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Deborah Robinson

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POINT BLANK: PRODUCT LIABILITY LAW TAKES AIM AT GUNS

DEBORAH ROBINSON, J.D.*

INTRODUCTION

Life in our dot com world has become perilous: the pills we take to cure one malady seem to cause problems elsewhere; automobile air bags may break bones; in the cruelest betrayal of all, the lawyer's best friend, the cell phone, now shows promise as a carcinogen. The technology we crave and in which we invest with abandon opens new vistas but often leaves us with lingering suspicion: what *will* happen to our eyes twenty years after our laser surgery?

As a culture, we are fascinated with things. To a large extent, the modern law of product liability reflects that fascination. Product liability law has developed a set of rules by which to assess the value of things to society and ultimately assign responsibility for the harm caused by the objects.¹ Ironically, as this area of the law ostensibly moves increasingly in the direction of imposing liability that is truly "strict"—that is, liability without fault—the gun, much in the news, often vilified, may well prove to be the most non-defective product ever made.

There is no question that violence involving guns is an American societal problem of epidemic proportion. Other papers in this issue will plumb the depths of gun violence statistics. The purpose of this paper is not to advocate for or argue against the existence of guns in society, nor to advocate for or argue against more statutes and regulations regarding guns. The purpose of this paper is to demonstrate that the law of products liability does not provide a sound basis for the imposition of liability against manufacturers of well-made,² non-defective guns.

* Partner, Robinson Woolson, P.A.; Adjunct Faculty, University of Maryland, School of Law.

1. See RESTATEMENT (THIRD) OF TORTS §2 (1998).

2. Excluded from this discussion are cases of obvious product defect, such as those in which a gun misfires or malfunctions. In those instances "there may be recovery, in appropriate circumstances, under settled principles of products liability law." *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1143, n.2 (Md. 1985); *see also*, *Scronce v. Howard Bros. Discount Stores, Inc.*, 679 F.2d 1204, 1205 (5th Cir. 1982) (plaintiff alleged rifle "exploded" at shooting range).

I. LITIGATION AGAINST GUN MANUFACTURERS

Beginning in at least the 1980s, people who had been injured by gunshots, and as often their survivors, filed civil lawsuits against gun manufacturers³ seeking to hold them liable under various theories. The typical context in which these suits have arisen either involves an innocent person who has been shot during the commission of a crime, or a child shot while exploring a gun found in the home or during play with another child.⁴ These lawsuits have nearly universally ended in verdicts for the defendants.⁵ Undaunted by their stunning lack of success in the civil courts, would-be gun plaintiffs have shifted theories of recovery in an attempt to find one that would stick to the manufacturers. A review of these cases follows.

A number of early suits involving firearms alleged that gun and ammunition manufacturers were liable in ordinary negligence merely for making and selling their products. These plaintiffs postulated that the manufacture and sale of firearms to the general public created an unreasonable risk of harm, and that injury caused by these weapons was thus legally compensable.⁶ Holding that manufacturers owe no duty to refrain from making and selling non-defective, legally-made

3. Suits have also been initiated against manufacturers of ammunition. *See, e.g.*, *McCarthy v. Sturm, Ruger & Co., Inc.*, 916 F. Supp. 366 (S.D.N.Y. 1996), *aff'd sub nom*; *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997) (suit filed against manufacturer of hollow-point "Black Talon" bullets used in shooting spree on passenger train).

4. *See, e.g.*, *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532 (11th Cir. 1986); *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326 (9th Cir. 1986); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984); *Wasylow v. Glock, Inc.*, 975 F. Supp. 370 (D. Mass. 1996); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771 (D.N.M. 1987), *aff'd*, 843 F.2d 406 (10th Cir. 1988); *Patterson v. Gesellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985); *Mavilia v. Stoeger Indus.*, 574 F. Supp. 107 (D. Mass. 1983); *DeRosa v. Remington Arms Co.*, 509 F. Supp. 762 (E.D.N.Y. 1981); *Bennet v. Cincinnati Checker Cab Co., Inc.*, 353 F. Supp. 1206 (E.D. Ky. 1973); *Delahanty v. Hinckley*, 686 F. Supp. 920 (D.D.C. 1986), *aff'd*, 900 F.2d 368 (D.C. Cir. 1990); *Trespalacios v. Valor Corp.*, 486 So. 2d 649 (Fla. Dist. Ct. App. 1986); *Rhodes v. R.G. Indus., Inc.*, 325 S.E.2d 465 (Ga. Ct. App. 1984); *Riordan v. Int'l Armament Corp.*, 477 N.E.2d 1293 (Ill. App. Ct. 1985); *Linton v. Smith & Wesson Corp.*, 469 N.E.2d 339 (Ill. App. 3d 1984); *Addison v. Williams*, 546 So. 2d 220 (La. App. 1989); *Resteiner v. Sturm, Ruger & Co.*, 566 N.W.2d 53 (Mich. App. 1997); *King v. R.G. Indus., Inc.*, 451 N.W.2d 874 (Mich. App. 1990); *Robinson v. Howard Bros. of Jackson, Inc.*, 372 So. 2d 1074 (Miss. 1979); *Richardson v. Holland*, 741 S.W.2d 751 (Mo. App. 1987); *Burkett v. Freedom Arms, Inc.*, 704 P.2d 118 (Or. 1985); *Diggles v. Horwitz*, 765 S.W.2d 839 (Tex. App. Beaumont 1989); *Robertson v. Grogan Inv. Co.*, 710 S.W.2d 678 (Tex. App. Dallas 1986); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661 (Wash. App. 1988).

5. *See supra* note 4.

6. *See* *Adkison v. Rossi Arms Co.*, 659 P.2d 1236 (Alaska 1983); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771 (D.N.M. 1987); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661 (Wash. 1988); *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 477 N.E.2d 1293 (Ill. 1995); *Forni v. Ferguson*, 648 N.Y.S.2d 73 (N.Y. App. Div. 1996); *McCarthy v. Sturm, Ruger and Co.*, 916

products to the general public, the courts have easily dispensed with these negligence actions.⁷

Plaintiffs in civil actions against gun manufacturers have alternatively claimed that the manufacturers should be held strictly liable under RESTATEMENT (SECOND) OF TORTS, section 402A⁸ for the injuries caused by their weapons. These plaintiffs have primarily asserted design defect claims—that is, that even a properly-functioning gun may subject its maker to liability if it fails to incorporate “enough safety” into its design to have prevented the injury that occurred to the plaintiff.⁹ A great debate then ensued over what theoretical “test” of product defectiveness should be applied to guns. Two principal tests of product defect have evolved in the law to assess whether a product subjects its maker to strict liability: the consumer expectations test and the risk-utility test.¹⁰

The consumer expectations test of strict liability, established in section 402A of the RESTATEMENT (SECOND) OF TORTS, provides that a product is defective and unreasonably dangerous, subjecting its maker to liability, if the product is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who

F. Supp. 366 (S.D.N.Y. 1996); *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997); *Resteiner v. Sturm, Ruger & Co.*, 566 N.W.2d 53 (Mich. 1997).

7. See, e.g., *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1326 (9th Cir. 1986); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771 (D.N.M. 1987); *Adkison v. Rossi Arms Co.*, 659 P.2d 1236 (Alaska 1983); *First Commercial Trust Co. v. Lorcin Eng'g Inc.*, 900 S.W.2d 202 (Ark. 1995); *Delahanty v. Hinckley*, 564 A.2d 758 (D.D.C. 1989), *aff'd*, 900 F.2d 368 (D.C. Cir. 1990); *Trespalacios v. Valor Corp.*, 486 So. 2d 649 (Fla. 1986); *Riordan v. Int'l Armament Corp.*, 477 N.E.2d 1293 (Ill. 1985); *Linton v. Smith & Wesson*, 469 N.E.2d 339 (Ill. 1984); *Resteiner v. Sturm, Ruger & Co.*, 566 N.W.2d 53 (Mich. 1997); *Forni v. Ferguson*, 648 N.Y.S.2d 73 (N.Y. App. Div. 1996); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661 (Wash. 1988).

