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## Held Accountable: Should Gun Manufacturers Be Held Liable for the Criminal Use of Their Products

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# HELD ACCOUNTABLE: SHOULD GUN MANUFACTURERS BE HELD LIABLE FOR THE CRIMINAL USE OF THEIR PRODUCTS

Benjamin Caryan\*

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## I. INTRODUCTION

## A. Overview

Gun violence occurs every day in the United States.<sup>1</sup> Whether it is a mass shooting, gang-related shooting, suicide, homicide, or armed robbery, firearms are used during the commencement of crimes every single day.<sup>2</sup> So what are we to do? Gun control seems to be totally ineffectual.<sup>3</sup> From background checks to assault weapons ban, no amount of gun legislation reduced the amount of gun violence.<sup>4</sup> One relatively new proposal that seemed to gain traction lately and has backers such as Elizabeth Warren and Hillary Clinton is to hold firearms manufacturers liable for acts carried out with their products.<sup>5</sup> Does it make sense to hold a manufacturer liable for the damage caused by their product if that product is working as intended? Should firearm dealers be open to suits even though they are selling their inventory legally? Under what legal theories would this even be feasible? Do we, as a people, wish to set the precedent that the manufacturer of an otherwise lawful product that can be used to aid in carrying out a crime be held liable? What effect have other gun laws and restrictions had on the gun manufacturing and sales industry? These are only a few of the questions addressed in this comment, discussed in our courts, and taken up at the pulpit. For this comment, I will be delving into what gun control worked and not worked; what gun control has been proposed; the implications of potential gun control, what gun control laws exist; and what legal theories suggested by courts.

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<sup>1</sup> *Gun Violence Statistics*, GIFFORDS LAW CENTER, <https://lawcenter.giffords.org/facts/gun-violence-statistics/> (last visited Jan. 25, 2020).

<sup>2</sup> *Id.*

<sup>3</sup> See Amy Swearer, *Broad Gun-Control Restrictions Are Not the Answer*, THE HERITAGE FOUND. (Nov. 16, 2018), <https://www.heritage.org/firearms/commentary/broad-gun-control-restrictions-are-not-the-answer>. See generally Protection of Lawful Commerce in Arms, 15 U.S.C. §§ 7901–7903 (2018).

<sup>4</sup> *Gun Violence in America*, NAT'L INST. OF JUST. (July 31, 2019), <https://nij.ojp.gov/topics/articles/gun-violence-america> [hereinafter NIJ].

<sup>5</sup> Ruby Cramer, *Elizabeth Warren Is Setting A Goal Of Reducing Gun Deaths By 80%*, BUZZFEED.NEWS (Aug. 10, 2019, 9:01 AM), <https://www.buzzfeednews.com/article/rubycramer/elizabeth-warren-gun-plan>; Michelle Y. H. Lee, *Hillary Clinton's claim that the gun immunity law limits the Sandy Hook families' lawsuit*, THE WASH. POST (Apr. 20, 2016, 12:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2016/04/20/hillary-clintons-claim-that-the-gun-immunity-law-limits-the-sandy-hook-families-lawsuit/?noredirect=on>.

## B. Summary

I'll start with the most stringent laws currently enacted. After going over what is enacted, I will discuss the reasons given as to why gun manufacturers should be held liable and under what theories, including tort liability and public nuisance theories. Next, I will cover novel approaches to the strict liability, including arguments like negligent distribution, entrustment, and marketing. I will discuss similarities between the tobacco, automobile, and alcohol industry with the firearms industry. I will then go over how the recent push for gun legislation affected the sale and purchase of firearms. Lastly, to summarize, I will discuss the different state reactions to proposed gun legislation attempts to make manufacturers liable and make my arguments as to what I believe and why I believe it.

## II. THE STATE OF AFFAIRS

Although gun violence is not a new phenomenon in the United States, and by statistics seems to be decreasing rather than increasing,<sup>6</sup> recent sensationalism and media attention brought it to the forefront of our political discourse today.<sup>7</sup> While the perceived importance of gun violence, laws, and regulations seems to ebb and flow as shootings drift in and out of public consciousness, the gun debate has never been more divisive than it is today. Political candidates' campaigns have lived and died on the single issue of firearms legislation,<sup>8</sup> and the decisions that the courts and the court of public opinion make in regards to what to do about the ownership rights of private citizens and the liability of sellers of products deemed too dangerous to own has ripple effects throughout the political discourse and even the foundations of our democracy and market ideologies.<sup>9</sup> When all is said and done,

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<sup>6</sup> NIJ, *supra* note 4 (showing that incidents of gun violence have been steadily decreasing since 1993).

<sup>7</sup> German Lopez, *America's unique gun violence problem, explained in 16 maps and charts*, VOX (Aug. 31, 2019, 8:10 PM), <https://www.vox.com/policy-and-politics/2017/10/2/16399418/us-gun-violence-statistics-maps-charts>.

<sup>8</sup> Charles M. Blow, *Stop Lying About Gun Control*, N.Y. TIMES (Sept. 4, 2019), <https://www.nytimes.com/2019/09/04/opinion/beto-orourke-gun-control.html> (responding to a question regarding the complete confiscation of weapons in the US, Beto O'Rourke stated that he plans to confiscate every weapon he deems an assault weapon). *See also* Tim Hains, *Joe Biden Suggests Banning "Magazines That Can Hold Multiple Bullets"*, REALCLEAR POLITICS (Sept. 3, 2019), [https://www.realclearpolitics.com/video/2019/09/03/joe\\_biden\\_suggests\\_banning\\_magazines\\_that\\_can\\_hold\\_multiple\\_bullets.html](https://www.realclearpolitics.com/video/2019/09/03/joe_biden_suggests_banning_magazines_that_can_hold_multiple_bullets.html) (Joe Biden recently stated that he wants to ban magazines that can hold several bullets as more proof that politicians are just as ignorant or maybe even perniciously deceitful when it comes to the reality of guns. Because holding several cartridges is exactly what a magazine does, there is no such thing as a magazine that only holds one round).

<sup>9</sup> Kimberly Holland, *What Are the 12 Leading Causes of Death in the United States*, HEALTHLINE (Nov. 1, 2018), <https://www.healthline.com/health/leading-causes-of-death>.

“consumer gun sales affect a \$40 billion industry of manufacturers and retailers of guns, ammunition [sic] and accessories.”<sup>10</sup>

### III. CURRENT STATE OF LIABILITY FOR GUN MANUFACTURERS

#### A. *Protection of Lawful Commerce in Arms Act and the State of Immunity*

Congress passed the Protection of Lawful Commerce in Arms Act (“PLCAA”) in 2005.<sup>11</sup> This federal statute “provides broad immunity to gun manufacturers and dealers in federal and state court.”<sup>12</sup> The PLCAA prohibits a “qualified civil liability action,” that results from the criminal or “lawful misuse” of firearms or ammunition.<sup>13</sup> There are six exceptions to the blanket civil immunity provided in the PLCAA: 1) actions brought against individuals who “knowingly transfer a firearm, knowing that such firearms will be used to commit a crime of violence” by an individual directly harmed by such unlawful conduct;<sup>14</sup> 2) actions brought against a seller for negligent entrustment or negligence per se;<sup>15</sup> 3) an action in which a manufacturer or seller knowingly violated a state or federal statute applicable to the sale or marketing of their product, and the violation was a proximate cause of the harm for which relief is sought;<sup>16</sup> 4) an action for breach of contract or warranty;<sup>17</sup> 5) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product;<sup>18</sup> 6) an action brought by the Attorney General to enforce the Gun Control Act or the National Firearms Act.<sup>19</sup> At the time of this comment, “34 states provide either blanket immunity to the gun industry in a way similar to the PLCAA or prohibit cities or other local government entities from bringing lawsuits against certain gun industry defendants.”<sup>20</sup>

California adopted an immunity statute in 1983 that states, “[i]n a product liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk

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<sup>10</sup> Daniel Trotta, *U.S. gun sales down 6.1 percent in 2018, extending ‘Trump slump’*, REUTERS (Jan. 29, 2019, 3:29 PM), <https://www.reuters.com/article/us-usa-guns-sales/u-s-gun-sales-down-6-1-percent-in-2018-extending-trump-slump-idUSKCN1PN346>.

<sup>11</sup> 15 U.S.C. §§ 7901–7903 (2018).

<sup>12</sup> *Gun Industry Immunity*, GIFFORDS LAW CENTER, <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/> (last visited Jan. 25, 2020).

<sup>13</sup> 15 U.S.C. §§ 7902(a), 7903(5) (2018).

<sup>14</sup> 15 U.S.C. §§ 7901–7903 (2018).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Gun Industry Immunity*, *supra* note 12.

of injury posed by its potential to cause serious injury, damage, or death when discharged.”<sup>21</sup> California became the first state to repeal an immunity statute in 2002 after it was used in a California Supreme Court Case *Merrill v. Navegar*<sup>22</sup> to hold that the statute immunized an assault weapons manufacturer from a negligence action brought by the victims of the 101 California street massacre.<sup>23</sup>

### III. THE STRICTEST LAWS IN THE LAND: WASHINGTON D.C.

Currently, the only laws in which gun manufacturers are positively held strictly liable for crimes committed with their products exist in Washington D.C.<sup>24</sup> The D.C. Assault Weapons Strict Liability Act limits liability to production and sale of Assault Weapons.<sup>25</sup> The actual text of D.C. Assault Weapons Strict Liability Act: Section 7-2551.02 Liability reads:

Any manufacturer, importer, or dealer of an assault weapon or machine gun shall be held strictly liable in tort, without regard to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death if the bodily injury or death proximately results from the discharge of the assault weapon or machine gun in the District of Columbia.

