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Saturday Night Specials: A "Special" Exception in Strict Liability Law

Every year in the United States individuals armed with Saturday Night Specials commit thousands of crimes. The federal Gun Control Act of 1968, aimed at eliminating the importation of these handguns, has been ineffective. Moreover, courts have ruled that the Gun Control Act does not imply a cause of action against a Saturday Night Special manufacturer when his or her product is used in crime. These courts have concluded that Congress intended to protect the public through administrative enforcement of the Gun Control Act rather than through private suits. Courts have also refused to expand existing tort law to provide Saturday Night Special victims with an effective remedy against the manufacturer.

A recent case may signal progress in this area. In Kelley v. R.G. Industries, Inc., the highest court of Maryland, the Court of Appeals, ruled that strict liability could be imposed upon manufacturers of Saturday Night Specials, and that an individual injured by such a weapon could sue the manufacturer directly. The court concluded that it was free to change the common law of torts to conform with contemporary conditions, and that imposing strict liability on Saturday Night Special manufacturers coincided with federal and state gun control legislation. As the first decision to impose strict liability on Saturday Night Special manufacturers under any theory,

1 A "Saturday Night Special" is a small, inexpensive handgun primarily used in crime. See United States v. Looney, 501 F.2d 1039, 1040 (4th Cir. 1974). See also Fields, Handgun Prohibition and Social Necessity, 23 St. Louis U.L.J. 35 (1979) (provides a thorough discussion of the problems caused by the ready availability of handguns in the U.S.).
3 See Kennedy, The Handgun Crime Control Act of 1981, 10 N. Ky. L. Rev. 1 (1982). Senator Kennedy claims that "Saturday night specials . . . are . . . readily available because of a loophole in the law that allows their lethal parts to be imported from abroad, and then assembled and sold in this country." Id. at 7. He claims that, while federal law prohibits the importation of Saturday Night Specials, the law does not "specifically ban the importation of gun parts, a loophole many foreign manufacturers discovered almost immediately" after the enactment of the federal Gun Control Act of 1968. Id. at 7 n.33.
5 See cases cited in note 4 supra.
8 Id. at 157, 497 A.2d at 1159.
commentators have attacked *Kelley* as a "radical and dangerous departure from fundamental principles governing . . . jurisprudence and [the] tripartite system of government." 9

This note discusses and defends the Maryland court's decision to extend strict liability to Saturday Night Special manufacturers when their product is used in crime. Part I examines the limitations of traditional theories of strict liability when applied to manufacturers of handguns. Part II discusses *Kelley* and its expansion of tort law to avoid these limitations. Part III argues that state courts have historically enjoyed substantial law-making authority in tort law, and that the Maryland Court of Appeals acted within its authority in extending strict liability to Saturday Night Special manufacturers. Part IV examines the likely impact of *Kelley* and concludes that the decision creates a new, but very limited, area of strict liability that probably will not be extended beyond its facts.

I. Traditional Theories of Strict Liability

Saturday Night Special victims 10 and legal commentators 11 have argued that traditional strict liability theories 12 permit courts

10 See note 6 *supra* and accompanying text.
12 "Traditional strict liability theory" refers to the *RESTATEMENT (SECOND) OF TORTS* §§ 402A, 519, and 520 (1977), and its interpretation by the courts. 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
   (a) the seller is engaged in the business of selling such a product, and
   (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
   (a) the seller has exercised all possible care in the preparation and sale of his product, and
   (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Section 519 provides that:

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Section 520 provides that:
to hold Saturday Night Special manufacturers liable for injuries resulting from criminal misuse of these handguns. Under traditional strict liability, a defendant may be held liable in two circumstances: (1) when he or she engages in an "abnormally dangerous activity" and injury results;\(^ {13} \) or (2) when he or she produces a "defective product" that is "unreasonably dangerous," and injury results.\(^ {14} \) The courts currently rely on two tests to determine whether, under the second theory, a product is unreasonably dangerous: the "consumer expectation test"\(^ {15} \) and the "risk/utility test."\(^ {16} \)

Plaintiffs\(^ {17} \) and authors\(^ {18} \) contend that the manufacture of Saturday Night Specials constitutes an "abnormally dangerous activity" under the Restatement (Second) of Torts sections 519 and 520.\(^ {19} \) Courts, however, generally limit this theory of strict liability to situations where the tortfeasor is an owner or occupier of land and injury results from his or her use of this land.\(^ {20} \) Thus, a court will hold a defendant who manufactures or stores dynamite in a given location strictly liable for damages caused by an explosion.\(^ {21} \)

