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GUN TORTS: DEFINING A CAUSE OF ACTION FOR VICTIMS IN SUITS AGAINST GUN MANUFACTURERS

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Although tens of thousands of Americans die from gun violence every year, the regulation of firearms remains inadequate. Those who are injured, or the survivors of those killed by guns, therefore have sought relief through tort law against those who manufacture these uniquely deadly products. With rare exceptions, however, these suits have been unsuccessful. Most courts have found that the conduct of gun manufacturers is not actionable under strict product liability doctrine, negligence, or the law of abnormally dangerous activities. This Article argues that courts have been too reluctant to apply tort liability to gun manufacturers. It is possible and necessary, the authors demonstrate, to fashion a rule of liability that will call irresponsible gun manufacturers to account, and that doing so will not amount to absolute liability against the gun industry. Drawing theoretical support for their position from central pillars of tort law, the authors offer a test for judging whether a class of guns should be considered defectively designed. Such a determination should hinge on whether the impugned gun is a "manifestly unreasonable" design. This concept is recognized in the Third Restatement of Torts, but too narrowly defined there. The authors flesh out the concept by reworking the factors for abnormally dangerous activities to make them more directly applicable to the complex array of design and marketing decisions that gun manufacturers make. Through a series of illustrations, they then apply this test to different types of guns and show how the test supports liability for certain egregious practices, but not for some other practices. In addition, the authors recommend that

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claims for negligent marketing be allowed to supplement the design claims in appropriate cases.

INTRODUCTION

The Littleton, Colorado, school shootings of 1999 sparked national interest in the development of measures to control access to and usage of firearms in this country. Because of a deeply divided and partisan Congress, however, no definitive and uniform legislation emerged.[1] Prospects for effective firearms control dimmed following the Election 2000 anomaly, which resulted in the installation of a president who was actively anti-gun control.[2] The trend away from

1. One piece of proposed legislation was emblematic of the problem gun control advocates faced. A pending Senate bill received a boost from the media attention and public concern following the Columbine shootings. The bill contained a variety of provisions, including: requiring background checks on firearms sales at gun shows and pawn shops; requiring gun safety devices to be sold with all handguns; assisting prosecutors and the juvenile court system in the prosecution and processing of violent gun offenses committed by juveniles; funding studies on the impact of the entertainment industry on children and on the marketing practices of the firearms industry with regard to children; and limiting the liability of gun owners who use a gun lock for injuries resulting when the gun has been stolen and subsequently used to commit a crime. *See* Helen Dewar, *Legislators Stymied On Gun Measures*, WASH. POST, May 12, 2000, at A33. A heavily partisan and Republican Senate barely passed the bill, with Vice President Al Gore casting the tie-breaking vote on the measures related to gun shows. *See* Janet Hook, *Senate OKs Crime Bill; Gun Curbs Come After New Shooting*, L.A. TIMES, May 21, 1999, at A1 (referring to S. 254, 106th Cong. (1999)). In a bipartisan split, the House of Representatives entertained, then defeated, a weaker version of the Senate bill. Frank Bruni & James Dao, *Gun Control Bill Rejected in House in Bipartisan Vote*, N.Y. TIMES, June 19, 1999, at A1. The proposals languished in a House-Senate conference and did not survive the end of the 106th Congress. *See* John Lancaster, *Campaign Bill Unearths a Senate Relic: Debate*, WASH. POST, Mar. 23, 2001, at A01; *see also* Helen Dewar, *Senate Narrowly Passes Gun Control Resolution*, WASH. POST, May 18, 2000, at A9 (outlining the political haggling that accompanied the issue of gun control in Congress).

2. When he was Governor of Texas, President George W. Bush signed into law a bill allowing citizens to carry concealed weapons, and a separate measure intended to deter

comprehensive solutions to gun violence has been bolstered by recent court decisions refusing to recognize causes of action against gun manufacturers for the harmful effects of their products.[3] The net result of these rebuffs has been frustration for gun control advocates.

While judicial and legislative interest in gun control has waned, the violence, regrettably, has continued. One only has to peruse the daily news for examples of deadly shooting incidents and rampages.[4] Further, the American propensity for gun violence may be contributing to this country's vulnerability to terrorist attacks. Especially troubling is information disseminated by Al Qaeda terrorists, suggesting ways to exploit the United States' lax gun control practices to advance their violent cause.[5]

Perhaps reflecting the renewed laissez-faire attitude of government, media coverage of school shootings has taken a curious twist. The current focus has been largely on the failure of students and school officials to read certain psychological and social "signals" that may have prevented the shootings. The manufacturers and other sellers,[6] meanwhile, have taken a comfortable back seat as public

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municipal lawsuits against gun manufacturers. James Dao, *New Gun Control Politics: A Whimper, Not a Bang*, N.Y. TIMES, Mar. 11, 2001, at § 4, 1.

3. Most notably, in California and New York, decisions from the states' highest courts concluded that victims of gun violence do not have a cause of action for negligent marketing against the manufacturers of the firearms causing their injuries. *See* Merrill v. Navegar, Inc., 28 P.3d 116, 134–35 (Cal. 2001); Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1068 (N.Y. 2001) (ruling on certified questions from the United States Court of Appeals for the Second Circuit).

4. A relatively recent and troubling event was reported at Francis X. Clines, *3 Slain at Law School; Student is Held*, N.Y. TIMES, Jan. 17, 2002, at A18.

5. *See* PRESS RELEASES, VIOLENCE POLICY CENTER, *Jihad Trainees Urged to Use Lax U.S. Gun Laws to Wage Holy War* (Nov. 21, 2001), *at* http://www.vpc.org/press/0111jihad.htm (last visited October 14, 2002) (on file with the North Carolina Law Review).

6. This Article recognizes that in product liability law, the term "seller" includes manufacturers, retail dealers, and all other persons and entities within the chain of commercial distribution of the product. This Article focuses on the manufacturer, which is the most remote of those entities to the victim and, thus, the most difficult entity on which to impose liability in most cases. Because the problems of gun manufacturer liability are complex, this Article limits its thesis to manufacturers. Theoretically, at least, there is no reason why the proposal presented in this Article could not be applied to other gun sellers. In reality, however, the closer a seller is to the perpetrator of the gun violence, the easier it will be for the plaintiff to establish specific negligent conduct on the part of the seller that fits within the traditional interpretation of negligence law. From a policy standpoint, the proposal in this Article should be applied to sellers other than manufacturers because the deterrent aspects of tort law function best when participants in the system responsible for placing the product into the marketplace, and into the hands of the user, are made answerable for the harm that the product visits upon another. *See* John G. Culhane, *Real and Imagined Effects of Statutes Restricting the Liability of Nonmanufacturing Sellers of Defective Products*, 92 DICK. L. REV. 287 (1992). Where the term "seller" is used in this

concern has shifted to the personal responsibility of citizens rather than the collective responsibility of an industry that markets dangerous products.[7] The practical result is that the gun industry is immunized from the most serious impacts of its products. Thus, the unfortunate victims of gun violence will likely be forced to bear the costs—monetary and emotional—of their injuries.

Political issues aside, one clear fact remains: Guns are inherently dangerous products, uniquely lethal in that they are designed and manufactured to maim and kill people. Although used in sport, guns also are used by military and law enforcement personnel, by citizens for protection of their persons, homes, and families, and by criminals. Notwithstanding the variety of laws that punish people for crimes committed with guns, little regulation governs the manufacture and sale of guns and ammunition. Although the sellers of these products are fully aware of the propensity of their products to cause serious harm and death, their industry, along with the tobacco industry, remains one of the least regulated hazardous industries in our country.[8]

Tort law has an established role in supplementing regulation,[9] but the tort system so far has done little to fill the deep hole in firearms regulation. The drafters of the *Restatement (Third) of Torts: Products Liability* have taken the paradoxical position that inherently dangerous products do not fall within the definition of "abnormally

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Article, it is intended to be interchangeable with "manufacturer" unless specifically noted otherwise.

7. In May 2001, Governor Bill Owens of Colorado made public the report of the Columbine Review Commission, a twenty-person blue-ribbon panel charged with evaluating the shootings and recommending initiatives to prevent future occurrences. Michael Janofsky, *Columbine Panel Blames Lack of Action for Deaths*, N.Y. TIMES, May 18, 2001, at A12. The report amounted to an indictment of the Jefferson County Sheriff's Office for, among other things, failing to take steps to prevent the shootings prior to their occurrence. *See* STATE OF COLORADO, THE REPORT OF GOVERNOR BILL OWENS' COLUMBINE REVIEW COMMISSION 73–117 (May 2001), *available at* http://www.state.co.us/columbine/ (last visited Oct. 14, 2002) (on file with the North Carolina Law Review). Criticism was also directed at school officials, *see id.* at 12–13; students, *see id.* at xv, 18; and the parents of the killers, *see id.* at 91–92 & nn.204–05. Although the charge of the commission was not directly to determine fault in the matter, the report provided a detailed evaluation of the failures of these persons, but refrained from suggesting any responsibility that may have resided with gun sellers.

8. *See infra* notes 59–83 and accompanying text.

9. Imposing liability for harm caused by one's products requires the seller of the product to internalize its costs, either by spreading the cost among all buyers or, if such internalization reveals that the product is too costly, eliminating it from the market. The point is explored further *infra* at notes 313–38 and accompanying text.

dangerous,"[10] thus placing guns outside the scope of strict product liability. Claims based on negligence have focused mainly on retail dealers, who often defend by arguing that the third-party perpetrator of the criminal act that injured the plaintiff is the proper defendant.[11] Negligence claims against manufacturers have failed on similar grounds.[12] Victims of gun crimes and accidental shootings often are unable to bring an action directly against the perpetrator of the violent act, because that person is either unknown or judgment-proof. Lacking a remedy against the seller, victims must bear the costs of their own injuries.

Under both corrective justice and economic accounts of tort law, compelling arguments favor extending liability directly to gun sellers.[13] Yet, the judicial system has been reluctant to do so. A major factor in this reluctance has been judicial unwillingness to extend generally accepted principles of tort law to cases involving guns. This intransigence is not news: that the law is slow to change and adapt is a fact of legal life. Strict product liability law became accepted doctrine only in the 1960s, almost fifty years after the court in *MacPherson v. Buick Motor Co.*[14] recognized a product liability claim sounding in tort law, rather than in contract law. The unique challenges of late twentieth century products cases—such as tobacco,[15] blood clotting products,[16] prescription drugs,[17] and guns—

10. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, rprtrs' note IV.D (1998) [hereinafter THIRD RESTATEMENT].

11. *See, e.g.*, Jantzen v. Leslie Edelman, Inc., 634 N.Y.S.2d 551 (N.Y. App. Div. 1995) (awarding summary judgment to a sporting goods retailer on the basis of an intervening act of the gun purchaser); Chapman v. Oshman's Sporting Goods, Inc., 792 S.W.2d 785 (Tex. App. 1990) (affirming summary judgment for a retailer, holding that the plaintiff had not come forward with evidence that the gunman's conduct was foreseeable at the time of sale).

12. *See, e.g.*, Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1061 (N.Y. 2001) (stating that the defendant generally has no duty to control the actions of third persons, absent a special relationship); *infra* notes 126–65 and accompanying text.

13. *See infra* Part V.A.

14. 111 N.E. 1050, 1051 (N.Y. 1916).

15. *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) (holding that the federal cigarette labeling act preempts some, but not all, common law claims against cigarette manufacturers); R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996) (allowing a class action for nicotine addiction).

16. *See, e.g.*, Ray v. Cutter Labs., 754 F. Supp. 193 (M.D. Fla. 1991) (applying the market share liability theory to negligence claims brought by hemophiliacs who contracted HIV from a blood clotting factor product); Royer v. Miles Lab., Inc., 811 P.2d 644 (Or. Ct. App. 1991) (using the Oregon state blood shield statute to bar a strict liability claim of a hemophiliac who contracted HIV from a blood clotting factor product).

17. *See, e.g.*, Perez v. Wyeth Labs. Inc., 734 A.2d 1245 (N.J. 1999) (holding that under New Jersey law, manufacturers of mass marketed prescription drugs must warn consumers directly about drugs' risks); Grundberg v. Upjohn Co., 813 P.2d 89 (Utah 1991) (holding

have required the law to adapt at an unprecedented rate. Tort law has begun to adapt to many of these product challenges, yet guns have been left behind. It is time for courts to meet this challenge by imposing liability on gun manufacturers in appropriate circumstances.

This Article begins with a discussion of the exigencies behind the need for tort law to accommodate gun violence victims. Part I discusses the trend toward increased lethality in the design of firearms and ammunition and the inadequacy of existing regulation. Part II examines existing legal obstacles to recovery by victims of gun violence against gun manufacturers under theories of strict liability and negligence. Particular attention is given to the *Restatement (Third) of Torts: Products Liability*, which refused to extend strict product liability doctrine to uniquely lethal products, such as guns, absent some indication that the product malfunctioned. Part III is a cautionary reminder that analogies of guns to other products, while potentially instructive, should be approached warily. Part IV is a discussion of various judicial opinions that have gone against the tide and argued in favor of tort liability as an appropriate remedy for victims of gun violence. The final two parts of this Article develop a proposal for extending tort liability to gun manufacturers grounded solidly in public policy and existing tort doctrine.

I. THE NEED FOR A TORT LAW SOLUTION TO GUN VIOLENCE

Courts are reluctant to fashion a tort remedy for private injury against gun manufacturers, absent a malfunction of the gun,[18] in part because the manufacture, distribution, and sale of guns are legally sanctioned.[19] The New York Court of Appeals stated this view succinctly: "While common law principles can supplement a manufacturer's statutory duties, we should be cautious in imposing novel theories of tort liability while the difficult problem of illegal gun sales in the United States remains the focus of a national policy

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prescription drug manufacturers immune from design defect claims under the unavoidably unsafe product doctrine).

18. *See, e.g.*, Loitz v. Remington Arms Co., 563 N.E.2d 397 (Ill. 1990) (holding that the explosion of a shotgun barrel presented sufficient evidence for the jury to find that the gun was negligently manufactured); *infra* Part II.A.1. (discussing cases rejecting gun manufacturer liability without evidence of malfunction).

19. *See, e.g.*, McCarthy v. Olin Corp., 119 F.3d 148, 157 (2d Cir. 1997) ("New York courts do not impose a legal duty on manufacturers to control the distribution of potentially dangerous products such as ammunition."); Linton v. Smith & Wesson, 469 N.E.2d 339, 340 (Ill. App. Ct. 1984) ("No Illinois decision has imposed a duty upon the manufacturer of a non-defective firearm to control the distribution of that product to the general public, such regulation having been undertaken by Congress, the Illinois General Assembly and several local legislative bodies.").

debate . . . ."[20] Yet guns are consumer products, and a gun sold legitimately may cause as much serious injury or death as one sold illegally.[21]

The federal government and the states have enacted an array of legislation directed at maintaining the legitimacy of gun sales while simultaneously imposing certain safety-minded restrictions. For example, existing laws prohibit the sale of certain weapons,[22] require background checks on prospective gun purchasers,[23] impose waiting periods,[24] or disqualify certain persons from purchasing guns.[25] But such legislation—as is much of the legislative and regulatory process—is reactive, responsive to the loudest voice at a particular moment despite other equally troublesome hazards.[26] Nevertheless,

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20. Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1066 (N.Y. 2001). The use of the term "novel theories" is interesting in itself. The court discussed negligence—hardly a novel theory. There is a significant distinction between *application* of negligent marketing to gun manufacturers and characterization of negligence theory as novel. The court seemed to have the application issue in mind.

21. The question whether guns sold illegally cause more injuries and deaths than those sold legally has been vigorously debated, and the answer is far from conclusive. *See* MARIANNE W. ZAWITZ, U.S. DEPT. OF JUSTICE, GUNS USED IN CRIME 3 (1995). No direct, reliable statistics are available on whether guns sold illegally have caused more injuries and deaths. Some studies have compiled data on illegal gun acquisitions by criminals, and others have demonstrated that criminals prefer large-caliber handguns generally. *Id.* at 2–3. But no comprehensive study examining the relationship between illegally acquired firearms and the commission of crimes had been conducted. *See id.* at 1 (stating that "[n]o national collection of data contains detailed information about all of the guns used in crimes"). The available data are subject to various interpretations. *See also* Fox Butterfield, *Law Bars a National System for Tracing Bullets and Shells*, N.Y. TIMES, Oct. 7, 2002, at A12 (reporting that despite available technology, Congress has prohibited a national ballistic fingerprint system that would allow officials to trace bullets to specific guns).

22. *See, e.g.*, 18 U.S.C. § 922(v)(1) (2000) (prohibiting manufacture and sale of semiautomatic assault weapons); N.J. STAT ANN. § 2C:39-5(f) (West Supp. 2002) (prohibiting assault weapons).

23. *See, e.g.*, CAL. PENAL CODE §§ 12071(b)(3)(A), 12072(c)(1), 12076(d)–(e), 12084(d)(7)(A) (West Supp. 2002) (requiring a background check for acquisition, loan and purchase of firearms); WASH. REV. CODE § 9.41.110(5) (West 1998) (requiring fingerprinting and background check).

24. *See, e.g*, N.J. STAT ANN. § 2C:58-2(a)(5)(a) (West Supp. 2002) (prohibiting delivery of a handgun without a valid permit to purchase and a seven-day waiting period); WASH. REV. CODE ANN. § 9.41.110(5) (allowing thirty days to determine whether to grant a license).

25. *See, e.g.*, PA. CONS. STAT. ANN. § 6105 (West 2000) (disqualifying persons convicted of certain crimes); WASH REV. CODE ANN. § 9.41.040 (disqualifying various categories of persons).

26. One example is the reactive legislation that has been enacted to prevent certain specific kinds of suits against gun manufacturers. When the Maryland Supreme Court ruled that strict product liability could apply to impose liability on manufacturers of Saturday night specials—but not other guns, *see* Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1153 (Md. 1985)—the legislature responded by banning such suits. *See* MD. ANN. CODE,

some commentators insist that courts should defer to the legislative forum on the subject of guns.[27] The reality is that the mantle of federal and state gun laws barely conceals a significant vacuum in effective regulation of an inherently lethal product. And that vacuum is unlikely to be filled any time soon.

A. Guns as Inherently Lethal Products

Guns are designed to kill, and their use in doing so is well supported by survey data. Moreover, the statistics demonstrate a gun market flooded with products of increasing lethality. Although the published statistical data lag in time, a disturbing picture of a hazardous product and a weakly regulated industry emerges. More than thirty-two thousand Americans suffered fatal gunshot wounds in 1997, including homicides, accidental shootings, and suicides.[28] An additional sixty-four thousand non-fatal shootings occurred the same year.[29] Data compiled for 1994 demonstrated that forty-four million Americans owned 192 million firearms; sixty-five million of those weapons were handguns.[30] Studies have estimated that during this time, anywhere from thirty-five percent to forty-three percent of

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art. 27, § 36-I (Supp. 2002). See *infra* note 245 for the definition of "Saturday night specials." This law, enacted in reaction to the concerns of the gun lobby, did nothing to solve the public health problem of gun violence in general or Saturday night specials in particular. Justice Stephen Breyer, in a book written prior to his appointment to the United States Supreme Court, provided numerous examples of similar inconsistencies in the regulatory process. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 21–29 (1993). He noted, for example, certain proposed regulations designed to facilitate the disposal of sewage sludge through an incineration process that actually presented a greater health hazard to the public than the sludge itself. *Id.* at 22.

27. *See, e.g.*, Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 52–54 (2000) [hereinafter Lytton, *Tort Claims*] (arguing that tort claims against gun manufacturers can complement legislative efforts to regulate the firearms industry); Richard A. Epstein, *Lawsuits Aimed at Guns Probably Won't Hit Crime*, WALL ST. J., Dec. 9, 1999, at A26 ("Good political results require sound political process.").

28. Donna L. Hoyert et al., *Deaths: Final Data for 1997*, 47 NAT'L VITAL STAT. REP. 19, 68 tbl. 16 (1999).

29. Centers for Disease Control and Prevention, U.S. Dep't of Health & Human Servs., *Nonfatal and Fatal Firearm-Related Injuries—United States, 1993–1997*, 48 MORBIDITY & MORTALITY WKLY. REP. 1029, 1031 (1999). For updates on these statistics, the website of The Centers for Disease Control and Prevention is a reliable source. *See* National Center for Health Statistics, Firearm Mortality, *at* http://www.cdc.gov/nchs/fastats/firearms.htm (last visited Nov. 21, 2002) (on file with the North Carolina Law Review).

30. PHILIP J. COOK & JENS LUDWIG, U.S. DEPT. OF JUSTICE, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 5 (1997).

American households contained guns.[31] Since 1980, ownership of semiautomatic handguns—featuring substantial firepower and easy concealability—has risen, swelling from thirty-two percent of all guns produced in the United States in 1980 to seventy-five percent in 1999.[32] In general, public demand for guns of higher caliber and with larger magazines has been on the rise since 1993.[33] In response to this demand, manufacturers have provided gun designs of increased lethality, even where safer alternative designs were readily available.[34]

Apart from the statistical evidence demonstrating the escalation of lethality in the gun market, some manufacturers have designed

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31. *See id.* at 1. The report stated that the 35% figure actually represented a lower estimate of household ownership of guns than the 50% figure floated since the 1950s. *Id.* The reporters admit that the 35% figure is likely to be "off the mark" somewhat, and they cite other studies conducted during the early 1990s that estimate household ownership at 38% to 43%. *Id.* (citing Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995)). These somewhat shaky statistics may or may not indicate that the number of households owning guns has declined over the second half of the twentieth century. It is difficult to determine the degree to which members of the public may have been forthcoming about their gun ownership in survey information collection. This may be particularly true of persons with criminal records, persons who used guns to commit crimes in the past, whether or not they entered the criminal justice system, and persons engaged in or about to engage in criminal activity at the time of the survey. The Justice Department survey, using a random-digit-dial telephone sampling, *id.* at 4, yielded data that showed that 37% of persons who had been arrested for non-traffic violations owned firearms in comparison to 25% of the general population. *Id.* at 3. Because of the likelihood that these persons may have been reporting at a lower rate than other persons—and certainly because of the likelihood that persons engaging in or about to engage in such activity would be nonresponsive to such a survey—accurate data regarding household gun ownership may be impossible to obtain. The Justice Department survey provides some indication of the data that are missing.

32. VIOLENCE POLICY CENTER, *Facts on Firearms*, *at* http://www.vpc.org/fact_sht/firearm.htm (last visited Oct. 14, 2002) (on file with the North Carolina Law Review) (presenting data obtained from BATF with percentages calculated by the Violence Policy Center).

33. COOK & LUDWIG, *supra* note 30, at 5.

34. Jon S. Vernick & Stephen P. Teret, *A Public Health Approach to Regulating Firearms as Consumer Products*, 148 U. PA. L. REV. 1193, 1197 (2000). Statistical comparisons between production of semiautomatic pistols and revolvers are most instructive. In 1985, for example, gun manufacturers produced 844,000 revolvers and 707,000 semiautomatic pistols. In 1993, those figures had shifted to 2.2 million semiautomatic pistols, compared to 550,000 revolvers. *Id.* at 1198 n.27 (citing BUREAU OF ALCOHOL, TOBACCO & FIREARMS, ANNUAL FIREARMS MANUFACTURERS AND EXPORT REPORT (1994)). Both the absolute numbers and the ratio of semiautomatic pistols to revolvers are worth noting here. In 1985, slightly more than 1.5 million revolvers and semiautomatic pistols were manufactured in this country; less than a decade later, the combined numbers grew to approximately 2.75 million. *Id.* These statistics do not take into consideration other types of firearms produced. The production ratio of these two types of firearms was 8.44 revolvers to 7.07 semiautomatic pistols in 1985; but by 1993, the ratio had shifted dramatically to 22 semiautomatic pistols to 5.5 revolvers produced. *Id.*

certain guns with features that appeal to criminals. For example, Navegar, Inc.'s TEC-9 and TEC-DC9 semiautomatic assault weapons were the subject of a lawsuit against the company by representatives and survivors of persons who died during an assault in a San Francisco office building.[35] Extensive discovery in the case revealed that the two guns were designed after military and police assault weapons and that they were useless for hunting, other kinds of recreational shooting, or self-defense because of their inaccuracy and danger to the shooter.[36] The design of the guns facilitated rapid firing (in particular, spray-firing), firing with higher velocity, firing at greater distances, and breakdown into smaller, concealable parts.[37] The guns could be modified to be fully automatic.[38] The TEC-DC9 was designed with a "combat sling" feature, which permitted the rapid firing of two such firearms simultaneously.[39] One witness in the case, a police chief who was a nationally recognized firearms expert, characterized these firearms as " 'mass produced mayhem.' "[40] Furthermore, in promotional materials available to the general public, the manufacturer emphasized that the gun's surface had "excellent resistance to fingerprints."[41]

The TEC-9 and TEC-DC9 were marketed to the general public, with the target market group admittedly being " 'militaristic people,' including the 'survivalist community,' as well as 'Walter Mittyish'

35. *See* Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146, 152 (Cal. Ct. App. 1999), *rev'd*, 28 P.3d 116 (Cal. 2001). The TEC-DC9 gained further notoriety when it was used by the killers in the Littleton, Colorado, shootings in 1999. *See* Michael Janofsky, *Both Sides See Momentum in Congress for Gun Control*, N.Y. TIMES, Nov. 15, 2000, at A18. The guns, as well as the others used in the shootings, were bought at gun shows where no background checks were required. *Id.*

36. *Merrill*, 89 Cal. Rptr. 2d at 154–55. The court stated that the TEC-DC9 was a successor to the TEC-9 model, and noted that the minor modifications in the successor were designed to avoid a ban of the TEC-9 in the District of Columbia, but that the two models were "materially indistinguishable." *Id.* at 152 n.3; *see infra* note 285 (discussing the lack of social utility of assault weapons).

37. *Merrill*, 89 Cal. Rptr. 2d at 154.

38. *Id.*

39. *Id.*

40. *Id.* at 155. The witness also testified that the TEC-9 was " 'far and away' the leading assault weapon seized by law enforcement agencies in [large American] cities in 1990 and 1991, 'accounting for 24% of all assault weapons seized, and 42% of all assault pistols seized.' " *Id.* The witness's testimony was generally undisputed. *Id.* at 154.

41. *Id.* at 157. Testimony on behalf of Navegar from a forensic firearms criminalist indicated that the gun's special surface was not actually capable of preventing detection of fingerprints. *Id.* at 158–59. Nevertheless, a member of the public could be persuaded by the promotional statement to think otherwise.

individuals, who 'play military.' "[42] Although criminals are not on this list, criminals nevertheless got the message. The court reported:

> Just ten models account for 90 percent of the crimes in which assault weapons are used, and one out of every five was a TEC-9, putting it at the top of the list. According to the [Bureau of Alcohol, Tobacco and Firearms] Tracing Center, the TEC-9 or TEC-DC9 accounted for 3,710 of the firearms traced to crime by law enforcement officials nationwide during 1990–1993, mainly cases involving narcotics, murder and assault, and these weapons were in the top ten firearms traced.[43]

It is reasonable to conclude from the available evidence that the appeal of these firearms to criminals was a product of both design features and marketing decisions, and that the attraction of criminals to these products was intense, inevitable, and well within the manufacturer's expectations. It is not unreasonable to require manufacturers to keep informed of the uses of their products, particularly when this information is compiled in government documents. Even if the manufacturers did not plan their designs to appeal to criminals, they would easily have known the gun features would be attractive to them.

Similarly, guns that can be easily assembled from mail-order gun kits offer another instance of rising danger in gun design and marketing. In the late 1990s, a case reached a jury on claims that a gun manufacturer had negligently marketed the Cobray M-11/9 as parts in a mail-order assembly kit, causing the death of the plaintiffs' decedent.[44] Guns sold in this fashion skirted federal and state

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42. *Id.* at 156 (quoting testimony of Navegar's national sales and marketing director from 1989 to 1993).

43. *Id.* at 155 (discussing Cox Newspaper report, BATF tracing data, and testimony of an expert in firearms). Although Navegar's expert challenged this statistical information, *id.* at 158–59, the court rejected the challenge and found the data persuasive. *See id.* at 166.

44. Timothy D. Lytton, *Negligent Marketing:* Halberstam v. Daniel *and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOKLYN L. REV. 681, 686 (1998) [hereinafter Lytton, *Negligent Marketing*]. Ultimately, the jury found that the plaintiffs' evidence was insufficient to support the negligent marketing claims. *Id.* at 681. As Professor Lytton points out, the case provided little precedential value due to the combined effect of the insufficiency finding and the fact that the case did not result in a written opinion. *Id.* at 685. Of additional note is the fact that the case was before the Honorable Jack B. Weinstein of the Eastern District of New York, the judge who had also found merit in the negligent marketing claim in Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1332 (E.D.N.Y. 1996). The *Hamilton* decision was effectively reversed when the New York Court of Appeals issued its 2001 decision, on certified questions, that the negligent marketing claim against the gun manufacturer would not be recognized under New York law. *See* Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055 (N.Y. 2001)

regulations;[45] in addition, the absence of a serial number on the firearm[46] rendered it essentially untraceable.[47] Moreover, according to the plaintiffs' second amended complaint, ads for the gun—some of which displayed a cartoon gangster figure—referred to it as "The Gun that Made the '80s Roar" and included language referring to "the controversial 'Drug Lord' choice of COBRAY firearms throughout the '80s."[48] Again, it is reasonable to view this firearm, in both its design and marketing, as one that would be attractive to criminals.

