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LEGAL CLAIMS OF CITIES AGAINST THE MANUFACTURERS OF HANDGUNS

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INTRODUCTION: THE HANDGUN PROBLEM AND THE ROLE OF HANDGUN MANUFACTURERS

Public debate about handguns understandably focuses on the toll of handgun deaths each year and the causes of violence so pervasive it seems to threaten the foundations of American society. Here in the City of Philadelphia, handgun deaths are literally a daily crisis; there is on average more than one handgun death each day, three-quarters of which are criminal homicides. Another three people are injured but not killed by handguns in a typical day.¹ This is Philadelphia's share of a staggering national toll: the United

* © 1998 by David Kairys. Professor of Law, Temple University. In the Fall of 1996, while participating in the Handgun Violence Reduction Taskforce organized by Philadelphia Recreation Commissioner Michael DiBerardinis, I noticed the early stages of governmental suits against tobacco companies and began exploratory research on claims that cities might raise against handgun manufacturers. No city or state as yet has brought such a lawsuit, and claims by individuals harmed by handguns have been unsuccessful, except where a handgun was defective, mainly because of the difficulty of proving legal causation or duty. Several novel theories, however, emerged based on long established legal claims. Over most of the last year, until I withdrew on January 9, 1998, I was counsel for the City of Philadelphia, charged with investigation of the facts, gathering of evidence, legal research, and preparation of a complaint for a City lawsuit against handgun manufacturers. This essay, a slightly edited version of my paper publicly released on January 20, 1998, presents the results of this effort in summary form, drawing in part on the work of others who were part of the team, and relying on facts and theories that are matters of public record or have become generally known. The essay, however, is limited in some significant respects by attorney-client confidentiality. The views expressed are entirely my own and do not represent or reflect the views of the City of Philadelphia, its mayor or other officials, anyone else on the legal team, or Temple University. I appreciate the suggestions and assistance on the public health issues of Stephen Teret and Jon Vernick of the Center for Gun Policy and Research, School of Public Health, Johns Hopkins University. I have attempted to explain some terms unfamiliar to non-lawyers so that this essay will be generally accessible.

1. Clea Benson & Craig R. McCoy, *Phila. Firearms: Why City Remains Under the Gun*, PHILA. INQUIRER, Jan. 11, 1998, at A1; *Disarming In Light of Rising Violent Crime, Philadelphia Needs a Strategy for Dealing with Gun Trafficking*, PHILA. INQUIRER, Jan. 18, 1998, at E6. Based

States leads the world in the overall number of people who die and who are injured each year by handguns—the yearly toll of about 25,000 dead compares to no more than a few hundred in every other industrialized country²—and in the number of children³ who perish and who are injured by handguns, with an average of more than four accidental shootings of children under 15 each day, one of whom dies every other day.⁴ There are about 65 million handguns in the United States; about 2.5 million more are added each year.⁵ Handguns are surely not the only causative factor in such devastating statistics, but it takes an ideological leap or some form of denial of reality not to recognize that, at least in this country at this time, people with readily available handguns kill people.⁶

on national estimates, there are almost three nonfatal injuries requiring hospital treatment for every death. J.L. Annett et al., *National Estimates of Nonfatal Firearm-Related Injuries*, 273 JAMA 1749 (1995).

2. In 1995, there were 35,957 firearm deaths in the United States, consisting of homicides, suicides, and unintentional deaths. See R.N. Anderson et al., *Report of Final Mortality Statistics*, 45 MONTHLY VITAL STAT. REP. 11 (Supp. 2, 1997). The estimate that the number of these deaths that are specifically attributable to handguns is about 25,000, and the comparisons to other countries, are based on a range of studies and data. See FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1996 (1997); S.P. KACHUR ET AL., CENTER FOR DISEASE CONTROL, SUICIDE IN THE UNITED STATES (1995); UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE DIVISION, DRAFT REPORT OF THE UNITED NATIONS INTERNATIONAL STUDY ON FIREARM REGULATION (1997); Anderson et al. *supra*; Center for Disease Control, *Rates of Homicide, Suicide, and Firearm-Related Death Among Children—26 Industrialized Countries*, 46 MORBIDITY AND MORTALITY WKLY. REP. 101 (1997).

3. In accidents involving children reported in the Philadelphia media, most children shoot themselves or are shot by another child, usually with a handgun maintained in the home for self-protection. For example, based on a computer database search of the *Philadelphia Inquirer* and the *Philadelphia Daily News* during 1996: a three-year-old boy was killed when he pulled the trigger while playing with a handgun in a second-floor bedroom; 11-year-old Matthew Johnson picked up his father's handgun and shot himself in the neck; a 16-year-old was seriously wounded when he and two friends played with a handgun; a 14-year-old was killed during "horseplay" with friends; Antonio Good, 4, killed himself while playing with a handgun in his home; and 4-year-old Dante Manago shot himself in the stomach with a handgun in his Strawberry Mansion home. In recent years, there have been an increasing number of incidents in which very young children obtain handguns, usually from their homes, and use them outside the home: an 8-year-old took a loaded gun into the Joseph Pennell School in the Ogontz neighborhood, because, according to published reports, he was "having trouble with a teacher"; a 15-year-old took a loaded gun to school at Cardinal O'Hara High School; a 14-year-old fired 5 shots during a French class in South Philadelphia; a 9-year-old took his father's handgun to school at the Saint Joseph's School in Cheltenham; and a 16-year-old shot randomly out the window of his home, injuring a neighbor who was asleep in her bedroom.

4. See N. Sinauer et al., *Unintentional, Nonfatal Firearms-Related Injuries*, 275 JAMA 1740 (1996); Center for Disease Control, *Mortality File* (1997) <<http://wonder.cdc.gov>>.

5. See P.J. COOK & J. LUDWIG, NAT'L INSTITUTE OF JUSTICE, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY ON FIREARMS OWNERSHIP AND USE (1997).

