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Laid To Rust: Proposing Strict Liability in Tort for Prop Firearm Injuries Following the Alec Baldwin Shooting

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LAI D TO RUST: PROPOSING STRICT LIABILITY IN TORT FOR PROP FIREARM INJURIES FOLLOWING THE ALEC BALDWIN SHOOTING

Mark Edward Blankenship Jr.* & Joseph A. Ott**

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INTRODUCTION

One of the most important rules about gun safety is that one should treat all guns as if they are loaded, even if they are not.¹ This principle was the main reason why a “firestorm” of criticism erupted after attorney Thomas Binger aimed an AR-15 at the courtroom crowd during the Kyle Rittenhouse trial, despite there being no magazine inserted into the rifle.² Does the principle apply to prop guns as well? We argue it does.

There is a wide misconception that prop guns are merely fake and harmless, not real and dangerous.³ Within the past couple of decades in film and entertainment history, this has proven to be the contrary. For instance, the most recent prop gun incident involving actor Alec Baldwin, left one person dead and another injured.⁴ Given such outcomes, it is clear that prop guns kill.⁵ And

¹ Geoff Mulvihill et al., *Gun Safety on Movie Sets? States Mostly Follow Guidelines Set by Studios, Unions*, CHI. SUN TIMES (Oct. 23, 2021, 10:36 AM), <https://chicago.suntimes.com/news/2021/10/23/22741990/gun-safety-rules-movie-sets-state-regulations-brandon-lee-alec-baldwin-rust-accidental-shooting> [https://perma.cc/69T8-5UTX]; Jay Langston, *Firearm Safety: 4 Rules That Every Shooter Should Follow*, PERS. DEF. WORLD (Apr. 1, 2022), <https://www.personaldefenseworld.com/2018/09/firearm-safety-rules-jeff-cooper/> [https://perma.cc/6YTP-7THV]; *Firearm Safety – 10 Rules of Safe Gun Handling*, NAT’L SHOOTING SPORTS FOUND., <https://www.nssf.org/safety/rules-firearms-safety/> [https://perma.cc/YGX3-G27E] (last visited Jan. 8, 2022).

² Cameron Arcand, *Rittenhouse Prosecutor Violates Gun Safety, Points AR-15 with Finger on Trigger at Ct. Full of People*, W. J. (Nov. 15, 2021, 2:29 PM), <https://www.westernjournal.com/rittenhouse-prosecutor-violates-gun-safety-points-ar-15-finger-trigger-court-full-people/> [https://perma.cc/9W5F-73QZ]; Yevgeny Kuklychev, *Fact Check: Did Kyle Rittenhouse Prosecutor Point Gun at Jury, Telling Them to Convict?*, NEWSWEEK (Nov. 17, 2021, 5:40 AM EST), <https://www.newsweek.com/fact-check-did-kyle-rittenhouse-prosecutor-point-gun-jury-telling-them-convict-1649832> [https://perma.cc/NJX4-H66P].

³ Peter Suci, *There is Really No Such Thing as a ‘Prop Gun’ in Hollywood*, GUNPOWDER MAGAZINE (Sept. 26, 2018), <https://gunpowdermagazine.com/there-is-really-no-such-thing-as-a-prop-gun-in-hollywood/> [https://perma.cc/S94Q-B6DA].

⁴ Lisa Respers France & Sofia Couceiro, *Prop Guns: What They Are and How They Can Kill*, CNN, <https://www.cnn.com/2021/10/22/entertainment/prop-gun-meaning-deaths/index.html> [https://perma.cc/AJZ2-MYZY] (Oct. 22, 2021, 1:23 PM); Jaclyn Diaz, *On-set Deaths from Prop Guns are Rare — But Not Unheard of*, NPR (Oct. 22, 2021, 8:37 AM), <https://www.npr.org/2021/10/22/1048295916/props-gun-death-injuries-rust-movie-set-rare> [https://perma.cc/YEU8-KS4X].

the Alec Baldwin shooting shows that the film industry must begin to take care of this risk. In general, between 1990 and 2016, at least 43 deaths and over 150 life-altering injuries have taken place on production sets in the U.S.⁶

Prop gun safety standards are often a mixed bag. “Despite some industry reforms following previous tragedies, the federal workplace safety agency in the U.S. is silent on the issue of on-set gun safety.”⁷ Some states follow film labor union and movie studio guidelines.⁸ Other states have regulations on pyrotechnic devices, but not on prop guns.⁹ Thus, states should consider what successful legal course of action a wrongfully deceased heir can bring in the event that no criminal charges can be filed.¹⁰

This article proposes that the best regulatory approach and tort liability course of action is through (1) treating prop guns the same as a pyrotechnic device, and (2) characterizing the use of prop guns on-set as an abnormally or inherently dangerous activity for purposes of strict liability, should no criminal charges be granted. Part I provides both a mechanical and historical overview of the use of prop weapons in film and television. Part II further explains how props are regulated. Parts III and IV analyze the tort legal framework and explain why strict liability analysis is best suited for injuries caused by such prop gun devices.

⁵ France & Couceiro, *supra* note 4; Diaz, *supra* note 4; Suci, *supra* note 3.

⁶ Anna Kaplan, *Blanks Ban? Baldwin Shooting Renews Calls To End Prop Gun Use*, FORBES (Oct. 22, 2021, 02:15 PM EDT), <https://www.forbes.com/sites/annakaplan/2021/10/22/blanks-ban-baldwin-shooting-renews-calls-to-end-prop-gun-use> [<https://perma.cc/GFY4-FWGZ>]; Anthony McCartney, *Too Quiet On the Set; Filming Accidents Often Go Untold*, ASSOC. PRESS (Nov. 20, 2016), <https://apnews.com/article/entertainment-ap-top-news-us-news-business-movies-2dfb6c787f2249529ae04c9443828a7f> [<https://perma.cc/3RMP-LAD3>].

⁷ Mulvihill et al., *supra* note 1; see David Court & Peter Millynn, *Explainer: The Rules for Shooting on Film Sets*, THE CONVERSATION (Jan. 25, 2017, 1:08 AM), <https://theconversation.com/explainer-the-rules-for-shooting-on-film-sets-71797> [<https://perma.cc/6SJY-PQX8>].

⁸ Mulvihill et al., *supra* note 1; Court & Millynn, *supra* note 7.

⁹ Mulvihill et al., *supra* note 1.

¹⁰ Prosecutors would eventually dismiss the involuntary manslaughter charge against Alec Baldwin in the fatal 2021 shooting of a cinematographer on the set of the Western film *Rust*. See Morgan Lee & Andrew Dalton, *Prosecutors dismiss Alec Baldwin charge, citing new evidence*, AP (Apr. 21, 2023), <https://apnews.com/article/baldwin-manslaughter-charged-dismissed-c4b2928da21ee4ff00a51d2e4eddd7dc> [<https://perma.cc/J5KB-TCSR>]; Dominic Patten & Anthony D’Alessandro, *Alec Baldwin Not Absolved In Fatal ‘Rust’ Shooting Despite Planned Dropping Of Charges, Prosecutors Say – Update*, DEADLINE (Apr. 20, 2023, 5:46 PM), <https://deadline.com/2023/04/alec-baldwin-charges-dropped-rust-shooting-halyna-hutchins> [<https://perma.cc/6BSS-EWZX>].

I. PROP GUN USE IN FILM & TELEVISION

Before regulatory intervention, real firearms and ammunition were used in film across the globe.¹¹ In 1915, D.W. Griffith's *The Birth of a Nation*¹² fired actual cannons, loaned to him by the U.S. Army.¹³ During that year, Cecil B. DeMille incorporated guns with real bullets when capturing a scene for his 16th film *The Captive*,¹⁴ which unfortunately left one stage extra shot and killed.¹⁵ However, the call to prohibit real ammunition on set did not arrive until after the introduction of labor laws in the mid to late 1930s,¹⁶ followed by actor pushback in response to such regulations.¹⁷

A. *History, Characterization and Mechanics*

The use of prop guns is not entirely dangerous. Some prop guns were merely replicas made of plastic, rubber, or wood — meant entirely for aesthetic or costume accessory purposes, and perhaps in combination with either light or computer graphic (CG) effects.¹⁸ There are a couple of types of ammunition and pyrotechnic devices that have been used for theatrical stage effects.¹⁹

¹¹ See Tristin Hopper, *The Guns on Movie Sets are Real: That's Why They Can Kill People*, NATIONAL POST (Oct. 22, 2021), <https://nationalpost.com/news/the-guns-on-movie-sets-are-real-thats-why-they-can-kill-people> [https://perma.cc/PVL3-EKZR].

¹² THE BIRTH OF A NATION (David W. Griffith Corp. 1915).

¹³ Nicholas Werner, *Times Movie Fight Scenes Used Real Weapons on Purpose*, LOOPER (Mar. 5, 2018, 9:51 AM), <https://www.looper.com/112026/times-movie-fight-scenes-used-real-weapons-purpose/> [https://perma.cc/DYH2-YSMY].