Manufacturers now have the technology to produce smaller guns with greater firepower than ever before.[49] These guns, sometimes referred to as "pocket rockets," fit into the palm of the hand, making them concealable even in plain sight, and advertising has taken advantage of this feature.[50] Some manufacturers have also designed "compact" or "subcompact" models of their larger pistols or streamlined their guns to improve concealability.[51]

Furthermore, guns are easily accessible, even to children. More than half the persons in one survey of students in grades seven

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(holding that victims of gun violence do not have a cause of action for negligent marketing against gun manufacturers).

45. Because this gun was sold in parts, it was not subject to the same regulations as fully assembled guns. Lytton, *Negligent Marketing*, *supra* note 44, at 688. *See generally* ERIK LARSON, LETHAL PASSAGE: THE STORY OF A GUN 74–82 (1994) (describing a manufacturer's efforts to market machine-gun kits and silencer kits with virtual impunity).

46. The part that would become the gun frame—and thus require a serial number—was sold in the kit as a sheet metal flat, thus avoiding the serial number requirement. Lytton, *Negligent Marketing*, *supra* note 44, at 695.

47. *Id.* at 688.

48. *Id.* (citing Plaintiffs' Second Amended Complaint, at Exh. H, I); *see also* LARSON, *supra* note 45, at 60, 74 (stating that "[t]he Cobray and its ancestors became the favorites of drug rings, street gangs, and assorted killers throughout the 1980s").

49. *See* Garen J. Wintemute, *The Relationship Between Firearm Design and Firearm Violence*, 275 J.A.M.A. 1749, 1751–52 (June 12, 1996). "Technology and opportunity are now coming together. A rapidly growing number of manufacturers have introduced lightweight, easily concealable, double-action or double-action-only, medium- or large-caliber pistols; some smaller companies produce nothing else." *Id.* at 1752.

50. *Id.* at 1752. "The trend has given rise to a resurgence of what might be called 'palmshot' advertising in gun consumer magazines, in which manufacturers emphasize photographically that their pistols can be hidden entirely behind the hand." *Id.* For descriptions of various models of "pocket rockets" and photographs of manufacturer advertisements, see VIOLENCE POLICY CENTER, POCKET ROCKETS, *at* http://www.vpc.org/studies/pockone.htm (last visited June 13, 2002) (on file with the North Carolina Law Review).

51. Wintemute, *supra* note 49, at 1752. Some jurisdictions have encouraged this trend by permitting the carrying of concealed weapons. *See, e.g.*, FLA. STAT. ANN. § 790.06 (West 2000); TEX. GOV'T CODE ANN. § 411.172 (Vernon Supp. 2002). Even in jurisdictions having strict bans, criminals would derive a significant advantage from guns designed to be easily concealed—and thus used—in plain sight.

through twelve admitted that they could gain access to guns.[52] In general, research surveys indicate that theft of firearms has played a significant role in much violent criminal activity. A recent Justice Department report noted that in 1986, thirty-two percent of incarcerated felons surveyed admitted that theft had been the source of their most recently obtained handgun.[53] A separate study in 1994 revealed that approximately 593,000 guns were stolen noncommercially during that year.[54] The virtual omnipresence of guns, combined with the increased lethality of gun designs, creates a picture of a society in urgent need of gun control.

The ability to evade gun regulations has manifested itself in other ways. In 1994, approximately sixty percent of firearm acquisitions in this country were from federally licensed firearm dealers.[55] Hence, the remaining forty percent involved transactions made on the secondary market, without record-keeping and other requirements.[56] In 1994, there were approximately two million such secondary transactions.[57] Situations giving rise to undocumented firearm acquisitions on the secondary market include gun shows, transfers or inheritance from family members, and transfers from acquaintances.[58]

B. The Regulatory Vacuum

Current firearm regulation focuses mainly on parties other than manufacturers. An array of laws reaches various uses and abuses of firearms; but while the sale of some guns is prohibited,[59] most laws do not reach the manufacturers directly. In general, the patchwork of laws on the federal, state, and local levels fails to limit many of the acts and transactions that lead directly to gun violence.

On the federal level, no agency has comprehensive authority to address gun issues. The federal Gun Control Act of 1968, as amended by the Brady Handgun Violence Protection Act ("Brady

52. Philip J. Cook et al., *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 62 (1995) (citing LOUIS HARRIS, A SURVEY OF EXPERIENCES, PERCEPTIONS, AND APPREHENSIONS ABOUT GUNS AMONG YOUNG PEOPLE IN AMERICA (1993)). This number grew to sixty-two percent among the surveyed persons living in central cities. *Id.*

53. COOK & LUDWIG, *supra* note 30, at 7 (citing J.D. WRIGHT & P. ROSSI, ARMED AND CONSIDERED DANGEROUS 183 (1986)).

54. *Id.*

55. *Id.* at 6.

56. *Id.* at 5, 7.

57. *Id.* at 7.

58. *See id.* at 6 exh. 5.

59. *E.g.*, 18 U.S.C. § 922(b)(4) (2000) (banning sale of destructive devices, machine guns, short-barreled shotguns, and short-barreled rifles); N.Y. PENAL LAW § 265.02 (McKinney Supp. 2002) (prohibiting assault weapons).

Act"),[60] places certain limitations on gun transactions. Thus, the Brady Act prohibits the importation of handguns unless they are "suitable for or readily adaptable to sporting purposes."[61] But domestically manufactured handguns do not receive the same treatment. The Brady amendments do, however, specifically ban semiautomatic assault weapons[62] and large capacity ammunition magazines.[63] The primary focus of the Brady Act is on dealer licensing. The act requires that a person "engaged in the business" of making or selling firearms be licensed according to the provisions of the act,[64] and limits gun transactions to those between licensed dealers and residents of the dealer's state.[65] The act requires background checks on gun purchasers[66] and prohibits sales to certain categories of persons, such as convicted or indicted felons.[67] Age restrictions apply as well; the Brady Act prohibits the sale of all firearms to persons under the age of eighteen and the sale of handguns to persons under the age of twenty-one.[68]

The Brady Act provides no regulation for the secondary market in firearms, however. While some intrastate transfer requirements affect these transactions,[69] a gun transfer becomes unregulated by the act once the gun has left the hands of a licensed dealer. Data on secondary market gun transfers are scant and inconclusive.[70] Some data suggest that annually there may be an even split between the number of gun transactions on the primary market and those on the secondary market.[71] A combination of data and logic leads one to surmise, as a recent research study did, that "[y]ouths and criminals tend to obtain their guns *outside* the regulated sector of licensed dealers."[72] In any event, it is clear that thousands of firearms are transferred annually on the unregulated secondary market, and a

60. Brady Handgun Violence Protection Act, Pub. L. No. 103-159, 107 Stat. 1536 (codified as amended in scattered sections of 18 U.S.C.).

61. 18 U.S.C. § 925(d)(3).

62. *Id.* § 922(v)(1) (banning some firearms by name and others by design characteristics).

63. *Id.* § 922(w)(1).

64. *Id.* § 923.

65. *Id.* § 922(a)(5), (b)(3).

66. *Id.* § 922(s), (t).

67. *See id.* § 922(g)(1)–(8).

68. *Id.* § 922(b)(1).

69. *See id.* § 922(a)(3), (5).

70. COOK & LUDWIG, *supra* note 30, at 69.

71. *Id.* at 70 (acknowledging a certain amount of extrapolation from data to reach this conclusion).

72. *Id.*

substantial segment of those may be used in the commission of crimes.

Additionally, the Brady Act establishes the authority of the Bureau of Alcohol, Tobacco and Firearms ("BATF") to implement certain provisions.[73] Although the general public may have the impression that BATF has broad jurisdiction to address all gun transactions, BATF's jurisdiction is narrowly circumscribed. BATF's authority is limited to certain licensing activities, taxing, and exports;[74] it has no general authority to regulate firearms in the United States.

Likewise, the Consumer Product Safety Commission ("CPSC") lacks authority over firearms, even though firearms are quite plainly consumer products. Specifically, Congress has explicitly provided that the CPSC "shall make no ruling or order that restricts the manufacture or sale of firearms" or ammunition.[75] As written, this provision disables the CPSC from removing guns with known defects from the market, even where such defects imperil the gun's user. Thus, the federal scheme is a picture of loose regulation that focuses primarily on the obligations of federally licensed dealers.

State regulation paints a different kind of picture, but one that is equally deficient. While a small minority of states, as well as the District of Columbia, ban certain specified guns,[76] most states impose no restrictions on the kinds of guns citizens are allowed to possess. Most of these bans, where they exist, generally duplicate the ban imposed by the Brady Act. Some extend to "Saturday night specials," also referred to colloquially as "junk guns."[77] But in general, as with

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73. *See* 27 C.F.R. §§ 1.1–275.228 (2002).

74. *Id.* §§ 47 & 53.

75. Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, § 3(e), 90 Stat. 503, 504 (1976). The exclusion of guns from CPSC jurisdiction makes it especially appropriate and necessary for tort law to step in and provide supplemental remedies.

76. For example, some states prohibit "assault weapons." *See, e.g.*, N.J. STAT. ANN. § 2c:39-5(f) (West Supp. 2002) (declaring that anyone knowingly in possession of an assault firearm is guilty of a crime of the third degree); N.Y. PENAL LAW § 265.02 (McKinney Supp. 2002) (making it a felony to possess any machine-gun-like weapon); *cf., e.g.*, N.Y. PENAL LAW § 265.10(1) (Consol. 2001) (making the manufacture of assault weapons, machine guns, large capacity ammunition feeding devices, and disguised guns a felony). The District of Columbia bans sawed-off shotguns, machine guns, short-barreled rifles, and new acquisitions of handguns since the effective date of the law. D.C. CODE ANN. § 7-2502.02 (2001).

77. *See, e.g.*, MD. ANN. CODE art. 27, § 36-I(a)–(b) (Supp. 2002) (prohibiting manufacture or sale of handguns not listed on state handgun roster); MINN. STAT. § 624.716 (2001) (declaring that any firearms dealer who sells or manufactures a "Saturday Night Special Pistol" shall be guilty of a gross misdemeanor). The Maryland Code of Regulations lists the criteria to be used by the handgun roster board in determining whether to place a handgun on the roster. The criteria include, among other things,

the federal Act, state regulation has focused mostly on gun purchase and use, not manufacture and marketing. Thus, for example, various states have imposed their own waiting periods for purchases of firearms,[78] required firearm owner identification cards,[79] or required the reporting of gun sales records to state or local government officials.[80] States also have addressed the permissibility of carrying a firearm on one's person or in a vehicle. Many states allow their citizens to carry concealed firearms with properly issued permits,[81] while others prohibit concealed firearms, with some exceptions.[82]

Notwithstanding this loose collection of state and federal legislation on the topic of guns, any sense that the firearm industry is substantially regulated is illusory.[83] The differences among the states'

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concealability, quality of materials and manufacture, and safety. *See* MD. REGS. CODE tit. 29, § 03.03.10 (2001).

78. *See, e.g.*, CAL. PENAL CODE §§ 12071(b)(3)(A), 12072(c)(1), 12076(d)–(e), 12084(d)(7)(A) (West Supp. 2002) (imposing a ten-day waiting period and a background check prior to obtaining handguns); N.J. STAT. ANN. § 2C:58-2(a)(5)(a) (West Supp. 2002) (imposing a seven-day waiting period for the purchase of a handgun running from the date of application for a handgun permit).

79. *See, e.g.*, 2001 Ill. Legis. Serv. 92-442(3)(a) (West) (codified at scattered sections of 430 ILL. COMP. STAT. 65/ (West Supp. 2002)) (requiring firearm identification cards); MASS. ANN. LAWS ch. 140, § 129C (Law. Co-op. 1995 & Supp. 2002) (same).

80. *See, e.g.*, ALA. CODE § 13A-11-79 (1994) (requiring the reporting of gun sales to state officials); MD. REGS. CODE tit. 29, § 03.01.09(A) (2001) (same); *cf.* N.J. STAT. ANN. § 2C:58-2(b) (West Supp. 2002) (requiring retailer to keep detailed records of gun sales and to make them available for inspection by law enforcement officers).

81. *See* COOK & LUDWIG, *supra* note 30, at 7–8; *see also* Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence From State Panel Data*, 18 INT'L REV. L. & ECON. 239, 240 (1998). Some states, while detailing certain convictions and other limits (in some cases, demonstrated training in firearm use) on obtaining a permit, are relatively permissive regarding concealed carrying. *See, e.g.*, FLA. STAT. ANN. § 790.06 (West 2000) (authorizing the Department of State to issue licenses to carry concealed firearms to persons qualified as provided in the section); 18 PA. CONS. STAT. ANN. § 6109 (West 2000) (allowing the issuance of a license to carry a concealed firearm after an investigation by the sheriff to whom the application is made); TEX. GOV'T CODE ANN. § 411.172 (Vernon Supp. 2002) (delineating the requirements for eligibility for a license to carry a concealed handgun). Colorado permits concealed carrying of firearms, but grants governmental authorities substantial discretion to limit that right. *See* COLO. REV. STAT. § 18-12-105.1(2) (2002) ("A sheriff or chief of police shall make an inquiry . . . to determine if the applicant would present a danger to others or to himself or herself if the applicant is granted a permit.").

82. *See, e.g.*, 720 ILL. COMP. STAT. ANN. § 5/24-1(a)(4) (West Supp. 2002) (allowing possession of a concealed weapon where weapon not immediately accessible, among other circumstances); MO. ANN. STAT. § 570.030.1(1) (Supp. 2002) (strict ban); OHIO REV. CODE ANN. § 2923.12(C) (Anderson 2002) (allowing possession of a concealed weapon for certain defensive purposes, among other circumstances).

83. Gun industry advocates have long argued that the unregulated manufacture, distribution, and ownership of guns in this country are protected by the Constitution. They interpret the Second Amendment as extending rights to individual citizens to acquire and own guns. Gun control advocates insist that the right expressed in the amendment

approaches to gun regulation have created a patchwork with inconsistent patterns and many gaps. Given the unimpeded movement of guns across state lines, federal regulation in this area seems especially deficient. The need for states' intervention speaks loudly about the current silence at the federal level. In this country, the design, manufacture, and marketing of many guns with little or no sporting utility remain unregulated. The lack of effective regulation and the reasons for legislative inaction strengthen the argument for using tort law as a means of holding gun manufacturers responsible for the costs their products impose.

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was intended to extend only to the militias about which it was written and at most could be applied to the military and law enforcement bodies. For a brief overview of this debate, see Steven H. Gunn, *A Lawyers Guide to the Second Amendment*, 1998 B.Y.U. L. REV. 35. The Second Amendment states: "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." U.S. CONST. amend. II. The United States Supreme Court has decided few cases involving the Second Amendment. It is clear from those cases, however, that the Second Amendment does not restrict either the federal government or the states from enacting gun control legislation. *See* United States v. Miller, 307 U.S. 174, 178 (1939) (holding that the federal government has the right to regulate firearms); Miller v. Texas, 153 U.S. 535, 539 (1894) (holding that a statute prohibiting the carrying of dangerous weapons did not violate the Second Amendment); Presser v. Illinois, 116 U.S. 252, 265 (1886) (upholding a state law forbidding unauthorized military groups from organizing and drilling or parading with arms); United States v. Cruikshank, 92 U.S. 542, 553 (1875) (noting that the Second Amendment only restricts infringement by Congress). Recently, the Bush Justice Department has taken a position contrary to the Supreme Court decisions. In two briefs filed by the Government in recent Supreme Court cases, footnotes indicated the Government's broad position that the Second Amendment protects the rights of individual citizens to own and carry firearms. The footnotes attached a letter written by Attorney General Ashcroft during the fall of 2001 to the National Rifle Association, expressing the same views. *See* Linda Greenhouse, *U.S., in a Shift, Tells Justices Citizens Have a Right to Guns*, N.Y. TIMES, May 8, 2002, at A1. The letter and footnotes make clear that the Bush Administration is making a bold move toward trying to overturn decades of Supreme Court jurisprudence on the interpretation of the Second Amendment. Opportunistic litigation has followed. For example, defense attorneys in the District of Columbia are currently attempting to take advantage of the Justice Department's position in cases against their clients based upon illegal possession of weapons. They have peppered the D.C. Superior Court with motions to dismiss the charges against their clients on the theory that D.C. gun laws violate the Second Amendment. *See* Arthur Santana & Neely Tucker, *Cases Take Aim at District's Gun Law*, WASH. POST, June 13, 2002, at A20. In at least one case, the D.C. Office of Corporation Counsel has moved to intervene in support of the District's gun law. *Id.* This effort has been reflected across the nation in dozens of gun-possession cases. *See* Adam Liptak, *Defendants Fighting Gun Charges Cite New View of 2nd Amendment*, N.Y. TIMES, July 23, 2002, at A1. Even in the unlikely event that the Supreme Court were to change its consistent position that the Second Amendment does not prohibit the regulation of guns, courts would still have the power, and the responsibility, to impose liability on gun manufacturers for injuries caused by their products. Tort liability is not regulation. This point is discussed more fully in Part V.B. *infra*.

II. OBSTACLES TO PRIVATE SUITS AGAINST GUN MANUFACTURERS

Guns and ammunition are indisputably dangerous products. Few would doubt that the manufacturers of these products are aware that they are used for the commission of violent crimes and can easily be misused. The common law, however, has refused to provide a remedy for the harms caused by these dangerous products, preferring instead to pass off responsibility to the legislatures and administrative agencies. Product liability law has been especially dilatory in this regard.

A. Guns and the Failure of Traditional Strict Product Liability Doctrine

Product liability law, particularly strict product liability doctrine, has been a relatively late arrival on the tort scene. It was the result of a long evolution that began with the effects of the Industrial Revolution, when products became increasingly mass-produced and consumers grew increasingly distanced from the manufacturers. The reluctance with which courts[84] and commentators[85] treated the arrival of product liability law reflected a deep-seated concern that sellers might be forced to become virtual insurers of the products they market and would consequently either voluntarily or involuntarily leave the industry. In the mid-twentieth century, as product liability law was belatedly developing, products were becoming highly technological, increasingly dangerous, and often incomprehensible to the average consumer. Yet, some dangerous products that have

84. An instructive example of the reluctant awakening of courts to the merits of strict product liability law can be seen in the case of asbestos. *See generally* PAUL BRODEUR, OUTRAGEOUS MISCONDUCT (1985) (detailing early history of asbestos litigation with emphasis on obstacles faced by plaintiffs in the civil justice system). In one case typical of early asbestos personal injury cases, a worker exposed to asbestos dust in the workplace sued the manufacturers of the asbestos products to which he was exposed on a strict product liability theory based in failure to warn. The court dismissed the action because, inter alia, it did not construe product liability law as applicable to products causing occupational diseases, even though the claim against the manufacturers was not covered by state workers' compensation law. Bassham v. Owens-Corning Fiber Glass Corp., 327 F. Supp. 1007, 1009 (D.N.M. 1971). The dramatic shift in asbestos litigation occurred not long after *Bassham* when the Fifth Circuit, construing Texas law, held that neither the workplace environment nor the plaintiff's latent illness was an impediment to the application of strict product liability to asbestos worker personal injury cases. *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1092, 1101 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). Following the *Borel* case, jurisdictions around the nation embraced the use of strict product liability doctrine in the context of asbestos worker personal injury litigation.

85. *See* William L. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 799 (1966).

become entrenched in our social fabric retained a substantial immunity from both liability[86] and regulation.[87] Thus, manufacturers of tobacco, alcohol, and guns have benefited from a freedom from the consequences of their hazardous products that other product manufacturers have not enjoyed.[88]

Nearly fifty years ago, Dean Prosser wrote a memorable criticism of the emerging doctrine of strict product liability:

> [T]he question remains whether our courts, our legislators, and public sentiment in general, are yet ready to adopt so sweeping a legal philosophy, and to impose so heavy a burden abruptly and all at once upon all producers. Thus far there has been relatively little indication that the time is yet ripe for what may very possibly be the law of fifty years ahead .... [T]here are too many vested interests in the way, and the sudden change is likely to be regarded as too radical and disruptive; and progress in the direction of any such broad general rule cannot be expected to be rapid.[89]

In retrospect, Prosser was half correct. The ink was scarcely dry on his article when the California Supreme Court decided *Greenman v. Yuba Power Products Inc.*,[90] adopting a theory of strict liability for defective products and ushering in the strict liability era. Thus, as to the question whether the tort system was ready to adopt the new theory, Prosser was, by all accounts, wrong. His comments

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86. *See, e.g.*, Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 236 (6th Cir. 1988) (holding that defendant's cigarettes were not, as a matter of law, defective because they were not dangerous beyond what an average consumer would contemplate); Maguire v. Pabst Brewing Co., 387 N.W.2d 565, 569–70 (Iowa 1986) (holding that the plaintiff injured in automobile accident had no failure-to-warn claim against the manufacturer of alcoholic beverage consumed by the driver of the other car). Notwithstanding the relative immunity that the tobacco industry has enjoyed for decades, the tide may be turning. *See* R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 42 (Fla. Dist. Ct. App. 1996). The *Engle* class action ultimately resulted in a multi-billion dollar verdict. *See* Rick Bragg, *Tobacco Lawsuit in Florida Yields Record Damages*, N.Y. TIMES, July 15, 2000, at A1.

87. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 *passim* (2000) (holding that the FDA does not have the authority to regulate cigarettes pursuant to the federal Food, Drug & Cosmetic Act).

88. This immunity is justified in the Second Restatement by the consumer contemplation test. Because products such as tobacco, alcohol, and guns have known hazards, they would not be defective under the consumer contemplation test because their dangers are obvious. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965) [hereinafter SECOND RESTATEMENT] (presenting alcoholic beverages and products containing saturated fats as an example of products for which no warning is necessary because they are only dangerous when consumed excessively or over long periods of time).

89. William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1120–21 (1960).

90. 377 P.2d 897 (Cal. 1963).

concerning the role of vested interests, however, ring hauntingly true. Prosser correctly predicted that the time was not ripe for a comprehensive doctrine encompassing all dangerous products. The "vested interests" to which Dean Prosser referred include economic interests that have become entrenched in our political process and have an unprecedented financial power to shape the law. Gun interests are just such a force.

In 1960, when Prosser wrote his memorable article, courts were still struggling with a concept of liability for product sellers unfettered by the rules of negligence.[91] The *Restatement (Second) of Torts* ("Second Restatement"), with its bold advocacy of strict product liability, had not yet made its appearance. Indeed, even the California Supreme Court's seminal decision in *Greenman* had not been handed down. Yet, the legal system was unmistakably poised to address an onslaught of cases under the new doctrine of strict product liability. Now, past the turn of the new millennium, new issues beyond the contemplation of the drafters of the Second Restatement are plaguing the courts.

To twenty-first century sensibilities, the Second Restatement has a certain quaint, old-fashioned ring to it.[92] Its attitude toward many

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91. An early warning of the struggle appeared in Justice Traynor's concurrence in *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring), in which he argued that the court should dispense with clumsy theories of warranty and res ipsa loquitur and straightforwardly acknowledge strict liability in tort. The concept of product warranty is now understood as a transitional stage of development in product liability law, bridging the doctrinal gap from negligence to strict liability in tort. *See* DAN B. DOBBS, THE LAW OF TORTS 972–75 (2000). The states recognized both express warranties and implied warranties of quality, based on a theory of privity of contract between buyer and seller. These warranties are currently set forth in the Uniform Commercial Code, as adopted by the various states. *See* U.C.C. § 2-313 (1998) (express warranty); *id.* § 2-314 (implied warranty of merchantability); *id.* § 2-315 (implied warranty of fitness for a particular purpose). Until 1960, warranty was a clumsy concept because of the requirement of vertical privity; thus, although liability was strict, the privity requirement remained, meaning that an injured buyer could sue only the immediate seller. The situation changed forever in 1960, when the New Jersey Supreme Court handed down Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 81–83 (N.J. 1960), abolishing the vertical privity requirement in warranty cases. But problems of horizontal privity persist. The scope of persons allowed to bring warranty claims is now governed by each particular state's adoption of one of the alternatives set forth in section 2-318 of the UCC. Warranty claims are not typically invoked in suits by gun violence victims because the warranties go directly and explicitly to the function of the gun and because, more generally, the rise of strict liability has made warranty claims less inviting.

92. For example, comment i states: "Good butter is not unreasonably dangerous merely because . . . it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous." SECOND RESTATEMENT, *supra* note 88, § 402A cmt i. While the concept of contamination is sound, the threat seems quaintly remote.

hazardous products, such as tobacco, is curiously permissive and archaic. For example, the Second Restatement eschews liability for "good tobacco," but allows liability where the tobacco contains marijuana.[93] The law has been slow to acknowledge the reality of modern society in which the dangers posed by many previously tolerated products are increasing daily. Indeed the recently drafted *Restatement (Third) of Torts: Products Liability* ("Third Restatement") retains, at least implicitly, many of these attitudes.[94] The tenacity of such outmoded views of liability is reflected in the courts' reticence to impose liability on gun manufacturers for injuries associated with their products.

The concept of strict liability allows for seller liability when its defective product injures the ultimate user or consumer. Gun manufacturers design and market their products to shoot and, where necessary, to injure or kill human beings. Thus, the argument continues, guns are not defective when they are so used, for the product is functioning exactly as intended. Courts have generally not imposed liability on classes of products that are inherently dangerous such as guns. Additionally, guns have created problems for the application of strict product liability law because injuries arising from criminal and accidental activity typically involve a third person who pulls the trigger. We will discuss each of these points in turn.

1. Establishing a Product Defect

The Second Restatement defined an abnormally dangerous product as one that is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it."[95] The level of knowledge attributed to the ordinary consumer is the common knowledge of the community.[96] Thus, a highly dangerous product, the hazards of which are generally known to the public, would not meet the definition of product defect as contemplated by the Second Restatement. The dangerous design of guns, for example, is widely known and publicized, and the "ordinary" consumers of guns would be aware of their ability to be used as weapons in criminal acts, as well as the dangers of accidental shootings. According to this argument, there would be no strict liability for guns as properly designed. Some jurisdictions refused to

93. *Id.* Similarly, comment i states that "good whiskey" is defective if it contains fusel oil, but not if it causes drunkenness. *Id.*

94. *See infra* notes 98–106 and accompanying text.

95. SECOND RESTATEMENT, *supra* note 88, § 402A cmt. i.

96. *Id.*

follow strictly the Second Restatement's consumer expectation test, preferring instead to employ a risk-utility standard for determining whether a product's design is defective.[97] The risk-utility test assigned a lesser role to consumer contemplation of danger, thus making room for the possibility of manufacturer liability for inherently dangerous products.

In accordance with this trend, the Third Restatement, which appeared officially in 1998, rejected consumer expectation as the test of product defect, preferring instead the risk-utility test for claims of defective product design.[98] Thus, if a product's foreseeable risks outweigh its social utility, the product seller may be liable for a design defect, provided that a safer alternative design, which would have reduced or eliminated the hazards, could have been adopted.[99] Accordingly, at least some products with egregious defects obvious to the user or consumer could be deemed defective under the Third Restatement's test.[100] Notwithstanding this broader definition of design defect, the Third Restatement continued to require that the product be defective in the traditionally contemplated way.[101]

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97. *See, e.g.*, Radiation Tech., Inc. v. Ware Constr. Co., 445 So. 2d 329, 331 (Fla. 1983) (including reasonable alternative design in risk-utility analysis); Holm v. Sponco Mfg. Inc., 324 N.W.2d 207 (Minn. 1982) (adopting the risk-utility test for design defects).

98. THIRD RESTATEMENT, *supra* note 10, § 2(b).

99. *Id.*

100. *Compare* Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 230 N.W.2d 794, 798–99 (Wis. 1975) (finding a swimming pool gate not defective under the consumer contemplation test because the hazard was obvious to the purchaser) *with* Phillips v. Kimwood Machine Co., 525 P.2d 1033, 1038–39 (Or. 1974) (finding a fiberboard sanding machine defective under the risk-utility test).

101. As we discuss later in this Article, the drafters of the Third Restatement did acknowledge the possibility of liability for a manifestly unreasonable product, but only in extreme cases, such as (and maybe only) that of an injury-causing exploding cigar. Other products arguably fitting that category, including "alcoholic beverages, firearms, and above-ground swimming pools," would not qualify as manifestly unreasonable. THIRD RESTATEMENT, *supra* note 10, § 2, cmt. d. In the ALI's view, "legislatures and administrative agencies can, more appropriately than courts, consider the desirability of commercial distribution of some categories of widely used and consumed, but nevertheless dangerous, products." *Id.* One item omitted from the above list—but present in earlier drafts of the Third Restatement—was tobacco. *See* David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 778 n.153 (listing products originally included under comment d: "alcoholic beverages, tobacco, firearms, above-ground swimming pools"). Tobacco was stricken from the final version of the comment because it had by then become clear that courts had, in fact, gotten involved in determining that cigarette manufacturers could be liable for the sale and marketing of their products. *See* PROCEEDINGS OF THE AMERICAN LAW INSTITUTE, May 10, 1997, at 209–11 (Comments of Jay Dratler, preceding vote to strike tobacco from the list). As we discuss in Part III.A., the courts' changing views on the liability of tobacco manufacturers is due in part to the recent revelations that the manufacturers knew that

Hazards designed into the product that go to the essence of the product's utility would not be deemed product defects.

