GUNS IN THE PRIVATE SQUARE

Cody J. Jacobs *

The regulation of guns has been one of the most hotly debated public policy issues in the United States throughout the country's history. But, up until recently, it has always been just that—a debate about public policy. Two recent developments have changed the landscape and moved the debate about publicly carrying firearms from the realm of public policy, to the realm of private decision-making and private law. First, laws related to publicly carrying firearms have been dramatically loosened throughout the United States to the point that, in the vast majority of states, anyone who is legally allowed to carry a firearm is also eligible to legally carry a gun in public. Second, truly public spaces—spaces owned by state and local governments and open to all—have shrunk considerably and been replaced by spaces that are owned by private businesses but open to the public such as big box stores, shopping malls, building plazas, and even sidewalks. The upshot of these two trends is that the decisions businesses make about whether to allow guns on their property will have a large impact on the degree to which the general public is exposed to guns when going about their daily lives.

This Article argues that businesses can be held accountable for the consequences of these decisions through tort liability. Specifically, most businesses should be subject to premises liability if they do not have an explicit and clearly communicated policy prohibiting customers from bringing guns into their stores when the failure to have such a policy causes a customer's injury. The Article explains that assigning such liability will not interfere with the goals of permissive concealed carry laws or the rights protected by the Second Amendment. Indeed, such liability would not even force businesses to ban guns, instead it would only force businesses to internalize the costs of those decisions. The Article concludes by situating the controversy over guns in private businesses within a larger trend of the privatization of the gun debate.

* Lecturer, Boston University School of Law. Thanks to Joe Blocher, Carolyn Shapiro, Sheldon Nahmod, Mark Rosen, Kathy Baker, Lori Andrews, Christopher Schmitt, Greg Riley, Felice Batlan, Debbie Ginsberg, Stephanie Stern, Alexander Boni-Saenz, and Sungjoon Cho for their very helpful comments on this Article. I was also grateful for the opportunity to present an earlier version of this paper at the Chicagoland Junior Scholars Conference and get helpful detailed feedback from Jim Lindgren, Franciska Coleman, Daniel McConkie, and other conference participants. I also greatly benefited from workshopping a later version of this paper at the Duke Center for Firearms Law's Works-in-Progress Workshop. I especially thank Mandy Lee for her extremely helpful research assistance.

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I. INTRODUCTION

Chad Oulson was seeing a movie with his wife in a central Florida movie theater when he got into an argument.[1] During the previews, Mr. Oulson had been texting with his three-year-old daughter's babysitter, when another theater patron, Curtis Reeves Jr., told him to stop.[2] Mr. Oulson apparently refused, and their argument escalated to the point that, allegedly, Mr. Oulson threw some popcorn at Mr. Reeves.[3] Mr. Reeves then pulled out a gun and shot Mr. Oulson, killing him.[4] This case received a lot of attention because Mr. Reeves was carrying the gun legally as a concealed carry permit holder.[5] Florida has a very permissive concealed carry permitting law that allows virtually anyone who is not

1. *See* Dan Freedman, *Florida Theater Shooting Evokes Condemnations of Concealed-Carry and Self-Defense Laws*, HOUS. CHRON. (Jan. 15, 2014), https://www.houstonchronicle.com/news/nation-world/nation/article/Florida-theater-shooting-evokes-condemnations-of-5147263.php.

2. *Id.*

3. *Id.*

4. *Id.*

5. *See id*.

otherwise prohibited from owning a firearm to obtain a permit to carry a concealed, loaded gun in public.[6]

Certainly, this incident and others like it should prompt reflection on the wisdom of these statutes, but the statute alone is not the reason Mr. Reeves was allowed to have a gun that day. While Florida's statute allows permit holders to carry firearms in public, it says nothing about what most[7] private businesses should do with respect to concealed carry permit holders. If the movie theater had an explicit, clearly posted policy prohibiting guns, it is likely that Mr. Reeves, a former law enforcement officer with no criminal record,[8] never would have brought a gun to the movie that day in the first place, and Mr. Oulson would still be alive.

Florida's statute is not unique—the majority of states have similarly permissive schemes allowing the public carrying of firearms while at least twelve states have even more permissive laws.[9] Yet, like Florida's law, these laws all allow the vast majority of private businesses to make their own decisions about whether to allow guns on their premises.[10] The decision whether to allow guns into a business is a politically fraught one that has thrust businesses into the uncomfortable situation of taking sides in a heated culture war topic.[11] As Mr. Oulson's case illustrates, making the right decision can be a matter of life and death.

This Article argues that businesses should not be immune from the consequences of these decisions. Instead, businesses should be held liable under a premises liability theory if they fail to explicitly prohibit firearms when doing so could have prevented a shooting like the one that claimed Mr. Oulson's life.[12] Such liability would fit well within established principles of premises liability. Premises liability has long been concerned with ensuring that businesses that are open to the public take all reasonable steps to ensure that their property is safe for customers. For most businesses, prohibiting firearms is a low-cost measure that has the potential to prevent rare, but deadly, incidents. As with any tort claim that involves criminal activity, proving causation will sometimes be difficult, but

6. *See* FLA. STAT. § 790.06 (2017).

7. Guns are explicitly prohibited in a few narrow types of businesses such as bars. *See* FLA. STAT. § 790.06(12)(a).

8. Lisa Buie, *Curtis Reeves*, *Suspect in Movie Theater Shooting, Released on Bail*, TAMPA BAY TIMES (July 12, 2014), https://www.tampabay.com/news/courts/criminal/appeals-court-sends-bail-issue-for-accused-movie-theater-shooter-back-to/2188116.

9. *See infra* Section II.A.

10. *See infra* Subsection II.B.2.

11. *See infra* Subsection II.B.2.

12. Mr. Reeves claims that the shooting was valid self-defense under Florida's expansive stand your ground law. *See* Carson Chambers, *Suspect in Deadly Wesley Chapel Movie Theater Shooting Asks to Get Rid of Ankle Monitor*, ABC ACTION NEWS (Aug. 18, 2019), https://www.abcactionnews.com/news/region-pasco/suspect-in-deadly-wesley-chapel-movie-theater-shooting-asks-to-get-rid-of-ankle-monitor. A judge ruled against Mr. Reeves' motion to dismiss the charges against him on that basis, but that was before a change in the law that shifted the burden on the issue to the prosecution. *Id.* Irrespective of whether Mr. Reeves was engaged in legal self-defense, he was only able to engage in self-defense with a gun because of the theatre's lack of a weapons policy.

should not be an insurmountable barrier to liability where there is at least circumstantial evidence that a firearm prohibition would have been followed by the perpetrator.

Applying premises liability in this context would not undermine permissive statutory public carry schemes or Second Amendment rights. Permissive public carry schemes are designed to ensure that most people are allowed to easily carry firearms without facing criminal liability. If businesses prohibited customers from bringing firearms onto their property to avoid tort liability, that would not frustrate that purpose. Moreover, a tort duty emanating from common law would simply provide a default rule—if legislatures really wanted to force private businesses to allow guns on their premises or eliminate the tort duty, they could do so through legislation. The fact that even the most permissive public carry schemes do not usually interfere with these decisions, however, suggests that legislatures are rightly wary of interfering with the rights of private property owners to decide whether or not to allow guns.

Similarly, even if the Second Amendment guarantees a right to carry guns outside the home,[13] there is no justification for creating a right to carry guns inside private businesses. Most constitutional rights have no application to private parties and limited application to private law.[14] In the particular case of private businesses and the Second Amendment, requiring businesses to allow public carry presents special difficulties because doing so might run up against other constitutional values including private property rights, First Amendment rights, and even the Second Amendment itself.[15] Finally, the need for personal self-defense is less acute in private businesses than it is in other public places because unlike the police, businesses that are open to the public have a legally enforceable duty to provide a safe environment for their customers.

This Article does not argue that businesses ought to be prohibited from allowing guns on their premises. On the contrary, the privatization of public spaces actually presents a unique opportunity to empower individuals to exercise greater control over their own relationship with guns than would be possible in a world more dominated by traditional public spaces. Ultimately, it should be up to consumers whether to patronize gun-free or gun-friendly businesses. Premises liability simply provides a vehicle to force businesses to internalize the costs of these decisions.

This issue of guns in public—and how businesses should respond to them—is only going to become more important. Public carrying laws nationwide are at one of their most permissive levels in history with the vast majority of states allowing most people to carry guns in public.[16] And, efforts are currently underway at the federal level to nationalize permissive public carry.[17] While some gun control measures have gained increased attention and popularity in

13. Which is not necessarily the case. *See infra* note 59.
14. *See generally* Cody J. Jacobs, *The Second Amendment and Private Law*, 90 S. CAL. L. REV. 945 (2017).
15. *See infra* Subsection II.B.2.
16. *See infra* Section II.A.
17. *See infra* Section II.A.

recent years, restrictions on public carrying are not among them.[18] Thus, for the foreseeable future, publicly carried guns are here to stay and businesses—and the tort system—will need to respond.

The issue of guns in public businesses is emblematic of a larger trend—the increasing privatization of the gun debate. Ever since the Founding, guns have been a subject of intense debate in Congress, state legislatures, and courts. But recently, in part because of the immense success of the gun rights movement in those public forums, the gun debate has increasingly moved into the realm of private decision-making. Should Wal-Mart allow guns to be carried in its stores? Should Dick's Sporting Goods sell assault weapons? Should Bank of America provide financing to gun manufacturers? As activists on both sides of the gun debate have increasingly turned their advocacy efforts to these private entities, it is worth asking how private law may also play a role in the next chapter of the story of guns in America.

Part II of this Article explores the increasingly permissive laws that regulate the public carrying of firearms and the increasing dominance of private businesses over formerly public spaces. These two trends have made the decisions these businesses make about whether to allow guns on their property highly consequential. Part III argues that premises liability provides a vehicle for tort law to hold companies accountable for those decisions when they result in injury to consumers. Part IV explains why the privatization of public spaces presents an opportunity to allow people on both sides of the debate over guns in America to live with—or without—guns in their daily lives regardless of the course the public politics of guns may take. Forcing businesses to internalize the costs of their decisions in this area will not diminish this opportunity and may actually enhance it. Finally, Part V situates the question of guns in businesses within a larger trend of the privatization of the gun debate.

II. GUNS IN PUBLIC & GUNS IN "PRIVATE"

The National Rifle Association ("NRA") and other pro-gun advocates have enjoyed perhaps their greatest policy success in expanding the ability of people to carry guns in public. In a period of less than two decades, liberalized concealed carry laws went from a very rare exception to the norm.[19] In fact, ordinary concealed carry laws have become so normalized that pro-gun groups have already moved on to pushing for even more relaxed laws that require no permit at all to carry guns in public.[20]

The pro-gun movement's near-total success in bringing guns into the public sphere has moved the debate about guns in public from legislatures to corporate boardrooms where businesses have faced the dilemma of whether to allow legally carried guns onto their premises. Businesses making these decisions often face intense media scrutiny and threats of backlash and boycotts from both sides

18. *See infra* Section II.A.
19. *See infra* Section II.A.
20. *See infra* Section II.A.

of the gun debate.[21] Yet, their role in making these decisions is an inevitable byproduct of a shrinking public sphere and expanding private one. Just as controversies over "free speech" increasingly concern policies put into place by private entities, controversies over guns in "public" are increasingly being decided by private decision-makers.

In the next subsection, I will examine the rapid expansion of liberalized concealed carry laws. In the following subsection, I will explore one of the results of this expansion—the increasing role of the private sector in making decisions about where guns can be carried.

A. A Brief History of Public Carry: How Guns Took Over Public Spaces

Contrary to the popular view of the Founding era as a time when guns were ubiquitous, there is significant historical evidence that many states enacted statutes prohibiting people from carrying guns in public under many circumstances nearly contemporaneous with the ratification of the Constitution.[22] Other scholars and some courts argue that these statutes were construed more narrowly and that open public carrying of firearms was largely allowed at the Founding.[23] Whatever laws existed at that time, it is hard to dispute that the policy objectives behind those laws were quite different from today's gun laws. As historian Saul Cornell has explained, "[i]nterpersonal violence, including gun violence, simply was not a problem in the Founding era that warranted much attention and therefore produced" very little legislation.[24] Instead, the gun laws that existed were designed to "disarm dangerous and disloyal groups, provide for the safe storage of gunpowder and firearms, and arm and regulate the militia."[25]

That started to change as handguns became more popular.[26] Starting in the early nineteenth century, several states began to enact more comprehensive statutes on carrying firearms.[27] A split quickly emerged, however, between northern and southern states.[28] Several northern states, most notably, Massachusetts, passed laws that almost completely forbid publicly carrying firearms except

21. *See infra* Subsection II.A.2.

22. *See* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Revie*w, 60 CLEV. ST. L. REV. 1, 31–36 (2012); *see also* Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1710 (2012) ("It is easy to mischaracterize the Founding era's recognition that militia weapons might be used in public with a broad right to carry arms.").

23. *See, e.g.*, Wrenn v. District of Columbia, 864 F.3d 650, 660 (D.C. Cir. 2017) (arguing that colonial era laws prohibited "the carrying of 'dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people'"); *see also* Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1218–19 (2015) (laying out some of the arguments on both sides of the debate).

24. Cornell, *supra* note 22, at 1713.

25. *Id.*

26. *See id.* at 1714; Daniel Peabody, Comment, *Target Discrimination: Protecting the Second Amendment Rights of Women and Minorities*, 48 ARIZ. ST. L.J. 883, 889 (2016).

27. *See* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 CLEV. ST. L. REV. 373, 401–05 (2016).

28. *Id.*

when someone had a reasonable fear of being attacked.[29] In the South, on the other hand, a more permissive view took hold that generally prohibited the concealed carrying of firearms but allowed people to carry firearms openly in most circumstances.[30] Historians have traced this split to the South's "distinct cultural phenomena of slavery and honor" which encouraged southern men to carry guns "both 'as a protection against the slaves' and also to be prepared for 'quarrels between freemen.'"[31]

In the period after the Civil War up through the early twentieth century, this regional divide lessened somewhat as a slew of more restrictive laws regulating public carrying were enacted throughout the country.[32] These laws took several forms, but most of them completely banned concealed carrying without addressing open carrying.[33] On the other hand, some did allow people to carry concealed firearms, but only with special permission from local officials.[34] Still other statutes placed serious limits on or completely banned public carrying in cities and towns while allowing it in rural areas.[35]

29. *Id.* at 402–03.

30. *Id.* at 405; Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. FORUM 121, 127 (2015); *see also* Mark Frassetto, *Firearms and Weapons Legislation up to the Early 20th Century* 20–24 (Jan. 15, 2013), https://ssrn.com/abstract=2200991 (collecting public carry related statutes from this era). There were a few exceptions to this divide. For example, Ohio and Indiana both allowed open carry. Charles, *supra* note 27, at 405.

31. Ruben & Cornell, *supra* note 30, at 126 (citation omitted); *see also* Robert J. Cottrol & Raymond T. Diamond, *Freedom: Constitutional Law: "Never Intended to Be Applied to the White Population": Firearms Regulation and Racial Disparity-the Redeemed South's Legacy to A National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1318–19 (1995) ("Almost from the beginning, the unique need to maintain white domination in the nation's first truly multi-racial society led the South to a greater vigor with respect to the private possession of arms . . . as a means of insuring racial control."). In contrast to the permissive laws that were applicable to whites, even free blacks were severely restricted from owning and using firearms in the antebellum south. *See, e.g.*, *id.* at 1320–21.

32. *See* Charles, *supra* note 27, at 426–27 ("[B]y the close of the nineteenth century almost every state in the Union maintained some type of armed carriage law, as did many cities and municipalities. Additionally, some armed carriage laws were modified to eliminate discretion of enforcement. As a result, law enforcement officials could be fined or removed from office for failing to arrest individuals that violated the respective armed carriage law."); Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1724 (2012) ("Gun regulation in the years after the adoption of the Fourteenth Amendment became stricter, not looser.").

33. *See, e.g.*, 1899 Alaska Sess. Laws 1270, *An Act to Define and Punish Crimes in the District of Alaska and to Provide a Code of Criminal Procedure for Said District*, ch. 6, § 117; 1881 Del. Laws 716, *An Act Providing For The Punishment Of Person Carrying Concealed Deadly Weapons*, ch. 548, § 1; Fla. Act of Feb. 12, 1885, ch. 3620, § 1 (codified in FLA. REV. STAT., tit. 2, § 2421 pt. 5 (1892)).

34. *See, e.g.*, COLO. REV. STAT. § 149 pt. 229 (1881) (codified in COLO. REV. STAT. ANN. § 1830 ch. 35 (1911)) ("No person, unless authorized to do so by the chief of police of a city, mayor of a town or the sheriff of a county, shall use or carry concealed upon his person any fire arms . . . ."); W. VA. CODE ch. 153, § 8 (1870) ("If any person go armed with a deadly or dangerous weapon, without reasonable cause to fear violence to his person, family, or property, he may be required to give a recognizance.").

