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HANDGUN MANUFACTURERS' TORT LIABILITY TO VICTIMS
OF CRIMINAL SHOOTINGS: A SUMMARY OF RECENT
DEVELOPMENTS IN THE PUSH FOR A
JUDICIAL BAN OF THE
"SATURDAY NIGHT SPECIAL"

I. INTRODUCTION

Handguns, like a variety of other dangerous products such as alcoholic beverages and automobiles, enjoy great popular demand in spite of the fact that their use regularly causes death and serious injury.¹ The term "saturday night special" has become the generic designation for a class of handguns characterized by small size, low cost and easy concealability.² The manufacture and marketing of such weapons presents

1. See, e.g., Turley & Harrison, *Strict Tort Liability of Handgun Suppliers*, 6 HAMLINE L. REV. 285 (1983). Turley and Harrison state:

Every thirteen seconds a new handgun is sold in this country, every two and a half minutes the product injures someone and three times every hour it is an instrument of death. The handgun is ranked second only to motor vehicles as the cause of unnatural deaths in this country. There are an estimated fifty million handguns in the United States today. . . . [and] two and [a] half million [are] sold each year. . . . The result is some twenty-two thousand handgun deaths annually in this country alone.

Id. at 285-86 (footnotes omitted) (citing U.S. DEP'T OF JUSTICE, F.B.I. UNIFORM CRIME REPORTS 130 (1980); 2 MORTALITY STATISTICS BRANCH, DIVISION OF VITAL STATISTICS, VITAL STATISTICS OF THE UNITED STATES 23 (1981); BUREAU OF ALCOHOL, TOBACCO AND FIREARM STATISTICS (1980); U.S. DEP'T OF JUSTICE, REPORT OF THE U.S. ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME (1979)). Turley and Harrison argue that holding handgun manufacturers strictly liable in tort for even a small percentage of these casualties will result in a judicial ban on the types of handguns most often abused. See *id.* at 309-10. But see Kates, *Handgun Banning in Light of the Prohibition Experience*, in FIREARMS AND VIOLENCE: ISSUES OF PUBLIC POLICY 139 (D. Kates, Jr. ed. 1984). Professor Kates asserts that banning handguns to effect a reduction in crime would be analogous to—and as unsuccessful as—alcohol prohibition during the 1930's and states that

[t]he involvement of liquor and handguns (respectively) in types of mortality other than intentional homicide is well known. Handguns are used in about one half of all suicides yearly; liquor is involved in about one third of them. Handgun accidents take between 200 and 250 lives per year; liquor is involved in approximately 53,000 accidental deaths per year, including 25,000 automobile fatalities, Overall, handguns are involved in approximately 25,000 violent deaths yearly (homicide, suicide, and accident), while liquor is involved in 75,000. Adding in fatalities resulting from liquor-related physical ailments, liquor is estimated to be involved in about 11 percent of all deaths each year, while handguns are involved in a little over 1 percent.

Thus, the "life-saving" argument for banning handguns is roughly comparable to that for banning alcohol.

Id. at 145-46 (footnotes omitted).

2. See Cook, *The "Saturday Night Special": An Assessment of Alternative Definitions*

(1577)

difficult legal problems.³ In light of the obvious propensity for criminal use of small handguns and the current widespread concern over the proliferation of violent crime, there is presently a lively debate regarding the need and ability to ban or control the use of "saturday night specials."⁴

The issue of firearms regulation has been actively debated in American politics since the formation of the United States.⁵ The traditional

from a Policy Perspective, 72 J. CRIM. & CRIMINOLOGY 1735-36 (1981). The term "saturday night special" was coined to describe small, low caliber, inexpensive weapons made from inferior quality materials and with poor workmanship. *Id.* at 1736. These weapons are generally regarded as having little or no use to serious target shooters and hunters because they are inaccurate and unreliable. *Id.*; see also *Kelley v. R.G. Indus.*, 304 Md. 124, 145-46, 497 A.2d 1143, 1153-54 (1985) ("short barrels, light weight, easy concealability, low cost, use of cheap quality materials, poor manufacture, inaccuracy and unreliability. . . . render the Saturday Night Special particularly attractive for criminal use and virtually useless for . . . legitimate purposes"; McClain, *Prohibiting the "Saturday Night Special": A Feasible Policy Option?*, in FIREARMS AND VIOLENCE: ISSUES OF PUBLIC POLICY 201-02 (D. Kates, Jr. ed. 1984) (discussing various definitions for "saturday night special" based primarily on cost, caliber and barrel length). *But see* Bruce-Briggs, *The Great American Gun War*, in THE ISSUE OF GUN CONTROL 22-23 (T. Draper ed. 1981) (arguing that "saturday night special" designation is merely political tool used to encourage public support for banning use of handguns by particular classes of people).

3. Two extensive collections of research present various points of view on the legal problems associated with handgun manufacture and regulation. *Symposium on Firearms Legislation and Litigation*, 6 HAMLINE L. REV. 277 (1983); *Second Amendment Symposium: Rights in Conflict in the 1980's*, 10 N. KY. L. REV. 1 (1983). In addition, a collection of papers presents relatively unbiased public policy research on the issue of gun control. FIREARMS AND VIOLENCE: ISSUES OF PUBLIC POLICY (D. Kates, Jr. ed. 1984). Several collections of articles oppose gun control as a method of reducing crime. *The Issue of Gun Control* (T. Draper ed. 1981); RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT (D. Kates, Jr. ed. 1979); THE RIGHTS OF GUN OWNERS (A. Gottlieb ed. 1981).

4. See Draper, *Preface to THE ISSUE OF GUN CONTROL* at 5-6 (T. Draper ed. 1981). The author states:

The pro-control argument is that some kind of regulation of the private possession of handguns—the weapons most adaptable to close-range bodily assault—will result in fewer crimes and less human destruction. Of those opposed to regulation, some fear that it would lead inevitably first to a ban on hunting rifles and shotguns and then to other encroachments on human freedom. Others argue that while the handgun is the cheapest and most versatile firearm for use in crime, it is also the most practical means of personal protection *against* crime. In this survey of current opinion on the issue of gun control, no disagreement was found on the need to stem the increasing volume of handgun violence and also to keep down the rising number of Saturday Night Specials in society. (Most estimates of the number of firearms in private hands [in the United States] . . . range from 140 million to 200 million.) Where disagreement begins is over evaluation of evidence found in books, articles, congressional hearings, and studies to support the contention that fewer handguns would indeed mean fewer crimes.

Id. (emphasis in original).

5. See Halbrook, *Tort Liability For the Manufacture, Sale, and Ownership of Handguns?*, 6 HAMLINE L. REV. 351 (1983). The author notes:

result has been that the right to "keep and bear arms" is protected by the United States Constitution⁶ and by most state constitutions.⁷ There exists, however, a vast framework of statutory regulation restricting the sale, use and importation of firearms in general.⁸ Currently, the sale and use of handguns is subject to a comprehensive federal regulatory scheme⁹ as well as to literally thousands of state and municipal regula-

When the Constitution [of the United States] was proposed in 1787, not a single proponent questioned the individual character of the right to keep and bear arms. John Adams referred to the right of "arms in the hands of citizens, to be used at individual discretion . . . in private self defence. . . ." In *The Federalist*, James Madison referred to "the advantage of being armed, which the Americans possess over the people of almost every other nation," in contrast with the European kingdoms, where "the governments are afraid to trust the people with arms."

Insisting on a bill of rights, the Constitution's opponents observed that "to preserve liberty, it is essential that the whole body of the people always possess arms." Patrick Henry stated, "The great object is, that every man be armed." Samuel Adams proposed an amendment "that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, . . . or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms. . . ."

Id. at 375 (footnotes omitted).

6. See U.S. CONST. amend. II. The second amendment states: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." *Id.*

7. See, e.g., GA. CONST. art. I, § 1 para. VIII which states: "The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne." *Id.*

8. For a discussion of federal, state and municipal gun control statutes, see *infra* notes 9-11 and accompanying text. For a discussion of the effect of the second amendment on federal, state, and municipal gun control laws, see Ashman, *Handgun Control By Local Government*, 10 N. KY. L. REV. 97, 110-11 (1983) (concluding that second amendment restricts federal powers only). *But see* Gottlieb, *Gun Ownership: A Constitutional Right*, 10 N. KY. L. REV. 113, 136 (1983) (arguing that second amendment is incorporated into fourteenth amendment and thus binding on states); Spannaus, *State Firearm Regulation and the Second Amendment*, 6 HAMLINE L. REV. 383, 390 (1983) (attempting to reconcile state gun controls with second amendment "right to bear arms").

9. Gun Control Act of 1968, 18 U.S.C. §§ 921-929 (1982); *see also Noncombatant's Guide to the Gun Control Fight* in *THE ISSUE OF GUN CONTROL* 38 (T. Draper ed. 1981). Federal gun control legislation generally followed violent periods in American history. *Id.* at 41. The National Firearms Act of 1934 (1934 Act) was a congressional reaction to the "gangster years" of prohibition and regulated, through taxation, the sale of machine-guns, silencers, and sawed-off shotguns. *Id.* The 1934 Act was quickly followed by the Federal Firearms Act of 1938 (1938 Act) which required interstate firearms dealers to be licensed and to keep records. *Id.* The Gun Control Act of 1968 (1968 Act) was enacted in the aftermath of the urban riots of the 1960's and the assassinations of President John Kennedy, Rev. Martin Luther King and Senator Robert Kennedy. *Id.*

The 1968 Act largely amended and coordinated existing laws. See Research Project, *Federal Firearm Legislation*, 6 HAMLINE L. REV. 409 (1983). The 1968 Act focused on assisting state gun control efforts through implementation of a national licensing system. *Id.* at 410. In addition, the act attempted to reduce vio-

tions.¹⁰ Statistics suggest, however, that legislative controls have been ineffective in preventing handgun misuse.¹¹

lent crime by limiting the availability of crime-prone firearms. *Id.* at 410-11. Thus, the Act criminalized the sale of guns to high risk individuals; banned interstate handgun sales and all interstate mail-order gun sales; and prohibited the importation of non-sporting firearms. *Id.* The Act also imposed additional federal criminal sanctions in excess of normal substantive penalties in cases where a firearm was used in the commission of a crime. *Id.* at 411.

The 1968 Act has been criticized both by pro-gun and anti-gun groups on the basis that it has been ineffective in achieving its crime reduction goals. *Id.* Recent legislative reform efforts have produced two diametrically opposed bills: The Firearms Owners Protection Act, S. 1030, 97th Cong., 2d Sess. (1982) (McClure - Volkmer) and The Handgun Crime Control Act, S. 974 & H.R. 3200 97th Cong., 1st Sess. (1981) (Kennedy - Rodino). Research Project, 6 *HAMLIN L. REV.* at 409-10. The McClure-Volkmer Act would amend the 1968 Act to reduce restrictions on gun ownership and increase penal sanctions on gun abusers. *Id.* at 410, 412-16. By contrast, the Kennedy-Rodino Act would strengthen federal gun ownership restrictions in order to decrease the availability of crime-prone weapons to high risk groups. *Id.* at 410, 416-18.

10. See McClain, *supra* note 2, at 208. Among the federal, state and municipal levels of government, it is estimated that there are more than 20,000 laws affecting gun use currently in force throughout the United States. *Id.* Many of the state and municipal statutes require permits for purchasing or possessing handguns; prohibit the sale of small handguns that do not conform to statutory size, caliber and quality minimums; and restrict possession of firearms in general to high risk individuals. *Id.* at 208-09. For a discussion of state and local firearms legislation, see generally Research Project, *Licensing and Registration Statutes*, 6 *HAMLIN L. REV.* 419 (1983); Research Project, *Municipalities and Gun Control: Handgun Bans*, 6 *HAMLIN L. REV.* 431 (1983). For a discussion of a state statute designed to reduce criminal handgun misuse without registration or confiscation, see Research Project, *Minnesota Gun Laws*, 6 *HAMLIN L. REV.* 455 (1983).

In recent years, some municipalities, such as San Francisco, have enacted ordinances banning handguns altogether, following the lead of the Village of Morton Grove, Illinois. See McClain, *supra* note 2, at 210; see also Note, Quilici v. Village of Morton Grove: *Ammunition For A National Handgun Ban*, 32 *DE PAUL L. REV.* 371 (1983) (discussing litigation resulting from ordinance banning handguns which inhibited plaintiff from opening gun store in Morton Grove). But see Research Project, *Municipalities and Gun Control: Handgun Bans*, *supra*, at 431 n.3 (noting Kennesaw, Georgia ordinance requiring all heads of households to maintain guns and ammunition for self-protection).

11. See Hardy, *Legal Restriction of Firearm Ownership as an Answer to Violent Crime: What Was the Question?*, 6 *HAMLIN L. REV.* 391, 395-97 (1983). Mr. Hardy presents statistics showing increases in violent crime following enactment of local gun controls. *Id.* at 395. Hardy discredits the use of "sociological factors" as the sole explanation of this phenomenon, citing statistical studies which considered such factors and still concluded that firearm laws have consistently failed to measureably reduce crime. *Id.* at 396 (citing Murray, *HANDGUNS, GUN CONTROL LAWS AND FIREARM VIOLENCE*, 23 *SOC. PROBS.* 81 (1975)); see also Hardy & Kates, *Handgun Availability and the Social Harm of Robbery: Recent Data and Some Projections*, in *RESTRICTING HANDGUNS, THE LIBERAL SKEPTICS SPEAK OUT* 118, 131-34 (D. Kates, Jr. ed. 1979) (suggesting that vigorous handgun prohibitions in New York City and England resulted only in increased illegal gun ownership); McClain, *supra* note 2, at 210-14 (citing studies showing that handgun controls have minimal impact on homicide rates).

Commentators have suggested that bans on small, low caliber handguns will increase the incidences of criminal homicide as criminals substitute "sawed-off"

Perceiving a need to circumvent the politics of the legislative process and in particular to avoid the strong influence of pro-gun lobby groups,¹² recent commentators have argued that a *de facto* ban of small handguns can be accomplished by persuading the judiciary to apply tort principles in order to hold gun manufacturers liable to shooting victims.¹³ In the wake of this commentary, advocates have urged courts to hold handgun manufacturers strictly liable to victims of criminal shoot-

versions of larger, more powerful weapons for use in their undiminished criminal pursuits. See, e.g., McClain, *supra* note 2, at 213-14; Hardy & Kates, *supra*, at 398-401. Commentators have also suggested that demand for small inexpensive handguns is so great that decreasing their legitimate supply will only result in an active black market supplied through theft, smuggling, and illegal production. See, e.g., Kates, *supra* note 1, at 158-60; McClain, *supra* note 2, at 213.

