

CHAPTER 8

Comparing Tobacco & Gun Litigation

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Cigarettes and guns are enormous problems. Cigarettes kill more than four hundred thousand Americans each year, perhaps 10 percent of whom are victims of secondhand smoke and approximately one thousand of whom are victims of cigarette-started fires.¹ Firearms these days kill nearly thirty thousand Americans annually, including about eleven thousand homicide victims, more than sixteen thousand suicide victims, and about one thousand victims of the accidental discharge of firearms.²

This chapter first compares tobacco control and gun control from the public health perspective. It then examines possible aims of litigation against tobacco and gun companies, linking those aims to the public health goals earlier described. The results of tobacco litigation are then discussed, followed by an exploration of the implications for gun litigation.

The chapter concludes that, based upon the experience with tobacco, gun litigation should not be viewed as a central policy strategy for making public health gains with respect to firearms, especially given the highly uncertain prospects for the claims that cities have brought against the gun industry. Nonetheless, individual tort litigation might play a modest role in the broader public health initiative on guns.

Comparing Tobacco Control and Gun Control Goals and Strategies

Why Not Prohibition?

Many Americans wish that no one smoked cigarettes and that only law enforcement officials had access to handguns (and that ownership of

other firearms was sharply restricted and regulated). Some favor strict legal bans on smoking and on gun owning. In June 2003, U.S. Surgeon General Richard Carmona said he favored abolishing all tobacco products, and over the years gun control advocates have urged the government to make it generally illegal to *possess* handguns.

Yet, such aspirations are unrealistic given current social norms. Tobacco and gun prohibition would make criminals out of millions of Americans who are addicted to cigarettes and/or who would hold onto their weapons regardless of the law. While smoking prevalence has shrunk about 50 percent since 1964, when the surgeon general issued his famous report on the health risks of smoking, today about 22 percent of American adults (more than 40 million people) regularly smoke cigarettes. Americans currently own more than 200 million guns, including more than 70 million handguns; indeed, between one-third and one-half of U.S. households reportedly contain a working gun. Moreover, experience with alcohol and marijuana prohibition shows that criminalizing tobacco and gun possession, if at all seriously enforced, would likely bring with it huge costs in the form of law enforcement and prison operations, the abuse of civil liberties, and an increase in organized crime.

Even apart from enforcement issues, individual liberty claims make gun and tobacco prohibition problematic. Although most adult smokers began as teens and say they are addicted, many enjoy cigarettes by choice. Given public support of personal autonomy and privacy, it would be highly troubling to criminalize smoking at home. As for guns, first there is the libertarian value that underlies the popular understanding of the Second Amendment. Second, there is the long-standing belief in the right of self-defense with guns that would be difficult to dislodge in a nation as violent as ours—a belief reenforced by some scholars who claim that violence is reduced when ordinary citizens are allowed to own guns because the fear of being shot deters some “bad guys” from committing crimes. Beyond these policy considerations are practical political considerations arising from the power of the tobacco industry and the NRA.

This is not to say that a prohibition policy for cigarettes and/or guns is totally unimaginable forever. After all, a few American locales have made handgun possession a crime (with minor exceptions), and in the era of alcohol prohibition, some states also criminalized tobacco possession and use—albeit with widespread violation of these laws.

Nonetheless, more realistic tobacco and gun control advocates do not focus on prohibition. Whether limited policy changes are actually seen by gun control advocates as second-best steps en route to gun prohibition is contested and has made compromise on gun control policy very difficult. By contrast, although tobacco control advocates are sometimes called “health Nazis,” it appears that few wish tobacco use to be criminalized in the way marijuana and cocaine use have been.

Putting legal prohibition aside, tobacco and gun control efforts may be grouped under three headings: (1) changing social norms, (2) user harm reduction, and (3) protecting third parties.

Changing Social Norms

With respect to changing social norms around tobacco, the underlying assumption is that many people smoke because of the influence of others. The core idea, then, is to encourage people to be nonsmokers by making smoking seem deviant, not something one routinely encounters fellow citizens doing like eating, driving, or even drinking alcoholic beverages. Restrictions on tobacco advertising and secondhand smoke regulation (as well as the current campaign to curtail smoking by actors in motion pictures) are policies aimed at changing social norms by providing people with a daily environment in which they no longer widely observe people (or visual representations of people) enjoying cigarettes.

Put more strongly, the goal is to convince the public either that those who smoke must have been duped by an evil tobacco industry or else that they are fools. When efforts to demonize the tobacco companies through publicly funded antismoking ads are added to the policy package, the broader message intended is that smoking is decidedly not “cool.”

A parallel with respect to guns is to convince ordinary folks that keeping a firearm for self-defense reasons is unwise or inappropriate. The underlying assumption here is that, if Americans who have guns were voluntarily to get rid of them, homicide, suicide, and accidental death rates would decline for the reason that guns obtained for self-protection are sometimes used irresponsibly, impulsively, or carelessly (perhaps by a different household member).

Changing this social norm is problematic for a number of reasons,

however. Whereas getting one hundred people to quit (or not to start) smoking generally translates into perhaps fifteen or twenty years of extra life for perhaps fifty people, the consequences of one hundred ordinary citizens giving up their guns are much less certain. For one thing, to the extent that the fear that ordinary citizens are armed now dissuades criminals from attacking them, widespread voluntary disarmament could actually stimulate more assaults. Moreover, even if accidental and impulsive violence could be reduced by getting ordinary Americans voluntarily to give up guns, it is not clear what policy strategy can be employed in furtherance of that goal (although laws recently adopted in many states that permit people to carry weapons away from home would seem a step in the wrong direction).