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\(^{13}\) See Restatement (Second) of Torts §§ 519-520 (1977).
\(^{14}\) Id. § 402A.
\(^{15}\) The "consumer expectation" test states that a product, no matter how inherently dangerous, cannot be defective unless it is dangerous beyond the extent contemplated by the purchaser. See Justice Schaefer's attempt to explain this in Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 342, 247 N.E.2d 401, 403 (1969) ("Although the definitions of the term 'defect' in the context of products liability law use varying language, all of them rest upon the common premise that those products are defective which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function.").


\(^{17}\) See cases cited in notes 6 and 7 supra.
\(^{18}\) See note 11 supra.
\(^{19}\) See note 12 supra.

\(^{20}\) See, e.g., Note, Legal Limits of a Handgun Manufacturer's Liability for the Criminal Acts of Third Persons, 49 Mo. L. Rev. 830, 843-45 (1984); Kelley, 304 Md. at 133, 497 A.2d at 1147. But see Siegler v. Kuhlman, 91 Wash. 2d 448, 502 P.2d 1181 (1972) (court imposed strict liability for damages resulting from transporting gasoline in a large tank truck even though the activity was not connected to the use of land).

but the court will not hold the manufacturer of a steak knife used in a stabbing liable, even though a knife is dangerous when used in this manner. Likewise, the danger which a Saturday Night Special poses does not render its manufacture an “abnormally dangerous activity.” Although the handgun is inherently dangerous, it is not dangerous in connection with the use of land.

Similarly, a Saturday Night Special is not an “unreasonably dangerous product” as contemplated by the Restatement (Second) of Torts section 402A. Under the “consumer expectation” test, a product is “unreasonably dangerous” only if it is dangerous beyond the expectation of the consumer. An unreasonably dangerous product is one that malfunctions, not one that operates exactly as the consumer expects. Alcohol, for example, is a dangerous product because excess consumption intoxicates. It is not unreasonably dangerous, however, because the consumer expects it to intoxicate. On the other hand, alcohol inadvertently mixed with poison is unreasonably dangerous because the consumer does not expect this mixture when he or she purchases the product. Thus, a Saturday Night Special is not unreasonably dangerous simply because it kills, since this is its expected function. Under this test, a product that functions according to consumer expectations is not unreasonably dangerous even if its contemplated purpose is primarily destructive.

Under the second test used to determine whether a product is unreasonably dangerous, the “risk/utility” test, courts consider whether the design of a product is so faulty that the risk of injury from its use outweighs its utility. Although it has been forcefully argued that the easy concealability of a Saturday Night Special renders it an unreasonably dangerous product under the risk/utility test, courts do not apply this test unless the product actually malfunctions. Thus, an automobile manufacturer is not strictly liable

22 The comments to the Restatement (Second) of Torts § 520 stress the importance of locality in the determining whether an activity is unreasonably dangerous. See Restatement (Second) of Torts § 520 comments c, e, f, and h (1977).
23 See notes 12 and 15 supra.
24 Comment i of the Restatement (Second) of Torts § 402A (1977) states in part: The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it. . . . [Thus g]ood whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous.
25 Id. See also note 15 supra.
26 See notes 15 and 24 supra. See also Note, Handguns and Products Liability, 97 Harv. L. Rev. 1912 (1984).
27 See note 24 supra.
28 See note 16 supra.
29 See note 11 supra.
30 See Barker v. Lull Engineering Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225
under the risk/utility test for placing the gas tank at the rear of the vehicle unless the vehicle actually explodes in a rear-end collision. A manufacturer of a high-lift loader without adequate safety devices is not strictly liable under the risk/utility test unless the loader actually tips over and injures the plaintiff. Similarly, a Saturday Night Special manufacturer is not liable under the risk/utility test unless the product malfunctions.

