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Lawsuits Against the Gun Industry: A Comparative Institutional Analysis

TIMOTHY D. LYTTON*

I. INTRODUCTION

The current wave of lawsuits against the gun industry is part of a nationwide debate over how to reduce gun violence. Proponents of these lawsuits view litigation as a way to promote controversial proposals aimed at reducing gun violence, such as making manufacturers responsible for supervising retail gun sales and forcing them to install safety features that would render guns inoperable in the hands of unauthorized users.¹ To opponents, these proposals would unfairly burden gun manufacturers and could make it harder for law-abiding citizens to use guns for self-defense.²

Lawsuits against the gun industry are also part of another debate over the proper role of the tort system in the process of making public policy. Proponents of the suits argue that litigation is a legitimate way to regulate a powerful industry whose lobbying efforts have distorted the legislative process.³ Opponents counter that policymaking ought to be left to legisla-

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1. Several lawsuits recently filed against gun manufacturers demand manufacturer supervision of retail gun sales. See, e.g., Complaint at ¶ A-C, *NAACP v. A.A. Arms, Inc.*, No. 99 C.V. 3999 (E.D.N.Y. filed July 16, 1999); see also Brian Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Another Deadly Industry*, 18 ST. LOUIS U. PUB. L. REV. at Part IV.B (forthcoming 2000). Other lawsuits seek compulsory installation of safety features. See, e.g., Complaint (Award) at ¶ 4(h), *City of Chicago v. Beretta U.S.A. Corp.*, No. 98 CH 15596 (Ill. Cir. Ct. Cook County filed Nov. 12, 1998); Jonathan Lowy, *Litigating Gun Violence Cases: Liability for Design Defects 2-3* (1999) (unpublished manuscript, presented at ABA conference on Gun Violence Liability, June 4, 1999, on file with the author).

2. See Charleton Heston, *The President's Column*, AMERICAN RIFLEMAN, June 1999, at 12; Gary Kleck, *Guns Aren't Ready to be Smart*, N.Y. TIMES, Mar. 11, 2000, at A15 [hereinafter Kleck, *Guns Aren't Ready*].

3. See Andrew Jay McClurg, *Strict Liability for Handgun Manufacturers: A Reply to Professor Oliver*, 14 U. ARK. LITTLE ROCK L.J. 511, 516-17 (1992).

tures and that plaintiffs are using litigation as a way to circumvent the legislative process.⁴

These debates involve two different kinds of questions, one about the best policy to reduce gun violence, the other about which institution should make that choice. This article addresses the question of institutional choice. I argue that the tort system can complement the efforts of other institutions such as markets, legislatures and administrative agencies to make public policy. Solving complex social problems typically requires the cooperation of several policymaking institutions, each with its own strengths and weaknesses. My examination of lawsuits against the gun industry reveals that the tort system can and should play an active policymaking role in reducing gun violence.

I support this claim using comparative institutional analysis, identifying the strengths and weaknesses of different policymaking institutions and showing how the tort system can overcome the limitations of other institutions.⁵ Comparative institutional analysis justifies policymaking through litigation when even a flawed tort system can regulate better than markets, legislatures and administrative agencies.

My claim challenges two extreme positions that now dominate debate over the proper role of the tort system in policymaking. On one hand, I reject the view that the failure of legislatures to enact tougher gun control laws reveals that they "have abdicated their responsibility in this area," leaving courts free "to act on their own."⁶ The refusal of a legislature to adopt new restrictions following robust legislative debate should guide judicial policymaking efforts. I advocate a secondary role for the tort system in policymaking, one that complements legislative efforts. On the other hand, I reject the view that only legislatures are well suited to policymaking and that courts should merely resolve individual disputes.⁷ Tort adjudication has always had public policy implications, and I argue that courts should carefully attend to these implications when adjudicating claims against the gun industry.

The tort system is an imperfect policymaking institution, but it can enhance the policymaking process. Legislatures can make better policy with

4. See Phillip D. Oliver, *Rejecting the "Whipping-Boy" Approach to Tort Law: Well-Made Handguns Are Not Defective Products*, 14 U. ARK. LITTLE ROCK L.J. 1, 5 (1991).

5. My use of comparative institutional analysis owes much to Neil Komesar and Peter Schuck. See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 3 (1994) (describing comparative institutional analysis as the way we chose to allocate authority among decision making processes and institutions within society); PETER SCHUCK, *THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE* 424 (2000) (arguing that comparative institutional analysis is essential to evaluating the effectiveness of regulation) [hereinafter SCHUCK, *LIMITS OF LAW*].

6. McClurg, *supra* note 3, at 519.

7. See Anne Giddings Kimball & Sarah L. Olson, *Municipal Firearm Litigation: Ill Conceived From Any Angle*, 32 CONN. L. REV. 1277 (2000).

the help of courts. While this Article advocates a complementary role for the tort system, it provides merely an outline for an argument that would do justice to the enormous complexity of this topic. I hope, however, that despite its limitations, the Article will raise important challenges to both unrestrained enthusiasm for and uncompromising opposition to gun litigation.

In Part II of the Article, I advocate a complementary role for the tort system in policymaking by showing how the tort system can remedy certain deficiencies of other institutions seeking to reduce gun violence. In Part III, I analyze how the tort system influences public policy. I begin by describing two specific policy proposals at issue in lawsuits against the gun industry. Next, I examine how the actions of parties, judges and juries influence the success of these proposals. Finally, I discuss the dangers of relying too heavily on the tort system to make policy. In Part IV, I explore how legislatures and courts limit the policymaking powers of the tort system.

II. ARGUMENTS IN FAVOR OF A COMPLEMENTARY ROLE FOR THE TORT SYSTEM IN POLICYMAKING

Public policy is typically produced by the overlapping efforts of different institutions. Markets, legislatures, administrative agencies, and the tort system all have different strengths and weaknesses; one's advantages can compensate for another's shortcomings. I will advocate a complimentary policymaking role for the tort system by showing that it compensates for the shortcomings of other institutions. These shortcomings are: market failure, legislative bias, gaps in prospective regulation, agency capture, and limited enforcement resources.

A. *Market failure*

One institution that makes gun-violence policy is the market. A cardinal virtue of markets is their capacity to promote beneficial products and behaviors, and discourage detrimental ones. Consumers' willingness to pay for goods and services encourages their production. Conversely, consumers' refusal to purchase goods and services eliminates them. In a well-functioning market, consumer demand determines whether the benefits of a particular product or behavior outweigh its costs. However, where consumers do not bear the full costs and benefits of a product or behavior, consumer demand is no longer a reliable indicator of whether the benefits of a product or behavior outweigh its costs. This can occur when the price of the product or service does not reflect its true costs or when individuals other than the consumer enjoy its benefits. Economists call these kinds of

market failures externalities.

The gun market suffers from externalities. Many of the costs and benefits of gun ownership are not borne by consumers. On one hand, the costs of gun violence fall heavily on victims who are not themselves gun consumers.⁹ On the other hand, the deterrence benefits of widespread private gun ownership may accrue to those who do not own guns.¹⁰ These externalities make the failure of the market to promote gun-manufacturer supervision of retail sales or installation of safety features a poor indicator of whether either of them would be, on balance, beneficial. If one is seeking cost effective measures to reduce gun violence, then one ought not rely exclusively on the gun market as currently constituted.

The tort system can help to overcome some externalities. By making gun manufacturers liable for gun violence that results from their failure to supervise retail sales or to install safety features, the tort system can internalize some of the costs of gun ownership currently borne by gunshot victims. Tort liability would provide manufacturers with an incentive to adopt precautionary marketing practices or safer designs whenever these cost less than the gun-violence liability costs that they prevent.

The choice to impose the costs of gun violence on gun manufacturers, however, is not so clear. If the same reduction in gun violence could be achieved at lower cost by someone else, such as retail dealers, consumers, or the government, then from an economic point of view it would be preferable to internalize the cost to that party by making them liable. Either way, the tort system provides one way to internalize some gun violence costs by imposing liability on the cheapest cost avoider.¹¹

8. See generally, R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960) (providing examples of actions of firms that have harmful effects on others).

9. A recent study estimated that 134,445 gunshot injuries in the United States in 1994 produced \$2.3 billion in lifetime medical costs of which half was paid by taxpayers. This figure does not include the additional costs generated by the approximately 39,000 fatalities in that year. See Philip Cook, et al., *The Medical Costs of Gunshot Injuries in the United States*, 282 JAMA 447, 447 (1999).

10. Existing studies on the self-defense benefits of guns estimate between 64,000 and 3.4 million defensive gun uses each year. See GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* 147-89 (1997) [hereinafter KLECK, *TARGETING GUNS*]. Additionally, a potential criminal may be deterred merely by the fear of encountering an armed victim, meaning that the widespread private ownership of guns may deter crimes against even unarmed victims. See JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* 5 (1998).

11. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 174 (1970) (discussing society's goal of placing liability on the cheapest and best cost avoider). In practice, tort liability internalizes only some of the costs borne by victims since it pays compensation only to those victims who successfully bring suit for injuries caused by negligent defendants or defective products. In addition, the tort system does nothing to address the remaining externalization of the benefits of gun ownership.

B. *Legislative bias*

Another institution that makes gun-violence policy is the legislature.¹² Ideally, legislative regulation enjoys a special status as a highly democratic method of policymaking. The decisions of a well-functioning legislature, even when they produce inefficient policies, still represent the will of a majority of legislators who fairly represent the interests of their constituents. In practice, however, the legislative process can be biased in favor of well organized minority interests. This bias can undermine the democratic legitimacy of legislative policymaking.

