

# A Farewell to Arms: Risk/Benefit Litigation Against Gun Manufacturers in California After the Repeal of Statutory Immunity

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## I. INTRODUCTION

In 1983, the California Legislature, in an attempt to ward off impending litigation against gun manufacturers for damages arising from criminal misuse of their products, enacted Civil Code Section 1714.4.<sup>1</sup> The statute granted gun manufacturers immunity from product liability suits based on an imbalance of risk over

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1 The Statute states:

Products liability actions; Firearm or ammunition not to be deemed defective in design on basis that benefits not outweighed by risk

(a) In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.

(b) For purposes of this section:

(1) The potential of a firearm or ammunition to cause serious injury, damage, or death when discharged does not make the product defective in design.

(2) Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product.

(c) This section shall not affect a products liability cause of action based upon the improper selection of design alternatives.

(d) This section is declaratory of existing law.

CAL. CIV. CODE § 1714.4 (Deering 1994) (repealed 2002).

The Senate analysis described the bill's "purpose" as follows: (1) "to protect manufacturers and sellers of firearms from being held liable in tort for selling or furnishing a firearm that was used to cause an injury or death"; (2) "to preclude courts from using products liability theories to hold firearm manufacturers and dealers civilly liable to victims of firearms usage"; (3) "to prevent the courts from extending products liability laws to hold a supplier of a firearm liable in tort to persons injured by use of the weapon"; and (3) [sic] "to 'stop at birth' the notion that manufacturers and dealers are liable in products liability to victims of handgun usage."

See *Merrill v. Navegar, Inc.*, 28 P.3d 116, 127 (Cal. 2001) (citing *Analysis of Assembly Bill No. 75 Before the Senate Comm. on the Judiciary*, 1983-1984 Reg. Sess. 2-3, 7).

benefits, but expressly permitted suits based on improper selection of design alternatives.<sup>2</sup>

Section 1714.4 proved effective in holding off an onslaught of suits<sup>3</sup> and protecting the businesses that had lobbied for its passage.<sup>4</sup> Most recently, in *Merrill v. Navegar, Inc.*<sup>5</sup>—the third and last case to reach the appellate level, and the only one to reach the California Supreme Court since the statute's enactment—the California Supreme Court held that the Section 1714.4 not only prohibited strict product liability suits, but also prohibited actions based on a negligence theory, such as negligent distribution or marketing, on the basis that these actions necessarily relied on a risk/benefit analysis and thus fell within the statutory bar.<sup>6</sup>

In September 2002, in direct response to the *Merrill* decision, Section 1714.4 was repealed.<sup>7</sup> This comment predicts that the imminent flood of lawsuits against gun manufacturers in California in the wake of repeal will likely be successful, despite the consistent reluctance of courts in jurisdictions without immunity statutes to impose liability based on risks outweighing benefits (or on any other theory).<sup>8</sup> This prediction is founded on the current state

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2 CAL. CIV. CODE § 1714.4 (Deering 1994) (repealed 2002).

3 See, e.g., *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326 (9th Cir. 1986). The plaintiff's claim that the defendant's gun was "defectively designed because it [was] small, easily concealable, relatively inexpensive, and serves no useful social purpose" was rejected on the grounds that both Section 1714.4 and California common law precluded the imposition of strict product liability for a product that performed as it was intended. *Id.* at 1327. See also *Whitfield v. Heckler & Koch, Inc.*, 98 Cal. Rptr. 2d 820, 830 (Ct. App. 2000) (holding that "the Legislature intended to preclude both courts and juries from engaging in any type of risk-benefit analysis when it comes to the design of firearms or ammunition").

4 From 1974 until 1983, annual handgun sales in California averaged 270,014 units. Between 1984 and 2001, annual sales averaged 280,959 units. *Dealer's Record of Sale (Calendar Year Statistics)*, Office of the Attorney General, State of California, Department of Justice, available at <http://caag.state.ca.us/newsalerts/2002/02-024.htm> (last visited Feb. 19, 2003) [hereinafter *Dealer's Record of Sale*].

5 28 P.3d 116 (Cal. 2001).

6 *Id.* at 127.

7 S.B. 682, 2001–2002 Reg. Sess. (Cal. 2002). The bill also added language to California Civil Code Section 1714 (dealing with negligence, generally) to expressly permit negligence actions against gun manufacturers: "The design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section." CAL. CIV. CODE § 1714(a) (Deering Supp. 2003). See Jenifer Warren & Dan Morain, *Davis Signs More Curbs on Gun Makers*, L.A. TIMES, Sept. 26, 2002, Cal. Metro, at B8.

Recently proposed federal legislation, however, may effectively reinstate statutory immunity for gun manufacturers in California. H.R. 1036, 108th Cong. (2003). The proposed legislation, introduced primarily in response to municipal nuisance suits against gun manufacturers, provides a similar breadth of immunity to that previously provided by California Civil Code Section 1714.4. A significant difference is the inclusion of language expressly permitting negligent entrustment actions wherein "the seller knows or should know the person to whom the product is supplied is likely to use the product, and in fact does use the product, in a manner involving unreasonable risk of physical injury to the person and others." *Id.* § 4(5)(B). See also John Tierney, *A New Push to Grant Gun Industry Immunity from Suits*, N.Y. TIMES, Apr. 4, 2003, at A12.

8 See, e.g., *McCarthy v. Olin Corp.*, 119 F.3d 148, 157 (2d Cir. 1997); *Keene v. Sturm, Ruger & Co.*, 121 F. Supp. 2d 1063, 1069 (E.D. Tex. 2000); *Halliday v. Sturm, Ruger & Co.*,

of California product liability law, the apparent intent behind the enactment and repeal of Section 1714.4, and the comparative weight of risk and benefit evidence. In conclusion, this comment argues that the ability of juries to severely restrict the right of gun manufacturers to pursue a legal trade is not only compelled by law, but also morally justified in that the cost to society at large resulting from distribution of guns should be borne exclusively by those transacting in guns.

## II. GUN MANUFACTURER SUITS IN CALIFORNIA AFTER *MERRILL V. NAVEGAR, INC.* AND THE REPEAL OF SECTION 1714.4

### A. The Claim Rejected in the *Merrill* Opinion

In *Merrill*, the California Supreme Court addressed the issue of whether a plaintiff could sue a gun manufacturer for injuries sustained as a result of criminal misuse of its product.<sup>9</sup> The *Merrill* plaintiffs' claim was presented as one of "negligent distribution," i.e., that the defendant knew, or should have known, that selling its product—a semi-automatic "assault-type" pistol<sup>10</sup>—to the general public would likely result in harmful criminal misuse.<sup>11</sup> The Supreme Court held that this claim was directed at the inherent qualities of the product, and that because an assessment of risk versus benefit is essential to the determination of a duty in negligence, the claim was really a product liability design defect action of the type expressly barred by Section 1714.4.<sup>12</sup> Thus the Court disposed of the negligence claim as falling within the scope of the statute, and did not directly address the possible viability of the claim absent a statutory bar.

770 A.2d 1072, 1091–92 (Md. Ct. Spec. App. 2001), *cert. granted*, 778 A.2d 382 (Md. 2001), *aff'd*, 792 A.2d 1145 (Md. 2002); *Forni v. Ferguson*, 648 N.Y.S.2d 73, 73 (App. Div. 1996).

<sup>9</sup> 28 P.3d 116, 126 (Cal. 2001). The plaintiffs were relatives of victims of a shooting rampage by Gian Luigi Ferri that occurred in an office building in San Francisco. Ferri was armed with an Intratec TEC-9 (manufactured by Navegar) that he had purchased at a pawnshop in Nevada. While legally available in Nevada, the TEC-9 was not legally available for sale in California at that time. *Id.* at 119–20, 126.

<sup>10</sup> An "assault weapon" is defined by federal statute as:

(C) a semiautomatic pistol that has an ability to accept a detachable magazine and has at least 2 of [the following characteristics]—

- (i) an ammunition magazine that attaches to the pistol outside of the pistol grip;
- (ii) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer;
- (iii) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned;
- (iv) a manufactured weight of 50 ounces or more when the pistol is unloaded

18 U.S.C. § 921(a)(30)(C) (2000 & Supp. 2003). The statute's definition also encompasses any one of a number of listed models including the Intratec TEC-9 and TEC-DC9.

<sup>11</sup> *Merrill v. Navegar, Inc.*, 28 P.3d 116, 124 (Cal. 2001).

<sup>12</sup> *Id.* at 129–30.