¹⁴ THE CAPTIVE (Jesse Lasky Feature Play Co. 1915).

¹⁵ Werner, *supra* note 13.

¹⁶ See generally Gail Frommer, *Hooray for . . . Toronto? Hollywood, Collective Bargaining, and Extraterritorial Union Rules in an Era of Globalization*, 6 U. PA. J. LAB. & EMP. L. 55 (2003); Peter J. Dekom, *Labor Pains, Movies and the Antitrust Blues*, 20 UCLA L. REV. 142, 147–48 (1972); Note, *The Sherman Act and The Motion Picture Industry*, 13 U. CHI. L. REV. 346, 346 (1946) ("The application of the Sherman Act to the motion picture industry has been long continued and erratic.").

¹⁷ Live ammunition was used in a scene of the 1931 film, *The Public Enemy*, where Tom Powers ducks around the corner of a building to take cover from machine gun fire. The bullets struck the wall of the building at the position where actor James Cagney's head had been just a moment before. Cagney would later refuse to perform scenes involving real firearms due to both his previous experiences on set and his changing political views, which were partly caused by the National Labor Relations Act and other emerging labor movements of the 1920s and 1930s. See James Cagney, CAGNEY BY CAGNEY 56–57, 73 (1976); Patrick McGilligan, CAGNEY: THE ACTOR AS AUTEUR 148, 187, 192–93 (1975).

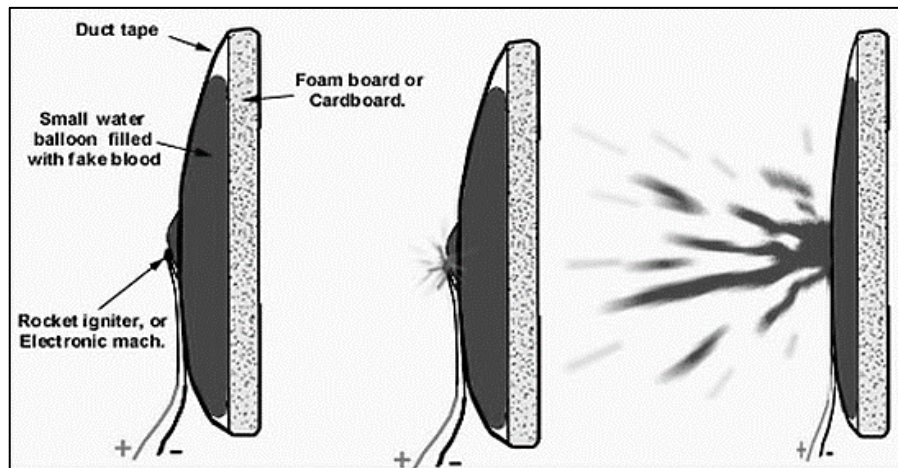
¹⁸ See Dave Brown, *Filming with Firearms*, AM. SOC'Y CINEMATOGRAPHERS (July 2019), <https://ascmag.com/blog/filmmakers-forum/filming-with-firearms> [https://perma.cc/KU8S-NVP8]; Jessica Gelt, *What Is a Prop Gun and How Does a Blank Cartridge Work? An Explainer*, L.A. TIMES (Oct. 22, 2021, 11:59 AM PT), <https://www.latimes.com/entertainment-arts/story/2021-10-22/alec-baldwin-what-is-a-prop-gun-how-does-it-work> [https://perma.cc/KU6J-MW73].

¹⁹ See Brown, *supra* note 18; Gelt, *supra* note 18.

1. Blood Squib

The first kind is the *squib*. This miniature explosive device resembles a tiny stick of dynamite, both in appearance and construction, and “consist[s] of two electrical leads separated by a plug of insulating material; a small bridge wire or electrical resistance heater; and a bead of heat-sensitive chemical composition, in which the bridge wire is embedded.”²⁰ The squib is connected to a bladder component — either a balloon, a condom, or other type of plastic pouch — that is filled with fake blood.²¹ The blood bag is then attached to a foam, cardboard, or metal plate, which is worn by the actor.²²

FIGURE 1: COMPOSITION OF A BLOOD SQUIB²³



The use of squib effects in Hollywood first began in the mid to late 1950s from American Western films *River of No Return*²⁴ and *Run of the Arrow*,²⁵

²⁰ *Squib (explosive)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Squib_\(explosive\)](https://en.wikipedia.org/wiki/Squib_(explosive)) [<https://perma.cc/J9EF-CBZ4>] (last visited Feb. 18, 2023). It is also sometimes referred to as a blood squib or damp squib, due to its diminished explosive power caused by moisture exposure. See also *What Is This “Squib”*, WEEBLY (Oct. 27, 2016), <https://dampsquibs.weebly.com/index.html> [<https://perma.cc/T76V-F8FP>] [hereinafter *Damp Squib*]; see also *infra* Figure 1 (illustrating the construction of a squib).

²¹ *Damp Squib*, *supra* note 20.

²² *Id.*; see also John Aldred, *How to Make Your Own DIY Air-Powered Blood Squibs*, DIY PHOTOGRAPHY (June 19, 2017), <https://www.diyphotography.net/make-diy-air-powered-blood-squibs> [<https://perma.cc/CK2R-JR7M>].

²³ Illustration of a Blood Squib, in *What Is This “Squib”*, WEEBLY (Oct. 27, 2016), <https://dampsquibs.weebly.com/index.html> [<https://perma.cc/T76V-F8FP>].

²⁴ *RIVER OF NO RETURN* (Twentieth Century-Fox Film Corp. 1954); Nikolai Adams, *River Rafting*, FILMIZON (Feb. 16, 2021, 6:21 PM), https://filmizon.com/movie_reviews/river-rafting/ [<https://perma.cc/YQS9-WVMJ>].

²⁵ *RUN OF THE ARROW* (Global Enterprises, Inc. & RKO Teleradio Pictures, Inc. 1957); Pdraig Cotter, *Run of the Arrow Was the First Hollywood Film to Use Blood Squibs*, SCREENRANT (Aug. 11, 2019), <https://screenrant.com/run-arrow-first-film-blood-squibs> [<https://perma.cc/G8KE-LCCY>].

though it is uncertain which film was actually the first to use such effects.²⁶ “Prior to the 1960s, onscreen violence tended to be somewhat tame. If a character was shot, for instance, it was taboo to show the shooter and victim in the same frame.”²⁷ In the 1960s this became more acceptable when films like Sam Peckinpah's *The Wild Bunch*²⁸ and Arthur Penn's *Bonnie and Clyde*²⁹ featured graphic sequences of characters being shot.³⁰

Blood squibs can still be found on filmsets. For instance, director Quentin Tarantino heavily used blood squibs in the film *Django Unchained*.³¹ While explosive blood squibs can be dangerous when not used properly and may urge entertainers to opt for insurance coverage, people within the film industry have found safer and more cost effective methods of blood squib effects by implementing homemade air compression squibs.³² Today, “compressed air squibs get most of their use in indie film...partly because they can be a hassle to operate, and sometimes aren't as practical as explosive squibs.”³³

2. *Dummy Rounds*

A dummy round is used for crew training and to check weapon function, and is completely inert in that it contains no primer, propellant, or explosive charge.³⁴ “Dummy ammunition is distinct from ‘practice’ ammunition, which may contain smaller than normal amounts of propellant and/or explosive.”³⁵

²⁶ WIKIPEDIA, *supra* note 20. *But see* Cotter, *supra* note 25.

²⁷ Cotter, *supra* note 25.

²⁸ THE WILD BUNCH (Warner Bros.-Seven Arts 1969).

²⁹ BONNIE AND CLYDE (Warner Bros.-Seven Arts 1967).

³⁰ Cotter, *supra* note 25.

³¹ Kyle Buchanan, *How Quentin Tarantino Got Those Crazy Blood Spurts in Django Unchained*, VULTURE (Jan. 16, 2013), <https://www.vulture.com/2013/01/how-they-got-those-crazy-blood-spurts-in-django.html> [<https://perma.cc/U65R-V899>]; Barry Hertz, *Quentin Tarantino Goes For a Few Blood Drops More in Django Unchained*, NAT'L POST (Dec. 20, 2012), <https://nationalpost.com/entertainment/movies/quentin-tarantino-goes-for-a-few-blood-drops-more-in-django-unchained> [<https://perma.cc/J8HQ-A9YF>].

³² Damp Squib, *supra* note 20.

³³ *Id.*

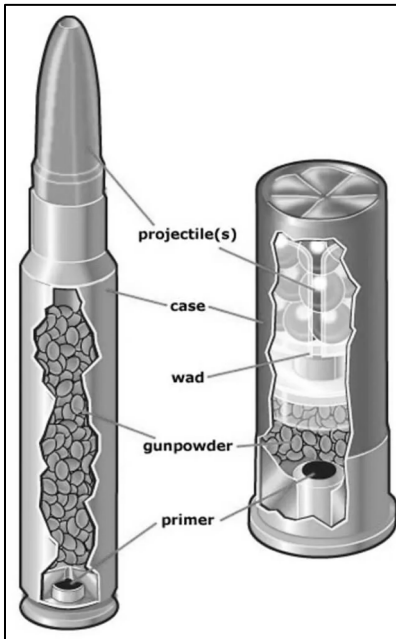
³⁴ *Dummy round*, WIKIPEDIA, https://en.wikipedia.org/wiki/Dummy_round [<https://perma.cc/22J3-JJZ7>] (last visited Feb. 3, 2023).

