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## AIMING FOR ACCOUNTABILITY: HOW CITY LAWSUITS CAN HELP REFORM AN IRRESPONSIBLE GUN INDUSTRY

*Rachana Bhowmik\**

### INTRODUCTION

Imagine an industry that manufactures products responsible for the death and injury of thousands of Americans. These products are distributed through a system in which no party—neither the dealer, the distributor nor the manufacturer—takes responsibility or is held liable for the negligent sale of the product. The same distribution system guarantees that the product flows through the market to individuals that society has deemed unfit to possess and use such products. Despite the high number of deaths and injuries caused by the product, the manufacturers do not utilize reasonably available safety devices that would prevent accidental deaths and injuries, because there is no federal agency with authority to mandate such safety devices. Moreover, the manufacturers assume they will not be held liable under common law tort principles, so they continue to conduct business while innocent Americans continue to die from the foreseeable negligent use of the product.

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While this may seem a far-fetched hypothetical, there is no need to imagine such an industry. One already exists: the United States gun industry. The industry's manufacturing process is subject to no federal safety or health oversight. It is not subject to any federal manufacturing regulations and only occasional state regulation.<sup>1</sup>

Despite the tangible impact that the gun industry has on American society, the American public is largely unaware of the protected status afforded gun manufacturers under current regulations. The American public does not realize that domestically manufactured guns are exempt from any consumer product safety oversight. One poll showed that about half of respondents mistakenly believed that guns are regulated by federal safety standards.<sup>2</sup> It is important for Americans to know this, and to understand that the gun industry uses a marketing and distribution system that *knowingly* funnels guns into the hands of

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<sup>1</sup> For example, Maryland and Massachusetts have enacted legislation regulating the sale and storage of firearms. See MD. CODE ANN., § 442(C)(c) (2002) (prohibiting a regulated firearm dealer from selling or transferring firearm until seven days from the time the application for purchase has been processed in triplicate and the original copy has been sent to the Secretary); MASS. GEN. LAWS ch. 140, § 131L(a) (1998) (requiring that firearms be properly stored in a secured locked container or equipped with a safety device to render it inoperable by any person other than the authorized user). See also Stephen T. Bang, *Crimes: Trigger Locks and Warning Labels on Firearms Become a Reality*, 31 MCGEORGE L. REV. 265 (2000) (discussing California's strict gun control laws); Anne-Marie White, *A New Trend in Gun Control: Criminal Liability for the Negligent Storage of Firearms*, 30 HOUS. L. REV. 1389 (1993) (discussing state regulation of the gun industry and asserting that many state gun control laws are upheld as a reasonable exercise of the state's police power).

<sup>2</sup> Susan B. Sorenson, *Regulating Firearms as a Consumer Product*, 286 SCIENCE 1481, 1482 (1999) (polling awareness and opinions on gun safety issues among various groups and finding that 51.3% believed safety was already federally regulated and 19.1% did not know whether it was). This poll also found that the overall support for government regulations on the design of firearms, by percent, was 74.9% for design safety standards, 36.9% for suits against manufacturers, 38.5% for banning personal possession, 87.9% for child-proofing and 72.2% for personalizing handguns. *Id.*

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criminals.<sup>3</sup>

Gun manufacturers have declared for decades that they bear no responsibility for the accidental use or criminal misuse of guns, refusing to include safety devices on their weapons or correct the distribution system that ensures easy criminal access to guns.<sup>4</sup> Recent litigation by cities, municipalities, and one state, however, seeks to hold the industry accountable for failure to provide reasonably available safety devices that would save lives and failure to implement even minimal restrictions on the sale of its products to prevent easy access to guns by minors and criminals.<sup>5</sup>

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<sup>3</sup> See *infra* Part III (discussing the gun industry's knowledge of an illicit gun market).

<sup>4</sup> See Wayne LaPierre, Vice-President of the National Rifle Association (NRA), Address at the NRA Annual Meeting of Members (May 1, 1999) (remarking that the NRA "has never agreed that magazine capacity has any relationship to the criminal misuse of firearms" and "there is no evidence waiting periods work."), available at [http://www.nrahq.org/transcripts/denver\\_wlp.asp](http://www.nrahq.org/transcripts/denver_wlp.asp); see also National Rifle Association, *NRA Gun Safety Rules*, at <http://www.nrahq.org/education/guide.asp> (last visited Mar. 26, 2002) (stating that rules for gun safety are to merely "[k]now your target and what is beyond[,] . . . [k]eep your finger off the trigger until ready to shoot . . . [and] [n]ever use alcohol or over-the-counter or other drugs before or while shooting[.]" but not indicating that gun manufacturers should have any role in gun safety).

<sup>5</sup> Litigation by states, cities and municipalities is a relatively recent phenomenon, and the plaintiffs' pleading theories are relatively consistent. See Plaintiff's Complaint, *City of Chicago v. Beretta U.S.A. Corp.*, 2003 Ill. App. LEXIS 276 (Ill. App. Ct. 2003) (No. 1-00-3541) (claiming that gun dealers, manufacturers and distributors engaged in conduct that constituted a nuisance in Cook County by knowingly exploiting the market for illegal guns and designing and manufacturing firearms to stimulate demand of illegal firearms); Plaintiff's Complaint, *Archer v. Arms Tech., Inc.*, 72 F.Supp.2d 784 (E.D. Mich. 1999) (No. 99-912658) (claiming that gun manufacture's business practices are calculated to exploit the illegitimate firearms market and have adopted a strategy of willful blindness); Plaintiff's Complaint, *City of St. Louis v. Cernicek* (Mo. Cir. Ct. 1999) (No. 992-01209) (claiming gun manufacturers and distributors created a public nuisance, conspired to engage in unlawful acts and negligently failed to develop safety devices); Plaintiff's Complaint, *City of New York v. Arms Tech., Inc.* (E.D.N.Y. 2000) (No. 1:00-cv-3641) (claiming that gun manufacturers failed to exercise control over production, marketing and distribution of guns, resulting in purchase of handguns by criminals and other

As Americans, we know the great devastation that guns cause in our country. Recent statistics indicate that from 1981 through 1999, firearms caused 271,103 homicides, 337,954 suicides and 26,294 unintentional deaths in the United States.<sup>6</sup> Studies show that for each gun death in our country there are three gun injuries.<sup>7</sup>

Guns take a particularly heavy toll on the nation's young people, as highlighted by the horrific school shootings in

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prohibited persons); Plaintiff's Complaint, *Morial v. Smith & Wesson Corp.* 785 So.2d 1 (La. 2001) (No. 00-CA-1132) (claiming that gun manufacturers designed an unreasonably dangerous product, failed to include safety device and failed to provide adequate warnings in violation of the Louisiana Product Liability Act); First Amended Complaint, *City of Boston v. Smith & Wesson* (Mass. Super. Ct. 2000) (No. 1999-02590) (claiming gun manufacturers created a public nuisance, negligently distributed and marketed, defectively designed firearms and failed to warn); Plaintiff's Complaint, *State of N.Y. v. Arms Tech. Inc.*, No. 1-00-03641-JBW (N.Y. Sup. Ct. 2000); Plaintiff's Complaint, *District of Columbia v. Beretta U.S.A. Corp.* (D.C. Super. Ct. 2000) (No. 00-0000428) (claiming gun manufacturers violated public nuisance laws and negligently distributed firearms); Plaintiff's Complaint, *City of Atlanta v. Smith & Wesson Corp.* (Fulton County Ct. 1999) (No. 99VS014917J) (claiming that gun manufacturers defectively and negligently design their products, and failed to include safety devices and adequate warnings); Plaintiff's Complaint, *People of California ex rel. Hahn v. Arcadia Machine & Tool* (Cal. Super. Ct. 1999) (No. BC210894) (claiming gun manufacturers designed handguns to appeal to criminals and have increased production to meet demand from illegal market, and failed to incorporate feasible safety technology); Plaintiff's Complaint, *City of Cincinnati v. Beretta U.S.A. Corp.*, 1999 Ohio Misc. LEXIS 27 (Ohio Ct. C.P. 1999) (No.381897) (claiming gun manufacturers violated strict liability and created an unreasonable dangerous product, failed to warn and engaged in unfair and deceptive advertising practices).

<sup>6</sup> NATIONAL CENTER FOR HEALTH STATISTICS, CENTERS FOR DISEASE CONTROL AND PREVENTION, MORTALITY DATA FROM THE NATIONAL VITAL STATISTICS SYSTEM (2002), available at <http://www.cdc.gov/nchs/about/major/dvs/mortdata.htm>.

<sup>7</sup> Joseph L. Annett et al., *National Estimates of Non-fatal Firearm-Related Injuries: Beyond the Tip of the Iceberg*, 273 JAMA 1751, 1751-54 (1995) (describing the magnitude and characteristics of nonfatal firearm-related injuries treated in hospital emergency departments, comparing nonfatal injury rates with firearm-related fatality rates and concluding that nonfatal firearm-related injuries contribute substantially to the overall public health burden of firearm-related injuries).

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Paducah, Kentucky, Springfield, Oregon and Littleton, Colorado.<sup>8</sup> Studies show that a teenager in the United States is more likely to die of a gunshot wound than from all “natural” causes combined.<sup>9</sup> Between 1993 and 1998, there was an average 22,000 nonfatal firearm injuries annually among people under 20.<sup>10</sup> One recent study shows that a statistically significant

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<sup>8</sup> See Lynda Gorov & Brian Macquarrie, *Oregon Youth Warned of Trouble*, BOSTON GLOBE, May 23, 1998 at A1 (detailing shooting at Springfield, Oregon school where 15-year old Kip Kinkle killed two students, injured 22 others and also killed his mother and father); Paul Hoversten, *In Kentucky, “Blood was Everywhere,” Teens Dismissed Suspect’s Vow of “Something Big,”* USA TODAY, Dec. 2, 1997 at 3A (describing Paducah, Kentucky school shooting by 14-year old student, killing two and injuring six); Patrick O’Driscoll, *Students Massacred in Colorado. Police Say 25 Killed; Shooters Stalked School on a “Suicide Mission,”* USA TODAY, April 21, 1999 at 1A (discussing shooting by two high school students armed with high-powered rifles who took over school).

<sup>9</sup> LOIS A. FINGERHUT, CENTERS FOR DISEASE CONTROL AND PREVENTION, ADVANCE DATA FROM THE NATIONAL VITAL STATISTICS SYSTEM, FIREARM MORTALITY AMONG CHILDREN, YOUTH AND YOUNG ADULTS 1-34 YEARS OF AGE, TRENDS AND CURRENT STATUS, UNITED STATES: 1985-90 (1993) (finding that among black males 10 through 34 years of age, injuries from firearms are the leading cause of death), <http://www.cdc.gov/nchs/about/major/dvs/mortdata.htm>.

<sup>10</sup> KAREN GOTSCH ET AL., CENTERS FOR DISEASE CONTROL AND PREVENTION, SURVEILLANCE FOR FATAL AND NONFATAL FIREARM-RELATED INJURIES—UNITED STATES 1993-1998, 1-32 (Apr. 13, 2001), *available at* <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5002a1.htm>. The Centers for Disease Control found that from 1993 to 1998, an estimated average of 115,000 firearm-related injuries, including 35,200 fatal and 79,400 nonfatal injuries, occurred annually in the United States. Males were seven times more likely to die or be treated in a hospital for a gunshot wound than females. The proportion of firearm-related injuries that resulted in death increased from younger to older age groups. Approximately 68% of firearm-related injuries for teenagers and young adults aged 15-24 years were from interpersonal violence and 78% of firearm-related injuries among older persons aged greater or equal to 65 years old were from intentionally self-inflicted gunshot wounds. Since 1993, firearm-related injuries and deaths have been declining steadily. In 1998, however, firearm-related injuries remained the second leading cause of death in the United States, accounting for approximately 31,000 deaths. The majority of these fatal and nonfatal firearm-related injuries result from interpersonal violence and intentionally self-inflicted gunshot wounds, but approximately 15,000 unintentional gunshot wounds are treated in U.S. hospital emergency

association exists between gun availability and elevated rates of suicide and homicide among children.<sup>11</sup> Gun deaths and injuries not only cause American communities immense anguish and sorrow, they also exact a heavy financial toll on society. The burden borne by the American public as a result of gun violence is estimated at approximately \$20 billion each year.<sup>12</sup>

Addressing the costs and causes of gun violence requires a multi-faceted approach. The only regulation to date is on the sale of guns, and can be undermined, as manufacturers know, by savvy buyers. The Brady Bill, the most significant body of federal law on gun sales, established a five-day mandatory waiting period before the purchase of a firearm, required a background check to be made for any firearm purchase and created a national database to facilitate these background checks.<sup>13</sup> While criminals and those who misuse or fail to

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departments each year. Although firearm-related injuries represent less than 0.5% of injuries treated in hospitals, they have an increased potential of death and hospitalization compared with other causes of injury. In 1994, treatment of gunshot injuries in the United States was estimated at \$2.3 billion in lifetime medical costs, of which \$1.1 billion was paid by the federal government. These factors emphasize the importance of firearm-related injuries as a public health concern. *Id.*

<sup>11</sup> Matthew Miller et al., *Firearm Availability and Unintentional Firearm Deaths, Suicide and Homicide Among 5-14 Year Olds*, 52 J. OF TRAUMA 267 (2002) (finding that a disproportionately high number of 5-14 year olds died from suicide, homicide, and unintentional firearm wounds in states and regions where guns were more prevalent).

<sup>12</sup> See Linda Gunderson, *The Financial Costs of Gun Violence*, 131 ANNALS INTERNAL MED. 483 (1999), available at <http://www.annals.org/issues/v131n6/full/199909210-00102.html>. Gunderson states that because many victims of gun violence have no health insurance, taxpayers fund approximately 85% of their medical costs. *Id.* Further, “[t]wo major factors contribute to the effect of gun violence on the overall costs of health care: the cost of long-term care for disabled victims and the cost of lost productivity.” *Id.* For example, of the \$20 billion gun violence cost taxpayers, “\$1.4 billion was solely for expenses related to health care, \$1.6 billion was for injury-related illness and disability (lost productivity), and \$17.4 billion was for premature death (lost productivity).” *Id.*

<sup>13</sup> Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1543 (1993). The Brady Bill had its genesis in the 1981 shooting of James Brady by John Hinckley, Jr. during the unsuccessful attempted assassination of

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adequately store firearms should be punished, those who manufacture and market guns should be held to the same standards of accountability as other manufacturers. The American taxpayer should not be left to foot the bill for foreseeable injuries caused by manufacturers' irresponsible behavior.

The industry's abject failure to implement even the most basic of preventative measures is due in large part to the fact that the industry has been exempt from common law tort liability for too long.<sup>14</sup> Despite knowledge that it contributes to the underground criminal gun market, and despite the ability to implement design and distribution changes that would stem the tide of guns into this market, the industry has taken no action.<sup>15</sup> Since the rise of city

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President Ronald Reagan. See Jill A. Tobia, *The Brady Handgun Prevention Act: Does It Have a Shot at Success?*, 19 SETON HALL LEGIS. J. 894, 898 (1995). The final version of the legislation was passed twelve years and one president later. See Richard M. Aborn, *The Battle Over the Brady Bill and the Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 417, 420-28 (1995) (recounting the legislative process necessary for the passage of the Brady Bill).

<sup>14</sup> See, e.g., Timothy 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, 7-8 (2000). Lytton points out that only four suits against the industry have survived pretrial dismissal or summary judgment. He further notes that "to date, claims against gun manufacturers for crime-related injuries based on design defect theory have been dismissed for plaintiffs' failure to allege a defect in the gun that caused it to malfunction." *Id.* Ultimately, he concludes that this immunity of "gun manufacturers highlights the importance of non-economic concepts of wrong—such as defect and breach of duty—in the adjudication of tort claims against gun manufacturers," and argues that the reliance of economic analysis on complex statistical data, given the highly speculative nature of such data in gun cases, makes economic analysis unhelpful in finding workable answers to the questions posed by tort claims against firearms manufacturers. *Id.*

<sup>15</sup> See David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMP. L. REV. 1, 6-7 (1998) Kairys states:

[t]he company and the industry as a whole are fully aware of the extent of the criminal misuse of firearms. The company and the industry are also aware that the black market in firearms is not simply the result of stolen guns but is due to the seepage of guns into the illicit market from multiple thousands of unsupervised federal firearms licensees. In spite of their knowledge, however, the industry position has consistently been to take no independent action to insure



suits against the gun industry, however, the special status enjoyed by the industry has begun to change.<sup>16</sup>

Part I of this article debunks the arguments proffered by opponents of common sense gun regulations: that unregulated gun ownership actually helps reduce crime, and that any regulation of guns in the United States is an infringement on the Second Amendment. Next, Part II examines the fact that, despite studies indicating that guns are responsible for thousands of injuries and deaths in the United States each year, the industry enjoys a privileged status. The gun industry is specifically exempt from the most basic consumer product safety standards, and efforts are underway to further exempt the industry from basic common law tort claims. Part III discusses how the underground market in guns is regularly supplied by the gun industry and the ways in which the gun industry could implement simple, common sense design, marketing and distribution changes that would prevent gun sales to criminals, prevent child accidental shootings and help save lives. Lastly, Part IV examines minor changes the industry has made in response to the

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responsible distribution practices.

*Id.*

<sup>16</sup> See, e.g., Brian J. Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Another Deadly Industry*, 18 ST. LOUIS U. PUB. L. REV. 247, 248 (1999) (examining legal theories behind city-suit litigation against the gun industry). Law suits brought by cities have proceeded on theories that focus on three major areas of gun industry misconduct: “1) failing to incorporate feasible safety systems into guns that would prevent widespread firearm misuse by unauthorized users; 2) facilitating illegal gun trafficking by using a porous distribution system; and 3) deceptively advertising and overwhelming data indicating this lessens home safety.” *Id.* at 248. See also, Rachana Bhowmik, *How State Attorneys General Can Act Now to Save Lives*, Center to Prevent Gun Violence Legal Action Project (2001) (listing statewide gun safety measures and actions that public officials should take for gun safety regulation), available at <http://www.gunlawsuits.org/pdfreports/targetingsafety.pdf>; Ingrid Evans, *City Lawsuits Against The Gun Industry Will Pressure Firearm Manufacturers to Design Safer Weapons and Sell Guns Responsibly* (2001) (assessing the positive impact of municipal pressure on firearm manufacturers to incorporate safety features), at [http://articles.corporate.findlaw.com/articles/file/00138/005491/title/Subject/topic/Injury%20%20Tort%20Law\\_Products%20Liability/filename/injurytortlaw\\_2\\_197](http://articles.corporate.findlaw.com/articles/file/00138/005491/title/Subject/topic/Injury%20%20Tort%20Law_Products%20Liability/filename/injurytortlaw_2_197).

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on-going city-suit litigation. These suits have increased accountability and brought about the very same changes that the industry once claimed were both impractical and impossible.

## I. ARGUMENTS AGAINST LIABILITY

Opponents of increased gun control and manufacturer liability advance myriad arguments to support their positions. Their conclusions, whether based in statistical or constitutional analysis, are fundamentally flawed.

A. *“More Guns Mean Less Crime”: Questionable Statistics Used to Argue Against Common Sense Gun Laws*

The gun industry and the National Rifle Association (“NRA”) regularly repeat the mantra “more guns mean less crime.”<sup>17</sup> In his article “Pistol Whipped,” Robert Levy declares “the higher the number of carry permits in a state, the larger the drop [in crime].”<sup>18</sup> These assertions are often based on research by American Enterprise Institute fellow John Lott, in conjunction with David Mustard.<sup>19</sup> Their research showed that at the same time that states across the country enacted relaxed concealed weapons laws (“shall issue” laws), a national reduction in crime

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<sup>17</sup> See Wayne LaPierre, Address at the NRA Annual Meeting *supra* note 4 (remarking that “We believe that a lawful, properly-permitted citizen who chooses to carry a concealed firearm not only deserves that right, but is a deterrent to crime. We support the right to carry because it has helped cut crime rates in all 31 states that have adopted it”).

