup>131</sup> Only the Virginia statute does not list any express defenses.<sup>132</sup>

*E. Notice provisions.*

The goal of CAP laws is the prevention of firearm deaths by children, not the punishment of gun owners. Thus, one of the most desirable features of a CAP law is a requirement that warnings about the law be distributed to gun purchasers and prominently displayed in all establishments where firearms are sold. Education and reminders of the potential for criminal penalties are likely to enhance the deterrent effect of CAP laws. Five states currently require such warnings.<sup>133</sup>

The New Jersey notice provisions provide a good model to follow. The New Jersey safe storage statute requires gun purchasers be provided with this warning: "IT IS A CRIMINAL OFFENSE, PUNISHABLE BY A FINE AND IMPRISONMENT, FOR AN ADULT TO LEAVE A LOADED FIREARM WITHIN EASY ACCESS OF A MINOR."<sup>134</sup> The statute requires retail and wholesale firearms sellers to conspicuously display a similar warning.<sup>135</sup>

The pending federal bills contain a notice provision of sorts in requiring that a copy of the CAP statute appear on the firearm transaction form that licensed dealers are required to obtain from transferees.<sup>136</sup> However, simply reprinting the statute on a form is unlikely to deliver effective notice. Like all other legalese in fine print, it will not draw the attention this information requires. The federal bills should be amended to require that clear and conspicuous notice be given to gun purchasers and posted on the premises of all firearms sellers.

*F. Parental Suffering and Prosecutorial Discretion.*

One objection to CAP laws is that criminal prosecutions would aggravate an already terrible situation where the defendant is the parent or other family member of a child who has been killed in an accidental shooting. As a parent, I can imagine no greater punishment than the knowledge that one contributed irresponsibly to the death of his or her child. Three state CAP laws take this concern into consideration by providing that no arrest can be made of a victim's family member until seven days after the shooting incident.<sup>137</sup> Such a

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131. See MD. ANN. CODE art. 27 § 36K(c)(4).

132. See VA. CODE ANN. § 18.2-56.2.

133. See CAL. PENAL CODE § 12035(h); CONN. GEN. STAT. ANN. § 29-37b; N.J. STAT. ANN. § 2C:58-16(a)-(b); N.C. GEN. STAT. § 14-315.2(b); TEX. PENAL CODE ANN. § 46.13(g).

134. N.J. STAT. ANN. § 2C:58-16(a).

135. See *id.* at § 2C:58-16(b).

136. See *supra* note 16 at (4).

137. See CAL. PENAL CODE § 12035(f); FLA. STAT. ANN. § 784.05(3)(d); TEX. PENAL CODE ANN. § 46.13(f)(1).

waiting period provides a brief respite for grief-stricken families and helps prevent rash reactions to emotional tragedies by giving prosecutors time to deliberate and weigh all the circumstances. The California and Florida statutes expressly counsel prosecutors to carefully weigh the circumstances before initiating a prosecution in family situations.<sup>138</sup> The California statute makes it clear that prosecution of family members should occur in only the most egregious situations.<sup>139</sup>

Family grief is a legitimate factor to consider in deciding whether to prosecute a CAP law violation. However, family status should not by itself constitute a defense. Parents are the first and often only line of defense in keeping guns away from children.<sup>140</sup> CAP law prosecutions of negligent parents, as cruel as they may appear, would be likely to generate publicity that could very well deter other tragedies.

#### V. THE IMPACT OF CAP LAWS ON SELF-DEFENSE

Years of participating in the gun control debate have convinced me that the largest obstacle to a meeting of the minds on most issues involving firearm regulation is differing perspectives on the utility of firearms for self-defense. Gun owners are convinced their firearms may one day save their lives.<sup>141</sup> Gun control proponents believe it is more likely the same firearms will be used to end innocent lives.<sup>142</sup>

The self-defense argument creeps into the CAP law debate. Gun owners fear that laws requiring guns to be stored in lock boxes or with trigger locks will decrease their usefulness for self-defense because they will not be as

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138. See CAL. PENAL CODE § 12035(e) (West 1992); FLA. STAT. ANN. § 784.05(3)(d) (West 1992).

