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Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry

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I. INTRODUCTION

Gun violence is a serious problem in the United States. For many years, in order to decrease gun violence, the sale and possession of firearms has been regulated by statute.¹ This Article argues that tort claims against gun manufacturers can complement legislative efforts to regulate the firearms industry and can thereby make a modest contribution to decreasing gun violence. The Article does not, however, endorse attempts to impose restrictions on the firearms industry by using tort litigation as a substitute for legislation.

Gun ownership in the United States is commonplace and gun violence is widespread. Social scientists estimate that, in 1994, there were 235 million

1. See BUREAU OF ALCOHOL, TOBACCO & FIREARMS, DEP'T OF THE TREASURY, ATF P 5300.4, FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE (1995); BUREAU OF ALCOHOL, TOBACCO & FIREARMS, DEP'T OF THE TREASURY, STATE LAWS AND PUBLISHED ORDINANCES—FIREARMS (21st ed. 1998).

privately owned firearms, nine guns for every ten Americans.² Approximately half of American households report owning one or more guns.³ Like other popular products in our society, such as automobiles or alcoholic beverages, guns have become a major source of injury. In 1993, 39,500 people were killed with guns and another 125,000 suffered injuries.⁴ Unlike most other consumer items, however, guns are commonly employed in violent crimes. In 1993, guns were used in the commission of over one million murders, assaults, robberies, and rapes, about ten percent of all such crimes.⁵

Since the early 1980s, some crime victims injured by guns have turned to the tort system to seek compensation for their losses. Victims have filed claims against their assailants as well as against sellers and manufacturers of guns. By suing sellers and manufacturers, who have deeper pockets than the criminals, victims seek to improve their chances of receiving compensation. Some victims, in addition to seeking compensation, hope that successful tort claims against firearms sellers and manufacturers will deter the sale of guns to criminals in the future and will place part of the blame for violent crime on gun sellers and gun makers.⁶

2. GARY KLECK, TARGETING GUNS 63-64, 94, 96-97 (1997). By comparison, in 1994 there were 198 million privately registered motor vehicles. See BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S.: 1997, at 625 (117th ed. 1997).

3. See KLECK, *supra* note 2, at 64, 98-99.

4. Of these gun fatalities, 48% were suicides, 47% homicides, 4% accidents, and 1% within the legal justice system. See KLECK, *supra* note 2, at 1. By comparison, in 1993, there were 40,000 motor vehicle-related deaths and 20,000 alcohol-related deaths. See BUREAU OF THE CENSUS, *supra* note 2, at 104, 633 (for alcohol and motor vehicle statistics respectively). One recent study estimated that "gunshot injuries in the United States in 1994 produced \$2.3 billion . . . in lifetime medical costs." Phillip Cook et al., *The Medical Costs of Gunshot Injuries in the United States*, 282 JAMA 447, 454 (1999).

5. See KLECK, *supra* note 2, at 24.

6. E.g., Freddie Hamilton, the mother of a shooting victim and the plaintiff in *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999), explained her motivations for bringing suit: "Nothing can bring my son back, nothing. And there can't be a price for his life. So the case is really not about that. It's about changing what's happening right now in terms of the flow of guns into our communities." *Jurors Will Begin Deliberation in a Case that Pits Gunmakers Against Victims of Gun Violence Who Feel the Manufacturers are Responsible* (National Public Radio broadcast, Feb. 4, 1999). Devorah Halberstam, another mother of a shooting victim and plaintiff in *Halberstam v. Daniel*, No. 95 Civ. 3323 (E.D.N.Y. 1998), explained: "If we nail them, then at least Ari will get justice . . . and maybe some lives will be saved." CHATTANOOGA TIMES, Mar. 16, 1998, at B3. For similar statements, see also David Gonzalez, *Another Gun, Another Day at a Cemetery*, N.Y. TIMES, Feb. 20, 1999, at B1;

In addition to claims by individual crime victims, a number of municipalities have more recently filed lawsuits against sellers and manufacturers, seeking to recover the costs of law enforcement and emergency medical services related to gun violence.⁷ These municipal suits also seek injunctions that would force sellers and manufacturers to restrict their sales in ways that might lower the risk that guns they sell will be used to commit crimes.⁸ The gun industry has responded to these lawsuits by lobbying state legislatures for immunity from tort claims brought by municipalities.⁹

Tort suits against gun sellers and manufacturers are proceeding in a national context of growing concern over gun violence and calls for greater regulation of the gun industry. While urban gun violence throughout the 1980s and 1990s gave rise to calls for tougher criminal sentencing and more prisons, recent suburban gun violence has focused national attention on regulating gun sales.¹⁰ Following a highly publicized massacre at a suburban high school in

Lawsuit Targets Gun Industry (National Public Radio broadcast, Jan. 11, 1999).

7. See Fox Butterfield, *Results in Tobacco Litigation Spur Cities to File Gun Suits*, N.Y. TIMES, Dec. 24, 1998, at A1; see also Peter J. Boyer, *Big Guns*, NEW YORKER, May 17, 1999, at 54. See, e.g., *Archer v. Arms Tech., Inc.*, 725 F. Supp. 2d 784 (E.D. Mich. 1999); *City of Bridgeport v. Smith & Wesson, Inc.*, No. CV-99-036-1279 (Conn. Super. Ct. filed Jan. 27, 1999); *Miami-Dade County v. Arms Tech., Inc.*, No. 99-1942-Civ., 1999 WL 812126 (S.D. Fla. Aug. 20, 1999); *City of Chicago v. Beretta U.S.A. Corp.*, No. 99-2518 (Ill. Cir. Ct. Cook County filed Nov. 12, 1998); *City of New Orleans v. Smith & Wesson, Inc.*, No. 98-18578 (Civ. D. Ct. Parish of Orleans filed Oct. 30, 1998); *City of Cleveland v. Hi-Point Firearms*, No. CV-99-381897 (Ohio Ct. C.P. Hamilton County filed Apr. 8, 1999).

8. A class action suit, asking only for injunctive relief in the form of industry restrictions, has been filed by the NAACP. See Joseph P. Fried, *N.A.A.C.P. Suit Seeks Change in Marketing and Sale of Guns*, N.Y. TIMES, July 17, 1999, at B3. The Federal Department of Housing and Urban Development (HUD) is also reportedly considering filing a lawsuit. See Paul M. Barrett, *HUD May Join Assault on Gun Makers*, WALL ST. J., July 28, 1999, at A3.

9. See Fox Butterfield, *Verdict Against Gun Makers is Likely to Prompt More Suits*, N.Y. TIMES, Feb. 13, 1999, at B1; David E. Rosenbaum, *Echoes of Tobacco Battle in Gun Suits*, N.Y. TIMES, Mar. 21, 1999, § 1 (Magazine), at 4; *Firearms Industry Immunity Legislation* (visited July 19, 1999) < www.gunfree.org/>.

10. See, e.g., Paul M. Barret, *Guns*, WALL ST. J., Aug. 13, 1999, at B1; Frank Bruni, *G.O.P. to Separate Gun-Control Measures from Juvenile-Crime Bill*, N.Y. TIMES, June 15, 1999, at A24; *Gore, Bradley Both Favor Gun Registration*, DES MOINES REGISTER, July 13, 1999, at 3; Melinda Henneberger, *Gore Unveils Crime-Fighting Plan, From Right and Left*, N.Y. TIMES, July 13, 1999, at A10; Katherine Q. Seelye, *Clinton Asks Hunters to Back His Proposals Curbing Guns*, N.Y. TIMES, Apr. 28, 1999, at A26; *President Clinton Proposes Sweeping Changes to American*

Littleton, Colorado in the spring of 1999, carried out by two students armed with guns, proposals for greater regulation of gun sales moved to the top of the national political agenda.¹¹ With President Clinton calling for industry reform, Congress has debated new federal restrictions on the sale and possession of guns.¹² Also in the wake of the Littleton massacre, many state legislatures abandoned pending legislation designed to reduce gun regulation.¹³

This Article argues that the tort system can play an essential role in current efforts to regulate the firearms industry. Tort liability can complement legislative regulation, providing gun sellers and manufacturers with incentives to take reasonable measures to prevent gun sales to criminals, instead of looking for legal ways to increase them. The Article does not, however, endorse all tort claims against the gun industry. It argues in favor only of narrowly tailored claims that identify specific marketing and sales practices that increase the risk that guns will be used to commit crimes. The likely effect of such claims would be to make the firearms industry more responsible and to reduce gun violence.

Proving that particular marketing and sales practices increase the risk of gun violence presents a difficult challenge to plaintiffs bringing claims against gun manufacturers. In order to meet this challenge, some plaintiffs have begun to rely on complex and highly speculative statistical analysis purporting to link particular marketing practices to gun crime. This Article argues that evaluation of this kind of highly speculative social scientific evidence is beyond the institutional capacities of common law courts. If regulatory decisions must be based on speculation by social science experts, such decisions ought to be made by legislatures which are democratically accountable for potential mistakes.

By favoring narrowly tailored claims that do not rely on complex statistical analysis, this Article advocates an essential, albeit secondary, role for the tort system in regulating the gun industry. Legislatures ought to decide whether and under what circumstances the sale of guns should be legal. The tort system, by means of liability exposure, ought to discourage attempts by manufacturers

Gun Laws Following the School Massacre (CTV television broadcast, Apr. 27, 1999).

11. See, e.g., Seelye, *supra* note 10, at A26.

12. See *Gun Control Deal Uncertain For Bills in House and Senate*, N.Y. TIMES, Aug. 1, 1999, at A20; David Stout, *Gun Control Awaits Action by Conferees*, N.Y. TIMES, July 30, 1999, at A15.

13. See James Brooke, *Shootings Firm Up Gun Control Cause, At Least for Present*, N.Y. TIMES, Apr. 23, 1999, at A6; Boyer, *supra* note 7, at 66-67; Lucy Morgan, *School Tragedy Ends Push for Gun Bill*, ST. PETERSBERG TIMES, Apr. 27, 1999, at B5; Sam Howe Verhovek, *Terror in Littleton: The Overview*, N.Y. TIMES, Apr. 22, 1999, at A28.

to legally circumvent the aims of the regulatory system. On one hand, this Article advocates a greater role for the tort system than those who view tort claims against the gun industry as illegitimate attempts to achieve more stringent regulation of the gun industry through the court system, following failure to do so in state legislatures and Congress.¹⁴ On the other hand, this Article advocates a more modest role for the tort system than those who view the tort system as a primary source for industry reform, free from gun lobby influence that has allegedly distorted legislative policy making.¹⁵

Part II of this Article examines the five principal doctrinal approaches to holding manufacturers liable for gun violence. It offers a brief history of each approach and evaluates recent developments. Part III takes a stand on the proper role of the tort system in current efforts to regulate the gun industry. It takes into account some institutional strengths and weaknesses of common law courts, current politics surrounding the issue of gun control, and some lessons from tort claims involving automobile safety, toxic torts, and tobacco litigation. Part IV offers some thoughts about the current state of tort theory and its applicability to the issue of tort claims against gun manufacturers. In particular, Part IV argues that the reliance of economic analysis on complex statistical data, given the highly speculative nature of such data in gun cases, makes economic analysis unhelpful in finding workable answers to the questions posed by tort claims against firearms manufacturers. Instead, tort theorists ought to develop a better understanding of the non-economic concepts of wrongdoing that emerge from a detailed examination of these claims.

II. FIVE DOCTRINAL APPROACHES TO GUN MANUFACTURER LIABILITY

Crime victims have sued firearms manufacturers under a variety of theories, including strict liability for abnormally dangerous activities,¹⁶ strict

14. See, e.g., Nicholas E. Calio & Donald E. Santarelli, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 ST. MARY'S L.J. 471, 505-06 (1983).

15. See, e.g., Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 65-72 (1995).

16. See, e.g., *Copier v. Smith & Wesson Corp.*, 138 F.3d 833 (10th Cir. 1998); *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d. Cir. 1997) (ammunition); *Armijo v. Ex Cam, Inc.*, 843 F.2d 406 (10th Cir. 1988); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532 (11th Cir. 1986); *Moore v. R.G. Indus.*, 789 F.2d 1326 (9th Cir. 1986); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984); *McCarthy v. Sturm Ruger & Co.*, 916 F. Supp. 366 (S.D.N.Y. 1996); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530 (S.D. Ohio 1987); *Mavilia v.*

product liability,¹⁷ negligence,¹⁸ public nuisance,¹⁹ and deceptive trade practices.²⁰ While some tort claims against firearms retailers for selling guns to criminals have been successful,²¹ almost all such claims against firearms

Stoeger Indus., 574 F. Supp. 107 (D. Mass 1983); *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146 (Ct. App. 1999), *rev. granted* 991 P.2d 775 (2000); *Delahanty v. Hinkley*, 564 A.2d 758 (D.C. 1989); *Coulson v. DeAngelo*, 493 So. 2d 98 (Fla. Dist. Ct. App. 1986); *Riordan v. International Armament Corp.*, 477 N.E.2d 1293 (Ill. App. Ct. 1985); *Strickland v. Fowler*, 499 So. 2d 199 (La. Ct. App. 1986); *Kelley v. R.G. Indus.*, 497 A.2d 1143 (Md. 1985); *Burkett v. Freedom Arms, Inc.*, 704 P.2d 118 (Or. 1985).

17. *See, e.g.,* *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997) (ammunition); *Armijo v. Ex Cam, Inc.*, 843 F.2d 406 (10th Cir. 1988); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532 (11th Cir. 1986); *Moore v. R.G. Indus.*, 789 F.2d 1326 (9th Cir. 1986); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984); *McCarthy v. Sturm Ruger & Co.*, 916 F. Supp. 366 (S.D.N.Y. 1996); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530 (S.D. Ohio 1987); *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985); *Mavilia v. Stoeger Indus.*, 574 F. Supp. 107 (D. Mass 1983); *DeRosa v. Remington Arms Co.*, 509 F. Supp. 762 (E.D.N.Y. 1981); *Coulson v. DeAngelo*, 493 So. 2d 98 (Fla. Dist. Ct. App. 1986); *Trespalacios v. Valor Corp.*, 486 So. 2d 649 (Fla. Dist. Ct. App. 1986); *Rhodes v. R.G. Indus.*, 325 S.E.2d 465 (Ga. Ct. App. 1984); *Riordan v. International Armament Corp.*, 477 N.E.2d 1293 (Ill. App. Ct. 1985); *Strickland v. Fowler*, 499 So. 2d 199 (La. Ct. App. 1986); *Kelley v. R.G. Indus.*, 497 A.2d 1143 (Md. 1985); *Richardson v. Holland*, 741 S.W.2d 751 (Mo. Ct. App. 1987); *Forni v. Ferguson*, 648 N.Y.S.2d 73 (App. Div. 1996).

18. *See, e.g.,* *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997) (ammunition); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532 (11th Cir. 1986); *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999); *Halberstam v. Daniel*, No. CV-95-3323 (E.D.N.Y. 1998); *McCarthy v. Sturm Ruger & Co.*, 916 F. Supp. 366 (S.D.N.Y. 1996); *Adkinson v. Rossi Arms Co.*, 659 P.2d 1236 (Alaska 1983); *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 900 S.W.2d 202 (Ark. 1995); *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146 (Ct. App. 1999), *rev. granted* 991 P.2d 775 (2000); *Trespalacios v. Valor Corp.*, 486 So. 2d 649 (Fla. Dist. Ct. App. 1986); *Riordan v. International Armament Corp.*, 477 N.E.2d 1293 (Ill. App. Ct. 1985); *Linton v. Smith & Wesson*, 469 N.E.2d 339 (Ill. App. Ct. 1984); *Restein v. Sturm, Ruger & Co.*, 566 N.W.2d 53 (Mich. Ct. App. 1997); *Forni v. Ferguson*, 648 N.Y.S.2d 73 (App. Div. 1996); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661 (Wash. Ct. App. 1988).

19. *See, e.g.,* *Bubalo v. Navegar, Inc.*, No. 96 C 3664, 1998 WL 142359 (N.D. Ill. Mar. 20, 1998); *City of Chicago v. Beretta U.S.A. Corp.*, No. 99-2518 (Ill. Cir. Ct. Cook County filed November 12, 1999).

20. *See, e.g.,* *City of Bridgeport v. Smith & Wesson, Inc.*, No. CV-99-0361279 (Conn. Super. Ct. filed Jan. 27, 1999).

21. *See, e.g.,* *K-Mart Enterprises of Fla., Inc., v. Keller*, 439 So. 2d 283 (Fla. Dist. Ct. App. 1983); *Rubin v. Johnson*, 550 N.E.2d 324 (Ind. Ct. App. 1990). *See generally*

manufacturers have failed.²² Indeed, only four claims against manufacturers for crime-related injuries have survived pretrial dismissal or summary judgment: one was abandoned by the plaintiffs before reaching a jury, one ended in a jury verdict against the plaintiffs, one resulted in a jury verdict for the plaintiffs that is currently on appeal, and one involved the reversal of summary judgment against the plaintiffs by an intermediate appellate court that is now being reviewed by the supreme court of the state.²³

James L. Isham, Annotation, *Liability of One Who Provides, by Sale or Otherwise, Firearm or Ammunition to Adult Who Shoots Another*, 39 A.L.R. 4th 517 (1985).

22. See, e.g., *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997) (ammunition); *Armijo v. Ex Cam, Inc.*, 843 F.2d 406 (10th Cir. 1988); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532 (11th Cir. 1986); *Moore v. R.G. Indus.*, 789 F.2d 1326 (9th Cir. 1986); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984); *McCarthy v. Sturm Ruger & Co.*, 916 F. Supp. 366 (S.D.N.Y. 1996); *Caveny v. Raven Arms, Co.*, 665 F. Supp. 530 (S.D. Ohio 1987); *Mavilia v. Stoeger Indus.*, 574 F. Supp. 107 (D. Mass. 1983); *Adkinson v. Rossi Arms Co.*, 659 P.2d 1236 (Alaska 1983); *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 900 S.W.2d 202 (Ark. 1995); *Delahanty v. Hinkley*, 564 A.2d 758 (D.C. 1989); *Trespacios v. Valor Corp.*, 486 So. 2d 649 (Fla. Dist. Ct. App. 1986); *Coulson v. DeAngelo*, 493 So. 2d 98 (Fla. Dist. Ct. App. 1986); *Rhodes v. R.G. Indus.*, 325 S.E.2d 465 (Ga. Ct. App. 1984); *Riordan v. International Armament Corp.*, 477 N.E.2d 1293 (Ill. App. Ct. 1985); *Linton v. Smith & Wesson*, 469 N.E.2d 339 (Ill. App. Ct. 1984); *Strickland v. Fowler*, 499 So. 2d 199 (La. Ct. App. 1986); *Restein v. Sturm, Ruger & Co.*, 566 N.W.2d 53 (Mich. Ct. App. 1997); *King v. R.G. Indus.*, 451 N.W.2d 874 (Mich. Ct. App. 1989); *Richardson v. Holland*, 741 S.W.2d 751 (Mo. Ct. App. 1987); *Forni v. Ferguson*, 648 N.Y.S.2d 73 (App. Div. 1996); *Burkett v. Freedom Arms, Inc.*, 704 P.2d 118 (Or. 1985); *Clancy v. Zale Corp.*, 705 S.W.2d 820 (Tex. App. 1986) (accidental shooting); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661 (Wash. Ct. App. 1988); *Bubalo v. Navegar, Inc.*, No. 96C3664, 1998 WL 142359 (N.D. Ill. Mar. 20, 1998); *City of Cincinnati v. Beretta U.S.A. Corp.*, No. A9902369, 1999 WL 809838 (Ohio Ct. C.P. Oct. 7, 1999).

23. See *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 808 (E.D.N.Y. 1999) (jury verdict for plaintiffs); *Halberstam v. Daniel*, No. CV-95-3323 (E.D.N.Y. 1998) (jury verdict against plaintiffs); *Merrill v. Navegar*, 89 Cal. Rptr. 2d 146, 188-92 (Ct. App. 1999) (reversal of summary judgment); *Kelley v. R.G. Indus.*, 497 A.2d 1143, 1159-62 (Md. 1985) (abandoned by plaintiffs). For more on *Kelley*, see Howard L. Siegel, *Winning Without Precedent: Kelley v. R.G. Industries*, 14 LITIG. 32 (1988). For more on *Halberstam*, see Timothy D. Lytton, *Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOK. L. REV. 681 (1998). A case involving an accidental shooting, *Clancy v. Zale Corp.*, 705 S.W.2d 820, 823 (Tex. App. 1986), ended in a jury verdict for the defendants. Two notable cases are pending: *Wright v. Golden*, No. CIV98-349(B) (Ark. Cir. Ct. Craighead County filed Aug. 10, 1998), arising out of the Jonesboro school shooting;

In a typical case, the victim is shot by an assailant during the commission of a crime. In some cases, the crime is directed against the victim, such as when the assailant is attempting to assault, rob, or rape the victim.²⁴ In other cases, the victim is merely a bystander struck by a stray bullet.²⁵ The victim typically sues the assailant as well as the manufacturer of the gun used by the assailant.²⁶ If the victim dies as a result of the gunshot wound, then a representative of the victim's estate or a relative often brings the lawsuit.²⁷

and *Young v. Bryco Arms*, No. 98 L 6684 (Ill. Cir. Ct. Cook County filed June 9, 1998) discussed in Sharon Walsh, *Offensive Heats Up Against Gun Firms*, WASH. POST, Apr. 12, 1999, at A1. The complaints are on file with the Author.

24. See, e.g., *Richman v. Charter Arms Corp.*, 571 F. Supp. 192, 193 (E.D. La. 1983), *rev'd sub nom. Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985).

25. See, e.g., *Delahanty v. Hinkley*, 564 A.2d 758, 759 (D.C. 1989).

26. See, e.g., *Coulson v. DeAngelo*, 493 So. 2d 98, 99 (Fla. Dist. Ct. App. 1986); *Burkett v. Freedom Arms, Inc.*, 704 P.2d 118, 119 (Or. 1985).

27. See, e.g., *Richman*, 571 F. Supp. at 194; *Riordan v. International Armament Corp.*, 477 N.E.2d 1293, 1295 (Ill. App. Ct. 1985).

A. *Strict Liability for Abnormally Dangerous Activities*

One theory under which crime victims have brought claims against firearms manufacturers is strict liability for abnormally dangerous activities.²⁸ According to Section 519 of the *Restatement (Second) of Torts*, which reflects the approach of most jurisdictions, "One who carries on an abnormally dangerous activity is subject to liability for harm to . . . another resulting from the activity, although he has exercised the utmost care to prevent the harm."²⁹ Plaintiffs in claims against firearms manufacturers have asserted that the manufacture, distribution, and sale of guns is an abnormally dangerous activity.³⁰ With one exception, courts have dismissed these claims, holding that the manufacture and sale of firearms is a common activity that poses no abnormally high risk to the public.³¹

For example, in *Richman v. Charter Arms Corp.*,³² the mother of a young woman who was robbed, raped, and fatally shot by a man with a handgun sued the gun manufacturer.³³ The plaintiff alleged that the manufacture, marketing, and sale of handguns is an abnormally dangerous activity, subject to strict liability.³⁴ The court rejected this theory, holding that strict liability for abnormally dangerous activities applies only to land use and not to other types of activities.³⁵ The early development of this doctrine involved high-risk land uses, and the court refused to extend it beyond land-use activities.³⁶ More importantly, the court noted that there was no abnormal risk inherent in the manufacture, marketing, or sale of guns.³⁷ According to the court, the manufacture and sale of 4.5 million new guns each year makes these activities very common, ordinary commercial undertakings.³⁸ Furthermore, the court said: "the risks of harm from handguns do not come from their sale and

28. See *supra* note 17 and accompanying text.

29. RESTATEMENT (SECOND) OF TORTS § 519 (1977).

30. See, e.g., *Perkins*, 762 F.2d at 1252; *Martin*, 743 F.2d at 1201-02; *Riordan*, 477 N.E.2d at 1295.

31. See *Kelley v. R.G. Indus.*, 497 A.2d 1143, 1159-62 (Md. 1985).

32. *Richman v. Charter Arms Corp.*, 571 F. Supp. 192 (E.D. La. 1983), *rev'd sub nom.* *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985).

33. On appeal, *Richman* was consolidated with *Perkins*. See *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1252-53 (5th Cir. 1985).

34. *Id.* at 1252.

35. *Id.* at 1256-57.

36. *Id.* at 1256-57 (citing *Fletcher v. Rylands*, 3 H.L. 330 (1868)).

37. *Id.* at 1265 n.43.

38. See KLECK, *supra* note 2, at 87, 96-97.

distribution as such.”³⁹ Other courts have cited these reasons in rejecting abnormally dangerous activity claims against firearms manufacturers.⁴⁰

In *Kelley v. R.G. Industries*,⁴¹ a case that was eventually abandoned by the plaintiff, the Supreme Court of Maryland created a new category of strict liability where the weapon used to injure the victim was a “Saturday Night Special.”⁴² The *Kelley* court defined Saturday Night Specials as cheap, easily concealable handguns “particularly attractive for criminal use and virtually useless for the legitimate purposes of law enforcement, sport, and protection.”⁴³ The court asserted that the manufacture, distribution, and sale of these guns posed an abnormally high risk of criminal misuse.⁴⁴ On this basis, the court held that manufacturers and sellers of Saturday Night Specials should be “strictly liable to innocent persons who suffer gunshot injuries from the criminal misuse of their products.”⁴⁵

Shortly after the *Kelley* decision, the Maryland legislature passed a gun control act creating a board of experts to identify and restrict the sale of handguns with a high risk of criminal misuse and overturning the doctrine of strict liability for the manufacture and sale of Saturday Night Specials.⁴⁶ In the

39. *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1265 n.43 (5th Cir. 1985).

40. *See, e.g., Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1534 (11th Cir. 1986); *Moore v. R.G. Indus.*, 789 F.2d 1326, 1328 (9th Cir. 1986); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1203-04 (7th Cir. 1984); *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1323-24 (E.D.N.Y. 1996); *McCarthy v. Sturm Ruger & Co.*, 916 F. Supp. 366, 371-72 (S.D.N.Y. 1996); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 774 (D.N.M. 1987); *Caveny v. Raven Arms, Co.*, 665 F. Supp. 530, 531-33 (S.D. Ohio 1987); *Merrill v. Navegar*, 89 Cal. Rptr. 2d 146 (Ct. App. 1999), *rev. granted* 991 P.2d 775 (2000); *Delahanty v. Hinkley*, 564 A.2d 758, 761 (D.C. 1989); *Coulson v. DeAngelo*, 493 So. 2d 98, 99 (Fla. Dist. Ct. App. 1986); *Riordan v. International Armament Corp.*, 477 N.E.2d 1293, 1297-98 (Ill. App. Ct. 1985); *Strickland v. Fowler*, 499 So. 2d 199, 201-02 (La. Ct. App. 1986); *Kelley v. R.G. Indus.*, 497 A.2d 1143, 1147 (Md. 1985); *Burkett v. Freedom Arms, Inc.*, 704 P.2d 118, 120-22 (Or. 1985); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661, 664-65 (Wash. Ct. App. 1988).

41. *Kelley v. R.G. Indus.*, 497 A.2d 1143 (Md. 1985).

42. Following the decision by the Supreme Court of Maryland, the *Kelley* plaintiffs abandoned their claim. *See Siegel, supra* note 23, at 32.

43. *Kelley*, 497 A.2d at 1153-54.

44. *Id.* at 1158-59.