<sup>18</sup> Robert A. Levy, *Pistol Whipped: Baseless Lawsuits, Foolish Laws*, 10 J.L. & POL’Y 1, 40 (2001) (citing John Lott’s research as proof that “[l]aws permitting the carrying of concealed handguns reduce murder by about 8% and rape by about 5%”).

<sup>19</sup> John R. Lott Jr. & David B. Mustard, *Crime, Deterrence, and Right to Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997) (utilizing a cross-section of crime data for U.S. counties from 1977 to 1992, the authors found that states allowing citizens the right to carry concealed weapons deterred violent crimes and predicted that other states would have experienced a drop in violent crime had they adopted such a provision).

occurred.<sup>20</sup> From that fact, they erroneously determined that the carrying of firearms among the general population causes a reduction in crime.<sup>21</sup> Analyzing county-level crime data for the years 1977 to 1992, and relying upon statistical regressions of select datasets, Lott and Mustard concluded that the relaxation of concealed weapons laws deterred violent crimes, increased property crimes due to criminal substitution and had no effect upon the number of accidental deaths.<sup>22</sup> They also claimed that, “[their] evidence implies that concealed handguns are the most cost-effective method of reducing crime thus far analyzed by economists, providing a higher return than increased law enforcement or incarceration, other private security devices, or social programs like early educational intervention.”<sup>23</sup>

Lott and Mustard’s bold assertions led researchers to re-examine their data.<sup>24</sup> While the gun lobby and its supporters have

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<sup>20</sup> See Lott & Mustard, *supra* note 19, at 64. “Shall issue” concealed weapons laws allow practically all non-felons to carry concealed handguns. These laws are characterized as “non-discretionary” because the buyer is not required to demonstrate a need to carry a concealed firearm when applying for a concealed carry permit. Compare ARIZ. REV. STAT. ANN. § 13-3112 (2002); ARK. CODE ANN. § 5-73-309 (2001); FLA. STAT. ANN. § 790.06 (2002); LA. REV. STAT. ANN. § 40:1379.3 (West 2001); ME. REV. STAT. ANN. tit. 25, § 2003 (West 2002); MICH. COMP. LAWS ANN. § 28.425b (West 2002); N.Y. PENAL LAW § 400.00 (McKinney 2002); with KAN. STAT. ANN. § 75-7b17 (2001) (requiring that applicants demonstrate the need to carry a firearm in order to protect life or property); N.D. CENT. CODE § 62.1-04-03 (2001) (stating that applicants must have a valid reason for carrying a concealed weapon such as self-protection, protection of others or work-related needs); UTAH CODE ANN. § 1953 53-5-704 (2002) (establishing that permits shall be issued for the purpose of “lawful self defense”).

<sup>21</sup> Lott & Mustard, *supra* note 19, at 64.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 65.

<sup>24</sup> See, e.g., Daniel Webster & Jens Ludwig, *Myths about Defensive Gun Use and Permissive Gun Carry Law* (1999) (describing problems with Lott and Mustard’s data such as variations in the estimated effects in their studies (8-67%), failure to account for other important factors, which affect state crime and homicide rates and the absence of expected effects, for example, the small effect of “shall carry” laws on robberies), at <http://www.jhsph.edu/gunpolicy/myths.pdf>; Franklin Zimring & Gordon Hawkins, *Concealed Handguns: The*

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since quoted Lott and Mustard's thesis as fact, they fail to acknowledge the numerous critical reviews of Lott and Mustard's assertions which reveal either that concealed weapons laws have no effect on crime or, worse, that more guns equal more crime.<sup>25</sup>

Researchers Daniel Webster and Jens Ludwig pointed out that, "errors aside, the fundamental problem with Lott's research can be summarized by the old science adage 'correlation is not causation.' Variables may be related to one another yet not cause one another."<sup>26</sup> Professor Franklin Zimring,<sup>27</sup> determined that the datasets used in the Lott-Mustard Study included inherent biases that resulted in skewed results.<sup>28</sup> Even Gary Kleck, an author whose own data regarding defensive gun usage is regularly used to argue against gun safety measures, is skeptical of Lott's numbers.<sup>29</sup> Kleck remarked that the Lott-Mustard results:

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*Counterfeit Deterrent*, 7 RESPONSIVE COMMUNITY 46, 49-50 (1997) (finding "insurmountable methodological flaws" in Lott's study).

<sup>25</sup> See, e.g., Levy, *supra* note 18, at 40-41 (relying on Lott and Mustard's data without acknowledging methodological criticism).

<sup>26</sup> Webster & Ludwig, *supra* note 24 (asserting arguments prepared for the "Strengthening the Public Health Debate on Handguns, Crime and Safety" meeting in October 1999, and clarifying that it would be erroneous to attribute differences in crime rate to the presence of permissive concealed-carry laws without considering other unmeasured differences).

<sup>27</sup> Professor Franklin Zimring is the William G. Simon Professor of Law and Director of the Earl Warren Legal Institute at the University of California, Berkeley. His co-author Professor Gordon Hawkins teaches at the Institute of Criminology, University of Sydney. *Id.*

<sup>28</sup> Many of Lott's strongest critics believe that his work has stepped over the line of academic research into policy advocacy, which may have dulled his attentiveness to disconfirming evidence. Zimring & Hawkins, *supra* note 24, at 49-50. The authors noted that "[a]s a gauge of his blind belief in the power of concealed weapons, following the March 1998 Jonesboro massacre, Lott . . . argued in a *Wall Street Journal* op-ed that the best way to prevent such shootings was to arm teachers. *Id.* Wrote Lott, '[a]llowing teachers and other law-abiding adults to carry concealed handguns in schools would not only make it easier to stop shootings in progress, it could also help deter shootings from ever occurring.'" *Id.*

<sup>29</sup> GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 372 (1997) (suggesting that Lott and Mustard's conclusion that "shall carry" laws reduce crime and deter prospective criminals may be overstated because "if those who got permits were merely legitimizing what they were already doing

could be challenged, in light of how modest the intervention was. The 1.3% of the population in places like Florida who obtained permits would represent at best only a slight increase in the share of potential crime victims who carry guns in public places. . . . More likely, the declines in crime coinciding with relaxation of carry laws were largely attributable to other factors not controlled in the Lott and Mustard analysis.<sup>30</sup>

Even David Mustard, co-author of the Lott-Mustard study, admitted that the study did not include all factors that may have affected the decline in crime rates during the time period examined.<sup>31</sup>

Most researchers agree that the methods of the Lott-Mustard study were not scientifically sound.<sup>32</sup> For example, the *American Journal of Public Health* published a criticism of the Lott-Mustard study highlighting significant flaws in the study, including “misclassification of gun-carrying laws, endogeneity of predictor variables, omission of confounding variables, and failure to control for the cyclical nature of crime trends.”<sup>33</sup> These

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before the new laws, it would mean there was no increase at all in carrying or in actual risks to criminals.”)

<sup>30</sup> *Id.* at 372. See also Albert W. Alschuler, *Two Guns, Four Guns, Six Guns, More Guns: Does Arming the Public Reduce Crime?*, 31 VAL. U. L. REV. 365, 367 (1997) (discussing the faults of regression analysis as a methodology and noting discrepancies in the Lott-Mustard study, such as finding a negative correlation between murder, burglary, rape and large versus small cities).

<sup>31</sup> See *Klein v. Simon Leis*, 767 N.E.2d 286 (Ohio Ct. App. 2002) (stating some of the variables not included in the study, such as family structure or wide spread state or county prison sentences). Mustard also conceded that “some experts in his field disagreed with his methodology, and that reasonable people might differ on the efficacy of various concealed-carry laws.” *Id.* at 296.

<sup>32</sup> See, e.g., ROBERT EHRlich, NINE CRAZY IDEAS IN SCIENCE, A FEW MIGHT EVEN BE TRUE 32 (2000); Dan A. Black & Daniel S. Nagin, *Do Right-to-Carry Laws Deter Violent Crime?*, 27 J. LEGAL. STUD. 209, 214 (1998); Daniel W. Webster et al., *Flawed Gun Policy Research Could Endanger Public Safety*, 87 AM. J. PUB. HEALTH 918, 918-21 (1997).

<sup>33</sup> Webster et al., *supra* note 32, at 918-22. The authors criticized the methodology of the Lott-Mustard study, noting that the study attempted to classify the “shall issue” laws into two neat categories, without consideration of those falling somewhere in between. *Id.* This caused serious problems for their

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flaws were so “substantial” that the researchers stated, “any conclusions about the effects of shall-issue laws based on this study are dubious at best.”<sup>34</sup> Researchers Dan Black and Daniel Nagin reviewed Lott and Mustard’s data and determined that:

their results are highly sensitive to small changes in their model and sample. Without Florida in their sample, there is no detectable impact of right-to-carry laws on the rate of murder and rape, the two crimes that by the calculations of Lott and Mustard account for 80 percent of the social benefit of right-to-carry laws.<sup>35</sup>

Professor Robert Ehrlich of George Mason University debunked Lott’s myth and gave Lott’s theories “three cuckoos” on a crazy scale of four cuckoos.<sup>36</sup>

Moreover, the conclusions of several independent studies directly contradict the Lott-Mustard thesis.<sup>37</sup> Researchers Ian Ayers and John Donahue published a study in the *Journal of American Law and Economics* using the same trends analyzed by Lott and Mustard and found that the implementation of “shall

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classification scheme. Additionally, the authors assert that Lott and Mustard failed to control the complex relationship between “shall issue” laws, arrests and the crime rate. *Id.* The authors also point out that Lott and Mustard failed to explain deviations between the crime rate and other trends and incorporated no techniques for controlling other unexplained fluctuations, like poverty or changes in the criminal justice system. *Id.*

<sup>34</sup> *Id.* at 920.

<sup>35</sup> Black & Nagin, *supra* note 32, at 214 (reanalyzing the data collected by Lott and Mustard and concluding that no definitive inference or conclusion of a deterrent effect can be drawn when a single state is removed from the data sample).

<sup>36</sup> See EHRLICH, *supra* note 32, at 32. Ehrlich challenges Lott’s assertion that both violent and non-violent crime decrease with increased rates of gun-ownership because Lott neglected other variable in his analysis. For example, those states with a high rural population are likely to have lower crime rates as well as higher gun ownership. *Id.* The author also suggests that Lott’s contention regarding decreases in crimes due to non-discretionary gun laws is less persuasive when Lott adjusted his regression analysis to take account of rates of change and not merely absolute crimes rates. *Id.*

<sup>37</sup> EHRLICH, *supra* note 32, at 32; Lott & Mustard, *supra* note 19, at 1. See also Black & Nagin, *supra* note 32, at 209; Webster et al., *supra* note 32, at 918-21.

issue” concealed carry permit laws actually *increased* the rates of crime and violence.<sup>38</sup> Similarly, research conducted by University of Chicago economics Professor Mark Duggan discovered that increases in gun ownership rates directly correlate with increases in gun crimes.<sup>39</sup> Duggan specifically concluded that, correcting for improper variables, the Lott-Mustard research is incorrect.<sup>40</sup>

The gun lobby and its supporters are similarly fond of quoting unreliable self-defense statistics.<sup>41</sup> Gary Kleck estimates that civilians use guns in self-defense some 2.5 million times a year.<sup>42</sup> While these numbers have been oft-cited by the NRA and other opponents of gun safety measures,<sup>43</sup> these number are based

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<sup>38</sup> Ian Ayres & John J. Donohue III, *Nondiscretionary Concealed Weapons Laws: A Case Study of Statistics, Standards of Proof, and Public Policy*, 1 AM. L. & ECON. REV. 436, 436-70 (1999) (concluding that “[at] the end of the day, we are concerned that Lott’s estimated coefficients for adopting states are not as robust as he claims and may be seriously biased because of omitted explanatory variables.”), available at <http://islandia.law.yale.edu/ayers/pdf/lottreview.pdf>.

<sup>39</sup> Mark Duggan, *More Guns, More Crime*, 109 J. POL. ECON. 1086, 1089 (2001). Estimating annual rates of gun ownership at both the state and the county levels during the past two decades, Duggan demonstrates that changes in gun ownership are significantly positively related to changes in the homicide rate, with this relationship driven almost entirely by an impact of gun ownership on murders in which a gun is used. *Id.* The effect of gun ownership on all other crime categories is much less marked. *Id.* Recent reductions in the fraction of households owning a gun can explain one-third of the differential decline in gun homicides relative to non-gun homicides since 1993. *Id.*

<sup>40</sup> *Id.* at 1086.

<sup>41</sup> See Levy, *supra* note 18, at 42 (asserting that evidence suggests armed civilians in fact deter crime, and that proposed gun regulations will “strip law-abiding citizens of their most effective means of self-defense”).

<sup>42</sup> Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 167 (1995) (discussing research methodology and survey results showing that there are 2.2 – 2.5 million self-defense uses of guns a year in the United States).

<sup>43</sup> Paul H. Backman, *Armed Citizens and CrimeControl*, National Rifle Association Institute for Legislative Action, at <http://www.nra.org/media/misc/Blackman.htm> (last visited Oct. 10, 2002) (citing Kleck & Gertz, *supra* note 42, at 167 in part for the premise that “firearms are used for self-protection about 2.5 million times annually”).

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on self-reporting surveys and are grossly over-estimated.<sup>44</sup> The Kleck study projects a number of assailants wounded by armed citizens in 1992 that is more than double the estimate from another study of the total number of people treated for gunshot wounds in a nationally representative sample of hospitals in 1994.<sup>45</sup> In his efforts to externally validate Kleck's estimate, researcher David Hemenway discovered that there were several problems with the Kleck study.<sup>46</sup> Among those problems are difficulties in estimating a rare event and conflicts due to social desirability or personal presentation bias, whereby surveyed individuals misrepresent information because of the desire to "look good."<sup>47</sup>

Despite this substantial body of research challenging such statistics and conclusions, critics of gun safety laws and city-suit litigation repeatedly rely upon these controversial studies to justify not holding the gun industry responsible for their negligent behavior.<sup>48</sup> Once these flawed calculations are laid aside,

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<sup>44</sup> See Kleck & Gertz, *supra* note 42, at 167.

<sup>45</sup> Webster & Ludwig, *supra* note 24, at 7 (arguing that more guns will lead to more deaths).

<sup>46</sup> See David Hemenway, *The Myth of Millions of Annual Self-Defense Gun Uses: A Case Study of Survey Overestimates of Rare Events*, 10 CHANCE 3, 6 (1997).

<sup>47</sup> See *id.* One methodology flaw in Kleck's survey was that participants were posed questions in contexts where they were likely to misrepresent information in the hopes of "looking good." For example, if they purchased a gun for self-defense purposes they will want to claim they used the gun for self-defense so that their intended use was realized. *Id.*

<sup>48</sup> See, e.g., Levy, *supra* note 18, at 12-16 (arguing that the Second Amendment protects the rights of individuals to keep arms against tyranny); Lott & Mustard, *supra* note 19, at 1. See also H. Sterling Burnett, *Suing Gun Manufacturers: Hazardous to Our Health*, 5 TEX. REV. L. & POL. 433 (2001) (stating that societal benefits stemming from policies allowing less regulated gun use outweigh associated costs and therefore gun use should not be regulated in the ways suggested by several pending lawsuits against the gun industry). See generally Richard C. Ausness, *Tort Liability for the Sale of Non-defective Products: An Analysis and Critique of the Concept of Negligent Marketing*, 53 S.C. L. REV. 907 (2002) (identifying the theories of negligence on which lawsuits against gun manufactures are based); Symposium, *Guns and Liability in America*, 32 CONN. L. REV. 1425 (2000) (discussing and debating issues of



however, one central truth emerges: Americans suffer from unreasonable levels of gun violence and something must be done to curb the epidemic of gun violence in our nation.

*B. "The Right to Keep and Bear Arms": Debunking the Myth that the Second Amendment Prohibits Common Sense Gun Safety Laws*

The interpretation and application of the Second Amendment is a hotly debated issue.<sup>49</sup> The Amendment reads "[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."<sup>50</sup>

Robert Levy of the CATO institute contends that the Second Amendment "protects. . . each individual against the state."<sup>51</sup> With no supporting evidence, he argues that "disarmed societies tend to become police states"<sup>52</sup> and maintains "the individual rights view [of the Second Amendment] establishes a

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and relationships between gun safety policy, statistical studies, state laws, and pending lawsuits).

<sup>49</sup> See generally, *Symposium on the Second Amendment: Fresh Looks: The Second Amendment in Context: the Case of the Vanishing Predicate*, 76 CHL-KENT. L. REV. 403 (2000) (describing the controversy between the "individual rights" interpretation of the Second Amendment and the position that the Amendment was adopted to assure the states' control over their local militias only). Compare Todd Barnet, *Gun "Control" Laws Violate the Second Amendment and May Lead to Higher Crime Rates*, 63 MO. L. REV. 155 (1998) (arguing that the Second Amendment creates an individual right to bear arms for personal protection, as opposed to a collective right, to bear arms and suggesting that gun regulation may increase crime rates), with Harold S. Herd, *Re-Examination of the Firearms Regulation Debate and Its Consequences*, 36 WASHBURN L.J. 196 (1997) (applying a textual analysis to the Second Amendment, and concluding that right to bear arms is a qualified one, recognized only in the context of the "people" forming a "well regulated Militia" to protect the security of the free states, and clearly does not provide for an individual right to bear arms independent of the "militia" clause).

<sup>50</sup> U.S. CONST. amend. II.

<sup>51</sup> See Levy, *supra* note 18, at 13.

<sup>52</sup> *Id.*

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presumption against gun control.”<sup>53</sup> According to former Chief Justice Warren Burger, however, Robert Levy and other opponents of gun safety legislation continue to perpetrate a “fraud” on the American people when they argue that implementing or enforcing gun safety legislation upon the gun industry is prohibited by the Second Amendment.<sup>54</sup> Indeed, the Second Amendment Foundation filed suit against mayors whose cities brought cases against the gun industry, citing a “conspiracy” and a violation of Second Amendment rights.<sup>55</sup> Although the case was dismissed on jurisdictional grounds, it illustrates just how far gun advocates will go to perpetuate the “fraud.”<sup>56</sup>

Contrary to gun lobbyists’ repeated assertions, the Second Amendment poses no barrier to reasonable gun safety laws.<sup>57</sup> In

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<sup>53</sup> Robert Levy, *Bearing Arms in D.C.*, LEGAL TIMES, July 22, 2002 at 42.

<sup>54</sup> *McNeil-Lehrer Newshour* (CNN television broadcast, Dec. 16, 1991) (establishing that Justice Berger was in support of gun control legislation which would impose a “thirty day waiting period so they could find out why this person needs a handgun or a machine gun.”). See Dick Stitz, *Handgun Debate: Who’s Really Trying to Save Lives Here?*, SEATTLE TIMES, Oct. 7, 1993, at 2 (referring to Burger’s comment on television on Dec. 16, 1991 that the NRA’s promotions about the Second Amendment have “been the subject of one of the greatest pieces of ‘fraud’ on the American people by special interest groups that I have ever seen in my lifetime.”).

<sup>55</sup> See *Second Amendment Found. v. U.S. Conference of Mayors*, 274 F.3d 521 (D.C. Cir. 2001). The Second Amendment Foundation brought civil conspiracy claims against the mayors of 22 cities that filed public nuisance actions against gun manufacturers and dealers. *Id.* The Second Amendment Foundation is an organization of firearm consumers dedicated to using legal action to protect “our Constitutional heritage to own firearms.” See Second Amendment Foundation, *The SAF Web Site*, <http://www.saf.org> (last visited Nov. 14, 2002).

