

TORT LAW AND CRIMINAL BEHAVIOR (GUNS)

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I. INTRODUCTION

The relation between tort liability and criminal behavior goes back to the very origins of the tort system. Originally, tort damages were awarded as an incident of criminal prosecution, and the linkage of criminal and tort liability meant that the early common-law courts “approach[ed] the field of tort through the field of crime.”¹ Tort actions continued to be quasi-criminal until the late seventeenth century.²

As history shows, tort actions based on the defendant’s criminal conduct are not controversial. A more controversial issue is whether tort liability should be based on crimes committed by someone else. If a third-party criminal caused the plaintiff’s injury, should the plaintiff be able to recover from a non-criminal defendant whose conduct facilitated or enabled the crime? Whatever the normative resolution of this matter, non-criminal defendants have incurred liability for these “enabling torts” in a variety of contexts, including the negligent distribution of guns.³

Enabling torts have been recognized by the tort system for a long period, and courts have exhibited an increasing tendency to hold a defendant liable for the negligent or criminal acts of a third person.⁴ Nevertheless, the enabling torts have

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1. FREDERICK POLLACK & FREDERICK MAITLAND, II *THE HISTORY OF ENGLISH LAW* 530 (Cambridge Univ. Press, 2d ed. 1968) (1898).

2. *See* W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* 8 (“[A]s late as 1694 the defendant to a writ of trespass was still theoretically liable to a criminal fine and imprisonment.”).

3. *See generally* Robert L. Rabin, *Enabling Torts*, 49 *DEPAUL L. REV.* 435 (1999) (conceptualizing the category of enabling torts and showing their progression to handgun litigation). Vicarious liability provides another basis for imposing tort liability on one (like an employer) for the crimes of another (employee). The enabling torts, and the discussion hereafter, do not pertain to the relationships required for vicarious liability.

4. *See* *FOWLER V. HARPER ET AL.*, 3 *THE LAW OF TORTS* 413 n.63 (2d ed. 1986).

not been adequately analyzed,⁵ which may explain why courts have not taken a consistent approach to unlawful behavior. When applying the enabling torts, courts recognize that *some* individuals (the third-party criminals) will act unlawfully despite the threat of criminal and tort sanctions. When applying the rule of strict liability for abnormally dangerous activities, courts assume the threat of negligence liability induces *all* individuals to act lawfully, even the criminally predisposed.⁶ The courts adopt a concept of unlawful behavior for the enabling torts that is inconsistent with the behavioral assumption they make when applying the rule of strict liability for abnormally dangerous activities.

This Article argues that courts should eliminate the inconsistency by applying the rule of strict liability in a manner that accounts for unlawful behavior. The superiority of this approach is illustrated by the tort litigation involving handgun manufacturers. The approach to strict liability currently used by courts obfuscates the real issue posed by these cases. By assuming that negligence liability induces everyone to exercise reasonable care, courts unrealistically assume there is no criminal misuse of handguns and therefore never address the social problem created by the manufacture and distribution of handguns—the foreseeable likelihood that criminals will obtain handguns and shoot people. To address this problem appropriately, courts must account for the social fact of unlawful behavior when applying the rule of strict liability.

Part II describes the doctrinal basis of the enabling torts. Part III analyzes these torts, concluding they often will be ineffective due to an inherent limitation of negligence liability. By acknowledging the social fact of crime, enabling torts recognize that the threat of criminal and tort liability does not prevent self-interested individuals from committing crimes when they can escape detection or avoid sanctions. This motive for acting unlawfully, however, often means that a non-criminal defendant's failure to reasonably reduce the risk of crime cannot be causally linked to the plaintiff's injury. For example, even if a negligent gun dealer had distributed handguns in a reasonable manner, the third-party criminal would still be motivated to obtain a gun from somewhere else and would likely succeed due to the widespread availability of handguns from unregulated sources. Still armed, the third-party criminal would likely cause the type of harm suffered by the plaintiff. In most cases, then, the gun distributor's negligence is not a legal cause of the plaintiff's injury. Effectively insulated from tort liability, many gun distributors will find it profitable to disregard the tort duty, thereby avoiding the costs of reasonable distribution practices. Such behavior merely reflects the fact that self-interested parties, such as profit-maximizing businesses, will act unlawfully when they can avoid sanctions. The nature of predictable, unlawful behavior, which makes the risk of crime foreseeable and subject to a tort duty, also significantly limits the effectiveness of the enabling torts based on negligence.

For situations in which negligence liability is ineffective, strict liability is the obvious alternative. Part IV first shows that courts have adopted a behavioral assumption for purposes of strict liability that is both inconsistent with the

5. See Rabin, *supra* note 3, at 437.

6. See *infra* Part IV.A.

enabling torts and wholly unrealistic. Even though criminals frequently misuse handguns, and negligent gun dealers predictably avoid tort sanctions, courts assume everyone, in fact, exercises reasonable care. Part IV argues that the rule of strict liability should account for such unlawful behavior. This rule does justice to the complexity of social facts, while being faithful to the rule of strict liability for abnormally dangerous activities promulgated in the *Restatement (Second) of Torts*.⁷

Part V applies this rule of strict liability to the manufacture and distribution of handguns. Under this rule, the appropriateness of strict liability for handgun distribution depends on how the self-defense interests of non-criminal gun owners should be weighed against the competing security interests of individuals who do not own guns and are exposed to the risk of being injured by gun-toting criminals. In an analogous context, tort law has decided in favor of self-defense, as reflected in the principle that one who reasonably acts in self-defense need not pay for the injuries suffered by an innocent bystander.⁸ The implications of this well established tort principle provide a persuasive rationale for not applying strict liability to the manufacture and distribution of guns; a rationale, in any event, that is far superior to the ones previously relied upon by the courts.

Although courts may have reached a defensible result in these cases, their poorly reasoned decisions have substantially undermined an important role of strict liability. The use of strict liability to enforce the duty of care is rejected by the proposed *Restatement (Third) of Torts: General Principles*, which rejects the *Restatement (Second)* rule of strict liability in favor of a rule that assumes everyone actually exercises reasonable care.⁹ This proposed rule of strict liability restates the reasoning courts have employed in the handgun cases.¹⁰ Even tort doctrine, it would seem, has been harmed by handguns.

7. See RESTATEMENT (SECOND) OF TORTS §§ 519–20 (1964).

8. See *id.* § 75.

9. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 21 (Council Draft No. 2, Sept. 26, 2000).

10. The Comment explaining why risk is defined in terms of reasonable care includes the following rationale:

As for companies that engage in the business of manufacturing and selling certain potentially dangerous products such as toxic substances and handguns, even when these companies exercise reasonable care, the distribution of their products still involves a significant risk of eventual harm. However, that risk can be minimized if the purchasers of products exercise reasonable care and avoid improper use. In large part for this reason, the sale of such products has not been deemed to be an abnormally dangerous activity.

Id. § 21 cmt. h, at 90.

II. TORT LIABILITY BASED ON THIRD-PARTY CRIMINAL BEHAVIOR

The enabling torts typically involve cases in which the non-criminal defendant has a special relationship with the victim of the crime.¹¹ The relationship is essential to the tort duty, because the nature of the relationship exposes one party to the risk of criminal harm while putting the other in a good position to prevent such crimes. Thus a college or university has a duty to protect its students from criminals.¹² Other relationships of this type include carriers and passengers, hotels and guests, landlords and tenants, prisons and inmates, and landowners and business visitors.¹³

Enabling torts also involve contexts in which the non-criminal defendant has a pre-existing relationship with the third-party criminal who caused the plaintiff's harm.¹⁴ The prior relationship typically gives the non-criminal defendant the opportunity to control the criminal impulses of the third party, thereby creating a tort duty to those foreseeable individuals who might be harmed by the criminally disposed third party. Thus, those in charge of persons with dangerous propensities, such as criminals or the insane, have a duty to reasonably restrain their charges from harming others.¹⁵

This latter form of the enabling torts is illustrated by the lawsuits involving gun manufacturers and distributors. The duty, which depends on a pre-existing relationship, is established whenever "the actor entrusts an instrumentality capable of doing serious harm to one whom he knows, or has reason to believe, [] intend[s] or [is] likely to misuse it to inflict intentional harm."¹⁶ In light of this duty, a store that sells a pistol to an escaped convict in violation of gun-registration laws can be liable for the shooting deaths caused by the sale.¹⁷ Similarly, handgun manufacturers have a duty to market and distribute their products in a manner that reasonably reduces the risk of criminal misuse.¹⁸