There is some evidence that the gun industry and the National Rifle Association ("NRA") represent a well organized minority interest that has defeated proposals to reduce gun violence that a majority of Americans support. Nationwide surveys conducted in 1996 and 1998 revealed majority support for laws that would restrict qualified purchasers to one gun per month and that would compel manufacturers to install locking devices in all new handguns; both measures were successfully opposed in Congress by the industry and the NRA.¹³

Allegations of pro-gun industry bias in the legislative process are strengthened by the structure of gun control politics.¹⁴ On one hand, it is relatively easy to organize pro-industry lobbying efforts since additional regulation would mean very high costs to the small number of firms in the industry. The benefits to members of this group from lobbying efforts opposing gun industry regulation are high and concentrated within a small group. On the other hand, it is relatively hard to organize gun-control lobbying efforts since, while the overall costs of suffering gun violence are high, the risk to any one individual is quite low. The benefits to members of the public of lobbying efforts in favor of gun industry regulation are low and dispersed among a very large group.

The tort system provides an alternative forum for policy debate when powerful interests have squelched legislative discussion. The tort system also provides a decision making process that is largely insulated from the influence of powerful lobbies. In the tort system, parties, despite differences in the amount of resources that they can invest in litigation, are

12. Congress and state assemblies have traditionally attempted to reduce gun violence without eliminating the crime deterrence benefits of widespread private gun ownership by means of statutes regulating the sale and possession of firearms. See generally BUREAU OF ALCOHOL, TOBACCO & FIREARMS, DEP'T OF THE TREASURY, FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE (1995) (detailing the federal statutes regulating firearms); BUREAU OF ALCOHOL, TOBACCO, & FIREARMS, DEP'T OF THE TREASURY, STATE LAWS AND PUBLISHED ORDINANCES—FIREARMS (1998) (detailing state laws and ordinances placing restrictions on the sale and possession of firearms).

13. See Stephen P. Teret, et. al., *Support for New Policies to Regulate Firearms: Results of Two National Surveys*, 339 NEW ENG. J. MED. 813 (1998).

14. My analysis of the structure of gun control politics draws on the work of Neil Komesar. See generally KOMESAR, *supra* note 5, at 53-97 (discussing the political process and the balance between the power of the few and the power of the many).

granted equal access to decision makers. Judges, especially those who do not stand for election, and jurors are less likely than legislators to be influenced by the political power of litigants.

Having suggested that policymaking by means of tort litigation offers a solution to the problem of legislative bias, I do not wish to dismiss the gun industry and its allies as no more than a special interest group that has corrupted the legislative policymaking process. To its credit, the industry has successfully opposed measures to ban guns that are opposed by a majority of Americans.¹⁵ In these situations, the gun industry might rightly be viewed as a public interest advocacy group. Furthermore, the lobbying activities of gun-control organizations such as the Center to Prevent Handgun Violence and the Violence Policy Center could equally be viewed as either special interest or public interest efforts. Indeed, both sides in the gun-violence policy debate have sought to portray themselves as defenders of the public interest while casting their opponents as narrowly self-interested special interest lobbies.¹⁶ For the purposes of the comparative institutional analysis presented in this Article, I wish to suggest only that there is some evidence that gun industry lobbying efforts have introduced bias into the legislative policymaking process with regard to the specific areas of industry marketing practices and development of safer gun designs.

C. *Gaps in prospective regulation*

In addition to bias, another problem with legislative policymaking arises out of an inherent limitation of prospective rulemaking. Legislatures promulgate rules that regulate conduct. In making these rules, legislatures cannot possibly anticipate all situations, and so the rules inevitably fail to cover conduct that the legislature would have wanted to regulate if it had contemplated the conduct.

The tort system offers a way to fill in the gaps that remain in legislative regulation. Holding gun manufacturers liable for unreasonable marketing practices gives gun manufacturers an incentive to stay well within the letter of the law rather than looking for ways around it. For example, while extensive federal and state regulations restrict the interstate sale of "firearms",¹⁷ at least one gun manufacturer has marketed its weapons in the form of "firearms parts kits" in order to avoid these restrictions.¹⁸ The

15. See KLECK, *TARGETING GUNS*, *supra* note 10, at 337.

16. This is a common strategy among interest groups in American political debate. See SCHUCK, *LIMITS OF LAW*, *supra* note 5, at 212.

17. See generally *Commerce in Firearms and Ammunition*, 27 C.F.R. § 178 (1999) (detailing the extensive limits state and federal government has placed on the sale of firearms).

18. See Brief in Support of Defendant's Motion to Dismiss at 5-7, *Halberstam v. Daniel*, No. 95 Civ. 3323 (E.D.N.Y. 1998); see also Timothy D. Lytton, *Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOK. L. REV. 681, 686-87 (1998).

manufacturer legally sold its semi-automatic pistols through the mail without keeping any transaction records or conducting any background checks on purchasers, both of which are required for the sale of "firearms."¹⁹ As the result of a lawsuit against this manufacturer, no manufacturer currently avoids record keeping and background check requirements by selling guns in the form of parts kits.

D. *Administrative capture*

Administrative agencies are a third type of institution that makes gun-violence policy. Legislatures often delegate power to administrative agencies, allowing the agencies to transform general rules into a practical and nuanced set of regulations. Administrative agencies provide expertise, attention to individual cases, and enforcement resources that support legislative regulatory efforts. Ideally, administrative agencies are impartial executors of legislative mandates. In practice, however, a powerful industry can exert significant influence over the agencies that are created to govern it. Agency capture can defeat a legislature's attempts to regulate an industry.

Agency capture interferes with regulation of the gun industry. For example, decades of criticism by the gun industry and the NRA have made the Bureau of Alcohol, Tobacco and Firearms ("BATF"), the federal agency responsible for promulgating and enforcing firearms regulations, reluctant to publish information unfavorable to gun manufacturers.²⁰ Instead, the agency's criticisms have been limited to irresponsible dealers.²¹

The tort system is not subject to this problem of agency capture. In contrast to agency officials, tort plaintiffs have the incentive and the power (through discovery) to uncover damaging industry information that may help to produce better informed policy choices. Tort plaintiffs are more likely to dig deeper and more persistently into the highly secretive gun industry than any government regulatory agency.²²

E. *Limited enforcement resources*

A second difficulty encountered by administrative agencies is lack of resources. BATF regulation of the gun industry is severely limited by the paucity of agency resources compared to the extent of industry activity. In 1997, BATF agents were able to make on-site inspections to only 13,000 of

19. See Lytton, *supra* note 18, at 695.

20. See TOM DIAZ, MAKING A KILLING: THE BUSINESS OF GUNS IN AMERICA 6-7 (1999); see also Fox Butterfield, *Limits on Power and Zeal Hamper Firearms Agency*, N.Y. TIMES, July 22, 1999, at A1 [hereinafter Butterfield, *Limits on Power*].

21. See BUREAU OF ALCOHOL, TOBACCO & FIREARMS, DEP'T OF THE TREASURY, ATF CRIME GUN TRACE ANALYSIS REPORT: YOUTH CRIME INTERDICTION INITIATIVE: THE ILLEGAL YOUTH FIREARMS MARKETS IN 27 COMMUNITIES 1 (1999); BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, DEP'T OF THE TREASURY, GUN SHOWS: BRADY CHECKS AND CRIME GUN TRACES 2-3, 20 (1999).

22. See DIAZ *supra* note 20, at 5.

the approximately 100,000 federally licensed firearms dealers.²³ The threat of tort liability provides incentives for the industry to police itself, without the expense of on-site inspections.

To summarize, I have advocated a policymaking role for the tort system by showing how it complements the policymaking efforts of markets, legislatures, and administrative agencies. The tort system provides solutions to common problems faced by these other institutions. It alleviates market failures due to externalities, counteracts the effects of legislative bias, fills gaps in prospective regulation, circumvents the obstacles posed by agency capture, and supplements limited enforcement resources. For all of these reasons, the tort system should play an active and supportive policymaking role in current efforts to reduce gun violence.

III. HOW THE TORT SYSTEM MAKES GUN-VIOLENCE POLICY

Having advocated a complementary policymaking role for the tort system, I turn now to examining how the tort system makes gun-violence policy. I begin by outlining two specific policy proposals at issue in lawsuits against the gun industry. Next, I describe the doctrinal theories that allowed plaintiffs to seek adoption of these proposals by means of tort litigation. I then analyze how different players in the tort system—parties, judges, and juries—have contributed to making gun-violence policy. At several points in the discussion, I caution against over-reliance on the tort system, pointing out the pitfalls of expanding the policymaking role of the tort system beyond merely complementing the efforts of other institutions.

A. *Two policy proposals*

Plaintiffs in lawsuits against the gun industry have explicitly stated in pleadings and press conferences that the primary aim of their litigation efforts is to promote public policies that will reduce gun violence. For example, in a class action lawsuit recently filed by the NAACP against more than one-hundred gun manufacturers, the complaint begins by stating that: "Plaintiff . . . brings this action for equitable relief against the defendants seeking changes in the marketing, distribution and sales practices of the defendants—practices which have led to disproportionate numbers of injuries, deaths and other damages among those whose interests the plaintiff represents."²⁴ The lead plaintiff in a lawsuit brought by seven mothers

23. See *id.* at 43; see also Robert J. Spitzer, Letter to the Editor, *Enforcing Gun Laws*, N.Y. TIMES, July 24, 1999, at A14 (asserting that the DEA's budget has risen much faster than the BATF's); Butterfield, *Limits on Power*, *supra* note 20 (discussing the BATF's poor resources as compared to that of the DEA). But see *Clinton Seeks New Spending to Enforce Laws on Guns*, N.Y. TIMES, Jan. 18, 2000, at A16 (reporting new efforts to increase BATF enforcement resources).

