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HANDGUNS AS PRODUCTS UNREASONABLY
DANGEROUS PER SE

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“Thank God for President Reagan, a man who, even after being shot, realizes that more gun controls are not the solution to our crime problem. . . . Here’s a man of guts, common sense and vision. May he live to be 120.”

J. Anderson, *Guns In American Life* 7 (1984) (quoting a tribute to the former President appearing in a gun magazine following the Hinckley assassination attempt).

“[I] want you to know something . . . and I’m going to state it in clear, unmistakable language. I support the Brady Bill and I urge the Congress to enact it. . . . [I]t’s just plain common sense that there be a waiting period to allow local law enforcement officials to conduct background checks on those who wish to buy a handgun.”

Address by Ronald Reagan, George Washington University (Mar. 28, 1991).

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INTRODUCTION: HANDGUN VIOLENCE AND SOCIAL POLICY

Narrowly, this written debate between Professor Oliver and me¹ concerns tort law, not gun control. The issue we will be disagreeing about is whether handgun manufacturers should be held strictly liable when one of their products is used to kill or injure someone. However, there is no denying that the success of my argument in favor of such liability hinges upon public policy. Consequently, some initial words about policy are appropriate.

I have always shunned the word "rethinking," that favorite expression employed by legal scholars to describe what they do when they write about a subject that has already been written about extensively by others. However, President Reagan's stunning reversal in position tempted me to use it here. Mr. Reagan's endorsement of the Brady Bill,² which would impose a national waiting period and background checks for handgun purchases, is nothing less than remarkable. President Reagan was the first candidate for president ever endorsed by the National Rifle Association and has long been a staunch supporter of the unrestricted right of American citizens to own as many guns as they choose.

Perhaps, I thought, President Reagan's support for the Brady Bill is an omen that we finally are ready to begin "rethinking" this country's insane gun policies. Then, as I was strapping on my rethinking cap, I was saved by the realization that one cannot *rethink* what has never been seriously thought about. There has been too little serious thought or discussion about either the reasons for or the consequences of this nation's gun policies.³ Intimidated by the N.R.A., enchanted

1. Professor Oliver's response will appear in a future issue, along with my reply to his response. It is my hope that this faculty forum will become an annual feature in the UALR Law Journal. One of our greatest assets is the diversity of our faculty and we should take advantage of it. I see the faculty forum serving as a provocative, intellectual showcase of competing views upon major issues of the day in a more informal, less traditional law journal format.

2. Brady Handgun Violence Prevention Act, S. 257; H.R. 7, 102nd Cong., 1st Sess. (1991).

3. There are a handful of works, most of them written by students, addressing the issue of strict liability for gun manufacturers. Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims*, 10 N. KY. L. REV. 41 (1982); Note, *The Manufacture and Distribution of Handguns As an Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369 (1987); Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912 (1984); Note, *A Shot At Strict Controls: Strict Liability for Gun Manufacturers*, 15 PAC. L.J. 171 (1983); Note, *Manufacturers' Strict Liability for Injuries From A Well-Made Handgun*, 24 WM. & MARY L. REV. 467 (1983); Case Note, *Maryland Holds Manufacturer of "Saturday Night Specials" Strictly Liable for Injuries Suffered by Innocent Victims of Criminal Handgun Violence*, 20 SUFFOLK U.L. REV. 1147 (1986).

The second amendment, the constitutional source of the right to keep and bear arms, has

with the rich and romantic history of guns in America and bamboozled by an absolutist interpretation of the second amendment,⁴ most of us have simply accepted that there should be little or no legal regulation of this most dangerous of products.

Americans are becoming desensitized to violence and I fear this colors all debate about handguns. Every day we read horror stories of sleeping children killed by random bullets flying through walls or other innocents gunned down while standing on street corners, yet we do little more than shake our heads and mutter "how awful." This desensitization is not particularly surprising. By age eighteen, the average American child will have watched more than 200,000 violent acts on television, 40,000 of them murders.⁵ The violence saturation process starts early with Looney Tune cartoons where Elmer Fudd and Bugs Bunny take turns blowing each other's head off with a shotgun. I feel like a liar telling my five-year-old that it is all just pretend, knowing that while she is watching the cartoon there is a good chance someone

received little attention from legal scholars. In "The Embarassing Second Amendment," Professor Sanford Levinson notes that only one law journal article regarding the amendment (not including his) has ever appeared in an "elite" law review. Levinson, *The Embarassing Second Amendment*, 99 YALE L.J. 637, 639 n.13 (1989). The amendment is mentioned in leading constitutional law casebooks only in the text of the constitution reprinted in the casebooks. *Id.* at 639 n.14. Constitutional law treatises give the amendment only minimal treatment. *Id.* at 640.

4. The second amendment 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." U.S. CONST. amend. II. The debate regarding the proper interpretation of the second amendment is unresolved. One view is that the preamble sets out the purpose of the amendment, so as to restrict the right to keep and bear arms to that necessary to maintain a well regulated state militia. Levinson, *supra* note 3, at 644. This interpretation precludes recognition of any individual right to keep and bear arms. *Id.* Professor Levinson's article, however, makes a case for a stronger interpretation of the second amendment which would protect the individual's right to own guns for self-protection. In any event, the second amendment is not implicated by the proposal for state-imposed strict liability against handgun manufacturers because it has never been incorporated into the fourteenth amendment due process clause and made binding against the states. *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (holding that the second amendment declaration that the right to bear arms shall not be infringed "means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National Government . . ."). Professor Levinson points out that *Presser* was decided before any of the amendments in the Bill of Rights were incorporated and, therefore, we cannot know whether the *Presser* court was singling out the second amendment or would have reached the same conclusion with regard to any amendment. *Id.* at 653. However, a federal court of appeals has rejected this construction of *Presser*. *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269-70 (7th Cir. 1982) ("we hold that the second amendment does not apply to the states").