<sup>56</sup> *Second Amendment Found.*, 274 F.3d at 524. The district court dismissed the claims, concluding that the firearm consumers had not made the prima facie showing of personal jurisdiction because their allegations that the mayors conspired together represented nothing more than a legal conclusion. *Id.* The fact that multiple cities filed suit did not establish that the mayors had entered a conspiratorial agreement at the mayoral meeting because some cities had filed suit before that meeting. *Id.*

<sup>57</sup> While many special interest groups maintain that the Second Amendment is an absolute bar to any regulation of firearms, this is not the case.

fact, the Second Amendment does not necessarily provide an individual with the right to bear arms.<sup>58</sup> The Supreme Court stated more than sixty years ago that the Second Amendment was designed “to assure the continuation and render possible the effectiveness” of the state militia and the Amendment “must be interpreted and applied with that end in view.”<sup>59</sup> The federal courts have consistently echoed the view that the Second Amendment merely guarantees a right to be armed to those persons using the arms to serve in an organized state militia.<sup>60</sup>

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*See* Sayoko Blodgett-Ford, *The Changing Meaning of the Right to Bear Arms*, 6 SETON HALL CONST. L.J. 101, 173-87 (1995). The most important gun legislation passed in the recent past is the Brady Handgun Prevention Act. Pub. L. No. 103-159, 107 Stat. 1543 (1993). *See also supra* note 13 and accompanying text; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (restricting transfer and purchase of semi-automatic assault weapons).

<sup>58</sup> *See* Rachana Bhowmik, *Our Second Amendment Rights Are Not Eroded, but Our Understanding of Them Is*, CHURCH & SOCIETY, May/June 2000 (characterizing the Second Amendment as not granting an individual right to bear arms independent of the “militia” clause and asserting that an unfortunate and “unrelenting campaign of misinformation by the N.R.A. whose opposition to any regulations on firearms in this country has given much of the American public a warped understanding of the Second Amendment.”). *See also* Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson’s The Embarrassing Second Amendment*, 99 YALE L.J. 661 (1989) (explaining why the Second Amendment should be interpreted against providing an individual with the right to bear arms); Anthony Gallia, *Your Weapons, You Will not Need Them*, 33 AKRON L. REV. 131 (1999) (examining the history of the Second Amendment, and discussing the ambiguity in whether the Second Amendment grants individuals the right to bear arms); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U.L. REV. 57 (1997) (stating that “the individual right to bear arms for all legal purposes” is a “myth[ ] created by the gun lobby”).

<sup>59</sup> *U.S. v. Miller*, 307 U.S. 174, 178 (1939) (holding that the Second Amendment does not guarantee private citizens the right to keep and transport shotguns since it was not part of any ordinary military equipment and its use could not contribute to the common defense).

<sup>60</sup> *See, e.g., U.S. v. Napier*, 233 F.3d 394, 402 (6th Cir. 2000) (holding that Second Amendment’s right to bear arms applies only to the right of the State to maintain a militia); *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1997), *cert. denied*, 519 U.S. 912 (1996) (holding that the Second Amendment does not

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Erwin Griswold, Solicitor General to former President Nixon and former Dean of Harvard Law School, declared, “that the Second Amendment poses no barrier to strong gun laws is perhaps the most well-settled proposition in American Constitutional Law.”<sup>61</sup>

When the Second Amendment was drafted, most states were

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grant an individual right to be armed); *U.S. v. Wright*, 117 F.3d 1265 (11th Cir. 1997), *cert. denied*, 525 U.S. 896 (1997) (concluding that there is a “well regulated militia” requirement for protection under the Second Amendment); *U.S. v. Rybar*, 103 F.3d 273 (3d Cir. 1996) (upholding firearms regulation against Second Amendment challenges), *cert. denied*, 522 U.S. 807 (1997); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1994), *cert. denied*, 516 U.S. 813 (1995) (holding that the Second Amendment does not confer an absolute right to bear any type of firearm); *U.S. v. Hale*, 978 F.2d 1016, 1120 (8th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993) (stating that to succeed on a Second Amendment violation claim, claimant must prove possession of a firearm was reasonably related to a well regulated militia); *U.S. v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (recognizing that in absence of “some reasonable relationship to the preservation or efficiency of a well regulated militia,” the right to possess a gun is not a fundamental right); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) (upholding a village ban on handguns against Second Amendment challenges); *U.S. v. Oakes*, 564 F.2d 384 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978) (asserting that the purpose of the Second Amendment is only to preserve effectiveness and assure continuation of state militia and did not preserve a right to keep unregistered firearms in the home merely because he is technically a member of the Kansas militia); *U.S. v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971) (holding that the Second Amendment only guarantees the right to bear arms in some reasonable relationship to a militia).

<sup>61</sup> Neil A. Lewis, *At the Bar: In the Constitutional Amendment on the Right to Bear Arms, One Clause Defines a Cause*, N.Y. TIMES, May 5, 1995, at B18 (declaring that the Second Amendment protects rights of states to arm militias). See also BRADY CENTER TO PREVENT GUN VIOLENCE, SECOND AMENDMENT MYTH AND MEANING, available at <http://www.gunlawsuits.org/defend/second/articles/mythandmean.asp> (last visited Mar. 18, 2003). Griswold contended:

to assert that the Constitution is a barrier to reasonable gun laws, in the face of the unanimous judgment of the federal courts to the contrary, exceeds the limits of principled advocacy. It is time for the NRA and its followers in Congress to stop trying to twist the Second Amendment from a reasoned, if antiquated, empowerment for a militia into a bulletproof personal right for anyone to wield deadly weaponry beyond legislative control.”

*Id.*

concerned chiefly with maintaining a viable state militia to defend the state against possible invasion.<sup>62</sup> As the framers understood it, a “militia” was “an organized, state-sponsored group of individuals acting in defense of the whole.”<sup>63</sup> Further, the Constitution grants Congress the power “[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the Service of the United States.”<sup>64</sup> This grant of power necessarily implies governmental organization of the group. Alexander Hamilton acknowledged that, because a truly “well-regulated militia” would require frequent “military exercises and evolutions,” such a requirement would be a “serious public inconvenience and loss.”<sup>65</sup> Hamilton believed a more reasonable approach would be to ensure that militia members were “properly armed and equipped” and to “assemble them once or twice in the course of a

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<sup>62</sup> See, e.g., JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 708 (Boston, Hilliard, Gray & Co. 1833) (recognizing the importance of the Second Amendment and elaborating that a militia is “the natural defense of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers”); Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENTARY 221, 299 (1999) (discussing Pennsylvania’s “right to bear arms” within context of the Second Amendment to the U.S. Constitution); Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 509 (2000) (discussing the framers’ desire to preserve local power and commenting that the [Second] Amendment is concerned with preserving “states’ capacities to defend themselves against disorder, insurrection, and invasion”).

<sup>63</sup> See Steven J. Heyman, *Symposium on the Second Amendment: Fresh Looks: Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 263 (2000) (discussing Virginia Bill of Rights which served as model for bill of rights and the right to arm the militia). See also Uviller & Merkel, *supra* note 62, at 552 (citing the consensus among scholars that the founding generation of Americans conceived of a militia as “a group . . . responding as needed for the common defense”).

<sup>64</sup> U.S. CONST. art. I, § 8, cl. 16.

<sup>65</sup> THE FEDERALIST NO. 29, at 184 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

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year.”<sup>66</sup> Similarly, James Madison described militia as a group of citizens “united and conducted by governments possessing their affections and confidence.”<sup>67</sup>

That the framers selected the phrase “bear arms” further illustrates the military connotations of the Second Amendment. To “bear arms” means possession of weapons for military use.<sup>68</sup> As historian Garry Wills stated, “one does not bear arms against a rabbit.”<sup>69</sup> Indeed, both historical and contemporary definitions of the word “arms” have a distinctly military connotation; the term “arms” refers to instruments of war.<sup>70</sup> Accordingly, the Second Amendment was not meant to protect the rights of hunters or sportsmen, but was purely a means of protecting a state’s right to maintain an organized armed force.

In addition to the historical definition of the terms “militia” and “bear arms,” we must understand why the Second

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<sup>66</sup> *See id.* at 185.

<sup>67</sup> THE FEDERALIST NO. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961).

<sup>68</sup> *See* U.S. v. Miller, 307 U.S. 174, 176 (1939) (“In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”); U.S. v. Graham, 305 F.3d 1094, 1106 (10th Cir. 2002) (“We have previously held that a federal weapons restriction ‘does not violate the Second Amendment unless it impairs the state’s ability to maintain a well-regulated militia,’ and that the right to bear arms is a collective rather than individual right.”); U.S. v. Wright, 117 F.3d 1265, 1273 (11th Cir. 1997) (“The concerns motivating the creation of the Second Amendment convince us that the amendment was intended to protect only the use or possession of weapons that is reasonably related to a militia actively maintained and trained by the states.”). *See also* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1993) (defining “bear arms” as “1: to carry or possess arms and 2: to serve as a soldier”), available at <http://www.m-w.com/cgi-bin/dictionary>.

<sup>69</sup> Gary Wills, *To Keep and Bear Arms*, N.Y. REV. OF BOOKS, Sept. 21, 1995, at 62 (debunking the myth that the Second Amendment protects the rights of individuals to be armed).

<sup>70</sup> *See* AMERICAN HERITAGE COLLEGE DICTIONARY 74 (3rd ed. 1993) (defining “arm” as “a weapon, esp. a firearm.”). *See also supra* note 60 (discussing case law providing contemporary definitions of “arms”).

Amendment was passed. It is important to remember that the Constitution was drafted for a then untested federal power. Out of concern for a possible abuse of power by the federal government, the framers drafted the Bill of Rights to amend the Constitution “in order to prevent misconstruction or abuse of its powers.”<sup>71</sup> The debates among the states reflected a fear that giving Congress excessive power over the militia would enable Congress not only to regulate the militia, but also to disarm it completely, leaving the states defenseless against the federal government.<sup>72</sup> In this sense, the state militias were thought to function as the “bulwarks of liberties.”<sup>73</sup> The state militias were properly preserved in the Bill of Rights as an important mechanism to enforce limits on the federal government.

Despite this well-established proposition, one recent aberrant decision has garnered significant media and public attention.<sup>74</sup> In

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<sup>71</sup> 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 338 (Jonathon Eliot ed., 1836) (Resolutions of the First Congress in March 4, 1789); *see also* DAVID E. YOUNG, ORIGIN OF THE SECOND AMENDMENT 10 (Golden Oaks Books 1995).

<sup>72</sup> *See* Cornell, *supra* note 62, at 299 (providing a good overview of the various historical state concerns in regards to overreaching by the federal government in the context of the Second Amendment). *See also* THE FEDERALIST Nos. 17 (A. Hamilton), 39, 45, 46 (J. Madison) (asserting view that the Framers endorsed strong state governments); Robert J. Spitzer, *Symposium on the Second Amendment: Fresh Looks: Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT. L. REV. 349 (2000) (stating that “the Second Amendment was added to allay the concerns of Anti-federalists and others who feared that state sovereignty . . . would be impinged or neglected by the new federal government, which had been given vast new powers, particularly and alarmingly over the use of military force”). *Id.* at 351.

<sup>73</sup> 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 400 (Jonathan Eliot ed., 1836) (statement by Gov. Randolph).

<sup>74</sup> *Id.*

<sup>74</sup> U.S. v. Emerson, 46 F. Supp. 2d 598 (N.D. Tex. 1999), *rev'd and rem'd*, 270 F.3d 203 (5th Cir. 2001); *pet'n for reh'g denied*, 281 F.3d 1281 (5th Cir. 2001), *cert. denied*, 2002 U.S. Lexis 4269 (U.S. June 10, 2002). *But see* U.S. v. Lewis, 236 F.3d 948 (8th Cir. 2001) (refusing to apply *Emerson* and finding that the Second Amendment does not provide an individual right to bear arms); U.S. v. Napier, 233 F.3d 394 (6th Cir. 2000) (upholding finding that Second

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*U.S. v. Emerson*, the district court for the Northern District of Texas rejected federal court precedent and held that a federal law prohibiting an individual under a domestic restraining order from possessing a firearm violates that individual's Second Amendment right.<sup>75</sup> The defendant, Timothy Joe Emerson, threatened his estranged wife and child with a firearm and threatened to kill his estranged wife's friends.<sup>76</sup> On appeal, the Fifth Circuit upheld the district court's decision in part, and, contrary to every other appellate court in the country, found that the Second Amendment *does* provide an individual right to keep firearms.<sup>77</sup> But the Fifth Circuit found that the indictment did not violate that right and reversed the decision overturning the indictment.<sup>78</sup> The court went to great lengths to cite recent scholarship to support this novel decision on the Second Amendment.<sup>79</sup> In a strongly worded special concurrence, Judge

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Amendment does not protect individual's right to keep and bear arms); *U.S. v. Baer*, 235 F.3d 561 (10th Cir. 2000) (refusing to apply *Emerson's* conclusion that the Second Amendment protects rights of individuals to keep arms).

<sup>75</sup> 46 F. Supp. 2d 598 (holding that the federal statute under which defendant was indicted was unconstitutional since the defendant's right under the Second Amendment was violated because the statute did not require any particularized finding of the threat of future violence by defendant toward his spouse or child).

<sup>76</sup> See Ann LoLordo, *A Small-Town Doctor Caught in the Cross Fire*, BALTIMORE SUN, May 30, 2000, at 1A (describing the case where a doctor had gun in violation of a state restraining order and allegedly pointed it at his ex-wife in the presence of his daughter).

<sup>77</sup> See *Emerson*, 270 F.3d at 203.

<sup>78</sup> *Id.* at 261. The Fifth Circuit held that, under Texas law, a restraining order could not have been properly issued unless the issuing court concluded, based on adequate evidence at a hearing, that the party restrained would have otherwise posed a realistic threat of imminent physical injury to the protected party. *Id.* In such a case, the court concluded that the nexus between firearm possession by the husband and the threat of lawless violence was sufficient to support the deprivation, while the order remained in effect, of the husband's Second Amendment rights. *Id.*

<sup>79</sup> *Id.* at 227 (citing various scholarship produced by prolific individual rights professors such as Nelson Lund and Steven Halbrook to support their conclusion that the framers designed the Second Amendment to guarantee an individual's right to arms for self-defense).



Robert M. Parker refused to join the panel opinion on the Second Amendment, stating that “it is dicta and is therefore not binding on us or any other court.”<sup>80</sup>

Apart from the Fifth Circuit’s flouting of precedent, one central truth remains: no federal appellate court has overturned any form of gun regulation on the basis of the Second Amendment.<sup>81</sup> Indeed, despite the gun lobby’s campaigns decrying the erosion of the Second Amendment, the NRA abandoned attempts to use the Second Amendment as a legal basis for challenging gun safety laws.<sup>82</sup> They deserted this argument, realizing that the federal courts have long been in agreement that the Second Amendment does not prohibit reasonable regulation of firearms.<sup>83</sup>

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<sup>80</sup> *Id.* at 273. Judge Parker stated:

whether ‘the district court erred in adopting an individual rights or standard model as the basis for its construction of the Second Amendment’ is not a question that affects the outcome of this case no matter how it is answered. In holding that § 922(g)(8) is not infirm as to Emerson, and at the same time finding an individual right to gun-ownership, the majority today departs from these sound precepts of judicial restraint.

*Id.*

<sup>81</sup> *See supra* note 74 (citing cases finding that gun regulations did not violate the Second Amendment).

<sup>82</sup> *Compare* *Oefinger v. Baker*, 1986 U.S. Dist. LEXIS 18370 (D.C. Cir. 1986). (dismissing as unripe a case filed by the NRA as plaintiff-inventor challenging a ban on machine guns, claiming violation of Second Amendment), *with* *Olympic Arms v. Buckles*, 301 F.3d 384 (6th Cir. 1999), *rev’g*, *N.R.A. v. Magaw*, 909 F. Supp. 490 (E.D. Mich. 1995) (dismissing for lack of standing a suit filed by the NRA claiming violations of due process, equal protection and of the Commerce Clause).

<sup>83</sup> *See* *U.S. v. Lopez*, 514 U.S. 549 (1995) (challenging the Gun Free School Zone Act under the Tenth Amendment, rather than the Second Amendment); *U.S. v. Murphy*, 53 F.3d 93 (5th Cir. 1995) (claiming the Gun Free School Zone Act was outside Congressional power under the Commerce Clause). *See also* *Fraternal Order of Police v. U.S.*, 173 F.3d 898 (D.C. Cir. 1999) (arguing that amendments to the Gun Control Act of 1968 violate the substantive due process guarantee of the Fifth Amendment by “unnecessarily and irrationally burdening important individual interests in possession of a firearm in the public interest, in serving the community, and in pursuing an

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II. AN INDUSTRY EXEMPT: HOW THE GUN INDUSTRY HAS  
MANAGED TO EVADE OVERSIGHT

Despite Robert Levy's claims that the gun industry is "friendless,"<sup>84</sup> this industry's ability to influence federal legislation and policy reveals its tremendous power and influence.<sup>85</sup> One of the gun industry's greatest allies is the NRA, an organization whose hostility toward federal intervention is evinced by its vice president's reference to federal officers as "jack-booted thugs."<sup>86</sup> The NRA has successfully influenced federal legislation and worked to protect the gun industry from any significant federal oversight.<sup>87</sup> For example, when Congress

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established career.").

<sup>84</sup> See Levy, *supra* note 18, at 1 (claiming that the city lawsuits against the gun industry are an attempt "to exact tribute from friendless industries.").

<sup>85</sup> See Jake Tapper, *Guns and Money*, SALON.COM (Aug. 11, 1999) (focusing on the financial contributions of the gun industry to the Bush campaign as a method of influencing gun control policy), <http://salon.com/news/feature/1999/08/11/gun/index.html>.

<sup>86</sup> *Threats to Federal Law Enforcement Officers: Hearing Before the Subcommittee on Criminal Justice Oversight*, 106th Cong. (May 16, 2000) (statement of Vermont Senator Patrick Leahy, Member, S. Judiciary Comm.), available at <http://www.senate.gov/~judiciary/oldsite/51620pjl.htm>. In April 1995 NRA vice president Wayne La Pierre sent a fund-raising letter to NRA members calling Federal law enforcement officers "jack-booted thugs" who wear "Nazi bucket helmets and black storm trooper uniforms." Mr. La Pierre was referring to Federal Bureau of Investigation and Bureau of Alcohol, Tobacco and Firearms agents involved in law enforcement actions in Ruby Ridge, Idaho, and at the Branch Davidian compound in Waco, Texas; see also Dan K. Thomasson, *NRA Call to Enforce Gun Laws Lip Service*, DESERT NEWS, July 23, 2000, at AA-04 (describing the NRA's anti-ATF campaign against Congress as efforts to paint ATF agents as "Nazis only interested in violating the constitutional rights of Americans").

<sup>87</sup> See BRADY CENTER TO PREVENT GUN VIOLENCE, *THE ENFORCEMENT FABLE: HOW THE NRA PREVENTED ENFORCEMENT OF THE COUNTRY'S GUN LAWS* (2002) (explaining how the NRA has maintained a strict policy of opposing any effort to strengthen gun safety laws since the passage of the 1968 Gun Control Act, including passage of Gun Owners Protection Act, McClure-Volkmer in 1986 and promotion of gun industry preemption laws today); see also Carl T. Bogus, *Symposium on the Second Amendment: Fresh Looks: The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI-

created the Consumer Product Safety Commission (“CPSC”) in 1972, it exempted firearms.<sup>88</sup> All other consumer products, except tobacco, are regulated for safety.<sup>89</sup> Thanks to the influence of the “friendless” gun industry, however, guns are not. When asked why the bill to include guns under the CPSC had failed in Congress, Senator Howard Metzenbaum said “[t]he NRA’s position is consistent. They’re opposed to any legislation that has the word ‘gun’ anywhere in it.”<sup>90</sup> When asked what would happen if the NRA were to refrain from opposing the bill,

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KENT L. REV. 3 (2000) (discussing the NRA’s “concerted effort to promote more writing supporting the individual right position” by “distributing large sums to friendly scholars”); Carl T. Bogus, *Gun Litigation and Societal Values*, 32 CONN. L. REV. 1353 (2000) (explaining NRA’s opposition to any additional gun control laws because the mechanism to prevent gun crime is better enforcement of existing laws).

<sup>88</sup> See Consumer Product Safety Act, 15 U.S.C. § 2052(a)(E) (2002) (excepting any article from the definition of “consumer product, which would be subject to Consumer Product Safety Commission oversight, if such article is subject to the tax imposed by Internal Revenue Code § 4181, which imposes taxes on firearms, shells and cartridges”). Articles which are defined as ‘consumer products’ are regulated by the Consumer Product Safety Commission which promulgates performance requirements, requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions, and any requirements of such a standard shall be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product. Consumer Product Safety Act, 15 U.S.C. § 2056 (2002).

