

## CHAPTER 10

### *The Complementary Role of Tort Litigation in Regulating the Gun Industry*

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Tort claims against gun manufacturers call on judges to make policy choices about firearm design and marketing. There is much debate over whether judges should be in the business of making policy choices. On the one hand, traditionalists denounce judicial policy-making as violating the constitutional separation of powers, which reserves policy-making to legislatures and consigns courts to resolving individual disputes between parties.<sup>1</sup> Moreover, according to this view, courts lack the breadth of perspective necessary to make good public policy, a breadth that legislatures achieve through initiating investigations or holding hearings.<sup>2</sup> In addition, courts of general jurisdiction lack the technical and scientific expertise that administrative agencies lend to legislative policy-making.<sup>3</sup> On the other hand, progressives embrace judicial policy-making as part of a public law vision of the tort system. According to this view, courts should craft creative solutions to social problems when deadlocked or corrupt legislatures fail to act.<sup>4</sup> Furthermore, by using procedural techniques that allow for the consolidation of many claims into one legal proceeding, courts can resolve individual claims en masse, thereby avoiding the possible inconsistencies and inefficiencies of piecemeal adjudication on a case-by-case basis.<sup>5</sup>

In this chapter, I advocate an intermediate position. I argue that courts should play a secondary role in policy-making that complements the regulatory efforts of legislatures and administrative agencies. Against the traditionalist position, I assert that judges are wise in attending to the public policy implications of their rulings in individual cases. The nature

of common law adjudication is to apply old legal principles to new problems. The proper application of these principles, however, is often unclear, and judges are required to resolve ambiguities on the basis of something other than clear precedent. It is here that policy analysis plays a legitimate role in judging. Against the progressive position, I argue that courts should confine their policy analysis to the resolution of doctrinal ambiguities. Courts should use policy analysis to gradually refine tort law's system of rules for resolving private disputes in ways that serve the public interest. Radical shifts in doctrine, even when supported by sound policy choices, undermine the legal stability that in our constitutional scheme courts are uniquely qualified to protect. Furthermore, I argue that in making policy choices, courts should, where possible, follow the lead of legislatures. To the extent that there are discernable trends in legislative consideration of a problem, it undermines the legitimacy of judicial decision making for judges to contradict them. The danger of unrestrained judicial policy-making is greatest in mass torts, where the aggregation of claims and industrywide liability exposure can easily transform the resolution of private disputes into the crafting of innovative solutions to social problems, without due regard for doctrinal integrity or legislative preferences.

A complementary policy-making role for courts is not a new idea, but it has found few, if any, proponents in the highly polarized controversy over gun litigation.<sup>6</sup> My analysis reveals that tort claims against gun manufacturers can complement legislative efforts to regulate the firearms industry and can thereby make a modest contribution to decreasing gun violence. It cautions, however, that the mass tort features of some of the more recent cases threaten to undermine the legitimacy of the whole enterprise.

My defense of a complementary policy-making role for courts in regulating the gun industry involves several steps. I begin by defending tort claims against gun manufacturers that offer opportunities for complementary policy-making by courts. Next, I caution against the use of mass tort strategies in gun litigation based on their tendency to view the tort system as an alternative, rather than a complement, to legislative policy-making. I then address common objections to the complementary model that I am advocating, and I conclude with some general remarks about the regulatory advantages of allowing the tort system to play a complementary role in making public policy.

### Opportunities for Complementary Policy-Making

Some tort claims against firearms manufacturers present courts with an opportunity to play a complementary role in regulating the gun industry. Allowing these claims would not imply new rules or special exceptions that would undermine the doctrinal consistency of the tort system, and the policy choices involved—concerning firearms design and marketing—would support existing legislative mandates in these areas. Consider the following examples.

#### Halberstam v. Daniel: *Regulating Gun Kits*

Federal law requires that those regularly in the business of selling guns obtain a Federal Firearms License; conduct background checks on all buyers; restrict out-of-state purchases to other Federal Firearms Licensees (FFLs); and comply with federal, state, and local firearms laws. In addition, the law requires that all guns carry a serial number on the frame or receiver of the gun in order to assist law enforcement in tracing the sales and ownership history of the gun if used in a crime. One strategy for evading these regulations is to sell guns disassembled in the form of parts kits, since the regulations apply to firearms but not to firearm parts.<sup>7</sup> The case of *Halberstam v. Daniel* arose out of just such a scheme.<sup>8</sup> In that case, the plaintiffs were shot by a criminal assailant using a semiautomatic pistol that had been assembled from a mail-order parts kit manufactured and sold by the defendants. While the statutory definition of a firearm includes “any combination of parts from which a firearm . . . can be assembled,” the defendants’ gun kits included all the necessary parts except a frame.<sup>9</sup> The kits did, however, include sheet metal flats that, when folded, were designed to serve as frames. In this way, the defendants succeeded in circumventing federal licensing restrictions on gun sales.

