

CHAPTER 7
*Gun Litigation in the
Mass Tort Context*

RICHARD A. NAGAREDA



Lawsuits by individuals and municipalities against the gun industry exemplify a new form of mass tort litigation, what one commentator aptly dubs “social policy tort” litigation.¹ Plaintiffs in gun litigation seek conventional civil damages for tortious misconduct in the past. But a complementary goal—arguably, the predominant goal of the lawsuits by municipalities—is to precipitate prospective changes in the marketing practices of the gun industry as a whole. This prospective dimension of gun litigation by municipalities has led critics accurately to see it as an attempt to bring into being, through settlement of litigation, the kind of regulatory regime that gun control advocates have failed to secure from legislatures or public regulatory agencies.²

I initially explain how the social policy dimension of contemporary gun litigation distinguishes it from most previous instances of mass tort litigation. This is not to suggest that those litigating against the gun industry somehow are a monolithic force, united in all respects about objectives and strategy. As Howard Erichson cautions in chapter 5 of this volume, gun litigation is as notable for the variations in its origins and objectives as it is for its common features. My initial point is simply that there is a substantial social policy dimension to gun litigation—arguably, a dimension in some tension with the conventional tort goal of compensation for individual plaintiffs—and that one may frame that dimension within the backdrop of mass tort litigation generally. I then advance two claims about gun litigation as a species of social policy tort litigation.

My first claim is that one can fit the emergence of social policy tort litigation within two longer-term trends: developments in tort theory and a roughly contemporaneous transformation in the political landscape for regulatory programs in the public sector. Theorists of tort law today tend to conceptualize tort litigation largely as a convenient occasion for regulatory policy-making through the vehicle of the common law. At the same time, critics of public regulatory programs have called into doubt their efficacy and, indeed, their very legitimacy. The confluence of these two developments has meant that tort law is seen as an arm of regulatory law but that political support for expansion of the regulatory state is tenuous. It should come as no surprise that, in such a world, ambitious regulatory programs should come to the fore through the avenue of tort litigation. There is more than a hint of irony here. The implication of this initial claim is that gun litigation today is the unexpected and unintended outgrowth of two developments that many free-market conservatives would applaud: the instrumental conception of tort law associated with the law-and-economics perspective and the Reagan revolution in regulatory policy.

My second claim is that gun litigation seeks to implement its regulatory program in a manner strikingly unmindful of the lessons learned about conventional regulation in the public sphere. Recent decades have witnessed a reorientation of regulatory policy-making, one implemented through measures embraced by such divergent political regimes as the Reagan and Clinton administrations. This reorientation has two components of significance here: (1) systematic comparison of proposed regulatory interventions based upon their relative cost-effectiveness, broadly defined; and (2) greater emphasis on political accountability in the making of regulatory policy decisions. By contrast, gun litigation by many municipalities seeks to frame the questions surrounding industry marketing practices on a stand-alone basis, as matters to be addressed irrespective of other interventions to protect public safety and through arrangements for the financing of litigation that often are removed from the conventional budgetary process.

Two specific subpoints stand out here. First, the challenge to industry marketing practices in gun litigation seems, at first glance, to comprise a new kind of allegation in the mass tort world. On closer examination, however, this challenge actually replicates—indeed, accentuates—the difficulties associated with both tort litigation and regulation with

respect to products alleged to cause latent disease. This too should come as no surprise, given the efforts of some gun litigation advocates to recast the social consequences of gun availability as an issue of public health.³ I expose here the conceptual relationship between the negligent marketing claim at the heart of gun litigation and more conventional allegations of latent disease associated with the kinds of pharmaceutical products characteristically the focus of mass tort lawsuits.

Second, the growing disconnection between social policy tort litigation and public regulation is more than a matter of theoretical interest. The rise of social policy tort litigation presents free-market conservatives today with the ironic consequences of their own successes. But social policy tort litigation in the future could proceed along lines that would be deeply ironic for liberals. A world in which social policy tort litigation emerges as a vehicle through which to recoup the costs to the public fisc of private behavior that the government has not regulated directly—perhaps cannot regulate directly—would be a world quite amenable to a social conservative agenda. The only question would be how to gain control of the political offices with the authority to arrange for litigation in the name of the government. Gun litigation, if anything, demonstrates that social policy tort suits may proceed on a local, rather than a state or a national, basis. And, as no less than James Madison famously recognized in *The Federalist*, narrow factions of all sorts are more apt to achieve political dominance on a local, rather than a national, level.

