

A Sense of Duty: Retiring the "Special Relationship" Rule and Holding Gun Manufacturers Liable for Negligently Distributing Guns

Rachana Bhowmik

Jonathan E. Lowy

Allen Rostron

Rachel Hoover

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/jhclp>

 Part of the [Civil Law Commons](#), [Health Law Commons](#), and the [Public Health Commons](#)

Recommended Citation

Rachana Bhowmik, Jonathan E. Lowy, Allen Rostron, & Rachel Hoover, *A Sense of Duty: Retiring the "Special Relationship" Rule and Holding Gun Manufacturers Liable for Negligently Distributing Guns*, 4 J. Health Care L. & Pol'y 42 (2000).

Available at: <http://digitalcommons.law.umaryland.edu/jhclp/vol4/iss1/5>

This Article is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Journal of Health Care Law and Policy by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

**A SENSE OF DUTY:
RETIRING THE “SPECIAL RELATIONSHIP” RULE AND
HOLDING GUN MANUFACTURERS LIABLE FOR
NEGLIGENTLY DISTRIBUTING GUNS**

RACHANA BHOWMIK, J.D., JONATHAN E. LOWY, J.D.,
ALLEN ROSTRON, J.D., & RACHEL HOOVER*

INTRODUCTION

A company is in the business of making and selling handguns, known tools of the violent criminal trade. The company knows that a substantial share of the guns it makes and sells will be purchased in the thriving unregulated secondary “criminal gun market” by criminals and young people who are prohibited from possessing these lethal weapons. The company knows that it supplies the roaring pipeline to the criminal market, a pipeline that starts at its own factory doors, then funnels through distributors and dealers who sell to gun traffickers and straw purchasers – often in suspect transactions that are well-known trafficking methods – then completes its journey in sales to criminals who wreck havoc on our streets. In those cases in which the criminal justice system works well, the shooter is punished to the full extent of the law (albeit after the damage has been done), and in the cases where the dealer or seller is found to have violated gun laws, they too are punished. The gun manufacturer, however, the source of the pipeline, continues to pump its guns into the criminal market without restriction or limitation, selling guns to any distributor or dealer, even if they have been indicted or continually sell to gun traffickers, so long as they meet minimal federal standards. While manufacturers of far less dangerous products rigorously supervise their distribution networks, the gun manufacturer takes no steps whatsoever to prevent its guns from ending up in another criminal’s hands and profits from every sale.

* Rachana Bhowmik, J.D. University of Virginia, B.A. Yale University. Jonathan Lowy, J.D. University of Virginia, B.A. Harvard University. Allen Rostron, J.D. Yale University, B.A. University of Virginia. Rachel Hoover, J.D. expected 2002, Stanford Law School, B.A. Williams College. Ms. Bhowmik, Mr. Lowy, and Mr. Rostron are attorneys with the Legal Action Project of the Center to Prevent Handgun Violence. Ms. Hoover was a summer law clerk with the Legal Action Project. The authors wish to thank Dawn Canady and Allison Klein for their assistance with the preparation of this article. The views expressed in this article are strictly those of the authors and do not necessarily represent the views of any parties to the cases discussed or any other litigation.

In a growing number of lawsuits, victims of gun violence, their families, government entities, and organizations are seeking to hold gun manufacturers liable in negligence for distributing guns in a manner that supplies the criminal market. The plaintiffs argue that gun manufacturers' "willful blindness" toward the consequences of their reckless business practices is negligent and unreasonable.¹ Gun manufacturers counter that they owe no duty to the public to use reasonable care in distributing their products.² They argue that they are guilty, at worst, of failing to "prevent" or "protect" potential victims from criminal attack.³ They claim to be mere bystanders to crimes committed by third parties over whom they have no control.⁴ They argue that they cannot be liable for such nonfeasance unless they have a "special relationship" with the victims or the shooters, which they claim they do not.⁵ The fundamental issue that the courts must decide is whether gun manufacturers owe the public a duty to use reasonable care in distributing their products.⁶ At this early stage in these lawsuits, courts have split on the question.⁷

This article suggests that the gun manufacturers' reliance on the special relationship rule and the distinction between misfeasance and nonfeasance is misplaced on factual, legal, and policy grounds. Gun makers do owe a duty to use reasonable care in distributing guns and can be held liable for negligently distributing them.⁸ Under the traditional analysis, gun manufacturers' conduct should be classified as misfeasance because they engage in affirmative conduct that creates and increases the risks of foreseeable harm to others.⁹ Contrary to what some courts have held, no "special relationship" with victims or

1. See, e.g., *City of Boston v. Smith & Wesson Corp.*, 2000 WL 1473568, at *15 (Mass. Super. Ct. July 13, 2000); *City of Cincinnati v. Beretta U.S.A. Corp.*, 1999 WL 809838, at *1 (Ohio Ct. C.P. Oct. 7, 1999), *aff'd*, 2000 WL 1133078 (Ohio Ct. App. Aug. 11, 2000), appeal allowed, 740 N.E.2d 1111 (Ohio 2001); *Penelas v. Arms Tech. Inc.*, 1999 WL 1204353, at *1 (Fla. Cir. Ct. Dec. 13, 1999), *aff'd*, 2001 WL 120529 (Fla. Dist. Ct. App. Feb. 14, 2001), *cert. denied* (Mar. 21, 2001).

2. See *Boston*, 2000 WL 1473568, at *15; *Cincinnati*, 1999 WL 809838, at *2; see also *Penelas*, 1999 WL 1204353.

3. See *Boston*, 2000 WL 1473568, at *15; *Cincinnati*, 1999 WL 809838, at *2; see also *Penelas*, 1999 WL 1204353.

4. See *Boston*, 2000 WL 1473568, at *15; *Cincinnati*, 1999 WL 809838, at *2; see also *Penelas*, 1999 WL 1204353.

5. See *Boston*, 2000 WL 1473568, at *5-6; *Cincinnati*, 1999 WL 809838, at *2; see also *Penelas*, 1999 WL 1204353.

6. See *Boston*, 2000 WL 1473568, at *15; *Cincinnati*, 1999 WL 809838, at *2; see also *Penelas*, 1999 WL 1204353.

7. See *Boston*, 2000 WL 1473568, at *15; *Cincinnati*, 1999 WL 809838, at *2; see also *Penelas*, 1999 WL 1204353.

8. See *infra* notes 156-179 and accompanying text.

9. See *infra* notes 180-190 and accompanying text.

shooters should be required for such a duty to exist. By choosing to distribute lethal weapons in a manner that enables them to be easily obtained by criminals and others prohibited from possessing guns, and then to be used to commit violent crimes, gun manufacturers create foreseeable risks that members of the public will be injured when those guns end up in the wrong hands. Gun manufacturers should be held liable in negligence for damages that result from their failure to exercise such care.

This article further argues that the traditional approach is flawed. While the distinction between misfeasance and nonfeasance is a significant concept in defining the existence and scope of duties under negligence law, courts have made a mistake by treating these as two completely separate boxes into which all forms of negligent conduct can be neatly sorted.¹⁰ In fact, these concepts are merely two points on a spectrum. Although some negligence cases clearly involve only one or the other, many cases include elements of both, and often the distinction between the two is easily confused.¹¹ When courts treat misfeasance and nonfeasance as wholly distinct and impose a general duty to refrain from misfeasance but only impose liability for nonfeasance when a “special relationship” is present,¹² the traditional approach produces arbitrary and unjustifiable results. This article argues for retirement of the “special relationship” concept and the adoption of a more flexible analysis that locates negligent conduct on the spectrum between active misfeasance and pure nonfeasance, and focuses on the dangerousness of defendants’ conduct and the foreseeability that it will cause harm.¹³

This article first briefly discusses the factual basis for these claims – how gun manufacturers’ distribution practices in the United States facilitate the supply of guns to underground markets through which guns flow to convicted criminals, juveniles, and others who cannot legally obtain them.¹⁴ The article then describes attempts to hold gun manufacturers legally accountable for injuries resulting from their negligent distribution of guns and how the “special relationship” rule has divided courts.¹⁵ Finally, the article describes three principal grounds that support the proposed approach to duty analysis. As a

10. See generally W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984).

11. See *infra* notes 118-125 and accompanying text.

12. See *infra* notes 108-155 and accompanying text.

13. See *infra* notes 180-313 and accompanying text.

14. See *infra* notes 19-51 and accompanying text.

15. See *infra* notes 52-179 and accompanying text.

practical matter, gun makers should owe a duty of care because they are engaged in conduct that causes severe and unnecessary harm to others.¹⁶ As a theoretical matter, principles of economic efficiency and the underlying premises of tort law support the conclusion that gun manufacturers should bear the costs of their negligent conduct.¹⁷ As a matter of legal precedent, courts have already moved away from a rigid approach focused on “special relationships” to a more flexible approach centering on the degree to which the defendant creates risks of foreseeable harm to others and can reform his conduct to avoid doing so.¹⁸

I. NEGLIGENT DISTRIBUTION OF GUNS AND THE HARM IT CAUSES

The violence caused by the easy availability of handguns in the United States has been a matter of public knowledge for decades, well-recognized by gun manufacturers and others.¹⁹ Public reports have noted that:

Gun violence represents a major threat to the health and safety of all Americans. Every day in the United States 93 people die from gunshot wounds, and an additional 240 sustain gunshot injuries. The fatality rate is roughly equivalent to that associated with HIV infection – a disease that the Centers for Disease Control and Prevention has recognized as an epidemic.²⁰

The threat posed to young people by gun violence is especially severe: a teenager in the United States is more likely to die of a gunshot wound than from all “natural” causes combined.²¹ Gun violence is largely attributable to handguns; an overwhelming majority of guns used in crime – over 80% – are handguns.²² The handgun problem is caused, in large part, by their easy availability, especially among

16. See *infra* notes 19-51 and accompanying text.

17. See *infra* notes 197-232 and accompanying text.

18. See *infra* notes 156-179 and accompanying text.

19. See NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE: FINAL REPORT 169 (1969) (“The availability of guns contributes substantially to violence in American society. Firearms, particularly handguns, facilitate the commission and increase the danger of the most violent crimes: assassination, murder, robbery and assault.”).

20. U.S. DEPARTMENT OF JUSTICE, PROMISING STRATEGIES TO REDUCE GUN VIOLENCE xiii (1999) [hereinafter PROMISING STRATEGIES].

21. See *id.*; see also LOIS A. FINGERHUT, U.S. DEP’T. OF HEALTH AND HUMAN SERVICES, FIREARM MORTALITY AMONG CHILDREN, YOUTH, AND YOUNG ADULTS 1- 34 YEARS OF AGE, TRENDS AND CURRENT STATUS: UNITED STATES 6 (1993).

22. See MARIANNE W. ZAWITZ, U.S. DEP’T. OF JUSTICE, FIREARMS, CRIME, AND CRIMINAL JUSTICE: GUNS USED IN CRIME 2 (1995) (“Of all firearm-related crime reported to the survey, 86% involved handguns.”).

juveniles and criminals who are legally barred from possessing them.²³ In 1997, one in seven juveniles (14%) reported carrying a gun outside the home in the previous thirty days.²⁴ Among convicted juvenile offenders, 88% reported carrying guns.²⁵ Easy access to handguns has led to a raft of shootings in schools, day care centers, and community centers.²⁶ The financial toll is considerable and the burden borne by the American public is high as a result of gun violence.²⁷

Public policy recognizes that because of the grave risks posed by the easy availability of guns, certain categories of persons are prohibited from possessing them. Federal gun laws are intended to keep "these lethal weapons out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too high a price in danger for us all to allow."²⁸ However, this policy is regularly undermined by a vast, thriving secondary market, which provides those who are prohibited from buying guns at retail the means to readily obtain them.

The major source of this unregulated secondary market is not guns stolen from private citizens, but guns purchased from licensed gun dealers with the intent to promptly resell or transfer them to prohibited purchasers.²⁹ Gun makers are well aware that the retailers and distributors whom they supply often act, contrary to the spirit of federal law, as willing conduits that enable the continuing, thriving black market in handguns.³⁰ According to the Bureau of Alcohol, Tobacco and Firearms (ATF), all new firearms used in crime first pass through the legitimate distribution system of federally licensed firearm dealers (FFLs).³¹

23. See generally JOSEPH F. SHELEY & JAMES D. WRIGHT, U.S. DEP'T. OF JUSTICE, GUN ACQUISITION AND POSSESSION IN SELECTED JUVENILE SAMPLES, RESEARCH IN BRIEF 1 (1993).

24. See PROMISING STRATEGIES, *supra* note 20, at 4.

25. See *id.*

26. See *id.* at 6.

27. See Linda Gunderson, *The Financial Costs of Gun Violence*, 131 ANNALS OF INTERNAL MED. 483, 483 (1999).

28. *Huddleston v. United States*, 415 U.S. 814, 825 (1974) (quoting 114 CONG. REC. 13219 (1968) (Statement of Sen. Tydings)); see also 18 U.S.C. § 922.

29. See Joseph J. Vince, Jr., *Memo from the Chief, CGAB SHOTS*, Oct. 1998, at 2. See also BUREAU OF ALCOHOL, TOBACCO AND FIREARMS PERFORMANCE REPORT: THE YOUTH CRIME GUN INTERDICTION INITIATIVE (1999) (showing that half of investigations involved guns trafficked by straw purchasers; 14% were from other unregulated sellers; 10% from gun shows and similar venues; 6% from FFLs) [hereinafter PERFORMANCE REPORT].

30. See Affidavit of Robert I. Hass ¶ 20, *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999) [hereinafter Hass Affidavit].

31. See U.S. DEP'T OF THE TREASURY, A PROGRESS REPORT: GUN DEALER LICENSING & ILLEGAL GUN TRAFFICKING (1997) (statement of Raymond W. Kelly, Under Secretary (Enforcement)).

Many of the handguns that flow into the underground market are bought from FFLs in suspect transactions, made with the obvious intent of promptly reselling them to prohibited purchasers.³² Such sales include “multiple sales” in which FFLs may sell large numbers of guns to a single customer in a single transaction (even though it is highly foreseeable that the multiple-sale guns are intended to be resold on the streets);³³ sales by licensed dealers to “straw purchasers,” where non-prohibited purchasers fill out the paperwork and complete a firearm sales transaction and then hand over the weapon to a prohibited purchaser;³⁴ unregulated sales at gun shows;³⁵ and sales by corrupt dealers “off the books,” including dealers who, though licensed, do not even have a storefront, so they sell entirely from their homes or on the street.³⁶ The short intervals of time between the purchase of many firearms from an FFL to their recovery at a crime scene (“time to crime”) is a strong indicator that many initial sales by licensed dealers are intended to be conveyed to illegal or irresponsible purchasers.³⁷

Studies have confirmed that these transactions are not merely “suspect,” but are a ready source of handguns for prohibited purchasers.³⁸ Curbing such sales can have a significant effect on gun trafficking to criminals. For example, the Commonwealth of Virginia was traditionally a primary source state for crime guns.³⁹ By banning mul-

32. See Mark D. Polston, *Civil Liability for High Risk Gun Sales: An Approach To Combat Gun Trafficking*, 19 SETON HALL LEGIS J. 821, 828 (1995).