The plaintiffs claimed that this marketing scheme was negligent insofar as the defendants failed to exercise reasonable care to prevent acquisition of their guns by individuals with a high risk of criminal misuse.<sup>10</sup> In support of their claim, the plaintiffs described the defendants’ sales methods, including out-of-state sales to non-FFLs, taking orders by

phone, postal delivery, reduced prices for bulk purchases, no requests for any information other than that relevant to payment and shipping, and failure to keep any sales records. Furthermore, the defendants avoided having to place serial numbers on their guns since the unmarked sheet metal flats did not constitute frames until folded. At trial, the defendants testified that they did not care who purchased their weapons.

The trial judge in *Halberstam* refused to dismiss the plaintiffs' claim, implying that the manufacturer owed a duty to exercise reasonable care in marketing its weapons and allowing, for the first time, a negligent marketing case to reach a jury. The jury, however, rejected the plaintiffs' claim, finding that, while the defendants' marketing practices were negligent, they were not a substantial factor in causing the plaintiffs' injuries. At trial, the defendants had produced an affidavit and a deposition by the criminal assailant in which he stated that he had purchased the gun from someone on the street and that he had never had any business dealings with the defendants.

While the plaintiffs' claim foundered on the issue of causation, given the particular facts of the gun purchase involved, *Halberstam* illustrates a type of case where imposing liability would be consistent with general tort principles and would complement legislative efforts to regulate the gun industry. As I discussed in the introduction to this volume, the primary obstacle to negligent marketing claims is the absence of a duty to exercise reasonable care in marketing firearms. The establishment of such a duty requires showing that gun violence injuries are a foreseeable risk of marketing guns and that gun manufacturers have a unique capacity to reduce this risk. The existing regulatory regime lends credibility to both of these assertions. This regime is based on the premise that gun violence is a known risk of selling guns and that this risk can be reduced by regulating gun sales through dealer licensing and background checks on purchasers. When manufacturers sell their guns at the retail level, as did the *Halberstam* defendants, they are engaged in conduct that, according to the regulatory regime, entails a foreseeable risk of harm. One might argue that, even when selling further up the distribution chain, the risk is no less foreseeable. Furthermore, the practice of manufacturing and marketing guns in the form of unregulated mail-order parts kits reveals that manufacturers have, in some circumstances, a unique capacity to manipulate this risk. If the regulations are premised on the idea that

they reduce the risk of gun violence, then marketing guns in a way that evades the regulations would presumably increase it. These arguments weigh heavily in favor of imposing a duty of care on gun manufacturers, and, even if they are not sufficient by themselves, they at least show that such a duty is an option consistent with traditional doctrinal requirements of foreseeability and a unique capacity to reduce risk.

When doctrinal considerations alone cannot definitively settle a question, judges should consider the public policy implications of different options. In doing so, they should be deferential to policy choices already made by legislatures, since the legitimacy of judicial policy-making is weakened when it contradicts legislative policy choices. In cases like *Halberstam*, these considerations further favor the imposition of a duty of care on manufacturers. Selling guns in the form of unregulated mail-order parts kits, while legal, undermines the existing regulatory regime developed by Congress over the past sixty years. The fundamental purpose of this regime is to prevent firearms purchases by criminals and other disqualified persons. Dealer licensing and background checks on purchasers are the chosen means to achieve this aim. The absence of similar regulations governing the sale of gun parts reflects a legislative decision that regulating the acquisition of spare parts for existing firearms would do little to prevent criminals and other disqualified persons from illegally purchasing guns. This rationale for not extending licensing and background checks to gun parts hardly supports the legislative failure to include gun kits. The most likely explanation for the failure to regulate gun kits is that Congress simply did not anticipate this strategy for evading the regulations on gun sales.<sup>11</sup> The failure to impose licensing and background check restrictions on the sale of a gun merely because it is sold disassembled is a gap in the regulatory regime detrimental to its underlying purpose.

The existence of this gap in the regulatory regime, and the ability of tort liability to plug it, favors imposing a duty on gun manufacturers to exercise reasonable care in marketing firearms. The *Halberstam* verdict indicates that at least some juries are likely to find that reasonable care requires using the same precautions when marketing guns in the form of gun kits as when marketing them fully assembled. This form of tort liability would complement legislative regulations by deterring manufacturers from using marketing practices designed to evade them.