8. Section 402A provides that:

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

RESTATEMENT (SECOND) OF TORTS § 402A (Main Vol. 1963-1964).

9. The primary focus of a design defect claim usually involves the absence of safety locks, trigger locks, or other technology to reduce the possibility of an adult other than the owner being able to fire the gun, and claims regarding the easy concealability of the weapon, making it more likely to be used in the commission of a crime. See, e.g., Stephen P. Teret & Garen J. Wintemute, *Handgun Injuries: The Epidemiological Evidence for Assessing Legal Responsibility*, 6 *HAMLIN L. REV.* 341, 347-48 (1983).

10. See DAVID G. OWEN ET AL., *PRODUCTS LIABILITY AND SAFETY* 190 (3d ed. 1996).

purchases it, with the ordinary knowledge common to the community as to its characteristics."¹¹ The problems for plaintiffs inherent in this test as applied to guns are obvious: the ordinary consumer who purchases a gun expects it to shoot with deadly force, and if the gun indeed shoots with deadly force, the consumer's expectations are not frustrated; they are perfectly met.

Such an analysis was set forth with blinding logic by the Court of Appeals of Maryland in *Kelley v. R.G. Industries, Inc.*¹² There, the court reasoned:

[f]or a seller to be liable under section 402A, the product must be both in a "defective condition" and "unreasonably dangerous" at the time that it is placed on the market by the seller. Both of these conditions are explained in the official comments in terms of consumer expectations. As Comment g explains, the requirement of a defective condition limits application of section 402A to those situations where "the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." An "unreasonably dangerous product is defined in Comment i as one which is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

A handgun manufacturer or marketer could not be held liable under this theory. Contrary to [the plaintiff's] argument, a handgun is not defective merely because it is capable of being used during criminal activity to inflict harm. A consumer would expect a handgun to be dangerous, by its very nature, and to have the capacity to fire a bullet with deadly force. [The plaintiff] confuses a product's *normal function*, which may very well be dangerous, with a defect in a product's design or construction For the handgun to be defective, there would have to be a problem in its manufacture or design, such as a weak or improperly placed part, that would cause it to fire unexpectedly or otherwise malfunction.¹³

11. RESTATEMENT (SECOND) OF TORTS § 402A cmt i. (Main Vol. 1963-1964). Comment g to § 402A defines a defective condition as one "not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."

12. 497 A.2d 1143 (Md. 1985). See also *infra* note 61 and accompanying text.

13. *Id.* at 1148 (quoting *Phipps v. Gen. Motors Corp.*, 363 A.2d 955 (Md. 1976) (emphasis in original)); see also *Riordan v. Int'l Armament Corp.*, 477 N.E.2d 1293, 1298-99 (Ill.

The consumer expectations test affording no relief to plaintiffs seeking to hold gun manufacturers strictly liable, some plaintiffs then turned to the risk-utility test, first articulated by a court in *Barker v. Lull Engineering Co., Inc.*¹⁴ There, the California Supreme Court established that a product is defective in design "if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove . . . that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design."¹⁵

Plaintiffs felt that the risk-utility test paved a clear road to victory for them in litigation against gun manufacturers. Simply put, they felt that the "utility" side of the balancing equation was virtually nil and the "risk" side insurmountable.¹⁶ A leading proponent of this view, Professor Stephen P. Teret of the Johns Hopkins University School of Public Health, engaged in this analysis by identifying these elements of "risk" inherent in guns:¹⁷ (a) for some segments of the population, murder is the leading cause of death, and being shot by a handgun is the most common form of murder; (b) thousands of cases of homicide occur each year by use of handguns; (c) deaths by handgun occur disproportionately to the percentage of handguns that comprise the universe of firearms; (d) the risk of death by gun is not confined to any specific category of people; (e) the number of murders per year has been increasing over time; (f) the prevalence of handguns in the United States provides the risk of injury; (g) handguns are user-friendly; (h) handguns are often not designed to prevent inadvertent use or accidental injury; and (i) the concealability of the common handgun contributes materially to its risk.¹⁸ The only good thing Professor Teret and his colleague had to say about handguns in the risk-utility calculus was a passing reference to their "legitimate use," which they derisively defined as self-protection, target practice, hunting, and employment.¹⁹

1985); *Richman v. Charter Arms Corp.*, 571 F. Supp. 192, 200 (E.D. La. 1983), *rev'd on other grounds*, 762 F.2d 1250 (5th Cir. 1985).

14. 573 P.2d 443 (Cal. 1978).

15. *Id.* at 432.

16. See, e.g., *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1251 (5th Cir. 1985); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1202 (7th Cir. 1984); *Patterson v. Gesellschaft*, 608 F. Supp. 1206, 1208 (N.D. Tex. 1985); *Richman v. Charter Arms Co.*, 571 F. Supp. 192, 202 (E.D. La. 1983), *rev'd on other grounds*.

17. The author was discussing primarily handguns, as opposed to all forms of guns.

18. See Teret & Wintemute, *supra* note 9, at 345-48.

19. See *id.* at 348. Professor Teret went on to debunk the notion that a handgun provides its owner with protection. *Id.* Studies that cite the likelihood of a homeowner's being shot with his own gun as proof that a gun is more dangerous than protective do not and cannot take into account the immeasurable possible deterrent effect a gun may have

Yet despite the optimism with which plaintiffs approached the courts with their risk-utility theories of gun manufacturers' liability, the courts have universally rejected those claims.²⁰ The clearest rationale for this rejection can be found in the Maryland Court of Appeals' decision in *Kelley*:

We believe . . . that the risk/utility test is inapplicable to the present situation. This standard is only applied when something goes wrong with a product. In *Barker*, an unbalanced machine tipped over. In *Back v. Wickes Corp.*, . . . , a motor home exploded, and in *Duke v. Gulf & Western Mfg. Co.*, . . . , a power press caught the plaintiff's hands. These products malfunctioned. On the other hand, in the case of a handgun which injured a person in whose direction it was fired, the product worked precisely as intended. Therefore, the risk/utility test cannot be extended to impose liability on the maker or marketer of a handgun which has not malfunctioned.

In sum, regardless of the standard used to determine whether a product is "defective" under section 402A, a handgun which functions as intended and as expected is not "defective" within the meaning of that section. This has been the consistent conclusion in other jurisdictions which have confronted the issue.²¹

Another theory of recovery attempted by plaintiffs in civil actions against gun manufacturers has been that of the abnormally dangerous or ultrahazardous activity under RESTATEMENT (SECOND) OF TORTS sections 519 and 520.²² Indeed, a reading of the Restatement's lan-

on home intrusion in the first place; one cannot measure whether any would-be felons bypass a home which they believe may contain a gun because they fear being hurt during commission of the crime.

20. See, e.g., *Perkins*, 762 F.2d at 1251; *Martin*, 743 F.2d at 1202; *Patterson*, 608 F. Supp. at 1208; *Richman*, 571 F. Supp. at 202.

21. *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1149 (Md. 1985) (citations omitted). The Maryland Court of Appeals in *Kelley* then went on to condemn a category of firearms it termed "Saturday Night Specials." See *id.* at 1152-60.