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11. See RESTATEMENT (SECOND), *supra* note 7, § 302B cmt. e.
 12. See, e.g., *Nola M. v. University of S. Cal.*, 20 Cal. Rptr. 2d 97 (Cal. Ct. App. 1993).
 13. See HARPER, *supra* note 4, §§ 16.5 n.63, 18.7, at 741-42.
 14. See RESTATEMENT (SECOND), *supra* note 7, § 302B cmt. e.
 15. See HARPER, *supra* note 4, § 18.7, at 741 & n.20.
 16. RESTATEMENT (SECOND), *supra* note 7, § 302 B cmt. e, illus. E; see also RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES, Reporter's Note, § 17 cmt. f, at 248 (Discussion Draft, Apr. 5, 1999) (observing that negligent entrustment "is in essence a special case of the liabilities" involving the criminal conduct of another).
 17. See *Franco v. Bunyard*, 261 Ark. 144, 547 S.W.2d 91 (1977).
 18. Although many courts have held that manufacturers have no duty regarding the legal marketing of non-defective products to the general public, courts have been willing to find a more limited duty regarding reasonable restraints on marketing. See *Hamilton v. Berretta U.S.A. Corp.*, 222 F.3d 36, 43 (2d Cir. 2000) (certifying duty question to the New York State Court of Appeals after finding that the more limited duty involved in the plaintiffs' allegation significantly differed from the more general duty regarding gun distribution that courts have previously rejected); *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146 (Cal. Ct. App. 1999), superseded by grant of petition for review, 991 P.2d 755 (Cal.

The enabling torts define duty, or the corresponding concept of tortious risk, in terms of the harm threatened by third-party unlawful behavior. This definition of tortious risk is based on the social fact that crime frequently occurs. The fact of criminal behavior shows that the threat of criminal and tort liability does not always force individuals to act lawfully. The "inability to effectively reach the putative wrongdoer himself, either through criminal or tort sanctions," creates a "deterrence gap" that provides the basis for the tort duty.¹⁹ "This is the crux of the matter and the link to creating responsibility for enabling behavior."²⁰

By defining duty or tortious risk in terms of third-party criminal conduct, the enabling torts recognize that a segment of society is criminally disposed and predictably responds to certain types of situations. This predictability makes the risk of criminal conduct foreseeable, the condition required of any tort duty.

Foreseeability is most easily established when the criminal harm was caused by someone whom the defendant knew was a criminal. The defendant, for example, should know that someone who is already incarcerated for prior criminal acts may commit further criminal harms if given the opportunity.

Foreseeability can also be established for cases in which the defendant did not know who would commit the criminal act. In these cases, foreseeability follows from the fact that criminals often predictably respond to situations in a rational, self-interested manner. Anyone who rationally contemplates engaging in criminal conduct will consider the costs of criminal and civil sanctions. Presumably those sanctions are high enough for deterrence purposes under situations of perfect enforcement, so that rational, would-be criminals who know they will be caught and sanctioned will act lawfully. Situations of underenforcement, which involve any circumstance that reduces the likelihood a criminal will be caught and sanctioned, reduce the cost of crime and can lead a self-interested person to act unlawfully.

This concept of criminal behavior is supported by numerous empirical studies finding that a reduced likelihood of sanction is associated with an

2000) (finding a limited duty); *City of Boston v. Smith & Wesson Corp.*, No. 1999-02590, 2000 WL 1473568 (Mass. Super. Ct., July 13, 2000); see also Timothy D. Lytton, *Negligent Marketing: Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOKLYN L. REV. 681 (1998) (discussing case in which court accepted a more limited duty regarding distribution). For example, plaintiffs could allege that gun manufacturers have a limited duty not to sell guns to distributors like Baltimore Gunsmith, which has sold a disproportionately large number of handguns used in crimes. See *infra* note 36 and accompanying text. A limited duty of this type is substantially more defensible than the more general duty to refrain from marketing handguns to the general public. See *Hamilton v. Accu-Tek*, 2001 N.Y. Slip Op. 03401, 2001 WL 429247 (N.Y. Apr. 26, 2001) (observing that manufacturers may have a duty not to sell to certain distributors or that duty can be established if the manufacturer was "realistically in a position to prevent the wrongs").

19. See Rabin, *supra* note 3, at 444.

20. *Id.*

increased incidence of crime.²¹ Such behavior is characteristic of the Holmesian "bad man," who complies with the law only for reasons of self-interest rather than moral obligation.²²

By making it possible to foresee or predict how circumstances can influence the likelihood of crime, the concept of rational, self-interested unlawful behavior is an integral component of the enabling torts. As explained by the *Restatement (Second) of Torts*:

There are certain situations which are commonly recognized as affording temptations to which a recognizable percentage of humanity is likely to yield. So too, there are situations which create temptations to which no considerable percentage of ordinary mankind is likely to yield but which, if they are created at a place where persons of peculiarly vicious type are likely to be, should be recognized as likely to lead to the commission of fairly definite types of crime. If the situation which the actor should realize that his negligent conduct might create is of either of these two sorts, an intentionally criminal or tortious act of the third person is not a superceding cause which relieves the actor from liability.²³

Given the prevalence of rational, self-interested criminal behavior, actions (or inactions) that reduce the likelihood of detection increase the risk of crime by making it more likely that the Holmesian bad man will find it worthwhile to act unlawfully. Unlocked doors, for example, make it easier for someone to enter the building and steal things from tenants without getting caught. By increasing the likelihood of detection, a non-criminal defendant can reduce the risk of crime. The ability to reduce risk in this manner, stemming from the requisite pre-existing relationship, supplies the basis for imposing a tort duty on one to protect another from the criminal conduct of a third party.

III. THE INHERENT LIMITATION OF THE ENABLING TORTS

To establish liability for an enabling tort, the plaintiff must show that the defendant's failure to provide reasonable protection enabled the third-party criminal to cause the harm. The causal question is counterfactual, asking whether the harm would have occurred had the defendant exercised reasonable care. The

21. See Erling Eide, *Economics of Criminal Behavior*, in V *ENCYCLOPEDIA OF LAW & ECONOMICS* 345, 355-64 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000) (providing a survey of these studies).

22. According to Oliver Wendell Holmes:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 459 (1897).

23. *RESTATEMENT (SECOND)*, *supra* note 7, § 448 cmt. b.

counterfactual inquiry, by definition, requires construction of a hypothetical world. How should this counterfactual world be constructed?

In the simplest version of the counterfactual inquiry, the hypothetical world is constructed by altering only the defendant's wrongful conduct and nothing else.²⁴ Consider a defendant who failed to comply with the gun-registration laws and negligently sold a pistol to a criminal who subsequently shot the plaintiff during a robbery. The simple counterfactual inquiry alters the world by making the defendant gun distributor comply with the gun-registration laws, while holding everything else constant. In this hypothetical world, the criminal cannot buy the gun from the defendant. The gun actually used by the criminal to shoot the plaintiff is no longer in the criminal's hands. Causation might seem to be established, as it appears the plaintiff would not have been shot had the gun distributor acted with reasonable care. That conclusion, though, is premature.

If the counterfactual inquiry must hold everything constant except for the defendant's wrongful conduct, then the inquiry must hold constant the third-party criminal's motive for purchasing the gun. That motive does not necessarily change merely because the criminal cannot buy the gun from a particular dealer, such as the defendant. The criminal's desire to obtain a handgun means he would try to get a gun elsewhere, and typically he would succeed given the widespread availability of guns on the secondary (unregulated) market, including gun shows.²⁵ The criminal's motives, if held constant, also would often lead him to use that gun in a robbery, as reflected by his actual conduct. Perhaps someone other than the plaintiff would have been shot. The identity of the victim can be a coincidence, though, and causation does not depend on coincidental factors that do not affect

24. See David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1770-71 (1997).

25. "That inventory [of guns in private hands] exceeds 200 million, with thirty-five to forty percent of households owning at least one gun." Thus, proscribed individuals would have little trouble in obtaining a gun in a typical jurisdiction. Phillip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 ARIZ. L. REV. 277, 291 (2001) (manuscript at p. 12). Proscribed individuals can readily obtain handguns in the unregulated secondary market. "Neither the Brady Law nor any other federal law regulates gun sales, loans, gifts, or barter that take place between private individuals, if neither of them is a federal firearms licensee ("FFL"). The Brady Law regulates the retail sale of new and used firearms by FFLs (the primary market), but not sales or transfers by non-FFLs (the secondary market)." James B. Jacobs & Daniel M. Heumann, *Extending Brady to Gun Shows and the Secondary Market*, at 1 (2001) (unpublished manuscript presented at Symposium on Guns, Crime, and Punishment in America, James E. Rogers College of Law, University of Arizona, Jan. 2001) (on file with Author). The unregulated secondary market, including gun shows, supplies firearms to the vast majority of criminals. See Phillip J. Cook et al., *Regulating Gun Markets*, 86 J. CRIM. LAW & CRIMINOLOGY 59, 69 (1995) (reporting survey finding that 43% of inmate respondents report purchasing their firearm, but only one-third purchased the gun in the primary market, a gun show, or pawnshop); Cook & Braga, *supra* at 294 (concluding that federal tracing data suggest that "a substantial portion (albeit a minority) of the guns that end up in crime are first purchased from an FFL by a 'straw purchaser'—someone who intended to resell them to a trafficker (illicit dealer) or to a proscribed individual").

the underlying risk of harm.²⁶ Causation, in other words, requires the reduction of risk rather than the displacement of risk from one individual to another. Hence the defendant's negligent distribution of the gun often will not be the legal cause of the plaintiff's injury, because the criminal would have gotten a handgun anyway.

