A SECOND AMENDMENT RIGHT TO BE NEGLIGENT?

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Professor Andrew Jay McClurg maintains that the Second Amendment has created a right to store firearms negligently.[1] It is conceivable that some such thing could happen, just as the Supreme Court has used the First Amendment to require plaintiffs who are public figures to prove more than negligence in defamation actions.[2] But Professor McClurg presents no evidence to support his claim. He criticizes many decisions in which courts declined to find liability when a gun stolen from the defendant was used to injure an innocent person.[3] But he cites no case in which a court invoked the Second Amendment as the ground for its decision. Many of the cases, moreover, were decided before the Supreme Court's 2010 decision in *McDonald v. City of Chicago*,[4] which made the Second Amendment applicable to the states.[5] Professor McClurg himself says that before this decision, "courts correctly assumed that the Second Amendment had no application to state tort law."[6] To accept Professor McClurg's claim that the Second Amendment has caused courts to distort the application of standard tort principles, we have to believe that they have done it secretly and that they undertook this insidious project before they believed there was a legal basis for what they were doing.

Although the title of Professor McClurg's article appears to be a marketing gimmick, he does make two somewhat more serious claims. First, he maintains that courts have misapplied well-established tort principles in refusing to hold the victims of gun thefts liable for injuries subsequently inflicted with the stolen weapons.[7] Second, he contends that legislatures have irresponsibly failed to impose objectively reasonable safe-storage duties on gun owners.[8] Both claims are mistaken.

GUN STORAGE INVOLVES TRADEOFFS, NOT SELF-EVIDENT SOLUTIONS

We agree that gun owners should store their weapons responsibly, with due regard for the risks posed by unauthorized access to them. We do not agree that responsible gun storage is simply a matter of minimizing

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1. Andrew Jay McClurg, *The Second Amendment Right to Be Negligent*, 68 FLA. L. REV. 1 (2016).
2. *See id*. at 2–3 (discussing *New York Times v. Sullivan* and its progeny).
3. *See id.* at 26–30.
4. 561 U.S. 742 (2010).
5. *See id.* at 750.
6. McClurg, *supra* note 1, at 9.
7. *See id.* at 5.
8. *See id.*

these risks, any more than it is with other dangerous tools like knives and automobiles. The primary purpose for which millions of law-abiding people own guns is to defend themselves, their families, and their homes.[9] For them, a gun that is locked in a local bank's vault is very safely stored, but it is also useless.

Professor McClurg pays lip service to the truism that reasonable care with regard to firearm security varies with the circumstances, but he promotes a general standard that would require either "keeping the gun under one's immediate control," or storing it in a "sturdy, non-portable gun safe."[10] Under that standard, it would be negligent to keep one's gun in a drawer next to the bed at night because one's control while sleeping is not "immediate."

Professor McClurg suggests that only the groundless fears of gun owners keep them from accepting his favored standard of care.[11] Apart from the fact that the cost of a well-built gun safe is not trivial, fears of rendering a gun useless by making it inaccessible are not groundless. Professor McClurg asserts that there is not "a single credible report of a person being injured because of an inability to access a properly secured gun."[12] Even if this were true, the inference he draws would be unwarranted. Gun owners who are more likely to need a gun for self-defense are less likely to store their guns where they are not immediately accessible,[13] and very few jurisdictions have mandatory storage requirements.[14] If few people are injured because they do what Professor McClurg wants them to do, that should hardly be surprising in a world where most people are *not doing* what he wants them to do.

Professor McClurg's inability to find "credible reports" of gun owners being injured by criminals because their guns were not locked away is also misleading. To whom would the gun-owner victim "report" this datum, and why? Professor McClurg points to no systematic attempt by law enforcement agencies or social scientists to collect information about cases in which a gun owner is injured by a criminal. For all we know, "credible reports" are rare because there is no one taking such reports.

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9. *See* Kate Masters, *Fear of Other People is Now the Primary Motivation for American Gun Ownership, a Landmark Survey Finds*, TRACE (Sept. 19, 2016), https://www.thetrace.org/2016/09/harvard-gun-ownership-study-self-defense/.

