

RESPONDEAT MANUFACTURER: IMPOSING VICARIOUS LIABILITY ON
MANUFACTURERS OF CRIMINAL PRODUCTS

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[S]ecurity no human being can possibly do without; on it we depend for all our immunity from evil and for the whole value of all and every good, beyond the passing moment, since nothing but the gratification of the instant could be of any worth to us if we could be deprived of everything the next instant by whoever was momentarily stronger than ourselves.

John Stuart Mill, *Utilitarianism* 50 (1861).

I. INTRODUCTION

Bill worked the night shift at a convenience store.¹ Benny and Sam needed money. After buying a soda in the store and seeing that Bill was the only employee, they decided the store would be an easy target. They put on

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¹While this particular story is fictional, its real life counterpart is all too common. See, e.g., *Hamilton v. ACCU-TEK*, 62 F.Supp.2d 802, 809-810 (E.D.N.Y. 1999) vacated 264 F.3d 21 (U.S.Ct. App. 2d Cir. 2001), (recounting the shootings of the seven people involved in the case). The opinion in *Hamilton v. ACCU-TEK* at 62 F.Supp. 2d 802 (E.D.N.Y. 1999) is hereinafter referred to as *Hamilton*. Each year, more than 600,000 firearm crimes are reported in the United States. See *Hamilton v. ACCU-TEK*, 935 F.Supp. 1307, 1313-14 (E.D. N.Y. 1996) (summarizing the extensive supporting data regarding the risks posed by guns and listing sources). More than thirty-two thousand Americans suffered fatal gunshot wounds in 1997. See Donna L. Hoyert et al., *Deaths: Final Data for 1997*, 47 *National Vital Stat. Rep.* 19, 68 tbl.16 (1999). Updated information may be found at <http://www.cdc.gov/HealthyYouth/injury/facts.htm> (last visited August 12, 2007). See also, Violence Policy Center, *Facts on Firearms*, at <http://www.vpc.org/factsht/firearm.htm> (last visited August 12, 2007). Possession of a handgun is indeed the most common way for a person to become momentarily stronger than others.

face masks, reentered the store and Benny took a 9mm handgun² from his pocket, pointed it at Bill and told him to open the register. Sam took out the cash and put it in a bag. A car pulled into the parking lot in front of the store, and when Benny saw the headlights sweep across the store he panicked and shot Bill in the chest at close range. Bill died in the store.

Under our legal system it's clear that both Benny the shooter, and Sam his accomplice are guilty of murder.³ But what responsibility, if any, should the gun manufacturer bear for this crime?⁴ Or more generally what responsibility should manufacturers bear for the criminal or wrongful use of their products?⁵ Usually the criminal use of a product is deemed to be a

²Leading the top eighteen guns appearing in BATF traces are Colt, Ruger and Smith & Wesson .38/37 caliber revolvers as well as Beretta, Colt and Smith & Wesson 9mm and .45 caliber pistols. See *The 'Six Shooter' Is Still No. 1*, *USA Today*, June 3, 1992, at 4A.

³See, e.g., Model Penal Code § _____ (felony murder).

⁴Much has been written regarding the liability of gun manufacturers. See, e.g., Jean Macchiaroli Eggen and John G. Culhane, *Gun Torts: Defining a Cause of Action for Victims in Suits against Gun Manufacturers*, 81 N.C.L.Rev. 115 (2002); Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 Mo.L.Rev.1 (2000). While commentators have generally been in favor of imposing responsibility on gun manufacturers for the harm caused by their products, courts with very few exceptions have refused. See, e.g., *Merril v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146 (Cal. Ct. App. 1999), rev'd, 28 P.3d 116 (Cal. 2001) (no liability based on negligent marketing); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001)(ruling on certified questions from the United States Court of Appeals for the Second Circuit, no duty owed to plaintiffs regarding marketing of guns); *DeRosa v. Remington Arms Co.*, 509 F.Supp.762 (E.D.N.Y. 1981) (no strict product liability claim for properly functioning gun); *Richardson v. Holland*, 741 S.W.2d 751 (Mo.Ct.App. 1987) (same); *Forni v. Ferguson*, 648 N.Y.S. 2d 73 (N.Y. App. Div. 1996) (same); *Patterson v. Rohm Gesellschaft*, 608 F.Supp. 1206 (N.D. Tex. 1985) (illegal use of gun not subject to risk utility test); *First Commercial Trust v. Lorcin Engineering, Inc.*, 900 S.W.2d 202 (Ark.1995) (generally act of criminal use of gun is supervening intervening cause preventing liability of manufacturer absent special relationship between victim and defendant – no such relationship between gun manufacturer and eventual victim); *Delahanty v. Hinckley*, 564 A.2d 758 (D.C. 1989) (no special relationship between gun manufacturer and victim; gun manufacturers are not in a position to prevent the criminal use of the guns they market). *But see*, *Kelly v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985) (strict product liability may apply to impose liability on manufacturers of Saturday Night Specials – but not other guns) (note, the Maryland legislature quickly overruled *Kelly* by barring such suits. See Md. Ann. Code, art.27 § 36-1 (Supp. 2002).

⁵To be clear, the question is; what responsibility should manufacturers have for well made, properly functioning products that are used to cause injury to non-users? See generally, Robert L. Rabin, *Enabling Torts*, 49 DePaul L. Rev. 435 (1999); Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 Mich. L. Rev. 1266 (1997); Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 Mo. L. Rev. 1 (1995). Alan O.

supervening, intervening event that eliminates any responsibility on the part of the manufacturer.⁶ In short, the legal system usually presumes that criminal activity is not to be expected.⁷ For most products this presumption is accurate. While it is possible for any product to be used in crime, the possibility of such use does not make such use likely or expected. But, with hundreds of thousands of handgun related crimes each year⁸ this traditional

Sykes, *The Economics of Vicarious Liability*, 93 Yale L.J. 1231 (1984).

⁶See Oliver Wendell Holmes, *Privilege, Malice and Intent*, in COLLECTED LEGAL PAPERS 117, 131-32 (1952) (criminal misuse by third party is supervening act relieving seller of any liability); Oliver Wendell Holmes, *Privilege, Malice and Intent*, 8 Harv.L.Rev. 1, 10 (1894) (“Why is not a man who sells fire-arms answerable for assaults committed with pistols bought of him, since he must be taken to know the probability that, sooner or later, someone will buy a pistol of him for some unlawful end?”) Holmes concludes that there shall be no liability stating “the principal seems to be pretty well established...that everyone has a right to rely upon his fellow-man acting lawfully, and, therefore is not answerable, for himself acting upon the assumption that they will do so, however improbable it may be.” *Id.*; See, e.g., *Delahanty v. Hinckley*, 564 A.2d 758, 761 (D.C. 1989) (“When injury occurs, it is not the direct result of the sale [of a gun] itself, but rather the result of actions taken by a third-party”); WILLIAM L. PROSSER AND W. PAGE KEETON, LAW OF TORTS § 44 (1971) (Where there is a malicious or criminal act, the original actor might be free to say, even if he had anticipated the misconduct, that it was not his concern...) (note omitted) *Id.* at 287.

⁷See, e.g., *Delahanty v. Hinckley*, 564 A.2d 758 (D.C. 1989) (“In general no liability exists in tort for harm resulting from the criminal acts of third parties, although liability for such harms sometimes may be imposed on the basis of some special relationship between the parties”). *But see*, Rabin *supra* note 5 at 438-444 discussing the key-in-the-ignition cases (defendant driver negligently leaves the key in the car, the car is stolen, thief drives negligently and plaintiff is injured) as well as premise liability cases (defendant landowner is liable for criminal attack on plaintiff because defendant did not take reasonable measures to prevent criminal activity in or around the premises) *Id.*; The Restatement (Second) of Torts states: The act of a third person in committing an intentional tort is a superseding cause of harm to another resulting therefrom although the actor’s negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, *unless* the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime. Restatement (Second) of Torts § 448 (1965) (emphasis added). Although section 448 reflects legal principles applicable to those whose conduct indicates negligence, the author believes such principles, as they relate to causation, can be properly applied in the products liability and criminal product context. See generally W. PROSSER, *supra* note 6, § 44.

⁸According to the National Crime Victimization Survey (NCVS), in 2005 there were 477, 040 victims of violent crimes that stated they faced an offender with a firearm. See Bureau of Justice Statistics, “Firearms and Crime Statistics” summary findings at <http://www.ojp.usdoj.gov/bjs/guns.htm> (site last visited Feb. 27, 2007). Handguns generally account for over half of all weapons used in crime and account for more than eighty percent of firearms used in homicides. See Federal Bureau of Investigation, Uniform Crime Report 2004,

presumption, at least with respect to handguns, is not justified.⁹ Moreover, with respect to any product that is designed to kill or harm humans or that is designed to assist in illegal activity, like for example a radar detector, the use of the product in illegal activity is to be expected.¹⁰

It is an undesirable reality that a certain percentage of the firearms produced and distributed in any given year will be used in crime.¹¹ In addition, it is known that a higher percentage of handguns will be used in crime than other types of firearms. Moreover, certain types of handguns are more likely than others to be used in crime. Given such knowledge, what responsibility should be imposed on manufacturers who nevertheless choose to manufacture and profit from the broad based marketing and distribution of, for example, handguns or assault weapons? These manufacturers could choose not to produce firearms at all, or choose not to produce handguns, or certain types of handguns, or they could choose to restrict their marketing and/or distribution of the product.¹² A manufacturer might for example choose to market and distribute a product like hollow point bullets only to the police or the military.¹³ The decision to market and

Table T.9, p. 19 (2005).

⁹While handguns make up only a third of total firearms sold each year they account for over half of all weapons used in crime and account for more than eighty percent of the firearms used in homicides. See Federal Bureau of Investigation, *Uniform Crime Report 2004*, Table T.9, p. 19 (2005). See also Jean Macchioroli Eggen and John G. Culhane, *Gun Torts: Defining a Cause of Action for Victims in Suits against Gun Manufacturers*, 81 N.C.L. Rev 115, 123-24 (2002); Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 Mo. L. Rev 1, 59-64 (1995).

¹⁰See definition of “criminal product” *supra* at notes 213-225 and accompanying text.

¹¹Recent analysis has shown that 11 percent of handguns sold between 1996 and 2000 were used in violent crimes by the year 2000; 18 percent of handguns sold in the year 1990 were in the hands of violent criminals or used in violent crimes by the year 2000. See *City of New York v. Beretta U.S.A. Corp.*, 401 F.Supp. 2d 244, 254 (2005) (The court recites these facts in a section of the opinion titled “Facts supporting the case were alleged as follows:”).

¹²See *infra* notes 265-286 and accompanying text.

¹³See *McCarthy v. Olin Corp.*, 199 F.3d 148 (2d, Cir. 1997) (case involved the 1993 Long Island Railroad shooting in which Colin Ferguson boarded a commuter train in New York City and opened fire on the passengers, using a 9mm semiautomatic handgun loaded with Winchester “Black Talon” bullets.) *Id.* at 151. The “Black Talon” is a hollow point bullet designed to “bend upon impact into six ninety-degree angle razor sharp petals or ‘talons’ that increase the wounding power of the bullet by stretching, cutting and tearing tissue and bone as it travels through the victim.” *Id.* at 152. The bullet was designed by Olin Corp. for use in law enforcement, but Olin decided to market the Black Talon to the general public. *Id.* at 152. Due to public criticism, Olin ceased marketing to the general public one month before the killings in *McCarthy* occurred. *Id.* The evidence in *McCarthy* showed that Ferguson had purchased the Black Talons used in the

distribute more widely is obviously driven by the desire for greater profit.¹⁴ However, the manufacturer's decision to increase profit by broadly marketing and distributing these types of products has an unintended, but nevertheless very real and predictable consequence which is the increased risk of harm to innocent bystanders, like Bill in the preceding example, from the criminal use of the product.¹⁵ In an ideal world the cost of Bill's

shooting prior to the withdrawal of the bullets from the public market. *Id.*

¹⁴ See *City of New York v. Beretta*, 401 F.Supp. 2d 244, 254 (2005).

Criminals are an important market segment for the gun industry. Recent analysis has shown that 11 percent of handguns sold between 1996 and 2000 were used in violent crimes by the year 2000; 18 percent of handguns sold in the year 1990 were in the hands of violent criminals or used in violent crimes by the year 2000. Recent analysis has shown that guns move quickly from the legal to the illegal market; 13 percent of guns recovered in crimes were recovered within one year of their sale, and 30 percent were recovered within 3 years of their first sale. ATF trace data indicates that as many as 43 percent of guns used in crimes in urban centers across the United States were purchased from retail dealers less than three years prior to commission of the crime. A relatively short interval between the retail sale of a gun and its recovery in a crime is an accepted indicator that a party to the initial retail transaction intended to transfer the gun to a prohibited user or into the illegal market. The firearm trafficking investigations of the New York Police Department-ATF Joint Task Force also indicate that most of the guns purchased in the secondary market were relatively new. Many times the task force members brought brand new guns, many of them still in original boxes with manuals and gun cleaning paraphernalia. The guns seized and investigated almost invariably did not come from retail sources in the city of New York, but came from out-of-state. Few of the guns recovered had been diverted into the illegal market through theft. Firearms can be obtained easily in New York City in the secondary market despite prices that are often two to three times the price charged by legitimate dealers.

Id. (The court recites these facts in a section of the opinion titled "Facts supporting the case were alleged as follows:")

¹⁵ The efficient lethality and concealability of handguns not only embolden and encourage would-be criminals to engage in the crime with greater confidence of success, but these weapons also increase the extent of the harm that results from criminal acts. For example, in *Merill supra* note 4 the criminal was able to kill eight people and wound six in four minutes. In four minutes he discharged fifty rounds of ammunition. See Susan S. Ward, *Gunman Slays 8 in Highrise*, S.F. Chron., July 2, 1993, at A1. Certainly the same efficient killing power would not exist with other non-firearm weapons. See *Merill supra* note 4 at 155-56 (San Francisco Police Inspector Napoleon Hendrex opined;

the TEC-DC9's Mr. Ferri used played a significant role in the timing of the murders. Had Mr. Ferri not used the TEC-DC9s, and instead used a conventional semiautomatic pistol, he would not have been able to fire as many shots as fast as he did. As a result, I believe, it would have taken Mr. Ferri longer to carry out his crime had he not been armed with the two TEC-DC9's. Said otherwise, without the TEC-DC9's, I believe Mr. Ferri would not have arrived on the 33rd and 32nd floors when he did and instead would have arrived at a later point in time.

This view was confirmed by Inspector Sanders, who testified that the "extended magazines" of the TEC-DC9, which held up to 50 rounds "gave [Ferri] an opportunity to fire for a much longer

death would be borne by the criminals, Benny and Sam. In the real world,

period of time [and] many more shots than he would have been capable of with ... what might be determined to be a standard semiautomatic pistol.” These extended magazines enabled Ferri to lay down a blanket of fire rather than fire one individual shot, recover and then fire another individual shot. With the TEC-DC9, he was able to lay down what, in essence, would be a blanket of fire which would cover a large area, thus cutting the chances of intended targets to escape. *Id.* at 56.

With respect to the availability of gun’s encouraging criminal activity – i.e. increasing the otherwise existing-risk of harm to innocent bystanders from criminal activity. *See Merrill supra* note 4 at 155 where the opinion states:

Chief Supenski [a nationally recognized firearms expert] stated that the TEC-DC9 is “completely useless” for hunting, is never used by competitive or recreational shooters and “has no legitimate sporting use.” The weapon is designed to engage multiple targets during rapid sustained fire. It has no practical value for self-defense and is hazardous when used for that purpose due to its weight, inaccuracy, and firepower, he stated. The fact that the TEC-DC9 is designed primarily for “spray fire” would present a “severe threat” to innocent bystanders, who would also be endangered by the full-metal jacketed ammunition recommended for the weapon, which “will penetrate a human body and keep on moving.” *Id.*

The *Merill* opinion also states:

J. Reid Meloy, PH.D., a forensic and clinical psychologist specializing in “affective violence and predatory violence during mass murder,” submitted a twenty-two page declaration in support of appellants’ opposition to Navegar’s motion for summary judgment. Meloy is Chief of the Forensic Mental Health Division of the Office of Court Services in San Diego, a consultant to numerous federal and state law enforcement agencies, an adjunct professor of psychiatry at the University Of California San Diego School Of Medicine, the author of numerous books and articles in professional journals and has made over 300 forensic evaluations.

Meloy did not believe the availability of the TEC-9 was the only or necessarily the chief reason Ferri carried out his attack at 1201 California Street, but it was his opinion that “the availability of the TEC-9 military style assault weapon was a substantial factor in causing Ferri to undertake his assault at 101 California.” He based this opinion on a distinction between “affective aggression,” which is “a defensive mode of violence,” and “predatory aggression,” which is “an attack mode of violence.” According to Meloy, persons who meet all or most of ten forensic criteria for predatory violence, as in his opinion did Ferri, “are reasonably certain to have engaged in a planned, purposeful and emotionless attack form of aggression.” Meloy explained the meticulous detail in which Ferri planned his assault over a nine-week period and why the availability of the TEC-9 and the advertising of the weapon “fueled” the “fantasy-based violence” he planned against the law firm located at 101 California Street. As examples, Meloy pointed to statements in the owner’s manual that the TEC-9 and TEC-DC9 represented “a radically new type of semiautomatic pistol, designed to deliver a high volume of fire power,” and that, due to the extended magazine capacity, a firing cycle could be completed in .08 seconds. Meloy believed such boasts, as well as many other advertising statements – such as the claim that the weapon was “as tough as your toughest customer,” and that the surface of the weapon has “excellent resistance to fingerprints” – are “exactly what appeals to individuals who engage in such fantasy-based violence.” In Meloy’s opinion, the capabilities of the TEC-DC9 and the “military style physical appearance” of the weapon “likely emboldened Ferri to undertake mass killings without fear of failure.” *Id.* 158.

Benny and Sam are very unlikely to be able to compensate Bill's family for his death.¹⁶ Thus, we are left with the question: who should bear financial responsibility for Bill's injuries? Bill the unlucky victim and society through welfare type programs that may offer some assistance to Bill's family,¹⁷ or the manufacturer who chose to impose this risk in pursuit of greater profit?¹⁸ Put another way, is the risk of harm from the criminal use of the product a societal cost properly associated only with the propensity of certain members of society to engage in criminal activity, or is the risk of harm from the criminal use of the product a cost properly associated with the production of the product that enables the crime?¹⁹

If, for example, a criminal uses a 2" by 4" piece of lumber to beat someone, the manufacturer of the 2x4 should not be liable.²⁰ The 2x4 is not designed to harm or kill, is not commonly used in crime,²¹ and is not marketed or distributed in a way to encourage criminal use.²² A handgun is a very different sort of product. A handgun is designed to kill; that is its function! As a result, manufacturers of handguns should bear greater responsibility for the use of their product than should the manufacturers of

¹⁶At least 80 percent of the economic costs of treating firearm injuries are paid for by taxpayer dollars. See W. Max and D.P. Rice, *Shooting in the Dark: Estimating the Cost of Firearm Injuries*, 12 Health Affairs Journal 171-185 (1993); G.J. Wintermute and M.A. Wright, *Initial and Subsequent Hospital Costs of Firearm Injuries*, 34 Journal of Trauma 556-560 (1992).

¹⁷A study of all direct and indirect costs of gun violence including medical, lost wages, and security costs estimates that gun violence costs the nation \$100 billion dollars per year. See P.J. COOK AND J. LUDWIG, *GUN VIOLENCE: THE REAL COSTS*, New York, NY, Oxford University Press (2000). The cost of firearm injuries in the United States in 1990 was an estimated \$20.4 billion. This includes \$1.4 billion for direct expenditures for health care and related goods, \$1.6 billion in lost productivity resulting from injury-related illness and disability, and \$17.4 billion in lost productivity from premature death. See W. Max and D.P. Rice, *Shooting in the Dark: Estimating the Cost of Firearm Injuries* 12 Health Affairs Journal 171 at 175-76 (1993). At least 80 percent of the economic costs of treating firearm injuries are paid for by tax payer dollars. *Id.* at 174-75.

¹⁸See *supra* notes 1, 2 and 14 and accompanying text.

¹⁹See *supra* note 15 and accompanying text and *infra* notes 206-286 and accompanying text.

²⁰See definition of criminal product *infra* notes 213-225 and accompanying text.

²¹Between 1993 and 2001, of the 2.3 million armed violent crimes committed 16 percent were committed with a blunt object such as a brick, bat or bottle. Firearms were used in 40 percent, knives or other sharp objects in 24 percent and 20 percent were committed with unspecified/"other" objects used as weapons. See U.S. Department of Justice, Bureau of Justice Statistics, Special Report: National Crime Victimization Survey, 1993-2001 *Weapon Use and Violent Crime* (Sept. 2003) (written by Craig Perkins, Bureau of Justice statistician).

²²*Cf. infra* note 15 and accompanying text.

2 x 4's.²³ It is the position of this article that the design, functional characteristics, marketing and distribution of certain products, herein referred to as "criminal products"²⁴ belie the notion that criminal use of the product is not to be anticipated; indeed for these products, some level of criminal use is to be expected.²⁵ Moreover, for these criminal products the risk of harm from the criminal use of the product is a cost that is properly associated with the product and therefore one that should be borne by the manufacturer.²⁶ This article advocates the recognition and application of a doctrine of *respondeat manufacturer*²⁷ to impose vicarious liability on manufacturers of criminal products for harm suffered by innocent bystanders from the use of such products in criminal activity.²⁸ Part II of this article provides an overview of the central argument in this article, part III provides background information which includes a brief discussion of why traditional legal theories have largely failed to solve the criminal products problem, as well as a brief look at how courts and legislators have addressed the problem. Part IV explains the doctrine of respondeat manufacturer and provides a definition of "criminal product." Part V offers an analysis of the proposed doctrine of respondeat manufacturer from both a fairness and efficiency perspective. Part VI concludes.

II. OVERVIEW

A product is a criminal product if it is designed to harm or kill, or if the product is such that its existence, design, marketing or distribution increases the risk of harm to the public from criminal conduct above the level of such risk – the background level – that would otherwise exist without the availability of the product.²⁹ The availability of a product may increase the risk of harm from criminal conduct either by making criminal conduct more likely – by, for example, improving the odds of the criminal's success or by

²³ See *infra* notes 213-225 and accompanying text.

²⁴ See *infra* notes 213-225 and accompanying text.

²⁵ The manufacturers of criminal products know or should know that their products are frequently used in crime. See *infra* notes 213-244 and accompanying text.

²⁶ See *infra* notes 206-286 and accompanying text.

²⁷ This doctrine is similar to the doctrine of respondeat superior. This doctrine provides for the vicarious liability of an employer for the certain torts (usually negligence) committed by his employee as long as the tortious conduct occurred within the scope of the employer's business. See *infra* notes 250-264 and accompanying text.

²⁸ See *infra* notes 29-55 and accompanying text.

²⁹ See *infra* notes 213-225 and accompanying text.

making criminal conduct more deadly or likely to cause severe injury.³⁰ Examples of criminal products include radar detectors³¹ and radar jammer kits³² both of which are designed to allow someone to exceed the speed

³⁰ See, e.g., *Merill v. Navegar* supra note 4, discussed supra at note 15 (discussing the particular lethality of the TEC-DC9 and that the capabilities of the TEC-DC9 emboldened and encouraged the killer to undertake the mass killings without fear of failure). But see, Bruce H. Kobayashi and Joseph E. Olson, *In Re 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacturer and Sale of Assault Weapons*, 8 Stan. L. & Poly Rev. 41, 42 (1997) (Noting that the TEC-DC9's jammed early in the incident, so most of the wounds resulted from the killers use of an ordinary .45 pistol.) The authors also note that the killer fired one round every five seconds and that at that rate of fire he could have used any firearm to carry out his crime (the self-loading semi-automatic) characteristic of the TEC-DC9 was not necessary to the commission of the crime). *Id.* at nt. 14. Thus, all guns are extremely dangerous.

