THE TORTIOUS SECOND AMENDMENT: A RESPONSE TO ANDREW MCCLURG'S THE RIGHT TO BE NEGLIGENT

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In his recent provocative article addressing gun violence and the negligence of gun owners and gun sellers, Professor Andrew McClurg asserts the failure of courts and legislatures to invoke traditional tort principles to gun ownership has created what he calls "[t]he Second Amendment right to be negligent."[1] Professor McClurg's claim is eye opening in that it can be characterized as anti-private gun ownership,[2] or at the very least his article is advocating for a far more regulated right of ownership, during a time where the U.S. Supreme Court in *District of Columbia v. Heller*,[3] specifically endorsed an arguable unregulated private right of ownership.[4] Moreover, Professor McClurg takes on this issue when it is rare for any politician to dare question the Second Amendment, let alone assert it promotes negligent conduct.[5] However, the tragic events of February 14, 2018, where a teenage former student gunman killed 17 and injured 17 others at Marjory Stoneman Douglas High School in Parkland, Florida, may have changed the political will of the public to address regulation concerning the arguable third rail of politics—the Second Amendment's right to own guns.[6]

In addition to fending off the wave of political will and support for

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∗ Professor of Law & Director of Citizenship and Immigration Initiatives, Florida International University. I would like to thank the Florida Law Review for the opportunity to respond to Professor McClurg's brilliant, and potentially transformative public policy recommendation. As with everything I do, I dedicate this work to my children: Katerina, Christian, Nicholas, Andres, and Bella.

1. Andrew Jay McClurg, *The Second Amendment Right To Be Negligent*, 68 FLA. L. REV. 1, 1–2 (2016).

2. Professor McClurg's article does not address all aspects of the gun control debate, such the potential liability of manufacturers of guns. Instead, he focuses on potential liability of gun owners and sellers when they fail to safeguard those guns from thieves.

3. 554 U.S. 570 (2008).

4. *Id*.

5. The tragic 2018 attack on the High school students in Parkland Florida has brought to light, or at least the interest in debating, the need for greater gun control or gun reform. Thus, the landscape of gun control is in a state of flux, and hopefully, some reform is on the horizon. *See generally*, Jeffrey Schweers, *Parkland Shooting Seen as Turning Point for Gun Control*, TALLAHASSEE DEMOCRAT (Feb. 24, 2018), https://www.tallahassee.com/story/news/2018/02/24/parkland-shooting-seen-turning-point-gun-control-debate/367792002/.

6. *See* Rick Anderson, *Since Parkland School Shooting, Gun Control Debate Spreads to State Capitols*, L.A. TIMES (Feb. 28, 2018), http://www.latimes.com/nation/la-na-washington-guns-20180228-story.html; ; Lee Drutman, *Why Parkland Could be a Turning Point for Gun Control*, VOX (Feb. 21, 2018) https://www.vox.com/polyarchy/2018/2/21/17035952/parkland-shooting-gun-control-turning-point; Tessa Stuart, *Will Parkland Change the Gun Debate?*, ROLLING STONE (Mar. 9, 2018), https://www.rollingstone.com/politics/news/parkland-florida-school-shooting-gun-control-debate-nra-washington-w517618.

some measures of gun control following the Marjory Stoneman Douglas shooting in Parkland, Florida, Professor McClurg's argument to expose negligent gun owners liability, should make champions of the right to own and use guns more than a bit uneasy. At the heart of his analysis, McClurg correctly asserts gun owners have immunity, both through the courts and legislatures, to engage in conduct that if it were pertaining to any other consumer good, could, and likely would, be considered negligent. Yet the current state of immunity prevents liability even when injury results through the failure of the owners to take due care to safeguard the guns, thereby allowing for relative ease in the theft of the guns, and consequently causing harm to others.