10. McClurg, *supra* note 1, at 16.

11. *See id*. at 14.

12. *Id*.

13. Professor McClurg himself cites studies suggesting that as many as 50% of all handguns are stored unlocked, *id*. at 44, and it is obvious that many handguns that are stored locked are *not* kept in a sturdy, non-portable gun safe.

14. *See Safe Storage & Gun Locks*, LAW CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/gun-laws/policy-areas/consumer-child-safety/safe-storage-gun-locks/ (last visited Jan. 11, 2017) (summarizing state storage requirements).

Still, couldn't Professor McClurg be right? Almost certainly not. Consider first this question: Are gun owners whose guns *are within their immediate control* ever injured because they are not able to access them in time to stop a violent criminal? Unless you believe that the good guys always win, the answer must be 'yes, sometimes.' But this implies (and common sense confirms) that delays of only a second or two can alter the outcome of a struggle between a gun owner and a violent criminal. Retrieving a firearm from a locked safe involves longer delays. Mandatory safe-storage requirements will therefore result in some additional risk to gun owners who comply with them.

Professor McClurg's own evidence confirms this analysis. After claiming that there is no "credible report" of a gun owner or user being injured by a criminal because his gun was secured,[15] he drops a footnote dismissing three cases that seem to fit this description with the bald assertion that none of them are "meritorious examples of the pitfalls of safe gun storage."[16] This much is true: None of the cases involves guns stored in a non-portable safe, as Professor McClurg would require. In two of them, it appears the guns were simply locked; in the other, they had been collected and stored in a bag rather than distributed throughout the home.[17] Obviously, however, in each of these cases the guns in question would have been even *more* inaccessible had their owners followed Professor McClurg's prescriptions.

In short, Professor McClurg assumes away the costs of safe-storage practices, which include the expense of gun safes and the risk of being unable to quickly access the gun in an emergency. For some gun owners in some circumstances, these costs may be small compared with the potential costs to other people of failing to take precautions like those he favors. For many gun owners, however, the costs may be very high. Rather than undertake a serious cost-benefit analysis, Professor McClurg suggests that the imposition of negligence liability on individual gun owners is an urgently needed solution that—but for the Second Amendment—courts and legislatures should rush to adopt. This proposition will seem intuitively obvious only to readers who implicitly discount the interests of gun owners nearly to zero. Perhaps these readers constitute Professor McClurg's intended audience.

WELL-ESTABLISHED PRINCIPLES OF TORT LAW SUPPORT THE LIABILITY RULES THAT MCCLURG DECRIES

Professor McClurg claims that the Second Amendment is responsible for the state of the common law because there is no other plausible

15. *Id.* at 14.
16. *Id.* at 14 n.57.
17. *See id.*

explanation for the refusal of state courts to hold gun owners liable when their unsecured guns are stolen and subsequently used in violent crimes.[18] In fact, however, traditional principles and doctrines of tort law strongly support what these courts have done.

In order to help create the appearance of an anomaly in existing law, Professor McClurg suggests that guns deserve to be treated as disfavored engines of destruction. He describes firearms, for example, as "the only legal product designed to inflict what the tort system is designed to prevent: death and injury to human beings."[19] This makes as much sense as describing wrecking balls and bulldozers as products designed to inflict the destruction of property, which the tort system is also designed to prevent. As the word "tort" suggests, our legal system makes a distinction between wrongful and rightful violence, whether it is carried out with wrecking balls, bulldozers, or firearms. That distinction has existed in the law for quite some time now, and you do not need anything like the Second Amendment to accept it.

More seriously, Professor McClurg asserts that courts have authorized unreasonable behavior by gun owners through "those wayward twins of different mothers, duty and proximate cause, along with their shady cousin, foreseeability."[20] This language is telling. Duty, proximate cause, and foreseeability are not the least bit wayward or shady. On the contrary, they are foundational concepts in the law of tort. Nor is the application of these concepts in stolen-gun cases anomalous.