Is this counterfactual inquiry required by tort law? The issue has not been resolved.²⁷ The most defensible resolution would seem to involve a counterfactual inquiry consistent with the behavioral premise underlying the duty, unless the evidence dictates otherwise. The causation question asks whether the breach of duty caused the harm. The nexus between duty and cause makes it defensible to rely on the same behavioral assumptions for each inquiry, an approach courts have taken in other contexts.²⁸ Moreover, counterfactual behavioral assumptions are

26. See RICHARD A. EPSTEIN, TORTS § 10.7 (1999). The coincidence in the identity of victims disappears if the defendant's negligence increased the risk of criminal harm relative to the baseline situation in which the defendant exercised reasonable care. See *id.*

27. See DAN B. DOBBS, THE LAW OF TORTS 412 n.3 (2000); see also Robert N. Strassfeld, *If...Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 352 (1992) (concluding that "the law's response to counterfactuals is ad hoc and inconsistent").

28. Many jurisdictions evaluate causation for defective product warnings by presuming that consumers read and heed product warnings. See *Coffman v. Keene Corp.*, 628 A.2d 710, 719 (N.J. 1993). The duty to warn, of course, assumes that consumers read and heed warnings. Similarly, a counterfactual causation inquiry based on the behavioral premise underlying the tort duty explains why courts often let juries decide whether a life-saving device would have saved someone, even though it may seem improbable that the device would have made a difference. See, e.g., *Kirincich v. Standard Dredging Co.*, 112 F.2d 163, 164 (3d Cir. 1940) ("We can take judicial notice of the instinct of self-preservation that at first compensates for lack of skill."). In general, courts are "avowedly liberal" with causation issues whenever "the defendant's conduct is deemed negligent for the very reason that it creates a core risk of the kind of harm suffered by the plaintiff." DOBBS, *supra* note 27, at 420-21. The core risk governed by a tort duty often depends on the plaintiff's behavior. Would the plaintiff, for example, have taken advantage of the precaution had the defendant provided it? By being "avowedly liberal" with this issue, courts implicitly adopt a behavioral presumption consistent with the rationale for imposing a duty to provide the precaution.

In most cases, like those involving defective product warnings, the presumption eases the plaintiff's burden of establishing causation. For the enabling torts, by contrast, one of the important presumptions involves the conduct of the third-party criminal, and a behavioral presumption consistent with the underlying tort duty makes it harder to establish causation for reasons given in the text. Hence, there is no obvious reason why courts should be "avowedly liberal" on the causation inquiry for the enabling torts, even though the plaintiff suffers the kind of harm that makes the conduct negligent in the first instance. Compare John C.P. Goldberg & Benjamin C. Zipursky, *Concern for Cause: A Comment on the Twerski-Sebok Plan for Administering Negligent Marketing Claims Against Gun Manufacturers*, 32 CONN. L. REV. 1411 (2000) (arguing that courts should not be liberal regarding causation in the handgun cases), with Aaron Twerski & Anthony J. Sebok, *Liability Without Cause? Further Ruminations on Cause-in-Fact As Applied to Handgun Liability*, 32 CONN. L. REV. 1379 (2000) (arguing that causation can be established in the handgun cases as long as the plaintiff had a "gambler's chance" at survival and only recovers proportional damages).

most defensible when based on generalizations about which we are highly confident.²⁹ Such generalizations enable us to conclude that certain kinds of behavior are foreseeable, and foreseeability is an essential component of duty. The counterfactual causal inquiry therefore naturally depends upon the behavioral generalizations underlying the tort duty.

A generalized explanation for criminal behavior is adopted by the enabling torts. To reject that generalization requires some basis for relying on a particularized explanation of (counterfactual) criminal behavior sufficiently different from the general pattern. Such a particularized assessment of the criminal conduct may be possible in some cases based on the available evidence.³⁰ Absent such evidence, the widespread availability of guns from unregulated sources, coupled with the criminal's manifest desire to have a gun to facilitate the commission of crimes, ineluctably leads to the conclusion that the criminal probably would have obtained a gun, even if the defendant gun distributor had exercised reasonable care. The counterfactual conclusion follows directly from the concept of criminal behavior adopted by the enabling torts, making it difficult to establish causation in these cases.³¹

The causal problem in cases of negligent gun distribution has already been recognized.³² The behavioral component of the problem, though, has deeper implications for tort law that have not been adequately appreciated.

Consider further the negligent marketing of guns for cases in which there is no particularized evidence regarding the conduct of the third-party criminal.³³ In these cases, the tortious risk consists of an unreasonable increase in the generalized risk of the criminal misuse of guns, so the appropriate causation question asks how many guns would have been in the hands of criminals had the defendant gun distributors adopted reasonable distribution practices. This causation question, according to some scholars, can be answered by determining the proportion of negligently marketed guns possessed by criminals.³⁴ On this view, if over half of all guns possessed by criminals are attributable to negligent marketing, then negligent marketing is the likely cause of the gun-shot injury. This resolution of the causation question, despite its apparent logic, is hard to square with the concept of criminal behavior adopted by the enabling torts.

29. See Strassfeld, *supra* note 27, at 412-13.

30. For example, if the gun distributor negligently sold a gun to an ex-convict who had no money and instead proffered a worthless check, then there may be sufficiently particularized grounds for concluding that without this particular gun, this particular criminal would have been unable to shoot three victims the next day. See Franco v. Bunyard, 261 Ark. 144, 547 S.W.2d 91 (1977).

31. See Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 811 (E.D.N.Y. 1999) (stating that jurors failed to find that defendant gun manufacturers' negligent marketing practices caused injury to four plaintiffs).

32. See, e.g., Lytton, *supra* note 18, at 704-06; Twerski & Sebok, *supra* note 28.

33. See, e.g., Hamilton, 62 F. Supp. 2d at 811.

34. See Twerski & Sebok, *supra* note 28, at 1403-04.

Rational criminals will get guns by the least costly means. Negligently marketed guns presumably cost criminals less than guns from other sources (involving a greater likelihood of detection), explaining why criminals often possess such guns.³⁵ The elimination of negligent marketing practices therefore would increase the cost of guns for criminals. Nevertheless, insofar as guns effectively facilitate the commission of crimes, most criminals who want guns will still get them, despite the higher cost. This outcome seems especially likely for criminals who have an expressed preference for using guns while committing crimes, such as the criminal responsible for the gun-shot injury involved in the tort claim. Consequently, even if most guns involved in crimes can be traced to negligent marketing practices, it does not follow that negligent marketing probably caused the criminal shooting at issue in the tort case against negligent gun distributors. The criminal probably would have gotten a gun anyway.

Indeed, the widespread availability of guns in the unregulated market is another predictable outcome produced by self-interested unlawful behavior. Given the demand for guns by criminals, there should be a ready supply from those who find it in their self-interest to skirt the law. Gun manufacturers are obvious candidates for feeding the unregulated market, since they know the issue of causation often will insulate them from liability for negligent distribution practices. The desire to maximize profits, coupled with the knowledge that they will often avoid liability for unreasonable marketing practices, predictably leads gun manufacturers to feed the unregulated market. One gun dealer, for example, is responsible for selling twenty percent of the traced guns used in crimes in Baltimore over the last ten years.³⁶ The store is still open for business.³⁷ According to an affidavit from a former Senior Vice President of Marketing and Sales for the gun manufacturer Smith & Wesson:

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 from 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 [e]nsure responsible distribution practices....³⁸

The criminal misuse of guns therefore reveals the inherent limitation of the enabling torts based on negligence liability. These torts recognize that

35. See *supra* note 25.

36. See Fox Butterfield, *The Federal Gun Laws: The First Obstacle to Enforcement* (2001) (unpublished manuscript presented at Symposium on Guns, Crime, and Punishment in America, James E. Rogers College of Law, University of Arizona, Jan. 2001) (on file with Author) (discussing enforcement efforts directed at Baltimore gunsmith).