While McClurg's critique of the legislative efforts at creating immunity is less involved than his critique of the judicial basis for immunity, this is due to what he observes is the legislative focus on the liability of gun manufacturers, which McClurg admits is not the focus of his article.[7] Therefore, understandably, McClurg wrestles with the judicial basis for gun owners and users immunity from liability, particularly because these decisions turn on the very tort principles McClurg argues have been repeatedly misapplied[8]. It is McClurg's key conclusion concerning the judicial decisions regarding gun ownership liability, and those decisions' distortion of tort principles is where the rubber hits the road for this article's critique of his work. Simply put, McClurg is correct that the legal decisions examining the liability of gun owners or sellers have misapplied tort law proximate cause and duty principles. In doing so, these decisions resulted in anomalies to existing tort law, and discrepancies in tort principles. As a result, the decisions have somewhat clandestinely, or at the very least have implicitly created a tort exception, for guns. Yet these decisions somewhat awkwardly apparently use political views concerning the Second Amendment to try to fit them into existing tort principles, but at no point do these decisions even suggest they were creating tort exceptions for gun owners and users.

After brief mention of his legislative analysis, an examination of McClurg's critique of the judicial basis for the so-called "right to be negligent" is examined in order to further fully examine the merits of his positions on the purported misuse of tort principles. As for the legislative basis for immunity, McClurg primarily argues the imprimatur for negligence derives from what he describes as inaction; in other words, the legislative failures to act, i.e., the failure of Congress or state legislatures to mandate safety obligations on gun owners or sellers. In other words, McClurg points to the legislative abdication of their obligations to even debate the issue has resulted in analysis that

7. *See* McClurg, *supra* note 1, at 22–23 (citations omitted).
8. *Id.* at 1.

necessarily that, somewhat sadly, must focus on judicial pronouncements on these issues. As a result, McClurg does not have much to turn to in terms of legislative action as a basis for promoting gun ownership negligence. The reason for this is where there has been legislation concerning gun ownership or production, the legislation has focused on immunity to gun manufacturers, which was not the focus of his article. It is perhaps at this point in his article where a reader is left with an unmet interest in a more involved analysis. However, if there are few or no examples of legislative action promoting negligence for gun owners or sellers, then there is simply little an author can analyze. And for whatever it is worth, this writer cannot recall any legislation that can further McClurg's legislative action as a basis for promoting negligence. It nevertheless may have been useful for McClurg to suggest some legislation or other governmental acts or policies that could be proposed in the future, which could be debated at different levels of government.

In terms of legislative inaction, McClurg argues the failure of federal or state laws requiring gun owners to secure their weapons to prevent theft from homes or motor vehicles has effectively sanctioned negligence.[9] To bolster this point, McClurg observes only a handful of states have imposed any sort of affirmative obligations on gun owners.[10] For instance, only Massachusetts has a mandatory safe storage law of broad applicability and even that law would not necessarily protect guns from theft.[11] Furthermore, only California, Connecticut, and New York require safe gun storage in specific circumstances.[12] Interestingly, McClurg highlights the irony resulting from states highly regulating the legal sale of marijuana, which often includes securing the marijuana, and the lack of similar requirements to the far more dangerous commodity that are guns.[13] Accordingly, this irony is not lost on this, or the typical

9. *Id*. at 17.

10. *Id*. at 18.

11. *See* MASS. GEN. LAWS ANN. ch. 140, § 131L(a) (West 2015) ("It shall be unlawful to store or keep any firearm . . . in any place unless such weapon is secured in a locked container or equipped with a tamper-resistant mechanical lock or other safety device, properly engaged so as to render such weapon inoperable by any person other than the owner or other lawfully authorized user.").

12. *See* CAL. PENAL CODE § 25135 (West 2015) (mandating safe gun storage if firearm owner knows or has reason to know that a co-dweller is prohibited by state or federal law from possessing a firearm); CONN. GEN. STAT. ANN. § 29-37i (West 2015) (requiring safe storage of loaded guns if another resident is ineligible to possess a firearm under state or federal law or "poses a risk of imminent personal injury to himself or herself or to other individuals"); N.Y. PENAL LAW § 265.45 (McKinney 2015) (requiring safe gun storage if a firearm owner lives with one who has been convicted of a felony, adjudicated as a mental defective or committed to a mental institution, or convicted of domestic violence).