³¹ Radar detectors sense the presence of police radar, and give a warning to the driver to slow down before entering the police radar area. The National Highway Traffic Safety Administration estimates that speeding was a contributing factor in 30 percent of all fatal traffic collisions in 1997. See National Highway Traffic Safety Administration, U.S. Department of Transportation, Traffic Safety Facts 1997: Speeding at 1 (1998). Between ten and twenty million American motorists use radar detection devices to avoid police monitoring of their speed. Consumer Electronics Manufacturers Association, Consumer Car Corner: Radar Detectors, at 1 <http://207.17.181.16/cemacity/mall/product/mobile/files/corner.htm> (visited Aug. 9, 1998). Radar detectors allow a driver to speed with confidence that he or she won't be caught; if the presence of police radar is detected, then of course the driver must slow down, until out of radar range, to avoid a ticket.

The Federal Highway Administration has issued regulations banning the use of radar detectors in commercial motor vehicles. See 23 U.S.C. § 101 (1994); Radio Association on Defending Airwave Rights, Inc., v. United States Department of Transportation, 47 F.3d 794 (6th Cir. 1995) (upholding Federal Highway Administration regulations banning the use of radar detectors in commercial motor vehicles). The 6th circuit found sufficient evidence in the record of the rulemaking process showing that radar detector users were more likely to speed than non-users and that radar detectors encouraged speeding and speeding causes accidents. *Id.* at 803-804. Several states also ban the use of radar detectors by all drivers. These states include Virginia, District of Columbia and New York. State statutes prohibiting radar detectors have been found constitutional. See, e.g., *Bryant Radio Supply, Inc., v. Shane*, 669 F.2d 921 (4th Cir. 1982) (Virginia).

See generally, Insurance Institute for Highway Safety, Q&A: Speed Law Enforcement <http://www.hwysafety.org/ganda/galaw.htm#anchor>; Michele McDowell Fields & Andrew R. Hricko, Prohibiting Radar Detectors: Legal Issues, 37 FED'N OF INS. & CORP. COUNS. Q 317 (1987).

³² Radar jammers emit a radio signal designed to counter and confuse the signal coming from police radar. The use of a radar jammer allows the driver to continue speeding, confident in the knowledge he or she will not be caught speeding. See Don Schroeder, *Do Jammers Work?* CAR & DRIVER, Mar. 1996, at 105. The Federal Communications Commission had label the use of radar jammers as "malicious interference" with radio transmissions and held that they are strictly

limit with much less chance of being caught.³³ Also included are weapons like handguns,³⁴ assault style weapons,³⁵ or tactical knives³⁶ and weapon ammunition or accessories such as hollow point or Teflon coated bullets,³⁷ flash suppressors,³⁸ large capacity magazines,³⁹ trigger holders⁴⁰ or barrel

prohibited by the Communications Act. *See* 47 U.S.C. § 333 (1998). The FCC's action was challenged but upheld by the U.S. Court of Appeals for the Tenth Circuit in *Rocky Mountain Radar, Inc. v. Fed. Communications Comm'n*, 158 F. 3d 1118 (10th Cir. 1998).

However, some companies have attempted to avoid the FCC ban by selling the parts necessary to allow a buyer to construct his own radar jammer. *Cf.* *Halberstam v. Daniel*, No. 95C-3323 (E.D.N.Y. 1998) sale of gun parts kits, discussed *infra* at notes 79-87 and accompanying text.

³³These products encourage speeding and speeding increases the likelihood of an accident. *See* *Radio Ass'n Inc., v. U.S. Dept. of Transportation*, 47 F. 3d 794 at 803-804 (6th Cir. 1995) discussed *supra* note 31. As a result, these products increase the risk of injury from criminal conduct (speeding) to innocent third parties (other drivers) above the background level that would otherwise exist (some people would exceed the speed limit even without assistance from radar detectors/jammers but not as many or as frequently or to the same extent as do now because of the design, manufacturer, marketing, and distribution of the product). Moreover, while a radar detector/jammer is not designed to harm or kill, its normal function directly enables, facilitates, and assists criminal conduct (speeding). Thus radar detectors and/or radar jammer kits are criminal products. *See infra* notes 213-225 and accompanying text discussing the definition of criminal products.

³⁴Guns are designed to kill; that is their function. *See infra* notes 213-225 and accompanying text.

³⁵*Id.*

³⁶A tactical knife is a "pocket-knife" like folding knife whose blade may be flicked open with one finger faster than the widely outlawed switchblade (outlawed by 37 states). These knives have curved, perforated, or serrated blades and ergonomic grips, can inflict deadly damage, but are compact, easily concealed and virtually unregulated. Tactical knives are perfectly legal, and represent a \$1 billion a year consumer business. These knives, designed to be weapons, were originally used in military combat. The marketing of these knives usually reflects this. One advertisement touts the knives utility when "shooting is just not appropriate." Other marketing material boasts about the knives "stopping power" and bills its "bones" knife as "bad to the bone." Cold Steel Inc., a maker of tactile knives shows on its website a film clip of men attacking slabs of meat and decapitating plywood people, and notes that its plastic knives can be taped just about anywhere on the body. *See* Mark Fritz, *How New, Deadly Pocketknives became a \$1 Billion Business* *WSJ* Tuesday July 25, 2006 at B-1. Knife related crimes have also gone up. In a monthly FBI bulletin (March '06) the FBI alerted law enforcement agents to "the emerging threats" posed by knives. There are no statistics on how many crimes have involved "tactical-style knives, knife related crimes have gone up to 15.5 percent in 2004 from 15.0 percent in 2000 (over that time violent crime in general dropped 4.1 percent). *Id.*

³⁷*See* *McCarthy v. Olin Corp.*, 199 F. 3d 148 (2d Cir. 1997) discussed *supra* at note 13.

³⁸*See, e.g.,* *Merill v. Navegar* *supra* note 4 at 154-155 (discussing various characteristics of certain guns that appeal to criminals). The court's opinion states:

The intensive discovery in this case focused upon the characteristics of the TEC-DC9. Appellants'

insulators⁴¹ which provide the deadly force necessary for criminals to easily and efficiently kill intended victims and those attempting to interfere with their criminal activity.⁴² Another example of a criminal product is the digital file sharing software that allows computer users to share electronic

experts provided deposition testimony and declarations establishing that the TEC-DC9 is a “military-patterned weapon” of the type “typically issued to specialized forces such as security personnel, special operations forces, or border guards. “Even though it is normally a semiautomatic, the standard 32-round magazine “can be emptied in seconds.” According to the undisputed testimony of police chief Leonard J. Supenski, a nationally recognized firearms expert, the TEC-DC9 differs from conventional handguns in several ways. A large capacity detachable magazine, “designed to deliver maximum firepower by storing the largest number of cartridges in the smallest ... space,” provides a level of firepower “associated with military or police, not civilian, shooting requirements.” The TEC-DC9 has a “barrel shroud, “also peculiar to military weapons, which disperses the heat generated by the rapid firing of numerous rounds of ammunition and allows the user to grasp the barrel and hold the weapon with two hands, which facilitates spray-firing. The barrel is threaded, allowing the attachment of silencers and flash suppressors, which are restricted under federal law (18 U.S.C. § 921(a)(24) and (a)(30)(C)(ii)), and are primarily of interest to criminals. The threaded barrel also permits the attachment of a barrel extension, enabling the weapon to be fired with higher velocity and at greater distances, while still allowing it to be broken down into smaller concealable parts. The weapon comes with a “sling swivel” that permits it to be hung from a shoulder harness, known as a “combat sling,” when firing rapidly from the hip. The sling device also permits the rapid firing of two weapons simultaneously, as was done by Ferri in this case. The relatively compact size of the TEC-DC9 allows a shooter to transport maximum firepower with relative ease, and with far greater concealability than almost any other weapon having similar firepower. The TEC-DC9 is also compatible with the “Hell-Fire” trigger system, which, when properly installed, permits the weapon to be fired virtually at full automatic rate -- 300 to 500 rounds per minute. As noted, Ferri installed such trigger systems on the TEC-DC9s he used at 101 California Street, and he also used the unusually large 40- and 50-round magazines the weapons were designed to accommodate.

Chief Supenski stated that the TEC-DC9 is “completely useless” for hunting, is never used by competitive or recreational shooters and “has no legitimate sporting use. “The weapon is designed to engage multiple targets during” rapid sustained fire. It has no practical value for self-defense and is hazardous when used for that purpose due to its weight, inaccuracy, and firepower, he stated. The fact that the TEC-DC9 is designed primarily for “spray fire” would present a “severe threat” to innocent bystanders who would also be endangered by the full-metal jacketed ammunition recommended for the weapon, which “will penetrate a human body and keep on moving.” Supenski agreed with a BATF statement that assault weapons such as the TEC-DC9 “were designed for rapid fire, close quarter shooting at human beings. That is why they were put together the way they were. You will not find these guns in a duck blind or at the Olympics. They are mass produced mayhem.” *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See supra* notes 15-30 and accompanying text (killed 8 wounded 6 in four minutes).

files through peer-to-peer networks.⁴³ This software makes violating copyrights very easy to do and very difficult for copyright holders to detect or prevent. Moreover, the makers of such software via their advertising, and by their failure to develop filtering tools or other mechanisms to diminish the infringing activity using their software, promote infringement – illegal conduct.⁴⁴ In addition, alcoholic beverages,⁴⁵ especially those such as beer,

⁴³ See *Metro-Goldwyn-Mayer Inc., v. Grokster, Ltd.*, 545 U.S. 913 (2005). Grokster and others distributed free software that allowed computer users to share electronic files through peer-to-peer networks. The court noted that although such networks can be used to share any type of digital file, recipients of respondents' software have mostly used them to share copyrighted music and video files without authorization. *Id.* at 919-920. Defendants were sued for their users' copyright infringements. The lower court held that the distribution of a commercial product capable of substantial non-infringing uses could not give rise to contributory liability for infringement unless the distributor had actual knowledge of specific instances of infringement and failed to act on that knowledge. In addition, the lower court refused to find the defendants liable for vicarious infringement because they did not monitor or control the software's use, had no agreed-upon right or current ability to supervise its use, and had no independent duty to police infringement. *Id.* 928-929.

The Supreme Court disagreed holding: "One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of party action, is liable for the resulting acts of infringement by third parties." *Id.* 919.

The court stated that the tension between competing "values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies" by limiting infringement liability is the subject of this case. *Id.* at 928-929.

This is exactly the same for criminal products. The tension with respect to criminal products is between competing values of providing the public with freedom from the risk of harm from criminal conduct – whether that conduct is copyright infringement or other criminal conduct such as murder, robbery, rape, etc. and the promotion and encouragement of legitimate commerce. Just as in *Grokster*, despite offsetting considerations, the argument for imposing indirect [vicarious] liability in the case of criminal products is powerful given the number of innocent bystanders injured everyday by criminal products.

In *Grokster* the court notes that a rule that premises liability on purposeful, culpable expression and conduct does nothing to compromise legitimate commerce or discourage innovation having a lawful promise. *Id.* at 936-938. The same is true with regard to the vicarious liability argued for here under the doctrine of respondeat manufacturer. When a product meets the definition of a criminal product, there is assurance that the manufacture has engaged in "purposeful, culpable expression and conduct" related to the product in accordance with *Grokster*.

⁴⁴ *Id.*

⁴⁵ Ethyl alcohol, or ethanol, see <http://www.cdc.gov/alcohol/faqs.htm> (last visited 3/20/07) is the intoxicating ingredient found in beer, wine, and liquor. Drinking alcohol has immediate effects on the body; impairment of the central nervous system begins with the first drink. *Id.* Alcohol affects every organ in the body. *Id.* It is a central nervous system depressant that is rapidly absorbed from the stomach and small intestine into the bloodstream. *Id.* In fact, according to the

spykes, hard lemonade, or raspberry fizz wine coolers which provide the means to inebriation for those most likely to drink to excess and/or to drink and drive⁴⁶ may be considered criminal products.⁴⁷

Dietary Guidelines for Americans, any one “driving, planning to drive, or participate in any other activities requiring skill, coordination, judgment or alertness should not drink any alcohol. http://www.cdc.gov/alcohol/quickstats/general_info.htm (last visited 3/20/07). It is difficult to think of any aspect of life, other than sleeping, that does not require judgment, coordination, alertness or skill. Thus it is not surprising that it is not possible to consume any amount of alcohol and drive without increasing the risk of an accident. *Id.* Any amount of alcohol use slows reaction time and impairs judgment and coordination.

The more alcohol consumed, the greater the impairment. *Id.* The legal limit for drinking alcohol is an alcohol blood level above which (.08% (80 mg/dl) for persons over the age of 21) an individual is subject to penalties (e.g. arrest or loss of license). See <http://www.cdc.gov/alcohol/fags.htm> (last visited 3/20/07). It is important to note that “legal limits” do not define a level below which it is safe to operate a vehicle or engage in some other activity. *Id.* Impairment due to alcohol use begins to occur at levels well below the legal limit. *Id.* In fact, it begins with the first drink.

⁴⁶Beer is the drink of choice in most cases of heavy drinking, binge drinking, drunk driving and underage drinking. See <http://www.madd.org/stats/1789> (citing sources) (last visited 3/22/07). Alcohol-related fatalities are caused primarily by the consumption of beer (80%) followed by liquor/wine at 20%. *Id.* Beer is the drink most commonly consumed by people stopped for alcohol-impaired driving or involved in alcohol-related crashes. *Id.* Alcoholic beverages such as hard lemonade, raspberry fizz wine coolers, or spykes are designed to appeal mainly to young drinkers who are most likely to be involved in alcohol-related car accidents.

⁴⁷Alcohol may meet the definition of criminal product. *See infra* notes 213-225 and accompanying text. Impairment begins with the first drink; alcohol consumption has an immediate harmful effect on the body by depressing the central nervous system, etc. *See supra* note 45. However, the party harmed in this way is the consumer of the alcohol not third parties. But alcohol does directly enable, facilitate or assist certain criminal conduct. In fact it is a necessary condition to certain criminal conduct like DUI. Thus, it can be argued that the design, production, marketing or distribution of the product increases the risk of harm from criminal behavior. *See infra* notes 213-225 and accompanying text. There are approximately 75,000 deaths attributable to excessive alcohol use each year in the United States. See http://www.cdc.gov/alcohol/quickstats/genera_info.htm (last visited 3/20/07). This makes alcohol use the third leading lifestyle-related cause of death in the nation. *Id.* In the single year 2003, there were over 2 million hospitalizations and over 4 million emergency room visits for alcohol-related conditions. *Id.*

The existence of alcohol containing products, their broad marketing and widespread distribution clearly increases the risk of injury to innocent bystanders from criminal conduct directly enabled by such products. In 2005, 16,885 people died in alcohol-related motor vehicle crashes, accounting for 39 percent of all traffic-related deaths in the United States. See <http://www.cdc.gov/ncipc/duip/spotlite/3d.htm> (last visited 3/20/07). An alcohol-related motor vehicle crash kills someone every 31 minutes and nonfatally injures someone every two minutes. *Id.* Each year, alcohol-related crashes in the United States cost about \$51 billion. *Id.* Alcohol is also closely linked with violence. See <http://www.madd.org/stats/1789> (last visited 3/22/07).

The doctrine of respondeat manufacturer and the vicarious liability it imposes is justified by the public interest in life, health and safety, and by the fact that manufacturers of criminal products are in a special relationship with innocent by-standers.⁴⁸ This special relationship results from the fact that manufacturers of criminal products knowingly, if not intentionally, impose an increased risk of harm on innocent bystanders from the use of these products in criminal activity,⁴⁹ and from the fact that these manufacturers exercise significant control over whether their products are used in criminal activity through the decisions they make regarding the design,⁵⁰ manufacturer, marketing⁵¹ and distribution of their products. As a

About 40 percent of all crimes (violent and non-violent) are committed under the influence of alcohol. *Id.* About 3 in every 10 Americans will be involved in an alcohol-related crash at some time in their lives. *Id.* A recent federal study found that more than 30 percent of American adults have abused alcohol or suffered from alcoholism at some point in their lives. See Bridget Grant, National Institute on Alcohol Abuse and Alcoholism in Archives of General Psychiatry June 11, 2007.

⁴⁸A special relationship with either the injured party (here the innocent bystander) or with the wrongdoer has traditionally been recognized as a reason for imposing vicarious liability. See generally WILLIAM L. PROSSER AND W. PAGE KEETON, LAW OF TORTS, 4th ed. WEST Chapter 12 Imputed Negligence (1971).

Courts have recognized that manufacturers may stand in a special relationship with both innocent bystanders and wrongdoers. See, e.g., *Hamilton supra* note 1 at 821. The court states:

First, the special ability to detect and guard against the risks associated with their products warrants placing all manufacturers, including these defendants [handgun manufacturers], in a protective relationship with those foreseeably and potentially put in harm's way by their products. [citations omitted].... Particularly where the product is lethal, and its criminal misuse is not only foreseeable, but highly likely to occur and to result in death or devastation, the existence of such a protective relationship may be deemed to exist. [citations omitted.]

Second, a duty [to be responsible for the conduct of the wrongdoer] is created by virtue of a manufacturer's relationship with downstream distributors and retailers, giving it "sufficient authority and ability to control," the later conduct for the protection of prospective victims. [quoting *Purdy v. Public Adm'r of Westchester Cty.*, 72 N.Y. 2d 1, 8, 526 N.E. 2d. 4, 7, 530 N.Y.S. 2d 513, 516 (1988)]. *Id.* at 821.

The court also notes "Defendants' [handgun manufacturers] ongoing relationship with downstream distributors and retailers putting new guns into consumers' hands provide them with appreciable control over the ultimate use of their products." *Id.* at 820.

The special relationship between manufactures of criminal products and innocent bystanders may also be based on the fact that these manufacturers increase the risk of harm from criminal conduct that innocent third parties are subject to. See generally, Robert L. Rabin, *Enabling Torts*, 49 DePaul L. Rev. (1999).

⁴⁹See *supra* notes 29-48 and *infra* notes 213-225 and accompanying text.

⁵⁰For example, during the period 1985-1993 increases were noted in both the number of gunshot wounds per shooting victim, and the likelihood of a shooting victim's death from gunshot

wounds. These observations were attributed to the introduction by manufacturers of new generations of semi-automatic handguns in the 1980's. *See* Garren Wintemute M.D., *The Relationship between Firearm Design and Firearm Violence*, 275 JAMA 1749 (1996). Moreover these changes in design were driven by the desire to increase profits. *See* Fox Butterfield, *To Rejuvenate Gun Sales, Critics Say, Industry Started Making More Powerful Pistols*, New York Times, February 14, 1999 at 16.

⁵¹*See, e.g.,* Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146, 152-157 (Cal. Ct. App. 1999), rev'd, 28 P.3d 116 (Cal. 2001) (court discusses the characteristics designed into the product to appeal to criminals and also the marketing methods which were also designed to appeal to criminals.) The courts opinion notes:

Navegar's advertisements emphasize the "paramilitary" appearance of the weapon, including references to "[m]ilitary non-glare" finish and "combat-type" sights. Among the advertising methods employed for the TEC-DC9 were using the slogan, "tough as your toughest customer," in promotion materials sent to dealers and distributors, but accessible to the general public, and pointing out the surface of the weapon had "excellent resistance to fingerprints." that Solodovnick [national marketing director for Navegar] acknowledged that people who were not knowledgeable about fingerprints could interpret the latter representation as meaning fingerprints would not be left on this weapon. Promotional materials also called attention to other design features of the TEC-DC9 that would be of interest to persons interested in carrying out violent assaults or other illegal activities, such as the "combat sling" and the threaded barrel, which permitted the attachment of a silencer, flash suppressor or barrel extension.

Solodovnick [national marketing director for Navegar] was aware that news reports of the TEC-DC9 being used in a sensational murder or other crime, and condemnation of the weapon by law enforcement and other government officials, invariably helped sales. He acknowledged having been correctly quoted in a 1992 New York Times article, as follows: "I'm kind of flattered," Mr. Solo[dovnick] said when he was asked about condemnations of the TEC-9. "It just has that advertising tingle to it. Hey, it's talked about, it's read about, the media write about it. That generates more sales for me. It might sound cold and cruel, but I'm sales oriented." He also acknowledged saying, with reference to an assault at a school in Stockton, that "whenever anything negative has happened, sales have gone tremendously high."

To stimulate the interest of consumers thought to be attracted to the weapon because of its connection to violence, Navegar gave or loaned TEC-DC9s to the producers of violent films, such as "Robocop" and "Freejack," and television programs, such as "Miami Vice," who wanted a weapon that had, "that flashing intimidating look." In Solodovnick's opinion, "use of the weapon in such films and television programs was beneficial to sales of the weapon." *Id.*

See also, Jean Marchiaroli Eggen and John G. Culhane, "Gun Torts: Defining a Cause of Action for Victims in Suits against Gun Manufacturers" 81 N.C.L. Rev. 115 (2002). The article contains the following discussion of Navegar:

The TEC-9 and TEC-DC9 were marketed to the general public, with the target market group admittedly being "militaristic people," including the "survivalist community," as well as "Walter Mittyish" individuals, who "play military." Although criminals are not on this list, criminals nevertheless got the message. The court reported:

Just ten models account for 90 percent of the crimes in which assault weapons are used, and one out of every five was a TEC-9, putting it at the top of the list. According to the [Bureau of Alcohol, Tobacco and Firearms] Tracing Center, the TEC-9 or TEC-DC9 accounted for 3,710 of

result of this special relationship, manufacturers of criminal products should be held vicariously financially liable for the harm suffered by innocent bystanders from the use of such products in criminal activity.⁵² The manufacturer's liability is vicarious and thus, if the user of the product is not liable to the victim then the manufacturer would have no liability under the doctrine argued for here.⁵³

Fairness and justice, and to a lesser extent efficiency in injury avoidance and cost distribution are the primary policy reasons for imposing vicarious liability on criminal product manufacturers. Fairness and justice require that a manufacturer who benefits from the imposition of a particular risk on an innocent bystander compensate the innocent bystander when harm results from the risk imposed.⁵⁴ In addition, the imposition of the liability called for here is efficient because it will provide an incentive for manufacturers to reduce the risk of harm from the criminal use of their products by changing the design, marketing and/or distribution of such products to lessen the likelihood that they will be used in criminal activity.⁵⁵ This incentive is sorely lacking in the current political, regulatory and legal environment. In addition, the doctrine will produce efficiency in cost distribution by allowing injured bystanders to recover from manufacturers who in turn will pass on this expense through pricing to those who benefit from the product.

the firearms traced to crime by law enforcement officials nationwide during 1990-1993, mainly cases involving narcotics, murder and assault, and these weapons were in the top ten firearms trace. *It is reasonable to conclude from the available evidence that the appeal of these firearms to criminals was a product of both design features and marketing decisions, and that the attraction of criminals to these products was intense, inevitable, and well within the manufacturer's expectations.* [emphasis supplied] It is not unreasonable to require manufacturers to keep informed of the uses of their products, particularly when this information is compiled in government documents. Even if the manufacturers did not plan their designs to appeal to criminals, they would easily have known the gun features would be attractive to them. *Id.* at 124-126 (notes omitted).