139. The CAL. PENAL CODE § 12035(e) statute states:

If the person who allegedly violated this section is the parent or guardian of a child who is injured or who dies as the result of an accidental shooting, the district attorney shall consider, among other factors, the impact of the injury or death on the person alleged to have violated this section when deciding whether to prosecute an alleged violation. It is the Legislature's intent that a parent or guardian of a child who is injured or who dies as the result of an accidental shooting shall be prosecuted only in those instances in which the parent or guardian behaved in a grossly negligent manner or where similarly egregious circumstances exist.

140. See *supra* note 20 and accompanying text (citing figure that 90 percent of accidental child shootings are linked to unlocked guns in home).

141. See John R. Lott, Jr., *Concealed guns reduce crime; If people are packing, crooks think twice*, STAR TRIB. (MINNEAPOLIS, MINN.), Aug. 16, 1998, at 25A (arguing that Americans use guns for defensive purposes more than two million times each year).

142. See *Concealed-gun idea full of risks to women (letter)*, CHI. SUN-TIMES, Sept. 14, 1998, at 34 (citing study by Dr. Arthur Kellermann that gun kept in home for self-protection is 43 times more likely to be used to kill a family member than an intruder).

readily accessible when needed.<sup>143</sup> Since the purpose of safe storage laws is to make guns less easily accessible, an apparent conflict does exist.

Is it a serious conflict? Gun advocates would have the public believe so. In another *Wall Street Journal* article, John Lott argued against childproof gun locks: “[L]ocked, unloaded guns offer far less protection from intruders,” he asserted, “and so requiring locks would likely greatly increase deaths resulting from crimes.”<sup>144</sup> What evidence did Lott offer to support his dramatic claim of a “greatly increase[d]” death rate from crime resulting from childproof guns? Nothing other than the generic and none-too-precise claim “that there are at least 760,000, and possibly as many as 3.6 million, defensive uses of guns per year.”<sup>145</sup> Although fifteen states have CAP laws, including three of the nation’s four most populous states in California, Florida and Texas,<sup>146</sup> Lott did not cite a single example of a situation where a person suffered injury from a criminal due to an inability to gain access to a secured firearm.

Simply “having” a gun does not make it useful for self-defense.<sup>147</sup> Effective self-defense using a firearm requires, like every other skill in life, an organized plan and practice to implement it. In an article on the use of firearms for home defense, a leading expert summed up his advice as follows: “Train yourself or, better yet, get yourself trained.”<sup>148</sup> However, too many gun owners simply buy a gun, load it and store it, with no thought about what to do with it if they need it.<sup>149</sup> I submit that rehearsing self-defense drills with a safely stored gun would result in much quicker response times than most gun owners could presently muster with their unsecured guns.<sup>150</sup> In my law school

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143. See *infra* note 144 and accompanying text.

144. John R. Lott, Jr., *Childproof Gun Locks: Bound to Misfire*, WALL ST. J., July 16, 1997, at A22.

145. *Id.*

146. In 1997, California’s population was 32,268,000 and ranked first out of the fifty states; Florida’s population was 14,654,000 and ranked fourth; Texas’ population was 19,439,000 and ranked second. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1998 28-29 (118<sup>th</sup> ed. 1998).

147. See Massad Ayoob, *Strategy and Tactics for Home Defense*, GUNS & AMMO: HANDGUNS FOR HOME DEFENSE, 1994, at 37 (“Understand that the gun won’t keep you safe by itself. Far too many citizens have fallen into the trap of thinking, ‘I have a gun, so I’m automatically safe.’”). Ayoob’s article begins with the observation: “Home-defense tactics cannot be adequately covered in 2,500 words, and some have failed to do so in 25,000.” *Id.* at 35.

148. *Id.* at 39.

149. See Walt Rauch, *Training and Instruction*, GUNS & AMMO: HANDGUNS FOR HOME DEFENSE, 1994, at 79 (“In some cases, the sorry truth of the matter is that a gun is bought, loaded and stored away – with no more thought given to it until it’s needed. When you make the decision to get a handgun for home defense, your first step should be to get some training in the defensive use of a firearm . . .”).