6. For example, handgun homicides among youth usually involve a quick and lethal escalation of violence in the range of conflicts that long have characterized youthful interactions and in the particular conflicts and tensions that characterize modern urban life. Over the last few decades, the manufacturers have succeeded in providing each new generation of American youth with an increasing and unprecedented level of access to handguns, and the handguns they provide are increasingly smaller, cheaper, more rapid-firing, and more lethal.

Although the statistics are well-known, the moral and legal role and responsibility of handgun manufacturers largely have escaped scrutiny. Unlike tobacco manufacturers, who also have an awareness of their products' devastating consequences, handgun manufacturers market a product designed to kill and have an intimate connection to violent crime. A substantial portion of the demand for their product, in fact, stems from criminal activity.

Yet the debates about the dangers of tobacco, drugs, and asbestos, for example, centrally integrate the roles played by their manufacturers and distributors, while the handgun debate does not. Products that cause far less death, injury, or monetary damage than handguns are usually strictly regulated, and regulatory scrutiny and public debate about them usually focus on their manufacturers and distributors. Major examples of both the governmental and public sides of this phenomenon are Congress's exclusion of guns and ammunition from the jurisdiction of the Consumer Products Safety Commission and prohibition of certain public health research on guns by the Centers for Disease Control, neither of which drew significant attention or public outcry.⁷

There are a range of possible explanations for the lack of public and media focus on handgun manufacturers, and the probably related lack of meaningful regulation of handguns of the sort found in almost all the other western democracies and almost every other country in the world. Among the most significant are the status of guns in our history, culture, and constitutional scheme,⁸ which makes it possible for the manufacturers to maintain a relatively low profile without harming sales.

It is not unusual in countries born by armed revolution for guns to symbolize freedom, independence and justice. We have a deep connection to that birth, to the armed expansion that yielded our vast lands, and to a fierce sense of individualism. Causes and effects are hard to distinguish in such matters, but one current manifestation of this cultural heritage and our historical development is the notion and favorite media theme that well-armed good people will triumph. We know from repeated experience but avoid acknowledging or understanding that the good and the innocent—and the many whose character and circumstances are unknown and irrelevant be-

7. Pub. L. No. 94-284, § 3(e), 90 Stat. 504 (1996); Pub. L. No. 104-208, § *105, 111 Stat. 1467 (1997) (prohibiting CDC to "advocate or promote" policies regarding control of guns, which it regularly does as to other products and conditions creating a health hazard, and reducing CDC funding by the amount it spent the previous year on gun-related public health research).

8. There is a widespread popular belief that the courts have guaranteed a right to possess at least some guns based on the Second Amendment. However, federal courts uniformly have rejected any individual right to own guns and have refused to find in the Second Amendment a fundamental right for purposes of incorporation and applicability against the states. *See, e.g.*, *United States v. Miller*, 307 U.S. 174, 178 (1939) (finding that Second Amendment guarantees only militias' right to bear arms); *Quilici v. Morton Grove*, 695 F.2d 261, 271 (7th Cir. 1983) (affirming city's ban on handguns); *Eckert v. City of Phila.*, 477 F.2d 610, 610 (3d Cir. 1973) (holding city's firearms regulation constitutional under Second Amendment). In any event, the claims described here do not raise a Second Amendment issue because they do not seek any limit or restriction on anyone's right to buy or sell handguns.

cause they were just at the wrong place at the wrong time—often wind up bleeding on the street. The cultural license or mandate to arm and triumph encourages and excuses armed violence as a response or solution to adversity, controversy and perceived unfairness. The triumph of well armed good people is a powerful myth and refuge available to all who feel wronged.

Handgun manufacturers depict their products in their advertisement and promotions as instruments of safety and peace and, sometimes simultaneously, of overwhelming, instantaneous destruction.⁹ But they have little reason or need to seek name recognition or to pay for extravagant advertising campaigns. Their promotional efforts are carried out largely by voluntary associations and popular media and movements, rather than by advertising agencies.

There are regular handgun advertisements in sportsmen's and gun magazines, and some promotional surprises that bring Joe Camel to mind. The most consistent theme of their handgun advertisements is that handguns provide safety, and that anyone concerned about safety should have at least one. A *Ladies' Home Journal* advertisement for Colt, showing a mother leaning over her daughter at bedtime, suggests the protective benefit of a gun in the home is like that of a fire extinguisher and says, "[s]elf-protection is more than your right . . . it's your responsibility." A Beretta advertisement is headlined "Homeowner's Insurance." Another offers: "Protection, Peace of Mind and Self Confidence under \$100."¹⁰

Advertisements like these affect consumers as well as guide them to particular brands. But the manufacturers also can count on three marketing realities: prime time TV, the film industry, and the mass media regularly depict handguns as the embodiment of heroism, truth, and the Bill of Rights without asking the manufacturers to buy advertising time; their product creates increased demand for itself; and there is a baseline demand for the product for use in crime.

The more handguns there are, the more people see them as necessary for self-defense. Their spread is very much an epidemic, carried by fear rather than a virus. It is an unusual epidemic in that the cause is widely seen as the cure, as fear breeds more fear and guns create the demand for more guns—great for handgun sales but devastating for a city like Philadelphia.

There is no legal, social, or moral basis for continuing to ignore the central role of handgun manufacturers in the crisis of violence that confronts and

9. Some advertisements and promotions are reproduced in the Appendix.

10. See Appendix; see generally GAREN WINTERMUTE, ADVERTISING FIREARMS AS PROTECTION (Violence Prevention Research Program, University of California-Davis, 1995); Jon S. Vernick et al., *Regulating Firearms Advertisements That Promise Home Protection*, 277 JAMA 1391 (1997). Some manufacturers' promotional efforts seem directed at the criminal demand and market for their products. The manufacturer's brochure for Navegar's TEC series (reproduced in the Appendix) states that a trademarked coating provides "excellent resistance to fingerprints," and another manufacturer named one of its products the "Streetsweeper." Such brazenness probably reflects the lack of public or legal attention to the responsibility of handgun manufacturers. On their appeals to youth, see section I(d), *infra*.

undermines our urban areas. They are escaping responsibility for the grave harm their product does to the cities of America. In economic terms, cities are, in effect, subsidizing the handgun industry by absorbing a substantial portion of the damage done by their products.