13. *See* McClurg, *supra* note 1, at 20 ("A comparative indicator of how society tolerates conduct by firearms dealers that increases the risk of guns being stolen or otherwise diverted to criminal users can be found by examining Colorado's laws regarding recreational marijuana.

reader. It strikes this reader of his work (and now writer of this response) that one should be in awe of the extensive nature of the regulation of fairly benign drugs such as marijuana, and yet feel a sense of angst and frustration at the dearth of legislative will concerning something as dangerous as negligent ownership of guns.

Thus, the legislative failure to promote safety from guns was worth the analysis in McClurg's article, and arguably merited even more discussion in his article, particularly with respect to specifically how such legislative failures have effectively fostered the creation of a Second Amendment right to be negligent. Nevertheless, the thrust of McClurg's article is the logic, or lack thereof, of the judicial determinations that provide immunity for owners and sellers of guns.[14]

As is logical, and what one might expect, tort law is replete with references to and of the danger of guns.[15] Indeed, guns are considered *inherently dangerous* in the eyes of the law, meaning that the law imposes or requires extra precautions when using them.[16] As one court observed, "a person dealing with a [handgun] is held to the highest standard of due care, even a slight deviation from which may constitute negligence in the safeguarding of such a dangerous instrument."[17] Numerous others have come to similar conclusions.[18]

Yet despite the wealth of authority of the danger of guns and the

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While the federal government and forty-one states (including Colorado) have declined to mandate security measures for retail gun dealers, the Colorado Constitution and regulations adopted pursuant thereto require security measures for recreational marijuana retailers.").

14. *Id*. at 23–46.

15. *See, e.g*., RESTATEMENT (SECOND) OF TORTS § 298 cmt. b (AM. LAW INST. 1965) ("[T]hose who deal with firearms . . . are required to exercise the closest attention and the most careful precautions, not only in preparing for their use but in using them.").

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

17. *See* Reida v. Lund, 18 Cal. App. 3d 698, 704 (Ct. App. 1971) (citation omitted). *See also* Bridges v. Dahl, 108 F.2d 228, 229 (6th Cir. 1939) (stating that the utmost caution must be exercised by those in possession and control of dangerous instrumentalities such as firearms and explosives); Jacobs v. Tyson, 407 S.E.2d 62, 64 (Ga. Ct. App. 1991) (classifying a firearm as an "inherently dangerous instrumentality" that imposes on users a duty to employ "exceptional precautions to prevent injury" and distinguishing firearms from other products that are capable of being used to inflict harm, such as knives and golf clubs, because of the unusual dangers presented by firearms (emphasis omitted) (quoting Glean v. Smith, 156 S.E.2d 507, 509 (1967))); Long v. Turk, 962 P.2d 1093, 1096 (Kan. 1998) (characterizing a handgun as a dangerous instrumentality requiring the highest degree of care in safeguarding); Estate of Strever v. Cline, 924 P.2d 666, 671 (Mont. 1996) (stating that a firearm is a dangerous instrumentality requiring a higher degree of care in use and handling); Luttrell v. Carolina Mineral Co., 18 S.E.2d 412, 417 (N.C. 1942) (stating that those having possession and control of dangerous instrumentalities such as firearms and explosives owe the highest degree of care and that utmost caution must be exercised in their care and custody).

18. *See supra* note 17 and accompanying text.

necessity to take extra precaution when handling or otherwise using them, which McClurg addresses in detail, McClurg highlights an irony and incongruence when he memorializes the courts distortion of tort principles in order to create immunity from liability. [19] McClurg grimaces at "the elaborate lengths to which courts have gone to avoid placing responsibility on gun owners to secure from theft the only legal consumer product designed to kill people."[20] He observes:

> [T]here are reasons to believe a credible threat of tort liability would incentivize lawful gun owners and sellers to exercise reasonable care in keeping guns out of the hands of thieves. Similarly, an affirmative mandate of reasonable gun security practices in the form of legislative or regulatory rules could be expected to have a deterrent effect on lawful gun owners and sellers, as most could be expected to follow the law. But in the topsy-turvy world of guns in America, the legal system has essentially abandoned the deterrence model as a means for promoting safe conduct in securing the most dangerous product. As seen throughout this Article, the law imposes almost no expectations on the most efficient cost-avoider—gun possessors.[21]

