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George J. Benston

Frank Vandall

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Articles

Legal Control Over the Supply of Handguns: An Analysis of the Issues, With Particular Attention to the Law and Economics of the *Hamilton v. Beretta* Lawsuit Against Handgun Manufacturers

George J. Benston*
Frank J. Vandall**

Introduction

One of the most influential schools of thought in evaluating the legal process is law and economics.¹ Although this discipline has been in existence for over thirty years, no one has attempted to evaluate whether, and to what extent, it affects the court's decision in a case. The issues we consider in this paper are how economic testimony affected the decision in an actual case and the role afforded by the court to economic

* John H. Harland Professor of Finance, Accounting, and Economics, Goizueta Business School, Emory University, B.A. 1952, Queens College (N.Y.C.); M.B.A., 1953 New York University, Ph.D. 1962, University of Chicago Graduate School of Business, CPA, 1953 North Carolina.

** Professor of Law, Emory University School of Law. B.A. 1964, Washington and Jefferson College; J.D. 1967, Vanderbilt University School of Law; L.L.M. 1968, S.J.D. 1979, University of Wisconsin Law School. I appreciate the research assistance of Michelle Marks. Mistakes are mine, however.

1. There are numerous cites to "law and economics" in various cases and law review articles.

analysis as contrasted with the law in crafting a decision. This presentation also provides readers with a review of the issues and evidence on the important public policy issue of handgun control.

Our methodology is to examine the trial and appeal of *Hamilton v. Beretta*² from both a legal and an economic perspective. *Hamilton* was selected because it involves a critical contemporary social issue: handgun control by means of the judicial process. It was also important that one author, George Benston, had served as an expert in *Hamilton v. Beretta*, and the other author, Frank Vandall, had previously evaluated lawsuits as a means of regulating gun manufacturers.³ Part I provides background material on the contentious public policy issue of the role of handguns in crime and human suffering and the legislative means that have been adopted to restrict handgun purchase and use. People who believe that those laws have been inadequate to control handgun misuse and, in order to obtain compensation and redress, have brought lawsuits against handgun manufacturers as a means of controlling the criminal use of handguns, most notably is *Hamilton v. Beretta*. Part II examines the legal issues raised by *Hamilton* and similar cases. Part III presents an economic analysis of the demand and supply of handguns by ordinary people and criminals. Much of this information was presented for the defendants in *Hamilton v. Beretta*.⁴ Part IV is an evaluation of the courts' use of economic testimony, and Part V is an analysis of the legal reasoning in both the trial court and the New York Court of Appeals. Part VI concludes with respect to the courts' decisions in *Hamilton v. Beretta* and considers the public policy issue of handgun control.

2. *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001). Plaintiffs, relatives of gunshot victims, sued 49 defendant handgun manufacturers. Plaintiffs assert various causes of action, including an action for negligence on the theory that defendants all marketed handguns in a manner that "fostered the growth of a substantial underground market in handguns" and that defendants were liable under theories of design defect and ultrahazardous activity. See *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1314-15 (E.D.N.Y. 1996); *Hamilton v. Accu-Tek*, 222 F.3d 36 (2d Cir. 2000); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001); *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001).

3. See Frank J. Vandall, *Economic and Causation Issues in City Suits Against Gun Manufacturers*, 27 PEPP. L. REV. 719 (2000) [hereinafter Vandall, *Causation Issues*]; see also Frank J. Vandall, *O.K. Corral II: Policy Issues in Municipal Suits Against Gun Manufacturers*, 44 VILL. L. REV. 547 (1999) [hereinafter Vandall, *O.K. Corral II*]. See Professor Benston's economic arguments *infra* Part II.

4. The material presented is more extensive than the testimony offered at trial by Professor Benston, so that readers of this article will have a more complete description and analysis of what is known about the economics of handgun demand, supply, and regulation.

I. The Public Policy Issue of Criminal Misuse of Handguns and Legislative Actions to Control Handgun Ownership and Use

A. *The Public Policy Debate*

Handguns (and cigarettes) are perhaps the most controversial of all products sold legally in the United States. Many people would like to require registration of handguns and more severely limit handgun purchase and ownership; some would make it illegal for individuals other than police and the military to own handguns.⁵ Both groups point to the fact that between 1962 and 1994, for example, 667,000 of the more than 1,000,000 firearm-related deaths involved handguns.⁶ Handguns are identified as having been used in an overwhelming number of crimes: "In 1993 there were about 1.3 million such crimes [assaults and robberies] committed with a firearm—and 86% of the time the weapon was a handgun."⁷ Handguns also are said to be responsible for suicides: "from 1990 to 1997 there were 147,000 suicides committed with a firearm in contrast to 100,000 firearm homicides. An estimated 90,000 of those suicides were accomplished with a handgun . . ."⁸ Unintentional shootings, particularly when they involve children, are another reason given to support the need for legislation that would substantially reduce or eliminate handgun ownership. The Violence Policy Center reports that "[i]n 1997 there were 981 victims of unintentional shooting deaths, of whom 142 were aged 14 years old or younger."⁹

In addition to the cost of death and suffering caused by handguns, there is also the monetary cost. Philip Cook and Jens Ludwig estimate that handgun violence costs American society about \$100 billion a year (1998 dollars).¹⁰ About \$1 billion is the cost of medical treatment of people who are injured as a consequence of handgun-inflicted wounds.¹¹ Another \$1 billion is the value of the productivity of people killed or

5. See, e.g., Violence Policy Center, *Unsafe in Any Hands: Why America Needs to Ban Handguns* (2000), <http://www.vpc.org/studies/unsafe.htm>.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. PHILLIP J. COOK & JENS LUDWIG, *GUN VIOLENCE: THE REAL COSTS* 113-15 (2000).

11. *Id.* at 70-71, 73.

seriously injured, net of their maintenance cost.¹² This amount, although substantial, is not as great as one might expect because, as Cook and Ludwig note, criminals, who may also be victims, have relatively low levels of productivity and do not require high-risk premiums for their dangerous line of work.¹³ Immigration also can replace injured and killed workers. Suicides, Cook and Ludwig estimate, result in zero cost to the economy, because lost productivity is offset by reduced medical costs.¹⁴ They ascribe the remaining \$98 billion of the cost of handgun violence to people's loss of well being as a result of concerns that they or others will be injured or killed by handguns.¹⁵ They estimate this amount from a random survey that asked respondents how much they would be willing to pay in taxes to reduce handgun violence by thirty percent.¹⁶

Although the amounts estimated by Cook and Ludwig are open to criticism (as they recognize),¹⁷ it seems clear that handguns do a lot of damage and engender a lot of fear among people generally. For example, Geoffrey Canada, who writes movingly and specifically about growing up and later working with violent youth in a very tough urban neighborhood (the South Bronx in New York City), states:

[i]t's handguns that make living in the inner city so lethal today. People have been armed and violent for a long time, but the weapon of choice used to be a bottle or a knife; the explosion of killing we see today is based on decades of ignoring the issue of violence in our inner cities. Every indication I see suggests that it's going to get worse. How much worse? I don't think we understand the potential of how bad it can get.¹⁸

Canada blames demand, supply, and inadequate regulation for this deplorable state of affairs.¹⁹ Demand, at least by the young people with whom he works and who have suffered disproportionately from handgun violence, is a consequence of illegal drugs. He explains,

guns didn't become commonplace among the young until crack use became epidemic in the eighties. Several separate accidents of history created the love affair that today's young people have with guns. The first was the

12. *Id.* at 81.

13. *Id.* at 82.

14. *Id.* at 70-71.

15. *Id.* at 114.

16. *Id.* at 103.

17. *Id.*

18. GEOFFREY CANADA, *FIST STICK KNIFE GUN: A PERSONAL HISTORY OF VIOLENCE IN AMERICA* 36 (1995).

19. *Id.* at 36-37.

unintended consequence of the Rockefeller [New York State] drug laws [which mandated harsh sentences for adult offenders] bringing children into the drug trade.²⁰

He then identifies widespread addiction and high profits from crack cocaine, which yielded young dealers great sums of money that they spent on expensive clothes and jewelry.²¹ He concludes: “[a]nd, as could only be expected, other kids began to rob them of their clothes, sneakers, and jewelry. The answer for almost all of the young dealers was to buy a handgun for protection.”²²

Canada’s field observations are supported by an insightful statistical study by Alfred Blumstein and Richard Rosenfeld of the relationship between murders, robberies, and assaults and the age and race of offenders and victims between 1975 and 1995.²³ Blumstein and Rosenfeld present data showing that the per-capita rate of serious crimes over this period is associated primarily with the proportion of population in the high-crime ages.²⁴ Following increases and then decreases through about 1984-85, they show that the crime rate increased substantially through 1991 followed by a decrease.²⁵ Almost all of the post-1985 increase, they find, is in homicides with handguns, predominantly committed by and against African-American males ages fifteen through eighteen.²⁶ Blumstein and Rosenfeld ascribe this gun-related violence to the increased involvement of black youth in distribution of crack cocaine and the decline after 1993 to an abatement of the crack epidemic.²⁷

Both the Violence Policy Center and Canada (but not Cook/Ludwig and Blumstein/Rosenfeld) blame the supply side for the increase in gun-related violence. Canada asserts: “[g]reedy handgun manufacturers and lax government regulations have helped precipitate in this country a crisis of unimagined proportions Part of the problem is that most current policymakers fail to address the problem of the sheer availability of guns.”²⁸ The Violence Policy Center also points to the ready availability of handguns. They would have Congress “vest the

20. *Id.* at 80.

21. *Id.*

22. *Id.* at 81.

23. See Alfred Blumstein & Richard Rosenfeld, *Explaining Recent Trends in U.S. Homicide Rates*, 88 J. CRIM. L. & CRIMINOLOGY 1175 (1998).

24. *Id.* at 1202.

25. *Id.*

26. *Id.* at 1207.

27. *Id.* at 1208-10.

28. CANADA, *supra* note 18, at 68.

Department of the Treasury with strong authority to regulate the design, manufacture, and distribution of firearms.”²⁹ Indeed, they would completely ban handguns and have the government buy back civilian-owned guns.³⁰ Cook and Ludwig would not ban handguns, but would employ additional government regulation to restrict handgun sales, have handguns regulated as consumer products, and attempt to reduce the use of guns by criminals.³¹ Blumstein and Rosenfeld, however, suggest stronger efforts to reduce the demand by young people for handguns, primarily for drug-related crimes.³²

On the other side of the argument, many handgun proponents believe that individual ownership of these weapons is, and should be, protected by the Second Amendment to the United States Constitution, which states, “[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.”³³ Other opponents of additional controls over handguns point to extensive ownership by law-abiding citizens who find these products valuable to them.³⁴ They claim that legal handgun ownership reduces harm inflicted on people from criminal use of handguns, because criminals fear that intended victims who are armed might injure them.³⁵ John Lott, Jr. and David Mustard put forth considerable evidence to this effect, using countywide data from both states with and without laws that permit most citizens to carry concealed handguns.³⁶ However, other researchers have questioned the validity of their estimates.³⁷ Thus, the question as to whether handgun ownership reduces crime has not yet been resolved.

29. Violence Policy Center, *supra* note 5.

30. *See id.*

31. *See* COOK & LUDWIG, *supra* note 10, at 132-33.

32. *See* Blumstein & Rosenfeld, *supra* note 23, at 1214-15.

33. U.S. CONST. amend. II.

34. *See generally* HENRY H. KIM, GUNS AND VIOLENCE (1999) (providing a collection of essays on both sides of the issue).

35. *See id.*

36. *See* John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997); JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (1998).

37. *See* Hashem Dezhbakhsh & Paul H. Rubin, *Lives Saved or Lives Lost? The Effects of Concealed-Handgun Laws on Crime*, 88 AM. ECON. REV. 468, 468-74 (1998); Mark Duggan, *More Guns, More Crime*, 109 J. POL. ECON., 1086, 1086-1114 (2001).

B. Legal Controls Over Purchase and Use

Federal, state, and municipal laws regulate and limit the sale and possession of handguns. The Gun Control Act of 1968 (§ 922 (g)), as amended by the Firearms Owners' Protection Act (1986) and subsequent enactments, makes it illegal in all states for federal firearms licensees (FFLs) to sell handguns to specified persons, including persons under age 21 (for handguns), convicted felons, fugitives from justice, illegal aliens, persons subject to a court order restraining them from threatening others, and people with a history of domestic violence, drug addiction, and mental disorders. Retail purchasers of firearms from FFLs complete a Federal Form 4473 in which the buyer attests to the firearms dealer that he or she is legally qualified to purchase the gun. The buyer also must certify that he or she is a U.S. citizen or resident alien and is the actual buyer of the gun (i.e., not buying the gun on behalf of an ineligible person). Form 4473 informs the prospective buyer that it is a felony under federal law to give false information to a firearms dealer.

Before passage of the Brady Handgun Violence Prevention Act (1993) (Brady Act), federal law did not require FFLs to verify the truthfulness of a gun purchaser's statements. Jeremy Travis and William Smarrito provide examples that support their conclusion that, at the time of their writing, "the federal system is an honor system."³⁸ The Brady Act initially added a waiting period of up to five days before a prospective (non-licensed) buyer could complete the purchase of a handgun from a dealer.³⁹ However, since 1998, the FBI offers almost instant computerized checks that permit gun buyers to complete their purchases in minutes.⁴⁰

States impose additional requirements. All states require handgun sellers to give to the chief law enforcement officer ("CLEO") handgun purchasers' names, addresses, and dates of birth.⁴¹ As shown in Table 1, twenty-four states have no additional restrictions ("NAR").⁴² Thirteen states have some restrictions ("SR"), particularly waiting periods, limitations on the number of handguns that can be purchased in a month, and sales prohibited to persons who are intoxicated or are not of good

38. Jeremy Travis & William Smarrito, *A Modest Proposal to End Gun Running in America*, 19 FORDHAM URB. L.J. 795, 809 (1992).

39. See Brady Handgun Violence Prevention Act, 18 U.S.C. § 922 (1994).

40. Op-Ed., *Gun Control: Instant Checks Faster But Not Perfect*, THE MORNING CALL (Allentown, Pa.), June 2, 2003, at A6.

41. See Table 1 *infra*.

42. *Id.*

moral character.⁴³ Thirteen states plus the District of Columbia impose substantial restrictions ("R") on handgun purchases and use, particularly permits required for purchases, registration, and application of requirements to private sales at gun shows.⁴⁴ The more restrictive states tend to be in the Mid-Atlantic, East North Central, West North Central, and South Atlantic regions.⁴⁵ States with no additional restrictions dominate the Pacific, West South Central, and Mountain regions.⁴⁶ However, most of the regions include states of each type.⁴⁷ See Table 1.

Few products that are not *per se* illegal (such as many addictive drugs) are as extensively restricted and regulated by federal, state, and municipal laws. A possible exception is cars. Unlike the situation in most states for handguns, cars must be registered. Drivers of motor vehicles must obtain licenses that require tests of vision, knowledge of driving regulations, and driving proficiency. Only a few states, though, make gun owners show that they are able to use handguns properly. However, a 1994 survey finds that 87.2% of handgun owners have either taken formal training (56.7%) or informal training (30.6%) in handgun use.⁴⁸

Neither the federal government nor most states interfere with or get information on the private transfer of used handguns. Legally, these sales and purchases may be made only within states among state residents. There is no requirement, though, for non-FFLs to report on sales or purchases or to do background checks. These transactions often are made through advertisements in newspapers, magazines and personal contacts. Many of these transactions are also completed at large gatherings of gun enthusiasts, such as gun shows. However, FFL dealers who offer their handguns at these shows must complete the same background checks and paperwork that they are required to do when they make sales from their regular places of business. As shown in Table 1, fourteen states impose additional requirements for all sales at gun-shows.

43. *Id.*

44. *Id.*

45. See Table 4 *infra*.

46. *Id.*

47. *Id.*

48. PHILIP J. COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY ON FIREARMS OWNERSHIP AND USE 22 (1996).

Table 1
State Requirements Governing Purchase and Use of Handguns
By Census Regions

	purchase						possession			
	overall legal con- straints	add'l Limits And req'ts [note 2]	add'l waiting period in days [note 3]	permit re- quired	one per month maximum	back- ground check req'd for gun shows [note 4]	req'ts also apply to all private sales [note 5]	restrictions on carry- ing a con- cealed handgun [note 6]	license re- quired	registra- tion required [note 7]
R = restrictive SR = somewhat restrict. NAR = no additional restrictions				Y = requirement or additional require- ment N = no requirement or no additional requirement			YN = yes, nondiscretionary YD = yes, discretionary F = forbidden			
<u>New England</u>										
Connecticut	R	Y (1)	14	Y	N	Y	Y (1,2,3)	YN	Y	N
Massachusetts	R	Y (2,3)	40	Y	N	Y (1)	Y (1,5)	YD	Y	Y (1)
Rhode Island	SR	Y (1)	7	N	N	Y	Y (1)	YD	N	N
Maine	NAR	N	0	N	N	N	N	YN	N	N
New Hampshire	NAR	Y (1)	0	N	N	N	N	YN	N	N
Vermont	NAR	N	0	N	N	N	N	N	N	N
<u>Mid Atlantic</u>										
New Jersey	R	Y (1)	30	Y	N	Y	Y (1,2,4)	YD	Y	Y
New York	R	Y (3)	183	Y	N	Y (2)	Y (1,2)	YD	Y	Y
Pennsylvania	SR	Y (1)	0	N	N	Y (1)	Y (3)	YN (1)	N	N
<u>East North Central</u>										
Illinois	R	Y (1)	3	Y	N	Y	Y	F	Y	N&Y (3)
Michigan	R	Y (1)	0	Y	N	Y	Y (1)	YD	Y	Y
Iowa	SR	Y (1,4)	3	Y	N	N	Y (1)	YD	N	N
Wisconsin	SR	Y (1)	2	N	N	N	N	F	N	N
Indiana	NAR	Y (1)	0	N	N	N	Y (6)	YN	N	N
Ohio	NAR	N	0	N	N	N	N	F	N	N
<u>West North Central</u>										
Minnesota	R	Y(3)	7	Y	N	Y	Y (1)	YD	Y	N
Missouri	R	Y (1)	7	Y	N	Y	Y (1)	F	Y	N
Nebraska	R	N	2	Y	N	Y	Y (1,3,4)	F	Y	N
South Dakota	SR	N	2	N	N	Y	Y (1)	YN	N	N
Kansas	NAR	N	0	N	N	N	N	F	N	N
North Dakota	NAR	Y (1)	0	N	N	N	N	YN	N	N
<u>Pacific</u>										
California	R	Y (1)	10	N	N	Y	Y (1,2,3)	YD	N	Y (1,2)
Hawaii	R	Y (1)	14	Y	N	Y	Y (1,2)	YD	Y	Y
Washington	SR	Y (1)	5	N	N	N	N	YN	N	N
Alaska	NAR	N	0	N	N	N	N	YN	N	N
Arizona	NAR	N	0	N	N	N	N	YN	N	N
Oregon	NAR	Y (1)	0	N	N	Y (2)	Y (7)	YN	N	N
Wyoming	NAR	N	0	N	N	N	N	YN	N	N

overall legal constraints	purchase						possession				
	add'l	add'l				back-ground check req'd	req'ts also apply to all private sales	restrictions on carrying a concealed handgun	license re-	registra- tion required	
	And req'ts [note 2]	waiting period in days [note 3]	permit re-quired	one per month maximum	for gun shows [note 4]	[note 5]	[note 6]			[note 7]	
R = restrictive SR = somewhat restrict. NAR = no additional restrictions			Y = requirement or additional requirement N = no requirement or no additional requirement						YN = yes, nondiscretionary YD = yes, discretionary F = forbidden		

South Atlantic

	R	note 1	note 1	note 1	note 1	note 1	note 1	note 1	note 1	note 1	note 1
Dist. Columbia	R	Y (1)	7	Y	Y	Y	Y	Y (1,2)	YD	N	Y
Maryland	R	Y (1)	7	Y	Y	Y	Y	Y (2)	YN	Y	N
North Carolina	R	Y (1)	7	Y	Y	Y	Y	Y (2)	YN	Y	N
Delaware	SR	Y (1)	0	N	N	N	N	N	YD	N	N
Florida	SR	N	3	N	N	N	N	N	YN	N	N
South Carolina	SR	Y (1)	0	N	Y	N	Y (3)	N (2)	N	N	N
Virginia	SR	N	0	N	Y	N	N	N	YN	N	N
Georgia	NAR	N	0	N	N	N	N	N	YN	N	N
West Virginia	NAR	N	0	N	N	N	N	N	YN	N	N

East South Central

Alabama	SR	N	2	N	N	N	Y (1)	YN	N	N	N
Tennessee	SR	Y (1)	15	N	N	N	N	YN	N	N	N
Kentucky	NAR	N	0	N	N	N	N	YN	N	N	N
Mississippi	NAR	N	0	N	N	N	N	N	N	N	N

West South Central

Arkansas	NAR	N	0	N	N	N	N	YN	N	N	N
Louisiana	NAR	N	0	N	N	N	N	N	N	N	N
Oklahoma	NAR	N	0	N	N	N	N	YN	N	N	N
Texas	NAR	N	0	N	N	N	N	YN	N	N	N

Mountain

Colorado	SR	Y (1)	0	N	Y (2)	Y (7)	YD	N	N		
Idaho	NAR	N	0	N	N	N	N	YN	N	N	N
Montana	NAR	N	0	N	N	N	N	N	N	N	N
Nevada	NAR	N	0	N	N	N	N	YN	N	N	N
New Mexico	NAR	N	0	N	N	N	N	F	N	N	N
Utah	NAR	N	0	N	N	N	N	YN	N	N	N

Notes

Note 1. All handguns must be registered, all owners licensed, no handguns may be sold since 1976, handguns may not be brought into or transported through the city.

Note 2. in addition to Federal prohibitions and requirements, some state laws additionally:

- (1) prohibit purchases to some persons, primarily those who are habitually or presently intoxicated or convicted violent assaults or drug use or sales
- (2) applicants must satisfy CLEO (chief local law enforcement officer) that they have a proper purpose and are suitable persons
- (3) applicant must be of good moral character
- (4) additional personal descriptions, such as height, weight, hair color, eye color, social security number, fingerprints, business address, occupation, and previous names and addresses

Note 3. Does not apply to holders of concealed handgun permits

Note 4. Source: Americans for Gun Safety, www.ags.foundation.com

- (1) Requirements explicitly extended to gun shows in 1998
- (2) Requirements explicitly extended to gun shows in 2000

Note 5.

- (1) same waiting period as for FFL sales
 - (3) transfers must be made through FFL
 - (4) transfer certificate from CLEO required
 - (5) transfer may not be made to a violent felon, alcohol, or drug abuser or by an adult to a child, except under specified circumstances
 - (6) background check required
 - (7) required in Colorado as of 3/31/01 and in Oregon as of 12/7/00
-

Note 6. Other than for people whose work requires carrying handguns. Source of laws that limit or permit discretionary carry of concealed handguns is Lott, *supra* note 36, Figure 3.6.

- (1) Philadelphia is exempted from the nondiscretionary-carry law, although people with permits from other Pennsylvania jurisdictions can carry concealed handguns into the city.
- (2) South Carolina removed restriction as of 12/31/96

Note 7.

- (1) FFLs must maintain record of transfers that is available to the police.
- (2) California requires that all transfers of handguns be made through a FFL.
- (3) Chicago requires registration

Sources (except as stated in note 5):

Bureau of Alcohol, Tobacco, and Firearms, aft.treas.gov/gov/firearms/statelaws

Americans for Gun Safety, agsfoundation.com/home.html

National Rifle Association, nraila.org

Americans for Gun Safety, agsfoundation.com/home.html

National Rifle Association, nraila.org

Individuals and organized groups, who strongly believe that handguns are an unreasonably dangerous product, believe that the present legal restrictions on handgun purchase and use are inadequate. As a means of reducing the supply, particularly to criminals, they have taken legal action against handgun manufacturers. The next section examines the legal issues underlying such lawsuits.

II. The Legal Issues in a Suit Against Handgun Manufacturers for Gun Violence

In considering whether to sue a handgun manufacturer, distributor, or retailer for the injuries inflicted by a purchaser or a criminal third party, the plaintiffs have a wide array of legal issues to consider. The various causes of action facing the plaintiffs will be considered first, followed by an analysis of the core issues in handgun violence cases.