Recent developments suggest that this may be an opportune time to raise the issue of the moral and legal responsibility of the manufacturers. New studies and investigations by local and national law-enforcement agencies, coupled with recent research and studies now generally recognized in the field of public health, establish more concretely and convincingly than previously available evidence that the manufacturers of handguns: (1) produce, market, and distribute substantially more handguns than they reasonably expect to sell to law-abiding purchasers, saturating urban areas and consciously and knowingly participating in the criminal handgun market; and (2) market and distribute to lawful purchasers for purposes and in circumstances they know, but do not reveal, to be dangerous to purchasers, their families, and the public at large.

I. THE MARKETING, DISTRIBUTION, AND PROMOTION OF HANDGUNS

In the last several years, an average of over 35,000 new handguns were sold per year in the Philadelphia area through dealers and retailers, amounting to well over 100,000 every few years.¹¹ The manufacturers' marketing and distribution policies and practices promote and yield high volume sales, widespread availability, and easy access,¹² without any meaningful attention

11. The number of sales and additional facts alluded to herein are not confidential because they were published with the City's consent and are generally known. See, e.g., Benson & McCoy, *supra* note 1, at A1 (detailing city's difficulty in limiting criminal firearms use); David Davies, *Going to War on Guns: Mayor Weighs Suits Against the Makers, and Limits on Purchases*, PHILA. DAILY NEWS, July 24, 1997, at 3 (covering Mayor Rendell's plan to crackdown on "straw" purchases of guns); Craig R. McCoy & Clea Benson, *City Considers Novel Suit Against Gun Makers*, PHILA. INQUIRER, Jan. 8, 1998, at A1 (discussing public nuisance approach to potential lawsuit by city against handgun manufacturers). The sales figures do not include additional unrecorded or unlawful sales, or purchases brought into or out of the area.

12. I made telephone inquiries to four handgun retailers in the Philadelphia area on July 8, 1997, to determine the availability of handguns widely identified as frequent crime guns. I asked each store about Lorcin's L380 and Navegar's TEC 9, DC9, or AB10. The Lorcin L380 is a semi-automatic found to be among the most frequent crime guns. The semi-automatic TEC 9 series, also a frequent crime gun, is advertised by the manufacturers as fingerprint-resistant. See Appendix (reproducing manufacturer's brochure). Both handguns can fire multiple bullets in a matter of seconds. The local inquiries: (a) Lou's Loans in Upper Darby, Pa. directed the inquiry to "the gun guy," who said he had both guns; he would not give exact prices over the phone, but the L380 was available for less than \$200 and the TEC AB10 for a little more than \$200; (b) Colisimo's in Center City had the L380 and one of the TECs (no prices were given over the phone); (c) Johnston's in Bucks County was out of the L380 and does not sell the TEC models because of "jamming problems"; they suggested as an alternative Jennings-Bryco's J38, a semi-automatic available for \$109, which the "gun guy" at Lou's said is a "junk gun" that he would not sell; (d) DeLia's in northeast Philadelphia did not have either model in stock but would order them; as alternative semi-automatics, they suggested Jennings' J59 for \$99.95 and Davis' P380 for \$80. With a clean record, I could buy any or all of them, in any quantities, after only the five-day waiting period required by the Brady Act, 18 U.S.C. §§ 921-930 (1994).

to, or apparent concern for, the consequences. They do not limit, or require or encourage their dealers and retailers to limit, the number, purpose, or frequency of handgun purchases. Nor do they take any meaningful measures to determine the training, skill, or suitability of any purchaser. For example, the manufacturers encourage and promote purchase by the general public of very small, inexpensive, powerful, and rapid-firing handguns for concealed carrying in public places.¹³

Because of such policies and practices by the manufacturers—which facilitate maximum sales without restraint or apparent concern for human suffering or the monetary costs imposed on individuals, medical and other facilities, healthcare plans, and cities—virtually anyone can get a handgun for any purpose. The result—known to, and directly created by, the manufacturers—is a handgun market with the following major segments: crime, home protection, concealed carrying, and, as identified in the industry’s own literature, women and youth.¹⁴

A. *The Crime Market*

The manufacturers claim that they market and sell to law-abiding people concerned about self-protection, that their handguns seldom wind up in criminal hands except as the result of the theft of guns from lawful, well-meaning purchasers, and that they are not morally or legally responsible for what others do with their products. However, according to Robert I. Hass, the former Senior Vice President of Marketing and Sales for Smith & Wesson,

13. See Appendix. Over the last 20 years, the manufacturers have changed the design and features of handguns significantly, making them more lethal and less expensive. Previously, most handguns produced were revolvers, with bullets stored in a rotating cylinder and brought into position when the gun is cocked. Revolvers are now a dwindling part of the market, as defendants have switched to pistols, with bullets stored in usually detachable magazines and with semi-automatic firing. These pistols, and many of the more recent revolver models, are increasingly smaller and easily concealable, more powerful, rapid-firing, and often less accurate and made with lower-quality materials and lower production standards. They are also considerably cheaper. The shift to such designs was initiated by Lorcin, Jennings-Bryco, Davis and Phoenix (and Phoenix’s predecessor, Raven), a group of California manufacturers owned by members of an extended family and dubbed by a well-known researcher the “Ring of Fire.” GAREN WINTEMUTE, *RING OF FIRE: THE HANDGUN MAKERS OF SOUTHERN CALIFORNIA* (Violence Prevention Research Program, University of California-Davis, 1994). The older, established companies, like Smith & Wesson, Sturm, Ruger & Co., and Colt, have followed their lead, producing similar handguns, while continuing to manufacture higher-end handguns. The manufacturers have not equipped their products with available, reasonably priced devices or features that protect against children firing a handgun or against theft and unauthorized use, although they know that the absence of such protective features will result in a substantial number of deaths and injuries to children and adults. They recently announced an intention to provide some form of safety lock, which they have publicly described as, at least in part, a response to early media reports saying that the City of Philadelphia was preparing a lawsuit. See McCoy & Benson, *supra* note 11, at A15 (discussing Philadelphia’s consideration of a possible lawsuit against gun manufacturers to recover costs related to gun injuries).