## B. Other Jurisdictions' Rejection of Gun Manufacturer Suits

In light of other jurisdictions' decisions, it appears that even after the removal of the statutory immunity granted by Section 1714.4, there are significant obstacles facing plaintiffs who seek redress from gun manufacturers. Courts outside California have rejected lawsuits against gun manufacturers on the following bases: a gun (or ammunition) is not defective if it performs as intended,<sup>13</sup> the market assumes the risk of misuse of a known dangerous product,<sup>14</sup> gun manufacturers cannot be held liable in negligence as long as the product is legally available and functions as intended,<sup>15</sup> and the weighing of risks against benefits of guns is a task for the legislature, not the courts.<sup>16</sup>

The highest court of only one state has held a gun manufacturer liable for criminal misuse of its product.<sup>17</sup> Acknowledging contrary precedent, the Maryland Court of Appeals held, as a matter of public policy, that manufacturers of "Saturday Night Specials"<sup>18</sup> could be held strictly liable for criminal misuse of their product.<sup>19</sup> The Maryland ruling was short-lived, as it was overruled by statute only three years later,<sup>20</sup> and it seems to have had little impact on out-of-state sales, despite the potential under Ma-

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13 *Keene*, 121 F. Supp. 2d at 1066-67 (finding no risk/benefit test in Texas); *Halliday v. Sturm, Ruger & Co.*, 770 A.2d 1072, 1087-89 (Md. Ct. Spec. App. 2001), cert. granted, 778 A.2d 382 (Md. 2001), *aff'd*, 792 A.2d 1145 (Md. 2002) (holding no defect under either consumer expectation or risk/benefit theory when there is no malfunction).

14 *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661, 664 (Wash. Ct. App. 1988) (citing *Riordan v. Int'l Armament Corp.*, 477 N.E.2d 1293, 1295 (Ill. App. Ct. 1985)) (holding that there can be no liability for gun manufacturers when the general public "presumably can recognize the dangerous consequences in the use of handguns and can assume responsibility for their actions").

15 *McCarthy v. Olin Corp.*, 119 F.3d 148, 157 (2d Cir. 1997). The court held that "New York does not impose a duty upon a manufacturer to refrain from the lawful distribution of a non-defective product" despite foreseeability by manufacturer of misuse. *Id.* (quoting *Forni v. Ferguson*, 648 N.Y.S.2d 73, 74 (App. Div. 1996)).

16 *Forni v. Ferguson*, 648 N.Y.S.2d 73, 73 (App. Div. 1996) ("While there have been and will be countless debates over the issue of whether the risks of firearms outweigh their benefits, it is for Legislature to decide whether manufacture, sale and possession of firearms is legal.").

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

18 The Maryland Court of Appeals described "Saturday Night Specials" as "characterized by short barrels, light weight, easy concealability, low cost, use of cheap quality materials, poor manufacture, inaccuracy and unreliability . . . render[ing] the Saturday Night Special particularly attractive for criminal use and virtually useless for . . . legitimate purposes." *Kelley*, 497 A.2d at 1153-54.

19 *Id.* at 1159.

20 The Maryland statute states:

A person or entity may not be held strictly liable for damages of any kind resulting from injuries to another person sustained as the result of the criminal use of any firearm by a third person, unless the person or entity conspired with the third person to commit, or willfully aided, abetted, or caused the commission of the criminal act in which the firearm was used.

MD. CODE ANN., art. 27 § 36-I(h)(1) (*Michie 1996 & Supp. 2002*).

ryland's long-arm statute<sup>21</sup> for suits arising from shootings in the state involving guns manufactured or sold in other states.

### C. The Continued Relevance of the *Merrill* Holding

Although negligence and strict product liability suits against gun manufacturers have been largely unsuccessful outside California,<sup>22</sup> this does not necessarily mean that California state courts will now follow other jurisdictions and reject claims based on risk/benefit. There may be compelling reasons why California *should* allow such claims. Before dismissing *Merrill* as “bad law” overruled by the repeal of Section 1714.4, one should examine some of the language in the holding of that case. Writing for the majority, Justice Chin stated:

[T]he availability of [risk/benefit based] negligence liability would effectively render Section 1714.4 useless. As the Court of Appeal majority observed, “the risk of harm from the criminal misuse of firearms is always present in a society such as ours, in which the presence of firearms is fairly widespread and many individuals possess the capacity to criminally misuse them.” Thus, virtually every person suing for injuries from firearm use could offer evidence the manufacturer knew or should have known the risk of making its firearm available to the public outweighed the benefits of that conduct, and could therefore raise a triable issue of fact for the jury. In each of these cases, the jury would be asked to do precisely what section 1714.4 prohibits: weigh the risks and benefits of a particular firearm. The result would be to resurrect the very type of lawsuit the Legislature passed section 1714.4 to foreclose, in which the plaintiffs “asserted that the availability of ‘Saturday Night Special’ handguns to the general public cause[d] widespread damage and severe harm without conferring any substantial social benefit.”<sup>23</sup>

The above passage strongly suggests that without Section 1714.4, California courts would be compelled to entertain risk/benefit lawsuits against gun manufacturers. The following language from the *Merrill* opinion further strengthens the implication that Section 1714.4 was the *only* reason for rejecting risk/benefit claims:

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21 The Maryland long-arm statute states:

A court may exercise personal jurisdiction over a person, who directly or by an agent . . . [c]auses tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State.

Md. CODE ANN., CTS. & JUD. PROC. § 6-103(b) (Michie 2002).

22 See cases cited *supra* notes 8, 14.

23 *Merrill v. Navegar, Inc.*, 28 P.3d 116, 129–30 (Cal. 2001) (alteration in original).

Because the Legislature, in section 1714.4, has precluded a weighing of the risks and benefits of selling a firearm to the general public in determining whether the firearm is defective, we conclude that neither a court nor a jury may undertake this same task simply because a plaintiff alleges and offers evidence the manufacturer knew or should have known the risks outweighed the benefits.<sup>24</sup>

Should other grounds exist under California law, one would expect the Court to have mentioned them at some point in its fourteen-page opinion, in order to prevent unnecessary litigation in the event that section 1714.4 would one day be repealed.<sup>25</sup>

California courts will now be forced to either devise other grounds for rejection, despite the conspicuous lack of guidance from the *Merrill* opinion (or any other binding California precedent),<sup>26</sup> or to accommodate an imminent barrage of risk/benefit lawsuits.

#### D. Future Scenarios for Gun Manufacturer Lawsuits in California

##### 1. The New York Approach

Under New York product liability law, a product is defective when it is sold in a condition not reasonably contemplated by the ultimate consumer,<sup>27</sup> and when its utility is outweighed by the danger inherent in placing it into the stream of commerce.<sup>28</sup> In a recent case involving a suit against manufacturers of "hollow-point" ammunition, the United States Court of Appeals for the Second Circuit in *McCarthy v. Olin Corp.*<sup>29</sup> (applying New York common law) declared that a product which performs its intended function—in the case of guns or ammunition, to seriously wound—simply cannot be described as defectively designed.<sup>30</sup> This is the doctrinal trap that the *Merrill* plaintiffs sought to

<sup>24</sup> *Id.* at 130 (footnote omitted).

<sup>25</sup> The Ninth Circuit and the California Court of Appeal have each stated that absent the statutory bar imposed by Section 1714.4, risk/benefit claims would nonetheless be precluded by existing common law. *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326, 1327 (9th Cir. 1986); *Whitfield v. Heckler & Koch, Inc.*, 98 Cal. Rptr. 2d 820, 829–30 (Ct. App. 2000). The Supreme Court was presumably aware of these opinions (both predating *Merrill*), yet declined to follow a similar tack.

<sup>26</sup> See cases cited *supra* note 3. A possible exception is the Ninth Circuit's opinion in *Moore*. In *Moore*, the Ninth Circuit held that a handgun that performs as "intended" cannot be found to be defective under California products liability common law. *Moore*, 789 F.2d at 1327. It is noteworthy that *Moore* is not cited in the California Supreme Court's *Merrill* opinion.

<sup>27</sup> *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 403 N.E.2d 440, 443 (N.Y. 1980).

<sup>28</sup> *Id.*

<sup>29</sup> 119 F.3d 148 (2d Cir. 1997).

<sup>30</sup> *Id.* at 155 (holding that "the primary function of the Black Talon bullets [used by "Long Island Railroad Killer" Colin Ferguson] was to kill or cause serious injury").

avoid by couching their claim in terms of negligence.<sup>31</sup> Under a “negligent distribution” approach, the claim is directed toward the defendant’s conduct in making a non-defective, yet potentially harmful product available to a market that would likely misuse it.<sup>32</sup> The California Supreme Court, however, held that this claim was merely a product liability defect claim “in disguise” and that the focus remained on the product, not the defendants’ conduct, despite the allegation being framed in terms of negligence.<sup>33</sup>

If California courts, post-repeal, continue to hold that a negligent distribution claim is simply a disguised design defect claim, such a claim would face a sturdy barrier should the courts ignore the implications of the *Merrill* holding and choose instead to follow the New York approach of refusing to find a defect in a product that performs its intended function.

