CORRECTIVE JUSTICE AND THE D.C. ASSAULT WEAPON LIABILITY ACT

In November 1991, the citizens of Washington D.C. enacted by referendum the D.C. Assault Weapon Manufacturing Strict Liability Act,[1] holding manufacturers, importers, and dealers of military style assault weapons responsible for injuries and deaths caused by the use of their products. Seventy-seven percent of the voters approved the referendum.[2]

The measure was a binding vote that reinstated a law which the City Council had previously repealed.[3] The council first passed the law in late 1990 in response to escalating drug-related violence in the city.[4] Mayor Sharon Pratt Kelly then urged its repeal in response to pressure from Capitol Hill, which held the keys to her financial bailout plan.[5] A coalition of ministers revived the proposal by petitioning to have it placed on the November ballot.[6]

The act is unique; it represents the first imposition of strict liability on gun manufacturers by a legislature. Although the courts originated and developed this theory of liability, they have generally been unwilling to extend strict products liability to the manufacture or distribution of firearms.[7] In the wake of increasing urban violence involving military style assault weapons, however, gun control advocates sense a public willingness to pass measures such as this.[8]

Part I of this Note discusses attempts to impose strict liability on gun makers and dealers through the courts. Part II analyzes the liability elements and defenses contained in the D.C. Act. Part III looks at corrective justice principles as developed by several theorists and proposes the following postulate: As between the relevant parties to a transaction, the party most outcome responsible for the loss has the duty to annul the loss and restore the balance of interests. Part IV then applies this axiom to the D.C. law, and concludes that although the law is a sound application of corrective justice principles, it currently rests on invalid premises. This Note concludes that, as a political matter, laws like this one are difficult to justify when they are articulated on instrumentalist grounds. Instead of viewing the law as a tool to accomplish social goals, it is more defensible when grounded in corrective justice.

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1. D.C. CODE ANN. §§ 6-2391 to -2393 (Supp. 1992).
2. Keith A. Harrison, *Eight Months Later, No Suits Filed Under D.C. Gun-Liability Law*, WASH. POST, Aug. 26, 1992, at D3.
3. Assault Weapon Manufacturing Strict Liability Act of 1990 Temporary Repealer Act of 1991, D.C. Act 9-8, Mar. 15, 1991.
4. Kent Jenkins Jr., *District's Gun Liability Law Again Under Fire From the Hill*, WASH. POST, Jan. 27, 1992, at B3.
5. Jonetta Rose Barras, *Weapons Liability in Effect Today*, WASH. TIMES, Dec. 26, 1991, at B1.
6. Kent Jenkins Jr., *District's Gun Liability Law Again Under Fire From the Hill*, WASH. POST, Jan. 27, 1992, at B3.
7. *See infra* notes 24-30 and accompanying text; *see* Carl T. Bogus, *Pistols, Politics, and Products Liability*, 59 U. CIN. L. REV. 1103 (1991).
8. Don J. DeBenedictis, *Boy Scout Gun Suit Rejected*, ABA JOURNAL, Jan. 1992, at 21.

I. GUNS, STRICT LIABILITY, AND THE COURTS

Many commentators have argued that traditional strict liability theories can be used to hold manufacturers and retailers of certain weapons liable for injuries resulting from the criminal misuse of their products.[9] Under traditional strict liability, a defendant may be held liable in two circumstances: when the defendant carries on an abnormally dangerous activity[10] or when the defendant places into the stream of commerce a defective product that is unreasonably dangerous.[11] Numerous suits involving criminal misuse of firearms have been brought under both of these theories, and all have been rejected by the courts.

A. Abnormally Dangerous Activities

The *Restatement (Second) of Torts* recognizes liability for injuries resulting from an abnormally dangerous or ultrahazardous activity regardless of the degree of care exercised to avoid harm.[12] The policy behind this doctrine is that enterprisers who engage in highly dangerous and unusual activities should bear the costs of resulting accidents.[13] Whether an activity is abnormally dangerous is determined by reference to six factors.[14] Additionally, this doctrine is generally limited to instances in which the tortfeasor is an owner or occupier of land.[15]

Various plaintiffs have argued that because there is no safe method of distributing Saturday Night Specials,[16] the manufacture and sale of these guns should be treated as an abnormally dangerous activity. An analogous argument can be made with respect to military style assault weapons. Courts, however,

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9. *See, e.g.*, Bogus, *supra* note 7; Andrew J. McClurg, *Handguns as Products Unreasonably Dangerous Per Se*, 13 U. ARK. LITTLE ROCK L. J. 599 (1991); Windle Turley & Cliff Harrison, *Strict Tort Liability of Handgun Suppliers*, 6 HAMLINE L. REV. 285 (1983); Note, *Manufacturers' Liability to Victims of Handgun Crime: A Common Law Approach*, 51 FORDHAM L. REV. 771 (1983); Windle Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims*, 10 N. KY. L. REV. 41 (1982).

10. RESTATEMENT (SECOND) OF TORTS §§ 519-524A (1977).

11. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

12. RESTATEMENT (SECOND) OF TORTS § 519 cmt. d (1977).

13. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 78, at 555 (5th ed. 1984) [hereinafter PROSSER & KEETON].

14. The six factors are:

(a) existence of a high degree of risk of some harm to the person, land, or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 520 (1977).

One criticism of this approach is that a court applying all of these factors is doing virtually the same thing as would be done in a negligence case. PROSSER & KEETON, *supra* note 13, at 555.

15. This limitation springs from the doctrine's roots in *Rylands v. Fletcher*, in which water in the defendant's reservoir broke through and flooded the adjoining mine of the plaintiff. Writing for the House of Lords, Lord Cairns stated that the principle applied to a non-natural use of the defendant's land. Rylands v. Fletcher, L.R. 3 H.L. 330, 338 (1868). *See generally* PROSSER & KEETON, *supra* note 13, at 545-54.

16. A Saturday Night Special is a small, inexpensive handgun often used in crime. *See* United States v. Looney, 501 F.2d 1039, 1040 (4th Cir. 1974). *See also* Sam Fields, *Handgun Prohibition and Social Necessity*, 23 ST. LOUIS U. L.J. 35 (1979) (discussing the problems caused by the ready availability of handguns in the U.S.).

have generally rejected use of this theory to impose liability on gun manufacturers because marketing handguns is not a land-related activity.[17] Thus, when an owner or occupier of land causes injury through her use of the land, as in the classic case of blasting operations, she will be held strictly liable. On the other hand, a gun manufacturer will not be held liable when the criminal misuse of its product results in injury or death to another since the gun is not dangerous in connection with the use of land.

In addition to the above limiting rationale, commentators have asserted two other reasons for not extending the ultrahazardous activities doctrine to cover gun makers and sellers. First, an activity that is a matter of common usage is generally exempt from classification as an ultrahazardous activity.[18] Although firing a weapon in a particular area may not be a common usage, the manufacture and sale of guns, even assault weapons, arguably constitutes a matter of common usage.[19] Second, the user of the product, not the manufacturer, is usually held liable under this doctrine.[20] Consequently, the doctrine of abnormally dangerous activities can not be used to impose liability on assault weapon manufacturers and dealers.

B. Products Liability

The most common approach plaintiffs have used in their attempts to hold gun manufacturers strictly liable is products liability theory. Under this doctrine, a manufacturer must bear the financial costs of injuries resulting from a defective product that it introduces into the stream of commerce.[21] These costs are, of course, eventually reflected in higher prices charged for the products. Market forces, therefore, ensure that the financial burden is borne by those who derive benefits from product availability.

The policy aims of products liability include spreading the risk of loss while compensating innocent victims, eliminating proof difficulties inherent in negligence actions, and providing incentives to produce safe products.[22] The focus is on the product itself, not the manufacturer's conduct.[23]

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17. *See, e.g.*, Kelley v. R.G. Industries, Inc., 304 Md. 124, 133, 497 A.2d 1143, 1147 (Md. 1985); Perkins v. F.I.E. Corp., 762 F.2d 1250, 1266-67 (5th Cir. 1985), rev'g Richman v. Charter Arms Co., 571 F. Supp. 192 (E.D. La. 1983); Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1203 (7th Cir. 1984); Riordan v. International Armament Corp., 477 N.E.2d 1293, 1297 (Ill. App. Ct. 1985); Burkett v. Freedom Arms, Inc., 299 Or. 551, 554, 704 P.2d 118, 121 (Or. 1985); *See also* Jane Bridegewater, Note, *Legal Limits of a Handgun Manufacturer's Liability for the Criminal Acts of Third Persons*, 49 MO. L. REV. 830, 843-45 (1984).

18. Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912, 1923 (1984).

19. *Id.* This is true if the term "common usage" is taken to mean "not unusual" or "not foreign to our experience." However, the *Restatement* identifies the term "common usage" with activities carried out by the "great mass of mankind." RESTATEMENT (SECOND) OF TORTS § 520 (1977). Under this formulation, the manufacture and sale of guns is probably not a matter of common usage.

20. Note, *supra* note 18, at 1923.

21. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

22. Escola v. Coca-Cola Bottling Co. of Fresno, 24 Cal.2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring); *See also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965); PROSSER & KEETON, *supra* note 13, at 692-93.

23. Page Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 33 (1978) ("The plaintiff is no longer required to impugn the maker, but he is required to impugn the product."); Barker v. Lull Engineering Co., Inc., 20 Cal.3d 413, 418, 143 Cal. Rptr. 225, 573 P.2d

Section 402A of the *Restatement (Second) of Torts* is the "holy writ" that has shaped products liability law.[24] However, as this legal doctrine has developed it has been so altered as to render the original text and comments anachronistic.[25] In general, the current state of the law is that commercial sellers of defective products are subject to liability for harm to persons or property proximately caused by the product defect.[26] There are three classes of product defect recognized: manufacturing, design, and warning.[27] Commentators typically call on the courts to impose liability on gun manufacturers under the design defect standard. Nonetheless, courts have universally rejected the use of this theory of liability in cases involving the criminal misuse of firearms.

The majority of courts use some version of a risk-utility balancing test to determine whether a product is defective in design.[28] Essentially, this test equates defective with unreasonably dangerous.[29] Its application involves a simple cost-

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443 (1978). However, this truism is often questioned: *See, e.g.* Prentis v. Yale Manufacturing Co., 421 Mich. 670, 365 N.W.2d 176 (1984) ("As a common-sense matter, the jury weighs competing factors presented in evidence and reaches a conclusion about the judgment or decision (i.e, *conduct*) of the manufacturer) (emphasis in original); Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 610 (1980) (risk-utility balancing test is essentially negligence). Nonetheless, this principle is often cited as a major premise for further refinements in strict products liability. *See* Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982) (denying state-of-the-art defense in asbestos case because strict liability is product-oriented and not based on the blameworthiness of the manufacturer).

24. Section 402A provides that:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS §402A (1977).

Another formulation of this theory is the "Greenman Doctrine," which provides: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963). *Greenman* was subsequently modified by Barker v. Lull Eng'g Co., 573 P.2d 443, 457-58 (Cal. 1978) (liability attaches when plaintiff is injured while foreseeably misusing a product).

25. James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992). Henderson and Twerski write that section 402A was written "primarily to govern manufacturing defect cases." *Id.* at 1526. Thus, although "section 402A has achieved the status of sacred scripture," its subsequent application to design and warning defect cases and other doctrinal developments of the past twenty-five years require that the section be updated. *Id.* at 1513-15.

26. Henderson & Twerski, *supra* note 25, at 1514.

27. *Id.* Different standards apply to each type of defect. For example, a product with a manufacturing defect simply fails to meet the manufacturer's own quality standard. *Id.* at 1516. With minor jurisdictional exceptions, the standard of liability for design and warning defects is that the "product's reasonably foreseeable risks outweigh its social utility." *Id. See generally* PROSSER & KEETON, *supra* note 13, at 694-702.

28. Henderson & Twerski, *supra* note 25, at 1520; *see* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); PROSSER & KEETON, *supra* note 13, at 699-700.

29. Prentis v. Yale Manufacturing Co., 421 Mich. 670, 365 N.W.2d 176 (1984) (adopting negligence, risk-utility test for design defect cases).

benefit analysis, where the court considers whether the product design is so faulty that its risks outweigh its social utility.[30]

While a straightforward balancing seems to indicate that the risks of such weapons far outweigh their benefits,[31] courts have refused to hold gun manufacturers liable under this theory.[32] Their hesitancy stems from the generally held position that this standard applies only when something goes wrong with a product.[33] Henderson and Twerski's proposed revision of section 402A reflects this position by imposing liability only if a manufacturer fails to adopt a safer, cost-effective design that would have prevented all or part of the plaintiff's harm.[34] This "reasonable-cost, safer design" standard does not permit "categorical design" liability.[35] Henderson and Twerski write:

> Social risk-utility balancing employed in judging the reasonableness of product designs will not be undertaken on a categorical basis. . . . [P]roduct categories are relatively broad subsets of products for which, given their inherent design characteristics, no adequate alternatives are available. Examples include alcoholic beverages, tobacco products, handguns, and above-ground swimming pools. With respect to a product in such a category, plaintiffs are unable to prove the availability of a safer design that does not eliminate the inherent characteristic that renders the product and other similar products attractive in the marketplace.[36]

As a result of this widely-held position, one would expect the courts to decline to find perfectly operable assault weapons defective.

An alternative method of determining whether a product's design is defective is the consumer expectation test.[37] Under this test, a product is defective if, at the time it leaves the seller's hands, it is in a condition not contemplated by the ultimate consumer and is unreasonably dangerous to him.[38]

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30. Bogus, *supra* note 7, at 1109.

31. *See, e.g.*, Bogus, *supra* note 7, at 1112-22; Turley & Harrison, *supra* note 9, at 302-08; Turley, *supra* note 9, at 50-61.

32. *Kelley*, 497 A.2d at 1149 ("[T]he risk/utility test cannot be extended to impose liability on the maker or marketer of a handgun which has not malfunctioned."); *Perkins*, 762 F.2d at 1269-75 (properly functioning handguns lack the requisite defect, thus do not give rise to liability under either the risk/utility or consumer expectation tests); *Martin*, 743 F.2d at 1201 (unreasonably dangerous theory inapplicable without a showing of defect); *Riordan*, 477 N.E.2d at 1298-99 (a handgun that works as expected fails both the consumer expectation and risk/utility tests absent a showing of defect); Patterson v. Gesellschaft, 608 F. Supp. 1206, 1211 (N.D. Tex. 1985) (liability under § 402A using the risk/utility balancing test inappropriate without showing something wrong with the product).

33. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965) ("Good butter is not unreasonably dangerous because . . . it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous."). A few courts have held that a broad product category could be unreasonably dangerous per se. Halphen v. Johns-Manville Corp., 484 So.2d 110 (La. 1986) (a manufacturer may be held liable for injuries caused by a product proven to be unreasonably dangerous per se, although the manufacturer did not know and reasonably could not have known of the danger); O'Brien v. Muskin Corp., 94 N.J. 169, 463 A.2d 298 (1983) (design of vinyl swimming pool may be defective even in absence of alternative safer designs); Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982) (state of the art defense unavailable in asbestos case). However, most such decisions have been overturned by statute and "[v]irtually every American jurisdiction now rejects product category liability." Henderson & Twerski, *supra* note 25, at 1521.

34. Henderson & Twerski, *supra* note 25, at 1514.

35. *Id.* at 1520.

36. *Id.*

37. RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965); PROSSER & KEETON, *supra* note 13, at 698-99.

38. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

While the consumer expectation test may be useful in manufacturing or marketing defect cases, it falls short where a product's design or inherent characteristics are at issue, as is the case when an innocent victim is shot with an assault weapon. Thus, courts have refused to hold gun manufacturers liable under this standard for the simple reason that the consumer expectation is that a gun will fire a bullet with deadly force.[39]

Additionally, most of the courts that apply the consumer expectation test combine it with the risk-utility balancing approach.[40] For example, the consumer's expectation may be viewed as another factor to consider in the risk-utility calculus, or as an independent requirement the product must satisfy. In any event, the consumer expectation test is not helpful to plaintiffs in gun defect cases.