*Smith v. Bryco Arms: Mandating Safer Gun Designs*

Federal administrative agencies regulate the safety of a wide range of products. Agencies such as the Food and Drug Administration (FDA), the Environmental Protection Agency (EPA), the National Highway Transportation Safety Administration (NHTSA), the National Boating Safety Administration (NBSA), and the Consumer Products Safety Commission (CPSC) promulgate rules that mandate safety features in medical devices, pesticides, automobiles, boats, and many other products. No federal agency, however, has the power to regulate firearm designs. The Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) is empowered to enforce only sales and ownership restrictions, and guns were explicitly excepted from the jurisdiction of the CPSC.

Another source of product safety regulation is the tort system. Potential liability exposure provides manufacturers with a powerful incentive to equip products with safety features that prevent injuries that could give rise to lawsuits. Lawsuits over the failure of manufacturers to equip light construction vehicles with anti-tipping devices or to equip food processors with cut-off switches have led to safety improvements in these and other products. The case of *Smith v. Bryco Arms* illustrates how gun litigation has the potential to similarly improve firearm designs.<sup>12</sup> In that case, the plaintiff was injured when he was shot with a gun by a friend who believed that the gun was unloaded because the magazine had been removed. The plaintiff sued the gun manufacturer for defective design insofar as the gun could have been equipped with a safety feature that would have prevented the gun from firing when the magazine was removed. An intermediate appellate court reversed the trial court's dismissal of the claim, holding that the plaintiff's theory that inclusion of a magazine safety was a feasible, cost-effective alternative design fell squarely within New Mexico product liability doctrine. "[W]e do not perceive," noted the court, "anything so unique about handguns that they cannot or should not be subject to normal tort law concepts, norms, and methods of analysis. . . . [T]he application of our tort law can be expected to . . . increase the safety of handgun use."<sup>13</sup>

To the extent that passing judgment on the reasonableness of gun designs involves policy choices, the appellate court in *Smith* considered

those choices to be a well-established and legally uncontroversial aspect of adjudicating product liability cases. In answer to the trial court's assertion that product design regulation is a matter for legislatures, not courts, the appellate court explained: "The notion that courts cannot speak in the area of products liability without legislative guidance has been considered and rejected by the New Mexico Supreme Court . . . New Mexico courts have long held manufacturers and distributors responsible in strict liability or negligence for failing to include safety devices in their products."<sup>14</sup> This is equally true of other states as well.

It might be objected that while evaluating design choices is indeed a normal part of adjudicating product liability claims, in the case of guns, this sort of judicial policy-making contradicts a federal legislative mandate against regulating gun designs, implied by the exclusion of gun designs from regulation by the CPSC or the BATFE. Rather than playing a complementary role, courts like the *Smith* court are in competition with legislative policy choices. The problem with this objection is that it misconstrues the exclusion of gun designs from regulation by the CPSC and BATFE as a legislative mandate against regulation by the tort system. The Consumer Product Safety Act (CPSA), which established the CPSC, recognizes the independent regulatory role of the tort system. The CPSA does not pretend to provide a comprehensive regulatory scheme; it excludes not only firearms but other consumer products such as tobacco, motor vehicles, pesticides, aircraft, boats, drugs, medical devices, cosmetics, and food, the regulation of which are left to other federal agencies. Furthermore, Section 25(a) of the act explicitly states that "[c]ompliance with consumer product safety rules or other rules or orders under this Act shall not relieve any person from liability at common law or under State statutory law to another person."<sup>15</sup> Thus, the exclusion of firearms represents a decision not to establish CPSC regulation of gun designs, not a decision to forbid all regulation of guns by other agencies, state legislatures, or the tort system. This is equally true of the absence of BATFE regulatory authority over gun designs. The federal gun control acts that BATFE is charged with enforcing do not include any mandate concerning gun designs. It is a mistake to interpret congressional silence on this matter as precluding other sources of regulation. Congressional silence on the regulation of gun designs reflects merely the lack of a mandate to replace decentralized regulation by state and local legislatures and

common law courts.<sup>16</sup> This type of regulation, as the *Smith* court pointed out, is a well-established function of the tort system.

City of Chicago v. Beretta: *Defending the  
Integrity of Local Gun Regulations*

In addition to federal laws, there are many firearms regulations promulgated by state and local governments. The most restrictive of these tend to be municipal ordinances in large cities with high crime rates. For example, the cities of Chicago and Washington, D.C., ban civilian gun possession altogether. Yet, despite such measures, cities like Chicago and Washington continue to suffer from high rates of gun violence. City officials blame the failure of these restrictive policies on the ready availability of firearms from suburban gun dealers who sell guns to city residents.