Gun Litigation as a New Form of Mass Tort

Recent decades have witnessed a transformation in the nature and objectives of mass tort litigation. Before turning to that transformation, however, one must bear in mind the features of mass torts in more conventional forms. I use the term *mass torts* to describe tortious misconduct alleged to affect large numbers of geographically dispersed persons and to give rise to latent disease.⁴ Mass torts thus differ from mass accidents—such as an airplane crash or a hotel fire—which might cause injury to large numbers of people but generally do not involve latent disease. Mass torts also differ from toxic torts—such as might arise from the release of toxic chemicals from an industrial facility—which involve

allegations of latent disease but only on the part of persons within a relatively circumscribed geographic area.

Each feature that defines a mass tort—numerosity, geographic dispersion, and latency—presents a host of challenges for the conventional tort system. The sheer number of claims makes unwieldy, at best, the processing of individual tort lawsuits by a litigation system that remains geared around discrete, idiosyncratic wrongs. Geographic dispersion accentuates the problem by spreading cases across multiple judicial systems, thereby making difficult the coordination of pending litigation. And the phenomenon of latent disease pushes at conventional principles of causation and injury to such an extent that some commentators call for new principles of tort liability predicated upon the imposition of risk itself.⁵

For all the practical and conceptual challenges that they pose, however, mass torts are quite conventional in one significant respect: mass tort suits seek damages based upon allegations of tortious misconduct in the past. To be sure, the sheer scale of such damage liability can raise difficulties of its own—hence, the tendency of mass torts to lead defendant manufacturers to opt for corporate reorganization under the Bankruptcy Code. But the point remains that the focus of mass tort litigation is overwhelmingly retrospective in temporal orientation. Mass torts characteristically carry the possibility of effecting prospective change only remotely and at a high level of generality by enhancing the deterrence of risk taking by corporate America as a whole. In conventional mass tort litigation, the defendant manufacturer typically has ceased to market broadly—often to market at all—the underlying product in question. This account describes the vast majority of examples commonly used to illustrate the mass tort phenomenon. Such illustrations include litigation over asbestos, the defoliant Agent Orange, the Dalkon Shield contraceptive device, silicone gel breast implants, and the diet drug combination fen-phen.

Three features characterize the emergence in recent years of social policy torts as a genre of mass tort litigation. First, litigation proceeds not simply on multiple fronts in geographic terms but also in the name of both private persons and the government itself. For the government, the predicate for litigation consists of a public benefit program, whether state-funded health care benefits in the case of tobacco litigation⁶ or locally funded police and other public services in the case of gun litiga-

tion. The crux of the government's argument for liability consists of the claim that the defendant industry's tortious misdeeds have resulted in some increment of additional outlays from the public fisc. The government, as plaintiff, often seeks not only damages to recoup those additional outlays in the past but also injunctive relief against the underlying marketing practices of the defendant industry, so as to alleviate the need for similar outlays in the future.

The financial engine for social policy tort litigation by the government is also noteworthy in many instances. Such litigation frequently takes place not through the use of budgetary resources for law enforcement but, instead, through the retention of law firms within the plaintiffs' bar on a contingency fee basis.⁷ In tobacco litigation, for instance, the law firms retained by state governments generally consisted of those spearheading litigation by individual smokers or classes thereof.⁸ One must take care, however, not to paint with too broad of a brush. Some municipal lawsuits against the gun industry are financed in the ordinary fashion, through the allocation of budgetary resources to that end.⁹ The important point about litigation finance, nevertheless, is that many of the government suits aspire to what one might describe as a budgetary freebie: recovery of funds for the public fisc, but not through the financing of litigation from the public fisc.

Second, from the standpoint of defendants, the practical effect of social policy tort litigation on multiple fronts is to give rise to its own *in terrorem* effect, such as may lead corporate executives to contemplate seriously the prospect of a comprehensive settlement agreement. This is not to say that the multifront aspect of social policy tort litigation is the result of conscious, coordinated decision making by plaintiffs' lawyers and governments. Again, the plaintiffs' side of social policy tort litigation is not monolithic. The absence of coordination on the plaintiffs' side notwithstanding, the multifront nature of social policy tort litigation has the effect—intended or not—of placing the defendant industry in the position of having to prevail in all, or virtually all, fora in order to avoid the imposition of injunctive relief that, as a practical matter, might well entail the restructuring of industry marketing practices as a whole.

To observe that the multifront nature of social policy tort litigation has its own *in terrorem* effect, moreover, is not to say that the defendants ultimately will succumb. Many, though not all, suits by municipalities against the gun industry have met with dismissal on legal grounds.¹⁰

And, thus far, only one firm in the gun industry—Smith & Wesson—has gone the settlement route, a strategic choice that has made the company the subject of considerable scorn from other gun makers.¹¹ A substantial facet of social policy tort litigation nonetheless remains its *potential* to effectuate, through comprehensive settlement, a regulatory program by means that do not necessarily require an extended series of clear-cut victories in court.

