

Pistol Whipped Baseless Lawsuits, Foolish Laws

by Robert A. Levy

Executive Summary

Although Congress and the majority of state legislatures have resisted enacting draconian gun control laws, the courts are the final bulwark in safeguarding our constitutional right to keep and bear arms. Yet the courts of late have been the scene of unprecedented attacks on that right as gun control advocates have used the judiciary to make an end-run around the legislative process. Meritless litigation brought by government plaintiffs in multiple jurisdictions are just part of a scheme to force gun makers to adopt policies that legislatures have wisely rejected. Moreover, the suits are used by politicians to reward their allies—private attorneys, many of whom are major campaign contributors—with lucrative contingency fee contracts.

Meanwhile, many of the same politicians have exploited a few recent tragedies to promote their anti-gun agenda. But gun controls haven't worked and more controls won't help. In fact, many of the recommended regulations will make matters worse by stripping law-abiding citizens of their most effective means of self-defense.

Violence in America is due not to the availability of guns but to social pathologies—illegitimacy, dysfunctional schools, and drug and alcohol abuse. Historically, more gun laws have gone hand in hand with an explosion of violent crime. Only during the past decade—with vigorous law enforcement, a booming economy, and an older population—have we seen dramatic reductions in violence, coupled with a record number of guns in circulation.

Before we compromise constitutional rights expressly recognized in the Second Amendment, we ought to be sure of three things: first, that we've identified the real problem; second, that we've pinpointed its cause; and, third, that our remedy is no more extensive than necessary to fix the problem. The spreading litigation against gun makers fails all three tests as do the latest gun control proposals. Guns do not increase violence; they reduce violence. Banning or regulating firearms will not eliminate the underlying pathologies. And a less invasive remedy already exists: enforce existing laws.

We're dealing not with law but with extortion parading as law.

Introduction

Gun makers, engulfed by a torrent of litigation from dozens of cities, were threatened by the Clinton administration during the summer of 1999 with additional claims, from more than three thousand public housing authorities, coordinated by the U.S. Department of Housing and Urban Development.¹ Under President Bush, further action by HUD will almost certainly be shelved. Still, ongoing city- and state-sponsored lawsuits could destroy the firearms industry, with profound implications for the rule of law and the Constitution. The government's resort to litigation as a tactic of intimidation and extortion will have destructive consequences extending far beyond a single industry.

Here's how the current avalanche of lawsuits against gun makers unfolded. In June 1997 the giant tobacco companies first caved in to the state Medicaid recovery suits. Cigarette manufacturers, besieged by claims in dozens of states and sued under perverted rules of tort law that eliminated any opportunity to defend themselves,² decided to settle—that is, to bribe the politicians instead of going to war against a punitive money grab. That capitulation—the surrender of the industry's right to market a perfectly legal product—predictably spawned a new round of litigation. This time, gun makers were pitted against the combined resources of billionaire trial lawyers, city mayors, county executives, a state attorney general, and the Clinton administration.

In bullying gun makers, the plaintiffs have included three corrosive ingredients, carried over from the tobacco wars, in their litigation formula: First, they have sued in multiple jurisdictions, thereby escalating the industry's legal costs. Second, they have employed contingency fee lawyers, many of whom are major political donors. Third, they have tried to use the judicial branch to bypass the legislature.

To begin, I will examine that new litiga-

tion paradigm. Then I'll digress briefly to explore Second Amendment concerns. Next, I will analyze the suits threatened by public housing authorities, the claims by some cities that gun makers are responsible for "negligent marketing," the allegation by other cities that guns are an "unreasonably dangerous" and "defective" product, and the fallout from the Smith & Wesson settlement. That will be followed by an assessment of the data that allegedly link gun injuries to gun ownership and, finally, a look at the various proposals that purport to remedy gun violence.

Government-Sponsored Tort Suits: The New Paradigm

When public officials prosecute lawbreakers, those officials are fulfilling a legitimate role of government. Most of the time, that prosecutorial role is unobjectionable, and it is often commendable. But the latest rounds of litigation—tobacco, then guns—are different in three respects, each of which threatens the rule of law.

First, coordinated actions by multiple government entities can impose enormous legal fees on defendants. Such actions have been used to extort money notwithstanding the fact that the underlying case is without merit. Just listen to former Philadelphia mayor Edward G. Rendell, a Democrat, calling for dozens of cities to file concurrent suits against gun makers: They "don't have the deep pockets of the tobacco industry," Rendell explained, and multiple lawsuits "could bring them to the negotiating table a lot sooner."³ Never mind that the suits are baseless. We're dealing not with law but with extortion parading as law.

One effective way to stop such thievery is to implement a "government pays" rule for legal fees when a governmental unit is the losing plaintiff in a civil case. In the criminal sphere, defendants are already entitled to court-appointed counsel if needed; they're also protected by the requirement for proof

beyond reasonable doubt and by the Fifth and Sixth Amendments to the Constitution. No corresponding safeguards against abusive public-sector litigation exist in civil cases. By limiting the rule to cases involving government plaintiffs, access to the courts is preserved for less-affluent, private plaintiffs seeking redress of legitimate grievances. But defendants in government suits will be able to resist meritless cases that are brought by the state solely to ratchet up the pressure for a large financial settlement.

“Government pays” becomes ever more urgent with the recent emergence of an insidious relationship between the plaintiffs’ bar and some government officials. That relationship—common to tobacco and gun litigation—is a second major threat to the rule of law.

Both rounds of litigation were concocted by a handful of private attorneys who entered into contingency fee contracts with the government. In effect, members of the private bar were hired as government subcontractors, but with a huge financial share in the outcome. That’s not a problem, says Rendell. He announced that cities were suing gun makers only for improved safety features and changes in distribution practices, not monetary damages. Yet one day after Rendell’s disclaimer, Miami and Bridgeport filed their suits, seeking hundreds of millions of dollars in damages.⁴ New Orleans asked for damages⁵ and so did Chicago (in fact, \$433 million).⁶ The claims include not only medical costs associated with gun violence but also the costs of police protection, emergency services, police overtime and pensions, courts, prisons, loss of population, cleaning the streets of blood, lower property values, even lost tax revenue from reduced worker productivity⁷—plus punitive damages. And nearly all of the cities have solicited private lawyers to work for a contingency fee based on those damages.

So if money isn’t the primary goal, there will be a lot of attorneys working for free. Maybe that’s what they deserve. After all, the gun suits aren’t intended to go to trial. In fact, HUD’s threat, on top of the city and county claims, was meant to promote a set-

tlement, not a trial. No doubt, with a piddling \$1.5 billion in annual revenues, gun makers are not going to yield the same treasure trove as the tobacco behemoths whose worldwide sales are \$300 billion. But that’s not fatal, because the real goal of the trial lawyers is to chalk up one more victory, thus demonstrating to future wealthy defendants that groundless legal theories are good enough when the coercive power of multiple government entities is arrayed against an unpopular industry.

When a private lawyer subcontracts his services to the government, he bears the same responsibility as a government lawyer. He is a public servant beholden to all citizens, including the defendant, and his overriding objective is to seek justice. Imagine a state attorney paid a contingency fee for each indictment that he secures, or state troopers paid per speeding ticket. The potential for corruption is enormous. Still, the states in their tobacco suits doled out multibillion dollar contracts to private counsel—not pursuant to per hour fee agreements, which might occasionally be justified to acquire unique outside competence or experience, but as contingency fees, a sure-fire catalyst for abuse of power. And those contracts were awarded without competitive bidding to lawyers who often bankrolled state political campaigns.⁸

Government is the single entity authorized, in narrowly defined circumstances, to wield coercive power against private citizens. When government functions as prosecutor or plaintiff in a legal proceeding in which it also dispenses punishment, adequate safeguards against state misbehavior are essential. That is why in civil litigation we rely primarily on private remedies with redress sought by, and for the benefit of, the injured party and not the state. As the Supreme Court cautioned more than 60 years ago, an attorney for the state “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.”⁹

Put bluntly, contingency fee contracts

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between government and a private attorney should be illegal. We cannot in a free society condone private lawyers enforcing public law with an incentive kicker to increase the penalties.

Third, and perhaps most important, laws are supposed to be enacted by legislatures, not by the executive or judicial branches. In too many instances, government-sponsored litigation has been a substitute for failed legislation. That violates the principle of separation of powers—a centerpiece of the federal Constitution and no less important at the state level. Evidently, none of that matters to many of the attorneys general, mayors, and their allies in the private bar. In an attempt to circumvent the legislative process, they intend to pursue through litigation what was rejected by the legislature.