5. *Violence in Our Culture*, NEWSWEEK, Apr. 1, 1991, at 51 (citing Thomas Radecki, research director for the National Coalition on Television Violence).

is being murdered with a handgun.⁶ Trying to hide the truth about gun violence from children seems futile anyway, as more and more children experience it first hand in school and on the streets.⁷

Statistics regarding handgun violence in America are so staggering that they tend to numb the mind. In trying to think of a way to convey the actual horror of 22,000 Americans killed by handguns each year,⁸ I remembered with sympathy how President Reagan used to struggle to explain the federal deficit in comprehensible terms: "If you lined up a trillion dollars, they would reach all the way to Alpha Centauri and back, with enough change to take four trips to the moon." (It was something like that.)

Twenty-two thousand people killed each year. That is more people than live in most counties in Arkansas. It is twenty-one thousand and nine-hundred more casualties than the United States lost in combat in the Persian Gulf war. With 22,000 bullets, we could follow Shakespeare's advice and kill all the lawyers in the state seven times over, with plenty of ammunition left over for the expert witnesses. Twenty-two thousand people is more people than most of us will know in a lifetime.

Our anesthetized consciousness (and perhaps conscience) to hand-

6. Every day, twenty-five people are murdered with handguns, thirty-three women are raped at gun point, 575 people are robbed with a gun and 1,116 people are assaulted with a gun. King, *Sarah and James Brady; Target: The Gun Lobby*, N.Y. TIMES MAGAZINE, Dec. 9, 1990, at 80, col. 4.

7. There has been a 97 percent increase in youth firearm murders since 1984. In 1988 and 1989, both record years, 3,435 youths under the age of nineteen were murdered with guns. Since 1986, seventy-one persons have been killed at school. *Handgun Control Semi-Annual Progress Report*, Jan. 1991, at 6.

8. This includes deaths from criminal attacks, accidents, and suicides. Wilson, *The Numbers Game; The Data Behind the Policy*, Nat'l J., July 21, 1990, at 1796. Though precise statistics are not available, it is estimated that for every firearm fatality there are five nonfatal firearm injuries. Stokes, *Daily Devastation; Faulty Thinking About 'Accidents' is Hurting Us More Than We Think*, Chi. Trib. Oct. 7, 1990 (Sunday Good Health Magazine), at 32 col. 4. Accepting this estimate means there are more than 100,000 nonfatal handgun injuries each year.

In 1988, the most recent year for which statistics are available, 8,915 people were murdered with handguns in the United States. King, *supra* note 6, at 80, col. 4. This figure becomes more shocking when it is compared with handgun deaths in other Western nations. In the same year, only seven people were murdered with handguns in Great Britain, eight in Canada, nineteen in Sweden, and fifty-three in Switzerland. *Id.* Approximately 1,200 people die in accidental shootings each year. Wilson, *supra*.

The majority of handgun deaths are suicides. In 1986, more than 12,000 people committed suicide with handguns. *Id.* While the argument has been made that the easy availability of handguns is causally linked to the soaring suicide rate (Turley, *supra* note 3, at 55-56), I limit my argument for strict liability to cases of intentional criminal attacks by third persons and accidental shootings.

gun violence may help explain our extremely selective response to events which get our ire up. If some idiot burns a flag the solution is to try to amend the Constitution. The answer to court rulings that state-sanctioned prayer does not belong in public schools is to try to amend the Constitution. Every year, someone will introduce a proposal in Congress to amend the Constitution to prohibit busing school children to achieve integration. But dare to suggest that sensible controls be placed upon handguns and the instant rallying cry becomes: "You can't do that. It's in the Constitution!"

Perhaps the answer is to run video tape on the evening news of a convenience store clerk being executed in cold blood. Live coverage is apparently what it takes to motivate many Americans. It took a hellish home video to wake us to the nightmare police brutality, even though several thousand complaints of such brutality are filed each year.⁹ Apparently, we have to see it to believe it. That probably explains why every major national law enforcement organization has spoken out in favor of reasonable gun control measures like the Brady Bill.¹⁰ Police officers see and live the consequences of our skewed gun policies every day. What will it take to persuade the rest of us that something is wrong with those policies? At what point will we begin to fairly and honestly weigh the reality of the societal cost of handgun violence against the mostly illusory value of handguns to society?

The time has come for courts to impose strict liability upon handgun manufacturers when a well-made¹¹ handgun is used to inflict death or injury, either intentionally or accidentally. Professor Oliver may respond by condemning what he sees as a blatant appeal for the courts to make a major social policy decision which, if it is to be made at all, should be left to Congress or state legislatures. Support for this view would be easy to find. The New York Court of Appeals, in describing

9. I am referring to the sickening episode earlier this year where four Los Angeles police officers were captured on video tape kicking and clubbing an unarmed black motorist they had apprehended after an automobile chase, while a dozen other officers, including their supervisor, stood by and watched.

10. The following police organizations have voiced support for the Brady Bill: Fraternal Order of Police (with 217,000 members), National Association of Police Organizations (130,000 members), International Association of Chiefs of Police (15,000 members), National Sheriffs' Association (22,000 members), and the National Organization of Black Law Enforcement Executives (2,300 members). *Just the Facts About the Brady Bill* (newsletter of Handgun Control, Inc.).

11. 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.

the role of the judiciary in resolving controversies, once commented: "It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court."¹²

Ignoring the questionable accuracy of this pronouncement,¹³ using it to argue against strict liability for handgun manufacturers would be a case of trying to close the barn door after the horses are out. The decision to impose strict liability for defective products was a major policy decision of the purest kind. The principal rationale underlying strict products liability is that those who manufacture defective products should bear the cost of injuries associated with those products because they are in the best position to insure against the risk and to distribute the cost of the risk among society.¹⁴ This rationale, of course, applies with equal force to handgun manufacturers.

Thus, the argument that courts would be exceeding their judicial function by imposing strict liability upon handgun manufacturers commits the logical fallacy of *ignoratio elenchi* — that is, it supports a different conclusion than the one sought to be proved. Rather than establish the propriety of discriminating against victims of handguns, the argument supports only the much broader proposition that courts acted improperly when they implemented strict liability for other defective products. That battle, however, has been fought and lost.