Some gun control advocates depict the choice to possess a weapon for self-defense not only as foolish (i.e., you might accidentally shoot yourself or a family member or provoke an intruder to shoot you) but, worse, as depraved (i.e., what kind of society is this in which we individually resort to frontier justice instead of relying on collective security?). Hunting and other “sporting” uses of guns are also disparaged by some as inappropriately callous and macho. Yet, it is not clear whether these attitudes toward guns are being embraced by Americans who aren’t already anti-gun and don’t own them anyway. After all, for many responsible Americans, having guns in the family is a long-standing cultural pattern.

Of course, were our society to become dramatically less violent—were robberies and worse personal crimes to decline to low levels—then people who now obtain guns for self-defense purposes might be considerably less inclined to do so. Indeed, put more broadly, were there less poverty, less alcoholism, and less drug abuse; were Americans less depressed; and were effective mental health facilities more accessible, then one would expect fewer homicides and suicides generally, including fewer caused by firearms. But that is a different reality from ours.

One way to entice people to abandon gun possession is to impose a high tax on the purchase of guns. It has been estimated that the discounted present value of the harm to third parties caused by handguns is something like \$850 per gun. Although this is not a precise scientific estimate, if a sum like that were added to the price of owning a weapon, this would probably have a substantial impact on gun ownership. People who currently can buy a pistol for \$100 are likely to have second

thoughts if they faced a cost of \$1,000. Maybe a burglar alarm would seem a better investment; maybe the worried householder would make do with a club. “Sporting” users of guns might go in for other sports. In short, as with cigarettes, there is good reason to believe that a gun purchase is price sensitive. But, so far, nothing like that sort of tax on guns has been seriously considered, let alone adopted.

One explanation for why cigarette taxes are increasingly popular and yet governments have not imposed high taxes on gun purchases is that policymakers and voters see guns differently from cigarettes. Society seems quite content to increase the financial burden on everyone who smokes. But many gun owners are viewed as legitimately entitled to their weapons, and to price them out of the market (or even to heavily burden them financially) seems inappropriate to many. This sentiment is similar to that concerning alcohol, which tends to be relatively lightly taxed and which is responsibly used by most drinkers.

Besides, given the vast arsenal of existing guns, even if a high tax on the purchase of new guns influenced the market price of used guns, it is hard to imagine that anyone really keen on obtaining firearms would be discouraged from doing so—especially given estimates that at least five hundred thousand guns are stolen each year. (High taxes on new guns might also have the undesirable effect of encouraging owners of older less safe guns not to replace them with newer safer ones.)

The discussion of social norm change with respect to guns has focused on convincing ordinary citizens to disarm. A different idea is to change the social norms around the use of guns by “criminals” by making both threats with firearms and the firing of guns at victims culturally taboo. Unfortunately, it is not clear how our society might go about achieving this change without compulsion. Hence, more coercive policies aimed specifically at keeping guns out of the hands of “bad guys” are considered in a later section.

User Harm Reduction

“Harm reduction” has been embraced by the public health community with respect to illegal drugs, which views clean needle exchanges and less disabling heroin substitutes as good examples. But tobacco control advocates have been leery of harm reduction and have tended to follow

the mantra of conservatives in the war on drugs—“just say no.” Tobacco control advocates have been cool to the notion that there might be safer cigarettes or even that smokers should be encouraged to cut down on how much they smoke, fearing that these approaches would draw from people who otherwise would quit entirely, thereby causing more harm than good.

Moreover, the tobacco control community is highly suspicious of the tobacco companies. Such advocates believe that tobacco companies have insidiously conned smokers into thinking that filtered cigarettes and so-called low tar or light cigarettes are safer, when those advocates are convinced that such products are at least as dangerous as traditional products. Because of this experience, the public health community is generally hostile to the recent development by tobacco companies of products such as additive-free cigarettes and sharply reduced nicotine cigarettes.

Nevertheless, some tobacco control advocates have pointed out that the public health would be considerably improved if, for example, masses of smokers were to switch to chewing tobacco (even though there would be a rise in oral cancers). Moreover, the tobacco control movement seems content with products such as the nicotine patch or nicotine gum used in transition from being a smoker to a nonsmoker. Still, there are fears. What if more youths start using chewing tobacco as a gateway to cigarette smoking? What if people use alternative nicotine products in addition to smoking (e.g., drinking “nicotine water” while on a long flight)? What if such products make some people less fearful about taking up cigarette smoking in the first place? In short, many tobacco control leaders remain skeptical about whether there are genuine tobacco analogies to such efforts as the clean needle exchange.

By contrast, harm reduction appears promising to many gun control advocates. They imagine that guns could be made that young children with limited strength could not fire, that gun triggers could be locked and unusable by anyone without the key, that indicators could make clear when a gun is loaded, and that improved unloading and cleaning technology could reduce the risk of an unintended firing. Alterations like these might especially reduce accidental deaths (and injuries) from guns. In short, safer weapons are seen as decidedly feasible, whereas safer cigarettes are still generally viewed as a fantasy.

Yet, while even saving a modest number of lives is a good idea, one

should not be overly optimistic about the potential gains from safer guns, given that rather few guns are now accidentally fired by children who would be prevented from doing so by triggers that are harder to pull and given that gun owners motivated by fear of attack might well choose to leave their guns unlocked despite the availability of locks. Moreover, many accidental gun shootings today result from irresponsible behavior by those with guns in their hands that technology is not likely to overcome.

Protecting Third Parties

Now that secondhand smoke is believed by scientists and the public to cause thousands of deaths from cardiovascular and lung diseases every year, restrictions on where people can smoke are primarily promoted to legislators on the ground that they protect involuntary third-party victims. (As noted earlier, these controls also importantly serve to make smoking appear to be an uncommon and deviant behavior. Furthermore, researchers have found that zoning out smoking at work and other locations helps smokers to quit or former smokers not to relapse.)

Homicides caused by guns (as well as the wounding of third parties with firearms) are obviously of enormous public concern. And it seems clear that, even though data show that many more people die from secondhand smoke than are murdered, Americans view the risks to third parties from guns as a more important social problem than third-party risks from tobacco. Perhaps this is because the gun risk seems so arbitrary or random to most people or because guns are often used to kill young people in gruesome ways as compared with the slower deaths of generally older people from tobacco.