As is clear in the words of the text, it does not matter if there is any fault or proof of defect in the product itself, the manufacturer, importer, or dealer, will be found strictly liable in tort for any and all damages as a result of the use of an assault weapon.<sup>26</sup>

#### a. “Assault Weapon”: Origins

Now, in order to fully understand the scope of the law, we must first understand what an assault weapon is. The first time the term assault weapon was used in regard to a specific type of firearm was in 1985 by Art Agnos, who introduced in the California State Assembly a bill to ban semi-automatic “assault firearms.”<sup>27</sup> At that time the only distinction mentioned that differentiated an “assault firearm” from other forms of semi-automatic weapons was the capability to use a detachable magazine capable of carrying

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<sup>21</sup> CAL. CIV. CODE § 1714.4 (West 2007) (repealed 2002).

<sup>22</sup> *Merrill v. Navegar*, 28 P.3d 116 (Cal. 2001).

<sup>23</sup> Gun Industry Immunity, *supra* note 12, at 3.

<sup>24</sup> D.C. CODE ANN. § 7-2551.02. (West 2001).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Carl Ingram, *Restricting of Assault-Type Guns OKd by Assembly Unit*, L.A. TIMES (Apr. 9, 1985, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1985-04-09-mn-27984-story.html> (covering the passing of a bill to restrict the sale of assault weapons).

twenty rounds or more.<sup>28</sup> Many attribute the current popularization of the term assault weapon, rather than assault firearm, to a 1988 paper written by gun-control activist and Violence Policy Center founder Josh Sugarmann, who wrote in reaction to the Cleveland School massacre in Stockton, California.<sup>29</sup>

Assault weapons—just like armor-piercing bullets, machine guns, and plastic firearms—are a new topic. The weapons’ menacing looks, coupled with the public’s confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons. In addition, few people can envision a practical use for these weapons.<sup>30</sup>

The firearms industry itself claims that, rather than the term being introduced by anti-gun activists, it was they who introduced the term in order to garner interest in new product lines.<sup>31</sup> The author of *Gun Digest Buyers Guide to Assault Weapon’s*, Phillip Peterson, wrote:

The popularly held idea that the term “assault weapon” originated with anti-gun activists is wrong. The term was first adopted by manufacturers, wholesalers, importers and dealers in the American firearms industry to stimulate sales of certain firearms that did not have an appearance that was familiar to many firearms owners. The manufacturers and gun writers of the day needed a catchy name to identify this new type of gun.<sup>32</sup>

Regardless of what the intention was when the word was first contrived, the phrase assault weapon is used today, mostly by anti-gun activists and pro-gun control advocates, in order to try to differentiate them in some

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<sup>28</sup> Fred Kavey, *California: gun control’s primary target*, GUNS & AMMO MAG., (Nov. 1, 1985).

<sup>29</sup> Aaron Blake, *Is it fair to call them ‘assault weapons’?*, THE WASH. POST (Jan. 17, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/01/17/is-it-fair-to-call-them-assault-weapons/?arc404=true>.

<sup>30</sup> *Assault Weapons and Accessories in America*, VIOLENCE POLICY CTR. (last visited Feb. 8, 2020), <http://www.vpc.org/studies/awaconc.htm>.

<sup>31</sup> Josh Richman, *Assault weapons: What are they, and should they be banned?*, THE MERCURY NEWS (Jan. 17, 2013, 7:59 AM), <https://www.mercurynews.com/2013/01/17/assault-weapons-what-are-they-and-should-they-be-banned/>.

<sup>32</sup> PHILLIP PETERSON, GUN DIGEST BUYER’S GUIDE TO ASSAULT WEAPONS 11 (Gun Digest Books ed. 2008).

way from the “run-of-the-mill” semi-automatic weapon.<sup>33</sup> If it was indeed used by gun manufacturers initially to market a new product, they are definitely kicking themselves for that mistake. The moniker has been weaponized by anti-gun politicians and lobbying groups to mislead uninformed individuals regarding the lethality and danger of a semi-automatic weapon.

*b. Assault Rifle versus Assault Weapon; Features and Functions*

Assault weapon and assault rifle are often conflated by the ignorant to mean the same thing when there is a very specific, and important difference. An assault rifle is a military term meant to designate a rifle capable of select-fire, the ability to choose between the option of shooting semi-auto, burst, and fully automatic, as well as firing a rifle mid-sized rifle cartridge.<sup>34</sup> The most common rifle cartridge in the world is the NATO Standardized 5.56 NATO round.<sup>35</sup> A round that has its own swirl of misinformation surrounding it. An assault weapon, on the other hand, has no real standard and evolved over time. It can use any ammunition and have or lack several different features. Initially, an assault weapon was, as described above, a firearm with a detachable magazine that could hold twenty or more rounds.<sup>36</sup> Since then it expanded to include a plethora of new features. An assault weapon as defined by D.C.: Section 7-2501.01.(3A)(A): “Assault Weapon” means a plethora of semiautomatic firearms, specified by general name as well as manufacturer. For example, all AK series rifles, “including, but not limited to, . . . [m]ade in China AK, AKM, AKS, AK47, AK47S, 56, 56S, 84S, and 86S;”<sup>37</sup> and then includes specific manufacturers of AK variant rifles like Norinco, Poly Technologies, MAADI, and Mitchell.<sup>38</sup> Section IV includes specific features for a semiautomatic rifle that has the capacity to accept a detachable magazine and any one of the following features: a pistol grip that protrudes conspicuously beneath the action of the weapon, a thumbhole stock, a grenade launcher or flare launcher, a flash suppressor, and a forward pistol grip.<sup>39</sup>

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<sup>33</sup> Assault Weapon Characteristics, S. B. 23, 1999 Sess. (C.A. 2000), <https://oag.ca.gov/firearms/regs/genchar2>.

<sup>34</sup> Debbie Lord & Cox Media Grp. Nat’l Content Desk, *Assault weapon vs. assault rifle: What is the difference?*, JOURNAL-NEWS (Aug. 3, 2019), <https://www.journal-news.com/news/national/assault-weapon-assault-rifle-what-the-difference/LPXLAj8ZcHkPn2rLn3bOGK/>.

<sup>35</sup> Sam Hooper, *The Most Common Bullet Sizes And What They’re Good For*, THE TRUTH ABOUT GUNS (Mar. 24, 2009), <https://www.thetruthaboutguns.com/most-common-bullet-sizes/>.

<sup>36</sup> *Gun Industry Immunity*, *supra* note 12, at 3.

<sup>37</sup> D.C. CODE ANN. § 7-2501.01. (West 2001) (including a list of brands and models of different rifles, pistols, and shotguns, as well as what would be considered destructive devices by the National Firearms Act, that have their own set of stringent limitations and requirements).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*



California extended the language further to include features like an adjustable stock.<sup>40</sup>

The D.C. language that includes grenade launchers is strange because a grenade launcher is actually considered a destructive device by the National Firearms Act (NFA) and, therefore, the Bureau of Alcohol Tobacco and Firearms (ATF) and has its own laundry list of restrictions.<sup>41</sup> This article will not be going into the National Firearms Act or destructive devices, and any other weapons it includes like machine guns and short-barreled rifles because that is its own can of worms. Section V of the D.C. code includes features for a semiautomatic pistol that has the capacity to accept a detachable magazine and one of the following: a threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer; a second handgrip; a shroud that is attached to, or partially or completely encircles, the barrel that allows the bearer to fire the weapon without burning his or her hand, except a slide that encloses the barrel; or the capacity to accept a detachable magazine at some location outside of the pistol grip.<sup>42</sup>

Section VII covers semiauto shotguns with detachable magazines and an adjustable stock.<sup>43</sup> Section VIII is a catchall clause that reads, “All other models within a series that are variations, with minor differences, of those models listed in subparagraph (A) of this paragraph, regardless of manufacturer” that basically covers all the other brands not mentioned so long as they have the same or similar features to the ones listed.<sup>44</sup> The code also includes exemptions for firearms used in Olympic shooting competitions as well as exemptions for police officers.<sup>45</sup> As you can imagine, D.C. does not

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<sup>40</sup> *Assault Weapon Characteristics*, *supra* note 33. Senate Bill 23 defines an assault weapon in California, including bans by name, type, and make, as well as features. Senate Bill 23 is similar to the D.C. law but also includes other features like a detachable magazine, regardless of size, and an adjustable stock. *Id.*

<sup>41</sup> *National Firearms Act*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, <https://www.atf.gov/rules-and-regulations/national-firearms-act> (last updated Feb. 14, 2019). The National Firearms Act instated stringent requirements for the purchase of certain weapons and “destructive devices;” a designation made by the Bureau of Alcohol, Tabaco, and Firearms that includes anywhere from grenades to gun barrels that lack rifling. The NFA requires that tax stamps be paid to the ATF in order to process applications in order to own weapons and accessories specified in the NFA like short-barreled rifles and suppressors. *Id.*

<sup>42</sup> § 7-2501.01. *supra* note 37, at 8.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

have many gun shops and sellers are essentially banned from selling assault weapons there unless they wish to open themselves up to litigation.<sup>46</sup>

It is important to define what a “crime of violence” is as defined by Section 23-1331(4) of the D.C. Code. A “crime of violence” includes “aggravated assault; acts of terrorism or arson, assault on a police officer, assault with a dangerous weapon, assault with the intent to kill, first-degree sexual abuse, and second-degree sexual abuse.”<sup>47</sup> While these descriptors might sound scary to a person who isn’t informed on the workings of firearms and their differences, in reality there is no actual difference between what would be considered an assault weapon and any other semi-automatic weapon. A prime example of this is the AR-15 versus a gun like the Mini-14.<sup>48</sup> Both shoot the same cartridge.<sup>49</sup> Both are accurate to a distance of 300 meters.<sup>50</sup> And yet, the Mini-14 has a hunting rifle grip and does not have the customizability or look of the AR-15, a rifle modeled after the M-16 military issued assault rifle.<sup>51</sup> At the end of the day it is as Josh Sugarmann puts it, an assault weapon is no different than any other semi-auto in functionality, it simply has “menacing” features that make it appear as though it is a military weapon when in fact semi-automatics are the most rudimentary and crude weapons in common use today.

