

## INTRODUCTION

### *An Overview of Lawsuits against the Gun Industry*

TIMOTHY D. LYTTON



Since the early 1980s, a growing number of gun violence victims have turned to the tort system seeking compensation for their injuries. These victims have filed claims not only against their assailants but also against gun sellers and manufacturers. By suing sellers and manufacturers, who have deeper pockets than the assailants, victims seek to improve their chances of receiving compensation. Victims also view successful tort claims as a way to promote safer firearm designs, to deter future sales to criminals, and to place part of the blame for gun violence on the industry. In addition to claims by individual victims, over thirty municipalities and the State of New York have filed lawsuits against the industry, seeking to recover the costs of law enforcement and emergency medical services related to gun violence. Several of these government lawsuits also demand injunctions that would force the industry to incorporate safety features into firearms and to restrict sales in ways aimed at reducing gun violence. In response, the industry and its allies have lobbied state legislatures and Congress to grant them statutory immunity. Proponents of the suits claim that this litigation will reform the industry in ways that will reduce gun violence. Opponents argue that the suits represent an end run around the legislative process and that the costs of defending these suits, even if the courts ultimately reject them, will wreak financial ruin on the industry.

This book examines lawsuits against the gun industry within the context of two larger controversies at the top of the nation's domestic political agenda: gun control and tort reform. Throughout, discussion of the

litigation is framed by two questions. The first, central to the debate over gun control, is whether regulating the firearms industry can reduce gun violence. The second, underlying the disagreement about tort reform, is what role, if any, courts should play in the creation of public policies such as gun control.

It may be helpful at the outset to clarify the relationship between gun litigation and gun control policy. Many lawsuits against gun manufacturers demand only money damages for injuries suffered by victims of gun violence or, in the case of suits brought by municipalities, for the costs of police and emergency services occasioned by gun violence. While the principal aim of these claims is compensation, they have regulatory implications insofar as they discourage manufacturers from engaging in the types of conduct that gave rise to the claims in the first place. Some lawsuits against manufacturers aim more directly at regulatory outcomes, demanding injunctive relief in the form of restrictions on the way gun manufacturers do business. Thus, whether by implication or by design, gun litigation has the power, and often the purpose, to regulate the firearms industry.

Lawsuits against the gun industry promote two types of regulations—the imposition of safety standards in the design of firearms and restrictions on the ways guns are marketed. Disagreement about the efficacy of these types of regulations has fueled many decades of legislative controversy over gun control. Stiff resistance to firearms regulation by the National Rifle Association (NRA) has defeated or significantly scaled back most congressional attempts to impose design standards and sales restrictions. Gun control proponents have filed lawsuits against the gun industry as a way to shift the struggle over gun control from legislatures to courts, where NRA lobbying power is not effective. They have argued that the NRA's fierce lobbying tactics and its use of campaign contributions to reelect its allies and defeat its enemies distort the legislative process and that litigation is a legitimate way to overcome the NRA's undue political influence. The NRA and the industry have fired back accusations that courts have no business deciding the gun control policy issues raised by plaintiffs' claims and that these issues should be decided by democratically elected legislatures, not unelected judges. The NRA has denounced the suits as an attempt to achieve through litigation the very same reforms rejected by federal, state, and local legislatures. This argument has held sway with many judges and legislatures.

Judges have dismissed all but a few of the suits, many based on a reluctance to engage in judicial policy-making, to “legislate from the bench.” For their part, legislatures in thirty-two states, lobbied heavily by the NRA, have passed legislation granting the industry immunity from suit. There is strong congressional support for similar nationwide immunity legislation. In turn, gun control proponents have pointed to immunity legislation as further evidence of the gun lobby’s power to manipulate the legislative process.

The chapters that follow offer a variety of perspectives on gun violence, gun control, the gun industry, gun litigation, and the use of gun litigation as a regulatory tool. This book aims not to resolve the tensions between these different perspectives but rather to deepen appreciation of them and the ways in which they sometimes complement and sometimes clash with each other. Thus, by providing insight into the diversity of views driving the litigation, the book aims to advance discussion; it does not pretend to offer a solution. This introduction begins with an overview of gun litigation and then examines a number of themes that run throughout the book.

### The Rise of Personal Injury Suits against Firearm Manufacturers and the Transformation of Gun Litigation into a Mass Tort

Throughout the 1980s and the first half of the 1990s, lawsuits by shooting victims against gun manufacturers took the form of individual plaintiffs seeking compensation from individual defendants. Plaintiffs portrayed their suits as traditional personal injury claims based on conventional theories such as negligence or strict product liability. Beginning in the mid-1990s, plaintiffs began to develop novel theories of liability and new litigation strategies. In 1998, two cities filed suit against the entire industry, seeking not only money damages but also injunctive relief in the form of design standards and marketing restrictions. Within a few years, gun litigation had been transformed from a relatively obscure collection of personal injury cases into one of the most notable legal trends of the decade. By 2000 gun litigation was regularly front-page news, and manufacturers faced potentially bankrupting industrywide liability exposure as a result of suits by dozens of individual victims, over thirty cities, and the State of New York.

The rise of lawsuits against the gun industry is part of a larger trend to reframe gun violence as a public health problem. In the 1960s and 1970s, injury prevention emerged as a field of inquiry within public health.<sup>1</sup> As this field developed, researchers turned their attention to violence as a source of injury and to gun violence in particular. Talking of a gun violence “epidemic,” public health scholars sought to identify the causes and distribution of gun violence injury using epidemiological tools common in the study of disease.<sup>2</sup> Epidemiological interest in identifying the “disease agent” drew attention to firearms, which in turn spurred interest in safer gun designs.<sup>3</sup> A desire to isolate “environmental factors” that foster gun violence led researchers to examine the marketing and distribution of firearms, giving rise to proposals for greater restrictions on gun sales.<sup>4</sup> Increasing interest in firearm designs and marketing restrictions spurred by this public health approach has expanded the focus of attention from the individual perpetrators of gun violence to include manufacturers and dealers. As a result, there has been less emphasis on criminal sanctions as a response to gun violence and more interest in industry regulation as a way to prevent it.<sup>5</sup> Early lawsuits against the gun industry both were inspired by this focus on gun designs and marketing restrictions and helped to promote it.<sup>6</sup> And given legislative resistance to their proposed reforms, public health scholars expressed support for the litigation.<sup>7</sup>

The transformation of gun litigation from the early individual personal injury suits into a mass tort is part of a second trend. In the 1960s, injury victims, advocacy groups, and plaintiffs’ attorneys began using tort litigation as a tool to address large-scale public health problems by suing industries that manufacture the products that cause them. This type of litigation is characterized by the aggregation of hundreds, thousands, or even, in some cases, millions of victim claims; the naming of most or all manufacturers as defendants; and the use of epidemiological studies linking the injuries of the victims to the conduct of the industry. Other features include a high level of organization among both the plaintiffs’ and the defendants’ bars, high-stakes global settlement negotiations that involve detailed regulatory terms, managerial judging, bankruptcy, and government involvement. Inspired by this type of mass tort litigation against the manufacturers of asbestos, Agent Orange, Bendectin, the Dalkon Shield, silicone breast implants, and, perhaps most of all, tobacco, plaintiffs’ attorneys and gun control advocacy groups developed a new strategy for suing the gun industry. They organized litiga-

tion efforts, aggregated victim claims, compiled complex social science data linking gun makers to gun violence, mobilized state and local government cost-recovery suits, and conducted settlement negotiations with an aim to force gun makers to accept design changes and marketing restrictions.<sup>8</sup> The reinvention of gun litigation as a mass tort has attracted enormous public attention, placing it in the center of both the gun control controversy and the debate over tort reform. At the same time, individual victims have continued to file old-style personal injury actions. Let us now turn to a survey of the liability theories behind the litigation.

