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### Kelley v. R.G. Industries, Inc.: Maryland Court of Appeals Takes Shot in the Dark at Saturday Night Specials

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## **KELLEY V. R.G. INDUSTRIES, INC.: MARYLAND COURT OF APPEALS TAKES SHOT IN THE DARK AT SATURDAY NIGHT SPECIALS**

The primary purpose of tort law is to compensate aggrieved individuals for harm incurred as a result of another's tortious acts.<sup>1</sup> Under tort law principles, victims of gunshot wounds traditionally have been able to seek recovery against their assailants.<sup>2</sup> Although a civil remedy is available, the fact that these assailants are often judgment-proof criminals has caused many gunshot victims to institute proceedings, not against their assailants, but against the manufacturer and marketer of the criminally misused weapon.<sup>3</sup> Despite the emergence of these claims, efforts to recover under established tort theories, such as the abnormally dangerous activity doctrine<sup>4</sup> or strict products liability,<sup>5</sup> have been generally unsuccess-

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<sup>1</sup> G. WILLIAMS & B. HEPPLER, FOUNDATIONS OF THE LAW OF TORTS 23 (1976). A distinction between tort and criminal law arose from the primitive law, the former concerning interferences with the rights of individuals and the latter relating to offenses against the state. P. KEETON & R. KEETON, TORTS 1 (2d ed. 1977). While tort law retains many remnants of the criminal law as it existed in primitive times, such as retribution from the offending party, the modern tort action emphasizes compensation of the aggrieved party. *Id.* at 2. To this end, tort law seeks to establish when loss shall be shifted from one party to another, and if so, how much. *Id.* The importance of this compensatory purpose is highlighted by the fact that tort actions seeking compensatory damages have been given their own label—reparation. G. WILLIAMS & B. HEPPLER, *supra*, at 26.

<sup>2</sup> See, e.g., *Burge v. Forbes*, 23 Ala. App. 67, 71, 120 So. 577, 579 (1928) (mere pointing of pistol at another may be grounds for civil action), *cert. denied*, 219 Ala. 700, 121 So. 915 (1929); *Carlton v. Geer*, 138 Ga. App. 304, 305, 226 S.E.2d 99, 99 (1976) (firing at retreating trespasser is basis for civil action); *Singleton v. Townsend*, 339 So. 2d 543, 545 (La. App. 1976) (firing at one who allegedly stole four dollars grounds for civil action); See also RESTATEMENT (SECOND) OF TORTS § 21 (1965). Section 21(1) of the Restatement provides: "(1) An actor is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension." *Id.*

<sup>3</sup> See *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985); *Martin v. Harrington and Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984); *Riordan v. International Armament Corp.*, 132 Ill. App. 3d 642, 477 N.E.2d 1293 (1985).

<sup>4</sup> See RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1965). The following criteria will be considered in imposing liability under the abnormally dangerous activity doctrine, as promulgated by section 520:

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

cessful.<sup>6</sup> Recently, however, in *Kelley v. R. G. Industries, Inc.*,<sup>7</sup> the

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;

(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.

*Id.* at § 520.

The abnormally dangerous activity doctrine originated in the case of *Fletcher v. Rylands*, 1 L.R.-Ex. 265 (1866), *aff'd*, *Rylands v. Fletcher*, L.R. 3 L.R.-H.L. 330 (1868). In *Rylands*, a reservoir constructed on the defendant's property developed a leak which filled up a coal mine shaft on the plaintiff's adjoining property. *Id.* at 265. The court held that:

[T]he person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

*Id.* at 279-80. While this has been stated as the rule of *Rylands*, it has been suggested that a better statement of the court's holding is that the defendant will be liable when he "damages another by a thing or activity inappropriate to the place where it is maintained." W. PROSSER, *The Principles of Rylands v. Fletcher*, in *SELECTED TOPICS ON THE LAW OF TORTS* 147 (1982). Currently, the *Rylands* case has been rejected in twelve U.S. jurisdictions and accepted in eighteen. *See id.* at 152.

<sup>6</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A provides that:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

- (a) the seller has exercised all possible care in the preparation and sale of his product, and
- (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*Id.*

The rationale underlying section 402A is that by marketing a product, the seller has undertaken a responsibility to the consuming public and that the public has the right to expect the seller to stand behind his goods. *Id.* at § 402A comment c.