³⁵ *Id.*

3. Blank Rounds

Blank rounds are the type of ammunition commonly used for prop weapons.³⁶ The weapons that are used for blank-firing are actual firearms.³⁷ The crucial distinction between a live round and a blank round is the absence of a projectile.³⁸ Instead, the tip of a blank cartridge is "crimped" with either wadding or wax.³⁹

FIGURE 2: COMPOSITION OF A LIVE ROUND OF AMMUNITION⁴⁰



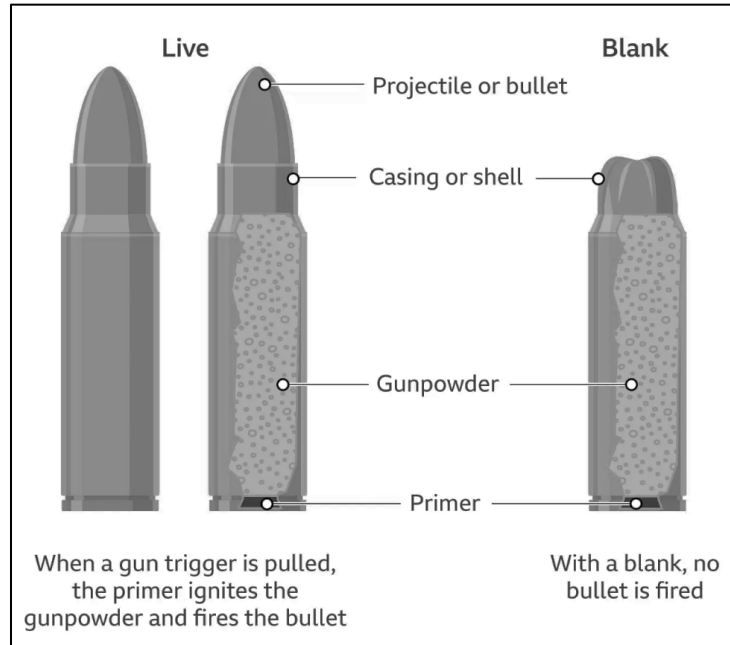
³⁶ See Eastwood Christian, *What Is Prop Gun? Can Prop Gun Filled With Blanks Kill?*, ABTC (Feb. 15, 2022), <https://abtc.ng/what-is-prop-gun-can-prop-gun-filled-with-blanks-kill/> [https://perma.cc/48FU-V4J5]; Katherine Rodriguez, *What To Know About Prop Guns and Why They're Dangerous*, NJ (Oct. 22, 2021, 2:26 PM), <https://www.nj.com/entertainment/2021/10/what-are-prop-guns-why-are-they-dangerous-heres-what-to-know.html> [https://perma.cc/ZL9E-W4NK]; Mike Mancini, *How Do Blanks Work As Compared to Regular Bullets?*, MENTAL FLOSS (Dec. 4, 2015), <https://www.mentalfloss.com/article/71752/how-do-blanks-work-compared-regular-bullets> [https://perma.cc/7G8C-F682]; Alec Baldwin, *What Are Prop Guns and Why Are They Dangerous?*, BBC (Oct. 23, 2021), <https://www.bbc.com/news/world-us-canada-59006905> [https://perma.cc/L67T-KYRY].

³⁷ Christian, *supra* note 36; Rodriguez, *supra* note 36; BBC, *supra* note 36.

³⁸ Christian, *supra* note 36; Rodriguez, *supra* note 36; Mancini, *supra* note 36; BBC, *supra* note 36; *see infra* figs. 2 & 3.

³⁹ Christian, *supra* note 36; Mancini, *supra* note 36; BBC, *supra* note 36; Ross A. Lincoln, *Here's How a Prop Gun Using Blanks Can Still Fire a Fatal Shot*, YAHOO! (Oct. 21, 2021), <https://www.yahoo.com/video/prop-gun-using-blanks-still-052227936.html> [https://perma.cc/6F8H-BRTM]; *see also infra* fig.3.

⁴⁰ Illustration of the composition of a live round, *in* Ross A. Lincoln, *Here's How a Prop Gun Using Blanks Can Still Fire a Fatal Shot*, YAHOO! (Oct. 21, 2021), <https://www.yahoo.com/video/prop-gun-using-blanks-still-052227936.html> [https://perma.cc/6F8H-BRTM].

FIGURE 3: COMPARISON OF A LIVE ROUND AND A BLANK ROUND⁴¹

Like with real ammunition, blank rounds can also create a muzzle flash, which is the visible and infrared light produced by an exothermic reaction within the muzzle of a firearm during shooting.⁴² “When a gun fires, only about 30% of the chemical energy released from the propellant...actually mov[es] the projectile down the barrel....A significant portion of [the] remaining energy is dissipated in the bright muzzle flash seen when the gun fires.”⁴³

A muzzle flash has five components. The first is the *muzzle glow*, which is a reddish glow that is visible prior to the bullet’s ejection from the barrel.⁴⁴ The glow is created by superheated, highly compressed gases that have leaked past the projectile, jumping in front of it to exit the barrel first.⁴⁵ The second component is the *primary flash*, caused by hot propellant gases exiting the firearm behind the projectile.⁴⁶ Following the primary flash is the *intermediate flash*,

⁴¹ Illustration of the difference between a live round and a blank round, in Alec Baldwin: *What Are Prop Guns and Why Are They Dangerous?*, BBC (Oct. 23, 2021), <https://www.bbc.com/news/world-us-canada-59006905> [<https://perma.cc/L67T-KYRY>].

⁴² See *Blank (cartridge)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Blank_\(cartridge\)](https://en.wikipedia.org/wiki/Blank_(cartridge)) [<https://perma.cc/BH29-FSZY>] (last visited Feb. 12, 2022); see also G. Klingenberg, *Gun Muzzle Blast and Flash*, 14 PROPELLANTS EXPLOSIVES PYROTECHNICS 57, 59 (1989).

⁴³ Tony DiGiulian, *Muzzle Flash*, NAVWEAPS, http://www.navweaps.com/index_tech/tech-090.php [<https://perma.cc/ND37-4RDU>] (last updated Sept. 12, 2006); see also Klingenberg, *supra* note 42 at 57-59.

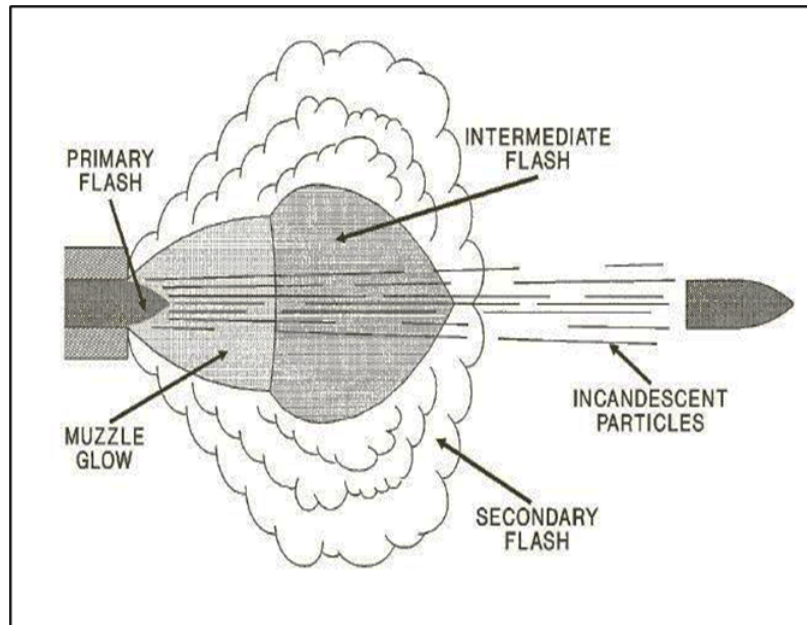
⁴⁴ DiGiulian, *supra* note 43; see also *infra* fig. 4.

⁴⁵ DiGiulian, *supra* note 43

⁴⁶ *Id.*

which appears as a reddish disc slightly in front of the muzzle.⁴⁷ The *intermediate flash* occurs at the time the projectile is ejected and is caused by a shock wave created by the heat and pressure of the escaping gases and projectile.⁴⁸ Next is the *secondary flash* which appears beyond the intermediate flash as a yellowish white flame, and is caused when the combustible propellant gases exit the muzzle and are ignited by the oxygen in the atmosphere.⁴⁹ Finally, the partially unburnt powder or other heated or metallic materials ejected from the muzzle can cause sparks.⁵⁰

FIGURE 4: COMPONENTS OF A MUZZLE FLASH⁵¹



B. Deaths Caused by Prop Guns

While prop guns are useful in replicating real-life gunfire effects in film, shootings involving prop guns have in fact happened, some of which had fatal consequences.⁵²

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Illustration of the five components of a muzzle flash, in Tony DiGiulian, *Muzzle Flash*, NAVWEAPS, http://www.navweaps.com/index_tech/tech-090.php [https://perma.cc/ND37-4RDU] (last updated Sept. 12, 2006).

