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# TURNING THE GUN ON TORT LAW: AIMING AT COURTS TO TAKE PRODUCTS LIABILITY TO THE LIMIT*

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## I. An Armed Assault on Product Sellers: Making Them Strictly Liable in Tort for the Criminal Misuse of Their Products

The manufacturers and distributors of a broad range of products—from legal weapons to automobiles, alcohol, and drugs—are facing an expansion of their products liability exposure which is unprecedented even in comparison to recent tort law developments. Over the last twenty years, doctrines of manufacturer and seller liability for allegedly product-related harm have expanded dramatically. Traditional defenses have been eliminated or significantly eroded and less stringent proof requirements for claimants have been instituted in order to ease the path to recovery. As one commentator has stated:

> Tort law has continually developed in a fashion that favors plaintiffs, both in liability and in damages issues. First came the demise of the privity requirement; then came strict liability as defined in section 402A of the *Restatement (Second) of Torts;* then came the shifting of the burden of proof of actual causation (as opposed to proximate cause) in multiple-defendant cases . . . ; then came rejection of the section 402A "unreasonably dangerous" limitation on strict liability; then, in strict liability cases where the plaintiff has established that his injury was caused by the design of the manufacturer's product, came the shifting to the defendant of the burden of proving that the product is not defective; then came "enterprise liability . . . ."[1]

While these developments have virtually destroyed the doctrinal underpinnings of the traditional Anglo-American tort system, some members of the plaintiffs' bar are advocating an even more dramatic expansion of tort concepts. They propose to hold gun manufacturers, distributors, and sellers strictly liable in tort to the victims of crime for the criminal misuse of a firearm by a third party. Their purpose is to ban or control access to handguns through products liability law.

Two articles detailing the grounds for what we will refer to as

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1. Wheeler, *Product Liability, Civil Or Criminal—The Pinto Litigation,* 1981, 17 Forum 250, 258-59 (1981). In an effort to curb this expansion of manufacturer's liability, however, some states have enacted statutes of repose to protect specified classes of defendants. Generally, these statutes are not favored. *See* Dworkin, *Product Liability of the 1980's: "Repose Is Not the Destiny" of Manufacturers,* 61 N.C.L. Rev. 31, 42-65 (1982).

the "new" or "proposed" theory of liability have appeared in the *California Bar Journal*[2] and the *National Law Journal*.[3] A third article analyzed the first two in *The Brief*, a publication of the American Bar Association.[4] In addition, the print and television media have accorded widespread coverage to the articles and cases promoting the new theory of liability.

The articles advancing the theory announce the authors' intentions to ban or regulate handguns by "bring[ing] the great power of our civil courts to bear on a problem that our legislatures . . . have not been able to solve."[5] Initially, the idea of curing a perceived social ill by holding a product manufacturer or seller liable in tort for the criminal misuse of its product appears radical. Nonetheless, members of the plaintiffs' bar are seriously promoting their cause as a logical extension of recent tort law developments. Businessmen will—or should—be wary of the idea's attractiveness to plaintiffs' lawyers and activist courts. Since the theory's rationale is readily transferable to a wide range of other products which cannot be made safe from abuse if they are to remain functional, the theory opens new vistas to members of the plaintiffs' bar who, in the words of one past ATLA president, believe that "[w]e are beginning to have enough lawyers . . . [but] we need a vast expansion in victims' rights to sustain the lawyers . . . ."[6]

Advocates of the proposed theory of liability do well to place it in the context of firearms manufacture. Any effort to ban or control access to handguns will predictably cause emotional reactions on all sides of the issue which divert attention from the real purpose and likely impact of such an endeavor.[7]

The instant article avoids the emotionalism of the gun control

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2. Fisher, *Are Handgun Manufacturers Strictly Liable in Tort?*, 56 CAL. ST. B.J. 16 (1981).

3. Speiser, *Disarming the Handgun Problem By Directly Suing Arms Makers*, The National Law Journal, June 8, 1981, at 29, col. 1.

4. Podgers, *Tort Lawyers Take Aim at Handguns*, 11 THE BRIEF 4, 5 (Nov. 1981).

5. Speiser, *Disarming the Handgun Problem By Directly Suing Arms Makers*, The National Law Journal, June 8, 1981, at 29, 30, col. 3.

6. Philo, *Trial Lawyers Have A Political Constituency Greater Than That of the A F of L-CIO*, TRIAL MAG., October, 1980 at 4, col. 1-2.

7. *See* Comment, *A Farewell To Arms?—An Analysis Of Texas Handgun Control Law*, 13 ST. MARY'S L.J. 601, 601-02 (1982). *See generally* Wright, *Public Opinion and Gun Control: A Comparison of Results from Two Recent National Surveys*, 445 ANNALS 24, 25 (1982).

controversy by focusing on the factual, legal, and policy flaws in the proposed theory of liability in terms of tort law and the public interest. More specifically, this article provides an overview of the new theory of liability propounded in the journal articles and complaints from actual cases; examines the factual bases which allegedly justify imposing liability; analyzes the legal grounds of the theory and defenses to it; explores the public interest implications of adopting a doctrine of vicarious criminal responsibility under tort law; and concludes that the new theory of liability lacks merit as a matter of fact, law, and policy.

## II. Taking Aim at Gun Manufacturers: The Proposed Theory of Liability in the Words of Its Proponents

Proponents of the theory allege a number of grounds for holding gun manufacturers and sellers strictly liable in tort for harm caused by the criminal misuse of their product by a third party. Principally, they allege that guns are per se or inherently dangerous instrumentalities, the criminal misuse of which is legally foreseeable. Guns are therefore defective and unreasonably dangerous products by their nature and/or the manufacture and distribution of guns is an "abnormally dangerous" activity. Hence, manufacturers, distributors, and sellers of guns should be strictly liable for *any* harm caused by their products even if the product does not malfunction or have a "defect" in the traditional tort sense.[8]

Complaints in test cases specifically allege, inter alia, that guns "are an inherently dangerous commodity used for the killing of human beings";[9] "the defendant knew and foresaw that said handgun by its design and because of the function for which it was manufactured, sold and distributed, could be used to kill human beings";[10] "that by its sale and distribution of said handgun there was created the hazard that said handgun had the inherent function of being utilized to aid its buyer in perpetrating murder";[11] that "said handgun was in the same unreasonably dangerous con-

8. *See* Podgers, *Tort Lawyers Take Aim at Handguns*, 11 The Brief 4, 5 (Nov. 1981).

9. Gebhardt v. Bangor Punta Operations, Inc., No. 81-40059 (E.D. Mich., Oct. 15, 1981) (order dismissing complaint).

10. Riordan v. Interarms, Ltd., No. 81-L-27923 (Circuit Court of Cook County, Ill. filed Dec. 2, 1981).

11. *Id.*

dition, to-wit: it was designed, manufactured and sold, having as its principal function, the killing of individuals";[12] and that the "risk associated with the use of the type pistol . . . greatly outweighs any potential benefit . . . ."[13]

These emotionally-charged allegations assume their own conclusion, but lack factual or legal foundation. Upon examination, they prove merely the necessary premises for a syllogism designed to bring the proposed theory of liability within the ambit of traditional products liability law.

## III. SHOT FULL OF HOLES: THE FACTUAL PREMISES OF LIABILITY

The contention that tort law developments support holding firearms manufacturers liable for the acts of criminals over whom they have no control rests on three false premises. First, handguns are manufactured "as instruments to deliver deliberate harm." Second, handguns lack social utility. Third, while existing statutory measures regulating the possession and use of firearms are ineffective in controlling firearm violence, products liability suits which partially shift a criminal's culpability to a businessman will effectively lower the murder and crime rate. None of these assumptions withstands scrutiny.

### A. *False Premise No. 1—Handgun Manufacturers Know and Intend That Their Products Will Be Used for Criminal Purposes*

The allegation that gun manufacturers intend their products to be misused as instruments of death is almost too ludicrous to require a response. Most states and several territories of the United States,[14] as well as the federal government itself,[15] recognize the

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12. *Id.*

13. Wolf v. Colt Indus., No. 81-11899-6 (Dist. Ct. of Dallas County, 134th Judicial Dist. of Texas, filed Oct. 15, 1981); *see also* Richman v. Charter Arms Co., No. 82-1314 (E.D. La. filed Apr. 2, 1982); Burks v. Smith & Wesson Co., No. 82-L-1835 (Circuit Court of Cook County, Ill. filed July 20, 1982); Linton v. Smith & Wesson Co., (Circuit Court of Cook County, Ill. Jan. 4, 1983) (order dismissing complaint); Haviland v. Sturm, Ruger, Co., No. L-2369 (Circuit Court of Blount County, Tenn., Feb. 18, 1983) (order dismissing complaint).

14. *See generally* BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, U.S. DEP'T OF THE TREASURY, ATF P 5300.5, STATE LAWS AND PUBLISHED ORDINANCES: FIREARMS (1981).

15. *See* 18 U.S.C. §§ 921-928 (1976) (Gun Control Act of 1968). The Act allows persons to engage in firearm trade upon compliance with applicable licensing procedures. *See id.* § 923. Additionally, exemptions from the prohibition of firearm ownership or control are delineated. *See id.* § 925.

sale of firearms as a lawful activity. We presume with a high degree of certainty that the social authorities would outlaw any business activity which had as its purpose the sale of a product *intended* to cause the deaths of innocent persons.