33. See *id.* at 828; see also Julius Wachtel, *Sources of Crime Guns in Los Angeles, California*, 21 POLICING: AN INT'L J. OF POLICE STRATEGIES & MGMT. 220 (1998) (outlining firearms markets). When a licensed gun dealer sells two or more handguns to an unlicensed person within a five-business-day period, dealers are required to fill out and forward to ATF a form 3310.4, which lists the guns sold. See 27 C.F.R. § 178.126a. There is no federal limit on the number of firearms that can be purchased in a single sale, and the only states that have such limits are Maryland, Virginia, South Carolina, and California. See CAL. CODE § 12072 (9)(A) (W); MD. CODE ANN. art. 27, § 442A(a) (2000); S.C. CODE ANN. § 23-31-140(c) (Law. Co-op. 2000); VA. CODE ANN. § 18.2-308.2:2(Q) (Michie 2000).

34. See, e.g., Polston, *supra* note 32, at 828 (discussing “straw purchases” as a ready source of criminal guns).

35. See *id.* at 836; see also BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, GUN SHOWS: BRADY CHECKS AND CRIME GUN TRACES (1999).

36. See Polston, *supra* note 32, at 836-37; see also BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, THE ILLEGAL YOUTH FIREARMS MARKET IN 27 COMMUNITIES 12 (1999) [hereinafter YOUTH FIREARMS MARKET].

37. See GLENN L. PIERCE ET AL., THE IDENTIFICATION OF PATTERNS IN FIREARMS TRAFFICKING: IMPLICATIONS FOR FOCUSED ENFORCEMENT STRATEGIES, A REPORT TO THE UNITED STATES DEPARTMENT OF TREASURY BUREAU OF ALCOHOL, TOBACCO AND FIREARMS OFFICE OF ENFORCEMENT 9-10 (1995) (discussing significance of “time to crime” statistics).

38. See YOUTH FIREARMS MARKET, *supra* note 36, at 12.

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

tiple handgun sales in 1993, Virginia eliminated a major source of crime guns, as evidenced by the subsequent marked decrease in crime guns nationwide traced to Virginia.⁴⁰

Straw purchases are another significant source of guns to the underground market. Data from tracing projects in twenty-seven cities nationwide led the Chief of ATF's Crime Gun Analysis Bureau to conclude that "[t]he [most important] single source of firearms is still illegal traffickers who are acquiring firearms from retail outlets. It still appears that acquisition of firearms by false declarations and straw purchasers are still the method preferred by traffickers, both small and large."⁴¹ Recent undercover investigations by Chicago and Wayne County, Michigan confirmed that many dealers blatantly engage in straw purchases.⁴²

Corrupt licensed dealers also fuel the criminal gun market. Studies suggest that a limited number of licensed gun dealers are the source for a disproportionate amount of traced crime guns.⁴³ According to one study, in 1998, one percent of all licensed gun dealers were the source for forty-five percent of the successfully traced crime guns.⁴⁴

Gun manufacturers know that their lax distribution fuels the criminal handgun market, but they have deliberately chosen to employ a "hands off" approach to distribution, as Robert Hass, the former Senior Vice-President of Marketing and Sales for Smith & Wesson, recognized in a sworn statement:

The company [Smith & Wesson] and the industry as a whole are fully aware of the extent of the criminal misuse of hand-

40. Of all nationwide crime guns traced to stores in the Southeastern United States, the percentage of those guns originating from Virginia plummeted from 27% to 19% after the ban – even though gun trafficking from the Southeastern United States actually increased during that time. For crime guns in New York, the number of crime guns traced to Virginia dropped from 38.2% before the Virginia one handgun a month law to 15.3 after – a precipitous drop of more than 66%. See *id.* at 1760; see also 'It was easy,' *Confessions of a Gun Trafficker*, USA TODAY, Oct. 28, 1999, at A1.

41. See Vince, *supra* note 29. See also PERFORMANCE REPORT, *supra* note 29, at 6 (half of trafficked guns were straw purchases).

42. Both entities carried out undercover operations involving law enforcement officers posing as juveniles and criminals who were barred from legally buying guns, blatantly attempting to engage in straw purchases. The dealers overwhelmingly cooperated with the undercover officers' attempts to obtain firearms through straw purchases. See Barry Meier, *Cities Turn to U.S. Gun Tracing Data for Legal Assault on Industry*, N.Y. TIMES, July 23, 1999, at A16.

43. See PIERCE, *supra* note 37; REPORT OF SENATOR CHARLES SCHUMER, A FEW BAD APPLES: SMALL NUMBER OF GUN DEALERS THE SOURCE OF THOUSANDS OF CRIMES (1999) [hereinafter SCHUMER REPORT].

44. See SCHUMER REPORT.

guns. The company and the industry are also aware that the black market in firearms is not simply the result of stolen guns but is due to the seepage of guns into the illicit market from multiple thousands of unsupervised federal firearms licensees. In spite of their knowledge, however, the industry's position has consistently been to take no independent action to insure responsible distribution practices, to maintain that the present minimal federal regulation of federal handgun licensees is adequate and to call for greater criminal enforcement of those who commit crimes with guns as the solution to the firearm crime problem . . . I am familiar with the distribution and marketing practices of the [sic] all of the principal U.S. handgun manufacturers and wholesale distributors and none of them, to my knowledge, take additional steps, beyond determining the possession of a federal handgun license, to investigate, screen or supervise the wholesale distributors and retail outlets that sell their products to insure that their products are distributed responsibly.⁴⁵

Despite their knowledge of the criminal misuse of guns acquired in the underground market, gun makers continue to willingly supply the market. Even when dealers frequently engage in suspect or illegal transactions, and even when trace requests inform manufacturers that particular dealers continually sell crime guns, the pipeline to the black market flows with full force, as gun makers continue to supply all dealers (who meet the minimal federal licensing requirements) with as many handguns as they desire.⁴⁶

In an age when franchising and integrated, regulated distribution is common, it is striking that gun makers have decided to regulate retailers only on issues of gun prices.

As retailers' sole source of handguns, gun makers have the power to impose reasonable restrictions and limitations on how handguns are sold by those whom they supply, thereby preventing many guns from being obtained by criminals.⁴⁷ With the stroke of a pen they could write into their distribution contracts prohibitions on multiple sales, sales at gun shows, or sales to dealers who regularly sell a disproportionate number of crime guns. As a result of the on-going litigation against gun manufacturers by governmental entities, Smith & Wesson, one of the nation's largest gun manufacturers, agreed to a

45. Hass Affidavit, *supra* note 30, ¶¶ 20-21.

46. *See id.* ¶¶ 16-21.

47. *See id.*

marked change in the way they do business.⁴⁸ On March 17, 2000, Smith & Wesson signed a settlement with certain cities, the U.S. Department of Housing and Urban Development, and the New York and Connecticut attorneys general in which the company agreed to monitor the downstream distribution of its products.⁴⁹

Even before that agreement, Smith & Wesson implemented some restrictions on their retailers' conduct and informed them that it might terminate sales to any dealer who did not agree to refrain from making sales to "straw purchasers" or any other person who the dealer had reason to believe made a false or misleading statement.⁵⁰ After the City of Chicago caught on videotape and indicted two dealers engaging in "straw purchases," Smith & Wesson decided to terminate those dealers for violating the agreement.⁵¹ These actions clearly demonstrate that gun manufacturers *can* act to reduce the risk that criminals and other prohibited purchasers will obtain guns.

Although all gun manufacturers have the ability to supervise and monitor distribution as stringently – indeed more so – they have not done so. The industry's willful blindness to the criminal consequences of its negligent distribution is underscored by the fact that all gun manufacturers other than Smith & Wesson continued to supply

48. See Smith & Wesson Settlement Agreement (Mar. 17, 2000) [hereinafter Settlement Agreement]; Dennis J. Opatrny, *Gun Pact Gives Plaintiffs New Ammunition*, THE RECORDER, Mar. 20, 2000, at 1.

49. Under the terms of the Smith & Wesson settlement the company has agreed to change its distribution practices, including the following: Smith & Wesson will only allow their guns to be sold by authorized dealers and distributors who must abide by a set of terms and conditions governing who they can sell guns to, who can sell guns, and where those guns can be sold. These conditions are well beyond what is required by law or what is currently done by the industry. Under the agreement, if a dealer or distributor wants to sell Smith & Wesson guns, they must agree to, among other things: make no sales of any gun to anyone until that person has passed a background check, regardless of how long the check takes; make no sales to anyone who has not passed a certified firearms safety course or exam; require employees to attend annual training and pass a comprehensive exam on how to recognize suspect sales and how to promote safe handling and storage; not sell a disproportionate number of guns that are used in crime; implement specific security procedures to prevent gun thefts; not sell multiple guns until 14 days have passed after the first gun is sold; not allow children under 18 access to gun stores or sections of stores where guns are sold without an adult; maintain an electronic record of crime gun traces and report them to the manufacturer on a monthly basis; not sell weapons attractive to criminals, such as those with large capacity magazines or semi-automatic assault weapons, regardless of the date of manufacture. Smith & Wesson has also agreed not to market guns particularly attractive to juveniles or criminals and not to advertise near schools, high crime zones, and public housing. See Settlement Agreement, *supra* note 48, at 7-17.

50. See David B. Ottaway & Barbara Vobejda, *Smith & Wesson, Stocking Dealer Code of Responsible Business Practices; Gun Manufacturer Requires Dealer to Sign Code of Ethics*, WASH. POST, Oct. 22, 1999, at A11.

51. See *id.*

suburban Chicago dealers with all the guns they ordered even after they were videotaped (and televised) willingly engaging in illegal straw purchases. Gun manufacturers make the same profit from every gun sold, regardless of whether it is sold as part of a multiple sale to a trafficker or an individual sale to a law-abiding person. Unless gun makers are subjected to legal liability when they engage in irresponsible sales that cause injury, they have no incentive to end their willful and profitable participation in this dangerous underground market.

II. THE "SPECIAL RELATIONSHIP" RULE AND ITS SIGNIFICANCE TO NEGLIGENT DISTRIBUTION CLAIMS AGAINST GUN MANUFACTURERS

A growing number of lawsuits seek to reverse these socially perverse incentives and hold gun manufacturers accountable under the law of negligence for harm resulting from negligent distribution. Dozens of cities and counties have brought such suits, including Boston, New York City, Washington, D.C., Atlanta, New Orleans, Chicago, St. Louis, Cleveland, Cincinnati, Detroit, Los Angeles, and San Francisco.⁵² In June 2000, New York became the first state to enter the legal fray against gun makers.⁵³ Numerous individual victims of gun violence have pending negligence cases against the industry,⁵⁴ and the NAACP and the National Spinal Cord Injury Association have a simi-

52. See Plaintiff's Complaint, *City of New York v. Arms Tech., Inc.* (E.D.N.Y. 2000) (No. 1:00-cv-3641); First Amended Complaint, *City of Boston v. Smith & Wesson* (Mass. Super. Ct. 2000) (No. 1999-02590); Plaintiff's Complaint, *District of Columbia v. Beretta U.S.A. Corp.* (D.C. Super. Ct. 2000) (No. 00-0000428); Plaintiff's Complaint, *People of the State of California ex rel. Hahn v. Arcadia Machine & Tool* (Cal. Super. Ct. 1999) (No. BC210894); Plaintiff's Complaint, *People of the State of California ex rel. Renne v. Arcadia Machine & Tool* (Cal. Super. Ct. 1999) (No. 303753); Plaintiff's Complaint, *City of St. Louis v. Cernicek* (Mo. Cir. Ct. 1999) (No. 992-01209); Plaintiff's Complaint, *City of Cincinnati v. Beretta U.S.A. Corp.* (Ohio Ct. C.P. 1999) (No. A9902369); Plaintiff's Complaint, *White v. Hi-Point Firearms* (Ohio Ct. of C. P. 1999) (No. 381897); Plaintiff's Complaint, *City of Chicago v. Beretta U.S.A. Corp.* (Ill. Cir. Ct. 1999) (No. 98 CH 015596); Plaintiff's Complaint, *Archer v. Arms Tech., Inc.* (Mich. Cir. Ct. 1999) (No. 99-912658); Plaintiff's Complaint, *City of Atlanta v. Smith & Wesson Corp.* (Ga. Cty. Ct. 1999) (No. 99VS0149217J); Plaintiff's Complaint, *Morial v. Smith & Wesson Corp.* (La. Dist. Ct. 1998) (No. 98-18578).

53. See Plaintiff's Complaint, *State of New York v. Arms Tech. Inc.*, No. 1-00-03641-JBW (N.Y. Sup. Ct. 2000).

54. See, e.g., *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146 (Cal. Ct. App. 1999), *petition for review granted*, 92 Cal. Rptr. 2d 256 (Cal. 2000); Plaintiff's Complaint, *Anderson v. Bryco*, No. 00 L 7476 (Ill. Cir. Ct. 2000); First Amended Complaint, *Ceriale v. Smith & Wesson Corp.*, No. 99 L 5628 (Ill. Cir. Ct. 1999). Authors represent a large number of the individuals, cities and municipalities suing the gun industry. For a complete list of these cases, see <<http://www.gunlawsuits.org/docket/index.asp>>.

lar case seeking injunctive relief to reform the industry's distribution practices.⁵⁵

The legal issue posed by the negligent distribution cases is: Should gun makers be liable for their failure to take reasonable steps to prevent guns from arming criminals and minors when those persons then use those guns in crime? Or should gun makers be allowed to profit from their unreasonably dangerous conduct without paying any of the resulting costs, which are now borne by innocent victims?

The plaintiffs in these cases view this question as a relatively simple one. They think that gun makers, like all others who engage in conduct that exposes others to a reasonably foreseeable risk of harm, should be held liable for the damage caused by their failure to use reasonable care to minimize that risk. A jury could find that a reasonable business, under the circumstances faced by gun makers, would take steps to prevent prohibited purchasers from obtaining guns.⁵⁶ In order to save lives, reasonable businesses would sacrifice some profits for the sales that will foreseeably arm criminals and youths. As a society we should not reward businesses that sacrifice the public's safety for their own profits.

Gun manufacturers vigorously contest these conclusions. One of their principal arguments is that they do not owe a duty of care to the plaintiffs and cannot be held liable under negligence law in the absence of a "special relationship" with plaintiffs or the individuals who used negligently distributed guns to injure the plaintiffs.

A. *The "Special Relationship" Rule*

An examination of the "special relationship" rule and its history clearly demonstrates its inapplicability to gun distribution cases. Courts have generally viewed the grounds for imposing liability to be stronger where the defendant affirmatively acted to cause harm to others, as opposed to failing to take an action that would have protected others from injury. When a defendant engages in misfeasance, she is held to owe a general duty of care to all who might foreseeably be injured by her actions.⁵⁷ When an action is characterized as non-feasance, the defendant is held to owe no duty of care to prevent inju-

55. See Plaintiff's Complaint, National Ass'n for the Advancement of Colored People v. A.A. Arms, Inc. (E.D.N.Y. 1999) (No. 99CV3999).