### Theories of Liability

As a preliminary matter, it will be helpful to distinguish four types of lawsuits against the gun industry. First, and least controversial, are product liability claims against manufacturers for injuries caused by guns that malfunction. Plaintiffs have prevailed in many of these cases.<sup>9</sup> Second are negligent entrustment claims against retail dealers who sell guns that are subsequently used in crimes. These cases have proven more controversial, and plaintiffs have prevailed in only a few instances.<sup>10</sup> Third are claims against wholesale distributors and manufacturers for injuries caused by misuse of a gun that could have been prevented by equipping the gun with a safety device. And fourth are claims against wholesale distributors and manufacturers for injuries caused by the criminal use of a gun that could have been prevented by more restrictive marketing and sales practices. It is these last two types of cases—involving design modification and marketing restriction claims—that are at the center of the controversy over gun litigation. For the most part, courts have been hostile to these claims. The great majority have been dismissed or abandoned prior to trial, and of the few favorable jury verdicts obtained by plaintiffs, all but one have been overturned on appeal.<sup>11</sup> A handful of claims have been settled prior to trial.<sup>12</sup>

My discussion of the doctrinal theories behind lawsuits against the gun industry will focus on design modification and marketing restriction claims. These cases involve a variety of different types of shootings. In some, the victim is shot by a criminal assailant as the target of an attack or as a bystander. In others, the victim is accidentally shot by another

who does not intend to discharge the firearm. In a few cases, the victim shoots himself or herself, either by accident or in a suicide attempt. The plaintiffs in most of these cases are the victims themselves or, if the shooting was fatal, a relative or representative of the victim's estate. In some cases, the plaintiffs are municipal governments, and in one case, the plaintiff was the State of New York. The defendants are either individual distributors or manufacturers or, in some cases, the industry as a whole.

### *Strict Liability for Abnormally Dangerous Activities*

Most jurisdictions adhere to the doctrine that “[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to . . . another resulting from the activity, although he has exercised the utmost care to prevent the harm.”<sup>13</sup> Gun litigation plaintiffs have asserted that the manufacture, distribution, and sale of firearms is an abnormally dangerous activity and that gun manufacturers, distributors, and retail sellers should be held strictly liable for injuries related to gun violence.<sup>14</sup> With one exception, courts have rejected this theory, holding that the manufacture and sale of firearms—approximately 4.5 million new guns each year—is a common activity that poses no abnormally high risk to the public.<sup>15</sup>

The exception, *Kelley v. R.G. Industries*, attracted much attention when it was decided in 1985 but has had little lasting doctrinal impact on gun litigation.<sup>16</sup> In that case, the Supreme Court of Maryland imposed strict liability on the manufacture, distribution, and sale of “Saturday Night Specials,” which the court defined as cheap, easily concealable handguns “particularly attractive for criminal use and virtually useless for the legitimate purposes of law enforcement, sport, and protection.” The manufacture, distribution, and sale of this class of weapon, the court held, posed an abnormally high risk of criminal misuse. Following the *Kelley* decision, the Maryland legislature passed a law overturning the doctrine of strict liability for the manufacture and sale of Saturday Night Specials and replacing it with a board of experts to identify and restrict the sale of handguns with a high risk of criminal misuse.<sup>17</sup> In the years following, courts in other states expressly rejected the *Kelley* doctrine. It is worth noting, however, that as a result of the case the defendant ceased production and sale of Saturday Night Specials.<sup>18</sup> As for the plaintiff, he

abandoned the case, preferring to declare a legal victory rather than engage in a costly trial to obtain a judgment likely under six figures from a foreign parent corporation with no attachable assets in the United States.<sup>19</sup>

### *Defective Design*

As a general rule, manufacturers are subject to liability for injuries caused by design defects in the products they produce.<sup>20</sup> Plaintiffs have argued that the failure of gun manufacturers to equip their firearms with safety features such as gun locks or personalization technology constitutes a design defect.<sup>21</sup> When it comes to firearms, however, the concept of a design defect is highly controversial. Under one widely accepted approach, a product design is defective when the risks associated with the design outweigh its utility.<sup>22</sup> Citing this doctrine, plaintiffs have argued that the risks associated with handguns—designed to be small and concealable, making them attractive to criminals—outweigh their utility.<sup>23</sup> Courts have rejected this theory, holding that liability for design defect applies only to products that are defective in the sense that they malfunction in some way. In the words of one court: “[w]ithout this essential predicate, that something is wrong with the product, the risk-utility balancing test does not even apply.”<sup>24</sup>

According to another widely accepted approach, a product design is defective when the “foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe.”<sup>25</sup> Plaintiffs have alleged that the failure of manufacturers to incorporate safety features into guns constitutes a design defect. Some cases have focused on safety features such as a chamber-loaded indicator that would alert the bearer of a gun to the presence of a live round in the firing chamber.<sup>26</sup> This type of safety feature would prevent accidental shootings that occur when the possessor of a gun mistakenly believes it to be unloaded. Other cases have focused on safety features such as locking devices or personalization technology that would render guns inoperable in the hands of unauthorized users.<sup>27</sup>

Gun manufacturers have responded to these claims in a number of ways. They argue that the accidental discharge of firearms results from

improper and unintended use of the weapon, in some cases by children, and that liability should rest with gun owners who fail to secure their weapons or to supervise their proper use.<sup>28</sup> Gun manufacturers have also asserted that mechanical locking devices might defeat the usefulness of a gun in situations where an authorized user might not have time to unlock the gun. They allege similarly that personalization technology may be subject to electronic failure when the gun is needed for self-defense.<sup>29</sup>

Claims against gun manufacturers based on reasonable alternative design theories have fared better in the courts than those based on risk-utility theories. Two alternative design cases have made it to juries, and one resulted in a verdict for the plaintiff.<sup>30</sup> Other cases are currently pending. The fate of these cases, and of design defect claims against gun manufacturers in general, is still unclear.

### *Negligent Marketing*

According to generally accepted tort doctrine, one may be subject to liability for negligence if one fails to exercise reasonable care and, as a result, injures another. Plaintiffs have asserted that gun manufacturers are negligent in failing to take reasonable precautions that would prevent their guns from being acquired by individuals likely to use them for criminal purposes. These precautions include a number of voluntary marketing restrictions, for example, refusing to supply firearms to retail dealers who sell a disproportionate number of guns used in crimes.<sup>31</sup> The failure to take these precautions, allege plaintiffs, is a cause of gun violence. Manufacturers have responded that such precautions would do no good, since those bent on acquiring guns for criminal purposes could easily evade sales restrictions or purchase guns on the black market. Moreover, manufacturers assert, even if voluntary marketing restrictions could reduce gun violence, regulating gun sales is the job of government, not the industry.<sup>32</sup>

For the most part, one has a duty to exercise reasonable care only to prevent foreseeable injuries. In addition, one is generally under no duty to prevent even foreseeable injuries where the risk of injury arises out of the conduct of a third party. For example, if an individual learns of a stranger's intention to harm another, the individual is normally under no duty to restrain the stranger or to protect the victim, even if it would be



reasonable to do so. Courts do, however, impose such duties where there exists a special relationship between the individual and the injurer or between the individual and the victim.<sup>33</sup> Such special relationships are characterized by the individual's unique capacity to control the risk of harm posed by third parties, for example, a parent's capacity to restrain a violent child or a landlord's capacity to protect tenants from intruders.<sup>34</sup>

Manufacturers have argued that they owe no duty to gun violence victims to exercise control over retail sales since the misuse of guns is not a foreseeable consequence of marketing guns to the general public.<sup>35</sup> In addition, they assert that they owe no duty to prevent injury to victims by third parties who misuse guns.<sup>36</sup> Plaintiffs respond that gun violence is a highly foreseeable risk of marketing guns and, furthermore, that manufacturers are uniquely situated to supervise the sales of retail dealers whom they supply. On this basis, plaintiffs argue, courts should recognize that gun manufacturers have a duty to exercise reasonable care in marketing firearms and that they should be held liable when their breach of this duty results in injury.

Whether there exist specific marketing restrictions short of a total gun ban that would reduce gun violence is the central question at the heart of these negligent marketing cases. Only if marketing restrictions would reduce gun violence can it be said that manufacturers have a unique capacity, and therefore a duty, to take reasonable precautions to prevent injuries due to gun violence. And only if these marketing restrictions are modest enough to appear reasonable in the eyes of a jury can it be said that the failure to adopt them is unreasonable and therefore a breach of the duty to exercise reasonable care. And, finally, only if these modest marketing restrictions are effective can it be said that the failure to adopt them causes injury. Plaintiffs in negligent marketing suits present a variety of different marketing restrictions and offer often complex social science analysis to establish the potential effectiveness of these restrictions in reducing gun violence. Let us examine briefly three leading theories of negligent marketing.