35. *See, e.g.*, 1901 Ariz. 1251, *Crimes Against the Public Peace*, §§ 381, 385, 390 (prohibiting concealed carry and all public carrying within "any settlement, town, village or city" except when transporting a weapon through one of those places in the course of travel); 1888 Idaho Sess. Laws 23, *An Act Regulating The Use and Carrying of Deadly Weapons in Idaho Territory*, § 1 ("It is unlawful for any person, [certain government officials and employees of delivery companies] . . . to carry, exhibit or flourish any dirk, dirk-knife, sword, sword-cane, pistol, gun or other deadly weapons, within the limits or confines of any city, town or village or in any public assembly of Idaho Territory."); Wyo. Comp. Laws (1876) ch. 52, § 1 (codified in WYO. REV. STAT., *Crimes*

By the early twentieth century, public carry laws began to harmonize to some degree with the spread of the Uniform Act to Regulate the Sale and Possession of Firearms, sometimes just called the Uniform Firearms Act ("UFA"), which was adopted by the National Conference of Commissioners on Uniform State Laws in the late 1920s.[36] The UFA, which was seen as a more lenient alternative to complete bans on concealed carry,[37] allowed people to carry concealed weapons with a license. The decision whether to grant a concealed carry license was left to the discretion of local officials who would grant such a license only when those officials determined that an applicant had "good reason to fear an injury to his person or property."[38]

These statutes generally did not address open carry; by the post-war period, however, many states began to similarly regulate open carry as gun laws became a bit more restrictive.[39] By 1950, twenty states required a license for open carrying, and a handful of states completely prohibited carrying firearms outside the home, whether concealed or openly.[40] That trend continued and intensified in the 1960s and 70s as violent crime became more of a national concern.[41]

As restrictions on public carrying and gun control generally, at least arguably, reached a peak in the early 1980s, a strong backlash began to develop. The NRA, which had previously supported restrictions on public carrying,[42] became an active opponent of restrictions on carrying firearms outside the home.[43] The NRA began to promote a model "shall issue" licensing statute for carrying concealed firearms.[44] "Shall issue" is a licensing regime where state officials do not have discretion to deny an applicant a permit to carry a firearm simply because the applicant lacks a good reason for applying—that is, anyone who satisfies

Carrying Concealed Weapon § 980 (1887)) ("Hereafter it shall be unlawful for any resident of any city, town or village, or, for any one not a resident of any city, town or village, in said territory, but a sojourner therein, to bear upon his person, concealed or openly, any fire-arm or other deadly weapon, within the limits of any city, town or village.").

36. *See* Brief for Academics for the Second Amendment as Amicus Curiae Supporting Petitioners, Woollard v. Gallagher, 571 U.S. 952 (2013) (No. 13-42), 2013 WL 4153178, at *8; Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 681 (1995).

37. *See* Nicholas Moeller, Note, *The Second Amendment Beyond the Doorstep: Concealed Carry Post-Heller*, 2014 U. ILL. L. REV. 1401, 1408 (2014) ("Following the passage of a rigidly restrictive concealed carry ban in New York, the United States Revolver Association drafted the more lenient model uniform law with the hopes of 'forestall[ing] laws which might seriously interfere with the privileges of pistol shooting and hunting.'"). The UFA also enjoyed the support of the NRA. *See* Cramer & Kopel, *supra* note 36, at 681.

38. A Uniform Act to Regulate the Sale and Possession of Firearms § 7 (1926).

39. *See* Editors, *Restrictions on the Right to Bear Arms: State and Federal Firearms Legislation*, 98 U. PA. L. REV. 907, 908–09 (1950).

40. *See id.*

41. *See* Gary Lafree, *Explaining the Crime Bust of the 1990s*, 91 J. CRIM. L. & CRIMINOLOGY 269, 270–72 (2000).

42. *See* Cramer & Kopel, *supra* note 36, at 681; *see also* Charles, *supra* note 27, at 461 (noting that at least through the late 1960s, the NRA did not see the Second Amendment "as guaranteeing a right to preparatory armed carriage").

43. *See* Charles, *supra* note 27, at 464–66, 471.

44. *Id.* at 471.

specific statutory requirements (like firearms training and a background check) can obtain a permit.[45]

Ultimately, the NRA's advocacy on this issue proved to be incredibly successful.[46]Although "shall issue" statutes existed in a handful of states before the NRA's campaign,[47] the number of such states exploded starting in 1987 when Florida became the first state to enact the NRA's model "shall issue" statute.[48] During the next ten years, the number of such states went from a small minority (eight states) to a solid majority (thirty states).[49] The NRA's campaign has become even more ambitious in the twenty-first century—the organization has recently begun successfully advocating for "permitless carry" laws that allow anyone who can legally possess a firearm to carry it in public (either concealed or openly) without any permit at all.[50]

* * * * *

The upshot of all this is that today the United States has some of the most permissive public carry laws it has ever had. Every state allows some form of public carrying. Only nine states retain traditional "may issue" regimes (laws that require some showing of a particularized need to carry a firearm in public).[51] Twenty-nine states and the District of Columbia have "shall issue" statutes, and twelve others require no permit at all.[52]

The NRA's massively successful legislative advocacy[53] in this area is not likely to be rolled back any time soon. Although gun control advocates have arguably attained renewed momentum in the aftermath of the Sandy Hook Elementary School massacre and other mass shootings, the focus of those campaigns has been on things like universal background checks and bans on assault weapons

45. *See, e.g.*, Peabody, *supra* note 26, at 895.

46. *See* Charles, *supra* note 27, at 473.

47. Eight states had such laws in 1987. *See* Steven W. Kranz, Comment, *A Survey of State Conceal and Carry Statutes: Can Small Changes Help Reduce the Controversy?*, 29 HAMLINE L. REV. 637, 647 (2006).

48. *See* Charles, *supra* note 27, at 473.

49. *See* Kranz, *supra* note 47, at 646–47.

50. *See Governor Brownback Signs NRA-Backed Permitless Carry Legislation Into Law*, NRA INST. FOR LEGIS. ACTION (Apr. 2, 2015), https://www.nraila.org/articles/20150402/governor-brownback-signs-nra-backed-permitless-carry-legislation-into-law. In 2002, just one state—Vermont—had a permitless carry regime. See Eric Benson, *Vermont's Long, Strange Trip to Gun-Rights Paradise*, TRACE (July 9, 2015), https://www.thetrace.org/2015/07/vermont-gun-rights-constitutional-carry/. Today, fifteen states do. *See Concealed Carry*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/ (last visited May 21, 2020).

51. *See Guide to the Interstate Transportation of Firearms*, NRA INST. FOR LEGIS. ACTION, https://www.nraila.org/gun-laws/ (last visited May 21, 2020).

52. *Id.*

53. Despite the high profile of Second Amendment litigation on this topic, almost none of these changes to public carrying laws came about through federal constitutional litigation. The exceptions are the District of Columbia and Illinois. *See* Wrenn v. District of Columbia, 864 F.3d 650, 667–68 (D.C. Cir. 2017) (invalidating the District's "may issue" permitting law); Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (invalidating Illinois' complete ban on public carrying). A Ninth Circuit panel also recently struck down Hawaii's "may issue" concealed carry law, *see* Young v. Hawaii, 896 F.3d 1044 (9th Cir. 2018), but the Ninth Circuit has granted a motion for re-hearing en banc. *See* Young v. Hawaii, No. 12-17808, 2019 WL 494053, at *1 (9th Cir. Feb. 8, 2019).

and large capacity magazines, rather than on public carry laws.[54] In fact, public carry laws may become even more permissive in the near future. Although permitless carry is not very popular nationally,[55] there are many current "shall issue" states that may be poised to move in that direction.[56]

There is also the very real possibility that the Supreme Court will find that the "may issue" regimes that remain violate the Second Amendment. Although Second Amendment litigation challenging "may issue" regimes has been largely unsuccessful in the lower courts,[57] at least some on the Supreme Court have signaled their receptiveness to such arguments.[58] Assessing the validity of these arguments is beyond the scope of this article,[59] but it is fair to say that there is at least a reasonable chance that the Supreme Court will find that the Second Amendment extends outside the home and that "may issue" schemes do not provide a fair opportunity for people to exercise that right.[60] The impact of such a ruling might seem relatively negligible since so few states retain "may issue" regimes today, but among those states are two of the four most populous—California and New York.[61]

Even if the Supreme Court does not strike down "may issue" laws, they may be rendered meaningless by a proposed federal law, the Concealed Carry Reciprocity Act ("CCRA"). The CCRA would require all states to honor concealed carry permits issued in any other state.[62] Although the idea behind the

54. *See, e.g.*, *Our Plan*, MARCH FOR OUR LIVES, https://marchforourlives.com/peace-plan (last visited May 21, 2020) (listing policy goals of March For Our Lives, none of which relate to public carrying). This dichotomy is also reflected in polling data. While bans on assault weapons and large capacity magazines are popular (and universal background checks are even more so), public opinion on public carrying is more closely divided. *See, e.g.*, Kim Parker et al., *America's Complex Relationship with Guns*, PEW RES. CTR. (June 22, 2017), http://www.pewsocialtrends.org/2017/06/22/americas-complex-relationship-with-guns/ (showing over 60% of American adults support bans on assault weapons and large capacity ammunition magazines and over 90% support universal background checks while over 50% say that guns should be allowed to be carried either "almost everywhere" or in "most places").

55. Parker, *supra* note 54 (showing only 19% of American adults favor permitless carry).

56. *See* Katie Zezima, *More States Are Allowing People to Carry Concealed Handguns Without a Permit*, WASH. POST (Feb. 24, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/02/24/more-states-are-allowing-people-to-carry-concealed-handguns-without-a-permit/ (noting that permitless carry legislation is being actively pushed by gun advocates in several states).

57. *See* Jacobs, *supra* note 14, at 979 & n.194 (collecting cases). *But see* Wrenn, 864 F.3d at 667–68.

58. *See* Peruta v. California, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting from the denial of certiorari) ("This Court has already suggested that the Second Amendment protects the right to carry firearms in public in some fashion. . . . I find it extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen."); *see also* N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1541 (2020) (Alito, J. dissenting) ("[A] necessary concomitant of [the right recognized in *Heller*] is the right to take a gun outside the home for certain purposes.").

59. *Compare* Darrell A.H. Miller, *Guns As Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009), *with* Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585 (2012), for a good representation of some of the arguments on both sides.

60. *See* cases cited *supra* note 58.

61. *See* CAL. PENAL CODE § 25400, 26150 (West 2016); N.Y. PENAL LAW § 400.00 (West 2019). In fact, the eight states with "may issue" statutes make up nearly 30% of the United States' total population. *See* List of U.S. States and Territories by Population, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_population (last visited May 21, 2020).

62. *See* Concealed Carry Reciprocity Act of 2017, H.R. 38, 115th Cong. § 101(a) (2017).

CCRA has been around for some time, it has received renewed attention recently, and a version of it passed in the House of Representatives in 2017.[63] The bill would effectively make the least restrictive state's laws a national standard since anyone could simply obtain a permit from another state and use it in their home state. Thus, the CCRA would probably be even more effective than a Supreme Court decision striking down the remaining "may issue" laws at completely nationalizing the spread of public guns.[64]

Thus, most people who want to carry guns in public spaces are allowed to do so. And, the number of people who can carry guns in public and the number of places they can carry them is likely to grow rather than shrink in the foreseeable future.[65]

B. The Next Firearms Frontier: Private Businesses

This massive expansion of guns in public has come at the same time as another trend—the shrinking of the public sphere itself. Over the last few decades, cities and towns have been transformed from being dominated by publicly owned spaces to being dominated by privately owned spaces. This trend means that the right to carry firearms in public is worth less today than it would have been fifty years ago. Instead, what will really determine whether "public" carrying becomes truly widespread and socially acceptable will be the policies adopted by places of public accommodation—businesses that are privately owned but open to the public. Advocates on both sides of the gun debate have begun to recognize this, and increasingly, the battle over guns in public has now moved onto private turf.

1. The Shrinking Public Sphere

Truly public space—that is, spaces that are publicly owned, open to the general public, and where people actually congregate—has become a rarity in the modern age.[66] This trend began with the suburbanization of the United States in the second half of the twentieth century and has continued into the twenty-first

63. *See* Steve Kroft, *The Showdown Over the Concealed Carry Reciprocity Act*, CBS NEWS (Feb. 11, 2018), https://www.cbsnews.com/news/concealed-carry-reciprocity-act-showdown/.

64. Although both routes would effectively eliminate "may issue," the CCRA would also eliminate things like live-fire training requirements since some states that do not have such requirements issue permits to non-residents. *See, e.g.*, VA. CODE ANN. § 18.2-308.06 (West 2017).

65. As of 2017, there were an estimated 16 million concealed carry permit holders in the United States. *See* John Lott, *Concealed Carry Permit Holders Across the United States: 2017*, at 5, CRIME PREVENTION RES. CTR. (July 9, 2014), https://crimeresearch.org/wp-content/uploads/2014/07/Concealed-Carry-Permit-Holders-Across-the-United-States.pdf. Of course, that number does not capture the whole picture. As discussed above, some states do not require a permit for public carry, so that number does not include people who choose to carry publicly in those states. On the other hand, many people who have such permits do not actually engage in public carry. A recent study estimates that about 3 million people actually carry a gun in public every day, while another 9 million carry a gun in public at least once per month. *See* Ali Rowhani-Rahbar et al., *Loaded Handgun Carrying Among US Adults*, 2015, 107 AM. J. PUB. HEALTH 1930, 1930 (2017).

66. *See, e.g.,* Jason K. Levine, *Defending the Freedom to Be Heard: Where Alternate Avenues Intersect Empty Public Spaces*, 36 U. MEM. L. REV. 277, 279 (2006).

century.[67] The specific story of the town square being replaced by the shopping mall is a familiar one that has received a lot of attention in First Amendment scholarship and judicial decisions because of its ramifications for freedom of speech and assembly.[68] But this trend is not limited to shopping malls, and its ramifications go far beyond its impact on First Amendment activities.

The traditional shopping mall—enclosed spaces anchored by large department stores and filled with smaller stores—has been in a steady decline over the last few decades.[69] Yet, this has not been accompanied by a resurgence in public space; instead, new forms of private spaces have been introduced and public spaces have continued to shrink.[70] As Professor Sarah Schindler explains:

> Developers are now building new "lifestyle centers" that often resemble stylized, traditional main streets, but are effectively outdoor malls on private property. Public parks are often now managed by private non-profit entities or Business Improvement Districts ("BIDs"). In some cash-strapped cities, officials have sold public land to private developers, and it is common to see restaurants taking over large portions of city sidewalks for outdoor dining.[71]
>
> These developments are supplemented by privately-owned spaces open to the public, which are spaces that are privately owned but legally required to be accessible to the public, including things like plazas outside of large buildings and even rooftop gardens within those buildings.[72]

The result of these changes is that private companies now have unprecedented control over the most heavily used public spaces.[73] Companies of course, like having such control since it allows them to create an environment that maximizes customer comfort and, by extension, the companies' profits.[74] But, companies have learned that "with great power, comes great responsibility."[75] Now, private companies have been thrust into the center of controversies that previously would have primarily involved governments: how, if at all, should the use

67. *See, e.g.*, Frank Askin, *The Privatization of Public Space and Its Impact on Free Speech*, 185 N.J. L. 12 (June 1997); Sarah Schindler, *The "Publicization" of Private Space*, 103 IOWA L. REV. 1093, 1096–97 (2018).

68. *See, e.g.*, Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 324–25 (1968), *abrogated* by Hudgens v. N.L.R.B., 424 U.S. 507 (1976); Askin, *supra* note 67, at 12; Levine, *supra* note 66, at 279, 310; *see also* Jacobs, supra note 14, at 957–59 (describing the Supreme Court's brief application of the First Amendment to some privately-owned spaces and eventual retreat from that position).

69. *See, e.g.*, Loren F. Selznick & Carolyn LaMacchia, *#Mall Ruckus Tonight: Should Mall Owners Be Forced to Provide A Stage for Expression in the Virtual Age?*, 53 WILLAMETTE L. REV. 239, 267–69 (2017) ("By the late 1990s . . . civic planning experts had recognized a decline in mall attendance and spoke of 'mall fatigue' and 'ghost malls' . . . More than two dozen malls have closed since 2010 while hundreds of malls . . . are expected to disappear in the next decade. Within 15 to 20 years, as many as half America's shopping malls are expected to fail.") (quotations and citations omitted).