56. Indeed, at least one court has found that because it was so foreseeable that others would use an individual's guns in crimes, the gun owner was subject to an enhanced criminal sentence as a result of those third party crimes. See *United States v. Gilmore*, 60 F.3d 392, 393-94 (7th Cir. 1995).

57. See *infra* notes 99-101 and accompanying text.

ries to others absent one of a limited number of "special relationships" that obligate her to act for the protection of the plaintiff.⁵⁸

Courts have distinguished between active perpetration of an injury (misfeasance) and passive inaction in the face of possible injury to others (nonfeasance) since the fifteenth century.⁵⁹ Loath to convert the courts into an agency for forcing men to help one another⁶⁰ and fearful of imposing an amorphous, unworkable duty on an indefinite number of bystanders,⁶¹ the common law refused to impose liability on the man who could easily stop the blind woman from stepping off the pier or the store owner who, by complying with a robber's request, could forestall injury to a customer.⁶² In the words of Benjamin Cardozo, then a judge on the New York Court of Appeals, the difference is that between "merely withholding a benefit" and "positively or actively . . . working an injury."⁶³ The law "does not compel active benevolence between man and man,"⁶⁴ but it does demand that acts, once undertaken, be prosecuted with care.

The clearest application of this theoretical distinction, and the paradigmatic case of nonfeasance, is the rule that one generally has no duty to aid another.⁶⁵ Commentators have long lamented the moral and ethical difficulties engendered by this "no duty to rescue" rule,⁶⁶ and a few states have enacted statutes imposing a duty, under

58. See *infra* notes 68-76 and accompanying text.

59. See Jean Rowe & Theodore Silver, *The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance from the Fifteenth Through the Twentieth Centuries*, 33 DUQ. L. REV. 807 (1995).

60. See LEON GREEN, JUDGE AND JURY 62 (1930).

61. See Robert Lipkin, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 UCLA L. REV. 252, 267-74 (1983) (noting that practical difficulties involved in proving negative causation, identifying the specific tortfeasor, and demonstrating that the alleged tortfeasor had prior knowledge of what was legally required have led courts to reject a general duty to rescue).

62. See, e.g., *Kentucky Fried Chicken of Cal., Inc. v. Superior Court*, 927 P.2d 1260, 1269 (Cal. 1997) ("no duty to comply with a robber's unlawful demands should be imposed on a shop-keeper.").

63. *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 898 (N.Y. 1928). See also Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 220-21 (1908) (distinguishing between acts that create "a minus quantity, a positive loss" and those that create a loss "only in the sense of an absence of a plus quantity"); LAWRENCE H. ELDRIDGE, *MODERN TORT PROBLEMS* 13 (1941) ("The man who is guilty of a misfeasance makes the other's condition worse than it was before, while the man who is guilty of a nonfeasance does not worsen the other's condition.").

64. James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112 (1908).

65. See RESTATEMENT (SECOND) OF TORTS § 314 (1965).

66. See, e.g., John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations about the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867 (suggesting that courts always impose a reasonableness standard); Steven J. Hey-

limited circumstances, to aid another in peril.⁶⁷ Nonetheless, under the common law, courts held that an expert swimmer need not save a drowning child,⁶⁸ a passerby with medical skills need not bind up the wounds of a stranger who is bleeding to death,⁶⁹ and an aunt need not warn her nephew about a defective lawn mower seat.⁷⁰ Absent an affirmative act that increased the risk of harm to the injured party, there was no liability.⁷¹

A close cousin to the "no duty to rescue" principle was the old rule that one generally need not control the conduct of a third person to prevent him from causing harm to another.⁷² This was true even if "the actor realize[d] that he has the ability to control the conduct of a third person, and could do so with only the most trivial of efforts and without any inconvenience to himself."⁷³ Thus courts held that a woman was not liable for her husband's shooting spree,⁷⁴ a halfway house was not responsible for a tenant's criminal activities,⁷⁵ and a restaurant had no duty to protect its patrons from assailants in the parking lot.⁷⁶ Once again, the law would not force action where none had been undertaken.

The law was not entirely callous, however; custom, public sentiment, and social policy considerations carved out "special relationships" in which action was required. One of the earliest and most basic special relationships was that between property owners and their invitees.⁷⁷ Either because of the potential economic gain to the business owner⁷⁸ or an implied representation to the invitee that the

man, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 738-40 (1994) (developing a liberal-communitarian theory for imposing a duty to rescue).

67. Vermont, Minnesota, and Rhode Island have all enacted "easy rescue" statutes. See MINN. STAT. ANN. § 604A.01 (West 1999); R.I. GEN. LAWS § 11-56-1 (1994); R.I. GEN. LAWS § 31-26-3 (1994); R.I. GEN. LAWS § 9-1-27.1 (1984); VT. STAT. ANN. tit. 12, § 519 (1968).

68. See *Handiboe v. McCarthy*, 151 S.E.2d 905, 907 (Ga. Ct. App. 1966). See generally KEETON, *supra* note 10, § 56, at 375-76.

69. See *Allen v. Hixson*, 36 S.E. 810, 810 (Ga. 1900). See generally KEETON, *supra* note 10, § 56, at 375-76.

70. See *Chastain v. Fuqua Indus., Inc.*, 275 S.E.2d 679, 681 (Ga. Ct. App. 1980). See generally KEETON, *supra* note 10, § 56, at 375-76 (discussing decisions "revolting to any moral sense.").

71. See generally Ames, *supra* note 64, at 111.

72. See RESTATEMENT, *supra* note 65, § 315.

73. *Id.* at cmt. b.

74. See *Newton v. Tinsley*, 970 S.W.2d 490, 494 (Tenn. Ct. App. 1997).

75. See generally *Bailor v. Salvation Army*, 854 F. Supp. 1341, 1365 (N.D. Ind. 1994), *aff'd*, 51 F.3d 678 (7th Cir. 1995).

76. See *Saccuzzo v. Krystal Co.*, 646 So. 2d 595, 597 (Ala. 1994).

77. See KEETON, *supra* note 10, § 61, at 419.

78. See *id.* at 420.

premises would be made safe for his occupation,⁷⁹ a landowner was deemed to owe invitees "an affirmative duty to protect them, not only against dangers of which he knows, but also against those which with reasonable care he might discover."⁸⁰ Under old common law non-feasance principles, this duty did not extend beyond invitees. Trespassers and licensees were expected to look out for themselves; the property owner need neither warn them of nor protect them from even foreseeable danger.⁸¹

Beyond landowners and occupiers, other special relationships have included common carriers and passengers,⁸² innkeepers and guests,⁸³ parents and children,⁸⁴ and psychotherapists and patients.⁸⁵ In general, special relationship exceptions to the no-duty rule have been based on control and impose on a defendant an initial duty to protect or aid a vulnerable, dependent plaintiff or restrain a third party bent on doing harm.⁸⁶ The list of special relationships continues to expand and depends on "a variety of factors not yet fully defined,"⁸⁷ which vary from state to state. In all cases, the degree of care required is not Herculean; a person is merely required to act reasonably under the circumstances.⁸⁸

At the other end of the spectrum sits strict liability, under which certain activities are so likely to result in injury to others that those who engage in them are always liable for the injuries that result.⁸⁹ Since the English case of *Fletcher v. Rylands*,⁹⁰ the common law recognized that some activities are so dangerous that those who engage in them ought to be liable to those harmed by them, irrespective of the

79. *See id.* at 422.

80. *Id.* at 419.

81. *See id.* at 412. *See also* *Adams v. Ferraro*, 339 N.Y.S.2d 554, 555 (N.Y. App. Div. 1973) (per curiam) (holding that tavern was not liable to man who slipped on ice in parking lot because he was only going to the tavern to look for a relative). Although many jurisdictions have held on to these distinctions, following the California Supreme Court's landmark decision in *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968), this arbitrary and confusing sliding scale has begun to be superceded by a single reasonableness standard.

82. *See* RESTATEMENT, *supra* note 65, § 314A(1).

83. *See id.* at § 314A(2).

84. *See id.* at § 314A(4).

85. *See* *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

86. *See* RESTATEMENT, *supra* note 65, § 314A, § 315(a), (b); Lipkin, *supra* note 61, at 264 (suggesting that a duty to rescue arises from the ability of the defendant and the dependency of the plaintiff).

87. *Rodriguez v. Inglewood Unified Sch. Dist.*, 230 Cal. Rptr. 823, 826 (Cal. Ct. App. 1986).

88. *See* RESTATEMENT, *supra* note 65, § 314A, cmt. e.

89. *See infra* notes 90-97 and accompanying text.

90. L.R. 1 Ex. 265 (1866), *aff'd*, *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868).

level of care exercised.⁹¹ Those whose artificial reservoirs flood their neighbor's coal mine,⁹² whose dynamite blasting injures a pedestrian on the highway,⁹³ whose oil wells blow out and spew sludge on neighboring land,⁹⁴ and whose fuel rockets destroy another's well⁹⁵ bear complete responsibility for the destruction wrought by their activities.⁹⁶ In such cases, the landowner who conducts an ultrahazardous activity on her land was deemed to owe an absolute duty to protect against harm, regardless of her relationship to the injured party or the care she took to prevent injury from occurring.⁹⁷

Between no duty and strict liability sits misfeasance, under which liability is imposed for failure to exercise reasonable care.⁹⁸ At the simplest level, misfeasance involves positive action that creates a foreseeable risk of harm to a person who is then injured.⁹⁹ In such cases, a general duty to avoid causing injury is assumed,¹⁰⁰ and the courts progress to the other required elements of negligence, i.e., breach, causation, and damage.¹⁰¹ When, for example, a man fires his gun on the streets and injures someone, no one asks whether he had a special relationship with the victim. By wielding a gun, one places others at risk and so owes potential victims a duty to use reasonable care not to injure them.¹⁰²

91. See *id.* at 299.

92. See *id.*

93. See *Sullivan v. Dunham*, 55 N.E. 923 (N.Y. 1900).

94. See *Green v. General Petroleum Corp.*, 270 P. 952 (Cal. 1928).

95. See *Smith v. Lockheed Propulsion Co.*, 56 Cal. Rptr. 128 (Cal. Ct. App. 1967).

96. See *Sullivan*, 55 N.E. at 923; *Green*, 270 P. at 952; *Smith*, 56 Cal. Rptr. at 128.

97. In a spate of cases filed in the 1980s, which are wholly different from the current city lawsuits against gun manufacturers, some victims of gun violence contended that the business of selling handguns – particularly “Saturday Night Specials” – that were likely to end up in the hands of (and may have been intended for) criminals posed such a great risk of danger to society that those who engage in it should be strictly liable for the costs of the harm that resulted, rather than innocent victims. See, e.g., *Armijo v. Ex Cam, Inc.*, 843 F.2d 406 (10th Cir. 1988); *King v. R.G. Indus., Inc.*, 451 N.W.2d 874 (Mich. Ct. App. 1990); *Delahanty v. Hinckley*, 564 A.2d 758 (D.C. 1989). This theory was generally rejected by the courts, though one court did accept it in part. See *Kelly v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985). The current crop of gun distribution cases expressly discards the absolute liability theories of these prior cases and instead seeks to impose liability for gun makers' failure to exercise reasonable care under the circumstances.

98. See RESTATEMENT, *supra* note 65, § 314A, cmt. f.

99. See *id.*

100. See *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 818 (E.D.N.Y. 1999) (“In the usual run of cases, a general duty to avoid negligence is assumed, and there is no need for the court to undertake detailed analysis of precedent and policy.”).

101. See *id.* at 827.

102. See *supra* notes 98-100 and accompanying text.

Misfeasance encompasses more than the obvious. Actions that increase the risk that others will cause harm also engender a duty.¹⁰³ Such “risk facilitation” or “enabling” is as much misfeasance as is the wielding of a gun.¹⁰⁴ This concept of enabling forms the basis of liability for the kindly old lady who buys her alcoholic, drug-addicted, license-less grand-nephew a new car¹⁰⁵ and the train conductor who carelessly abandons a young woman at night in Hoboes’ Hollow.¹⁰⁶ Acts that, in other situations, may be perfectly harmless, even laudable, enter the realm of misfeasance when they “enhance the risk that a malevolent or consciously indifferent intervenor will seriously injure an innocent third party.”¹⁰⁷

B. Courts That Have Ruled in Favor of the Gun Manufacturers on the “Special Relationship” Issue

In the past year, state trial judges in Michigan, Ohio, and Florida dismissed negligence claims against gun manufacturers and distributors for lack of a duty to control the conduct of criminal third parties.¹⁰⁸ Instead of focusing on the gun manufacturers’ and distributors’ positive contributions to the harm, the judges mischaracterized their behavior as nonfeasance and dismissed the cases for lack of any special relationships.¹⁰⁹ These courts dismissed plaintiffs’ cases on the pleadings, holding that even if the allegations were true that gun manufacturers knew that their conduct continually endangered the public and that manufacturers could feasibly prevent much criminal possession, they could not be liable because they had

103. See Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 442 (1999) (discussing the expansion of the enabling tort concept); Rowe & Silver, *supra* note 59, at 854 (explaining that a duty arises if “it may be said that absent the defendant’s existence, the risk through which plaintiff was injured would not have arisen.”).

104. See Rabin, *supra* note 103, at 437, 439.

105. See *Vince v. Wilson*, 561 A.2d 103, 104 (Vt. 1989) (finding that grand-aunt had a duty to victim of grand-nephew’s reckless driving because she bought him a car in full knowledge of his dubious driving credentials).

106. See *Hines v. Garrett*, 108 S.E. 690, 695 (Va. 1921) (holding that train motorman was liable for rape of female passenger after he took her beyond her stop and she was forced to walk back through dangerous area). See also Rabin, *supra* note 103, at 440 (identifying “key in the ignition” cases as another example of an enabling tort).

107. Rabin, *supra* note 103, at 443.

108. See *Archer v. Arms Tech., Inc.*, No. 99-912658 NZ (Mich. Cir. Ct. May 16, 2000); *City of Cincinnati v. Beretta U.S.A. Corp.*, 1999 WL 809838 (Ohio Ct. C.P. Oct. 7, 1999), *aff’d*, 2000 WL 1133078 (Ohio Ct. App. Aug. 11, 2000), *appeal allowed*, 740 N.E.2d 1111 (Ohio 2001). See also *Penelas v. Arms Tech., Inc.*, 1999 WL 1204353 (Fla. Cir. Ct. Dec. 13, 1999), *aff’d*, 2001 WL 120529 (Fla. Dist. Ct. App. Feb. 14, 2001), *cert. denied* (Mar. 21, 2001) (dismissing negligent design claim against gun manufacturers for lack of duty).