#### OVERSUPPLY

In *Hamilton v. Beretta*, plaintiffs alleged that gun manufacturers knowingly oversupplied handguns to dealers in states with weak gun controls and that this oversupply resulted in the sale and resale of those guns to

individuals in states with strict gun controls, where the guns were subsequently used in crimes.<sup>37</sup> For example, plaintiffs asserted that defendant gun makers oversupplied handguns to dealers in Florida knowing that many of those guns would be smuggled to New York for use in crime. In support of this theory, plaintiffs presented federal law enforcement statistics indicating that 40 percent of handguns used in crimes in New York between 1989 and 1997 were originally sold in five Southern states with weak gun control laws. They also commissioned a study suggesting that manufacturers were supplying guns to retail dealers in those states far beyond the estimated demand for new guns among residents. And, finally, they cited data showing that a significant number of guns used in crime had been purchased within the previous three years, which they interpreted as indicating that these guns were purchased, not stolen, by the criminals who used them. All of this evidence, according to the plaintiffs, added up to proof that the oversupply of guns to Southern markets was a significant cause of gun crime in the North, and in New York in particular, where the plaintiffs were injured.<sup>38</sup> Defendants countered that oversupply is a normal by-product of legitimate competition between firms for market share and that the industrywide cooperation that would be required to prevent it would likely run afoul of antitrust laws. A Brooklyn jury found three of the twenty-five defendants liable.<sup>39</sup> The New York Court of Appeals subsequently overturned the verdict, rejecting the theory of oversupply as overbroad. “Without a showing that specific groups of dealers play a disproportionate role in supplying the illegal gun market,” the court held, “the sweep of plaintiffs’ duty theory is far wider than the danger it seeks to avert.” Allowing liability based on oversupply, the court explained, “would have the unavoidable effect of eliminating a significant number of lawful sales to ‘responsible’ buyers by ‘responsible’ Federal firearms licensees (FFLs) who would be cut out of the distribution chain” by manufacturers seeking to reduce their liability exposure. While the court rejected the theory of oversupply, it left open the possibility that a duty to exercise reasonable care in marketing firearms might be acceptable on some narrower basis.

#### OVERPROMOTION

In *Merrill v. Navegar*, plaintiffs alleged that the manufacturer of a semi-automatic pistol designed for close combat-style assaults should have

limited promotion and sale of the gun to the military and law enforcement, the only consumers who might have legitimate use for such a weapon.<sup>40</sup> In arguing that the manufacturer's promotion of the weapon to the general public was negligent, plaintiffs pointed to the combination of design features and advertising. The Tec-DC9 (so named because its maker designed it to circumvent the Washington, D.C., ban of its predecessor—the Tec-9—which was banned also in California, where *Merrill* was filed) was capable with modification of delivering fully automatic spray fire, was easily concealed, and could be fitted with silencers and flash suppressors. Promotional materials emphasized the paramilitary appearance of the gun, boasted its “excellent resistance to fingerprints,” and assured dealers that it was as “tough as your toughest customers.”<sup>41</sup> The manufacturer responded that it owed no duty to refrain from selling a legal product to the public and that the suit was barred by the California Civil Code's prohibition on product liability actions against gun manufacturers based on assertions that the risks of a weapon outweigh its benefits. The California Supreme Court, relying on the Civil Code provision, affirmed the trial court's grant of summary judgment in favor of the defendants. In response, the California legislature revised the relevant Civil Code section to allow for product liability claims against gun makers, opening the door to future suits of this kind.<sup>42</sup>

#### FAILURE TO SUPERVISE RETAIL DEALERS

Plaintiffs in several cases have alleged that manufacturers are negligent in failing to train and monitor retail dealers in order to prevent illegal sales.<sup>43</sup> Plaintiffs argue that dealer training on how to comply with gun laws, to keep better track of store inventory, and to spot fraudulent buyers would reduce access to guns by criminals. Moreover, using data available from the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE), plaintiffs maintain that manufacturers could identify and refuse to supply dealers who have a record of illegal sales or to whom large numbers of crime guns are traced. Defendants have responded that such training would be ineffective and that attempts to police retail sales would interfere with law enforcement efforts to uncover and prosecute rogue dealers. Courts in several jurisdictions have rejected this theory, although several cases are currently pending.<sup>44</sup>

*Public Nuisance*

The details of public nuisance doctrine vary significantly from jurisdiction to jurisdiction. Most courts, however, agree on the general definition of a public nuisance as “an unreasonable interference with a right common to the general public.”<sup>45</sup> Plaintiffs have alleged that the extensive illegal secondary market in firearms constitutes a public nuisance for which the gun industry is responsible. These claims rely on many of the same allegations as negligent marketing suits. For example, a lawsuit brought by the City of Chicago alleged that gun manufacturers oversupply suburban retail dealers, who sell handguns to residents of the city, where handgun possession is illegal. The suit further asserted that manufacturers design and advertise weapons in ways attractive to criminals and that they fail to discipline irresponsible dealers. Oversupply, overpromotion, and the failure to supervise retail dealers, according to the city, are all unreasonable interferences with the public right of Chicago residents to be free from the human and material costs of gun violence. The Illinois Supreme Court rejected the city’s claim, holding that manufacturers and wholesale distributors owe no duty to the public at large to guard against the criminal misuse of guns.<sup>46</sup>

Courts in several jurisdictions have rejected similar public nuisance claims on two additional grounds: first, that the industry marketing practices in question are legal, and second, that plaintiffs cannot establish a direct connection between industry marketing practices and illegal gun sales. For example, the U.S. Court of Appeals for the Third Circuit rejected a suit by the City of Philadelphia, holding that the sale of “lawful products that are lawfully placed in the stream of commerce” cannot be the basis of a public nuisance claim.<sup>47</sup> A New York state appellate court, in affirming the dismissal of New York State’s public nuisance claim against the gun industry, held that “the harm plaintiff alleges is too remote from defendants’ otherwise lawful commercial activity.”<sup>48</sup>

By contrast, other courts have specifically held that the legality of the industry’s marketing practices does not insulate it from liability and that plaintiffs have at least alleged a close enough connection between particular industry practices and illegal gun sales to avoid dismissal of their claims. The Supreme Court of Indiana, reinstating a suit by the City of Gary, held that “a nuisance claim may be predicated on a lawful activity conducted in such a manner that it imposes costs on others” and that alle-

gations concerning the industry's refusal to crack down on illegal sales by retail dealers, if proven true, would be sufficient to support liability for public nuisance.<sup>49</sup> Moreover, there is some question as to whether considerations of remoteness are even relevant in actions where plaintiffs are seeking merely abatement of the nuisance, as opposed to money damages.<sup>50</sup>

When public nuisance claims are brought by private parties, plaintiffs must additionally show that they suffered “special injury”—harm different from that experienced by the general public. A public nuisance claim brought by the National Association for the Advancement of Colored People (NAACP) against the gun industry foundered on just this element. After a six-week trial, the Federal District Court in Brooklyn dismissed the case. In an unusual 261-page memorandum, the court concluded that

The evidence presented at trial demonstrated that defendants are responsible for the creation of a public nuisance and could—voluntarily and through easily implemented changes in marketing and more discriminating control of the sales practices of those to whom they sell their guns—substantially reduce the harm occasioned by the diversion of guns to the illegal market and by the criminal possession and use of those guns. Because, however, plaintiff has failed to demonstrate, as required by New York law, that it has suffered harm different in kind from that suffered by the public at large in the State of New York, the case is dismissed.<sup>51</sup>

The memorandum offers a highly detailed analysis—accompanied by illustrative charts—in support of its finding of industry responsibility for illegal gun markets. While ostensibly a document justifying dismissal of the case, the memorandum reads like a blueprint for bringing a successful public nuisance claim against the industry. It is worth mentioning that the judge who wrote this memorandum was Jack B. Weinstein, who also presided over *Halberstam v. Daniel*, the first negligent marketing case to reach a jury, and the *Hamilton* case, the first negligent marketing case to obtain a jury verdict favorable to plaintiffs (later overturned on appeal). Judge Weinstein currently presides over a public nuisance suit, which he refused to dismiss, brought by the City of New York.<sup>52</sup> In another public nuisance case brought by private plaintiffs, *Ileto v. Glock*, the victims and survivors of a shooting spree by Buford Furrow, who shot several

children at a Southern California Jewish community center and a U.S. postal worker, filed a public nuisance claim against a group of industry defendants.<sup>53</sup> The U.S. Court of Appeals for the Ninth Circuit reversed a trial court's dismissal of the claim, which is now likely to reach trial.