37. See *id.*

38. Affidavit of Robert I. Hass, *Hamilton v. Accu-Tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996), quoted in David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 *TEMPLE L. REV.* 1, 7 (1998).

criminals respond predictably to certain situations, satisfying the requirement of foreseeability. The predictability is based on criminal rationality or self-interested motivation. Such behavior, however, often means a particular precaution against crime probably would not have prevented injury. That same type of behavior, moreover, often means that those who have a tort duty to reduce the risk of criminal harm will choose to ignore the duty given their likely insulation from tort liability. The basis for the tort duty—the prevalence of self-interested, unlawful behavior—also undermines its practical effect. The problem is starkly illustrated by the negligent distribution of guns, but is pervasive for the enabling torts based on a generalized risk of criminal harm.³⁹

IV. STRICT LIABILITY AND CRIMINAL BEHAVIOR

The enabling torts inadequately reduce the risk posed by third-party criminals, because the element of causation often bars recovery against a non-criminal defendant who failed to take reasonable precautions against such risk. The causal bar is eliminated by strict liability. As long as the defendant has a relationship with the plaintiff or third-party criminal, the defendant could be strictly liable for any criminal risks to which the plaintiff is exposed as a result of the relationship. A university, for example, could be strictly liable for any criminal harms suffered by its students while in residence. Similarly, a gun manufacturer has a relationship with a criminal who possesses one of its guns, providing a relational basis for making the manufacturer strictly liable for the criminal misuse of its guns.⁴⁰ By applying strict liability to the relationship, the tort claim avoids the causal problem that limits the effectiveness of the enabling torts.

Despite the potential of strict liability to reduce crime, this approach to the problem has been foreclosed by the courts. For purposes of strict liability, courts assume there is no criminal behavior, thereby assuming away the very problem that might justify strict liability. The appropriateness of strict liability should be determined by analysis rather than assumption, particularly an assumption rejected by other tort doctrines (the enabling torts). To account for the different reasons why individuals follow the law, the rule of strict liability should acknowledge the social fact of unlawful behavior.

39. Compare *Kolodziejzak v. Melvin Simon & Assoc.*, 685 N.E.2d 985, 991 (Ill. App. Ct. 1997) (ordering a directed verdict for strip mall defendants because an additional security guard would not have prevented plaintiff's death by gunshot); *Nola M. v. University of S. Cal.*, 20 Cal. Rptr. 2d 97 (Cal. Ct. App. 1993) (holding that even if defendant had operated its campus security in the reasonable manner proposed by plaintiff, the criminal attack still would have occurred).

40. Criminal prosecutors in Michigan have applied strict liability against a handgun seller who failed to comply with the gun-registration laws. See Dirk Johnson, *Years After Sale, Handgun Haunts Ex-Owner in Court*, N.Y. TIMES, Dec. 16, 2000, at A12.

A. The Untenable Behavioral Assumption Underlying the Rule of Strict Liability

Strict liability applies to abnormally dangerous activities.⁴¹ Highly significant risks are created by the manufacture and distribution of guns due to their widespread criminal misuse. In 1993, for example, criminals used guns in the commission of over one million murders, assaults, robberies, and rapes.⁴² The risk of criminal misuse becomes even higher if defined in terms of handguns rather than guns.⁴³

Despite the high degree of risk created by criminal misuse, courts have uniformly rejected the claim that strict liability should apply to the manufacture and distribution of handguns.⁴⁴ The courts' primary rationale for doing so, as summarized in the proposed *Restatement (Third) of Torts: General Principles*, is that "a prerequisite for strict liability...is not merely a highly significant risk in the defendant's activity itself, but a highly significant risk that remains even when all actors exercise reasonable care."⁴⁵ Guns pose no risk of criminal misuse when everyone exercises reasonable care, as there is no criminal conduct (unreasonable behavior) involving guns. Because guns do not pose a significant degree of risk, their distribution is not an abnormally *dangerous* activity governed by strict liability.

As illustrated by the gun cases, the assumption that everyone exercises reasonable care "has played a major role in judicial decisions actually determining whether particular activities qualify as abnormally dangerous."⁴⁶ The reasonable-care assumption, despite its importance, has not been justified by the courts, nor is it adequately defended in the proposed *Restatement (Third)*.

The assumption would be defensible if it were improper to impose tort liability on one for the criminal or tortious behavior of another. The propriety of such liability, however, would seem to be established by the enabling torts. Unless the enabling torts are normatively indefensible, the reasonable-care assumption must be defended descriptively—as a realistic depiction of actual behavior under the law.

As a descriptive matter, the assumption might mean that everyone always obeys the law out of a sense of moral obligation. That description, of course, fails. Social facts establish widespread self-interested, unlawful behavior. To be descriptively defensible, then, the reasonable-care assumption must account for the Holmesian bad man. In other words, the assumption can be defended only if the threat of negligence liability actually induces risk-creating actors, whether the

41. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 21 (Council Draft No. 2, Sept. 26, 2000).

42. See GARY KLECK, TARGETING GUNS 24 (1997).

43. See generally Stephen P. Teret & Garen J. Wintemute, *Handgun Injuries: The Epidemiologic Evidence for Assessing Legal Responsibility*, 6 HAMLIN L. REV. 341 (1983).

44. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 21, Reporter's Notes, cmt. h, at 110 (Council Draft No. 2, Sept. 26, 2000).

45. See *id.* § 21, cmt. b; see also *supra* note 10.

46. *Id.* § 21, Reporter's Notes, cmt. h, at 106.

law-abiding citizen or the Holmesian bad man, to exercise reasonable care. Some actors exercise reasonable care out of a sense of moral obligation. Other actors, like the Holmesian bad man, exercise reasonable care only because it is in their self-interest to avoid tort liability for noncompliance. But this defense of the reasonable-care assumption also fails. Once the inquiry includes consideration of the Holmesian bad man, tortious risk can no longer be defined exclusively in terms of reasonable care.

A behavioral assumption that realistically accounts for the Holmesian bad man must consider issues of detection and enforcement. A self-interested actor, if given the opportunity to avoid negligence liability, will disobey the tort duty to avoid the burdens of precautionary measures. Such opportunities to avoid negligence liability are rare, according to the proposed Restatement (Third). In the context of the enabling torts, the proposed Restatement (Third) asserts that insolvency is the only reason why a criminal will avoid tort liability.⁴⁷ It also asserts that the threat of negligence liability actually induces all (presumably solvent) actors to exercise reasonable care, which is why risk can be defined in these terms for purposes of strict liability.⁴⁸ Both assertions are untenable.

Insolvency enables a criminal to avoid tort liability but not criminal liability. If criminal sanctions are high enough, a would-be criminal will obey the law, even though insolvency insulates him from tort liability. Insolvency therefore does not induce the Holmesian bad man to commit crimes. Instead, the Holmesian bad man commits crimes if there is sufficient opportunity to escape detection, to get away. And a solvent criminal who escapes detection will care little about tort liability for shooting someone. Hence, the threat of negligence liability does not ensure that all (solvent) actors who possess guns will exercise reasonable care, a conclusion borne out by social practice and contrary to the claim made by the proposed Restatement (Third).

By defining tortious risk in terms of reasonable care, the proposed Restatement (Third) and the courts implicitly adopt a behavioral assumption in the context of strict liability that is rejected by the enabling torts as both a normative

47. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES cmt. d, at 239 (Discussion Draft, Apr. 5, 1999) ("It is only when the third party is insolvent that the plaintiff will prefer the claim against the originally negligent defendant, and will that defendant be unable to collect reimbursement from the third party.").

48. For purposes of strict liability, the proposed Restatement Third defines risk by assuming that everyone exercises reasonable care. See *infra* note 53 and accompanying text (quoting the proposed rule). The proposed Restatement Third recognizes the possibility that some unreasonable behavior will escape detection in the negligence regime, but then asserts that this possibility merely strengthens the proposed rule of strict liability rather than undermining it. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 21, cmt. b, at 81 (Council Draft No. 2, Sept. 26, 2000). Thus, the proposed Restatement Third treats any additional risk reduction induced by strict liability as a beneficial by-product of strict liability rather than as a sufficient reason for such liability. The issue under discussion is whether risk reduction provides a sufficient reason for adopting strict liability. If strict liability is to be used for that purpose, the rule cannot define risk in terms of the factual assumption that everyone exercises reasonable care.

and descriptive matter. For the enabling torts, the absence of perfect law enforcement, coupled with the prevalence of self-interested unlawful behavior, makes unlawful conduct foreseeable, providing the basis for a tort duty to reduce the risk of third-party crime.⁴⁹ Either the enabling torts are indefensible and should be eliminated, or the reasonable-care assumption must be jettisoned.

