

CIVIL LIABILITY FOR HIGH RISK GUN SALES: AN APPROACH TO COMBAT GUN TRAFFICKING

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I. Introduction

One day in 1991, a woman appeared in a Baltimore, Maryland gun store. She selected one gun. And then she picked out more. She did not stop until she had purchased over \$6000 worth of handguns. The woman did not return home with the guns. In fact, the woman never saw these guns again because she immediately turned them over to a drug dealer who had paid her \$500 to make the purchases.¹ The guns are now showing up in crime.² Remarkably, the dealer who sold this woman \$6000 worth of handguns, an amount that no one would argue is necessary for self-defense or sport, escapes accountability even though he certainly knew he was feeding the illegal gun market. Sadly, this is only one of the many ways that guns enter the illegal market where they are then purchased by people who are bent on using them in crime.

This story is repeated numerous times every day across the country and the illegal gun market continues to flourish. Of course, combining guns with crime creates a volatile mix that produces hundreds of thousands of injuries and deaths every year. Even the most ardent opponents of gun control legislation cannot dispute facts revealing the significant role guns play in crime in the United States. In 1992, handguns were used in approximately one million violent crimes:³ 13,495 of these crimes were murders.⁴ There is also overwhelming evidence that the rate of gun use in

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¹ See Michael James, *How Maryland Outlaws Get Around Gun Laws*, BALTIMORE SUN TIMES, Mar. 26, 1995, at 1A.

² *Id.* at 20A.

³ MICHAEL R. RAND, U.S. DEP'T OF JUST., GUNS AND CRIME 1 (Apr. 1994).

⁴ FBI, U.S. DEP'T OF JUST., CRIME IN THE U.S. 1992, at 18 (1993). This figure includes all murders for which handguns were reported as the murder weapon (12,580 in 1992) as well as part of the murders for which the type of firearm was not reported (1,050 in 1992). The type of firearm used in the murder was known in 14,439 cases; 12,580, or approximately 87%, were known to be handguns. Therefore,

crime is rapidly increasing. Between 1989 and 1993, the handgun homicide rate skyrocketed 48%, while the homicide rate with other weapons dropped 3%.⁵

Solid evidence supports the theory that restricting the sale of guns, particularly handguns, will reduce the size of the illegal markets for guns used in crimes, and thereby curb their use.⁶ But despite this evidence, and despite the spiralling rate at which guns are used in crime, there is no national, comprehensive policy designed to prevent the flow of guns into gun trafficking markets. Until the passage of the Brady Handgun Violence Prevention Act in 1993,⁷ federal law permitted any adult to purchase as many handguns as he or she desired from a licensed gun dealer, even hundreds, without so much as submitting to a background check or waiting period. Practically, a buyer only needed to supply a driver's license for identification and certify on a federal form that he or she was not a felon, not a mental incompetent, and not in-

87% of the "unknown" firearm murders are likely attributable to handguns, raising the total number of murders by 915, to 13,495.

⁵ FBI, U.S. DEP'T OF JUST., *CRIME IN THE U.S. 1993*, at 18 (1994).

⁶ See John Henry Sloan, M.D., M.P.H. et al., *Handgun Regulations, Crime, Assaults, and Homicide*, NEW ENG. J. MED., Nov. 1988, at 1256. For example, in 1988, two researchers published a study comparing the handgun homicide rates between 1980 and 1986 in Seattle, Washington and Vancouver, British Columbia, two cities with similar population, household income, and unemployment. *Id.* at 1256-57. The study concluded that Canada's laws restricting access to handguns accounted for the fact that Seattle's handgun homicide rate was five times that of Vancouver's, while the homicide rate for other weapons was essentially equal. *Id.* at 1258-59.

Convincing evidence is also provided by a simple comparison of the number of handgun homicides in the U.S. with that of other western, developed nations. As mentioned previously, in 1992, 13,495 people were murdered with handguns in the United States. See *supra* note 5. That same year only 33 people were killed with handguns in England, 129 in Canada, and 13 in Australia.

⁷ See 18 U.S.C. §§ 922(s)-(t) (1993) [hereinafter *Brady Law*]. Generally, the Brady Law prohibits a federally licensed firearm dealer from transferring a handgun to a purchaser without first transmitting a copy of the purchaser's request to the chief law enforcement officer of the jurisdiction, who is then required to conduct a background check on the purchaser. § 922(s)(1)(A)(i). The seller must either wait for verification that the check reveals no reason why the transfer would be illegal (e.g., the purchaser is not a felon) or consummate the sale if five business days have expired and no response has been received. § 922(s)(1)(A)(ii).

The Brady Law does not cover those states that already have in place a background check system that is comparable to, or more stringent than, Brady's. § 922(s)(1)(D). As of Feb. 28, 1995, 27 states and territories were subject to the Brady Law. Bureau of Alcohol, Tobacco & Firearms, Dep't of the Treasury, *One-Year Progress Rep.: Brady Handgun Violence Prevention Act 3* [hereinafter *One-Year Progress Rep.*] (Feb. 28, 1995).

cluded in any other category of persons prohibited from purchasing a firearm under federal law.⁸ This system was so impotent for the purpose of preventing felons from buying guns that it was commonly referred to as the "lie and buy" method.⁹

The background check system imposed by the Brady Law has proven to be enormously successful in its first year of operation. It has prevented the sale of handguns to over 41,000 felons in the states in which the Brady Law applies.¹⁰ However, there are other defects in the system of selling guns which, as this paper demonstrates, still permit gun trafficking markets to flourish.

The fact that legislative battles surrounding gun control measures are hotly contested, as in the passage of the Brady Law and the recently enacted federal ban on assault weapons,¹¹ perplexes the American public, the vast majority of which supports gun control measures designed to prevent the use of guns in crime.¹² But change in the federal gun laws has been blocked by a few who believe that losing 13,495 lives a year to handgun homicides is a small

⁸ See 18 U.S.C. § 922(d) (1993) (prohibiting firearm sales to certain listed individuals); 27 C.F.R. § 178.124(c) (requiring certification on firearm transaction record, Form 4473); and 27 C.F.R. § 178.124(c)(1) (requiring presentation of identification customarily used in commercial transactions prior to transfer of firearm).

⁹ This assertion is based upon the author's general knowledge of the subject matter.

¹⁰ See *One-Year Progress Report*, *supra* note 7, at 1. In Feb. 1995, The Bureau of Alcohol, Tobacco and Firearms surveyed 30 law enforcement authorities across the country responsible for conducting background checks for handgun purchases as required by the Brady Law. The survey found that approximately 3.5% of persons who applied to purchase handguns had been denied because they were convicted felons, fugitives from justice, persons subject to a restraining order for alleged domestic violence, or another type of prohibited purchaser. *Id.* The study concluded that, based upon the total number of applications to purchase handguns in the states in which the Brady Law applies, 41,000 felons, fugitives, and other prohibited purchasers were denied handguns. *Id.* at 9.

Handgun Control, Inc. conducted a similar survey of 115 law enforcement authorities and also found that 3.34% of handgun purchasers were denied weapons because of their backgrounds, i.e., because they were felons or had felony arrest records. See *The Brady Law: One Year Proves Effectiveness* (Handgun Control, Inc., Wash. D.C.), Feb. 27, 1995, at 5.

¹¹ 18 U.S.C. § 922(v) (1993).

¹² According to one national survey conducted in 1993, 87% of the people surveyed favored the Brady Law, 77% favored a ban on the manufacture, sale, and possession of assault weapons, and 69% favored a law limiting gun purchases to one per month. GEORGE GALLUP JR., *The Gallop Poll Monthly*, No. 340, ATTITUDES TOWARD PROPOSED GUN CONTROL MEASURES 23-24 (Jan. 1994), *reprinted in* BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., SOURCEBOOK OF CRIM. JUST. STAT. 209 (1993).

price to pay for easy access to guns. This paper explores an approach to use litigation to reduce the rate at which guns are used in crimes by holding irresponsible gun retailers, gun distributors, and gun show promoters liable for selling guns when they have reason to know that these guns are heading to the illegal gun market.

Using the common law to create social change is not, of course, a unique endeavor. Long before anti-discrimination laws were passed, the NAACP challenged segregation in the nation's courts. Consumer advocates have long used the threat of high dollar lawsuits to force manufacturers to make design changes that will save lives. Similarly, this paper outlines how tort litigation can be used in the battle against gun violence.

Part II of this paper is a brief survey of the basic structure of the federal gun laws as they relate to the retail sale of guns. Part III of this paper explains why these laws are ineffective in stopping illegal gun trafficking and describes the "high risk" transactions upon which gun traffickers rely to ply their trade. Part IV of the paper surveys case law from various jurisdictions that holds gun retailers liable for the negligent sale of firearms and argues that the combination of these cases establishes a duty on behalf of gun retailers, gun distributors, and possibly gun show promoters to avoid selling a gun or facilitating its sale if the sale implicates one of the high risk transactions identified in Part III.

II. Federal Law Regulating Gun Retail

Federal law requires that anyone "engaged in the business" of selling firearms or ammunition possess a federal firearms license ("FFL") to deal in firearms.¹³ A person is "engaged in the business" if he or she "devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit . . ."¹⁴ The definition specifically excludes anyone making an "occasional sale[] . . . for the enhancement of a personal collection or for a hobby" and anyone who "sells . . . his [or her] personal collection of firearms."¹⁵

¹³ 18 U.S.C. §§ 922(a)(1)(A) and 922(a)(1)(B) (1993); *see also* 18 U.S.C. § 923(a) (1993).

¹⁴ 18 U.S.C. § 921(a)(21)(A) (1993).

¹⁵ 18 U.S.C. § 921(a)(21)(C) (1993); *see also* 27 C.F.R. § 178.11 (1994). Federal regulations also define "principal objective of livelihood and profit" to mean that "the

Ironically, while the definition of who must be licensed to sell firearms seems to cast a wide net, firearms enter the illegal market in part because the system for granting a federal dealer's license has ensured that virtually anyone who wants a dealer's license can get one. Gun dealers who hold a federal license are exempt from a critical feature of federal law: though unlicensed buyers are not permitted to purchase firearms across state lines or receive them through the mail,¹⁶ licensed dealers can engage in such transactions,¹⁷ and often do. In fact, it is quite common for federal licensees to receive wholesale prices from firearm distributors for making bulk purchases.