## 2. California’s Two-Part Barker Test as Applied to Firearms

### a. Consumer Expectation and Safer Alternative Design

The New York approach is similar to the disjunctive two-part *Barker* test used in California,<sup>34</sup> which states that a product is defectively designed if it “fail[s] to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner” (the “consumer expectation” test), or if the benefits of the design are outweighed by the risk of inherent danger (the “risk/benefit” test).<sup>35</sup> The consumer expectation test has yet to be considered by the California Supreme Court in relation to gun manufacturers.<sup>36</sup> The plaintiffs in *Merrill* expressly avoided application of the consumer expectation test, apparently in an attempt to keep the focus of their claim on the defendant’s conduct and away from defects generally.<sup>37</sup>

Although a consumer expectation defect claim was not expressly barred by Section 1714.4,<sup>38</sup> such a claim would likely have been futile, especially in light of the persuasive weight of the Sec-

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<sup>31</sup> See *Merrill v. Navegar, Inc.*, 28 P.3d 116, 126 (noting that “contrary to the view of plaintiffs and the dissent,” they could not avoid § 1714.4, “simply by reformulating their claim as one for negligent distribution to the general public”).

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

<sup>33</sup> *Id.*

<sup>34</sup> *Barker v. Lull Eng’g Co.*, 573 P.2d 443, 457–58 (Cal. 1978).

<sup>35</sup> *Id.*

<sup>36</sup> *But see* *Whitfield v. Heckler & Koch, Inc.*, 98 Cal. Rptr. 2d 820, 829 (Ct. App. 2000) (describing the defendant-manufacturer’s HK .308 assault weapon as a non-defective “well-made gun”).

<sup>37</sup> *Merrill*, 28 P.3d at 124.

<sup>38</sup> The Statute excludes “a products liability cause of action based upon the improper selection of design alternatives.” CAL. CIV. CODE § 1714.4(c) (Deering 1994) (repealed 2002).

ond Circuit's decision in *McCarthy*.<sup>39</sup> Post-repeal, the outlook for consumer expectation claims in California remains grim.

California courts, like those in New York, require that when using the consumer expectation test, a plaintiff show the availability of a feasible alternative design that would accomplish the purpose of the product in a safe manner.<sup>40</sup> In the context of firearms, this requirement raises a logical hurdle: What safer way *is* there to design a product intended to maim and kill? (Assuming, as courts have, that guns *are* intended for that purpose.) Despite the New York courts' reference to a product's "function,"<sup>41</sup> and the California courts' reference to "use" or "purpose,"<sup>42</sup> neither jurisdiction has attempted to form any semantic distinction between the various terms. Although such a distinction might seem crucial to an assessment of the validity of alternative designs, courts in both jurisdictions have looked solely at the product's ability to perform its basic mechanical function.<sup>43</sup>

Justice Calabresi, dissenting in *McCarthy*,<sup>44</sup> suggested that a safer alternative design for Black Talon bullets would be to remove the talons,<sup>45</sup> thereby removing the product's propensity to cause massive internal damage while retaining its ability to incapacitate a human target.<sup>46</sup> Although Justice Calabresi rejected the notion that a weapon's function is to cause the maximum amount of bodily injury,<sup>47</sup> he did not consider that the broader intended purpose of many weapons is to provide a reliable means of self-defense.

<sup>39</sup> 119 F.3d 148, 155 (2d Cir. 1997).

<sup>40</sup> *Baker v. Chrysler Corp.*, 127 Cal. Rptr. 745, 749 (Ct. App. 1976); *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204, 208 (N.Y. 1983).

<sup>41</sup> *See, e.g., McCarthy*, 119 F.3d at 155.

<sup>42</sup> *See, e.g., Baker*, 127 Cal. Rptr. at 748.

<sup>43</sup> *See, e.g., McCarthy*, 119 F.3d at 155 ("[T]he primary function of . . . Black Talon bullets was to kill or cause serious injury. There is no reason to search for an alternative safer design where the product's sole utility is to kill and maim."); *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326, 1327 (9th Cir. 1986) (criminally used handgun "performed as it was intended"). *But cf. Sindell v. Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980) (prescription drug's intended purpose was to prevent miscarriage); *Pike v. Frank G. Hough Co.*, 467 P.2d 229, 236 (Cal. 1970) (heavy machinery that could not be safely reversed without additional mirrors was "unreasonably dangerous for its intended use"). The distinction between function and purpose is not always an easy one. Consider a high-fashion shoe equipped with a large metal spike protruding from the toe. It may perform its *function* by clothing the foot, but if its *purpose* is to facilitate comfortable walking, it may fail miserably. Such a shoe might also pose a threat to third parties if it were to become popular amongst violent youths as a foot-borne weapon. As long as California courts continue to confuse purpose with function, any potential harm to the consumer or others would not render the product defective, no matter how foreseeable the harm, as long as the shoe effectively performs its intrinsic function of clothing the foot.

<sup>44</sup> *McCarthy*, 119 F.3d at 157 (Calabresi, J., dissenting).

<sup>45</sup> *Id.* at 173. The "talons" are six spikes on a bullet that extend 90 degrees upon impact. *Id.* at 152.

<sup>46</sup> *Id.* at 152 (giving a graphic description of the Black Talons' effects).

<sup>47</sup> *Id.* at 173 (Calabresi, J., dissenting).

The most effective weapon for the task of self-defense would seem to be a weapon capable of concealment, portability, and lethality.<sup>48</sup> It is quite likely, however, that it is exactly these qualities of guns that contribute to their collective negative effect on public health. Thus, the distinction between function and purpose becomes significant when one considers the contribution that the lethality of guns sold and purchased for the intended purpose of self-defense makes to the number of homicides and suicides in the United States.<sup>49</sup> When effective achievement of an intended use or purpose is looked at in this light, the better a gun performs its *function* of propelling bullets with lethal speed and accuracy; the less it achieves its intended *purpose* of providing a reliable means of preserving human lives. One commentator has suggested that a safer alternative design for a gun intended for self-defense would be one whereby the gun delivers a non-lethal, yet fully incapacitating stun.<sup>50</sup> Whether or not such a design is technically feasible, a simpler and even more radical alternative design is readily available to gun manufacturers—a gun that can only fire blanks. When one considers that for every time a gun is used to justifiably kill an assailant, a gun is used in over forty non-legitimate killings,<sup>51</sup> then a gun that fires only blanks would easily contribute more toward the goal of life preservation than one that fires traditional live ammunition. The problem with these examples is that they attempt to propose the next best thing to no gun at all, while at the same time proposing something that can still (barely) be described as a gun and thus meet the requirement of alleging that a feasible safer design exists. Such a problem would not arise were the purpose of guns not the complete opposite of their effect.

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48 Forty-six percent of gun owners (and three-quarters of those owning only a handgun) surveyed in 1994 possessed a gun primarily for protection against crime. Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, U.S. Department of Justice, National Institute of Justice: Research in Brief, at 3 (May 1997), available at <http://www.ncjrs.org/pdffiles/165476.pdf>.

49 See *About Four in Ten Americans Report Owning a Gun*, The Gallup Organization (Oct. 5, 2000), available at <http://www.gallup.com/poll/releases/pr001005.asp> [hereinafter Gallup Poll] (reporting that thirty-nine percent of Americans surveyed believed that having a gun in the house makes their home safer). However, the reality is somewhat different. See Arthur L. Kellermann, *Injuries and Deaths Due to Firearms in the Home*, 45 J. OF TRAUMA 263, 263–67 (August, 1998) (“The number of unintentional shootings, criminal assaults, and suicide attempts involving a gun kept in the home exceeded the number of self-defense and legally justifiable shootings by a ratio of 22 to 1.”); Arthur L. Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 N. ENG. J. MED. 1084, 1087–88 (1993) (stating that a gun in the home substantially increases the likelihood of intra-familial homicide).

50 Carl T. Bogus, *Gun Litigation and Societal Values*, 32 CONN. L. REV. 1353, 1377 (2000).

51 See *Firearm Violence in California: Fact Sheet*, Physicians for Social Responsibility Los Angeles, available at <http://www.psrila.org/FS-California.htm> (last visited Apr. 17, 2003) [hereinafter *California Fact Sheet*] (citing California Department of Health Services, 2002) (2000 figures for California).