It's interesting to contrast the legal perspective on product prohibition that prevailed in 1919 with the view that now prevails—eight decades later. In 1919 we understood that Congress did not have the power to prohibit the sale of alcohol, so prohibition was accomplished by a constitutional amendment (the Eighteenth). Today the drug war is entirely statutory with little thought of its constitutional implications. When it comes to tobacco, the Clinton administration argued that not only didn't we need a constitutional amendment, we also didn't need a statute – just a delegation of some sort to an unelected and unaccountable administrative agency (the Food and Drug Administration) with authority to ban nicotine.¹⁰ And in the case of guns, it seems we don't need a constitutional amendment, or a statute, or a delegation, just multiple lawsuits by means of which the executive branch uses the judicial branch to bypass the legislature and effect a variety of gun prohibitions. So much for limited government and separation of powers. We're left with the executive state. Return of the king. That's the regime under which dozens of cities, aided by the Clinton administration, took the gun battle to the courts—suing gun makers for “negligently marketing” a “defective product.”

But before discussing those lawsuits, a quick but important detour.

To Keep and Bear Arms

At the same time cities are suing the gun industry, a Texas appeals court is reviewing a lower court decision that invalidated a federal statute on Second Amendment grounds. Thus, the Supreme Court, for the first time in more than 60 years, may soon revisit the right to keep and bear arms. Does the Second Amendment secure that right? If so, what restrictions can governments place on its exercise? The answers to those questions could determine the outcome of litigation, and legislation as well, directed at stricter gun control. So let's look briefly at the underlying constitutional issue.

“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.” That's the text of the Second Amendment; and here's the question that seems to have perplexed the Supreme Court for more than 200 years: Does the right to keep and bear arms, as laid out in the Second Amendment, belong to each of us as an individual, or does it belong to us collectively as members of the militia? Here's the answer:

The Second Amendment, like the First and Fourth Amendments, refers explicitly to “the right of the people.” No reasonable person can doubt that First Amendment rights—speech, religion, assembly, and redress of grievances—belong to us as individuals. Similarly, Fourth Amendment protections against unreasonable searches and seizures are individual rights. We secure “the right of the people” by guaranteeing the right of each person. Likewise, the Second Amendment protects, not the state, but each individual against the state—that is, the amendment is a deterrent to government tyranny.¹¹

Some people would insist that, although the threat of tyrannical government has not disappeared, it is less today than it was when our Republic was experiencing its birth pangs. Perhaps so. Tyranny may well be a lesser threat now, but incompetence by the state in defending its citizens against crimi-

nals is a greater threat. The demand for police to defend us increases in proportion to our inability to defend ourselves. That's why disarmed societies tend to become police states. Witness law-abiding inner-city residents, many of whom have been disarmed by gun control, begging for police protection against drug gangs despite the terrible violations of civil liberties such protection entails—such as curfews, anti-loitering laws, civil asset forfeiture, even nonconsensual searches of public housing.

So even if a reduced threat of government tyranny no longer requires an armed citizenry, an unarmed citizenry could well create the conditions that lead to tyranny. The right to bear arms is thus prophylactic—it reduces the demand for a police state—rather than remedial. George Washington University law professor Robert Cottrol puts it this way: “A people incapable of protecting themselves will lose their rights as a free people, becoming either servile dependents of the state or of the criminal predators who are their de facto masters.”¹²

More than 60 years ago, in 1939, the Supreme Court looked at the question of individual right or collective right in *United States v. Miller*.¹³ The statute in *Miller* was the 1934 National Firearms Act, which required registration of machine guns, sawed-off rifles, sawed-off shotguns, and silencers. First, said the Court, “militia” is a term of art that means “the body of the people capable of bearing arms.”¹⁴ That suggested a right belonging to all of us, as individuals. But the Court also held that the right to bear arms extended only to weapons rationally related to the militia—not a sawed-off shotgun, which was at issue in *Miller*.

That mixed ruling has puzzled legal scholars for six decades. If military use is the decisive test, then one would think today's citizens can possess rocket launchers, missiles, even nuclear arms. Obviously, that's not what the Court had in mind. Because the Court's opinion in *Miller* is so murky, argues George Mason University law professor Nelson Lund, maybe the only lesson we can draw is that the case must be interpreted narrowly,

allowing restrictions on those types of weapons covered by the 1934 Act—weapons like machine guns and silencers, which have slight value to law-abiding citizens and high value to criminals.¹⁵

Apparently, that's the position that a few renowned, liberal law professors are now taking. It started with a famous 1989 article, “The Embarrassing Second Amendment,” by professor Sanford Levinson in the *Yale Law Journal*.¹⁶ For the first time, a prominent liberal acknowledged that the Second Amendment should be treated as something more than an inkblot. Evidently, the liberal apostasy has caught on. Harvard professor Laurence Tribe and Yale professor Akhil Amar concede that there's an individual right to keep and bear arms, albeit limited as in *Miller* by “reasonable regulation in the interest of public safety.”¹⁷

In effect, they argue that the Second Amendment, like the First Amendment, is not absolute. “Reasonable” restrictions—for example, on the types of weapons that can be purchased—may be justified on cost/benefit grounds. On the other hand, Tribe and Amar imply that the Fourteenth Amendment binds the states, not just the federal government, to honor the Second Amendment. In that respect, the two professors go further than our federal appellate courts, which have taken a states' rights approach to the Second Amendment—rubber-stamping state gun prohibitions without subjecting them to rigorous constitutional scrutiny.

That difference between federal and state treatment is important in answering one of the arguments frequently made against the Second Amendment by anti-gun advocates. For example, the Center to Prevent Handgun Violence makes this argument: When our nation was founded, many states had communal storage of guns and restricted their use to white males only. Maryland actually seized guns that weren't used in the militia; Pennsylvania denied firearms to 40 percent of its citizens for lack of virtue. Therefore, the Framers could not have intended an individual right to keep and bear arms. But here's

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the missing link: Until 1868 when the Fourteenth Amendment was ratified, the Bill of Rights constrained only the federal government. What the states did prior to that time is not directly relevant from a constitutional perspective.

With that brief background, let's turn next to an important new case in Lubbock, Texas. *United States v. Emerson*¹⁸ could be the first Second Amendment case to reach the Supreme Court in more than six decades. In Texas, like many other states, spouses involved in divorce proceedings are routinely put under a court order restraining them from harassing, stalking, or threatening their partner—even without a showing that malevolent intent exists. A federal statute makes it illegal for anyone under that type of restraining order to possess a gun. Emerson was indicted under the federal statute, although there was no proof that he planned a violent act against his wife. He contested his indictment on Second Amendment grounds. In April 1999 a federal judge dismissed the indictment, agreeing with Emerson that the statute violated the Second Amendment. The government appealed, the case has been argued, and a decision is now awaited from the U.S. Court of Appeals for the Fifth Circuit.

The trial judge, Samuel Cummings, didn't equivocate. He said: "If the amendment truly meant what the collective rights advocates propose, then the text would read, 'A well regulated Militia being necessary to the security of a free State, the right of the *states* [or the militia] to keep and bear arms shall not be infringed.'"¹⁹ Cummings might have added that a collective right, if conferred on the states, would permit "state governments [to] maintain military organizations independent from the federal military, and to arm those organizations with nuclear weapons or whatever else the state may choose."²⁰ A states' rights approach would also suggest that "Supreme Court decisions recognizing that the federal government has final authority over the deployment and use of the National Guard must be incorrect."²¹

When Cummings parsed the two clauses

of the Second Amendment, he concluded: "The function of the subordinate clause was not to qualify the right, but instead to show why it must be protected. . . . If this right were not protected, the existence of the militia, and consequently the security of the state, would be jeopardized."²² In other words, the second clause ("the right of the people to keep and bear Arms, shall not be infringed") is operational; it secures the right. The first clause ("A well regulated Militia, being necessary to the security of a free State") is explanatory; it justifies the right. That syntax was not unusual for the times. For example, the free press clause of the 1842 Rhode Island Constitution states, "The liberty of the press being essential to the security of freedom in a state, any person may publish his sentiments of any subject."²³ That provision surely doesn't mean that the right to publish protects only the press. It protects "any person," and one reason among others that it protects any person is that a free press is essential to a free society.