The related allegation that death or injury is so likely to result from the distribution and sale of firearms to the public that a product seller can be presumed to know his product will be misused for a criminal purpose also lacks substance. However appealing such a contention may be in fundamentalist anti-gun ownership circles, it finds no support in existing empirical data as an objective examination of the available evidence demonstrates.[16]

A recent study sponsored by the National Institute of Justice[17] reports the results of a comprehensive review of the existing literature and studies on weapons, crime, and violence in this country. The report is significant both for the breadth of its undertaking—"to assess what is now known about weapons, crime and violence"[18]—as well as for its concerted effort to "set aside . . . biases and to let each published piece of research stand or fall on its own merits."[19] It is particularly telling in terms of the proposed theory of liability under consideration here that the study concludes:

> [R]eview of the relevant literature . . . confirms that the existing studies are far more noteworthy for what they do not show than for what they do. With a few exceptions that are duly noted in the body of the volume itself, there is scarcely a single point in the whole of the literature that could be said to be firmly and indisputably established.[20]

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16. *See generally* Comment, *A Farewell To Arms?—An Analysis Of Texas Handgun Control Law*, 13 ST. MARY'S L.J. 601, 619 app. I (1982).

17. NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, WEAPONS, CRIME, AND VIOLENCE IN AMERICA (1981). The National Institute of Justice (NIJ) is a research, development, and evaluation center within the United States Department of Justice. The official reports of NIJ-sponsored studies are reviewed by Institute officials and staff, as well as outside experts.

18. *Id.* at 5.

19. *Id.* at iii.

20. *Id.* at 43. The report repeatedly underscores the general unreliability of existing studies and the conclusory nature of the results. For instance, it notes that "[i]n general, one would be ill-advised to point to the academic literature on weapons and crime as an example of . . . scientific objectivity . . . . Both 'guns' and 'crime' are emotionally-laden symbols that evoke strongly held and not always rational feelings, anxieties, and concerns . . . which . . . sometimes interfere with sound research judgments." *Id.* at 6.

That "there is very little in the weapons, violence and crime literature that would qualify as hard empirical fact"[21] suggests that individuals suing under the new theory face a major obstacle to proving that manufacturers can be presumed to know that their products will be misused for a criminal purpose. The NIJ report notes that "we do not know the total number of privately owned firearms in the United States except to the nearest few tens of millions . . . ."[22] Estimates range from 50 to 200 million weapons in private hands[23] of which an estimated 30 to 40 million are handguns.[24] However, all methods of estimating the total quantity of firearms and handguns are inferential and inherently subject to errors of unknown proportions.[25]

As a result, studies on the number of guns involved in crimes *"suffer from the absence of a proper comparison standard, namely, empirically reliable information on non-crime guns."*[26] That is, while a claimant can establish the number of handguns involved in murders in a given year, it is presently impossible to show with any reliability the number of extant handguns, the number of handguns actually used in violent crime (some are used more than once) and, a fortiori, the percentage of all handguns used for criminal activity. However, the best available data indicates that "the fraction of all privately owned firearms that are involved in any sort of criminal activity in any given year is in the order of a fraction of one per cent . . . ."[27] Hence, theory proponents should not be able to credibly support their claims about the manufacturers' imputed "knowledge" and "intent" based upon the frequency of handgun use in crime.

### B. *False Premise No. 2—Handguns Lack Social Utility in the Hands of the General Public*

The argument that firearms lack social utility in the hands of the general public is similarly flawed. Firearms, including handguns, serve a number of useful functions. A number of these so-

21. *Id.* at 9.
22. *Id.* at 9.
23. *See id.* at 45.
24. *See id.* at 66.
25. *Id.* at 45-72.
26. *Id.* at 33 (emphasis added).
27. *Id.* at 12.

cially utilitarian purposes are implicitly recognized in section 101 of the Gun Control Act of 1968[28] which states:

> The Congress hereby declares that the purpose of this title is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence, and *it is not the purpose of this title to place any undue or unnecessary federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity,* and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition of Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title.[29]

Proponents of holding firearms manufacturers liable for the criminal misuse of their products argue that handguns, particularly smaller ones, serve no purpose in the hands of the general public.[30] Yet millions of Americans use handguns safely for hunting and related purposes and a variety of recreational sports such as target shooting.[31] Others collect firearms, including handguns of all sizes, safely and responsibly.[32] Still others employ them in their work as military, law enforcement, or private security personnel.[33] In addition, many law-abiding citizens own handguns for protection against animals and criminal activity.[34] Objective indicators suggest that handguns are used for all of these socially benign purposes.[35]

Advocates of the new theory attack the self-defense justification with particular vigor. They inevitably point out, and correctly so, that guns kept for self-defense are sometimes involved in injury to

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28. Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified at 18 U.S.C. section 921(a)).

29. *Id.* (emphasis added).

30. *See* Fisher, *Are Handgun Manufacturers Strictly Liable in Tort?*, 56 CAL. ST. B.J. 16, 18 (1981); Speiser, *Disarming the Handgun Problem By Directly Suing Arms Makers*, The National Law Journal, June 8, 1981, at 29, col. 2.

31. NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, WEAPONS, CRIME, AND VIOLENCE IN AMERICA 18, 82 (1981).

32. *See id.* at 105.

33. *See id.* at 116.

34. *See id.* at 141.

35. *See id.* at 18.

the innocent or are used in the heat of passion.[36] Nonetheless, the argument fails to negate the social value of keeping handguns for self-defense purposes. Nor does it suggest that an absence of handguns or other firearms will insulate victims from crimes of passion perpetrated by the use of other products such as knives or blunt objects.[37]

It is impossible to know how many crimes are deterred by gun ownership. Deterred crimes are often unknown and hence unreported. On the other hand, it is possible to pinpoint thousands of reported incidents in which a handgun owned for self-defense was responsible for saving law-abiding citizens from serious injury or death.

The following is an account of one such incident:

> A small, middle-aged black cab driver . . . was preparing dinner in his Harlem tenement. A junkie forced his way in and began beating the cabbie over the head with a lead pipe demanding money with each blow. Having already been mugged twice that month, Mr. Washington didn't have any money. But the junkie didn't give him time to mention that fact—and anyway he didn't seem inclined to stop beating Mr. Washington's head in for any explanation less convincing than actual cash. So Mr. Washington grabbed a "Saturday Night Special" and shot the junkie dead.[38]

This incident illustrates the self-defense value of handgun ownership. It also underscores two points ignored by proponents of the theory: smaller firearms are well-suited to self-defense uses and are affordable for those segments of society most often victimized by crime—the poor and the elderly.

Another incident involves a burglar who was shot after breaking into the home of a Galveston, Texas couple. For over three years

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36. *See id.* at 36.

37. *See id.* at 296. *See generally* Kates, *Some Remarks on the Prohibition of Handguns*, 23 ST. LOUIS U.L.J. 11, 16-19 (1979) (effect of ban on substitution of other lethal weapons). For example, in England, which has strict handgun control laws, there has been no reduction in the rate of violent crimes. England has in fact been experiencing a rise in violent crime. *See* C. GREENWOOD, FIREARMS CONTROL: A STUDY OF ARMED CRIME IN ENGLAND AND WALES 67, 168-69, 173, 243 (1972).

38. Kates, *Some Remarks on the Prohibition of Handguns*, 23 ST. LOUIS U.L.J. 11, 12 (1979). The story concludes that "[i]n about 20 minutes the police arrived, arrested Mr. Washington, took him to the emergency ward and then booked him into the police hospital for an extended stay. Because, of course, Mr. Washington did not have a permit to own a gun." *Id.* at 12.

prior to the break-in, the Galveston area had been terrorized by a series of burglaries and rapes that had women "in a state of paranoia."[39] Police were baffled and had no immediate hope of apprehending the criminal. Finally, however, the criminal broke into the home of a handgun owner who slept with a gun under his pillow for protection. When the intruder stood in the bedroom doorway with a rifle and declared "don't move or I'll shoot you," the homeowner shot him. As a result, the police arrested the intruder who was subsequently linked to 87 separate rapes.[40]

Another news report tells the story of New York physicians who carry—and have had to use—guns to protect themselves from drug addicts.[41] Another story reports how a woman fended off an ice pick and knife-wielding assailant in her apartment with a handgun.[42] Yet another woman used a handgun to stop a man from choking to death the police officer he had already shot.[43]

The stories could go on.[44] The point is clear, however; handguns are often owned and used for self-defense. It is estimated that one-half of the existing stock of such firearms are owned for self-defense purposes[45] and that the proportion of United States adults who have actually fired a gun in self-defense is in the range of two to six percent.[46] Thus, the social utility of firearms cannot be quantitatively or reasonably denied, no matter what position one takes on the need for gun control. The evidence is simply insufficient to support a claim to the contrary.

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39. The Houston Post, Apr. 4, 1982, at 2, col. 1 ("Galveston's Fear Ended With Rapist's Capture").

40. *Id.*

41. N.Y. Times, June 3, 1974, at 31, col. 1 ("Gun Carrying Doctors").

42. L.A. Times, May 29, 1981, at 2, 7, col. 1 ("The Dog Barked and Suddenly She Was Glad She Had Her Gun").

43. CRIME CONTROL DIGEST, Jan. 7, 1980, at 8, col. 2.

44. The *American Rifleman* magazine regularly carries a column, "The Armed Citizen," which has reported hundreds of similar cases over the years in which the mere presence of a firearm has prevented a crime without a shot being fired.

45. *See* NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, WEAPONS, CRIME, AND VIOLENCE IN AMERICA 26, 223 (1981).

46. *See id.* at 255.

### C. *False Premise No. 3—Holding Handgun Manufacturers Strictly Liable for the Criminal Acts of a Third Party Will Reduce Crime*

Finally, the premise that tort actions will effectively reduce crime by controlling access to firearms proves too much for a number of reasons. While it is not within the scope of the present article to explore in minute detail all of the evidence which undermines this third factual premise of the new theory, a brief examination of the evidence, or lack of it, is in order.