Because a gun is a product, a preliminary issue is whether to sue the manufacturer, distributor, or retailer of the handgun, rather than the shooter, who is unidentified or incarcerated and without funds. In products liability, such a suit can be brought in negligence or strict liability. Strict liability will be considered first, negligence will be considered later.⁵⁰ A suit in strict liability for manufacturing and selling a defective product could be based on either design defect or a failure to warn. Most of the principles dealing with defective products have evolved from the Restatement (Second) of Torts, section 402A.⁵¹ Essentially three tests have developed for whether a product is defectively designed.⁵² Preliminary to an analysis of design defect, some courts hold that something must be wrong with the product.⁵³ These courts would likely dismiss a products liability suit by concluding that there is nothing wrong with a handgun—it does what it is designed to do.⁵⁴ New Jersey and California, on the other hand, might decide that the question is best answered by weighing the risks of the product as compared with the utility of the product.⁵⁵ If a jurisdiction were to

49. PHILIP J. COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY ON FIREARMS OWNERSHIP AND USE 22 (1996).

50. See negligence discussion *infra* Part IV.

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

52. See JERRY J. PHILLIPS ET AL., PRODUCTS LIABILITY: CASES, MATERIALS, & PROBLEMS 147-266 (2002).

53. See, e.g., *Kelley v. R.G. Indus. Inc.*, 497 A.2d 1143, 1150 (Md. 1985).

54. *Id.*

55. See, e.g., *O'Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983).

follow the New Jersey or California approach, it might well find that a handgun is defective because the risks exceed the utility even though there is nothing “wrong” with the product.⁵⁶

The first test for deciding whether a handgun is defectively designed is the consumer expectation test.⁵⁷ This asks whether a reasonable consumer would expect the product to function as it did.⁵⁸ In regard to handgun litigation the reasonable consumer would likely expect that a handgun would be used to shoot people, if necessary to defend oneself, or threaten to or actually shoot people, if the handgun were used in a criminal activity.⁵⁹ There is a possibility that the victim of the shooting could recover under strict liability. In *Elmore v. AMC*, a defective drive shaft dropped out of the car, causing it to enter oncoming traffic and collide with the bystander’s car. The court held that strict liability extended to consumers, users and bystanders.⁶⁰

The second, and perhaps the most popular test for design defect, is the risk-utility test.⁶¹ This test asks whether the risks of the product exceed the utility of that particular design.⁶² If it does, then the product is defective. Indeed, one court has suggested that a handgun is defective because it has very high risks and very low social utility.⁶³ The third test for design defect holds that the jury imputes to the manufacturer the knowledge of the defective design and then must decide whether a manufacturer, who produced the product, knowing of the defect, was negligent.⁶⁴ There are, of course, a large number of variations among each of the three tests.⁶⁵

So far we have been considering design defect from the perspective of the Restatement (Second), section 402A, which states that a product is defective when it is unreasonably dangerous.⁶⁶ In 1997, the American

56. *Id.* at 304-05.

57. Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1712-13 (2003).

58. *Id.*

59. *Barker v. Lull Eng'g Corp.*, 573 P.2d 443, 452, 454-55 (Cal. 1978). There is some debate as to who is the “consumer.”

60. See *Elmore v. AMC*, 451 P.2d 84, 88-89 (Cal. 1969) (stating, “[i]f anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders . . . is reasonably foreseeable”).

61. See *Barker*, 573 P.2d at 454-55.

62. *Id.*

63. *Kelley v. R.G. Indus. Inc.*, 497 A.2d 1143, 1158-59 (Md. 1985).

64. See, e.g., *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033 (Or. 1974).

65. See PHILLIPS ET AL., *supra* note 51, at 155.

66. *Id.*

Law Institute promulgated the Restatement (Third) of Products Liability, section 2B. It requires that before a court can hold a product defective, it must first find that there was a reasonable alternative design for the product.⁶⁷ In the ten years since the first promulgation of draft section 2B of the Restatement (Third), only one state in the United States has adopted the provision⁶⁸—Iowa.⁶⁹ Without any discussion of the issues or policies, Iowa adopted section 2B for tobacco products liability litigation. It held that tobacco was not a defective product because there was no reasonable alternative design for tobacco.⁷⁰ A court could find that, under the Restatement (Third) section 2B, a handgun is not defective because there is no reasonable alternative design for a handgun. It does what it is supposed to do; it shoots bullets and can injure or kill people, can be used to defend people against those who would harm them, or be used for target shooting, collecting, and other aspects of recreation.⁷¹

A product can also be defective because it fails to adequately warn of the risks related to the product.⁷² The courts have held that a package insert, the container, or the product itself must contain a reasonable warning of the risks.⁷³ A suit by a shooting victim based on failure to warn against a dealer or manufacturer of handguns would likely fail, however, because the victim would not likely have access to the warning, whether it was on the package or on the gun. An exception to this might be a situation in which a handgun is purchased for recreation or for the defense of the family and purchaser, and where a friend, family member, or a child who obtained the gun is injured. In that case, a warning might be of value to the person who purchased the gun.⁷⁴

One of the leading causes of action in recent suits against the cigarette manufacturers is fraud.⁷⁵ The basis of the suits has been that

67. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2B (1998).

68. See Frank J. Vandall & Joshua F. Vandall, *A Call for an Accurate Restatement (Third) of Torts: Design Defect*, 33 U. MEM. L. REV. 909, 911 n.2 (2003).

69. *Id.*

70. *Id.* at 940.

71. See generally PHILLIPS ET AL., *supra* note 51, at 271-456.

72. See, e.g., *Ayers v. Johnson & Johnson Baby Prods. Co.*, 818 P.2d 1337 (Wash. 1991).

73. If the defect is obvious, that is often a defense. Sometimes obviousness is handled under the defense of assumption of risk, however. The shooting victim did not likely assume the risk, and it was not obvious to her.

74. The warning could say "Caution: Store the gun in a locked cabinet and use a trigger lock." The obvious nature of the gun might be a defense for the manufacturer.

75. See, e.g., *Tompkin v. Am. Brands*, 2000 FED App. 0245P (6th Cir.); 219 F.3d

the manufacturers of cigarettes knew that the cigarettes were addictive and caused cancer, and failed to warn the consumer of this fact. The juries, on discovering that the manufacturers had long known of the injurious nature of tobacco, have held the cigarette manufacturers liable for misrepresentation and fraud.⁷⁶ Indeed, one of the first gun-related products liability suits was based on fraud.⁷⁷ The gun dealer had falsely stated the rifle was made by Nock. It exploded and injured the purchaser's son when he fired it.

A suit based on fraud against a handgun manufacturer will likely fail because it is clear to consumers and victims alike that handguns are extremely dangerous.⁷⁸ Fraud, though, may be used to argue that the manufacturers are aware of alternative means of making handguns safe and have failed to take advantage of "smart gun" technology.⁷⁹

A strict liability suit was brought against the manufacturer of a handgun used to murder a young medical school student, based on the fact that the sale of a handgun is an abnormally dangerous activity.⁸⁰ This action rested on the Restatement (Second), section 402B.⁸¹ The case was won in the trial court, with the jury finding that the manufacture and sale of a handgun is an abnormally dangerous activity, but on appeal the holding was reversed because there was a criminal intervening cause that severed the liability of the manufacturer.⁸² The Court of Appeals for the Fifth Circuit also held that all previous abnormally dangerous activity cases dealt with injuries resulting from a defendant using explosives to blast on his land. In gun cases, land is not an issue and therefore the "abnormally dangerous activity" theory does not apply.⁸³

One court has held that strict liability should apply to the manufacturer of a Saturday Night Special, a small, concealable,

566.

76. See *Inherent Characteristic Defense Overruled in Tobacco Liability Suit*, HEALTH LAW WEEK, Mar. 17, 2006, at 30.

77. See *Langridge v. Levy*, [1838] 150 Eng. Rep. 586 (L.R. Exch. 1837). Apparently Nock was a well-respected manufacturer.

78. In the classic fraud case *Baxter v. Ford Motor Co.*, 12 P.2d 409 (Wash. 1932), the manufacturer said the windshield glass was "non-shatterable." It was not, and plaintiff was severely injured. *Id.* at 410.

79. *Vandall, Causation Issues*, *supra* note 3, at 721-22.

80. *Richman v. Charter Arms Corp.*, 571 F. Supp. 192 (E.D. La. 1983).

81. *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1268 (5th Cir. 1985) (citing RESTATEMENT (SECOND) OF TORTS § 402B (1965)).

82. *Id.* See also discussion on criminal intervening cause *infra* in this section and Part IV.

83. *Perkins*, 762 F.2d at 1256, 1266-68.

unreliable handgun made of poor materials.⁸⁴ The decision was based on the fact that a Saturday Night Special is not safe to use and is not accurate.⁸⁵ This case was superseded by statute.⁸⁶ It is, therefore, of little precedential value.

Public nuisance may be a cause of action that is available in suits against handgun manufacturers and dealers.⁸⁷ The charge to the court in a public nuisance case is "do what is right." The plaintiff in such a suit must show a violation of a law or an interference with a public right.⁸⁸ Several of the recent public nuisance suits brought by cities against the gun manufacturers, to recover for the costs of dealing with gun violence, have been victorious at the trial stage.⁸⁹ These are presently before the appellate courts. The final answer to the question whether violation of public nuisance will be a viable cause of action against gun manufacturers and dealers is not yet clear.

Negligence is the broadest and most flexible cause of action.⁹⁰ It could be argued that the design of a specific handgun was negligent. For example, a rifle was designed with an inadequate safety mechanism so that in some circumstances it was possible for the gun to fire without pressure on the trigger.⁹¹ In a Texas case, a rifle was loaded into a car with the safety engaged. When the safety was switched off, the gun fired, wounding the driver.⁹² A California suit, *Merrill v. Navegar*, was brought against a gun manufacturer based on negligent marketing.⁹³ The case rested on the premise that the manufacturer was careless in

84. *Kelley v. R.G. Indus. Inc.*, 497 A.2d 1143, 1160 (Md. 1985).

85. *Id.* at 1154.

86. MD. ANN. CODE art. 27, § 36-I(h) (1957) (repealed 2003).

87. *See Ileto v. Glock, Inc.*, 349 F.3d 1191 (9th Cir. 2003), *cert. denied*, *China N. Indus. Corp. v. Ileto*, 543 U.S. 1050 (2005) (permitting the district court to proceed with negligence and public nuisance causes of action); *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256 (E.D.N.Y. 2004).

88. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 86, 617-18 (5th ed. 1984) (a classic example of public nuisance is a house of prostitution or the blockade of a public road).

89. *See, e.g., City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002).

90. *See, e.g., FRANK J. VANDALL & ELLEN WERTHEIMER, TORTS: CASES & PROBLEMS* 177 (1997). In general, negligence may be applied to all people and corporations for injuries caused by a failure to exercise reasonable care. *See generally* KEETON, *supra* note 87, § 28, at 160-61.

91. *See* STUART M. SPEISER, LAWSUIT 348 (1980).

92. *Id.*

93. *See Merrill v. Navegar*, 89 Cal. Rptr. 2d 146 (Ct. App. 1999).

advertising and targeting her audience.⁹⁴ California had a statute providing that no suit could be brought against a gun manufacturer based on a balance of risk and utility factors, and the California Supreme Court held that this provision applied to a suit against a gun manufacturer resting on either negligence or strict liability.⁹⁵ Shortly after the California Supreme Court decision, the statute was repealed and it now appears possible to sue a handgun manufacturer or dealer in California based on either strict liability or negligence.⁹⁶ The two most challenging issues in a negligence suit are cause-in-fact and proximate cause.⁹⁷ These are discussed below and in Part V.

The basis of the negligent marketing cause of action in *Merrill* was that the manufacturers and dealers failed to exercise reasonable care in the advertising and marketing of their guns.⁹⁸ In that case, the negligent marketing was based on the defendant placing ads in *Soldier of Fortune* magazine, and other magazines that the court believed were aimed at people who might be drawn toward using guns for criminal purposes.⁹⁹ The gun manufacturer also went to great lengths to place his guns in the hands of actors in various television programs, such as *Miami Vice*, that glamorized gun violence.¹⁰⁰ In *Hamilton v. Beretta*, however, the cause of action for negligent marketing was based on the theory that the gun manufacturers knew that their guns were being sold beyond the saturation level in the south, and purchased in large volume by “straw” purchasers and shipped to cities in the north, such as New York and Chicago, where handgun sales were very strictly limited.¹⁰¹

In suits against gun manufacturers and dealers, two of the most challenging concepts are cause-in-fact and proximate cause.¹⁰² Cause-in-fact is a requirement in all civil liability suits.¹⁰³ The cause-in-fact concept provides that the conduct of the defendant must have something

94. *Id.* at 166.

95. *See Merrill v. Navegar*, 28 P.3d 116 (Cal. 2001).

96. *See Ileto v. Glock, Inc.*, 349 F.3d 1191 (9th Cir. 2003).

97. *See VANDALL & WERTHEIMER*, *supra* note 89, at 261.

98. *Merrill*, 28 P.3d at 121-23.

99. The court held there was an insufficient showing of cause-in-fact, since there was no evidence that the perpetrator of the crime had read the ads in *Soldier of Fortune* and other such magazines. *Id.* at 132.

100. *Id.*

101. *See Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1316 (E.D.N.Y. 1996).

102. *See* discussion of proximate cause *infra* this section and Part V.

103. *VANDALL & WERTHEIMER*, *supra* note 89, at 261.

to do with the injury to the victim, as a matter of science.¹⁰⁴ “There are two tests for cause-in-fact: the ‘but for’ test and the ‘substantial factor’ test.”¹⁰⁵ The “substantial factor” test casts a much broader net than the “but for” test. The key question is whether the conduct of the defendant was a substantial factor in causing the plaintiff’s injury.¹⁰⁶ In a suit against a gun manufacturer the question would be: did the manufacture, distribution, and sale of handguns have something to do with the injury to the plaintiff as a matter of science? Using the “substantial factor” test, it could be argued that the manufacture and sale of handguns did indeed have something to do with the shooting of the victim.¹⁰⁷ In terms of cause-in-fact, the victim would not have been shot but for the existence of the defendant’s gun; it was a cause-in-fact of his injury.

The concept of market share liability may be important in gun violence cases.¹⁰⁸ Shootings by criminals may create a unique problem in regard to cause-in-fact (under either the but-for test or the substantial-factor test) when the gun cannot be found, and therefore the specific manufacturer cannot be identified.¹⁰⁹ The solution to this problem that is sometimes adopted is known as “market share” liability.¹¹⁰ In the foundational case where the mother took the drug DES to prevent miscarriages, the daughter of the woman who took DES developed vaginal cancer approximately twenty years after the mother took the drug. The cause-in-fact problem is that there were over three hundred manufacturers of DES, but neither the mother, nor the doctor who prescribed it, remembered the name of the manufacturer of the drug.¹¹¹ Furthermore, most of the pills produced by different manufacturers were very similar in appearance. The issue presented was whether the suit should be dismissed, because the actual manufacturer of the particular drug the mother consumed could not be identified. The solution adopted in *Sindell v. Abbott Labs* was to hold the drug manufacturers liable in proportion to their market share of DES.¹¹² Once the plaintiff sues more

104. *Id.*

105. Vandall, *O.K. Corral II*, *supra* note 3, at 557-58.

106. *Id.*

107. *See generally* Hamilton v. Accu-Tek, 935 F. Supp. 1307 (E.D.N.Y. 1996).

108. *See, e.g.*, Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989).

109. *See id.*

110. *See id.* Richard C. Ausness argues that “market share” liability is unfair to gun manufacturers. *See Green, Duty Problem*, *infra* note 142, at 1034.

111. *See Hymowitz*, 539 N.E.2d at 1072.

112. *See Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980). The New York version of *Sindell* is *Hymowitz*, 539 N.E.2d at 1069.

than fifty percent of the drug manufacturers, the case goes to trial and the drug manufacturers who have been joined are held liable, not for all of the plaintiff's damages, but only the percent of the damages that is equivalent to the market share of the defendant drug manufacturers.¹¹³ The share is decided at the time the suit is tried and, of course, the plaintiff must prove that the manufacturer was negligent in marketing the drug.¹¹⁴ For example, if 60% of the DES manufacturers were joined, the daughter would recover only 60% of her damages.¹¹⁵

A similar problem is presented in regard to suits against the manufacturers and distributors of handguns. Assume that someone is shot by a criminal, but the specific handgun is not identified, and there are numerous manufacturers of similar handguns (identified by the spent shells or identified only as a handgun manufacturer), and the handguns in question are accepted by the court as being sufficiently similar to be considered to be a homogeneous group. The market share question is, should the suit be dismissed (for failure to prove cause-in-fact), or should it go forward against the manufacturers of the similar handguns, as long as at least fifty percent of the manufacturers in existence at the time of the suit are joined? This was a foundational question in *Hamilton v. Beretta*.¹¹⁶

The most challenging question in torts is proximate cause. Proximate cause was designed by judges to control the issues that are given to juries.¹¹⁷ It is a matter of policy.¹¹⁸ In contrast, cause-in-fact is essentially a question of fact (did Joe's punch cause Tim's broken nose?).¹¹⁹ The issue in proximate cause is whether this defendant should be liable to this particular plaintiff for this particular injury.¹²⁰ It is not accurate to say that everyone is entitled to their day in court because proximate cause, and therefore what the jury is permitted to hear, is subject to the judge's control. Proximate cause is the measuring device used by the courts to decide which cases go to the jury as a question of

113. See *Sindell*, 607 P.2d at 924-26.

114. See *id.*; see also *Hymowitz*, 539 N.E.2d at 1069.

115. The plaintiff must join more than 50% of the manufacturers. The burden then shifts to the joined manufacturers as to whether they want to expend the funds to join other manufacturers. *Hymowitz*, 539 N.E.2d at 1072.

116. *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1325 (E.D.N.Y. 1996).

117. Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 755, 773-74 (1950) [hereinafter Green, *Proximate Cause*].

118. *Id.*

119. KEETON, *supra* note 87, § 41, at 264.

120. *Id.*

policy.¹²¹ Proximate cause analysis is generally applied after the defendant is found by the judge to be negligent and also a cause-in-fact of the injury.¹²²

There are two fundamental approaches to dealing with the proximate cause issue, whether the judge should exercise her discretion to send the case to the jury. The first is the "rule" approach, and the second is the "policy," or duty, approach developed by Dean Leon Green over seventy years ago. The "rule" approach assumes that a precise rule for proximate cause can be found for resolving all cases.¹²³ The judge, therefore, searches for the perfect rule. Perhaps six rules have been announced by various courts over the last several hundred years as being the true and correct rule for resolving proximate cause issues. The six rules are: remote, direct, foreseeable, foreseeable small risk, foreseeable plaintiff (zone of danger), and practical politics. An examination of the six rules follows.

The first rule of proximate cause centers on the remoteness of the defendant's conduct. The rule emanated from an early New York case where sparks from a train ignited a building owned by the railroad.¹²⁴ Sparks from the railroad building then spread to the plaintiff's nearby building. The plaintiff sued the railroad for damages, but the holding was that the plaintiff could not recover because his building was remote from the defendant's sparking train.¹²⁵

The second popular test for proximate cause is "direct."¹²⁶ In the *Polemis* case, during unloading of cargo, a plank was carelessly dropped into the hold of a ship causing a spark that ignited benzene in the hold, and the resulting fire destroyed the ship. The court held that the defendant, a lessor, who was in charge of unloading the ship, was liable because the injury was direct.¹²⁷

The important third test for proximate cause is foreseeability.¹²⁸ In the classic case of *Wagon Mound I*, the defendants were charterers of the S.S. *Wagon Mound*, whose servant carelessly allowed oil to spill into the

121. VANDALL & WERTHEIMER, *supra* note 89, at 289.

122. *Id.*

123. KEETON, *supra* note 87, at 272-81.

124. *See* Ryan v. N.Y. Cent. R.R., 35 N.Y. 210 (1866).

125. *Id.*

126. *In re Polemis & Furness, Wilthy & Co.*, [1921] 3 K.B. 560.

127. *Id.*

128. KEETON, *supra* note 87, § 42, at 273.

bay, where it settled on the surface of the water beside a dock.¹²⁹ Sparks from welding on the dock dropped onto cotton that was floating on the water, and caused the oil to catch fire. The dock, owned by the plaintiff, was severely damaged by the ensuing fire. The court held that the defendant, who carelessly discharged the oil, was not liable because it was not possible to foresee that oil on the top of the water might catch fire.¹³⁰

The fourth test is foreseeable small risk. In a related case, *Wagon Mound II*, the suit was brought by the owner of a ship tied to the dock.¹³¹ The owner of the ship was able to recover against the defendant ship that was leaking oil, because the defendant's chief engineer, with his wide experience in regard to machinery and chemicals, should have been able to foresee the risk that the oil floating on water could catch fire (a foreseeable small risk).¹³²

The fifth test for proximate cause is whether the plaintiff is foreseeable. It was developed in the famous case, *Palsgraf v. The Long Island Railroad Company*.¹³³ In *Palsgraf*, a passenger was running to catch a departing train while carrying a package wrapped in newspaper. The package (about the size of a shoe box), was filled with fireworks. As two railroad employees helped the passenger board the train, the passenger dropped the box onto the tracks, where it exploded. Over thirty feet away, a penny scale was knocked over by the force of the explosion, injuring Mrs. Palsgraf. She brought suit in negligence against the railroad. The court held in favor of the railroad reasoning that Mrs. Palsgraf was not a foreseeable plaintiff.¹³⁴ She was not within the zone of danger. The court reasoned that before the court reaches the question of proximate cause, they must first find a duty on the part of the defendant, and the duty only extends to a plaintiff who is foreseeable to the "ordinarily prudent eye."¹³⁵ In *Palsgraf*, there was no reason to foresee that the unmarked box contained fireworks and might cause injury to someone thirty feet away.¹³⁶

129. *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co., Ltd. (Wagon Mound I)*, [1961] 1 App. Cas. 388, 1 All E.R. 404 (J.C. 1961).

130. *Id.*

131. *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. (Wagon Mound II)*, [1967] 1 App. Cas. 617, [1966] 2 All E.R. 709 (P.C. 1966).

132. *Id.*

133. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

134. *Id.* at 101.

135. *Id.* at 100.

136. *Id.* at 99.

The dissent in *Palsgraf* has been influential in refining proximate cause theory.¹³⁷ Judge Andrews, writing the dissent, reasoned that everyone owes a duty of care to the entire world.¹³⁸ Once that duty is breached, the defendant is liable to the person who is in fact injured by that breach.¹³⁹ However, Andrews recognized a line demarking liability must be drawn, based on the practical politics of a particular case.¹⁴⁰ Andrews argued that some injury to someone was foreseeable due to the pushing of the passenger carrying the box, and since some injury to someone was foreseeable, the defendant railroad should be liable to Mrs. Palsgraf, unless there was some reason of practical politics that would sever the railroad's liability.¹⁴¹

The second major approach to proximate cause theory was developed by Dean Leon Green.¹⁴² He criticized the rule approach, arguing that it was rigid and misleading, and could produce bad results.¹⁴³ Instead of searching for the perfect rule, Green argues that duty rests on policy and should vary with the facts of each case.¹⁴⁴ In his numerous articles and books on the subject, he suggests that there are three fundamental questions that the judge should consider in analyzing duty.¹⁴⁵ The first is "cause-in-fact." Is there sufficient evidence that the defendant's conduct was a cause-in-fact of the plaintiff's injury?¹⁴⁶ Under either the "but for" or "substantial factor" test, was there sufficient evidence to send the case to the jury? The second is whether there is "evidence of negligence."¹⁴⁷ Is there sufficient evidence that the defendant failed to exercise care? Assuming the first two questions are answered in the affirmative, the third is, does the defendant's duty extend

137. *Id.* at 101-05 (Andrews, J., dissenting).

138. *Id.* at 103.

139. *Id.*

140. See Frank J. Vandall, *Duty: The Continuing Vitality of Dean Green's Theory*, 15 QUINNIPIAC L. REV. 343, 345 (1995) [hereinafter Vandall, *Green's Theory*].

141. See *Palsgraf*, 162 N.E. at 103-05 (Andrews, J., dissenting).

142. See Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928) [hereinafter Green, *Duty Problem*]. Dean Leon Green taught at Yale Law School and was Dean at Northwestern and Texas Universities.

143. *Id.*

144. See *id.* at 1034. Green eliminated proximate cause from the negligence equation. *Id.*

145. California defines duty similarly to Dean Green: "[w]hether a legal duty arises 'is a question of law which is simply an expression of the sum total of the policy considerations that lead a court to conclude that a particular plaintiff is entitled to protection.'" *Ileto v. Glock*, 349 F.3d 1191, 1203 (9th Cir. 2003).