The likelihood that California courts will avoid the conceptual conundrum of function versus purpose by refusing to extend the definition of a gun's purpose beyond firing live ammunition need not render a defect claim futile. Under California law, a product liability claim may proceed on a risk/benefit theory alone.<sup>52</sup>

### b. Risk/Benefit

Under risk/benefit prong of the *Barker* test, a product is defectively designed if the benefits of its design are outweighed by the risk of inherent danger, even when the product's design meets ordinary consumer expectations.<sup>53</sup> The California risk/benefit test differs from the New York test in that there is no requirement in California that the plaintiff show there is "something wrong" with the product before proceeding with a risk/benefit challenge.<sup>54</sup> The plaintiffs in *Merrill* might well have succeeded under California law with a risk/benefit product defect claim, but they were forced by the "products liability" limitation of Section 1714.4 to direct their claim toward the defendants' conduct and to characterize it as one of negligent distribution.<sup>55</sup>

## 3. Negligence as Applied to the Manufacture and Sale of Firearms

### a. Negligent Entrustment

Justice Werdegar, the lone dissenter in *Merrill*, noted that the plaintiffs' negligent distribution claim closely resembled the more traditional doctrine of negligent entrustment.<sup>56</sup> Typically, a claim for negligent entrustment lies when a defendant sells, or otherwise transfers, a non-defective product or instrumentality to a person who could reasonably be foreseen to use that item in a harmful manner.<sup>57</sup> In the context of gun sales, this doctrine has been applied to sales to discernibly drunk or psychotic customers.<sup>58</sup> Negligent entrustment has also been applied to sales of a product to entire classes of customers, such as selling slingshots to

52 *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 457-58 (Cal. 1978).

53 *Id.*; *Cavers v. Cushman Motor Sales, Inc.*, 157 Cal. Rptr. 142, 148 (Ct. App. 1979).

54 *See McCarthy v. Olin Corp.*, 119 F.3d 148, 155 (2d Cir. 1997) (quoting *Addison v. Williams*, 546 So. 2d 220, 224 (La. Ct. App. 1989)).

55 *See Merrill v. Navegar, Inc.*, 28 P.3d 116, 124 (Cal. 2001).

56 *Id.* at 134 (Werdegar, J., dissenting).

57 *See Jacques v. United Merch. Corp.*, 11 Cal. Rptr. 2d 468, 486 (Ct. App. 1992).

58 *See, e.g., Knight v. Wal-Mart Stores, Inc.*, 889 F. Supp. 1532, 1539 (S.D. Ga. 1995) (holding there is a duty not to sell to a mentally defective person); *Cullum & Boren-McCain Mall, Inc. v. Peacock*, 592 S.W.2d 442, 444 (Ark. 1980) (holding there was sufficient evidence for a negligence claim where a buyer acted strangely and wanted a gun that "would make a big hole"); *Phillips v. Roy*, 431 So. 2d 849, 852 (La. Ct. App. 1983) (holding there is a duty not to sell to a person "manifesting signs of instability"); *Bernethy v. Walt Failor's, Inc.*, 653 P.2d 280, 283 (Wash. 1982) (en banc) (holding there is a duty not to sell to an intoxicated person).

children.<sup>59</sup> Justice Werdegar suggested that the entire gun-buying public would be a patently unfit customer class for certain types of firearms.<sup>60</sup> This analysis is very similar to the *Merrill* plaintiffs' characterization of their negligent distribution claim, except that it directs the focus even further away from the product's inherent danger, and more toward the relationship between the seller's conduct and the ultimate use of the product by the consumer. Such a claim, if framed carefully, might succeed before a California court, if only for selected classes of guns.

#### b. Risk/Benefit in Negligence

In the wake of section 1714.4's repeal, the distinction between a strict liability product defect claim and a negligence claim is largely moot. California, like many other states, incorporates its own version of the well-known "Hand Formula"<sup>61</sup> into its test for a duty in negligence.<sup>62</sup> This test weighs the risk of harm, or more accurately, the likelihood of harm multiplied by the severity of the harm, against the burden of preventing the harm.<sup>63</sup> This balancing test differs from the risk/benefit test used in product liability defect cases only in that the potential harm (or cost of compensation) is weighed against the cost of prevention of harm, rather than the value to society of the harmful product or activity. The similarity of the evidentiary requirements of both tests was noted in the *Merrill* opinion and used to bolster the Court's holding that a negligence claim necessarily employs risk/benefit analysis.<sup>64</sup>

#### 4. Weighing Risk of Guns Versus Benefit of Guns

Whether or not a claim is framed in negligence or in strict product liability, the risk/benefit analysis is essentially the same; if the benefit of a product to society is outweighed by the risk of harm to society, then the product is defectively designed (or, in the case of negligent distribution, the product has been negligently placed on the market).<sup>65</sup> Measuring risk versus benefit is seemingly straightforward in the context of firearms. If it were a mat-

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<sup>59</sup> See *Moning v. Alfonso*, 254 N.W.2d 759, 769-70 (Mich. 1977) (holding that the manufacturer and distributor of a slingshot could be held negligent for marketing a slingshot directly to children). *But see* *Bojorquez v. House of Toys, Inc.*, 133 Cal. Rptr. 483, 484 (Ct. App. 1976) (holding that there was no duty to refrain from selling slingshots to children, as the use of slingshots by children had been socially acceptable "since Old Testament times").

<sup>60</sup> *Merrill*, 28 P.3d at 149 (Werdegar, J., dissenting).

<sup>61</sup> *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). The "Hand Formula" is named after the author of the *Carroll Towing* opinion, Justice Learned Hand.

<sup>62</sup> See *Pike v. Frank G. Hough Co.*, 467 P.2d 229, 232 (Cal. 1970).

<sup>63</sup> See *Carroll Towing*, 159 F.2d at 173.

<sup>64</sup> *Merrill*, 28 P.3d at 125.

<sup>65</sup> See *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 457-58 (Cal. 1978); *Pike*, 467 P.2d at 232.

ter of counting the number of lives saved by guns and comparing that to the number of unjustifiable deaths involving guns, then as a product class, guns would almost certainly fail the risk/benefit test.<sup>66</sup>

While it is tempting to stay with a lives saved versus deaths caused tally, the application of the risk/benefit test to firearms is, in actuality, somewhat more complex and harder to measure. For example, much of the self-defense benefit derived from gun ownership might arise from the mere possession of guns, as opposed to their actual discharge during a confrontation. One recent study conducted by Professors John Lott and David Mustard (“Lott/Mustard study”) has suggested that the prevalence of gun ownership—and the accompanying likelihood that a potential crime victim may possess a gun—deters a significant amount of potentially violent confrontations.<sup>67</sup> Because the study’s conclusion relies on abstract, unrealized benefits—i.e., the potential reduction in crime through increased defensive gun use, it is unlikely that it would fare well in a statistical duel against stark figures of deaths actually caused by guns.<sup>68</sup>

Despite the repeated disavowal by federal courts of a Second Amendment right to personal gun ownership,<sup>69</sup> California courts may still be loath to inhibit what many citizens nonetheless perceive to be a fundamental constitutional right.<sup>70</sup> The deeply ingrained feeling of communal empowerment among American gun owners might then provide another, albeit unquantifiable, factor to add to the benefit side of the formula.<sup>71</sup>

A trial based on litigation of risk versus benefit as factual issues would ultimately turn on the strength of statistical evidence. The few reported justifiable lethal uses of guns,<sup>72</sup> together with unreported uses of guns in self-defense and the academic guess-

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<sup>66</sup> There were seventy-three justified gun-related killings versus 3,019 gun-related suicides, homicides, and unintentional deaths in California during 2000. *California Fact Sheet*, *supra* note 51.

<sup>67</sup> John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997).

<sup>68</sup> According to some critics in academia, another weakness of the Lott/Mustard study might be its flawed methodology. See, e.g., Dan A. Black & Daniel S. Nagin, *Do Right-to-Carry Laws Deter Violent Crime?*, 27 J. LEGAL STUD. 209 (1998).

<sup>69</sup> See *Silveira v. Lockyer*, 312 F.3d 1052, 1092–93 (9th Cir. 2003) (holding that the Second Amendment of the United States Constitution does not guarantee an individual right to possess firearms); *Olympic Arms v. Buckles*, 301 F.3d 384, 388–89 (6th Cir. 2002) (refusing to recognize a fundamental right to individual gun ownership or manufacture).

<sup>70</sup> In a 2002 ABCNEWS.com poll, seventy-three percent of respondents who heard the Second Amendment recited verbatim said it guarantees the right to individual gun ownership. Daniel Merkle, *America: It's Our Right to Bear Arms*, ABCNEWS.com (May 14, 2002), at [http://abcnews.go.com/sections/us/DailyNews/guns\\_poll020514.html](http://abcnews.go.com/sections/us/DailyNews/guns_poll020514.html) [hereinafter ABCNEWS.com poll].