45. *Id.* at 1159.

46. *See Monica Fennel, Missing the Mark in Maryland: How Poor Drafting and Implementation Vitiates a Model State Gun Control Law*, 13 *HAMLIN J. PUB. L. & POL'Y* 37, 43-44 (1992).

years following *Kelley*, courts in other states have expressly rejected this theory.⁴⁷

The *Kelley* court's assertion that Saturday Night Specials are useless for self-defense and are particularly attractive for criminal misuse lacks empirical support. Indeed, there is no reason to think that cheap, portable guns are any less useful for threatening or shooting a criminal assailant than a crime victim.⁴⁸

Furthermore, available data suggests that most guns used in crimes are not Saturday Night Specials, and that most Saturday Night Specials are not used to commit crimes.⁴⁹

B. Product Liability for Design Defect

Crime victims have also brought tort claims against firearms manufacturers under a theory of strict product liability for defective design. Under Section 402A of the *Restatement (Second) of Torts*, which serves as the general rule in most jurisdictions, strict product liability applies to injuries caused by a product sold in a "defective condition unreasonably dangerous."⁵⁰ Plaintiffs in suits against firearms manufacturers have argued that where the risks associated with a product outweigh the product's utility, the product is in a defective condition unreasonably dangerous.⁵¹ Courts have rejected these claims, holding that plaintiffs must identify a particular defective condition in the gun that caused it to malfunction in order to recover under the theory of design defect.⁵²

1. Dismissal of Claims for Failure to Allege a Defect that Caused the Gun to Malfunction

47. See, e.g., *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 775 (D.N.M. 1987); *Delahanty v. Hinckley*, 564 A.2d 758, 775 (D.C. 1989); *King v. R.G. Indus.*, 451 N.W.2d 874, 875 (Mich. Ct. App. 1989). See also Michael J. Folio, *The Politics of Strict Liability: Holding Manufacturers of Nondefective Saturday Night Special Handguns Strictly Liable After Kelley v. R.G. Industries*, 16 *HAMLIN L. REV.* 147, 168-69 (1992).

48. See KLECK, *supra* note 2, at 130-35.

49. See KLECK, *supra* note 2, at 130-35.

50. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

51. See, e.g., *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1271 (5th Cir. 1985); *Caveny v. Raven Arms, Co.*, 665 F. Supp. 530, 532 (S.D. Ohio 1987); *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1208 (N.D. Tex. 1985); *Richardson v. Holland*, 741 S.W.2d 751, 753-54 (Mo. Ct. App. 1987).

52. See, e.g., *Perkins*, 762 F.2d at 1272; *Caveny*, 665 F. Supp. at 532-33; *Patterson*, 608 F. Supp. at 1212; *Richardson*, 741 S.W.2d at 753-54.

To date, claims against gun manufacturers for crime-related injuries based on design defect theory have been dismissed for plaintiffs' failure to allege a defect in the gun that caused it to malfunction. For example, in *Patterson v. Rohm Gesellschaft*,⁵³ the mother of a store clerk killed by a robber using a revolver sued the gun manufacturer.⁵⁴ The plaintiff alleged "that the handgun was 'defective and unreasonably dangerous' in its design because handguns simply pose risks of injury and death that 'far outweigh' any social utility that they may have."⁵⁵ The plaintiff admitted that the handgun did not malfunction in any way; indeed, it functioned precisely as designed and as the robber expected.⁵⁶ The court granted the defendant-manufacturer's motion for summary judgment against the plaintiff, explaining that strict product liability for design defects applies only to products that are defective in the sense that they malfunction and unreasonably dangerous in the sense that the risks associated with them outweigh their utility. Regardless of whether handguns are unreasonably dangerous, the gun in question was not defective in this sense. In granting summary judgment against the plaintiff, the court held that "[w]ithout this essential predicate, that something is wrong with the product, the risk-utility balancing test does not even apply."⁵⁷

Other courts have rejected similar design defect claims by crime victims against firearms manufacturers for failure to identify a particular defective condition in the gun that caused it to malfunction.⁵⁸ These courts have held that in order to recover under the theory of strict product liability for design defect, "there must be something wrong with the product."⁵⁹ "It makes no sense," explained the *Patterson* court, "to characterize a product as 'defective'—even a handgun—if it performs as intended and causes injury only because it is intentionally misused."⁶⁰

53. *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 530 (S.D. Ohio 1987).

54. *Patterson*, 608 F. Supp. at 1208.

55. *Id.*

56. *Id.*

57. *Id.* at 1211; *see also* *McCarthy v. Olin Corp.*, 119 F.3d 148, 155 (2d Cir. 1997); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984); *Caveny*, 665 F. Supp. at 532; *Forni v. Ferguson*, 648 N.Y.S.2d 73, 73-74 (App. Div. 1996).

58. *See, e.g.*, *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1272 (5th Cir. 1985); *Caveny v. Raven Arms, Co.*, 665 F. Supp. 530, 532-33 (S.D. Ohio 1987); *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1212 (N.D. Tex. 1985); *Richardson v. Holland*, 741 S.W.2d 751, 753-54 (Mo. Ct. App. 1987).

59. *DeRosa v. Remington Arms Co.*, 509 F. Supp. 762, 769 (E.D.N.Y. 1981). *DeRosa* is cited in *Forni*, 648 N.Y.S.2d at 74; *McCarthy*, 119 F.3d at 155; and *Armijo v. ExCam, Inc.*, 656 F. Supp. 771, 773 (D.N.M. 1987).

60. *Patterson*, 608 F. Supp. at 1216.

The clash between plaintiffs' claims that handguns are defective because their risks outweigh their utility and courts' rulings that handguns are only defective if they malfunction is part of a larger debate about the definition of the term design defect and the purpose of products liability. In following the *Restatement (Second) of Torts*, which imposes strict liability on manufacturers for injuries arising from the use of a product that was sold in a "defective condition unreasonably dangerous,"⁶¹ courts have generally recognized three types of product defects that subject a manufacturer to strict liability.⁶² The first type of defect, a manufacturing defect, exists when the finished product does not conform to the manufacturer's own design specifications.⁶³ The second type of defect, a warning defect, occurs when the product is not accompanied by adequate instructions and cautions concerning risks posed by use of the product.⁶⁴ The third type of defect, a design defect, has been the subject of much controversy.⁶⁵

Some courts and commentators have interpreted design defects to include all product designs that pose unreasonable risks, either because the risks associated with a product design outweigh its benefits or because the design makes the product perform in a way that does not conform to reasonable consumer expectations.⁶⁶ Proponents of this interpretation view the purpose of product liability as protecting consumers and the public from unreasonably unsafe products.⁶⁷ Imposing liability on the manufacturer of such products will increase their price, making them less attractive to consumers or driving them from the market altogether. In claims against firearms manufacturers by crime victims, plaintiffs have invoked this interpretation of design defect, alleging that the risks associated with handguns outweigh their benefits.⁶⁸

61. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

62. RESTATEMENT (THIRD) OF PRODUCTS LIABILITY § 2 cmt. a (1998).

63. RESTATEMENT (THIRD) OF PRODUCTS LIABILITY § 2(a) (1998).

64. RESTATEMENT (THIRD) OF PRODUCTS LIABILITY § 2(c) (1998).

65. See, e.g., Bogus, *War on the Common Law*, *supra* note 15, at 1; Victor E. Schwartz, *The Restatement (Third) of Torts: Product Liability—The American Law Institute's Process of Democracy and Deliberation*, 26 HOFSTRA L. REV. 743 (1998).

66. See, e.g., *Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978); Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 U. CIN. L. REV. 1103, 1109 (1991); Marshall Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1302 (1974).

67. See, e.g., Bogus, *War on the Common Law*, *supra* note 15, at 15-16; Carl T. Bogus, *The Third Revolution in Products Liability*, 72 CHI.-KENT L. REV. 3, 11 (1996).

68. See, e.g., *Perkins v. F.I.E., Corp.*, 762 F.2d 1250, 1271 (5th Cir. 1985); *Caveny v. Raven Arms, Co.*, 665 F. Supp. 530, 532 (S.D. Ohio 1987); *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1208 (N.D. Tex. 1985); *Richardson v. Holland*, 741

Other courts and commentators have interpreted design defects to include product designs that pose unreasonable risks only where the unreasonable risks result from a particular design feature that renders the design defective.⁶⁹ In order to recover under this second approach, a plaintiff must identify a particular design feature that is defective and then prove that this design feature rendered the product unreasonably dangerous. The identification of a defective design feature, what courts refer to simply as a defect, serves as a threshold requirement to considering if the design poses unreasonable risks. Unlike the first approach, this approach does not impose liability for product designs that pose unreasonable risks generic to the basic design of all products of that type.⁷⁰ It limits liability to product designs that pose unreasonable risks that result from particular design features considered defective.

There are several different tests for determining whether a particular design feature constitutes a defect. In some jurisdictions a design feature that causes the product to perform in a way not contemplated by a reasonable consumer constitutes a defect.⁷¹ In other jurisdictions, a design feature for which there is a reasonable alternative design that would make the product safer constitutes a defect.⁷² In gun cases, a design feature that causes the firearm to malfunction constitutes a defect.⁷³

Under all three of these tests for defect, a plaintiff must additionally prove that the defect rendered the product unreasonably dangerous.⁷⁴ The test to determine whether a product is unreasonably dangerous also varies. In some jurisdictions, risk-utility balancing is the test for unreasonable danger, while in other jurisdictions it is a mix of factors, often including consumer

S.W.2d 751, 753-54 (Mo. Ct. App. 1987).

69. See, e.g., *Voss v. Black & Decker Mfg.*, 450 N.E.2d 204, 208 (N.Y. 1983); RESTATEMENT (THIRD) OF PRODUCTS LIABILITY § 2 cmt. d (1998).

70. See generally James Henderson & Aaron Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991) (rejecting “product-category” liability, sometimes known as “generic” liability). But cf. Bogus, *The Third Revolution*, supra note 67, at 3 (introducing symposium of articles in support of generic liability). Whether product-category/generic liability is a form of liability that does not require proof of a defect is itself subject to disagreement among scholars, rooted in competing conceptions of defect.

71. See, e.g., *Lee v. Volkswagen of Am., Inc.*, 688 P.2d 1283, 1285 (Okla. 1984).

72. See, e.g., *Townsend v. General Motors Corp.*, 642 So. 2d 411, 418 (Ala. 1994).

73. See, e.g., *Perkins*, 762 F.2d at 1272; *Caveny*, 665 F. Supp. at 532-33; *Patterson*, 608 F. Supp. at 1212; *Richardson*, 741 S.W.2d at 753-54.

74. RESTATEMENT (THIRD) OF PRODUCTS LIABILITY § 2 cmt. f (1998).

expectations.⁷⁵ Thus, this second interpretation of design defect requires a plaintiff to establish a defect as a threshold matter prior to consideration of whether the product was unreasonably dangerous. Only when a product includes a design feature which caused the product to perform in a way not contemplated by a reasonable consumer, to operate less safely than a reasonable alternative design, or to malfunction and, as a result, rendered it unreasonably unsafe, is the manufacturer subject to liability. Proponents of this second interpretation of design defect view the purpose of product liability as protecting consumers and the public from those unreasonably unsafe products that are defective in one of the ways mentioned above.

Aside from the issue of defect, some courts have dismissed strict product liability claims against firearms manufacturers based on a lack of proximate cause.⁷⁶ Several courts have held that where a plaintiff is injured by the criminal misuse of a gun, neither the manufacture nor the distribution of the gun was a proximate cause of the plaintiff's injuries.⁷⁷ The criminal misuse of a weapon, according to these courts, is an unforeseeable, intervening cause that relieves the manufacturer of liability.⁷⁸

Another reason given by courts for dismissing strict product liability claims against firearms manufacturers is that imposing liability would so restrict the sale of guns as to constitute a "ban by judicial fiat."⁷⁹ The presence of extensive federal and state statutory regulations concerning the possession and sale of firearms has led many courts to consider gun control policy an issue exclusively for legislatures to decide.⁸⁰ Imposing liability in a way that would effect a gun ban is, according to these courts, an illegitimate exercise in judicial legislation.⁸¹ This issue will be addressed in detail below in Part III.⁸²

2. The Ambiguities of Risk-Utility Analysis

75. RESTATEMENT (THIRD) OF PRODUCTS LIABILITY § 2 cmt. f (1998).

76. *See, e.g.,* *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1205 (7th Cir. 1984); *McCarthy v. Sturm Ruger & Co.*, 916 F. Supp. 366, 372 (S.D.N.Y. 1996); *Richardson v. Holland*, 741 S.W.2d 751, 755 (Mo. Ct. App. 1987).

77. *See, e.g.,* *Martin*, 743 F.2d at 1205; *McCarthy*, 916 F. Supp. at 372; *Richardson*, 741 S.W.2d at 754.

78. *See Martin*, 743 F.2d at 1205; *McCarthy*, 916 F. Supp at 372.

79. *Martin*, 743 F.2d at 1204.

80. *See, e.g.,* *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1215-16 (N.D. Tex. 1985); *Mavilia v. Stuegar Indus.*, 544 F. Supp. 107, 111 (D. Mass. 1983).

81. *Martin*, 743 F.2d at 1204; *Richardson*, 741 S.W.2d at 757.

82. *See infra* notes 255-337 and accompanying text.

Some commentators have called on courts to drop their insistence that plaintiffs identify a defect in the gun that caused it to malfunction in order to recover under design defect theory.⁸³ These commentators are confident that if the courts would only adopt the broader interpretation of design defect, which includes all product designs that pose unreasonable risks, plaintiffs could prove that the risks of handguns outweigh their utility. Even if these commentators could convince courts to discard the malfunction requirement, however, current social science does not support any clear conclusion concerning whether the risks of widespread private gun ownership outweigh the benefits.

The most obvious justification for maintaining the product malfunction requirement of strict liability is anti-paternalism. While imposing liability on unreasonably dangerous products that do not malfunction might protect consumers from them, doing so would deprive consumers of the choice to purchase them by increasing the price of these products, or perhaps even pricing them out of the market altogether. Thus, the product malfunction requirement protects consumer choice at the expense of consumer safety.⁸⁴

The argument for abandoning the product malfunction requirement in claims against gun makers begins with the observation that this anti-paternalist justification does not apply to gun sales because third parties (*i.e.* crime victims), rather than consumers, bear many of the risks associated with guns. While anti-paternalism may justify protecting consumer choice at the expense of consumer safety, it cannot justify doing so at the expense of public safety.

Law Professor Carl Bogus has suggested a way to eliminate the malfunction requirement without abandoning courts' commitment to consumer choice. A simple risk-utility test for design defect with a defense of assumption of risk would subject the sale of unreasonably dangerous products to strict product liability for injuries to third parties while preventing claims by consumers who made informed decisions to purchase such products.⁸⁵ Assuming that the crime-related costs of handguns outweigh their benefits, this proposed rule would no longer deny recovery to crime victims for the benefit of gun owners. It would also internalize the crime-related costs of guns in decisions to purchase guns, making consumer choices reflect the true risks of gun ownership.

Proponents of design defect liability, like Bogus, display an overconfidence in the ability of plaintiffs to establish that the risks of guns outweigh their utility.

83. See, *e.g.*, Bogus, *Pistols*, *supra* note 66, at 1109-12.

84. Bogus, *War on the Common Law*, *supra* note 15, at 34.

85. Bogus, *War on the Common Law*, *supra* note 15, at 34; *cf.* Schwartz, *supra* note 65, at 392-98.

Such commentators often cite copious statistics concerning the crime-related costs of guns while lightly dismissing⁸⁶ or ignoring altogether⁸⁷ the benefits of widespread private gun ownership. By contrast, some social scientists have argued that widespread private gun ownership provides sizeable benefits in terms of crime deterrence.

An excerpt from Bogus's otherwise very careful argument in favor of strict product liability for selling handguns illustrates this tendency to trivialize the benefits of gun ownership. "A careful examination of relevant data," he states, "inescapably leads to the conclusion that handguns fail a risk-utility test."⁸⁸ Bogus begins his risk-utility analysis with two paragraphs of crime statistics that illustrate the high social costs of crime-related gun injuries.⁸⁹ He then concludes his "careful examination" with the following:

The benefits of handguns do not match these costs. Most Americans who own handguns do so solely for self-defense yet data show that people who have a handgun at home are far more likely to be shot with their own gun or have a family member shot with it than to use it to kill an intruder. It is a relatively rare event for a private citizen to kill a felon with a handgun; for every instance of that kind there are more than a hundred handgun murders, accidents, and suicides. Moreover, the data suggest that handguns do not significantly deter burglaries. Besides recreation, therefore, the principal utility of handguns is that they give some owners a false sense of security.⁹⁰

86. See, e.g., Bogus, *War on the Common Law*, *supra* note 15, at 59-60; Bogus, *Pistols*, *supra* note 66, at 1116-18, 1121-22; Markus Boser, *Go Ahead, State, Make them Pay: An Analysis of Washington D.C.'s Assault Weapon Manufacturing Strict Liability Act*, 25 COLUM. J.L. & SOC. PROBS. 313, 321-22 (1992); Frank J. Vandall, *The American Law Institute is Dead in the Water*, 26 HOFSTRAL. REV. 801, 807-08 (1998).

87. See, e.g., H. Todd Iveson, *Manufacturers' Liability to Victims of Handgun Crime: A Common Law Approach*, 51 FORDHAM L. REV. 771 (1983); Andrew J. McClurg, *The Tortious Marketing of Handguns: Strict Liability is Dead, Long Live Negligence*, 19 SETON HALL LEGIS. J. 777, 791-95 (1995); John P. McNicholas & Matthew McNicholas, *Ultrahazardous Products Liability: Providing Victims of Well-Made Firearms Ammunition to Fire Back at Gun Manufacturers*, 30 LOY. L.A. L. REV. 1599, 1625-26 (1997); Ronald R. Ratton, *Corrective Justice and the D.C. Assault Weapon Liability Act*, 19 J. LEGIS. 287 (1993); Windle Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims*, 10 N. KY. L. REV. 41, 41-43 (1982).

88. Bogus, *War on the Common Law*, *supra* note 15, at 60.

89. Bogus, *War on the Common Law*, *supra* note 15, at 60-63.

90. Bogus, *War on the Common Law*, *supra* note 15, at 62-63.

This cursory dismissal does a disservice to the extensive social science data concerning the deterrent effects of widespread private gun ownership.

First of all, even if true, the studies cited by Bogus provide little support for his claim. Widespread private gun ownership may deter crime in a variety of ways other than the killing of an assailant. Referring to, showing, or pointing a gun may deter a criminal act. The proper measure of the deterrent benefits of guns depends upon how many crimes are deterred, not how many assailants are killed.⁹¹ Thus, citing the low rate of defensive killings may be a poor indicator of the deterrence benefits of guns.

Social scientists have sought to measure the deterrence benefits of gun ownership by attempting to estimate the number of defensive gun uses each year. These estimates are based on the results of telephone surveys. Estimates have varied considerably due to the reluctance of many respondents to provide information about gun use that they may not have reported to the police and the difficulty of distinguishing defensive gun use by crime victims from gun uses characterized as defensive by criminal assailants.⁹² Despite these difficulties, the surveys provide a more reliable indicator of the deterrence benefits of guns than the studies cited by Bogus.⁹³

91. DON KATES, JR. & GARY KLECK, *THE GREAT AMERICAN GUN DEBATE: ESSAYS ON FIREARMS AND VIOLENCE* 218-21 (1997).

92. KLECK, *supra* note 2, at 160-62.

93. To bolster his argument, Bogus cites "a more detailed analysis" of claims concerning the deterrence benefits of gun ownership in his 1991 article, *Pistols, Politics and Products Liability*. See Bogus, *War on Common Law*, *supra* note 15, at 88 n.310 (citing to Bogus, *Pistols*, *supra* note 66, at 1113-23). The six paragraphs that Bogus dedicates to the self-defense benefits of gun ownership in his 1991 article offer little more in the way of careful analysis. In this article, he ignores survey data available prior to 1991 concerning defensive gun use, claiming that: "There is anecdotal evidence of homeowners frightening away would-be burglars by calling out 'I have a gun,' or the like, but no empirical data supports the contention that this is significant to crime prevention." Bogus, *Pistols*, *supra* note 66, at 1116; cf. KLECK, *supra* note 2, at 187-88 (citing self-defense studies prior to 1991). Bogus also asserts that the level of crime in the U.S. proves that gun ownership does not have a significant deterrent effect on crime. "Moreover, about half of all households in the United States have a firearm; if they are an effective deterrent, it is hard to understand why there are more than three million burglaries annually." Bogus, *Pistols*, *supra* note 66, at 1117. This assertion makes no attempt to estimate how high burglary rates would be without widespread private ownership of guns. In addition, he states that "if handguns have utility for self-defense, there should be significant numbers of legally justifiable homicides." Bogus, *Pistols*, *supra* note 66, at 1117. This assertion ignores the self-defense uses of guns that do not involve killing an assailant. Bogus concludes with the assertion that "A review of the data leads ineluctably to one

Eleven nationwide surveys concerning defensive gun use, conducted between 1978 and 1994, estimated that there are between 760,000 and 3.6 million defensive gun uses per year.⁹⁴ Of these defensive gun uses, only between one thousand and three thousand involved the killing of an assailant,⁹⁵ and only between eight thousand and sixteen thousand involved the wounding of an assailant.⁹⁶ The most conservative estimates show that more than ninety-seven percent of defensive gun uses involve showing or merely referring to the gun.⁹⁷ For a criminal, given these estimates, facing a victim with a gun is more likely than arrest and far more likely than incarceration.⁹⁸ And unlike the reactive nature of police response, defensive gun use preempts crime before it happens.⁹⁹ Professor Gary Kleck, a leading criminologist who studies defensive gun use, claims that widespread private gun ownership may deter as much crime as the criminal justice system.¹⁰⁰

The number of defensive gun uses is only one measurement of the benefits of gun ownership. Criminological studies indicate that resistance to robbery or assault with a gun is less likely to result in injury or property loss than any other method of self protection or than offering no resistance at all.¹⁰¹ Thus, the sense of security associated with gun ownership, far from being false, may be a sizeable benefit of gun ownership. Clearly, this sense of security is harder to quantify than the number of defensive gun uses. Nevertheless, the difficulty in quantifying such security does not mean that it does not exist. Whether and how the law should consider unquantifiable costs and benefits remains a difficult question.

conclusion—the costs that handguns impose on society overwhelmingly outweigh their benefits. No other conclusion is possible.” Bogus, *Pistols*, *supra* note 66, at 1122. This conclusion reflects far more confidence than a careful examination of available data would support.

94. See KLECK, *supra* note 2, at 147-90. These statistics do not take into account the National Crime Victimization Survey (NCVS), which found only between 64,000 and 85,000 defensive gun uses per year. The reliability of the NCVS data is the subject of much debate. See, e.g., KLECK, *supra* note 2, at 152; David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430, 1432-33 (1997).

95. See KATES & KLECK, *supra* note 91, at 199.

96. See KATES & KLECK, *supra* note 91, at 202.

97. See KATES & KLECK, *supra* note 91, at 225.

98. See KATES & KLECK, *supra* note 91, at 236.

99. See KATES & KLECK, *supra* note 91, at 237.

100. See KATES & KLECK, *supra* note 91, at 252. See generally JOHN LOTT, JR., *MORE GUNS, LESS CRIME* (1988).

101. See KATES & KLECK, *supra* note 91, at 213.

The deterrent effects of widespread private gun ownership benefit not only gun owners but also the public at large. Criminal assailants can seldom tell whether a potential victim is armed. The risk of encountering an armed victim may deter crimes against victims who are not in fact armed. In one survey of convicted felons, fifty percent responded that they feared encountering an armed victim.¹⁰² Seventy percent of convicted burglars in another study stated that they burglarized unoccupied homes out of fear of encountering an armed homeowner.¹⁰³ Thus, the benefits of gun ownership, like the risks, may be largely external to gun owners.

Survey data indicating that widespread private gun ownership provides sizable crime-deterrence benefits is currently the subject of much controversy among social scientists.¹⁰⁴ The use of surveys to collect this kind of data has two principal dangers. First, survey respondents have an incentive to falsely report self-defense gun use, thereby displaying the wisdom of having purchased a firearm for self-defense in the first place. Second, a few false positive replies in a survey seeking to measure the frequency of a relatively rare event can create extreme overestimates when extrapolations are made from the survey data to the total population.¹⁰⁵

If nothing else, the current debate among social scientists reveals that determining the costs and benefits of widespread private gun ownership is more complex than the largely unsupported claims offered by advocates of strict product liability for gun manufacturers suggest. While the costs of injury associated with guns are admittedly high, these costs may not outweigh the benefits. Guns, like cars, are surely dangerous consumer products but, given their arguably sizeable benefits, they may not be unreasonably dangerous. Thus, unless advocates of liability for gun makers can produce reliable empirical support for their claim that guns are unreasonably dangerous, gun sales ought not to be subject to strict product liability.

3. Reasonable Alternative Design: Locking Devices and Smart Guns

102. See KATES & KLECK, *supra* note 91, at 237.

103. See KATES & KLECK, *supra* note 91, at 250.

104. See, e.g., H. STERLING BURNETT, *SUING GUN MANUFACTURERS: HAZARDOUS TO OUR HEALTH* (NCPA POLICY REPORT NO. 223, 1999), available in <<http://www.ncpa.org/studies/s223.html>>; Paul M. Barret, *In Gun Debate, Both Sides Simplify Data to Make a Case*, WALL ST. J., May 27, 1999, at B1; Hemenway, *supra* note 94, at 1430; Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. & CRIMINOLOGY 150 (1995).

105. See Hemenway, *supra* note 94, at 1431.

A number of plaintiffs in recent lawsuits against gun manufacturers have filed design defect claims that allege a defect in the gun under the reasonable alternative design test.¹⁰⁶ These plaintiffs argue that the failure of manufacturers to incorporate reasonable alternative design features that would reduce the risk of guns being used in crime constitutes a defect in current gun designs that makes the guns unreasonably dangerous and subjects manufacturers to strict product liability.¹⁰⁷ Plaintiffs have pointed out that safety features such as locking devices would serve to “personalize” guns, making them useless to non-authorized users.¹⁰⁸

Locking devices, in the form of a combination lock built into the gun itself, have been available since first patented in 1976.¹⁰⁹ Today many different designs for locking devices, both combination and key-operated, exist.¹¹⁰ According to plaintiffs, such devices would prevent misuse of guns by unauthorized users. Those individuals most likely to be prevented from using a gun equipped with a lock include children tempted to play with the gun or unauthorized users seeking to use the gun immediately upon taking possession of it. Unauthorized users who have time to figure out the combination, pick the lock, or dismantle it, however, would not be prevented from using such guns in crime. Plaintiffs may be unable to establish causation in cases where the unauthorized user would have had sufficient time to defeat a locking device had the gun been equipped with one. Furthermore, gun manufacturers have argued that locking devices might defeat the usefulness of a gun in situations where the

106. See, e.g., *City of New Orleans v. Smith & Wesson Inc.*, No. 98-18578, (Civ. D. Ct. Parish of Orleans filed Oct. 30, 1998); *City of Bridgeport v. Smith & Wesson, Inc.*, No. CV-99-036-1279, (Conn. Super. Ct. filed Jan. 27, 1999); *City of Cleveland v. Hi-Point Firearms*, No. CV-99-381897, (Ohio Ct. C.P. Hamilton County filed Apr. 8, 1999).