⁵² See *infra* notes 207-300 and accompanying text.

⁵³ See *infra* notes 306-316 and accompanying text.

⁵⁴ See Kathryn R. Heidt, *Corrective Justice from Aristotle to Second Order Liability: Who Should Pay when the Culpable Cannot?* 47 Wash. & Lee L. Rev. 347 (1990) ("Often wrongful activity yields gains not only to the wrongdoer, but also to some other person or group. ...to the extent that the actual wrongdoer cannot compensate the victim, corrective justice requires that the innocent gainers be made to give up their gains to compensate the victims." [notes omitted]) *Id.* at 360. "When one receives gains as a result of the wrongful act of a third party, an act that also causes an innocent party a loss, the gains are arguably "unfair" because the gainer is getting more than its share." *Id.* "Even a mechanical application of corrective justice requires that such gains be used to compensate the victims." [notes omitted] *Id.* at 363.

⁵⁵ See *supra* notes 50-51 and accompanying text.

III. BACKGROUND

A. *Failure of Traditional Legal Theories to Solve the Criminal Products Problem*

Traditional legal theories, both product based and activity based, have been inadequate to solve the criminal products problem.⁵⁶ Product based theories have failed because typically when criminal products are used in criminal activity they are functioning precisely as intended⁵⁷ and thus, they are not defective either in the sense that they have malfunctioned or that they have functioned in an unexpected way.⁵⁸ In addition, product based theories were developed to provide compensation primarily to injured users.⁵⁹ The concern with criminal products however is injury to non-users.⁶⁰

Activity based doctrines have failed because the risk created by criminal products does not result directly from the activity of manufacturing. Rather, the risk from these products is an increase in the already existing risk of harm from criminal activity.⁶¹ Thus, neither the abnormally dangerous activity doctrine nor the nuisance doctrine have been successful in imposing liability on manufacturers of criminal products for harm to innocent third parties.⁶² A brief review of these traditional legal theories follows.

1. Negligence Theories

Under negligence law the plaintiff must show: (1) that defendant owed the plaintiff a duty, (2) a breach of the duty, (3) a reasonably close casual connection between the defendants conduct and the resulting injury and (4) loss or damage resulting from the breach.⁶³ Criminal product manufacturers might be held liable for their own negligence relating to the entrustment

⁵⁶ See *infra* notes 63-133 and accompanying text.

⁵⁷ See *infra* notes 63-114 and accompanying text.

⁵⁸ See *infra* notes 92-114 and accompanying text.

⁵⁹ See *infra* notes 63-114 and accompanying text.

⁶⁰ See *infra* notes 207-212 and accompanying text.

⁶¹ See *infra* notes 114-133 and accompanying text.

⁶² See *infra* notes 114-133 and accompanying text.

⁶³ See W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON and DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS, §30, at 164-65 (5th ed. 1984).

(distribution),⁶⁴ marketing⁶⁵ or design of the product.⁶⁶ However, with very

⁶⁴ See Restatement (Second) of Torts § 390 (1965) which states:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Most of the cases involve automobiles that are lent by the owner to an unfit (minor, intoxicated) individual and as a result an innocent party (pedestrian) is injured. With regard to criminal products see *Linton v. Smith and Wesson*, 469 N.E. 2d 339 (Ill. App. Ct. 1984) discussed *infra* at notes 69-70 and accompanying text.

⁶⁵ Negligent marketing cases argue that the defendant was negligent in marketing the product. In one case the plaintiffs who had been criminally assaulted alleged that given the large number of injuries and deaths resulting from the use of handguns to commit crime, criminal use was foreseeable and the defendant manufacturers and distributors were negligent in marketing handguns to the general public without taking reasonable steps to make sure the guns were not sold to persons likely to harm the public. See *Riordan v. International Armament Corp.*, 477 N.E. 2d 1293, 1294 (Ill. App. Ct. 1985). Another type of negligent marketing claim alleges that the defendant marketed the product in a way that appealed to criminals and/or encouraged criminal use. See, e.g., *Merrill v. Navegar*, 28 P. 3d 116 (2001) (Navegar deliberately targeted the marketing of the TEC-9 and the TEC-DC9 to certain types of persons attracted to or associated with violence) (See discussion *supra* at note 51.); *MGM v. Grokster* 545 U.S. 913, 125 S. Ct. 2764 162 L.Ed. 781 (2005) (Grokster's action in marketing itself as a Napster alternative indicated that Grokster was promoting its products use to infringe copyright and thus may be liable for contributory infringement) *Id.* at 937-938. In another case, a negligent marketing claim was based on the gun manufacturer's decision to consciously over supply states with lax gun regulations, and supply unscrupulous dealers. It was argued that such marketing fed the black market in crime guns. See *Hamilton v. ACCU-TEK* 62 F. Supp 2d 802, 820-25 (1999) (See discussion of *Hamilton infra* at notes 134-183 and accompanying text). See also *First Commercial Trust Co. v. Lorcin Engineering, Inc.* 900 S.W. 2d 200 (Ark. 1995) (discussed *supra* at notes 77-78.) Another negligent marketing claim involved a marketing plan designed allegedly to avoid federal and state regulations governing the sale and possession of guns. The manufacturers sold their weapons disassembled, in the form of parts kits. The manufacturers argued that regulations related to the sale of guns did not apply to the sale of gun parts. In addition, while federal law requires a serial number on gun frames, the defendants sold unmarked sheet metal flats that when folded became gun frames for the other parts sold by the defendants. The defendants sold their guns through the mail. The case involved a drive-by shooting involving one of the defendant's guns. The plaintiffs alleged that the manufacturers marketing scheme was negligent because the manufacturer failed to exercise reasonable care to prevent acquisition of its guns by people likely to use them for crime. See *Halberstan v. Daniel*, No. 95-C3323 (E.D.N.Y. 1998) (discussed *infra* at notes 79-86 and accompanying text). See generally, Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability is Dead, Long Live Negligence*, 19. *Seton Hall Legis. J.* 777 (1999).

⁶⁶ A claim of negligent manufacturer involves the recognition that a manufacturer is obligated to exercise reasonable care in his plan or design so as to avoid any unreasonable risk of harm to

few exceptions⁶⁷ courts have refused to find manufactures of criminal products liable based on negligence for the harm suffered by innocent bystanders from the use of the product in criminal activity.⁶⁸ For example, in *Linton v. Smith and Wesson*⁶⁹ the court refused to allow a negligent

anyone who is likely to be exposed to danger when the product is used in the manner for which the product was intended, as well as in an unintended yet reasonably foreseeable manner. *See, e.g.,* McCarthy v. Olin Corp. *supra* note 4 discussed at note 13 (plaintiffs originally argued a negligent manufacturer theory, the theory was evidently abandoned on appeal, but is discussed by both the majority and the dissent) *Id.* at 156-57 (Circuit Judge Calabresi, dissenting at 161-164).

⁶⁷ *See, e.g.,* McCarthy v. Olin Corp. *supra* note 13 (no duty owed by hollow point ammunition manufacturers to limit sale of its bullets to law enforcement agencies). Of the few cases that have found a duty owed, virtually all have been overturned on appeal except *Halberstam supra* note 79 . In *Halberstam* the defendant manufacturer sold guns as parts kits though the mail. *Id.* The manufacturer claimed that the regulations related to the sale of guns did not apply to the sale of parts kits, and that the manufacturer did not care who purchased their products. The plaintiffs alleged that the manufacturer's marketing scheme was negligent because the manufacturer failed to exercise reasonable care to prevent acquisition of its automatic pistols by individuals with a high risk of criminal misuse. The District court refused to dismiss the negligence claim and allowed the case to go to the jury. The jury found in favor of the defendant manufacturer because there was no causal connection between the defendants negligence and the plaintiffs injuries (the defendant bought the gun assembled from someone on the street and had no dealings with the defendant); *Merrill supra* note 4, California Court of Appeals imposed a duty on gun manufacturers to exercise reasonable care in marketing weapons so as not to increase to risk of criminal use beyond that already present due to the widespread presence of firearms in society. *See* Merrill v. Navegar, 89 Cal. Rptr. 2d 146 at 151 (Ct.App. 1999). The California Supreme Court reversed and granted summary judgment for the manufacturer basing its decision on a California statute (since repealed) that barred manufacturer liability in civil suits for the criminal use of firearms. *See* Merrill v. Navegar, Inc. 1991 P.2d 755 (2000); *Hamilton v. Accu-Tek*, 62F. Supp. 2d 802 (E.D.N.Y. 1999) (jury verdict for plaintiffs on negligent marketing theory; manufacturers must exercise reasonable care in marketing and distributing their products so as to guard against risk of its criminal misuse) *Id.* at 824. The *Hamilton* judgment was vacated and the case dismissed by the United States Court of Appeals Second Circuit based on answers to questions the court had certified to the New York Court of Appeals to the effect that under New York law, manufacturers did not owe a duty of care to the injured plaintiffs. *See* *Hamilton v. ACCU-TEK* 264 F.3d 21, 28-32 (2001).

⁶⁸ *See, e.g.,* McCarthy v. Olin Corp. *supra* note 4 (no duty owed by manufacturer of hollow point "black talon" ammunition to limit sale of its bullets to law enforcement agencies); *Riordan v. International Armament Corp.* 477 N.E. 2d 1293 (Ill. App. Ct. 1985) ("no common law duty exists upon the manufacturer of a non-defective handgun to control the distribution of the product to the general public.") *Id.* at 1295; *Ileto v. Glock, Inc.* 194 F. Supp. 2d 1040, 1055, 1061 (C.D. Cal. 2002) (no duty owed because the foreseeability of the plaintiffs injuries was too attenuated and the manufacturer was not in sufficient control of the weapons used to support a finding of proximate cause).

⁶⁹ 469 N.E. 2d 339 (Ill. App. Ct. 1984).

entrustment (distribution) claim against a gun manufacturer for selling a gun that was used in a criminal shooting, to the general public, reasoning that the general public does not lack the capacity to exercise ordinary care.⁷⁰

Negligence based claims usually fail because of problems with causation or duty. Courts typically hold that criminal product manufacturers have no duty to refrain from manufacturing or marketing lawful products despite their potential to cause harm.⁷¹ In addition, usually a duty to exercise reasonable care only exists with regard to foreseeable risks of injury arising out of the actors conduct.⁷² Thus, generally a manufacturer only has a duty to exercise reasonable care to guard against foreseeable injuries to foreseeable victims.⁷³ Moreover courts typically hold that, absent a special relationship, and notwithstanding the two million handgun related injuries annually, a manufacturer generally has no duty to act reasonably to prevent the criminal use of the product.⁷⁴ Most courts simply hold that criminal activity is not foreseeable and therefore the manufacturer owes no duty to act reasonably to prevent it.⁷⁵

⁷⁰ *Id.* at 342.

⁷¹ *See, e.g.,* *McCarthy v. Olin Corp.* *supra* note 13 (no duty to stop manufacturing or limit distribution of “black talon” hollow point bullets – no duty not to sell a legal non-defective product) *Id.* at 151; *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (manufacturer of videocassette recorders not liable for contributory infringement of copyright based solely on distribution of the product because the product was capable of commercially significant non-infringing uses) *Id.* at 442, 104 S.Ct. 774.

⁷² Duty analysis involves more than just foreseeability. *See, e.g.,* *City of Philadelphia v. Beretta*, 126 F. Supp. 2d 882, 899 (E.D. Pa. 2000) (stating that whether a duty exists is a matter of law to be determined by the court upon consideration of policy factors including: “(1) the relationship between the parties; (2) the social utility of the actor’s conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; (5) and the overall public interest in the proposed solution.”) *Id.*

⁷³ *See* W. PAGE KEETON et al., *PROSSER AND KEETON ON THE LAW OF TORTS* § 53 (5th ed. 1984).

⁷⁴ *See, e.g.,* *Delahanty v. Hinckley* 564 A.2d 758 (D.C. App. 1989) (“no liability exists in tort for ... criminal acts of third parties”) *Id.* at 762. *But see* Robert L. Rabin, *Enabling Torts* 49 *DePaul L.Rev.* 435 (1999) (discussing of exceptions to this general rule):

We do not wish to be understood as questioning the general proposition that no responsibility for a wrong attaches whenever an independent act of a third person intervenes between the negligence complained of and the injury. But... this proposition does not apply where the very negligence alleged consists of exposing the injured party to the act causing the injury. [Note omitted] *Id.* at 439.

⁷⁵ *See, e.g.,* *Delahanty v. Hinckley*, 564 A.2d 758, 762 (D.C. App. 1989) (“no liability exists in tort for ... criminal acts of third parties”); *Riordan v. International Armament Corp.* 477 N.E. 2d 1293, 1295 (Ill. App. Ct. 1985) (manufacturers owe no duty of care to the public in selling non-

Finally, issues of causation also greatly impede the usefulness of negligence in the criminal products area. Under a negligence theory the plaintiff must prove that the negligent conduct caused injury.⁷⁶ For example, in *First Commercial Trust Co. v. Lorcin Engineering Inc.*,⁷⁷ which involved a woman murdered by an assailant using a handgun, the court ruled that the injury to the victim arose out of the assailant's conduct in attacking her, not that of the gun manufacturer in distributing and selling handguns to the general public.⁷⁸ In another case, *Halberstam v. Daniel*⁷⁹ a drive-by shooting involving a semi-automatic pistol resulted in the death of one victim and the injury of another.⁸⁰ The pistol used in the crime had been assembled from a parts kit sold by the defendant.⁸¹ By selling the gun disassembled, in parts kits, the manufacturer claimed to be free from federal and state regulations relating to the sale and possession of guns.⁸² The gun kits were sold through the mail with no background checks conducted on the buyers.⁸³ Thus, the plaintiffs alleged that the manufacturer's marketing methods were negligent because they attracted criminal buyers.⁸⁴ The *Halberstam* court is one of very few courts to find a duty owed by the manufacturer and thus to allow the case to reach the jury.⁸⁵ The jury, however, in a special verdict found no casual connection between the manufacturers marketing conduct and the plaintiff's injuries and thus, found in favor of the defendant.⁸⁶ The criminal assailant in the case did not purchase the gun from the defendant, rather he bought the gun already

defective guns). *Ileto v. Glock, Inc.* 194 F.Supp. 2d 1040, 1055, 1061 (C.D. Cal. 2002) (no duty owed to plaintiffs because foreseeability of injury was too attenuated and defendant was not in sufficient control of the weapons).

⁷⁶ See *supra* notes 63-70 and accompanying text.

⁷⁷ *First Commercial Trust Co. v. Lorcin Engineering, Inc.*, 900 S.W.2d 202 (Ark. 1995).

⁷⁸ *Id.* at 203.

⁷⁹ *Halberstam v. Daniel*, No. 95-C3323 (E.D.N.Y. 1998).

⁸⁰ See Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry* 65 Mo. L.Rev. 1 (2000) (discussing *Halberstam* including cites to Memoranda, Briefs and Transcripts at nts. 128-135).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ For two other cases see *supra* note 67 and accompanying text.

⁸⁶ See *Halberstam supra* note 79.

assembled from someone on the street.⁸⁷

Other plaintiffs have tried to overcome the causation problem by using a theory of negligence in marketing due to over distribution.⁸⁸ Under this theory one could argue for example, that manufacturers have a duty to sell assault style weapons only to customers with a legitimate use for such weapons, like the police or military.⁸⁹ If the manufacturer breaches that duty by selling to the general public and a member of the public, uses the product to injure the plaintiff then causation is clear. That is, but for the defendant's negligence in selling to the public, the assailant would not have had the product that he used to injure the plaintiff. Causation under this theory is much easier to prove than under a theory of negligent marketing based on marketing methods that attract or encourage criminal buyers. However, while in theory this argument could help establish causation, it does nothing to overcome the lack of duty problem discussed above.⁹⁰ That is, as long as courts continue to hold that the criminal use of the product is not legally foreseeable, then the manufacturer has no duty to act reasonably to prevent such use.⁹¹

2. Strict Liability for Defective Products

The strict products liability doctrine developed primarily to allow consumers injured by defective products to recover without the often insurmountable burden of having to prove negligence by the

⁸⁷ See *supra* notes 79-84 and accompanying text.

⁸⁸ See, e.g., *Merill supra* note 4 (assault weapons sold to the public); *McCarthy supra* note 13 ("black talon" hollow point bullets sold to the public); *Hamilton supra* note 1 (oversupply of handguns to low regulation states).

⁸⁹ See, e.g., *Merill supra* note 4.

⁹⁰ See *Hamilton supra* note 1 (district court judgment vacated).

⁹¹ This theory was advanced in *Hamilton supra* note 1 and the jury found liability on the part of several defendants due to their oversupplying hand guns to low regulation states in the south eastern U.S. and to unscrupulous dealers. The court found that the defendants knew or should have known that the guns distributed in this way were being funneled into a black market that supplied crime guns to heavily regulated areas like New York City. The defendants negligence caused the plaintiffs injury because, but for the oversupply, the criminal assailants in the case would not have had access to the guns they used to harm their victims. Even though the jury found liability on this theory, the decision was vacated on appeal because the New York Court of Appeals, in answering questions certified to it by the Court of Appeals for the Second Circuit, held that under New York Law no general duty of care was owed by manufacturers to reduce gun trafficking through the control of the marketing or distribution of their products. See *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E. 2d 1055 (N.Y. 2001).

manufacturer.⁹² However, while this doctrine relieves the plaintiff from the burden of proving negligence, negligence is clearly lurking in the background of the doctrine.⁹³ The plaintiff must prove that the product is defective.⁹⁴ In addition, while the liability imposed under the doctrine is

⁹²See PROSSER *supra* note 63 at § 98 (discussing the development of strict product liability).

⁹³*Id.* See also, Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 25 Ga.L.Rev. 601, 633-634 (1992). (Products liability law is driven primary by negligence concepts.)

⁹⁴Restatement (Second) of Torts § 402 (A) (1965) (strict product liability applies to a product sold in a “defective condition unreasonably dangerous”). For an interesting discussion of the history and ambiguity of this language see Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability* 60 Mo.L.Rev. 1, 10-13 (1995) (Bogus argues that the words “defective condition” are unnecessary and create difficulty; according to Bogus a product may be “unreasonably dangerous” even if it has not been mismanufactured, no safer alternative design is available and no amount of warning will make the product safe as long as the risks from the product outweigh the products utility). *Id.* at 30-65. This is sometimes referred to as “generic product liability” or “product category liability.” *Id.* Under this concept a particular type of product, for example handguns, could be deemed defective. *Id.* Most courts have not embraced this view and require that something be wrong with the product in the sense that it has failed to function as intended before the risk/utility test is applied. See, e.g., *DeRosa v. Remington Arms Co.*, 509 F. Supp. 762 (E.D.N.Y. 1981) (“the very purpose [of a handgun] is to cause injury – to kill or wound”) *Id.* at 767; *Richardson v. Holland*, 741 S.W. 2d 751 (Mo. Ct. App. 1987) (“for a handgun to be defective, there would have to be a problem in its manufacture or design such as a weak or improperly placed part that would cause it to fire unexpectedly or otherwise malfunction”) *Id.* at 754; *Forni v. Ferguson* 648 N.Y.S. 2d 73 (N.Y. App. Div. 1996) (“As a matter of law, a products defect is related to its condition, not its intrinsic function...”) *Id.* at 74. See also the discussion of *McCarthy supra* note 13. *But see*, *Kelley v. R.G. Industries Inc.*, 409 A.2d 1143 (1985) (holding that victims shot with “Saturday Night Special” handguns which the court defined as, small cheap handguns, could bring strict liability claims against the manufacturers of these guns). The Kelley decision was quickly overturned by legislation that also banned “Saturday Night Special” handguns in Maryland. See Md.Code Ann. Art. 27, at § 36-I (h)(1)(1996) and Art. 3A, § 36-I(L) (1988).

The new restatement of torts, Restatement (Third) of Torts (1998) hereafter [Third Restatement] provides for a risk/utility test to determine if a product is defective (rather than a consumer expectations test). See Third Restatement § 2b. However, the Third Restatement continues to require that the product be defective in the sense that it failed to operate as intended and provides that a products design is defective only if the plaintiff proves that a safer alternative design is available. *Id.* The Third Restatement provides the possibility of a very limited exception to these requirements for a “manifestly unreasonable design.” See Third Restatement § 2 cmt.e. The Third Restatement limits the concept of manifestly unreasonable design to a product whose “extremely high degree of danger posed by its use or consumption substantially outweighs its negligible social utility [so] that no rational, reasonable person, fully aware of the relevant facts, would choose to use, or to allow children to use the product.” *Id.* Not only is the definition extremely

strict, the plaintiff need not prove negligence,⁹⁵ it is not necessarily liability without fault;⁹⁶ after all a product does not become defective on its own.⁹⁷

narrow, but specifically excluded from it are “alcoholic beverages, firearms, and above-ground swimming pools.” *Id.* § 2 cmt.d. Interestingly tobacco was included in the list of excluded products in an earlier version of the comment but had to be removed when it became clear that courts were holding cigarette companies liable for the sale and marketing of their products. *See* Proceedings of the American Law Institute, May 10, 1997, at 209-11 (Comments of Jay Dartler, preceding vote to strike tobacco from the list). The examples provided by the Third Restatement of manifestly unreasonable design are toys or novelty items (toy guns and exploding cigars). Third Restatement § 2 cmt.e. illus. 5. Courts and commentators have criticized the Third Restatement for being too narrow minded, for deferring important issues of generic liability regarding guns, tobacco, and alcohol to legislators overly influenced by lobbys, and for setting forth provisions that are actually contrary to existing law. *See, e.g.*, Jean Mocchiaroli Eggen and John G. Culhane, *Gun Torts: Defining a Cause of Action for Victims in Suits against Gun Manufacturers* 81 N.C.L. Rev. 115 (2002) 138-141 and 191-209 (esp. note 106).

⁹⁵ *See* PROSSER *supra* note 63 at §98.

⁹⁶ *See* Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability* 95 Mich.L.Rev. 1266 (1997) (“At least some, and perhaps most manufacturing defects exist because it is cheaper to bear the costs of certain accidents than to prevent them. Thus they are a “distinctive risk” of the manufacturer’s activity; a risk deliberately created by its conscious investment in quality control, material inputs, human capital, equipment, and so on.”) *Id.* at 1290. A manufacturer could reduce the number of his products that are defective, by investing more resources in such an effort, but he chooses not to. It’s not that such choice is immoral or even socially undesirable, but in a broad sense the defect is the manufacturers fault. Moreover, where statistical analysis will allow an accurate prediction of how many defects will occur at a given level of investment in defect prevention, it can be said that the manufacturer deliberately, intentionally chooses the number of defective products. Certainly the manufacturer does not intend to harm a particular user of the product, but the manufacturer has chosen to proceed with a course of conduct that he knows or should know will result in harm to some users of the product. Again, this is not the type of fault or intentional conduct to which culpability attaches but it is conduct to which financial responsibility does and should attach. *See* *Lubin v. Iowa City*, 131 N.W. 2d 765 (Iowa 1964) (city that did not inspect or maintain its water mains until a break occurred, held liable to homeowners damaged by a break). The *Lubin* court states that it is “neither just nor reasonable that a city engaged in a proprietary activity can deliberately and intentionally plan to leave a water main underground beyond inspection and maintenance until a break occurs and escape liability.” *Id.* at 770. The court goes on to say that the “risks from such a method of operation should be borne by the water supplier who is in a position to spread the cost among the consumers who are in fact the true beneficiaries of this practice and of the resulting savings in inspection and maintenance costs.” *Id.*

As Professor Keating notes: “The unreasonableness of the conduct subject to strict (or enterprise) liability lies not in the imposition of the risk, but in the refusal to accept financial responsibility for the harm ensuing from that risk.” Keating, *supra* at 1374.

