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Juveniles, Firearms and Crime: Extending Criminal Liability to Parents in Oklahoma and beyond

Richard M. AuBuchon

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NOTES

JUVENILES, FIREARMS AND CRIME: EXTENDING CRIMINAL LIABILITY TO PARENTS IN OKLAHOMA AND BEYOND

I. INTRODUCTION

Children[1] in America have a dubious reputation for causing violence and going unpunished.[2] The common perception that a violent juvenile will not be punished for his/her crimes contributes to a heightened sense of unfairness among adult Americans.[3] This sense of unfairness, when compounded with hauntingly vivid images and descriptions such as the massacre at Columbine High School[4] in Littleton, Colorado, forces communities to assert blame, which in turn may tear a community apart.[5] Another school shooting which occurred in Paducah, Kentucky on December 1, 1997 inspired a lawsuit claiming, among other things,

1. Child, minor or juvenile, as used in this comment, shall include any male or female persons who has not attained his eighteenth (18th) birthday. *See* Federal Juvenile Delinquency Act ("FJDA"), 18 U.S.C.A. § 5031 (West 1999); OKLA. STAT. ANN. tit. 21, § 857 (West 1999).

2. *See* Steve Jacob, *Myths and Realities of Juveniles and the Law*, THE FORT WORTH STAR-TELEGRAM, Sept. 3, 1999, *available at* 1999 WL 23947522 (addressing common perceptions that a minor's criminal record disappears after age eighteen (18) and that minors are not punished for their crimes).

3. *See id.*

4. *See In The Line Of Fire,* NEWSWEEK, Aug. 23, 1999, *available at* 1999 WL 19354836 (reporting the story of Columbine High School, Littleton Colorado, Apr.4, 1999, where Eric Harris, 18, and Dylan Klebold, 17, killed 13 and injured 23 using a TEC-DC9 handgun, a sawed-off shotgun, a pump-action shotgun, and a 9mm rifle). Several unexploded bombs were later found by investigators. *Id.*

5. *See* Daniel Pederson, *Lessons from Paducah: Slain Teens Families Quest for Vindication Divides Community,* NEWSWEEK, May 20, 1999, *available at* 1999 WL 9500126.

that the school was to blame for failing to detect the warning signs of violence.[6] Other juvenile shootings[7] in the past several years received heavy publicity throughout America and shaped adult perceptions that juveniles are the "root of all evil."[8] However, in reality, violent crimes committed by juveniles account for only a minimal amount of the total number of violent crimes committed.[9]

Latest statistics compiled by the Office of Juvenile Justice and Delinquency Prevention indicated that in 1997, juveniles committed seventeen percent (17%) of all violent crime[10] in America.[11] Of violent crime, juveniles accounted for fourteen percent (14%) of all murders[12] and seventeen percent (17%) of all weapons violations.[13] Statistics also indicate that between 1987 and 1993, juvenile homicide involving the use of a firearm increased one hundred and eighty-two percent (182%).[14] Coupling these statistics with a fear that juveniles will go unpunished for their use of firearms manifests an issue for both Oklahoma and the United States of how to punish and prevent juvenile violence. As a solution to this issue some people are calling for the imposition of criminal liability upon parents for the criminal delinquency of their minor children.[15] This comment takes the position that states should not use contributing to the delinquency of a minor statutes to punish parents for the crimes of a child involving firearms. However, parents should be punished, via access to firearms statutes, for allowing their children unsupervised access to firearms.

This comment focuses on criminal penalties to parents based on the delinquent acts of their children involving firearms. Part II-A describes the history of parental liability in torts and then draws a distinction between civil and criminal law. Part II-B discusses two types of parental liability statutes: 1)

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6. *Id.*

7. *Id.* The author reports the event in Conyers, Ga., May 20, 1999, where T.J. Soloman is charged with injuring six students; in Jonesboro, Ark., Mar. 24, 1998, where Mitchell Johnson and Andrew Golden allegedly killed four students and one teacher and wounded ten others; in Pearl, Miss., Oct.1, 1997, where Luke Woodham killed his mother, two students and wounded seven others; and in Springfield, Or., May 21, 1998, where Kipland Kinkel allegedly killed two students and shot twenty-two others. *Id.*

8. *Id.*

9. *See* Howard Snyder, *Juvenile Proportion of Arrests by Offense, 1997*, Office of Juvenile Justice and Delinquency Prevention, 1998, *OJJDP Statistical Briefing Book*, (visited August 8, 1999), http://ojjdp.ncjrs.org/ojstatbb/qa003.html.

10. *Id.* Violent crime includes criminal homicide (murder and non-negligent manslaughter), forcible rape, robbery, and aggravated assault. *Id.*

11. *Id.* Diagram of 1997 Violent Crime Index.

12. *Id.*

13. *Id.*

14. *See* Howard Snyder, *Known Juvenile Homicide Offenders by Weapon Type 1980-1995*, Office of Juvenile Justice and Delinquency Prevention, 1997, *OJJDP Statistical Briefing Book* (visited August 8, 1999), http://ojjdp.ncjrs.org/ojstatbb/qa050.html.

15. *See* Child Firearms Access Prevention Act of 1998, S. 1917, 105th Cong. § 2(a)(2)(A)-(B); *see e.g.*, Rachel Smolkin Scripps, *Parental Responsibility Laws, Plans Vary*, THE GRAND RAPIDS PRESS, May 2, 1999, at A10; Laura Sessions Stepp & Edward Walsh, *Sins Of The Sons: Laws Aim At Parents*, THE WASHINGTON POST, April 27, 1999, at C01; Kim Murphy & Melissa Healy, *When The Sins Of The Child Point To Parents, Law's Grip Is Tenuous Courts: Murderous Youths From Seattle To Littleton Test Limits Of Growing Sanctions Aimed At Their Guardians*, LOS ANGELES TIMES, April 30, 1999, at A1.

Contributing to the delinquency of a minor statutes and 2) Access to firearms statutes. This section also discusses the laws of California and Florida and then presents an overview of Oklahoma's criminal parental liability law. Part III-A discusses the application of the statutes in the model states and in Oklahoma. Part III-B describes the constitutional challenges created by statutory applications. Finally, Part IV concludes that criminal parental liability statutes in Oklahoma are redundant to civil liability statutes and will fail to achieve the desired result of reducing juvenile crime involving firearms.

II. BACKGROUND

A. Origins of Parental Liability: A Brief History of Parental Liability

Historically, parents were not criminally prosecuted for the crimes of their children because parents were subject to the courts via tort law.[16] Today, state statutes impose vicarious[17] civil liability upon parents whose children cause injury to third parties.[18] Even where civil liability is allowed by statute the recovery is typically limited to either hundreds of dollars or several thousand dollars.[19] In the absence of a vicarious liability statute a parent may be held liable for the acts of his/her child if the parent "directed it[,] . . . encouraged it . . . or . . . ratified it by accepting its benefits."[20] Similarly, a parent may incur civil liability if the parent was "negligent in entrusting to a child a dangerous instrument such as a gun," or if the parent left a gun "accessible to the child where misuse is a risk."[21] Of course, the injured party must prove that the parent was aware of the risk as well as the child's disposition towards violence.[22]

The rationale behind parental liability is that parents are in the best position to compensate an innocent third party for the willful and malicious acts of the child because parents are more likely to have the money to make restitution.[23] A parent is in the best position to prevent their minor child from inflicting intentional harm because the parent is around the child everyday and the parent is the absolute mentor and teacher for the child throughout the child's life.[24] Tort law allowed the extension of civil liability upon the parents in the belief that a parent stood in a position of a special relationship with the child to exercise a greater amount of control so as to reduce the amount of injuries to third parties.[25] This special relationship is also codified in Section 316 of the Restatement

16. *See* W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, § 123, at 913 n.20 (5th ed. 1984).
17. *See* BLACK'S LAW DICTIONARY 1566 (6th ed. 1990).
18. *See* KEETON, *supra* note 16, at 913.
19. *See id.*
20. *Id.* at 914.
21. *Id.*
22. *Id.*
23. Vanthournout v. Burge, 387 N.E.2d 341, 343 (Ill. App. Ct. 1979).
24. *See id.*
25. *See* KEETON, *supra* note 16, at 914.