70. *See* Schindler, *supra* note 67, at 1096–97.

71. *Id.* (citations omitted).

72. *See id.* at 1095–96.

73. *See, e.g.*, Kelly McInroy, Buzzworthy: *The Mosquito Teen Deterrent and the Right to Assemble in England and the United States*, 27 ARIZ. J. INT'L & COMP. L. 873, 887 (2010).

74. *See* Gregory C. Sisk, *Returning to the Pruneyard: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 HARV. J.L. & PUB. POL'Y 389, 394 (2009).

75. SPIDER-MAN (Columbia Pictures 2002).

of public spaces by homeless people be regulated? What speakers should be allowed in public spaces and what methods are those speakers allowed to employ to get their point across? What kind of security is appropriate to ensure safety in public spaces while still keeping them welcoming to all people?[76] And, with guns in public becoming commonplace, deciding whether guns should be allowed in these privately-owned public spaces has been added to the list.

2. Businesses in the Crosshairs

Despite the spread of increasingly permissive laws on public carrying, there are very few laws that explicitly regulate the carrying of firearms in businesses that are open to the public. Many states have laws that specifically prohibit firearms in certain kinds of establishments like bars[77] and hospitals.[78] On the other hand, a handful of states have "parking lot" laws that require businesses to allow employees and sometimes customers to keep guns in their cars in the businesses' parking lots.[79] Beyond these narrow provisions, most businesses have the right to decide for themselves whether guns are allowed on their premises.

In fact, many state laws anticipate businesses making these decisions by requiring businesses that wish to prohibit guns on their property to use specific kinds of signage to let customers know.[80] Some statutes just require some kind of conspicuous sign stating that no guns are allowed,[81] but others go into much more detail, including requiring that the signs be readable from a certain distance[82] or that the font and pictures on the sign be of a certain size.[83] Other states even provide or require businesses to use specific signs that are issued by state administrative agencies.[84]

And there appears to be little appetite to take this choice away from businesses by requiring them to allow guns on their premises. Even the most aggressive reading of the Second Amendment would not force businesses to allow guns on their property.[85] In fact, a law requiring businesses to allow guns might itself

76. *See* Schindler, *supra* note 67, at 1129–30.

77. *See, e.g.*, LA. STAT. ANN. § 14:95.5 (2014); MICH. COMP. LAWS § 28.425o (2017).

78. *See, e.g.*, D.C. CODE ANN. § 7-2509.07(a)(3) (2016); MICH. COMP. LAWS § 28.425o (2017); MO. ANN. STAT. § 571.107(17) (2014); S.C. CODE ANN. § 23-31-215(M)(9) (2016).

79. *See, e.g.*, FLA. STAT. § 790.25 (2019); KAN. STAT. ANN. § 75-7c10 (2017); W. VA. CODE § 61-7-14(d)(1) (2018).

80. *See, e.g.*, ARK. CODE ANN. § 5-73-306(18)(A)(i) (2019); 430 ILL. COMP. STAT. 66/65(d) (2019); KY. REV. STAT. ANN. § 237.110(17) (West 2017).

81. *See, e.g.*, ALA. CODE § 13A-11-61.2(c) (2018); NEB. REV. STAT. § 69-2441(2) (2018); OKLA. STAT. tit. 21, § 1290.22(C) (2019).

82. *See, e.g.*, MISS. CODE. ANN. § 45-9-101(13) (2016) (requiring that signage be readable from at least 10 feet away).

83. *See, e.g.*, TENN. CODE ANN. § 39-17-1359(b)(3)(B) (2020) (requiring businesses prohibiting firearms to post signs with the phrase "NO FIREARMS ALLOWED" with the text of that phrase "at least one inch (1″) high and eight inches (8″) wide"); TEX. PENAL CODE ANN. § 30.06(c) (West 2019) (requiring specific phrasing that "appears in contrasting colors with block letters at least one inch in height").

84. *See, e.g.*, 430 ILL. COMP. STAT. 66/65(d) (2019); KAN. ADMIN. REGS. 16-11-7(b) (2014).

85. *See* Jacobs, *supra* note 14, at 994–95; *see also infra* Part III (explaining why the Second Amendment does not bar the imposition of a premises liability on stores that allow guns on the premises).

be unconstitutional either because it would violate private property rights,[86] or, perhaps, even the Second Amendment itself.[87] Whether such a law would survive these challenges or not, the political will might not be there to pass such laws because of likely opposition from the business community.[88]

Thus, for the foreseeable future, the decision about whether or not guns will be allowed inside businesses will remain firmly in the hands of the owners of those businesses. This reality has not gone unnoticed by advocates on both sides of the gun debate. In recent years, both sides have put public pressure on businesses to make clear policies either allowing guns or prohibiting them.[89] Most businesses have been reluctant to take a stand because of a desire to avoid alienating customers on either side of the issue.[90] While some businesses have outright banned guns,[91] and a few have actually promoted their gun friendly policies,[92] many have tried to find a middle ground. Some businesses, including a few major chains, have tried to do this by issuing statements "requesting" that gun owners not bring guns into their stores, but stopping short of actually instituting a ban.[93] Others purport to ban guns in statements online but do not actually post signs in their stores announcing the policy to customers.[94] Finally, some businesses simply have a policy of following state and local law as a way of sidestepping the issue.[95]

86. Challenges on this basis to laws requiring guns to be allowed in business parking lots have so far been rejected by courts. *See* Ramsey Winch Inc. v. Henry, 555 F.3d 1199, 1208–11 (10th Cir. 2009); Fla. Retail Fed'n, v. Attorney Gen. of Fla., 576 F. Supp. 2d 1281, 1291 (N.D. Fla. 2008). But, requiring businesses to allow guns inside their actual establishments is a far greater imposition on their property rights than simply allowing customers to keep guns locked away in a car in the parking lot. *See* Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 41–45 (2012).

87. *See* Blocher, *supra* note 86, at 41–45.

88. Businesses have generally opposed even the narrower laws requiring them to allow guns in parking lots. *See, e.g.*, Phil Kabler, *Justice Signs Bill Barring Businesses from Prohibiting Firearms in Private Parking Lots*, CHARLESTON GAZETTE-MAIL (Mar. 22, 2018), https://www.wvgazettemail.com/news/justice-signs-bill-barring-businesses-from-prohibiting-firearms-in-private/article_cb278b49-78c4-5b25-8a27-3222357ca95c.html (noting the opposition of the West Virginia Business and Industry Council to that state's guns in parking lots law); Kyle Rothenberg, *Tennessee Governor Amends 'Guns in Parking Lots' Law to Protect Workers*, FOX NEWS (Apr. 21, 2015), https://www.foxnews.com/politics/tennessee-governor-amends-guns-in-parking-lots-law-to-protect-workers (noting the Tennessee Chamber of Commerce's opposition to that state's law).

89. *See, e.g.*, Ellen Jean Hirst & Bob McCoppin, *Concealed Carry: Illinois Businesses Face a Loaded Issue Over Concealed Carry*, CHI. TRIB. (Jul. 29, 2013, 2:00 AM), http://www.chicagotribune.com/news/ct-met-concealed-carry-business-20130729-story.html; Bruce Horovitz, *Gun Control Group: 'Skip Starbucks Saturday'*, USA TODAY: BUS. (Aug. 21, 2013, 3:14 PM), https://www.usatoday.com/story/money/business/2013/08/21/starbucks-boycott-gun-control-group/2681203/.

90. *See* Kerry Shaw, *What Is a 'Gun-Free Zone,' and What's Behind the Movement to Get Rid of Them?*, TRACE (Mar. 16, 2017), https://www.thetrace.org/2017/03/gun-free-zone-facts/.

91. *See, e.g.*, *id.* ("Walt Disney World bans weapons of all kinds, including toy guns. So do Costco, Ikea, California Pizza Kitchen, Whole Foods, AMC Theaters, and Waffle House.").

92. *See* Kelly Riddell, *More than 57,000 Gun-Friendly Bars, Eateries Crop up Across America*, WASH. TIMES (Sept. 1, 2014), https://www.washingtontimes.com/news/2014/sep/1/gun-friendly-businesses-bars-restaurants-growing-i/.

93. *See, e.g.*, Shaw, *supra* note 90; Matt Valentine, *Tallying the Costs of Open Carry*, ATLANTIC (Jan. 31, 2016), https://www.theatlantic.com/politics/archive/2016/01/open-carry-laws/436665/.

94. *See* Shaw, *supra* note 90 (describing Costco's policy).

95. *See, e.g.*, Alexander C. Kaufman, *Someone Left a Loaded Gun in a Walmart Bathroom*, HUFF. POST: BUS. (Jul. 17, 2014, 1:13 PM), https://www.huffingtonpost.com/2014/07/17/walmart-bathroom-gun_n_5595

These efforts to find a middle ground are doomed to fail. Simply asking customers not to carry guns is not likely to dissuade committed gun carriers who sincerely believe that carrying a gun is essential to their personal safety.[96] Even an actual anti-carrying policy is useless if it is not posted in a place customers can see it. Not only are most customers unlikely to be aware of such a policy, even customers who are aware of it will be under no legal obligation to follow it in the many states that require specific signage to effectively prohibit legally carried firearms. Companies that purport to defer to state and local law are essentially taking a pro-carrying stance since every state allows public carrying to some degree.[97] And, for the reasons described in the next section, none of these half-measures is likely to insulate a company from liability if a shooting occurs on its premises because it allowed customers to carry guns.

III. PREMISES LIABILITY

Premises liability is a category of negligence where the plaintiff claims that the defendant failed to "maintain land in their possession and control in a reasonably safe condition."[98] The duty of a landowner or lessor can vary depending on the nature of the land, the relationship between the plaintiff and the defendant, and other circumstances.[99] Businesses that are open to the public usually have some duty to take reasonable steps to protect customers "against foreseeable criminal acts of third parties that are likely to occur in the absence of . . . precautionary measures."[100] A defendant can be held liable for breaching this duty if the plaintiff can prove that the defendant's failure to take adequate security measures caused the plaintiff's injury (that is, that the defendant's failure was the proximate cause of the third-party's criminal act that hurt the plaintiff).[101]

Under these principles, most businesses should have a duty to prohibit publicly carried firearms. Imposing this simple-to-satisfy duty would fit well within

620.html ("'Our policy is to comply with all state, federal and local laws as it pertains to carrying firearms,' Walmart spokesman Brian Nick [said.]"); Katie Reilly, *Kroger Joins Walmart in Asking Customers to Stop Openly Carrying Guns in Stores After Mass Shootings*, TIME (Sept. 4, 2019), https://time.com/5668355/kroger-open-carry-gun-policy/.

96. *See* Rowhani-Rahbar, *supra* note 65, at 1932 (noting over 80% of those who publicly carry firearms do so for personal protection).

97. *See supra* Part I.

98. *See, e.g.*, Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 212 (Cal. 1993) (citations omitted), disapproved of on other grounds by Reid v. Google, 235 P.3d 988 (Cal. 2010).

99. *See, e.g.*, *id.* at 212, 212 n.5.

100. *See, e.g.*, *id.* at 212; Griffin v. AAA Auto Club S., 470 S.E.2d 474, 476 (Ga. Ct. App. 1996) ("[G]enerally an intervening criminal act by a third party insulates a proprietor from liability, but even an independent criminal act could render the proprietor liable if the defendant . . . had reasonable grounds for apprehending that such criminal act would be committed or is reasonably to be anticipated.") (quotations and citations omitted); Martin v. Rite Aid, 80 A.3d 813, 815 (Pa. Super. Ct. 2013) ("[P]ossessors of land who hold it open to the public . . . owe a duty to any business invitee . . . to take reasonable precaution against harmful third-party conduct that might be reasonably anticipated.") (quotations and citations omitted).

101. *See, e.g.*, Nallan v. Helmsley-Spear, 407 N.E.2d 451, 459 (N.Y. 1980) ("[T]he fact that the 'instrumentality' which produced the injury was the criminal conduct of a third person would not preclude a finding of 'proximate cause' if the intervening agency was itself a foreseeable hazard.") (citing REST. TORTS 2d, §§ 302B, 449) (additional citations omitted).

the theoretical framework behind premises liability which strikes a careful balance between placing the duty to prevent injuries on those in the best position to do so and not forcing business owners to go to undue lengths to prevent every conceivable injury. Because of the unique nature of firearms and their newly common legal presence in society, the duty to prohibit carrying firearms should not be as narrow as the more general duty to take precautionary measures against third party criminal conduct which generally requires the plaintiff to show some established pattern of criminal incidents before the duty is triggered.

The cause of action I am proposing, however, would have important limitations, especially when it comes to causation. To prove causation, the plaintiff would have to show that the person who misused a firearm in a commercial establishment would have followed a no-guns policy. Businesses should not have a duty to prevent every conceivable kind of gun crime, and it should be obvious that many kinds of criminals would not be dissuaded by a sign asking them not to bring guns into a store. This simply is not true, however, of all kinds of crimes or misuses of guns—when a gun is fired in a business in the heat of an argument or by accident by an otherwise law-abiding person the business's decision to allow guns into the store may indeed be the cause of the plaintiff's injury.

Theoretically, states could pass statutes to prevent courts from recognizing this kind of duty. Most have chosen not to do so, however, and the reasons behind permissive public carry schemes do not necessarily extend to the context of private businesses. For similar reasons, recognizing such a cause of action would not conflict with the Second Amendment.

A. The Duty to Prohibit Guns

The basic idea of premises liability is that a landowner has a duty to maintain her land in a safe condition and failing to do so is negligent. As intuitive as that concept seems today, historically, landowners had no such duty.[102] In fact, with a few exceptions, landowners were immune from liability for injuries that resulted from another's use of the land.[103] But, "[a]s societal interest shifted from protection of land to protection of individuals, courts slowly eroded the many protections once afforded to landowners."[104] Eventually, landowners maintaining their land became subject to the same general duty as virtually everyone else engaged in any activity—a duty of reasonableness.[105]

102. *See, e.g.*, Shanda K. Pearson, Comment, *Justice in a Changed World: Lack of Special Relationships Not Special Enough to Relieve Landowners from Duty in Premises Liability Actions-Louis v. Louis*, 29 WM. MITCHELL L. REV. 1029, 1032–33 (2003); W. Marshall Sanders, Note, *Between Bystander and Insurer: Locating the Duty of the Georgia Landowner to Safeguard Against Third-Party Criminal Attacks on the Premises*, 15 GA. ST. U. L. REV. 1099, 1099 (1999).

103. *See* Sanders, *supra* note 102, at 1099.

104. Pearson, *supra* note 102, at 1033.

105. *See, e.g.*, *id.* at 1032–33. Historically, courts applied different duties to landowners based on the landowner's relationship with the plaintiffs. *See, e.g.*, Lauren E. Potocsky, Note, *The Blind Plaintiff Post-Lugo v. Ameritech: Falling Away from the Restatement in "Open and Obvious" Jurisprudence in Michigan*, 62 WAYNE L. REV. 557, 559 (2017). A trespasser was owed either no duty at all or a very limited duty against wanton and reckless conduct. Id. A landlord owed a licensee—a person entering the land with the landowner's permission—

The difficulty in applying general negligence principles to the way land is maintained, however, arises from tort law's general reluctance to impose affirmative duties to act. A person is usually not negligent for failing to take action to prevent harm when she did not create the initial risk that gave rise to that harm, even if doing so would be relatively costless and prevent great injury.[106] The dramatic example often used to illustrate this point is that an Olympic swimmer could sit idly by while a child drowns and not have committed any actionable tort because, although the swimmer could easily help the child, the swimmer did nothing to create the risk that the child would drown.

Fitting premises liability into this paradigm is no problem in cases where there is a physical defect on land that causes an injury—for example, a loose floorboard that causes a person to trip. In that case, it is clear that the failure of the defendant to fix the floorboard gave rise to the risk of injury.[107] The more difficult cases arise when the dangerousness on the land is created by third parties but the defendant creates the conditions that make that dangerousness possible (or more likely).[108] For example, when a customer spills a drink and a store fails to clean up the mess before another customer slips and falls. Or, when a business fails to provide adequate lighting in the parking lot and a customer is robbed on the way to her car.

Curiously, the duty analysis in these two kinds of examples is different. Defendants are generally held to have a duty to remedy dangerous conditions like spilled drinks created by other customers as long as the customers' actions are foreseeable, and the defendant reasonably should have been aware of the condition the customer created.[109] Conditions that enable *criminal* activity on the other hand, only give rise to liability under a relatively limited set of circumstances. Up until the 1970s, property owners were usually not subject to civil liability at all for criminal activity that occurred on their premises.[110] Today, courts generally agree that businesses have some duty to protect their customers

a duty to make known dangerous conditions safe or fix those conditions. *See* Tab H. Keener, *Can the Submission of a Premises Liability Case Be Simplified?*, 28 TEX. TECH L. REV. 1161, 1165 (1997). An invitee, a person who is on the land for the benefit of the landowner (like a customer going to a business), was owed the highest duty—a duty to remedy or warn of dangerous conditions that were either known or could be discovered through reasonable inspection. *Id.* at 1166. Recently, some states have moved away from these categories towards a more general reasonableness standard, though many still retain them. *Id*. at 1172.