In a similar vein, Article I, section 8, of the U.S. Constitution gives Congress the power to grant copyrights to "promote the Progress of Science and useful Arts." Yet copyrights are granted to *Hustler* magazine, to racist publications, even to literature that expressly seeks to retard science and the useful arts.²⁴ The proper understanding of the copyright provision is that promoting science and the arts is one justification—but not the only justification—for the copyright power. Analogously, the militia clause helps explain why we have a right to bear arms, but it's not necessary to the exercise of that right.

As you might guess, that was not the position of the Clinton administration. Consider this exchange at the oral argument before the Fifth Circuit in *Emerson*:

Judge William L. Garwood: You are saying that the Second Amendment is consistent with a position that you can take guns away from the public? You restrict ownership of rifles, pistols, and shotguns from all

people? Is that the position of the United States?

Deputy U.S. Attorney General William Meteja: Yes.

Garwood: Is it the position of the United States that persons who are not in the National Guard are afforded no protections under the Second Amendment?

Metēja: Exactly.²⁵

Metēja later explained that even Guard members are protected by the Second Amendment only when and to the extent that their weapons are used for Guard business.

For those who believe that the Constitution means what it says, here's another text-based argument: The term "well-regulated," in its 18th century context, didn't mean *heavily* regulated, but rather *properly*, and not *overly*, regulated. Looked at in that manner, the Second Amendment ensures that the militia would not be improperly regulated, even weakened—say by disarming the citizens who would be its soldiers.²⁶

Bear in mind that Article I, section 8, gives Congress, not the states, the power to call forth and "provide for organizing, arming . . . disciplining . . . and for governing" the militia. State powers are limited to appointing officers and training. The Framers feared and distrusted standing armies; so they provided for a federal militia—all able-bodied males over the age of 17—as a counterweight against potential tyranny. But the Framers also realized, in granting Congress near-pleinary power over the militia, that a select, armed militia subset—like today's National Guard—could be equivalent to a standing army. So they wisely crafted the Second Amendment to forbid Congress to disarm other citizens, thereby certifying that the militia would be "well-regulated."²⁷

Consider also these three changes made by the 1789 Congress when it drafted the amendment: First, a provision excusing conscientious objectors from military service was eliminated—making it clear that the Second Amendment is about firearms, not about military service. Second, the term "well

armed" was stripped as a modifier of "Militia"—again clarifying that the arms were those of the people not those of the military. Third, the phrase "for the common defense" was dropped after the words "to keep and bear Arms"—no ambiguity there; the intent was to provide an individual right of defense, not common defense.²⁸

Finally, it's worth noting that there are at least three other constitutional arguments against gun control, apart from the Second Amendment: (1) Many gun regulations are too vague and thus don't provide citizens with adequate notice of the particular acts that are illegal. That offends the Due Process Clause. (2) Some federal controls may intrude on matters traditionally subject to state supervision, or may exceed the powers of Congress enumerated in Article I, section 8. That would violate the Tenth Amendment, which instructs that the federal government may exercise only those powers that are enumerated in the Constitution and delegated by it to the United States. (3) An individual right to keep and bear arms could well be among the unenumerated rights secured by the Ninth Amendment.

Litigation Tyranny

Now let's switch gears—from constitutional law to tort law—as we turn to the deluge of lawsuits against the gun industry: first, the federal government claims, which the Bush administration will probably not pursue, then the litigation by more than 30 cities and counties as well as New York state.

Federal Claims

At the federal level, Clinton's HUD secretary, Andrew Cuomo, had a plan to change the way the nation's gun makers do business. Already smothered by litigation from dozens of cities and counties, the gun industry would have been crushed under the weight of legal action from a horde of 3,200 housing authorities synchronized by HUD. The government wanted to hold gun makers respon-

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sible for defraying the cost of security guards and for alarm systems installed to curb violence in public housing.²⁹

Like the cities, HUD said it was not interested in money damages. Maybe so, but Cuomo and his acolytes understood very well that the small gun industry couldn't afford to defend itself, even against unfounded suits, in the face of such overwhelming firepower. A *Wall Street Journal* story emphasized that very point: "As with the municipal suits, one filed on behalf of housing authorities would be groundbreaking and certainly not a sure bet to succeed in court. But a suit by a large group of housing authorities could [exhaust] gun companies' resources in pretrial maneuvering—by making demands for documents concerning industry distribution practices in hundreds or thousands of localities."³⁰

In justifying HUD's litigation plans, Cuomo contended that "only one percent of the dealers are selling over 50 percent of the guns used in crimes."³¹ But if crimes were linked to guns sold by particular dealers, why weren't the underlying data turned over to authorities whose duty it is to shut down dealers who break laws against those sales—laws that are on the books in all 50 states? Instead, Cuomo sought to compel gun makers to become police, judge, and jury—to ferret out "bad" dealers, some of whom were entirely innocent, and deny to those dealers, without due process of law, the merchandise they sell for a living.

That was just the beginning. Cuomo also demanded safer guns. "We have safety caps on aspirin," he says, so why not safety locks on guns?³² Well, let's see, there are a couple of relevant differences between guns and aspirin. The requirement for safety caps on aspirin arose out of legislation, not judicial mandate. Aspirin is legally accessible to kids; guns aren't. Furthermore, not many people when confronted with an emergency will turn to a bottle of aspirin for protection. Use of a gun for self defense could be dangerously compromised if the gun is locked. Listen to Sammy "The Bull" Gravano, the Mafia turncoat, quoted in *Vanity Fair*: "Safety locks? You . . . pull the

trigger with a lock on, and I'll pull the trigger [without one]. We'll see who wins."³³

Actually, if Cuomo was concerned about unsafe public housing, he should have sued his own agency.³⁴ HUD is responsible for housing authorities—including their location, selection of tenants, eviction policies, even inadequate policing. But rather than admit to the abject failure of public housing, Cuomo instructed his minions to plan lawsuits, modeled after those filed by cities and counties from coast to coast. Here are the two principal legal theories.

City Claims

Negligent Marketing. The city of Chicago, and other cities following its example, accused gun makers of "negligent marketing"—flooding the suburbs, where gun laws are relaxed, with more guns than suburban residents will buy, knowing that the excess will find its way to the inner city, where gun laws are more restrictive.

Simple economic logic puts the lie to Chicago's negligent-marketing claim. If gun makers reduce the supply of firearms sold to suburban dealers, the market price of guns will rise. Consumers with the most "elastic" demand—that is, consumers who are most sensitive to price changes—will reduce or eliminate their purchases. The evidence is clear: Those price-sensitive consumers are typically law-abiding citizens. By contrast, criminals' demand for guns is highly "inelastic." They operate in a "survival at any price" environment—which is why crooks are willing to pay inflated black-market prices for firearms. Perversely, by restricting the legal supply of guns and raising the price, manufacturers will put relatively more weapons in criminals' hands and relatively fewer in the hands of honest citizens.

Besides, any coordinated industry response to a negligent-marketing claim would surely run afoul of the antitrust laws. Manufacturers that supposedly overproduce would have to collude in order to reduce production jointly. Yes, Smith & Wesson knows how many of its guns are going to, say, Maryland. But those

guns, by themselves, don't come close to saturating the Maryland market. And Smith & Wesson has no idea how many guns are shipped to Maryland by Colt, Beretta, Glock, Ruger, or any other manufacturer. Because brands are more or less interchangeable, no single gun maker would agree to cut back production for fear that other manufacturers would simply take up the slack. An antitrust suit is sure to follow.

Compare the gun model with dram shop laws, which hold bartenders liable when they continue to ply an obviously drunk patron with liquor knowing full well that the customer could kill himself or others when he drives home. Whatever the merit of those laws, the analogy in the gun context is not to hold the bartender responsible or even the bar owner. Instead, it's the equivalent of holding Seagrams or Anheuser Busch accountable for the ensuing drunk-driving fatality.

An obvious solution to Chicago's problem, said the judge who dismissed the city's case this past September,³⁵ would be for the police to enforce laws that already prohibit sales to minors, felons, the mentally incompetent, and anyone else without a state-issued firearm owner's ID card. Instead, Chicago sued gun makers—who lawfully sell to wholesalers who, in turn, sell to licensed retailers. The city wants to hold gun makers liable for the violent acts of criminals, most of whom did not buy from licensed retailers and over whom the manufacturers have no control. As the Seventh Circuit held in a 1989 case, *Bloomington v. Westinghouse*,³⁶ a manufacturer is not liable for creation of a nuisance by the buyer unless the manufacturer participated in the conduct.