Third, social policy tort litigation both accentuates and transforms the preexisting tendency of mass torts toward a convergence of tort and criminal concepts.¹² Conventional mass torts often involve substantial factual questions about the existence of a causal link between the alleged tortious misconduct of the defendants and the particular maladies suffered by the plaintiffs. At the same time, mass torts frequently involve substantial evidence of fault on the defendants' part—perhaps a lax attitude toward product safety or, even worse, a conscious corporate program to mislead consumers with regard to product risk. But fault does not, in itself, make for causation. Defendant manufacturers simply may have had the sheer good luck—the “outrageous fortune,” one might say—not to have caused injury to anyone. To take perhaps the most famous illustration from the annals of mass torts: notwithstanding a less than exemplary regard for product safety on the part of manufacturers, silicone gel breast implants still do not cause autoimmune disease as a scientific matter.¹³

Existing commentary marks the tendency of mass tort litigation along the foregoing lines toward “commingling” by civil juries—a willingness, often spurred by plaintiffs' counsel, to overlook substantial factual questions of causation in the presence of formidable evidence of blameworthy conduct on the defendants' part.¹⁴ One tendency in conventional mass torts, in short, is to impose civil liability as a way to punish defendants for their misdeeds, with little regard to whether they actually caused the harm suffered by plaintiffs. This is not to say that such a tendency is necessarily unjust in the overall scheme of the law. The criminal law punishes on this basis with regularity, through its recognition of attempted crimes in addition to completed ones. I simply suggest that this approach is uncharacteristic of tort law.

Social policy torts introduce a new twist to this familiar pattern. For all the factual questions that frequently surround conventional mass torts, their legal underpinnings typically are secure. The usual allegation

is that the defendants failed to warn consumers about some risk associated with their product. To be sure, the facts may not bear out this assertion in a given instance; but the underlying notion of liability for failure to warn remains well established in tort doctrine. Not so with regard to many theories of liability invoked in gun litigation. As existing commentary observes, even individual tort suits predicated on negligent marketing by gun manufacturers raise formidable questions of legal duty where the harm to the plaintiff comes, most immediately, as a result of criminal misconduct.¹⁵ Challenges to industry marketing practices at the behest of the government raise substantial legal questions of their own. As currently conceived, the “free public services” doctrine deems unrecoverable public expenditures made in the performance of government functions.¹⁶

Social policy tort litigation raises a prospect of commingling of a new sort: not simply the prospect that civil juries will overlook factual barriers to liability when confronted with substantial evidence of defendants’ blameworthiness but, additionally, that some courts in some jurisdictions might come to regard the problem of gun availability in modern America as so pressing and of such societal consequence as to warrant the surmounting of doctrinal barriers to liability. Thus far, the constraints of existing tort doctrine have largely held firm in gun litigation. But, once again, the multifront dimension of social policy tort litigation comes into play. It is not enough for the defendant industry, over time, to win in many, or even most, fora if the prospect of losses in some effectively would make for the implementation of marketing changes along the lines demanded by litigation proponents.

Intellectual and Political Context

Its implications for mass tort litigation aside, the emergence of social policy tort litigation in recent decades highlights the unexpected confluence of two larger developments in the late twentieth century, the implications of which have become apparent only in recent years. The first development is intellectual in nature, though it is by no means one confined to academia in its repercussions. The second development is political in character and defines the landscape for public regulatory initiatives to the present day.

An intellectual history of tort theory in the United States is well beyond the parameters of this chapter.¹⁷ A bird's-eye view nonetheless suffices to frame—with some risk of generalization, I admit—the rise of social policy tort litigation as a distinctive species of mass tort. Put simply, the dominant theoretical account of tort law today sees tort litigation as a convenient occasion for regulatory policy-making by common law judges—as an invitation for the crafting of tort doctrine to achieve, among other regulatory goals, the optimal deterrence of risk taking by product manufacturers. As one commentator tellingly observes, tort law today tends to be conceived as a gigantic enabling act, one that delegates to common law judges—and, by implication, to their counselors in the academy—the authority to enact a wide range of regulatory policies on the basis of their judgment as to how best to promote social welfare.¹⁸

This regulatory perspective has a lengthy intellectual pedigree, tracing its origins at least to Oliver Wendell Holmes's famous account in *The Common Law* of tort law as a vehicle for social regulation.¹⁹ Holmes's writings mark the early stirrings of Legal Realism, a movement whose proponents, by the mid-twentieth century, would tout explicitly tort law as a form of "public law in disguise" for the achievement of regulatory ends.²⁰ In his landmark 1941 *Handbook on the Law of Torts*, William Prosser would include an early section overtly describing tort law as an exercise in "Social Engineering."²¹