⁹⁷ A product may be defective because it was improperly manufactured (a mistake was made in the manufacturing process), the manufacturer failed to provide adequate warnings regarding the risks of the product) or the manufacturer chose an unreasonable design for the product. *See*

Rather the doctrine eliminates the necessity of proving the negligence of the manufacturer, and instead focuses on the product itself.⁹⁸ The doctrine fails however to deal effectively with criminal products because, as noted above, virtually all courts have found that such products are not defective, in the sense usually required by the strict product liability doctrine.⁹⁹ Another difficulty with using the doctrine in the criminal products context is that strict product liability developed with its primary focus on consumers or product users,¹⁰⁰ though it has been applied to allow bystanders to recover as well.¹⁰¹ In the criminal products context the primary focus is on injury to bystanders not consumers.¹⁰²

In general, a product may be deemed defective under the doctrine of strict product liability if the product is more dangerous than an ordinary consumer would expect, (the consumer expectations test)¹⁰³ or if the risk of danger inherent in the design of the product outweighs the benefits of the design (the risk utility test).¹⁰⁴ A criminal product such as a handgun will

PROSSER *supra* note 63 at §98.

⁹⁸ *Id.*

⁹⁹ *See supra* note 94.

¹⁰⁰ *See* Second Restatement § 402(a) (“...unreasonable dangerous to the user or consumer...”).

¹⁰¹ *See, e.g.,* Elmore v. Am. Motors Corp., 451 P.2d 84 (Cal. 1969) (discussed in *Gun Torts supra* note 4 at 201-02). The Third Restatement also allows recovery by bystanders. *See* Third Restatement *supra* note 94 § 1 (“... for harm to persons or property caused by the defect”) *Id.*

¹⁰² *See supra* notes 29-55 and accompanying text. Notwithstanding the judicial applicability of strict products liability to bystanders, many concepts associated with the doctrine don’t fit well with criminal products. For example, the argument that the risks associated with guns are obvious and well known to the buyer or user of the gun and that therefore guns are not defective under either a failure to warn or consumer expectation test for defective product, is completely irrelevant for criminal products and for the doctrine of respondeat manufacturer where the primary focus is on the injury to the victim not the shooter (user of the product).

The extension of the strict products liability to by-standers is simply an extension of liability to users or consumers of the product; the risks faced by both from a defective product are very similar – this is not the case for criminal products. In the criminal products context, the risk faced by the victim is completely different than the risk (if any) faced by the product user.

¹⁰³ Second Restatement *supra* note 94 § 402 cmt. i. (“dangerous to an extent beyond that which would be contemplated by an ordinary consumer who purchases it.”). *Id.*

¹⁰⁴ Courts developed this risk/utility standard in addition or instead of the consumer expectations test called for in the Second Restatement. *See, e.g.,* Radiation-Tech., Inc. v. Ware Constr. Co., 445 So. 2d 329, 331 (Fla. 1983) (reasonable alternative design included in risk-utility analysis); Holm v. Sponco Mfg. Inc., 324 N.W. 2d 207 (Min. 1982) (adopting the risk utility test for design defects). As noted *supra* most courts refuse to apply to risk/utility test until the plaintiff shows the product was defective. *See supra* notes 92-103and accompanying text. The Third

not be found defective under the consumer expectations test as long as it functions as designed, because the risk of harm from the product is obvious to a reasonable consumer.¹⁰⁵ That is, the lethal nature of properly functioning guns is well known. The same is true of tactical knives, and the purchaser of a radar detector knows the device will help him speed while the consumer of alcoholic beverages knows that inebriation will result from consuming alcohol. In addition, as noted *supra*, the focus on the consumer creates a problem because the risk from criminal products is not to the consumer but to bystanders.¹⁰⁶

While in theory a criminal product may be found defective under the risk utility test¹⁰⁷ in practice most courts refuse to apply the test at all until a defect in the product is shown to have caused the product to malfunction.¹⁰⁸ For example, in *Patterson v. Rohm Gesellschaft*¹⁰⁹ the family of a store clerk killed by a robber using a revolver sued the gun manufacturer claiming that the revolver was defective and unreasonably dangerous in its design because handguns pose risks of injury and death that far outweigh their social utility.¹¹⁰ The court dismissed the claim against the defendant stating that strict product liability for design defect only applies to products that malfunction.¹¹¹ The court noted that even if handguns were considered to be unreasonably dangerous in that the risk associated with them outweighs their utility, a specific handgun could not be considered defective for purposes of strict product liability, unless it malfunctioned.¹¹² In

Restatement adopts a risk/utility test for product defect but requires that the plaintiff show a safer alternative design. See Third Restatement *supra* note 94 § 2(b). (See *supra* note 94 for a discussion of § 2(b) and the exception for “manifestly unreasonable design.”)

¹⁰⁵ See *supra* note 94 and cases cited there. See also Second Restatement *supra* note 94 § 401 A cmt.i. (“good whiskey” is defective if it contains fusel oil, but not if it causes drunkenness). *Id.*

¹⁰⁶ See *supra* note 102 and accompanying text.

¹⁰⁷ See *Kelley v. R.G. Indus. Inc.*, *supra* note 4 (victims shot with “Saturday Night Special” handguns (small, cheap handguns) could bring strict liability claims against the manufacturer of those guns).

¹⁰⁸ See *supra* note 94.

¹⁰⁹ 608 F.Supp. 1206 (U.S.D.C. Tex. 1985).

¹¹⁰ *Id.* at 1207-08.

¹¹¹ *Id.* (the court stated “It [the claim of the plaintiff] is a misuse of tort law, a baseless and tortured extension of products liability principles. And, it is an obvious attempt – unwise and unwarranted, even if understandable – to ban or restrict handguns through courts and juries, despite the repeated refusals of state legislatures and Congress to pass strong, comprehensive gun-control measures.”) *Id.*

¹¹² *Id.* at 1210-1212.

dismissing the plaintiffs claims the court held “(w)ithout this essential predicate, that something is wrong with the product, the risk-utility balancing test does not even apply.”¹¹³ It makes no sense, to characterize a product as “defective” – even a handgun – if it performs as intended and causes injury only because it is intentionally misused.”¹¹⁴

3. Abnormally Dangerous (Ultrahazardous) Activity

Activity based theories of liability come closer to being able to deal with the harm caused by criminal products because the imposition of liability for criminal products hinges on the fact that the creation and distribution of the product increases the risk of harm to the public from an activity – namely criminal activity. However, the abnormally dangerous activity doctrine imposes strict liability on the person engaged in the activity for harm caused by the activity.¹¹⁵ In the case of criminal products the person engaged in the criminal activity is the criminal not the manufacturer.¹¹⁶ Moreover, even if manufacturing may be considered an activity for purposes of the doctrine,¹¹⁷ it is not abnormally dangerous in

¹¹³ *Id.* at 1210.

¹¹⁴ *Id.* at 1216.

¹¹⁵ Restatement (Second) Torts § 519 (1977) (“One 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.”) *Id. See, e.g.,* Fletcher v. Rylands, 3 H.L. 330 (1868) (landowner constructed a well made reservoir on his land, the water escaped and caused danger to his neighbors property – even though there was no negligence in the construction or maintenance of the reservoir owner of reservoir held strictly liable).

¹¹⁶ As discussed *infra* the respondeat manufacturer doctrine advocated for here does nothing to alter or minimize the liability and responsibility of the product user, rather it increases the scope of financial responsibility for the product users conduct beyond just the product user to include the manufacturer of the criminal product. It is a type of vicarious liability, and if the product user is not liable, neither is the manufacturer of the product. *See infra* notes 306-316 and accompanying text.

¹¹⁷ Many courts limit the doctrine to land use activities. *See, e.g.,* Richman v. Charter Arms Corp., 571 F. Supp. 192 (E.D. La. 1983), rev'd sub non. Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985). On appeal Richman was consolidated with Perkins. *See* Perkins v. F.I.E. Corp., 762 F.2d 1250. Richman involved the mother of a young woman who was robbed, raped, and fatally shot by a man with a handgun who sued the gun manufacturer alleging that the manufacture, marketing, and sale of handguns was an abnormally dangerous activity subject to strict liability. *Id.* 1252. The court rejected the theory, holding that strict liability for abnormally dangerous activities applies only to land use and not to other types of activities. *Id.* 1256-57. The court held that there is no abnormal risk inherent in the manufacturer, marketing, or sale of guns. *Id.* 1265 n. 43. The court stated “the risks of harm from handguns do not come from their sale and

itself.¹¹⁸ That is, it is not like blasting or storing water in reservoirs on one's land which poses a direct threat to nearby landowners.¹¹⁹ The manufacture and distribution of criminal products increases the risk of harm to the public in general not just adjacent landowners;¹²⁰ moreover the harm that may occur is the direct result of criminal activity not the actual manufacturing of the product.¹²¹ Thus, the doctrine of strict liability for abnormally dangerous activities has not been effective in dealing with the criminal products problem.¹²²

4. Public Nuisance

The Restatement (Second) of Torts defines a public nuisance as “an unreasonable interference with a right common to the general public.”¹²³ The same problems discussed above with regard to abnormally dangerous activity arise with respect to nuisance claims.¹²⁴ First, the activities of

distribution as such.” *Id.*

¹¹⁸ *Id.*

¹¹⁹ See *supra* note 115.

¹²⁰ See *supra* note 117. Cf. *Siegler v. Kuhlman*, 502 P.2d 1181, 1187 (Wash. 1972) (holding the owner of a gasoline tanker strictly liable). See *Keating supra* note 96 at 1288 noting that strict liability applies to harm caused by escaping gasoline but not from driving decisions resulting in ordinary accidents. *Id.* at 1288.

¹²¹ See *Gun Torts supra* note 4 at 149-155 (“Thus, courts have accepted the argument that the manufacture and/or marketing of a gun are not themselves dangerous; rather the abnormally dangerous activity is the action of the third party in pulling the trigger.”) *Id.* at 178.

¹²² Cases in accord with *Richman* and *Perkins supra* note 117 include: *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1534 (11th Cir. 1986); *Moore v. R.G. Indus.*, 789 F.2d 1326, 1328 (9th Cir. 1986); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1203-04 (7th Cir. 1984); *Hamilton v. Accu-Tek*, 62 F.Supp. 2d 802 (E.D.N.Y.) vacated 264 F. 3d 21 (U.S. Ct. App. 2d Cir. 2001); *McCarthy v. Sturm Ruger & Co.*, 916 F. Supp. 366, 371-72 (S.D.N.Y. 1996); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 774 (D.N.M. 1987); *Caveny v. Raven Arms, Co.*, 665 F. Supp. 530, 531-33 (S.D. Ohio 1987); *Merrill v. Navegar*, 89 Cal. Rptr. 2d. 146 (Ct. App. 1999), rev'd, 28 P.3d 115 (Cal. 2001); *Delahanty v. Hinkley*, 564 A.2d 758, 761 (D.C. 1989); *Coulson v. DeAngelo*, 493 So. 2d 98, 99 (Fla. Dist. Ct. App. 1986); *Riordan v. International Armament Corp.*, 477 N.E.2d 1293, 1297-98 (Ill. App. Ct. 1985); *Strickland v. Fowler*, 499 So. 2d 199, 201-02 (La. Ct. App. 1986); *Kelley v. R.G. Indus.*, 497 A.2d 1143, 1147 (Md. 1985); *Burkett v. Freedom Arms, Inc.*, 704 P.2d 118, 120-22 (Or. 1985); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661, 664-65 (Wash. Ct. App. 1988).

¹²³ Restatement (Second) Torts § 821 B (1965).

¹²⁴ See, e.g., *City of Chicago v. Beretta U.S.A. Corp.*, No. 98-CH155 96 (Ill. Cir. Ct. Cook County Filed Nov. 12, 1998); *Buffalo v. Navegar, Inc.*, No. 96 C3664, 1998 WL 142359 (N.D. Ill. Mar. 20, 1998); *Young v. Bryco Arms, Corp.*, No. 98 L 6684 (Ill. Cir. Ct. Cook County Filed June

manufacturing and distributing a criminal product do not directly interfere with any right of the general public. The nuisance caused by criminal products concerns safety and security. But this only occurs as a result of the use of the product. The manufacturer of a criminal product does not commit a nuisance directly; rather they increase the risk that others will commit a nuisance.¹²⁵ Similar to negligence cases, the manufacturer's liability for nuisance depends on whether the manufacturer has a duty, in a legal sense, to take action to prevent or reduce the likelihood of crime involving the product.¹²⁶ This analysis of duty is likely to be very similar to the duty analysis under negligence¹²⁷ and as noted the vast majority of courts continue to hold that manufacturers of criminal products such as handguns do not owe a duty to the public to prevent criminal use of the product.¹²⁸ As discussed *infra* this view in light of readily available statistics involving the use of certain products in crime, seems unrealistic and unreasonable.¹²⁹

However, notwithstanding these difficulties, a number of nuisance based suits have been brought against the gun industry¹³⁰ and two cases¹³¹

9, 1998).

¹²⁵It is possible to commit a public nuisance by failing to take action to prevent or abate a nuisance, provided that there is a duty to take such action. *See* Restatement (Second) Torts § 824 (1965).

¹²⁶Whether or not manufacturers of criminal products owe such a duty depends on the same factors discussed regarding duty under negligence. *See infra* notes 63-91 and accompanying text.

¹²⁷*Id.* *See* Timothy D. Lytton, *Tort Claims against Gun Manufacturers for Crime Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry* 68 *Mo. L. Rev.* 1, 49 (2000) ("Thus, the liability of gun manufacturers for public nuisance depends on the issue of duty, which courts are likely to address just as they would under a negligent marketing theory.") *Id.*

¹²⁸*See supra* notes 63-91 and accompanying text.

¹²⁹*See infra* notes 250-286 and accompanying text.

¹³⁰State courts have divided when confronted with the question of nuisance actions against the firearms industry. *See, e.g.,* *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002) (affirming dismissal of public nuisance action); *White v. Smith & Wesson*, 97 F.Supp.2d 816 (N.D. Ohio 2000) (allowing public nuisance action to proceed); *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 290 Ill. Dec. 525, 821 N.E.2d 1099 (2004) (allowing public nuisance action to proceed); *City of Gary v. Smith & Wesson*, 801 N.E.2d 1222 (Ind. 2003) (allowing public nuisance action to proceed); *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416, 768 N.E.2d 1136 (2002) (allowing public nuisance action to proceed); *Ganim v. Smith & Wesson*, 258 Conn. 313, 780 A.2d 98 (2001) (affirming dismissal of public nuisance action); *City of Boston v. Smith & Wesson*, No. 199902590, 2000 WL 1473568 (Mass.Super. July 13, 2000) (allowing public nuisance action to proceed).

¹³¹The two cases are *NAACP v. Acusport, Inc.* 271 F.Supp.2d 435 (E.D.N.Y. 2003) and *City of Gary v. Smith & Wesson, Corp.*, 801 N.E.2d 1222 (Ind. 2003). In *NAACP v. Acusport* the

in particular indicate that nuisance based claims may be successful at least in requiring the industry to clean up its marketing and distribution practices.¹³² But, even if nuisance based claims are successful, they do not

court found that the manufacturers and distributors of handguns negligently or intentionally arm criminals; the fact that a criminal pulled the trigger did not relieve the gun industry of responsibility. *NAACP v. Acusport, Inc.* 271 F.Supp 2d 435, 449, 451 and 482 (E.D.N.Y. 2003). The court also found that the tortious conduct or omissions of the gun industry created harm tantamount to a public nuisance. *Id.* The case however was dismissed because, since all New York City residents suffer from the harm caused by the criminal use of handguns, the NAACP could not prove a distinct type of harm and therefore lacked standing. *Id.* at 451. A very interesting pending case is *City of New York v. Beretta U.S.A. Corp., et al.* 401 F.Supp. 2d 244 (2005) which is a nuisance action that is discussed in more detail *infra* at notes 132-133 and accompanying text, and that is before the same judge as *NAACP v. Acusport*, Senior District Judge Weinstein (also the same judge in *Hamilton* discussed *supra* at notes 134-183 and accompanying text). In *City of Gary v. Smith & Wesson, Corp.*, the court denied a motion to dismiss based on allegations that the gun industry knowingly engaged in distribution practices that generated profit to the gun industry at a cost of substantial harm to others. *Id.* at 1235. The court held that “a nuisance claim may be predicated on a lawful activity conducted in such a manner that it imposes costs on others... [T]he law of public nuisance is best viewed as shifting the resulting cost from the general public to the party who creates it.” *Id.* at 1234.

¹³²The following excerpt from *City of New York v. Beretta U.S.A. Corp. et al.* 401 F.Supp. 2d 244, 273-74 (2005) illustrates the problem:

By means of this lawsuit, New York City seeks to impose limits on possession through controls on dangerous methods of selling handguns. In the complaint, plaintiff offers dramatic statistics, both for the city and the nation, regarding the number of homicides and other crimes involving handguns. It paints a powerful picture of how some members of the firearms industry knowingly profit from illegal commerce in handguns. Plaintiff claims, for instance, that defendants produce, market and distribute substantially more handguns than they reasonably expect to be used by law-abiding purchasers. Particularly oversupplied are those states with weak handgun restrictions, specifically “certain southern states along the I-95 corridor....” According to plaintiff, defendants sell excess guns “with the knowledge that the oversupply will be sold to prohibited purchasers in states, counties and cities, like New York City, which have strong restrictions on the purchase and ownership of firearms.” Compl. <paragraph> 88. They allege that “[c]riminals are an important market segment for the gun industry.”

The complaint quotes Robert Haas, the former Senior Vice President for Marketing and Sales for defendant Smith & Wesson, for the proposition that the gun industry knows that the criminal market is fueled by the industry’s questionable distribution practices:

The company and the industry as a whole are fully aware of the extent of the criminal misuse of firearms. The company and the industry are also aware that the black market in firearms is not simply the result of stolen guns but is due to the seepage of guns into the illicit market from multiple thousands of unsupervised federal firearms licensees. In spite of their knowledge, however the industry’s position has consistently been to take no independent action to insure responsible distribution practices.... Compl. <paragraph> 102. The complaint also quotes Robert Lockett, a firearms dealer named the 1993 Dealer of the Year by the National Alliance of Stocking

typically provide any direct recovery to individuals hurt by the wrongful or

Gun Dealers, whose article was published in Shooting Sport Retailer, a firearms industry trade magazine, as declaring:

I've been told INNUMERABLE times by various manufacturers that they 'have no control' over their channel of distribution. I've been told INNUMERABLE times that once a firearm is sold to a distributor, there is no way a manufacturer can be held responsible for the legal transfer and possession of a firearm....

IF YOU DO NOT KNOW WHERE AND HOW YOUR PRODUCTS ARE ULTIMATELY BEING SOLD – YOU SHOULD HAVE KNOWN OR ANTICIPATED THAT THEY WOULD BE ILLEGALLY SOLD AND SUBSEQUENTLY MISUSED.

Let's just get down and dirty. We manufacture, distribute, and retail items of deadly force.... Your arguments of yesterday regarding lack of accountability were pretty flimsy. Today, they are tenuous at best. Tomorrow, they are not going to indemnify you. We are going to have to get a whole lot better – and fast – of being in control of our distribution channel. Compl. <paragraph> 104 (emphasis in original).

See also, Timothy D. Lytton, "Tort Claims against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry" 65 Mo.L.Rev. 1, 47-49 (2000) (discussing *City of Chicago v. Beretta U.S.A. Corp.*, No. 98-CH15596 (Ill.Cir.Ct.Cook County Filed Nov. 12, 1998) and the complaint filed in that case). Lytton reports that the complaint provides dozens of examples of these practices. The following are a few:

On September 30, 1998, Officer 4 entered Midwest Sporting Goods to purchase firearms. She informed the sales clerk that she was looking for a firearm that was concealable, yet powerful. The sales clerk told her that it was illegal to carry a handgun in Chicago, and that even though they are supposed to tell Chicagoans that it is illegal, 90% of the people who purchase guns in his store are from Chicago. The sales clerk told Officer 4 that the questions on the ATF Form 4473 were stupid, but that she had to answer them anyway. The sales clerk then recommended to her that she have separate purchase orders for each of the two firearms and pick them up separately so that the store did not need to inform ATF of a multiple purchase.

On October 8, 1998, Officers 2 and 3 entered Breit & Johnson (Sporting Goods, Ltd.) to purchase firearms. Officer 3 expressed an interest in purchasing small semi-automatic pistols. When he told the sales clerk that he did not have a (Firearm Owner Identification) card (required for the purchase of a firearm in Illinois), the sales clerk said that while the sales clerk could not hand him a firearm to examine, he could hand it to Officer 2, who could in turn hand it to Officer 3. In this way, Officer 3 examined different firearms. They purchased two .380 caliber pistols.

On August 19, 1998, Officer 2 returned to B&H (Sports, Ltd.) with Officer 3. Officer 2 told the same sales clerk with whom he had dealt on August 14, that Officer 6 owed him money and was likely on the run. Officer 2 stated that Officer 6 had to be dealt with before he left town, and said he needed to "get a Tec for his ass." Officer 3 agreed that they had to "take care of business today." The sales clerk recommended an Intratec 9mm assault weapon that could fire 100 rounds per load, telling them, "You made a good choice; this will take care of business." The sales clerk then added the Intratec 9mm assault weapon Officer 2 had just selected to the purchase order he had created on August 14 (in order to allow Officer 2 to take possession of the gun immediately without waiting five days as mandated by statute).

[Notes omitted] *Id.* See also excerpts from *Merill supra* note 4 *supra* at notes 15, 38 and 51.

illegal use of criminal products. For that a different type of theory is necessary.¹³³

B. Court and Legislative Responses to Criminal Products

1. Courts

One very interesting court decision dealing with the criminal products problem is the District Court decision *Hamilton v. Accu-Tek*. (hereinafter “Hamilton I”)¹³⁴ Even though the decision was overturned on appeal the case represents the greatest success to date of the negligent marketing (due to over distribution) theory.¹³⁵ The case involved a claim by a number of plaintiffs, family members of shooting victims and one surviving shooting victim, against some twenty-five handgun manufacturers for the negligent marketing and distribution of handguns.¹³⁶ The defendants collectively supplied most of the United States market for handguns.¹³⁷ The plaintiffs represented seven shooting victims, six of whom died.¹³⁸ In all but one of the shootings the gun used was never found.¹³⁹ At the end of the trial the jury found fifteen of the defendants negligent, and nine were found to have proximately caused injury to one or more plaintiffs.¹⁴⁰ Damages were found

¹³³ See, e.g., Lytton *supra* note 127 at 45-50.

¹³⁴ *Hamilton supra* note 1.

¹³⁵ *Hamilton* was brought in federal court which, as discussed, found in favor of the plaintiff. The Second Circuit Court of Appeals certified questions of state law to the New York Court of Appeals; its opinion, *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001), concluded that New York law did not recognize a cause of action against gun manufacturers for negligent marketing of firearms. *Id.* at 1066. As a result, the Second Circuit Court of Appeals vacated the judgment of the District Court. See *Hamilton supra* note 1. Another very interesting negligent marketing case is *Merill supra* note 4, discussed *supra* at notes 15, 38 and 51. The California Court of Appeals reversed the summary judgment granted by the trial court in favor of the manufacturer and recognized a claim for negligent marketing against a gun manufacturer. The Court of Appeals decision was reversed by the California Supreme Court. The focus of *Merill* was the marketing of assault weapons, highly lethal guns that can be made fully automatic and that were marketed in a manner that would attract criminals. *Id.* at 1566-57.