107. See Brian Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Another Deadly Industry*, 18 ST. LOUIS U. PUB. L. REV. (forthcoming 2000).

108. See Siebel, *supra* note 107. In a case involving an accidental shooting, a California jury recently rejected a claim that a gun was defectively designed due to the manufacturer’s failure to design the gun with a locking mechanism that would have made the weapon “child-proof.” *Dix v. Beretta U.S.A. Corp.*, No 7506819 (Cal. Super. Ct. Alameda County Nov. 16, 1998), *reprinted in* ANDREWS CONSUMER PROD. LITIG. REP., Dec. 1998, at 6.

109. See Siebel, *supra* note 107.

110. See Siebel, *supra* note 107; Peter Fritsche & Vanessa O’Connell, *Brazil’s Taurus Shows Why Gun Makers Are Grateful to the U.S.*, WALL ST. J., Aug. 11, 1999, at A1; William Greider, *Will the Smart Gun Save Lives?*, ROLLING STONE, Aug. 6, 1998, at 36; Ron Spomer, *Locked and Loaded*, POPULAR MECHANICS, Sept. 1998, at 88.

authorized user may not have time to unlock the gun.¹¹¹ If this were the case, then the costs of alternative gun designs that incorporated locking devices might not be reasonable.

Plaintiffs have also alleged that new electronic technology might provide reasonable alternative designs that would personalize guns while avoiding the limitations of mechanical trigger locks. Guns equipped with this technology would fire only upon electronic recognition of the user. In one version of this “smart gun” technology, a microchip in the gun stores images of the authorized users’ fingerprints and fires only when it recognizes the fingerprints of the person holding the gun. Another version involves a gun that fires only when it senses radio signals emitted by a special ring or lapel pin worn by the individual holding the gun.¹¹² Unauthorized users would no doubt find it harder to defeat smart gun technology than mechanical locking devices.

Following the availability of such technology, design defect liability might apply to the sale of guns without such technology that were manufactured after personalization became available. The threat of liability might provide an incentive for gun makers to adopt personalization, and this might have some positive effect on violent crime rates, an effect that would increase over time as more “dumb guns” became inoperable. Strict liability would not, however, extend to the more than 235 million guns already in circulation manufactured prior to the availability of smart gun technology. Moreover, gun makers would still avoid liability for personalized guns used in crime. Thus, the advent of smart gun technology would, at best, make gun makers liable to crime victims shot with a non-personalized weapon manufactured after the technology became available.

111. Jonathan Lowy, *Litigating Gun Violence Cases: Liability for Design Defects*, at 8 (unpublished paper, on file with Author).

112. Anne Eisenberg, *Smart Guns Can Check Identities Before Firing*, N.Y. TIMES, Sept. 10, 1998, at 63; David Kocieniewski, *Trenton Debates Requiring Guns that Sense Owners*, N.Y. TIMES, Sept. 24, 1998, at B1; Leslie Wayne, *‘Smart’ Guns proving not to be a Quick Fix*, N.Y. TIMES, June 15, 1999, at A24.

C. Negligent Marketing

Some crime victims have sued gun manufacturers for crime-related injuries under the theory of negligence.¹¹³ Victims have alleged that manufacturers have failed to take reasonable precautions in marketing guns in order to prevent the guns from being acquired by individuals likely to use them for criminal purposes. Two central issues raised in such cases are: (1) whether gun manufacturers ought to be held responsible for injuries caused by the criminal acts of third parties, and (2) if so, what “reasonable care” is required to prevent such crimes.

1. Dismissal of Claims for Lack of Duty

With the exception of three cases, discussed in detail below, negligent marketing claims against gun manufacturers have been dismissed prior to trial or defeated by summary judgment based on judicial insistence that manufacturers owe no duty of care to the public in marketing non-defective guns. For example, in *Riordan v. International Armament Corp.*, the plaintiffs were shot with handguns while being criminally assaulted.¹¹⁴ They alleged that given

the large number of injuries and deaths resulting from the use of handguns to commit crime, criminal misuse was foreseeable and the defendant[s], handgun manufacturers and distributors[,] were negligent in marketing [their] handguns to the general public without taking adequate precautions to prevent the sale of [their] handguns to persons who were reasonably likely to cause harm to the general public. Plaintiffs claim that the defendant[s] . . . had a duty to determine whether [their] retailers had taken all reasonable measures to screen prospective purchasers and a duty to terminate sales to those retailers the defendants knew or had reason to know had a history of sales to persons who had used [their] handguns in crime.¹¹⁵

The *Riordan* court affirmed the dismissal of the plaintiffs’ negligence claims, holding that “no common law duty exists upon the manufacturer of a nondefective handgun to control the distribution of that product to the general

113. *See supra* note 18 and accompanying text.

114. *Riordan v. International Armament Corp.*, 477 N.E.2d 1293, 1294 (Ill. App. Ct. 1985).

115. *Id.* at 1295.

public.”¹¹⁶ Following *Riordan*, most courts have dismissed negligent marketing claims against firearms manufacturers based on the absence of a duty to exercise reasonable care in marketing guns.¹¹⁷ In dismissing these claims for lack of duty, courts have refused to examine whether the distribution and sales practices of firearms manufacturers pose unreasonable risks.

The role of duty as a threshold consideration in negligence doctrine explains this refusal to consider the risks associated with marketing firearms. In most jurisdictions, tort duties to exercise reasonable care are imposed on manufacturers only with regard to foreseeable risks of injury arising out of the manufacturer’s conduct and with regard to foreseeable victims of those injuries.¹¹⁸ Thus, as a general matter, manufacturers have a duty to exercise reasonable care to guard against foreseeable injuries to foreseeable victims.

In addition to foreseeability, there are other limitations on the imposition of tort duties. Courts are reluctant to impose duties upon individuals to prevent even foreseeable injuries where the risk of injury arises out of the conduct of a third party.¹¹⁹ For example, if an individual learns of a stranger’s intention to harm another, the individual is normally under no duty to restrain the stranger or protect the victim. Courts do, however, impose such duties where there exists a special relationship between the individual and the injurer or between the individual and the victim.¹²⁰ For example, where the individual is a parent and

116. *Id.*

117. *See, e.g.*, *McCarthy v. Olin Corp.*, 119 F.3d 148, 156-57 (2d Cir. 1997); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1533-34 (11th Cir. 1986); *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999); *Halberstam v. S.W. Daniel, Inc.*, No. CV-95-3323 (E.D.N.Y. 1998); *Adkinson v. Rossi Arms Co.*, 659 P.2d 1236, 1239 (Ala. 1983); *First Commercial Trust Co. v. Lorcin Eng’g, Inc.*, 900 S.W.2d 202, 203-05 (Ark. 1995); *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146 (Ct. App. 1999), *rev. granted* 991 P.2d 775 (2000); *Trespacios v. Valor Corp.*, 486 So.2d 649, 651 (Fla. Dist. Ct. App. 1986); *Linton v. Smith & Wesson*, 469 N.E.2d 339, 340 (Ill. App. Ct. 1984); *Resteiner v. Sturm, Ruger & Co.*, 566 N.W.2d 53, 55-56 (Mich. Ct. App. 1997); *Forni v. Ferguson*, 232 A.D.2d 176, 177 (N.Y. App. Div. 1996); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661, 664 (Wash. Ct. App. 1988). *Halberstam, Hamilton, and Merrill* are the three exceptions to the dismissal of negligent marketing claims.

118. *See* W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 53 (5th ed. 1984). The classic statement of this principle is in *MacPherson v. Buick*, 111 N.E. 1050 (N.Y. 1916). Foreseeability in New York is sometimes said to be relevant only in determining to whom the duty is owed. *See McCarthy v. Olin Corp.*, 119 F.3d 148, 156 (2d Cir. 1997). Policy considerations may trump foreseeability in some instances in some jurisdictions. *Id.* at 166.

119. *See, e.g.*, *Hall v. Ford Enter., Ltd.*, 445 A.2d 610, 611 (D.C. 1982); *Purdy v. Public Adm’r*, 526 N.E.2d 4, 7 (N.Y. 1998).

120. *See* KEETON, *supra* note 118, § 56.

the injurer is an insanely violent child who expresses a desire to harm another, the parent may have a duty to restrain the child or warn the intended victim.¹²¹ Where the individual is a landlord and the victim a tenant, the landlord may have a duty to protect the tenant from intruders.¹²² These special relationships are characterized by the individual's unique capacity to control the risk of harm posed by third parties.

In rejecting negligence claims against firearms manufacturers by crime victims, courts have cited both the foreseeability and the special relationship limitations on imposing duties. For example, in *Riordan*, the court held that manufacturers owe no duty to crime victims to exercise control over retail sales, since criminal misuse of handguns was not a foreseeable consequence of marketing and selling handguns to the general public.¹²³ In *First Commercial Trust Co. v. Lorcin Engineering, Inc.*,¹²⁴ the plaintiff, representing the estate of a woman murdered by an assailant using a handgun, sued the manufacturer of the gun under a negligence theory.¹²⁵ In that case, the court held that the injury to the victim arose out of the assailant's conduct in attacking her, not that of the defendant in distributing and selling handguns to the general public. "One is not ordinarily liable for the acts of another unless a special relationship exists."¹²⁶ The court found that no special relationship existed between the defendant and either the criminal or the victim that would give rise to a duty to the victim to exercise care to prevent misuse of the handgun.¹²⁷

121. *Estate of Mathes v. Ireland*, 419 N.E.2d 782, 784 (Ind. Ct. App. 1981).

122. *Burgos v. Aqueduct Realty Corp.*, 706 N.E.2d 1163 (N.Y. 1998).

123. *Riordan v. International Armament Corp.*, 477 N.E. 2d 1293, 1295 (Ill. App. Ct. 1985).

124. 900 S.W.2d 202 (Ark. 1995).

125. In *First Commercial*, the plaintiff alleged that the defendant-manufacturer was negligent in "promoting its .380 handgun for sale to a market it knew or should have known included a substantial number of persons who would be prone to misuse the handgun by injuring and killing others." *First Commercial*, 900 S.W.2d at 203. The plaintiff further alleged that the defendant was negligent in failing "to supply distributors or retailers with a safe-sales policy, including descriptions of the point-of-purchase appearance/conduct 'profiles' of prospective purchasers that Lorcin knew would likely misuse the .380 handgun." *Id.* Finally, the plaintiff alleged that the defendant "negligently failed to warn its distributors and retailers so as to enhance their abilities to identify probable misusers of Lorcin's .380 handgun." *Id.* The court affirmed the trial court's dismissal of the complaint, refusing to impose a duty on the defendant to exercise care in order to prevent misuse of its handguns. *Id.*

126. *Id.* at 215.

127. *Id.* at 204-05.

2. Defining a Duty in Relation to the Regulatory Regime:

Halberstam v. Daniel

One notable exception to these dismissals for lack of duty is *Halberstam v. Daniel*.¹²⁸ The *Halberstam* case arose out of a drive-by shooting involving a semi-automatic pistol, resulting in the death of one victim and injury to another. The pistol used in the attack had been assembled from a mail-order parts kit manufactured and sold by the defendants.¹²⁹ The plaintiffs alleged that the manufacturer's marketing scheme was negligent insofar as the manufacturer failed to exercise reasonable care to prevent acquisition of its automatic pistols by individuals with a high risk of criminal misuse.¹³⁰ In support of this claim, the plaintiffs pointed to the defendants' sales methods which involved ordering by phone, postal delivery, reduced prices for bulk purchases, no requests for any information other than that pertinent to payment and shipping, and failure to keep any sales records.¹³¹ By selling their weapons disassembled, in the form of parts kits, the defendants avoided federal and state regulations governing the sale and possession of guns which, they argued, did not apply to the sale and possession of gun parts.¹³² While federal law requires serial numbers on gun frames, the defendants sold unmarked sheet metal flats that, when folded, would serve as gun frames for the other parts that they sold.¹³³ At trial, the defendants testified that they did not care who purchased their weapons.¹³⁴

The court refused to dismiss the plaintiffs' negligence claim and, for the first time, allowed such a claim to reach a jury. The jury, however, found in favor of the defendants in a special verdict, finding no causal connection between the defendants' conduct in marketing its guns and the plaintiffs'

128. *Halberstam v. Daniel*, No. 95-C3323 (E.D.N.Y. 1998); see Lytton, *supra* note 23, at 681.

129. See Lytton, *supra* note 23, at 686.

130. See Memorandum of Devorah and David Halberstam and Nachum Sosonkin in Opposition to the Motions to Dismiss by S.W. Daniel, Inc., et al. at 12-13, *Halberstam v. Daniel*, No. 95-C3323 (E.D.N.Y. 1998); Lytton, *supra* note 23, at 686 (discussing *Halberstam*).

131. Transcript of Trial at 1549-57, *Halberstam v. Daniel*, No. 95-C3323 (E.D.N.Y. 1998); Lytton, *supra* note 23, at 694-95 (discussing *Halberstam*).

132. Brief in Support of Defendant's Motion to Dismiss at 5-7, *Halberstam v. Daniel*, No. 95-C3323 (E.D.N.Y. 1998).

133. Transcript of Trial at 1560, 1588, *Halberstam v. Daniel*, No. 95-C3323 (E.D.N.Y. 1998); Lytton, *supra* note 23, at 695 (discussing *Halberstam*).

134. Transcript of Trial at 1578, 1584, *Halberstam v. Daniel*, No. 95-C3323 (E.D.N.Y. 1998); Lytton, *supra* note 23, at 695 (discussing *Halberstam*).

injuries. At trial, the defendants had offered an affidavit and a deposition by the criminal assailant in which he stated that he had purchased the gun used in the attack from someone on the street, that he had never had any business dealings with the defendants personally or by proxy, and that the defendants did not cause him in any way to purchase firearm parts.¹³⁵

While the plaintiffs' claim foundered on the issue of causation, given the particular facts of the gun purchase involved, the *Halberstam* case illustrates the need to impose a duty on manufacturers to exercise reasonable care in the way they distribute and sell guns. The existence of a statutory regime governing the sale of guns, which the *Halberstam* defendants circumvented by selling gun parts, provides strong support for the creation of a duty in tort that would govern the marketing of guns. Such a common law duty would provide manufacturers with an incentive to comply with the spirit of statutory regulations and discourage them from looking for loopholes like the one exploited by the *Halberstam* defendants. Plaintiffs should draw on the existence of statutes that govern gun sales and possession, where they do not expressly preempt tort claims, to support the imposition of common law duties that would complement the regulatory regime. Arguments in favor of this complementary role for the tort system will be further addressed below in Part III.

The *Halberstam* case provides a clear example of how certain marketing practices by gun manufacturers, such as selling guns in the form of unregulated mail-order parts kits, can increase the risk of criminal acquisition and thwart the aims of the regulatory regime designed to prevent such acquisition. The existence of an extensive statutory framework designed specifically to reduce this risk shows that it is foreseeable. Additionally, gun manufacturers like the *Halberstam* defendants have a unique capacity to control this risk by simply refraining from unreasonable marketing practices that increase the risk. Thus, the *Halberstam* case provides convincing reasons for imposing a duty on gun manufacturers to adopt reasonable marketing restrictions in order to reduce the risk of criminal acquisition of guns.

Even where courts recognize such a duty, however, plaintiffs must establish that a defendant-manufacturer breached this duty by engaging in a marketing practice that created an unreasonable risk of criminal acquisition. The practice of selling guns in the form of mail-order parts kits, as in the *Halberstam* case, is a clear example of breach. This practice, however, is highly unusual, and most marketing practices common in the gun industry are not as clearly linked to criminal acquisition.

Furthermore, where judges wish to withhold negligent marketing claims from jury consideration, they may evaluate allegations of a link between a

135. Transcript of Trial at 1641-43, *Halberstam v. Daniel*, No. 95-C3323 (E.D.N.Y. 1998); Lytton, *supra* note 23, at 697-98 (discussing *Halberstam*).

particular marketing practice and the risk of criminal acquisition as an issue of duty for the court to decide rather than as an issue of breach for the jury to determine. By defining the duty in question in terms of a specific marketing restriction rather than a general duty to undertake reasonable marketing restrictions, a judge can decide as a matter of law whether a manufacturer is under a duty to adopt that marketing restriction instead of allowing the jury to determine as a matter of fact whether the failure to adopt the restriction constitutes breach of a general duty to exercise reasonable care.¹³⁶ In contrast to the example provided by the *Halberstam* case, judges inclined to reject negligent marketing claims by means of dismissal or summary judgment will be likely to define the duty in question in terms of a particular marketing restriction, reserving to themselves as a matter of law evaluation of whether manufacturers should be liable for failure to adopt that restriction.

3. Overpromotion of Assault Weapons: *Merrill v. Navegar*

A second notable negligence case is *Merrill v. Navegar*.¹³⁷ The *Merrill* case arose out of a multiple shooting in an office building carried out by an assailant, Luigi Ferri, armed with two semi-automatic TEC-DC9 assault pistols. During the course of the shooting, Ferri killed eight people and wounded six others before killing himself.¹³⁸ Representatives of those killed along with the survivors brought suit against Navegar, the manufacturer of the TEC-DC9.¹³⁹

The plaintiffs claimed that Navegar was negligent in marketing the TEC-DC9 to the general public.¹⁴⁰ In support of this claim, they alleged that the TEC-DC9 was designed as a military-style assault weapon. They produced deposition testimony from a firearms expert that

the TEC-DC9 differs from conventional handguns in several ways. A large capacity detachable magazine, “designed to deliver maximum firepower by storing the largest number of cartridges in the smallest . . . space,” provides a level of firepower “associated with military or police, not civilian, shooting requirements.” The TEC-DC9 has a

136. See, e.g., *Stagl v. Delta Airlines, Inc.*, 52 F.3d 463, 470 (2d Cir. 1995); *Kentucky Fried Chicken v. Superior Court*, 927 P.2d 1260, 1271-72 (Cal. 1997); *Moning v. Alfano*, 254 N.W.2d 759, 762-65 (Mich. 1977).

137. *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146 (Ct. App. 1999), *rev. granted* 991 P.2d 755 (2000).

138. *Merrill*, 89 Cal. Rptr. 2d at 152.

139. *Id.* The plaintiffs also made claims under theories of negligence per se and strict liability for ultrahazardous activities which I will not discuss here. *Id.*

140. *Id.* at 162.

“barrel shroud,” also peculiar to military weapons, which disperses the heat generated by the rapid firing of numerous rounds of ammunition and allows the user to grasp the barrel and hold the weapon with two hands, which facilitates spray-firing. The barrel is threaded, allowing the attachment of silencers and flash suppressors, which are restricted under federal law . . . and are primarily of interest to criminals. The threaded barrel also permits the attachment of a barrel extension, enabling the weapon to be fired with higher velocity and at greater distances, while still allowing it to be broken down into smaller concealable parts. The weapon comes with a “sling swivel” that permits it to be hung from a shoulder harness, known as a “combat sling,” when firing rapidly from the hip. The sling device also permits the rapid firing of two weapons simultaneously. . . . The relatively compact size of the TEC-DC9 allows a shooter to transport maximum firepower with relative ease, and with far greater concealability than almost any other weapon having similar firepower. The TEC-DC9 is also compatible with the “Hell-Fire” trigger system, which, when properly installed, permits the weapon to be fired virtually at full automatic rate—300 to 500 rounds per minute.¹⁴¹

The expert further stated that the TEC-DC9 is “completely useless” for hunting, target shooting, or self-defense, concluding that weapons like the TEC-DC9 “were designed for rapid fire, close quarter shooting at human beings.”¹⁴²

The plaintiffs also alleged that Navegar deliberately targeted the marketing of the TEC-DC9 to persons with a high risk of criminal misuse.¹⁴³ They produced deposition testimony from a former Navegar sales and marketing director who stated that the “target market” for the TEC-DC9 was “militaristic people,” including the “survivalist community,” and individuals who “play military.”¹⁴⁴ The plaintiffs cited advertisements for the TEC-DC9 that emphasized the “paramilitary” appearance of the weapon and promotional materials aimed at dealers boasting that the TEC-DC9 was as “tough as your toughest customer” and pointing out that its special surface finish provided “excellent resistance to fingerprints.”¹⁴⁵

141. *Id.* at 154 (first omission in original).

142. *Id.* at 154-55.

143. *Id.* at 156.

144. *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 156 (Ct. App. 1999), *rev. granted* 991 P.2d 775 (2000).

145. *Id.* at 156-57.

In addition, the plaintiffs pointed out that the California Assault Weapons Control Act (AWCA) of 1989 specifically prohibited the advertising and sale of the TEC-9, an earlier and substantially similar version of the TEC-DC9.¹⁴⁶ Indeed, the TEC-DC9 was designed with modifications to overcome a ban on the TEC-9 in Washington D.C.¹⁴⁷ In response, the defendant, Navegar, pointed out that Ferri purchased the TEC-DC9s in Nevada, where the weapon is legal, and that the plaintiffs could not prove that any of the company's ads or promotional materials influenced Ferri's actions.¹⁴⁸

Prior to trial, Navegar moved for summary judgment, arguing that it owed the plaintiffs no duty to refrain from legally marketing and selling the TEC-DC9 outside of California.¹⁴⁹ The trial court granted Navegar's motion, holding that a gun manufacturer owes no duty to refrain from legally marketing and selling weapons merely because of the potential for misuse by a third party.¹⁵⁰ The California Court of Appeals disagreed, however, reversing the summary judgment and imposing a duty on gun manufacturers to exercise reasonable care in marketing weapons so as not to increase the risk of criminal misuse beyond that already present due to the widespread presence of firearms in society.¹⁵¹

146. *Id.* at 167. For a discussion of the trial court's rejection of the plaintiffs' negligence per se claim, see Opinion and Order Re Motion for Summary Judgment (Navegar, Inc.) at 4-14, *In re* 101 California Street, Master File No. 959-316 (Cal. Sup. Ct. filed May 6, 1997). See also Bruce H. Kobayashi & Joseph E. Olson, *In re* 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of 'Assault Weapons,' 8 STAN. L. & POL'Y REV. 41 (1997); Joi Gardner Pearson, *Make It, Market It, And You May Have to Pay for It: An Evaluation of Gun Manufacturer Liability for the Criminal Use of Uniquely Dangerous Firearms in Light of In re* 101 California Street, 1997 BYU L. REV. 131.

147. *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 152 n.3 (Ct. App. 1999), *rev. granted* 991 P.2d 775 (2000).

148. Opinion and Order Re Motion for Summary Judgment (Navegar, Inc.) at 10-14, *In re* 101 California Street, Master File No. 959-316 (Cal. Sup. Ct. filed May 6, 1997).

149. Opinion and Order Re Motion for Summary Judgment (Navegar, Inc.) at 19, *In re* 101 California Street, Master File No. 959-316 (Cal. Sup. Ct. filed May 6, 1997).

150. Opinion and Order Re Motion for Summary Judgment (Navegar, Inc.) at 20, *In re* 101 California Street, Master File No. 959-316 (Cal. Sup. Ct. filed May 6, 1997).

151. *Merrill*, 89 Cal. Rptr. 2d at 151. The dissenting opinion in *Merrill* accused the majority of improperly substituting its own theory of duty for that pleaded by the plaintiffs. *Id.* at 194. According to the dissent, the plaintiffs argued that Navegar owed them a duty not to sell the TEC-DC9 to the general public. While the majority does restate the duty at issue in language that differs markedly from that used by the plaintiffs, one could view the majority's version as a restatement of the duty alleged at a higher level of generality. Under this view, the difference between the duty as stated by the plaintiffs and as stated by the majority is that under the plaintiffs'

The California Court of Appeals justified its imposition of a duty to exercise reasonable care in marketing weapons based on four factors.¹⁵² First and foremost, the court found that “use of the TEC-DC9 in violent assaults of the type carried out by Ferri . . . was foreseeable.”¹⁵³ In support of this finding, the court dwelt at length on the particular design features and advertising of the TEC-DC9 that the court claimed “would be of interest only to criminals.”¹⁵⁴ “Given these facts,” the court concluded, “it could hardly have surprised the company that a TEC-DC9 would be used in a violent criminal assault such as the one Ferri perpetrated.”¹⁵⁵

Second, the court supported its imposition of duty based on a finding that Navegar’s conduct was morally blameworthy, insofar as “the marketing of the TEC-DC9 was calculated to bring the TEC-DC9 to the attention of violent persons likely to use it for a criminal purpose.”¹⁵⁶ Third, the court maintained that imposing a duty to exercise care in the marketing of firearms would further the desirable social policy of decreasing gun-related injuries.¹⁵⁷ Fourth, the court held that the burden of imposing a duty on Navegar to exercise reasonable care in marketing the TEC-DC9 would be insignificant. “[T]he imposition of

formulation, the question of whether Navegar’s failure to restrict sales of the TEC-DC9 to the military and law enforcement is negligent is a question of duty for the court to decide as a matter of law; whereas, under the majority’s formulation, it is a factual issue of breach for the jury to decide. For more on this common manipulation in the formulation of tort duties in order to make a defendant’s negligence an issue of judicial decision or jury deliberation, see *supra* notes 128-36 and accompanying text.

152. The court adopted these four factors from *Rowland v. Christian*, 69 Cal. 2d 108 (1968), which held that the determination as to whether a particular defendant owes a duty of care in tort depends upon a variety of factors, including:

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

Merrill, 89 Cal. Rptr. 2d at 159 (quoting *Rowland*, 69 Cal. 2d at 113).

153. *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 167 (Ct. App. 1999), *rev. granted* 991 P.2d 775 (2000).

154. *Id.* at 166. The court discussed the design and advertising of the TEC-DC9 repeatedly. *Id.* at 155-60, 162, 166, 200.

155. *Id.* at 166.

156. *Id.* at 169.

157. *Id.* at 169-70.

liability on gun manufacturers who make a particularly lethal weapon having little or no legitimate civilian use available to the public and target the marketing of the weapon to persons likely to misuse it . . . would . . . have minimal adverse social consequences.”¹⁵⁸

The *Merrill* court’s theory of negligent marketing, which relies on claims about gun design and advertising, faces two potential challenges. On the one hand, the court’s sustained emphasis on the design features of the TEC-DC9 as the basis for a possible finding of negligence at trial makes the plaintiffs’ theory of recovery look more like a design defect claim than a negligent marketing claim.¹⁵⁹ The court’s detailed discussion of the TEC-DC9’s high-capacity magazine clip, barrel shroud, sling swivel, and compact size make it appear as if the essence of Navegar’s negligence is sale of the TEC-DC9 as such rather than the way Navegar marketed the weapon. If the *Merrill* court’s theory really is tantamount to a design defect approach, then it clearly failed to offer any analysis of the concept of defect that would allow for a jury finding that the TEC-DC9 is defective as designed.¹⁶⁰

On the other hand, the court’s reliance on Navegar’s promotional materials and consumer advertising raises problems of causation. It is unclear from the record whether Ferri even saw any of the promotional materials aimed at retailers or any of the advertisements for the TEC-DC9 in gun magazines.¹⁶¹ Moreover, even if a criminal assailant does see advertising for a weapon, claims that advertising serves as a substantial factor in motivating or facilitating crime are highly speculative and are the subject of much controversy among social scientists.¹⁶² Nevertheless, in support of its finding that the plaintiffs presented

158. *Id.* at 171.

159. *Cf.* DeRosa v. Remington Arms Co., 509 F. Supp. 762, 766 (E.D. N.Y. 1981); and Lytton, *supra* note 23, at 700-03 (discussing the similarities between design defect and negligent marketing claims in firearms litigation).