The reporters for the Third Restatement, in their Notes, expressly rejected the application of strict liability to "nondefective products that are nevertheless egregiously dangerous,"[102] such as guns. The reporters noted that a clear majority of courts that have dealt with products falling into this category have held that strict liability does not apply. This view presents some inconsistencies. Inasmuch as the Third Restatement specifically endorses a risk-utility analysis to determine the existence of a product design defect (along with the availability of a safer alternative design), application of strict liability to inherently dangerous products appears to be warranted.[103] If a product is defective where its risk outweighs its utility and where a safer alternative design is generally available and practicable, then an inherently lethal product should fit within the paradigm. Nevertheless, the Third Restatement observes that "[a]bsent proof of defect . . . , courts have not imposed liability for categories of products that are generally available and widely used and consumed, even if they pose substantial risks of harm."[104] Rather, the reporters declare that these matters are more appropriately handled by legislatures and administrative agencies.[105] Traditionally, such products have included alcohol, tobacco, and firearms.[106] Significantly, these products are

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their product was addictive, but concealed that information. The issue of knowledge, we argue, is also relevant in gun cases.

102. THIRD RESTATEMENT, *supra* note 10, § 2, rptrs' note IV.D.

103. The Third Restatement states that a product "is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe . . . ." *Id.* § 2(b).

104. *Id.* § 2 cmt. d. The real questions raised here are specifically what the reporters intended by "defect," and, more generally, how defect *should* be defined. Courts refusing to hold gun manufacturers liable typically have defined "defect" narrowly.

105. *Id.*

106. *See generally id.* (discussing alcoholic beverages, firearms, and above-ground swimming pools in this context); *id.*, rptrs' note IV.D (referencing tobacco products). These views are perhaps defensible if one views the Third Restatement as exactly that—a restatement of existing law. But as to current issues involving substantial policy questions, the reporters had to step outside the role of restaters and take a position. They explicitly set forth this position prior to the official issuance of the Third Restatement. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1266 (1991) ("In our view, American products liability law has reached a point from which further meaningful development is not only socially undesirable but also institutionally unworkable."). Moreover, courts and commentators have justly criticized the Third Restatement for setting forth provisions that are actually contrary to existing law. *See, e.g.*, Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1331 & n.11 (Conn. 1997) (also providing summary of commentary on the issue); John F. Vargo, *The Emperor's New Clothes: The*

precisely the kinds of products for which adequate government regulation is lacking.

Under the Third Restatement, a gun would not be considered defectively designed unless it were to misfire or exhibit some other malfunction. This position conforms to the view of cases such as *DeRosa v. Remington Arms Co.*,[107] in which the court stated that the "very purpose [of a handgun] is to cause injury—to kill and to wound."[108] In *Richardson v. Holland*,[109] the court expanded on this common theory, stating that "[f]or a handgun to be defective, there would have to be a problem in its manufacture or design, such as a weak or improperly placed part, that would cause it to fire unexpectedly or otherwise malfunction."[110] Similarly, in *Forni v. Ferguson*,[111] the court stated: "As a matter of law, a product's defect is related to its condition, not its intrinsic function . . . ."[112]

In *McCarthy v. Olin Corp.*,[113] the court applied similar reasoning to a case involving "Black Talon" bullets. The Black Talon is a bullet

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American Law Institute Adorns a 'New Cloth' for Section 402A Products Liability Design Defects—Survey of the States Reveals a Different Weave, 26 U. MEM. L. REV. 493, 501 (1996) (analyzing the common law, statutes, and pattern jury instructions for the standard for design defects in all fifty states). The *Potter* court stated that "[c]ontrary to the rule promulgated in the Draft Restatement (Third), our independent review of the prevailing common law reveals that the majority of jurisdictions *do not* impose upon plaintiffs an absolute requirement to prove a feasible alternative design." *Potter*, 694 A.2d at 1331. The court also noted that only eight states require a plaintiff to prove reasonable alternative design, and five of these do so by statute, not decisional law. *Id.* n.11 (listing, by category of rule, all states that have considered the issue). For an interesting view of *Potter*'s quick disavowal of the Restatement Third's definition of design defect by a dissenting member of the ALI, see Marshal S. Shapo, *Products Liability: The Next Act*, 26 HOFSTRA L. REV. 761 (1998).

107. 509 F. Supp. 762 (E.D.N.Y. 1981).

108. *Id.* at 767.

109. 741 S.W.2d 751 (Mo. Ct. App. 1987). The plaintiffs alleged that the gun in question was a Saturday night special. *Id.* at 753.

110. *Id.* at 754.

111. 648 N.Y.S.2d 73 (N.Y. App. Div. 1996).

112. *Id.* at 74; *accord, e.g.*, Moore v. R.G. Indus., Inc., 789 F.2d 1326, 1327 (9th Cir. 1986) (holding that a handgun that performs as intended is not defectively designed); Shipman v. Jennings Firearms, Inc., 791 F.2d 1532, 1533–34 (11th Cir. 1986) (holding that there was no claim against gun manufacturers under theories of strict product liability or negligence and that the ultrahazardous doctrine did not apply to guns); Perkins v. F.I.E. Corp., 762 F.2d 1250, 1272 (5th Cir. 1985) (holding that there must be a showing of a functional problem with a handgun to prove a defect); Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1323 (E.D.N.Y. 1996) ("The mere act of manufacturing and selling a handgun does not give rise to liability absent a defect in the manufacture or design of the product itself."); Armijo v. Ex Cam, Inc., 656 F. Supp. 771, 773 (D.N.M. 1987) (rejecting "strict products liability as a theory for holding handgun manufacturers liable for the criminal misuse of their products").

113. 119 F.3d 148 (2d Cir. 1997). *McCarthy* arose out of the 1993 Long Island Railroad shooting in which Colin Ferguson boarded a commuter train in New York City and

designed to enhance the tearing, and thus wounding, power of the bullet.[114] It was designed by Olin Corporation for use by law enforcement personnel, but Olin also marketed the Black Talon bullet to the general public.[115] Among other claims, the *McCarthy* plaintiffs alleged a strict liability claim against Olin based upon design defect. The district court had ruled that the plaintiffs failed to state a strict liability claim because the nature of the risk was in the function of the bullets and was not created by a defect.[116] The Second Circuit Court of Appeals agreed with the district court and stated:

> [T]he risk of injury to be balanced with the utility is a risk not intended as the primary function of the product. Here, the primary function of the Black Talon bullets was to kill or cause serious injury. There is no reason to search for an alternative safer design where the product's sole utility is to kill and maim.[117]

Thus, the court took a rather narrow, but traditional, approach to the concept of product defect. Since the purpose of the bullet was to tear through flesh and bone to enhance wounding power, no safer alternative design would have been feasible without denying the product its essential function. Accordingly, the Black Talons could not be deemed to be defectively designed because they had performed according to their intended purpose. The court so ruled notwithstanding the extreme hazard of the product.

While some products must be designed as unreasonably dangerous to function properly—knives and guns among them—the question remains whether the law will tolerate the harm these products cause. The same question arises in situations in which

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opened fire on the passengers, using a 9mm semiautomatic handgun loaded with Winchester "Black Talon" bullets. *Id.* at 151.

114. *Id.* at 152. "The Black Talon is a hollowpoint bullet designed to bend upon impact into six ninety-degree angle razor-sharp petals or 'talons' that increase the wounding power of the bullet by stretching, cutting and tearing tissue and bone as it travels through the victim." *Id.*

115. Originally marketed in 1992, Olin received public criticism and ceased marketing the bullet to the general public approximately one month prior to the Long Island Railroad incident. The evidence showed that Ferguson had purchased the Black Talons used in the shooting prior to withdrawal of the bullets from the public market. *Id.*

116. *Id.*

117. *Id.* at 155. The plaintiffs originally brought suit in New York state court and named two additional defendants in the lawsuit—Sturm, Ruger & Company, the manufacturer of the handgun, and Ram-Line Inc., the manufacturer of the handgun's magazine. Following the defendants' removal of the action to federal district court, the claims against those two defendants were dismissed with prejudice. *Id.* at 152. In addition to the strict liability design defect claim, the plaintiffs alleged claims against Olin based upon negligence theories. *See id.* at 156–57.

marketing strategies target high-risk consumers—such as criminals or the public in general—when the product should be limited to military or law enforcement use.

The rule of *McCarthy* is counterintuitive. The Second Circuit has clearly stated that the only risks appropriate for consideration in a risk-utility analysis are those unassociated with the "primary function" of the product. Because the risk that a criminal would use the bullets in a devastating shooting spree in which people were killed and seriously injured—a result enhanced by the essential function of the Black Talons—is within the "primary function" of the Black Talons, the manufacturer simply escapes liability. Thus, the more dangerous the function of the product, the broader the range of injuries from which the manufacturer will be immunized. Such a rule runs a serious risk of underdeterrence by encouraging gun manufacturers to design their products with excessively dangerous features. The *McCarthy* court's definition of a product defect thus omits from liability some of the most dangerous products on the market.

2. The Third-Party Tortfeasor Issue

A further argument advanced to defeat strict product liability claims against gun manufacturers is that the manufacturers should not be held liable for criminal misuse of their products. Courts are concerned that to hold to the contrary would require manufacturers to be insurers of their products. Thus, in *DeRosa v. Remington Arms Co.*,[118] the court stated that "[a] manufacturer in New York is not . . . required . . . to protect against every conceivable misuse by its design choices."[119] Accordingly, the court declined to impose liability on the gun manufacturer, notwithstanding long-established law in New York that intervening acts do not generally relieve a tortfeasor of liability for the ultimate harm that occurs from a third party's use of its product if the third party's actions were foreseeable.[120] The court applied its pronouncement to claims founded in both strict product liability and negligence.[121]

The *DeRosa* court's approach is puzzling. As discussed below,[122] well-understood principles of tort law call for the imposition of liability even where the intervening act was intentional, so long as the

118. 509 F. Supp. 762 (E.D.N.Y. 1981).
119. *Id.* at 768.
120. *Id.*
121. *Id.*
122. *See infra* notes 400–06 and accompanying text.

defendant "at the time of his negligent conduct realized or should have realized the likelihood that [a future action] might [occur], and that a third person might avail himself of the opportunity to commit . . . a tort or crime."[123] Gun manufacturers clearly fit this profile for liability.

As a public policy matter, courts and commentators who espouse the majority view accept the result that manufacturers of guns that are foreseeably used for illegal purposes may escape liability for the injuries caused by their products.[124] But they have failed to offer any clear explanation as to why this position is desirable from a public policy standpoint, much less any explanation as to how it can be reconciled with general rules of causation. Indeed, under these circumstances, courts would be more faithful to these general rules by coming down on the side of manufacturer liability, at least with regard to guns promoted and used frequently in violent crimes.[125]

B. Retrogressive Negligence Rulings: Protecting Gun Manufacturers

Victims and their families have also advanced various negligence claims against gun manufacturers. The most prevalent theory is negligent marketing. This theory is based upon the manufacturer's knowledge that its gun would be prone to criminal misuse resulting in the injury or death of others. Thus, the argument continues, the manufacturer should be held liable just as a retail seller would be held liable under the circumstances. These claims have been based on such manufacturer practices as advertising the guns in publications known to be popular with criminals (but not legitimate gun users), packaging and distributing guns in a kit format to evade federal and local regulation, and failing to exert control over the distribution of the guns into the criminal market.[126]

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123. SECOND RESTATEMENT, *supra* note 88, § 448.

124. *See, e.g.*, Patterson v. Rohm Gesellschaft, 608 F. Supp. 1206, 1212–13 (N.D. Tex. 1985) (holding that illegal use of handgun is not subject to risk/utility test). *But see* Windle Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims*, 10 N. KY. L. REV. 41, 60–61 (1982) (advocating manufacturer liability for foreseeable and predictable illegal use of their handguns).

125. For a fuller discussion of the policy justifications for allowing liability under these circumstances see *infra* notes 308–26 and accompanying text, in which we demonstrate that the policies of tort law are better served by holding gun manufacturers liable in cases in which the foreseeability of harm is great and the social utility of the particular gun is low.

126. *See* Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055 (N.Y. 2001). The New York Court of Appeals summarized the *Hamilton* plaintiffs' negligent marketing claims as follows:

> According to the plaintiffs, handguns move into the underground market in New York through several well-known and documented means, including straw

The court in *First Commercial Trust v. Lorcin Engineering, Inc.*,[127] addressed this issue in affirming summary judgment for the defendant gun manufacturer.[128] The court relied on the fact that under Arkansas law, and the law of many states, liability may only be found if a special relationship exists between the victim and the defendant.[129] The court then determined that the relationship between a gun manufacturer and the victim of criminal activity was too remote to establish the necessary special relationship.[130] The court in *Delahanty v. Hinckley*,[131] concurring on this point,[132] noted that gun manufacturers are not in a position to prevent the criminal misuse of the guns they market, through screening or otherwise.[133] The reasoning of these courts begins to unravel when one examines marketing information demonstrating that some manufacturers deliberately promote their guns—usually guns with no real utility in law enforcement or sporting—in ways that are sure to capture the attention of criminals and other persons who may use them in a less than socially conscientious manner. These manufacturers certainly are in a position to market their products in a more socially responsible manner, thus at least reducing the harm they foster. Allowing the manufacturers to escape liability altogether would create a curiously perverse result.

> purchases . . . , sales at gun shows, misuse of Federal firearms licenses and sales by non-stocking dealers . . . . Plaintiffs further assert that gun manufacturers have oversaturated markets in states with weak gun control laws (primarily in the Southeast), knowing those "excess guns" will make their way into the hands of criminals in states with stricter laws such as New York, thus "profiting" from indiscriminate sales in weak gun states. Plaintiffs contend that defendants control their distributors' conduct with respect to pricing, advertising and display, yet refuse to institute practices such as requiring distribution contracts that limit sales to stocking gun dealers, training salespeople in safe sales practices . . . , establishing electronic monitoring of their products, limiting the numbers of distributors, limiting multiple purchases and franchising their retail outlets.

Id. at 1059–60.

127. 900 S.W.2d 202 (Ark. 1995).

128. *Id.* at 205.

129. *Id.* at 204. Such special relationships have been found between landlord and tenant, employer and employee, hospital and patient, and school and student. Delahanty v. Hinckley, 564 A.2d 758, 762 (D.C. 1989) (citing Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 482–83 (D.C. Cir. 1970); District of Columbia v. Doe, 524 A.2d 30, 32 (D.C. 1987)). These relationships, while not necessarily of a one-on-one nature, are not as attenuated as the relationship between gun manufacturer and ultimate victim.

130. 900 S.W.2d at 204.

131. 564 A.2d 758 (D.C. 1989).

132. *Id.* at 762 ("In general no liability exists in tort for harm resulting from the criminal acts of third parties, although liability for such harms sometimes may be imposed on the basis of some special relationship between the parties.").

133. *Id.*

More recently, the New York Court of Appeals followed the special-relationship rule in *Hamilton v. Beretta U.S.A. Corp.*,[134] a case heard on certified questions from the United States Court of Appeals for the Second Circuit.[135] *Hamilton* began in 1995, when the families of persons killed by handguns brought an action in federal court against forty-nine handgun manufacturers on a variety of claims, including negligent marketing.[136] A jury trial on the negligent marketing claim resulted in an award of damages against three of the manufacturers, with liability apportioned according to the manufacturers' respective market shares in the national handgun market.[137] The relevant question certified by the Second Circuit was "[w]hether the defendants owed plaintiffs a duty to exercise reasonable care in the marketing and distribution of the handguns they manufacture."[138]

The court of appeals followed the general rule that defendants ordinarily do not have a duty to control the actions of third parties.[139] Acknowledging that exceptions to this rule have been recognized for certain special relationships that did not appear in this case, the court refused to find a duty.[140] The general thrust of the court's opinion was that "[f]oreseeability, alone, does not define duty,"[141] thus minimizing the significance of the defendants' knowledge that many of their guns would be used in criminal activities and would be sold in an illegal market. Absent proof that the negligent marketing itself caused the plaintiffs' decedents' injuries, no duty will attach.[142]

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134. 750 N.E.2d 1055 (N.Y. 2001).

135. *Id.* at 1059.

136. *Id.* at 1058.

137. *Id.* at 1059. The three defendants ordered to pay damages were American Arms, Beretta U.S.A., and Taurus International Manufacturing. *Id.* Their market shares were determined to be 0.23%, 6.03%, and 6.80%, respectively. *Id.* Judge Weinstein of the Eastern District of New York had previously ruled that a market share liability theory could apply to the case, "[i]f the underlying cause of the injuries is the unchecked growth of the underground handgun market," rather than a particular individual sale, or if the manufacturer is unknown. Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1331 (E.D.N.Y. 1996). Examining New York law, the district court stated at the time that "it would be premature to conclude that the New York Court of Appeals would decline to adopt any theory of collective liability in this case." *Id.* The court of appeals later did just that, stating that "plaintiffs here have not shown a set of compelling circumstances akin to those in [DES cases] justifying a departure from traditional common law principles of causation." *Hamilton*, 750 N.E.2d at 1068.

138. *Hamilton*, 750 N.E.2d at 1059.

139. *Id.* at 1061.

140. *Id.*

141. *Id.* at 1060.

142. *Id.* at 1062.

The court noted that the plaintiffs submitted no evidence that different marketing strategies by the defendants would have prevented or mitigated the injuries.[143] The court suggested that the plaintiffs relied instead on the argument that guns in general—rather than just those guns marketed negligently—create a risk to the public.[144] Thus, the focus of the court's inquiry was on the extent to which the negligent marketing was the cause of the plaintiffs' injuries. The plaintiffs could not present any argument that would have surmounted the obstacles imposed by the special relationship rule, notwithstanding the foreseeability of the use of the guns by criminals.

The court also rejected the plaintiffs' arguments that the gun manufacturers had a general duty of care toward the public because they were in a unique position to control the risk through prudent marketing.[145] In rejecting this theory of liability, the court expressed concern that recognition of such a duty would create "indeterminate" classes of plaintiffs and defendants,[146] thus offering another version of the timeworn Pandora's box scenario.

An alternative, but closely related, theory advanced by gun plaintiffs has been negligent entrustment. The basis for this theory can be found in section 390 of the Second Restatement:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.[147]

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143. *Id.*

144. *Id.*

145. *Id.* at 1063.

146. *Id.* Elsewhere, the court stated that concern for the future requires that litigation be kept within manageable bounds. *Id.* at 1060. In another part of the opinion, the court rejected the theory of market share liability, which had been accepted by the district court as a means of permitting suits when the plaintiffs cannot identify the precise manufacturer of the gun (which may not have been recovered at the crime scene). The court stated that the specific circumstances that gave rise to market share liability in New York in the context of the DES personal injury cases were not present in this case. The court stated: "Notably, courts in New York and other jurisdictions have refused to extend the market share theory where products were not fungible and differing degrees of risk were created." *Id.* at 1068. For an articulation of the market share theory under New York law, see *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y.), *cert. denied sub nom. Rexall Drug Co. v. Tigue*, 493 U.S. 944, 110 S. Ct. 350 (1989).

147. SECOND RESTATEMENT, *supra* note 88, § 390.

Another Restatement section reinforces this duty in situations in which third persons commit criminal acts with the chattel. Section 302B of the Second Restatement provides: "An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of . . . a third person which is intended to cause harm, even though such conduct is criminal."[148] Thus, a gun manufacturer's knowledge that its guns are likely to be used by criminals to harm members of the public arguably falls within the scope of the duty defined in these sections.

The New York Court of Appeals considered this theory in *Hamilton*, at least under the facts presented there.[149] The court acknowledged that the negligent entrustment theory had been successfully applied to gun sales in some cases[150] and that the "duty may extend through successive, reasonably anticipated entrustees."[151] But the court confined the doctrine to situations in which the manufacturer had actual knowledge of the specific individual's potential for harm.[152] Although the court conceded that the manufacturer may have a duty to refuse to deal with distributors who the manufacturer knows or reasonably should know have been engaged in "substantial sales of guns into the gun-trafficking market on a consistent basis,"[153] the court declined to impose on manufacturers an affirmative duty "to investigate and identify corrupt dealers."[154] The court noted that gun manufacturers are not able to effectively trace guns used in crimes to specific dealers without the assistance of law enforcement bodies. Because that task has been assigned to the Bureau of Alcohol, Tobacco and Firearms, which does not disclose such information, imposing a duty to investigate on the manufacturers would be oppressive.[155] Moreover, the court said, an

148. *Id.* § 302B.

149. *Hamilton*, 750 N.E.2d at 1066.

150. *See, e.g.*, Cullum & Boren-McCain Mall, Inc. v. Peacock, 592 S.W.2d 442, 444 (Ark. 1980) (holding that common law negligence applies to sale of guns); Semeniuk v. Chentis, 117 N.E.2d 883, 884–85 (Ill. App. Ct. 1954) (holding that a seller of a gun who knows the product will be used by a minor can be subject to a negligence claim); Splawnik v. DiCaprio, 540 N.Y.S.2d 615, 617 (N.Y. App. Div. 1989) (holding that a claim of negligent entrustment of a gun is a sufficient cause of action to defeat a motion to dismiss).

151. *Hamilton*, 750 N.E.2d at 1064 (cautioning against imposing theories of tort liability while the issue of illegal gun sales remains the focus of national policy debate).

152. The court cited a case in which a negligent entrustment claim involving a BB gun had been dismissed: "[A] dealer's knowledge of the individual's ability to use the gun safely could not be imputed to the manufacturer." *Id.* (citing Earsing v. Nelson, 629 N.Y.S.2d 563 (N.Y. App. Div. 1995)).

153. *Hamilton*, 750 N.E.2d at 1064.

154. *Id.* at 1065.

155. *Id.* at 1065 n.7.

independent manufacturer investigation could impede BATF's investigation.[156]

The *Hamilton* case is consistent with most decisions on these negligence theories. Unlike *Hamilton*, however, most courts addressing this issue have offered little in the way of explanation.[157] The sum total of the court's analysis of the negligence claim alleged in *Forni v. Ferguson*[158] consisted of boilerplate language tracking the requirements of duty, breach, and proximate cause, followed by a summary conclusion that these requirements were not met.[159] In *Hilberg v. F.W. Woolworth Co.*,[160] the court cited the special relationship doctrine, mentioned an earlier Colorado case involving injuries from a trampoline, and rapidly concluded that the trial court had been correct in dismissing the negligence claims against the gun manufacturer.[161] Similarly, the court in *Delahanty v. Hinckley*[162] merely stated that the plaintiffs "have alleged no special relationship with the gun manufacturers and have suggested no reasonable way

156. *Id.* at 1065.

157. *See, e.g.*, Armijo v. Ex Cam, Inc., 656 F. Supp. 771, 775 (D.N.M. 1987) ("In the absence of any legislative action, or specific guidance from the New Mexico courts, this Court will not impose a 'duty' upon manufacturers of firearms not to sell their products, merely because such products have the potential to be misused for purposes of criminal activity."); Forni v. Ferguson, 648 N.Y.S.2d 73, 74 (N.Y. App. Div. 1996) ("The manufacturers in this case certainly had no control over the criminal conduct of a third party.").

158. 648 N.Y.S.2d 73, 74 (N.Y. App. Div. 1996).

159. *Id.*; *accord, e.g.*, *Armijo*, 656 F. Supp. at 775 (D.N.M. 1987) (holding that the elements of negligence were not met); Caveny v. Raven Arms Co., 665 F. Supp. 530, 536 (S.D. Ohio 1987) (same); Riordan v. Int'l Armament Corp., 477 N.E.2d 1293, 1296 (Ill. App. Ct. 1985) (same); Resteiner v. Sturm, Ruger & Co., 566 N.W.2d 53, 55–56 (Mich. App. 1997) (same), *appeal denied*, 586 N.W.2d 918 (Mich. 1998).

160. 761 P.2d 236 (Colo. App. 1988), *overruled by* Casebolt v. Cowan, 829 P.2d 352 (Colo. 1992).

161. *Id.* at 239–40. The *Hilberg* plaintiffs also brought several negligence claims against F.W. Woolworth Co., the retailer that sold the gun in question. The injured minor was accidentally shot by a friend who was using a rifle purchased by his father for him. *Id.* at 238. One of the claims alleged negligent entrustment in the selling of the rifle because the Woolworth employee allegedly knew that the purchaser intended to give the rifle to his minor son. *Id.* The court stated that "the supplier of the instrumentality entrusted must have actual knowledge either of the user's propensity to misuse the instrumentality or of the facts from which such knowledge could reasonably be inferred." *Id.* The court also required that the supplier "have some ability subsequently to control the user of the manner in which the instrumentality is used." *Id.* Here, the Woolworth employee had no such knowledge or control. *Id.* at 239. *Hilberg* was overruled by the Colorado Supreme Court on the point of subsequent control in Casebolt v. Cowan, 829 P.2d 352, 360 (Colo. 1992) (stating "we reject subsequent control as an essential element of negligent entrustment. To the extent that . . . *Hilberg* require[s] subsequent control, we overrule [it].").

162. 564 A.2d 758 (D.C. 1989).

that gun manufacturers could screen the purchasers of their guns to prevent criminal misuse."[163] Even in *McCarthy v. Olin Corp.*,[164] the Second Circuit's explanation was essentially a longer version of the abbreviated conclusion that gun manufacturers cannot be expected to exert control over the activities of the persons in whose hands their products land.[165]

Indeed, the separate claims of negligent marketing and negligent entrustment seem to fuse into a single negligence claim in the cases against gun manufacturers. While negligent marketing is essentially broader than negligent entrustment, the courts' discomfort with these gun claims boils down to one issue—the fact that the manufacturer and the perpetrator of the violence are not directly involved with each other. In the Second Restatement, this rule is embodied in section 315, which, on its face, provides that a person has no duty to control the conduct of third parties without a special relationship.[166]

The special relationship requirement is inappropriate in cases against gun manufacturers. As the court in *Weirum v. RKO General Inc.*[167] pointed out, section 315 was intended to apply only to conduct that constitutes nonfeasance, not to conduct that constitutes misfeasance.[168] The court stated that the special relationship rule thus "has no application if the plaintiff's complaint . . . is grounded upon an affirmative act of defendant which created an undue risk of harm."[169] In many gun personal injury torts, the plaintiffs' claims

163. *Id.* at 762.

164. 119 F.3d 148 (2d Cir. 1997).

165. *Id.* at 156–57. The court stated:

> New York courts do not impose a legal duty on manufacturers to control the distribution of potentially dangerous products such as ammunition .... "[I]t is unreasonable to impose [a] duty where the realities of every day experience show us that, regardless of the measures taken, there is little expectation that the one made responsible could prevent the . . . conduct [of another]."

Id. at 157 (quoting Pulka v. Edelman, 358 N.E.2d 1019, 1022 (N.Y. 1976)).

166. SECOND RESTATEMENT, *supra* note 88, § 315.

167. 539 P.2d 36 (Cal. 1975).

168. *Id.* at 41. The court interpreted section 315 as an adjunct to section 314, which provides that no duty exists for a person to be a "good samaritan." *Id. Weirum* involved an automobile accident caused by a car chasing a radio station car during a radio game for a cash prize. The chasing car collided with the decedent's car, and his survivors sued the radio station. *Id.* at 38–39. For a recent article focusing on the special relationship rule in the context of gun distribution, see Rachana Bhowmik et al., *A Sense of Duty: Retiring the "Special Relationship" Rule and Holding Gun Manufacturers Liable for Negligently Distributing Guns*, 4 J. HEALTH CARE L. & POL'Y 42, 51–77 (2000) (arguing that abrogation of the special relationship rule is warranted in gun cases).

169. 539 P.2d at 41. The court held that the special relationship rule did not apply to the plaintiffs' claim against the radio station. The California Supreme Court recently applied *Weirum* in a case where the California Highway Patrol ("CHP") required the car in which the plaintiffs were traveling to pull into the center median of a highway, rather

against gun manufacturers are grounded in such allegations. The plaintiffs do not claim that the manufacturers did nothing; rather, they claim that the manufacturers affirmatively placed unnecessarily dangerous and socially useless guns on the market knowing that they would get into the hands of criminals who were likely to use them to injure or kill people.[170] The special relationship rule does not shield gun manufacturers from such claims of misfeasance.

Furthermore, the special relationship rule does not reflect the realities of contemporary society, where manufacturers place thousands of hazardous products into the hands of the public through a chain of distributors and retailers. The courts' tendency to issue blanket dismissals of claims involving manufacturers sued for the actions of remote users of their products is coupled with refusals to scrutinize the ability of the manufacturers to exert some control over the hazards their products impose. For example, gun manufacturers are in a position to investigate, *ex ante*, the retailers who sell their guns to determine if the practices of those retailers in complying with federal and local law and refusing gun sales to persons likely to commit crimes are in order.[171] From a public policy standpoint, imposing a duty on manufacturers to investigate is designed to prevent future harms that could result from their products. Yet courts have been unwilling to engage this issue in a serious, deliberative way.

As Professor Robert L. Rabin has aptly noted, negligence doctrine has been evolving toward a broader concept of proximate cause in categories of cases that have close similarities to the gun cases, particularly those involving liability for the intervening acts of

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than off to the side. Lugto v. Cal. Highway Patrol, 28 P.3d 249, 256–57 (Cal. 2001). CHP had convinced the trial court that it should be granted summary judgment, in part because it owed no affirmative duty to protect the car's occupants from harm. The Court of Appeal and the California Supreme Court disagreed; according to the high court, this case, like *Weirum*, was an instance of misfeasance, which exists when "the defendant is responsible for making the plaintiff's position worse; i.e., defendant has created a risk." *Id.* at 256–57 (quoting *Weirum*, 539 P.2d at 49).

170. *See* Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1060 (N.Y. 2001).