¹³⁶ *Hamilton supra* note 1 at 808-10.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 811.

only in favor of one shooting victim (the survivor) and his mother.¹⁴¹ Liability of the defendants was based on their respective national market share.¹⁴² The defendants denied having marketed or distributed handguns negligently and denied any responsibility for the plaintiffs injuries; claiming that the sole proximate cause of the murders and shootings in these cases was the criminal conduct on the part of the shooters.¹⁴³

The *Hamilton I* court noted that the question of the manufacturers responsibly “arises at the intersection of two types of cases – those concerning liability for the acts of third parties and those concerning the duties of manufacturers under the law of negligence and strict liability.”¹⁴⁴ The courts observation while directed specifically at the manufacturers of handguns, applies equally well to all criminal products.¹⁴⁵ As noted, the risk associated with criminal products is of increased harm to the public due to the criminal use of the product.¹⁴⁶ Thus, vicarious liability principles and product liability concepts are both relevant to solving the criminal products problem.¹⁴⁷

The *Hamilton I* court found that it was both fair and economically acceptable to impose liability on handgun manufacturers for the harm caused by the criminal use of their products.¹⁴⁸ The court noted that generally there is no duty to anticipate criminal or tortuous conduct on the part of a third party.¹⁴⁹ However, there are a number of exceptions to this general rule.¹⁵⁰ The exception the *Hamilton I* court found applicable was

¹⁴¹ *Id.*

¹⁴² *Id.* at 839-47.

¹⁴³ *Id.* at 810-11.

¹⁴⁴ *Id.* at 819.

¹⁴⁵ The problem with criminal products is that their production and distribution increases the risk of criminal activity involving the product. Thus, product liability law as well as the law of vicarious liability for the acts of third parties come together in the criminal products context. *See supra* notes 29-133 and accompanying text.

¹⁴⁶ *See supra* notes 29-56 and accompanying text.

¹⁴⁷ *Id.*

¹⁴⁸ *Hamilton supra* note 1 at 819-23.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* and 833-34. (“Under New York Law, an intervening intentional or criminal act by a third party is not automatically deemed a supervening act insulating the initial tortfeasor from liability.”) *Id.* (“Where the intervening act is a natural and foreseeable consequence of a circumstance created by defendant, liability will subsist.”) *Id.*; *Kush v. City of Buffalo*, 59 N.Y.2d 26, 33, 449 N.E.2d 725, 729, 462 N.Y.S.2d 831, 835 (1983) [Intervening acts of student employees who stole chemicals from lab and stored them in bushes on school property were the

based on the special relationship between the manufacturer and either the distributors and retailers or the victim.¹⁵¹ According to the court all

sort of risk which gave rise to the duty and therefore did not insulate the school from liability to 8-year-old boy injured when chemicals exploded as he played with them). The court also cites *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d at 520-21, 407 N.E.2d at 459, 429 N.Y.S.2d at 614-15 (1980) (intentional shooting of plaintiff in lobby of office building with history of criminal activity was not a supervening cause exonerating building owner and manager from liability but a significant foreseeable possibility) and *Rotz v. City of New York*, 143 A.D.2d 301, 532 N.Y.S. 2d 245 (1st Dept. 1988) (intervening acts of third persons who initiated stampede after Central Park concert did not insulate concert promoter from liability for plaintiff's injuries). *Id.* See *Merill supra* note 4 where the Court of Appeals noted that while a defendant generally does not have a duty to control the actions of a third person absent a special relationship between the defendant and the third person or the ultimate victim, such a duty may exist in certain recognized special circumstances. *Id.* at 157. One such circumstance exists where the defendant, through his or her own action (misfeasance) has made the plaintiff's position worse and has created a foreseeable risk of harm from the third person. *Id.* at 164-65. The court determined that the defendant gun manufacturer had created a foreseeable risk of harm in the design, marketing, and availability of the TEC-9 and TEC-DC9. *Id.* at 165-69. The court concluded: "Navegar had substantial reason to foresee that many of those to whom it made the TEC-DC9 available would criminally misuse it to kill and injure others, [and] that its targeted marketing of the weapon 'invited or enticed' persons likely to so misuse the weapon to acquire it." *Id.* at 168-69. *But see*, *DeRosa v. Remington Arms Co.*, 509 F.Supp. 762 (E.D.N.Y. 1981) ("[a] manufacturer in New York is not ... required ... to protect against every conceivable misuse by its design choices") *Id.* at 768. See *Gun Torts supra* note 4 at 141-42. Critiquing *DeRosa*:

The *DeRosa* court's approach is puzzling. As discussed below, well-understood principles of tort law call for the imposition of liability even where the intervening act was intentional, so long as the defendant "at the time of his negligent conduct realized or should have realized the likelihood that [a future action] might [occur], and that a third person might avail himself of the opportunity to commit ... a tort or crime." [citing Restatement (Second) of Torts § 448 (1965)]. *Id.*

¹⁵¹ See *Hamilton supra* note 1 at 820-23, where the court states:

First, the special ability to detect and guard against the risks associated with their products warrants placing all manufacturers, including these defendants, in a protective relationship with those foreseeably and potentially put in harm's way by their products. See, e.g., *Moning v. Alfonso*, 400 Mich. 425, 254 N.W.2d 759, 765 (1977) ("It is well established that placing a product on the market creates the requisite relationship between a manufacturer, wholesaler and retailer and persons affected by use of the product giving rise to a legal obligation or duty to the persons so affected." (citing *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); cf. *John C.P. Goldberg and Benjamin C. Zipursky, The Moral of MacPherson*, 146 U.Pa.L.Rev. 1733, 1823 (1998) ("The logic of *MacPherson* might well imply the existence of a duty to ... bystander[s]" foreseeably injured by a manufacturer's negligence, "[b]ut this would be because certain bystanders fall within a class of persons to whom vigilance of life and limb is a duty, which duty was breached"). Particularly where the product is lethal, and its criminal misuse is not only foreseeable, but highly likely to occur and to result in death or devastation, the existence of such a protective relationship may be deemed to exist. See, e.g., *Timothy D. Lytton, Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*,

manufacturers are in a special protective relationship with those foreseeably put in harms way by their products.¹⁵² In this regard the court noted that where the product is lethal, criminal misuse is not only foreseeable but also highly likely to occur.¹⁵³ Moreover, the court found that there was also a special relationship between the manufacturers and downstream distributors and retailers that gave the manufacturers sufficient authority and ability to control the distribution of their product to those likely to use them in illegal activity.¹⁵⁴ The court recognized that the manufacturers were in a position to take action that could have reduced the risk of their products being sold to persons likely to misuse them.¹⁵⁵ The court concluded that defendant manufacturers had appreciable control over the ultimate use of their products.¹⁵⁶ With regard to the economic consequences of vicarious liability the court relied on the negligence basis of the claim and on the authority and control that the manufacturers could exercise over downstream distributors and retailers to conclude that the manufacturers would not be exposed to “crushing liability.”¹⁵⁷ The court noted that “. . . manufacturers can avoid liability by marketing and distributing their product

64 Brook. L.Rev. 681, 703 (1998); H. Todd Iveson, *Manufacturers’ Liability to Victims of Handgun Crime: A Common Law Approach*, 51 *Fordham L.Rev.* 771, 783-84 (1983) (“[B]ecause of the inherent dangerousness of handguns, the manufacturer has special responsibility to guard against risks that may result from a failure to fulfill this common-law duty.”). The appropriateness of the imposition of a duty in such circumstances is best expressed by the “now familiar axiom that “[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation.”” *Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 N.Y.2d at 585, 634 N.E.2d at 192, 611 N.Y.S.2d at 820 (quoting *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99 (1928) (Cardozo, C.J.)).

Second, a duty is created by virtue of a manufacturer’s relationship with downstream distributors and retailers, giving it “sufficient authority and ability to control,” the latter’s conduct for the protection of prospective victims. *Purdy*, 72 N.Y.2d 1, 8, 526 N.E.2d 4, 7, 530 N.Y.S.2d 513, 516 (1988). A third basis for finding duty may be found in the concept described by Professor Rabin as “enhancement of risk.” Robert L. Rabin, *Enabling Torts*, 49 *DePaul L.Rev.* (1999) (forthcoming). Professor Rabin characterizes plaintiffs’ negligent marketing claim as an example of an “enabling tort” in which liability is predicated on defendants’ affirmative enhancement of risk. *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* This also speaks to the risk enhancement; the manufacturers conduct increases the risk of harm to innocent bystanders from criminal conduct. *See infra* notes 206-255 and accompanying text.

¹⁵⁶ *See Hamilton supra* note 1 at 820-23 (quoted *supra* note 138).

¹⁵⁷ *Id.* at 820.

responsibly.”¹⁵⁸

One of the central arguments of this article is that a negligence paradigm is not necessary nor, in fact, appropriate to avoid what the *Hamilton I* court called “crushing liability.”¹⁵⁹ First, liability, even “crushing liability,” is not always to be avoided.¹⁶⁰ In the abstract, if the

¹⁵⁸ *Id.*

¹⁵⁹ There are two fundamental reasons for imposing liability on manufacturers of criminal products under the doctrine of respondeat manufacturer; fairness and injury avoidance. The primary fault of the manufacturer is not one of these fundamental reasons. The fairness reason is based on the corrective justice idea that it’s unfair to profit from exposing another to an increased risk of harm, but then refuse to compensate for such harm when it is realized. The fault associated with this reason is secondary or conditional fault. That is, the manufacturer is only at fault if it refuses to accept financial responsibility for the harm when it occurs. See discussion *infra* at notes 226-286 and accompanying text. However, fault clearly underlies the doctrine of respondeat manufacturer. If the user of the product is not at fault, that the manufacturer will not be liable. The manufacturer’s liability under the doctrine is vicarious. See *infra* notes 306-316 and accompanying text.

¹⁶⁰ While the principle justification of respondeat manufacturer is fairness, one of the most important benefits of imposing vicarious financial responsibility on the manufacturer of criminal products is to create incentives that will encourage the appropriate design of such products as well as an appropriate level or intensity of criminal product production, marketing and distribution. Without respondeat manufacturer, manufacturers of criminal products have no reason to treat a sale to a would-be criminal user any differently than a sale to a legitimate user. Under current law a sale is a sale is a sale. The manufacturer incurs the same expense and makes the same profit whether it sells a semiautomatic handgun to someone who will use the product to commit a crime or sells it to a police department. Thus, under existing law criminal product manufactures have every incentive, to sell as much product as possible to whomever wants to buy it for whatever reason. If advertising in ways that attract or appeal to would-be criminal users, like for example the methods used by Navegar to sell its TEC-9 discussed in *Merill supra* note 1, or designing the products to appeal to would be criminal users as also discussed in *Merill supra* note 1 or selling to un-reputable distributors as in *City of Chicago supra* 124 or oversuppling weak gun regulation states as in *Hamilton supra* note 1 will increase sales then this is what criminal product manufacturers will do and perhaps must do. Imposing financial responsibility – even in some instances at a crushing level – may be necessary to restore the appropriate balance to the activities of criminal product manufacturers. See, e.g., *Gun Torts supra* note 4 at nt. 34 which states:

Jon S. Vernick and Stephen P. Teret, A Public Health Approach to Regulating Firearms as Consumer Products, 148 U. Pa. L. Rev. 1193, 1197 (2000)

Statistical comparisons between production of semiautomatic pistols and revolvers are most instructive. In 1985, for example, gun manufacturers produced 844,000 revolvers and 707,000 semiautomatic pistols. In 1993, those figures had shifted to 2.2 million semiautomatic pistols, compared to 550,000 revolvers. *Id.* at 1198 n.27 (citing Bureau of Alcohol, Tobacco & Firearms, Annual Firearms Manufacturers and Export Report (1994)). Both the absolute numbers and the ratio of semiautomatic pistols to revolvers are worth noting here. In 1985, slightly more than 1.5 million revolvers and semiautomatic pistols were manufactured in this country; less than a decade

cost of the harm caused by a product exceeds what the market is willing to pay for the product then the product should not be produced.¹⁶¹ In addition, even under the vicarious liability regime called for here, manufacturers of criminal products may significantly reduce or eliminate their liability by exercising prudence in their choices regarding the products they decide to produce as well as the design, promotion and distribution of those products.¹⁶² In fact the *Hamilton I* court alludes to this when it states “. . . , it is not inappropriate for the price of handguns to be more reflective of their true economic cost to the community in the way of avoidable injuries and deaths.”¹⁶³

As noted, in the *Hamilton I* case the plaintiff’s claimed that the manufacturers were negligent in the way they marketed and distributed their product.¹⁶⁴ In concluding that handgun manufacturers owe a duty to market their product reasonably¹⁶⁵ the District Court recognized that there is a foreseeable increase in the risk of harm to the public from the manufacture and unreasonable distribution of handguns.¹⁶⁶ The court states: “Where unavoidably hazardous products like handguns are distributed, it is not unfair for the law to minimize unreasonable risk of harm through the imposition of a duty on manufacturers to market and distribute responsibly.”¹⁶⁷ The court then paraphrases Justice Cardozo in *MacPherson v. Buick Motor Co.*, 217 N.Y. at 390, 111 N.E. at 1053 as follows: “If the

later, the combined numbers grew to approximately 2.75 million. *Id.* These statistics do not take into consideration other types of firearms produced. The production ratio of these two types of firearms was 8.44 revolvers to 7.07 semiautomatic pistols in 1985; but by 1993, the ratio had shifted dramatically to 22 semiautomatic pistols to 5.5 revolvers produced. *Id.*

See also, Garren J. Wintemute, *The Relationship Between Firearm Design and Firearm Violence*, 275 J.A.M.A. 1749, 1751-52 (June 12, 1996). The article notes that many manufacturers introduced lightweight, easily concealable, double-action or double-action-only, medium – or large – caliber pistols. The author notes: “The trend has given rise to a resurgence of what might be called ‘palmshot’ advertising in gun consumer magazines, in which manufacturers emphasize photographically that their pistols can be hidden entirely behind the hand.” *Id.*

¹⁶¹ *See supra* note 157.

¹⁶² *See supra* note 50-51 and accompanying text.

¹⁶³ *See Hamilton supra* note 1 at 820.

¹⁶⁴ *Id.* at 808 (“They claim that the manufacturers’ indiscriminate marketing and distribution practices generated an underground market in handguns, providing youths and violent criminals like the shooters in these cases with easy access to the instruments they have used with lethal effect.”). *Id.*

¹⁶⁵ *Id.* at 820-25.

¹⁶⁶ *Id.* at 824.

¹⁶⁷ *Id.*

nature of a thing is such that it is reasonable certain to place life and limb in peril when negligently [marketed and distributed], it is then a thing of danger. Its nature gives warning of the consequences to be expected.”¹⁶⁸ Cardozo’s logic seems even more strongly applicable to criminal products because they are reasonably certain to place life and limb in peril even when they are *properly* manufactured.¹⁶⁹

The nature of criminal products indeed gives warning of the consequences to be expected.¹⁷⁰ The *Hamilton I* court’s observation concerning handguns is equally applicable to all criminal products; manufacturers of criminal products set the stage for their criminal misuse.¹⁷¹ “They place at risk innocent persons who derive no gain from easy access to these products.”¹⁷² Unlike the users and consumers of criminal products, injured bystanders exercise no control over their exposure to risk.¹⁷³ They have virtually no opportunity to choose either to encounter a criminal product or to avoid contact with them.¹⁷⁴

Manufacturers of criminal products profit from the acquisition of their products by those seeking to use them in criminal activity.¹⁷⁵ Thus, fairness mandates the imposition of responsibility on the part of the manufacturers of criminal products for the injury and suffering to innocent bystanders from the criminal use of such products.¹⁷⁶ Moreover, as the *Hamilton I* court noted the manufacturer is clearly the “cheapest cost avoider – the party upon whom imposition of liability will lead to the greatest degree of safety and efficiency.”¹⁷⁷ The manufacturer may spread the risk of loss by raising prices to more accurately reflect the cost to society of the manufacture and distribution of criminal products.¹⁷⁸

The District Court’s decision in *Hamilton I* was vacated on appeal.¹⁷⁹

¹⁶⁸ *Id.*

¹⁶⁹ *See supra* notes 213-225 and accompanying text.

¹⁷⁰ *See infra* notes 213-225 and accompanying text.

¹⁷¹ *See Hamilton supra* note 1 at 826.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 826-27.

¹⁷⁶ *Id.* *See also infra* notes 287-300 and accompanying text.

¹⁷⁷ *Id.* at 827 (citing Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (1970)).

¹⁷⁸ *See Hamilton supra* note 1 at 820.

¹⁷⁹ *Hamilton v. ACCU-TEC* 264F.3d 21(2001).

The Circuit Court of Appeals for the 2nd Circuit certified a question to the New York Court of Appeals.¹⁸⁰ The question regarded duty: “Whether the defendants [manufacturers] owed plaintiffs a duty to exercise reasonable care in the marketing and distribution of the handguns they manufacture.”¹⁸¹ The New York Court of Appeals answered the question in the negative concluding that the defendant manufacturers did not owe the plaintiff a duty.¹⁸² As a result, the Second Circuit Court of Appeals vacated the District Courts opinion and ordered dismissal of the plaintiff’s complaint.¹⁸³

2. Legislation

The legislative response to criminal products has been inconsistent.¹⁸⁴

¹⁸⁰ Hamilton v. ACCU-TEK 222F.3d 36(2001).

¹⁸¹ *Id.*

¹⁸² *Hamilton supra* note 1.

¹⁸³ *See Hamilton supra* note 176.

¹⁸⁴ For example in 1983 California passed legislation to protect gun manufacturers from liability in civil suits for the misuse of firearms. *See* Cal. Civ. Code § 1714.4 (West 1998) (this legislation was based upon model legislation drafted by the National Rifle Association). This legislation was applied by the California Supreme Court in *Merill supra* note 4 to protect the manufacturer of an assault weapon. *Id.* Then in 2002 California repealed the statutory protection for gun manufacturers. *See* Cal. Civ. Code § 1714 (amended), 1714.4 (repealed) S.B. 682 (Perata; 2002 STAT. Ch. 913).

In Maryland, after *Kelley (supra* note 4) imposed strict liability upon manufacturers and distributors of Saturday night special handguns for injuries caused to victims of crime the Maryland legislature passed legislation that essentially overturned *Kelley*. *See* Md. Ann. Code art. 27, § 36-I (h) (Supp. 2002) (“A person or entity may not be held strictly liable for damages of any kind resulting from injuries to another person sustained as a result of the criminal use of any firearm by a third person, unless the person or entity conspired with the third person.”). *Id.*

However, Maryland also ban the sale or possession of Saturday Night Special handguns in the state. *See* Md. Code Ann. art. 27, § 36-I(a)-(b) (Supp. 2002) (prohibiting manufacturer or sale of handguns not listed on state handgun roster). *See also* Minn. Stat. § 624.716 (2001) (any firearms dealer who sells or manufactures a “Saturday Night Special Pistol” shall be guilty of a gross misdemeanor).

The second Amendment states: “A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed” U.S. Const. Amend. II. This does not prohibit either the federal government or the states from enacting gun control legislation. *See* United States v. Miller, 307 U.S. 174, 178 (1939) (federal government may regulate firearms); Miller v. Texas, 153 U.S. 535, 539 (1894) (Statute prohibiting the carrying of dangerous weapons did not violate the Second Amendment); Presser v. Illinois, 116 U.S. 252, 265 (1886) (upholding a state law forbidding unauthorized military groups from organizing and drilling or parading with arms); United States v. Cruikshank, 92 U.S. 542, 553 (1875) (Second Amendment only restricts infringement by Congress).

Ironically the most important current legislation has made it more difficult for victims of certain criminal products (guns) to recover for their injuries. In 2005 the U.S. Congress passed and President Bush signed the “Protection of Lawful Commerce in Arms Act” (hereinafter “Gun Protection Act”).¹⁸⁵ Among the purposes listed for the Gun Protection Act are the following:

To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm caused *solely* by the criminal or unlawful *misuse* of firearm products or ammunition products by others when the product functioned as designed and intended [emphasis supplied].¹⁸⁶

The Gun Protection Act prohibits a civil action brought by any person against a manufacturer or seller of a firearm, or ammunition for damages or other relief resulting from the criminal or unlawful misuse of such products by the person or a third party.¹⁸⁷ The Gun Protection Act is written in broad terms and is clearly intended to insulate gun manufacturers from bearing responsibility for the harm caused by the criminal use of their products.¹⁸⁸ Time will tell how effective the Gun Protection Act will be in insulating

State regulations concerning gun ownership are far from consistent. *See, e.g.*, Cal.Penal Code § 1207(b) (3)(A), 12072 (c)(1), 12076 (d)-(e), 12084 (d)(7)(A) (West Supp. 2002) imposing a ten-day waiting period and a background check prior to obtaining handguns); N.J. Stat. Ann. § 2C: 58-2(a)(5)(a) (West Supp. 2002) (imposing a seven-day waiting period for the purchase of a handgun). Some states require a firearm identification card. *See, e.g.*, 2001 Ill. Legis. Serv. 94-442 (3)(a)(West)(codified at various sections of 430 Ill. Comp. Stat. 651 (West Supp. 2002); Mass. Ann. Laws Ch. 140 § 129 (c) (Law Co-op. 1995 and Supp. 2002). Alabama and Maryland require reporting gun sales to state officials (Ala. Code § 13A-11-79 (1994); Md. Legs. Code tit. 29, § 03.01.09(A)(2001). While New Jersey requires the retailer to keep detailed records of gun sales and to make them available to law enforcement. N.J. Stat. Ann. § 2C: 58-a(b)(West Supp. 2002). Some states prohibit “assault weapons.” *See, e.g.*, N.J. Stat. Ann. § 2C: 39-5(f)(West Suppl. 2002); N.Y. Penal Law § 265.02 (McKinney Supp. 2002) (making it a felony to possess any machine-gun-like weapon). New York law also prohibits the manufacture of assault weapons, machine guns, large capacity ammunition feeding devices, and disguised guns. *See* N.Y. Penal Law § 265.10(1) (Consol. 2001).

With regard to other criminal products the legislative response has also been inconsistent. A few states ban radar detectors but the rest do not. Also many states ban switch-bade knives but no state currently bans tactical knives. In addition, some local communities ban the retail sale of alcohol.

¹⁸⁵Protection of Lawful Commerce in Arms Act, Pub.L.No. 109-92, 119 Stat. 2095 [hereinafter “Gun Protection Act”].

¹⁸⁶*Id.* at §2(b).

¹⁸⁷*Id.* at § 4(5)(A)

¹⁸⁸*Id.*

manufacturers from liability. The fact that such legislation was passed however is an indication that courts were slowly but surely moving in the direction of imposing liability on gun manufacturers for the vast amount of foreseeable, preventable and all too common harm and suffering caused to innocent bystanders by guns.¹⁸⁹ The Congressional and Presidential fondness for, and special treatment of the gun industry is truly unprecedented.¹⁹⁰ While legislation has favored certain industries before,¹⁹¹ never has an industry responsible for so much pernicious conduct and such vast amounts of devastating harm been intended to receive such complete insulation from liability.¹⁹² Nevertheless, several potentially effective

¹⁸⁹ See cases and theories of law discussed *supra* notes 56-133 and accompanying text.