160. *Cf.* Second Amended Complaint at 16, Young v. Bryco, No. 98 L6684 (Ill. Cir. Ct. Cook County filed June 9, 1998).

161. *See* Opinion and Order Re Motion for Summary Judgment (Navegar, Inc.) at 10-14, *In Re* 101 California Street, Master File No. 959-316 (Cal. Sup. Ct. filed May 6, 1997) (rejecting the plaintiffs’ negligence per se claim based on insufficient evidence); *cf.* *Merrill v. Navegar, Inc.* 89 Cal. Rptr. 2d 146, 180-83 (Ct. App. 1999) (arguing sufficient evidence of causation to merit jury consideration of the plaintiffs’ ordinary negligence claim), *rev. granted* 991 P.2d 775 (2000).

162. *See Merrill*, 89 Cal. Rptr. 2d at 198-200 (Haerle, J., dissenting). *See generally* Justice and the Media, 182-245 (Ray Surrence ed., 1984); THE MEDIA AND CRIMINAL JUSTICE POLICY 3-128 (Ray Surrence ed., 1990) (discussing the affect of the media on crime); Clay Calvert, *Excising Media Images to Solve Societal Ills: Communication, Media Effects, Social Science, and the Regulation of Tobacco Advertising*, 27 SW. U. L. REV. 401 (1998).

a triable issue of fact concerning causation, the court cited deposition testimony by an expert that “the nature of Navegar’s magazine advertisements of the TEC-DC9 as well as its other promotional activities, ‘likely emboldened Ferri to undertake mass killings without fear of failure,’ and was for these reasons ‘a substantial factor in his decision to carry out his mass murder in a predatory assault. . . .’”¹⁶³ The court’s uncritical acceptance of the reliability of this testimony betrays an oversimplification of the causal complexity inherent in such claims.

The *Merrill* court was aware of the problems associated with overreliance on either weapon design or advertising. The court explained:

We make no suggestion . . . that the manufacture of the TEC-DC9, even with all the features supplying its military combat style and appeal to a criminal element, *alone* could be found to constitute negligence. Rather, it is the *combination* of such manufacture with distribution of the weapon to the general public and marketing targeted to persons most likely to misuse it that supports a cause of action for negligence.¹⁶⁴

The court further stated that Navegar could be found negligent for “overpromotion” of the TEC-DC9 for uses beyond those for which it was suited.¹⁶⁵ Under such an approach, reasonable care would require Navegar to restrict sales of the TEC-DC9 to military and law enforcement, the only consumers who might legitimately use the TEC-DC9 in combat-style assaults for which it was designed.

The concept of overpromotion relies on the design features of the TEC-DC9 and Navegar’s marketing practices while avoiding the problems associated with overreliance on either of these two factors. Under this approach, Navegar’s potential negligence is based not on sale of the TEC-DC9 as such but rather on sale of the weapon to inappropriate customers. Furthermore, Navegar’s failure to restrict sales of the TEC-DC9 to military and law enforcement was clearly a cause of Ferri’s ability to purchase two of the weapons and subsequently misuse them. Navegar itself designed and advertised the TEC-DC9 for combat-style shooting, and the *Merrill* court’s negligent marketing theory based on the concept of overpromotion merely requires Navegar to restrict sales of the weapon to consumers who can legitimately use the weapon for that purpose.

163. *Merrill*, 89 Cal. Rptr. 2d at 188.

164. *Id.* at 184 (emphasis added).

165. *Id.*

The California Assault Weapons Control Act (AWCA) provides additional support for the court's theory of negligent marketing based on overpromotion. The court explained that although AWCA did not prohibit sale of the TEC-DC9 to a California resident outside of the state, neither did it provide Navegar with immunity from liability for such a sale.¹⁶⁶ The court then implied that imposing a duty on Navegar to exercise reasonable care in marketing the TEC-DC9 would complement efforts by the California legislature to end sale of weapons like the TEC-DC9 within the state.¹⁶⁷ Such a duty might require Navegar to issue notices to dealers not to sell the TEC-DC9 to California residents or to limit sales in neighboring states to residents of those states.¹⁶⁸ As does the *Halberstam* case, the *Merrill* case illustrates how courts could justify the imposition of tort duties on gun manufacturers by showing how such duties would complement the existing regulatory regime established by the legislature. How the *Merrill* decision will fare on appeal to the California Supreme Court is uncertain.

4. Oversupply, Gun Trafficking, Gun Shows, and Rogue Dealers:

Hamilton v. Accu-Tek

In many cases, plaintiffs' allegations of negligence on the part of gun makers have been based largely on speculation concerning the link between selling guns and gun violence. Without much hard evidence, plaintiffs have claimed that particular marketing practices facilitate criminal acquisition of guns. In a similarly speculative way, courts have rejected these claims, arguing that gun makers cannot reduce the risk of gun purchases by criminals.

More information about the marketing practices of firearms manufacturers may strengthen future negligence claims by revealing that gun makers can foresee and can control the risk of gun purchases by criminals. At least one industry insider has admitted that firearms manufacturers make marketing decisions that they know may increase the risk that their guns will be sold or later resold to criminals.¹⁶⁹ In addition to disclosures from industry insiders,

166. *Id.* at 173-78.

167. *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 176-77 (Ct. App. 1997), *rev. granted* 991 P.2d 775 (2000).

168. Such restrictions are already common practice among responsible gun dealers. Dealers at an Oct. 9, 1999 gun show in Springfield, Massachusetts refused to sell the Author, a New York City resident, a TEC-DC9 or any other assault pistol or rifle, due to a ban on possession of such weapons in New York City.

169. Affidavit of Robert I. Hass at ¶¶ 20-21, *Hamilton v. Accu-Tek*, 935 F. Supp.

plaintiffs have recently begun to link particular marketing practices to gun violence using complex statistical evidence.

The case of *Hamilton v. Accu-Tek*¹⁷⁰ provides an example of this kind of claim. In *Hamilton*, nine gunshot victims and their families sued a group of handgun manufacturers.¹⁷¹ The *Hamilton* plaintiffs alleged that the gun makers were negligent for engaging in marketing practices that they knew would result in the sale or resale of handguns to criminals in order to profit from the demand for guns among criminals. They argued that common industry practices, such as marketing guns through small federally licensed dealers who sell out of their homes or at gun shows, raise the risk that the guns will be sold or resold to criminals.¹⁷² In support of this claim, they obtained an affidavit from a former Senior Vice President of Marketing and Sales for Smith & Wesson who stated that:

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 [sic] responsible distribution practices¹⁷³

The plaintiffs also offered social science data and expert testimony to support the alleged link between gun industry marketing practices and crime.¹⁷⁴

The *Hamilton* plaintiffs succeeded in obtaining an unprecedented jury verdict against several gun manufacturers.¹⁷⁵ Following the verdict, Judge Jack B. Weinstein, the same judge who presided over the *Halberstam* case, issued an opinion in favor of imposing a common law duty on gun manufacturers to exercise care in marketing firearms in order to prevent criminal acquisition.¹⁷⁶

1307 (E.D.N.Y. 1996) (No. 95-CV-0049) cited in David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMP. L. REV. 1, 7 (1998).

170. *Hamilton v. Accu-tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

171. *Id.* at 808.

172. *Id.* at 824-27.

173. Kairys, *supra* note 169, at 7 (omission in original).

174. Expert Report of Lucy Allen and Jonathan Portes at 8-12, *Hamilton*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999) (No. 95-CV-0049) (hereinafter Expert Report).

175. Joseph P. Fried, *9 Gun Makers Called Liable for Shootings*, N.Y. TIMES, Feb. 12, 1999, at A1; see also *Hamilton*, 62 F. Supp. 2d at 808.

176. *Hamilton*, 62 F. Supp. 2d at 824-27.

While Judge Weinstein argued at length in support of such a duty, he ultimately requested that the Court of Appeals for the Second Circuit certify questions concerning the issue to the New York Court of Appeals for definitive resolution.¹⁷⁷

Judge Weinstein's opinion in the *Hamilton* case provides a variety of arguments in favor of imposing a duty on gun manufacturers "to take reasonable steps available at the point of . . . sale to primary distributors to reduce the possibility that [guns] will fall into the hands of those likely to misuse them."¹⁷⁸ These arguments seek to base this duty on the foreseeability of gun crimes, the existence of special relationships that require protecting plaintiffs from injury by third parties, and an extension of products liability doctrine. First, Judge Weinstein argued that the activity of marketing guns foreseeably enhances the risk of criminal misuse.¹⁷⁹ Second, he contended that the ability of gun manufacturers to "detect and guard against" the risks of gun violence constitutes a special "protective relationship" between gun manufacturers and potential crime victims.¹⁸⁰ Third, Judge Weinstein held that the "authority and ability" of gun manufacturers "to control" the conduct of retailers constitutes a special supervisory relationship between them.¹⁸¹ Finally, he stated that the

177. *Id.* at 808, 847. The relevant state and federal rules do not allow district courts in the Second Circuit to certify questions to the New York Court of Appeals. *Id.* at 847.

178. *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 825 (E.D.N.Y. 1999); see also Robert Rabin, *New Torts: Are They Being Developed? If so, Where, When, and Why?*, 49 DEPAUL L. REV. 435 (1999).

179. *Hamilton*, 62 F. Supp. 2d at 819-21.

180. *Id.* at 821. The court stated:

[T]he special ability to detect and guard against the risks associated with their products warrants placing all manufacturers, including these defendants, in a protective relationship with those foreseeably and potentially put in harm's way by their products. Particularly where the product is lethal, and its criminal misuse is not only foreseeable, but highly likely to occur and to result in death or devastation, the existence of such a protective relationship may be deemed to exist.

Id. (internal citations omitted).

181. *Id.* The court stated:

[A] duty is created by virtue of a manufacturer's relationship with downstream distributors and retailers, giving it "sufficient authority and ability to control," the latter's conduct for the protection of prospective victims [A] manufacturer who does business with a distributor it knows is likely to dispose of handguns in such a manner as to pose an unreasonable risk of harm to the public may be regarded as having "negligently entrusted" its products.

progressive expansion of common law duties imposed on manufacturers for product-related injuries, including liability for injuries to bystanders resulting from misuses of a product, supports the imposition of a duty on gun manufacturers to exercise care in marketing guns.¹⁸²

By arguing for a broad duty to exercise reasonable care in marketing guns, Judge Weinstein allowed the jury to evaluate whether the particular marketing practices employed by the defendants constituted a breach of that duty.¹⁸³ Judge Weinstein's opinion makes reference to three distinct marketing practices that might constitute a breach of duty: oversupplying guns to dealers in states with weak gun controls, distributing guns to dealers who sell at unregulated gun shows, and failing to supervise rogue gun dealers.¹⁸⁴ The *Hamilton* plaintiffs' case relied primarily on the theory of oversupply.

The *Hamilton* plaintiffs presented extensive evidence that the gun makers consciously oversupplied handguns commonly used in crime to dealers in states with weak gun controls and that this oversupply resulted in the sale and resale of those guns to individuals in states with strict gun controls, where the guns were subsequently used in crimes.¹⁸⁵ For example, the gun makers oversupplied handguns to dealers in Florida with knowledge that many of those guns would be smuggled to New York for use in crime. The plaintiffs laid out this argument in three distinct steps.

First, the *Hamilton* plaintiffs cited studies indicating that many handguns are smuggled from states with weak gun controls to states with strict gun controls. They presented federal law enforcement statistics indicating that ninety percent of handguns used in crimes in New York State between 1989 and 1997 were originally sold in other states, and more than half of these guns were purchased originally in five southern states with weak gun control laws.¹⁸⁶

Second, the plaintiffs commissioned a study indicating that the gun makers oversupplied handguns to states with weak controls, knowing that these guns

Id.; see also *Read v. Fetzer, Co.*, 990 S.W.2d 732 (Tex. 1998) (imposing duty on manufacturer and distributor of vacuum cleaners to protect customers from the criminal acts of its door-to-door salespersons).

182. *Hamilton*, 62 F. Supp. 2d at 826.

183. *Hamilton*, 62 F. Supp. 2d at 828.

184. *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 827-33 (E.D.N.Y. 1999).

185. Plaintiffs' Memorandum in Opposition to Defendants' Summary Judgment Motion, *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999) (No. CV-95-0049) (hereinafter Plaintiffs' Memo); Expert Report at 8-12, *Hamilton* (No. CV-95-0049); Transcript of Trial at 3733-34, *Hamilton* (No. CV-95-0049).

186. Expert Report at 8, *Hamilton* (No. CV-95-0049); Transcript of Trial at 3733, *Hamilton* (No. CV-95-0049); *New Data Point Blame at Gun Makers*, N.Y. TIMES, Nov. 28, 1998, at A9.

were likely to be smuggled for criminal use into states with strict controls. In “those states that are the primary source of handguns used in crime,” claimed the study, “sales of handguns were significantly higher than would be expected given the level of gun ownership.”¹⁸⁷ The study emphasized the “oversupply” of “[c]ertain types of guns [that] are relatively more popular for use by criminals than other guns.”¹⁸⁸ “Manufacturers,” the study alleged, “have substantially and disproportionately increased their production of such guns in recent years.”¹⁸⁹ The study concluded that this “oversupply” of crime guns in a given state with weak gun controls “help[s] to explain the number of handguns from that state that are used in other states to commit a crime.”¹⁹⁰

Third, plaintiffs cited several studies to show a relatively direct path between oversupply and criminal misuse. One study indicated that nearly forty percent of the handguns used in crimes had been purchased within the preceding three years.¹⁹¹ According to the study, this short time between sale and misuse indicated that, contrary to conventional wisdom, a significant percentage of guns used in crime were purchased by criminals rather than stolen.¹⁹² “The above pattern may arise,” the study’s authors speculated, “because pistols are in great demand by individuals involved in many types of crimes. As a result, we might expect a high demand for pistols so that pressure is applied in procuring these weapons from [small dealers] or through straw purchasers rather than through burglary or stealing. Burglary can be an unreliable, low yield and possibly high-risk source for firearms.”¹⁹³

187. Plaintiffs’ Memo at 29, *Hamilton* (No. CV-95-0049); see also Expert Report at 2, 12-14, *Hamilton* (No. CV-95-0049).

188. Plaintiffs’ Memo at 29, *Hamilton* (No. CV-95-0049); see also Expert Report at 2, 12-14, *Hamilton* (No. CV-95-0049).

189. Plaintiffs’ Memo at 29, *Hamilton* (No. CV-95-0049); see also Expert Report at 2, 12-14, *Hamilton* (No. CV-95-0049).

190. Plaintiffs’ Memo at 29, *Hamilton* (No. CV-95-0049); see also Expert Report at 2, 12-14, *Hamilton* (No. CV-95-0049).

191. See *New Data*, *supra* note 186, at A9.

192. Prior to such studies, the weight of social science data supported the view that most guns used in crimes were stolen at some point between the time of sale and the commission of the crime. This view is based on data showing a volume of gun theft that could account for more than all of the crimes committed with guns. The fact that there are enough stolen guns each year to supply all persons who will commit a gun crime, however, merely makes it possible, not likely, that most guns used in crime are stolen. See KLECK, *supra* note 2, at 90-94.

193. Plaintiffs’ Memo at 30, *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 827-33 (E.D.N.Y. 1999) (No. CV-95-0049); see also Expert Report at 7, *Hamilton* (No. CV-95-0049).

Based on these three sets of data, the *Hamilton* plaintiffs alleged that defendant-gun manufacturers were negligent insofar as they failed to take reasonable measures to restrict and supervise initial handgun sales in states known to be a source of crime guns in order to prevent their being sold or resold to criminals.¹⁹⁴ As examples of such measures, the plaintiffs suggested “[f]ranchising of retail outlets to insure control; [d]istribution contracts that restrict retail sales with respect to specific areas; [p]romulgation of . . . sales practices at the retail level; [i]ndustry-wide distribution enforcement mechanisms; [e]lectronic inventory and sales tracking systems; [t]ermination of distribution agreements with irresponsible retailers.”¹⁹⁵

The *Hamilton* plaintiffs’ claim that gun makers engage in marketing practices that they know will increase the risk of criminal misuse in order to profit from the demand for guns among criminals seems entirely plausible. The empirical studies relating to oversupply that they cited, however, fall short of proving it. First, the concept of oversupply itself unnecessarily complicates the plaintiffs’ negligence theory. Even assuming that gun makers could accurately forecast legitimate demand,¹⁹⁶ it is unclear whether the practice of oversupplying itself causes traffic in guns from one state to another. It is possible, for example, that even if gun makers sold only enough guns in Florida to satisfy legitimate demand, the same percentage of guns sold in Florida would still be taken to New York and used in crime. If this were the case, then while selling guns in Florida might foreseeably result in gun trafficking to New York, oversupplying guns in Florida would itself not be the cause of this traffic. In

194. Transcript of Trial at 76, *Hamilton* (No. CV-95-0049).

195. Plaintiffs’ Memo at 39, *Hamilton* (No. CV-95-0049); *Hamilton*, 62 F. Supp. 2d at 831-32.

196. The *Hamilton* plaintiffs’ experts measured what they called legitimate demand based on the number of gun owners in each state, which they estimated using data from the General Social Survey (GSS) of the U.S. Census Bureau. They calculated the oversupply of guns by comparing industry sales figures to the level of gun ownership. For example, as evidence of oversupply, they stated that “the GSS data allows us to estimate that residents of Florida are 1.20 times as likely to own a handgun as the national average. However, Florida gun sales reported by distributors are 2.47 times the national average.” Expert Report at 13, *Hamilton* (No. CV-95-0049). There are several difficulties with this measure of oversupply. First, legal gun owners may be reluctant to report their gun ownership in government surveys. Second, current gun ownership may not be an accurate indicator of legal demand for guns in an expanding market for them. Third, the experts failed to consider that the difference between the rate of gun ownership and the rate of gun purchases in Florida might be accounted for by a tendency among Floridians to purchase multiple guns during the time studied, a practice not uncommon among gun owners.

this case, it would be the laxity of sales controls in Florida, not the oversupplying of guns, that causes gun trafficking to New York. While oversupplying might increase the volume of gun trafficking, it would not itself be a cause of it. Additionally, it is unclear why oversupply is wrongful. It would appear to be merely a by-product of legitimate competition between firms for market share. Furthermore, the cooperation required to prevent oversupply might violate antitrust laws.

Second, the Bureau of Alcohol, Tobacco and Firearms (BATF) crime gun tracing statistics upon which the plaintiffs relied may greatly exaggerate the role of gun trafficking in the criminal acquisition of guns. BATF trace statistics account for only a small percentage of total crime guns. These statistics offer information about the source of crime guns that are successfully traced pursuant to a trace request from local law enforcement.¹⁹⁷ Crime guns that are recovered by local law enforcement and subject to trace requests represent only a small fraction of total crime guns, and BATF trace statistics indicate that only thirty-seven percent of these requests resulted in successful traces.¹⁹⁸ Furthermore, the overwhelming majority of crime guns reported by BATF, as many as ninety-seven percent in some cities, are involved in possession and narcotics crimes, not in violent crimes such as theft, assault, or murder.¹⁹⁹

There is some reason to believe that the very small percentage of crime guns included in BATF trace statistics are disproportionately involved in gun trafficking. Local law enforcement officials may more often request traces for guns that they suspect of being trafficked, since traces will be especially helpful in addressing this crime.²⁰⁰ Additionally, BATF trace statistics do not distinguish between guns that originated out-of-state that were transferred through illegal

197. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, DEP'T OF THE TREASURY, ATF CRIME GUN TRACE ANALYSIS REPORT: YOUTH CRIME GUN INTERDICTION INITIATIVE: THE ILLEGAL YOUTH FIREARMS MARKETS IN BRIDGEPORT, CONN. (1997).

198. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, DEP'T OF THE TREASURY, ATF CRIME GUN TRACE ANALYSIS REPORT: YOUTH CRIME GUN INTERDICTION INITIATIVE: THE ILLEGAL YOUTH FIREARMS MARKETS IN BRIDGEPORT, CONN. 6 (1997). The percentage of requests that resulted in successful traces rose to sixty percent in a subsequent BATF study. See BUREAU OF ALCOHOL, TOBACCO & FIREARMS, DEP'T OF THE TREASURY, ATF CRIME GUN TRACE ANALYSIS REPORT: YOUTH CRIME GUN INTERDICTION INITIATIVE: THE ILLEGAL YOUTH FIREARMS MARKETS IN 27 COMMUNITIES 19 (1999). Gary Kleck, *BATF Gun Trace Data and the Role of Organized Gun Trafficking in Supplying Guns to Criminals*, ST. LOUIS U. PUB. L. REV. (forthcoming 2000).

199. See, e.g., BUREAU OF ALCOHOL, TOBACCO & FIREARMS, *supra* note 189, at 7.

200. Kleck, *supra* note 198.

gun trafficking as opposed to the normal movement of gun owners between states for legitimate reasons such as job transfers. Finally, BATF may have a bias towards findings that support the existence and importance of organized gun trafficking since this is one of the primary modes of criminal gun acquisition that BATF is designed to control.²⁰¹

Third, it is unclear why BATF statistics establishing a relatively short time lag between sale and criminal misuse indicate a link between particular marketing practices and gun crimes. The statistics merely indicate that a disproportionate number of crime guns are young guns (*i.e.* purchased within the previous three years). Crime guns reported in BATF trace statistics include a disproportionately high number of newer guns because local law enforcement officials are more likely to request traces on newer guns which would lead them to rogue dealers still in business and because traces of newer guns are more often successful and therefore recorded in BATF trace statistics.²⁰² Furthermore, the statistics do not indicate what percentage of those crime guns which are young guns are stolen guns. Given that there are more than enough guns stolen each year to supply guns for the crimes committed each year, that it is likely gun thieves prefer newer models, and that among the pool of available stolen guns criminals may well prefer to use newer guns when committing a crime, it is entirely possible that almost all crime guns are stolen guns.²⁰³ Finally, even assuming that a significant percentage of crime guns were never stolen, the statistics do not indicate what percentage of non-stolen crime guns were sold by small dealers as opposed to large retail establishments. Thus, studies establishing a short time lag between sale and criminal misuse neither provide a reliable indication of the percentage of crime guns that passed from sale to crime without an intervening theft, nor do they support the claim that

201. Kleck, *supra* note 198; see also David Kennedy et al., *Youth Violence in Boston: Gun Markets, Serious Youth Offenders, and a Use-Reduction Strategy*, 59 LAW & CONTEMP. PROBS. 147, 172 (1996) (noting that 34% of youth crime guns in Boston study were originally sold in Massachusetts, only 31% from all southern states combined); Fox Butterfield, *Gun Flow to Criminals Laid to Tiny Fraction of Dealers*, N.Y. TIMES, July 1, 1999, at A14 (noting that a recent study for BATF found that 49.1% of crime guns traced by BATF were originally sold by a dealer within 50 miles of the crime).

202. Kleck, *supra* note 198.

203. *Cf.* Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 838 (E.D.N.Y. 1999); Kennedy, *supra* note 195, at 151, 177 (stating that youth crime guns in are Boston more likely to be acquired through illegal purchase than theft); Julius Wachtel, *Sources of Crime Guns in Los Angeles, California*, 21 POLICING 220, 224, 234-35 (1998) (discussing that most crime guns are acquired through illegal purchase rather than theft).

adopting restrictions such as marketing only through large, franchised retail establishments would decrease the risk that a gun would be sold directly or resold to criminals.

Despite these shortcomings, the *Hamilton* plaintiffs succeeded in obtaining a jury verdict against several gun manufacturers.²⁰⁴ The verdict, however, is far from a clear endorsement of the plaintiffs' case. The jury found fifteen of the twenty-five defendant-manufacturers negligent and found nine of those fifteen liable for three of the nine shootings, but awarded damages to only one victim.²⁰⁵ According to an interview with several jurors, the jury was highly skeptical of and largely ignored the plaintiffs' statistical studies relating to oversupply, gun trafficking, and short time lag between sale and criminal misuse.²⁰⁶ It remains unclear how the *Hamilton* claim will fare on appeal.

Judge Weinstein's *Hamilton* opinion also mentioned as another example of manufacturer negligence the widespread industry practice of marketing guns through small dealers who sell at unregulated gun shows.²⁰⁷ At trial, however, plaintiffs offered only expert speculation, unsupported by statistical evidence, that this practice creates an unreasonably high risk of criminal acquisition.²⁰⁸ While many sales at gun shows are made by unlicensed dealers and are not subject to regulatory restrictions such as background checks, there is as yet little empirical evidence to indicate that such sales are a greater source of crime guns than sales by licensed dealers in gun shops.²⁰⁹ The allegation that

204. *Hamilton*, 62 F. Supp. 2d at 808; Fried, *supra* note 175, at A1.

205. *Hamilton*, 62 F. Supp. 2d at 808; Fried, *supra* note 175, at A1. The jury awarded plaintiffs Stephen and Gail Fox \$515,870 and \$6,530 respectively as a result of Stephen Fox's injuries. Notably, unlike the other *Hamilton* plaintiffs who were crime victims, Stephen Fox was the victim of an accidental shooting by a friend. See *Hamilton*, 62 F. Supp. 2d at 808-10; Fox Butterfield, *Verdict Against Gun Makers Is Likely to Prompt More Suits*, N.Y. TIMES, Feb. 13, 1999, at B6.

206. Vanessa O'Connell & Paul M. Barrett, *Open Season: How a Jury Placed The Firearms Industry on the Legal Defensive*, WALL. ST. J., Feb. 16, 1999, at A1; cf. *Hamilton*, 62 F. Supp. 2d at 811.

207. *Hamilton*, 62 F. Supp. 2d at 831.

208. *Hamilton*, 62 F. Supp. 2d at 831; cf. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, DEP'T OF THE TREASURY, GUNSHOWS: BRADY CHECKS AND CRIME AND GUN TRACES 1 (1999).

209. See, e.g., BUREAU OF ALCOHOL, TOBACCO & FIREARMS, GUN SHOWS, *supra* note 208, at 1 (asserting the high level of illegal sales at gun shows but offering no comparison between the percentage of crime guns sold at gun shows and the percentage sold in stores); Wachtel, *supra* note 197, at 230, 234-35 (indicating a high percentage of crime guns originally sold by large commercial retail stores). In a highly publicized trade magazine article, a gun store owner suggested, based on personal experience, that gun shows were a significant source of crime guns

marketing guns through small dealers at gun shows involves an unreasonably high risk of criminal acquisition relies heavily on the assumption that these dealers are more likely than retail establishments to engage in illegal sales practices, since small dealers can more easily evade inspection, and they have less to lose if they are caught making illegal sales. Courts other than Judge Weinstein's are likely to demand reliable empirical evidence to show that this assumption is more than mere speculation.

A study, for example, indicating that a disproportionate percentage of guns used in crime were originally sold by small dealers at gun shows would substantiate the claim that marketing guns through these dealers creates an unreasonable risk of gun acquisition by criminals. To carry out such a study, one might rely on federal registration of dealers, data about guns recovered in crime, and records of legal firearms sales.

The difficulties of producing such a study, however, are considerable. First, most guns used in crime are never recovered so that any conclusions would be based on a subset of crime guns—those recovered by law enforcement officials. Furthermore, federal data about guns recovered in crime is based solely on guns successfully traced pursuant to requests from local and federal law enforcement.²¹⁰ Successfully traced guns represent only a small percentage of recovered crime guns.²¹¹ Nevertheless, this subset may be a fair representation of all crime guns, at least with respect to their retail source.