14. The military and law-enforcement handgun markets, and the very small market for target shooting, are not considered here.

which has the highest share of the national and Philadelphia handgun market and among the highest number of handguns used in Philadelphia crime:

The company and the industry as a whole are fully aware of the extent of the criminal misuse of firearms. The company and the industry are also aware that the black market in firearms is not simply the result of stolen guns but is due to the seepage of guns into the illicit market from multiple thousands of unsupervised federal firearms licensees. In spite of their knowledge, however, the industry's position has consistently been to take no independent action to insure responsible distribution practices

I am familiar with the distribution and marketing practices of all of the principal U.S. firearms manufacturers and wholesale distributors and none of them, to my knowledge, . . . investigate, screen or supervise the wholesale distributors and retail outlets that sell their products to insure that their products are distributed responsibly.¹⁵

An economic analysis of the market and sales structure and practices of one manufacturer, Lorcin, concluded that "the high-volume marketing of this weapon is not random or haphazard but pursuant to a disciplined product marketing plan whose strategy emphasizes saturation sales in certain high-crime metropolitan areas."¹⁶

The structure of the industry's marketing and distribution system is consistent with these assessments. The manufacturers have divorced themselves from the distribution and sales of their products by selling only to large distributors and dealers who are federally licensed¹⁷ and by avoiding any trace of vertical integration. This structure is not exclusive to this industry, but one would expect—as Smith & Wesson's own head of marketing and sales expected¹⁸—some concern and restraint when one manufactures devices designed to kill as opposed to, for instance, refrigerators or tennis rackets. This structure, which the manufacturers have created, also provides them with a deceptive deniability: they can claim that they have no responsibility

15. Affidavit of Robert I. Hass at ¶¶ 20-21, *Hamilton v. Accu-Tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996).

16. Affidavit of David W. Stewart at 4, *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, No. 94-3006 (Ark. Cir. Ct.—Pulaski County 1994), *aff'd*, 900 S.W.2d 202 (Ark. 1995) (Mr. Stewart is a professor of marketing at the University of Southern California). Recently available evidence also suggests that the sales policies and practices of the manufacturers, such as large quality discounts and no-return policies, though not exclusive to this industry, knowingly promote widespread, easy access to this product designed to kill.

17. The licensing scheme, adopted several decades ago with the support of the firearms industry as a way to avoid serious regulation, establishes only a formal technicality rather than a functional regulatory scheme. Almost anyone at least 21 years old who does not have a criminal felony record can be licensed. In the early 1990s, there were more federally licensed firearms dealers than gas stations, and only a small percentage of them actually operated gun stores. VIOLENCE POLICY CENTER, *MORE GUN DEALERS THAN GAS STATIONS* 1 (1992). In recent years the number has significantly declined because of stricter enforcement by the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), but there are still over 100,000. The manufacturers know that this licensing scheme does not significantly limit who winds up with their products.

18. See *supra* note 15 and accompanying text (quoting affidavit of Smith & Wesson's marketing and sales chief).

for whatever occurs after they sell to the wholesalers, which hides their lack of even minimal safeguards or concern for the public or the costs to cities.¹⁹

The manufacturers maintain an unusual secrecy about their operations, so it is hard to assess their claims or to break down precisely the elements of their market. For example, one cannot determine whether or how theft of handguns explains anything, but there would have to be an inexplicable level of purchaser indifference to, and lack of precautions against, theft for it to have any significant role.²⁰ There are not even any publicly known production figures for the various models each manufacturer makes. The manufacturers should reveal such information if they wish their claims to be taken seriously.

Recent studies and investigations suggest the obvious: although a large number of people do buy handguns for self-protection, a substantial portion of the handgun market is also criminally oriented.²¹ People with criminal intent can buy handguns themselves, if they have no criminal records, easily get around often lax identification requirements, or ask or hire someone with a clean record to purchase for them—a “straw” purchaser. The Philadelphia ATF office reports that almost half of their gun cases involve straw purchases. Moreover, there is a very substantial level of multiple purchases—people buying two or more handguns—amounting to a much larger proportion of total sales than previously thought.²² These are not nec-

19. The manufacturers' claim that they bear no responsibility or liability because they sell to distributors rather than end purchasers is reminiscent of the old requirement of “privity” in product liability cases. Under the privity rules, a consumer could not recover from a manufacturer unless the purchase was made directly from the manufacturer. *See, e.g.,* *Losee v. Clute*, 51 N.Y. 494 (1873). Privity was rejected early in the 20th century, first with a rash of exceptions and then more generally. *See, e.g.,* *Pillars v. R.J. Reynolds Tobacco Co.*, 117 Miss. 490 (1918); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916).

20. Theft may be a less likely source because, in the economic terms so prevalent these days in legal scholarship, handguns are too cheap to steal. A small, rapid-firing, extremely powerful handgun can be purchased—new, right out of the box—for under \$100, directly, through a straw purchaser, or, at a somewhat higher price, on the underground but easily found market on the streets. Theft or burglary to obtain an old, used one hardly seems worth the risks.