Later scholars—most prominently, Richard Posner and Guido Calabresi—would endeavor to lend precision to the regulatory force of tort law by bringing to bear on its doctrines the concepts and rigor of economic analysis. Common law judges, for example, could target the regulatory force of liability principles in order to place the costs of accidents on the "least cost avoider."²² One commentator captures the central thrust of these developments, observing that, by the 1960s, "[a]mbitious judges and scholars viewed tort rules not as a direct reflection of the mores of the citizenry, but as a means of implementing social policy decisions arrived at through the application of philosophical, scientific, and technical knowledge to social problems."²³

All of this is not to suggest that the regulatory account of tort law stands unchallenged. The major theoretical rift in tort law for some time has pitted the instrumentalist heirs of Holmes, Posner, and Calabresi against a competing camp of scholars who see tort law not in terms of the regulatory ends that it might advance but as a vehicle for the achieve-

ment of corrective justice as between the plaintiff and the defendant.²⁴ One may find in commentary on gun litigation ripples from this larger theoretical debate. In a telling recent exchange, law-and-economics scholar Barry Adler defends gun litigation—indeed, strict liability for the gun industry—as a vehicle through which to internalize the social costs of gun availability and to spread those costs through the mechanism of gun prices.²⁵ Corrective justice theorists Jules Coleman and Arthur Ripstein, by contrast, insist that tort law must understand gun litigation not as “a matter of fixing prices” but as “a matter of doing justice,” by which they mean the making of judgments about “responsibility and wrongdoing.”²⁶

My enterprise here is not to settle the theoretical debate but simply to fit the emergence of social policy tort litigation within the larger intellectual context of tort theory. This is not to suggest that conventional tort litigation somehow lacks a social policy agenda. The demise of the privity limitation in products liability, for example, could not have occurred unless someone had sued and demanded such a change in doctrine. The distinctive feature of social policy tort litigation is not that it has a regulatory agenda but rather that it has the potential to implement that agenda not necessarily through definitive judicial rulings but through the dynamics of tort litigation itself—through settlements that would implement prospective changes in defendants’ practices in the face of doctrinal uncertainty. No less of a tort-as-regulation proponent than Gary Schwartz remarked with regard to the multibillion-dollar state attorneys general settlement with the tobacco industry: “Never has so much money changed hands on account of lawsuits in which the legal theories have been so uncertain.”²⁷ By conceptualizing torts as occasions for *judicial* policy-making, regulatory accounts unwittingly have opened the possibility of policy change not so much through the decisions of enlightened judges schooled in economic or other regulatory analysis but, instead, through the dynamics of litigation itself.

Social policy tort litigation not only exhibits a kinship with regulatory theories of tort law. One also must understand the phenomenon in light of other developments in the political realm. Here, too, I compress a complex story to highlight key points. The election of Ronald Reagan in 1980 marked a transformation of the political landscape for ambitious new programs of government regulation. Famously declaring that “[g]overnment is not the solution to our problem; government is the

problem,”²⁸ President Reagan embarked on an extensive program of deregulation. Indeed, as I shall discuss momentarily, significant facets of the Reagan administration’s approach to regulatory policy have had enduring effects that transcend partisan lines. No less than President Clinton would declare two decades later that “[t]he era of big Government is over.”²⁹

Whether the Reagan revolution in regulatory policy transformed public perception of government or largely capitalized on preexisting political trends will remain a subject of debate among historians for the foreseeable future. A variety of contemporaneous developments undoubtedly contributed to a dwindling of the 1960s zeitgeist that new public regulatory programs should occupy the forefront of efforts to address social problems. The Reagan revolution was much in keeping with the undermining of public regard for government generally in the aftermath of the Watergate scandal and the Vietnam War. In addition, attention to the costs of the regulatory state for both industry and the government itself is consonant with the slow economic growth prevalent in the 1970s and the deepening public distaste for taxes during the same period.