Second, federal records of firearms licenses do not distinguish between gun dealers on the basis of size or circumstance, nor do they account for unlicensed dealers.²¹² From these records, one could not distinguish a large retail chain from a gun show dealer. Investigation beyond the records would be necessary to make such distinctions. Given that in 1993 there were approximately 250,000 licensed dealers and, in 1997, after federal efforts to

compared to retail stores. While this admission by an industry insider is likely to attract the attention of plaintiffs in future litigation, one ought to question the extent to which the author's views on gun shows might be influenced by the fact that gun show dealers, who pay very little overhead, often sell guns at lower prices than stores. Bob Lockett, *The Implications of New York City*, SHOOTING SPORTS RETAILER, July-Aug. 1999, at 18; see also Paul M. Barrett, *Guns: Littleton Probe Puts Gun Shows in Cross Hairs*, WALL ST. J., Apr. 28, 1999, at B1.

210. Telephone Interview with Tom Diaz (Jan. 6, 1999).

211. Telephone Interview with Gary Kleck (Jan. 8, 1999).

212. Telephone Interview with Tom Diaz (Jan. 6, 1999); Telephone Interview with Gary Kleck (Jan. 8, 1999).

lower this number, there were still almost 100,000, this is no small obstacle.²¹³ It might be possible to survey a subset of all dealers and estimate the totals.

Third, sales records for firearms dealers might be incomplete due to non-compliance with record keeping laws by some dealers.²¹⁴ If there is any reason to suspect greater non-compliance among small dealers, as compared to established retail stores, then a study based on sales records might undercount the number of crime guns initially sold by these dealers. One might correct for this by inspecting manufacturers' and wholesalers' distribution records in order to estimate rates of non-compliance with record keeping among retail dealers.

Fourth, even if reliable data could be generated, such a study would merely link the practice of marketing guns through small dealers at gun shows to criminal misuse of the guns, without any indication of the path of transfer between these dealers and the criminals. Crime guns sold by small dealers at gun shows might be resold several times, transferred illegally, or stolen prior to their use in a crime. Tracing the path from manufacture to crime of any one gun is a highly complex, and often impossible, task. Hoping to do this for a statistically significant pool of guns is unrealistic. Doing so, however, may not be necessary for the purposes of establishing gun manufacturer negligence. The link between marketing through small dealers at gun shows and crime may itself be enough to support a negligent marketing claim without further specification of the path from dealer to criminal. At issue is whether this marketing practice foreseeably increases the risk of criminal misuse. If resale, illegal transfer, and theft are all themselves foreseeable features of this practice, as the *Hamilton* affidavit indicates, then there is no need to separate each of these possibilities in order to substantiate the link between marketing through small dealers and crime.

Substantiating these claims with gun industry admissions and empirical studies will be complicated by the difficulties of extracting information from a highly secretive industry and of undertaking new studies requiring data that is hard to obtain. In the end, however, information about the gun industry generated by negligent marketing claims may reveal that marketing guns through supervised retail outlets creates just as much risk of criminal misuse as selling guns through small dealers at gun shows. This information, even if unhelpful to plaintiffs, is of great importance in larger efforts to regulate the gun industry in order to reduce gun violence. Additionally, evaluation of the evidence linking particular marketing practices to gun violence may require a level of expertise beyond the capacities of courts and juries. Should this be the case, one can

213. TOM DIAZ, MAKING A KILLING: THE BUSINESS OF GUNS IN AMERICA 42 (1999); see also *House Shatters Gun Bill*, SHOOTING SPORTS RETAILER, July-Aug. 1999, at 8-9 (counting 104,000 federal firearms licenses, 73,200 of them dealers).

214. Wachtel, *supra* note 203, at 226.

expect courts to dismiss future negligent marketing claims based on complex statistical analysis, leaving evaluation of the data to legislatures and regulatory agencies. The tendency of courts in the gun cases to avoid complex statistical analysis will be discussed further in Parts III and IV.

Judge Weinstein's *Hamilton* opinion also cites as an example of manufacturer negligence the failure of gun manufacturers to supervise retail sales and to terminate distribution agreements with rogue gun dealers whose stores are a common source of crime guns.²¹⁵ At trial the *Hamilton* plaintiffs provided little evidence concerning rogue dealers, most likely because they were unable to trace any of the guns involved in the case.²¹⁶ Future plaintiffs pursuing this theory of negligence might argue that BATF trace statistics make it possible for gun manufacturers to identify rogue dealers who repeatedly sell guns used in crime. A recent study analyzing BATF trace data claims that in 1998 a mere 137 gun stores, representing one tenth of one percent of licensed dealers, accounted for thirteen thousand guns traced to crimes, and that between 1996 and 1998, these same 137 stores sold more than 34,631 guns traced to crimes.²¹⁷ This kind of data supports the claim that manufacturers could reduce the risk of criminal acquisition by terminating distribution agreements with these rogue dealers. A number of plaintiffs in cases currently pending are pursuing this theory of negligence. These cases will be discussed below in Part II(D) on public nuisance claims.

5. Modified Market-Share Liability: *Hamilton v. Accu-Tek*

In addition to the issues of duty and breach, plaintiffs suing under a negligence theory commonly encounter difficulties with regard to causation.²¹⁸ It is often difficult, and sometimes impossible, to recover the particular gun used against a crime victim. Moreover, even if the type of gun can be identified by analyzing bullets or casings from the crime scene, without the serial number, plaintiffs will be unable to identify through what channel the particular gun was marketed.²¹⁹ Even if the crime gun is recovered, the serial number may have

215. *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 831 (E.D.N.Y. 1999).

216. *Id.* at 809-10.

217. See Charles Schumer, *A Few Bad Apples: Small Number of Gun Dealers the Source of Most of Crimes* (visited July 14, 1999) <www.senate.gov/┐schumer/html/a_few_bad_apples.htm>; see also Fox Butterfield, *Gun Flow to Criminals Laid to Tiny Fraction of Dealers*, N.Y. TIMES, July 1, 1999, at A14.

218. See, e.g., *Hamilton*, 62 F. Supp. 2d at 808-11, 833.

219. Recent development of a tracing system that can identify a particular gun from bullets or bullet casings, even when the gun is not recovered, may make it easier

been removed. Finally, even if the particular gun is recovered and its path of distribution identified, a jury may find that the marketing of the gun was not a substantial factor in the crime since the criminal, had he not acquired that particular gun, could easily have obtained a different gun elsewhere.²²⁰

In view of these obstacles to establishing causation, some plaintiffs have suggested shifting the burden of proving causation onto defendant-manufacturers.²²¹ Under this approach, if a plaintiff could establish that a manufacturer had engaged in negligent marketing practices, then the manufacturer, in order to escape liability, would have to prove that it did not manufacture the gun in question. The *Hamilton* plaintiffs suggested an even more radical solution to the difficulties of proving causation. Under market share liability theory, they argued that a defendant-manufacturer should be subject to liability for negligent marketing practices even where it can prove that it did not manufacture the particular gun in question.²²² In calling for the application of market share liability to the defendants, the *Hamilton* plaintiffs

for future plaintiffs to trace crime guns back to manufacturers. See Fox Butterfield, *U.S. to Develop a System for 'Fingerprinting' Guns*, N.Y. TIMES, Dec. 20, 1999, at A18; Raymond Hernandez & Fox Butterfield, *Two Gun Companies in New York Talks*, N.Y. TIMES, July 21, 1999, at A1; Barry Meier, *Deadlock over Bullet-Tracing System*, N.Y. TIMES, July 21, 1999, at A1.

220. See, e.g., Lytton, *supra* note 23, at 697-98 (discussing *Halberstam*).

221. See, e.g., Lytton, *supra* note 23, at 693 (discussing *Halberstam*).

222. *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 844 (E.D.N.Y. 1999). The theory of market share liability originated in *Sindell v. Abbott Lab.*, 607 P.2d 924 (Cal. 1980). In that case, the plaintiff sued a group of companies that produced diethylstilbestrol (DES), which her mother took during pregnancy. Her mother's use of DES resulted in injury to the plaintiff, caused while she was in utero but manifested many years later. The plaintiff could not establish which of the many DES manufacturers made the DES that her mother took. The *Sindell* court held that where the plaintiff has joined defendants representing a substantial share of the market in DES, the burden shifts to each defendant to prove that it did not make the DES which caused the plaintiff's injuries. If the defendant cannot do so, it will be liable for the share of plaintiff's damages which approximates its share of the market for DES. *Id.* at 937. In *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989), the court expanded the reach of market share liability, holding that a DES manufacturer could not escape liability by proving that it did not manufacture the particular brand of DES that harmed the plaintiff. *Id.* at 1078. The *Hamilton* court relied heavily on the *Hymowitz* decision in its application of market share liability to gun manufacturers. *Hamilton*, 62 F. Supp. 2d at 844-46. For a discussion of the policies and principles behind the *Hymowitz* decision, see Timothy D. Lytton, *Responsibility for Human Suffering: Awareness, Participation, and the Frontiers of Tort Law*, 78 CORNELL L. REV. 470, 497-99 (1993).

argued that the defendants, as a group, represented a substantial share of the market in handguns, that all were similarly negligent in their marketing, and that the causal uncertainties of linking crime guns to their manufacturers result from the fungibility, or indistinguishability, of handguns.²²³ In response, the defendant-manufacturers argued that the guns in question were not only not fungible, but were in most cases traceable to other manufacturers not joined in the suit.²²⁴

There is a certain irony in this debate. On one hand, plaintiffs often distinguish certain models of guns as especially well suited for crime when describing what makes certain marketing practices negligent.²²⁵ This would seem to contradict the claim that all guns are fungible. On the other hand, defendant-manufacturers have argued that the marketing of a particular gun is not a substantial factor in causing a crime-related injury, even where the crime gun is successfully traced, since countless other guns are available and would have served the criminal just as well.²²⁶ According to this logic, one gun is the same as any other for criminal purposes.

At the close of evidence in *Hamilton*, Judge Weinstein submitted the issue of causation to the jury under a modified, and quite novel, market share liability instruction.²²⁷ Judge Weinstein instructed the jury that “if it is not proven (by any party) that a handgun manufactured by a particular manufacturer . . . or class of manufacturers . . . was used in the shooting of a particular plaintiff, liability must be assessed against each defendant on the basis of that defendant’s percentage of national market share.”²²⁸ In the case that either the plaintiffs or defendants proved that a handgun used in the shooting of a particular plaintiff was manufactured by a particular manufacturer, however, Judge Weinstein instructed the jury to assess all of the damages against that manufacturer alone. And finally, if the jury found that one of a class of manufacturers, for instance .25 caliber handgun manufacturers, made the handgun used in the shooting of a particular plaintiff, but the jury could not trace the gun to a particular handgun manufacturer within the class, liability should be assessed against defendants in the class in proportion to their share of the national market in that class of guns. Notably missing from Judge Weinstein’s instruction was the possibility of a defendant defeating liability by proving that it did not manufacture any of the

223. Transcript of Trial at 3738-39, *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999) (No. CV-95-0049); *Hamilton*, 62 F. Supp. 2d at 844-46.

224. Trial Transcript at 3848, 3920, *Hamilton* (No. CV-95-0049).

225. See, e.g., Plaintiff’s Memo at 29, *Hamilton* (No. CV-95-0049); Expert Report at 2, 15-17, *Hamilton* (No. CV-95-0049).

226. See Lytton, *supra* note 23, at 696-97.

227. *Hamilton*, 62 F. Supp. 2d at 849-50.

228. *Id.* at 849.

guns used in any of the shootings, short of identifying the particular manufacturer that manufactured each of the guns or showing that it did not manufacture a gun in the same class as any of the guns used in the shootings. In other words, a defendant that proved that it did not manufacture any of the guns used in any of the shootings, but could prove no more than this, would still be subject to liability.

While the difficulties of tracing a crime gun, in order to determine who manufactured it and how it was marketed, might justify shifting the burden of proving causation onto defendant-manufacturers, these difficulties do not justify liability where a defendant can prove that it did not make the gun in question. The best argument in favor of shifting the burden of proving causation is that it would increase our understanding of the link between marketing guns and crime, independent of the requirements of market-share liability, especially the complex requirement of fungibility. Tracing crime guns requires that manufacturers, wholesale distributors, and retailers maintain and make available accurate sales records. Clearly, manufacturers have easier access to such information, and shifting the burden of proving causation onto them would provide a strong incentive to maintain and disclose complete distribution and sales information. Holding gun makers liable even when a successful trace revealed that they did not manufacture the crime gun in question, however, would remove this incentive to maintain and disclose marketing information. Shifting the burden of proving causation onto gun manufacturers, while allowing them to defeat liability if they can prove that their product was not a cause of the plaintiff's injury, will improve the quality of information about how guns are marketed, in a way that will be advantageous to crime victims, gun makers, and the public.

Where courts refuse to shift the burden of proving causation, they should nevertheless reject the idea that when a crime gun is successfully traced to a particular manufacturer, marketing the gun was not a cause-in-fact of the victim's injuries since, had the criminal not obtained a gun made by that manufacturer, he would easily have obtained another.²²⁹ Such reasoning would lead to the paradoxical conclusion that no gun sale caused the injury, since the injury was neither caused by the sale of the actual crime gun nor that of any other gun. Furthermore, assuming, for the sake of argument, that a defendant-manufacturer was negligent in marketing the crime gun, the ready availability of alternative guns with which to commit the crime may very well be due to similar negligence on the part of other manufacturers, for which none of them would be liable. The marketing of a particular gun, positively identified as the gun used in a crime, should be a cause-in-fact of the crime as a matter of law. Such a finding still leaves open the issues of whether the defendant's marketing

229. Cf. Lytton, *supra* note 23, at 697-98 (discussing *Halberstam* jury verdict).

of the gun was negligent in the first place, addressed above, or whether marketing of the gun was a proximate cause of injury.

The issue of proximate cause presents another challenge to future plaintiffs bringing negligent marketing claims. In the past, defendant-manufacturers have argued that an intentional criminal act breaks the proximate causal link between the manufacturer's marketing the gun and the crime victim's injury.²³⁰ In response, based on the same testimony and data about the gun industry that supports the imposition of a duty of care in marketing firearms, future plaintiffs might argue that criminal misuse of a gun is itself a foreseeable risk of marketing firearms.²³¹ Furthermore, it is precisely this risk of criminal misuse that shapes the duty in the first place. It would be nonsensical to impose a duty on gun makers to exercise reasonable care in marketing firearms in order to prevent the risk of criminal misuse and then to claim that there could never be liability for breach of this duty owing to lack of proximate cause.²³²

D. Public Nuisance

The City of Chicago recently filed a lawsuit against gun manufacturers and retail dealers based on the theory of public nuisance.²³³ According to Section 821B of the *Restatement (Second) of Torts*, upon which the lawsuit relies, the definition of a public nuisance is "an unreasonable interference with a right common to the general public."²³⁴ Whether the interference was unreasonable is a factual determination and may be based on evidence that the defendant's conduct: (1) is proscribed by statute; or (2) involves a significant interference with public health, safety, peace, comfort, or convenience; or (3) is of a continuing nature and has produced a long-lasting and significant effect upon

230. See, e.g., *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 835 (E.D.N.Y. 1999); *McCarthy v. Sturm Ruger & Co.*, 916 F. Supp. 366, 372 (S.D.N.Y. 1996); *Forni v. Ferguson*, 232 A.D.2d 176, 177 (N.Y. 1996).

231. *Hamilton*, 62 F. Supp. 2d at 835.

232. Cf. *Kush v. City of Buffalo*, 449 N.E.2d 725 (N.Y. 1983); *Bell v. Board of Educ.*, 687 N.E.2d 1325 (N.Y. 1997); RESTATEMENT (SECOND) OF TORTS § 302B (1965).

233. *City of Chicago v. Beretta U.S.A. Corp.*, No. 98-CH15596 (Ill. Cir. Ct. Cook County Filed Nov. 12, 1998). The first reported case involving a public nuisance claim against a gun manufacturer was *Bubalo v. Navegar, Inc.*, No. 96 C3664, 1998 WL 142359 (N.D. Ill. Mar. 20, 1998). See also *Young v. Bryco Arms, Corp.*, No. 98 L 6684 (Ill. Cir. Ct. Cook County filed June 9, 1998).

234. See *The Concept of Public Nuisance* (visited May 17, 1999) <www.ci.chi.il.us/Mayor/GunIndustry/SummaryGunLawSuit.html>.

the public right, of which the defendant has knowledge or reason to know.²³⁵ The Chicago claim alleges that by marketing handguns through suburban gun stores, manufacturers knowingly facilitate the sale of guns to Chicago residents whose possession of them within city limits violates city ordinances and whose misuse of them to commit crimes interferes with the health and safety of the public.²³⁶ The city's complaint demands money damages to pay for law enforcement and emergency medical costs to the city that resulted from gun violence as well as injunctive relief in the form of marketing and sales restrictions on gun dealers in the Chicago area.²³⁷

One basis for Chicago's public nuisance claim is violation of the city's municipal code which prohibits the private ownership of a handgun unless it was registered prior to March 30, 1982.²³⁸ In order to support its claim that gun manufacturers and suburban retail dealers facilitate violation of this ordinance, the city's complaint provides detailed accounts of sales of handguns by gun store employees to Chicago residents who identified themselves as such and indicated their intention to take the gun into the city.²³⁹ The city's complaint further alleges that the manufacturers who supply these dealers are aware of such sales and do nothing to prevent them. According to the complaint, "[a]ll of the defendant manufacturers produce firearms that are regularly recovered by the Chicago Police Department because they have been possessed and illegally used in the City of Chicago."²⁴⁰ For example, "[i]n the period from January 1, 1994 through June 30, 1998, at least 3933 firearms marketed by defendant Lorcin were recovered by the Chicago Police Department and found to have been possessed and used illegally in the City of Chicago."²⁴¹

This version of public nuisance theory based on violation of statute has the advantage of making it relatively easy for the plaintiff to establish injury and causation. Unlike other theories of recovery, liability under this theory requires linking the defendants' marketing and sales practices merely to violation of an ordinance, in this case against handgun possession, rather than to the

235. *Id.*

236. *Id.*; Complaint, *City of Chicago v. Beretta U.S.A. Corp.*, No. 98-CH15596 (Ill. Cir. Ct. Cook County filed Nov. 12, 1998).

237. Complaint at 71-72, *City of Chicago* (No. 98-CH15596).

238. According to Illinois case law, a claim for public nuisance may be based on "violation of an ordinance designed to protect the public from a threat to its health, welfare or safety." *The Concept of Public Nuisance*, *supra* note 234; Complaint at 11-12, *City of Chicago* (No. 98-CH15596).

239. Complaint at 18, *City of Chicago* (No. 98-CH15596).

240. Complaint at 51, *City of Chicago* (No. 98-CH15596).

241. *Id.*

commission of violent crimes.²⁴² It is also easier to recover, and therefore trace to a particular dealer or manufacturer, a handgun used in a possession offense than to recover a handgun used in the commission of a violent crime.²⁴³

Another basis for Chicago's public nuisance claim is the failure of manufacturers to take reasonable measures to prevent retail sales practices that interfere with the public right to health and safety in Chicago. Based on crime reports and an undercover police investigation, the city's complaint alleges widespread and common sales practices among Chicago area gun dealers such as

(1) selling to Chicago residents firearms that are illegal in Chicago; (2) selling firearms to individuals who are obviously making the purchase for another individual who is himself prohibited from purchasing firearms, some of whom even admit to the dealers that they are purchasing firearms for others; (3) selling large numbers of guns to a single individual over a short period of time; (4) selling guns to individuals who indicate that they will be using the gun for illegal purposes; (5) selling guns to individuals who demonstrate that they illegally will be concealing the gun on their person; (6) counseling purchasers on how to evade existing firearms regulations; and (7) knowingly selling outlawed guns.²⁴⁴

The complaint provides dozens of examples of these practices. The following are a few:

On September 30, 1998, Officer 4 entered Midwest Sporting Goods to purchase firearms. She informed the sales clerk that she was looking for a firearm that was concealable, yet powerful. The sales clerk told her that it was illegal to carry a handgun in Chicago, and that even though they are supposed to tell Chicagoans that it is illegal, 90% of the people who purchase guns in his store are from

242. Interview with Lawrence Rosenthal, Deputy Corporation Counsel, City of Chicago (May 25, 1999).

243. Consequently, most guns reported in BATF trace data are involved in possession offenses. *See supra* note 198 and accompanying text.

244. *See The Concept of Public Nuisance, supra* note 228 (summarizing Complaint, City of Chicago v. Beretta U.S.A. Corp., No. 98-CH15596 (Ill. Cir. Ct. Cook County Filed Nov. 12, 1998)). The U.S. Attorney for Chicago is reportedly bringing criminal charges against four of the gun dealers included in the undercover operation. *See Barry Neier, U.S. Appears Prepared to Indict 4 Gun Dealers in Chicago Sting*, N.Y. TIMES, Aug. 18, 1999, at A17.

Chicago. The sales clerk told Officer 4 that the questions on the ATF Form 4473 were stupid, but that she had to answer them anyway. The sales clerk then recommended to her that she have separate purchase orders for each of the two firearms and pick them up separately so that the store did not need to inform ATF of a multiple purchase.²⁴⁵

* * *

On October 8, 1998, Officers 2 and 3 entered Breit & Johnson [Sporting Goods, Ltd.] to purchase firearms. Officer 3 expressed an interest in purchasing small semi-automatic pistols. When he told the sales clerk that he did not have a [Firearm Owner Identification] card [required for the purchase of a firearm in Illinois], the sales clerk said that while the sales clerk could not hand him a firearm to examine, he could hand it to Officer 2, who could in turn hand it to Officer 3. In this way, Officer 3 examined different firearms. They purchased two .380 caliber pistols.²⁴⁶

* * *

On August 19, 1998, Officer 2 returned to B&H [Sports, Ltd.] with Officer 3. Officer 2 told the same sales clerk with whom he had dealt on August 14, that Officer 6 owed him money and was likely on the run. Officer 2 stated that Officer 6 had to be dealt with before he left town, and said he needed to “get a Tec for his ass.” Officer 3 agreed that they had to “take care of business today.” The sales clerk recommended an Intratec 9mm assault weapon that could fire 100 rounds per load, telling them, “You made a good choice; this will take care of business.” The sales clerk then added the Intratec 9mm assault weapon Officer 2 had just selected to the purchase order he had created on August 14 [in order to allow Officer 2 to take possession of the gun immediately without waiting five days as mandated by statute].²⁴⁷

While these examples provide evidence of the regularity with which retail dealers illegally supply guns to individuals engaged in criminal activity, the guns sold to undercover police officers were obviously not involved in any violent

245. Complaint at 42, *City of Chicago* (No. 98-CH15596).

246. Complaint at 33, *City of Chicago* (No. 98-CH15596).

247. Complaint at 27, *City of Chicago* (No. 98-CH15596).

crimes that affected public health and safety. Conversely, while guns used in violent crimes have been traced to these retail dealers, there is no direct evidence that the guns were sold in an illegal or careless manner. The link between illegal and negligent sales practices like those described in the undercover investigation and gun violence documented in police reports entails a certain amount of speculation, although far less than in complex studies like the one presented in the *Hamilton* case. The tolerance of courts and juries for such speculation remains to be seen.

One potential objection to public nuisance theory is that it would hold manufacturers liable not for their own wrongful acts but rather for not preventing the wrongful acts of suburban retail dealers. According to the *Restatement*, however, the conduct necessary to make an actor liable for public nuisance may consist of an act or a failure to act under circumstances in which the defendant is under a duty to take action to prevent or abate the nuisance.²⁴⁸ Thus, the liability of gun manufacturers for public nuisance depends on the issue of duty, which courts are likely to address just as they would under a negligent marketing theory.

The City of Chicago is likely to argue that the duty of gun manufacturers to exercise reasonable care to prevent illegal and negligent sales practices by retail dealers is based on the foreseeability of such practices and the special relationship between manufacturers and retail dealers. The city's complaint alleges that these sales practices are the reasonably foreseeable result of supplying guns to retail dealers without any instruction, regulation, or supervision from the manufacturer.²⁴⁹ The complaint also implies that manufacturers could exercise significant control over retail dealers by training and monitoring them and refusing to supply irresponsible dealers.²⁵⁰ The ability of manufacturers to control the conduct of retail dealers in these ways might lead courts to find a special relationship between the two that would lead them to impose a duty of care on manufacturers.²⁵¹

E. Deceptive Trade Practices

Several cities have filed suit against gun manufacturers under a theory of deceptive trade practices.²⁵² The plaintiffs in these suits allege that

248. RESTATEMENT (SECOND) OF TORTS § 824 (1965).

249. Complaint at 69, *City of Chicago* (No. 98-CH15596).

250. Complaint at 72, *City of Chicago* (No. 98-CH15596).

251. *Cf. Read v. Fetzer*, 990 S.W.2d 732, 735-36 (Tex. 1998) (imposing a duty of care on vacuum cleaner manufacturer to protect customers from non-employee sales representatives).

252. *See, e.g.,* Complaint at 18, *City of Bridgeport v. Smith & Wesson, Inc.*, No.

manufacturers' advertising claims that gun ownership in the home increases safety contradict public health studies, and that these claims constitute intentional misrepresentation in violation of state laws governing deceptive trade practices.²⁵³ These lawsuits rely heavily on controversial social science that highlights the risks of gun ownership while failing to consider seriously opposing studies concerning the crime deterrence benefits of gun ownership.²⁵⁴ Furthermore, given the sustained disagreement among social scientists, it seems unfair to insist that gun manufacturers are intentionally misleading consumers by making controversial advertising claims about the crime deterrence benefits of gun ownership in the home.

Having discussed in this part of the Article five doctrinal approaches to gun manufacturer liability for crime-related injuries—strict liability for abnormally dangerous activities, product liability for design defect, negligent marketing, public nuisance, and deceptive trade practices—the next part of the Article discusses the proper role of the tort system in regulating the firearms industry in relation to legislatures and administrative agencies.

III. THE PROPER ROLE OF THE TORT SYSTEM IN REGULATING THE FIREARMS INDUSTRY

Several courts have dismissed tort claims against gun manufacturers on institutional grounds, arguing that regulation of the firearms industry is a job for legislatures and regulatory agencies, not common law courts.²⁵⁵ These dismissals place a burden on those who favor liability, under any of the five approaches discussed above in Part II, to define and justify a role for the tort system in regulating the gun industry. This part of the Article attempts to do just that by suggesting that the tort system is institutionally well suited to

CV-99-036-1279 (Conn. Super. Ct. filed Jan. 27, 1999); Complaint at 34, *California v. Arcadia Mach. & Tool, Inc.*, No. BC210894 (Cal. Super. Ct. Los Angeles filed May 25, 1999); Complaint at 32, *California v. Arcadia Mach. & Tool, Inc.*, No. 303753 (Cal. Super. Ct. San Francisco filed May 25, 1999).

253. Complaint at 18-21, *City of Bridgeport* (No. CV-99-036-1279); Complaint at 38-39, *California v. Arcadia Mach. & Tool, Inc.*, No. BC210894 (Cal. Super. Ct. Los Angeles filed May 25, 1999); Complaint at 31, *California v. Arcadia Mach. & Tool, Inc.*, No. 303753 (Cal. Super. Ct. San Francisco filed May 25, 1999).