<sup>89</sup> See Consumer Product Safety Act, 15 U.S.C. § 2052(a) (exempting tobacco, firearms, shells and cartridges from the Safety Commission oversight but the Act states that the other exempted categories—motor vehicles, pesticides, aircraft, boats, food, drugs, and cosmetics—are regulated under other federal acts). See also Jon S. Vernick & Stephen P. Teret, *A Public Health Approach to Regulating Firearms as Consumer Products*, 148 U. PA. L. REV. 1193 (2000) (advocating a consumer product-based regulatory scheme for firearms which would include the following: (1) standards for safe design; (2) closer regulation of firearm models that are particularly dangerous or attractive to criminals; (3) surveillance and recall authority; (4) improved manufacturer and government oversight of firearm dealers and distributors; (5) requirements for responsible advertising practices; and (6) no immunity from litigation for firearm manufacturers).

<sup>90</sup> ROBERT SPITZER, *THE POLITICS OF GUN CONTROL* 81 (Chatham House Publishers 2d ed. 1998).

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Metzenbaum replied, “[w]e would pass the bill overnight.”<sup>91</sup>

This vacuum of gun safety standards has led to predictably tragic consequences. Without regulation, gun manufacturers lack any incentive to design safer firearms.<sup>92</sup> Instead, manufacturers enjoy tremendous profits while producing products with a callous disregard for safety. Moreover, the illogical result of this specific exemption from regulatory oversight is that the CPSC has statutory oversight of trigger locks, holsters, and other products sold as accessories for firearms, but no oversight of the guns themselves.<sup>93</sup>

In addition to supporting exemption of the gun industry from safety standards, the NRA has lobbied across the country for laws immunizing gun manufacturers from lawsuits brought by cities, and in some cases, consumers as well.<sup>94</sup> In February 1999,

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<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., 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 41 (2000) (discussing the lack of incentives for gun manufacturers to design or distribute with safety in mind). See also Amy Edwards, *Mail-Order Gun Kits and Fingerprint-Resistant Pistols: Why Washington Courts Should Impose a Duty on Gun Manufacturers to Market Firearms Responsibly*, 75 WASH. L. REV. 941, 948 (2000) (arguing that not holding gun manufacturers strictly liable for injuries caused by criminal use allows them to continue to market products that are used for criminal purposes); Lytton, *supra* note 14, at 1 (arguing that tort liability can complement legislative regulations, providing gun sellers and manufacturers with incentives to take responsible measures to protect the public at large).

<sup>93</sup> See Memorandum from Stephen Lemberg, Asst. General Counsel, U.S. Consumer Product Safety Commission, to Michael S. Solender, General Counsel, U.S. Consumer Product Safety Commission, Commission Jurisdiction Over Separate Firearm Trigger Locks (Jul. 12, 2000) (on file with author); see also Press Release, U.S. Consumer Product Safety Commission, CPSC, National Shooting Sports Foundation Announce Recall to Replace Project Homesafe Gun Locks (Feb. 7, 2001) (on file with author) (recalling 400,000 defective trigger locks distributed by gun industry trade association, the National Shooting Sports Foundation).

<sup>94</sup> See, e.g., National Rifle Association, 6 Fax Alert 18 (1999) (asking NRA members to call state legislatures in support of gun lawsuit preemption laws), available at <http://www.nramemberscouncils.com/contracosta/FaxAlerts/fa990514.shtml>; James Brooke, *Terror in Littleton: The Gun Debate*, N.Y.

the Georgia State Legislature became the first to enact legislation prohibiting municipalities from bringing tort suits against any “firearms or ammunition manufacturer, trade association, or dealer,” subject to limited exceptions.<sup>95</sup> Since then, over twenty other states have followed suit, passing legislation providing the gun industry with a blanket exemption from cities’ basic common law tort claims.<sup>96</sup> The state of Colorado passed a law prohibiting

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TIMES, April 23, 1999, at A1 (discussing stricter proposed gun legislation before the Colorado legislature in the wake of the Littleton high school shootings); Sam Howe Verhovek, *Firearms Limits Gaining Support in Legislatures*, N.Y. TIMES, May 31, 1999, at A1 (discussing attempts to limit liability of gun makers).

<sup>95</sup> GA. CODE ANN. § 16-11-184 (2002) (reserving the right to sue manufacturers to the state alone); *see also* Sturm, Roger & Co. v. City of Atlanta, 560 S.E.2d 525, 529 (Ga. Ct. App. 2002) (noting that the state legislature, through the Georgia statute, intended for firearms regulation to take place on the state level). The state’s intent to preempt this area “can be inferred from the comprehensive nature of the statutes regulating firearms in Georgia,” among which is GA. CODE ANN. § 16-11-184.

<sup>96</sup> ALA. CODE § 11-80-11 (2001) (reserving authority to bring and settle lawsuits involving firearms to the Attorney General, by and with the consent of the Governor); ALASKA STAT. § 09.65.155 (2001) (conferring immunity with the exception of negligent design claims); ARIZ. REV. STAT. § 12-714 (2001) (prohibiting any political subdivision from commencing a civil liability action against a firearm manufacturer in state court); ARK. CODE ANN. § 14-16-504 (2001) (prohibiting any local unit of government from commencing an action against a firearms manufacturer or dealer and reserving that right to recover to the State of Arkansas); COLO. REV. STAT. § 13-21-504.5 (2001) (stating “a person or other private or public entity may not bring an action other than a product liability action”); FLA. STAT. ch. 790.331 (2002) (declaring “the manufacture, distribution, or sale of firearms and ammunition . . . lawful activity and [ ] not unreasonably dangerous, and . . . that the unlawful use of firearms and ammunition, rather than their lawful manufacture, distribution, or sale, is the proximate cause of injuries arising from their unlawful use”); IDAHO CODE § 5-247 (2002) (requiring state legislature to approve suits brought by a governmental unit on behalf of any other governmental unit); IND. CODE ANN. § 34-12-3-3 (Michie 2002) (prohibiting nuisance suits by persons against firearms or ammunition makers, trade associations or sellers); KY. REV. STAT. ANN. § 65.045 (Michie 2001) (reserving to the Commonwealth the right to bring suit and recover against a firearms dealer on behalf of the state); LA. REV. STAT. ANN. § 40:1799 (West 2002) (reserving to the state the right to recover against a firearms dealer); MICH. COMP. LAWS § 28.435(9) (2002) (reserving to the state the right to bring suit against a producer of firearms or ammunition); MONT.

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suits by individuals against those responsible for negligently sold guns.<sup>97</sup> For example, the law prevents victims of the Columbine school shooting from suing gun distributors, where prohibited purchasers used negligently sold guns to massacre their teachers and classmates.<sup>98</sup> As commentators have noted, “[t]his legislative strategy mirrors the NRA’s largely successful efforts in the 1980s

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CODE ANN. § 7-1-115 (2001) (reserving exclusively to the state the right to bring suit against firearms manufacturers and specifically prohibiting actions in that area by a local governmental unit); NEV. REV. STAT. ANN. § 12.107 (Michie 2001) (reserving to the state the right to bring suit against firearms distributors or manufacturers); N.D. CENT. CODE § 32-03-54 (2002) (limiting the liability of firearm manufacturers, sellers, and distributors in wrongful death actions because of the use of firearms by another); OHIO REV. CODE ANN. § 2305.401 (Anderson 2002) (creating immunity for members of the firearms industry “for harm allegedly sustained by any person as a result of the operation or discharge of a firearm”); OKLA. STAT. tit. 21, § 1289.24a (2002) (reserving the authority to bring suit against a firearms manufacturer or dealer on behalf of a governmental unit to the state); 18 PA. CONST. STAT. § 6120 (2002) (prohibiting any municipality or county from bringing suit against a firearms manufacturer for the marketing or sale of the firearm or ammunition); TENN. CODE ANN. § 39-17-1314 (2001) (reserving the authority to bring suit on behalf of the state exclusively to the state); TEX. CIV. PRAC. & REM. CODE § 128.001 (Vernon 2002) (requiring legislative approval for suits brought against firearm manufacturers or dealers); UTAH CODE ANN. § 78-27-64 (2002) (prohibiting all suits against gun manufacturers other than for breach of warranty or contract); VA. CODE ANN. § 15.2-915.1 (Michie 2002) (reserving to the Commonwealth the right to bring suit against members of the firearms industry); *see also* MO. REV. STAT. § 67.138 (2001) (creating liability for all costs associated with a frivolous lawsuit brought by a political subdivision against a firearm or ammunition manufacturer); N.H. REV. STAT. ANN. § 159-C:10(v), *repealed* 1994 (granting civil and criminal immunity to any licensed firearm importer, manufacturer, or dealer who relies upon a background check in making a sale of a firearm).

<sup>97</sup> *See* COLO. REV. STAT. § 13-21-504.5 (2002) (establishing that a gun seller cannot be held liable for a third party’s injury, damage, or death, even if the injury is found to be foreseeable, unless the damages were proximately caused by a gun seller in violation of a state or federal statute or regulation).

<sup>98</sup> *See id.* *See also* Charles Brennan, *Columbine Lifts New Gun Rules to Victory in Colorado*, DALLAS MORNING NEWS, Nov. 9, 2000, at 6A (discussing the Columbine shooting, in particular, the way in which shooters obtained guns sold at a gun show by a straw purchaser who was not subject to a background check).

and 90s to convince state legislatures to enact preemption laws that forbid localities from enacting their own gun control laws. Today more than forty states have some form of firearm preemption law.”<sup>99</sup> This unprecedented blanket exemption for a particular industry underscores the strength of the gun industry and its ability to encroach upon even the most basic consumer rights. This exemption also demonstrates the need for some behavior-enforcing mechanism to encourage the gun industry to act responsibly.<sup>100</sup>

Recently, House Representative Bob Barr, who since lost his bid for reelection<sup>101</sup> but remains an NRA board member,<sup>102</sup> sponsored legislation that would further exempt the gun industry

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<sup>99</sup> John S. Vernick & Stephen P. Teret, *New Courtroom Strategies Regarding Firearms: Tort Litigation Against Firearm Manufacturers and Constitutional Challenges to Gun Laws*, 36 HOUS. L. REV. 1713, 1753 (1999). Preemption laws forbid most cities from enacting their own gun control laws as an alternative to lawsuits. The courts have still not answered the question of whether state legislatures have the authority to forbid localities from bringing lawsuits against firearm manufacturers. *Id.*

<sup>100</sup> See Brent W. Landau, *State Bans on City Gun Lawsuits*, 37 HARV. J. ON LEGIS. 623, 638 (2000). “State laws that prevent cities from suing the gun industry are . . . undesirable because they deny local governments the ability to have their day in court on the issue of who should bear the financial burden of gun violence.” *Id.* See also Kairys, *supra* note 15, at 6. Kairys stated:

[t]he damages incurred by cities that directly result from the manufacturers’ conduct are wide-ranging and . . . can include medical costs and the range of expenses incurred by police, emergency personnel, public health, human services, courts, prisons, sheriff, fire, and other services. A city’s potential damages can begin with a 911 call, cleaning blood from the street, and emergency medical care, and continue through support of an orphaned child.

*Id.*

<sup>101</sup> Dahleen Glanton, *Georgia’s Barr Loses Seat; McKinney Falls in Democratic Race*, CHI. TRIB., Aug. 21, 2002, at 9 (discussing Bob Barr’s loss in the Republican primary to another conservative regarded as more low-key than the nationally renowned Barr).

<sup>102</sup> Bob Barr, a former Assistant Majority Whip in the House, is a “life member” of the National Rifle Association and serves on its board of directors. See Bob Barr Leadership Fund, *About Bob Barr*, <http://www.bobbarr.org> (last visited Nov. 15, 2002).

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from liability.<sup>103</sup> The bill, first proposed in the 106th Congress, is called the “Firearms Heritage Protection Act.”<sup>104</sup> The bill’s express purpose is to “prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.”<sup>105</sup> The broadly worded House bill would effectively bar gun owners and any others from pursuing cases against the gun industry, even if the industry’s negligence is a clear cause of the harm suffered. Senators Zell Miller and Larry Craig, also an NRA Board Member, sponsored similar legislation in the Senate.<sup>106</sup>

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<sup>103</sup> Firearms Heritage Protection Act of 1999, H.R. 1032, 106th Cong. (1999). The purpose of the bill is “[t]o prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.” See Vito Magglio, *Rep. Barr Aims to Ban Lawsuits Against Gun Manufacturers*, CNN (March 9, 1999), available at <http://www.cnn.com/ALLPOLITICS/stories/1999/03/09/guns.barr>. Barr charged that lawsuits brought by major cities against gun manufacturers to collect the costs for crimes committed with guns are in violation of a citizen’s Second Amendment right to bear arms and are an unfair burden on a legitimate industry. *Id.* Barr states that “[i]f these lawsuits are allowed to proceed, then it really will be ‘Katie bar the door,’ because there will be no industry in America that will be safe from these abusive and predatory laws.” *Id.* See also, Protection of Lawful Commerce in Arms Act of 2001, H.R. 2037, 107th Cong. (2001) (proposing similar legislation sponsored by Rep. Cliff Stearns “[t]o amend the Act establishing the Department of Commerce to protect manufacturers and sellers in the firearms and ammunition industry from restrictions on interstate or foreign commerce.”).

<sup>104</sup> H.R. 1032, 106th Cong. (1999).

<sup>105</sup> *Id.*

<sup>106</sup> See Protection of Lawful Commerce in Arms Act of 2002, S. 2268, 107th Cong. (2002) (“To amend the Act establishing the Department of Commerce to protect manufacturers and sellers in the firearms and ammunition industry from restrictions on interstate or foreign commerce.”). See also *Clinton Takes Gun Control Message to School Children*, CNN (Apr. 17, 2000) (stating that Larry Craig is a board member of the National Rifle Association who advocates that education, not legislation is the key to stopping gun violence), at <http://www.cnn.com/2000/ALLPOLITICS/stories/04/17/clinton.guns>; John DeVries, *Weapons in the Cockpit*, THE POLITICAL LANDSCAPE, June 23, 2002 (characterizing Democrat Zell Miller of Georgia as a member of the NRA Board of Directors who often aligns himself with Senate Republicans), at



Both the House and Senate bills would prevent cases similar to *Kitchen v. K-Mart*, where the plaintiff sued the retail chain under a theory of negligent entrustment for selling a gun to a patently drunk man who then immediately used the gun to shoot plaintiff, rendering her paraplegic.<sup>107</sup> The Florida Supreme Court found that gun sellers could be held liable under negligence theories for sales that are entirely legal.<sup>108</sup> The court noted that it “cannot close [its] eyes to this obvious danger or fail to impose some responsibility on those who control access to dangerous firearms.”<sup>109</sup> The broad protections Bob Barr and other opponents

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<http://balderdashe.com/usapol/archives/vol2/V2-24.html>.

<sup>107</sup> 697 So. 2d 1200, 1204 (Fla. 1997). Kitchen was shot by her ex-boyfriend, Thomas Knapp, who testified that he had consumed a fifth of whiskey and a case of beer that morning and until he left a local bar around 8:30 p.m. *Id.* Knapp drove from the bar to a local K-Mart store where he purchased a rifle and a box of bullets. *Id.* He returned to the bar and, after observing Kitchen leave in an automobile with friends, followed in his truck. *Id.* He subsequently rammed their car, forcing it off the road, and shot Kitchen at the base of her neck. *See also* Angel v. F. Avanzini Lumber Co., 363 So. 2d 571 (Fla. 2d Dist. Ct. App. 1978) (holding that a dealer in firearms could have foreseen the probability of someone being injured after selling a firearm to an erratic purchaser); Howard Bros. of Phoenix City, Inc. v. Penley, 492 So. 2d 965 (Miss. 1986) (finding a gun retailer liable for negligently entrusting a pistol to a purchaser who was mentally deranged and under the influence of drugs and alcohol and who subsequently held another customer hostage).

<sup>108</sup> *Kitchen*, 697 So. 2d at 1204. Under common law “zone of risk” analysis, respondent’s selling the gun to an intoxicated purchaser created a foreseeable risk that a third party might be injured with the gun. *Id.* Pursuant to the common-law doctrine of negligent entrustment, as the risk grew, so did respondent’s duty. *Id.* The court noted that a number of Florida appellate courts had already recognized liability in similar factual scenarios. *Id.*

<sup>109</sup> *Id.* at 1207. *See also* Bernethy v. Walt Failor’s Inc., 653 P.2d 280 (Wash. 1982) (gun dealer liable for legal sale to man who had been on a two day drinking binge and then killed his wife); K-Mart Enters. of Fla. v. Keller, 439 So. 2d 283 (Fla. Dist. Ct. App. 1983) *reh’g denied*, 450 So. 2d 487 (Fla. 1984) (upholding judgment against gun dealer for negligent sale of gun to brother of man who later shot police officer); Decker v. Gibson Products Company of Albany, Inc., 679 F.2d 212 (11th Cir. 1982) (reversing a district court’s grant of summary judgment where the sale of a firearm to a former felon who used the gun to kill his ex-wife was a breach of the retailer’s duty); Cullum & Boren-McCain Mall, Inc. v. Peacock, 592 S.W.2d 442 (Ark. 1980) (finding sufficient

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to such common sense liability seek represents unparalleled preferential treatment for an industry that “controls access to dangerous firearms.”<sup>110</sup> Interestingly, even staunch gun safety regulation opponent Robert Levy opposes such legislation, arguing that such state common law causes of action are “none of the (federal government’s) business.”<sup>111</sup>

The gun industry and the NRA have also found a strong champion in current Attorney General John Ashcroft.<sup>112</sup> Ashcroft has long been a friend of the NRA, supporting NRA-supported initiatives to weaken gun ownership laws in his home state of Missouri and receiving the NRA’s highest grades when he served as a United States Senator.<sup>113</sup> Ashcroft’s stance is in strong contrast to the Department of Justice’s (“DOJ’s”) position under the Clinton Administration, and directly contradicts the United States’ longstanding position on the Second Amendment.<sup>114</sup>

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evidence of breach of common law duty where gun dealer violated no federal statute by selling a gun to a man who acted strangely and asked for a gun “that would make a big hole,” loaded the gun in his car and later shot a man for no reason); *Angell v. F. Avanzini Lumber Co.*, 363 So. 2d 571 (Fla. Dist. Ct. App. 1978) (reversing dismissal where gun dealer sold rifle to woman who was acting strangely and then killed a man); *Pavrides v. Niles Gun Show, Inc.*, 637 N.E.2d 404 (Ohio Ct. App. 1994) (finding negligent gun show owner liable for the subsequent criminal shooting of four teenagers who, due to lax security at gun show, stole several handguns from a gun show and shot bystander while driving stolen car; also held that reasonable minds could find that Pavrides’s shooting was a foreseeable consequence of the gun show’s negligent security).

<sup>110</sup> See *Kitchen*, 697 So. 2d at 1207.

<sup>111</sup> See Robert A. Levy, *None of Their Business*, NAT’L REV., May 22, 2002 (arguing that legislation which shields gun makers and sellers from liability lawsuits is an abuse of Congress’s commerce power, and that such legislation is more appropriately left to the individual states), available at <http://www.nationalreview.com/comment/comment-levy052202.asp>.

<sup>112</sup> See, e.g., National Rifle Association, 6 Fax Alert 18 (1999) (asking NRA members to call and voice support for nomination of Ashcroft to serve as United States Attorney General), available at <http://www.nramemberscouncils.com/contracosta/FaxAlerts/fa990514.shtml>.

<sup>113</sup> See Press Release, Handgun Control, NRA Favorite Son John Ashcroft Defeated in Reelection Campaign for U.S. Senate in Missouri (Nov. 8, 2000), available at <http://www.gunlawsuits.org/features/press/release.asp?Record=36>.