The ascendance of regulatory theories of tort law and the emergence of a political landscape inhospitable to demands for government regulation have made for a potent combination, one that has created a hospitable intellectual and political environment for the development of social policy tort litigation. This observation should give pause to free-market conservatives who attack gun litigation as an effort to expand marketing restrictions on firearms through means other than ordinary political channels. Gun litigation, properly understood, is the unanticipated consequence of developments that free-market conservatives largely applaud—indeed, have taken a prominent role in implementing. This is not to suggest that law-and-economics scholarship is uniformly hostile to government regulation or, even more fancifully, that all who practice it somehow harbor a deregulatory agenda. To the contrary, an increasingly important branch of law-and-economics scholarship—behavioral law and economics—aspires to build a richer and more precise case for government regulatory interventions.³⁰ Nor do I mean to imply that the innovations in government operations deployed to implement the Reagan revolution were not used later by the Clinton administration to support a dramatically different vision of the regula-

tory state. My point is simply that those who tend, on the whole, to applaud the rise of law and economics as an account of tort law and to laud the Reagan revolution in regulatory policy need to confront starkly the unanticipated consequences of their own successes. By simultaneously accentuating the regulatory dimension of tort law and downplaying the efficacy of the regulatory state, free-market conservatives have unwittingly created a climate ripe for the use of social policy tort litigation to sidestep the political arena.

Gun Litigation as Risk Regulation

Apart from its ironic intellectual and political roots, gun litigation undertakes its regulatory enterprise in a manner oblivious, for the most part, to the major lessons learned over the past two decades about prospective risk regulation. These lessons are twofold, and, most important, they transcend partisan political lines.

First, regulatory policy post-1980 has emphasized both precision and comparison in the evaluation of regulatory programs. The intellectual starting point for this development consists of the now famous chart developed in the early 1980s by the Office of Management and Budget (OMB) to compare across agencies the cost-effectiveness of various regulatory measures intended to advance public health and safety. The OMB chart later formed the centerpiece for a book in which Stephen Breyer calls for the prioritization of regulatory interventions based upon their capacity to deliver the greatest health and safety benefits for the least compliance costs.³¹ Subsequent academic commentary has called into question the methodology of the OMB chart specifically.³² The larger lesson nonetheless remains: Sensible regulatory policy in a world of limited social resources calls for precision in the identification of the costs and benefits associated with regulatory interventions and for prioritization of interventions according to their anticipated cost-effectiveness, broadly defined.

In the Reagan administration, the principal vehicle for the reorientation of regulatory policy along the foregoing lines consisted of Executive Order 12,291.³³ The Reagan Order demanded cost-benefit analysis of proposed regulatory interventions and provided for centralized oversight of the regulatory process by OMB to implement the policy agenda

of the president. The most striking feature of the Reagan Order is not so much its content as the durability of its basic framework across partisan lines.³⁴ President Clinton entered office with a markedly different view of government regulation. But his counterpart Executive Order 12,866³⁵ largely retained the framework for regulatory policy analysis set forth in the Reagan Order. If anything, President Clinton went a step further, issuing directives to administrative agencies with regard to particular regulatory policies, sometimes at preregulatory stages of the agency decision-making process.³⁶ President George W. Bush likewise has embraced a process for regulatory review centered upon cost-benefit analysis across administrative agencies, as reflected in his Executive Order 13,258.³⁷

Gun litigation unquestionably addresses a substantial risk to public safety—that posed by gun violence. But gun litigation—like all social policy tort litigation—proceeds on a distinctly noncomparative basis, framing the response of the law simply in terms of changes in gun marketing practices. This is not to say that gun litigation advocates ignore the costs and benefits of their preferred policy course or even that they agree on the microlevel details of the changes in industry marketing practices that would be most desirable. It is only to say that the inquiry is not comparative in the sense embraced in the realm of public regulation. As a matter of regulatory policy, the question is not simply whether the benefits of additional limitations on gun marketing outweigh their costs—a question that tort litigation, particularly on a regulatory conception, might explore. The question also is whether such an approach gives the law the biggest bang for the buck compared to other ways to address the safety risks posed by gun violence, some of which might not center on changes in manufacturers' conduct at all.

Second, regulatory policy post-1980 has come to appreciate the inherently political character of its enterprise and the consequent centrality of political accountability in the making of regulatory decisions. The Reagan, Clinton, and Bush Orders all reflect this view, calling for coordination of regulatory initiatives across administrative agencies not only for reasons of cost-effectiveness but also to ensure that agencies implement the overall policy agenda of the president. That agenda differed, of course, from Reagan to Clinton to Bush. The point, however, is precisely that. Absent the setting in stone of particular regulatory policies by Congress, the question of whether regulatory policy at a given time

should be marginally more or less receptive to government intervention is quintessentially a political question and, as such, one suited for resolution by the institutional actor, aside from Congress itself, accountable to the populace as a whole.