<sup>6</sup> *See* *Martin v. Harrington and Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984). In *Martin*, the plaintiffs brought an action in damages for Larry Martin, who was shot and killed. *Id.* at 1201. The action was not brought against the indigents who committed the homicide, but against the manufacturer of the gun used in the commission of the crime. *Id.* The plaintiff claimed that the manufacture and sale of handguns to the public were ultrahazardous activities giving rise to strict liability for any injuries incurred as a result of the use of a handgun. *Id.* at 1201-02. The court rejected this claim, holding that the State of Illinois had never imposed liability upon a non-negligent manufacturer of a product that was not defective, and that to change such a policy would be inconsistent with Illinois' public policy of regulating but not banning the possession of firearms. *Id.* at 1204. The *Martin* court interpreted the Illinois Firearms and Ammunition Act, ILL. REV. STAT. ch. 38, §§ 83-1

Maryland Court of Appeals held that the manufacturers and marketers of Saturday Night Specials<sup>8</sup> may be held strictly liable to innocent victims who suffer gunshot injuries as a result of the criminal misuse of such weapons.<sup>9</sup>

In *Kelley*, the plaintiff, Olen J. Kelley, was shot in the chest during an armed robbery of the grocery store where he was employed.<sup>10</sup> The weapon used in the crime was a handgun manufactured in West Germany by the defendant, Rohm Gesellschaft.<sup>11</sup> The handgun was shipped to this country in parts and subsequently assembled and marketed in this country by a second defendant, R.G. Industries, Inc., a subsidiary of Rohm Gesellschaft.<sup>12</sup>

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to 83-16.319 (1970), to be a legislative finding that handguns do not constitute unreasonably dangerous products. See *Martin*, 743 F.2d at 1204.

In *Riordan v. International Armament Corp.*, 132 Ill. App. 3d 642, 477 N.E.2d 1293 (1985), the court similarly rejected an attempt to impose liability upon a handgun manufacturer, concluding that it is not the manufacture or sale of a handgun that is ultrahazardous, but its use. *Id.* at 1297. The *Riordan* court held that the imposition of liability upon the manufacturer would constitute an extension of the ultrahazardous activity doctrine beyond its "accepted meaning." *Id.* But see *Richman v. Charter Arms Corp.*, 571 F. Supp. 192, 204 (E.D. La. 1983)(sale of handguns to public constitutes ultrahazardous activity).

<sup>7</sup> 304 Md. 124, 497 A.2d 1143 (1985).

<sup>8</sup> See *id.* at 144, 497 A.2d at 1153. The court noted that "Saturday Night Specials are generally characterized by short barrels, light weight, easy concealability, low cost, use of cheap quality materials, poor manufacture, innacuracy and unreliability." *Id.* at 145-46, 497 A.2d at 1153-54. The inexpensiveness of Saturday Night Specials makes them highly prone to criminal use, and their poor quality makes them useless for most any other purpose. See *Hearings on S. 2507 Before the Subcomm. to Investigate Juvenile Delinquency of the Comm. on the Judiciary*, 92nd Cong., 1st Sess. 109-10 (1971) (hereinafter *S. 2507 Hearings*).

The term "Saturday Night Special" originated in Detroit, where law enforcement officials noted the frequency with which inexpensive handguns were responsible for weekend violence. *Id.*; see also R. SHERRILL, *THE SATURDAY NIGHT SPECIAL* 97 (1973) ("A cheerful special name has been reserved for the low class gun that draws heavily on the emotions but lightly on the purse."). While the term originally referred to inexpensive, poorly designed weapons, the current definition includes virtually any foreign or domestic handgun used to commit a crime. See R. SHERRILL, *supra*, at 99. A typical Saturday Night Special will be a .22 or .25 caliber handgun, although even .38 caliber weapons may fall within the ambit of the term if their quality is sufficiently poor. *Id.* Despite the fact that Saturday Night Specials are generally low caliber weapons, they may be more lethal than better quality, higher caliber weapons due to the propensity of a bullet shot from a Saturday Night Special to ricochet within the human body, rather than passing cleanly through it. *Id.* at 106. Additionally, these weapons often misfire, fire accidentally, backfire, are notoriously inaccurate even at short distances, see *S. 2507 Hearings, supra*, at 109-10, may have a bullet jam within the cylinder, or fire more than one bullet at a time due to the closeness of the cylinders, possibly resulting in the fragmentation of the handgun. See R. SHERRILL, *supra*, at 106.

<sup>9</sup> *Kelley*, 304 Md. at 157, 497 A.2d at 1159.

<sup>10</sup> *Id.* at 128, 497 A.2d at 1144.

<sup>11</sup> *Id.* at 128, 497 A.2d at 1145.