<sup>114</sup> See U.S. DEPARTMENT OF JUSTICE, GUN VIOLENCE REDUCTION:

Despite promises to the Senate Judiciary Committee that he would uphold gun control laws, Ashcroft has continually sought to use his position to weaken federal firearm regulation.<sup>115</sup> In

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NATIONAL INTEGRATED FIREARMS VIOLENCE REDUCTION STRATEGY (1999) [hereinafter GUN VIOLENCE REDUCTION], available at <http://www.usdoj.gov/archive/opd/ExecSum.htm>. The DOJ's report states:

The firearms industry must do much more to help solve our country's firearms violence problem. Each gun manufacturer and distributor must do a better job of policing its own distribution chain to reduce the illegal supply of guns and keep them from falling into the hands of criminals, unauthorized juveniles, and other prohibited persons. And the industry must do much more to ensure that firearms are transferred only to persons who have the knowledge and experience to handle them safely. The firearms industry also must do everything it can to design its products to be as safe as reasonably possible. We are actively encouraging manufacturers to voluntarily improve their distribution controls, incorporate existing safety devices on their firearms, and devote significant resources to developing new safety devices and technologies to prevent accidental shootings.

*Id.*

*See also* the following cases in which United States supported application of the *Miller* decision. *U.S. v. Lewis*, 236 F.3d 948 (8th Cir. 2001) (refusing to apply *Emerson* decision's finding that Second Amendment protects individual right to bear arms); *U.S. v. Baer*, 235 F.2d 561 (10th Cir. 2000) (refusing to apply *Emerson* decision's finding that Second Amendment protects rights of individuals to keep arms); *U.S. v. Napier*, 233 F.3d 394 (6th Cir. 2000) (upholding finding that Second Amendment does not protect an individual's right to keep and bear arms).

<sup>115</sup> *See, e.g., An Ominous Reversal on Gun Rights*, N.Y. TIMES, May 14, 2002 at A18. The editorial discusses the Bush administration's radical shift in policy towards the rights of Americans to own guns. By using a standard that equates gun ownership with free speech rights, Mr. Ashcroft and the Bush administration has made it extremely difficult for the government to regulate firearms in the manner it has for the last six decades. *See also* 147 CONG. REC. § 839 (2001) Senator Leahy stated:

[c]ontrary to the majority of the American public, Senator Ashcroft vigorously opposes stricter gun control laws. He addressed this issue during the hearing, where he seemed to change his long held beliefs and emphasized his commitment to enforce the gun laws and defend their constitutionality. He testified that "there are constitutional inhibitions on the rights of citizens to bear certain kinds of arms." Saying he supported some controls, Senator Ashcroft referred to his

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2001, Ashcroft proposed a policy of destroying Brady Act gun purchase records after merely 24 hours.<sup>116</sup> This was despite a federal appeals court ruling that upheld maintaining those records for six months to audit the background check system.<sup>117</sup> This same court supported the Federal Bureau of Investigation's recommendation that the record retention period be *increased* to one year.<sup>118</sup> Furthermore, a recently released Government Accounting Office ("GAO") report released in July of 2002 indicated that the Ashcroft changes would "adversely affect some aspects of current [gun check] operations, which would have public safety implications."<sup>119</sup>

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attempt to amend the juvenile justice bill to make semiautomatic assault weapons illegal for children. However, he neglected to mention that his proposed amendment was actually a weaker version of one proposed by Senator Feinstein. At the hearing, Senator Ashcroft also testified that the assault weapons ban, the Brady law, licensing and registration of guns, and mandatory child safety locks are all constitutional. Although Senator Ashcroft's testimony was intended to ease our concerns about his willingness to enforce gun control laws, it is difficult to reconcile what he said last week with his rhetoric and his record.

*Id.*

<sup>116</sup> Paul M. Krawzak, *Report Shows Problems With Gun Check Plan*, COPLEYS NEWS SERVICE, July 25, 2002 (describing Government Accounting Office Report with Ashcroft's refusal to release gun check records despite FBI's request to use them in its efforts against terrorism).

<sup>117</sup> See *NRA v. Reno*, 216 F.3d 122 (D.C. Cir. 2000) (holding that nothing in either 18 U.S.C.S. § 922(t)(2) or Brady Handgun Violence Prevention Act unambiguously prohibited temporary retention of the hand gun check records for allowed transactions). The court found that the appellee's interpretation that the audit log regulation represented a permissible construction of the requirement to establish a system for preventing disqualified persons from purchasing firearms was reasonable. *Id.*

<sup>118</sup> *Id.* at 124.

<sup>119</sup> *Potential Effects of Next-Day Destruction of NICS Background Check Records*, Government Accounting Office Report, GAO-02-653 (July 2002) (explaining how the FBI's National Instant Criminal Background Check System ("NICS") would be affected if records of sales of firearms by licensed dealers were destroyed within 24 hours of the transaction). The GAO study found that while routine system audits may not be adversely affected by the proposed requirement of next-day destruction of records, other uses of NICS records

In the midst of the United States continued war against terrorism, and despite the FBI's specific request for review of Brady Act gun purchase records, Ashcroft unilaterally decided that these documents cannot be used to determine whether persons detained as suspected terrorists had recently purchased a gun.<sup>120</sup> Ashcroft claimed that federal law did not permit the use of Brady Background check records as investigative tools.<sup>121</sup> Reports show, however, that his contention directly contradicted an opinion released by the DOJ's Office of Legal Counsel stating that the office saw "nothing in the National Instant Check System regulations that prohibits the FBI from deriving additional benefits from checking audit log records as long as one of the genuine purposes" is auditing the use of the system.<sup>122</sup>

In addition to weakening gun background checks, Ashcroft has also reversed longstanding DOJ policy on the Second Amendment, which was in keeping with the United States Supreme Court's finding that the Second Amendment does not protect an individual's right to keep and bear arms.<sup>123</sup> In footnotes to the United States' briefs in two gun possession cases appealed to the United States Supreme Court, including *Emerson v. U.S.*, the DOJ notes that "the Second Amendment 'more broadly' protects the rights of individuals to bear arms, and does not relate only to the operation of militias."<sup>124</sup>

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would be affected with consequences for safety and NICS operations. *Id.*

<sup>120</sup> John Meyer, *Response to Terror Security Ashcroft Defends U.S. Anti-Terrorism Tactics, Saying That 'We Are at War' Law: Attorney General tells lawmakers he won't support FBI background checks on gun buyers to aid attack inquiry*, L.A. TIMES, Dec. 7, 2001, at A4 (reporting that Ashcroft did not support a change in the law that would allow the FBI to find out whether an illegal immigrant or suspected terrorist had purchased a gun).

<sup>121</sup> *Id.*

<sup>122</sup> GENERAL ACCOUNTING OFFICE, POTENTIAL EFFECTS OF NEXT-DAY DESTRUCTION 6 (July 2002), available at <http://www.gao.gov/new.items/d02653.pdf>. See also Fox Butterfield, *Traces of Terror: the Gun Laws*, N.Y. TIMES, July 24, 2002, at A14 (discussing DOJ memo on policy of using background checks to assist law enforcement);

<sup>123</sup> See *supra* note 60 (discussing U.S. Supreme Court decision in *U.S. v. Miller*, finding Second Amendment protects the states' right to arm the militia).

<sup>124</sup> See Brief for Government, *Emerson v. U.S.*, 270 F.3d 203 (5th Cir.

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This change in the DOJ's position has had predictable results. It has motivated challenges to even the most entrenched area of gun regulation: the criminalization of certain uses and types of possession. Criminal defendants now seek dismissal of gun charges, arguing that under the DOJ's interpretation, the Second Amendment protects an individual's right to possess a firearm.<sup>125</sup> Indeed, Taliban member John Walker Lindh relied upon the Ashcroft DOJ's interpretation of the Second Amendment as part of his defense.<sup>126</sup> The change in policy has placed United States Attorneys in the unfortunate position of trying to advocate a position unsupported by precedent, while simultaneously attempting to enforce federal firearm legislation. For example, criminal defendants in the District of Columbia attempted to rely upon the DOJ's interpretation of the Second Amendment as a defense to convictions under criminal possession laws.<sup>127</sup> There,

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2001) (No. 01-8780). Brief for Government, *Haney v. U.S.*, 264 F.3d 1151 (10th Cir. 2001) (No.01-8272). In a strange twist of circumstances, in the opposition for a petition for rehearing of *Emerson*, Ashcroft's DOJ refused to challenge an appellate argument that the Second Amendment provides an individual with the right to weapons. *Id.*

<sup>125</sup> See Arthur Santana & Neely Tucker, *Cases Take Aim at District's Gun Law; Attorney Uses Bush Administration's Second Amendment Stand in Attack on Ban*, WASH. POST, June 3, 2002, at A20 (reporting that defense attorneys had filed about 30 motions in D.C. Superior Court asking judges to dismiss gun-carrying charges against their clients based on the Department of Justice and the Bush administration's assertion that the Second Amendment gives them the right to bear arms).

<sup>126</sup> See Government Opposition to Motion to Dismiss Count Ten of Indictment, *U.S. v. Lindh*, 2002 U.S. Dist. LEXIS 20863, n.12 (E.D. Va. 2002) (Crim. No. 02-37A) (responding to Lindh's Second Amendment defense, the government asserted that the case cited by defendant, *Wilborg v. U.S.*, 163 U.S. 632 (1896), is wholly inapposite and confined to the criminal status extent, and "whatever the defendant's Second Amendment rights may be, they do not extend to carrying weapons in support of a terrorist organization bent on the violent destruction of the United States."). See Stuart M. Powell, *Lindh's Right to Bear Arms Stops Short of Aiding Terror*, SAN DIEGO UNION-TRIBUNE, June 6, 2002, at A11 (arguing that charging Lindh with a firearms violation would be an abridgement of his Second Amendment rights as an individual, Lindh pointed to a DOJ assertion of the same argument in a case then pending before the Supreme Court).

<sup>127</sup> See Press Release, Roscoe C. Howard, Jr., U.S. Attorney for the District

United States Attorneys relied upon case law upholding the District's laws prohibiting possession of unregistered handguns, but were forced to note that the opinion "contains reasoning that is inconsistent with the position of the United States as to the scope of the Second Amendment."<sup>128</sup> Ashcroft's weakening of the nation's gun laws, and reversal of the DOJ's long-standing position on the Second Amendment underscores the lengths to which friends of the gun industry will go to protect it from liability.

### III. ANALYSIS OF THE GUN INDUSTRY

Although guns in this country are exempt from most consumer product safety standards, they are subject to a body of laws regarding their sale.<sup>129</sup> These laws are intended to keep "lethal weapons out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too high a price to pay in danger for us all."<sup>130</sup> Unfortunately, this policy is regularly undermined by a

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of Columbia, U.S. Department of Justice, *District Man Convicted of First-Degree Murder While Armed for Shooting Friend in Struggle Over a Gun in S.W. Parking Lot* (June 10, 2002) (discussing a motion to dismiss the charge of carrying a pistol without a license, claiming that the District of Columbia's statute violated the Second Amendment to the United States Constitution), available at <http://www.usdoj.gov/usao/dc/press/02176.html>.

<sup>128</sup> Evan P. Schultz, *Bullets for Ballots in D.C.*, LEGAL TIMES, Aug. 5, 2002, at 58, citing Dennis Henigan, *Ashcroft's Bad Aim*, LEGAL TIMES, July 29, 2002, at 34 (discussing the difficult position that federal prosecutors have been put in by Ashcroft's conflicted position with long standing and established law on the scope of the Second Amendment).

<sup>129</sup> See *supra* Part II for discussion of exemption. See 18 U.S.C. § 922 (2002) (prohibiting purchase of firearms by certain classes of people and providing regulations regarding sale of firearms by licensed firearm dealers). See also *Huddleston v. U.S.*, 415 U.S. 814, 825 (1974) (quoting Sen. Tydings in 114 CONG. REC. 13219 (1968) and recognizing that federal gun laws are intended to keep "these lethal weapons out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too high a price in danger for all of us to allow.").

<sup>130</sup> *Huddleston*, 415 U.S. at 825 (quoting 114 CONG. REC. 13219 (1968) for a statement by Sen. Tydings asserting that Sec. 922 was "enacted as a means of

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vast, thriving underground market which regularly provides guns to those who are prohibited from buying them in retail markets. The underground market is largely supplied by guns diverted from licensed dealers.<sup>131</sup> That is, guns purchased from licensed retailers with the intent to promptly resell or transfer them to prohibited purchasers.<sup>132</sup>

Gun makers are fully aware that the retailers and distributors they supply often act as willing conduits that enable the continuing, thriving underground market in guns.<sup>133</sup> Many of these trafficked guns, however, have design defects which, if remedied, would drastically reduce the likelihood that guns would be trafficked in the underground market.<sup>134</sup>

Given that the primary sources for illegally trafficked guns have been well-known for decades, gun manufacturers are on notice that their design and distribution choices have a definite effect on the proliferation of the underground market.<sup>135</sup> Furthermore, gun manufacturers are repeatedly notified that their

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providing adequate and truthful information about firearms transactions”). *See also* Firearms Act, 18 U.S.C. § 922 (2002) (establishing that it is “unlawful for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms [or ammunition] or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce”).

<sup>131</sup> *See* BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, YOUTH CRIME GUN INTERDICTION INITIATIVE, PERFORMANCE REPORT 6 (1999) [hereinafter PERFORMANCE REPORT] (reporting that half of the Bureau’s investigations involved guns trafficked by straw purchasers, 14 percent from other unregulated sellers, 10 percent from gun shows and other similar ventures and 6 percent from Federal Firearm License (“FFL”) holders), *available at* <http://www.atf.treas.gov/firearms/ycgii/preport.pdf>.

<sup>132</sup> *Id.* at 6.

<sup>133</sup> *See* Affidavit of Robert I. Hass, *Hamilton v. Accu-Tek*, 95-CV-0049 (E.D.N.Y. 1996) at 20-21 (describing familiarity with the distribution and marketing practices of the principal U.S. firearms manufacturers and stating that none of them investigate, screen or supervise the wholesale distributors and retail outlets that sell their products to insure responsible distribution) [hereinafter Hass Affidavit].

<sup>134</sup> *See infra* Part III.B (discussing design changes that can reduce usefulness of trafficked or illegally acquired guns).

<sup>135</sup> *See infra* Part III.C (discussing tracing system).



guns are sold via the underground crime gun market.<sup>136</sup> Yet they refuse to do anything to stem the tide of their products into the underground market. The combination of the gun industry's negligence in manufacturing and designing weapons, coupled with willful blindness towards the distribution of guns into the underground market perpetuates the dangers of illegally held guns.

*A. Proliferation of the Underground Gun Market: How the Use of "Multiple Sales" and "Straw Purchasers" Fuel a Dangerous Marketplace*

Guns that flow into the underground market are often bought from retail firearms dealers in suspect transactions, such as multiple sales and straw purchasers.<sup>137</sup> According to the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), "virtually all new firearms used in crime first pass through the legitimate distribution system of federally licensed firearm dealers ("FFLs")."<sup>138</sup>

Studies indicate that "multiple sales" and sales of more than one gun in a transaction, are the most common sources of crime guns.<sup>139</sup> The term "multiple sales" refers to any transaction

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<sup>136</sup> See *id.*

<sup>137</sup> See Julius Wachtel, *Sources of Crime Guns in Los Angeles, California*, 21 POLICING: AN INT'L J. OF POLICE STRATEGIES & MGMT. 220, 221 (1998) (outlining firearms markets). See, e.g., Mark Polston, *Should Manufacturers, Distributors, and Dealers Be Held Accountable for the Harm Caused by Guns?: Civil Liability for High Risk Gun Sales: An Approach to Combat Gun Trafficking*, 19 SETON HALL LEGIS. J. 821 (1995) (discussing "straw purchases" as a ready source of criminal guns).

<sup>138</sup> U.S. DEP'T OF THE TREASURY, A PROGRESS REPORT: GUN DEALER LICENSING & ILLEGAL GUN TRAFFICKING (Jan. 1997) (discussing steps taken to reduce illegal availability of firearms to criminals and juveniles, such as more effective screening of firearms purchasers, strengthening the gun dealer licensing system and compliance with applicable laws and regulations), available at <http://web.archive.org/web/19980129032256/http://www.ustreas.gov/enforcement/cover.html>.

<sup>139</sup> See Wachtel, *supra* note 137, at 221. When a licensed gun dealer sells two or more handguns to an unlicensed person within a five-day period, dealers

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involving more than one handgun to a single purchaser or several sales of guns to an individual purchaser over a five-day period.<sup>140</sup> In recognition of the significant role multiple sales play in supplying the underground market, federal law requires that any “multiple sale” be accompanied by a “multiple sales form” which is sent to the ATF to notify the law enforcement agency of the transaction.<sup>141</sup> The very fact that an FFL engages in multiple sales is an indicator that the dealer is likely selling to gun traffickers.<sup>142</sup>

Curbing such sales can have a significant effect on gun trafficking to criminals. For example, the Commonwealth of Virginia was traditionally a primary source state for crime guns.<sup>143</sup> In 1993, however, Virginia banned multiple handgun sales,<sup>144</sup> and in doing so, successfully eliminated a major source

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are required to fill out and forward to the ATF a form listing the guns sold. *See* 27 C.F.R. §178.126a. There is no federal limit on the number of firearms that can be purchased in a single sale, and the only states that have such limits are Maryland, Virginia, South Carolina, and California. *See* Douglas S. Weil & Rebecca Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 JAMA 1759 (June 12, 1996).

<sup>140</sup> *See* U.S. DEP’T OF THE TREASURY, COMMERCE IN FIREARMS IN THE UNITED STATES 25 (Feb. 2000) [hereinafter COMMERCE IN FIREARMS IN THE UNITED STATES] (reporting The Bureau of Alcohol, Tobacco and Firearms’ (ATF) activities relating to the regulation of firearms during the calendar year 1999), available at [http://www.atf.treas.gov/pub/fire-explo\\_pub/020400report.pdf](http://www.atf.treas.gov/pub/fire-explo_pub/020400report.pdf).

<sup>141</sup> *See* 18 U.S.C. § 923(g)(3)(A) (2003).

<sup>142</sup> *See* COMMERCE IN FIREARMS IN THE UNITED STATES, *supra* note 140, at 22 (explaining that multiple sales or purchases are a significant trafficking indicator because crime guns recovered with obliterated serial numbers are frequently purchased in multiple sales).

<sup>143</sup> *See* Weil & Knox, *supra* note 139, at 1759 (describing Virginia as a “principal supplier of guns to the illegal market in the northeastern United States); *see also* Laura Parker, ‘It was Easy,’ *Confessions of a Gun Trafficker*, U.S.A TODAY, Oct. 28, 1999, at A1 (discussing with a gun trafficker who was arrested after a gun he sold was used in a crime and traced back to him the ease of making multiple purchases and obtaining guns legally and redistributing them illegally without any one questioning the frequency and amounts of the purchases).

<sup>144</sup> *See* Weil & Knox, *supra* note 139, at 1759 (discussing a Virginia law limiting handgun purchases by an individual to one gun in a 30-day period).

of crime guns, as evidenced by the subsequent marked nationwide decrease in crime guns traced to Virginia.<sup>145</sup> Accordingly, legislative prohibitions of multiple sales can prevent sales to the underground gun market.

Sales by licensed dealers to “straw purchasers” are another significant source of guns for the underground market.<sup>146</sup> “Straw purchasers” are non-prohibited purchasers who fill out the paperwork and complete a firearm sales transaction, then hand the weapon over to a prohibited purchaser, such as a felon or minor.<sup>147</sup> Data from tracing projects in 27 cities nationwide led the Chief of the ATF’s Crime Gun Analysis Bureau to conclude that:

The [most important] single source of firearms is still illegal traffickers who are acquiring firearms from retail outlets. It still appears that acquisition of firearms by false declarations and straw purchasers are still the method preferred by traffickers, both small and large.<sup>148</sup>

Recent undercover investigations in Chicago, Gary, Indiana and Wayne County, Michigan, confirmed that many dealers blatantly engage in straw purchases – one gun dealer was caught on

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<sup>145</sup> Of all nationwide crime guns traced to stores in the Southeastern United States, the percentage of those guns originating from Virginia plummeted from 27 percent after the ban—even though gun trafficking from the Southeastern United States actually *increased* during that time. For crime guns in New York, the number of crime guns traced to Virginia dropped from 38.2 percent before the Virginia one handgun a month law to 15.3 after—a precipitous drop of more than 66 percent. *See* Weil and Knox, *supra* note 139, at 1760; *see also* Parker, *supra* note 143, at A1.