The City of Chicago's public nuisance suit against the gun industry illustrates how tort litigation can complement the regulatory efforts of local governments. As explained in the introduction, the City's claim alleged that gun manufacturers' unrestricted supply of guns to suburban gun dealers with a record of illegal sales or who have sold many guns eventually used in crimes constitutes a public nuisance—an "unreasonable interference with a public right." The Supreme Court of Illinois rejected Chicago's claim, holding that manufacturers and wholesale distributors owe no duty to the public at large to guard against the criminal misuse of guns.<sup>17</sup> Notwithstanding the dismissal of Chicago's suit, suing gun manufacturers, distributors, and dealers for public nuisance offers cities a way to eliminate a significant source of weapons that undermine their attempts to ban or otherwise restrict the sale or possession of firearms. Thus, tort liability enables cities to protect their legislative policy choices from threats by gun sellers and manufacturers who are outside of their legislative jurisdictions, but not beyond the reach of tort claims.

A problem with municipal claims like Chicago's is the question of remedy. Chicago's suit demanded the payment of money damages for the gun violence costs incurred by the city as a result of the nuisance. Calculating these damages requires isolating that portion of gun vio-



lence attributable specifically to oversupply, lack of dealer supervision, and illegal sales practices—a complex calculation to say the least. The suit also requested injunctive relief in the form of marketing restrictions designed to limit the flow of guns into the city from surrounding suburbs. Such restrictions could be viewed not merely as a strategy for protecting a city’s own regulatory regime but as an attempt to thwart the regulatory decisions of suburban governments—to use tort litigation as a way to impose the city’s will on its neighbors. While a city may have chosen to ban guns, suburban governments often choose to permit easy access to guns within their borders. To the extent that a municipal public nuisance suit would greatly restrict the availability of guns in surrounding suburbs, it might be characterized as an attempt to exercise regulatory power beyond the city limits, and they may run afoul of state home rule provisions. Only if a city can identify limited measures aimed specifically at abating the nuisance by reducing the risk of sales to city residents can the city make its claim look less like an attempt to impose its will on suburban governments and more like a garden-variety cross-border nuisance suit. Insofar as municipal suits have regulatory implications beyond state borders, they may raise concerns based on the U.S. Constitution’s dormant Commerce Clause doctrine. Chapter 13 takes up this issue in greater detail.

*Market Share Approaches to Causation: Generating Regulatory Information*

It is often the case that guns used in crimes are never recovered, so many gun violence victims cannot identify the particular manufacturer that made the gun used against them. Some plaintiffs have suggested shifting the burden of proving causation. Under this approach, defendants would have to prove that they did not manufacture the gun in question in order to avoid liability. Failing such a showing, they would be held liable in proportion to their share of sales within the total gun market or within the market for the type of gun used to injure the plaintiff. The idea behind such “market share” theories is that, although defendants will not be held liable for the entire amount of damage that they caused to any particular plaintiff, they will over time be held liable to all plaintiffs for a fair share of the total damage that they caused. In *Hamilton v. Beretta*, discussed in the introduction, the plaintiffs could not identify the manu-

facturers of the weapons used to injure them. They argued that the defendant manufacturers should each be held liable in proportion to the percentage of guns that they sold, or, if either party could narrow it down to a class of guns (for example, .25 caliber handguns), the defendant manufacturers should each be held liable in proportion to the percentage of guns that they sold within that class.<sup>18</sup>

Shifting the burden of proving causation where no gun was recovered is another way in which the tort system can complement legislative regulation. Most federal and state gun regulation focuses on sales restrictions aimed at reducing the risk that guns will be sold to criminals and other disqualified persons. Shifting the burden of proving causation onto manufacturers would provide them an incentive to maintain and disclose sales records, since this information would be essential to exoneration. The information would also be useful in enforcing federal and state sales regulations and in better understanding the link, if any, between gun marketing and crime. In this way, gun litigation can generate information that is helpful to legislatures and administrative agencies in enforcing and further developing effective industry regulation. In addition, this information would be useful in courts' own consideration of the duty issue in negligent marketing cases.

Exceptional doctrines such as market share liability should be applied with caution. In some versions of the doctrine, defendants cannot avoid liability even if they do establish that they did not make the product that injured the plaintiff (the idea being that others who cannot prove this are nonetheless held liable to each plaintiff in proportion to their market share and that holding everyone partially liable in every case is fair in the aggregate).<sup>19</sup> Applied to gun litigation, this version of the doctrine would eliminate manufacturers' incentive to keep sales information and would thereby undercut justification for the doctrine based on the complementary role of tort law.

### Problems with Mass Tort Strategies for Gun Litigation

Tort law is first and foremost a mechanism for resolving private disputes between parties. In this chapter, I have argued that, where the law leaves room for judicial discretion in resolving private disputes, judges should take into account the public policy implications of their decisions, and

they should seek to complement the public policy choices of legislatures where possible. Some suits against gun manufacturers do not fit this vision of the tort system. These suits employ mass tort strategies that treat the tort system as an alternative, rather than a complement, to legislative policy-making.