24. Complaint at ¶ 1, NAACP v. A.A. Arms, Inc., No. 99 C.V. 3999 (E.D.N.Y. filed July 16, 1999).

of shooting victims against twenty-five gun manufacturers, explained her motivations for suing: "Nothing can bring my son back, nothing. And there can't be a price for his life. So the case is really not about that. It's about changing what's been happening right now in terms of the flow of guns into our communities."²⁵

Shooting victims have been suing gun manufacturers for their injuries since the early 1900s.²⁶ Until recently, victims recovered only for accidental shootings where the gun malfunctioned in some way, such as firing unexpectedly.²⁷ By contrast, the current wave of lawsuits against the gun industry seeks not merely to hold individual manufacturers liable for faulty weapons, but to change the way the whole industry designs and sells guns.

I focus here on two specific policies proposed by plaintiffs: manufacturer supervision of retail gun sales and compulsory installation of safety features. I do not present these two proposals in order to evaluate whether they would be fair and effective ways to reduce gun violence. Rather, I introduce them in order to analyze how the tort system makes that determination.

1. *Manufacturer supervision of retail gun sales*

Plaintiffs allege that manufacturer supervision of retail gun dealers would decrease sales to individuals who pose a high risk of criminal misuse, such as those with convictions for violent crime.²⁸ Gun manufacturers currently have no legal obligation to supervise the activities of retail dealers. Illegal sales at the retail level are quite common.²⁹ In addition to making illegal sales, dealers also sell guns to qualified purchasers who buy them for disqualified individuals, a transaction known as a straw purchase.³⁰

There is reason to believe that manufacturers could identify irresponsible dealers using readily available information. Federal law enforcement

25. *NPR Morning Edition: Jurors Will Begin Deliberation in a Case that Pits Gunmakers Against Victims of Gun Violence Who Feel the Manufacturers are Responsible* (National Public Radio broadcast, Feb. 4, 1999).

26. See WINDLE TURLEY & JAMES E. ROOKS, JR., *FIREARMS LITIGATION: LAW, SCIENCE, AND PRACTICE* 150 (1988).

27. See generally *Bender v. Colt Industries, Inc.*, 517 S.W.2d 705 (Mo. Ct. App. 1974) (gun discharged when fell out of buyer's pocket onto concrete platform); *Sturm Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979) (gun discharged when buyer grabbed gun as it dropped out of his hand while unloading it); *Cobb v. Insured Lloyds*, 387 So. 2d 13 (La. App. 1980) (gun accidentally discharged while located underneath the seat of a moving car).

28. See Siebel, *supra* note 1, at Part IV.B.

29. See Complaint at ¶ 22-36, *City of Chicago v. Beretta U.S.A. Corp.*, No. 99-2518 (Ill. Cir. Ct. Cook County filed Nov. 12, 1998) (providing evidence of the frequency of illegal gun sales by retail dealers); Complaint at ¶ 77-83, *Wayne County v. Arms Technology*, No. 99-73056 (E.D. Mi ch. filed Jul. 15, 1999).

30. See Julius Wachtel, *Sources of Crime Guns in Los Angeles, California*, 21 *POLICING: AN INT'L J. OF POLICE STRATEGIES & MGMT.*, 220, 233-37 (1998).

statistics reveal that a small number of dealers are the source of a high percentage of guns that are used in crime.³¹ A recent study of this data concluded that a mere one-hundred and thirty-seven gun stores sold 13,000 guns traced to crimes in 1998, and that these same one-hundred and thirty-seven stores sold more than 34,631 guns traced to crimes between 1996 and 1998.³² Each of these dealers was the source of at least fifty guns traced to crimes in 1998, and two of them each sold over one-thousand guns traced to crimes in that year.³³

Plaintiffs have suggested several specific measures that would enable gun manufacturers to supervise retail sales and weed out rogue dealers.³⁴ First, plaintiffs have proposed that manufacturers promulgate retail sales practices and train dealers to identify disqualified individuals and straw purchasers.³⁵ Second, plaintiffs have suggested that manufacturers sell only through franchised retail outlets in order to ensure greater control over sales activities.³⁶ Third, plaintiffs have demanded that manufacturers refuse to supply dealers who have sold a disproportionate number of guns traced to crimes.³⁷

For their part, defendants have expressed support for reducing illegal sales and weeding out rogue dealers, but argue that these are tasks for which law enforcement agencies are better equipped than private business firms.³⁸ From the industry's perspective, promulgating retail sales practices and providing training would be redundant given the existence of extensive Federal and state regulations governing firearms sales and dealer licensing.³⁹ Distributing only to franchised retail outlets would drastically restrict sales.⁴⁰ Termination of supply contracts with rogue dealers would be unnecessary if state agencies like the BATF would properly police gun dealers as they are mandated to do. Furthermore, defendants have argued

31. See Charles Schumer, *A Few Bad Apples: Small Number of Gun Dealers the Source of Most Crimes*, (visited July 14, 1999) <www.senate.gov/~schumer/html/a_few_bad_apples.htm> (on file with the author); see also Fox Butterfield, *Gun Flow to Criminals Laid to Tiny Fraction of Dealers*, N.Y. TIMES, July 1, 1999, at A14 (detailing the relatively few dealers who deal in guns used to commit crimes).

32. See Schumer, *supra*, note 31.

33. See *id.*

34. See *Hamilton v. Accu-Tek*, 62 F. Supp.2d 802, 821-33 (E.D.N.Y. 1999).

35. See Complaint (Award) at ¶ 4(e), *City of Chicago v. Beretta U.S.A. Corp.*, No. 99-2518 (Ill. Cir. Ct. Cook County filed Nov. 12, 1998).

36. See *Hamilton*, 62 F. Supp.2d at 831-32.

37. See Complaint (Award) at ¶ 4, *Chicago* (No. 99-2518); *Hamilton*, 62 F. Supp.2d at 832.

38. See, e.g., Trial Transcript of Feb. 3, 1999, at 3829-3837, 3909, *Hamilton v. Accu-Tek*, 62 F. Supp.2d 802 (No. CV-95-0049) (E.D.N.Y. 1999) [hereinafter *Hamilton* Trial Transcript] (on file with the author).

39. See SPORTING ARMS AND AMMUNITION MANUFACTURERS' INSTITUTE, NON-FICTION WRITER'S GUIDE: A WRITER'S RESOURCE TO FIREARMS AND AMMUNITION 12 (1998). Industry literature estimates that there are already some 20,000 Federal, state and local regulations governing firearms sales. See *id.*

40. See *Hamilton* Trial Transcript, *supra* note 38, at 3908.

that attempting to identify and sanction rogue dealers would interfere with sensitive law enforcement attempts to infiltrate and shut down organized gun trafficking operations.⁴¹

2. *Compulsory installation of safety features*

In addition to advocating manufacturer supervision of retail sales, plaintiffs have also demanded that gun manufacturers install safety features that would "personalize" guns, rendering them inoperable in the hands of unauthorized users.⁴² Plaintiffs have pointed out that mechanical locking devices built into the gun itself have been feasible since first patented in 1976.⁴³ Today many different designs for locking devices, both combination and key-operated, exist.⁴⁴ In addition, plaintiffs have called for further development of electronic locking devices that would allow a gun to fire only upon recognition of an authorized user. In one version of this "smart gun" technology, a microchip in the gun stores images of the authorized users' fingerprints and fires only when it recognizes the fingerprints of the person holding the gun. Another version involves a gun that fires only when it senses radio signals emitted by a special ring or lapel pin worn by the individual holding the gun.⁴⁵

According to plaintiffs, personalizing guns would have a significant impact on gun violence. Locking devices would reduce the risk that children who play with loaded guns would accidentally fire them or that individuals who steal guns would be able to use them to commit crimes.⁴⁶ Defendants counter that locking devices may make it more difficult for authorized users to fire a gun in an emergency, thereby reducing the effectiveness of the gun for self-defense.⁴⁷ The time necessary to unlock a gun could be the time it takes for an assailant to fire first or overpower the victim.

B. *The doctrinal grounds for tort claims against the gun industry*

By filing lawsuits, plaintiffs have introduced into the tort system the policy debate over whether manufacturer supervision of retail gun sales

41. See *id.*

42. See Complaint (Award) at ¶ 4, *Chicago* (No. 99-2518); First Amended Complaint at ¶ 12, *Dix v. Beretta U.S.A. Corp.*, No. 750681-9 (Cal. Super. Ct. County of Alameda filed Apr. 15, 1998).

43. See Siebel, *supra* note 1, at Part III.C.

44. See Marjorie Sessions, *Gun Locks: Key to Future Sales?*, 17 SHOOTING SPORTS RETAILER, July/Aug. 1999, at 16; Ron Spomer, *Locked and Loaded*, POPULAR MECHANICS, Sept. 1998, at 88.

45. See Anne Eisenberg, *Smart Guns Can Check Identities Before Firing*, N.Y. TIMES, Sept. 10, 1998, at 63; William Greider, *Will the Smart Gun Save Lives?*, ROLLING STONE, Aug. 6, 1998, at 36; Amanda Ripley, *Ready. Aim. Enter Your Pin*, N.Y. TIMES MAGAZINE, Nov. 21, 1999, at 82; Leslie Wayne, *Smart Guns Prove to be no Quick Fix for Firearm Violence*, N.Y. TIMES, June 15, 1999, at A24.

