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STRICT LIABILITY FOR HANDGUN MANUFACTURERS: A REPLY TO PROFESSOR OLIVER

*Andrew Jay McClurg**

This is the final installment of my debate with Professor Philip D. Oliver concerning whether strict liability should be imposed upon manufacturers of well-made handguns when those guns are used to kill or injure.¹ Professor Oliver's thoughtful and articulate response to my article advocating such liability sets forth two basic arguments: (1) if strict liability is to be imposed, this is a decision which should be made by legislatures rather than courts;² and (2) products liability law does not support the imposition of strict liability.³ Additionally, because I addressed the interrelationship between gun control policy and tort liability, Professor Oliver devotes a portion of his response to this issue;⁴ however, he maintains that gun control is irrelevant to the subject of our debate.⁵ Section I of this reply explains why it is proper for courts to impose strict liability upon handgun manufacturers and incorporates a discussion regarding the relevance of gun control. Section II responds to Professor Oliver's arguments concerning principles of products liability law.

I. THE DECISION TO IMPOSE STRICT LIABILITY FOR HANDGUN MANUFACTURERS MAY PROPERLY BE MADE BY COURTS

The largest portion of Professor Oliver's article is devoted to argu-

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1. My article proposing strict liability for handgun manufacturers appeared in volume 13, number 4. Andrew J. McClurg, *Handguns As Products Unreasonably Dangerous Per Se*, 13 U. ARK. LITTLE ROCK L.J. 599 (1991). Professor Oliver's response opposing strict liability appeared in volume 14, number 1. Philip D. Oliver, *Rejecting the "Whipping-Boy" Approach to Tort Law: Well-Made Handguns Are Not Defective Products*, 14 U. ARK. LITTLE ROCK L.J. 1 (1991). I agree with Professor Oliver that, while we disagree, we do so most agreeably. Everything herein should be read in the spirit of free and open debate.

2. Oliver, *supra* note 1, at 11-26.

3. Oliver, *supra* note 1, at 26-35.

4. Oliver, *supra* note 1, at 6-11.

5. Oliver, *supra* note 1, at 6.

ing that the decision to impose strict liability against handgun manufacturers is one that should be made by legislatures rather than courts.⁶ I am not sure I needed convincing, but if I did, Professor Oliver has persuaded me that it probably would be *better* for legislatures to impose strict liability than for courts to do so. His arguments concerning technical matters such as retroactivity⁷ and the greater ability of legislatures to write comprehensive restrictions specifying what kinds of guns would give rise to strict liability⁸ support this conclusion. Moreover, in a perfect world where legislative conduct accurately reflected majority will, it would be more becoming for legislatures rather than courts to make the decision to impose strict liability. However, legislatures have not acted to implement strict liability and are not likely to do so in the foreseeable future. In the absence of legislative action, it is not improper for courts to act on their own in this area.

A. Deference To Legislatures

Professor Oliver's principal argument concerning legislative prerogative is that the issue of strict liability for makers of handguns is a policy matter which is beyond the legitimate power of courts to address.⁹ Professor Oliver and I have very different views about how courts function and how they should function. I believe it is both inevitable and desirable that courts consider public policy when making decisions upon which tremendous social consequences depend. Professor Oliver, on the other hand, would choose to live in the textbook world presented to us by tenth grade civics teachers where only legislatures make law and courts simply interpret it.¹⁰ Though he acknowledges that this does not always comport with reality,¹¹ he asserts a positivistic view that the legitimacy of courts "derives from the supposition that they are applying and interpreting constitutions, statues, regulations, and common-law precedent, and not purely applying their ideas of good

6. Oliver, *supra* note 1, at 11-26.

7. Oliver, *supra* note 1, at 17-20.

8. Oliver, *supra* note 1, at 21-24.

9. "The most basic reason [why courts should not impose strict liability] is recognition of the proper role of courts. Courts should defer to legislatures for resolution of policy issues, within constitutional limits." Oliver, *supra* note 1, at 5. *See also id.* at 12-16.

10. "Tenth-grade civics students learn that the proper role of legislative bodies is to make law, while that of courts is interpretation. But we are grown-ups, and can acknowledge that Professor McClurg is correct in stating that in fact, courts do make laws." Oliver, *supra* note 1, at 12.

11. Oliver, *supra* note 1, at 12.

policy."¹²

While this may be sound as a statement of general principle, to borrow a phrase from Professor Oliver, "[t]he real world is a bit more complex."¹³ Even accepting that the exclusive role of judges is to "interpret" the law, this imposes very few restraints upon judicial decision-making because so much of what judges are called upon to interpret is indeterminate and, therefore, open to more than one interpretation.¹⁴ When the law which the judge is interpreting does not clearly compel only one conclusion, which it usually does not, what then does the judge turn to as a basis for making a decision? One obvious choice is the judge's view of what is desirable social policy.¹⁵

12. Oliver, *supra* note 1, at 12.

13. Oliver, *supra* note 1, at 9.

14. In the realm of constitutional adjudication, for example, Ronald Dworkin has observed that it is misleading to label judges as either interpretivists or noninterpretivists. Both types of judges decide cases by interpreting the Constitution. Each seeks to enforce the Constitution as law according to his or her own interpretive judgment. They simply disagree about how it should be interpreted. RONALD DWORKIN, *LAW'S EMPIRE* 357-60 (1986).

15. Professor Oliver and I disagree about this perhaps only as a matter of degree. He concedes that "[i]f a court is faced with a novel question not contemplated by legislative or constitutional drafters, it must decide the case, and in doing so, 'makes law.' In reaching its decision, the court presumably would be influenced to a great degree by its view of policy—its desire for a good outcome. . . ." Oliver, *supra* note 1, at 12. Because of the inherent ambiguities of language and the absence of evidence regarding what legislative or constitutional framers intended in most instances, I believe that courts are faced with novel questions of law in virtually every case involving an issue which the court has not previously decided. In addition to the problems of statutory and constitutional interpretation, courts must struggle to ascertain the meaning of a vast body of evolving, often vague common-law principles.