Thus, under traditional strict liability theories, a court cannot hold a manufacturer of a Saturday Night Special liable when his or her product functions in a crime exactly as the consumer contemplated. Courts have declined to impose liability on Saturday Night Special manufacturers under these theories, and rightly so. To do otherwise distorts the meaning of Restatement sections 402A, 519, and 520. A court should not impose strict liability on Saturday Night Special manufacturers if it distorts existing law to fit an inappropriate circumstance. The court, however, may modify the common law to compensate deserving victims. The Maryland Court of Appeals in *Kelley v. R.G. Industries, Inc.* adopted this approach.


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 to the robber. The plaintiff sought redress under traditional strict liability theories, but the court declined to impose liability under any of those theories.

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34 See *Linkins v. Protestant Episcopal Cathedral Foundation*, 187 F.2d 357, 360 (D.C. Cir. 1950) ("[T]he very term 'common law' means a system of law not formalized by legislative action, not solidified but capable of growth and development at the hands of judges."). See also *Ursin, Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229 (1981). Professor Ursin discusses "judicial lawmaking and the common law, using tort law to illustrate general themes." *Id.* at 230. He argues that state courts should adapt the common law to "constantly changing conditions and values," and that, if anything, "the real danger is not that judicial creativity will be excessive, but rather that the common law will not be responsive enough to changing conditions and values." *Id.* at 231 (citing *Traynor, The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 363-64, 368, 373 (1965)).
36 R.G. Industries has been called "the nation's major producer of Saturday Night Specials." *Id.* at 159, 497 A.2d at 1161 (citing Brill, *The Traffic (Legal and Illegal) In Guns*, HARPER'S, Sept. 1977, at 39).
37 304 Md. at 132-39, 497 A.2d at 1146-50. The court did not depart from traditional interpretations of the *Restatement (Second) of Torts* §§ 402A, 519-520 (1977). Regard-
The court conducted an in-depth analysis of Maryland gun control laws\(^3\) and the federal Gun Control Act of 1968.\(^3\) The court then concluded that extending strict liability to Saturday Night Special manufacturers furthered public policy in the area of gun control.\(^4\) The court did not feel constrained by common law precedents in deciding to extend strict liability to this situation.\(^4\)

In its analysis, the court first examined Maryland gun control legislation. Because this legislation expressly permits citizens to possess handguns under certain circumstances,\(^4\) the court determined that it violates public policy to hold all handgun manufacturers strictly liable for injuries resulting from legitimate uses of these guns.\(^4\) The court pointed out, however, that Saturday Night Specials comprise a separate category of handguns which clearly are

\(^3\) See for example, \(\text{MD. ANN. CODE art. 27, §§ 36B-36G (1982 & Supp. 1984).}\)

\(^4\) See for example, \(\text{Id. at 133, 497 A.2d at 1147.}\)

\(^3\) The court stated:

[T]he policy implications of the gun control laws enacted by both the United States Congress and the Maryland General Assembly reflect a governmental view that there is a handgun species, i.e., the so-called Saturday Night Special, which is considered to have little or no legitimate purpose in today's society.

\(^4\) The court stated:

The fact that a handgun manufacturer or marketer generally would not be liable for gunshot injuries from a criminal's use of the product, under previously recognized principles of strict liability, is not necessarily dispositive. This Court has repeatedly said that "the common law is not static; its life and heart is its dynamism—its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems." . . . Indeed, we have not hesitated to change the common law to permit new actions or remedies where we have concluded that such course was justified.
not sanctioned by state gun control legislation. The court considered it significant that Maryland law prohibits the sale of handguns to convicted criminals, and that Saturday Night Specials are mainly used by criminals. The court also observed that the Maryland legislature contemplated only certain uses of handguns, and that Saturday Night Specials are inappropriate for any of these uses because of their poor quality, unreliability, and inaccuracy. The court reasoned that federal law prohibiting the importation of Saturday Night Specials provides further evidence of their undesirability. The court concluded that the chief value of a Saturday Night Special is its low price and concealability, characteristics which encourage the very criminal activity that the legislature sought to control. "[O]nly the legitimate use of handguns is consistent with state policy," and Saturday Night Specials serve no legitimate purpose.