46. See Siebel, *supra* note 1, at Part III.C.

47. See generally Kleck, *Guns Aren't Ready*, *supra* note 2.

and compulsory installation of safety features would be fair and effective ways to reduce gun violence. Plaintiffs aiming to pressure manufacturers to supervise retail gun sales have sued based on negligent marketing and public nuisance doctrines, while plaintiffs seeking to compel gun makers to install safety devices have sued based on strict liability for design defect.⁴⁸

Negligent marketing claims allege that manufacturers are careless in promoting, distributing and selling their weapons in ways that unreasonably increase the risk that the weapons will be used to commit crimes. For example, in *Hamilton v. Accu-Tek*,⁴⁹ seven mothers of shooting victims sued twenty-five gun manufacturers alleging that the defendants negligently oversupplied guns to retail dealers in states with weak gun laws, creating a pool of available guns for illegal gun trafficking to states with strict gun laws, where the guns were subsequently used in crimes.⁵⁰ According to the plaintiffs, liability for negligent marketing would provide gun manufacturers an incentive to adopt reasonable sales restrictions that would reduce the risk of illegal gun trafficking and resulting crimes. These restrictions include franchising retail outlets to more closely monitor sales and maintain appropriate supply levels.⁵¹ The jury found in favor of one of the seven plaintiffs, and the case is currently on appeal.⁵²

Closely related to negligent marketing claims, public nuisance claims allege that manufacturers promote, distribute and sell their weapons in ways that unreasonably interfere with a right common to the general public. For example, in *City of Chicago v. Beretta*, the city of Chicago sued gun manufacturers alleging that by marketing handguns through suburban gun stores, the defendants knowingly facilitate the sale of guns to Chicago residents whose possession of them within city limits violates city ordinances and whose misuse of them to commit crimes interferes with the health and safety of the public.⁵³ In this case, the city of Chicago is seeking not only money damages to compensate for the emergency-service and law-enforcement costs resulting from gun violence, but is also seeking an injunction that would force gun manufacturers to terminate supply contracts with dealers who repeatedly sell to Chicago residents guns that are traced to crime.⁵⁴ The *City of Chicago* case is currently in the pretrial

48. For a detailed doctrinal and policy analysis of these claims, see Timothy Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. (forthcoming 2000).

49. 62 F. Supp.2d 802 (E.D.N.Y. 1999).

50. See *Hamilton*, 62 F. Supp.2d at 808. For a discussion of the *Hamilton* case and other negligent marketing claims against gun manufacturers, see Lytton, *supra* note 49, at Part II.C.

51. See *Hamilton*, 62 F. Supp.2d at 831.

52. See *id.* at 808.

53. See Complaint at ¶ 23, *City of Chicago v. Beretta U.S.A. Corp.*, No. 98 CH 15596 (Ill. App. Ct. Cook County filed Nov. 12, 1998). For a discussion of *City of Chicago v. Beretta U.S.A. Corp.*, see Lytton, *supra* note 49, at Part II.D.

54. See Complaint (Award) at ¶ 4, *Chicago* (No. 98 CH 15596).

phase.

Design defect claims allege that guns lacking locking devices are defective products. For example, in *Dix v. Beretta*, a fourteen-year-old child, accidentally shot by a friend who was playing with a pistol that he did not know was loaded, sued the manufacturer of the gun alleging that the gun was defectively designed since it lacked a built-in safety lock and a load indicator that would have alerted the friend that the gun was loaded.⁵⁵ Similarly, in *Morial v. Smith & Wesson*,⁵⁶ the city of New Orleans sued gun manufacturers alleging that their sale of guns without locking devices and load indicators subjected the defendants to strict liability for the municipal costs associated with gun violence.⁵⁷ The jury in *Dix* found for the defendants.⁵⁸ The *Morial* case is currently in the pretrial phase.

C. Parties

The doctrines of negligent marketing, public nuisance, and strict liability for design defect have allowed plaintiffs to use the tort system as a forum in which to conduct policy debates over whether manufacturer supervision of retail sales and compulsory installation of safety mechanisms would be fair and effective ways to reduce gun violence.⁵⁹ Within the tort system, a variety of players—parties, judges, and juries—exercise policy-making powers that influence the outcome of these debates. I analyze how each of these players contributes to making policy within the tort system, beginning with parties. I focus on two ways in which parties have influenced gun-violence policy in lawsuits against the gun industry: first, by means of settlement negotiations that have produced changes in regulation of the industry and second, by means of public discourse that has reframed debate over gun-violence policy.

Parties resolve most lawsuits by negotiating a settlement.⁶⁰ Settlement allows parties to resolve their dispute in a way that avoids the high costs

55. See Complaint at ¶¶ 11-12, *Dix v. Beretta U.S.A. Corp.*, No. 750681-9 (Cal. Super. Ct. County of Alameda filed Apr. 15, 1998). For a discussion of design defect claims against gun manufacturers, see Lytton, *supra* note 48, at Part II.B.

56. No. 98-18578 (La. Civ. Dist. Ct. Parish of Orleans filed Oct. 30, 1998).

57. See Complaint at ¶¶ 2-7, *Morial v. Smith & Wesson*, No. 98-18578 (La. Civ. Dist. Ct. Parish of Orleans filed Oct. 30, 1998).

58. See *Jury Finds Gun Maker Not Liable for Death of CA Boy*, 9 ANDREWS LITIG. RPTR., at 6 (1998).

59. Plaintiffs have also sued based on other theories, such as deceptive trade practices and strict liability for abnormally dangerous activities, in order to conduct similar policy debates about other proposals concerning promotion and advertising as well as sales levels. See, e.g., *Copler v. Smith & Wesson Corp.*, 138 F.3d 833 (10th Cir. 1998) (holding defendant strictly liable for abnormally dangerous activity); Complaint at ¶¶ 3-4, *Ganim v. Smith & Wesson Corp.*, No. CV 99 361279-S (Conn. Super. Ct. Fairfield County filed Feb. 5, 1999) (alleging deceptive trade practices). For a discussion of these claims, see Lytton, *supra* note 48, at Part II.A.

60. See Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-40 (1994).

and uncertainties of litigation. For this reason, parties usually prefer to settle.

This has not been the case, however, in lawsuits against the gun industry.⁶¹ The industry has for the most part resisted settlement, perhaps fearing that settlement would be a sign of weakness that could encourage a flood of claims against it by thousands of victims of gun violence.⁶² Rather than settling, most gun manufacturers have gambled that they could defeat plaintiffs in court, either by having the claims against them dismissed prior to trial or by obtaining favorable jury verdicts. So far, the gamble has paid off. The overwhelming majority of claims have been dismissed prior to trial, and of the few that have been tried, plaintiffs have obtained a favorable jury verdict in only one, the *Hamilton*⁶³ case, which is currently on appeal.

The recent entry of municipal plaintiffs into gun litigation has softened the industry's resistance to settlement. Plaintiffs in litigation against gun manufacturers have traditionally been individual gunshot victims or their representatives. In the fall of 1998, the City of New Orleans filed the first municipal lawsuit against a group of manufacturers.⁶⁴ Shortly thereafter, Chicago and Bridgeport filed similar lawsuits, followed by Miami, Atlanta, Boston, Washington, D.C., Cleveland, St. Louis, Newark, Los Angeles and San Francisco.⁶⁵ To date, twenty-nine cities have filed lawsuits against the gun industry.⁶⁶ For the most part, these municipal lawsuits are based on the same theories of recovery as those brought by private plaintiffs.⁶⁷ Unlike private plaintiffs, however, cities can invest far more resources into litigation and demand far higher damages based on the costs of law enforcement and emergency services required to address gun violence.

The potentially devastating costs of simultaneously defending against so many municipal suits has motivated several major gun manufacturers to enter into settlement negotiations with city attorneys. These negotiations have reportedly focused on industry acceptance of voluntary marketing restrictions and design modifications in exchange for the cities dropping

61. This does not include traditional product liability claims where the gun malfunctioned.

62. Cf. Peter Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 482-87 (1998).

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

64. See Paul M. Barrett, *As Lawsuits Loom, Gun Industry Presents a Fragmented Front*, WALL ST. J., Dec. 9, 1998, at A1.

65. See Fox Butterfield, *Suits Hold Microscope Over Gun Makers*, N.Y. TIMES, May 27, 1999, at A14; Vanessa O'Connell, *Cleveland Becomes Sixth City to Sue a Group of Gun Makers*, WALL ST. J., April 9, 1999, at B3; Mark Schlinkman, *St. Louis Files Lawsuit Against 27 Defendants in Gun Industry*, ST. LOUIS POST DISPATCH, May 1, 1999, at 8. See also Firearms Litigation Clearinghouse, *Firearms Litigation: Current Cases* (visited Apr. 6, 1999) <<http://www.firearmslitigation.org/cases/html>> [hereinafter *Firearms Litigation*].

66. See *Firearms Litigation*, *supra* note 65.

67. See Lytton, *supra* note 48, at Part III.C.

their demands for monetary damages.⁶⁸ Settlement according to these terms would allow the municipal plaintiffs to achieve their policy goals while providing the industry with a way to avoid enormous litigation costs and the risk of damaging jury verdicts.

So far, only one manufacturer, Smith & Wesson, has actually signed a settlement.⁶⁹ Under its terms, Smith & Wesson agreed to establish a "code of conduct" that requires its authorized retail dealers to accept voluntary sales restrictions designed to decrease illegal purchases. Smith & Wesson also agreed to sell all its handguns with mechanical trigger locks and to develop a marketable smart gun within three years. In return, most cities agreed to drop their claims and the attorneys general of New York and Connecticut agreed not to file lawsuits against the company in the future. The Clinton administration, which helped to shape the settlement, promised not to name the company in a threatened suit against the industry by the Federal Department of Housing and Urban Development ("HUD"). The administration also indicated that it would encourage federal and state law enforcement agencies to purchase Smith & Wesson firearms.⁷⁰

Other gun manufacturers have denounced the Smith & Wesson settlement, and retail dealers have called for a boycott of the company's products. The National Shooting Sports Foundation ("NSSF"), an industry trade group, criticized Smith & Wesson for breaking rank with other manufacturers to "run off and cut their own deal."⁷¹ "The decision by foreign owned handgun manufacturer Smith & Wesson to forge an agreement with the most anti-gun administration in our nation's history has violated a trust with their customers and with the entire firearms industry."⁷² In opposition to the settlement, one of the nation's largest gun wholesalers announced that it would stop distributing Smith & Wesson handguns and many retail dealers now refuse to sell the company's products.⁷³ In response, the attorneys general of New York and Connecticut are investigating the industry to determine whether these efforts to promote a boycott constitute an antitrust violation.⁷⁴ Firing back, the NSSF and several manufacturers filed suit against the Secretary of HUD, the attorneys general of New York and Connecticut, and 16 local governments claiming that their attempts to adopt purchasing agreements favoring companies that accept the terms of

68. See Fox Butterfield, *Safety and Crime at the Heart of Talks on Gun Lawsuits*, N.Y. TIMES, Oct. 2, 1999, at A1.

69. See James Dao, *Under Legal Siege, Gun Maker Agrees to Accept Curbs*, N.Y. TIMES, Mar. 18, 2000, at A1 [hereinafter Dao, *Under Legal Siege*].