C. A Third Approach? - *Kelley v. R.G. Industries*[41]

In *Kelley* the Court of Appeals of Maryland, like all other courts who had previously considered the question, rejected the use of existing theories of strict liability to impose liability on a gun manufacturer.[42] The court in *Kelley*, however, went one step further and purported to create an entirely new common law cause of action against a manufacturer or dealer of a Saturday Night Special for injuries resulting from its criminal misuse.

In *Kelley*, an armed robber shot a storeowner with a Saturday Night Special. The victim sued Rohm Gesellschaft, the West German manufacturer, and R.G. Industries, Inc., the Miami-based subsidiary that assembled and sold the gun. The court first declined to apply any of the traditional theories of strict liability.[43] It then created the new cause of action, reasoning that Saturday Night Specials were not sanctioned by public policy as evidenced by both federal and State gun control laws.[44]

The court focused on unique characteristics of Saturday Night Specials that make them inappropriate for any legitimate uses such as their poor quality, unreliability, inaccuracy, and easy concealability.[45] They also stated as a judicial finding that manufacturers know or ought to know of the criminal misuse of their products, thus removing the thorny problem of proximate cause.[46] They

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39. *Kelley*, 497 A.2d at 1148; *Perkins*, 762 F.2d at 1269-75 (properly functioning handguns lack the requisite defect, thus do not give rise to liability under either the risk/utility or consumer expectation tests); *Riordan*, 477 N.E.2d at 1298-99 (a handgun that works as expected fails both the consumer expectation and risk/utility tests absent a showing of defect).

40. Henderson & Twerski, *supra* note 25, at 1533.

41. 304 Md. 124, 497 A.2d 1143 (1985).

42. *See supra* notes 15-30 and accompanying text.

43. *Kelley*, 497 A.2d at 1149.

44. The court began its analysis by stating that "common law principles should not be changed contrary to the public policy of the State . . . ." *Id.* at 1151. The court then examined Maryland's statutory scheme regulating handguns, as well as the federal Gun Control Act of 1968, to determine the state's public policy. From these laws, the court reasoned that there were a number of legislatively-recognized legitimate purposes for handguns, such as hunting and target practice. Since a Saturday Night Special was unsuited to any of these purposes, the court was free to create a new cause of action. *Id.* at 1150-59.

45. *Id.* at 1153-54.

46. *Id.* at 1158-59; *see* Matthew S. Steffey, Note, *Torts - Strict Liability - Manufacturers' or Marketers' Liability for the Criminal Use of Saturday Night Specials: A New Common Law Approach* - Kelley v. R.G. Industries, 14 FLA. ST. U. L. REV. 149, 158-60 (1986) (criticizing the cursory treatment of the causation issues in *Kelley*).

also stated that "as between the manufacturer or marketer of a Saturday Night Special, who places among the public a product that will be used chiefly in criminal activity, and the innocent victim of such misuse, the former is certainly more at fault than the latter."[47]

Although the Maryland Court explicitly rejected the use of strict products liability doctrine in this case, their analysis of the Saturday Night Special's characteristics in light of state and federal legislative policies appears to be little more than an application of the risk-utility test to a specific class of handguns. The court took notice of the limited utility of Saturday Night Specials, as evidenced by various gun control measures, and imposed liability because the risk of criminal misuse inherent in the design of these weapons outweighed any benefits. Given the wholesale rejection of risk-utility analysis in the area of firearms, one can expect that *Kelley* will not travel far beyond its facts.[48]

II. THE ELEMENTS OF LIABILITY UNDER THE D.C. ACT

Given the judicial hesitancy to impose strict liability on gun manufacturers, it was perhaps only a matter of time until a statutory cause of action was created.[49] The D.C. Assault Weapon Manufacturing Strict Liability Act is aimed at reducing the number of paramilitary style assault weapons on the streets.[50] Findings accompanying the law cite a significant increase in the percentage of semi-automatic handguns used in crime.[51] The findings also use traditional products liability language to justify imposing liability.[52]

Section 6-2392 of the code states:

> Any manufacturer, importer, or dealer of an assault weapon shall be held strictly liable in tort, without regard to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death if the bodily injury or death proximately results from the discharge of the assault weapon in the District of Columbia.[53]

An examination of the statutory elements reveals the following points. First, the defendant must be a manufacturer, importer, or dealer. Thus, the entire marketing chain is subject to liability without regard to fault. The liability is joint and several. Defendants need not reside in the District of Columbia, although

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47. *Kelley*, 497 A.2d at 1159.

48. Additionally, the Maryland legislature has effectively overruled the *Kelley* decision. MD. ANN. CODE art. 27, § 36-I(h) (1992).

49. Perhaps underlying this judicial hesitancy is the fear of pre-empting legislative bodies. Rather than reflexively applying a test they developed to cover other, less controversial areas, the courts intuitively drew a line and refused to step into what they perceived to be the legislative realm. Henderson and Twerski write: "Decisions regarding which product categories should generally be available to users and consumers are best left to the marketplace or, in rare instances, to government regulators other than courts." Henderson and Twerski, *supra* note 25, at 1521. The category of assault weapons may present one of those rare instances.

50. These weapons are good for spraying up to 30 bullets at a time, though without great accuracy. The small companies which manufacture these weapons are prospering despite a general slump in the gun industry. Erik Eckholm, *Ailing Gun Industry Confronts Outrage Over Glut of Violence*, N.Y. TIMES, Mar. 8, 1992, at A19.

51. Assault Weapon Manufacturing Strict Liability Act of 1990, D.C. Act 8-289, § 2.

52. *Id.* For example, the findings state that assault weapons are "abnormally and unreasonably dangerous" and that the risks of such weapons outweigh any benefits. *Id.*

53. D.C. CODE ANN. § 6-2392 (Supp. 1992).

the prospect of bringing in a foreign defendant raises obvious jurisdictional problems.[54]

Next, an assault weapon must be involved. The law specifically identifies certain assault weapons, such as the Action Arms Israeli Military Industries UZI, Colt AR-15, MAC 10, and the INTRATEC TEC-9.[55] This section does not provide an actual definition of an assault weapon, but instead states that the term "includes" a number of specific weapons.[56]

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54. Specifically, this is a question of personal jurisdiction. A plaintiff wishing to take advantage of the new law must be prepared to show that the manufacturer, importer, or dealer has sufficient contacts to Washington D.C. such that it would not be unfair to appear as a defendant in that forum. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945) (defendant must have certain minimum contacts with the forum state so that maintenance of the suit against him does not offend traditional notions of fair play and substantial justice; such contacts exist if defendant engages in systematic or continuous activity in the state); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (jurisdiction is proper where knew or should have foreseen that his activities elsewhere could give rise to the cause of action in the state); Hanson v. Denckla, 357 U.S. 235 (1958) (purposeful availment of state's benefits or protections necessary to show minimum contacts); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) (casual, occasional, or indirect activities will not suffice to establish minimum contacts). *See also* Jacob A. Stein, *Profile of a Products Liability Case*, 6 HAMLINE L. REV. 313 (1983).

55. D.C. CODE ANN. § 6-2391 (Supp. 1992). The INTRATEC TEC-9 is representative of the type of weapon the law is aimed at and which police say play a disproportionate role in crime today. Larry Rohter, *Pistol Packs Glamour, Power, and Reputation as Menace*, N.Y. TIMES, Mar. 10, 1992, at A1. It is a nine-millimeter pistol with a 32-round magazine and is confiscated in crimes at a higher rate than any other weapon. *Id.* at A22. It is generally not used in law enforcement because of the hazard it poses to innocent people - it is designed to spray indiscriminately whole groups of persons. *Id.* at A1. It sells new for only $260, and advertisements tout its special finish which is highly resistant to fingerprints. *Id.* at A22. Understandably, this weapon, and others like it, is valued by crack dealers and drug gangs. *Id.*

56. D.C. CODE ANN. § 6-2391 (Supp. 1992). The use of the term "includes" probably indicates that the list is meant to be illustrative. Thus, a similar weapon such as the INTRATEC TEC-22 "Scorpion" should also classify as an assault weapon although it is not specifically listed in the law. However, the failure of the law's drafters to include a default provision for "all similar weapons," and a precise definition of "assault weapon" or a set of applicable standards, is a glaring weakness of the law. These omissions invite a court to strictly construe the terms of the statute and disallow lawsuits involving unnamed assault weapons.