150. See *Masked man kicks in door, yells for money*, ARK. DEMOCRAT-GAZETTE, Dec. 3, 1998, at 4B (describing incident in which assailant broke into house, spotted handgun on victim’s bedside table and grabbed it before the waking victim could respond; assailant stole gun and left).

course, *Gun Violence and the Law*, we performed an admittedly unscientific experiment in which a student, who is both an experienced gun user and a gunsmith, responded to an “intruder” by making it across the classroom, retrieving a gun, unlocking a trigger lock and having the gun ready to discharge in less than ten seconds.

Moreover, manufacturers are developing a variety of new safe storage boxes and trigger locks made with quick access in mind. The Saf T Lok trigger lock replaces the grip of a handgun and uses a “quick click” combination designed to release the lock within three seconds, even in total darkness.<sup>151</sup> The Speed Release Gun Lock is an electronic trigger locking device powered by a 9-volt battery featuring a programmable four-digit illuminated key pad.<sup>152</sup> The manufacturer of the Sesamee line of combination gun locks boasts that its locks “can be opened quickly, even in low-light conditions.”<sup>153</sup>

The self-defense argument is a bogeyman that haunts all gun control discourse. With respect to safe storage laws, the argument lacks merit.<sup>154</sup>

#### VI. CIVIL TORT LIABILITY: VIOLATIONS OF CAP LAWS AS NEGLIGENCE PER SE

CAP laws provide for criminal, rather than civil liability. However, civil tort liability might serve as a more effective deterrent. Criminal prosecutions for violating CAP laws are rare.<sup>155</sup> Despite the fact that fifteen states have CAP laws, including three of the four most populous states,<sup>156</sup> research found

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151. See Carl Stewart, *Keep 'Em Safe: It's Smart Business*, SHOOTING INDUSTRY, Nov. 1, 1997, available in 1997 WL 13741933.

152. See *id.*

153. *Id.* (quoting Maura Griffin, representative of CCL Security Products).

154. Lott supplements the self-defense argument with an economic discrimination argument, the gist of which is that gun safety requirements will increase the cost of firearm ownership to the detriment of poor people. He asserts that “[s]afety rules that raise the costs of gun purchases will . . . reduce gun ownership and hit these [poor] people hardest.” Lott, *supra* note 144, at A22.

While the argument has emotional rhetorical appeal, it is substantively unsound. All products cost more because of safety measures imposed either as the result of corporate responsibility or, more often, government regulation and the threat of tort liability. As with all other expenditures of life, these costs fall disproportionately on the less affluent. Automobiles, for example, cost more because of required investments in quality control and safety covering everything from crashworthy designs to airbags. However, not many people are heard arguing that auto manufacturers should dispense with these measures because poor people cannot afford them. This is true even though transportation has much more vital daily utility than firearms.

155. See Polston & Weil, *supra* note 22, at 16 (stating “CAP laws are underenforced”); Tessie Borden, *Gun Death of Boy, 8, Costs Dad; Guard Charged With Failing To Lock Up Weapon*, SUN-SENTINEL (FT. LAUDERDALE), Aug. 17, 1995, at 1A (referring to Florida’s CAP law as “a rarely used law”).

156. See *supra* note 146.

only one reported court opinion involving a CAP prosecution.<sup>157</sup> News reports of CAP law charges are also scarce.<sup>158</sup> Prosecutors understandably are not anxious to pursue CAP law violators, who many members of the community would be likely to view with sympathy, especially in situations where the shooting victim is the defendant's child.<sup>159</sup>

Because the decision to bring a tort suit would rest with motivated victims, rather than reluctant prosecutors, civil suits would be a more certain response than criminal charges when the negligent storage of firearms results in tragedy, at least to a non-family member. They would, therefore, serve as a more powerful deterrent.<sup>160</sup> A realistic threat of tort liability might also bring insurance companies into the equation, accentuating the deterrent effect. One can foresee insurance companies giving incentives for safe firearm storage to homeowners in the form of lower premiums,<sup>161</sup> as some currently do for smoke alarms and fire extinguishers.