21. *See, e.g.,* BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, DEP'T OF THE TREASURY, CRIME GUN TRACE ANALYSIS REPORTS: THE ILLEGAL YOUTH FIREARMS MARKETS IN 17 COMMUNITIES 5 (July, 1997) (finding eight of ten crime guns traced are handguns); *supra* notes 1 and 11 (citing newspaper investigations concerning criminal use of handguns). Although the focus of media and public attention to crime is on street crime, I use crime here in a broader sense, because a large portion of criminal killings with handguns are by people who shoot their spouses, former lovers, or others related to or associated with them. There is also at least some correlation between levels of crime and gun sales. For example, in the 1980s, there was a surge in the use of crack cocaine, murder, and handgun sales. This likely included a surge in sales to drug-related criminals as well as to people fearful of drug-related and other crime. I am not aware of any studies that convincingly explain these data; the matter seems worthy of further investigation and study.

22. *See supra* notes * and 11. The ATF is supposed to receive written notification from dealers of any person buying more than one handgun from the same dealer within five days. The number of handguns reported on such notices amounted to about 8% of Philadelphia area handgun sales in 1996, a significant portion. *Benson & McCoy, supra* note 1, at A1. However, this is, at best, an incomplete measure of multiple sales: it does not reach, for example, weekly single

essarily straw purchases, but a very substantial proportion of them probably are. A firm determination of the proportion of the handgun market that is criminally oriented probably will have to await discovery in litigation or disclosure compelled by an authorized investigatory body. However, in my judgment, it seems to amount to a minimum of 10% of the market, and may be considerably more.

B. Home Protection

The largest segment of the handgun market is purchases for home protection: about 25% of American households have at least one handgun.²³ However, the presence of handguns in the home, contrary to the advertisements²⁴ and public statements of the manufacturers, is highly dangerous. It is now generally recognized in the field of public health that introducing a handgun into the home is dangerous to the people who live there and to their family, friends, and associates because it is much more likely to be used against them than against an intruder or aggressor. Statistically significant studies that control for the relevant variables have demonstrated that the homicide of a household member is almost three times more likely in homes with guns than in homes without them; the risk that a household member will commit suicide is nearly five times greater, and for households with members between the ages of 15 and 24, it is 10 times greater. Putting aside other uses, a gun in the home is 43 times more likely to kill a household member than it is to kill an intruder in self-defense.²⁵

purchases from the same dealer, or daily single purchases from different dealers, and there is substantial non-reporting. Law enforcement officials, using more thorough records covering the Philadelphia area in 1996 and part of 1997, found that purchasers of more than one handgun accounted for almost *half* of the total of 38,338 handguns sold (to a total of 25,510 purchasers, and purchasers of three or more accounted for about 30% of total sales. The following table summarizes this data:

Number of Hanguns Purchased	Average Number Purchased	Percentage of All Handguns Sold	Percentage of Purchasers
1	1.0	51%	77%
2 or more	3.2	49%	23%
3 or more	5.0	30%	9%
5 or more	8.8	17%	3%

23. NATIONAL OPINION RESEARCH CENTER, UNIVERSITY OF CHICAGO, GENERAL SOCIAL SURVEYS, 1972-1996 (1996). Almost 40% of households have some kind of gun. THE JOHNS HOPKINS CENTER FOR GUN POLICY AND RESEARCH, JOHNS HOPKINS UNIVERSITY, HANDGUN FACT SHEET (Nov., 1997).

24. See the Appendix for examples of advertisements.

25. See, e.g., Arthur L. Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084, 1084-91 (1993) (concluding guns posed great risk to families of gun owners); Arthur L. Kellermann & Donald T. Reay, *Protection or Peril?: An Analysis of Firearm-Related Deaths in the Home*, 314 NEW ENG. J. MED. 1557, 1557 (1986) (concluding that only two of three hundred and ninety-eight deaths studied involved intruder shot during attempted entry); Arthur L. Kellermann et al., *Suicide in the Home in relation to Gun*

The handgun industry has been on notice of these risks since at least 1968, when the National Commission on the Causes and Prevention of Violence noted an increasing number of handgun deaths and injuries and concluded that:

[Americans] may seriously overrate the effectiveness of guns in protection of their homes. In our urbanized society the gun is rarely an effective means of protecting the home against either the burglar or the robber Possession of a gun undoubtedly provides a measure of comfort to a great many Americans, but, for the homeowner, this comfort is largely an illusion bought at the high price of increased accidents, homicides, and more widespread illegal use of guns When the number of handguns increases, gun violence increases.²⁶

C. Concealed Carrying in Public Places

The manufacturers promote widespread purchase of small, inexpensive handguns for concealed carrying in public places, even though such weapons, of course, are useful and appealing to criminals, and even though the manufacturers specifically are aware of the danger presented by large numbers of untrained and unskilled people carrying concealed handguns. The most definitive study of the effects of widespread concealed carrying in three states shows that for large urban areas there is, as one would expect, an increase in gun murders.²⁷ The manufacturers have shown no restraint or interest regarding the level of skill, training, and self-control required for a person to carry a concealed handgun without posing a substantial danger to himself or herself, others, and the public.

After Pennsylvania adopted legislation three years ago prohibiting the police from even questioning a person's reason for carrying a concealed

Ownership, 327 NEW ENG. J. MED. 467, 467-72 (1992) (noting gun ownership increases owner's risk of suicide); David McDowell & Brian Wiersema, *The Incidence of Defensive Firearm Use by U.S. Crime Victims, 1987 through 1990*, 84 AM. J. PUB. HEALTH 1982, 1982-84 (1994) (noting victims rarely use firearms in self-defense); Vernick et al., *supra* note 10, at 1391-97 (noting that there is now general consensus in the field). There have been contrary studies. One such example is a widely publicized study undertaken by criminologist Gary Kleck, which concludes that handguns in the home have a protective and beneficial effect. GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 7 (Aldine de Guyter, 1991). This study and conclusion have been widely repudiated. See, e.g., COOK & LUDWIG, *supra* note 5; P.J. Cook et al., *The Gun Debate's New Mythical Number: How Many Defensive Uses Per Year?*, 16 J. POL'Y ANALYSIS & MGMT. 463 (1997); McDowell & Wiersema, *supra*.

26. STAFF REPORT OF THE NAT'L COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, *FIREARMS AND VIOLENCE IN AMERICAN LIFE* at xiii, 139 (1968).