(Second) of Torts.[26]

Supporters of civil parental liability believe that parents will deter their children from committing violence as long as the parents may be forced to pay for the injuries resulting from the child's violent act(s).[27] To the extent that parents can be liable for the torts of their children, parental liability is not a new concept. However, the transition from civil to criminal liability is a large step and represents significant changes in how parents are viewed. Instead of the parent being associated with a criminal, the parent becomes the criminal, which carries much more stigma in our society than mere association with criminals.

B. To Be A Criminal

Criminal law involves higher stakes than civil law, a concept that should not be taken lightly.[28] For example, a person convicted of a crime may lose his or her freedom in society and face severe monetary penalties. Yet, to be labeled a criminal is more than paying fines and serving time in a jail cell. Professor George K. Gardner provides a good illustration of why the label of a criminal conviction is so feared by the public, stating:

> The essence of punishment for moral delinquency lies in the criminal conviction itself. One may lose more money on the stock market than in the court room; a prisoner of war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law. It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment.[29]

Criminal law generally requires strict constitutional and statutory safeguards because of the potential for a citizen to be stripped of precious freedoms.[30] First, the accused party is presumed innocent until proven guilty.[31] Second, the prosecution must establish guilt beyond a reasonable doubt, which is a heavy burden for the State.[32] Third, the doctrines of actus reus,[33] mens rea[34] and

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26. *See* RESTATEMENT (SECOND) OF TORTS § 316 (1965), which reads in part:
A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
(a) knows or has reason to know that he has the ability to control his child, and
(b) knows or should know of the necessity and opportunity for exercising such control.
Id.

27. KEETON, *supra* note 16, at 914.

28. *See In re* Winship, 397 U.S. 358, 363-64 (1970). The Supreme Court arguing that a reasonable doubt standard should be used in criminal prosecutions and stating, "The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *Id* at 364.

29. George K. Gardner, *Bailey v. Richardson and the Constitution of the United States,* 33 B.U.L.REV. 176, 193 (1953); *quoted in* Henry M. Hart, Jr. *The Aims of the Criminal Law,* 23 LAW AND CONTEMP. PROBS. 401 (1953).

30. *See* MODEL PENAL CODE §§ 2.01-.03.

31. *Id.*

32. *Id.*

33. *Id.*

causation[35] limit punishment of who should be convicted of a crime.[36] Finally, constitutional protections limit society's ability to punish.[37]

Conventional criminal statutes punish those who commit specific types of conduct, which are deemed by society to be criminal in nature. However, criminal parental liability statutes differ from conventional criminal statutes in that criminal parental statutes punish a third party for the acts of another. Inspection of criminal parental liability statutes yields two types of statutes. Both focus on the parent and the parent's duty to supervise their child's access to firearms.

C. *Model Statutes*

1. Contributing to the delinquency of a minor statutes.

The two general types of criminal parental liability statutes discussed in this comment are: 1) Contributing to the delinquency of a minor statutes and 2) Negligent or reckless access to firearms statutes. These two general forms of statutes stand as the last legislative line of defense in the battle against a minor's use of firearms.[38] They must be examined in order to understand each type as it relates to parental duties to control a child's use of a firearm. Section 272 of California's Penal Code will serve as the model primarily because it was the first statute to employ strong language, but also because it was the first state code to have an appellate decision upholding the constitutionality of the statute.[39]

The California legislature custom tailored its contribution to the delinquency of a minor statute to address the growing issue of juvenile violence and to reduce gang-related activity.[40] The statute is actually an old one that was enacted in 1903 in the form of punishment for contributing to the delinquency of a minor.[41] However, amid rampant juvenile gang-related violence, the statute was raised from the dead in a political resurrection in 1988 that took the form of a powerful amendment to the California Penal Code.[42] The 1988 amendment to Section 272 of the California Penal Code included a sentence that placed parents in an awkward position.[43] After the amendment the statute reads in part, "a parent or legal guardian to any person under the age of 18 years shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child."[44] A parent in California who does not exercise reasonable care, supervision, protection and control over their child:

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34. *Id.*
35. *Id.*
36. MODEL PENAL CODE §§ 2.01-.03.
37. *See generally* U.S. CONST. art. V; *id.* amend. XIV.
38. *See id.*
39. *See generally* Williams v. Garcetti, 853 P.2d 507 (Cal. 1993).
40. *See* CAL. PENAL CODE § 272 (West 1999).
41. CAL. STAT. ANN. PENAL CODE § 272 (Amended Sept. 26, 1988).
42. *See id.*
43. *See id.*
44. *Id.*

> is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding two thousand five hundred dollars, ($2,500), or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment in a county jail, or may be released on probation for a period not exceeding five years.[45]

Now compare the first form of criminal parental liability to the second form, negligent or reckless access to weapons statutes.

2. Access to Firearms Statutes

Due to the existence of parents' general duty to exercise reasonable control over their child or children it was foreseeable that more specific duties would arise in relation to a child's access to firearms. This is seen in a Florida statute which requires a parent to exercise greater caution for access to firearms.[46] Section 784.05 of Florida Statutes Annotated should be viewed as the model for access to firearms statutes because of its breadth and because of the specific exceptions which indirectly place a duty upon parents or those whom the child knows well enough to know where a firearm would be located in a residence. The Florida statute makes access to a weapon by a minor culpable negligence.[47] Section 784.05 states:

> (1) Whoever, through culpable negligence, exposes another person to personal injury commits a misdemeanor of the second degree . . .
>
> (2) Whoever, through culpable negligence, inflicts actual personal injury on another commits a misdemeanor of the first degree . . .
>
> (3) Whoever violates subsection (1) by storing or leaving a loaded firearm within the reach or easy access of a minor commits, if the minor obtains the firearm and uses it to inflict injury or death upon himself or herself or any other person, a felony of the third degree . . .
>
> However, this subsection does not apply:
>
> (a) If the firearm was stored or left in a securely locked box or container or in a location which a reasonable person would have believed to be secure, or was securely locked with a trigger lock;
>
> (b) If the minor obtains the firearm as a result of an unlawful entry by any person;
>
> (c) To injuries resulting from target or sport shooting accidents or hunting accidents; or
>
> (d) To members of the Armed Forces, National Guard, or State Militia, or to police or other law enforcement officers, with respect to firearm possession by a minor which occurs during or incidental to the performance of their official duties. . . .
>
> (4) As used in this act, the term "minor" means any person under the age of 16.[48]

Although the Florida statute does not explicitly mention application to parents it is implicit within the language because it seeks to hold the provider of

45. *Id.*
46. *See* FLA. STAT. ANN. § 784.05 (West 1999).
47. *See id.*
48. *Id.*

the weapon guilty of a misdemeanor through negligence by access alone.[49] Also, an exception to liability is that the statute does not apply when the firearm is stolen. It can be deduced that a firearm cannot be stolen from the child's own home, therefore, suggesting that this statute relates more toward the parent because of the ease of access language.[50] Recent efforts to follow Florida's model are also working their way through Congress.[51]