#### IV. WHY MAKE GUN MANUFACTURERS LIABLE?

So why make gun manufacturers liable? It is actually quite simple. An outright ban on these weapons would be considered unconstitutional under the current law of *Miller*, *Heller*, and *McDonald*.<sup>52</sup> As such, the goal of anti-gun groups in instilling tort liability on gun manufacturers is to instill a de facto ban by making it uneconomical to sell guns. The argument is that by making guns, gun manufacturers engage in “ultrahazardous activity” and should, therefore, be held liable for the actions of people using their product. By opening up gun manufacturers to liability, they would make it so expensive to produce the firearm that gun manufacturers would cease to make guns. This

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<sup>46</sup> *Best gun store in Washington, DC*, YELP.COM [https://www.yelp.com/search?find\\_desc=gun+store&find\\_loc=Washington%2C+DC](https://www.yelp.com/search?find_desc=gun+store&find_loc=Washington%2C+DC) (last visited Feb. 8, 2020).

<sup>47</sup> D.C. Code § 23-1331(4).

<sup>48</sup> *AR15 vs. Mini-14*, AM. SHOOTING J. (Feb. 23, 2018), <http://americanshootingjournal.com/ar15-vs-mini-14/>.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (where the court found that the second amendment specifically protects the ownership of handguns but may or may not protect weapons that are not in common use like machine guns); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (where the court found that a homeowner has the right to have a handgun in working order, overturning the charges brought against a homeowner by the D.C. government); *State v. Miller*, 208 S.W.3d 284 (Mo. Ct. App. 2006).

argument is exceptionally egregious when courts reliably rejected the argument of ultrahazardous activity when it comes to guns, as it has traditionally been limited to land use. The gun industry has a very low profit margin. While premium firearms can range anywhere from 1,000 to 3,000 dollars, and custom long range rifles have an essentially limitless price cap, the actual profit of firearms manufacturers and federally licensed sellers does not exceed ten percent.<sup>53</sup> Opening up the industry to legal liability and remedial and punitive damages essentially puts gun companies out of business and would be a very thinly veiled and roundabout attempt at achieving a level of gun control that the courts and the Constitution would never uphold. Gun laws have traditionally been a legislative question but the attempt to circumvent passing laws by having single judges torture existing common law doctrines is a pernicious attempt to silence the voices of millions of people who would otherwise vote against proposed gun laws.

## V. STRICT LIABILITY ARGUMENTS

In this section I will cover the legal arguments made by proponents of gun control. Most of these arguments are, frankly, reaching, twisting and turning the existing law in order to fight in a gun control-shaped box. As such, none of them are particularly good or convincing. However, these are the arguments made and are the ones that will need to be covered and analyzed.

### a. *Dangerous But Not Unreasonable*

The first method used has been to try to tie gun manufacturers and resellers to crimes committed with their products under the theory of strict products liability. A glaring flaw in this line of reasoning is that, traditionally, manufacturers cannot be held liable for the misuse of their products by a third party and that criminal activity of a third party is considered unforeseeable.<sup>54</sup> For example, when a car dealer sells a vehicle to a third party, they cannot foresee that individual planning a bank robbery using that vehicle, or intentionally ramming that vehicle into someone else. Strict products liability requires a flaw or defect in a product that makes it dangerous and has not applied to products deemed dangerous inherently.<sup>55</sup> A gun is meant to fire a round. The target of that round is entirely up to the shooter. It can be at a deer for the purpose of hunting, or an intruder for the purpose of home defense. It can also be misused for the purpose of committing a crime, but as mentioned above, the acts of a third-party purchaser have been deemed unforeseeable to the seller or producer of that product. As Judge Roger T. Benitez writes in *Duncan v. Becerra*, his opinion striking down the sale “large capacity”

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<sup>53</sup> *America's Gun Business, By the Numbers*, CNBC: U.S. NEWS (Oct. 2, 2015), <https://www.cnbc.com/2015/10/02/americas-gun-business-by-the-numbers.html>.

<sup>54</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. INDEX § 320 (AM. LAW INST. 1997).

<sup>55</sup> *Id.*

magazines in California, “the Second Amendment does not exist to protect the right to bear down pillows and foam baseball bats. It protects guns and every gun is dangerous.”<sup>56</sup>

There actually exists a distinction in regard to firearms since firearms are inherently dangerous, everyone knows it, and that is why people purchase them. Certain calibers are marketed for their stopping power. Different barrels are priced differently for their accuracy and bullet velocity. Different sized weapons are marketed differently for their concealability and portability. No matter how uninformed a purchaser may be, they know that when they buy a gun, they are buying that gun because it can kill. It is the shooter who decides for what purpose he uses that capability. There is a risk benefit analysis when discussing the danger of allowing guns for sale in the United States. Aside from it being enshrined within the Constitution, the courts have been open to different interpretations as to the limits of what the Second Amendment entails when it says “arms.” For example, a citizen of the United States cannot own a nuclear bomb, a tank, or a fighter jet. The owning of machine guns is incredibly difficult and costly and the manufacture of new machine guns for civilian purchase has been illegal since 1968 when the Firearm Owners Protection Act was enacted,<sup>57</sup> with the specific language banning the domestic manufacture of new machine guns referred to as the Hughes Amendment.<sup>58</sup> Certain guns have been deemed protected by the Constitution. In *D.C. v. Heller*, the Supreme Court ruled that the owning of a handgun was protected.<sup>59</sup>

## VI. DEFECTIVE

Louisiana Law goes a step further in defining a defective product as something that is “unreasonably dangerous [in all] reasonably [foreseeable] use[s].”<sup>60</sup> Illegal use by a third party is not and has never been considered a reasonably foreseeable use. In *Kelly v. R.G. Industries*,<sup>61</sup> a Michigan case, the court tackled the question of whether or not “Saturday Night Specials” a specific brand of handgun would fall under a strict products liability argument.<sup>62</sup> Even in that case in which the handgun in question was known for being unreliable and easily concealable, the court refused to impose strict liability upon the manufacturer of the firearm as an abnormally dangerous or ultrahazardous activity because the application of this doctrine was limited to the owners and occupiers of land under Michigan law.<sup>63</sup> The plaintiffs in *Kelly* also tried to bring a products liability claim that inevitably failed since the

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<sup>56</sup> *Duncan v. Becerra*, 366 F. Supp. 3d 1131,1146 (S.D. Cal. 2019).

<sup>57</sup> Gun Control Act of 1968, Pub. L. 99-308, 82 Stat. 1213.

<sup>58</sup> *Id.*

<sup>59</sup> *Heller*, 554 U.S. at 574.

<sup>60</sup> *Injury From Defective Goods: The Louisiana Products Liability Act*, THE TOWNSLEY LAW FIRM (last visited Fed. 12, 2020).

<sup>61</sup> *Kelly v. R.G. Industries*, 451 N.W.2d 874 (Mich. Ct. App. 1990).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

handgun in question was not defective.<sup>64</sup> The court did eventually carve out an exception specifically targeting Saturday Night Specials with the argument that manufacturers who sell guns deemed so dangerous in that they are inaccurate and concealable, that they serve no legitimate purpose, can be held strictly liable.<sup>65</sup> While one could argue that the concealability of a firearm lends itself to a legitimate purpose, the court's incredibly narrow exception restricted itself to Saturday Night Specials due to the fact that they are poorly made, inaccurate, and unreliable, making them useless for legitimate use.<sup>66</sup> The court's mentioning of unreliability reinforces the argument that the purpose of the gun is the fire and that while firing a gun is inherently dangerous, it is its inability to fire reliably that makes it useless for legitimate use.<sup>67</sup>

## VII. STRICT LIABILITY AND AMMUNITION

Another seminal case—this time regarding ammunition—is the New York case *McCarthy v. Olin Corp.*<sup>68</sup> New York is one of the strictest states regarding gun ownership—second only to California—so this case speaks volumes as to the ineffectiveness of the strict liability argument.<sup>69</sup> In this case, plaintiffs asserted a strict products liability claim, arguing that “Black Talon” brand ammunition was defective.<sup>70</sup> Black Talon ammunition is a brand of hollow-point pistol and rifle ammunition.<sup>71</sup> Hollow-point ammunition is specifically designed to eviscerate its target.<sup>72</sup> It achieves this by incorporating a hollow point at the tip of the bullet.<sup>73</sup> This hollow point creates an incredibly high-pressure area when it comes into contact with flesh.<sup>74</sup> Eventually the flesh gives way and the shape of the bullet creates a tiny explosion of high-pressure air.<sup>75</sup> This high-pressure air breaks apart the bullet and sometimes causes irreparable damage to the body.<sup>76</sup> While easily overcome with thick clothing, the incredible damage done by these bullets is undeniable.<sup>77</sup> Plaintiffs, however, did not argue that the ammunition was exceptionally

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<sup>64</sup> *Id.* at 875.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 875.