⁵² See Diaz, *supra* note 4; see also Robyn Wuth, *Brisbane Inquest Hears Stuntman Fatally Shot by Untested Gun on Music Video Set*, 7NEWS, <https://7news.com.au/entertainment/music/stuntman-fatally-shot-by-live-gun-on-set-c-3756430> [https://perma.cc/QS6B-TJJP] (last updated Aug. 22, 2021).

1. *Jon-Erik Hexum*

In 1984, actor Jon-Erik Hexum was on the set of television series *Cover Up*, when he accidentally killed himself.⁵³ Hexum “reportedly unloaded all blank cartridges except one and started playing Russian roulette with [a .44 magnum handgun prop].”⁵⁴ Unaware of the potentially fatal consequence of his actions, Hexum placed the gun near his head, pulled the trigger, and shot himself.⁵⁵

2. *Brandon Lee*

On March 31, 1993, actor Brandon Lee, the son of renowned martial artist Bruce Lee, was fatally shot while filming a scene for his movie, *The Crow*.⁵⁶ “During a test firing of the dummy ammunition, a bullet tip wound up in the barrel of the handgun that was later used by actor Michael Masee” during that scene.⁵⁷ The tip that was then fired, “struck Brandon Lee in the abdomen with great force and violence, creating an entry wound approximately the size of a silver dollar.”⁵⁸

The deceased actor’s mother, Linda Lee Cadwell, filed a negligence lawsuit contending that the defendants, including Crowvision, Inc.; parent corporation, Edward R. Pressman Film Corp.; Masee; and “various other crew members, failed to properly exercise their responsibilities or follow industry standards for the use of firearms on a movie set.”⁵⁹ The suit alleged several factors: (1) the crew members ran out of dummy bullets and, instead of waiting a day to buy them from a licensed firearms dealer, improperly manufactured their own from live ammunition; (2) the crew members did not have the “proper

⁵³ Diaz, *supra* note 4; Barsha Roy, *Who Was Jon-Erik Hexum? All About the Actor who Killed Himself with a Prop Gun, as Internet Draws Comparisons to Alec Baldwin Incident*, SK POP (Oct. 22, 2021, 11:06 PM), <https://www.sportskeeda.com/pop-culture/who-jon-erik-hexum-all-actor-killed-prop-gun-internet-draws-comparisons-alec-baldwin-incident> [<https://perma.cc/XPK5-PAGT>]; Filiz Mustafa, *Remembering Jon-Erik Hexum amid Alec Baldwin Prop Gun Incident*, HITC (Oct. 22, 2021), <https://www.hitc.com/en-gb/2021/10/22/jon-erik-hexum/> [<https://perma.cc/KJ9K-EAUY>].

⁵⁴ Diaz, *supra* note 4; Roy, *supra* note 53; Mustafa, *supra* note 53.

⁵⁵ Roy, *supra* note 53; Mustafa, *supra* note 53.

⁵⁶ THE CROW (Dimension Films, 1994).

⁵⁷ Terry Pristin, *Brandon Lee’s Mother Claims Negligence Caused His Death: Movies: Linda Lee Cadwell Sues 14 Entities Regarding the Actor’s ‘Agonizing Pain, Suffering and Untimely Death’ Last March on the North Carolina Set of ‘The Crow.’*, L.A. TIMES (Aug. 11, 1993, 12 AM), <https://www.latimes.com/archives/la-xpm-1993-08-11-ca-22553-story.html> [<https://perma.cc/H553-UR49>].

⁵⁸ *Id.*

⁵⁹ Pristin, *supra* note 57; Maria Puente, *Why Wasn’t Anyone Criminally Charged in Brandon Lee’s Death? Those Involved Look Back*, USA TODAY (Nov. 4, 2021, 8:20 PM), <https://www.usatoday.com/story/entertainment/celebrities/2021/10/31/alec-baldwin-rust-set-shooting-brings-questions-brandon-lee/8570212002/> [<https://perma.cc/Q938-C6RZ>]; Yaron Steinbuch, *Actor Who Fatally Shot Brandon Lee In 1993 Movie Tragedy Was Also Traumatized*, N.Y. POST (Oct. 22, 2021, 2:15 PM), <https://nypost.com/2021/10/22/actor-who-fatally-shot-brandon-lee-in-1993-tragedy-also-traumatized/> [<https://perma.cc/6ZFR-K9Z3>].

training, proper equipment and the required federal firearms license” to perform this task; (3) the use of live ammunition on a movie set violated industry standards; and (4) the gun used by Masee was not inspected by the property masters responsible for making sure it was safe.⁶⁰ However, the lawsuit was later settled.⁶¹

3. *Halyna Hutchins*

On October 21, 2021, the twelfth day of a three-week-long film shoot of the wild western *Rust*, Hollywood actor Alec Baldwin discharged a prop gun on set, injuring Script Supervisor Mamie Mitchell and Director Joel Souza and killing Director of Photography Halyna Hutchins, each of whom was standing less than four feet away from Baldwin.⁶² The scene was being filmed in a small church on the premises of Bonanza Creek Ranch, located near Santa Fe, New Mexico. Camera shots were to be aimed at three locations: (1) Baldwin’s eyes, (2) the flesh wound on Baldwin’s shoulder, and (3) Baldwin’s torso region, which included the holster in which he would pull the revolver out of.⁶³ Not only did the script not call for the discharge of the prop weapon inside the church, but there were no safety devices or protocols implemented in anticipation of any weapon discharge.⁶⁴

Mitchell filed suit against Baldwin; Rust Movie Productions, LLC; and several other Defendants, alleging that Alec Baldwin intentionally, without just cause or excuse, cocked and fired the loaded gun even though the upcoming scene to be filmed did not call for the cocking and firing of a firearm.⁶⁵ In addition, the armorer, Hannah-Gutierrez, filed a different lawsuit in response to the Hutchins tragedy, against the supplier PDQ Arm & Prop, LLC, along with its owner Seth Kenney, for claims of New Mexico trade practice violations, false and deceptive product labels, and false and material misrepresentations for allegedly providing Reed with dummy ammunition that had live rounds mixed in.⁶⁶ Then in February 2022, the Hutchins family filed their wrongful death lawsuit against Baldwin and the film production company.⁶⁷

What is bizarre are the claims asserted in some of the lawsuits against Baldwin and Rust Movie Productions, LLC. In *Mitchell*, Plaintiff asserts the following: (1) assault, (2) intentional infliction of emotional distress, and (3)

⁶⁰ Pristin, *supra* note 57; Puente, *supra* note 59.

⁶¹ Puente, *supra* note 59; Steinbuch, *supra* note 59.

⁶² See Complaint at 3, *Mitchell v. Rust Movie Productions, LLC*, No. 21STCV42301 (Super. Ct. Cal. Nov. 17, 2021) [hereinafter *Mitchell* Complaint].

⁶³ *Id.* at 14.

⁶⁴ *Id.* at 14–16.

⁶⁵ *Id.* at 20.

⁶⁶ See Complaint at 20–22, *Reed v. Kenney*, No. D-202-CV-2022-00217 (Jud. Dist. N.M. Jan. 12, 2022) [hereinafter *Reed* Complaint].

⁶⁷ See Complaint at 18, *Hutchins v. Baldwin*, No. D-101-CV-2022-00244 (Jud. Dist. N.M. Feb. 15, 2022) [hereinafter *Hutchins* Complaint].

“deliberate infliction of harm.”⁶⁸ Under New Mexico’s worker’s compensation laws, employers are only held responsible for conduct that is something *less than intentional but more than negligence*, placing Plaintiff in the precarious position of having to prove that the employer’s conduct was grossly negligent.⁶⁹ Moreover, Defendants argue that Plaintiff’s claim of assault was not sufficiently plead, because it failed to describe how Defendants: “(1) attempted to commit a battery on Plaintiff, (2) committed ‘an unlawful act, threat, or menacing conduct which causes the plaintiff to reasonably believe she is in danger of receiving an immediate battery,’ or (3) used ‘insulting language toward another impugning his honor, delicacy or reputation.’”⁷⁰ In *Hutchins*, Plaintiffs assert loss of consortium and “negligent, intentional, willful, or reckless misconduct resulting in wrongful death,” perhaps as a means of weaving through the legal safeguards provided to employers under New Mexico’s worker’s compensation laws.⁷¹

II. REGULATION OF PROP SAFETY

Accidents, dangerous hazards, and injuries can exist in a multitude of ways within the film industry. While the Occupational Health & Safety Act (OSHA) does apply to film sets and props used therein,⁷² it does not mention the use of firearms within the workplace.⁷³ In the film industry, prop use is further regulated either by industry guidelines, established practice, and state legislation, which can apply to pyrotechnics or firearms including replicas and prohibited weapons, regardless of the scale of the production.⁷⁴

⁶⁸ See Mitchell Complaint, *supra* note 62.