Like the other factual premises, this one is unsupported by credible, empirical evidence. No legitimate study has yet demonstrated a corollary between private weapons ownership and the rate at which violent crime occurs,[47] let alone between gun control and a reduction in the crime rate.[48] A conclusion of the Department of Justice report is instructive:

> There is little or no conclusive evidence to show that gun ownership among the larger population is per se, an important cause of criminal violence. Most of the research designs employed in the literature would not allow for a decisive demonstration of such an effect, even if it did exist; designs that would allow one to detect the effect usually require data that do not exist or would be prohibitively expensive to generate.
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> It is true by definition that gun crimes require guns, and it is true empirically that guns, mainly handguns, are involved in a very large share of criminally violent incidents . . . . But it does not follow from any of this that reductions in the private ownership of weapons would be accompanied by similar reductions in the rates of violent crime, or, what amounts to the same thing, that private weapons ownership is itself a cause of violent crime.[49]

Much of what is known or can be proven suggests that a relationship between private gun ownership and crime is unlikely.

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47. *See id.* at 22.

48. *See id.* at 501-46. *See generally* Comment, *A Farewell To Arms?—An Analysis Of Texas Handgun Control Law*, 13 ST. MARY'S L.J. 601, 613-14 (1982).

49. NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, WEAPONS, CRIME, AND VIOLENCE IN AMERICA 236-37 (1981). Indeed, the statistics in FBI Uniform Crime Reports, U.S. Dep't of Justice, Crime in the United States (1981), contradict the assertions made by theory proponents. The statistics indicate that handgun involvement in murders *fell* by seven percent between 1974 and 1981, while handgun ownership *grew* by twenty-five percent from 18,700 per 100,000 of population to almost 24,000 per 100,000 during the same period.

Contrary to popular perception, gun ownership appears to increase in higher income categories[50] and the "average" gun owner can be accurately depicted as a "small town or rural middle class Protestant male who owns a gun primarily for sport and whose interest in and familiarity with firearms results from early childhood socialization."[51] In addition, while gun ownership is concentrated in rural areas, most violent crime occurs in urban areas.[52]

No evidence suggests that restricting the availability of private firearms to the general population through products liability law will prevent individuals intent on arming themselves for criminal purposes from doing so. Experience teaches that persons with criminal intent will be able to arm themselves.[53] "Here it may be appropriate to recall the First Law of Economics, a law whose operation has been sharply in evidence in the case of Prohibition, marijuana and other drugs, prostitution, pornography, and a host of other banned activities and substances—namely, that demand creates its own supply."[54] Nor does it suggest that a criminal would not simply substitute a different weapon if a firearm were unavailable. Thus, like the other premises upon which the proposed theory is based, the "reduction of crime" premise is unsupported by credible evidence.

## IV. Missing the Target on the Elements: The Legal Bases of Strict Liability

An examination of the legal grounds proposed for holding firearms manufacturers strictly liable in tort for third party criminal acts demonstrates that tort law in general and strict liability in particular are ill-suited to the task of shifting civil responsibility for criminal conduct from the perpetrator to innocent business-

50. *See* National Institute of Justice, U.S. Dep't of Justice, Weapons, Crime, and Violence in America 21 (1981).

51. *Id.* at 22, 236; *see also* Bureau of Alcohol, Tobacco & Firearms, Memorandum on the Problem of the Criminal Use of Handguns 15-16 (1975).

52. National Institute of Justice, U.S. Dep't of Justice, Weapons, Crime, and Violence in America 235 (1981).

53. *See* Murray, *Handguns, Gun Control Laws and Firearms Violence*, 23 Soc. Probs., 81, 90 (1975) (statistics suggest gun legislation is "totally irrelevant to its purpose").

54. *See* National Institute of Justice, U.S. Dep't of Justice, Weapons, Crime, and Violence in America 238 (1981). *See generally* Comment, *A Farewell To Arms?—An Analysis Of Texas Handgun Control Law*, 13 St. Mary's L.J. 601, 618 (1982).

men. A claimant under such a theory simply cannot meet the requirements of a strict liability suit as a matter of law. Hence, complaints based upon the theory should be dismissed for failure to state a claim upon which relief can be granted or, in cases in which the case is permitted to go to the jury, any decision adverse to a manufacturer or seller should be subject to reversal by a judgment notwithstanding the verdict.

A review of elements which must be established to recover in a strict products liability action provides the appropriate framework for considering the legal bases of this new theory. The *Restatement (Second) of Torts,* section 402A provides a definitional starting point. Section 402A provides that:

> (1) One who sells a 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
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> . . . . . .
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.[55]

In all jurisdictions, regardless of the permutation of section 402A employed, a plaintiff in a strict liability case must establish three minimal elements—product defect, causation, and injury—to recover.[56]

### A. *A Product Is Not Defective or Unreasonably Dangerous Because It Is Criminally Misused*

The initial determination in a strict liability action is whether the product in question was "defective." While the courts have failed to provide a wholly satisfactory definition for the term "defect,"[57] it can be basically defined as a characteristic in a product which makes it dangerous such that it is not reasonably fit for the purpose for which it is sold.[58] The term is more easily defined and

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

56. *See* Bevard v. Ajax Mfg. Co., 473 F. Supp. 35, 39 (E.D. Mich. 1979). *See generally* 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 1.2, at 7-8 (2d ed. 1974).

57. II INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEP'T OF COMMERCE, REP. NO. ITFPL-77/02, FINAL REPORT OF THE LEGAL STUDY 17 (1977).

58. A product can also be seen as defective when it falls short of the reasonable expectations of the consumer regarding its safety. *See* Durham v. Vaughan & Bushnell Mfg. Co.,

understood as "something wrong" with a product which causes injury.

Product defects may be grouped into three general categories.[59] The first category involves manufacturing mistakes in which one or more but less than all of a product line are rendered dangerous.[60] The second category comprehends the absence of warnings or instructions which render a product dangerous.[61] The third category includes cases in which the product is in the condition intended by the seller, but a design characteristic renders it dangerous for its intended use.[62]

The test suits brought against gun manufacturers to date allege liability grounded in the design defect category. The gravamen of the complaints is that guns are defective and unreasonably dangerous by design because they are inherently capable of causing harm, are known to cause harm, and do cause harm when intentionally misused for the specific purpose of causing injury. This allegation is fundamentally flawed in that it describes a characteristic inherent in all firearms, handguns or otherwise, and in a wide variety of other products.[63] Such products, however, are neither "defective" nor "unreasonably dangerous" for products liability purposes.

The policy rationale underlying products liability law is to provide "the consumer a legally-enforceable right, as against the manufacturer, to proceed on the assumption that the product will serve in *normal* use without causing injury. Generally speaking, a prod-

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247 N.E.2d 401, 403 (Ill. 1969). Some courts equate the terms "defective condition" and "unreasonably dangerous" when defining defect in a product. *See* Burks v. Firestone Tire & Rubber Co., 633 F.2d 1152, 1154-55 (5th Cir. 1981); Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1272 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974).

59. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 99, at 659 (4th ed. 1971).

60. *See* Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1036-37 (Or. 1974); General Motors Corp. v. Hopkins, 535 S.W.2d 880, 889 (Tex. Civ. App.—Houston [1st Dist.] 1976), *aff'd*, 548 S.W.2d 344 (1977). The supreme court opinion was subsequently overruled on other grounds in Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979).

61. *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1088-89 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); Bristol-Myers Co. v. Gonzales, 561 S.W.2d 801, 804 (Tex. 1978).

62. *See* DeRosa v. Remington Arms Co., 509 F. Supp. 762, 765-66 (E.D.N.Y. 1981); Foster v. Ford Motor Co., 616 F.2d 1304, 1310 (5th Cir. 1980). *See generally* Keeton, *Product Liability And The Meaning Of Defect*, 5 ST. MARY'S L.J. 30, 36-37 (1973).

63. *See generally* Fisher, *Are Handgun Manufacturers Strictly Liable In Tort?*, 56 CAL. ST. B.J. 16, 16-17 (1981).

uct is defective if it does not fulfill this assumption."[64] Many courts and commentators thus agree that "the prevailing interpretation of 'defective' is that the product does not meet the reasonable expectations of the ordinary consumer as to its safety."[65] Other courts employ a "balancing of factors" test for determining "defect" which includes an examination of consumer expectations,[66] while still others include consumer expectations and product utility among the factors to be employed in the balancing process.[67]

The federal district court in *DeRosa v. Remington Arms Co.*,[68] employs a framework for determining whether a product is defective which is instructive here:

> Where a product presents an unreasonable risk of harm, notwithstanding that it was meticulously made according to detailed plans and specifications, it is said to be defectively designed . . . . *[A] defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use: that is, one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce* . . . . [emphasis added]. Since no product may be completely accident proof, *the ultimate question in determining whether an article is defectively designed involves a balancing of the likelihood of harm against the burden of taking precaution against that harm.*
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> . . . . . .
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> Thus, . . . a product is defectively designed only when it presents an unreasonable risk of harm in light of other design considerations; liability is imposed where that defect is a substantial factor in bring-

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64. Snider v. Bob Thibodeau Ford, Inc., 202 N.W.2d 727, 730 (Mich. Ct. App. 1972) (emphasis added).

65. *See* Southwestern Bell Tel. Co. v. Griffith, 575 S.W.2d 92, 99 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); Hamilton v. Motor Coach Indus., 569 S.W.2d 571, 576-77 (Tex. Civ. App.—Texarkana 1978, no writ); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 99, at 659 (4th ed. 1971); Keeton, *Product Liability And The Meaning Of Defect*, 5 ST. MARY'S L.J. 30, 37 (1973).