27. See David McDowall et al., *Easing Concealed Firearms Laws: Effects on Homicide in Three States*, 86 J. CRIM. L. & CRIMINOLOGY 193, 194-204 (1995) (concluding non-discretionary laws to determine what applicants meet criteria for gun licenses do not reduce homicide rates in large urban areas, but may increase homicide rates). But see John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence and Right to Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997) (concluding that increased carrying of concealed guns reduces violent crime).

handgun,²⁸ applications for permits have soared in Philadelphia, and the police have to grant almost all of them. The manufacturers know this means that anyone not disqualified by, principally, a criminal record, can carry a handgun in public places—always and instantly accessible in the car, at work, and in the homes and offices of friends. No community in America allows even their own police to carry handguns in public places without training and testing for skill and self-control.²⁹ Further, because in Pennsylvania a permit is also considered sufficient to dispense with the Brady Act³⁰ record check, a person holding a permit to carry a concealed handgun can walk into any gun store and buy any quantity of handguns, on-the-spot and without any questions asked.³¹

D. Women and Youth

After handgun manufacturers experienced stagnant or declining sales in some periods to their traditional markets, consisting overwhelmingly of men, they embarked on a concerted effort to promote sales to women and youth. In 1992, one of the gun industry's leading trade associations, the National Shooting Sports Foundation (NSSF), announced a "new focus on women and youngsters." NSSF started a "Youth Education Program" in a search for new customers and an expansion of the gun market. NSSF's magazine carried a column by an industry celebrity, Grits Gresham, in which he said:

There's a way to help insure that new faces and pocketbooks will continue to patronize your business: Use the schools . . . [I]t's time to make your pitch for young minds, as well as for the adult ones. Unless you and I . . . imprint our positions in the minds of those future leaders, we're in trouble.³²

Some of the manufacturers' advertisements specifically reflect these efforts.³³

28. 18 PA. CONS. STAT. ANN. §§ 6106-6109 (West 1995). The legislature also has pre-empted local gun-control legislation, with the specific purpose of invalidating Philadelphia's ban on assault weapons. *Id.* § 6120.

29. The state legislature's action in no way relieves the manufacturers of responsibility. They are still responsible for what they do in the absence of statutory restraint.

30. The Brady Act recently was invalidated in part. *Printz v. United States*, 117 S. Ct. 2365, 2369-83 (1997).

31. They would have to fill out some forms that, in theory, could be used for subsequent investigations, but they walk out with the handguns.

32. *S.H.O.T. Business* (Sept./Oct., 1992).

33. An advertisement by Beretta in the February, 1994 issue of *Women and Guns* says, "[t]ip the odds in your favor," and shows a night stand on which is resting a picture of a mother and two daughters, an alarm clock, and a handgun. A loose bullet is shown on the night stand next to the gun, an unsafe practice, particularly in a household with two young children. Colt followed up its *Ladies Home Journal* advertisement discussed previously with an advertisement directed at dealers and retailers in the January/February 1993 issue of *S.H.O.T. Business*, the industry publication which reproduces the mother-daughter advertisement, that says, "YOU MIGHT THINK THIS AD IS ABOUT HANDGUNS. IT'S REALLY ABOUT DOUBLING YOUR BUSINESS." See also VIOLENCE POLICY CTR., "USE THE SCHOOLS, HOW FEDERAL TAX DOLLARS ARE SPENT TO MARKET GUNS TO KIDS (1994); *Gunmakers Aim at Youth Market*,

Overall, the manufacturers of handguns produce, sell, and distribute large quantities of handguns with full knowledge that the overwhelming majority of those that will be fired at a person, and will cause death or injury, will be used to commit a crime; to harm a spouse, family member, or associate; or to harm a friend or neighbor in an accident (most often a young child harming himself or another young child). Looking at the whole range of uses of handguns in which a handgun is directed at another person (not limited to instances of firing)—including, for example, stickups, gangland murders, street crime, repelling intruders, and criminal shootings of spouses—the overwhelming proportion of handgun uses are criminal, not lawful.³⁴

Of the various domestic markets for handgun sales, crime is by far the most important because, in addition to its significance as a proportion of total sales, it drives demand in all other market segments. Each handgun sold and used for crime spurs the purchase of many more handguns as fear generates demand. The manufacturers of handguns facilitate, sustain, and sometimes encourage the demand for their products for use in crime, then turn around and promote handguns to everybody else as necessary for protection from handguns used by criminals.

II. THE MANUFACTURERS' LIABILITY TO CITIES

Lawsuits by, or on behalf of, individuals shot by handguns have been unsuccessful, except where a particular gun was shown to be defective, largely because of the legal problems of causation and duty.³⁵ Whatever the role of the manufacturer, someone else shoots the handgun, and thereby usually commits a criminal act. This is analogous to the causation problem in the individual tobacco cases litigated unsuccessfully for some 15 years: whatever the problem with cigarettes, the smoker kept smoking, at least sharing some of the responsibility for the harm done to him or her. As is the case in the governmental tobacco suits,³⁶ the problems of causation and duty are less-

BALT. SUN, May 2, 1998, at A1; *Gun Marketing Focuses More on Teens, Children*, PHILA. INQUIRER, March 30, 1998, at A3.

34. See *supra* note 24 (listing studies of gun use).

35. See, e.g., *In re 101 California Street, No. 959-316* (Cal. Super. Ct.—San Francisco May 6, 1997) (granting summary judgment in favor of assault weapon manufacturer on negligence claim because of lack of legal duty, and on product liability claim because of lack of ultra-hazardous activity).

36. There are other similarities and some differences. The tobacco industry claimed for some time that tobacco was not the cause of the harm done to smokers; handgun manufacturers cannot deny that the injuries in question were caused by handguns. But in the tobacco cases, users got addicted and were misled. There is no analogous addiction issue with handguns (although part of the significance of addiction in the tobacco cases was its affect on the issue of the victims' claimed contribution to their own injuries, which is not often at issue in a gun case), but there has also been misrepresentation by the handgun industry. See *infra*, section II(c).

ened substantially when a city, which did not smoke or shoot handguns, sues for the direct, foreseeable, and known³⁷ damages it has suffered.