B. An Enforcement Rationale for Strict Liability

The rule of strict liability, like other torts, should account for the different reasons why individuals follow the law. As the legal philosopher H.L.A. Hart has observed:

At any given moment the life of any society which lives by rules, whether legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons' behavior in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment [the Holmesian bad man]. One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both points of view and not to define one of them out of existence.⁵⁰

The rule of strict liability, as interpreted by the courts and the proposed Restatement (Third), fails "to do justice to the complexity of the facts" by assuming all individuals exercise reasonable care. In light of this factual assumption, there is no role for strict liability to enforce the duty of care, because perfect enforcement is provided by negligence liability. The assumption is flatly contradicted by the widespread carnage caused by the criminal misuse of guns. The threat of negligence liability does not induce everyone to exercise reasonable care, including gun distributors.⁵¹

In these contexts, strict liability can enforce the duty of care more effectively than negligence liability. An enforcement rationale for strict liability accounts for the different reasons why individuals comply with the law, thereby doing justice to the complexity of facts. This approach to strict liability is consistent with the enabling torts and does not require rejection of other rationales for strict liability.

To see how this approach to strict liability would work, first consider those individuals who "live by the rules" because it is the right thing to do. These individuals look to tort law for guidance on how they should conduct themselves when exposing others to a risk of harm. The rule of negligence tells these

49. See *supra* Part II.

50. H.L.A. HART, *THE CONCEPT OF LAW* 90-91 (2d ed. 1994); see also, e.g., Lewis A. Kornhauser, *The Normativity of Law*, 1 *AMER. LAW & ECON. REV.* 3 (1999); Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 *VA. L. REV.* 837 (1997).

51. See *supra* notes 36-38 and accompanying text.

individuals they should exercise reasonable care, and they will strive to do so. For this group of individuals, tortious risk for purposes of strict liability can be defined in terms of reasonable care.

Now consider someone who acts like the Holmesian bad man. A self-interested individual will exercise reasonable care only if doing so is less costly than acting negligently. The cost of negligent behavior depends on the likelihood that such behavior will be detected by a plaintiff, proven in court, and subjected to an enforceable judgment for damages. When enforcement is sufficiently high, the cost of negligent behavior (the expected damages) typically outweighs the cost of reasonable care, so the threat of negligence liability gives the Holmesian bad man a sufficient incentive to exercise reasonable care.⁵²

In contexts of sufficient enforcement, then, negligence liability induces all actors, whether the law-abiding citizen or the Holmesian bad man, to exercise reasonable care. Tortious risk can be defined in terms of reasonable care for purposes of strict liability, as in the proposed Restatement (Third)'s rule of strict liability:

- (A) A defendant who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.
- (B) An activity is abnormally dangerous if:
 - (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and
 - (2) the activity is not a matter of common usage.⁵³

According to the proposed Restatement (Third), this rule of strict liability can be explained in terms of reciprocity.⁵⁴ The rule of negligence allows everyone

52. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 6–17, 148 (1987) (showing that a perfectly enforced negligence standard gives potential injurers an incentive to exercise reasonable care, whereas the incentive can be reduced if a negligent injurer can avoid liability).

53. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 21 (Council Draft No. 2, Sept. 26, 2000).

54. See *id.*, cmt. j, at 93–94 (“Whenever an activity is engaged in by a large fraction of the community, the absence of strict liability can be explained by principles of reciprocity.”). The reciprocity rationale is developed in George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). Critics argue that “the norm of reciprocity is consistent with either general system, whether negligence or strict liability.” RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 152 (7th ed. 2000). This criticism is true at a high level of abstraction, but does not withstand scrutiny. For perfectly reciprocal risks, the costs and benefits of the tort rule inure equally to all affected individuals, so everyone prefers the allocatively efficient tort rule. See Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 851–52 (1995). Negligence is more efficient than strict liability in situations of perfect enforcement, due to the higher cost injury compensation via tort as compared to other insurance mechanisms. See Mark Geistfeld,

to impose reasonable risks on others without having to pay for the resultant injuries. Those individuals exposed to reasonable risks are not compensated for their injuries, but, as the New York Court of Appeals recognized long ago, each "receives his compensation for such damages by the general good, in which he shares, and the right which he has to [engage in similarly risky conduct]."⁵⁵ Reasonable risks typically are quite small and merge into the background risk of society assumed by each of its members.⁵⁶ More significant risks merit special consideration. Highly significant risks created by common activities, such as automobile driving, are reciprocal and merge into the acceptable level of social risk. Those individuals injured by such risks are not compensated under a negligence rule, but the negligence regime works equally in their favor (reciprocity) because they also engage in the activity and may injure others. Highly significant risks created by uncommon activities, by contrast, are not reciprocal and do not merge into the background level of social risk. For these risks, the negligence rule does not provide an adequate reciprocal benefit for potential victims. Absent such a benefit, potential victims must be compensated for their injuries, the result attained by the rule of strict liability for highly significant, uncommon risks.

Although principles of reciprocity explain why strict liability applies to abnormally dangerous risks, the rule can be justified more broadly. The application of strict liability to abnormally dangerous risks implies that negligence liability provides inadequate compensation for such risks. A related implication is that negligence liability provides adequate compensation for other risks, even though accident victims do not always receive damages when injured. One form of such compensation is identified by the reciprocity rationale, which explains how potential victims can benefit from a negligence rule in ways unrelated to the receipt of damages in the event of injury. Another important form of such (non-monetary) compensation stems from the ability of a negligence standard to reduce risk below the level attainable by strict liability.⁵⁷

Strict liability protects potential victims from nonconsensual risks by giving them a guarantee of injury compensation. Such protection is not adequate for fatal injuries, because tort damages do not compensate a dead person for the

Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?, 45 UCLA L. REV. 611, 625–33, 639–46 (1998) [hereinafter Geistfeld, *Strict Liability*]. The reciprocity rationale therefore explains why a negligence rule applies to reciprocal risks under conditions of perfect enforcement, the claim made by the proposed Restatement Third.

55. *Losee v. Buchanan*, 51 N.Y. 476, 485 (1873).

56. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 21, cmt. h, at 89 (Council Draft No. 2, Sept. 26, 2000) ("Most ordinary activities can be made entirely safe when all actors exercise reasonable precautions; and when such safety cannot be achieved, there is good reason to disregard the danger as an abnormal one.").

57. See Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle That Safety Matters More Than Money*, 76 N.Y.U. L. REV. 114 (2001) (arguing that risk reduction greater than the amount attainable by strict liability is a form of compensation consistent with the principle that safety matters more than money).

lost pleasures of living. For fatal risks, potential victims must be protected or compensated by some other means. Such protection can be provided by a negligence standard that reduces risk below the level that would obtain when potential victims are guaranteed compensatory damages (strict liability). The risk reduction benefits potential victims by making it less likely that they will be seriously injured or killed, providing a non-monetary compensatory advantage for negligence over strict liability consistent with on the tort principle that safety matters more than money.⁵⁸

This important advantage of negligence liability provides a limited enforcement role for strict liability. When enough negligent injurers are able to avoid tort liability, the enforcement problem renders the negligence standard incapable of reducing risk below the level attainable by strict liability. In these contexts, negligence loses an important non-monetary compensatory advantage over strict liability, creating the possibility that strict liability better protects the individual entitlement to be free of nonconsensual, physical harms.

If the regimes of negligence and strict liability would each attain identical risk levels, for example, then the guarantee of injury compensation (strict liability) may better protect the entitlement. In these contexts, strict liability is not appropriate for reciprocal risks, because the negligence rule provides adequate non-monetary compensation (the reciprocity rationale). Strict liability, therefore, is appropriately limited to highly significant, non-reciprocal risks whenever negligence and strict liability would each attain identical risk levels.⁵⁹ Such a rule of strict liability is the one contained in the proposed *Restatement (Third) of Torts*.