Despite McClurg's exhaustive review of the caselaw on the subject, as well as the logic of his arguments, not all examining his article agree with him, or even give his arguments much credence. Professor Denning, for instance, throws a jab or two at McClurg in his essay when he observes:

> The second question I have concerns [McClurg's] repeated assertions that in relieving owners of liability for negligence when unsecured guns are stolen and used in crimes, that courts "ignore[d] or mischaracterize[d] fundamental scope of liability principles" like duty and proximate cause. Early in the article, Professor McClurg notes that "[b]oth duty and proximate cause are pure policy determinations and are two ways of asking the same question: as a matter of fairness and public policy, should the law extend tort liability in the particular circumstances at issue?" If duty and proximate cause are, at bottom, labels we give policy determinations and not Platonic ideals, then the conclusion that he draws—that the courts had to distort the law to reach their decisions, resulting in a "right to be negligent"—seems puzzling. How can the courts distort principles whose content is dictated by judgments about where liability ought to lie when judges

19. *See* McClurg, *supra* note1, at 21.
20. *See id.* at 26.
21. *See id*. at 42 (footnote omitted).

> determine that liability does or does not exist based on implicit, if un- or under-articulated, policy judgments?[22]

While it appears Professor Denning had a bit of fun pointing out the apparent logical inconsistency of McClurg's primary argument, at this point, and perhaps with a slight bit of motivation of defending my former FIU colleague and friend, this article will seek to set the legal record straight, and correct the slight inaccuracies of all concerned. Professor Denning was in fact correct when he questioned McClurg's argument pertaining to proximate cause and duty being merely questions of public policy. As Professor Denning correctly notes, if these two components of the negligence test are merely policy determinations, how could courts distort a policy conclusion?[23] As Professor Denning puts it, according to McClurg's argument, courts were not distorting the law, they were merely coming to a different policy determination, which by definition is not a distortion.[24] In others words, Professor Denning uses McClurg's argument to highlight that if the standard is merely a policy conclusion, subsequent court decisions merely came to a different or new policy determination. Accordingly, there is no distortion of a standard or principle if a subsequent determination is merely based on a different or differently weighed policy determination.[25] Denning makes a fair point with this criticism, but I believe McClurg, perhaps a bit artfully, was seeking to make a slightly different point.

In all likelihood, what occurred in McClurg's original article is that he made a slight overstatement when he asserted proximate cause and duty are purely matters of public policy. I suspect both McClurg and Denning, as well as virtually all other torts professors in the country, appreciate duty and proximate cause turn on notions of foreseeability.[26] As the prolific, exceptionally brilliant, and path-breaking/setting Justice Cardozo wrote in *Palsgraf v. Long Island Railroad*,[27] concerning both proximate cause and duty: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."[28] Thus, at their core, the notions of proximate cause and duty have substance and create a standard, as Cardozo so brilliantly stated with three simple words—risk imports relation.[29] To put it another way, the risk one creates determines the scope of liability to be imposed. It is because proximate cause and duty are standards that have substance and said standards can in fact be distorted, and as McClurg observes when discussing the relevant cases on gun

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22. Brannon P. Denning, *Is there A "Second Amendment Right to Be Negligent?*," 68 FLA. L. REV. F. 99, 103–04 (2017) (emphasis omitted).

23. *Id*.

24. *Id*.

25. *See generally id* at 99.

26. *See* Palsgraf v. Long Island R.R., 248 N.Y. 339, 344 (N.Y. 1928) ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.") (emphasis added for every one of the thousands torts students I have had the honor to teach over the last two decades).

27. *Id.*

28. *Id*. (emphasis added).

29. *Id*

owners' liability, proximate cause and duty are not merely reflections of the whim of one or more judges. Thus, I believe McClurg was attempting to acknowledge duty and proximate cause reflect policy consideration, but ultimately turn on questions of foreseeability, which perhaps McClurg could have stated a bit more clearly.