70. See Fox Butterfield, *Gun Maker's Accord on Curbs Brings Pressure from Industry*, N.Y. TIMES, Mar. 30, 2000, at A1 [hereinafter Butterfield, *Gun Maker's Accord*].

71. Leslie Wayne, *Gun Makers See Betrayal in Decision by Smith & Wesson*, N.Y. TIMES, Mar. 18, 2000, at A8.

72. *Id.*

73. See Butterfield, *Gun Maker's Accord*, *supra* note 70, at A1.

74. See *id.*

the Smith & Wesson settlement constitute an unconstitutional interference with interstate commerce.⁷⁵ In this highly adversarial atmosphere, prospects for additional settlements are unclear.⁷⁶

Many commentators have pointed to the recent settlement between state attorneys general and the tobacco industry as a model for settlement negotiations between city attorneys and gun manufacturers.⁷⁷ While the tobacco settlement provides an example of how well-coordinated litigation can force a powerful industry to the bargaining table, more importantly it reveals how a successful litigation strategy can result in a disappointing policy outcome. The tobacco settlement, which includes annual payments by tobacco manufacturers to states for twenty-five years in exchange for an end to litigation by the states and any local government entities, has so far done little to help, and may in fact hinder, tobacco control policy.⁷⁸

Greed among plaintiffs' lawyers, lack of coordination among state officials, and intensive lobbying efforts by the tobacco industry have diverted most of the settlement money from tobacco control toward unprecedented attorneys' fees and unrelated public works projects.⁷⁹ Even worse, the substantial income that states will receive from the tobacco settlement gives them reason to oppose future regulatory measures aimed at tobacco control or private litigation against tobacco companies that might interfere with the industry's ability to make its annual payments.⁸⁰ These results of the tobacco settlement should serve as a warning to municipal plaintiffs in lawsuits against the gun industry to keep focused on their policy goals and view litigation as merely a means to those ends. That there is relatively little money at stake in the gun litigation will make it easier to avoid the problems illustrated by the tobacco settlement.⁸¹

Overemphasis on settlement may obscure another significant way in

75. See James Dao, *Gun Makers Sue Governments on Buying Rules*, N.Y. TIMES, Apr. 27, 2000, at A18.

76. Both the government's enthusiasm for and the industry's denunciations of the settlement seem surprising in view of the fact that prior to the agreement Smith & Wesson had already promulgated a code of conduct for retail dealers, was already equipping all of its handguns with trigger locks, and had been working to develop smart gun technology for some time. David B. Ottoway & Barbara Vobejda, *Gun Manufacturer Requires Dealers to Sign Code of Ethics*, WASH. POST, Oct. 22, 1999, at A11; Dao, *Under Legal Siege*, *supra* note 69, at A1.

77. See, e.g., Paul M. Barrett, *Jumping the Gun?: Attacks on Firearms Echo Earlier Assaults on Tobacco Industry*, WALL ST. J., Mar. 12, 1999, at A1; Fox Butterfield, *Results in Tobacco Litigation Spur Cities to File Gun Suits*, N.Y. TIMES, Dec. 24, 1998, at A1.

78. See Hanoch Dagan & James J. White, *Citizens, Governments, and Injurious Industries*, 75 N.Y.U. L. REV. (forthcoming 2000).

79. See Scott Harshbarger, *Comments at Northeastern University Law School, 15th Tobacco Products Liability Conference: From Tobacco to Firearms: Lessons for Litigators* (May 25, 1999); David Stout, *Few States are Using Settlements in Tobacco Suit to Cut Smoking*, N.Y. TIMES, Aug. 25, 1999, at A12; Dagan & White, *supra* note 78, at Part I.C.1.

80. See Dagan & White, *supra* note 78, at Part I.C.1.

81. The annual sales of gun manufacturers totals a mere \$1.4 billion compared to \$45 billion for the tobacco industry. See Barrett, *supra* note 64.

which parties play a role in policymaking. Scholars have distinguished between two distinct effects that litigation can have on public policy. First, litigation can have "instrumental" effects, creating legal sanctions or incentives that regulate behavior.⁸² For example, settlement negotiations between city attorneys and gun manufacturers may create sanctions that would apply to manufacturers who fail to restrict their sales and incentives for manufacturers to develop smart gun technology. Second, litigation can have "constitutive" effects, giving rise to new interpretations of an old problem and reshaping the terms of debate about it.⁸³ For example, by highlighting the claims of gunshot victims and the social costs of gun violence, lawsuits against the gun industry may reframe the debate over gun-violence policy by downplaying disagreement over the right to bear arms and highlighting concern for public safety.

The potential of plaintiffs to reframe the debate over gun-violence owes a great deal to a highly publicized massacre at a suburban high school in Littleton, Colorado, in the spring of 1999, carried out by two students armed with guns. The Littleton incident elevated the problem of gun violence to the top of the national political agenda.⁸⁴ Throughout the 1980s and most of the 1990s, gun violence had been viewed as an urban crime problem primarily among African American boys. Talk of ineducable "super predator" juvenile criminals became fashionable among criminologists, and calls for stiffer juvenile sentencing and more prisons were common responses to gun violence.⁸⁵ The Littleton massacre, following similar shootings at schools in Pearl, Mississippi and West Paducah, Kentucky in

82. See Lynn Mather, *Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 900 (1998).

83. See *id.* at 900.

84. See Katherine Q. Seelye, *Clinton Asks Hunters to Back His Proposals Curbing Guns*, N.Y. TIMES, Apr. 28, 1999, at A26; Sam H. Verhovek, *2 Are Suspects: Delay Caused by Explosives*, N.Y. TIMES, Apr. 22, 1999, at A1.

85. For discussions about "super-predator" juvenile criminals, see FRANK ZIMRING, AMERICAN YOUTH VIOLENCE 49-181 (1998) (analyzing the rhetorical aims of those who use the term "super-predator" in youth violence studies); Elizabeth Joh, "If It Suffices to Accuse," *United States v. Watts and the Reassessment of Acquittals*, 74 N.Y.U. L. REV. 887, 891 (1999) (discussing the use of the term "super-predator" in criminal sentencing classifications); John Dilulio, Jr., *Moral Poverty: The Coming of the Super-Predators Should Scare us into Wanting to Get to the Root Causes of Crime a Lot Faster*, CHI. TRIB., Dec. 15, 1995, at 31 (coining the term "super-predator" to denote juvenile criminals); For examples of proposals for stiffer criminal sentencing in response to youth violence, see *Symposium on the Attorney General's Task Force on Violent Crime: Foreward Remarks by Governor James R. Thompson on the Attorney General's Task Force on Violent Crime*, 73 J. CRIM. L. & CRIMINOLOGY 867, 868-69 (1982); Karl Zinsmeister, *Growing Up Scared: Spurred on by Family Instability, Violent Crime Now Touches Millions of Young Lives*, 265 ATL. MONTHLY 49 (June 1990); *The Enemy Within: Violent Youth Prey Upon the Innocent*, SAN DIEGO UNION-TRIB., Dec. 2, 1993, at B12, available in LEXIS, News Library, Sdut File; Roger Starr, *Crime: How It Destroys, What Can Be Done*, N.Y. TIMES, Jan. 27, 1985, at 19; *Symington on Crime: Tour de Force Proposals*, PHOENIX GAZETTE, Nov. 3, 1993, at B6; *Top Police Officials Would Reply to Rise in Violent Crime*, CHRISTIAN SCI. MONITOR, Apr. 2, 1981, at 6.

1997 and Springfield, Oregon and Jonesboro, Arkansas in 1998, transformed public discourse about gun violence from a battle against urban crime into a concern for child safety.⁸⁶ In addition to the portrayal of gun violence as a child safety issue, social scientists in the late 1990s began to describe it as a public health problem, emphasizing injury prevention rather than punishment.⁸⁷ These social scientists have drawn attention to accidental shootings resulting from children playing with guns, as well as intentional shootings.

In the context of this new focus on child safety and injury prevention rather than criminal conduct, plaintiffs in lawsuits against the gun industry have cast gun makers rather than criminals or children as the cause of gun violence. Plaintiffs allege that irresponsible marketing practices are a significant source of guns used in crime and that the failure to equip guns with safety features accounts for many accidental injuries.⁸⁸ Plaintiffs are using discovery to substantiate these claims by uncovering new information about the highly secretive gun industry. In the *Hamilton* case, the plaintiffs obtained an affidavit from a former Smith & Wesson Senior Vice President of Marketing and Sales who stated that:

The company and the industry as a whole are fully aware of the extent of 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 [sic] responsible distribution practices⁸⁹

Plaintiffs demand greater industry regulation, further supporting the view that the gun industry is responsible for gun violence.⁹⁰ Whether or not

86. See Frank Bruni, *Mother Love: Democrats Try Pitching to Maternal Instincts*, N.Y. TIMES, July 4, 1999, at 5; Alison Mitchell, *Democrats Gain Ground, An Inch, On Gun Control*, N.Y. TIMES, May 21, 1999, at A23; Alison Mitchell & Frank Bruni, *Suburban Districts Seen as Key In the Debate over Gun Control*, N.Y. TIMES, June 16, 1999, at A1; John O'Neil, *Vital Signs: Safety: When Children and Guns Live Together*, N.Y. TIMES, June 15, 1999, at E8; *Other Shootings Involving Students*, N.Y. TIMES, Apr. 21, 1999, at A17.