Rather than disarming the entire population, however, for the past several decades the central gun control strategy with respect to third-party harms has been to try to prevent “bad guys” from obtaining firearms or, as a less effective substitute, to keep them from obtaining especially dangerous weapons. The thinking is that, if “irresponsible” users do not have guns, the homicide rate would decline sharply (acknowledging that “bad guys” could resort to other weapons even if they did not have guns).

One problem with this strategy, of course, is trying to predict in

advance who might use a gun to kill or wound, so as to know who should not be allowed to have one. Because making accurate predictions is so difficult, policymakers have had no choice but to employ under- and overinclusive substitute measures instead. For example, it is currently illegal to purchase a gun if you are a convicted felon, an illegal alien, mentally ill (by certain criteria), or a minor. Of course, many who kill with guns are not in these categories and not everyone in these categories is likely to do so. But finer tuning is difficult. Where the baseline rule allows people to own guns, it is politically hard to add categories to this list except those describing people whose past conduct is viewed as sufficiently stigmatizing to justify this “penalty.”

To be sure, even an underinclusive policy might yield substantial social benefits. But a second serious problem is actually keeping guns from those who, according to official policy, should not have them. Certain licensed retailers often fail to comply with the law requiring a background check before making a sale—out of carelessness, indifference, or worse. Some headway can be achieved here by improved technology and the investment of more law enforcement resources. However, in addition, there is the vast secondary market for guns. People who are not supposed to possess guns can readily obtain them at flea markets, at gun shows, from want ads, from underworld sources whose identity spreads via word of mouth, from friends making “straw” purchases from legitimate dealers, from family arsenals, as well as by theft. Gun show regulation and straw purchase regulation, currently hot topics, are probably steps in the right direction, but they are likely to have only a modest impact.

This gun access problem is similar to the problem of controlling youth access to cigarettes. Teens are not supposed to be able to purchase tobacco products from licensed retailers, but, in practice, most find it easy to obtain cigarettes anyway.

New gun technology might change this. For example, if guns could be connected to users by some sort of fingerprint identity (which has been proposed and which some companies are working on), then such “smart guns” could be fired only by the registered owner (unless an overriding technology were developed). This should undercut the secondary market for such new guns. Even so, it could be many years before the vast supply of existing guns would break, be lost, or be confiscated in the normal course of police business. In an era of fingerprint-connected

weapons, perhaps some headway might be made on the problem of the existing stock of less safe guns, if government both bought back and increased penalties for possession of older guns—although existing gun buy-back programs and existing laws that make it a crime for convicted felons to possess guns seem to have had little effect.

Looking from Gun Control to Tobacco Control with Envy

Although some new national gun control measures have been adopted in recent years, these federal laws (including, most importantly, the Brady Bill, enacted in the early 1990s) appear to have had relatively little impact on reducing gun violence. To be sure, violent crime (including handgun crime) is significantly down nearly everywhere in the country as compared with, say, a decade ago. But in most places it does not seem credible to view gun control measures as a major cause. In some places, such as New York City, strong gun control laws and determined policing efforts to enforce those laws may be making a difference.³ Yet few other locations appear to be copying New York's approach.

Moreover, whereas the "gun problem" was previously viewed by many as essentially an urban matter involving minorities and gangs, the spate of suburban school shootings of whites by whites has caused many now to view the gun problem as much more of a national concern.

When gun control advocates look to tobacco control, they might conclude that the grass there is considerably greener. Tobacco control legislation appears to be much more widespread, and in several places across the nation considerable headway has been achieved in enacting much of the tobacco control community's agenda. In California, for example, there are very tough controls on secondhand smoke; cigarette taxes have been boosted to a high level by U.S. standards; there is a reasonably funded antitobacco control campaign that, among other things, pays for hard-hitting antitobacco ads; many local legislative bodies have adopted controls on the marketing and promotion of tobacco products; new efforts are continually made to restrict youth access to tobacco; and many public pension plans have rid their portfolios of tobacco stocks. Moreover, cigarette smoking levels in California continue to drop and are now well below 20 percent of the adult population (quite a low rate

by U.S. and worldwide standards, albeit still far higher than tobacco control leaders would like).

Beyond legislative comparisons, a further point of comparison between the movements concerns the place of litigation. Now that we have witnessed a blizzard of tobacco litigation, some of which is perceived to have been quite successful, many have wondered whether that success can be carried over to gun control.

Litigation as Part of the Tobacco and Gun Control Strategy

Before turning to details, it is important to emphasize where the analysis will wind up. First, despite widespread sentiment to the contrary, there is reason to doubt that tobacco litigation has achieved, or will achieve, a great deal by way of tobacco control. Second, it is not at all clear that legal strategies that have succeeded, or might succeed, against tobacco companies would succeed against gun companies. Third, on the other hand, in certain modest respects there may be greater prospects for successful gun litigation than for tobacco litigation.

Most of the litigation against tobacco companies has been tort (or personal injury) litigation, although some important cases, most significantly those brought by states and the federal government, have been based on other areas of the law.⁴ Individual victims (or a victim and a spouse) have brought most of the cigarette lawsuits, although a few celebrated cigarette cases have been class actions. The same general pattern applies to the lower volume of gun litigation.

This section explores, in a general way, potential goals of tobacco and gun litigation and links them to the public health objectives discussed previously. The next sections examine actual and likely litigation achievements.

Put Product Manufacturers out of Business

One possible goal of litigation against cigarette and gun manufacturers is to put them out of business. It is not altogether clear how the goal of financially crushing the industry fits with the public health themes dis-

cussed earlier. At its most powerful, litigation that has destroyed an industry might be a backdoor way of achieving prohibition that is politically implausible through regular legislative processes.