Considering the enormous loophole it creates, the license requirement does nothing to weed out potential gun dealers who may be disposed to ignore federal law when selling guns. The Bureau of Alcohol, Tobacco and Firearms ("ATF") has no discretion to deny an applicant's request for a license, and the application must be approved if the applicant is over twenty-one, is not prohibited from possessing a firearm under federal law, and has premises from which to conduct business.¹⁸ Even the minimal amount of action ATF can take to ensure that a license is not granted to someone who would use it to illegally traffick in guns is compromised by law: ATF must approve a license after sixty days regardless of whether a background check has been performed on the applicant.¹⁹

Before the Brady Law was passed in November 1993, a dealer's license cost an applicant only ten dollars per year.²⁰ The Brady

intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents such as improving or liquidating a personal firearms collection " § 178.11.

¹⁶ See 18 U.S.C. § 922(a)(3) (1993) (prohibiting unlicensed person's receipt of firearms purchased from out-of-state); 27 C.F.R. § 178.29 (1994) (same); 18 U.S.C. § 1715 (1993) (firearms as nonmailable except to firearms dealers).

¹⁷ 18 U.S.C. § 923(a) (1993).

¹⁸ 18 U.S.C. §§ 923(c) and 923(d) (1993); 27 C.F.R. § 178.47(b) (1993).

¹⁹ 18 U.S.C. § 923(d)(2) (1993); 27 C.F.R. § 178.47(c) (1993). Prior to Aug. 1994, ATF had only 45 days to make its decision to approve or deny the application. 18 U.S.C. § 923(d)(2) (1993); 27 C.F.R. § 178.47(c) (1993). The extension of the approval period, as well as a new requirement that applicants certify that they will comply with state and local licensing requirements within 30 days of receiving their federal license, was intended to thin the ranks of those holding federal dealer's licenses. These reforms have worked to some degree. See *infra* notes 31-32 and accompanying text.

²⁰ 18 U.S.C. § 923(a)(3)(C) (1993).

Law raised the initial fee to \$200 for a three-year license, renewable for another three years at a cost of only \$90.²¹ Beginning in September 1994, the applicant is now required to certify that he or she will comply with state and local licensing requirements within thirty days after receiving a federal license.²²

The ease with which one can obtain a federal license, its low cost, and the benefits of holding one brought a flood of applications to ATF's door in the late 1980s and 1990s. At its peak, ATF received 6000 applications per month.²³ Because the agency could devote only twenty-five agents²⁴ to the task of reviewing applications and renewals, this flood essentially annulled ATF's ability to conduct meaningful checks into an applicant's background before expiration of the approval period.

Consequently, the number of FFLs mushroomed to 244,000 by 1992.²⁵ Of this 244,000, it is estimated that only 20,000 of these licensees conduct business from a legitimate store-front enterprise.²⁶ Licensees without a store-front enterprise are commonly called "kitchen table" dealers.²⁷ With only 200 agents to monitor their transactions,²⁸ this vast number of FFL holders has swamped ATF's resources and prevented any real oversight to ensure that these licensees are complying with the law when selling firearms.²⁹

²¹ 18 U.S.C. § 923 (a)(3)(B) (supplement, 1993); 27 C.F.R. § 178.42(c) (1994).

²² 18 U.S.C. § 923(d)(1)(F)(ii)(I) (supplement, 1994).

²³ *Federal Firearms Licensing: Hearing Before the Subcomm. on Crime and Criminal Justice of the Committee on the Judiciary House of Representatives*, 103d Cong., 1st Sess. 15 (1993) [hereinafter "*House Hearing*"].

²⁴ See *House Hearing*, *supra* note 23, at 29.

²⁵ *House Hearing*, *supra* note 23, at 24. The total number of all licenses granted by ATF, including licenses to manufacture, import, and collect firearms, was 287,000 in 1993. *Id.*

²⁶ CONGRESS OF THE U.S. OFF. OF TECHN. ASSESSMENT, AUTOMATED REC. CHECKS OF FIREARM PURCHASERS: ISSUES AND OPTIONS 14 (1991) (this figure includes 15,000 dealers who sell primarily firearms and 5000 stores that sell firearms from a sporting goods section).

²⁷ See discussion *infra* part III.C.

²⁸ *House Hearing*, *supra* note 23, at 29.

²⁹ Even if their resources were greater, federal law still hinders ATF from effectively monitoring FFL holders. ATF may not audit a licensee's records more than one time each year to ensure that he or she is complying with federal law. See 18 U.S.C. § 923(g)(1)(B)(ii)(I) (1993). Otherwise, federal law prevents ATF from examining a dealer's records unless there is "reasonable cause to believe a violation of [the Gun Control Act] has occurred," or if conducted during "the course of a criminal investigation of a person . . . other than the licensee." See 18 U.S.C. § 923(g)(1)(A) and (B)(i).

ATF has candidly admitted that, due to lack of resources, kitchen-table dealers might not see an inspector for ten to twenty years.³⁰

The number of FFL holders has declined within the past eighteen months due to recent reforms in the licensing system. First, in August 1993, the Department of Treasury announced that it would require all applicants for a federal license to submit fingerprints and a photograph.³¹ Second, as discussed above, the Brady Law increased the license fee to \$200 for a three-year license. As a result, the number of licensed dealers has declined from approximately 248,000 to 197,500.³² Because licenses are granted for a three-year period, this number will continue to decline over the next two years. There is no doubt, however, that even with these reforms, the vast majority of dealers who hold federal licenses are kitchen-table dealers.

With the exception of the Brady Law, federal law does almost nothing to prevent this vast cadre of licensees from selling to likely felons or gun traffickers. Licensees must record the model, caliber, and serial number of all firearms sold on a firearms transaction record: ATF Form 4473. The buyer is required to complete Part I of the form which asks whether the buyer falls into one of the categories of persons prohibited from possessing a firearm under federal law.³³ The licensee must keep Form 4473 at his or her place of business.³⁴ If the sale is for two or more handguns to

³⁰ Michael de Courcy Hinds, *A Gun Dealer's Story: Good Intentions Go Astray*, N.Y. TIMES, June 6, 1994, at B1; see also Pierre Thomas, *Hit or Miss Control of Firearms Sales*, WASH. POST., Nov. 29, 1992, at A1.

³¹ In May 1993, the Center to Prevent Handgun Violence outlined in a memorandum for the Clinton Administration a series of proposals for new regulations and policies to strengthen the enforcement of the federal firearm laws. See generally *Proposals for the Clinton Administration to Implement New Gun Control Initiatives Without Passing New Legislation* (Center To Prevent Handgun Violence, Wash., D.C.), May 11, 1993. Two of these recommendations were the fingerprint and photograph requirements. *Id.* at 7-8. These recommendations were adopted by the Department of the Treasury in August 1993. See 27 C.F.R. 178.44(a).

³² Pierre Thomas, *Gun Dealer Licenses Hit 3-Year Low*, N.Y. TIMES, Feb. 22, 1995, at A3.

³³ Such persons include felons, fugitives from justice, unlawful users or addicts of prohibited substances, persons adjudicated mentally incompetent or committed to a mental institution, persons under 18, illegal aliens, persons dishonorably discharged from the military, persons subject to a civil protective order fashioned to protect an intimate partner, and anyone who has renounced their citizenship. 18 U.S.C. § 922(g) (1993).

³⁴ 27 C.F.R. § 178.124(b) (1994). In addition, federal regulations require all licen-

one person in a five day period, the licensee must send a "multiple sale report" to ATF containing the name of the purchaser and the number of pistols and revolvers sold.³⁵

Although the Brady Law has been successful in stopping thousands of sales to felons, it was not designed to stop interstate gun trafficking. As discussed in the next section of this paper, handguns depart the legal market for the criminal market in several ways other than in over-the-counter sales to felons.

III. "High Risk" Wholesale and Retail Transactions as Sources of Illegal Gun Trafficking

Smith & Wesson has never shipped a shipment from their factory marked, 'Shipped for use by felons' At some stage in the process, those firearms are diverted into the hands of felons. And it is, in almost every case, by a federal licensee.³⁶

This quote is undoubtedly true. Virtually every gun used in a crime was legally manufactured and sold commercially. Because the commercial sale of guns requires a license, a dealer licensed under federal law was, at some point, involved in the "life" of a gun later used in crime. While in fairness a licensee may be ignorant of his or her customers' intentions, it is just as true that certain sales put gun retailers, distributors, and even gun show promoters, on notice that the guns they are selling are destined for the illegal gun market and, therefore, much more likely to be used in a crime than a gun purchased in an ordinary retail sale. What follows is an outline of three types of "high risk" transactions that commonly fuel the illegal gun market. There is ample evidence to believe that the volume of these "high risk" transactions is quite high, though precise quantification of the number of these transactions leading to illegal gun market sales is still speculative. Studies report that anywhere from 28% to 43% of criminals identified the "black market" as the source of their latest handgun.³⁷ Other than through theft of guns and sporadic pri-

sees to keep a bound volume showing the receipt and disposition of all firearms sold. 27 C.F.R. § 178.125(e) (1994).

³⁵ 18 U.S.C. § 923(g)(3)(A) (1993). Sales between licensees do not require multiple sales reports. *Id.*

³⁶ Rick Linsk, *Gun Dealing Neighbors*, ASBURY PARK PRESS, Oct. 23, 1994, at C6 (quoting Bill Bridgewater, Executive Director, National Alliance of Stocking Gun Dealers, an independent gun store trade group).

³⁷ JOSEPH F. SHELEY AND JAMES D. WRIGHT, NAT'L INST. OF JUST., GUN ACQUISITION

vate sales, there is no other way for legally manufactured and commercially sold guns to find their way to the illegal gun market. Therefore, these "high risk" transactions likely account for a sizeable portion of the illegal gun market.