In any event, this Article and the cause of action it suggests are primarily concerned with invitees—customers who enter businesses in order to patronize those businesses.

106. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 37 (AM. LAW INST. 2012).

107. It is important to remember that tort law does not draw a line between action and inaction, rather the line is between creating the risks that give rise to the injury and not creating those risks. *Id*. § 37 cmt. c. Whether the risk is created by action or inaction is irrelevant. *Id.*

108. *See* 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, 1211 (2009) ("Judges have long struggled to articulate rules and principles governing the responsibility, in tort, of a remote actor whose wrong consists of setting the stage for a second wrongdoer who inflicts injury on a victim.").

109. *See* Steven D. Winegar, Comment, *Reapportioning the Burden of Uncertainty: Storekeeper Liability in the Self-Service Slip-and-Fall Case*, 41 UCLA L. REV. 861, 866 (1994).

110. *See, e.g.*, Sanders, *supra* note 102, at 1099; *see also* McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 897–98 (Tenn. 1996) (collecting older cases denying imposition of such a duty).

from foreseeable criminal attacks,[111] but states have widely differing tests for determining the scope of that duty and all of them are more narrow than the duty applicable to noncriminal third party conduct.[112]

This might suggest that most businesses open to the public should *not* have a duty to prohibit legally carried firearms. The only risk created by allowing those firearms into a business is the risk of criminal activity. Businesses only have a duty to guard against foreseeable criminal activity, and violent attacks by people legally carrying guns are too rare to qualify as foreseeable.

In the next two subsections, I will explain why—for two independent reasons—this line of argument is wrong, and premises liability does place a duty on businesses to clearly prohibit legally carried firearms. First, allowing guns into a business is categorically different from other conduct (or nonconduct) that creates a risk of criminal activity. Such policies should instead be treated more like policies and practices that create other kinds of risk. Second, even if allowing guns into a business is treated as creating a criminal risk and subject to those tests, businesses should still have a duty to prohibit legally carried firearms because of the extremely low cost to businesses to do so.

1. Guns as Big Gulps, Not Broken Locks

As described above, when it comes to noncriminal third-party conduct that makes a business unsafe, the business will usually be liable if the conduct was a foreseeable result of the business's policy. If that kind of analysis were to apply to cases of shootings by legal gun carriers, it would be fairly simple to conclude that a business's policy allowing the gun inside in the first place could have foreseeably resulted in the shooting.[113] But, at least at first glance, that analysis doesn't apply to those shootings because they are criminal acts, and therefore subject to the more stringent tests applicable to criminal conduct.

One problem with this reasoning is that not all shootings carried out with legally carried guns are crimes. Sometimes, legally carried guns may go off accidentally and result in injuries.[114] While the gun owner might be negligent in these situations, it may be difficult to prove that their conduct amounts to a

111. *See* Sanders, *supra* note 102, at 1099.

112. *See* Wylie Clarkson, *Premises Liability in South Carolina: Should You Expect Criminal Activity on Your Property?*, 3 CHARLESTON L. REV. 619, 619–20 (2009).

113. That wouldn't be the case if there was evidence that the shooter would not have complied with a businesses' policy in any event. *See supra* Part III.

114. *See* Tom Dart, *Open Carry of Handguns in Texas: Fear for Some But 'Everybody Else is Packing'*, GUARDIAN (Jan. 1, 2016), https://www.theguardian.com/us-news/2016/jan/01/texas-open-carry-handguns-law-public-places-businesses (detailing some incidents of concealed carriers accidentally firing guns, mostly inside private businesses); John Metcalfe, *Americans Who Carry Concealed Weapons Keep Accidentally Shooting Themselves in Public Bathrooms*, CITYLAB (Sept. 17, 2014), https://www.citylab.com/equity/2014/09/americans-who-carry-concealed-weapons-keep-accidentally-shooting-themselves-in-public-bathrooms/380327/ (same); *More Than 900 Non-Self Defense Deaths Involving Concealed Carry Killers Since 2007, Latest VPC Research Shows*, VIOLENCE POL'Y CTR. (Jan. 13, 2017), http://vpc.org/press/more-than-900-deaths-at-the-hands-of-concealed-carry-killers-since-2007-latest-vpc-research-shows/ (national study showing at least 30 incidents of fatal unintentional shootings involving the gun of a concealed handgun permit holder between 2007 and 2017) [hereinafter VPC Study].

crime.[115] Although these incidents may be somewhat rare,[116] they may become more common as the trend of more states loosening training requirements for public carrying or altogether abandoning them continues.[117]

The more fundamental issue is that a policy allowing legally carried guns creates a risk of injury that is different in kind than other acts and omissions by business owners that increase the risk of crime. In the typical case, a business creates conditions that are more favorable to criminal activity. For example, a restaurant might provide inadequate lighting in its parking lot, thus making it easier for an attacker to target a customer or employee on the way to her car.[118] Or a mall could fail to deploy adequate or competent security guards, making it easier for customers or employees to be targeted for assault.[119]

What makes a policy allowing legally carried guns different from these examples is that a policy allowing guns does not merely create an environment that is more amenable to criminal activity, rather it provides the very instrumentality that will allow the crime to be committed. Providing the instrumentality *necessary* to allow the crime to happen is significantly more culpable than simply creating conditions that make the crime *easier*. In this sense, a shooting that occurs as a result of a legally carried weapon is much more analogous to a customer slipping on a drink spilled by another customer than it is to the criminal conduct cases.[120] In both the case of the spilled drink and the gun, the store allowed the instrumentality that caused the injury to be present.

One might argue that the cases are distinguishable because the business doesn't actually *provide* the gun in the same way that it provides the drink—it's the customer's choice to carry the gun. But, because of how common legally carried guns have become,[121] the distinction between actually providing guns and just allowing customers to carry them into a business is not a major one. If a business does not have a policy prohibiting outside food and drink and a person slips and falls in a business on a drink another customer brought in and then spilled, the business would not be relieved of its duty to guard against that kind of injury simply because the drink originated elsewhere.[122] The same logic could

115. Usually, to prove that such an accidental discharge is criminal, the prosecution must show that the defendant acted with "reckless disregard for the safety of others." *See, e.g.*, Bryant v. Commonwealth, 798 S.E.2d 459, 463 (Va. App. 2017), *aff'd*, 811 S.E.2d 250 (Va. 2018).

116. There hasn't been a comprehensive study of accidental shootings by legal gun carriers, but one study by the Violence Policy Center found only thirty such incidents that resulted in death over a ten-year period. *See* VPC Study, *supra* note 114. That number likely vastly underestimates the number of such incidents given the limitations on the data described in the study, and the fact that the study was limited only to incidents that actually resulted in deaths as opposed to mere injuries. *See id.* Still, given the large number of legally carried guns being carried today, see *supra* note 65, the rate of such incidents appears to be relatively low.

117. *See supra* Part I.

118. *See* Koutoufaris v. Dick, 604 A.2d 390, 393 (Del. 1992).

119. *See* L.A.C. *ex rel.* D.C. v. Ward Parkway Shopping Ctr. Co., 75 S.W.3d 247, 250–51 (Mo. 2002).

120. *See* Winegar, *supra* note 109, at 866.

121. I concede that the argument for this duty is somewhat weaker in "may issue" states where a customer bringing a gun into a store is a relatively rare event.

122. *See* Lebrio v. Pier Shops at Caesar's, No. A-0268-13T2, 2014 WL 4745411, at *7 (N.J. Super. Ct. App. Div. Sept. 25, 2014) (finding the plaintiff in a slip and fall case entitled to a mode of operation instruction where

be applied to other legal instrumentalities that have a high potential for injuring other people such as skateboards or dangerous animals. Where appropriate,[123] businesses have a duty to prohibit these things even if the business itself does not provide them.

Another argument against this analogy is that spilling a drink is a foreseeable consequence of serving (or allowing customers to carry) drinks in a store, whereas a shooting is not a foreseeable consequence of allowing legally carried guns in a store. There is conflicting data on how common it is for people legally carrying guns to commit illegal shootings, or whether legally carried guns lead to an increase in crime generally.[124] But, even if such shootings are rare, that argument misapprehends the point of the foreseeability inquiry. The question is not whether shootings by legal gun carriers in stores are rare as an absolute matter, rather the question is whether the injury is a foreseeable consequence of allowing customers to carry guns in stores. The vast majority of legal gun carrying customers in businesses will never shoot anyone just as the vast majority of spilled drinks will never result in injury. Yet, just like with the drink, allowing the gun to be carried inside the business clearly creates a condition where a shooting is a foreseeable outcome, even if it is not the most likely one.

Treating firearms policies the same way as other hazardous conditions inside a business does, however, present a small conceptual difficulty. Under traditional premises liability analysis, "a premises occupier may be found liable if she or one of her employees created the hazardous condition" or knew or should have known "of the condition and failed to exercise reasonable care to eliminate it before it caused an injury."[125] A firearms policy does not really fit neatly into either of these two boxes. On the one hand, the business creates the hazardous condition by not having such a policy, but the actual condition (the presence of the gun) is created by the choice of the gun carrier to actually bring it into the store. And a store is not likely to know or have reason to know who exactly does

a mall "allowed patrons to consume [food and beverages] on an unrestricted basis in common areas of the mall"); Ryder v. Ocean Cty. Mall, 774 A.2d 700, 703 (N.J. Super. Ct. App. Div. 2001) (same).

123. Of course, a business whose purpose revolved around dangerous animals or skateboarding would not be negligent for allowing those things inside, just like a shooting range would not be negligent for failing to prohibit guns. In those situations, while the business may have a duty to reasonably supervise the activities that they facilitate, they are not negligent merely for allowing the items necessary for these activities to occur. *See, e.g.*, Emmanuel S. Tipon, Annotation, *Standard of Care and Duty of Particular Persons—Person Owning or Possessing Premises Where Target Shooting Occurred*, 49 A.L.R.3d 762, § 4(b) (1973).

124. *Compare* John J. Donohue, Abhay Aneja & Kyle D. Weber, *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Controls Analysis* 63 (Nat'l Bureau of Econ. Research, Working Paper No. 23510, 2018), http://www.nber.org/papers/w23510.pdf (finding that less restrictive public carrying laws "are associated with increases in violent crime"), *and* VPC Study, *supra* note 114 (documenting over 900 non-self-defense shootings over a ten-year period), *with* JOSEPH A. WEGENKA, CONCEALED HANDGUN LAWS IN THE UNITED STATES 19–25 (2008), https://www.wku.edu/mae/documents/econ596-wegenka.pdf (finding that less restrictive public carrying laws decrease crime), *and* Brendan Kirby, *No State Carries Concealed More than Alabama, But Does it Affect Crime?*, AL.COM (Mar. 7, 2019), https://www.al.com/news/index.ssf/2014/09/no_state_carries_concealed_mor.html (describing a study of county-level data in Alabama showing no correlation between the number of concealed carry permits issued and the crime rate). Of course, as discussed in notes 114 and 116, *supra*, the kinds of shootings that may happen are not limited to criminal shootings—they can also happen by accident.

125. *See* Winegar, *supra* note 109, at 865.

and does not choose to carry a gun inside, especially where the carrying is concealed.

Fortunately, there is a way around this dilemma—the "mode of operations" test. Under the mode of operations test, whether the business had notice of a particular hazardous condition is irrelevant. Instead, the test focuses on whether the "proprietor could reasonably anticipate that hazardous conditions would regularly arise" based on the way the store operates.[126] The key limitation on the mode of operations test is that it only applies when a business "can reasonably anticipate that hazardous conditions will *regularly* arise."[127] As recently as the 1980s, it may have been true that most businesses—even in the absence of a policy about firearms—wouldn't expect customers to regularly bring them into their store.[128] But, as demonstrated in Section II.A, *supra*, the opposite is true today. In the absence of a policy on firearms, businesses can reasonably expect that customers will regularly bring firearms into their business, thus creating hazardous conditions.[129]

A final argument against imposing a duty under this theory is that privately carried guns are not hazardous at all. Of course, nobody would dispute that guns are themselves hazardous—that is their whole purpose. But, the crux of the argument is about to *whom* they are hazardous. Some establishments that welcome customers with guns argue that doing so will help prevent crime since an armed customer could potentially stop a criminal attack.[130] If it were true that a legally

126. Chiara v. Fry's Food Stores of Arizona, Inc., 733 P.2d 283, 285 (Ariz. 1987) (en banc) (citations omitted); *see also* Winegar, *supra* note 109, at 888 (discussing the mode of operations rule).

127. *See* Chiara, 733 P.2d at 286 (emphasis added); *see also* Porto v. Petco Animal Supplies Stores, Inc., 145 A.3d 283, 289 (Conn. App. Ct. 2016) (describing "three overarching requirements for the mode of operation rule to apply: (1) the defendant must have a particular mode of operation distinct from the ordinary operation of a related business; (2) that mode of operation must create a regularly occurring or inherently foreseeable hazard; and (3) the injury must happen within a limited zone of risk"). The mode of operations test is also, in some jurisdictions, limited to situations where a store is "self-service"—that is, where the store has customers perform tasks traditionally performed by employees. *See* William Brekka, Note, *Extending the Mode-of-Operation Approach Beyond the Self-Service Supermarket Context*, 48 NEW ENG. L. REV. 747, 756 (2014). The gun policy issue doesn't map very neatly onto that test because neither customers nor businesses have been traditionally responsible for deciding whether guns should be present in a store or not since, up until recently, publicly carried firearms were uncommon. *See* discussion *supra* Section II.A. Gun policies, however, seem like a good candidate for the mode of operations test because only the store, not the customer, is in a position to set such a policy, and in the absence of such a policy, customers will likely bring guns into stores without regard to the risks posed to other patrons. *See* Brekka, *supra*, at 765–66 ("Further, one of the . . . main justifications for adopting the [mode of operation] approach is that customers generally will be less careful than store owners and employees in avoiding dangerous conditions. . . . [I]t is consistent with th[is] rationale . . . to apply it to all situations where the owner's mode of operation makes the creation of dangerous conditions by third parties reasonably foreseeable, not just those where the business employs a self-service mode of operation.") (citations omitted); *see also* Markowitz v. Helen Homes of Kendall Corp., 826 So. 2d 256, 260 (Fla. 2002) ("The mode of operation theory of negligence is not a new principle of law and is not unique to a particular business.").

128. *See supra* notes 40–43 and accompanying text.

129. *See supra* notes 96–97 and accompanying text.

130. *See* Dart, *supra* note 114 (quoting a pastor who allows guns in his church as stating, "[a] thief's gonna come in and do what he wants to do anyway, the only difference now is that he might get one or two of us, but that's it, because everybody else is packing"); Heather Jordan, *'Firearms Welcome' at These Michigan Businesses*, MLIVE (Jan. 21, 2016), https://www.mlive.com/news/saginaw/index.ssf/2016/01/saginaw_business_owners_welcom.html (noting that some businesses claimed "welcoming and encouraging their customers to carry guns makes their businesses more secure").

armed customer is more likely to use her gun to stop a criminal attack than to hurt herself or another customer, the presence of the gun would go from being a hazardous condition to a beneficial one.

Although anecdotal reports of civilians using guns to prevent or stop crime are widespread,[131] reliable data about defensive uses of guns has proven difficult to gather.[132] Estimates range from tens of thousands of incidents of defensive gun uses per year to over 2.5 million, and most of the studies on this topic are well over a decade old.[133] But, the limited data that is available suggests that successful defensive gun use is less likely in a private business than it may be in other locales.

The study on defensive gun use most often relied on by pro-gun advocates is a telephone survey conducted by Gary Kleck and Marc Gertz.[134] That study—which is where the 2.5 million per year figure comes from—has been heavily criticized as likely inflating the number of such incidents.[135] But, even in that study, only 12% of the reported defensive gun uses took place in a "commercial place" or "parking lot" or "commercial garage."[136]

Perhaps this shouldn't be surprising; there may be fewer opportunities for defensive gun use against crime in commercial establishments because fewer crimes take place in those places than elsewhere. A Department of Justice report from the mid-2000s found that less than 15% of violent crimes and less than 8%

131. *See* Andrew Jay McClurg, *Firearms Policy and the Black Community: Rejecting the "Wouldn't You Want A Gun If Attacked?" Argument*, 45 CONN. L. REV. 1773, 1790–91 (2013) ("Anecdotes involving instances of people using guns in self-defense are among the most pervasively circulated items of information in the gun debate.").