To further the doctrinal thrust of this point, one need only to look to arguably the Twentieth Century's leading judicial light on torts-- Justice Benjamin N. Cardozo. Indeed, Cardozo's observation on the subjects of duty and proximate cause are considered the cornerstone of torts and negligence.[30] This conclusion does not detract from the fact that courts have, as McClurg also observes, recognized proximate cause and duty include policy considerations.[31] Thus, when McClurg was referring to proximate cause and duty as policy determinations,[32] there was truth to those comments. Where McClurg's comments could have benefited from some clarity, and perhaps addressing Professor Denning's concern, McClurg could have paid slightly more emphasis on the role foreseeability has on proximate cause and duty. Such an addition would have also highlighted that both proximate cause and duty have substance and basis. Thus, McClurg was correct when he concludes courts addressing gun owner and gun seller liability in fact distorted torts principles of duty and proximate cause.

In another article questioning McClurg's analysis, Professors Gilles and Lund, using fairly harsh and arguably dismissive language and tone, question most of McClurg's observations and conclusions.[33] The focus here will be on their questionable torts analysis, which attempts to rebuke McClurg's sound torts examination.[34] The "first problem with [McClurg's] argument," according to Professors Gilles and Lund, is that negligence requires in addition to foreseeability, a "special relationship" in order to impose liability on a wrongdoer to the ultimate victim.[35] The problem with this analysis is that in making their argument, the authors have created an element that is not supported by torts caselaw. Citing essentially two cases, these authors seem to suggest a "special relationship" requirement in addition to the traditional foreseeability test

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30. *See* Lawrence Cunningham, *Poll on Famous Torts Cases and Judges*, CONCURRING OPINIONS (May 20, 2009), https://concurringopinions.com/archives/2009/05/poll-on-famous-torts-cases-and-judges.html (in discussing the importance on torts, the author rates judges Cardozo and Posner number one and two all-time greats, respectively, stating: "[t]hose judges are the first and second most consequential on tort law measured by opinion frequency in 20 current Torts casebooks. Both are legendary judges with particular recognition in the law of torts. Cardozo's torts opinions are canonical: 10 appear in the books, 7 in at least 1/4 of them, and all but 1 appear in at least 3 books. Posner's opinions enjoy more sporadic interest: 25 opinions appear in the books, only 2 in at least 1/4 of them, and 20 appear in only 1 or 2 books").

31. *See* McClurg, *supra* note 1, at 23–24.

32. Interestingly, when making this observation, McClurg cites Judge Andrews' dissent in *Palsgraf*. However, Andrews' construction did not carry the day in that decision, and most would consider his opinion as not being a winning decision today. *Id.* at 23 n.107.

33. Stephen G. Gilles and Nelson Lund, *A Second Amendment Right To Be Negligent?*, 68 FLA. L. REV. F. 79, 79 (2016).

34. *Id*. at 82 –83.

35. *Id.*

for proximate cause.[36] The problem with this argument is simple: neither tort law nor the scant authority the authors cite support their conclusions. First, they cite the *Third Restatement of Torts, Section 40,* for the proposition that liability that a negligent actor is only liable to a third person when there is a special relationship.[37] The problem here is that while Restatement Section 40 does stand for the proposition the authors assert, this restatement provision does not provide the exclusive basis to impose liability when one creates a risk that harms others. The provision merely asserts that: "An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship."[38] Foreseeability of the risk one creates determines the scope of liability, as Section 40 by its own terms recognizes.[39] Moreover, the few cases these authors cite for the creation of an additional special relationship requirement do not stand for the proposition asserted.[40] They simply address the issue of liability when a special relationship existed.[41] They do not proclaim a special relationship requirement in order to impose liability, especially if the defendant creates a risk that leads to the harm of others.[42] As the *Restatement of Torts* has long recognized: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby."[43] Accordingly, if the potential theft of a gun and subsequent harming of another(s) is the or a hazard that leads a court to conclude the gun owner's failure(s) was that which made owner negligent, proximate cause should allow for recovery. Indeed, courts have not hesitated to impose liability on defendants when they created a risk and that risk led a third person to ultimately harm the plaintiff.[44] Thus, protestations aside, McClurg's torts analysis in general, and proximate cause analysis in particular, is unquestionably correct.

Indeed, the most significant contribution of McClurg's article is his proximate cause analysis of the judicial decisions refusing to impose

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36. *Id.*

37. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 (a) (AM. LAW INST. 2012).

38. *Id.*

39. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 cmt. h (AM. LAW INST. 2012).

40. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976).