Interestingly, the statute does precisely define "handgun" as "a firearm with a barrel less than 12 inches in length at the time of manufacture." *Id.* However, handguns are not otherwise mentioned in the statute; only assault weapons are subject to strict liability.

A recent bill introduced in the U.S. House of Representatives does include handguns, and also avoids the difficulty of an imprecise definition. On February 2, 1993, Democratic Representative Melvin J. Reynolds of Illinois introduced the "Strict Liability for Safer Streets Act of 1993." Title I of this act imposes strict liability on manufacturers and importers of handguns and assault weapons. The bill provides the following definition:

> (2) ASSAULT WEAPON. - The term "assault weapon" means -
> (A) a firearm -
> (i) which -
> (I) has a barrel of 12 or more inches in length; and
> (II) is capable of receiving ammunition directly from a large capacity ammunition magazine;
> (ii) which is a semiautomatic firearm which is -
> (I) not generally recognized as particularly suitable for, or readily adaptable to, sporting purposes; or
> (II) concealable on a person; or
> (B) a firearm which is substantially functionally equivalent to a firearm described by clause (i) or (ii) of subparagraph (A).

H.R. 737, 103rd Cong., 1st Sess. (1993).

The bill further defines "large capacity ammunition magazine" and "semiautomatic firearm." One point litigants will quibble over is whether a firearm is "particularly suitable for sporting

Third, the weapon must be fired in the District. Since the term "discharge" is not modified, an accidental shooting as well as an intentional firing exposes defendants to liability. The weapon discharge must "proximately result" in bodily injury or death. Normally, determining causation is a two-step process: cause-in-fact and proximate cause. As noted above, the law contains findings that criminal misuse of assault weapons is foreseeable and that the manufacture and distribution of assault weapons is a proximate cause of homicides in D.C. Given these findings, the "proximately results" language indicates that a plaintiff must only show that the weapon discharge was the actual cause-in-fact of the injury.

A plaintiff can recover both direct and consequential damages that arise from bodily injury or death. There is no provision for punitive damages.

The law also contains the following specific statutory exemptions: assault weapons originally distributed to law enforcement; persons injured while committing a crime; and self-inflicted injury.[57] Additionally, a defendant may claim any defense available in a strict liability action, such as assumption of the risk.[58]

III. A CORRECTIVE JUSTICE JUSTIFICATION FOR LIABILITY RULES

The fundamental question when normatively evaluating tort law is: Why should this defendant be held financially responsible for this plaintiff's injury or loss? In this section I will show that the answer is grounded in corrective justice. By analyzing several tort theories, I conclude that corrective justice requires that, as between the injurer and the victim, losses should be annulled by the person most outcome responsible for the loss. This axiom satisfactorily describes existing tort law, and provides a prescriptive foundation for new liability rules. Then, in section IV, I evaluate the D.C. Assault Weapon Manufacturing Strict Liability Act to see if corrective justice permits imposing liability on makers and marketers of assault weapons when those weapons are criminally misused.

A. Two Models of Tort Law

In answering the question posed above, tort theorists generally begin from one of two starting points. Those adhering to the law and economics school of thought analogize tort law to contract law. Thus, these theorists treat the duty to compensate as part of a hypothetical bargain struck between rational and wealth maximizing parties.[59] On the other hand, some theorists adopt a "moral" model, assimilating tort law to criminal law. These theorists ascribe the duty to compensate to the blameworthiness of the actors.[60]

The problem with both of these approaches is that tort law is neither contract law nor criminal law, but a unique body of law standing by itself. This is evident when we try to describe tort law in light of these models. For example, the "economic" model ties the duty to compensate to loss.[61] The reason for this

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purposes." The courts should have no problem deciding what is meant by "sporting purposes," however, the use of the modifier "particularly" is unnecessary and only confuses the matter.

57. D.C. CODE ANN. § 6-2393 (Supp. 1992).

58. *Id.*

59. Claire Finkelstein, *Tort Law as a Comparative Institution: Reply to Perry*, 15 HARV. J.L. & PUB. POL'Y 939, 939-40 (1992).

60. *Id.*

61. *Id.* at 940. Finkelstein writes: "The attention to loss is a by-product of the way in which economic analysis conceives the point of tort law, namely, to create incentives for efficient behavior." *Id.*

focus is because economic analysis of tort law is necessarily instrumentalist.[62] The instrumentalist approach sees liability rules as tools for achieving one or several goals, such as compensation, deterrence, and loss spreading.[63] Since Justice Traynor's concurrence in *Escola*,[64]this approach has been dominant; today, "[n]ormative discourse about tort law consists in an appeal to the postulated goals and an assessment of the effectiveness of tort law in realizing them."[65]

Thus, the economic analysis evaluates tort law by determining its effectiveness in maximizing wealth.[66] Although economic analysis has undeniable value,[67] it is not normatively appealing; efficiency is not a morally attractive goal.[68]

In contrast, the "moral" model focuses on wrongful conduct. Liability rules, like criminal sanctions, are a form of punishment for "wrongful" behavior.[69] Unlike the economic model, the moral model looks backward to the injurious incident rather than forward to the achievement of favored social goals. This conceptual structure better describes tort law. However, this model fails to explain why tort law requires injurers to compensate victims for the full degree of loss in situations where the extent of the loss was neither intended nor foreseen.[70] Similarly, it cannot explain why we do not attach liability to negligence that fortuitously does not result in harm.[71]

Clearly, tort law contains elements of both contract and criminal law. Each of the two models explains various aspects of tort law, but neither can describe the entire practice. Instead, tort law must be viewed as a unique institution; "tort law itself provides the keys to its own intelligibility."[72]

B. A Corrective Justice Model

Tort law has been called "a unique repository of intuitions of corrective justice."[73] One problem with this statement is that many commentators equate

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62. Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 487 (1989).

63. *Id. See also* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 538 (1972) ("The fashionable questions of the time are instrumentalist: What social value does the rule of liability further in this case? Does it advance a desirable goal, such as compensation, deterrence, risk-distribution, or minimization of accident costs?").

64. *See supra* note 22 and accompanying text.

65. Weinrib, *supra* note 62, at 487. Weinrib points out that it is virtually impossible for the payment of damages to effect the multiple independent goals posited by the instrumentalist. For example, the amount needed to fulfill goals as diverse as deterrence and compensation will rarely be equivalent. *Id.* at 501.

66. Weinrib describes Posner, the foremost economic theorist, as a single goal instrumentalist; maximization of wealth is the only goal. The purpose of tort law is to deter uneconomical accidents by inducing the defendant to avert injury when the injury costs exceed precaution costs. Weinrib's objection is that this theory does not explain why the amount of damages equals the amount necessary to make the plaintiff whole instead of a greater or lesser amount, depending on the amount needed to deter defendants. *Id.* at 506-07.

67. *See, e.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987).

68. Richard W. Wright, *The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics*, 63 CHI.-KENT L. REV. 553, 562-78 (1987). *See also* Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

69. Like the criminal law, the "wrongfulness" of one's conduct is seen as a function of one's state of mind at the time of the act. Finkelstein, *supra* note 59, at 940.

70. Finkelstein, *supra* note 59, at 940. This point is clear when one considers that negligence is based on an *objective* standard of reasonableness: "[T]he question is not whether the defendant thought his conduct was that of a prudent man, but whether [the jury thought] it was." OLIVER WENDELL HOLMES, THE COMMON LAW 107 (1881).

71. Weinrib, *supra* note 62, at 500.

72. *Id.* at 489.