¹⁹⁰ See Patricia Foster, *Good Guns (and Good Business Practices) Provide All the Protection they Need; Why Legislation to Immunize the Gun Industry from Civil Liability is Unconstitutional* 72 U.Cin.L.Rev. 1739 (2004) (the author discusses a forerunner of the Gun Protection Act that is very similar to the final legislation). Ms. Foster concludes “the broad, federal statutory immunity from liability granted the gun industry in the Arms Act [forerunner of the Gun Protection Act] is not merely unprecedented and contentious, but unconstitutional.” *Id.* at 1742 [notes omitted].

¹⁹¹ See, e.g., General Aviation Revitalization Act of 1994 (“GARA”) (created a statute of repose for one segment of the aviation industry); Air Transportation Safety and System Stabilization Act of 2001, Public No. 107-42, 115 Stat. 230 (2001) (created a federal strict liability cause of action for all property and personal injury claims resulting from the September 11 terrorist attacks, limited the airlines’ liability to the extent of their liability insurance coverage, and established the 9/11 Victim Compensation Fund which provided victims of the attack with a remedy); National Vaccine Injury Compensation Program, 42 U.S.C. §§ 300aa-11 (2001) (protection of the vaccine industry to ensure continued production of life saving vaccines and ensure that vaccine-injured plaintiffs would be fully and quickly compensated); Price-Anderson Act, 42 U.S.C. § 2210 (1970) (removed cases involving nuclear incident from the jurisdiction of the federal judiciary and created a fund to compensate potential victims).

¹⁹² In virtually every case where Congress has enacted such legislation, it sought to protect both the industry and the victim. See *supra* note 188. See also, Patricia Forster *supra* note 187 at 1750-1755 (discussing this point).

Legislation like the Gun Protection Act results from an illegitimate legislative process corrupted by woefully inadequate campaign finance laws; the idea is one person one vote not one dollar/one vote. See Patricia Foster *supra* note 187 at 1748 discussing the Arms Act (a forerunner of the Gun Protection Act) as follows:

The Arms Act passed through the House Judiciary Committee with such speed that its real purpose appeared to be “less about remedying a perceived boom of frivolous lawsuits as it [was] delivering a pro-gun bill in advance of the N[ational] R[ifle] A[ssociation]’s late April annual convention.” Chairman Sensenbrenner of the Judiciary Committee abruptly ended any opportunity for debate and amendment of the draft in committee and prompted criticism of maneuvers by the majority to silence dissent and promote special interest legislation. “The partisan manner in which this bill was rushed through the Committee constitutes a major disservice to the American public who expect their representatives to engage in a deliberative effort when constructing legislation of

such magnitude.”

Opponents of the Arms Act attempted to amend the draft on the House floor in order to hold the gun industry more accountable for such acts as negligence or the sale of guns to illegal drug users. None of the amendments were accepted, nor was a motion by Rep. Watt [D-NC] to recommit the bill to the Judiciary Committee to address the retrospective nature of the Arms Act. Instead, on April 9, 2003, the same day the opponents were quelled, the House passed the Arms Act with 285 yeas and 140 nays. [notes omitted];

See *City of New York v. Beretta U.S.A. Corp.* 401 F.Supp.2d 244 at 281-283 (2005) reviewing the concerns of some senators regarding the Gun Protection Act:

Some senators expressed reservations about exercising Commerce Clause authority to support the Act. For example, Senator Reed stated at length the factual arguments against the need for, or rationality of, the Act: A part of the rationale for this bill advanced by the proponents is that there is a crisis. There is a crisis with respect to the industry. They are about to lose their ability to manufacture. They are going to go bankrupt. We won't have any weapons for our national security. That is not substantiated by any of the facts before us. The gun lobby says it needs protection because it is faced with a litigation crisis. The facts tell precisely the opposite story. There is no crisis. There is a crisis in Iraq. There is a crisis in Afghanistan. There is a crisis across the globe with international terrorists. That is a crisis. But it is not a crisis with respect to gun liability in this country. Yet we move from legislation dealing with these huge crises, some of which have existential consequences to us, particularly if terrorists ever get their hands on any type of nuclear material, to a situation where there is no crisis.

The only two publicly held gun companies that have filed recent statements at the Securities and Exchange Commission contradict the claim that they are threatened by lawsuits. Smith & Wesson filed a statement with the SEC on June 29, 2005, stating that:

We expect net product sales in fiscal 2005 to be approximately \$124 million, a 5 percent increase over the \$117.9 million reported for fiscal 2004. firearms sales for fiscal 2005 are expected to increase by approximately 11 percent over fiscal 2004 levels. That is their SEC report which they have to file subject to severe penalties for misstatement and mistruth. I believe that. It appears to be a banner year for Smith & Wesson. There is no crisis. They go on and say in another filing on March 10, 2005:

In the nine months ended January 31, 2005, we incurred \$4,535 in defense costs, net of amounts received from insurance carriers, relative to product liability and municipal litigation. What they said is – this company, with a banner year of increased sales, with projections for better sales – they incurred \$4,535 in out-of-pocket costs to defend product liability and municipal litigation claims and suits. That is a crisis? Sales are up. Litigation costs in this particular area – out-of-pocket costs, to be accurate, of \$4,500. That is what they are telling the Federal regulators, under severe penalties for misstatements and even inaccurate statements. There is no crisis. In that same period for which they incurred \$4,535 in out-of-pocket costs, Smith & Wesson spent over \$4.1 million in advertising.... Meanwhile, gun manufacturer Sturm, Ruger told the SEC in a March 11, 2005 filing:

It is not probable and is unlikely that litigation, including punitive damage claims, will have a material adverse effect on the financial position of the Company. Essentially, what these two publicly reporting companies have said, despite all of the discussion by others that they are on the verge of bankruptcy, is: There is no material adverse effect on our financials based on this type of litigation. There is no crisis. So at the same time the gun makers are reporting to the SEC that

litigation costs are not likely to have a material adverse effect on the businesses, their trade associations have been rapidly inflating the unsubstantiated estimates of litigation costs. Gun lobby claims of alleged litigation costs have risen in \$25 million increments, with no data of any kind to support these claims because most of these companies in the industry are privately held. But I would suggest if the publicly held companies are offering their truthful admissions to the SEC – unless the privately held companies are woefully unmanaged or are unusually involved in this type of litigation – then these estimates have to be widely suspect.

[The number] of lawsuits faced by the gun industry is, if anything, far less than many other industries. From 1993 to 2003, 57 suits were filed against gun industry defendants, out of an estimated 10 million tort suits, according to the State Court Journal published by the National Center for State Courts – 57 out of 10 million. That is not a record of litigants out of control.

The actual monetary awards faced by the gun lobby are even less.... In any case, the purpose of lawsuits filed on behalf of victims is not to bankrupt the industry. In fact, some of the cases filed have sought only injunctive relief, including reforms of industry trade practices that would make the public safer. This is not always about money. In some cases it is about safety for the general public.... Even when plaintiffs seek commonsense reforms in the industry that could save lives, rather than have money damages, the gun lobby and its allies in Congress seek to shut the courthouse door in the face of these victims. *Id.* at S. 8913-14 (Sen. Reed).

See also, Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 U.Cin.L.Rev. 1103, 1156-57 (referring to the remarkably vigorous and well-financed lobbying activities of the National Rifle Association (“NRA”) at all levels of government). In another startling display of the unprecedented political power of the gun lobby, and the inability of the political system to withstand its corrupting influence, Congress adopted the latest in a series of riders appended to appropriations bills designed to limit the availability of gun trace data maintained by the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF trace data”). The ATF trace data is the primary source of data used to establish the improper merchandising methods of the gun industry. *See NAACP v. AcuSport, Inc.*, 271F.Supp.2d 435 (E.D.N.Y 2003). On November 22, 2005 the Science, State, Justice, Commerce and Related Agencies Appropriations Act of 2006, Pub.L.No. 109-108, 119 Stat.2290, 2295-96 was adopted by Congress and provides in part as follows:

[N]o funds appropriated under this or any other Act with respect to any fiscal year may be used to disclose part or all of the contents of the Firearms Trace System database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms and Explosives or any information required to be kept by licensees pursuant to section 923(g) of title 18, United States Code, or required to be reported pursuant to paragraphs (3) and (7) of such section 923(g), to anyone other than a Federal, State, or local law enforcement agency or a prosecutor solely in connection with and for use in a bona fide criminal investigation or prosecution and then only such information as pertains to the geographic jurisdiction of the law enforcement agency requesting the disclosure and not for use in any civil action or proceeding other than an action or proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms and Explosives, or a review of such an action or proceeding, to enforce the provisions of chapter 44 of such title, and all such data shall be immune from legal process and shall not be subject to subpoena or other discovery, shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based upon such data, in any civil action pending on or filed after the effective date of this Act in any State (including the District of Columbia) or Federal court or in any administrative proceeding other than a proceeding

arguments for imposing responsibility on gun manufacturers for harm to innocent bystanders, notwithstanding the Gun Protection Act, are apparent.¹⁹³ For example, the Gun Protection Act's constitutionality could be questioned because it infringes upon individual and state rights guaranteed by the Constitution.¹⁹⁴ In addition, the legislation uses the word "misuse" in the phrase unlawful "misuse" and thus may be deemed not to apply to unlawful "use,"¹⁹⁵ also § 4(5)(A) of the Act uses the phrase "resulting from" but § 2(b)(1) says "for harm solely caused by" and it can be argued that the harm is not caused *solely* by the criminal conduct, but also by the misconduct of the manufacturer in its design, manufacture, marketing or distribution of the product.¹⁹⁶ The harm may also be caused by

commenced by the Bureau of Alcohol, Tobacco, Firearms and Explosives to enforce the provisions of that chapter, or a review of such an action or proceeding; except that this proviso shall not be construed to prevent the disclosure of statistical information concerning total production, importation, and exportation by each licensed importer (as defined in section 921(a)(9) of such title) and licensed manufacturer (as defined in section 921(a)(10) of such title)... The obvious purpose of this legislation is to prevent plaintiffs from accessing the data they need to prove empirically the connection between the gun industries marketing and distribution methods and increasing gun, especially handgun, violence. This legislation was not passed to prevent frivolous lawsuits or because plaintiffs can't prove the harm caused by the gun industry – it was passed because the plaintiffs *can* prove their claim empirically with access to the data. The purpose of this legislation is not to protect the public, but rather to protect the gun industry at the expense of the public. For a discussion of this legislation *see*, *City of New York v. Beretta U.S.A. Corp.*, 429F.Supp.2d 517 (2006) (holding the rider would not prohibit the use of ATF data already obtained by the City of New York).

¹⁹³ *See, e.g.*, *City of New York v. Beretta U.S.A. Corp.*, 401F.Supp.2d 244 (2005) (ruling that the Gun Protection Act did not bar the cities claim of public nuisance against the gun industry for negligent and reckless merchandising of handguns).

¹⁹⁴ The unprecedented protection given to the gun industry by the Act raises many constitutional issues including: violation of the Due Process Clause of the Fifth Amendment, violation of the Takings Clause of the Fifth Amendment, prohibited federal commandeering under the Tenth Amendment, and violation of the fundamental right retained by the States under the Constitution to protect local populations against violence, crimes, and the negative public health effects of widespread mortality and morbidity all of which are increased by the manufacture, marketing and distribution of guns, especially handguns. *See*, Patricia Foster *supra* note 187 (concluding that "the broad federal statutory immunity from liability granted the gun industry in the Arms Act [a forerunner of the Gun Protection Act] is not merely unprecedented and contentious, but unconstitutional"). *Id.* at 1743. *But see*, *City of New York v. Beretta U.S.A. Corp.*, 401 F.Supp.2d 244 (2005) (concluding for purposes of an alleged public nuisance that the Gun Protection Act was constitutional but inapplicable to the nuisance claim) *Id.* at 268-270 and 271-98.

¹⁹⁵ *See* Gun Protection Act *supra* note 182 at §2(b)(1) and §4(5).

¹⁹⁶ *See infra* notes 265-286 and accompanying text.

the misconduct of distributors and/or dealers.¹⁹⁷ Additional questions regarding the Gun Protection Act's effectiveness may also be raised, however further discussion of the Gun Protection Act is beyond the scope of this article. Interestingly prior to the Gun Protection Act a number of individual states, municipalities and cities had passed legislation to ban so called Junk guns or Saturday Night Specials.¹⁹⁸ Such bans would certainly seem to be a valid exercise of the states police power.¹⁹⁹

There are other statutes relating to criminal products. For example, some states have laws prohibiting the use of radar detectors,²⁰⁰ or switch-blade knives.²⁰¹ Radar jammers are prohibited by FCC regulations.²⁰² In addition, as noted the Supreme Court found that the file sharing software offered by Grokster violated the Copyright Act.²⁰³ On balance, legislation, notwithstanding its potential, has proven ineffective in dealing with the criminal products problem.²⁰⁴ Moreover, some legislation like the Gun Protection Act actually exacerbates the problem.²⁰⁵

¹⁹⁷ See *supra* notes 132.

¹⁹⁸ See *supra* note 184.

¹⁹⁹ A fundamental right retained by the States is the right to protect its citizens – this right is often referred to as a states police power. See, Betsey J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 Wash. & Lee L.Rev. 475 (2002). The author states:

[T]he recognition of an irreducible moral or ethical imperative in tort law reaches the heart of the exercise of state sovereign power, giving the states an irreducible role to play as co-equal norm setters in our federal system. Insofar as state tort law serves this normative function, it is closer to the other areas granted special protection, particularly to criminal law. In that case, Congress's power to federalize tort law is subject to greater scrutiny under the recent federalism decisions. *Id.* at 535.

See generally, Eva H. Shine, *The Junk Gun Predicament: Answers Do Exist* 30 Ariz.St.L.J. 1183 (1998).

²⁰⁰ See *supra* note 31.

²⁰¹ See *supra* note 36.

²⁰² See *supra* notes, 32 and 33.

²⁰³ See *supra* notes 43 and 44.

²⁰⁴ See Eva H. Shine *supra* note 196 at 1202-03 (“Currently, teddy bears and toy guns are more heavily regulated than domestically produced handguns. ‘No federal regulatory agency, not even [the] ATF [or] the Consumer Product Safety Commission, has the power to impose minimum design and safety standards on domestically manufactured junk guns.’ [notes omitted]”).

²⁰⁵ See, e.g., *City of New York v. Beretta U.S.A. Corp.*, 401 F.Supp.2d 244 (2005) (discussed *supra* notes 131-132 and accompanying text); *Merrill v. Navegar, Inc.*, 28P.3d 116 (2001) (California had a statutory bar to gun manufacturer liability in civil suits for the use of firearms in illegal or criminal conduct [the statute was repealed in 2002] and the Supreme Court of California

III. CRIMINAL PRODUCTS AND RESPONDEAT MANUFACTURER: A PROPOSED SOLUTION

A. *Criminal Products Increase the Risk of Harm from Criminal Conduct*

The fundamental question to be answered in order to determine whether a product is a “criminal product” is whether the product given its characteristics, marketing and distribution increases the risk of harm from criminal behavior above the level that would otherwise prevail.²⁰⁶ The problem of criminal behavior in general is a societal problem and thus, the costs of such behavior are properly borne by society at large. However, where the otherwise existing or background risk of such harm is increased by the design, production, marketing or distribution of a product, then fairness and efficiency require that the cost of this harm be borne by the manufacturers of that product.²⁰⁷

A product can increase the risk of harm to innocent bystanders from criminal behavior either by increasing the likelihood of criminal behavior, or by increasing the severity of the harm likely to result from criminal behavior. For example, a product like a radar detector reduces the likelihood that a speeder will be caught, thus emboldening someone who would otherwise be less likely to speed for fear of receiving a ticket.²⁰⁸ The same can be said of a product like Photo Blocker spray, that is designed to be applied to a license plate in order to frustrate the use of traffic cameras in the enforcement of traffic regulations.²⁰⁹ Moreover, the radar detector or

applied the statute to dismiss a claim against the manufacturer of assault weapons used in a rampage to kill 8 people)(for a discussion of *Merill* see *supra* notes 15, 38 and 51).

²⁰⁶ See Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 Mich.L.Rev. 1266 (1997) (discussing characteristic risk as a basis for enterprise liability – a characteristic risk is one that is created by the enterprise that is different from the risks usually occasioned by the ordinary life of the community). *Id.* at 1275 and 1360. See, *Ira S. Bushey & Sons, Inc. v. United States*, 398F.2d 167 (2d Cir. 1968) (Friendly J.) (Enterprise liability rests “not so much” on policies of accident prevention and loss spreading “as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities”) *Id.* at 171.

²⁰⁷ See *infra* notes 245-300 and accompanying text.

²⁰⁸ See *supra* note 31.

²⁰⁹ See, e.g., Road & Track, December 2006 p. 157 (advertisement for “PhotoBlocker” using copy such as “Avoid Costly Traffic Tickets: ‘License plate spray foils traffic cameras’ [attributed to The Washington Times], ‘Photo Blocker Spray will hide your license plant from red light

plate spray allows the speeder to continue his illegal conduct for a longer time than would have otherwise been possible without the product. That is, without the product the speeder would have received more citations and “points” and have lost his privilege to drive.²¹⁰

Another example of a criminal product is a gun. A gun’s efficient killing power significantly increases the lethality of a criminal. This increases his likelihood of success and thereby his willingness to engage in the criminal behavior, and also increases the severity and the amount of harm to innocent bystanders likely to result from the criminal behavior.²¹¹ Simply put, a criminal with a gun may quickly and efficiently kill people, while the same criminal without a gun would have to expend considerably more time and effort, and thus, accept a much greater risk to accomplish the same result.²¹²

B. Criminal Product Definition

A product is a criminal product if it meets the following definition:²¹³

cameras...’ [attributed to CBS News] and “The question is ‘is it legal?’ It is practically impossible for police to spot plates that have been treated with the reflective spray. And in many jurisdictions there is no specific rule that says your tag must be photogenic” [attributed to Fox 31 News, Denver.].

²¹⁰ See *supra* note 31.

²¹¹ See *supra* note 15.

²¹² *Id.*

²¹³ Cf. *GunTorts*, *supra* note 4 at 192-200. The authors advocate a broader application of the “manifestly unreasonable design” concept from the Third Restatement to guns. *Id.* The authors suggest a six part test to determine whether a particular gun represents a manifestly unreasonable design. *Id.* While I agree with much of what the authors advocate, I believe that their focus on design is too narrow and that the six factor test they suggest suffers as a result. It really doesn’t matter, especially to the innocent bystander/victim whether he is injured or killed by an assault weapon, a hunting rifle or a semi-automatic pistol. The doctrine of respondeat manufacturer, unlike the doctrine manifestly unreasonable design, recognizes that an increase in the risk of harm from criminal activity may result even if the manufacturer designs the product for legitimate users. A semi-automatic pistol reasonably designed and distributed for self-defense is nevertheless very useful as a crime gun and as a result increases the risk of harm from criminal activity. The manufacturer’s decision to produce products designed to harm or kill humans carries with it a responsibility to compensate those innocent by-standers injured when the product is used in criminal or wrongful activity. Moreover, the imposition of financial responsibility is not the same as banning the product. The actual criminal or wrongful use of the product will determine, and should, the actual level of liability to which the manufacturer is exposed. Obviously, under respondeat manufacturer, the manufacturer, marketing and distribution practices will have a direct impact on the level of liability to which the manufacturer is exposed. If the manufacturer markets

A product is a criminal product if:

(a) its intended function is to harm or kill people²¹⁴ or;

(b) its intended or normal function directly enables, facilitates or assists criminal conduct such that the design, production, marketing or distribution of the product increases the risk of harm to innocent bystanders from criminal behavior.

(c) factors important in establishing that the design, production, marketing or distribution of a product increases the risk of harm from criminal behavior include:²¹⁵

(i) whether the product is commonly used in criminal activity,

(ii) whether the product has now or in the foreseeable future is likely to have a significant legitimate use, and

(iii) whether the product could be designed, produced, marketed or distributed in a way that would preserve the legitimate use but eliminate or

in ways to increase acquisition of the product by criminals by for example, widely distributing the product rather than limiting distribution to law enforcement or military personal then the manufacturers liability will, and again should be, greater.

²¹⁴The doctrine of respondeat manufacturer recognizes that an increase in the risk of harm to bystanders from criminal activity results any time a criminal product is produced – even if the manufacturer’s only desire is to provide the product to legitimate users. Thus, the requirement that the products intended function is to harm or kill – does not mean that the defendant must have intended that the product be used to harm the plaintiff or that the defendant intended that the product be used in criminal activity. The intent required is objective and relates only to the function of the product – not the actual use to which the product is put. The basis of liability under the doctrine is that the manufacturer has imposed (regardless of whether intended) an increased risk of harm from criminal activity on bystanders. This increased risk results from the manufacturer’s decision to produce a product that is designed to harm or kill people or that has as its normal function the direct enabling, facilitating or assisting of criminal conduct. Thus, a product would fall under part (a) of the criminal product definition if a reasonable person would conclude that the product was designed to harm or kill people. For example, all handguns and all assault style firearms (e.g. automatic or semiautomatic firearms) would be considered criminal products. A bb gun or a pellet gun would not fit the definition under part (a) because neither product’s intended function is to harm or kill people, nor is either product likely to fall within part (b) of the definition. A shotgun or .22 rifle may or may not be considered a criminal product depending on the evidence concerning design, marketing, distribution, and actual use of those products.

²¹⁵These factors are only relevant as to whether the product in question is a criminal product pursuant to part (b) of the definition. These factors are not relevant to the application of part (a) of the criminal product definition. In order for a product to be considered a criminal product under part (b) it is not necessary that all of these factors be satisfied. The determination under part (b) turns on whether the products existence (manufacture, marketing etc.) increases the otherwise existing risk of harm to innocent bystanders from criminal activity.

discourage illegal use.

A product that is designed to harm or kill is a criminal product because manufacturers of such products knowingly subject the public to an increased risk of harm from criminal behavior,²¹⁶ and thus, stand in a special protective relationship with innocent bystanders who might be injured by the product while it is being used in criminal activity.²¹⁷

The requirement that non-lethal products directly enable, facilitate or assist criminal conduct, recognizes the fact that virtually any product may be used in criminal conduct. For example, sneakers may help a criminal escape by helping him run fast, eye glasses may assist the commission of a crime by improving the criminal's eye sight, or a car may assist a crime by transporting the criminal to a safer location. However, none of these products are criminal products because their normal or intended function does not directly enable, facilitate or assist criminal behavior. The normal function of sneakers is to allow the user to run faster, the normal function of eyeglasses is to improve sight and the normal function of an automobile is transportation. The normal function of these products provides only indirect assistance to criminals. But products like radar detectors,²¹⁸ license plate sprays²¹⁹ or digital file sharing software²²⁰ have as their normal or intended

²¹⁶For example, manufacturers of guns choose a course of conduct – the manufacture and sale of guns – knowing that some of their guns will be used in illegal or criminal conduct. As a result of this knowledge, gun manufacturers in some broad sense “intend” the illegal or criminal use. If the manufacturer knows that a certain result, (criminal use of the gun) is sure to follow from certain conduct, (the manufacture and sale of guns), and the manufacturer chooses nevertheless to engage in the conduct then the manufacturer can be said in some broad sense to intend the result. See, Keating *supra* note 5 at 1342 where he states:

When we tunnel under the English Channel, construct a highway, or build a skyscraper, the ‘cost’ in lives lost and limbs crushed may be foreseeable with considerable actuarial precision. Decisions to commence and carry through such projects therefore involve intending the accidental injuries and deaths that the projects inevitably entail. When we will the realization of an end, we will the means necessary to its attainment. However, this type of broad intent does not indicate culpability or even necessary fault, it does however indicate financial responsibility for the harm that results from the criminal or illegal use of the product.