146. See Green, *Proximate Cause*, *supra* note 116, at 773-74.

147. *Id.* at 774.

to this particular plaintiff for this particular injury?¹⁴⁸ In answering this critical question, Dean Green suggests a balancing of several factors. He was very much opposed to a concrete list of factors to be considered in answering the duty question, because the appropriate policies should be driven by the facts of the particular case. The thesis of his writings is that the court should search for a fair and appropriate result in each case. He asks whether it makes more sense for the victim to bear the loss or whether the defendant is in a better financial position to bear it.¹⁴⁹ For example, in a defective automobile case, often the manufacturer is better able to bear the loss than the injured driver. He also asks, what is the impact on society of placing the loss on the defendant?¹⁵⁰ For example, placing a large loss on a tobacco manufacturer may not affect society in a negative way, but placing a large award on a drug manufacturer might. Green was perhaps the first person to look at the administrative factor:¹⁵¹ whether the court is competent to deal with the issue raised in the case and the issues that will be raised in later cases.¹⁵² An example of an administrative problem is when a victim suffers emotional distress as the sole injury. The courts have had substantial difficulty dealing with such cases.¹⁵³ Dean Green also suggests that the availability of insurance is a relevant factor to consider.¹⁵⁴ Could the defendant or plaintiff have purchased insurance and at what cost?¹⁵⁵ Damage to a plaintiff's building might be an example of the insurance factor. The plaintiff knows the value of the building and might be able to obtain insurance to cover that loss cheaper than the defendant, who does not know the value of the plaintiff's property. He also suggests precedent as a factor. Green reasons that if there is a case on point, it should be followed. Finally,

148. *Id.* at 775.

149. *See* Green, *Duty Problem*, *supra* note 141, at 1034. Bryce A. Jensen accepts that the gun manufacturers are better able to bear the loss and control the gun market than the victims. Bryce A. Jensen, *From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1374 (2001) (quoting *Hamilton v. Accu-Tek*, 222 F.3d 36, 41 (2d Cir. 2000) (discussing the testimony of Professor Vandall)).

150. *See* Green, *Duty Problem*, *supra* note 141, at 1034.

151. *Id.* at 1034-35.

152. *Id.*

153. *See, e.g.,* *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989).

154. *See* Green, *Duty Problem*, *supra* note 141, at 1034; *see also* Leon Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255 (1929) [hereinafter *Green, Duty Problem II*].

155. *See* Green, *Duty Problem*, *supra* note 141, at 1034; *see also* Green, *Duty Problem II*, *supra* note 153, at 255.

Dean Green suggests that justice (an open-ended term that allows the court to consider whatever is important in the case before it when drawing a duty limitation) may be a consideration in deciding whether to place a particular loss on the plaintiff or the defendant.¹⁵⁶

The quality of the expert witness presented by the plaintiff also is a potential issue in contemporary products liability cases. In 1993, the *Daubert* case changed the rules for expert testimony.¹⁵⁷ Formerly, the plaintiff in a products case merely had to provide an expert and it was then the defendant's responsibility to counter with her expert.¹⁵⁸ The trial was viewed as a war between the experts, and it was the task of the jury to evaluate the demeanor and the quality of the evidence in deciding who should win the case.¹⁵⁹ The *Daubert* case changed the rules and the trial court judge is now the gatekeeper and has the obligation and authority to evaluate whether the plaintiff's expert has sufficient qualifications and experience in the subject matter of the litigation.¹⁶⁰ Since *Daubert* was decided, numerous cases, involving many different products, have been dismissed because the judge held that the plaintiff's expert was not qualified to testify.¹⁶¹ In gun litigation, the plaintiff has the threshold obligation to produce a qualified expert who has experience or training in the area and will be able to pass muster under the watchful eye of the trial court.

A critical issue surrounding all suits against handgun manufacturers and dealers is the Second Amendment.¹⁶² The plaintiff will argue that recent Supreme Court cases have held that guns can be regulated by the state.¹⁶³ On the other side, the defendant will argue that the Second Amendment forbids any regulation of handguns: all gun ownership is a right protected by the Second Amendment.¹⁶⁴ In *United States v. Emerson*, a doctor was arrested for possessing a handgun and threatening

156. See generally Vandall, *Green's Theory*, *supra* note 139.

157. *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993).

158. *Id.* at 590.

159. *Id.*

160. *Id.* at 592-93.

161. See, e.g., *Siharath v. Sandoz Pharm. Corp.*, 131 F. Supp. 2d 1347 (N.D. Ga. 2001); *Verzwyvelt v. St. Paul Fire & Marine Ins. Co.*, 175 F. Supp. 2d 881 (W.D. La. 2001).

162. The complete wording is: "[a] well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." U.S. CONST. amend. II.

163. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995).

164. See, e.g., *Printz v. United States*, 521 U.S. 898, 939 (1997).

his wife during the pendency of their divorce.¹⁶⁵ The wife informed the authorities and the doctor was arrested and enjoined from carrying a gun.¹⁶⁶ The issue on appeal was whether the doctor's right to own and carry a handgun was protected by the Second Amendment.¹⁶⁷ In the United States Court of Appeals for the Fifth Circuit, the majority opinion held that the federal statute prohibiting the defendant from owning and carrying a handgun, while under a court order, was constitutional.¹⁶⁸ The long concurring opinion argued that an individual had a right to possess firearms and embraced the sanctity of the Second Amendment, but still agreed with the majority.¹⁶⁹ *Emerson* was appealed to the Supreme Court,¹⁷⁰ but the Court refused to grant certiorari, thereby upholding the Fifth Circuit's narrow holding that the statute prohibiting the husband from carrying a gun while under a court order was constitutional.

With this survey of legal issues involved in a typical gun violence case, we can now consider the economic testimony presented in *Hamilton v. Beretta*. In Part IV we will examine how the courts dealt with the specific legal issues raised in the case.

III. An Economic Analysis of a Suit to Regulate the Sale of Handguns as a Means of Reducing the Criminal Use of Handguns

This section begins with a description of the legal demand by non-criminals for handguns, because it is essential for understanding why more extensive government controls have been politically difficult to achieve and why those who want to restrict the availability of handguns to criminals (and others) have brought lawsuits against handgun manufacturers. It also is an important aspect of the handgun manufacturers' defense in *Hamilton v. Beretta*, which maintained that there is a legal demand for and use of handguns by consumers for purposes other than doing or threatening harm to others, and that the manufacturers' serve this legitimate demand as do producers of other products. This is followed by a description of the illegal demand for handguns, the primary reason for regulation. Next, this section describes and analyzes the supply of handguns, and notes that regulations govern

165. See *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).

166. *Id.* at 210.

167. *Id.* at 218-19.

168. *Id.* at 264-65.

169. *Id.* at 173-74 (Parker, J., concurring).

170. *Emerson*, 270 F.3d 203, *cert. denied*, 536 U.S. 907 (2002).

only about half of the supply. An analysis of supply is crucial for determining whether additional legal controls, if they could be enacted, would be effective, and whether lawsuits that seek to restrict and punish handgun manufacturers are likely to be effective in reducing the supply of handguns to criminals.

A. Legal Demands for Handguns

Several surveys provide information about the extent to which non-criminals own handguns. Gary Kleck lists 85 surveys taken from 1959 through 1996 which report that 34 to 53% of households own guns.¹⁷¹ A 1993 survey by Kleck and Marc Gertz finds that 26% of individuals owned guns.¹⁷² In November and December 1994 Philip Cook and Jens Ludwig conducted a telephone interview study for the Police Foundation with a probability sample of 2568 adults.¹⁷³ The responses indicate that 35% of U.S. households (and 25% of individuals) owned at least one working firearm.¹⁷⁴ Cook and Ludwig use these numbers to estimate that, as of year-end 1994, the public (excluding police and the military) had 65 million handguns, 119 million long guns (rifles and shotguns), and 8 million not specified, a total of 192 million firearms in working order.¹⁷⁵

Additionally, Kleck points out that surveys are likely to result in undercounting.¹⁷⁶ He cites a study by Rafferty et al., finding that "as many as 12.7% [of registered gun owners] may have falsely denied gun ownership."¹⁷⁷ In addition, people who own guns illegally, non-criminals as well as criminals, are very unlikely to disclose this fact to an interviewer.¹⁷⁸ Furthermore, the people interviewed may not know that

171. GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* 98-100 (1997). The survey reporting 53% was taken in 1994. *Id.*

172. See Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 187 (1995).

173. See Phillip J. Cook & Jens Ludwig, *Guns in America: Results of a Comprehensive National Survey on Firearms Ownership and Use, Technical Report*, Police Foundation, Wash. D.C. (1996) at 5 and table 2.1. Of 13,969 possible interviews that were eligible or not known to be ineligible for inclusion in the study, 2568 interviews were completed, yielding a response rate of 18.4%.

174. *Id.* at 35.

175. *Id.* at 34.

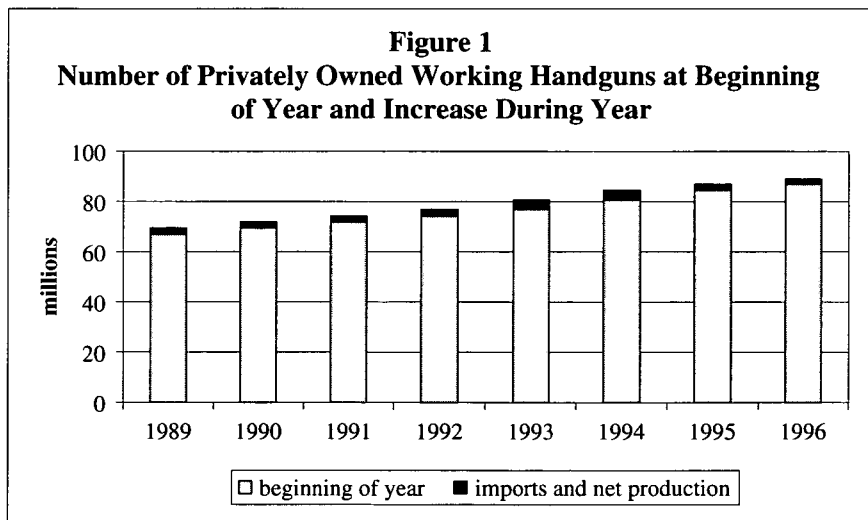
176. See KLECK, *supra* note 170, at 68.

177. *Id.*; see also Ann P. Rafferty, *Validity of a Household Gun Question in a Telephone Survey*, 110 PUB. HEALTH REP. 282, 284 (1995).

178. See KLECK, *supra* note 170, at 68.

someone else in the family owns a gun. In particular, Cook and Ludwig find that 49% of husbands but only 36% of wives report the presence of a gun in the same household.¹⁷⁹ (Kleck reports a similar, though somewhat smaller, discrepancy in the GSS data).¹⁸⁰ And, some people believe strongly that gun ownership is a private matter or do not trust interviewers, who, necessarily, they do not know.¹⁸¹ This bias towards undercounting is particularly relevant for handguns. An alternative measure is provided by Kleck, derived from the number of firearms produced, imported, and exported.¹⁸² He estimates that in 1994 the civilian gun stock totaled 235 million guns—over 80 million handguns and 150 million long guns.¹⁸³

Figure 1 shows both measures of the handgun stock as of year-end 1996, computed by adding to Kleck's 1994 numbers (which still are likely to undercount the stock) the additional four million handguns sold in 1995 and 1996.¹⁸⁴ Also shown are annual sales of handguns (measured by production net of exports plus imports), 1989 through 1996. As the figure shows, annual sales are a very small fraction of handguns that are potentially available to those who demand them.



179. See Cook & Ludwig, *supra* note 172, at 11.

180. See KLECK, *supra* note 170, at 96-97.

181. *Id.* at 68.

182. *Id.* at 96-97.

183. *Id.* at 64.

184. *Id.* at 96-97 for 1989-1994; additional amounts for 1995 and 1996 are taken from Table 5.

Evidence concerning people's reasons for buying and owning handguns can be gleaned from marketing surveys of gun purchasers and from academic surveys of gun owners. As is usual for many companies, handgun manufacturers employ professional marketing research firms to learn about their customers. One such survey is the Scout Market Intelligence.¹⁸⁵ It uses responses to a questionnaire sent to 100,000 households, balanced by census region, metropolitan statistical area (MSA), marital status, and number of people in the household.¹⁸⁶ The respondents are asked whether they purchased a spectrum of 120 household products, including handguns, in a calendar quarter.¹⁸⁷ For the fourth quarter 1992 survey, for example, 71,538 households responded, of which 1,037 said they had purchased a handgun.¹⁸⁸ An additional questionnaire was sent to these people and 724 (69.8%) responded.¹⁸⁹

Table 2 shows the reasons that people buy and own handguns.¹⁹⁰ Most specified "self-defense."¹⁹¹ The percentage is lower for people who own both handguns and long guns (81.5% versus 58.2%).¹⁹² Apparently, many of these people use long guns as a means of self-defense as well as for other purposes. However, recreation and job-related uses are substantial for both purchasers and owners, particularly among those who also own long guns. *See Table 2.*

These findings are consistent with those of academic studies. Kleck reviews a large number of studies on the relationship between fear, victimization, and gun ownership.¹⁹³ The best studies, he says, are by Lizotte and Bordua and Lizotte et al., which find that "county crime rates positively affected Rs' [respondents'] perceived level of crime, which in turn positively and significantly affected fear of crime. Both fear and prior victimization were significantly and positively associated with gun ownership for protection."¹⁹⁴

185. Polk Company, NDL.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *See Table 2 infra.*

191. *Id.*

192. *Id.*

193. *See KLECK, supra* note 170, at 75-79.

194. *Id.* at 76; *see* Alan J. Lizotte & David J. Bordua, *Firearms Ownership for Sport and Protection: Two Divergent Models*, 45 AM. SOC. REV. 229, 229-44 (1980); Alan J. Lizotte et al., *Firearm Ownership for Sport and Protection: Two Not So*

Table 2
Why People Purchase and Own Handguns
Percentages of Handgun Owners and Purchasers

	Purchasers [note 1]		Owners [note 2]	
	Primary Purpose	Intended Use	Handguns Only	Hand- and Longguns
A. Reasons for Purchasing and Owning Handguns				
Protection:				
personal protection:	40.4	76.6		
home security	17.0	71.0		
total self defense	<u>57.4</u>		<u>81.5</u>	<u>58.2</u>
Recreation:				
sport shooting	22.6	64.7		
silhouette shooting (IHSA)	1.0	12.9		
practical shooting (IPSC)	1.0	11.9		
target/sport shooting	24.6		11.8	12.7
hunting	5.3	15.0	0.5	12.7
part of a collection	4.0	21.2	1.0	13.9
total recreation	<u>33.9</u>		<u>13.4</u>	<u>39.3</u>
Job related:				
law enforcement	7.9	11.4		
professional security job	0.9	4.0		
total job related	<u>8.8</u>		<u>5.1</u>	<u>2.5</u>
B. Prior Ownership and Later Purchasing Plans				
	Purchasers		Owners	
	[note 1]		[note 2]	
Already own at least one other:				
revolver		74.6		
pistol		78.1		
Likelihood of purchasing a handgun				
next year				
very likely		20.8		
somewhat likely		21.9		
total		42.7		
Gun ownership at Time of Handgun				
Acquisition:				
working handgun			65.0	
working firearm			76.9	
handgun in household			80.0	
gun in household			69.9	

Note 1: Respondents were asked to identify the primary use for which they purchased a handgun (sums to 100%) and their intended use, which can (and often does) be multiple (hence, sum not relevant)

Source: Scout Statistical Analysis Reports, number of respondent-weighted averages of two surveys, October 1991 through December 1992 (828-875 respondents) and October 1994 through September 1995 (387 – 425 respondents).

Note 2: Source, Cook and Ludwig [1996]

Panel A: Table 4.6, excluding “don’t knows;” “other reason” also is excluded for comparison with purchasers

Panel B: Table 3.15

Divergent Models, 46 AM. SOC. REV. 499, 499-503 (1981).

Kleck concludes that “the weight of the best available evidence supports the idea that crime affects handgun ownership, although interpretation of the evidence is clouded by the fact that associations may simultaneously reflect both the effects of fear or victimization on gun owning and the effects of gun ownership on fear and victimization.”²⁰⁰ Cook and Ludwig find that handgun owners are more likely than non-owners to have suffered a home burglary or been robbed or attacked in the past twelve months (They do not indicate whether a handgun was purchased as a result).²⁰¹ Consistent with most of the literature reviewed by Kleck, they do not find much of a relationship between gun ownership and fundamental feelings of insecurity.²⁰² Academic researchers also have found that gun ownership is, to a significant extent, culturally related. Kleck reviews this literature and concludes: “The pattern of evidence as a whole is fully compatible with the thesis that gun ownership is a product of socialization into a rural hunting culture.”²⁰³ Cook and Ludwig report that “[t]hose whose parents kept guns are three times as likely as others to own one themselves. In fact, 80% of all current gun owners report that their parents kept a gun in the home.”²⁰⁴

Finally, it is interesting to note why people said they do *not* currently own a firearm. Cook and Ludwig asked this question of their panel. They report that 32.9% say it is because they “can’t afford one, too expensive.”²⁰⁵ A substantial proportion, though, believe that “guns are dangerous to have” (21.6%) or are “opposed to guns” (21.6%).²⁰⁶

To further understand the nature of the demand for handguns, an extensive review was made of the catalogues of a variety of manufacturers who were defendants in *Hamilton v. Accu-Tek*.²⁰⁷ These

195. See KLECK, *supra* note 170, at 75-79.

196. *Id.* at 76; see Alan J. Lizotte & David J. Bordua, *Firearms Ownership for Sport and Protection: Two Divergent Models*, 45 AM. SOC. REV. 229, 229-44 (1980); Alan J. Lizotte et al., *Firearm Ownership for Sport and Protection: Two Not So Divergent Models*, 46 AM. SOC. REV. 499, 499-503 (1981).

197. See KLECK, *supra* note 170, at 76.

198. See Cook & Ludwig, *supra* note 172, at 55.

199. See *id.*

200. See KLECK, *supra* note 170, at 76.

201. See Cook & Ludwig, *supra* note 172, at 55.

202. See *id.*

203. KLECK, *supra* note 170, at 85.

204. Cook & Ludwig, *supra* note 172, at 55.

205. *Id.* at 66 table 4.5.

206. *Id.*

207. The firm not included, Interarms, is an importer.

companies are representative of the range of manufacturers, from those who offer a large number of models and kinds of handguns, to those who produce only a few models. These manufacturers (and their 1994 handgun production net of exports, in thousands of units) include Sturm, Ruger (290), Smith & Wesson (285), Glock Inc. (199), Colt Manufacturing Co. (86), Beretta USA and Italy (101), Phoenix Arms (42), Springfield, Inc. (17), Thompson Center Arms (13), Taurus International Manufacturing (11), H&R 1871 (8), and Freedom Arms (2). The handguns offered are suggested for several broad kinds of demands: personal protection, law enforcement and private security, target shooting, hunting, and collecting. A very large variety of handgun calibers, barrel lengths, sizes, finishes, grips, and collateral products, such as clothing, shotguns, and rifles, are available for purchase. To avoid boring some readers, only Smith & Wesson and Glock are presented; the other descriptions are given in a footnote.²⁰⁸

208. The 1994 Sturm, Ruger & Co. firearms catalogue shows pictures and descriptions of rifles, shotguns, and handguns. Among the handguns are 22 single-action revolvers and 12 autoloading pistols. The revolvers include two .22 rimfire "classics" recommended for target shooting (plinking) and hunting, two "Old Army" models for muzzle-loading shooters, a target model first used in the 1890s, two western-style models (.44-40 and a .45), three new-model .22 LR handguns for Western action shooters, and two new .44 models. The 9mm pistols include a manual safety model, a double-action only model, four autoloading models suggested for defensive or action-shooting sports, two .22 caliber models for plinking, inexpensive practice, or hunting small game, and five models recommended for target shooting. (catalog on file with authors).

Colt Manufacturing's 1991 catalogue features both long guns and handguns. The handguns include 42 models of revolvers and 48 models of semiautomatic pistols featuring different barrel lengths, calibers, finishes, weights, capacity, etc. The handguns are variously described as rugged, an ideal choice for law enforcement, handgun hunting, target shooting, and personal, home and business protection.

Beretta USA's 1994 catalogue shows 30 pictures of different pistols. These are double/single and double-action only in varying finishes and grips, sizes, barrel lengths, capacity, safety locking features, and so forth. Specific models are suggested for competitive shooting and range training, military and police work, and personal protection. The catalogue also includes a large number of long guns and clothing. (catalog on file with authors).

Phoenix Arms' 1994 catalogue shows two less-expensive semiautomatic pistols for "all round performance . . . backed by a no-nonsense 100% Lifetime Warrantee."

Springfield, Inc. sells customized, special-order .45 caliber pistols specifically designed for shooting sports and for self-defense purposes. (catalog on file with authors).

Thompson/Center Arms Company manufactures only muzzle-loading blackpowder handguns and single shot pistols. Its Contender pistol is described as "designed as a hunting/sports pistol" used for both small and big game handgun hunting, as well as handgun silhouette shooting and plinking. (catalog on file with authors).

Taurus International's 1994 catalogue pictures and describes 18 revolvers and 9 semiautomatic pistols. The revolvers use four calibers of ammunition: .22 long rifle, .38

The Smith & Wesson 1994 catalogue describes and has pictures of sixteen models of revolvers, seventeen models of semi-automatic pistols, and a limited-run performance center revolver. Among the revolvers there are five small-frame models in two calibers (.22 and .38) that are described as lightweight and are suggested for personal security and police and security work. Five medium frame revolvers are offered. Two are .357 magnums suggested as a police sidearm, one of which is additionally described as “durable.” One is a .38 caliber revolver described as “traditional, for serious shooters.” One is a .22 caliber that is suggested for training. Six large frame .22 caliber revolvers are offered for target shooting and outdoor use—beginning plinking, casual plinking, and competitive target shooting. The pistols include six compact lightweight 9mm models suggested for personal security and plain-clothes police duty. Six are full size 9mm models suggested for law enforcement. Five .22 long rifle models are offered for target shooting—beginning and casual plinking, and competitive shooting. In addition, the Smith & Wesson catalogue features handcuffs, engraving services for handguns, and apparel.

Glock, Inc. sold nine different models of pistols from 1989 through 1994, all made of polymer and steel construction. These varied among calibers, sizes, and magazine capacities. Model G17 is offered as a law enforcement and military service pistol. Models G22 and G23 are “FBI issue” pistols. Model G20 is recommended for hunting and the “C” series are recommended for competitive sports shooting.

special, .357 magnum, and .44 special. They variously hold from five to nine rounds and have varying barrel types and weights. The small-frame models are suggested as trail guns, for personal defense, and for beginning target shooting. The medium-frame revolvers are offered as sporting guns, for rural police work and backpack campers, as well as for personal defense. The .44 magnum large-frame revolvers are for close-range, big game hunting. The semiautomatic pistols include two small-frame models that “may most commonly serve as a concealed carry gun or policeman’s backup . . . [but] many sportsmen are taking up the little .22 and .25 autos as ideal informal plinkers and pest control guns.” A medium-frame .380 also is offered for sport shooting. Three 9mm large-frame pistols are shown, with finishes resistant to salt water and suggested for police and security personnel. Two .40 and one .45 caliber pistols complete the line; their descriptions emphasize power and safety. (catalog on file with authors).

H&R 1871, Inc. manufactures .22 and .32 caliber revolvers, used primarily by plinkers who prefer nine-shot capacity. The company also produces handguns that replicate historical firearms. (catalog on file with authors).

Freedom Arms’ catalogue features the “454 Casull,” described as a “primary hunting firearm or a backup while hunting large, dangerous game.” Other revolvers are described in the catalogue as made for “varmint” hunting and serious competition. (catalog on file with authors).

These descriptions (and those presented in the footnote) are inconsistent with some gun-control advocates' assertions that the only real purpose of handguns is to kill or hurt people. Not only do people own guns for multiple purposes, but most gun purchasers already owned a handgun at the time of their most recent purchase and intend to purchase additional handguns, as shown in Panel A of Table 3. Gun owners also generally own many guns (three at the median), as shown in Panel B of Table 3. Kleck's analysis finds that "an average of over five guns [per household] are owned, considerably higher than most survey data suggest. The distribution, however, is undoubtedly skewed to the right, with a few households owning very large numbers of guns."²⁰⁹ See Table 3.

B. The Effect of Laws on the Legal Demand for Handguns

Non-criminal consumers in states that impose fewer and less-costly restrictions on handgun purchase and use are likely to demand more handguns, all other things equal. Moreover, state legislators probably would not enact restrictive laws when citizens generally want to use or do not object to others using handguns. Hence, cross-section studies could yield potentially misleading results. Although the restrictiveness of state laws (shown in Table 1) is not homogeneous within census regions, it does accord generally with the purchase and ownership data by location (cities v. rural and census regions) presented in Table 4. This table shows that the New England and Mid-Atlantic regions, which have about half as many handgun purchasers and owners to population, also include three states with "no additional restrictions" (NAR). However, Maine, New Hampshire, and Vermont are low population states and the region is dominated by the "restrictive" (R) states of Massachusetts, New Jersey, and New York. The regions with approximately similar number of purchasers and owners to population of East North Central, West North Central, Pacific, and South Atlantic include each of the three kinds of states. States in the three regions with relatively more handgun purchasers and owners than population are dominated by NAR states, with only three "somewhat restrictive" (SR) states and no R states. See Table 4.