22. See *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532 (11th Cir. 1986); *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326 (9th Cir. 1986); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771 (D.N.M. 1987), *aff'd*, 843 F.2d 406 (10th Cir. 1988); *Riordan v. Int'l Armament Corp.*, 477 N.E.2d 1293 (Ill. App. Ct. 1985); *Addison v. Williams*, 546 So. 2d 220 (La. App. 2d Cir. 1989); *Richardson v. Holland*, 741 S.W.2d 751 (Mo. App. 1987); *Burkett v. Freedom Arms, Inc.*, 704 P.2d 118 (Or. 1985); *Diggles v. Horwitz*, 765 S.W.2d 839 (Tex. App. Beaumont 1989); *Robertson v. Grogan Inv. Co.*, 710 S.W.2d 678 (Tex. App. Dallas 1986); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661 (Wash. App. 1988); *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997); *Kelley*, 497 A.2d at 1146 n.2. See also RESTATEMENT (SECOND) OF TORTS §§ 519 & 520 (Main Vol. 1963-1964).

guage might suggest that those sections are a viable means of recovery for injuries sustained from guns.²³ Whether an activity is "abnormally dangerous" under the Second Restatement depends on its satisfying the following six factors:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.²⁴

No court that has considered the question, however, has found a gun manufacturer liable under the theories of abnormally dangerous or ultrahazardous activity.²⁵ In *Kelley*, the Maryland Court of Appeals held:

Maryland law would not permit liability to be imposed on a handgun manufacturer or marketer under this theory. This Court has refused to extend the abnormally dangerous activity doctrine to instances in which the alleged tortfeasor is not an owner or occupier of land The thrust of the doctrine is that the activity be abnormally dangerous in relation to the area where it occurs The dangers inherent in the use of a handgun in the commission of a crime, on the other hand, bear no relation to any occupation or ownership of land. Therefore, the abnormally dangerous activity doctrine does not apply to the manufacture or marketing of handguns.²⁶

Around the margins of these straightforward theories of product liability—negligence, strict liability in tort, abnormally dangerous or

23. See John P. McNicholas & Matthew McNicholas, *Ultrahazardous Products Liability: Providing Victims of Well-Made Firearms Ammunition to Fire Back at Gun Manufacturers*, 30 LOY. L.A. L. REV. 1599 (1997); Andrew O. Smith, *The Manufacture and Distribution of Handguns As an Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369, 382-83, 386-87 (1987).

24. See RESTATEMENT (SECOND) OF TORTS § 520 (1977).

25. See Smith, *supra* note 23, at 387-88 (stating that *Richman v. Charter Arms Corp.*, 571 F. Supp. 192 (E.D. La. 1983), the only case to recognize the "abnormally dangerous activities" theory against a handgun manufacturer or distributor, was overturned in the Fifth Circuit).

26. *Kelley*, 497 A.2d at 1147; *accord*, *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984); *Riordan v. Int'l Armament Corp.*, 477 N.E.2d 1293 (1985); *Burkett v. Freedom Arms*, 704 P.2d 118 (Or. 1985).

ultrahazardous activity—there have been a few claims leveled against gun manufacturers that have met with some degree of success. These theories have in common a turning away from the design or manufacturing processes of guns and a focus upon the manner in which the guns are marketed or distributed to particular segments of society. In *Halberstam v. S.W. Daniel, Inc.*,²⁷ the plaintiffs were able to avoid dismissal of, and to have a jury consider, their claims of negligent entrustment based upon their assertion that the manufacturers in question had a duty to refrain from marketing their products to consumers “likely to be involved in criminal activity.”²⁸ They argued that firearms manufacturers owed a duty to the public to take precautions against the intentional, criminal misuse of their products where their own promotion and distribution of weapons contributed to the risk of such misuse.²⁹

The *Halberstam* case is interesting not only because of its unique facts, the particular venality of the gun at issue, and the result, but also because it was presided over by Judge Jack B. Weinstein, a leading scholar and innovator in the field of product liability law.³⁰ The case involved a massacre of Hasidic Jewish children in New York with semi-automatic guns manufactured by means of mail-order assembly kits.³¹ Defendants Wayne and Sylvia Daniel were the owners of the company that sold the weapons through mail- and telephone-order assembly kits; they did not sell already-assembled weapons.³² The weapon at issue in the case, a Cobray M-11/9, was described by the law enforcement professionals who testified at trial as unsuitable for sporting, hunting, or defense.³³ Its primary use, according to an article about the gun in *Machine Gun News*, was “cleaning out a phone booth or an elevator.”³⁴ Testimony at trial revealed that the defendants requested no information from their customers other than that relating to payment and delivery; the defendants apparently did not keep good records of their sales.³⁵ Both defendants testified at trial that they did not care who purchased their weapons.³⁶ The court permitted the

27. No. 95 Civ. 3323 (E.D.N.Y. 1998)

28. Timothy D. Lytton, *Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOK. L. REV. 681, 684 (1998) (citation omitted).

29. *Id.* at 681, 685.

30. *Id.* at 684.

31. *See id.* at 686

32. *See id.*

33. *See id.* at 695.

34. *Id.*

35. *See id.*

36. *See id.*

plaintiffs' theory of negligent entrustment/negligent marketing to go to the jury, marking the first time such a claim had gone that far in court.³⁷ After six hours of deliberations, the jury returned verdicts in favor of the defendants.³⁸

Another very celebrated case involving the marketing practices of gun manufacturers is *Hamilton v. Accu-Tek*,³⁹ a complex and confusing action involving claims of negligent distribution of handguns to juveniles and criminals.⁴⁰ The essence of the plaintiffs' claims in *Hamilton* was that manufacturers and distributors of handguns worked together to sell and distribute their products to an oversaturated national handgun market and to circumvent the law's efforts to keep those products out of the hands of children and criminals.⁴¹ Fifteen of the twenty-five manufacturers were found liable in some, but not all, of the individual plaintiffs' claims that had been consolidated for trial.⁴² In some plaintiffs' cases, none of the defendants found liable for negligent marketing or distribution was held liable in the particular plaintiffs' cases.⁴³ In its unprecedented opinion, the court upheld the jury's verdicts, ruling that "[t]he precise duty . . . in this case is that of handgun manufacturers to exercise reasonable care in marketing and distributing their products so as to guard against the risk of its [sic] criminal misuse."⁴⁴

37. See *id.* at 697.

38. In response to the jury question, "Did the defendants' negligence cause [the plaintiffs'] death[s]?", the jury answered "no." Absent access to well-done jury research following the verdict, it is impossible for an outsider to know exactly what the jurors were thinking in rendering their verdict. One commentator has written that "the jury's verdict was driven primarily by a sense that the defendants' marketing did not cause [the plaintiffs'] death or . . . injuries. Several jurors expressed a belief that had [the perpetrator] not obtained a weapon made from the defendants' parts, he would easily have obtained another and carried out the attack. A number of jurors stated their belief that [the] attack, not the Daniels' marketing, really caused the death of [the plaintiff]. That is, the defendants' marketing was neither a but-for cause nor a substantial factor in bringing about the plaintiffs' harm." *Id.* at 697-98.

39. 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

40. See *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1314-15 (E.D.N.Y. 1996) (dismissing on summary judgment the two plaintiffs' claims of product liability and fraud but allowing them to proceed on a negligent marketing theory).

41. See *id.* at 1330.

42. See *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 808 (E.D.N.Y. 1999). This case was originally filed in 1996 as *Hamilton v. Accu-Tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996). It was amended to include more plaintiffs after additional plaintiffs attempted to intervene in April of 1996. The original plaintiffs in the 1996 action re-filed their claims in Virginia and California because of conflict of laws and jurisdictional issues.

