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Philip D. Oliver

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REJECTING THE "WHIPPING-BOY" APPROACH TO
TORT LAW: WELL-MADE HANDGUNS ARE NOT
DEFECTIVE PRODUCTS

*Philip D. Oliver**

INTRODUCTION

This article sets forth an argument against courts declaring that well-made handguns are products sold in "a defective condition unreasonably dangerous"¹ and imposing strict liability on their manufactur-

* Professor of Law, University of Arkansas at Little Rock; B.A., University of Alabama; J.D., Yale Law School. I am indebted to my able research assistant, Mr. Gregory Taylor of the UALR Law School class of 1993; and to my sister, Dr. Kay Oliver, who read a draft of this article and made valuable comments. Finally, I am obliged to Professor McClurg, whose article I am answering, for facilitating my research by giving me copies of materials he had consulted in the course of writing his article. While Professor McClurg and I disagree, we do so in the most agreeable manner.

1. The principal theory under which liability is sought against handgun suppliers is the one addressed in this article and by Professor McClurg—that well-made handguns are "defective products unreasonably dangerous." According to this argument, strict liability should be imposed based on principles of products liability law that flow from Restatement (Second) of Torts, section 402A. I argue that well-made handguns are not defective. (For brief discussion of the relationship between the terms "defective" and "unreasonably dangerous," *see infra* note 94.)

A number of closely related issues are not addressed here. These fall in two main groups: alternative theories of liability and additional defenses. Although these issues are generally beyond the scope of this article, a few comments are in order. In general, the additional liability theories add little to the "defective product" theory. Much of my analysis relating to the proper role of

courts is fully applicable here. See *infra* notes 26-38 and accompanying text. The additional defenses may well be meritorious, but are unnecessary because the case for liability falls once it is established that well-made guns are not defective.

1. *Other liability theories.*

a. *"Abnormally dangerous" activity.* Strict liability has been advocated on the theory that the manufacturing and marketing of handguns is an "abnormally dangerous" activity, as defined in Restatement (Second) of Torts, sections 519-20. See Andrew O. Smith, Comment, *The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369 (1987). This theory has been repeatedly argued as an alternative theory to section 402A, and repeatedly rejected. Almost all the cases noted as rejecting the "defective" theory have also rejected the "abnormally dangerous" theory. See *infra* note 114 and accompanying text. The outcome has not been identical, however. In the one case to adopt the theory that certain handguns are defective, the court expressly rejected the alternative argument that manufacturing and marketing them is an abnormally dangerous activity. *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985). The court held that the doctrine of abnormally dangerous activities should be limited to uses of land. Even if not so limited, however, the doctrine has no proper application to an activity so widespread as gun distribution. "In light of the fact that . . . two million handguns are sold each year, the manufacture and sale of handguns are unquestionably 'of common usage.'" Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912, 1923 (1984) (footnote omitted). Unlike dynamite, the prototypical example of a product regarded as abnormally dangerous, guns are found in tens of millions of homes of unexceptional Americans. Further, strict liability is normally imposed on those who use dangerous products, not those who sell them. *Id.*

A single court accepted the abnormally dangerous doctrine in a gun case, at least to the extent of refusing summary judgment to the defendant. *Richman v. Charter Arms Corp.*, 571 F. Supp. 192 (E.D. La. 1983). (Interestingly, the court rejected the argument that the gun could be regarded as "defective," and therefore granted summary judgment on the section 402A claim.) A unanimous panel of the Fifth Circuit reversed, directing the district court to grant the defendant summary judgment, and the full court refused to grant en banc review. *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985).

b. *Distribution.* Liability arguments based on the selling of guns are frequently presented, but have nothing to add to a strict liability case based on section 402A. It is difficult to visualize a court holding that a gun was not a defective product, yet holding that the defendant should be held strictly liable for selling it. Distribution of guns as an independent basis for strict liability has been uniformly rejected. Distribution can constitute an independent basis of liability when framed in negligence. An example of liability for negligent distribution is *Franco v. Bunyard*, 261 Ark. 144, 547 S.W.2d 91, *cert. denied*, 434 U.S. 835 (1977), in which the defendant sold a gun to an escaped convict without requiring completion of a form required by federal law. I concede, of course, that negligent acts can be committed by suppliers of guns, just as I concede that guns can be poorly designed or manufactured with the result that section 402A liability can properly be imposed.

The leading advocate of strict liability for handgun suppliers offers an elaborate argument tying the product design to the segment of the public to which it is marketed. Windle Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims*, 10 N. KY. L. REV. 41, 51-54 (1982). If the method of distribution does not violate applicable regulations, the following judicial response is typical: "No Illinois decision has imposed a duty upon the manufacturer of a non-defective firearm to control the distribution of that product to the general public; such regulation having been undertaken by Congress, the Illinois General Assembly and several local legislative bodies." *Linton v. Smith & Wesson, Inc.*, 469 N.E.2d 339, 340, (Ill. App. 1984). See also David T. Hardy, *Product Liability and Weapons Manufacture*, 20 WAKE FOREST L. REV. 541, 563 (1984) (arguing that imposition of liability on account of legally permitted distribution would lead distributors to "discriminate, either consciously or unconsciously, against entire categories of

ers and sellers.² It was written principally in response to Professor Andrew J. McClurg's article, *Handguns as Products Unreasonably Dangerous Per Se*, which was published in the last issue of this journal,³ but more broadly addresses issues raised by a number of proponents of strict liability against gun suppliers.⁴

people").

c. *Failure to warn*. Similarly, cases based on failure to warn have failed. See, e.g., *DeLahanty v. Hinckley*, 564 A.2d 758, 760 (D.C. App. 1989), *aff'd*, 900 F.2d 283 (D.C. Cir. 1990) ("Because hazards of firearms are obvious, the manufacturer had no duty to warn.").

2. Defenses.

a. *Causation*. A basic part of any case, whether the basis of liability is intent, negligence or strict liability, is that the defendant is liable only for harms proximately caused by his wrongful act. Both cause-in-fact and proximate cause can be troublesome issues here. If the assailant purchases a gun, but owned or had access to another gun or another weapon, but-for causation may be questionable. In addition, the matter of intervening acts may cause a court to say that a wrong was not the proximate cause of an injury. I place little faith in a separate causation defense. Causation issues, especially proximate causation, usually mean whatever courts want them to mean. If a court is willing to swallow the camel of branding a well-made gun defective, it can easily digest the gnat of causation.

b. *Constitutional issues*. Certainly the most important set of constitutional issues relate to the proper interpretation of the Second Amendment to the United States Constitution, which provides: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." At least three questions come immediately to mind. First, does the amendment protect only the right to bear arms in the common defense, through a militia, or is an individual right to bear arms involved? Second, if such an individual right exists, what restrictions can constitutionally be placed upon it? Third, are the rights protected by the Second Amendment applicable to the states? For a recent treatment of the topic, see Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

A constitutional matter that seems to have received even less attention than the Second Amendment is similar provisions in state constitutions. The Arkansas Constitution, for example, provides: "The citizens of this State shall have the right to keep and bear arms for their common defense." ARK. CONST. art. II, § 5. The meaning of this provision seems as murky as that of the federal constitution's Second Amendment. State constitutional provisions such as this could become important if states enact sweeping gun control provisions and the Second Amendment is held inapplicable to the states.

2. Professor McClurg phrases the issue dividing us in almost exactly these terms. Andrew J. McClurg, *Handguns As Products Unreasonably Dangerous Per Se*, 13 U. ARK. LITTLE ROCK L.J. 599, 605 (1991). Nevertheless, throughout his article Professor McClurg ignores the implications of his approach for sellers of handguns. Under the approach of section 402A, however, it is clear that sellers as well as manufacturers are strictly liable for placing defective products into the market. I shall generally use the more inclusive term "suppliers."

3. *Id.*

4. In addition to Professor McClurg's ably written article, law review works clearly supporting the proposition that well-made guns are defective include the following: Turley, *supra* note 1; Daniel C. Pope, Note, *Maryland Holds Manufacturer of "Saturday Night Specials" Strictly Liable for Injuries Suffered by Innocent Victims of Criminal Handgun Violence*: *Kelley v. R.G. Indus. Inc.*, 304 Md. 124, 497 A.2d 1143 (1985), 20 SUFFOLK U.L. REV. 1147 (1986); and Rose Safarian, Comment, *A Shot at Stricter Controls: Strict Liability for Gun Manufacturers*, 15 PAC. L.J. 171 (1983). Gerard M. Mackarevich, Comment, *Manufacturers' Strict Liability for*

The broad outline of this article can be stated very simply: Section I addresses the liability proponents' red herring, while Section II deals with the real issue.

The red herring—admittedly, an interesting red herring—is gun control. Liability proponents expend considerable energy decrying the prevalence of violent crime in American society, much of it committed with handguns. This handwringing might be to some purpose if any responsible person disagreed with them. Certainly I share their horror. I differ with liability proponents concerning not the tragic scope of the problem, but rather whether tort law can make any appropriate contribution to its solution.

In fact, I count myself an unenthusiastic, unoptimistic supporter of some types of *statutory* gun control. The benefits of gun control, however, whether legislatively or judicially imposed, would be minimal at best. Surely we have discovered from our efforts to prohibit other products, such as alcohol and drugs, that a legal prohibition does not automatically result in the product disappearing from society. Guns of all types will still be with us, by the millions, regardless of the provisions of criminal law and tort law.

For that reason, the modest benefits of gun control might well be offset by accompanying drawbacks. Gun control could shift the balance in favor of criminals, who still will be able to obtain guns. For millions of law-abiding Americans scared to walk the streets of their neighborhoods, being deprived of their preferred means of self-defense would be a major downside of gun control.

It is unnecessary to evaluate the merits of gun control in order to arrive at a firm conclusion concerning the real issue of this debate. The issue at hand is a question not of gun control, but of the proper scope of tort law. The bulk of this article is devoted to the argument that

Injuries from a Well-Made Handgun, 24 WM. & MARY L. REV. 467 (1983) appears to be favorably disposed to the proposition that handguns are defective products. Other writers have advocated strict liability on other theories. These include Smith, Comment, *supra* note 1; and David J. Forrester, Comment, *Halberstam v. Welch: Economic Justice As a Means of Handgun Control?*, 7 AM. J. TRIAL ADVOC. 377 (1984). Some liability proponents have used less scholarly vehicles to argue that guns are defective; for a recent example, see Joshua Horwitz, *At Issue: Strict Liability: Should Assault Weapon Makers Be Liable for Gun Injuries? Yes: Justice for Victims*, 77 A.B.A.J., July, 1991, at 36. Less scholarly writing has opposed the proposition that well-made guns are defective. See Hardy, *supra* note 1; and Note, *Handguns and Products Liability*, *supra* note 1.

This article is not a point-by-point refutation of Professor McClurg's article. Because it is written to respond to the arguments of liability proponents in general, not every argument and criticism advanced in this article is directly applicable to Professor McClurg's proposal.

courts should continue to resist the invitation to extend tort law in the radical manner advocated by liability proponents. They should do so for at least three reasons, any one of which is sufficient.