109. See *Archer*, No. 99-912658 NZ, slip op. at 6; *Cincinnati*, 1999 WL 809838, at *2.

no special relationship with the victims.¹¹⁰ Disregarding precedent in which gun sellers were held liable for shootings where their negligence enabled the shooters to obtain the gun, these courts seem to have ignored the affirmative steps taken by gun manufacturers that increased the risk of harm to the victims and treated the plaintiffs' cases as requesting gun makers to rescue victims from the clutches of gun-toting criminals. Comparing the allegations of plaintiffs with the courts' opinions, it appears that the two were speaking past each other, with the courts assuming the claims concerned only nonfeasance when in fact, the plaintiffs alleged otherwise. Although these cases are not the only instances in which judges have erroneously categorized the gun manufacturers' and distributors' conduct as nonfeasance,¹¹¹ they provide a good basis for examination.

In 1999, Wayne County and the City of Detroit filed suit against gun manufacturers and distributors for public nuisance and negligent marketing and distribution of guns.¹¹² Although the court upheld the public nuisance claim,¹¹³ it dismissed the municipalities' negligence action.¹¹⁴ In their complaint, the plaintiffs alleged that the defendants employed a policy of active encouragement and willful blindness to facilitate the creation of an illegal secondary market in firearms.¹¹⁵ Straw purchases, multiple sales, sales to minors, and diversion of guns to felons and other unauthorized purchasers were not only encouraged but exploited and relied upon as a vital source of revenue, according to the plaintiffs.¹¹⁶ As a result, the plaintiffs' complaint alleged, thousands of firearms were put into the hands of criminals, juveniles, and other dangerous people for the commission of crimes.¹¹⁷

The court found that notwithstanding these facts, gun manufacturers did not owe a duty to use reasonable care to prevent foreseeable injuries caused by their distribution.¹¹⁸ Instead, the court focused on the defendants' duty to protect the victims or restrain the criminals; in spite of the plaintiffs' clear misfeasance allegations, the

110. See *Archer*, No. 99-912658 NZ, slip op. at 4; *Cincinnati*, 1999 WL 809838, at *2.

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

112. *Archer v. Arms Tech., Inc.*, No. 99-912658 NZ (Mich. Cir. Ct. 1999); *McNamara v. Arms Tech., Inc.*, No. 99-912662 NZ (Mich. Cir. Ct. 1999).

113. See *id.* at 12.

114. See *id.* at 6.

115. See Plaintiff's Complaint, *Archer*, No. 99-912658 NZ, ¶ 2 (Apr. 26, 1999).

116. See *id.* ¶ 4.

117. See *id.* ¶ 2.

118. See *Archer v. Arms Tech., Inc.*, No. 99-912658 NZ, slip op. at 7 (Mich. Cir. Ct. May 16, 2000).

court analyzed the issue as if it were a nonfeasance case.¹¹⁹ After stating, “[i]t is well accepted that there is no duty to protect another person from the criminal acts of a third party in absence of special circumstances,” the judge relied on two nonfeasance cases to dismiss the plaintiffs’ negligence action.¹²⁰ The first, *Williams v. Cunningham Drug Stores, Inc.*,¹²¹ addressed the scope of the special relationship between landowners and invitees.¹²² In *Williams*, a drug store security guard called in sick, and the store owner failed to replace him.¹²³ An armed robbery occurred later that day, and, in the ensuing panic, one of the customers was shot.¹²⁴ After establishing that merchants owe their customers a duty to exercise reasonable care for their protection, the court held that such a duty “does not include providing armed, visible security guards to deter criminal acts of third parties.”¹²⁵

The second case, *Murdock v. Higgins*,¹²⁶ examined the duty of a supervisor to investigate and report suspected misbehavior.¹²⁷ In *Murdock*, a young Department of Social Services volunteer was sexually assaulted at the home of his manager while on a voluntary social visit.¹²⁸ At his previous department location, the manager had been suspected of sexual misconduct with young boys; however, no formal complaint was ever filed.¹²⁹ The volunteer sued the former supervisor for failing to properly investigate the manager’s activities or disclose his suspicions to the new department.¹³⁰ The *Murdock* court found no special relationship between the supervisor and the victim,¹³¹ and the relationship between the supervisor and the manager was held not to include a “duty to disclose for intradepartmental or intracompany transfers.”¹³²

Neither of these cases should govern the issue of the gun manufacturers’ and distributors’ negligence. In analogizing from these nonfeasance cases, the *Archer* court failed to recognize the fundamen-

119. *See id.* at 4-7.

120. *Id.* at 4.

121. 418 N.W.2d 381 (Mich. 1988).

122. *See id.* at 383.

123. *See id.* at 382.

124. *See id.*

125. *Id.* at 384.

126. 559 N.W.2d 639 (Mich. 1997).

127. *See id.* at 643-44.

128. *See id.* at 641.

129. *See id.* at 642.

130. *See id.*

131. *See id.* at 643.

132. *Id.* at 644.

tal difference between idly bystanding, merely allowing an injury to occur, and actively increasing the risk of harm to others. Selling aspirin and toothpaste does not increase the risk of an armed robbery.¹³³ Supervising a community service employee does not increase the risk of a sexual assault in that employee's home.¹³⁴ On the other hand, distributing guns into a supply network rife with unscrupulous dealers, gun traffickers, and straw purchasers who fuel the criminal gun market, affirmatively increases the risk of harm to society in a way that the inaction of the defendants in the cited cases did not.

The *City of Cincinnati*¹³⁵ decision followed a similar erroneous line of reasoning. The plaintiffs in *City of Cincinnati* also alleged that gun manufacturers and distributors negligently distributed and marketed their products.¹³⁶ The trial court disregarded precedent in which Ohio courts recognized that the grave foreseeable danger posed by guns warrants the imposition of a duty to prevent them from falling into the wrong hands.¹³⁷ The Ohio Court of Appeals had held that a gun show operator could be liable for a criminal shooting by teenagers using a gun they stole from a dealer at the show on the theory that the operator negligently failed to prevent minors from entering the show and negligently failed to require dealers at the show to take appropriate security measures to prevent thefts.¹³⁸ The Ohio Supreme Court had held that a gun owner could be liable for a shooting where she negligently failed to prevent her son from obtaining the gun, and he then gave it to a young friend, who accidentally shot the plaintiff.¹³⁹ In neither case did the court deem that a "special relationship" was needed in order to impose liability for another's criminal or negligent act; the potential danger of guns in the wrong hands was sufficient to warrant a duty.¹⁴⁰

Notwithstanding this precedent, the trial court found the gun negligence cases less relevant than two landowner liability cases, *Gelbman v. Second National Bank*¹⁴¹ and *Simpson v. Big Bear Stores Co.*,¹⁴²

133. See *supra* text accompanying notes 122-125 (discussing the duty a merchant owes customers).

134. See *supra* text accompanying notes 126-132 (discussing the duty of a supervisor to report an employee's suspected misbehavior).

135. See *City of Cincinnati v. Beretta U.S.A. Corp.*, 1999 WL 809838 (Ohio Ct. C.P. Oct. 7, 1999).

136. See *id.* at *2.

137. See *Pavrides v. Niles Gun Show, Inc.*, 679 N.E.2d 728 (Ohio Ct. App. 1996).

138. See *id.* at 731.

139. See *Taylor v. Webster*, 231 N.E.2d 870, 872 (Ohio 1967).

140. See *id.*; see also *Pavrides*, 679 N.E. at 731.

141. 458 N.E.2d 1262 (Ohio 1984).

142. 652 N.E.2d 702 (Ohio 1995).

which it cited for the proposition that “under Ohio law, in order to hold a defendant liable in negligence for the criminal conduct of a third party, the defendant must owe a duty arising out of a special relationship which requires the defendant to protect the plaintiff.”¹⁴³

Like the Michigan trial court, the Cincinnati trial court failed to appreciate that the defendants in the “special relationship” cases did not engage in conduct that increased the risk of harm.¹⁴⁴ Rather, the cases relied upon by the court were nonfeasance cases that turned on whether the duty imposed on a landowner due to his special relationship with invitees extends to those outside the landowner’s property.¹⁴⁵ *Gelbman* held that a property owner did not owe a duty to third parties to prevent injury caused by business invitees outside of their premises; specifically, a plaintiff whose car was struck by a car exiting a Burger King parking lot could not recover against Burger King for injuries suffered in an accident upon leaving the lot.¹⁴⁶ Similarly, *Simpson* held that while a property owner (there, a supermarket) owes a duty to keep its premises safe for invitees, a responsibility that includes protection from foreseeable criminal attacks, it has no such duty to protect customers off of its premises.¹⁴⁷

The difference between the landowner cases relied on by the court and the negligent distribution cases should be obvious. By selling hamburgers or groceries, one does not expose persons to an increased risk of being injured by a driver or a criminal when one leaves the store. Any duty to protect patrons from such injuries is properly limited to property within the business’s control. If, on the other hand, Burger King sold tainted meat in a hamburger that a customer did not eat until he had driven across the country, Burger King would properly be liable for food poisoning even though it occurred off the premises. The risk of food poisoning is one created by the selling of burgers, and it is a risk that travels as far as customers take their burgers. So too, the risk posed by carelessly-distributed guns is not limited to certain locations or classes of persons; all are exposed to it.

A state trial court in Florida dismissed Miami-Dade County’s negligent design claim against gun manufacturers using similar reasoning.¹⁴⁸ Although that case focused on the failure to use reasonable care in design rather than in the distribution of guns, the legal error

143. *Id.* at 705; see also *Gelbman*, 458 N.E.2d at 1262, 1263.

144. See *supra* text accompanying notes 135-137.

145. See *supra* notes 141-143 and accompanying text.

146. See *Gelbman*, 458 N.E.2d at 1264.

147. See *Simpson*, 652 N.E.2d at 705.

148. See *Penelas v. Arms Tech., Inc.*, 1999 WL 1204353, at *2 (Fla. Cir. Ct. 1999).

was the same. The court held that "Florida law does not impose a duty on a defendant to protect others from the criminal and reckless behavior of a third person unless there is a special relationship between the defendant and the plaintiff and the third person."¹⁴⁹ The *Penelas* court refused to follow a long line of Florida cases in which gun sellers who negligently enabled an irresponsible person to obtain a gun were held liable for shootings,¹⁵⁰ even when the dealer sold the gun to an irresponsible person who was not himself the shooter.¹⁵¹ Instead, the court relied on precedent limiting liability of persons who fail to control the criminal conduct of another.¹⁵² Again, the court looked to nonfeasance cases in which the defendant did not engage in conduct that exposed others to risks beyond those inherent in society.

By characterizing the gun manufacturers' and distributors' conduct as failure to prevent harm rather than creating risk of harm by actively distributing dangerous products in a manner that supplies illegal markets, these courts misperceived the nature of the municipalities' allegations.¹⁵³ The precedent relied upon by the court only resembles negligent gun distribution claims to the extent that both seek to impose liability for third party criminal conduct.¹⁵⁴ However, the cited cases were wholly inapposite in that they did not involve conduct by a defendant that caused great foreseeable (and preventable) dangers to others.¹⁵⁵ Gun manufacturers' negligent distribution should more properly be classified as *misfeasance* – affirmatively exposing the public to foreseeable risks of injury.

149. *See id.* at *3.

150. *See, e.g.,* *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200 (Fla. 1997); *Tamiami Gun Shop v. Klein*, 116 So. 2d 421 (Fla. 1959) (holding a gun dealer liable for accidental shooting); *Sogo v. Garcia's Nat'l Gun, Inc.*, 615 So. 2d 184 (Fla. Dist. Ct. App. 1993) (reversing summary judgment for gun dealer who delivered gun, without waiting three days as law required, to man who committed suicide with it later that day); *Angell v. F. Avanzini Lumber Co.*, 363 So. 2d 571 (Fla. Dist. Ct. App. 1978) (reversing dismissal where gun dealer sold rifle to woman who was acting strangely and then killed a man).

151. *See K-Mart Enters. of Florida, Inc. v. Keller*, 439 So. 2d 283 (Fla. Dist. Ct. App. 1983), *review denied*, 450 So. 2d 487 (Fla. 1984).

152. *See Lighthouse Mission of Orlando, Inc. v. Estate of McGowen*, 683 So. 2d 1086 (Fla. Dist. Ct. App. 1996); *Austin v. Mylander*, 717 So. 2d 1073, 1074 (Fla. Dist. Ct. App. 1998).

153. *See supra* note 52.

154. *See supra* notes 150-152 and accompanying text.

155. *See supra* notes 150-152 and accompanying text.

C. Courts That Have Ruled in Favor of Plaintiffs on the
"Special Relationship" Issue

Other courts have agreed with this view in a series of key decisions.¹⁵⁶ In *Hamilton v. Accu-Tek*,¹⁵⁷ a federal jury returned a verdict in favor of criminal shooting victims and their families on negligent distribution claims against several major handgun manufacturers.¹⁵⁸ In denying a motion to overturn the verdict, the trial court (Judge Weinstein of the Eastern District of New York) held that the manufacturers owed a duty of care to the plaintiffs under New York negligence law and could be held legally responsible for criminal shootings resulting from their breach of that duty.¹⁵⁹ The court described the duty as requiring the manufacturers "to exercise reasonable care in marketing and distributing their products so as to guard against the risk of [their] criminal misuse."¹⁶⁰ The court explained that:

[i]t is the duty of manufacturers of a uniquely hazardous product, designed to kill and wound human beings, to take reasonable steps available at the point of their sale to primary distributors to reduce the possibility that these instruments will fall into the hands of those likely to misuse them.¹⁶¹

The *Hamilton* court held that the gun manufacturers not only created a risk of foreseeable harm to the plaintiffs but also had the ability to avoid doing so by changing the manner in which they distributed their products.¹⁶² This decision recognizes that the manufacturers had an "ongoing close relationship with downstream distributors and retailers putting new guns into consumers' hands [and] provided them with appreciable control over the ultimate use of their products."¹⁶³ The court held that the evidence supported the jury's find-

156. See, e.g. *City of Boston v. Smith & Wesson Corp.*, 2000 WL 1473568, at *15 (Mass. Super. Ct. July 13, 2000) (finding that gun manufacturers owed a basic duty not to create an illegal, secondary firearms market); *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 185 (Cal. Ct. App. 1999) (holding that a gun manufacturer has a duty "not to increase the risk inherently presented by the assault weapon it manufactures, markets and distributes"), *review granted*, 92 Cal. Rptr. 2d 256 (Cal. 2000).

157. 62 F. Supp. 2d 802 (E.D.N.Y. 1999), *questions certified*, 222 F.3d 36 (2d Cir. 2000), *certified questions accepted*, 95 N.Y.2d 878 (N.Y. 2000).

158. See *id.* at 808.

159. See *id.* at 827, 832-33.

160. *Id.* at 824.

161. *Id.* at 825.