### *Deceptive Trade Practices*

Lawsuits brought by municipalities have alleged that manufacturers' advertising claims contain intentional misrepresentations in violation of state laws prohibiting deceptive trade practices.<sup>54</sup> Municipal plaintiffs have disputed industry assertions that keeping a gun at home increases safety. These assertions, they argue, contradict public health studies showing that the presence of a gun in the house increases the risk of gun-related injuries to family members. Defendants have countered that these studies fail to take seriously the self-defense benefits of gun ownership. While most courts have rejected these claims, in at least two cases courts have refused to dismiss them.<sup>55</sup>

### *Defenses*

There are two common defenses raised by gun manufacturers in addition to those already mentioned. The two often appear together and, as a result, are frequently confused with one another. They are, however, quite distinct.

#### REMOTENESS

Defendants have argued that the injuries of gun violence victims are too remote from the alleged wrongdoing by gun manufacturers to support liability.<sup>56</sup> In one version of this defense, gun manufacturers assert that the plaintiffs lack standing to bring suit against them in the first place. For example, in dismissing the City of Bridgeport's suit against the gun industry, the court held that the city's claimed losses in responding to gun violence were entirely derivative of harms suffered by the victims themselves and that "a plaintiff who complains of harm resulting from misfortune visited upon a third person is generally held to stand at too

remote a distance to recover[;] . . . standing requires a colorable claim of direct injury to the complaining party.”<sup>57</sup> Municipal plaintiffs have responded to this argument by asserting that many of the costs of responding to gun violence—for example, the costs of security patrols or metal detectors in public buildings—are independent of harms to any particular gun violence victim.

In another version of the remoteness defense, gun manufacturers argue that their alleged wrongdoing is not a proximate cause of harm to the plaintiff.<sup>58</sup> According to well-settled tort doctrine, a defendant is not liable for negligence unless his failure to exercise reasonable care is a proximate cause of harm to the plaintiff. Depending upon the situation, proximity may be defined by the directness of the connection between the defendant’s wrongdoing and the plaintiff’s harm, the foreseeability of the defendant’s wrongdoing resulting in harm to the plaintiff, or the public policy implications of holding the defendant liable.<sup>59</sup> Whether the defendant’s negligence is a proximate cause of harm to the plaintiff is normally a matter of fact for a jury to decide. Occasionally, judges will make this determination themselves if they believe that there is no room for reasonable disagreement. (By contrast, the issue of standing is always decided by the judge.) Courts have dismissed a number of lawsuits against the gun industry for lack of proximate cause.<sup>60</sup>

#### THE FREE PUBLIC SERVICES DOCTRINE

A common defense raised by gun manufacturers against municipal plaintiffs is the free public services doctrine, also known as the municipal cost recovery rule.<sup>61</sup> According to this doctrine, a government entity may not recover from a tortfeasor the costs of public services occasioned by the tortfeasor’s wrongdoing. Curiously, while some courts have accepted this doctrine as a well-established principle of common law, others have dismissed it as without precedent. A handful of courts have relied on the doctrine in dismissing municipal claims.<sup>62</sup>

#### The Social Science Underpinnings of Gun Litigation

Both plaintiffs and defendants in gun litigation rely heavily on social science findings from the fields of public health, criminology, and econom-

ics. These findings provide a foundation for claims and defenses in individual cases. They also undergird competing arguments about the potential effectiveness of proposed remedies such as design modification and marketing restrictions. Beyond the realm of gun litigation, social science findings also play a prominent role in legislative battles and the broader public debate about gun control. Indeed, in the war over gun control, scholarly debate among social scientists is itself a significant battleground, exhibiting the same highly polarized, and often nasty, exchanges typical of ad campaigns and public debates. Scholars on both sides disagree vociferously not only about each other's findings but also about each other's integrity. Charges of fabricating data and skewing results have become increasingly common in recent years.

Personal attacks aside, some of the disagreement among scholars is due to differences in the disciplines within which they work. These distinct disciplines influence the way scholars define problems and the types of solutions on which they focus. For example, public health scholars bring an epidemiological perspective to the study of gun violence: they focus on morbidity and mortality rates and advocate environmental changes and alterations in the agent of injury (i.e., guns) that do not rely heavily on behavior modification. Thus, the public health literature on gun violence tends to emphasize the magnitude of injury and death from gun violence, including not only assaults but also accidents and suicides, and to call for changes in how guns are marketed and designed. Public health scholarship places little faith in behavior modification as a response to gun violence, whether in the form of crime deterrence or gun safety courses. By contrast, criminologists view gun violence as primarily an issue of criminal behavior: they focus on crime rates and advocate crime-deterrence strategies. Thus, the criminological literature focuses primarily on the more limited problem of gun injury and death resulting from assault and discusses gun-crime deterrence strategies such as criminal prosecution, police searches for illegal weapons, and private gun ownership for self-defense. To be fair, there is less uniformity of orientation and opinion among criminologists than among public health scholars, and there is increasing interdisciplinary overlap between the two fields. Nevertheless, it is not unfair to say that a significant source of disagreement between public health scholars and many prominent criminologists arguing over gun control stems from differences in the way that these two disciplines frame issues and the types of solutions on



which they focus. Thus, they argue over not only how big the problem is but *what* the problem is, and they debate not only the efficacy of a proposed solution but the relevance of it. This battle of experts is further complicated by the additional participation of economists, historians, sociologists, and legal scholars.

Chapters 1 and 2 offer an introduction to the public health and criminological literature on gun violence and gun control. In chapter 1, Julie Samia Mair, Stephen Teret, and Shannon Frattaroli survey public health findings that gun violence is a significant source of death and injury, and they argue that policies directed at modifying gun designs and restricting gun marketing offer promise of reducing gun-related mortality and morbidity rates. In chapter 2, Don Kates offers an overview of criminological studies suggesting that narrowly tailored government restrictions on gun ownership and sales effect only marginal decreases in gun violence rates and that broad restrictions may even cause an increase in gun violence rates by depriving private citizens of an effective means of self-defense. In characteristic fashion, the public health and criminology perspectives presented in these two chapters talk past one another. The public health chapter defines the problem of gun violence to include assaults, accidents, and suicides (this last category accounting for over half of gun deaths); emphasizes the magnitude of this problem in terms of injury, death, and economic cost; and focuses on nonbehavioral solutions such as incorporation of safety features in guns and increased marketing restrictions. By contrast, the criminology chapter is more concerned with murder rates than with injuries, accidents, or suicides; stresses the high cost of enforcing gun control laws; and advocates private gun ownership for self-defense as the most effective means of addressing gun assaults.

The two chapters do, however, join issue on one significant point: the relation between widespread private gun ownership and gun violence rates. Whereas chapter 1 concludes that “[t]he weight of public health research finds that the high prevalence of guns in the United States is associated with this country’s high gun death rate,” a central claim of chapter 2 is that “criminological research does not support claims that gun availability to ordinary people promotes violence.” Kates goes so far as to denounce the link between gun ownership and gun violence rates as “an erroneous mantra” of the public health community. To be fair, Mair, Teret, and Frattaroli do not claim that widespread private gun owner-

ship *causes* gun violence; they are careful to insist only upon an association between the two. Of course, a mere association provides a much weaker foundation upon which to argue that a reduction in gun ownership would result in lower gun violence rates. This argument is most speculative—indeed, Kates argues that it is just plain wrong—when applied to murder and assault rates. It is stronger, however, when applied to accident rates: less gun ownership presents less opportunity for accidental shootings with guns—an argument largely unaddressed by criminologists. Professors Franklin Zimring and Gordon Hawkins, in contrast to Kates and the scholars upon whom he relies, are criminologists who assert a causal link between widespread private gun ownership and gun violence rates. In their book, *Crime Is Not the Problem: Lethal Violence in America*, they argue that the prevalence of guns in America, while not associated with higher crime rates, is associated with higher rates of lethal violence. A significant aim of their study is to encourage criminologists, and the public at large, to consider the problem of gun violence from the perspective that public health scholars have been advocating all along—“to shift the subject from crime to life-threatening violence.”<sup>63</sup> Chapters 1 and 2 thus introduce the tension between public health and criminological perspectives on gun violence, especially where they miss each other and where they disagree. When reading, one should keep in mind, however—as the work of Zimring and Hawkins shows, along with other recent work by scholars in both fields—that the disciplinary battle lines are neither clear nor fixed.