12. See *Noncombatants' Guide to the Gun Control Fight*, *supra* note 9, at 42-43. Opposition to gun control has been suggested to be:

monolithic and embodied in the National Rifle Association. The NRA [was] . . . organized by National Guard officers who had been disturbed that [their] Civil War recruits couldn't shoot straight. For many years it has conducted civilian marksmanship and firearms safety programs . . . and generally served the interests of hunters, firearms enthusiasts and collectors, and the firearms industry. Its lobbying arm, the NRA Institute for Legislative Action, set up in 1975, . . . describe[s] itself as "the strongest, most formidable grassroots 'lobby' in the nation . . . with a professional team of full-time lobbyists, researchers, writers and attorneys covering Capitol Hill, the White House and executive agencies." The NRA position is perfectly clear. NRA is against "discriminatory or punitive" taxes or fees for buying, owning or using a gun. It is against . . . licens[ing] . . . because that gives some government functionary the . . . [power to determine who may own guns]. It is against regist[ration] because that would not keep arms out of the hands of undesireables but would make it possible for guns to be seized "by political authorities or by persons seeking to overthrow the government by force."

Id.

13. See, e.g., Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims*, 10 N. KY. L. REV. 41 (1983). Mr. Turley has been credited with the start of a concerted effort to expand traditional areas of tort liability to effect a judicial ban of handguns by making handgun manufacturers strictly liable to shooting victims. See Comment, Halberstam v. Welch: *Economic Justice as a Means of Handgun Control?*, 7 AM. J. TR. ADV. 377 (1983) (describing new field of practice as "the Turley Angle"). Although he has advocated his theories against handgun manufacturers in a number of recently reported cases, Mr. Turley has not yet been successful in establishing such liability. See, e.g., Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985), *aff'g in part, rev'g in part*, Richman v. Charter Arms Corp., 571 F. Supp. 192 (E.D. La. 1983); Patterson v. Gesellschaft, 608 F. Supp. 1206 (N.D. Tex. 1985); Mavilia v. Stoeger Ind., 574 F. Supp. 107 (D. Mass. 1983). For a collection of legal commentary on "the Turley Angle," see *Symposium on Firearms Legislation and Litigation*, *supra* note 3; *Second Amendment Symposium: Rights in Conflict in the 1980's*, *supra* note 3.

For other commentaries advocating the need for handgun manufacturers' strict liability as an effective method of gun control, see, e.g., Turley & Harrison, *supra* note 1, at 308-09 (since legislatures are inhibited by pro-gun lobby, courts are proper place to prevent foreseeable handgun misuse by imposing strict liability on handgun manufacturers); Note, *Manufacturers' Liability to Victims of Handgun Crime: A Common-law Approach*, 51 FORDHAM L. REV. 771, 799 (1983) (suggesting shooting victim recovery based on handgun manufacturers' duty to

ings, arguing that manufacturers of such weapons are engaging in an "ultrahazardous activity" by marketing "unreasonably dangerous products" to the public.¹⁴ The proponents of these theories contend that large tort judgments against handgun manufacturers will result in substantial price increases and the eventual elimination of handgun models which are prone to criminal and other forms of misuse.¹⁵

In recent years, these theories have been tested¹⁶ and rejected in all

reasonably market and design weapons to avoid risks of foreseeable criminal use).

However, for commentary criticizing the use of tort liability to regulate handgun misuse, see Santarelli & Calio, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 ST. MARY'S L.J. 471, 507-08 (1983) (handguns are neither defective nor unreasonably dangerous and no principle of existing tort law warrants transfer of liability from criminal actor to innocent manufacturer for harm to shooting victim); Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912, 1928 (1984) (arguing handguns which function properly are not "defective" and handgun manufacturers cannot prevent criminal misuse, thus, courts should not use product liability law to preempt political debate over handgun control) [hereinafter cited as Note, *Handguns and Products Liability*], cited with approval in *Patterson v. Gesellschaft*, 608 F. Supp. 1206, 1208 (N.D. Tex. 1985); see also Hardy, *Product Liability and Weapons Manufacture*, 20 WAKE FOREST L. REV. 541, 567-68 (1984) (handguns not "unreasonably dangerous" under consumer expectation or risk/utility tests of defectiveness, and unforeseeable criminal conduct cuts off proximate causation).

14. See, e.g. *Richman v. Charter Arms Corp.*, 571 F. Supp. 192 (E.D. La. 1983), *aff'd in part, rev'd in part*, *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985). The plaintiff in *Richman* asserted:

[The murder weapon] was designed, manufactured, and marketed by Defendant in a defective condition unreasonably dangerous to consumers, bystanders, and the general public, because the risk of [foreseeable] harm associated with marketing the product, as designed, to the general public, greatly outweighs any socially accepted utility, if any Therefore, Charter Arms Corporation is "strictly liable" to Plaintiff.

Id. at 194 (quoting and paraphrasing Complaint). The court interpreted this statement to represent plaintiff's contention that the gun manufacturer should be held strictly liable to the shooting victim under a products liability theory or, alternatively, under an ultrahazardous activity theory. *Id.*

15. See, e.g., Turley & Harrison, *supra* note 1, at 309-10. The authors state:

It is estimated that perhaps 100 lawsuits premised on theories of strict liability have been filed during the last two years against handgun manufacturers and suppliers. Many more will be filed. The plaintiff will prevail in a number of these suits. Given that a seriously injured plaintiff may demonstrate economic losses of from five to ten million dollars, . . . [t]he question may no longer be whether and how product liability laws will affect handgun suppliers, but rather how soon will the suppliers self-impose their own destruction.

Id.

16. The first reported case to directly address the issue of handgun manufacturers' strict liability to shooting victims is the 1983 decision in *Richman v. Charter Arms Corp.*, 571 F. Supp. 192 (E.D. La. 1983), *aff'd in part, rev'd in part*, *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985). For a discussion of *Richman*, see *infra* notes 32-48, 88-106 and accompanying text. There are cases preceding *Richman*, however, which held that sellers of firearms may be liable to shooting victims, but only where the gun was *negligently sold* to a high risk individ-

jurisdictions in which there are reported cases on this issue.¹⁷ The "ultrahazardous activity"¹⁸ theory is largely rejected because judicial interpretation has generally limited this cause of action to activities related to land use.¹⁹ Theories of products liability²⁰ have also been rejected on the basis that handguns which are designed to propel bullets with lethal force are not legally "defective" unless there is something physically "wrong" with them.²¹ In one of the most recently reported decisions on this issue, however, Maryland's highest court acknowledged the limitations of existing strict liability principles and created a unique cause of action tailored specifically to hold manufacturers of "Saturday night specials" strictly liable to the victims of *criminal* shootings.²²

This note will first summarize the recent line of cases dealing with

ual. *See, e.g.*, *Franco v. Bunyard*, 261 Ark. 144, 547 S.W.2d 91, *cert. denied*, 434 U.S. 835 (1977) (gun dealer sold weapon to escaped convict without checking identification; convict subsequently murdered hostages).

17. For a discussion of the line of cases after *Richman* which reject the extension of products liability and ultrahazardous activity strict liability theories to manufacturers of non-defective weapons, see *infra* notes 47-118 and accompanying text.

18. The terms "ultrahazardous" and "abnormally dangerous" are used interchangeably to describe activities that create grave risks to the public despite the actor's exercise of reasonable care. *See, e.g.*, *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1203 (7th Cir. 1984) (discussing imposition of strict liability where "abnormally dangerous" or "ultrahazardous" activities cause harm to members of public). *See generally* R. EPSTEIN, C. GREGORY & H. KALVERN, *CASES AND MATERIALS ON TORTS* 572-95 (4th ed. 1984) [hereinafter cited as R. EPSTEIN & C. GREGORY] (presenting cases demonstrating "ultrahazardous or abnormally dangerous activities").

19. *See, e.g.*, *Kelley v. R.G. Indus.*, 304 Md. 124, 133, 497 A.2d 1143, 1147 (1985) (abnormally dangerous activity doctrine not applicable unless alleged tortfeasor is owner or occupier of land); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1267 (5th Cir. 1985) ("ultrahazardous activity" must be related to land use). For a discussion of cases applying the ultrahazardous activity doctrine to the manufacture and marketing of handguns, see *infra* notes 28-66 and accompanying text.

20. For a discussion of the theoretical and historical basis of modern products liability law, see *infra* notes 68-86 and accompanying text.

21. For a discussion of cases applying products liability theories to handgun manufacture and sale, see *infra* notes 88-134 and accompanying text.

22. *Kelley v. R.G. Indus.*, 304 Md. 124, 497 A.2d 1143 (1985). For a discussion of the *Kelley* court's new form of strict liability, see *infra* notes 120-34 and accompanying text. For recent commentary discussing the *Kelley* decision, see generally Note, *Saturday Night Specials, a "Special" Exception in Strict Liability Law*, 61 NOTRE DAME L. REV. 478 (1986) (arguing in favor of *Kelley* approach of creating narrow strict liability cause of action to further social policy goals); Case Note, *Holding Handgun Manufacturers Strictly Liable: The Search For a Theory*; *Kelley v. R.G. Indus. Inc.*, 304 Md. 124, 497 A.2d 1143 (1985) (approach in *Kelley* proper to prevent purposeful manufacture and sale of small handguns to criminals); Casenote, *Torts—Strict Liability—Manufacturers' or Marketers' Liability For the Criminal Use of Saturday Night Specials: A New Common Law Approach*, 14 FLA. ST. U.L. REV. 149 (1986) (arguing in favor of *Kelley* holding); Casenote, *Kelley v. R.G. Industries: Gun Control Fires Back*, 21 TORTS & INS. L.J. 493 (1986) (favoring *Kelley* result but presenting possible statutory and constitutional problems).

the issue of whether manufacturers of handguns should be held strictly liable to shooting victims under traditional theories of relief. The first cases presented demonstrate the rejection of the "ultrahazardous activity" doctrine as an avenue of relief. Next, cases demonstrating the rejection of products liability theories will be discussed. Finally, the Maryland case, *Kelley v. R.G. Industries*,²³ which created a unique cause of action against certain handgun manufacturers will be discussed.

Against this background, and in light of fundamental principles of modern tort law,²⁴ this note will analyze the propriety of a theory of tort recovery based solely on the manufacture of handguns which are deemed to be crime-prone.²⁵ This note will suggest that the decisions leading to *Kelley* properly recognized that the appropriate forum in which to balance the risks against the benefits of small handguns is the legislature. This note will then argue that the *Kelley* court's display of judicial activism, albeit well intentioned, was inconsistent with Maryland's legislated public policy because the Maryland legislature, con-

23. 304 Md. 124, 497 A.2d 1143 (1985).

24. For a discussion of the evolution of modern tort principles, see W. PROSSER, *THE LAW OF TORTS* 492-96 (4th ed. 1971). Early common law tort cases imposed strict civil liability for all acts which resulted in damages to another. *Id.* at 492; see, e.g., *The Thorns Case*, Y.B. Mich. 6 ed. 4, f.7, pl 18 (1466), reprinted in R. EPSTEIN & C. GREGORY, *supra* note 18, at 56 (defendant held strictly liable for trespass resulting from cutting and retrieving thorns which accidentally fell onto plaintiff's land). Tort principles slowly progressed toward recognition of "fault" as a basis of liability. W. PROSSER, *supra*, at 492; see, e.g., *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616), reprinted in R. EPSTEIN & C. GREGORY, *supra* note 18, at 61 (no liability for accidental shooting during military exercise because defendant "had committed no negligence to give occasion to the hurt").

As negligence concepts replaced strict liability during the 19th century, the concept of "fault" developed to embody the notion that an innocent departure from an objective standard of reasonableness in the conduct of one's affairs is sufficient to require the "negligent" actor to compensate his innocent victim. W. PROSSER, *supra*, at 493; see also *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850), reprinted in R. EPSTEIN & C. GREGORY, *supra* note 18, at 74 (defining standard of "ordinary care" as that which "prudent and cautious men would use").

Following the evolution of negligence concepts, theories of strict liability re-emerged during the 20th century. See W. PROSSER, *supra*, at 494. These traditional strict liability principles are presently applied in cases dealing with escaped animals and in cases where "abnormally dangerous things and activities" cause injury. *Id.* at 494, 496-516; see also *Baker v. Snell*, 2 K.B. 825 (1908), reprinted in R. EPSTEIN & C. GREGORY, *supra* note 18, at 564 (dog bite); *Spano v. Perini Corp.*, 25 N.Y.2d 11, 250 N.E.2d 31, 302 N.Y.S.2d 527 (1969) (blasting activities).

25. For a discussion of data relating handgun type to types of violent crime, see McClain, *supra* note 2, at 204-09. Correlating handgun type with tendency for criminal use is exceedingly difficult due to conflicting data and is a subject beyond the scope of this note. See *id.* For the purpose of analyzing a basis for handgun manufacturers' tort responsibility, this note will proceed on the assumption that certain handgun manufacturers may have knowledge that their products are "crime-prone" and possibly "target market" these weapons in high crime areas. For a discussion of "target marketing," see *infra* note 168 and accompanying text.

fronted with the same evidence, chose *not* to ban "saturday night specials" as a sub-group of socially undesirable firearms.²⁶

This note will conclude by suggesting that the proper focus in a case such as *Kelley* should be on the *conduct* of the gun manufacturer, rather than on the physical characteristics of its *product*. It will argue that the proper approach should be to allow a neutral factfinder to hear courtroom evidence in order to determine whether the handgun manufacturer *acted* negligently or recklessly in marketing dangerous products to criminals and other high risk market segments.²⁷ For example, holding a handgun manufacturer liable to foreseeable victims whose injuries proximately resulted from the manufacturer's tortious target marketing practices would be entirely consistent with existing tort principles. This note will demonstrate however that recent attempts to circumvent the legislative process and effect a judicial ban on "saturday night specials" through tortured expansion of strict liability principles represents an improper use of judicial resources.

II. BACKGROUND

A. "ULTRAHAZARDOUS ACTIVITY"

The rationale of strict liability for "ultrahazardous" or "abnormally dangerous" activities lies in the assumption that certain activities are so inherently dangerous that they create a risk of great harm to the public notwithstanding the exercise of reasonable care by the actor.²⁸ A majority of courts have suspended the requirement that a plaintiff demonstrate negligence when injury was proximately caused by a defendant's abnormally dangerous act.²⁹ The injury, however, must fall within the

26. *Cf. Patterson v. Geshelschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985). The *Patterson* court concluded: "[d]espite the well documented dangers of 'Saturday Night Specials' and other handguns, not a single state has seen fit to prohibit the manufacture and sale of handguns. Nor has Congress passed any meaningful gun-control measures." *Id.* at 1215.