254. See *supra* notes 50-112 and accompanying text (discussing design defect claims).

255. See, e.g., *Patterson v. Rohm Gessellschaft*, 608 F. Supp. 1206, 1216 (N.D. Tex. 1985); *Mavila v. Stoeger Indus.*, 574 F. Supp. 107, 111 (D. Mass. 1983); *Linton v. Smith & Wesson*, 469 N.E.2d 339, 340 (Ill. App. Ct. 1984); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661, 665 (Wash. Ct. App. 1998).

complement the regulatory efforts of legislatures and administrative agencies, especially in the case of the gun industry. The Article then examines the limits of this complementary role, in particular the problems that arise when regulation involves the evaluation of complex data. Next, the Article discusses how the municipal suits, legislative responses to them, and the current politics of gun control may undermine the tort system's ability to fulfill this complementary role. Finally, this part of the Article considers comparisons between the tort system's role in addressing gun violence and its role in dealing with automobile safety, toxic torts, and tobacco.

A. The Tort System as a Complement to Legislative and Administrative Regulation

Commentators have suggested that regulation of the gun industry ought to be the exclusive province of legislatures and administrative agencies under their control.²⁵⁶ Legislatures, the argument goes, are democratically accountable, while courts are not, and administrative agencies enforce rules proactively across an entire industry, whereas courts can only enforce rules after injury has occurred in a particular case. This view oversimplifies matters. Courts have an important role to play in regulating industries, complementing the efforts of legislatures and the regulatory agencies that carry out their mandates.²⁵⁷ Administrative agencies have several important limitations which courts do not have.

First, an industry may exert significant influence over the agencies that are created to govern it.²⁵⁸ For example, in recent years, the Bureau of Alcohol, Tobacco and Firearms (BATF) has become increasingly reluctant to publish information unfavorable to the gun industry.²⁵⁹ In contrast to agency officials, tort plaintiffs have both the incentive and the power to uncover damaging industry information. Tort plaintiffs are likely to dig deeper and more

256. See, e.g., Calio & Santarelli, *supra* note 14, at 505-06; Philip Oliver, *Rejecting the 'Whipping-Boy' Approach to Tort Law: Well-Made Handguns are not Defective Products*, 14 U. ARK. LITTLE ROCK L. J. 1, 4-6 (1991).

257. For a discussion of the complementary role of courts in current efforts to regulate tobacco products, see Peter D. Jacobson & Kenneth E. Warner, *Litigation and Public Health Policy Making: The Case of Tobacco Control*, 24 J. of Health Pol., Pol'y & L. 769, 770 (1999).

258. See PETER BELL & JEFFREY O'CONNELL, ACCIDENTAL JUSTICE 97 (1997) (discussing the concept of "agency capture"); Bogus, *War on the Common Law*, *supra* note 15, at 76.

259. DIAZ, *supra* note 213, at 6-7; see also Fox Butterfield, *Limits on Power and Zeal Hamper Firearms Agency*, N.Y. TIMES, July 22, 1999, at A1.

persistently into the highly secretive gun industry than any government regulatory agency.²⁶⁰

Second, regulatory agencies promulgate general industry standards.²⁶¹ Gun makers often find new ways around these limitations without running afoul of the letter of the law. For instance, at least one manufacturer has marketed its weapons in the form of “firearms parts kits” in order to avoid the extensive federal and state regulation governing the sale of “firearms.”²⁶² The threat of potential tort liability provides gun makers with an incentive to stay well within the letter of the law.²⁶³

Third, regulatory enforcement in the gun industry is severely limited by lack of agency resources in comparison to the extent of industry activity.²⁶⁴ In 1997, BATF agents were able to make on site inspections to only 13,000 of the approximately 100,000 federally licensed firearms dealers.²⁶⁵ The threat of tort liability provides incentives for the industry to police itself.

Finally, if the courts impose restrictions on the industry that provoke popular outrage, legislatures are free to overturn them through legislation. Deterring unreasonable risk has traditionally been a goal of the common law tort system. In the modern regulatory state, the tort system plays an essential role in complementing the work of legislatures and administrative agencies.

B. Complex Statistical Analysis and the Institutional Limits of Common Law Courts

The complementary role of the tort system in regulating industry is limited to the types of tasks that common law courts are well suited to perform. For example, it is appropriate for common law courts to make regulatory decisions that require close examination of particular events, since this is a task that courts perform well. By contrast, it is inappropriate for common law courts

260. DIAZ, *supra* note 213, at 5.

261. See BELL & O'CONNELL, *supra* note 258, at 97.

262. See Lytton, *supra* note 23, at 695. Another example of violating the spirit of a regulation while adhering to the letter of the law has occurred when legislatures have banned a certain model of gun and manufacturers have made minor design modifications in order to continue marketing the gun under a different name. See DIAZ, *supra* note 206, at 120.

263. See Bogus, *War on the Common Law*, *supra* note 15, at 82.

264. See BELL & O'CONNELL, *supra* note 258, at 97.

265. DIAZ, *supra* note 213, at 41-43; see also Fox Butterfield, *Limits on Power and Zeal Hamper Firearms Agency*, N.Y. TIMES, July 22, 1999, at A1; Robert J. Spitzer, *Enforcing Gun Laws*, N.Y. TIMES, July 24, 1999, at A14.

to make regulatory decisions that rely on complex and highly speculative statistical analysis, since courts are not well equipped to perform this task.

In the case of design defect claims against gun manufacturers, courts are called upon to make regulatory decisions concerning firearms design. Where plaintiffs have asked courts to make these decisions based solely on risk-utility analysis, courts have dismissed their claims. In dismissing these claims, courts have refused to attempt the task of quantifying the risks and utility of handguns, a task that requires reliance on complex and highly controversial data. Social scientists cannot agree on an estimate for the number of guns in the U.S., much less their total risks and utilities. As long as such uncertainty persists among experts concerning the reliance of available data, regulatory decisions that rely on this data ought to be left to legislatures and regulatory agencies. These institutions are at least democratically accountable for their mistakes. If need be, they can legitimately make such decisions on political grounds. They can also revisit their decision later when more information is available.

Courts may be more willing to make regulatory decisions concerning firearms design in design defect cases where the plaintiff alleges a safer alternative design. Comparing the relative safety and utility of alternative gun designs involves far less complexity and speculation than determining the overall risks and utility of guns.²⁶⁶ Furthermore, this simpler comparative analysis requires detailed examination of each design, which is a task courts are well suited to perform. Because courts are well suited to perform the kind of analysis required by design defect claims based on a safer alternative design, they are less likely to dismiss these claims.²⁶⁷

Negligent marketing claims require courts to make regulatory decisions concerning limitations on the promotion, distribution, and sale of guns. These decisions require linking particular marketing practices to an unreasonable risk of gun violence. Courts are better suited to making these decisions where evaluating the allegation of such a link relies on detailed examination of specific facts surrounding the sale of a gun and a particular act of violence committed with the gun. The *Halberstam* case provides a model for the type of negligent marketing claim that courts are well suited to evaluate. By contrast, the *Hamilton* negligent marketing claim relied on complex statistical analysis and a high degree of speculation by experts. The court was not well equipped to evaluate this complex statistical analysis, as evidenced by the jury's reported

266. See James Henderson & Aaron Twerski, *Achieving Consensus on Defective Product Designs*, 83 CORNELL L. REV. 867, 883-87 (1998).

267. See, e.g., *Dix v. Beretta U.S.A. Corp.*, No. 750681-9 (Cal. Super. Ct. Alameda County Nov. 16, 1998) (allowing accidental shooting case based on reasonable alternative design theory to jury, who found for defendants).

disregard of it.²⁶⁸ While the resulting verdict in favor of the plaintiffs has generated a great deal of enthusiasm among advocates of liability, the *Hamilton* case offers an example of a highly speculative negligent marketing claim that courts are not well suited to evaluate.

Evaluating negligent marketing claims that rely on complex statistical analysis requires a level of training beyond the capacities of most judges and jurors. While parties can educate judges and jurors about a subject during the course of a trial, it is unrealistic to expect judges and jurors to acquire the analytical sophistication required to evaluate the work of social science experts. A proper assessment of the *Hamilton* negligent marketing claim requires a critical assessment of the methodological assumptions and degree of speculation employed by highly trained experts. This is not a matter of judging the veracity or competence of the experts, which juries do in many tort cases, but rather of passing judgment on the soundness of theoretical approaches about which the experts honestly disagree. Where regulatory decisions require choosing between competing theoretical approaches that are controversial among competent experts, these decisions should be left to legislatures and regulatory agencies.

Dismissing design defect and negligent marketing claims that rely on complex statistical analysis constrains the regulatory impact of the tort system. The safer alternative design and *Halberstam*-type negligent marketing claims defended here rely on a low level of speculative analysis and would have a limited impact on the industry. At best they could encourage marginally safer gun designs and eliminate particular marketing practices. By contrast, the risk-utility design defect claims and the *Hamilton*-type negligent marketing claims rely on a high level of speculative analysis and would have a greater impact on the industry. Were courts to impose liability in these cases, the industry would be forced to internalize the costs of gun violence and would be forced to completely reorganize the way it markets guns. The Chicago public nuisance theory, based on the detailed accounting of individual sales that reflect widespread marketing practices, is an innovative attempt to combine low analytical complexity with high regulatory impact.

Determining the level of complex statistical analysis that places a claim beyond the institutional competence of a court is a matter of judgment and will vary depending upon the judge. The history of claims against gun manufacturers for crime-related injuries indicates that Judge Weinstein's tolerance for the highly speculative evidence presented by the *Hamilton* plaintiffs is far beyond that of most judges. Additionally, the level of complexity tolerated by judges may change over time as general knowledge of a subject develops. Thus, the increasing documentation of particular instances of gun

268. O'Connell & Barrett, *supra* note 206, at A1.

industry abuse that reflect industry-wide patterns, as in the Chicago nuisance claim, may well provide the basis for future high impact claims that judges feel comfortable submitting to a jury.

C. Municipal Suits, Industry Responses, and the Politics of Gun Control

In the fall of 1998, the City of New Orleans was the first municipality to file a lawsuit against a group of gun manufacturers.²⁶⁹ Shortly thereafter, Chicago and Bridgeport filed similar lawsuits, and more recently additional lawsuits have been filed by other cities, including Miami, Atlanta, Cincinnati, Boston, Cleveland, St. Louis, Newark, Los Angeles, and San Francisco.²⁷⁰ A stated aim of these municipal suits is greater regulation of the firearms industry.²⁷¹ If this result is achieved by obtaining judgments against manufacturers, then the tort system will be able to perform its proper complementary role in regulating the industry. If, however, this result is achieved by filing so many municipal claims simultaneously that manufacturers are forced to settle solely to avoid prohibitive defense costs, as some have advocated, then such a victory will undermine the integrity of the tort system and could seriously erode public support for it.²⁷² Similarly, if manufacturers avoid liability by successfully lobbying for statutory immunity, as they have

269. Paul M. Barrett, *As Lawsuits Loom, Gun Industry Presents A Fragmented Front*, WALL ST. J., Dec. 9, 1999, at A1.

270. Fox Butterfield, *Suits Hold Microscope Over Gun Makers*, N.Y. TIMES, May 27, 1999, at A14; Vanessa O'Connell, *Cleveland Becomes Sixth City to Sue a Group of Gun Manufacturers*, WALL ST. J., Apr. 9, 1999, at B3; Mark Schlinkman, *St. Louis Files Lawsuit Against 27 Defendants in Gun Industry*, ST. LOUIS POST DISPATCH, May 1, 1999, at 8; see Firearms Litigation Clearinghouse, *Firearms Litigation: Current Cases* (visited Oct. 6, 1999) <www.firearmslitigation.org/cases.html>.

271. Paul M. Barrett, *Attacks on Firearms Echo Earlier Assault on Tobacco Industry*, WALL ST. J., Mar. 12, 1999, at A1; Fox Butterfield, *Results in Tobacco Litigation Spur Cities to File Gun Suits*, N.Y. TIMES, Dec. 24, 1999, at A1; Fox Butterfield, *California Cities Sue Gun Makers Over Sales Methods*, N.Y. TIMES, May 25, 1999, at A20; Fox Butterfield, *Bill Would Subject Guns to Federal Safety Controls*, N.Y. TIMES, Mar. 3, 1999, at A10. Recently, the NAACP filed a class action lawsuit against gun manufacturers in Judge Weinstein's court seeking only injunctive relief in the form of marketing restrictions. See Fried, *supra* note 8, at B3.

272. Fox Butterfield, *Results in Tobacco Litigation Spur Cities to File Gun Suits*, N.Y. TIMES, Dec. 24, 1999, at A1; Fox Butterfield, *California Cities Sue Gun Makers Over Sales Methods*, N.Y. TIMES, May 25, 1999, at A20; Laura Mansnerus, *Moving Target: Gun Makers*, N.Y. TIMES, Feb. 14, 1999, at WK5.

already begun to do, then it is they who will undermine the integrity of the tort system, escaping liability on the basis of political influence rather than doctrinal principle.

While the doctrinal bases for the municipal suits are substantially the same as those of suits by individual plaintiffs, the municipal suits have an institutional dimension that distinguishes them. Unlike individual crime victims, the cities regularly do business with the gun industry in ways that may undermine their claims. Several cities have recently purchased for their police departments the very same guns which they have alleged are defectively designed. Even worse, in a deal between the city of New Orleans and the handgun manufacturer Glock, the city obtained a credit towards the purchase of new guns by giving Glock crime guns that its police force had confiscated. When questioned at an ABA conference about the city's responsibility for the potential resale of the guns to criminals, New Orleans Mayor Marc Morial said that once the city handed them over to Glock, it was no longer the city's responsibility what Glock did with them.²⁷³

Another aspect of the municipal suits that distinguishes them from individual claims is the difficulty in calculating damages. The municipal suits seek to recover the costs of city services related to gun violence. Not all gun violence, however, results from negligent marketing practices. While municipal plaintiffs have calculated the total costs of city services related to gun violence, they may have no reliable way of estimating the percentage of those costs that result from incidents caused by negligent marketing.

An even greater difficulty for the municipal suits is possible legal limitation on the ability of cities to recover the costs of municipal services, usually paid for by tax dollars, through tort actions. A trial court recently dismissed Cincinnati's lawsuit against the gun industry holding that "absent statutory authorization, the City may not recover for expenditures for ordinary public services which it has a duty to provide."²⁷⁴

Perhaps the most important aspect of the municipal suits that distinguishes them from individual claims is the amount of resources that the cities can invest in litigation and the magnitude of damages suffered by municipal entities. Efforts by some mayors to file suits simultaneously in order to wage a coordinated campaign against the industry may pressure manufacturers into a settlement regardless of the likelihood of liability so as to avoid the costs of

273. Mayor Marc Morial, Comments at ABA Conference on Gun Violence Liability: Taking Aim at the Gun Industry—Are Guns the Next Tobacco? (June 5, 1999).

274. *City of Cincinnati v. Beretta U.S.A.*, No. A9902369, 1999 WL 809838, at *10 (Ohio Ct. C.P. Oct. 7, 1999).

defending so many suits at once.²⁷⁵ The recent example of simultaneous lawsuits by state attorneys general pressuring the tobacco industry to settle may make this strategy very attractive to some municipal plaintiffs.

This strategy, however, has already been portrayed by the industry, and may be perceived by the public, as regulation by blackmail, a misuse of legal process by mayors bent on achieving gun control measures that they were powerless to obtain in their own city councils and state legislatures.²⁷⁶ Such a perception could ignite a popular backlash against the tort system, creating grass roots support for industry efforts to shrink the regulatory role of the tort system through tort reform.²⁷⁷ While the mayors may be able to outgun the industry in the battle over firearms regulation, they should be careful not to cause the public to rise up in arms against the tort system.

The firearms industry has responded to these municipal suits in a variety of ways. Shortly after the first municipal suits were filed, the National Shooting Sports Council (NSSC), representing the firearms industry, with help from the National Rifle Association (NRA), lobbied state legislatures to pass legislation prohibiting cities from bringing tort claims against gun manufacturers.²⁷⁸ So far, these efforts have been successful in thirteen states, including Texas,

275. See Fox Butterfield, *Results in Tobacco Litigation Spur Cities to File Gun Suits*, N.Y. TIMES, Dec. 24, 1999, at A1; Fox Butterfield, *California Cities Sue Gun Makers Over Sales Methods*, N.Y. TIMES, May 25, 1999, at A20; Mansenerus, *supra* note 266, at WK5; see also Paul M. Barrett, *HUD May Join Assault on Gun Makers*, WALL ST. J., July 28, 1999, at A3; Barry Meier, *In Seeking Firearms Deal, Spitzer May Set Standard*, N.Y. TIMES, July 22, 1999, at B5. In toxic tort litigation, defendants sometimes settle cases that they are likely to win in order to avoid high defense costs. See KENNETH FOSTER ET AL., *PHANTOM RISK: SCIENTIFIC INFERENCE AND THE LAW* 35-36 (1994); Peter Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 492-94 (1998).

276. *The President's Column*, AM. RIFLEMAN, Apr. 1999, at 12.

277. There is already some reason to fear such backlash. A January 1999 survey found that 66% of respondents opposed "government suits against gun makers" and only 19% supported such efforts, with 15% unsure. Paul M. Barrett, *Jumping the Gun*, WALL ST. J., Mar. 12, 1999, at A1. Additionally, in reaction to the success of plaintiffs in mass toxic tort litigation, Congress recently passed a law limiting the rights of class action plaintiffs to file in state courts. Stephen Labaton, *House Passes Bill That Would Limit Class-Action Suits*, N.Y. TIMES, Sept. 24, 1999, at A1.

278. Fox Butterfield, *Verdict Against Gun Makers is Likely to Prompt More Suits*, N.Y. TIMES, Feb. 13, 1999, at B2; Rebecca Carr, *Barr's Bill on Gun Suits Draws Opposition*, ATLANTA J. & CONST., Mar. 10, 1999, at A4; David E. Rosenbaum, *Echoes of Tobacco Battle in Gun Suits*, N.Y. TIMES, Mar. 21, 1999, at 32.

Georgia, and Louisiana.²⁷⁹ Legislation proposed in Florida went so far as to make it a crime to file a tort claim against a gun manufacturer on behalf of a municipality.²⁸⁰

The success of industry and NRA efforts to obtain immunity against municipal suits for gun manufacturers reflects the political power of the gun lobby to influence state legislatures. Such success, however, undermines the integrity of the tort system, determining liability on the basis of political muscle rather than judicial procedure. The industry's legislative efforts also belie a cynicism behind its complaints about the mayors' manipulation of the tort system.

In addition to seeking legislative immunity, some gun manufacturers may consider filing for bankruptcy protection a good litigation strategy against the municipal suits. Filing for bankruptcy would significantly increase plaintiffs' litigation costs, could place the litigation before federal bankruptcy judges rather than urban juries in state courts, and might limit the amount of damages that plaintiffs could ultimately recover.²⁸¹ Davis Industries, the first manufacturer to try this strategy, was denied bankruptcy protection against potential liability in the municipal suits.²⁸²

Taking a more conciliatory strategy, one major gun manufacturer has responded to the municipal suits by dramatically reducing its gun sales to the civilian market. In October 1999, Colt's Manufacturing Co. announced that it was discontinuing production of seven handgun models designed for target shooting and self-defense.²⁸³ The company publicized plans to focus instead on gun sales to the military and law enforcement agencies, while pursuing the development of a marketable smart gun.²⁸⁴ While Colt's has denied that its withdrawal from the civilian market for inexpensive handguns was motivated by pressure from lawsuits against it, one senior Colt's executive was quoted as

279. See *Firearms Industry Immunity Legislation* (visited July 19, 1999) <<http://www.gunfree.org/>>.

280. Florida Senate Bill 1586 proposed that any municipal employee who, in his official capacity, brought a lawsuit against a gun manufacturer alleging design defect in the absence of a malfunction or negligent marketing would be guilty of committing a third degree felony. S.B. 1586, 1999 Leg., Reg. Sess. (Fla. 1999). The Florida Senate ended consideration of this bill in April 1999, following the Littleton massacre.

281. Fox Butterfield, *Lawsuits Lead Gun Maker to File for Bankruptcy*, N.Y. TIMES, June 24, 1999, at A14.

282. *Colt's Handgun Plan Heats Up Debate* (visited Oct. 12, 1999) <<http://www.dailynews.yahoo.com/h/ao/19991012/cr/19991012001.html>>.

283. Barbara Vobejda, *Colt to Discontinue Cheaper Handguns*, WASH. POST, Oct. 12, 1999, at E1.

284. *Id.*

saying that the company was having trouble securing credit to pay its suppliers due to fears that the litigation would undermine its ability to repay loans.²⁸⁵

Another major gun manufacturer, in response to the municipal suits, has voluntarily agreed to supervise retail dealers who sell its weapons. Smith & Wesson Corp. has promulgated a "Stocking Dealer Code of Responsible Business Practices," which requires dealers to pledge that they will sell safety locks with all Smith & Wesson guns and that they will monitor buyers to avoid illegal purchases. The company claims that it will refuse to supply any dealer who refuses to sign the code or is accused of illegal sales.²⁸⁶

A group of gun manufacturers has recently entered into settlement negotiations with a number of municipal plaintiffs. The manufacturers may be motivated by more than merely fear of mounting litigation costs. The *Hamilton* verdict in New York federal court and the *Merrill* decision in the California Court of Appeals have made it more likely that future claims against gun makers will survive pre-trial defense motions for dismissal and summary judgment. A few large jury verdicts against the industry could drive even the most established manufacturers out of business.²⁸⁷

The settlement talks have reportedly focused on industry acceptance of voluntary marketing restrictions and design modifications in exchange for the cities dropping their demands for monetary damages.²⁸⁸ The primary advantage of such a settlement is that it would avert the risk of damaging jury verdicts against the industry while achieving the municipal plaintiffs' regulatory goals without either side incurring potentially enormous litigation costs. The disadvantage, however, is that a settlement agreement would have the same limitations as legislative regulation. For example, any potential settlement agreement is likely to have unforeseen loopholes which manufacturers might exploit in the future. More generally, any settlement agreement would limit industry incentives for self-regulation to the explicit terms of the agreement. By contrast, a judgment against the industry would create incentives for manufacturers to avoid irresponsible marketing strategies or weapon designs that might not be contemplated in a settlement agreement.

The lawsuits and the settlement talks are merely one front in the long-running political battle over gun control. A brief analysis of this battle will place

285. Mike Allen, *Colt's to Curtail Sale of Handguns*, N.Y. TIMES, Oct. 11, 1999, at A1; *Colt's Consolidates Some Product Lines* (visited Oct. 11, 1999) <http://www.dailynews.yahoo.com/h/nm/19991011/bs/guns_colt_1.html>.

286. David B. Ottaway & Barbara Vobejda, *Gun Manufacturer Requires Dealers to Sign Code of Ethics*, WASH. POST, Nov. 22, 1999, at A11.

287. See Schuck, *supra* note 275, at 486.

288. FoxButterfield, *Safety and Crime at the Heart of Talks on Gun Lawsuits*, N.Y. TIMES, Oct. 2, 1999, at A1.

the municipal suits within a broader political context and illuminate how recent changes in the politics of gun control have and will continue to influence tort claims against gun manufacturers in the future.

Throughout the 1980s and most of the 1990s, gun violence was considered primarily an urban problem. Thus, it is no surprise that high crime cities such as New Orleans, Chicago, Miami, Detroit, and Bridgeport have filed claims against the gun industry. Gun control measures in general, and tort claims against gun makers in particular, are well suited to the anti-crime platforms of liberal mayors eager to find solutions to crime that do not require raising new taxes. Traditionally, rural and suburban communities have been either indifferent or opposed to gun control.²⁸⁹

The massacre at Columbine High School in Littleton, Colorado changed gun control politics dramatically, making gun violence a suburban concern. On May 20, 1999, two Columbine High School students, armed with an assortment of semi-automatic pistols and long guns, entered the school and killed twelve students and one teacher and wounded twenty others before killing themselves.²⁹⁰ Following similar shootings at suburban schools in Pearl, Mississippi and West Paducah, Kentucky in 1997, and Springfield, Oregon and Jonesboro, Arkansas in 1998, the Littleton massacre transformed gun violence into a suburban problem.²⁹¹

289. See Mark Johnson, *Virginia Legislators Split Votes; Gun Issue Divided by Rural-Urban Line*, RICHMOND TIMES DISPATCH, June 20, 1999, at A11; Wendy Kock, *The Shift on Gun Control: A More Receptive Congress Hears Push for Tough Laws*, USA TODAY, May 26, 1999, at 1A (noting growing support for gun control measures in suburban communities in the wake of the Littleton massacre); Thomas McGoldrick, *Happiness is a Warm Gun: The Sixth Circuit Shoots Down a Ban on Assault Weapons*, 5 TEMP. POL. & CIV. RTS. L. REV. 203, 212-14 (1996) (analyzing rural opposition to gun control); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 281 (1990) ("In general, states with largely urban populations tend to favor gun control while states with rural populations often prefer to provide citizens with broad rights to own and carry guns."); Terry M. Neal, *Moderate Gun Control Gains Support*, WASH. POST, Sept. 9, 1999, at A11 (increasing suburban support for gun control following Littleton massacre).

290. Sam H. Verhovek, *2 Are Suspects; Delay Caused By Explosives*, N.Y. TIMES, Apr. 22, 1999, at A1.

291. Allison Mitchell & Frank Bruni, *Suburban Districts Seen as Key In the Debate Over Gun Control*, N.Y. TIMES, June 16, 1999, at A1; Katharine Q. Seelye, *Killings in Littleton Pierced Soul of the Nation, Clinton Says*, N.Y. TIMES, May 21, 1999, at A23; *Other Shootings Involving Students*, N.Y. TIMES, Apr. 21, 1999, at A17.

Just as important, Littleton also transformed gun violence into a child safety issue. As long as gun violence was contained to inner cities, it was considered a juvenile crime problem primarily among African American boys. Calls for stiffer juvenile sentencing and more prisons were common political responses to urban gun violence.²⁹² Talk of ineducable “super predator” juvenile criminals became fashionable among criminologists.²⁹³ After Littleton, gun violence in predominantly white suburban schools has caused many to reconceptualize gun violence as a child safety issue.²⁹⁴ Calls for counseling to alleviate the social pressures and feelings of isolation suffered by high school adolescents, along with stronger school security, have been the most common

292. See, e.g., Governor James R. Thompson, *Forward to Symposium on the Attorney General’s Task Force on Violent Crime*, 73 J. CRIM. L. & CRIMINOLOGY 867, 868-69 (1982); Roger Starr, *Crime: How It Destroys, What Can Be Done*, N.Y. TIMES, Jan. 27, 1985, at 19; *Symington on Crime: Tour De Force Proposals*, PHOENIX GAZETTE, Nov. 3, 1993, at B6; *The Enemy Within: Violent Youth Prey Upon the Innocent*, SAN DIEGO UNION-TRIB., Dec. 2, 1993, at B12; *Top Police Officials Would Reply to Rise in Violent Crime*, CHRISTIAN SCI. MONITOR, Apr. 2, 1981, at 6; Karl Zinsmeister, *Growing Up Scared: Spurred on by Family Instability, Violent Crime Now Touches Millions of Young Lives*, ATLANTIC MONTHLY, June 1990, at 49.