### *Undifferentiated Damages and Regulatory Remedies*

One mass tort strategy is to consolidate many individual injuries into one lawsuit. Recovery for these injuries may be sought against one defendant or, as is increasingly common, against all members of an industry. The aggregation of claims and defendants forces judges to balance many distinct interests in search of a global solution that may require crafting complex remedies and an administrative apparatus to execute it. The judicial resolution of mass tort claims has increasingly given rise to complaints that judges have exercised quasi-legislative powers beyond their traditional role.<sup>20</sup>

Some lawsuits against the gun industry aggregate individual gun violence injuries and seek complex regulatory remedies. For example, municipal suits aggregate thousands of individual injuries in calculating costs occasioned by gun violence. Since the cities, even according to their own claims, are entitled only to those gun violence–related costs caused by industry wrongdoing, granting them recovery requires separating out that portion of gun violence due to design flaws and unreasonable marketing practices. Plaintiffs have so far been unable to provide data isolating these costs, and even if they could, any conclusions would likely be highly speculative. Some suits seek complex regulatory injunctions in addition to or instead of monetary compensation. For example, the City of Chicago’s suit demanded a court injunction that would force defendant manufacturers to “market personalized firearms that can only be used by the lawful purchaser,” “participate in a court-ordered study of lawful demand for firearms and to cease sales in excess of lawful demand,” “provide adequate training to . . . dealers,” “systematically monitor . . . dealers,” and “terminate shipments of firearms to dealers” who fail to adopt voluntary sales restrictions such as limiting purchasers to one gun per month and refusing sales to Chicago residents “unless the purchaser can prove that he has a legal place to maintain the firearm out-

side of the City of Chicago.”<sup>21</sup> The design, administration, and enforcement of such a regulatory scheme would engage courts in a legislative enterprise well beyond their traditional powers, one that would draw much criticism and could erode respect for the courts.<sup>22</sup> Moreover, such a scheme would subvert the legislative refusal in many states to limit purchasers to one gun per month.

### *Regulatory Settlement*

Another mass tort strategy is to use aggregation as a means of applying pressure in settlement negotiations aimed at securing regulatory outcomes beyond remedies that courts could or would provide. In pursuit of such regulatory settlements, some plaintiffs have litigated in ways designed less to clarify issues at the heart of their dispute than to intimidate their opponents. This degrades the litigation process, transforming a respected public institution into a private tool of extortion.

Within a year of the first municipal suit against the gun industry (filed by the City of New Orleans), twenty-seven other similar suits were filed by cities and counties across the country, and eventually the total rose to over thirty. One aim of suing simultaneously was to increase the industry’s defense costs so as to pressure them into settlement. Philadelphia mayor Edward Rendell vowed that municipalities would file one hundred suits if the industry refused to adopt marketing restrictions, and Secretary of Housing and Urban Development (HUD) Andrew Cuomo threatened to unleash additional suits by local housing authorities nationwide if the industry refused to accept settlement terms proposed by city attorneys and state attorneys general.<sup>23</sup> The settlement terms included design specifications, marketing restrictions, and an industry oversight commission. One manufacturer—Smith & Wesson, the nation’s largest gun maker—eventually did accept the settlement, only to face denunciations from other manufacturers, a boycott of its product by angry gun owners, sale of the company, and eventual withdrawal from the settlement.<sup>24</sup> Two California gun dealers and three national distributors recently settled claims against them brought simultaneously by twelve California county and municipal governments. The dealers and distributors agreed to refrain from selling weapons at gun shows and to implement background check and record-keeping systems beyond those

mandated by law.<sup>25</sup> The coordination of municipal suits, which individually may not be without merit, uses the litigation process to make public policy privately, independent of judicial restraints and legislative oversight, without justification based in either the rule of law or the democratic process.<sup>26</sup>

### The Regulatory Benefits of Tort Litigation

As the foregoing analysis illustrates, allowing the tort system to play a complementary policy-making role can enhance legislative efforts to regulate the marketing and design of firearms, defend the integrity of local gun control efforts, and promote the establishment and maintenance of information systems that are essential to effective oversight of the industry. Generalizing from the case of gun litigation, this section outlines the regulatory benefits of allowing the tort system to play a complementary role in making public policy.