The focus of the claims outlined here is not the pain and suffering or lost earnings of handgun victims, but the direct, foreseeable, and known harm done to cities by the marketing, distribution, and promotion policies and practices of handgun manufacturers.³⁸ The damages incurred by cities that directly result from the manufacturers' conduct are wide-ranging and vary depending on the particular city and state. They can include medical costs and the range of expenses incurred by police, emergency personnel, public health, human services, courts, prisons, sheriff, fire, and other services.³⁹ A city's potential damages can begin with a 911 call, cleaning blood from the street, and emergency medical care, and continue through support of an orphaned child.

In such circumstances, there is no need for reform of the law or any new legal theories, although some interesting new ones have been proposed.⁴⁰ A range of very traditional tort claims are available, four of which are briefly summarized here.⁴¹

37. There would seem to be little difficulty proving, particularly after discovery, that the manufacturers are aware and knowledgeable about the details of their market and the risks associated with their products, especially given the array of governmental studies and reports and media focus on these issues. In addition, the law of many, if not most, states imputes such knowledge to them. *See, e.g.,* *Foley v. Clark Equip. Co.*, 523 A.2d 379, 389 n.3 (Pa. Super. Ct. 1987) (stating that a "manufacturer is held to standard of an expert in the field" and thus must stay informed of discoveries involving their products). This seems a common sense approach, because manufacturers ordinarily do not want to make models or quantities they cannot sell or to miss out on sales they can make, so they utilize various methods for market research. For example, assuming the Philadelphia data are approximately representative of at least the urban handgun market, over 15% of sales are to a small number of purchasers (3% of the purchasers) who buy on average 8 to 10 handguns a year, and over a quarter are to purchasers of 3 or more a year who buy an average of about 5 per year. *See supra* note 11 (citing to newspaper articles chronicling Philadelphia's problems with handguns). It seems quite unlikely that, unlike other manufacturers, handgun manufacturers would not keep track of and attempt to influence the preferences of these significant consumers of their products.

38. A city's action might be on behalf of its residents and visitors to the limited extent that personal injuries to them involved or resulted in damage or a need for assistance for which the city suffered losses and damages. The appropriate defendants would be the array of manufacturers whose products account for the harm done to a particular city.

39. In Philadelphia, although medical costs would not be recoverable because they are paid by the state, they amount to a reported \$29 million per year. *McCoy & Benson, supra* note 11, at A1; *see generally supra* note 11 (noting newspaper articles discussing Philadelphia's gun problems).

40. *See, e.g.,* Carl T. Bogus, *The Third Revolution in Products Liability*, 72 CHI.-KENT L. REV. 3, 3 (1996) (discussing "generic liability," which is defined as "strict liability that is imposed upon products that are unreasonably dangerous despite the best possible design, manufacture, and warnings").

41. Other potentially viable claims include intentional misconduct and common law strict liability. *See, e.g.,* *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1153-60 (Md. 1985) (creating a common law strict liability cause of action against manufacturers of "Saturday Night Specials").

A. Public Nuisance

A public nuisance, traditionally remedied by a lawsuit brought by a state or local government, is an unreasonable interference with a right that is "common to all members of the public . . . who come in contact with it . . . or [that] affects the interests of the community at large." An unreasonable interference with a public right can be based on: a significant interference with public safety, public health, or the public peace, comfort, or convenience; conduct in violation of a statute, municipal law, or administrative regulation; or conduct of a continuing or recurring nature that the actor knows, or has reason to know, significantly affects a public right. Anyone who creates, substantially participates in, or carries on a public nuisance, by their acts or omissions, is liable for the nuisance.⁴²

Handgun manufacturers' marketing, distribution, and promotion of their products, designed to instantaneously deliver lethal force, significantly interferes with a public right and creates a public nuisance in most large urban areas by: (a) flooding neighborhoods and communities with handguns; (b) making handguns easily available to persons with criminal intentions, felons, and minors; (c) confusing and deceiving law-abiding purchasers about the great risk of possession of a handgun in the home and of concealed carrying of a handgun in public places; and (d) failing to provide potential purchasers with appropriate warnings.

The only reported case identified by my research in which a public nuisance claim has been raised against a handgun manufacturer was brought by individual handgun victims rather than a city. In *Bubalo and Dofflyn v. Navegar*,⁴³ two police officers, one of whom died, were shot in the line of duty by a perpetrator using a TEC-DC9 promoted by the manufacturer for its rapid-firing lethality and "excellent resistance to fingerprints." The district court initially denied the manufacturer's motion to dismiss because the manufacturer's conduct created a public nuisance.⁴⁴ On reconsideration,⁴⁵ the court, concerned that application of public nuisance law might result in widespread liability for the manufacturers, granted the motion to dismiss, emphasizing that as a federal court exercising diversity jurisdiction it was "reluctant to recognize a new theory of nuisance liability under Illinois law without a more solid foundation in the state decisional law."⁴⁶

42. See generally RESTATEMENT (SECOND) OF TORTS §§ 821-40 (1979) (discussing types of, and liability for creating, nuisances). The Restatement sets out the usual rules, but the laws in each state vary, and not all states accept the Restatement.

43. N.D. Ill. No. 96-C-3664, 1997 U.S. Dist. LEXIS 8551 (June 11, 1997), reconsidered, 1998 U.S. Dist. LEXIS 3598 (March 30, 1998). The portion of the manufacturer's brochure touting fingerprint resistance is reproduced in the Appendix.

44. 1997 U.S. Dist. LEXIS 8551, at *4-6, 11-13.

45. 1998 U.S. Dist. LEXIS 3598, at *15.

46. *Id.* at *14-15.