Aside from the relationship between public health and criminology scholarship, chapters 1 and 2 also offer insight into some limitations of the findings offered by social science. For example, Mair, Teret, and Frattaroli explain that national “[v]ital statistics data provide no useful information about the guns used to kill and do not include information about perpetrators of gun homicides or, when applicable, unintentional gun deaths.” While there are small-scale studies that compile such information for specific localities, they “fall short of providing nationwide, comprehensive data.”<sup>64</sup> Such data are essential to evaluating the remedies to gun violence advocated by the public health community. More comprehensive data on whether certain types of guns are more prevalent in gun deaths are essential to determining the efficacy of “an outright ban” on the sale of those guns; data on the perpetrators of gun homicides are necessary in evaluating the effectiveness of additional barriers to pur-

chasing guns; and data on the circumstances of accidents are required in determining the usefulness of additional safety features. Kates, for his part, admits up front that “[c]arefully tailored gun controls can marginally reduce gun violence rates,” although his chapter goes on to condemn the “futility” of gun marketing restrictions and the “failure” of stiff penalties for illegal possession or use of guns due to lax enforcement and inadequate resources. One should be careful not to belittle the value of marginal reductions in gun violence. Indeed, marginal reduction is a mark of success for most, if not all, public policies aimed at addressing social problems. That passenger-side air bags offer marginal reductions in highway fatalities is hardly an insignificant achievement. Furthermore, safety features or sales restrictions, while not shown to have any impact on murder rates, might reduce accidents. Whether the reduction in accident rates is worth any losses in self-defense against assaults (due to reduced effectiveness or availability of guns) remains unclear. At the present time, social science simply cannot answer this question.

In addressing questions about gun design and marketing at the heart of gun litigation or more general discussions about gun violence, it is helpful to examine the gun industry. In chapter 3, Tom Diaz argues that the structure of the gun industry produces a tendency over time to design and sell weapons of increasing “lethality” and that this trend causes an increase in gun violence rates. Perhaps the most illuminating insight of Diaz’s discussion is that the increasing killing power of guns is not based on any secret conspiracy among gun makers to supply weapons to street gangs and illegal paramilitary groups but rather is simply the result of market forces not unlike those in any other consumer-product industry. Just like the automobile industry, gun makers need to continuously produce new models in order to maintain sales. In the words of a gun industry analyst quoted by Diaz, “[w]ithout new models that have major technical changes, you eventually exhaust your market.”<sup>65</sup>

Diaz’s claim that this “deliberate enhancement of lethality contributes directly to the criminal use of firearms and to death and injury resulting from firearms use” features prominently in many lawsuits against the gun industry. Plaintiffs have claimed that the marketing of easily concealed guns is an abnormally dangerous activity, that manufacturers are negligent in marketing guns with increased firepower, and that especially lethal guns are defectively designed. The link, however, between lethality and gun violence rates is difficult to prove, since, as Diaz him-

self admits, “uniform national data on firearm injury is not available. There is simply no resource from which one can obtain such useful data as types of handguns, caliber, and number of rounds taking effect in shootings.” In support of the link between lethality and gun violence, he does cite “a national survey of anecdotal medical evidence,” a “study of shootings in Philadelphia,” comments from “law enforcement officials,” and a recent study by a gun control advocacy group on 211 fatal shootings of police officers. Furthermore, Diaz argues, aside from any effect on gun violence rates, increased lethality results in more damage to shooting victims in the form of multiple and larger wounds. While Diaz’s assertions that the industry’s gun designs and marketing practices are responsible for gun violence have yet to be definitively proven, his analysis of lethality is nevertheless essential to understanding how the gun industry operates.

The prevailing view among social scientists is that collecting more data on guns and gun violence will promote consensus and ultimately lead to a resolution of the gun control controversy. In chapter 4, Dan Kahan, Donald Braman, and John Gastil challenge this view. They argue that people’s positions on gun rights and gun control are determined not by social science but by culture. Indeed, Kahan, Braman, and Gastil argue that disputes about social science findings are nothing more than a proxy for cultural differences. One’s cultural commitments determine which studies one finds convincing: “Culture not only *matters* to citizens in the gun debate; but it *determines* how they evaluate and even what they believe about the consequences of gun control.”

Culture determines individuals’ views on gun control, according to Kahan, Braman, and Gastil, because culture affects risk perception, and one’s views on gun control are ultimately about the type of risks one fears most. The fear of some risks and the disregard of others, they explain, both “reflect and reinforce” an individual’s values and worldview. For example, those with a more “egalitarian” cultural orientation will be more “sensitive to environmental and industrial risks, the minimization of which reinforces their demand for the regulation of commercial activities productive of disparities in wealth and status.” By contrast, those with a more “individualist” cultural orientation tend to fear “the dangers of social deviance, the risks of foreign invasion, or the fragility of economic institutions,” all of which they perceive as serious potential threats to individual liberty. Kahan, Braman, and Gastil cite empirical evidence that

these “cultural orientations . . . more powerfully predict individual attitudes toward risk than myriad other influences, including education, personality type, and political orientation.” The gun control debate is framed by social science scholarship as a contest “between *two* competing risk claims: that insufficient gun control will expose too many innocent persons to deliberate or accidental shootings and that excessive gun control will render too many law-abiding citizens vulnerable to violent predation.” Egalitarians fear the first risk more and therefore support gun control, while individualists fear the second risk more and consequently oppose gun control. Both sides readily cite social science findings that support their risk perceptions, and they distrust findings that contradict them.

Kahan, Braman, and Gastil dismiss gun litigation—with its intense focus on competing social science claims—as “culturally obtuse.” Litigants exacerbate the misplaced obsession with statistics by plying juries with complex data analyses concerning the impact of gun designs and marketing on gun violence rates. Juries, in evaluating this evidence, are likely to split along the same cultural divide that underlies the broader gun debate. To the extent that juries do reach verdicts in these cases, they will merely offer an endorsement of one side or the other, adding to the polarization that has made the controversy so intractable. “Gun litigation won’t work,” conclude Kahan, Braman, and Gastil, “because it doesn’t do anything to extricate the gun issue from the conflict between competing cultural styles in American life.”

If Kahan, Braman, and Gastil are right—that views about gun control are ultimately rooted in culture—then the work of social scientists like Mair, Teret, Frattaroli, and Kates is not only irrelevant but actually counterproductive in advancing the debate over gun policy. And if the primary function of gun litigation is to put the social science on trial, then gun litigation will do more to entrench the current stalemate than to alleviate it.

Kahan, Braman, and Gastil’s cultural critique of gun litigation focuses primarily on jury verdicts. Later chapters suggest, however, that other parts of the litigation process—such as filing, discovery, and settlement—may have far greater impact on the gun control debate than jury verdicts. In chapter 6, I suggest that these aspects of gun litigation may have an impact on the cultural dimension of gun control politics. Insofar as gun litigation has reframed the gun control debate—from merely a contest between public safety and individual gun ownership

rights to also a contest between individual rights to recovery in tort and crime reduction through self-defense—it complicates the easy identification of gun control with egalitarianism and gun rights with individualism. This new complexity could prompt people to reconsider their views on gun control. Indeed, it might even be a sign that gun litigation has potential to generate the kind of “constructive cultural deliberation” that Kahan, Braman, and Gastil promote as a solution to the current standoff.