Basic negligence law – which requires all of us to act with reasonable care to avoid unreasonable risks<sup>162</sup> – already imposes a duty to safely store firearms.<sup>163</sup> Express provisions for civil liability in CAP laws would

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157. See *State v. Wilchinski*, 700 A. 2d 1 (Conn. 1997) (affirming CAP law conviction and upholding constitutionality of statute).

158. See Cindy Elmore, *Dad Charged After Daughter Shot Brother*, SUN-SENTINEL (FT. LAUDERDALE), Aug. 30, 1995, at 1B (describing a total of four convictions and four other prosecutions under Florida's CAP statute, which article describes as "a rarely used state law"). Connecticut appears to be the most aggressive state in charging CAP law violators. See Richard Blumenthal, *More states keep guns from kids*, USA TODAY, June 18, 1998, at 17A (stating that from 1991 to 1997 forty-two persons were charged in Connecticut with negligent storage of a firearm, but only seven have been convicted).

159. See Richard Weizel, *Loaded Guns: Whose Responsibility?*, N.Y. TIMES, Feb. 16, 1997, at 13CN-23 (quoting Robert T. Crook, lobbyist and executive director of Coalition of Connecticut Sportsmen: "[C]ourts are very reluctant to prosecute people who are already perceived as suffering a terrible tragedy."); *Don't punish parents for kids' gun tragedies*, USA TODAY, June 5, 1992, at 10A (arguing it is "heartless and useless" to prosecute parents under CAP laws when victim is their child).

160. See Polston & Weil, *supra* note 22, at 16 (making this point); see also LAFAVE & SCOTT, *supra* note 64, § 1.5, 25, 25 n.31 (certainty of punishment an important factor in effective deterrence).

161. See Polston & Weil, *supra* note 22, at 16.

162. See RESTATEMENT (SECOND) OF TORTS § 282 (1965) (defining negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm"), § 283 (defining standard of required conduct as reasonable care under the circumstances).

163. See, e.g., *Reida v. Lund*, 96 Cal. Rptr. 102 (Cal. Ct. App. 1971) (reversing summary judgment for defendant parents where 16-year-old son retrieved Mauser military rifle from locked cabinet with key kept in location known to son; son used rifle to kill motorists on highway); *Seabrook v. Taylor*, 199 So.2d 315, 318 (Fla. Ct. App. 1967) (negligent to leave loaded .22 caliber pistol where 14-year-old had unsupervised access to it; child used pistol to intentionally harm others); *Spivey v. Sheeler*, 514 S.W.2d 667, 672-73 (Ky. Ct. App. 1974) (reasonable

substantially solidify this obligation. Unfortunately, only one state law – Nevada’s – provides for civil liability.<sup>164</sup> Maryland’s CAP law expressly states that a violation of the statute shall not be considered as evidence of negligence or admissible in a civil tort action.<sup>165</sup> The other CAP laws, including the proposed federal bills, are silent on the issue of civil liability.

The good news for those favoring civil liability is that violations of CAP laws are attractive candidates for invoking the doctrine of negligence per se for statutory violations. When a statute establishes a standard of conduct for purposes of criminal responsibility, courts may interpret the statute as fixing the standard of care for civil tort purposes.<sup>166</sup> Depending on the jurisdiction, violation of the statute may be either conclusive evidence of negligence in the tort action, create a rebuttable presumption of negligence or be considered by the fact finder as evidence of negligence.<sup>167</sup>

The Restatement (Second) of Torts imposes four requirements for when a court may borrow the standard of conduct set by a criminal statute and apply it in a civil negligence action. The purpose of the statute must be: (1) to protect a class of persons which includes the plaintiff; (2) to protect the particular interest which is invaded; (3) to protect that interest against the kind of harm which has resulted; and (4) to protect the interest against the particular hazard from which the harm occurs.<sup>168</sup>

Courts should have no difficulty concluding that victims of CAP law violations meet these four requirements. First, CAP laws are clearly intended to protect children who gain access to firearms and others who may be injured by such children.<sup>169</sup> Second, the interest sought to be protected by CAP laws is the interest in bodily integrity to be free from firearm injuries.<sup>170</sup> Third,

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persons could find negligence in storing .25 caliber pistol in locked gun cabinet where son had access to key and used gun to accidentally shoot playmate); *Cathey v. Bernard*, 467 So.2d 9, 11 (La. Ct. App. 1985) (liability for leaving loaded pistol on high shelf in closet where child retrieved it and accidentally killed another child).

