

## Saint Louis University Public Law Review

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Volume 18  
Number 1 *Gun Control (Vol. XVIII, No. 1)*

Article 12

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1999

### City Lawsuits Against the Gun Industry: A Roadmap for Reforming Gun Industry Misconduct

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**CITY LAWSUITS AGAINST THE GUN INDUSTRY: A ROADMAP FOR  
REFORMING GUN INDUSTRY MISCONDUCT**

BRIAN J. SIEBEL\*

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## I. INTRODUCTION: GUNS HAVE BECOME THE NEXT TOBACCO

On October 30, 1998, New Orleans became the first city in the nation to file suit against the gun industry.<sup>1</sup> Two weeks later, Chicago followed with a second lawsuit.<sup>2</sup> The lawsuits struck an immediate chord with municipal and county officials across the United States, who have been facing widespread gun violence in their communities for years. Within a year of New Orleans' filing, 28 additional cities and counties have filed suit against gun manufacturers, dealers and trade associations,<sup>3</sup> with additional lawsuits under consideration.<sup>4</sup>

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1. *Morial v. Smith & Wesson, et al.*, No. 98-18578 (New Orleans Parish Ct.). The complaint is available on the Center to Prevent Handgun Violence ("CPHV") website at <<http://www.handguncontrol.org/legalaction.htm>>

2. *Chicago v. Beretta U.S.A. Corp., et al.*, No. 98-CH-015596 (Cook County Circuit Court, Chancery Div.). The complaint is available on the Center's website, *supra* note 1.

3. The 28 additional cities and counties and their dates of filing are: Chicago and Cook County, IL (filed Nov. 12, 1998); Miami-Dade County, FL (Jan. 27, 1999), Bridgeport, CT (Jan. 27, 1999), Atlanta, GA (Feb. 5, 1999), Cleveland, OH (Apr. 8, 1999), Wayne County, MI (Apr. 26, 1999), Detroit, MI (Apr. 26, 1999), Cincinnati, OH (Apr. 28, 1999), St. Louis, MO (Apr. 30, 1999), San Francisco, Alameda County, Berkeley, Sacramento, and San Mateo County, CA (May 25, 1999) (East Palo Alto, and Oakland, CA joined July 16, 1999), Los Angeles, Compton, and West Hollywood, CA (May 25, 1999) (Englewood, CA joined July 16, 1999), Camden County, NJ (June 2, 1999), Boston, MA (June 3, 1999), Newark, NJ (June 9, 1999), Camden, NJ (June 21, 1999), Los Angeles County, CA (Aug. 6, 1999), Gary, IN (Aug. 27, 1999), and Wilmington, DE (Sept. 29, 1999).

More than 40 gun manufacturers have been sued in the various suits, including major U.S. and foreign gun makers Beretta U.S.A. Corp., Pietro Beretta, Sp. A., Browning Arms Co., Bryco Arms, Cobray Firearms, Colt's Manufacturing Co., Davis Industries, Inc., Glock, Inc., Glock GMBH, Hi-Point Firearms, H & R 1871 Inc., Hechler & Koch, International Armament Corp., Carl Walther GMBH, Lorcin Engineering Co., Inc., Kel-Tec CNC Industries, Inc., Navegar, Inc. (d/b/a Intratec), Phoenix Arms, Sigarms, Inc., Smith & Wesson Corp., Sturm Ruger & Co., S.W. Daniel, Inc., Taurus International Manufacturing, Inc., and Forjas Taurus, S.A. Distributor defendants include: B.L. Jennings, Inc., Ellett Brothers, Inc., Faber Brothers, Inc., and Southern Ohio Gun Distributors. Cities have also sued dozens of local dealers and three industry trade associations: American Shooting Sports Council, Inc. ("ASSC"), National Shooting Sports Foundation, Inc. ("NSSF"), and Sporting Arms and Ammunition Manufacturing Institute, Inc. ("SAAMI"). Since the suits were filed, ASSC has been taken over by NSSF.

4. Additional cities considering suit include Washington, D.C., Philadelphia, Baltimore, Seattle, and Portland, Oregon. See Tom Schoenberg, *D.C. Targets Gun Industry*, LEGAL TIMES, Nov. 18, 1999, online edition; Timothy McNulty, *O'Connor Taking Aim at Gun Makers*, PHILADELPHIA POST-GAZETTE, Mar. 8, 1999, online edition; J. Martin McOmber, *City Targets Gun Industry Over Safety, Cost of Violence*, SEATTLE TIMES, Dec. 18, 1998, online edition; Craig R. McCoy and Clea Benson, *Philadelphia May Sue Gun Industry for Violence Costs*, PHIL. INQUIRER, Jan. 10, 1998, online edition. Several attorneys general have also considered filing, including New York Attorney General Eliot Spitzer and Connecticut Attorney General Richard Blumenthal. See Fox Butterfield, *Major Gun Makers Talk with Cities on Settling Suits*, N.Y. TIMES, Oct. 2, 1999, online edition. Most recently, the federal government has said it will file

The lawsuits focus on three major areas of gun industry misconduct that causes gun violence in communities across America: 1) failing to incorporate feasible safety systems into guns that would prevent widespread firearm misuse by unauthorized users; 2) facilitating illegal gun trafficking by using a porous distribution system; and 3) deceptively advertising and marketing guns in ways that encourage buyers to purchase guns for home security despite overwhelming data indicating this lessens home safety. The lawsuits seek to reform a secretive industry that has too long been able to get away with reckless and irresponsible behavior in the design and marketing of its lethal products.

The city and county gun lawsuits draw inspiration from and build on the lessons learned from the recent public lawsuits against the tobacco industry. For decades, the tobacco industry acknowledged no responsibility for the deaths and debilitating illnesses caused by its products. Likewise, the public tended to see tobacco-related disease as the result of a choice made by the smoker, with little relation to the conduct of the tobacco industry. The wave of state and city lawsuits against the tobacco industry changed all that. Litigation threw the light of day on a secretive industry marketing a lethal product.<sup>5</sup> The public now understands that, for decades, the tobacco industry made conscious choices in the design and marketing of its products – by manipulating nicotine levels, marketing to children, suppressing research findings, and lying about product dangers – that fueled a public health crisis of massive proportions. Litigation also forced the tobacco industry to the bargaining table where it finally acknowledged its responsibility for the harm it had caused and agreed to pay unprecedented damages to state and city governments.<sup>6</sup>

Through nationwide city and county lawsuits, guns have become the next tobacco. Like the tobacco industry, the gun industry also makes conscious choices that increase the risk of devastating harm to the American people, particularly to children. This article focuses on four of those choices, and the role litigation can play in changing them. First, for years the industry has focused all of its design innovation efforts on making more concealable and/or more powerful guns, while it has blocked installation of feasible, available safety features and devices that would prevent thousands of unintentional shootings and teen suicides, as well as crimes committed with stolen guns.

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suit through the Department of Housing and Urban Development on behalf of more than 3,000 public housing authorities across the U.S. See Charles Babington, *U.S. Plans Role in Gun Lawsuits*, WASH. POST, Dec. 8, 1999, at A1.

5. See, e.g., Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63 (1997) (discussing evidence against industry uncovered by lawsuits).

6. See Robert Suro, *Cities Plan Legal Assault on Makers of Handguns*, WASH. POST, Dec. 23, 1998, at A8 (as of December 1998, cigarette manufacturers agreed to payments of \$246 billion to settle lawsuits brought by state governments).

Second, the industry has established a distribution system without controls, and may have consciously targeted criminal markets, thereby making it all too easy for criminals and juveniles to obtain guns from the legal marketplace. Third, the industry has deceptively advertised and marketed guns as increasing the safety of homes, when empirical research has proven that a gun in the home *increases* the danger to members of the household. Fourth, certain gun makers have marketed high-firepower assault weapons that have no legitimate sporting or self defense use, but are perfectly suited for criminals.

Parallel to the successful lawsuits against the tobacco industry, public entity litigation against the gun industry can thus expose the gun industry's reckless conduct and help recover at least a portion of the public costs caused by gun violence. Moreover, by forcing the industry to pay damages when its actions cause shootings, the most irresponsible gun industry practices can be changed, thereby helping prevent further gun violence and protecting citizens' lives. Certainly the public – even a majority of gun owners – believes these reforms should be made.<sup>7</sup>

This article provides a roadmap for the city and county lawsuits against the gun industry. Section II discusses the costs of gun violence borne by communities. Section III discusses the New Orleans lawsuit model, which alleges that the gun industry's failure to "personalize" guns by installing feasible, low-cost, locking systems on weapons that too often fall into the hands of youths and other unauthorized users, with tragic results, exposes the industry to liability under basic product liability and negligence law. Section IV explains the Chicago lawsuit model, which charges the industry with recklessly marketing its guns in a manner designed to feed the illegal gun trade, thereby fueling crime in the city and creating a public nuisance. Section V analyzes current legal attacks on two additional areas of gun industry misconduct – deceptive advertising and marketing weapons of mass destruction. Each of the last three sections identifies the problems litigation can address, the gun industry's failure to respond, and the legal theories in support.

## II. THE PUBLIC COSTS OF GUN VIOLENCE

Gun violence is a huge problem in America today. In 1997, more than 32,400 people were killed with firearms, making firearms second only to motor

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7. See Susan B. Sorenson, *Regulating Firearms as a Consumer Product*, 286 SCIENCE 1481 (Nov. 19, 1999) (among Americans polled, 87.9% support making firearms childproof, 72.2% supported personalizing firearms); Stephen P. Teret, et al., *Support for New Policies to Regulate Firearms*, 339 NEW ENG. J. MED. 813 (Sept. 1998) (among gun owners polled, 80% favored childproofing, and 59% favored a law requiring personalization); *Newsweek Poll: Gun Control*, NEWSWEEK, Aug. 16, 1999, online edition (93% favor mandatory waiting period for all handgun buyers, 89% favor mandatory safety locks on new handguns, 74% support registration of all handgun owners, and 68% say military-style assault weapons should be banned).

vehicles as the most frequent cause of injury death in the United States.<sup>8</sup> Of these, more than 13,500 were homicides and about 17,560 were suicides, with almost 1,000 deaths from unintentional shootings.<sup>9</sup> In addition, more than 64,000 individuals were treated in hospital emergency rooms in 1997 for non-fatal firearm injuries, with more than 13,000 of these victimized by unintentional shootings.<sup>10</sup> Most of these injuries and deaths are caused by handguns.<sup>11</sup>

Of course, firearm injuries and deaths impact the victims of gun violence and their families the hardest. But gun violence also creates significant problems and costs for public entities responsible for protecting public welfare and keeping society safe. Cities, counties, and states have been stuck with a bill for billions of dollars in costs directly resulting from gun violence.<sup>12</sup> These costs include direct injuries to public property, and outlays for medical care, police investigation, emergency rescue services, increased security at schools and public buildings, costs for coroner and funeral services for unknown victims, pensions, disability benefits, higher prison costs, youth intervention programs, and numerous other costs, including lost tax revenues from declining real estate values in neighborhoods beset by gun violence.

Several recent studies have attempted to estimate the total public costs associated with firearm-related injuries. The studies arrive at the same

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8. See Centers for Disease Control and Prevention, *Deaths Resulting from Firearm- and Motor-Vehicle-Related Injuries – United States, 1968-1991*, 43 M.M.W.R. 37 (1994) (estimating that firearms will, by the year 2003, surpass automobiles as the leading cause of injury death in the United States).

9. The intent of the shooter was unknown in the remaining 360 deaths. *National Center for Health Statistics, unpublished data from the Vital Statistics System* (1999) (available on the internet at WONDER.CDC.GOV).

10. See Centers for Disease Control and Prevention, *Nonfatal and Fatal Firearm-Related Injuries – United States, 1993-1997*, 48 M.M.W.R. 1029, 1031 (1999).

11. See David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMP. L. REV. 1, 2 & n.2 (1998) (in 1995, out of 35,957 firearm-related deaths in the United States, an estimated 25,000 were attributable to handguns); ATF—*Gun Trace Analysis Reports: The Illegal Youth Firearms Markets in 27 Communities* (October 1998) (hereinafter *27 Cities Report*) (reporting that approximately 80% of the guns traced to crime are handguns).

12. Chicago and Wayne County, Michigan alone have estimated public gun violence costs to exceed \$850 million every few years. See *Chicago v. Beretta U.S.A. Corp., et al.*, *supra* note 2, amended complaint at 76-77 (itemizing more than \$400 million in costs); *Wayne County v. Arms Technology, et al.*, No. 99-912662 NZ, amended complaint at 49 (Wayne County Circuit Court) (estimating public costs at \$450 million). See also Melanie Eversley, *With Guns, Everyone Pays*, DETROIT FREE PRESS, Mar. 9, 1999, at 7A (reporting that gun violence costs Detroit taxpayers about \$850 million each year); Michael Higgins, *Taking Their Best Shot*, A.B.A. J. 79, 80 (Aug. 1998) (itemizing Philadelphia's annual gun violence costs at \$72.2 million, not including medical costs).

conclusion: the costs are exceptionally high for the tax-paying public.<sup>13</sup> For example, the *Los Angeles Times* did a report on the public costs stemming from one teenage victim in South Central, who is now a paraplegic as a result of a gunshot wound.<sup>14</sup> The costs of the initial response at the crime scene, which included the fire department, paramedics, police officers, and a helicopter were \$7,624. The hospital charged \$34,794 for the first stage of treatment. The *Times* estimated the cost of additional police investigation and subsequent arrests at \$5,999. The teenage paraplegic incurred additional medical charges of \$126,603. The public paid \$11,627 for the preliminary stages of criminal proceedings and \$1,200 for a hospital social worker. The total cost of the trial, incarceration, and appeal was estimated to be \$352,649. In addition, the lifetime cost of medical care, disability payments, and special counseling and education classes for the victim was estimated at \$490,302, leaving a total public cost of \$1,091,768.<sup>15</sup> More recent reports by the *Washington Post*, *U.S. News & World Report*, and others document similar cases with public tabs exceeding one million dollars for a single shooting

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13. See Linda Gunderson, *The Financial Costs of Gun Violence*, 131 ANNALS INTERNAL MED. 483 (1999) (estimating 1995 medical costs for firearm-related injuries at \$4 billion, with taxpayers bearing approximately 85% of these costs); Philip J. Cook, et al., *The Medical Costs of Gunshot Injuries in the United States*, 282 JAMA 447 (1999) (estimating that gunshot injuries in 1994 produced approximately \$2.3 billion in lifetime medical costs, of which \$1.1 billion will be paid by U.S. taxpayers); Wendy Max & Dorothy P. Rice, *Shooting in the Dark: Estimating the Cost of Firearm Injuries*, 12 HEALTH AFFAIRS 171 (1993) (estimating firearm injury costs).

One 1997 study estimated that firearm fatalities each cost \$2.8 million. Ted R. Miller & Mark A. Cohen, *Costs of Gunshot and Cut/Stab Wounds in the United States, With Some Canadian Comparisons*, 29 ACCID. ANAL. & PREV. 329 (1997). This figure included estimates of both direct costs, e.g., medical care, mental health care, emergency transport, police services, and insurance administration costs, and indirect costs, e.g., productivity lost as the result of both physical and psychological injuries, and the costs of pain, suffering, and lost quality of life. The same study estimated the total direct and indirect costs for each *nonfatal* firearm injury as \$249,000 for every hospitalized victim, and \$73,000 for each victim who is treated in an emergency room and then released. Total costs in the U.S. approached \$126 billion a year. *Id.*

Several other studies have documented hospitalization costs, and found that a large percentage of gunshot victims are dependent on publicly financed insurance or are uninsured. See, e.g., Mary J. Vasser, et al., *Hospitalizations for Firearm-Related Injuries*, 275 JAMA 1734 (1996) (study of California hospitalized gunshot victims found that 81% did not have private insurance); Kenneth W. Kizer, et al., *Hospitalization Charges, Costs, and Income for Firearm-Related Injuries at a University Trauma Center*, 273 JAMA 1768 (1995) (itemizing public bill for 66% of gunshot victims without insurance); Garen J. Wintemute & Mona A. Wright, *Initial and Subsequent Hospital Costs of Firearm Injuries*, 33 J. TRAUMA 556 (1992) (conducting similar study for earlier period). Of course, hospitalization costs are only a fraction of the total medical costs associated with firearm related injuries. Extensive outpatient services are often needed for the survivors of gunshot wounds, and these services increase the total cost of medical care.

14. Bob Sipchen, *Putting a Price Tag on Violence*, L.A. TIMES, June 5, 1994, at A22.

15. *Id.*

victim.<sup>16</sup> With four out of five gunshot victims on public assistance or uninsured,<sup>17</sup> firearm injuries clearly place an enormous financial burden on the public each year.

Of course, none of the public costs itemized above has been borne by the \$2-billion-a-year gun industry,<sup>18</sup> which is nevertheless responsible for a significant amount of gun violence because of the way it makes and markets its lethal products. The city and county lawsuits are seeking to bring this disparity into balance.

### III. THE NEW ORLEANS MODEL – PROMOTING SAFER GUN DESIGNS

To understand the basis for the New Orleans lawsuit and the other city and county cases that focus on gun safety, it is helpful to first understand the problem these lawsuits address, and the gun industry's refusal to do anything to lessen that problem.