The most basic reason is recognition of the proper role of courts. Courts should defer to legislatures for resolution of policy issues, within constitutional limits. Here, the considered legislative judgment has been against the policy contended for by liability proponents. Especially pernicious is the idea that courts should act because legislatures, or the public, have been intimidated by the "gun lobby." This notion betrays either a naive misunderstanding of the political branches of government or a deliberate effort to rationalize judicial usurpation of legislative authority. Indeed, many liability proponents all but concede that the principal reason for seeking strict liability against gun suppliers is to achieve judicially mandated gun control and thus obtain a political victory denied them by the political branches of government.⁵

In addition, courts should not impose strict liability on account of major shortcomings of common-law policymaking. First, unlike legislatures, courts usually give their decisions retroactive effect. Therefore, unless a court were willing to openly acknowledge its usurpation of legislative prerogatives, the court would find it awkward to apply its new rule only prospectively. Yet retroactive application would not only put gun suppliers out of business, but would bankrupt them on the way out. This seems a bit harsh, considering they have done nothing wrong. Second, although liability proponents claim they want to impose strict liability only with respect to some guns, the slope would prove to be unusually slippery. Any common-law decision imposing strict liability with respect to any gun would profoundly affect insurance costs, and sales prices, for all guns. By contrast, legislatures can (and do) regulate some guns without affecting the market for others. Third, courts should be reluctant to create a huge new category of tort cases. Not only are

5. Professor McClurg acknowledges that his "agenda regarding handguns is not a hidden one," but asserts that he seeks only the neutral application of tort principles: "[L]ike all other manufacturers of unreasonably dangerous products, [handgun manufacturers] must bear the cost of injuries their products cause." McClurg, *supra* note 2, at 618-19.

Not surprisingly, students are less guarded. "In reaction to the lack of an effective legislative remedy to this problem, gun control proponents now seek a solution from the courts." Safarian, Comment, *supra* note 4, at 173. "Due to the enormous potential for liability now placed upon manufacturers of Saturday Night Specials, the *Kelley* decision will effectively ban the sale of such handguns by judicial fiat." Pope, Note, *supra* note 4, at 1170. (Prior to its legislative repeal, the *Kelley* decision created strict liability against the suppliers of certain handguns. *Kelley* is discussed *infra* at notes 43-55 and accompanying text.)

dockets overburdened throughout the country, but the jury system functions poorly in tort cases. Far from being significantly expanded, as liability proponents urge, tort law, if anything, should be contracted.

Finally, the assertion that strict liability against suppliers of well-made guns follows from existing principles of tort law must be roundly rejected. The underlying principles of products liability law require a defect before liability is to be imposed. Simply stated, a well-made handgun is free from defect. Principles of products liability law compel that conclusion, which has been accepted across the country. Indeed, *no* jurisdiction recognizes the rule that liability proponents claim is logically required from well-established principles of tort law.

I. A RED HERRING: THE GUN-CONTROL ISSUE

Liability proponents tend to confuse the merits of gun control with the merits of strict tort liability against the suppliers of guns. Professor McClurg and I both teach torts. Our debate, as I understand it, is about tort law. Professor McClurg, however, attempts to diminish the importance of the question we are addressing by characterizing it as a "narrow" one: "Narrowly," he began, "this written debate between Professor Oliver and me concerns tort law, not gun control."⁶ It is this supposedly "narrow" issue—which, in fact, deals with such broad questions as the role and competency of courts, and the proper reach of products liability law—that yields a clear and unambiguous answer: Handguns are not defective products, and their suppliers should not be held liable for violence brought about with handguns.

I might be well advised to avoid discussion of gun control altogether because of its essential irrelevance to the question at hand. Even were I wholeheartedly enthusiastic about gun control, I would remain steadfastly opposed to imposing liability on gun suppliers. In view of the attention given this matter by Professor McClurg and other proponents, however, a few comments on the points they raise are in order so as to dispense with this side issue before getting at the heart of the issue under consideration.

First, given the tenor of Professor McClurg's article, it seems desirable to affirm at the outset that I am not a gun nut and that I join him in deploring criminal violence, including that committed with handguns. Like Professor McClurg,⁷ I have never owned or shot a

6. McClurg, *supra* note 2, at 600.

7. McClurg, *supra* note 2, at 608.

handgun. I have never gone hunting and, having watched *Bambi* perhaps forty times in the past year (I have a four-year-old), I am a poor prospect for taking up the sport.

I wholeheartedly agree with Professor McClurg's concern about the level of violence in contemporary America.⁸ Many people are being murdered, and guns, of one sort or another, are clearly the weapon of choice for murderers.⁹ We are concerned not only with death, of course, but with wounding, and with other crimes, such as robbery and rape, that are facilitated by guns. Perhaps the most important consequence of contemporary American violence is that millions of people are simply afraid to walk on the streets of many parts of American cities—frequently including the neighborhoods in which they live.

As bad as things are, it seems that they are getting worse. Figures from 1990 indicate a national increase in violent crime of ten percent over the preceding year,¹⁰ and recent figures suggest that 1991 may set an all-time record for American homicides.¹¹ Drug wars rage in our cities, and dealers shoot not only competitors and customers, but also bystanders, whom they callously term "mushrooms." At the same time, fundamental respect for human life appears to be at a low ebb, with murderous reactions to slight insults seemingly common.

Thus far, I am on common ground with the liability proponents. But this is hardly surprising; I am also on common ground with 99.9 percent of the American population, including, I am sure, virtually

8. Professor McClurg's presentation, however, may overstate the volume of the problem. Having repeatedly stated that handguns account for 22,000 deaths annually, he conceded (via a footnote, in good academic form) that most handgun deaths are attributable to suicide. McClurg, *supra* note 2, at 602, n.8. Assuming that society should always attempt to prevent suicide when possible (a thorny ethical issue in its own right), it is impossible to know how often a person determined to end his own life can be prevented from doing so. (We are dealing with the least promising subset of the suicidal, those who in fact commit suicide, as contrasted, for example, to those who call a suicide hotline and talk over their problems.) In any event, Professor McClurg does not choose to enter the debate; in his suicide footnote he limits his "argument for strict liability to cases of intentional criminal attacks by third persons and accidental shooting." *Id.*

9. Professor McClurg's focus is on handguns. Under his proposal, "long guns" would not be regarded as defective products. Other advocates of strict liability have focused on other types of guns, and litigation has been brought against suppliers of various types of guns. See *infra* notes 60-64 and accompanying text. As discussed below, it is by no means clear that a common-law court could successfully establish liability for one type of gun without imposing many of the costs of liability on other types. See *infra* notes 56-73 and accompanying text.

10. ARK. DEMOCRAT, Aug. 11, 1991, at 4A, col. 3.

11. STAFF OF SENATE COMM. ON THE JUDICIARY, 102D CONG. 1ST SESS., 1991 MURDER TOLL: INITIAL PROJECTIONS (1991) [hereinafter MURDER TOLL]. The report projected 23,700 homicides for 1991.

every member of the National Rifle Association. My differences with the liability proponents relate not to the characterization of the problem, but to whether tort law has some role to play in its solution.

I tend to favor some forms of legislative gun control,¹² but without great optimism or enthusiasm.¹³ While I would be pleased if the country could be magically ridded of guns, in the real world, the benefits of gun control are problematic. Proponents of gun control should recognize that a pronouncement that sale or possession of an item is illegal does not necessarily result in that item being removed from the market. This approach works with things that people do not care very much about, such as artificial sweeteners¹⁴ or (to use an example from Professor McClurg's article) lawn darts.¹⁵ Our nation's experience is that success is less certain (to put it mildly) when the item prohibited is something greatly desired, such as alcohol or drugs. For many people, including many of those most likely to misuse them, guns fall in this category. Like cocaine, guns can be manufactured and distributed by the underworld.¹⁶ It is true that the price of guns would rise if they were illegal, but, I would suggest, less than if the cost had to include the costs of strict liability in tort.¹⁷ There is some truth (along with some hokum, of course) to the gun advocates' bumper sticker: "When guns are outlawed, only outlaws will have guns."

Difficult as it would be, stopping the manufacture and sale of newly-manufactured guns would be easier than confiscating the tens of millions of guns already in the public's hands. Without question, such an attempt would draw considerable opposition from gun owners, the segment of the population whose cooperation would be most important.

12. Parts of New Jersey's sweeping gun control legislation, which was considerably expanded in 1990, are worthy of careful consideration. See N.J. STAT. ANN. §§ 2C: 39-1 to -12 (West 1982 & Supp. 1990).

13. For a view critical of statutory gun control, see Don B. Kates, Jr., *Some Remarks on the Prohibition of Handguns*, 23 ST. LOUIS L.J. 11 (1979). Mr. Kates' essay is rebutted in Sam Fields, *Handgun Prohibition and Social Necessity*, 23 ST. LOUIS L.J. 35 (1979).

14. See *California Cannery and Growers v. United States*, 7 Cl. Ct. 69 (1984) (detailing history of Food and Drug Administration's actions concerning cyclamates, culminating in FDA's banning them from consumer foods in 1970).

15. McClurg, *supra* note 2, at 611-12.

16. Even at present, the overwhelming bulk of handguns used in criminal activity are not legally purchased. The staff of the Senate Judiciary Committee estimates that only about twenty percent of handgun murders (1,700 in 1990) are committed each year with legally purchased handguns. MURDER TOLL, *supra* note 11.

17. See *infra* note 45 and accompanying text concerning the costs of paying strict liability claims for injuries inflicted through guns.

Moreover, it is likely that a debate that showed real promise of leading to a ban on the legal sale of guns would result in millions of additional guns being purchased before the ban took effect.

Thus, guns, including handguns, will continue to be with us. Assuming that we wished to do so (as I would), we cannot mandate that our society be as gun-free as Europe's. Since guns would still be in wide circulation, gun control might have the effect of shifting the balance against law-abiding citizens. Proponents of gun control denigrate the importance of self defense.¹⁸ But for that large number of law-abiding persons who feel vulnerable to criminal attack, and who realize that millions of guns (of all types) would remain available to criminals, being deprived of their chosen means of defense would be a major downside to gun control.

The benefits of guns in the hands of law-abiding citizens is not limited to those who use the guns, or even to those who possess them. If gun control had the effect of disarming almost all law-abiding citizens, it would remove an important element of uncertainty for criminals. For example, while I do not own a gun myself, I would prefer that someone who was considering burglarizing my home not be sure of that fact.¹⁹

Proponents of gun control often focus on the availability of handguns in this country to such a degree that they neglect examination of other factors that may account for our high murder rate. For example, they tell us that other societies, such as Britain, Switzerland and Sweden, have gun control, and enjoy a low murder rate, particularly murders committed by handguns.²⁰ We have no gun control and a high murder rate, with many murderers using guns. The suggestion seems to be that if only we would do away with our guns, we would have a negligible murder rate as well. The real world is a bit more complex. Even ignoring for the moment that any gun control program would

18. Sometimes they seem to ignore it altogether, as when Professor McClurg appeared to attribute all handgun deaths to one of three categories: "deaths from criminal attacks, accidents and suicides." McClurg, *supra* note 2, at 602, n.8. Elsewhere, Professor McClurg stated that he did not reject the utility of handguns in self-protection as "insignificant," although he went on to counsel the long gun is to be preferred as a means of self-defense. *Id.* at 613-14. For further discussion of long guns as a replacement for handguns, see *infra* notes 119-22 and accompanying text.