43. See *id.* at 811.

44. See *id.* at 824.

Another nibble at the edge of what was once an unbroken line of authority in favor of the manufacturers and sellers of guns is the case of *Merrill v. Navegar, Inc.*⁴⁵ There, the appellate court reversed the trial court's entry of summary judgment for the manufacturer, holding that a gun maker that negligently marketed its product could be liable for a criminal shooting using its weapon.⁴⁶ In *Navegar*, plaintiffs, victims of a mass shooting involving a military-style TEC-9 assault weapon, claimed that the manufacturer should have reasonably foreseen that its weapon would be used in criminal attacks and that the manufacturer in fact directly marketed a weapon designed for criminal use.⁴⁷ Particularly of interest to the court in *Navegar* was the manufacturer's advertising that its weapon was "fingerprint resistant," significant to the court as an indicator that only a criminal would care about leaving fingerprints on the gun.⁴⁸ The *Navegar* opinion is limited in application and carefully crafted; the court took pains to make clear that its ruling did not constitute a blanket condemnation of guns or their manufacturers.⁴⁹ The court reasoned:

It must be acknowledged that the risk of harm from the criminal misuse of firearms is always present in a society such as ours, in which the presence of firearms is fairly widespread and many individuals possess the capacity to criminally misuse them. It follows that the manufacturer and distributor of a legal and nondefective firearm may not be found negligent merely because it manufactured and/or distributed the weapon. This does not mean, however, that those who manufacture, market and sell firearms have no duty to use due care to minimize risks which *exceed* those necessarily presented by such commercial activities, which can be accomplished without unreasonably depriving responsible citizens of the right to purchase and use firearms [T]he manner in which Navegar manufactured and marketed the TEC-DC9 and made it available to the general public created risks above and beyond those citizens may reasonably be expected to bear in a society in which firearms may legally be acquired and used and are widely available. Appellants' complaint can best be understood as presenting a theory of negligence based on Navegar's breach of a duty to use due

45. 89 Cal. Rptr. 2d 146 (Cal. Ct. App. 1999). On January 19, 2000, the Supreme Court of California granted review in this case, but has yet to issue an opinion. See *Merrill v. Navegar, Inc.*, 991 P.2d 755 (2000) (No. SO83466).

46. See *id.* at 189.

47. See *id.* at 162.

48. See *id.* at 163.

49. See *id.*

care not to increase the risk beyond that inherent in the presence of firearms in our society.⁵⁰

The *Navegar* case is not far in theory from *Kitchen v. K-Mart Corp.*,⁵¹ in which the Supreme Court of Florida held K-Mart negligent for selling a rifle to an obviously intoxicated man, who then shot the plaintiff with the rifle.⁵²

These later cases, in which liability has been imposed on manufacturers of well-made guns, are not truly product liability actions. They make no claims of product failure and focus not upon the product but instead on the alleged tortious action of the manufacturer in doing something other than the straightforward making and selling of a weapon.⁵³ These cases do not honestly confront the central question posed by guns in our society: how are we best able to address the problem of violence involving guns? Admitting both that there is a need for guns in our world (for police and military protection, as the clearest examples) and that our world has too much gun violence in it, how can we stop the wrongful harms that guns cause? And, for purposes of this paper, does products liability law provide an adequate, honest, logical remedy for this problem?

II. THE NON-DEFECTIVENESS OF GUNS

The previous discussion demonstrates that when the courts have been asked to judge the defectiveness of guns as products, they have overwhelmingly responded that guns that do what they are supposed to do are not defective, whether judged by negligence or strict liability standards. Liability, when it has been imposed, has been assessed based upon the conduct of manufacturers either in super-charging the deadliness of weapons or in failing to take precautions to keep weapons out of the hands of children and criminals.⁵⁴ Still, one does not have to strain to hear the drumbeat of those who continue to entreat the courts to hold guns defective as products.⁵⁵ Municipal and even state actions against gun manufacturers continue wending their way through the courts; although most of the cases are too recently-filed to have yet been fully litigated, the few which have reached

50. *Id.* (emphasis in original).

51. 697 So. 2d 1200 (Fla. 1997).

52. *See id.* at 1208.

53. *See generally Kitchen*, 697 So. 2d at 1200; *see also Merrill*, 89 Cal. Rptr.2d at 146.

54. *See supra* note 46 and accompanying text.

55. *See Frank Bruni, The 2000 Campaign: The Gun Issue*, N.Y. TIMES, May 6, 2000, at A8.

dispositive motions have fairly consistently held for defendant manufacturers.⁵⁶

Every test for product defect, from ancient negligence theory to the most recent formulation contained in the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, rests upon a moral foundation which presupposes that a product may not be defined as defective unless there is something "wrong" with it. No less a scholar than Oliver Wendell Holmes as early as 1894 posed the question of firearms manufacturers' liability:

[I]f notice so determined is the general ground [upon which liability may rest], why is not a man who sells fire-arms answerable for assaults committed with pistols bought of him,

56. New York is the first and so far only state to sue firearms manufacturers and wholesalers alleging public nuisance. See *New York v. Sturm, Ruger & Co., Inc.*, No. 3748324 (N.Y. Sup. Ct. filed June 26, 2000). As of June 20, 2000, 32 municipalities had filed 22 civil actions against firearms manufacturers and others alleging public nuisance, negligence in product distribution, and defectively designed products. 14 FIREARMS LIT. RPTR. 8 (spring/summer 2000). The cases are: *City of Atlanta v. Smith & Wesson Corp.*, No. 99vs0149217] (Fulton County Ct. filed Feb. 4, 1999) (Atlanta); *City of Boston v. Smith & Wesson Corp.*, No. 99-2590C (Suffolk County Super. Ct. filed Jun 3, 1999) (Boston); *City of Bridgeport v. Smith & Wesson, Inc.*, No. CV-99-1531988 (Conn. Super. Ct. filed Jan. 27, 1999) (Defendants' Motion to Dismiss granted Dec. 10, 1999) (Bridgeport); *City of Camden v. Beretta U.S.A. Corp.*, No. 451099 (Camden County Super. Ct. filed June 21, 1999) (Camden City); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, No. 99-2518 (D.N.J. filed June 1, 1999) (Camden County); *City of Chicago v. Beretta U.S.A. Corp.*, No. 98-CH15596 (Cook County Cir. Ct. filed Nov. 12, 1998) (Chicago); *City of Cincinnati v. Beretta U.S.A. Corp.*, No. A99-02369 (Ohio Ct. C.P. Hamilton County filed Apr. 28, 1999) (Cincinnati); *City of Cleveland v. Hi-Point Firearms, Inc.*, No. CV-99-381897 (Ohio Ct. C.P. filed Apr. 8, 1999) (case removed to federal court) (Cleveland); *Archer v. Arms Tech., Inc.*, No. 99912658-NZ (Wayne County Cir. Ct. filed Apr. 26, 1999) (Defendants' Motion for Summary Judgment granted as to negligence and denied as to public nuisance by order dated May 16, 2000) (Detroit); *District of Columbia v. Beretta U.S.A. Corp.*, No. 00-0000428 (D.C. Super. Ct. filed Jan. 20, 2000) (District of Columbia); *City of Gary v. Smith & Wesson Corp.*, No. 45D029908CT355 (Lake Super. Ct. filed Aug. 30, 1999) (Gary); *People v. Arcadia Machine & Tool, Inc.*, No. BC210894 (Los Angeles Super. Ct. filed May 25, 1999) (City of Los Angeles); *People v. Arcadia Machine & Tool, Inc.*, No. BC214794 (Los Angeles Super. Ct. filed Aug. 6, 1999) (County of Los Angeles); *Miami-Dade County v. Arms Tech., Inc.*, No. 99-01941-CA-06 (Fla. Cir. Ct. filed Jan. 27, 1999) (Defendants' Motion to Dismiss granted Dec. 13, 1999) (Miami-Dade County); *City of New Orleans v. Smith & Wesson Corp.*, No. 98-18578 (Orleans Parish Dist. Ct. filed Oct. 30, 1998) (New Orleans); *New York v. Arms Tech., Inc.*, No. 2000CV3641 (E.D.N.Y. filed June 20, 2000) (New York City); *James v. Arcadia Machine & Tool, Inc.*, No. ESX-L-6059-99 (Essex County Super. Ct. filed June 9, 1999) (Newark); *People v. Arcadia Machine & Tool, Inc.*, No. 303753 (San Francisco Super. Ct. filed May 25, 1999) (San Francisco); *City of Philadelphia v. Beretta U.S.A. Corp.*, No. 00-1442 (Pa. Ct. C.P. Phila. County filed Apr. 11, 2000) (removed to federal court) (Philadelphia); *City of St. Louis v. Cernicek*, No. CV-992-01209 (St. Louis Cir. Ct. filed Apr. 30, 1999) (St. Louis); *McNamara v. Arms Tech., Inc.*, No. 99912662-NZ (Wayne County Cir. Ct. filed Apr. 26, 1999) (Wayne County); *Sills v. Smith & Wesson Corp.*, No. 99C09283 (New Castle County Super. Ct. filed Sept. 29, 1999) (Wilmington).