164. *See* NEV. REV. STAT. § 41.472(1). *See supra* note 92-93 and accompanying text for explanation of the Nevada statute.

165. *See* MD. ANN. CODE art. 27 § 36K(d).

166. *See* W. PAGE KEETON, et al. PROSSER & KEETON ON THE LAW OF TORTS § 36, 220-22 (5<sup>th</sup> ed. 1984) [hereinafter PROSSER & KEETON ON TORTS].

167. *See id.* § 36, 229-31 (explaining these three different approaches).

168. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 162, § 286.

169. Although CAP laws are focused on preventing children from acquiring and misusing guns, they could be broadly construed as intended to protect all citizens from the danger of unauthorized users gaining access to firearms. Thus, if a burglar—minor or not—stole an unsecured gun and used it to cause harm, the victim arguably would fall within the class of persons intended to be protected by the legislation.

170. *See supra* note 90 and accompanying text (explaining that CAP laws impose criminal penalties if child gains access to a gun and uses it to inflict injury or death upon herself or another person). Some CAP statutes, including the proposed federal bills, authorize criminal penalties if a child gains access to a gun and exhibits it in a public place. *See supra* note 90. These statutes

victims of CAP law violations suffer the kind of harm the statutes are intended to protect against: firearm injuries. Closely related, the hazard of accidental or intentional shootings by children is precisely the hazard that CAP statutes are intended to prevent.

Borrowing the standard of care set by criminal CAP laws for use in civil negligence proceedings would not only provide an avenue of redress for victims of irresponsible gun storage, but would likely bolster the deterrent impact of CAP laws.<sup>171</sup>

## VII. WHY WE NEED A FEDERAL LAW

Congress should act now to pass a CAP law similar to those introduced in the House<sup>172</sup> and Senate<sup>173</sup> of the 105<sup>th</sup> Congress as part of the broader Children's Gun Violence Prevention Act of 1998.<sup>174</sup> The primary reason we need a federal law is simple: thirty-five states have failed to pass a CAP law.

Critics frequently denounce gun control as a failure by pointing to the fact that crime continues apace in jurisdictions with gun control laws in place.<sup>175</sup> However, in a society where people and guns travel freely across state and local boundaries, the effectiveness of gun control cannot be measured by the

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might be construed as protecting a broader range of interests, such as an interest in the protection of property from robbery.

171. With respect to the proposed federal CAP laws, there is no federal common law doctrine of negligence per se for violations of federal statutes. See JOHN W. WADE et al., PROSSER, WADE & SCHWARTZ'S TORTS: CASES AND MATERIALS 211 (9<sup>th</sup> ed. 1994) [hereinafter WADE & SCHWARTZ'S TORTS]. However, federal courts may achieve the same result by "implying" a civil cause of action from a federal statute if it is determined Congress intended to create such a cause of action. See PROSSER & KEETON ON TORTS, *supra* note 166, § 36, 221; see also *Cort v. Ash*, 422 U.S. 66, 78 (1975) (listing four factors for determining whether a private remedy is implicit in a federal statute not expressly providing one: (1) whether plaintiff is one of class for whose especial benefit statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, to create such a remedy or to deny one; (3) whether it is consistent with underlying purposes of legislative scheme to imply such a remedy; and (4) whether the cause of action is one traditionally relegated to state law, so that it would be inappropriate to infer a federal cause of action).