19. Mr. Hardy views the deterrent factor as important. He states that burglars of occupied dwellings face a two percent risk of being shot, which is more than double the risk of being apprehended and imprisoned. Hardy, *supra* note 1, at 554 (citing REPORT PREPARED FOR THE USE OF THE SENATE COMMITTEE ON THE JUDICIARY, 97th Cong., 2d Sess., FEDERAL REGULATION OF FIREARMS, Part 7, at 172).

20. See, e.g., McClurg, *supra* note 2, at 602 n.8.

leave tens of millions of guns of all types in circulation,²¹ the low level of violence enjoyed in these countries is simply not available to the United States. Our society, particularly in our inner cities, where most handgun violence occurs, differs from those of Europe in important ways not related to the availability of handguns. Discussion of the various reasons for this country's high homicide rate is beyond the scope of this paper, but I note that proponents of gun control are not persuasive when they rely on transnational comparisons that do not take account of such factors.²²

Before accepting the *post-hoc-ergo-propter-hoc* analysis offered by proponents of gun control, perhaps we should take note of changes other than the proliferation of guns that have accompanied the elevation of our murder rate. By this reasoning, for example, one might surmise that the doubling of our murder rate since the early 1960s has been due to decisions of the United States Supreme Court. The 1960s, the heyday of the Warren Court, brought us decisions such as *Mapp v. Ohio*²³ and *Miranda v. Arizona*.²⁴ Perhaps the Court unwittingly encouraged a generation of potential criminals to believe that they could successfully flaunt society's laws. Would Professor McClurg join me in calling on the Court to overrule these decisions?

Unquestionably, the most important factor driving the murder rate, and crime of all sorts, is our drug problem. If we want to take a bold stand that might have a realistic chance of curbing our crime problem, rather than simply making millionaires of a few more personal injury lawyers, we should give serious consideration to legalizing drugs. For the foreseeable future, however, that route appears to be politically impossible. Gun control can make a modest contribution to public safety, at best, if our drug problem does not improve.

For these and other reasons,²⁵ violence, including violence commit-

21. See *supra* notes 14-17 and accompanying text.

22. It might be instructive, for example, to compare the percentage of children who are born to unmarried teenagers in this country, Japan, and European countries.

23. 367 U.S. 643 (1961) (evidence obtained in violation of constitutional search-and-seizure rights cannot be introduced in state prosecution).

24. 384 U.S. 436 (1966) (criminal accused must be advised of right to remain silent and of right to counsel, including state-paid counsel for indigent accused; confession obtained in absence of such warning is inadmissible).

25. For example, I agree completely with Professor McClurg's concern about violence on television, which, he tells us, results in the average American child witnessing 40,000 murders by age 18. McClurg, *supra* note 2, at 601 (citing "Violence in Our Culture," *Newsweek*, Apr. 1, 1991, at 51, (citing Thomas Radecki, research director for the National Coalition on Television Violence)).

ted with handguns, will continue at a very high level regardless of what tort or criminal law says about the legality of guns. Liability proponents' oft-repeated lament that many people are killed with handguns, therefore, adds little to the present debate.

II. JUDICIAL IMPOSITION OF STRICT LIABILITY AGAINST GUN SUPPLIERS

The merits *vel non* of gun control need not be evaluated in order to determine that judicially-imposed strict liability for gun suppliers is a very bad idea, indeed. This is true for at least three reasons, any one of which is sufficient. The most fundamental objection is that courts should defer to legislative bodies to resolve competing policy choices, within constitutional limits. Both action and inaction by legislative bodies lead to the inescapable conclusion that they have uniformly rejected strict liability for gun suppliers.

Even if proper deference to legislative bodies did not require that courts refrain from judicially proclaiming strict liability, recognition of three shortcomings of common-law policymaking should lead them to do so. First, if a court adopted strict liability for gun suppliers, establishing an effective date for this new law would prove unusually difficult. The court would be forced to choose between two unpalatable alternatives. It could act as courts normally do, and give its decision some retroactive effect. That would result in manifest unfairness to handgun suppliers, predictably leading to their bankruptcy. Alternatively, it could throw aside all pretenses and openly act like a legislative body enacting gun control legislation. Second, it would prove impossible for a court to condemn only some guns, as liability proponents advocate. The nature of modern American common law is such that suppliers and purchasers of all guns would be adversely affected by a ruling establishing strict liability in the case of any gun. It is likely that the result would be grossly unfair to suppliers of products held defective, and disruptive and costly to suppliers and purchasers of products that were not judicially condemned. Third, courts should be reluctant to place a large new category of cases on our overburdened system of litigation, especially in light of growing evidence that the jury system

While Professor McClurg points to the problem, however, he offers no solution. (Certainly he does not suggest that television be restricted. It is interesting that most liability proponents tend to be extremely supportive of rights protected by the First Amendment, given the narrow interpretation they place on the Second Amendment.) The imposition of strict liability on gun suppliers is not the "solution" to televised violence that comes most readily to mind.

does not work well in torts cases.

Finally, courts should refuse to impose strict liability against gun suppliers in recognition that such a determination would be inconsistent with the history and policy underlying products liability law. As evidence of this fact, courts and legislative bodies all over the country have rejected such a radical extension of liability. After a decade or more of effort by proponents—all over the country, legislatively and judicially, at federal and state levels—in no American jurisdiction are gun suppliers held strictly liable.

A. Deference to the Legislature

Tenth-grade civics students learn that the proper role of legislative bodies is to make law, while that of courts is interpretation. But we are grown-ups, and can acknowledge that Professor McClurg is correct in stating that, in fact, courts do make law.²⁶ Nevertheless, there are sharp limits on the *proper* circumstances in which courts may make law. If a court is faced with a novel question not contemplated by legislative or constitutional drafters, it must decide the case, and in doing so, "makes law." In reaching its decision, the court presumably would be influenced to a great degree by its view of policy—its desire for a good outcome, in the instant case and in terms of creating good precedent. The fact that such an exercise of judicial power is entirely proper, however, assuredly does not mean that a court can properly make law whenever it wishes, in the way that a legislative body can. For example, the fact that a court has the *power* to invalidate any statute on constitutional grounds does not mean that it has the *right* to do so.²⁷

Even "activist" courts generally defer to legislative determinations. Courts recognize that their legitimacy derives from the supposition that they are applying and interpreting constitutions, statutes, regulations, and common-law precedent, and not purely applying their ideas of good policy. Obviously, the power to overstep the proper judicial role creates a temptation that courts sometimes cannot resist. No court, however, routinely misuses its powers in this manner; even when a court occasionally does so, it claims that it is not, thereby implicitly recognizing the impropriety of its action.

26. McClurg, *supra* note 2, at 604-05.

27. The fact that a decision may stand is no assurance that it was correct or even principled. In Justice Jackson's famous words: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

1. *Legislative Bodies Have Rejected Strict Liability*

The foregoing principles are not particularly controversial. Proponents of strict liability for handgun suppliers may argue, however, that while courts are bound by legislative determinations, they are free to act where the legislature has been silent. By extension of this argument, courts are free to follow their own policy choices unless a legislature enacts a statute explicitly providing that strict liability may not be imposed against gun suppliers.²⁸ Liability proponents, in other words, might contend that the courts are "writing on a blank slate."

Such a position is untenable. As a starting point, it is unquestioned that guns have traditionally been permitted in every jurisdiction in this country. Accordingly, a rejection of preexisting law would be required to bring the law to the position advocated by liability proponents. If this were an area governed by common law and to which legislative bodies had devoted little attention, courts might legitimately change the law they had created. In fact, however, Congress and state legislatures have given considerable attention to issues of gun regulation. Even considered inaction gives strong evidence of legislative will. Where the law is settled, as it is here, the fact that a legislative body considers and rejects a new policy should make a court quite hesitant to implement that policy on its own. But it is not just inaction that evidences a lack of legislative enthusiasm for the proponents' proposals. Legislative bodies have actively regulated guns in many ways,²⁹ but never have they indicated that properly functioning, lawful guns should be deemed products that subject their manufacturers and sellers to strict liability. Because it is well established that properly manufactured guns are not defective, it is understandable that legislatures have not frequently addressed the issue of strict liability; when they have done so, however, they have acted to reject it.³⁰ In the face of careful

28. See, e.g., Safarian, Comment, *supra* note 4, at 171, who acknowledged that "although a strict products liability cause of action against gun manufacturers may be foreclosed in California," on account of an explicit statute, "the theories advocated by the author . . . may be used in jurisdictions that have not foreclosed the cause of action."

29. The Arkansas Legislature, for example, has criminalized a large number of acts relating to firearms and other weapons. Ark. Code Ann. §§ 5-73-101 to -120 (Michie 1987).

30. See, e.g., CAL. CIV. CODE 1714.4 (West 1983), which rejected a classification of guns as defective based on a risk/benefit analysis. It is instructive that the statute provided that it was "declarative of existing law."

Similarly, following the Maryland court's imposition of strict liability against suppliers of so-called "Saturday Night Specials," in *Kelley v. R.G. Industries, Inc.*, 497 A.2d 1143 (Md. 1985), the Maryland Legislature acted to legislatively reverse the decision. MD. ANN. CODE art. 27, § 36-

legislative attention that has uniformly rejected the approach advocated by liability proponents, only a willful court would attempt to implement such an important policy choice.³¹

2. *The Asserted Invalidity of Legislative Determinations Concerning Gun Control*

While the primary argument of liability proponents is that legislative bodies have not spoken, leaving courts free to do what they think best, the proponents offer two additional, and quite revealing, lines of argumentation on this issue. One group of liability proponents argues that legislative bodies have been intimidated by the "gun lobby"—principally, the National Rifle Association. They argue that legislative bodies, particularly Congress, have kowtowed to the gun lobby, and thus have failed to enact gun control legislatively, disregarding popular support for gun control.³² Assuming *arguendo* that these proponents are correct concerning public opinion,³³ this attitude suggests a fundamental misunderstanding of how the political branches of government are supposed to work. We do not use the New England town-meeting system, much less government by public opinion poll. It is to be expected that in a representative government, those individuals to whom an issue is particularly important will exercise influence dis-

I(h) (1957 & Supp. 1990).

The District of Columbia City Council adopted a form of strict liability against suppliers of assault weapons, but repealed the provision before it became effective. *See infra* note 55.

31. A court cannot properly disregard less than unambiguously expressed legislative will on the theory that the legislature can reverse its decision by subsequent litigation. As Dean Calabresi, who favors more activist judges than I, puts it: "[J]udicial abuse is not adequately compensated because a legislature has the last word. Acceptance of such judicial abuse implies acceptance of the doubtful proposition that a past legislative starting point has no greater claim of legitimacy than the court's own willful preference." GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 169 (1982).

32. This appears to be the position of most liability proponents. *See, e.g.,* Turley, *supra* note 1, at 61; Pope, Note, *supra* note 4, at 1170-71; Safarian, Comment, *supra* note 4, at 172. Some liability proponents comment on the "gun lobby's" influence on legislative bodies without directly stating that they think public opinion supports gun control. *See, e.g.,* Richard C. Miller, *New Perspectives in Litigation: Smoking Guns*, 27 TRIAL, July, 1991, at 26; Mackarevich, Comment, *supra* note 4, at 468.