#### A. *Unsafe Gun Designs Cause Countless Shootings*

Guns, especially handguns, are killing and injuring children and teenagers at an alarming rate. The most recent data indicates that approximately one child is killed, and at least thirteen more are injured, in unintentional shootings each day.<sup>19</sup> The tragic stories fill newspapers across the country,<sup>20</sup> while

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16. See Allan Lengel, *The Price of Urban Violence: Bullet Shatters a Teen; Taxpayers Get the Bill*, WASH. POST, Dec. 28, 1997, at B1 (documenting the costs to repair the life of a 16-year-old boy hit by a stray bullet); Susan Headden, *Guns, Money & Medicine*, U.S. NEWS & WORLD REP., July 1, 1996, at 30 (itemizing the public costs of several gunshot victims). See also Jay Weaver, *County Targets Handgun Industry: Shooting Spurs Lawsuit Proposal*, S. FLA. SUN-SENTINAL, Dec. 27, 1998, at 1B (noting public hospital tab of \$768,000 for drive-by shooting victim).

17. See Gunderson, *supra* note 13, at 483; Headden, *supra* note 16, at 31-34; Vasser, *supra* note 13, at 1736.

18. Given that gun companies are nearly all privately held, estimates on the value of the industry vary, with \$2 billion per year in the middle of the range. Compare Fox Butterfield, *Results in Tobacco Litigation Spur Cities to File Gun Suits*, N.Y. TIMES, Dec. 24, 1998 (reporting 1997 sales of handguns, rifles, shotguns, and ammunition at \$1.4 billion), with Jay Weaver, *supra* note 16, at 1B (estimating \$2.5 billion in annual sales).

19. See National Center for Health Statistics, *unpublished data from the Vital Statistics System* (1998 and 1999) (in 1997, 306 children aged 19 and under were killed in unintentional shootings, with 376 children similarly killed in 1996); Nancy Sinauer, et al., *Unintentional, Nonfatal Firearm-Related Injuries: A Preventable Public Health Burden*, 275 JAMA 1740 (1996) (estimating that for each death from an unintentional shooting, there are about 13 non-fatal shootings).

20. In October 1998, the Center to Prevent Handgun Violence published a report analyzing 137 reports of gun violence culled from newspaper reports and news websites across the country. The incidents resulted in 80 deaths and 84 non-fatal injuries. *A School Year in the U.S.A.*, Center to Prevent Handgun Violence (Oct. 1998). A similar report by the Violence Policy Center used a national clipping service to track unintentional shootings from October 1995 through June 1996,



public health reports recount the deadly toll.<sup>21</sup> Most often these shootings are committed by young people who, according to federal law, are prohibited from possessing handguns, but who nevertheless can easily access them.<sup>22</sup>

The all-too-common scenario is a curious child or teen coming across a loaded gun stored in a home, which they then handle as if it is unloaded, the trigger is pulled, and a playmate or sibling is killed or injured.<sup>23</sup> A 1991 report

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where both the shooter and victim were under 18 years old. Suicides and self-inflicted wounds were excluded. Clippings reporting on 97 shooting deaths and 125 shooting injuries are compiled and explained on a state-by-state basis in their report: *Kids Shooting Kids*, Violence Policy Center (March 1997). See also *Child's Play: A Study of 266 Unintentional Handgun Shootings of Children*, Center to Prevent Handgun Violence (1988).

21. Public health reports analyzing unintentional shooting deaths are numerous. See, e.g., Joseph L. Annett, *National Estimates of Nonfatal Firearm-Related Injuries: Beyond the Tip of the Iceberg*, 273 JAMA 1749 (1995) (discussing national data); Sinauer, *supra* note 19 (discussing national data); Roberta K. Lee & Mary J. Harris, *Unintentional Firearm Injuries: The Price of Protection*, 9 AMER J. PREVENTIVE MED. (Supp) 16 (1993) (in 1987, among people younger than fifteen, 35-40% of firearm fatalities were classified as unintentional); *Unintentional Firearm-Related Fatalities Among Children, Teenagers—United States, 1982-1988*, 268 JAMA 451 (1992) (reporting that 3607 children and teenagers died of unintentional shootings during the period studied); John R. Martin, et al., *Accidental Firearm Fatalities Among New Mexico Children*, 20 ANNALS OF EMERGENCY MED. 58 (1991) (studying accidental firearm fatalities of children ages 0-14); Garen J. Wintemute, et al., *When Children Shoot Children: 88 Unintentional Deaths in California*, 257 JAMA 3107 (1987) (examining California shootings from 1977-1983 where victim and shooter were children); Paul L. Morrow, et al., *Accidental Firearm Fatalities in North Carolina, 1976-80*, 76 AM. J. PUB. HEALTH 1120 (1986) (studying 210 cases, in 31% of which the victim was under 15); Marilyn Heins, et al., *Gunshot Wounds In Children*, 64 AM. J. PUB. HEALTH 326 (1974) (reviewing cases of children admitted to Detroit General Hospital from 1962-1971). Among industrialized nations, the United States is far and away the leader for these types of shootings. See Centers for Disease Control and Prevention, *Rates of Homicide, Suicide, and Firearm-Related Death Among Children – 26 Industrialized Countries*, 46 M.M.W.R. 101, 102-03 (1997) (noting that the overall firearm-related death rate for U.S. children 0-14 years old was nearly 12 times higher than among children in the other 25 countries combined).

22. A May 1997 study sponsored by the National Institute of Justice showed that 34% of handgun owners keep their handguns loaded and unlocked. *Guns in America: Results of a Comprehensive National Survey on Firearms Ownership and Use*, Police Foundation (1997). The Centers for Disease Control and Prevention ("CDC") estimate that nearly 1.2 million latchkey children have access to loaded and unlocked firearms. See Robert K. Lee, *Latchkey Children and Guns at Home*, 264 JAMA 2210 (1990). A 1998 survey by the Center to Prevent Handgun Violence and Peter D. Hart Research Associates found there was a loaded gun in every 10 households with children. *Parents, Kids & Guns: A Nationwide Survey* (1998). See also Mirna M. Farah, et al., *Firearms in the Home: Parental Perceptions*, 104 PEDIATRICS 1059 (Nov. 1999) (in survey of parents with children from 4 to 12 years of age, 52% of gun owners stored their firearms loaded or unlocked); Yvonne D. Senturia, et al., *Gun Storage Patterns in U.S. Homes With Children*, 150 ARCHIVES PEDIATRICS & ADOLESCENT MED. 265 (1996) (survey of parents attending pediatric offices found that only 30% of all households reported that their guns were unloaded and in locked storage).

23. See, e.g., Ted Copetas, *Handguns Without Child Safety Devices – Defective In Design*, 16 J.L. & COM. 171, 171-72 (1996) (reporting unintentional shootings of two young children);

by the General Accounting Office (“GAO Report”), which surveyed unintentional firearm fatalities in 1988 and 1989, explained the problem.<sup>24</sup> The GAO Report found that 31% of the unintentional firearm deaths studied occurred either because a child six years old or younger was able to fire the weapon (8%), or because the person firing the gun was unaware that the gun was loaded (23%).<sup>25</sup> The GAO Report concluded that all of these shootings could have been prevented by the incorporation of two simple safety devices into firearms – a grip safety and a chamber-loaded indicator.<sup>26</sup>

Teen suicides with firearms – which claimed the life of a child every six to seven hours in 1997<sup>27</sup> – are another serious problem. From 1970 to 1990, suicide rates among 10- to 19-year-olds nearly doubled.<sup>28</sup> The higher rate has been attributed not to an increase in attempts, but to an increase in the lethality of the means used.<sup>29</sup> By 1991, guns were used in about 65% of male teen

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John Temple, *Deadly News: Unsecured Weapons Kill*, TAMPA TRIBUNE, December 1, 1998 at 1 (12-year old shot in head while tussling over .22 caliber pistol with his 16 year-old brother), Paul W. Valentine, *Maryland Teen Kills Sister in Apparent Accident*, WASH. POST, Nov. 28, 1998, at D1 (11 year-old girl accidentally shot in the head and killed by her 13-year old brother with a .357 magnum handgun, which was found in a dresser drawer of their grandparent’s house); Cindy Lash & Rona Kotell, *Boy, 12, Charged in Fatal Shooting of Friend*, PITTS. POST-GAZETTE, Sept. 24, 1998 at B1 (12-year-old fired .38 caliber gun taken from his home at 14-year-old’s head, thinking the gun was unloaded).

24. See *Accidental Shootings: Many Deaths and Injuries Caused by Firearms Could Be Prevented*, GAO/PEMD-91-9 (March 1991). The report was commissioned by the U.S. Senate. Its purpose was to examine the extent to which certain safety devices, if installed on firearms, could prevent firearm-related deaths. *Id.* at 15-17. See also *A School Year in the U.S.A.*, *supra* note 20, at 2 (analyzing shootings that could have been prevented with safer gun designs).

25. GAO Report at 2-3. The report gave several examples of why a person might believe a gun to be unloaded when in fact it is not. “For example, one might empty a firearm but not notice that a round remains in the chamber, one might typically leave a weapon unloaded and so assume that it is always unloaded, or one might pull the trigger several times without discharge (dry-firing) and so assume the chamber is empty even though it is not.” *Id.* at 4.

26. *Id.* at 2-3. A grip safety can easily be designed to prevent children six years old and younger from firing a handgun, see *infra* note 47 and accompanying text (discussing “lemon squeezer” safety), and a chamber-loaded indicator is designed to alert users when a gun is loaded. See *infra* note 50.

27. See *National Center for Health Statistics, unpublished data* (1999) (1,262 suicide victims age 19 and under in 1997).

28. See James T. Dixon, *On Lemon Squeezers and Locking Devices: Consumer Product Safety and Firearms, A Modest Proposal*, 47 CASE W. RES. L. REV. 979, 990 & n.84 (1997) (In the 10-14 year old age group, suicides increased from 0.6 to 1.5 per 100,000 between 1970 and 1990. Among 15-19 year olds, the rate increased from 5.9 per 100,000 in 1970, to 11.1 in 1990.).

29. See *Suicide Among Children, Adolescents, and Young Adults – United States, 1980-1992*, 274 JAMA 451 (1995) (noting that the CDC has identified restricting access to methods of suicide as a strategy for reducing suicide among young people); S. Patrick Kachur et al., *Suicide in the United States, 1980-1992*, CDC (1995) (firearms accounted for 77% of the increase in the age-adjusted suicide rate for the total U.S. population from 1980-1992, and were disproportionately responsible for increases among the young).

suicides and 47% of female teen suicides.<sup>30</sup> Moreover, suicide attempts with firearms are almost always fatal, whereas suicide attempts by other means for the most part rarely are.<sup>31</sup>

*B. Changing Gun Design Can Save Lives*

One way to dramatically reduce this tragic toll of unintentional shootings and teen suicides is to design handguns in the same way that we design other products – *e.g.*, automobiles – to be inaccessible to youths. We build locking systems into them.<sup>32</sup> For the last two decades, gun manufacturers have had the ability to design guns to be self-locking, utilizing various types of key or combination devices that prevent the gun from being fired when locked.<sup>33</sup> Such feasible self-locking devices would “personalize” guns and prevent a whole host of firearm injuries and deaths which now occur when children gain access to guns they do not have the maturity to handle safely. In addition to “personalizing” guns, gun manufacturers can install other simple safeties and warnings to help stop the hundreds of unintentional shootings that occur each year because the person handling the firearm does not realize the gun is loaded.<sup>34</sup>

In 1991, the GAO Report analyzed the number of lives that would have been saved had even simple safeties and load indicators been placed on all firearms.<sup>35</sup> The report concluded that 458 people killed in unintentional

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30. *National Center for Health Statistics, unpublished data* (1991).

31. *See* Murray L. Katcher, *Firearm Injuries Among Children and Adolescents*, 93 WISC. MED. J. 511, 512 (1994) (reporting that when firearm is chosen suicide method, 91% of attempts end in death); Centers for Disease Control and Prevention, *Fatal and Nonfatal Suicide Attempts Among Adolescents—Oregon, 1988-1993*, 44 M. M.W.R. 312 (1995) (study of Oregon youths found 78.2% of suicide attempts with firearms were fatal, while only 0.4% of suicide attempts by drug overdose were); Annet, *supra* note 21, at 1751.

32. *See* Richard J. Bonnie, et al., *Reducing the Burden of Injury: Advancing Preventing and Treatment*, Institute of Medicine 133 (1999) (concluding that “personalization of guns would be expected to have major benefits in reducing firearm injuries”); Mark D. Polston & Douglas S. Weil, *Unsafe by Design: Using Tort Actions to Reduce Firearm-Related Injuries*, 8 STAN. L. & POL’Y REV. 13, 15-16 (1997) (explaining how changes in gun design can save lives); David Hemenway & Douglas Weil, *Phasers on Stun: The Case for Less Lethal Weapons*, 9 J. POL’Y ANAL. & MGMT 94, 94 (1990) (arguing for safer guns).

33. *See, e.g.*, Asra Q. Nomani, *Massacres Spark Interest in Kid-Proof Gun Locks*, WALL ST. J., July 16, 1998, at B1. *See also infra* § III(C) (discussing available safety designs). These internal locking systems should be distinguished from child safety locks, which are simple padlocks that attach to the trigger guard of handguns or other firearms. While child safety locks are certainly valuable, they do not provide the same kind of safety and security that a personalized gun locking system does. *See, e.g., infra* note 52 (noting that Saf-T-Lok system cannot be removed without rendering gun inoperable).

34. GAO Report, *supra* note 24, at 24.

35. *Id.* (estimating how many lives would be saved if firearms contained grip safeties and chamber-loaded indicators).

shootings—about one-third of the total—would have been saved in 1988 alone by incorporating the devices.<sup>36</sup> If the safeties stopped a similar percentage of *non-fatal* unintentional shootings, another 4,900 to 7,500 unintentional injuries would not have occurred that year.<sup>37</sup>

If “personalized” gun technology were used, obviously a much higher number of shooting deaths and injuries would be prevented. In addition to stopping unintentional shootings by unauthorized users, personalized locking technology could prevent a substantial number of the 1,300 or so teen suicides with firearms that occur every year. Also, if a gun subject to theft has been personalized and locked, it will be useless to thieves who do not have the key or combination. Recent reports indicate that more than 500,000 guns are stolen each year in the United States, and many of these are then used to commit crimes.<sup>38</sup> Recent highly-publicized school shootings in Jonesboro, Arkansas,<sup>39</sup> Springfield, Oregon,<sup>40</sup> and elsewhere,<sup>41</sup> and the murder of two police officers at the U.S. Capitol,<sup>42</sup> were committed with stolen guns wielded by unauthorized users. Thus, personalized guns can prevent both unintentional and intentional shootings. Indeed, a recent informal study by the Center to Prevent Handgun Violence which looked at both intentional and unintentional shootings found that *more than half* of them could have been prevented if personalized gun technology were used.<sup>43</sup>

Changing gun design is not the only thing that should or must be done to decrease firearm fatalities and injuries. Also critical is the role of parents in properly securing firearms kept in the home, and the role of training and

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36. *Id.*

37. Polston & Weil, *supra* note 32, at 15 & n.27.

38. Philip J. Cook, et al., *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 81-82 (1995). See also Marianne W. Zawitz, *Guns Used in Crime*, U.S. Dep’t of Justice, Bureau of Justice Statistics 3 (July 1995); Michael Rand, *Guns and Crime: Handgun Victimization, Firearm Self-Defense, and Firearm Theft*, U.S. Dep’t of Justice, Bureau of Justice Statistics 3 (April 1994); Polston & Weil, *supra* note 32, at 15 & nn. 34-36; Dixon, *supra* note 28, at 990-91 & nn. 87-93 (discussing role of stolen firearms in crime).

39. See Peter Katel, *Ark. Boys Stole Family Guns*, U.S.A. TODAY, March 26, 1998, at 1A.

40. See Timothy Egan, *Oregon Freshman Goes to Court as Number of Deaths Rises to 4*, N.Y. TIMES, May 23, 1998, at A1.

41. See, e.g., *Guns in American Schools*, Center to Prevent Handgun Violence Fact Sheet (Nov. 1999) (listing 73 reported incidents of guns in schools from October 1998 through September 1999); *Guns in American Schools*, Center to Prevent Handgun Violence Fact Sheet (Oct. 1998) (listing 64 reported incidents of guns in schools from September 1997 through September 1998).

42. See Francis X. Clines, *Gunman Invades Capitol, Killing 2 Guards: Assailant and a Tourist Hurt in Shootout*, N.Y. TIMES, July 25, 1998, at A1.

43. See *A School Year in the U.S.A.*, *supra* note 20, at 2 (concluding that more than half of 137 incidents of intentional and unintentional shootings would have been prevented had the gun used been personalized).

education.<sup>44</sup> Yet many injury-control experts say that changing the design of a product is generally the most effective way to reduce injury.<sup>45</sup> For example, automobile fatalities have fallen so dramatically over the last twenty-five years not because of changes in driving behavior, but because cars are now designed to be crash-resistant with seat belts, airbags, and other safety improvements, and roadway safety has been improved.<sup>46</sup> Improving product design also applies in more situations, because while training applies only to the individual who has been trained, a safer design can save the life of anyone who comes into contact with the product, whether trained or not.

C. *“Personalized” Gun Technology Is Available And Feasible, But The Gun Industry Has Refused To Incorporate It Into Gun Designs*

Firearm safeties to prevent accidental shootings of children are not new. As early as 1884, Smith & Wesson sold a handgun which utilized a type of grip safety nicknamed a “lemon squeezer,” that could not be fired by children under the age of nine.<sup>47</sup> In 1912, magazine-disconnect safeties were patented to prevent shootings which commonly occur after a person has removed a

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44. See Polston & Weil, *supra* note 32, at 16 (explaining the importance of firearm storage in reducing injuries). In addition to advocating safe storage practices, the Center to Prevent Handgun Violence has for years promoted a comprehensive K-12 school-based curriculum called Straight Talk About Risks (STAR) to reduce firearms violence among youths, and fostered various programs with health professionals to help educate the public. The STAR program is far more thorough than the National Rifle Association’s “Eddie Eagle” cartoon show, which has been criticized as doing more to market guns to kids than to promote safety. See Ron Scherer, *NRA Gun-Safety Mascot Ruffles Feathers*, CHRISTIAN SCIENCE MONITOR, July 7, 1999, online edition; *Joe Camel With Feathers: How the NRA with Gun and Tobacco Industry Dollars Uses its Eddie Eagle Program to Market Guns to Kids*, Violence Policy Center (1997).