27. For a discussion of evidence in the *Kelley* case suggesting that the defendant gun manufacturer knowingly marketed small, crime-prone handguns in high crime areas, see *infra* note 127 and accompanying text.

28. See W. PROSSER, *supra* note 24, at 494. Dean Prosser states:

[T]he courts have in effect recognized a new doctrine, that the defendant's enterprise, while it will be tolerated by the law, must pay its own way. . . . This new policy frequently has found expression where the defendant's activity is unusual and abnormal in the community, and the danger which it threatens to others is unduly great—and particularly where the danger will be great even though the enterprise is conducted with every possible precaution. The basis of liability is the defendant's intentional behavior in exposing those in his vicinity to such a risk.

Id. (footnote omitted).

29. See *id.* The ultrahazardous activity doctrine emerged from the 19th century English case of *Rylands v. Fletcher*. 3 H. & C. 774, 159 Eng. Rep. 737 (1865), *rev'd*, L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868); see W. PROSSER, *supra* note 24, at 505-06 (discussing *Rylands*). In *Rylands*, the defendant con-

scope of risks anticipated by the actor in light of the abnormally dangerous aspects of the act.³⁰ The reason behind this rule is that social policy considerations and principles of fairness favor recovery for plaintiffs where: 1) proof of negligence or intent is impossible; 2) the defendant is benefitting at the risk of grave harm to the public; and 3) as between the innocent victim and a risk-creating, albeit reasonable, defendant, the risks of injury belong with the defendant.³¹

structed a large man-made water reservoir on his property. *Id.* The water from this tank eventually leaked through the bottom and flowed underground through abandoned mine shafts into the plaintiff's adjoining property. *Id.* The English court found no unreasonable conduct on the part of the defendant, yet held him liable for plaintiff's damages. *Id.* In the Exchequer Chamber, Justice Blackburn stated the principle that anyone who kept anything on his land for his own purposes which "is likely to do mischief if it escapes, must keep it at his peril." *Id.* In the House of Lords, this rule was limited by Lord Cairns to cases where a defendant made a "non-natural" use of his land. *Id.*

Rylands was initially rejected by a majority of American jurisdictions because dangerous enterprises were deemed indispensable to the development of a new country. *Id.* at 508-09. However, the doctrine now enjoys majority acceptance as the country's resources have developed to the point where hazardous enterprises can be expected to shoulder the burden of providing compensation to the victims of industrial development. *Id.* A classic application of this doctrine in American jurisprudence lies in cases where the use of explosives causes damages due to shock concussion. *See, e.g., Spano v. Perini Corp.*, 25 N.Y.2d 11, 250 N.E.2d 31, 302 N.Y.S.2d 527 (1969). In *Spano*, the court stated that where the defendant's blasting "involves a substantial risk of harm no matter the degree of care exercised, we perceive no reason for ever permitting a person . . . to impose this risk upon nearby persons or property without assuming responsibility therefore." *Id.* at 18, 250 N.E.2d at 35, 302 N.Y.S.2d at 532. The court thus held that the defendant would be liable to the plaintiffs once plaintiffs proved causation. *Id.* at 19, 250 N.E.2d at 35-36, 302 N.Y.S.2d at 533.

30. *See* RESTATEMENT (SECOND) OF TORTS § 519(2) (1977). Section 519 provides for strict liability for abnormally dangerous activities, stating:

- (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
- (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Id. § 519. The drafters of the *Second Restatement* state that designating an activity "abnormally dangerous" does not render the actor strictly liable for every possible harm that may result from his actions. *Id.* comment e. Rather, as comment e explains, strict liability applies only to harm that is within the scope of the abnormal risk which forms the basis of the liability. *Id.* For example, transporting explosives by truck is an abnormally dangerous activity due to the risk that an explosion may injure people and property in the vicinity. *Id.* Thus, injuries resulting from such an explosion will create strict liability. *Id.*; *see, e.g., Siegler v. Kuhlman*, 81 Wash. 2d 448, 502 P.2d 1181 (transporter of gasoline strictly liable to victim of highway explosion), *cert. denied*, 411 U.S. 983 (1973). However, if the same truck were to simply run over a pedestrian, there would be no liability unless the truck was negligently driven. RESTATEMENT (SECOND) OF TORTS § 519 comment e (1977); *cf. Madsen v. East Jordan Irr. Co.*, 101 Utah 552, 125 P.2d 794 (1942) (blaster not strictly liable where vibrations frightened plaintiff's minks causing them to kill their kittens).

31. *See generally* W. PROSSER, *supra* note 24, at 494-96, 505-16 (explaining

The first recorded application of the ultrahazardous activity doc-

doctrine and citing examples). The ultrahazardous activities doctrine has been embodied in the *Second Restatement* which recognized the imposition of strict liability where a defendant has "carri[ed] on an abnormally dangerous activity," but only in cases where the harm done is such that its very possibility is the reason for classifying the activity as abnormally dangerous. RESTATEMENT (SECOND) OF TORTS § 519 (1977). For relevant text, see *supra* note 30.

The *Second Restatement* sets forth six factors which are weighed to determine whether an activity is "abnormally dangerous." RESTATEMENT (SECOND) OF TORTS § 520 (1977). Section 520 provides:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Id.

Of the first three factors, the drafters state: "A combination of the[se] factors . . . or sometimes any one of them alone, is commonly expressed by saying that the activity is 'ultrahazardous,' or 'extra-hazardous.'" *Id.* comment h. The drafters further suggest that as the gravity of potential harm increases, a lesser likelihood of it taking place is required for the activity to be regarded as abnormally dangerous. *Id.* comment g. The drafters explain that the risk referred to is the residual risk in an activity after all reasonable precautions have been taken. *Id.* comment h. Thus the risk need not be one that no conceivable precautions or care could eliminate. *Id.*

Regarding the fourth, "common usage" factor, the drafters stated that: [a]n activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community. . . .

Thus automobiles have come into such general use that their operation is a matter of common usage. This, notwithstanding the residue of unavoidable risk of serious harm that may result even from their careful operation, is sufficient to prevent their use from being regarded as an abnormally dangerous activity.

Id. comment i.

In terms of the "location" test, the drafters suggest that activities such as blasting, storing explosives, and collecting large quantities of water are not abnormally dangerous when carried on in remote areas where persons and valuable property are not constantly at risk. *Id.* comment j. However, these same activities would warrant strict liability if carried on in an urban setting, even if they were socially useful activities. *Id.* In the drafters' words:

[t]he fact that the activity is inappropriate to the place where it is carried on is a factor of importance in determining whether the danger is an abnormal one. This is sometimes expressed, particularly in the English cases, by saying there is strict liability for a "non-natural" use of the defendant's land.

Id.

Lastly, the drafters state that the sixth factor provides a balancing test, which they articulate as follows:

[an activity's] value to the community may be such that the danger will not be regarded as . . . abnormal . . . Thus . . . [i]n England, . . .

trine to the manufacture of handguns was *Richman v. Charter Arms Corp.*³² In *Richman*, the plaintiff brought a wrongful death action in the United States District Court for the Eastern District of Louisiana against the manufacturer of a "snub-nose" .38 caliber pistol which was used in the rape/murder of plaintiff's daughter.³³ The plaintiff's complaint broadly averred a theory of recovery in strict liability based on the allegation that the handgun manufacturer had designed and marketed an unreasonably dangerous product to the general public which foreseeably caused the death of plaintiff's daughter.³⁴ When considering the defendant's motion for summary judgment, the district court interpreted plaintiff's contentions to state alternative causes of action, in strict products liability and under the ultrahazardous activity doctrine.³⁵ The court held that the plaintiff was not entitled to relief under the law of products liability

where constant streams and abundant rains make the storage of water unnecessary for ordinary or general purposes, a large reservoir in an inappropriate place has been found to be abnormally dangerous. . . . [whereas], [i]n west Texas, a dry land whose livestock must have water, such a reservoir is regarded as 'a natural and common use of the land.'

Id. comment k.

Although many jurisdictions deny that these factors are controlling in their decisions, all of the courts which have considered whether the manufacture and sale of handguns is an ultrahazardous activity have incorporated the *Second Restatement's* factors into their analyses. See, e.g., *Burkett v. Freedom Arms*, 299 Or. 551, 557-58, 704 P.2d 118, 121 (1985) ("this court does not necessarily adhere to the six factors listed in section 520. . . . our focus has been on 'assessing abnormal hazards by their potential for [great] harm . . . despite the utmost care'"); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1203 (7th Cir. 1984) ("Illinois . . . has never explicitly relied upon the Restatement factors in determining whether an activity is abnormally dangerous."); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1265, 1268 (5th Cir. 1985) (marketing of handguns to public falls outside boundaries of Louisiana doctrine but even the *Second Restatement* would not impose strict liability on such activity).

32. 571 F. Supp. 192 (E.D. La. 1983), *aff'd in part, rev'd in part*, *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985).

33. 571 F. Supp. at 193-94. On April 4, 1981, Willie Watson obtained a .38 caliber handgun from an acquaintance which he used that night in the kidnapping, robbery, and rape of plaintiff's daughter Kathy Newman, a third year medical student at Tulane University. *Id.* at 193. Watson then instructed Newman to dress herself, and as she did so he shot her in the back of the head, killing her. *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1253 (5th Cir. 1985). Watson was convicted of first degree murder and sentenced to death. *Id.*; *accord State v. Watson*, 449 So. 2d 1321 (La. 1984), *cert. denied*, 469 U.S. 1181 (1985).

34. *Richman*, 571 F. Supp. at 194. For a discussion of plaintiff's contentions, see *supra* note 14 and accompanying text.

35. *Richman*, 571 F. Supp. at 194. The court distinguished the case from ordinary strict liability cases on the basis that this case involved the intervening "reprehensible actions" of a third party criminal. *Id.* at 194-95. The plaintiff contended that the law nonetheless permitted her to sue and recover from the defendant gun manufacturer, who then would have the burden of trying to recover from the criminal. *Id.* at 195. The manufacturer of the handgun defended on grounds that the intervening third party criminal act was the sole cause of plaintiff's daughter's injury and death. *Id.* at 204-05. For a discussion of the court's rejection of this defense, see *infra* notes 41-43 and accompanying text.

in Louisiana and granted summary judgment on that issue.³⁶ The court, however, refused to deny relief under the ultrahazardous activity doctrine.³⁷ Since no Louisiana cases specifically precluded the application of this strict liability theory to the activity of manufacturing firearms,³⁸ the court applied the doctrine to the facts in the *Richman* record and determined that genuine factual disputes existed with respect to each of six factors used by the *Second Restatement of Torts* for determining when an activity is "ultrahazardous."³⁹ Thus, the court denied summary judgment.

36. *Richman*, 571 F. Supp. at 195-98. The court found that the handgun used by Willie Watson was not unreasonably dangerous for its intended use under Louisiana law. *Id.* at 197-98. For a discussion of the products liability analysis in *Richman*, see *infra* notes 86-96 and accompanying text.

37. See 571 F. Supp. at 199-204, 209.

38. *Id.* at 199. The *Richman* court stated that Louisiana courts have imposed a form of absolute liability when activities are ultrahazardous. *Id.* In such cases liability is imposed as a matter of policy when harm results from the risks inherent with the activity. *Id.* The court found no Louisiana cases which addressed the issue of whether activities involving handguns were ultrahazardous. *Id.* However, the *Richman* court found that Louisiana cases have repeatedly stated in dicta that people handling or distributing highly dangerous substances such as explosives, electricity and *firearms* are held to a high degree of care. *Id.* (citations omitted). Since distributors of electricity and explosives were subject to strict liability under Louisiana law, the court concluded that it had "no alternative but to examine the defendant's handgun marketing practices" under the ultrahazardous activities doctrine. *Id.*

39. *Id.* at 199-204. The court found support in Louisiana caselaw for applying the *Second Restatement's* six factors to determine whether marketing small handguns is an abnormally dangerous activity. *Id.* at 199-200 (quoting *Langlois v. Allied Chemical Corp.*, 258 La. 1067, 249 So. 2d 133 (1971)). For a discussion of relevant *Second Restatement* provisions, see *supra* note 31 and accompanying text.

The *Richman* court stated that resolution of the first two factors, which require consideration of the risks and likelihood of serious injury resulting from defendant's marketing practices, hinged on issues of causation most appropriately considered by a jury. 571 F. Supp. at 201. As to the third factor, the court found legal merit in plaintiff's contention that, as long as defendant continued to market handguns to the general public, no amount of due care could significantly reduce the risk of serious harm to potential shooting victims. *Id.* As to the fourth factor, the court stated that "[h]andguns are not an item of 'general use'; they are an item of extraordinary or abnormal use. . . . Thus, [as distinguished from automobiles and alcoholic beverages], the Court cannot conclude that the operation of handguns is 'a matter of common usage.'" *Id.* at 202.

The court went on to find that the *Second Restatement's* fifth factor, pertaining to the appropriateness of location, was also supportive of plaintiff's claims. *Id.* The court found plaintiff's argument that "there is no place in the United States where handguns can be safely marketed for sale to the general public" to be persuasive and not subject to disposal on summary judgment. *Id.* Lastly, the court applied the *Second Restatement's* sixth factor to plaintiff's contention that "marketing handguns to the general public has no utility at all." *Id.* The court found this statement to be an "exaggeration" in light of the fact that the manufacture of handguns is socially useful to the extent that it provides jobs and a means of self defense to the community. *Id.* However, the court noted that the gun manufacturers have the ability to spread the risks of their activity to their customers, stating that "fairness and economic efficiency suggest that the community would be better off if the defendant's marketing practices were classified

ment to the defendant gun manufacturer on this theory.⁴⁰

The *Richman* court also considered the manufacturer's defense that the criminal use of the handgun was an intervening force which was the sole proximate cause of the victim's death.⁴¹ The court suggested that criminal use of a handgun is not unforeseeable and therefore does not break the causal link between the marketer of a gun and the injury inflicted by the gun in the hands of a criminal.⁴² Further, the court found Louisiana precedent unclear regarding the extent to which actions of a third person cut off strict liability under the ultrahazardous activity doctrine.⁴³ The court stated that the critical question before it was not to determine causation, but rather to answer the question: "What are the legal limits of a handgun manufacturer's liability for the criminal acts of

as ultrahazardous." *Id.* at 202-04. The court concluded that the defendant's handgun marketing practices were not so valuable to the community that they should be automatically exempt from the "ultrahazardous" classification. *Id.* at 204. The court went on to suggest that the defendant would bear the burden of trial of demonstrating that its marketing practices were a matter of common usage or were of such value to the community as to avoid having the activity classified as ultrahazardous. *Id.*

40. 571 F. Supp. at 204, 209.