171. This has become an issue in the lawsuit brought by twelve California cities and counties against gun manufacturers. The cities have sought to introduce evidence at trial indicating that one manufacturer failed to comply with a request from BATF to investigate the illegal use of its guns. Fox Butterfield, *Letter is Crucial in Lawsuit on Liability of Gun Makers*, N.Y. TIMES, Sept. 30, 2002, at A11. Among other things, the cities have contended that the manufacturer could use such information, along with BATF information tracing guns used in certain crimes, to refuse to sell its products to dealers associated with guns used in crime. *Id.*

others.[172] Accompanying this evolution has been a transformation in at least moral duty concepts, if not legal duty concepts. Rabin has stated: "In an important sense, the erosion of the proximate cause limitation for intervening acts can be regarded as a temporal shift in moral sensibilities from a more individualistic era to one in which tort law . . . increasingly reflects more expansive notions of responsibility for the conduct of others."[173] As we demonstrate in Part VI, gun manufacturer liability is a logical extension of this evolution in negligence law.

C. *Guns and the Abnormally Dangerous Activities Doctrine: An Off-Target Theory*

Another theory frequently—and, once again, unsuccessfully—alleged in personal injury suits against gun manufacturers states that the manufacturing and marketing of guns are abnormally dangerous activities for which strict liability should be imposed. Most courts recognizing the doctrine of strict liability for abnormally dangerous activities follow sections 519 and 520 of the Second Restatement,[174] at least in substance, if not explicitly.[175] Section 519 provides: "One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm."[176] Section 520 lists several factors[177] for courts to consider in

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172. *See* Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 441–42 (1999). For example, Rabin discusses the development of the doctrine of social host liability for alcohol-related motor vehicle accidents as support for his argument that tort doctrine has moved away from the more restrictive special relationship theories. *Id.* at 441. In such cases, the social host is the "enabler" held liable for damages directly caused by the intervening act of the motorist.

173. *Id.* at 441–42.

174. This doctrine is under revision in another volume of the Third Restatement, which is currently in tentative draft form. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) §§ 20, 24 (Tentative Draft No. 1, Mar. 28, 2001). The draft does not alter the substance of the doctrine.

175. *See* DOBBS, *supra* note 91, at 954.

176. SECOND RESTATEMENT, *supra* note 88, § 519. This doctrine originated in the case of Rylands v. Fletcher, L.R. 3 H.L. 330 (1868), which imposed strict liability on landowners for damage to the land of an adjoining landowner when the defendant's reservoir flooded the neighboring property.

177. SECOND RESTATEMENT, *supra* note 88, § 520. The factors enumerated in section 520 are:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

determining whether a particular activity is "abnormally dangerous" within the meaning of section 519. Comment d to section 519 can be read to suggest that the marketing of a product does not fall within the kinds of activities contemplated by the doctrine.[178] The question posed by gun cases is whether this doctrine may be applied to the manufacture and marketing of guns on the theory that those particular activities pose the kinds of risks intended to fall within the scope of the doctrine.

Courts have refused to apply this doctrine to gun cases for a variety of reasons. Perhaps the most frequently cited reason is that the doctrine is perceived as remedying injuries from hazardous activities, not from products. Even if it were intended to apply to products, the argument continues, the doctrine would apply only to the *use* of the product and not to its manufacture or sale. Thus, in *Copier v. Smith & Wesson Corp.*,[179] the court observed that the plaintiff's injuries resulted from the use of the gun to shoot her, not from Smith & Wesson's manufacture of the gun.[180] Similarly, the court in *Hammond v. Colt Industries Operating Corp.*[181] stated that "[t]he marketing of a gun is not dangerous in and of itself since when injury occurs it is not the result of the sale itself, but the result of

(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

178. *Id.* § 519 cmt. d. Comment d provides that "liability arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity." *Id.* Thus, courts have accepted the argument that the manufacture and/or marketing of a gun are not themselves dangerous; rather, the abnormally dangerous activity is the action of the third party pulling the trigger. *See, e.g.*, Burkett v. Freedom Arms, Inc., 704 P.2d 118, 119–21 (Or. 1985) (holding that the manufacture of a handgun does not constitute an abnormally dangerous activity). The position set forth in this Article is that the manufacture and sale of certain guns is an activity that does create a substantial and unwarranted risk to the public.

179. 138 F.3d 833 (10th Cir. 1998).

180. *Id.* at 836. The court objected to the plaintiff's argument because in categorizing all firearms as abnormally dangerous, the plaintiff was denying the uses of guns that would not, in the court's estimation, be considered abnormally dangerous. These uses included use by law enforcement entities, and protection of self and home. *Id.* The court concluded: "[The plaintiff's] argument, carried to its logical extension, would suggest that the manufacturing of any product that is significantly misused and has great potential for injuring or killing persons should be considered an ultrahazardous activity." *Id.* at 838. This theory would then logically extend to products such as alcohol, which the Utah Supreme Court had ruled was not subject to sections 519 and 520. *Id.* It is important to recognize that in this case, the plaintiff made no effort to show how this weapon was more dangerous than necessary to carry out the legitimate functions of a gun.

181. 565 A.2d 558 (Del. Super. Ct. 1989).

actions taken by a third party."[182] Some courts have further charged that plaintiffs invoke the abnormally dangerous activities doctrine solely to dodge the pitfalls of their product liability claims. In *Burkett v. Freedom Arms, Inc.*,[183] the court accused the plaintiffs of exactly this tactic. The court concluded that, even though the plaintiffs claimed the gun in question was manufactured in a manner that deliberately made it easily concealable, the manufacture of the gun was not an abnormally dangerous activity, as it was the *use* of the gun that caused the plaintiff's injuries.[184]

Some courts have rejected application of the abnormally dangerous activities doctrine to the manufacture and marketing of guns on the ground that the doctrine was intended to be limited to activities associated with the land.[185] Other courts have determined that even where the use—as opposed to the manufacture or sale—of guns is the issue in the case, the factors in section 520 simply do not fit.[186] This view presupposes that guns have a value to society

182. *Id.* at 563 (citing Perkins v. F.I.E. Corp., 762 F.2d 1250, 1265 (5th Cir. 1985)); *accord* Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1215 (7th Cir. 1984) (holding that criminal misuse of a handgun breaks the causal connection between the manufacturer and the injury); Patterson v. Rohm Gesellschaft, 608 F. Supp. 1206, 1210–11 (D.C. Tex. 1985) (same); Mavilia v. Stoeger Indus., 574 F. Supp. 107, 111 (D. Mass. 1983) (holding that the state does not find the marketing of handguns to the public unreasonable); Riordan v. Int'l Armament Corp., 477 N.E.2d 1293, 1297 (Ill. App. Ct. 1985) (finding hazardous the misuse of handguns, not the marketing of the handguns); Richardson v. Holland, 741 S.W.2d 751, 755 (Mo. Ct. App. 1987) (holding that manufacturers of handguns owed no duty to plaintiffs to control distribution of its handguns); Faiella v. Bangor Punta Corp., 42 Pa. D. & C.3d 534, 537–39 (Pa. Ct. Common Pleas 1985) (holding that liability results from use, not manufacture, of a nondefective product); *cf.* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1267–69 (5th Cir. 1985) (applying Louisiana's version of "ultrahazardous activities" doctrine, but reaching the same conclusion that the doctrine does not apply to the manufacture and sale of guns).

183. 704 P.2d 118, 118–22 (Or. 1985).

184. *Id.* at 121. The .22-caliber single-action handgun involved in the case was a very small gun that shot long rifle bullets. The court observed that it was "manufactured so as to be concealable as a decorative item on the front of a large belt buckle." *Id.* at 119.

185. *Richardson*, 741 S.W.2d at 754–55; *see also Perkins*, 762 F.2d at 1268 (applying Louisiana law). This mistaken view may derive from the doctrine's case of origin, Rylands v. Fletcher, L.R. 3 H.L. 330 (1868), which did impose strict liability for certain land-based activity.

186. *See* Miller v. Civil Constructors, Inc., 651 N.E.2d 239, 244–45 (Ill. App. Ct. 1995), *appeal denied*, 657 N.E.2d 625 (Ill. 1995). In *Miller*, the plaintiff's injury occurred when he was struck by a bullet that ricocheted from target practice, apparently by law enforcement officers, in a nearby quarry. *Id.* at 241. The court framed the issue as whether the *use* of firearms could be deemed to be an ultrahazardous activity under Illinois law. *Id.* at 244. In applying the section 520 factors, the court determined that: (1) the exercise of reasonable care could render the activity safe; (2) use of guns is a matter of common usage, which ordinarily does not create a risk of harm absent misuse; (3) the existence of a firing range in a quarry is an appropriate location for firearm activity; and (4) target

generally, and that the risk of harm posed by criminal misuse of guns does not outweigh their social utility.[187]

In *Martin v. Harrington & Richardson, Inc.*,[188] the court reasoned that allowing liability under the abnormally dangerous activities doctrine for the manufacture or distribution of a product would have the undesirable effect of making the manufacturer of any dangerous product an insurer of its safety.[189] Such a policy decision, the court opined, was for the legislature, not the courts.[190] Courts fear that imposition of a liability that may be construed as *absolute* would extend gun manufacturer liability beyond compensation to the victims of crime. Thus, in *Perkins v. F.I.E. Corp.*,[191] the court noted with disapproval the potential for the doctrine to be applied to compensate families of suicide victims, persons injured in the course of legitimate self-defense or home defense, and persons injured in hunting accidents.[192] Following this logic, courts also fear that if gun manufacturing and sales were considered abnormally dangerous activities, the same theory could too easily be applied to the manufacturing of other dangerous products, such as knives, automobiles, and alcohol.[193]

Another obstacle to applying strict liability under the Second Restatement test is that, as one court has stated, "ultrahazardousness or abnormal dangerousness is, in the contemplation of the law at least, a property not of substances, but of activities."[194] Thus, applying this doctrine without modification to dangerous products, per se, is problematic. In addition, the doctrine of abnormally dangerous activities leans more toward absolute liability than

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practice is an activity that has social value to the community. *Id.* at 245. Accordingly, the use of firearms here was not deemed to be an ultrahazardous activity. *Id.*

187. *See* SECOND RESTATEMENT, *supra* note 88, § 520.

188. 743 F.2d 1200 (7th Cir. 1984).

189. *Id.* at 1204. Similarly, the court in Burkett v. Freedom Arms, Inc., 704 P.2d 118, 122 (Or. 1985), stated that holding handgun manufacturers liable for engaging in an abnormally dangerous activity would amount to enterprise liability. The court refused to endorse this result, stating that it had previously declined to allow enterprise liability to form the basis of strict liability. *Id.*

190. *Martin*, 743 F.2d at 1204 (stating that a ruling characterizing the marketing of handguns as an abnormally dangerous activity "would produce a handgun ban by judicial fiat").

191. 762 F.2d 1250 (5th Cir. 1985).

192. *Id.* at 1269.

193. *Id.*

194. Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174, 1181 (7th Cir. 1990).

anything that has emerged in the product arena.[195] Guns, seen in their full context from inherently dangerous design through criminal use, though, are more than products. The abnormally dangerous activities doctrine has a special relevance to guns because it focuses on the inherently dangerous nature of the activity. There may be nothing objectively "wrong" with the activity; but carrying on the activity in a certain way or in a certain place may present intolerable dangers to the public. The actor, thus, must pay the costs of the activity. As we propose later in this Article, certain aspects of the doctrine of abnormally dangerous activities can be effectively blended with strict product liability doctrine to assist courts in applying strict product liability to gun manufacturers in a reasonable and measured way.

III. ANALOGIES TO OTHER PRODUCTS: AN IMPRECISE FIT

As the discussion in Part II suggests, the initial role of tort law in providing remedies for victims of gun violence, or their families, has often been justified by the argument that liability imposed on gun manufacturers would lead to liability for manufacturers of other products that are inherently dangerous and widely used. Guns and ammunition have been compared with many other products including tobacco, alcohol, saturated fats, prescription drugs, swimming pools, and automobiles. Critics of product liability have raised the *in terrorem* argument that liability for one would lead to liability for all. "Where will it all end?" they lament.[196] While fear of "too much liability" may be useful as a rhetorical device, all suits, including those against gun manufacturers, must be judged on their own merits, in the specific contexts in which they arise. Comparison of gun claims to other product liability claims involving difficult issues drives home the point that courts are in fact capable of deciding difficult liability issues according to fundamental principles of tort law.[197] This Part considers two of the analogies frequently made to gun suits—tobacco and automobiles. In each case, we consider two different contexts in which the design and use of these products have been the subjects of litigation. The similarities and differences between these situations

195. The sole exception would be manufacturer liability for manufacturing defects. *See* THIRD RESTATEMENT, *supra* note 10, § 2(a) & cmt. a.

196. For example, one commentator stated: "What comes next—coffee, soft drinks, red meat, dairy products, sugar, fast foods, automobiles, sporting goods?" Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S. ILL. U. L.J. 601, 648 (1998).

197. As discussed in Part V.B, *infra*, however, courts have been even more reluctant to consistently apply established tort law principles in the case of lawsuits against gun manufacturers than in cases involving other problematic products.

and gun litigation demonstrate that although guns are uniquely lethal products that raise special concerns, courts nevertheless can fashion reasonable rules of liability for guns, just as they do for these other products.

A. *Tobacco*

From time to time, both plaintiffs and the gun industry have compared personal injury lawsuits against gun manufacturers to similar suits against the tobacco industry. This comparison became unavoidable when municipalities began suing gun manufacturers for the public costs of gun violence.[198] The comparison became more

198. *See* David E. Rosenbaum, *Echoes of Tobacco Battle in Gun Suits*, N.Y. TIMES, Mar. 21, 1999, at A32. *See generally* John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S.C. L. REV. 287, 295–318 (2001) (discussing claims brought by municipalities against gun manufacturers and arguing that public nuisance doctrine is applicable). Even efforts to analogize the state lawsuits against the tobacco industry to the municipal lawsuits against the firearms industry are skewed. The states that brought lawsuits against the tobacco industry sought reimbursement for public monies expended to treat smoking-related illnesses. The municipal suits against gun manufacturers have sought reimbursement for law enforcement, fire department, and medical emergency response efforts associated with gun violence, the costs of increasing these services in anticipation of future needs, money damages, and injunctive and abative relief. *Id.* at 305; Brian J. Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Gun Industry Misconduct*, 18 ST. LOUIS U. PUB. L. Rev. 247, 251–53 (1999). In other words, the municipalities have a litany of very specific complaints involving costs with which they have dealt on a daily basis with great familiarity. *See* Culhane & Eggen, *supra*, at 300 ("This seems to be a situation in which the states and cities have divergent interests: the cities are intimately familiar with the toll exacted by gun violence in a way that the states may not be."). Ultimately, the major tobacco companies settled the suits brought by the states, the first few individually and the remainder through a massive settlement plan that became effective in December 1998, and included the remainder of the states. *See* Master Settlement Agreement (MSA) (Nov. 23, 1998), *available at* http://www.naag.org/tobac/index.html (last visited Jan. 31, 2002) (on file with the North Carolina Law Review). Even if the gun manufacturers were amenable, a similar result would be virtually impossible in the context of gun litigation, because of the variation among and the uniqueness of the municipalities and their losses. *See* Culhane & Eggen, *supra*, at 315–18 (discussing, inter alia, Complaint, ¶ 1, *City of Chicago* (No. 98-CH-15596) (alleging that "[defendant gun manufacturers'] conduct undermines the City's efforts to protect the public health, safety and welfare through stringent gun control ordinances which make it illegal to possess most types of guns in the City")). Another major distinction has been the extent to which the municipalities have relied upon tort law in their suits against the gun manufacturers. These claims are diverse, drawing attention once again to the uniqueness of each municipal lawsuit. These claims have included negligence, product liability, and unfair and deceptive trade and advertising practices. *See, e.g.*, Ganim v. Smith & Wesson Corp., 780 A.2d 98, 101–02 (Conn. 2001) (claiming unfair and deceptive trade and advertising practices); Smith & Wesson Corp. v. City of Atlanta, 543 S.E.2d 16, 18 (Ga. 2001) (claiming negligence and product liability); Morial v. Smith & Wesson Corp., 00-1132 (La. 04/03/01), 785 So. 2d 1, 5 (same), *cert. denied*, 122 S. Ct. 346 (2001); Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1140 (Ohio 2002) (alleging that firearms manufacturers

attractive to gun control advocates in recent years because of a number of high-profile victories by smokers against tobacco manufacturers with billions of dollars awarded in punitive damages.[199] Although tobacco litigation arose in a unique political and social context that is not readily translatable to other products, including guns, some of the arguments in favor of cigarette company liability are useful in arguing for similar treatment of gun sellers.

1. Smoker Litigation

Cigarettes are widely used, inherently dangerous, legal consumer products that are known to cause substantial harm to users.[200] Tobacco products are legally produced and sold in this country by a large and thriving industry that has been a feature on the American business horizon for much of the country's history. That industry is largely unregulated.[201] The same statements could be made about firearms. Many courts have been unsympathetic to arguments that cigarettes should be considered defective for the purpose of strict product liability doctrine. For example, in *Paugh v. R.J. Reynolds Tobacco Co.*,[202] a case under Ohio product liability law based upon the Second Restatement, the court held that the risks posed by cigarettes were inherent characteristics of the product itself, thus precluding a claim for defective design.[203] Similarly, in *Roysdon v.*

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deceived citizens regarding the safety of guns). The Firearms Litigation Clearinghouse maintains a frequently updated accounting of the status of these and other suits filed by municipalities. *See* Firearms Litigation Reporter, *at* http://www.firearmslitigation.org/content/newletter/news.html (last visited Feb. 25, 2002) (on file with the North Carolina Law Review). Thus, concerns that guns and tobacco might be equated are unjustifiable.

199. *See, e.g.*, Carter v. Brown & Williamson Tobacco Corp., 778 So. 2d 932, 934–44 (Fla. 2000) (reversing appellate court's ruling that statute of limitations barred plaintiff smoker's claims, and effectively upholding jury verdict for plaintiff), *cert. denied*, 121 S. Ct. 2593 (2001); Myron Levin, *Jury Awards $145 Billion in Landmark Tobacco Case*, L.A. TIMES, July 15, 2000, at A1 (discussing verdict in Florida case of *Engle v. R.J. Reynolds Tobacco Co.*).

200. Even Philip Morris, the largest American cigarette manufacturer, has admitted the health hazards of cigarette smoking. *See Health Issues for Smokers*, *at* http://www.philipmorrisusa.com/displaypagewithtopica378.asp (last visited Sept. 6, 2002) (on file with the North Carolina Law Review) ("We agree with the overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other serious diseases in smokers.").

201. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 156–59 (2000) (holding that FDA does not have authority to regulate tobacco products). The very limited regulation of tobacco products has come from federal labeling legislation. *See, e.g.*, *infra* note 215.

202. 834 F. Supp. 228 (N.D. Ohio 1993).

203. *Id.* at 230. The Ohio Product Liability Act excluded from the category of design defect "an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or

R.J. Reynolds Tobacco Co.,[204] the Sixth Circuit Court of Appeals, construing Tennessee law, concluded that in the absence of any allegations or proof that the cigarettes smoked by the plaintiff were "improperly manufactured" or "contained impurities," no claim for product defect could lie.[205]

Smoker litigation and gun litigation also share, at least to an extent, the feature of plaintiff helplessness. The perceived "choice" of whether to smoke[206] turns out to have been less voluntary than the manufacturers have long maintained. The addictive properties of nicotine were concealed from smokers for decades.[207] Juries have responded by awarding smokers large damages verdicts, both compensatory and punitive.[208] Until the companies' misrepresentations on the issue of nicotine's addictive properties were brought to light, the industry had successfully argued that smokers had assumed the risk of smoking.[209] With regard to guns, assumption of risk is not even an arguable defense in the typical personal injury action[210] brought by a victim of gun violence. Thus, guns present a stronger case for recovery on lack of plaintiff culpability.

The differences between smoker cases and gun victim cases are also significant. The dangers presented by the two categories of

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desirability and which is recognized by the ordinary person with the ordinary knowledge common to the community." OHIO REV. CODE ANN. § 2307.75(E) (Anderson 2001). Because the dangers of smoking had been public knowledge for some time, the *Paugh* court held that cigarettes fell directly within the exception outlined in the Act. 834 F. Supp. at 230.

204. 849 F.2d 230 (6th Cir. 1988).

205. *Id.* at 236 (quoting Pemberton v. Am. Distilled Spirits Co., 664 S.W.2d 690, 692 (Tenn. 1984)). Tennessee law defined a defective product as one in a condition "that renders it unsafe for normal or anticipatable handling and consumption." TENN. CODE ANN. § 29-28-102(2) (2000).

206. *See* Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Liability*, *in* SMOKING POLICY: LAW, POLITICS, AND CULTURE 110, 130 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

207. *See, e.g.*, Cipollone v. Liggett Group, Inc., 893 F.2d 541, 551 (3d Cir. 1990) (addressing the deceptive behavior of cigarette manufacturing firms), *rev'd on other grounds*, 505 U.S. 504 (1992); Horton v. American Tobacco Co., 667 So. 2d 1289, 1292 (Miss. 1995). The tobacco industry has been aware of the addictive nature of nicotine since the 1960s. RICHARD KLUGER, ASHES TO ASHES 238–39 (1996). Once a smoker is addicted, recreational voluntariness cedes to physical necessity.

208. *See* Gordon Fairclough, *Tobacco Firms Ordered to Pay Ex-Smoker*, WALL ST. J., Mar. 21, 2000, at. A3.

209. *E.g.*, Paugh v. R.J. Reynolds Tobacco Co., 834 F. Supp. 228, 230 (N.D. Ohio 1993) (favoring an assumption of risk defense for cigarette manufacturers).

210. Assumption of the risk could arise, however, in other kinds of gun injury cases, such as where the plaintiff is the user of the gun and inflicts a self-injury while handling or using it.

products are significantly different, both in kind and consumer expectation. The hazards of guns are obvious, and are indeed the motivation for most people purchasing them—whether for sport, law enforcement, self-defense, or criminal purposes. The hazards of cigarettes were far more insidious for many decades, the subject of careful concealment and advertising misdirection for much of that time.[211] It was not until the 1950s and 1960s that the true extent of the hazards of smoking was made public,[212] along with the advent of package and advertising warnings.[213] Much of the course of cigarette litigation has been determined by this fact. Early legal issues focused on whether cigarettes were dangerous, whether the manufacturers were negligent, and whether smoking caused the plaintiffs' health injuries. Those injuries involved a long latency period, often extending for several decades, between the initial smoking experience and the ultimate diagnosis of smoking-related disease in the plaintiffs.[214] Later litigation has focused on the addictive nature of tobacco products, and whether that fact reduces the legal force of the voluntary nature of smoking. Thus, the legal struggles in the smoking context were markedly different from anything that would arise in gun litigation.

Additionally, although the tobacco industry is substantially unregulated, the primary existing federal legislation of cigarettes—the statutes known collectively as the cigarette labeling acts[215]—have

211. KLUGER, *supra* note 207, at 55–57 & *passim*.

212. *See generally id.* (detailing the history of the tobacco industry, including scientific studies, industry awareness of hazards, and slow availability of information to the public).

213. *See* Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, §§ 2–5, 79 Stat. 282, 282–84; Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, §§ 2–8, 84 Stat. 87, 87–89 (codified as amended at 15 U.S.C. §§ 1331–1341 (2000)).

214. *See, e.g.*, Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963) (upholding a jury verdict for defendant on the basis of lack of causation); KLUGER, *supra* note 207 (discussing, for example, a study that demonstrated that persons who had quit smoking for a decade developed lung cancer at higher rates than persons who had never smoked).

215. The Federal Cigarette Labeling and Advertising Act, which became effective in 1966, required packages of cigarettes sold in the United States to display a label with the following statement: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Pub. L. No. 89-92, § 4, 79 Stat. 282, 283. The 1969 Act changed the wording of the required warning to declare that cigarette smoking "is dangerous." Pub. L. No. 91-222, § 4, 84 Stat. 87, 88 (codified as amended at 15 U.S.C. § 1334 (2000)). The 1969 Act also banned electronic advertising of cigarettes. *Id.* § 6. Both acts contained express preemption provisions with some ambiguous language and which changed in wording from the first act to the second act. This led to the Supreme Court ruling that in the 1969 Act, Congress expressed an intent to preempt at least some state tort law claims based upon smoking and health. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 520–30 (1992). The preemption provision in the 1969 Act provided: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to

been held to have some preemptive effect on claims brought under state tort law.[216] In *Cipollone v. Liggett Group, Inc.*,[217] the United States Supreme Court interpreted the preemption provisions in the 1969 labeling act to preempt some, but not all of the common law claims brought by the plaintiffs in a smoker personal injury suit.[218] As a consequence, much of the smoker litigation that has confronted the judicial system in the past decade has been tailored to avoid the preempted claims and to articulate claims in the categories the Court held were not preempted or that were not addressed by the Court.[219] The impact of this phenomenon on tobacco litigation cannot be overstated. No similar legal battle has been fought in the area of gun litigation. Nor is it likely to be fought soon, given Congress's failure to enact legislation in recent years and given current administrative policy.[220]

2. Environmental Tobacco Smoke

One category of tobacco litigation that provides a closer analogy to victim personal injury litigation against gun manufacturers is environmental tobacco smoke ("ETS") litigation. Exposure to ETS, frequently referred to as "passive smoking," differs from smoking primarily because typically exposure is not even arguably voluntary. Manufacturer defenses asserted against smokers rarely apply to non-smokers claiming to have developed smoking-related illness. Accordingly, assumption of the risk and preemption, previously

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the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." Pub. L. No. 91-222, § 5(b), 84 Stat. 88 (codified as amended at 15 U.S.C. §§ 1331–1340 (2000)).

216. *See generally* Jean Macchiaroli Eggen, *Sense or Sensibility?: Toxic Product Liability Under State Law After* Cipollone *and* Medtronic, 2 WIDENER L. SYMP. J. 1, 6–18 (1997) (discussing preemption and the cigarette labeling acts and articulating the lessons of preemption that can be gleaned from tobacco preemption issues).

217. 505 U.S. 504 (1992).

218. *Id.* at 517–18.

219. *See, e.g.*, Castano v. Am. Tobacco Co., 870 F. Supp. 1425 (E.D. La. 1994) (holding smoker claims based on tobacco industry research and testing practices and claims based on nicotine addiction not preempted by cigarette labeling act), *rev'd on other grounds*, 84 F.3d 734 (5th Cir. 1996); Laschke v. Brown & Williamson Tobacco Corp., 766 So. 2d 1076 (Fla. Dist. Ct. App. 2000) (holding that smoker's claim based upon strict liability for design defect was not preempted by cigarette labeling act).

220. *See generally* David S. Cloud, *Justice Department Is Shifting Stance on Gun Rights*, WALL ST. J., July 11, 2001, at A3 (reporting a letter written by Attorney General John Ashcroft to the National Rifle Association stating his belief that the Second Amendment protects individual gun owners). With this attitude prevailing in the Bush administration, it is unlikely Congress will proceed with any new gun safety legislation. The Brady Act clearly does not preempt tort actions. For a discussion of the Brady Act, see *supra* notes 60–74 and accompanying text.

discussed, are irrelevant in the context of ETS litigation. Like gun victims, non-smokers claim to be victims of a product that is being used by another for its anticipated purpose. Also like gun victims, non-smokers have argued that cigarettes have no real social utility, but create high risks of harm to the general public.[221] In addition, ETS has been the subject of somewhat decentralized regulation. The federal government, despite years of tossing the subject among agencies, has not been able to develop comprehensive health regulations on ETS that withstand judicial scrutiny.[222] States and local municipalities have a multitude of regulations that vary widely from jurisdiction to jurisdiction.[223] This pattern of federal regulatory inactivity, coupled with an array of conflicting state and local rules, is not unlike the pattern presented by gun regulation.[224] Finally, tobacco regulation, like gun regulation, generally has been the subject of strong political opinions tied to individual rights, tort reform, and wealthy and tenacious lobbying organizations.[225]

Notwithstanding the ability to build a plausible analogy between guns and ETS, ETS litigation is also an incomplete model for gun litigation. First, thorny causation questions abound in ETS litigation. Persons exposed to ETS have claimed an assortment of illnesses, from asthma and allergic reactions to lung cancer, heart disease, and other cancers.[226] The causal ties have not been established between ETS and many of these illnesses, thus leaving cause-in-fact a major dispute in the litigation.[227] While issues of causation arise in gun litigation, they do not involve whether the gunshot caused the victim's injuries. Rather, they involve the policy-oriented question of the propriety of holding manufacturers liable for injuries resulting from intervening criminal acts, expressed as either an issue of duty or legal cause.

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221. *See* Broin v. Philip Morris Cos., Inc., 641 So. 2d 888, 889 (Fla. Ct. App. 1994) (addressing flight attendants seeking compensation for a wide variety of injuries related to exposure to ETS in the workplace).

222. *See, e.g.*, Flue-Cured Tobacco Coop. Corp. v. EPA, 4 F. Supp. 2d 435 (M.D.N.C. 1998) (holding that EPA did not follow correct procedure before declaring ETS a human carcinogen).

223. *See generally* Robert A. Kagan & David Vogel, *The Politics of Smoking Regulation: Canada, France, the United States*, *in* SMOKING POLICY: LAW, POLITICS, AND CULTURE 22, 38–40 (Robert L. Rabin & Stephen D. Sugarman eds., 1993) (discussing specific restrictions instituted by various state and local governments).

224. For a discussion of gun regulation generally, see Part I *supra*.

225. *Feature: Gun Control in America: Feature Interview: Interview with Michael Barnes, President, Handgun Control, Inc.*, 6 GEO. PUBLIC POL'Y REV. 31, 34 (2000).

226. *See Broin*, 641 So. 2d at 889.

227. *See* KLUGER, *supra* note 207, at 761 (discussing studies).

Second, most court decisions on ETS have involved claims arising in the workplace, with persons experiencing severe respiratory reactions to ETS generated by persons smoking legally in locations allowed by the employer and applicable law. These cases, which usually involve state workers' compensation laws[228] or employer duties to keep a safe workplace,[229] do not provide a useful comparison to cases involving the personal injuries of gun violence victims.