#### *Information*

Effective regulation requires reliable information about risk and industry misconduct. Tort litigation can uncover such information.<sup>27</sup> Plaintiffs' lawyers are often more tenacious and civil discovery rules more invasive than legislative hearings or agency investigations. The gun industry has been less than forthcoming about many of its business practices. Do gun makers intend, as many lawsuits allege, to design their weapons in ways that appeal especially to the criminal market for guns? Do the industry's current distribution practices make it too easy for criminals to obtain guns? Lawsuits against the gun industry have produced testimony from former industry executives indicating that manufacturers know more about the relationship between their marketing strategies and criminal markets than they have been willing to admit.<sup>28</sup>

While regulatory information is a valuable by-product of tort litigation, the courts should beware of potential abuses. For one thing, the high litigation costs associated with discovery can be used to threaten or harass an industry even if the underlying legal claims are without merit. For another, interest groups may file groundless suits as a means of

obtaining information. Dismissal of actions prior to discovery offers judges an effective tool to protect the industry against these kinds of abuse. A more detailed analysis of the role of tort law in uncovering useful regulatory information is the subject of the next chapter.

### *Gap Filling*

In crafting rules designed to regulate conduct, a legislature cannot possibly anticipate all situations. So the rules inevitably fail to cover conduct that the legislature would have wanted to regulate if it had contemplated the conduct. Tort litigation offers an efficient and effective way to fill these legislative gaps in accordance with the policy goals of the legislature. In the case of gun control, we have seen that liability for the unrestricted selling of gun kits can deter manufacturers from exploiting gaps in sales restrictions that do not cover guns when sold disassembled. In seeking to fill gaps in legislation, however, courts should be careful not to mistake the limitations of a rule for gaps in the rule. That is, legislatures often limit the conduct that they wish to regulate, and the absence of regulation may indicate not an oversight but rather a desire not to regulate. So, for example, courts should be wary of imposing liability for the unrestricted sale of individual gun parts since the omission of gun parts from the legislation regulating gun sales indicates a legislative desire not to regulate gun parts. Distinguishing between gaps and exceptions in legislation is a difficult but customary task of courts for which there is a long tradition of statutory interpretation and for which courts are well equipped.

### *Enforcement*

Legislative regulation is often ineffective due to poor enforcement. The threat of tort liability can provide individuals and corporations with a powerful incentive to comply with regulations where enforcement resources are limited. For example, each year BATFE is able to inspect only about 10 percent of the roughly one hundred thousand licensed gun dealers, and the agency is limited to one unannounced audit of a dealer in any given year.<sup>29</sup> Tort liability based on violation of federal sales regula-

tions provides added incentive for dealers to comply with the law, even if they are unlikely to be inspected by BATFE. This benefit of tort liability requires that tort rules be clear and tailored to legislative mandates in order to provide effective notice to dealers and to refrain from deterring conduct that BATFE wishes to leave unregulated.

### *Federalism*

One advantage of a decentralized approach to regulation is that it provides an opportunity to test different regulatory strategies in different jurisdictions. Decentralization also makes possible the use of different rules based on different local circumstances. The major disadvantages are lack of uniformity, predictability, and federal agency expertise.<sup>30</sup> Congress balances these competing regulatory approaches and often adopts a decentralized, or federalist, approach to regulation simply by not choosing to regulate. In doing so, Congress leaves regulation in many areas up to the states. State tort law is and has historically been an important part of state regulation. The regulation of gun designs through product liability in state courts is entirely consistent with Congress's desire to exempt them from centralized CPSC regulation and is, as the New Mexico appellate court said in *Smith*, a traditional role of state courts. Tort litigation in general and gun litigation in particular promote the benefits of a federalist approach to regulation.

### Objections to a Complementary Policy-Making Role for the Tort System

At this point, I would like to address three objections to the complementary policy-making role for the tort system that I have been advocating. The first objection, from traditionalists, asserts that legislatures are perfectly able to plug their own gaps and to correct their own mistakes without the involvement of courts. Nothing prevents legislatures from investigating the results of their policy choices and revisiting them where necessary. The problem with this objection is that it assumes an idealized vision of the legislative process. The committee structure and deliberative nature of legislatures are designed to make it *hard* to pass legislation.

Of the thousands of bills proposed in large state legislatures or Congress each term, only a small fraction are passed into law. Legislative policy-making is cumbersome, slow, and highly inefficient. Such is the price of deliberative democracy. Furthermore, the outcome is often incomplete or internally inconsistent, reflecting not so much a clear policy choice as the numerous compromises necessary to pass legislation. Courts, by contrast, can more efficiently and more coherently plug gaps or correct contradictions so as to make legislative policies more effective. Agencies also perform this function of gap filling, subject to review by courts. Where courts err egregiously or overstep their legitimate complementary role, this will usually create enough controversy to attract legislative attention and action, as it did in the *Kelley* case, discussed in chapter 6.