41. *Id.* at 204-09. The court stated that "[u]nder Louisiana law, no defendant can be strictly liable for any injury 'caused by the fault of the victim, by the fault of a third person, or by an irresistible force.'" *Id.* at 204 (citations omitted). The court went on to cite Louisiana precedent limiting this defense to cases where the third person fault is the sole cause of the damage. *Id.* at 205; *accord*, *Olsen v. Shell Oil Co.*, 365 So. 2d 1285 (La. 1979) (adopting the formulation of superseding intervening causation of RESTATEMENT (SECOND) OF TORTS §§ 440-453 (1965)).

42. *Richman*, 571 F. Supp. at 206-08. In considering the issue of causation, the court relied upon sections 440 and 448 of the *Second Restatement*. *Id.* at 206. Section 440 defines superseding cause as "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." RESTATEMENT (SECOND) OF TORTS § 440 (1965). Section 448 provides that:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third party to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Id. § 448.

43. *Richman*, 571 F. Supp. at 206. The court noted that while Louisiana courts had only applied the *Restatement* formulation for superseding cause in negligence cases, the Louisiana Supreme Court had stated in dicta that the formulation is also applicable to strict liability cases. *Id.* at 207 (citing *Olsen v. Shell Oil Co.*, 365 So. 2d 1285 (La. 1979)). Finding no principled distinctions between negligent and intentional acts of third persons, the *Richman* court concluded that the dispositive question is not one of sole or superseding causation but rather whether the gun manufacturer's activities were a "substantial factor" contributing to the criminal shooting. *Id.* at 207.

third persons?"⁴⁴ The trial judge thus denied summary judgment and immediately certified all questions of law to the United States Court of Appeals for the Fifth Circuit.⁴⁵

On appeal, the Fifth Circuit in *Perkins v. F.I.E. Corp.*⁴⁶ reversed *Richman* on the ultrahazardous activity issue and remanded with instructions for the district court to grant summary judgment to the handgun manufacturer.⁴⁷ The Fifth Circuit performed an extensive analysis of Louisiana ultrahazardous activity precedent⁴⁸ and found that the determination of whether an activity is abnormally dangerous is strictly a question of law.⁴⁹ The Fifth Circuit further found that a court applying Louisiana's ultrahazardous activity law must analyze the activity within the following limitations: 1) the activity must be related to land or immovables; 2) the activity itself must cause the injury; and 3) the activity must be such that substantial participation by third parties is not required to produce the injury.⁵⁰ The court concluded that the activity of marketing handguns fell "far beyond" these boundaries and held that marketing handguns was therefore not an abnormally dangerous activity in Louisiana.⁵¹

44. *Id.* at 208. The court went on to discuss the political nature of the issue of handgun violence. *Id.* at 208-09. The court noted that under Louisiana jurisprudence, "except in the clearest of cases," a judge may shape his application of the law to the facts by considering the case from the standpoint of a legislator regulating the matter at issue. *Id.* at 208 (quoting *Entrevia v. Hood*, 427 So. 2d 1146, 1149 (La. 1983)). The court noted that the *Richman* case was not one of "the clearest cases" and that the Louisiana legislature, while permitting the sale and use of handguns, had not yet considered the issue of strict liability for handgun manufacturers. *Id.* at 208. The court concluded that this silence, viewed in connection with the applicability of both Louisiana and the *Second Restatement* criteria for ultrahazardous activity, prevented the court from denying plaintiff a remedy as a matter of law. *Id.* at 209.

45. See *Perkins v. F.I.E. Corp.*, 743 F.2d 262 (5th Cir. 1984). The Fifth Circuit in turn certified questions of law to the Louisiana Supreme Court. *Id.* at 264-65 (citing LA. REV. STAT. ANN. tit. 13 § 72.1 (1973)). The Louisiana court declined to accept certification, with two judges dissenting. *Perkins v. F.I.E. Corp.*, 460 So. 2d 1039 (La. 1984).

46. 762 F.2d 1250 (5th Cir. 1985). *Perkins* was a consolidated appeal of two cases in which victims of criminal shootings involving small caliber handguns sought recovery from handgun manufacturers. *Id.* at 1252. In the *Perkins* case, the district court had granted summary judgment to the defendant on both the products liability and ultrahazardous activity theories and the Fifth Circuit affirmed. *Id.* at 1252-53.

47. *Id.* at 1252, 1275.

48. *Id.* at 1254-69.

49. *Id.* at 1260.

50. *Id.* at 1267-68.

51. *Id.* at 1268. The Fifth Circuit stressed that since liability for ultrahazardous activities is "absolute" under Louisiana law, the extension of this doctrine to manufacturers of inherently dangerous products would make manufacturers insurers against all risks associated with their products. *Id.* at 1269. Thus, the extension of this liability for handgun manufacture logically could require its application to many other useful consumer products. *Id.*

In the time between the *Richman* and *Perkins* decisions, the Seventh Circuit also considered and rejected the application of the ultrahazardous activity doctrine to the manufacture and marketing of handguns.⁵² In *Martin v. Harrington and Richardson, Inc.*,⁵³ the Seventh Circuit stated that while the *use* of handguns is “clearly” an ultrahazardous activity under Illinois law, the *sale* of non-defective handguns is not.⁵⁴ The Seventh Circuit criticized the *Richman* decision on the basis that it “blur[red] the distinction between strict liability for selling unreasonably dangerous *products* and strict liability for engaging in ultrahazardous *activities* by making the sale of a product an activity.”⁵⁵ The court found that imposition of strict liability where a non-negligent manufacturer produces a non-defective but inherently dangerous handgun would be contrary to Illinois’ firearms policy.⁵⁶ In addition, the

52. See *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984). In *Martin*, two brothers shot and killed plaintiff’s husband with a Harrington & Richardson pistol. *Id.* at 1201. The United States District Court for the Northern District of Illinois found no support in Illinois law for plaintiff’s theory that the defendant gun manufacturer should be held strictly liable under either a product liability or ultrahazardous activity theory and dismissed the wrongful death action for failure to state a cause of action. *Id.* The Seventh Circuit affirmed, reasoning that under Illinois law a manufacturer of a non-defective handgun could not be held strictly liable to the victim of a criminal shooting. *Id.* at 1204-06.

The plaintiff petitioned for rehearing and motioned to certify questions of law to the Supreme Court of Illinois. *Id.* at 1207. The Seventh Circuit denied rehearing and certification on the basis that recent Illinois precedent was in accord with its conclusions of law. *Id.* (citing *Linton v. Smith & Wesson*, 127 Ill. App. 3d 676, 469 N.E.2d 339 (Ill. App. Ct. 1984) (manufacturer of handguns has no duty under Illinois law to control distribution to general public and is not strictly liable to shooting victims under products liability or ultrahazardous theories)); see also *Riordan v. Int’l Armament Corp.*, 132 Ill. App. 3d 642, 477 N.E.2d 1293 (Ill. App. Ct. 1985) (following *Linton* and *Martin*).

53. 743 F.2d 1200 (7th Cir. 1984). The Seventh Circuit addressed the applicability of both products liability and ultrahazardous activity theories under Illinois law. *Id.*

54. *Id.* at 1203. The court rejected plaintiff’s claim that the marketing of handguns to the general public is an abnormally dangerous activity under the *Second Restatement’s* formulation, noting that Illinois courts rely on these factors for guidance only. *Id.* For a discussion of the *Second Restatement’s* formulation, see *supra* note 31 and accompanying text.

55. *Martin*, 743 F.2d at 1204 (emphasis in original). The Seventh Circuit contrasted the *Richman* holding with an Illinois trial court opinion in *Riordan v. Int’l Armament Corp.*, 81 L.27923 (Cir. Ct. Cook County 1983), *aff’d*, 132 Ill. App. 3d 642, 477 N.E.2d 1293 (Ill. App. Ct. 1985). The *Martin* court adopted the *Riordan* court’s reasoning that imposition of strict liability on handgun manufacturers based merely on their marketing practices would ultimately make them insurers against all risks associated with their products. *Martin*, 743 F.2d at 1204. The court concluded that this is a matter of social policy for the legislature, not the judiciary, to resolve. *Id.*

56. *Martin*, 743 F.2d at 1204. The court noted that Illinois’ constitution and statutes protect its private citizens’ right to bear arms:

The State of Illinois regulates, but does not ban, the possession of handguns. . . . this express policy is a strong indication that handguns

court noted that Illinois law would relieve gun manufacturers of all liability where an intervening force, such as criminal conduct, becomes the sole cause of the plaintiff's gunshot injury.⁵⁷

The *Martin* court concluded that Illinois law and public policy provided no support for a federal court hearing a diversity action to expand the state's traditional strict liability theories to encompass an "enterprise liability" standard which could be used to ban or spread the risks associated with marketing inherently dangerous products.⁵⁸ The Seventh Cir-

should not be considered unreasonably dangerous. . . . Imposing [strict] liability for the sale of handguns, which would in practice drive manufacturers out of business, would produce a handgun ban by judicial fiat in the face of the decision of Illinois to allow its citizens to possess handguns.

Id. (citing *Mavilia v. Stoeger Indus.*, 574 F. Supp. 107 (D. Mass. 1983) (Massachusetts' decision to allow possession of handguns precludes imposing strict liability on handgun manufacturers under products liability law)).

57. *Martin*, 743 F.2d at 1205. The court stated that "[w]ith the exception of *Richman*, every decision that has considered the foreseeability of criminal uses of firearms has found that such criminal activity is not reasonably foreseeable." *Id.*; see also *Bennet v. Cincinnati Checker Cab. Co.*, 353 F. Supp. 1206 (E.D. Ky. 1973) (pre-1968 Act mail order handgun dealer not liable for criminal misuse by customers); *Adkinson v. Rossi Arms Co.*, 659 P.2d 1236 (Alaska 1983) (manufacturer of gun owes no legal duty and is not liable to victim of fatal shooting by third person); *Hulsman v. Hemmeter Dev. Corp.*, 65 Haw. 58, 647 P.2d 713 (1982) (seller of gun not liable for plaintiff's gunshot injury as proximate cause was unforeseeable criminal act of third person); *Robinson v. Howard Bros.*, 372 So. 2d 1074 (Miss. 1979) (gun shop was negligent per se in selling handgun to minor in violation of 1968 Act, but minor's subsequent criminal use was "independent intervening cause" cutting off gun-shop's liability to shooting victim); *Hulsebosch v. Ramsey*, 435 S.W.2d 161 (Tex. 1968) (independent negligence of third party rifle user barred finding gun manufacturer liable for plaintiff's injury). But see *Franco v. Bunyard*, 262 Ark. 144, 547 S.W.2d 91 (1977) (gun dealer who negligently sold gun to escaped convict held liable for deaths of two hostages resulting from escapee's subsequent criminal acts), *cert. denied*, 434 U.S. 835 (1977).

58. *Martin*, 743 F.2d at 1205. The *Martin* majority expressed its reluctance to adopt a theory of strict liability which was premised solely on the justification that whenever someone is injured, someone must be accountable for the damages. *Id.* To adopt such a theory, the court found, would advance the jurisprudence of Illinois toward that of the fictional future society called "Litigatia." *Id.*; see P. Horton, *How Lawsuits Brought the World's Greatest Nation to Ruin*, MEDICAL ECONOMICS, Feb. 21, 1977, at 142. In the fictional land of "Litigatia":

Throughout the economy, new ventures disappeared. New factories were not built, since no new locations could be found where it was legally possible to build them. In 1998, the U.S. Supreme Court promulgated the "omnia culpa" doctrine (*Lipshitz v. General Motor Corp.*), which in plain language meant that whenever a person suffered injury through use of a product, all persons or corporations who had any contact with the product, from raw material to delivery van, were equally liable to damage claims. It soon became very difficult to get anyone to make or sell anything, and most people went back to the ancient art of making things for themselves.

743 F.2d at 1205 (quoting P. Horton, *supra*, at 149) (emphasis in original).

In a concurring opinion, however, Judge Cudahy asserted that handgun violence imposed substantial costs on society as a whole. *Id.* at 1206 (Cudahy, J.,

cuit affirmed a grant of summary judgment in favor of the defendant handgun manufacturer, ruling that Illinois law does not require such manufacturers to insure the public against all hazards posed by their products.⁵⁹

Perkins, published eight months after *Martin*, adopted the foregoing logic as part of its justification for reversing *Richman*, holding that under Louisiana law the sale of handguns was not abnormally dangerous.⁶⁰ Similarly, one month after *Perkins*, the Supreme Court of Oregon held in *Burkett v. Freedom Arms*⁶¹ that even “the design, manufacture, sale and marketing of a small, easily concealable handgun does not constitute an abnormally dangerous activity. . . .”⁶²

The most recently reported decision addressing the issue of whether marketing handguns is an ultrahazardous activity is *Kelley v R.G. Industries*.⁶³ In *Kelley*, the Maryland Court of Appeals reasoned that the

concurring). He suggested that imposition of strict liability on the sellers and manufacturers of handguns would represent a proper attempt to shift these costs onto the users rather than the victims of handguns. *Id.* (Cudahy, J., concurring). Judge Cudahy would not view this liability as an improper “attempt to drive handguns from the market. . . .” *Id.* (Cudahy, J., concurring).

59. *Martin*, 743 F.2d at 1205-06.

60. See *Perkins*, 762 F.2d at 1267-69.

61. 299 Or. 551, 704 P.2d 118 (1985). In *Burkett*, the plaintiff was injured by a .22 caliber “freedom arms handgun” used by an inmate attempting a jail break. *Id.* at 553, 704 P.2d at 119. The handgun was concealable as part of a belt-buckle and was marketed by the defendant to the general public. *Id.* The plaintiffs initially sought recovery under Oregon’s products liability law and the action was dismissed by the United States District Court for the District of Oregon. *Id.* at 555, 704 P.2d at 120. The plaintiffs amended their complaint to assert that the defendant’s marketing “small, easily concealable handguns” was an abnormally dangerous activity under Oregon law. *Id.* The district court declined to rule on a second motion to dismiss pending answers to questions of law certified to the Supreme Court of Oregon. *Id.* at 554, 704 P.2d at 120. The Supreme Court of Oregon adopted the reasoning of *Perkins*, *Martin*, and the *Second Restatement* §§ 519-20 to the effect that marketing a dangerous product to the public is not an abnormally dangerous activity even if the use of such product is. *Id.* at 555-57, 704 P.2d at 120-21.