Finally, ETS litigation has been the subject of a unique series of twists and turns related to the tobacco industry's decision to settle state suits for reimbursement of public funds expended for smoking-related illnesses. One collateral result of the negotiations was a tobacco company decision to settle a large class action lawsuit brought by flight attendants claiming illnesses related to exposure to ETS in the workplace.[230] The flight attendant suit thus provides no precedent for either ETS cases or cases involving other products.

Accordingly, ETS tort litigation does not present a workable model for gun litigation. Indeed, ETS litigation is probably more in its infancy than gun litigation.

B. Automobiles

As with tobacco litigation, any attempt to analogize guns to automobiles and predict or model the course of the law on that basis is limited. The automobile analogy, when raised in gun cases, sometimes reflects a fear of the floodgates opening, that imposing liability on the gun industry for the harm that results from the use of its products would mean liability for the makers of other widely used, legal products.[231] The automobile analogy has great rhetorical appeal, perhaps because cars are so pervasive in our culture, and our citizens are so dependent on their availability. The threat of broad

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228. *See, e.g.*, Palmer v. Del Webb's High Sierra, 838 P.2d 435, 435–36 (Nev. 1992) (affirming the denial of workers' compensation benefits); McCarthy v. Dep't of Soc. & Health Servs., 759 P.2d 351, 352 (Wash. 1988) (holding that an employee may bring an action for an employer's breach of the duty to provide a safe work place when workers' compensation does not apply).

229. *See, e.g.*, Smith v. W. Elec. Co., 643 S.W.2d 10 (Mo. App. Ct. 1982) (holding that an employer breached the duty to provide a safe work place by not separating smoking and non-smoking areas); Shimp v. N.J. Bell Tel. Co., 368 A.2d 408, 409 (N.J. Super. Ch. Div. 1976) (upholding the employee's right to a safe working environment and ordering the employer to restrict smoking to separate areas).

230. *See Broin*, 641 So. 2d at 889 (settling during trial).

231. We have noted this point of view elsewhere, while at the same time using our own versions of the analogy: "Permitting litigation against gun sellers would supposedly lead to a parade of horrible lawsuits, in which cars are often the grand marshal." Culhane & Eggen, *supra* note 198, at 305.

automobile manufacturer liability creates a bevy of fears, from astronomical increases in the costs of automobiles to paralysis of the judicial system by massive numbers of product liability lawsuits. Indeed, critics of gun manufacturer liability—and product liability in general—have managed to keep such fears in the public consciousness.[232] The analysis that follows demonstrates that these fears will not be realized by holding gun manufacturers liable, and those who purvey these concerns are engaging in a deliberate misdirection exercise. In automobile cases, courts have imposed liability only under carefully defined circumstances and have been doing so for some time. It is therefore unlikely that holding gun manufacturers liable in a completely different set of cases would make a dent in the conduct of automobile litigation.

Most automobile product liability suits contain legal issues that are quite different from claims by victims against gun manufacturers. Nevertheless, examination of some categories of automobile cases offers useful assistance in thinking about legal liability rules for the manufacture and sale of guns, either by contrast or by analogy. A closer look also demonstrates the specious nature of the floodgates argument.

1. Theft Cases

Once sold, automobiles and guns have in common the fact that third parties are often involved in harmful use of the product. Many cases have involved stolen or vandalized motor vehicles, where the subsequent actions of the thief or vandal then cause harm to another person.[233] While these cases have been cited only rarely in gun

232. For a sampling of media articles that voice this fear, see Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 3–5 (1986). Professor Richard Abel points out that courts have long stated that limitations on liability must be imposed, but have often failed to offer an argument in support of this position. Richard Abel, Symposium: *What We Know and Do Not Know About the Impact of Civil Justice on the American Economy and Polity: Judges Write the Darndest Things: Judicial Mystification of Limitations on Tort Liability*, 80 TEX. L. REV. 1547, 1549–50 (2002).

233. *See, e.g.*, Palma v. U.S. Indus. Fasteners, Inc., 681 P.2d 893, 901 (Cal. 1984) (finding triable issues of fact where the defendant left a commercial truck unlocked with the keys inside, in a high crime area, allowing it to be stolen and ultimately cause the plaintiff's injuries); Richards v. Stanley, 271 P.2d 23, 24–25 (Cal. 1954) (finding a violation of an ordinance prohibiting individuals from leaving an ignition key in an unlocked car inadmissible for purposes of establishing a negligence claim); Foreign Auto Preparation Serv., Inc. v. Vicon Constr. Co., 474 A.2d 1088, 1089–90 (N.J. Super. Ct. App. Div. 1984) (holding that a jury could find damage reasonably foreseeable where the defendant did not protect a bulldozer from vandalism despite defendant's knowledge of recent incidents of vandalism and trespassing); Cruz v. Middlekauff Lincoln-Mercury, Inc., 909 P.2d 1252,

decisions,[234] commentators, ourselves included, have found various auto theft scenarios instructive in addressing certain negligence issues related to guns.[235] While the comparison is sometimes helpful,[236] the distinctions between guns and cars also must be considered in applying the results of automobile theft cases in gun personal injury litigation.

The automobile suits typically name as the defendant the owner of the vehicle, rather than the manufacturer, because the owner's identity can easily be ascertained. The system of vehicle registration and insurance requirements in place in each state make identification of the owner likely. Moreover, automobiles are large and difficult to conceal; when involved in accidents, they become easier to identify due to damage and often cannot be driven from the scene. Guns are more lethal, more concealable, more mobile, and less likely to be traceable to an owner. They are less regulated than automobiles, and far less likely to carry liability insurance.

The car theft cases typically involve some action on the part of the automobile owner, such as leaving the vehicle unlocked or the keys in the ignition, that contributes to the damage alleged. In appropriate cases, courts have imposed liability upon the person who facilitated the injury suffered by the plaintiff by setting in motion the course of events leading to the intervening party's actions.[237] But this result is more difficult to envision if the *manufacturer* of the automobile is sued because—to use one common example—the owner negligently left the keys in the ignition and an intervening party drove the car into the plaintiff.[238] Even there, however, liability

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1253 (Utah 1996) (finding that a car dealer who left the ignition key in an unlocked car may be liable for damages caused by the subsequent foreseeable actions of a thief).

234. *See* Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146, 168 (Cal. Ct. App. 1999), *rev'd*, 28 P.3d 116 (Cal. 2001).

235. *See* Culhane & Eggen, *supra* note 198, at 305–07; Lytton, *Tort Claims*, *supra* note 27, at 63; Rabin, *supra* note 172, at 440–44.

236. We found these cases useful in demonstrating the point at which negligent conduct may become a public nuisance actionable in a suit by a public entity against the manufacturer of the product. *See* Culhane & Eggen, *supra* note 198, at 305–07 (noting that some conduct by the manufacturer "both grounds the tort suit by the injured party and creates the public nuisance because the otherwise lawful product is being used in a way that poses a substantial and unwarranted threat to public health and safety").

237. *See, e.g.*, Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943) (holding that the owner of a truck left with the key in the ignition, in violation of a local ordinance, was liable for injuries inflicted by the unknown driver); Cruz v. Middlekauff Lincoln-Mercury, Inc., 909 P.2d 1252 (Utah 1996) (holding that plaintiffs stated a claim against defendant automobile dealer who left keys in ignition).

238. For a discussion of some of these issues in the context of municipal suits against gun manufacturers, see Culhane & Eggen, *supra* note 198, at 305–11.

should not be automatically disallowed. The manufacturer who declined to implement a simple design modification that would have made the car door locks tamper-proof might also be found responsible for the subsequent, foreseeable acts of third parties.[239] If anything, the car theft cases exemplify a larger trend toward "more expansive notions of responsibility for the conduct of others."[240] As long as the distinctions between automobile and gun cases are kept firmly in mind, this trend toward imposing responsibility for third-party conduct should be followed in gun litigation.

2. Crashworthiness

The analogy to crashworthiness may be stronger. Cars that are designed with inadequate protection in the highly foreseeable event of collision are deemed defective. The cases are sympathetic to plaintiffs "mainly because of the helplessness of the . . . consumer."[241] In many cases, the owner or operator of an insufficiently crashworthy car bears no fault for the accident in which he or she is involved.[242] Even when the accident is partially the fault of the plaintiff driving the unsafe car, however, the car's inability to protect its occupant should not be excused. Typically, the driver is unaware of the defect. In most, perhaps all, cases involving uncrashworthy cars, the manufacturer is better-positioned than both the vehicle owner and driver to prevent the crash in the first instance and avoid future crashes. Further, when plaintiffs are passengers in cars that they do not own, their cases emphasize the injured party's lack of power even more effectively.

Similarly, the victim of gun violence is typically in no position to protect himself or herself against the effects of the deadly weapon. If anything, persons killed or injured by gun violence have less of an opportunity to protect themselves than the occupants of defective cars. Therefore, just as the intervening act of a third party does not necessarily cut off manufacturer liability in the crashworthiness cases,

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239. *See id.* at 306 (noting that this argument would increase in strength if a particular kind of car was often stolen).

240. Rabin, *supra* note 172, at 442.

241. John G. Culhane, *The Limits of Product Liability Reform Within a Consumer Expectation Model: A Comparison of Approaches Taken by the United States and the European Union*, 19 HASTINGS INT'L & COMP. L. REV. 1, 92 (1995).

242. No car provides complete protection for its occupants in the event of a crash. Thus, the issue of whether a car is defective because of its inability to withstand a crash is a complex inquiry involving a risk-utility analysis, the latency or obviousness of the defect, and the consumer's reasonable expectation. *Id.* at 92–99; *see also* THIRD RESTATEMENT, *supra* note 10, § 2 cmts. f–g (discussing numerous factors to be considered in determining the existence of a design defect).

it ought not do so in cases involving the discharge of firearms. In both cases, the proper inquiry is on the foreseeability of the ultimate result from the perspective of the manufacturer.[243]

In addition, both cars and guns present challenges to the traditional notion of product defect as a "malfunction" of the product. As with gun violence cases, uncrashworthy cars usually function as intended. Only under certain circumstances is the defect manifested. Were it not for the intervening accident, the defect would never affect the owner and driver.

These similarities make a compelling argument that victims of gun violence should be permitted to recover damages from gun manufacturers. Guns present an even stronger case for manufacturer liability than uncrashworthy cars, however. Even those who make the most audacious claims concerning the usefulness of handguns could not seriously argue that they are as useful as automobiles. Whether the claims sound in negligence or strict liability, the magnitude of the risk created by a handgun manufacturer will overshadow the utility of the gun. While this fact alone may not be sufficient to impose liability on the gun manufacturer, it emphasizes that the analogy to automobiles, though imperfect, may lend strength to arguments for imposing liability on gun manufacturers.

IV. JUDICIAL EFFORTS TO ALLOW PRIVATE CLAIMS AGAINST GUN MANUFACTURERS

In a small number of cases, strong judicial voices—writing sometimes for the court and sometimes in dissent—have espoused and articulated arguments favoring claims against gun manufacturers. While these cases cannot be characterized as a trend, they provide valuable insight into the alignment of judicial sensibility and legal argument that may result in accountability of gun manufacturers in the tort system. These judicial voices also address both strict liability

243. In Bigbee v. Pac. Tel. & Tel. Co., 665 P.2d 947 (Cal. 1983), the fact that the plaintiff had been injured by a drunk driver—whose conduct was worse than negligent—did not insulate the defendant from liability in placing a telephone booth too close to a highway and in improperly maintaining the booth's door so as to prevent the plaintiff's escape. *Id.* at 952. The court relied in part on section 449 of the Second Restatement, which provides in part: "If the likelihood that a third person may act in a particular manner is ... one of the hazards which makes the actor negligent, such an act whether innocent, negligent, *intentionally tortious, or criminal* does not prevent the actor from being liable for harm caused thereby." SECOND RESTATEMENT, *supra* note 88, § 449 (emphasis added). This provision is highly relevant in cases involving the design, manufacture, and sale of guns, where the defendant's culpability often arises from the "likely" conduct of third parties. For further discussion of crashworthiness, *see* Culhane, *supra* note 241, at 92–99.

and negligence and cover the activities of product design and marketing. The discussion that follows reveals the acuity and persuasiveness of their arguments.

A. *Strict Liability*

In *Kelley v. R.G. Industries, Inc.*,[244] the Maryland Court of Appeals, on questions certified by the United States District Court for the District of Maryland, allowed a strict liability claim for the manufacture and sale of "Saturday Night Specials."[245] Although Maryland law did not generally recognize the applicability of strict product liability doctrine to guns, the court created an exception for Saturday Night Specials. The court examined the characteristics of the weapons—including their attractiveness to criminals—in light of federal[246] and state[247] policy and ruled that they "comprise a distinct category of handguns that, because of their characteristics, should be treated differently from other handguns."[248] This finding led the court to rule that manufacturers of Saturday Night Specials could be held strictly liable under a design defect theory.

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244. 497 A.2d 1143 (Md. 1985) (on certification from the United States District Court for the District of Maryland), *overruled by* MD. ANN. CODE art. 27, § 36-I(h) (Supp. 2002).

245. *Id.* at 1159. The court described Saturday night specials as having "short barrels, light weight, easy concealability, low cost, use of cheap quality materials, poor manufacture, inaccuracy and unreliability." *Id.* at 1153–54. The court cited Senate testimony maintaining that the poor quality of these weapons poses a danger not only to persons intended as targets, but also to bystanders and to users themselves, due to a high rate of misfires, backfires, and accidental fires. *Id.* at 1153 n.9 (citing *Hearings on S. 2507 Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary*, 92d Cong., 1st sess., at 109–10 (1971)). Their cheap construction has resulted in extraordinarily low prices. The inexpensive metal used to manufacture them is soft enough to allow for removal of serial numbers. *Id.* The design features, poor quality, easy availability, and low cost of Saturday night specials make them "attractive for criminal use and virtually useless for the legitimate purposes of law enforcement, sport, and protection of persons, property and businesses." *Id.* at 1154. Recent data demonstrate that the successors of the Saturday night special are guns with more firepower—and thus greater wounding potential—than the Saturday night special, but which retain the low cost and poor quality of their predecessors. Wintemute, *supra* note 49, at 1752.

246. The court examined federal law, particularly the Gun Control Act of 1968, Pub. L. No. 90-618, sec. 102, 82 Stat. 1213, 1214 (codified as amended at 18 U.S.C. § 921 (2000)) (ruling prior to Brady amendments), and determined that Congress imposed certain access restrictions and other regulations on Saturday night specials because of their negligible legitimate utility. *See Kelley*, 497 A.2d at 1154–57.

247. The court examined Maryland gun control laws, which the court determined embodied the same restrictive policy evinced by federal law. 497 A.2d at 1157–58 (stating that because the chief "value" of Saturday night specials is for the commission of crimes, these guns do not conform to any legitimate uses permitted by Maryland gun control laws).

248. *Id.* at 1154.

The *Kelley* court's theory of strict liability centered on gun manufacturers' knowledge of the extraordinary hazards of their guns and their propensity for use in criminal activity. Declaring that "the manufacturer or marketer of a Saturday Night Special knows or ought to know that he is making or selling a product principally to be used in criminal activity,"[249] the court proceeded to fashion the elements of the strict liability claim. Acknowledging that this claim was distinct from both Second Restatement doctrines—the doctrine of abnormally dangerous activities in section 519 and strict product liability in section 402A—the court characterized it as "a separate, limited area of strict liability," justifiable by the need for the common law to adapt to social exigencies.[250] The court established the following elements of this strict liability claim: (1) the gun involved in the case must fall within the definitional parameters of a Saturday Night Special; (2) the plaintiff or the plaintiff's decedent must have suffered injury or death in a shooting by a Saturday Night Special;[251] (3) the shooting must be a criminal act; and (4) the plaintiff must not have been a participant in the crime. If all of these requirements are met, the defendant or defendants will be liable for "all resulting damages . . . consistent with the established law."[252] Liable parties would be the manufacturer and anyone else in the chain of distribution of the gun.[253]

In justification of its special strict liability claim for Saturday Night Specials, the *Kelley* court observed generally that under the

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249. *Id.* at 1158.

250. *Id.* at 1159.

251. In determining whether the gun involved in the shooting was a Saturday night special, the court first noted that there is no single definition of a Saturday night special; rather, these guns feature the characteristics of small barrel length, low cost, concealability, low quality materials and workmanship, and unreliability of performance. *Id.* at 1159–60. The determination of whether the gun can be characterized as a Saturday night special would be a question of fact, although the court would first determine whether the gun "possesses sufficient characteristics of a Saturday Night Special." *Id.* at 1160. Also affecting this determination would be the perceptions of the public and the law enforcement community as to whether the particular handgun involved in the case was considered a Saturday night special. *Id.*

252. *Id.* at 1160.

253. *Id.* In 1988, the Maryland legislature overruled *Kelley* when it enacted a statutory provision disallowing claims for strict liability involving any gun. The statute provides:

> A person or entity may not be held strictly liable for damages of any kind resulting from injuries to another person sustained as a result of the criminal use of any firearm by a third person, unless the person or entity conspired with the third person to commit, or willfully aided, abetted, or caused the commission of the criminal act in which the firearm was used.

MD. ANN. CODE art. 27, § 36-I(h) (Supp. 2002). This provision also incorporates what appears to be a superfluous proximate cause provision in the second clause.

consumer expectation test adopted by the courts in Maryland, handgun manufacturers could not be strictly liable for defective design. The court stated that under existing law, "[f]or the handgun to be defective, there would have to be a problem in its manufacture or design, such as a weak or improperly placed part, that would cause it to fire unexpectedly or otherwise malfunction."[254] It was precisely this malfunction rule that the court rejected in cases involving Saturday Night Specials.

The need for a malfunction of the product was questioned in a somewhat oblique fashion by Judge Guido Calabresi of the United States Court of Appeals for the Second Circuit in his dissent in *McCarthy v. Olin Corp.*[255] The primary thrust of Judge Calabresi's dissent in the case was to state his objection to the majority's refusal to certify the tort law questions raised in the case to the New York Court of Appeals.[256] In that light only, he examined the law of product liability to determine whether New York law was sufficiently clear to support the majority's refusal to certify questions to the court of appeals. He determined that it was not.[257] During the course of his analysis, Judge Calabresi raised some thoughtful questions about the evolving flexibility of product liability law.

Judge Calabresi's discussion of New York law necessarily revolved around a comparison of the consumer expectation test and the risk-utility test for product defectiveness.[258] Noting that an increasing number of jurisdictions have espoused the risk-utility test, he characterized this test as one that may impose liability where

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254. *Kelley*, 497 A.2d at 1148. Under the consumer expectation test, a person would normally expect a handgun to be "dangerous, by its very nature, and to have the capacity to fire a bullet with deadly force." *Id.* Moreover, the court opined, a handgun is not a defective product simply by virtue of the fact that it is used in the commission of a crime. *Id.*

255. 119 F.3d 148, 157–75 (2d Cir. 1997) (Calabresi, J., dissenting).

256. *Id.* at 157–61 (Calabresi, J., dissenting). Judge Calabresi emphasized this point from the first words of his dissent:

> This case is less about bullets than about federal/state relations. It raises important questions of when it is appropriate for this court to certify issues of New York law to the New York Court of Appeals. I believe that federal courts in general, and this circuit in particular, have tended to be far too reluctant to certify questions to the state courts.

Id. at 157 (Calabresi, J., dissenting). Judge Calabresi emphasized his caution in this regard in the last footnote of the opinion: "In this respect, I have, in my dissent, emphasized the arguments in favor of liability, not because I am necessarily convinced by them, but because that is what I must do to determine whether there is sufficient uncertainty to warrant certification." *Id.* at 175 n.34 (Calabresi, J., dissenting).

257. *Id.* at 174 (stating that issues of liability in the case present a "complex question of New York common law" that lacks sufficient precedent).

258. *See id.* at 170–73 (Calabresi, J., dissenting).

"there is something wrong with any product that is unreasonably dangerous, 'even though it comports in all respects to its intended [and obvious] design.' "[259] He further noted that New York, the Third Restatement, and other jurisdictions have required that the plaintiff show the availability of a safer alternative design before liability may be imposed.[260] In the instance of the Black Talon bullets that were the subject of the product liability claims in *McCarthy*, Judge Calabresi observed that a safer alternative design did exist by eliminating the "talons" that gave the bullets their extreme wounding power.[261] His ultimate position was that New York law was not sufficiently clear to permit the Second Circuit to rule without input from the court of appeals. He advised that the determination of the test for product defect "will turn in substantial part on considerations of public policy"[262]—considerations best left to the New York courts.

In both *Kelley* and the Calabresi dissent in *McCarthy*, the judicial voices expressed deep concern and alarm about the availability of products that were uniquely lethal with no sport or recreational value. While Judge Calabresi considered the possibility that highly lethal bullets that could have been designed to eliminate the excess lethality may fit into a definition of defect within strict liability doctrine, the *Kelley* court chose instead to craft a strict liability exception for the type of gun involved in the case. What the two products have in common is their excess hazard. They were designed—intentionally—by the manufacturers with features that present extreme dangers. These judges recognized a need to curb certain gun manufacturer practices that were likely to cause ultimate harm to innocent victims.

B. Negligence

In one of two relatively recent high-profile gun cases,[263] a California appellate court, in *Merrill v. Navegar, Inc.*,[264] recognized a claim for negligent marketing against a gun manufacturer. Although the California Supreme Court ultimately reversed the appellate

259. *Id.* at 171 (Calabresi, J., dissenting) (quoting Azzarello v. Black Bros. Co., 391 A.2d 1020, 1025 (Pa. 1978)).

260. *Id.* at 173–74 (Calabresi, J., dissenting).

261. *Id.* at 173 (Calabresi, J., dissenting).

262. *Id.* at 174 (Calabresi, J., dissenting).

263. In addition to *Merrill*, the other case was Hamilton v. Accu-Tek, 935 F. Supp. 1307 (E.D.N.Y. 1996). *Hamilton* was brought in federal court, and the Second Circuit Court of Appeals certified questions of state tort law to the New York Court of Appeals. The result was Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055 (N.Y. 2001), in which the court of appeals concluded, among other things, that New York law did not recognize a cause of action against gun manufacturers for negligent marketing of firearms. *Id.* at 1066.

264. 89 Cal. Rptr. 2d 146 (Cal. Ct. App. 1999), *rev'd*, 28 P.3d 116 (Cal. 2001).

court,[265] both the Court of Appeal's opinion and the lone dissenting opinion of Justice Werdegar of the California Supreme Court offer strong and persuasive arguments favoring the liability of gun manufacturers for negligence.

Merrill arose from highly publicized shootings in an office building at 101 California Street in San Francisco in which the shooter used two semiautomatic assault weapons and an additional semiautomatic pistol.[266] The plaintiffs did not assert claims for product defect, but rather focused on the circumstances of the marketing of the assault weapons. The two opinions presented detailed descriptions of the testimony and other evidence on the features of the assault weapons—the TEC-9 and the TEC-DC9 previously discussed[267]—and on the marketing efforts of the manufacturer,[268] as well as the course of events leading up to the shooter's purchase of the weapons.[269] The evidence presented a picture of a highly lethal gun that could be made fully automatic and that was marketed in a manner that would attract criminals.[270] The plaintiffs' claims for negligent marketing addressed manufacturing, marketing, and availability of the guns to the general public, including criminals, as interdependent concepts.[271]

The Court of Appeal acknowledged the general rule that the manufacture or distribution of a gun that is not defective—according to the traditional definition of defect—does not create liability in negligence.[272] The court noted the widespread availability and use of firearms in contemporary American society and expressed a desire to allow law-abiding citizens to continue to purchase and use firearms.[273]

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265. Merrill v. Navegar, Inc., 28 P.3d 116, 133 (Cal. 2001).

266. 89 Cal. Rptr. 2d at 152.

267. *See supra* notes 35–43 and accompanying text.

268. 28 P.3d at 136–39 (Werdegar, J., dissenting); 89 Cal. Rptr. 2d at 155–57.

269. 28 P.3d at 136 (Werdegar, J., dissenting); 89 Cal. Rptr. 2d at 152–54. Gian Luigi Ferri made several trips to pawn shops inquiring about guns and eventually purchased one of the TEC-9 guns used in the shootings. During these visits, he told one salesperson he was interested in a gun for "home protection," and another that he was looking for a gun to use for target practice, or "plinking." *Id.* at 152–53. Subsequently, Ferri purchased the second TEC-DC9 used in the shootings at a gun show. *Id.* at 153. Both guns were purchased in Nevada, and were purchased legally under federal and state law, except that Ferri used a counterfeit Nevada driver's license in violation of federal law. *Id.* at 153–54. He later purchased the semiautomatic pistol used in the shootings at one of the pawn shops he had previously visited in Nevada, as well as Black Talon bullets for the pistol. *Id.* at 154.

270. *See Merrill*, 89 Cal. Rptr. 2d at 156–57.

271. *See id.* at 162.

272. *Id.* at 163.

273. *Id.*

The court emphasized, however, that this fact does not abrogate the manufacturers' duty to reduce the risks associated with their guns.[274] That said, the court proceeded to outline the elements of negligence that could, under appropriate circumstances, lead to a gun manufacturer's liability. The court stated: "Appellants' complaint can best be understood as presenting a theory of negligence based on Navegar's breach of a duty to use due care not to increase the risk beyond that inherent in the presence of firearms in our society."[275] The plaintiffs' proof would then focus on the *manner* in which the defendant manufactured, marketed, and made available to the public the guns in question in the case.[276] The duty, thus defined, would require gun manufacturers "to refrain from affirmatively increasing the inherent risk of danger posed by the furnishing of their product."[277]

The Court of Appeal examined existing California tort law and determined that while a defendant generally does not have a duty to control the actions of a third person absent a special relationship between the defendant and the third person or the ultimate victim, such a duty may exist in certain recognized special circumstances. One such circumstance exists " 'where the defendant, through his or her own action (misfeasance) has made the plaintiff's position worse and has created a foreseeable risk of harm from the third person.' "[278] The court had no trouble determining that the defendant gun

274. "This does not mean, however, that those who manufacture, market and sell firearms have no duty to use due care to minimize risks which *exceed* those necessarily presented by such commercial activities." *Id.*

275. *Id.*

276. *Id.*

277. *Id.* at 164. In explaining this concept of duty, the court cited to sports cases in which the inherent danger in the activity was part of the social value of the activity. The cases cited supported a duty not to increase the danger beyond what makes the activity socially useful. *Id.* at 163–64. In contrast to sports, however, assault weapons serve no recreational purpose and have no apparent social utility to the general public. Indeed, any utility to the military or law enforcement organizations is questionable as well. The court stated:

> The closest Navegar came to establishing that the TEC-DC9 has any utility whatsoever was the deposition testimony of the chairman of its board of directors that the weapon provided effective protection against a government "takeover" and "corrupt law enforcement agencies" and could also be used for "plinking," casual shooting for fun at random targets, such as bottles and cans. The first two of these putative uses are exceedingly implausible if not preposterous .... Chief Supinski ... pointed out that "the size, weight, and configuration of the TEC-9 presents a challenge to any shooter to shoot accurately. Since the purpose of 'plinking' targets is to hit them, the TEC-9 is not even useful for that purpose."

Id. at 166.

278. *Id.* at 164–65 (quoting Pamela L. v. Farmer, 169 Cal. Rptr. 282, 284 (Cal. Ct. App. 1980)).

manufacturer had created a foreseeable risk of harm in the design, marketing, and availability of the TEC-9 and TEC-DC9.[279] The court concluded: "Navegar had substantial reason to foresee that many of those to whom it made the TEC-DC9 available would criminally misuse it to kill and injure others, [and] that its targeted marketing of the weapon 'invited or enticed' persons likely to so misuse the weapon to acquire it."[280]

Justice Werdegar of the California Supreme Court took this point a step further in her dissent, stating that "the record in this case shows not only foreseeability but *foresight itself*."[281] She noted that the owner of Navegar admitted that the low price of its weapons was appealing to criminals and acknowledged the company's awareness that some of its guns would harm people. But the company took the position that it was unable to exert control over the criminal acts of others.[282] Thus, lack of foreseeability was not a viable argument for Navegar, nor did the company even bother to advance it in the California Supreme Court.[283]

Furthermore, the Court of Appeal found support for its ruling in public policy. Here the court cited the morally reprehensible nature of the defendant's conduct and the deterrent value of allowing such claims.[284] Separately, the court examined the projected impact of imposing such a duty on the manufacturer, concluding that the negligible social utility of the TEC-9 and TEC-DC9[285] was certainly outweighed by the goal of protecting the life and health of members of the public.[286] These policies had been articulated by both the California legislature[287] and the United States Congress.[288]

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279. *See id.* at 165–69.

280. *Id.* at 168–69.

281. Merrill v. Navegar, Inc., 28 P.3d 116, 141 (Cal. 2001) (Werdegar, J., dissenting).

282. *Id.* (Werdegar, J., dissenting).

283. *Id.* (Werdegar, J., dissenting).

284. *Merrill*, 89 Cal. Rptr. 2d at 169–70 (citing statistics on the societal costs of gun violence, including medical costs, police resources, and public fear and stress of living in a violent society).

285. Justice Werdegar also emphasized the guns' lack of social utility:

> [A]t stake is nothing more than a gunmaker's ability to make and sell on the civilian market, unfettered by potential negligence liability, a type of firearm that Congress and our own Legislature have found *highly dangerous to public safety and of relatively little value for recreation, hunting, and other legitimate uses.*

Merrill, 28 P.3d at 141 (Werdegar, J., dissenting).