45. See Polston & Weil, *supra* note 32, at nn. 28-29; *Playing it Safe*, TRIAL 20 (Oct. 1998) (interview with Ann Brown, Chair of the Consumer Product Safety Commission, on how regulation yields safer products for children).

46. See Bonnie, et al., *Reducing the Burden of Injury*, *supra* note 32, at 115-24 (noting that fatalities per 100 million miles has dropped from 4.43 in 1972 to 1.76 in 1996; had 1972 rate applied in 1996, there would have been 110,000 fatalities instead of 43,399. Between 1966 and 1990, 243,000 lives were saved as a result of federal highway, traffic, and motor vehicle safety programs.).

47. The purpose behind the device was very similar to the purpose behind child-proof caps on bottles holding dangerous substances, from medicine to toxic household chemicals. Smith & Wesson sold 500,000 of the firearms before discontinuing the design in 1940. Certain firearms are still made with grip safeties, but the manufacturers do not describe these as child-resistant. See Krista D. Robinson, et al., *Personalized Guns: Reducing Gun Deaths Through Design Changes*, JOHNS HOPKINS CENTER FOR GUN POL’Y AND RES. 5 & nn. 43-45 (Sept. 1996). See also Copetas, *supra* note 23, at 173 & nn. 13-20 (discussing the use of ‘lemon squeezers’ to prevent children from using guns); Dixon, *supra* note 28, at 993 & nn. 101-13 (listing already existing gun safety devices).

pistol's ammunition magazine thinking they have unloaded the gun.<sup>48</sup> A bullet is often left hidden in the chamber, however, with tragic results.<sup>49</sup> This simple device costs less than 50 cents to install, yet the gun industry puts them only on a few pistols. Various types of chamber-loaded indicators have also been devised over the decades.<sup>50</sup>

More recently, internal locking systems have been perfected to "personalize" guns. One simple design uses a push-button lock in the handle of the firearm very much like the combination lock on a briefcase.<sup>51</sup> The

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48. See United States Patent Office, Patent #1,024,933 (April 30, 1912) ("A great number of accidents arise from the following cause: The fire arm being loaded, if the magazine is withdrawn, persons little acquainted with the operation of such weapons regard it as unloaded while a cartridge remains in the barrel. Means are known to avoid such accidents by setting the weapon at safety by withdrawal of the magazine."); U.S. Patent #1,638,068 (Aug. 5, 1926) ("It is well known that the user of an automatic pistol frequently assumes that withdrawal of the magazine necessarily leaves the pistol in inoperative condition and that the trigger may then be safely pulled without danger of discharge . . . one cartridge may remain in the firing chamber"); U.S. Patent #4,031,648 (June 28, 1977) ("It is well known . . . that a live round left in the chamber after the magazine has been removed from its receiver poses a great danger to those who may handle or be exposed to the seemingly unloaded weapon . . . . The newspapers bear repeated and tragic testimony to the seriousness of this deficiency."). See also Stanton O. Berg, *Magazine Safeties: Important Safety Design*, AFTE JOURNAL (Oct. 1993) (reviewing magazine safety designs); Hurst v. Glock, *infra* note 82 (discussing patents and how magazine safety would save lives).

49. See, e.g., Dan Chapman & Kristen Gardner, *Teen-Ager Accidentally Shoots 13 Year Old to Death, Police Say*, WINSTON-SALEM JOURNAL, Oct. 13, 1989, at 1, 4 (shooter removed ammunition clip from small semi-automatic pistol, thinking it was unloaded when showing it to friend); Maria E. Odum & Robert F. Howe, *Fatal Shooting of Fort Belvoir Boy Ruled an Accident*, WASH. POST, April 10, 1993, at B1 (13-year-old boy accidentally shot and killed his 10-year-old brother with a .22 caliber rifle, after loading an ammunition magazine, pulling back the bolt, then removing the magazine, thinking the gun was unloaded).

50. For example, in the early 1900's, the German Luger pistol had a device that protruded from the top of the pistol when a bullet was in the chamber which said, in German, that the gun was "loaded." In the 1930's, several Walther pistols used a pin protruding from the back of pistol to indicate when a bullet was in the chamber. Recently, the Jennings Nine pistol added a chamber load indicator in the form of a red button that sticks out from the top of the pistol.

51. See Polston & Weil, *supra* note 32, at 20 & nn. 68-69 (explaining how push-button combination lock safety device is just as cost-affordable as other safety systems, and does not inhibit use of the firearm); Copetas, *supra* note 23, at nn. 70-73, nn. 84-91 (explaining Saf-T-Lock, a push button combination lock that can be built into revolvers and semi-automatic pistols). Several internal locking designs have been patented. See, e.g., U.S. Patent #3,939,679 (Feb. 24, 1976); U.S. Patent #4,136,475 (Jan. 30, 1979); U.S. Patent #4,261,127 (April 14, 1981); U.S. Patent #4,457,091 (July 3, 1984); U.S. Patent #4,467,545 (Aug. 28, 1984); U.S. Patent #4,488,370 (Dec. 18, 1984); U.S. Patent #4,563,827 (Jan. 14, 1986); U.S. Patent #4,682,435 (July 28, 1987); U.S. Patent #4,763,431 (Aug. 16, 1988); U.S. Patent #4,970,819 (Nov. 20, 1990); U.S. Patent #4,987,693 (Jan. 29, 1991); U.S. Patent #5,022,175 (June 11, 1991); U.S. Patent #5,062,232 (Nov. 5, 1991); U.S. Patent #5,140,766 (Aug. 25, 1992); U.S. Patent #5,168,114 (Dec. 1, 1992); U.S. Patent #5,235,763 (Aug. 17, 1993); U.S. Patent #5,303,495 (April 19, 1994); U.S. Patent #5,361,525 (Nov. 8, 1994).

device is secure when locked, but can be unlocked almost instantaneously by the person knowing the combination, even in the dark.<sup>52</sup> Several police departments have been so impressed, they are now incorporating this product into department handguns,<sup>53</sup> and the State of Maryland is considering requiring this kind of internal lock for all handguns made or sold in the state by the year 2002.<sup>54</sup> This kind of device can also be designed to lock itself so that, like airbags in cars, it can save a life even if the owner forgets to engage it.<sup>55</sup> Other personalized guns require the user to wear a special magnetic ring to activate the weapon.<sup>56</sup> Still other designs incorporate key locks or other mechanisms.<sup>57</sup>

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52. See Bob Lesmeister, *Safety In Numbers*, AMER. FIREARMS INDUS., Aug. 1996, at 18. This review explained the favorable features of Saf-T-Lok in detail.

Saf-T-Lok is a device that fits onto a revolver or pistol without having to modify the gun or permanently alter it. Once installed, the device allows the gun's owner to lock it up completely making it impossible to fire. Also, once it is installed, the patented interlock system prevents the lock from being removed without damaging the gun itself. So, if anyone should steal the firearm, it will do them no good because they can't remove the lock to make it serviceable.

To install the Saf-T-Lok just takes a few minutes. If you can change a set of grips, you can install the Saf-T-Lok. . . . Once on, your customer can set the lock to any combination he or she prefers. To set the combination all one has to do is ratchet the three buttons in any sequence of preference.

The Saf-T-Lok doesn't work on batteries so your customers are saving money by not having to buy replacements and there are no keys to worry about, so that if the gun is needed in an emergency situation, it can be unlocked in the fraction of a second. There won't be any tragedies for the want of a key. The three button system is very easy to operate and you don't have to see the lock to work it. Anyone can unlock a Saf-T-Lok in total darkness.

*Id.* at 18, 37. The reviewer also noted that Saf-T-Lok was still working like new after 36,500 test cycles, and is made better than any gun it is designed to fit. Moreover, the designers have yet to come across a handgun that the Saf-T-Lok cannot be adapted to without altering the gun. *Id.* at 37.

53. See Joe Matthews, *Boston to Require Child-Proof Locks on its Police Department Handguns*, BALT. SUN, Dec. 16, 1998 (Boston Police will attach child-proof combination locks to the service weapons of all 2,247 police officers).

54. See Daniel DeLuc, *'Smart-Gun' Mandate Urged By Md. Panel*, WASH. POST, Nov. 10, 1999, at B1.

55. The Intraloc™ Gun Design, which includes a grip safety that automatically re-locks the gun, ensures that the gun is always locked at rest. Passive systems like airbags have obvious benefits over active systems like seatbelts that require a person to engage them before they are effective. The Intraloc device can still be unlocked in a couple of seconds by the authorized user if the gun is needed, but otherwise remains in locked mode. See U.S. Patent #4,763,431 (Aug. 16, 1988).

56. See Mike Izumi, *Magna-Trigger: The 'Magic Ring' Revolver Safety*, HANDGUNS, April 1996, at 38 (The Magna-Trigger module is made of aluminum, with strategically placed magnets in the module body. The magnets prevent the trigger from being pulled and hammer from being cocked. A magnetic ring worn by the user cancels the magnetic field, allowing for use.); Robinson, *supra* note 47, at 6.

In addition to these simple, mechanical designs, other companies have begun using electronic technologies to devise personalized gun designs. One company has incorporated fingerprint recognition technology into handguns as a way of truly linking the firearm to the authorized user.<sup>58</sup> In 1996, Colts' Manufacturing Company unveiled a prototype handgun using radio frequency tags that fire only if the user is wearing a tag emitting a radio frequency matching the one imbedded in the gun.<sup>59</sup> This design stemmed from a federal grant awarded to Colt's to develop a police firearm that could not be fired if it was taken away from the officer by a criminal, since many officers killed in the line of duty are shot with their own guns.<sup>60</sup>

Based on these advances, Ron Stewart, then CEO and President of Colt's Manufacturing, called on the industry to create a research and development program to advance personalized gun technology.<sup>61</sup> "If we can send a motorized computer to Mars, then certainly we can advance our technology to be more childproof," he said.<sup>62</sup>

Unfortunately, Mr. Stewart's view has not been shared by other industry executives, including his own successor at Colt's Manufacturing.<sup>63</sup> Industry

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57. See Crila May Hayes, *Taurus "Lock" Gun – An Unusual Approach to the Trigger Lock Debate*, WOMEN & GUNS, March-April 1998, at 44 (the Taurus locking system is a small, round lock built into the lower curve of the hammer that is locked by a hollow key; when locked, the hammer cannot move more than 1/4 inch). Another safety design is made by Saf-T-Hammer, Inc. The product is a removable hammer, which when removed, renders the gun inoperable. It will work on any firearm with an external hammer, making it fit for use on a majority of the 65 million handguns currently owned in the U.S. See patents, *supra* note 51; Robinson, *supra* note 47, at 6-7.

58. Oxford Micro Devices, Inc. makes a small fingerprint capture and verification module that can be built into the handle of a gun, allowing only the authorized user to fire. See *Safer Guns to Result from Oxford Micro Devices, Inc. Miniature Fingerprint Capture & Verification Module*, Press release (March 25, 1998) <<http://www.oxfordmicrodevices.com>>.

59. See Polston & Weil, *supra* note 32, at 17 (noting that "[t]his technology is both readily available and inexpensive. It is widely used in shoplifting detection systems in department stores, inventory control systems in large businesses, and automated toll booths."); *High Tech Gun Hailed for Safety*, ASSOCIATED PRESS, Sept. 19, 1996 (.40 Caliber pistol developed by Colt Manufacturing Co., Inc., uses radio frequency technology to block unauthorized use); Melissa Healy, "Smart" Weapon Shoots Holes in Gun Rift Violence, L.A. TIMES, Oct. 22, 1998, at A1 (gun can only fire when user is wearing ring containing microchip).

60. See J. Taylor Buckley, "Smart Guns": A Safe Alternative?, U.S.A. TODAY, Sept. 18, 1996, at 5B.

61. Ron Stewart, *This Month's Guest Editorial*, AMER. FIREARMS INDUS. (Dec. 1997).

62. *Id.* See also Henry Goldman, *Colt's Chief Stands Up for Federal Gun Control*, Phila. Inquirer, July 13, 1998, online edition (quoting Stewart as saying: "The gun industry is where the automobile industry was in the 1960s – the same clamor for safety regulations. Seat belts. Air bags. We are going to go through a period of reform and regulation. All I'm trying to do is survive and prosper in whatever direction this thing takes.")

63. See *Stewart Resigns as Colt's Manufacturing President*, 7 FIREARMS BUS. 16, 1 (Sept. 1998) ("[Stewart's] views of our industry and the issues confronting it differ considerably from



spokespeople continue to claim that personalized gun technology is still “years away,” that their current firearm designs are completely safe, and that everyone else is to blame for gun violence.<sup>64</sup> The only crack in the industry’s stonewalling came in October 1997, when most major handgun manufacturers agreed with President Clinton to begin voluntarily offering child safety locks for sale with new handguns by the end of 1998.<sup>65</sup> Although this was the first time the industry acknowledged there was something it could do to help save lives, it was motivated not to protect the safety of citizens, but by a desire to stave off more restrictive legislation being considered by Congress and to help the industry in future litigation.<sup>66</sup> Meanwhile, the industry continues to offer up hundreds of new, more lethal, firearm designs.<sup>67</sup>

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those held by most of us.’ ASSC President Georgia Nicols said.”). Stewart’s successor, Steven Sliwa, has testified against any measure that would mandate personalized guns, while arguing that public funding is needed to research and perfect the technology. See Testimony on S113 (proposed New Jersey legislation to require personalized gun technology) at <<http://www.colt.com>>.

More recently, Mr. Sliwa stepped down as Colt’s President, announcing plans to open a new company called iColt to develop and market Colt’s new personalized gun. See Matt Bai, *Under the Gun*, NEWSWEEK, Sept. 29, 1999, at 54; Paul M. Barrett, *Colt’s Cuts Role Of Handguns In Revamping*, WALL ST. J., Sept. 29, 1999, at A3. Most recently, Colt’s testified it hoped to have its radio-based personalized gun commercially available in four years. See DeLuc, *supra* note 54, at B1.

64. See “An Open Letter to Mayor Ganim”, Sturm, Ruger & Company, Inc. (Dec. 8, 1998) (seeking to discredit the technology of thumb-print detectors and the use of loaded chamber indicators on .22 caliber pistols, as well as the use of trigger locks on all guns); Ed Schultz (Smith & Wesson CEO), *Speak Out: An Open Letter to the Citizens of Boston*, HANDGUNS, Nov. 1999, at 15, 17 (claiming that “acceptable” personalized gun technology does not yet exist); Daniel DeLuc, *Industry Opposes Glendening ‘Smart Gun’ Plan*, WASH. POST, Sept. 28, 1999, at B1 (quoting Beretta executive’s criticisms of personalized gun technology).

65. James Bennet, *Gun Makers Agree on Safety Locks*, N.Y. TIMES, Oct. 9, 1997, at A1; *Gun Companies, Clinton Reach Accord on Safety Locks*, FIREARMS BUS., Oct. 15, 1997, at 1.

66. See Mike France, *Can Gunmakers Disarm Their Attackers?* BUS. WEEK, Nov. 10, 1997, at 94 (quoting Richard Feldman of ASSC as saying that a major reason gun companies agreed to child safety locks is “because it puts the manufacturers in a better position in front of a jury . . . . We could never take the kind of hit that tobacco could take and survive”); Leslie Wayne, *Gun Makers Learn From Tobacco Fight*, N.Y. TIMES, Dec. 18, 1997 (voluntary agreement to sell gun locks was “smart politics in the face of what would have happened. In just a few years, Congress would have required it.”).

67. There are scores of magazines published by the industry, each of which tout the newest models. See, e.g., SHOOTING TIMES, HANDGUNNING, HANDGUNS, GUN WORLD, GUNS & AMMO, and AMERICAN FIREARMS INDUSTRY. Given the importance to the industry of the market for carrying concealed handguns, much of the recent innovation has been designed to make higher-caliber weapons into smaller and smaller models. See Tom Diaz, *Making A Killing: The Business of Guns In America* 91-106 (1999) (explaining the industry’s decision to steadily increase the lethality of firearms to tap new markets); Fox Butterfield, *To Rejuvenate Gun Sales, Critics Say, Industry Started Making More Powerful Pistols*, N.Y. TIMES, Feb. 14, 1999 (same).

Any other responsible industry, when faced with overwhelming data of injuries and deaths caused by its products, would not only change product design on items yet to be sold but would *recall* and retrofit products already in consumers' hands.<sup>68</sup> Yet for decades gun manufacturers have done little or nothing to make their weapons safer to prevent foreseeable tragedies.<sup>69</sup> Because guns have a unique exemption from federal safety regulations under the Consumer Product Safety Act,<sup>70</sup> there has been no pressure placed on the industry to innovate for safety. Public entity lawsuits have the ability to change that dynamic.

*D. The New Orleans Lawsuit—Morial v. Smith & Wesson, et al.*

To address the firearm safety problem, on October 30, 1998, the Center to Prevent Handgun Violence's Legal Action Project joined with lawyers who had brought ground breaking tobacco litigation to represent the City of New Orleans in filing the first public entity lawsuit in the nation against the gun industry.<sup>71</sup> The lawsuit alleges that children are killed or injured with firearms in New Orleans because of gun manufacturers' failure to install feasible internal locking devices into their firearms to prevent unauthorized access and misuse. The City is seeking unspecified damages for its costs in responding to this crisis. The City is also hopeful that, in the same way that litigation induced the auto industry to design motor vehicles to be crashworthy, its lawsuit will provide a powerful incentive to the gun industry to redesign

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68. See, e.g., Warren Brown, *Ford to Install Emergency Trunk Releases*, WASH. POST, March 31, 1999, at A10 (discussing voluntary decision of Ford Motor Co. to install internal trunk releases based on information showing that 19 children had died in trunk-related accidents since 1987); CPSC, *Evenflo Co. Inc. Announce Recall to Repair Child Carriers*, Sept. 8, 1998 press release, available at <<http://ws1.kidsource.com/CPSC/child.carrier.recall.html>>

69. Of course, the fact that the gun industry has universally failed to install personalized gun technology should be no bar to recovery. As the famous case of the *T.J. Hooper* held:

[I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices . . . . There are precautions so imperative that even their universal disregard will not excuse their omission.