The court further stated that the imposition of strict liability on manufacturers of non-defective products “would amount essentially to the imposition of enterprise liability. . . . [which this] court has rejected . . . standing alone as a justification for the imposition of strict liability. *Id.* at 558, 714 P.2d at 122 (citing *Tillman v. Vance Equip. Co.*, 286 Or. 747, 753, 596 P.2d 1299 (1979)(basis of strict liability is implied representation of safety, not enterprise liability, thus, seller of used tractor “as is” held not liable for hidden design defect)).

62. *Burkett*, 299 Or. at 558, 704 P.2d at 122 (emphasis added).

63. 304 Md. 124, 497 A.2d 1143 (1985). In *Kelley*, the plaintiff was shot and seriously injured with a Rohm Gesellschaft .38 caliber pistol. *Id.* at 128, 497 A.2d at 1144-45. The plaintiff brought action initially in a state circuit court seeking recovery under products liability, ultrahazardous activity, and negligence theories. *Id.* at 129, 497 A.2d at 1145. The defendants had the case removed to the United States District Court for the District of Maryland and motioned for dismissal for failure to state a cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6). *Id.* at 129, 497 A.2d at 1145. The district

thrust of the abnormally dangerous activity doctrine under Maryland law is that the activity creates danger in relation to the area in which it takes place.⁶⁴ The court stated that the criminal use of handguns bears no relation to the manufacturer's ownership or occupancy of land and thus Maryland's abnormally dangerous activity doctrine provides no vehicle for recovery where a plaintiff is intentionally shot with a handgun.⁶⁵ The *Kelley* court declared itself to be in accord with the reasoning in *Perkins*, *Martin* and *Burkett* on this issue.⁶⁶

B. PRODUCTS LIABILITY

Until recently, manufacturers of consumer products were substantially shielded from liability when their products malfunctioned or otherwise caused injury to users or bystanders.⁶⁷ A plaintiff seeking recovery in such cases was faced with the substantial burden of proving that the manufacturer's negligence was the proximate cause of the injury.⁶⁸

court found no controlling Maryland precedent and certified questions of law to the Court of Appeals of Maryland. *Id.*

The Maryland Court of Appeals rejected the plaintiff's use of products liability and ultrahazardous activity theories as a basis of recovery. *Id.* at 132-39, 497 A.2d at 1146-50. The court proceeded, however, to create a new cause of action in Maryland, embracing a novel theory of strict liability specifically created to dispose of the *Kelley* case. *Id.* at 140-59, 497 A.2d at 1150-60. For a discussion of the *Kelley* court's products liability analysis, see *infra* notes 119-20 and accompanying text. For a discussion of the court's new theory of handgun manufacturers' strict liability, see *infra* notes 121-34 and accompanying text.

64. *Kelley*, 304 Md. at 133, 497 A.2d at 1147. The court adopted sections 515-520 of the *Second Restatement* as the test of whether conduct amounts to being an ultrahazardous activity in Maryland. *Id.* For relevant text of sections 519 and 520, see *supra* notes 30 and 31 respectively. The *Kelley* court stated, however, that "regardless . . . of whether a handgun might satisfy these factors, . . . [t]his [c]ourt has refused to extend the abnormally dangerous activity doctrine to instances in which the alleged tortfeasor is not an owner or occupier of land." *Kelley*, 304 Md. at 133, 497 A.2d at 1147 (citations omitted).

65. *Id.*

66. *Id.* at 133-34, 497 A.2d at 1147. The *Kelley* court, however, proceeded to create a new cause of action to specifically hold the manufacturers of "saturday night specials" strictly liable to victims of criminal shootings and remanded the case for a trial on the merits under this new theory. *Id.* at 140-62, 497 A.2d at 115. For a discussion this new cause of action in detail, see *infra* notes 121-34 and accompanying text.

67. For discussions of the development of products liability law, see generally, R. EPSTEIN & C. GREGORY, *supra* note 18, at 637-39; W. PROSSER, *supra* note 24, at 641-82.

68. See R. EPSTEIN & C. GREGORY, *supra* note 18, at 637. The plaintiff in a products liability action based on negligence first had to demonstrate that he was a member of class of persons to whom the manufacturer or seller owed a duty of care. *Id.* Next, the plaintiff was faced with the burden of proving that the manufacturer or seller failed to exercise reasonable care to discover or take precautions to eliminate a particular defect in the product. *Id.* Finally, the plaintiff had to establish that the specific defect complained of was the factual and legal cause of the injury. *Id.* In such cases, the defendant was held to the standard of care of the reasonable manufacturer, in light of the circumstances of manufac-

Moreover, the manufacturer enjoyed immunity from liability if the plaintiff was not in privity with the manufacturer.⁶⁹ Gradually, courts recognized that the manufacture and marketing of defective products was tortious conduct for which the law did not provide an adequate remedy.⁷⁰ Thus, the privity defense was eliminated,⁷¹ and many courts began to expand the application of *res ipsa loquitur*⁷² and implied warranty⁷³ theories to facilitate recovery by victims of defective product

ture and customs of the trade. See W. PROSSER, *supra* note 24, at 644 & n.30. Manufacturers also owed the consumer a duty to make reasonable quality inspections, to test the product and its component parts and to avoid misrepresentative advertising. *Id.* at 644.

69. See *Winterbottom v. Wright*, 10 M.&W. 109, 152 Eng. Rep. 402 (Ex. 1842), reprinted in R. EPSTEIN & C. GREGORY, *supra* note 18, at 413-15 (contractual duty to properly repair carriages did not extend to carriage driver who was not party to repair contract). Dean Prosser described *Winterbottom* as a "fishbone in the throat of the law," and suggested that courts erroneously derived from this case the general rule that sellers of products were shielded from tort liability by privity of contract. See W. PROSSER, *supra* note 24, at 641. This "error" was "corrected" in 1916. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (Cardozo, J.) (car manufacturer owed duty of reasonable care to consumer who had been invited by manufacturer to purchase automobile which could foreseeably cause harm if not manufactured, inspected, and tested with proper care).

70. See R. EPSTEIN & C. GREGORY, *supra* note 18, at 637-38.

71. See *id.* (citing *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916)).

72. See, e.g., *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944). In *Escola*, the plaintiff concededly could not demonstrate Coca Cola's negligence when a bottle of Coke exploded, causing serious injury. *Id.* at 457, 150 P.2d at 438. Nevertheless, the Supreme Court of California affirmed a judgment for the plaintiff using what has been referred to as "an heroic and tortured application of the *res ipsa loquitur* doctrine." See R. EPSTEIN & C. GREGORY, *supra* note 18, at 640. In a concurring opinion, Judge Traynor stated his preference for a straightforward rule of "absolute liability" in products liability cases. *Escola*, 24 Cal. 2d at 461, 150 P.2d at 440 (Traynor, J., concurring). Judge Traynor reasoned that the use of *res ipsa loquitur* and implied warranty theories in products liability cases "circuitous[ly]. . . [made] negligence the basis of recovery [while] impos[ing] what [was] in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix the responsibility openly." *Id.* at 463, 150 P.2d at 441 (Traynor, J., concurring).

73. See, e.g., *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960). In *Henningsen*, the plaintiff was injured while driving a new Plymouth automobile which had a defective steering mechanism. *Id.* at 369, 161 A.2d at 75. The defendants, the manufacturer and dealer, each denied liability on the basis that the express warranty protected only plaintiff's husband, the actual purchaser, who had waived all implied warranties in the purchase contract. *Id.* at 367, 412, 161 A.2d at 74, 99. The Supreme Court of New Jersey held in favor of the plaintiff, stating that "modern marketing conditions" require car manufacturers to extend an implied warranty of suitability for use by the ultimate purchaser and whomever, in the reasonable contemplation of the parties to the warranty, might be expected to become a user of the automobile. *Id.* at 384, 414, 161 A.2d at 84, 100. Plaintiff's lack of privity, therefore, did not preclude her from suing both the manufacturer and seller of the car for breach of implied warranties. *Id.* at 412-16, 161 A.2d at 99-101. For a discussion of the use of

malfunctions.⁷⁴

The conceptual breakthrough in this area was provided in *Greenman v. Yuba Power Products*,⁷⁵ a case in which the California Supreme Court recognized a specific tort theory of product liability. In *Greenman*, the court held that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."⁷⁶ Under *Greenman*, the plaintiff's burden was reduced to require only proof "that he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use."⁷⁷ The court stated that "[t]he purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers . . . rather than by the injured persons"⁷⁸

The *Restatement (Second) of Torts* subsequently defined a "special" products liability cause of action which was essentially in accord with *Greenman*.⁷⁹ The *Second Restatement* has been construed to recognize three types of product defects which can trigger strict liability of a seller or manufacturer: 1) a manufacturing or assembly flaw; 2) a design de-

warranty as a basis for a products liability action, see generally W. PROSSER, *supra* note 24, at 650-56.

74. See R. EPSTEIN & C. GREGORY, *supra* note 18, at 637-38.

75. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). In *Greenman*, a "Shopsmith" which was manufactured with insufficiently strong "set screws" caused a piece of wood to suddenly fly loose, injuring plaintiff. *Id.* at 59-60, 377 P.2d at 898-99, 27 Cal. Rptr. at 698-99. Judge Traynor, writing for a unanimous court, established and applied his preferred theory of strict products liability which he had espoused in *Escola*. *Id.* at 62-64, 377 P.2d at 900-01, 27 Cal. Rptr. at 700-01. For a discussion of *Escola*, see *supra* note 71.

76. *Greenman*, 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

77. *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

78. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

79. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A states, in pertinent part:

§ 402A. *Special Liability of Seller of Product For Physical Harm to User or Consumer*

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

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and it does reach the user or consumer without substantial change in the condition in which it is sold.

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

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

fect; and 3) an inadequate warning.⁸⁰ In addition to being “defective,” the *Second Restatement* requires that the product be “unreasonably dangerous” and cause physical harm to the “ultimate user or consumer, or to his property.”⁸¹

The *Second Restatement's* use of the language “defective and unreasonably dangerous” has created difficulties in interpretation, and a split of opinion has developed concerning the proper use of reasonability concepts in jury trials in which strict liability concepts must be applied.⁸² This is particularly a problem in design defect cases in which the jury is asked to evaluate the manufacturer's design process without considering the reasonableness of the designer.⁸³ Some states have attempted to circumvent this problem by developing a “risk/utility” test for design defectiveness.⁸⁴ In applying this test, the jury is asked to determine whether the design feature responsible for the injury could have been

80. See, e.g., *Patterson v. Gesellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985) (“defective distribution” of handguns is not recognized under Texas products liability law). For a discussion of *Patterson*, see *infra* notes 107-18 and accompanying text. See also Keeton, *Products Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 33-34 (1974) (product defects include improper design, manufacture or inadequate warning); Wade, *On the Nature of Strict Tort Liability For Products*, 44 MISS. L.J. 825, 830, 841-43 (1973) (defining “defective” products as those not in their intended condition, improperly designed, or unaccompanied by adequate warnings).

Manufacturing flaws are defects specific to individual articles of manufacture that enter the marketplace in an unintended unsafe condition due to poor quality of parts, workmanship or both. See Wade, *supra*, at 830, 841. The test for defectiveness in these cases generally centers on whether the product functioned properly for its intended use. *Id.*; see also Keeton, *supra*, at 37. In order to recover, the consumer must show that the product did not perform as a reasonable consumer would have expected and, as a result, the product caused injury (the “consumer expectation” test). Wade, *supra*, at 841. A design defect occurs when a whole product line lacks a design element which could have been feasibly incorporated into the product to increase its overall safety. *Id.*

Defective warning cases generally arise where the product embodies risks which are known to the manufacturer but are not obvious to the consumer to whom the manufacturer has provided inadequate warnings, all of which contribute to unexpected injury during use of the product. *Id.* at 842. In cases where useful products are unavoidably unsafe, such as vaccines and blood, courts have made a determination of the product's risks versus its social utility to determine whether the product should have been marketed at all. *Id.* A fourth category of product includes products which are inherently and obviously dangerous as designed, even when manufactured flawlessly. *Id.* at 842. General knowledge and common expectations may render products such as liquor and cigarettes non-defective despite their foreseeable risks of harm. *Id.*

81. RESTATEMENT (SECOND) OF TORTS § 402A(1).

82. See Wade, *supra* note 80, at 830-33.

83. *Id.*; see also *Cronin v. J.B.E. Olsen Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) (prohibiting the use of *Second Restatement's* “unreasonably dangerous” language in jury instructions).

84. See, e.g., *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). For a discussion of the *Barker* theory of design defect, see *infra* note 99-102 and accompanying text.

improved or eliminated without compromising the overall safety of the product.⁸⁵ Under this rationale, if the design could feasibly have been made safer for its intended use, then the risks of harm exceed the products' utility and it is defective.⁸⁶

Against this background, the *Richman* court held that handgun manufacturers are not strictly liable to victims of criminal shootings under Louisiana's products liability law.⁸⁷ The court first found that under Louisiana law, a product is defective when it is unreasonably dangerous in the context of "all reasonably foreseeable uses."⁸⁸ The district court went on to state that products are unreasonably dangerous when they pose greater risks than reasonable consumers expect, or when reasonable sellers would refuse to market products if apprised of their attendant risks.⁸⁹ The court concluded that handguns are not unreasonably dangerous products because their inherently dangerous nature is obvious to the reasonable consumer.⁹⁰ The court further concluded that marketing handguns to the general public is not unreasonable conduct because the Louisiana legislature had refused to ban handguns despite the obvious risks they pose.⁹¹

85. See *Barker v. Lull Eng'g Co., Inc.*, 20 Cal. 3d 413, 431-32, 573 P.2d 443, 455-56, 143 Cal. Rptr. 225 237-38 (1978).

86. *Id.*

87. *Richman v. Charter Arms Corp.*, 571 F. Supp. 192, 198 (E.D. La. 1983), *aff'd in part, rev'd in part*, *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985). For a discussion of the facts of *Richman*, see *supra* note 33 and accompanying text. For a discussion of commentary advocating and opposing the use of products liability law to hold gun manufacturers liable to shooting victims, see *supra* note 13 and accompanying text.

88. *Richman*, 571 F. Supp. at 195 (emphasis in original) (quoting *Le Bouef v. Goodyear Tire & Rubber Co.*, 623 F.2d 985, 989 (5th Cir. 1980)).

89. *Richman*, 571 F. Supp. at 195.

90. *Id.* at 197. The *Richman* court stated:

[C]ommon sense requires the Court to find that the risks involved in marketing handguns for sale to the general public are not greater than reasonable consumers expect. Every reasonable consumer that purchases a handgun doubtless knows that the product can be used as a murder weapon. This knowledge, however, in no way deters reasonable consumers from purchasing handguns. . . . [W]arnings are not likely either to alter consumer buying behavior or to reduce handgun violence. The plaintiff's reliance on the "consumer expectation" theory is therefore misplaced.