Even gun litigation jury verdicts themselves may be viewed as culturally relevant. Where Kahan, Braman, and Gastil see polarization and incoherence, one might instead perceive a tendency toward compromise and accommodation that has enabled both sides to declare victory. For example, in the *Halberstam* case, the jury found that the defendants were negligent in selling gun kits but that their negligence was not a proximate cause of the plaintiff’s harm, validating part of each side’s case. In the *Hamilton* case, the jury found fifteen of the twenty-five defendant manufacturers negligent, nine to be the proximate causes of injury to the plaintiffs, and three liable for specified amounts of damages—an outcome that might be characterized as both moderate and the product of compromise. By avoiding a clear endorsement of either party’s position, these verdicts allowed both sides in the gun debate to view them as significant victories and vindication of their views. While clearly these verdicts have not produced a resolution to the gun debate, they may be evidence that the litigation process offers more in the way of dialogue and deliberation, or at least moderation and compromise, than Kahan, Braman, and Gastil’s cultural critique admits.

Kahan, Braman, and Gastil’s trenchant cultural critique raises the question of just how the gun debate found its way into litigation in the first place. It is to this question that we now turn.

### Reasons for the Rise of Gun Litigation

Aside from the desire of individual plaintiffs to obtain compensation for their losses and to hold the gun industry accountable, there are a number of larger social and political forces that account for the rise of gun litigation. Viewed from one perspective, gun litigation is fueled less by shooting victims than by their lawyers, who have designed and coordinated

the litigation. From a second perspective, gun litigation might be viewed as a new front in the ongoing political battle between gun control and gun rights advocates. From yet a third perspective, one could consider it the result of larger ideological and institutional trends, such as an ascendant vision of the tort system as a regulatory tool. Finally, commentators commonly cast gun litigation as a logical, and perhaps even inevitable, outgrowth of tobacco litigation. The chapters in Part II address these different perspectives on gun litigation.

The rise of gun litigation is commonly attributed to trial lawyers run amok, in particular to well-heeled antitobacco lawyers looking for another unpopular industry with which to do battle. In chapter 5, Howard Erichson moves beyond this overly simplistic account, exposing how a unique alliance among three distinct groups of players on the plaintiffs' side—activists, politicians, and trial lawyers—gave rise to municipal gun litigation. Erichson shows how, on the one hand, cooperation among these three groups made the municipal litigation possible while, on the other hand, divergent interests among the groups gave rise to significant differences between the resulting lawsuits. He uses the New Orleans and Chicago suits, filed within two weeks of one another, as illustrations.

The New Orleans suit was designed by a group of antitobacco trial lawyers working with activist lawyers from the Legal Action Project of the Brady Center to Prevent Gun Violence. The Chicago suit grew out of a collaboration between an activist law professor concerned about inner-city crime and a city attorney who was formerly a federal prosecutor. For the New Orleans trial lawyers, Erichson explains, gun litigation was not only a just cause but also, importantly, an investment opportunity; for the Chicago team, the litigation was primarily a law enforcement strategy. This difference is reflected in the legal theories behind each suit. The mind-set and background of the trial lawyers in the New Orleans suit resulted in a lawsuit based on design defect theory and modeled on mass tort product liability litigation. By contrast, the Chicago suit was based on a novel theory of public nuisance and resembled a government public safety action. Thus, according to Erichson, “[t]he gun litigation is a story of mixed motives—moral, political, and financial—by diverse actors on the plaintiffs' side.”

One should be careful in reading Erichson's illuminating account of the municipal litigation not to ignore the important role of lawsuits

against gun makers filed by individual plaintiffs. These suits predate municipal litigation by more than fifteen years, and, as later chapters will argue, they hold out as much, if not more, promise of gun industry reform. As an analysis of the individual actors behind municipal gun litigation, however, Erichson's account offers a depth and subtlety missing in previous accounts.

Beyond a clearer understanding of the role of plaintiffs' lawyers in shaping gun litigation, there is much to be learned by examining the broader political context within which gun litigation has arisen. In chapter 6, I argue that many big-city mayors and gun control advocates have filed lawsuits against the gun industry as a way to pursue gun control policies that they have failed to achieve through the political process. They blame this failure on NRA corruption of the legislative process. In turn, the gun industry, with help from the NRA, has turned to state legislatures and Congress for protection in the form of statutory immunity from the lawsuits. Thus, while gun control advocates are using tort litigation to circumvent the legislative process, the industry and the gun lobby are calling on legislatures to usurp the judicial role by deciding lawsuits.

I assert that this situation is bad for both gun violence policy and the institutional integrity of legislatures and courts. On the one hand, using litigation as a means to elude the NRA's lobbying power may ultimately prove self-defeating, since the gun lobby can easily shift its resources from legislative politics to judicial elections. Furthermore, this approach to litigation is likely to further politicize the judiciary, increasing the influence of interest groups on judicial decision making. This is not, however, to reject all lawsuits against the gun industry or to deny that suits based on viable common law claims may have a legitimate impact on the legislative process. On the other hand, broad immunity legislation undermines the integrity of the judicial process by resolving lawsuits on the basis of political power rather than legal principle, and it impairs the capacity of courts to play a supportive role in refining and enforcing the legislature's own regulatory policies. In contrast to broad grants of immunity, I examine and defend more focused legislative responses to the perceived excesses of gun litigation.

While my analysis of gun litigation as an extension of interest-group politics places it within the broader context of gun control politics, it is



worth considering also larger ideological and institutional trends beyond the gun control debate. In chapter 7, Richard Nagareda examines gun litigation as a new form of mass tort litigation that aims, in addition to securing compensation for accident victims, at specific regulatory outcomes. According to Nagareda, this new form of litigation—“social policy tort litigation”—results from a confluence of two specific trends, one in tort theory and the other in regulatory practice. On the one hand, during the past hundred years, scholars have successfully promoted an “instrumental conception of tort law” as a regulatory tool well suited to risk management and loss spreading. On the other hand, the past twenty-five years, starting with the Reagan revolution in the early 1980s, have witnessed a steady retreat away from the large-scale centralized government regulation that characterized the New Deal and the Great Society. Thus, according to Nagareda, “the ascendance of regulatory theories of tort law and the emergence of a political landscape inhospitable to demands for government regulation have . . . created a hospitable intellectual and political environment for the development of social policy tort litigation.” The regulatory power of social policy tort regulation, explains Nagareda, lies not only, and perhaps not even primarily, in “definitive judicial rulings but through the dynamics of [mass] tort litigation itself—through settlements that would implement prospective changes in defendants’ practices in the face of doctrinal uncertainty.” Unfortunately, Nagareda points out, much social policy tort litigation (and gun litigation is no exception) “seeks to implement its regulatory program in a manner strikingly unmindful of the lessons learned about conventional regulation in the public sphere,” lessons such as the importance of regulatory cost-benefit analysis and interagency coordination.

Nagareda’s account of gun litigation is based on a compelling analysis of developments in tort law and changes in the regulatory environment that encouraged the litigation. His critique of the litigation rests on a claim about the inferiority of gun litigation as a regulatory tool compared to legislative and agency regulation. The crux of this claim is that gun litigation lacks essential features for effective regulation—namely, cost-benefit analysis and interagency coordination. The current regulatory regime governing guns, however, is plagued by a dearth of cost-benefit analysis all around. Moreover, there may be more policy coordination between gun litigation and government regulatory efforts

than Nagareda's critique suggests. The reason for the paucity of cost-benefit analysis in gun regulation—whether by the federal or state legislatures, BATFE, or the tort system—is the difficulty in measuring the marginal benefits of gun controls in terms of crime, accident, and suicide prevention and the marginal costs in terms of diminished self-defense. As the chapters in Part I illustrate, current social science findings do not reliably support this sort of precise cost-benefit analysis of current or proposed policies. As for policy coordination, Erichson's account reveals that municipal litigation has often been brought by teams of private, public interest, and government lawyers working together. Furthermore, as I argue in chapter 10, many lawsuits against the gun industry complement, rather than compete with, the regulatory efforts of legislatures and agencies by filling gaps in legislation, uncovering important regulatory information, and enhancing agency enforcement resources.