More importantly, the argument depends upon a false premise: that by *not* imposing strict liability for handgun injuries, courts are *not* engaged in policy making. The fact is that current law, which rejects strict liability for handgun manufacturers,¹⁵ promotes a social policy

12. *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 222, 257 N.E.2d 870, 871, 309 N.Y.S.2d 312, 314 (1970).

13. I think Professor Oliver would agree that the word "rare" needs to be replaced by "common" or "frequent" to make the court's statement accurate, though I suspect he also would like to modify the sentence with an adverb along the lines of "unfortunately" or "lamentably."

14. In his seminal opinion imposing strict liability in tort for injuries caused by defective products, Justice Traynor opined that "[t]he purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put the product on the market rather than by the injured persons who are powerless to protect themselves." *Greenman v. Yuba Power Prod. Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962). More recently, the California Supreme Court declared that "[t]he paramount policy of the strict products liability rule remains the spreading throughout society of the cost of compensating otherwise defenseless victims of manufacturing defects." *Becker v. IRM Corp.*, 38 Cal. 3d 454, 466, 698 P.2d 116, 123, 213 Cal. Rptr. 213, 220 (1985) (imposing strict liability upon residential landlords for latent defects in rental property).

15. Only one court has imposed strict liability against a handgun manufacturer. In *Kelley v. R.G. Industries, Inc.*, 304 Md. 124, 497 A.2d 1143 (1985), the Court of Appeals of Maryland

that protects and cultivates the icon-like worship of guns in this country. This is borne out by the discussion below, which will demonstrate that faithful application of modern tort principles justifies imposing strict liability against handgun manufacturers.

RISK-UTILITY BALANCING AND THE THEORY OF PRODUCTS UNREASONABLY DANGEROUS PER SE

The narrow legal issue involved in this debate is whether a well-made handgun is in a "defective condition unreasonably dangerous" when used for its intended or foreseeable purpose so as to subject the manufacturer to strict liability under section 402A of the Restatement (Second) of Torts.¹⁶ Two tests are available for making this determination: the consumer expectation test and risk-utility balancing.

The consumer expectation test, derived from comment i to Section

held the manufacturer of an inexpensive handgun strictly liable when the gun was used in a robbery to shoot a store clerk. The court limited its holding to "Saturday Night Specials" (*id.* at 157-58, 497 A.2d at 1159-60), a label reserved for small, low quality, inexpensive handguns with little utility other than the perpetration of criminal violence. In imposing strict liability, the court rejected the risk-utility theory relied upon herein (*id.* at 138-39, 497 A.2d at 1148-50), choosing instead to base liability upon the somewhat vague theory that it would not be contrary to the public policy of the state of Maryland to impose liability. *Id.* at 144-46, 497 A.2d at 1152-53. *See generally* Case Note, *supra* note 3.

Every other court to consider the issue has declined to impose liability upon handgun manufacturers. *See, e.g.,* Delahanty v. Hinckley, 564 A.2d 758 (D.C. Cir. 1989); Shipman v. Jennings Firearms, Inc., 791 F.2d 1532 (11th Cir. 1986); Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985); Martin v. Harrington and Richardson, Inc., 743 F.2d 1200 (7th Cir. 1984); Armijo v. Ex Cam, Inc., 656 F. Supp. 771 (D.N.M. 1987), *aff'd*, 843 F.2d 406 (10th Cir. 1988); Richman v. Charter Arms Corp., 571 F. Supp. 192 (E.D. La. 1983); Hilberg v. F.W. Woolworth Co., 761 P.2d 236 (Colo. App. 1988); Trespalacios v. Valor Corp. of Fla., 486 So. 2d 649 (Fla. Dist. Ct. App. 1986); Linton v. Smith & Wesson, 127 Ill. App. 3d 676, 469 N.E.2d 339 (1984); Strickland v. Fowler, 499 So. 2d 199 (La. App. 1986); Richardson v. Holland, 741 S.W.2d 751 (Mo. App. 1987); Diggle v. Horwitz, 765 S.W.2d 839 (Tex. App. 1989); Knott v. Liberty Jewelry and Loan, Inc., 50 Wash. App. 267, 748 P.2d 661 (1988); Estate of Schilling v. Blount, Inc., 152 Wis. 2d 608, 449 N.W.2d 56 (Wis. Ct. App. 1989).

16. Restatement (Second) of Torts § 402A (1965). Section 402A provides as follows:

(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.

402A, holds that a product is unreasonably dangerous if it is dangerous beyond the extent anticipated by the ordinary consumer.¹⁷ Admittedly, application of this test would compel the conclusion that handguns are not defective products since their dangers are well-known. However, precisely because the consumer expectation test is inadequate to analyze large classes of generic defect cases,¹⁸ most courts apply some form of risk-utility balancing as an alternative to the consumer expectation test.¹⁹

As the name implies, risk-utility balancing requires that the risk of the product be weighed against the utility of the product to determine whether it is in a defective condition unreasonably dangerous. Underlying this approach is the recognition that all products have some risk and some utility.²⁰ If every product which presented a risk of harm were deemed to be defective, every product would be defective.²¹ Therefore, the only way to meaningfully evaluate whether the product is *unreasonably* dangerous is to weigh the risk of the product against the product's usefulness to the user and to society.

Courts recognize two basic kinds of generic product defects: products defective because of inadequate warnings and products defective in

17. "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.* at § 402A comment i.

18. The consumer expectation test would result in a finding of no defect in all cases (including handgun cases) where the defect was open and obvious. For example, take the case of an industrial press designed to be activated by a foot pedal rather than a dual-button arrangement which would require the worker to remove both hands in order to engage the press. A worker whose hands were crushed by the press could not recover under the consumer expectation test because she undoubtedly expected the press would crush her hands if she engaged the foot pedal while her hands were under the press. The consumer expectation test also does not work in situations where because of the complexity of the product or the user's inexperience with it, the user has no expectations regarding its dangerousness.

19. *Prentis v. Yale Mfg. Co.*, 421 Mich. 670, 686, 365 N.W.2d 176, 183 (1984) ("the overwhelming consensus among courts deciding defective design cases is in the use of some form of risk-utility analysis, either as an exclusive or alternative ground of liability").