Id.

91. *Id.* at 198. The court stated:

[T]he Louisiana legislature has neither enacted a statute banning the sale of handguns to the general public nor adopted a joint resolution to amend the Constitution to that effect. Given the prominence of the handgun issue in public debates. . . . [t]he inference the court should draw from this is clear: the legislature does not think handgun manufacturers act unreasonably (are negligent per se) when they market their product to the general public. . . . Any other view . . . would appear to be implausible.

Id.

The decision of the *Richman* court that handgun manufacturers are not liable to victims of criminal shootings under Louisiana's products liability law was affirmed by the Fifth Circuit in *Perkins*.⁹² In *Perkins*, however, the plaintiffs argued that Louisiana precedent supported application of a "risk/utility" test to find that small concealable handguns are unreasonably dangerous because their inherent propensity to cause serious injury outweighs their social utility.⁹³ The Fifth Circuit rejected this argument because the Louisiana precedent relied upon by plaintiffs mentioned "risk/utility" only in dicta.⁹⁴ The *Perkins* court found that Louisiana caselaw mandated a "consumer expectation" standard of product defectiveness.⁹⁵ The court reasoned that even if a general risk/utility test was applicable, there must be "something wrong" with the product before the test can be applied.⁹⁶ The court concluded that it is common knowledge that small, concealable handguns are *designed to be dangerous weapons* and as such, they are not defective simply because their misuse causes human injury.⁹⁷

In dicta, however, the *Perkins* court explored the propriety of applying a specific risk/utility test enunciated by the California Supreme Court in *Barker v. Lull Engineering Co.*⁹⁸ to the manufacture and marketing of small handguns.⁹⁹ The *Barker* test was developed as an alternative to the consumer expectation standard in design defect cases.¹⁰⁰ Under

92. *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1252 (5th Cir. 1985), *aff'g in part, rev'g in part*, *Richman v. Charter Arms Corp.*, 571 F. Supp. 192 (E.D. La. 1983).

93. *Perkins*, 762 F.2d at 1271. The plaintiffs in *Perkins* relied on *Hunt v. City Stores*, 387 So. 2d 585 (La. 1980). In *Hunt*, an escalator manufacturer was held strictly liable for failure to warn of a latent defect to a boy who was injured after his shoe lodged in a moving escalator. *Id.* at 587, 590. The Louisiana Supreme Court stated that when deciding whether a product is unreasonably dangerous for normal use, "a balancing test is mandated: if the likelihood and gravity of harm outweigh the benefits and utility of the manufactured product, the product is unreasonably dangerous." *Id.* at 589.

94. *Perkins*, 762 F.2d at 1271-72. The *Perkins* court stated that "[a]lthough the [*Hunt*] Court spoke in terms of a risk/utility test, the analysis it actually applied was that of the consumer expectation test and its attendant duty-to-warn rule." *Id.* at 1272.

95. *Id.* at 1272, 1274.

96. *Id.* at 1272 (citing Note, *Handguns and Products Liability*, *supra* note 13).

97. *Id.* at 1272-73.

98. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

99. *Perkins*, 762 F.2d at 1273-75.

100. See *Barker*, 20 Cal. 3d at 426-27, 573 P.2d at 452, 143 Cal. Rptr. at 234.

The court stated:

[I]n design defect cases, a court may properly instruct a jury that a product is defective in design if (1) the plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) the plaintiff proves that the product's design proximately caused injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.

the *Barker* risk/utility test, the plaintiff must make a *prime facie* showing that the allegedly defective product proximately caused the injury.¹⁰¹ The burden then shifts to the manufacturer "to prove that the benefits of the product's design outweigh its risk of danger."¹⁰² The *Perkins* court reasoned that this language in *Barker* could remove from the plaintiff the burden of demonstrating a functional defect in the handgun before the court could apply the risk/utility analysis.¹⁰³ The *Perkins* court reasoned, however, that proximate causation would be difficult to establish where intervening criminal use of a handgun caused plaintiff's injury.¹⁰⁴ The court also noted that the California legislature has expressly precluded California courts from applying the *Barker* risk/utility test to firearms.¹⁰⁵ The *Perkins* court concluded, however,

Id., quoted in *Perkins*, 762 F.2d at 1273.

101. *Perkins*, 762 F.2d at 1273.

102. *Id.*

103. *Id.* at 1274. The *Perkins* court noted, however, that even the *Barker* court used language which could be construed to limit defective design liability to cases in which there is something functionally "wrong" with the product so as to stop short of making the manufacturer an insurer for all injuries which may result from the use of its product." *Id.* at 1273 n.64, quoting *Barker*, 20 Cal. 3d at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238. *Accord*, *Kelley v. R.G. Indus., Inc.*, 304 Md. 124, 138, 497 A.2d 1143, 1149 (1985) (nothing "wrong" with handgun that fires with lethal force); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1202 (7th Cir. 1984) (handguns analagous to alcoholic beverages which are dangerous but not defective).

104. *Perkins*, 762 F.2d at 1274.

105. *Id.* at 1273-74 n.64. In response to the *Barker* decision, the California legislature passed an act, precluding the use of a risk/utility test on firearms, which provides in relevant part: "In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged." CAL. CIV. CODE § 1714.4 (West 1985), quoted in *Perkins*, 762 F.2d at 1274 n.64. For an analysis of the potential use of the *Barker* risk/utility test in a products liability case against a handgun manufacturer, see generally Comment, *A Shot at Stricter Controls: Strict Liability for Gun Manufacturers*, 15 PAC. L.J. 171 (1984) (acknowledging California statutory bar but advocating use of *Barker* analysis against handgun manufacturers in other states).

But see Francis v. Diamond Int'l Corp., Nos. CV82-11-1279 & CV83-02-0215 (Ohio C.P. 1983), *aff'd*, No. CV84-09-111 (Ohio Ct. App. 12 Dist., Dec. 30, 1985) (available Feb. 14, 1985, on *LEXIS, States Library, Ohio file*). In *Francis*, a worker shot three members of a management team, using a pistol loaded with hollow point bullets, just after being given notice of termination. *Id.* (*LEXIS*), at 6. In a products liability action against both the gun and ammunition manufacturers, the trial court refused to allow the jury to determine whether the gun and bullets were defective under a *Barker* analysis:

The [*Barker*] weighing test should be applied where the product could be made safer with an alternative design, and not where the product is in itself dangerous. . . . The jury should not be allowed to speculate on whether handguns are beneficial to society; that is a policy matter for the legislature to decide.

Id., slip op. at 4 quoted in *Perkins*, 762 F.2d at 1274 n.68. The Ohio Court of Appeals affirmed and added: "[I]t is this court's conclusion that a jury could not

that regardless of the merits of the risk/utility test, the *Barker* rule could not provide the plaintiffs in *Perkins* with a remedy because Louisiana had not yet adopted such a standard.¹⁰⁶

The issue of handgun manufacturers' strict liability for criminal shootings was finally tested in a general risk/utility jurisdiction in *Patterson v Gesellschaft*.¹⁰⁷ In *Patterson*, the plaintiff argued that a "saturday night special" was defective under the Texas risk/utility doctrine "because handguns . . . pose risks of injury and death that 'far outweigh' any social utility they may have."¹⁰⁸ In response to this claim, the district court determined that Texas had adopted the *Second Restatement's* position that manufacturers who place products on the market "in a defective condition unreasonably dangerous" are subject to strict liability for injuries caused by the products.¹⁰⁹ The court next explained that this standard does not make the manufacturer an insurer against all risks presented by its products.¹¹⁰ Rather, the court stated that the standard provides relief only when a product is "defective."¹¹¹

The district court in *Patterson* further explained that the risk/utility test as applied in Texas design defect cases is based on the premise that the product's design embodied a defective element which could have been remedied or improved in a technically and economically feasible manner before the product went to market.¹¹² The court reasoned that since handguns are designed specifically to discharge bullets with lethal force, this design feature could not be eliminated to increase the overall safety of the product.¹¹³ The court concluded that the Texas risk/utility test was inapplicable to products which are obviously and inherently dangerous, notwithstanding the fact that they create substantial risks of

determine that the design of all handguns and all hollow point bullets embodies 'excessive preventable danger'." Francis, No. CV84-09-111, slip op. at 6 (emphasis added).

106. *Perkins*, 762 F.2d at 1274. The *Perkins* court reasoned that "[n]o court in this jurisdiction has ever applied a general risk/utility analysis to a well-made product that functioned precisely as it was designed to do [sic]." *Id.*

107. 608 F. Supp. 1206 (N.D. Tex. 1985).

108. *Id.* at 1208. The *Patterson* court stressed at the outset that it dismissed the case on the basis that the plaintiffs' claims were "totally without merit. . . . a misuse of tort law, [and] a baseless and tortured extension of products liability principles." *Id.*

109. *Id.* at 1209 (citations omitted).

110. *Id.*

111. *Id.* The *Patterson* court explained that a product can be defective only "in the sense that something is wrong with it." *Id.* The court went on to explain that the product liability formulation set forth in the *Second Restatement* contemplates only three types of defect: manufacturing defect, insufficient warning, and design defect. *Id.* For a discussion of these types of product defects, see *supra* note 79 and accompanying text.

112. *Patterson*, 608 F. Supp. at 1210; cf. *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 749 (Tex. 1980) (under Texas' risk/utility test, defective designs judged against technological and economic feasibility of safer alternative design elements).

113. *Patterson*, 608 F. Supp. at 1212.

harm to their users and other members of society.¹¹⁴

Additionally, the *Patterson* court rejected the plaintiff's alternative theory that the manner in which handguns are distributed to the general public presents an actionable defect.¹¹⁵ The court first noted that Texas' products liability law does not recognize any cause of action for "defective distribution."¹¹⁶ Next, the court stated that even if such a defect were to be recognized, the manufacturer of a handgun used in a criminal assault would not be liable to the victim because the criminal's intentional conduct would preclude a finding that the defect proximately caused the injury.¹¹⁷ The court concluded that the case before it represented an attempt to ban handguns through an improper use of the judicial system.¹¹⁸

C. Maryland's "Saturday Night Special" Strict Liability

After examining the law in this area, the Maryland Court of Appeals in *Kelley*¹¹⁹ found both the products liability and ultrahazardous activity theories inapplicable to the situation in which a party seeks recovery from a gun manufacturer for injuries resulting from a criminal assault.¹²⁰ The *Kelley* court, however, went on to fashion a unique theory of strict liability under which manufacturers and sellers of "saturday night specials" could be held strictly liable to victims of criminal shootings.¹²¹

114. *See id.* The *Patterson* court stated that expansion of "unconventional" products liability theories for the purpose of eliminating handguns would not be logically consistent with the generally accepted proposition that manufacturers are not insurers against all risks associated with their products. *Id.* at 1216.

115. *Id.* at 1215.

116. *Id.* at 1214; *see also* *Martin v. Harrington & Richardson, Inc.*, 743 F.2d at 1200, 1204 (7th Cir. 1984) (criticizing *Richman* for "blur[ring] the distinction between strict liability for selling unreasonably dangerous products and strict liability for engaging in ultrahazardous activities") (Emphasis in original). *But see* *Moning v. Alfonso*, 400 Mich. 425, 254 N.W.2d 759 (1977) (if jury determines that risks of marketing slingshots to children outweigh utility of permitting children to purchase such items, manufacturer of slingshot may be held liable when children are injured during use).

117. *Patterson*, 608 F. Supp. at 1215.

118. *Id.* at 1215-16. District Judge Buchmeyer stated:

As an individual, I believe, very strongly, that handguns should be banned and that there should be stringent, effective control of other firearms. However, as a judge, I know full well that the question of whether handguns can be sold is a political one, not an issue of products liability law—and that this is a matter for the legislatures, not the courts.

Id. at 1216 (emphasis in original).

119. 304 Md. 124, 497 A.2d 1143 (1985).

120. *Id.* at 132-39, 497 A.2d at 1146-50.

121. *Id.* at 158-59, 497 A.2d at 1160. The *Kelley* court stated the elements of its new cause of action as follows:

[O]nce the trier of fact determines that a handgun is a Saturday Night Special [based on the gun's size and barrel length plus evidence of low cost, poor quality, unreliability, and inaccuracy], then liability may be

In *Kelley*, an inexpensive .38 caliber pistol was used to injure the plaintiff in the course of a grocery store robbery.¹²² Rejecting traditional theories of recovery, the *Kelley* court determined that Maryland precedent supported the creation of a new cause of action where "modern circumstances or increased knowledge" justify judicial modification of the common law in a manner consistent with the state's legislatively articulated public policy.¹²³ The court noted that while Maryland's legislative policy supported the manufacture and sale of handguns for general legitimate purposes, the manufacture and sale of "saturday night specials" had not been similarly sanctioned.¹²⁴

The court determined that the policies embodied in both the Maryland Code¹²⁵ and the 1968 Federal Gun Control Act¹²⁶ reflect the view that "saturday night specials" exist as a sub-species of handguns which are useless for legitimate purposes.¹²⁷ Moreover, the court found that

imposed against a manufacturer or anyone else in the marketing chain, including the retailer. Liability may only be imposed, however, when the plaintiff or plaintiff's decedent suffers injury or death because he is shot with the Saturday Night Special. In addition, the shooting must be [or occur in the course of] a criminal act. . . . Although neither contributory negligence nor assumption of the risk will be recognized as defenses, nevertheless the plaintiff must not be a participant in the criminal activity. If the foregoing elements are satisfied, then the defendant shall be liable for all resulting damages suffered by the gunshot victim, consistent with the established law concerning tort damages.

Id. (footnote omitted).

122. *Id.* at 128-29, 497 A.2d at 1144-45. The pistol's parts were manufactured abroad by Rohm Gesellschaft, a West German corporation, and the gun was assembled in Miami, Florida by R.G. Industries, a wholly owned subsidiary of Rohm. *Id.* at 128, 497 A.2d at 1145. The *Kelley* court noted that R.G. Industries "has been called the nation's major producer of Saturday Night Specials." *Id.* at 159, 497 A.2d at 1161 (citing Brill, *The Traffic (Legal and Illegal) In Guns*, HARPER'S, Sept. 1977, at 39 (describing loophole in 1968 Federal Gun Control Act which permits importation of parts for domestic assembly of weapons which are illegal to import under act)).

123. *Kelley*, 304 Md. at 140-41, 497 A.2d at 1150-51.