<sup>12</sup> *Id.*

The plaintiff brought suit in the Circuit Court for Montgomery County, Maryland, setting forth two counts based on strict liability.<sup>13</sup> R.G. Industries, Inc. removed the case to the United States District Court for the District of Maryland, where the suit against it was dismissed.<sup>14</sup> Subsequently, the remaining defendant, Rohm Gesellschaft, moved to dismiss the case for failure to state a claim, arguing that the handgun was not defective and that it, as the manufacturer, could not be held accountable for the criminal acts of the plaintiff's assailant.<sup>15</sup> At a hearing on the motion to dismiss, the district court, finding no controlling precedents under Maryland law, certified questions to the Maryland Court of Appeals.<sup>16</sup> Although the Court of Appeals rejected the plaintiff's traditional strict liability claims,<sup>17</sup> it did create a distinct new theory of strict liability under which the manufacturers and marketers of Saturday Night Specials may be held liable for criminal acts committed with such weapons.<sup>18</sup>

Writing for the court, Judge Eldridge found that the plaintiff's first count, the abnormally dangerous activity claim, failed to satisfy Maryland's threshold requirement that the activity be dangerous in relation to the property on which it occurs.<sup>19</sup> The plaintiff's unreasonably dangerous product claim was similarly rejected, due

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<sup>13</sup> *Id.* The plaintiff also set forth a third count based on negligence theory and a fourth count based on loss of consortium. *Id.* at 129, 497 A.2d at 1145. These counts were not considered on appeal because they were not among the questions of law certified to the Maryland Court of Appeals. *See id.* at 129-31, 497 A.2d at 1145-46.

<sup>14</sup> *Id.* at 129, 497 A.2d at 1145; *see* 28 U.S.C. §§ 1441, 1446 (1982). The case against the defendant R.G. Industries, Inc. was dismissed pursuant to stipulation of the parties. *Kelley*, 304 Md. at 129, 497 A.2d at 1145.

<sup>15</sup> *Kelley*, 304 Md. at 129, 497 A.2d at 1145. At common law, the criminal acts of a third party constitute a superseding cause that serves to relieve an alleged tortfeasor of liability for harm caused by a third party. *See* RESTATEMENT (SECOND) OF TORTS § 448 (1965).

<sup>16</sup> *Kelley*, 304 Md. at 129, 497 A.2d at 1145.

<sup>17</sup> *See id.* at 132-39, 497 A.2d at 1146-50. *See supra* notes 4-5.

<sup>18</sup> *Kelley*, 304 Md. at 157, 497 A.2d at 1159.

<sup>19</sup> *Id.* at 133, 497 A.2d at 1146-47. *See Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (1969); *Toy v. Atlantic Gulf & Pacific Co.*, 176 Md. 197, 4 A.2d 757 (1939); *Kirby v. Hylton*, 51 Md. App. 365, 443 A.2d 640 (1982). The rationale behind this requirement is that some activities, like blasting, for example, would be ultrahazardous if conducted in a densely populated area, but not ultrahazardous if conducted in a sparsely populated location. *See Richman v. Charter Arms Corp.*, 571 F. Supp. 192, 202 (E.D. La. 1983). The court in *Kelley* held that "[t]he dangers inherent in the use of a handgun in the commission of a crime . . . bear no relation to any occupation or ownership of land." *Kelley*, 304 Md. at 133, 497 A.2d at 1147. *See also* Note, *Legal Limits of a Handgun Manufacturer's Liability for the Criminal Acts of Third Persons*, 49 Mo. L. Rev. 830, 844 (1984) (criticizing application of abnormally dangerous activity doctrine to activities deemed inappropriate in all localities).

to the court's determination that the handgun was not defective under either of the tests for defectiveness developed under common law.<sup>20</sup> Notwithstanding the inapplicability of established principles of strict liability, Judge Eldridge stated that the common law's ability to adapt to modern circumstances enabled the courts to impose a new theory of strict liability on the manufacturers and marketers of Saturday Night Specials in consonance with what it perceived to be the public policy goals of the State of Maryland.<sup>21</sup> In support of its holding, the court examined federal gun control law and legislative history,<sup>22</sup> determining that Saturday Night Spe-

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<sup>20</sup> *Kelley*, 304 Md. at 134-39, 497 A.2d at 1147-50. The plaintiff's second strict liability claim was based on the Restatement (Second) of Torts section 402A. The court concluded that a properly functioning handgun was not defective and thus not within the scope of section 402A. *Kelley*, 304 Md. at 138, 497 A.2d at 1149. In making this determination, the *Kelley* court applied two tests for defectiveness. *See id.* at 135-39, 497 A.2d at 1148-50. The first of these, the consumer expectations test, states that a product is defective if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics". RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965). In applying the consumer expectations test, the *Kelley* court determined that a handgun manufacturer could not be held strictly liable because a consumer should and generally does expect a handgun to be dangerous. *See Kelley*, 304 Md. at 135-36, 497 A.2d at 1148.