Public support for increasing parental responsibility is appearing at the national level in Congress.[52] Regardless of whether the incentive of the legislators to support parental criminal liability is a sincere effort to curb violence or whether it is simply a token showing of political grand-standing and party-politics, the substance of the legislation is not reduced.[53] Senate Bill 1917 is designed to "prevent children from injuring themselves and others with firearms."[54] In light of the recent perceived increase of teen violence committed in public places as highlighted by the national media,[55] congressional efforts to reduce the ease of access to firearms may punish parents for allowing easy access to weapons by their minor children.[56] And the penalties could be the stiffest to date imposed on a parent for the commission of a crime by his/her child with a maximum fine of $10,000 and up to one (1) year of imprisonment if found guilty.[57] Congress has not only followed Florida's model, but has expanded it in an attempt to create a new national model where parents are viewed as enemies of the state if they allow their children access to weapons and those weapons are used to injure a third party.[58]

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49. *See id.*

50. *See generally id.*

51. *See* Child Firearms Access Prevention Act of 1998, S. 1917, 105th Cong. § 2(a). That Act reads in pertinent part:

> (2)Prohibition-Except as provided in paragraph (3) any person that –
> (A) keeps a loaded firearm, or an unloaded firearm and ammunition for the firearm, any of which has been shipped or transported in interstate or foreign commerce or otherwise substantially affects interstate or foreign commerce, within any premise that is under the custody or control of that person; and
> (B) knows, or reasonably should know, that a juvenile is capable of gaining access to the firearm without the permission of the parent or legal guardian of the juvenile; shall, if a juvenile obtains access to the firearm and thereby causes death or bodily injury to the juvenile or to any other person, or exhibits the firearm either in a public place, or in violation of subsection (q), be imprisoned not more than 1 year, fined not more that $10,000, or both.

Id.

52. *See* Rachel Smolkin Scripps, *Parental Responsibility Laws, Plans Vary,* THE GRAND RAPIDS PRESS, May 2, 1999, at A10.

53. *See* Kathleen Reagan, *Blaming Parents is Taking the Easy Way Out,* THE PATRIOT LEDGER, May 29, 1999, at 19.

54. *Id.*

55. *See supra* note 4.

56. *See* Child Firearms Access Prevention Act of 1998, S. 1917, 105th Cong. § 2(a)(2)(A)-(B).

57. *Id.* at § 2(a)(2)(B).

58. *See id.*; FLA. STAT. ANN. § 784.05 (West 1999). Language concerning negligence per se based on lack of firearm locks is almost identical in both Florida statute and U.S. Senate legislation.

D. Oklahoma

The previously examined California and Florida models are also present in Oklahoma's criminal statutes.[59] Section 1273 of Title 21 of the Oklahoma Statutes imposes a duty upon parents to restrain their child from committing acts of violence with weapons by limiting access to firearms.[60] Moreover, Section 1273 provides that any parent who allows a child access or possession of a weapon, other than a shotgun or rifle for the sake of sport, commits a crime punishable by a fine of $100 or three months in jail.[61] Additionally, any child who violates any provision of Section 1273 is subject to "adjudication as a delinquent."[62]

A delinquent in Oklahoma is defined in Section 857 of Title 21 as "a minor . . . who shall have been or is violating any penal statute of this state."[63] If a child becomes a delinquent under Section 857, it may in turn bring the parent under the purview of another criminal statute, Title 21, Section 858.1. This section is designed to protect minors from persons who would lead a minor astray.[64] In addition, a child who brings a gun to school opens a parent up to an administrative penalty of up to $200 or up to forty (40) hours of community service.[65]

Title 21, Section 858.1 of the Oklahoma Statutes targets parents directly, similar to California Penal Code Section 272.[66] The language of Section 858.1 also follows closely the model of Section 272 of California's Penal Code, stating:

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59. *Compare* FLA. STAT. ANN. § 784.05, *with* OKLA. STAT. ANN. tit. 21 § 1273 (West 1999). The Oklahoma statute states:

> A. It shall be unlawful for any person within this state to sell or give to any child any of the arms or weapons designated in Section 1272 of this title; provided, the provisions of this section shall not prohibit a parent from giving his or her child a rifle or shotgun for participation in hunting animals or fowl, hunter safety classes, target shooting, skeet, trap or other recognized sporting events, except as provided in subsection B of this section.
>
> B. It shall be unlawful for any parent or guardian to intentionally, knowingly, or recklessly permit his or her child to possess any of the arms or weapons designated in Section 1272 of this title, including any rifle or shotgun, if such parent is aware of the substantial risk that the child will use the weapon to commit a criminal offense or if the child has either been adjudicated a delinquent or has been convicted as an adult for any criminal offense.
>
> C. Omitted
>
> D. Any person violating the provisions of this section shall, upon conviction, be punished as provided in Section 1276 of this title, and, any child violating the provisions of this section shall be *subject to adjudication as a delinquent.* In addition, any person violating the provisions of this section *shall be liable for civil damages* for any injury or death to any person and for any damage to property resulting from any discharge of a firearm or use of any other weapon. Any person convicted of violating the provisions of this section after having been issued a concealed handgun license pursuant to the provisions of the Oklahoma Self-Defense Act, Sections 1 issued a through 25 of this act, may be liable for an *administrative violation* as provided in Section 1276 of this title.
>
> E.As used in this section, "child" means a person under eighteen (18) years of age.

OKLA. STAT. ANN. tit. 21, § 857 (emphasis added).

60. *Id.* § 1273.

61. *Id.*

62. *Id.*

63. *Id.* § 857(4).

64. *See generally* Lewis v. State, 212 P.2d 148 (Okla. Crim. App. 1949); Wallin v. State, 182 P.2d 788 (Okla. Crim. App. 1947). *See also* OKLA. STAT. ANN. tit. 21, § 856 (contributing to the delinquency of a minor statute).

65. *See id.* § 858.

66. *Compare id.* § 856, *with* CAL. PENAL CODE § 272 (West 1999).

> (A) Any parent or other person who knowingly and willfully: (1) causes, aids, abets or encourages any minor to be in need of supervision, or deprived; or (2) shall by any act or omission to act have caused, encouraged or contributed to the deprivation, or the need of supervision of the minor, or to such minor becoming deprived, or in need of supervision; shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined a sum not to exceed Five Hundred Dollars ($500.00), or imprisonment in the county jail for a period not to exceed one (1) year, or by both such fine and imprisonment. (B) Upon a second or succeeding conviction for a violation of this section, the defendant shall be fined not more than One Thousand Dollars ($1,000.00), or imprisoned in the county jail not to exceed one (1) year, or punished by both such fine and imprisonment.[67]

Oklahoma's statutes appear to be a jumbled ball of string that may lead to an end but will take a long time to unravel. It is unclear how the application of the laws will withstand the scrutiny of appellate review when a child uses a firearm to commit an assault or murder. Unlike California, Oklahoma does not have a published decision on point. Also, it would seem there is some conflict between Oklahoma's civil and criminal statutes concerning liability of the parent for the child's delinquent act(s).[68] On one hand, Title 21, Section 1273 establishes negligence per se and states that a parent is liable for any civil damages that result from a child's illegal use of a firearm.[69]

On the other hand, Title 10, Section 20 clearly states that a parent is not liable for acts of his/her child.[70] Title 10, Section 20, as interpreted by the Oklahoma Court of Appeals, applies only to limit the civil liability of parents with exception to criminal and delinquent acts of the child.[71] Therefore, according to case law and statute, a parent is liable for any criminal act of the child, but the parent is not liable for any simple torts committed by the child.[72] If the child

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67. OKLA. STAT. ANN. tit. 21, § 856(1).

68. *Compare id.* § 1273, *with id.* tit. 10, § 20 ("Neither parent or child is answerable, as such, for the act of the other.").

69. *Id.* tit. 21, § 856(D) (stating, "[A]ny person violating the provisions of this article shall be liable for civil damages for any injury or death to any person and any damage to property resulting from any discharge of a firearm or use of any other weapon."). *Id.*

70. *Id.* tit 10, § 20.