<sup>146</sup> *See, e.g.*, Polston, *supra* note 137. *See also infra* Part III.A.

<sup>147</sup> *See* 18 U.S.C.S. § 922(a)(6) (2003) (prohibiting false statements when purchasing firearms); *see also* Anthony A. Braga & David M. Kennedy, *Gun Control in America: Gunshows and Illegal Diversions of Firearms*, 6 GEO. PUBLIC POL’Y REV. 7, 11 (2000) (discussing high percentage of crime guns that were straw purchased and defining term “straw purchase”); *see also* PERFORMANCE REPORT, *supra* note 131, and accompanying text (describing prohibited purchasers).

<sup>148</sup> Joseph J. Vince, Jr., *Memo from the Chief*, CGAB SHOTS 2, Oct. 1998; *see also* PERFORMANCE REPORT, *supra* note 131, at 6 (stating that half of trafficked guns were straw purchases).

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videotape selling to a straw purchaser while declaring the transaction to be “highly illegal.”<sup>149</sup> Such sales are a significant problem.

In a congressional hearing on criminal gun sales, former gun trafficker Edward Daily explained the problem to the House Subcommittee on Crime and Criminal Justice in great detail.<sup>150</sup> Daily described how he traveled to gun shows throughout Virginia and used straw purchasers to obtain multiple firearms, “I would basically point out the types of handguns that these straw purchasers would buy right in front of the gun dealers, and most of them didn’t even pay any attention to me. . . . [B]asically, a lot of them would hand the guns to me after I purchased them, and I would walk out with the guns myself and put them in my car.”<sup>151</sup> Daily was able to purchase a total of 150 handguns, of which 146 were obtained by straw purchasers.<sup>152</sup> He acknowledged that dealers usually recognized straw purchasers when they saw them but continued to sell the weapons to such people anyway.<sup>153</sup> These guns were not only straw purchased but many were part of multiple sales. Daily noted that “[e]ach individual would buy anywhere from 6 to maybe 8, and as a

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<sup>149</sup> See Barry Meier, *Cities Turn to U.S. Gun Tracing Data for Legal Assault on Industry*, N.Y. TIMES, July 23, 1999, at A12. Both Chicago and Wayne County carried out undercover operations involving law enforcement officers posing as juveniles and criminals who were barred from legally buying guns, blatantly attempting to engage in straw purchases. The dealers overwhelmingly cooperated with the undercover officers’ attempts to obtain firearms through straw purchases. *Id.*

<sup>150</sup> *Federal Firearms Licensing: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103rd Cong. 1st, sess. 8-14 (1993) (statement of witness Edward Daily, convicted gun trafficker) (detailing the ease with which illegal straw purchases were made from gun dealers in Virginia and North Carolina)[hereinafter *Federal Firearms Licensing Hearing*].

<sup>151</sup> *Id.* at 9.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 8-9 According to Daily, the vendors who sold him guns recognized him as a repeat purchaser at these shows and understood that he was the actual purchaser in a sham transaction.

group, 12 to 20 a weekend.”<sup>154</sup> Ultimately, the guns “were transported to New York City where they were traded for narcotics or sold individually.”<sup>155</sup>

Daily’s dramatic testimony was echoed by Steve Higgins, then-Director of the ATF. Higgins stated that “the method by which criminals acquire firearms that is of most concern to us is the scenario where traffickers conspire with licensed dealers to divert firearms to criminal use.”<sup>156</sup> Accordingly, the important role licensed dealers play in the underground market has been recognized by law enforcement for years.

Additionally, studies suggest that a small number of licensed gun dealers are the source for a disproportionately large percentage of traced crime guns.<sup>157</sup> For example, in 1998, one percent of all licensed gun dealers were the source for 45 percent of the successfully-traced crime guns.<sup>158</sup> As ATF research indicates, although corrupt FFLs account for a small proportion of trafficking investigations they are responsible for the largest portion of illegally diverted firearms per investigation.<sup>159</sup> This is

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<sup>154</sup> *Id.* at 10 (explaining the purchasing patterns of individual straw purchasers).

<sup>155</sup> *Id.* at 9.

<sup>156</sup> See *Federal Firearms Licensing Hearing*, *supra* note 150, at 19 (statement of witness Steve Higgins).

<sup>157</sup> See Glenn L. Pierce et al., THE IDENTIFICATION OF PATTERNS IN FIREARMS TRAFFICKING: IMPLICATIONS FOR FOCUSED ENFORCEMENT STRATEGIES, A REPORT TO THE UNITED STATES DEPARTMENT OF TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS (BATF) (1996); REPORT OF SENATOR CHARLES SCHUMER, A FEW BAD APPLES: SMALL NUMBER OF GUN DEALERS THE SOURCE OF THOUSANDS OF CRIMES (June 1999) (analyzing raw data collected by the BATF regarding the small number of dealers responsible for selling the majority of crime guns).

<sup>158</sup> See DEP’T OF TREAS. BUREAU OF ALCOHOL, TOBACCO, & FIREARMS, FOLLOWING THE GUN: ENFORCING FEDERAL LAWS AGAINST FIREARMS TRAFFICKERS 18 (June 2000) (noting that although 43 percent of the investigations involved 10 firearms or less, trafficking in large numbers of firearms does occur, indicated by the two largest numbers of firearms reported in connection with a single investigation, 10,000 and 11,000 firearms tracked respectively), available at, [http://www.atf.treas.gov/pub/fire-explo\\_pub/pdf/followingthegun\\_internet.pdf](http://www.atf.treas.gov/pub/fire-explo_pub/pdf/followingthegun_internet.pdf).

<sup>159</sup> *Id.* at 12. See also COMMERCE IN FIREARMS IN THE UNITED STATES

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primarily due to their unfettered access to large numbers of guns.<sup>160</sup> Gun dealers, distributors, and manufacturers are well aware of the role straw purchases and multiple sales play in the underground criminal gun market, yet they have refused to address these significant problems for too long. Despite the ability to place at the least minimal restrictions on the ways in which their products are sold, gun dealers, distributors and manufacturers have continued business as usual.

*B. Defectively Designed Guns Facilitate the Flood of Guns into the Underground Market*

In addition to the factors examined above, guns are easily trafficked due to significant design flaws. For example, serial numbers provide the most effective method to trace a gun and determine ownership, yet the weapons are manufactured in such a way that this vital piece of information can be easily removed or destroyed. Remedying this and other egregious manufacturing flaws would curb re-sale and trafficking of guns and prevent harm to innocent victims. Moreover, defective gun manufacturing results in numerous accidental deaths and injuries.<sup>161</sup>

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*supra* note 140, at 21 (noting a Northeastern University-ATF study showing the small number of licensees associated with the disproportionately large percentage of crime guns traced in 1994).

<sup>160</sup> See Braga & Kennedy, *supra* note 147, at 15 (explaining that gun shows provide licensed dealers access to a large volume of firearms and thus, a corrupt licensed dealer can illegally divert large numbers of firearms).

<sup>161</sup> See, e.g., General Accounting Office Report, *Accidental Shooting: Many Deaths and Injuries Caused by Firearms Could Be Prevented*, GAO-PEMD-91-9, at 2-3 (1991) (discussing safety devices that could have prevented accidental shootings and help save lives). The GAO examined 107 case records on accidental gunshot deaths during 1988 and 1989 from the randomly selected jurisdictions. It found that 8% and 23% of the deaths it examined could have been avoided with the presence of two design features, child-proof safety device and loaded-indicators, respectively.

*1. Tamper-Proof Serial Numbers Would Curb the Underground Trafficking of Guns*

The serial number on a gun allows regulators and law enforcement personnel to trace the weapon to its origin and determine ownership. Many guns, however, are sold with serial numbers that can be easily removed with household tools such as, hammers, drills or grinding wheels.<sup>162</sup> Data from 1998 revealed that between 9 percent and 20 percent of all guns recovered by law enforcement agencies had their serial numbers tampered with in some fashion or form.<sup>163</sup> In 1999, a survey of 11 cities indicated that up to 9 percent of recovered crime guns had obliterated serial numbers.<sup>164</sup> ATF Studies show that traffickers regularly destroy serial numbers to prevent weapons from being traced,<sup>165</sup> even though obliteration of a serial number is a federal crime, as is possession of a firearm with an obliterated serial number.<sup>166</sup> Additionally, the ATF has recognized obliterated

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<sup>162</sup> See David Kreighbaum, *Obliterated Serial Numbers*, 2 CGAB SHOTS Vol. 3, 1 (Mar. 1998); James B. Jacobs & Kimberly A. Potter, *Criminal Law: Comprehensive Handgun Licensing & Registration: An Analysis and Critique of Brady II, Gun Control's Next (and Last?) Step*, 89 J. CRIM. L. & CRIMINOLOGY 81, 103 (1998); DAVID KENNEDY, JUVENILE GUN VIOLENCE AND GUN MARKETS IN BOSTON, U.S. DEP'T OF JUSTICE, available at <http://www.ncjrs.org/txtfiles/fs000160.txt> (last visited Mar. 16, 2003); Americans for Gun Safety, <http://www2.americansforgunsafety.com> (last visited Mar. 16, 2003).

<sup>163</sup> See Martha Brognard, *Obliterated Serial Number Restoration*, 2 CGAB SHOTS Vol. 6, 1 (Aug. 1998).

<sup>164</sup> U.S. BUREAU OF ALCOHOL TOBACCO, AND FIREARMS, U.S. DEP'T OF THE TREASURY, CRIME GUN TRACE REPORTS, 1999: National Report 39 (2000).

<sup>165</sup> See David M. Kennedy et al., *Youth Violence in Boston: Gun Markets, Serious Youth Offenders, and a Use-Reduction Strategy*, 59 LAW & CONTEMP. PROBS. 147, 174 (1996) (providing the reasons people obliterate serial numbers: To avoid being tied to a crime which was committed while using that particular fire arm, and to avoid being identified as a seller or buyer of a gun involved in crime).

<sup>166</sup> 18 U.S.C.S. § 922(k) (2003) (making it unlawful to sell, transport, or deal with a firearm in which a serial number has been obliterated, removed, or altered); see also DEP'T OF TREAS. BUREAU OF ALCOHOL, TOBACCO, & FIREARMS, CRIME GUN TRACE REPORTS: *The Illegal Youth Firearms Markets in 27 Communities* at 6 (1999) (investigating the illegal trafficking of firearms to

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serial numbers as a “key trafficking indicator,”<sup>167</sup> because the “intentional obliteration of a serial number is intended to make it difficult for law enforcement officials to identify the last licensed seller and first unlicensed purchaser of a firearm.”<sup>168</sup>

Because of the prevalent use of guns with obliterated serial numbers in crimes, law enforcement has developed methods to restore obliterated serial numbers in an effort to curb gun trafficking.<sup>169</sup> The most effective means of combating such destruction, however, is not restoration, but prevention through tamper-proof serial numbers.<sup>170</sup> As a result, the ATF recently imposed standards requiring serial numbers “to meet minimum height and depth requirements that will make them more resistant to obliteration.”<sup>171</sup> The Commonwealth of Massachusetts has implemented regulations requiring a second hidden tamper-proof serial number on each handgun sold in the state.<sup>172</sup> Gun

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the youth and juvenile and directing the information at reducing illegal access to firearms in 27 communities in the United States)[hereinafter ATF GUN TRACE REPORTS].

<sup>167</sup> ATF GUN TRACE REPORTS, *supra* note 166, at 7 (explaining that obliterating serial numbers indicates trafficking because it, “shows that someone in the chain of possession assumes that the gun will be used for a crime, may have to be discarded by a criminal, or may be recovered by the police”).

<sup>168</sup> *Id.* at 12-13. *See also* Kennedy et al., *supra* note 165, at 174.

<sup>169</sup> *See* GUN VIOLENCE REDUCTION, *supra* note 114. One of these methods would require the restoration of obliterated serial numbers. *Id.* at 29. Another method would use ballistics technology to trace bullets or bullet casings to the guns from which they were fired. This would require that detailed characteristics of guns be recorded in a central system so that examiners would be able to electronically compare the bullets found at crime scenes to the guns recorded in the ballistics system. *Id.* at 28-29.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*; *see also* 27 C.F.R. § 178.92 (2002) (describing information that must be placed on firearm, including serial number); 27 C.F.R. § 179.102 (2002) (describing how firearms must be identified for firearms made on or after January 30, 2002, “for firearms manufactured, imported, or made on and after January 30, 2002, the engraving, casting, or stamping (impressing) of the serial number must be to a minimum depth of .003 inch and in a print size no smaller than 1/16 inch”).

<sup>172</sup> MASS. REGS. CODE tit. 940, § 16.00 (1987) (mandating a handgun drop test, prohibiting sales of handguns made from inferior products and prohibiting



manufacturers have proven capable of meeting the new requirement, exhibiting that the gun industry can implement minimal changes in the design of guns that can greatly assist law enforcement.<sup>173</sup>

## 2. *Personalized Gun Technology Would Curb the Sales of Guns in the Underground Market*

There are a number of other design changes that, if implemented, would prevent unauthorized gun use, decrease the number of accidental deaths and injuries and minimize illegal trafficking of guns.<sup>174</sup> Ranging from basic locking devices to sophisticated user recognition technology, these modifications are affordable, reliable, and effective.<sup>175</sup> Most importantly, however, the majority of these mechanisms are currently available to gun manufacturers, should they wish to employ them.<sup>176</sup>

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the sale of handguns without either a chamber loaded indicator or a magazine disconnect safety).

<sup>173</sup> Pamela Ferdinand, *Massachusetts Gun Laws Take Heavy Toll on Sales*, WASH. POST, Jan. 24, 2001, at A3 (discussing how new Massachusetts gun safety regulations, including a requirement that all guns sold have tamper resistant serial numbers, have reduced handgun sales in the state).

<sup>174</sup> See generally Bang, *supra* note 1 (discussing new California firearm safety regulations, including laws requiring locks on firearms); James T. Dixon, *On Lemon Squeezers and Locking Devices: Consumer Product Safety and Firearms, A Modest Proposal*, 47 CASE W. RES. L. REV. 979 (1997) (discussing firearm safety devices, including trigger locks, that can help prevent accidental shootings and unauthorized use of guns); *Unintentional Firearm-Related Fatalities Among Children and Teenagers—United States 1982-1988*, 41 MORBIDITY AND MORTALITY WKLY. REP. 25 (Centers for Disease Control) June 26, 1992, at 445 (finding that “the addition of child proof safety devices would prevent children aged [six years and younger] from discharging a firearm”).

<sup>175</sup> See NATIONAL INSTITUTE OF JUSTICE, SMART GUN TECHNOLOGY PROJECT- FINAL REPORT (1996) [hereinafter SMART GUN TECHNOLOGY PROJECT] (noting that this is the same technology used to detect shoplifting in department stores), available at [http://infoserve.sandia.gov/sand\\_doc/1996/961131.pdf](http://infoserve.sandia.gov/sand_doc/1996/961131.pdf); See Joseph D’Agnese, *Smart Guns Don’t Kill Kids*, DISCOVER, Sept. 1999, at 90 (discussing personalization devices such as fingerprint lock, the magnetic lock, and the electromagnetic lock).

<sup>176</sup> But see Paul M. Barrett & Vanessa O’Connell, *Personal Weapon: How*

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Basic trigger locks are external additions to guns and include everything from pad-locks intended to immobilize the trigger to more advanced apparatus that replace the grip of the handgun and require a combination to release the lock.<sup>177</sup> Integrated locks, such as those provided by the gun manufacturer Taurus, use an internal lock to secure the gun.<sup>178</sup> This patented security system “engages with the turn of a special key to render the firearm inoperative, and is entirely contained within the firearm with no parts to misplace.”<sup>179</sup> This is “the first integral system provided by a manufacturer to help prevent unauthorized use by children.”<sup>180</sup> Even the most advanced forms of trigger locks, however, cannot prevent all accidents.<sup>181</sup>

The most effective, sophisticated manufacturing modifications include personalization technology that enables a gun to

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*a Gun Company Tries to Propel Itself Into the Computer Age*, WALL ST. J., May 12, 1999, at 1-3 (discussing Colt Manufacturing Company’s development of personalized gun technology and offering opposing viewpoints on the market-readiness of such technology); *Taurus News and Reviews* (May 5, 2001) (announcing firearm manufacturer’s new user identification technology, although recognizing no imminent date for commercial release due to environmental sensitivity and power source limitation), at <http://www.taurususa.com/news.html>.

<sup>177</sup> See Bang, *supra* note 1, at 266, 268-70 (2000); see also, Cynthia Leonardatos, Paul H. Blackman & David B. Kopel, *Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 CONN. L. REV. 157 (2001) (discussing the effectiveness of various types of gun locks and personalization devices).

<sup>178</sup> Press Release, Taurus Int’l Mfg., Inc., Taurus Renews Offer to Immediately Share Patented Gun Safety System with Smith & Wesson (Mar. 20, 2000), available at <http://www.taurususa.com/news.html>.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See Bang, *supra* note 1, at 273-74 (noting that the use of trigger locks may create an even greater risk for potential unauthorized gun use by children). For example, if a user inadvertently attaches the trigger lock to a loaded gun, the gun could mistakenly go off when the user attempts to remove the device. *Id.* In addition, gun owners could depend too heavily upon a trigger lock to prevent accidental injury, creating a false sense of security, resulting in accidents due to a failure by parents to properly educate their children regarding the dangers of unauthorized gun use. *Id.*

“recognize” the authorized user.<sup>182</sup> Cost effective, reliable designs include radio frequency tags in the handgun and on the shooter, often worn as a ring or a bracelet.<sup>183</sup> The tag in the gun must match that worn by the shooter for the gun to operate.<sup>184</sup> Personalization technology, therefore, prevents gun use by anyone other than licensed, authorized users.

Wide-spread manufacturing of personalized guns would also curb the proliferation of criminal activity and illicit gun trafficking by drastically limiting the utility of stolen firearms.<sup>185</sup> Because thieves are unable to use guns with personalized technology, this would also reduce the number of homicides. At least one study has shown that almost 50 percent of all shootings, both intentional and unintentional, could have been prevented if a personalization device was placed on the gun.<sup>186</sup> This fundamental design change would both save innocent lives and decrease the threat that guns, and criminals, pose to society at

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<sup>182</sup> See Johns Hopkins Center For Gun Policy and Research, *Personalized Guns: Reducing Gun Deaths Through Design Changes* (Sept. 1996) [hereinafter *Personalized Guns*], at <http://www.pcvp.org/pcvp/firearms/pubs/lock.shtml>; see also MASS. REGS. CODE tit. 940, § 16.00 (1987) (discussing devices including magnetic resonance devices that require the user to wear a special bracelet or ring, radio frequency identification, and touch memory devices, among others); see also, SMART GUN TECHNOLOGY PROJECT, *supra* note 175.

<sup>183</sup> See *Personalized Guns*, *supra* note 182.

<sup>184</sup> SMART GUN TECHNOLOGY PROJECT, *supra* note 175.

<sup>185</sup> See Jon S. Vernick & Stephen P. Teret, *A Public Health Approach to Regulating Firearms as Consumer Products*, 148 U. PA. L. REV. 1193, 1198-99 (April 2000) (positing that personalized guns may be used only by authorized user, and hypothesizing therefore that homicides could be prevented because those who steal the guns may not use them to murder others); Marianne W. Zawitz, *Firearms, Crime, and Criminal Justice: Guns Used in Crime*, Department of Justice, United States Department of Justice, July 1995, at 3 (citing statistics that “15% of the adult offenders and 19% of the juvenile offenders had stolen guns; 16% of the adults and 24% of the juveniles had kept a stolen gun, and 20% of the adults and 30% of the juveniles had sold or traded a stolen gun”; and citing studies of adult and juvenile offenders indicating that many offenders have stolen, possessed, or traded stolen fire arms).