73. Fletcher, *supra* note 63, at 538. *See also* Richard W. Wright, *Allocating Liability Among*

corrective justice with a purely fault-based system, which inevitably leads to usage of the "moral" model.[74] This is improper and unfortunate.[75]

The notion of corrective justice springs from Aristotle's distinction between corrective and distributive justice. Distributive justice refers to the overall distribution of benefits throughout society.[76] Corrective justice, on the other hand, deals with "a local or temporary distortion in the distributive scheme . . . ."[77] Corrective justice requires that the balance of interests between the parties be restored. Additionally, we should look only at the parties and transaction at hand, without regard to the overall distribution scheme.[78]

Corrective justice is simply an expression of fundamental principles of fairness necessary for community living. It is, in a very real sense, intuitive.[79] When conceptualized in its Aristotelian sense, corrective justice does not necessarily require a fault-based system.[80] There are, however, other salient characteristics implicated by this theory.

1. Characteristics of a Tort System Based on Corrective Justice Principles

Since a tort is a "wrong" against this plaintiff, not the world at large,[81] a system based on corrective justice principles must be bi-polar in structure.[82] That is, the procedure for correcting the balance must only address the equities of the injurer and the victim.[83] This distinguishes the tort system from a mere compensation scheme.[84]

Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure, 21 U.C. DAVIS L. REV. 1141, 1180 (1988) ("Tort law continues to be based on, and makes sense only in the light of, the traditional corrective justice view, which is a deeply held part of our overall concept of justice.").

74. *See, e.g.*, Finkelstein, *supra* note 59, at 940. One notable exception to this is Posner's analysis of corrective justice. Posner begins with the premise that corrective justice requires rectification of wrongful gains and losses. He then asserts that economic analysis defines wrongful gains and losses in terms of their efficiency; i.e., does the liability rule maximize wealth?
Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 201 (1981). One criticism of Posner's approach is that it substitutes a large normative issue - whether the law should maximize wealth - for a more local issue - whether this plaintiff should recover from this defendant. A liability rule that maximizes wealth may not necessarily determine a fair outcome for individual litigants. Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2372 (1990).

75. A fault standard is based on a felt need to morally censure defendant. Fault is usually identified with negligence rules, which provide an incoherent and inadequate translation of the fault standard since negligence is based on an *objective* standard of reasonableness. Wells, *supra* note 74, at 2357.

76. ARISTOTLE, NICOMACHEAN ETHICS Book V at 1131a (Terence Irwin trans. 1985).

77. Wells, *supra* note 74, at 2350. ARISTOTLE, *supra* note 76, at 1132a.

78. ARISTOTLE, *supra* note 76, at 1132a.

79. Wells, *supra* note 74, at 2351 ("[I]f one party wrongfully injures another, our deepest intuitions seem to argue that justice requires a remedy"). Similarly, Aristotelian scholar Sir William David Ross included among his *prima facie* ethical duties the duty of reparation. W.D. Ross, THE RIGHT AND THE GOOD 19-22 (1930). Such *prima facie* duties were intuitively known to be true. Ross remarked, "Many readers will perhaps say that they do *not* know this to be true. If so, I certainly cannot prove it to them: I can only ask them to reflect again, in the hope that they will ultimately agree that they know it." *Id.* at 20-21 (emphasis in original).

80. Wells, *supra* note 74, at 2355.

81. Weinrib, *supra* note 62, at 512. Once again attacking instrumentalism, Weinrib states that tort law does not forward independently justified goals, but redresses conduct which has upset the balance of interests between the two parties. *Id.* at 525-26.

82. *Id.* at 494.

83. The bi-polar structure of the tort system is reflected in the way tort law operates as a system

Closely related to bi-polarity is the necessity to view the tort system as a comparative institution. A comparative inquiry provides the most appropriate framework for determining who, if anyone, has a duty of repair.[85] The reason for this is that tort law attempts to allocate "a cost that has already been incurred among parties who have had varying degrees of involvement in creating it."[86] Thus, tort law compares each party's degree of involvement and assigns liability to the party most responsible for the outcome.[87]

A third feature of a tort system founded on corrective justice precepts is the centrality of causation.[88] This is so because in order to recover from *this* defendant, the plaintiff must show that it was the defendant's conduct, and not someone else's conduct, that resulted in plaintiff's loss. This ensures the focus stays on the parties to the particular transaction and prevents further disruptions to the distributive scheme.

This focus on causal principles further distinguishes corrective justice theorists from their colleagues in the law and economics school. Since economic analysts evaluate liability rules by looking forward to the goals tort law is supposed to further, they have little use for looking backward at the cause of the injury or loss.[89]

The above analysis leaves two unanswered questions. First, what types of losses are compensable? Must they be "wrongful," "unjust," or are all injurers strictly liable regardless of moral culpability? In other words, what are the grounds of recovery? Second, how do we compare the parties to determine who, if anyone, has a duty of repair. In other words, what are the grounds of liability? The following two sections answer these two closely related questions.

2. *Grounds of Recovery*

The threshold question in any tort case is whether the plaintiff deserves to be compensated. Only after this is answered affirmatively do we need to determine who should pay. Fletcher attempted to answer this question with his theory of

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of case-by-case adjudication. Such a structure is well-suited to handling corrective justice disputes. Wells, *supra* note 74, at 2351.

84. For the instrumentalist, the bi-polar structure is not significant other than as a means of singling out a defendant to act as a convenient conduit to an insurance fund. Weinrib, *supra* note 62, at 498.

85. Stephen R. Perry, *The Mixed Conception of Corrective Justice*, 15 HARV. J.L. & PUB. POL'Y 917, 936 (1992). Perry states that the comparative inquiry determines "[w]ho among the group comprised of the victim and those persons who are outcome-responsible for his loss should most appropriately suffer the interference with well-being that *either* the original loss *or* the payment of compensation necessarily entails?" *Id.*

Epstein has described a similar inquiry: "As only the plaintiff and the defendant are parties to the suit at hand, only the equities between them should be taken into account in its resolution. These equities . . . must . . . show why it is that the loss is better placed upon one party than another." Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 167 (1974).

86. Finkelstein, *supra* note 59, at 956.

87. *Id.* at 956-62.

88. Weinrib, *supra* note 62, at 494.

89. *See, e.g.*, William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109 (1983) (stating that the economic approach to tort law can dispense with causation); Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 105 (1975) (the language of causation is alien to tort law's goals).

reciprocal risk. This theory posits that "a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant - in short, for injuries resulting from nonreciprocal risks."[90] This "paradigm of reciprocity" expresses the principle that "all individuals in society have the right to roughly the same degree of security from risk."[91]

Thus, according to Fletcher, any loss resulting from exposure to a nonreciprocal risk deserves compensation. The purpose of tort law, then, is to distinguish nonreciprocal risks from "background risks that must be borne as a part of group living."[92] Fletcher's paradigm of reciprocity serves this function by holding that "we may be expected to bear, without indemnification, those risks we all impose reciprocally on each other."[93]

The strength of Fletcher's theory is its ability to account for almost all aspects of the modern tort system, encompassing intentional torts, negligence, and strict liability. Its chief weakness is in its application: How do we identify unexcused, nonreciprocal risks?

Building on Fletcher's theory of reciprocity, Jules Coleman has postulated that corrective justice requires that *wrongful* losses be annulled.[94] A wrongful loss is one resulting from an injurer's wrongdoing or wrong.[95] A wrongdoing is an unjustified or impermissible harming of a legitimate interest.[96] A wrong is an action that invades, or is contrary to, a right.[97] A wrong can be justifiable[98] or unjustifiable.

Coleman identifies three possible ways the justifiability of an injurer's conduct can affect a victim's claim to repair:[99]

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90. Fletcher, *supra* note 63, at 542. This principle determines whether the victim is entitled to compensation, not who should pay. Fletcher answers the latter question by stating that liability is imputed to the party who engaged in the risk-creating act, absent some excuse whereby the defendant cannot be rationally singled out as immediately causing harm. Thus, an injurer who acts out of physical compulsion or ignorance is spared liability. *Id.* at 551-53.

91. *Id.* at 550.

92. *Id.* at 543.

93. *Id.* Fletcher distinguishes the paradigm of reciprocity from the paradigm of reasonableness. The latter filters out background risks by holding that victims must absorb the costs of reasonable risks. Fletcher asserts that the paradigm of reasonableness results in an instrumentalist tort system concerned only with developing rules that further particular social goals, such as deterrence and cost-spreading. On the other hand, the paradigm of reciprocity reflects our intuitions of corrective justice.