A theme common to many different perspectives on gun litigation is the link between lawsuits against the gun industry and lawsuits against the tobacco industry. As Erichson's chapter shows, antitobacco lawyers played a prominent role in the rise of municipal gun litigation. In chapter 8, Stephen Sugarman examines the similarities between tobacco litigation and gun litigation as public health strategies. Sugarman explores the potential of gun litigation to change positive social attitudes about gun ownership—"to convince ordinary folks that keeping a firearm for self-defense reasons is unwise or inappropriate"—and to encourage gun makers to equip their weapons with safety features such as child-proof locks and personalization technology. While Sugarman offers a public health perspective, unlike Mair, Teret, and Frattaroli, he emphasizes the potential of behavior modification as well as marketing and design restrictions. And while he stresses the importance of behavior modification, unlike Kahan, Braman, and Gastil, he does not consider gun litigation culturally obtuse—he sees it instead, like tobacco litigation, as highly attentive to the cultural dimensions of regulation. In the end, however, Sugarman concludes that tobacco litigation has made at best modest contributions to tobacco control policy and that gun litigation is unlikely to be much more effective.

The limitations of social science findings about gun violence make any claims about the potential public health benefits of gun litigation speculative, and, as a result, Sugarman's analysis is tentative and his con-

clusions cautious. Given this uncertainty, perhaps the most important contribution that gun litigation could make is that of generating information about the link between gun industry marketing practices and gun designs, on the one hand, and gun violence, on the other. A number of the chapters in Part III explore this potential benefit of the litigation. Unsurprisingly, they reach different conclusions. And, of course, there is always the view of Kahan, Braman, and Gastil, who suggest that more information, no matter how accurate, will not address the real differences of opinion, which are rooted in cultural attitudes.

### Litigation as a Means of Regulating the Gun Industry

Whether viewed from the perspective of individual plaintiffs and their lawyers or in the broader contexts of gun control politics and mass torts, gun litigation is a regulatory response to gun violence. Evaluating the regulatory merits of gun litigation rests on one's views not only about gun control but also about the institutional competence of the tort system to make public policy. The chapters in Part III offer a variety of different ways by which to evaluate whether litigation is an effective and legitimate way to make gun control policy.

One way to evaluate the regulatory competence of the tort system is to compare it to other regulatory institutions such as legislatures and administrative agencies. In chapter 9, Peter Schuck offers just such a "comparative institutional analysis," weighing "the relative advantages and disadvantages of undertaking gun control through common law litigation versus other forms of social policy-making and implementation." Schuck argues that tort litigation is inferior to legislative and agency risk regulation in six ways. First, litigation does not produce as much or as reliable "technocratic information" about gun-related risks, and this type of information is essential for effective policy-making. Moreover, the threat of litigation actually discourages manufacturers from developing this information on their own, for fear that it might be used against them in lawsuits. Second, policy-making judges are insulated from "political information" concerning what types of regulation the public and different interest groups favor, making any resulting policies unresponsive to voter preferences. Third, common law courts, limited in most cases to awarding money damages, lack effective "policy instru-

ments” for crafting and enforcing nuanced policies. Fourth, courts lack the capacity for “social learning”—the ability to “obtain feedback on their policies’ real-world effects” and to adjust them accordingly. Fifth, tort rules lack “predictability”—they are generally “much less determinate and transparent than regulations.” Sixth, judicial policy-making carries with it the risk of failure, followed by public disappointment and a lowering of public esteem for the legitimacy of the courts.

Schuck’s assessment is not all negative. He does admit that, to date, gun litigation has generated some “new policy-relevant information about gun-related violence” and “captur[ed] the industry’s undivided attention,” forcing it to examine its own role in the problem of gun violence. Yet even in conceding these points, he questions whether these results would not have been eventually produced without litigation by a regulatory agency. As for the future of the litigation, however, he is unequivocal, concluding that “[a]t this point . . . it amounts to a costly and institutionally inappropriate distraction from the real political and policy tasks before us.”

Schuck’s six-pronged comparative institutional analysis offers a powerful tool for assessing the suitability of gun litigation as a regulatory tool. The high level of generality at which Schuck applies his analysis to gun litigation may, however, lead him to underestimate its regulatory value. Throughout, he admittedly “finesse[s] the substantive issues of gun control policy,” characterizing his role as “that of an Olympian designer of an optimal regime for controlling gun-related risks, one who compares the litigation option as it now exists to the regulatory option that would become viable were the gun control movement to achieve greater political success in the future.” To ignore the political realities of gun control politics—in particular, NRA dominance of the legislative process and chronic underfunding of BATFE—obscures some of the regulatory value of gun litigation. Gun litigation is responsible not merely for uncovering new policy-relevant information about gun designs and industry marketing practices but for focusing public attention on these regulatory strategies in the first place and keeping it there. Persistent public concern for designing safer guns and questioning some marketing strategies has the potential to embolden both legislatures and agencies to explore these policy options despite NRA opposition. Public awareness may also create a market for the development of safety technologies. Furthermore, as I argue in chapter 10, the ongoing threat of lia-

bility enhances legislative and agency regulation by providing gun makers with incentives to avoid marketing schemes designed to circumvent statutory regulations and by supplementing scarce enforcement resources.

Addressing complex social problems often requires the involvement of multiple regulatory institutions. In many, if not most, areas of public policy, legislatures, agencies, and courts work together in making, refining, and enforcing policy. In chapter 10, I argue that tort litigation plays a “complementary role” in regulating the gun industry. While legislatures and agencies should take the lead in making gun violence policy, courts should embrace a secondary role that supports their efforts. I offer specific examples of lawsuits against the gun industry that illustrate four ways in which gun litigation complements the efforts of legislatures and courts to regulate the industry. First, the civil discovery process generates information relevant to regulating gun designs and industry marketing practices. Second, tort liability fills gaps in statutory rules and agency regulations, deterring gun makers from seeking technically legal ways around the law. Third, the threat of tort liability supplements scarce BATFE enforcement resources by encouraging self-regulation and voluntary compliance among gun makers, distributors, and retail dealers. And fourth, gun litigation offers opportunities for a decentralized, federalist approach to gun industry regulation.

My defense of a complementary role of tort litigation in regulating the gun industry is not, however, a blanket endorsement. I criticize those suits that employ mass tort aggregation strategies designed to pressure manufacturers into settlement and those that pursue policies already rejected by the legislative process. In both of these types of cases, plaintiffs are attempting to use tort litigation as an alternative, rather than as a complement, to legislative and agency regulation.

The line between complementary judicial policy-making and overreaching is hard to define with any precision. Defining the limits of the judicial policy-making role, I explain, depends more on “a sensibility rather than a set of determinate rules.” While this approach has the virtue of being sensitive to context and avoiding oversimplification, it leaves my evaluation of gun litigation open to charges of being too subjective. Furthermore, while my account offers more detail about gun control and gun litigation than Schuck’s, the differences may be more a matter of tone than substance. In many cases, his tentative admissions

concerning the regulatory value of gun litigation cite the same facts as my qualified endorsements.

Schuck's comparative institutional analysis suggests that the information about gun designs and marketing practices uncovered by gun litigation would eventually have come to light absent lawsuits against the industry. In chapter 11, Wendy Wagner challenges this view, citing the comparative superiority of litigation in obtaining hard-to-get, or "stubborn," information. She criticizes comparative institutional analyses that emphasize the superiority of legislatures and agencies in using regulatory information without accounting for their capacity to obtain it. While commentators like Schuck assert that legislatures and agencies are better suited to address complex regulatory issues like gun control based on arguments about competency and representative capacity, Wagner argues that they fail to assess the capacities of these institutions to extract "the information needed for informed and reasoned debate" from often highly secretive industries like the gun industry. "If political institutions are incapable of generating information needed for competent problem solving," she observes, "then their superior capacities in resolving the problems once the information is produced are beside the point. Analysts must account for stubborn information problems or run the risk that their institutional comparisons will be incomplete." Wagner contends that tort litigation in general and gun litigation in particular have been effective means of extracting information that legislatures, agencies, and markets have failed to uncover.

According to Wagner, the information-extracting capacity of tort litigation benefits not only the tort system. It also enhances prospects for reconciling policy differences within legislatures, agencies, and the public at large. Polarization within the gun control debate is due in part, she asserts, to lack of information: "Without information, interest group leaders [may be] emboldened to advocate extreme positions." Thus, more information is likely to lead to more moderation. Wagner shares with social scientists like Mair, Teret, Frattaroli, and Kates the belief that, at bottom, the gun control controversy persists because of inadequate information. But if Kahan, Braman, and Gastil are right—that the fight is really about competing cultural views—then the extraction of more information by gun litigation is just another diversion from the honest cultural confrontation that is needed to advance the gun control debate. In response, Wagner suggests that "credible information . . .

endorsed by trusted experts on both sides of the gun debate” would narrow the cultural divide by promoting a shared sense of what policy options are even feasible and, if feasible, worth the costs.