293. John Dilulio Jr., *Moral Poverty: The Coming of the Super-Predators Should Scare Us Into Wanting to Get to the Root Causes of Crime a Lot Faster*, CHI. TRIB., Dec. 15, 1995, at 31 (coining the term “super-predator” to denote juvenile criminals); Elizabeth Joh, *If It Suffices to Accuse: United States v. Watts and the Reassessment of Acquittals*, 74 N.Y.U. L. REV. 887, 891 (1999) (discussing the use of the term “super-predator” in criminal sentencing classifications); FRANK ZIMRING, *AMERICAN YOUTH VIOLENCE* 49-181 (1998) (analyzing the rhetorical aims of those who use the term “super-predator” in youth violence studies).

294. Frank Bruni, *Mother Love: Democrats Try Pitching to Maternal Instincts*, N.Y. TIMES, July 4, 1999, at 5; Alison Mitchell, *Democrats Gain Ground, An Inch, On Gun Control*, N.Y. TIMES, May 21, 1999, at A23; Alison Mitchell & Frank Bruni, *Suburban Districts Seen as Key In the Debate over Gun Control*, N.Y. TIMES, June 16, 1999, at A1; John O’Neil, *Vital Signs: Safety: When Children and Guns Live Together*, N.Y. TIMES, June 15, 1999, at F8.

response to the Littleton shooting.²⁹⁵ The press has tended to portray suburban school shooters as troubled youth, not super predators.²⁹⁶

The transformation of gun violence into a suburban child safety issue has already had a dramatic effect on gun control politics, and it is likely to affect pending and future tort claims against the gun industry. First, this transformation has weakened gun lobby influence in state legislatures. Immediately following the Littleton massacre, several state legislatures rejected or dropped pending legislation that would have granted the gun industry immunity against municipal tort claims as well as measures that would have liberalized gun ownership restrictions.²⁹⁷ Gun industry regulation became a top priority in Washington D.C., where President Clinton trumpeted his support for gun control measures and Congress hotly debated measures further restricting gun sales.²⁹⁸

Second, the transformation of gun violence into a child safety issue popular among suburban constituencies may entice state attorneys general into filing suits against the gun industry. Attorneys general in New York and Connecticut have reportedly been considering filing suits.²⁹⁹ The entrance of state attorneys general will significantly increase the pressure on the gun industry to settle suits against it by adopting voluntary marketing restrictions and design modifications. Third, and perhaps most importantly, public attitudes about the gun industry and

295. See, e.g., David Firestone, *After Shootings, Nation's Schools Add to Security*, N.Y. TIMES, Aug. 13, 1999, at A1; Erica Goode, *Deeper Truths Sought in Violence by Youths*, N.Y. TIMES, May 4, 1999, at A28; Stephen S. Hall, *The Troubled Life of Boys: The Bully in the Mirror*, N.Y. TIMES, Aug 22, 1999, at 31; William Hamilton, *How Suburban Design is Failing Teenagers*, N.Y. TIMES, May 6, 1999, at F1; Anne Imse, *Coping with Jonesboro: Arkansas Grapples with Legacy of School Shootings*, DENVER ROCKY MOUNTAIN NEWS, June 14, 1999, at 4A; Ann Marie C. Lenhard & Michael V. Hasel Swerd, *School Violence: We All Share The Responsibility of Keeping Our Children Safe*, BUFFALO NEWS, June 13, 1999, at 1H; Bryan Weber, *Cherry Creek's Incoming Head of the Class New Superintendent Monte Moses Places Priorities on Diversity, Planning for Growth*, DENVER ROCKY MOUNTAIN NEWS, June 6, 1999, at 28A.

296. Cf. *Young Gunman at Georgia High School Will Be Tried as an Adult*, N.Y. TIMES, Aug. 12, 1999, at A12.

297. James Brooke, *Shootings Firm Up Gun Control Cause, At Least for Present*, N.Y. TIMES, Apr. 23, 1999, at A1; Lucy Morgan, *School Tragedy Ends Push for Gun Bill*, *St. Petersburg Times*, Apr. 27, 1999, at 5B; Sam Howe Verhovek, *Terror in Littleton: The Overview*, N.Y. TIMES, Apr. 22, 1999, at A28.

298. See *supra* note 12 and accompanying text.

299. Fox Butterfield, *Safety and Crime At Heart of Talks On Gun Lawsuits*, N.Y. TIMES, Oct. 12, 1999, at A1; Barry Meier, *In Seeking Firearms Deal, Spitzer May Set Standard*, N.Y. TIMES, July 22, 1999, at B5.

gun ownership are likely to change, affecting the way judges and jurors respond to tort claims against gun manufacturers.

D. Comparisons to Automobiles, Toxic Torts, and Tobacco

In shaping a proper role for the tort system in gun industry regulation, useful insights can be gleaned by comparing lawsuits against gun manufacturers to litigation concerning automobiles, toxic torts, and tobacco. The comparison to automobile litigation supports the idea that the tort system can play an effective role in regulating both product safety and product-related injuries. The comparison to toxic torts illustrates the problems that arise when courts attempt to make regulatory decisions that rely on highly controversial expert evaluation of complex or ambiguous data. And finally, the comparison to tobacco provides a warning that winning lawsuits is no guarantee of a successful regulatory outcome.

Tort litigation has been a driving force in regulating automobile safety throughout the twentieth century. While automobile design specifications are regulated by the National Highway Traffic Safety Administration,³⁰⁰ liability exposure for manufacturing, warning, and design defects provides a powerful incentive for manufacturers to adhere not merely to published regulations but to ensure that their car designs provide an optimal mix of safety and effectiveness.

The similarities between cars and guns invite comparison between the way the tort system regulates each of them. Both cars and guns are widely owned in the U.S. and each is a major source of injury. In 1994, there were 198 million privately registered automobiles and approximately 230 million privately owned firearms.³⁰¹ In that same year there were 40,000 automobile-related deaths and 39,500 gun-related deaths, 5.8 million automobile-related injuries and 125,000 gun-related injuries.³⁰² Tort law demands that automobiles be crashworthy, holding manufacturers liable for injuries that result from car designs that do not provide adequate protection in the event of a crash.³⁰³ So

300. Bogus, *War on the Common Law*, *supra* note 15, at 77-82. For more information on the National Highway Traffic Safety Administration, see *About the National Highway Traffic Safety Administration* (visited Oct. 18, 1999) <www.nhtsa.dot.gov/nhtsa/whatis/overview>.

301. BUREAU OF THE CENSUS, *supra* note 2, at 625; KLECK, *supra* note 2, at 63-64, 94, 96-97.

302. BUREAU OF THE CENSUS, *supra* note 2, at 633; KLECK, *supra* note 2, at 1.

303. *See, e.g.*, *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968);

too, tort law requires that firearms be dropworthy, holding manufacturers liable for injuries that result from gun designs that do not protect against inadvertent discharge when a gun is dropped.³⁰⁴ Furthermore, just as many jurisdictions have attempted to remove automobile accidents from the tort system by requiring no-fault automobile insurance, perhaps they ought to do the same for firearms by establishing no-fault gun insurance.

While there are many parallels between automobiles and firearms, it is important to note that in claims against gun manufacturers for crime-related injuries, plaintiffs in most cases are suing manufacturers for criminal misuse of the product by illegal owners. Thus, an appropriate comparison in these cases would be to suing an automobile manufacturer for the misuse of a car to intentionally run down a pedestrian. If the car had been stolen prior to its criminal misuse, one might sue the car manufacturer under a design defect theory for failing to put adequate locks on the car that would have prevented its theft. Alternatively, if the driver were not properly licensed to drive, one might sue the manufacturer under a negligent marketing theory for not exercising reasonable care in supervising retail car sales. Insofar as these types of claims appear outlandish, the parallels between automobiles and guns would seem ultimately to undermine the case for imposing liability on gun manufacturers for crime-related injuries.

If tort claims against gun manufacturers for crime-related injuries are justifiable, it may be because gun crimes differ in important ways from crimes committed with automobiles. Both the criminal justice establishment and the public consider gun crime to be a more significant social problem than crimes committed with automobiles.³⁰⁵ Gun crime is more closely studied and is the subject of a great deal of political activity. For these reasons, gun crime is a more foreseeable risk of selling guns, and marketing restrictions on gun sales can be more easily tailored to control this risk. These two factors may help to justify the imposition of common law duties on gun manufacturers to take reasonable measures to reduce the risk of criminal acquisition of their products,

Turner v. General Motors Corp., 514 S.W. 497 (Tex. App. 1974).

304. See, e.g., *Sturm Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979); *Bender v. Colt Indus., Inc.*, 517 S.W.2d 705 (Mo. Ct. App. 1974). See also WINDLE TURLEY & JAMES E. ROOKS, JR., *FIREARMS LITIGATION: LAW SCIENCE AND PRACTICE* 178-200 (1988).

305. Unlike the sizeable literature concerning gun crime statistics, there are no similar figures available concerning crimes committed with automobiles. Similarly, while gun crime has been the subject of extensive legislative activity, with the exception of drunk driving, legislatures have not addressed the role played by automobiles in crimes such as assault, robbery, and kidnapping.

even if it seems unreasonable to impose similar duties on automobile manufacturers.

Tort suits against gun manufacturers also invite comparisons to toxic tort litigation. This comparison was made explicitly by the *Hamilton* plaintiffs, who analogized “handguns and their ammunition to a pathogen leading to latent injuries and the deaths of many thousands of people, much like claims associated with asbestos, agent orange, the Dalkon shield, and silicone breast implants.”³⁰⁶ The *Hamilton* plaintiffs also compared gun industry marketing practices to the dumping of industrial waste into rivers.³⁰⁷ Additionally, the application of market share liability in the case rested on parallels between marketing guns and marketing DES.³⁰⁸

One similarity between the suits against gun manufacturers and mass toxic tort claims that has not received adequate attention is their reliance on expert opinion about complex and often ambiguous data. Design defect claims against gun manufacturers rely on controversial public health and criminology studies concerning the risks and benefits of widespread private gun ownership, and negligent marketing claims depend upon speculative analysis of statistics that may or may not indicate a link between particular marketing practices and gun crimes. Similarly, breast implant litigation, for example, has been fueled by controversial medical findings about the correlation between silicone gel and a variety of illnesses, including cancer, connective-tissue disorder, and autoimmune disease.³⁰⁹ Distinguishing legitimate medical findings from “junk science” in toxic tort litigation has proven a difficult challenge for courts. Neither judges nor juries are well equipped to evaluate the conclusions of clinical and epidemiological studies. The same is true in the gun cases in terms of the need to distinguish reliable social science findings from mere expert speculation.

One response to the complexity of scientific evidence in toxic tort litigation has been to set standards for the admissibility of expert testimony. In 1993, in *Daubert v. Merrell Dow Pharmaceuticals*, the United States Supreme Court established a set of factors that federal judges may rely upon in determining the admissibility of expert testimony concerning scientific findings.³¹⁰ These factors include: (1) whether the theory or technique employed to produce the findings can be, or has been, tested; (2) whether it has been subjected to peer

306. *Hamilton v. Accu-Tek*, 935 F. Supp. 2d 1307, 1313 (E.D.N.Y. 1996).

307. Trial Transcript at 3735, *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999) (No. 95-CV-0049).

308. *Id.*

309. See generally David E. Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. 457 (1999).

310. 509 U.S. 579 (1993); see Bernstein, *supra* note 309, at 487-92.

review and publication; (3) the known or potential rate of error of the technique, as well as the existence and maintenance of standards controlling the technique's operation; and (4) the degree of acceptance of the evidence in question in the relevant scientific community. These factors provide judges with a way to identify and exclude unreliable scientific evidence without having to evaluate the conclusions of clinical or epidemiological studies. Judges may distinguish good science from bad science by examining whether the methodology of a particular study conforms to standards set by the professional community in which it was conducted.³¹¹

Unfortunately, the *Daubert* test for the reliability of expert testimony will be difficult to apply to claims against gun manufacturers. In gun cases, courts will be called upon to evaluate the methodologies of social sciences rather than medical sciences. In the social sciences, there is ongoing debate about the reliability of methodologies that have been widely accepted in some areas of inquiry and rejected in others. For example, there is no scholarly consensus concerning the reliability of analyzing law enforcement records versus conducting telephone surveys in trying to measure the self-defense benefits of widespread private gun ownership.³¹²

Additionally, in the study of gun violence, there are a variety of different disciplines, each with their own orientations and methodologies. These include criminology, public health, and economics.³¹³ At times, disagreements over methodology take the form of attacking an entire discipline. For example, Gary Kleck, a criminologist, has written that

There has probably been more outright dishonesty in addressing the issue of the frequency of [defensive gun use] than any other issue in the gun control debate. . . . Authors writing in medical and public health journals are typically the most crudely dishonest: they simply withhold from their readers the very existence of a mountain of contradictory evidence.³¹⁴

311. At least one commentator argues that the *Daubert* test requires that judges review not only the methodology underlying scientific testimony but also the soundness of the reasoning. See Bernstein, *supra* note 309, at 488 n.147.

312. See, e.g., Paul M. Barrett, *In Gun Debate, Both Sides Simplify Data to Make a Case*, WALL ST. J., May 27, 1999, at B1; Hemenway, *supra* note 94, at 1430; Kleck & Gertz, *supra* note 104, at 150.

313. See generally LOTT, *supra* note 100, at 1; Hemenway, *supra* note 94, at 1430; Kleck & Gertz, *supra* note 104, at 150.

314. KLECK, *supra* note 2, at 154; see also KATES & KLECK, *supra* note 91, at 123 (denouncing public health literature concerning gun violence as "sagecraft").

Fundamental disagreement over methodology within social science disciplines as well as mutual distrust between them makes it especially difficult for judges to evaluate the reliability of expert testimony based on a single, identifiable set of professional standards among social scientists.

Aside from the difficulties of excluding expert testimony based on unreliable science, toxic tort litigation has highlighted the dangers of allowing juries to evaluate admissible scientific evidence that may be ambiguous or incomplete. In breast implant litigation, several juries awarded multi-million dollar awards to plaintiffs for injuries allegedly resulting from silicone gel.³¹⁵ Subsequent medical research and expert reviews of the earlier findings have failed to substantiate these plaintiffs' claims about the toxicity of silicone gel, although there still remains a great deal of uncertainty about it.³¹⁶

Jury consideration of social science evidence that is ambiguous or incomplete is a similar problem in gun litigation. As discussed above, there is some indication that the complexity of the plaintiffs' expert testimony concerning oversupply in the *Hamilton* case led the jury to simply ignore it.³¹⁷ That juries accept ambiguous or incomplete scientific findings that are not supported by subsequent research raises questions about the suitability of submitting toxic tort claims to juries.³¹⁸ That juries might altogether ignore highly complex and speculative social science evidence in the gun cases threatens to undermine the integrity of the jury system.

In order to avoid the problems that arise out of forcing judges to determine the reliability of expert testimony and allowing juries to evaluate scientific findings, courts should encourage plaintiffs in gun cases to avoid relying on expert evaluation of complex social science data. Claims like that of the *Hamilton* plaintiffs, which rely on a great deal of expert testimony and complex statistical data concerning oversupply, threaten to focus gun litigation on the same type of evidentiary problems prevalent in toxic tort litigation.³¹⁹ By contrast, the City of Chicago's claim, based on extensive documentation of individual illegal sales by rogue dealers, provides support for allegations of industry negligence without relying on social science experts or complex statistics.³²⁰ Claims of this type do not require judges to examine the methodology of controversial social scientific studies, nor do they ask juries to evaluate the accuracy of scholarly conclusions. These kinds of tasks have

315. Bernstein, *supra* note 309, at 471-72.

316. Bernstein, *supra* note 309, at 480-83.

317. See *supra* notes 185-206 and accompanying text.

318. See Bernstein, *supra* note 309, at 494-502.

319. See *supra* note 185-206 and accompanying text.

320. See *supra* notes 238-51 and accompanying text.

given rise to much controversy about the institutional competence of common law courts, which courts would be well advised to avoid in gun litigation.

A third comparison is that between claims against gun manufacturers and tobacco litigation.³²¹ Tobacco litigation illustrates how the political context surrounding lawsuits can influence their outcomes. Successful efforts to transform smoking from a matter of personal choice to a massive public health crisis, with particular emphasis on children's health, are largely responsible for the recent revolution in tobacco liability.³²² Tobacco politics in the 1960s and 1970s focused on respecting the choices of smokers and non-smokers alike. For example, the Surgeon General mandated warnings on tobacco products designed to help consumers make informed choices about whether and how much to smoke, and public accommodations generally provided both smoking and non-smoking areas.³²³ Tobacco politics shifted focus in the 1980s and 1990s from a concern for personal choice to demands for "tobacco control."³²⁴ For instance, the FDA has attempted to regulate cigarettes as a "drug delivery device," and smoking has been banned throughout the country in most public accommodations.³²⁵ Throughout this transformation in tobacco politics, growing public opposition to smoking and increasing regulatory activity have developed side by side.

The transformation in tobacco politics has generated new information about the health effects of smoking and about the tobacco industry, and this information has been central to the success of tobacco litigation. President Clinton's repeated denunciation of tobacco industry advertising aimed at

321. See, e.g., Paul M. Barrett, *Attacks on Firearms Echo Earlier Assaults on Tobacco Industry*, WALL ST. J., Mar. 12, 1999, at A1; Fox Butterfield, *Results in Tobacco Litigation Spur Cities to File Gun Suits*, N.Y. TIMES, Dec. 24, 1998, at A1.

322. Each year over 430,000 people die from tobacco-related illness. See Julie A. Fishman et al., *CDC State Laws on Tobacco Control—United States, 1998*, MORBIDITY & MORTALITY WKLY. REP., June 25, 1999, at 21-22, available at <<http://www.cdc.gov/tobacco>>.

323. Congress passed the Federal Cigarette Labeling and Advertising Act on July 27, 1965. See Pub. L. No. 89-92, 79 Stat. 282 (codified at 15 U.S.C. §§ 1331-39 (1994)).

324. See Goerge B. Merry, *No Butts About It, States Restricting 'Lighting Up' in Public*, CHRISTIAN SCI. MONITOR, Apr. 16, 1980, at 6; see also Fishman et al., *supra* note 322, at 21-22 (discussing tobacco control as a year 2000 National Health Initiative).

325. See *FDA Says Congress Gave It Power to Regulate Tobacco as a 'Drug' or 'Device'*, MEALEY'S LITIG. REP., Dec. 19, 1996, at 19. For a description of an attempt to create this type of regulation, see *Clinton Gives FDA Rules Final Approval*, FACTS ON FILE WORLD NEWS DIGEST, Aug. 29, 1996, at 635 F3.

children,³²⁶ congressional inquiries into the tobacco industry,³²⁷ the tobacco CEOs' now famous sworn testimony denying that smoking causes cancer,³²⁸ and increased regulatory agency activity,³²⁹ have all generated new information about tobacco and served to turn public opinion even more strongly against the industry.³³⁰ The lawsuits by state attorneys general and the resulting settlement owe much to the popularity of fighting the tobacco industry.³³¹ In turn, publicity surrounding these lawsuits has vilified the industry even more, which is likely to make judges and juries more sympathetic to individual plaintiff's claims. Several large jury awards in individual cases following the settlement between the state attorneys general and the industry are evidence of this growing sympathy.³³²

Like the politics of tobacco, the politics of guns may be changing, especially in the aftermath of the high school shooting in Littleton, Colorado in 1999. The shooting at Littleton, and similar incidents before and after, are transforming gun control from a matter of the right to bear arms to an issue of public health and child safety.³³³ The school shootings and increasing gun

326. See, e.g., *Clinton Strengthens FDA's Anti-Cigarette Hand* (National Public Radio broadcast, Aug. 23, 1996).

327. See *Seven Congressmen Seek Federal Inquiry into Tobacco Makers*, HOUSTON CHRON., May 28, 1994, at A2.

328. Seven tobacco industry CEOs testified before a House Subcommittee that cigarettes are not addictive or cancer causing. See *Nicotine and Cigarettes: Hearing on Food & Drug Administration Jurisdiction to Regulate Cigarettes Before the Subcomm. on Health & the Env't of the House Energy & Commerce Comm.*, 103d Cong., 2d Sess. (Apr. 14, 1994).

329. See Fishman et al., *supra* note 322, at 21-22.

330. See, e.g., *If Tobacco Execs Lied Under Oath, Prosecute Them*, USA TODAY, Feb. 12, 1998, at 14A.

331. In a 1997 hearing, various representatives noted that political party lines should not get in the way of the tobacco settlement and that "America's children and parents are . . . counting on us, and they are counting on us to get it right." *Hearing on Tobacco Settlement Before the House Commerce Comm.*, 105th Cong., 1st Sess. (Nov. 13, 1997) (statement of Rep. Bliley).

332. See Douglas W. Kmiec, *Addiction Overturned: Until Recently The Odds of Recovering Against Big Tobacco Were Less Than Winning the Illinois Lottery*, CHI. TRIB., Apr. 5, 1999, at N13; see also *Individual Action: Judge Orders Henley to Accept \$25M in Punitives or Face New Trial*, ANDREWS TOBACCO LITIG. REP., Apr. 9, 1999, at 8.

333. See, e.g., Thomas B. Cole et al., *What Can We Do About Violence*, 282 JAMA 481 (1999); Garen J. Wintemute, *The Future of Firearm Violence Prevention*, 282 JAMA 475 (1999) (viewing injury resulting from gun violence as a public health problem); *Guns in the House*, N.Y. TIMES, May 27, 1999, at A32; Joe Mathews,

regulation in response to them may well turn public opinion against the gun industry, which would increase crime victims' and cities' prospects for success in litigation against gun manufacturers.

The comparison to tobacco litigation should offer not only hope to plaintiffs suing gun manufacturers, but also a sober warning. While it is premature to judge the final outcome of the tobacco wars, it is fair to say that the litigation success of state attorneys general has so far been a regulatory failure. Greed among plaintiffs' lawyers, lack of coordination among state officials, and intensive lobbying efforts by the tobacco industry have diverted much of the settlement money from tobacco control toward unprecedented attorneys' fees and unrelated public works projects.³³⁴ The inability of state attorneys general to translate their litigation victory into a successful tobacco control policy has weakened public support for lawsuits against the industry and left the industry largely unaffected from a regulatory standpoint.³³⁵

The disappointing regulatory outcome of tobacco litigation should serve as a reminder to plaintiffs in lawsuits against the gun industry, especially cities, to keep focused on their policy goals and to view litigation as merely a means to those ends. That there is relatively little money at stake in gun litigation will make it easier to avoid the temptations of high attorneys' fees and the diversion of settlement funds to unrelated municipal projects.³³⁶ Plaintiffs in one recently filed case did not even ask for damages, seeking only injunctive relief in the form of marketing restrictions.³³⁷ Litigation victories against the gun industry, whether by jury verdict or settlement, that translate into high damage awards and handsome attorneys' fees will do little to improve regulation of the gun industry and will do a lot to undermine public confidence in the tort system.

Gunmakers Aim at Youth Market, BALTIMORE SUN, May 2, 1999, at 1A (discussing gun industry efforts to market firearms to children); Alison Mitchell, *Democrats Gain Ground, an Inch, on Gun Control*, N.Y. TIMES, May 21, 1999, at A23 (noting efforts by pro-gun control forces in Congress to frame gun control as a child safety issue); Alison Mitchell, *The Politics of Guns: Tilting Toward the Democrats*, N.Y. TIMES, May 14, 1999, at A22.

334. See David Stout, *Few States are Using Settlements in Tobacco Suit to Cut Smoking*, N.Y. TIMES, Aug. 25, 1999, at A12; Scott Harshbarger, Comments at Northeastern University Law School, 15th Tobacco Products Liability Conference, From Tobacco to Firearms: Lessons for Litigators (May 25, 1999).

335. See Stout, *supra* note 334, at A12.

336. The annual sales of gun manufacturers totals a mere \$1.4 billion compared to \$45 billion for the tobacco industry. Paul M. Barrett, *Attacks on Firearms Echo Earlier Assaults on Tobacco Industry*, WALL ST. J., Mar. 12, 1999, at A1.

337. See Fried, *supra* note 8, at B3.

This part of the Article has sought to define a proper role for the tort system in regulating the firearms industry. It has argued that the tort system ought to complement the regulatory efforts of legislatures and administrative agencies without attempting to perform tasks beyond the institutional capacities of common law courts. Close examination of the municipal suits against gun manufacturers as well as comparisons to other areas of tort litigation have helped to highlight both benefits and limitations of the tort system as part of a regulatory regime. The next part of the Article examines some theoretical aspects of tort claims against gun manufacturers.

IV. A THEORETICAL NOTE: THE NEED TO LOOK BEYOND ECONOMIC ANALYSIS

Commentators on both sides of the debate surrounding tort claims against gun manufacturers have advocated using economic analysis in adjudicating these claims.³³⁸ They argue that courts should decide these cases so as to optimize the costs and benefits of selling guns to the public. Courts, however, as shown above in Part II, have largely ignored cost-benefit considerations, focusing instead on non-economic concepts of design defect and duty. This rejection of economic analysis by courts in the gun cases makes sense in light of the institutional perspective on the tort system employed above in Part III. Since economic analysis in the gun cases relies heavily on precisely the type of complex statistical evaluation of costs and benefits that courts are poorly suited to deal with, it should come as no surprise that courts have rejected it. Instead, they have relied on non-economic considerations that draw on concepts of wrongdoing, commonplace in courts but not yet well understood by tort theorists.

A. Judicial Avoidance of Risk-Utility and Cost-Spreading Analysis in Design Defect Cases Against Gun Manufacturers

Commentators who favor, as well as those who oppose, design defect claims against gun makers have advocated an economic approach to adjudicating these claims. Scholars who favor liability, arguing that the costs of guns outweigh their benefits, have advocated adoption of a risk-utility test for design defects.³³⁹ Strict product liability under a design defect theory would,

338. See, e.g., Paul R. Bonney, Note, *Manufacturers' Strict Liability for Handgun Injuries: An Economic Analysis*, 73 GEO. L. REV. 1437 (1985); Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912 (1984).

339. See Bogus, *War on the Common Law*, *supra* note 15, at 60; Iveson, *supra*

they argue, internalize the crime-related costs of marketing guns, making the price of guns for consumers more accurately reflect their social costs to society. Scholars who oppose liability, arguing that the benefits of guns outweigh their costs, have invoked this same risk-utility analysis against liability.³⁴⁰ Furthermore, opponents of liability point out that strict tort liability, in practice, would internalize only the costs without internalizing the public benefits of widespread private gun ownership. Thus, liability would inefficiently burden the gun industry, resulting in underproduction of firearms.

Contrary to these scholarly recommendations, in dismissing design defect claims against firearms manufacturers, courts have explicitly refused to engage in risk-utility analysis in the absence of a defect in the gun that causes it to malfunction. The *Patterson* court's opinion is typical in this respect: "Without this essential predicate, that something is wrong with the product, the risk-utility balancing test does not even apply."³⁴¹ Thus, courts have rejected risk-utility balancing as an appropriate way to adjudicate design defect claims by crime victims against gun makers.

In addition to risk-utility analysis, there are other economic approaches that courts might employ to adjudicate product liability claims against gun makers. Using a cost-spreading analysis, plaintiffs might advocate manufacturer liability as the most efficient way to spread the costs of injury associated with guns. Alleging that gun makers have better information about the risks of gun misuse than either gun owners or crime victims, plaintiffs could argue that manufacturers are best situated to structure and administer an insurance market for gun injuries.³⁴² By contrast, defendants, alleging that victims themselves have better access than firearms manufacturers to information regarding the crime risks that they face, could argue that first-party victim insurance is a more efficient way than manufacturer liability to spread the costs of gun injuries.³⁴³

note 84, at 790.