A. *Interstate Gun Trafficking As a Product of the Patchwork of State and Local Laws*

Local and state legislative bodies have created a patchwork of weak and strong laws regulating gun sales across the country. In some jurisdictions, the commercial purchase of a handgun may be prohibited outright,³⁸ may be practically quite difficult,³⁹ or may be delayed significantly by a long waiting period or lengthy background check.⁴⁰ In other jurisdictions, there are no meaningful limitations beyond those imposed by federal law.⁴¹ Consequently, the jurisdictions with weaker gun retail laws attract buyers who then transport their purchases to stronger jurisdictions and sell them illegally on the streets. Also waiting to buy in these jurisdictions are individuals who cannot buy a gun because they are felons and buyers who do not want a gun which can be traced back to them.

For example, ATF recently completed a study on gun trafficking in southern California, where a 15-day waiting period applies. The study found that more than 30% of the guns recovered in crime in that region which could be traced back to a gun dealer came from outside California.⁴² Almost a third of these out-of-state guns were sold initially by dealers in Nevada, Arizona, and Texas,

AND POSSESSION IN SELECTED JUVENILE SAMPLES 6 (1993); Alan Beck, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SURVEY OF STATE PRISON INMATES 19 (1991).

³⁸ See, e.g., D.C. CODE ANN. §§ 6-2311 and 6-2312 (1995).

³⁹ See, e.g., N.Y. PENAL LAW § 400 (McKinney 1995).

⁴⁰ See, e.g., CAL. PENAL CODE § 12071(b)(3)(A) (West 194) (15-day waiting period for delivery of firearm).

⁴¹ See *supra* part II. For example, Georgia requires firearm retailers to obtain licenses, but license applicants need only show that they are over 21 years old, a citizen of the U.S., and not a felon. See GA. CODE ANN. §§ 43-16-2 and 43-16-3 (1991). Georgia licensees are not required to keep paperwork beyond that required under federal law. *Id.* at § 43-16-10.1(b). Recently, a law was passed in Georgia instituting an instant background check program in order to exempt the state from the Brady Law. The new law also preempts localities from regulating the sale of firearms. GA. CODE ANN. §§ 16-11-184 (1995).

⁴² BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, SOURCES OF CRIME GUNS IN SOUTHERN CALIFORNIA, 21-22, 1995.

where the most exacting rules concerning handgun sales are the minimum restrictions set forth in federal law.⁴³ The experience in New York City is the same. For example, ATF reports that 75% of all the guns recovered in crime in that city in 1991 and traced by the Bureau originated from Virginia, Florida, Ohio, and Texas, "weak" gun control states compared to New York.⁴⁴

Virginia's experience as a leading "source" state for guns recovered in crime illustrates the tendency for guns to be trafficked from weak to strong gun control jurisdictions. In 1991, Virginia accounted for 41% of all the guns recovered in crime in New York City, more than any other state.⁴⁵ In 1992, the state retained the dubious honor, accounting for 26% of the guns recovered in crime.⁴⁶ Virginia has long been the primary source state of guns recovered in Washington D.C. crimes,⁴⁷ and from late 1989 to June 1992, it was the third leading source state for guns recovered on the streets of Boston.⁴⁸ Even though Virginia recently established the instant-check system for criminal background checks for handgun purchases,⁴⁹ it placed no other restrictions upon the sale of handguns until July 1993, when it passed a law limiting buyers to one handgun purchase every thirty days.⁵⁰ Consequently, in less

⁴³ *Id.*

⁴⁴ Margaret Edds, *The Pipeline to the Streets of New York*, VIRGINIAN-PILOT, Jan. 3, 1993, at A9.

⁴⁵ *Id.* (pie chart).

⁴⁶ James Dao, *States Joining in Combating Illegal Guns*, N.Y.TIMES, Apr. 26, 1993, at B1, B7.

⁴⁷ See BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PROJECT LEAD STUDY, *Firearms Trace Project* 10-11. Project Lead is a study initiated by the Bureau of Alcohol, Tobacco, and Firearms designed to identify as much data as possible, including the source state, of guns recovered in criminal investigations in Washington, D.C. and New York City.

⁴⁸ Bill Montgomery, *Guns Bought in Georgia Arm Northern Criminals*, ATLANTA J. AND CONST., Oct. 11, 1993 at A1, A4. Georgia's experience also provides evidence that interstate gun trafficking moves from weaker jurisdictions to stronger. Between Oct. 1989 and June 1992, Georgia was the second leading source state of guns recovered in Boston crimes, behind only Massachusetts. It was the third leading source state for guns recovered in Washington, D.C. crimes, and the fourth leading state for guns recovered in New York City, New York. *Id.* According to the ATF, Georgia has replaced Virginia as the number one source state of guns recovered in crime. See *Agenda for Change '95*, ATLANTA J. AND CONST., Jan. 12, 1995, at A10. As mentioned previously, Georgia's retail gun laws remain among the most lax in the nation. *Id.* See also *supra* note 41.

⁴⁹ See VA. CODE ANN. § 18.2-308.2:2(B) (Michie 1993).

⁵⁰ VA. CODE ANN. § 18.2-308.2:2(Q) (Michie 1993).

than a year and a half, Virginia has plunged from first to ninth as the leading source state for crime guns.⁵¹

B. *The Multiple Sales Transaction*

One major tenet of federal law actually supports interstate trafficking from weak to strong jurisdictions: the ability to purchase limitless amounts of handguns in one transaction. The pipelines to the illegal gun market are filled with sales, not just from kitchen-table dealers, but also from ordinary commercial gun dealers who have an obvious financial incentive to consummate multiple sales transactions.

Purchasing large volumes of handguns in one transaction is obviously preferable for a gun trafficker; it maximizes profits by keeping the costs of business to a minimum. In addition to the capital required for gun purchases, part of the gun trafficker's costs include the efforts he or she must exert in making the initial purchase from the gun retailer. For a trafficker coming from out-of-state, the barrier to purchase is high because sales of handguns to out-of-state residents are illegal under federal law.⁵² An out-of-state purchaser, therefore, must either procure false identification that provides an in-state residence⁵³ or arrange for a straw purchase.⁵⁴

In-state buyers may also need to recruit a straw purchaser. The actual buyer may be a felon, for example, and prohibited by law from purchasing firearms. Or the buyer may want to avoid attracting the attention that purchasing large volumes of handguns may bring; if he or she intends to resell the guns illegally, the chances that these guns will surface later in crime and be traced back to the original purchaser are drastically increased. Straw purchasers eliminate both of these concerns, but they also represent a "cost" to the trafficker. If the straw purchaser can make multiple handgun purchases in one transaction, that cost is spread over sev-

⁵¹ See *Agenda for Change '95*, *supra* note 48, at A10.

⁵² See 18 U.S.C. § 922(a)(5) (1993); see also, *supra* notes 16-17 and accompanying text.

⁵³ Obtaining false identification is not a significant barrier in states which do not require proof of residency when issuing a driver's license.

⁵⁴ This entails recruiting, and likely paying, another person to provide his or her identification for the sale, complete the required paperwork, and turn the gun over to the actual buyer.

eral future "sales" for the gun trafficker, thus maximizing profit. If illegal and untraceable guns command a street value far in excess of retail sales, the profits of multiple purchases will be large.

Though multiple purchase transactions are not illegal, federal law at least recognizes that they are a concern in that dealers are required to submit reports on multiple handgun sales.⁵⁵ Anecdotal evidence also reveals that the multiple purchase is the cornerstone of the illegal gun trafficking trade. One gun trafficker, Reuben Floyd, armed the streets of Philadelphia by traveling to Ohio, making multiple purchases of handguns, and smuggling them back to the streets. In one six month period, Floyd purchased 135 handguns, mostly Saturday Night Specials and TEC-9 assault pistols, in ten visits to one gun store. In less than a month, Floyd bought nineteen, thirty-one, sixteen, and twenty-one handguns in four separate visits to that dealer. Floyd made profits of \$200 to \$300 per gun. At the time of his arrest, authorities considered him "the number one gun supplier" to Philadelphia.⁵⁶

Albert Jeaniton is another indicted gun trafficker who apparently understood the economics behind the multiple sale. A New York resident who possessed a Florida identification, Jeanniton, with the aid of his wife, is alleged to have purchased 132 handguns between September 1992 and December 1992. On three occasions, the couple bought thirty-four, sixty-six and thirty-two guns from the same Florida gun shop. Sixty-seven of these guns were intercepted on Interstate 95 in South Carolina on their way to the northeast.⁵⁷

Finally, the Virginia experience provides solid support beyond economic theory and anecdotal evidence to demonstrate that multiple sales fuel illegal gun trafficking in this country. In July 1993, stung by criticism for being the primary source state in the country for guns recovered in crime, Virginia enacted the one-gun-a-month law.⁵⁸ As mentioned previously, ATF reports that Virginia has

⁵⁵ See *supra* note 35 and accompanying text.

⁵⁶ Michael Isikoff, *Gun Pipeline: From Ohio to Streets of Phila.*, WASH. POST, Mar. 12, 1991, at A1, A4; see also *U.S. v. Reuben Floyd*, Crim No. 91-00078 (Indictment Feb. 28, 1991).

⁵⁷ Bruce Frankel, *New York Shooting Investigation Zeroes in on Gun*, USA TODAY, Mar. 9, 1994, at 10A.

⁵⁸ See VA. CODE ANN. § 18.2-308.2:2(Q) (Michie 1993).

plummeted to the ninth leading source state.⁵⁹

A recent study confirmed the role of multiple gun purchases in interstate gun trafficking. The Center to Prevent Handgun Violence found that the percentage of guns being traced back to Virginia gun dealers since the passage of the one-gun-a-month law has dropped dramatically.⁶⁰ For example, the study first looked at guns that were recovered in criminal investigations in the northeast and which were originally purchased in southeastern states before the one-gun-a-month law was passed. Thirty-five percent of these guns were traced back to Virginia gun dealers. However, when the study examined northeastern crime guns purchased *after* the change in the law, only sixteen percent of all southeastern guns were traced back to Virginia gun dealers. The study concluded that, for guns being traced from the northeast, those purchased after the change in the law were sixty-six percent less likely to be traced to a Virginia gun dealer as compared to guns purchased before the law.⁶¹ Preventing multiple purchases substantially disrupted the gun trafficking patterns on the east coast.