87. See, e.g., Thomas B. Cole, et. al., *What Can We Do About Violence?*, 282 JAMA 481 (1999); Garen J. Wintemute, *The Future of Firearms Violence Prevention*, 282 JAMA 475 (1999) (viewing injury resulting from gun violence as a public health problem).

88. See Siebel, *supra* note 1, at Part III.C.

89. Affidavit of Robert I. Haas at ¶¶ 20-21, *Hamilton v. Accu-Tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996) No. 95-CV-0049, cited in David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMPLE L. REV. 1, 7 (1998).

90. See, e.g., Complaint (Award) at ¶ 4, *City of Chicago v. Baretta U.S.A. Corp.*, No. 98 CH 15596 (Ill. Cir. Ct. Cook County filed Nov. 12, 1998) (asking the court to, inter alia, prohibit the sale of illegal firearms to Chicago residents, prohibit gun dealers from selling firearms to individuals who have purchased a firearm within the previous thirty days).

plaintiffs ultimately prevail in individual cases, their litigation strategy may significantly change views about gun violence and reframe the debate over how best to address it.

Plaintiffs have not been alone in attempting to shape the terms of debate over gun-violence policy. The gun industry has portrayed the municipal plaintiffs' attempt to pressure gun manufacturers into a settlement by filing simultaneous lawsuits as a kind of blackmail, a misuse of legal process by mayors bent on achieving gun control measures that they were powerless to obtain in their own city and state legislatures.⁹¹ With the help of the NRA, the industry has lobbied state legislatures to pass legislation prohibiting cities from bringing tort claims against gun manufacturers.⁹² So far, these efforts have been successful in thirteen states, including Texas, Georgia and Louisiana.⁹³ In these states, the gun industry has successfully recast gun litigation from an attempt to address the problem of gun violence to a cynical abuse of the tort system designed to circumvent the legislative process.

Having analyzed how parties in the tort system influence policymaking by negotiating settlements and shaping the terms of debate, it is important to point out two dangers of relying on parties to make gun-violence policy. First, settlement agreements suffer from the same problem of gaps as prospective regulation by legislatures. Such agreements can never anticipate all future situations and they provide both parties opportunities to circumvent the spirit of the accord while sticking to the letter of it. For example, a week after it settled, Smith & Wesson published a "clarification" of the settlement agreement, offering an interpretation that excludes many of the sales restrictions originally announced by the plaintiffs.⁹⁴ Moreover, any future settlement agreement between the cities and current members of the gun industry cannot bind new manufacturers who enter into the market after the litigation ends or old manufacturers who close down and start up again under a new name.

Second, there is a danger that plaintiffs' and defendants' success in influencing policymaking could undermine the integrity of the tort system. The extent to which plaintiffs' ability to force manufacturers into settle-

91. See *The President's Column*, AM. RIFLEMAN, April 1999, at 12. There is reason to believe that much of the public agrees with this portrayal of the current wave of gun litigation. A January 1999 survey found that 66% of respondents opposed government suits against gun makers and only 19% supported such efforts, with 15% unsure. See Barrett, *supra* note 64.

92. See Fox Butterfield, *Verdict Against Gun Makers is Likely to Prompt More Suits*, N.Y. TIMES, Feb. 13, 1999, at B2; Rebecca Carr, *Barr's Bill on Gun Suits Draws Opposition*, ATLANTA J. & CONST., Mar. 10, 1999, at A4; David E. Rosenbaum, *Echoes of Tobacco Battle in Gun Suits*, N.Y. TIMES, Mar. 21, 1999, at 32.

93. For a complete list of such legislation, see *Firearms Industry Legislation* (visited Apr. 12, 1999) <<http://www.gunfree.org/>>.

94. See Fox Butterfield & Marc Lacey, *Biggest Gunmaker Revises the Rules of Pact with U.S.*, N.Y. TIMES, Mar. 14, 2000, at A1.

ment talks and to publicize their views about gun violence is based on the threat of litigation costs lends credibility to the charge that their strategy amounts to a form of blackmail. This could ignite a public backlash against the tort system and erode public confidence in the courts. The success of industry efforts to obtain legislative immunity from municipal lawsuits also threatens to undermine the integrity of the tort system, determining liability on the basis of political muscle rather than judicial procedure.

D. Judges

Judges have the power to make policy by ruling in ways that determine the outcome of litigation. Judges in lawsuits against the gun industry have frequently exercised this power by granting defense motions to dismiss and motions for summary judgment, thereby rejecting plaintiffs' policy proposals.⁹⁵ Judges could, in future cases, rule in favor of plaintiffs, thereby supporting their policy proposals.

In negligent marketing cases involving proposals for manufacturer supervision of retail sales, judges have the power to accept or reject these proposals by framing the issue of duty in specific terms. Judges can alternatively leave this determination to the jury by framing the issue of duty in general terms. In order for a plaintiff to prevail in a negligent marketing cases, he must establish that the defendant owed him a duty, breached that duty, and that this breach of duty was a proximate cause of his injuries.⁹⁶

95. See, e.g., *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997); *Armijo v. Ex Cam, Inc.*, 843 F.2d 406 (10th Cir. 1988); *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326 (9th Cir. 1986); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532 (11th Cir. 1986); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984); *Bubalo v. Navegar, Inc.*, No. 96-C-3664, 1998 WL 142359 (N.D. Ill. Mar. 16, 1998); *McCarthy v. Sturm, Ruger & Co., Inc.*, 916 F. Supp. 366 (S.D.N.Y. 1996); *Caveny v. Raven Arms, Co.*, 665 F. Supp. 530 (S.D. Ohio 1987); *Mavilia v. Stoeger Indus.*, 574 F. Supp. 107 (D. Mass. 1983); *Adkinson v. Rossi Arms Co.*, 659 P.2d 1236 (Alaska 1983); *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 900 S.W.2d 202 (Ark. 1995); *Delahanty v. Hinkley*, 564 A.2d 758 (D.C. 1989); *Coulson v. DeAngelo*, 493 So. 2d 98 (Fla. Dist. Ct. App. 1986); *Trespacios v. Valor Corp.*, 486 So. 2d 649 (Fla. Dist. Ct. App. 1986); *Rhodes v. R.G. Indus.*, 325 S.E.2d 465 (Ga. App. 1984); *Riordan v. International Armament Corp.*, 477 N.E.2d 1293 (Ill. App. Ct. 1985); *Linton v. Smith & Wesson*, 469 N.E.2d 339 (Ill. App. Ct. 1984); *Strickland v. Fowler*, 499 So. 2d 199 (La. Ct. App. 1986); *Resteiner v. Sturm, Ruger & Co.*, 566 N.W.2d 53 (Mich. Ct. App. 1997); *King v. R.G. Indus.*, 451 N.W.2d 874 (Mich. Ct. App. 1989); *Richardson v. Holland*, 741 S.W.2d 751 (Mo. Ct. App. 1987); *Forni v. Ferguson*, 232 A.D.2d 176 (N.Y. App. Div. 1996); *Burkett v. Freedom Arms, Inc.*, 704 P.2d 118 (Or. 1985); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661 (Wash. Ct. App. 1988).

Cases that were not dismissed prior to trial include *Hamilton v. Accu-Tek*, 62 F. Supp.2d 802 (E.D.N.Y. 1999) (jury verdict for one of nine plaintiffs, currently on appeal), *Halberstam v. Daniel*, No. 95 Civ. 3323 (E.D.N.Y. 1998) (jury verdict against plaintiffs), and *Kelly v. R.G. Indus.*, 497 A.2d 1143 (Md. 1985) (abandoned by plaintiffs). For more on *Kelly*, see Howard L. Siegel, *Winning Without Precedent: Kelly v. R.G. Industries*, 14 No. 4 Litigation 32 (1988). For more on *Halberstam*, see Timothy D. Lytton, *Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOK. L. REV. 681 (1998); Lytton, *supra* note 48, at Part II.C.4 & 5.

96. See, e.g., *Hamilton*, 62 F. Supp.2d at 818.

The question of whether the defendant owed the plaintiff a duty is a matter of law for the judge to decide, while the question of whether the defendant breached this duty is a matter of fact for the jury to decide.⁹⁷

By framing the duty in question in general terms, judges make it easier to rule that the defendant owed the plaintiff a duty and to submit the question of whether the defendant breached that duty to the jury. Consider the example of a negligent marketing claim where a shooting victim alleges that a gun manufacturer was negligent in failing to terminate its supply contract with a dealer who sold over a hundred guns traced to crime in each of the last two years. Suppose the defendant moves for dismissal of the case arguing that it should not be found liable because it owed the plaintiff no duty of care. Were the judge in such a case to frame the duty in question as the duty to exercise reasonable care, it would be easy to rule against the defendant, holding that the gun manufacturer owed the plaintiff a duty to exercise reasonable care. This would leave for the jury (as an issue of breach) the question of whether the defendant's failure to terminate the supply contract was unreasonable. Justification of imposing a duty to exercise reasonable care on a defendant requires little more than mention of the generally accepted principle that all persons owe foreseeable victims a duty to exercise reasonable care.⁹⁸

By framing the duty in question in specific terms, however, judges can themselves determine the ultimate issue of liability.⁹⁹ Were the judge in our example to frame the duty in question as a duty to terminate supply contracts with irresponsible dealers, there would be little or nothing left for the jury to decide. The judge might rule that there is no such duty, thereby dismissing the case. Alternatively, the judge might rule that there is such a duty, leaving only the question of whether the defendant in fact failed to terminate the supply contract, a fact that would most likely be admitted by the defendant. Thus, the judge's duty analysis, carried out in the context of ruling on a motion to dismiss, would determine the ultimate issue of liability as a matter of law.