As Professor McClurg acknowledges, "courts traditionally have been more likely to treat criminal acts as superseding causes than other types of intervening forces."[21] Superseding-cause doctrine is nonetheless inapplicable to stolen-gun cases, he believes, because "liability is appropriate when the criminal act was within the scope of the original risk," and American courts have imposed liability "in a diverse array of other situations where an original negligent actor created a risk of a subsequent criminal act."[22] Their failure to do so in this context, Professor McClurg concludes, is proof of the Second Amendment's maleficent influence.

The first problem with this argument is the premise that foreseeability alone generally suffices to impose duties on individuals to protect others from the risks of wrongdoing by third parties. This is not true. *In addition* to foreseeability of the risk, such duties generally require a "special relationship" between the person charged with a duty to protect and either

18. *See id*. at 9.
19. *Id*. at 3.
20. *Id*. at 23 (internal citations omitted).
21. *Id*. at 25.
22. *Id*.

the potential victim,[23] or the foreseeable wrongdoer.[24] The existence of such a relationship has led some courts to impose a duty of safe storage on gun owners with regard to juvenile family members and their guests.[25] Similarly, courts have held that businesses sometimes owe a duty to protect customers who are invitees at common law from criminal acts on their premises.[26] But there is no special relationship between individual gun owners and remote strangers who are victimized by criminals using stolen firearms. Consequently, as many courts have ruled, gun owners do not owe the general public a duty to protect them from the risk of theft and subsequent criminal misuse of their guns.[27]

Of course, one can imagine exceptional cases in which a safe-storage duty would be owed to strangers. If a person "has affirmatively enhanced the risk of harm . . . no special relationship is required to establish responsibility."[28] Suppose someone leaves his gun on the table at a rowdy saloon while he uses the men's room. If another patron grabs the gun and shoots someone in his absence, a court might well rule that the owner is liable for creating a foreseeable risk of harm to other customers. In the ordinary case, however, guns are stolen from the owner's home or car, and the risk of subsequent misuse is attributable to the thieves who steal them, not the owners. The thief, not the owner, caused the gun to "escape" from the owner's property, where it posed no risks to the public. Thus, even apart from the special-relationship doctrine, some courts have declined to find that a failure to secure a firearm is a proximate cause of injuries to remote victims of gun violence.[29]

Standard cause-in-fact analysis also supports judicial reluctance to hold the victims of gun theft liable for subsequent misuse of the weapons. Suppose a burglar steals a gun left unlocked in a home, and then uses it to commit an armed robbery. Even but-for causation would be difficult

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23. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 (AM. LAW. INST. 2012) (including examples such as hospital-patient, prison-prisoner, and school-student).

24. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976) (holding that if a therapist knows or should know that a patient poses a serious danger of violence to others, the special relationship between therapist and patient imposes a duty to exercise reasonable care to protect the foreseeable victims of that danger).

25. *See, e.g.*, Olson v. Hemsley, 187 N.W 147, 149 (1922); Kuhns v. Brugger, 135 A.2d 395, 403 (Pa. 1957).

26. Often, however, these rulings are limited to situations in which the commercial enterprise should be aware of a heightened risk of violent crime on its premises. *See, e.g.*, Kroger Co. v. Knox, 98 So. 3d 441, 443 (Miss. 2012) (duty limited to premises where "an atmosphere of violence exists"); Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W. 2d 749, 757 (Tex. 1998) (crime on premises foreseeable only if other similar crimes have occurred "on the property or in its immediate vicinity").

27. *See* McClurg, *supra* note 1, at 29–30 (discussing no-duty cases).

28. Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 442 (1999).

29. *See, e.g.*, Strever v. Cline, 924 P.2d 666, 674 (Mont. 1996).

to establish because it is likely that had the robber been frustrated by a gun safe, he would have obtained another gun elsewhere. This causation problem is aggravated in the common scenario in which a burglar sells the stolen gun to a criminal who uses it to commit a crime of violence. Given the large numbers of guns already in circulation, the chances are overwhelming that the buyer would have been able to purchase a substitute elsewhere had the gun been stored in a safe the burglar could not defeat. And if the burglar sells to a middleman who resells to the person who eventually commits a violent crime, a but-for causal connection becomes even more improbable.