There is certainly a point at which a gun retailer who is asked to complete a multiple transaction has reason to believe that the guns are not being purchased for the buyer's personal use, whether that is personal protection, collection, or sport. For example, if a buyer purchases five handguns of the same or similar make, the inference that the buyer intends to traffick the guns or is a straw purchaser outweighs any inference that the buyer intends to use the guns personally for legitimate reasons. It can be presumed that collectors do not normally purchase multiple copies of the same gun, and multiple handguns do not further the goals of protection and sport. The point is that, though on a case-by-case basis an individual may have an idiosyncratic reason to buy five copies of the same handgun, there are more conceivable illegitimate uses than legitimate uses for these multiple handgun purchases.

The scale tips even further in favor of an inference of gun trafficking when other factors enter the equation. Considering the transaction hypothesized above, it is much more likely that the

⁵⁹ See *supra* note 45-51 and accompanying text.

⁶⁰ See generally Weil, D. and Knox, R., *Evaluating the Impact of Virginia's One-Gun-A-Month Law* (Center to Prevent Handgun Violence, Wash. D.C.), Aug. 1995.

⁶¹ *Id.* at 4-5.

buyer intends to traffick the handguns if they are a type that often turn up in crime, such as a Lorcin, Bryco, or Jennings model, each of which is a notorious Saturday Night Special.⁶² Any reasonable person would conclude that it is vastly more likely that the buyer intends to resell the guns on the black market than use all five for personal protection or target practice, uses for which these models are notoriously inappropriate.⁶³

There are many other factors that can strengthen the inference of trafficking. A significant number of handguns being purchased in one transaction, as in Reuben Floyd's purchase of sixteen to twenty handguns per transaction,⁶⁴ renders an inference in favor of legitimate use patently unreasonable, even if the guns are not identical or not of the type commonly traced to crime. It would also be unreasonable to infer legitimate use if there were one or more similar transactions between the same purchaser and dealer within a short period of time, as in Reuben Floyd's four visits to his dealer in one month,⁶⁵ even if the number of guns purchased during each transaction was not suspiciously high. A multiple purchase may also arouse suspicions of a straw purchase. For example, if a person has frequented the store previously, and then returns with another person providing identification for a sale. This kind of multiple purchase would tip the balance towards an inference of gun trafficking.

In summary, multiple sales are a cornerstone of illegal gun trafficking. Certain multiple sales transactions lead to the inescapable conclusion that the buyer intends to sell the guns illegally on the black market (or turn them immediately over to someone who will). Thus, any dealer who confronts such a multiple sale

⁶² The term "Saturday Night Special" is commonly used to refer to a type of handgun that is inexpensive, of low-quality, small caliber, and easily concealable. Lorcin, Bryco, and Jennings models are among the 10 handguns most frequently confiscated by California law enforcement agencies. Garen Wintemute, *Ring of Fire: The Handguns of Southern California* (Violence Prevention Research Program, Sacramento, CA), 1994, at 61. These three models are manufactured by a group of six related companies in southern California. Sixty-two percent of all guns seized at crime scenes in California and traced by the ATF between 1991 and 1993 originated from these companies. *Id.* at 64.

⁶³ *Id.* at 17-21.

⁶⁴ See *supra* note 56 and accompanying text.

⁶⁵ *Id.*

transaction has reason to know that the guns are likely to be used in crime and, thus, likely to harm others.

C. *The Problem of Kitchen-Table Dealers*

As explained in Part II of this article, federal law purports to control the retail sale of firearms by requiring anyone "engaged in the business" of selling firearms to obtain a dealer's license.⁶⁶ But due to severe defects in the system, over 197,000 dealer's licenses have been granted, and approximately 177,000 of these have been granted to those who have no commercial location from which to sell firearms.⁶⁷

Unscrupulous kitchen-table dealers can use the power to purchase guns in interstate shipments from gun wholesalers⁶⁸ to make bulk purchases, then have them delivered by parcel service, and sell the guns on the black market. While federal law does require these dealers to keep records of their sales and comply with the Brady Law when selling handguns, with only 200 ATF agents monitoring 197,000 dealers, virtually no one is stopping dealers from ignoring the law.

This is exactly how dealers like Gustavo Salazar, David Taylor, and Otis Cutler operate. Salazar used his federal license to buy guns wholesale and purchased over 1500 guns from at least three gun distributors in the Los Angeles area without complying with federal law. Ninety of the guns he sold have been recovered in crime incidents.⁶⁹ Taylor, with five misdemeanor charges on his record, could not procure a New York state dealer's license, but he was able to obtain a federal license because he had no felony convictions. He used the federal license to purchase guns from wholesalers across the country, and then had them shipped to him by United Parcel Service. He sold over 800 of these guns on the black market.⁷⁰ With his dealer's license, Otis Cutler purchased 184 handguns from only three distributors in seven months, also delivered by United Parcel Service. Cutler sold most of these guns to a middle man, who later sold them on the street. Thirty-seven of Cutler's guns have been recovered in crimes, including three of

⁶⁶ See *supra* notes 13-15 and accompanying text.

⁶⁷ See *supra* notes 26-27, and accompanying text.

⁶⁸ See *supra* notes 16-17 and accompanying text.

⁶⁹ See *House Hearing*, *supra* note 23, at 3.

⁷⁰ *Id.* at 3-4.

which were murders.⁷¹

Many kitchen-table dealers, also known as "hobby dealers," ply their trade at guns shows or flea markets. According to ATF, every weekend there are thousands of gun shows in the United States.⁷² One source reported that there are approximately 50,000 gun shows a year.⁷³ Larger, established guns shows promoted by an organizer will feature thousands of tables with people selling guns. Because there is no conceivable way to monitor the tens of thousands of transactions occurring each weekend, background checks, waiting periods, and record-keeping can be flouted with impunity.⁷⁴ In fact, ATF has only within the last two years set upon a policy of making random calls at gun shows.⁷⁵

Convicted gun trafficker Edward Daily testified before Congress that he routinely used straw purchasers to provide identification and complete sales transactions at gun shows. According to Daily, the vendors who sold him guns recognized him as a repeat purchaser at these shows and understood that he was the actual purchaser in a sham transaction; at times, they even handed the guns directly to him.⁷⁶

A vast percentage of dealers licensed under federal law are "under-licensed," i.e., they do not have the necessary state and local licenses to conduct a legitimate business.⁷⁷ In 1993, ATF estimated that, of the kitchen-table dealers who must comply with state and local laws in order to sell guns, 40% do not do so.⁷⁸ Closer inspection by states and localities gives reason to believe that this gap may be even greater. In New Jersey, for example, only 725 of the 2000 federal licensees possess the necessary state dealer's license.⁷⁹ In Maryland, only 401 of 3401 federal licensees hold a

⁷¹ Scott Shane, *U.S. Unwittingly Aids Illegal Firearm Sales*, BALTIMORE SUN, at 1A, 8A.

⁷² *House Hearing*, *supra* note 23, at 30.

⁷³ *A Call to Arms*, THE TIME INC. MAG. CO., Jan. 10, 1994, at 60.

⁷⁴ See, e.g., John Hurst, *Gun Shows Are Easy Mark for Illegal Weapon Sales*, L.A. TIMES, May 8, 1989, at 1, 20. In one sting, the Pomona Police Department arrested 32 gun show vendors for violating California's 15-day waiting period. One was arrested for the same offense a second time after he had been released and returned to the show. *Id.*

⁷⁵ *House Hearing*, *supra* note 23, at 30.

⁷⁶ *House Hearing*, *supra* note 23, at 8-9.

⁷⁷ For purposes of this paper, such dealers will be referred to as "under-licensed kitchen-table dealers."

⁷⁸ *House Hearing*, *supra* note 23, at 25.

⁷⁹ Rick Linsk, *Gun-Dealing Neighbors*, ASBURY-PARK PRESS, Oct. 23, 1994, at C1.

state license.⁸⁰ Such an enormous disregard for the law is significant because state and local requirements for licensing are sometimes more stringent - as in weeding out misdemeanants, for example - and it can be assumed that federal licensees do not seek the necessary local license because it will not be granted.

It is true that because of the dealer licensing reforms discussed in Part II, the ratio of under-licensed dealers to commercial storefront dealers is declining. In part, this is because federal law now requires license applicants to certify that they will comply with local license requirements. But licenses are granted for a three-year period and it will take some time for the vast number of under-licensed dealers to be weeded out by the change in law. In addition, some unscrupulous people will falsely certify that they intend to obtain local licenses. Therefore, there is still reason to believe that under-licensed dealers will continue to operate in the illegal gun market in the near future.

Given the acknowledged role that kitchen-table dealers have played in gun trafficking, a role that has led to legislative and regulatory reforms to reduce their ranks, wholesalers who have no independent reason to believe that an order comes from a legitimate storefront enterprise, such as if the order comes from a long-time customer or a recognized retail chain, should be suspicious that the bulk order is made by a kitchen-table dealer. As discussed in Parts IV and V,⁸¹ case law supports the idea that this suspicion creates a duty on the part of the wholesaler to inquire whether the federal licensee is, in fact, running a legitimate enterprise. In the context of gun sales, an expedient method to confirm the buyer's motives would be to require evidence that the licensee possesses all necessary state and local licensing. Because the lack of necessary licensing confirms the suspicions of gun trafficking, a wholesaler has a duty not to fulfill the bulk purchase.

D. *Sales by Unlicensed Vendors at Gun Shows*

ATF states that, on any given weekend in this country, thousands of gun shows take place.⁸² They range from small affairs

⁸⁰ Scott Shane, *U.S. Unwittingly Aids Illegal Firearm Sales*, *supra* note 71, at 1A, 8A.

⁸¹ *See infra* pp. 875-890 and 890-891.