The *T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (J. Learned Hand).

70. The Consumer Product Safety Act ("CPSA") was passed by Congress in 1972 in response to findings by the National Commission on Product Safety that industry self-regulation was inadequate and consumers were being exposed to too many product dangers. See Dixon, *supra* note 28, at 999-1003 (discussing purpose and workings of CPSA). At the time the CPSA was passed, however, firearms were exempted from the Act's protections, see 15 U.S.C. § 2052(a)(1)(E), due to last-minute lobbying from the National Rifle Association. See Robert J. Spitzer, *The Politics of Gun Control* 104-05, 110 (1995).

71. *Morial v. Smith & Wesson, et al.*, No. 98-18578 (New Orleans Parish Court). See *supra* note 1.

firearms in ways that will protect the nation's youths.<sup>72</sup> Since New Orleans' suit was launched, about two dozen additional cities and counties have filed suit seeking to force gun manufacturers to make their guns safer. The gun industry is so fearful of facing the merits of these lawsuits, that they have joined with the National Rifle Association in seeking state legislation barring the lawsuits from going forward.<sup>73</sup>

The *Morial* case is modeled after another lawsuit – *Dix v. Beretta U.S.A. Corp.*<sup>74</sup>—filed by the Center's Legal Action Project which has received extensive media attention.<sup>75</sup> The *Dix* case, in which an appeal has been filed,<sup>76</sup> is based on an unintentional shooting scenario that is unfortunately all too common. In May 1994, a fourteen-year-old boy retrieved his father's 9mm Beretta pistol from the bedroom, placed an empty ammunition magazine in the gun, playfully pointed it at his fifteen-year-old best friend, Kenzo Dix, and pulled the trigger, unaware that a bullet remained hidden in the pistol's chamber. Kenzo was killed instantly. The Center's lawsuit alleges that the Beretta pistol was defectively designed because it failed to include an effective

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72. See *Childproof Handguns: New Jersey Should Create the Market*, THE TIMES (Trenton, N.J.), Jan. 6, 1999, at A18 (drawing analogy between automakers who protested that technology for improved auto safety was not available and would be resisted by buyers because of added costs, and gun makers who make the same complaints today). The Center's Legal Action Project is also involved in several pending lawsuits brought by individuals to push the industry to change its design practices. See, e.g., *Smith v. Bryco Arms* (N.M. Court of Appeals) (fourteen-year-old boy would not have been shot by best friend, who was unaware of bullet hidden in chamber, had pistol included magazine-disconnect safety, load indicator, or proper warnings); *Mathieu v. Beretta U.S.A. Corp.* (D. Mass.) (twelve-year-old boy would not have been killed by another twelve-year-old if any of the safeties or warnings discussed above had been incorporated into pistol design).

73. See, e.g., Sharon Walsh, *NRA Moves To Block Gun Suits*, WASH. POST, Feb. 26, 1999 (reporting on NRA efforts in at least 10 states to block litigation); Roberto Suro, *In Policy Shift, NRA Will Lobby for Gun Makers*, WASH. POST, Jan. 15, 1999 (discussing NRA teaming with industry to lobby against lawsuits); *Why Stop Cities from Suing?*, USA TODAY, Oct. 21, 1999, at 18A (editorial arguing against blocking city lawsuits). The industry also retaliated against New Orleans by scrapping plans to hold its major annual gun show in the city. Stewart Yerton, *Gun Show Shoots Down Visit to New Orleans*, TIMES-PICAYUNE, Jan. 22, 1999, at A1.

74. No. 750681-9 (Alameda County Cal. Super. Ct.).

75. See, e.g., Gordon Witkin, *Childproofing Guns*, U.S. NEWS & WORLD REP., June 22, 1998, at 24; Melissa Healy, *'Smart' Weapon Shoots Holes in Gun Rift*, L.A. TIMES, Oct. 22, 1998, at A1; Henry K. Lee, *Suit Over Boy's Shooting Could Clip Gunmakers: Son's Death Prompts Safety Crusade*, S.F. CHRONICLE, Oct. 26, 1998, at A11. See also *supra* note 72 (discussing other gun safety lawsuits which support the *Morial* case).

76. At a trial held in October-November 1998, the jury ruled 9-3 for Beretta on the gun safety count. See Henry K. Lee, *Gunmaker Not to Blame for Berkeley Boy's Slaying, Jury Decides*, S.F. CHRONICLE, Nov. 17, 1998, online edition (the jury found 7-5 against Beretta on a failure to warn claim, but this was short of the 9 votes needed for a verdict). The Center has appealed on grounds of jury misconduct and other issues. See *Dix v. Beretta U.S.A. Corp.*, No. A086018 (Cal. Ct. App.).

chamber-loaded indicator or internal lock that would prevent “unauthorized” users, such as the teenager who shot Kenzo, from firing the weapon. At the time it was made, an internal locking device called “Saf-T-Lok” was available and could have been adapted for the Beretta. Other locking designs were also feasible.<sup>77</sup> Beretta, however, considered no alternative designs, instead routing all product safety ideas sent to the company through its in-house lawyer, who promptly rejected each one. Beretta also turned a blind eye to reports of unintentional shootings, and took no steps to determine how serious a problem its guns presented to families with children.

### E. Legal Issues

The *Morial* claims against the gun manufacturers are brought under Louisiana’s product liability statute, while the claims against three industry trade associations and six local firearms distributors are brought in negligence.<sup>78</sup> The primary legal theory in *Morial* is based on the provable fact that the industry markets defective products which unnecessarily cause injuries to New Orleans citizens and the City, which must respond to the crisis.<sup>79</sup> A federal judge recently held that the City stated a cause of action against defendants on these grounds.<sup>80</sup> Moreover, this theory is viable in nearly every state.

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77. See *supra* notes 51-60 and accompanying text (discussing available safety designs).

78. See Louisiana Products Liability Act, La. Rev. Stat. § 2800.51-.56, the “Louisiana Products Liability Act.” Under the statute, which establishes the exclusive theory of liability for manufacturers for damage caused by defective products, *id.* § 2800.52, negligence could not be alleged against the manufacturers, nor could local sellers be charged under products liability. See *id.* § 2800.53-.56. In other jurisdictions, cities have pled the gun safety issue under additional causes of action, including public nuisance, civil conspiracy, violation of consumer protection standards, and unjust enrichment. See, e.g., *Boston v. Smith & Wesson Corp., et al.*, No. 99-2590 (Mass. Super. Ct. Dep’t of Trial Court, Suffolk) (public nuisance and unjust enrichment); *Ganim v. Smith & Wesson Corp., et al.*, No. CV-99-0361279S (Conn. Super. Ct., Waterbury) (civil conspiracy and consumer protection statute). See also CPHV website, *supra* note 1 (index with additional city complaints).

79. Under Louisiana’s statute, a product manufacturer is liable to a claimant for damage proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from a reasonably anticipated use. LA. REV. STAT. § 2800.54(A). A product is “unreasonably dangerous” in design if, at the time the product was made, (1) there existed an alternative design that was capable of preventing the claimant’s damage and (2) the likelihood that the product’s design would cause the damage and the gravity of the damage outweighed the burden on the manufacturer of adopting an alternative design, and the adverse effect, if any, of the alternative design on the utility of the product. *Id.* § 2800.56.

The City has recently amended its complaint to add causes of action seeking recovery for damages related to the gun industry’s negligent distribution practices, as Chicago and other cities have pled in their complaints. See *infra* section IV.

80. See *Morial v. Smith & Wesson*, hearing transcript at 39 (E.D. La. Aug. 18, 1999) (ruling from the bench on the City’s successful motion to remand the case to state court). A state court

[V]irtually every jurisdiction recognizes that a product may be defective if its design presents an inherent risk of serious injury *and* existing technology can be used to produce a safer design without undue costs or interference in the performance of the product. In many jurisdictions, it is irrelevant whether the safer alternative design has been incorporated into a product currently on the market. Manufacturers have a responsibility to pursue available technology to make their products safer or face liability.<sup>81</sup>

In the *Dix* case, this theory was tested on Beretta's motion for summary judgment, and both the trial court and California Court of Appeal permitted plaintiffs to go to trial.<sup>82</sup> A New Jersey appellate court also recently held that a gun could be defective because it failed to utilize a feasible safety that would have prevented a child from unintentionally shooting her friend.<sup>83</sup> A 1998 decision by the Supreme Court of Ohio<sup>84</sup> explains why an industry's failure to child-proof products likely to be misused by children exposes it to liability. Applying Ohio's risk-benefit analysis to a "properly functioning" disposable lighter, the court held that the jury could find a lighter not equipped to prevent

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judge in Atlanta denied defendants' motion to dismiss a similar cause of action in the Atlanta lawsuit. See Paul M. Barrett & Vanessa O'Connell, *Atlanta Wins Ruling Allowing Its Suit Against Gun Manufacturers To Proceed*, WALL ST. J., Oct. 28, 1999 (reporting on unpublished decision in *Atlanta v. Smith & Wesson*, Fulton County State Court, Oct. 27, 1999).

81. Polston & Weil, *supra* note 32, at 19 & nn. 62-64 (reviewing state products liability laws). See also Copetas, *supra* note 23, at 177-84 & nn. 53-54 (discussing risk-utility test and applying it to handgun design); Dixon, *supra* note 28 at 996-99 (analyzing liability for gun manufacturers for design defects).

This theory is also supported by the new Third Restatement of Torts, which requires proof of an alternative design that could have been adopted at the time of sale. See RESTATEMENT (THIRD) OF TORTS § 2, cmt. d (1998) ("This Section states that a design is defective if the product could have been made safer by the adoption of a reasonable alternative design" that could have been "practically adopted" at the time of sale). Louisiana requires that the alternative design be available at the time the product is made. LA. REV. STAT. § 2800.56.

82. In *Dix*, after the trial court rejected Beretta's motion for summary judgment, Beretta sought a writ of mandate to the California Court of Appeal, which affirmed the trial court's decision. See Polston & Weil, *supra* note 32, at 19-20 (discussing favorable features of California law).

83. *Hurst v. Glock*, 684 A.2d 970 (N.J. Super. Ct., App. Div. 1996). In *Hurst*, a fifteen-year-old boy found his mother's boyfriend's police service pistol in its unsecured holster after the officer had gone out. His fourteen-year-old girl friend then arrived, but before they went to school, they went into the kitchen where the boy removed the magazine and the bullets therein. The girl picked up the gun, believing it to be unloaded, pointed it at the boy, and pulled the trigger. The bullet hidden in the chamber fired and hit the boy in the head, causing catastrophic injuries. Noting that magazine-disconnect safeties have been "state of the art" since 1910, that these types of unintentional shootings are common, and that the gun would not have fired had it been equipped with that safety, the court held that a jury could find the officer's Glock pistol defective. *Id.* at 974. See also *Lemaster v. Glock*, 610 So. 2d 1336 (Fla. Ct. App. 1992) (holding that lack of external safety in firearm could render it defective).

84. *Perkins v. Wilkinson Sword, Inc.*, 700 N.E.2d 1247 (Ohio 1998).

activation by children posed an excessive preventable danger and could therefore be defective.<sup>85</sup>

This is not to say that all jurisdictions fully embrace the legal theories underpinning *Morial*. For example, some jurisdictions may deny recovery if the product is misused by unintended users.<sup>86</sup> Other jurisdictions restrict products liability to situations where the product fails to meet the expectations of the ordinary consumer,<sup>87</sup> which may be more difficult to prove in this instance because the public does not yet widely expect guns to be self-locking to prevent unauthorized access and misuse. Still other jurisdictions hold that because firearms pose open and obvious dangers, recovery is barred.<sup>88</sup>

The decisions restricting recovery, however, are not soundly reasoned. Product misuse in gun defect cases is most often committed by juveniles who cannot appreciate the dangers posed by firearms. Moreover, such misuse is both completely foreseeable, as it happens thousands of times each year, and is entirely preventable by the incorporation of feasible alternative designs.<sup>89</sup> Application of the consumer expectations test does not account for the fact that the people injured by firearms are usually not the purchasers, and will not be

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85. *Id.* at 1249-52. In holding that it is reasonably foreseeable that children would access disposable lighters and play with them, the court noted statistics showing they have been linked to 170 deaths and 1,190 injuries per year. *Id.* at 1252. These numbers are horrific, but are much smaller than the numbers of children killed and injured by firearms each year. *See supra* notes 19-21 and accompanying text.

The case also holds that the risk-benefit test applies to properly functioning handguns that could be made safer. Perkins, 700 N.E.2d at 1249-50. In that sense, it distinguishes a series of cases brought in the 1980s which argued that handguns were defective *per se* because their risk of misuse in crime outweighed their social benefits. All but one of these latter cases failed. *See, e.g.,* King v. R.G. Indus., Inc., 451 N.W.2d 874 (Mich. App. 1990); Delahanty v. Hinckley, 564 A.2d 758 (D.C. 1989); Caveny v. Raven Arms Co., 665 F. Supp. 530 (S.D. Ohio 1987), *aff'd* 849 F.2d 608 (6th Cir. 1988); Armijo v. Ex Cam, Inc., 656 F. Supp. 771 (D.N.M. 1987), *aff'd* 843 F.2d 406 (10th Cir. 1988). The one that succeeded—Kelley v. R.G. Indus., Inc., 497 A.2d 1143 (Md. 1985)—was later negated by the Maryland legislature.

86. *See* Griffs v. BIC Corp., 981 F.2d 1429, 1433 (3d Cir. 1992).

87. *See* Polston & Weil, *supra* note 32, at n.72.

88. *See* Copetas, *supra* note 23, at 184-85 (discussing cases).

89. *See* Perkins v. Wilkinson Sword, Inc., 700 N.E.2d 1247, 1252 (Ohio 1998) (strict liability “contemplates that a manufacturer may be liable for failing to use a foreseeable alternative design that would have prevented harm caused by an unintended but reasonably foreseeable use of its product”); Hernandez v. Tokai Corp., 1999 Tex. Lexis 100, \*11 (Tex. 1999) (“the fact that the foreseeable risk of harm is due to a misuse of the product, rather than an intended use, is not an absolute bar to liability for that portion of an injury caused by a product’s defective design”); RESTATEMENT (THIRD) OF TORTS § 2, cmt. p (1998) (liability may attach if risks of harm related to foreseeable misuse could have been reduced by reasonable alternative design); Polston & Weil, *supra* note 32, at 20 (criticizing misuse doctrine); Copetas, *supra* note 21, at 185-86 (same).

protected unless the risk to them is considered.<sup>90</sup> Finally, the risks posed by unsafe firearms are not really “open and obvious” – since a bullet in the firearm chamber cannot be seen<sup>91</sup> – and, even if they were, that should not shield a manufacturer that can prevent the danger by incorporating a feasible safety device.<sup>92</sup>

#### IV. THE CHICAGO MODEL—ATTACKING GUN TRAFFICKING AND INDUSTRY MARKETING PRACTICES

The Chicago lawsuit, and the numerous city and county suits like it, attacks a very different problem caused by the gun industry – loose marketing practices that move firearms from the legal marketplace into criminals’ and juveniles’ hands. To understand the problems with that marketing system, some background is required.

##### A. *Negligent Firearms Marketing Fuels Crime*

The legal firearms market is made up of two levels: the *primary* market, which comprises all transactions involving the licensed gun industry; and the *secondary* market, where unlicensed persons act as both buyer and seller.<sup>93</sup> In the primary market, gun manufacturers sell their guns mainly to wholesale distributors, who in turn resell the firearms to storefront dealerships, who then sell the guns to the public.<sup>94</sup> The three layers of sellers—manufacturers, distributors, and dealers—are all federally licensed, and must comply with

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90. See RESTATEMENT (THIRD) OF TORTS § 2, cmt. g (1998) (rejecting notion that conformance with consumer expectations can block recovery where safer design available); Perkins, 700 N.E.2d at 1249 (holding product manufacturer can be liable under risk-benefit test even if not liable under consumer expectations test); Copetas, *supra* note 23, at 176 (criticizing consumer expectations test as failing to provide incentive to make safer products).

91. See GAO Report, *supra* note 25, at 3 (noting that 23% of unintentional shootings could be prevented if person realized the firearm was loaded).

92. See RESTATEMENT (THIRD) OF TORTS § 2, cmt. d (1998) (obviousness of design-related risk does not preclude finding of defect, if plaintiff can establish that reasonable alternative design would have reduced or prevented injury to plaintiff); Perkins, 700 N.E.2d at 1251 & n.3 (obviousness of risk for disposable lighters may be outweighed by other risk-benefit factors where childproof design available); Hernandez, 1999 Tex. Lexis 100, \*13 (obviousness of danger is not an absolute bar to liability for a defective design); Polston & Weil, *supra* note 32, at 20 (criticizing open and obvious doctrine); Copetas, *supra* note 23, at 184-85 (same).

93. See Mark D. Polston, *Civil Liability for High Risk Gun Sales: An Approach to Combat Gun Trafficking*, 19 SETON HALL LEGIS. J. 821, 824-28 (1995) (discussing federal law regulating the firearms market); Julius Wachtel, *Sources of Crime Guns in Los Angeles, California*, 21 POLICING: AN INT’L J. OF POLICE STRATEGIES & MNGMNT. 220, 221 (1998) (outlining firearms markets).