132. *See, e.g.*, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 102–18 (Charles F. Wellford et al. eds., 2005) (describing some of the difficulties associated with getting accurate numbers); McClurg, *supra* note 131, at 1793 ("Unfortunately, no one is able to conduct an informed evaluation of the risks and benefits of guns because we live in almost complete darkness with respect to having accurate, complete, and current data regarding the issues."). Besides the methodological challenges of gathering reliable data, the lack of attention to the issue may be in part attributable to a moratorium on some federally funded firearms related research. See Michael de Leeuw, *Let Us Talk Past Each Other for A While: A Brief Response to Professor Johnson,* 45 CONN. L. REV. 1637, 1647 (2013).

133. *See, e.g.*, McClurg, *supra* note 131, at 1794–95.

134. *See id.* at 1793–94.

135. *See, e.g.*, David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430, 1430 (1997) (providing several reasons why the Kleck and Gertz study's "conclusions cannot be accepted as valid" and are likely to overestimate the number of defensive gun uses); McClurg, *supra* note 131, at 1794–95 ("If one accepts the general conclusion regarding the number of annual DGUs, one must also confront some fantastic sub-conclusions. For example, respondents to the Kleck-Gertz survey reported wounding a criminal adversary in 8.3% of encounters, which, applied to the 2.5 million annual DGUs estimate, would mean that 207,000 criminals were being shot in self-defense each year. During the survey years, however, approximately 100,000 nonfatal gunshot victims were treated annually in hospital emergency rooms, with nearly all of them classified as victims of assaults, suicide attempts, or accidental shootings-not wounded criminals." (citations omitted)).

136. *See* Gary Kleck & Mark Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun,* 86 J. CRIM. L. & CRIMINOLOGY 150, 185 (1995). About 36% of respondents claimed the incident occurred somewhere "near [the] defender's home" which is vague enough to potentially include nearby businesses, but since the survey also offered the more specific option for commercial establishments, it is likely that the vast majority of these incidents did not take place at a privately-owned business. *Id.*

of property crimes occurred inside commercial establishments.[137] And, these numbers likely overestimate the opportunities for defensive gun use in commercial establishments because many property crimes could not possibly be prevented by a gun. For example, if a customer's car were stolen from a mall parking lot while she is shopping inside, a gun would not have prevented that theft.

Moreover, the characteristics of commercial establishments make defensive gun use less likely to be necessary, while heightening the risk of firearms being used improperly. Motivated by their interests in both protecting their own property and attracting customers, businesses have plenty of incentives to make their property as safe as possible from criminal activity.[138] It is commonplace for businesses to have on-site security cameras, alarm systems, and even private security guards to deter or stop would-be criminal activity.[139] And, when businesses themselves are targeted for robberies, it tends to be at times when fewer customers are around.[140] Thus, businesses are a place where private gun carriers are particularly unlikely to have the need to use a gun for self-defensive purposes.

At the same time, businesses are more likely than other locations to present opportunities for legally carried guns to be used improperly. Businesses bring people into close contact with many other people, most of whom are strangers to each other. This involuntary close contact can lead to problems. Patronizing a business provides plenty of opportunities for conflicts to arise including disputes over parking spots,[141] places in line,[142] or food orders.[143] The closer physical proximity also allows the opportunity for other people to potentially notice the gun's presence, which could also escalate tensions.[144]

137. *See* National Crime Victimization Survey, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STAT., https://www.bjs.gov/index.cfm?ty=tp&tid=44 (last visited May 21, 2020).

138. Not to mention the incentive provided by the possibility of liability for third party criminal conduct. *See* discussion *infra* Subsection III.A.2.

139. *See, e.g.*, *Small Business Crime Prevention*, L.A. POLICE DEP'T, http://www.lapdonline.org/crime_prevention/content_basic_view/7757 (last visited May 21, 2020) (describing security measures business can take to prevent crime).

140. *See* ALICIA ALTIZIO & DIANA YORK, U.S. DEP'T OF JUSTICE, ROBBERY OF CONVENIENCE STORES 13 (2007), https://popcenter.asu.edu/content/robbery-convenience-stores-0 (noting that in one study, fifty percent of convenience store robberies occurred at "times when business traffic is minimal").

141. *See* Enjoli Francis, *Gunman in Parking Space Shooting Not Charged Because of 'Stand Your Ground' Law*, ABC NEWS (July 20, 2018, 4:34 PM), https://abcnews.go.com/US/gunman-parking-space-shooting-charged-stand-ground-law/story?id=56715356 (describing an incident in which someone was shot in a dispute over a parking spot at a Circle A Food Store).

142. *See* Howard Cohen & Johanna A. Álvarez, *Publix Shopper Leaves Her Cart Unattended. Pulling a Gun Was Her Next Mistake*, MIAMI HERALD (May 15, 2018, 9:19 PM), https://www.miamiherald.com/news/state/florida/article211215579.html (describing an incident where a customer at a grocery store allegedly pulled a gun on another customer over a spot in the check-out line); *Police: Shooting Followed Dispute in Walmart Checkout Lines*, AP NEWS (Aug. 14, 2018), https://apnews.com/039eeb84a26b40ae849f4483987cb6e2/Police:-Shooting-followed-dispute-in-Walmart-checkout-lines (describing a shooting that occurred after a dispute in a Wal-Mart check-out line).

143. *See* Isabelle D'Antonio, *Altamonte Springs McDonald's Manager Shot After Dispute over Order, Police Say*, ORLANDO SENTINEL (June 1, 2017, 11:50 AM), http://www.orlandosentinel.com/news/breaking-news/os-mcdonalds-manager-shot-20170601-story.html (describing an incident where a McDonald's manager was shot after an argument over whether the customer's food order was correct).

144. *See* Alan Yuhas, *Mere Sight of a Gun Makes Police–and Public–More Aggressive, Experts Say*, GUARDIAN (Aug. 5, 2015, 7:00 AM), https://www.theguardian.com/us-news/2015/aug/05/gun-police-public-

Thus, whatever the benefits of legally carried firearms may be in other contexts, once they are carried inside a business, they become a hazardous condition[145] and ought to be treated as any other hazardous condition.[146] But, unlike cleaning up drinks, repairing broken floorboards, or preventing items from falling, keeping these guns out of private businesses is a simple and almost costless matter—the business merely needs to put up a sign that complies with the statutory requirements in its state.

2. Prohibiting Guns Eliminates a Small Risk with a Very Small Effort

Even if shootings with legally carried guns are evaluated for premises liability purposes like other criminal activity, businesses should still have a duty to prohibit guns. When considering whether a business should have a duty to take some precaution against criminal activity, courts generally follow one of four different approaches: the imminent harm test, the prior similar incidents test, the totality of the circumstances test, or the balancing test.[147]

The narrowest test is the imminent harm test—it only places a duty on property owners to prevent a criminal act when the owner knows or should know of specific imminent harm that is about to befall a customer on her property.[148] Although popular in some of the early cases, few courts today utilize this approach.[149]

The prior similar incidents test requires the plaintiff to show that the defendant was aware or should have been aware of prior similar criminal incidents

more-aggressive-psychology-weapons-effect (describing the "weapons effect," a psychological phenomenon where people behave more aggressively in the presence of a gun). Obviously the prospect of the gun being noticed is higher when the gun is openly carried, but even an ostensibly concealed firearm may be accidentally exposed in a crowded setting.

145. A related argument against this duty is that businesses that allow guns are simply relying on the state's implicit assurance—through the license to carry—that people carrying guns are responsible enough to do so and businesses should not be penalized for the state's "mistake" if that turns out not to be the case. One problem with this argument is that it doesn't apply in the growing number of states with permitless carry where the state has made no such certification. *See* discussion *supra* Section II.A. Even in states that still require a permit for concealed carrying, many do not require a permit for open carrying. See discussion *supra* Section II.A. More fundamentally, the state's grant of a license does not generally allow businesses to shirk their obligations to keep their customers (and other foreseeable plaintiffs) safe. For example, a business cannot escape liability for hiring a negligent driver simply because the driver had a state granted license. *See* MICHAEL JAY LEIZERMAN, LITIGATING TRUCK ACCIDENT CASES § 7:12 (West 2018).

146. Of course, there are some businesses where firearm carrying could be more hazardous than others. For example, guns may be more hazardous in an establishment that serves alcohol and generally puts people in close contact with strangers for a long time like a bar and less hazardous in places that involve more private transactions like a doctor's office. Thus, courts that wanted to make a more conservative approach could exempt less risky businesses from this duty or even apply the duty only to places where publicly carried guns would be particularly risky. This would be a difficult fact-bound inquiry and, given the cost-benefit analysis above, I think the better approach is to apply the duty to most publicly open businesses (exempting only those whose purpose is tied to gun-use). Still, even applying premises liability to some businesses' gun policies would be more beneficial than not applying it to any of them.

147. *See, e.g.*, Clarkson, *supra* note 112, at 619–20.

148. *Id.* at 621; *see also* Robert Weisberg, *Preventing Crime: Private Duties, Public Immunity*, 2 J.L. ECON. & POL'Y 365, 373 (2006).

149. *See* Weisberg, *supra* note 148, at 373; Stefan A. Mallen, Note, *Touchdown! A Victory for Injured Fans at Sporting Events? Hayden v. University of Notre Dame*, 66 MO. L. REV. 487, 494 (2001).

that occurred on or near the defendant's premises.[150] The idea behind this is that the prior incidents show that the possibility of a particular type of criminal activity on the premises was foreseeable to the defendant.[151] Although still fairly common, this approach has been critiqued because of the difficulty of determining what incidents qualify as "similar."[152] Depending on the degree of generality utilized, the test can either become very under-inclusive (almost no two crimes are exactly alike) or very over-inclusive (there is at least some crime almost everywhere).[153]

A third approach requires courts to take into account the totality of the circumstances in deciding whether the defendant had a duty to prevent a criminal attack.[154] Under this test, courts still consider the presence or absence of prior similar incidents, but also take into account circumstances like the location and nature of the business.[155] Finally, there is the balancing approach.[156] That "approach 'weighs the foreseeability of the harm against the burden imposed on a [landowner] by protecting against that harm.'"[157] In other words, the more likely a criminal attack is, the more willing the court should be to impose even expensive duties on the defendant to guard against that kind of harm.

The balancing test represents the most straightforward argument for a duty to prohibit guns. The foreseeability of the harm in that case—an improper shooting with a legally carried gun—may be relatively low in the sense that these shootings do not occur very often. On the other hand, it is foreseeable in the sense described in the previous subsection—a gun is inherently hazardous whether or not it actually manifests its hazardous nature particularly frequently.[158] Even under the former conception of foreseeability based solely on the frequency of these incidents, the balancing test still suggests a duty should exist because, unlike almost all other kinds of security measures, the burden imposed on the landowner is virtually nonexistent. All the landowner must do is put up a sign. Thus, even if these incidents are relatively infrequent, businesses still have a duty to prevent them because the costs of doing so are so low.[159]

Under the other approaches, how the gun issue comes out depends upon how one views the role of prior similar incidents. It is certainly true that, in most cases, there are not likely to be prior similar incidents of people misusing legally

150. Clarkson, s*upra* note 112, at 622; Weisberg, *supra* note 148, at 374.

151. *See, e.g.*, Clarkson, *supra* note 112, at 622; Weisberg, *supra* note 148, at 374.

152. *See, e.g.*, Clarkson, *supra* note 112, at 622–25; Weisberg, *supra* note 148, at 374.

153. *See, e.g.*, Clarkson, *supra* note 112, at 622–25.

154. *See, e.g.*, Weisberg, *supra* note 148, at 374.

155. *Id.*

156. *See, e.g.*, *id.*

157. Clarkson, *supra* note 112, at 627 (quoting Miletic v. Wal-Mart Stores, Inc., 529 S.E.2d 68, 70 (S.C. Ct. App. 2000)).

158. *See supra* Subsection III.A.1.

159. That is not to say that there are no costs to banning guns. There is, of course the cost of purchasing and maintaining the proper signage. There is also the possibility that some gun carriers will refuse to patronize the business altogether if they cannot carry their guns with them, though some of that lost business may be offset by attracting customers who prefer a no-gun policy. Finally, there is also the lost possibility of a customer being able to use a gun defensively to prevent a criminal incident in a store, however unlikely that prospect may be. *See supra* Subsection III.A.1.

carried firearms in a particular business.[160] Although the exact number of these incidents is not clear,[161] it is fair to say that they are rare enough that the chances of one of them happening in the same business twice are fairly remote.[162] And, unlike other kinds of criminal activity, there is nothing about a legal-gun shooting happening once in a particular location that makes it particularly foreseeable that it will happen again there.

This is because of the unique nature of these kinds of incidents. A store may be targeted for a robbery, for example, because it is in a poorly policed neighborhood, or because the store has bad lighting, or because the store handles a lot of cash. If a store is targeted once because of one of these characteristics, that ought to put the store owner on notice that her store may be targeted again for the same reason. On the other hand, if a person with a concealed carry permit gets in an argument with another customer and shoots her, that doesn't point to anything inherent about the store (other than its gun policy) that should put the owner on notice that such a thing may happen again. Instead, it is just the nature of having civilians carry around guns that creates a similar risk at every establishment where they are permitted.[163]

Because of this, a more useful way to think about the prior similar incidents question[164] in this context is as a mere proxy for the larger question of foreseeability.[165] Assuming that the business is operating in one of the many states where virtually anyone can legally carry a gun, it should be eminently foreseeable that in the absence of a policy banning guns, people will carry them into the business. Since it is foreseeable that people will carry guns into the business, it is also foreseeable that people could misuse them in ways that could harm other customers.

Of course, a court certainly could conceive of prior similar incidents more narrowly and use that criterion to completely rule out any liability related to firearms policies, but that would be a mistake. Besides serving as a proxy for foreseeability, the prior similar incidents requirement is also designed to shield businesses from liability for failing to put in place security measures that would be a waste of resources because no criminal activity was likely to happen in any

160. *See supra* Subsection III.A.1.

161. *See id.*

162. *See id.*

163. There are some establishments where the risk might be higher than the background risk, such as bars where other factors such as alcohol make tensions between customers more likely.

164. Of course, under the totality of the circumstances test, courts have repeatedly emphasized that prior similar incidents are not a per se requirement for a duty to arise. *See, e.g.*, Clohesy v. Food Circus Supermarkets, Inc., 694 A.2d 1017, 1028 (N.J. 1997) ("The mere fact that a particular kind of incident had not happened before is not a sound reason to conclude that such an incident might not reasonably have been anticipated."); Ronk v. Parking Concepts of Tex., Inc., 711 S.W.2d 409, 418 (Tex. App. 1986) ("While prior similar incidents are helpful to determine foreseeability, they are not required to establish it.") (quoting Isaacs v. Huntington Memorial Hosp., 695 P.2d 653, 665 (Cal. 1985)).

165. *See* Paragon Family Rest. v. Bartolini, 799 N.E.2d 1048, 1052 (Ind. 2003) (emphasizing the importance of foreseeability).

event.[166] Just because every business *could* be a target for criminals does not mean that every business should have to hire security guards, for example.[167] Instead, such onerous requirements should only be put on businesses where there is demonstrated evidence—in the form of prior similar incidents—that the security guards would actually prevent enough crime to make them worthwhile.[168]

The gun policy issue though, is unique in that the preventative measure businesses are being asked to take—to prohibit guns—is so low cost that the heightened foreseeability requirement is not necessary to shield businesses from some great burden.[169] Rather, the duty is limited only to prohibiting guns, which usually involves nothing more than putting up a sign. And, as discussed in the following subsection, the potential for liability is further limited by the causation requirement—a business will not be liable unless the circumstances make it likely that the gun owner who misused a firearm would not have brought the gun into the business if a no-guns policy existed.[170]

* * * * *

The question of how the duty to keep customers safe applies in a particular situation is ultimately a policy question with no bright-line rule. Instead, "[w]hether a duty exists in a premises-liability case . . . turns on a 'legal analysis balancing a number of factors, including the risk, foreseeability, and likelihood of injury, and the consequences of placing the burden on the defendant.'"[171] Here, all of these factors point in the direction of placing a duty on businesses to take the simple precaution of prohibiting publicly carried firearms. In most cases, such a policy will do nothing, but in a few, it just may save lives.

Before moving on to the question of causation, the next part of the tort claim—breach—is worth addressing briefly. The duty I am proposing is quite limited in that it would only be a breach of the duty to prohibit guns if a business does not have a clearly posted policy prohibiting firearms. Businesses should not usually have a duty to take more drastic measures to prevent firearms from entering their premises, such as installing metal detectors or searching customers. While these kinds of policies would no doubt be more effective than a sign at

166. *See* George Bair South, Note, *The Duty to Protect Customers from Criminal Acts Occurring Off the Premises: The Watering-Down of the "Prior Similar Incidents" Rule*, 19 HOFSTRA L. REV. 1271, 1281 (1991) ("[C]ost-benefit analysis is inextricably tied to the issue of foreseeability.").