⁸² *House Hearing*, *supra* note 23, at 30. *See also supra* notes 72-75 and accompanying text.

of a few tables apiece to larger shows of hundreds of tables organized by promoters who may be sponsoring gun shows in several cities in a region. One estimate places the number of gun shows a year at 50,000.⁸³ Though the volume of sales transactions taking place at gun shows is not known, it is safe to say that there is no reason to expect that the 240 agents at ATF can monitor gun shows sufficiently to deter vendors at shows from acting upon what they all know to be true: no one is looking over their shoulders. As explained previously, this ethos can lead to federal licensees ignoring the law with impunity.⁸⁴ But there is reason to believe that it has also lead to another problem: an increase in unlicensed individuals selling guns at shows.⁸⁵

Federal law does not regulate secondary firearm sales. An individual selling an occasional gun or two on the secondary market is of little concern.⁸⁶ While gun traffickers and felons have reason to seek out private sales - there is no paperwork or background checks - there are significant barriers to such buyers actually finding occasional, private sellers with whom to transact. Gun shows, however, eliminate these barriers by attracting large numbers of people interested in buying and selling second-hand guns. Shows not only tempt the unlicensed seller to transact in large volumes, they also act as a clearinghouse for buyers who seek out private sellers for both legitimate and illegitimate reasons.

There are reports that gun shows are now attracting unlicensed sellers who deal in large volumes of sales and whose primary motivation is profit - activity that is illegal under federal law⁸⁷ - and that these sellers are encroaching on the sales of licensed dealers at shows.⁸⁸ Such reports are not surprising; unlicensed sell-

⁸³ See *supra* note 73 and accompanying text.

⁸⁴ See *supra* notes 74-75 and accompanying text.

⁸⁵ Because federal law only prohibits someone from "engag[ing] in the business" of selling firearms without a license, sporadic sales are permitted as long as the primary motivation of the sale is not profit. See *supra* notes 15-17 and accompanying text.

⁸⁶ The risks associated with occasional private firearm sales would be eliminated for the most part by requiring all purchasers to possess a handgun license prior to the sale and by requiring all purchasers to register their handgun purchases, even if they are bought from private, unlicensed sellers. Handgun Control, Inc. has lobbied for such legislative changes for some time.

⁸⁷ See *supra* notes 13-15 and accompanying text.

⁸⁸ See *Brady Bill Doesn't Apply to Most Sales at Gun Shows*, WASH. TIMES, Dec. 20, 1993, at 1; *Oust Gun Shows*, VA-PILOT, Apr. 29, 1994, at A24; Allen G. Breed, *Private Sales of Guns Booming at Flea Markets*, S.F. CHRON., Jan. 15, 1995, at A4.

ers are exempt from the most stringent of federal gun retail regulations: the background check and waiting period requirements of the Brady Law.

Thus, business activity like that of Clarence Pleau presents a rising danger to the public. A Wisconsin native, Pleau purchased 392 guns from a federal dealer and resold these guns at shows and flea markets. There is no doubt that Pleau intended to make a profit from these sales: he kept detailed records of his transactions for his personal use. Investigators have recovered twenty-seven of his guns in crimes committed as far away as Denver, Colorado.⁸⁹ Obviously, many of Pleau's patrons were buyers who intended either to use his guns in crime or to pass them along on the illegal gun market.

Evidence may soon bear out the hypothesis that sales by unlicensed vendors at gun shows are dramatically increasing because of their attractiveness to those interested in avoiding paperwork and background check requirements. If it can be shown that a growing percentage of guns recovered in crime pass through unlicensed dealers at gun shows, then it could be argued that gun show promoters have reason to believe that unlicensed sales are leading to illegal gun trafficking. This knowledge would impose upon promoters a duty to require unlicensed gun vendors to comply with the same rules with which licensed vendors must comply.⁹⁰

IV. *Theories of Third-Party Negligence*

As the preceding sections of this paper make clear, the "life story" of a handgun used in crime may be quite simple: the gun may have been a solitary, primary sale from a federal firearms licensee to the criminal end-user, for example. It is much more likely,

⁸⁹ Erik Larson, *Private Gun Sales Go Unregulated at Shows and at Flea Markets*, WALL ST. J., July 12, 1994, at A1, A5. Larson's article also features two other private "high volume" sellers, Carl and Carroll Miller. The Millers were supplied by a federal licensee and sold thousands of guns at flea markets, including three dozen Lorcin .380s to the ATF. The Millers' guns have surfaced in homicides, robberies, and a Pakistani arms trafficking ring. *Id.* at A5.

⁹⁰ For example, promoters would require all unlicensed vendors to transfer their handguns prior to a sale to a licensed vendor. The licensed vendor would be required by law to conduct a background check and comply with any applicable waiting period. This system is law in California. See CAL. PENAL CODE, § 12072(d) (1994) (if neither party to a transfer holds a California dealer's license, the parties must complete the transaction through a licensed dealer or a law enforcement agency).

however, that the story is more intricate: the gun was part of a multiple purchase by a gun trafficker or straw purchaser, part of a bulk purchase by a kitchen-table dealer, or one of a number of guns sold by an unlicensed seller doing business at a gun show. In fact, certain gun sales are such obvious points of departure to the illegal gun market that anyone facilitating these sales has a duty to avoid them.

The cornerstone for imposing this duty is the foreseeability of the harm through criminal misuse of the gun that is likely to occur should the transaction go forward. The goal of imposing the duty is to require, through the threat of liability, a gun dealer, gun distributor, or gun show promoter to stop knowingly engaging in high risk gun sales. In other words, the goal is to make the sellers of guns accountable for their foreseeable use in crime.

Part IV.A of this paper discusses the common law source of the duty to avoid high-risk gun transactions, the doctrine of negligent entrustment. Part IV.B surveys case law from various jurisdictions, establishing that firearm sellers do indeed have a duty to avoid sales when they know, or have reason to know, that the sale will result in criminal use of the gun.

A. *The Doctrine of Negligent Entrustment*

There is nothing remarkable about holding the seller of a gun legally responsible for the death or nonfatal injury of another person, even though a third-party, rather than the seller, "pulled the trigger." Liability for third-party actions recognizes the simple notion that injuries are the result of several causes. A strong foundation for imposing a legal duty *not to act* is forged whenever an actor can foresee that his or her actions will produce a significant chance that one person will cause harm to another. If tort law allocates liability in order to curtail injuries by providing the incentive to prevent them,⁹¹ then a sensible rule would prescribe liability any time the intervening event is foreseeable, whether it is an act of nature, a third-party's act of negligence, or even a third party's criminal act.

⁹¹ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 25-6 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

1. Section 390 and Foreseeability

Several courts have reached this conclusion in the firearm retail context,⁹² and the most often cited source of this duty is Section 390 of the Restatement (Second) of Torts. The doctrine of "negligent entrustment" set forth in Section 390 provides that:

[o]ne who supplies directly or through a third person a chattel - for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.⁹³

Section 390 is an exception to the more general rule that an actor may presume that third-parties will conduct themselves properly.⁹⁴ This general rule does not apply when an actor knows, either actively or constructively, that the person to whom he is supplying a chattel is likely to misuse the chattel.⁹⁵

Certainly Section 390 means that a supplier has a duty not to entrust the chattel if he or she has first hand knowledge of the purchaser's personal proclivities suggesting the purchaser will harm himself or others.⁹⁶ But the comments and illustrations to Section 390 also make clear that suppliers of chattel, such as a firearm, must look to a variety of sources in order to deduce whether the transfer presents a risk of harm.

For example, the circumstances surrounding a transfer can give the supplier reason to know that the purchaser is likely to misuse the item, a source of duty relevant to the firearm retail context. Illustration five in comment b to Section 390 sets forth an example in which the lessor of an automobile overhears the lessee's "fixed purpose to misuse" the automobile, i.e., to drive it recklessly.⁹⁷ The Restatement

⁹² See *infra* part IV.B.

⁹³ RESTATEMENT (SECOND) OF TORTS § 390.

⁹⁴ *Id.* § 390 cmt. b.

⁹⁵ *Id.*

⁹⁶ *Id.* § 390 cmt. b, illus. 6 (transfer of car to a known epileptic).

⁹⁷ *Id.* § 390 cmt. b, illus. 5. This illustration is as follows:

A rents an automobile to B, a young man who announces his purpose to drive it from Boston to New York on a bet that he will do so in three hours. A is subject to liability if the excessive speed at which the car is driven causes harm to travelers on the highway.

concludes that the supplier has a duty to act upon the purchaser's pronouncement, even though the supplier has no prior knowledge of the purchaser that would confirm these suspicions.⁹⁸ Though no illustrations are provided, logic dictates that a supplier must also consider just as seriously the purchaser's demeanor and actions which may give the transferor reason to suspect a "fixed purpose to misuse" the chattel.

The Restatement also recognizes that it is possible to predict the irresponsible behavior of certain classes of people and it is foreseeable that transferring certain types of chattel to these people will result in harm. For example, people generally know that minors fail to appreciate certain risks and the Restatement clearly acknowledges that entrusting a dangerous instrumentality, such as a loaded firearm, to a minor is a negligent act.⁹⁹

Both sources of information giving suppliers "reason to know" that the purchaser is likely to do harm apply to the "high risk" transactions highlighted in this paper: multiple gun sales transactions, sale of bulk orders of guns to "under licensed" kitchen-table dealers, and sales by unlicensed dealers at gun shows. The purchase of large numbers of guns in a single transaction, whether it be a gun retailer selling to an unlicensed individual or a distributor selling to a kitchen-table dealer, certainly gives the supplier reason to suspect a "fixed purpose to misuse" the guns. Furthermore, the supplier in both of these transactions, and possibly gun show promoters who permit unlicensed vendors to sell, can presume that these guns will be sold on the illegal gun market and eventually find their way into the hands of people who intend to use them in crime: a class of people whose use of the gun is easy to predict will be irresponsible.

2. Other Factors in the Duty Analysis

The foundation of liability under Section 390 is foreseeability. But, in practice, this is only one of many factors that courts consider when imposing a legal duty. These other factors also support a duty to avoid high-risk transactions. For example, courts routinely balance the likelihood that an activity will result in injury against the burden on the defendant to guard against the injury.¹⁰⁰

⁹⁸ *Id.*

⁹⁹ *Id.* § 390 cmt. b, illus. 1; see also RESTATEMENT (SECOND) OF TORTS § 308 cmt b.