²¹⁷See *Hamilton supra* note 1 at 821 (... the special ability to detect and guard against the risks associated with their products warrants placing all manufacturers, including these defendants, in a protective relationship with those potentially put in harms way by their products.) *Id.* (citations omitted).

²¹⁸See *supra* notes 31-33 and accompanying text.

²¹⁹See *supra* note 209.

²²⁰See *supra* note 43.

function the direct enabling of criminal behavior; speeding,²²¹ violation of traffic rules and regulations,²²² and copyright infringement²²³ respectively. In addition, an argument can be made that a product like alcohol has as its normal function inebriation of the consumer²²⁴ (even one drink causes inebriation to some degree; impairment begins with first drink)²²⁵ and thus, directly enables drunkenness and crimes in which drunkenness is a necessary element such as driving under the influence.

C. The Doctrine of Respondeat Manufacturer

The public interest in human life, health and safety is the justification for courts to adopt the doctrine of respondeat manufacturer and expand the sphere of financial responsibility for criminal or wrongful use of criminal products to include the manufacturers of such products. Under this Doctrine, manufacturers of criminal products are vicariously financially liable for the harm caused to innocent bystanders by the use of their products in criminal or wrongful activity. This vicarious liability arises from the special relationship between manufacturers of criminal products and innocent bystanders who may be injured by the use of such products in criminal activity.²²⁶ This special relationship is the result of the manufacturers' unilateral decision to subject innocent bystanders to an increased risk of harm from criminal activity.²²⁷ Manufacturers subject innocent bystanders to such increased risk as a result of the manufacturers' decision to pursue profit from designing, manufacturing, marketing, and placing into the stream of commerce criminal products.²²⁸

If manufacturers of criminal products are not forced to bear financial responsibility for the wrongful or criminal use of their products then they are unfairly permitted to force some of the expense of their business (the cost of injury or death from the use of the product in crime) onto innocent

²²¹ See *supra* notes 31-33 and accompanying text.

²²² The advertisement for PhotoBlocker suggests the violation of traffic lights, tolls, and speeding regulations. See *supra* note 209.

²²³ See *supra* note 43.

²²⁴ See *supra* notes 45-47 and accompanying text.

²²⁵ See *supra* notes 45-47 and accompanying text.

²²⁶ See *supra* note 217.

²²⁷ See *supra* notes 206-212 and accompanying text.

²²⁸ See definition of criminal products *supra* at notes 213-225 and accompanying text.

bystanders yet retain all of the profits for themselves.²²⁹ Without the doctrine of respondeat manufacturer, manufacturer's of firearms, for example, have no incentive to distinguish sales to would-be-criminals from sales to non-would-be criminals. Under current law, a sale is a sale. A sale to a would-be-criminal carries exactly the same cost and provides the same profit to the manufacturer as any other sale. Thus, not only do manufacturers have no incentive to avoid such sales – in fact they have a strong incentive to encourage them.²³⁰ As noted, under current law a sale is

²²⁹Manufacturers of criminal products, even if not intentionally, profit from the sale of their products to those who use them in criminal or wrongful activity. In the case of criminal products, this criminal or wrongful use is not unexpected, in fact it is inevitable. Criminal product manufacturers should not be able to accept the advantages (profit) of making criminal products without also expecting to pay for harm enabled by their activity. *See Keating supra* note 5 at 1360 (“The general argument for enterprise liability is the argument that it is fair to make enterprises pay for the accidental injuries [accidental from the point of view of the gun manufacturer – i.e. assuming that selling to a person who would use the product criminally was not intentional but accidental] characteristic of their activities whenever doing so will distribute the financial burden of those accidents among those who have benefited from the underlying risk impositions.”) *Id.*

Cf. Alan O. Sykes, The Economics of Vicarious Liability, 93 Yale L.J. 1231, 1241-1248 (1984) (if liability is not imposed on the business for the torts of its agent/employees then the business may profit at the expense of the tort victims) Sykes states:

Many agents are potentially insolvent in the face of a substantial judgment against them. Indeed, if an agent's activities create the risk of a judgment that exceeds the agent's net worth and the agent can obtain a discharge in bankruptcy, then the principal and the agent can use the agent's potential insolvency to their advantage under a rule of personal liability. The agent's insolvency increases the expected profits of the principal agent enterprise by the value of the judgment less the agent's ability to pay, multiplied by the probability of the judgment. A rule of personal liability thus allows the principal and the agent jointly to increase their expected profits by eschewing any risk-sharing agreement or any insurance policy that averts agent insolvency and concurrently provides greater compensation to injured parties. *Id.* 1241-42.

Finally, when agents are potentially insolvent, the perceived costs of production for each principal-agent enterprise understate the true economic costs of production. The attendant excess profit either induces enterprises to expand, attracts entry into their industries, or both. Eventually, expansion in a competitive market reduces the selling price of agency output until the incentive for further expansion disappears. At that point, however, the selling price is below the true economic cost of each unit of output, and the level of production is inefficiently high. *Id.* at 1244.

Vicarious liability has yet another benefit. Because the enterprise no longer earns excessive profits from the evasion of liability judgments by the insolvent agent, the incentive for inefficient expansion disappears, and the scale of the enterprise (or its industry) contracts to its socially efficient level. *Id.* at 1247.

For this analogy the criminal actor using the criminal product may be thought of as an agent/employee who disobeys his principals order to act with all due care.

²³⁰For example, criminals are an important market segment for the gun industry. *See supra*

a sale, and sales are good for business.²³¹ The truth of this statement can be readily seen in the marketing practices of firearms manufacturers,²³² and other makers of criminal products.²³³ For example, advertisements for firearms or tactical knives regularly appear in outlets such as *Soldier of Fortune* aimed at survivalists or potential criminals.²³⁴ In the *Grokester* case the court noted that advertisements were aimed at former Napster users and encouraged infringement.²³⁵ This type of marketing is not necessarily an indication that criminal product manufacturers want to encourage criminal use, it is simply an indication that they want to sell their product, and that they currently have no reason to care whether their buyer plans to use the product legally or illegally.²³⁶ Criminal product manufacturers are in a business, and as in any business there is a never ending pressure to increase sales and revenue. Criminal product manufacturers, such as gun makers, respond to the market and design, manufacture, market and distribute in whatever way will make the most money.²³⁷ Not only is there a natural incentive to do this, but in the case of a publicly traded company there is an obligation to do it.²³⁸ It is the proper role of the law as an institution to regulate the market place and create incentives that align the interests of the market participants²³⁹ with those of society. Fulfilling this role is the

note 14.

²³¹The national marketing director for a gun manufacturer responded to questions about the effect of news reports of its guns being used in sensational murder or other crimes by noting that such reports invariably helped sales; while condemnations of the weapon by law enforcement and other government officials – generates more sales – “it might sound cold and cruel, but I’m sales oriented.” *See supra* note 51.

²³²*See supra* note 251.

²³³*See supra* notes 36 and 209.

²³⁴*See supra* note 251.

²³⁵*See supra* note 43.

²³⁶*See supra* note 228 (“it might sound cold and cruel but I’m sales oriented”).

²³⁷*See supra* note 50 (gun manufacturers introduced new generations of deadlier semi-automatic handguns in the 1980s in order to rejuvenate sales and increase profits).

²³⁸Shareholders have a right to expect the managers of the business to act to maximize profits.

²³⁹*See Bogus supra* note 9 at 72 (arguing in favor of generic or product category liability. Professor Bogus states: “At least in some quarters, there appears to be increasing support for the view that the courts have an appropriate role – that the common law principles require that manufacturers’ of unreasonably dangerous products be held responsible for costs their products impose on society-at-large.” *Id.* at 72. It is a proper function of tort law to assign responsibility and create appropriate incentives for safety when there is protracted legislative inaction in response to a continuing serious personal injury toll. *Id.* *See Kelley v. Guinnell*, 476 A.2d 1219

legitimate province of the common law as well as statutory law.²⁴⁰ In the case of criminal products, the market while it is functioning logically is not functioning properly. Judicial adoption of respondeat manufacturers will help remedy that by creating appropriate incentives for manufacturers and other market participants.

In addition, the manufacturers of criminal products are in the best position to fairly and efficiently manage the cost of the harm that results from the criminal use of their products. The manufacturers can manage this cost in several ways. Manufacturers can reduce the overall cost by producing less of the product²⁴¹ or by changing the design, marketing or distribution of the product,²⁴² and as discussed, adoption of respondeat manufacturer will give manufacturers an incentive to do just that.²⁴³ In addition, manufactures can fairly distribute the cost of the harm among those who benefit from the product through pricing.²⁴⁴

(N.J. 1984 (finding social host liability for serving liquor to intoxicant.); *MGM v. Grokster supra* note 43 at 917 (One ... infringes vicariously by profiting from direct infringement while declining to exercise the right to stop or limit it ... [the] Copyright Act does not expressly render anyone liable for [another's] infringement, [but] these secondary liability doctrines emerged from common law principles and are well established in the law." [citations omitted]); Patricia Foster, Good Guns (and Good Business Practices) Provide All the Protection They Need: Why Legislation to Immunize the Gun Industry from Civil Liability is Unconstitutional, 72 U. Cin. L.Rev. 1739 (2004) ("[T]here has been a massive failure of democracy when it comes to guns. This failure is so great that even the simplest regulations concerning the sale of guns have not been implemented. When democracy so blatantly fails to address public harms as serious as deaths and injuries due to criminals' gun violence, a judicial solution begins to seem more attractive.") (citations omitted).

²⁴⁰ See *supra* note 235.

²⁴¹ See *Hamilton supra* note 1 (the claim of negligent marketing in that case – that resulted in liability of the defendants at trial – was based in part on an oversupply of handguns by the industry). *Id.* at 825-827. Such oversupply is to be expected without the adoption of a doctrine like respondeat manufacturer, to impose liability on criminal product manufacturers for the criminal use of their products. See *Sykes supra* note 5 at 125-51.

²⁴² See *supra* notes 49-52 and *intra* 265-286 and accompanying text (discussing design, marketing and distribution decisions of gun manufacturers that increase the likelihood of criminal use of their products).

²⁴³ See *supra* note 228-240 and accompanying text.

²⁴⁴ Cf. *Bogus supra* note 9 at 50-51 (discussing liability of tobacco companies).

There is, however, another dimension to the question of personal responsibility. In virtually all instances, the smoker does not bear the financial burden of her choice; the medical reimbursement system shifts that burden to society-at-large. If the smoker has private medical insurance, the costs will be spread among all the policy holders; if not, the costs will be forced upon the taxpayers through the Medicare or Medicaid systems. These costs run into the tens of billions of dollars

IV. ANALYSIS OF RESPONDEAT MANUFACTURER

A. Risk and Profit

The previous sections of this article have established the following relevant facts. Criminal products differ from other products because criminal products are either designed to kill or injure, or their design, manufacture, marketing and/or distribution results in an increase in the otherwise existing risk of harm to innocent bystanders from criminal activity. The manufacturer knows or should know that its decision to manufacture a criminal product will increase the risk of harm to the public from criminal activity. Thus, a manufacturer who chooses to make a criminal product also chooses to impose this increased risk of harm on the public.²⁴⁵ In addition, the manufacturer is in the best position to fairly and efficiently distribute the cost of this risk among those who benefit from the product.²⁴⁶ Also, manufacturers of criminal products exercise significant control over the use of their products.²⁴⁷ The manufacturers' actions are, of course, motivated by the desire to make money. Finally, the presumption in this article is that it is not illegal per se to design, manufacture, market and distribute criminal products, nor will the adoption of the doctrine of respondeat manufacturer result in a judicial ban of criminal products.²⁴⁸

annually. The real question is whether the costs of tobacco-related diseases should be borne by those who benefit from tobacco or by society-at-large, and there is strong sentiment that tobacco companies and smokers should bear those costs (notes omitted). *Id.*

²⁴⁵ See, e.g., Restatement (Third) of Torts: Products Liability §2A, Cmt.(a) “[b]ecause manufacturers invest in quality control at consciously chosen levels, their knowledge that a predictable number of flawed products will enter the marketplace entails an element of deliberation about the amount of injury that will result from their activity.” Cf. Keating *supra* note 5 at 1339-1344 (arguing that “mere knowledge of statistically certain harm, however actuarially, precise” does not always establish morally relevant intentionality) *Id.* at 1344. With respect to criminal product manufacturers, the choice to produce criminal products coupled with the statistically certain use of some of these products in criminal or wrongful activity results in the requisite moral intentionality required to impose financial responsibility for the actual harm that results from the criminal, or wrongful, use of these products.

²⁴⁶ See *infra* notes 292-300 and accompanying text.

²⁴⁷ See *infra* notes 265-286 and accompanying text.

²⁴⁸ See, e.g., Bogus *supra* note 9 at 69-70 (Professor Bogus is discussing generic product liability, but his point is equally applicable to liability under respondeat manufacturer), Professor Bogus states:

These facts support two conclusions. First, the increased risk of harm to the public imposed by manufacturers of criminal products in pursuit of profits represents a cost properly associated with the manufacturer's business. Second, because the manufacturer unilaterally imposes this increased risk on the public, fairness requires that the manufacturer be financially liable for the harm suffered when the risk is realized. The doctrine of respondeat manufacture achieves both fairness and efficiency and is consistent with these two conclusions. The doctrine ensures that the cost of the increased risk of harm to the public from criminal activity will be borne by the manufacturer unless the criminal actor can completely compensate the victims.²⁴⁹

B. Control – Manufactures of Criminal Products Exercise Significant Control Over the Use of Their Products.

1. Similarities Between Respondeat Manufacture and Respondeat Superior

The doctrine of respondeat manufacturer suggested here is similar in many ways to the doctrine of respondeat superior that imposes vicarious liability on employers for certain tortuous conduct of their employees.²⁵⁰ The imposition of vicarious liability under respondeat superior is often said

Generic liability is not a judicial ban of products. A manufacturer is free to continue selling his product regardless of whether liability attaches. He may, of course, be forced to increase the price of the product to cover liability costs, and he may be driven from the market if he cannot do so successfully. Yet that is exactly the market-determined result that many claim they want. "Decisions regarding which product categories should generally be available to users and consumers are best left to the marketplace," Henderson and Twerski write, for example. It is the court's responsibility however to redress harm that one party inflicts on another, and that is what the court is doing when it requires those who benefit from a product to pay for the costs that fall indiscriminately upon others. [notes omitted].

Professor Bogus argues for generic or product category strict product liability, but with a robust assumption of the risk defense. *Id.* at 30-39. In this way Professor Bogus would prevent a criminal accomplice who was shot, for example, from being able to hold the manufacturer liable for his injuries. The author believes that respondeat manufacturer provides a better solution to the criminal products problem because the products are not defective in the normal sense of the word, and the liability is really a type of vicarious liability.

²⁴⁹ See *infra* notes 301-316 and accompanying text.

²⁵⁰ See W. PROSSER, HANDBOOK OF THE LAW OF TORTS 460 (4th ed. 1971); Restatement (Second) Agency §219 (1958); Restatement (Third) Agency §2.04.

to be based on control.²⁵¹ Specifically, because of the employer/employee relationship the employer is deemed to be able to control the employee.²⁵² Thus, the employer, at least in theory, should be able to control his exposure to vicarious liability for the tortious conduct of the employee by exercising his control over the employee.²⁵³

However, while an employer has the right to exercise significant control over its employees, its control is far less than absolute.²⁵⁴ The limits of the employers control become clear when one considers that courts hold that an employer cannot avoid liability for the wrongful acts of an employee by ordering the employee to obey the law, by properly training or supervising the employee or even by threatening to discharge employees that act carelessly.²⁵⁵ For example, assume that an employer hires an employee to drive a delivery truck for the employer. Further, assume that the employer will only hire drivers who are 18 years of age or older and who have no record of traffic violations. In addition, let us assume that the employer requires each driver to attend a driver-training refresher course with both classroom and on the road instruction and that the drivers are clearly instructed not to violate any traffic rules or regulations. Under the doctrine of respondeat superior if this well hired and trained driver drives negligently and causes injury to an innocent third party the employer will

²⁵¹ See, e.g., Restatement (Second) Agency §220(2) (1958); Restatement (Third) Agency §2.04 Cmt.(b) (It [Respondeat Superior] is limited to the employment relationship, and to conduct falling within the scope of that relationship because an employer has the right to control how the work is done.) *Id.*

²⁵² See Restatement (Second) Agency §1 (1958) (defining agency in terms of the agent being “subject to his [principal’s] control”). *Id.*; Restatement (Second) Agency §2(1) – 2(2) 1958. (1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service. (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master. *Id.*

²⁵³ In practice, however, the “right” to control does not necessarily mean the employer has actual control of the employees physical conduct. What it does mean is that if the employee fails to follow the employers orders the employee will be liable to the employer. See Restatement (Second) Agency §228.

²⁵⁴ If employers had absolute control employees would never engage in tortious conduct.

²⁵⁵ See W. PROSSER, HANDBOOK OF THE LAW OF TORTS §70 (1971) (“The fact that the servant’s act is expressly forbidden by the master, or is done in a manner which he has prohibited...does not in itself prevent the act from being within the scope of employment. A master cannot escape liability merely by ordering his servant to act carefully...no matter how specific detailed and emphatic his orders may have been...”) *Id.*, Restatement (Second) Agency §230.

nevertheless be held vicariously liable for the harm to the third party.²⁵⁶

Even though the employer is held vicariously liable in the above example, its efforts to improve the safety of its drivers are not wasted. Overall, such efforts should reduce the employer's exposure to liability by reducing the number of accidents caused by its drivers.²⁵⁷ In fact, if the employer were not held vicariously liable the employer might find it economically beneficial to take more risk regarding its drivers because it could save money, but avoid any risk of liability from its choice.²⁵⁸

The fact that in practice employers have rather limited control over their employees indicates that there are other reasons, in addition to control, for imposing vicarious liability on employers under the doctrine of respondeat superior.²⁵⁹ This article if focused on respondeat manufacturer not

²⁵⁶ *Id.* According to Prosser "this has been clear since the leading English case in which the Omnibus Company was held liable notwithstanding definite orders to its driver not to obstruct other vehicles." *Id.* (citing *Limpus v. London General Omnibus Co.*, 1862, 1 H.&C. 526, 158 Eng.Rep. 993).

²⁵⁷ In fact, this is one reason for the doctrine of respondeat superior. In the words of the drafters of the Third Restatement of Agency, "Respondeat superior creates an incentive for principals to choose employees and structure work within the organization so as to reduce the incidence of tortuous conduct. This incentive may reduce the incidence of tortuous conduct more effectively than doctrines that impose liability solely on the individual tortfeasor. Restatement (Third) Agency §2.04 cmt. (b).

²⁵⁸ See Sykes *supra* note 226 ("...the principal and agent can use the agents potential insolvency to their advantage under a rule of personal liability") *Id.* 1241.

²⁵⁹ Prosser states the following reasons:

What has emerged as the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the basis of all past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large. Added to this is the makeweight argument that an employer who is held strictly liable is under the greatest incentive to be careful in the selection, instruction and supervision of his servants, and to take every precaution to see that the enterprise is conducted safely. Notwithstanding the occasional condemnation of the entire doctrine which used to appear in the past, the tendency is clearly to justify it on such grounds, and gradually to extent it [notes omitted].

See PROSSER *supra* note 63 at §60 (p. 459). The drafters of the Third Restatement of Torts add to this list the "deep pockets" of the employer and the employer's ability to insure the risk. Respondeat superior also reflects the likelihood that an employer will be more likely to satisfy a

respondeat superior but the similarity of the doctrines is such that many of the same reasons that support respondeat superior also support respondeat manufacture. In the case of respondeat superior the additional justifications, beyond control, for imposing liability include: the employer's choice to pursue profit by hiring employees and exposing society to the risks inherent in engaging employees in the employers business (the employer exercises complete control over this decision).²⁶⁰ For example, in the case of the driver discussed above, the employer chose to pursue profit by exposing the public to the risk that results from putting additional drivers (even well trained ones) on the road.²⁶¹ Finally, respondeat superior imposes vicarious liability on the employer because the employer is in the best position to minimize and fairly distribute the loss.²⁶² As discussed above, the employer can minimize the loss by providing proper training and incentives for its employees. The employer can distribute any unavoidable loss by pricing its product or service to reflect the increased risk of harm from its use of employees.²⁶³ As a result, those who benefit from the employers business will pay for the increased risk of harm from the employers use of employees. The harm caused by the employees is treated as an expense of the production of the good or service. In short, the harm caused by the negligence of an employee, when acting within the scope of his employment, is treated as a cost properly associated with the employers business.²⁶⁴

judgment. Moreover, an employer may insure against liability encompassing the consequences of all employees' actions, whereas individual employees lack the incentive and ability to insure beyond any individual's liability or assets. *See* Restatement (Third) Agency §2.04 cmt.(b).

²⁶⁰ *See supra* note 255.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ As noted *supra*, in the case of criminal products if the doctrine of respondeat manufacturer is adopted the cost of the harm inflicted by the wrongful or criminal use of the product will be passed on to those who benefit from the availability of the product via pricing. It may be that some or all of the customers will find the higher price unacceptable and thus, no longer purchase the product – but that is exactly how a free market should operate. The unwillingness of the market to pay for the costs associated with the product indicates that production of the product is a misallocation of resources and should cease. *See supra* note 248.

²⁶⁴ Under respondeat manufacturer, the requirement that the user of the product be liable for the wrongful or criminal use of the product that caused the innocent bystander's injuries is analogous to the requirement under respondeat superior that the employees tortious conduct occur within the scope of his employment. In the case of respondeat superior, this requirement ensures that the employees tortious conduct and the harm caused by it is an expense that should be borne by the business. Likewise in the case of respondeat manufacturer, the requirement that the user of

2. Respondeat Manufacturer - Control

Respondeat manufacturer, like respondeat superior, is based in part on control. The manufacturers of criminal products exercise significant, albeit not absolute, control over the likelihood that their product will be used in criminal activity.²⁶⁵ The control exercised by criminal product manufacturers is control in the enabling sense that Prosser discusses.²⁶⁶ Financial responsibility is placed upon the criminal product manufacturer because, having engaged in the manufacturer of criminal products, which

the product be liable for the wrongful or criminal use of the product ensures that the bystander's injuries are a manifestation of the increased risk of harm (to bystanders from the wrongful or criminal use of the product) that the criminal product manufacturer has unilaterally imposed on the bystander.

²⁶⁵ See, e.g., *Hamilton supra* note 1 at 820 (“Defendants’ [handgun manufacturers] ongoing close relationship with downstream distributors and retailers putting new guns into consumers’ hands provided them with appreciable control over the ultimate use of their products.”) *Id.*; (“First, the special ability to detect and guard against the risks associated with their products warrants placing all manufacturers, including these defendants [handgun manufacturers], in a protective relationship with those foreseeably and potentially put in harm’s way by their products.”) *Id.*; H. Todd Iveson, *Manufacturer’s Liability to Victims of Handgun Crime: A Common Law Approach*, 51 *Fordham L.Rev.* 771, 783-84 (1983) (“[B]ecause of the inherent dangerousness of handguns, the manufacturer has a special responsibility to guard against risks that may result from a failure to fulfill this common-law duty.”); *City of New York v. Beretta supra* note 11 at 274.