167. *See* Craig Crawford, Comment, *Delgado v. Trax Bar & Grill: Determining the Scope of the Prior Similar Incidents Test in Terms of Efficient Resource Allocation*, 39 U.S.F. L. REV. 499, 517–18 (2005).

168. *See id.* at 520 ("Thus, by assuming that the cost of future accidents will be proportionate to the cost of the prior accident, the landowner can then compare the cost of permitting future crimes (Ca) with the cost of taking reasonable measures to prevent that accident (Cap).").

169. *See* Nallan v. Helmsley-Spear, Inc., 407 N.E.2d 451, 458 n.8 (N.Y. 1980) ("[I]n assessing the reasonableness of the landowner's conduct, the jury might take into account such variables as the seriousness of the risk and the cost of the various available safety measures."); William K. Jones, *Tort Triad: Slumbering Sentinels, Vicious Assailants, and Victims Variously Vigilant*, 30 HOFSTRA L. REV. 253, 282 (2001) ("[S]ome practices may be so universally observed or so low in cost in relation to the expected harm that any owner of residential or business premises should observe them.").

170. *See infra* Subsection III.A.2.i.

171. Scott W. Weatherford, Comment, *The Ad Hoc Duty: A Landowner's Duty to Protect After Del Lago Partners v. Smith*, 63 BAYLOR L. REV. 565, 568 (2011) (quoting Gen. Electric Co. v. Moritz, 257 S.W.3d 211, 216–18 (Tex. 2008)).

keeping guns out of a business, their costs would be vast. Obviously, the costs to a business of implementing these measures would be high—it would require extra employees and equipment. But the cost to society would also not be insignificant as people would be forced to sacrifice significant privacy interests just to go about their daily lives. Finally, these kinds of policies would inevitably create annoying delays, replicating the experience of the airport security line on a massive scale.[172]

All a business should have to do to satisfy its duty to prohibit legally carried guns is to have a clear policy prohibiting them that is made readily known to customers. The policy ought to be posted in a visible place where customers can clearly see it near the entrance and should include easily visible text and pictures. This should be true even when there is no state statute that explicitly requires signage. It is not enough for a business to post a policy on its website or wait to verbally tell armed customers that guns are not allowed. Not many people are likely to see the former, and the latter approach may lead to unnecessary confrontation. Posting a sign gives fair notice to gun owners and gives businesses a bright line rule to follow to avoid liability.

3. Causation Issues

Like with any tort, causation is an essential element of a premises liability case.[173] Causation involves two parts: "but-for" cause and proximate causation.[174] In a premises liability case, "but-for" causation is usually about whether the defendant's failure to exercise reasonable care in preventing injuries from occurring on her land was a substantial factor in bringing about the plaintiff's harm and whether the plaintiff's harm would have occurred in the absence of the defendant's failure.[175] Proximate cause is about whether the harm that occurred was a foreseeable consequence of the defendant's negligence.[176]

The "but for" causation question calls for a counterfactual. If the property owner had exercised ordinary care, would the accident still have happened?[177] This can be a difficult question when criminal conduct is involved because it is often difficult to reconstruct whether particular security measures would have prevented or stopped a criminal attack.[178] It is difficult to figure out what would or would not have deterred a particular criminal, and it can be even more difficult to determine how a chaotic situation might have changed in the presence of different security measures.

172. Perhaps these costs could be outweighed in certain particularly sensitive businesses where guns would be particularly threatening, but it certainly would not be the norm.

173. *See, e.g.*, LMB, Ltd. v. Moreno, 201 S.W.3d 686, 688 (Tex. 2006).

174. *See, e.g.*, *id.* Proximate cause is sometimes called "legal cause." Holmes v. Campbell Properties, Inc., 47 So. 3d 721, 724 (Miss. Ct. App. 2010).

175. *See, e.g.*, LMB, Ltd., 201 S.W.3d at 688; Holmes, 47 So. 3d at 724; Michael Campbell, Comment, *Ballpark Beat-Downs: A New Framework to Protect Fans*, 22 S. CAL. INTERDISC. L.J. 109, 124 (2012).

176. *See, e.g.*, Holmes, 47 So. 3d at 724.

177. *See* Mark Geistfeld, *Tort Law and Criminal Behavior (Guns)*, 43 ARIZ. L. REV. 311, 316–17 (2001).

178. *See id*.

In the context of gun carrying policies, however, the inquiry is much simpler. The question in those cases should not be about whether the crime would have occurred, but rather about whether the perpetrator of the crime would have followed a "no-guns" policy. If the perpetrator would have followed the policy, then by definition the crime would not have occurred, whereas if no policy would deter the perpetrator in any event, then the business's lack of a policy could not have caused the plaintiff's injury. Whether a perpetrator would have followed a no-guns policy ought to be fairly easy to determine in most cases based on two factors: (1) the nature of the crime and (2) the characteristics of the perpetrator.

First, certain kinds of crimes are more likely to be prevented by a no-guns policy than others. For example, would-be robbers usually are not going to be deterred by a sign saying guns are not allowed. If someone enters a business at least open to the possibility of committing a robbery if the opportunity comes up, that person is not likely to be dissuaded from carrying a gun by a sign because the consequences of a robbery are so much more serious than the consequences of violating a store policy.[179] On the other hand, a person who gets into an argument over a place in line at a grocery store, loses her cool, and shoots someone may have followed a no-gun policy.[180] A person like that has no idea when she enters the store that she is going to end up committing a crime, and likely does not intend to do so until she finds herself pulling the trigger.[181] Thus, whether the crime is the kind that is usually driven by a general desire for, or openness to, criminal activity or whether the crime is the kind that arises from passion in the spur of the moment ought to be a helpful guidepost for determining whether causation is satisfied.

Second, the type of person perpetrating the crime can also be a helpful factor. Here, the pro-gun dichotomy of the "good guy with a gun" and the "bad guy with a gun"[182] is actually quite helpful. A "bad guy with a gun"—someone with a criminal history who may even be carrying the gun illegally—is not likely to be dissuaded by a no-guns sign.[183] A "good guy with a gun"—a person with little or no criminal history who is carrying a gun legally—is likely to follow a sign, even if they may disagree with it.[184] A good example of this is the story described

179. *See id.* at 315–16 ("Anyone who rationally contemplates engaging in criminal conduct will consider the costs of criminal and civil sanctions.").

180. *See id.* at 315.

181. And maybe not even then if she believes her actions are in self-defense.

182. *See, e.g.*, Michael Cohen, The Dangerous 'Good Guy' Myth, NY DAILY NEWS (June 16, 2014, 4:30 AM), http://www.nydailynews.com/opinion/dangerous-good-guy-myth-article-1.1829274; *NRA: 'The Only Thing That Stops a Bad Guy with a Gun is a Good Guy with a Gun'*, TELEGRAPH (Dec. 21, 2012, 8:11 PM), https://www.telegraph.co.uk/news/worldnews/northamerica/usa/9762200/NRA-The-only-thing-that-stops-a-bad-guy-with-a-gun-is-a-good-guy-with-a-gun.html.

183. *Cf.* Nowlan v. Cinemark Holdings, Inc., No. 12-cv-02517-RBJ-MEH, 2016 WL 4092468, at *3 (D. Colo. June 24, 2016) (granting summary judgment on causation in a premises liability case arising out of the Aurora movie theatre shooting because the shooter's "premeditated and intentional actions were the predominant cause" of the plaintiff's harm) (emphasis added).

184. *Cf.* Cynthia Leonardatos et al., *Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 CONN. L. REV. 157, 178 (2001) ("There are apparently a large number of gun owners who are punctilious about obeying the law. That is one reason why so many people apply for permits to carry concealed handguns . . . Carrying a concealed gun is, after all, a rather easy offense to commit with low

at the beginning of this article of Chad Oulson's death in a Florida movie theatre after an argument over texting.[185] The shooter there not only had no criminal history but also was a retired police officer with an accomplished record who founded Tampa's SWAT team.[186] If the theatre had a sign that clearly prohibited firearms, the shooter in that case almost certainly would have complied with it.

The question of proximate cause is often a little bit trickier than but-for cause because foreseeability is a component of both duty and proximate cause.[187] It is tempting to assume that if one form of foreseeability is established, the other is as well, but courts have repeatedly insisted that duty and proximate causation are distinct.[188] Although the issue is a bit unsettled,[189] the key difference that most courts seem to identify between the two foreseeability standards is that duty is focused on the generic question of foreseeability while proximate cause is focused on the question of foreseeability in the context of the particular facts of each case.[190] In other words, a court examining duty asks whether this *kind* of behavior by this *kind* of defendant could foreseeably lead to injury.[191] A court examining proximate causation on the other hand, asks whether the behavior of *this defendant* could foreseeably lead to *this* injury.[192]

Applying this conception of proximate causation to the gun-policy issue will involve looking at many of the same factors as the but-for causation analysis. A shopkeeper probably could not foresee that the failure to have a no-gun sign would lead to a robbery because a reasonable shopkeeper would not foresee that having such a sign would stop a robber. On the other hand, a reasonable shopkeeper should be able to foresee that allowing customers to bring guns in into her establishment could lead to those guns being misused either by accident or during heated arguments.

But the proximate causation analysis would not simply be duplicative of the but-for causation question. Instead, a court would look at case-specific factors that might increase or decrease the foreseeability of each particular incident to the defendant. For example, a store in a predominantly Spanish-speaking

fear of being caught, as long as one stays away from metal detectors. Nevertheless, millions of people fill out paperwork, pay fees, submit fingerprints, and undergo training—all in exchange for a little card that authorizes the person to do what he could easily get away with doing anyway.") (emphasis omitted).

185. *See supra* Part I.

186. *See* Enjoli Francis, *Man Accused in Fatal 2014 Moviegoer Shooting: 'It Was His Life or Mine'*, ABC NEWS (Feb. 28, 2017, 4:43 PM), https://abcnews.go.com/US/man-accused-fatally-shooting-moviegoer-details-lengthy-tenure/story?id=45801619 ("[The shooter] testified that he served multiple roles with the Tampa Police Department in Florida. He started as a patrolman before being promoted to a detective and later a sergeant. He created and designed a SWAT team for the department, and by the early 1980s rose to the rank of captain.").

187. *See, e.g.*, Rogers v. Martin, 63 N.E.3d 316, 325 (Ind. 2016).

188. *See* Campbell, *supra* note 175, at 151 ("duty and causation are 'separate and independent element[s] . . . of negligence'") (quoting Saelzler v. Advanced Grp. 400, 23 P.3d 1143, 1152–53 (Cal. 2001)).

189. *See, e.g.*, Rory Bahadur, *Almost a Century and Three Restatements After Green it's Time to Admit and Remedy the Nonsense of Negligence*, 38 N. KY. L. REV. 61, 61–63 (2011).

190. *See, e.g.*, Goldsberry v. Grubbs, 672 N.E.2d 475, 479 (Ind. Ct. App. 1996) ("[T]he foreseeability component of proximate cause requires an evaluation of the facts of the actual occurrence, while the foreseeability component of duty requires a more general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence.").

191. *See id.* at 480.

192. *See id.* at 479.

neighborhood might be able to foresee that failing to include a Spanish translation on its sign might lead to it not being followed, while a store in a more English-dominated area might not be able to reasonably foresee that. Or, if the store is robbed and an armed customer attempts to stop the robbery with her gun, only to accidentally shoot another innocent customer, it may be that the intervening event of the store being robbed breaks the proximate causal chain.[193] These involved factual determinations often come down to notions of common sense and are usually left up to the jury.[194]

One final hurdle to consider is the role of the shooter's conduct in the causation inquiry. The traditional rule is that a third party's criminal conduct, or even a third party's intentionally tortious conduct, automatically breaks the chain of causation between a negligent defendant and a plaintiff even if the defendant's negligence created conditions that were a but-for cause of the plaintiff's injury.[195] An important exception to that rule, however, is applicable here. As the Restatement (Second) of Torts explains:

> There are certain situations which are commonly recognized as affording temptations to which a recognizable percentage of humanity is likely to yield. . . . If the situation which the actor should realize that his negligent conduct might create is of [that] sor[t], an intentionally criminal or tortious act of the third person is not a superseding cause which relieves the actor from liability.[196]

Allowing customers to carry guns into a store creates a situation in which some (small) percentage of people will likely yield to the temptation to kill or seriously hurt other customers. Thus, the chain of causation should not be broken just because someone does surrender to that temptation which the defendant created.

4. Statutory & Constitutional Issues

Any tort duty to prohibit guns cannot be examined without considering the statutory and constitutional framework surrounding guns. A duty to prohibit guns, however, is not in conflict with either permissive statutory carrying schemes or the constitutional right to keep and bear arms. Permissive carrying regimes rarely, if ever, regulate the use of guns on private property because they are primarily concerned with the relationship of the state to gun-carrying individuals rather than with the decisions of private actors.[197] While states could pass laws foreclosing such a duty to prohibit guns, the vast majority have not done so. And, although the Second Amendment may sometimes place limits on private law where guns are concerned, that is not likely here where the conduct being regulated is purely private and has a minimal impact on personal self-defense.

193. Assuming that the robbery was not also the result of the defendant's breach of a duty.
194. *See, e.g.*, William L. Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 382–83 (1950).
195. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 448 (AM. LAW. INST. 1965).
196. *Id.* cmt. b.
197. *See supra* Part I.

5. *Permissive Statutory Schemes & Premises Liability for Gun Policies Can Co-Exist*

As described in Section II.A, *supra*, most statutory schemes regulating publicly carried firearms do not prescribe what private businesses must do about legally carried guns.[198] And, for the most part, they do not address the imposition of tort liability on the basis of businesses' decisions about guns.[199] There are, however, a few exceptions. Many of the states that have "parking lot" laws that require businesses to allow customers or employees to keep guns locked in their cars, explicitly shield businesses from any liability in connection with a customer or employee's use of such a firearm.[200] Only five states explicitly prohibit courts from imposing the kind of liability advocated in this Article.[201]

Though the vast majority of states have not explicitly prohibited these kinds of actions, courts may still be reluctant to impose liability on store owners that allow publicly carried guns if they believe doing so would be inconsistent with the legislature's general policy goals regarding firearms.[202] The direction of legislative action on this issue over the past few decades has been without exception, in the direction of making it easier for more people to carry guns in public.[203] If

198. *See supra* Section II.A.

199. *See id.*

200. *See, e.g.*, ALASKA STAT. ANN. § 18.65.800(c); FLA. STAT. ANN. § 790.251(5) (West 2008); LA. STAT. ANN. § 32:292.1(B).

201. *See* KAN. STAT. ANN. § 75-7c10(c)(2) (West 2019); OHIO REV. CODE ANN. § 2923.126(C)(2)(a) (West 2019); OKLA. STAT. ANN. tit. 21 § 1290.22 (West 2019); TENN. CODE ANN. § 39-17-1325 (West 2016); WIS. STAT. ANN. § 175.60(21)(b) (West 2017). Kansas's statute is actually a bit unclear. It provides immunity from liability for the actions of valid concealed carry permit holders on private property only where the property owner "does not provide adequate security measures in a private building and . . . allows the carrying of a concealed handgun . . . [.]" KAN. STAT. ANN. § 75-7c10(c)(2) (West 2019). This suggests that a business which did provide adequate security could potentially be liable for the actions of a legal gun carrier if it allowed such carrying. This would obviously create some perverted incentives—providing worse security would make a business less likely to be subject to liability. It is possible this is not what the legislature intended, but the meaning of this provision has apparently never been litigated.

A larger group of states does foreclose liability associated with employees bringing guns onto an employer's property (usually in parking lots) but do not address liability associated with guns carried by customers. *See, e.g.*, ALASKA STAT. ANN. § 13A.11.91 (West 2019) ("[A]n employer and the owner and/or lawful possessor of the property on which the employer is situated shall be absolutely immune from any claim, cause of action or lawsuit that may be brought by any person seeking any form of damages that are alleged to arise, directly or indirectly, as a result of any firearm brought onto the property of the employer, owner, or lawful possessor by an employee, including a firearm that is transported in an employee's privately owned motor vehicle.") (emphasis added). A few of these statutes are written broadly enough that a business could conceivably argue that it also provides immunity in cases of guns carried by customers. *See, e.g.*, GA. CODE ANN. § 16-11-135 (West 2019). For example, Georgia's statute provides immunity to property owners for any use of a firearm "pursuant to" the statutory section requiring businesses to allow customers and employees to keep guns in parking lots. *Id.* It is unclear whether carrying a gun inside a business would constitute use of a firearm "pursuant to" that section. *See, e.g.*, LA. STAT. ANN. § 32:292.1 (2019); MISS. CODE ANN. § 45-9-55 (West 2019); N.D. CENT. CODE ANN. § 62.1-02-13 (West 2019).