<sup>71</sup> Thirty-nine percent of Americans surveyed in 2000 believed that having a gun in the house made the house safer. See Gallup Poll, *supra* note 49.

<sup>72</sup> See *California Fact Sheet*, *supra* note 51.

work of the Lott/Mustard study,<sup>73</sup> would be pitted against copious, reliable evidence showing the huge volume of homicides, suicides, injuries, and accidental deaths attributable to the misuse of legally purchased firearms.<sup>74</sup>

The availability of other weapons (such as knives) to potential assailants necessitates a downward adjustment of gross firearm casualty figures to allow for those deaths and injuries that would still have occurred absent an available gun.<sup>75</sup> Assuming that knives are second in lethality to guns, and that they have a lethality rate approximately one fifth that of guns (not allowing for physical disparities between assailants and victims—a factor largely irrelevant to guns),<sup>76</sup> the annual homicide toll in California attributable to guns can be reduced to a net figure of 1,182, around eighty percent of the 1,478 gross reported gun-related homicides.<sup>77</sup> Therefore, the removal of guns would ultimately appear to prevent over 1,000 homicides annually in California.<sup>78</sup>

The Lott/Mustard study found that homicide rates fell by an average of 8.5 percent in states that legalized concealed handguns.<sup>79</sup> From this, it follows that, in a state such as California, which currently has strict concealed handgun laws, greater access to guns in the community would reduce the total annual number of homicides from 2,074<sup>80</sup> to 1,898, and the number of firearm homicides from 1,478<sup>81</sup> to 1,352.<sup>82</sup>

The findings of the Lott/Mustard study were distilled into a popular book entitled *More Guns, Less Crime*.<sup>83</sup> Any truth in that book's title is diminished by the statistical evidence that no guns

<sup>73</sup> Lott & Mustard, *supra* note 67.

<sup>74</sup> See *California Fact Sheet*, *supra* note 51. In 2000, firearms killed 3,092 people in California. Of these deaths, 1,488 were suicides, 1,478 were homicides, 53 were unintentional, and 73 were legally justified or undetermined. *Id.*

<sup>75</sup> See, e.g., Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 U. CIN. L. REV. 1103, 1114–15 (1991).

<sup>76</sup> *Id.* (citing NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE TASK FORCE, FIREARMS AND VIOLENCE IN AMERICAN LIFE 41 (1969)).

<sup>77</sup> This reduction ignores the implausibility of drive-by knifings replacing drive-by shootings.

<sup>78</sup> The net amount of lives saved by removal of guns and the net amount of lives unjustifiably lost to guns can both arguably be adjusted downward on the assumption that the few annual justifiable gun killings would be replaced by an equivalent number of unjustifiable homicides if a gun were not available to perform each justifiable killing.

<sup>79</sup> John R. Lott, Jr., *Rule of Law: More Guns, Less Violent Crime*, WALL ST. J., Aug. 28, 1996, at A13. See also Lott & Mustard, *supra* note 67.

<sup>80</sup> This number is based on figures for 2000 from the Office of the Attorney General, State of California, Department of Justice. *California Crime Index Crimes Cleared, 1996–2001*, Office of the Attorney General, State of California, Department of Justice, available at <http://caag.state.ca.us/cjsc/publications/candd/cd01/tabs/cd0115.pdf> (last visited Apr. 17, 2003).

<sup>81</sup> *California Fact Sheet*, *supra* note 51.

<sup>82</sup> Assuming that an increase in concealed firearms would reduce all types of potential homicides in equal proportion.

<sup>83</sup> JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME* (Univ. of Chicago Press 1998).

equals roughly six times less crime than more guns.<sup>84</sup> Professors Lott and Mustard's argument is therefore not an argument in favor of the use of guns, but an argument in mitigation of the harm caused by guns.

Despite the speculative nature of calculating the amount of suicides that would not occur absent a readily available firearm, a study by the *New England Journal of Medicine* ("NEJM") determined that the presence of a gun in the home increased the risk of suicide approximately fivefold.<sup>85</sup> This finding supports the common-sense belief that because almost all non-gun suicide attempts require a longer interval between inception of the suicidal notion and completion of the act, removal of guns would reduce deaths by facilitating greater opportunities for reconsideration by the potential victim and intervention by third parties. In 2000, there were 2,969 suicides reported in California.<sup>86</sup> In 1,488 of these, a firearm was used.<sup>87</sup> Using the NEJM figures, the removal of guns from Californian households would therefore reduce the number of gun-related suicides by eighty percent, from 1,488 to 298, and the total number of suicides from 2,969 to 1,779,<sup>88</sup> leaving a net annual suicide toll attributable to guns of 1,190.

In 2000, there were fifty-three deaths in California attributable to accidental or unintentional shootings.<sup>89</sup> Despite the Lott/Mustard study's somewhat inexplicable finding that accidental gun deaths were lower in jurisdictions with liberal concealed gun laws,<sup>90</sup> it is unreasonable to assume that the removal of guns would do anything but completely eliminate deaths caused by accidental discharge of a gun.

Based on the above figures, the removal of guns from Californian society would prevent 2,425 unjustified deaths annually,<sup>91</sup> while current levels of gun ownership in California would prevent

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<sup>84</sup> Specifically, six times less non-legitimate gun-related deaths (based on more guns reducing gross annual homicide by 8.5 percent, and the removal of guns reducing gross gun-related homicide by eighty percent). See *supra* notes 75–79 and accompanying text.

<sup>85</sup> Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 N. ENG. J. MED. 467, 470 (1992). It is unclear whether this study accounts for guns purchased after the inception of the suicidal notion. The presence of those guns purchased specifically for the purpose of committing suicide would contribute to the total number of suicides only by increased lethality, not by ready availability. Another study found that as few as ten percent of firearm suicides were committed using a firearm purchased specifically for the act. Myron Boor, *Methods of Suicide and Implications for Suicide Prevention*, 37 J. CLINICAL PSYCHOL. 70, 74 (1981).

<sup>86</sup> John L. McIntosh, *Rate, Number, and Ranking of Suicide for Each U.S.A. State, 2000*, American Association of Suicidology, available at <http://www.suicidology.org/associations/1045/files/2000statepg.pdf> (last visited Apr. 17, 2003).

<sup>87</sup> *California Fact Sheet*, *supra* note 51.

<sup>88</sup> See Kellermann et al., *supra* note 85, at 469.

<sup>89</sup> *California Fact Sheet*, *supra* note 51.

<sup>90</sup> Lott & Mustard, *supra* note 67, at 64.

<sup>91</sup> If the combined net total of homicides, suicides, and accidental deaths attributable to guns is adjusted downward on the assumption that without guns, the seventy-three re-

only seventy-three,<sup>92</sup> rising to 249 prevented deaths (according to Professors Lott and Mustard) if concealed permit laws were liberalized.<sup>93</sup>

One offset to the economic harm to society caused by guns is based on the questionable observation that many homicide victims are habitual criminals, and/or welfare recipients, and would be a burden to society if they were to have continued living.<sup>94</sup> Even if this were true, it is likely that a jury would treat such evidence of economic offset as morally repugnant.

As complex as the factual issues are when it comes to measuring the risk versus the benefit of guns in society, a jury is ultimately left with the task of measuring the massive death toll attributable to firearms on the risk side, against the few reported uses of guns in self-defense, the arguable deterrent effect of undischarged guns, and the unquantifiable worth of guns for recreation on the benefit side.

Suits against gun manufacturers have largely been directed at the misuse of guns and ammunition that have a higher than average potential for lethality, for example, the Intratec TEC-9 semi-automatic "assault-type pistols,"<sup>95</sup> "Black Talon bullets,"<sup>96</sup> "Saturday night specials,"<sup>97</sup> etc. If liability is to be based on risk/benefit alone, the distinction is merely one of degree. While the ratio of risk to benefit may vary considerably across the broad spectrum of legally available firearms, it is unlikely that even the most benign class of firearm could tip the risk/benefit scales in its favor. Notwithstanding the Intratec TEC-9 and other excessively lethal weaponry, many guns have at least some potential for legitimate use. But the fact remains that the potential for self-defense is realized in minuscule proportion to the frequency of misuse,<sup>98</sup> leaving the overwhelming burden of outweighing the cost of thousands of unjustified killings almost entirely upon recreational use. The only realistic defenses to gun manufacturer suits in Cali-

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ported justifiable gun deaths would have been replaced by an equivalent amount of unjustifiable deaths, then 2,352 deaths would result. See *supra* note 78.

<sup>92</sup> *California Fact Sheet*, *supra* note 51. This figure is based on the assumption that the seventy-three reported justifiable gun deaths prevented an equivalent amount of unjustifiable deaths.

<sup>93</sup> Lott & Mustard, *supra* note 67.