94. Guns that are imported go through a similar distribution system. See 18 U.S.C. § 923; 27 C.F.R. §§ 47, 178-79. Many foreign manufacturers, such as Beretta and Glock, have domestic distribution companies that bear the manufacturer’s name.

certain limited federal paperwork requirements in making gun sales.<sup>95</sup> Manufacturers and distributors must keep acquisition and disposition records to show how and when they acquired and sold all guns.<sup>96</sup> Dealerships must ask public buyers to fill out a form and show identification, then wait until an instant background check is completed before selling the gun.<sup>97</sup> Once members of the public receive firearms, however, there is little or no federal regulation placed on resale of the weapons in the secondary market. Moreover, the system can be readily subverted by firearms dealers willing to look the other way when “straw purchasers” with clean criminal records buy guns on behalf of disqualified persons.

According to the U.S. Bureau of Alcohol, Tobacco and Firearms (“ATF”), “[v]irtually all new firearms used in crime first pass through th[is] legitimate distribution system of federally licensed firearms dealers.”<sup>98</sup> The volume of guns sold in the primary market is enormous, ranging from 2.5 to 3.9 million handguns, and another 2.7 million long guns, a year.<sup>99</sup> Data developed for a lawsuit against the gun industry indicates that a substantial proportion of handguns sold through this legal marketplace end up being used in crime.<sup>100</sup>

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95. See 18 U.S.C. § 923; 27 C.F.R. pts. 178-79.

96. See 18 U.S.C. § 923(g)(1)(A).

97. See 18 U.S.C. § 922(s). The background check is designed to weed out convicted felons, people who have been committed to a mental institution, and other disqualified purchasers. See *id.* §§ 922(d), (g) (listing 9 categories of persons disqualified under federal law from being sold or owning firearms). From November 1993 through November 1998, only handgun purchasers were required to submit to the background check under a system that allowed law enforcement up to five days to complete a check of records. By November 1998, all firearm purchasers were required to submit to checks, but the system was also required to be computerized for instant checking, so that purchasers could leave the store with their gun. Although the instant-check system has problems because many records are still not computerized, background checks have been overwhelmingly successful in stopping direct sales to criminals. See, e.g., Donald A. Manson, *Presale Handgun Checks, the Brady Interim Period, 1994-98*, Bureau of Just. Stat. Bull. (June 1999) (noting that approximately 312,000 felons and other disqualified buyers have been turned away because of the background check from March 1, 1994 through December 1998).

98. U.S. Dep’t of Treasury, *A Progress Report: Gun Dealer Licensing & Illegal Gun Trafficking* i (Jan. 1997) [hereinafter *A Progress Report*] (statement of Raymond W. Kelly, Under Secretary (Enforcement)). See also Polston, *supra* note 93, at 828 & n.36 (“‘Smith & Wesson has never shipped a shipment from their factory marked, ‘Shipped for use by felons . . . .’ At some stage in the process, those firearms are diverted into the hands of felons. And it is, in almost every case, by a federal licensee.’”) (quoting Bill Bridgewater, Executive Director, National Alliance of Stocking Gun Dealers).

99. See Expert Report of Lucy Allen and Jonathan Portes 5-6, Ex. 1 (May 1, 1998) (filed in *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999)); Wachtel, *supra* note 93, at 220; Diaz, *supra* note 67, at 23-35 (giving data for 1995 domestic production and imports).

100. See Allen & Portes, *supra* note 99, at 5-6, Ex. 1 (concluding that more than 600,000 handguns sold in the U.S. in 1989, or nearly 24% of that year’s total, were used in crime before the end of 1997, while more than 760,000 handguns sold in 1993 (19.7%) were used in crime before the end of 1997). Since the lawsuit in which Ms. Allen and Mr. Portes were retained—



Moreover, 43% of the handguns recovered nationwide between August 1, 1997 and July 31, 1998 that were traced as part of a criminal investigation were sold in the primary market within the previous three years,<sup>101</sup> which ATF considers a strong indicator that the guns were trafficked for illegal use.<sup>102</sup>

There are a number of reasons why firearms sold legally end up being diverted easily to crime. First, there is no federal limit on the number of guns that can be bought in a single sale. Multiple sales must be recorded by the dealer, and the forms forwarded to ATF and local law enforcement, but these reporting requirements do not preclude the sale.<sup>103</sup> Second, there is no federal regulation of secondary sales, including no paperwork or background check requirements. Thus, once “straw purchasers”<sup>104</sup> leave the gun store, they can resell firearms without creating a paper trail. Finally, law enforcement’s ability to curb illegal gun trafficking is constrained by limits on the number of ATF investigators, congressional restrictions on computerizing records, and broad legal loopholes that make trafficking convictions difficult to secure.<sup>105</sup>

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Hamilton v. Accu-Tek—involved shootings with handguns only, they did not similarly analyze the diversion of long guns into crime. However, independent data shows in the vast majority of crimes where firearms are used, handguns are the weapon of choice. *See* Polston, *supra* note 83, at 821 & n.4 (noting that 13,495 murders were committed in 1992 with handguns, or 87% of the total number of firearm murders). *See also* ATF - *The Youth Crime Gun Interdiction Initiative - The Illegal Youth Firearms Markets in 17 Communities* 7, Dep’t of Treasury (July 1997) [hereinafter *17 Cities Report*] (“Eight out of ten crime guns traced are handguns. . . . In all sites, handguns are the largest category of firearms recovered by enforcement agencies.”).

101. *See* *17 Cities Report*, *supra* note 11, at 9; U.S. Dep’t of Treasury and Justice, *Gun Crimes in the Age Group 18-20* 4 (June 1999). *See also* Allen & Portes, *supra* note 99, at 6, Ex. 2 (finding based on earlier data that 39% of handguns traced to crime had been sold commercially within previous three years); Wachtel, *supra* note 93, at 229 (noting that “[p]istols seemed especially prone to quick turn-around: a third were seized within one year and more than half within two years.”).

102. *17 Cities Report*, *supra* note 11, at 8; Wachtel, *supra* note 93, at 229. ATF “estimates that newer crime guns comprise 25-36% of the guns recovered from juveniles, 32-49% of the guns recovered from youths aged 18-24, and 27-40% of the guns recovered from adults.” *17 Cities Report*, *supra* note 11, at A2.

103. ATF defines a multiple sale as the sale by a licensed gun dealer of two or more handguns to an unlicensed person within a five day period. 27 C.F.R. § 178.126a. When making such sales, dealers are required to fill out and forward to ATF a Form 3310.4 which lists the guns sold.

104. “Straw purchasers” are persons with clean records who purchase guns for others – usually criminals, juveniles, or other dangerous buyers. *See* Bureau of Alcohol, Tobacco & Firearms, *Federal Firearms Regulations Reference Guide* 97 (Oct. 1995).

105. *See* Fox Butterfield, *Limits on Power and Zeal Hamper Firearms Agency*, N.Y. TIMES, July 22, 1999, at A1 (discussing constraints on ATF, including fact that agency has only 9 more agents than the 1,622 it had in 1973, while the Drug Enforcement Administration is up to 4,261 agents from 1,370 in 1973); Andrew Conte, ‘Bad Apple’ Gun Dealers Hard to Stop, CINCINNATI POST, Sept. 20, 1999, online edition (current federal law makes it extremely difficult for the ATF to crack down on bad dealers); David Montgomery, *Weapon Study Details Arming of D.C. Youth*, WASH. POST, July 20, 1997, at B1 (noting inability of ATF to trace more than 37% of 37,589

These constraints are no accident. They are due to heavy lobbying by the gun industry and the National Rifle Association.<sup>106</sup>

Certain states have attempted to tighten control on these markets to prevent guns from being diverted to crime. For example, as will be discussed below, Virginia passed a law limiting sales to one handgun per month per buyer, while other states have imposed limited controls on secondary sales.<sup>107</sup>

Unfortunately, these laws are not uniform and so can be circumvented by traffickers making purchases in states with weak gun laws and then transporting the guns to states with stronger laws.<sup>108</sup> Naturally, criminals take

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firearms recovered at crime scenes); Tom Jackman, *Gun Dealer's Legacy: Pain*, K.C. STAR, Oct. 5, 1996, at A1 (explaining the difficulty authorities have tracking and getting convictions for illegal gun sales); Tori Marlan, *Dealing Death*, CHICAGO READER, June 6, 1997, at 1, 20-21 (explaining difficulty in tracking illegal sales); Wachtel, *supra* note 93, at 235-36 (noting difficulty of tracking down all multiple sales).

106. See Butterfield, *supra* note 105, at A1 (describing ATF difficulties in pursuing firearm trafficking violations because of legal loopholes pressed for and won by gun lobby); David B. Ottaway, *System Shot Full of Holes*, WASH. POST, July 11, 1999, at A1 (due to lobbying by groups like the NRA, an estimated 40% of the nation's gun market is largely unregulated); Matt Bai, *Clouds Over Gun Valley*, Newsweek, Aug. 23, 1999, at 34 (describing how the NRA, who once referred to the ATF agents as "jackbooted thugs," is frequently at odds with the government agency); *Gun Shows In America: Tupperware Party for Criminals*, Violence Pol'y Center 9-13 (1996) (discussing how 1986 McClure/Volkmer bill backed by NRA made changes in federal law that increased the number of gun shows and allowed illegal sales to flourish).

Several books have also been written on the gun lobby's influence in creating legislative loopholes for gun manufacturers and restrictions on law enforcement. See, e.g., Jack Anderson, *Inside the NRA: Armed and Dangerous* (1996); Robert J. Spitzer, *The Politics of Gun Control* (1995); Osha Gray Davidson, *Under Fire: The NRA and the Battle for Gun Control* (1993); Josh Sugarman, *NRA: Money, Firepower, Fear* (1992).

107. See VA. CODE ANN. § 18.2-308.2:2(Q) (Michie 1993) (one-gun-a-month law); Cal. Penal Code § 12072(d) (requiring every gun transfer to go through a federal firearms licensee or law enforcement agency, with the same background check, waiting period, and paperwork required for new sales).

108. Under federal law, persons without federal firearms licenses can only purchase handguns in their state of residence. 18 U.S.C. § 922(b). This limitation is intended, in part, to give effect to state laws that regulate firearms transactions more strictly than federal law. It is often circumvented, however, by interstate trafficking of firearms from states with weak gun laws to states with strong gun laws. See Allen & Portes, *supra* note 99, at 7-11 (analyzing how handguns are smuggled from weak law states to strong law states); Fox Butterfield, *Report Links Crimes to States With Weak Gun Controls*, N.Y. TIMES, April 9, 1997 (reporting on study showing that the 10 states with the loosest gun control laws accounted for 54.2% of all out-of-state guns traced to crime); Margaret Edds, *The Pipeline to the Streets of New York*, VIRGINIA PILOT, Jan. 3, 1993, at A9 (reporting ATF data showing that 75% of crime guns recovered in New York City in 1991 came from four states); Robert Rudolph, *Lawmen Target Illegal Gun Traffic*, N.J. STAR LEDGER, March 9, 1998 (reporting that more than 80% of weapons confiscated from crimes committed in New Jersey were purchased outside the state and smuggled in); Bureau of Alcohol, Tobacco and Firearms, *Sources of Crime Guns in Southern California* 21-22 (1995) (more than 30% of guns recovered in crime in California were traced back to dealer in another state); Polston, *supra* note 91, at 830 (discussing guns trafficked out of Virginia before one-gun-a-month law passed). In

advantage of these holes in the system to obtain a ready supply of firearms for illicit purposes.<sup>109</sup> A number of methods are employed.

A leading source of firearm diversion is sales to “straw purchasers.” As the Chief of ATF’s Crime Gun Analysis Bureau has said, based on data from tracing projects in 27 cities nationwide,

the [most important] single source of firearms is still illegal traffickers who are acquiring firearms from retail outlets. It still appears that acquisition of firearms by false declarations and straw purchasers are still the method preferred by traffickers, both small and large.<sup>110</sup>

Indeed, in one major federal study of gun trafficking, straw purchasing accounted for almost 50% of the firearms trafficked into crime.<sup>111</sup>

Although straw sales are often made one gun at a time,<sup>112</sup> the impact is obviously much more severe if large quantities of guns are bought and resold. Numerous reports have documented multiple sale schemes involving hundreds, or even thousands of guns, where the guns purchased end up being traced to crime.<sup>113</sup> Moreover, evidence indicates that multiple sale guns may be twice as

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some instances, the percentage of guns coming from outside the state is almost 90%. *See 27 Cities Report, supra* note 11, at 12 (only 13% of crime guns recovered in New York City originated in New York). Overall, however, a majority of crime guns in a state are usually purchased within that state. *Id.* at 8.

109. *See* Wachtel, *supra* note 93, at 221-22, Table I (reviewing studies showing how criminals obtain guns).

110. Joseph J. Vince, Jr., *Memo from the Chief, CGAB Shots 2* (Oct. 1998). *See also* ATF *Performance Report: The Youth Crime Gun Interdiction Initiative 5-21* (Feb. 1999) [hereinafter *Performance Report*] (discussing the methods of diversion for 640 gun trafficking cases involving almost 27,000 guns); Michelle Bennett, *Project Lead Tip of the Month, CGAB Shots 4* (Nov. 1998) (discussing importance of tracking multiple sales).

111. *Performance Report, supra* note 110, at 12 (47.8% of ATF illegal firearm trafficking investigations involved straw purchases).

112. *See, e.g.,* Chicago v. Beretta U.S.A. Corp., *supra* note 2, amended complaint at 16-20 (identifying instances where gang members supplied Chicago street gangs with dozens of guns bought one or two at a time over a course of months); Mark Obmascik, *Officials Say Girlfriend Bought Guns*, DENVER POST, April 27, 1999, online edition (reporting how girlfriend of one of Columbine High School killers purchased guns for them).

113. *See* Polston, *supra* note 93, at 821, 831-34 (reporting on cases); Wachtel, *supra* note 93, at 230-33 (same); *A Progress Report, supra* note 98, at 13 (same); *Federal Firearms Licensing: Hearing Before the Subcomm. on Crime and Criminal Justice of the Committee on the Judiciary, House of Representatives, 103rd Cong., 1st Sess., 8-10* (June 17, 1993) [hereinafter *House Hearing*] (same). *See also* Jeffrey Taylor, *Mr. Sizer’s Sideline: How a Gun Supplier Goes About Business*, WALL ST. J., Oct. 19, 1999, at A1 (explaining how owner of Christian bookstore trafficked more than 90 guns straw purchased at Philadelphia gun stores); Vanessa O’Connell, *Legally Sold Gun Ended Up In Killer’s Hand*, WALL ST. J., July 13, 1999, at B1 (describing how gun used in deadly shooting spree was obtained through person who bought 65 guns in two years from Illinois dealer); Clea Benson, *Metro Section, PHILA. INQUIRER*, March 17, 1998 (telling story of couple who resold 55 AK-47 assault rifles bought at local gun stores); *Conviction on Gun Charges*, WASH. POST, Sept. 1, 1997 (man convicted of selling 300 weapons in D.C. he bought

likely as other guns to be picked up in crime in a state other than where they were bought, indicating their important role in interstate trafficking.<sup>114</sup> All evidence suggests that the volume of multiple sales transactions is quite high.<sup>115</sup>

Corrupt firearms dealers have posed another problem. Until recently, in addition to storefront firearms dealers, there were also thousands of persons, known as “kitchen-table dealers,” who obtained federal firearms licenses and sold guns out of their homes. At one point, there were more firearms dealers in America—over 280,000—than gas stations.<sup>116</sup> Needless to say, the large number of dealers posed extraordinary law enforcement problems and were the source of thousands of guns entering the illegal market.<sup>117</sup> Passage of the

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from dealers and gun shows); Clifford Krauss, *Guns Found At Crime Scene Yield Trove of Clues On Traffickers*, N.Y. TIMES, Jan. 6, 1997, at B1 (tracking four handguns found at shooting of New York police officer to ring of traffickers); Michael James, *How Maryland Outlaws Get Around Gun Laws*, BALT. SUN TIMES, March 26, 1995, at 1A (recounting case of Baltimore woman who bought \$6000 worth of guns for drug dealer in one trip.); Bruce Frankel, *New York Shooting Investigation Zeroes In On Gun*, U.S.A. TODAY, March 9, 1994, at 10A (reporting on New Yorkers with Florida identification who bought 132 handguns in Florida, half of which were intercepted on I-95 on their way to the northeast); Michael Isakoff, *Gun Pipeline: From Ohio to Streets of Philadelphia*, WASH. POST, March 12, 1991, at A1 (reporting on trafficker who traveled to Ohio to buy 135 handguns, then resold them on streets of Philadelphia for profit of \$200-300 per gun); *U.S. v. Bryan*, 1997 U.S. App. Lexis 2340 (2d Cir. 1997) (explaining methods of convicted trafficker).

114. See Testimony of Sarah Brady, Chair, Handgun Control, Inc. before Senate Judiciary Committee (Sept. 2, 1998) (explaining Center to Prevent Handgun Violence study of 1173 multiple sales guns traced to crime).