124. *Id.* at 143-45, 497 A.2d at 1151-53. The *Kelley* court recognized that the Maryland Code expressly permits possession of handguns in specified situations. *Id.* at 144, 497 A.2d at 1152-53; see MD. ANN. CODE art. 27, §§ 36B-36G (1982 Repl. Vol. & Cum. Supp. 1986). Thus, the court reasoned that Maryland's legislatively articulated policy generally supports legitimate handgun ownership and use. This being the case, imposition of strict liability on the manufacturers of all handguns would be contrary to Maryland public policy. *Kelley*, 304 Md. at 144, 497 A.2d at 1152-53.

125. MD. ANN. CODE art. 27, §§ 36B-36G, 441-448 (1982 Repl. Vol. & Cum. Supp. 1986) (permitting use of handguns for purposes of law enforcement, sporting, and self-defense in Maryland).

126. 18 U.S.C. § 925 (1982 & Supp. II 1984) (allowing importation of firearms for law enforcement, military, and recreational purposes as regulated by Secretary of the Treasury); 27 C.F.R. part 178 § 178.112 (regulations delegating authority to Director of the Bureau of Alcohol, Tobacco and Firearms to compile importation list of firearms adaptable to sporting purposes).

127. *Kelley*, 304 Md. at 147-55, 497 A.2d at 1154-58. The court reasoned that both Maryland's Code and the 1968 Federal Gun Control Act sanction the

manufacturers of such weapons know or should know that their products are principally used for criminal purposes.¹²⁸ Thus, the *Kelley* court concluded that it was entirely consistent with both Maryland and federal public policy to hold manufacturers of "saturday night specials" strictly liable to innocent crime victims.¹²⁹

The *Kelley* court thus created a theory of relief which requires a plaintiff to convince a court, as a threshold matter, that the handgun which caused the injury was a "saturday night special."¹³⁰ The court stated, however, that the issue of whether a handgun was, in fact, a "saturday night special" is generally a jury determination based on factors such as the gun's size, cost and quality.¹³¹ The court held that once a

use of handguns for such "legitimate purposes" as police enforcement, sporting and collecting activities, and self defense. *See id.* The court stated that "saturday night specials" are unfit for legitimate uses because they are poorly made, inaccurate, and unreliable. *Id.* at 154, 497 A.2d at 1158. The court further stated that the chief value of low cost, easily concealable, poorly made handguns is as a tool for perpetrators of violent crimes. *Id.* The court noted that criminal activities were "obviously" not legitimate uses for handguns. *Id.* Thus, the court concluded that neither federal nor applicable state law supported the existence of "saturday night specials." *Id.* at 155, 497 A.2d at 1158.

128. *Id.* at 155, 497 A.2d at 1158. The court quoted the following statement from a magazine article, purportedly made by a sales representative of R.G. Industries to a gun shop owner, as follows: "If your store is anywhere near a ghetto area, these ought to sell real well. This is most assuredly a ghetto gun." *Id.* at 155, 497 A.2d at 1158 (quoting Brill, *supra* note 122, at 40). Finally, the court relied on a law review article to support its major premise that "saturday night specials" are primarily used for criminal purposes and that any countervailing social usefulness they might have is negligible. *Kelley*, 304 Md. at 155-56, 497 A.2d at 1158-59 (citing Note, *Manufacturers' Liability to Victims of Handgun Crime: A Common Law Approach*, 51 *FORDHAM L. REV.* 771, 791-92 (1983)).

129. *Kelley*, 304 Md. at 157, 497 A.2d at 1159. *Cf.* *Moning v. Alfonso*, 400 Mich. 425, 254 N.W.2d 759 (1977) (manufacturer of slingshots could be held liable for foreseeable misuse where dangerous product target marketed and distributed directly to children). For a discussion of "defective distribution" as a basis of strict products liability, see *supra* notes 116-119 and accompanying text.

130. *Kelley*, 304 Md. at 158, 497 A.2d at 1160. The *Kelley* court stated that a trial court may not consider size and barrel length alone when determining whether a plaintiff has met the initial burden of demonstrating that a gun is a "saturday night special." *Id.* at 158, 497 A.2d at 1160. Rather, the trial court must also consider evidence of a handgun's cost, quality or other "identifying characteristics" before allowing the issue to go before the jury. *Id.*

131. *Id.* at 157-58, 497 A.2d at 1160. The court developed criteria for courts and juries to use to determine whether a particular handgun is a "saturday night special" so as to impose the new strict liability standard on the manufacturer or seller of such gun:

There is no clear-cut, established definition of a Saturday Night Special, although there are various characteristics which are considered in placing a handgun into that category. Relevant factors include the gun's barrel length, concealability, quality of materials, quality of manufacture, accuracy, reliability, whether it has been banned from import by the Bureau of Alcohol, Tobacco and Firearms, and other related characteristics [including industry standards and public perception]. . . . Because many of these factors are relative, in a tort suit a handgun

plaintiff proves that a "saturday night special" caused injury or death in the course of a criminal act in which the shooting victim was not a criminal participant, then anyone in the marketing chain of that particular gun can be held strictly liable for all resulting damages suffered by the gunshot victim.¹³² The court expressly prohibited the use of contributory negligence or assumption of risk as defenses to this new cause of action.¹³³ The court, however, declined to decide whether the handgun at issue was, in fact, a "saturday night special."¹³⁴

III. ANALYSIS

The major issue presented to the courts in the foregoing cases is whether handgun manufacturers have a cognizable legal duty to prevent criminal use of their products.¹³⁵ An underlying, yet equally important

should rarely, if ever, be deemed a Saturday Night Special as a matter of law. Instead, it is a finding to be made by the trier of facts.

Id. at 157-58, 497 A.2d at 1159-60.

132. *Id.* at 158-59, 497 A.2d at 1160. The court designated the ruling to apply in the *Kelley* case and to all causes of action arising from the criminal use of "saturday night specials" which were first marketed prospective to the mandate. *Id.* at 161-62, 497 A.2d at 1161-62. The Maryland Court of Appeals noted the possible unfairness inherent in applying its new theory of liability to all causes of action accruing after *Kelley*, stating:

The gist of the wrongful act on the part of the manufacturers and marketers of Saturday Night Specials, underlying the cause of action, is the marketing of such guns to the public, knowing that they have little or no legitimate use and foreseeing that the product's chief use is for criminal activity. While manufacturers and marketers of handguns have or should have had such knowledge for a long time, nevertheless until now they have had little reason to anticipate that their actions might result in tort liability. . . . Consequently, when a Saturday Night Special has been first marketed to a member of the public prior to the date of our mandate in this case, but the cause of action accrues after the date of the mandate, there may be some basis for the defendant manufacturers and marketers to complain of unfairness.

Id. at 161-62, 497 A.2d at 1162. Recognizing this potential unfairness, the court held that its new theory of liability would

apply to all . . . causes of action accruing after the date of our mandate . . . unless it is shown that the initial marketing of the Saturday Night Special . . . occurred prior to the date of the mandate. In such event, the basis for liability recognized [in this case] will not apply, even though the gunshot injury took place after our mandate.

Id. at 162, 497 A.2d at 1162 (footnote omitted). While noting this unfairness, the court nonetheless held that its new theory of liability would apply to the defendant in *Kelley*, even though that defendant had no reason to anticipate any tort liability, the gun at issue having been both marketed and misused before the court laid down its mandate. *Id.* The court rationalized that ordinarily in cases such as *Kelley*, it is proper to "apply the change [in common law principles] to the case before us and prospectively to all such causes of action accruing after the date of the case before us." *Id.* at 161, 497 A.2d 1161-62.

133. *Id.* at 159, 497 A.2d at 1160.

134. *Id.*

135. See, e.g., *Richman v. Charter Arms Corp.*, 571 F. Supp. 192, 208 (E.D.

issue concerns the respective roles of courts and legislatures in imposing standards of care on gun manufacturers with respect to this duty.¹³⁶ It is submitted that handgun manufacturers should not be immune from liability to shooting victims who can demonstrate that their injuries were proximately caused by a gun manufacturer's breach of a legal duty owed to the victim. It is suggested, however, that manufacturers of non-defective firearms have no legal duty to compensate shooting victims under "ultrahazardous activity"¹³⁷ or strict products liability law.¹³⁸

La. 1983) ("The critical question here is: What are the legal limits of a handgun manufacturer's liability for the criminal acts of third persons?").

136. *See id.* (discussing related roles of judges and legislators in Louisiana jurisprudence).

137. For a discussion of cases rejecting the application of the ultrahazardous activity doctrine to the manufacture and distribution of handguns, see *supra* notes 47-66 and accompanying text. It is submitted that the courts in these decisions have properly refused to extend strict liability under the ultrahazardous activity doctrine to the manufacture of *products* which can be used in an abnormally dangerous manner. These courts are in agreement with the view that manufacturers should not be subject to this absolute form of liability unless the very act of manufacturing or handling of the product is itself extremely dangerous. *See, e.g.,* Kelley v. R.G. Indus., 304 Md. 124, 133-34, 497 A.2d 1143, 1147 (1985) (listing cases in accord on proposition that abnormally dangerous activity doctrine is not applicable to manufacture and distribution of handguns). Thus, it is suggested that the courts which have addressed the issue have properly distinguished the relatively safe act of manufacturing a small concealable handgun from the ultimate ultrahazardous act of shooting it. *See* Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984) ("Illinois has never imposed liability upon a non-negligent manufacturer of a product that is not defective.") It is submitted that preserving this distinction is necessary to avoid a socially undesirable manipulation of the ultrahazardous activity doctrine to make manufacturers of patently dangerous products insurers against all risks associated with the use of their products. *Cf. id.* at 1205 (suggesting enterprise liability theory holding "that whenever someone is injured there must be someone also answerable in damages" would be socially undesirable and could lead to significant discouragement of new manufacturing ventures).

138. For a discussion of cases rejecting the application of strict product liability law to hold handgun manufacturers liable to shooting victims, see *supra* notes 87-120 and accompanying text. It is submitted that the existing framework of strict products liability law serves well to regulate the *quality* rather than the *type* of new products that enter the consumer market, irrespective of the product's overall social utility. *See* RESTATEMENT (SECOND) OF TORTS § 402A comment i (1966). Courts and commentators have repeatedly emphasized that this theory of liability does not force manufacturers to insure against all risks flowing from the use of their products. *See supra* note 113 and accompanying text. Moreover, the drafters of the *Second Restatement* state explicitly that strict liability under § 402A should not be applied in situations where a dangerous product's risks are obvious to the consuming public. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1966).

It is submitted that properly functioning handguns are analagous to the *Second Restatement's* "good whiskey." They are obviously and inherently dangerous in that they are designed specifically to propel a projectile with lethal force. *See, e.g.,* Patterson v. Gesellschaft, 608 F. Supp. 1206, 1212 (N.D. Tex. 1985); Note, *Handguns and Products Liability supra* note 13, at 1916. If handguns malfunction and cause injury due to a design defect or manufacturing flaw, § 402A is clearly applicable. *See, e.g.,* Philippe v. Browning Arms Co., 375 So. 2d 151 (La. App.

It is further respectfully submitted that the Maryland Court of Appeals in *Kelley*,¹³⁹ overstepped the bounds of its judicial role by relying exclusively on out-of-court factual assertions to legally define a proscribed class of handguns and by imposing a new form of strict liability on manufacturers of guns which fit into this proscribed class.¹⁴⁰ It is suggested that while it is certainly proper for the legislature to regulate handguns on the basis of information obtained through legislative discourse, it was not proper for the Maryland Court of Appeals to do this within the judicial forum—particularly when both the federal and Maryland legislatures have declined to define and restrict production of “Saturday night specials” after considering the same factual assertions relied upon by the *Kelley* court.

Where the legislature has acted on an issue of social policy, the courts are bound to interpret and enforce the mandates of the legislature, subject, of course, to constitutional limitations.¹⁴¹ However, on issues for which the legislature has not specifically enacted statutory rights and duties, the courts may recognize and enforce existing or newly created common law rules to achieve a desirable social result.¹⁴² Violations of such rules are then redressable in common law tort actions.¹⁴³ Since the issue of whether it is socially acceptable to manufacture crime-prone handguns has been left open by the legislatures, it may be proper in certain circumstances for courts to resolve this issue by creating common law duties affecting handgun manufacturers.¹⁴⁴ How-

1979) (gun manufacturer strictly liable for injury caused by malfunction of safety due to defect in design and manufacture), *aff'd*, 395 So. 2d 310 (La. 1980). However, in the absence of “something wrong” with the product, the law of products liability does not hold handgun manufacturers strictly liable to shooting victims. See generally Wade, *supra* note 80, at 825, 830-38 (analyzing defectiveness in terms of requirement of “something wrong” with product); W. PROSSER, *supra* note 24, at 659 (“There must . . . be something wrong with the product which makes it unreasonably dangerous to those who come in contact with it [to generate strict liability].”). It is thus submitted that the courts in the foregoing handgun cases properly rejected the attempt of handgun control advocates to manipulate the framework of strict products liability law in order to regulate what *type* of handgun should reach the consumer marketplace.

139. *Kelley*, 304 Md. 124, 497 A.2d 1143 (1985). For a discussion of the *Kelley* case, see *supra* notes 119-34 and *infra* notes 154-56, 159 & 161 and accompanying text.

140. For a collection of articles discussing the interaction of the courts and the legislatures in making and administering laws and public policy, see generally R. GAMBETTA, M. MAY, & J. FOSTER, *GOVERNING THROUGH COURTS* (1981)[hereinafter cited as R. GAMBETTA & M. MAY].

141. See R. GAMBETTA & M. MAY, *supra* note 140, at 9-10.

142. See generally *id.* at 9-16; see also W. PROSSER, *supra* note 24, at 15 (“There is good reason . . . [for courts] to make a conscious effort to direct the law along the lines which will achieve a desirable social result, both for the present and the future.”).

143. W. PROSSER, *supra* note 24, at 15.

144. Cf. *Moning v. Alfonso*, 400 Mich. 425, 436, 254 N.W.2d 759, 764 (1977) (“The Legislature has not approved or disapproved the manufacture of

ever, it is submitted that in order to hold handgun manufacturers liable to shooting victims, such manufacturers must have committed some form of tort.

Dean Prosser has described a tort as "conduct which is twisted, or crooked, not straight."¹⁴⁵ In practice, courts determine whether specific acts are tortious by reference to objective standards of reasonable conduct.¹⁴⁶ Where an individual is called to account for unreasonable conduct, the applicable standard of care is based on an assessment of what an ordinary, reasonable prudent person would have done under the factual circumstances of the case.¹⁴⁷ In all cases where reasonable people could differ as to the tortious nature of an act, principles of fairness suggest that the actor have the opportunity to try, before an unbiased factfinder, the issue of whether the applicable standard of care was breached.¹⁴⁸

It is submitted that in the absence of a legislative mandate, and in the absence of applicable traditional strict liability theories, the proper

slingshots and their marketing directly to children; the Court perforce must decide what the common law rule shall be."