Gun litigation, by contrast, uses tort liability as a vehicle for regulation in a manner that, in substantial part, sidesteps the ordinary political process. Insofar as elected officials in municipal governments have authorized gun litigation, many have tended to do so through the use of contingency fee arrangements that do not require budgetary authorization and, hence, are not subject to budgetary limitation at the behest of the legislature. Where ordinary political channels have raised their head in this area, they have done so through legislation at the state level to disempower municipalities from bringing or maintaining suits against gun makers.³⁸

My overarching point here is not to come definitively to rest on the question of whether additional regulation of gun marketing stands as desirable policy from the vantage point of post-Reagan regulatory policy analysis. My claim, instead, is simply that a vision of social policy tort litigation as a vehicle for risk regulation makes for a growing disconnection between tort law and regulatory policy. That would not be so incongruous if tort law itself were seen as achieving something different from regulation—say, corrective justice between the parties. But it is a distinctly curious thing in a world in which tort law is conceptualized primarily as public regulatory law “in disguise.”

Here, many advocates of gun litigation seek to walk a very thin tightrope. Their legal allegations fit within the prevailing theoretical account of tort law as a privatized vehicle for risk regulation. That account holds the promise of enabling them to obtain the kind of regulatory program that they have been unable to secure from the political system—one captured, some might say, by the gun industry and its supporters. Yet advocates of gun litigation tend not to subject their chosen vehicle of risk regulation to the kind of comparative, politically informed inquiry now regarded, on a bipartisan basis, as the hallmark of sound regulatory decision making. They want the regulatory force of tort law, but only if they can control how and where that force is targeted. As I now explain, social policy tort litigation against the gun industry tends to skirt even the parameters that the civil justice system has managed to fashion for the handling of conventional mass tort litigation.

Gun Violence as Latent Disease

Like mass tort litigation, the regulatory system too must confront the prospect of products suspected to cause latent disease. Cost-benefit analysis in the regulatory sphere depends upon precision in risk assessment, an ability to estimate the marginal benefit to public health associated with regulatory interventions. As a consequence, epidemiology—a field of scientific research concerned with the incidence and causes of disease in human populations—has come to the forefront of regulatory decision making. This is not to say that any branch of science can eliminate the need for regulators to make difficult value judgments in the face of uncertainty. The point nonetheless remains that mere speculation about the benefits of proposed regulatory interventions—speculation unsupported by the intellectual norms of science—is unlikely to carry weight in the policy debate. Science, in short, can serve to delineate the terrain within which political judgment takes place.

Attentiveness to the intellectual norms of science is not a notion confined to the regulatory sphere. The signal development in mass tort litigation practice in recent decades has been the exercise by trial courts of enhanced supervision over the admission of expert scientific testimony. In its 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court posited a “gatekeeping” role for trial judges with respect to expert scientific testimony.³⁹ Appropriately enough, *Daubert* itself involved a conventional tort suit brought late in the sequence of mass tort litigation over the morning sickness drug Bendectin—in particular, after the development of a “vast” epidemiological literature documenting that children of mothers who consumed Bendectin during pregnancy suffered no increased incidence of birth defects as compared to children not so exposed.⁴⁰ The *Daubert* Court directed trial judges to differentiate expert testimony grounded in “scientific knowledge” from faux expertise backed only by “subjective belief or unsupported speculation.”⁴¹

Elaborating on the foregoing distinction in subsequent decisions, the Court has recognized the need for scientists to draw inferences from underlying data but nevertheless has underscored the role of the trial court to determine whether, in a given instance, there is “simply too great an analytical gap between the data and the opinion proffered.”⁴² Along similar lines, the Court has underscored the trial court’s responsi-

bility “to make certain that the expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”⁴³ *Daubert* and its progeny have spawned whole treatises⁴⁴ and a vast array of scholarly articles. The important point for present purposes is that, after *Daubert*, speculation ungrounded in the intellectual norms of science is likely to have as little impact in mass tort litigation as in a regulatory process with an emphasis on cost-benefit analysis.

The most striking feature of the negligent marketing claim at the heart of gun litigation is that it replicates the analytical challenges associated with difficult causation issues in conventional mass tort litigation but without the “intellectual rigor” of an established branch of expertise. The negligent marketing claim arises in both individual lawsuits by victims of gun violence and litigation by municipalities under the rubric of tort liability for the creation of a public nuisance.⁴⁵ The claim has many dimensions that speak to, among other things, the adequacy of defendant manufacturers’ monitoring of gun retail sales practices and manufacturers’ tolerance of what one might describe as interjurisdictional arbitrage, whereby guns initially sold in jurisdictions with less stringent regulatory controls come to be transferred on the secondary market to jurisdictions with greater regulation. Details aside, the essential thrust of the negligent marketing claim is that the practices of manufacturers make guns readily available to persons inclined to use them in the commission of violent crime—a phenomenon that, in turn, results in some increment of additional expenditure by local governments. The negligent marketing claim in gun litigation is part of a larger genre of “enabling torts,”⁴⁶ situations in which the tortious misconduct of the defendant facilitates the commission of an intentional tort by a third party: here, the gun-wielding criminal offender.