The second test for defectiveness, the risk/benefit test, requires the defendant to prove that the benefits of the defendant's design outweigh the risk of danger inherent in that design. *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 426-27, 573 P.2d 443, 452, 143 Cal. Rptr. 225, 234 (1978). The *Kelley* court determined that this test was inappropriate because it should be applied only "when something goes wrong with product." *Kelley* 304 Md. at 138, 497 A.2d at 1149. Because the handgun in this case performed exactly as designed, the court concluded that the manufacturer was not liable under this test. *See id.*

<sup>21</sup> *Kelley*, 304 Md. at 140-41, 497 A.2d at 1151. The court observed that "the common law is not static; its life and heart is its dynamism—its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems." *Id.* The Court of Appeals relied on Maryland's Gun Control Law, MD. ANN. CODE art. 27, §§ 36B-36G (1985), for a declaration of state policy. *See Kelley*, 304 Md. at 141-42, 497 A.2d at 1150-51. Maryland's Gun Control Law provides:

- (i) There has, in recent years, been an alarming increase in the number of violent crimes perpetrated in Maryland, and a high percentage of those crimes involve the use of handguns;
- (ii) The result has been a substantial increase in the number of persons killed or injured which is traceable, in large part, to the carrying of handguns on the streets and public ways by persons inclined to use them in criminal activity;
- (iii) The laws currently in force have not been effective in curbing the more frequent use of handguns in perpetrating crime; and
- (iv) Further regulations on the wearing, carrying, and transporting of handguns are necessary to preserve the peace and tranquility of the State and to protect the rights and liberties of its citizens.

MD. ANN.CODE art. 27, § 36B(a) (1985).

<sup>22</sup> *See Kelley*, 304 Md. at 147-53, 497 A.2d at 1154-57.

cial had little or no legitimate purpose in society, and that the manufacturers and marketers of Saturday Night Specials should reasonably foresee that the chief use of their product is criminal activity.<sup>23</sup>

The *Kelley* court's decision conceivably could have favorable ramifications for both law enforcement officials and society in general.<sup>24</sup> It is suggested, however, that in an effort to judicially resolve an issue that has long plagued legislatures,<sup>25</sup> the *Kelley* court has developed a legal theory without foundation in the common law, and has created law that will not necessarily serve to decrease criminal activity. This Comment will assert that the decision in *Kelley* is inconsistent with established strict liability principles, and will analyze possible adverse effects of the decision. This Comment will suggest that the court of appeals' decision constitutes undesirable judicial activism, and that legislative enactments would best fulfill the demands of public policy and meet the ends

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<sup>23</sup> *Id.* at 156, 497 A.2d at 1159. While the common law traditionally insulated an alleged tortfeasor from liability for the harm caused by the criminal acts of a third party, *see supra* note 15, the *Kelley* court's conclusion that the criminal use of a handgun was foreseeable is not without legal foundation. In *LeBouef v. Goodyear Tire & Rubber Co.*, 623 F.2d 985 (5th Cir. 1980), the plaintiffs, highly intoxicated and driving at speeds in excess of 100 miles per hour, sued Goodyear for injuries resulting from an accident which occurred when the tread of the Goodyear tires separated from the body of the tire. *Id.* The United States Court of Appeals for the Fifth Circuit held that while the operation of an automobile at illegal speeds is not a "normal use" in the sense that it is routine or intended, it is a normal use in the parlance of products liability law because "normal use" is a term of art encompassing "all reasonably foreseeable uses of a product." *Id.* at 989 (emphasis added).

Citing *LeBouef*, the district court in *Richman v. Charter Arms Corp.*, 571 F. Supp. 192 (E.D. La. 1983), *rev'd sub nom.* *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985), made the following somewhat strained analogy: "[I]f 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." *Richman*, 571 F. Supp. at 197. It is asserted that this analogy is seriously flawed, and therefore the use of this analogy in declaring that murder by handgun is a "normal use" is similarly flawed. The ethical and societal implication of speeding cannot be realistically compared with a shooting. The criminal law recognizes as much by distinguishing between, for example, vehicular homicide and criminal homicide.