71. Glidden v. Higgs, 839 P.2d 680, 680 (Okla. Ct. App. 1992) (holding that where son had an accident and was issued a traffic citation for failure to yield did not constitute a criminal or delinquent act and parents were not liable for the non criminal traffic accident of their son). *Glidden* cites Title 10, Section 20 and Title 23, Section 10 of the Oklahoma Statutes for this holding. *See* OKLA. STAT. ANN. tit. 10, § 20 (stating neither parent or child is answerable for the acts of the other is limited to the criminal or delinquent acts of the child); *id.* tit. 23, § 10 (stating that a parent is liable for criminal or delinquent acts of his or her child).

72. OKLA. STAT. ANN. tit. 23, § 10. This section states:

> The state or any county, city, town, municipal corporation or school district, or any person, corporation or organization, shall be entitled to recover damages in a court of competent jurisdiction from the parents of any minor under the age of eighteen (18) years, living with the parents at the time of the act, who shall commit any criminal or delinquent act resulting in bodily injury to any person or damage to or larceny of any property, real, personal or mixed, belonging to the state or a county, city, town, or municipal corporation, school district, person, corporation or organization. The amount of damages awarded shall not exceed Two Thousand Five Hundred Dollars ($2,500.00).

Id.

commits a crime, then the parents are liable for restitution damages and or incarceration; but if a child commits a simple tort, then the parents face no legal liability.[73]

By examining the above statutes, common threads become apparent: 1) parents have a duty to reasonably control and care for their minor children so as not to allow their children to become delinquent; 2) parents who own a firearm are under a duty to exercise all reasonable precautions to prevent a minor's access to a firearm; 3) parents who breach this duty are criminally negligent and subject to sanctions by the State which may include a fine or a period of short imprisonment; and 4) parents who breach their duty to reasonably limit a minor's access to a firearm, when the minor uses the firearm to injure a third party, are punishable by fines and imprisonment. A parent is also liable for civil damages filed by the injured third party which result from the minor's use of the firearm to inflict injury. In conclusion, a parent whose child commits a crime using a firearm, which the parent knew about or reasonably should have known about the child having access to, is open to imposition of criminal penalties.

III. APPLYING THE NEW MODEL

A. *Illustrative Cases*

The most influential authority regarding criminal prosecution of parents for their children's crimes comes from California. In *Williams v. Garcetti*,[74] the California Supreme Court heard a case where the mother of a child who participated in a gang rape was charged with violation of Section 272 of California's Penal Code.[75] Mrs. Williams allowed her son to participate in a gang and was not only knowledgeable of the gang-related activity, but apparently encouraged his activities.[76] The mother was charged by the State of California for contributing to the delinquency of her son based on the facts that circumstantial evidence culminated in her knowledge of his gang-related activity.[77]

The court reasoned that her conduct resulted in criminal negligence based upon the statute, which recognizes a duty by the parent to exercise reasonable control[78] over his/her children.[79] In finding criminal negligence the court required a higher standard than that required under tort law.[80] And in applying the higher standard the California Supreme Court used the objective test to determine the criminal state of mind or the mens rea[81] by stating, "[I]f a reasonable person in

73. *See id.* tit. 10, § 20.
74. Williams v. Garcetti, 853 P.2d 507 (Cal. 1993).
75. *Id.*
76. *Id.*
77. *See* Toni Weinstein, *Visiting the Sins of the Child on the Parent: The Legality of Criminal Parental Liability Statutes,* 64 S. CAL. L. REV. 859, 859 (March 1991).
78. CAL. PENAL CODE § 272 (West 1999).
79. *Williams*, 853 P.2d at 514.
80. *Id.*
81. MODEL PENAL CODE § 2.02(2)(d) (defining negligent state of mind).

defendant's position would have been aware of the risk involved, then defendant is presumed to have had such an awareness."[82]

Williams strengthened the theory and practice of prosecuting parents because it gave persuasive authority for every other state to draw from when they take these types of statutes to task in the courts. Although it strengthened the enforcement of the statute the decision helped to clear the water of a muddy subject. *Williams* limited the scope of parental liability by requiring knowledge by the parent of the delinquency, stating, "The amendment requires parents who know of or reasonably should know of the child's risk of delinquency to exercise their duty of supervision and control."[83] This language is very similar to the established law of parental liability in torts, which is codified in Section 316 of the Restatement (Second) of Torts. That section states that the parent is liable for the acts of his/her child when the parent is aware of the risk.[84] The court analogized the rationale behind criminal penalization as of the same type of duties required of the parent in the law of torts and, in the mind of the court, criminal prosecution placed no extension of duty beyond what was already required of parents.[85] Also, the California Supreme Court allowed the defendant to claim a defense whereby a parent is not liable if he or she exercises reasonable efforts in supervision and control.[86]

However, the ever-nebulous issue of what reasonable supervision is should give courts some pause. The California Supreme Court addressed the issue, stating, "There is no formula for determination of reasonableness. Yet standards of this kind are not impermissibly vague, provided their meaning can be objectively ascertained by reference to common experiences of mankind."[87] It is not clear from the court's language what constitutes reasonableness, but it arguably does not mean a parent giving a child a semi-automatic firearm or allowing the child to participate in a gang.[88]

California is not the only state to impose criminal parental liability for contributing to the delinquency of a minor. Numerous states[89] have codified

82. *Williams*, 853 P.2d at 514.

83. *Id.*

84. RESTATEMENT, *supra* note 26, at § 316.

85. *See Williams*, 853 P.2d at 514.

86. *Id.*

87. *Williams*, 853 P.2d at 513 (citing People v. Daniels 459 P.2d 225 (Cal. 1969)).

88. For discussion of void for vagueness argument, *see infra* Part III (5).

89. *See* ALA. CODE § 12-15-13 (West 1999); ALASKA STAT. § 11.51.130 (West 1999); ARIZ. REV. STAT. ANN. §§ 5-27-205, 5-27-220 (West 1999); CAL. PENAL CODE § 272 (West Supp. 1999); COLO. REV. STAT. ANN. § 18-6-701 (West 1999); CONN. GEN. STAT. ANN. § 53-21 (West 1999); DEL. CODE. ANN. tit. 11, § 1102 (West 1999); GA. CODE ANN. § 16-12-1 (West 1999); HAW. REV. STAT. §§ 709-904 (1999); ILL. REV. STAT. ch 23, para. 2361A (1987); IND. CODE ANN. § 35-46-1-8 (West 1999); IOWA CODE ANN. § 233.1 (West 1999); KAN. STAT. ANN. § 21-3608 (1999); KY. REV. STAT. ANN. § 530. 060 (Michie 1999); LA. REV. STAT. ANN. § 92 (West 1999); ME. REV. STAT. ANN. tit. 17-A, § 554 (West 1999); MD. CODE ANN. CTS. & JUD. PROC. § 3-831 (West 1999); MASS. GEN. LAWS ANN. ch. 119, § 63 (West 1999); MICH. COMP. LAWS ANN. § 750.145 (West 1999); MINN. STAT. ANN. § 260.315 (West 1999); MISS. CODE ANN. § 97-5-39 (West 1999); NEB. REV. STAT. § 28-709 (West 1999); NEV. REV. STAT. ANN. § 201.110 (Michie 1999); N.H. REV. STAT. ANN. § 169-B:41 (West 1999); N.J. STAT. ANN. § 2C:24-4 (West 1999); N.M. STAT. ANN. § 30-6-3 (Michie 1999); N.Y. PENAL LAW § 260.10 (McKinney

statutes, which penalizes parents who either neglect their duty to exercise reasonable care in supervising their child or who allow a minor access to weapons.[90] Oklahoma has traditionally used the contributing to the delinquency of a minor statute, Title 21, Section 856 of the Oklahoma Statutes Annotated, to punish parents for allowing their child to become a truant[91] or for a person who sexually abuses or provides the minor with intoxicating substances.[92] However, as society evolves, the contributing to the delinquency of minor statutes may be applied in new situations that will test the limits of the statute's usefulness. Attention must now turn to a model case for access to firearms statutes. Unfortunately, appellate review of access to firearm statutes is minimal to nonexistent.