since he must be taken to know the probability that, sooner or later, some one will buy a pistol of him for some unlawful end? . . . The principle seems to be pretty well established, in this country at least, that every one has a right to rely upon his fellow-men acting lawfully⁵⁷

Thus, Holmes rejected the notion of gun sellers' liability because of the intervening criminal act of another; the "wrong" that he saw was that of the assailant, not the gun dealer.⁵⁸

Holmes's concept of personal freedom resonates among legal scholars today. Where freedom (*e.g.*, to manufacture goods, to choose what goods to purchase) clashes with injury to the person, the law of products liability intervenes.⁵⁹ The moral and ethical foundations of products liability law require that a manufacturer be held responsible for harm caused by its product only if there is in fact something "wrong" with it; as Professor David Owen states: "A manufacturer's liability must rest . . . on something that is wrongful in its actions."⁶⁰

As a nation, we do not yet appear ready to condemn the making of firearms.⁶¹ What then is wrongful about the actions of a gun manufacturer such that the manufacturer may be held liable in a court of law when one of its guns inflicts wrongful harm on an innocent? Pro-

57. Oliver Wendell Holmes, *Privilege, Malice, and Intent*, 1894 HARV. L. REV. 1, 10 (1894).

58. *See id.*

59. *See id.* at 4; *see also* David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 430 (1993) [hereinafter *Moral Foundations*].

60. *Moral Foundations, supra* note 59, at 462; *see also*, WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS at 659 (4th ed. 1971) ("There must, however, be something wrong with the product which makes it unreasonably dangerous to those who come in contact with it.").

61. At least one state court has been prepared to condemn a category of firearms it termed "Saturday Night Specials." In *Kelley v. R.G. Indus.*, 497 A.2d 1143 (Md. 1985), the Court of Appeals of Maryland, while refusing to hold manufacturers liable for negligence, strict liability, or abnormally dangerous or ultrahazardous activity in general, did find that on balance, a "Saturday Night Special" has so little utility, and carries such a tremendous societal risk, that a manufacturer could be civilly liable for personal injuries caused by such a weapon. Plaintiff's lawyer at oral argument to the Court of Appeals analogized the actions of gun manufacturers to those of the I.G. Farben Company, the notorious makers of Xyclon B poisonous gas used for extermination in Nazi death camps. *See* Howard L. Siegel, *Winning Without Precedent: Kelley v. R.G. Industries*, 14 LITIGATION 32, 34 (Summer 1988). The court was unable to define precisely what it meant by a "Saturday Night Special," but stated that they "are generally characterized by short barrels, light weight, easy concealability, low cost, use of cheap quality materials, poor manufacture, inaccuracy and unreliability." *Kelley*, 497 A.2d at 1153. The court's opinion in *Kelley* was overturned by the Maryland General Assembly by statute now codified at MD. ANN. CODE art. 3A, § 36-I (h) (1988 Supp.). The statute eliminates civil liability for gun manufacturers when a weapon they made is used in the commission of a crime. *Id.*

fessor Owen suggests that the constructs of truth and expectations illuminate the ideal of freedom and point the way to the answer to this question: "Truth and expectations, rooted deeply in autonomy, . . . play a major role in determining moral accountability for product accidents."⁶² Manufacturers' and users' visions of the world are relevant to the question of moral responsibility for harms caused by products.⁶³ Thus, it is relevant to determine what both gun makers and gun users expect out of a weapon; for the purposes of determining whether manufacturers ought to be assigned liability, we are concerned almost exclusively with the users' expectations.⁶⁴

A recent Maryland case illustrates the relevance of users' expectations with respect to the question of liability of gun manufacturers. In *Halliday v. Sturm, Ruger & Co., Inc.*,⁶⁵ plaintiff, surviving mother of a child shot while exploring his father's gun stored in the home, sued gun manufacturers alleging defective design and failure to warn.⁶⁶ After a period of discovery, defendants moved to dismiss the complaint, or, in the alternative, for summary judgment.⁶⁷ At the hearing on defendants' motion, the court posed the following questions:

Doesn't everybody know guns are dangerous? Doesn't everybody know that guns kill people? That [is] true because we have people who pick up the paper and see a child dead, a child or adult, because they are doing something with a gun. To phrase it in another way, don't people know guns are dangerous even in the absence of a warning?

[T]his is a handgun we're talking about where there is a question of whether any warning whatsoever is necessary because guns are made to kill people. That simple. Particularly a handgun such as this was not made for hunting. It was made to kill people, pure and simple.

[W]e're talking about a gun. And a gun, where clearly the person who purchased it knew it was dangerous by the way it was handled . . . [T]he risk utility test is applicable and only applied when something goes wrong with a product. And I think what they're talking about is not something going wrong in the sense of clearly Plaintiff was right, something went wrong in the sense that a three year old was killed

62. *Moral Foundations*, *supra* note 59, at 462.

63. *Id.* at 463.

64. *See id.*

65. *See* Case No. 24-C-99-003188 (in the Circuit Court for Baltimore City). This case is presently on appeal to the Court of Special Appeals. *See* *Halliday v. Sturm, Ruger & Co.*, Case No. 2095 (Ct. of Spec. App. Sept. Term 1999).

66. *See id.*

67. *See id.*

and that's very wrong, but not in the sense of the gun behaving the way one would predict the gun should behave, and in the sense the gun operated the way it should have.⁶⁸

Thus the court in *Halliday* granted the defendants' motions based in large part on its view that the dangerousness of guns is well-known in society.⁶⁹ Indeed, one may go further and state without fear of contradiction that guns are made in the first place for the purpose of shooting, and some guns are made exclusively and especially for the purpose of shooting *people*. These are precisely the uses for which a consumer purchases a gun, particularly a handgun.

Similar logic can be found in the Fifth Circuit's opinion in *Perkins v. F.I.E. Corp.*,⁷⁰ in which plaintiffs particularly complained about the size and concealability of the handguns which had caused the injuries there.⁷¹ The court reasoned:

The plaintiffs insisted . . . that the small size of the handguns at issue in these cases, which allows them to be readily concealed as weapons by members of the general public to whom they are marketed, is the feature that should be subjected to a risk/utility analysis to decide whether the handguns should be labeled "defective" or "unreasonably dangerous." But the small size of the handgun, rather than being something *wrong* in the design, even when the gun is marketed indiscriminately to the public, is more properly characterized as a central *attribute* of the design. At bottom, then, what the plaintiffs seek is a ruling that it is sufficient to hold a manufacturer strictly liable if the design of the product causes injury, rather than a *defect* in the product. . . . Under the plaintiffs' view of the risk/utility test, any product, whether or not it has something wrong with it that allows it to malfunction or cause unintended results, can be subjected to a general balancing test by a jury of the risk of harm resulting when the product is used in a foreseeable manner—either correctly, negligently, or criminally—against the benefits of the product.