The court noted that Saturday Night Special manufacturers know or ought to know that their product's chief use is in criminal activity. In light of this foreseeability, as well as the greater amount of fault on the part of the manufacturer as compared to the

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44 See notes 45-51 infra and accompanying text.
A dealer or person may not sell or transfer a pistol or revolver to a person whom he knows or has reasonable cause to believe has been convicted of a crime of violence . . . .
46 304 Md. at 155, 497 A.2d at 1158.
47 See note 42 supra. The court considered "legitimate" uses of handguns to include sport, law enforcement, and self-protection. 304 Md. at 146, 497 A.2d at 1154.
48 Id. at 154, 497 A.2d at 1158.
49 18 U.S.C. § 922(l) (1982). Moreover, 18 U.S.C. § 925(a) (1982) allows the importation of firearms for the use of law enforcement, military, or other governmental purposes. Based on these statutes, the court reasoned that "[t]he ban on the importation of any firearm, except those used for law enforcement, military or sporting purposes, indicates Congressional belief that there is a category of firearms which has little or no legitimate purpose." 304 Md. at 150, 497 A.2d at 1156. The court concluded that this category includes Saturday Night Specials. Id. at 147, 497 A.2d at 1154.
50 Id. at 154, 497 A.2d at 1158.
51 Id.
52 The court stated:
[T]he manufacturer or marketer of a Saturday Night Special knows or ought to know that he is making or selling a product principally to be used in criminal activity. For example, a salesman for R.G. Industries, describing what he termed to be a "special attribute" of a Rohm handgun, was said to have told a putative handgun marketer, "'If your store is anywhere near a ghetto area, these ought to sell real well. This is most assuredly a ghetto gun.'" The R.G. salesman allegedly went on to say about another R.G. handgun, "'This sells real well, but, between you and me, it's such a piece of crap I'd be afraid to fire the thing.'" Id. at 155, 497 A.2d at 1158 (quoting Brill, supra note 36, at 40). But see Santarelli & Calio, Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit, 14 St. Mary's L.J. 471, 476 (1983) ("The allegation that gun manufacturers [know or] intend their products to be misused as instruments of death is almost too ludicrous to require a response.").
innocent victim, the court concluded that it could appropriately impose liability upon the manufacturer.\(^5\) The court emphasized that it would impose strict liability only upon those manufacturers that produced "Saturday Night Specials," and determining whether a handgun is a Saturday Night Special is a question of fact.\(^4\)

The court did not "imply" a cause of action through federal and state gun control laws;\(^5\) instead, it decided that imposing strict liability through its own initiative would coincide with these laws. The \textit{Kelley} decision sparks the familiar legal controversy on how far a court can go before it encroaches on the legislature's authority. Extending strict liability to Saturday Night Special manufacturers when their product is used in criminal activity is arguably a drastic step.\(^6\) But a brief examination of the history of judicial law-making suggests that the step is not too drastic to take.

\section*{III. The Role of Courts in the Development of Tort Law}

Under the federal system of law, a federal court functions to interpret legislation rather than create law.\(^5\) Only a very limited "federal common law" exists; the legislature possesses the vast majority of law-making authority in the federal system.\(^5\)

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\(^{53}\) 304 Md. at 157, 497 A.2d at 1159.

\(^{54}\) "[I]n a tort suit a handgun should rarely, if ever, be deemed a Saturday Night Special as a matter of law. Instead, it is a finding to be made by the trier of facts." \textit{Id.} at 157-58, 497 A.2d at 1160.

\(^{55}\) See \textit{Note, Implying Private Causes of Action from Federal Statutes: Amtrak and Cort Apply The Brakes}, 17 B.C. IND. & COM. L. REV. 53, 65 (1975), in which the author explains: There is a . . . viewpoint which maintains that a court should \textit{never} imply a cause of action. This criticism of the implied remedies doctrine may be reduced to two basic contentions: (1) the implication of a private cause of action is an invasion by the judiciary of the legislative function; and (2) the implication of a private cause of action often unfairly subjects the offender to a different type or level of liability than that which the statute expressly imposes on him.


\(^{56}\) See \textit{note 52 supra}.

\(^{57}\) \textit{Erie R.R. Co. v Tompkins}, 304 U.S. 64 (1938).