<sup>186</sup> See Center to Protect Handgun Violence, *A School Year in the USA* (Oct. 1988) (analyzing 137 reports of gun violence culled from newspaper reports and news websites across the country).

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Personalization technology is more than a fantastical item on the wish list of gun control advocates. Many inventors have developed workable prototypes that can be implemented on guns today to make them safer.<sup>188</sup> A recent study by the National Institute of Justice described this technology as both affordable and available to gun manufacturers.<sup>189</sup> At least one manufacturer has announced that it has a pistol “with user identifying technology,” using battery-powered fingerprint reader technology.<sup>190</sup>

Not surprisingly, many in the gun industry have attempted to delay, if not derail, efforts to develop personalized gun technology.<sup>191</sup> Rather than proactively implementing design changes that help reduce crime, assist law enforcement, and even save lives, the gun industry has stonewalled attempts at innovation and even tacitly supported boycotts of industry members who strayed from the party line.<sup>192</sup> The industry refuses to provide consumers with the safest product possible and has failed to promote widespread technological advancement.

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<sup>187</sup> See *Personalized Guns*, *supra* note 182; see also Vernick & Teret, *supra* note 185, at 1204 (predicting that personalized guns might prevent some of the deaths caused by unauthorized users such as juveniles and criminals who disarm a police officer).

<sup>188</sup> See Joseph D’Agnese, *Smart Guns Don’t Kill Kids*, DISCOVER, Sept. 1999, at 90 (describing gun manufacturers’ efforts to develop smart gun technology, such as fingerprinting, magnetic, electromagnetic and radio lock guns).

<sup>189</sup> SMART GUN TECHNOLOGY PROJECT, *supra* note 175.

<sup>190</sup> See *Taurus News and Reviews*, *supra* note 176 (explaining that the prototype is a polymer frame 9mm pistol).

<sup>191</sup> David B. Ottaway, *A Boon to Sales, or a Threat? Safety Devices Split Industry*, WASH. POST, May 20, 1999, at A1 (explaining industry members’ opposition to development of new safety technology because it is seen as “a first step toward mandatory federal safety measures”). See also Margie Hyslop, *“Smart Gun” Law Pushed in Md.; Glendening to Fight for Childproofing*, WASH. TIMES, Aug. 28, 1999, at A1 (discussing opposition to smart gun technology by major gun manufacturers).

<sup>192</sup> See Ottaway, *supra* note 191, at A1 (noting gun manufacturers’ opposition, specifically Beretta U.S.A. Corp, to smart gun technology).

*C. Gun Makers Know They Are a Substantial Factor in the  
Creation and Maintenance of the Underground Gun  
Market*

The main sources for illegally trafficked firearms have been well documented throughout the past few decades and gun manufacturers are aware that their designs and methods of distribution facilitate the operation of the underground market.<sup>193</sup> Moreover, gun manufacturers are repeatedly informed that their products are being sold to dangerous individuals through the underground market.<sup>194</sup> They persistently refuse, however, to take simple, positive steps to curb the flow of their products into this illegal and hazardous forum.

*1. Gun Tracing Serves as Notice to Gun Makers Regarding the  
Criminal Use of Their Products*

Even with the problem of destroyed serial numbers and the loopholes present in record-keeping requirements, gun makers receive thousands of formal notices every year that the guns they manufacture and distribute are diverted to criminal misuse.<sup>195</sup>

One important mechanism for notification is tracing, which is “the systematic tracking of the movement of a firearm recovered by law enforcement officials from its first sale by the

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<sup>193</sup> See Hass Affidavit, *supra* note 133, at 20-21 (explaining that although Smith & Wesson and the industry as a whole are fully aware of the extent of the criminal misuse of firearms, the industry’s position has consistently been to take no independent action to insure responsible distribution practices). Furthermore, none of the principal U.S. firearms manufacturers take additional steps to investigate, screen or supervise the wholesale distributors and retail outlets that sell their products to insure that their products are distributed responsibly. *Id.*

<sup>194</sup> See COMMERCE IN FIREARMS IN THE UNITED STATES, *supra* note 140, at 19-20 (detailing crime gun tracing, which includes contacting the gun manufacturer to determine the first retail transaction); see also, Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 ARIZ. L. REV. 277 (2001) (discussing the proper interpretation and use of data obtained from firearms tracing to affect gun control laws and criminal enforcement actions).

<sup>195</sup> *Id.*

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manufacturer or importer through the distribution chain (wholesaler/retailer) to the first retail purchase.”<sup>196</sup> Law enforcement officials contact the ATF at the National Tracing Center (“NTC”), which then conducts a trace by checking out-of-business FFLs and multiple sales records.<sup>197</sup> If these sources do not uncover the first retail transaction, the NTC notifies the importer or manufacturer of the gun and tracks the recovered weapon through the wholesaler and retailer distribution chain “to the retail dealer, requesting the dealer to examine his records to determine the identity of the first retail purchaser.”<sup>198</sup> Thus, the ATF contacts the manufacturer each time it initiates a trace of a gun used in crime.<sup>199</sup> This happens hundreds of thousands of times each year.<sup>200</sup>

Comprehensive tracing data “can provide guidance to the regulatory—and criminal—enforcement activities of ATF and more generally provide a statistical basis for understanding the supply side of the gun violence problem.”<sup>201</sup> Accordingly, this tracing data, much of which gun manufacturers, distributors and dealers, can access, can be used to determine who is consistently selling guns that end up in crime.<sup>202</sup> As Forest G. Webb, a special agent of the ATF in charge of the NTC, told Taurus International Manufacturing, “[i]f your corporation determines that there is an unusually high number of Taurus Firearms being traced to certain” wholesalers and dealers “we suggest you look

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<sup>196</sup> See COMMERCE IN FIREARMS IN THE UNITED STATES, *supra* note 140, at 19.

<sup>197</sup> *Id.* The NTC is an agency that tracks guns recovered in crime. *Id.*

<sup>198</sup> See *id.* at 20.

<sup>199</sup> Although manufacturers are aware of traces about which they are contacted, they are not currently informed about traces resolved by searches of the out-of-business records or multiple sales report information. *Id.*

<sup>200</sup> See Cook & Braga, *supra* note 194, at 278 (noting that law-enforcement agencies confiscate hundreds of thousands of firearms every year).

<sup>201</sup> *Id.*

<sup>202</sup> While access to the raw tracing data is only available via special request, annual reports digesting the trace data are available from the Bureau of Alcohol, Tobacco and Firearms. See BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, CRIME GUN TRACE REPORTS, *available at* <http://www.atf.treas.gov/firearms/ycgii/2000/> (last visited Mar. 16, 2003).

at their business practices more carefully.”<sup>203</sup> Unfortunately, like others in the gun industry that refuse to take steps to stop the flow of guns to the underground market, Taurus never acted on this suggestion.<sup>204</sup>

## *2. The Gun Industry Knows That It Has the Power to Curb the Underground Gun Market*

Gun makers know the role their conduct plays in the proliferation of the underground market.<sup>205</sup> As a former gun company executive, Robert Hass, who served as Senior Vice-President of Marketing and Sales for Smith & Wesson recognized in a sworn statement:

[Smith & Wesson] and the industry as a whole are fully aware of the extent of the criminal misuse of handguns. The company and the industry are also aware that the black market in handguns is not simply the result of stolen guns but is due to the seepage of guns into the illicit market from multiple thousands of unsupervised federal handgun licensees.<sup>206</sup>

Gun dealers acknowledge the industry’s refusal to take responsibility for their participation in the crime gun market. Hass noted in his sworn affidavit that “the industry’s position has consistently been to take no independent action to insure responsible distribution practices, to maintain . . . minimal federal regulation of . . . handgun licensees . . . and to call for greater criminal enforcement of those who commit crimes with

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<sup>203</sup> See Fox Butterfield, *Letter Is Crucial in Lawsuit On Liability of Gun Makers*, N.Y. TIMES, Sept. 30, 2002, at A17 (discussing letter from ATF to Taurus International instructing gun company Taurus to investigate wholesalers and dealers that repeatedly show up in crime gun traces).

<sup>204</sup> *Id.* (noting that “Taurus never acted on Mr. Webb’s advice”).

<sup>205</sup> 18 U.S.C. §922 (1994). The Gun Control Act of 1968 grants gun makers and law enforcement officials the power to “determine the chain of commerce for a firearm from the point of import or manufacture to the first retail sale.” *Id.* See also Cook & Braga, *supra* note 194, at 277.

<sup>206</sup> See Hass Affidavit, *supra* note 133, at 20.

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guns as the solution to the firearm crime problem.”<sup>207</sup> One firearms dealer, named 1993 Dealer of the Year by the National Alliance of Stocking Gun Dealers, expressed similar sentiments in *Shooting Sport Retailer*, an industry trade magazine.<sup>208</sup> He stated:

I’ve been told INNUMERABLE times by various manufacturers that they ‘have no control’ over their channel of distribution. I’ve been told INNUMERABLE times that once a firearm is sold to a distributor, there is no way a manufacturer can be held responsible for the legal transfer and possession of a firearm . . . . IF YOU DO NOT KNOW WHERE AND HOW YOUR PRODUCTS ARE ULTIMATELY BEING SOLD - YOU SHOULD HAVE KNOWN OR ANTICIPATED THAT THEY WOULD BE ILLEGALLY SOLD AND SUBSEQUENTLY MISUSED. Let’s just get down and dirty. We manufacture, distribute, and retail items of deadly force. . . . Your arguments of yesterday regarding lack of accountability were pretty flimsy. Today, they are tenuous at best. Tomorrow, they are not going to indemnify you. We are going to have to get a whole lot better—and fast—of being in control of our distribution channel.<sup>209</sup>

Gun manufacturers nevertheless deliberately employ a “hands off” approach to distribution.<sup>210</sup> This is largely because the underground market is an important source of revenue for gun makers and loss of these sales would mean a significant decline in profits for gun makers.<sup>211</sup> Although the magnitude of the

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<sup>207</sup> *Id.*

<sup>208</sup> See Robert Lockett, *The Implications of New York City*, SHOOTING SPORTS RETAILER, 18-20, July/August 1999. Lockett is the proprietor of the Second Amendment gun shop in Overland Park, Kansas. *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> See Bhowmik, *supra* note 92, at 48-49 (noting that despite their knowledge of the criminal misuse of guns acquired in the underground market, gun makers continue to willingly supply the market).

<sup>211</sup> Only 10% of the guns recovered by the ATF are stolen property. See *Federal Firearms Licensing Hearing*, *supra* note 150, at 31. Given the volume



underground market cannot be calculated with mathematical certainty, the significance of the primary market for provision of firearms to the illicit market is beyond refute.<sup>212</sup>

What is and has been ascertainable, however, is the importance of the primary market for guns to the illicit market. One former ATF Director noted that “access to lawful channels of firearms in commerce is overwhelmingly attractive to criminals. Quantity and selection that cannot be provided consistently by home burglaries can only be obtained through the retail market.”<sup>213</sup>

In light of the overwhelming evidence of negligently designed and distributed firearms, steps must be taken to abate the monumental effects of these hazards. The gun industry is in the best position to respond to this problem, because it has both knowledge of the issues and the ability to implement remedial changes. Gun manufacturers and retailers, however, continue to conduct business as usual, with express exemption from federal consumer product safety laws and absent the threat of potential liability. The industry’s refusal to act demonstrates a desire to maximize profits in utter disregard for human life and safety.

#### IV. AN ATTEMPT TO ESTABLISH ACCOUNTABILITY: THE RISE OF CITY SUITS AGAINST GUN MANUFACTURERS AND THE INDUSTRY’S RESPONSE TO THE LITIGATION

A new wave of city-suit litigation attempts to hold the gun

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of guns recovered in crime, it is likely that the 90% not stolen are a strong source of revenue for gun makers. *See* Bhowmik, *supra* note 92, at 58 (referencing *Archer v. Arms Tech., Inc.*, No. 99-912658 NZ (Mich. Cir. Ct. 1999), in which plaintiffs claimed gun manufacturers actively encouraged an illegal secondary market in firearms). Bhowmik notes that “[s]traw purchases, multiple sales, sales to minors, and diversion of guns to felons and other unauthorized purchasers were not only encouraged but exploited and relied upon as a vital source of revenue.”

<sup>212</sup> *See Federal Firearms Licensing Hearing*, *supra* note 150, at 17, 31 (including testimony by the Director of ATF Stephen E. Higgins before Congressional Committee stating that “virtually all [criminal] guns at some point pass through a licensed dealer’s inventory”).

<sup>213</sup> *Id.* at 32.

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industry accountable for the negligent design and distribution of its products and is forcing the industry to implement changes in the way it does business.<sup>214</sup> While these reforms are not a panacea, they mark an important first step towards altering the way gun manufacturers and retailers conduct their trade and demonstrate that the industry has the means to prevent the sale of guns to criminals and other prohibited purchasers.

These city suits have been met with mixed results.<sup>215</sup> Some courts have dismissed claims for negligent design and distribution of guns.<sup>216</sup> For example, in 1999, Wayne County, Michigan and the City of Detroit filed a lawsuit against gun manufacturers and distributors for public nuisance and negligent marketing and distribution of guns.<sup>217</sup> Specifically, the plaintiffs alleged that the defendants used a policy of active encouragement and willful blindness to facilitate the creation of an illegal secondary market

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<sup>214</sup> See, e.g., Complaint, City of New York v. Arms Tech., Inc., (E.D.N.Y. 200) (NO. 1:00-cv-3641); First Amended Complaint, City of Boston v. Smith & Wesson, (Ma. Super. Ct. 2000) (No. 1999-02590); Complaint, District of Columbia v. Beretta U.S.A. Corp., (No. 00-0000428); Complaint, People of California *ex rel.* Hahn v. Arcadia Machine & Tool, (Cal. Super. 1999) (No. BC210894); Complaint, People of California *ex rel.* Renne v. Arcadia Machine & Tool, (Cal. Super. 1999)(No. 303753); Complaint, City of St. Louis v. Cernicek, (Mo. Cir. Ct. 199) (No. 992-01209); Complaint, City of Cincinnati v. Beretta Corp., (Oh. Ct. C.P. 1999) (No. A9902369); Complaint, White v. Hi-Point Firearms, (Oh. Ct. C.P. 1999)(No. 381897); Complaint, Archer v. Arms Tech., (Mich. Cir. Ct. 1999)(No. 99-912658); Complaint, City of Atlanta v. Smith & Wesson Corp., (Ca. Cty. Ct. 1999)(No. 99vs0149217j); Complaint, Morial v. Smith & Wesson Corp., (La. D.C. 1998)(No. 98-18575).

<sup>215</sup> See, e.g., Philadelphia v. Beretta U.S.A. Corp., 126 F. Supp. 2d 882 (E.D. Pa. 2000) *upheld*, 277 F.3d 415 (3d Cir. 2002) (holding that gun industry's methods for distributing guns were neither negligent nor a public nuisance); Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536 (3d Cir. 2001) (holding that manufactures' lawful distribution of handguns was not a public nuisance and manufacturers could not be held liable for negligent misuse by third party); City of Boston v. Smith & Wesson Corp., 12 Mass. L. Rptr. 225 (Mass. Super. 2000).

<sup>216</sup> See Philadelphia v. Beretta U.S.A. Corp., 277 F.3d at 415. See also *Camden County Bd. Of Chosen Freeholders*, 273 F.3d at 536.

<sup>217</sup> Archer v. Arms Tech., Inc. 72 F. Supp. 2d 784 (E.D. Mich. 1999); McNamara v. Arms Tech., Inc. 71 F. Supp. 2d 720 (E.D. Mich. 1999).

in firearms.<sup>218</sup> They contended that, as a result of defendants' active encouragement and reliance upon straw purchases, multiple sales, sales to minors, and diversion of guns to felons and unauthorized purchasers, thousands of firearms were placed in the hands of criminals, juveniles, and other dangerous people for the use in crimes.<sup>219</sup> The court upheld the public nuisance claim.<sup>220</sup> But the negligent marketing and distribution claim was dismissed because the court found that the defendant gun manufacturers did not owe the plaintiffs a duty to use reasonable care to prevent foreseeable injuries resulting from the negligent sale of their products.<sup>221</sup>

Other courts have held gun manufacturers liable for negligent behavior that results in injury to a city.<sup>222</sup> In *White v. Smith & Wesson, Corp.*, the City of Cleveland filed claims against gun manufacturer Smith & Wesson under the Ohio Products Liability Act,<sup>223</sup> as well as state common law claims of negligent design, unjust enrichment, public nuisance, negligent distribution,<sup>224</sup> and a statutory claim for nuisance abatement.<sup>225</sup> The defendant argued that the case should be dismissed for "three overarching reasons" – (1) as a matter of public policy; (2) for failure to state a claim

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<sup>218</sup> See Plaintiff's Complaint, Archer, No. 99-912658 NZ ¶2 at 3 (Apr. 26, 1999), at [http://www.firearmslitigation.org/content/pdf/detroit/detroit\\_complaint.pdf](http://www.firearmslitigation.org/content/pdf/detroit/detroit_complaint.pdf).

<sup>219</sup> *Id.* at 3, 20, 50.

<sup>220</sup> Archer v. Arms Tech., Inc., No. 99-912658 NZ, slip op. at 12 (Mich. Cir. Ct. May 16, 2000) (on remand from the federal district court, *Archer*, 72 F. Supp. 2d 784).

<sup>221</sup> *Id.* at 6 (stating that crime prevention "is simply not a cognizable legal duty owed by these Defendants to these Plaintiffs.")..

<sup>222</sup> *White v. Smith & Wesson Corp.*, 97 F. Supp. 2d 816, 828 (N.D. Ohio 2000) (alleging that as a result of defendants' unreasonably dangerous and negligently designed handguns that the city suffered harm, lost substantial tax revenue due to lower productivity and was obligated to pay millions of dollars in enhanced police protection, emergency services, police pension benefits, court and jail costs, and medical care).

<sup>223</sup> *White*, 97 F. Supp. 2d at 819-30, *citing* Ohio Products Liability Act, Ohio Rev. Code §§ 2307.7-2307.79.

<sup>224</sup> *White*, 97 F. Supp. at 830.

<sup>225</sup> *White*, 97 F. Supp. 2d at 819, *citing* Cleveland City Code § 203.01,

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under Ohio law; and (3) because the claims encroached upon the United States Constitution.<sup>226</sup> The District Court for the Northern District of Ohio denied the defendant's motion in full, relying in part on state law precedent recognizing that the grave, foreseeable risk posed by guns warrants the imposition of a duty to prevent them from falling into the wrong hands.<sup>227</sup> The court noted that "[a] duty of care for the protection of a plaintiff against an unreasonable risk of injury is owed to all people 'to whom injury may reasonably be anticipated.'"<sup>228</sup>

In another significant case, the City of Cincinnati claimed that gun manufacturers and distributors negligently distributed and marketed their products, resulting in both a public nuisance and injury to the city.<sup>229</sup> The Supreme Court of Ohio overturned the

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<sup>226</sup> *White*, 97 F. Supp. 2d at 829-30. Regarding the public policy argument, the court held that it "does not dismiss cases based on public policy; rather, a case will be dismissed if it fails 'to state a claim upon which relief can be granted.'" *Id.* at 820. The court analyzed each of the state law claims in detail and concluded that each stated a claim under Ohio law. *Id.* at 821-829. The court also rejected the defendants' argument that plaintiffs' claims were "an attempt to regulate a lawful national industry" and barred by the Commerce Clause and the Due Process Clause. *Id.* at 829. The court found that "[p]laintiffs. . . are attempting to protect their own citizens and economy, and to recover for their own injuries and losses. Plaintiff's claims, like any other product liability claim that implicates a national manufacturer, are not barred by the United States Constitution." *Id.* at 829-30.