286. *Merrill*, 89 Cal. Rptr. 2d at 171.

287. The Assault Weapons Control Act of 1989 ("AWCA") expressly stated that an assault weapon's "function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings." CAL. PENAL CODE § 12275.5 (West 2000). The Court of Appeal in *Merrill* conducted a lengthy analysis of the AWCA. The court concluded that imposition of a duty in negligence on

The Court of Appeal also took issue with the manufacturer's complaint that such a duty would effectively impose an impermissible judicial ban on the legal manufacture and sale of firearms. The court emphasized that civil liability is aimed at cost internalization, not elimination of the product or activity.[289] Even if liability forces manufacturers out of business or into the protection of the bankruptcy laws, such results have been tolerated repeatedly in other industries, such as the asbestos industry.[290] Furthermore, a ruling that

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the manufacturer of assault weapons would not create an impermissible conflict with the AWCA, either directly by preemption, or by deference to the legislature. *Merrill*, 89 Cal. Rptr. 2d at 173–75. In fact, a common law duty—which, not insignificantly, has been codified in general terms by the California legislature—would supplement the penal provisions of the AWCA. *See id.* at 174. The most significant obstacle to the common law duty announced by the Court of Appeal was a provision in the California Civil Code banning firearm or ammunition product-liability actions based on defective product claims. The provision states that "no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged." CAL. CIVIL CODE § 1714.4(a) (West 1998). Additional language in the section underscores the point: "The potential of a firearm or ammunition to cause serious injury, damage, or death when discharged does not make the product defective in design." *Id.* § 1714.4(b)(1). The section addresses causation as well: "Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product." *Id.* § 1714.4(b)(2). The Court of Appeal concluded that this section was inapplicable, in its entirety, to the present negligent marketing case because the section was intended to preclude strict liability design defect claims and no others. *Merrill*, 89 Cal. Rptr. 2d at 175–76. In so ruling, the court examined the legislative history of the provision, which clearly demonstrated that language relating to negligence claims was deleted by the Senate, and explanatory language clearly specifying "defective in design" was inserted. *Id.* at 176. The legislature accepted the Senate modifications. *Id.* Thus, the court concluded that a reasonable interpretation of the provision was that it did not purport to proscribe negligence actions and therefore had no relevance to the common law duty prescribed in the opinion. *See id.* The court stated:

> The policy expressed in section 1714.4 of insulating firearms from product liability actions based on design defects under the risk/benefit theory . . . does not relate to the manner in which nondefective firearms or ammunition are manufactured, marketed, and sold to the public. Nor does it relate specifically to assault weapons, as does the AWCA.

Id. (citation omitted).

In contrast, the California Supreme Court held that section 1714.4 applied to bar the plaintiffs' negligence claims. *Merrill*, 28 P.3d at 125. The court concluded that alleging that a product was negligently placed on the market was virtually identical to alleging a strict liability theory for defective design, particularly in the application of the risk-utility test. *Id.* To rule otherwise, the court explained, would be to allow plaintiffs to keep alive prohibited claims merely by manipulating the wording of the claim to avoid the language of product defect. *Id.* at 126–27.

288. *Merrill*, 89 Cal. Rptr. 2d at 171–72 (referring to the Violent Crime Control and Law Enforcement Act of 1994).

289. *Id.* at 178.

290. *Id.* at 172 & n.15, 179.

defines a duty in negligence to encompass the manufacturers of certain guns insofar as those guns may injure innocent third parties is not the end of the case; plaintiffs have a burden of proof that they must carry, and the jury ultimately will decide the matter.[291] In light of the fact that neither Congress nor the California legislature has preempted common law actions, the courts are free to recognize doctrines that do not conflict with legislative enactments.[292]

With regard to causation, the Court of Appeal determined that sufficient evidence existed for a jury to find that the actions of the defendant manufacturer constituted a substantial factor in the injuries claimed by the plaintiffs.[293] The court once again relied upon traditional negligence doctrine[294] relating to the intervention of the criminal or negligent act of a third person. The court stated that under these circumstances, "the defendant's conduct may constitute a [legally cognizable] contributing cause if it created or increased the risk of such criminal or negligent acts even though the defendant did not control the party whose criminal or negligent act most directly caused harm."[295] Where the criminal act of a third party is reasonably foreseeable to the manufacturer, the manufacturer's actions may be deemed a proximate cause of the injury that occurs.[296]

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291. The court observed: "Such a jury determination will, to be sure, also necessitate a value judgment—indeed the ultimate one—as to the risks and social utility of Navegar's conduct." *Id.* at 180. The court expressed its opinion that insufficient evidence of foreseeability has thwarted plaintiffs in gun personal injury cases against manufacturers more often than other failures in their cases. *Id.* at 180–81 n.23. In contrast, the court stated, the evidence of foreseeability of harm in the *Merrill* case was "compelling." *Id.* at 181 n.23.

292. *See id.* at 180; *see also Merrill*, 28 P.3d at 147–48 (Werdegar, J., dissenting) (arguing that a finding of negligence on the part of a gun manufacturer does not equate with a legislative ban on the manufacture of a particular gun).

293. *Merrill*, 89 Cal. Rptr. 2d at 185–89.

294. *Id.* at 186.

295. *Id.*

296. *See* Kush v. City of Buffalo, 449 N.E.2d 725, 729 (N.Y. 1983). The court in *Kush* held the defendant board of education liable for foreseeable acts of students hired as summer employees who took chemicals from a school chemistry lab and left them on school premises, where they were found by the infant plaintiff. *Id.* at 728. Similarly, the acts of third parties using guns in ways hazardous to others are foreseeable, although the specific incidents may not be. In her dissent in *Merrill*, Justice Werdegar observed:

> [P]laintiffs seek not imposition of a duty of rescue or prevention, but rather, application of the ordinary duty . . . to conduct one's activities with reasonable care for the safety of others . . . . Where, as here, the defendant's positive conduct of its business is claimed to have created or increased the risk of danger to the plaintiffs from attack by a third person, liability is not barred simply because the defendant had no special relationship with the third party actor or the victims.

Merrill, 28 P.3d at 143–44 (Werdegar, J., dissenting).

The negligence analysis conducted by Judge Calabresi in his dissent in *McCarthy*[297] paralleled the view of the *Merrill* Court of Appeal. The determination of whether a duty existed was key to the *McCarthy* case as well. While it was beyond the scope of his opinion to decide these issues, Judge Calabresi found it reasonable for the New York courts to recognize a duty by the Black Talon manufacturer if it so chose.[298] Nor did Judge Calabresi see any impediment to liability in a causation analysis.[299]

Judge Calabresi's reading of New York law emphasized the public policy context of the law. It is up to the state, he urged, to conduct its own public policy analysis—an analysis he did not believe the New York courts had yet fully undertaken.[300] As would be expected from Judge Calabresi,[301] the role of cost internalization figured prominently in this overall analysis.[302]

297. Again, because Judge Calabresi directly dissented from the majority's refusal to certify questions of New York tort law to the New York Court of Appeals, he did not reach an ultimate conclusion as to how New York law would apply to the Black Talon case. His goal was to demonstrate that it was not unreasonable to interpret New York law to encompass the ammunition manufacturer in the case. *See* McCarthy v. Olin Corp., 119 F.3d 148, 161 (2d Cir. 1997) (Calabresi, J., dissenting).

298. *Id.* at 168 (Calabresi, J., dissenting). "Whether the imposition of liability in these circumstances would go beyond the dictates of sound public policy is, of course, a difficult policy issue, but it is certainly not out of the question that the [New York] Court of Appeals might make just that determination." *Id.* at n.20 (Calabresi, J., dissenting).

299. *See id.* at 164–65 (Calabresi, J., dissenting).

300. *See id.* at 165–66 (Calabresi, J., dissenting). Judge Calabresi quoted the New York Court of Appeals regarding the judicial determination of duty:

> [Duty] coalesces from vectored forces including logic, science, weighty competing socioeconomic policies and sometimes contractual assumptions of responsibility. These sources contribute to pinpointing and apportioning of societal risks and to an allocation of burdens of loss and reparation on a fair, prudent basis .... Courts traditionally and as part of the common law process fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.

Id. at 166 (Calabresi, J., dissenting) (quoting Palka v. Servicemaster Mgmt. Servs. Corp., 634 N.E.2d 189, 192–93 (N.Y. 1994)).

301. As the widely respected author of GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970), and numerous other publications on the subject, Judge Calabresi's expertise as a tort-law theoretician places him in a unique position to evaluate the policy aspect of duty.

302. *See McCarthy*, 119 F.3d at 169–70 (Calabresi, J., dissenting).

V. SERVING THE POLICIES OF TORT LAW THROUGH GUN MANUFACTURER LIABILITY

Before setting forth our proposal, a brief examination of the policy goals of the tort system as they apply to gun manufacturer liability is warranted. Our analysis demonstrates that liability of manufacturers for inherently dangerous products, under appropriate circumstances, would effectively serve those goals. As a preliminary matter, victims of gun violence frequently cannot identify the person directly responsible for the shooting that caused the injury—the person who actually pulled the trigger. And in instances where the person is known and within the jurisdictional reach of the court, that person more likely than not will be judgment-proof. While the unavailability of the most culpable tortfeasor will not, standing alone, justify imposing liability on a different party, the unavailability does make it all the more reasonable to impose liability on the original responsible party who initiated the risk to which the victim was exposed, knowing the dangers of the product. This party is the gun manufacturer.

It is easy to become mired in the details of the various theories that might be employed to hold sellers of guns accountable for gun victims' injuries. Those details, however important, should not occlude the fundamental policy question: What justifies holding gun sellers liable for the injuries caused by their products? As previously discussed, some would argue that liability is not proper unless a statute explicitly bans the sale.[303] Under this view, even the manufacture and marketing of guns and ammunition known to present enormous threats to the public safety are beyond judicial power to influence. As shown throughout this Article, courts have, by and large, acquiesced in this conclusion.[304] But this result is consistent neither with the major policies underlying tort law nor with product liability law in particular.

Judicial reticence in these cases reflects certain concerns. Most obviously, the whole issue of gun sales and regulation has become so politically freighted that judges doubtless feel more comfortable remaining to one side of the fray.[305] Courts have been known to express the view that the legislature is better positioned to assess the

303. *See supra* Part I.

304. *See, e.g.*, *supra* notes 95–125 and accompanying text (discussing cases refusing to hold gun manufacturers liable for defective products).

305. For a discussion of the political fray, *see supra* notes 1–7 and accompanying text.

risks and benefits presented by guns.[306] Indeed, legislatures are equipped with certain fact-finding capabilities unavailable to courts, which are tethered to the facts of individual cases. Thus, courts should be careful when acting in areas that may conflict with legislative determination.[307] But where, as in the matter of guns, neither Congress nor the state legislatures have comprehensively and responsibly addressed the issue of gun regulation, the courts play an essential role. A further reason for judicial reticence is the difficult task of deciding which acts should result in liability, once liability is recognized in principle. For the reasons developed below, neither of these justifications for inaction can bear scrutiny. Indeed, imposition of liability in some cases is not only consistent with fundamental principles of tort law, it is required by them.

A. *Support for Gun Manufacturer Liability in the Policies of Tort Law*

Tort law is grounded in well-understood principles of corrective justice.[308] Unless a powerful countervailing reason is present, liability

306. As discussed *supra* note 287, legislation had a dispositive effect on the outcome of the California Supreme Court's holding in Merrill v. Navegar, Inc., 28 P.3d 116 (Cal. 2001), as the court read the statute banning firearm product liability actions so broadly as to bar suits based on negligence as well. *Cf.* Culhane & Eggen, *supra* note 198, at 257–89 (discussing the dismissal of a municipality's public nuisance claim against a gun manufacturer based on an overly deferential reading of a Florida state statute regulating firearms).

307. *See* Culhane & Eggen, *supra* note 198, at 302; *cf.* Lytton, *Tort Claims*, *supra* note 27, at 52–54 (arguing that legislatures are better-equipped to sift through complex data).

308. The principles of corrective justice were originally articulated by Aristotle in his NICHOMACHEAN ETHICS, Book V, Chapter VII (Prometheus Books ed. 1987). Once one moves beyond the proposition that corrective justice requires righting the balance that has been upset when the defendant does something to affect the plaintiff's interests without consent or justification, however, scholars are in famous disagreement as to what circumstances warrant compensation. Under one view of corrective justice, compensation is required only when one of the set of possibilities that made the defendant's conduct unreasonable in the first place comes to fruition by injuring a particular plaintiff or class of plaintiffs. *See generally* Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI-KENT L. REV. 407 (1987) [hereinafter Weinrib, *Causation and Wrongdoing*] (discussing the notion of wrongdoing without causation); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992) (discussing corrective justice as the neutralizing of one party's gain and another's loss). The former piece is part of a comprehensive symposium on the various articulations of the corrective justice theory. *See* Symposium: *Corrective Justice and Formalism: The Care One Owes One's Neighbors*, 77 IOWA L. REV. 403–863 (1992). Criticisms of Weinrib's formulation of the corrective justice principle range from complaints about the overly formal nature of his theoretical architecture, see JULES L. COLEMAN, RISKS AND WRONGS 433 (1992) ("Weinrib ... claims to have derived the content of corrective justice from [an] abstract Kantian or Hegelian conception of free agency. My approach could not be more different."), to more basic disagreements over whether corrective justice requires compensation even when the defendant's actions are

is generally imposed upon those whose conduct creates an unreasonable risk of harm to a foreseeable class of persons,[309] when personal injury results to a person in that class.[310] This kernel principle of tort law has proved immensely difficult in practical application.

The simplest and most direct example of the operation of tort principles is when one deliberately swings a fist at another person, thus creating a high degree of foreseeable risk of contact;[311] liability naturally follows the successful blow. But not since the beginning of English tort law have courts restricted liability to such simple cases. The ancient writ of trespass on the case, for example, developed for situations in which the connection between the wrongful conduct and the result was less direct, such as where the defendant negligently left a pole on the highway that later caused a horse to stumble.[312] Thus, very early, tort law addressed culpability for indirect harms and recognized that liability can flow from such actions.

For centuries, however, the causal intervention of a culpable third party displaced the original tortfeasor from the cause of action. Under the so-called "last wrongdoer rule," the intervening actions of the third party became a superseding cause of the plaintiff's injury.[313] Courts preferred simple causal chains, and disfavored the idea of

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not unreasonable in any way, see Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 159–60 (1973). Our view is in accord with the more common position that corrective justice is only brought into play when the defendant's actions were unreasonable.

309. Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (N.Y. 1928) (stating that "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension").

310. *See* John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 981–94 (2000–2001) (discussing recent retreat from foreseeability in California and Texas, and citing New Jersey as an example of a jurisdiction that continues to take the concept seriously). Foreseeability is not the only factor relevant to duty. *See id.*; *see also* McCarthy v. Olin Corp., 119 F.3d 148, 165–66 (2d Cir. 1997) (Calabresi, J., dissenting) (discussing the place of foreseeability in various jurisdictions, including New York). Where personal injury is involved, a duty should generally be owed to the injured party by those whose conduct created the foreseeable risk. According a central role to foreseeability respects the intrinsic, adjudicative nature of tort law.

311. According to the Second Restatement, one "intends" the resulting contact if he "desires to cause consequences of his act, or ... believes that the consequences are substantially certain to result from it." SECOND RESTATEMENT, *supra* note 88, § 8A. Although "intent" is generally used in battery, and "foreseeability" in negligence, the two concepts are part of a continuum. In a sense, "intent" and (especially) "substantial certainty" are extreme forms of foreseeability.

312. W.V.H. ROGERS, WINFIELD & JOLOWICZ ON TORTS 46 (14th ed. 1994).

313. Under this rule, the intervening culpable conduct (negligent or worse) of a third party relieved the original defendant of liability. *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 491–92 (7th ed. 2000).

allowing one plaintiff to have more than one defendant against whom to proceed. But today, common law-courts consistently recognize that the very principle that justifies liability in the first place—the creation of an unreasonable, foreseeable risk—also militates against such bright-line rules choking off liability against the defendant whose initial negligence set the dangerous course of events in motion.[314] Thus, as mentioned earlier, one who negligently entrusts an automobile to someone likely to pose a danger to others will be liable when that danger is realized through the car borrower's negligence.[315] Tobacco companies that concealed information concerning the addictive nature of nicotine may be held accountable for smoking-related diseases despite the intervention, possibly negligent, of the smoker.[316] And the manufacturer of a product that presents a foreseeable, but correctable, risk if misused is routinely made to compensate the plaintiff who in fact misuses that product.[317] Even the intentional intervening act of a third party will not operate to defeat recovery, where such act is foreseeable from the perspective of the initial defendant.[318] Thus, extending tort liability to gun manufacturers for the foreseeably illegal use of their products fits squarely into the progression of modern tort doctrine.

This evolution brings tort law closer to fulfilling one of its central aims—deterrence of conduct that imposes an unreasonable risk on others.[319] While it may not be possible to eliminate entirely the harm

314. *See id.* at 491–94.

315. *See supra* notes 233–40 and accompanying text.

316. *See supra* notes 200–20 and accompanying text.

317. *See infra* notes 410–14 and accompanying text.

318. For example, a security company would be liable to the owners of burglarized offices for its employee falling asleep on the job because "the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent." SECOND RESTATEMENT, *supra* note 88, § 449. A security guard falling asleep is negligent precisely because of the likelihood of the very criminal behavior the company was hired to prevent. Similarly, a railroad company that drops the plaintiff off in a high-risk area will be liable for her subsequent sexual assault. Hines v. Garrett, 108 S.E. 690 (Va. 1921) (holding the defendant liable for negligently taking the passenger past her stop and leaving her in a dangerous area where she was twice raped). In *Hines*, the court noted that "the very negligence alleged consists of exposing the injured party to the act causing the injury." *Id.* at 695; *see also* Landeros v. Flood, 551 P.2d 389, 395 (Cal. 1976) (physician liable for negligently failing to diagnose a battered child, thereby allowing child to return to the offending parent where the harm continued).

319. Whether deterrence is relevant to corrective justice has been a contested issue. Under a formal theory of corrective justice, it is not, because the only concern is to restore the allocation of assets that existed before the defendant's actions upset that allocation. *See* Weinrib, *Causation and Wrongdoing*, *supra* note 308, at 444–50. The more prevalent view, which we share, is that the requirement of achieving corrective justice should not (and, in fact, does not) disable courts from considering the consequences of their rulings beyond restoring the balance upset by *this* wrongful act involving *these* parties. This

presented by guns—or by any product, for that matter—without eliminating that entire class of products from the market, it is nevertheless possible to reduce the overall harm guns cause. Liability produces an incentive for manufacturers to adopt safer product designs and marketing practices, absorbing the costs of these safer designs into the price of the products.[320] In addition to these specific deterrence issues, tort liability serves an important general deterrence purpose. Manufacturers that see other manufacturers profit with impunity from products or distribution patterns that endanger the public health may find it irresistible to mimic the profitable conduct, thus amplifying the problem.

Focusing on deterrence leads from corrective justice to its principal theoretical rival, the economic efficiency model of tort. In one well-known articulation of efficiency theory, Judge Calabresi stated that the goal of tort liability is to determine the "cheapest cost avoider" and place liability on that party.[321] In other words, who "is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made"?[322] The economic model also counsels in favor of liability against gun manufacturers under certain circumstances. Gun manufacturers are often the cheapest cost avoiders—not the innocent victims, who typically have not even voluntarily encountered the manufacturer's product.[323] Imposing liability on gun manufacturers for injuries associated with their products would hold them accountable for their decisions to design and market lethal products with knowledge of the injuries that are likely to occur.

The goal of cost internalization is particularly relevant to the sale of guns. By placing liability on the product seller, the product's price

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position is not inconsistent with our earlier emphasis on tort law's intrinsic function. See *supra* note 310, in which we expressed a view disfavoring judicially imposed limitations on duty. Such limitations are vulnerable to criticism because they serve only to disqualify an innocent plaintiff, whose injuries allegedly are caused by the defendant's wrongful conduct. No similar solicitude is due the party whose conduct was wrongful in the first place; the deterrent effect of tort law may, at least as a formal matter, be seen as incidental to the central mission of corrective justice between the parties.

320. *See* Merrill v. Navegar, Inc., 28 P.3d 116, 145 (Cal. 2001) (Werdegar, J., dissenting).

321. CALABRESI, *supra* note 301, at 135 & *passim*.

322. Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972).

323. In cases involving conduct by both a manufacturer and a product user that ultimately injures an innocent third-party plaintiff, Calabresi and Hirschoff have this to say: "If both the manufacturer and the user are in a better position than the . . . victim to make the cost-benefit analysis, the strict liability test would require, as a general rule, that the victim should recover, whether he sues the manufacturer or the user." *Id.* at 1072.

can accurately reflect all of its costs, including the costs of injuries caused by the product and the costs of insuring against those risks. In this manner, the costs of doing business include the resulting costs of marketing a dangerous product.[324] One of the successful arguments typically made by product manufacturers against the imposition of strict product liability has been that they should not be held liable for hazards associated with a product that were unknowable at the time of the product's marketing.[325] Guns, however, contain risks that are not merely knowable at the time of marketing, but actually are known. As one court has stated, shifting the costs of injuries associated with the product onto "all those who produce, distribute and purchase manufactured products is far preferable to imposing it on the innocent victims who suffer illnesses and disability from defective products."[326] In addition to the normative statement this policy makes, there is a highly practical element of both compensating the innocent victim and spreading the costs among the users of the products in price increases, rather than onto society as a whole, which must bear the cost of injuries through public expenditures related to health and safety.

B. The Role of the Judiciary

Semi-automatic handguns and Black Talon bullets are examples of highly technological product designs that have emerged in the twentieth century and that were not contemplated during the evolution of the strict product liability doctrine embodied in the Second Restatement. They offer graphic examples of why the laissez-faire approaches of government and traditional tort law toward these inherently dangerous and uniquely lethal products no longer work. But they also pose the question of the proper role of the judiciary in addressing the dangers of modern products. With regard to guns, the

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324. *See* W. Page Keeton, *Products Liability—Inadequacy of Information*," 48 TEX. L. REV. 398, 408 (1970) ("It should be a cost of doing business that in the course of doing business an unreasonable risk was created.").

325. *Cf.* Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 546 (N.J. 1982) (noting and rejecting defendants' argument that they should be allowed to raise the state-of-the-art defense in an asbestos personal injury case based upon inadequate warnings). Most courts have disagreed with the *Beshada* court; the current consensus is that liability should not be imposed for failing to warn of the unknowable. *See* Mark McLaughlin Hager, *Don't Say I Didn't Warn You (Even Though I Didn't): Why the Pro-Defendant Consensus on Warning Law Is Wrong*, 61 TENN. L. REV. 1125, 1130 (1994). Of course, what was *knowable* is a world apart from what was actually *known* by the defendant when the product was designed.

326. *Beshada*, 447 A.2d at 547.

judiciary serves an important supplemental role to existing legislation, and courts should affirmatively embrace that role.[327]

In their effort to avoid tort liability, gun manufacturers and their supporters often cite the fact that guns are legal. In his dissent in *McCarthy v. Olin Corp.*,[328] Judge Calabresi stated, "Legality of an act does not insulate it from possible tort liability."[329] This statement reflects a fundamental principle of our legal system—that legislative and judicial activities serve different functions. The majority of jurisdictions follow a rule that compliance with safety statutes or regulations relating to products is relevant evidence on the issue of product defect, but not dispositive on liability.[330] Absent preemption[331] of state common law, existing safety regulations are viewed as "minimum standards" beyond which the judicial system is free to go in crafting rules of liability.[332]

Notwithstanding this basic tenet, courts often defer to legislatures in areas of substantial public interest, particularly on issues traditionally within the scope of legislative action.[333] Courts

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327. This statement has not gone unchallenged. One article argues, specifically with reference to guns, that "courts intrude on the regulatory and revenue responsibilities of legislatures" when they permit suits challenging the design and sale of otherwise lawful guns. *See* Michael I. Krauss & Robert A. Levy, *So Sue Them, Sue Them . . .*, THE WKLY. STANDARD 19–20 (May 24, 1999). *See generally* Martin A. Kotler, *Social Norms and Judicial Rulemaking: Commitment to Political Process and the Basis of Tort Law*, 49 KAN. L. REV. 65, 67–68 (2000) (stating that "the judicial role should be contracted so as to encompass only limited forms of decisionmaking—those which are either legislatively mandated . . . or essential to ensuring that the adjudication process remains broadly consistent with the majoritarian political commitment of our society as a whole.").

328. 119 F.3d 148 (2d Cir. 1997).

329. *Id.* at 163 n.14 (Calabresi, J., dissenting).

330. *See, e.g.*, O'Gilvie v. Int'l Playtex, Inc., 821 F.2d 1438, 1443 (10th Cir. 1987) (finding compliance with FDA regulations in toxic shock syndrome case insufficient to preclude liability); Sours v. Gen. Motors Corp., 717 F.2d 1511, 1517 (6th Cir. 1983) (finding compliance with federal motor vehicle safety regulation in automobile case insufficient to preclude liability). *See generally* DOBBS, *supra* note 91, at 1033–35 (commenting that evidence of compliance with a statute or regulation is not a dispositive defense).

331. The existing federal statutory and regulatory structure for firearms and ammunition does not preempt state common law. *See supra* notes 59–75 and accompanying text.

332. *See* Feldman v. Lederle Labs., 625 A.2d 1066, 1070 (N.J. 1993), *cert. denied*, 505 U.S. 1219 (1992); DOBBS, *supra* note 91, at 1034 (stating that "[f]requently regulations are intended to provide a floor . . . , not an optimal level or a ceiling on safety precautions").

333. Thus, for example, the New York Court of Appeals refused to impose a discovery statute of limitations on latent disease claims, even though plaintiffs found that their claims had become time-barred under the existing time-of-exposure rule prior to their development of symptoms. *See* Wetherill v. Eli Lilly & Co., 678 N.E.2d 474, 478 (N.Y. 1997). The New York courts thus deferred to the state legislature on a traditional legislative function—determining statutes of limitations and related tolling provisions. In

may also defer to legislatures or regulatory agencies on matters for which statutory action or regulation is imminent.[334] In many gun suits, courts have invoked this deferential attitude, stating that the social policies involved make liability appropriate for legislative decision-making, rather than judicial determination. The court in *Martin v. Harrington & Richardson, Inc.*[335] typified this judicial attitude, stating: "Imposing liability for the sale of handguns, which would in practice drive manufacturers out of business, would produce a handgun ban by judicial fiat in the face of the decision by [the state] to allow its citizens to possess handguns."[336] Such deference to the legislature under these circumstances is both unwarranted and ineffectual.

As Judge Calabresi stated: "There is all the difference in the world between making something illegal and making it tortious. . . . [V]ery different policy considerations go into the decision of whether to forbid something and the decision of whether to find a duty that permits liability for the harm it causes."[337] Tort liability is not a product ban. Rather, tort liability forces cost optimization by requiring manufacturers to take steps to conduct their own risk-utility analysis in deciding whether to continue marketing the product as-is, modify the product design, or remove the product entirely from the market. Critics of gun manufacturer liability charge that any such liability will effectively constitute a ban of firearms because guns can be made no safer.[338] This is simply not true. Some guns have no

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1986, the New York State Legislature enacted a broad discovery statute of limitations for toxic exposures, including prescription drugs. *See* N.Y. C.P.L.R. 214-c (McKinney Supp. 2002). At the same time, the legislature authorized the revival of previously time-barred claims involving exposure to certain enumerated substances. 1986 N.Y. Laws 682 (§§ 4–5).

334. *See* Hammond v. Int'l Harvester Co., 691 F.2d 646, 651 (3d Cir. 1982) (OSHA regulations requiring a roll-over protective structure promulgated *after* manufacture of an allegedly defective vehicle could be introduced into evidence, as regulation "provides strong support for the proposition that a loader tractor . . . does not possess every element necessary to make it safe for use.").

335. 743 F.2d 1200 (7th Cir. 1984).

336. *Id.* at 1204. The *Martin* court also favorably quoted an earlier decision in which the court stated: " 'Although . . . a social policy [of gun manufacturer liability] may be adopted by the legislature, it ought not to be imposed by judicial decree.' " *Id.* (quoting Riordan v. Int'l Armament Corp., 81 L. 27923, slip op. at 3 (Cir. Ct. Cook County, Law Div. July 21, 1983)).

337. McCarthy v. Olin Corp., 119 F.3d 148, 169–70 (2d Cir. 1997) (Calabresi, J., dissenting).

338. *See, e.g.*, Perkins v. F.I.E. Corp., 762 F.2d 1250, 1269 (5th Cir. 1985) (holding that the marketing of a handgun is not an ultrahazardous activity and expressing concern that liability would send manufacturers out of business); Timothy A. Bumann, *A Products Liability Response to Gun Control Legislation*, 19 SETON HALL LEGIS. J. 715, 733 (1995) (referring to a defense attorney's argument against gun manufacturer liability and stating that "[t]he gun control proponents have made it clear that their goal is to put the firearms industry out of business"). This point of argument is so fraught with emotion that

sporting value; indeed, some even have no value for the limited purposes of legitimate law enforcement or the military. Certain guns appeal to criminals more than others, due to features that have no social value, such as fingerprint resistance, modifiability, and excessive firepower. And some guns and ammunition are designed to achieve maximum wounding power and carnage. Some of these guns probably should not be on the market, but others may serve some legitimate function. The prospect of tort liability places these decisions in the hands of the manufacturers.