\(^{58}\) \textit{Id. at 78. See also} Texas Industries, Inc. v. Radcliff Materials, 451 U.S. 630 (1981).
In contrast, the common law tradition has granted substantial law-making authority to state courts.\(^5\) Nowhere has this been more visible than in the area of tort law. Virtually all of the major tort doctrines, from negligence\(^6\) to strict liability,\(^6\) are court creations. In the area of strict liability, courts have steadily expanded the law to allow more injured parties to recover.\(^6\) "The great judges in American history have . . . recogniz[ed] the duty of courts constantly to adapt the common law [of torts] to contemporary conditions and values."\(^6\) The courts have assumed this role in the development of tort law for at least one hundred and fifty years, with an unfortunate abstention around the turn of the century.\(^6\)

In the mid-nineteenth century, for example, courts strongly believed that the economic growth of the nation depended on protecting industry from excessive liability.\(^6\) Because of this, courts imposed restrictive tort doctrines upon plaintiffs, such as contributory negligence,\(^6\) the fellow-servant rule,\(^6\) and assumption of the risk.\(^6\) These doctrines denied relief to many industrial accident victims.\(^6\)

After the turn of the century, industry became firmly estab-
lished in this country. Legislative emphasis shifted from protecting industry to protecting employees and their families, yet the courts failed to join the legislature by relaxing its rigid rules. Commentators began to challenge the courts' authority to alter the common law as a result of the improper judicial activism of the Lochner era.

Commentators criticized Lochner and related cases that the Supreme Court decided during the early decades of this century for usurping the power of the legislature in the most dangerous and flagrant way: by invoking the Constitution to invalidate economic and social legislation. The Supreme Court sought to impose its own bias toward laissez faire economics on Congress and state legislatures by manipulating the due process clause of the fourteenth amendment. This was judicial activism in its worst form, because it rendered the legislature powerless to act.

Fear of judicial activism in constitutional law has caused commentators to challenge almost any judicial innovation as "improper." Yet, those who would react to "Lochnerism" by

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70 See Friedman & Ladinsky, supra note 69, at 69.
71 See note 64 supra.
72 See Lochner v. New York, 198 U.S. 45 (1905). In Lochner, the Supreme Court held that a New York law prohibiting the employment of bakery employees for more than ten hours a day or sixty hours a week was unconstitutional under the due process clause of the fourteenth amendment. The Court declared that the "general right to make a contract in relation to [a person's] business is part of the liberty of the individual protected by the 14th Amendment." Id. at 53. Many legal scholars of the era severely criticized the Court's reliance on "substantive due process." See Hand, Due Process of Law and the Eight-Hour Day, 21 HARV. L. REV. 495 (1908).
73 See, e.g., Coppage v. Kansas, 236 U.S. 1 (1915) (invalidated a Kansas law prohibiting employers from requiring employees to agree to not join a labor union as a condition of employment on due process grounds); Adair v. United States, 208 U.S. 161 (1908) (invalidated a federal law prohibiting "yellow dog" contracts on interstate railroads under the due process clause).
74 See Warren, The New "Liberty" under the Fourteenth Amendment, 39 HARV. L. REV. 431 (1926). Professor Warren argues that because "liberty" at common law meant only freedom from physical restraint, it should mean no more under the due process clause. See also Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972); Hand, supra note 72; Lochner, 198 U.S. at 45, 74 (Holmes, J., dissenting).
76 Ursin, supra note 34, at 267. Arguably, such improper activism continues today in the individual rights area of constitutional law. See Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing that the Bill of Rights and the fourteenth amendment create a "zone of privacy" although the right to privacy is not specifically mentioned in the Constitution).
curtailing a state court’s authority to modify the common law are forcing tort law to remain years behind contemporary social conditions. As Professor Ursin suggests, the “evils” of *Lochner* should not lead to fear of judicial activism in the common law. *Lochner* and *Kelley*, for example, are very dissimilar cases. *Lochner* involved a federal court purposefully and directly overruling legislation through improper constitutional analysis. In contrast, *Kelley* involves a state court developing the common law of torts in an attempt to be consistent with the legislature.

By declaring legislation unconstitutional, *Lochner* prohibited the legislature from exercising its law-making authority. *Kelley* allows the legislature to exercise this authority. The Maryland legislature may accept the court’s imposition of strict liability upon Saturday Night Special manufacturers, or it may enact legislation that overrules the decision. In *Lochner*, the Court had the final say; in *Kelley*, the legislature will ultimately decide. No basis exists for arguing that the legislature is better suited to decide tort liability issues because the courts are not subject to the “check” of the ballot box. The courts are checked by the legislature itself.