But even if existing companies were financially destroyed, would new companies step in to replace those driven out? Or would they too face threats of legal liability that would dissuade them from entering this line of business? The answers may depend on the legal theory behind the litigation. If based on past misconduct in which future entrants need not engage, the answers could be very different than if the theory behind the litigation would make any future manufacturer equally financially at risk.

Furthermore, even if existing “legitimate” manufacturers are driven out of business and there are no “legitimate” new entrants, the issue of product supply remains. For cigarettes, this is primarily a matter of the potential for smuggling cigarettes into the United States and the possibility of homegrown (or perhaps simply home-rolled) cigarettes. This parallels the problem of illegal sources of drugs like marijuana today, as well as illegal sources of alcohol during prohibition. The same concerns apply to guns, but for guns there is the additional matter of the huge existing inventory of handguns in the United States.

A different issue is whether what might appear to be financially crippling litigation would actually put the existing product makers out of business. Existing firms, faced with crushing legal judgments, might seek the protection of bankruptcy courts. Resolving those claims via the bankruptcy process, firms could emerge from bankruptcy (perhaps with different owners) and continue making the same product (guns or cigarettes) in the future.

With respect to tobacco companies, although some tobacco control advocates would like to destroy the American cigarette industry, most observers of tobacco litigation have viewed lawsuits as unlikely to achieve that result. At most, there has been half-serious talk about putting the major companies into bankruptcy without stopping their production of cigarettes (although a few tobacco control activists dream of the possibility that the U.S. government would take over the industry and manufacture unbranded cigarettes that doctors could provide to addicted smokers—a kind of methadone analogy).

In any event, whatever aspirations some tobacco control activists might have, even in the \$250 billion Master Settlement Agreement

(MSA) with the state attorneys general (discussed in more detail later), arrangements were carefully made for the industry to pay huge sums to the states over time and in ways that minimized the chances that these financial obligations would put the companies out of business. And none of the rest of the cigarette litigation (as detailed later) has so far seriously threatened to destroy the industry.

By contrast, because the gun industry is much smaller overall than the tobacco industry, and because the major gun makers are not financial giants like Philip Morris, R. J. Reynolds, and British-American Tobacco, there is a greater chance that successful industrywide gun litigation could destroy the *existing* manufacturers. Indeed, the financial burdens of defending lawsuits, regardless of their outcomes, could eventually overwhelm the gun companies. But, given ease of entry into the handgun business by companies with very limited capitalization, even if existing gun makers are driven out of business, they might readily be replaced by waves of newcomers who, in turn, would earn a quick profit and then disappear.

Fully Internalize the Injury and Illness Costs of the Product into Its Price

A different vision of litigation against some product makers (including cigarette and gun makers) is that lawsuits could force them to fully internalize all the injury and illness costs of those products into the price of their products. This litigation goal seems most consistent with the public health aim of changing social norms around smoking and owning guns.

For tobacco, it has been estimated that, with full cost internalization, smokers might be forced to pay, say, twenty dollars or more for a pack of twenty cigarettes. Buying cigarettes at this price would confront buyers with the full costs of the risks *they* run—such as shorter lives, lower earnings, and extra and earlier health-care costs—as well as the full costs their smoking imposes on others via secondhand smoke. Of course, smokers (and their families) today already bear a substantial share of those costs. But they bear them in the future when they become ill and die. By contrast, a mechanism that fully internalizes those costs at the time of purchase would make vivid to the buyer the enormity of those costs and would probably sharply reduce consumption.

In a parallel way, fully internalizing the costs of guns in the price of

guns could possibly increase the price of typical handguns from between one hundred dollars and four hundred dollars to, say, upward of two thousand dollars. This price hike could substantially reduce the acquisition of guns.

But finding a valid legal ground that would achieve full cost internalization via litigation is quite another matter. For cigarettes, the funding of the MSA was loosely based on the idea that the cost to states of having to pay for health care for indigent smokers should be internalized into the cost of smoking. This is clearly only a tiny share of the total costs of smoking. And while the MSA, as noted earlier, is scheduled to yield payments in the range of \$250 billion over the next two decades, on a per-pack basis this is thought to amount to something like thirty-five cents. Yet, as already noted, a full cost internalization approach would involve an increased cost of many dollars a pack. No serious tobacco litigation strategy so far attempted envisions such an outcome.

Gun litigation brought by cities and others (discussed later) that has been modeled on tobacco litigation is also not aimed at full cost internalization—although it is worth noting that, as a general matter, it seems that a larger share of the costs of guns is borne by third parties and public services (as contrasted with gun users themselves from suicides and accidental self-shooting) than is the case for cigarettes.

At least so far as tort law is concerned, the main problem with the full cost internalization aspiration is that there is no existing legal theory readily applicable to cigarettes or guns that would achieve this outcome. Although tort law does recognize what is called “strict liability,” this does not mean absolute liability for all the costs associated with the use of the product. Were that so, then automakers, power tool makers, and alcoholic beverage makers, to take but three important examples, could be held liable and forced to internalize the costs of all injuries and deaths associated with their products. That simply does not occur.

The reason for this result as a legal matter is that product makers are only meant to be forced by tort law to internalize the costs of “defective” products they put into the market. This means paying for harms arising from defective automobiles, for example, but not for harms connected to autos in general.

The basic way that products are determined to be defective (or not) is by carrying out a risk-benefit analysis. In principle, the risk-benefit analysis could be done by asking whether the product is so dangerous

that, in the jury's view, it should not have been marketed at all. But, in practice, courts generally require that the "defect" be measured by comparing the design of a product with a safer alternative design that the plaintiff proposes.⁵

It is true that the Restatement (Third) Torts for Products Liability no longer contains a provision found in the Restatement (Second) Torts that made clear that ordinary cigarettes were not defective products.⁶ Moreover, the Restatement (Third) Torts opens the door a crack for the possibility of condemning certain socially unacceptable products as "defective" without claimants' having to prove a safer alternative design.⁷ Yet, the narrow invitation to courts to consider embracing strict liability for unacceptably dangerous products without substitutes has so far come to nothing.