94. JULES L. COLEMAN, RISKS AND WRONGS 306-11 (1992) This annulment view was first articulated in Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982). Although this view specified the grounds for recovery and liability, it did not specify who had the duty to repair. COLEMAN, *supra*, at 318 ("The annulment conception of corrective justice runs into trouble because it seeks to do no more than to articulate the *grounds* of repair.") (emphasis in original). In *Risks and Wrongs*, Coleman combines the annulment view with a relational view, imposing on the wrongdoer a duty to rectify the losses he causes. *Id.* at 311-24. This "mixed" conception reflects Weinrib's identification of bi-polar procedure as one of two conspicuous features of tort law. *Id.* at 312. *See* Weinrib, *supra* note 62, at 494.

95. COLEMAN, *supra* note 94, at 330.

96. *Id.* at 331.

97. *Id.* at 332.

98. As in necessity cases. *See* Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910) (shipowner who reasonably uses another's dock during a storm to prevent greater harm to his vessel must compensate dock owner for harm caused to dock).

99. COLEMAN, *supra* note 94, at 291.

> (1) Compensation is due if the loss is caused by the injurer's unjustifiable or unreasonable conduct, that is, if the injurer acts with fault.
> (2) Compensation is due even though the injurer acted justifiably.
> (3) The injurer's conduct is justifiable only if the injurer pays compensation for the losses he causes.

According to Coleman, compensation is due in category (1) because the injurer has done something wrong.[100] In the second category, compensation is owed because, although the injurer's action was justifiable, he still infringed the rights of another.[101] In the third case, "compensation *changes* the moral character of what the injurer does. Compensation rights what in its absence would be wrongful conduct."[102]

The first two categories can be referred to as fault and necessity, respectively.[103] Both of these are grounded in corrective justice. The third category is referred to as legitimate pricing[104] and is best explained as a remedy for market failure.[105] Thus, Coleman concludes that tort law is a mixture of markets and morals.[106]

There are some weaknesses with this thesis. First, most products liability cases rely on negligence principles, and therefore could fit in category (1).[107] Also, although Coleman is able to describe most of tort law, he is only able to do so by relying on an economic rationale for products liability. Most significantly, Coleman does not explain why the duty to repair extends only to *wrongful* losses. In other words, Coleman fails to explain why corrective justice does not allow the victim a remedy when the injurer acts without fault.[108]

One commentator has proposed a refinement of Coleman's theory that concentrates on the comparative nature of tort law. Under this modification, a plaintiff ought to be compensated for any loss (not just a wrongful loss) he suffers so long as the defendant was more outcome responsible for the loss than was the plaintiff.[109]

Finkelstein was responding to the suggestion that Coleman incorporate a fault requirement into his wrongful loss requirement.[110] Instead, she asserts:

> Fault can be thought of as simply a further degree of involvement than contributing casually to a foreseeable outcome; it is not an essential part of the

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100. *Id.*
101. *Id.* at 291-92.
102. *Id.* at 291. (emphasis in original) The first category apparently includes intentional torts, recklessness, and negligence. The second category contains cases of necessity; and the third describes typical products liability claims. Kenneth W. Simons, *Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformulation*, 15 HARV. J.L. PUB. POL'Y 849, 858 (1992).
103. Simons, *supra* note 102, at 860.
104. *Id.*
105. *Id.*
106. COLEMAN, *supra* note 94, at 428.
107. Simons, *supra* note 102, at 863; *see also* COLEMAN, *supra* note 94, at 411 ("Modern product liability law is governed by a mixture of strict and negligence liability.").
108. Simons, *supra* note 102, at 864-65.
109. Finkelstein, *supra* note 59, at 957.
110. Perry, *supra* note 85.

> institution. Unlike criminal law, the injurer need not be in any particular psychological state for it to be fair to impose liability on her. She must only fare worse, I argue, than the victim in a comparative analysis.[111]

Thus, to determine whether the plaintiff ought to be compensated, we must compare the parties' degree of involvement to determine who, if anyone, is most outcome responsible.[112] Outcome responsibility is defined as "the sufficiently proximate consequences of voluntary actions."[113] Sufficiently proximate is construed in terms of reasonable foreseeability, thus you are outcome responsible for effects you could have been expected to foresee, whether you actually foresaw them or not.[114]

Importantly, viewing tort law in this way does not dispense with fault altogether; in fact, it *cannot* dispense with fault. Outcome responsibility is seen as subordinate to fault. Thus, fault is relevant whenever both of the parties are at least outcome responsible. If one of those parties is also at fault, then that party is liable.[115]

This inquiry into outcome responsibility completes the work begun by Fletcher. Fletcher's paradigm of reciprocity looked solely at the claims and interests of the litigants and assigned liability when one party imposed on the other party a nonreciprocal risk.[116] Like Fletcher, Coleman's approach (as modified) focuses on the immediate parties, not the community interests. This modified approach, however, solves the most vexing problem associated with Fletcher's thesis: identifying nonreciprocal risks. Comparing each party's degree of involvement, and labeling their involvement as either "not outcome responsible," "outcome responsible," or "faulty" serves as a convenient construct for identifying nonreciprocal risks. More accurately, Finkelstein's comparative analysis focuses on the reciprocity of each party's conduct at the time of injury. Fletcher states that we must abstract risks of a different genus to identify their unifying characteristics; then we can classify them as reciprocal or nonreciprocal.[117] Finkelstein does not attempt this imprecise analysis. With respect to the other relevant parties there are only three choices: the plaintiff is more outcome responsible, less outcome responsible, or equally responsible. If the plaintiff's degree of involvement is less than the defendant's, then the plaintiff is owed a duty of repair; she has suffered the imposition of a nonreciprocal risk.

In sum, a comparative analysis yields a system where the right to compensation is derived from being less outcome responsible for the loss than any other

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111. Finkelstein, *supra* note 59, at 956-57. Finkelstein criticizes substituting a fault requirement for Coleman's wrongful loss requirement primarily because a fault-based system cannot adequately explain the duty to compensate in necessity cases. *Id.* at 947-51. Under a comparative analysis, the injurer is outcome responsible but not at fault. The victim is neither outcome responsible nor at fault. Thus, the injurer is comparatively more outcome responsible and has the duty to repair. *Id.* at 959.

112. Perry and Finkelstein borrow the term "outcome responsibility" from Tony Honoré. *See* Tony Honoré, *Responsibility and Luck*, 104 LAW Q. REV. 530 (1988).

113. Finkelstein, *supra* note 59, at 951.

114. *Id.* at 951-52.

115. *Id.* at 957. Though not expressly stated, fault apparently encompasses intentional torts, recklessness, and negligence.

116. *See supra* notes 90-93 and accompanying text.

117. Fletcher, *supra* note 63, at 572.

relevant party. A system that compares the injurer's and the victim's degree of involvement best reflects the dictates of corrective justice which require that we focus on the relationship between the parties and equitably restore the balance of interests.

3. Grounds of Liability

The previous section concluded that corrective justice requires that a person suffering a loss must be compensated when another person was more outcome responsible for that loss than was the plaintiff. Who, then, should be held financially responsible for the loss?

Again, several tort theorists have attempted to answer this question. Epstein asserts that defendants should be held financially responsible for injuries they "cause" plaintiffs.[118] His critique of negligence and subsequent formulation of a strict liability system is helpful, but is subject to the criticism that it works in only the most "paradigmatic" of cases.[119]

Fletcher's paradigm of reciprocity analyzes whether the victim is entitled to recover and whether the defendant ought to pay as distinct issues.[120] Fletcher concludes that it is fair to hold the nonreciprocal risk-creator liable for the loss, unless the risk is excused.[121] Once again, however, we are faced with the problem of correctly identifying nonreciprocal risks.[122]

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118. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 166 (1973). In Epstein's view, corrective justice requires abandoning the negligence principle in favor of strict liability. He argues that the rules of modern tort law can be explained by reference to four paradigms of causation: force, fright, compulsion, and risk creation. These four paradigms encompass common sense notions of when A must compensate B. *Id.* at 166.