209. KLECK, *supra* note 170, at 69.

Table 3
How Often and How Many Guns People Buy and Own
Percentages of Handgun Owners, Purchasers,
and Enthusiasts

A. Handgun Purchases					
		Owners	Purchasers	Enthusiasts	
		[note 1]	[note 2]	[note 3]	
Already own at least one other:					
revolver			74.6		
pistol			78.1		
Likelihood of purchasing a handgun next year:					
very likely			20.8		
somewhat likely			21.9		
total			42.7	71.0	
Gun Ownership at Time of Handgun Acquisition:					
working handgun		65.0			
working firearm		76.9			
handgun in household		80.0			
gun in household		69.9			
B. Number of handguns and longguns owned by households which own guns					
		percentage	cumulative %		
4 or more guns		34.3	34.3		
3		13.3	47.6		
2		22.3	69.9		
1		30.1	100.0		
Number of handguns owned by "enthusiastic" handgun owners [note 2]:					
		percentage	cumulative %	average number of guns owned	
9 or more guns	5.2	9 or more guns	5.2	5.2	3.0
8	1.7	8	1.7	6.9	2.6
7	2.5	7	2.5	9.4	2.5
6	2.5	6	2.5	11.9	2.4
5	7.2	5	7.2	19.1	2.3
4	10.7	4	10.7	29.8	2.0
3	17.0	3	17.0	46.8	1.8
2	25.2	2	25.2	72.0	1.5
1	27.9	1	27.9	100.0	1.0

Note 1: Source, Cook and Ludwig [1996], Tables 4.6 and 3.15

Note 2: Source, Scout Statistical Tabular Analysis Reports, respondent weighted averages of two surveys (see Table 1, note 1)

Note 3: B&T survey mailed to 2500 handgun owners nationwide obtained from *Peter- sen's Handguns*,

a "handgun enthusiasts" magazine, March 1993, 414 responses, 16.6% response rate

Table 4
Where Handgun Purchasers and Owners Live
Percentages of respondents who purchased or own a
handgun [note 1]

	percentages of				
	handgun purchasers	handgun owners	U.S. population 1990 census	purchasers % of U.S.	owners % of U.S.
A. Primary residence					
owner	63.6	note 2	66.2	96.2	
renter	36.4	note 2	33.8	107.4	
B. Location of Residence					
central city	27.8	note 2	note 2		
non-central city	43.6	note 2	note 2		
total cities	71.4	79.9	75.2	95.0	106.3
rural (note 2)	28.5	21.1	24.8	115.1	85.1
C. Area of Residence (Census Regions)					
New England (CT, ME, MA, NH, RI, VT)	2.9	3.1	5.3	54.9	58.1
Mid Atlantic (NJ, NY, PA)	8.9	7.4	15.1	58.7	48.9
East North Central (IL, IN, IA, MI, OH, WI)	13.2	16.3	18.0	73.2	90.3
West North Central (KS, MN, MO, NE, ND, SD)	6.1	4.7	6.0	102.5	79.2
Pacific (AK, AZ, CA, HI, OR, WA, WY)	18.7	15.6	17.2	108.8	90.9
South Atlantic (DC, DE, FL, GA, MD, NC, SC, VA, WV)	17.5	19.8	17.5	100.0	113.2
East South Central (AL, KY, MS, TN)	8.6	9.3	6.1	141.0	152.1
West South Central (AR, LA, OK, TX)	15.4	17.9	10.7	143.4	166.4
Mountain (CO, ID, MT, NV, NM, UT)	8.8	5.9	4.0	219.6	147.2

Note 1: sources - handgun purchasers, Scout Market Intelligence surveys handgun owners - General Social Surveys (GSS) conducted by the National Opinion Research Center, Kleck [1997], Table 3.4

Note 2: not reported

Note 3: for owners, defined as places with under 5,000 population; for purchasers and U.S., defined as places with under 2,500 population

Interestingly, the possibility that more restrictive federal laws might be enacted appears to have increased the demand for handguns. Prior to passage of the 1993 Brady Act and the 1994 Public Safety and Recreational Firearms Use Protection Act, many people feared that a law requiring registration of handguns or licensing of handgun owners would be passed. Some even thought that an outright ban on handguns might be enacted. These people had strong incentives to purchase handguns before such a restrictive law went into effect, if it were passed. The data on handgun supply, presented below, shows a substantial increase in output in 1993 and 1994 that appears to have been driven by this increase in demand.²¹⁰

C. Illegal but Non-Criminal Demand for Handguns

It is not known how many people illegally own handguns for non-criminal purposes, most likely for self-defense. As noted earlier, some jurisdictions (notably Washington D.C., New York City, and Chicago) either prohibit or severely restrict the legal ownership of handguns. Some other states make it costly or difficult for people to own guns (see Table 1). Nevertheless, some people believe that a handgun offers them protection that they otherwise could not obtain or afford, and they are willing to break the law to obtain that protection. They might have experienced robberies and muggings or other assaults, or have known or heard about people who have been subjected to such attacks. They might be old or infirm, or female and vulnerable to the horrors of rape. They may have jobs or family situations that put them in danger and are unable to convince the authorities to grant them a permit to own or carry a handgun. They may live in neighborhoods that they perceive as dangerous, and they believe that they cannot rely on the police for protection.

Of course, people who may not legally own a handgun could substitute other means of protection, such as window bars, dogs, alarm systems, mace, and personal sirens. They also could live in protected communities and homes, such as gated and guarded compounds and apartment houses that restrict entry with doormen. However, many people, particularly the poor and those who live in rural areas, are likely to find these means of personal protection excessively expensive or believe them to be insufficiently effective. For these people, the benefits from protection and a reduction in fear apparently exceed the cost of

210. See *infra* Table 5.

violating the law and being caught and possibly prosecuted. In addition, ordinary people might inadvertently or unthinkingly violate local laws by keeping a handgun without a permit. This could occur if they moved with handguns from localities where they did not need a license and did not bother to or know that they had to get a permit in their new place of residence. This section does not classify these people as “criminals.”

D. Criminals’ Demand for Handguns

Criminals demand handguns primarily for three purposes. One is to threaten people as a means of getting them to part with their property or, worse yet, to surrender their persons. Handguns offer the advantages of being small and powerful, easy to carry and conceal, and usually effective for intimidating people (particularly if the victims are not similarly armed). Handguns also can be used to hurt and kill people. Of course, other weapons—such as knives and clubs—can be and often are used for these purposes.²¹¹ A second purpose is similar to that motivating non-criminals—self defense. Criminals cannot turn to the police for protection against other criminals. In fact, they are more vulnerable than are other people to predators. They often have goods, such as cash and drugs, worth stealing. Their associates are often violent and have few reservations against using violent means to get what they want. Third, criminals cannot use the courts to enforce agreements or ordinary business means to defend and expand their turf. Rather, they must either use violence or its threat to expand or defend their share of illegal markets.

James Wright and Peter Rossi studied the use of firearms by criminals.²¹² They gathered information on gun use by convicted felons from 1732 felons jailed in the prisons of ten states.²¹³ Three-quarters of these owed a gun at one time or another; of these, 87% owned a handgun.²¹⁴ Thus, even though handguns were readily available to the

211. KLECK, *supra* note 170, at 215-59 (outlining and evaluating the substantial literature on the relative damage caused by violent-prone people with guns and other weapons and the empirical studies of the relationship between the availability of guns and the incidence of violent crime). Kleck concludes, “the hypothesis that general gun availability causes increases in rates of homicide and other violent crimes is not supported.” *Id.* at 258. Other researchers disagree. For present purposes, it is not necessary for me to join this debate.

212. See JAMES D. WRIGHT & PETER H. ROSSI, *ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS* (1994).

213. See *id.* at 80.

214. *Id.*

felons (as described below), many chose other weapons. Among those who had owned a gun, 28% said they got it specifically to use in crime; however, 50% of these said they never actually fired a gun at anyone.²¹⁵ Most of the 50% who fired a gun said they did so to protect themselves (66%); 39% said they fired a gun while committing a crime.²¹⁶

When asked why they obtained their most recent handgun, the convicted felons reported the following “very important” and “somewhat important” reasons (in order of “very important”):²¹⁷

	<u>very important</u>	somewhat <u>important</u>	<u>total</u>
Protection	58%	26%	84%
Target shooting	31	31	62
Just wanted one	26	36	62
To use in crimes	28	20	48
Hunting	26	20	46
Gun collecting	25	19	44
Stole to sell	17	18	35
Need to get someone	10	10	20

Remarkably, perhaps, criminals’ demands for guns are similar to those of non-criminals, except in the criminals’ demand for handguns to use in crime and as objects to steal and subsequently sell.

The features that criminals prefer in guns also provide some insights into their demands. Wright and Rossi’s felons identify the following gun characteristics as “very important” or “somewhat important” to them (in order of “very important”):²¹⁸

215. *Id.* at 81.

216. *Id.*

217. *Id.* at 137.

218. *Id.* at 163.

	<u>very important</u>	somewhat <u>important</u>	<u>total</u>	single most <u>important</u>
Accurate	62%	21%	83%	9%
Untraceable	60	12	72	13
Well made	58	20	78	17
Easy to shoot	54	24	78	2
Concealable	50	25	75	13
Easy to get	48	23	71	4
Ammunition easy to get	45	26	71	2
Firepower	42	25	67	22

Fewer than 43% listed the following traits as total important (very important plus somewhat important): cheap, small caliber, scary-looking, and cheap ammunition.²¹⁹ Wright and Rossi conducted additional analyses, which lead them to conclude: “the felons in our sample neither preferred to own, nor did they actually own, small, cheap, low-quality handguns. The strong preference, rather, was for large, well-made guns.”²²⁰ This preference “was especially strong among felons who had owned guns and who had used guns to commit crimes.”²²¹

Additional insights may be obtained from a study conducted by Joseph Sheley and James Wright in 1991 of 835 male inmates in six reformatories and 758 male students in ten inner-city high schools.²²² They found that, similar to adult criminals, 83% of the inmates owned some kind of gun just prior to confinement and 58% owned a handgun.²²³ Among the inner-city students, though, only 22% currently owned a gun, and 18% owned a handgun.²²⁴ They asked questions about desirable handgun traits shown above and received similar answers.²²⁵ Summarizing their findings, Shelley and Wright say:

219. *Id.*

220. *Id.* at 15.

221. *Id.* at 16.

222. JOSEPH F. SHELEY & JAMES D. WRIGHT, IN THE LINE OF FIRE: YOUTH, GUNS, AND VIOLENCE IN URBAN AMERICA 40 (1995).

223. *Id.*

224. *Id.* at 42. Other studies, cited and summarized by Hemenway, et. al, report similar findings; the percentages of gun ownership range from thirteen to twenty-five percent), particularly for African-American males in inner-city schools. David Hemenway, et. al, *Gun Carrying Among Adolescents*, 59 LAW & CONTEMP. PROBS, 39, 40 (1996).

225. *Id.* at 45.

The profile of desirable features was remarkably similar in both groups. Among inmates, the three highest traits were firepower, quality of construction, and difficulty in tracing ownership, followed by being easy to shoot and accurate. Among students, quality of construction was the highest rated trait, followed by being easy to shoot, accurate, untraceable, and with high firepower.²²⁶

The demand for handguns for protection is even more pronounced in the youth samples than among the adult criminals, perhaps reflecting conditions in a later decade. The most important of the "very important" reasons given by 80% of the inmates for carrying a gun during a crime was "have to be ready to defend self."²²⁷ The next most important reason given by 58% is "chance victim would be armed," followed by "might need weapon to escape" (49%), "victim won't put up a fight" (45%), and "people don't mess with armed offender" (42%).²²⁸ The inmates were likely to carry guns primarily when they felt they were in danger.²²⁹ For example, 75% said they needed a handgun "when needing protection," and 72% said "when in a strange area."²³⁰ In contrast, 37% said they carried a gun "when planning to do a crime."²³¹ Indeed, Shelley and Wright say "that the juvenile's decision to arm himself is motivated primarily by a sensed need for self-preservation."²³² They also find that most of our inmate respondents had used guns to intimidate others and had guns used against them.²³³ Much of the self-protection they sought, in short, was protection against one another. Likewise, it seems probable that many of our high school student respondents felt some need to protect themselves against one another and nearly certain that they felt a need to protect against the sorts of juveniles represented in the inmate sample.

Shelley and Wright conclude: "[t]he perception that one's very survival depends on being armed makes a weapon a necessity at nearly any cost."²³⁴ Thus, these studies indicate that increasing the retail costs of handguns is unlikely to have much effect on criminals' demands for these weapons.

226. *Id.* at 45-46.

227. *Id.* at 62.

228. *Id.*

229. *Id.* at 65.

230. *Id.*

231. *Id.*

232. *Id.* at 67.

233. *Id.* at 68-69.

234. *Id.* at 71.

E. Supply of Handguns

1. Regulated, Legal Supply of New Handguns to Non-Criminal Consumers

Federal legislation governs the production, importation, distribution, and sale of firearms. Manufacturers, importers, distributors, and retailers must be federal firearms licensees (FFLs). The 1993 Brady Act increased the annual fee for an FFL from \$10 to \$200 for three years and \$90 for each additional three-year period.²³⁵ The Crime Control Act of 1994 further amended the licensing provisions of the GCA by requiring all FFL applicants to submit a photograph and fingerprints with an application.²³⁶ Largely as a consequence, the number of FFLs, which had increased to 284,000 in 1993, decreased to 104,000 in 2000. Of these, 79% are retail gun dealers and pawnbrokers, 17% collectors, and 4% manufacturers and importers.²³⁷ A 1998 ATF study “disclosed that 44 percent of the retail dealers operated out of commercial premises and 56 percent out of residential premises (down from 74% in 1992).”²³⁸

The organization of regulated suppliers of new handguns is now described, including the number of handguns produced and imported annually from 1989 through 1996.²³⁹ These data indicate that the industry is very competitive and capable of expanding the supply of new handguns very quickly, which has important implications for regulatory proposals.

The size, scope, production methods, and longevity of the domestic firearms manufacturers and importers vary substantially. As of March 1995, ATF lists 687 companies as having manufactured or imported firearms at one time or another.²⁴⁰ From 1989 through 1996, 116

235. The Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 303, 107 Stat. 1536, 1546 (1993).

236. *See* Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, 110301(a), 108 Stat. 1796, 2012 (1994).

237. U.S. DEPT. OF THE TREASURY, COMMERCE IN FIREARMS IN THE UNITED STATES Figure 8 (Washington D.C., U.S. Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms 2000) *available at* <http://www.virtualref.com/govdocs/34.htm> [hereinafter COMMERCE IN FIREARMS].

238. *Id.* at 16.

239. For purposes of this presentation, all handguns have been lumped together, not distinguishing among the many different kinds described earlier.

240. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, *ATF Handbook* 1997 (not produced for later years).

companies reported to ATF that they produced at least 250 handguns in any one year; 45 of these companies exported handguns (Between 6 and 32 additional firms a year produced less than 250 handguns). Within the period, the number of companies with net domestic production (production less exports) has varied, as follows:

	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>Total</u>
New producers		8	10	7	19	8	6	7	65
No longer producing		-8	-9	-15	-8	-8	-15	-5	-68
Number producing	51	51	52	44	55	55	46	48	

Note: one company did not report production in 1995; hence, it is counted as a new 1996 company. In addition, handguns were imported from 39 different countries, including five from which less than 250 units were imported

Table 5 is constructed using production and export data reported to ATF and imports reported by the U.S. Department of Commerce.²⁴¹ For purposes of this table and the following analysis, all of the various models and kinds (revolvers and pistols) of handguns produced were aggregated. Panel A of the table shows the number of handguns (in thousands) imported and produced domestically, net of exports. The total number ranges between 2.0 million (1996) and 3.8 million (1994). With 1989 as the base (=100), the number has changed substantially over the period, first decreasing through 1991 to 90% of the 1989 base, then increasing to 150% through 1994. These figures are consistent with the belief that consumers increased their demand for handguns out of concern that a law would be enacted that would restrain them from obtaining handguns legally. The number then dropped in 1995 and 1996 to 92 and 78% of 1989, perhaps because many consumers had purchased the handguns they demanded in the earlier years. The annual percentage of imports also has varied over the period, from a low of 26% in 1989 to a high of 36% in 1994, which indicates the ability of distributors to obtain handguns from overseas in response to consumer demand (and available supplies). See Table 5.

241. This exercise was far from trivial. Annual reports of 116 individual companies obtained from ATF under the Freedom of Information Act had to be recorded and summarized. Imports could be assigned to most of the individual companies with data made available to Professor Benston in his capacity as an expert witness in a case involving many of the companies. See *COMMERCE IN FIREARMS*, *supra* note 231.

Table 5
Handguns Imported and Domestically Produced (net of
Exports) and Privately Owned, 1989 through 1996

	1989	1990	1991	1992	1993	1994	1995	1996
A. Imports and Net Production (in thousands)								
imports	657	681	658	938	1,209	1,392	825	664
domestic net production	<u>1,915</u>	<u>1,672</u>	<u>1,663</u>	<u>1,836</u>	<u>2,571</u>	<u>2,467</u>	<u>1,546</u>	<u>1,331</u>
total	2,571	2,353	2,321	2,773	3,780	3,858	2,371	1,995
annual change as % of 1989	100%	91%	90%	108%	147%	150%	92%	78%
imports as % of total	26%	29%	28%	34%	32%	36%	35%	33%
B. Number of Privately Owned Working Handguns, millions of units [note 2]								
beginning of year	66.9	69.5	71.8	74.1	76.9	80.7	84.6	86.9
imports and net production	<u>2.6</u>	<u>2.4</u>	<u>2.3</u>	<u>2.8</u>	<u>3.8</u>	<u>3.9</u>	<u>2.4</u>	<u>2.0</u>
end of year	69.5	71.8	74.1	76.9	80.7	84.6	86.9	88.9
increase % over prior year	3.8%	3.4%	3.2%	3.7%	4.9%	4.8%	2.8%	2.3%
C. Percentages of the Annual Domestic Increase of Handguns Provided by Manufacturers and Importers with at least 250 Units per Year in 1989 By Quintiles of Companies in 1989 Plus Additional Producers in 1990 through 1996								
	1989	1990	1991	1992	1993	1994	1995	1996
Top 20% in 1989	76.1	70.0	51.9	47.2	43.2	42.5	49.9	48.2
Next 20-40% in 1989	12.1	10.7	10.4	10.4	9.1	10.6	12.4	14.2
Next 40-60% in 1989	6.9	7.3	9.6	13.7	12.8	7.4	6.5	6.5
Next 60-80% in 1989	3.5	3.9	11.2	10.3	10.4	8.9	4.9	3.3
Next 80-100% in 1989	1.4	0.9	0.9	0.7	0.6	0.6	0.6	0.7
new producers		<u>7.3</u>	<u>16.0</u>	<u>17.6</u>	<u>23.8</u>	<u>29.9</u>	<u>25.7</u>	<u>27.1</u>
total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Sources:

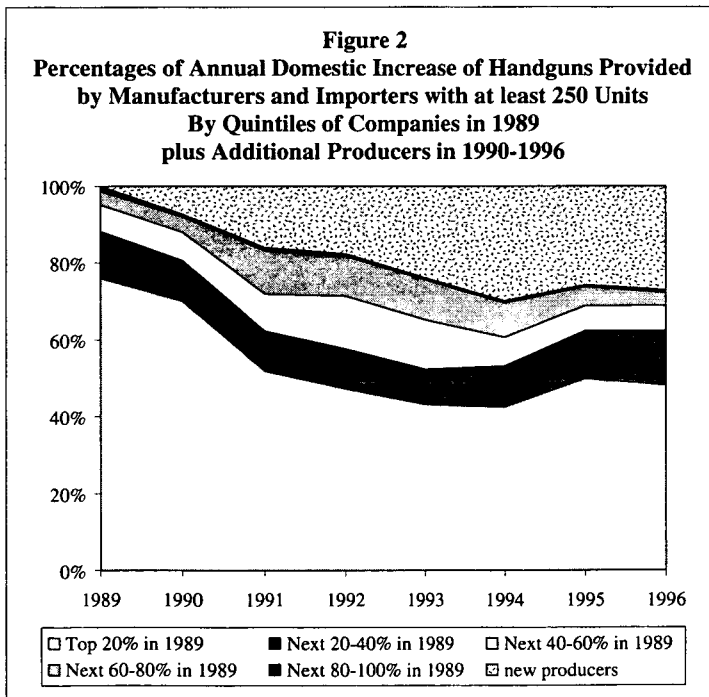
Panel A: ATF (domestic) and Department of Commerce (Imports)

Panel B: 1995 per Cook and Ludwig [1996], Table 3.1 for 1995, adjusted for earlier and later years by subtracting imports plus net domestic production per Panel A

Panel A: ATF (domestic) with Department of Commerce (Imports) data assigned to individual companies with data provided by the companies.

Panel B relates the annual number sold (assuming no change in inventories) to the stock of privately owned working handguns. The percentage addition to the stock (assuming no handguns were destroyed or lost) varies from a low of 2.9% in 1996 to a high of 6.2% in 1993. Thus, the overwhelming number of handguns available for non-criminal and criminal use appears to be met primarily from the stock rather than the annual flow.

Panel C and Figure 2 provide a measure of the extent to which the imports and net production of individual companies have varied over the period. Companies were ranked by number of handguns imported and produced (net of exports) and aggregated them in quintiles of the number in 1989. In that year, the top 20% of companies produced 76.1% of the total. Those companies' share of the market decreased to a low of 42.5% in 1994, as new producers entered the market to meet the substantial increase in consumer demand. In addition to the four major companies that produced over 100,000 units in 1993 and 1994, (Beretta USA, Smith and Wesson, Sturm-Ruger, and Davis Industries), four companies that produced no or few handguns in 1989 (Colt's Manufacturing, Bryco, Navegar/Intratec, and Phoenix), produced over 100,000 handguns in 1993 and/or 1994. Their production subsequently declined substantially.



These data indicate that the supply of handguns is very elastic; it can increase substantially within a year from additional imports and expansion of domestic production. In addition, the stock of working handguns is some twenty to thirty times annual production. These factors have important implications for regulatory policy.

Distributors, similar to manufacturers, almost never sell directly to consumers, for two important reasons. One is simply the cost of developing and maintaining retail outlets, particularly as noted above, when consumers want goods that the distributor does not carry. The other is avoidance of conflicts with retailers who might view distributors' retail sales as unfair competition.

Hundreds of firms distribute new handguns in the United States. *Shooting Industry* magazine produces a list of distributors for its annual Shot Show Super Issue, in which they identify by code whether the firms listed distribute each of eight shooting-related products: firearms, ammunition, leather, archery, reloading tools, reloading components, scopes and accessories, and firearm accessories. This list is updated annually. Only four percent of the distributors listed carry only guns. Panel A of Table 6 presents the number of distributors in each census region of the United States in each of five years, first in 1989 and then, beginning in 1990, every other year through 1996. Although distributors are willing to sell to retailers anywhere, it is likely that they serve areas closer to the location of their warehouses, as this gives them an advantage over competitors with respect to shipping expenses. *See Table 6.*

From these data, it should be apparent that handguns are distributed by many distributors and that the number changes substantially over the period examined. In part, the change is due to a tightening of standards for inclusion by the editor of *Shooting Industry*. After 1994, his publication sought to eliminate firms that were but minor distributors from the list.²⁴² A substantial portion of the reduction in the number from 250 in 1994 to 176 in 1996 is due to this effort. Keeping this change in mind, it is apparent that there are few barriers to entry and exit, which is consistent with a competitive market for distribution. Distributors of handguns are located in almost all states of the United States.²⁴³ However, relatively more are located in the southern states.²⁴⁴

242. Telephone Interview with Russ Thurman, Editor, *Shooting Industry* (Oct. 5, 1998).

243. *Shooting Industry Magazine*, Shot Show Issues.

244. *See id.*

Table 6
Handgun Distributors

	1989	1990	1992	1994	1996
A. Number					
New England	16	20	20	19	15
Mid Atlantic	32	40	40	37	23
northeast	48	60	60	56	38
South Atlantic	32	45	48	43	33
East South Central	15	16	17	12	10
West South Central	33	34	34	23	16
south	80	95	99	78	59
East North Central	40	46	46	35	27
West North Central	21	23	29	31	19
midwest	61	69	75	66	46
Pacific	32	45	42	35	24
Mountain	18	20	17	15	9
west	50	65	59	50	33
total	239	289	293	250	176
B. Percentages of total					
New England	6.7	6.9	6.8	7.6	8.5
Mid Atlantic	13.4	13.8	13.7	14.8	13.1
northeast	20.1	20.8	20.5	22.4	21.6
South Atlantic	13.4	15.6	16.4	17.2	18.8
East South Central	6.3	5.5	5.8	4.8	5.7
West South Central	13.8	11.8	11.6	9.2	9.1
south	33.5	32.9	33.8	31.2	33.5
East North Central	16.7	15.9	15.7	14.0	15.3
West North Central	8.8	8.0	9.9	12.4	10.8
midwest	25.5	23.9	25.6	26.4	26.1
Pacific	13.4	15.6	14.3	14.0	13.6
Mountain	7.5	6.9	5.8	6.0	5.1
west	20.9	22.5	20.1	20.0	18.8
total	100.0	100.0	100.0	100.0	100.0

Source: *Shooting Industry Magazine*, "Shot Show" issues

Specifically, in 1996, the East South Central, West South Central and South Atlantic states had 59 distributors, compared to 38 in the Middle Atlantic and New England states. The percentages of the total presented in Panel B of Table 6 also indicate that the number of distributors roughly mirrors the distribution of gun owners, as shown in Table 4.