162. See *id.* at 839.

163. *Id.* at 820.

ings that criminal misuse of guns was foreseeable, and that defendants had failed to take reasonable steps to prevent it.¹⁶⁴

Other courts have recognized a duty under analogous circumstances, where plaintiffs alleged specific acts of negligence on the part of gun makers that increased the risk of criminal misuse.¹⁶⁵ In *Merrill v. Navegar, Inc.*,¹⁶⁶ the Court of Appeal of California found that a gun manufacturer “owed appellants a duty to exercise reasonable care not to create risks above and beyond those inherent in the presence of firearms in our society.”¹⁶⁷ Reversing the trial court’s summary judgment ruling that gun makers did not owe a duty of care to the victims of a shooting, the Court of Appeal held that a gun maker’s negligent conduct in manufacturing, distributing, and marketing to the general public a high-capacity, rapid-fire, military-style assault weapon, uniquely suited for mass shootings and lacking legitimate civilian uses, could make it liable for a 1994 assault at the offices of the Pettit & Martin law firm at 101 California Street in San Francisco, in which a former client fatally shot eight people and seriously wounded six others in a matter of minutes.¹⁶⁸ The defendant, Navegar, Inc., designed, distributed, and marketed the TEC-9, an assault pistol so inimical to the public’s health and safety that it was banned by the California Legislature prior to the shooting and later by the U.S. Congress.¹⁶⁹ Among other things, the evidence showed that Navegar:

- designed the TEC-9 to be perfectly suited for rapidly killing people at short-range in military-style assaults but to be unsuited for any legitimate civilian sporting, defensive, or other use;
- aggressively promoted its military features and unsurpassed firepower;
- included features on the TEC-9 of great interest to criminals, such as a threaded barrel for silencers or flash suppressers;
- marketed the gun as being “tough as your toughest customer” and having an “excellent resistance to fingerprints,” thereby specifically inviting criminal interest in and use of the gun;

164. *See id.* at 839.

165. *See City of Boston v. Smith & Wesson Corp.*, 2000 WL 1473568, at *15 (Mass. Super. Ct. July 13, 2000); *White v. Smith & Wesson Corp.*, 97 F. Supp. 2d 816, 828-29 (N.D. Ohio 2000).

166. 89 Cal. Rptr. 2d 146 (Cal. Ct. App. 1999) *review granted*, 92 Cal. Rptr. 2d 256 (Cal. 2000).

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

168. *See id.* at 152, 154-55.

169. *See id.* at 152 n.3, 153 n.5.

- welcomed news of high-profile mass killings with the TEC-9 as having “advertising tingle” because, according to Navegar, “anything bad would be good” for sales; and
- exploited the TEC-9’s appeal to criminals by highlighting legislative efforts to ban it, while changing the gun’s name to dodge such bans and potential civil liability.¹⁷⁰

The Court of Appeal held that California tort law places limits on the manner in which a gun manufacturer, like anyone else, conducts its activities.¹⁷¹ It ruled that Navegar owed a duty of care to the public, which was placed at risk by the TEC-9 pistols that Navegar designed, manufactured, distributed, and marketed to the public.¹⁷² Rejecting Navegar’s argument that the plaintiffs needed to show a “special relationship” or “special circumstances” to establish Navegar’s duty of care, the court held that California common law has recognized the distinction between misfeasance and nonfeasance, requiring a special relationship or circumstances only in cases involving nonfeasance, and that Navegar’s negligent conduct was misfeasance.¹⁷³ Navegar designed and widely distributed a weapon uniquely suited for mass killing and lacking legitimate civilian uses and had “substantial reason to foresee that many of those to whom it made the TEC-DC9 available would criminally misuse it to kill and injure others,” and its “targeted marketing of the weapon ‘invited or enticed’ persons likely to so misuse the weapon to acquire it.”¹⁷⁴

Some courts in the cases brought by cities and counties have also ruled that gun manufacturers could be held liable for negligence resulting in a shooting, without regard to the presence of a “special relationship.”¹⁷⁵ Denying a motion to dismiss the claims brought by the city of Cleveland, the U.S. District Court for the Northern District of Ohio relied on the same Ohio precedent rejected by the trial court in Cincinnati to hold that “[a] duty of care for the protection of a plaintiff against an unreasonable risk of injury is owed to all people ‘to whom injury may reasonably be anticipated.’”¹⁷⁶ A Massachusetts court also firmly rejected the gun makers’ arguments in denying their

170. *See id.* at 154-57, 162-63.

171. *See id.* at 168-69.

172. *See id.* at 185.

173. *See id.* at 165.

174. *Id.* at 168-69.

175. *See White v. Smith & Wesson Corp.*, 97 F. Supp. 2d 816, 828 (N.D. Ohio 2000); *see also City of Boston v. Smith & Wesson Corp.*, 2000 WL 1473568, at *15 (Mass. Super. Ct. July 13, 2000).

176. *White*, 97 F. Supp. 2d at 828 (quoting *Gedeon v. East Ohio Gas Co.*, 190 N.E. 924, 926 (Ohio 1934)). Like the case brought by Miami-Dade, Cleveland’s negligence claims

motion to dismiss a case brought by the city of Boston.¹⁷⁷ While the defendants in that case insisted that they “did not owe Plaintiffs a duty to protect from the criminal acts of third parties[.]” the court recognized that this argument misconstrued the complaint because “Plaintiffs do not allege that Defendants were negligent for failure to protect from harm but that defendants engaged in conduct the foreseeable result of which was to cause harm to Plaintiffs.”¹⁷⁸ The court explained further that:

Taking Plaintiffs’ allegations as true, Defendants have engaged in affirmative acts (i.e., creating an illegal secondary firearms market) by failing to exercise adequate control over the distribution of their firearms. Thus it is affirmative conduct that is alleged—the creation of the illegal secondary firearms market. The method by which Defendants created this market, it is alleged, is by designing or selling firearms without regard to the likelihood the firearms would be placed in the hands of juveniles, felons or others not permitted to use firearms in Boston. Further, according to the complaint, Defendants did this knowing that the firearms would end up in that market, and, depending upon precisely that result, realizing that Plaintiffs would be harmed. Taken as true, these facts suffice to allege that Defendants’ conduct unreasonably exposed Plaintiffs to a risk of harm.¹⁷⁹

As these courts have recognized, gun manufacturers’ conduct in distributing guns exposes the public to foreseeable danger, and the duty of gun manufacturers to responsibly distribute their products is firmly rooted in misfeasance, rather than in nonfeasance.

III. THE CASE FOR REPLACING THE “SPECIAL RELATIONSHIP” RULE WITH A MORE FLEXIBLE AND FAIR ANALYSIS

Plaintiffs should be able to prevail on negligent distribution claims against gun manufacturers under the traditional analysis, and the weight of authority is growing in favor of that conclusion.¹⁸⁰

addressed only the negligent design of guns rather than their negligent distribution. See *Penelas v. Arms Tech., Inc.*, 1999 WL 1204353, at *3 (Fla. Cir. Ct. Dec. 13, 1999).

177. See *Boston*, 2000 WL 1473568, at *15.

178. *Id.*

179. *Id.*

180. See, e.g., *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 824 (E.D.N.Y. 1999) (holding gun manufacturers have a duty to exercise reasonable care in marketing and distributing to guard against the risk of criminal misuse), *questions certified*, 222 F.3d 36 (2d Cir. 2000), *certified questions accepted*, 95 N.Y.2d 878 (N.Y. 2000); *Boston*, 2000 WL 1473568, at *15 (finding that gun manufacturers owed a basic duty not to create an illegal secondary market); *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 185 (Cal. Ct. App. 1999) (finding that the

Nonetheless, the split of authority in these cases indicates that the traditional approach can produce inconsistent results.¹⁸¹ While the distinction between misfeasance and nonfeasance is clear in theory, “in practice it is not always easy to draw the line and say whether conduct is active or passive.”¹⁸² At some level, the difference between misfeasance and nonfeasance can appear to be only semantic. For example, an automobile collision can be described as misfeasance (the driver actively drove into the rear-end of another car) or nonfeasance (the driver merely failed to apply the brakes). In the gun cases, the manufacturers attempt a similar semantic slight of hand by characterizing the issue as whether they can be held liable for failing to prevent crimes or to protect plaintiffs from harm, rather than whether they should be liable for the irresponsible distribution of their lethal products.¹⁸³

Courts should be able to apply these concepts properly and to distinguish a defendant whose conduct created or increased a risk of harm to the plaintiff from a defendant who merely failed to benefit the plaintiff by coming to his aid. However, as is evident from the cases discussed above, the stakes are high if error in applying these concepts is made. Under the special relationship regime, distinguishing between misfeasance and nonfeasance is all-important.¹⁸⁴ That approach allows defendants to obtain a virtually complete exemption from liability for the harm resulting from their negligent distribution if they win the semantic game and can convince courts to characterize the claims against them as concerning nonfeasance, as the gun manufacturers have managed to do in several cases.¹⁸⁵

Moreover, the “special relationship” rule is a poor way of defining duties of care even for those cases that unmistakably concern only pure nonfeasance, particularly if courts decide what constitutes a “special relationship” by looking to an arbitrary and outdated set of classifications made by courts in decades or centuries past. For example, applying the “special relationship” rule in its most rigid form, courts must hold that innkeepers owe a duty of care to protect their guests from harm, but landlords have no such duty toward their tenants, because courts decided long ago under circumstances very different

gun manufacturers had a duty not to create risks), *review granted*, 92 Cal. Rptr. 2d 256 (Cal. 2000).

181. *See* Copier By and Through Lindsey v. Smith & Wesson Corp., 138 F.3d 833, 837 n.3 (providing examples of the split of authority).

182. KEETON, *supra* note 10, § 56, at 374.

183. *See, e.g., Boston*, 2000 WL 1473568, at *15; *Hamilton*, 62 F. Supp. 2d at 821.

184. *See supra* notes 57-107 and accompanying text.

185. *See id.*

from today's conditions that innkeeper-guest is a "special relationship" but landlord-tenant is not.¹⁸⁶

A more logical and equitable approach would favor retiring the "special relationship" requirement and applying a more flexible approach to determine the existence or scope of duties of care. Under this approach, the primary focus of courts would be the degree to which the defendant created or increased a risk of foreseeable harm to others and its ability to prevent or to reduce that risk of harm through reasonable changes in its conduct.¹⁸⁷ Courts would not be forced to classify negligent conduct as purely misfeasance or nonfeasance, and the courts' conclusions about whether a defendant owes a duty of care would not depend entirely on the rigid application of a limited set of "special relationships," if the court deems the negligence to be more in the nature of nonfeasance than misfeasance.¹⁸⁸ Rather, a defendant whose business or conduct increased the risk of harm to the public would owe a duty to use reasonable care to minimize those risks, even if its conduct could be deemed as nonfeasance.¹⁸⁹

Many courts across the country already have begun to develop and apply this form of analysis to duty issues, though others have adhered to the traditional version of the "special relationship" rule.¹⁹⁰ The approach endorsed here is supported by considerations of public policy, economic principle, legal theory, and legal precedent.

A. *The Public Policy Justifications: Gun Manufacturers Can Avoid Causing Harm to Others by Exercising Reasonable Care and Responsibility in Distributing Their Products*

A more flexible approach to analyzing issues of duty under negligence law, simultaneously more sophisticated and common-sense

186. See *infra* note 78-80 and accompanying text.

187. See generally *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 161-69 (Cal. Ct. App. 1999), *review granted*, 92 Cal. Rptr. 2d 256 (Cal. 2000).

188. *Id.* at 164.

189. See *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 824-27 (E.D.N.Y. 1999), *questions certified*, 222 F.3d 36 (2d Cir. 2000), *certified questions accepted*, 95 N.Y.2d 878 (N.Y. 2000).

190. Compare *Hamilton*, 62 F. Supp. 2d at 827 (finding for criminal shooting victims on claims of negligent distribution against major handgun manufacturers), and *City of Boston v. Smith & Wesson Corp.*, 2000 WL 1473568, at *15 (Mass. Super. Ct. July 13, 2000) (denying defendant gun manufacturer's motion to dismiss based on conduct of which harm to plaintiffs was foreseeable), with *Archer v. Arms Tech., Inc.*, No. 99-912658 NZ, slip op. at 5 (Mich. Cir. Ct. May 16, 2000) (upholding the requirement of a special relationship for manufacturer liability), and *City of Cincinnati v. Beretta U.S.A. Corp.*, 1999 WL 809838, at *2 (Ohio Ct. C.P. Oct. 7, 1999) (imposing special relationship requirement in denying plaintiff relief), *aff'd*, 2000 WL 1133078 (Ohio Ct. App. Aug. 11, 2000).

than the traditional analysis, would ensure that gun manufacturers bear the costs of unreasonable and unnecessary risks of harm they create by the manner in which they distribute guns. Guns are inherently dangerous weapons designed to kill human beings, which are sought after and frequently used for exactly that purpose.¹⁹¹ Society has already declared that guns – especially handguns – are too dangerous to be possessed by broad categories of persons, yet illegal gun possession and illegal sales are rampant.¹⁹² It should be clear that by pouring guns into a vast unregulated market, without taking reasonable steps to prevent them from flowing into the criminal market, gun manufacturers greatly increase the risk that the public will be exposed to criminal attacks.

The fact that gun manufacturers have made conscious decisions not to take steps to prevent their guns from flowing into well-known conduits to the criminal market can be demonstrated not only by the studies discussed earlier,¹⁹³ but also through a hypothetical. Suppose that the only gun makers in America rigorously monitored and supervised their distribution of guns, requiring that all dealers take pains to prevent guns from falling into criminal hands. The gun makers would not allow any of their guns to be sold in multiple sales or without background checks. They would allow only certified, trained persons to purchase guns, and would take other measures to prevent guns from being resold to criminals or minors, including refusing to supply gun dealers who had a history of selling to gun traffickers. Then a new gun maker opens its doors without any of these restrictions. This gun maker allows its guns to be sold in any quantity, requires no training of buyers, and makes no attempt to prevent its guns from being resold in gun shows or on the streets. The new gun maker would, in short order, provide a ready supply of guns to unscrupulous dealers and traffickers, leading to the creation of a thriving criminal market.

191. See Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention, *Overall Firearm Deaths and Rates Per 100,000* (last modified July 14, 1999) <<http://www.cdc.gov/ncipc/data/us9794/Ofarm.htm>> (reporting that in 1997 there were 32,346 firearm deaths); Nat'l Ctr. for Injury Prevention and Control, CDC, *Overall Homicide Deaths and Rates Per 100,000* (last modified July 14, 1999) <<http://www.cdc.gov/ncipc/data/us9794/fhomi.htm>> (reporting that in 1997 there were 13,252 homicides); see also PROMISING STRATEGIES, *supra* note 20, at xiii (articulating the major threat posed by gun violence to Americans' safety and pointing out 93 daily fatalities and 240 daily injuries from gun violence).

192. See U.S. DEP'T OF TREASURY, GUN DEALER LICENSING & ILLEGAL GUN TRAFFICKING I (1997) (noting that "President Clinton has identified the 'ease with which criminals, the mentally deranged, and even children can acquire firearms' as a major national problem").

193. See *supra* notes 29-43 and accompanying text.

In short, the new gun maker would operate as virtually every gun maker in America currently does.¹⁹⁴ Should not this new gun maker bear the costs of the harm it has created?