B. Negligence

Negligence is an act or omission lacking the care exercised by a reasonable person under like circumstances that causes injury to another person.⁴⁷ In the only case alleging negligence for conduct similar to that outlined here, *Hamilton v. ACCU-TEK*,⁴⁸ a federal district court denied a motion to dismiss individual claims against a range of manufacturers for “negligence in methods of marketing handguns and flooding the handgun market.”⁴⁹

C. Fraud

In spite of the consensus in the field of public health, as well as their own knowledge, the manufacturers advertise handguns as a means to provide safety, lending the matter an aspect of misrepresentation familiar in the tobacco suits. Although the risk is real and well-established, it is not well-known. Rather, the contrary view is held widely, because there are no warnings about it on the products, and because the manufacturers mislead the public about it in their promotions.⁵⁰

D. Product Liability

The underlying purpose of strict products liability—to impose on manufacturers the real costs of their products, including the damage the product does—goes to the heart of the handgun problem. However, to state a claim the product must be “defective,” and courts have noticed that handguns work all too well.⁵¹

47. RESTATEMENT (SECOND) OF TORTS §§ 282-83 (1965).

48. 935 F. Supp. 1307 (E.D.N.Y. 1996); *see also* *McCarthy v. Olin Corp.*, 119 F.3d 148, 157-75 (2d Cir. 1997) (Calabresi, J., dissenting).

49. *Hamilton*, 935 F. Supp. at 1330.

50. For the elements of a fraud claim, *see* generally RESTATEMENT (SECOND) OF TORTS § 525 (1977). Petitions have been filed with the Federal Trade Commission seeking restriction of these now unregulated advertisements. *See* Petition of Stephen Teret, Jon Vernick, and Garen Wintermute (alleging that “the consensus within the public health community is that the risk from firearms in the home greatly outweighs any protective benefit,” and that the advertisements are “unfair” and “deceptive”); Petition of the Center to Prevent Handgun Violence et al. (alleging that “a reasonable consumer would be susceptible to the advertisement’s message that bringing a handgun into the home increases premises safety”); *see also* CENTER FOR GUN POLICY AND RESEARCH, FIREARM ADVERTISEMENTS PROMISING PROTECTION: A LEGAL ANALYSIS 20 (John Hopkins Univ. 1995) (stating legal grounds exist for FTC regulation because ads are “unfair, deceptive and/or unsubstantiated”).

51. Suits based on the RESTATEMENT (SECOND) OF TORTS § 402A (1965), which sets forth the principles of strict liability, and the risk/benefit analysis accepted in many states have failed. *See* *Delahanty v. Hinckley*, 564 A.2d 758, 760-61 (D.C. 1989) (rejecting claims based on § 402A and §§ 519-520); *Riordan v. International Armament*, 477 N.E.2d 1293, 1298 (Ill. App. Ct. 1985) (rejecting claim based on § 402A). Claims based on ultrahazardous activity generally are limited to activities that cannot be conducted safely, no matter what precautions or warnings there are. *See* RESTATEMENT (SECOND) OF TORTS §§ 519-520 (1977) (stating standard and factors applying to ultra-hazardous activities). Courts have refused to apply this tort to handguns. *See, e.g.,* *Hammond v. Colt*, 565 A.2d 558, 563 (Del. Super. Ct. 1989) (refusing to apply ultra-hazardous activity standard to manufacturing and distribution of guns).

There is, however, another, novel approach to this claim. The absence of appropriate product warnings generally is recognized by courts as a defect, except that warnings about well-known dangers are not required. Thus, because everybody knows that guns are dangerous, the lack of such a warning is not an actionable defect.⁵² However, the public also thinks—bolstered by industry advertisements—that having a handgun in one's home or carried concealed in public places provides enhanced safety, because it will be used, if at all, against an intruder or aggressor. The public does not know what the manufacturers know quite well: a handgun in the home or carried concealed in public places is dangerous. No claim based on this narrower, specific warning defect has been litigated as yet.

CONCLUSION

One cannot predict with certainty the outcome of a novel lawsuit or the range of complex questions not addressed here that would arise in a lawsuit by a city against handgun manufacturers.⁵³ However, there are viable theories based on traditional torts and backed by ample facts and evidence. The claims require no reform or change of the law, nor do they present any Second Amendment problem as the lawsuit would not restrict the purchase or sale of handguns by anyone. The outcome is uncertain and the prospects for success would vary depending on the specifics of state law, but it seems unlikely, except in jurisdictions where state law is very hostile to the claims, that a reasonable judge would dismiss the lawsuit without discovery or throw the case out on summary judgment. Such a lawsuit would very likely achieve, at least, unprecedented discovery and an unprecedented jury trial.⁵⁴ This would not fully resolve the problem of guns or crime, but it might provide compensation to cities and perhaps prompt the manufacturers to make some changes, and in the process it could help us gain focus and insight on a difficult social and cultural problem.

52. See *Sherk v. Daisy-Heddon*, 450 A.2d 615, 618 (1982) (rejecting liability for manufacture where lethal propensity of gun is known or should have been known).

53. For example, one needs a theory of collective liability, although the case for joint and several liability and concerted activity seems strong, even in a jurisdiction that rejects market-share liability; and there is a complex statute of limitations issue, with the possibility that a city, like a state, may not be subject to any period of limitation.

54. Discovery likely would include smoking gun documents, no pun intended, and whistleblower testimony. The handgun industry has been more protected, and sometimes more brazen than, for example, the tobacco industry, perhaps for the reasons suggested in the Introduction. There is every reason to believe that there are internal documents that address the industry's legal and public vulnerability should the public begin to pay attention, for example, to their connection to crime.

APPENDIX

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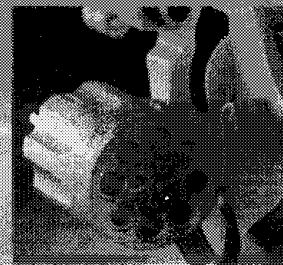


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