20. Keeton, *The Meaning of Defect In Products Liability Law—A Review of Basic Principles*, 45 Mo. L. Rev. 579, 592 (1980).

21. In my Torts class, I challenge students to name a product which does not present *some* risk of harm. Thus far, they have been unsuccessful. Some popular entries, along with my responses, include: a nerf ball—could obstruct driver's vision and cause an accident if tossed around in a moving vehicle; a law book—could cause someone to trip and fall if left on the floor; a roll of toilet paper—could ignite if stored near a heat source; a postage stamp—could result in choking or a paper cut. Having progressed halfway through the Prosser casebook so heavily laced with notes chronicling the amazing capacity of persons to injure themselves, most students accept that these seemingly improbable risks are not only possible but have probably happened dozens of times.

design. Warnings are not an issue in handgun cases because the dangers of handguns are open and obvious. Moreover, though handgun cases are usually analyzed under a design defect theory, handguns are not defective in design because, admittedly, there is no safer design available which would not impair their utility. However, as discussed below, handguns are defective under the discrete theory of products unreasonably dangerous per se.

The Prosser hornbook identifies three different reasons for concluding under risk-utility analysis that a product is unreasonably dangerous in design: (1) the intended and reasonably foreseeable risks of the product outweigh the benefits from the product in terms of wants, desires, and needs served by the product; (2) although the risks do not outweigh the benefits, alternative products with the same utility are available; and (3) although the risks do not outweigh the benefits, there was a feasible way to design the product more safely without substantially impairing its utility.²²

Of these three categories, only the last one truly relates to design defects because it is the only one which requires proof that the product could have been designed more safely without impairing its utility. Unless proof is required of a feasible alternative design, it makes little sense to analyze the problem in terms of a defect in design. Defect in design connotes that there is a nondefective, safer design available for the same product which does not impair its utility. To say a product is designed defectively in the absence of evidence that it could have been designed in a safer way without substantially impairing its usefulness or cost utility is really to make a per se determination that the risk of the product outweighs its utility to society.

Thus, clarity can be added to the risk-utility calculus by reserving the rubric "design defect" for cases involving products which are defective because of the existence of a feasible alternative design (the third category outlined in the Prosser hornbook). Cases where the product is deemed to be defective under risk-utility balancing without regard to the existence of feasible alternative designs (the first two categories listed in Prosser) can be analyzed more profitably by recognizing the classification of products unreasonably dangerous per se as a distinct category of product defect.²³

22. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 99, 699 (5th ed. 1984) (citing Keeton, *Torts, Annual Survey of Texas Law*, 35 Sw. L.J. 1 (1981)).

23. See *Halphen v. Johns-Mansville Sales Corp.*, 484 So. 2d 110 (La. 1986). In *Halphen*,

A central theme in products liability law is that, as a threshold to imposing strict liability, there must be "something wrong" with the product.²⁴ Otherwise, the argument goes, all product related injuries would result in liability to the manufacturer. However, as applied to handguns and other products which are unreasonably dangerous per se, this simply begs the question. Under risk-utility balancing, there is "something wrong" with the product if the risk presented by the product outweighs its utility. This conclusion is strengthened where substitute products exist which satisfy the same needs as the unreasonably dangerous product.

Contrary to argument, this is not the same as saying that all products which cause injury are defective. The examples usually offered in connection with this argument — e.g., automobiles, knives, matches — are not defective because their utility outweighs their risk. To put handguns on a par with these products in terms of their respective utility to society is ludicrous. A day rarely passes where I do not use an automobile, knife, or match, but, at age thirty-six, I have yet to find need for a handgun. Automobiles, knives, and matches have substantial utility apart from causing harm. Handguns do not. Were it declared that beginning at sunrise tomorrow we could not use our automobiles, knives, or matches, society would be paralyzed. On the other hand, were it declared that handguns could no longer be used, society would continue to function with little disruption.²⁵

the court recognized products which are unreasonably dangerous per se as a separate category of defective products and held that manufacturers of such products are strictly liable even if the risk of the product was not foreseeable. *Id.* at 113-14. This latter issue—whether knowledge of a risk for purposes of risk-utility balancing should be imputed to the manufacturer regardless of whether the manufacturer knew or should have known of the risk— is what distinguishes true strict liability from negligence precepts. It is not an issue with respect to handguns since the dangers of handguns are well-known to manufacturers.

A Louisiana appellate court has rejected application of the *Halphen* unreasonably dangerous per se classification to both handguns and assault rifles. *Strickland v. Fowler*, 499 So. 2d 199 (La. Ct. App. 1986) (handguns); *Addison v. Williams*, 546 So. 2d 220 (La. Ct. App. 1989) (assault rifle). The court held in *Addison* that a product "cannot be said to be unreasonably dangerous per se where the danger complained of is the purpose and function of the product." 546 So. 2d at 225.

24. See *Wade, On the Nature of Strict Tort Liability for Products*, 44 *Miss. L.J.* 825, 830 (1973) (noting that the drafters of section 402A added the word "defective" to make it clear that something had to be wrong with the product); see also Note, *Handguns and Products Liability*, *supra* note 3, at 1915-19 (asserting this as a basis for rejecting strict liability against handgun manufacturers).

25. In a comment to section 402A of the Restatement, the drafters state:

Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably

Courts indirectly recognize this theory of products as unreasonably dangerous per se when, in design cases, they impose liability in the absence of proof regarding a feasible alternative design. *O'Brien v. Muskin Corporation*²⁶ is illustrative. The plaintiff suffered serious injuries as a result of diving into an above-ground swimming pool which was only four feet deep. He sued the manufacturer alleging the pool was defective in design because the vinyl liner used by the manufacturer was too slippery.²⁷ There was conflicting testimony regarding whether a feasible alternative design existed for the pool,²⁸ but the trial court refused to allow the issue of design defect to go to the jury.²⁹

The New Jersey Supreme Court held the jury should have been permitted to consider the issue of design defect. Moreover, the court said that, utilizing a risk-utility analysis, the plaintiff could prove a defect in design without having to prove the existence of an alternative, safer design. The existence of an alternative design, the court said, is only one factor to consider. The following passage discussing these issues is enlightening:

The assessment of the utility of a design involves the consideration of available alternatives. . . .