A second objection, from progressives, questions why courts owe any deference at all to legislative policy choices, especially when those choices are dictated by special interest lobbies. For one thing, our constitutional tradition of judicial review empowers courts to sit in judgment of legislative policy choices. For another, as was just mentioned, if legislatures do not approve, they can always pass legislation more to their liking. The problem with this objection is that it fails to distinguish between judicial decisions based on constitutional concerns and those based on policy preferences. There is an important difference between a court's claiming that a legislative decision is illegitimate—that the legislature had no right to make such a decision in the first place—and claiming that a legislative decision is wrong—that, all things considered, the choice of policy is a poor one. The former is no law at all, while the latter, no matter how misguided, is valid law. While our constitutional tradition of judicial review does empower courts to contradict the policy choices of legislatures when they are illegitimate, it expects them to defer to legitimate legislative policy choices, even when wrong. Moreover, as hard as it is to make legislative policy, independent judicial policy-making would only make it harder. And while the legislature is free to replace judicial policy choices with its own, this is, as I have mentioned, a difficult process. It took the Maryland legislature three years to overturn the policy established by the *Kelley* case. Courts should refrain from regularly testing the limits of their policy-making powers, for the cumbersome corrective capacity of legislatures will work best if taxed only rarely.



A third objection, from those sympathetic to the general approach of the complementary model, questions the model's usefulness to judges in deciding cases. It is not enough that the model offers an attractive intermediate position between those who would deny judges any role in policy-making and those who would grant them unfettered discretion. In order to be useful in practice, the model must clarify specific constraints that define the complementary role in a way that provides guidance to judges when they are adjudicating cases. In other words, how does the concept of a complementary role help judges distinguish legitimate judicial policy-making from overreaching? How is a judge to determine, in a way that can be articulated and without the benefit of hindsight, whether the policy implications of a decision are consistent with a complementary role?

There is no simple response to this objection. Defining the judicial role and the proper limits of judicial discretion have been persistent difficulties throughout the history of jurisprudence, and I do not purport to have solved them. I can, however, further develop the concept of a complementary policy-making role in ways that may offer practical guidance in adjudicating claims.

The complementary policy-making role of courts, as I have developed it so far, is defined by two elements. First, the primary function of common law courts should be to provide a stable and predictable system of rules for resolving private disputes. Second, judges should engage in policy analysis only insofar as this is necessary to resolve doctrinal ambiguities and should make policy choices that support discernable legislative trends. This formulation, however, is too simple, for it fails to account for occasions where courts justifiably overturn established doctrines. For example, the products liability "revolution" of the last century was carried out by courts willing to overturn established precedents and to create new doctrines that drastically altered the regulation of consumer product safety. Landmark cases such as *MacPherson v. Buick Motor Co.*, overturning the privity requirement in negligence cases, or *Greenman v. Yuba Power Products*, establishing strict liability for defective products, now, ninety years later and forty years later respectively, stand for well-accepted, indeed foundational, doctrinal principles.<sup>31</sup> If a model of common law adjudication does not accommodate widely respected doctrinal transformations such as these, so much the worse for the model.

In order to accommodate cases such as *MacPherson* and *Greenman* that overturn established doctrines and set new directions for public policy, let me offer both a refinement of my model and a more subtle view of these two landmark cases. From this discussion will emerge a more specific delineation of the complementary judicial role that I am advocating. In order to maintain a stable and predictable system of rules for resolving private disputes, the rules must be, or at least be perceived as, fair by most people in most situations. A system of rules that is widely viewed as unjust is likely to become unstable and unpredictable. Judges and juries will be more likely to ignore them, litigants will be more prone to resist enforcement of them, and legislatures will be more apt to reform them. All of these reactions, which will intensify the more the rules are perceived as unfair, undermine the stability and predictability of private dispute resolution, the primary function of the tort system. The long-term maintenance of a system of stable and predictable rules for resolving private dispute may therefore on occasion require replacing rules perceived as unfair with rules perceived as fair. This explains how the complementary model could countenance the occasional reversal of established tort doctrines.

The unfairness of particular doctrines is not enough, however, to explain the decisions in *MacPherson* and *Greenman*. In *MacPherson*, Justice Cardozo not only viewed the privity rule as unfair because it failed to recognize the realities of manufacturer-consumer relations in the age of mass production and national distribution; he also considered the rule substantially compromised by prior decisions that carved out increasingly significant exceptions to it for “inherently dangerous products,” a gradually expanding category that included poisons, guns, and scaffolding.<sup>32</sup> *MacPherson* did not so much signal a sudden revolution in tort doctrine as the culmination of a gradual shift away from privity. Moreover, in overturning the privity rule, Cardozo was concerned with updating the tort system as a whole by expanding the scope of negligence liability. He was not merely using the litigation as a means of addressing the particular social problem of auto accidents. These two observations are even more true of *Greenman*. Justice Traynor in the *Greenman* decision did not dramatically change the rule governing injuries caused by defective products from negligence to strict liability; rather, he merely recategorized an existing strict liability rule in contract—implied warranty—as a strict liability rule in tort. And, like Cardozo in *MacPherson*,