A second legal strategy might try to have the selling of cigarettes and guns deemed "abnormally dangerous activities" to which strict liability in tort attaches.⁸ Under this branch of the law, for example, companies are permitted to set off dynamite when it is reasonable to do so, but if the dynamite injures anyone, those doing the blasting are liable for the harm done regardless of whether they acted with due care. Although some writers have suggested that this branch of strict liability in tort should apply to cigarettes and guns, courts have been unreceptive to this theory. If nothing else, note that it is those who engage in dynamite blasting, not sellers of dynamite, who are strictly liable.

It is imaginable under the common law of torts that courts could adopt a new category of strict liability that is not based on the existing "abnormally dangerous activity" or "defective product" rationales, and were they to do so, it is easy to envision both cigarettes and handguns at the top of the list of likely candidates for inclusion. Indeed, judges in Maryland did just that some years ago for at least a certain class of handguns.⁹ Yet, this decision has not been followed in other states, and in Maryland the court's ruling was overturned by state legislation.¹⁰

Therefore, for the present, it seems wiser to focus on whether litigation against tobacco and guns might achieve other goals.

Promote Safer Products and Safer Practices

To many, the most important goal of tort litigation is the deterrence of unreasonably dangerous acts, and in the product setting this means stim-

ulating product manufacturers to make safer products. The basic economic idea behind this goal is that, faced with the risk of legal liability if their product is proved unduly unsafe, firms will, in advance, take precautions to make it safer. Second, some argue that once a manufacturer is shown through litigation to be producing an unacceptably unsafe product, that company and others in its industry will get the message and begin to produce a safer product. Finally, some argue that litigation can pry secret safety information from defendants that not only shows that they all along knew about dangers that could have been reduced but also paves the way toward safer products in the future.

There is no reason to believe that, because of the threat of litigation, cigarettes smoked today are safer than they would otherwise be. Indeed, plausibly safer cigarettes may not have been introduced by the leading companies for fear that this would make them vulnerable to lawsuits by those who smoked the older more dangerous versions. On the other hand, some tobacco control activists believe that, if tobacco companies were held liable for the consequences of their current products, they would soon have something safer on the market.

Although the connection with litigation is not entirely clear, it is notable that some tobacco companies have recently been experimentally marketing new products that might possibly be safer than traditional cigarettes. However, so far there has been little market acceptance of these quasi-cigarette products, and, as noted earlier, public health activists are generally leery of them.

By contrast, with respect to guns, as noted earlier, there is hope in some circles for the development of much safer guns, and some genuine progress seems under way on this front. Although the threat of legal liability might be driving these technological advances, that is not self-evidently so. After all, guns that would actually provide greater safety to users would probably be readily purchased by many people who are determined to buy a gun, at least so long as the safety feature did not add too greatly to the gun's cost or usability.

In any event, when it comes to promoting safer products, one can at least see the connection between the public health aims and the aspirations of litigation. Indeed, depending upon what sort of safety improvements were achieved, this safety-promoting goal of litigation could further both the aim of reducing user harm and the aim of providing better protection for third parties.

Beyond changing the products themselves, another related goal of litigation is to prompt what could be termed the “safer” marketing of products. Both the tobacco control and gun control movements strongly object to the marketing practices of the industries they attack. If nothing else, these objections demonstrate that fear of tort liability has not prevented these product makers from marketing in the way they do. Nonetheless, industry opponents have hoped that they can alter marketing practices for the future through litigation efforts that charge tobacco companies with false and misleading advertising and charge gun companies with improperly marketing high-power weapons and improperly distributing guns in ways they know will put them into the hands of criminals.

It is also important to appreciate that, while tort law is meant to promote safety by the threat of and imposition of money damages, litigation brought by the government against the tobacco and gun industries is based on a different approach. Although the governmental lawsuits also seek money damages, those cases typically seek injunctive relief as well. Moreover, it is clear that government plaintiffs from the start have been seeking settlements with both industries that, apart from any financial payments, would include promises of behavioral changes by the defendants. It is this “regulation by litigation” approach that has especially infuriated those who believe that the plaintiffs’ lawyers in these cases are making an end run around the political process. Yet, to the extent that the defendants (or their downstream distributors) are violating laws properly enforceable by public officials, this objection seems to miss the point that injunctive relief and settlements based on promised behavioral changes are regularly obtained by district attorneys, state attorneys general, and the like.

Provide Financial Compensation to Victims

A traditional tort law role is to compensate victims of wrongdoing by providing them with money. To be sure, one-third or more of the money collected in a successful lawsuit usually goes to the claimant’s lawyer and the other costs of litigation, and another hunk typically reimburses health insurers who have paid for the victim’s medical expenses. Nonetheless, successful tort claimants can wind up with money that

replaces the uninsured income they lost, pays for uninsured health-related expenses, and provides a not inconsiderable lump sum as a solace for the pain and suffering they have had to, and continue to, endure.

Furthermore, some tobacco litigation has sought to secure other compensation. In one series of cases, smokers who are not yet ill have sought compensation for ongoing medical monitoring that they would undergo in hopes that it would provide early warning of adverse health consequences of smoking. In an altogether different vein, in a recent wave of litigation smokers have sought reimbursement for the money they have paid for cigarettes on the theory that they were duped into thinking that light cigarettes were safer than regular cigarettes and that, absent such fraud, they would not have bought cigarettes at all. Neither of these sorts of claims has an evident application to gun litigation.

Beyond the medical monitoring remedy, it is not clear that the compensation goal per se is well connected with public health aims (apart from any product price increases it may in the end bring with it, a topic discussed next). This is because the compensation goal is generally backward looking, whereas the public health focus is forward looking.