Consumers purchase handguns from thousands of retail stores. The publication, *The U.S. Market for Firearms & Accessories, 1992-1997* states: "[a]ccording to knowledgeable people in the industry, there are between 13,000 and 16,000 independent retailers of hunting supplies in the United States. For the most part, the primary firearms suppliers will go through the wholesalers to get to the independent retailers."²⁴⁸ The Shooting Sports Foundation lists 8815 firearms dealers.²⁴⁹ As of October 1999, federal firearms licenses were held by 71,290 people who identified themselves as retail gun dealers and 10,035 as pawnbrokers.²⁵⁰ An ATF study of a random sample of retail dealers and pawnshops found that 56% of the retail gun dealers operated out of residential premises.²⁵¹ Among the balance in commercial premises, 25% were gunshops, hardware stores, or sporting goods stores and "[t]he remainder were located in businesses such as funeral homes and auto parts stores, and other businesses not normally associated with a gun business."²⁵² About 68% of the residential dealers were located in rural areas.²⁵³

2. Supply of Used Handguns to Non-Criminal Consumers

The number of used handguns supplied to the market is not known, but it is essential for an adequate analysis of the market for and regulation of handguns. Philip Cook, Stephanie Molliconi, and Thomas Cole estimate that about the same number of used and new guns change hands each year.²⁵⁴ Among the respondents to Cook and Ludwig's

245. Telephone Interview with Russ Thurman, Editor, *Shooting Industry* (Oct. 5, 1998).

246. *Shooting Industry Magazine*, Shot Show Issues.

247. *See id.*

248. U.S. Market for Firearms & Accessories, 1992-1997 54 (Paumanok Pub. Inc., Bus. Pub. Div., Shoreham, NY).

249. *Id.*

250. *See* COMMERCE AND FIREARMS, *supra* note 231, at 16.

251. *Id.*

252. *Id.*

253. *Id.* at 16-17.

254. Phillip J. Cook, Stephanie Molliconi & Thomas B. Cole, *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 69 (1995).

survey of persons who acquired a handgun within the past two years, 31% say it was used.²⁵⁵ Thus, perhaps, one third to one half of handguns are used when legally acquired.

Retail sellers of used handguns primarily are pawn shops, retail dealers, and private individuals. The retail sellers obtain their stock from distributors and other retailers, purchases from individuals, and as trade-ins (similar to trade-ins by vehicle purchasers, except that, unlike vehicles, handguns can remain in good operating condition a very long time). Retail gun dealers and pawn shops must be FFLs and are subject to the same federal and state laws and regulations as are required for new handgun sales. Private sellers are subject to federal and some state laws which limit to whom they may sell their firearms. However, as shown in Table 1, 31 states do not require private handgun sellers to conduct background checks or document the transfer of firearms; one of these, though (Illinois), requires background checks for handguns sold at gun shows.²⁵⁶

Ironically, an important source of used handguns is "law enforcement trade-ins." The volume of these guns increased substantially in the 1990s when many police departments and other law enforcement agencies switched from revolvers to semi-automatics, primarily 9mm. In part, this change was motivated by the military's adoption of semi-automatic 9mm pistols.²⁵⁷ Another reason for the change was demand by law enforcement officers for a weapon that could be quickly reloaded.²⁵⁸ In any event, because of the switch, a large (but unknown) number of well-maintained handguns were sold to the general public, presumably through licensed distributors and retailers. In addition, handguns confiscated by police departments often are sold by them to the public.²⁵⁹

3. Illegal Supply of Handguns to Non-Criminal Consumers

As noted earlier, some people who are not criminals (those who do

255. See Cook & Ludwig, *supra* note 172, at 44.

256. See *supra* Table 1.

257. See *supra* note 86.

258. See Massad Ayoob, *Guns 50th Police: It's Been a Helluva Ride the Last Century, With an Almost Complete and Diametric Reversal of the Traditional Paradigm*, GUNS MAGAZINE, Jan. 2005, available at www.findarticles.com (follow "Sports" hyperlink; then follow "Guns Magazine" hyperlink; then follow "January 2005" hyperlink).

259. *Id.*

not intend to use a gun for criminal purposes) demand handguns, but are unable to obtain them legally, because of state and municipal licensing laws that are administered restrictively. These people necessarily must purchase a gun from someone who is not an FFL (an FFL could be corrupt; however, they are unlikely to sell single or a few units to non-criminals, because such people who are caught with illegally owned handguns are likely to identify the FFL in exchange for leniency). If these handgun demanders were willing to violate the law, they could obtain a handgun in several ways. They could have an eligible person buy a handgun for them in their own state. Or, if their state or city laws are too restrictive and they have a relative or friend who resides in a less restrictive locality, they could ask that person to purchase a gun for them. These “straw purchasers” would be violating federal law, but they might not realize or care about it.

Alternatively, the gun-demander could buy or be given a gun previously purchased by a relative or friend. Or, a gun could be bought from a private person who, perhaps deliberately, did not inquire about the buyer’s residence and legal right to own a handgun. Or, the buyer could falsely claim that he or she is a state resident who is not legally barred from handgun ownership. Although private handgun sellers would have violated the law by selling to people who are not legal purchasers, it would be very difficult for the authorities to prove that they did so knowingly.

A person who wants a handgun also could simply take (“borrow”) one from a friend or relative. In this event, only the thief would have violated a law. And, the person from whom the handgun was taken might not want to report the theft to the police or might not realize that the gun was stolen or could not prove who had taken it. In this situation there would be no record of the crime.

Finally, the non-criminal purchaser might buy a gun “on the street,” necessarily from a criminal. Such transactions, though, are likely to be rare, and certainly are not advisable. The criminal could easily take the potential purchaser’s money and keep the gun, and the buyer could hardly file a complaint with the police.

4. Illegal Supply of Handguns to Criminals

Criminals might obtain handguns from four sources. The first is from straw purchasers – people who are legally entitled to purchase handguns for themselves from FFLs and who buy and transfer handguns to criminals who could not pass the background checks. The second is

purchases from private individuals, who are not required to conduct background checks. The third is purchases from gun traffickers, either rogue FFLs or operators of rings of straw purchasers. Advocates of more restrictive handgun laws claim that these traffickers buy handguns in states with laws no more restrictive than federal laws and import these handguns into states and municipalities with restrictive laws. The fourth source is theft, handguns stolen by the criminals or sold to them by burglars. The source from which criminals obtain handguns has important implications for public policy, because sales of handguns by legal sellers might be controlled, whereas thefts are affected only slightly by laws that restrict handgun sales.

The supply of handguns to criminals can be quantified from their responses to researchers' questions, analysis and estimates of straw purchases and of trafficking revealed by ATF investigations of the sources of handguns confiscated by the police and analysis of data on handgun thefts. Theft appears to be the overwhelmingly important source of criminal handguns. Wright and Rossi's study of adult convicted felons in 1981 provides data on where and how criminals obtain handguns.²⁶⁰ Of their sample, 939 convicted felons responded to the question of where and how they obtained their most recent handgun, in percentages, as follows:²⁶¹

Purchased from retail outlets (gun shop, pawnshop, hardware or department store): 15%

Purchased from family and friends: 17

Purchased probably stolen handgun:

Purchased on the street: 12

Rented, borrowed or traded from family and friends or on the street: 16

Theft: 60

Gift: 8

In response to Wright and Rossi's question: "Was it new or used?," the answers are: 62% used, 33% new, and 5% don't know.²⁶² They asked: "Did you get it in or out of state?" and 77% said "in state" and

260. See WRIGHT & ROSSI, *supra* note 206, at 184-85.

261. *Id.* at 185-86.

262. *Id.* at 184.

23% “out-of-state.”²⁶³ They also asked: “Once you decided to get it, how long did it take?” The responses are:²⁶⁴

Few hours: 60%

Day: 12

Few days: 18

Week or a few weeks: 7

Month or longer: 3

Wright and Rossi do not report whether the guns that were purchased at retail were bought from in-state or out-of-state stores. If the handguns were purchased at retail from FFLs, the purchases would have had to have been made before the purchasers were convicted felons (unless the FFLs did not conduct a valid background check), and in the state (unless the purchaser later moved to another state).

A 1997 survey of Federal prison inmates by John Scalia finds that 14% “reported that they used, carried, or possessed a firearm while committing the offense for which they were imprisoned. Most of these inmates (86%) reported using a handgun.”²⁶⁵ Of these, 19% reported that they purchased or traded for the firearm from a retail store or pawnshop, 4% from a gun show or flea market, 35% from a friend or family member, and the balance (42%) from burglary, drug dealer, fence, or black market.²⁶⁶

Interviews of seven thousand arrestees in eleven major urban areas reveal that 37% on average said they had owned a gun.²⁶⁷ The researchers report: “Fully 37 percent of the arrestees indicated they could obtain a gun in less than 1 week.”²⁶⁸ One in five suggested they would need only one day or even less time, adding credibility to the notion that the urban firearms market is quite accessible.”²⁶⁹

263. *Id.*

264. *Id.*

265. JOHN SCALIA, *FEDERAL FIREARM OFFENDERS, 1992-1998: WITH PRELIMINARY DATA FOR 1999*, at 10, NCJ 180795 (Bureau of Justice Statistics, Special Report June 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/ffo98.pdf>.

266. *Id.*

267. SCOTT DECKLER, SUSAN PENNELL & ARNI CALDWELL, *ILLEGAL FIREARMS: ACCESS AND USE BY ARRESTEES 1* (Nat'l Inst. of Justice, Research in Brief Jan. 1997), available at <http://www.ncjrs.gov/pdffiles/163496.pdf>.

268. *Id.* at 3.

269. *Id.*

Persons under age twenty-one are not permitted, under federal law (1968 Gun Control Act), to purchase a handgun.²⁷⁰ Nevertheless, several studies have found that a substantial portion of juveniles have handguns. For example, Sheley and Wright, who queried juvenile reformatory inmates (average age 17) and inner-city high school students, report that 87% of the inmates and 65% of the students said they could get a gun with little or no trouble.²⁷¹ Buying on the street (often from a drug dealer or addict) was the source mentioned most often by inmates (54% for inmates, 37% for students), and borrowing from a family member or a friend was also listed frequently (45% for inmates, 53% for students). Only 12% of the inmates and 28% of the students mentioned buying from a gun shop.²⁷² If, at that time, they were not at least twenty-one years of age without a prior criminal record, they would have used a straw purchaser or bought from a rogue FFL.

Thus, criminals appear to obtain about 12 to 23% of their handguns from purchases at retail stores, either directly (before they have a criminal record) or through a straw purchaser, about 42 to 60% from theft or purchase from other criminals (who might have gotten the weapons from thefts, straw purchasers, or rogue FFLs), and about 8 to 35% from gifts of guns that were legally or illegally purchased or stolen. One can conclude, from these data and from the analysis presented next that theft is, by far, the most important source of guns used by criminals.

It is unlikely that straw purchasers supply a substantial portion of handguns to criminals, because it is likely to be an unprofitable enterprise. Federal law requires FFLs to report sales of more than one handgun within a five-day period to an individual purchaser to ATF. Hence, to avoid being picked up, straw purchasers who seek to acquire many handguns would have to frequent many stores, which entails travel time, cost and multiple background checks (which might come to the attention of the police authorities). Then the handguns have to be transported to the receiving state and buyers for the guns who are not likely to be police informants must be found. Unlike the situation for drugs, few buyers want regular and repeated purchases of handguns. Consequently, new customers must be found, which increases the risk of detection. This cannot be a good way to make a dishonest living.

However, straw purchases may be made from individuals who

270. 1968 Gun Control Act, § 922(g), as amended by the Firearms Owners' Protection Act (1986).

271. SHELEY & WRIGHT, *supra* note 216, at 46.

272. *Id.* at 47.

advertise handguns from their “private collections” for sale. These sales do not require a background check. The Gun Control Act (1968) forbids sales to residents of other states other than mail order sales (which are explicitly mentioned); this prohibition, though, cannot be enforced. For example, the seller (who is not required to maintain records) could claim that the buyer presented proof of in-state residence, or the buyer could get a local friend to make the purchase for him.

Two forms of straw purchasing have been distinguished. One is labeled a “crime of opportunity,” as described by Joseph Kelly, who retired in 1996 after 25 years with ATF as a Special Agent and Supervisor of the New York Group:

I think the main way guns come into the City of New York is through crimes of opportunity when individuals are home where they came from a Christmas visit or what have you, and they come across the path of someone who has a gun for sale or wants to get rid of a gun or gives it away and they bring it back spur of the moment. That’s how I think the vast majority of guns come into the City of New York and that there are really extraordinarily little organized little groups that run guns back into the City of New York.²⁷³

The other form is “gun running,” wherein criminals use straw purchasers to buy quantities of guns that are transported for resale to areas where guns are difficult or impossible for people to buy legally; areas such as New York City, Chicago, and Washington, D.C.²⁷⁴ Kenneth McCann, an officer for twenty-seven years with the New York City Police Department and Commanding Officer of the Joint Firearms Task Force from 1990 through 1994 (when he retired), describes two such cases. One he describes as a “convenience trafficker who travels back and forth from a state with lax firearms [sic] and transports anywhere from two to thirty guns.”²⁷⁵ He then identifies the gun runners as “two college students who attended Ohio State University and drove to New York on the weekends.”²⁷⁶ They were arrested for selling seven guns to an undercover New York City detective. The other “would purchase firearms utilizing ‘straw purchasers’ at gun shows in Virginia and North Carolina . . . [moving] approximately 150 firearms to New

273. Deposition of Joseph Kelly at 1, 125, *Hamilton v. Accu-Tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996) (No. 95 Civ. 0049).

274. See, e.g., Submitted Statement of Kenneth McCann at 1-2, *Hamilton*, 935 F. Supp. 1307 (No. 95 Civ. 0049).

275. *Id.* at 1-2.

276. *Id.* at 2-3.

York City.”²⁷⁷

The extent to which straw purchasing generally takes place is revealed in a report of 1530 investigations of both handguns and long guns conducted by ATF Special Agents in charge of 23 divisions between July 1996 and December 1998.²⁷⁸ *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* includes 709 investigations of “firearms trafficked by straw purchasers or straw purchasing ring.”²⁷⁹ In 695 of these investigations, 25,741 firearms were diverted to the illegal market; the median number per investigation is 14.²⁸⁰ Of these 695 investigations, 387 (56%) involved actual straw purchases from FFLs as distinguished from traffickers.²⁸¹ Most of these people purchased firearms for a friend, relative, intimate (spouse or boyfriend), or fellow gang member; about a quarter purchased guns to sell or trade for drugs. Unlicensed dealers were the subject of 301 investigations involving about 20,000 firearms.²⁸² These include an unidentified number of straw purchases.

Data on prosecutions of straw purchasers is included in a Bureau of Justice Statistics Special Report, *Federal Firearm Offenders, 1992-98*.²⁸³ “During 1998, 341 defendants were convicted of a firearm receipt or transfer offense. Detailed information was collected on 85% (288) of those convicted . . . 19% [56 cases] were identified as straw purchasers.” In more than two-thirds of the 56 cases . . . the firearm was purchased from a licensed firearms dealer.²⁸⁴ The Special Report does not give separate statistics for straw purchasers. For the 288 cases analyzed, 62% involved handguns; the median (mean) number of firearms purchased is 3 (18 cases).²⁸⁵ Thus, in 1998 there were perhaps 25 cases of straw purchases of handguns from FFLs involving relatively few handguns.

Trafficking is distinguished from straw purchases in that it involves

277. *Id.* at 3-4.

278. *See, e.g.*, DEPT. OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, FOLLOWING THE GUN: ENFORCING FEDERAL LAWS AGAINST FIREARMS TRAFFICKERS 11 (June 2000), available at http://www.atf.gov/pub/fireexplo_pub/pdf/followingthegun_internet.pdf. [hereinafter FOLLOWING THE GUN].

279. *Id.*

280. *Id.* at 13.

281. *Id.* at 18.

282. *See id.* at 13.

283. SCALIA, *supra* note 256, at 5.

284. *Id.*

285. *Id.*

the active participation of FFLs or rings that use straw purchasers to buy many guns for resale to criminals generally. These “rogue” firearms dealers could obtain a sufficient quantity of handguns for sale to criminals to make the enterprise profitable. And, since they are criminals themselves, they do not have legitimate businesses to lose if they are caught. But, to avoid being caught, they must remove the serial numbers from the handguns they sell to criminals, a procedure that entails some cost. In addition, removing a serial number is a federal crime punishable by five years in prison.

Even more so than straw purchasers, rogue FFLs face the problem of finding new buyers who are not or will not become police informants. In addition, they must compete with sellers of stolen handguns, who have a considerable cost advantage. Indeed, Kelly testified that the profit margin on an illegal handgun sale is “slight:”

It’s from my experience over the years buying guns, it is never more than double the retail price and I will tell you why. We had a policy, an unwritten policy at ATF, that we would try to go 20, 30% over the retail price if necessary, but no more because once you get beyond a certain state, you are almost getting into an entrapment area. And we were never turned down when we offered 20, 30 percent more than the retail price of a gun. We are talking about a profit of \$100, 150, 200. It was minimal. For someone to risk prosecution and jail for \$100, 200, 300 always floored me.²⁸⁶

McCann, though, states that his New York City Joint Firearms Taskforce arrested 15 federal firearms licensees during 1990 to 1994, who “were responsible for purchasing and distributing 4,315 firearms in the New York area.”²⁸⁷ In his statement, he describes the activities of thirteen “rogue gun dealers” (located in many cities around the nation), six of whom sold between 1000 and 2937 guns illegally.²⁸⁸

Information on trafficking is provided by *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers*.²⁸⁹ The study defines trafficking very broadly to include any “illegal diversion of legally owned firearms from lawful commerce into unlawful commerce,”

286. Deposition of Joseph Kelly at 123-24, *Hamilton v. Accu-Tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996) (No. 95 Civ. 0049).

287. Submitted Statement of Kenneth McCann at 1-2, *Hamilton*, 935 F. Supp. 1307.

288. *Id.*

289. See FOLLOWING THE GUN, *supra* note 269, at 3.

including guns obtained from burglaries.²⁹⁰ Of the 1530 investigations reported, about 581 (38%) appear to involve trafficking.²⁹¹ Of the 581 trafficking investigations, 198 are identified as “trafficking in firearms at gun shows and flea markets” that diverted 25,862 firearms to the illegal market.²⁹² Corrupt FFLs are said to be responsible for a substantial portion of trafficking in new firearms; particularly because each FFL investigated diverted a mean number of 350 firearms into the illegal market.²⁹³ Further, the Treasury study notes that when an FFL was acting as the sole trafficker in an investigation, or working with an unlicensed dealer, the mean number of guns per investigation rose to over 560.²⁹⁴ However, very few FFLs appear to be corrupt. Some evidence on this issue is provided by a study conducted by Glenn Pierce for ATF of traces of firearms to 83,272 retail gun dealers and pawnshops.²⁹⁵ In 1998, 85.7% did not have any traces, 14.3% had one, 7.2% two to five, and 2.7% five to ten. Only 2% had ten or more traces. Thus, among the thousands of FFLs, very few sold handguns that were used by criminals, as indicated by handguns confiscated by the police and traced by ATF.

By far the greatest source of handguns used by criminals is theft. An indication of the number may be gleaned from the number of stolen guns reported to the FBI. The FBI’s National Crime Information Center (NCIC) stolen gun file, which was initiated in 1967, contained 1.26 million reports of handguns not recovered as of March 1995 and 2.34 million as of July 1999.²⁹⁶ Marianne Zawitz reports that the Department of Justice’s National Criminal Victimization Study “estimates that there were 341,000 incidents of firearm theft from private citizens annually from 1987 to 1992 [53% are handguns; thus, approximately 181,700 handgun thefts appear to have been reported]. Because the survey does not ask how many guns were stolen, the number of guns stolen probably exceeds the number of incidents of gun theft.”²⁹⁷ Cook, Molliconi and

290. *Id.*

291. *See id.* at 13.

292. *Id.*

293. *Id.* at 12.

294. *Id.* at 41.

295. *See id.* at Table 3.

296. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, REDUCING ILLEGAL FIREARMS TRAFFICKING: PROMISING PRACTICES & LESSONS OF CRIMINAL LAW & CRIMINOLOGY, NCJ 180752 (July 2000), available at <http://www.ncjrs.gov/pdffiles1/bja/180752.pdf>.

297. MARIANNE W. ZAWITZ, GUNS USED IN CRIME 3, NCJ 148201 (U.S. Dept. of

Cole estimate from data on thefts in North Carolina that, on average, 1.5 firearms are stolen per theft, of which 68% are handguns.²⁹⁸ Based on this number plus an additional 11% “to take account of gun thefts from commercial locations,” they estimate that 567,000 firearms are stolen per year.²⁹⁹ Cook and Ludwig’s 1994 survey asked respondents: “In the past 12 months, have you, or has anyone in your household, had any firearms stolen from them [excluding thefts at work]?”³⁰⁰ From the responses, they calculate that 269,000 gun-owning households experienced a theft.³⁰¹ Using these numbers and data reported in Cook, Molliconi and Cole, Cook and Ludwig estimate that 211,000 handguns and 382,000 long guns—593,000 in total—were stolen.³⁰² These are lower bounds, they warn, because they also find that “a large number of firearms may be stored in American households without the full knowledge of all of the adult members living at home.”³⁰³

Indeed, as noted earlier, Kleck finds an average of five guns per household.³⁰⁴ Cook and Ludwig report that 42.1% of individuals who own guns have four or more guns.³⁰⁵ The ATF compilation of firearms investigations finds a mean (median) of 21.5 (7.0) firearms per investigation “stolen from a residence.”³⁰⁶ For this reason, the number of guns per theft and the total number stolen reported above (and widely quoted) appear to be substantially understated. Using the higher number of thefts cited by Zawitz (341,000) and the median number of four firearms per household reported by Cook and Ludwig, a better estimate is 1,364,000 firearms stolen per year. If about 53% of these are handguns, then about 723,000 handguns a year might be considered to have been stolen (if the ATF-reported median number stolen was 7 guns per household, 1,265,100 handguns per year were stolen).

The more conservative estimate of 723,000 handgun thefts is most

Justice, Bureau of Justice Statistics, Selected Findings July 1995), available at <http://www.ojp.usdoj.gov/bjs/abstract/guic.htm>.

298. See Cook, Molliconi & Cole, *supra* note 245, at 82.

299. *Id.*

300. See Cook & Ludwig, *supra* note 172, at 32.

301. *Id.* at 31-32.

302. *Id.* at 32. How they arrived at these numbers is unclear; they do not provide an explanation. Cook, Molliconi & Cole, *supra* note 245, report 1.5 firearms per theft, which multiplied by 269,000 thefts yields 403,500.

303. *Id.*

304. See KLECK, *supra* note 170, at 69.

305. See Cook & Ludwig, *supra* note 172, at 35.

306. See FOLLOWING THE GUN, *supra* note 269, at 13.

likely substantially understated. Only about half the burglaries that occur tend to be reported to the police.³⁰⁷ And, Kleck cites a “BATF study of 300 crime guns [that] found that, among those which had been stolen, only 21% had been reported to the police.”³⁰⁸ Furthermore, the reported thefts probably do not include guns stolen from illegal owners of guns (particularly in New York City, Chicago, and Washington, D.C.), because these are unlikely to be reported to the police. Nor do the numbers include thefts from commercial establishments and common carriers. In 1998 and 1999, FFLs reported that 27,287 firearms were stolen; common carriers are not required to report thefts.³⁰⁹ Consequently, at least 1,500,000 handguns are stolen annually and, presumably, diverted into the illegal market.³¹⁰

In comparison, the number of handguns made available to criminals through straw purchases and trafficking of weapons obtained from FFLs and private sellers appears to be relatively small. The volume of units (not all of which are handguns) reported in ATF firearms investigations between June 1996 and December 1998, most of which are ascribed to straw purchases and trafficking, total 84,128, or an average of about 34,000 a year.³¹¹ In conclusion, criminals obtain handguns predominantly from thefts.