<sup>94</sup> JOSH SUGARMANN, EVERY HANDGUN IS AIMED AT YOU 160-61 (2001). See also Paul H. Blackman, *The Federal Factoid Factory on Firearms and Violence: A Review of CDC Research and Politics* (paper presented at the annual meeting of the Academy of Criminal Justice Sciences, Chicago, Ill., March 1994), available at [http://www.saf.org/journal/7\\_factoid.html](http://www.saf.org/journal/7_factoid.html) (last visited Apr. 17, 2003).

<sup>95</sup> *Merrill v. Navegar, Inc.*, 28 P.3d 116, 119 (Cal. 2001).

<sup>96</sup> *McCarthy v. Olin Corp.*, 119 F.3d 148, 151 (2d Cir. 1997).

<sup>97</sup> *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326, 1327 (9th Cir. 1986); *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1146 (Md. 1985).

<sup>98</sup> See *California Fact Sheet*, *supra* note 51. See also *supra* note 66.

fornia, therefore, lie outside of risk/benefit analysis in the unpredictable world of public policy.

## E. Public Policy Against Gun Manufacturer Liability

### 1. Deference to the Legislature

The courts of more than one state have rejected the application of risk/benefit analysis in gun cases in deference to legislative judgment on the societal value of firearms, even when that judgment is presumed from silence.<sup>99</sup> The notion that the absence of prohibitive legislation supercedes a judicial determination of negative net social utility will always remain attractive to courts that are unwilling to apply precedent that conflicts with a deeply ingrained social acceptance of a product that is nonetheless patently dangerous.

The California Legislature, however, has *not* been silent on the issue of regulation of gun sales, whether by state courts or by local governments. The Legislature has made its position clear by an affirmative legislative action—the repeal of a statute expressly prohibiting risk/benefit product liability actions against gun manufacturers.<sup>100</sup> This in itself should be sufficient evidence that the Legislature approves of civil suits against gun manufacturers based on risk/benefit theories. Any attempt to replace Section 1714.4 with a statute expressly allowing risk/benefit suits against gun manufacturers would be unnecessary, as those suits will presumably be treated the same as those against any other manufacturer.

Furthermore, in *California Rifle & Pistol Ass'n v. City of West Hollywood*,<sup>101</sup> the California Court of Appeal held that statutes governing licensing, permit issuance, and registration of guns showed intent by the Legislature to regulate only those fields, and not the field of gun sales.<sup>102</sup> Therefore, because the Legislature has abdicated the role of regulating gun sales and limiting liability of gun manufacturers, California courts are not only free to decide the issue of gun manufacturers' liability without deference to the Legislature, but are obligated to do so—even if it would indirectly result in a *de facto* state-wide ban on gun sales.

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<sup>99</sup> See, e.g., *Forni v. Ferguson*, 648 N.Y.S.2d 73, 73 (App. Div. 1996) (“While there have been and will be countless debates over the issue of whether the risks of firearms outweigh their benefits, it is for Legislature to decide whether manufacture, sale and possession of firearms is legal.”).

<sup>100</sup> S.B. 682, 2001–2002 Reg. Sess. (Cal. 2002) (repealing CAL. CIV. CODE § 1714.4).

<sup>101</sup> 78 Cal. Rptr. 2d 591 (Ct. App. 1998).

<sup>102</sup> *Id.* at 605.

## 2. Assumption of Risk by the Market

The Washington Court of Appeal, in *Knott v. Liberty Jewelry & Loan, Inc.*,<sup>103</sup> held that gun manufacturers could not be held liable when the general public “presumably can recognize the dangerous consequences in the use of handguns and can assume responsibility for their actions.”<sup>104</sup> This policy-based imposition of an assumption of risk defense ignores the fact that most plaintiffs seeking redress for gun-related injuries are not consumers. This begs the question: For what actions should these victims take responsibility?

## 3. Criminal Intervention Abrogates Duty

It is unlikely that California courts will consider criminal misuse to be an intervening act that abrogates the duty of a gun manufacturer to avoid distribution to a class of customers, most of whom show no signs of intent to misuse the product. Typically, a defendant has no duty to prevent harm to the plaintiff by a third party absent a “special relationship” between the plaintiff and the defendant.<sup>105</sup> But in the case of gun manufacture and distribution, it is not nonfeasance, but active misfeasance—the distribution of a product to a class of consumer that collectively carries a substantial risk of criminal misuse—that creates the risk of danger to the plaintiff.<sup>106</sup> Thus, the link between the plaintiff’s injuries and the defendant’s affirmative conduct remains unbroken by foreseeable criminal misuse. The weight and availability of statistical evidence showing the volume of crimes (and other misuse) committed using legally purchased guns<sup>107</sup> easily refutes any claim by a manufacturer-defendant that such acts by a consumer (or foreseeable transferee) are unforeseeable. In fact, any seller of firearms having a basic familiarity with the relevant statistics should know that every gun he sells has a roughly 1 in 160 chance of being used in the commission of an unjustified killing.<sup>108</sup>

103 748 P.2d 661 (Wash. Ct. App. 1988).

104 *Id.* at 664 (quoting *Riordan v. Int’l Armament Corp.*, 477 N.E.2d 1293 (Ill. App. Ct. 1985)).

105 RESTATEMENT (SECOND) OF TORTS § 315 (1965). Section 315 states:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

*Id.*

106 See *Merrill v. Navegar, Inc.*, 28 P.3d 116, 143 (Cal. 2001) (Werdegar, J., dissenting).

107 See *California Fact Sheet*, *supra* note 51.

108 No figures are available for the amount of guns currently in circulation in California. A somewhat reliable estimate can be made, however, based on an extensive national survey conducted in 1994, which found that approximately 192 million guns were in circulation nationwide at that time. Cook & Ludwig, *supra* note 48, at 1. In 1994, there were

### III. THE PROPRIETY OF JUDICIAL REGULATION OF FIREARM SALES

#### A. The Economic Effect on the Industry

If California courts were to allow risk/benefit lawsuits against gun manufacturers, the flood of litigation might well be brief, when one considers how many lawsuits the gun industry can afford to lose. In 2000, over three thousand lives were lost in California as a result of non-legitimate gun use.<sup>109</sup> Under the California long-arm statute,<sup>110</sup> and constitutional personal jurisdiction jurisprudence,<sup>111</sup> victims of gun violence in California may sue in California, under California law, no matter where the gun was manufactured or sold,<sup>112</sup> provided that the gun manufacturer

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38,505 firearm deaths nationwide. *WISQARS Injury Mortality Reports, 1981-1998*, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, available at <http://webapp.cdc.gov/sasweb/ncipc/mortrate9.html> (last visited Apr. 17, 2003).

Assuming that the ratio of guns to deaths is the same for California in 2000 as it was for the nation in 1994 (i.e., guns in California today carry the same risk as guns across the nation did in 1994), then a figure of approximately fifteen million guns in circulation in California in 2000 can be derived from the 3,092 gross firearm deaths reported for that year. *California Fact Sheet*, *supra* note 51.

During the period from 1991 to 2000, an average of 465,375 guns were sold annually in California. *Dealer's Record of Sale*, *supra* note 4. Assuming that annual sales, as well as the total amount of guns in circulation, have remained fairly steady over time, the useful life of a gun can be estimated at roughly thirty-nine years.

The chance of any one gun in California causing an unjustified killing during one year can therefore be calculated by dividing the fifteen million guns in circulation by the net annual non-legitimate gun deaths—2,425 for the year 2000. *California Fact Sheet*, *supra* note 51. The chance of killing in one particular year—1 in 6,186—increases to a chance of approximately 1 in 160 of the gun being used to cause a non-legitimate killing at any time during a thirty-nine-year useful life.

One manufacturer has admitted to being well-informed of the likelihood of misuse, while at the same time denying any responsibility. Carlos Garcia, owner of Navegar, Inc., the manufacturer of the Intratec TEC-9, is quoted in the California Supreme Court's *Merrill* opinion as saying: "I know some of the guns going out of here end up killing people, but I'm not responsible for that." *Merrill v. Navegar, Inc.*, 28 P.3d 116, 138 (Cal. 2001) (Werdegar, J., dissenting).

109 The exact number of lives lost was 3,092 (1,488 were suicides, 1,478 were homicides, and 53 were accidental). *California Fact Sheet*, *supra* note 51. When adjusted downward for causation, the net total is approximately 2,352. *See supra* Part II.D.5.

110 CAL. CIV. PROC. CODE § 410.10 (Deering 1991 & Supp. 2003). *See also* *Benefit Ass'n Int'l, Inc. v. Superior Court*, 54 Cal. Rptr. 2d 165, 168 (Ct. App. 1996) ("[I]f a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical presence in the State.") (quoting *Southeastern Express Sys. v. S. Guar. Ins. Co.*, 40 Cal. Rptr. 2d 216, 219 (1995)) (alteration and emphasis in original).