While legislatures have a legitimate interest in regulating firearm sale and usage, existing regulation has done little or nothing to prevent the surge in the manufacture and sale of firearms with increased hazards.[339] More effective regulation is not on the legislative horizon. Plaintiffs have argued that judicial intervention is particularly crucial when, as with guns, legislatures have done little to regulate the hazards. Some courts have disputed plaintiffs' arguments that legislative inaction mandates judicial imposition of liability on gun manufacturers. These courts have implied that minimal regulation is not the result of legislative indifference or political disagreement. Rather, these courts aver that further legislation is not forthcoming because legislators have determined that it is not warranted or desirable. Thus, in *Patterson v. Rohm Gesellschaft*,[340] where the plaintiff argued that tort liability was appropriate in light of legislative inaction,[341] the court stated:

> It would be improper for courts to ignore the fact that legislatures have repeatedly rejected arguments like those made by the plaintiff's attorneys in this case. Indeed, . . . the clear inference is that the majority of legislators—certainly those in Texas—do not consider that the manufacture and sale of handguns to the public is unreasonably dangerous or is socially unacceptable.[342]

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reasoned analysis and response are often difficult. At least from an economic standpoint, allowing liability to send some manufacturers out of the marketplace may be a desirable result: "[I]f people purchase fewer handguns and some companies go out of business, efficiency has been improved and, because handgun victims are assured compensation, everyone is better off. There is no need to preserve companies for their own sakes by employing a rule that produces inefficient results . . . ." Paul R. Bonney, Note, *Manufacturers' Strict Liability for Handgun Injuries: An Economic Analysis*, 73 GEO. L.J. 1437, 1459–60 (1985).

339. *See supra* Part I.B.

340. 608 F. Supp. 1206 (N.D. Texas 1985).

341. *Id.* at 1213. "[Plaintiff] claim[s] that the fact that not a single legislature has banned handguns—and that most have rejected efforts for any meaningful gun control—'weighs very heavily in the plaintiff's favor.' " *Id.* (quoting Transcript, p. 26).

342. *Id.* at 1214 (footnotes omitted).

Similarly, in *Mavilia v. Stoeger Industries*,[343] a federal district court in Massachusetts noted that the state legislature had considered and rejected "numerous" resolutions to ban handguns. The court concluded that the lack of legislative activity signified affirmative legislative support for the marketing of handguns to the public.[344]

This interpretation of legislative inactivity ignores the realities of the political process. Banning a product outright is a difficult legislative endeavor, fraught with political implications for legislators who are beholden to their constituencies. A legislator's decision to vote against a product ban does not imply that he or she is not in favor of increasing regulation of the product.

Indeed, the lack of a legislative ban provides perhaps the best situation for judicial intervention. The role of the judiciary is not to impose absolute product bans. Rather, the common law supplements positive statutory enactments and regulation in ways that may modify product seller behavior so as to enhance public safety.[345] Admittedly, a manufacturer might determine that removal of a product from the market is the most prudent response to the threat of liability. But that would be a decision for the particular manufacturer. Under a common law rule applying product liability law to gun manufacturers, it is conceivable that a manufacturer of a Saturday Night Special may decide to remove the product from the market because the risk of harm is high and, therefore, the risk of liability is great. It is far less likely that a hunting rifle would be forced from the market because the sporting utility of the rifle is substantial and the likelihood that it would inflict criminal harm is diminished. The cost of harm inflicted by the rifle would likely be outweighed, in the manufacturer's analysis, by the profitability of the safe use of the rifle in its ordinary use.

It is a reality of the regulatory process that regulatory responses to problems do not necessarily reach the broad range of all hazards posed by products. Government regulators tend to focus narrowly on

343. 574 F. Supp. 107 (D. Mass. 1983).

344. *Id.* at 111; *accord* Richman v. Charter Arms Corp., 571 F. Supp. 192, 198 (E.D. La. 1983) ("Given the prominence of the handgun issue in public debates, the only plausible explanation for the refusal to ban handgun sales to the general public . . . is that a majority of the legislators think such a ban would be undesirable as a matter of public policy."), *aff'd in part & rev'd in part sub nom.* Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985).

345. *See* Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1066 (N.Y. 2001). After acknowledging this point, the court of appeals went on to say that "we should be cautious in imposing novel theories of tort liability while the difficult problem of illegal gun sales in the United States remains the focus of a national policy debate." *Id.* While that policy debate is continuing, all evidence points to the virtual end—at least for the time being—of meaningful legislative action on this matter.

acute problems.[346] While this approach may result in effective resolution of a specific immediate problem, it often ignores other existing problems or creates additional problems.[347] Moreover, administrative agencies have inconsistent track records in both prioritizing risks and drafting effective regulations.[348] In light of these problems, the common law has an important role to play in supplementing the regulatory process.

Furthermore, as Professor Carl T. Bogus has observed, flaws in the regulatory process may allow manipulation of product information by manufacturers in their favor.[349] Federal agencies are littered with products about which the manufacturers have presented partial or incorrect information.[350] Because federal agencies rely upon the manufacturers to conduct full-fledged testing of their products and present that data to the agencies, the agencies are not equipped to verify or conduct that testing themselves. As a result, "the manufacturer holds the cards" in the regulatory process.[351] This fact highlights the important role of the judicial system[352] in assuring the safety of products on the market.

Bogus has astutely noted that political disagreement over regulation of other products has not caused the same degree of judicial deference to legislatures as that evidenced in the gun suits.[353] He suggests that courts have treated guns differently not only because they have generated political debate, but because of the nature of that

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346. *See* BREYER, *supra* note 26, at 19–20.

347. *See id.* at 12 (analyzing example of asbestos removal).

348. *See id.* at 10–29.

349. Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 72–76 (1995) [hereinafter Bogus, *War on the Common Law*].

350. The products cited by Professor Bogus are asbestos, PCBs, the Dalkon Shield birth control device, MER/29 (an anticholesterol drug), and heart catheters. *Id.* at 73.

351. *Id.* at 76.

352. Professor Bogus would take this point one step further. He has stated:

> The courts have final authority in matters involving constitutional law, and therefore the concept of judicial restraint is critical in constitutional cases. The situation is reversed in common law areas, however; just as there is no check on bad constitutional law made by the courts, there is no check on bad common law made by legislatures. It is time to recognize a parallel doctrine of legislative restraint.

Id. at 71. This Article is not the place to engage in a jurisprudential debate on the appropriate balance between legislative activity and the common law in all areas of the law. But this debate is significant here inasmuch as it demonstrates that the injuries inflicted by guns cannot be dismissed so facilely by a brief statement in a judicial opinion that they are matters for the legislature. The issue is far more complex and requires participation by *both* the legislative and judicial branches.

353. Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 U. CIN. L. REV. 1103, 1149–53 (1991).

debate. The politics of the gun debate have reached a broader base of participants than the debate over other products, such as pesticides. Gun issues have generated strong passions in an especially large consumer base—not merely in specific interest groups—whose members are both in favor of and against regulation. This broad public interest, coupled with the remarkably vigorous and well-financed lobbying activities of the National Rifle Association ("NRA") at all levels of government, represent intimidating silent forces in the courtroom.[354]

Finally, the issue of tort compensation for gun victims cannot be divorced from the raging debate over tort reform generally, the flames of which have burned in Congress and state legislatures since the 1980s. While recent efforts at general federal tort liability reform—particularly in the area of products liability—have fizzled,[355] the disappearance of extreme tort reform proposals from the legal landscape is unlikely. The tort reform movement is driven by the zeal and resources of the business community and their lobbying organizations. These groups view the tort system as resulting in "excessive, unpredictable, and often arbitrary damage awards and unfair allocation of liability."[356] The gun lobby has been a perennial and vigorous supporter of tort reform. Thus, the tort reform debate has been closely tied to the gun debate, invoking the same interests and policies.

On the state level, tort reform has made greater inroads, but it has been no less controversial. A typical example of a state tort reform act was the legislation enacted in Ohio, which included provisions on comparative fault, joint and several liability, statutory limitations of actions, damage caps, and separate provisions for a variety of types of actions, such as product liability, premises liability, and medical malpractice.[357] Similarly, legislation enacted in Florida in 1999[358] included many provisions favorable to business. The Florida

354. *See id.* at 1156–57. Professor Bogus suggests that the intimidation factor may arise from inevitable accusations by the NRA of "judicial activism," should a judge determine that tort law appropriately applies to guns. *Id.* at 1157. A further concern may be that angry pro-gun forces will redouble their efforts at tort reform in the wake of judicial decisions that are favorable to personal injury plaintiffs. *Id.* at 1158–59.

355. *See, e.g.*, Product Liability Reform Act of 1997, S. 648, 105th Cong. (1997) (proposing a uniform set of legal principles governing product liability).

356. *Id.* § 2(a)(4)–(5). This language appeared in the "Findings" section of the Senate bill.

357. *See* State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1073 n.6 (Ohio 1999).

358. 1999 Fla. Sess. Law Serv. Ch. 99-225 (West) (H.B. 775).

act, among numerous other provisions, capped punitive damages[359] and created a rebuttable presumption that a product was not defective if its design complied with existing government standards and regulations.[360] Both the Ohio and Florida examples demonstrate the risks of such broad legislation. In 1999, the Ohio Supreme Court held the Ohio tort reform statute unconstitutional[361] because it usurped the authority of the court to establish rules governing litigation and to act as the final arbiter of the constitutionality of Ohio law.[362] The constitutionality of the Florida act has been the subject of a long battle in the courts of the state, and its ultimate fate is far from certain.[363]

The examples of Ohio and Florida illustrate both how hard-fought the battles of tort reform have been and how fragile the boundary is between permissible legislative intrusion in an area traditionally left to the courts and impermissible legislative usurpation of judicial authority. The tort reform debate will continue, in different forms and with different features, indefinitely. Gun interests and gun control advocates have a continuing stake in the outcome of the debate, on both the federal and state levels. Their concerns and passions on this subject—and not the matters raised in individual cases—will continue to boil the kettle of legal issues of gun tort liability. Leaving issues of gun manufacturer liability solely to legislatures virtually guarantees delay, uncertainty, and political bias.

VI. GUN TORTS: FASHIONING A REMEDY FOR GUN VICTIMS FROM EXISTING TORT LAW

The appropriate remedy for victims of gun violence is obvious when one strips away the diversions and distractions of the political debates over guns and tort reform. It is in plain sight in existing tort doctrine. It is the next logical step in the evolution of the common law of product liability. Courts should not fear the political ramifications of taking this logical step. Rather, they should embrace and develop a reasoned, nuanced approach to its implementation.

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359. *Id.* § 23.
360. *Id.* § 15.
361. *Sheward*, 715 N.E.2d at 1111.
362. *Id.* at 1073.
363. *Appeals Court Reverses Finding that Florida Repose Law Unconstitutional*, 17 TOXIC L. RPTR. 1002 (2002) (discussing recent ruling impacting fate of Florida tort reform act).

A. *Liability for Manifestly Unreasonable Products*

Courts have recognized the inherent lethality of handguns, as well as the fact that criminal use of guns is easily foreseen by manufacturers. In *Richman v. Charter Arms Corp.*,[364] for example, the court, analogizing to automobiles,[365] held that violence is a foreseeable use of guns. The court stated:

> The analogy here is manifest: if car manufacturers must reasonably expect purchasers of their products to speed periodically, then surely handgun manufacturers must reasonably expect purchasers of their products to kill periodically .... For this reason, the Court finds that in the context of this case the criminal use of a handgun is, as a matter of law, a normal use of that product.[366]

Unfortunately, courts have perverted the foreseeability concept in holding gun manufacturers immune from liability for gun violence, given that the criminal use of their guns is eminently foreseeable.[367] This result is absurdly counterintuitive. It permits manufacturers with full knowledge that their guns will be used to commit violent crimes to continue producing and marketing those guns because the tort system has not done its job of requiring the manufacturers to modify their unreasonably hazardous behavior and products.

This attitude reaches its zenith in the Third Restatement. With characteristic linguistic circuitousness, the Third Restatement states the dilemma using the example of a toy gun that shoots hard rubber pellets with excessive force. Under the risk-utility test endorsed in

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364. 571 F. Supp. 192 (E.D. La. 1983), *aff'd in part & rev'd in part sub nom.* Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985).

365. Specifically, the court discussed a case in which two persons were injured in a sports car when the car lost a tire tread. LeBouef v. Goodyear Tire & Rubber Co., 623 F.2d 985 (5th Cir. 1980). The *LeBouef* court upheld a judgment against the manufacturer because the accident occurred while the car was being used for its normal use—and not being misused by the driver—notwithstanding the facts that the driver was intoxicated and speeding. *Id.* at 989. The court explained that the manufacturer could reasonably have foreseen that its cars—particularly sports cars—would be driven in excess of the speed limit. *Id.* at 989 n.4.

366. *Richman*, 571 F. Supp. at 197. This case involved the kidnapping, robbery, rape, and murder of a woman by a man who obtained from an acquaintance a "snub nose .38" handgun manufactured by the defendant. *Id.* at 193.

367. *See, e.g.*, Moore v. R.G. Indus., Inc., 789 F.2d 1326, 1327 (9th Cir. 1986) (finding no design defect because the handgun performed as intended); Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1323 (E.D.N.Y. 1996) (stating that the act of manufacturing a handgun "does not give rise to liability absent a defect in the manufacture or design of the product itself"), *vacated by* 264 F.3d 21 (2d Cir. 2001); Armijo v. Ex Cam, Inc., 656 F. Supp. 771, 773 (D.N.M. 1987) (rejecting plaintiff's argument that the potential criminal use of a firearm renders the product defective), *aff'd*, 843 F.2d 406 (10th Cir. 1988); *see also supra* Part II (discussing judicial decisions hostile to gun manufacturer liability).

the Third Restatement, such a gun that causes injury could be deemed defective because alternatives exist, such as softer projectiles or water.[368] The Restatement continues: "However, if the realism of the hard-pellet gun, and thus its capacity to cause injury, is sufficiently important to those who purchase and use such products . . ., then no reasonable alternative will ... be available."[369] The Third Restatement places guns and ammunition into the latter category of products for which no reasonable alternative is available. Indeed, in the Third Restatement's view, Black Talon bullets may be analytically indistinguishable from rubber pellets. According to the Third Restatement, the only question is whether the "capacity to cause injury" is "sufficiently important" to the user; if so, the product is not defective. While this approach examines the availability of alternative design, it omits any analysis of the social utility of the product.[370]

The theory that gun manufacturers must not be made to reduce the hazards of their products through tort liability because guns are intended to shoot and kill is patently absurd. It is time that courts recognize this incongruence and fashion a tort remedy against gun manufacturers for victims of gun violence. Contrary to popular rhetoric, courts (and especially juries) often stand the best chance of achieving truly democratic results, because there is less opportunity for special interests to gain control of the proceedings.[371] Courts

368. THIRD RESTATEMENT, *supra* note 10, § 2 cmt. e.

369. *Id.*

370. The Third Restatement raised the possibility of liability for manifestly dangerous products in a narrowly defined set of circumstances. *See id.* The sole illustration involved an exploding cigar, intended as a joke item. If the cigar's explosion caused the smoker's beard to catch fire, thus causing injury, the manufacturer could be found liable even though no reasonable alternative design could have eliminated the hazard while retaining the joke element of the cigar. *Id.* illus. 5. Liability may be found under these circumstances because "[t]he utility of the exploding cigar is so low and risk of injury is so high as to warrant a conclusion that the cigar is defective and should not have been marketed at all." *Id.* The language of comment e and illustration 5 is generally disapproving of any exception at all, so it is safe to assume that the exploding cigar was intended to be an isolated one. We view the exploding cigar as having much in common with many of the excessively hazardous firearms and bullets that have been the subject of lawsuits by shooting victims and their families. These guns and ammunition often have little or no utility other than the commission of crimes and the killing and maiming of persons. *See* Merrill v. Navegar, Inc., 28 P.3d 116, 125 (Cal. 2001) (gunman using semiautomatic assault weapon to kill eight people). Thus, these products seem to be indistinguishable from the exploding cigar example, except that the harms they cause are far more serious.

371. *See* Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 533 (2000) ("[C]ourts tend to be populist and deliberative, whereas legislatures tend to be captured by special interests, secretive, hasty, and unwilling or unable to offer reasons for their actions."); *see also* Mark Curriden, *Putting*

should not permit the same paralysis that has afflicted the legislative branch to afflict their own offices.

1. Strict Product Liability for Manifestly Unreasonable Product Design

Strict product liability doctrine contains the essential theory and framework to impose liability on gun manufacturers for injuries and death caused by gun violence. While strict liability typically has been applied to guns only when they malfunction, contemporary product liability doctrine supports a broader scope for design defect to encompass manifestly unsafe products. The risk-utility doctrine advocated in some form by most states and the Third Restatement is clearly applicable to such products, while the consumer contemplation test is more difficult to apply.[372]

As mentioned above, the Third Restatement recognizes that under certain circumstances a product design may be so manifestly unreasonable as to constitute a defect, notwithstanding that the product was in normal use and did not malfunction when the injury occurred.[373] If a product falls into this category, it may contain a design defect absent proof of a reasonable alternative design.[374] The rationale behind this approach is that "the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible social utility that no rational, reasonable person, fully aware of the relevant facts, would choose to use, or to allow children to use, the product."[375] The Reporters make clear, however, that they

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the Squeeze on Juries, 86 A.B.A. J., Aug. 2000, at 52, 58 (discussing various state statutes enacted to shield certain special interest defendants from tort liability). A thoughtful recent article that addresses the democratic nature of both the legislative and adjudicative processes is Christopher J. Peters, *Persuasion: A Model of Majoritarianism as Adjudication*, 96 NW. U. L. REV. 1 (2001). In Peters's view, participation is "central to democratic legitimacy . . . ." *Id.* at 20–22. Thus, when special interests capture legislators, in the sense of rendering them incapable of seriously considering opposing viewpoints, participation—and therefore democracy—suffers. The analogy in the adjudicative process would be to a judge who is bribed, or unduly influenced, by one of the parties.

372. The position advanced in this Article is consistent with that developed in Culhane, *supra* note 241. The consumer expectation test is difficult to apply in the case of products, such as handguns, that typically injure a bystander, rather than the consumer. For an analysis of the ways in which the developing doctrine of bystander liability supports gun manufacturer liability for the injuries and death of victims of gun violence, see *infra* notes 400–06 and accompanying text.

373. THIRD RESTATEMENT, *supra* note 10, § 2 cmt. e.

374. *Id.*

375. *Id.* It is curious but telling that the Restatement employs toy guns and exploding cigars as examples of products that raise the issue of manifestly unreasonable design. *Id.* illus. 5. The choice to illustrate this significant concept with the examples of a toy and a novelty item is a clear effort to avoid the troubling issues of guns and tobacco products.

espouse a conservative application of this theory, declining to apply it to truly dangerous products such as guns.[376] Viewed objectively, there seems to be no real reason—other than political inclination or a penchant for legal inertia—not to apply this theory in appropriate cases involving guns.[377]

2. The Test for "Manifestly Unreasonable Design"

The obvious starting point for a determination of manifestly unreasonable design is the risk-utility analysis. Yet, simple application of this test is insufficient to deal with the issues involved. An unmodified risk-utility analysis could lead to liability in virtually all cases of injury of third persons from guns, including persons injured in hunting accidents. Accordingly, evaluation of a manifestly unreasonable design must consider a series of factors to enable nuanced examination of the product under scrutiny.[378] Thus, the proposal set forth below employs various familiar legal tests not usually found in tandem and applies them in a new context. The test is a synthesis that recognizes that some torts that have proliferated in contemporary society require a fresh approach,[379] and encourages courts to relinquish their grip on old-fashioned modes of applying the tests and develop a balanced, sensible approach to gun torts.

To determine whether a manufacturer should be held liable for a manifestly unreasonable product design, it is useful to adapt and apply the multifactored analysis usually reserved for abnormally

376. *See id.* § 2, rptrs' note IV.D (endorsing the view of a majority of courts).

377. For a discussion of the treatment under this theory of guns that have substantial legitimate uses, see *infra* notes 396–98 and accompanying text.

378. Some commentators have discussed the concept of "generic product liability," which would obviate much of the analysis we propose. *See* Bogus, *War on the Common Law*, *supra* note 349, at 9 (discussing the inevitable evolution of product liability law toward generic liability); Jerry J. Phillips, *The Unreasonably Unsafe Product and Strict Liability*, 72 CHI.-KENT L. REV. 129, 131 (1996) (stating that the Third Restatement approach is too restrictive). The primary criticism of generic product liability has been its sweeping and somewhat indiscriminate breadth, which would wipe out liability for whole categories of products. *See, e.g.*, Richard C. Ausness, *Product Category Liability: A Critical Analysis*, 24 N. KY. L. REV. 423 (1997) (discussing problems associated with generic product liability in the context of tobacco litigation). Whether or not generic product liability would have this effect, our proposal is preferable because it allows the application of strict product liability to inherently dangerous products and forces an examination of the merits of each product that comes before the courts.

379. *See, e.g.*, Jean Macchiaroli Eggen, *Toxic Reproductive and Genetic Hazards in the Workplace: Challenging the Myths of the Tort and Workers' Compensation Systems*, 60 FORDHAM L. REV. 843 (1992) (discussing ways in which toxic torts in the workplace challenge traditional legal tests and recommending new approaches to liability questions).

dangerous activities.[380] Use of these factors is appropriate for several reasons. First, simply put, they have been used for many years in a related strict liability context and have proved workable.[381] Second, the factors construct a risk-utility analysis which parallels the developments in strict product liability. Finally, these factors are consistent with strict product liability law in the sense that they infuse elements of reasonableness and foreseeability[382] into strict liability, thus moving away from absolute liability. The abnormally dangerous activities factors must be modified, however, to suit the unique characteristics of these consumer products.

The factors set forth in section 520 of the Second Restatement reflect their focus on activities. With minimal modification, and the addition of other factors, they are quite relevant to products involving manifestly unreasonable design. Accordingly, we offer the following factors as determinative of a manifestly unreasonable design:

(1) the existence of a high degree of risk of harm to the person of others;

(2) the likelihood that the harm that results will be great;

(3) the extent to which the product is not in legitimate common usage;

(4) the extent to which the product's value to the community is outweighed by its dangerous attributes;

(5) the availability of a safer alternative design;

(6) the seller's actual or constructive knowledge that the product is likely to be used in the manner that caused the injury to the plaintiff.

The first four factors track closely the section 520 factors.[383] As with the section 520 factors, all factors are to be considered, but no single

380. *See* SECOND RESTATEMENT, *supra* note 88, § 520. These factors are listed *supra* note 177.

381. A fairly recent use of, and justification for, the strict liability factors were offered by Judge Posner in *Indiana Belt Railroad v. American Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990) (concerning the transportation of dangerous chemicals by rail).

382. *See* RESTATEMENT (THIRD) OF THE LAW OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), § 20 cmt. i (Tentative Draft No. 1, Mar. 28, 2001) (regarding claims for abnormally dangerous activities, stating that "the case on behalf of strict liability is strengthened when the defendant has actual knowledge of the risky quality of the activity in which the defendant is engaging . . . [and thus] is deliberately engaging in risk-creating activity for the sake of the defendant's own advantage").

383. SECOND RESTATEMENT, *supra* note 88, § 520.

factor will be dispositive.[384] All six factors need not be present to determine that the product design was manifestly unreasonable.[385]

The first three factors focus on the weight of the harm caused by the use of the gun. The first and second factors state the role of degree of risk and severity of harm. The third factor adds to the language of section 520(d) the word "legitimate," recognizing that a product may have several different uses, some legitimate and some socially unacceptable. This is particularly true with some guns, which may be used for legitimate purposes, such as law enforcement or sporting, or for illegitimate criminal purposes. Because criminal use of a gun is illegitimate, such use is not "common usage" for the purpose of this factor. Thus, where a gun has virtually no legitimate purpose, but is commonly used for criminal activity, this factor would weigh strongly in favor of liability.

The fourth factor is the essence of the risk-utility balancing test. It also addresses the characteristics of the gun under scrutiny and complements the third factor. Injuries inflicted as a result of criminal use of a gun that has no legitimate uses will weigh more heavily than injuries inflicted through the use of a gun in its legitimate use. Thus, barring extraordinary circumstances, injuries inflicted in the course of legitimate law enforcement activities through the use of a particular manufacturer's firearm likely would not result in manufacturer liability because of the legitimate use of the firearm and the value of law enforcement activities to the community.

The fifth factor is a modification of section 520(c), which focuses on "the inability to eliminate the risk by the exercise of reasonable care."[386] In the case of a product, the issue translates to considering whether a safer alternative design was available to the defendant. While existence of a safer alternative design may provide evidence of the manufacturer's choice to make the product more dangerous when faced with a viable safer option, the alternative design is not a requirement for the manufacturer to be held liable. Thus, this approach rejects the Third Restatement's position in favor of that followed by most courts that have considered the issue.[387] While not an absolute requirement, the existence of a safer alternative design weighs heavily in favor of liability.

384. *See id.* § 520 cmt. f.
385. *See id.*
386. *Id.* § 520(c).
387. *See supra* note 106.

The sixth factor addresses legal causation.[388] Because gun violence typically results from an intervening cause—that is, the violent act of the shooter—the sixth factor permits liability where the manufacturer knew or had reason to know that its gun design likely would be used by criminals to cause injury to other persons.[389] This cause of action contemplates a causation rule based upon the manufacturer's knowing creation of an extreme hazard to the public. In this sense, the rule mirrors that contemplated by the doctrine of abnormally dangerous activities set forth in Second Restatement section 519. Section 519 does not require that the defendant have knowledge that the *specific* plaintiff could foreseeably be harmed by the defendant's activities. Rather, the focus of the inquiry is on the high degree of risk of harm inherent in the activity.[390] Subsection (2) of section 519 emphasizes this point, declaring that strict liability "is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous."[391] Similarly, for a manufacturer to be liable

388. The only section 520 factor that does not appear on the above list, even in different form, is 520(e), which focuses on the "inappropriateness of the activity to the place where it is carried on." SECOND RESTATEMENT, *supra* note 88, § 520(e). This factor is more appropriate for land-based activities.

389. Courts could require manufacturers to assume a significant role in gathering information regarding the uses to which their products are put and the persons to whom the products appeal. Requiring manufacturers to conduct their own studies, however, raises some concerns. Gun manufacturers—as all manufacturers of products to some degree—have a vested interest in viewing their products in the light least likely to result in liability, and such studies would be subject to criticism for bias. This is particularly true in the absence of regulatory oversight of gun design and manufacture. Nevertheless, the manufacturers should not be allowed to simply place their products into the stream of commerce and blindly turn their backs to the foreseeable consequences of the products' use. Thus, while we do not suggest imposing any absolute affirmative duty on the manufacturer to conduct studies in all circumstances, our proposal does mandate that the gun manufacturer be required to conduct a reasonable investigation of the actual use of its products. This standard may require the manufacturer to conduct its own studies, collect information from Justice Department studies or other sources, or both, depending on the kind of data and its availability.

390. *See, e.g.*, Sterling v. Velsicol Chem. Corp., 647 F. Supp. 303, 306–07 (W.D. Tenn. 1986) (stating that modern courts attach strict liability to activities that are considered ultra-hazardous), *aff'd in part & rev'd in part*, 855 F.2d 1188 (6th Cir. 1988); Klein v. Pyrodyne Corp., 810 P.2d 917, 922 (Wash. 1991) (stating that strict liability for abnormally dangerous activities applies to fireworks displays). In *Sterling*, the district court determined that the defendant's chemical waste burial site created a high risk of harm to the community. The residents who brought suit in a class action against Velsicol were members of the community. In *Klein*, the court ruled that setting off a public fireworks display, even during a Fourth of July celebration, was considered an abnormally dangerous activity. The court found that the first two Restatement factors were met, but not the others. Regarding the high degree of harm inherent in the activity, the court emphasized the "high risk of serious personal injury or property damage . . . because of the possibility that a rocket will malfunction or be misdirected." 810 P.2d at 920.

391. SECOND RESTATEMENT, *supra* note 88, § 519(2).

for a claim based upon manifestly unreasonable design, the manufacturer need only have actual or constructive knowledge that the product is likely to be used in a manner that would harm other persons.[392]

The determination of whether a product has a manifestly unreasonable design could be made by the court as a matter of law where the evidence presented on a summary judgment motion supports doing so. This proposal envisions a significant role for the jury in resolving questions of fact related to the manifestly unreasonable design factors.[393] In addition, the jury would consider fact questions related to apportionment among multiple parties, including the plaintiff, and fact questions relating to any affirmative defenses, as well as damages. The procedural law of the forum state would structure the means of jury participation, whether by special interrogatories or other devices.

3. Illustrations of the Manifestly Unreasonable Design Doctrine

A few examples illustrate appropriate applications of the manifestly unreasonable design doctrine to guns. The first example ("Illustration One") is an assault weapon capable of being modified to increase firepower and lethality. This gun is unsuitable for sporting uses, law enforcement, or even self-defense because it sprays fire inaccurately and presents danger to the shooter.[394] It contains features that make it appealing to criminals, including a surface that makes the gun somewhat resistant to fingerprints. The manufacturer

392. The proposed new third restatement of torts takes up the issue of intervening causes in strict liability for abnormally dangerous activities. *See* RESTATEMENT (THIRD) OF THE LAW OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), § 24 cmt b (Tentative Draft No. 1, Mar. 28, 2001). Comment b essentially rejects strict liability where the action of a third person has intervened, thus causing damage. *Id.* The example presented is that of explosives stored on the defendant's land, but stolen by a third person who thereby causes injury to another. *Id.* This reasoning does not have direct relevance to our proposal because of its land-based nature. In contrast, a manufacturer who, knowing the special dangers of its product, places the product on the market, and the foreseeable danger occurs, is in a different position from the landowner whose explosives may be stolen by a third person. The manufacturer has affirmatively placed the product in a position to be used by the third person and has profited from its product distribution.