The chain of causation is broken when a criminal act intervenes between a gun maker's original sale and an injury arising out of the gun's violent use. That time-honored principle of law, by itself, is sufficient to dismiss these cases. A gun maker is liable only if the risk of injury was foreseeable. And when the law says "foreseeable," it doesn't mean merely possible; it means that the intervening criminal act was the natural and probable

outcome of the gun maker's sale.³⁷ Yes, Americans own roughly 250 million guns and commit about 500,000 gun-related crimes each year.³⁸ But even if a different gun is used in each of those crimes, only two-tenths of 1 percent of all guns are involved in criminal activity in any given year. That negligible chance of criminal conduct surely doesn't cross the "natural and probable outcome" threshold.

The manufacture, sale, and ownership of handguns are highly regulated. If a gun dealer knowingly condones so-called straw purchases—those made by legal buyers on behalf of criminals—the dealer can be prosecuted under current law. As of April 2000, 17 months after Chicago filed its lawsuit, only four of the retailers targeted by the city's undercover "stings" had been charged. In the one case to go to trial, the jury took but 10 minutes to find the defendant not guilty.³⁹ If the behavior of those dealers was as egregious as the city's complaint suggests, why were there only four indictments and no convictions?

More generally, as gun control authorities David Kopel and Richard Gardiner point out:

Handguns are the only consumer product which an American consumer is forbidden to purchase outside his state of residence. They are the only mass consumer product for which retailers, wholesalers, and manufacturers all require federal licenses. They are among a tiny handful of consumer products for which the federal government regulates simple possession, and further regulates the terms of retail transactions, going so far as to require (for handguns) that police be notified and given an opportunity to disapprove the sale before being allowed to consummate the transaction.⁴⁰

Nationwide thousands of laws regulate everything from who can own a gun and how it can be purchased to where one can possess or use it.⁴¹ Yet, in 1998, thousands of guns

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In order to hold gun makers liable for selling an unsafe product, tort law requires a true defect, not merely that a product is dangerous when it does what it is designed to do.

were brought illegally onto school grounds, but there were only eight federal prosecutions.⁴² From 1992 to 1999, according to a Syracuse University study, federal gun prosecutions declined by 43 percent.⁴³ During the two years ended mid-1999, half of the guns used in crimes were traced by the Bureau of Alcohol, Tobacco and Firearms to 389 dealers, but only 19 had their licenses revoked.⁴⁴ Julius Wachtel, retired after 23 years as an ATF agent, remarked that he and his coworkers had a saying: “No cases, no waves; little cases, little waves; big cases, big waves.”⁴⁵

An ATF study released in June 2000 documented 1,700 federal and state gun-law prosecutions and 1,000 verdicts from July 1996 through December 1998.⁴⁶ On a per year basis, that’s 680 prosecutions and 400 guilty pleas—trivial numbers when contrasted with roughly 500,000 gun crimes committed in the United States each year.

The effect of more rigorous law enforcement and stiffer penalties is apparent from the experience of Richmond, Virginia, with Project Exile—a federal program that, in part, mandates a five-year minimum sentence in federal prison for any felon caught carrying or trying to buy a gun. Richmond reported a 36 percent decline in gun homicides and 37 percent drop in armed robberies for the 1997 calendar year.⁴⁷ When the National Rifle Association sought to expand Project Exile, it received little support from the Clinton administration until September 1999, at which time the president requested an inconsequential budget increase of \$5 million. Congressional Republicans had wanted \$25 million, albeit targeted at cities in states where the senators on the Appropriations Committee served, not at cities where crime rates were highest.⁴⁸

To be sure, the states, not the federal government, exercise general police power. Why should federal courts be turned into what one federal judge in Richmond characterized as “police courts”?⁴⁹ Far better for the states to stiffen their own penalties than to federalize yet more crimes. Indeed, the federalization of most gun crimes cannot be squared with the

Tenth Amendment. Still, many federal criminal laws would qualify as a legitimate exercise of state police power. In any event, lack of enforcement, whether state or federal, cannot be laid at the doorstep of gun makers.

To listen to the politicians, if existing laws are not being enforced, the best bet is to pass more laws. In the Chicago suburbs, the legislative unit is Cook County, which could have enacted more restrictive gun laws. For whatever reasons, it chose not to. Instead, Cook County signed on as coplaintiff in Chicago’s lawsuit. It wanted the judicial branch to do what the county elected not to do. Think about it: Cook County’s complaint to the court, quite literally, is that the county has itself failed to pass appropriate legislation. In effect, Cook County’s plea is “Stop me before I don’t legislate again,” which must be a first in American jurisprudence.⁵⁰

Defective Product. The second major claim of cities suing the gun industry is that firearms are “defective and unreasonably dangerous” as they are currently manufactured. How are the firearms defective? Do they misfire? Do they fire inaccurately? Not at all. Even the *Washington Post* has editorialized: “As a legal matter, it is hard to see how companies making lawful products can be held liable when those products perform precisely as intended.”⁵¹ No matter. First New Orleans, then other cities, insisted that guns are defective if they are sold without devices that prevent discharge by unauthorized users. On that ground, the cities hope to drag gun makers to the settlement table—turning the law of product liability on its head.

In order to hold gun makers liable for selling an unsafe product, tort law requires a true defect, not merely that a product is dangerous when it does what it is designed to do. True enough, some guns have features that are particularly attractive to criminals. But that may be because criminals value many of the same features that appeal to law enforcement officers. Legislatures across the nation have regulated virtually every aspect of gun design and distribution. If a determination is to be made that guns are unreasonably dan-

gerous, the legislature, constrained by the Constitution, must make that determination, not the courts. Here's how a federal judge in Massachusetts put it in a 1996 case, *Wasylow v. Glock*: "Frustration at the failure of legislatures to enact laws sufficient to curb handgun injuries is not adequate reason to engage the judicial forum in efforts to implement a broad policy change."⁵²

Even Brooklyn's Jack Weinstein, the favorite federal judge of the plaintiffs' bar, had this comment about the safety of guns: "Whether or not . . . products liability law would require an anti-theft safety mechanism as part of the design of handguns requires a balancing of the risk and utility. . . . Plaintiffs have not shown that such a device is available, nor have they asserted the possibility of showing at trial that such a device would satisfy the . . . risk-utility test." Weinstein added, "The mere act of manufacturing and selling a handgun does not give rise to liability absent a defect in the manufacture or design of the product itself."⁵³

When it comes to guns, New Orleans city officials are singularly unsuited to be the guardians of public safety. In 1998 the city's police department traded more than 8,000 confiscated weapons—40 percent of which were semiautomatic—to a commercial dealer in return for Glocks. Nearly half of the traded guns would have been characterized as "unsafe" in the city's lawsuit against gun makers—including TEC9s, AK47s, and Uzis, banned since 1994. Only a quarter of the guns had safety locks. Still, Mayor Marc Morial signed and approved the deal, paving the way for resale of those guns across the nation.⁵⁴ Ironically, New Orleans could end up as defendant in other cities' suits.

Under pressure, Morial suspended the swap program.⁵⁵ But New Orleans wasn't the only hypocritical plaintiff. Police departments in Boston, Detroit, Oakland, Miami, St. Louis, and Bridgeport also traded in "unsafe" guns, which are now back on the street, even while suing gun makers for marketing a defective product.⁵⁶ Undoubtedly sensitive to the bad publicity, several police

departments announced that they would explore a lease program, rather than trade-ins, with Glock.⁵⁷ Yes, that might relieve the city of direct responsibility for providing unsafe guns for commercial resale. But the revised contractual arrangement is mere camouflage for what is basically the same deal—that is, a so-called defective product is first used by the police and then recycled by Glock for sales to private citizens.