Some argue against judicial activism by stating that the legislature is better equipped to make informed decisions because of its ability to conduct hearings and gather information. Dean Wellington dismisses this argument:

While there can be no question that the fact-finding facilities available to legislatures through committee hearings and investigations are frequently helpful . . . this advantage is less than meets the eye. On many issues more than enough factual information is generated without hearings; legislative facts abound and for every expert there is his equal and opposite number. Each has published widely; each researched extensively. Judges, then, often have as many useful legislative facts as do

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79 Id. at 263-78.
80 See note 72 *supra*.
81 See note 40 *supra* and accompanying text.
82 See Ursin, *supra* note 34, at 254 (“Ultimately, judicial lawmaking is accountable to the legislative process because legislatures can always act to alter judicially created common law . . . by the simple enactment of a statute.”) (emphasis in original).

California recently passed a law specifically prohibiting its courts from imposing strict liability on Saturday Night Special manufacturers under the “risk/utility test” discussed in note 16 *supra*. CAL. CIV. CODE § 1714.4(a) (West Supp. 1985) provides:

In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.
The *Kelley* court had sufficient information to reach an informed decision. Again, the legislature has the right to enact a law overruling the decision if it concludes otherwise.

The right of the legislature to have the final say in tort law is not a theoretical one; legislatures have exercised it frequently in the recent past. The most appropriate recent example of the legislature exercising final authority in tort law, for present purposes, is in the area of strict liability. When the courts first introduced strict liability, they restricted its availability to users and consumers of the allegedly defective product. This restriction was unnecessary, and was apparently due to the courts' reliance on warranty theory to impose liability. The policy reasons behind strict liability did not support restricting causes of action in this manner. Courts thus expanded the doctrine to allow a bystander who neither used nor consumed the product to seek redress against the manufacturer for his injuries. In the end, however, many state legislatures responded to court decisions in this area by "enacting comprehensive products liability statutes . . . [that] define and often limit consumer remedies for damage and injury caused by allegedly defective

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84 Id.
85 The court in *Kelley* considered the following facts in reaching its decision: (1) the federal Gun Control Act and federal regulations affecting Saturday Night Specials; (2) Maryland gun control legislation; (3) transcripts of hearings before the Senate Committee on the Judiciary regarding Saturday Night Specials, including the testimony of top law enforcement officials in New York City and Washington, D.C.; (4) transcripts of hearings before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary; (5) statistical studies of handguns used in crime; (6) transcripts of testimony of representatives of the National Rifle Association; (7) cases from other jurisdictions; and (8) law review articles. 304 Md. at 141-55, 159-60, 497 A.2d at 1150-58, 1161.
88 In *Greenman v. Yuba Power Products*, Inc., 59 Cal. 2d 57, 59, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963), the landmark strict liability case, the court stated that the "purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by injured persons who are powerless to protect themselves."
89 In *White v. Jeffrey Galion*, Inc., 326 F. Supp. 751, 754 (E.D. Ill. 1971), the court stated:

It seems somewhat incongruous to say that a user or consumer of a product has a right of action against the manufacturer of a defective product, but to withhold protection from an innocent bystander who has suffered injuries through no fault of his own, . . . solely because . . . [he] was merely standing by innocently minding his own business when he was suddenly injured by another's use of the defective product.
products."91

Courts have also prompted the legislatures of various states to adopt comparative negligence statutes.92 The failure of state legislatures to respond to court decisions extending liability in the areas of misrepresentation,93 implied warranties of habitability (where strict liability was imposed),94 abolition of immunities,95 and imputed negligence96 suggests legislative acceptance of these judicial developments. It also lends support to the proposition that the courts are remarkably able to accurately assess the "demands" of the times.

Judicial modification of tort law simply does not present the dangers that opponents of judicial activism dread. In fact, a decision like Kelley should be encouraged. The courts are not exposed to the pressures of special interest groups in the same manner as the legislature.97 Powerful lobbying groups such as the National Rifle Association which oppose strong gun control legislation98 un-

91 2 PROD. LIAB. RPTR. (CCH) ¶ 90,000 (1982). See 2 PROD. LIAB. RPTR. (CCH) ¶¶ 90,000-92,602 (1982), which provides a convenient state-by-state listing of products liability legislation. Most of these laws were passed in the 1970s, when tort suits were multiplying, the courts were extending liability, and insurance costs were rising at a dramatic rate.