<sup>24</sup> *See e.g.*, Kennedy, *The Handgun Crime Control Act of 1981*, 10 N. KY. L. REV. 1, (1982) (banning sale of Saturday Night Specials necessary to lower crime); Zimring, *Is Gun Control Likely to Reduce Violent Killing?*, 35 U. CHI. L. REV. 721, (1968) (significant number of homicides are caused by possession of guns during otherwise mild disorderly conduct). *But see* Santarelli & Calio, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 ST. MARY'S L.J. 471, 482-83 (1983) (persons with criminal intent able to arm themselves notwithstanding any restrictions).

<sup>25</sup> *See* Cook, *The "Saturday Night Special": An Assessment of Alternative Definitions from a Policy Perspective*, 72 J. CRIM. L. & CRIMINOLOGY 1735, 1736 n.5 (1981) (listing of unenacted handgun control bills).

of gun control.

### COMMON LAW RECOVERY WITHOUT COMMON LAW PRINCIPLES

Conspicuously absent from the *Kelley* court's decision are common law tort principles upon which the decision may be logically founded.<sup>26</sup> The court of appeals contradicts existing tort principles by requiring neither that the handgun be defective,<sup>27</sup> nor that its usage be dangerous in relation to the property on which it is used.<sup>28</sup> Further, the court does not specify that there be no criminal activity which would serve to act as a superseding cause.<sup>29</sup> It is asserted that by requiring only that the handgun be a Saturday Night Special, the *Kelley* decision provides no incentive for careful design, manufacture, or marketing,<sup>30</sup> but serves only as an ill-conceived and ineffectual attempt to judicially ban the production of Saturday Night Specials.<sup>31</sup>

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<sup>26</sup> See *Kelley*, 304 Md. at 141, 497 A.2d at 1151. The court rejected existing common law theories of recovery, *id.* at 134-39, 497 A.2d at 1146-50, and created a new theory of strict liability based upon public policy factors. See *id.* at 157, 497 A.2d at 1159.

<sup>27</sup> *Id.* at 135-39, 497 A.2d at 1148-50. The *Kelley* court expressly rejected the notion that a properly functioning handgun is defective merely because it is dangerous. *Id.* A defect is required for strict liability. See RESTATEMENT (SECOND) OF TORTS § 402A (1965), *supra* note 5.

<sup>28</sup> *Kelley*, 304 Md. at 133, 497 A.2d at 1147. The court imposed liability despite the fact that it determined that "[t]he dangers inherent in the use of a handgun in the commission of a crime . . . bear no relation to any occupation or ownership of land." *Id.*; see *supra* note 4.

<sup>29</sup> *Kelley*, 304 Md. at 156-57, 497 A.2d at 1159. The court overcame the common law superseding cause doctrine, discussed *supra* note 15, by ruling that "the manufacturer or marketer of a Saturday Night Special knows or ought to know that the chief use of the product is for criminal activity." *Id.* at 156-57, 497 A.2d at 1159; see RESTATEMENT (SECOND) OF TORTS § 448 (1965).

<sup>30</sup> See RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965). The rationale behind strict liability is that it will force sellers to stand behind their goods and presumably provide them with an incentive to use care in their design and manufacture. See *id.*

<sup>31</sup> Since the manufacturer is not relieved of liability by producing a better Saturday Night Special, he has no incentive to do so. If a manufacturer chooses to avoid liability completely, he must completely eliminate production of handguns which fall within this category. It is asserted that in this respect the *Kelley* decision constitutes a judicially imposed ban on production that is not within the scope of a court's authority. See *Bojorquez v. House of Toys, Inc.*, 62 Cal. App. 3d 930, 133 Cal. Rptr. 483 (1976). In *Bojorquez*, the plaintiff's child was hit in the eye by a projectile fired from a slingshot that was retailed and distributed by the defendant. See *id.* at 932, 133 Cal. Rptr. at 484. The court refused to hold the defendant strictly liable for the injuries sustained by the plaintiff, reasoning that such a result would be tantamount to the banning of production by "judicial fiat." See *id.* at 933, 133 Cal. Rptr. at 484. The court held that "[s]uch a limitation is within the purview of the legislature, not the judiciary." *Id.* at 133 Cal. Rptr. at 484.