Traynor was concerned about the larger doctrinal system governing product-related injuries, not the specific social problem of power tool accidents. In both of these cases, judicial policy-making was characterized by gradual, incremental change rather than sharp, sudden departures from precedent and a concern for the integrity of the tort system as whole rather than a specific solution to a particular social problem. By contrast, cases like *O'Brien v. Muskin Corp.*, establishing liability for defective design even where the plaintiff can propose no safer alternative, known as “generic” or “product-category” liability, and *Kelley v. R.G. Industries*, establishing strict liability for the manufacture or sale of “Saturday Night Specials,” lack these qualities.<sup>33</sup> The rule in *O'Brien*, subsequently overturned by the New Jersey legislature, marked a sudden departure from existing precedent. The rule in *Kelley*, overturned by the Maryland legislature, was more focused on proposing a solution to the particular problem of gun violence than on the systemic integrity of tort doctrine.

In the end, the judicial role is a sensibility rather than a set of determinate rules. It is more an aesthetic than a set of principles. In the complementary conception of this role, judicial policy-making is constrained by a concern for the doctrinal integrity of the tort system as a stable and predictable way to resolve private disputes. This means that judges generally restrain their policy analysis to resolving ambiguities in existing doctrine and their policy choices to options that support legislative trends where discernable. Even on the extraordinary occasions when judges overturn established doctrines in favor of fairer rules, they do so in an incremental manner guided by a concern for the systemic integrity of tort doctrine. Thus, when adjudicating gun cases, judges should generally dismiss those claims unsupported by existing doctrine and should resolve doctrinal ambiguities in ways that avoid contradicting legislative policy choices. Should parties on either side call on judges to overturn existing doctrine, judges should do so only if they are convinced that such a change would best serve the doctrinal integrity of the tort system as a whole.

#### Institutional Complementarity as a Regulatory Virtue

Complementarity between courts and legislatures is difficult to maintain. At times, courts ignore doctrinal restraints or make policy choices with-

out regard for legislative preferences. The realities of the legislative process often make it difficult, if not impossible, to pass legislation overruling such decisions. It takes more than a mere legislative majority to get a bill through the many procedural hurdles of the legislative process. Similarly, legislatures occasionally take it upon themselves to influence pending litigation or to hand out immunity based on political considerations without respect for the role of courts or regard for the integrity of legal doctrine. In most instances, there is little that courts can do to correct such legislative overreaching. The litigation process is slow, and judicial action is limited to deciding the cases that happen to appear before the court. Thus, complementarity is less an enforceable rule than an institutional virtue to which courts and legislatures should aspire.

The complementary role of courts is based on the view that the primary duty of common law courts is to provide a stable and predictable system of rules for resolving private disputes. Insofar as it is highly deliberative and insulated from political pressures, the judicial process is well suited to this task. When ambiguities arise in the application of existing rules, judges must exercise discretion and should be guided in part by the public policy implications of different options for deciding a case. In making policy choices within the context of resolving doctrinal ambiguities, complementarity suggests that courts should show deference to legislative policy preferences where discernable. By playing a complementary role, courts can enhance legislative policy-making by uncovering information, filling gaps, enhancing enforcement, and, where desirable, being part of a decentralized, federalist approach to regulation.

For their part, legislatures too should play a complementary role in making public policy. Legislatures should take the lead in shaping public policy. The perception of democratic legitimacy makes them better suited than courts to broker political compromises between competing interest groups. Furthermore, they have the power to establish, fund, and supervise agencies capable of gathering and developing special expertise in a particular regulatory area. At the same time, legislatures should leave room for courts to play a secondary role, one that, in the end, can strengthen the effectiveness of their own policy choices. In responding to court decisions with which they disagree, legislatures should exercise restraint, overturning the particular judicial rule with which they disagree without eliminating altogether future court involve-

ment in an area of public policy. Legislatures should also exercise restraint in replacing common law rules with statutory substitutes, especially when this introduces inconsistencies into tort doctrine. Such inconsistencies should be justified by the public interest, not political influence.

Again, when courts and legislatures transgress these norms, there is usually little if anything that the other can do about it. It is up to judges and legislators themselves to promote institutional integrity and to cultivate the benefits of complementarity between courts and legislatures. Doing so will strengthen both private law and public policy. While cultivating mutual respect and complementarity between courts and legislatures may not be enforceable, it is nevertheless essential to good government.