In some contexts, however, enforcement problems are sufficiently severe so that a negligence regime would have higher risk levels than strict liability. In these contexts, strict liability better protects the entitlement both in terms of risk reduction and guaranteed injury compensation. One such context involves injurers who avoid negligence liability only because they do not get caught or are insolvent. The other context involves identifiable, solvent injurers who avoid negligence liability due to difficulties of proof. The amount of care actually required by the negligence standard depends upon the evidence available to plaintiffs and courts concerning the benefits and burdens of feasible risk-reducing measures. If good evidence concerning desirable safety precautions is unavailable,

58. The individual entitlement to be free of nonconsensual harms gives legal priority to the security interests of potential victims over the competing liberty and economic interests of potential injurers, pursuant to the tort principle that safety matters more than money. The entitlement clearly conforms to the intentional torts, but has a less obvious connection to negligence. That connection is provided by fatal risks. Potential victims could be compensated for facing non-consensual, fatal risks in two different ways: (1) by giving tort plaintiffs extra-compensatory damages for nonfatal injuries in a regime of strict liability, or (2) by increasing the negligence standard of care above the cost-benefit amount (the amount that would occur under strict liability). The latter approach, which reduces risk relative to a regime of strict liability under conditions of adequate enforcement, is consistent with tort law and the principle that safety matters more than money. See generally *id.*

59. See *id.* at 151–52, 168–69.

a negligent injurer who fails to take such precautions will escape liability. Similarly, a negligent injurer can avoid liability by relying on evidentiary problems concerning causation, as illustrated by the negligent distribution of guns.⁶⁰ The Holmesian bad man, aware of these avenues for escaping liability, predictably disobeys the tort duty to avoid the cost of exercising reasonable care.

In the latter context, strict liability more effectively enforces the tort duty than negligence liability. A self-interested individual is concerned only about minimizing his costs: the sum of safety expenditures and liability costs. Under strict liability, the desire to minimize costs leads the Holmesian bad man to take safety precautions to reduce the incidence of injuries and payment of tort damages. If the Holmesian bad man would not take such precautions under an imperfectly enforced negligence rule, then strict liability will increase precautions and reduce risk below the level attainable by a negligence regime.

The rule of strict liability therefore should account for the possibility that enforcement problems will induce self-interested actors to act negligently, a particular concern for contexts in which actors are motivated by profit maximization. Such an enforcement rationale for strict liability has been recognized by generations of tort scholars and is an express rationale for strict products liability.⁶¹ Moreover, as I have argued elsewhere, the enforcement rationale provides the best interpretation of the rule of strict liability for abnormally dangerous activities promulgated in the *Restatement (Second) of Torts*.⁶² The key to this interpretation, which has been missed by most courts and

60. See *supra* Part III.

61. In one of the first tort treatises, Frederick Pollock observed that "the ground on which a rule of strict obligation has been maintained and consolidated by modern authorities is the magnitude of danger, coupled with the difficulty of proving negligence as the specific cause, in the particular event of the danger having ripened into actual harm." *Richard A. Epstein, Causation—In Context: An Afterword*, 63 *CHI.-KENT L. REV.* 653, 662 n.25 (1997). (quoting FREDERICK POLLOCK, *THE LAW OF TORTS* 393 (1st ed. 1887)). Similarly, Oliver Wendell Holmes has observed that "as there is a limit to the nicety of inquiry which is possible in a trial, it may be considered that the safest way to secure care is to throw the risk upon the person who decides what precautions shall be taken." OLIVER WENDELL HOLMES, *THE COMMON LAW* 117 (1881). Recently, the rationale has been relied upon in the economic analysis of tort law. See Steven Shavell, *Strict Liability Versus Negligence*, 9 *J. LEGAL STUD.* 1 (1980). The rationale has been accepted in the products liability context. One justification for imposing strict liability on product sellers for manufacturing defects is that doing so "encourages greater safety investment in product safety than does a regime of fault-based liability under which, as a practical matter, sellers may escape their appropriate share of responsibility." *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY* § 2, cmt. a (1998). See also *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978) ("[T]his courts' product liability decisions...have repeatedly emphasized that one of the principal purposes behind the strict products liability doctrine is to relieve an injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action.").

62. See Geistfeld, *Strict Liability*, *supra* note 54, at 646–60. These arguments focused on the ability of strict liability to reduce risk below the level attainable by a negligence standard, which is the only argument capable of accounting for all of the factors in the *Restatement (Second)* rule. As should be clear by now, I also maintain that strict

is rejected by the proposed Restatement (Third), is to give the term “reasonable care” practical rather than ideal meaning, as indicated in the bracketed term below:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- (a) the existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care [practically induced by the negligence regime];
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on, and;
- (f) extent to which its value to the community is outweighed by its dangerous attributes.⁶³

Importantly, factors (a)–(d) subsume the rule of strict liability in the proposed Restatement (Third), showing how the enforcement rationale for strict liability can complement other rationales. Strict liability has no enforcement rationale if negligence liability in practice induces *all* actors, including the Holmesian bad man, to exercise reasonable care. In these contexts, courts can consider only factors (a)–(d) for reasons given by the proposed Restatement (Third).

Other contexts may provide an enforcement rationale for strict liability. That rationale, which is rejected by the proposed Restatement (Third), can be considered under the Restatement (Second) rule. The court must first conclude that the negligence regime, in light of practical considerations involving enforcement, yields a significant level of risk (factors (a)–(c)). Such a risk does not necessarily merge into the background level of risk assumed by all members of society, and merits special consideration. Accordingly, the court must determine whether the risk is “abnormally dangerous” by applying the remaining factors (d)–(f), an inquiry that essentially seeks to determine whether strict liability, rather than negligence, more adequately compensates potential victims exposed to such risks. Thus, whether the risk is common—factor (d)—determines the degree to which the negligence regime reciprocally benefits potential victims and the likelihood that strict liability would reduce risk.⁶⁴ Whether the activity can be relocated—

liability can be justified in some contexts if it leads to the same level of risk as the negligence regime. As discussed in text, that use of strict liability requires consideration of factors (a)–(d) in the Restatement (Second) rule. Hence, the proposed Restatement Third incorrectly concludes that an enforcement rationale for strict liability “excludes or rejects all ethical arguments in favor of strict liability.” *RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES* § 21, Reporter’s Notes. cmt. k, at 128 (Council Draft No. 2, Sept. 26, 2000).

63. *RESTATEMENT (SECOND)*, *supra* note 7, § 520.

64. See Geistfeld, *Strict Liability*, *supra* note 54, at 653 (discussing deterrence role of this factor); *supra* note 57, at 151–52 (discussing compensatory aspect of reciprocal risks).

factor (e)—affects the possibility that strict liability would reduce risk.⁶⁵ And the social value of the activity—factor (f)—addresses the distributive issue of whether strict liability would have undesirable impacts on social interests other than the private interests of parties to such lawsuits.⁶⁶

The inquiry can be illustrated by applying this rule of strict liability to the manufacture and distribution of handguns. The threat of negligence liability does not induce third-party criminals to use handguns reasonably, nor does it give the manufacturers and distributors of handguns a sufficient incentive for adopting distribution practices that would reasonably reduce the risk of criminal misuse. The criminal misuse of handguns poses a significant risk in the negligence regime—as the crime statistics so clearly establish—creating the possibility that the associated duty of care is defensibly enforced by strict liability.

V. IS THE MANUFACTURE AND DISTRIBUTION OF HANDGUNS AN ABNORMALLY DANGEROUS ACTIVITY?

Numerous courts have concluded that the manufacture and distribution of handguns is not an abnormally dangerous activity, giving reasons that do not withstand scrutiny. A more defensible resolution of the issue can be derived from the enforcement rationale for strict liability, illustrating the superiority of an approach to strict liability that accounts for the social fact of unlawful behavior.

A. Judicial Rationales for the Rejection of Strict Liability

In finding that the manufacture and distribution of handguns is not abnormally dangerous, courts have assumed that the threat of negligence liability actually makes everyone exercise reasonable care.⁶⁷ That assumption is inconsistent with the enabling torts and unrealistic. Courts have rejected strict liability for other reasons, but they too are unsatisfactory.

Most courts have reasoned that the manufacture and distribution of handguns is not abnormally dangerous because the danger inheres only in the subsequent use or misuse of the product.⁶⁸ The *use* of a handgun may be abnormally dangerous, but not its manufacture and distribution. However, as the enabling torts show, the distribution of handguns involves a duty to reasonably

65. An activity could be negligently located, but that aspect of the negligence inquiry involves an onerous evidentiary burden and is likely to be underenforced. *See Geistfeld, Strict Liability, supra* note 54, at 653–54.

66. Any risk reduction attained by strict liability could be undesirable for socially valuable activities. *See id.* at 653. Even if strict liability does not reduce risk, it could have socially undesirable distributive effects. *See infra* Part V.B. Both concerns were the primary motivations for the inclusion of the social-value factor in the Restatement (Second). *See* RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 21, Reporter's Notes, cmt. k, at 123 (Council Draft No. 2, Sept. 26, 2000).