No court in this jurisdiction has ever applied a general risk/utility analysis to a well-made product that functioned precisely as it was designed to do. The plaintiffs have not

68. Transcript of hearing and ruling from the bench, *Halliday v. Sturm, Ruger*, No. 24-C-99-003188 at 35, ll.4-10; 57, ll.9-14, and 60, ll.4-17 (Cir. Ct. Oct.13, 1999), *cert. denied*, 357 Md. 482 (Feb. 10, 2000) (No. 555).

69. *See id.*

70. 762 F.2d 1250 (5th Cir. 1985).

71. *See id.* at 1272-75.

alleged that the handguns in these cases had something wrong with them—such as a safety mechanism that fails under certain circumstances, a tendency to misfire, or a trigger structure that can get caught on foreign objects and cause the gun to discharge unexpectedly—that would bring the risk/utility analysis . . . into play We therefore conclude that as a matter of law the plaintiffs cannot recover.⁷²

What one reasonably expects a product to do has been an element of the calculus of its dangerousness since at least the Second Restatement.⁷³ Comment i explicates the meaning of “unreasonably dangerous” in terms of the community’s common knowledge about a product:

The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.⁷⁴

The Second Restatement’s definition of “unreasonable danger,” then, expresses more concretely the moral and ethical relationships among truth, expectations, and freedom in the assessment of responsibility for product accidents. Stated more simply, given that society knows that guns are dangerous, and that, to a degree, society promotes and fosters that dangerousness, we cannot as a society fault a manufacturer for making a product that gives us what we want: “If the information is obvious or possessed already by consumers—that

72. *Id.*

73. “If ever a Restatement reformulation of the law were accepted uncritically as divine, surely it is section 402A of the Second Restatement of Torts.” David G. Owen, *Defectiveness Restated: Exploding the “Strict” Products Liability Myth*, 1996 U. ILL. L. REV. 743, 744 (1996) [hereinafter *Exploding*]. See also remarks of Professor Aaron Twerski, co-reporter for the Third Restatement, observing that section “402A has achieved the status of sacred scripture.” *Id.* at 788 n.4.

74. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (Main Vol. 1963-1964).

knives can cut and matches burn—there generally is no reason in moral theory for a manufacturer to warn consumers.”⁷⁵

The Third Restatement of Torts (Products Liability) casts off the Second Restatement’s now-classic definitions of “defective and unreasonably dangerous” products and divides the analysis of defect into three parts: those caused during manufacturing, design, and instructions and warnings.⁷⁶ All liability for products under the Third Restatement is premised upon the notion of “defect.”⁷⁷ With respect to manufacturing defects, in terms that could be no clearer, the Third Restatement imposes strict liability if the product departs from its intended design, even if and when a seller exercises all possible care with respect to the product.⁷⁸ In a typical civil action brought against gun manufacturers, the manufacturing defect section of the Third Restatement is largely irrelevant since those actions do not concern wrongly-manufactured firearms.

With respect to design and warnings cases, in contrast to manufacturing cases, the Third Restatement employs a “reasonableness-balancing-negligence”⁷⁹ test of defect cloaked in the language of strict liability. In the Third Restatement, consumer expectations were given the academic heave-ho as a defining test of defectiveness⁸⁰ but the obviousness of a product’s danger continues to be a factor in assessing design.⁸¹ Both consumer expectations and the obviousness of a product’s dangers may be considered under the Third Restatement as factors impinging upon the question of product defect.⁸² Both defective design and defective instructions and warnings questions turn on the

75. *Moral Foundations*, *supra* note 59, at 465. See also, Note, *Handguns and Products Liability*, 1997 HARV. L. REV. 1912, 1915-16 (1984).

76. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (Main Vol. 1997).

77. Sections 1 and 2 of the Third Restatement establish the basic liability standard:
§ 1 Liability of Commercial Seller or Distributor for Harm Caused by Defective Products

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.

§ 2 Categories of Product Defect

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings.

Id. §§ 1, 2.

78. See *id.* § 2(a).

79. *Exploding*, *supra* note 73, at 750.

80. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. a, e, and g (Main Vol. 1997).

81. See *id.* at cmt. j.

82. See *Exploding*, *supra* note 73, at 779:

concept of “not reasonably safe” and return the black-letter law of the new Restatement to the practice of importing negligence concepts into the products field.⁸³

Thus, under the Third Restatement, a manufacturer’s liability for a well-made gun turns upon time-honored questions of reasonableness, consumer expectations, obviousness of danger, and all those questions posed with such clear frustration from the bench in the *Halliday* case in Baltimore City.⁸⁴ Specifically with respect to the matter of guns, the drafters of the Third Restatement spoke as follows:

Common and widely distributed products such as alcoholic beverages, firearms, and above-ground swimming pools may be found to be defective only upon proof of the requisite conditions in Subsection (a), (b), or (c). If such products are defectively manufactured or sold without reasonable warnings as to their danger when such warnings are appropriate, or if reasonable alternative designs could have been adopted, then liability under Sections 1 and 2 may attach. Absent proof of defect under those sections, however, courts have not imposed liability for categories of products that are generally available and widely used and consumed, even if they pose substantial risks of harm. Instead, courts generally have concluded that legislatures and administrative agencies can, more appropriately than courts, consider the desirability of commercial distribution of some categories of widely used and consumed, but nevertheless dangerous, products.⁸⁵

The new Restatement thus brings full circle the plain and common sense approaches with which we began evaluating liability for

The comments [to the Third Restatement] officially declare that the obviousness of a product’s dangers in design is only one among the many factors (if sometimes an important one) to be considered in the calculus of design defectiveness.

In warnings cases, on the other hand, the obviousness of a product danger often properly continues to play a decisive no-duty role, as many courts have held. If a danger is truly obvious, then its very obviousness informs potential victims of the danger, so that the informational goals of warnings have been fulfilled. In such cases, there is no value in providing warnings of dangers that should be known already, and the (nonmonetary) costs may be substantial. The Third Restatement adopts this view, which makes good sense.

Id. (citations omitted).

83. See *id.* at 750 (“[T]he new Restatement, like most courts in fact (but not in word), explains liability for design and warnings defects in the reasonableness-balancing-negligence terms of the law of tort.”).

84. See transcript of hearing and ruling from the bench, *Halliday v. Sturm, Ruger & Co.*, Case No. 24-C-99-003188 (Ct. of Spec. App. Sept. Term 1999).

85. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. d (Main Vol. 1997) (emphasis added).

product accidents when Mr. MacPherson drove his Buick into the ditch⁸⁶ and the first dead mouse was found in the bottom of the Coke bottle.⁸⁷ Those questions ask what we expect a product to do, how well we as a community understand what the product does, and why we should hold responsible a manufacturer who gives us exactly what we've asked for.⁸⁸ The reason we squirm when we answer these questions with respect to firearms in particular stems from the unusual nature of the gun as a product, for it is difficult to think of any other product which is made for the express purpose of causing physical harm to someone else. Because the law of product liability looks to the expectations of the consumer or purchaser (the shooter), not the expectations of the person ultimately affected by the gun (the victim), traditional approaches to liability for this product may be seen as unsatisfactory. When Ms. Halliday's husband purchased his gun, his expectations may have been perfectly met, and the gun discharged as it was designed and intended to do; but the interests of the young child who was shot by the gun are left largely unprotected by these legal constructs.⁸⁹

The emotional content of accidental child shootings is closely matched with that of drunk driving homicides. Interestingly, however, the public's reaction and the heated assignment of blame diverge in the two cases. When a person gets drunk and takes the wheel of a car, then drives drunk and kills someone, the alarm is sounded against the drunk driver—not against the car manufacturer for making a car that someone could drive irresponsibly, causing death, and not against the brewery or distillery that made the stuff the driver

86. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

87. See *Crigger v. Coca-Cola*, 179 S.W. 155 (Tenn. 1915).

88. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (Main Vol. 1997).