For example, imposing liability on assault weapon makers would fall into Epstein's fourth category, risk creation. Epstein's concise statement of this paradigm is: "The dangerous conditions created by the defendant resulted in harm to the plaintiff." Epstein provides helpful examples of dangerous conditions, and then distinguishes between dangerous conditions and "mere" conditions. An example of the latter is a thief who steals a carving knife out of H's kitchen drawer, and then uses the knife to wound I. In this case, H has not caused I harm in the sense of creating a dangerous condition. *Id.* at 177-79.

With respect to assault weapons, then, the inquiry is whether manufacturing and placing into the stream of commerce a military-style semi-automatic weapon creates a dangerous condition, or a mere condition in which the assailant's action breaks the causal chain.

Note that Epstein argues against the proposition that deliberate acts of a third party always break the causal link. "It does not follow, because a man bent upon harm *usually* can find some way of doing it, that one must *never* seek to go behind a deliberate infliction of harm. There are many cases where the harm, even if deliberate, could be inflicted only because of the dangerous condition created by the defendant." *Id.* at 182 (emphasis in original). Thus, a gun owner, bent upon destruction, takes advantage of a dangerous condition created by the defendant gun manufacturer. The gun owner's action does not necessarily absolve the defendant of responsibility, particularly where the assailant "had no alternative means at his disposal to execute his plans." *Id.* Third party action does not *per se* sever the causal connection. Such action *will* absolve the defendant of liability where the third party does not take advantage of the dangerous *aspects* of the situation created by the defendant. For example, where an assailant strikes the victim over the head with an assault weapon, the manufacturer is not liable. "The dangerous potential in the antecedent situation did not 'result in' harm to the plaintiff." *Id.* at 183.

119. Wells, *supra* note 74, at 2374. *Compare* Epstein's embrace of strict liability *with* Weinrib, *supra* note 62, at 519-20 (rejecting strict liability in favor of a negligence standard).

120. Fletcher, *supra* note 63, at 540.

121. *Id.* at 541.

122. *See supra* notes 90-93 and accompanying text. Despite this problem, in the case of assault weapons it is probably safe to assert that victims do not create risks in gun manufacturers. On the other hand, producing and marketing assault weapons subjects victims to a relative deprivation of security. Consequently, imposing liability on assault weapon manufacturers is sound under Fletcher's conception of corrective justice.

As discussed in the previous section, Coleman's mixed conception of corrective justice combines the principle that wrongful losses must be annulled with a relational principle that places the duty to annul on the person responsible for the loss.[123] The mixed conception postulates that if the conditions of wrongful loss and responsibility are met, then corrective justice imposes a duty on the wrongdoer to remedy the victim's loss, unless there is an alternative source of repair such as a social insurance scheme.[124]

The primary criticism leveled at Coleman's original thesis was that it did not give a reason why any particular person has the duty of repair.[125] The new view corrects this deficiency, primarily because Coleman now feels that corrective justice requires giving the injurer an agent-relative reason for acting.[126] Thus, it is the injurer's agency in creating losses that grounds the duty to repair; his wrongdoing has changed the relationship between the parties. The focus on the injurer-victim relationship is welcome, but once again the wrongfulness requirement is unexplained.

This problem is avoided if we treat the loss itself as normatively significant. Since tort law is a comparative institution, wrongfulness is replaced with the outcome responsibility requirement described previously.[127] The duty to compensate is thus placed on the agent whose conduct was most outcome responsible.[128] This squares with corrective justice, since we are simply restoring the balance of benefits between the two parties to a particular transaction; wrongfulness is an unnecessary distraction.

4. The Problem of Multiple Responsible Defendants

One difficulty with a comparative inquiry arises when there are multiple responsible causes of the same injury: How should liability be allocated? Wright answers that in a tort system based on corrective justice principles, each responsible defendant should be liable to the plaintiff for the entire injury, with a right to obtain partial reimbursement from the other tortfeasors.[129]

In general, there are two approaches to allocating liability. The first is the traditional joint and several liability allocation rule: When more than one defendant tortiously contributes to the same injury, each is held jointly and severally liable for the entire injury. Those who pay may be able to obtain indemnity or contribution from other tortfeasors, based on their comparative responsibility.[130] The alternative is proportionate several liability; each tortfeasor is liable only for

123. COLEMAN, *supra* note 94, at 318-24.

124. COLEMAN, *supra* note 94, at 319. The duty to compensate is analogized to a debt, which, if paid by a third party, is fully satisfied. Thus, access to a public compensation scheme, as in New Zealand, eradicates the duty of payment. *Id.* at 401-02. For a criticism of this aspect of Coleman's theory, *see* Simons, *supra* note 102, at 855-56.

125. *See, e.g.*, Stephen R. Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381 (1992).

126. COLEMAN, *supra* note 94, at 319.

127. *See supra* notes 109-115 and accompanying text.

128. "It [tort law] is concerned with distributing losses on the basis of degrees of involvement, not because 'degree of involvement' serves as a proxy for something else, such as culpability or cheapest cost avoider. Involvement in bringing about a loss, where certain types of protected interests are concerned, is normatively significant in its own right." Finkelstein, *supra* note 59, at 962-63.

129. Wright, *supra* note 73, at 1147, 1179-93.

130. *Id.* at 1141-42.

the fraction of the injury to which she tortiously contributed. A by-product of this approach is that the plaintiff "bears a substantial risk of receiving less than full compensation if any tortfeasor is missing, insolvent, or has an expected share of liability that would not be worth the cost of litigation."[131] Thus, Wright frames the issue: Should the plaintiff, the tortfeasors, or both bear the expense of apportionment and the risk of collecting from insolvent or otherwise unavailable tortfeasors?[132]

The short answer to this question is the tortfeasors. This conclusion is grounded in corrective justice principles: Each tortfeasor is fully responsible for the injury; "[t]he fact that some other person also tortiously contributed to the same injury does not - logically or otherwise - eliminate or reduce each tortfeasor's responsibility for the entirety of the injury that was proximately caused by her tortious behavior . . . ."[133] The concurrent full responsibility of another tortfeasor for the same injury does not reduce each tortfeasor's independent full responsibility to the plaintiff. It merely provides a basis for contribution or indemnification among the tortfeasors.[134]

Thus, Wright distinguishes between each tortfeasor's independent full responsibility for the injury and the appropriate method for allocating liability among the multiple responsible causes of the injury.[135] For the former, we ask whether the defendant behaved tortiously, whether the defendant's conduct caused the injury, and whether there are any policy reasons to absolve the defendant of responsibility.[136] Because causation is the touchstone at this stage, we do not say that a defendant is ten, twenty, or eighty percent outcome responsible. "Some condition either was or was not a cause (in the proper scientific sense) of a particular injury. There is no way, based purely on causation, to identify one cause of an injury as more important or significant than any other cause of the same injury."[137]

On the other hand, the latter inquiry consists of an examination of several factors. These include the level of risk created, the remoteness of the causal connection between the risk and the injury, and the policies underlying various categories of tortious behavior such as negligence and strict liability.[138] But "the calculation of comparative responsibility begins with multiple tortfeasors each of whom is fully responsible for the injury."[139] Its only use is to provide a basis for one tortfeasor to collect reimbursement from another responsible party.

In the end, Wright describes a corrective justice-based method for allocating liability. First, the plaintiff's claim against each tortfeasor is reduced in accordance with his comparative responsibility for the injury. Second, each tortfeasor is jointly and severally liable for the full amount of the plaintiff's (reduced) claim. Third, the cost of compensating the plaintiff is apportioned among the tortfeasors

131. *Id.* at 1142.
132. *Id.* at 1143.
133. *Id.* at 1153.
134. *Id.* at 1153.
135. *Id.* at 1164.
136. *Id.* at 1144.
137. *Id.* at 1146.
138. *Id.* at 1144.
139. *Id.* at 1188.

based on their comparative responsibility through actions for contribution or indemnity.[140]

Wright's analysis is most persuasive when viewed through the corrective justice lens constructed here. As previously noted, a tort system based on corrective justice principles is comparative in nature. The comparative approach to determining the grounds of liability suggests two alternative approaches when there are multiple defendants.