Even assuming that more information would advance the gun control debate, comparative institutional analysis suggests reasons to doubt Wagner’s endorsement of tort litigation as the best way to extract it. Tort litigation not only has a capacity to extract information; it also has a tendency to hide it. While the discovery process empowers plaintiffs to extract stubborn information, the settlement process often provides defendants an opportunity to seal that information using confidentiality clauses. Indeed, the threat of future litigation may encourage the industry to hide more information in secret settlements than it otherwise would have. To be fair, however, given the history and politics of gun industry regulation, it is doubtful that, absent litigation, the industry would have shared or surrendered this information to legislative or agency regulators or that government officials would have even asked for it in the first place. Moreover, in municipal suits, publicly accountable government plaintiffs are less likely to enter into sealed settlements.

In the end, Wagner concludes that the theoretical promise of gun litigation in terms of extracting stubborn information is not matched by practical results. Gun litigation, she argues, has discovered little new information, and “the . . . information that has been produced through discovery has not been transformative,” painting a picture more of “corporate inattention” to gun violence risks than industry malfeasance. As the most notable accomplishment of the litigation, she cites greater industry and public attention to safer gun designs and distribution practices. Wagner’s conclusions do not address an important question prompted by Nagareda’s analysis: are the modest regulatory benefits of gun litigation in terms of information and internal industry reform worth the costs? This question may be impossible to answer, but this lack of cost-benefit accountability is the very reason that Nagareda questions the use of gun litigation as a regulatory tool in the first place.

Institutional analysis of tort litigation often ignores the primary mechanism by which the tort system effects risk regulation: insurance. In chapter 12, Tom Baker and Thomas Farrish examine the extent to which commercial insurance carriers deter, manage, and spread gun-related risks by imposing conditions—such as proper storage and sales practices—on the liability insurance policies that they offer to gun manufac-

turers, distributors, and retail dealers. Their findings are largely negative, that “there is very little regulation by insurance of gun-related activities.” Their study reveals that, by means of selective exclusion of risks arising out of intentional harm, product liability, and mass torts, insurance policies provide few incentives to gun makers and sellers to take precautions that might eliminate or reduce the risks of gun violence. This situation, they lament, amounts to a missed opportunity, since “leaving gun violence outside the liability insurance umbrella may in fact promote gun violence by depriving the gun arena of a potentially powerful institutional force for the prevention of harm.” They explain that a liability insurance industry responsible for paying millions of dollars in gun-related claims in any given year would have an incentive to learn more about gun violence and, if it determined that there were cost-effective prevention measures, to impose those prevention measures on insureds either through the underwriting process or through engagement with public regulators. In addition, depending on what the research revealed, owning a gun could lead to a premium surcharge, which could remove some guns from circulation. “Moreover . . . insurance-funded researchers could function as the ‘honest brokers’ in the debates over the safety and costs of guns, much as they have in the field of auto and fire safety.”

Thus, in theory, liability insurance markets could provide market incentives to reduce gun violence risks, to generate reliable regulatory information, and to recommend proven risk-reduction policies to public regulators. In practice, however, the insurance industry has largely opted out of gun regulation.

As tort litigation increasingly plays a role in public regulation, it is bound to bump up against constitutional limitations that restrain government regulators. In chapter 13, Brannon Denning examines two constitutional limitations that are especially relevant to gun litigation: the Second Amendment and the dormant Commerce Clause. He first examines whether the Second Amendment’s guarantee of the right to keep and bear arms—which he interprets as guaranteeing an individual right—might restrict tort claims against the gun industry. The argument in favor of a Second Amendment restriction on gun litigation is based on an analogy to the First Amendment’s free speech protection as a limit on defamation suits by public figures or by private parties concerning matters of public concern. After careful analysis, Denning rejects this anal-



ogy, concluding that gun litigation does not pose the kind of governmental threat to individual liberty that motivates First Amendment restrictions on defamation suits.

Denning next questions whether gun litigation has regulatory implications that would violate the dormant Commerce Clause doctrine (DCCD). In interpreting the DCCD, the U.S. Supreme Court has held that a state may not regulate “extraterritorially.” That means, Denning explains, “a state may not ‘project’ its legislation into another state or seek to effectively regulate economic activity that takes place beyond its borders.” The gun industry has argued that municipal suits demanding changes in marketing practices violate this aspect of the DCCD, since they call for judgments based on state tort law that would regulate commercial activity beyond the borders of the state. The Supreme Court of Indiana recently rejected such a DCCD challenge to a suit brought by the City of Gary, pointing out that states are free to promulgate their own product liability standards through tort law and declaring that it saw no principled distinction between the imposition of money damages under state product liability law and injunctive relief for negligent marketing and nuisance based on an industry’s marketing practices. Far from eliminating DCCD concerns, points out Denning, this observation “merely raise[s] further questions about state tort law and whether constitutional doctrines have anything to say about its regulatory effects on products with national markets.”

In a somewhat more cautious tone, Denning admits that “limiting the tort law of the fifty states through DCCD would be nothing short of revolutionary.” Perhaps it would be more accurate to call it *counterrevolutionary*, given the revolutionary nature of developments in product liability and mass tort over the past fifty years. Denning’s analysis raises the possibility that, aside from legislative reactions, potent constraints on regulatory tort litigation could eventually be imposed by the Constitution.

### The Persistence of Disagreement over Gun Litigation

So where do all these different perspectives on gun violence, gun control, and gun litigation leave us? The aim of this book is not to reconcile these different perspectives but rather to put them next to each other in order to highlight issues that remain unresolved and to offer insight into

why these issues are so hard to resolve. Indeed, what emerges is that the difference in perspective itself accounts for much of the difficulty in resolving the controversy over gun litigation. For example, the lack of consensus about whether gun design or marketing affects gun violence rates is itself partly rooted in differences between the disciplines of public health, with its broad focus on all gun-related death and injury, criminology, which focuses more narrowly on crime rates, and sociology, which considers the question itself merely a diversion from an underlying cultural divide. So, too, the debate about whether tort litigation is an appropriate tool for generating more information about the link between the gun industry and gun violence (or for confronting the underlying cultural divide) depends largely on the alternatives to which one compares it. Gun litigation appears less appropriate when one compares it to general standards of regulatory accountability such as cost-benefit analysis or interagency coordination, as Nagareda does, or to “the regulatory option that would become viable were the gun control movement to achieve greater political success in the future,” as Schuck does, than when one takes into account the political reality of NRA domination of the political process, as I do, or the regulatory system’s failure to uncover stubborn information, as Wagner does.

Besides information, another unresolved issue is enforcement. Is it possible to effectively enforce regulations concerning gun design and marketing, and, if so, at what cost? And is tort litigation an appropriate enforcement mechanism? Again, different answers emerge depending upon whether one approaches these issues from the perspective of public health policy (Mair, Teret, and Frattaroli, and Sugarman), crime control (Kates), commercial liability insurance (Baker and Farrish), or constitutional law (Denning).

Thus, the controversy over gun litigation is attributable not only to inadequate information but also to different perspectives that focus on different questions or take different approaches to the same questions. This insight is important for the study of other policy disputes. A good grasp on policy disputes requires understanding why it is so hard—at times impossible—to resolve them. Indeed, understanding the irreconcilability or noncomparability of different views is as important as finding common ground, since we need not only to resolve policy differences when we can but to live together even when we cannot. The ability to live peacefully alongside those with whom we disagree based on

deeply held convictions is an essential skill—a core virtue—of a liberal society. In the end, will a clearer picture of the disagreement really help policymakers resolve the controversy over gun control? Perhaps not. But the contributors to this volume all share the conviction that, by increasing mutual understanding, it can promote peaceful coexistence and, perhaps, even dialogue.

As this book goes to press, the New York City and Gary, Indiana, lawsuits are in discovery and individual suits across the country are headed for trial. Simultaneously, there is widespread support in Congress for legislation that would grant the gun industry broad immunity, putting an end to gun litigation. But regardless of the outcomes of these latest developments, the lessons of gun litigation will add to our understanding of the role of guns, tort litigation, and, most important, controversy in our society.