Tyson v. State[93] is the only Florida appellate decision regarding the use of Section 784.05(3) of the Florida statutes.[94] In *Tyson*, the State of Florida charged Tracy S. Tyson with culpable negligence for allowing her minor child access to a loaded firearm, which the minor then used to injure another person.[95] The Florida Court of Appeals did not review the constitutionality of the statute on its face nor did the court review the application of the statute as applied to the parent.[96] Rather, the court simply found that the statute should be upheld and the parent should be liable.[97]

Access to firearms statutes worked their way into our nation's criminal law jurisprudence to add incentive to keep firearms out of the hands of minors. The desire to provide negative incentives for adults to keep firearms out of the hands of minors propelled the enactment of access to firearm statutes. The *Tyson* case exemplifies a tragic situation in which a statutorily derived heightened parental awareness to the dangers of easy access to firearms may have prevented the injuries to the other party. The following case is a good, albeit distressing, example of why our society needs access to firearms statutes to increase a parent's awareness to the dangers of easy access to firearms.

Andrew Golden, age eleven (11) and Mitchell Johnson, age thirteen (13) had easy access to firearms.[98] On the morning of the day of the shooting, Mitchell

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1999); N.C. GEN. STAT. § 14-316.1 (1999); N.D. CENT. CODE § 14-10-06 (1999); OHIO REV. CODE ANN. § 2919.25 (West 1999); OKLA. STAT. ANN. tit. 21, § 856 (West 1999); OR. REV. STAT. § 163.575 (1999); PA. STAT. ANN. tit. 18 § 4304 (West 1990); R.I. GEN. LAWS § 11-9-4 (1999); S.C. CODE ANN. § 16-17-490 (1999); S.D. CODIFIED LAWS § 26-9-1 (Michie 1999); TENN. CODE ANN. § 37-1-156 (1999); TEX. FAM. CODE ANN. § 72.002 (Vernon 1999); VT. STAT. ANN. tit. 13, § 1301 (1999); VA. CODE. ANN. § 18.2-371·(1999); WASH. REV. CODE ANN. § 9A.42.030 (West 1999); W. VA. CODE § 49-7-7 (1999); WIS. STAT. ANN. § 948.40 (West 1999).

90. *See generally* Kathryn J. Parsley, *Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of Their Children*, 44 VAND. L. REV. 441 (1991).

91. Habitually absent from school.

92. *See generally* Cox v. State, 270 P.2d 373 (Okla. 1954); Lewis v. State, 212 P.2d 148 (Okla. 1950); Wallin v. State, 182 P.2d 788 (Okla. 1947).

93. Tyson v. State, 646 So.2d 816 (1994).

94. *Id.* at 816.

95. *Id.*

96. *Id.*

97. *Id.*

98. *See* David Brauer & John McCormick, *The Boys Behind the Ambush*, NEWSWEEK, April 6,

drove the Johnson's van to the Golden's home to pick up Andrew.[99] At the Golden's home, the boys tried unsuccessfully to break into a safe to get to some high-powered weapons.[100]

However, the boys were unable to open the safe, but did take several handguns from elsewhere in the house.[101] The boys then drove to Andrew's grandparents' farm, broke into the basement, and procured three high-powered rifles and four handguns.[102] With their assembled arsenal the boys drove the van to an ambush spot, dressed in camouflage and laid in wait until students emptied the school into the shooting field in response to a fire alarm.[103] Together, the boys shot a total of fifteen (15) people within one minute. Of the fifteen (15) people who were shot, five (5) were mortally wounded.[104] Although deeply disturbing, the scenario of Jonesboro, Arkansas is not a recent development for our nation.

Consider another tragedy, which happened in 1965. The horror unfolded when Michael Clark, sixteen (16), who was a Boy Scout, Sea Scout and member of his high school band and who did not use drugs, alcohol or display any psychological instability, took to the streets.[105] On April 24, 1965, he started the atrocity by leaving his parents' Long Beach home around 8 p.m. in his parents' car, outfitted with his parents' credit cards and his father's 6.5 millimeter Swedish Mauser with telescopic site.[106]

Around 6 a.m. the following morning, Michael positioned himself overlooking a busy highway and proceeded to fire the Mauser at passing automobiles.[107] Three people were killed and several others were wounded before Michael ultimately shot himself.[108] Michael appeared to be a normal young man before his rampage and his parents did not know that he was a violent person.[109] However, if an access to firearm statute was in force at that time, the ease of access to the rifle would make the parents more likely to be criminally liable for the harm that Michael caused.

Michael's father seemed to have done everything that a reasonable person would do to raise a healthy child.[110] Yet, Forest Clark, Michael's father should have gone beyond reasonable rearing of Michael and taken the steps necessary to keep a weapon out of a minor's unsupervised hands. Unfortunately, Mr. Clark, kept the rifle in a locked gun cabinet-closet along with a sack of steel jacketed ammunition, which, as it turned out, Michael could unlock without anyone

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1998, at 20.

99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. Brauer & McCormick, *supra* note 98, at 20.
104. *Id.*
105. *See* Reida v. Lund, 96 Cal.Rptr. 102 (Cal. Ct. App. 1971).
106. *Id.* at 103.
107. *Id.*
108. *Id.*
109. *Id.*
110. *See id.*

noticing.[111] Certainly, the situations involving Michael Clark and Jonesboro are what legislatures have in mind when they adopt criminal access to firearms statutes.

Popular opinion holds parents accountable for the ease of access a minor has to weapons.[112] Certainly the children who committed the assault upon their schools in Jonesboro, Arkansas or Paducah, Kentucky had a higher level of ease of access and a lower level of supervision.[113] Yet, ease of access alone should not make parents liable for their child's acts. There should be the additional component of provocation or instigation by the parent to use the weapon in an offensive manner. Similarly, the parent should be held accountable for the failure to properly educate and instruct the minor on the uses and dangers weapons present. Where statutes exist, parents are being charged with liability for the acts of their children in appropriate situations. Yet, a statute's mere existence does not guarantee that the statute is primae facie enforceable.

B. Constitutional Problems Presented By Application

1. Due Process

a. Over breadth Analysis

i. Contributing to the Delinquence of Minor Statutes

To be enforceable a statute must be constitutional and because the statute is criminal in nature, it must survive the due process test. A statute will be overturned for violating due process if it infringes upon constitutionally protected conduct.[114] Criminal statutes require a higher standard of certainty to determine that the statute does not infringe upon constitutionally protected rights.[115] A statute may also be invalid on its face even if there are situations of valid application.[116] When evaluating the constitutionality of a criminal parental liability statute, on the basis of contributing to the delinquency of minor by allowing the knowing, negligent or reckless access to a firearm, the courts should apply the strict scrutiny test.[117]

Strict scrutiny is applied when a court determines that a statute infringes upon a constitutionally protected freedom.[118] The Fourteenth Amendment gives a "wide scope of discretion" to the states to enact laws that "affect some groups of