First, we can group all of the defendants together as one causal unit. This is appealing if our goal is to find a way to compensate a plaintiff who we might describe as being 40 percent outcome responsible, while the two defendants are each 30 percent outcome responsible. Since the defendants, as a group, are more outcome responsible, we are therefore justified in assigning to them the duty of repair.

The flaw with this approach is that it ignores the centrality of causation in a corrective justice-based tort system. Such a system is unable to assign percentages to outcome responsibility; there are only three choices — the defendant is more outcome responsible than the plaintiff, less outcome responsible than the plaintiff, or both are equally responsible. Consequently, the second approach is the sounder one: Where there are multiple defendants, tort law separately compares each defendant's degree of involvement with the plaintiff's degree of involvement. If the defendant is more outcome responsible than the plaintiff, then he is fully responsible for the injury. The defendant's liability is not reduced by the fortuitous occurrence of another tortfeasor, but he may have a resulting claim for indemnity or contribution.

IV. EVALUATION OF THE D.C. ACT USING CORRECTIVE JUSTICE PRINCIPLES

Corrective justice requires that, as between the relevant parties to a transaction, the party most outcome responsible for the loss has the duty of repair. This postulate yields a system which can, and usually does, impose liability without fault - just as the D.C. act provides.

The D.C. act imposes strict liability on "[a]ny manufacturer, importer, or dealer of an assault weapon . . . for all direct and consequential damages that arise from bodily injury or death if the bodily injury or death proximately results from the discharge of the assault weapon . . . ."[141] Applying the criteria described above, in the typical case, the manufacturer, importer, or dealer would be outcome responsible, but not at fault. The victim would be neither outcome responsible nor at fault.[142] Thus, the manufacturer would be held financially liable for the victim's damages.

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140. *Id.* at 1194. Under Wright's approach, the plaintiff's own responsibility for the injury only negates his corrective justice claim if his responsibility substantially outweighs the tortfeasor's responsibility. If his claim is not barred, it is reduced according to his comparative responsibility. *Id.* at 1189. Although his claim is reduced, liability is still joint and several because "the tortfeasors have no corrective justice claim against the plaintiff to offset or match the plaintiff's corrective justice claim against each of them." *Id.* at 1192.

141. D.C. CODE ANN. § 6-2392 (Supp. 1992).

142. Situations where the victim is at least outcome responsible are handled separately under the act. For example, Section 5 of the act does not allow persons injured while committing a crime to

Some will argue that this is unfair because there exists at least one other responsible party - the person who pulled the trigger. That person is also outcome responsible, and perhaps at fault. However, this sense of unfairness is not connected to the plaintiff, who is, after all, an innocent victim. It flows from the fact that the tortfeasor with comparatively greater fault seems to escape all liability, while the tortfeasor with comparatively lesser fault bears all or almost all of the liability. "The unfairness exists between or among the multiple tortfeasors, rather than between the innocent plaintiff and any jointly and severally liable tortfeasor."[143]

Thus, the manufacturer, as well as the person who fired the assault weapon, is fully responsible for the innocent plaintiff's injury. The innocent plaintiff can recover from either one or both defendants and leave the concurrent tortfeasors to sort out indemnity or contribution questions amongst themselves.[144] The defendant gun maker is fully responsible for the injury; his responsibility is not decreased by the existence of another responsible party.

As previously noted, the act contains specific findings which justify imposing strict liability. For example, one finding states that the manufacture and distribution of assault weapons is unreasonably dangerous because the risks associated with these weapons outweigh their benefits.[145] Clearly, the D.C. Assault Weapon Manufacturing Strict Liability Act is aimed at reducing the number of assault weapons on the streets. A worthy goal, no doubt, but an inadequate justification for the law.

The proponents of the law attempted to justify the law on instrumentalist grounds; they see tort law merely as a tool for achieving a particular social end. This is its fundamental weakness. The reason is simple: The findings focus the debate about the desirability of this type of law on the desirability of the posited goals and the effectiveness of the law in furthering those goals. Proponents, by their own maneuvering, have placed their backs to the wall. They face the difficult task of proving that this liability rule will best accomplish their ultimate goal of reducing street violence.

Opponents of this type of law can easily come up with a list of objections: More effective law enforcement and stiffer sentences are more likely to reduce the violence; the local character of the law means that the guns will still be readily available just across the border in Virginia or Maryland; and outright regulation or banning the weapons is the most effective, and honest, way of achieving the instrumentalist's goals.[146] These objections are persuasive precisely

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recover. Similarly, victims of a self-inflicted injury cannot recover damages. The law also allows a defendant to claim any defense available in a strict liability action such as assumption of the risk. D.C. CODE ANN. § 6-2393 (Supp. 1992).

143. Wright, *supra* note 73, at 1162.

144. *See supra* notes 129-140 and accompanying text.

145. Assault Weapon Manufacturing Strict Liability Act of 1990, D.C. Act 8-289, § 2, Dec. 17, 1990.

146. Additional objections are that the law violates the Second Amendment and that gun manufacturers will no longer sell to the federal government for fear of establishing the "minimum contacts" necessary to fall under the local court's jurisdiction. Kent Jenkins Jr., *District's Gun Liability Law Again Under Fire From the Hill*, WASH. POST, Jan. 27, 1992, at B3. The first objection would probably fail since most recent Second Amendment cases have analyzed the right to keep and bear arms in terms of protecting state militias, rather than individual rights. *See, e.g.*, United States

because the posited goals are independent of tort law. "For tort law optimally to accomplish its different goals would be the merest fluke. Directly pursuing these goals, therefore, makes more sense than fortuitously combining them in tort law."[147]

A corrective justice justification is more persuasive and satisfying. After all, a plaintiff sues to have a "wrong" set right, not as a private enforcer of the public interest in reducing inner city violence. The defendant-manufacturer should not be singled out because it is a convenient conduit to an accessible insurance pool, but because its conduct resulted in the plaintiff's loss.

V. CONCLUSION

A growing movement seeks to make manufacturers and sellers of firearms liable for the injuries caused by their products. The D.C. Assault Weapon Manufacturing Strict Liability Act, and similar laws that are sure to follow in other jurisdictions, is attractive because it reflects our intuitions of corrective justice. This law seeks to redress an imbalance to the distributive scheme caused by the injurer's conduct. Unfortunately, proponents of this type of legislation weaken their cause by depending on modern instrumentalist rationales such as market deterrence and loss spreading.

Grounding assault weapon liability on trendy social goals invites criticism that the goals are not worthy or that there are other mechanisms which will better accomplish those goals. If deterrence and loss-spreading are your concerns, then it makes more sense to ban assault weapons via regulation, and establish a social insurance scheme that apportions the cost of accidents throughout the entire community. For the instrumentalist, tort law is dispensable; for the corrective justice proponent, however, it is intrinsically valuable because it redresses the unjust disruption of the balance of individual interests. Thus, the D.C. Act's proper foundation is corrective justice. Tort law does not forward independently justified goals, but redresses conduct which has upset the balance of interests between two parties.

In this Note I have advanced the following conception of corrective justice: As between a plaintiff and a defendant, the party who is more outcome responsible for the injury has the duty of repair. This axiom is derived from three principal characteristics of tort law: its bi-polarity, its comparative nature, and the centrality of causation. A victim of gun violence deserves to be compensated because she has suffered a harm for which another is more outcome responsible. Those in the manufacturing and marketing chain have the duty of compensation because they are more outcome responsible than the plaintiff. Reliance on this corrective justice justification acknowledges the unique and important role of tort law, the

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v. Miller, 307 U.S. 174 (1939); United States v. Oakes, 564 F.2d 384 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); United States v. Warin, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976); United States v. Nelsen, 859 F.2d 1318 (8th Cir. 1988). *But see* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983) (arguing that the Founders intended the Second Amendment to guarantee an individual right to possess certain kinds of weapons in the home). The second objection may be valid, but is easily remedied by amending the relevant long-arm statute.

147. Weinrib, *supra* note 62, at 503.

normative significance of disruptions to the distributive justice scheme, and avoids the criticisms leveled at a liability law based on instrumentalist goals.

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