¹⁰⁰ PROSSER AND KEETON, *supra* note 91, § 31, at 171-72. Prosser states that:

The role of multiple sales transactions and kitchen-table dealers in supplying guns to the illegal gun market is well documented and evidence is mounting to demonstrate that unlicensed sales at gun shows are becoming equally problematic. There is every reason to believe that guns sold on the illegal gun market are likely to be used in crime and, therefore, likely to be used to injure another person.¹⁰¹ In contrast, the burden upon gun retailers, distributors, or gun show promoters to avoid these transactions is minimal. Presumably, these actors believe that their businesses will prosper by engaging in legitimate transactions with gun buyers. Therefore, avoiding transactions that attract a disproportionate amount of illegitimate gun buyers will not be a burden upon their businesses.¹⁰²

Courts also look to the moral blame attached to the defendant's conduct.¹⁰³ Supplying a gun to someone who the transferor has reason to know will use the gun to cause another harm is certainly not an action that can be carried out with a clear conscience

As the gravity of the probable harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution. Against this probability, and gravity of the risk, must be balanced in every case the utility of the type of conduct in question. . . . The alternative dangers and advantages to the person or property of the actor himself and to others must be thrown into the scale, and a balance struck which all of these elements are weighed.

Id. See also *Rowland v. Christian*, 69 Cal.2d 108, 113 (1968); *Forrest v. Imperial Distrib. Servs.*, 712 P.2d 488, 490 (Colo. App. 1985); *Lance v. Senior*, 224 N.E.2d 231, 233 (Ill. 1967) (four factors affect the duty analysis: foreseeability, likelihood of injury, magnitude of the burden in guarding against the injury, and the consequences of placing that burden on defendant); *Lovell v. Oake Elec. Corp.*, 382 N.W.2d 396, 399 (S.D. 1986).

¹⁰¹ Empirical evidence could be used to demonstrate that this likelihood is almost a certainty in the multiple sale context. Using tracing data collected by ATF and reviewing multiple sales reports filed with ATF, it would be possible to determine the "profiles" of multiple sales more likely to lead to a gun traced to crime. In comparison to solitary handguns purchased in single transactions, what is the likelihood that a single transaction of five handguns, ten handguns, fifteen handguns, or more will be associated with the recovery of guns in crime? To what degree does that likelihood change if other factors are added, such as the caliber or make of the handgun?

A similar analysis could be performed to determine the degree to which guns from sales to under-licensed kitchen-table dealers are recovered in crime in comparison to sales to commercial dealers.

¹⁰² Retailers would also argue that discouraging all multiple sales will impose a burden upon them because some portion of multiple sales are legitimate. This burden, however, is minimal as long as such legitimate sales remain only a very small portion of all multiple sales.

¹⁰³ See PROSSER AND KEETON, *supra* note 91, § 4, at 21-23; see also *Rowland*, 69 Cal.2d. at 113.

and it is ludicrous to argue that society would ever value such an act merely to support the seller's opportunity to make a profit.

Courts are also concerned about the consequences to the community should a duty not to act be imposed and they ask whether it will chill actions valued by the community.¹⁰⁴ Selling a gun, while ignoring the foreseeable consequences of harm to others, is certainly not a valued activity. Such actions have, in fact, contributed to some part of the one million handgun crimes each year in this country. Nor does holding gun retailers, distributors, and gun show promoters liable for third-party actions unreasonably affect the ability of law-abiding citizens to purchase guns given the potential dangers of negligent sales. Forcing gun retailers to refrain from engaging in multiple sale transactions by imposing liability will not affect the ability of legitimate buyers to purchase guns because such people have no significant interest in engaging in such sales themselves.¹⁰⁵

Similarly, under-licensed kitchen-table dealers are not supplying guns to legitimate gun buyers. Therefore, discouraging gun distributors from fulfilling their bulk orders will not affect legitimate transactions at commercial retail establishments.¹⁰⁶ Finally, should evidence bear out the hypothesis that such sales are fueling the illegal gun market, imposing liability on gun show promoters for failing to subject unlicensed vendors to the same rules that cover licensed vendors does not affect community-valued activity. Gun purchasers do not have a significant interest in turning to easy-to-come-by private sales whenever they decide that they do not want to submit themselves to a background check. In fact, the success of the Brady Law demonstrates that society has a significant

¹⁰⁴ See PROSSER AND KEETON, *supra* note 91, § 31, at 171-72. See also, *Rowland*, 69 Cal.2d at 113; *Lance*, 224 N.E.2d at 233; *Mitchell v. Central Vermont Railway*, 158 N.E. 336 (Mass. 1927); *Moning v. Alfano*, 254 N.W.2d 759 (Mich. 1977); *Smith v. West Point*, 475 S.2d 816, 818 (Miss. 1985); *Otis Engineering v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983) (one factor weighing against imposing a duty is consequences of placing the burden on the defendant); *Dewald v. State*, 719 P.2d 643 (Wyo. 1986).

¹⁰⁵ Indeed, the Virginia legislature enacted the one-gun-a-month law after concluding that the lack of significant, legitimate reasons for a purchaser to engage in multiple sales did not outweigh the concern that such transactions were being used to traffick guns illegally.

¹⁰⁶ In fact, the recent change in gun retail licensing policy in the U.S. is designed to discourage the proliferation of retail licenses among individuals who have no sincere interest in conducting commercial, retail sales of firearms. See *supra* part II.

interest in assuring that any large volume seller conducts background checks.

B. *Negligent Entrustment in the Firearm Retail Context*

In theory, each of the high risk transactions described above, i.e., conducting multiple sales transactions, fulfilling bulk orders by under-licensed kitchen-table dealers, and permitting unlicensed gun show vendors to sell without conducting background checks or complying with waiting periods, fits well within the boundaries of the negligent entrustment doctrine. The retailer, distributor, or gun show promoter is knowingly supplying a firearm through a third party to someone who is likely to misuse it. Case law also supports liability against the distributors, retailers, and promoters who conduct these transactions.

In the majority of jurisdictions in which the claim has been made, courts have held that firearm retailers have a duty to decline to sell a firearm when the retailer knows, or has reason to know, that the purchaser will harm himself or do harm to others. Dealers who breach this duty are ultimately responsible, according to these courts, for the misuse of the guns they sell.

Each of these cases requires gun retailers to assess the circumstances of the gun transaction and decline the sale because the purchaser is of a class of persons likely to misuse the gun and harm others. This is, of course, important precedent for holding gun dealers, distributors, and gun show promoters liable for engaging in high risk transactions likely to put a gun in the hands of an actor who may do harm with it.

1. The Duty to Decline a Sale

In *Jacoves v. United Merchandising Corp.*,¹⁰⁷ the parents of Jonathan Jacoves brought a negligence claim against the gun retailer who sold their son the rifle with which he committed suicide. Their complaint alleged that Jonathan initially entered the gun shop to purchase a handgun. When he discovered that California's 15-day waiting period prevented him from immediately purchasing a handgun, he left the store and returned later to purchase a rifle not subject to the waiting period.¹⁰⁸ The complaint also alleged

¹⁰⁷ 11 Cal. Rptr. 468 (Cal. App. 1992).

¹⁰⁸ *Id.* at 483, 487.

that, during the purchase, Jonathan appeared confused, distraught, and was trembling.¹⁰⁹

The California Court of Appeals held that the doctrine of negligent entrustment, which had long been applied to dangerous instrumentalities in California, applied to the firearm retail context.¹¹⁰ The court stated that, "[i]f during the normal course of the purchasing process, the seller knows or has reason to know that the purchaser is likely to be a danger to himself or herself, or others, the seller has a duty to decline to sell the firearm."¹¹¹ Such persons, according to the court, "are a class of individuals whom we legally recognize as incompetent to purchase firearms."¹¹²

The Texas Court of Appeals in *Peek v. Oshman's Sporting Goods, Inc.*¹¹³ reached the same conclusion as the *Jacoves* court with respect to sales to mentally unbalanced purchasers.¹¹⁴ In *Peek*, the plaintiffs alleged that the purchaser's behavior gave the gun dealer reason to know that the purchaser, who later shot and killed the plaintiff's decedent, had been adjudicated mentally incompetent.¹¹⁵ Because the sale of a firearm to a manifestly irrational or mentally unbalanced person can foreseeably result in irresponsible use of the gun, the court imposed a duty on the gun dealer to avoid such sales, though the court did not specifically rely upon Section 390.¹¹⁶ Such a duty attaches any time the "purchaser's manifest behavior or comportment have put the seller on notice

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 486.

¹¹¹ *Id.* at 487.

¹¹² *Id.* Even though the *Jacoves* court concluded that a duty not to sell a firearm attaches whenever the retailer has reason to suspect a likelihood of harm, the court dismissed the *Jacoves*' complaint on other grounds. The court found, as a matter of law, that the facts as pled by the *Jacoves* were insufficient for a sales clerk to conclude that Jonathan intended to commit suicide. *Id.* at 488-89.

¹¹³ 768 S.W.2d 841 (Tex. App. 1989).

¹¹⁴ *Id.* at 847. The *Peek* court also concluded that federal law, which prohibits selling a firearm to anyone the dealer has reason to know has been adjudicated mentally incompetent or committed to a mental institution, see 18 U.S.C. § 922(d), establishes a duty to decline sales. But, as in *Jacoves*, the *Peek* court ruled that, as a matter of law, there was no evidence to show that the dealer had reason to know that the purchaser had been committed to a mental institution or adjudicated mentally incompetent. *Peek*, 768 S.W.2d at 845. The court reached the same conclusion as to the common law negligent entrustment claim. *Id.* at 847.

¹¹⁵ *Id.* at 844-45.

¹¹⁶ *Id.* at 847 (citing *Angell v. F. Avanzini Lumber Co.*, 363 So. 2d 571 (Fla. Dist. Ct. App. 1978), *Phillips v. Roy*, 431 So. 2d 849 (La. App. 1983), *Bernethy v. Walt Failor's Inc.*, 653 P.2d 280 (Wash. 1982)).

that the purchaser, if possessed of a firearm, would foreseeably pose a danger to third persons."¹¹⁷

The *Jacoves* and *Peek* courts dismissed the plaintiffs' claims because they found that the evidence did not suggest that the gun dealers had reason to know that the buyers intended harm. While the courts imposed a duty to avoid a sale to a known mental incompetent (someone who is likely to do harm), they apparently perceived some challenge in recognizing the signs of instability. There is no challenge in recognizing a high risk transaction, such as a multiple sale or a bulk order from an unknown licensee. Because such high risk transactions are characteristic of gun trafficking and, therefore, likely to lead to harm, it would seem that the *Jacoves* and *Peek* courts would conclude that a dealer or distributor has a duty to avoid such transactions.