340. See Calio & Santarelli, *supra* note 14, at 493-94; *Handguns*, *supra* note 338, at 1913-20.

341. *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1211 (N.D. Tex. 1985); see also *McCarthy v. Olin Corp.*, 119 F.3d 148, 155 (2d Cir. 1997); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984); *Caving v. Raven Arms Co.*, 665 F. Supp. 530, 532 (S.D. Ohio 1987); *Forni v. Ferguson*, 648 N.Y.S.2d 73, 73-74 (App. Div. 1996).

342. See generally Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993); Jon D. Hanson & Kyle Logue, *The First Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 131 (1990).

343. See George Priest, *A Theory of Consumer Product Warranty*, 90 YALE L.

In dismissing design defect claims against gun makers, courts have also refused to consider cost-spreading. Again, the *Patterson* court's opinion is typical: "The ability of gun manufacturers to 'spread the loss' is not a sufficient basis for requiring the guiltless purchaser of guns to subsidize the actions of those who use firearms wrongfully."³⁴⁴ In adjudicating claims against gun makers, courts have brushed aside cost-spreading arguments, basing their opinions instead on a non-economic concept of design defect.

A third economic approach, contractarianism, would recommend dismissing claims against gun makers that would require courts to interfere with the operation of efficient consumer markets.³⁴⁵ According to contractarian theory, individual consumers, with adequate information, are better situated than courts to evaluate the risks and benefits of a particular product and to make efficient purchasing decisions. Where consumers are well informed, consumer markets will be better at identifying and discouraging the sale of inefficient product designs through lack of demand. Under this theory, a court ought to substitute its own risk-utility calculation for that of consumers only when consumers lack adequate information about the product, in order to discourage the sale of inefficient product designs through the imposition of liability when the risks of a product design outweigh its utility. Inadequate consumer information may be due to product defects such as mismanufacture of the product, lack of adequate warning about its risks, or malfunction. Thus, according to contractarian theory, the so-called defect requirement in strict product liability is really a test for inadequate consumer information. So long as gun buyers have adequate information about the risks and benefits of guns, then a contractarian approach would recommend that courts dismiss claims against firearms manufacturers without engaging in risk-utility analysis. This is precisely what courts have done by dismissing design defect claims against gun makers for lack of a defect in the product.

While the dismissal of strict product liability claims against gun makers is congruent with the recommendation of a contractarian approach, contractarian analysis cannot explain the courts' reasoning in these cases. Contractarianism supports well-informed consumer choice over court intervention because consumer choice produces efficient purchasing decisions. Contractarianism's reliance on efficiency is what makes it an economic theory. Given, however, the extensive deterrence benefits and crime-related costs associated with guns that are not borne by gun owners themselves, even well-informed consumers

J. 1297, 1313 (1981).

344. *Patterson*, 608 F. Supp. at 1213.

345. I am indebted to Steven Croley and John Hanson for the term "contractarianism" to describe this economic approach to products liability. See Croley & Hanson, *supra* note 342, at 690.

may make inefficient purchasing decisions when buying guns. Due to these significant externalities, consumer markets for guns may be highly inefficient. Nevertheless, for lack of a defect, courts have refrained from interfering with these markets.

According to the judicial opinions dismissing design defect claims against gun manufacturers, only in the event that a product is defective in a way that causes it to malfunction should courts employ tests for liability that take into account efficient product safety or cost spreading. As the *Patterson* court made clear, risk-utility and cost-spreading analysis will not support liability unless “something is wrong with the product.”³⁴⁶ One could read *Kelley v. R.G. Industries*³⁴⁷ as the lone exception to this view, holding that the manufacturers of non-defective Saturday Night Specials are subject to strict liability based upon the low utility of these guns for self-defense or sport and the high risk of criminal misuse even when they do not malfunction.³⁴⁸ Even the *Kelley* court, however, offers no empirical support for this claim. Thus, the court’s discussion of risk and utility appears to be a rhetorical strategy rather than an economic analysis.

From a purely economic perspective, the defect requirement in the gun cases appears to be a merely formalistic, doctrinal barrier to promoting social welfare through optimal product safety and insurance. Adopting an economic perspective, many commentators have recommended eliminating this concept of design defect and allowing courts to engage in unrestricted risk-utility and cost-spreading analysis.³⁴⁹ From an institutional perspective, however, courts are not well equipped to undertake these kinds of extensive empirical analyses, especially in comparison to legislatures and regulatory agencies.³⁵⁰

346. *Patterson*, 608 F. Supp. at 1211.

347. *Kelley v. R.G. Indus.*, 497 A.2d 1143 (Md. 1985).

348. While I interpreted *Kelley* in Part II above as creating a variation of the doctrine of strict liability for abnormally dangerous activities, some have interpreted it as creating a variation of strict product liability for design defect. See RESTATEMENT (THIRD) OF PRODUCTS LIABILITY § 2 (1998); cf. *O’Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983). In *O’Brien*, the plaintiff dove into a three-and-a-half foot deep pool, his outstretched hands hit the vinyl-lined bottom, slid apart, and he struck his head on the bottom of the pool. In an opinion reversing the trial court’s dismissal of the plaintiff’s design defect claim, the New Jersey Supreme Court set forth a test for defect based on risk-utility analysis and cost-spreading and not requiring proof of a malfunction in the pool or a reasonable safer alternative design.

349. See, e.g., *Handguns*, *supra* note 338, at 1912; *Croley & Hanson*, *supra* note 342, at 683.

350. *Henderson & Twerski*, *supra* note 70, at 1306-08.

First, consider the difficulties of risk-utility analysis. After thirty years of intensive study, criminologists and public health scholars remain deeply divided over whether the risks of guns outweigh their benefits.³⁵¹ Aside from the disparities in study results and their interpretation, there are seemingly insurmountable methodological obstacles to measuring the risks and benefits of guns. Merely estimating the total number of guns in the U.S. or the number of defensive gun uses each year is the subject of ongoing debate.³⁵² Even more difficult is figuring out how to measure the total fear that guns produce or the sense of security that guns provide, and whether such intangible costs and benefits are even relevant to the calculation.³⁵³

Legislative committees and regulatory agencies are better equipped than courts to evaluate the large and complex body of social science regarding the risks and benefits of guns.³⁵⁴ And if the results of social science are indeterminate, as they seem to be at the present time, then the democratic accountability of these bodies gives them legitimate authority to make necessary regulatory decisions on political grounds. They also have the procedural flexibility to delay a decision pending further reflection or additional research.

By contrast, judges and jurors are less well equipped to undertake comprehensive risk-utility analyses in the context of a three or four week trial, based solely on evidence presented by lawyers and the testimony of experts who happen to be willing and available to testify at the time of trial. Furthermore, judges and jurors lack the legitimate authority to reach a decision based on their political judgment rather than their scientific judgment where the evidence is indeterminate. And the constraints of judicial procedure do not allow courts to postpone a decision pending further reflection or additional research.

Second, consider the complexity of determining the most efficient way to spread the costs of product-related injuries. A debate has recently developed between scholars who recommend that the most efficient way to spread such costs is through health or accident insurance purchased by consumers and those who favor liability insurance purchased by manufacturers.³⁵⁵ Professor George Priest, who recommends consumer insurance pools, has called for limiting manufacturer liability to negligence, arguing that strict product liability

351. *See, e.g.*, THE GUN CONTROL DEBATE: YOU DECIDE 211-303 (Lee Nisbet ed., 1990).

352. *See* KLECK, *supra* note 2, at 63-104.

353. KLECK, *supra* note 2, at 165-67; Bogus, *War on the Common Law*, *supra* note 15, at 63.

354. Henderson & Twerski, *supra* note 70, at 1305-08.

355. *See generally* Croley & Hanson, *supra* note 342, at 683; Hanson & Logue, *supra* note 342, at 131; Priest, *supra* note 343, at 1297.

amounts to a compulsory insurance policy that consumers do not want and which increases the price of many products beyond what consumers are willing to pay. Professors Steven Croley, Jon Hanson, and Kyle Logue, who favor manufacturer insurance pools, have called for enterprise liability, arguing that internalizing all injury costs into the price of products will provide consumers with simpler and more information about product risks at the time of purchase.³⁵⁶

Whether consumer insurance pools or manufacturer insurance pools more efficiently spread risk depends upon complex empirical analysis of insurance markets and accident rates. As in the case of risk-utility analysis, legislative committees and regulatory agencies are better equipped than courts to conduct this analysis. Furthermore, even more so than risk-utility analysis, determining the most efficient way to insure product-related injuries involves judgments about large groups—manufacturers and consumers—-independent of the peculiarities of any one manufacturer-consumer relationship or a particular product.

While courts are poorly equipped to undertake risk-utility and cost-spreading analyses, they are especially well suited to determine the presence of a defect in a product that causes it to malfunction. Figuring out whether there is something wrong with an individual product requires close examination of the condition of the product itself, as well as its purpose, design, and manufacturing specifications. Relevant also are the reasonable expectations of consumers regarding the product and the particular circumstances surrounding the injury it may have caused. Analyzing product defects requires individualized attention to each product on a case-by-case basis and common sense evaluation. Judicial procedure is designed for precisely this kind of inquiry.

An institutional perspective suggests that courts are better equipped to conduct inquiries into product malfunction than they are to undertake risk-utility or cost-spreading analyses. This helps explain why courts have adjudicated design defect claims against gun manufacturers based on a non-economic concept of defect rather than using economic analysis. Furthermore, this institutional perspective indicates that courts are better suited to conduct such inquiries into product malfunction than either legislatures or administrative agencies. This helps justify the complementary role of common law courts in regulating the gun industry.

While courts have so far rejected economic analysis in adjudicating design defect claims against gun manufacturers by crime victims, their opinions indicate that if plaintiffs could establish a defect in the gun the courts would be prepared to engage in risk-utility or cost-spreading analyses in order to

356. Croley & Hanson, *supra* note 342, at 786-92; Hanson & Logue, *supra* note 342, at 175.

determine the ultimate issue of liability. These courts have not rejected economic analysis altogether. Rather, they have limited its application to cases where there is a defect in the product. From an exclusively economic perspective, this defect requirement appears to be an unjustifiable doctrinal barrier to judicial promotion of social welfare. From an institutional perspective, however, it is the insistence on unrestrained efficiency analysis that seems unjustified. Indeed, highlighting the institutional limitations of courts raises questions about the use of economic analysis by courts even when restricted to cases where the product is defective.

B. Judicial Preference for Non-Economic Determinants of Duty in Negligence Cases Against Gun Manufacturers

An economic approach to negligent marketing claims would favor imposing liability on gun manufacturers who either engage in inefficient marketing practices or who fail to employ cost-effective precautions. An inefficient marketing practice is a practice, the risks of which outweigh its benefits.³⁵⁷ For example, plaintiffs might allege that marketing guns through small dealers who sell out of their homes and at gun shows entails risks of criminal misuse that outweigh the benefits of easy access to guns and increased sales. A cost-effective precaution is one, the cost of which is less than the risks that it prevents.³⁵⁸ For instance, plaintiffs might allege that refusing to supply guns to dealers with a history of selling crime guns would cost less than the risk of criminal misuse that it would prevent.

In adjudicating negligent marketing claims, however, courts have most often dismissed them without any efficiency analysis. Where courts have held that firearms manufacturers owe the public no duty to exercise reasonable care in their marketing practices, they have done so without regard for the efficiency of such practices.³⁵⁹ These dismissals reveal the centrality of non-economic considerations in the courts' analysis of duty. Even in the two cases where courts have imposed a duty of care on gun manufacturers, these courts have focused their analysis of duty on non-economic considerations.³⁶⁰

357. RESTATEMENT (SECOND) OF TORTS § 291 (1965).

358. *U.S. v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 85 (1987).

359. These dismissals reveal the centrality of non-economic considerations in the courts' analysis of duty. Even in the two cases where courts have imposed a duty of care on gun manufacturers, these courts have focused their analysis of duty on non-economic considerations.

360. *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 819-31 (E.D.N.Y. 1999); *Merrill v. Navegar*, 89 Cal. Rptr. 2d 146 (Ct. App. 1999), *rev. granted* 991 P.2d 733(2000).

Courts, in dismissing negligent marketing claims against gun manufacturers, have decided the issue of duty based on non-economic considerations such as the foreseeability of gun violence as a result of marketing firearms;³⁶¹ the nature of the relationship between gun manufacturers, gun sellers, and victims;³⁶² legislative preemption;³⁶³ and moral blame for gun violence.³⁶⁴ The characterization of these considerations as non-economic requires some initial clarification. By describing these considerations as non-economic, I do not mean to suggest that they are incompatible with or irrelevant to economic analysis. On the contrary, examination of the gun cases will reveal how non-economic considerations may determine the applicability of economic analysis to particular cases in at least two ways.

Non-economic considerations may provide the basis for imposing duties that require levels of care determined by economic analysis. What such duties require of those who have them depends upon economic considerations. Whether to impose such duties in the first place, however, rests on non-economic considerations. For example, in imposing a duty of care based on the foreseeability of harm, a court may define the standard of care required by the duty as cost-effective care, and it may instruct the jury to undertake some sort of cost-benefit analysis in order to determine whether a defendant has breached the duty. Foreseeability, the basis for imposing such a duty, however, reflects non-economic concerns, as will be explained below.

Additionally, non-economic considerations may be important preconditions for the efficacy of imposing tort duties designed to promote economic goals such as optimal deterrence. For example, imposing a duty on manufacturers to take cost-effective precautions in marketing guns may only promote optimal deterrence of gun-related violence if manufacturers can foresee the risk of gun-related violence as a consequence of marketing guns. If gun manufacturers cannot foresee the risk of gun-related violence, then they will be unlikely to take precautions against it.

While the considerations underlying the duty analysis of courts in the gun cases are part of an approach to adjudicating these cases that could include economic analysis, the considerations are not themselves wholly reducible to economic terms. These considerations are non-economic insofar as the they

361. *See, e.g.*, *Adkinson v. Rossi Arms Co.*, 659 P.2d 1236, 1239-40 (Alaska 1983); *Linton v. Smith & Wesson*, 469 N.E.2d 339, 339-40 (Ill. App. Ct. 1984).

362. *See, e.g.*, *McCarthy v. Olin Corp.*, 119 F.3d 148, 156-57 (2d Cir. 1997); *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 900 S.W.2d 202, 202-05 (Ark. 1975).

363. *See, e.g.*, *Riordan v. International Armament Corp.*, 477 N.E.2d 1293, 1295-97 (Ill. App. Ct. 1985); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661, 664 (Wash. Ct. App. 1988).

364. *See, e.g.*, *Adkinson*, 659 P.2d at 1239-40.

are rooted in particular views about social roles, institutional competence, and moral responsibility rather than cost-benefit or optimizing analysis. At many points in the analysis that follows, it may be possible, contrary to this claim, to provide a wholly economic account of these considerations, showing how the sole purpose of each one is to promote efficient liability rules. Whether the non-economic account presented below more accurately represents the reasons underlying the adjudication of claims against gun manufacturers by crime victims is a matter of interpretation, as well as some speculation. The discussions of duty in most of the opinions are very general and provide little in the way of in-depth analysis, and this only complicates matters.

In *Riordan v. International Armament Corp.*, the court held that a gun manufacturer owes no duty to exercise care in marketing guns since “misuse of the product [is] not a foreseeable consequence of sales to the general public.”³⁶⁵ The court did not think that foreseeability was a question of fact for the jury but rather that it was a question of law for the court to decide. Thus, the question of foreseeability was not a question of whether gun manufacturers actually do, or under specified circumstances would, foresee gun-related violence as a risk of marketing guns. Instead, the question of foreseeability was a question of what the court thought gun manufacturers *ought* to foresee, that is, the amount of foresight that the law demands of them. Under the foreseeability test for duty, courts require manufacturers to exercise care with regard to those risks, and on behalf of those potential victims, that the law demands the manufacturers take into consideration.

The court’s view of which risks and potential injury victims gun manufacturers ought to take into consideration most likely depends upon a variety of unstated factors that inform the court’s sense of the proper role of a manufacturer in society and the duties and responsibilities of manufacturing that help to shape that role.³⁶⁶ By holding that gun-related violence is not a foreseeable risk of marketing guns, the court in *Riordan* was expressing the view that it is not part of a manufacturer’s job to worry about crime victims. This view may be based on such non-economic considerations as existing

365. *Riordan*, 477 N.E.2d at 1295.

366. See Timothy D. Lytton, *Rules and Relationships: The Varieties of Wrongdoing in Tort Law*, 28 SETON HALL L. REV. 359, 369, 382, 388 (1997); John Goldberg & Benjamin Zipursky, *The Moral of McPherson*, 146 U. PA. L. REV. 1733, 1830-42 (1998). For example, in *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033 (9th Cir. 1991), deciding whether a publisher has a duty to investigate the accuracy of information in books that it publishes, the court held that “there is nothing inherent in the role of publisher or the surrounding legal doctrines to suggest that such a duty should be imposed on publishers.” *Id.* at 1037.

practices in manufacturing, social expectations on manufacturers, or an unarticulated ideal of manufacturer-consumer relations.

A more extensive analysis of how judges' conceptions of social roles serve as a basis for findings of duty in tort law, as well as how tort law in turn helps to shape and reinforce these same social roles, is beyond the scope of this Article. For the purposes of this Article, it is enough to claim simply that the consideration of foreseeability, as the basis for the *Riordan* court's finding of no duty, ought not be reduced to purely economic terms. To do so would distort the court's reasons for its holding. While some unstated, rough calculation of what would be most efficient might have contributed to the court's sense of the proper role of a manufacturer, any claim that this was the court's only consideration seems unlikely.

The court in *First Commercial v. Lorcin Engineering, Inc.* held that the defendant-manufacturer owed no duty to protect the victim from criminal misuse of its guns by third parties since no special relationship existed between the manufacturer and the victim. The court explained that such a special relationship was characterized by three factors: a contractual relationship between the defendant and the victim, the foreseeability of danger to the victim as a result of the defendant's conduct, and the degree of control that the defendant had over the third-party injurer.³⁶⁷

The first factor, a contractual relationship between the defendant and the victim, reflects the court's desire to ground a duty of protection from third parties on the notion of promissory obligation. Even if the contract does not explicitly provide for a duty of protection, the mere existence of a contract between the parties indicates that the defendant has taken on voluntary obligations to the victim. Because of the contract between them, the defendant is likely to be at least more aware of, and perhaps even more concerned about, the risks faced by the victim in the course of their dealings. This heightened awareness or concern of the defendant for the victim serves as a partial basis for characterizing the relationship between them as a special relationship that would give rise to a duty of protection. The second factor, the foreseeability of danger to the victim, concerns the court's conception of the social role of the defendant, as the above analysis of the *Riordan* opinion showed.

The third factor, the degree of control that the defendant exercised over the third-party injurer, reflects the relevance of causation to the court's duty analysis. Unless the defendant exercises some degree of control over the third-party injurer, then the defendant's breach of a duty of care, regardless of how it is defined, will not be a cause of the victim's injury. From a moral point of view, it would be unfair to hold the defendant liable for an injury which its

367. *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 900 S.W.2d 202, 214-16 (Ark. 1975).

breach of duty did not cause.³⁶⁸ From an instrumental point of view, it would be pointless to impose on the defendant, and similarly situated defendants in the future, a duty of care that would not serve to deter future injuries inflicted by third parties. As mentioned above, the ability of a defendant to control the occurrence of injury is a precondition for the efficacy of imposing a duty of care, including a duty defined by economic analysis. The court's use of this third factor most likely reflects a mix of these moral and instrumental considerations. The *First Commercial* court also cited lack of control in finding that there existed no special relationship between the defendant-manufacturer and retail gun sellers that would have given rise to a duty to protect the victim by altering its marketing practices.³⁶⁹

In *Linton v. Smith & Wesson*, the court cited federal, state, and local legislation regulating the commercial distribution of firearms as one basis for refusing to impose a duty of care in marketing guns.³⁷⁰ One might explain the court's concern for legislative preemption in economic terms. Perhaps the *Linton* court believed that legislatures are better equipped than courts to undertake the economic analysis necessary to design efficient liability rules. Even so, the court's deference to legislatures most likely also reflects a respect for the democratic legitimacy of legislative regulations, regardless of their efficiency. While the court's attitude towards the separation of powers might be informed by economic considerations, it is unlikely that it is wholly reducible to economic considerations.

The court in *Adkinson v. Rossi Arms Co.* cited popular morality as one basis for its refusal to impose a duty of care on gun manufacturers in marketing guns.³⁷¹ In *Adkinson*, the parents of a crime victim brought a wrongful death action against an assailant, who himself filed a third-party complaint against the manufacturer and the seller of the gun. In refusing to impose a duty of care on the gun manufacturer, the court argued that "[a]ny 'moral blame' attaching to the conduct of Rossi [the manufacturer] or Mountain View [the seller] is of a significantly lesser degree than that which society assigns to James Adkinson's commission of a homicide."³⁷² Any attempt to reduce the concept of moral blame to economic considerations, while possible, would misconstrue the court's reasoning.

368. Under most accounts, moral responsibility requires causal responsibility. See, e.g., JOEL FEINBERG, *DOING AND DESERVING* 25 (1970); MARION SMILEY, *MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY* 179 (1992); MICHAEL ZIMMERMAN, *AN ESSAY ON MORAL RESPONSIBILITY* 1 (1988).

369. *First Commercial*, 900 S.W.2d at 204-05.

370. *Linton v. Smith & Wesson*, 469 N.E.2d 339, 340 (Ill. App. Ct. 1984).

371. *Adkinson v. Rossi Arms Co.*, 659 P.2d 1236, 1239, 1240 (Alaska 1983).

372. *Id.* at 1239.

In the two cases where courts have imposed a duty on gun manufacturers to exercise reasonable care in marketing firearms, these courts also have relied on non-economic considerations. The *Hamilton* court's finding of duty rested primarily on its assertion that gun manufacturers have a special ability to detect and guard against the risks associated with selling firearms.³⁷³ At the very end of its duty analysis, the court did make additional claims that imposing a duty of care on gun manufacturers would minimize prevention costs and efficiently spread accident costs.³⁷⁴ The court, however, provided no quantitative analysis whatsoever to support these claims. The *Merrill* court, in justifying its finding of duty, cited the foreseeability of gun crimes as a result of selling guns, the moral blameworthiness of the defendant-manufacturer's marketing practices, and the public policy of preventing injuries resulting from gun violence.³⁷⁵ The court also claimed that selling assault weapons was an inefficient activity insofar as the utility of the activity was low compared to the risks it created.³⁷⁶ Again, however, the court offered no empirical evidence to support this claim. As in the *Kelley* case, the unsupported economic claims made by the *Hamilton* and *Merrill* courts appear to play a merely rhetorical role in supporting their imposition of a duty of care on gun manufacturers.

While economic analysis may play an important role in deciding negligent marketing claims that make it to juries, economic analysis alone cannot account for the central place of duty in adjudicating these claims prior to jury consideration. The determination of whether a gun manufacturer owes a duty of care in marketing guns depends upon a variety of non-economic considerations. Thus, in claims against gun manufacturers, negligence doctrine permits courts to promote efficient care only when lack of such care constitutes breach of a duty—that is, a wrong—the existence of which depends upon non-economic considerations. The dismissal of negligent marketing claims against gun manufacturers for lack of a duty highlights that any complete theory of negligent marketing will require a non-economic account of the doctrinal concept of duty.³⁷⁷

V. CONCLUSION

373. See *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 821 (E.D.N.Y. 1999); *supra* notes 165-90 and accompanying text (discussing *Hamilton*).

374. *Hamilton*, 62 F. Supp. 2d at 826-27.

375. See *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 165 (Ct. App. 1999), *rev. granted* 991 P.2d 755 (2000); *supra* notes 137-67 and accompanying text (discussing *Merrill*).

376. *Merrill*, 89 Cal. Rptr. 2d at 171.

377. See, e.g., *Goldberg & Zipursky*, *supra* note 366, at 1825-39.

By holding gun manufacturers liable for their role in facilitating gun violence, the tort system can play a useful role in current efforts to regulate the firearms industry as one way to address the problem of violent crime. Part II of this Article explained how, after nearly twenty years of pretrial dismissals and summary judgments against plaintiffs, there are recent signs that courts might be willing to impose liability on gun manufacturers for crime-related injuries. The *Halberstam*, *Hamilton*, and *Merrill* cases have shown that at least a few courts believe that negligent marketing claims by crime victims against gun manufacturers deserve jury consideration. Whether other courts will be willing to accept negligent marketing claims, or claims under other theories of recovery such as design defect based on safer alternative design, public nuisance, or deceptive trade practices, remains to be seen.

Part III of this Article argued that the role of the tort system in regulating the gun industry should be a secondary one, complementing the efforts of legislatures and administrative agencies. These institutions are better equipped than courts to evaluate the complex statistical information essential to understanding the gun industry, and they have a high degree of democratic legitimacy with which to justify the imposition of industry-wide regulations. Legislatures and administrative agencies, however, have significant limitations that impede the regulatory process. Legislatures can fall prey to powerful lobbies. Regulatory agencies are subject to industry capture. In the case of firearms, BATF lacks the resources necessary to enforce existing regulations. That is where the tort system comes in.

Tort litigation, through the discovery process, has unearthed a great deal of information about manufacturing and marketing practices among gun manufacturers that is relevant to regulating the industry. Additionally, the threat of tort liability provides manufacturers a powerful financial incentive to police themselves, making sure to stay well within regulatory guidelines rather than seeking legal ways to circumvent them. And if courts make decisions that offend the public, legislatures are free to undo the effects of them, as the Maryland legislature did in its response to the *Kelley* decision.

Part IV of this Article noted that, in adjudicating claims against gun manufacturers by crime victims, courts have rejected the use of economic analysis, relying instead on non-economic concepts such as defect and duty. Courts have repeatedly dismissed design defect claims based on the failure of plaintiffs to allege a defect in the gun that caused it to malfunction without engaging in any risk-utility or cost-spreading analysis. Similarly, courts have dismissed negligent marketing claims, holding that a manufacturer owes no duty of care in marketing non-defective weapons and refusing to examine the efficiency of its marketing practices or the cost effectiveness of adopting precautions proposed by plaintiffs.

The dismissal of claims against gun manufacturers highlights the importance of non-economic concepts of wrong—such as defect and breach

of duty—in the adjudication of tort claims against gun manufacturers. In deciding these claims, courts have refused to impose standards of product safety or care based on economic considerations in the absence of a wrong. Product defects and breaches of duty are each wrong in different ways. A gun that backfires is wrong in a different way than selling a gun to a criminal is wrong.³⁷⁸ Nevertheless, they are both wrong, and wrong is the term that courts use to describe them. This Article has attempted to demonstrate that the meaning of wrong, as used by the courts in adjudicating claims against gun manufacturers, is not reducible to economic considerations.

Common law courts are better equipped to identify individual wrongs, like a defect in a product or a breach of duty, than they are to analyze inefficiencies in product or insurance markets. This kind of institutional perspective helps to explain why tort law is concerned primarily with wrongs and only secondarily with efficiency. But institutional analysis is only a start.³⁷⁹ Judges and commentators must begin to think more self-consciously about what wrongfulness means in the law of torts and why wrongs have historically been and continue to be a central concern of tort law. The analysis of claims against gun manufacturers for crime-related injuries presented in this Article has attempted to show that economics alone cannot provide the answers.

378. See Lytton, *supra* note 366, at 362-77.

379. For a helpful introduction to institutional analysis, see Richard Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184 (1987).