111 *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

112 *When* the gun was manufactured or sold may be controversial. Following the 1998 repeal of Civil Code Section 1714.45 granting tort immunity to tobacco manufacturers, the California Supreme Court held that immunity did not extend to conduct occurring prior to the enactment of the statute. *See Naegele v. R.J. Reynolds Tobacco Co.*, 50 P.3d 769, 775 (Cal. 2002); *Myers v. Philip Morris Cos.*, 50 P.3d 751, 763 (Cal. 2002).

or retailer regularly conducts business in California.<sup>113</sup> Because all major American gun manufacturers (as well as some foreign manufacturers) regularly conduct business in California,<sup>114</sup> the only way for a manufacturer to avoid liability for injuries in California would be to either cease selling firearms to the public nationally, or to withdraw from all commercial contact with the state.

The economic cost of gun-related deaths and injuries in California has been estimated at over \$300 million annually.<sup>115</sup> Even when this figure is adjusted to account for those deaths and injuries that would have occurred if the assailant (or suicide victim) had not had access to a gun,<sup>116</sup> the financial burden if transferred to the gun industry would add over \$100 to the price of every gun sold in California,<sup>117</sup> or if applied to nationwide gun sales, \$6 to every gun sold.<sup>118</sup> This calculation assumes that the dollar amount of jury verdicts would be equivalent to the cost of victims' medical care alone, and that the volume of gun sales would remain steady, despite the increased cost of liability being passed on to the consumer. The reality for gun manufacturers would likely be far bleaker.

#### B. Risk/Benefit Liability as a Restraint on the Right to Contract

Such a devastating, and possibly fatal, assault on the gun industry might be seen by some as an unjustifiable restraint on the ability of merchants and consumers to enter into lawful contracts. A prominent critic of the risk/benefit strict product liability doctrine, Professor Richard Epstein, has called for the abolition of risk/benefit analysis on the grounds that it is not only an infringement on the right to contract, but it is also inefficient, arbitrary,

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113 It is under this principle that the plaintiffs in *Merrill* were able to sue a defendant corporation based in Florida for injuries arising in California from a firearm sold in Nevada.

114 "Weapons from nearly 650 manufacturers were sold in California — but just 20 companies accounted for 83.8 percent of all sales. Eleven of these companies are based in the United States, including three from California. Imports accounted for about 40 percent of medium- and large-caliber guns." *Calif. Handgun Study to Fortify Crime Prevention Effort*, Newswise (Sept. 19, 2002), available at <http://www.newswise.com/articles/2002/9/HANDGUNS.UCM.html>.

115 *Firearm-Related Violence: Costs*, Pacific Center for Violence Prevention (Dec. 6, 1996), available at <http://www.pcvp.org/pcvp/firearms/facts/guncost2.shtml>.

116 See *supra* Part II.D.5.

117 This amount is based on annual sales in 2000 of 386,210 units. See *Dealer's Record of Sale*, *supra* note 4.

118 This amount is based on annual manufacture and importation of 4.7 million guns. Garen J. Wintemute, *Where the Guns Come From: The Gun Industry and Gun Commerce*, 12 CHILDREN, YOUTH, & GUN VIOLENCE 55, 58 (2002), available at [http://www.futureofchildren.org/usr\\_doc/tfoc\\_12-2e.pdf](http://www.futureofchildren.org/usr_doc/tfoc_12-2e.pdf).

and unnecessary.<sup>119</sup> Professor Epstein's view is that unless a product is defectively manufactured, i.e., prone to malfunction, or unless its dangerous propensity is misrepresented to the consumer, then the market should decide its fate.<sup>120</sup> Thus, the consumer is free to either assume the known risk of danger inherent in the product, or to boycott the product. This argument might work for cigarettes—as long as secondhand smoke injuries can be reduced without an adverse impact on the market—and for many other dangerous products, but in the case of firearms, it is unreasonable, if not morally indefensible, to suggest that the economic “right” of the consumer and merchant to enter into a consensual bargain outweighs the threat of harm to non-consumers.

Gun advocates have compared the risk/benefit analysis of gun sales to other popular products that present an inherent risk of danger, such as cars, swimming pools, bathtubs, aspirin, and even household kitchen products.<sup>121</sup> Most of these products, however, have unique and widespread social utility that cannot be more safely derived through feasible alternative means. The social utility of guns is limited to self-defense and recreation. Self-defense has been proven to be a largely illusory function of guns,<sup>122</sup> and the recreational value of guns, while unique, is limited to relatively few consumers<sup>123</sup> and has little value to society as a whole.

The fundamental question is who should bear the cost to society of a consensual, legal transaction between two parties? Should it be society at large? Or should it be the parties to the transaction? The threat that internalizing the cost of the transaction poses to the viability of the transaction itself is not a justifiable reason for the parties to the transaction to pass the cost on to the largely gunless general population, simply to preserve a right to conduct a lawful business.

The libertarian mantra of individual responsibility cannot be used to justify sales of a legal product if the seller and purchaser—both of whom reap the benefit of the transaction—remain unwilling to accept the responsibility of compensating those who are not

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119 Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193, 2202–03 (1989) [hereinafter Epstein, *The Unintended Revolution*]; Richard A. Epstein, *The Risks of Risk/Utility*, 48 OHIO ST. L.J. 469, 474–77 (1987) [hereinafter Epstein, *The Risks of Risk/Utility*].

120 See generally Epstein, *The Unintended Revolution*, *supra* note 119.

121 See, e.g., Paul Craig Roberts, *Talking Points: Facts About Guns*, Libertarian Party News Online (Sept. 2002), available at <http://www.lp.org/lpnews/0209/talkingpoints2.html>; Karen Selick, *The Legitimate Uses of Firearms* (Jan. 1995), available at <http://www.karen-selick.com/CL9501.html>.

122 In 2000, only 73 gun deaths were reported as the result of legally justified intervention or undetermined intent. See *California Fact Sheet*, *supra* note 51.

123 “[A]bout 35 percent of gun owners (15 million people, 8 percent of the adult public) hunted in 1994, and about an equal percentage engaged in sport shooting other than hunting.” Cook & Ludwig, *supra* note 48, at 2–3.

a party to the transaction but who are inevitably and foreseeably harmed by it. If those likely to be injured by a product were primarily the consumers, then it would be logically and morally sound to allow consumers the right to decide for themselves whether the benefits of the purchase outweigh the risks. California courts, however, have long held that as long as that decision puts non-consumers at risk, the cost of injuries to non-consumers must be "borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."<sup>124</sup>

Professor Epstein's argument for consumers deciding safety is particularly problematic when applied to sales of firearms. On the one hand, he argues that liability should attach when there is differential knowledge at the time of purchase regarding the danger posed by a product's use.<sup>125</sup> On the other hand, he proposes that the risk of harm posed by a product that is free of patent physical defects should be gauged by common knowledge among the general public or the consumers.<sup>126</sup>

In the context of guns, "common knowledge" of the dangers of firearms<sup>127</sup> differs substantially from the actual risk of harm as known only to an informed few, including those who manufacture guns and nonetheless represent them as a reliable means of self-defense.<sup>128</sup> Not only is the gun manufacturers' knowledge of the true risks superior to that of the consumers, it is also misrepresented to the consumer. According to Professor Epstein, however, neither of these facts matters, as it is the "common knowledge" of consumers as a whole that should draw the line between dangerous and *unreasonably* dangerous products.<sup>129</sup>

124 *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1962).

125 Epstein, *The Risks of Risk/Utility*, *supra* note 119, at 474.

126 Epstein, *The Unintended Revolution*, *supra* note 119, at 2212. See also *Cronin v. J. B. E. Olson Corp.*, 501 P.2d. 1153 (Cal. 1972). In *Cronin*, the California Supreme Court appeared to adopt into California common law, as part of what would later become the consumer expectation prong of two-part *Barker* test, the following language from comment i to Section 402A of the Restatement (Second) of Torts: "[D]angerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the as to its characteristics." *Id.* at 1161 (emphasis added). The court, however, rejected the "unreasonably dangerous" terminology of the Restatement as overreaching, at least insofar as it relates to consumer expectation. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965)). But see *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 309 n.5 (Cal. 1994) ("*Barker* . . . strongly implies that the consumer expectations test does not apply when the degree of safety a product should exhibit under particular circumstances is a matter beyond the common experience and understanding of its ordinary users.").

127 This is reflected by the number of Americans who purchase guns believing them to provide a safe and effective means of self-defense. See Gallup Poll, *supra* note 49.