The American legal realists rejected entirely the notion that judges are able to decide cases by simply applying neutral legal rules to neutrally determined facts. *See, e.g.*, JEROME FRANK, *COURTS ON TRIAL* 182 (1949). They did not believe that either legal rules or the process of judicial fact determination are certain enough to provide any basis for controlling the discretion of judges. *See generally* JEROME FRANK, *LAW AND THE MODERN MIND* xii-xvii (Anchor Books ed. 1963) (hereinafter *LAW AND THE MODERN MIND*). The realists asserted that judicial results can best be explained by reference to external stimuli such as the judge's values, prejudices, disposition, or temperament. *E.g.*, *LAW AND THE MODERN MIND, supra*, at 119 (decisions are determined by the judge's "peculiar traits, disposition, biases and habits"); Charles G. Haines, *General Observations On the Effect of Personal, Political and Economic Influences In the Decisions of Judges*, 17 U. ILL. L. REV. 98, 116 (1922) (education, family and personal associations, wealth, and social position, legal and political experience, and intellectual and temperamental habits); Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897) (Judges make particular choices deciding cases "because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude . . . upon a matter not capable of exact quantitative measurement. . . ."); *Ex Parte Chase*, 43 Ala. 303, 311 (1869) (suggesting that judicial power may be misdirected "by a fit of temporary sickness, an extra mint julep, or the smell or looks of a peculiar raincoat").

The fact that written opinions often follow a logical form creates an illusion that rules of law

Because existing products liability law does not clearly compel only one conclusion concerning the issue of strict liability for handgun manufacturers, I adhere to my original assertion that it is false to assume that courts which reject strict liability are not engaging in policy making.¹⁶ Regardless of whether one agrees with my theory that handguns are defective products under a risk-utility analysis, I think it is fair to say that product liability principles are sufficiently broad that they *could* be read to support such a conclusion. Accordingly, when a judge rejects that interpretation and instead chooses an interpretation that handguns are not defective products, it is reasonable to believe that the judge's views of public policy influenced the decision.

Certainly, the history of products liability law offers no support for the view that public policy is an improper or irrelevant concern in the development of common-law tort principles. When Justice Traynor wrote his landmark opinion in *Greenman v. Yuba Power Products*¹⁷ adopting strict liability for defective products, he did so expressly to advance the policy of insuring "that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."¹⁸ This statement reflects what has come to be known as the "enterprise theory" of strict liability. Under the enterprise theory, liability is imposed upon manufacturers of defective products not because the manufacturer acted wrongfully, but as a matter of social justice. It is founded upon the assumption that

strict liability should be imposed on producers in order to force them to incorporate accident costs into the price of their products. The theory is that the increased prices will then discourage consumers from purchasing risky products and thereby lower total accident costs to society. Further, imposing the costs of accidents generally on manu-

are being neutrally applied. As Frank said:

The court can decide one way or the other and in either case can make its reasoning appear equally flawless. Formal logic is what its name indicates; it deals with form and not with substance. The syllogism will not supply either the major premise or the minor premise. The "joker" is to be found in the selection of these premises.

LAW AND THE MODERN MIND, *supra*, at 72. See also Holmes, *supra*, at 465-66 ("The language of judicial decision is mainly the language of logic. . . . You can give any conclusion a logical form."); see generally Andrew J. McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions In Criminal Procedure Cases*, 59 U. COLO. L. REV. 741, 748-52 (1988).

16. McClurg, *supra* note 1, at 604-05.

17. 377 P.2d 897 (Cal. 1962).

18. *Id.* at 901.

facturers and consumers allows the costs of product-caused injuries to be spread over a class of users.¹⁹

If a purer example exists in the law of policy dictating judicial decision making, I am not aware of it. Consequently, we may ask Professor Oliver: if policy was the impetus for adopting strict liability for defective products, how does it become an improper or irrelevant consideration when deciding whether to extend the doctrine to any particular product?

Professor Oliver attempts to bolster his "deference to legislatures" argument by curiously suggesting that legislatures have already settled this issue of strict liability.²⁰ While conceding that courts could properly act "[i]f this were an area governed by common law,"²¹ he maintains that this is an area within legislative domain.²² But as Professor Oliver is well aware, strict liability for defective products, though now the subject of statutory regulation in many states, is a creature of common-law origin. Hundreds of thousands of first-year law students have borne witness to its tortured judicial evolution from the law of negligence and warranty. The doctrine of strict liability emerged from the pens of great judges like Cardozo and Traynor, not from voice votes on the legislative floor.

The fact that Congress and state legislatures have "given considerable attention to issues of gun regulation"²³ and have "actively regu-

19. *Bynum v. EMC Corp.*, 770 F.2d 556, 571 (5th Cir. 1985). See also *Klimas v. International Tel. & Tel.*, 297 F. Supp. 937, 941 n.4 (D.R.I. 1969) ("Much of the development of strict liability in the products area has been based on the economic theory of 'enterprise liability.' According to this theory, the risk of loss from defective products is placed upon the manufacturer rather than upon the individual consumer or user, since the manufacturer can insure against the risk . . . thus spreading the risk of loss over the entire group of buyers."); *Camacho v. Honda Motor Co., Ltd.*, 741 P.2d 1240, 1246 (Colo. 1987) ("In the final analysis, the principle of products liability contemplated by section 402A is premised upon the concept of enterprise liability for casting defective products into the stream of commerce."); *Santor v. A & M Karagheusian*, 207 A.2d 305, 311-12 (N.J. 1965) ("The obligation of the manufacturer thus becomes what in justice it ought to be—an enterprise liability. . . . The purpose of such liability is to insure that the cost of injuries or damages, either to the goods sold or to other property, resulting from defective products, is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves."); see generally Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 COLO. L. REV. 153 (1976).