66. *See* Lamon v. McDonnell Douglas Corp., 588 P.2d 1346, 1350 (Wash. 1979); Seattle-First Nat'l Bank v. Tabert, 542 P.2d 774, 779 (Wash. 1975); Wagner v. Flightcraft, Inc., 643 P.2d 906, 910 (Wash. Ct. App. 1982). Other factors the court will consider include the relative cost of the product, severity of the potential harm, feasibility of minimizing or eliminating the risk, the nature of the product, and the nature of the alleged defect. *See* Seattle-First Nat'l Bank v. Tabert, 542 P.2d 774, 779 (Wash. 1975).

67. *See* Robinson v. Reed-Prentice Div. of Package Mach. Co., 403 N.E.2d 440, 444, 426 N.Y.S.2d 717, 721-22 (1980).

68. 509 F. Supp. 762 (E.D.N.Y. 1981).

> ing about plaintiff's injuries when the product is being used in a reasonably foreseeable manner.[69]

Viewed under any test, then, a gun is not defective or unreasonably dangerous solely on the grounds that it can be—and sometimes is—intentionally misused for a criminal purpose.

1. Criminal Misuse of a Handgun Is Neither a Normal Nor a Foreseeable Use of the Product.

A claimant can only prove defectiveness by showing "a demonstrable malfunction in a product or behavior which contradicts the assumption that the product will serve a *normal* use without causing injury."[70] Proponents of the proposed theory of liability fail to allege a defect as that term is defined for strict liability purposes. On closer analysis, they seek to premise liability not on any defect in design of the firearm, but on the independent, allegedly foreseeable, intentional misuse of the product by a criminal.

While criminal misuse of a firearm may be literally foreseeable, it is not a use which product sellers have a duty to anticipate or guard against to the degree suggested by theory proponents. The courts and commentators have recognized that product sellers are not liable for injury caused by abnormal use,[71] misuse,[72] or abuse[73]

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69. *Id.* at 766 (citing Robinson v. Reed-Prentice Div. of Package Mach. Co., 403 N.E.2d 440, 443, 426 N.Y.S.2d 717, 720 (1980)).

70. Robinson v. Reed-Prentice Div. of Package Mach. Co., 403 N.E.2d 440, 443, 426 N.Y.S.2d 717, 720 (1980).

71. *See* Magnuson v. Rupp Mfg. Inc., 171 N.W.2d 201, 208-09 (Minn. 1969); Corprew v. Geigy Chem. Corp., 157 S.E.2d 98, 103 (N.C. 1967); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 824-25 (1966).

72. *See* Horville v. Anchor-Wate Co., 663 F.2d 598, 602-03 (5th Cir. 1981) (recovery will be reduced by percentage of injury caused by product misuse); Bell Helicopter Co. v. Bradshaw, 594 S.W.2d 519, 534 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (defense of misuse available if misuse not reasonably foreseeable). The defense can prevent reimbursement to plaintiff for damages "caused by a use of the product which the supplier would not have foreseen—and which use the plaintiff should have foreseen would create or increase the attendant danger." General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351 (Tex. 1977), *overruled on other grounds*, Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979).

73. *See* Snider v. Bob Thibodeau Ford, Inc., 202 N.W.2d 727, 731 (Mich. Ct. App. 1972) (manufacturer not liable for injuries caused by abuse of product). A manufacturer may assume:

> [t]hat his product will be put to a normal use, for which the product is intended or appropriate; and he is not subject to liability when it is safe for all such uses, and harm results only because it is mishandled in a way which he has no reason to expect,

of their products. "A product is not in a defective condition when it is safe for *normal* handling and consumption . . . ."[74] Likewise, "[t]he seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful . . . ."[75] Recognition of this limitation on liability has been stated in a variety of ways. For instance, the Fifth Circuit in *Perez v. Ford Motor Co.*[76] ruled that the concept of " 'normal use' . . . is not broad enough to cover a situation where the ordinary use of a product by the plaintiff is altered or interrupted by the actions of a third party."[77]

The same principle has been recognized in a number of cases involving firearms. *Bennet v. Cincinnati Checker Cab Co.*[78] is virtually identical in fact and principle to those now being initiated by members of the plaintiffs' bar.[79] *Bennet*, as well as other pertinent cases,[80] contradicts proponents' assertion "that no suits alleging manufacturer, distributor and seller liability for injuries caused by handguns that did not malfunction have been decided . . . ."[81]

The plaintiff in *Bennet*[82] was shot by a cab driver, an ex-convict, with a revolver imported by the defendant, Omega Import Company. The plaintiff alleged that the defendant firearms dealer "should have reasonably foreseen and anticipated that the weapon

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or is used in some unusual and unforeseeable manner.

RESTATEMENT (SECOND) OF TORTS § 395 comment j (1965). The manufacturer should, however, reasonably anticipate "other uses than the one for which the chattel is primarily intended." *Id.* comment k.

74. RESTATEMENT (SECOND) OF TORTS § 402A comment h (1965) (emphasis added).

75. *Id.* comment g.

76. 497 F.2d 82 (5th Cir. 1974).

77. *Id.* at 87.

78. 353 F. Supp. 1206 (E.D. Ky. 1973).

79. *See* Gebhardt v. Bangor Punta Operations, Inc., No. 81-40059 (E.D. Mich. Oct. 15, 1981) (order dismissing complaint); *see also* Richman v. Charter Arms Co., No. 82-1314 (E.D. La. filed Apr. 2, 1982); Burks v. Smith & Wesson Co., No. 82-L-1835 (Circuit Court of Cook County, Ill. filed July 20, 1982); Riordan v. Interarms, Ltd., No. 81-L-27923 (Circuit Court of Cook County, Ill. filed Dec. 2, 1981); Wolf v. Colt Indus., No. 81-11899-6 (Dist. Ct. of Dallas County, 134th Judicial Dist. of Texas, filed Oct. 15, 1981).

80. *See* Gebhardt v. Bangor Punta Operations, Inc., No. 81-40059 (E.D. Mich., Oct. 15, 1981) (order dismissing complaint); Haviland v. Sturm, Ruger, Co., No. L-2369 (Circuit Court of Blount County, Tenn., Feb. 18, 1983) (order dismissing complaint); *see also* Adkinson v. Rossi Arms Co., 659 P.2d 1236, 1239-40 (Alaska 1983).

81. Podgers, *Tort Lawyers Take Aim at Handguns*, 11 THE BRIEF 4, 6 (Nov. 1981).

82. Bennet v. Cincinnati Checker Cab Co., 353 F. Supp. 1206 (E.D. Ky. 1973).

in question would be used in the commission of a crime." [83] The court concluded that plaintiff's complaint failed to state a claim upon which relief could be granted since the law "erects no duty upon a manufacturer of a nondefective product to anticipate the various unlawful acts possible through the misuse of that item" under either a negligence or strict liability theory of exposure.[84] In reaching its conclusion, the court examined the question of foreseeability of criminal acts:

> There is normally much less reason to anticipate acts on the part of others which are malicious and intentionally damaging than those which are merely negligent; and this is all the more true where, as is usually the case, such acts are criminal. Under all ordinary and normal circumstances in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law.[85]

The court in *Robinson v. Howard Brothers of Jackson, Inc.*[86] also refused to find that a product seller had a duty to anticipate an intervening, third party criminal act. The defendant firearms dealer sold a pistol and ammunition to a minor in violation of both state and federal law. Subsequently, the purchaser used the gun and ammunition to murder his former lover, and her relatives sued the firearms dealer.[87] In refusing to find liability, the court of appeals of Mississippi held that "[t]he criminal act cannot be said to have been within the realm of reasonable foreseeability because the defendants, although negligent per se, could reasonably assume that Alexander would obey the criminal law."[88]

The federal court in *DeRosa*[89] reached a conclusion similar in principle. In *DeRosa*, the widow of a police officer sued the manu-

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83. *Id.* at 1210.

84. *Id.* at 1210.

85. *Id.* at 1210 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33, at 173-74 (4th ed. 1971)).

86. 372 So. 2d 1074 (Miss. 1979).

87. Plaintiffs alleged that the death resulted from the sale of the pistol and ammunition in violation of the law and argued that "liability was established as a matter of law." *Id.* at 1074-75. While the defendants admitted negligence in selling the firearm to a minor, the trial court nevertheless granted a directed verdict in their favor. *Id.* at 1074-75.

88. *Id.* at 1076. While the court did not expressly reach this conclusion, a logical extension of the court's rationale is that criminal misuse of a handgun may constitute misuse per se and thereby relieve product sellers from liability.

89. DeRosa v. Remington Arms Co., 509 F. Supp. 762 (E.D.N.Y. 1981).

facturer of a shotgun which accidentally discharged and fatally injured her husband. The death resulted from the intervening *negligent, not criminal,* acts of a fellow police officer who failed to employ various safety devices in using the firearm. The plaintiff alleged that the trigger force of the shotgun was so low that it was defectively designed for its foreseeable use in police work.[90]

The jury found for the plaintiff, but the court granted judgment notwithstanding the verdict.[91] A critical element in the court's conclusion was the finding that the design of the shotgun incorporated optimum safety features *consistent with its use as a weapon.* While the court recognized "that a manufacturer must design its product so that it avoids unreasonable risk of harm when the product is being used for an 'unintended yet reasonably foreseeable use,' "[92] the court ruled that:

> A manufacturer in New York is not, however, required to act as an insurer with respect to its product, . . . nor to protect against every conceivable misuse by its design choices. *Neither in strict liability nor negligence is a manufacturer to be held absolutely liable for all harm occasioned by its product since no product can be made absolutely safe or completely accident-proof.*[93]

The *DeRosa* court relied heavily on the New York Court of Appeals decision in *Robinson v. Reed-Prentice Division of Package Machinery Co.*[94] In *Robinson,* the court stated that the manufacturer's duty:

> does not extend to designing a product that is impossible to abuse or one whose safety features may not be circumvented. A manufacturer need not incorporate safety features into its product so as to guarantee that no harm will come to every user [or bystander] no matter how careless or even reckless [the user may be] . . . . Nor must he trace his product through every link in the chain of distribution to insure that users will not adapt the product to suit their own unique purposes. The duty of a manufacturer, therefore, is not an open-ended one. It extends to the design and manufacture of a finished product which is safe at the time of sale.[95]

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90. *See id.* at 763-65.
91. *See id.* at 763.
92. *Id.* at 768.
93. *Id.* at 768 (emphasis added).
94. 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980).
95. *Id.* at 444, 426 N.Y.S.2d at 721.