Duty analysis in negligent marketing cases is often complicated by the added difficulty of imposing a duty on gun manufacturers to protect victims from third parties, either careless retail sellers or criminal assailants. The imposition of such a duty requires that the plaintiff establish a special relationship between the gun manufacturer and either the third party or the victim that makes the gun manufacturer uniquely situated to prevent the injury.¹⁰⁰ Judges have argued both in favor of and against the existence of

97. See *id.* at 818, 828; see also W. PAGE KEETON, ET AL., PROSSER & KEETON ON TORTS § 37 (5th ed. 1984).

98. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 6 cmt. a. (Discussion Draft 1999).

99. See *id.* cmt. h.

100. See *Hamilton*, 62 F. Supp.2d at 820; KEETON ET AL., *supra* note 97, § 53, at 838.

such a special relationship.¹⁰¹

In the overwhelming majority of negligent marketing claims, judges have framed the duty in question narrowly, ruled in favor of defendants, and dismissed the claims.¹⁰² For example, in *Riordan v. International Armament Corp.*,¹⁰³ the plaintiffs were shot with handguns while being criminally assaulted.¹⁰⁴ They alleged that given

the large number of injuries and deaths resulting from the use of handguns to commit crime, criminal misuse was foreseeable and the defendant[s], handgun manufacturers and distributors[,] were negligent in marketing [their] handguns to the general public without taking adequate precautions to prevent the sale of [their] handguns to persons who were reasonably likely to cause harm to the general public. Plaintiffs claim that the defendant[s] . . . had a duty to determine whether [their] retailers had taken all reasonable measures to screen prospective purchasers and a duty to terminate sales to those retailers the defendants knew or had reason to know had a history of sales to persons who had used [their] handguns in crime.¹⁰⁵

The *Riordan* court affirmed the trial court's dismissal of the plaintiffs' negligence claim holding that "no common law duty exists upon a manufacturer of a nondefective handgun to control the distribution of that product to the general public."¹⁰⁶ By framing the duty narrowly, as a duty to control the distribution of guns, the court rejected the plaintiffs' proposal for gun manufacturer supervision of retail sales. Had the court accepted this duty, it would have supported the plaintiffs' proposal, since the defendants could have defeated liability only by showing that they in fact supervised retail sales. The court could have left the policy decision to the jury by framing the duty generally as a duty to exercise reasonable care, refusing to dismiss the case, and leaving the jury to determine whether reasonable care requires manufacturer supervision of retail sales.

In design defect claims involving proposals to develop safety features for guns, judges have the power to support or reject these proposals by varying the standard by which courts evaluate the safety of a particular gun design. In order to prevail on a design defect claim, a plaintiff must establish that the product was sold in a "defective condition unreasonably dan-

101. See, e.g., *Linton v. Smith & Wesson*, 469 N.E.2d 339, 340 (Ill. App. Ct. 1984) (finding no duty); *Hamilton*, 935 F. Supp. at 827 (finding a duty).

102. See *supra* note 95 (collecting various cases that illustrate this phenomenon).

103. 477 N.E.2d 1293 (Ill. App. Ct. 1985).

104. See *id.* at 1294.

105. *Id.* at 1295.

106. *Id.* (citing *Linton*, 469 N.E.2d at 340).

gerous.”¹⁰⁷ In gun cases, several courts have insisted that this doctrine requires plaintiffs to establish first that the gun has a defect that caused it to malfunction and second that the risks associated with the design outweigh its utility.¹⁰⁸

For example, in *Patterson v. Rohm Gesellschaft*, the mother of a store clerk killed by a robber using a revolver sued the manufacturer.¹⁰⁹ The plaintiff alleged “that the handgun was ‘defective and unreasonably dangerous’ in its design because handguns simply pose risks of injury and death that ‘far outweigh’ any social utility that they may have.”¹¹⁰ The plaintiff admitted that the handgun did not malfunction in any way; indeed, it functioned precisely as designed and as the robber expected.¹¹¹ The court granted the defendant’s motion for summary judgment against the plaintiff, explaining that strict product liability for design defects applies only to products that are defective in the sense that they malfunction and unreasonably dangerous in the sense that the risks associated with them outweigh their utility. The court held that “[w]ithout this essential predicate, that something is wrong with the product, the risk/utility balancing test does not even apply.”¹¹² Many courts have rejected design defect claims by crime victims against gun manufacturers for failure to identify a particular defective condition in the gun that caused it to malfunction.¹¹³

In recent cases, plaintiffs have argued that they should be entitled to recover under the doctrine of strict liability for design defect as long as they can establish that there exists a reasonable alternative design that would make a gun safer and that the failure to adopt this design makes the gun unreasonably dangerous.¹¹⁴ They allege that guns equipped with locking devices present a reasonable alternative design, rendering guns without such locks unreasonably dangerous.¹¹⁵

In jurisdictions that require plaintiffs to establish that the gun malfunctioned, the existence of a reasonable alternative design raises the question: Does the misuse of a gun without a locking device constitute a malfunction? In accidental shooting cases, answering this question requires judges to determine whether a properly functioning gun fires only when its user

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

108. See *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1272 (5th Cir. 1985); *Patterson v. Gesellschaft*, 608 F. Supp. 1206, 1209-10 (N.D. Tex. 1985); *Richardson v. Holland*, 741 S.W.2d 751, 753-54 (Mo. Ct. App. 1988).

109. See *Patterson*, 608 F. Supp. at 1208.

110. *Id.*

111. See *id.* at 1209.

112. *Id.* at 1211.

113. See *Perkins*, 762 F.2d at 1272; *Patterson*, 608 F. Supp. at 1208; *Richardson*, 741 S.W.2d at 753-54.

114. See Complaint at ¶ 6, *Morial v. Smith & Wesson Corp.*, No. 98-18578 (La. Civ. Dist. Ct. Parish of Orleans filed Oct. 30, 1998).

115. See Complaint at ¶ 6, *Morial* (No. 98-18578).

intends it to fire. In criminal shooting cases, answering this question requires judges to determine whether a properly functioning gun fires only when fired by authorized users. Any answer to either of these questions assumes a standard for evaluating gun designs based on what the judge thinks the requirements of a properly functioning gun are, in particular whether a locking device is an essential feature of a properly functioning gun. Thus, in considering the issue of malfunction prior to any risk-utility analysis by a jury, judges make policy choices about whether gun manufacturers ought to develop safer gun designs.

Policymaking within the context of doctrinal analysis is a well accepted feature of the judicial role.¹¹⁶ For example, Prosser and Keeton describe duty analysis in negligence cases as "an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection."¹¹⁷ Similarly, doctrinal analysis in products liability since its inception has been driven by policy considerations such as product safety and loss spreading.¹¹⁸

Judicial policymaking has advantages over policymaking by parties or by juries. In comparison to parties, judges may be better representatives of the public interest. Parties' attempts to make or influence public policy may be heavily influenced by private concerns such as attorneys' fees, reelection, product reputation, or industry profits and may exclude altogether the interests of groups not represented in the litigation. Additionally, policy that results from settlement negotiations between parties may be more a reflection of the parties' relative bargaining power than a fair balance of the competing interests at stake. While judges bring their own personal perspectives and interests to doctrinal analysis, the judicial role encourages them to look beyond merely the personal interests of the parties and to attempt a fair balancing of the relevant policy considerations.

In comparison to juries, judges may provide more consistent policy choices. Juries are encouraged to base their verdicts only on their views of the particular case before them. By contrast, judges typically consider past cases and often take them into account. While this does not guarantee uniformity of policy choices across jurisdictions, it does tend toward greater consistency.

Judicial policymaking also has several shortcomings. While judges may be more impartial than legislatures and less self-interested than parties, they are limited by being able to act only in response to cases presented to them and only on the basis of information provided by

116. See generally, Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1 (1995) (discussing the policymaking role of courts in products liability cases).

117. KEETON ET AL., *supra* note 97, § 53, at 358.

118. See Bogus, *supra* note 116, at 16.

litigants.¹¹⁹ Policy choices are more likely to strike a fairer and more effective balance between competing interests when they are based on a broad perspective and ample information, rather than the peculiarities of a particular case before a judge and limited information provided by litigants. Judicial insularity from political pressures creates a narrow perspective that may limit judges' effectiveness in policymaking.¹²⁰

In addition, judges are less well equipped than legislatures to make policy choices that rely on evaluation of complex and highly speculative scientific data. Some claims against the gun industry, like the *Hamilton* case, call upon judges to evaluate claims about the relation between particular marketing practices and the incidence of gun crimes, based on complex econometric analysis and highly speculative expert opinion.¹²¹ In order to strengthen their capacity to evaluate such evidence, the Federal Rules of Evidence allow judges to appoint their own experts who can present additional information or render opinions on evidence offered by the parties.¹²² Nevertheless, legislatures, unlike courts, can defer judgment pending further investigation or legitimately make a policy decision based on political grounds. Additionally, legislatures, in contrast to courts, are democratically accountable for their mistakes.

E. Juries

Juries have the power to make policy by rendering verdicts that have implications beyond a particular case. In lawsuits against the gun industry, judges have submitted very few cases to juries. Nevertheless, these verdicts can have great influence on gun-violence policy.