93 Courts have both created and denied causes of action to third parties injured as a result of a misrepresentation made by one party of a contract to another. See Prosser, Misrepresentation and Thrid Persons, 19 VAND. L. REV. 229 (1966).


95 See Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980) (abolishing parental immunity); Ayala v. Philadelphia Bd. of Public Educ., 453 Pa. 584, 305 A.2d 877 (1973) (abolishing state and local governmental immunity); Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972) (abolishing family immunities); Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599 (Mo. 1969) (abolishing charitable immunity).


97 See Wellington, supra note 83, at 240-41.

98 See Kennedy, supra note 3, at 2 n.7. Senator Kennedy points out that:

Numerous measures regulating the control of handguns were introduced during the 1981 legislative year [for example], but none reached the floor in either chamber. For years the powerful National Rifle Association, a 1.8 million member spe-
doubtedly oppose an extension of strict liability to Saturday Night Special manufacturers. Yet the will of these groups is not necessarily the will of the people.99

A decision such as Kelley bridges the gap between the powerful gun lobby and the relatively powerless "gun victim" lobby by forcing the former to spend its money fighting for change rather than the status quo.100 If the people of the state of Maryland oppose Kelley, legislation will certainly follow. On the other hand, if they support the decision, the court has frustrated the gun lobby's attempt to thwart the democratic process by exerting an influence that exceeds its popular support. Those who argue that it is improper for a court to engage in law-making of any kind, including tort law; and those who argue that only the legislature can represent the people are thinking in terms of "democratic theory" rather than "political reality."101 The court in Kelley acted within its historical realm of authority in extending strict liability to Saturday Night Special manufacturers. It did not engage in "dangerous" judicial activism since it declared no law unconstitutional. In fact, the court stressed its desire to remain consistent with the legislature. Thus, in assessing Kelley, it is inappropriate to conclude that the decision "endangers" the democratic process. It is also premature to predict an unlimited expansion of strict liability law.

IV. The Impact of Kelley on Strict Liability Law

The Kelley decision has already generated considerable controversy. In evaluating the potential impact of the case, two authors declared:

[T]he court's opinion, unprincipled and heedless of jurisprudential reasoning as it is, contains no limitation which would confine the results of [the] case to any discrete category of products. Although the opinion was clearly intended . . . to apply [only] to . . . "Saturday Night Specials," its disconsonant reasoning could be applied to any product.102

Such concerns are premature for several reasons. First, Kelley is not the first instance in which a court has imposed strict liability for "the sale of goods involving a considerable risk to the pub-
lic." Some jurisdictions, for example, have enacted "Dram Shop" or Civil Liability Acts which impose strict liability upon the seller of alcoholic beverages if the sale results in injury to a third party by means of an intoxicated buyer. Courts have held these Acts constitutional, and in most cases the Acts are liberally construed to provide adequate relief to plaintiffs. Certainly the manufacture and sale of Saturday Night Specials poses a similar risk to the public.

Second, because the holding in Kelley is very specific, it is unlikely that the court's reasoning will extend beyond the Saturday Night Special arena. The court merely placed a particular product in a "special" category because its manufacturers were aware that their product is mainly used in criminal activity,

103 W. Keeton, Prosser and Keeton on Torts § 81, at 581 (5th ed. 1984).
106 See Lavieri v. Ulysses, 149 Conn. 396, 180 A.2d 632 (1962); Pierce, 144 Conn. 241, 129 A.2d 606; Hahm v. Ortonville, 258 Minn. 428, 57 N.W.2d 254 (1953). On the other hand, at least one state court has held that because Dram Shop Acts are penal in nature, they should be strictly construed. See Moran v. Katsinas, 16 Ill. 2d 169, 157 N.E.2d 38 (1959).
107 See Fields, supra note 1. Dram Shop Acts are, of course, legislative enactments. However, once it is accepted that courts also have authority to modify the common law, exactly which branch announces the law becomes unimportant. See notes 59-64 supra and accompanying text. Moreover, Prosser points out that strict liability "has been found at the common law in the 'Dramshop' situation, where the defendant sells liquor to an intoxicated person, and a third person suffers injury." W. Keeton, Prosser and Keeton on Torts § 81, at 582 (5th ed. 1984) (emphasis added). See Galvin v. Jennings, 289 F.2d 15 (3d Cir. 1961); Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968); Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 490 (1965); Jardine v. Upper Darby Lodge Co., 413 Pa. 498, 198 A.2d 550 (1964); Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963). See also Cahn, New Common Law Dramshop Rule, 9 CLEV.-MAR. L. REV. 302 (1960).