Professor McClurg is right to say that judicial decisions in this area involve "policy," just as any tort law doctrine or ruling on such issues would. But after mentioning "the obvious policy reason that it seems unfair to hold an actor who was merely negligent responsible for another's intentional criminal act,"[30] he offers no policy counter-argument. Instead, he claims that the weight of authority outside the gun context is to the contrary. Not so. He relies, for example, on cases imposing liability on owners who leave keys in cars that are involved in crashes after being stolen.[31] But the jurisdictions that bar such claims outright outnumber jurisdictions that permit them by roughly two to one, and many other jurisdictions allow such claims only upon a showing that the defendant "ignored an identifiable and heightened risk of theft such that his conduct involved gross negligence or recklessness."[32] Using Professor McClurg's misleading terminology, all these courts have created a right to be negligent. Similarly, very few states impose liability on social hosts for failing to use reasonable care when serving alcohol to their adult guests.[33] Yet hosts are in a social relationship to their guests, have supplied them with alcohol, and can easily foresee that those who become intoxicated may injure others while driving. Non-liability for gun-owners whose stolen guns are misused by criminals to injure strangers follows a fortiori from these lines of cases.

Professor McClurg's claim that gun owners are negligent if they fail to store their guns in "a sturdy, non-portable gun safe"[34] implicitly relies on a foreseeability analysis that would also require car owners to store

30. McClurg, *supra* note 1, at 25.

31. *Id.*

32. John C.P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211, 1224 n.47 (2009).

33. *See* Peter A. Slepchuk, Note, *Social Host Liability and the Distribution of Alcohol and Narcotics: A Survey and Guide*, 44 SUFFOLK U. L. REV. 933, 939 (2011). Moreover, several state legislatures have prevented (or overridden) judicial innovation in the realm of social host liability law by adopting statutes that specifically immunize social hosts from any liability arising out of the intoxication of a guest. *See id*. at 939 n.39 (citing representative statutes).

34. McClurg, *supra* note 1, at 16.

their keys in the same kind of safe. Approximately 40% of American households have guns, and about 90% have a car.[35] The number of vehicles stolen each year exceeds—and may well be double or triple—the number of stolen guns.[36] Thus, the probability of losing one's gun to a thief is about the same as the probability of having one's car stolen. Similarly, while it is readily foreseeable that a criminal will subsequently use a stolen gun to commit a crime, it is also readily foreseeable that a criminal will use a stolen car to drive dangerously.[37] We are confident that no court would ever hold an automobile owner liable to the victim of a car thief's careless driving because the owner left the keys in a dresser drawer. Professor McClurg's desire to have the law treat gun owners differently than car owners reflects his personal policy views, not the policies that inform tort law generally.

MCCLURG'S PROPOSED TORT RULE MIGHT VIOLATE THE SECOND AMENDMENT

In the late 1990s, the firearms industry was subjected to a barrage of litigation inspired by the success that tort lawyers had recently enjoyed in their campaign against the tobacco industry.[38] Much of this litigation sought to hold manufacturers and distributors liable for the criminal misuse of guns, under a variety of rubrics including product liability,[39]

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35. *See* L. Hepburn, M. Miller, D. Azrael, and D. Hemenway, *The US Gun Stock: Results from the 2004 National Firearms Survey*, 13 INJURY PREVENTION 15, 15 (2007); AM. ASS'N OF STATE HIGHWAY & TRANSP. OFFICIALS, COMMUTING IN AMERICA 2013: THE NATIONAL REPORT ON COMMUTING MATTERS AND TRENDS 9 (2013), http://traveltrends.transportation.org/Documents/B7_Vehicle%20and%20Transit%20Availability_CA07-4_web.pdf.