Though not cast in scientific terms, the negligent marketing claim bears more than a passing resemblance to the sorts of epidemiological questions common in both conventional mass tort lawsuits and public regulation. Epidemiologists use the concept of “relative risk” to describe the relationship between a given substance and human disease.⁴⁷ As the term suggests, relative risk expresses the incidence of disease in the population exposed to the substance in question as compared to the incidence in an unexposed population similar in all other relevant respects. Thus, relative risk greater than 1.0 indicates that the incidence of disease

in the exposed population is greater than that in the unexposed population—a finding that reflects an association between the substance and the disease, though not necessarily a causal relationship. Epidemiological research might seek to estimate relative risk in a variety of ways,⁴⁸ but the crux of the methodology remains to *compare* exposed and unexposed persons who are otherwise similar.

The comparative nature of epidemiological research is central to its power, both as a tool for scientific inquiry and as evidence of causation in tort litigation. The existence of a strong association between, say, silicone gel breast implants and autoimmune disease does not demonstrate the existence of a causal relationship between the two. One needs to know more about what toxicologists describe as the background or baseline risk of disease—in the present example, the prevalence of autoimmune disease among persons without the disputed implants. The concept of baseline risk relates closely to the counterfactual nature of the causation inquiry in tort litigation. The question of “but-for” causation in tort law asks whether the plaintiff would have suffered the same disease, even in a world without the misconduct that she attributes to the defendant⁴⁹—or, to rephrase the question, whether the association between the product and her case of disease is simply coincidental.

As Aaron Twerski and Anthony Sebok note with respect to gun litigation, “it is the responsibility of the plaintiff to identify the differential between the baseline risk produced by non-negligent marketing and the ultimate risk produced by the defendants’ negligence.”⁵⁰ Translated into epidemiological terms, the central question surrounding the negligent marketing claim concerns the *magnitude* of the relative risk. As an intuitive matter, there is more than a little plausibility to the idea that, but for the challenged marketing practices of gun manufacturers, the incidence of gun-related violent crime might be lower. Evidence produced by the plaintiffs in recent unsuccessful litigation by the NAACP against the gun industry on a theory of public nuisance identifies a “significant relationship” between deficiencies in gun retailer care and the eventual use of the guns sold in criminal activities.⁵¹ The calculus of additional outlays from the public fisc nevertheless is not a matter for intuitive guesswork based upon evidence of such an association—evidence that, in itself, advances no systematic comparison of the world with and without negligent gun marketing. To determine the additional increment of outlays from the public fisc attributable to negligent gun marketing, the hard question is

whether and, if so, how much relative risk exceeds 1.0. And the magnitude of that excess itself affects the confidence with which one can infer a causal relationship, as distinct from a mere association.

For individual tort litigants advancing a negligent marketing claim, an additional question would be whether the particular plaintiff's injury—say, her shooting at the hands of a criminal offender—would have occurred even absent the negligent marketing of the defendant manufacturers. That question, however, is no different conceptually from that of specific causation in conventional mass tort litigation. Even if one is confident that a given product is capable of causing disease in humans generally, an individual mass tort plaintiff still must demonstrate that the product more likely than not caused her particular case of disease.⁵² The attraction to municipalities of the negligent marketing claim as a basis for the recouping of budgetary expenditures is that it enables them to ground liability simply upon a showing of general causation—or, more specifically, to avoid the need to identify which gun-related injuries to which citizens come within the additional increment associated with the negligent marketing practices of the defendant manufacturers. This observation is in keeping with Howard Erichson's account in chapter 5 of this volume of how municipal lawsuits operate, in practice, as a form of litigation aggregation.

The nature of the negligent marketing claim is such as to make it exceedingly difficult to identify the magnitude of the relative risk through anything approaching a scientific method. As noted earlier, the way that epidemiologists estimate relative risk for products suspected to cause latent disease is by differentiating exposed from unexposed persons. In conventional mass tort litigation—say, over a pharmaceutical product—this kind of differentiation is straightforward. Some people consumed the product, whereas others did not. This observation is not to belie the methodological challenges inherent in the design of a sound epidemiological study—chiefly, the identification of human populations comparable in all relevant respects, except for the exposure at issue. But it is at least possible as a practical matter to deploy such a methodology.