Internalize Some Costs to the Product

Although it was noted previously that tort and other litigation theories currently available to claimants are unlikely to force the full internalization of the costs of products like cigarettes and guns into the price of those products, somewhat more promising theories exist that, if successful, might internalize some of those costs. From the public health perspective, any strategy that increases the cost of providing such products, and hence forces sellers to raise their prices, is potentially a social gain. This litigation goal seems most connected to the public health theme of changing social norms.

For cigarettes, if higher prices only forced people to switch to lower-priced generic brands, this by itself would not yield a public health gain since those products are as dangerous as premium brands. But the evidence is clear that higher cigarette prices actually reduce consumption and, most important, reduce the smoking prevalence rate. The only awkward aspect of higher cigarette prices is that addicted smokers will

have to devote even more of their money to their addiction, and they are increasingly from the ranks of the working class and the poor.

As for guns, as noted earlier, higher prices should also mean fewer sales—although it is contested whether this alone would yield a net reduction in violence. Also, some buyers may respond to higher prices by purchasing what today are cheaper guns. This may be better than nothing if cheaper guns in general are less accurate and therefore a bit less lethal.

Punish Manufacturers for Misconduct

If companies (or whole industries) badly misbehave, then government prosecutors can pursue them, seeking fines and other financial penalties and possibly even individual penalties (as severe as prison sentences) against those inside the firm who were responsible. This government litigation could be of a civil or criminal nature (or both).

Private litigation can also be deployed for arguably similar purposes, especially when claimants seek punitive damages as a remedy. Punitive, or exemplary, damages are meant as a punishment for outrageous conduct, and the threat of such damages is meant to deter such conduct in the first place. In the corporate setting, punitive damages are basically imposed on companies, not on individually culpable employees. Yet, it is possible that, if punitive damages are awarded, wrongdoers inside the enterprise may be fired or otherwise punished (provided they are still connected to the firm, which often is not the case). Moreover, punishing the firm itself can sometimes punish the misconduct of management by driving down the price of the firm's stock (and the value of stock options), which executives often depend on as part of their compensation. (Of course, this consequence also penalizes all investors in the enterprise, many of whom are not personally blameworthy.)

Many tobacco and gun control advocates are angry at the industries they are trying to control, and their rhetoric often sounds highly vindictive, as though they are seeking a kind of vengeance against what they view as evil actors. While this is perhaps understandable, and while punishing those industries and their leaders may also help fortify fellow activists, as well as attract new supporters, it is not clear that punishment *by itself* serves a public health objective. Perhaps it can best be seen as a

warning to others who undermine the public health that a similar fate may await them. Or it may be instrumentally seen as part of the effort to delegitimize the target industry so as to weaken it politically—for reasons noted next.

*Weaken the Industry in Legislative Battles by Creating and/or
Maintaining a Public Image of the Industry as “Evil”*

Litigation can be used as part of an attempt to tarnish (or keep tarnished) the reputation of a company or industry. This result might be achieved simply by announcing that a lawsuit has been filed and/or by publicizing documents obtained in discovery—that is, without actually winning a case. In short, litigation, and the media attention it receives, can be a vehicle for educating the public. Moreover, litigation (or even its prospect) may itself spur whistle-blowers to come forward with evidence disparaging defendants.

If, through litigation, an industry can be branded in the public’s eye as an evil outlier, this may make it more vulnerable in legislative battles. Legislators may be less willing to take contributions from such an industry and more willing to vote for legislative changes designed to regulate such an industry. The tobacco industry appears quite concerned about this. Philip Morris, for example, engages in a variety of activities that seem aimed at (re)gaining the admiration of at least parts of the public.

This goal of using litigation to politically weaken the tobacco and gun industries is not connected to any particular public health goal. Rather, it may be seen as potentially facilitative of whatever is on the public health legislative agenda that could no longer be blocked by the political might of those industries.

*Discourage Consumer Patronage by Exposing
and Documenting Company Misconduct*

Quite apart from weakening an industry on the legislative front, stigmatizing an industry via litigation could cause many of that industry’s customers to withdraw their patronage. The underlying idea is that consumers may dislike buying from “bad guys,” especially those they now

believe have been trying to dupe them. This idea seems most aligned with the public health goal of changing social norms around smoking.

With respect to guns, although publicity around litigation may be effective in (re)arousing the ire of those who already favor gun control, it is less clear whether exposing even the most troubling marketing practices of some gun makers will turn off many would-be purchasers.

This completes the review of potential goals of litigation. The next sections describe the status of cigarette and gun litigation. One important overall point is that, in terms of actual final legal victories, both tobacco and gun control forces so far have rather little to show for their efforts.

Tobacco Litigation Overview

Smokers (and their spouses and heirs) have been suing the tobacco companies in tort cases for more than fifty years. Until recently, these cases have all failed. Claimants generally have lost because they could not prove that the smoker was actually harmed by smoking, because they could not convince the jury of tobacco company wrongdoing and/or because they could not prove that better disclosure of the risks of smoking by tobacco companies would have made any difference in the smoker's behavior.

Of late, the tide has turned somewhat at the trial level, as about a dozen juries have become convinced that the tobacco industry badly misbehaved and that had it not done so the victim would not have become ill.¹¹ In a first-ever victory, a Florida case (*Carter v. Brown & Williamson Tobacco Corp.*) was won at trial, and, after all appeals were exhausted, in March 2001 the victim was actually paid about one million dollars.¹² In mid-2003, something less than two hundred thousand dollars was paid to another Florida smoker who had won at trial.¹³

Beyond that, claimants have now won approximately ten other verdicts around the nation. Several of these victories include enormous sums (many millions of dollars) as punitive damages. But all these cases are still on appeal. Moreover, tobacco company defendants continue to win jury verdicts in a substantial share of individual smoker tort cases, so the future prospects for these cases remain cloudy.