<sup>67</sup> *Id.*

<sup>68</sup> *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997).

<sup>69</sup> Giffords Law Center, *Annual Gun Law Scorecard*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/scorecard/> (last visited Feb. 9, 2020).

<sup>70</sup> *McCarthy*, 119 F.3d at 154.

<sup>71</sup> Suzanne Wiley, *Black Talon and Today's Best Self-Defense Ammo*, THE SHOOTER'S LOG (Oct. 24, 2014), <https://blog.cheaperthandirt.com/black-talon-todays-self-defense-ammo/>.

<sup>72</sup> Allen Gear Holsters, *All About Hollow Point Bullets*, BIGFOOT GUNBELTS (July 3, 2019), <https://gunbelts.com/blog/all-about-hollow-point-bullets/>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

lethal; rather, they argued that the ammunition was defective.<sup>78</sup> In New York, a products liability claim is established when there is a manufacturing defect, warning defect, or design defect.<sup>79</sup> Plaintiffs claimed that the ammunition's unique ability to cause excessive damage was a defect of the ammunition rather than the purpose of its design.<sup>80</sup>

The court easily dismissed this argument because causing excessive damage to its target was exactly what the ammunition was designed to do.<sup>81</sup> It is designed to be devastating against soft targets but ineffective against armored targets.<sup>82</sup> The risk arose from the product's functioning, not due to any defect in its design.<sup>83</sup> The court in *McCarthy* gave great weight to *Forni v. Ferguson*, which involved almost identical issues.<sup>84</sup> Firearms and ammunition are not defective as a matter of law because “a product’s defect is related to its condition, not its intrinsic function.”<sup>85</sup> The manufacture, sale, and ownership of any legal product is legally sanctioned. New York’s view on strict products liability is typical in that “products are not generically defective merely because they are dangerous.”<sup>86</sup>

#### VIII. MANUFACTURERS, NOT INSURERS

*Casillas v. Auto-Ordinance Corp.*, a California case and another typically gun-hostile state and court system confirmed that the users of firearms—not the manufacturers of legal, non-defective firearms—are responsible for injuries caused by those firearms.<sup>87</sup> Further, *DeRosa v. Remington Arms Co.* expanded on this line of reasoning.<sup>88</sup> There, the court suggested that a manufacturer is not an insurer for its product and is not required to safeguard against every conceivable misuse when selecting design alternatives.<sup>89</sup> “Guns may kill; knives may maim; liquor may cause alcoholism; but the mere fact of injury does not entitle the [person injured] to recover . . . [rather] there must be something wrong with the product, and if nothing is wrong there will be no liability.”<sup>90</sup> In *Delahanty v. Hinckley*, the court reasoned that manufacturers have no duty to warn the public of dangers

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<sup>78</sup> *McCarthy*, 119 F.3d at 154.

<sup>79</sup> FindLaw’s Team of Legal Writers and Editors, *New York Product Liability Laws*, FINDLAW, <https://statelaws.findlaw.com/new-york-law/new-york-product-liability-laws.html> (last visited Feb. 9, 2020).

<sup>80</sup> *McCarthy*, 119 F.3d at 155.

<sup>81</sup> Holsters, *supra* note 72.

<sup>82</sup> *Id.*

<sup>83</sup> *McCarthy*, 119 F.3d at 155.

<sup>84</sup> *Forni v. Ferguson*, 232 A.D.2d 176 (1996).

<sup>85</sup> *Id.* at 176.

<sup>86</sup> *New York Product Liability Laws*, *supra* note 79.

<sup>87</sup> *Casillas v. Auto-Ordinance Corp.*, No. C 95-3601 FMS, 1996 WL 276830, at \*1 (N.D. Cal. May 17, 1996).

<sup>88</sup> *DeRosa v. Remington Arms Co.*, 509 F. Supp. 762 (E.D.N.Y. 1981).

<sup>89</sup> *Id.* at 768.

<sup>90</sup> *Id.* at 769.

associated with firearms since those hazards are obvious and generally recognized.<sup>91</sup> Therefore, traditional tort theories of negligence and strict products liability do not provide a basis to hold gun manufacturers liable for the criminal misuse of guns by others.<sup>92</sup>

## IX. TORT-BASED ARGUMENTS

### a. *Ultrahazardous Activity*

Another argument is tort-based and focuses on abnormally dangerous or ultra-hazardous activity. *Ileto v. Glock Inc.* is the main case I will use in my argument.<sup>93</sup> The factors of abnormally dangerous or ultra-hazardous activity, as outlined in Restatement (Second) of Torts, are: (1) Existence of a high degree of risk of some harm to the person, land, or chattel of others; (2) likelihood that the harm that results from it will be great; (3) inability to eliminate the risk by the exercise of reasonable care; (4) extent to which the activity is not a matter of common usage; (5) inappropriateness of the activity to the place where it is carried on; and (6) extent to which its value to the community is outweighed by its dangerous attributes.<sup>94</sup> As stated before, generally, strict liability only applies to land and activities, but in *Ileto*, there was an attempt to shoehorn the theory into the production and sale of guns by manufacturers.<sup>95</sup> However, the court stated that this remedy for an injury caused by a fungible good introduced into the stream of commerce was inappropriate.<sup>96</sup> Further, New York law has no cause of action for unreasonably dangerous products.<sup>97</sup> The Illinois Supreme Court has stated:

[a] manufacturer is not under a duty in strict liability to design a product which is totally incapable of injuring those who foreseeably come in contact with the product. Products liability does not make the manufacturer an insurer of all foreseeable accidents which involve its product. Virtually any product is capable of producing injury when put to certain uses or misuses .... Injuries are not compensable in products liability if they derive merely from those inherent properties of a product which are obvious to all who come in contact with the product. The injuries must derive from a distinct defect which subjects

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<sup>91</sup> *Delahanty v. Hinckley*, 564 A.2d 758, 760 (D.C. 1989).

<sup>92</sup> *Id.* at 762.

<sup>93</sup> *Ileto v. Glock Inc.*, 349 F.3d 1191 (9th Cir. 2003).

<sup>94</sup> RESTATEMENT (SECOND) OF TORTS § 520 (1976).

<sup>95</sup> *Ileto*, 349 F.3d at 1201.

<sup>96</sup> *Id.* at 1219.

<sup>97</sup> *Id.* at 1206.

those exposed to the product to an [u]nreasonable risk of harm.<sup>98</sup>

#### X. THE REASON AND WHY IT DOES NOT ADD UP

Proponents of gun control claim applying liability to gun manufacturers and distributors ensures compensation to victims of gun violence for their damages. In E. Judson Jennings' article, "Saturday Night Ten PM: Do You Know Where Your Handgun Is?," she summarizes this argument, recognizing the ineffectiveness and impracticability of gun control measures and instead advocating for strict liability and mandated insurance coverage in order to provide victims of gun violence with adequate compensation.<sup>99</sup> However, this argument also falls flat as there are other methods to receive a remedy that do not include holding the manufacturer of a product liable for the criminal actions of third party. This argument is primarily a public policy argument that places an insurer's standards on manufacturers and ignores the relevant substantive law. The court in *Patterson v. Gesellschaft* succinctly describes this angle of argument as a misuse of tort law and a baseless and tortured extension of the product liability principle.<sup>100</sup>

In *Copier v. Smith & Wesson*, the plaintiff tried to sue the manufacturer of the handgun that her ex-husband shot her with.<sup>101</sup> She argued that handguns are designed to inflict injury, and statistics show that some handguns actually do cause harm, therefore making the manufacturing of handguns an ultrahazardous activity.<sup>102</sup> The court responded to this argument by stating that "[n]one of the factors are implicated by the *manufacturing* of handguns, as opposed to the use—or rather, the *misuse*—of handguns."<sup>103</sup>

#### XI. PUBLIC NUISANCE

The next argument is that of a public nuisance. Proponents of gun control try to paint the manufacturing of firearms as a public nuisance that creates an unreasonable interference with a right common to the general public, specifically safety and self-preservation. In *Merrill v. Navegar, Inc.*, the plaintiffs asserted that the defendant created a public nuisance by manufacturing and distributing a semi-automatic pistol.<sup>104</sup> Again, the court found that liability imposed upon the manufacturer, in absence of an actual defect in the product, would equate to an insurer's standard and is an action

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<sup>98</sup> *Rodriguez v. Glock, Inc.*, 28 F. Supp. 2d 1064, 1068 (N.D. Ill. 1998).

<sup>99</sup> E. Judson Jennings, *Saturday Night, 10 PM: Do You Know Where Your Handgun is?*, 21 SETON HALL LEGIS. J. 31 (1997).