33. One of the authors cited in the preceding footnote asserted that "the majority of Americans have continually expressed a desire for more restrictions on handguns." Safarian, Comment, *supra* note 4, at 172 (citing a public opinion poll). In the same paragraph, however, she lamented the fact that the California electorate had voted down a gun control initiative by a two-to-one margin, without betraying any lack of confidence in her assertion that the public firmly supported gun control. *Id.* Public opinion is difficult to assess, and in surveys of public opinion, much may hang on how the question is phrased.

proportionate to their numbers. This is the case not only regarding gun control but also with respect to almost all issues arising before any legislative body. The argument that the resulting legislative decisions are somehow less worthy of deference proves far too much. A wide range of legislative decisions, from price supports for tobacco to military aid to Israel, if separately submitted for referendum, might well be rejected by the public. Decisions of the political branches, including those concerning gun control, are not writ in stone. This open society, with its freedom of speech and press, affords advocates of gun control the opportunity to seek a reversal of policy by legitimate means—by taking its case not to the courts, but to the public and its elected officials.

Thus, legislative determinations on gun control issues are due full deference regardless of whether public opinion polls show majority support for an abstract "gun control." If anything, such determinations are due greater deference than usual because of widespread publicity concerning gun control issues. While Congress may enact price supports for sugar, with no one particularly interested or informed except the sugar industry, other legislative determinations—those concerning abortion or the mandatory wearing of seat belts, for example—are rendered amidst a high degree of public awareness. Certainly gun control matters command much greater public attention than the average matter considered by the legislature and thus are due the fullest deference from the courts.

The other branch³⁴ of liability proponents, which appears to include Professor McClurg, suggests a position that is even farther removed from political legitimacy. Professor McClurg argues that "most of us"—which I take to mean the American public—have been "[i]ntimidated by the N.R.A., enchanted with the rich and romantic history of guns in America and bamboozled by an absolutist interpretation of the second amendment."³⁵ In effect, Professor McClurg is advancing the untenable position that courts should disregard legislative determinations that not only are constitutionally permissible³⁶ but are

34. It may be incorrect to call this a branch, because it is not clear that any liability proponent other than Professor McClurg concedes that the public may not support gun control. Clearly, most think the public is squarely in their corner, its will frustrated by the representatives it elects.

35. McClurg, *supra* note 2, at 600-01. I merely note the dubious nature of Professor McClurg's assumption that "most of us" are aware of the existence of the Second Amendment, let alone bamboozled by a particular interpretation of it.

36. Nothing in Professor McClurg's article, or in the writings of any liability proponent of which I am aware, suggests the view that legislatures are not constitutionally free to reject gun control and/or strict liability for gun suppliers. The constitutional doubt is on the other side,

supported by public opinion—because the public and its elected representatives are wrong. In a similar vein, another liability proponent argues that the California electorate's two-to-one rejection of a gun-control measure is a reason *favoring* judicial imposition of strict liability against gun suppliers.³⁷

Thus, while the first group of liability proponents wants courts to protect a public that assertedly favors gun control from the cowardice of its elected legislators, the second group calls on the courts to protect the public from its own bad judgment. This is classic paternalism in its purest antidemocratic form. Even if we should decide to abandon representative democracy, judges might not be our choice for the dictator role.³⁸

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

It is the political branches of government that have legitimacy to deal with the regulation of guns. But even if judges persuaded themselves that they properly had the power to act as the proponents propose, they should refrain from doing so. More than in most areas of law, a statutory approach to gun regulation would prove to be fairer, more certain, and more workable than a new policy developed through case law. Almost inevitably, a common-law approach could not be limited to the particular gun suppliers, and the particular acts of those suppliers, that the liability proponents say they wish to reach. To use the conventional metaphor, the slope would prove unusually slippery. Moreover, the limitations of tort trials in general are becoming increasingly apparent; leaving aside the issue of whether some curtailment in the present scope of tort law is appropriate, this is reason enough to raise serious doubts about extending it in the radical manner the liability proponents advocate.

because it is possible that the Second Amendment may restrict the legislature's power to regulate guns. The Second Amendment is generally beyond the scope of this article. *See supra* note 1.

37. Safarian, Comment, *supra* note 4, at 172.

38. "Enlightened dictatorship" seems a big improvement over the messy, inefficient, inconsistent, and frequently *unenlightened* government obtained through democratic processes. Unfortunately, history suggests that dictators frequently flunk the enlightenment test.

1. *Limiting the Retroactive Effect of Judicially Established Strict Liability*

Legislative bodies normally change the law only prospectively.³⁹ This practice is fundamentally and obviously fair. Suppose a legislature determined that handguns should no longer be sold in a particular state. It could enact a statute providing criminal penalties for selling a handgun in that state. In addition to the criminal penalties, violators might be made liable to victims of injuries inflicted with handguns sold in violation of the new statute. Alternatively, without criminalizing the sale of handguns, a legislature could directly create tort liability for injuries brought about with handguns sold in the jurisdiction. In either case, the legislature would change the rules only prospectively. A supplier who had sold a handgun before the effective date of the legislation would not be subject to criminal or civil liability. Liability would result only if the defendant acted after having been put on notice by the legislation. It is important to note that this result—prospective effect—would follow whether the legislature directly imposed civil liability or a court used a newly-enacted criminal standard as a basis for civil liability.⁴⁰

39. In some cases, there are constitutional prohibitions on giving retroactive effect to statutes. *See, e.g.*, U.S. CONST. art. I, § 9 (Congress may pass no ex post facto law); U.S. CONST. art. I, § 10 (states may not pass ex post facto law or impair obligation of contracts); ARK. CONST. art. 2, § 17 (State of Arkansas may not pass ex post facto law or law impairing obligation of contracts). These constitutional prohibitions apply most surely when criminal rules of law are being changed adversely to the criminal defendant.

Clearly, many examples exist of legislative bodies changing legal rules with retroactive effect. For example, if a legislative body enacts a statute that it deems declarative of pre-existing law, it may seem proper to give the statute retroactive effect. *See, e.g.*, *Brookings v. Sargent Indus.*, 717 F.2d 1201, 1203 (8th Cir. 1983) (amendments to Nebraska products liability statute should not be applied retroactively, distinguishing holding that Arkansas products liability statute should be applied retroactively because it “merely codifies . . . and does not attempt to change existing product liability case law”). If the change harms only the state, the legislative body can give retroactive effect if it prefers. Sometimes, legislative bodies can constitutionally change civil rules of law, even where the changes adversely affect individuals vis-a-vis the government. One of the most dramatic examples was the first federal income tax statute enacted after ratification of the Sixteenth Amendment. The statute was enacted on October 3, 1913, but taxed all income earned after February 28, 1913. The United States Supreme Court held that it “cannot be doubted” that, at a minimum, Congress “could impose a tax on the income of the current year.” *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 20 (1916).

For a full discussion of constitutional prohibitions on retroactive legislation and related issues, *see, e.g.*, Lewis H. Orland & David G. Stebing, *Retroactivity in Review: The Federal and Washington Approaches*, 16 GONZ. L. REV. 855, 864-69 (1981).

40. The more common situation is that the legislature enacts a criminal statute that is silent concerning its effects on tort liability. In that case, a court might look upon the criminal statute as

By contrast, when courts "make law," the normal practice with respect to retroactive effect is quite different. This difference may have arisen from the fact that courts are supposed to interpret, rather than create, law.⁴¹ Even today, a court that is breaking new ground is likely to characterize its decision not as creation of new law, but as a new interpretation of pre-existing law. If the law already was in effect, although with a different interpretation, the rationale for prospective-effect-only seems much weaker. In fact, "most state civil decisional law is given retroactive effect."⁴² Courts frequently "apply the change to the case before us and prospectively to all such causes of action accruing after the date of the case before us."⁴³ This is the rule usually applied by the Court of Appeals of Maryland, the only court to have decided a case favorably to the proponents' position.⁴⁴

establishing a new legal standard for civil conduct. Under the doctrine called negligence per se in most jurisdictions, the violator could then be held liable for harm proximately caused by the violation so long as the legislation had as one of its purposes prevention of the type of injury that occurred. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS 229-31 (5th ed. 1984) [hereinafter PROSSER & KEETON].

It is well settled that in a proper case, liability can arise where the defendant's violation allowed a third party to commit a more direct criminal act against the plaintiff. *Id.* at 305. Not surprisingly, there are close cases in application. For example, selling of alcoholic beverages to an obviously intoxicated person is criminal. See, e.g., ARK. CODE ANN. § 3-3-209 (Michie 1987). In some jurisdictions, the seller can be held liable if the purchaser subsequently drives while intoxicated (a more direct wrong) and injures the plaintiff. See, e.g., *Vesely v. Sager*, 486 P.2d 151 (Cal. 1971). In others, including Arkansas, the seller's criminal violation is deemed not to be the proximate cause of the plaintiff's injury. *Milligan v. County Line Liquor*, 289 Ark. 129, 709 S.W.2d 409 (1986); *Carr v. Turner*, 238 Ark. 889, 385 S.W.2d 656 (1965). The legislature can overrule the court, of course. For example, the California court's decision in *Vesely* was rejected through enactment of CAL. BUS. & PROF. CODE § 25602 (West 1964 & Supp. 1982).

Clearly, it is preferable for legislatures to spell out the civil effects of criminal statutes in order to avoid judicial misinterpretations, as in *Vesely*. Nevertheless, for present purposes, it is not of great importance that civil liability may be imposed by courts rather than directly by legislatures. The criminal statute was itself enacted by the legislature, and with prospective effect only. Therefore, if courts require violation of the criminal statute before imposing liability, they will not impose liability for an act lawful when done. Even if courts change their interpretation of the tort effect of a criminal violation (again, *Vesely* provides an example), at least the defendant has been put on notice, in advance, that his conduct is subject to punishment.

41. This "declaratory theory" has fallen in disfavor, and courts generally do not feel bound to give retroactive effect to their decisions. See Orland & Stebing, *supra* note 39, at 856-62.

42. See Orland & Stebing, *supra* note 39, at 869. State courts are free, under the federal constitution, to not apply their decisions retroactively. *Great Northern Railway v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). In criminal law, courts may not apply a new interpretation even to the case at bar if the new decision is adverse to the defendant. For example, in *James v. Unites States*, 366 U.S. 213 (1961), a criminal tax fraud conviction was reversed even as the Supreme Court announced a new statutory interpretation that supported the conviction.

43. *Kelley v. R.G. Indus.*, 497 A.2d 1143, 1161-62 (Md. 1965).