Although the *Kelley* decision dramatically alters the rights and duties of Saturday Night Special manufacturers and marketers,<sup>32</sup> its inconsistency with existing tort law could be countenanced if credible evidence indicates that the decision would effectuate Maryland public policy. No such evidence in fact exists.<sup>33</sup>

#### ECONOMIC RAMIFICATIONS OF MANUFACTURER LIABILITY

To the extent that it forces Saturday Night Special manufacturers and marketers to obtain insurance or expend money to satisfy gunshot victims' claims, the *Kelley* decision increases manufacturing and marketing costs, thereby increasing the price paid by consumers.<sup>34</sup> Proponents of the imposition of strict liability argue that increased prices will lead to lower demand for handguns, and will eventually decrease criminal activity.<sup>35</sup> However, this argu-

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<sup>32</sup> See *supra* notes 26-29 and accompanying text. Under Maryland law, when the resolution of an issue would work a substantial change in established rights and duties, the matter is best left for the legislature to resolve. See *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955, (1976). In *Phipps*, the United States District Court for the District of Maryland issued a certified question to the Maryland Court of Appeals as to whether the state of Maryland recognized section 402A of the Restatement (Second) of Torts. *Id.* at 338, 363 A.2d at 955. The court rejected the defendant's claim that the adoption of section 402A would constitute such a radical change in the duties of manufacturers that it was necessarily a matter for the legislature, and noted that strict liability in tort is closely related to traditional negligence theory, an area rightfully within the domain of the judiciary. *Id.* at 350-51, 363 A.2d at 962. It is suggested that the *Kelley* decision does not rest on a solid legal foundation, unlike *Phipps*. Section 402A constitutes a well-scrutinized doctrine that has been accepted by nearly every state in the union. See *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976); Note, *Torts—Products Liability—Theory of Strict Tort Liability Under Restatement (Second) of Torts § 402A*, 6 BALT. L. REV. 295, 295 n.3, n.4 (1977) (held applicable in Maryland when complaint alleged that defendant manufactured and placed on the market an automobile in a defective condition not reasonably safe for its intended use). However, while commentators have argued for the adoption of liability based on existing theories of tort liability, see Note, *Manufacturer's Liability to Victims of Handgun Crimes*, 10 N. KY. L. REV. 41 (1982), it seems that no commentators have proposed the adoption of liability based on whether a handgun qualifies as a Saturday Night Special.

<sup>33</sup> See Zimring, *Two New Books on Guns*, 83 MICH. L. REV. 954, 954 (1984). Gun control has been described as an "ideologically dominated and emotionally charged" issue. See *id.* For this reason, many studies have been criticized as result oriented, or questioned because of their methodology. See *id.* at 966. For a discussion of the conflicting opinions concerning the efficacy of handgun control, see *supra* note 24.

<sup>34</sup> See Note, *Manufacturers' Strict Liability for Handgun Injuries: An Economic Analysis*, 73 GEO. L.J. 1437 (1985). It has been suggested that the price of handguns under a no liability rule is artificially low, since it does not reflect the handgun's true costs to society. *Id.* at 1438. One commentator argues that only when the price of a handgun includes the cost of compensating gunshot victims for their wounds will the price reflect its true cost to society. See *id.* at 1462.

<sup>35</sup> See *id.* at 1459. Presumably, purchasers would be less inclined to buy at a higher

ment relies upon the disputable assumption that the demand for handguns is elastic, or responsive to price changes.<sup>36</sup> A review of past attempts to regulate handguns suggests that demand for these weapons is inelastic; consequently, if criminals seek to obtain handguns, they will not be influenced by an increase in cost.<sup>37</sup> Analogously, efforts to control alcohol production during Prohibition and drug consumption today have failed because society simply would not permit itself to be regulated.<sup>38</sup> In the case of handguns, it is possible that increased costs will not reduce demand, but will instead cause criminals to seek out alternative methods of obtaining them, presumably by stealing either the guns themselves or the money necessary to buy them.<sup>39</sup> It is conceivable, therefore, that the imposition of liability upon handgun manufacturers and marketers, which will cause a corresponding cost increase to purchasers, may encourage criminal activity rather than reduce it.

Even if the *Kelley* decision succeeds in decreasing the demand for Saturday Night Specials, it is asserted that its effect on handgun related criminal activity would be insignificant due to the fact

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price, thus causing a decrease in demand and eventually, a decrease in production. *See id.*; but see *infra* note 37. For a review of supply and demand and the influence of increased costs, see generally P. SAMUELSON, *ECONOMICS* (11th ed. 1980). Even if increased costs resulted in a decrease in demand, commentators have questioned whether a reduction in the number of handguns available would effectively reduce criminal activity. *See supra* note 24.