<sup>100</sup> *Patterson v. Gesellschaft*, 608 F. Supp. 1206, 1208 (N.D. Tex. 1985).

<sup>101</sup> *Copier ex rel. Lindsey v. Smith & Wesson Corp.*, 138 F.3d 833, 834 (10th Cir. 1998).

<sup>102</sup> *Id.* at 834.

<sup>103</sup> *Id.* at 836.

<sup>104</sup> *Merrill v. Navegar, Inc.*, 26 Cal. 4th 465, 474 (2001).



that is within the purview of the legislature, not the judicial system.<sup>105</sup> Courts are generally reluctant to recognize a new theory of nuisance under existing state law because it falls on the legislature to make new laws for the courts to interpret. This is something that stumped gun advocates because, while it may seem that public opinion is strictly anti-gun manufacture and ownership, the polls speak differently. The public nuisance cause of action fails when a manufacturer does not substantially participate in the activity that constitutes the nuisance—in this case, that nuisance being illegal activities and crime.<sup>106</sup> Again, when this line of reasoning is applied to any other industry, the ludicrousness of the argument comes to light. A manufacturer of alcohol is not liable for the acts of a drunk driver, and a manufacturer of automobiles is not liable for automobile collisions and the death and damage that may follow.

*Cincinnati v. Beretta U.S.A Corp.* is another case where the court rejected a nuisance cause of action.<sup>107</sup> There, the plaintiffs argued that the nuisance was the manufacturer's alleged negligent manufacture and distribution of firearms, which are lawful products.<sup>108</sup> However, the court held that a nuisance argument is inappropriate because strict product liability and negligence laws have been developed to cover the design and manufacture of products.<sup>109</sup> To allow a nuisance argument would destroy the separate tort principles that govern such activities.<sup>110</sup> Also, allowing the muddying of the term "dangerous" to cover objects that are fully functioning as intended rather than having inherent flaws or defects blurs the lines of tort principles even further.<sup>111</sup>

## XII. NEGLIGENCE MARKETING

Revisiting *McCarthy*, negligent marketing is another cause of action that proponents of gun control have brought against manufacturers.<sup>112</sup> The argument brought by the plaintiffs for their negligent marketing claim is that the manufacturer should have restricted the sale of firearms to law enforcement agencies and should have known that its marketing strategy would attract "many types of sadistic, unstable, and criminal personalities."<sup>113</sup> This argument, aside from absolutely obliterating the common law limits on the negligent marketing tort, completely ignores the Constitution. It is the right of "people" to keep and bear arms.<sup>114</sup> While "people" is up 'for debate in today's political climate, it traditionally meant a citizen of the United States. Only

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<sup>105</sup> *Id.* at 482.

<sup>106</sup> *Id.*

<sup>107</sup> *Cincinnati v. Beretta U.S.A Corp.*, 768 N.E.2d 1136 (Ohio 2002).

<sup>108</sup> *Id.* at 1139.

<sup>109</sup> *Id.* at 2

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997).

<sup>113</sup> *Id.*

<sup>114</sup> U. S. CONST. amend. II.

allowing law enforcement or government agencies to keep arms is a huge leap from the current status quo in which there are 100 million gun owners in the United States and 300 million guns in civilian hands.<sup>115</sup> The plaintiff's line of reasoning also places a legal duty on firearms manufacturers that simply does not exist. The court rejects their argument and reaffirms that the manufacturer of a product cannot control the criminal misuse of their product.<sup>116</sup>

### XIII. THE PUSH FOR A SAFER GUN

Unable to charge manufacturers under tort theories of the law, gun control proponents moved to pushing for modifications to the design of guns in order to make them "safer."<sup>117</sup> They contend that the design of firearms contributes to both intentional and unintentional shootings.<sup>118</sup> There has been a recent push for "smart gun tech," that is additions, either integral or attachable, that put certain physical and digital barriers in place before a trigger can be pulled.<sup>119</sup> Proponents cite the fact that one out of six police officers shot in the line of duty are shot with their own firearm, having it wrestled or swiped from them and then used against them.<sup>120</sup> Things like fingerprint scanners on pistol grips or RFID chips implanted in the officers themselves that emit the proper frequency allowing for proper operation of the firearm have been tried, but they never provided a reliable function that is required for high stress, high risk situations.<sup>121</sup>

Police having their firearms forcefully taken from them is more a fault of police practice than the safety of the firearm. Police should not be, and are in fact trained, not to put themselves in a position in which their assailant would be able to reach for their weapon. Police practice dictates that officers have the right to fire at their assailant once they are within twenty feet of them.<sup>122</sup> A distance that closes fast when someone is running at you with intent. Recently, incidents of police hesitating to draw or fire their weapon increased due to the shift in media reporting a public scrutiny of police practices.<sup>123</sup> This

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<sup>115</sup> John Gramlich & Katherine Schaeffer, *7 facts about guns in the U.S.*, PEW RESEARCH CENTER (Oct. 22, 2019), <https://www.pewresearch.org/fact-tank/2018/12/27/facts-about-guns-in-united-states/>.

<sup>116</sup> *McCarthy*, 119 at 148.

<sup>117</sup> Jean Eggen & John G. Culhane, *Gun Torts: Defining a Cause of Action for Victims in Suits against Gun Manufacturers*, 81 N.C. L. Rev. 1, 195 (2002).

<sup>118</sup> *Id.*

<sup>119</sup> ZORE GUN LOCK, (last visited Feb. 9, 2020), <https://www.zore.life>.

<sup>120</sup> *Law enforcement Officers Feloniously Killed*, FBI: UCR (last visited Feb. 12, 2020), <https://ucr.fbi.gov/leoka/2017/tables/table-19.xls>.

<sup>121</sup> Kevin McCarthy, *SMART GUNS*, OLR RESEARCH REPORT (Jan. 18, 2013), <https://www.cga.ct.gov/2013/rpt/2013-R-0036.htm>.

<sup>122</sup> *Guiding Principles ON Use of Force*, POLICE EXECUTIVE RESEARCH FORUM 20 (Mar. 2016), <https://www.policeforum.org/assets/30%20guiding%20principles.pdf>.

<sup>123</sup> Doug Wyllie, *A Plague of Deadly Hesitation, De-Motivation, and De-Policing in America*, Police Law Enforcement Solutions (Aug. 17, 2018),

led to an increase in injured officers and even in crime in areas that were heavily policed prior having their presence cut in order to avoid confrontations between police and civilians.<sup>124</sup>

All in all, smart gun tech has not panned out. The necessity for an officer, or even a civilian acting self-defense, to draw their weapon and be able to fire in a moment's notice actually makes for safer operation of the weapon; at least to the wielder. Any blocks or slowdowns implemented, for whatever noble or feel good cause, puts the person carrying the weapon in danger as they are in a dangerous situation. Otherwise they would not feel the need to draw their weapon. The gun tech approach has been another roundabout way to achieve gun control, as mass implementation increases the cost and reduces the effectiveness of the firearm.

A perfect example of this is the California Handgun Roster, that requires that any new weapons manufactured for sale in California have a technology called micro-stamping.<sup>125</sup>

The purpose of micro-stamping is to make bullet casings more identifiable, and therefore traceable, by having a serial number printed on it once it is fired through a handgun. While technology would be a great way of tying a bullet to a shooter, there is one caveat. The technology does not exist and has yet to be invented. Rather, it is impossible to carry out.<sup>126</sup> Surprisingly, courts upheld the California requirement, stating that just because a technology doesn't exist does not mean it cannot be a requirement as that is what incentivizes innovation.<sup>127</sup> In reality what actually happened is that manufacturers are unable to sell their product in California.<sup>128</sup> Updated versions of existing handguns are also not allowed.<sup>129</sup> Note that these new guns are no more dangerous than the guns that are allowed through the roster. Rather, the roster is just another roundabout method of restricting guns and California courts and the Ninth Circuit have been unwilling to deal with the roster, upholding it under the argument that restricting purchase of *some*

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<https://www.policemag.com/374573/a-plague-of-deadly-hesitation-de-motivation-and-de-policing-in-america>.

<sup>124</sup> *Id.*

<sup>125</sup> Xavier Becerra, *Handguns Certified for Sale*, DEPT. OF JUSTICE (last visited Feb. 10, 2020), <https://www.oag.ca.gov/firearms/certified-handguns/search>.

<sup>126</sup> Matthew Harper, *Commentary: It's Time to End 'Microstamp' Requirement for Handguns*, DAILY PILOT (Apr. 5, 2018), <https://www.latimes.com/socal/daily-pilot/opinion/tn-dpt-me-harper-commentary-20180405-story.html>.