The complaint also quotes Robert Lockett, a firearms dealer named the 1993 Dealer of the Year by the National Alliance of Stocking Gun Dealers, whose article was published in *Shooting Sport Retailer*, a firearms industry trade magazine, as declaring: “I’ve been told INNUMERABLE times by various manufacturers that they ‘have no control’ over their channel of distribution. I’ve been told INNUMERABLE times that once a firearm is sold to a distributor, there is no way a manufacturer can be held responsible for the legal transfer and possession of a firearm.... IF YOU DO NOT KNOW WHERE AND HOW YOUR PRODUCTS ARE ULTIMATELY BEING SOLD – YOU SHOULD HAVE KNOWN OR ANTICIPATED THAT THEY WOULD BE ILLEGALLY SOLD AND SUBSEQUENTLY MISUSED. Let’s just get down and dirty. We manufacture, distribute, and retail items of deadly force.... Your arguments of yesterday regarding lack of accountability were pretty flimsy. Today, they are tenuous at best. Tomorrow, they are not going to indemnify you. We are going to have to get a whole lot better – and fast – of being in control of our distribution channel. Compl. paragraph. 104 (emphasis in original).

Id.; *NAACP v. Acusport, Inc.* 271F.Supp.2d 435 (E.D.N.Y. 2003) (court found clear and convincing evidence that manufacturers and distributors of handguns negligently or intentionally arm criminals; that intervening actors pulled the trigger did not relieve the gun industry of responsibility.) *Id.* at 449, 451, 482.

²⁶⁶ See *supra* note 259; Robert L. Rabin, *Enabling Torts* 49 *DePaul L.Rev.* 435 (discussing the liability of commercial activity systematically conducted in circumstances that heighten third-party risks of serious injury to others).

will, on the basis of all past experience involve harm to innocent bystanders through the use of the product in criminal or wrongful activity, and sought to profit by it, it is just that he, rather than the injured innocent bystander, bear such responsibility.²⁶⁷ Manufacturers make (control) many decisions regarding their product that directly affect the likelihood that the product will be used in crime. For example, the initial decision to produce the product obviously affects the risk that it will be used in crime.²⁶⁸ If radar detectors were not produced at all for example, no driver would be encouraged to speed by the reduced risk of getting caught that the product claims to provide.²⁶⁹ Similarly, the manufacturer decides (controls) how much of the product to produce. The level of production also affects the risk of criminal use associated with the product.²⁷⁰ The decision to produce more of the product increases the likelihood that the product may be used in crime.²⁷¹

Design decisions also affect the risk of criminal use associated with the product. Manufacturers may choose to design their products in a way that either reduces or increases the products attractiveness to criminal users.²⁷² For example, the decision to design handguns that are semi-automatic, inexpensive, easily concealable and/or compatible with silencers, flash suppressors, high capacity magazines, barrel insulators or trigger holders increases the attractiveness of the product to criminal users.²⁷³ Other

²⁶⁷ Cf. *supra* note 259.

²⁶⁸ This is very obvious for egregious products like black talon ammunition, assault style weapons, radar detectors, license plate sprays, etc.

²⁶⁹ See *supra* note 31.

²⁷⁰ See, e.g., *City of New York v. Beretta* *supra* note 11 at 273:

In the complaint, plaintiff offers dramatic statistics, both for the city and the nation, regarding the number of homicides and other crimes involving handguns. It paints a powerful picture of how some members of the firearms industry knowingly profit from illegal commerce in handguns. Plaintiff claims, for instance, that defendants produce, market and distribute substantially more handguns than they reasonably expect to be used by law-abiding purchasers. Particularly oversupplied are those states with weak handgun restrictions, specifically “certain southern states along the I-95 corridor. ...” Compl. <paragraph> 88. According to plaintiff, defendants sell excess guns “with the knowledge that the oversupply will be sold to prohibited purchasers in states, counties and cities, like New York City, which have strong restrictions on the purchase and ownership of firearms.” *Id.*

²⁷¹ *Id.* The greater the supply of a product the more difficult it is to monitor the product and prevent it falling into the hands of someone likely to use it in criminal or illegal activity.

²⁷² See *supra* notes 31-51.

²⁷³ See *supra* notes 31-51 and accompanying text, especially note 38.

examples include decisions to design so called “tactile” knives that flip open and lock in position instantaneously and have a grip designed for fighting,²⁷⁴ and the decision of liquor companies to design soda or juice like alcoholic drinks, like, for example, hard lemonade or raspberry fizz wine coolers, or Spykes malt beverages.²⁷⁵ The tactical knives are designed to appeal to those who would use them as weapons,²⁷⁶ while the soda, juice or even hot chocolate flavored alcoholic drinks are designed to appeal to young, often underage drinkers who statistically are most likely to drink to excess and/or to drink and drive.²⁷⁷ Finally, manufacturers make decisions regarding the marketing and distribution of their products that also affect the likelihood that their products will be used in crime.²⁷⁸ For example, in the case of an assault style weapon a manufacturer could decide to market and distribute it only to the military or the police, or the manufacturer could decide to market and distribute the product more broadly to the general public.²⁷⁹ When a manufacturer chooses to market and distribute to the general public he is increasing the likelihood that the product will be used in crime.²⁸⁰ In addition, a manufacturer may choose the individuals to whom it distributes its product.²⁸¹ The manufacturer may also trace the product to ultimate consumers and thus create data that will allow it to determine which individual distributors are most likely to put products in

²⁷⁴ See *supra* note 36.

²⁷⁵ Spykes are a malt beverage from Anheuser-Busch Cos. They are packaged in colorful small bottles (easily mistaken as a non-alcoholic product) in nine flavors including “Hot Chocolate” and “Spicy Lime.” The drinks contain 12% alcohol by volume and also contain caffeine, ginseng and guava. See www.spykes.com last visited August 12, 2007. According to the web site Spykes may be used to “spice up your beer” or “invent a new cocktail” *Id.* In May 2007 “about 30 state attorneys general signed a letter addressed to August A. Busch IV, Anheuser’s chief executive, expressing their “serious concern” about the companies promotion and sale of caffeine-infused alcoholic beverages. See David Desmodel, *Label Ruling Temporarily Halted Anheuser Drink*, Wall St. J., May _____, 2007 at 1. Some advocacy groups and politicians have complained that Anheuser’s marketing of Spykes is designed to subtly entice underage drinkers. *Id.*

²⁷⁶ See *supra* note 36.

²⁷⁷ See *supra* notes 45-47 and note 275.

²⁷⁸ See *supra* notes 36 and 51 and accompanying text.

²⁷⁹ See, e.g., *McCarthy v. Olin Corp.* discussed *supra* note 13 (black talon bullets, designed to increase the wounding and killing power of the ammunition, were available to the general public and used in a massacre of innocent bystanders aboard the Long Island Railroad).

²⁸⁰ See *supra* notes 8-51 and accompanying text.

²⁸¹ See *supra* note 265.

the hands of criminal users.²⁸² The manufacturer may then refuse to sell to such distributors.²⁸³ Manufacturers make decisions regarding production, design, marketing and distribution to increase profit, but fairness and justice require that these decisions, when they concern a criminal product, result in the imposition of responsibility on the manufacturers to pay for the harm that occurs when the risks they have chosen to impose manifest themselves.²⁸⁴

Under respondeat manufacturer, the manufactures of criminal products will be liable for the cost of harm caused by the use of their products in crime even if they have chosen to limit their products marketing or distribution or to design the product in a way to make it less attractive to criminal users. However, such decisions by the manufacturer are similar to the employers efforts to hire and train safe drivers in the previous example;²⁸⁵ they will make it far less likely that the product will be used in crime, and thus will correspondingly reduce the manufacturers overall liability under respondeat manufacturer.²⁸⁶

C. Fair and Efficient Cost Distribution Fair and efficient cost allocation will also be achieved by the doctrine of respondeat manufacturer.

1. Fairness

The cost of the harm to innocent bystanders caused by the use of criminal products in criminal activity, should be placed on the manufacturing enterprise as a cost of doing business. This is because the manufacturer has chosen to pursue profit through the production of a criminal product; a product that the manufacturer has designed to harm or kill or to directly assist criminal conduct.²⁸⁷ In addition, often the manufacturer has chosen not to limit the marketing and or distribution of the product.²⁸⁸ Moreover, the manufacture has made all of these decisions

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *See, e.g., supra* note 50 (gun manufacturers introduced new generations of deadlier semi-automatic handguns in the 1980s in order to rejuvenate sales and increase profits).

²⁸⁵ *See supra* notes 250-254 and accompanying text.

²⁸⁶ *Id.*

²⁸⁷ *See supra* notes 210-222 and accompanying text.

²⁸⁸ *See, e.g.,* discussion of *Hamilton supra* note 1; *Merill supra* note 4; *McCarthy supra* note

knowing, on the basis of all past experience that some of its products will be used in crime to harm innocent bystanders.²⁸⁹ Finally, the manufacturer chooses to impose this risk of harm on innocent bystanders in pursuit of profit.²⁹⁰ As a result, it is just and fair that the decision to manufacture criminal products carry greater responsibility than the decision to produce other types of products.²⁹¹ Thus, the manufacturers of criminal products should bear financial responsibility for the harm caused by their product rather than the injured innocent bystander who had no opportunity to protect himself.

2. Efficiency

Efficiency requires the proper alignment of costs with activities. In the case of criminal products, which by definition increase the otherwise existing risk of harm to the public from criminal activity, the harm caused by the criminal or wrongful use of the product is a cost properly associated with the product, and thus, one that should be borne by the manufacturer, and ultimately by those who benefit from the availability of the product. The imposition of such liability on criminal product manufacturers not only fairly allocates such cost among those who benefit from its imposition,²⁹² it also creates market incentives to reduce such costs, something that is sorely lacking now.²⁹³ Under respondeat manufacturer, legitimate users of the product will choose to purchase from manufacturers who design, manufacture, market and/or distribute the product in ways that reduce or eliminate the products attractiveness to criminals because the product will

4; *City of New York v. Beretta supra* note 11; *MGM v. Grokester supra* note 43.

²⁸⁹ See *supra* notes 8-21 and accompanying text (guns); notes 31-33 and accompanying text (radar detectors); note 36 (tactical knives); note 43 (file sharing software); notes 45-47 and accompanying text (alcohol); and notes 213, 226 and 255.

²⁹⁰ See *supra* note 54 (innocent gainers should give up their gains to compensate victims).

²⁹¹ The design, manufacturing, marketing and distribution of other types of products, non-criminal products, does not increase the risk of harm to innocent bystanders from criminal or illegal conduct, and thus, the respondeat manufacturer doctrine does not apply. See Robert L. Rabin, *Enabling Torts* 49 DePaul L. Rev. 435 (1999) (“By contrast, in the enabling situations that I have been discussing defendant has *affirmatively enhanced the risk of harm*, and as a consequence, no special relationship is required to establish responsibility.” [emphasis supplied] *Id.* at 442; *Cf. supra* notes 264-265 and accompanying text.

²⁹² See *supra* notes 257-263 and accompanying text.

²⁹³ See *supra* notes 228-240 and accompanying text.

be cheaper.²⁹⁴ The product will be cheaper because the manufacturers of such products will have to bear less expense related to injuries to innocent bystanders from the criminal use of their products.²⁹⁵

To the extent that the risk of harm to innocent bystanders from the criminal use of the product is not eliminated by changes in the design, marketing or distribution of the product (either because such changes are not possible, or because “the market” for the product, such as it is, will not accept such changes)²⁹⁶ adoption of the doctrine of respondeat manufacturer will ensure that the cost of such harm will nevertheless be borne by the criminal product manufacturer. This is efficient for two reasons. First, criminal product manufacturers are in the best position to fairly distribute the cost of innocent bystander harm among legitimate users of the product through pricing.²⁹⁷

Second, ensuring that the price of criminal products reflects the cost of the harm to innocent bystanders is important to ensure that the existence and availability of the product is justified by legitimate demand.²⁹⁸ That is, if the cost of the harm to innocent bystanders is so high that legitimate users are unwilling to pay the price of the product, when such cost is included in it, then the product will not and should not be produced.²⁹⁹ If certain criminal products such as radar detectors or assault style weapons for example are no longer produced or if their production and distribution is

²⁹⁴This is also important because it creates an incentive for legitimate users of the product to purchase the product from manufacturers who have tried to reduce the likelihood that the product will be used in crime.

²⁹⁵Under respondeat manufacturer criminal product manufacturers will be liable for any harm caused to innocent bystanders by the wrongful or criminal use of the product, but such occurrences will be fewer if manufacturers have made an effort to reduce the attractiveness of the product to criminal users, and this will rebound to the benefit of the criminal product manufacturer. *Cf. supra* notes 250-258 and accompanying text.

²⁹⁶As noted the adoption of respondeat manufacturer is not intended to and will not directly ban any product. After the adoption of respondeat manufacturer, criminal products will continue to be manufactured and sold as long as there is sufficient demand at the new price which will include the cost of the harm to innocent bystanders from the criminal or illegal use of the product. If certain products were deemed to be so destructive or harmful that, notwithstanding sufficient demand, banning the product or directly regulating its features was deemed desirable, the legislature would have to do so directly.

²⁹⁷*See supra* notes 257-263 and accompanying text.

²⁹⁸If there is not sufficient demand for a particular criminal product at a price that reflects the cost of the harm to innocent bystanders from the criminal or wrongful use of the product, then the market is indicating the manufacturing of the product is a misallocation of resources.

²⁹⁹*Id.*

severely restricted it will be because the free market has determined the proper level (if any) of production and distribution.³⁰⁰

3. Deep Pocket

Finally, an important policy supporting respondeat manufacturer is that in favor of compensating innocent victims for their injuries.³⁰¹ There is a very high likelihood that the criminal product user (i.e., the criminal actor) is insolvent or otherwise unavailable or unable to pay for the harm caused by his use of the product.³⁰² In an ideal world, the injured bystander would fully recover from the criminal wrongdoer and a rule of exclusive personal liability would be sufficient. In the real world, however, this is rarely possible,³⁰³ and when it's not, the harm to the innocent bystander must be borne either by the innocent bystander (which often means by society in general)³⁰⁴ or by the manufacturer who has profited from the harm and who has the power to distribute the cost of the harm to the legitimate users of the product who benefit from its availability.³⁰⁵ Once again both fairness and efficiency require that criminal product manufacturers be vicariously liable for the harm caused by the criminal or wrongful use of their products.

D. Innocent Bystander Injury Must Result from the Wrongful or Criminal Use of the Product

The liability called for under respondeat manufacturer is not absolute liability.³⁰⁶ The liability is fault based. That is, the user of the product must

³⁰⁰ *Id.* See *supra* note 248.

³⁰¹ *Cf. supra* note 259 (quoting the comments to the Restatement (Third) of Torts: Respondeat Superior also reflects the likelihood that an employer will be more likely to satisfy a judgment"); Sykes *supra* note 5 at 1241 ("Many agents are potentially insolvent in the face of a substantial judgment against them.") The same can certainly be said of criminal actors. Sykes goes on to note that where "a plaintiff chooses to collect his entire judgment from a vicariously liable principal who has a 'deeper pocket' than his agent" that empirical evidence suggests the principal even if he has a right to full or partial indemnity from the agent very rarely pursues his right to indemnity against the agents. *Id.* at 1242 [cites omitted].

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Cf. supra* note 244 citing Professor Bogus to the effect that the medical reimbursement system shifts the financial burden of smoker's injuries to society at large. The same is true of injuries from criminal products.

³⁰⁵ See *supra* notes 248 and 296 and accompanying text.

³⁰⁶ It is vicarious liability and thus, strict liability with respect to the criminal product

be liable, usually criminally, for the injuries of the innocent third party. Respondeat manufacturer, like respondeat superior, increases those financially responsible for the wrongful conduct.³⁰⁷ In the case of respondeat manufacturer, manufacturers' of criminal products bear financial responsibility along with the user of the product for the harm caused by the criminal or wrongful use of the product.³⁰⁸ Thus, respondeat manufacturer, like respondeat superior, creates vicarious liability.³⁰⁹ The liability is fault based, but it is not based on the fault of the manufacturer.³¹⁰ Thus, the manufacturer may not avoid liability by not being at fault or by acting reasonably.³¹¹ Though, as discussed above, such conduct will as a practical

manufacturer because the plaintiff need not prove fault with respect to the manufacturer. However, the liability under respondeat manufacturer is not liability without fault; the product user must be at fault in causing harm to the innocent bystander or the manufacturer will not be liable. See PROSSER *supra* note 63 §69 (noting that vicarious liability is in one sense a form of strict liability but in another it is not) (p. 458). Such liability is a type of "enterprise liability." In practice, plaintiffs bringing a cause of action under respondeat manufacturer will bring the action against all manufacturers of the offending product and the liability of the defendants will be based on their market share. See, e.g., *Hamilton supra* note 1. Often a bystander will not be able to identify the specific manufacturer of the product that was used to injure him. *Id.* The liability created by respondeat manufacturer is not absolute liability because as noted the product user must be at fault, also the product must fit the definition of a "criminal product." The answer to the question: What is it about the product that calls for imposing strict liability? (which Professor Bogus identifies as the "most fundamental question in product liability." See Bogus *supra* note 9 at 10) is in the case of criminal products, that the product (its design, manufacture, marketing and/or distribution) increases the risk of harm to innocent bystanders from wrongful or criminal conduct. It is this risk increasing nature of criminal products that calls for the imposition of liability under respondeat manufacturer, and it is this same risk increasing nature of the product requirement that limits application of the doctrine and prevents it from imposing absolute liability. Cf. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461, 527 (1985) (enterprise liability is inherently illimitable).

³⁰⁷ See PROSSER *supra* note 63 §69 (all the law has done is to broaden the liability for that fault by imposing it upon additional albeit innocent, defendants) (p. 458).

³⁰⁸ *Id.* See *supra* notes 206-300 and accompanying text.

³⁰⁹ The manufacturers are liable for the actions of the product user. See *supra* notes 306-308 and accompanying text.

³¹⁰ If the manufacturer is at fault or liable under some other legal theory such as for example, nuisance, see, e.g., *City of New York v. Beretta supra* note 11 or negligent making, see *Hamilton supra* note 1, then additional liability may be imposed on the manufacturer under such other legal theories.

³¹¹ The only way to avoid the application and thus the potential liability of respondeat manufacturer is not to manufacture criminal products. As a practical matter, however, if manufacturers exercise their control over design, marketing and distribution they could often

matter, reduce the manufacturers overall amount of liability.³¹²

For example, if an innocent bystander is accidentally shot by the police while they are engaged in a shootout with criminals and the officers were not found liable to the victim, then the gun manufacturer would not be liable under the doctrine presented here.³¹³ If however, the bystander was shot by a criminal in the same shootout, then the gun manufacturers would be liable under respondeat manufacturer.³¹⁴

A product is a criminal product because its design, production, marketing and/or distribution causes an increase in the risk of harm to innocent bystanders from the wrongful or criminal use of the product.³¹⁵ In order for the manufacturer of the criminal product to be liable under the respondeat manufacturer doctrine the harm suffered by the innocent bystander must be a manifestation of this increased risk.³¹⁶ When the harm suffered by the innocent bystander is not caused by criminal or wrongful conduct the harm does not fall within the scope of the respondeat manufacturer doctrine.

VI. CONCLUSION

A criminal product is one that is designed to kill or injure, or is a product whose design, manufacture, marketing and/or distribution results in an increase in the otherwise existing risk of harm to innocent bystanders from criminal or wrongful activity. The criminal products that are the focus of this article are legally produced and distributed, and have *not* malfunctioned in any way. Criminal products are fundamentally different from other products because their production imposes an increased risk of harm on society from criminal or wrongful conduct. As a result, manufacturers of criminal products should bear greater responsibility than other manufacturers for the use of their products. In order to protect the public interest in life, health and safety, this article calls upon courts to adopt as part of the common law the doctrine of respondeat manufacturer as

virtually eliminate any liability under the respondeat manufacturer. *See supra* notes 230-286 and accompanying text.

³¹² *Id.*

³¹³ Under respondeat manufacturer the plaintiffs injuries must be a manifestation of the increased risk of harm from criminal or wrongful activity enabled by the product.

³¹⁴ *Id.*

³¹⁵ *See supra* notes 213-225 and accompanying text.

³¹⁶ If the product user is not liable, neither is the manufacturer under respondeat manufacturer.

a means of requiring manufacturers of criminal products to bear financial responsibility for the harm caused to innocent bystanders by the use of these products in criminal or wrongful activity.

The primary justifications for imposing this financial responsibility are: fairness, efficiency and concern for victim compensation. Manufacturers of criminal products knowingly create and profit from the imposition of an increased risk of harm from criminal conduct. Since the manufacturers choose to impose this risk and profit from it, fairness requires that they pay for the harm from the results when the risk is realized. In addition, the manufacturers may distribute the cost of such harm among those who benefit from the products availability and its attendant risks through pricing. Moreover, the manufacturers are in the best position to reduce the risk of harm from the criminal use of the product through their decisions related to design, level of production, marketing and distribution. Under current law criminal product manufacturers have no incentive to try to avoid sales of their products to those who would use them in wrongful or criminal activity. On the contrary, under current law they have everything to gain and nothing to lose by encouraging such sales. The adoption of respondeat manufacturer will correct this problem by providing manufacturers with an incentive to exercise their control over design, level of production, marketing and distribution to reduce the likelihood that their products will be used in wrongful or criminal activity. The creation of these incentives, which will properly align the interests of criminal product manufacturers with the interests of society, is perhaps the most important reason for adopting respondeat manufacturer. Finally, spreading financial responsibility to manufacturers via the imposition of vicarious liability for the criminal use of their products helps to ensure that innocent bystanders will be able to recover for their injuries. That is, criminal actors are unlikely to be able to pay for the injuries they cause to innocent bystanders, notwithstanding their liability for such injuries, because such actors are usually insolvent or otherwise unable or unavailable to pay.

Traditional analysis suggests that manufacturers of properly functioning products should not be responsible for injuries caused to innocent bystanders by the criminal use of their products. This analysis is based on the belief that manufacturers have no control over the use of their products, and the legal fiction that criminal use is not foreseeable. This article argues that in the case of criminal products the traditional analysis is incorrect. First, while manufactures do not exercise absolute control over the use of their products, they do exercise significant control over use through the

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decisions they make concerning the design, manufacture, marketing and distribution of their products. Second, criminal product manufacturers exercise complete control over their decision to make a criminal product and thereby pursue profit by imposing an increased risk of harm from criminal or wrongful activity on society. Third, in the case of criminal products, criminal use and innocent bystander injury is not only foreseeable, but is to be expected.

A special relationship exists between manufacturers of criminal products and innocent bystanders that is based on the fact that manufacturers knowingly create and profit from an increased risk of harm from the criminal or wrongful use of their products, and the fact that manufacturers exercise significant control over the level of such risk through their decisions concerning the manufacture, design, marketing and distribution of their products. This control and foreseeability, and the special relationship that results from it, provide a legally sufficient basis for imposing vicarious liability for the criminal use of the product upon the manufacturer. As a practical matter the choice is whether to have the unlucky innocent bystander pay for his injuries, or have the manufacturer, who in pursuit of profit choose to engage in the manufacture of criminal products, (knowing on the basis of all past experience that this would involve harm to innocent bystanders) pay for the injuries. The criminal product manufacturer should pay, and the respondeat manufacturer doctrine is the best way to accomplish this result.