⁶⁹ Compare Reed Complaint, *supra* note 66, with Delgado v. Phelps Dodge Chino, Inc., 131 N.M. 272, 280 (2001) and Sean McAfee, A Sea Change or Much Ado About Nothing? The Future of New Mexico Jurisprudence Concerning Tort Claims Arising from On-the-job Injuries of Employees in the Wake of Delgado v. Phelps Dodge Chino and the Substantial Certainty Test, 1–2 (June 1, 2004) (Student Thesis Honors, University of New Mexico) (on file with the University of New Mexico).

⁷⁰ See Demurrer to Plaintiff’s Complaint, Mitchell Complaint, at 17 (Super. Ct. Cal. Jan. 24, 2022).

⁷¹ See Hutchins Complaint, *supra* note 67, at 1, 18.

⁷² See David Robb, *Stricter OSHA Reporting Guidelines Kick in For “Corner Cutting” Film & TV Biz – Update*, DEADLINE (Jan. 2, 2015, 4:41 PM), <https://deadline.com/2015/01/osha-rules-changes-film-tv-sets-1201339203/> [<https://perma.cc/T5P6-KR3F>];

Anthony J. Oncidi et al., *How Hollywood Can Make On-Set Work Safer When Production Resumes (Guest Column)*, HOLLYWOOD REP. (Apr. 30, 2020, 6:45 AM), <https://www.hollywoodreporter.com/news/general-news/how-hollywood-can-make-set-work-safer-production-resumes-guest-column-1292493/> [<https://perma.cc/P5GY-NMVW>].

⁷³ See Kamika S. Shaw, *Regulating Guns in the Workplace*, ONLABOR (Mar. 29, 2017), <https://onlabor.org/regulating-guns-in-the-workplace> [<https://perma.cc/W449-6XQR>].

⁷⁴ Mulvihill et al., *supra* note 1; Court & Millynn, *supra* note 7 (discussing Australian rules and regulations on film sets).

A. State Legislation

New York prohibits guns from being fired overnight on movie sets but does not otherwise regulate their use.⁷⁵ Georgia and Louisiana regulate pyrotechnics on movie sets but have no specific rules around gun use.⁷⁶ In California, handling pyrotechnics on a film set requires a license, “which requires five letters of recommendation, two years of apprenticeship, and passing a written test.”⁷⁷ However, to be an armorer in California, only a background check is needed.⁷⁸ Armorers would then need to obtain an entertainment firearms permit from the state attorney general’s office, which from certain gun control laws — like a ten-day waiting period and a limit on purchases — but does not require proof of competency with firearms. Other states do not provide any of these requirements.⁷⁹

The death of Halyna Hutchins has resulted in “an outcry from the public and producers alike calling for more regulation on Hollywood sets. California state senator, Dave Cortese had been considering adopting legislation that bans live ammunition, and firearms that can fire live ammunition from film sets in California.”⁸⁰

B. Union Involvement and Other Industry Standards

In college theatre or film departments, sometimes the universities incorporate their own codes of conduct, if not emphasize the importance of firearm safety.⁸¹ Outside of the university, states mostly defer to union guidance or other film industry standards for on-set firearm safety. For instance, the Screen Actors Guild - American Federation of Television and Radio Artists (SAG-AFTRA), one of the most notable unions in the film industry, states in their Safety Bulletin:

⁷⁵ See *Code of Conduct*, N.Y.C. MAYOR OFF. MEDIA & ENT., http://www.nyc.gov/html/film/downloads/pdf/keys_to_the_city.pdf [https://perma.cc/YR7R-VF89] (last visited Feb. 3, 2023).

⁷⁶ Ga. Code § 25-10-3.2; La. R.S. §§ 51:650–51:660.

⁷⁷ Gene Maddaus, *Film Armorers Have Almost No Regulation. The ‘Rust’ Tragedy Could Change That*, VARIETY (Nov. 4, 2021, 7:50AM), <https://variety.com/2021/film/news/rust-film-armorers-guns-no-regulation-1235104337/> [https://perma.cc/PST7-39K7].

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Katia Cortes Guzman, *Eradicating Real Guns in Hollywood: Why No One’s Life Should be Put at Risk on a Fictional Movie Set.*, INSIDE COMPLIANCE: LOY. L. BLOG (Nov. 10, 2021), <http://blogs.luc.edu/compliance/?p=4258> [https://perma.cc/B9FV-6CMF].

⁸¹ See, e.g., *Undergraduate Filmmaking Prop Weapon and Staged Combat Policy*, YALE C., YALE UNDERGRADUATE PRODUCTION, <https://up.yalecollege.yale.edu/policies/undergraduate-filmmaking-prop-weapon-and-staged-combat-policy> [https://perma.cc/56KV-GTVA] (last visited Feb. 10, 2023); *Prop Weapons*, SONOMA ST. U., POLICIES & PROCEDURES, <https://theatreartsanddance.sonoma.edu/current-students/callboard/policies-procedures/prop-weapons> [https://perma.cc/NQ6K-JTV3] (last visited Feb. 10, 2023); University of California Office of the President – Environment, Health & Safety, *Performing Arts Safety Manual*, U. CAL. (2015), https://www.ucop.edu/safety-and-loss-prevention/_files/perform-arts/SafetyPerformingArtsManual.pdf [https://perma.cc/FRQ8-WMGW].

The Property Master (or, in his/her absence, the weapons handler and/or other appropriate personnel determined by the locality or the needs of the production) will be the individual acting in the interest of the Producer for obtaining, maintaining, and handling all firearms for the production. He/she will work in conjunction with the production's designated Safety Representative to assure that the following standards are adhered to. . . . No one shall be issued a firearm until he or she is trained in safe handling, safe use, the safety lock, and proper firing procedures. If there are any questions as to the competency of the person who will use the firearm, the Property Master (or, in his/her absence, the weapons handler and/or other appropriate personnel determined by the locality or the needs of the production) shall determine if additional training is required. . . . All local, state and federal laws and regulations are applicable and can override these guidelines if they are more stringent.⁸²

The Actor's Equity Association's (AEA) safety guidelines for the use of firearms, although not as extensive as those from SAG-ACTRA, also include the same general principles, such as the duty of care extended to the Property Master, the emphasis on safety training, and how to properly aim the weapon while on set.⁸³ But not all unions in the film industry regulate the same way. For instance, The International Alliance of Theatrical Stage Employees (IATSE) is comprised of over 360 local unions, acting as "autonomous, independent 501(c)5 nonprofit entit[ies] . . . that determine[] their own Constitution and By-Laws, officer elections, dues structure, membership meetings, and more through democratic processes."⁸⁴ In addition, locals negotiate labor contracts regarding wages, work rules, and grievance procedures.⁸⁵

C. *The Method Gun: Actor Resistance to Safety Reform*

Despite the repeated tragedy of actors being killed by fake guns, Hollywood is resistant to efforts at reform.⁸⁶ Indeed, despite film crew and safety

⁸² Screen Actors Guild, *Safety Bulletin #1 Recommendations for Safety With Firearms And Use of "Blank Ammunition,"* in SAFETY BULLETINS RECOMMENDED BY INDUS. WIDE LABOR-MANAGEMENT SAFETY COMM. FOR THE MOTION PICTURE AND TELEVISION INDUS (Nov. 2009).

⁸³ *Compare id.* (demonstrating the SAG-AFTRA's guidelines state, "Refrain from pointing a firearm at anyone, including yourself. If it is absolutely necessary to do so on camera, consult the Property Master (or, in his/her absence, the weapons handler and/or other appropriate personnel determined by the locality or the needs of the production) or other safety representative, such as the First A.D./Stage Manager. Remember that any object at which you point a firearm could be destroyed."), with *Safety Tips for Use of Firearms*, ACTORS EQUITY ASSOC. (June 2006) ("Never point a firearm at anyone including yourself. Always cheat the shot by aiming to the right or left of the target character. If asked to point and shoot directly at a living target, consult with the property master or armorer for the prescribed safety procedures. . . . If you are the intended target of a gunshot, make sure that the person firing at you has followed all these safety procedures.").

⁸⁴ *About Us*, IATSE, <https://iatse.net/about/> [<https://perma.cc/CH5W-UM9H>] (last visited Feb. 8, 2023).

⁸⁵ *Id.*

⁸⁶ Shirley Li, *Why Hollywood Can't Quit Guns*, ATL. (Feb. 17, 2022), <https://www.theatlantic.com/culture/archive/2022/02/gun-safety-hollywood-alec-baldwin/622836/> [<https://perma.cc/U2XA-8MXE>].

persons' efforts at organizing methods of reducing the incidence of these tragedies, actors and directors persist in using prop guns in dangerous ways and in allowing actual guns to be used in their stead.⁸⁷ The dramatic underbelly of entertainment regulation must remember the unique performance psychology that motivates actors and filmmakers to take such incredible risk.