The legislature's announcing of an extension of strict liability remains important, however, because the legislature can expressly limit the court's authority to interpret the law. Thus, in Robinson v. Bognano, 215 N.W.2d 530 (Iowa 1973), the Supreme Court of Iowa, interpreting the state's Dram Shop Act, stated:
In adopting the statutory right of recovery against dram shop operators legislature expressly and carefully limited the class of persons to whom that right was given. It would not be a proper judicial function to amend the legislation by interpretation so as to enlarge the class. Such an amendment would be the exclusive province of the legislature.

Id. at 552. The court in Kelley was not limited by the legislature in the same manner; hence, it felt free to modify the common law of torts.

108 The court stated that "no case to the best of our knowledge has heretofore dealt with the particular form of liability recognized in . . . this opinion." 304 Md. at 162, 497 A.2d at 1162. The court declined to impose strict liability on Saturday Night Special manufacturers who sold their handguns before the date of this opinion for this reason: "While manufacturers and marketers of handguns have or should have [known that their guns were used in crime] . . . until now they had little reason to anticipate that their actions might result in tort liability." Id. at 161-62, 497 A.2d at 1162.

109 See note 52 supra.
is strictly regulated by Congress and the Maryland legislature,\textsuperscript{110} and the product has little or no legitimate use.\textsuperscript{111} Thus, because \textit{Kelley} emphasizes a specific product, it does not "open the door" to excessive liability for the manufacture of other products that are not defective but cause injury in any event.

Moreover, \textit{Kelley} imposes strict liability on manufacturers of Saturday Night Specials only under specific circumstances. The court made clear that not only must the product be a "Saturday Night Special,"\textsuperscript{112} but also that the potential class of plaintiffs "could [only] include the intended victims of . . . crime, innocent persons who are unintentionally shot by [a] criminal, and law enforcement personnel and others who intervene to prevent [a] crime."\textsuperscript{113} \textit{Kelley} therefore does not impose strict liability on a Saturday Night Special manufacturer if a purchaser for self-protection accidentally discharges the firearm and injures himself or a third party, since no criminal act took place.

Thus, the \textit{Kelley} holding is simply too specific to manipulate in future cases. It does not signal an unlimited expansion of strict liability law; it merely attempts to fill a gap in this law "in light of the ever growing number of deaths and injuries due to [Saturday Night Specials] being used in criminal activity . . . ."\textsuperscript{114}

V. Conclusion

Current strict liability theory does not impose liability upon Saturday Night Special manufacturers when their product functions as expected in a criminal's hand. Courts, however, are not restricted to current strict liability theory; they should be encouraged to modify the common law to conform to contemporary conditions and values.

The Maryland Court of Appeals in \textit{Kelley v. R.G. Industries, Inc.} acted within its authority when it extended strict liability to Saturday Night Special manufacturers. In doing so, it redressed an egregious situation that the legislature had neglected. While \textit{Kelley} was an aggressive decision, its extension of strict liability does not constitute improper judicial activism. The decision is consistent with federal and state gun control legislation and does not prevent the legislature from exercising its final authority in the matter. It is up to the legislature to overrule, modify, or accept the decision. Even if the legislature overrules \textit{Kelley}, the court should be commended. The court addressed a neglected area of the law, and prompted the

\textsuperscript{110} See notes 42-51 \textit{supra} and accompanying text.
\textsuperscript{111} 304 Md. at 155, 497 A.2d at 1158.
\textsuperscript{112} \textit{Id.} at 157-58, 497 A.2d at 1159-60.
\textsuperscript{113} \textit{Id.} at 159, 497 A.2d at 1160 n.20.
\textsuperscript{114} \textit{Id.} at 157, 497 A.2d at 1159.
legislature to firmly decide where it stands on an important issue. In this sense, the court will have assisted rather than undermined the democratic process.

It is premature to conclude that *Kelley* leads to an unlimited expansion of strict liability to manufacturers of products that neither are defective nor malfunction. The holding of the case is too narrow to apply to any product except a Saturday Night Special. The court expressly created a specific exception to a general rule.

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