115. In 1991 and 1992, before Virginia enacted its one-gun-a-month law, there were 6,835 cases in which one person bought two or more handguns from the same Virginia dealer in less than a week. See Pierre Thomas, *Wilder Bill Would Disrupt Thousands of Gun Sales*, WASH. POST, Jan. 19, 1993, at A1. In another report, the ATF field division in Southern California documented over 5,700 instances of multiple sales involving 13,181 handguns. Almost 18% of these multiple sales involved individual purchases of three or more guns. Bureau of ATF, *Sources of Crime Guns in Southern California* 21 (1995). More recent data from Philadelphia indicates that in 1996 and part of 1997, purchasers of more than one handgun accounted for almost half of the total number of handguns sold in that city, buyers of three or more handguns made up 30% of total sales, and buyers of five or more handguns—only 3% of the buyers—bought 17% of the weapons, for an average of 8.8 guns each. See Kairys, *supra* note 11, at 8 & n.22. In 1998, as many as 22% of the handguns sold in California were part of multiple sales. *People of the State of California v. Arcadia Machine & Tool*, No. BC 210894, amended complaint at 21 (Los Angeles Super. Ct.).

116. *A Progress Report*, *supra* note 98, at 2.

117. See Polston, *supra* note 93, at 826-27, 835-39 (discussing problems with kitchen-table dealers); Wachtel, *supra* note 93, at 222, 230-34 (reviewing 28 gun diversion cases in Los Angeles area between 1992 and 1995 involving 19,145 guns; corrupt dealers bought 13,128 of these guns from wholesale distributors, or about 68%); Burt Hubbard, *1 Dealer Sold 36 Guns Used in '98 Crimes*, DENVER ROCKY MOUNTAIN NEWS, June 9, 1999, online edition (one Colorado gun dealer was the source of 36 guns traced to crimes in 1998; four dealers were the

Brady Law in 1993 reduced the number of dealers by raising the fee for federal firearms licensees from \$10/year to \$200 for a three-year license, and requiring applicants to certify that they would comply with state and local licensing and zoning requirements.<sup>118</sup> The result has been a drop of well over 50% in the number of federal firearms licensees (“FFLs”), and a steady decrease in the number of kitchen-table dealers.<sup>119</sup> Nevertheless, corruption remains a significant problem, even among storefront dealers.<sup>120</sup>

Undercover sting operations in Chicago, Wayne County, Michigan, and Gary, Indiana have proved that firearms dealers are loathe to turn away paying customers, even if they openly admit to being felons or juveniles.<sup>121</sup> And some dealers have pumped literally thousands of guns into the illegal market.<sup>122</sup> Thefts from firearms dealers is another source of crime guns.<sup>123</sup>

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source of ten or more crime guns); Bob Port, *Sometimes the Dealer Is a Criminal*, ST. PETERSBURG TIMES, June 28, 1993, at 7 (detailing stories of convicted felons who have been allowed to retain and/or renew their federal licenses); Pierre Thomas, *Hit-or-Miss Control of Firearm Sales*, WASH. POST, Nov. 29, 1992, at A1 (reporting that a dozen Detroit dealers have been charged with supplying 2,000 guns to criminals in the city); *House Hearing*, *supra* note 113, at 64 (statements of Sen. Simon) (“At least 600 federally licensed dealers have been arrested on criminal charges in the last five years.”).

118. See 18 U.S.C. §§ 923(a), (d); *A Progress Report*, *supra* note 98, at 2-3 (explaining changes).

119. See *A Progress Report*, *supra* note 98, at 2-10.

120. See, e.g., Wachtel, *supra* note 93, at 234 (concluding that “[d]ealer corruption emerged as a surprisingly significant source of supply” in study of the sources of crime guns); *infra* note 121, and accompanying text (discussing undercover investigation of Chicago-area, Wayne County, Michigan, and Northern Indiana storefront dealers who were eager to sell guns to straw buyers).

121. See *Chicago v. Beretta*, *supra* note 2, amended complaint at 22-54 (discussing results of sting); *McNamara v. Arms Technology*, *supra* note 12, amended complaint at 25-34 (same); *King v. Smith & Wesson Corp.*, No. 45DO2-9908-CT-0355, complaint at 15-20 (Lake County Superior Court) (same). See also *Parmer v. Carter’s Country*, No. 97-48432, July 14, 1998 deposition of Dana King (Harris Co. Texas District Ct.) (explaining how supervisors admonished gun store clerk who turned away buyers with criminal records, advising him to ask felons whether person with clean record could purchase gun for them).

122. See *House Hearing*, *supra* note 113, at 3-4 (statements of Rep. Schumer) (detailing stories of “Dirty Dozen” of corrupt FFLs who trafficked more than 12,000 guns); Senator Charles Schumer, *A Few Bad Apples: Small Number of Gun Dealers the Source of Thousands of Crime Guns* (June 1999) (identifying 1% of dealers who collectively sold nearly half of all guns traced to crime between 1996 and 1998); Glenn L. Pierce, et al., *The Identification of Patterns in Firearm Trafficking: Implications for Focused Enforcement Strategies* ii (ATF 1995) (a small number of FFLs participating in illegal firearms trafficking are capable of causing exponential damage by supplying firearms directly or indirectly to the criminal element); Laura Parker, ‘It Was Easy:’ *Confessions of a Gun Trafficker*, U.S.A. TODAY, Oct. 28, 1999, at 1A (person able to traffic more than 1,000 handguns in eight months using forged federal firearms license); Jackman, *supra* note 105, at A1 (a local gun dealer illegally sold 1300 guns over a 3 year period); J.R. Moehringer, *Man Charged With Providing Guns to Gangs*, LA TIMES, Apr. 15, 1995, at B1

Gun shows—which occur in at least 100 cities nationwide every weekend—also permit widespread illegal trafficking in firearms because most gun show sales are unregulated.<sup>124</sup> Unlicensed sellers are not required in most states to fill out any paperwork on the sale, or wait for a background check to be completed. The proliferation of these temporary gun supermarkets also overtaxes law enforcement, which has limited resources to police these sales.<sup>125</sup> With the Brady background check turning away more than 300,000 disqualified gun buyers from gun stores in just a few years,<sup>126</sup> many of these purchasers have no doubt turned to gun shows to obtain guns for use in crime.<sup>127</sup>

The gun industry takes advantage of these weaknesses in the law to market more of their guns to criminals and juveniles. For example, evidence

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(California man had close to 1700 crime guns traced to him); *see also supra* note 117 (identifying additional corrupt dealers).

123. *See* Wachtel, *supra* note 93, at 232 (noting that thefts from commercial outlets accounted for 11% of guns diverted to crime in Southern California study); Valerie Park, *Stolen Firearms*, CGAB Shots 1, 3-4 (Oct. 1998) (discussing stolen firearms data received by ATF).

124. *See* U.S. Dep't of Treasury, *Gun Shows: Brady Checks and Crime Gun Traces* 10-15 (Jan. 1999) [hereinafter *Gun Shows*]; *Gun Shows In America: Tupperware Party for Criminals*, Violence Pol'y Center 22 (1996) [hereinafter *Gun Shows In America*].

125. *See Gun Shows in America, supra* note 124, at 20 (quoting ATF agent Ed Gleba: "There are just too many gun shows and not enough agents"); *House Hearing, supra* note 113, at 30 (remarks of ATF Director Higgins that, with thousands of gun shows, ATF covers only a minute percent because of lack of manpower); Erik Larson, *Private Gun Sales Go Unregulated At Shows and at Flea Markets*, WALL ST. J., July 12, 1994, at A1 (discussing lack of oversight); David Olinger, *Gun Shows: Open Season for Lawless Shopping*, ST. PETERSBURG TIMES, June 28, 1993, at 1A (outlining enforcement problems and resultant illegal sales).

126. *See* U.S. Dep't of Treasury, *Implementation of Brady Law* 5 (Sept. 1999) (estimating that 312,000 prohibited persons were prevented from purchasing firearms during interim Brady law, and tens of thousands more under permanent Brady law); Manson, *supra* note 97, at 1 (giving full data on Brady rejections).

127. *See Gun Shows, supra* note 124, at 6-9 (noting that in 314 firearms trafficking investigations involving gun shows, felons buying or selling firearms were involved in more than 46% of the cases); Polston, *supra* note 93, at 837-39 (explaining problem); *House Hearing, supra* note 113, at 8-14 (testimony of convicted felon Edward Daily regarding how easy it was to purchase multiple guns at gun shows in Virginia for resale in New York City); Philip J. Cook, et al., *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 89 (1995) (discussing "gun show cowboys" who travel from state-to-state selling semi-automatic handguns); Melvin Claxton & William Gaines, *Killer Covered Tracks at Gun Shows*, CHICAGO TRIB., Dec. 30, 1997 (reporting case of serial killer who bought and sold murder weapons at gun shows). Numerous licensed dealers who have sold at gun shows have been arrested for selling guns without having a proper background check performed. *See, e.g.,* United States v. Calloway, 1993 U.S. App. LEXIS 25553 (6th Cir. 1993) (per curiam) (dealer sold weapon to convicted felon); Ciznewski v. Department of Treasury, 773 F. Supp. 148, 151 (E.D. Wis. 1991) (dealer sold guns in violation of Wisconsin 48-hour waiting period); Mayhew v. Virginia, 458 S.E.2d 305, 310 (Va. Ct. App. 1995) (upholding conviction of dealer); *Guns Shows in America, supra* note 125, at 18 (reporting arrest of fifty individuals in 1994 at Pennsylvania gun shows).

presented in the *Hamilton v. Accu-Tek*<sup>128</sup> case in New York suggests that the industry deliberately targets areas with lax gun control laws for higher gun sales than can be supported by the legal marketplace, knowing that guns purchased there will be trafficked into states and cities with tougher gun laws.<sup>129</sup> In another case, an analysis of the sales practices of Lorcin Engineering, which made cheap “Saturday Night Special” handguns, concluded that the company’s marketing strategy emphasized “saturation sales in certain high-crime metropolitan areas.”<sup>130</sup>

*B. Changing Industry Marketing Practices Can Reduce Crime*

As former ATF Crime Gun Analysis Chief Joseph J. Vince, Jr. has said:

In examining enforcement activities and results across the United States, we have found one universal maxim: Decrease the amount and availability of illegally trafficked firearms in a community, and the number of violent crimes will also go down.<sup>131</sup>

Gun trafficking can be addressed in several ways. One of the most effective methods to reduce the flow of guns into the criminal market is to limit sales of handguns to one per month per buyer. Without multiple sales, the value of straw purchasing as a means to obtain crime guns is dramatically reduced, because if a straw purchaser can only legally obtain one handgun a month, a gun trafficker would need to recruit hundreds of straw purchasers to acquire the number of guns a single straw buyer could buy today. The effectiveness of this limit has been proven in Virginia, which passed its one-gun-a-month law in July 1993.<sup>132</sup> Prior to that time, Virginia was the leading source state for crime guns traced by law enforcement in the northeast.<sup>133</sup> After the law took effect, however, Virginia’s position as a source of crime guns trafficked into other states dropped dramatically.<sup>134</sup> Background checks have also proven effective in reducing gun trafficking.<sup>135</sup>

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128. 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

129. See Allen & Portes, *supra* note 99, at 12-15.

130. See Kairys, *supra* note 11, at 7 (quoting affidavit of David W. Stewart in *First Commercial Trust Co. v. Lorcin Eng’g, Inc.*, No. 94-3006 (Ark. Cir. Ct. 1994), *aff’d*, 900 S.W.2d 202 (Ark. 1995)). Lorcin has recently filed for Chapter 7 dissolution under the Bankruptcy Code.

131. *Memo from the Chief*, CGAB Shots 2 (Jan. 1998) (emphasis in original).

132. See *supra* note 107, and accompanying text (citing Virginia law).

133. See Douglas S. Weil & Rebecca C. Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 JAMA 1759, 1759-61 (1996).

134. *Id.* For example, Virginia’s share of crime guns ending up in New York dropped 66% after the law took effect. With other northeast states, the effect was similar. *Id.* at 1760. See also Polston, *supra* note 93, at 830-33 (discussing data). Maryland’s one-gun-a-month has also been effective. See Testimony of Sarah Brady, *supra* note 113, (Baltimore police recovered one-third fewer handguns the year after Maryland’s one-gun-a-month law took effect).

135. See Douglas S. Weil, *Traffic Stop: How the Brady Act Disrupts Interstate Gun Trafficking* (Center to Prevent Handgun Violence 1997). The study compared the percentage of

The gun industry could itself institute controls to reduce firearms trafficking. A system of training, monitoring, and disciplining dealers could be instituted through contracts between gun manufacturers and their downstream distributors, much in the way that certain businesses require dealers to be “authorized” before being able to sell the manufacturer’s product line. Other industries selling products where the danger of misuse is high, such as chemical products and SCUBA diving equipment, have instituted marketing controls, including franchising retail sales outlets, restricting retail sales through distribution contracts, and requiring safe sales practices at the retail level.<sup>136</sup> Specific controls gun manufacturers could implement include: requiring dealers to maintain a retail place of business and carry full liability insurance coverage, training dealers on how to minimize the risk of transfers to illegitimate purchasers, tracking ATF trace requests through distribution channels to identify, retrain, sanction and/or terminate distributors and dealers that are repeatedly the subject of crime gun traces, requiring dealers to limit sales to individuals to one handgun per month, prohibiting dealers from selling at gun shows, and requiring dealers to secure their firearms from theft.<sup>137</sup>

This point was recently underscored by leading gun maker Smith & Wesson, which this year started requiring its “stocking” gun dealers to sign a new “Code of Responsible Business Practices” or be cut off.<sup>138</sup> Unfortunately, the Code is very weak, merely requiring dealers to maintain a store premise, to not “knowingly” sell firearms to straw purchasers or otherwise violate the law, and to comply with other minimal provisions.<sup>139</sup> Smith & Wesson has the right under the Code to terminate dealers who have been sued by municipalities for negligent distribution practices.<sup>140</sup>

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guns traced to crime recovered in seven recipient states that had originated in four source states for the periods before, and after, the Brady Law took effect. The impact was dramatic. After passage of Brady, the four source states provided a lower percentage of crime weapons to *every one* of the seven recipient states, with most showing declines well above 50%. *Id.* at 4-10.

136. See Expert Report of David Stewart (May 1, 1998) (filed in *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999)).

137. See *Chicago v. Beretta U.S.A. Corp.*, *supra* note 2, amended complaint at 56-59; David Shepardson & Kim Kozlowski, *Wayne Wants Gun Suit Deal*, DETROIT NEWS, Oct. 21, 1999, online edition) (reporting on Wayne County’s settlement terms to manufacturers that would mandate strict gun licensing and controls, and development of smart guns).

138. See David B. Ottaway and Barbara Vobejda, *Gun Manufacturer Requires Dealers to Sign Code of Ethics*, WASH. POST., Oct. 22, 1999, at A11; Martin Kasindorf, *Smith & Wesson Promotes Gun Ethics*, USA TODAY, Oct. 25, 1999.

139. See Smith & Wesson, *Stocking Dealer Code of Responsible Business Practices* (1999).

140. *Id.* Smith & Wesson has already terminated two of the Chicago-area storefront dealers implicated in the Chicago lawsuit.



C. *The Gun Industry Is Aware Of The Problem, But Does Nothing*

The gun industry is well aware of its lax distribution practices, but continues to ignore the crime problem it creates because of the profits at stake. Robert Hass, a former Senior Vice-President of Marketing and Sales at Smith & Wesson, the nation's largest gun manufacturer, admitted the industry's knowledge in a sworn affidavit.

The company and the industry as a whole are fully aware of the extent of the criminal misuse of firearms. The company and the industry are also aware that the black market in firearms is not simply the result of stolen guns but is due to the seepage of guns into the illicit market from multiple thousands of unsupervised federal firearms licensees. In spite of their knowledge, however, the industry's position has consistently been to take no independent action to insure responsible distribution practices . . . . I am familiar with the distribution and marketing practices of all the principle U.S. firearms manufacturers and wholesale distributors and none of them, to my knowledge, take additional steps, beyond determining the possession of a federal firearms license, to investigate, screen or supervise the wholesale distributors and retail outlets that sell their products to insure that their products are distributed responsibly.<sup>141</sup>

Other industry executives have also admitted that gun manufacturers deliberately choose not to oversee dealers, or impose controls that would help inhibit trafficking.<sup>142</sup>

Industry stonewalling recently led Robert Lockett, a storefront gun dealer in suburban Kansas City, to publish an article in *Shooting Sports Retailer* blasting gun manufacturers for claiming that nothing could be done to control distribution.<sup>143</sup>

I've been told INNUMERABLE times by various manufacturers that they 'have no control' over their channel of distribution. I've been told INNUMERABLE times that once a firearm is sold to a distributor, there is no way a manufacturer can be held responsible for the legal transfer and possession of a firearm. Well, good people, a jury in New York [in the *Hamilton v. Accu-Tek* case] has now told you otherwise. . . .

IF YOU DO NOT KNOW WHERE AND HOW YOUR PRODUCTS ARE  
ULTIMATELY BEING SOLD – YOU SHOULD HAVE KNOWN OR

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141. Affidavit of Robert I. Hass ¶¶ 20-21 (Feb. 20, 1996) (filed in *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999)). See also, Matt Bai, *Is He the Smoking Gun?*, NEWSWEEK, Jan. 25, 1999, at 42 (discussing Hass's testimony).

142. See Allen & Portes, *supra* note 99, at 17-18 (recounting testimony of Browning and Beretta executives). Cf. Smith & Wesson Stocking Dealer Code, *supra* notes 138-40, and accompanying text (proving that gun companies could oversee dealers).

143. See Paul M. Barrett, *A Dealer Breaks Rank, Blaming Gun Makers: 'Let the Chips Fall'*, WALL ST. J., June 22, 1999, at A1 (profiling dealer).

ANTICIPATED THAT THEY WOULD BE ILLEGALLY SOLD AND SUBSEQUENTLY MISUSED.