State courts presumably would be free to construe violations of a federal CAP statute as negligence per se. See *Steagall v. Dot Mfg. Corp.*, 446 S.W. 2d 515 (Tenn. 1969) (suggesting violation of federal Occupational Safety and Health Administration regulation would constitute negligence per se as a matter of state law, but ruling against plaintiff based on lack of causal connection between regulatory violation and injury); WADE & SCHWARTZ'S TORTS, *supra*, at 211 (stating federal courts in diversity cases applying state law sometimes assume state court would apply negligence per se to a federal statute).

172. See *supra* note 15.

173. See *supra* note 14.

174. See *supra* note 16 for a description of this act.

175. See McClurg, *supra* note 7, at 105 n.232 (citing numerous statements to this effect made by members of Congress during the debate over the Brady bill). See also *id.* at 105-06 (critiquing logical fallacy in this reasoning).

existing patchwork of state and local laws. Gun control will work best when we have uniform, national standards that cover all of the 223 million privately-owned firearms<sup>176</sup> kept in 41 percent of the households in America.<sup>177</sup> A federal CAP law would raise the consciousness of *all* gun owners with respect to the dangers and liabilities of unsafe storage and provide a strong incentive for them to act responsibly in keeping guns away from unauthorized users.

States' rights advocates would argue the matter should be left to individual states. However, time is of the essence with respect to this issue. While CAP bills are currently under consideration in some states,<sup>178</sup> it may be many years, perhaps decades, before even a majority of states pass CAP legislation. Thousands of savable lives may be lost while we sit around and wait.

As a long-time observer of gun politics, I am pessimistic about the prospects for meaningful gun control at any level of government. Certainly, Congress has not yet taken the lead on the issue. However, while some states have demonstrated courage and wisdom in tackling gun control,<sup>179</sup> many other states probably never will do so.

Currently, in my own state of Arkansas, at the same time a CAP law was being debated in one legislative committee, another committee was considering a bill to expand the state concealed weapons law to allow persons to bring handguns into bars.<sup>180</sup> One would be hard-pressed to think of a more dangerous mix than alcohol and firearms, but a modified version of the bill that allows concealed weapons to be carried into restaurants where alcohol is served sailed through the House by a 61-27 vote.<sup>181</sup>

Meanwhile, at the Arkansas Capitol, Suzann Wilson, whose 11-year-old daughter was shot and killed in the Jonesboro schoolyard massacre, was

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176. See *supra* note 22 and accompanying text.

177. See *id.*

178. See *supra* note 13.

179. See Bejar, *supra* note 41, at 67-78 (discussing proposed state consumer protection regulations that, *inter alia*, would ban poorly manufactured handguns and require child-proof safety features on guns).

180. As originally proposed, House Bill 1262 would have expanded the Arkansas concealed weapons statute by allowing permit holders to carry concealed handguns into several locations where they are currently prohibited, including bars, churches, sporting events and parks. Rachel O'Neal, *Panel OKs amending '95 gun law*, ARK. DEMOCRAT-GAZETTE, Jan. 27, 1999, at A13.

181. Ray Pierce, *By 61-27 House OKs new places to go with a gun*, ARK. DEMOCRAT-GAZETTE, Feb. 20, 1999, at A1. Allowing persons to carry weapons in places where alcohol is served is not merely asking, but begging, for trouble. Concealed weapons permit holders are prohibited from drinking alcoholic beverages while carrying a gun. See *id.* However, most of the 117 concealed weapons permits revoked by the Arkansas state police occurred because the holder consumed alcohol while carrying the weapon. See *id.* One can imagine that for every permit revoked for "drinking and carrying," many more permit holders engage in the dual activities without getting caught. Moreover, where intoxicated people congregate, friction and altercations follow. Thus, even a non-drinking gun carrier presents an added hazard in such places.

encircled by hostile gun advocates after testifying in favor of a proposed Arkansas CAP law at a legislative hearing.<sup>182</sup> One man taunted the grieving mother, telling her: "I've got guns. Come and get them."<sup>183</sup>

The president of the Arkansas Rifle & Pistol Association testified against the bill, calling it "hate legislation against gun and gun owners."<sup>184</sup> This is what we are up against: people who view a measure demanding that they safely store a product that is the second leading cause of traumatic death in America<sup>185</sup> as "hate legislation."