20. See Oliver, *supra* note 1, at 13 ("Where the law is settled, as it is here, the fact that a legislative body considers and rejects a new policy should make a court quite hesitant to implement that policy on its own.")

21. Oliver, *supra* note 1, at 13.

22. Oliver, *supra* note 1, at 13.

23. Oliver, *supra* note 1, at 13.

lated guns in many ways"²⁴ adds nothing to his argument in this regard. The issue here is tort doctrine, not criminal or regulatory restrictions. That Congress and state legislatures have imposed some regulatory restrictions upon guns is not related to the power of courts to shape tort principles founded in state common law.²⁵ While legislatures undoubtedly have the power within constitutional limits to preempt this area, they have not chosen to do so. In truth, there is virtually no support for Professor Oliver's statement that courts acting in this area do so "[i]n the face of careful legislative attention that has uniformly rejected the approach advocated by liability proponents."²⁶

Thus, because strict liability for defective products is a common-law invention, implemented for policy reasons, it is reasonable to expect that courts will continue to interpret products liability law with a view towards advancing the social goals which underly strict liability. Moreover, it is particularly desirable that they do so in the area of strict liability for handgun manufacturers, since legislators have abdicated their responsibility to protect their constituents from guns. In cataloging the arguments against him, Professor Oliver correctly identifies one asserted justification for judicial boldness in this area as being the failure of representative bodies to actually represent the interests of their constituents.²⁷ He also correctly identifies the most plausible explana-

24. Oliver, *supra* note 1, at 13.

25. See *Freehe v. Freehe*, 500 P.2d 771, 775 (Wash. 1972). (In response to a claim that any change in the law of interspousal tort immunity should come from the legislature, the court said: "This argument ignores the fact that the rule is not one made or sanctioned by the legislature, but rather is one that depends for its origins and continued viability upon the common law.")

26. Professor Oliver cites only one state statute which explicitly rejects strict liability for injuries caused by well-made handguns. CAL. CIV. CODE § 1714.4 (West 1985). Interestingly, the statute appears to be expressly intended to preempt utilization of the risk-utility analysis which I assert supports the conclusion that handguns are defective products. *Id.* § 1714.4(a) ("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 the injury posed by its potential to cause serious injury, damage, or death when discharged.") That the California legislature felt compelled to take this preemptive step suggests that it believed the risk-utility analysis would logically and readily lend itself to application to firearms.

The *New York Times* recently reported that strict liability legislation pertaining to assault weapons has been proposed in New York, Illinois, Minnesota, and Oregon. Tamar Lewin, *Anti-Gun Forces Step Up Effort To Hold Sellers Liable*, N.Y. TIMES, Nov. 5, 1991, at A8. While this proposed legislation does not pertain to handguns, it does indicate that legislative resolve against strict liability for firearms is not as firmly ensconced as Professor Oliver asserts.

27. Oliver, *supra* note 1, at 14. He mistakenly concludes that I do not adhere to this asserted justification by misconstruing a statement from my original article to mean that I "concede[] that the public may not support gun control." Oliver, *supra* note 1, at 15 n.34. I made no such concession. I do believe that for too long the American public has failed to question the

tion for this failure: fear of the National Rifle Association (NRA).²⁸

How otherwise can one explain Congress' virtual paralysis on this vital issue in light of public opinion evidence showing that Americans overwhelmingly favor gun control?²⁹ The NRA's intimidation tactics are well documented. The following resolution, adopted by the organization at an annual meeting in response to recent state and federal gun control initiatives, is enough to send a chill up the spine of any politician interested in continuing his or her political career:

WHEREAS this unprecedented string of legislative defeats and outrageous political backstabbing cannot and will not be tolerated by the membership of this Association,

THEREFORE, BE IT RESOLVED, that the membership of the National Rifle Association of America . . . pledges that we shall not soon forgive, and shall never forget, the betrayals of those politicians who once sought our support and will need it again. . . .³⁰

Experience has shown that the NRA backs up its threats.³¹ There is no way to know how many politicians the NRA has cowed, but the record suggests that the NRA has largely had its way with respect to congressional action concerning major gun control initiatives.

Professor Oliver considers it heretical to suggest that courts should

nation's gun policies, but when confronted with the issue, the populace expresses overwhelming support for gun control. *See infra* note 29.

28. The NRA has a staff of 450, 2.6 million members, and an annual budget of \$87 million. Michael Isikoff, *NRA Selects Hard-Liner As Gun Bill Battle Nears*, WASH. POST, Apr. 16, 1991, at A5. I have to confess a certain admiration for the NRA. It is a well-organized, well-funded organization which has been extremely successful in assembling millions of members from different social strata into a cohesive lobbying group that operates at a continuous state of battle readiness. It does only what all other lobbying organizations try to do: effectively represent its special interest. While I disapprove of some of the methods the NRA employs, the real problem is with the system which allows the NRA and other lobbying groups to wield as much power as they do.

29. *E.g.*, 137 CONG. REC. H2833 (daily ed. May 8, 1991) (statement of Rep. Feighan) (citing to Gallup poll showing 95% of American public supported passage of the Brady Bill, the measure to impose a national waiting period and background checks for handgun purchases). Congress did ultimately vote to enact the Brady Bill, but the measure never made it to the President. *See infra* note 64 (discussing disposition of the Brady Bill).

30. *Members Meeting Adopts Resolution*, AMER. RIFLEMAN, Dec. 1990, at 50.