Let's just get down and dirty. We manufacture, distribute, and retail items of deadly force. . . . Your arguments of yesterday regarding lack of accountability were pretty flimsy. Today, they are tenuous at best. Tomorrow, they are not going to indemnify you. We are going to have to get a whole lot better – and fast – of being in control of our distribution channel.<sup>144</sup>

The gun industry apparently takes this “see no evil” approach regarding the funneling of guns to crime for at least two reasons. First, the industry reaps huge profits on all the guns channeled through its legal but lax distribution system that quickly and easily end up in the hands criminals, juveniles, and other prohibited purchasers.<sup>145</sup> Second, by selling guns through middlemen distributors and dealers over whom manufacturers scrupulously avoid control, manufacturers seek to insulate themselves from liability.<sup>146</sup> Litigation like the *Hamilton* case and the city lawsuits is beginning to break down this barrier.

*D. The Chicago Lawsuit—Chicago v. Beretta U.S.A. Corp., et al.*

In 1998, Chicago aggressively attacked the trafficking problem with an extensive undercover investigation, called Operation Gunsmoke, that brought all of these issues into sharp relief.<sup>147</sup> Over a three-month period, the Chicago Police Department sent two-person teams into the twelve gun stores ringing Chicago that had sold the highest numbers of guns traced to crime within the city, and purchased 171 firearms.<sup>148</sup> Both agents carried identification indicating they lived in Chicago, where it has been illegal to own handguns since 1982.<sup>149</sup> Only one of the agents carried a firearm owner identification (“FOID”) card, which is required under Illinois law to purchase a firearm in the state.<sup>150</sup> The agent who did *not* have an FOID card, and therefore whom

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144. Robert Lockett, *The Implications of New York City*, SHOOTING SPORTS RETAILER (July 1999) (emphasis in original).

145. See *supra* notes 100-02 and accompanying text (discussing magnitude of diversion of guns to crime). Of particular note is the fact that approximately 15% of the guns traced to crime in the United States are seized from 18-20 year old youths, who cannot legally purchase handguns. See *Gun Crimes in the Age Group 18-10*, *supra* note 101, at 3, 10, Fig. 3 (noting also that 85% of the guns seized from these youths are handguns); *27 Cities Report*, *supra* note 11, at 10, Fig. 1.

146. No other conclusion can be drawn from gun manufacturer's irrational decision to avoid contractual and information-sharing relationships with downstream sellers. Other manufacturers routinely seek as much information as possible about who is buying their products so they can improve production and marketing efficiency. Gun makers, by contrast, have gone out of their way to avoid obtaining this information from sellers.

147. *Chicago v. Beretta U.S.A. Corp.*, *supra* note 2, amended complaint at 22-54.

148. *Id.*

149. *Id.* at 13.

150. *Id.* at 13-14 (listing municipal gun laws violated by dealers).

the dealer knew was a disqualified buyer, nevertheless did the talking, placed the cash on the counter, and walked out with the gun.<sup>151</sup> The agents openly bragged about needing the guns to “settle a score,” to resell the firearms to drug gangs, and to use in other criminal enterprises.<sup>152</sup> Despite these brazen indications of criminal intent, in each case the suburban dealers sold the firearms.<sup>153</sup> In many cases, the dealers even counseled the agents in how best to arrange a purchase to avoid federal paperwork which might trigger an investigation.<sup>154</sup> Chicago’s investigation also identified numerous cases where Chicagoans, including a police officer, had been killed by firearms trafficked from these same gun dealerships.<sup>155</sup>

Based on this investigation, on November 12, 1998, Chicago filed its lawsuit against the twelve dealers, and the distributors and manufacturers who supplied them with guns.<sup>156</sup> The suit seeks several hundred million dollars in damages to the city caused by crime guns in Chicago.<sup>157</sup> Damages are based on the city’s calculation of the direct costs the city incurred—for medical, police, fire, and court services—because of this crisis.<sup>158</sup> The suit alleges that the gun industry created a public nuisance by facilitating trafficking of large numbers of firearms into Chicago that would foreseeably lead to crime.<sup>159</sup> In his remarks announcing the suit, Mayor Daley analogized the gun industry to polluters, who have long been held liable for dumping waste into rivers and injuring people downstream.<sup>160</sup>

Chicago’s lawsuit builds on the pathbreaking victory secured earlier this year in *Hamilton v. Accu-tek*, in which a Brooklyn jury concluded that fifteen major gun manufacturers negligently distributed their firearms and were thus responsible for the foreseeable crime that resulted.<sup>161</sup> The *Hamilton* case was tried on behalf of the families of seven New York victims of handgun violence,

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151. *Id.* at 25-27, 31, 34, 35, 36, 37, 41, 45, 46-48, 49.

152. *Id.* at 28-29.

153. *Id.* at 23-24, 25, 30, 34, 38, 41, 43, 45.

154. *Id.* at 22-54 (detailing negligent conduct of dealers in making sales).

155. *Id.* at 16-20. Many of the firearms traced to crime were originally purchased as part of multiple sales.

156. *Id.* at 7-9.

157. *Id.* at 76-77.

158. *Id.*

159. *Id.* at 70-76.

160. See Remarks of Mayor Rickard M. Daley – Gun Lawsuit Press Conference (Nov. 12, 1998) (available at [www.ci.chi.il.us/Mayor/Speeches/GunLawSuit](http://www.ci.chi.il.us/Mayor/Speeches/GunLawSuit)).

161. *Hamilton v. Accu-tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999). The fifteen companies found negligent were: American Arms, Inc., Arcadia Machine & Tool, Inc., Beretta U.S.A. Corp., Bryco Arms, Calico Light Weapons Systems, Inc., Colt’s Manufacturing, Inc., Freedom Arms Co., Glock, Inc., International Armament Corp. d/b/a Interarms Industries, Inc., Jennings Firearms, Inc., K.B.I., Inc., Phoenix Arms, Inc., Sigarms, Inc., Sundance Industries, Inc., and Taurus International Manufacturing, Inc. *Id.* at 811.

all but one of whom was killed, and for none of whom was the gun recovered.<sup>162</sup> Plaintiffs persuaded the jury with evidence showing that gun manufacturers oversupplied the market and failed to implement any controls over downstream distributors, knowing that a large percentage of guns it sold through legal channels would end up being diverted to the criminal market and being criminally misused.<sup>163</sup> On post-trial motions, the court upheld the verdict, finding that gun manufacturers had a duty to distribute firearms responsibly,<sup>164</sup> and could control their distribution network.<sup>165</sup> Their failure to do so caused firearms to fall into the wrong hands where they would foreseeably be used in crime, the court held.<sup>166</sup>

Although Illinois' gun-control statutes give Chicago certain advantages to identify scofflaw dealers,<sup>167</sup> the trafficking problems identified in the Chicago complaint and the *Hamilton* case certainly occur in other jurisdictions. Indeed, undercover stings conducted in Wayne County, Michigan and Gary, Indiana after the Chicago lawsuit was filed indicate the industry's negligent distribution practices are deep-seated and pervasive. In both cases, buyers posing as convicted felons or juveniles were able to buy as many guns as they wanted as long as they had a person with a clean record accompanying

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162. *See id.* at 808-10 (identifying plaintiffs).

163. *Id.* at 829-33 (recounting evidence of negligent distribution sufficient to support jury findings).

164. *Id.* at 818-27. In framing the duty, the court held:

The duty sought to be imposed by the plaintiffs here is circumscribed. It is the duty of manufacturers of a uniquely hazardous product, designed to kill and wound human beings, to take reasonable steps available at the point of their sale to primary distributors to reduce the possibility that these instruments will fall into the hands of those likely to misuse them. Such a limited duty is consistent with manufacturers' traditional broad duties . . . .

*Id.* at 825.

165. *Id.* at 820-22. The court held that:

Defendants' ongoing close relationship with downstream distributors and retailers putting new guns into consumers' hands provided them with appreciable control over the ultimate use of their products. Even if they could not control what the first 'consumer' would do with the gun or whether it would fall into the hands of a person other than the new gun owner, they could reduce the risk of criminal misuse by ensuring that the first sale was by a responsible merchant to a responsible buyer.

*Id.* at 820.

166. *Id.* at 838 (holding "there was sufficient evidence to persuade a rational jury that criminal misuse of handguns was a reasonably foreseeable result of defendants' negligent distribution and marketing practices").

167. Aside from the open expressions of criminal intent, the fact that Chicago's undercover agents carried identification with Chicago addresses should have put dealers on notice of the buyer's illicit purpose, since the firearms being bought could not legally be possessed in Chicago. The fact that one buyer lacked an FOID card should also have alerted dealers that a straw purchase for illicit purposes was being made. These restrictions do not apply in most jurisdictions.

them.<sup>168</sup> One Wayne County dealer went so far as to state on videotape – “This is a straw purchase. . . . This is highly illegal. . . . This is highly illegal” – yet went ahead and made the sale.<sup>169</sup> Another dealer fretted about how he could go to jail for completing the transaction, since he knew it was a straw purchase, yet could not resist the more than \$500 in cash being offered for the gun and ammunition.<sup>170</sup> Given this kind of evidence, the two dozen or so cities and counties that have sued the industry for negligent distribution practices should have no difficulty proving their case.<sup>171</sup>

### *E. Legal Issues*

Chicago’s claims against the gun industry are based on public nuisance law, which protects the right of citizens “to be free from disturbance and reasonable apprehension of danger to person and property.”<sup>172</sup> A public

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168. In Wayne County, Michigan, during a sting conducted in March and April 1999, undercover officers posing as felons and juveniles were able to purchase more than two dozen firearms, including assault weapons, from local gun dealers. *See* McNamara v. Arms Technology, Inc., *supra* note 12, amended complaint at 25-30. In fifteen buying trips, officers were turned down only four times, and later trips to two of those stores were successful in securing firearms. *Id.* at 30.

In Gary, Indiana, a sting was conducted during June and July 1999. Undercover officers posing as felons or juveniles, or as straw buyers whose background was unknown to the dealer, were sold guns and ammunition in nine transactions, while being turned away only four times. Of the four dealers who declined a sale, one made two other straw sales to undercover officers and another made a straw sale at a different store location. *See* King v. Smith & Wesson Corp., *supra* note 121, complaint at 15-20.

169. *See* McNamara v. Arms Technology, Inc., *supra* note 12, amended complaint at 27 (quoting dealer). The undercover sting was captured on videotape, segments of which have aired on Dateline NBC and other news programs.

170. *Id.* at 29.

171. Evidence of multiple sales, where it is clear that some or all of the guns are not for personal use, but are instead likely to be resold and used to commit crime, can also be used against the industry. The cities will likely be able to show that a significant percentage of guns sold in this way end up being used in crime, thus making the irresponsibility of these sales foreseeable to gun dealers, distributors, and manufacturers. This link can be bolstered by several factors which heighten the likelihood that a purchase is intended for illicit purposes, including: the number of guns bought at one time or over time, whether the guns are of a type that often turn up in crime, and whether multiple guns of the same make and model are bought. *See* Polston, *supra* note 93, at 833-35 (explaining legal and factual underpinnings for liability); Kairys, *supra* note 11, at n.37 (arguing that there should be little difficulty proving after discovery that manufacturers are aware about the details of their market and the risks associated with their products). The fact that such sales are legal in all but four states does not exonerate the industry, as gun sales do not have to be illegal to be negligent. *See, e.g.,* Kitchen v. K-Mart, 697 So.2d 1200 (Fla. 1997) (holding K-Mart liable for lawfully selling a rifle to an intoxicated buyer).

172. Village of Des Plaines v. Poyer, 14 N.E. 677 (Ill. 1888). More recently, the Illinois Supreme Court has defined a public nuisance as “an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all.” Village of Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824, 834 (Ill. 1981). Other states similarly define a

nuisance claim can be based either on a violation of an ordinance designed to protect the public from a threat to its safety or health, or other unreasonable conduct, including negligence.<sup>173</sup> If a public nuisance is found, the court may enjoin industry conduct contributing to the nuisance, and award damages to the city.<sup>174</sup>

Chicago has a very strong public nuisance case against the suburban gun dealers who sold guns to Chicago residents and persons without FOID cards in blatant disregard of Illinois law and Chicago's handgun ban. Operation Gunsmoke also established that dealers are more than willing to sell firearms to persons who are brazen about their criminal intentions. Numerous courts have held that it is negligence to entrust a firearm to a person whom the seller knows or should know is likely to pose a danger to himself or others.<sup>175</sup> Courts

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public nuisance broadly to include any unreasonable interference with a common right or interest enjoyed by the general public. *See, e.g.,* Orlando Sports Stadium, Inc. v. State ex rel. Powell, 262 So. 2d 881, 884 (Fla. 1972); Hadfield v. City of Detroit, 422 N.W.2d 205, 211 (Mich. 1988); Brown v. County Comm'rs of Scioto County, 622 N.E.2d 1153 (Ohio Ct. App. 1993); Parker v. City of Fort Worth, 281 S.W.2d 721 (Tex. Civ. App. 1955).

173. *See* Chicago Nat'l League Ball Club, Inc. v. Thompson, 108 Ill.2d 357, 365-66 (1985); Gilmore v. Stanmar, Inc., 633 N.E.2d 985, 993 (Ill. Ct. App. 1994). Under the RESTATEMENT (SECOND) OF TORTS § 821B, comment e (1965), a defendant can be held liable "for a public nuisance if his interference with a public right was intentional or was unintentional and otherwise actionable under the principles of controlling liability for negligent or reckless conduct or for abnormally dangerous activities." If the interference was intentional, it must also have been unreasonable. *Id.* The Restatement identifies three circumstances under which conduct may be deemed unreasonable: (1) the conduct involves a significant interference with the public health, safety, peace, comfort, or convenience; (2) the conduct is proscribed by statute, ordinance, or regulation; or (3) the conduct is of a continuing nature or has produced a permanent effect, and the actor knows or should know it has a significant effect on a public right. *Id.*

174. *See* Village of Wilsonville, 426 N.E.2d at 834; Mergenthaler Linotype Co. v. Leonard Storch Enter., Inc., 383 N.E.2d 1379, 1382 (Ill. 1978) (permitting Illinois court to enjoin activities in New York causing injury in Illinois). While public nuisance remains a common-law cause of action in most states, California has codified its nuisance law in a statute that permits injunctive relief, but not damages, to be awarded in suits brought by city attorneys on behalf of the People to abate a public nuisance. *See* Cal. Civ. Code §§ 3479-80; Cal. Code Civ. Proc. § 731; Van de Kamp v. American Art Enters., Inc., 656 P.2d 1170, 1173 n.11 (Cal. 1983).

175. *See, e.g.,* Kitchen v. K-Mart, 697 So.2d 1200 (Fla. 1997) (finding K-Mart negligent for selling rifle to intoxicated buyer who immediately used the weapon to shoot and seriously injure his ex-girlfriend, despite the fact that the sale violated no law); Bernethy v. Walt Failers, Inc., 653 P.2d 280 (Wash. 1982) (same); Jacoves v. United Merchandising Corp., 11 Cal. Rptr.2d 468 (Cal. App. 1992) (holding gun dealers to duty to scrutinize buyers and decline sale if they have reason to know that the purchaser of a firearm is likely to be a danger to herself or others); Bryant v. Winn-Dixie Stores, Inc., 786 S.W.2d 547 (Tex. App. 1990) (ammunition sellers have duty to scrutinize buyers); Howard Bros. of Phoenix City, Inc. v. Penley, 492 So.2d 965 (Miss. 1986) (finding that dealers "should have in his business some safeguard to see that loaded handgun is not placed in the hands of an unknown person, who may very well be a mental case, unless or until his background can be thoroughly investigated"). This standard has been applied where a purchaser's comments suggested criminal intent, *e.g.,* Salvi v. Montgomery Ward & Co., Inc.,

have specifically found negligence for dealer sales to straw purchasers.<sup>176</sup> Chicago's case against the gun manufacturers is also strong, given their role in creating a marketing system without controls, where straw purchasing and multiple sales are common.<sup>177</sup>

The gun manufacturers deny that nuisance law is applicable, because the focus of the cities' claims is not on an unreasonable use of or interference with real property. However, that argument confuses the law of private nuisance with that of public nuisance.<sup>178</sup> The manufacturers also insist that they have no control over the alleged nuisance and therefore cannot be held liable for it,<sup>179</sup>

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489 N.E.2d 394, 403 (Ill. App. Ct. 1986), or other impairment. *E.g.*, *Rubin v. Johnson*, 550 N.E.2d 324 (Ind. Ct. App. 1990) (mentally ill buyer); *Phillips v. Roy*, 431 So.2d 849 (La. Ct. App. 1983) (mentally ill buyer). *See also* RESTATEMENT (SECOND) OF TORTS § 390 (1965) ("One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them"); *Polston*, *supra* note 93, at 840-50 (analyzing application of doctrine of negligent entrustment to firearms dealers).

176. *See West v. Mache of Cochran, Inc.*, 370 S.E.2d 169 (Ga. Ct. App. 1988) (holding dealer liable for fatal shooting where gun was sold to shooter's wife after shooter could not produce identification and had been committed to mental institution); *Semenuik v. Chentis*, 117 N.E.2d 883 (Ill. Ct. App. 1954) (dealer liable for selling rifle to parents for use by minor son, where minor shot another child).

177. *See supra* note 161-66 (discussing jury's conclusion in *Hamilton v. Accu-Tek* that 15 major gun manufacturers were negligent in their distribution of handguns). One federal court applying Illinois law indicated that in its view a gun manufacturer could be held liable on a public nuisance claim brought against a gun manufacturer by a shooting victim, but declined to make that ruling because it believed Illinois state courts should speak first on issues of first impression under Illinois law. *See Bubalo v. Navegar, Inc.*, 1998 U.S. Dist. Lexis 3598 (N.D. Ill. 1998) (dismissing public nuisance claim against assault pistol manufacturer). A state court in Illinois has now made that ruling, finding that gun manufacturers' negligent marketing and distribution of guns exposes them to liability for creating a public nuisance in Chicago. *Ceriale v. Smith & Wesson Corp.*, No. 99L5628, Order Denying Motion to Dismiss (Cook Cty. Circuit Ct., Nov. 30, 1999). The *Ceriale* case has been brought by the families of three victims of gun violence who were shot in Chicago with handguns fired by juveniles.