202. *See* Donaca v. Curry Cty., 734 P.2d 1339, 1342–43 (Or. 1987) (declining to engage in "freewheeling judicial 'policy declarations'" in determining whether a duty exists and instead relying on statutory "indication[s] of legislative policy").

203. *See supra* Section I.A; *see also*, *e.g.,* Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 754 (2005) ("[T]he most recent enactments of RTC

the most recent legislative pronouncements are in favor of public gun carrying, would not courts be undermining the legislature's goals by recognizing a tort duty that would keep guns out of many places of public accommodation?

The answer to that question turns on what the legislative goals of relaxed gun carrying policies actually are. Some may say that the goal is to have "guns everywhere,"[204] but this is too simplistic a conception of the animating principles behind these laws.[205] Instead of being motivated by a generalized desire to have more guns in more places, these laws are about changing the relationship between *the government* and individuals with respect to guns. These laws seek to change that relationship for three primary reasons: to prevent government from abusing discretion in deciding who carries a gun, to increase personal liberty, and to afford people an opportunity to protect themselves from crime. The first two goals are not implicated at all by assigning tort liability to stores that allow guns, and the third goal is only marginally affected.

Back in the days when "may issue" concealed carry regimes were dominant, a frequent (and often justified) complaint of gun rights advocates was that the discretion these regimes gave government officials was often subject to abuse.[206] Economic and social elites were often able to get concealed carry permits without demonstrating a particularly compelling need for such permits while ordinary citizens with apparently serious threats to their personal safety were denied permits.[207] Or, even more perniciously, the discretion could be used to unfairly deny permits to disfavored groups.[208] Shall issue systems, and later, permitless systems, fixed this problem by removing that discretion.

Another justification for relaxed concealed carry regimes is a more general interest in personal liberty. Individuals always have an interest in not having their

legislation show, that after nearly twenty years of debate and controversy, the trend is toward more concealed carry, not less.").

204. For example, a recent Georgia bill that removed some prohibitions on specific locations where guns could be carried was often cast by opponents as a "guns everywhere" law. *See, e.g.*, Larry Copeland & Doug Richards, *Ga. Governor Signs 'Guns Everywhere' into Law*, USA TODAY (Apr. 23, 2014, 4:17 PM), https://www.usatoday.com/story/news/nation/2014/04/23/georgia-gun-law/8046315/.

205. Of course, determining the policy goals behind any law is a difficult endeavor. Different legislators and supporters of these laws may have different motivations in enacting them. Nonetheless, I think a few general conclusions can be drawn from the historical development of these laws and some of the scholarship supporting them.

206. *See, e.g.*, Cramer & Kopel, *supra* note 36, at 682–85; *see also* Lara L. Overton, *Permit to Carry Legislation: Has the Time Come for Change in Minnesota's Firearm Legislation and Policy?*, 21 HAMLINE J. PUB. L. & POL'Y 95, 112–13 (1999) ("The primary controversy surrounding the ['may issue' statute then in place in Minnesota] involves the concern that concealed carry permits are issued at the sole discretion of the local police chief or county sheriff. The granting or refusal of permits has become an arbitrary and capricious standard in Minnesota. Decisions are being based on the whims of local law enforcement, not a literal application of the statutes.").

207. *See, e.g.*, Lindsay K. Charles, *Feminists and Firearms: Why Are So Many Women Anti-Choice?*, 17 CARDOZO J.L. & GENDER 297, 314 (2011); Cramer & Kopel, *supra* note 36, at 682–85; Johnson, *supra* note 203, at 750.

208. *See* Johnson, *supra* note 203, at 750 (explaining that discretionary carry statutes enabled "class and race discrimination"); David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment,* 74 TUL. L. REV. 387, 437, 447 (1999) (arguing that discretionary permitting regimes disproportionately deny permits to women and African Americans).

autonomy limited by the government, and autonomy is uniquely inhibited by laws that prohibit people from being armed.[209] This viewpoint is part of a larger philosophy commonly held by gun-rights advocates that "prizes individual autonomy, celebrates free markets and other institutionalized forms of private ordering, and resents collective interference with the same."[210] Thus, the government has no business prohibiting people from being armed in public or limiting public gun carrying to people with compelling needs.

Finally, the most commonly offered justification for these laws is that they will deter and prevent crime by allowing armed citizens to defend themselves from criminals.[211] Although, as discussed in Section III.A, *supra*, there is conflicting data on the issue, advocates for these laws successfully highlighted empirical literature suggesting that defensive gun uses are common and that concealed carry does not increase, and may actually decrease, crime rates.[212] Beyond these empirical arguments, advocates also argued that police are either stretched too thin or inherently unable to respond to violent crime quickly enough.[213]

209. *See, e.g.*, Charles, *supra* note 207, at 307 ("Freedom to make choices, as well as freedom from external forces such as patriarchy and violence, are both necessary for autonomy: the ability of an individual to define her own conception of the good and exercise control over her own life.").

210. *See* Christopher T. Pierce, Note, *Not Only in My Backyard but on My Front Stoop: The Forgotten Opinion of Urbanites About Concealed-Carry in Missouri*, 21 WASH. U. J.L. & POL'Y 407, 417–18 (2006) (quotations and citations omitted); *see also* Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 348 (2016) ("[T]he right to keep and bear arms could have some kind of intrinsic value—one that is rooted in an individual right to personal autonomy. This view resonates with the strongly libertarian flavor of much gun-rights rhetoric. A person who subscribes to this autonomy view of the Second Amendment is primarily concerned with the liberty of self-reliance, not with instrumental ends like preventing tyranny or even promoting personal safety.") (citations omitted); David B. Kopel & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438, 464 (1997) ("[Strong gun rights supporters'] model is that of the independent frontiersman who takes care of himself and his family with no interference from the state.") (quotations and citations omitted).

211. *See, e.g.*, Charles, supra note 207, at 316 ("Allowing law-abiding citizens to carry concealed weapons has been shown to deter violent crime."); Simeon Kim, Comment, *Utopia or the Wild, Wild, West? The Right to Carry Concealed Handguns Law: Senate Bill 1190 and House Bill 2164*, 21 S. ILL. U. L.J. 597, 597 (1997) ("Supporters claim that [shall-issue concealed carry] laws increase societal safety by deterring crime . . . ."); John R. Lott, Jr., *Does Allowing Law-Abiding Citizens to Carry Concealed Handguns Save Lives?,* 31 VAL. U. L. REV. 355, 357 (1997) ("Stories of individuals using guns to defend themselves has helped motivate thirty-one states to adopt laws requiring authorities to issue, without discretion, concealed-weapons permits to qualified applicants."); Lydia Zbrzeznj, *Florida's Controversial Gun Policy: Liberally Permitting Citizens to Arm Themselves and Broadly Recognizing the Right to Act in Self-Defense*, 13 FLA. COASTAL L. REV. 231, 268 (2012) ("Supporters of [Florida's shall issue concealed carry law] focused on the importance of protecting law-abiding citizens and the deterrent effect on criminals of knowing a person may be armed.").

212. *See supra* note 124.

213. *See, e.g.*, Missouri House of Representatives Committee on Crime Prevention and Public Safety, Report on HB349, https://house.mo.gov/billtracking/bills03/bilsum/commit/sHB349C.htm ("People who live in rural areas can't rely upon law enforcement to protect them all the time, because there are too few deputies covering a large geographical area. The problem is even worse now, with budget problems forcing many sheriff's offices to make cutbacks. When methamphetamine dealers set up labs in the woods nearby, and the closest sheriff's deputy is a half hour away, a person needs to be able to protect himself."); Beau A. Hill, *Go Ahead, Make My Day: Revisiting Michigan's Concealed Weapons Law*, 76 U. DET. MERCY L. REV. 67, 77 (1998) ("Those advocating permissive concealed weapons laws cite the need for self-protection . . . . in light of the inability of the police to defend the public from violent crimes."); *see also* Charles, *supra* note 207, at 306 ("[W]omen may want

A related concern was that police did not have enough of an incentive to prevent crime because police are generally not liable for failing to protect people from crime.[214] In other words, if the government cannot or will not protect its citizens, they should have a right to protect themselves.

None of these justifications[215] for permissive public carrying policies is undermined by a tort duty to prohibit firearms in private businesses. To begin with, all of these justifications deal with the relationship between the government and gun carriers. While the tort system is certainly an instrument of the state, placing a tort duty on businesses is fairly far removed from direct government regulation of gun carriers. Instead, the duty to prohibit guns would merely force businesses that chose to allow gun carrying to internalize the costs of that practice,[216] while leaving individual citizens and even the businesses themselves free to make their own decisions about gun carrying.

Beyond the theoretical question of the government's involvement, there are several practical reasons that this duty would not undermine the objectives of permissive carrying policies. First, a duty to prohibit guns would necessarily be evenhanded in its application. A store that allowed some people to carry guns inside but not others would not satisfy its duty to prohibit guns. Instead, as described in Section III.A, *supra*, stores would have a duty to prohibit guns using clear signage that would be visible and applicable to all customers on an equal basis.[217]

Second, personal liberty is not undermined by such a duty even if it leads to many businesses prohibiting firearms. A business prohibiting firearms because of the costs they create is simply not a limitation on personal liberty in the same way that a government prohibition on carrying firearms is. The former is actually a *manifestation* of liberty because it represents an exercise of the business's right to control the use of its property. A prospective customer who wishes to carry

to consider the average 911 response time in their community [in deciding whether to own guns for self-defense].").

214. *See, e.g.*, Charles, *supra* note 207, at 319 ("Each state must choose a path: either allow women the means of effective self-defense, or assume a duty to protect them."); Frank Espohl, *The Right to Carry Concealed Weapons for Self-Defense*, 22 S. ILL. U. L.J. 151, 179 (1997) ("The right to carry weapons for self-defense is particularly important because courts have repeatedly held that police departments exist to prevent crime in general but have no duty to prevent any specific crime or protect any specific person, no matter how clear and present the danger faced by that person."); Kim, *supra* note 211, at 602 ("The police incentive to protect individual citizens is lessened because of judicial rulings that police can not be held civilly liable for refusing such protection.").

215. This is certainly not a complete list of the reasons for permissive concealed carry regimes, but most of the other justifications that have been offered also focus on the relationship between people and the government rather than between private parties. *See, e.g.*, SpearIt, *Firepower to the People! Gun Rights & the Law of Self-Defense to Curb Police Misconduct*, 85 TENN. L. REV. 189, 190–91 (2017) ("[E]xpanded lawful gun possession by educated carriers increases the potential for legal gun possessors and carriers to intervene—not only to prevent mass killings, but also to counter unlawful bodily harm by police."); *see also* Kopel & Little, *supra* note 210, at 465 ("[A] number of notable constitutional scholars have shown that . . . the Second Amendment's very reason for being is to enable American citizens to resist even their own government when their civil liberties are thus assailed.").

216. *See infra* Part III.

217. *See supra* Section III.A.

guns, is also free to respond to this decision however she sees fit, including refusing to patronize businesses that prohibit guns. If enough people decide to take their business elsewhere, stores may decide that the costs of prohibiting guns outweigh the costs of allowing them. Either way, this would be a great example of the kind of private, market-driven ordering that individualist supporters of permissive concealed carry schemes favor. Conversely, giving businesses special immunity for firearms related decisions that they do not enjoy in any other context as a few states have chosen to do is more consistent with the collectivist vision of government meddling with private ordering that permissive carry laws purport to eschew.

Finally, whatever crime prevention benefits concealed carry regimes may have in general, they simply are not present in the context of private businesses. As discussed in Section III.A, *supra*, the limited data available on defensive gun uses does not suggest that they are particularly common in private businesses, and there are several inherent features of private businesses that make them less likely to be the site of criminal attacks on customers.[218] And, unlike the police, private businesses *do* have a legally enforceable duty to protect patrons from foreseeable criminal attacks.[219] Private businesses that are trying to attract as many customers as possible also have an incentive to be in places that are highly accessible, and therefore more likely to have faster police response times and possibly even a regular police presence. Thus, the crime preventing goals of permissive carry regimes are not as compelling in the context of private businesses as they are in truly public places.[220]

Therefore, establishing a tort duty to prohibit firearms would not undermine the primary justifications for permissive concealed carry laws. The fact that so many states have permissive concealed carry laws and yet, so few have enacted provisions foreclosing the recognition of such a duty is further evidence that the two policies do not necessarily conflict. Of course, once such a duty is recognized, legislators may decide to reverse the courts' decision, but until that happens,

218. *Id.*

219. *See supra* Section II.A.

220. One might argue that prohibiting carrying in private businesses will lead to less public carrying in general because people will not be able to carry their guns when traveling between their homes and these businesses. There are ways, however, around that problem. As discussed in Subsection II.B.2, *supra*, several states have "parking lot" laws that require businesses to allow customers to keep guns in their cars. These laws allow people to carry guns while in transit even if they plan to stop at businesses that prohibit firearms. Places where traveling by car is less common present a more difficult problem, but in those instances where there was enough demand businesses could offer a "gun check" service that would allow customers to leave their guns at the door while they shop and take them again when they leave. This idea may seem somewhat fanciful, but at least one state's parking lot law actually allows businesses to set up such a system in lieu of allowing guns in parking lots. *See* ARIZ. REV. STAT. ANN. § 12-781(C)(3)(c) (2009) (providing that a parking lot owner can prohibit customers from keeping guns in their cars if, among other requirements, "[t]he property owner . . . [p]rovides temporary and secure firearm storage. The storage shall be monitored and readily accessible on entry into the premises and allow for the immediate retrieval of the firearm on exit from the premises.").

A related argument is that guns left in parking lots could be a target for thieves. Parking lot laws, however, again point in the right direction on this point by usually requiring firearm owners to store their guns out of sight in their vehicles. *See, e.g.*, *id.* § 12-781(A)(2).

courts should not hesitate to apply long-standing tort rules to the new reality of commonplace public gun carrying.

6. The Second Amendment is Not a Barrier to a Duty to Prohibit Guns

Many scholars and some courts have argued that the Second Amendment requires permissive gun carrying laws.[221] Assuming that is correct,[222] might it follow that a tort duty on businesses requiring them to prohibit guns would be unconstitutional? After all, private law causes of action have sometimes been subject to constitutional limitations, most notably in the context of defamation actions against public figures.[223] Since the tort system is simply a part of the state, should it not be subject to the same constitutional constraints as any other form of state action?

While this argument has some intuitive appeal, following it to its logical conclusion would completely collapse the public/private distinction.[224] Perhaps for this reason, courts have not taken that approach and instead have applied constitutional rights to private law only in certain circumstances.[225] As I have described in another article, courts tend to only apply constitutional limitations to private law where the private law cause of action threatens the core of a constitutional right.[226]

Premises liability actions based on store gun policies do not implicate the core of the Second Amendment. The core of the Second Amendment has been repeatedly identified by courts as "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[227] Obviously any gun use that takes place in a store would, by definition, not take place in a person's home and therefore be outside the core of the Second Amendment.[228] One might object that if we are proceeding under the assumption that the Second Amendment requires permissive concealed carry laws, then the core should not be defined so narrowly. But, the core should not be conflated with the entire scope of the right—Second

221. *See, e.g.*, Wrenn v. District of Columbia, 864 F.3d 650, 665–66 (D.C. Cir. 2017); O'Shea, *supra* note 59, at 588.

222. There are certainly strong arguments on the other side, *see, e.g.*, Miller, *supra* note 59, and most courts to consider the issue have upheld may-issue concealed carry regimes. *See* Jacobs, *supra* note 14, at 979 n.194 (collecting cases).

223. Jacobs, *supra* note 14, at 948.

224. *See id.* at 962, 965.

225. *See id.* at 965.

226. *Id.* at 968–70.

227. *Id.* at 978–79 (quotations and citations omitted).

228. Perhaps as applied to store owners, the analysis would be a little different to the extent that a store is sufficiently analogous to a person's home. *Cf.* State v. Hamdan, 665 N.W.2d 785, 807 (Wis. 2003) ("[A] citizen's desire to exercise the right to keep and bear arms for purposes of security is at its apex when undertaken to secure one's home or privately owned business."). But the duty discussed here would not impact the ability of a store owner (or her employees) to carry a firearm, only the store's customers.