The legal prospects for lawsuits claiming harm from secondhand

smoke injuries are also uncertain. Although the tobacco companies have won most of these cases so far litigated, a flight attendant plaintiff has won an important trial victory, but that case too is on appeal.¹⁴

Class actions on behalf of ill (and deceased) smokers have not fared well. One enormous temporary exception was the Florida class action (*Engle v. R.J. Reynolds Tobacco Corp.*) in which a jury awarded nearly \$150 billion in punitive damages against the tobacco companies, as well as substantial compensatory sums to three individual smoker victims.¹⁵ However, in 2003 the intermediate Florida appeals court threw this case out entirely, concluding, among other things, that a class action never should have been allowed in the first place.¹⁶ That case too is not yet fully resolved.

Class actions seeking medical monitoring remedies, noted earlier, have also fared poorly, and the two most promising cases, in West Virginia and Louisiana, have recently been lost by plaintiffs (although in Louisiana the jury awarded smoking cessation benefits to smokers, a result likely to be tied up in court for some time).¹⁷

Although, as explained earlier, the tobacco control movement has been skeptical about making cigarettes safer for smokers, potentially “fire-safe” cigarettes are another matter. If cigarettes self-extinguished more quickly and reliably, tossed lighted cigarettes might cause fewer fires. In 2003, however, Philip Morris agreed to a settlement in a case brought on behalf of a burned child—albeit in what is widely viewed as an extraordinarily pro-plaintiff local jurisdiction.¹⁸

Health-care providers and foreign governments have also sued tobacco companies, seeking reimbursement for expenditures they incurred in the treatment of those with smoking-related diseases. But these cases have essentially all been won by the defendants (with a couple of special exceptions not likely replicable elsewhere).¹⁹

During the Clinton administration, the Department of Justice brought a wide-ranging federal lawsuit against the tobacco industry that initially contained several causes of action. Trial of the potentially most damaging claim—that the defendants violated the federal racketeering act (RICO)—finally began in late 2004. Whether the government will prevail is quite uncertain, although, if it does, the financial consequences for the tobacco companies could be enormous.

As noted earlier, several class actions have recently been filed claiming that tobacco companies duped smokers into thinking that light, or

low-tar, cigarettes are safer than traditional cigarettes when, it is claimed, they are just as dangerous (or perhaps more so), given how they are actually smoked. These cases seek financial reimbursement for the cigarettes that lawyers say victims would not have purchased had they known the truth. Although these cases have been dismissed in some states, they are moving ahead elsewhere, and in Illinois, a trial judge has awarded the class an astounding twelve billion dollars (including punitive damages).²⁰ This case, too, is on appeal.

As the story of tobacco litigation has so far been detailed in this section, the record ought to make one wonder just what gun control advocates might be seeing in tobacco litigation to make them want to pursue this same trail. But this retelling has so far ignored the MSA.

Starting in the 1990s a few state attorneys general, with critical help from the personal injury bar, sued tobacco companies, seeking huge financial recoveries. Soon they were joined by the attorneys general of most states (with the support of many of the same personal injury lawyers). The legal theories underlying these cases were varied and, in the end, largely untested.

Although many describe these cases as a new form of tort litigation, there is reason to reject this characterization. Governments who provide health care to indigent smokers do potentially have rights under established tort principles, but these are *subrogation* rights. And that means that the government must step into the legal shoes of the smokers whose care they funded, seeking reimbursement from defendants against whom the smokers themselves have valid legal claims. But it was absolutely clear from the outset that the state attorneys general were making legal claims that did not depend upon proving what individual smokers themselves would have to prove if their own claims were to succeed.

These state lawsuits prompted an effort by the tobacco industry to reach a so-called global settlement that, among other things, would have protected the industry against future class actions and future punitive damages claims and would have capped their potential annual financial obligations in individual lawsuits. The agreement was understood to require adopting a confirming and implementing federal statute. But that never happened. Simply put, the tobacco control side got much greedier once the global settlement was presented to Congress, and as their Democratic supporters sought more money from, more concessions

from, and fewer concessions to the industry, the tobacco companies pulled out of the deal and had their Republican supporters kill it.

This left the tobacco companies in a somewhat difficult position, however. In the run-up to the global settlement, they opted to settle the most advanced cases (in Mississippi, Florida, and Texas) before trials could begin, and then they settled the Minnesota case during trial (when things were looking good for the “home team”). After the collapse of the global settlement, the MSA, agreed to by the other states (plus jurisdictions like the District of Columbia and Puerto Rico), provides about one-third less money than the global settlement would have, and, although it contains public health concessions, they are weaker than those the global settlement would have contained. Yet, the MSA does not contain the litigation protections that the global settlement would have provided the tobacco industry, although, of course, it did get rid of the highly threatening, if legally uncertain, state attorneys general lawsuits.

Many public health experts believe that the behavioral measures agreed to in the MSA (such as an end to billboard advertising and certain magazine advertising)—despite their aim of changing social norms around smoking—are too narrow in their reach and as a result have had, and will continue to have, little impact on smoking and health. The money provided by the MSA gives states as a group around ten billion dollars a year, which is a large sum, although many tobacco control activists bitterly complain that, in most states, none or next to none of the money is being used for tobacco control.

Hence, the primary impact of the MSA, apart from generating huge legal fees for the private lawyers involved, appears to be an increase in the price of cigarettes, estimated to be around thirty-five cents a pack, which reliably reduces the volume of cigarettes sold. Of course, this same result could be much more directly achieved by an excise tax increase. Furthermore, it is worth noting that some of the MSA provisions that are said to protect the public health also serve to protect the market shares of existing tobacco companies and to discourage new entrants.

Overall, the record of tobacco litigation is at best a mixed success from the public health perspective.²¹ Safer products have not been achieved, although, arguably, somewhat less seductive marketing methods were agreed to in the MSA. Hardly any victims have been compensated. A very modest share of the costs of smoking has been internalized

into the price of the product. The industry has not yet been financially punished by the litigation.