111. *See Lund*, 96 Cal.Rptr. at 103.
112. *See, e.g.*, Murphy & Healy, *supra* note 15.
113. *See* Brauer & McCormick, *supra* note 98.
114. Hoffman Estates v. Flipside, 455 U.S. 489, 494 (1982).
115. Winters v. New York, 333 U.S. 507, 515 (1948).
116. *See* Colautti v. Franklin, 439 U.S. 379, 394-401 (1979); *see also* Lanzetta v. New Jersey, 306 U.S. 451 (1939).
117. *See* Zablocki v. Redhail, 454 U.S. 374, 388 (1978).
118. *Id.*

citizens differently than others."[119] A statute is presumed to be constitutional by a reviewing court, but to overcome the presumption, when there is an over breadth claim, requires a court to find that there exists a member of a particular class of people requiring special protection.[120] Parents become members of a protected class when they are targeted as a separate class distinct from other people in the community.[121]

Next, a court must find that the party possesses a fundamental right that is protected by the Constitution.[122] A court should determine that the implicated fundamental right is the right to raise a child without governmental interference.[123] Once a court determines that the statute infringes upon a fundamental right the court then should apply the test of strict scrutiny.[124] A statute will not survive the strict scrutiny test unless "it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[125]

Contributing to the delinquency of a minor statutes should invoke the strict scrutiny test. Yet, the state interests in the enforcement of contributing to the delinquency of minor statutes and access to firearms statutes are traditionally different. Contributing to the delinquency of a minor statutes are designed to keep minors away from "evil and people who would lead the minor astray."[126] Whereas access to firearms statutes are designed to reduce the number of deaths from accidental discharge of a loaded weapon, which might result from carelessly leaving a loaded weapon in the presence of a child.[127]

However, the purposes of these statutes have undoubtedly changed in lieu of catastrophic crimes involving minors and their use of firearms to commit premeditated and brutal murders.[128] It can be inferred by reviewing both types of statutes that they are likely to be similarly applied for the attainment of a common goal. That goal is to force parents to exercise greater control over their children, specifically to keep them away from weapons and firearms.

Therefore, the compelling state interest would be to increase a parent's responsibility to control his/her children and to reduce a child's access to firearms. It is hard to argue that the reduction of access to firearms, other than for the sake

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119. McGowan v. State of Maryland, 366 U.S. 420, 425 (1961).

120. *See Zablocki*, 454 U.S. at 388.

121. *See generally id.*

122. *Id.*

123. *See generally* Sharon A. Ligorsky, Note And Comment *Williams v. Garcetti: Constitutional Defects in California's "Gang-Parent" Liability Statute,* 28 LOY. L.A. L. REV. 447 (1994) (giving an excellent argument about why parental liability statutes should be tested under the strict scrutiny standard of review).

124. *See Zablocki*, 454 U.S. at 388.

125. *Id.*

126. Lewis v. State, 212 P.2d 148 (1950) (citing OKLA. STAT. tit. 21 § 856 (1903).

127. *See generally* State v. Greene, 348 So.2d 3 (1977).

128. *See generally* OKLA. STAT. ANN. tit. 21 § 856 (West 1999) (defining a street gang and making the participation in a street gang a criminal offense if the person aided the minor to become a gang member). Therefore, it may be inferred that the purpose of the law is directed more at the reduction of gang violence instead of the traditional uses of the statute which enforced the law against parents for truancy and giving a child intoxicating spirits. *Id.*

of sport, is not a compelling state interest. It is paramount that the state reduces the number of weapon violations, especially when minors commit seventeen percent (17%) of all weapons violations. It is also important to the state to reduce the number of delinquents in the juvenile court system.[129] However, even if a state presents a compelling state interest, a court must determine that the statute is tailored closely enough to effectuate only those interests to which the statute pertains.[130]

For a court to determine that the suspect statute is narrowly drafted to the purpose for which it was intended the court must consider whether the statute is the least burdensome or restrictive way of effectuating the purported purpose.[131] Therefore, Section 858 in title 21 of the Oklahoma Statutes Annotated must be the least burdensome means to force parents to exercise reasonable care over their children, so as to reduce the amount of access that minors have to weapons. By looking to other state statutes, there appear to be other less intrusive and less burdensome means of regulating the parent's supervision of a child, rather than punishing a parent by using the contributing to the delinquency of a minor statute.

Specifically, the heavy reliance by the California Supreme Court on the relationship that a parent has to the child in tort law should alone be enough to constitute a less burdensome means of increasing control over a child, while reducing the minor's access to weapons.[132] The relationship that a parent has to the child in tort law allows an injured party to sue the parent for crimes that a child commits.[133] This alone should be enough to force parents to act responsibly and reasonably when they leave weapons around the house.

Another author strongly argues that application of the strict scrutiny standard to these types of statues is inappropriate when the state has less burdensome options, such as using court mandated parenting classes or requiring the parent to become a part of the rehabilitation of his/her child within the juvenile court system.[134] Therefore, there are less intrusive and less burdensome means of increasing a parent's duty to supervise a child and to reduce the amount of juvenile violence. Thus, the statute should not pass the muster of a strict scrutiny test because there are less burdensome means of effecting the desired result.

However, in the past, the Oklahoma Court of Criminal Appeals, the highest criminal court in Oklahoma, did not apply the strict scrutiny standard when interpreting Sections 856 and 858 of the Oklahoma Statutes.[135] Rather, the court

129. *See generally* Snyder, *supra* note 9, Diagram of 1997 Violent Crime Index.
130. *See* Zablocki v. Redhail, 454 U.S. 374, 388 (1978).
131. Dunn v. Blumstein, 405 U.S. 330, 343 (1972).
132. Williams v. Garcetti, 853 P.2d 507, 514 (Cal. 1993).
133. *See.* OKLA. STAT. ANN. tit. 10, § 20.
134. *See* Ligorsky, *supra* note 121, at 461; *see also Williams,* 853 P.2d at 514 (arguing that the use of settled tort law and court mandated parenting classes is a less intrusive means of increasing a parent's duty to control their child).
135. *See* Cox v. State, 270 P.2d 373, 376 (Okla. 1954); Lewis v. State, 212 P.2d 148 (Okla. 1950); Wallin v. State, 182 P.2d 788 (Okla. 1947).

stated that the preventive and protective nature of the statutes require that they be liberally construed so that the usefulness and strength of the statute is not impaired.[136] The court argued that the very purpose of the statute is to prevent minors from engaging in criminal conduct and to protect the child from further harm. The court reasoned that these goals would be impaired by giving the statute a narrow, limited and strict construction.[137]

More likely, the court would determine that parents are not a protected class of persons under the Constitution in relation to criminal statutes and would thus decline to apply strict scrutiny.[138] Even if the court determined that parents were a protected class of people in criminal statutes, the court would apply the rational relationship test to the statute and would likely not invalidate the statute on the grounds that it is overbroad based on the court's past relevant decisions.[139] On the other hand, access to firearms statutes should not require strict scrutiny and would survive the test of rational relationship to a compelling state interest.

ii. Access to Firearms Statutes

Access to firearms statutes are not overbroad in their application. In response to overbroad application arguments courts should determine that parents are not a protected class of people and that all people are treated equally under the statute. Thus, a court should determine that the statute must survive both the tests of rational relationship and compelling state interest. Access to firearms statutes are very specific.[140] They relate to conduct that could conceivably allow a child to use a weapon to injure another person.