Method acting is a common approach for contemporary actors attempting to instill a degree of realism and authenticity to their scenes.⁸⁸ The theory is concerned with emulating the verbal and non-verbal subtexts that the actor presumes would occur to the characters if a particular scene was real.⁸⁹ By focusing on the specific circumstances of a given performance, the actor can release a spontaneous, moment to moment performance as if the events in the scene were actually occurring.

Method acting has a well-documented and robust efficacy in generating quality acting performances, with long standing neurological examinations revealing a correlation between the intensity of the simulation of the experience and the perceived authenticity of the performance.⁹⁰ But performing intense emotions – such as the fear of being shot, or the anger that can motivate someone to murder – is decidedly more difficult than performing more subtle ones.⁹¹

Indeed, character roles containing fear are reported by directors as being the most difficult to portray.⁹² Such scenes are intrinsically challenging to emulate from a pure method acting perspective because acting is a controlled environment, but fear is typically derived from a loss of control.⁹³

⁸⁷ Associated Press, *Film Crew Voiced Complaints Before Fatal On-Set Shooting*, U.S. NEWS (Oct. 24, 2021, 12:12 AM), <https://www.usnews.com/news/us/articles/2021-10-23/baldwin-was-told-gun-was-cold-before-movie-set-shooting> [https://perma.cc/GS7V-BZ8F].

⁸⁸ Christopher B. Balme, *The Cambridge Introduction to Theatre Studies* 24 (2008).

⁸⁹ *Id.*, at 23–24.

⁹⁰ See generally Don M. Tucker & Steve L. Dawson, *Asymmetric EEG Changes As Method Actors Generated Emotion*, 19 *Biological Psy.* 63 (1984).

⁹¹ Compare Nico H. Frijda, *The Emotions: Studies in Emotion and Social Interaction* 239 (1986), with Jordan Kisner, *The Madness of Method Acting*, Atlantic (Feb. 1, 2022), <https://www.theatlantic.com/magazine/archive/2022/03/the-method-acting-isaac-butler-review/621310/> [https://perma.cc/2NGX-23EW]; *Method Acting: These Actors Got Way Too Deep into the Character*, AV Film Sch. (Oct. 27, 2022), <https://avfilmschool.com/method-acting-these-actors-got-way-too-deep-into-the-character/> [https://perma.cc/8FAS-EE54]; Daniel Graham, Ph.D., *What Acting Can Tell Us About Our Minds*, *Psy. Today* (Sept. 8, 2021), <https://www.psychologytoday.com/us/blog/your-internet-brain/202109/what-acting-can-tell-us-about-our-minds> [https://perma.cc/PT2Q-7F7Y].

⁹² Jean Schiffman, *Tips for Acting Scared on Stage and in Film*, *Backstage* (Jan. 25, 2023), <https://www.backstage.com/magazine/article/scared-acting-23814/> [https://perma.cc/66H5-99Y3].

⁹³ See generally Richard S. Lazarus, *The Self-Regulation of Emotion*, 19 *Philosophical Studies* 168 (1973); Lennart Levi & Ulf S. von Euler, *Emotions: Their Parameters and Measurement* (1975).

As a result, accurate portrayals of fear by actors have a marginally higher value than most other emotions.⁹⁴ It pays to be able to demonstrate fear on set – and doing so with authenticity requires, at least in some actors’ minds, the presence of actual danger.⁹⁵ Simulated danger is objectively insufficient.

III. TORT LIABILITY

The first case that involved the use of explosives was *Scott v. Shepherd*,⁹⁶ where the Defendant tossed a squib into a crowded market in the town of Milborne Port in Somerset, which then landed on the table of a gingerbread merchant named Yates.⁹⁷ Willis, a bystander, grabbed the squib and threw it across the market to protect himself and the gingerbread.⁹⁸ Unfortunately, the squib landed in the goods of another merchant named Ryal, who then immediately grabbed the squib and tossed it away, accidentally hitting the Plaintiff in the face and putting out one of his eyes upon explosion.⁹⁹ Relying upon *Reynolds v. Clark*, the court emphasized that it was not necessary for the Defendant to personally touch the Plaintiff in order to constitute a trespass, because Shepherd was nevertheless the person who gave the “mischievous faculty” to the squib, which remained in effect until the explosion.¹⁰⁰ Thus, the majority held that the first wrong is answerable for all the consequential damages, and the intermediate acts of Willis and Ryal will not purge the original tort in the defendant.¹⁰¹ However, American tort has extensively evolved since then. Below are the following tort theories in existence today.

A. Intentional Tort

When a plaintiff becomes injured by a prop gun, one claim that the person could assert is the intentional tort of battery, which requires a showing that the defendant voluntarily caused a harmful, or an offensive, touching, either directly or indirectly onto plaintiff’s person.¹⁰² A touching of another’s person may be both offensive and harmful, or it may be merely offensive and not inflict sub-

⁹⁴ *Id.*

⁹⁵ Compare *id.*, with Daniel Arkin, *Why Are Real Guns Still Used on Film Sets? In Wake of 'Rust' Shooting, Their Future Is In Question*, NBC, <https://www.nbcnews.com/pop-culture/movies/are-real-guns-still-used-film-sets-wake-rust-shooting-future-question-rcna3739> [<https://perma.cc/UM58-7QFT>] (last updated Oct. 25, 2021, 6:17 PM EDT), and Brooks Barnes, *Striving for Authenticity, Films Often Use Real Guns on Set*, N.Y. TIMES, <https://www.nytimes.com/2021/10/22/business/prop-guns-baldwin-shooting.html> [<https://perma.cc/58Z8-8NWQ>] (last updated Oct. 27, 2021).

⁹⁶ See 96 Eng. Rep. 525 (K.B. 1773).

⁹⁷ 96 Eng. Rep. 525, 52526 (K.B. 1773).

⁹⁸ *Id.* at 526.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See RESTATEMENT (SECOND) OF TORTS, § 13 (1965).

stantial harm.¹⁰³ A touching that is not harmful but is offensive to a normal or reasonable person is a battery, and it subjects the actor to liability if the touching is not consented to or privileged.¹⁰⁴ However, a defendant could argue that the plaintiff consented to the physical contact required on set, in the same sense that an athlete consents to physical contact anticipated in a particular sport.¹⁰⁵ Moreover, assault is a weaker cause of action, because a plaintiff must be in reasonable apprehension of an imminent harmful or offensive contact.¹⁰⁶

B. Negligence

A prima facie case of negligence has four requirements: (1) the defendant owed to the plaintiff a duty of care; (2) the defendant breached such duty; (3) plaintiff suffered an injury; and (4) the defendant's breach of the duty of care owed to the plaintiff was the actual and proximate cause of plaintiff's injury.¹⁰⁷

One contention with the negligence claim is that the shooter might not be held liable for a breach of duty, despite media portrayal and the fact that actors are given the weapon to fire. In other words, the duty of care will be on whoever was in charge of making sure the gun was safe and didn't contain a live round. This might be more than a single person, or it could be the result of failures of the production company's management. In Alec Baldwin's case, a court would have to determine whether it was his responsibility to re-check the gun when it was handed to him. Otherwise, the actor could always argue that they acted with reasonable care.¹⁰⁸

Another issue arises with regards to negligence per se, i.e., negligence in itself. Many states hold that "when a defendant violates a safety statute, regulation, or municipal ordinance, and someone else is hurt as a result, an inference of negligence is raised."¹⁰⁹ A safety statute or regulation applies only if it is intended to protect the class to which the plaintiff belongs, and if it is intended to guard against the particular harm suffered by the plaintiff.¹¹⁰ Sometimes, a violation of these statutes or regulations, such as the failure to obtain a permit before the use of an explosive or firearm, can be effective, for instance in the case

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Compare Kenneth Artz, *A Civil Lawsuit Will Likely Target Production Company, Alec Baldwin and the Other Producers of "Rust"*, TX. L. (Nov. 1, 2021), with Russ VerSteege, *Consent In Sports & Recreational Activities: Using Contract Law Terminology To Clarify Tort Principles*, 12 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1 (2016).

¹⁰⁶ RESTATEMENT (SECOND) OF TORTS, § 21 (1965); see also Demurrer to Plaintiff's Complaint at 17, *supra* note 70.

¹⁰⁷ See RESTATEMENT (SECOND) OF TORTS, § 281 (1965).

¹⁰⁸ See *supra* § II.B.

¹⁰⁹ *Negligence Per Se in Personal Injury Cases*, JUSTIA, <https://www.justia.com/injury/negligence-theory/negligence-per-se/> [<https://perma.cc/X3G6-9T3S>] (last updated Oct. 2021).