31. After former congressman Peter Smith spoke out in favor of legislation to ban assault weapons, the NRA spent as much as \$20,000 on a direct mail and advertising campaign to unseat him from the House of Representatives. He lost his bid for reelection. Stephanie Saul, *NRA Takes Aim At Brady Bill*, NEWSDAY, Apr. 16, 1991, at 85. Smith said the NRA created an "aura of anger" against him which prompted NRA supporters to shoot at his campaign signs, try to run his mother's car off the road, and make harassing phone calls to his wife. *Id.* An NRA spokesperson said the organization does not condone such conduct, *id.*, yet the unmistakable message the organization sends to politicians is that it is a mistake to cross the organization.

act undemocratically to fill the vacuum in this area left by our pusillanimous elected representatives. But the history of American law is richly annotated with situations where courts have acted boldly to implement social policy changes in the face of inaction by legislatures, whether due to apathy, intransigence, or cowardliness.³² For the most part, history has treated these decisions kindly. Though they triggered great controversy when they were rendered, hindsight has proven many of the most notable cases to be courageous decisions of great wisdom.³³ While I do not advocate willful judicial decision-making as a way of life and am not unaware of its dangers, I trust courts to do the right thing in this area more than I trust legislatures.

B. The Relevance of Gun Violence and Gun Control

The preceding discussion demonstrates that Professor Oliver is incorrect in asserting that the issue of gun control is "essentially irrelevant[t]" to the question of strict liability for makers of handguns.³⁴ The level of gun violence and the proper policy responses to it are the legitimate concerns of courts. Controlling gun violence is directly relevant to the tort issue being debated because one goal of the enterprise theory of strict liability is the deterrence of losses caused by risky products.³⁵ The theory is that once handgun manufacturers are forced to

32. I am thinking of cases such as *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Sixth Amendment right to court appointed counsel applies to the states through the Fourteenth Amendment Due Process Clause); *Baker v. Carr*, 369 U.S. 186 (1962) (holding that discrimination in the allocation of legislative representation is a justiciable issue, thereby laying the foundation for *Reynolds v. Sims*, 377 U.S. 533 (1964), recognizing one person-one vote as the constitutional standard for legislative representation); and [*Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that segregated public schools violate the Equal Protection Clause).] I concede there are also examples where courts have made policy-based decisions receiving something less than universal acclaim; e.g. *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing constitutional right of privacy protecting a woman's right to terminate a pregnancy). The issue of strict liability for handgun manufacturers may seem diminutive compared to the fundamental rights at issue in these landmark cases, until one takes stock of the magnitude of the tragedy. Every six years, as many Americans are murdered with handguns as died in the Vietnam War. See Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 U. CIN. L. REV. 1103, 1114 (1991) (citing figures showing that 9,200 handgun murders occur in the United States each year).

33. Anthony Lewis' book about Clarence Earl Gideon's historic trek to the Supreme Court seeking the assistance of counsel in his criminal trial should be required reading for anyone who doubts that there are occasions when justice is something larger than strict interpretation of existing positive law. ANTHONY LEWIS, *GIDEON'S TRUMPET* (Vintage ed. 1966).

34. Oliver, *supra* note 1, at 6.

35. See *supra* text accompanying note 19; see also ABA SPECIAL COMM. ON THE TORT LIABILITY SYSTEM, *TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW*, ch. 4 (1984).

incorporate the losses caused by handguns into the cost of their products, handgun prices will rise, handgun sales will decrease, and fewer handgun injuries will occur. Moreover, the need for courts to be concerned with the indisputably desirable social goal of reducing gun violence is heightened by the fact that legislatures have abdicated their responsibility in this area.

This brings us to Professor Oliver's gloomy assessment regarding the likely effectiveness of gun control. He does not believe reducing the number of guns in America will have any impact upon gun violence because, as the bumper sticker argument goes, "When guns are outlawed, only outlaws will have guns."³⁶ It is true that determined, resourceful criminals probably will always be able to obtain guns, but most handgun attacks are not the denouement of elaborate criminal plans which begin by scrutinizing the firearm offerings on the black market in search of the perfect weapon to commit the perfect crime.

Seventy-one percent of handgun murders are committed by relatives, friends, or acquaintances.³⁷ Eighty percent are the result of altercations.³⁸ These are usually spontaneous violent acts committed by people who pull guns out of drawers or glove compartments or coat pockets and murder because they are mad, drunk, jealous, scared, immature, or trying to be macho. What allows them to accomplish this so often and so easily is that our country is drowning in guns. Currently, Americans possess more than 200 million nonmilitary firearms, with four to five million additional guns entering the stream of commerce each year.³⁹ While reductions in these numbers would not be matched by a proportionate decrease in gun deaths and injuries, major reductions in handguns presumably would result in a measurable and much needed decrease in handgun tragedy.

No gun control measure will ever work perfectly, but if perfection were the standard for decision-making, not many decisions would be made about anything. It is faulty reasoning to attack a proposal on the ground that it is imperfect where perfection is unattainable.⁴⁰ Not

36. Oliver, *supra* note 1, at 8.

37. Bogus, *supra* note 32, at 1115.

38. Bogus, *supra* note 32, at 1115.

39. Erik Eckholm, *Ailing Gun Industry Confronts Outrage Over Glut of Violence*, N.Y. TIMES, March 8, 1992, at A1. In 1989, American manufacturers produced for nonmilitary use: 1,376,000 pistols, 622,000 revolvers, 1,382,000 rifles, and 688,000 shotguns. Alan Farnham, *Inside the U.S. Gun Business*, FORTUNE, June 3, 1991, at 191.

40. "There never was, or will be, any plan executed or proposed, against which strong and even unanswerable objections may not be urged; so that unless the opposite objections be set up in

many rules of law operate perfectly to achieve their intended goals. Murders occur even though murder is legally prohibited, yet we do not hear people advocating the repeal of the statutes which make murder a crime. Civil rights get violated even though it is illegal to do so, but no one would suggest that civil rights laws are futile. The fact that gun control would not be a perfect solution to gun violence is not a sufficient reason to reject it.