Amendment rights could very well be at their apex in the home while still protecting some kinds of conduct outside the home.[229] Thus, even to the extent that the proposed premises liability duty would prevent people from carrying firearms into private businesses,[230] it does not implicate the core of the Second Amendment.[231]

Of course, this home-focused understanding of the core of the Second Amendment is not unanimous. Some have argued that the core of the Second Amendment is simply armed self-defense, irrespective of the location where the need for self-defense may arise.[232] Supporters of this position point to the Second Amendment's text which references both keeping and bearing arms and suggest that the latter must refer to bearing arms independently of keeping them in the home.[233]

Even under this more expansive view of the Second Amendment's core, however, a duty to prohibit guns on private property still does not strike at the core of the right. That is because, even if there is a robust right to carry firearms in public, that does not suggest there is any right at all to carry firearms on private property.[234] One of the primary features of private property is the right to exclude others.[235] This was true both before and after the Second Amendment was ratified, and, in part for this reason, courts have affirmed that the Second Amendment has no application on private property just as the First Amendment generally does not.[236]

229. *See* Jacobs, *supra* note 14, at 985 n.225; *see also* Moore v. Madigan, 702 F.3d 933, 935 (7th Cir. 2012) ("Both Heller and McDonald do say that 'the need for defense of self, family, and property is most acute' in the home . . . , but that doesn't mean it is not acute outside the home.").

230. It is possible to imagine applying many of the arguments made in this article to the home context—that is, a duty to prohibit guns could apply to landlords in the same way it applies to business owners. Far more gun violence takes place inside the home than in public, so applying a duty to prohibit guns to landlords could save many more lives than applying the same duty to public business owners. *See, e.g.*, Dylan Matthews, *Living in a House with a Gun Increases Your Odds of Death*, VOX (Nov. 14, 2018, 4:19 PM), https://www.vox.com/2015/10/1/18000520/gun-risk-death ("Guns can kill you in three ways: homicide, suicide, and by accident. Owning a gun or having one readily accessible makes all three more likely."). Such a duty, however, would also have more costs to personal freedom. While applying that duty to landlords probably wouldn't violate the Second Amendment in a legal sense, see Jacobs, *supra* note 14, at 996, 996 n.286, it certainly would put more of a burden on Second Amendment interests than the business-focused duty.

231. Although the duty might not apply in homes themselves, it could easily apply to common areas of apartment buildings and similar residential structures. Many premises liability cases apply a duty to landlords to keep these areas safe, *see, e.g.*, § 41:11 Common areas, 3 PREMISES LIABILITY 3d § 41:11 (2018 ed.), and prohibiting guns in these areas (perhaps with an exception to allow residents to bring their own guns to and from their homes) is another way to do that.

232. *See* Young v. Hawaii, 896 F.3d 1044, 1069 (9th Cir. 2018) ("[M]uch of Heller's reasoning implied a core purpose of self-defense not limited to the home.").

233. *See* Peruta v. California, 137 S. Ct. 1995, 1998 (2017) ("As we explained in Heller, to 'bear arms' means to wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person.") (Thomas, J., dissenting from the denial of certiorari) (quotations and citations omitted); Young, 896 F.3d at 1069 ("While the Amendment's guarantee of a right to 'keep' arms effectuates the core purpose of self-defense within the home, the separate right to 'bear' arms protects that core purpose outside the home.").

234. *See* Jacobs, *supra* note 14, at 995.

235. *Id.* at 994–95.

236. *See id.* (discussing GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244 (11th Cir. 2012)).

Even if a business's decision to ban firearms is based on avoiding tort lawsuits, that does not alter this conclusion. Private businesses attempting to avoid tort liability may go farther than the government in regulating activities protected by the Second Amendment. For example, the Second Amendment likely protects a right to buy firearms,[237] yet businesses are free to take voluntary steps to limit the kinds of firearms they sell and who they sell them to, even if their choices are partially motivated by a desire to avoid tort liability for things like negligent entrustment.[238] Likewise, news outlets may take a conservative approach towards publishing information about people in order to avoid defamation liability.[239] Similarly, assigning tort liability to businesses that allow guns on their property does not run afoul of the Second Amendment, even if the threat of such liability prompts businesses to ban guns.

IV. PROHIBITING OR ALLOWING GUNS SHOULD BE A PRIVATE DECISION

This Article does *not* advocate that the government should *prohibit* businesses from allowing firearms on their premises. The decision of whether to have guns around ought to be a personal one that property owners should generally be able to make for themselves without government interference.[240] Ideally, even states that had restrictive concealed carry laws would allow private businesses to let people carry guns inside if they wished to do so.[241] Allowing businesses to make these decisions for themselves will, in turn, empower consumers to make their own decisions about whether they feel more comfortable in a business that bans guns or one that does not.

237. *See id.* at 987, 987 n.242 (collecting cases).

238. *See id.* at 992–93 (discussing the Second Amendment's applicability to negligent entrustment actions). For example, in the wake of the 2018 mass shooting at a Parkland, Florida, high school, several large businesses either raised the age limit for purchasing guns, stopped selling certain guns and accessories, or both. *See, e.g.*, Dave Altimari, *Sandy Hook Families Ask Bass Pro Shops to Stop Selling Assault Rifles*, HARTFORD COURANT (Mar. 2, 2018, 6:00 AM), http://www.courant.com/news/connecticut/hc-news-sandy-hook-bass-gun-ban-20180301-story.html. While those businesses did not explicitly cite the threat of tort liability in making their decisions, the possibility may have been a factor since it coincided with high profile litigation against gun manufacturers and sellers in connection with the Sandy Hook shooting, which included negligent entrustment claims. *See id.*

239. *See generally* Jacobs, *supra* note 14, at 948–50 (discussing the Supreme Court's approach to the relationship between the First Amendment and defamation and related torts). Admittedly, this analogy is not perfect since defamation actions are actually subject to First Amendment limitations while I am suggesting that these premises liability actions would not be subject to similar Second Amendment limitations. *See id.* Defamation actions, however, are different in two important ways that make them much more threatening to First Amendment rights than premises liability actions are to Second Amendment rights. First, defamation actions operate directly against speakers, whereas premises liability actions are not filed directly against gun owners and only affect them incidentally, if at all. Second, defamation actions could result in the speaker not being able to publish her message at all, whereas premises liability actions, at most, would result in a gun carrier not being able to carry her gun into some locations (private businesses).

240. *See* Blocher, *supra* note 86, at 26 ("[I]f self-defense is the "central component" of the Second Amendment right, it seems odd that self-defense decisions should only be constitutionally protected when they are effectuated with a gun, rather than threatened by one.").

241. Practically, the way this could work is a person could transport her gun unloaded, then load the gun once she arrives on the private property where guns are permitted. *See* CAL. PENAL CODE § 25505 (West 2012) (exempting the transportation of locked, unloaded guns from statutes prohibiting concealed carry without a permit).

Guns are bound up not just with political views but with deeply held cultural values about individualism, violence, and citizenship. As Professor Maxine Burkett put it:

> [Debates about gun policy] derive from intensely embraced cultural values and cultural myths. Proponents and opponents of gun control essentially are arguing not so much about policy as about the preservation—or, in some cases, the generation—of venerated ways of life. In its most basic incarnation, this argument takes the form of a clash between a strongly avowed reverence for the nation's individualist frontier spirit and an equally strongly expressed desire for a communitarian approach to American public life and policymaking.[242]

Simply put, there are two different Americas when it comes to guns. Divided by geography, race, gender, and other familiar cultural markers,[243] one side is not only comfortable with guns, but reveres them as both practically and symbolically important while the other side finds guns—and people carrying guns in public—threatening.[244]

One of the upsides of an increasingly privatized society is that it allows competing cultures like this to live side-by-side without forcing one side to accept defeat or even compromise. If business owners, like other Americans, are free to make their own choices in this debate, they will likely consider things like their customer base, their own cultural values, and the values of the communities they serve. Market forces will ultimately be the final arbiters of whether businesses make the "right" decision about gun carrying. The result will likely be a patchwork of different policies at different businesses around the country and even within individual communities. That, in turn, will give individuals the opportunity to decide for themselves whether they want guns around them when they go out in public rather than have that decision made for them by politicians.

Applying premises liability to businesses that choose to allow guns does not prevent this from happening; instead, it merely forces businesses to internalize the costs of their decision.[245] In fact, the inverse cause of action should be

242. Maxine Burkett, *Much Ado About . . . Something Else:* D.C. v. Heller*, the Racialized Mythology of the Second Amendment, and Gun Policy Reform*, 12 J. GENDER RACE & JUST. 57, 58 (2008). Professor Burkett's article also highlights the role of race and gender in these conceptions. *Id.* at 58–59.

243. *See* Kim Parker et al., *The Demographics of Gun Ownership*, PEW RES. CTR. (June 22, 2017), http://www.pewsocialtrends.org/2017/06/22/the-demographics-of-gun-ownership/ (showing that gun owners are overwhelmingly white, male, rural, and politically conservative). The demographics are similar for gun owners who choose to carry guns in public. *See* Peabody, *supra* note 26, at 911 (noting that about 75% of concealed carry permit holders are men); Rowhani-Rahbar, *supra* note 65, at 1931 ("Compared with handgun owners who did not carry a loaded handgun, a greater proportion of those who carried were aged 18 to 29 years [and] male.").

244. *See* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 123 n.215 (2013) (collecting polling data showing large majorities of Americans feel "less safe" around guns).

245. I at least theoretically favor the inverse as well—that a business ought to also be liable for prohibiting guns if allowing guns could have prevented an injury. At least one state legislator has proposed a bill that would explicitly create such a duty, although the bill would have done a bit more than that by also creating an entitlement to attorney's fees, which are not normally available in a common law premises liability action. *See* S.B. 610, 119th Reg. Sess. (Fla. 2017). I am a bit skeptical about plaintiffs' ability to establish causation in such cases since it would turn on reconstructing what would have happened in a criminal incident if the plaintiff tried to defend themselves with a gun, but plaintiffs ought to have the ability to try.

available as well—a business ought to be liable for *prohibiting* guns if allowing guns could have prevented an injury.[246] Causation may be even more difficult to establish in these cases than in ones involving a failure to prohibit guns since it would turn on reconstructing what would have happened in a criminal incident if the plaintiff tried to defend themselves with a gun, but plaintiffs ought to have the ability to try.[247]

In summary, applying premises liability to this decision no more bans guns in businesses than strict product liability bans poorly manufactured or dangerous consumer products.[248] Instead, it is simply about moving the burden to pay for the consequences of decisions about legally carried firearms from consumers to businesses.

In fact, the specter of premises liability may actually enhance the opportunity for consumer choice by encouraging businesses to be clearer about their firearms policies rather than hiding behind vague corporate policies buried deep on company websites. Businesses that choose to ban guns, will of course, be motivated to communicate that through clear signage in order to avoid premises liability as described in Section III.A, *supra*. But businesses that choose to allow guns will also be incentivized to publicize that fact to attract pro-gun customers in order to attempt to recoup the costs of the potential liability they will be taking on. Thus, premises liability will force many businesses off the fence and further empower consumers to incorporate this knowledge into their buying decisions.

V. THE PRIVATIZATION OF THE GUN DEBATE

The fight over guns in private businesses is emblematic of a larger trend in the gun debate of formerly public issues moving to private terrain. The gun-rights movement has been so successful in its legislative advocacy that it is beginning to reach a point where in many, or even most states, it is not possible to make gun laws any more permissive. The story of public carrying certainly reflects this—public carrying laws cannot be any more permissive than simply allowing anyone to carry a gun with no permit requirement, and that's exactly what the law is in twelve states, and that number will likely grow in the near future.[249] In turn, frustrated by the lack of political success despite popular support for their position, pro-regulation activists have moved on to pressuring private businesses

246. At least one state legislator has proposed a bill that would explicitly create such a duty, although the bill would have done a bit more than that by also creating an entitlement to attorney's fees, which are not normally available in a common law premises liability action. *See id.*

247. *Cf.* GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1262 n.39 (11th Cir. 2012) (noting, in upholding private businesses ability to ban guns, that businesses owe a duty to protect customers from foreseeable risks posed by other customers).

248. *See* Mut. Pharm. Co. v. Bartlett, 570 U.S. 472, 507 (2013) ("[E]xposure to liability, and the 'incidental regulatory effects' that flow from that exposure, is not equivalent to a legal mandate for a regulated party to take (or refrain from taking) a specific action.") (Sotomayor, J., dissenting) (citation omitted).

249. *See supra* Section II.A.

to ban guns.[250] The other side, of course, has quickly added countervailing pressure to allow guns in those places.

Other dimensions of gun policy are also moving in similar directions. For example, assault weapons and large capacity ammunition magazines are legal at the federal level and in the vast majority of states.[251] Faced with that reality, gun control groups have started putting pressure on gun sellers to stop selling these weapons and magazines and have sometimes succeeded.[252] Similarly, some businesses have also been pressured to raise the minimum age to purchase a gun higher than what is legally required.[253]

This kind of advocacy has also targeted even businesses that do not directly sell guns but may be able to have some influence on the market for firearms. For example, some banks have been pressured to deny loans to gun manufacturers.[254] And activists are on the lookout for other ways that investors and financial institutions may be able to wield their influence to change the behavior of firearm manufacturers and sellers.[255] As these efforts show signs of success while the political process remains intractable, it is reasonable to expect that activists will pour more energy into using private power to enact de facto gun regulations.

Scholars on both sides of the debate in the legal academy have a natural tendency to assign paramount importance to the legal framework of gun regulation—the various local, state, and federal laws applicable to guns, and, perhaps especially, the Second Amendment. But private businesses and the cultural forces that influence them may ultimately have a greater impact on the role guns play in the day to day lives of Americans in the future than any source of legal authority.

That is not to say, however, that law has no role in these private clashes. Just as the potential for premises liability may influence whether businesses allow guns inside, the potential for regulatory action may influence whether banks decide to continue providing financing for gun manufacturers, and the potential for negligent entrustment liability may influence what restrictions gun sellers place on their own sales. Disputes over guns in the private sphere will largely be

250. *See* Rachel Siegel, *145 CEOs Implore Senate to Act on Gun Violence, Saying Doing Nothing is 'Simply Unacceptable'*, WASH. POST (Sept. 12, 2019, 10:00 AM), https://www.washingtonpost.com/business/2019/09/12/ceos-implore-senate-act-gun-violence-saying-doing-nothing-is-simply-unacceptable/.

251. *See* Assault Weapons, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/assault-weapons/ (last visited May 21, 2020); Large Capacity Magazines, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines/ (last visited May 21, 2020).

252. *See* Ben Popken, *Dick's Sporting Goods Will Stop Selling Assault-Style Rifles, Walmart Raising Age for Gun Sales*, NBC NEWS (Feb. 28, 2018, 8:02 AM), https://www.nbcnews.com/business/business-news/dick-s-sporting-goods-will-stop-selling-assault-style-rifles-n851881; *see also* Nathaniel Meyersohn, *Walmart Ends All Handgun Ammunition Sales and Asks Customers Not to Carry Guns Into Stores*, CNN (Sept. 3, 2019), https://www.cnn.com/2019/09/03/business/walmart-ends-handgun-ammo-sales/index.html (describing Walmart's plan to stop selling assault rifle ammunition).

253. *See* Popken, *supra* note 252.

254. *See* Alan Rappeport, *Banks Tried to Curb Gun Sales. Now Republicans Are Trying to Stop Them.*, N.Y. TIMES (May 25, 2018), https://www.nytimes.com/2018/05/25/us/politics/banks-gun-sales-republicans.html.

255. *See id.*

adjudicated by cultural forces and private decision-making, but law may still sometimes provide an important nudge[256] in one direction or the other.

VI. CONCLUSION

The dramatic, unprecedented expansion of the number of people who are legally eligible to carry firearms in public is likely to have ripple effects across society that are just beginning to be felt. Private businesses, which today control a larger share of public space than ever before, will have serious decisions to make about whether guns become truly ubiquitous in most Americans' day-to-day lives. Premises liability provides a well-established framework for forcing businesses to internalize the full costs of those decisions. Applying premises liability to businesses that allow guns inside will not undermine permissive concealed carry laws or even necessarily stop businesses from maintaining such policies. Instead, it places the danger posed by firearms on equal footing with other dangers businesses have a duty to protect their customers from. Thirty years ago, those decisions may have been inconsequential since publicly carried firearms were rare, but now that they are commonplace, businesses must be held accountable for deciding whether consumers go shopping surrounded by armed civilians or not. In making that decision, businesses will have to consider the economic, cultural, and political implications of their choice along with the legal ones. In the years ahead, businesses will likely face many similar issues as they deal with an increasingly privatized gun debate.

256. *See* Cass R. Sunstein, *Do People Like Nudges?*, 68 ADMIN. L. REV. 177, 178 (2016) ("The last several years have seen an outpouring of work on 'nudges,' understood as interventions that steer people in particular directions but that also allow them to go their own way.").