Whether the claim is a defective product, negligent marketing, or public nuisance, these lawsuits are rubbish. Five of them have reached final judgment and all five were fully or partially dismissed.⁵⁸ In October 1999 an Ohio state judge threw out Cincinnati's claims. He wrote that gun makers are not responsible for the criminal misconduct of customers. "The city's complaint is an improper attempt to have this court substitute its judgment for that of the legislature."⁵⁹ The "design, manufacturer and distribution of a lawful product" is not a public nuisance.⁶⁰

Bridgeport's and Miami's suits were also dismissed, in December 1999. Miami's judge observed that the city cannot use the courts to regulate; that's the job of the legislature.⁶¹ A Florida appeals court upheld the Miami ruling, calling the lawsuit "an attempt to regulate firearms . . . through the . . . judiciary." "Clearly this round-about attempt is being made because of the County's frustration at its inability to regulate firearms," the appeals court wrote. "The County's frustration cannot be alleviated through litigation."⁶²

In Chicago on September 15, 2000, a judge threw out that city's negligent-marketing claim saying that statistical evidence of causation wasn't good enough and that individual instances of illegal sales were a matter for the police to counter.⁶³ Most recently, on December 21, 2000, a federal judge dismissed Philadelphia's claims, describing the city's charge of public nuisance as "a theory in search of a case," and rejecting the negligence claim "for lack of proximate cause."⁶⁴

Nevertheless, the trial lawyers press forward. Sooner or later they're likely to find a

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Threatened litigation by the federal government and actual litigation by dozens of cities were used as a bludgeon to force the industry's largest manufacturer, Smith & Wesson, into a settlement.

sympathetic judge who's willing to ignore the law in favor of his personal policy preferences. It's called "forum shopping," and it's a favorite tactic of the plaintiffs' bar. In fact, the major reason each city has sued its local dealers as well as the gun manufacturers is so the plaintiff and at least one defendant reside in the same jurisdiction. That way the case cannot be removed to federal court, where the rule of law generally prevails over provincial prejudices.

While the search for friendly forums moves ahead, pending lawsuits are having predictable effects. Smaller gun makers are going out of business; two California dealers have declared bankruptcy; and Colt announced a layoff of 300 workers, then said it would withdraw from the consumer handgun business and focus instead on military weapons and collectibles.⁶⁵ Prospective litigation costs are showing up in higher gun prices. Top quality handguns are now priced in the \$350 to \$550 range, and fewer guns are available for less than \$100.⁶⁶ Not surprisingly, higher prices have less impact on criminal demand than on the demand from price-sensitive, law-abiding citizens, especially those from the inner city.

On a parallel track, threatened litigation by the federal government and actual litigation by dozens of cities were used as a bludgeon to force the industry's largest manufacturer, Smith & Wesson, into a settlement. Despite countervailing pressure from its customers and other gun makers, Smith & Wesson threw in the towel—explaining that the \$100 million or more in damages sought by several of the larger cities exceeded the company's profits for the entire past decade. Moreover, the company protested, it cost \$1 million to defend against each government-sponsored claim.⁶⁷ Smith & Wesson simply didn't have the resources to fight multiple lawsuits across the country. Accordingly, on March 17, 2000, it surrendered.

Smith & Wesson Settlement

Essentially, the Smith & Wesson deal is no better than a shakedown. Various government entities—HUD at the federal level, New

York and Connecticut at the state level, and 13 cities—agreed not to pursue their baseless but costly litigation against the company. Other cities and counties offered to review their suits but made no formal commitment to exclude Smith & Wesson.⁶⁸ In return, the gun maker pledged, first, to impose the following restrictions on its dealers and distributors: (a) No sales of any manufacturer's guns unless the buyer has passed a safety course and cleared a background check—even if the check takes longer than the three-day period required by law. (b) No sales at any gun show unless all sales at the show are subject to a background check.⁶⁹ (c) No sales of Smith & Wesson guns if a "disproportionate number of crimes" is traced to guns sold by a dealer or distributor.⁷⁰ (d) No purchase by one person of more than one gun at a time unless the buyer is willing to wait 14 days before picking up the rest.⁷¹

Second, Smith & Wesson agreed to child-proof all of its handguns within a year, presumably by using features like a heavier trigger pull or a magazine disconnect, which prevents a gun from firing once the magazine is removed. Under terms of the settlement, every Smith & Wesson handgun would also be equipped with an external lock within 60 days and an internal lock within 24 months.⁷²

Third, each gun would have a hidden serial number to facilitate tracing the weapon if it is used in a crime.⁷³ Fourth (reminiscent of the tobacco settlement that forced manufacturers to fund anti-smoking programs), Smith & Wesson promised to "work together to support legislative efforts to reduce firearm misuse" and contribute 1 percent of its revenue toward an "education trust fund" to inform the public about the risk of firearms.⁷⁴ The specific content of the anti-gun campaign will be determined by a five-member oversight committee in each settling city. That same committee—comprising one Smith & Wesson official and one representative each from the city, county, state, and federal government—will monitor and supervise all provisions of the settlement.⁷⁵

Those terms and conditions obscure what

is actually driving the settlement. From the government's perspective, the settlement was a means of bypassing state and federal legislatures that had been singularly unresponsive to a variety of gun control proposals. Moreover, the settlement circumvents court review in many jurisdictions. Judicial approval would be required only in jurisdictions where lawsuits had already been filed and were to be dismissed as a condition of the settlement. That excludes the suits threatened but not filed by HUD and various cities and states.

From the company's perspective, the settlement represented an opportunity to avoid the cost, time, and uncertainty of pending litigation. That opportunity took on special meaning in the case of Smith & Wesson, which is owned by a United Kingdom company that was looking to sell its investment.⁷⁶ The market for acquisitions is materially diminished, of course, when lawsuits lurk menacingly in the background.

To sweeten the deal further, President Clinton sought to form an alliance of local governments and HUD—the Communities for Safer Guns Coalition—which would refrain from buying police firearms manufactured by any company that didn't sign the settlement. That commitment to favor Smith & Wesson was not embedded in the text of the settlement agreement but communicated informally by Clinton.⁷⁷ Perhaps that's because he knew that a refusal to deal might violate local and federal procurement regulations, discriminate against law-abiding gun makers, and deny disfavored companies the right to pursue a legitimate business.

In June 2000 the House of Representatives attempted, unsuccessfully, to pass a bill prohibiting enforcement of the Smith & Wesson settlement. But the House did approve a provision that would prevent spending in support of Clinton's coalition, which ultimately comprised 600 localities that agreed, first, not to sue Smith & Wesson and, second, to favor the company in police gun buys.⁷⁸ That was followed a month later by Senate approval of a bill barring federal procurement preferences for Smith &

Wesson.⁷⁹ With a change in administration, the settlement probably will not attract other gun makers as co-signers, nor is the settlement likely to benefit Smith & Wesson, which announced this past June that it was closing two of its plants for a month, in part because angry customers were buying fewer guns.⁸⁰

As the real terms of the settlement (including preferential contracting) became clear, seven gun makers and their trade association, the National Shooting Sports Foundation, filed suit against HUD secretary Cuomo, New York attorney general Eliot Spitzer, Connecticut attorney general Richard Blumenthal, and 14 mayors for conspiring to violate the constitutional right of the gun makers to engage in trade. The plaintiffs asked a federal court to forbid new gun regulations that were not authorized by Congress.⁸¹ By August 2000, however, it was apparent that the buying preferences had not materialized. Police departments wanted the best weapons available for obvious reasons. Even HUD bought guns from Glock,⁸² which did not sign the settlement yet continued to supply roughly two-thirds of police weapons nationally.⁸³ In January of this year, NSSF and the seven gun makers dropped their suit.⁸⁴

On another front, to intensify the pressure for a settlement, Cuomo, Spitzer, and Blumenthal threatened an antitrust suit against Smith & Wesson's rivals for organizing a boycott against that company's products. Blumenthal issued subpoenas for documents, despite no "solid evidence" other than a post-settlement industry meeting attended by a number of gun makers, who expressed criticism of Smith & Wesson and the settlement.⁸⁵ Spitzer pulled no punches. The goal, he gloated, is to "squeeze [gun] manufacturers like a pincers"⁸⁶—proving once again that unprincipled politicians are more than willing to use the antitrust laws as a club to force conformity by companies that refuse to play ball.