44. *Id.*

As applied to gun suppliers, even retroactive effect to the extent of "causes of action accruing after the date of the case before us" would be devastating because it would allow liability based on supplying guns before the court's new "interpretation" was announced. Immediately going out of the handgun business—never selling another handgun—would not suffice. The very large number of handguns already in circulation would be available to commit hundreds of thousands of crimes in the future. Bankruptcy would be a predictable result for most suppliers.⁴⁵ Thus, a ruling adopting the usual judicial approach to retroactivity would have the effect of a statute barring the sale of handguns, with the difference that legitimate suppliers would be bankrupted as well as put out of business.⁴⁶

Even the Maryland court deciding *Kelley v. R.G. Industries*,⁴⁷ the sole case adopting the liability proponents' view, recognized that its usual rule concerning retroactive effect would result in a blatantly unfair result. The suppliers were engaged in a lawful business, and as the court conceded, "until now they have had little reason to anticipate that their actions might result in tort liability."⁴⁸ Thus, the Maryland court departed from its usual practice and held that its new ruling would apply to cases accruing after its ruling unless the defendant could establish that the first retail sale of the gun occurred prior to its

45. By the reasoning of liability proponents, handguns are defective products. Their supposed "defect"—coupled with the proponents' view that the defect is the proximate cause of crimes committed with the guns—would lead to thousands of wrongful death actions each year. But it is not just deaths that would lead to tort actions. Battery is a tort, and handguns would many more people than they kill. McClurg, *supra* note 2, at 602 n.8. Moreover, without ever being fired, handguns are used in a still greater number of crimes that are also torts, such as assault and rape.

If the gun were recovered so that the manufacturer could be identified, the plaintiff's case would be easy under the liability proponents' theory. Even if the criminal absconded with the gun so that its manufacturer could not be identified, courts might relax normal rules of causation and allow the victim to sue many suppliers on a "market share" theory. *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980). In addition, some victims of rape or robbery committed by an unarmed felon, or a felon armed with a weapon other than a handgun, might claim that a handgun was used. I am not optimistic that such claims—or even wholly invented crime/torts—could be successfully detected in a personal injury trial.

The likelihood that suit would be brought, and that substantial damages would be awarded, is great. Gun suppliers would appear to constitute a deep pocket. (The pocket would rapidly become shallower, and would soon empty in bankruptcy, but a jury would probably not be aware of that.)

46. As observed earlier, it is likely that handguns would still be supplied, although not through legitimate sources. See *supra* notes 14-17 and accompanying text.

47. 497 A.2d 1143 (Md. 1965).

48. *Id.* at 1162.

decision.⁴⁹

This approach to the problem of retroactive effect could be used in *Kelley* because the court was openly engaging in legislating,⁵⁰ and it was almost willing to say so. It seemed to emphasize that its decision was wholly without precedent and nothing that a gun supplier could have expected.⁵¹ Because the court was almost willing to admit that it was acting as a legislature, there was no reason for it not to use the legislative practice in setting the effective date.⁵²

Few courts are prepared to act as openly as the Maryland court. Even "activist" courts usually contend that they are applying pre-existing law. This especially would be the case in that large number of states, such as Arkansas, in which products liability law is established by statute.⁵³ After the legislature has established substantive law to deal with products liability, it is most unlikely that even a court willing to accept the liability proponents' position would be willing to acknowledge that it was doing anything other than interpreting the statute, which, of course, would have been in effect for years. Thus, it would be difficult not to apply the decision retroactively.

A court considering acceptance of the liability proponents' position, therefore, should think twice. Not only would it be required to usurp legislative prerogatives—indeed, to reject rather clear legislative policy choices inconsistent with the proponents' proposals⁵⁴—but it would have to do so in an unusually open manner in order to avoid the gross unfairness of retroactivity. By contrast, gun control adopted by statute could comfortably use the usual, fair legislative approach of making the new law apply prospectively.⁵⁵

49. The burden of proof allocation is not unimportant, especially if a court allows plaintiffs to prevail even if the assailant's gun is not recovered.

50. Had this decision been allowed to stand, it would have had the relatively benign effect of putting suppliers out of business, but without bankrupting them if they ceased operations. *Kelley* was legislatively overturned through enactment of MD. ANN. CODE art. 27, § 36-1(h) (1957 & Supp. 1990).

51. See *supra* text accompanying note 48.

52. The court allowed the plaintiff in *Kelley* to recover, which constituted a deviation from a pure prospective-effect-only approach. 497 A.2d at 1162.

53. ARK. CODE ANN. §§ 4-82-102; 16-116-101 to -107 (Michie 1987). It appears that in Maryland, court decisions are the sole basis of products liability law. *Kelley*, 497 A.2d at 1147-48.

54. See *supra* notes 28-31 and accompanying text.

55. For example, as part of the same statute that legislatively reversed *Kelley*, Maryland's legislature criminalized the manufacture or sale of certain handguns with prospective effect. MD. CODE ANN. art. 27 § 36-1(f)-(g) (1957 & Supp. 1990).

I do not mean to suggest that any gun control measure enacted by a legislature would be a proper exercise of legislative power, even if its effect were only prospective. For example, the

2. *Limiting the Gun Marketers to Which Strict Liability Would Apply*

While courts would find it difficult to limit the effect of a strict liability decision temporally, they would find it impossible to limit its effect to specified types of guns. Again, a statutory approach would be superior.

Liability proponents claim that they do not seek strict liability against all gun marketers.⁵⁶ Professor McClurg, along with most other liability proponents,⁵⁷ keys on handguns. He emphasizes that his proposal would not reach "long guns,"⁵⁸ and argues that his proposal is justified, in part, by the fact that long guns would still be available as "a substitute product that serves the same needs as a handgun."⁵⁹ Assuming the wisdom of gun control, or of imposing strict liability on suppliers of certain guns, it is not self-evident that the handgun/long gun division is the place to draw the line. Perhaps only some handguns should be condemned; this was the approach of *Kelley* and of some

District of Columbia enacted a legislative measure imposing strict liability for certain assault weapons. D.C. Act 8-289 (1990). Although the measure would create liability only with respect to assault weapons manufactured or sold after its effective date, it appears that liability would result from selling a weapon outside the District of Columbia that subsequently was used by a third person to injure someone in the District. *Id.* §§ (4), (6). Should such a measure ultimately come into effect, it could greatly impact sales of assault weapons all over the country. Indeed, it seems that such extra-territorial effect was desired: "District Council Chairman David Clarke, the law's architect, says the real goal is to kill the sale of these weapons throughout the country." NAT'L L.J., Dec. 31, 1990—Jan. 7, 1991, at 5.

A single jurisdiction, whether the District of Columbia or a state, should not be able to make decisions, even by statute, that would have the effect of controlling the market nationwide.

The status of D.C. Act 8-289 is confusing. It was signed on December 17, 1990, as one of the final official acts of outgoing Mayor Marion Barry, that well-known opponent of crime. On January 18, 1991, a joint resolution to prevent the D.C. provision from coming into effect was proposed in Congress. H.J. RES. 79 (Jan. 18, 1991). Congressional action became unnecessary due to subsequent action by the District of Columbia, which adopted an emergency repealer, then a temporary repealer, and finally a repealer of the strict liability statute. D.C. Acts 9-1; 9-8; 9-32. However, the final repealer may be referred to the voters. (Litigation is pending, which will decide whether the repealer will, in fact, be on the ballot.) If the repealer is voted on, and the District's electorate defeats the repealer, then apparently D.C. Act 8-289 would be resurrected, to become effective unless Congress acted.

56. It is doubtful that the advocates of strict liability for handgun suppliers really intend to stop there. It is interesting that a recent proposal for strict liability against suppliers of assault weapons, which, of course, are not handguns, was authored by a representative of the Educational Fund to End Handgun Violence. Horwitz, *supra* note 4.

57. See, e.g., Turley, *supra* note 1; Mackarevich, Comment, *supra* note 4.

58. McClurg, *supra* note 2, at 614-16.

59. McClurg, *supra* note 2, at 614.

liability proponents.⁶⁰ On the other hand, perhaps not all long guns deserve protection; assault weapons, for example, have been responsible for a large and growing portion of criminal homicides,⁶¹ leading some liability proponents to propose strict liability for their suppliers.⁶²

Whatever classification might be chosen by a court, the chances are great that it would prove unstable. For example, suppose a court imposed strict liability for certain types of handguns, such as "Saturday Night Specials" or "snubbies."⁶³ If common-law courts imposed strict liability against one of these types of handguns, there is no particular reason to think that the matter would stop there. Victims shot with other types of handguns are just as appealing, just as worthy of compensation, and the defendants just as deep-pocketed. It would be difficult for a court to hold that someone shot with a concealed "snubby" could recover, for example, yet deny recovery to the next victim who was shot with a concealed handgun having a slightly longer barrel.

Professor McClurg and other liability proponents would have us believe that courts could impose liability with respect to all handguns, but no long guns, while even at present, calls are made for liability against suppliers of some long guns.⁶⁴ Once a court rejected the common-sense notion that there must be something wrong with a gun before it is defective,⁶⁵ why would it stop at handguns? Or at assault weapons? The victim of a criminal wielding a sawed-off shotgun⁶⁶ is appealing, as are innocent victims of criminals using other types of firearms, such as rifles and unmodified shotguns. Each time, the incremental difference in cases would be very small, and the slope might prove irresistibly slippery.

60. Pope, Note, *supra* note 4, at 1176-77, defended the decision in *Kelley* to impose liability only on suppliers of so-called "Saturday Night Specials," and predicted that the impact of the decision would be limited to that subset of handguns. *Id.*

Safarian, Comment, *supra* note 4, at 173, appeared to favor strict liability for handguns in general. Her comment, however, specifically proposed strict liability for suppliers of handguns with a barrel length of 2-½ inches or less, which she termed "snubbies." *Id.*

61. According to the staff of the Senate Judiciary Committee, "[m]ilitary assault weapons have become the weapons of choice for drug dealers," and are "20 times more likely to be used in a crime than other firearms." MURDER TOLL, *supra* note 11 (emphasis in original).

62. Horwitz, *supra* note 4.

63. These are categories of handguns singled out by some liability proponents. See *supra* note 60.

64. Horwitz, *supra* note 4.

65. This all-important matter is discussed *infra* at notes 94-118 and accompanying text.

66. The supplier might argue that the user had modified the shotgun by sawing off the barrel. This defense would likely prove unavailing, however, unless the modification was "rare and unusual," or at least "unforeseeable." PROSSER & KEETON, *supra* note 40, at 711.

The case-by-case approach of the common law, and its tradition of considerable deference to juries, make it unsuited to gun regulation. Legislatures can appropriately deal with a problem comprehensively and, for example, can restrict certain types of guns while clearly making those restrictions inapplicable to others. (In fact, of course, legislative bodies have done just that, a point seemingly lost on liability proponents.)⁶⁷ By contrast, courts normally decide one case at a time, and would say, in effect: "This type of gun is defective. The question of whether other types of guns are defective is not presented by this case." The resulting uncertainty is exacerbated by the common law's deference to the jury. In *Kelley*, for example, the court held that "Saturday Night Specials" were defective, but noted that "[t]here is no clear-cut, established definition of a Saturday Night Special."⁶⁸ The court failed to define the term itself,⁶⁹ and seemed to insure that case-by-case jury determinations would be required by stating that "a handgun should rarely, if ever, be deemed a Saturday Night Special as a matter of law."⁷⁰

Interestingly, the economic effect of a court's decision cannot be controlled by the court, no matter what its opinion says and *no matter how it in fact decides future cases*. Even if a court declared a particular, clearly defined, type of gun defective, and resolutely resisted all invitations to extend its holding to other guns, the suppliers and purchasers of *all* guns would be adversely affected. A rational insurer of the supplier of a permitted gun would worry about the slippery slope, and would raise its rates accordingly.⁷¹ Such increased insurance costs would be an additional cost of production and, like all costs, would

67. For example, as early as 1935 Arkansas enacted the Uniform Machine Gun Act. 1935 Ark. Acts No. 80 §§ 1-12 (now codified as ARK. CODE ANN. §§ 5-73-201 to -211).