128 This differential knowledge is apparent from the frank testimony of Carlos Garcia, owner of Navegar, Inc. See *Merrill v. Navegar, Inc.*, 28 P.3d 116, 138 (Cal. 2001) (Werdegar, J., dissenting).

129 Epstein, *The Unintended Revolution*, *supra* note 119, at 2212.

Professor Epstein argues that the only alternative to the objective “common knowledge” standard would be to use the subjective knowledge of each consumer-plaintiff on a case-by-case basis; a standard that would be formless, uncertain, and generate excessive litigation.<sup>130</sup> In an effort to protect the merchant’s right to enter into what merely *seems* to be an evenly matched bargain, Professor Epstein fails to consider the more reasonable alternative to either gauge of unreasonable dangerousness—*actual* risk of harm.<sup>131</sup> As a result of this deference to widespread ignorance determining standards of safety, a seller or manufacturer would never be held responsible for harm caused by misuse of a physically non-defective product by the consumer, whether to a third party or the consumer, even when that harm is not just foreseeable but inevitable.

### C. The Effect on the Market

The idea that the market should regulate itself—rather than *be* regulated by legislation or by tort liability—is simply not feasible in the context of firearms. A blanket ban would likely face insurmountable voter resistance.<sup>132</sup> Legislative attempts to regulate firearm sales have so far been severely hindered by the impracticality of listing models or classes of banned firearms,<sup>133</sup> and have been successful only in limiting access to a few excessively lethal types of guns,<sup>134</sup> while leaving the rest readily available to the general public. Thus, the market has been largely free, since its inception, to regulate itself.

Whether or not the widespread belief among gun owners (and many non-gun owners) that guns provide a reliable means of self-defense<sup>135</sup> is the product of misrepresentation or ignorance, there

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<sup>130</sup> *Id.* at 2213.

<sup>131</sup> See *supra* Part II.D.5.

<sup>132</sup> Almost three-quarters of Americans believe that the Second Amendment guarantees an individual right to bear arms. ABCNEWS.com poll, *supra* note 70.

<sup>133</sup> For example, the Intratec TEC-DC9 was introduced to evade a District of Columbia ban on its virtually indistinguishable predecessor, the TEC-9. See *Merrill v. Navegar, Inc.*, 28 P.3d 116, 135 n.2 (Cal. 2001) (Werdegar, J., dissenting). See also *Harrott v. County of Kings*, 25 P.3d 649, 653 (Cal. 2001) (discussing difficulty of identifying particular weapons as banned by statute).

<sup>134</sup> In 1994, Congress enacted the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2000 (codified as amended at 18 U.S.C. §§ 921-922 (2000 & Supp. 2003)). The Act banned the manufacture, sale, and possession of nineteen types of assault weapons, as well as others with certain characteristics. In California, the State Legislature enacted the Roberti-Roos Assault Weapons Control Act of 1989, prohibiting the advertising, manufacture, sale, and possession of certain assault weapons in California. CAL. PENAL CODE §§ 12275.5, 12276 (Deering 1992 & Supp. 2003). As of 2002, the following six states have some kind of statewide assault weapon ban: Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, and New York. *The Assault Weapons Ban: Questions & Answers*, Brady Center (Aug. 2002), available at <http://www.bradycampaign.org/facts/gunlaws/awb.asp>.

<sup>135</sup> See Gallup Poll, *supra* note 49.

remains a large portion of the public that is willing to continue purchasing a product that has been proven to put themselves and others at considerable risk of harm. As long as potential consumers perceive no risk to themselves, the market will not diminish absent external regulation.

If regulation by jury were to drive the gun market out of California,<sup>136</sup> Californians would still be able to legally buy guns in many other states. The gun industry might survive, but Californians' ability to purchase guns would be severely hindered. It could be argued that while gun ownership among law-abiding citizens in California would decline, ownership among the criminal population—most of whom would rather buy a gun illegally in California than travel out of state—would not. This point is succinctly made by a popular bumper sticker which declares, "If guns are outlawed, only outlaws will have guns."<sup>137</sup>

This argument assumes that the elimination of the legal gun market in California would not ultimately reduce the amount of guns available on the black market in California, and also that a significant portion of homicides are committed by people who would be willing to purchase a gun on the street. Studies have shown, however, that relatively few homicides (which, in themselves, comprise a minority of all non-legitimate gun deaths) are committed by "criminals" and that the large majority of homicides are committed by "law-abiding citizens"—usually against a family member.<sup>138</sup> Also, it would be inapposite to characterize the 1,190 annual suicides in California attributable to guns<sup>139</sup> as committed by "criminals." Therefore, even if guns remain in the hands of criminals, and even if there are less guns available for self-defense, as long as a substantial portion of "law-abiding citizens" are

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<sup>136</sup> Justice Werdegar, dissenting in *Merrill*, addressed the likelihood and propriety of a de facto ban by jury as follows:

[A] jury's finding in a product defect action that a particular product is defective because the risks of injury arising from the design outweigh the design's benefits does not "ban" the product. While bearing strict liability for injuries arising from such a product, the defendant in such a case may legally continue to produce and distribute it. And even when such decisions will, in the long run, effectively drive a product from the market, California courts and juries are empowered to make them.

*Merrill v. Navegar, Inc.*, 28 P.3d 116, 147 (Cal. 2001) (Werdegar, J., dissenting) (citations omitted).

<sup>137</sup> *Available for sale at* <http://www.campingsurvival.com/bumsticandwa.html>. For a sardonic commentary on the inherent irony of this message (and other pro-gun bumper sticker assertions) see Norman Townsend, *Understanding the Redneck Point of View*, FC Bytes, at <http://www.fc.peachnet.edu/webzine/backbytes/features10/redneck.htm> (last visited Apr. 17, 2003).

<sup>138</sup> See Arthur L. Kellermann & Donald T. Reay, *Protection or Peril?: An Analysis of Firearm-Related Deaths in the Home*, 314 N. ENG. J. MED. 1557, 1557-60 (1986) (discussing a study of 743 firearm deaths reported over a 6-year period in King County, Washington).

<sup>139</sup> See *California Fact Sheet*, *supra* note 51. This is a net figure adjusted downward for causation. See also *supra* Part II.D.5.

deterred from purchasing guns by a statewide sales ban, there would still be a substantial net gain in lives saved.

#### IV. CONCLUSION

In the absence of any statutory immunity for gun manufacturers, California courts will certainly have to allow *some* risk/benefit lawsuits for injuries resulting from the misuse of firearms. Whether the repeal invites a flood or a trickle, the factual issue of risks versus benefits should be quick and easy to resolve. Far from being left with "neither rule nor compass to guide [them],"<sup>140</sup> juries will merely have to decide how many deaths would be an acceptable price to pay for the recreational value of guns. At the very least, assault-type weapons like the Intratec TEC-9, as a class, would fail this test.<sup>141</sup> It is even possible that juries may find, as an issue of fact, that *any* gun fails the test. Whether such a result would force the demise of the American gun industry remains to be seen.

The imposition of tort liability upon manufacturers is not a betrayal of the traditional role of tort law as primarily compensatory. It has long been the role of juries to determine the societal value of private conduct by weighing the risks and benefits of that conduct—whether in terms of negligence or strict product liability. That the sale of guns has defied effective statutory and self-regulation only emphasizes the need for juries to play a decisive role in the regulation of gun sales, as well as providing a means of compensation to injured plaintiffs.

In California, it can no longer be claimed that the majority of the electorate—including those who do not own guns—tacitly share responsibility for the cost of widespread gun ownership in the state. It might be true that the failure of the Legislature to enact a law banning all civilian gun possession fairly represents the will of the people to permit continued gun ownership, but that does not mean that the people of California are willing to continue sharing the financial burden imposed on the state and its citizens as a result of gun sales to California residents and visitors.

The people of California have stated, through the repeal of Civil Code Section 1714.4, that the right to buy and sell guns may be regulated by the imposition of costs incurred from foreseeable misuse of the guns upon those who benefit the most from the

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<sup>140</sup> Epstein, *The Unintended Revolution*, *supra* note 119, at 2211.

<sup>141</sup> See *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 154–55 (Ct. App. 1999). The California Court of Appeal quoted the declaration of expert witness, Police Chief Supenski, in which he stated that the Intratec TEC-DC9 is "completely useless" for hunting, is never used by competitive or recreational shooters, "has no legitimate sporting use," has no practical value for self-defense due to its weight, inaccuracy and firepower, and is instead designed to engage multiple targets during rapid sustained fire. *Id.*

transaction. All that remains is for the California courts to follow the command of legislative action and legal precedent, and allow juries to determine whether the survival of the gun industry is worth the annual sacrifice of thousands of Californians.