In *Bernethy v. Walt Failor's, Inc.*,¹¹⁸ the Washington Supreme Court, relying upon Section 390, held that a gun dealer possesses a duty not to sell to someone the dealer has reason to know "is incompetent due to intoxication."¹¹⁹ The third party in *Bernethy*, during a drinking binge, murdered his ex-wife minutes after purchasing a rifle. Washington law did not prohibit the dealer from selling to an intoxicated purchaser. Nonetheless, the court held that the statute prohibiting the sale of firearms to other incompetent persons, such as minors and violent felons, established "a strong public policy . . . that certain people should not be provided with dangerous weapons."¹²⁰ According to the court, this same policy is articulated in Section 390 of the Restatement (Second) of Torts. Whether the activity is prohibited by statute is irrelevant because selling a gun to an intoxicated individual is just as likely to lead to injury as is selling a gun to a child.¹²¹

According to the Arkansas Supreme Court, a firearms dealer

¹¹⁷ *Id.* See also *Angell*, 363 So. 2d at 572, in which plaintiff alleged that the defendant gun dealer had acted negligently by selling a rifle to a woman who exhibited signs of mental instability. Some of her actions included: giggling, hugging and kissing store employees, and repeatedly aiming a rifle at the clerk's head, pulling the trigger. *Id.* The clerk was sufficiently disturbed by her behavior to call the police. The court agreed that the gun dealer clearly possessed a duty not to sell the rifle to the woman under these circumstances. *Id.*

¹¹⁸ 653 P.2d 280 (Wash. 1982).

¹¹⁹ *Id.* at 283.

¹²⁰ *Id.* at 281-82.

¹²¹ *Id.* at 283.

negligently sells a gun if he or she ignores evidence that the buyer has a "fixed purpose"¹²² to commit a crime. In *Cullum & Boren-McMain Mall v. Peacock*,¹²³ the plaintiff alleged that the purchaser had acted strangely, aroused the suspicion of the sales clerk, and stated that he wanted a gun capable of making "a big hole in a man."¹²⁴ The court found this evidence sufficient to send a claim of common law negligence to the jury.¹²⁵

Cases like *Jacoves* and *Peek* clearly set forth a duty to act upon information that the gun dealer has in his or her possession at the time of the sale. A few courts have found that gun retailers have an even higher duty. Because of the high degree of harm that could result from selling even a single gun to a possible misuser, these courts have found that gun dealers have a duty to inquire to ensure that a customer is not likely to do harm, even if the dealer has no reason to be suspicious of the purchaser.

In *Phillips v. Roy*,¹²⁶ plaintiffs alleged that the purchaser of a .357 magnum pistol had a history of mental illness of which everyone in the community was aware. Plaintiffs also presented specific evidence suggesting that the purchaser's behavior on the day of the sale left no reason to doubt that he was mentally disturbed. In contrast, the sales clerk who sold the handgun testified that she saw no signs of mental instability.¹²⁷ The sales clerk also admitted that she completed Part A of the Firearms Transaction Record (Form 4473) for the purchaser, contrary to the instructions printed on the form.¹²⁸

In a lengthy discussion of the gun dealer's duty in selling firearms, the court stated that "[i]n view of the dangerous instrumentality involved and its demonstrated potential for harm," the seller is obligated "to carefully observe the customer for any indication of incompetence. . . ."¹²⁹ This duty is intended to serve the public

¹²² See RESTATEMENT (SECOND) OF TORTS § 390 cmt. b. See also *supra*, notes 93-99 and accompanying text.

¹²³ 592 S.W.2d 442 (Ark. 1980).

¹²⁴ *Id.* at 444.

¹²⁵ *Id.*

¹²⁶ 431 So. 2d 849 (La. App. 1983).

¹²⁷ *Id.* at 850-51.

¹²⁸ *Id.* at 851; see also *supra* note 34 (Part A of the Firearms Transaction Form 4473 requires the purchaser to answer "yes" or "no" to eight questions asking whether federal law prohibits the buyer from purchasing a firearm).

¹²⁹ *Roy*, 431 So. 2d at 852.

interest by curtailing the " 'widespread traffic in firearms' " and reducing " 'lawlessness and violent crime. . . .' " ¹⁹⁰

This duty to "carefully observe," and the great public interest served by it, requires a "common-sense approach" whenever the seller finds that he or she is unable to make a "precise determination as to the mental competence of a prospective weapons purchaser. . . ." The duty requires the seller to

spend a reasonable time in observing the customer, watching carefully for any signs of mental disturbance or instability which would tend to alert the average individual to the possibility of problems in this area and which would *require some further inquiry, including consultation with one's superiors in the business establishment.* ¹⁹¹

As to the sale that led to plaintiff's death, the court ruled that this duty required the seller to observe the buyer complete Form 4473 because this procedure would have given the seller more information with which to assess the buyer's mental state; that is, the procedure is part of the careful observation of the buyer. Because she completed Part A of the form, the sales clerk in *Roy* missed this "added opportunity to test the customer[]" ¹⁹²

The great degree of harm that can result from the misuse of a gun also led the Mississippi Supreme Court to conclude that gun retailers possess a duty to inquire about their customers' fitness for possessing a gun. In *Howard Bros. of Phenix City v. Penley*, ¹⁹³ a sales clerk handed a customer a .357 Magnum pistol when the customer asked to see the gun displayed in a showcase. The customer asked to purchase ammunition and, after the clerk placed the ammunition on the counter, the customer loaded the gun. When the sales clerk refused to allow the customer to take the handgun outside to "see if it would shoot," the customer became erratic and took plaintiff, another store patron, hostage. ¹⁹⁴

The customer was later found to have a long history of mental illness. But there was no evidence that the customer's appearance and conduct was unusual prior to the point at which the clerk handed

¹⁹⁰ *Id.* at 852-53 (citing *Huddleston v. United States*, 415 U.S. 814 (1974)).

¹⁹¹ *Id.* at 853 (emphasis added).

¹⁹² *Id.*

¹⁹³ 492 So. 2d 965 (Miss. 1986).

¹⁹⁴ *Id.* at 966.

him the handgun.¹³⁵ Nonetheless, the Mississippi Supreme Court ruled that, even without the slightest bit of evidence of possible harm, the seller must get more information in order to determine whether the firearm can be safely entrusted.

In its scathing opinion, the Mississippi Supreme Court admonished the way in which the sales clerk had simply handed over a gun and ammunition to a customer "[w]ith little if any greater precaution than if she had been selling a can of salmon."¹³⁶ The court held that a gun retailer has a duty "to have in effect . . . some safety precautions and procedures designed to prevent" the "infinite variety of dangerous situations" that can arise from selling firearms.¹³⁷ At a minimum, these precautions should include "some safeguard to see that a loaded handgun is not placed in the hands of an unknown person, who may very well be a mental case, unless or until his background can be thoroughly investigated."¹³⁸ This level of care is "commensurate with the potential danger . . ." in the retail marketing of firearms.¹³⁹

A gun retailer's duty to prevent danger logically cannot end at a mental health background check. Of all the "potential dangers" of transferring firearms, the chance of transferring a gun to a mental incompetent is less likely than the chance that a seller may be entrusting the gun to a felon or someone who is part of a trafficking scheme. With only 15,000 out of 197,000 federal licensees operating out of commercial establishments and only 40% of licensees obtaining the local licensing required,¹⁴⁰ the chance that a distributor is likely to be selling a bulk order to an under-licensed kitchen-table dealer bent on trafficking the firearms seems far more likely than transferring to a mental incompetent.

2. The Duty of Gun Show Promoters

Recently, the Ohio Court of Appeals, in *Pavlidis v. Niles Gun*

¹³⁵ *Id.*

¹³⁶ *Id.* at 968.

¹³⁷ *Id.*

¹³⁸ *Id.* at 969. Of course, the duty to "thoroughly investigate" the buyer as set forth in *Howard Brothers* far exceeded any duty required under federal or Mississippi state law at that time. At least one other court acknowledges that a gun dealer's duties may extend this far. See *West v. Mache of Cochran, Inc.*, 370 S.E.2d 169, 172 (Ga. App. 1988) (holding that dealer had duty not to enter into straw sale (citing *Howard Brothers*, 492 So. 2d at 968, 969)).

¹³⁹ *Howard Bros.*, 492 So. 2d at 969.

¹⁴⁰ See *supra* notes 28, 64, 75 and accompanying text.

Show,¹⁴¹ overturned a grant of summary judgment in favor of a gun show promoter sued by two men who had been shot with handguns stolen from the promoter's show¹⁴². In January 1992, a group of minors visited the Niles Gun Show, stealing three handguns and buying several rounds of ammunition. The minors later stole a car and, while joyriding, were confronted by plaintiffs, who they then shot.

Plaintiffs asserted that the gun show promoter had a duty to protect the public from the acts of people who may steal guns from vendors at gun shows. Plaintiffs claimed that Niles Gun Show breached that duty by not requiring its vendors to secure guns from theft and permitting its vendors to sell ammunition to minors.¹⁴³

The court of appeals found that "reasonable minds certainly could conclude that unsecured firearms present an attractive if not irresistible lure to children."¹⁴⁴ The court went on to hold that it was foreseeable that minors would steal guns from gun shows and use them in pursuit of criminal activity. Niles Gun Show, therefore, possessed a duty to require its vendors to secure guns from theft and not to sell ammunition to minors.¹⁴⁵

While *Pavlidis* certainly broke ground as one of the first cases to hold that those involved in gun retail have a duty to secure firearms, it also has broader implications. As explained above, there is growing evidence that sales at gun shows by unlicensed vendors are attracting people who wish to avoid a background check and waiting period, namely felons and gun traffickers. If unlicensed gun show vendors are becoming a major channel for the illegal trafficking of firearms, then at some point, it can be argued that gun show promoters can foresee that these sales are supplying the illegal gun market and, therefore, those who intend to use guns in crime. Gun show promoters would then have a duty to stem this flow of guns by requiring unlicensed vendors to comply with the same rules that cover licensed vendors, i.e., the background check and waiting period requirements.