Gun manufacturers not only create a risk of severe harm, but they could avoid doing so. As discussed earlier, gun makers have the ability and power to regulate all of their retailers to prevent them from supplying guns to criminals and juveniles.¹⁹⁵ In order to prevent suspect practices and high risk transactions, all gun manufacturers can implement codes or provisions into their distribution agreements similar to, and more stringent than, Smith & Wesson's, requiring changes in the way guns are sold.¹⁹⁶ Recognizing that gun manufacturers owe a duty of care and can be held liable for breaching that duty will serve to reduce the supply of guns to unlawful markets and reduce gun violence and the associated costs.

B. The Theoretical Justifications: Principles of Economic Efficiency and the Underlying Premises of Tort Law Require Gun Manufacturers To Bear the Costs of Their Negligent Distribution of Guns

Gun companies currently enjoy enormous profit from the underground market while bearing none of the costs it imposes on society. Meanwhile, the economic costs of gun violence, much of it fueled by the underground market, are staggering. In 1998, there were 30,708 deaths due to firearms, including 12,102 homicides.¹⁹⁷ There are at least three times as many non-fatal shootings.¹⁹⁸ According to recent studies, the average total cost of one gun-related crime can be as high as \$1.79 million, including medical treatment, future living costs, and the prosecution and imprisonment of the shooter.¹⁹⁹ Most of this cost is borne by the taxpayer – studies have estimated that the public bears as much as eighty-five percent of the costs associated with gun shot injuries.²⁰⁰

194. See Hass Affidavit, *supra* note 30, ¶ 21; Hamilton, 62 F. Supp. 2d 802.

195. See Haas Affidavit, *supra* note 30, ¶¶ 17-20.

196. *Id.* ¶ 21.

197. See Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention, *Overall Firearm Deaths and Rates Per 100,000* (last reviewed Aug. 24, 2000) <<http://webapp.cdc.gov/sasweb/ncipc/mortrate.html>> (reporting that in 1998 there were 30,708 firearm deaths); Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention, *Overall Homicide Deaths and Rates Per 100,000* (last reviewed Aug. 24, 2000) <<http://webapp.cdc.gov/sasweb/ncipc/mortrate.html>> (reporting that in 1998 there were 12,102 homicides).

198. See Joseph L. Annett et al., *National Estimates of Non-Fatal Firearm-Related Injuries: Beyond the Tip of the Iceberg*, 273 JAMA 1751 (1995).

199. See Allan Lengel, *The Price of Urban Violence*, WASH. POST, Dec. 28, 1997, at B1.

200. See Gunderson, *supra* note 27, at 483.

Under the current "special relationship" rubric applied by certain courts, gun makers profit by maximizing sales to dealers and are exposed to no costs (or threat of criminal sanctions) when those guns are promptly diverted to prohibited purchasers via the black market.²⁰¹ Under the current allocation of costs, gun makers have no duty to distribute their products responsibly and therefore no incentive to do so.²⁰² The only incentive gun makers have is to sell as many guns as possible to whomever will buy them. The large multiple sales of guns to single purchasers that pose such a great risk of supplying criminals via gun traffickers are, at the same time, financial bonanzas for gun makers, because they lock up several sales at once. Tort policy and efficiency arguments support the reversal of these incentives.²⁰³ Accepting that "the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents[.]"²⁰⁴ tort law should discourage such "socially unreasonable conduct" and transfer the accident costs from victims and the public to those who can "avoid" them.²⁰⁵

The current costs associated with the underground gun market have been improperly allocated.²⁰⁶ Despite the direct link of responsibility between gun manufacturers and the illegal gun market, gun manufacturers have traditionally escaped any duty to the public to distribute their products in the safest method possible.²⁰⁷ When courts require a "special relationship," gun manufacturers do not suffer penalties when their products are negligently distributed to criminals and other prohibited purchasers.²⁰⁸ Therefore, gun manufacturers are not forced to internalize the costs caused by their negligence. Because of this failure to internalize, their products do not reflect the costs engendered by the underground market they facilitate.²⁰⁹ These tremendous costs are borne by the public as social expenditures;

201. *But see* Matt O'Connor, *Gun Shop Owner and Clerk Convicted in "Straw" Sales*, CHI. TRIB., July 15, 2000, at 5 (recognizing criminal sanctions imposed on gun dealer illegally selling guns). Importantly, gun manufacturers have not been subjected to criminal sanctions for their willful involvement in this market.

202. *See supra* notes 118-125 and accompanying text.

203. *See infra* notes 47-49 and accompanying text.

204. GUIDO CALABRESI, *THE COST OF ACCIDENTS* 26 (1970).

205. *See KEETON, supra* note 10, § 1, at 6.

206. The term "costs" used herein is defined as the public social service expenses and victim expenses associated with the use of guns accessed through the underground market, which is facilitated by gun manufacturers.

207. *See generally supra* notes 109-111 and accompanying text.

208. *See generally supra* notes 108-111 and accompanying text.

209. *See* Guido Calabresi, *First Party, Third Party, and Product Liability Systems: Can Economic Analysis of Law Tell Us Anything About Them?*, 69 IOWA L. REV. 833, 837-38 (1984).

Medicaid, emergency service costs, police costs, and the like are unnecessarily high due to the markets' failure to internalize costs.²¹⁰

Gun manufacturers should be held to a duty to the public and as a result of such duty should begin to internalize the costs associated with the negligent sales of their product. The risk that a suspect sale will likely arm a criminal should not be borne solely by innocent victims or the public. The gun maker who has the power to prevent such sales – and who profits from them – should also be exposed to risk, for only if gun makers face countervailing costs for their socially irresponsible conduct will they have an incentive to behave responsibly. By forcing gun manufacturers to bear the brunt of the costs their negligence imposes on society, gun manufacturers will have an incentive to distribute their products in a safer manner and the negligent sale of guns should decrease. With the decrease in negligently sold guns, fewer juveniles and criminals would have such easy access to guns and the public social services that have been focused on gun violence can be freed up for other efforts.

As numerous commentators have noted, “the dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient – the cost-justified – level of accidents and safety.”²¹¹ Accordingly, “the negligence system has been established not to eliminate negligence but to reduce its rate to some low level while at the same time incentivizing people to minimize the negative consequences of the negligent behavior that still occurs.”²¹² While some argue that the hazardous nature of guns and the dangers they pose arguably warrant strict liability treatment,²¹³ such is not the approach urged here. Instead, this article accepts Judge Posner's theory of negligence²¹⁴ as the applicable paradigm and proposes the internalization of costs by gun manufacturers.

210. See *id.* (recognizing that when the costs of car accidents are borne by a social insurance system, the cost of driving does not reflect accident costs at all, but the level of general taxation does).

211. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972); see also CALABRESI, *supra* note 204, at 17-18 (recognizing that society does not undertake to avoid accidents at all costs). Importantly, gun makers have not been forced to consider *any* of the costs of these accidents as courts have not held them to a reasonable standard of care in the distribution of their dangerous products.

212. Mark F. Grady, *Efficient Negligence*, 87 GEO. L.J. 397, 398 (1998).

213. See, e.g., Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 64 (1995) (positing that under a risk-utility analysis, guns could be treated with strict liability).

214. See generally Posner, *supra* note 211.

While some have criticized this theory,²¹⁵ its simplicity best demonstrates that much of the costs society currently undertakes to address gun violence are inefficient and should be reallocated. This theory of negligence, as explained by Judge Posner, is founded on the jurisprudence of Judge Learned Hand, specifically his decision in *United States v. Carroll Towing*:

Hand was adumbrating, perhaps unwittingly, an economic meaning of negligence. Discounting (multiplying) the cost of an accident if it occurs by the probability of occurrence yields a measure of the economic benefit to be anticipated from incurring the costs necessary to prevent the accident. The cost of prevention is what Hand meant by the burden of taking precautions against the accident If the cost of safety measures or of curtailment—whichever cost is lower—exceeds the benefit in accident avoidance to be gained by incurring that cost, society would be better off, in economic terms, to forgo accident prevention.²¹⁶

This theory, that businesses will implement precautions that are cheaper than the harm they cause, only works if the costs of harm are internalized by the cost-avoider – here, those who control the gun distribution network.

Judge Guido Calabresi has refined this “avoidance of cost” calculus and set forth three sub-goals of the reduction of accident costs:

1. “[r]eduction of the number and severity of accidents”;
2. “[r]educing societal costs resulting from accidents”;
3. reducing administration costs or reducing the costs associated with achieving the first two sub-goals.²¹⁷

215. See Daniel Q. Posner, *The Error of the Coase Theorem: Of Judges Hand and Posner and Carroll Towing*, 74 TUL. L. REV. 629 (1999) (arguing that the Posner theory of negligence fails as it is premised upon the Coase theorem, which in turn fails as it does not sufficiently account for transaction costs); Frank J. Vandall, *Judge Posner's Negligence-Efficiency Theory: A Critique*, 35 EMORY L. J. 383 (1986) (arguing that the Posner theory, based on Hand, fails to account for important values, especially in the personal injury realm).

216. Posner, *supra* note 211, at 32.

217. CALABRESI, *supra* note 204, at 26-28. The current allocation of costs of gun accidents to social service providers fails to further any of the three sub-goals. There is no reduction in the number of severity of accidents because gun makers are not held responsible for their role in the accidents and have no incentive to avoid the accidents. The societal costs are not reduced as a result and the administrative cost issue is moot, as neither of the other two sub-goals are achieved.

Without any common law or statutory duty imposed on gun makers to distribute their dangerous products in a safe manner, none of these sub-goals are met.²¹⁸

Calabresi recognized two primary methods for obtaining the three sub-goals: general deterrence or specific deterrence.²¹⁹ Imposing negligence liability on gun manufacturers would employ general deterrence to address the costs engendered by the underground gun market.²²⁰ Calabresi explains,

[t]he general deterrence approach treats accident costs as it does any other costs of goods and activities – such as the metal, or the time it takes, to make cars. If all activities reflect the accident costs they ‘cause,’ each individual will be able to choose for himself whether an activity is worth the accident costs it ‘causes.’²²¹

The individual’s choice will allow for the market to determine the acceptable accident level by forcing individuals to consider accident costs when choosing among activities.²²² By including accident costs in the cost of activities, general deterrence reduces accident costs in two ways: “[t]he first and more obvious one is that it creates incentives to engage in safer activities The second and perhaps more important way general deterrence reduces accident costs is that it encourages us to make activities safer.”²²³

The general deterrence method would force gun manufacturers to internalize the costs of gun violence caused by their negligence. As gun makers are not forced to pay the costs of their negligence, the gun market reflects an artificially low price.²²⁴ For example, a Lorcin L-25, “one of the guns most frequently traced to violent crime” in the United States,²²⁵ can be purchased at retail for sixty-nine dollars.²²⁶

218. *See id.*

219. *See id.* 68-69.

220. Although a specific deterrence approach, in the form of greater governmental regulation, would also affect cost reduction, the examination of such an approach is beyond the scope of this article. Instead, in the interest of simplicity, the reallocation of costs will be discussed only in the context of a general deterrence approach. *See id.* at 95-129 (examining at length the bases and methods for achieving specific deterrence).

221. *Id.* at 70.

222. *See id.* at 69.

223. *Id.* at 73.

224. *See generally* Richard C. Ausness, *Paying for the Health Costs of Smoking: Loss Shifting and Loss Bearing*, 27 SW. U. L. REV. 537 (1998) (examining the arguments for loss shifting in the tobacco arena and proposing a new loss allocation system).

225. Sharon Walsh, *The Cheapest Handgun Was Loaded with Profit*, WASH. POST, Aug. 26, 1999, at A1.

226. *See id.* This same gun costs only ten dollars to make, allowing Lorcin Engineering Company to reap huge profits. *See id.*

Its low price is one of the attributes that makes it so attractive to criminals; this artificially low price then engenders an artificially high demand, as the price of guns in no way reflects the dangers guns pose to society or the costs they generate.²²⁷ This artificially high demand then results in unnecessarily high levels of deaths, injuries, crimes, and costs incurred because of guns.²²⁸

By applying the "special relationship" requirement when allocating losses due to gun violence, the courts have failed to allocate to gun manufacturers any responsibility for negligent marketing.²²⁹ This has generated broad loss spreading by forcing the American public to foot the bill for much of the costs of the negligently supplied underground gun market.²³⁰ Unfortunately, this loss spreading has not lead to any reduction in these costs because it is borne entirely by people who have no ability to reduce those costs. Losses incurred as a result of the underground market should be placed on those who facilitate the harm, and who, in Calabresian terms, ought to achieve "primary accident cost avoidance."²³¹

Applying Calabresian cost avoidance theories to negligent distribution practices,²³² it is clear that allocating the costs of negligence to

227. See CALABRESI, *supra* note 204, at 70 (failure to internalize costs leads consumers to choose accident-prone activities).

228. See *id.*

229. See *McCarthy v. Olin Corp.* 119 F.3d 148, 57 (2d Cir. 1997); see also *Archer v. Arms Tech., Inc.*, No. 99-912658 NZ, slip op. at 5 (Mich. Cir. Ct. May 16, 2000) (upholding the requirement of a special relationship for manufacturer liability); *City of Cincinnati v. Beretta U.S.A. Corp.*, 1999 WL 809838, at *2 (Ohio Ct. C.P. Oct. 7, 1999) (imposing special relationship requirement in denying plaintiff relief), *aff'd*, 2000 WL 1133078 (Ohio Ct. App. Aug. 11, 2000).

230. See Gunderson, *supra* note 27, at 483 (estimating 1995 medical costs for firearm-related injuries at \$4 billion, with taxpayers bearing approximately 85% of these costs); Philip J. Cook et al., *The Medical Costs of Gunshot Injuries in the United States*, 282 JAMA 447, 453 (1999) (estimating that gunshot injuries in 1994 produced approximately \$2.3 billion in lifetime medical costs, of which \$1.1 billion will be paid by U.S. taxpayers).

231. See CALABRESI, *supra* note 204, at 68.

232. Judge Calabresi applied his economic efficiency theories in his dissent in *McCarthy v. Olin Corp.*, 119 F.3d 148, 157-75 (2d Cir. 1997), arguing in favor of certification of duty questions where the issue was one of first impression. See *id.* at 157. *McCarthy* was not a negligent distribution case, but sought to impose strict liability on the manufacturer of particularly destructive bullets, and the reasoning is therefore instructive. See *id.* at 154. The plaintiffs, family members of those injured or killed by the Long Island Railroad murderer, argued that the manufacturer of the "Black Talon" bullets used in the rampage should be strictly liable for damages caused by the marketing of an unreasonably dangerous product designed only to do excessive damage to its victims, more severe than that inflicted by ordinary bullets. See *id.* at 156. Unlike normal bullets, the Black Talon expands upon impact and blossoms into a claw-like flower, which rips apart the organs of its victims. See *id.* at 152. Although the majority found that the bullets were not "defective" and therefore strict liability was inapplicable, Judge Calabresi argued that so long as the

gun manufacturers will satisfy several goals of tort law, most importantly, the goal to reduce the amount of harm being suffered.