Guns, Crime, and Accidents

Paradoxically, politicians who are busily abusing the rule of law and zealots eager to

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put gun makers out of business overlook compelling statistics suggesting that the anti-gun crusade, if successful, would leave Americans more, not less, susceptible to gun violence. Three thousand criminals are lawfully killed each year by armed civilians. By comparison, fewer than 1,000 criminals are killed annually by police.⁸⁷ Guns are used defensively—often merely brandished, not fired—more than 2 million times per year.⁸⁸ That's far more than the 483,000 gun-related crimes reported to police in 1996.⁸⁹

Our country's most permissive "gun-carry laws" are in Vermont, which has a very low crime rate.⁹⁰ Nationwide, as Yale scholar John Lott has demonstrated, the larger the number of "carry permits" in a state, the larger the drop in violent crime.⁹¹ Half of our population lives in 31 states that have "shall issue" laws, which mandate that a permit be granted to anyone above the age of 21 who is mentally competent, has no criminal record, pays the requisite fee, and passes a gun safety course. Those states haven't turned into Dodge City, writes columnist Jonathan Rauch, "with fender-benders becoming hailstorms of lead."⁹²

Actually, data show that Dodge City was safer than today's Washington, D.C.,⁹³ which has the highest gun murder rate in the United States, accompanied by the strictest gun control. Is that because guns are readily available in nearby Virginia? Then why is the D.C. murder rate 57 per 100,000 while Arlington, Virginia, an urban community just across the river, has a rate of 1.6 per 100,000?⁹⁴ The answer is that social pathologies in D.C. promote crime, whereas guns in Virginia deter crime.

The reality is that less than 5 percent of the population take out concealed handgun permits.⁹⁵ The rest of us benefit because the criminals don't know which 5 percent are armed. Laws permitting the carrying of concealed handguns reduce murder by about 8 percent and rape by about 5 percent.⁹⁶ Police carry guns; mayors and bodyguards carry guns; why not law-abiding residents of high-crime areas?

In May 2000 the House of Representatives passed (by voice vote with almost no debate) a bill permitting federal judges (including bankruptcy judges and even some retired judges) to carry concealed guns in any state, despite state laws to the contrary. A Florida federal district judge, Harvey Schlesinger, had this to say: "If a judge is in danger, the fact that he or she is in one state or the other does not eliminate the danger."⁹⁷ He might have made the same statement about any person at risk.

It's a myth that the high gun ownership rate is a cause of the high murder rate in the United States. In Australia, for example, the population was disarmed in 1998. Since then, homicides are up 3.2 percent, assaults up 8.6 percent, and armed robberies up 44 percent. In the preceding 25 years, armed robberies and homicides committed with firearms had declined.⁹⁸ The Swiss, Finns, and New Zealanders each have an ownership rate similar to ours, but we have a far higher murder rate.⁹⁹ In Israel, gun ownership is 40 percent above the U.S. rate, but the murder rate is far lower.¹⁰⁰ When all countries are studied, there is no correlation between gun ownership and murder rates.

Interestingly, in Israel armed teachers are common¹⁰¹ and the threat of terrorism is pervasive, yet there are few terrorist attacks at schools. That's because armed civilians deter crime. An armed gun store employee in Santa Clara, California, shot a customer who had threatened to kill three others. Armed citizens prevented massacres in Anniston, Alabama; Pearl, Mississippi; and Edinboro, Pennsylvania.¹⁰² Yet the response of some politicians to such incidents is to disarm those very same citizens. Meanwhile, madmen in Rwanda murdered almost a million people in less than four months using nothing but machetes.¹⁰³

Advocates of gun control reject that analysis and point instead to a study by Arthur Kellerman, who concluded that families possessing a gun are 22 times more likely to kill a family member or acquaintance than to kill in self-defense.¹⁰⁴ But what is not factored

into the Kellerman equation is that guns are rarely fired; the value of the gun is to deter, not to kill. Moreover, 85 percent of the deaths that Kellerman cites are suicides.¹⁰⁵ He explains that suicides are five times more likely if there is a gun in the home.¹⁰⁶ But that assumes a particular causal relationship. It is just as likely that suicidal people acquire a gun precisely because they intend, or may be psychologically prone, to commit suicide.

Again conflating cause and effect, Kellerman notes that a handgun in the home raises the risk of death by 3.4 times.¹⁰⁷ Yet he overlooks the strong possibility that people at risk buy guns; the risk motivates the purchase, not vice versa. By analogy, a storeowner might decide to put iron bars on his store windows if the store were located in a high crime area. Surely, no one would suggest that the store would be safer if it removed the bars. Nor would a family in a high-risk inner-city environment be safer if it got rid of its handgun. The gun, like the bars, serves to safeguard lives and property.

Remember that each individual could well be the sole means of his own defense. In the words of Kopel and Gardiner:

Governments are immune from suit for failure—even grossly negligent or deliberate failure—to protect citizens from crime. Similarly, governments are immune from suit for injuries inflicted by criminals who were given early release on parole. Accordingly, it would be highly inappropriate for the government, through the courts, to make it . . . impossible for persons to own handguns for self-defense because, supposedly, ordinary Americans are too stupid and clumsy to use them effectively. If the Judiciary will not question the government's civil immunity for failure to protect people, the courts certainly should not let themselves become a vehicle that deprives people of the tools they need to protect themselves.¹⁰⁸

Ask yourself whether you'd be willing to put a sign on your house stating, "This home is a gun-free zone"¹⁰⁹—especially if you lived in the inner city.

While we're on the topic of the inner city, the head of the National Association for the Advancement of Colored People, Kweisi Mfume, acknowledges that there are "pathologies in any society that contribute to violence"¹¹⁰—for example, teenage pregnancy, dysfunctional schools, drug and alcohol abuse, and a welfare system that subsidizes illegitimacy and unemployment. And Cottrol reminds us that in the late 19th and early 20th century state gun control laws were aimed specifically at keeping guns away from former slaves, other blacks, and recent immigrants.¹¹¹ Cottrol, a self-described Hubert Humphrey Democrat, also writes that "bans on firearms ownership in public housing, the constant effort to ban pistols poor people can afford—scornfully labeled 'Saturday Night Specials' and more recently 'junk guns'—are denying the means of self-defense to entire communities in a failed attempt to disarm criminal predators."¹¹²

Or listen to Gregory Kane, an African-American columnist for the Baltimore Sun: "The NAACP should be assuring that every law-abiding citizen in America's black communities has a safe, affordable handgun. . . . These young men are smart enough to know that the combined forces of city and state governments, Bill Clinton, the police, the NAACP, and the outrage of gun controllers won't protect them."¹¹³ Civil rights activist Charles Evers was even more blunt: "I put my trust in God and my .45 . . . and not always in that order."¹¹⁴

One would have thought that, before filing its lawsuit, the NAACP would have examined the historical record. In 1967, a 13-year-old could buy a rifle from most hardware stores or even through the mail. Very few states had retail age restrictions for handguns. Until 1969, most New York City high schools had a shooting club; students regularly competed in shooting contests; and the federal government paid for rifles and ammunition.¹¹⁵ Federal and

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When gun ownership rates were constant through the 1960s and 1970s, violent crime skyrocketed. With ownership rates growing during the 1990s, we have seen dramatic reductions in crime.¹¹⁶ Recent statistics from the U.S. Bureau of Justice show that gun deaths and woundings declined by 33 percent from 1993 through 1997, with the decline continuing in 1998. Over the same interval, the number of guns in the United States grew by 10 percent.¹¹⁷ In short, despite misleading reports from the media, there is no evidence to suggest that gun ownership and violent crime are directly linked.

Speaking of the media, is it likely that the press would have been so interested in Buford Furrow—the neo-Nazi who killed a mailman and wounded five others at a Los Angeles Jewish community center—if he weren't a poster boy for gun control? Jeff Jacoby, columnist for the *Boston Globe*, offers this answer: On May 3, 1999, Steven Abrams decided to “execute” children on a playground in Costa Mesa, California. He floored his 1967 Cadillac, plowed through a chain link fence into the crowd of children, killing two and injuring five others—a toll more grisly than Furrow's. The Associated Press ran a story two days later; six papers ran a follow-up four days afterward. That was it—no drumbeat of national news, no editorials or op-eds, and, of course, no gun.¹¹⁸ Less than one year later, gun hysteria seemed to have gripped the nation: From the *Washington Post* in April 2000 we read, “Four 6-year-old boys were suspended from school for pointing fingers at one another as mock guns in a game of ‘cops and robbers’ on the playground.”¹¹⁹

For the five years ending in 1997, the Centers for Disease Control and Prevention reported a 21 percent decrease in violent crime, a 21 percent decrease in gun-related deaths, and a 41 percent decrease in nonfatal gun injuries.¹²⁰ Gun deaths and overall homicides reached their lowest level in more than

30 years.¹²¹ Some experts credit tougher gun control and safety courses, but that doesn't explain why all violent crime decreased by the same percentage as gun-related crime. The more likely reasons for the parallel decline are more vigorous enforcement, a booming economy, the waning crack trade, and an aging population.