¹¹⁰ *Id.*

against Carlo Goias.¹¹¹ However, many of the aforementioned statutes involving pyrotechnics or firearms might not apply.¹¹² And federal law does not require film studios to adopt a safety plan, nor designate an employee to handle safety guidelines.¹¹³ Furthermore, the actor can always argue that he or she was unable to comply with the regulation even while using reasonable diligence or care.¹¹⁴

C. *Strict Liability*

Under the tort doctrine of strict liability, neither fault nor intent is relevant to liability.¹¹⁵ In other words, the actions that caused injury were of a particular kind so dangerous, or for other reasons deemed so risky, that courts or legislators have decided to classify the conduct as a strict liability activity. Simply, a plaintiff would need to prove that the defendant *acted* in such a way that *caused* the plaintiff's *injuries*.¹¹⁶ While strict liability torts might appear easier to prove than negligence, strict liability also takes policy concerns into consideration, in addition to fact-intensive analysis.¹¹⁷

1. *Products Liability*

To successfully assert a strict products liability claim, a plaintiff need not show that the manufacturer failed to use due care or was reckless. Rather, a plaintiff must establish that (1) there was a defect at the time the product entered the stream of commerce, (2) the defect actually and proximately caused the plaintiff's injury, and (3) the defect made the product unreasonably dangerous.¹¹⁸ Any party within the chain of distribution can be held liable, such as manufacturers, retailers, and distributors.¹¹⁹ There are a couple issues with applying product liability theory for the use of prop guns. First, the defect from either the prop gun or the ammunition does not necessarily stem from the man-

¹¹¹ See, e.g., Ashe Schow, *New Jersey Man Faces 10 Years In Prison For Firing Prop Gun In Film*, WASH. EXAMINER (Mar. 24, 2016, 04:27 PM), <https://www.washingtonexaminer.com/new-jersey-man-faces-10-years-in-prison-for-firing-prop-gun-in-film> [https://perma.cc/S8VC-PSMZ].

¹¹² See *supra* notes 75-76.

¹¹³ Artz, *supra* note 105.

¹¹⁴ JUSTIA, *supra* note 109.

¹¹⁵ Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341, 342 (1996).

¹¹⁶ *Id.*

¹¹⁷ Compare *id.* at 364-73, with Michael Drahos et al., *Danger Ahead: The Changing Face of Failure to Warn Claims*, TRIAL ADV. QTR. 28, 29-31 (2014).

¹¹⁸ *Strict Liability and How it Impacts Your Personal Injury Claim*, ENJURIS, <https://www.enjuris.com/personal-injury-law/strict-liability.html> [https://perma.cc/E65N-3SR9] (last visited Jan. 18, 2022); David Goguen, *Product Liability Claims: Who to Sue?*, NOLO, <https://www.nolo.com/legal-encyclopedia/defective-product-liability-claims-who-29606.html> [https://perma.cc/732V-PZET] (last visited Jan. 18, 2022).

¹¹⁹ Goguen, *supra* note 118.

ufacturer, rather it may stem from either the property master or the supplier.¹²⁰ Secondly, the injured party is not a consumer or purchaser of a defective product, but is instead a bystander.¹²¹

2. *Abnormally Dangerous Activity*

The Restatement lists six factors to consider when determining whether an activity is abnormally dangerous: (1) “a high degree of risk of harm to [a] person, land, or chattels;” (2) “likelihood that [] harm...will be great;” (3) “inability to eliminate the risk” even with due care; (4) whether the activity is uncommon; (5) “inappropriateness of the activity to the place...;” and (6) “[the activity’s] value to the community [compared against the] dangerous attributes.”¹²² While all six of these factors are important, usually only one is necessary to declare the activity ultrahazardous and impose strict liability. What is crucial is that the activity’s risk must be so unusual, either in magnitude or because of the circumstances surrounding it, to justify imposing strict liability even though the activity was exercised with all reasonable care. Public policy is also considered, and particular consideration is given to the appropriateness of where the activity takes place.¹²³

Activities that have been held as abnormally dangerous include blasting, aerial crop dusting,¹²⁴ and exponentially storing water within dangerous location.¹²⁵ Courts to this day are still split as to whether the use of fireworks is considered an abnormally dangerous activity for purposes of strict liability.¹²⁶

¹²⁰ See Reed Complaint, *supra* note 66, at 3 (demonstrating in *Reed v. Kenney*, the supplier used Starline Brass ammo casings, which “can be made into dummy, blank or live ammunition by anyone with the knowledge and equipment to do so. [Starline Brass] does not itself make live rounds. [However] [a]nyone with access to the dummy rounds could convert them into live rounds with the proper reloading equipment.”). *But see generally* Karl Boedecker & Fred Morgan, *Strict Liability for Sellers of Used Goods: A Conceptual Rationale and Current Status*, 12 J. PUB. POLY. & MKTING 178, 182 (1993).

¹²¹ Robert F. Cochran, Jr., *Dangerous Products and Injured Bystanders*, 81 KY. L.J. 687, 689-90 (1993) (“When a bystander is injured by a dangerous product, abnormally dangerous activity liability may be a more appropriate precedent for courts to look to than warranty law. Courts developed warranty law in cases involving purchasers and consumers; they developed abnormally dangerous activity liability in cases involving injured bystanders and defendants who benefit from dangerous activity. In both the abnormally dangerous activity cases and the dangerous product cases, the plaintiffs are injured bystanders and the defendants are parties that benefit from activity that puts the bystanders at risk.”).

¹²² RESTATEMENT (SECOND) OF TORTS, § 520 (1977).

¹²³ King, *supra* note 115, at 369; Marnie L. Sayles & The Honorable James R. Lambden, *Stop Shooting Down Tort Liability: It Is Time to Resuscitate the Abnormally Dangerous Activity Doctrine Against Handgun Manufacturers*, 12 STAN. L. & POL’Y REV. 143, 146-47 (2001); Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 271-72 (1987).

¹²⁴ See *Langan v. Valicopters, Inc.*, 567 P.2d 218, 221-22 (1977).

¹²⁵ *Clark-Aiken Co. v. Cromwell-Wright Co.*, 323 N.E.2d 876, 887 (1975).

¹²⁶ *Klein v. Pyrodyne Corp.*, 810 P.2d 917, 918, 922 (1991) (holding that detonating fireworks displays constitutes an abnormally dangerous activity warranting strict liability for damage caused by the fireworks displays). *But see* *Cadena v. Chicago Fireworks Manufac-*

IV. PROMOTING A STRICT STANDARD FOR PROP FIREARM AND EXPLOSIVE TORTS

Interestingly, Plaintiff's counsel alleged that the events that led to the shooting did not constitute simple negligence because Baldwin, the producers and others were reckless by not following strict guidelines when it comes to having live ammunition and guns on a set.¹²⁷ However, the theory of gross negligence is perhaps insufficient in holding each defendant liable.

From the perspective of the actor and filmmaker, the portrayal of genuine fear is a singularly valuable commodity.¹²⁸ Plots involving fearful situations are common, but actors cannot reliably induce a fear response using solely method acting techniques, i.e., without actually dangerous situations.¹²⁹ As a result, the business of portraying fearful scenes effectively demands that there be actual danger. Portraying fear is intrinsically dangerous, and therefore strict liability is the best legal mechanism available for ensuring appropriate liability to protect injured workers.

A. Characterization

Injuries caused by prop guns on movie sets can be synonymous to those caused by pyrotechnics ignited during night club stage performances.¹³⁰ Blank firing should be considered an abnormally dangerous activity because it is a short-range explosive device. Because no projectile is released, any party injured by the blank firing suffers contact from the cone-shaped combination expelled gunpowder and hot gases out of the front of the barrel.¹³¹ Essentially, the plaintiff's injury is synonymous to being injured by a firework or other pyrotechnic device.¹³²

Alternatively, some statutes have held that capped tubes filled with gunpowder were "bombs" and not "fireworks" within the meaning of local fireworks law.¹³³ Regardless, this does not change the fact that even with the prop-

turing Co., 697 N.E.2d 802, 813 (1998) (holding that fireworks shows are not an abnormally dangerous activity and do not warrant strict liability for damage caused by the fireworks); *Toms v. Calvary Assembly of God*, 132 A.3d 866, 878 (2016) (holding that a lawful fireworks display, which was granted a permit by a fire marshal, was not an abnormally dangerous activity that gives rise to strict liability).

¹²⁷ See Mitchell Complaint, *supra* note 62.

¹²⁸ See *supra* Section II.C.

¹²⁹ *Id.*

¹³⁰ Adam Liptak, *Death in the Nightclub: Liability; Challenges and Strategies in Lawsuits Against Clubs*, N.Y. TIMES (Feb. 24, 2003), <https://www.nytimes.com/2003/02/24/us/death-nightclub-liability-challenges-strategies-lawsuits-against-clubs.html> [<https://perma.cc/ACX6-VF6U>].

¹³¹ France & Couceiro, *supra* note 4.

¹³² *Id.*; King, *supra* note 115, at 364, 380.