145. W. PROSSER, *supra* note 24, at 2 (emphasis added).

146. *Id.* at 6.

147. *Id.* at 150-51. However, where an entity, such as a manufacturing corporation is the alleged tortfeasor, an objective standard is based on the reasonableness of the entity's act with respect to the risks and benefits created by the act. See, e.g., *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932). In *Hooper*, Judge Learned Hand held that it was unreasonable for a tug boat operator not to supply all of its boats with radio receivers, despite the lack of a general custom to do so. *Id.* at 740. Judge Hand reasoned that "[a]n adequate receiving set . . . [is available] at small cost and is reasonably reliable if kept up; obviously it is a source of great protection to [the] tows." *Id.* at 739 (emphasis added). The decision in *Hooper* foreshadowed the enunciation of the "Hand Formula" in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). In *Carroll Towing*, Judge Hand stated:

Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions.

Id. at 173. Judge Hand went on to express his rule as an algebraic equation in which the burden of adequate precautions was directly proportional to the probability and potential gravity of the resulting injuries. *Id.*

148. See, e.g., *Moning v. Alfano*, 400 Mich. 425, 254 N.W.2d 759 (1977). The *Moning* court stated that the issue of whether selling slingshots to children was reasonable conduct was a jury question because:

Reasonable persons can differ on the balance of utility and risk, and whether marketing slingshots directly to children creates an unreasonable risk of harm;

The interest of children in ready-market access to slingshots is not so clearly entitled to absolute protection in comparison with the interest of persons who face the risk thereby created. . . .

Id. at 434, 254 N.W.2d at 763. For a discussion of the *Moning* decision, see *infra* notes 157-60 and accompanying text.

manner in which to determine whether the manufacture of "saturday night specials" is a tortious activity is to present the issue before a factfinder in the context of a traditional negligence action.¹⁴⁹ The plaintiff in such a case would bear the burden of proving that a handgun maker unreasonably introduced a weapon into the stream of commerce which was designed and target marketed for criminal use and which, in turn, proximately resulted in the shooting victim's injury.¹⁵⁰

It is submitted that a plaintiff could establish, using relevant statistical evidence, that marketing the type of handgun at issue created a circle of foreseeable risk which imputed a legal duty on the part of the manufacturers to take reasonable steps to avoid distributing their products to crime-prone purchasers.¹⁵¹ This plaintiff would then need to prove that the handgun manufacturer's marketing practices combined with a foreseeable criminal use to proximately cause injury to the shooting victim.¹⁵² To support the issue of foreseeability, the plaintiff would be required to introduce evidence that the manufacturer knew or should have known that the handgun it sold to the public was prone to criminal use.¹⁵³ In the foregoing cause of action, the focus would be on whether

149. *Cf. id.*

150. *See generally* W. PROSSER, *supra* note 24, at 208-11 (discussing burdens of proof and presumptions in negligence cases).

151. *Cf. Moning v. Alfonso*, 400 Mich. 425, 254 N.W.2d 759 (1977). In *Moning*, the court concluded that a boy injured by his friend's use of a slingshot was a "foreseeable plaintiff" with respect to the manufacturer, wholesaler, and retailer who could be expected to anticipate that such an event would take place. *Id.* at 439-40, 254 N.W.2d at 765; *see also* *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation: it is risk to another or to others within the range of apprehension . . ."). In the context of a negligence action by a shooting victim against a handgun manufacturer, the plaintiff could present evidence to demonstrate that the gun at issue enjoyed great popularity as an instrument of crime while having little or no countervailing social utility.

152. *See* W. PROSSER, *supra* note 24, at 272-76 (discussing foreseeable intervening causes). Courts have often stated as a general rule that criminal acts of third parties which combine with a defendant's negligent act to cause injury are presumed to be unforeseeable. *See, e.g., Martin*, 743 F.2d at 1205 ("criminal misuse of firearms . . . is not reasonably foreseeable."). For additional cases supporting this proposition, *see supra* note 56. However, in cases where it can be reasonably anticipated that a negligent act will set the stage for a subsequent criminal act, the chain of proximate causation will not be broken. *See, e.g., Franco v. Bunyard*, 261 Ark. 144, 147, 547 S.W.2d 91, 93 (since criminal use of gun by convict was foreseeable, seller of gun was not relieved of liability for injury caused by convict), *cert. denied*, 434 U.S. 835 (1977); *Brauer v. N.Y. Cent. & H.R.R.*, 91 N.J.L. 190, 193, 103 A. 166, 169 (1918) (railroad not insulated from liability for property stolen at scene of urban grade crossing accident).

153. The *Kelley* court noted a magazine article in which a sales representative for a handgun manufacturer allegedly told a gun store owner: "If your store is anywhere near a ghetto area, these [small, inexpensive handguns] ought to sell real well. This is most assuredly a ghetto gun. . . . [B]etween you and me, this [similar model] is such a piece of crap I'd be afraid to fire the thing." *Kelley*, 304 Md. at 155, 497 A.2d at 1158 (quoting Brill, *supra* note 122, at 40).

the *conduct* of the gun manufacturer was unreasonable, rather than whether its *product* was socially undesirable. Thus, where a preponderance of the evidence at trial established that a handgun manufacturer designed, promoted, and distributed small, inexpensive handguns in such a manner as to capitalize on the demand for the product in high crime areas, it would be entirely consistent with existing tort law principles to find such a manufacturer liable to the victims of its criminal customers.

It is respectfully submitted that the Maryland Court of Appeals in *Kelley* ignored this approach and improperly focused its analysis on the social utility of the handgun manufacturer's *product* in order to create a cause of action analagous to that of strict product liability and to avoid burdening shooting-victim plaintiffs with the proof problems inherent in a negligence cause of action. It is suggested that the *Kelley* court improperly relied primarily on commentary and legislative proceedings to determine that small handguns with certain characteristics have no legitimate social utility despite the fact that no plaintiff has yet proven by a preponderance of evidence that a factual basis exists to support the Maryland Court of Appeals' decision.¹⁵⁴ Therefore, it is respectfully submitted that the *Kelley* court's enumerated physical characteristics which make certain handguns "anti-social" should not form a basis of strict liability for gun manufacturers.¹⁵⁵ It is suggested that the court thus inappropriately fashioned a theory of relief ultimately designed to eliminate production of small, inexpensive handguns.¹⁵⁶

By contrast, it is suggested that the proper analysis for determining a handgun manufacturer's liability can be found in *Moning v Alfonso*.¹⁵⁷ In *Moning*, the Michigan Supreme Court determined that, in the absence of a controlling legislative mandate, the issue of whether a slingshot manufacturer was negligent in marketing its dangerous product to children was dependent on a jury determination that such *deliberate* marketing practices constituted unreasonable conduct.¹⁵⁸ The *Moning* court did not determine which physical characteristics make slingshots socially undesirable. Rather, the court concluded that if a jury found that the dangers associated with certain slingshots outweighed their social utility as childrens' playtoys, then the manufacturer could be held liable for

154. *See id.* The *Kelley* court had no trial record to work with since the issue came before it on questions of law certified by the United States District Court for the District of Maryland on the defendant's pre-trial motion for dismissal of plaintiff's complaint pursuant to FED. R. CIV. P. 12(b)(6). *Id.* at 129, 497 A.2d at 1145.

155. *See id.* at 147-57, 497 A.2d at 1154-59.

156. *Id.* at 157-59, 497 A.2d at 1159-60.

157. 400 Mich. 425, 254 N.W.2d 759 (1977). In *Moning*, the plaintiff was a 12-year-old boy who was injured by an inexpensive slingshot product which was marketed for sale to small children. *Id.* at 432, 254 N.W.2d at 762.

158. *Id.* at 432-36, 254 N.W.2d at 762-64.

injuries associated with their use.¹⁵⁹

It is submitted that the *Moning* decision, unlike the *Kelley* decision, adhered to the traditional principles of fairness which permit adverse parties to argue the reasonableness of the defendants' conduct in a trial setting before a neutral factfinder. By contrast, it is suggested that the *Kelley* court inappropriately developed a court-made standard of conduct based strictly on the qualities of the product before any fact-finder had the opportunity to determine whether the marketing practices of the manufacturer constituted unreasonable conduct. Additionally, under the *Kelley* court's new theory, such review by a factfinder will never occur because the focus of the new cause of action is on the quality of the handgun—that is to say, whether the handgun falls within the court's proscribed class. Since this new cause of action is one of strict liability, the reasonableness of the manufacturer's marketing practices is neither a defense, nor a focus of the plaintiff's proof at trial.¹⁶⁰

It is submitted that the legislative process has not produced a ban on the manufacture and sale of specific types of handguns because a majority of legislators has not been persuaded that the dangers associated with such weapons outweigh their social utility.¹⁶¹ This is so despite the fact that these legislators have been confronted with the same evidence and opinion relied upon by the *Kelley* court to support its conclusion that "Saturday Night Specials are largely unfit for any of the recognized legitimate uses sanctioned by . . . Maryland gun control legislation."¹⁶² It is further suggested that the evidence presented in the legislative debate has not provided a factual basis on which legislators could properly define and ban specific "anti-social" forms of handguns.¹⁶³ In particular, it is submitted that although there may exist a consensus that the outstanding number of "saturday night specials" should be reduced,¹⁶⁴ there is, in fact, insufficient evidence to enable legislators to determine which, if any, existing forms of handguns fit into this category.¹⁶⁵

159. *Id.*

160. For a discussion of the elements of the new strict liability cause of action enunciated in *Kelley*, see *supra* notes 118-33 and accompanying text.

161. See generally McClain, *supra* note 2, at 217 (concluding "that there is little agreement on the potential impact of national legislation banning the manufacture and distribution of ['saturday night specials']. . . .").

162. *Kelley*, 304 Md. at 154, 497 A.2d at 1158.

163. See McClain, *supra* note 2, at 202-04 (illustrating difficulties of defining "saturday night specials" in order to implement policy decisions aimed at curbing gun violence).

164. See Draper, *supra* note 4, at 5 ("In this survey of current opinion on the issue of gun control, no disagreement was found on the need to stem the increasing volume of handgun violence and also to keep down the rising number of Saturday Night Specials in society.").

165. See Bruce-Briggs, *supra* note 2, at 22-24 (arguing that a precise definition of "saturday night specials" is impossible to reach but "[c]oncentration on 'Saturday Night Specials' has definite political advantages").

IV. CONCLUSION

Thus, it is submitted that the Maryland Court of Appeals in *Kelley* improperly circumvented the traditional approach of deferring the establishment of judicial standards of conduct until there is a "background of experience out of which the standards have emerged."¹⁶⁶ This note concludes that the *Kelley* court improperly established court-made standards of conduct for the handgun industry before any handgun manufacturers had the opportunity to adjudicate in front of a neutral factfinder the issue of whether their marketing practices are reasonable. This note also suggests that legislatures' general reluctance to regulate the manufacture of handguns when confronted with the same evidence available to the Maryland Court of Appeals supports the conclusion that the *Kelley* holding does not in fact reflect current social policy.

Finally, this note suggests that the proper manner to establish judicial standards of conduct for handgun manufacturers is to allow shooting-victim plaintiffs to seek redress only in common law negligence actions against the manufacturers.¹⁶⁷ By proving that the gun that injured them was designed and target marketed to "high risk" population segments, these plaintiffs may convince factfinders that the defendant gun manufacturer acted negligently, having actual or imputed knowledge of the potential risks to the plaintiff.¹⁶⁸ Thus, the focus of the

166. *Pokora v. Wabash R.R.*, 292 U.S. 98, 105 (1934). In *Pokora*, the plaintiff was injured while driving his truck across defendant's four track grade crossing. *Id.* at 99-100. The trial court directed a verdict in favor of defendant on the basis that plaintiffs' failure to get out of his truck to check for oncoming trains before crossing the tracks made him contributorily negligent under the standard of care enunciated in *Baltimore & Ohio R.R. v. Goodman*, 292 U.S. at 99 (citing *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927) (requiring driver to stop vehicle, get out, look, and listen for train before crossing tracks)). Justice Cardozo criticized strict adherence to the standard set forth in *Goodman* and cautioned that court-set standards of care should yield to actual determinations of reasonable conduct:

Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. [In this case, the driver could have subjected himself to a greater risk of harm by leaving his vehicle, in accordance with *Goodman*.]. . . .

Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury.

Id. at 104-06 (citations omitted).

167. For a discussion of the application of traditional, straightforward negligence principles to the issue of handgun manufacturers' liability to shooting victims, see *supra* notes 148-53 and accompanying text.

168. *Cf. Franco v. Bunyard*, 261 Ark. 144, 547 S.W.2d 91 (gun dealer negli-

courts' approach to dealing with the sensitive issue of gun control should be on the conduct of parties responsible for gun violence. If a gun manufacturer's *conduct* is determined to unreasonably add to the proliferation of violent crime—such as where small, concealable, cheap handguns are *target marketed*¹⁶⁹ to criminals—then there is no basis for shielding that manufacturer from liability to shooting victims. However, in the absence of such a determination by a neutral factfinder in a common law negligence action, the courts should concentrate their efforts on imposing maximum available penal sanctions against the criminals themselves, who are the direct cause of violent crime. Unless a gun manufacturer is found to have acted negligently or recklessly, it is improper for courts to attempt to regulate the production of small, inexpensive handguns by shifting the burden of criminal handgun use onto gun manufacturers.

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gently sold gun to escaped convict who subsequently shot plaintiffs' decedents), *cert. denied*, 434 U.S. 835 (1977).

169. Target marketing generally involves using demographic statistics to identify the purchasing needs of specific sub-groups of consumers. *See* E. MC-CARTHY BASIC MARKETING, A MANAGERIAL APPROACH 37-41 (1960). Products may then be designed, advertised, priced, packaged, and distributed to specifically suit the needs of the target market. *Id.* Applying these principles to "saturday night specials," it is submitted that if a plaintiff could prove that a handgun manufacturer specifically and intentionally target marketed small, inexpensive handguns to the criminal element as a product designed to facilitate their illegal activities, then such conduct would be unreasonable. *Cf.* *Moning v. Alfonso*, 400 Mich. 425, 434, 254 N.W.2d 759, 763 (1977) (manufacturer that marketed 10-cent slingshots to children as toys may have acted unreasonably).