The evaluation of the utility of a product also involves the rela-

dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965). Courts rely upon this comment to hold that tobacco products and alcohol are not unreasonably dangerous products, even though they are both very dangerous. *See, e.g., Hite v. Reynolds Tobacco Co.*, 396 Pa. Super. 82, 578 A.2d 417 (1990) (tobacco); *Malek v. Miller Brewing Co.*, 749 S.W.2d 521 (Tex. Ct. App. 1988) (alcohol). However, the quoted passage from comment i immediately follows the statement of the consumer expectation test; thus, the passage must be read with reference to that standard for evaluating whether a product is unreasonably dangerous. *See Hite*, 396 Pa. Super. at 91, 578 A.2d at 421 (refusing to recognize defective design theory as to tobacco because Pennsylvania has not adopted risk-utility balancing in design defect cases). Under pure risk-utility balancing, reassessment of traditional assumptions about alcohol and tobacco may be required.

26. 94 N.J. 169, 463 A.2d 298 (1983).

27. *Id.* at 178, 463 A.2d at 302.

28. The plaintiff presented an expert who testified that wet vinyl is twice as slippery as rubber latex, which is used to line in-ground pools. The trial court, however, sustained an objection to this testimony because the expert admitted that he knew of no above-ground pool lined with a material other than vinyl. *Id.* at 178, 463 A.2d at 302. Defendant's expert testified that the slippery quality of vinyl actually made it safer because it allowed the outstretched arms of a diver to glide, preventing the diver's head from hitting the bottom. *Id.* at 178-79, 463 A.2d at 303.

29. *Id.* at 179, 463 A.2d at 303.

tive need for that product; some products are essentials, while others are luxuries. A product that fills a critical need and can be designed in only one way should be viewed differently from a luxury item. *Still other products, including some for which no alternative exists, are so dangerous and of such little use that under the risk-utility analysis, a manufacturer would bear the cost of liability of harm to others. . . .*

A critical issue at trial was whether the design of the pool, calling for a vinyl bottom in a pool four feet deep, was defective. The trial court should have permitted the jury to consider whether, because of the dimensions of the pool and slipperiness of the bottom, the risks of injury so outweighed the utility of the product as to constitute a defect. . . . [I]t was not necessary for plaintiff to prove the existence of alternative, safer designs. Viewing the evidence in the light most favorable to the plaintiff, even 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.³⁰

The court discussed the defect alleged in *O'Brien* in terms of a defect in design. However, to hold that the jury might find the product defective regardless of whether an alternative, safer design existed is tantamount to recognizing the theory of products unreasonably dangerous per se — that is, the court authorized the jury to find that the risk of vinyl-lined above-ground pools simply outweighs their low utility to society.

Courts act similarly when they impose liability upon manufacturers for failing to warn of obvious dangers. It is a general rule that a manufacturer has no duty to warn of an obvious danger inhering in a product.³¹ But courts often conclude or allow juries to conclude that product dangers were not obvious in cases where most reasonable people would disagree.³² From a narrow, realist perspective, the results in

30. *Id.* at 184-85; 463 A.2d at 305-06 (emphasis added).

31. Henderson & Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 280 (1990) (and cases collected therein).

32. See, e.g., Corbin v. Coleco Indus., 748 F.2d 411 (7th Cir. 1984) (genuine issue of fact existed as to whether danger of serious spinal cord injury from diving into shallow above-ground pool was open and obvious); Jimenez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971) (jury might conclude reasonable care required warning that ladder should not be used on soft ground); Leonard v. Pitstick Dairy Lake & Park, Inc., 202 Ill. App. 3d 817, 560 N.E.2d 467 (1990) (suggesting that owner of commercial swimming beach should have warned fifteen year-old boy of the danger of diving in shallow water); Strain v. Mitchell Mfg. Co., 534 So. 2d 1385 (La. Ct. App. 1988) (sufficient evidence for jury to find liability for failure to warn of dangers of folding cafeteria tables weighing 315 pounds, a task plaintiff had been performing for four years); Butz v. Werner, 438 N.W.2d 509 (N.D. 1989) (Plaintiff was injured while

individual cases of this type can probably best be explained by a judicial attitude that the severely injured plaintiff should be compensated even if this conclusion requires the adoption of some questionable factual premises. However, doctrinally, the most defensible explanation is that the courts, behind the guise of failure to warn theory, have found (or are willing to let the jury find) that the product was unreasonably dangerous per se. Since warning of an obvious danger does not make the product safer but only communicates information already known to the user, to impose liability for failing to warn of obvious dangers is to implicitly make a per se determination that the risk of the product outweighs the utility so as to justify requiring the manufacturer to bear the cost of the risk.

HANDGUNS AS PRODUCTS UNREASONABLY DANGEROUS PER SE

Handguns are perhaps the paradigmatic case of a product unreasonably dangerous per se. As discussed below, they present tremendous risk and have low utility. Accordingly, manufacturers should be strictly liable for handgun inflicted deaths and injuries.

A. The Risk of Handguns

The risk to human life presented by handguns in terms of both the severity of the risk and the probability of it occurring is almost unparalleled. Of all the millions of products marketed in the United States, only automobiles surpass handguns as a cause of unnatural death.³³ Handguns kill 22,000 people each year and injure probably another 100,000.³⁴

A telling contrast in how our society treats dangerous products can be found by examining the case of lawn darts. In 1990, the Consumer Product Safety Commission banned the sale of lawn darts based upon a

riding on a "Super Tube" being pulled behind a boat when the tube collided with a submerged boat. Court held that the following dangers were not obvious: that the tube should not be pulled above a certain speed, that the tube would accelerate and arc around corners, that the rider would have no control over speed, and that the rider's vision would be impaired by the spray of the tube.); *Lewis v. Watling Ladder Co.*, 1986 WL 13960 (Tenn. App.) (unreported) (court reversed summary judgment against plaintiff in case where the ladder plaintiff was climbing slipped on wet concrete; held genuine issue of fact existed with respect to adequacy of warning and defectiveness of design.). *Cf. Campos v. Firestone Tire & Rubber Co.*, 98 N.J. 198, 204, 485 A.2d 305, 310 (1984) ("A manufacturer is not automatically relieved of his duty to warn merely because the danger is patent.").