The court reasoned that:

> Principles of foreseeability . . . are inapposite where a third party affirmatively abuses a product by consciously bypassing built-in safety features. While it may be foreseeable that an employer will abuse a product to meet its own self-imposed production needs, responsibility for that willful choice may not fall on the manufacturer.[96]

Similarly, principles of foreseeability are inapposite in cases in which a third party intentionally misuses a product to commit a crime. Responsibility for that willful choice rests with the criminal. Otherwise, a product seller would become the insurer of its products for any product-related injuries.[97]

2. Products Like Handguns Cannot Be Labeled Defective or Unreasonably Dangerous Simply Because They Cannot Be Made Entirely Safe

A practical and compelling rationale underlies the rule that manufacturers have no duty to make their products accident-proof; many valuable and necessary products simply "cannot possibly be made entirely safe."[98] The authorities which recognize that such an inherent characteristic does not make a product "defective" or "unreasonably dangerous" for products liability purposes are legion. Dean Prosser states that:

> [t]here must . . . be something wrong with the product which makes it unreasonably dangerous to those who come in contact with it. An ordinary pair of shoes does not become unreasonably unsafe merely because the soles become somewhat slippery when wet; nor is there unreasonable danger in a hammer merely because it can mash a

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96. *Id.* at 443, 426 N.Y.S.2d at 721.

97. *Cf. id.* at 444, 426 N.Y.S.2d at 721-22 (where third party intentionally undertakes substantial modifications of safe product which causes injury, manufacturer not liable as insurer against abuse). It should be noted that proponents of the new theory rely on Franco v. Bunyard, 547 S.W.2d 91 (Ark.), *cert. denied*, 434 U.S. 835 (1977), as authority for the proposition that the criminal misuse of a handgun is foreseeable. *See* Podgers, *Tort Lawyers Take Aim at Handguns*, 11 THE BRIEF 4, 6 (Nov. 1981). Clearly, however, that reliance is overstated. In *Franco*, the Supreme Court of Arkansas ruled only that questions of fact existed as to the liability of the store sufficient to preclude summary judgment. Significantly, however, the court also ruled that no basis for liability existed against the store's national affiliate absent any power on its part to control the actions of the local dealer. *See* Franco v. Bunyard, 547 S.W.2d 91, 93 (Ark.), *cert. denied*, 434 U.S. 835 (1977).

98. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).

thumb. Knives and axes would be quite useless if they did not cut.[99]

The Final Report of the Interagency Task Force on Product Liability of the Department of Commerce examines the application of strict tort liability to inherently dangerous products. The study maintains that such products cannot be labeled defective merely because they pose a "commonly known danger":

> the danger of the product may be such common knowledge that the product cannot be considered to be defective. "Although a knife qualifies as an obviously dangerous instrumentality," for example, "a manufacturer need not guard against the danger that it presents." This type of hazard is an inherent risk of the product; it is also one that all reasonable persons would be aware of in the course of using the product.[100]

Other authorities provide a similar analysis:

> Many products, however well-built or well designed may cause injury or death. *Guns may kill; knives may maim; liquor may cause alcoholism,* but the mere fact of injury does not entitle the [person injured] to recover . . . *there must be something wrong with the product,* and if nothing is wrong there will be no liability.[101]

Thus, existing legal authority amply demonstrates that firearms, handguns or otherwise, cannot be characterized as defective or unreasonably dangerous simply because they may be dangerous if criminally, or even negligently, misused. A claimant must still prove that there was something wrong with the product—that it worked in an unexpected or defective manner.

The most that is alleged under the proposed theory is that handguns shoot bullets when loaded and fired. No facts are alleged to show a specific defect or that handguns used in crimes are any different from the handguns ordinarily and safely used by millions of other people. While it is common knowledge that guns can cause injury when operated for a criminal purpose, that knowledge fails

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99. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 99, at 659 (4th ed. 1971).

100. II INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEP'T OF COMMERCE, REP. No. ITFPL-77/02, FINAL REPORT OF THE LEGAL STUDY 17 (1978) (quoting Dorsey v. Yoder Co., 331 F. Supp. 753, 759 (E.D. Pa. 1971), *aff'd without opinion,* 474 F.2d 1339 (3d Cir. 1973)).

101. A. MURPHY, K. SANTAGATA & F. GRAD, THE LAW OF PRODUCT LIABILITY, PROBLEMS AND POLICIES 21 (Columbia University Legislative Drafting Research Fund/National Chamber Foundation (1982)).

to provide the basis for a legal finding that a particular firearm is dangerous or unsafe for normal use in the sense in which those terms are used for strict tort liability. As the *DeRosa* court recognized, "so too must a gun be designed so that it finally can be fired . . . ."[102]

3. Balancing the Likelihood of Harm Against the Costs of Eliminating the Potential for Misuse Tips the Scales Against Holding Manufacturers Vicariously Liable

Finally, "balancing the likelihood of harm against the burden of taking precaution against that harm"[103] demonstrates that a handgun is not "defective" under products liability law simply because it is used to commit a crime. As previously discussed, while it is not objectively possible to determine with any degree of certainty the likelihood of harm from a handgun based upon the available data,[104] it is relatively clear that the incidence of gun injuries as a result of criminal misuse is very low in comparison to the number of extant handguns.[105]

The pertinent legal authority recognizes that guns, and numerous other products to which the proposed theory of liability could apply, "must by their very nature be dangerous in order to be functional."[106] Yet, the only conceivable way to guard against the risk of criminal misuse of a handgun would be to make the product nonfunctional or to remove it from the market entirely. In either case, a lawful and significant enterprise which employs thousands of workers would be ruined without any supportable indication that the risk of harm—injury from criminal conduct—would be

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102. DeRosa v. Remington Arms Co., 509 F. Supp. 762, 769-70 (E.D.N.Y. 1981).

103. Robinson v. Reed-Prentice Div. of Package Mach. Co., 403 N.E.2d 440, 443, 426 N.Y.S.2d 717, 720 (1980).

104. The determination cannot be made because it is impossible to establish by objective empirical data the number of extant handguns or the number of such products used in crimes. It is known that many "crime guns" are used in more than one offense. *See supra* notes 21-27 and accompanying text.

105. *See* NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, WEAPONS, CRIME, AND VIOLENCE IN AMERICA 12 (1981). *See generally* 18 U.S.C. § 921(a) (1976) (Gun Control Act of 1968).

106. *See* DeRosa v. Remington Arms Co., 509 F. Supp. 762, 766 (E.D.N.Y. 1981); *cf.* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 99, at 659 (4th ed. 1971) (fact that product can cause injury because of its nature, such as axe or knife, does not without more render it unreasonably unsafe).

reduced.[107]

Moreover, handguns have many utilitarian purposes. The overwhelming majority of product users employ handguns of various shapes and sizes for lawful purposes—self-defense, sport, collection, or work. Large numbers of American citizens would be deprived of the lawful uses of a product they desire and in many cases need.

Finally, the number of crimes which are deterred by handgun ownership is not known since deterred crimes are generally undocumented.[108] In addition, many injuries to law-abiding citizens are prevented by the use of handguns for self-defense purposes.[109] While a ban on handgun ownership may prevent some injuries, it would also open the door to others. Thus, all factors considered, the doubtful effect of banning handguns through products liability law in the unfounded hope of reducing crime is outweighed by the significant costs of doing so.[110]

### B. *The Mere Act of Manufacturing and Selling a Firearm Cannot Be Held the Proximate Cause of an Injury Which Results from the Criminal Act of a Third Party*

The proposed theory of liability also fails at the next fundamental stage of strict liability analysis: proximate cause. A claimant must show a reasonable causal connection between the alleged act or omission of the defendant and the damage he has suffered. In a strict products liability case, a product seller is not liable unless

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107. The available evidence indicates that the use of handguns to commit violent crimes does not necessarily decrease with very restrictive gun control laws. For example, the use of handguns to commit violent crimes is greater in the state of New York than in either Texas or Vermont, in spite of the strict gun control statute New York has enacted. *See* Comment, *A Farewell To Arms?—An Analysis Of Texas Handgun Control Law,* 13 ST. MARY'S L.J. 601, 610-13, 619 app. I (1982). Simply removing handguns from the market, therefore, will not necessarily result in fewer violent crimes.

108. *Cf.* NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, WEAPONS, CRIME, AND VIOLENCE IN AMERICA (1981).

109. *See supra* notes 31-46 and accompanying text.

110. A different but related problem is presented by proponents who assert a constitutional right to bear arms which cannot be infringed by either judicial decision or by statute. *See* Schubert v. DeBard, 398 N.E.2d 1339, 1341-42 (Ind. Ct. App. 1980) (trial court's decision to uphold superintendent's refusal to grant gun license for insufficient need reversed); State v. Kessler, 614 P.2d 94, 100 (Or. 1980) (possession of billy club protected by Oregon's right to bear arms provision in constitution). *See generally* Caplan, *The Right Of The Individual To Bear Arms: A Recent Judicial Trend,* 1982 DET. C.L. REV. 789.

the injuries alleged are legally caused by the use of a *defective* product.