IV. An Analysis of the Court’s Use of Economic Testimony

In *Hamilton v. Accu-Tek*,³¹² argued before the United States district court, the defense’s argument, largely supplied by Professor George J. Benston, was that there is a huge stock of handguns in existence and, therefore, it would not make a difference if the gun manufacturers exercised more care while the plaintiffs’ position was that criminals preferred new guns because there was not a “body on it,” therefore, they obtained their guns like everyone else from gun dealers

307. SHANNAN M. CATALANO, CRIMINAL VICTIMIZATION 2003, at 10, NCJ 205455 (U.S. Dept. of Justice, Bureau of Justice Statistics 2004), available at <http://www.ojp.usdoj.gov/bjs/abstract/cv03.htm> (last visited Mar. 7, 2006).

308. KLECK, *supra* note 170, at 92. The report on firearms violations states: “Figures on stolen firearms are subject to the usual problems associated with determining whether a firearm has been stolen, due to the fact that most gun owners do not report stolen firearms to the police.” FOLLOWING THE GUN, *supra* note 269.

309. See KLECK, *supra* note 170, at 27-28.

310. *Id.* at 92 (conducts a similar analysis and concludes: “[i]n sum, the number of guns stolen each year could be from .57 to 1.82 million.”).

311. See *supra* Table 3.

312. *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

and gun shows.

The plaintiffs argued that, because each manufacturer's contribution to the supply of illegal handguns helps to place killing instruments in the hands of criminals, each manufacturer should be held partially responsible for the resulting injury.³¹³ It is the underground market, created and stocked by the defendants' negligence rather than by any one manufacturer's product, which caused the plaintiffs' injuries.³¹⁴ The plaintiffs reasoned that, because of the defendants' negligence, gun dealers in the south were able to sell handguns to straw purchasers, who then transported the guns to New York and sold them to criminals, such as the shooters in the present case.³¹⁵

The decision manifests that Judge Jack Weinstein carefully read and considered the economic testimony provided by Professor Benston. Judge Weinstein stated [the defendants] "retained an expert, Dr. Benston, who prepared and proffered evidence as to the market share statistics in both his deposition and at trial."³¹⁶ The Court rejected the economic testimony, however, and held:

Guns used in crime are increasingly being linked to federal firearms licensees ("FFLs"). Recent federal law enforcement review of illegal gun trafficking investigations conducted in twenty-seven cities between 1996 and 1998 reveals that 51% of guns used in crimes by juveniles and persons between the ages of 18 and 24 during that period were acquired from FFLs by intermediaries acting on their behalf. . . . According to analysis of 1998 crime gun traces from these twenty-seven cities, up to one-third of guns used in crimes by juveniles and one-half of those used by persons between ages 18 and 24 were purchased from an FFL within three years of the commission of the crime.³¹⁷

Judge Weinstein disregarded the economic evidence presented by Benston and instead relied upon the testimony of Joseph J. Vance, former Chief of the Crime Gun Analysis branch of the Bureau of Alcohol, Tobacco, and Firearms. Vance testified: "we have not seen stolen firearms being employed by criminals. The majority of the time

313. *See id.* at 844.

314. *Id.*

315. *See also* *Ileto v. Glock*, 349 F.3d 1191, 1191 (9th Cir. 2003).

316. *Hamilton*, 62 F. Supp. 2d at 817.

317. *Id.* at 825-26. As noted earlier, these data exclude handguns that were not traced because they were manufactured before 1985. When these handguns are included in the data, Benston's change to Table 9 finds that only 23% were purchased within one year of their having been confiscated by the police.

we are seeing them getting them from retail sources.”³¹⁸

Judge Weinstein also relied on a pamphlet produced by the Sporting Arms and Ammunition Manufacturers Institute. Its content supported an inference of industry awareness of an illicit handgun market traceable in significant part to retail sources unsupervised and uncontrolled by their “suppliers,” the manufacturers and their “agents,” the distributors.³¹⁹ The district court quoted evidence produced by Dr. Howard Andrews, a research scientist and professor at Columbia University School of Public Health, that most of the guns used in New York crimes come from outside New York.³²⁰ Judge Weinstein adopted the plaintiff’s analysis of the case:

The jury could also have credited the extensive documentary and oral evidence presented with regard to the flow of guns—particularly from the states of the southeast, where, experts testified, it is relatively easy to purchase a gun, to the states of the northeast, where it is relatively difficult to obtain one—and the high proportion of New York crime guns traceable to out-of-state sources.³²¹

The district court held for the plaintiffs³²², contrary to the economic evidence presented by Benston and others. The evidence:

[W]as sufficient to permit a reasonable jury to conclude that the negligent marketing and distribution of handguns by manufacturers was a substantial factor in the promotion and development of an underground illegal market supplying New York criminals, and thus increasing the probability of death or serious injury such as that suffered by Mr. Fox.³²³

On appeal, the United States Court of Appeals for the Second Circuit felt that the above decision in the United States District Court raised substantial questions of New York state law. It, therefore, certified two questions to the Court of Appeals of New York:

whether there is a duty owing by these defendant gun manufacturers to plaintiffs . . . and if there is such duty, whether liability may be apportioned on the basis of the negligent manufacturers’ market share.³²⁴

The New York Court of Appeals, in answering the certified

318. *Id.* at 830.

319. *Id.*

320. *Id.* 830-31.

321. *Id.* at 830.

322. *Id.*

323. *Id.* at 838.

324. *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36, 41 (2d Cir. 2000).

questions, rejected the reasoning of the United States district court and instead adopted Professor Benston's argument:

The pool of possible plaintiffs is very large—potentially, any of the thousands of victims of gun violence. Further, the connection between defendants, the criminal wrongdoers and plaintiffs is remote, running through several links in a chain consisting of at least the manufacturer, the federally licensed distributor or wholesaler, and the first retailer. The chain most often includes numerous subsequent legal purchasers or even a thief. Such broad liability . . . should not be imposed without a more tangible showing that defendants were a direct link in the causal chain that resulted in plaintiffs' injuries, and that defendants were realistically in a position to prevent the wrongs. Giving plaintiffs' evidence the benefit of every favorable influence, they have not shown that the gun used to harm plaintiff Fox came from a source amenable to the exercise of any duty of care that plaintiffs would impose upon defendant manufacturers.³²⁵

In rejecting the district court's decision, the New York Court of Appeals concluded:

[N]one of plaintiffs' proof demonstrated that a change in marketing techniques would likely have prevented their injuries. Indeed, plaintiffs did not present any evidence tending to show to what degree their risk of injury was enhanced by the presence of negligently marketed and distributed guns, as opposed to the risk presented by all guns in society.³²⁶

The New York Court of Appeals relies upon Professor Benston's economic reasoning to reject the plaintiff's duty argument:

The negligent entrustment doctrine might well support the extension of a duty to manufacturers to avoid selling to certain distributors in circumstances where the manufacturer knows or has reason to know those distributors are engaging in substantial sales of guns into the gun-trafficking market on a consistent basis. Here, however, plaintiffs did not present such evidence. . . . General statements about an industry are not the stuff by which a common-law court fixes the duty point. . . . Without a

325. *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061-62 (N.Y. 2001). To support its conclusion, the court reasoned: "[o]ne of the original plaintiffs was Katina Johnstone. Her husband was killed with a Smith & Wesson revolver. The gun was recovered and traced to its lawful owner, who had reported it missing after a burglary of his home two weeks before the shooting." *Id.* at 1062 n.2.

326. *Id.* at 1062. The New York Court of Appeals was convinced that the large number of handguns in existence would dwarf any attempts at due care by handgun manufacturers: "[h]ere, imposing such a general duty of care would create not only an intermediate class of plaintiffs but also an indeterminate class of defendants whose liability might have little relationship to the benefits of controlling illegal guns." *Id.* at 1063 (citing *Waters v. N.Y.C. Hous. Auth.*, 69 N.Y.2d 225, 230 (1987)).

showing that specific groups of dealers play a disproportionate role in supplying the illegal gun market, the sweep of plaintiffs' duty theory is far wider than the danger it seeks to avert.³²⁷

An assessment was made by Judge Weinstein that the defendants' negligent marketing was responsible for perhaps one-third of the plaintiffs' injuries.³²⁸ The New York Court of Appeals concluded, however, that at least two-thirds of the injuries were likely caused by guns that had been obtained by their users through theft or illegal purchases:

Plaintiffs do not contend that negligent marketing of handguns is the sole source of handguns used in crime. They acknowledge that some injuries from handguns [in the stockpile] will still occur. Indeed, the District Court, using BATF data, assessed the enhanced risk at 33%, leaving a significant probability that plaintiffs' injuries from unidentified weapons came from guns that had not been negligently marketed (*see, Hamilton v. Accu-Tek*, 62 F. Supp. 2d, at 826 [noting that only one third of all guns used in juvenile crimes come directly from FFLs]).³²⁹

In accepting the negative answers by the New York Court of Appeals to the two certified questions, the Second Circuit Court of Appeals adopted the economic argument:

Given the lack of evidence of "any statistically significant relationship between *particular classes* of dealers and crime guns," however, it [referring to the New York Court of Appeals] reasoned that imposition of such a general duty of care would create large, indeterminate classes of plaintiffs and defendants "whose liability might have little relationship to the benefits of controlling illegal guns."³³⁰

327. *Id.* at 1064. To support this point, the court cited the following statistic:

An analysis of Bureau of Alcohol, Tobacco, and Firearms (BATF) data for 1998 reveals that a very small number of FFLs do account for a significant portion of guns used in crimes. "Just about 1.2% of dealers—1,020 of the approximately 83,200 licensed retail dealers and pawnbrokers—accounted for over 57 percent of the crime guns traced to current dealers in 1998."

Id. at 1064 n.5 (citations omitted).

328. *See Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 826 (E.D.N.Y. 1999).

329. *Hamilton*, 750 N.E.2d at 1067 n.11.

330. *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21, 28 (2d Cir. 2001). The New York Court of Appeals' discussion of the second certified question, market share liability, is examined *infra*, Part V.

V. An Analysis of the Legal Reasoning in the United States District Court and the New York Court of Appeals

A. Primary Legal Issues

After a four week trial, Judge Weinstein ruled on three critical legal issues: the fundamental cause of action, negligent marketing; duty; and the applicability of market share liability. These issues are examined in turn.

After dismissing the first two causes of action, the district court refused to dismiss the plaintiff's count in negligent marketing.³³¹ Judge Weinstein stated the negligent marketing theory as follows:

The heart of the plaintiffs' theory . . . is the claim that defendants' negligence in methods of marketing handguns and flooding the handgun market has fostered the development of an extensive underground economy in handguns. Through this underground market, it is suggested, youths may readily illegally obtain handguns which they then use, resulting in the deaths of individuals such as the decedents represented by the plaintiffs in this court.

No one claims that defendants *intended* their guns to be used illegally to hurt anyone. There may, however, come a point that the market is so flooded with handguns sold without adequate concern over the channels of distribution and possession, that they become a generic hazard to the community as a whole because of the high probability that these weapons will fall into the hands of criminals or minors prohibited from possession under state and federal law.³³²

331. These are discussed later in the section.

332. *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1330 (E.D.N.Y. 1996). The New York Court of Appeals also outlined the plaintiffs' position in regard to the straw purchases and gun show aspects of negligent marketing. The court stated:

According to plaintiffs, handguns move into the underground market in New York through several well-known and documented means including straw purchases (a friend, relative or accomplice acts as purchaser of the weapon for another), sales at gun shows, misuse of Federal firearms licenses and sales by non-stocking dealers (i.e., those operating informal businesses without a retail storefront). Plaintiffs further assert that gun manufacturers have oversaturated markets in states with weak gun control laws (primarily in the Southeast), knowing those "excess guns" will make their way into the hands of criminals in states with stricter laws such as New York, thus "profiting" from indiscriminate sales in weak gun states. Plaintiffs contend that defendants control their distributors' conduct with respect to pricing, advertising and display, yet refuse to institute practices such as requiring distribution contracts that limit sales to stocking gun dealers, training salespeople

Judge Weinstein outlined in detail the steps that could be taken by the defendants in order to avoid negligence in the marketing of their handguns:

Defendants' ongoing close relationship with downstream distributors and retailers putting new guns into consumers' hands provided them with appreciable control over the ultimate use of their products. Even if they could not control what the first "consumer" would do with the gun or whether it would fall into the hands of a person other than the new gun owner, they could reduce the risk of criminal misuse by ensuring that the first sale was by a responsible merchant to a responsible buyer [U]nder a negligence regime, manufacturers can avoid liability by marketing and distributing their product responsibly.³³³

The district court found there were specific changes in marketing the defendants could have made in order not to be negligent: "declining to do business with careless or unscrupulous FFLs, limiting sales at unregulated gun shows, and requiring the first sales of handguns to the public take place only in fully stocked, responsibly operated stores."³³⁴

Judge Weinstein concluded by embracing the jury verdict in favor of the plaintiffs:

[T]here was sufficient evidence to persuade a rational jury that criminal misuse of handguns was a reasonably foreseeable result of defendants' negligent marketing and distribution practices; that easy access to illegal guns increases gun violence and homicide; that Mr. Adkins shot Mr. Fox with an unlawfully obtained handgun of a type that the Fox defendants manufactured [and distributed]; that this .25 caliber crime gun was originally diverted from a lawful retail source; that the gun used would not have been available to Mr. Adkins had the Fox defendants taken reasonable preventive measures; and thus that defendants' negligence proximately

in safe sales practices (including how to recognize straw purchasers), establishing electronic monitoring of their products, limiting the number of distributors, limiting multiple purchases and franchising their retail outlets.

Hamilton, 750 N.E.2d at 1059-60.

333. *Hamilton*, 62 F. Supp. 2d at 820.

334. *Id.* at 831. In doing so, they quoted the plaintiffs' expert, Dr. Stewart, who generated a list of steps handgun manufacturers could feasibly take to reduce the risks associated with their products, including franchising retail outlets, restricting distribution to qualified retail stores, and termination of the distribution agreements of those distributors who sell handguns irresponsibly. *Id.* at 831.

A trace request is part of a tracking system that the ATF uses to find out who sold the gun that was used in a crime. Careless gun dealers have more trace requests than careful ones. *Id.* at 830-31. The court in *Ileto* referred to these as ATF reports. *Ileto v. Glock*, 349 F.3d 1191, 1215 (9th Cir. 2003).

caused Stephen Fox's injuries.³³⁵

Before examining the New York Court of Appeals analysis in its answers to the two certified questions, it will be helpful to consider how the United States district court handled three foundational issues: duty, proximate cause and market share liability.

The first critical issue faced by the district court was duty. Judge Weinstein clarified the defendants' duty "[t]he precise duty alleged 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 criminal misuse."³³⁶

The District Court believed that placing a duty to exercise care upon the manufacturers and distributors would help to deter crime.³³⁷

The district court focused on an important facet of proximate cause, criminal intervening cause, when the defendants argued that their negligent conduct, if any, was superceded by the criminal shootings. Judge Weinstein rejected the defense argument:

Under New York law, an intervening intentional or criminal act by a third party is not automatically deemed a supervening act insulating the initial tortfeasor from liability Where "the intervening act is a natural and foreseeable consequence of a circumstance created by defendant, liability will subside."³³⁸

The court cited the *Nallan*³³⁹ and *Derdiarian*³⁴⁰ cases:

335. *Hamilton*, 62 F.Supp. 2d at 839.

336. *Id.* at 824.

337. The court stated:

Imposition of a duty to exercise care in the marketing and distribution of handguns will maximize safety Holding defendants liable when injuries result from their failure to exercise due care is likely to encourage more prudent manufacturing and distribution practices. This potential deterrent effect is of particular importance, where, as here, the legitimate market is saturated.

Id. at 827.

338. *Id.* at 833. California reached the same result in *Ileto*. 349 F.3d at 1208-09 (the Ninth Circuit applying their interpretation of California law).

339. *Id.* at 833-34 (citing *Nallan v. Helmsley-Spear, Inc.*, 407 N.E.2d 451, 458 (N.Y. 1980) (intentional shooting of plaintiff in lobby of office building with history of criminal activity was not a supervening cause exonerating building owner and manager from liability but a significant foreseeable possibility)).

340. *Id.* at 834 (citing *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666 (N.Y. 1980) (a construction company was not insulated from liability by intervening acts of negligent driver who entered a highway work site, where risk of such an event was what rendered company's failure to safeguard site negligent. As the New York Court of Appeals has made clear, "when the intervening, intentional act of another is itself the foreseeable harm that shapes the duty imposed, the defendant who fails to guard against

Defendants' reliance on the doctrine of supervening cause is misplaced. As already demonstrated, criminal misuse of handguns by third parties was not only a reasonably foreseeable consequence of defendants' negligent marketing and distribution practices, it was the precise risk; failure to take reasonable steps to guard against it is what made defendants' conduct negligent.³⁴¹

All of this changed when the New York Court of Appeals answered the first certified question—duty. In rejecting a duty to the plaintiff, the court focused on the court's administrative problem: "[The] judicial resistance to the expansion of duty grows out of practical concerns, both about potentially limitless liability and about the unfairness of imposing liability for the acts of another."³⁴²

The New York Court of Appeals also believed that there were too many possible plaintiffs to make this suit administratively feasible; in relation to the defendants, the shootings were remote:

The pool of possible plaintiffs is very large—potentially, any of the thousands of victims of gun violence. Further, the connection between [defendants], the criminal wrongdoers and plaintiffs is remote, running through several links in a chain consisting of at least the manufacturer, the federally licensed distributor or wholesaler, and the first retailer.³⁴³

The court's holding that the shootings were "remote" in relation to the defendants is subject to numerous interpretations: 1) The criminal use of the gun was not foreseeable to the manufacturer. The manufacturers could not foresee that some handguns (whether or not sold in great volume) would flow into the hands of criminals in New York.³⁴⁴ 2) Such use was not near to the manufacturer. A criminal, not the seller, pulled the trigger.³⁴⁵ 3) It is "unfair" to place the loss on the gun manufacturers. All things considered, including the thinness of cause-in-fact and the shooting by a third party.³⁴⁶ 4) The criminal had much more to do with the injury than the manufacturer. Only the shooter should be held civilly

such conduct will not be relieved of liability when that act occurs"). *Id.*

341. *Id.* at 835.

342. *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001).

343. *Id.* at 1061-62.

344. *See Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co., Ltd. (Wagon Mound I)*, [1961] 1 App. Cas. 388 (J.C. 1961). The Ninth Circuit Court of Appeals found that such criminal shootings were foreseeable. *Ileto v. Glock*, 349 F.3d 1191, 1198, 1203 (9th Cir. 2003).

345. *See Ryan v. N.Y. Cent. R.R. Co.*, 35 N.Y. 210 (1866).

346. *See Green, Duty Problem*, *supra* note 141, at 1034; *see also Green, Duty Problem II*, *supra* note 153, at 255.

liable.³⁴⁷ 5) The court is not prepared to deal with the liability of gun manufacturers at this time. In terms of politics, New York is not ready to hold the gun manufacturers liable.³⁴⁸ 6) The district court-made law, this is the function of the New York legislature.³⁴⁹ 7) This is too much loss to place on the defendants. Gun manufacturers are small and liability might put them out of business.³⁵⁰ 8) The cause-in-fact connection is thin. The criminal shooter had a much more substantial impact on the injury than the negligence of the manufacturer.³⁵¹ 9) Handguns are a part of the fabric of America and, at this time, it is inappropriate for this court to get involved in the debate. Handguns are as American as apple pie and should therefore be protected.³⁵² 10) The ultimate conclusion that can be

347. Criminal intervening cause.

348. See *Green Duty Problem*, *supra* note 141, at 1035.

349. The court strongly suggested that the issue before it was one for the legislature: "we should be cautious in imposing novel theories of tort liability while the difficult problem of illegal gun sales in the United States remains a focus of a national policy debate." *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1066 (N.Y. 2001).

When an issue is felt to be the province of the legislature, but the court nevertheless decides the question, it is referred to as "judicial legislation." H. Sterling Burnett argues that the district court decision in *Hamilton v. Beretta* is judicial legislation. See H. Sterling Burnett, *Suing Gun Manufacturers: Hazardous to Our Health*, 5 TEX. REV. L. & POL. 475 (2001). However, Jean Macchianoli Eggen and John G. Culhane reject that view and argue that existing gun legislation is ineffective and that guns are largely unregulated. Jean Macchianoli Eggen & John G. Culhane, *Gun Torts: Defining a Cause of Action for Victims in Suits Against Gun Manufacturers*, 81 N.C. L. REV. 115, 128, 130, 181 (2002). Absent regulation, there is a need for state involvement and suits against gun manufacturers. *Id.* at 132. John S. Vernick and Julie Samia Mair argue that suits against the gun manufacturers can promote public health. John S. Vernick & Julie Samia Mair, *How the Law Affects Gun Policy in the United States: Law—Intervention or Obstacle to Prevention*, 30 J.L. MED. & ETHICS 692, 693-95 (2002). The CPSC and ATF lack the authority to regulate guns. *Id.* at 700. See also Peter D. Jacobson & Soheil Soliman, *Litigation as Public Health Policy: Theory or Reality*, 30 J.L. MED. & ETHICS 224, 233, 235 (2002).

350. But gun manufacturing is a small industry as compared to tobacco, for example. The defendants' negligence, if any, was small as compared to the possible damages. VANDALL & WERTHEIMER, *supra* note 89, at 1374 n.293. However, Bryce A. Jensen suggests that the gun manufacturers are the appropriate parties to carry the loss (damages) in gun litigation. H. Sterling Burnett argues, "[t]he cases . . . provide no legal basis for making gun manufacturers insurers against the misuse of their products via the judiciary." Burnett, *supra* note 340, at 477.

351. See Aaron Twerski & Anthony J. Sebok, *Liability Without Cause? Further Ramifications on Cause-In-Fact as Applied to Handgun Liability*, 32 CONN. L. REV. 1379 (2000). But in *Ileto*, the Ninth Circuit applied the substantial factor test for cause-in-fact and allowed the negligence case to go forward against the manufacturer regardless of the criminal intervening cause. *Ileto v. Glock*, 349 F.3d 1191, 1208-09 (9th Cir. 2003).

352. This is arguably the thrust of the long concurring opinion in *Emerson* embracing the Second Amendment. *United States v. Emerson*, 270 F.3d 203 (5th Cir.

taken from the court's holding that the conduct of the gun manufacturers was remote is that the plaintiff loses. The many vague definitions of proximate cause function to conceal the reality that the court has found against the plaintiff.³⁵³ 11) In economic terms, the costs of finding the defendant liable exceed the benefits. Arguably, there is benefit to being able to defend oneself with a gun.

In rejecting plaintiff's duty argument, the New York Court of Appeals explained the unique role of foreseeability over-layered with Professor Benston's economic argument in the holding: "[t]he large number of guns in society present a continuing risk and the plaintiffs did not 'show to what degree their risk of injury was enhanced by the presence of negligently marketed . . . guns.'"³⁵⁴

The New York Court of Appeals therefore answered the first certified question in the negative: "analysis of this State's . . . precedents demonstrates that defendants . . . did not owe plaintiffs the duty they claim."³⁵⁵

2001).

353. Dean Tom Galligan wrote, "the doctrine of remoteness is merely a label for 'no liability.'" Thomas C. Galligan Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 WASH. & LEE L. REV. 1019, 1041 (2001).

354. *Hamilton*, 750 N.E.2d at 1062.

355. *Id.* at 1066. Because the New York Court of Appeals refused to find a duty between the plaintiffs and the manufacturers, it did not have to consider whether the defendants were negligent, but it did. The New York Court of Appeals concluded that the gun manufacturers and dealers were not negligent in marketing their handguns:

While manufacturers may be generally aware of traces for which they are contacted, they are not told the purpose of the trace, nor are they informed of the results. The BATF does not disclose any subsequently acquired retailer or purchaser information to the manufacturer. Moreover, manufacturers are not in a position to acquire such information on their own. Indeed, plaintiffs' law enforcement experts agreed that manufacturers should not make any attempt to investigate illegal gun trafficking on their own since such attempts could disrupt pending criminal investigations and endanger the lives of the undercover officers.

Id. at 1065.