C. *The Precedential Justifications: Courts Have Already Moved Toward Replacing the "Special Relationship" Rule with a More Flexible Duty of Care*

Recognizing the problems created by the "special relationship" requirement, courts have already moved toward diminishing their role in defining the scope of duties under negligence law.²³³ They have done so in ways that differ in form but generally achieve the same ultimate result. Rather than depending on the application of rigid, traditional categorizations of relationships, the duty of care depends instead on a practical assessment of a number of relevant factors.²³⁴ In particular, the analysis focuses on the extent to which the defendant participated in creating the risk of harm, the extent to which the defendant could have foreseen the danger and injury, and the extent to which the defendant had the ability to eliminate or to minimize the risk.²³⁵ The trend away from the traditional "special relationship" analysis is apparent both across states in specific types of cases, and within several states across a broader range of cases.²³⁶

1. *If Danger is Foreseeable, a Duty Arises: "Key in the Ignition," Dram Shop, and Manufacturer Distribution Cases*

Numerous courts across the country have dispensed with the special relationship test when determining whether a defendant who leaves her keys in the ignition owes a duty to a plaintiff injured by the negligent driving of a third party who steals the car.²³⁷ Rather than asking whether the car owner had control over the thief or a protective relationship with the victim, these courts look to the foreseeability of the danger.²³⁸ According to this mode of analysis, a duty arises

benefits of the product are outweighed by its dangerous nature, courts can find the manufacturer strictly liable for the harms caused by the product. *See id.* at 174.

233. *See infra* notes 244-250 and accompanying text.

234. *See infra* notes 237-243.

235. *See infra* notes 240-243 and accompanying text.

236. *See infra* notes 277-310 and accompanying text.

237. *See infra* note 238 and accompanying text.

238. *See, e.g., Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P.2d 1252, 1257 (Utah 1996) (concluding that "because the theft of the car and its negligent operation may have been foreseeable," a car dealership owed a duty to plaintiffs hit by the driver of a stolen vehicle); *Bell v. Colonial Parking, Inc.*, 807 F. Supp. 796, 798 (D.D.C. 1992) (finding that a parking lot owes a duty "if an injury to a person resulting from the collision of a car previously stolen from one of defendant's parking lots was a reasonably foreseeable risk created by defendant's failure to prevent the theft of that car"); *Lavo v. Medlin*, 705 S.W.2d 562,

“where a defendant should reasonably anticipate that its conduct will create an unreasonably enhanced danger to one in the position of the injured plaintiff.”²³⁹ Elements factored into the foreseeability analysis include the general safety of the area,²⁴⁰ the length of time the car was left unattended,²⁴¹ and the type and size of the vehicle.²⁴² Each case must be examined on its own facts to determine whether the defendant had a duty in that specific instance to refrain from subjecting the plaintiff to a risk of harm.²⁴³

In applying a foreseeability test, courts have frankly acknowledged that practical considerations, not just abstract principles of legal theory, influence their conclusions: “The increase of casualties from traffic accidents is a matter of common knowledge and concern. The incidence of automobile thefts and damages and injuries resulting from such larcenous escapades has accordingly increased.”²⁴⁴

In one opinion, the court described in detail the policy justifications for its conclusions, describing a recent nationwide campaign to reduce auto theft and citing statistics indicating that the accident rate for stolen cars was approximately two hundred times the normal accident rate, twenty-four percent of stolen cars were involved in acci-

564 (Mo. Ct. App. 1986) (“If it is reasonably foreseeable that an automobile with keys left in the ignition would be stolen and negligently operated by a thief, then one would have a duty to protect third parties from this conduct.”); *Hergenrether v. East*, 393 P.2d 164, 167 (Cal. 1964) (“each case must be considered on its own facts to determine whether the joint effect of them in toto justifies the conclusion that the foreseeable risk of harm imposed is unreasonable”). See generally David H. Friedland, *Negligence: Car Owner Leaving Key in Vehicle has a Duty to Third Person Injured by Thief*, 12 UCLA L. REV. 1260, 1261 (1965); Rabin, *supra* note 103, at 440-41 (discussing “keys in the ignition” cases as generic example of enabling tort). Courts often impliedly recognize a duty and analyze foreseeability as an element of proximate cause. See, e.g., *Vining v. Avis Rent-A-Car Sys., Inc.*, 354 So. 2d 54, 55-56 (Fla. 1977); *Kiste v. Red Cab, Inc.*, 106 N.E.2d 395, 398 (Ind. Ct. App. 1952).

239. *Cruz*, 909 P.2d at 1255.

240. See, e.g., *Vining*, 354 So. 2d at 56 (rental car lot at airport in high-crime area); *Kiste*, 106 N.E.2d at 395 (taxicab left on dangerous public street).

241. See, e.g., *Palma v. U.S. Indus. Fasteners, Inc.*, 681 P.2d 893, 902 (Cal. 1984) (truck left overnight, unlocked, on a lot adjacent to the street, in an industrial city with a transient population and a high crime rate); *Hergenrether*, 393 P.2d at 167 (two-ton truck left overnight in area populated by drunks).

242. See, e.g., *Richardson v. Ham*, 285 P.2d 269, 271 (Cal. 1955) (bulldozer); *Bicknell v. Lloyd*, 635 S.W.2d 150, 152 (Tex. Ct. App. 1982) (three-wheeled electric cart that posed a “continuing temptation to children”). These foreseeability factors are sometimes called “special” or “unusual” circumstances. See *Cruz*, 909 P.2d at 1255; Rabin, *supra* note 103, at 440.

243. See *Cruz*, 909 P.2d at 1255; *Kacena v. George W. Bowers Co.*, 211 N.E.2d 563, 568 (Ill. App. Ct. 1965).

244. *Colonial Parking v. Morley*, 391 F.2d 989, 991 (D.C. Cir. 1968) (quoting *Ney v. Yellow Cab Co.*, 117 N.E.2d 74, 79 (Ill. 1954)); see also *Ross v. Hartman*, 139 F.2d 14, 15 (“Everyone knows that children and thieves frequently cause harm by tampering with unlocked cars.”).

dents, eighty-five percent of car thieves in the area did not have drivers licenses, and nearly sixty percent of car thefts resulted from motorist neglect, such as leaving keys in the ignition.²⁴⁵

In addition, courts have noted that their decisions reflect the fundamental underlying concerns of negligence law.²⁴⁶ Decisions finding a duty to use care when leaving a vehicle unattended impose the costs of accidents on the people best situated to avoid or to minimize the costs.²⁴⁷ Recognizing that defendants owe a duty of care despite the absence of a special relationship "puts the burden of the risk, as far as may be, upon those who create it" and thereby "tends to make the streets safer" by deterring highly hazardous conduct and preventing harm that can be easily avoided.²⁴⁸ To the extent costs cannot be avoided, tort law favors shifting them to the person best able to spread them.²⁴⁹ Imposing a duty serves the purpose of "shifting the loss from the injured victim and his creditors to the vehicle operator who, in turn, if he chooses, may procure insurance."²⁵⁰

Similar considerations have led courts to adopt a foreseeability test in dram shop liability cases. As with "key in the ignition" cases, courts have held that bar owners owe a duty of care to third parties injured by intoxicated customers if the risk of danger is foreseeable.²⁵¹ In finding such a duty, courts are simply applying "the general duty to exercise reasonable care to avoid foreseeable injury to others."²⁵² Although at earlier common law, purveyors of alcohol were immune

245. *See* Gaither v. Myers, 404 F.2d 216, 222-23 (D.C. Cir. 1968).

246. *See, e.g., id.* at 222; *Ross*, 139 F.2d at 15 (discussing the policy concerns and purpose of negligence statutes).

247. *See supra* notes 237-245 and accompanying text.

248. *Ross*, 139 F.2d at 16.

249. *See, e.g., Ausness, supra* note 224, at 550-51 ("In the case of product-related injuries, it's assumed that producers are generally in a better position to spread than consumers . . . because producers generally sell their products to a mass market, the incremental cost to each customer of compensating accident victims is likely to be quite small.").

250. *Gaither*, 404 F.2d at 223.

251. *See, e.g., Buchanan v. Merger Enters., Inc.*, 463 So. 2d 121 (Ala. 1984); *Largo Corp. v. Crespin*, 727 P.2d 1098 (Colo. 1986); *Klingerman v. Sol Corp.*, 505 A.2d 474 (Me. 1986); *Young v. Caravan Corp.*, 663 P.2d 834 (Wash. 1984). *See generally* *El Chico Corp. of Maine v. Poole*, 732 S.W.2d 306, 310 n.1 (Tex. 1987) (listing the twenty-nine states that recognize a common law cause of action against an alcoholic beverage licensee for injuries caused by an intoxicated customer). In addition to those states that recognize a common law cause of action, numerous states have enacted civil dram shop liability statutes. *See, e.g.,* 235 ILL. COMP. STAT. ANN. 5/6-21 (West 1993) (imposing strict liability on licensed purveyors of alcohol); *see also Poole*, 732 S.W.2d at 310 n.2 (listing the nineteen state legislatures who have enacted such laws).

252. *Poole*, 732 S.W.2d at 311.

from liability for the acts of their drunken customers,²⁵³ in recent years courts have recognized that the devastation wrought by drunk driving is tragically predictable and eminently avoidable.²⁵⁴ In the words of Judge Spears of the Supreme Court of Texas, “[t]he risk and likelihood of injury from serving alcohol to an intoxicated person whom the licensee knows will probably drive a car is as readily foreseen as injury resulting from setting loose a live rattlesnake in a shopping mall.”²⁵⁵

The same and more could be said of the risk and likelihood of injury from distributing guns in a manner that the manufacturer knows will likely result in sales to straw purchasers, criminals, and children. The practical considerations and policy concerns that have led these courts to impose liability on a car owner who leaves her keys in the ignition and a dram shop that serves intoxicated patrons if danger is foreseeable, apply even more strongly in the case of gun makers.²⁵⁶ In determining whether gun manufacturers and dealers owe a duty, courts should fashion a foreseeability of danger test that would recognize the affirmative role that gun manufacturers and dealers play in facilitating gun violence while at the same time imposing liability where it would serve the deterrent purposes of tort law.

A third example of this general movement toward eliminating arbitrary and unfair results generated by rigid application of the special relationship requirement has been the recognition that manufacturers should be required to exercise reasonable care in distributing their products.²⁵⁷ If injured plaintiffs were required to show a traditional special relationship, manufacturers would virtually never be liable for negligent distribution resulting in purchasers using a product to harm others. Since manufacturers usually distribute through wholesale and retail intermediaries, they generally do not have a direct relationship with purchasers and users of their products. Manufacturers also do not have a traditional special relationship with those harmed by their products. An unduly narrow interpretation and ap-

253. See Joel E. Smith, Annotation, *Common-Law Right of Action for Damage Sustained by Plaintiff in Consequence of Sale or Gift of Intoxicating Liquor or Habit-Forming Drug to Another*, 97 A.L.R.3d 528 (1980) (containing an overview of the law in this area).

254. See *Poole*, 732 S.W.2d at 310.

255. *Id.* at 311. *Poole* has since been refined by statute. See TEX. ALCO. BEV. CODE ANN. § 2.02 (West 1995) (requiring that “at the time the provision occurred it [be] apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others”).

256. See *supra* notes 237-255 and accompanying text.

257. See RESTATEMENT, *supra* note 65, § 395, cmt. b.

plication of the special relationship rule would therefore create a substantial exemption from liability for this type of negligence. Recognizing this, some courts have held that manufacturers can be liable for harm resulting from their negligent distribution of products.²⁵⁸

For example, in *Suchomajcz v. Hummel Chemical Co.*,²⁵⁹ the Third Circuit held that a manufacturer could be liable for negligence under Pennsylvania law for negligently selling chemicals to a company that the manufacturer knew or should have known would use the chemicals to make and sell firecracker assembly kits in violation of federal law and several federal injunctions.²⁶⁰ A child purchased a kit and left a portion of it in a bottle in a park.²⁶¹ Someone threw a match into the bottle and it exploded, killing two children and injuring four others.²⁶² Despite the lack of a traditional special relationship between the chemical manufacturer and the kit purchaser or any of the other children involved, the court held that Pennsylvania negligence law imposes a duty upon a manufacturer for harm caused by foreseeable misuse of its product.²⁶³

In another case involving products hazardous to children, the Supreme Court of Michigan held that "a manufacturer, wholesaler, and retailer of a manufactured product owe a legal obligation of due care to a bystander affected by use of the product."²⁶⁴ The case, *Moning v. Alfonso*, involved a twelve-year old plaintiff shot in the eye with a slingshot purchased by his eleven-year old playmate.²⁶⁵ The court emphasized that "[t]he issue in the instant case is not whether slingshots should be manufactured, but the narrower question of whether marketing slingshots directly to children creates an unreasonable risk of harm."²⁶⁶ Relying in part on empirical evidence about the frequency of injuries to children from the use of slingshots, the court held that the manufacturer and wholesaler, as well as the retailer who directly sold the product to the consumer who misused it, could be liable under negligence law.²⁶⁷

258. See, e.g., *Larsen v. General Motors Corp.*, 391 F.2d 495, 496 (8th Cir. 1968); *Pouncey v. Ford Motor Co.*, 464 F.2d 957, 960 (5th Cir. 1972); *Micallef v. Miehle Co.*, 384 N.Y.S.2d 115, 118 (1976).

259. 524 F.2d 19 (3d Cir. 1975).

260. See *id.* at 22.

261. See *id.*

262. See *id.*

263. See *id.* at 25.

264. *Moning v. Alfonso*, 254 N.W.2d 759, 763 (Mich. 1977).

265. See *id.*

266. *Id.* at 771.

267. See *id.* at 771-72 n.30.

The U.S. Court of Appeals for the Eleventh Circuit reached the same conclusion in *Hunnings v. Texaco, Inc.*,²⁶⁸ where plaintiffs' son died after drinking mineral spirits that were packaged in a used milk container by a retail hardware store.²⁶⁹ The defendant manufacturers sold the mineral spirits to distributors in bulk, delivering the product to the distributors' holding tanks, and did not provide packaging for retail sale.²⁷⁰ The distributors sold the mineral spirits in fifty-five gallon drums to hardware stores, which illegally packaged them in the milk containers.²⁷¹

The court held that the plaintiffs stated a claim for negligent marketing under Florida law by alleging that the manufacturers "knew or should have known that it is a customary practice to sell mineral spirits at the retail level in used milk containers without adequate warning of their contents."²⁷² While the manufacturers argued that they could avoid liability on the ground that they had no direct relationship with retail sellers or purchasers, the court disagreed, stating that "manufacturers do not enjoy blanket protection from liability simply because others in the chain of distribution may repackage or reformulate the product before it reaches the ultimate consumer."²⁷³ Plaintiffs alleged that the manufacturers could exercise control over the distribution of their products and prevent or minimize this risk of harm, such as by issuing warnings, instructing distributors and retailers to discontinue the hazardous packaging practices, or curtailing business with distributors known to distribute the product to errant retailers.²⁷⁴

These courts found that manufacturers could be liable for negligent distribution and marketing, even where a third party misused the product to cause harm to the plaintiff, despite the absence of a traditional special relationship between the manufacturer and the product user or injured person.²⁷⁵ Although the manufacturers tried to characterize the claims asserted as requiring them to police retail sellers and users and to provide protection against third parties' misuse of the products, the courts did not impose special relationship requirements.²⁷⁶

268. 29 F.3d 1480 (11th Cir. 1994).