67. *See supra* notes 44–46 and accompanying text.

68. *See* RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 21, cmt. h, at 90 (Council Draft No. 2, Sept. 26, 2000).

reduce the risk of foreseeable criminal misuse.⁶⁹ Tortious risk is not defined exclusively in terms of distribution, but includes foreseeable criminal misuse. Consistency would seem to require that tortious risk be defined in terms of foreseeable misuse for purposes of strict liability.

The courts' reasoning in this regard becomes even more problematic when considered in relation to products liability. The manufacture and distribution of a defective product poses little or no danger; the risk is created by product use. If tortious risk were defined exclusively in terms of manufacturing and distribution, with no consideration of foreseeable product use, there would be no basis for imposing tort liability on the manufacturers and sellers of defective products. Such a limited definition of tortious risk was famously rejected by Justice Cardozo in the case that provided the foundation for the tort regulation of product manufacturing and distribution: "We are dealing now with the liability of the manufacturer of a finished product, who puts it on the market knowing it will be used....If he is negligent, where danger is to be foreseen, a liability will follow."⁷⁰

Foreseeability is the touchstone of tortious risk, as Cardozo emphasized. By using foreseeability as the link between manufacturing and product use, courts were able to impose a tort duty on manufacturers and distributors to reasonably reduce the risk of injuries caused by product use. Manufacturing requires distribution, and distribution depends on buyers who subsequently use the product. Foreseeable product use and misuse therefore define a manufacturer's duty for purposes of products liability.⁷¹

Some courts in the handgun cases have acknowledged the relation between products liability and the rule of strict liability for abnormally dangerous activities, concluding that it requires rejection of the strict liability claim. "[W]ere we to hold a manufacturer liable for gun marketing as an abnormally dangerous activity, we would improperly blur 'the distinction between strict liability for selling unreasonably dangerous products and strict liability for engaging in ultrahazardous activities by making the sale of a product an activity.'"⁷² This concern is unfounded.

Products liability claims filed on behalf of gunshot victims against gun manufacturers have been rejected by courts because plaintiffs could not show the handguns were defectively designed.⁷³ Absent an identifiable defect, courts would have to impose categorical or generic liability on handguns, a legal conclusion that

69. See *supra* notes 15–18 and accompanying text.

70. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

71. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. p.

72. *Delahanty v. Hinckley*, 564 A.2d 758, 761 (D.C. Ct. App. 1989) (quoting *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984)); see also *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 192 (Cal. Ct. App. 1999) (same).

73. 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, 10–14 (2000).

handguns pose an unreasonable risk no matter how designed.⁷⁴ That conclusion troubles the courts. If a product is defective no matter how designed, then it will be driven from the market. Sales of a product known to pose an unreasonable risk are subject to punitive damages.⁷⁵ The imposition of categorical liability on handguns would be tantamount, therefore, to a ban by judicial fiat. The courts conclude that the banning of handguns is a legislative matter, making the imposition of categorical liability inappropriate.⁷⁶

A judicial ban would not occur, though, if courts found the manufacture and distribution of handguns to be an abnormally dangerous activity. As a matter of law, an abnormally dangerous activity involves reasonable risks.⁷⁷ Hence, this form of tort liability does not inevitably lead to punitive damages and a ban by judicial fiat. Courts have previously found activities to be abnormally dangerous, such as blasting.⁷⁸ Those activities have not been driven from the market.

The blasting cases illustrate another important aspect of the relation between products liability and the rule of strict liability for abnormally dangerous activities. If manufacturers and distributors of handguns can be subjected to strict liability for abnormally dangerous activities, why can't the manufacturers and distributors of dynamite be strictly liable for injuries caused by the use of dynamite? Absent a limiting principle that distinguishes these cases, the rule of strict liability for abnormally dangerous activities might unduly encroach upon products liability. Such a limiting principle inheres in the enforcement rationale for strict liability, which is why the rule of strict liability for abnormally dangerous activities would not unduly encroach upon products liability as the courts have feared.

74. See generally *Symposium on Generic Products Liability*, 72 CHI.-KENT L. REV. 3 (1996).

75. "A deliberate policy of corporate misconduct may suffice. The A.H. Robbins company marketed its Dalkon Shield IUD knowing it was dangerous to women and presumably hoping its profits would exceed liability. Punitive damages of course were appropriate." DOBBS, *supra* note 27, at 1065 (citing *Tetuan v. A.H. Robbins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987)).

76. See, e.g., *Martin*, 743 F.2d at 1204.

77. An activity that creates unreasonable risks is subject to negligence liability, obviating the need for strict liability. Not surprisingly, then, an abnormally dangerous activity "is carried on with all reasonable care." RESTATEMENT (SECOND), *supra* note 7, § 520 cmt. b. An important caveat is in order. Even though the risks posed by such activities are reasonable as a matter of law, a legal finding of no negligence in any given respect is not equivalent to a legal finding that the negligence regime induces perfect compliance with the standard of care. Cf., e.g., *Cooley v. Public Serv. Co.* 10 A.2d 673 (N.H. 1940) ("It is not doubted that due care might require the defendant to adopt some device [that would have prevented the plaintiff's injury]. Such a device, if it exists, is not disclosed by the record. The burden was upon the plaintiff to show its practicability. Since the burden was not sustained a verdict should have been directed for the defendant.").

78. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 21, Reporter's Notes, cmt. e, at 101 (Council Draft No. 2, Sept. 26, 2000) (providing citations to numerous cases in which courts have applied strict liability to blasting).

When used as a method for enforcing the duty of care, the appropriateness of strict liability for abnormally dangerous activities necessarily depends on the nature of the duty. In the handgun cases, the duty is defined by the enabling torts. The basis of that duty lies in the "inability to effectively reach the putative wrongdoer himself, either through criminal or tort sanctions."⁷⁹ Because the plaintiff usually cannot recover from the third-party criminal who directly caused the harm, the threat of tort liability does not lead the third party to exercise reasonable care, nor does the availability of such a tort action provide a meaningful remedy for plaintiffs. In these contexts, the only effective recourse for the foreseeable risks stemming from product misuse involve an action directly against the manufacturer or gun distributor.

By contrast, plaintiffs face no unusual difficulty in recovering from the product user in the blasting cases and others involving abnormally dangerous product use. The ability of plaintiffs to recover regularly from the product user means that any duty regarding product use can be effectively enforced against product users, eliminating the enforcement rationale for proceeding directly against the product manufacturer or distributor. (Similarly, the duty involving design choices, warnings, and manufacturing defects must be enforced against the manufacturer, which is why bystanders can sue manufacturers directly for such risks under products liability law.) Consequently, the manufacture and distribution of dynamite is not abnormally dangerous, because that activity poses no significant risk to bystanders who are effectively guaranteed compensation for their injuries from the strictly liable blaster.

Thus, in finding that the manufacture and distribution of handguns is not an abnormally dangerous activity, courts have relied on indefensible rationales. Courts make an untenable distinction between manufacturing and distribution, on the one hand, and product use, on the other. The distinction is inconsistent with the enabling torts and products liability. Some courts defend this distinction by claiming that strict liability for abnormally dangerous activities would improperly encroach upon products liability. However, a defective product poses an unreasonable risk; an abnormally dangerous activity does not. Moreover, the rule of strict liability for abnormally dangerous activities applies to product manufacturers and distributors only if strict liability defensibly enforces a duty based on product use. The manufacturers and distributors of handguns already have a tort duty based on the criminal misuse of handguns. That duty does not disappear for purposes of strict liability. Rather, the appropriate question is whether the duty is defensibly enforced by the rule of strict liability.

B. Applying the Enforcement Rationale for Strict Liability to the Manufacture and Distribution of Handguns

The enforcement rationale for strict liability recognizes the social fact of gun violence. By adopting this rationale, a court would find that the activity of gun manufacture and distribution creates a highly significant risk of criminal misuse.

79. Rabin, *supra* note 3, at 444.

Under the rule of strict liability in the proposed Restatement (Third), the court could reject strict liability only by finding that the use of handguns is common in the community.⁸⁰ A finding of common usage would seem automatic, given that almost half of the households in the U.S. report owning one or more guns.⁸¹ Nevertheless, a court would have a hard time explaining why the use of handguns is a common activity under the proposed Restatement (Third) rule of strict liability.