The state's interest is to protect a youth from accidental discharge of a weapon and to prevent the public from intentional crimes by an unstable, unsupervised child. Therefore, imposition of criminal liability upon a parent for negligent or reckless access to a firearm bears a reasonable relation to the state's goal of reducing injuries caused by children using firearms. Furthermore, there is no foundation for the court to invoke the strict scrutiny test because there is no fundamental constitutional right to give minor children weapons for uses other than sport and hunting.[141] The Constitution protects the freedom to keep and bear arms, but it arguably does not mean that twelve-year-old Timmy should get a fully automatic Uzi with high capacity clips during Christmas time for unsupervised shooting. In short, the statute should survive an argument that it is over broad.

b. Vagueness Analysis

Criminal parental liability statutes may be attacked on grounds that they are vague. A statute is void for vagueness when it fails to: 1) provide adequate notice

136. *See Cox*, 270 P.2d at 376; *Lewis*, 212 P.2d at 149.
137. *Wallin*, 182 P.2d at 788.
138. *See generally Cox*, 270 P.2d at 373; *Lewis*, 212 P.2d at 148; *Wallin*, 182 P.2d at 788.
139. *See generally Cox*, 270 P.2d at 373; *Lewis*, 212 P.2d at 148; *Wallin*, 182 P.2d at 788.
140. *See* FLA. STAT. ANN. § 784.05 (West 1999); OKLA. STAT. ANN. tit. 21, § 1273 (West 1999).
141. *See* U.S. CONST. art. II.

to a person of normal intelligence that his conduct is forbidden by statute[142] or 2) establish minimal guidelines to govern law enforcement.[143] The Supreme Court, in *Kolender v. Lawson*, recognized that the most important element of vagueness is the "requirement that a legislature establish minimal guidelines to govern law enforcement... [W]here the legislature fails to provide such minimal guidelines, a criminal statute may permit a standard less sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."[144] Contributing to the delinquency of a minor and access to firearms statutes should survive the void for vagueness argument.

i. Contributing to the delinquency of minor statutes.

In *Kolender*, the Supreme Court overturned a statute, which defined vagrancy as a crime and allowed police to question persons suspected to be vagrants.[145] If the person did not identify himself/herself and explain why he/she was at the particular location the person would be taken to jail.[146] The statute provided law enforcement officers with complete discretion to select against whom they wanted to enforce the law.[147]

This is unlike criminal parental liability statutes, which do not enable a law enforcement officer to have "virtually complete discretion,"[148] because contributing to the delinquency statutes incorporate the same types of responsibilities as those found in tort law.[149] A prosecutor must also prove some connection to the mens rea, mental intent or knowledge of the parent.[150] Yet, the contributing to the delinquency of a minor statutes may give more leeway to the prosecutor than the access to firearms statutes because the contributing to the delinquency of minor statutes are considerably broader in language compared to the more defined access to firearms statutes.[151]

Although the United States Supreme Court placed a higher standard on enforcement guidelines, it nonetheless created a standard for determining whether the accused received adequate notice that his/her action was illegal. In *Papachristou v. City of Jacksonville*, the United States Supreme Court set forth a test for, "fair warning," that would bar a statute as void for vagueness if:

1. [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.
2. [T]he canon of strict construction of criminal statutes, or rule of lenity, ensures

142. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).
143. Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. Williams v. Garcetti, 853 P.2d 507, 515 (Cal. 1993).
149. See *id.*
150. See *id.*
151. *Compare* OKLA. STAT. ANN. tit. 21, § 1273 (West 1999), *with id.* § 856.

> fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.
>
> 3. [A court is barred from] applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.[152]

The Court further stated in *United States v. Lanier,* that "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal."[153]

Requiring a parent to know that his/her omission or commission of poor parenting may bring him/her within the scope of criminal parental liability statutes stretches the limits of what is deemed as notice. Yet, courts do not particularly mind the extension because they reason that parents have a long-standing recognized duty under tort law to supervise their children and that such duty is basically the same as that of tort law in criminal parental liability statutes.[154] Section 272 of the California Penal Code states that parents have a duty to "exercise reasonable care, supervision, protection, and control over their minor child."[155] Parents of normal intelligence would most likely be able to define what reasonable control over their child means in relation to the duty to supervise. Yet, the attack upon parental criminal liability statutes is premised upon the theory that parents would not know what reasonable supervision means and therefore would not have notice that their conduct was criminal.

However, as the United States Supreme Court stated in *Go-Bart Importing Co. v. United States*,[156] "There is no formula for determination of reasonableness."[157] Courts should look to the "reason of the law," and not merely at the wording in order to avoid decisions which might lead to "injustice, oppression, or an absurd consequence."[158] A reasonable parent would or should know not to give his/her child a gun and tell him/her or allow the child to harm someone. A reasonable parent would know that he/she should not leave weapons around the house without adequate supervision by a responsible adult.

Constitutionally, criminal parental liability statutes seldom face review in appellate courts. However, in *Williams*, the California Supreme Court upheld the validity of the notice requirement of Section 272 of the California Penal Code by stating, "[A] statutory definition of perfect parenting would be inflexible and not necessary to identify the egregious breaches of parental duty that come with the statute's purview."[159] The court seems to assume that parents should know how to teach their children to discern right from wrong. But the court reiterates that it

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152. Papachristou v. City of Jacksonville, 405 U.S. 156, 158 (1972).
153. United States v. Lanier, 520 U.S. 259, 266 (1997).
154. See *Williams*, 853 P.2d at 514.
155. CAL. PENAL CODE § 272 (West 1999).
156. 282 U.S. 344 (1931).
157. *Id.* at 357.
158. United States v. Kirby, 74 U.S. 482, 486-87 (1968).
159. *Williams*, 853 P.2d at 514.

will only punish those egregious situations where parents are clearly at fault.[160] Common sense dictates that a parent should know what constitutes reasonable control over their child. To put limits on what reasonable control over a child means would limit the effectiveness of these statutes and weaken a court in its discretion to enforce the law in cases where the parent knew that their child was becoming a delinquent.

ii. Access to firearms statutes.

Access to firearms statutes are very specific. The analysis for vagueness, as applied to contributing to the delinquency of a minor statutes, should also be applied to access to firearms statutes. Thus, an access to firearms statute must: 1) "[p]rovide adequate notice to a person of normal intelligence [to whom he or she can] contemplate that his [or her] conduct is forbidden by statute"[161] and 2) "[e]stablish minimal guidelines to govern law enforcement."[162] It takes little common sense to derive from the statute's wording that a parent should keep all weapons away from their minor child unless the child is hunting or shooting for sport.[163]

Parents of normal intelligence would know from reading Title 21, Section 1273 of the Oklahoma Statutes that it is unlawful for the parent to give or allow the possession of any firearm other than a shotgun or rifle for the sake of sport.[164] A reasonable parent would know, by reading the law, that a child should not have a pistol. It follows, therefore, that the parent should not give their child a semi-automatic assault rifle.

A reasonable parent would take measures to ensure that their child does not have unauthorized access to the parent's weapons. Trigger locks, gun safes and bolt locks are all relatively inexpensive means of reducing a child's access to a firearm and is considered a defense under the Florida access to firearm statute.[165] Section 784.05 of the Florida statutes states, "this subsection does not apply . . . if the firearm was stored or left in a securely locked box or container or in a location which a reasonable person would have believed secure, or was securely locked with a trigger lock."[166] Separating ammunition from weapons and keeping the weapon unloaded are very simple means of reducing the ease of firearm access to a minor. These relatively inexpensive reductions to access should also be accompanied by education and awareness of the dangers presented by weapons and their unauthorized use.

The second prong of the vagueness doctrine, as applied to access to firearms statutes, is also satisfied. A law enforcement officer would not have complete

160. *See generally id.* The Court analyzes legislative intent issues regarding enactment of the statute. *Id.*
161. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).
162. Kolender v. Lawson, 461 U.S. 352, 358 (1983).
163. *See generally* OKLA. STAT. ANN. tit. 21, § 1273 (West 1999).
164. *See generally id.*
165. FLA. STAT. ANN. § 784.05 (West 1999).
166. *Id.*

discretion to enforce the law with these statutes.[167] These statutes relate to specific instances of conduct by the parent which result in specific instances of conduct by the child.[168] Thus, law enforcement is controlled by the specificity of the statutes and if written correctly should withstand a void for vagueness argument.