Following a similar line of reasoning, Professor Oliver also attacks the notion that the availability of guns is the reason we have such a high murder rate.⁴¹ He argues correctly that other, more complex factors contribute to the level of gun violence in America.⁴² However, to concede this is to do nothing more than recognize the difference between necessary and sufficient causes. A necessary condition of an event is one which must be present for the event to occur but which is not by itself sufficient to produce the event.⁴³ A sufficient condition is one in the presence of which the event definitely will occur.⁴⁴ Gun control is a necessary condition, but not a sufficient one, to the reduction of violent crime in the United States. Professor Oliver is correct that the ready availability of guns is only one of many causes which contribute to violent crime. A substantial decrease in violent crime will occur only when these other causes—poverty, drugs, the disintegration of families—are dealt with effectively and comprehensively. Nevertheless, while gun control will not alone significantly reduce violent crime, it is doubtful we will make an appreciable dent in violent crime without gun control.

My greatest problem with the naysayers of gun control is that they rarely offer alternative solutions. They simply throw up their hands and say, "Gun control won't work," then leave us waiting for the ideas which will work, but which never come.⁴⁵ This should not be a tolerable response to a tragedy of such dimensions. We will never know whether reducing the number of handguns in this country will reduce handgun

the balance on the other side, we can never advance a step.'" W. WARD FEARNside & WILLIAM B. HOLThER, FALLACY: THE COUNTERFEIT OF ARGUMENT 131 (1959) (quoting nineteenth century logician Richard Whately).

41. Oliver, *supra* note 1, at 9.

42. Oliver, *supra* note 1, at 9.

43. T. EDWARD DAMAR, ATTACKING FAULTY REASONING 65 (1980).

44. *Id.*

45. I do not include Professor Oliver in this group inasmuch as he considers himself a supporter (albeit an "unenthusiastic, unoptimistic" one) of some kinds of legislative gun control. Oliver, *supra* note 1, at 4.

violence unless and until it happens.

C. Shortcomings of the Common-Law Approach to Policy Making

The second part of Professor Oliver's legislative prerogative argument is essentially a revolt against the American tort system.⁴⁶ Professor Oliver has a low opinion of some of its basic features. He apparently does not like the contingency fee system, worrying that strict liability for handgun manufacturers will do little more than "mak[e] millionaires of a few more personal injury lawyers."⁴⁷ Overall, he believes the tort system "works well for lawyers, worse for litigants, and still worse for society as a whole."⁴⁸ He lacks faith in trial by jury, lamenting the "manifest shortcomings of the jury system"⁴⁹ and concluding that "juries seem to be getting worse."⁵⁰ Nor, apparently, is he fond of allowing compensation for intangible injuries.⁵¹

While I share some of Professor Oliver's concerns regarding the tort system, they prove too much with respect to the issue in this debate. However persuasive Professor Oliver's call for revamping tort law, his arguments do not justify discriminating against the victims of handgun violence. Trying to minimize the ills of the tort system by denying access to it by one class of tort victims would be like trying to address the problem of drunk driving by prohibiting the sale of a particular brand of beer. Given his position that "the present scope of tort law should be considerably restricted,"⁵² one can speculate that Professor Oliver would readily transfer his arguments against strict liability for handgun injuries to any other proposal with the potential to expand tort liability.

Professor Oliver's other arguments concerning the shortcomings of judicial action in this area involve the superior ability of legislatures to make decisions regarding the retroactive effect of strict liability⁵³ and to determine with greater specificity than courts which kinds of guns would subject manufacturers to liability.⁵⁴ I tend to agree that legisla-

46. Oliver, *supra* note 1, at 24-26.

47. Oliver, *supra* note 1, at 10.

48. Oliver, *supra* note 1, at 24-25.

49. Oliver, *supra* note 1, at 25.

50. Oliver, *supra* note 1, at 26.

51. Oliver, *supra* note 1, at 25.

52. Oliver, *supra* note 1, at 26.

53. Oliver, *supra* note 1, at 17-20.

54. Oliver, *supra* note 1, at 21-24.

tures would be able to make these kinds of decisions more comprehensively and perhaps more efficiently than courts operating on an *ad hoc* basis.⁵⁵ However, neither of these problems is insurmountable by courts.

With regard to retroactivity, Professor Oliver asserts that legislatures usually change the law only prospectively, whereas courts normally give their decisions retroactive effect.⁵⁶ I agree with Professor Oliver that the consequences of imposing strict liability retroactively could be extreme.⁵⁷ Therefore, I do not advocate that judicial decisions imposing strict liability be given retroactive effect. However, Professor Oliver's anxiety concerning this issue seems out of proportion to the problem, given his footnote concession that "courts generally do not feel bound to give retroactive effect to their decisions."⁵⁸

He next argues that "[w]hile courts would find it difficult to limit the effect of a strict liability decision temporally, they would find it impossible to limit its effect to specified types of guns."⁵⁹ But Professor Oliver underestimates the abilities of courts. While legislatures perhaps could draw more precise lines more efficiently, line drawing is certainly not a challenge with which courts are unfamiliar. Indeed, as Justice Holmes once observed, "where to draw the line . . . is the question in pretty much everything worth arguing in the law."⁶⁰

The line which I assert should be drawn is a fairly concrete one between handguns and long-guns (rifles and shotguns). This line is jus-

55. There is, however, something to be said for gradual process of inclusion and exclusion which occurs in the development of most common-law principles. Legislatures sometimes act precipitously to draw hard and fast lines, without considering the problem cases which may lie ahead. Courts, on the other hand, precisely because they do operate on an *ad hoc* basis, are able to weigh individual fact situations and make reasoned determinations as to which side of the line the case should fall upon.

56. Oliver, *supra* note 1, at 17-18.

57. Oliver, *supra* note 1, at 19.

58. Oliver, *supra* note 1, at 18 n.41. Professor Oliver observed that in my initial article I referred throughout the article to 22,000 annual handgun deaths and mentioned only in a footnote that roughly 12,000 of these are suicides. *Id.* at 7 n.8. He good-naturedly chastised me for being in "good academic form." *Id.* He appears to be in similar good form with respect to his footnote observation regarding retroactivity and also in connection with his discussion of *O'Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983). Professor Oliver devotes only one footnote to this case, which constitutes the primary judicial support for my argument in favor of strict liability, McClurg, *supra* note 1, at 609-10. Oliver, *supra* note 1, at 31 n.111. Law students often skip over footnotes, believing them to be unimportant, when in truth, that is where judges and scholars are fond of burying annoying but relevant facts, law and counter-argument, hoping that out of sight is out of mind. Professor Oliver and I are not alone in our good academic form.