<sup>127</sup> Rob Egelko, *California Supreme Court Upholds Bullet Micro-Stamping Law*, GOVERNMENT TECHNOLOGY (June 29, 2018), <https://www.govtech.com/public-safety/California-Supreme-Court-Upholds-Bullet-Micro-Stamping-Law.html>.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

brands of guns is not an infringement of the second amendment because there are still some handguns for sale, therefore not constituting a total ban.<sup>130</sup>

#### XIV. NOVEL ARGUMENTS

##### a. *Negligent Distribution*

Aside from tort theories and legislative restrictions there are other, more novel, arguments brought up in court to hold firearms manufacturers liable for violence committed with their products. These approaches include negligent distribution and, by extension, negligent entrustment.<sup>131</sup> Negligent distribution requires that the manufacturer distribute directly to members of the public and fail to employ reasonable means to prevent the sale of guns to those who are likely to misuse them.<sup>132</sup> The hitch here is that firearms manufacturers do not sell their product to individuals. Rather, they sell them to resellers, who in turn sell them to Federal Firearm Licensed stores.<sup>133</sup> A claim for negligent distribution was raised in the case of *Merrill v. Navegar*, in which the plaintiffs sued the defendant for the sale of a certain type of handgun most famously used in the Columbine shooting.<sup>134</sup> Having failed a negligence analysis, the plaintiffs tried to argue a claim for negligent distribution.<sup>135</sup> The court rejected their claim stating:

[P]laintiffs' allegation that Navegar made the TEC-9/DC9 available to the general public adds nothing to the standard products liability action. Plaintiffs' claim that Navegar's decision to distribute the TEC-9/DC9 to the general public was negligent given the weapon's particular design features is therefore simply a reformulated claim that the weapon, as designed, fails the risk/benefit test.<sup>136</sup>

The court goes on, "The same is true of the dissent's negligence theory, which evaluates Navegar's conduct based on a weighing of the risks (known attractiveness to violent users) and benefits (lack of legitimate civilian use) of the TEC-9/DC9 in light of its design."<sup>137</sup> The court rejected plaintiffs' argument that certain features of the gun made it more attractive to violent

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<sup>130</sup> *Id.*

<sup>131</sup> Andrews Publications, *NO COVERAGE OWED TO GUN MAKER FOR NEGLIGENCE DISTRIBUTION*, 4<sup>TH</sup> CIR. RULES *Gun Claims*, 11 No. 43 Andrews Ins. Coverage Litig. Rep. 972. (Sept. 28, 2001).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Navegar*, 28 P.3d at 119.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 127.

people or criminals, and that their argument against its sale failed the risk–benefit analysis.<sup>138</sup>

*b. Negligent Entrustment*

Negligent entrustment covers “[o]ne who supplies a chattel for the use of another whom the suppliers knows or has reason to know . . . [is] likely . . . to use it in a manner involving unreasonable risk of physical harm to . . . others . . . is subject to liability.”<sup>139</sup> Therefore, the manufacturer must know or have reason to know the identity of the ultimate purchaser or, alternatively, the location where the weapon is going to end up.<sup>140</sup> Something that is altogether unreasonable and not a common practice in the firearms industry or any industry for that matter. There is supply set up for a reason: to allow the efficient production, shipping, and dissemination of a product. The very nature of the gun industry does not facilitate such a notice. Being a highly regulated industry, the sale of firearms requires a Federal Firearms License (FFL).<sup>141</sup> A manufacturer’s liability should, and currently does, end when the firearm is legally transferred to a licensed dealer.<sup>142</sup> *Hamilton v. Accutek* solidifies this line of reasoning.<sup>143</sup> The premise in *Hamilton* was that gun companies knew or should have known that oversupplying guns to southern states with weak gun laws would lead to what they called an “iron pipeline.”<sup>144</sup> A large-scale shipping of guns up the I-95 for illegal purposes into states with strong gun control like New York.<sup>145</sup> Here, the purchase of guns for another is already illegal. It is called straw purchasing.<sup>146</sup> It comes as no surprise that someone intent on criminal activity would not be too worried about getting a straw purchasing charge added on to their rap sheet. Gun laws tend to only work on individuals who already follow the law and there is zero evidence to suggest they have ever worked to prevent a criminal from obtaining a firearm or reduced the rate of violent crime. On the contrary, massive gun control bills like the assault-weapons ban actually saw an increase in gun violence after

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<sup>138</sup> *Id.* at 148–49 (“[i]n a products liability action . . . on the basis that the benefits of [its] product do not outweigh the risk of injury posed by [the product’s] potential to cause serious injury, damage, or death when discharged”) (quoting Cal. Civ. Code, § 1714.4(a) (repealed 2002)).

<sup>139</sup> RESTATEMENT (SECOND) OF TORTS § 390 (AM. LAW INST. 1965).

<sup>140</sup> *Id.*

<sup>141</sup> *Firearms*, ATF BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES (last visited Feb. 10, 2020), <https://www.atf.gov/firearms>.

<sup>142</sup> RESTATEMENT (SECOND) OF TORTS § 390.

<sup>143</sup> *Hamilton v. Accutek*, 62 F. Supp. 2d 802, 802 (E.D.N.Y. 1999), *vacated, sub nom. Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21, 21 (2d Cir. 2001).

<sup>144</sup> *Id.* at 831–832, 833; *see also Williams v. Beemiller, Inc.*, 130 N.E.3d 833, 860 (N.Y. 2019) (discussing the origins of the iron pipeline nickname).

<sup>145</sup> *Id.*

<sup>146</sup> *Trafficking & Straw Purchasing*, GIFFORDS LAW CENTER (last visited Feb. 12, 2020), <https://lawcenter.giffords.org/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing/>.

their enactment and a decrease in gun violence after they were repealed or sunsetted.

*c. Negligent Marketing*

“Negligent Marketing . . . contemplates the imposition of liability when a manufacturer utilizes methods of packaging and promotion that induces someone who is likely to misuse [the] firearm to purchase one.”<sup>147</sup> For this, “the method of marketing must have been a factor in the third party’s decision to purchase the firearm.”<sup>148</sup> “[A]dvertis[ing] a product that has distinguishing features is insufficient to impose liability even if those features are destructive in nature.”<sup>149</sup> Requiring “[l]iability for advertising distinguishing features[] would be tantamount to imposing limitless liability and making a manufacturer an insurer against the criminal misuse of its products.”<sup>150</sup> Continuing on in our analysis of *Hamilton v. Accutek*, in it, the court found that there was a duty based on the testimony of a witness claiming that gun manufacturers could stem the flow of guns to dealers who were known to make multiple gun sales or who had many of their guns end up in other hands illegally.<sup>151</sup> However, manufacturers really have no way of tracking the gun after they send it to the dealer, so the argument ignored the system in which gun sales operate but nevertheless the court found a duty and awarded the plaintiff \$500,000 dollars despite there being nothing defective about the gun used.

XV. ANALOGIES TO OTHER DANGEROUS INDUSTRIES

There are analogies between industries that provide dangerous products like the firearms industry and the tobacco industry. Both industries supply dangerous products that are causes of preventable death. However, there are important differences that must be considered. For instance, cigarettes cause harm when they are used as intended while guns do not cause tortious harm when used legally.<sup>152</sup> On the contrary, there is evidence to suggest that firearms are used in up to 200,000 instances of self-defense a year, meaning they potentially saved that many and more lives in those instances.<sup>153</sup> Unlike cigarettes, guns require the illegal action of a third party. Smoking

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<sup>147</sup> Matthew Pontillo, *Suing Gun Manufacturers: A Shot in the Dark*, 74 ST. JOHN’S L. REV. 1167, 1185 (Mar. 2012).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* 1185–86.

<sup>151</sup> *Hamilton*, 62 F. Supp. 2d at 830–31, 833.

<sup>152</sup> RESTATEMENT (FIRST) OF TORTS § 15 (1934). “Bodily harm is any impairment of the physical condition of another’s body or physical pain or illness.” *Id.*

<sup>153</sup> Mark W. Smith, *More People Use a Gun in Self-Defense Each Year Than Die in Car Accidents*, FOUNDATION FOR ECONOMIC EDUCATION (July 2018), <https://fee.org/articles/more-people-use-a-gun-in-self-defense-each-year-than-die-in-car-accidents/>.

cigarettes is the decision of the person smoking them. They are addictive and have been shown to cause just as much damage when inhaled second hand,<sup>154</sup> but the majority of the harm caused by cigarettes is caused upon the person who willingly, whether under the influence and addiction or not, the ingestion of its smoke.<sup>155</sup> There is no evidence to show that guns are addictive.<sup>156</sup> There are persons who have a propensity for violence who may be attracted to the idea of owning a gun and using it to commit violence, but the vast majority of gun owners in the United States are law-abiding citizens who wish to protect themselves and their property. There is also nothing in the design or function of a gun that makes it addictive.<sup>157</sup> Comparisons drawn between firearms and the tobacco industry, in which individuals successfully sued the manufacturer, should therefore be moot, if for no other reason than that ownership of a gun is a right enshrined by the Constitution and smoking tobacco is not.<sup>158</sup> Constantly suing gun manufacturers under established law that has nothing to do with the suit in question is just another attempt to supersede the legislature and the people by filing enough suits to force manufacturers to settle.

#### XVI. THE EFFECT OF GUN LAWS ON THE FIREARMS INDUSTRY

What effect do these laws actually have on sales and the number of guns that are available to the public? Since these laws are put in place in the hopes of reducing the flow of firearms into the market under the theory that “industry defendants have marketed and distributed their firearms in ways which they know or should know create and feed illegal secondary market in firearms,”<sup>159</sup> how have laws actually affected firearm sales? Data is hard to find for weapons bought and sold in Washington D.C. since it is not a state but a district. Washington D.C. is also the only district government that has been able to pass law making gun manufacturers liable for their products.<sup>160</sup> For that reason, we will look nationwide at gun bans and their effects on the flow of guns into the market.