<sup>36</sup> See P. SOLMON, *ECONOMICS* 407 (1980). "Elasticity of Demand is the term used to describe the responsiveness (in percentage terms) of the quantity demanded to changes in price." *See id.* at 408. Demand for a product is said to be elastic if a certain percentage change in that product's price creates a larger percentage change in the quantity of the good demanded. *Id.* If the percentage change in price results in a smaller percentage change in the quantity of the product demanded, the demand for that product is said to be inelastic. *Id.* Typically, demand is elastic, or responsive to price changes, when substitutes for the product exist. *Id.* at 414-16. For example, if the cost of one brand of soft drink increases, the demand for that beverage will decrease if the prices of the other brands remain the same. *Id.* However, for products where no suitable alternatives exist, such as insulin or electricity, an increase in price will probably have a small effect on demand. *Id.*

<sup>37</sup> Santarelli & Calio, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 ST. MARY'S L.J. 471, 482-83 (1983). Regardless of how much prices may rise, demand for handguns will not be suppressed, and this demand will create its own supply. *See id.* at 483. *See also* Murray, *Handguns, Gun Control Laws and Firearms Violence*, 23 Soc. PROBS. 81, 90 (1975) (gun control legislation is "totally irrelevant to its purpose").

<sup>38</sup> See Note, *A Farewell to Arms?—An Analysis of Texas Handgun Control Law*, 13 ST. MARY'S L.J. 601, 614-18 (1982). Government failure to adequately control the production of alcohol during Prohibition and the present day consumption of drugs has led one commentator to conclude that "those who wish to possess an illegal item will find some means of doing so." *Id.* at 618.

<sup>39</sup> *See id.*

that liability would be unavailable against manufacturers and marketers who do not deal in Saturday Night Specials,<sup>40</sup> and manufacturers and marketers of handguns sold before issuance of the court's decision.<sup>41</sup> These facts, combined with the possibility that a Saturday Night Special manufacturer may consciously avoid liability by merely producing a weapon that does not meet the Saturday Night Special prototype, such as a cheap handgun with a longer barrel, suggest that because so many handguns exist outside the scope of the court's ruling, *Kelley* will be rendered virtually ineffective. Finally, to the extent that it relieves criminals from civil liability in favor of imposing liability upon a lawful business, the *Kelley* decision serves to distort general notions of justice and fairness while creating the impression that the judiciary considers itself unable to adequately punish the perpetrators of criminal acts.<sup>42</sup>

#### ADVANTAGES OF LEGISLATION

It is submitted that in the area of handgun control, legislation constitutes a more effective alternative than judicial intervention.<sup>43</sup>

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<sup>40</sup> See *Kelley*, 304 Md. at 157, 497 A.2d at 1159.

<sup>41</sup> See *id.* at 161-62, 497 A.2d at 1161-62. Ordinarily, the court's decision would apply to any cause of action arising after its decision. See *id.* at 161, 497 A.2d at 1162. The *Kelley* court refused to apply its decision in such a far-reaching fashion, however, stating that there might "be an element of unfairness in applying [the *Kelley* decision] to . . . manufacturers and marketers of handguns [who] . . . have had little reason to anticipate that their actions might result in tort liability." *Id.* The court held that its decision would apply unless the defendant is able to show that the sale of the Saturday Night Special occurred before the *Kelley* decision. See *id.* The burden of proving the date of sale was placed upon the defendant manufacturer or marketer, on the ground that they are best able to offer the necessary evidence. See *id.* at 162 n.31, 497 A.2d at 1162 n.31.

<sup>42</sup> Cf. Santarelli & Calio, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 ST. MARY'S L.J. 471, 507 (1983) (attachment of liability tantamount to subsidization of criminal misdeeds); Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912, 1920 n.41 (1984) (imposition of liability would spread the costs of illegal activities by forcing "guiltless purchasers to subsidize the activities of the guilty"). One commentator argues that "[r]estitution for criminal acts should come from the criminal responsible for the damages, not a businessman engaged in a lawful exercise." Santarelli & Calio, *supra*, at 507. See also *Adkinson v. Rossi Arms Co.*, 659 P.2d 1236, 1240 (Alaska 1983) (extending liability to handgun manufacturers runs counter to basic values of criminal justice system and would erode societal norms).