36. *See* FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2012 1 (2013), https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/property-crime/motor-vehicle-theft (estimating 721,053 thefts of motor vehicles in 2012); LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, NCJ239436, FIREARMS STOLEN DURING HOUSEHOLD BURGLARIES AND OTHER PROPERTY CRIMES, 2005-2010 1 (2012), http://www.bjs.gov/content/pub/pdf/fshbopc0510.pdf (estimating that 232,400 firearms were stolen annually). The highest estimate Professor McClurg cites, based on survey research, is 600,000 noncommercial firearm thefts per year. McClurg, *supra* note 1, at 11.

37. We know of no reliable data on the chances that a thief will use a stolen gun to injure someone in a violent crime. As for stolen automobiles, the only estimate we are aware of, although dated, suggests that the chances that a thief will negligently drive a stolen car are extremely high. *See* Davis v. Thornton, 180 N.W.2d 11, 14 (Mich. 1970) (noting that the National Auto Theft Prevention Campaign estimated that about 24% of stolen vehicles were involved in accidents, and that this was roughly 200 times the normal accident rate).

38. *See* Howard M. Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs' Attorneys in Municipal Gun Litigation*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 129, 136 (Timothy D. Lytton ed., U. of Mich. Press 2005).

39. *See* Timothy D. Lytton, *An Overview of Lawsuits against the Gun Industry*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 1, 3 (Timothy D. Lytton ed., U. of Mich. Press 2005).

nuisance,[40] and some novel theories of negligent distribution and marketing.[41] This campaign enjoyed very little success, but it did inflict significant costs on the industry, especially in the form of legal fees. The future behavior of courts and state legislatures was inherently unpredictable, and the industry was concerned that legal doctrine might shift in a way that would permit potentially ruinous verdicts.

In response, Congress enacted the Protection of Lawful Commerce in Arms Act (PLCAA),[42] which immunized those who deal in firearms from a broad range of lawsuits seeking to hold them liable for the unlawful misuse of guns by other people.[43] Because the PLCAA recites that the Second Amendment "provides that the right of the people to keep and bear arms shall not be infringed," Professor McClurg thinks this immunity "is derived from deference to Second Amendment rights."[44] Quoting the Constitution was no doubt meant to signal a belief that the Second Amendment protects an individual right to have a gun for self-defense. The Supreme Court, however, did not so hold until 2008,[45] and did not apply that holding to the states until 2010.[46] When Congress enacted the PLCAA in 2005, it was widely believed that the Supreme Court had long ago implicitly rejected that interpretation,[47] and the lower federal courts had overwhelmingly done so.[48] The PLCAA no doubt reflects strong public support for the right to own guns for self-defense, but that support is not an artifact of the Second Amendment's presence in the Bill of Rights. The statute reflects the policy views of the people's elected representatives, and those policy views would not be altered much, if at all, were the Supreme Court to declare that nobody has a constitutional right to own a gun.

Professor McClurg disapproves of the statute adopted by Congress,

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40. *See* Erichson, *supra* note 38, at 132–33.

41. *See* Lytton, *supra* note 39, at 3.

42. Pub. L. 109-92, 119 Stat. 2095 (2005) (codified as amended at 15 U.S.C. §§ 7901–7903 (2012)).

43. The statute includes several exceptions from the grant of immunity, including a provision that preserves liability for negligent entrustment, which is defined as supplying a weapon to someone whom the supplier "knows, or reasonably should know . . . is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to [himself] or others." 15 U.S.C. § 7903(5)(A)(ii), (B) (2012).

44. 15 U.S.C. § 7901(a)(1) (2012); McClurg, *supra* note 1, at 8.

45. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

46. *See* McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).

47. The leading decision, *United States v. Miller*, 307 U.S. 174 (1939), held that short-barreled shotguns would be protected by the Second Amendment only if their possession or use has "some reasonable relationship to the preservation or efficiency of a well regulated militia." *Id.* at 178.