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<sup>154</sup> *Health Risks of Secondhand Smoke*, AMERICAN CANCER SOCIETY (last revised Nov. 13, 2015), <https://www.cancer.org/cancer/cancer-causes/tobacco-and-cancer/secondhand-smoke.html>

<sup>155</sup> *Burden of Cigarette Use in the U.S.*, CTR. FOR DISEASE CONTROL AND PREVENTION (last reviewed Dec. 6, 2019), <https://www.cdc.gov/tobacco/campaign/tips/resources/data/cigarette-smoking-in-united-states.html>.

<sup>156</sup> Matthew Pontillo, *Suing Gun Manufacturers: A Shot in the Dark*, 74 ST. JOHN’S L. REV. 1167, 1194 (Mar. 2012).

<sup>157</sup> *Id.*

<sup>158</sup> U. S. CONST. amend. II.

<sup>159</sup> *Gun Industry Immunity*, GIFFORDS LAW CENTER (2018), <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/>.

<sup>160</sup> *Assault Weapons in the District of Columbia*, GIFFORDS LAW CTR. (last visited Feb. 12, 2020), <https://lawcenter.giffords.org/assault-weapons-in-washington-d-c/>.

According to a study done by Christopher S. Koper and Jeffery A. Roth, in which they compared secondary-market prices for firearms banned under the federal assault weapons ban with prices for similar firearms unaffected by the ban between 1991 and 1999, during a period when the ban was in effect (September 13, 2004).<sup>161</sup> While analyzing assault pistols covered under the ban, Koper reported no significant changes in price before or after the ban.<sup>162</sup> During that same period of time, the prices on “Saturday Night Specials” steadily declined, though the effect of the federal law on these price trends was not well-identified.<sup>163</sup> Secondary-market prices for banned assault weapons, when compared to other semiautomatic rifles that were not covered under the ban, had sharp price increases directly following the ban in 1994 and 1995, but prices subsided and returned to pre-ban amounts for the remainder of his study period.<sup>164</sup>

In the same study, Koper examined manufacturer production of banned and weapons unaffected by the ban between 1985 and 2001.<sup>165</sup> Koper found that “production of banned assault pistols rose substantially in 1993 and 1994 before the ban took place, but then fell to below pre-ban levels even though several manufacturers were producing modified versions of the banned assault pistols that were not covered by the law.”<sup>166</sup> Production of assault weapons followed the same trend.<sup>167</sup> Based on this study, it appears that production and sale of assault weapons surges prior to bans but begins to settle back to pre-ban numbers after a few years.<sup>168</sup> However, there is no indication that weapons bans have led to a decrease in demand for the make and sale of assault weapons.<sup>169</sup>

Looking beyond the Federal Assault Weapons Ban enacted under President Bill Clinton, there is evidence to show that gun sales are directly tied to which party happens to have presidential power.<sup>170</sup> Prior to President Barack

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<sup>161</sup> Christopher S. Koper ET AL., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence 1994–2003* (June 2004) (unpublished manuscript) (on file with the United States Department of Justice).

<sup>162</sup> *Id.* at 27–29.

<sup>163</sup> *Id.* at 29.

<sup>164</sup> *Id.* at 32.

<sup>165</sup> *Id.* at 33–36.

<sup>166</sup> *Effects of Bans on the Sale of Assault Weapons and High-Capacity Magazines on Gun Industry Outcomes*, RAND CORP. (Mar. 2, 2018), <https://www.rand.org/research/gun-policy/analysis/ban-assault-weapons/gun-industry.html>.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Joe Weisenthal, *Gun Sales and Gun Stocks Are Going Nuts as Obama’s Re-Election Odds Improve*, BUS. INSIDER (Mar. 24, 2012, 8:06 AM), <https://www.businessinsider.com/gun-sales-are-booming-shares-of-ruger-and-smith-and-wesson-are-surg-ing-2012-3>.



Obama's re-election, and seemingly in direct response to his odds improving, gun sales and manufacturers' stocks rose substantially. Following fears of a second Obama term, Ruger stock rose by fourteen percent.<sup>171</sup> Gun shop owners around the United States experienced a sharp rise in their sales since President Obama was elected, and manufacturers like Ruger could not keep up with demand, so much so that they had to suspend new orders after one million firearms orders were placed in the first three months of the year.<sup>172</sup> Fear of new gun laws under the Obama administration led directly to an increase in gun sales.<sup>173</sup>

An article written by Gregor Aisch and Josh Keller for the New York Times, "What Happens After Calls for New Gun Restrictions? Sales Go Up," touches on the correlation between calls for new gun restrictions and those statements' or events' effects on gun sales.<sup>174</sup> Aside from the month of September 2001, in which 754,000 guns were sold, the highest sales of guns in a single month were in direct correlation to President Obama's election in November 2008, the January after President Obama's re-election in 2013, and in anticipation of Hillary Clinton winning the election in the month of December 2015.<sup>175</sup> The month of President Obama's election, 1.1 million guns were sold.<sup>176</sup> After President Obama's re-election, and in response to his statements made directly after the Sandy Hook shooting, 2 million guns were sold.<sup>177</sup> In December 2015, in anticipation of another democratic presidency, 1.5 million guns were sold.<sup>178</sup> They write, "more guns were sold in December [2015] than almost any other month in nearly two decades, continuing a pattern of spikes in sales after terrorist attacks and calls for stricter gun-buying laws, according to federal data."<sup>179</sup> They note that "fear of gun-buying restrictions has been the main driver of spikes in gun sales, far surpassing the effects of mass shootings and terrorist attacks alone."<sup>180</sup>

While proponents of gun restrictions tend to be Democrats, statements made considering further gun restrictions causes a spike in sales, regardless of party lines.<sup>181</sup> Gun sales in New Jersey in 2013 increased from 0.7 percent of national gun sales to 1.1 percent after New Jersey governor Chris Christie

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Gregor Aisch & Josh Keller, *What Happens After Calls for New Gun Restrictions? Sales Go Up*, N.Y. TIMES (June 13, 2016), <https://www.nytimes.com/interactive/2015/12/10/us/gun-sales-terrorism-obama-restrictions.html>

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

proposed measures to expand background checks and ban certain rifles.<sup>182</sup> Aisch and Keller remark on the “catch-22” faced by gun control proponents, noting that “pushing for new restrictions can lead to an influx of new guns.”<sup>183</sup> When Maryland approved one of the United States’ strictest gun control measures in May 2013 that banned most semiautomatic rifles, citizens of Maryland rushed to gun stores in order to beat the October deadline specified in the measure.<sup>184</sup> These purchases accounted for over four percent of national gun sales in those months.<sup>185</sup>

Gun owners, outraged at those police officers carrying out evacuations during Hurricane Katrina who confiscated legally registered guns from civilians, prompted an increase in gun sales in Georgia, Louisiana, and Mississippi.<sup>186</sup> According to Jurgen Brauer, a professor at Georgia Regents University, gun sales have more than doubled in a decade, from about 7 million guns sold in 2002 to about 15 million sold in 2013.<sup>187</sup> The number could be even higher, as this information is based on the number of times an individual has gone through the background check process.<sup>188</sup> Therefore, it does not cover permits that allow people in some states to buy multiple guns with a single background check.<sup>189</sup>

As it appears right now, it is damned if you do, damned if you don’t for proponents of gun control. In 2007, when Missouri repealed a requirement that gun buyers obtain a permit to purchase a handgun, estimated gun sales went up by roughly 9,000 additional guns a month.<sup>190</sup> Similarly, when the Supreme Court struck down a ban on handguns in Washington D.C., the monthly number of newly registered handguns in the city went up from nearly zero to forty.<sup>191</sup> The bittersweet reality for proponents of gun control is that people who legally purchase firearms are going to buy them when they fear their rights are in danger, and the evidence supports that understanding.

Daniel Trotta, in an article for Reuters, writes, “U.S. firearms sales fell 6.1 percent in 2018, according to industry data . . . , marking the second straight

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Jurgen Brauer, *The US Firearms Industry: Production and Supply*, SMALL ARMS SURVEY, WORKING PAPER NO. 14 (2013), <http://www.smallarmssurvey.org/fileadmin/docs/F-Working-papers/SAS-WP14-US-Firearms-Industry.pdf>; see also Gregor Aisch & Josh Keller, *What Happens After Calls for New Gun Restrictions? Sales Go Up*, N.Y. TIMES (Updated June 13, 2016), <https://www.nytimes.com/interactive/2015/12/10/us/gun-sales-terrorism-obama-restrictions.html>.

<sup>188</sup> *Id.* at 42.

<sup>189</sup> *Id.*

<sup>190</sup> See Aisch & Keller, *supra* note 174.