Surprisingly, the Senate Judiciary Committee actually approved a substantially diluted CAP bill.<sup>186</sup> However, the full Senate defeated the bill.<sup>187</sup> The week after the Senate committee voted in favor of the CAP bill, the more Arkansas House of Representatives passed a bill by a 90-0 vote that would immunize gun owners from liability if their guns are taken without their knowledge and used to injure someone.<sup>188</sup>

The "hate legislation" comment is indicative of the deep emotions the issue of gun control touches in people, particularly in regions like the South and West, where guns are culturally entrenched. Only four of the fifteen state CAP laws exist in states that could be classified as true Southern (North Carolina, Texas and Virginia) or Western states (Nevada<sup>189</sup>).<sup>190</sup> According to a study released by the Violence Policy Center in Washington, D.C., nine of the ten states with the highest firearm death rates per 100,000 are located in the South

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182. Ray Pierce & Elizabeth McFarland, *Gun rights advocates, shooting victim's mom argue over access bill*, ARK. DEMOCRAT-GAZETTE, Feb. 18, 1999, at 12A.

183. *Id.*

184. Elizabeth McFarland, *Panel Oks bill holding owners liable for harm from accessible guns*, ARK. DEMOCRAT-GAZETTE, Feb. 20, 1999, at 12A.

185. VIOLENCE POLICY CENTER, WHO DIES? A LOOK AT FIREARMS DEATH AND INJURY IN AMERICA 9 (1996).

186. McFarland, *supra* note 184, at 12A.

187. Elizabeth McFarland & Ray Pierce, *Senate votes down gun owners liability bill*, ARK. DEMOCRAT-GAZETTE, Mar. 9, 1999, at 1A. (reporting defeat of CAP bill by 18-14 vote).

188. Ray Pierce & Elizabeth McFarland, *House likes bill limiting liability of gun owners*, ARK. DEMOCRAT-GAZETTE, Feb. 25, 1999, at 1A. The bill was prompted by the lawsuit filed in the aftermath of the Jonesboro schoolyard shootings against the grandfather of one of the assailants, from whom the assailants stole the rifles used in the attack. *Id.* See *supra* note 1 for a description of the lawsuit.

189. As previously noted, although Nevada is included on lists of states with safe storage laws, the Nevada statute is not a CAP law, but a civil liability negligent entrustment law. See *supra* notes 92-93 and accompanying text.

190. Although California is on the West Coast, it resembles something approaching a nation unto itself more than a classically Western state such as Idaho or Montana. Similarly, having grown up in Florida, I would not characterize Florida as a Southern state despite its geographic location. A majority of state CAP laws have been passed in the Northeast (Connecticut, Delaware, Maryland, New Jersey and Rhode Island) and Midwest (Iowa, Minnesota and Wisconsin).

or West, Alaska being the only aberration.<sup>191</sup> Absent federal legislation, we may never see common sense gun control prevail in these regional strongholds for gun lovers.<sup>192</sup>

#### VIII. CONCLUSION

With 223 million firearms owned by private citizens, the deadly consequences of irresponsible firearm storage are more than foreseeable; they are entirely expectable: hundreds of children killed each year in accidental shootings, many more hundreds killed by suicide using an adult's gun and thousands of intentional shootings of children by other children.<sup>193</sup>

If all gun owners were responsible all of the time, we would not need CAP laws. However, not all gun owners are responsible and even responsible gun owners are not responsible one hundred percent of the time. I have a close friend who I will call "Ted." Ted likes guns and owns several of them. We have engaged in many debates about guns. Ted almost always carries a gun in his car for self-protection (legally with a concealed weapons permit), which has generated some particularly vociferous discussions about gun safety.