We have already seen that the courts generally refuse to find that product sellers have a duty to foresee or anticipate the criminal misuse of their products.[111] Under a similar analysis, criminal acts—and negligent acts in many cases—are held to be unforeseeable for purposes of proximate cause. Stated somewhat differently, they constitute a superseding or intervening cause of injury which breaks the chain of causation.[112]

An analysis of the intervening cause issue in cases brought under the new theory should require judgment for the firearms manufacturers as a matter of law. In *DeRosa v. Remington Arms Co.*,[113] the court ruled as a matter of law that no proximate causal link existed between the alleged defect in the firearm and the injuries suffered by the plaintiff. Instead, the court found that the negligence of plaintiff's partner was an intervening and sole proximate cause of the injuries:

> Whether or not the design of the trigger pull was unreasonably dangerous, it is clear from the evidence presented at trial that the harm to Officer DeRosa was not caused by Remington's design choice with respect to the force required to pull the trigger, where the user of Remington's product—a well trained and experienced professional policeman—had unnecessarily bypassed every safety device designed to protect against accidental firings. Had they not been deliberately disengaged by Officer Paton in violation of police procedure, these widely accepted safety devices would have prevented this accident.[114]

Similarly, the court in *Neusus v. Sponholtz*[115] found an intervening negligent act sufficient to break the chain of causation. *Neusus*

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111. *See supra* notes 56-96 and accompanying text.

112. *See* City of Austin v. Schmedes, 154 Tex. 416, 422-24, 279 S.W.2d 326, 330-31 (1955) (although defendant driving on wrong side of road, city liable where should have regulated traffic during street improvement); Cox v. Ekstrom, 163 S.W.2d 845, 846 (Tex. Civ. App.—San Antonio 1942, writ ref'd w.o.m.) (independent intervening act of bicycle rider sufficient to break sequence between original negligent act and injury). For an intervening act to be sufficient to negate proximate cause of the first negligent party, the intervening act must be unforeseeable. *See* Scurlock Oil Co. v. Birchfield, 630 S.W.2d 674, 676-77 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

113. 509 F. Supp. 762 (E.D.N.Y. 1981).

114. *Id.* at 770.

115. 369 F.2d 259 (7th Cir. 1966).

involved a claim by a fireman against a ladder manufacturer. While the fireman alleged that his injuries were caused by the ladder's defective design, the court found that he had climbed the ladder without engaging its safety mechanism and ruled that: "[h]is action in climbing it, knowing that the fly locks were disengaged, establishes as a matter of law that his injuries resulted from a misuse of equipment . . . ."[116] The Court concluded that "[i]t is a truism to observe that no mechanical device can be made accident-proof. If it is misused, it may cause injury, regardless of the method of manufacture.[117]

The cases being initiated against gun manufacturers under the proposed theory are patently different from cases involving negligent intervening acts; these cases involve a willful criminal act. As previously noted, the *Restatement (Second) of Torts* recognizes that a defendant "[n]ormally . . . has much less reason to anticipate intentional misconduct than he has to anticipate negligence."[118] Therefore, the general rule is that:

> [W]here there has intervened between the defendant's negligence [assuming fault or product defect has been proven] and the injury an independent, illegal act of a third person producing the injury and without which it would not have occurred, such independent criminal act should be treated as the proximate cause, insulating and excluding the . . . defendant [from liability.][119]

The application of the general rule to cases attempting to hold firearms manufacturers and sellers liable is clear. The nature of the intervening criminal act is such that no alleged defect in design can be said to have legally caused the harm.

Such a conclusion is supported by the pertinent case law. In *Pecan Shoppe of Springfield v. Tri-State Motor Transit Co.*,[120] the Missouri court of appeals addressed a claim which in all pertinent respects closely parallels those being initiated under the new theory. The defendant, a licensed motor carrier, was engaged in trans-

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116. *Id.* at 263.

117. *Id.* at 263.

118. RESTATEMENT (SECOND) OF TORTS § 302B comment d (1965); *see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33, at 173-74 (4th ed. 1971).

119. Decker v. Gibson Prods., 505 F. Supp. 34, 37 (M.D. Ga. 1980). Note that if the original wrongdoer reasonably believes the intervening criminal act would be committed, the rule does not apply.

120. 573 S.W.2d 431 (Mo. Ct. App. 1978).

porting a load of dynamite on an interstate highway. The company was subject to a union strike at the time and had been the target of acts of violence. As one of the company's tractor-trailers loaded with dynamite approached an underpass, a striking union employee fired shots at the defendant's truck. One of the bullets hit the dynamite and caused a tremendous explosion which resulted in the death of the driver, as well as heavy damage to plaintiff's nearby improved land.[121]

The court ruled as a matter of law that the purposeful intervening criminal act of the union member precluded imposing liability on the company. The court reasoned that the plaintiff failed to show "that Tri-State violated any statute or regulation dealing with the transportation of dynamite. There was nothing unlawful in Tri-State's operation of the unit which exploded."[122] Hence, the court refused to invoke "the doctrine of absolute liability where the undisputed evidence shows that the explosion was caused by the criminal act of a third person" and emphasized that "[p]laintiff's principal point has no merit."[123]

Other courts which have considered whether intentional acts of third parties are an efficient intervening cause have reached the same conclusion. For example, in *Robinson v. Howard Brothers of Jackson, Inc.*,[124] the court rejected the claim of plaintiff's decedent that the firearms dealer was a contributing cause of the murder. Despite the dealer's negligence, the court ruled that:

> the intentional criminal act . . . was an independent intervening cause that broke the causal connection between defendants' negligent act and the death of Mrs. Robinson. The criminal act cannot be said to have been within the realm of reasonable foreseeability because the defendants, although negligent *per se*, could reasonably assume that Alexander would obey the criminal law.[125]

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121. *See id.* at 432.

122. *Id.* at 438.

123. *Id.* at 439.

124. 372 So. 2d 1074 (Miss. 1979). For a previous discussion of this case, see *supra* notes 85-87 and accompanying text.

125. *Id.* at 1076 (emphasis added). In reaching its decision, the court reasoned that:

> If we accept appellants' position, one who sells a pistol to a minor in violation of the above statutes would be absolutely liable for any damages inflicted by a minor with the pistol. Stated differently, the seller would be an insurer of the safety of any person injured by a pistol sold to a minor.

*Id.* at 1075. The court concluded that that view was too restrictive and affirmed the directed

These cases, and numerous other decisions which are similar in fact and principle,[126] mandate a like result with respect to the proposed theory of liability at issue here. The nature of the acts of the defendants in these cases contrasts sharply with the acts of a firearms manufacturer. A firearms manufacturer simply produces a lawful product which it intends to be used for lawful purposes and which is overwhelmingly used for such purposes.[127] The mere manufacture of a mechanical device contrasts even more sharply with a criminal's willful, intentional act. Hence, as a matter of law and policy, the intentional, wanton nature of intervening criminal conduct renders its perpetrator, not a firearms manufacturer, responsible for the resulting injuries absent some true "defect" in the firearm.

## V. The Doctrine of Absolute Liability for Abnormally Dangerous Activity Is Not Applicable to the Manufacture and Sale of Firearms

Some members of the plaintiffs' bar also seek to impose liability upon gun manufacturers and sellers for injuries caused by the criminal misuse of firearms by alleging that manufacturing firearms is an "abnormally dangerous activity" which justifies the imposition of absolute liability.[128] The allegation is premised solely upon the concept of abnormally dangerous activities embodied in the *Restatement (Second) of Torts*. An examination of this claim demonstrates that its proponents misconceive the nature of abso-

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verdict for defendants because plaintiff failed to prove a cause of action upon which relief could be granted. *See id.* at 1075, 1076.

126. *See, e.g.*, United States v. Shively, 345 F.2d 294, 296-97 (5th Cir. 1965) (though army personnel negligently issued automatic pistol without authorization, sergeant's independent illegal use of gun to cause injuries was proximate cause); Gillot v. Washington Metropolitan Area Transit Auth., 507 F. Supp. 454, 467 (D.D.C. 1981) (parking lot owner not liable for abduction and rape of patron where assailant was not employee and owner had no control over actions of assailant); Warner v. Arnold, 210 S.E.2d 350, 352 (Ga. Ct. App. 1974) (if without notice, landlord not liable for damage caused by illegal acts of burglar); *see also* Nigido v. First Nat'l Bank of Baltimore, 288 A.2d 127, 128-29 (Md. 1972) (bank not liable for injuries sustained by bank customer during robbery); Thomas v. Bokelman, 462 P.2d 1020, 1022 (Nev. 1970) (although defendants left guns and ammunition accessible, no liability attached where ex-felon shot and killed visitor with defendants' gun); Romero v. National Rifle Ass'n of Am., Inc., No. 80-2576, slip op. at 14 (D.D.C. July 1, 1982).

127. *See supra* notes 21-27 and accompanying text.

128. *See* Podgers, *Tort Lawyers Take Aim At Handguns*, 11 The Brief, 4, 6 (Nov. 1981).

lute liability for abnormally dangerous activities and the situations in which it may be imposed.

Section 519 of the *Restatement (Second) of Torts* provides that: "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.[129] The comments indicate that "[t]he liability arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity" and "is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors . . . ."[130] The "extent to which [an activity's] value to the community is outweighed by its dangerous attributes" is one of the factors included for consideration[131] and is the factor focused upon by proponents of the theory as justification for imposing vicarious criminal responsibility upon firearms manufacturers. They claim that "handgun manufacturers, on the basis of the deaths and injuries their products cause, fail to meet any test of the value of their activities to the community."[132]

It is not necessary to recount the socially utilitarian purposes of firearms; that handguns have socially useful purposes is beyond peradventure. Moreover, the activity of manufacturing firearms has value beyond the ultimate individual uses of the items produced. The proponents of liability ignore that the firearms industry employs thousands of individuals in steady, well-paying jobs and contributes millions of tax dollars to local, state, and federal governments. Thus, the manufacturer of firearms provides the community with tangible benefits which are overlooked by the ad-

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

130. *Id.* § 519 comment d. The factors which must be considered to determine whether an activity is abnormally dangerous include:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

*Id.* § 520.