59. Oliver, *supra* note 1, at 21.

60. *Irwin v. Gavit*, 268 U.S. 161, 168 (1925) (Holmes, J.).

tified under a risk-utility balancing analysis both by the increased risk posed by handguns due to their easy concealability and the greater utility of long-guns for most legitimate purposes.⁶¹ Distinguishing between handguns on the one hand and rifles and shotguns on the other would not appear to pose any great difficulty.

However, I must credit Professor Oliver with successfully inserting a twist in this otherwise straight line by raising the issue of assault weapons.⁶² Assault weapons are admittedly problematic. They pose a greater risk than traditional long-guns for several reasons: some use high-power ammunition; they usually have larger magazine capacities than other long-guns; some models are not much larger than handguns and others have folding stocks which make them more easily concealable than other long-guns; they sometimes possess military features such as flash suppressors and threaded barrels for the attachment of silencers; and, as Professor Oliver notes, assault weapons have become the weapon of choice for some types of criminals.⁶³ Moreover, assault weapons have no utility for nonmilitary use which is not matched or surpassed by traditional rifles and shotguns.

If Congress had been able to sustain the rare burst of courage it mustered last year when it passed the Brady Bill,⁶⁴ we might not have to concern ourselves with the question of strict liability for assault weapons. The Senate voted to ban the manufacture and sale of fourteen types of assault weapons as part of the Senate Violent Crime Control Act of 1991, the broad crime control package which also included

61. McClurg, *supra* note 1, at 611-16.

62. Oliver, *supra* note 1, at 22.

63. Oliver, *supra* note 1, at 22 n.61.

64. The "Brady Bill" is the popular title given to proposed federal legislation to require waiting periods and background checks for handgun purchases. In the summer of 1991, the United States House of Representatives and the United States Senate passed different versions of the bill as part of broader crime control packages. *Brady Handgun Violence Protection Act*, H.R. 7, 102nd Cong., 1st Sess., 137 CONG. REC. H2854 (1991); Senate Violent Crime Control Act of 1991, S. 1241, 102nd Cong., 1st Sess. §§ 2701-2703, 137 CONG. REC. S9081-9083 (1991). In November 1991, House and Senate conferees reached agreement upon the overall crime bill, which was designated as the Omnibus Crime Control Act of 1991. Conf. Rep. on Omnibus Crime Control Act, H.R. 3371, 102nd Cong., 1st Sess., 137 CONG. REC. H11686 (1991) [hereinafter Conf. Rep.]. The conferees adopted the Senate version of the Brady Bill, with only minor modifications. Conf. Rep., *supra* at H11692. After President Bush wrote letters to the Republican leaders of Congress threatening to veto the bill because it did not go far enough in the areas of habeas corpus reform, the exclusionary rule, and the death penalty (Letters from George Bush to Robert H. Michel and Robert Dole (Nov. 25, 1991), reprinted in 137 CONG. REC. H11678, S18671 (daily ed. Nov. 26, 27, 1991)), Congress adjourned for the year without taking final action on the legislation.

the Senate's version of the Brady Bill.⁶⁵ However, the House of Representatives rejected the assault weapon ban.⁶⁶ Because assault weapons pose such tremendous risks and have no greater (and probably less) utility for legitimate purposes than traditional long-guns, banning their manufacture would appear to be the preferable way to address the problems they create.

Short of that, I concede that my risk-utility analysis could be applied to hold that some models of assault weapons are defective products. Professor Oliver no doubt would argue that this acknowledgement proves his point that judicially imposed strict liability for firearms will take us tumbling down the slippery slope,⁶⁷ but that is not the case. Even if courts were willing to extend strict liability to some assault weapons, that would still leave traditional long-guns untouched. While distinguishing between an assault weapon and a traditional long-gun might be more difficult in a particular case than distinguishing between a handgun and a long-gun, courts are not incapable of making such determinations. Moreover, courts might choose not to extend strict liability to assault weapons precisely because of the desirability of maintaining a single, straight (if somewhat arbitrary) line of distinction. In any event, the slippery slope danger is minimized in nonconstitutional contexts by the fact that the legislature can step in at any point to change common-law principles with which it disagrees.⁶⁸

II. PRODUCTS LIABILITY PRINCIPLES SUPPORT THE IMPOSITION OF STRICT LIABILITY

The theory I advanced in my initial article is that handguns are products in a defective condition unreasonably dangerous to users and bystanders under a risk-utility analysis because the risk they pose to human life outweighs the utility of handguns to society.⁶⁹ Professor Oliver commences his attack upon this theory with a broad-based discussion concerning the doctrinal basis for tort liability. He accurately as-

65. See *supra* note 64 for discussion of this legislation.

66. See generally Michael Isikoff, *House Rejects Attempt To Ban Assault Guns*, SAN. FRAN. CHRONICLE, Oct. 18, 1991, at A20.

67. Oliver, *supra* note 1, at 22.

68. I agree with Professor Oliver's assertion that courts cannot properly ignore expressed legislative will on the theory that the legislature can come back later and overrule the judicial determination by passing legislation. *Id.* at 14 n.31. However, I disagree with Professor Oliver that legislatures have so clearly expressed their will in this area as to make judicial action improper.