CDC also reports that violent behavior by adolescents is declining sharply, despite Columbine and other high-profile school incidents. That's confirmed by data from the U.S. Department of Education indicating that expulsions for bringing firearms to school during the academic year 1997–98 were lower by a third than during the prior year.¹²² And it's not only teen violence but also teen accident rates that are plummeting. The National Center for Health Statistics reports that in 1997 fatal gun accidents involving children were at an all-time low, down 75 percent since 1975. Of more than 32,000 gun-related deaths, only 630 were of children under 15. Of those, 142 were accidental.¹²³ Predictably, that good news was met by an outcry from the *Washington Post* that safety locks will “reduce this country's horrifying accidental-gun-death rate of children under 15.”¹²⁴

Horrifying? More children under 15 are killed by bikes, swimming pools, and cigarette lighters than by gun accidents.¹²⁵ Will our mayors be pursuing each of those industries? If gun manufacturers are responsible for violence, why not the makers of the steel used in the guns? Indeed, when an Ohio appellate judge upheld the dismissal of Cincinnati's gun suit in August 2000, he wrote: “Were we to decide otherwise, we would open a Pandora's box. The city could sue the manufacturers of matches for arson, or automobile manufacturers for traffic accidents, or breweries for drunken driving.”¹²⁶

If anything, the case for holding car makers liable for drunk-driving accidents is stronger than the case for charging gun makers for gun-related injuries. “In contrast to gun dealers, automobile [manufacturers] make no effort at all to ensure that the buyer is not a

criminal. Nor do automobile manufacturers require that their dealers take even minimal steps to check if a prospective automobile purchaser has recent convictions for drunk or reckless driving, or even for vehicular homicide."¹²⁷ Moreover, "automobile manufacturers have much more ability than gun manufacturers to control dealer behavior, since most automobile manufacturers have exclusive, direct relationships with dealers. In contrast, the majority of gun dealers purchase inventory from wholesalers" without any reliable means of tracking retail purchases.¹²⁸

Before we compromise the Constitution—undermining the principles of federalism and separation of powers, violating rights recognized expressly in the Second Amendment and implicitly in the Ninth—we ought to be sure of three things: first, that we've identified the real problem; second, that we've pinpointed its cause; and, third, that our fix is less intrusive than alternative fixes. The spreading litigation against gun makers fails all three tests. Guns do not increase violence; they reduce violence. Banning or regulating firearms will not eliminate the underlying social pathologies that cause violence. And a less intrusive remedy already exists: enforce existing laws.

There is a lesson to be learned from all of this. If we do nothing to rein in baseless, government-sponsored lawsuits, private attorneys and their accomplices in the public sector will continue to invent legal theories to exact tribute from friendless industries. In the latest rounds of litigation, law-abiding gun manufacturers may be forced to pay for the actions of criminals. That outcome will likely entice politicians unwilling to make tough choices and enrich trial lawyers, but there can be no pretense that litigation of that sort has any basis at all in the rule of law.

Clinton Administration Proposals

Apparently, that logic wholly escaped the Clinton administration. About to be

drowned in litigation from cities, counties, and more than 3,000 housing authorities, the gun industry was finding it hard to attract private investors to fund research on "smart guns"—personalized weapons incorporating technology that permits firing only by authorized parties. Not to worry, said President Clinton in his January 2000 State of the Union address. He and Sen. Ted Kennedy (D-Mass) favored a \$10 million research subsidy to Smith & Wesson to develop a smart weapon,¹²⁹ which could then no doubt be sold to presently unarmed suburban moms. Kristen Rand, from the anti-gun Violence Policy Center said, "It makes the lawsuits seem like a charade."¹³⁰ Gun control and corporate welfare do indeed make strange bedfellows.

The depth of the hypocrisy in Washington during the Clinton era was beyond belief. The president called for draconian gun controls after Columbine but told his Hollywood supporters, "There's no call for finger-pointing here." Although some young people will be pushed over the edge by violent imagery, that "doesn't make anybody who makes any movie or any video game or any television program a bad person or personally responsible. . . . For most kids it won't make any difference."¹³¹ Clinton said he didn't want to lecture the entertainment industry—an ongoing source of major bucks. Then, to satisfy critics, he recommended an 18-month study to see if the industry deliberately markets violence to kids. Carefully timed so that no legislation would be possible until after the 2000 election, the study was guaranteed not to embarrass either Clinton himself or Al Gore's fundraisers.¹³²

Meanwhile, Clinton and his surrogates offered a variety of gun control proposals. After six kids were trapped in the crossfire between rival gangs at the National Zoo in Washington, D.C., Gore bemoaned the shootings, then announced to a shocked audience of Democratic donors, "We really have to have mandatory child safety locks."¹³³ Laws against murder and a ban on handguns in the nation's capital didn't deter the young hoods,

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Let's look at that proposal along with a few others, and see why none of them will work.

Safety Locks

Gun accidents are not a significant problem. Locks are cumbersome and slow in an emergency. They're already available on 90 percent of new guns sold.¹³⁴ They give parents a false sense of security. In recent tests, 30 of 32 models of safety locks were found to afford inadequate protection. That generated calls for government-imposed standards, notwithstanding that not a single reported injury has been traced to an ineffective lock.¹³⁵

Smart Guns

Colt has estimated that 60 million people who do not own guns would consider buying smart guns.¹³⁶ At the same time, a smart gun mandate for new guns would have no effect on the 250 million guns already in circulation. Smart guns may prevent some unauthorized use, but they can be programmed for multiple users and will not, therefore, deter straw purchases. Moreover, suicides and homicides, not accidents, are the two leading causes of gun death,¹³⁷ and most suicides and homicides are committed by the gun owner. In 1997 only three-tenths of 1 percent of gun-related deaths were accidental. Many of those accidents involved owners cleaning their guns; and many others were preventable by existing technology like magazine disconnects and heavier trigger pulls.¹³⁸

One Gun per Month

Interestingly, from 1996 through 1998 Virginia was one of three states (the others were Maryland and North Carolina) that limited buyers to one gun per month. But Virginia was third in the nation as a source of guns used by criminals in other states.¹³⁹ Currently, multigun sales must be reported to authorities for investigation. The "one gun" rule makes sales more difficult to trace. And the rule is easy for criminals to circumvent by using straw purchasers. Most impor-

tant, advocates of one gun per month have produced no evidence to show that multiple gun purchases are responsible for an increase in illegal activity.

Age Limit

Under current federal law, 21 is the minimum age to purchase a handgun; 18 is the minimum age to possess a handgun. Clinton proposed to ban possession by anyone under age 21.¹⁴⁰ That's a bad idea, says John Lott. "Laws allowing those between 18 and 21 years of age to carry a concealed handgun reduce violent crimes just as well as those limited to citizens over 21."¹⁴¹ Yes, 18- and 19-year-olds commit gun crimes at the highest rates, but they are also likely victims, who need protection from gang members. Furthermore, we allow 18-year-olds to vote, go to war, get married and divorced, and have an abortion; surely they are sufficiently mature to be able to defend themselves.

Gun Shows

If gun shows are a problem, it's because current laws have raised the cost of a legitimate license. The number of licensed dealers declined from 250,000 in 1993 to 83,000 six years later.¹⁴² Harvard researcher David M. Kennedy reports that sellers "at gun shows are [often] people who have been forced to give up their licenses."¹⁴³ Moreover, the Clinton administration has provided no evidence that such shows are an important source of guns for criminals.¹⁴⁴ In the mid-1980s, a survey of felons in 12 state prisons indicated that fewer than 1 percent got their guns at gun shows. A 1997 Department of Justice study came up with 2 percent.¹⁴⁵ And those figures include straw purchases, which are already illegal, and purchases through licensed dealers, which are already subject to background checks. According to an ATF study, during the 30 months ending December 1998, 26,000 guns used in crimes were purchased at gun shows.¹⁴⁶ That's 10,400 guns per annum, which is only 2.1 percent of the guns used in the roughly 500,000 gun-related crimes each year.

Background Checks

Checks are already required for all dealer sales, including those at gun shows. Clinton would have extended the requirement to non-dealer sales at gun shows. That's the rule Maryland has already adopted. Not surprisingly, Maryland now wants to go further and ban gun shows on public property and property that receives taxpayer support.¹⁴⁷ The National Rifle Association's chief lobbyist, James Jay Baker, observes, "Our opponents say that all we want to do is close the loophole, but they're never satisfied."¹⁴⁸ Perhaps the slippery slope argument isn't illusory after all.