48. At that time, only one federal court of appeals had suggested that the Second Amendment protects an individual right to keep and bear arms for self-defense. *See* United States v. Emerson, 270 F.3d 203, 264 (5th Cir. 2001).

and particularly takes issue with the Child Safety Lock Act of 2005,[49] which Congress enacted as part of the PLCAA. This law requires gun dealers to include a "secure gun storage or safety device" with every handgun they sell, and it immunizes gun owners who use the devices from tort liability for injuries stemming from misuse by an unauthorized user.[50] The devices that confer immunity include trigger locks and cable locks, relatively inexpensive devices that Professor McClurg describes as "childproofing measures, not theft deterrent devices."[51] Yes, the statute is called the Child Safety Lock Act, and it might prevent some accidental gun injuries to children. That would seem to be a good thing. Professor McClurg, however, objects that gun owners can now immunize themselves from tort liability without taking what he thinks are adequate measures to prevent others from stealing guns.[52]

Professor McClurg manifestly wants the PLCAA repealed, which would free common law courts and state legislatures to adopt his preferred policy of imposing a legal duty to keep a gun under one's immediate control or stored in a sturdy, non-portable gun safe.[53] Although we disagree with his claim that the absence of such a duty today is the *result* of the Second Amendment, we do think that the imposition of such a duty in the future would raise serious Second Amendment questions.

As Professor McClurg points out, San Francisco and Massachusetts have adopted safe-storage laws that are similar to his proposal, though both of them require only a locked container or trigger lock rather than a non-portable safe. These laws were upheld by a federal district court and the Massachusetts Supreme Judicial Court, respectively.[54] In 2014, the Ninth Circuit affirmed the validity of the San Francisco ordinance, though on very questionable grounds. Applying intermediate scrutiny, the court found that the "delay of only a few seconds" required to open a modern gun safe serves the government's interest in reducing the number of handgun-related suicides and deadly domestic violence incidents, while imposing "only a minimal burden on the right of self-defense in the home."[55] For many people, the challenge of opening a gun safe, especially under stress in the dark after being roused from sleep by a potentially lethal threat, will not be what the court calls a minimal burden

49. 18 U.S.C. § 922(z) (2012).

50. *See id.*

51. *See* 18 U.S.C. § 921(a)(34)(A) (2012); McClurg, *supra* note 1, at 18. Some thieves might pass up a gun secured with such a device because the thief doesn't want to bother with defeating the lock, but this theft deterrent effect is presumably rare.

52. *See* McClurg, *supra* note 1, at 31–32.

53. *See id.* at 16.

54. *See id.* at 16 n.65.

55. Jackson v. San Francisco, 746 F.3d 953, 966 (9th Cir. 2014). Oddly, Professor McClurg does not mention this decision.

on their right to defend their lives. On the other hand, the delay of a few seconds would truly be little or no deterrent to someone intent on suicide or on retrieving a gun that he wants to use against his domestic partner. Like Professor McClurg, the Ninth Circuit discounted the legitimate interests of gun owners virtually to zero in order to justify a law whose benefits are entirely speculative.

As Justice Clarence Thomas pointed out in his dissent from the denial of certiorari, this decision is in serious tension with *Heller*.[56] The Ninth Circuit—and Professor McClurg—treat the Second Amendment and the *Heller* decision as obstacles to be circumvented in a campaign against gun rights and gun owners. We fully understand that the social value of the right to keep and bear arms in today's world is an intensely disputed policy issue. No matter what position one takes in that debate, however, one would be wrong to believe that the Second Amendment creates a right to be negligent or that blinkered courts have distorted tort doctrine to protect irresponsible gun owners.

This conclusion, of course, does not imply that nothing can be done to discourage the theft and subsequent violent misuse of firearms. A sensible strategy would focus on the cheaper cost-avoider. Contrary to Professor McClurg's mistaken assertion,[57] that person is the gun thief, not the gun owner. The gun thief is the cheaper cost-avoider because he can prevent the theft by refraining from expending resources to steal it: his precaution costs are negative. Because most gun thieves are judgment-proof, deterrence would require criminal sanctions rather than tort liability. Measures such as enhanced criminal penalties for stealing firearms and expanded liability for possessing a stolen gun might deter some gun thefts, while penalizing criminals rather than victimized gun owners.

56. *See* Jackson v. San Francisco, 135 S. Ct. 2799, 2800 (2015) (Thomas, J., dissenting).

57. *See* McClurg, *supra* note 1, at 35.