The inquiry concerning common usage focuses on reciprocity. Is the risk an unfortunate byproduct of activities from which everyone sufficiently benefits, either directly or indirectly? For this factor to be satisfied, the court must conclude that law-abiding citizens who do not own guns and face the significant threat of injury are nevertheless adequately compensated by the various benefits provided by private gun ownership. The opportunity to purchase a gun, if not exercised, cannot be adequate compensation, for otherwise any legal activity would be common and there would be no substance to the common-usage factor. All risks would be reciprocal. The question remains: how does the rule of negligence provide adequate compensation for the highly significant risk of physical injury faced by the substantial number of individuals who do not own guns?⁸²

This difficult question need not be resolved under the Restatement (Second) rule of strict liability. Unlike the proposed Restatement (Third) rule of strict liability, the Restatement (Second) rule expressly depends on the social value of the activity.⁸³ The social-value factor addresses the distributive issue of how the application of strict liability to the class of cases in question would affect interests other than those represented by the private parties involved in the lawsuit. This factor, as applied to the manufacture and distribution of handguns, identifies a distributive concern involving the self-defense interests of law-abiding gun owners, a concern that appears to be sufficient to defeat the strict liability claim.

If strict liability were to apply to the manufacture and distribution of handguns, then the price of handguns would rise for everyone, criminals and non-criminals alike. The interests of criminals are not socially valuable and can be disregarded, leaving the interests of law-abiding citizens who own guns for self-defense. Strict liability, via its impact on the price of handguns, would burden the

80. See *supra* note 53 and accompanying text (quoting rule).

81. See KLECK, *supra* note 42, at 64, 98–99.

82. Of course, individuals who do not own guns derive some benefit from the availability of guns in the marketplace. See, e.g., David B. Kopel, *Lawyers, Guns, and Burglars: Why Mass Tort Litigation Fails to Account for Positive Externalities and the Network Effect of Controversial Products*, 43 ARIZ. L. REV. 345 (2001) (providing data that show a lower incidence of burglaries in occupied residences for jurisdictions that permit the private ownership of handguns). The identification of such benefits, however, does not show that those who do not own handguns would be worse off if handguns were banned. Given the complexity of the issue, the reciprocity inquiry would be difficult for a court to resolve.

83. Compare *supra* note 53 and accompanying text (quoting the rule of strict liability under the proposed Restatement Third), with *supra* note 63 and accompanying text (quoting the Restatement (Second) rule).

individual interest in self-protection—an interest in physical security—by making it more costly for law-abiding citizens to obtain handguns. The burden, by possibly reducing the criminal misuse of guns and providing compensation for gun-shot injuries, would protect the security interests of the victims of such crimes. The appropriateness of strict liability therefore depends on how these competing sets of security interests should be mediated against one another.

Tort law appears to have already decided in favor of self-defense. If someone reasonably uses a gun in self-defense and accidentally kills an innocent third party, the party acting in self-defense need not pay for the injury.⁸⁴ The interest in self-defense has priority, for purposes of tort liability, over the competing security interest of a third party. The same set of interests is involved in the manufacture and distribution of guns. The privilege to purchase a gun for self-defense requires the marketing and distribution of guns in the marketplace, with the attendant risk of criminal misuse. Consequently, individuals who exercise this privilege of self-defense expose innocent third parties to the threat of being injured by the criminal misuse of guns. The tort cases involving self-defense suggest that the gun-owners' interest in self-defense has priority, for purposes of tort liability, over the competing third-party interest in bodily security, as long as the force used in self-defense is reasonable.⁸⁵ As a matter of law, abnormally dangerous activities involve reasonable risks.⁸⁶ Applying the rule of strict liability to the manufacture and distribution of handguns therefore would seem to violate the well-established tort principle concerning self-defense. If so, then the social value of the activity is sufficient to defeat the strict liability claim against the manufacturers and distributors of handguns.

The impact of strict liability on self-defense has concerned some courts, but they were unable to explain why the interest in self-protection defeats the strict liability claim.⁸⁷ Such an explanation requires the enforcement rationale for strict

84. See, e.g., *Courvoisier v. Raymond*, 47 P. 284 (Col. 1896); *Morris v. Platt*, 32 Conn. 75 (1864). The conduct in these cases involves risky behavior, because the party acting in self-defense does not intend to harm an innocent bystander. Instead, the party makes a reasonable mistake about the bystander's motive or identity or otherwise harms the bystander accidentally. Each of these mistakes involves risky conduct (the risk of an unintended outcome) not fundamentally different than the risky behavior involved in negligence actions.

85. See RESTATEMENT (SECOND), *supra* note 7, § 75.

86. See *supra* note 77 and accompanying text.

87. See *Caveny v. Raven Arms Co.*, 665 F. Supp. 530, 531–32, 534–35 (S.D. Ohio 1987) (rejecting abnormally dangerous claim for Saturday Night Special handgun without recognizing relation to self-defense and rejecting a different claim of strict liability because removing “cheap weapons from the community may very well remove a form of protection assuming that all citizens are entitled to possess guns for defense”); *Copier v. Smith & Wesson Corp.*, 138 F.3d 833 (10th Cir. 1998) (rejecting abnormally dangerous claim for handguns in part because the claim “ignores a number of legitimate uses, including self-defense, home protection, and use by law enforcement officers”); *Martin v. Harrington and Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984) (arguing that products liability claim is the same as the abnormally dangerous claim, and rejecting both

liability. To be sure, the foregoing explanation might not withstand further scrutiny. Maybe the individual interest in self-defense should not have legal priority over the competing security interests of those who do not own handguns.⁸⁸ The point, however, is that legal rules concerning handguns necessarily implicate this normative question, and courts have already addressed that question in other tort cases involving self-defense. Courts have never directly addressed that question in the handgun cases, relying instead on reasons that do not withstand scrutiny. At minimum, an enforcement rationale for strict liability would enable the courts to reach better-reasoned and more defensible results in the handgun cases.

VI. CONCLUSION

An inquiry into the relation between tort law and criminal behavior reveals an inconsistency that requires redress. Negligence doctrine acknowledges that the threat of criminal and tort liability does not induce perfect compliance with the law, whereas strict liability doctrine assumes perfect compliance.

As illustrated by the handgun cases, courts should eliminate the inconsistency by applying the rule of strict liability in a manner that accounts for unlawful behavior. In light of the vast number of deaths and injuries caused by the criminal misuse of handguns, the manufacture and distribution of handguns unquestionably creates a high degree of risk for some members of society. Instead of acknowledging the risk and determining whether strict liability is an appropriate response, courts have assumed the problem away. Criminals do not misuse handguns, and in any event there is nothing risky about the manufacture and distribution of handguns. This resolution of the problem is highly unsatisfactory and largely disconnected from the public debate on gun control. As the debate so clearly reveals, the legal regulation of handguns poses a hard question of how to mediate the legitimate interests of handgun owners, particularly regarding self-defense, against the interests of those who do not own handguns and face the threat of being shot by criminals. This normative question is ignored by the current judicial approach to strict liability.⁸⁹

This failure of the tort system is unnecessary. In cases of self-defense, the courts have long recognized that the interest in self-defense has legal priority over the competing security interest of a third-party, as long as the force used in self-

claims in part due to concern that liability would inappropriately burden the right of private citizens to possess arms).

88. Compare *supra* note 77 (observing the difference between reasonableness as a matter of law and fact).

89. The constitutional debate over the Second Amendment suffers from the same problem. See Christopher L. Eisgruber, *Moral Principle and the Second Amendment* (2001) (unpublished manuscript presented at Symposium on Guns, Crime, and Punishment in America, James E. Rogers College of Law, University of Arizona, Jan. 2001) (on file with Author) (lamenting the prominent role of 18th-century organized militias in the Second Amendment debate and arguing that the constitutional question requires resolution of an abstract moral principle regarding the individual right to bear arms).

defense is reasonable. The same issue is involved in the strict liability claims against the manufacturers and distributors of handguns. If courts were to find that the manufacture and distribution of handguns is an abnormally dangerous activity, the price of handguns would inevitably increase. The injuries suffered by those individuals who do not own guns would be paid for, in part, by those who own guns for self-defense, an outcome that appears to be contrary to the tort principle of self-defense. Perhaps this outcome does not violate the tort principle due to the difference in circumstances, or perhaps the principle requires rethinking. Whatever its resolution, though, the issue merits better treatment than it has received thus far from the tort system.

To address the real issue posed by the handgun cases, courts can apply the rule of strict liability in the *Restatement (Second) of Torts*, interpreted as a rule capable of enforcing the duty of care in contexts where the negligence rule cannot be adequately enforced. This interpretation would make the rule of strict liability consistent with the enabling torts and social facts. By adopting this interpretation, courts would undo the damage that the handgun cases have wrought on the jurisprudence of strict liability.

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