¹³³ See e.g., *Smithhart v. State*, 591 N.E.2d 149, 152 (1992). See generally Sean Philip Kraus, *The Fire Rises: Refining the Pennsylvania Fireworks Law so that Fewer People Get Burned*, 123 DICK. L. REV. 747 (2019); Kristen A. Nardolillo, *Dangerous Minds: The Na-*

er permits and years of expertise that the production has in handling prop firearms and pyrotechnics, people can still be injured or die on set. Moreover, this fact greatly impacts the high degree of risk involved, the likelihood that the harm would be great, and the sureness of mitigating such risk of harm, even with due care.¹³⁴

B. Recognition as Abnormally Dangerous

In addition to the general public and within the criminal justice system,¹³⁵ the film industry is increasingly viewing the use of prop firearms and blank firing on set as incredibly dangerous.¹³⁶ Although directors and movie producers might continue to find value in utilizing real firearms with blank rounds on set, more individuals within the industry are seeing that value diminish as more wrongful deaths occur.¹³⁷ While this is not to say that blank firing by itself should not be allowed, there are also numerous safeguard implementations and alternative special effects methods that are less dangerous.¹³⁸

Moreover, courts have sometimes analyzed whether the activity is a “commercial hazard,” i.e., whether the activity is carried on by a comparatively small number of persons and is not a matter of common usage.¹³⁹ In terms of demographics, the film industry’s use of real firearms as props is more commercial in nature than the use of firearms for sport shooting, hunting, and self-defense in the home.¹⁴⁰ The class of persons using such effects can be further reduced when considering other factors such as casting, film production budget, local laws, permitting, institutions involved, and film genre.¹⁴¹ Ultimately, it would seem that the value of human life outweighs the need for such use of props and effects.

tional Firearms Act and Determining Culpability for Making and Possessing Destructive Devices, 42 RUTGERS L.J. 511 (2011).

¹³⁴ See *supra* notes 122–23.

¹³⁵ Cf. *Guyton v. Colvin*, 473 So. 2d 266, 266–67 (Fla. Dist. Ct. App. 1985) (involving a fraternity initiation ritual where a shotgun and blank rounds were used); *State v. Stewart*, 327 P.3d 595, 596–97 (Utah Ct. App. 2014); *U.S. v. Wilson*, 2017 U.S. Dist. LEXIS 202792, *22 (E.D. Pa. 2017); *Vett v. City of New York*, 2022 U.S. Dist. LEXIS 2350, *4, n.2 (S.D.N.Y. 2022).

¹³⁶ Kaplan, *supra* note 6.

¹³⁷ Kaplan, *supra* note 6; King, *supra* note 115, at 371–73.

¹³⁸ Kaplan, *supra* note 6; King, *supra* note 115, at 352–53.

¹³⁹ Nolan & Ursin, *supra* note 123, at 300–01, 303–04.

¹⁴⁰ See *Percentage of Households in the United States Owning One or More Firearms from 1972 to 2022*, STATISTA (Nov. 2022), <https://www.statista.com/statistics/249740/percentage-of-households-in-the-united-states-owning-a-firearm/> [<https://perma.cc/WV8G-3WE7>]; William English, *2021 National Firearms Survey*, GEO. U. (July 13, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3887145 [<https://perma.cc/J3TG-MX27>].

¹⁴¹ See *supra* Parts I & II.

C. *Respect of Gun Safety*

One primary goal of strict liability is to reduce the number and severity of accidents in a way that “requires appraisal of the actor’s ability to systematically evaluate the risks of his activities and make sound cost-benefit decisions about the manner of operations as well as the level and location of the activity, safeguards, and alternatives.”¹⁴² One factor that should be heavily emphasized is the respect for gun safety instruction. According to a poll from Pew Research Center, “overall, half of all U.S adults say gun violence is a very big problem in this country, and an additional 33% say it is a moderately big problem.”¹⁴³ Another poll from the same research group indicate that both owners and non-owners of firearms believe that it is essential for gun owners to take gun safety courses, as well as keep their shooting skills up-to-date.¹⁴⁴ Regardless of an entertainer’s political stance on gun regulation, mass shootings, or the Second Amendment, actors and stunt professionals need to treat any “prop firearm” as if it is a real one. After all, a real firearm is arguably as dangerous of a prop as an animal with dangerous propensities.¹⁴⁵

D. *Reducing Celebrity Influence and Bias on the Justice System*

Proposing strict liability for torts caused by prop gun incidents, at first glance might appear unfair. However, it would be an equitable approach that not only holds every party accountable, but also reduces potential bias caused by celebrity influence, which has for years negatively impacted the justice system.¹⁴⁶ In fact, another goal of strict liability is to spread losses caused by acci-

¹⁴² King, *supra* note 115, at 352–53; Sayles & Lambden, *supra* note 123, at 149–55.

¹⁴³ KIM PARKER ET AL., *Views of Guns and Gun Violence in America’s Complex Relationship with Guns* 53 (PEW RES. CTR. 2017), <https://www.pewresearch.org/social-trends/2017/06/22/views-of-gun-safety-and-the-key-responsibilities-of-gun-owners/> [<https://perma.cc/S3SZ-6PTT>].

¹⁴⁴ *Id.* at 45.

¹⁴⁵ Kaplan, *supra* note 6; see Sean Spoonts, *The NRA, Nemesis of ‘Woke’ Hollywood, Could Have Made Alec Baldwin’s Set Safer*, NEWSWEEK (Oct. 28, 2021, 8:00 AM), <https://www.newsweek.com/nra-nemesis-woke-hollywood-could-have-made-alec-baldwins-set-safer-1643418> [<https://perma.cc/CB8U-MSYC>].

¹⁴⁶ See Puente, *supra* note 59 (“One difference between [the Halyna Hutchins shooting] and [the Brandon Lee shooting]: Baldwin is a bigger, more controversial star than the actor who fired the weapon that killed Lee, Michael Marsee, then 41, a veteran character actor who died of stomach cancer at age 64 in 2016”). See generally Nikki Finke, *Celebrity Justice: When Laws Are Broken, Fame Isn’t the Shield It Used to Be*, L.A. TIMES (Oct. 5, 1989 12:00 AM), <https://www.latimes.com/archives/la-xpm-1989-10-05-vw-881-story.html> [<https://perma.cc/B9J4-VQQL>]; Andrea L. Sturniolo, *The Entertainment Effect: Do Those Within The Entertainment Industry Receive Preferential Treatment When Facing The Justice System?*, SETON HALL U. L. 1 (2014); Jessy Corsello, *The Injustice in Celebrity Court Cases*, THE ECHO (Oct. 15, 2014), <https://cluecho.com/4343/news/the-injustice-in-celebrity-court-cases> [<https://perma.cc/86ZN-UT6P>]; Will Lester, *Do Celebrities Get Fair Trials?*, CBS NEWS (Jan. 16, 2004 5:33 AM), <https://www.cbsnews.com/news/do-celebrities-get-fair-trials/> [<https://perma.cc/U2DT-NLZA>]; Jonathan D. Glater, *Debating the Role of Celebrity in the System*, N.Y. TIMES (June 15, 2005), <https://www.nytimes.com/2005/06/15/us/debating-the-role-of-celebrity-in-the-system.html> [<https://perma.cc/695M-9XLT>].

dental injuries among a broad class of persons in order “to assure that the effects of otherwise devastating losses are ameliorated by diffusing them among a broad array of appropriate entities and individuals.”¹⁴⁷

CONCLUSION

The scene of a movie can always be recaptured and reedited; a human life cannot. Regulation intervened in the prevention of real firearms being used on set during the early 1900s. Today, the film industry has many options, such as blood squibs, CG effects, and non-firing gun replicas. However, using real weapons with blank rounds as props for a set is extremely dangerous. In fact, blank cartridges are comparable to fireworks and pyrotechnics, due to the ammunition’s cone-shaped blast projection. Not only is there a high risk of harm, but eliminating such risk seems unlikely, even with the most skillful of property masters and ammunitions specialists. Following the Alec Baldwin incident, workers within the film industry are pushing for resolution in order to prevent similar unfortunate deaths from ever occurring on set.

Strict liability is the only way to fairly spread the risk that actors take for meaningfully and authentically portraying fear in society. Our society is incredibly indebted to the production of excellent films, which orients societal moral values and provides common cultural platform to bridge increasing political disunity. It is also big business: In 2021, the 10 largest grossing films had receipts of \$2,096,585,242 *from ticket sales alone*.¹⁴⁸ In service of this tremendous industry, a standardized treatment of actor injuries from prop guns is required. And the only way to do so is to treat on screen portrayal of fear as what it is: an abnormally dangerous activity.

Practitioners continue to assert that negligence is the best means of pursuit, but this is all wrong. It fails to hold every individual accountable, short siding the plaintiff in recovery. Furthermore, this approach overlooks the full mechanics of prop gun ammunition and any possibility that any defendant can successfully prove that he or she acted with reasonable care. Characterizing the firing of prop guns in film as an abnormally dangerous activity sends a clearer message, especially in Hollywood: Any gun is a loaded gun.

¹⁴⁷ King, *supra* note 115, at 350; Sayles & Lambden, *supra* note 123, at 146–47; Nolan & Ursin, *supra* note 123, at 259–60.

¹⁴⁸ *Domestic Box Office For 2021*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/year/2021> [<https://perma.cc/4RXXR-WJVC>] (last visited Jan. 21, 2023).