393. This approach differs from the approach under the abnormally dangerous activities doctrine. The Second Restatement states that the determination whether an activity is abnormally dangerous is to be made by the court—not the jury. SECOND RESTATEMENT, *supra* note 88, § 520 cmt. l. The approach of the Second Restatement suits the nature of the abnormally dangerous activities doctrine, which was intended to approximate absolute liability. The proposal in this Article is not one of absolute liability. Nor is it one of generic product liability.

394. An example of a gun in this category is the TEC-9/TEC-DC9. *See* Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146, 154–56 (1999), *rev'd*, 28 P.3d 116 (Cal. 2001).

has marketed the gun through advertisements in magazines that are known to appeal to criminals.

Illustration One clearly fits within the scope of the manifestly unreasonable design doctrine. This highly lethal gun was designed as an assault weapon, with expanded firepower and the capability of being modified to cause even greater damage (factors one and two). The gun has virtually no benefit to the community, as it is unusable for effective law enforcement, sports, or self-defense (factor three). Thus, the conclusion is inevitable that the high risk of harm to others, through the criminal use of the gun, outweighs any value of the gun to the community (factor four). Clearly, safer alternative designs were available if the manufacturer wanted to provide the market with a handgun to be used for law enforcement, sports, or self-defense (factor five). If the goal of the manufacturer were to provide criminals with a highly lethal handgun that increases kill power, then a safer alternative design is irrelevant. Under such circumstances, unavailability of a safer alternative design does not preclude liability. Finally, actual or constructive knowledge of the use of the gun to harm others would be established by the marketing pattern of the gun through advertisements in magazines that appeal to persons who are likely to use it to harm others illegally (factor six). Such knowledge could also be established by the broad availability of information—through the news media or studies by governmental or private entities—regarding the usage of the gun. Further, the manufacturer would be well aware that its product had no redeeming social value, as it was packed with features that appeal to sociopaths.[395]

Illustration Two is a traditional hunting rifle. This rifle is marketed to hunters by advertisements in outdoor sports and hunting magazines and on web sites. It has been shown on television sports programs as an example of a rifle appropriate for deer hunting. As a

395. Another example of a gun that fits into Illustration One is the Saturday night special. This handgun has a short barrel, is lightweight, and easily concealed. Poor manufacture with inexpensive materials makes this gun cheap and readily available in quantity. Because of its poor quality, it essentially has no use for law enforcement, sports, or self-defense. But it is attractive to criminals. The same rationale for liability discussed in the text would apply to the Saturday night special as having a manifestly unreasonable design. One Department of Justice study indicated that of the handguns used in robberies, homicides, and assaults, guns fitting the description of the Saturday night special were used in 69%, 69%, and 75%, respectively. Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1153 n.9 (Md. Ct. App. 1985) (citing BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, U.S. DEPT. OF JUSTICE, CONCENTRATED URBAN ENFORCEMENT: AN ANALYSIS OF THE INITIAL YEAR OF OPERATION CUE IN THE CITIES OF WASHINGTON, D.C., BOSTON, MA., AND CHICAGO, ILL. 96–98 (1977)). This kind of information would serve to establish the knowledge in factor six.

result, most users of this rifle are hunters. This rifle is unattractive to most criminals because it is costly, heavy, and slow in comparison to handguns; it also requires a higher level of skill than many other firearms. If a criminal uses the rifle to intentionally shoot another person, the rifle's manufacturer probably would not be liable under the test for manifestly unreasonable design. First, the risk of harm to others is less in the case of this gun produced for sporting purposes because most purchasers will be using the gun for that legitimate purpose. The likelihood that any harm will be great also does not rise to the level of the gun in Illustration One. While the harm to an individual—death or serious injury—could be great, the likelihood that a criminal will go on a shooting spree with the rifle is much smaller.[396] So, too, does the rifle provide a value to the community in its sporting use that was not present in Illustration One. Moreover, the rifle, when used for its intended purpose according to generally recognized safety guidelines, is reasonably safe, thus indicating that the rifle's value to the community of hunters outweighs its inherent danger. The gun in Illustration One, on the other hand, is eminently unsafe and is incapable of being made safe for any socially acceptable purpose. Finally, while the manufacturer would have knowledge that the rifle *might* be used for criminal purposes to harm other persons, it is not reasonable to assume that it is *likely* to be used for such a purpose, absent statistical information to support that contention. When these factors are put into the balance—and assuming no safer alternative design is available—the gun would not be considered a manifestly unreasonable design.[397] If, however, the marketing and distribution of the gun were to invite criminals to use the gun illegally, then an injured plaintiff could pursue a cause of action for negligent marketing.[398]

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396. Such incidents nevertheless do occur. *See* Sarah Kershaw, *The Hunt for a Sniper: The Investigation*, N.Y. TIMES, Oct. 14, 2002, at A1 (detailing investigation into sniper attacks in Washington, D.C., area by shooter using rifle and bullets commonly used for hunting). In a highly publicized event in 1966, 16 people were killed and 31 wounded by a sniper at the University of Texas, using a 6mm hunting rifle and "a footlocker full of semi-automatic weapons." Sylvia Moreno, *Towering Tragedy*, DALLAS MORNING NEWS, Aug. 1, 1996, at A1.

397. If statistics and studies demonstrate that the rifle is used by criminals during the commission of a crime at a significantly higher rate than other rifles, one could reasonably question whether the rifle was truly intended to be used in sporting. Thus, weighing of the facts could lead to the conclusion that the rifle was designed in a manifestly unreasonable manner. Such a scenario would effectively place the rifle into the category of Illustration Three. *See* text discussion *infra*. Without such additional information, however, the court could rule that the hunting rifle was not a manifestly unreasonable design.

398. *See infra* notes 415–16 and accompanying text.

Illustration Three is the most difficult example. This gun is a semi-automatic handgun that is frequently used by law enforcement officials. It also may be used for target practice by sports enthusiasts and has been purchased by citizens for home security. Its versatility makes it appealing to criminals as well, but not to the extent of a Saturday Night Special, which is far cheaper and more easily available. This gun is widely marketed to law enforcement and to the public. It is advertised in magazines and on web sites targeting sports enthusiasts, law enforcement personnel, survivalists, and persons likely to be planning criminal activity.

The difficulty with applying the test for manifestly unreasonable design to the gun in Illustration Three lies in the gun's versatility. Its various uses have an escalating degree of risk associated with them. The extent to which the gun is in legitimate common usage and the extent to which its value to the community outweighs its dangerous attributes are difficult to resolve and will require resolution of questions of fact by the jury. Presumably, legitimate law enforcement and sporting uses would be the safest function of the gun. Home defense would be less safe, to the extent that the gun is purchased by persons with insufficient or minimal training and recognizing the reactive circumstances under which the gun might be used. But the concept of home defense is such that the gun should rarely, if ever, be used.[399] Criminal activity would present the highest risk of harm. Thus, the context in which the gun is used in a given case colors the determination of whether it is a manifestly unreasonable design. What has high utility in law enforcement has no social value in criminal activity. A careful balancing of the factors in the test would determine the result with regard to the gun in Illustration Three. Assuming the plaintiff was injured by the criminal activity of the shooter, the factfinder would likely be required to examine the

399. One issue that arises in this context is whether guns that lack safety locks or other devices that restrict their use should be considered defectively designed. Under our proposed test for manifestly unreasonable design, such a finding is possible, but not inevitable. Resolving the issue would require careful consideration of the type of safety devices available, their benefits (impeding wrongful or accidental discharge) and their risks (that the safety device, or user-specific technology, would cause a costly delay in using the weapon for self-defense). For a comprehensive, though one-sided, discussion of the various kinds of safety devices, both in use and proposed, see Cynthia Leonardatos et al., *Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 CONN. L. REV. 157 *passim* (2001). Here, too, is a case where legislation may remove the issue from the judicial sphere. *See, e.g.*, CONN. GEN. STAT. ANN. § 29-33(d) (West Supp. 2002) ("No person, firm or corporation shall sell, deliver or otherwise transfer any pistol or revolver, other than at wholesale, unless such pistol or revolver is equipped with a reusable trigger lock, gun lock or gun locking device appropriate for such pistol or revolver . . . .").

knowledge of the manufacturer regarding the appeal of the gun to criminals, the rate of its usage by criminals, and whether the gun could have been designed more safely. The outcome of this fact determination would dictate whether the gun is a manifestly unreasonable design.

As Illustration Three demonstrates, some products could conceivably be deemed a manifestly unreasonable design in some contexts, but not others. Thus, if the plaintiff in Illustration Three were a criminal injured during the course of a legitimate law enforcement activity, the criminal plaintiff would not have a cause of action against the manufacturer of the gun under the manifestly unreasonable design doctrine. The manufacturer had a legitimate interest in believing that the gun would be used properly in the hands of law enforcement personnel for the purpose of the public safety. The hazards posed by the gun (death or injury) cannot be designed out of the product without eliminating the gun's essential function. This legitimate "common usage" is one of high social value to the community.

In contrast, if the gun in Illustration Three were used for a criminal purpose, application of the test might generate the opposite result. The crucial question in such a case would involve factor six—the actual or constructive knowledge of the seller that the product is likely to be used in the antisocial manner that caused that plaintiff's injury. Factor six pushes toward liability where there is knowledge that the product is "likely" to be used for criminal purposes. Resolution of this factor will hinge on the availability of factual information to support that proposition, including the marketing practices of the manufacturer.

4. Other Support in Strict Product Liability Doctrine for a Manifestly Unreasonable Design Cause of Action

Several other principles of strict product liability doctrine support a cause of action for a manifestly unreasonable product design. These principles demonstrate that liability of a manufacturer for the inherent dangers of a product is well within the acceptable scope of existing product liability doctrine.

a. Gun Victims as the New "Bystanders"

Section 402A of the Second Restatement established a rule of strict liability "for physical harm . . . caused to the ultimate user or

consumer" of the product.[400] The Second Restatement contained a caveat indicating that it expressed no opinion on the application of section 402A "to harm to persons other than users or consumers."[401] Comment o further explained the caveat, indicating that courts, by the mid-1960s, had generally not extended liability beyond the actual user or consumer of the product to casual bystanders.[402] But the Institute did not disapprove of such an extension. In fact, comment o stated:

> There may be no essential reason why [bystanders] should not be brought within the scope of the protection afforded, other than that they do not have the same reasons for expecting such protection as the consumer who buys a marketed product; but the social pressure which has been largely responsible for the development of the rule stated has been a consumers' pressure, and there is not the same demand for the protection of casual strangers.[403]

Thus, there did not appear to be any compelling reasons in law or policy not to extend liability beyond the user or consumer of the product. Indeed, the Third Restatement's alteration of language reflects this view. Section 1 provides that sellers of defective products are "subject to liability for harm to persons or property caused by the defect."[404] The section does not limit the class of potential plaintiffs to users or consumers.

The Third Restatement's language reflects the consensus in case law that has emerged since section 402A was written. For example, in 1969, the California Supreme Court held that a plaintiff injured in a head-on collision with an apparently defective automobile that crossed the center line of the road had a cause of action in strict liability against the manufacturer of the defective vehicle.[405] The court noted that injuries to such "bystanders" may be just as foreseeable as injuries to users or consumers. The court stated: "If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable."[406] The reason, the court said, was that

400. SECOND RESTATEMENT, *supra* note 88, § 402A(1).

401. *Id.* § 402A caveat.

402. "Casual bystanders, and others who may come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery." *Id.* § 402A cmt. o.

403. *Id.*

404. THIRD RESTATEMENT, *supra* note 10, § 1.

405. Elmore v. Am. Motors Corp., 451 P.2d 84, 88–89 (Cal. 1969).

406. *Id.* at 89. The court characterized the limitations placed on bystander recovery by other courts as "only the distorted shadow of a vanishing privity," something grounded in

contrary to product users, bystanders are not in a position to judge the safety of the product prior to use.

With the exception of accidental discharges, guns do not typically injure their purchasers, users, or consumers. Gun victims have much in common with traditional bystanders, for they are the innocent victims of the wrongful conduct of the product users. With regard to guns that the manufacturers knew or reasonably should have known would cause the kind of injury suffered by the plaintiffs, imposition of liability on the manufacturers is warranted. The manufacturers are in the best position to incorporate the costs of the injuries into the price of the product and to reduce the appeal of the guns to criminals.

b. A Lesson From the Unavoidably Unsafe Product Doctrine

The Second Restatement carved out an explicit exception to design defect claims for products that could be considered unavoidably unsafe. Comment k of section 402A encompasses "products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use," but which have such high utility that their continued marketing is warranted, notwithstanding the risks.[407] If these products contain proper warnings of their hazards, the manufacturers will not be liable for any harm that results due to defects in design.[408] Comment k notes the usefulness of the unavoidably unsafe product exception in the area of prescription drugs;[409] but it is not limited to drugs. The key to this exception is that the product contains substantial hazards, but is so desirable and beneficial that its continued sale should be encouraged.

The unavoidably unsafe product exception disappeared from the Third Restatement. Once the Institute accepted a risk-utility test for design defect claims, the exception was subsumed under the basic test. Accordingly, the concept of an unavoidably unsafe product continues to have merit, as manufacturers of products with extremely high utility for which no safer design exists would not be held liable under the test espoused in the Third Restatement.

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an attachment to archaic concepts rather than representing a realistic view of the world. *Id.*

407. SECOND RESTATEMENT, *supra* note 88, § 402A cmt. k.

408. *Id.* "Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous." *Id.*

409. For example, new HIV/AIDS drugs, despite any serious side effects that may accompany them, may have a sufficient therapeutic value to warrant placement on the market. *See* Culhane, *supra* note 241, at 114 n.449.

This concept of the unavoidably unsafe product is consistent with our proposal; indeed, our proposal complements it. The policy underlying the rule of nonliability for unavoidably unsafe products is that the utility of these products is so strong, and the fear that liability would drive manufacturers from the market so great, that a shield for manufacturers is justifiable. Furthermore, manufacturers are in the best position to conduct the necessary research and development to improve the safety of their products, but will only do so if they continue in the business. Guns, which also contain serious inherent dangers, present the converse situation. As previously demonstrated, many guns have little or no social utility, so their manufacturers could not fall within the protection of a rule such as that embodied in comment k. These guns are at the opposite end of the spectrum from unavoidably unsafe products. They have no utility and present serious hazards. Gun manufacturers would not be able to make this argument or enjoy the immunity saved for developers of products with high social value. Liability of a gun manufacturer under the test proposed in this Article would be entirely consistent with this recognized doctrine.

c. Criminal Activity as a Foreseeable Use/Misuse

Gun manufacturers might attempt to avoid liability by arguing that a specific criminal act of gun violence is an unforeseeable misuse of their product for which they should not be liable. This argument is disingenuous. With regard to guns that have no social utility, criminal activity is virtually the only available use for those products. Moreover, modification and alteration of many guns to facilitate criminal activity are capabilities not merely foreseeable by the manufacturer, but in fact intended by the manufacturer. Whether criminal activity may be deemed either a use or a misuse of a gun, the operative word is "foreseeable." And it is undeniable that widespread criminal use of at least some guns is foreseeable and, in fact, likely.[410]

The Third Restatement aptly notes that "misuse, modification, and alteration are not discrete legal issues [but rather] aspects of the concepts of defect, causation, and plaintiff's fault."[411] Thus, the

410. *See* DOBBS, *supra* note 91, at 1028. One might well question a rule that imposes liability on a gun maker because it cannot design the hazard of injury or death of an innocent person out of a product the inherent nature of which is to shoot bullets. On the other hand, gun makers can and should be expected to guard against the criminal use of their guns through products designed not to appeal to criminals and not made or easily modified so as to facilitate criminal activity.

411. THIRD RESTATEMENT, *supra* note 10, § 2 cmt. p.

foreseeability of a particular use of a product is a matter of context. Illustration 20 of section 2 explains, for example, that a plaintiff injured while climbing the slats of a ladderback chair to reach something at a height is engaging in an unforeseeable misuse of the chair and does not have a claim for a design defect.[412] Had the plaintiff been sitting on the chair, and had the chair fallen apart, the result would have been different. The New Jersey Supreme Court has addressed this point by invoking the language of duty: "To the extent that misuse relates to the duty to design a safe product, 'a manufacturer has a duty to make sure that its manufactured products placed into the stream of commerce are suitably safe when properly used for their intended or reasonably foreseeable purposes.' "[413] This issue could equally be characterized in terms of causation: Is the intervening misconduct a superseding cause of the plaintiff's injury? As the Third Restatement suggests, foreseeable misuse is only part of a larger inquiry involving duty, defect, and causation.[414]

As in Illustration 20, the determination of whether a gun manufacturer will be liable to victims of gun violence is often a matter of context. The manufacture and sale of guns create a high degree of risk, and such risk is compounded in many of the cases in which parties injured or killed by gunfire have sought relief. Designing and manufacturing guns that fire an indiscriminate spray of bullets, or that are designed to be modified to increase kill power, to take but two egregious examples, pose a high degree of risk to innocent parties, even though the harm is realized through the criminal acts of third parties. With at least some guns, the criminal use or misuse of the product is foreseeable. In short, difficult issues regarding manufacturer responsibility may not be sidestepped merely by characterizing certain uses as "misuses." The issue is more complex.

B. Negligent Marketing

Negligent marketing claims should be permitted, either independently or in addition to strict liability claims. Whether or not a gun meets the requirements of a manifestly unreasonable product for strict liability purposes, plaintiffs should be permitted to present a case for negligent marketing. A gun that was manufactured for a legitimate purpose, such as a hunting rifle, could be advertised,

412. *Id.* § 2 illus. 20.

413. Jurado v. W. Gear Works, 619 A.2d 1312, 1318 (N.J. 1993) (quoting Brown v. U.S. Stove Co., 98 N.J. 155, 165, 484 A.2d 1234, 1239 (1984)).

414. *See* DOBBS, *supra* note 91, at 1026.

distributed, or otherwise marketed in a manner that invites criminal activity. The same is much more likely for a handgun.

1. Foreseeability of Third-Party Violence

Foreseeable use/misuse of a product is an even more significant concept when one turns to claims for negligence. As stated above, foreseeability of harm is a necessary, but not a sufficient, condition for liability.[415] Defining the limitations on recovery for foreseeable harm has proven elusive, but four factors are helpful in the gun tort situation. First, would liability create a great possibility of fraudulent or indeterminate claims? Second, would imposing liability prevent or reduce future harm? Third, would liability create an undue burden on the defendant or on the community? And finally, how vulnerable is the plaintiff? None of these questions has an easy answer. In the context of the manufacture and sale of at least some guns, however, all of these factors argue strongly in favor of recovery by gun victims.

The first question may be answered easily in the case of gun torts: Injuries suffered by victims of gun violence are open and obvious, and are not indeterminate in scope. Unlike latent illness claims, for example, the severity and extent of the injuries typically are manifested immediately upon use of the gun. Further, foreseeability has been an issue where problems of genuineness and extent of harm have caused courts to proceed very cautiously, such as claims for emotional distress and economic loss. These problems simply are not present in the case of gun torts.

With regard to the second question, imposing liability on manufacturers would at least mitigate, if not eliminate, the harm caused by gun violence. This point has been missed (or ignored) by courts that have ingested the line that "guns don't kill people; people kill people." The quoted statement sets up a false opposition. Guns make it easier for people to kill people, and certain kinds of guns, and certain marketing practices increase the risk yet further. The availability of a firearm, through certain marketing practices in which the manufacturer has engaged and from which it has profited, will result in the loss of life. Without acquisition of the weapon, the shooter may not have acted at all, or may have used a less lethal weapon. Against the background of legal and largely unregulated gun sales, using tort liability to discourage marketing choices that dramatically increase risk could be expected to reduce harm.

415. *See* Culhane, *supra* note 310, at 985 (arguing that while permitting recovery in all cases of foreseeable harm "would result in unfair and excessive liability, . . . , courts must define a manageable subset of cases for liability *given* a foreseeable risk").

The third question results in non-liability when the defendant would be held liable out of proportion to fault.[416] Marketing practices that deliberately target unsafe or illegal users should result in liability, however extensive; liability would be entirely justified under those circumstances. To focus the inquiry solely on the burden to the defendant would exclude from liability some of the most culpable acts, simply because the outcomes of those acts are often the most costly to the defendant. Thus, the extent of culpability should be an equally important element. As to the burden on the community that liability would impose, the burden would be greatly reduced if some of the most unsafe and irresponsible practices are stopped. Moreover, placing the burden on the manufacturer would enable the costs to be spread, with many of those costs assigned to future purchasers of the guns, who would face higher prices.

The final question—addressing the vulnerability of the plaintiff class—clearly favors liability. Innocent victims of gun violence are powerless to protect themselves. Insurance is useful for property losses, but glaringly incapable of restoring the important part of what has been lost through gun violence. Plaintiffs are often vulnerable in another sense, too, as those who inflict the violence directly are likely hard to bring to account, either because they remain unidentified or because they have few financial resources.

2. Negligent Marketing as an Enabling Tort

Professor Robert L. Rabin has explored the emerging concept of the enabling tort, according to which the victim reaches beyond the direct tortfeasor to the enterprise that may bear the ultimate responsibility for making possible, or enabling, the direct tortfeasor's

416. In economic loss cases, for example, courts draw a wavering but defensible line against recovery by foreseeable, but remote, parties because one act of negligence, such as spilling a contaminant into a river, could otherwise bankrupt the defendant. So those who fish the stream for a living will have standing to recover against the polluter, as might those who run a marina at the water's edge, but restaurants that depend on a supply of fish from the river likely will not. *Compare, e.g.*, Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1029–31 (5th Cir. 1985) (holding that defendants who were responsible for ship collision were liable to commercial fishers for resulting pollution of Mississippi River); Union Oil Co. v. Oppen, 501 F.2d 558, 570 (9th Cir. 1974) (holding that those known to be commercially fishing public waters may recover economic loss resulting from defendant's oil spill); Masonite Corp. v. Steede, 23 So. 2d 756, 758 (Miss. 1945) (holding that operator of fishing resort could recover lost profits due to pollution) *with* Pruitt v. Allied Chem. Corp., 523 F. Supp. 975, 978–79 (E.D. Va. 1981) (allowing recovery by those who fished Chesapeake Bay, either commercially or recreationally, but not by those who purchased seafood from commercial fishers). By contrast, in the case of gun sales, liability might indeed be great, but it would not be out of proportion to fault.

actions.[417] Among contemporary examples of attempted uses of an enabling tort theory are claims for the negligent marketing of guns.[418] The trend in the law that Rabin has identified is one toward permitting liability in appropriate situations of "commercial activity systematically conducted in circumstances that heighten third-party risks of serious injury to others."[419] He has argued that claims based upon the negligent marketing of handguns constitute "a direct descendant of the family of enabling torts."[420]

The line of cases discussed by Rabin involved premises liability in which the property owner created or allowed certain conditions on the property that posed a risk of criminal violence against tenants on the property.[421] As a matter of deterrence, he has noted that "[n]ot only is the renter in a better position than the tenant to adopt precautionary measures, but the renter is better situated than the police to diminish the risk of criminal assault on the premises . . . ."[422] The same could be said of gun manufacturers, who are in the optimal position to market their products in a manner that minimizes their attraction to criminals who may use them to harm other persons.[423] Similarly, gun manufacturers are in a better position than the police to prevent the injuries ab initio. While the police systematically patrol certain areas of the cities, they do not and cannot patrol every street, building, or private space where gun violence is just as likely to occur. Much of law enforcement activity takes place after gun violence has occurred, in the investigation and prosecution stages. The manufacturers may not be able to eliminate all gun violence, but they are certainly in the best position to minimize it before it occurs.

In line with this analysis of enabling torts, we propose that victims of gun violence be allowed to bring claims against the manufacturers of the guns causing their injuries on theories of negligent distribution and marketing. In situations in which gun manufacturers have undertaken marketing or other distribution activities that enhance the likelihood that criminals will use their guns to harm other persons, the special relationship rule is strictly irrelevant.[424] The manufacturers under these circumstances have

417. Rabin, *supra* note 172, at 437.
418. *See id.* at 435, 453.
419. *Id.* at 446.
420. *Id.* at 449.
421. *See id.* at 443–46.
422. *Id.* at 444.
423. This point is consistent with CALABRESI, *supra* note 301, at 119–26.
424. For a discussion of the special relationship rule in negligent marketing cases, see *supra* notes 126–73 and accompanying text.

taken on a duty to the public by their actions that affirmatively increase the likelihood of injury from their guns.[425] Examples of these situations abound: gun kits marketed to avoid local gun regulations, Saturday Night Specials, and guns such as the TEC-9.

3. Negligent Marketing as a Complement to Strict Liability

The negligent marketing claim has a potentially broader reach than the strict liability claim outlined above. Indeed, this is no different from the interaction between strict liability and negligence in any product case. One is an essential complement to the other when examining the entire course of product design, manufacture, and sales. The design of a particular gun may not be manifestly unreasonable,[426] but the manufacturer of the gun may have marketed it in a manner so as to reach and appeal to criminals. As a claim based in negligence, the manufacturer's conduct would be the focus, rather than the design characteristics of the gun. The negligent marketing claim would thus serve a further purpose. It would prevent manufacturers who avoid liability for the design of their guns to otherwise enrich themselves by distribution practices targeted at criminals. In other words, they could not vigorously market their more useful guns to criminals with impunity.

An example illustrates this point. Assume a gun manufacturer makes a semi-automatic handgun that has proved useful not only to law enforcement, but also for target practice (particularly among those seeking to learn to shoot a gun safely) and defense of self and home. The gun appeals to criminals because of its exceptional firepower and accuracy. It is generally known that there is a large

425. This point may have some support in the current version of the Third Restatement of Torts, which addresses issues outside product liability. *See* RESTATEMENT (THIRD) OF THE LAW OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), § 19 (Tentative Draft No. 1, Mar. 28, 2001). But the Reporters have carefully chosen not to wade into the muddy waters of gun manufacturer liability. Section 19 of Tentative Draft No. 1 states: "The conduct of a defendant can lack reasonable care insofar as it can foreseeably combine with or bring about the improper conduct of the plaintiff or a third party." *Id.* The third party's misconduct can be criminal. *Id.* cmt. a. An illustration in which a father leaves a loaded pistol in an area of the home where his ten-year-old son found it and accidentally shot another person is the only illustration of the principle of section 19 that involves a gun, however. *See id.* cmt. e, illus. 3. Comment h, addressing duty, again declines to address gun manufacturer liability, skirting the issue with vague language of disapproval of gun retailer liability for a purchaser's improper use of the gun. *Id.* cmt. h. In the reporters' note, the reporters finally refer directly to the duty issues involved in cases against gun manufacturers, citing cases such as *McCarthy* and *Hamilton*, but leave the subject unexplored. *See id.* cmt. h.

426. See, for example, the hunting rifle discussed in Illustration Two, *supra* Part VI.A.3.

secondary market for the purchase of these guns by persons seeking to avoid the regulations imposed on the primary sellers. The manufacturer advertises this gun in magazines and on web sites that promote cheap, short-barreled guns such as the Saturday Night Special variety, and other guns that are known favorites of many criminals. Government statistics show that the use of this gun by criminals has been growing, and it has been a gun of choice in some high-profile lethal shooting incidents. The question whether this gun would be characterized as a manifestly unreasonable product may be a close one because of its significant legitimate uses. But the manufacturer's choice to market the gun in a manner in which it is likely to result in purchase and use by criminals makes the manufacturer vulnerable to a negligent marketing claim. Liability would be the result even though the manufacturer did not know that a particular criminal would purchase the gun for use in a particular violent criminal act.

CONCLUSION

The familiar adage should be rewritten to reflect reality: Guns kill people, and some guns more than others. Some people are more likely to use guns in a socially unacceptable way, just as some people are more likely to use other products in a manner that will harm themselves or others. But the impression that gun manufacturers seek to create is that they have no input into the process by which criminals choose and use guns. Nothing could be further from the truth. Both the design and marketing of guns bear an important relationship to whether guns kill people.

Those who reject liability of gun manufacturers for the personal injuries of victims of gun violence do so largely on a "Pandora's box" theory. They fear that gun manufacturer liability will create a slippery slope of liability that would logically extend to manufacturers of alcoholic beverages for drunk driving accidents, car manufacturers for all vehicle accidents, or fast-food purveyors for deaths due to cardiovascular disease. Public policy, they argue, would not support opening this Pandora's box of societal ills, all linked to the tort system. It is no coincidence that some of the most vocal objectors to gun manufacturer liability are the gun lobby and the proponents of so-called tort reform.

It is time to fashion a rule of liability that reflects reality. Gun manufacturer liability is a logical progression of the trend in tort liability toward holding accountable those who enable the wrongful

conduct of others.[427] But courts have viewed gun manufacturer liability as a knot best left tied. The reasons behind this resistance do not hold up under close scrutiny. It is time to hold gun manufacturers accountable for knowingly endangering the general public. This country must move beyond the "whether" question to the "how" question. This proposal is intended to stimulate the dialogue that is necessary to put into place the appropriate mechanism. Tort law must be allowed to evolve to the next logical level and not remain mired in outdated restrictions that fail to address the problems of the twenty-first century.

427. Rabin, *supra* note 172, at 453. Rabin notes that there are legitimate reasons to draw the line of manufacturer liability to include gun manufacturers, but to exclude other manufacturers, such as those who make alcoholic beverages. The special dangers inherent in guns are reflected in the linguistics of modern culture. Thus, "one 'uses' a handgun in harming an innocent victim; one 'abuses' alcohol in doing so." *Id.*