A jury finding that a particular marketing practice creates an unreasonable risk of gun violence may discourage manufacturers throughout the industry from engaging in that practice for fear of liability. The case of *Halberstam v. Daniel*¹²³ provides an example of how a jury verdict can have industry-wide policy implications.¹²⁴ The *Halberstam* case arose out of a drive-by shooting involving a semi-automatic pistol, resulting in the death of one victim and injury to another.¹²⁵ The pistol used in the attack had been assembled from a mail-order parts kit manufacturer and sold by the defendants.¹²⁶ The plaintiffs alleged that the manufacturer's marketing scheme was negligent. In support of this claim, the plaintiffs pointed to the defendant's sales methods which involved ordering by phone, postal deliv-

119. See KOMESAR, *supra* note 5, at 141-42.

120. See *id.* at 149-50.

121. See Lytton, *supra* note 48, at Part II.C.4.

122. See Howard Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L. J. 1933, 1986 (1999).

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

124. See Lytton, *supra* note 18, at 686-98.

125. See *id.* at 686.

126. See *id.* at 686-88.

ery, reduced prices for bulk purchases, no requests for any information other than that pertinent to payment and shipping, and failure to keep any sales records.¹²⁷ By selling their weapons disassembled, in the form of parts kits, the defendants avoided Federal and State regulations governing the sale and possession of guns which, they argued, did not apply to the sale of gun parts.¹²⁸ While Federal law requires serial numbers on gun frames, the defendants sold unmarked sheet metal flats that, when folded, would serve as gun frames for the other parts that they sold.¹²⁹ At trial, the defendants testified that they did not care who purchased their weapons.¹³⁰

The jury returned a verdict in favor of the defendants, finding that while the defendants' marketing practices were negligent, the defendants' negligence was not a substantial factor in causing the plaintiffs' injuries.¹³¹ At trial, the defendants had offered an affidavit and a deposition by the criminal assailant in which he stated that he had purchased the gun used in the attack from someone on the street, that he had never had any business dealings with the defendants personally or by proxy, and that the defendants did not cause him in any way to purchase firearms parts.¹³² Despite this finding of no causation, the *Halberstam* jury's finding of negligence has been enough to end the practice of selling guns in the form of parts kits.

Jury findings can also reject plaintiffs' policy proposals. For example, a jury recently rendered a verdict in favor of the defendant in the design defect case *Dix v. Baretta*.¹³³ In the *Dix* case, the judge asked the jury to determine whether a pistol designed and manufactured without a locking device or a load indicator was an unreasonably dangerous product. The jury's verdict in favor of defendants rejected the plaintiff's policy proposal to compel all manufacturers to equip guns with safety devices.

Entrusting policy choices to juries has several advantages. Juries, like judges, are insulated from political pressures that sometimes distort legislative policymaking.¹³⁴ Juries have the added advantage of being more representative of the local community, which gives their verdicts greater democratic legitimacy than judicial decisions.

There are also disadvantages to relying on juries to make policy. While juries are more representative than judges, their perspective on a problem is even more constrained. The information available to a jury is

127. See *id.* at 694-95.

128. See Brief in Support of Defendant's Motion to Dismiss at 5-7, *Halberstam v. Daniel*, No. 95 Civ. 3323 (E.D.N.Y. 1998).

129. See Lytton, *supra* note 18, at 695.

130. See *id.*

131. See *id.* at 697-98.

132. See *id.* at 696.

133. See *Jury Finds Gun Maker Not Liable for Death of CA Boy*, *supra* note 58, at 6.

134. See KOMESAR, *supra* note 5, at 138-41.

only a subset of what the parties and the judge have, limited not only by the nature of the case before them and by what the parties choose to present to them, but also by the rules of evidence that restrict what they are allowed to hear.¹³⁵ Juries lack an appreciation for how the case before them compares to similar cases in the same and other jurisdictions. Juries also lack the expertise concerning complex evidence that parties and judges acquire as they build experience from case to case as litigation matures.¹³⁶

IV. SETTING LIMITS ON THE POLICYMAKING POWERS OF THE TORT SYSTEM

In Part II, I advocated a complementary role for the tort system in gun-violence policymaking. In Part III, I analyzed how different players in the tort system—parties, judges, and juries—have influenced gun-violence policymaking. Like all policymakers, these players each have particular strengths and weaknesses. Their shortcomings make it important not to rely too heavily on any one of them, or on the tort system as a whole, to make gun-violence policy. While the tort system ought to play a role in making gun-violence policy, it should be a limited one. I turn now to how legislatures and courts set limits on the policymaking powers of the tort system. Legislatures can pass laws preempting litigation before it occurs as well as laws overturning judicial doctrines after cases are decided. Judges can refuse to accept cases, leaving resolution of the underlying policy issues to legislatures. Relying on legislatures and courts to manage their own rivalry has obvious problems. The stability of this arrangement relies on each institutions' respect for the policymaking efforts of the other.

A. *Legislative preemption and overturning*

Legislatures can limit the policymaking powers of the tort system by passing laws that preempt plaintiffs from bringing certain kinds of claims or by enacting statutory tort rules that overturn common law doctrines made by judges. The case of *Kelly v. R.G. Industries*¹³⁷ provides an example of how a legislature can overturn a doctrine. In *Kelly*, the wife of a store clerk who was shot in the course of an armed robbery sued the manufacturer of the gun.¹³⁸ Although the case was eventually abandoned by the plaintiff, the Supreme Court of Maryland created a new doctrine of strict liability for the manufacture and sale of a Saturday Night Special which the court defined as any cheap, easily concealable handgun "particularly attractive for criminal use and virtually useless for the legitimate purposes of

135. *See id.*

136. *See* JOSEPH SANDERS, BENEDICTIN ON TRIAL: A STUDY OF MASS TORT LITIGATION 158 (1998).

137. 497 A.2d 1143 (Md. 1985).

138. *See id.* at 1144-45.

law enforcement, sport, and protection.”¹³⁹ The court asserted that the manufacture and sale of these guns posed an abnormally high risk of gun violence.¹⁴⁰ Shortly following the *Kelly* decision, the Maryland legislature overturned the doctrine of strict liability for the manufacture and sale of Saturday Night Specials within the provisions of a gun control act that also created a board of experts to identify and restrict the sale of handguns with a high risk of criminal misuse.¹⁴¹

There is an obvious problem with leaving the legislature in charge of limiting the policymaking powers of the tort system. If the tort system should be entrusted with making policy whenever the legislative process is distorted by minority interest groups, these same groups may be behind efforts to limit the policymaking power of the tort system. For example, in many states, the gun industry and the NRA have successfully lobbied legislatures to preempt litigation by passing laws that forbid lawsuits against gun manufacturers brought by municipal plaintiffs based on negligent marketing and defective design theories.¹⁴² One bill even proposed making it a crime to bring such a lawsuit.¹⁴³

B. *Judicial deference to legislatures*

Judges can limit the policymaking power of the tort system by refusing to hear claims, thereby leaving determination of the underlying policy issues to legislatures. For example, in *Riordan v. International Armament Corp.*,¹⁴⁴ the survivor of a man who died when he was shot with a gun during a fight sued the gun manufacturer.¹⁴⁵ The court rejected the plaintiff's negligent marketing claim pointing out that “the distribution of firearms is heavily regulated on both federal and state levels” and holding that the imposition of a duty on gun manufacturers to exercise reasonable care in marketing weapons was a legislative task.¹⁴⁶

There is an obvious problem with entrusting judges with the responsibility of limiting the policymaking power of the tort system. Placing judges in charge of limiting their own powers is not likely to inspire confidence among those who view the tort system as already having gone too

139. *Id.* at 1153-54.

140. *See id.* at 1158-59.

141. *See* Monica Fennel, Note, *Missing the Mark in Maryland: How Poor Drafting and Implementation Vitiates a Model State Gun Control Law*, 13 HAMLINE J. PUB. L. & POL'Y 37, 43-44 (1992).

142. *See supra* notes 92-93 and accompanying text.

143. Florida Senate Bill 1586 proposed that any municipal employee who, in his official capacity, brought a lawsuit against a gun manufacturer alleging design defect in the absence of a malfunction or negligent marketing would be guilty of committing a third degree felony. S.B. 1586, 1999 Reg. Sess. (Fla. 1999). The Florida Senate ended consideration of this bill in April 1999, following the Littleton massacre.

144. 477 N.E.2d 1293, 1294 (Ill. App. Ct. 1985).

145. *See id.* at 1294.

146. *Id.* (citing *Linton v. Smith & Wesson*, 469 N.E.2d 339, 340 (Ill. App. Ct. 1984)).

far. So far in lawsuits against the gun industry, most judges have either left policy choices to legislatures or decided them in favor of defendants. If plaintiffs begin to win cases, however, there may arise complaints about an unrestrained judiciary. If this occurs, then legislatures may step in and overrule judicial decisions.

The stability of the mechanisms that limit the policymaking power of the tort system in the end depends not only on a balance of power between legislatures and courts, but one that is imbued with a respect for the institutional integrity of the other. Legislatures and courts need each other, as well as markets and administrative agencies, in order to make, administer and enforce fair and effective public policy. They must work together as partners, even in managing their rivalry.

V. CONCLUSION

Policymaking in the United States is a complex activity that involves a variety of institutions including markets, legislatures, and administrative agencies. In this Article, I have argued that the tort system ought to play a complementary role in policymaking. I supported this claim by showing how the tort system compensates for particular problems faced by these other institutions, using gun-violence policymaking as an example. I then analyzed how the tort system makes gun-violence policy, highlighting both the strengths and weaknesses of parties, judges and juries as policymakers. Finally, I showed how legislatures and courts can maintain limits on the policymaking powers of the tort system, cautioning that their ability to support an active but limited policymaking role for the tort system depends not only on institutional arrangements but also on a culture of mutual respect between different branches of government. My goal throughout has been to add depth and detail to the controversy over the role of private litigation in the making of public policy.