Although the reputation of the tobacco companies surely must be far worse now than it was, say, ten years ago, it is unclear how much of that reputation decline should be attributed to litigation of the past decade. Litigation has unearthed documents that are embarrassing to the tobacco industry, but disgruntled insiders revealed similar information apart from the litigation.²² Moreover, the industry has been under attack in the media for reasons unrelated to litigation.

In any event, while this worse reputation may have made the industry politically weaker, federal regulation of tobacco products remains extremely modest, suggesting that the national tobacco control movement has been unable to capitalize on the altered political balance. State and local tobacco control efforts have grown. However, the most important measures put in place—higher taxes and tougher secondhand smoke controls—may well be the result of an increasing majority of nonsmokers ganging up on the much smaller and increasingly marginalized number of smokers.

To be sure, smoking levels are way down since 1964, although a large share of the decline occurred well before the recent wave of litigation. States like California have achieved significantly reduced smoking rates even in recent years, but apart from the MSA-based price increase, again it is by no means clear that tobacco litigation has played a major role in this outcome.

Lessons for Gun Litigation

Seeing governments obtain a lot of money and at least some policy reform measures via the MSA, it is easy to understand why lawyers, and especially personal injury lawyers who earned vast sums in the tobacco cases, would think about a parallel litigation campaign against handgun makers.²³

From the viewpoint of gun control advocates, the main attraction of the MSA approach is the possibility of achieving injunctive relief or a favorable settlement with the gun industry—remedies that might get gun companies to adopt public health measures that are politically implausible through normal legislative channels.

In addition, gun lawsuits modeled on the state tobacco cases could be used as part of a publicity campaign to expose what gun control advocates view as extreme misconduct by some gun makers. Using litigation in this way, as described earlier, should be understood as part of a strategy for generating greater public support for gun control in general and as a way of weakening the pro-gun political lobby, regardless of the outcome of the litigation.

Finally, gun control advocates can imagine that funds obtained through successful government gun cases could be earmarked for further gun control activities, thereby avoiding the fate of the tobacco control community in the MSA.

So far, however, most state attorneys general and governors have not supported lawsuits against gun makers. Indeed, at the state legislative level, often with the support of the governor, many states have adopted statutes designed specifically to preclude such cases. Moreover, in early 2004 Congress came very close to adopting a sweeping national ban on many types of gun litigation, an issue that is not likely to disappear quickly from the congressional docket.

The upshot is that government cases (in states where they have not been legislatively precluded) have mostly been filed by cities with the support of the mayor. (Parallel to the third-party lawsuits filed in the tobacco area by health insurers, there has been some third-party effort in gun cases as well, as best illustrated by a now unsuccessful lawsuit filed in New York by the NAACP.) So far, these cases have not fared well.

As with the tobacco cases, it is not clear whether there is a valid legal theory underlying the cities' gun cases, although several inventive theories have been advanced. Speaking generally, most of the claims have been primarily based on public nuisance law and/or on a theory of negligent marketing. Both of these legal approaches imagine that tighter controls on the legitimate distribution of handguns will keep many "bad guys" from obtaining handguns. Some of the lawsuits also seek to make guns safer. Details of these cases are provided in other chapters in this book.

During the Clinton administration, the federal government, led by Department of Housing and Urban Development head Andrew Cuomo, joined with New York attorney general Eliot Spitzer to try to achieve a deal with the gun industry. But this effort failed. One major gun maker,

Smith & Wesson, eventually reached a deal with government officials, but other companies did not go along. Moreover, once isolated, Smith & Wesson wound up facing an enormous backlash from the NRA and gun owners and significantly withdrew from its commitments.

In sum, achieving gun control via government lawsuits turns on whether the remaining cases being pursued by cities will ever become a sufficient threat to the industry as to force major concessions. Several California cities recently obtained what appear to be minor concessions from gun distributors, but those cities' legal claims against gun makers have, so far, been dismissed. Moreover, a continuing worry is that restrictions forced on (or agreed to by) existing gun makers and distributors would prompt entry into the gun market by outlaw providers.

As noted previously, individual tort cases against tobacco companies, in important respects, are about advertising and promotional strategies. That some tobacco cases are beginning to succeed also provides some hope for gun control advocates who have been promoting the use of tort law in individual gun cases also to go after advertising and distribution practices.

Gun control plaintiffs seek to put a stop to marketing practices such as the flooding of gun shops in the suburbs with weapons that everyone knows will largely wind up in cities and to discredit ads that flaunt certain weapons as especially dangerous and suited for killing people. Legal hurdles confronting these cases include the problem of proving that an individual victim would not have been shot had the industry changed its conduct.

Perhaps legally more promisingly are defective product gun cases brought by individual plaintiffs. As already noted, cigarette cases have not generally been based on design defect theories. But gun cases have begun to be, and, based on the previous public health discussion, that is understandable. Moreover, convincing a jury that guns could be made safer, and that had a certain one been made so, then a particular victim would not have been injured or killed, presents a lawyer with the sort of product liability challenge that is litigated all the time with respect to auto injuries, tool injuries, and the like.

To be sure, defective gun cases are likely to prove most attractive only in special instances of accidental shootings, and, to be sure, many of the superficially best targets of this litigation may be insolvent or

out-of-business gun makers. Nonetheless, a few victories that rest on the general idea that guns can be made less dangerous could pave the way for even more aggressive gun safety claims over time.

In conclusion, guns and cigarettes present public health problems that are both similar and different. Although public health strategies for dealing with these two problems fall into the same broad categories, the details are very different. Tobacco litigation is probably given credit for achieving more by way of public health than it actually has to date. One should not be optimistic that gun litigation will yield a dramatic decrease in homicide, suicide, or accident rates. Yet, gun litigation might have a useful complementary role to play as part of a mixed legislative, regulatory, and litigation approach to gun control.