Daniel L. Feldman, Director of the Legal Policy and Program Development Unit in the Office of the New York State Attorney General, concludes that the message from *Hamilton v. Beretta* is that a gun manufacturer may be held liable for negligence if only cause-in-fact can be proved. Cause-in-fact might be shown if several FFLs had disproportionately high trace results and the manufacturer foresaw it. However, as the court of appeals recognized, ATF does not provide manufacturers with trace results and prohibits them from taking actions on their own. Daniel L. Feldman, *Not Quite High Noon for Gunmakers, but It's Coming: Why Hamilton Still Means Negligence Liability in Their Future*, 67 BROOK. L. REV. 293, 295, 301, 302, 303, 313 (2001). "[T]he rationale of that decision (*Hamilton v. Beretta*) can still be used to form the basis of some duty in future gun control lawsuits." Charles C. Sipos, *The Disappearing Settlement: The Contractual Regulation of Smith and Wesson Firearms*, 55 VAND. L. REV. 1297, 1321

The second major issue faced by the United States District Court and the New York Court of Appeals was market share liability. A lynchpin issue in *Hamilton v. Beretta* was the fact that none of the handguns used by the criminal actors had been identified or found.³⁵⁶ It was therefore impossible to show which manufacturer or manufacturers produced the guns that caused the injuries or deaths to the plaintiffs. In order to overcome this hurdle, the plaintiffs argued market share liability. After walking through an historical analysis of the four different approaches to market share theory, the court stated: "At bottom, adoption by a state's highest court of a theory of collective liability is a policy decision."³⁵⁷ The District Court reasoned through market share liability:

The jury could have concluded from the available evidence (1) that defendants manufacture .25 caliber handguns and sell them in a national market . . . (2) that it was likely that the .25 caliber handguns defendants sold without taking reasonable precautions to prevent their entry into the underground market found their way into New York, and (3) that Stephen Fox was shot with a .25 caliber handgun illegally acquired from that underground market. This evidence, considered in conjunction with the evidence supporting the jury's finding that [defendants] did market and distribute negligently, was sufficient to permit a rational jury to causally and proximately connect these defendants' negligence to Stephen Fox's injuries.

* * *

These guns were fungible.

* * *

The court went on to hold that "[h]is burden was satisfied by the presentation of evidence from which rational jurors could conclude that negligence on the part of each of the Fox defendants . . . was a substantial factor in bringing about Mr. Fox's injuries."³⁵⁸

(2002).

In *Ileto*, the case is going forward against the gun manufacturers on pure negligence. The guns were found. 349 F.3d at 1194.

356. Market share liability was not a problem in *Ileto* because the guns had been found. *Id.*

357. *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1329 (E.D.N.Y. 1996).

358. *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 837 (E.D.N.Y. 1999). The district court presented the primary policy reason underlying market share liability: "[d]ecisions to impose collective liability have been grounded in both moral and pragmatic considerations. A primary motivating factor has been the injustice of barring innocent

Judge Weinstein took care to articulate the important policies underlying market share liability:

Many of the same factors which have previously led the New York Court of Appeals and other courts to relax the traditional rules of causation militate heavily in favor of the imposition of market share liability in the instant case. First, as in the case of DES, handgun plaintiffs are faced with intractable problems of proof. . . . Contemporary developments are relevant in deciding legal policy in favor of market share liability. The proliferation of illegal handguns in urban areas, the resultant epidemic of handgun violence among urban youth, and the gun industry's design and sale of increasingly lethal readily concealed and cheap handguns have created a crisis in today's cities. Many have now filed suits against handgun manufacturers.³⁵⁹

An essential requirement in applying market share liability is that the product is fungible, that the handgun used in the shooting is substantially similar to every other .25 caliber handgun manufactured by the defendants. The district court reasoned that these handguns were fungible,³⁶⁰ and therefore concluded that market share liability applied to these facts.³⁶¹

On appeal from the United States district court and the United States court of appeals, the second certified question to be answered by the New York Court of Appeals was market share liability. It first acknowledged that it could refuse to decide the question of market share,

plaintiffs' recovery solely because of their inability to identify which of a number of wrongdoing defendants caused their injuries." *Id.* at 841.

359. *Id.* at 843. The court added:

The same factors compelling recognition of a duty . . . support the imposition of market share liability: 1) the superior ability of defendants to bear the costs foreseeably associated with the manufacture and widespread distribution of handguns; 2) the fairness of requiring them to do so since they can reduce the risks by their ability to choose merchandising techniques; 3) the deterrent potential of placing the burden on manufacturers careless of their responsibilities to the public; and 4) the fact that injured plaintiffs . . . did not choose their connection with handguns.

Id. at 843-44.

360. The court stated:

Handguns, already found to be fungible for jurisdictional purposes . . . may also be deemed fungible for substantive law purposes. . . . The fungibility of handguns, and, thus, their amenability to market share analysis is even clearer when viewed from the vantage point of shooting victims.

Id. at 844. However, the New York Court of Appeals held that the handguns involved in the case were not fungible. *Hamilton*, 750 N.E.2d at 1067.

361. *See supra* note 346 and accompanying text.

because it had found that there was no duty extending to the plaintiff. However, because of the importance of the question, it decided to go forward with the analysis.³⁶² The court carefully examined the holding in the New York market share precedent, *Hymowitz*:

Key to our decision [in *Hymowitz*] were the facts that (1) the manufacturers acted in a parallel manner to produce an identical, generically marketed product; (2) the manifestations of injury were far removed from the time of ingestion of the product; and (3) the Legislature made a clear policy decision to revive these time-barred DES claims. . . . Circumstances here are markedly different. Unlike DES, guns are not identical, fungible products. . . . [P]laintiffs have never asserted that the manufacturers' marketing techniques were uniform. Each manufacturer engaged in different marketing activities that allegedly contributed to the illegal handgun market in different ways and to different extents. Plaintiffs made no attempt to establish the relative fault of each manufacturer, but instead sought to hold them all liable based simply on market share.³⁶³

The New York Court of Appeals rejected the applicability of *Hymowitz*. *Hymowitz* was different because there each manufacturer engaged in tortious conduct, the products were defective, and the risks were uniform.³⁶⁴ The New York Court of Appeals concluded by refusing to apply market share to these facts and answering the second certified question in the negative:

We recognize the difficulty in proving precisely which manufacturer caused any particular plaintiff's injuries since crime guns are often not recovered. Inability to locate evidence, however, does not alone justify the extraordinary step of applying market share liability.³⁶⁵

B. Secondary Legal Issues

The district court weighed and decided a number of important but

362. The court stated:

The Second Circuit has asked us also to determine if our market share liability jurisprudence is applicable to this case. Having concluded that those defendant-manufacturers did not owe the claimed duty to these plaintiffs, we arguably need not reach the market share issue. However, because of its particularly significant role in this case, it seems prudent to answer the second question.

Hamilton, 750 N.E.2d at 1066.

363. *Id.* at 1067. Evidence was offered by defendants in the district court that the handguns were not, in fact, fungible. See the analysis of manufacturers' catalogues presented *supra* Part III.

364. *See id.*

365. *Id.* at 1067.

secondary issues that were avoided by the New York Court of Appeals.³⁶⁶ A critical issue in almost all gun litigation is the Second Amendment to the United States Constitution.³⁶⁷ The threshold question is whether the Second Amendment prevents states from regulating the sale of handguns through common law litigation. The district court faced this issue head-on and rejected the applicability of the Second Amendment:

It is important to bear in mind that plaintiffs seek to enforce state, not federal, tort law. Thus it is not necessary to plumb the deeper meaning of the Second Amendment as it applies to Congress. The 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.³⁶⁸

The plaintiffs argued design defect as a foundational cause of action. The court reasoned:

For a viable . . . design defect claim against a handgun manufacturer, a plaintiff must allege that a particular model in question is unreasonably dangerous. . . . "[T]here must be something wrong with the product and if nothing is wrong there will be no liability." . . . The mere act of manufacturing and selling a handgun does not give rise to liability absent a defect in the manufacturer or the design of the product itself.³⁶⁹

366. These are styled secondary issues because the New York State Court of Appeals chose not to rely on them in its decision. Other courts might find them decisive, however.

367. The Second Amendment provides, "[a] well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." U.S. CONST. amend. II.

368. *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1317 (E.D.N.Y. 1996). The court added: "[t]he Second Amendment does not control state tort law. It does not limit regulation of private handgun sale for use through state tort law." *Id.* at 1321.

"[T]he Framers intended the Second Amendment to guarantee an individual right to keep and bear arms." William L. McCoskey, *The Right of the People to Keep and Bear Arms Shall Not Be Litigated Away: Constitutional Implications of Municipal Lawsuits Against the Gun Industry*, 77 IND. L.J. 873, 876 (2002).

In contrast,

[t]he Second Amendment was not intended to justify arming every Tom, Dick and Harriet with an assault weapon Rather, the Second Amendment was intended to provide a substitute for a standing army maintained by the federal government The Second Amendment became superfluous with the advent of the United States Armed Forces

Donna-Marie Korth & Candace Reid Gladston, *The Second Amendment Was Not Intended to Justify Every Tom, Dick and Harriet With an Assault Weapon*, 17 ST. JOHN'S J. LEGAL COMMENT 515, 516 (2003).

369. *Hamilton*, 935 F. Supp. at 1323.

The district court rejected the argument that the handguns were defective because of the lack of an anti-theft safety device:

There is no valid basis for this claim. . . . Whether or not New York products liability law would require an anti-theft safety mechanism . . . requires a balancing of the risk and utility of incorporating such a device into the design of handguns sold by defendants. Plaintiffs have not shown that such a device is available³⁷⁰

The plaintiffs claimed that the manufacturers should be liable because the handguns were marketed in such a way that they could readily fall into the hands of children, and therefore the manufacturers were engaged in an ultrahazardous activity.³⁷¹ The district court rejected the ultrahazardous activity count, however:

The New York Supreme Court recently ruled that a manufacturer could not be held strictly liable under an ultrahazardous activity theory for manufacturing and distributing guns Plaintiffs also have no basis for holding defendants strictly liable under an ultrahazardous or abnormally dangerous activity theory [T]his cause of action relates primarily to the improper use of land. Marketing, while conduct, is not "activity" within the meaning of this doctrine.³⁷²

The court also granted summary judgment on the plaintiffs' fraud theory:

Plaintiffs can not succeed on a fraud claim. They do not claim that they or those whom they represent were deceived by the defendants. Rather, they allege that the defendants deceived government officials and handgun purchasers. Even assuming these allegations to be true, the plaintiffs may not recover for fraud.³⁷³

The New York Court of Appeals also rejected the plaintiff's argument that an obligation to plaintiffs arose from marketing practices in regard to a hazardous substance (such as dynamite). The court stated:

370. *Id.* at 1324. The court explained why it rejected the strict liability cause of action. For strict products liability to apply there must be a defect in the product:

Recovery in strict liability in New York is predicated on the existence of a defect, either in the design of the product, the manufacture of the product, or the warning provided by the manufacturer. On the ground that the proof failed to fit the case into one of these categories, courts have rejected strict liability claims against manufacturers of guns and ammunition.

Id.

371. *Id.* at 1322.

372. *Id.* at 1323-24.

373. *Id.* at 1325.

The cases involving the distribution or handling of hazardous materials . . . do not support the imposition of a duty of care in marketing handguns. The manufacturer's duty in each case was based either on a products liability theory—that is, the product was defective because of the failure to include a safety feature—or on a failure to warn. . . . Here, defendants' products are concededly not defective—if anything, the problem is that they work too well. . . . Likewise, this case can hardly be analogized to those in which a duty has been imposed upon owners or possessors of hazardous substances³⁷⁴

Preemption has become an important and effective products defense in the last few years.³⁷⁵ It is now possible to tell students that any time there is a federal regulation or statute on point, they may be able to argue that it preempts the state statute or common law cause of action.³⁷⁶ The United States District Court in *Hamilton v. Beretta* forcefully rejected the defendants' preemption argument, however:

Congressional design is clear. Federal laws controlling the sale and distribution of firearms do not preempt state tort law The only way a federal law regulating the handgun market can preempt state common law is through a direct conflict making mutual compliance impossible. Defendants have not shown how any remedy sought by plaintiffs would force noncompliance with federal handgun laws governing sales, licensing, and distribution. Plaintiffs seek only to demonstrate the state law required gun manufacturers to take greater precautions than are required under federal law.³⁷⁷

As a means of economizing in the litigation of suits, plaintiffs have often sought class action certification.³⁷⁸ The plaintiffs argued that the class in this case would consist of persons killed or injured in unlawful handgun shootings, and the representatives of such persons.³⁷⁹ The court reasoned: "For a plaintiff-class action to be maintained, four prerequisites must be met: numerosity such that joinder is impractical, common questions of law or fact, typicality of claims or defenses, and the extent to which plaintiffs are representatives of the class."³⁸⁰ The district court, after examining the facts, rejected class action certification:

374. *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1062-63 (N.Y. 2001).

375. *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 866 (2000).

376. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

377. *Hamilton*, 935 F. Supp. at 1321.

378. *See Castano v. Am. Tobacco Co.*, 160 F.R.D. 554 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996).

379. *Hamilton*, 935 F. Supp. at 1331.

380. *Id.* at 1332.

"There has been no showing to date that resolution of the issues sought for class certification would advance the interests of judicial economy and efficiency. Certification is denied with leave to renew."³⁸¹

VI. Conclusion With Respect to *Hamilton v. Beretta* and Issues of Public Policy Towards Handgun Control

The effectiveness of economic theory in an actual case has not heretofore been evaluated. The question presented by this paper is the extent to which economic argument or legal theory drove the court's decision in *Hamilton v. Beretta*. The New York Court of Appeals, in refusing to hold the handgun manufacturers liable was resting its decision in substantial part on Professor Benston's economic argument that liability against the manufacturers would have little impact on the problem of handgun violence. He testified before the district court that because there are at least 200 million handguns in existence, holding the manufacturers liable would do little to affect the flow of handguns to criminals.³⁸²

In terms of legal analysis, the court selected the most flexible and amorphous element in the negligence formula for the foundation of its decision, duty. As Dean Leon Green taught over seventy years ago, "remote" can mean anything.³⁸³

This analysis of *Hamilton v. Beretta* from both a legal and an economic perspective reveals that in the end, the court of appeals relied on the specific facts in the case in making its decision. The court was informed by the law and by economics, but in the final analysis, it was this court's decision based on the facts of the particular case, all in regard to what the judges believed was appropriate for society at this time.

A. Professor Benston's Conclusions

The analysis of the legal issues in cases such as *Hamilton v. Beretta* and the outcome of that case indicate that this means of affecting the

381. *Id.*

382. *Ileto* is going forward against the handgun manufacturers on the negligence theory. It is different from *Hamilton* because the guns were found and it involves an appeal prior to trial. *Hamilton* involved an appeal after trial. Also *Ileto* is the Ninth Circuit's guess as to California law, while *Hamilton* in the Superior Court, was applying New York law. *Ileto v. Glock*, 349 F.3d 1191 (9th Cir. 2003).

383. See generally Green, *Proximate Cause*, *supra* note 116. Green was specifically referring to "sole proximate cause."

supply of handguns is not likely to be effective. But, even if such lawsuits were won, the supply of new handguns is unlikely to be substantially constrained by costs imposed on domestic manufacturers. As shown in Table 5 *supra*, 34% of the new handguns sold in the United States in 1996 were imported, up from 26% in 1989. There are many handguns produced in other countries which, were there an increase in the costs of domestic production (perhaps as a consequence of legal and other costs imposed on U.S. manufacturers), could readily replace or even displace U.S. produced handguns. Furthermore, there are no barriers to entry into the domestic manufacture of handguns. As shown in Part III, there were 51 manufacturers of at least 250 handguns a year in 1989 and 48 at year-end 1996. During this period, 65 companies began production and 68 discontinued production. Table 5 and Figure 2 show that the annual amount of handguns manufactured and imported has changed substantially over the period, as has the proportion provided by individual companies. Hence, even if the major manufacturers suffered substantial legal damages and/or became bankrupt, their output would rapidly be replaced by new producers (who probably would use the former manufacturers' molds and machinery) and by imports.

What then are the alternatives available to people who are concerned about and hope to reduce handgun violence? Researchers and legislators have offered several remedies, ranging from restrictions on the supply of handguns by bringing used as well as new handgun purchases under federal laws, increasing the cost of guns to purchasers, extending the more restrictive laws of some states to all states, and reducing the demand by criminals for handguns.

1. Cook and Ludwig's Proposals to Restrict Handgun Supply

In their book, after estimating the financial cost of gun violence of \$100 billion a year, Cook and Ludwig propose several "remedies."³⁸⁴ They say: "The heart of the policy response to gun violence focuses on efforts to reduce gun use in crime by restricting supply and thus making it more difficult, time consuming, or costly for a violent individual to obtain a gun."³⁸⁵ They advance three approaches: regulate all handgun sales, ban handguns, and design improvements.³⁸⁶

384. See COOK & LUDWIG, *supra* note 10, at 117.

385. *Id.* at 118.

386. *Id.* They also mention gun buyback programs. However, they dismiss these because "the results are likely to be trivial where 40 million households own guns and 4

Cook and Ludwig state: "First on our list is the regulation of secondary-market gun sales, which [they claim, incorrectly as indicated by the analysis presented in Part II, *supra*] is the main source of guns used in crime."³⁸⁷ They would require "mandatory registration of all handguns [and] require that all transactions be channeled through FFLs, and that FFLs report every transaction to ATF."³⁸⁸ But, even assuming Congress would impose this requirement, an analysis by James Jacobs and Kimberly Potter shows how readily federal laws, particularly the Brady Act, can be evaded.³⁸⁹ They point out that, except for felony records maintained by the FBI, there is no central databank that can be accessed to check other prohibited characteristics of handgun purchasers.³⁹⁰ Felons also could employ straw purchasers. Most importantly, a private person who did not want to use the services of an FFL could sell handguns virtually with impunity, both because the sales could not be traced back to the seller and, in the event they were, the seller could claim that the gun had been stolen.³⁹¹ In fact, Cook and Ludwig cite research (including their own) indicating that the Brady Act has had little effect on reducing gun injuries.³⁹²

A feasible proposal to require registration and licensing of handguns was introduced in the 104th Congress as part of the Handgun Control and Violence Prevention Act of 1995 (Brady II). Jacobs and Potter evaluate this proposal.³⁹³ They point out that it would apply only to handgun purchases and transfers, which ignores the 89 million handgun stock, as

million new guns are added to this private inventory each year." They also point out that such programs allow people to sell old guns at a profit and "upgrade to newer more lethal firearms." *Id.* at 10.

387. *Id.* at 10.

388. *Id.* A similar proposal is made by KLECK, *supra* note 170.

389. See James B. Jacobs & Kimberly A. Potter, *Keeping Guns Out of the "Wrong" Hands: The Brady Law and the Limits of Regulations*, 86 J. CRIM. L. & CRIMINOLOGY 93 (1995).

390. See *id.* at 105.

391. See also James B. Jacobs & Daniel M. Heumann, *Extending Brady to Gun Shows and the Secondary Market*, CRIM. L. BULL. 248 (May-June 2001). They describe and analyze a 1999 proposal (The Gun Show Accountability Act, H.R. 1903, 106th Cong.) to extend the Brady Act to gun shows. As they do in their earlier article on the Brady Act, they show how easy it would be for a seller to avoid the act. For example, the seller could say he does not have the firearm with him, but will sell it later if the purchaser meets him elsewhere. *Id.*

392. See COOK & LUDWIG, *supra* note 10, at 121-22.

393. James B. Jacobs & Kimberly A. Potter, *Comprehensive Handgun Licensing & Registration: An Analysis & Critique of Brady II, Gun Control's Next (And Last?) Step*, 89 J. CRIM. L. & CRIMINOLOGY 81, 89 (1998).

of 1996. As shown in Figure 1 *supra*, annual sales of new handguns are only two to four percent of the stock. Jacobs and Potter also show how easily a licensing system could be evaded.³⁹⁴ For example, an unlicensed person could persuade a gun owner to sell or lend him a gun, could use a counterfeit or stolen license, employ a straw purchaser, or just steal a gun. If the gun were traced (somehow) to the seller, he could claim that the purchaser (who he did not know) presented him with a license or that the gun was stolen.³⁹⁵

Cook and Ludwig do not propose a national ban because “little is currently known about the net effects of such a change on public safety, or the value of other intangible costs that such a policy would impose on gun owners. In any event, a handgun ban is infeasible in the current American political context.”³⁹⁶ Indeed, in September 2004 the U.S. House of Representatives refused to extend the ban on military-style assault weapons and large-capacity bullet clips enacted in 1994 with a sunset clause, despite strong support for the extension by the International Association of Chiefs of Police and other organizations. The strong demand for and ownership of handguns by large numbers of legitimate users, that is described and documented in Part II *supra*, supports the conclusion that more restrictive legislation is unlikely to be enacted.

Cook and Ludwig also consider bans on specific guns (e.g., cheap, small “Saturday Night Specials,” “assault weapons,” and high-capacity magazines). They conclude that there “is likely to be some reduction in the lethality of gun misuse, though there is admittedly little direct empirical evidence to support our hypothesis” and “the long-run effects are likely to be quite modest.”³⁹⁷

Finally, they mention requiring manufacturers to make design improvements that would make stolen handguns useless to criminals. They say that “[t]he most important design change is the development of personalized (or ‘smart’) guns,” that could be fired only by an owner

394. *Id.* at 93-97.

395. *Id.* This brief and partial summary does not do justice to the careful analysis presented by Jacobs and Potter. They also consider the analogy to automobile and driver licensing. They show that these regulations are not applicable to handguns (e.g., it is easy for law enforcement officers to determine and check the validity of the licenses), nor have regulations governing automobiles been very successful in preventing accidents or solving crimes (e.g., many accidents are caused by drivers who do not have valid licenses and criminals who use stolen cars rather than their own).

396. *Id.* at 119-20.

397. COOK & LUDWIG, *supra* note 10, at 129.

who wore, perhaps, a ring coded to the gun.³⁹⁸ Handgun manufacturers have been attempting to develop such a weapon, because it would likely be very popular with police, who risk having their handguns taken and used against them by criminals. Such efforts, though, appear to have been unsuccessful. In any event, such devices could be disabled by criminals and, of greater importance, the enormous stock of working handguns would still be available to criminals.³⁹⁹

2. Increase the Price of Handguns

Cook, Molliconi, and Cole argue: “[i]f effective regulation could make it more difficult for youths and criminals to buy guns from dealers, two notable consequences would result. First, one of the leaks in the regulatory system which helps to supply proscribed individuals would be plugged. Second, the total number of guns in circulation would decrease . . . prices would then rise, thus encouraging youths and others to economize on gun possession.”⁴⁰⁰ Cook and Leitzel also propose imposing a federal excise tax on firearms produced or imported to increase the price of firearms in order to decrease the firearms demanded.⁴⁰¹

Higher handgun prices, though, should have little effect on demand for weapons by criminals, because criminals use handguns for two essential purposes. One is to protect themselves from other criminals, particularly in drug-related crimes. The price of a weapon sufficient for this purpose is of little importance to a criminal whose life is in danger. The second is to intimidate the victims of crime to force them to give up their funds and, at times, their persons, to the criminal. A used handgun would be sufficient for this purpose.

Furthermore, criminals obtain many (probably most) of their guns from theft, as shown in Part II *supra*. Considering that there are at least 85 million privately owned working guns in the United States, a reduction in the supply of new handguns would have little effect on the

398. *Id.* at 133.

399. Laws requiring handgun owners to store their weapons in locked containers also appear to have been ineffective and possibly even perverse. See e.g., John L. Lott, Jr. & John E. Whitley, *Safe-Storage-Gun Laws: Accidental Deaths, Suicides, and Crime*, 44 J.L. & ECON. 659 (2001).

400. Cook, Molliconi & Cole, *supra* note 243, at 79.

401. Philip J. Cook & James A. Leitzel, “Perversity, Futility, Jeopardy”: *An Economic Analysis of the Attack on Gun Control*, 59 LAW & CONTEMP. PROBS. 91, 104-07 (1996).

availability of handguns to criminals. Indeed, it would tend to increase thefts as a consequence of an increase in the market price of stolen guns.

3. Nationally Adopt the Restrictive Laws Enacted by Some States and Municipalities

Legislators in states and cities with restrictive handgun control laws have complained that gun traffickers can and (they claim) do purchase weapons in states with weak laws, and then import these handguns for criminal use or sale their the restrictive venues.⁴⁰² This externality, they believe, cannot be dealt with except with a federal law that is as restrictive as the laws of their states or cities. In particular, Senator Charles Schumer (D. N.Y.), perhaps the most persistent and emphatic legislative proponent of greater gun controls, has claimed that ATF gun-trace data “shows that gun runners funneled thousands of guns from a handful of mostly southern states with weak gun laws to criminals in the Northeast and Midwest where gun laws are much more strict.”⁴⁰³ In an earlier press release, he says: “Several interstate highways are ‘firearm freeways’ —favorite smuggling routes for gunrunners. Illegally transported guns head north up I-95 from Florida, Georgia and South Carolina to New York, New Jersey and Massachusetts, or north from Mississippi along I-55 to Illinois.”⁴⁰⁴ This was the argument made by plaintiffs in *Hamilton v. Beretta*.

Data are available on over 200,000 “crime handguns” (as they are called) confiscated by police departments nationally over 1996-1998 that were submitted to ATF for tracing.⁴⁰⁵ For each handgun, these data include the city and date where and when it was confiscated, the crime associated with the handgun, the age and race of the possessor (where

402. Press Release, Charles E. Schumer, New Gun Running Data Shows: Florida, Mississippi and Texas Top Nation in Supplying Guns to Out of State Criminals (June 11, 2000) (on file with author).