269. *See id.* at 1480.

270. *See id.* at 1482-83.

271. *See id.*

272. *Id.* at 1483.

273. *Id.* at 1485.

274. *See id.* at 1487.

275. *See id.* at 1487. *See also* *Moning v. Alfonso*, 254 N.W.2d 759, 766 (Mich. 1977).

276. *See Hunnings*, 29 F.3d at 1485. *See also Moning*, 254 N.W.2d at 766.

Courts should recognize that the duty of manufacturers of dangerous products transcends the "special relationship" limitation and requires a duty to responsibly distribute such products. Especially in the case of guns, where the products are sought after by criminals and those prohibited from possessing them, the duty should extend to all those foreseeably affected by such products. This duty will further the interest of tort law and the public's interest in preventing gun violence.

2. *District of Columbia Approach: Eliminating the Special Relationship Requirement Where Justified by Public Policy Concerns*

Several jurisdictions have moved further to eliminate the special relationship requirement across a broad range of cases.²⁷⁷ For example, the District of Columbia's courts no longer require a special relationship for a duty of care to exist, even in cases where the defendant's misconduct could be characterized as failure to protect plaintiff from injury inflicted by a third party.²⁷⁸ Where a defendant creates a risk, can foresee the harm that might result, and has the ability to eliminate or reduce that risk, the District's courts have properly recognized that a duty of care should be imposed regardless of the presence or absence of special relationships.²⁷⁹

The earliest decisions of this kind under District law dealt with keys in the ignition.²⁸⁰ Courts addressing negligence claims under District law ruled that in certain circumstances leaving a key in the ignition of an unsecured car "might be both negligence and a legal or 'proximate' cause of a resulting accident."²⁸¹ The existence of a duty depends upon foreseeability, not a special relationship.²⁸²

The same considerations led courts applying the District's negligence law to hold that landlords of multiple-tenant buildings have a duty to exercise reasonable care to protect tenants from a criminal attack by a third person, even though landlord-tenant is not one of the special relationships giving rise to such a duty under common-law

277. See, e.g., *King v. Nat'l Spa & Pool Inst., Inc.*, 570 So. 2d 612, 617 (Ala. 1990); *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 974 (Ind. 1999).

278. See *East Penn Mfg. Co. v. Pineda*, 578 A.2d 1113, 1127 (D.C. 1990).

279. See *id.* at 1119.

280. See, e.g., *Gaither v. Myers*, 404 F.2d 216, 221 (D.C. Cir. 1968); *Colonial Parking, Inc. v. Morley*, 391 F.2d 989, 990-91 (D.C. Cir. 1967); *Schaff v. R.W. Claxton, Inc.*, 144 F.2d 532, 532-33 (D.C. Cir. 1944); *Bell v. Colonial Parking, Inc.*, 807 F. Supp. 796, 798 (D.C. Cir. 1992).

281. *Ross v. Hartman*, 139 F.2d 14, 15 (D.C. Cir. 1943).

282. See *Bell*, 807 F. Supp. at 798.

precedent.²⁸³ The traditional rule that a landlord has no duty to protect a tenant from a criminal act by a third party developed at a time when leases generally involved farm land rented for long periods of time with the landlord retaining little or no oversight of the property; “the rationale of this very broad general rule falters when it is applied to the conditions of modern day urban apartment living.”²⁸⁴ As in the key-in-the-ignition case, the District’s courts emphasized that a duty should exist where the defendant can anticipate harm and is in a position to prevent or minimize it:

And where, as here, the landlord has notice of repeated criminal assaults and robberies, has notice that these crimes occurred in the portion of the premises exclusively within his control, has every reason to expect like crimes to happen again, and has the exclusive power to take preventive action, it does not seem unfair to place upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants.²⁸⁵

Above all else, these decisions reflect a practical recognition that liability had to be imposed on landlords, regardless of how the law defined the scope of tort duties long ago, because landlords are the only ones able to prevent the injuries at issue.²⁸⁶ There are measures to increase safety that landlords can take but tenants cannot,²⁸⁷ just as there are steps that gun manufacturers can take to control distribution of their products and to reduce their violent use. The landlords claimed, as the gun makers argue now, that crime prevention is solely the responsibility of government, but “in the fight against crime the police are not expected to do it all; every segment of society has obligations to aid in law enforcement and to minimize the opportunities for crime.”²⁸⁸ Manufacturers are no exception.²⁸⁹

283. See *Kline v. 1500 Mass. Ave. Apt. Corp.*, 439 F.2d 477, 480-87 (D.C. Cir. 1970); *Ramsay v. Morrissette*, 252 A.2d 509, 512-13 (D.C. 1969).

284. *Kline*, 439 F.2d at 481.

285. *Id.*; see also *id.* at 483 (“As between tenant and landlord, the landlord is the only one in the position to take the necessary acts of protection required. He is not an insurer, but he is obligated to minimize the risk to his tenants.”).

286. See *id.* at 480.

287. See *id.*

288. *Id.* at 483.

289. See *id.* (noting that individuals can be held liable for leaving keys in the ignition of a car, but that “[i]n addition, auto manufacturers are persuaded to install special locking devices and buzzer alarms”).

3. *Massachusetts Approach: Rethinking the Meaning of a Special Relationship*

Massachusetts courts have moved in the same direction as the D.C. courts, but they have done so in a different manner. Rather than identifying specific contexts in which a special relationship should not be required, Massachusetts courts have changed the way in which they determine what constitutes a special relationship.²⁹⁰ They make this determination by applying the same type of careful analysis that determines the existence and scope of any negligence duty, instead of looking to traditional legal categorizations and characterizations of relationships.²⁹¹ This analysis takes into account all circumstances and changes with the "evolving expectations" of society; the "most crucial factor" is whether the defendant "reasonably could foresee that he would be expected" to protect the plaintiff and "could anticipate harm from the failure to do so."²⁹²

Applying this more flexible approach to determining what constitutes a special relationship, Massachusetts courts have reached conclusions matching those of the District of Columbia courts. For example, in *Poskus v. Lombardo's of Randolph, Inc.*,²⁹³ the Supreme Judicial Court of Massachusetts held that a person who negligently makes the theft of a car possible can be held liable for the thief's negligent operation of the stolen vehicle.²⁹⁴ In *Whittaker v. Saraceno*,²⁹⁵ the court held that a commercial landlord "does not have a special relationship with tenants" yet has a duty to guard against reasonably foreseeable crime risks.²⁹⁶

Moreover, Massachusetts courts have extended this reasoning to the context of liability for distribution of products. They have established that one who negligently makes a product available to those prohibited by law from obtaining it can be held liable for the foreseeable resulting harm.²⁹⁷ Sales to prohibited purchasers "set in motion the very harm which the Legislature has attempted to prevent" and therefore all who distribute these products "must exercise the care of a reasonably prudent person" in order to avoid circumvention of the

290. See *Irwin v. Town of Ware*, 467 N.E.2d 1292, 1300 (Mass. 1984).

291. See *id.* at 1300, 1303.

292. *Id.*

293. 670 N.E.2d 383 (Mass. 1996).

294. *Id.* at 385.

295. 635 N.E.2d 1185 (Mass. 1994).

296. *Id.* at 1187.

297. See *Tobin v. Norwood Country Club, Inc.*, 661 N.E.2d 627, 632 (Mass. 1996) (alcohol); *Michnik-Zilberman v. Gordon's Liquor, Inc.*, 453 N.E.2d 430, 431-33 (Mass. 1983) (alcohol); *Pudlo v. Dubiel*, 173 N.E. 536, 536-37 (Mass. 1930) (ammunition).

statutes and frustration of the legislature's effort to protect the public.²⁹⁸ Massachusetts courts have recognized that this tort duty is particularly vital because businesses otherwise have a financial incentive to circumvent the restrictions on their sales.²⁹⁹

While most of these cases have involved defendants at the retail level of distribution, the courts' decisions have established principles that should apply even to those who indirectly supply the product to the prohibited purchaser. The duty is triggered if the defendant knew or reasonably should have known that its actions enabled prohibited purchasers to obtain the product, and that requirement can be satisfied by a manufacturer or wholesale distributor.³⁰⁰ A contrary rule would permit anyone to profit from sales to prohibited purchasers merely by selling through intermediaries. Moreover, the Massachusetts courts have indicated that it is immaterial that the defendant is not in a position to know exactly which of its products go to prohibited purchasers, if it knows or should know that many do.³⁰¹

For example, the Supreme Judicial Court has held that, by analogy to alcohol distribution cases, a movie studio "owed a duty of reasonable care to members of the public . . . with respect to the producing, exhibiting, and advertising of movies," even though there was no direct interaction between the studio and moviegoers.³⁰² While the Supreme Judicial Court declined in one case to find that an alcohol manufacturer owed a duty of care to a person injured by a drunk driver, the allegations and claims in that case did not suggest any manner in which the manufacturer had the ability to prevent or reduce the risk of harm through its control over distribution of its product.³⁰³ When the evidence establishes a defendant manufacturer's creation of a risk of harm and its ability to prevent or to reduce it by its control over distribution, the principles of Massachusetts negligence law dictate that a duty exists.³⁰⁴

298. *Michnik-Zilberman*, 453 N.E.2d at 433; see also *Adamian v. Three Sons, Inc.*, 233 N.E.2d 18, 19 (Mass. 1968) ("[t]he legislative policy, being clear, is not to be rendered futile of practical accomplishment").

299. See *Tobin*, 661 N.E.2d at 634, 636.

300. See *id.* at 632-33 (rejecting the argument that defendant can be held liable only for "an actual 'hand to hand' transaction or its equivalent").

301. See *id.* at 635 (no need to prove defendant "knew or had reason to know that any particular drink was reaching a particular minor").

302. *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989).

303. See *O'Sullivan v. Hemisphere Broad. Corp.*, 520 N.E.2d 1301, 1302-03 (Mass. 1988).

304. See *supra* notes 297-301 and accompanying text.

4. *New Jersey Approach: Making Special Relationships Merely One Factor Among Many in Defining the Scope of Duties of Care*

New Jersey courts have approached the problem in their own way, but they have also prevented a special relationship requirement from eliminating duties of care when they should be recognized. Like courts elsewhere in the country, New Jersey courts have made clear that no special relationship is required where the defendants' misfeasance creates or unreasonably enhances a danger to plaintiff, regardless of the presence of a special relationship.³⁰⁵ For example, while holding that a landlord and tenant do not have a special relationship requiring the landlord to protect the tenant from a criminal act of a third person, New Jersey courts have established that a landlord can be held liable for undertaking an affirmative act that unreasonably enhances a foreseeable risk.³⁰⁶

New Jersey courts have moved away from the traditional special relationship rule even in cases where the plaintiff claims that defendant had a duty to protect plaintiff from a danger that defendant did not create or enhance. The Supreme Court of New Jersey has indicated that the presence of a "special relationship" should be only one factor among many that New Jersey courts can consider in defining duties under negligence law, not an absolute requirement.³⁰⁷ The concept of duty under negligence law should not be "a rigid formalism according to the standards of a simpler society, immune to the equally compelling needs of the present order."³⁰⁸ While courts "traditionally" imposed a duty to protect only on "selected individuals based on their status," New Jersey courts have favored "a broadening application of a general tort obligation to exercise reasonable care against foreseeable harm to others."³⁰⁹ New Jersey courts thus determine whether a duty to protect exists by looking to essentially the

305. See, e.g., *Poole v. Janeski*, 611 A.2d 169, 170 (N.J. Super. Ct. Law Div. 1992) (duty exists when a "person's conduct has created a perilous situation"); *Lombardo v. Hoag*, 566 A.2d 1185, 1187 (N.J. Super. Ct. Law Div. 1989) (duty exists where "a person by his prior conduct has created a situation of peril to another"), *overruled*, 634 A.2d 550 (N.J. Super. Ct. App. Div. 1993), *cert. denied*, 640 A.2d 850 (N.J. 1994).

306. See *Williams v. Gorman*, 520 A.2d 761, 763 (N.J. Super. Ct. App. Div. 1986); *Trentacost v. Brussel*, 412 A.2d 436, 440 (N.J. 1980); *Braitman v. Overlook Terrace Corp.*, 346 A.2d 76, 80 (N.J. 1975).

307. See *Snyder v. Am. Ass'n of Blood Banks*, 676 A.2d 1036, 1048 (N.J. 1996) (explaining that the absence of a special relationship "is not dispositive" of duty determination); *Atamian v. Supermarkets Gen. Corp.*, 369 A.2d 38, 43 (N.J. Super. Ct. Law Div. 1976) (stating that New Jersey law rejects the "restrictive" approach requiring "one of the traditional special relationships").

308. *Wytupeck v. City of Camden*, 136 A.2d 887, 894 (N.J. 1957).

309. *Butler v. Acme Markets, Inc.*, 445 A.2d 1141, 1143 (N.J. 1982).

same factors that determine the existence of any duty under negligence law – foreseeability, the nature of the risk, the opportunity to exercise care, and the interests of the public.³¹⁰

CONCLUSION

Gun manufacturers should be held liable for the foreseeable consequences of negligently distributing guns. They engage in affirmative acts that create severe risks of harm, and in doing so they commit misfeasance, for which negligence law has never required a “special relationship” for a duty of care to be imposed.³¹¹ The manufacturers’ negligent conduct cannot properly be characterized as mere nonfeasance for which liability would depend on the existence of a “special relationship” between gun makers and the victims or perpetrators of gun violence.³¹² Misguided decisions viewing gun manufacturers’ distribution practices as mere nonfeasance could be avoided by a better means of analyzing duty issues in negligence cases. Courts should recognize that there is a spectrum between misfeasance and nonfeasance, rather than a strict dichotomy, and that the location of a defendant’s negligent conduct on that spectrum should be an important factor in defining the existence and scope of a defendant’s duty of care, but not a factor that controls the duty issue without regard to any other factors or circumstances. Courts have already begun to move away from the most rigid version of the “special relationship” rule.³¹³ The time has arrived for complete retirement of that means of analyzing duty issues.

310. See *J.S. v. R. T. H.*, 714 A.2d 330, 338 (N.J. 1998); *Kuzmicz v. Ivy Hill Park Apts., Inc.*, 688 A.2d 1018, 1020 (N.J. 1997).

311. See *supra* notes 57-58 and accompanying text.

312. See *supra* notes 160-174 and accompanying text.

313. See *supra* notes 277-310 and accompanying text.