33. Turley, *supra* note 3, at 1.

34. *See supra* note 8 and accompanying text.

finding that they "present an unreasonable risk of injury."³⁵ The commission arrived at this conclusion by applying a risk-utility analysis quite similar to that which would be used to determine whether lawn darts are an unreasonably dangerous product for purposes of strict products liability.

The commission described the degree and nature of the risk as being the "puncture of the skulls of children caused by lawn darts being used by children,"³⁶ but mentioned that the total ban on lawn darts would also eliminate other types of puncture wounds, lacerations, fractures, and other injuries associated with the use of lawn darts.³⁷ With respect to the probability of the risk occurring, the commission estimated that 670 lawn dart injuries occurred each year and found that three children had been killed by lawn darts since 1970.³⁸

This risk was seen as outweighing the utility of lawn darts: *i.e.*, the "recreational enjoyment"³⁹ they provided to the more than one million consumers who purchased lawn darts annually.⁴⁰ This conclusion was bolstered by the commission's determination that substitute recreational enjoyment can be obtained from other products.⁴¹ The commission did not specify any particular type of recreational product which would replace the enjoyment of launching steel tipped missiles across the yard into a hoop. Apparently, the commission deemed recreational products to be fungible. Horseshoes, for example, might be deemed an adequate substitute for lawn darts.

A child being killed or seriously injured by a lawn dart puncturing his skull is a scene almost too horrible to imagine, but certainly no more horrible than a bullet penetrating the child's skull. Compare the three children killed in twenty years by lawn darts to the 22,000 annual handgun deaths, or even to the 365 children under age fifteen killed in accidental handgun shootings every year.⁴² Compare the 670 lawn dart injuries that the commission estimated were occurring each year to the estimated 100,000 yearly handgun injuries. Then ask: what is wrong with this picture?

35. 16 C.F.R. § 1306.4(a) (1990).

36. *Id.* at § 1306.4(b)(1).

37. *Id.* at § 1306.4(b)(2).

38. *Id.*

39. *Id.* at § 1306.4(d)

40. *Id.* at § 1306.4(c).

41. *Id.* at § 1306.4(d).

42. *Ghastly Statistic—Just Say No To Guns and Kids*, Seattle Times, Jan. 4, 1991, at A6, col. 1.

B. The Utility of Handguns

The answer lies in the exaggerated utility attached to handguns. Our culture glorifies guns. They are elevated to the level of God by one gun magazine, whose motto is: "For Americans who believe that God, Guns & Guts Made US Great."⁴³ Guns are symbols of manhood, machismo, and power. They are inextricably identified with the courage, ruggedness, and spirit of the American frontiersman.

Handguns have a cult of personality all their own. How many times have we seen the movie or television actor tenderly pat his shoulder holster while making some reference to "my friend here" or "this little baby"? Handguns are likely to be described by adjectives more appropriate for a thoroughbred racing horse—sleek, pretty, awesome—than an ugly instrument designed principally for the purpose of killing human beings.

Our romantic attraction to guns has honorable enough roots. There was a time in this country when guns were a virtual necessity, fulfilling vital needs for early pioneers and settlers. They put food on the table and protected against attack from hostile natives. But that was at least a century ago.

The utility of handguns in modern society is twofold: (1) they have recreational utility in the form of hunting and target shooting; and (2) they have the utility of self-protection. While I do not attach as much importance to these utilities as do gun owners, I do not reject them as insignificant. I appreciate that many people get substantial enjoyment from hunting and target shooting, and also that many people believe handguns afford them effective protection from criminals.

However, the utility of handguns is outweighed by the tremendous risk they pose to society, particularly in light of the availability of a substitute product which serves the same needs as a handgun: *i.e.*, a long gun.⁴⁴ It is curious that all of the debate about risk-utility balancing with respect to handguns has ignored this obvious and critical ele-

43. J. ANDERSON, GUNS IN AMERICAN LIFE 4 (1984) (quoting the slogan of a gun magazine called *Pistolero*). This book provides an interesting history of guns in American culture.

44. Long guns include shotguns and rifles. Under the theory of products unreasonably dangerous per se, no showing is required as to the existence of a feasible alternative design. However, if a court insisted upon such proof, I would argue that the availability of long guns satisfies that requirement. While I am treating long guns as a substitute product in this article, it would not be an unreasonable stretch to say that handguns and long guns are the same product with different designs. They are manufactured for the identical purpose and operate in precisely the same way: a firing pin strikes the back of a cartridge, causing an explosion that propels a bullet down a barrel at high velocity.

ment of the equation. The availability of rifles and shotguns substantially dilutes the utility of handguns. Long guns have almost the same utility and present less risk because they are not easily concealable.

As to recreational use, long guns are obviously superior in their utility for hunting because of their greater accuracy.⁴⁵ This would seem to make them superior for target shooting as well. Some sportsmen might insist that they are fond of shooting at targets with rifles *and* pistols, but this is where risk-utility balancing comes into play. The marginal utility in the smidgeon of extra pleasure derived from plinking a target with a handgun as opposed to a rifle is outweighed by the greatly increased risk of handguns.