Yet, when a child plans to do an evil deed with a gun the child may not procure it from his/her home. As was the case with the teenagers who attacked the Columbine High School in Littleton, Colorado.[169] However, these statutes are directed more towards parents who leave their weapons and ammunition open to their children as was the case with the children in Jonesboro, Arkansas.[170] Parents should be estopped from denying that they did not know that their child was likely to possess a gun. The consequences and losses are too great for a parent to continue to ignore the dangers.

Contributing to the delinquency of a minor criminal parental liability statutes, unfortunately, look backwards at conduct that perhaps happened years before the criminal act. Efforts are made to find circumstances where the parent should have been a better parent. This could lead to parental "witch-hunting" by those members of the community who were injured physically or emotionally by the delinquent child. This is the inherent problem of retrospective laws. Putting parents on the stand for failing to keep a deadly weapon out of a child's hands may not be nearly as hard to swallow as it would be to inquire into the deepest, most basic areas of parenting, such as the lessons in distinguishing right from wrong.

The problem with punishing parents is that the child has already committed the crime. The fact that a parent is put on notice to keep his/her child under reasonable control loses its muster when the child much of his/her criminal activity outside the home away from parental guidance. Punishing parents for the crimes of their minor child seems to defy the entire concept of causation in criminal law.

iii. Causation.

Causation is clear in situations where the child commits the crime. If the accused child caused the harm to the third person then the child should be punished for the injury. To punish the child would follow the retributive theory of criminal law by punishing an actor for the crime that the actor committed.[171] However, causation is only clear in relation to the third party and the child because of the direct link between the child's voluntary action and the harm to the third party. When a parent is tried for the acts of his/her child the burden of proving causation should be difficult. The prosecutor must show a link between

167. *Papachristou*, 405 U.S. at 162.

168. *See generally* OKLA. STAT. ANN. tit. 21, § 1273 (West 1999).

169. *See* Erika Check, Elizabeth Angell, Sherry Keene-Osborn & Donna Foote, *The New Age of Anxiety: Whether They Live in a Leafy Suburb or an Inner City, Parents can no Longer Pretend that Their Children are Immune From the Threat of Guns. The Challenge is to Make Kids Feel Secure – But Also Aware of the Real Risks,* NEWSWEEK, Aug. 23, 1999, at 39; *See also* Reagan, *supra* note 53.

170. *See* Brauer & McCormick, *supra* note 98, at 20.

171. *See* JOSHUA DRESSLER, CRIMINAL LAW Ch. 2 § C. 27 (1994).

the "parent's behavior and the child's delinquency."[172] It would not suffice to prove that the parent was merely in the home when the child took steps toward commission of a crime.[173] Nor would it suffice to prove guilt when the parents did not know that their child was at risk or that their child was a danger to others.[174]

In order to prove guilt the prosecutor must show a direct "causal link" between the child's act and the act or acts of the parent.[175] The standard of proof for the mens rea would be criminal negligence of the parent.[176] If a parent were to contribute directly or encourage a child to commit a wrong, the parent would fall more squarely under accomplice statutes than if the parent failed to exercise control over his/her child.[177] A parent's failure to act must be so egregious that a reasonable person would know in the same or similar circumstances that such omission would result in the injury of another person.[178]

However, the California Supreme Court in *Williams* argued that causation was not an issue.[179] The court in *Williams* found that the necessary elements of causation are so well entrenched in civil cases that the court all but dismissed the issue in and of itself, stating that proving causation "has not proved unduly troublesome."[180] Thus, the *Williams* court ignored the longstanding concepts of criminal law in deference to the relationship that a parent has to a child in civil law. A court must not ignore the duty to inspect all possible weaknesses in a statute simply because the relationship exists within a separate body of law.

V. CONCLUSION

States should not use contributing to the delinquency of a minor statutes to punish parents for the crimes of a child involving firearms. To punish someone for poor parenting is a weak attempt by legislatures to incorporate popular opinion into law; thereby, demonstrating that the legislatures are getting tough on crime. Unfortunately, this results in redundant lawmaking. The longstanding judicial history of civil parental liability for criminal acts of a child should be enough to hold parents accountable for the delinquent acts of their children. To attempt to punish parents for the knowing or negligent supervision of the child is overbroad and it could extend to every day decisions and supervision of the family unit. A parent would not only fear that he/she might be civilly liable for the acts of his/her child, but a parent should now fear that he/she will also go to jail or be fined. Getting tough on criminals is desirable, but getting tough on parents is something

172. *Id.*
173. *See* Charlie Brennan, *Parents Rarely Held Responsible Few in Colorado Face Charges in Kid's Crimes,* DENVER ROCKY MOUNTAIN NEWS, May 30, 1999, at 4A (quoting former Denver chief deputy district attorney Craig Silverman: "You'd have to prove that they knew that those homicides were intended, and then they had to do something to help.").
174. *Id.*
175. *Id.*
176. *See* Williams v. Garcetti, 853 P.2d 507, 514 (Cal. 1993).
177. *Id.*
178. *Id.*
179. *See id.*
180. *Id.*

we should not consider.

Using contributing to the delinquency of a minor statutes to punish parents may not be vague because of the longstanding definition in tort law. But that is exactly the problem since tort law is less intrusive and less burdensome to the state to enforce against the negligent parent. Enforcing these statutes will cost the state a great deal in prosecution and may gain very little in return. Also, parents may not be the cause of the delinquency of the child. The child may simply be mentally incapacitated or disrupted by peers.

This leads to the conclusion that parents should be punished for allowing their children unsupervised access to firearms via access to firearms statutes. A parent should know that the possession of a firearm in a household with children poses a significant danger if the child is not supervised or educated about the dangers of the weapon. An unstable child could quickly become destructive by accessing weapons left unsecured. Prevention is easy and inexpensive and the potential costs in human life are so great that the parent must take the effort to keep children away from firearms other than for the use of sport or hunting to the best of the parent's ability.

States should actively pursue the parents who allow their children to possess and use a weapon to commit a crime or injury. However, states should not use the contributing to the delinquency of a minor statutes to increase the standard of supervision of a child. This would be contrary to the notion of preserving the family, and it is unlikely to have the results of minimizing juvenile delinquency with firearms. States should allow a higher recovery in tort law and allow the family members of the victim(s) of the juvenile's crime to pursue punitive damages against the parents who neglected their duty to supervise the delinquent child. Guilty verdicts in wrongful death actions might provide an excellent incentive for parents to supervise their child more closely. States should also follow the trend to reduce the age that minors are tried as adults. When a minor commits a murder the child should be tried and sentenced as an adult for the crime.

Although these juvenile accessibility to weapons statutes may be contrary to prevailing criminal concepts the trend for lawmakers to pass these types of statutes is growing. And the net result is that parents will continue to be put in an ever-precarious situation of becoming criminals themselves for their negligent supervision. It is also likely that states will increase the fines associated with these statutes. This trend can be seen in the Senate Bill 1917, which would allow a $10,000 fine against a parent for allowing a minor access to a firearm.[181]

Yet, it is unlikely that reducing a child's access to a firearm at home will reduce the overall crime rate of juveniles and firearms. If a child wants to get a gun, he/she is most likely going to find one whether it be inside or outside the home. Perhaps no amount of reasonable parental control may prevent a determined juvenile from accessing weapons. But parents should not disregard

181. *See supra* note 51.

the warning signs of violence and should do whatever is possible to keep a firearm out of the unsupervised hands of children. It was much easier when the only weapon a child could use would be a sharp-tongued insult. Unfortunately times have changed and with that our legislatures are moving to force parents to supervise children. Perhaps there will be a time in the future when the only thing parents have to worry about is whether their child's lunch is packed for the next day. Until then, mom and dad beware because your community is watching!

Richard M. AuBuchon