178. *See* RESTATEMENT (SECOND) OF TORTS § 821B comment h (1965) ("Unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land."); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 86, at 618 (5<sup>th</sup> ed. 1984) (private nuisance originated as remedy "narrowly restricted to the invasion of interests in the use or enjoyment of land," while public nuisance has always been cause of action "extending to virtually any form of annoyance or inconvenience interfering with common public rights").

179. The manufacturers rely on a number of cases where courts dismissed nuisance claims against manufacturers of products. Each of these cases is distinguishable. *See, e.g.*, *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989) (finding defendant not liable for selling hazardous chemical, because it "made every effort" to assure that its distribution of product did not cause harm); *City of Manchester v. National Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986) (finding company not liable for installing asbestos in schools

but courts have recognized that gun makers can exercise significant control over the use of their products through the manner in which they distribute them.<sup>180</sup>

## V. ADDITIONAL APPROACHES

### A. Challenging Deceptive Advertising

Another area where the gun industry has acted irresponsibly is in marketing guns as increasing the safety of gun owners and their families, when empirical research has demonstrated just the opposite is the case.<sup>181</sup> Indeed,

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because it already stopped manufacturing and selling the product and therefore “no longer had the power to abate the nuisance”). At least one court has expressly recognized that such cases do not “categorically relieve manufacturers or suppliers of goods from liability for nuisance.” *Selma Pressure Treating Co. v. Osmose Wood Preserving Co. of America, Inc.*, 221 Cal. App. 3d 1601, 1619 n.7 (Cal. Ct. App. 1990).

180. *See supra* note 165, at \*43 (quoting *Hamilton v. Accu-Tek* court’s conclusion that tight link between manufacturer and downstream distributors gives manufacturers sufficient control); *Merrill v. Navegar, Inc.*, 75 Cal. App. 4th 500, 562 (1999) (gun manufacturer never lost complete control over consequences of its sales because “[t]hrough it did not retain such total control over the persons to whom the weapon would be resold, it nonetheless had the ability to restrict distribution of its weapons” and it “possessed complete control of the manner in which its products were marketed”). *See also* RESTATEMENT (SECOND) OF TORTS § 834 (1965) (imposing nuisance liability on those parties who participate to substantial extent in creating or carrying on the nuisance); *Kairys, supra* note 10, at 14 (arguing for manufacturer liability under nuisance law); *supra* note 116 and accompanying text (discussing controls available to manufacturers)

Outside the nuisance context, several courts have rejected claims that handgun manufacturers should be liable for failing to control the distribution of their products, but none of those cases involved strong allegations or evidence of negligent actions by the manufacturer beyond the mere act of selling a product capable of inflicting injury. *See supra* note 86 (listing cases).

181. Recent studies have been completed in this area, and all conclude that the risk of guns in the home is far greater to occupants than to potential intruders. *See* Arthur L. Kellermann, et al., *Injuries and Deaths Due to Firearms in the Home*, 45 J. TRAUMA: INJURY, INFECTION, AND CRITICAL CARE 263 (1998); James E. Bailey, et al., *Risk Factors for Violent Death of Women in the Home*, 157 ARCH. INTERN. MED. 777 (1997); Peter Cummings, et al., *The Association Between the Purchase of a Handgun and Homicide or Suicide*, 87 AM. J. PUB. HEALTH 974 (1997); Arthur L. Kellermann, et al., *Weapon Involvement in Home Invasion Crimes*, 273 JAMA 1759 (1995); Arthur L. Kellermann, et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 N. ENGL. J. MED. 1084 (1993); Arthur L. Kellermann, et al., *Suicide in the Home in Relation to Gun Ownership*, 327 N. ENGL. J. MED. 467 (1993); David A. Brent, et al., *Firearms and Adolescent Suicide: A Community-Based Case-Control Study*, 147 AM. J. DIS. CHILD 1066 (1993); Douglas S. Weil & David Hemenway, *Loaded Guns in the Home*, 267 JAMA 3033 (1992); Arthur L. Kellermann, *Protection or Peril? An Analysis of Firearm-Related Deaths in the Home*, 314 N. ENGL. J. MED. 1557 (1986).

Additional analysis has confirmed these results, and rebutted the writings of Gary Kleck, who argues in his book “Targeting Guns” that guns in the home increase safety. *See, e.g.*, Arthur L. Kellermann, *Comment: Gunsmoke-Changing Public Attitudes Toward Smoking and Firearms*,



the latest case study shows that a gun in the home is twenty-two times more likely to be involved in a fatal or nonfatal unintentional shooting (four-to-one), criminal assault or homicide (seven-to-one), or suicide attempt (eleven-to-one), than to be used to injure or kill in self-defense.<sup>182</sup> Despite this data, the gun industry has circulated numerous advertisements, often depicting mothers and young children, urging homeowners to purchase handguns for home protection.<sup>183</sup> Numerous cities and counties have attacked this problem in their complaints, alleging that the industry's misconduct has caused preventable local shootings to which the city or county must respond.<sup>184</sup>

In 1996, the Center to Prevent Handgun Violence, joined by numerous public health organizations and 75 noted public health researchers, filed a petition with the Federal Trade Commission challenging the industry's advertising as unfair and deceptive.<sup>185</sup> These practices also likely violate state

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87 AM. J. PUB. HEALTH 910 (1997); Philip J. Cook, et al., *The Gun Debate's New Mythical Number: How Many Defensive Uses Per Year*, 16 J. POL. ANAL. & MGT. 463 (1997); Hal Morgenstern, *Editorial: Gun Availability and Violent Death*, 87 AMER. J. PUB. HEALTH 899 (1997).

Gun ownership provides additional risks to children living in those homes, increasing the risks of suicide and unintentional shootings. See David C. Grossman, *Self-Inflicted and Unintentional Firearm Injuries Among Children and Adolescents*, 153 ARCH. PEDIATRIC & ADOLESCENT MED. 875 (Aug. 1999) (more than 75% of guns used in suicide attempts and unintentional injuries were stored in the residences of the victim, a relative, or a friend). See also David A. Brent et al., *The Presence and Accessibility of Firearms in the Homes of Adolescent Suicides: A Case-Control Study*, 266 JAMA 2989 (1991); David Lester & Ronald Clarke, *Note on 'Suicide and Increased Availability of Handguns in the United States: The Influence of Firearm Ownership on Accidental Deaths*, 32 SOC. SCI. MED 1311 (1991).

182. See Kellermann, *Injuries and Deaths*, *supra* note 181, at 263.

183. See *FTC Petition*, *infra* note 185 (attaching advertisements). See also Kairys, *supra* note 10, at 17-18 (reprinting ads); Jon D. Handon & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420, 1463 (1999) (describing how gun manufacturers capitalize on women's fears regarding personal protection and home defense in advertising their products).

184. See, e.g., *Ganim v. Smith & Wesson Corp.*, *supra* note 75, amended complaint at 23-25, 30-32 (alleging causes of action under Connecticut's consumer protection statute and common law negligence); *People of the State of California v. Arcadia Machine & Tool, Inc.*, No. 303753, amended complaint at 26-28, 31-35 (S.F. Superior Ct.) (pleading causes of action under California consumer protection laws).

185. See *Petition of the Center to Prevent Handgun Violence, American Academy of Pediatrics, American Public Health Association, American Association of Suicidology, American Academy of Child and Adolescent Psychiatry, and the National Association of Children's Hospitals and Related Institutions before the Federal Trade Commission* [hereinafter *FTC Petition*], Feb. 14, 1996 (available at [www.handguncontrol.org/legalaction.htm](http://www.handguncontrol.org/legalaction.htm)).

The FTC Act, 15 U.S.C. § 42 et seq., empowers the FTC "to prevent persons, partnerships, [and] corporations . . . from using . . . unfair or deceptive acts or practices in or affecting commerce." FTC Act § 45(a)(2). Under FTC standards, a practice is "unfair" if it may cause unjustified consumer injury. A consumer injury is unjustified if it (1) is substantial; (2) is not outweighed by any benefits it bestows upon consumers or competitors; and (3) could not

consumer protection statutes, as several cities have alleged.<sup>186</sup> In California, the penalties against company wrongdoing can be quite severe, including fines for each violation.<sup>187</sup>

*B. Assault Weapons And Gun Kits.*

Lawsuits can also be brought against gun manufacturers for negligent marketing of weapons of mass destruction. The Center's Legal Action Project has brought two such suits: *Merrill v. Navegar, Inc.*,<sup>188</sup> and *Halberstam v. S.W. Daniel*.<sup>189</sup> Of these, the *Merrill* case is by far the most significant, since it is the first appellate decision in the United States holding that a gun manufacturer can be liable for negligence leading to violence.<sup>190</sup>

The *Merrill* lawsuit stemmed from a July 1993 rampage by a mentally deranged man armed with two TEC-9 assault pistols and hundreds of rounds of

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reasonably have been avoided by the consumer. 15 U.S.C. § 45(3)(n); Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, 104 F.T.C. 1072 (1984) [hereinafter Unfairness Statement]. An advertising practice that results in severe injury to even a small number of people may be deemed unfair. *International Harvester Co.*, 104 F.T.C. 949, 1064 (1984). If the practice is likely to result in serious bodily injury, it is "especially likely" that a cost-benefit analysis will support a finding of unfairness. *Id.* at 1065 n.57. Finally, even if a consumer could avoid injury by choosing other products, a practice will be deemed unfair if it "unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking," which can include withholding or failing to include information that may be critical to informed comparison and consumer choice. Unfairness Statement, 104 F.T.C. at 1074.

Clearly, the industry's ads satisfy these criteria. First, based on the studies cited above, they are likely to cause substantial injury by encouraging home gun ownership. Second, given the magnitude of the harm to consumers, the benefit of eliminating them outweighs the costs of stopping them. Third, because the manufacturers' failure to include anything about the risks posed by guns in the home interferes with informed consumer choice, the reasonable consumer cannot avoid the injury imposed by the ads. Fourth, this problem is compounded by the improper storage of guns depicted in many ads, where guns are left loaded on nightstands. Public policy also supports liability in states with child access prevention laws.

A practice can be deemed deceptive if representations are "material" to the consumer's decision to purchase the product and are likely to mislead the reasonable consumer. FTC Statement on Deception, 103 F.T.C. 174, 183 (1984). The ad need not mislead all or even most consumers to be found deceptive. *Id.* at 177. For the reasons cited under unfairness, these ads are also deceptive.

186. Many states have modeled their consumer protection statutes on the FTC Act, using identical language. *See, e.g.*, Cal. Bus. & Prof. Code § 17200 et seq. (Deering 1980); Conn. Gen. Stat. Ann. §42-110 (West 1992); Fla. Stat. Ann. §510.204 (West 1997); Mass. Gen. Laws Ch. 93A.

187. *See* Cal. Bus. & Prof. Code § 17206 (allowing assessment of penalties of up to \$2,500 for each violation).

188. 75 Cal. App. 4<sup>th</sup> 500, 562 (1999).

189. No. 95-3325 (E.D.N.Y. 1998).

190. Harriet Chiang & Kevin Fagan, *Gunmakers Can Be Sued by Victims State Court of Appeal Rules in 101 California St. Massacre Case*, S.F. CHRONICLE, Sept. 30, 1999, online edition.

ammunition which enabled him to kill eight people and injure six others in a San Francisco office building in a matter of minutes.<sup>191</sup> The Center's lawsuit alleged that because Navegar designed the TEC-9 for mass destruction and without legitimate self defense or sporting purpose, it was negligent to sell this assault pistol to the general public, as it was foreseeable the guns would enable a criminal to carry out such a mass assault.<sup>192</sup> Considerable evidence obtained through discovery helped prove this allegation, and showed how consciously the company had targeted the criminal market.<sup>193</sup> The case was also bolstered by California's assault weapons statute, which banned, among other guns, the TEC-9s used in the shooting.<sup>194</sup> Nevertheless, after ruling at the demurrer stage that plaintiffs were not presenting "just another gun case," the district court judge reversed his position after discovery was complete and dismissed the case on summary judgment.<sup>195</sup>

On appeal, the First Appellate District of California reversed the trial court's decision, holding that Navegar owed a duty to defendants.<sup>196</sup>

Fundamental fairness requires that those who create and profit from commerce in a potentially dangerous instrumentality should be liable for conduct that unreasonably increases the risk of injury above and beyond that necessarily presented by their enterprise.<sup>197</sup>

The court rejected Navegar's argument that it could not be liable because its sale of the TEC-9 was entirely legal. "[W]e are aware of no tort principle that the marketing or distribution to the public of a product cannot as a matter of law constitute negligence because those activities have not been

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191. *Merrill v. Navegar*, 75 Cal. App. 4th at 508.

192. *Id.* at 523.

193. For example, Navegar, the Florida company that made TEC-9s, advertised them as "tough as your toughest customer," and having "an excellent resistance to fingerprints," in addition to being "paramilitary" in appearance. *Id.* at 515. The guns were adapted from submachine guns, and two company executives were convicted of selling conversion kits to make TEC-9s fully automatic. *Id.* at 516. After a newspaper study showed that assault weapons were disproportionately associated with crime, and the TEC-9 was *the* assault weapon most preferred by criminals, Navegar's marketing executives raved: "I'm kind of flattered. It just has that advertising tingle to it. Hey, it's talked about, its read about, the media write about it. That generates more sales for me. It might sound cold and cruel, but I'm sales oriented." *Id.* at 516. The company president also admitted: "I know some of the guns going out of here end up killing people, but I'm not responsible for that." *Id.* at 519. These are just a few of the facts recounted in detail in the appellate court's opinion. *See id.* at 509-20.

194. *See* Cal. Penal Code § 12275 et seq. (banning assault weapons after finding that their proliferation and use "poses a threat to the health, safety, and security of all citizens of the state").

195. *See In re 101 California Street*, No. 959-316, unpublished Opinion and Order Re Motion for Summary Judgment (Cal. Sup. Ct., May 6, 1997) (finding that Navegar had no duty to the injured plaintiffs).

196. *Merrill v. Navegar, Inc.*, 75 Cal. App. 4th at 553.

197. *Id.*

criminalized,” the court held.<sup>198</sup> The court also scoffed at the notion that such questions must be left to the legislature,<sup>199</sup> and found the increased risk created by Navegar’s misconduct sufficiently caused the mass shooting so as to hold it liable.<sup>200</sup>

The *Halberstam* case stemmed from a March 1994 assault on a van load of Hasidic Jews on the Brooklyn Bridge in which a Cobray M-11/9 assault pistol was used.<sup>201</sup> The Cobray’s maker designed the gun to evade federal gun laws and appeal to criminals by selling it through the mail as a disassembled “kit,” without a serial number, and with no means of tracing it to a criminal buyer.<sup>202</sup>

In February 1998, the Center won a critical ruling when the federal judge held that there was sufficient legal basis for the suit, marking the first time a suit seeking to hold a gun manufacturer liable for the criminal use of its product had ever been permitted to go to trial.<sup>203</sup> Following the March 1998 trial, however, the jury ruled for the defendants. Post-trial interviews with the jurors indicated that, although they found the defendants’ conduct reprehensible, they did not view it as a “cause” of the shooting, and therefore found no liability.<sup>204</sup>

#### CONCLUSION

Although not yet as widespread as the tobacco wars, the city and county lawsuits against the \$2-billion-a-year gun industry may have even more far-reaching impact than state-sponsored lawsuits have had on the tobacco industry. Whereas the state tobacco suits ended up focusing mostly on money, the city and county lawsuits against the gun industry are primarily focused on reforming the industry’s irresponsible conduct. Forcing the industry to incorporate feasible safety devices in all guns – especially locking technology

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198. *Id.* at 544. *See also id.* at 537-40.

199. *Id.* at 547.

200. *Id.* at 553-59.

201. *See* Nichole M. Christian, *Makers of Pistol Sued in Fatal Bridge Shooting*, N.Y. TIMES, March 14, 1998, at A19; Bill Hewitt et al., *Retribution Not Forgiving or Forgetting, a Shooting Victim’s Family Takes a Pair of Gun Makers to Court*, PEOPLE MAG., March 23, 1998, at 81.

202. It is illegal to sell a firearm through the mail, except to FFLs. *See* 18 U.S.C. § 922(b). A “firearm” is defined to include an assembled gun, as well as the frame or receiver of any such weapon. 18 U.S.C. § 921(3). The Cobray’s makers sought to avoid these laws by shipping all of the parts for the fully-automatic Cobray except for the frame, which they would ship as a flat, shaped, piece of metal that could easily be folded into a completed frame. The company then advertised its guns in *Shotgun News* as “the gun that made the 90’s roar” alongside a picture of a gangster. The company further assured buyers that any information about them would be destroyed after the purchase was completed.

203. *See Halberstam v. S.W. Daniel*, No. 95-3325 (E.D.N.Y.). Defendants motion was denied from the bench on March 18, 1997, so there is no written opinion.

204. *See Tenn. Gun Maker Held Not Liable In N.Y. Slaying of Hasidic Student*, WASH. POST., March 28, 1998, at A8.

to prevent unauthorized access and misuse – could prevent thousands of injuries and deaths, especially among children. Similar effects would likely flow once the gun industry stops duping the public into believing that guns increase home security, when empirical data proves the opposite is true. Finally, the greatest benefits may come from forcing the industry to tighten controls over its lax distribution network, thereby choking off the major gun pipeline for criminals, juveniles, and other dangerous gun purchasers. Certainly these are laudable goals, and the cities and counties which have filed suit to bring about these reforms deserve to be commended.