With regard to self-defense, it must first be noted that our faith in guns as insurers of personal security is vastly out of proportion to reality.⁴⁶ Statistics show that the bumper sticker tribute to guns that "they can take my gun when they pry it from my cold, dead fingers" is likely to be self-fulfilling. The fact is that one who resists a criminal is eight times more likely to be killed than one who does not.⁴⁷ It is more probable that the handgun kept in the bedside table drawer for self-protection will be used to shoot a relative or acquaintance than to successfully repel a criminal.⁴⁸ More probable still is that the handgun will be stolen by a burglar, increasing the risk that it will be used against an innocent person.⁴⁹

However, accepting that in some cases a gun offers an effective means of defending one's self, long guns fulfill that purpose almost as well. If a homeowner feels more secure with a loaded gun in the house while he sleeps, he should not feel any less secure because the weapon is a long gun rather than a handgun. Indeed, I would think that confronting a burglar with a 12-gauge shotgun would be much more intimidating and effective than a handgun. A large, visible weapon is more

45. Courts could follow the view taken by the Consumer Product Safety Commission with respect to lawn darts and treat recreational products as fungible. Thus, hunting and target shooting might be replaced by, for example, bird watching and electronic video games. However, it is not necessary to adopt such an indifferent attitude toward recreational preference because of the existence of a substitute product which tracks the recreational utility of handguns much more closely.

46. I do not discount that this psychological security, though misplaced, has some degree of utility.

47. Turley, *supra* note 3, at 60.

48. Turley, *supra* note 3, at 59. (citing study showing this is six times more likely than that the handgun will be used to defend against a burglar).

49. See Turley, *supra* note 3, at 59 (citing statistic that 275,000 handguns are stolen each year).

likely to deter the criminal, thereby eliminating the need to actually use deadly force. If the use of such force becomes necessary, accuracy counts. However, most people are not expert pistol shooters, particularly in a dark house when they are under tremendous stress. With a shotgun, simply firing the weapon in the general direction of the target offers a reasonable chance of making contact. Moreover, shotgun pellets which miss their target are not likely to penetrate the walls of a dwelling and kill innocent persons outside. That possibility exists as to missed shots fired from a high-powered handgun.

I concede there are situations where a long gun, because it is not small and easily concealable, will not be as effective as a handgun in defending persons or property. A liquor store owner, for example, may have a hard time withdrawing a long gun from beneath the counter to defend against a robber. However, this is another instance where risk-utility balancing dictates that long guns be viewed as an adequate substitute product. This marginal degree of enhanced utility of handguns attributable to their small size is outweighed by the vastly greater risk presented by handguns because of the same feature.⁵⁰

It is the easy concealability of handguns which makes them unreasonably dangerous as compared with long guns. Roughly seventy-five percent of all firearm homicides are committed with handguns.⁵¹ Handguns are what our children are carrying to school, not hunting rifles. Handguns are what armed robbers use to gun down store clerks. Handguns are what felons use to shoot police officers during routine traffic stops.⁵² While rifles and shotguns are very dangerous, they are not un-

50. The small size of handguns facilitates carrying them in public places, thus arguably giving them significantly greater utility for protection in such places than long guns. Ignoring the statistical evidence already cited showing it is usually more dangerous to resist an attacker than to submit to the crime or run away, it is illegal in Arkansas, and I presume most other states, for most private citizens to carry a handgun in a public place. Ark. Code Ann. § 5-73-120(a) (Supp. 1989) ("A person commits the offense of carrying a weapon if he possesses a handgun, knife or club on or about his person, in a vehicle occupied by him, or otherwise readily available for use with a purpose to employ it as a weapon against a person."). Thus, unless courts are prepared to accept that an illegal act has legally cognizable social utility, this increased utility should be disregarded. Moreover, this utility of handguns is reduced by the existence of other portable personal security products such as mace and electronic stun guns.

51. U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 11 (1989) (9,013, or 76 percent, of the total 11,832 firearm murders in 1989 were committed with handguns).

52. Seventy-six percent of the law enforcement officers killed with firearms from 1980-1989 were killed with handguns. U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 13 (1989). Sixty-nine percent of all officers killed during that period were killed with handguns. *Id.*

reasonably dangerous because their greater utility for most legitimate purposes outweighs their reduced risk as compared to handguns.⁵³

To appreciate the distorted way society has until now applied risk-utility balancing to handguns, it might be helpful to divorce the analysis from a product so steeped in tradition and adoration and cast it upon a different, hypothetical product. Suppose a manufacturer marketed a drug as a remedy for morning sickness. I assume many women who are or have been pregnant would attest that such a drug has significant social utility. But suppose this particular drug, while effective for combatting morning sickness, killed 22,000 women each year and seriously injured 100,000 others. Assume also that the manufacturer was aware of this risk at the time it manufactured and marketed the drug. Finally, assume that substitute products existed which were almost as effective in relieving morning sickness. There can be no doubt that: (a) the Food and Drug Administration would order the drug removed from the market; and (b) the manufacturer would be held strictly liable for manufacturing a defective product.

Some may argue that handguns have more social utility than a morning sickness drug and, therefore, the comparison is not an apt one. I disagree, but even accepting that as true, surely even the most ardent handgun enthusiast could imagine *some* drug with greater social utility than a handgun. Yet I submit that *any* drug—even a miracle cure for cancer or AIDS—which killed 22,000 people each year and seriously injured 100,000 others would be considered unreasonably dangerous, particularly if a substitute medication existed which had almost the same utility. This suggests that handguns have avoided being branded as unreasonably dangerous products not so much as a result of the faithful application of modern tort principles but because of a warped social policy.

53. Handguns have much greater utility when used by law enforcement officers in the course of their official duties. Courts could except manufacturers from liability when a law enforcement officer employs deadly force via a handgun on the basis that the utility of such use outweighs the risk. In fact, it may be desirable as a matter of public policy to absolve handgun manufacturers from liability in all cases where deadly force is legally employed. Thus, the burglar who is shot entering a dwelling would not be permitted to recover against the manufacturer if the use of deadly force was justified. This exception could be based upon the theory that the utility of the handgun in that situation outweighed its risk or, alternatively, that tort remedies against a handgun manufacturer should not be available to a person injured in the course of committing a criminal act.