<sup>191</sup> *Id.*

year of declines and extending the ‘Trump slump’ following the November 2016 election of pro-gun rights President Donald Trump.”<sup>192</sup> Data from the National Shooting Sports Foundation estimated 13.1 million firearms were sold in 2018.<sup>193</sup> This number is down from 14 million in the previous year and “down 16.5 percent from record 2016 sales of 15.7 million” firearms.<sup>194</sup> The spike in sales seen mostly during the Obama administration among fears of new gun regulations has been quelled; as President Trump stated during one of his rallies, “the eight-year assault on your Second Amendment freedoms has come to a crashing end.”<sup>195</sup>

President Trump’s rhetoric resonated with gun owners, and it shows in the sales of firearms. More recent statements by President Trump in favor of red-flag laws and universal background checks have yielded similar rises in the sale of firearms, again in short spikes.<sup>196</sup>

## XVII. STATE REACTIONS AND GUN PROPONENTS

States reacted to the actions of lobbying groups by enshrining manufacturers of firearms. Fourteen states passed legislation that prohibits the suing of gun manufacturers for violent crimes committed with their products.<sup>197</sup> Texas passed such a law under the tenure of George W. Bush when he was its governor.<sup>198</sup> While there is an argument that states should be able to tailor the law to match the views of their constituents, states that are anti-gun are inadvertently morphing the law of products itself that would have repercussions beyond simply the firearms industry. Cars, alcohol, and cigarettes kill more people every year than guns—three other industries that

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<sup>192</sup> Daniel Trotta, *U.S. Gun Sales Down 6.1 Percent in 2018, Extending ‘Trump Slump’*, REUTERS (Jan. 29, 2019, 3:29 PM), <https://www.reuters.com/article/us-usa-guns-sales/u-s-gun-sales-down-6-1-percent-in-2018-extending-trump-slump-idUSKCN1PN346>.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Ali Vitali, *Trump to NRA: ‘Eight-Year Assault’ on Gun Rights Is Over*, NBC NEWS (Apr. 28, 2017, 11:39 AM), <https://www.nbcnews.com/politics/white-house/trump-nra-eight-year-assault-gun-rights-over-n752446>.

<sup>196</sup> Tomi Kilgore, *Gun stocks surge after President Trump tweets about tightening regulations*, MARKETWATCH (Aug. 5, 2019), <https://www.marketwatch.com/story/gun-stocks-surge-after-president-trump-tweets-about-tightening-regulations-2019-08-05>.

<sup>197</sup> *Gun Industry Immunity: State by State*, GIFFORDS LAW CTR. (last visited Feb. 12, 2020),

<https://lawcenter.giffords.org/gun-laws/state-law/50-state-summaries/gun-industry-immunity-state-by-state/>

<sup>198</sup> *GUNS AND SCHOOLS: IN TEXAS; Bush Signs Bill Banning Anti-Gun Lawsuits*, N.Y. TIMES, (June 19, 1999), <https://www.nytimes.com/1999/06/19/us/guns-and-schools-in-texas-bush-signs-bill-banning-anti-gun-lawsuits.html>.

have a much further reach and that would be just as affected by changes in the interpretation of tort law as the gun industry.<sup>199</sup>

Aside from the legal implications, gun proponents argue it is simply illogical to hold a manufacturer, or even a dealer, liable for the actions of an individual.<sup>200</sup> Manufacturers are so far removed from the sale of the gun to a third party that to hold them liable would be the equivalent of holding automobile manufacturers liable for car accidents, spoon manufacturers liable for fat people, and alcohol companies liable for drunk drivers or domestic abusers. Holding dealers liable for legal sales to third parties is illogical because they are following protocols and laws when they sell guns to individuals.<sup>201</sup> Further, it has been dealers in the past who have tried to prevent the sale of guns to suspicious people using their own judgment, not required by law.<sup>202</sup> For example, in the case of the Pulse night club shooting, the shooter was denied sale of guns and was even reported to authorities as a suspicious person.<sup>203</sup> Law enforcement ignored those warnings, and the shooter went and bought a firearm from another store far from home where he was not known.<sup>204</sup> Gun stores should be commended for their judgment as they uphold the gun laws that are passed. They are not and should not be held accountable for straw purchasers or people who lie on their background checks. Even in instances where a dealer sells a gun to a person who goes on to commit a violent crime, that dealer should be protected from prosecution so long as it followed federal and state laws during the sale. The more common way that criminals get guns is through illegal sale or stealing firearms from lawful owners.<sup>205</sup> The owner

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<sup>199</sup> *Burden of Cigarette Use in the U.S.*, *supra* note 155; see also Lloyd Alter, *Cars kill more kids than guns, but you would never know that reading the news*, TREEHUGGER (Dec. 26, 2018), <https://www.treehugger.com/cars/cars-kill-more-kids-guns-you-would-never-know-reading-news.html>; see also Rob Thomas, *Letter to the Editor: Deaths from guns vs. alcohol: a comparison*, DAILY REPUBLIC (Feb. 3, 2019), <https://www.dailyrepublic.com/all-dr-news/opinion/letters-editor/letter-to-the-editor-deaths-from-guns-and-alcohol-compared/comment-page-1/>.

<sup>200</sup> Alden Crow, *Shooting Blanks: The Ineffectiveness of the Protection of Lawful Commerce in Arms Act*, 59 SMU L. REV. 1813, 1836 (2006).

<sup>201</sup> *Id.* at 1820-21.

<sup>202</sup> Steven Nelson, *Dealer's Choice: Gun Store Owners Can Deny Anyone They Want*, U.S. NEWS & WORLD REP. (June 17, 2016), <https://www.usnews.com/news/articles/2016-06-17/dealers-choice-gun-store-owners-can-deny-anyone-they-want>.

<sup>203</sup> Charles Passy, *Florida gun store owner says he turned away Orlando shooter*, THE WALL STREET J. (June 15, 2016), <https://www.marketwatch.com/story/florida-gun-store-owner-says-he-turned-away-orlando-shooter-2016-06-15>.

<sup>204</sup> Casandra Vinogra & Frank Thorp, *Omar Mateen Probed for Terror Ties but Legally Purchased Weapons*, NBC NEWS (June 13, 2016), <https://www.nbcnews.com/storyline/orlando-nightclub-massacre/omar-mateen-probed-terror-ties-legally-purchased-weapons-n590836>.

<sup>205</sup> Dan Noyes, *“how criminals get guns”*, PBS (last visited Feb. 12, 2020), <https://www.pbs.org/wgbh/pages/frontline/shows/guns/procon/guns.html>.

of the firearm can relieve responsibility by notifying law enforcement of the theft and providing the weapon's serial number in case it is used in a crime.<sup>206</sup> However, there is no punishment for having a gun stolen and then used in a crime if the owner has informed police of the theft.<sup>207</sup> How, then, does it make sense to hold a manufacturer or dealer liable when they are partaking in totally legal conduct?

*a. Private Suits*

Private suits are an unwarranted and unwise attempt to ban or restrict handguns through courts and juries, despite the repeated refusal of state legislatures and Congress to pass strong, comprehensive gun-control measures.<sup>208</sup> These decisions should not be made emotionally as they often are in response to a recent shooting or criminal activity. We cannot forget the Second Amendment as a right as well as its protections under *Heller* and *McDonald*. If cases such as these that seek to over-burden the industry out of business as an attempt to stop the manufacture and sale of handguns, then the courts should respond with sanctions for frivolous lawsuits. While safety is important, as shown in the cases provided in which the law is so tortured that it is painfully obvious when parties bring tort claims that are simply not applied correctly to a fact pattern in a weak attempt to appeal to a certain judge in the hopes that they can codify their opinions into law, there is certainly a problem. There is a social and constitutional utility to firearms. Just as with cars and their ease of travel, guns provide the cheapest and most compact form of self-preservation, a human right. Unlike cars, the right to bear arms is enshrined in the second amendment. The contortions of law that require legal manufacturers of a product to be held accountable for the actions of an individual would distort the very landscape of business, let alone the law.

#### CONCLUSION

In conclusion, it is obvious by the cases and history that tort theories of strict liability and negligence do not apply to holding manufacturers liable for the production of functional, non-defective products. Other factors like a risk-benefit analysis of firearm ownership and holding manufacturers accountable has consistently been found in favor of the manufacturer and the gun owner. For whatever reason, tort reasoning has been shoehorned into the

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<sup>206</sup> Chelsea Parsons & Eugenio Vargas, *Stolen Guns in America*, CTR. FOR AMERICAN PROGRESS (Jul. 25, 2017), <https://www.americanprogress.org/issues/guns-crime/reports/2017/07/25/436533/stolen-guns-america/>; see also *Reporting Lost & Stolen Guns*, GIFFORDS LAW CTR. (last visited Feb. 12, 2020), <https://lawcenter.giffords.org/gun-laws/policy-areas/gun-owner-responsibilities/reporting-lost-stolen-guns/>.

<sup>207</sup> *Reporting Lost & Stolen Guns*, *supra* note 206.

<sup>208</sup> See *Gesellschaft*, 608 F. Supp. At 1208.

gun control argument. Whether it is frivolous or genuine, it is ineffective and inappropriate. Whether the suits are thinly veiled attempts to sue gun manufacturers into submission or to roll the dice and hope for a friendly judge, some form of reprimand should be put in place when the same argument has been raised and rejected by the court so many times. For any other industry to be held to such a standard would be seen as ludicrous. Holding manufacturers liable for the actions of a third party is not a conversation in the automobile or alcohol industry. Two industries that have a much higher casualty rate per year than firearms. The emotional argument is difficult to swallow, that is certain. No one wants to see firearms misused in order to hurt innocents. However, firearms have been shown to be used much for often to protect, rather than harm. Regardless of moral, emotional, or logical arguments, any and all changes to tort law, regarding firearms or otherwise, should go through the legislature, not the courts. Therefore, because there is no basis for firearms manufacturers to be held liable for the actions of a third-party purchaser, and no other law or theories, at least of those that have been raised, under which they may be found liable, they should not be found liable. A manufacturer is not an insurer and should not be held to the same standards of duty of an insurer. Individuals should take responsibility for themselves rather than looking to businesses or the government to hold others responsible for them.