The NRA has agreed to background checks at gun shows, provided the check could be completed within 24 hours. But proposed legislation in the Senate contained a three-business-day time frame, presumably because most gun shows occur over a weekend. House Majority Whip Tom DeLay (R-Tex.) asked, quite logically, why the FBI couldn't be open during weekend hours.¹⁴⁹

In the House of Representatives, the corresponding bill included nearly all of the items that the Democrats had demanded—a requirement for safety locks, a prohibition on youth possession of semiautomatic weapons, a ban on large-capacity ammunition clips, and a lifetime ban on gun possession by anyone convicted of a felony as a juvenile. But the background check provision incorporated the NRA's proposal for a 24-hour time limit. House Democrats killed the bill¹⁵⁰—apparently more interested in an election issue than in real gun reform.

The National Instant Check System, implemented under the 1994 Brady Act, now has data on 38 million Americans. Expert witnesses testified before Congress in June 2000 that system glitches have delayed or blocked fully a quarter of all lawful purchases.¹⁵¹ Who knows how many of those purchases might have prevented gun violence. John Lott reports that "the national waiting period [under the Brady Act] had no significant impact on murder or robbery rates and was associated with a small increase in rape and aggravated-assault rates."¹⁵² Criminals

are not deterred; law-abiding citizens who want to defend themselves are told to wait.

Researchers at Georgetown University and Duke University identified 32 states that adopted Brady-style restrictions when the act was passed in 1994, and compared those states with 19 others that already enforced similar restrictions. Writing in the *Journal of the American Medical Association*, the researchers reported that the decline in gun homicide rates was the same for the two groups of states, thus belying the contention that the Brady Act reduced gun murders. There was "no evidence that implementation of the Brady Act was associated with a reduction in homicide rates."¹⁵³ The only contrary statistic was a larger drop in gun suicides for people above age 55 in the 32-state group. The authors explained, however, that there was an offsetting increase in nongun suicides within the 32-state group.¹⁵⁴

Notwithstanding Clinton's litany of gun control proposals, none would have prevented any of the recent spate of gun-related violence. In Illinois and Indiana, Benjamin Smith, a white supremacist, age 21, who went on a shooting rampage, bought two guns from an unlicensed dealer, but not at a gun show. He had previously failed a background check and was not prosecuted.¹⁵⁵ In Atlanta, a commodities trader killed nine, but his purchase of four handguns would not have violated any of the proposed new laws. Likewise for Buford Furrow, who bought seven guns legally before assaulting children at a Jewish community center in Los Angeles.¹⁵⁶ In Conyers, Georgia, the gun was stolen from the killer's stepfather.¹⁵⁷ In Michigan, a six-year-old also stole a gun. He lived in a crack house, without his mother or father, where the loaded gun was easily accessible.¹⁵⁸

More recently, in a Chicago suburb, a deranged former employee killed five and wounded four at a Navistar engine plant. He was armed with an AK47, pump shotgun, rifle, and revolver—purchased using a firearm owners identification card issued by the state two weeks before he was convicted of a sex felony. Despite state law to the contrary, no

There was "no evidence that implementation of the Brady Act was associated with a reduction in homicide rates."

Some government officials and private groups want to use registration to attain their ultimate objective, which is outright confiscation of handguns.

one demanded that he turn in the ID card.¹⁵⁹ And this past March, in a suburban high school near San Diego, a 15-year-old boy killed 2 and wounded 13 using his father's handgun, which he had extracted from a locked cabinet and brought to school in violation of California law. The troubled teen, who dabbled in marijuana, acid, speed, and alcohol, had announced his plan for mass murder, but no one took him seriously.¹⁶⁰ California's gun laws—among the strictest in the nation—didn't help at all. Under those laws, unsupervised juveniles can't possess a handgun or live ammunition, a background check is required on all gun sales, new residents must register their guns, purchases are final only after a 10-day waiting period, training is mandatory, and buyers are limited to one gun per month.¹⁶¹

The highest profile incident occurred at Columbine High School in Littleton, Colorado. There, the killers' girlfriend, age 18, bought two shotguns and a rifle. She would have passed a background check. The killers' semiautomatic TEC9 was already illegal, as were the pipe bombs and grenades that they possessed. Both shooters were reputed to have idolized Hitler; they wore trench coats and metal-tip boots with swastika emblems, made bombs in their parents' garage, and stored guns in their bedroom.¹⁶² A degree of parental supervision might have uncovered a serious psychological problem before it became fatal.

The Columbine outcome might also have been different if more guns had been present—in the hands of security guards or perhaps even teachers or an armed principal. Maybe a dress code and stricter discipline would have helped. But, observes Chief Judge J. Harvie Wilkinson of the Fourth Circuit Court of Appeals, "We are now in a society which freely and instinctively litigates routine public school decisions in the federal judiciary."¹⁶³ In public schools, avoiding lawsuits takes precedence over discipline, and effective education is too often sacrificed at the altar of students' rights.

President Clinton may well have had a

hidden agenda for dealing with future Columbines: federal registration, the ultimate in gun control short of prohibition. Despite repeated denials by Vice President Gore and others, Clinton asked rhetorically: "Should people . . . have to register guns like they register their cars? Do I think that?" He then answered, "Of course I do."¹⁶⁴ Never mind that registration would mean a national database containing names and addresses of every law-abiding, peaceful gun owner. Never mind that car registration—by states, not the federal government—is primarily for revenue. And never mind that some government officials and private groups want to use registration to attain their ultimate objective, which is outright confiscation of handguns. Indeed, Pete Shields, the founding chairman of Handgun Control, acknowledged: "The first problem is to slow down the number of handguns being produced and sold. . . . The second problem is to get handguns registered. The final problem is to make possession of all handguns . . . totally illegal."¹⁶⁵

The evidence—or more precisely the lack of evidence—is compelling in those states that already require registration. There are no serious studies that link registration to a reduction in gun-related violence. To the surprise of no one except gun-control zealots, criminals will not register their firearms. Only law-abiding citizens will comply with registration requirements.

Conclusion

Legislatures have a duty to secure the constitutional legacy of Americans to defend themselves—by frustrating ineffective gun control proposals, preventing registration, and blocking the more radical calls for gun confiscation. Yet, even if the legislatures behave responsibly, courts are the final bulwark in safeguarding our right to keep and bear arms. Courts may not be used as a way around the legislative process.

The American public, especially voters and jurors, must be warned that our tort sys-

tem is rapidly becoming a tool for extortion by a coterie of politicians and trial lawyers. Sometimes they seek money; sometimes they pursue policy goals; often they abuse their power. Take it from former labor secretary Robert Reich, certainly not renowned for his opposition to imperious government. Reich tells us that his former boss in the White House, President Clinton, launched “lawsuits to succeed where legislation failed. The strategy may work,” Reich adds, “but at the cost of making our frail democracy even weaker. . . . This is nothing short of faux legislation, which sacrifices democracy to the discretion of administration officials operating in utter secrecy.”¹⁶⁶

Reich has it just about right. But the problem outlives the Clinton White House. It infests many of the statehouses and city halls. Like most infestations, this one can be fumigated. When we condone the selective and retroactive application of extraordinary legal principles, intended specifically to transfer resources from disfavored defendants to favored plaintiffs—or even worse, to the public sector—we substitute political cronyism for fundamental fairness, profane the rule of law, and debase personal freedom.

Notes

This paper raises several issues addressed by the author in previously published material that has been adapted for inclusion here. “The Great Tobacco Robbery,” *Legal Times*, February 1, 1999, p. 27; “So Sue Them, Sue Them: Cities Look to Squeeze Gun Makers,” *Weekly Standard*, May 24, 1999, p. 19 (coauthored with Michael I. Krauss); “Turning Lead into Gold,” *Legal Times*, August 23, 1999, p. 21; “Blackmail of Gun Makers,” *National Law Journal*, January 31, 2000, p. A20; “When Theft Masquerades as Law,” *Cato Policy Report*, 22, no. 2 (March–April 2000): 1; “Clinton, Gore and a Million More,” *Washington Times*, May 12, 2000, p. A20.

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The American public, especially voters and jurors, must be warned that our tort system is rapidly becoming a tool for extortion by a coterie of politicians and trial lawyers.

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