89. At least arguably, the child in the *Halliday* case could have a cause of action against his parent or parents for their negligence in storing the gun. It is doubtful such actions are brought regularly, except in the most irretrievably fractured families. Another issue, at least in Maryland, is the criminal liability of one who permits a minor to have access to a gun. Under Maryland law, leaving a gun out so that a minor gains access to it is a criminal misdemeanor. See MD. ANN. CODE. art. 27, § 36K (b) (1992). The criminal code, however, provides that its violation may not be considered evidence of negligence or contributory negligence, nor may a party, witness, or counsel make reference to a violation of the statute "during the trial of a civil action that involves property damage, personal injury, or death." § 36K (d). The court in the *Halliday* case, *infra*, viewed the criminality of the deceased child's father's having left the gun in a position in which the child gained access to it as an important fact in holding for the defendant manufacturers. See Transcript of Hearing, *Halliday*, Case No. 24-C-99-003188 (in the Circuit Court for Baltimore City) (Oct. 13, 1999) (Opinion of Cannon, J.) at 60, ll. 18-22: "I think also, really even stronger here, is that it is a misdemeanor for someone to possess a gun, to store or leave a loaded firearm in any location where an individual knew or should have known that an unsupervised minor child would have access to it."

drank. Yet common sense suggests that both the auto maker and the brewery probably foresee that every year, and indeed quite often, someone will drink to excess, get into a car and kill someone. And while one might argue that an automobile has more social utility than a gun, it is difficult to maintain the same argument with respect to the alcoholic beverage. In the case of the drunk driver, however, the community condemns the driver for acting irresponsibly⁹⁰ and in the case of the child shooting, the community decries the gun manufacturer for not making a gun that would be more difficult to shoot.⁹¹

Perhaps the difference in the reaction lies in our view that cars are essential to our way of life and in our knee-jerk chafing at anything that would restrict our unlimited access to the automobile. Perhaps the difference in the reaction lies in our mounting fear of an increasingly gun-toting America and escalating gun crime statistics. Perhaps we believe that a person who is incarcerated for drunk driving will not repeat the offense, but we do not believe that the criminal justice system will work as well for the shooter. Whatever the reason for the difference in our reaction, from the perspective of product liability law the two scenarios are not so different as to require different analyses.

III. THE SECOND AMENDMENT

One final issue unique to guns must be addressed in order to understand fully why the law struggles with liability for their manufacture. Like the rhinoceros in the living room that everyone sees and no one talks about, the Second Amendment to the United States Constitution affects the way we view guns in America. The Second Amendment provides: “[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁹²

Whether the Second Amendment confers rights upon individuals to keep and bear arms, or only protects against government interfer-

90. “He had been caught driving drunk six times since 1984, and yet he continued to drink excessively and get behind the wheel. It’s that kind of irresponsible behavior that is addressed in the pending highway bill.” John Lawn & Marion Blakey, *Getting Hard-Core Drunk Drivers Off the Road*, THE WASH. POST, May 20, 1998, at A25; “This is another irresponsible drunk driver with no sane explanation.” Art Barnum, *Woman is Given 18 Months in Fatal Drunk-Driving Crash*, CHI. TRIB., Mar. 2, 2000, Tribune West, at 2.

91. “Gun manufacturers are not taking the responsibility to ensure their products are safe.” Jim Frost, *Warning Shots*, CHI. SUN-TIMES, Mar. 14, 1997 (Editorial), at 39; “Gun manufacturers could be required to put safety locks on guns.” Alan Bavley & Mary Sanchez, *Treat Firearm Violence Like a Disease, Experts Say*, THE KAN. CITY STAR, May 22, 1998, at A1.

92. U.S. CONST. amend. II.

ence with a popular ability to mount a militia, is a matter of heated debate that persists today:

Two main schools of thought have developed on the issue of whether the Second Amendment recognizes individual or collective rights. These schools of thought are referred to as the "states' rights," or "collective rights," school and the "individual rights" school. The former group cites the opening phrase of the amendment, along with subsequent case law, as authority for the idea that the right only allows states to establish and maintain militias, and in no way creates or protects an individual right to own arms. . . . Due to changes in the political climate over the last two centuries and the rise of National Guard organizations among the states, states' rights theorists argue that the Second Amendment is an anachronism, and that there is no longer a need to protect any right to private gun ownership.

The individual rights theorists, supporting what has become known in the academic literature as the "Standard Model," argue that the amendment protects an individual right inherent in the concept of ordered liberty, and resist any attempt to circumscribe that right⁹³

Surprisingly, few products actions involving harms caused by guns have based defenses upon the Second Amendment.⁹⁴ Rarely has a court squarely confronted a constitutional claim in a gun products case. Two notable opinions, one emanating from a products liability case involving guns and the other from a criminal case challenging a statute regarding possession of a firearm, report diametrically-op-

93. *United States v. Emerson*, 46 F. Supp. 2d 598, 600 (N.D. Tex. 1999) (citations omitted). It is beyond the scope of this Note to resolve this constitutional question. The literature is rich with debate, some scholarly and some overheated, as to the scope of the right conferred by the Second Amendment. See, e.g., David E. Johnson, *Taking a Second Look at the Second Amendment and Modern Gun Control Laws*, 86 KY. L.J. 197 (1998); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995); Randy E. Barnett and Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996); Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); Robert Dowlut, *The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots*, 8 STAN. L. & POL'Y REV. 25 (Winter, 1997).

94. Defenses to gun products liability claims which are not based on the Second Amendment include: Fed.R.Civ.P. 12(b)(6) in *McCarthy v. Olin Corp.*, 119 F.3d 148, 151 (2d Cir. 1997); the doctrine of collateral estoppel in *Adkinson v. Rossi Arms Co.*, 659 P.2d 1236, 1237-38 (Alaska 1983); and failure to state a cause of action in *Forni v. Ferguson*, 232 A.D.2d 176, 176 (N.Y. App. Div. 1996).

posed results on the interpretation of the Second Amendment's "right" to bear arms.⁹⁵

In *Hamilton v. Accu-Tek*,⁹⁶ Judge Weinstein addressed whether the Second Amendment could limit the plaintiffs' claims under state tort law regarding the defendant gun manufacturers' marketing practices.⁹⁷ Flatly denouncing the "individual rights" view of the Second Amendment, the court held:

The [Second] Amendment limits congressional power over the colonial analogues of our National Guard. It does not guarantee the right to kill. Nor does it inhibit state tort law. It does not protect the manufacturers of guns against the plaintiffs' charge that they must take whatever reasonable precautions are required by state tort law to prevent or limit the operation of an illegal handgun market that supplies criminals.