CAUSATION

A word about causation is warranted. Originally, courts permitted recovery under Restatement (Second) of Torts § 402A only where the plaintiff was injured while using the product for its "intended" purpose. This precluded, for example, plaintiffs from suing automobile manufacturers for failing to design their products so as to protect passengers in the event of a collision on the theory that collisions are not an intended purpose of an automobile. In *Larsen v. General Motors Corporation*,⁵⁴ the Eighth Circuit Court of Appeals extended the coverage of strict liability to include *foreseeable* uses of the product. Since it is foreseeable that automobiles will be involved in collisions, manufacturers owe a duty to design their products accordingly.⁵⁵ Most courts have followed the *Larsen* lead. With respect to handguns, the argument is that criminal and accidental shootings are not the intended uses of a handgun. The *Larsen* anticipated use doctrine, however, disposes of this argument since there is no denying that such uses are foreseeable.

A more discrete causation argument is also advanced against strict liability for handgun manufacturers in cases involving criminal attacks. Traditional causation rules held that intervening criminal acts by third persons supersede the original actor's conduct and, hence, liability. As applied to handguns, this is the "guns don't kill people; people kill people" argument.⁵⁶

The argument is unpersuasive. We could make the same kind of argument as to many other products. "Ford Pintos don't kill people; the people who run into the back of them do." "Industrial presses don't maim people; the people who put their hands under them do." Modern legal causation analysis focuses upon the foreseeability of the risk. Certainly, the overwhelming statistical evidence shows that one of the prime foreseeable risks of a handgun is that it will be used to kill someone during a criminal attack. In negligence cases, many modern decisions have held that intentional criminal acts do not supersede the negligence of the original actor where the criminal act was the very risk created by the negligence.⁵⁷

54. 391 F.2d 495 (8th Cir. 1968).

55. *Id.* at 502-03.

56. *See* *Sturm, Ruger & Co. v. Bloyd*, 586 S.W.2d 19 (Ky. 1979) ("By their very nature firearms are dangerous but do not kill people. It is the action of people in the use of firearms that kill or injure people.").

57. *See, e.g.,* *Silva v. Showcase Cinemas Concessions of Dedham, Inc.*, 736 F.2d 810, 813 (1st Cir.), *cert. denied*, 469 U.S. 883 (1984) (defendant's failure to adequately patrol premises

Interestingly, the leading case on this issue involving handguns is an Arkansas case. In *Franco v. Bunyard*,⁵⁸ the Arkansas Supreme Court reversed a summary judgment entered in favor of a gun dealer who sold a handgun to an escaped convict, Daniel Graham, who used the gun to kill two persons and injure a third. The plaintiffs alleged the gun dealer was negligent per se for failing to require Graham to complete Form 4473, the federal Firearms Transaction Record. Completion of the form, which contains identifying information about the purchaser, is required by federal law.

The trial court held that Graham's criminal act was an unforeseeable intervening cause which superseded the negligence of the gun dealer.⁵⁹ The supreme court disagreed, holding that while the precise manner in which the weapon was used may not have been foreseen, "[i]t certainly cannot be said that his use of the gun in such a way as to injure others was not foreseeable."⁶⁰ Therefore, the criminal act did not supersede the negligence of the gun dealer as a legal cause of the shootings.⁶¹

TRUTH ABOUT CONSEQUENCES

I know already from speaking with Professor Oliver that he sees my proposal for strict liability against handgun manufacturers as a thinly veiled attempt to drive handgun manufacturers out of business, thereby achieving maximum handgun control. I think I have made it clear that my agenda regarding handguns is not a hidden one. I oppose the policy in this country which favors ready access to this weapon of destruction which, while it may provide solace and recreation for many people, inflicts untold misery and suffering upon many others. Consequently, it is true that I would not be disappointed if all the handgun companies suddenly decided to devote their resources to making kinder, gentler products.

However, shutting down the nation's handgun industry is not the

proximate cause of plaintiff's stabbing); *Easley v. Apollo Detective Agency*, 69 Ill. App. 3d 920, 387 N.E.2d 1241 (1979) (security agency liable for hiring guard with a violent record); *Christensen v. Epley*, 36 Or. App. 535, 585 P.2d 416 (1978) (matron liable for police officer's death when he was shot by juveniles who escaped from youth center).

58. 261 Ark. 144, 547 S.W.2d 91, *cert denied*, 434 U.S. 835 (1977).

59. *Id.* at 145, 547 S.W.2d at 92.

60. *Id.* at 147, 547 S.W.2d at 93.

61. The court attached significance to the fact that Graham would not have been able to purchase the gun had the defendant complied with the federal regulations, since the regulations require proof of identification and Graham had none. *Id.*

inevitable consequence of imposing strict liability upon handgun manufacturers. Strict liability would not mean that manufacturers are precluded from making handguns. It would mean only that they, like all other manufacturers of unreasonably dangerous products, must bear the cost of injuries their products cause. The result would be that the price of handguns would rise to reflect their true cost to society. Once that price is reached, the free market would determine whether the product is worth that cost to society.⁶² If manufacturers can continue to make a profit by marketing handguns at this higher price, all is well and good from a tort perspective. If not, then handguns will be removed from the market.

Under present law, the price of handguns is heavily subsidized by the victims of handgun violence. The estimated direct cost to the economy of the lost lives and resources devoted to treating handgun injuries exceeds \$20 billion annually.⁶³ The manufacturers of handguns should bear, or at least share, this cost. I feel quite confident that, given the fervent devotion of gun enthusiasts, handguns would continue to sell at even ten times their current prices. They undoubtedly would sell at a slower rate, but that is not a bad result. There are already sixty to seventy million handguns in this country.⁶⁴ That seems to be about fifty-nine to sixty-nine million too many.

Let me close with a proud parent story. My favorite fodder for constructing classroom hypotheticals is, paradoxically, an Uzi machine gun. Last summer, my daughter, then four years old, picked up the toy Uzi which my Torts students gave me as a Christmas present and pointed it at me. I admonished her never to point a gun at anyone. She asked why and I told her that real guns kill and hurt people. Invoking wisdom only a four-year-old could possess, she asked: "Then how come they make them?" "Astute question," I said. Then, not wanting to brainwash the child, I started to explain the perceived utility of firearms, but she was not listening. She had gone back to watching Elmer Fudd blow Bugs Bunny's head off with a shotgun.

62. Turley, *supra* note 3, at 46.

63. *Id.* at 43.

64. King, *supra* note 6, at 80, col. 4.