New Jersey's detailed legislation, which was overhauled in 1990, devotes several pages to definitions. The statute specifies, by precise definition including extensive use of model numbers, a large number of guns to which certain statutory provisions either do, or do not, apply. N.J. STAT. ANN. § 2C: 39-1 to -12 (West 1982 & Supp. 1991).

68. 497 A.2d at 1159.

69. The court stated: "Relevant factors include the gun's barrel length, concealability, cost, quality of materials, quality of manufacture, accuracy, reliability, whether it has been banned from import by the Bureau of Alcohol, Tobacco and Firearms, and other related characteristics." *Id.* at 1159-60.

70. *Id.* at 1160.

71. It is reasonable to assume that recent suits and commentary proposing strict liability, although unsuccessful, have resulted in increased insurance rates for suppliers. Some commentators assert that this is a secondary goal of liability proponents. Mackarevich, Comment, *supra* note 4, at 470.

have to be passed to purchasers or absorbed by suppliers.⁷² Depending on the assessment of the slippery slope, many suppliers of guns not judicially condemned (or perhaps—and this is the key to the problem—not yet judicially condemned) might simply go out of business.⁷³ Thus, the very nature of the common law renders untenable the suggestion that a court could label handguns “defective” without effect on the market for long guns.

3. *General Shortcomings of Tort Law and Jury Trials*

Yet another reason to resist this radical expansion of tort law is that the tort system is performing its present tasks poorly. The system is notorious for delay and inefficiency.⁷⁴ The system works well for law-

72. Obviously, some gun suppliers might choose to self-insure. If the court never imposed strict liability on the type of gun in question, the self-insurance would turn out to cost nothing. Nevertheless, running a risk has a similar effect on business decisions as does an increased cost. Suppose that the investment climate is such that twelve percent was the expected return on invested capital in another business. This return could be obtained without either the expense of liability insurance, or the risk of ruinous liability. No rational investor would engage in the gun business—even the segment of the gun business that had not been judicially condemned—without a higher rate of return, either to cover the insurance premium or as a premium to justify the great risk. Other things being equal, risky investments must command a higher rate of return.

Some distinction should be made between the short-run and the long-run effect. Economists define the short run as a period during which production capacity cannot be altered, and the long run as a period long enough that changes in production capacity can be effected. ROY J. RUFFIN & PAUL R. GREGORY, *PRINCIPLES OF ECONOMICS* 399 (1983). From an initial position, suppose that a new cost were imposed on one type of business—here, the marketing of guns not condemned by courts, but as to which there is concern among suppliers and their insurers due to the slippery-slope nature of the common law. In the short run, the supplier might not be able to shift all, or even most, of the cost to his customers. (An economist would tell us that successful shifting of new industry-wide costs depends on the relative shape of the demand and supply curves. *Id.* at 55-77.) Thus, the supplier would absorb the cost, and earn less than before. In the short run, nothing could be done about this new cost because, by definition, the supplier had not had time to re-orient his investment into another business not subject to the new cost. In the long run, however, if the supplier could not shift the cost to his purchaser, he would allocate his capital to new investments not subject to the cost in question. Unless production ceased altogether, some costs would be passed through, resulting in increased prices even for guns that continued to be judicially-sanctioned. The higher price would lessen demand, and, in the long run, cause marginal producers to leave the business.

Thus, the long-term effect of judicial imposition of strict liability for one type of gun (handguns, for example) would be felt by the entire gun market. Purchasers of other guns (long guns, for example) would be forced to pay increased prices, and fewer guns would be sold, even of the type not judicially condemned.

73. As noted earlier, see *supra* note 45, the consequences of liability would be devastating, and there is no assurance that a future decision expanding the categories of condemned guns would not be retroactive. See *supra* notes 39-55 and accompanying text.

74. Attorneys' fees are the largest element of cost. The plaintiff's attorney alone takes a

yers, worse for litigants, and still worse for society as a whole.⁷⁵

Our nation's litigation explosion continually increases the strain on the courts, making the proposal of the liability proponents untimely in addition to its many other failings. It is all but inconceivable that courts, their dockets backed up for years, would undertake to solve a perplexing matter of public policy by taking on a huge new volume of litigation.

The manifest shortcomings of the jury system are yet another reason to reject the proponents' proposals. Juries are expected to assess liability, a task for which they are ill-suited.⁷⁶ Moreover, they are required to assess the plaintiff's damages, which, as I have argued elsewhere,⁷⁷ is an impossible task. A generation ago, Professor Jaffe discussed problems in assessing damages for intangible harms, such as pain and suffering. While recognizing that courts would be reluctant to discard existing law on account of these difficulties, he suggested that his arguments "are not irrelevant to the judicial creation of new remedies and new items of damage."⁷⁸ In effect, liability proponents seek judicial creation of a new tort.

A well-recognized problem (which is not always viewed as a problem by lawyers) is the likelihood that skill of counsel is frequently more important than the merits of the case.⁷⁹ Less well-known, but no less

contingency fee of approximately one third of any recovery. Parties must also bear many additional costs, including the *de rigueur* battery of expert witnesses. Societal costs include the monetary expenditure for courthouses and the salaries of judges and other court employees. The less tangible costs of disruption and lost productivity, for parties, witnesses and jurors, should not be forgotten.

75. See Philip D. Oliver, *Once Is Enough: A Proposed Bar of the Injured Employee's Cause of Action Against a Third Party*, 58 *FORDHAM L. REV.* 117 (1989).

76. Surely it is clear to all disinterested observers that juries are ill-suited to decide intricacies of product design, and that, at best, it is inefficient to give them mini-courses in engineering and then force a decision from them. To Professor McClurg's credit, this particular problem would not follow from his proposal. He apparently envisions a state supreme court declaring, as a matter of law, that all handguns are defective, and that no other guns are defective. If the court maintained this position, the jury would need determine only the type of gun used to injure the plaintiff, a finding for which a jury is reasonably suited.

Other liability proponents envision a jury determination on the issue of product defect, as did the *Kelley* court. 497 A.2d at 1159-60; Turley, *supra* note 1, at 61.

77. Oliver, *supra* note 75, at 159-63.

78. Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 *LAW & CONTEMP. PROBS.* 219, 225 (1953).

79. Skill is important in selection of the jury, of course. Professor Sannito and Dean McGovern suggest that such skill can be employed in surprising ways:

As veniremen are summoned, watch their eyes as they enter the jury box
Wide-eyed people are typically emotional and are easily moved to pity, empathy, and

disturbing, is research indicating that many jurors are swayed by such factors as physical attractiveness of parties, attorneys, and witnesses;⁸⁰ and that eighty percent of jurors decide how they will vote *by the end of voir dire*.⁸¹ Moreover, juries seem to be getting worse, to judge from a recent article published by the Association of Trial Lawyers of America, the most notable defender of the jury system in tort cases. The author, a trial lawyer who appears to support the jury system, observes that television controls jurors' expectations, and suggests that lawyers should make "L.A. Law" their model for presenting real cases.⁸²

I have argued elsewhere that the present scope of tort law should be considerably restricted.⁸³ Here, I offer the more modest argument that this poorly functioning system not be expanded.

C. Principles and Precedents of Products Liability Law

Imposition of strict liability on gun suppliers would constitute a radical departure from the principles governing products liability law. Courts and legislatures alike, all over the country, have recognized this. As a result, after a decade of determined litigation all over the country,

compassion. They are usually good for plaintiffs in personal injury cases

During jury selection try to notice if anyone blinks inordinately during your questioning. Compare this eyeblink rate to that which occurs when your adversary queries them, to determine with whom they are more anxious. . . .

Generally speaking, tight-lipped people with beady eyes and taut facial skin are bad for plaintiffs.

THOMAS SANNITO & PETER J. MCGOVERN, *COURTROOM PSYCHOLOGY FOR TRIAL LAWYERS* 95, 106, 122 (1985). This information hardly increases my faith in the jury system.

80. See Cash, Begley, McCown & Weise, *When Counselors Are Heard But Not Seen: Initial Impact of Physical Attractiveness*, 22 J. COUNSELING PSYCHOLOGY 273 (1975); Sigall & Ostrove, *Beautiful But Dangerous: Effect of Offender Attractiveness and Nature of the Crime on Juridic Judgment*, 31 J. PERSONALITY & SOC. PSYCHOLOGY 410 (1975); Dion, Berscheid & Walster, *What Is Beautiful Is Good*, 24 J. PERSONALITY & SOC. PSYCHOLOGY 285 (1972).

81. Susan E. Jones, *Voir Dire and Jury Selection*, 22 TRIAL, Sept. 1986, at 60.

82. William S. Bailey, *Lessons from "L.A. Law": Winning Through Cinematic Techniques*, 27 TRIAL, Aug. 1991, at 98. In more detail, Mr. Bailey argued:

Jurors now look at a real-life trial with the same set of expectations they have for viewing television and films. . . .

Compared with "L.A. Law" in the 1990's, Perry Mason moved at a snail's pace. . . . The first lesson to be learned from "L.A. Law" is that shorter is always better. . . . [A] good two-minute closing argument on "L.A. Law" may have more jury appeal than a 30-minute star performance in a courtroom. . . . The rapid pace of "L.A. Law" sets a standard in the courtroom that I constantly strive to match.

Id. at 98.

83. Oliver, *supra* note 75. For focused criticism of the jury, see *id.* at 163-66.

no jurisdiction in the country (including Maryland)⁸⁴ imposes strict liability on gun suppliers. In the face of this overwhelming rejection, liability proponents nevertheless assert, incorrectly, that their proposals are consistent with, and flow logically from, existing tort law.

1. *Principles of Products Liability Law*

No one questions that victims of gun misuse suffer. But compensation alone is an incomplete justification for imposing tort liability, and it remains incomplete even if we hypothesize a defendant who can insure or pass costs through to customers.⁸⁵ Were these justifications complete, they would be reason enough to impose liability on a deep-pocketed corporation for illnesses resulting from natural causes—whose victims also suffer—with which the defendant had no relationship whatever. Obviously, tort law has always required more. It is essential that there be a reason to shift the loss, not to society in general (as through welfare or social insurance) but to a particular defendant. While the law frequently requires intent or negligence, in other cases, including products liability, strict liability is imposed. But even where strict liability is utilized, the law specifies the nexus that must exist between the defendant and the injury, a nexus that does not exist in the case of well-made guns.

Under existing products liability law,⁸⁶ suppliers of defective products are held strictly liable for resulting injuries.⁸⁷ Each state's law is somewhat different, and some of these differences are of considerable importance.⁸⁸ Nevertheless, it is fair to say that the foundation of current products liability law in every jurisdiction⁸⁹ is section 402A of the

84. *Kelley* was legislatively reversed. See *supra* note 50.