The nature of the negligent marketing claim in gun litigation confounds any methodology that differentiates between exposed and unexposed persons. Here, exposure itself is a generalized phenomenon. Whereas only some persons in the populace come to be exposed to a pharmaceutical product and, as such, can be distinguished from unex-

posed persons in epidemiological research, everyone in the United States has been “exposed” to the disputed marketing practices of the gun industry. What is needed in gun litigation is the social science equivalent of epidemiology. But the nature of the causal chain at the core of the negligent marketing claim is such as to confound the prospects for such a methodology. The result is to cast the causation inquiry with regard to the negligent marketing claim in largely impressionistic terms at odds with those on which conventional mass tort litigation and the regulatory process have come to address conceptually similar issues.

Alabama and Beyond

The regulatory account of tort law gives defenders of gun litigation an avenue of response to criticism that they have cast the civil justice system adrift from recent learning in both regulatory policy and mass tort litigation practice. If tort law is to be judged principally by the regulatory outcomes that it facilitates, then one might defend gun litigation from an instrumental standpoint as at least better than the other approaches realistically on the regulatory horizon. Better to do something about gun violence through social issue tort litigation, so the argument goes, than to continue to leave the matter in the hands of a suspect political process inclined to inaction, at best. Better to rely on impressionism to a degree, some might say, than to await the development of an epidemiology of gun violence.

There is a certain appeal to this line of thinking, if all one cares about is reform of gun regulation in America. Social policy tort litigation undoubtedly has enhanced the public profile of gun industry marketing practices and, in so doing, has jump-started debate over the appropriate regulation of gun marketing. And the social meaning of gun availability itself is a matter surely worthy of public deliberation, as Dan Kahan, Donald Braman, and John Gastil observe in chapter 4 of this volume.

My concluding observation nonetheless is more in keeping with the classic song “Who’s Next?” composed by humorist Tom Lehrer at the height of the cold war and the civil rights movement in the South.⁵³ Lehrer begins with the observation that “[f]irst we [the United States] got The Bomb, and that was good, ’cause we love peace and motherhood.” He then lists the other nuclear powers at the time. For instance,

“France got The Bomb, but don’t you grieve, ’cause they’re on our side, I believe.” Lehrer’s list then extends fancifully to such nations as Luxembourg and Monaco, fading out with the lyrics: “We’ll try to stay serene and calm when Alabama gets The Bomb. Who’s next? Who’s next?”

A regime of social policy tort liability unmoored to parallel considerations of risk analysis in the regulatory or mass tort litigation sphere is a dangerous animal. Serenity and calm may well prevail, while social policy tort liability, like The Bomb, stands to be wielded only by those who “love peace and motherhood”—or, more precisely, who wish to reduce the incidence of smoking, to lessen gun violence, and to combat the health effects of fast-food consumption. But social policy tort litigation is not by nature a creature beholden to any particular regulatory agenda. The marketing practices of various industries—manufacturers of violent video games overtly marketed to teenagers; producers of rap music tout-ing violence against women and law enforcement officers; and purveyors of sexually explicit, nonobscene entertainment—might well be thought unamenable to direct regulation through conventional channels but nonetheless to precipitate, however remotely, some increment of additional outlay from the public fisc. For that matter, the concept of adverse “secondary effects,” including crime, is already a dimension of the First Amendment debate over direct regulation of nude dancing.⁵⁴ Alabama may not get The Bomb, but municipalities there, or elsewhere, might welcome social policy tort litigation, just on a different account of enlightened social regulation.

Seen in the foregoing light, the emerging debate over social policy tort litigation bears more than a passing resemblance to that over the wisdom of another modern-day legal innovation that presses at the bounds of conventional structural limitations in the service of other instrumental goals: the independent counsel statute. This resemblance actually is no surprise. A conception of tort law as simply an occasion for regulatory policy-making has difficulty accounting for the institutional role of the plaintiff. Whereas corrective justice theories readily explain the plaintiff’s presence in a tort lawsuit as the specific person mistreated by the defendant, regulatory theories can explain the involvement of the plaintiff only as a private attorney general. The plaintiff is simply as convenient a person as any to initiate suit and, in so doing, to create the occasion for regulatory policy-making by the court. Though not literally a

private actor, the independent counsel—as the title suggests—operates nominally within the scheme of government but nonetheless outside ordinary prosecutorial channels.

Challenged as a violation of the constitutional separation of powers, the independent counsel statute survived review by the Supreme Court.⁵⁵ At the time, only a lone dissenter among the justices penned a dire warning of the potential for abuse of the independent counsel position—of its tendency toward a process of “‘picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.’”⁵⁶ Less than a decade later, one might say metaphorically that Alabama got The Bomb. And the attitude of the legal academy toward the office of the independent counsel has undergone a transformation. One waits, with watchful eyes, to see whether the same sequence will prevail in the world of social policy tort litigation.