69. McClurg, *supra* note 1, at 605-16.

serts that compensation alone is not an adequate justification for imposing liability and that some relationship between the defendant and the injured person is necessary to justify shifting the loss to the defendant.⁷⁰ “[E]ven where strict liability is utilized, the law specifies the nexus that must exist between the defendant and the injury, a nexus that does not exist in the case of well-made guns.”⁷¹

But the nexus of which Professor Oliver speaks surely does exist between handgun manufacturers and the victims of handguns. Handgun manufacturers make the product which causes the injury or death. They distribute the product in the stream of commerce. They profit from the sales of the product. This is a sufficient nexus under the enterprise theory of strict liability to justify shifting the losses caused by handguns from the victims to the manufacturers.⁷²

Handgun manufacturers make large amounts of money selling a product that is second only to automobiles as a cause of unnatural death.⁷³ It is not unreasonable to force them to incorporate the inevitable losses that flow from their deadly business as a part of their costs of doing business.⁷⁴ Whenever a person is injured, society suffers a net

70. Oliver, *supra* note 1, at 27.

71. Oliver, *supra* note 1, at 27.

72. See *supra* text accompanying note 19 for discussion of the enterprise theory.

73. Windle Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims*, 10 N. KY. L. REV. 41 (1982).

74. With respect to manufacturers of cheap "Saturday Night Special"-type handguns, the imposition of strict liability is not simply reasonable but a moral imperative. In Miami, a company named Intratec manufactures a relatively inexpensive 9 millimeter assault pistol called the Tec-9, which features a five-inch ventilated barrel and a thirty-two round magazine. Larry Rohter, *Gun Packs Glamour, Force and Reputation as Menace*, N.Y. TIMES, Mar. 10, 1992, at A1. Sales brochures boast of the weapon's special Tec-Kote finish, which "'provides a natural lubricity to increase bullet velocities' and 'excellent resistance to fingerprints.'" *Id.* at A14. A member of the New York Police Department's Joint Firearms Task Force recently described the Tec-9 as "the weapon of preference for drug dealers here in New York City." *Id.* (quoting Lieut. Kenneth McCann). While only a small percentage of weapons used in crimes are traced, tracings by federal authorities suggest that the Tec-9 is used for criminal purposes more than any other assault-type weapon. *Id.* Questioned about the Tec-9's bad reputation with law enforcement authorities, a company executive responded: "'I'm kind of flattered. . . . It just has that advertising tingle to it. . . . It might sound cold and cruel, but I'm sales oriented.'" *Id.*

In California, a sixty-three-year-old man named George Jennings is the patriarch of a family empire consisting of three separate companies which manufacturer 400,000 cheaply made handguns each year, including the Raven Arms Ravenmp .25, the Davis Industries. 380 and the Bryco Arms J-.22. Alix M. Freedman, *Fire Power: Behind the Cheap Guns Flooding the Cities Is A California Family*, Wall St. J., Feb. 28, 1992, at A1, A6. The guns cost as little as \$13 each to manufacturer *id.* at A6 and sell for as little as \$35. *Id.* at A1. Handguns manufactured by Davis Industries ranked first on the list of all handguns used in crimes in 1990-91, based upon federal firearms tracings. *Id.* at A6 (U.S. Bureau of Alcohol, Tobacco and Firearms data of completed

loss.⁷⁵ To refuse to shift the losses caused by handguns to the manufacturers does not mean the losses disappear. It simply means that they will be borne by the persons who are least responsible for the injuries and least able to bear the cost. Medical expenses will still be incurred, wages will still be lost, and the victims and their families will continue to suffer physically and emotionally. The decision to hold manufacturers liable for the injury does not affect the loss, it merely shifts the burden from the plaintiff to the manufacturer.⁷⁶ Manufacturers of handguns are in a far superior position to victims of handguns to bear these losses, by insuring against them and/or spreading them among those who benefit from their products—*i.e.*, handgun purchasers. Presumably, the price of handguns would then rise to reflect their true cost to society. Fewer handguns would be sold and fewer handgun injuries would occur. This is the way strict liability for defective products is supposed to work.

Courts routinely shift the cost of personal injuries to manufacturers in cases involving defective ladders, tires, batteries, football helmets, playground equipment, automobiles, hair dryers, space heaters, water skis, lawnmowers, nuts, bolts, just about anything except handguns. Sometimes the “defect” in these cases consists of nothing more than failing to warn of dangers most people would consider obvious.⁷⁷ But we are told by Professor Oliver that strict liability for handguns is different because: “gun suppliers provide precisely what is requested and expected—an instrument that can intimidate, injure, and kill”;⁷⁸ and because the “*raison d’etre*” of guns “is to shoot a living thing, frequently another person”;⁷⁹ and because “[t]he utility of a gun lies in its capacity to kill and injure”;⁸⁰ and because “customers of gun marketers do not wish to buy a product that will not kill.”⁸¹ In other words, manufacturers who sell products whose purpose is to make our lives easier or more enjoyable are to be held to a higher level of legal respon-

tracings of handguns sold after 1986). Raven Arms handguns ranked second, according to the same data. *Id.* A young, inner city gun peddler who transacts exclusively in the Jennings family product lines, made a compelling argument for the imposition of strict liability when he told the *Wall Street Journal*: “Here where I live, every young kid has a .22 or a .25. . . . It’s like their first Pampers.” *Id.*

75. Klemm, *supra* note 19, at 161.

76. Klemm, *supra* note 19, at 161.

77. See McClurg, *supra* note 1, at 610 n.32.

78. Oliver, *supra* note 1, at 29.

79. Oliver, *supra* note 1, at n.96.

80. Oliver, *supra* note 1, at 31.

81. Oliver, *supra* note 1, at 32.

sibility than manufacturers of a product which has as its only purpose causing exactly what the tort system is designed to prevent: injury to human beings.⁸²

Professor Oliver might say this is an unfair characterization because manufacturers of products other than handguns usually are held liable only where the defect in their products is remediable; that is, where there is "something wrong" with the product that at least in theory can be fixed, whether it be a manufacturing flaw in an individual product, a defect in design, or the failure to attach a suitable warning. Handguns, on the other hand, are working just fine when they are used to kill human beings. Indeed, they could not be functioning any better. They are doing exactly what they are supposed to do. Therefore, they are not defective.