"Guns make me nervous," I told Ted. "They should be kept locked up. One of your kids could grab that gun when you're not looking." Nonsense,

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191. See Jim Brooks, *Study finds Arkansas No. 9 for gun deaths*, ARK. DEMOCRAT-GAZETTE, Feb. 27, 1999, at B1. The ten states are, in order: 1. Louisiana, 2. Nevada, 3. Alaska, 4. Mississippi, 5. Alabama, 6. New Mexico, 7. Arizona, 8. Tennessee, 9. Arkansas, and 10. Montana. See *id.* The study attributes the high rankings of so many Southern states to higher gun ownership rates in the South. See *id.*

192. Congress possesses the authority to pass a CAP law under its power to regulate interstate commerce. However, in light of *United States v. Lopez*, 514 U.S. 549 (1995), the federal CAP bills should be amended to require a nexus between the gun at issue and interstate commerce and to offer findings regarding the substantial effects that firearms and unsafe firearms storage have upon interstate commerce. *Lopez* struck down the Gun Free School Zones Act, 18 U.S.C. § 922(q), which makes it a federal crime to possess a firearm in a school zone, as an unconstitutional exercise of congressional power under the Commerce Clause. Justice Rehnquist's majority opinion held the Act had "nothing to do with 'commerce' or any sort of economic enterprise" (514 U.S. at 561); contained no requirement that the possessed firearm had any concrete tie to interstate commerce (*see id.*); and failed to include any congressional findings regarding the effects of gun possession in a school zone on interstate commerce (*see id.* at 562). The Gun Free School Zones Act was subsequently amended to include a requirement that the possessed gun "moved in or . . . otherwise affects interstate or foreign commerce" and to set forth findings regarding the effects that firearms and firearms possession in school zones have upon interstate commerce. See 18 U.S.C.A. § 922(q) (West Supp. 1997).

To avoid the risk that a federal CAP law might be declared unconstitutional as exceeding the congressional power to regulate commerce, it would be wise to add a requirement that the gun giving rise to a CAP law prosecution moved in or otherwise affected interstate or foreign commerce. Additionally, Congress should make findings regarding the substantial effects that firearms and the health costs of treating firearm victims have on interstate commerce.

193. See *supra* note 18 and accompanying text (citing figures).

Ted responded. He insisted he always exercised the utmost care in carrying and storing his guns.

One day my daughter, Caitlin, and I were visiting Ted's house. Caitlin and Ted's two children were, as usual, on a rampage around the house and yard—upstairs, downstairs, outside and in again in the blink of an eye. I had occasion to use the upstairs bathroom in Ted's master bedroom suite. On entering the bedroom, I was stunned to see a semiautomatic pistol lying in plain view on the dresser. I hurried down the stairs to confront Ted, realizing as I descended it was going to take effort to conceal my anger and "I told you so" indignance. Ted was in the kitchen drinking coffee. All I got out was, "Is that gun on the dresser loaded?"

Embarrassed and without a word, Ted got up quickly and went to secure the gun. We never discussed it.

Is Ted a bad person? Hardly. He is one of the most responsible persons I know: intelligent, well-educated, a successful lawyer and great father. But he got careless, just like every one of us gets careless. Gun owners—even those who are generally conscientious—need added incentive to keep them vigilant to the imminent, grave danger presented by their firearms. CAP laws, with their threat of criminal and potential civil liability, provide that incentive.

CAP laws are not onerous. They require only that one act reasonably in safeguarding a product that causes 35,000 deaths<sup>194</sup> and 100,000 serious injuries annually.<sup>195</sup> Moreover, state CAP laws and the proposed federal bills include several defenses that protect gun owners from prosecution. CAP laws already have been shown to be effective in reducing accidental shootings.

With even magazines for gun aficionados proclaiming that "[a]ll gun owners have the responsibility of keeping their firearms out of unauthorized hands,"<sup>196</sup> it is difficult to comprehend how anyone who considers himself or herself to be a "reasonable person" could oppose a statute imposing a legal duty to store firearms safely. CAP laws do no more than codify common sense. For the safety of children, for the safety of us all, Congress should act quickly to pass a national Child Access Prevention law.

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194. *See supra* note 39 and accompanying text.

195. *See supra* note 40 and accompanying text.

196. Bill O'Brien, *Securing Your Handgun*, GUNS & AMMO: HANDGUNS FOR HOME DEFENSE, 1994, at 41.