85. To be sure, compensation and loss spreading are important justifications for the decision to use a strict liability standard. *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 441 (Cal., 1944) (Traynor, J., concurring).

86. The interesting history of products liability has been ably told a number of times. See, e.g., M. STUART MADDEN, *PRODUCTS LIABILITY* 6-21 (2 ed. 1988). Classic accounts are found in Dean Prosser's famous pair of articles, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960), and *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

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

88. Of particular importance for present purposes is the fact that some jurisdictions judge products by consumer expectations, while others have adopted some form of risk-utility balancing. See *infra* notes 97-113 and accompanying text.

89. Prosser and Keeton state that "Section 402A liability in tort swept the country . . . until at the present writing nearly all states have adopted some version of it." PROSSER & KEETON, *supra* note 40, at 694. Moreover, section 402A "has influenced the development of the law of even

Restatement (Second) of Torts.⁹⁰ There have been significant developments in the quarter of a century since section 402A was adopted by the American Law Institute. For present purposes, the most important is that courts and legislatures across the country have pushed beyond the American Law Institute to provide that bystanders can recover,⁹¹ a development that is essential to the liability proponents' argument. In addition, in a development emphasized by liability proponents,⁹² a number of jurisdictions utilize a risk-utility balancing test to assist in determining whether a product is defective.⁹³

a. The Key Role of Defect

These developments should not cause us to lose sight of the central requirement of products liability law. Under the Restatement and under the law in *every* jurisdiction, a prerequisite to the imposition of strict liability is that the product be defective.⁹⁴ In a casual footnote

those states that have not officially embraced the Restatement position." Richard A. Epstein, *CASES AND MATERIALS ON TORTS* 642 (5th ed. 1990).

90. Section 402A of the RESTATEMENT (SECOND) OF TORTS provides:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

91. The Arkansas statute is typical in providing that suppliers are subject to "liability in damages for harm to a *person* or property" without regard to the relationship between the plaintiff and either the product or the supplier. ARK. CODE ANN. § 4-86-102(a) (Michie 1987) (emphasis added). The American Law Institute had expressly left open the question of whether section 402A should apply "to harm to persons other than users or consumers." RESTATEMENT (SECOND) OF TORTS § 402A Caveat 1 (1965).

The related defense of lack of privity of contract was rejected in the text of section 402A (*id.*, para. (2)(b)), a position universally accepted. *See, e.g.*, ARK. CODE ANN. §§ 4-86-101, 4-86-102(b) (Michie 1987).

92. *See, e.g.*, McClurg, *supra* note 2, at 7-13; Turley, *supra* note 1, at 50-54.

93. While many jurisdictions use some form of the risk-utility test, others follow the "consumer contemplation" test outlined in comment g to section 402A. Still others allow the plaintiff to recover on either theory, an approach pioneered by the California Supreme Court in *Barker v. Lull Engineering Co.*, 573 P.2d 443 (1978). *See generally* PROSSER & KEETON, *supra* note 40, § 99.

94. Section 402A of the Restatement requires that the product be "in a defective condition unreasonably dangerous." As Professor Wade observed, while this phrase has caused some diffi-

that is at once astounding and typical of liability proponents' analysis, Professor McClurg concedes: "This debate does not concern the non-controversial issue of tort liability for injuries caused by handguns which are defectively manufactured. It focuses only upon liability for injuries inflicted by handguns which are properly manufactured and perform as intended."⁹⁵

Stripped of its verbiage, the gravamen of liability proponents' complaint about guns is that they are *not* defective. If a gun gave its user no more deadly force than a water pistol, it would be defective, but liability proponents would be the last to complain. Instead, gun suppliers provide precisely what is requested and expected—an instrument that can intimidate, injure, and kill.⁹⁶ Perhaps society should stop making, or allowing, these requests, but even if that were so, it does not follow that well-made guns are somehow defective.

b. Risk-Benefit Analysis

In view of the common-sense proposition that "defective" does not accurately describe lawful products that perform exactly as they are supposed to—exactly as purchasers, legislators, and everyone in society expect—it is not surprising that proponents offer rather sophisticated arguments. Essentially, however, they argue that under risk-benefit analysis, handguns are defective.⁹⁷

culty, and perhaps "defective" and "unreasonably dangerous" could be regarded as redundant, one thing is clear: "The word 'defective' was added to ensure that it was understood that something had to be wrong with the product." John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 830 (1973). The California Supreme Court rejected "unreasonably dangerous" on account of its association with negligence, but continued to require that the product be "defective." *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153 (Cal., 1972).

Because well-made guns are not "defective," I do not discuss whether it would be necessary to establish that the guns were "unreasonably dangerous" as well as "defective."

95. McClurg, *supra* note 2, at 603, n.11.

96. Guns also have recreational value, and are viewed as collectors' items by many. But their *raison d'être* is to shoot a living thing, frequently another person. Even when used for this purpose, all three functions mentioned in the text may be entirely proper. For example, a gun may be displayed or a warning shot fired to ward off attack. If intimidation fails, the gun may be used by the victim of aggression to wound or (least likely of all) to kill the attacker.

97. Professor McClurg offers the terminology "products unreasonably dangerous per se," but bases his analysis on risk-utility balancing. McClurg, *supra* note 2, at 607. Professor McClurg correctly notes that the Louisiana Supreme Court has stated that some products should be regarded as "unreasonably dangerous per se." *Id.* n.23. Professor McClurg cites *Halphen v. Johns-Mansville Sales Corp.*, 484 So. 2d 110 (La. 1986). *Halphen*, however, aids Professor McClurg's argument not at all. The key issue in that case was whether an asbestos manufacturer could be held strictly liable even if it were reasonably ignorant of the product's dangerous properties when

First, it should be remembered that risk-benefit is not the unquestioned standard in judging products. There is considerable judicial⁹⁸ and academic⁹⁹ support for the "consumer contemplation" standard envisioned by the drafters of the Restatement.¹⁰⁰ No one argues that strict liability could be imposed against gun suppliers consistently with that standard.

But even if we assume that risk-benefit analysis is to be applied, the liability proponents ask that it be applied in a novel manner inconsistent with the purposes and history of products liability law. It is instructive to see how courts have used risk-benefit analysis. Perhaps the most important effect has been to allow recovery when an obvious defect could have been corrected, with little cost relative to the gain in safety.¹⁰¹ It also has served to provide a somewhat more definite standard than "consumer contemplation" in cases in which "the consumer would not know what to expect because he would have no idea how safe the product could be made."¹⁰² As explained by the California Supreme Court in the leading case of *Barker v. Lull Engineering Co., Inc.*,¹⁰³ risk-benefit analysis allowed imposition of liability "if through

it manufactured and sold the asbestos. The court held that reasonable ignorance was not a defense, and that the manufacturer could be subjected to liability based on hindsight analysis. The court's rationale is clearly inapplicable to the gun situation: "On balance, a rule of law requiring the manufacturer to assume the cost of accidents caused by products which are unreasonably dangerous per se, regardless of whether the danger was foreseeable, will provide an effective incentive to eliminate all possible dangers before putting products on the market." *Id.* at 118. "All possible dangers" have been eliminated from well-made guns. See *infra* notes 107-13 and accompanying text. Thus, it is not surprising that subsequent Louisiana cases have rejected the notion that guns are "unreasonably dangerous per se." *Addison v. Williams*, 546 So. 2d 220 (La. Ct. App. 1989) (assault rifle); *Strickland v. Fowler*, 499 So. 2d 199 (La. Ct. App. 1986) (handgun).

98. See, e.g., *Delvaux v. Ford Motor Co.*, 764 F.2d 469 (7th Cir. 1985) (convertible automobile unsafe in rollover crash not defective because danger obvious to ordinary consumer).

99. See, e.g., Richard A. Epstein, *The Risks of Risk/Utility*, 48 OHIO STATE L.J. 469 (1987). Professor Henderson argues that courts are ill-suited to evaluate product design. James A. Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973); James A. Henderson, *Design Defect Litigation Revisited*, 61 CORNELL L. REV. 541 (1976).

100. RESTATEMENT (SECOND) OF TORTS, § 402A, comment g.

101. See e.g., Aaron D. Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 312 (1977) ("[T]he judgment of society may be that for a slight additional cost (in some instances at no cost) design modifications could eliminate obvious dangers which are both substantial and hazardous."); Wade, *supra* note 94, at 842-43 ("[I]t is not necessarily sufficient to render a product duly safe that its dangers are obvious, especially if the dangerous condition could have been eliminated.").

102. *Barker v. Lull Engineering Co., Inc.*, 573 P.2d 443, 454 (1978) (quoting Wade, *supra* note 94).

103. 573 P.2d 443 (Cal. 1978).

hindsight the jury determines that the product's design embodies 'excessive preventable danger.'"¹⁰⁴ In jurisdictions following California's lead, use of risk-benefit analysis has also been associated with shifting the burden of proof to the defendant,¹⁰⁵ although this is by no means an essential feature.¹⁰⁶

All this is far removed from the prospect of imposition of strict liability on gun marketers. The utility of a gun lies in its capacity to kill and injure. This distinguishes the gun case from *Barker*, in which the purpose of the lift loader was not to injure its operator; from *Azzarello v. Black Bros. Co., Inc.*,¹⁰⁷ in which the purpose of the coating machine was not to crush the plaintiff's hand; from *Turner v. General Motors Corp.*,¹⁰⁸ in which the purpose of the automobile was not to paralyze its driver. Courts have recognized that risk-benefit analysis can be used profitably¹⁰⁹ in such cases in order to evaluate whether the manufacturer should have designed its product differently. Contrary to the wishes of those who wish to impose strict liability on gun suppliers, courts have not seized upon risk-benefit as an excuse to brand "defective" a lawful product made not only as safe as the state of the art, but as safe as is possible even in theory,¹¹⁰ consistent with its purpose.¹¹¹

104. *Id.* at 454.

105. "[O]nce the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product was not defective." *Id.* at 455.

106. *Wilson v. Pipe Aircraft Corp.*, 577 P.2d 1322 (Ore. 1978).

107. 391 A.2d 1020 (Pa. 1978).

108. 584 S.W.2d 844 (Tex. 1979).

109. I do not mean to suggest that risk-benefit analysis is to be preferred to the consumer contemplation standard, at least where consumer expectations are clear. See *supra* notes 98-100 and accompanying text. Beyond that point, courts may be engaged merely in paternalistic interference with consumer choice.

110. Naturally, like any product, the design of handguns can probably be improved. Under well-established principles of products liability law, the design of particular handguns can be challenged. See *Miller, supra* note 32, at 30. The present debate deals with guns that are both well designed and well manufactured, given their purpose.