¹⁴¹ 637 N.E. 2d 404 (Ohio App. 1994).

¹⁴² *Id.* at 410.

¹⁴³ *Id.* at 406-07.

¹⁴⁴ *Id.* at 409.

¹⁴⁵ *Id.* at 410.

3. No Duty Beyond Statutory Law

Not all courts agree with the rationale set forth in *Jacoves* and *Bernethy*. In *Buczowski v. McKay*,¹⁴⁶ the Michigan Supreme Court refused to hold that a gun dealer had a duty to avoid selling a firearm to someone who was not prohibited by law from purchasing a gun. *Buczowski* involved the sale of ammunition to an allegedly intoxicated buyer who used it hours later to wound the plaintiff. The evidence plaintiff presented as to the buyer's condition at the time of sale was the *buyer's own testimony* that he must have "looked a mess" after partaking in a "daylong beer-drinking binge."¹⁴⁷

Remarkably, the *Buczowski* court held that the harm that can result from entrusting a gun to an intoxicated person is "no more foreseeable than the potential harm from any product sold to an apparently inebriated customer that might be used to injure third parties."¹⁴⁸ This is an impossible conclusion to support because, unlike any other consumer product, guns are specifically made for the purpose of killing and are certainly more lethal in the hands of a misuser than is, for example, a knife.¹⁴⁹ Stating that the "policy considerations underlying regulation of the sale of firearms . . . are quintessentially within the legislative arena," the court held that a gun or ammunition retailer is only obligated under common law to avoid selling to people who are expressly prohibited by statute from purchasing them.¹⁵⁰ According to the court, it is only in such cases that it is "foreseeable that such persons will commit crimes if allowed access to weapons"¹⁵¹

¹⁴⁶ 490 N.W.2d 330 (Mich. 1992).

¹⁴⁷ *Id.* at 331-32.

¹⁴⁸ *Id.* at 335.

¹⁴⁹ Epidemiological researchers have established that alcohol is commonly present during incidents of violence. See James J. Collins, Ph.D. and Pamela M. Messerschmidt, M.A., *Epidemiology of Alcohol-Related Violence*, ALCOHOL HEALTH & RES. WORLD, Spr. 1993, at 93. Upon reviewing 15 studies on alcohol and homicide, two researchers concluded that most of the studies found over 60% of offenders consumed alcohol before committing the homicide. *Id.* at 94. In one survey, 49.5% of jail inmates and 25.6% of prison inmates admitted to being under the influence of alcohol when they committed a homicide. *Id.* (Table 1).

¹⁵⁰ *Buczowski*, 490 N.W.2d, at 335-36. Recently, the Florida Court of Appeals reached the same conclusion as the Michigan Supreme Court when it overturned a jury verdict against K-Mart for selling a rifle to an intoxicated buyer. See *K-Mart v. Kitchen*, 662 So. 2d 977 (Fla. Dist. Ct. App. 1995) (appeal pending before Florida Supreme Court).

¹⁵¹ *Buczowski*, 490 N.W.2d, at 336

In effect, the court held that the state's regulatory scheme concerning firearms and ammunition preempted common law courts from ruling that gun dealers have any greater duties than those set forth in the statute. Preemption through silence, however, is a precarious foundation because it presupposes that the legislature failed to regulate certain gun retail transactions (sales to intoxicated people, for example) because it concluded that no other transactions presented foreseeable risks of harm. But it is much more likely that the legislature either had not considered the question or had failed to regulate for other reasons.¹⁵²

Buczowski simply breaks ranks with the universally recognized principle that courts applying the common law can recognize duties beyond those expressed in statutes.¹⁵³ Because its premise has been rejected so often by other courts, it, and other cases like it,

¹⁵² The *Buczowski* court articulated two additional reasons for its holding: 1) imposition of liability would prevent law-abiding citizens from having access to these products or it would at least raise the price of the item so as to affect all customers; and 2) imposition of liability would not result "in a substantial impact on crime." *Id.* But again, these explanations make no sense. By implication, the court would reason that a dealer could be held liable for conducting a sale that is illegal. How can it be that liability for legal, but negligent, sales will affect a citizen's ability to purchase guns, but liability for sales that are illegal will not? In addition, whether imposing a duty would reduce crime is simply irrelevant. The court should impose a duty in order to require the retailer to avoid foreseeable harm, in this case the misuse of ammunition by an intoxicated person, regardless of the impact of the duty on crime.

¹⁵³ See, e.g., *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 656 (5th Cir. 1982) (compliance with federal automobile regulations did not exempt liability under common law); *Karl v. Burlington Northern R. Co.*, 880 F.2d 68, 76 (8th Cir. 1989) (railroad's compliance with government requirements concerning railroad crossings did not absolve railroad from liability); *Burch v. Amsterdam Corp.*, 366 A.2d 1079, 1085-86 (D.C. App. 1976) (warnings complying with Federal Hazardous Substance Act did not preclude negligence for failure to give a more specific warning); *Associated Health Systems v. Jones*, 366 S.E.2d 147, 151-52 (Ga. App. 1988) (compliance with law did not relieve nursing home of liability for failing to restrain a resident with known violent tendencies); *Schmitt v. Clayton County*, 284 N.W.2d 186, 190 (Iowa 1979) (county's compliance with legislative regulation not dispositive of claim of negligence for failure to place adequate warning signs on hazardous curve); *Collingwood v. General Electric*, 376 S.E.2d 425, 428 (N.C. 1989) (landlord's compliance with housing codes did not relieve him from liability for negligence in construction of house that caught fire); *Goldstein v. Moisse*, 572 N.E.2d 195, 197 (Ohio App. 1989) (compliance with safety code did not necessarily absolve school from liability in installing glass doors); *Koch v. Southern Pacific Transp. Co.*, 547 P.2d 589, 593 (Or. 1976) (railroad's compliance with government requirements concerning railroad crossings did not absolve railroad from liability); *Miller v. Warren*, 390 S.E.2d 207, 209 (W.Va. 1990) (compliance with safety code did not establish due care per se on part of hotel which caught fire).

should not stand in the way of imposing a duty upon the purveyors of guns in the high-risk transactions set out in this paper.¹⁵⁴

V. Summary

Section 390 of the Restatement (Second) of Torts and decisions from *Jacoves*¹⁵⁵ to *Pavlidis*¹⁵⁶ establish that a gun supplier has a general duty not to entrust a gun, through his or her actions or the actions of another, to someone the supplier has reason to know will use the gun in crime. In some cases, a gun supplier may have a duty to inquire to ensure that the transfer will not result in harm.¹⁵⁷ Moreover, a supplier's constructive knowledge of the possible misuse of the gun can arise out from what the supplier should have learned at the time of the transaction (the disposition of the buyer, as seen in *Jacoves*, for example) or from a general understanding of how certain individuals act (the foreseeable criminal conduct of minors who steal guns as in *Pavlidis*, for example). If a supplier of guns chooses to ignore this information, he or she will be held accountable for the foreseeable use of the gun in crime.

Part II of this paper demonstrated that certain transactions in firearms are so obviously fueling the illegal gun market that a purveyor involved in the transaction should know that the gun is likely to be used in crime to harm another person. There is a point, for example, at which a gun retailer must recognize that a multiple sale transaction is not occurring for purposes of sport or self-protection, but rather, in order to resell the guns on the illegal gun market. An obvious gun trafficking multiple purchase is a function of the number of guns purchased, the types of guns purchased, and the number of times that the purchaser has visited the dealer

¹⁵⁴ Other cases before *Buczkowski* have held that, when it comes to firearm retail, the common law does not impose duties beyond that found in statutes. See *Bryant v. Winn-Dixie Stores*, 786 S.W.2d 547 (Tex. App. 1990) (disposing of both negligence and negligence per se claims against ammunition retailer on ground that Gun Control Act does not establish a duty of inquiry without analyzing Texas common law) and *Phillips v. K-Mart*, 588 So. 2d 142 (La. App. 1991) (dismissal of common law negligence claim because Gun Control Act does not create a duty to train employees to recognize signs of mental instability without analyzing common law). Like *Buczkowski*, these cases ignore the general principle that a court applying common law can create duties beyond that found in statutory law. See also *supra* note 153.

¹⁵⁵ See discussion of case *supra* notes 107-12 and accompanying text.

¹⁵⁶ See discussion of case *supra* notes 141-45 and accompanying text.

¹⁵⁷ See discussion of *Howard Brothers*, *supra* notes 133-39 and accompanying text; and *Phillips v. Roy*, *supra* notes 126-32 and accompanying text.

in the recent past. Purchasing over ten handguns in one transaction, for example, is almost certainly a gun trafficking transaction and a dealer who consummates the transaction has ignored the foreseeable use of these guns in crime.

Similarly, given the well-established role that kitchen-table dealers play in gun trafficking, gun distributors have reason to be suspicious about an order from a licensee if the distributor has no other information to support the conclusion that the licensee is not a kitchen-table dealer (the licensee is a recognized retail chain or is a long-time customer, for example). If an under-licensed federal dealer receives a bulk purchase, he or she is certain to traffick these guns illegally, much like a private person making a multiple sale is also likely to traffick. Given this great potential for harm, gun distributors should possess a duty to inquire, much like that established in *Howard Brothers* and *Phillips v. Roy*, in order to determine whether unknown customers are bona fide commercial gun sellers. Any gun distributor who fails to require proof of the dealer's local licenses has breached this duty.

Finally, *Pavlides*¹⁵⁸ breaks new ground concerning the responsibility of gun show promoters by requiring them to act upon knowledge of who is attending gun shows. If it can be demonstrated, as evidence is beginning to suggest, that sales by unlicensed vendors at gun shows are becoming a significant source of illegal guns, then criminal use of these guns is foreseeable. Gun show promoters would, therefore, possess a duty to require unlicensed vendors to comply with those laws that are driving gun traffickers to private sellers: the background check and waiting period requirements of the Brady Law.

¹⁵⁸ See discussion of case *supra* notes 141-45 and accompanying text.