In addition, the Court's jurisprudence teaches that the Amendment establishes a collective right, rather than an individual or private right [T]he Second Amendment right "applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm."⁹⁸

The remarkable opinion in *U.S. v. Emerson*⁹⁹ is noted here to illustrate America's tortured relationship with the gun and to highlight how we as a culture struggle with countervailing societal currents when the issue of guns is confronted. In *Emerson*, the defendant had been subject to a temporary restraining order (TRO) emanating from a divorce proceeding.¹⁰⁰ Under that TRO, the defendant was enjoined from making various financial transactions detrimental to the family unit while the divorce proceedings were pending and from making threatening communications to, or physical attacks upon, his wife while the divorce was pending.¹⁰¹

A federal statute, 18 U.S.C. § 922 (g)(8), made it a felony for a person under a court order that included a finding that he represented a credible threat to the physical safety of an intimate partner to

95. See *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1317-18 (E.D.N.Y. 1996); *United States v. Emerson*, 46 F. Supp. 2d 598, 600-10 (N.D. Tex. 1999).

96. 935 F. Supp. 1307 (E.D.N.Y. 1996).

97. See *id.* at 1317.

98. *Id.* at 1317-18 (citations omitted).

99. 46 F. Supp. 2d 598 (N.D. Tex. 1999).

100. See *id.* at 598-99.

101. See *id.* at 599.

possess a firearm.¹⁰² The defendant in *Emerson* argued that the federal statute violated, *inter alia*, his Second Amendment right to keep and bear arms.¹⁰³ After an exhaustive analysis of the Second Amendment, including its text, the history of gun ownership in England, the history of gun ownership in colonial America, the constitutional ratification debates, the process of drafting the Second Amendment, the structure of the Amendment, and judicial decisions interpreting the Amendment, the court concluded that the federal statute violated the Second Amendment's individual right to keep and bear arms.¹⁰⁴ The court held:

It is absurd that a boilerplate state court divorce order can collaterally and automatically extinguish a law-abiding citizen's Second Amendment rights, particularly when neither the judge issuing the order, nor the parties nor their attorneys are aware of the federal criminal penalties arising from firearm possession after entry of the restraining order. That such a routine civil order has such extensive consequences totally attenuated from divorce proceedings makes the statute unconstitutional. There must be a limit to government regulation on lawful firearm possession. This statute exceeds that limit, and therefore it is unconstitutional.¹⁰⁵

Beginning with the proposition that "there is a long tradition of widespread lawful gun ownership by private individuals in this country,"¹⁰⁶ the court in *Emerson* concluded, "[a] historical examination of the right to bear arms, from English antecedents to the drafting of the

102. 18 U.S.C. § 922(g)(8) provides, in pertinent part:

(g) It shall be unlawful for any person –

(8) who is subject to a court order that –

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury

18 U.S.C. § 922(g)(8) (1999).

103. *United States v. Emerson*, 46 F. Supp. 598, 600 (N.D. Texas 1999).

104. *See Emerson*, 46 F. Supp. 2d at 600-11.

105. *Id.* at 611.

106. *Id.* at 601 (quoting *Staples v. United States*, 511 U.S. 600, 610 (1994)).

Second Amendment, bears proof that the right to bear arms has consistently been, and should still be, construed *as an individual right*.¹⁰⁷

Whether one subscribes to the view that the Second Amendment confers an individual or a collective right (and there appears in the literature no clear-cut answer to that question),¹⁰⁸ the Second Amendment throws a theoretical monkey wrench into the way in which we think about guns in our society. Constitutional arguments turn up the heat under the debate insofar as the debate about guns focuses on statutory or administrative efforts to curb gun ownership, possession, or control. The word "gun" causes legal theorists to duck and scramble for cover as effectively as it does when shouted on a crowded subway car. In short, we struggle with gun liability theory because our existing principles of consumer expectation and obviousness of danger do not seem to work justly when applied to guns and because we feel collectively powerless to protect ourselves against the harms that guns unquestionably cause.

CONCLUSION

When the emotional rhetoric is stripped away from the debate over guns in society, and solid legal analysis examines the question of whether products liability law provides a remedy for those injured by guns, it is clear that "carelessness and misuse cannot transform an obviously—and inherently—dangerous product into a defective, and 'unreasonably dangerous' product."¹⁰⁹ Professor Owen has suggested as a fundamental principle of liability the rule that "[u]sers should be responsible for foreseeable harm caused by product uses that they should know to be unreasonably dangerous."¹¹⁰ The rationale is rooted in the moral and ethical theory underpinning all of product liability law:

The final principles of justice and liability concern the consumer's responsibility for using products safely. The standard of responsibility is cast in objective terms of balance, requiring consumers to bear responsibility for harm that results from uses that fall below a norm that fairly may be ex-

107. *Id.* at 602 (emphasis added). One can find support for both sides of the issue; sometimes the support emanates from unexpected quarters. Staunch libertarian Justice William O. Douglas wrote: "A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment Our decisions belie that argument, for the Second Amendment, as noted, was designed to keep alive the militia." *Adams v. Williams*, 407 U.S. 143, 150-51 (1972) (Douglas, J., dissenting).

108. See *supra* note 93 and accompanying text.

109. *Wasylow v. Glock, Inc.*, 975 F. Supp. 370, 380 (D. Mass. 1996).

110. *Moral Foundations*, *supra* note 59, at 502.

pected of ordinary persons. At first glance, it may appear odd and perhaps regressive to propose a principle that resembles contributory negligence in a modern products liability system based on moral principles. But most consumers are generally capable of acting reasonably, and so their failure to conform their conduct to normal, proper standards ordinarily reflects a moral failure of responsibility. To hold otherwise would derogate the dignity of consumers as autonomous beings who are morally accountable for the harmful consequences of their chosen actions that they should know to be unsafe. Consumers cannot fairly demand to be relieved of the harmful consequences of mistakes attributable to their moral failures, nor to have such harm imposed instead upon other persons free of moral blame.¹¹¹

The noble intentions of advocates for gun control laws, the pain of loss for survivors of gunshot accidents, and the frustration of health care professionals who must clean up after the shooters, all are tragedies that we as a society must address. Civil actions against the makers of a product that performs exactly as expected and as intended, however, do not provide a satisfactory forum to redress those grievances:

The increasing number of cases like this one . . . are intended to . . . accomplish gun control under the guise of products liability law—by trying to subject handgun manufacturers to liability for all injuries caused by their products. Presumably, the proponents of these suits feel that “judges and juries enjoy immunity from the political pressures of the gun control lobby,” and that handgun control “is not going to come legislatively any time soon, if ever.”

But the unconventional theories advanced in this case (and others) are totally without merit, a misuse of products liability laws. It makes no sense to characterize any product as “defective”—even a handgun—if it performs as intended and causes injury only because it is intentionally misused

Moreover, the judicial system is, at best, ill-equipped to deal with the emotional issues of handgun control. Certainly, there can be no effective handgun control imposed on an ad hoc basis by six or twelve jurors sitting in judgment on a single case. Decisions in these suits—made on the basis of a particular record developing a unique set of facts—will necessarily be inconsistent, and there can only be varying and uneven results in different jurisdictions Thus, an over-

111. *Id.* at 505.

whelming number of cases—and tremendous expenditure of judicial resources—would be required before the proponents of these unconventional theories could even begin to accomplish their ultimate goal: driving all handgun manufacturers out of business

. . . . [A]s a judge, I know full well that the question of whether handguns can be sold is a political one, not an issue of products liability law—and that this is a matter for the legislatures, not the courts.¹¹²

112. *Patterson v. Gesellschaft*, 608 F. Supp. 1206, 1215-16 (N.D. Tex. 1985) (boldface original) (citations omitted). *See also, Wasylow*, 975 F. Supp. at 380-81 (“It is the province of legislative or authorized administrative bodies, and not the judicial branch, to advance through democratic channels policies that would directly or indirectly either 1) ban some classes of handguns or 2) transform firearm enterprises into insurers against misuse of their products. Frustration at the failure of legislatures to enact laws sufficient to curb handgun injuries is not adequate reason to engage the judicial forum in efforts to implement a broad policy change.”).