However, as I argued in my original article, there is "something

82. The argument that handgun manufacturers should be protected from strict liability because the purpose of handguns is to kill and injure seems topsy turvy when considered in context with the liability of manufacturers who make products beneficial to society and which are not intended to harm anyone. Asbestos provides a useful example for comparison. Asbestos is a natural fiber with certain unique properties: high tensile strength, flexibility and resistance to temperature and corrosive chemicals. These properties make it an excellent thermal and acoustic insulator for buildings, homes, and ships. See generally Barbara A. Wetzel, Comment, *Asbestos In the Work Place: What Every Employee Should Know*, 31 SANTA CLARA L. REV. 423, 425-28 (1991). At one time, asbestos was considered to be a "miraculous mineral" and a boon to mankind." Donald A. Brenner, *Recovering Asbestos Abatement Costs In Tort Actions*, 19 COLO. LAW. 659 (1990). It has been estimated that eighty percent of the buildings constructed in the United States before 1979 contain asbestos. *Id.* Unfortunately, while asbestos fulfills important societal needs as an insulator, it presents a collateral, unintended risk to human health because airborne asbestos fibers can lodge in a person's lungs and cause a variety of respiratory-related illnesses.

Despite the fact that asbestos is a beneficial product which admirably fulfills its intended purpose and even though it cannot be made any safer, asbestos manufacturers are sued and held strictly liable more often than the manufacturers of any other product in the world. There are currently almost 90,000 asbestos cases pending in state and federal courts. Patricia Zimand, Note, *National Asbestos Litigation: Procedural Problems Must Be Solved*, 69 WASH. U. L.Q. 899, 902 (1991).

I do not lose sleep worrying about the woes of asbestos manufacturers. Many asbestos lawsuits currently being filed allege that the manufacturers knew about the risks associated with asbestos but failed to warn of them or even actively concealed them. Marina C. Appleton, Comment, *Asbestos Manufacturers: The Pathway to Punitive Damages*, 6 J. CONTEMP. HEALTH L. & POL'Y 343, 344 (1990). However, I cannot reconcile imposing strict liability upon makers of a product which was intended to and did fulfill a benign societal need because the product presented an unintended risk to human life, while at the same time rejecting strict liability for manufacturers of a more deadly product on the basis that the product was intended to be deadly. Perhaps counsel to the manufacturing industry should advise their clients to begin touting the dangers of their products in advertising campaigns, rather than their innocuous, beneficial purposes. If we accept Professor Oliver's reasoning, the product will not be considered defective so long as it is intended to kill or maim.

wrong" with a product when the risk it poses to human life outweighs its utility to society.⁸³ This is true even though the product performs as intended and there is no feasible way to make it safer. Ordinarily, in design defect cases, the availability of a feasible alternative design is an important factor in evaluating whether the risk of the product as designed outweighs its utility as designed. The fact that another, safer design exists which would not substantially impair either the usefulness or the cost-utility of the product diminishes the utility of the design being challenged. But the absence of an alternative design does not prevent the conclusion that the product is defective under pure risk-utility balancing. As a federal district court recently stated in discussing the "state of the art" defense:

[T]he question is whether the product was made as good as it could have been made at the time it was made. If so, liability should not attach to the product *unless it is determined that the product was in fact so unjustifiably dangerous that the manufacturer is liable for having made it at all, even though it was made as good as it could have been made.*⁸⁴

83. McClurg, *supra* note 1, at 608.

84. Snowden v. Connaught Lab., Inc., 137 F.R.D. 336, 344 (D. Kan. 1991) (emphasis added). Professor John Wade's multi-factor risk-utility balancing test is also instructive here. He lists seven factors to be considered in deciding whether a product is unreasonably dangerous:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

John W. Wade, *On the Nature of Strict Liability for Products*, 44 Miss. L.J. 825, 837-38 (1973). If we substitute "bystander" for "user" in Professor Wade's factors (which is justified by the fact that the victims of intentional and accidental handgun injuries are most often bystanders), all of the factors except the fourth one support extending strict liability to handguns. Handguns lack substantial utility to society, *see* McClurg, *supra* note 1, at 613-16; they pose tremendous risks of injury, both in terms of the probability of injury and the severity of the injury, *id.* at 611-12; a long-gun is an adequate substitute product which meets almost the same needs and is not as unsafe as a handgun, *id.* at 613-16; bystanders are unable to avoid the danger of the product by

Handguns are the premier example of a product "unjustifiably dangerous" and manufacturers should be held strictly liable for making them at all.

CONCLUSION

Professor Oliver ends his article by repeating his admonishment that courts have no business acting in this area. Sounding like Winston Churchill, he states: "Representative democracy may be slow and cumbersome, and frequently wrong, but it is our legitimate system of government."⁸⁵ In the three weeks I worked on writing this reply, approximately 525 people were murdered in this country with handguns, 693 women were raped at gun point, 12,075 people were robbed with a gun, and 23,436 people were assaulted with a gun.⁸⁶ How long are we supposed to wait for the "slow and cumbersome, and frequently wrong" process of representative democracy to work? How many people must suffer without redress before the failure of elected representatives to act itself becomes illegitimate? I believe courts would be acting properly to impose strict liability upon handgun manufacturers.

the exercise of care; the fact that bystanders may anticipate the dangers of handguns is irrelevant since it does not help them avoid the potential harm; and, finally, it is feasible for handgun manufacturers to spread the losses caused by handguns by setting the price of the product or carrying insurance.

85. Oliver, *supra* note 1, at 35-36.

86. These calculations are based upon figures showing that, every day in this country, twenty-five people are murdered with handguns, thirty-three women are raped at gun point, 575 people are robbed with a gun, and 1,116 people are assaulted with a gun. King, *Sarah and James Brady; Target: The Gun Lobby*, N.Y. TIMES MAGAZINE, Dec. 9, 1990, at 80.