111. Language in *O'Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983), which Professor McClurg quotes at length (see *McClurg, supra* note 2, at 609-10), admittedly comes close to embracing the liability proponents' position. In that case, the plaintiff dived into an above-ground swimming pool, and sustained serious injury when his head struck the bottom. The bottom of the pool was lined with vinyl. At trial, plaintiff's expert argued that a vinyl bottom was less safe than a latex bottom, which is used in in-ground pools, because it was more slippery. (This increased the danger to a diver, according to the plaintiff's expert, because the diver's hands were likely to separate when they came in contact with the slippery bottom, leaving his head to absorb the full impact.) The trial court sustained an objection to this testimony because the expert conceded that he knew of no above-ground pool lined with a material other than vinyl. Defendant's expert testified not only that vinyl was the only material used in above-ground pools, but that it was safer

Gun suppliers may occupy an even stronger position than suppliers of alcohol and tobacco. Those products are generally protected by the fact that their dangers are well known. To this extent, they are on the same footing as guns.¹¹² The purpose of cigarettes, however, is not to cause lung cancer, and no one would be happier than cigarette companies and their customers if the pleasure delivered by smoking could be obtained without this risk. By contrast, customers of gun marketers do not wish to buy a product that will not kill.¹¹³

2. *Precedent*

The weakness of the assertion that logical inferences of present

than latex because it was slippery. (A diver would be likely to slide along a slippery bottom, said the defendant's expert, rather than striking it.)

The New Jersey Supreme Court's opinion includes a one-liner that understandably brings joy to advocates of strict liability for gun suppliers: "[E]ven if there are no alternative methods of making bottoms for above-ground pools, the jury might have found that the risk posed by the pool outweighed its utility." 463 A.2d at 306.

Despite this unfortunate language, *O'Brien* does not go nearly as far as gun liability proponents would wish. Essentially, as the court states in the first paragraph of its opinion, this is a "state-of-the-art" case. *Id.* at 301. Clearly, injuring divers was not the essential purpose of the pool, which distinguishes *O'Brien* from a gun case. Moreover, in *O'Brien* we can confidently predict that technological development will make possible greater safety without undermining the utility of the product. In fact, greater safety might have been possible without technological advance: "[Defendant's] customer service manager, who was indirectly in charge of quality control, testified that the vinyl bottom could have been thicker and the embossing deeper. A fair inference could be drawn that deeper embossing would have rendered the pool bottom less slippery." *Id.* at 303. By contrast, no one could testify that a well-made gun could be designed to fulfill its primary mission consistent with increased safety.

I regard *O'Brien* as outside the mainstream of American law. Of more relevance than my view, however, is that of the New Jersey legislature, which responded to *O'Brien* by legislatively overruling it. The legislature provided that, as a general rule, a marketer would not be liable for a defective design if, at the time of manufacture, there was no "practical and technically feasible alternative design that would have prevented the harm *without substantially impairing the reasonably anticipated or intended function of the product.*" N.J. STAT. ANN. 2A:58C-3(a)(I) (West 1987) (emphasis added). Thus, in New Jersey as in all other states, guns are *not* defective products.

112. In some respects, the gun plaintiff is more sympathetic, at least if we exclude suicide and mutual-combat cases. Unlike the lung cancer victim who also was the purchaser of the cigarettes, the gun plaintiff may have known of the risk but did not choose to run it. On the other hand, the gun plaintiff may be in a position comparable to the victim of an intoxicated driver, or to an individual whose health is impaired by inhalation of "secondary" smoke.

113. Similarly, gun suppliers should be on ground no less solid than the suppliers of convertible automobiles, which are less safe than conventional automobiles in rollover crashes. The language used by the Seventh Circuit in such a case is applicable to gun cases as well: "[T]he duty of a manufacturer of products with a special design is only to consider alternatives compatible with the special design." *Delvaux v. Ford Motor Co.*, 764 F.2d 469, 474 (7th Cir. 1985).

law justify imposition of strict liability is apparent from the long line of cases, from jurisdictions across the country, that have rejected just that theory.¹¹⁴ Typical statements from courts include the following: "The mere fact that a product is capable of being misused to criminal ends does not render the product defective."¹¹⁵ "The cases uniformly hold that the doctrine of strict liability under the doctrine of 402A is not applicable unless there is some malfunction due to an improper or inadequate design or defect in manufacturing."¹¹⁶ "Because the guns functioned precisely as they were designed, and because the dangers of handguns are obvious and well-known to all members of the consuming public, we hold that the plaintiffs cannot recover, as a matter of law . . . either under the consumer expectation test . . . or under the risk/utility test. . . ."¹¹⁷ "A nondefective product that presents a danger that the average consumer would recognize does not give rise to strict liability."¹¹⁸

3. *The Long Gun as a Substitute Product*

Professor McClurg's argument that handguns are defective products because long guns can fulfill substantially the same function, but more safely, merits discussion. This argument is much closer to traditional analysis concerning alternative design. Here, the substitute design, or substitute product, obviously is available; millions of long guns have been manufactured for five centuries.

For several reasons, however, this argument also must be rejected. First, and most fundamentally, it is by no means clear that long guns are safer than handguns; indeed, the contrary is more likely true.¹¹⁹

114. Cases that have rejected the proponents' theories include: *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985); *Armijo v. Ex. Cam, Inc.*, 843 F.2d 406 (10th Cir. 1988); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532 (11th Cir. 1986); *Delahanty v. Hinckley*, 564 A.2d 758 (D.C. App. 1989); *Hilberg v. F.W. Woolworth Co.*, 761 P.2d 236 (Colo. App. 1988); *Trespacios v. Valor Corp. of Florida*, 486 So. 2d 649 (Fla. App. 3 Dist. 1986); *State v. Sears*, 493 So. 2d 99 (Fla. App. 4 Dist. 1986); *Strickland v. Fowler*, 499 So. 2d 199 (La. App. 2 Cir. 1986); *Richardson v. Holland*, 741 S.W.2d 751 (Mo. App. 1987); *Knott v. Liberty Jewelry and Loan, Inc.*, 748 P.2d 661 (Wash. App. 1988). In *Martin v. Harrington and Richardson, Inc.*, 743 F.2d 1200, 1201 (7th Cir. 1984), the court rejected a claim for liability based on the theory that the handgun was "an inherently dangerous, nondefective product."

115. *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771 (D.N.M. 1987), *aff'd*, 843 F.2d 406 (10th Cir. 1988).

116. *Richardson v. Holland*, 741 S.W.2d 751, 754 (Mo. App. 1987).

117. *Strickland v. Fowler*, 499 So. 2d 199, 202 (La. App. 2 Cir. 1986).

118. *Martin v. Harrington and Richardson, Inc.*, 743 F.2d 1200, 1202 (7th Cir. 1984).

119. Shotguns, on which Professor McClurg lavished praise as a safer alternative to the

Second, as Professor McClurg concedes, handguns are preferable for some important purposes, such as for police use¹²⁰ and defense of business premises.¹²¹ Third, Professor McClurg's advise to homeowners that they could better defend their homes with a shotgun will not withstand analysis.¹²²

Finally, Professor McClurg simply overlooks one of the most important self-defense uses of handguns: self-protection outside the home or place of business. In many parts of our cities, law-abiding people are simply scared to leave home unarmed. Professor McClurg and I both wish that were not the case, but tort law should not be based on wishful

handgun, inflict wounds that "are over twice as likely to result in a fatality as handgun wounds." Hardy, *supra* note 1, at 555 (citing Sherman & Parish, *Management of Shotgun Injuries: A Review of 152 Cases*, 3 J. TRAUMA 76, (1963)). Single-shell long guns are also much deadlier than handguns, presumably on account of their larger caliber bullets. Kates, *supra* note 13, at 19. Thus if a gun is shot at another person (other than in justifiable self-defense, perhaps), society should want that gun to be a handgun.

Professor McClurg would argue that long guns are safer because they are not as easily concealed. This is true, at least if one ignores the fact that some long guns can easily be shortened, as in the case of a sawed-off shotgun. But the value of concealability is most important for a user's *premeditated* use of a gun. If a person—a robber, for example—desires a handgun on account of concealability, that person will be able to obtain a handgun for his illegal purposes. Many handguns will be available. See *supra* notes 14-17 and accompanying text.

But for the unplanned crime of passion, "rage overrides fear of detection." Hardy, *supra* note 1, at 563. In that case, concealability would probably be relatively unimportant, the desire to kill paramount. Would we not prefer that such an enraged person be armed with the less-deadly handgun?

120. Professor McClurg acknowledges the "much greater utility" of handguns when used by law enforcement officers. He suggests that courts might "except manufacturers from liability when a law enforcement officer employs deadly force via a handgun." McClurg, *supra* note 2, at 616, n.53. Professor McClurg acknowledges a societal benefit in providing handguns to policemen. For that reason, perhaps Professor McClurg would agree that liability of suppliers of police weapons should not turn on the actual use made of the weapon. For example, no liability should result if the gun were taken from the policeman in a struggle and used against him.

121. *Id.* at 615.

122. Shotguns probably would prove less safe. They are much heavier than handguns, and have a much stronger recoil. Strength would be a problem, particularly for women. It is hard to run carrying a shotgun.

Warning shots seem likely to reduce the danger of accidentally shooting, for example, a family member arriving at an unexpected time. But warning shots would be less likely to be fired by homeowners armed with shotguns. Standard shotguns provide only one or two shots. With a single-shot shotgun, a warning shot would be out of the question, and even with a double barrel, a warning shot would leave the homeowner with only one shot. (Some shotguns have a cartridge of several rounds, which should increase the chance that a warning shot would be fired. But perhaps not, because, even with these shotguns, reloading is not automatic, as with a revolver.)

Accidental shootings might also result from the fact that, with only a maximum of two barrels available (on most shotguns), the homeowner would probably keep the gun fully loaded. By contrast, many people leave one chamber of a six-chamber handgun empty, which greatly reduces the chance of accidental discharge.

thinking. A long gun is not a reasonable alternative to carry along to the grocery store.

It is not unreasonable to argue that handguns should be banned. It is false advertising, however, to tell people legitimately scared of crime that long guns are a realistic alternative.

CONCLUSION

Gun control will not make the United States into anything resembling a gun-free country, a goal that is probably unattainable. Thus, the benefits of gun control are highly problematic. Nevertheless, in their quest for gun control, proponents of strict liability against gun suppliers seek to have courts impose a major policy decision rejected by both elected officials and (at minimum) a considerable segment of the public.

To their credit, courts have declined to reject the decision of the public, as expressed through elected officials. As the Colorado Court of Appeals observed: "Questions concerning the social or societal utility of firearms and how and by whom they may be possessed and used are major public policy questions which properly reside with constitutional assemblies and legislative bodies."¹²³

Courts tempted to impose gun control through tort law should recognize that they are ill-suited to carry out carefully calibrated regulatory schemes, and that manifest injustice would result from imposing liability on suppliers who have done nothing that was not fully sanctioned by society. Courts should also recognize, as they have to date, that imposition of liability would be inconsistent with all legitimate doctrines of products liability law. Virtually no precedent, in gun cases or other products liability cases, would support such a step.

Those who favor sweeping gun control should take their arguments to people who can act on them legitimately. If they think homeowners are safer without handguns, they should tell the homeowners, not the courts. If they think we should give nationwide gun control a chance, they should attempt to convince Congress, which might mean first both convincing and energizing the public.¹²⁴ Representative democracy may

123. *Hilberg v. F.W. Woolworth Co.*, 761 F.2d 236, 241 (Colo. App. 1988).

124. Ironically, although courts cannot legitimately impose gun control, such legislation might lead to a task appropriate for courts: construction of the Second Amendment. *See supra* note 1.

be slow and cumbersome, and frequently wrong, but it is our legitimate system of government.