131. *Id.* § 520(f).

132. Podgers, *Tort Lawyers Take Aim At Handguns*, 11 THE BRIEF 4, 6 (Nov. 1981).

vocates of gun control through tort law.

More importantly, however, focusing upon the social value argument ignores the more fundamental flaws in the contention that manufacturing firearms is an abnormally dangerous activity. The logic of the *Restatement* provisions simply has no application to the manufacture of a firearm. Neither the manufacture nor the sale of a handgun is in and of itself abnormally dangerous. Such normal, lawful commercial activity lacks the essential characteristics which result in the imposition of absolute liability as an examination of the pertinent cases demonstrates.

The landmark case in this area is *Rylands v. Fletcher*[133] in which the defendant mill owners constructed a reservoir upon their land. The reservoir subequently broke through into an abandoned coal mine and flooded along connecting passages into plaintiff's adjoining mine. The mill owners were held liable despite their ignorance of the old coal works based largely upon the inappropriate and abnormal character of a reservoir in coal mining country. The risk created by such an unusual activity was so great that liability was imposed without regard to the degree of care which they exercised.[134]

In the hundreds of English and American cases decided since *Rylands*, the courts have determined that the following types of activities in addition to storing large quantities of water in an inappropriate place are abnormally dangerous: blasting;[135] storing explosives,[136] chemicals, or inflammable liquids[137] in populated areas; and releasing poisonous gas or dust into the air,[138] among others. A

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133. Fletcher v. Rylands, [1865] 3 H & C 774, 159 Eng. Rep. 737, *rev'd*, Fletcher v. Rylands, [1866] L.R. 1 Ex. 265, *aff'd*, Rylands v. Fletcher, [1868] L.R. 3 H.L. 330.

134. *See* Rylands v. Fletcher, [1868] L.R. 3 H.L. 330, 339-40, 341-42. It is important to note that while some jurisdictions within the United States have expressly rejected the *Rylands* theory, almost all jurisdictions have accepted the principle under another name, the most common being nuisance. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 78, at 508-12 (4th ed. 1971).

135. *See* Opal v. Material Serv. Corp., 133 N.E.2d 733, 742-47 (Ill. App. Ct. 1956); Davis v. L & W Constr. Co., 176 N.W.2d 223, 225-26 (Iowa 1970). *See generally* Annot., 56 A.L.R.3d 1017 (1974) (damages for blasting operations not directly caused by debris or concussion).

136. *See* St. Joseph Lead Co. v. Prather, 238 F.2d 301, 305-06 (8th Cir. 1956); Exner v. Sherman Power Constr. Co., 54 F.2d 510, 512-13 (2d Cir. 1931).

137. *See* Yommer v. McKenzie, 257 A.2d 138, 139-41 (Md. 1969).

138. *See* Susquehanna Fertilizer Co. v. Malone, 20 A. 900, 900-01 (Md. 1890); Dutton v. Rocky Mountain Phosphates, 438 P.2d 674, 681-82 (Mont. 1968).

reading of these cases underscores the point made in comment d to *Restatement* section 519—the pertinent inquiry is whether the activity *in and of itself* creates an abnormal danger.[139] Unlike the activities which have been subjected to absolute liability, the manufacture of firearms is as safe as the manufacture of any other mechanical device.

Moreover, proponents of the theory overlook the essential distinction made by the courts between the use of an item and the production and sale of the item. For example, while blasting and storing dynamite are considered abnormally dangerous activities, no case has held that the mere manufacture of dynamite justifies imposing absolute liability. Similarly, the determination that the storage and transport of certain chemicals constitute abnormally dangerous activities has never been extended to the manufacture of such chemicals. Thus, nothing in the law or logic of the concept of absolute liability justifies applying it to the mere manufacturer of firearms.

## VI. Imposing Vicarious Liability for the Criminal Acts of a Third Party on a Product Manufacturer Disserves the Public Interest

The threshold question in determining whether firearms manufacturers and sellers should be vicariously liable for the criminal misuse of their product is: "Can—and should—tort law be used to control the use of handguns?"[140] The preceding examination of the legal merits of the theory indicates that tort law *cannot* be used to control the use of handguns. Similarly, an analysis of the public interest implications of the new theory demonstrates that tort law *should not* be used to control handguns.

### A. *This Particular Principle of Vicarious Liability, Once Established, Will Apply to the Misuse of Other Products*

Proponents of the new theory of liability argue that guns are unique products whose inherently dangerous characteristics justify imposing vicarious liability for their intentional misuse on the manufacturers and sellers of such products. No logical indication is

139. *See* Restatement (Second) of Torts § 519 comment d (1977).

140. Podgers, *Tort Lawyers Take Aim at Handguns*, 11 The Brief, 4, 5 (Nov. 1981).

given as to the manner in which the application of this particular doctrine of vicarious liability will be restricted to firearms. Indeed, none can be offered since the principle, once established, will be applicable to other products for which the risk of intentional misuse can only be reduced or eliminated by impairing or destroying the product's functionality.

For instance, the proposed theory could be applied to products such as knives, alcohol,[141] drugs, cigarettes, and automobiles to name only a few. Knives are involved in incidents of violent crime at a rate which almost equals that of all firearms, not just handguns.[142] Alcohol is implicated in almost as many criminal homicides and other violent crimes as firearms.[143] Cigarette misuse is involved in the majority of fire-related deaths and injuries at a rate which is statistically significant in relation to the number of handgun-related deaths.[144] Finally, automobile misuse accounts for a far greater number of injuries and deaths every year than do handguns and all other firearms.[145]

In each case, the grounds alleged for holding firearms manufacturers and sellers liable for the intentional misuse of their products could serve as the basis of a complaint against the manufacturers and sellers of these other products. It is, for instance, foreseeable that an automobile will be misused by an intoxicated individual

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141. A similar theory has already been employed against a wine manufacturer. The case, Bryant v. 20-20 Wine Co., No. 82-L-648 (Circuit Court of Madison County, Ill. Feb. 22, 1983) (order dismissing complaint), amply demonstrates that the theory purportedly proposed only for guns can and will be applied to other products. *Bryant* involves a man who drank an entire bottle of MD 20-20 wine, raped his neighbor, and was sentenced to ten years in prison. The rapist's wife brought a products liability suit against the wine maker requesting $150,000 in actual damages and $10 million in punitive damages on the grounds that the wine motivated the rape. While the case has been dismissed, an appeal is expected.

142. *See* Address by Prof. John Kaplan, Fourteenth Cleveland-Marshall Fund Visiting Scholar Lecture (April 10, 1979), *reprinted in* 28 CLEV. ST. L. REV. 1, 3-4 (1979). *See generally* NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, WEAPONS, CRIME, AND VIOLENCE IN AMERICA (1981).

143. *See* Address by Prof. John Kaplan, Fourteenth Cleveland-Marshall Fund Visiting Scholar Lecture (April 10, 1979), *reprinted in* 28 CLEV. ST. L. REV. 1, 4 (1979); *see also* SCHOOL OF PUBLIC HEALTH SOCIAL RESEARCH GROUP, UNIVERSITY OF CALIFORNIA, FINAL REPORT: ALCOHOL, CASUALTIES, AND CRIME (Nov. 1977).

144. *See* Address by Prof. John Kaplan, Fourteenth Cleveland-Marshall Fund Visiting Scholar Lecture (April 10, 1979), *reprinted in* 28 CLEV. ST. L. REV. 1, 4 (1979).

145. *See* NATIONAL CENTER FOR STATISTICS AND ANALYSIS, NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., FATAL ACCIDENT REPORTING SYSTEM 1-3 (1980).

under circumstances approximating an intentional crime.[146] According to the logic of the proposed theory, cars would be less accessible to persons who drive under the influence of alcohol or drugs and auto deaths would be reduced if automobile makers could be sued directly by the victims of intoxicated drivers in cases where a car was purchased by "an irresponsible person, and where it could be shown that the manufacturer did not take steps to prevent the distribution of his [product] to such persons."[147] All that is required to achieve this efficacious result is a court decision requiring automobile manufacturers to control the business activities of independent car dealers. Auto manufacturers would merely have to insure that dealers ask potential buyers certain questions such as whether the buyer has ever driven after drinking alcohol or taking drugs; been arrested for drunk driving or using drugs; or been cited for reckless driving, speeding, or other moving violations. The sale of an automobile could be predicated on the potential purchaser's answers to these questions with the result that the carnage on our highways would be decreased.[148]

The analogy to automobiles is demonstrative since the proposed theory and products liability law are based largely on the dangerous propensities of a product and the risk and foreseeability of harm. Presently, manufacturers and sellers of firearms are liable for product-caused harm under the same principles and to the same extent as other product sellers. If there is "something wrong" with their product and *it* causes harm, they are liable to the injured party. As a matter of law and fundamental fairness, the firearms industry cannot be held to a special standard of responsibility without holding to the same standard all other sellers of products, for which the risk of misuse by a third party can only be eliminated by destroying the product's functionality.

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146. *See* Gray, *New Move on Drunk Drivers?*, The National Law Journal, Aug. 2, 1982, at 11, col. 1-3.

147. *See* Speiser, *Disarming the Handgun Problem By Directly Suing Arms Makers*, The National Law Journal, June 8, 1981, at 29, col. 1.