403. *See id.*

404. *See* Charles E. Schumer, War Between the States: How Gunrunners Smuggle Weapons Across America (1997).

405. George J. Benston, The Supply of Handguns to Criminals: Evidence from Firearms Tracing Data (2005) (unpublished working paper on file with author). An analysis of a much more limited amount of these data was presented in *Hamilton v. Accu-Tek* for the plaintiffs by Ms. Lucy Allen and Mr. Jonathan Portes of NERA. Their use of these data and their conclusion drawn there from that purport to show that manufacturers “oversupplied” handguns to retailers in states with “lax” laws, was criticized and reanalyzed by Dr. Gustavo Bamberger of Lexecon. Benston’s analysis uses a much larger data set (not available to the other experts at the trial).

known), the state of the last FFL who sold it, and the age and race of the purchaser (when recorded). Although there is no comparable source of information on handguns presumably used by criminals, the data suffer from some important limitations and biases.⁴⁰⁶ The most important limitation is that confiscated handguns can be traced only to the last purchase from an FFL; whether the gun subsequently was privately sold or stolen is not known. The data are biased towards finding that confiscated handguns came from other states, for several reasons. One is that police who can use in-state tracing systems (e.g., New York) tend to not submit in-state purchased handguns for federal tracing. Another is that handguns might have been legally purchased in one state and legally transported to another, after which they were stolen. An additional bias is that handguns are likely to come from states where they are more prevalent and from which there are more guns available for theft. These states tend to be those with less restrictive laws. Thus, a finding that handguns confiscated in states with restrictive laws tend to have been purchased in other states would be consistent with the “lax law” or the “theft” hypotheses. In part for those reasons, ATF claims that a short (less than three years) “time-to-crime,” the years following the last FFL sale and confiscation by the police, provides a useful measure of purchases by straw purchasers and gun traffickers.⁴⁰⁷ However, newer guns also are more likely to be traced, because ATF cannot readily trace handguns essentially manufactured before 1985.

States were classified according to whether their laws are “restrictive,” “somewhat restrictive,” or had “no additional restrictions” beyond federal laws, as shown in Table 1.⁴⁰⁸ Contrary to the claims of the plaintiffs experts in *Hamilton v. Accu-Tek* (who did not analyze the data according to the restrictiveness of all state laws, but simply assumed that all southern states have “lax” laws), the ATF tracing data are not consistent with the claim that crime handguns confiscated in states and cities with restrictive laws tend to have been purchased from FFLs in states with “lax” laws. Although the percentage of confiscated handguns purchased in the same state is significantly lower for restrictive states (44% versus 63% in the somewhat restrictive states and 70% in the states

406. See Gary Kleck, *BATF Gun Trace Data and the Role of Organized Gun Trafficking in Supplying Guns to Criminals*, 18 ST. LOUIS U. PUB. L. REV. 23 (1999).

407. See BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, U.S. DEPT. OF THE TREASURY CRIME GUN TRACE ANALYSIS REPORTS: THE ILLEGAL YOUTH FIREARMS MARKETS IN 27 COMMUNITIES (THE YOUTH CRIME GUN INTERDICTION INITIATIVE), Part II at 12 (Feb. 1999).

408. See *supra* Table 1.

with no additional restrictions), it is as likely that the other confiscated handguns were purchased in states with similarly restrictive laws or somewhat restrictive laws, as in states with no additional restrictions. Furthermore, handguns confiscated in states and cities with no additional restrictions often were purchased in states with restrictive laws. Indeed, many states are the “sources” of traced handguns, and those to which relatively more handguns were traced tend to border on the states where the handguns were confiscated, regardless of their laws. These are consistent with crime handguns having been obtained from thefts, rather than from FFLs in states with presumably lax laws.⁴⁰⁹

Nor is the restrictiveness of state laws associated with shorter “time to crime” (time between purchase from an FFL and time when gun was obtained by police), a presumed measure of straw purchases. ATF “time-to-crime” studies exclude handguns that were not traced because they were manufactured before 1985. However, when these older handguns are included (the state where confiscated is known), the data show significantly shorter times-to-crime of one, two, and three years for handguns confiscated in restrictive states compared to somewhat restrictive states and states with no additional restrictions. These findings are inconsistent with the hypothesis that straw purchases are more prevalent in states with no additional restrictions.

Thus, increasing the restrictiveness of federal laws to match those of the most restrictive states is unlikely to reduce the supply of handguns to criminals. Indeed, almost any attempt to restrict the supply of handguns is unlikely to reduce the use of these weapons by criminals. And, even if it were possible to keep handguns from most or even many criminals, they could readily substitute sawed-off shotguns and rifles for handguns. These weapons do considerably more damage to persons than do bullets shot from handguns.⁴¹⁰

In contrast to the small, if any, effect on criminals, increases in the cost and availability of new handguns is likely to reduce the quantity of this product that can be purchased by non-criminals. Not only would this be an unwarranted reduction in their well-being, but might result in an increase in crime. Lott has shown that the prospect that non-criminals might carry concealed handguns has resulted in substantial reductions of murder, rape, and aggravated assault in the jurisdictions where such laws have been enacted.⁴¹¹ Although some researchers (e.g., Dezhbakhsh,

409. *Id.*

410. See KLECK, *supra* note 170, at 135-39.

411. See LOTT, JR., *supra* note 36.

Rubin, and Duggan), though, have criticized Lott's analysis, none has found that the laws permitting people to carry concealed handguns has resulted in an increase in crime or in accidents or death.⁴¹² Thus, the imposition of costs on domestic new handgun manufacturers and distributors and established importers would tend to substantially damage ordinary people for whom this product serves legal, legitimate, and useful purposes.

4. Reduce the Demand for Handguns

Actions that reduce the demand for handguns by criminals and by ordinary people whose handguns might be stolen might offer a more promising solution to the problem of handgun violence. Cook and Leitzel suggest: "perhaps more promising is to deter gun theft by assigning special priority to prosecutions of defendants accused of stealing guns or to mandate stiffer penalties for thefts of guns than for thefts of other items of similar value."⁴¹³ They also would have handguns registered and make "the record owner liable for misuse of his gun by others, unless he had reported the guns stolen or could demonstrate that the gun had been transferred legally."⁴¹⁴ Assuming this proposal would be enacted by the Congress (which is doubtful, because the Congress has explicitly forbidden the federal government from keeping records of handgun sales, to say nothing of registrations), it is unlikely to be effective, considering the very large number of handguns already in public hands.

Criminals might be deterred from using handguns if penalties were increased. Cook and Leitzel suggest this remedy, but believe that it is

412. Dezhbakhsh & Rubin, *supra* note 37, at 468-74; see also Duggan, *supra* note 37, at 1086-1114. Duggan uses subscription data to a magazine, *Guns & Ammo*, to measure handgun ownership. Based on these data, he finds that statistically, significantly more homicides occur in counties where handgun ownership is, presumably, greater. Lott, though, finds that when data from similar magazines and more relevant magazines (e.g., *American Handgunner* and *Handguns Magazine*) are used, the relationship is not significant. Florenz Plassman & John Whitley, *Confirming More Guns, Less Crime*, 55 STAN. L. REV. 1313 (2003). Furthermore, Moody & Marvel show that Duggan's use of magazine subscriptions as a proxy for handgun ownership is misspecified. Carlisle E. Moody and Thomas B. Marvel, Remarks at the Southern Economics Association Meeting: Guns and Crime (Nov. 17, 2001). They use subscription data from the five largest gun-related magazines (including *Guns & Ammo*), employ a simultaneous equation model, and find that handgun ownership (as measured) tends to precede murders, rather than the reverse, as reported by Duggan.

413. Cook & Leitzel, *supra* note 392, at 114.

414. *Id.* at 113.

inadequate, because “in most instances the perpetrator of a gun crime is judgment-proof in the sense that he would be unable to pay a fine as large as the cost to the victim.”⁴¹⁵ Additional punishment also has been suggested. Cook and Leitzel also see this “solution” as inadequate: “even if all those who misused guns were apprehended and punished, there would still be too much gun misuse from society’s point of view.”⁴¹⁶ Cook and Ludwig, though, say: “we are encouraged by evidence suggesting that sentencing enhancements may reduce gun violence.”⁴¹⁷ Kleck reviews many such empirical studies and concludes: “Discretionary add-on penalties for committing crimes with guns may reduce homicide, robbery, and rape, while mandatory ones do not.”⁴¹⁸

In the concluding paragraph of a book in which he closely examines hundreds of empirical studies and discusses a wide range of issues related to gun violence, Kleck concludes:

[s]ignificant, lasting reductions in violence are not likely to be produced by revisions of the criminal laws, reallocation of law enforcement resources, or tinkering with crime control strategies, whether they involve the conservative panaceas of “getting tough” on criminals and making war on drugs, or the liberal panaceas of offender rehabilitation and gun control (Walker, 1994). In the long run, solving the violence problem will have to involve reducing economic inequality, injustice, and the social disorder these generate. It will have to involve improving the life chances of the underclass that contributes the bulk of both the victims and the perpetrators of violent crime.⁴¹⁹

I agree with Kleck. I also want to point out that, although our study of the demand, supply, and regulation of handguns supports the view that the demand for handguns by non-criminals makes additional regulation by legislators unsupportable and the conditions under which handguns are produced and distributed makes legal constrictions on supply ineffective, it does not support repeal of current (particularly federal) legislation. The study and other similar studies necessarily are based on data produced with that legislation in place. It is not known whether, absent current restrictions, handgun crime would have been greater or less. For those people who are appalled by the cost of handgun violence (with whom we stand), this is an unwelcome conclusion. However, it is

415. *Id.* at 96.

416. *Id.* at 97.

417. Cook & Ludwig, *supra* note 172, at 133.

418. See KLECK, *supra* note 170, at 363.

419. *Id.* at 396.

better to recognize the ineffectiveness of attempts to legally further restrict the supply of handguns than to waste resources to enact laws that would do almost nothing to reduce handgun violence, while reducing the well-being of ordinary people who find handguns beneficial.

B. Professor Vandall's Conclusion

The issue we analyzed in the paper was whether the gun manufacturer's economic argument had an impact on the court's decision. The New York District Court rejected the argument that since there was a huge stockpile of guns,⁴²⁰ care on the part of the manufacturers would have no impact on gun violence. In contrast, the New York Court of Appeals expressly relied on the stockpile argument and held that the connection between the alleged negligent marketing by the manufacturers and the gun violence was "remote" and therefore not compensable.⁴²¹

We did not address the larger issue of whether suits against gun manufacturers have a role to play, at this time, in our justice system. That question is still being litigated. In the similar California case of *Ileto*, the gun was found, and the case has been remanded for trial.⁴²² In addition, there remain numerous municipal suits against the gun manufacturers that have not been finally decided.⁴²³ They ask whether the design or negligent marketing of guns constitute a public nuisance.⁴²⁴

In regard to the supply argument, Professor Benston takes the view that since there is a huge stockpile of old guns, society can do nothing of importance to reduce gun violence by attempting to hold manufacturers to a standard of reasonable care. I disagree.

If gun manufacturers are held liable for negligent marketing, the price of guns will increase and, therefore, fewer guns will be purchased. It does not follow, as Benston suggests, that at a higher price, the demand for guns will stay the same. Economics works for all products and there is no apparent reason that it would not work for guns.

Also, we are looking at a litigation model that is affected by time. There may be little impact on violent crime tomorrow, but asking

420. *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001).

421. *Id.*

422. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1218 (9th Cir. 2003).

423. *See D.C. Court of Appeals Throws Out Ruling That Dismissed City's Suit Against the Gun Industry*, P. R. NEWSWIRE, Oct. 20, 2004.

424. *Id.*

handgun manufacturers to exercise care is likely to have a positive long-term impact.

Automobile air pollution is a good example. In the late 1960s when the automobile air pollution laws went into effect, there was a widespread feeling that the concept of cleaner cars would not work because there were millions of polluting ones in the "stockpile." Today, we know that the pollution controls on cars have helped to reduce air pollution and we also know that there are very few of the old polluting cars still on the road. The stockpile is almost gone. Collector cars are an exception, of course.

The same will likely be true in regard to handguns. When the gun manufacturers begin to exercise care in marketing, it will become more difficult and expensive for criminals to obtain new guns. Over time, the stockpile for guns will dwindle just like it has for old polluting cars.

Professor Benston's conclusion wrongly shapes the paper as a brief against banning handguns. That is not what I envisioned as the theme of our paper nor what was litigated in *Hamilton*. The issue in *Hamilton* was much simpler: should handgun manufacturers be required to exercise care, just like everybody else.

Professor Benston also implies that negligence based lawsuits will bankrupt some gun manufacturers. This is not preordained. If the gun manufacturers are held liable, the manufacturer will have several options. They can take the specific model off the market (like the Ford Pinto), absorb the cost themselves, raise the price of the gun (tobacco), spread the cost among other products, redesign the gun, increase advertising, and lastly, close down.⁴²⁵

Quoting John Lott's study in a paper with our limited scope is problematic. Lott's conclusion that there will be less shootings if more people carry guns is suspect and dangerous. First, Lott's methodology is suspect because his sample is too small. This has been carefully documented by Dezhbakhsh and Rubin.⁴²⁶ Secondly, Lott's conclusion is dangerous. Doctor Kellerman's study manifests family members and guests are much more likely to be shot when there is a gun in the home.⁴²⁷ Lott fails to take into account the real risk to members of the home.

Ayres and Donohue critique Lott's conclusion as follows:

425. See Vandall, *O.K. Corral II*, *supra* note 3, at 553-57.

426. Dezhbakhsh & Rubin, *supra* note 37.

427. See A.L. Kellerman & D.T. Reay, *Protection or Peril? An Analysis of Firearm-Related Deaths in the Home*, 314 NEW ENG. J. MED. 1557, 1559 (1986).

John Lott and David Mustard managed to set the agenda for much subsequent . . . work on the impact of guns on crime in America by creating . . . a powerful statistical argument that state laws enabling citizens to carry concealed handguns [shall-issue laws] had reduced crime. . . .

On the surface, the . . . data . . . appear to establish a *prima facie* case that shall-issue laws, reduce crime

Nevertheless, their results have not withstood the test of time. . . . [T]he previous Lott and Mustard findings proved not to be robust. Importantly, we showed that the Lott and Mustard results collapse when the more complete county data is subjected to less-constrained jurisdiction-specific specifications or when the more-complete state data is tweaked in plausible ways. No longer can any plausible case be made on statistical grounds that shall-issue laws are likely to reduce crime for all or even most states.⁴²⁸

Professor Benston's open embrace of handgun ownership, and of the gun industry marketing techniques, along with quoting Lott with enthusiasm, impliedly supports a call for a fully armed citizenry. Ayres and Donohue offer several reasons why having an armed citizenry may lead to more crime rather than less:

First, . . . it might . . . increase the number of criminals who decided to carry weapons themselves (. . . illegally) and also might increase the speed at which a criminal decides to shoot . . . potential victims. . . . Arming the citizenry can encourage an arms race, leading more criminals to carry even higher-powered weapons and to discharge them more quickly when threatened.

Second, . . . the injection of a gun into an angry dispute, perhaps in lawful defense, might escalate a minor dispute into a criminal homicide or a serious wounding.

Third, with some estimates suggesting that as many as one million or more guns are stolen each year, we know that putting more guns in the hands of the law-abiding population necessarily means that more guns will end up in the hands of criminals. . . . [T]he presence of more guns can actually serve as a stimulus to burglary and theft [because guns are easy to transport and sell].

Fourth, allowing citizens to carry concealed weapons imposes burdens on police in that they must ascertain whether the gun is being carried legally.

428. Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN L. REV. 1193, 1197, 1270, 1296 (2003).

Finally, accidental deaths and suicides are obviously aided by the presence of guns, and these costs could conceivably outweigh any benefits of shall-issue laws in reducing crime.⁴²⁹

Benston's arguments in favor of continuing the sale of guns under present regulations (or less) raises the specter we all know to be true: "A moment's reflection on one's own acquaintances would likely suggest the names of numerous angry or intemperate individuals who could pass the [present standards for purchasing a handgun] even though the prospect of their carrying a . . . weapon would not be likely to enhance one's sense of personal security."⁴³⁰

A question Professor Benston ducks is why we are not seeing creative gun-violence legislation from Congress. Although a majority of reasonable people (including President Bush who pledged in 1999 to support the ban) wanted the assault weapon ban extended by Congress, it was not.⁴³¹ We are talking about law suits and not creative legislation because Congress has walked away from its obligation to protect the people. If society wants to deal with gun violence, the courts are the only available venue.⁴³² This was also true with tobacco.

The holding in *Hamilton v. Beretta* is that if you have recovered the gun and can therefore prove cause-in-fact, you can sue the gun manufacturer for negligent marketing. *Hamilton* does not suggest that suits are not available to hold gun manufacturers to the standard of reasonable care. Tobacco provides a cautionary lesson against false bravado. Although hundreds of suits against tobacco manufacturers were filed from 1958-1996, the tobacco manufacturers did not pay one cent for tobacco caused cancer. They agreed in 1996 to pay \$206 billion.

One of Professor Benston's main arguments is that most guns are stolen, not purchased new. The New York District Court rejected that argument and found that most guns are purchased and come from outside New York. Even if a fair percent of guns are stolen, it does not follow that requiring gun manufacturers to exercise care in marketing will not have a meaningful impact on violence over time. The probable time period for reducing gun violence is not today or tomorrow, but perhaps

429. *Id.* at 1204-06.

430. *Id.* at 1203 (material added, Ayres quote was in reference to Lott's "shall carry" argument).

431. Gil Kerlikowske, *Renew Assault-Weapons Ban*, SEATTLE TIMES, Aug. 25, 2004, at B9.

432. However, the police are working to reduce gun violence in Boston. See Kennedy, Piehl & Braga, *infra*, note 433.

10 years from now.

Professor Benston states that the data from ATF gun tracings are available, but that is not accurate in regard to the most important party, the gun dealer. The New York Court of Appeals made clear that gun "tracings" are not available to the gun dealers by federal statute, and dealers must stay out of the tracing process.⁴³³

Professor Benston states in his conclusion "I agree with Kleck." He may, but I do not. I reject the unsupported notion that we must wait for society to improve before we can rein in gun violence. *Hamilton v. Beretta* is not the last lawsuit, it is one of the first. As with tobacco, the social accounting through litigation may be close at hand.⁴³⁴

C. Rejoinder by Professor Benston to Professor Vandall's Conclusion

Professor Vandall contends that, despite the presence of a huge stockpile of old guns, holding manufacturers to a standard of care would reduce gun violence. I agree with him that if costs were imposed on manufacturers by holding them liable for negligent marketing, the price of guns would increase and fewer handguns would be purchased. However, I see two major problems with this means of reducing handgun violence, both of which reflect the usual conclusion drawn by economists that partial constraints on supply can rarely substantially affect the amount of goods demanded.

First, most handguns used by criminals are stolen. Higher prices of new handguns would affect only non-criminals and, possibly, straw (criminal) purchasers. Although this would reduce the supply of guns available for stealing, the effect would be very small. Furthermore, as the data presented earlier show, even if domestic handgun manufacturers were substantially disadvantaged or even put out of business, a substantial proportion of handguns are imported, and it is almost trivially easy for new manufacturers to go into the business and produce a very large number of handguns. Also, unlike cars, handguns do not deteriorate irretrievably. Consequently, the higher costs would have but a slight effect on the supply of new handguns, and no effect at all on the very much larger supply of existing handguns.

433. "[M]anufacturers . . . are not told the purpose of the trace, nor are they informed of the results. The BATF does not disclose any . . . information to the manufacturer." *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1065 (N.Y. 2001).

434. From the mid-1950s until 1994 tobacco manufacturers had not paid one cent. See Frank Vandall, *The Legal Theory and the Visionaries that led to the Proposed \$368.5 Billion Tobacco Settlement*, 27 Sw. U. L. REV. 473 (1998).

Second, handgun manufacturers cannot prevent criminals from obtaining handguns; hence, their marketing practices (whether negligent or not) are irrelevant. Manufacturers almost always sell to distributors, who decide which federal firearm licensed (FFL) retailers to supply. Neither the manufacturers nor the distributors are privy to the information on traces of criminal handguns, the only available information on the sources of handguns used in or associated with crime. Whether or not this limitation is a result of lobbying by the NRA, the Bureau of Alcohol, Tobacco, and Firearms (ATF), which conducts the traces, insists that its investigations would be compromised if non-police people had this information. But, of greatest importance, handgun manufacturers can have no control over the use by criminals of stolen handguns or over the substantial resale of handguns by private persons.

Professor Vandall nevertheless contends that criminals prefer new guns over stolen handguns. Although this preference has been stated as a "fact," it is not based on research and is inconsistent with the existing research. In any event, it should be noted that, if that new handgun is confiscated by the police, it can be readily traced to the FFL who sold it and to the person who purchased it. From there, it could be traced to the criminal. A stolen handgun, though, is much safer.

Finally, Professor Vandall has neglected the benefits to many people from handgun ownership and use in activities that many people enjoy, such as target shooting and collecting. Handguns also offer hikers, campers, and farmers' protection from dangerous animals. Some people who live far from the police or who believe they cannot count on the police importantly find handguns valuable for protection from criminals and other wrong-doers. Instead, Professor Vandall argues with the validity of John Lott's findings that laws permitting people to carry concealed handguns reduce violent crime, research which I simply noted in a footnote. Whether or not Lott has credibly shown that violent crime declines substantially when such laws are enacted, no one has shown that violent crime increases.⁴³⁵

D. Surrejoinder by Professor Vandall

A study by the Department of Justice, resting on 648 ATF illegal gun trafficking investigations, involving youth ages 18-24 and juveniles ages 17 and under, revealed that 78% of the investigations involved new

435. Kellerman's study cited by Professor Vandall is irrelevant, as carry laws do not affect people who have handguns in their homes.

guns, while 55% involved used guns.⁴³⁶ This suggests that, at least in regard to the ATF investigations, new guns were fairly-often used in crime. The study revealed that some of the guns were obtained through “illegal diversion from retail sources,” and some from “purveyors of stolen guns.”⁴³⁷ Other sources for crime-guns included “interstate and intrastate trafficking in *new* firearms, *used* firearms, and in new and used *stolen* firearms.”⁴³⁸ The study also manifests that 43% of guns recovered from the 18-20 age group were on the street less than three years after the initial sale by an FFL.⁴³⁹ All of this suggests that new guns sold by licensed FFLs may play an important role in violent crime. At an earlier point in the paper, Professor Benston argued that most crime-guns are stolen from the huge stockpile of old guns.⁴⁴⁰ The implication was that new guns play a minor role in gun-related crime and therefore the plaintiffs’ theory in *Hamilton* was far-fetched. The DOJ study of recovered crime-guns suggests that a fair portion of weapons used in violent crime are new. This implies that requiring gun manufacturers to exercise care in marketing may indeed have a meaningful impact upon the violence generated by new crime guns.⁴⁴¹

This view is supported by anecdotal evidence that youth offenders prefer to purchase new guns because they do not want “a body on it.”⁴⁴² A stolen gun is viewed as a liability by young criminals, because it may have been used in a shooting. Apparently, youthful offenders prefer not to do time for someone else’s crime.

Finally, one of the foundational reasons for torts is to compensate

436. THE DEPT. OF THE TREASURY & THE DEPT. OF JUSTICE, *GUN CRIME IN THE AGE GROUP 18-20*, at 17 (1999) [hereinafter DOJ]. Since more than one of the firearms could have been recovered in an investigation, an investigation could be included in more than one category. That explains why the total of investigation exceeds 100%. “[W]e have not seen stolen firearms being employed by criminals. The majority of the time we are seeing them getting them from retail sources.” *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 830 (E.D.N.Y. 1999).

437. DOJ, *supra* note 427, at 3.

438. *Id.*

439. *Id.* at 13.

440. *See supra* note 298 and accompanying text. Criminals obtain handguns predominantly from thefts.

441. *Hamilton*, 62 F. Supp. 2d at 826, 827.

442. David M. Kennedy, Anne M. Piehl, & Anthony A. Braga, *Youth Violence in Boston: Gun Markets, Serious Youth Offenders, and a Use-Reduction Strategy*, 59 LAW & CONTEMP. PROBS. 147, 170 (1996). “[Y]outhful offenders seem to prefer new . . . guns. They regularly use the phrase ‘new in the box’ to describe the last gun they bought.” *Id.* at 169.

the victim.⁴⁴³ The theory of compensation is separate from the theory of deterrence that was the core issue in *Hamilton v. Beretta*. Even if Professor Benston has grounds for arguing that holding the handgun dealers and manufacturers liable in negligence will only have a slight impact on reducing handgun violence, the negligent parties should, nevertheless, be required to compensate the innocent victims.

443. See generally W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS 5 (5th ed. 1984); FRANK J. VANDALL, ELLEN WERTHEIMER, & MARK C. RAHDERT, TORTS, CASES AND PROBLEMS (2d ed. 2003).