<sup>227</sup> *White v. Smith & Wesson Corp.*, 97 F. Supp. 2d 816, 828 (articulating that the City of Cleveland alleged negligent design and distribution of guns by gun manufacturers and dealers caused injury and public nuisance). The court relied in part on *Pavrides v. Niles Gun Show, Inc.*, in which the Ohio Court of Appeals held that a gun show operator could be liable for a criminal shooting by teenagers using a gun they stole from a dealer at the show. That court found that the operator negligently failed to prevent minors from entering the show and negligently failed to require dealers at the show to take appropriate security measures to prevent thefts. *See also* *Pavrides v. Niles Gun Show, Inc.*, 679 N.E.2d 728 (Ohio Ct. App. 1996).

<sup>228</sup> *White*, 97 F. Supp. 2d at 828; *see also*, OHIO REV. CODE ANN. §2307.71 (Anderson 1999) (citing instances in the state products liability code where a product is deemed defective due to inadequate warning or instruction).

<sup>229</sup> *See Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002). The City alleged that the gun manufacturers' negligence violated the common right of Cincinnati residents to be free from conduct that interferes with their

lower court's dismissal of the city's case.<sup>230</sup> The court summarized the city's argument that "appellees created a nuisance through their ongoing conduct of marketing, distributing, and selling firearms in a manner that facilitated their flow into the illegal market. Thus . . . appellees control the creation and supply of this illegal, secondary market for firearms, not the actual use of the firearms that cause injury."<sup>231</sup> The court concluded that, "just as the individuals who fire the guns are held accountable for the injuries sustained, appellees can be held liable for creating the alleged nuisance."<sup>232</sup>

The Supreme Court of Massachusetts also denied gun manufacturers' motion to dismiss a case brought by the City of Boston.<sup>233</sup> Although defendants contended that they "did not owe Plaintiffs a duty to protect from the criminal acts of third parties," the court recognized that this argument misconstrued the complaint.<sup>234</sup> The court clarified its position by stating that the "[p]laintiffs do not allege that Defendants were negligent for failure to protect from harm but that Defendants engaged in conduct the foreseeable result of which was to cause harm to Plaintiffs."<sup>235</sup> The court further explained that:

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health, welfare, and safety. *Id.* at 1141. The City further argued that appellees' negligent conduct sustained a secondary, illegal market for firearms, ensuring that the firearms would end up in the hands of persons with criminal purposes. *Id.*

<sup>230</sup> *Id.* at 1151 (overturning dismissal).

<sup>231</sup> *Id.* at 1143.

<sup>232</sup> *Id.*, citing *City of Boston v. Smith & Wesson Corp.*, 2000 WL 1473568, 14 (Mass. Super. Ct. 2000) (noting that liability extends to all who join or participate in the creation or maintenance of a public nuisance).

<sup>233</sup> See *City of Boston v. Smith & Wesson Corp.*, 2000 WL 147 at 1 (Mass. Super. Ct. 2000). Although the City of Boston prevailed against defendants' motion to dismiss, the high cost of litigation caused the City to voluntarily dismiss the case in March 2002. See Raja Mishra, *Boston Drops Lawsuit on Guns: Growing Cost Cited in Case vs. 31 Firms*, BOSTON GLOBE, March 28, 2002, at A1 (reporting that budget cuts and legal costs of over \$30,000 a month contributed to the city's decision to drop the case).

<sup>234</sup> *Smith & Wesson Corp.*, 2000 WL 1473568 at \*6 (rejecting defendants' contention that the plaintiffs' complaint asked the court to impose such a duty).

<sup>235</sup> *Id.* at 15 (explaining the plaintiffs' allegation that the defendants engaged in affirmative misconduct).

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Taking Plaintiffs' allegations as true, Defendants have engaged in affirmative acts (i.e. creating an illegal secondary firearms market) by failing to exercise adequate control over the distribution of their firearms. Thus it is affirmative conduct that is alleged – the creation of the illegal secondary firearms market. The method by which Defendants created this market, it is alleged, is by designing or selling firearms without regard to the likelihood the firearms would be placed in the hands of juveniles, felons or others not permitted to use firearms in Boston. Further, according to the complaint, Defendants did this [knowing that the firearms would end up in that market, and] depending upon precisely that result, realizing that Plaintiffs would be harmed. Taken as true, these facts suffice to allege that Defendants' conduct unreasonably exposed Plaintiffs to a risk of harm.<sup>236</sup>

While courts have reached different conclusions on the application of common law tort claims to the gun industry's wrongdoings, lawsuits have helped reveal the means by which the gun industry knowingly supplies and profits from the underground gun market.<sup>237</sup> Cities' claims have eroded the shield of preemptive statutes and special treatment and, in response to demands for redress, the gun industry has made minor changes in the way it does business.<sup>238</sup> Although, these changes are far from

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<sup>236</sup> *Id.*

<sup>237</sup> *See, e.g.,* Butterfield, *supra* note 203, at A17 (reporting that a central argument in the cities' case against the gun industry alleging that gun manufacturers are liable for tort of public nuisance is bolstered by the discovery of a letter sent by ATF, urging the manufacturer to trace how and where its products were being sold, was ignored by the company). *See also* Richard C. Ausness, *Tort Liability for the Sale of Non-defective Products: An Analysis and Critique of the Concept of Negligent Marketing*, 53 S.C. L. REV. 907 (2002) (discussing the controversial tort of negligent marketing that is being put forth in cases against the gun industry and would impose a duty on gun manufacturers to more carefully market their products so as to prevent guns from falling into the wrong hands).

<sup>238</sup> *See* Burnett, *supra* note 48, at 481 (describing changes in the gun industry, such as Colt Manufacturing Company's decision to eliminate production of seven of its lines of consumer handguns and Smith & Wesson's

adequate, they demonstrate the industry's recognition of the role it plays in trafficking guns to criminals and minors. Sadly, however, if these changes had been made years ago, a great number of lives could have been saved.

As retailers' sole source of handguns, gun makers are uniquely positioned to restrict or limit the manner in which guns are sold, thereby preventing guns from being obtained by criminals. Manufacturers could ask distributors and dealers to apprise them of any information, including multiple sales, trace requests or criminal indictments.<sup>239</sup> Manufacturers, however, have refused to take precautionary measures. As a result of the municipal litigation against gun manufacturers, this behavior has begun to change.

For example, Smith & Wesson, one of the nation's largest

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pact with the U. S. Department of Housing and Urban Development, the Department of the Treasury, New York and Connecticut Attorneys General and the mayors of many of the cities suing the gun industry at that time). See Matt Bai, *Clouds Over Gun Valley*, NEWSWEEK, Aug. 23, 1999, at 34 (discussing gun industry's overtures to the ATF, including signals that the industry would be willing to monitor sales to cut down on illegal trafficking).

<sup>239</sup> See GUN VIOLENCE REDUCTION, *supra* note 114, at 26. The DOJ acknowledged the great importance of "industry self-policing" in the interest of public safety:

The firearms industry can make a significant contribution to public safety by adopting measures to police its own distribution chain. In many industries, such as the fertilizer and explosives industries, manufacturers impose extensive controls on their dealers and distributors. Gun manufacturers and importers could substantially reduce the illegal supply of guns by taking similar steps to control the chain of distribution for firearms. To properly control the distribution of firearms, gun manufacturers and importers should: identify and refuse to supply dealers and distributors that have a pattern of selling guns to criminals and straw purchasers; develop a continual training program for dealers and distributors covering compliance with firearms laws, identifying straw purchase scenarios and securing inventory; and develop a code of conduct for dealers and distributors, requiring them to implement inventory, store security, policy and record keeping measures to keep guns out of the wrong hands, including policies to postpone all gun transfers until NICS checks are completed.

*Id.*

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gun manufacturers, signed an agreement with various cities and federal agencies, agreeing to a marked change in the way they do business, including monitoring distributors and dealers for negligent behavior.<sup>240</sup> Under the same settlement, Smith & Wesson agreed to use personalization technology in its new models within three years of the settlement, with curio and collectors' models exempted from the requirement.<sup>241</sup> Smith & Wesson also agreed to spend two percent of its revenues on developing personalization technology.<sup>242</sup>

Even prior to that groundbreaking agreement, Smith & Wesson implemented some restrictions on their retailers' conduct, and informed them that it might terminate sales to any dealer who did not agree to refrain from selling to straw purchasers or any other person whom the dealer had reason to believe made a false or misleading statement.<sup>243</sup> After the City of Chicago videotaped and indicted two dealers engaging in straw purchases, Smith & Wesson terminated those dealers for violating the agreement.<sup>244</sup> These actions clearly demonstrate that

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<sup>240</sup> See SMITH & WESSON: CLARIFICATION: SETTLEMENT DOCUMENT: AGREEMENT (March 17, 2000) [hereinafter SMITH & WESSON AGREEMENT], at <http://www.gunnerynetwork/files/agreement.html>. Under the terms of the Smith & Wesson settlement, the company agreed to change its distribution practices, including the following: Smith & Wesson will only allow their guns to be sold by authorized dealers and distributors who must abide by a set of terms and conditions governing who they can sell guns to. *Id.* at 6. See also James Dao, *Under Legal Siege, Gun Maker Agrees to Curbs*, N.Y. TIMES, Mar. 18, 2000, at A1 (reporting the terms of Smith & Wesson's settlement agreement, its significance and the impact it may, or may not, have on the gun manufacturing industry as a whole); Steven Wilmsen, *Smith & Wesson, City Settle Lawsuit*, BOSTON GLOBE, Dec. 12, 2000, at B4 (reporting the terms of a separate settlement with the City of Boston which, while it is less ambitious in its terms than the March 2000 agreement, is a binding agreement).

<sup>241</sup> SMITH & WESSON AGREEMENT, *supra* note 240, at 2.

<sup>242</sup> *Id.*

<sup>243</sup> See David B. Ottaway & Barbara Vobejda, *Gun Manufacturer Requires Dealers to Sign Code of Ethics*, WASH. POST, Oct. 22, 1999, at A11 (detailing a code of ethics Smith & Wesson requires dealers selling its products to sign, pledging that they will avoid sales practices that facilitate the illegal flow of guns to young people and criminals).

<sup>244</sup> See *Protection of Lawful Commerce in Arms Act: Hearing on H.R. 2037*



gun manufacturers *can* act to reduce the likelihood that criminals and other prohibited purchasers will obtain guns. Significantly, these actions were taken only *after* cities and municipalities began suing the gun industry.<sup>245</sup>

Not surprisingly, the NRA and the gun industry responded negatively to Smith & Wesson's settlement. They supported a boycott of the gun maker, and treated Smith & Wesson as a pariah.<sup>246</sup> The boycott warned all gun manufacturers that no party could settle without first consulting with the rest of the industry.<sup>247</sup> Gun sellers contended that they only had the responsibility to obey the laws regulating gun sales, nothing more.<sup>248</sup> They argued that ATF and other law enforcement

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*Before the Subcommittee on Commerce, Trade, and Consumer Protection of the House Comm. Energy and Commerce, 107th Cong. 14 (April 18, 2002) (statement of David J. Pasternak, on Behalf of the American Bar Association), available at <http://energy.commerce.house.gov/107/action/107-94.pdf>.*

<sup>245</sup> See Ottaway & Vobejda, *supra* note 243, at A11 (Smith & Wesson first mailed letters to its registered dealers in July 1999, giving them 60 days to pledge that they would comply with the "Stocking Dealer Code of Responsible Business Practices," committing dealers to obey all firearms laws; to only sell Smith & Wesson guns with safety locks; and to closely monitor buyers to avoid illegal purchases); See also Complaint, *Morial v. Smith & Wesson Corp.* (La. D.C. 1998)(No. 98-18575) (initiating first city suit).

<sup>246</sup> See, e.g., Geneva Overholser, *NRA Fells Gun Maker*, SEATTLE POST INTELLIGENCER, Mar. 15, 2001, at B4, available at 2001 WL 3555261 (discussing the NRA's boycott of Smith & Wesson, resulting in a 125-employee lay-off due to sagging sales); Vin Suprynowicz, *What 'Smart Gun' Technology Is Really All About*, LAS VEGAS REVIEW-JOURNAL, Feb. 3, 2002 (describing the boycott of Smith & Wesson as a reaction to "a sell-out deal with the Clinton administration equivalent to Chamberlain's deal with Hitler over Czechoslovakia, that forced the bargain basement sale of the 150-year old Massachusetts gun-maker last year"), available at [http://www.lvrj.com/lvrj\\_home/2002/Feb-03-Sun-2002/opinion/18004463.html](http://www.lvrj.com/lvrj_home/2002/Feb-03-Sun-2002/opinion/18004463.html).

<sup>247</sup> Suprynowicz, *supra* note 246 (discussing boycott and Smith & Wesson's reaction to now tow the party line).

<sup>248</sup> See Butterfield, *supra* note 203, at A17. Specifically, Lawrence G. Keene, Vice President and General Counsel to the NSSF said that the gun makers are "complying with an extensive regulatory scheme." *Id.* As a result, the manufacturers have no responsibility to monitor what dealers do with their guns, he said, and "it is absurd to suggest that if criminals get their hands on guns the companies should be held responsible."

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agencies did not want them to do more to prevent sales intended for the criminal market.<sup>249</sup> This “party line” mentality has prevented true innovation in the industry.

Meanwhile, a gun industry trade association, the National Shooting Sports Foundation (“NSSF”) has implemented a program in response to the city suits, which underscores specific ways in which firearms dealers can exercise more responsibility in their sales.<sup>250</sup> This program, popularly referred to as “Don’t Lie for the Other Guy,” recognizes that preventing straw purchases requires more than simply following federally-mandated procedures.<sup>251</sup> Rather, the materials disseminated by NSSF advocate “go[ing] beyond the law,” and discuss the benefits of a “pre-sales screening” of prospective purchasers.<sup>252</sup> Under the NSSF guidelines, it is not enough to simply demand that customers provide identification, fill out the required forms and undergo a criminal background check.<sup>253</sup> An arms dealer is

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<sup>249</sup> Butterfield, *supra* note 203, at A17 (quoting the NSSF as saying that they had been told by the ATF that “law enforcement does not want manufacturers to play junior G-men and jeopardize investigations”).

<sup>250</sup> NSSF is a gun manufacturer trade association that represents a majority of foreign and domestic gun makers doing business in the United States. See National Shooting Sports Foundation, <http://www.nssf.org> (last visited Feb. 16, 2003).

<sup>251</sup> National Association of Firearms Retailers, *Don’t Lie for the Other Guy* [hereinafter *Don’t Lie for the Other Guy*] (explaining that a federally licensed firearms dealer is responsible under federal law for determining the legality of any firearm transaction (18 U.S.C. §921-930; 27 CFR §178)), available at <http://www.nafr.org/DontLie/index2.htm> (last visited Jan. 20, 2003). The campaign is a coordinated effort designed to educate the public on the consequences of purchasing a firearm for someone who legally cannot and to train firearms retailers on better identifying potential straw purchases. *Id.* Before transferring any firearm, a licensed dealer must first establish and verify the identity, place of residence and age of the buyer to insure that individuals meet the requirements under applicable state and federal laws. *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* Under the federal law, licensed gun sellers not selling guns from their personal collection are only required to view government issued identification and submit information for a background check of the purchaser by law enforcement. Such a check, if not completed within three days, is then irrelevant and the purchaser can still purchase the gun. 18 U.S.C.A. §

also required to verify that the individual buying the firearm is indeed the actual purchaser.<sup>254</sup>

The NSSF guidelines recommend that dealers ask prospective purchasers a number of questions, including the “intended use” of the gun.<sup>255</sup> Dealers are advised to look out for “suspicious acting customers who may appear nervous or evasive in their communications,” or even “customers who appear confident” who “may inadvertently reveal something if the dealer asks enough pertinent questions.”<sup>256</sup> NSSF recognizes that not only should a dealer adequately question prospective purchasers to weed out illegitimate customers, but the dealer should not complete a sale if they have suspicions about a customer.<sup>257</sup>

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922(t)(1)(B)(ii). See Gov’t Accounting Office Report, *Gun Control: Opportunities to Close Loopholes in the National Instant Criminal Background Check System*, GAP-020720 at 28 (July 2002) (recommending to Congress to remove the three day time limit as it does not provide the FBI with sufficient time in which to complete all background checks and as a result, many prohibited purchasers are obtaining weapons through this loophole).

<sup>254</sup> See *Don’t Lie for the Other Guy*, *supra* note 251, at 2. The NSSF guidelines suggest:

Many retailers routinely engage their customers in a series of helpful questions to determine the customer’s wants and needs. By including a couple of questions regarding the identity of the actual purchaser in this pre-sales screening, retailers can provide a valuable service to law enforcement and to their community without offending a legitimate customer.

An effective way to do this is to establish a store policy that every potential firearm purchaser will be asked the same sequence of questions. You may even want to post a sign in your store that informs the customer of this policy. The sign may read: to assist law enforcement it is out policy to go beyond the law in verifying the identity of the actual purchaser of a fireman.

*Id.*

<sup>255</sup> *Id.* (suggesting questions such as, “Is the firearm for you or someone else?”; “If someone else, is this a gift?”; “What is the intended use—personal protection, deer hunting, target shooting?”; and “What type of firearm are you interested in or most comfortable with?”).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* The materials state:

The key is to engage the customer and ask enough questions to draw

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The materials also stress that a dealer is obligated to verify that the purchaser is the intended user.<sup>258</sup> This means that, if a dealer is uncertain as to whether a transaction is a straw purchase, the dealer should not complete the sale. For instance, the materials list several hypothetical transactions. In one, a man “may simply be helping [his girlfriend] select her first handgun,” or he may be asking a woman to purchase a gun for him.<sup>259</sup> In the view of the NSSF, the dealer should refuse the sale, even though he may be denying a legitimate sale.<sup>260</sup>

Although the “Don’t Lie for the Other Guy” program could have been implemented much earlier and remains a voluntary program without great effect, it marks an important recognition on the part of the gun industry that their behavior can and does have an impact on the criminal trafficking of guns in this country. Because the ATF has recognized the importance of straw purchases on the underground gun market, any steps gun sellers take to impede—rather than promote—such sales, will mark a step in the right direction.<sup>261</sup> City suits, public pressure and the threat of liability have forced the industry to reexamine the way it

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out information on their background and intentions. If suspicions arise, it is more prudent to follow the precautionary principle of politely refusing the sale to protect yourself from the risk of contributing to a possible illegal transaction. It’s not just good business. It’s your responsibility.

*Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* (listing other examples of straw-purchases, such as when a person who can legally buy a firearm and wishes to do so arranges for a second person to pay for the gun and fill out and sign the paperwork in the second person’s name or when a person who is denied an approval returns to the store with a companion who asks to see the same firearm the man attempted to purchase and then the companion says that he or she would like to purchase the firearm).

<sup>260</sup> *Id.*

<sup>261</sup> See Weil & Knox, *supra* note 139, at 1761. Weil and Knox explain that straw purchasers’ ability to purchase large numbers of firearms with a street value that is much higher than their commercial price enables gun traffickers to make large profits and keep costs to a minimum, an important aspect of the underground gun market. *Id.* See also Braga & Kennedy, *supra* note 147 (discussing undercover operations in several cities demonstrating prevalence of dealer compliance in straw purchases).

does business. When the business involves the production of instruments of death and destruction, it is not too much to ask for extra precautions in the design, distribution and marketing of such products.

#### CONCLUSION

The gun industry has escaped liability for their negligent behavior for far too long. The nation pays the price—in lives lost and dollars spent—for easy access to guns by criminals and juveniles. Lawsuits filed by cities, municipalities and states aim to hold the gun industry accountable for its negligent behavior. Critics of these lawsuits rely upon questionable statistics regarding the benefits of unregulated gun ownership and revisionist history regarding the Second Amendment to argue against them. Nonetheless, the ways in which the underground market is supplied illustrate that gun manufacturers play a vital role in the underground crime gun market and that manufacturers knowingly financially benefit from the perpetuation of this market. The city suits have met with mixed results in the courts. While some courts have dismissed these lawsuits, the ongoing litigation has had definite effects on the way guns are sold in this country. The Smith & Wesson settlement and acknowledgement by the gun industry trade association that it can no longer hide behind a veil of denial mark the dawning of a new day—where the gun industry will finally be taken to task for its role in providing criminals and juveniles easy access to guns.