148. The proposed theory could actually be better justified in the automobile context since there is credible evidence that keeping intoxicated drivers off the road would decrease auto-related deaths. *See generally* NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., ALCOHOL AND HIGHWAY SAFETY (1978). The cost and effectiveness of such a program as applied to automobiles, however, is easily questioned.

### B. *Acceptance of the Proposed Theory Would Harm the Economy and the Consuming Public*

Judicial acceptance of a theory of liability which makes product sellers strictly liable in tort, absent fault or product defect, for the intentional misconduct of third parties would have a deleterious effect on the economy. It would effectively make manufacturers and sellers the absolute insurers of their products.[149] While business would suffer over the short term, such judicial action will ultimately have its greatest impact on American workers and the consuming public by unreasonably hampering general economic growth.

Court decisions over the last twenty years have already radically altered concepts of tort liability. The traditional concepts and defenses which underpin tort law have been steadily eroded or eliminated to extend the situations in which recovery against a manufacturer or seller of a product is permitted.[150] This expansion of liability has been based on the premise that the financial burdens of personal injuries should be borne by those who society believes can better bear the loss—business. In reality, however, the majority of such costs of doing business are ultimately passed on to consumers in the form of higher prices.

While more injured parties have been afforded remedies, the impact of these judicial decisions on the American economy has been tangible and significant. The price of consumer and industrial products has risen dramatically. Inflation has spiralled. The ability of American companies to compete on world markets has been impeded. The innovation of new and useful products has been discouraged. Companies have declined to enter the marketplace and,

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149. *See, e.g.*, Simien v. S. S. Kresge Co., 566 F.2d 551, 559 (5th Cir. 1978) (where no showing of defect in product, seller is not absolute insurer for all harm caused during use of product); Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1271 (5th Cir.) (manufacturers not insurers of products even though may be held liable for injuries caused by product), *cert. denied*, 419 U.S. 1096 (1974); Gravis v. Parke-Davis & Co., 502 S.W.2d 863, 868-69 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.) (injury alone, without showing of defect in drugs, does not create liability). In McCants v. Salameh, 608 S.W.2d 304, 307 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.), the court approved the trial court's use of the following jury instructions: "A manufacturer is not an insurer of the product he designs, and it is not required that the design adopted be perfect, or render the product accident proof, or incapable of causing injury . . . ." *Id.* at 307.

150. *See* Wheeler, *Product Liability, Civil or Criminal—The Pinto Litigation*, 17 FORUM 250, 258-59 (1981).

in some cases, gone out of business.[151] As a result, many product sellers have attempted to do business with no products liability insurance or with inadequate insurance—a practice which jeopardizes the stability of the business and the *legitimate rights* of claimants to compensation for harm caused by defective products.

The adoption of the proposed theory of liability would eliminate one of the last rational limitations on business liability. The elimination of this limitation would exacerbate each of the problems outlined above. Costs would rise, productivity would fall, and jobs would be lost. In the end, all of society, not just the manufacturers and sellers of products, would suffer.

### C. *The Proposed Shift of Liability Is a Legislative Matter Which Is Not Within the Judiciary's Realm of Authority or Expertise*

As previously noted, every state and territory of the United States has enacted laws which restrict access to firearms by prescribing the conditions under which they may be distributed.[152] The federal Gun Control Act of 1968,[153] for example, is directed to restricting public access to firearms so that weapons could not be obtained by individuals whose possession of them would be "contrary to the public interest."[154] Advocates of imposing vicarious responsibility for third party criminal acts on the manufacturers and sellers of guns believe, however, that the various state and federal legislatures have not taken sufficient measures to protect the public from firearms violence. Hence, they contend that the courts should implement handgun control through products liability

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151. An excellent example of the detrimental effect of numerous judgments against even large corporations is the recent declaration of bankruptcy by Johns-Manville Corp. *See* Wall St. J., Aug. 27, 1982, at 1, col. 6. Johns-Manville Corp. produced products containing asbestos, which has been found to cause asbestosis, see 4A H. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE ¶¶ 205C.50, 205C.60 (3d ed. 1981); lung cancer, see *id.* ¶ 205C.71; and mesothelioma, *see id.* ¶ 205C.72. A flood of asbestos suits were filed against various manufacturers. *See* McCarty v. Johns-Manville Sales Corp., 502 F. Supp. 335, 339 (S.D. Miss. 1980); Mooney v. Fibreboard Corp., 485 F. Supp. 242, 247-48 (E.D. Tex. 1980). Facing billion dollar liability, Johns-Manville declared chapter 11 bankruptcy. *See* Wall St. J., Aug. 27, 1982, at 1, col. 6.

152. *See* Comment, *A Farewell To Arms?—An Analysis Of Texas Handgun Control Law*, 13 ST. MARY'S L.J. 601, 619 app. I (1982).

153. *See* 18 U.S.C. §§ 921-928 (1976) (Gun Control Act of 1968).

154. Huddleston v. United States, 415 U.S. 814, 824 (1974).

law.[155]

In essence, the courts are being asked to don a legislative mantle and to step outside the realm of their authority and expertise. Decisions involving the public welfare—whether they relate to banning guns or other products, vicarious corporate liability for criminal acts, uninsured motorists protection, no-fault insurance, or crime victims compensation—are uniquely legislative matters. The questions are complex, delicate, and political. Thus, their proper resolution requires consideration of factual and policy matters from a broad, general perspective which permits a uniform approach to the problem in question.

The courts have recognized that such decisions are a kind for which the judiciary has neither the aptitude, facilities, nor responsibility.[156] Courts address important issues narrowly. Particular parties with a particular dispute litigate before a court based solely on the unique facts of that case. The broader implications of a given decision in such cases are often inadequately considered. As a result, bold attempts to bypass the legislative process, such as the one presently under consideration, often result in doctrinal instability which adversely affects society for the benefit of a few claimants and their lawyers.

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155. *See* Podgers, *Tort Lawyers Take Aim at Handguns*, 11 THE BRIEF, 4, 5 (Nov. 1981).

156. In Bojorquez v. House of Toys, Inc., 133 Cal. Rptr. 483 (Ct. App. 1976), the plaintiff alleged that the defendant negligently sold slingshots to children who were incapable of using them without creating an unreasonable risk of harm to others. The court affirmed summary judgment for the defendant holding that: "[Plaintiff] asks us to ban the sale of toy slingshots by judicial fiat. Such a limitation is within the purview of the Legislature, not the judiciary." *Id.* at 484. Similarly, the court in Holmes v. J. C. Penney Co., 183 Cal. Rptr. 777 (Ct. App. 1982), refused to prescribe the conditions under which CO2 cartridges could be distributed by "judicial fiat." *Id.* at 779. The court in Starling v. Seaboard Coast Line Railroad Co., 533 F. Supp. 183 (S.D. Ga. 1982), refused to recognize market share liability in asbestos cases since:

> [it] would result in an unprecedented departure from traditional . . . tort law. Furthermore, the Court believes that the legal and economic ramifications involved in moving towards insured compensation . . . do not commend a judicial resolution to the problem. Deferring evaluation of the competing public policy considerations to the legislature would be consistent with an existing policy of judicial restraint in the products liability area.

*Id.* at 186; *see also* Wirth v. Mayrath Indus., 278 N.W.2d 789, 792-93 (N.D. 1979) (because of potentially severe economic hardship, legislature better able to resolve issue); Miles v. Theobald Indus., 366 A.2d 710, 712 (N.J. 1976) (courts not entitled to alter scheme established by legislature for compensation benefits); *cf.* Yanhko v. Fane, 362 A.2d 1, 4 (N.J. 1976) (judicial imposition of tort duty of care arbitrary).

### D. *The Public Interest Requires That Criminals Be Fully Accountable for Their Individual Crimes*

The manner in which the proposed theory, if accepted, would partially shift responsibility for the consequences of a criminal act from the perpetrator to the manufacturer or seller of an intentionally misused product also undermines the public interest. Restitution for criminal acts should come from the criminal responsible for the damages, not a businessman engaged in a lawful enterprise.

While tort law does recognize and impose joint and several liability for concerted action on the part of two or more wrongdoers,[157] the concept is only applicable in cases in which the affirmative acts of joint wrongdoers directly cause the harm. In the context of the criminal misuse of a firearm, only the individual who intentionally inflicts harm is responsible for the injuries which result.

A widespread perception exists that our social authorities fail to hold criminals sufficiently responsible for their conduct. A partial shift of responsibility for their crimes to innocent parties, merely because they have deeper pockets, would not only send criminals a further signal that society will not hold them fully accountable for their violent conduct, but that society will in fact subsidize their criminal misdeeds.[158]

## VII. Conclusion

Sympathy for the victim of an intentional shooting is both understandable and commendable. Sympathy, however, cannot be the foundation for imposing civil liability where none is provided by the existing substantive law. Imposing civil liability on one party for the criminal acts of another works too fundamental a change in the law to be mandated by the courts. While such a result may satisfy the social—as well as the economic—vision of a group of lawyers, it will have a devastating impact on the rest of society. Civil liability must be based upon sound legal principle, not political emotionalism. No principle of existing tort law, or any

157. *See* Summers v. Tice, 199 P.2d 1, 2-3 (Cal. 1948).

158. *See* Adkinson v. Rossi Arms Co., 659 P.2d 1236, 1239-40 (Alaska 1983). Making firearms manufacturers and distributors liable for criminal acts of third party "runs counter to basic values underlying our criminal justice system . . . [and] would erode . . . societal norms." *Id.* at 1240.

**logical extension thereof, warrants the transfer of liability from a criminal actor to an innocent manufacturer or seller of the device used to inflict harm on a victim.**