41. *Id.*

42. *Id.*

43. RESTATEMENT (SECOND) OF TORTS § 449 (1965).

44. Lane v. Halliburton, 529 F3d. 548, 566 (5th Cir. 2008) ("*See* RESTATEMENT (SECOND) OF TORTS §§ 448–449 (1965); PROSSER AND KEETON ON THE LAW OF § 44, at 303–06 (W. Page Keeton *et. al.*, eds., 5th ed.1987). According to the Restatement, "[i]f the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby."); USAir Inc. v. U.S. Dep't of Navy, 14 F.3d 1410, 1412 (9th Cir. 1994) (No special relationship mentioned nor could be found if there was such a requirement); Deeds v. U.S., 306 F. Supp. 348, 353 (Dist. Ct. Mont. 1969) (no mention of special relationship).

liability on gun owners and sellers. When discussing what he aptly describes as the judicial imprimatur for negligence, McClurg both accurately and cogently highlights how courts, in a host of decisions concerning gun owners and sellers, refused to impose liability due to their *sui generis* standard of proximate cause and duty for negligent gun owners and sellers.[45] Indeed, McClurg's observations concerning the leading cases on the matter, including, *Romero v. National Rifle Ass'n of America, Inc*., highlights the distortion of traditional tort principles, when the court effectively required the defendant to have foreseen each and every subsequent event leading to the injury in order to impose liability.[46] As McClurg correctly argues, the appropriate proximate cause test is whether the harm that results was within the scope of likely results stemming from the original risk created by the defendant.[47] McClurg similarly highlights how subsequent decisions, such as *Strever v. Cline*,[48] used almost identical tortured proximate cause reasoning to that of the *Romero* decision in order to refuse to impose liability.[49] Unlike the tortured logic of *Romero* and *Strever*, proximate cause does not require a defendant to have effectively foreseen, thought of, or expected, every conceivable fact that led to the ultimate injury in order to be found liable. Under such a standard, every defendant would lack the requisite foreseeability to be held liable. Accordingly, such an analysis, if it were the law, would lead to the death of negligence as we know it.

Indeed, it is these observations and sound analytical undertakings that are the force of McClurg's argument: courts have effectively created a Second Amendment right for gun owners and seller to be negligent.[50] And while it may be true the courts do not specifically reject liability due to the Second Amendment, as McClurg observes, the decisions repeatedly make references implicating the Second Amendment, through the use of language such as "legitimate public debate concerning the private ownership and storage of firearms. . . . ,"[51] or "[this court is] not persuaded that society is prepared to extend the duties of gun owners that far."[52] As McClurg persuasively observes, when courts repeatedly reject classic and uncontested constructions of tort law to remove liability based upon some interest or public debate for a special or particular group, it leaves little doubt courts are creating special negligence immunity for that

45. McClurg, *supra* note 1, at 26–30.

46. *Id.* at 26.

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

48. 924 P.2d 666, 667–68 (Mont. 1996).

49. *Id*. at 667–68; McClurg, *supra* note 1, at 27–28.

50. McClurg, *supra* note 1.

51. McGrane v. Cline, 973 P.2d 1092, 1095 (Wash. Ct. App. 1999).

52. Holden v. Johnson, No. CV010811660, 2005 WL 1153739, at *6 (Conn. Super. Ct. Apr. 15, 2005).

group.[53] And indeed, it does not take a great leap to reach the conclusion the Second Amendment is in fact the policy debate behind, or at the center of, the issue guiding the courts. It is here where Professor McClurg makes an invaluable contribution to tort law and the Second Amendment. It is also here where hopefully students of law and public policy will continue to debate the inconsistency of tort law when applied to gun owners and sellers. Indeed, as political and legal theorists from Immanuel Kant to W.E.B Du Bois have recognized, for a law to be moral and just, it is necessary for the law to be predictable and equally applicable to all.[54] If we are to make special rules because we hold gun ownership so sacred, then are laws in fact predictable, just and moral? Perhaps they are merely applicable for things we do not so cherish?[55]

53. *See* McClurg, *supra* note 1, at 1.

54. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880 (1999); IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT (1796).

55. *See* Drutman, *supra* note 6; Stuart *supra* note 6.