<sup>43</sup> See *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). In discussing whether it should make a determination on an issue of public concern, the New York State Court of Appeals stated:

A court performs its essential function when it decides the rights of the parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private

Unlike the *Kelley* court, it is submitted that a legislature need not feel constrained to limit the scope of its regulation only to Saturday Night Specials, and need not hesitate to regulate handguns sold prior to the creation of the regulation. If a legislature determined that public policy required the regulation of handguns, it would have before it a much wider variety of methods and options, including the creation of a regulatory agency, stricter licensing requirements and criminalization of handgun possession.<sup>44</sup> Furthermore, it is suggested that a legislative body is better able to determine if public policy demands handgun regulation.

While the past failure of legislatures to enact handgun control laws has been characterized as one of the ills engendered by special interest groups such as the National Rifle Association, it is not clear that, in relation to regulation of Saturday Night Specials, special interest groups are applying any pressure at all.<sup>45</sup> It is sug-

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litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interest before the court.

*Id.* at 222, 257 N.E.2d at 871, 309 N.Y.S.2d at 314-15.

<sup>44</sup> See, S. 974, 97th Cong., 1st Sess., 127 CONG. REC. 3806-16 (1981). The unpassed Handgun Crime Control Act of 1981 (the "Act") provides an example of legislatively imposed regulation. See *id.* The Act prohibited the manufacture, sale, and importation of weapons designated as Saturday Night Specials. *Id.* at 3809-14. It proposed a twenty-one day waiting period prior to the purchase of any handgun so that weapons dealers could ascertain with law enforcement that a prospective purchaser was not a felon. *Id.* at 3811. Manufacturers were required to keep records of all handgun sales, *id.* at 3811-12, and failure to report the theft or loss of a handgun later used in a crime was a felony. *Id.* at 3810. Additionally, had it been passed, the Act would have provided for a mandatory minimum jail sentence of up to five years for the use or possession of a handgun during the commission of a felony. *Id.* at 3813. See generally Kennedy, *The Handgun Crime Control Act of 1981*, 10 N. Ky. L. Rev. 1 (1982)(discussion by Senator Edward Kennedy of 1981 Act, its requirements, and goals).

<sup>45</sup> See *Kelley*, 304 Md. at 146 n.10, 497 A.2d at 1154 n.10. The court noted that Maxwell Rich, Executive Vice President of the National Rifle Association (NRA), testified during Senate hearings that Saturday Night Specials were not permitted to be advertised in the NRA's official journal, the *American Rifleman*. *Id.* Mr. Rich stated: "Our reason is that they have no sporting purpose, they are frequently poorly made, and they do not represent value received to any purchaser." S. 2507 Hearings, *supra* note 8, at 109-10 (1971). In addition, the legislative process contains built-in safeguards sufficient to ensure that the effect of special interest groups does not undermine the democratic nature of our society by placing the interest of the few before the many. See N. ORNSTEIN & S. ELDER, INTEREST GROUPS, LOBBYING AND POLICYING 99-114 (1978). In fact, circumvention of special interest groups through persistent judicial intervention would, in effect, eliminate one part of the legislative process. See D. HALL, COOPERATIVE LOBBYING—THE POWER OF PRESSURE xi (1970). "[T]he process of exerting influence has itself become institutionalized: government expects to be 'pressured' and in fact takes considerable pains to see that at least some channels are always open as

gested that the inability of legislatures to enact handgun control legislation is not a failure at all, but a positive manifestation of the wishes of the public as expressed through their elected officials<sup>46</sup> and their private lobbies.<sup>47</sup>

#### CONCLUSION

In an attempt to resolve a social problem in accordance with public policy, the *Kelley* court has developed a theory of strict liability without foundation in the common law. While the ultimate effects are difficult to determine, it is clear that the *Kelley* court's attempt at regulation via the imposition of strict liability upon the manufacturers and marketers of Saturday Night Specials is of dubious merit in the short-run, is not the most efficient manner of handgun control, and does not reflect public opinion concerning handgun control. It is urged that if courts are to remain truly loyal to public policy, they must recognize their limitations and avoid abortive attempts at the regulation of handguns.

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access routes for significant interests." *Id.*

<sup>46</sup> See Kennedy, *supra* note 44, at 1, 3. Senator Edward M. Kennedy, co-author of the unenacted Kennedy-Rodino Handgun Control Act of 1981, expressed the opinion that the major obstacles to enactment of a handgun control bill are adverse public opinion and disagreement among legislators. *Id.*

<sup>47</sup> G. HERRING, *GROUP REPRESENTATION BEFORE CONGRESS* 1-3 (1967). Today, voters no longer look immediately to their respective political parties for support for their views and convictions. *Id.* at 3. Instead, voters look to an organized group that shares the same ideas, relying on it to best represent these views before the legislature. *Id.*