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LAWYERS, GUNS, AND MONEY

Barry E. Adler, Jules Coleman,** & Arthur Ripstein****

Gun manufacturer liability for injuries caused to third parties through the misconduct of gun purchasers has become the subject of a heated debate. In the exchange that follows, Professors Barry Adler, Jules Coleman, and Arthur Ripstein join this debate. Adler argues that gun manufacturers should be held liable for injuries to gunshot victims regardless of any moral culpability on the part of the manufacturers. Coleman and Ripstein respond that a standard divorced from culpability improperly ignores the essential role of justice in a tort system.

ADLER: Flushed with recent successes in settlement of litigation against tobacco companies, plaintiffs' lawyers across the country have set their sights on a new defendant, gun manufacturers. Like those who became ill from cigarettes and the states from whom the smokers received medical care, victims of gun violence and those who police or care for them seek compensation from the producers of a deadly implement. The claim in the tobacco cases is that the companies should be liable because they target children and fail to disclose the true dangers of addiction. The claim in the gun cases is that the manufacturers target geographic regions with lax gun controls and fail adequately to safeguard the guns against misuse. The parallels are clear, but unnecessary.

The plaintiffs have, or should have, a case against the gun manufacturers *regardless* of whether the plaintiffs' allegations are true. That is, the gun manufacturers should be held "strictly liable," to use a legal term, for the harm to innocents caused by guns even if the manufacturers have acted properly. Of course, manufacturer misbehavior would be an additional ground for liability.

In the tobacco litigation, plaintiffs could not concede that those injured by smoking were fully informed consenting adults, because with such a concession there would be no basis for liability. If smokers assumed the risk of injury, then neither they nor perhaps the states that chose to treat them would have any reasonable complaint against the

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sellers who would simply have provided a legal product to a desirous public.

Many victims of gun violence, in contrast, are not in a position similar to that of smokers. Gun victims often have *no* relationship with the manufacturer. Someone shot in an armed robbery or hit by a stray bullet never has an opportunity to assume the risk of death or injury in the way a fully informed smoker could. A child killed by a gun accidentally fired by another child also lacks the capacity meaningfully to consent to the risk. So when gun manufacturers deny charges of improper marketing and inadequate trigger locks, the legal system should respond with a shrug. The manufacturers cannot deny that guns injure innocent third parties, and these injuries alone should be sufficient for liability on claims brought by these victims or by others on their behalf.

This conclusion may seem to some the product of a radical anti-business bias, but in fact, the argument for manufacturer liability rests on conservative economic principle. In the analysis of law, economists have two distinct concepts, one of distributive effect, the other of allocative effect. A distributive effect determines who in society gains or loses from a law. An allocative effect determines how society's resources are deployed in response to the law. When gun manufacturers contend that they have done nothing wrong, and therefore should not be held liable, they are appealing to a distributive notion. When one contends, as I do here, that gun manufacturers should be held liable *even if* they have done nothing wrong, that is an appeal to an allocative notion.

For example, suppose a gun manufacturer competently designs and produces a defect-free handgun and distributes it to a dealer who conducts all reasonable background checks before a consumer buys the gun. The consumer then resells the gun to a felon who uses it to maim an innocent victim. To the extent such injury can be monetized, the victim suffers a loss of, say, \$1 million. The felon, of course, should be and is liable for such a loss, but has no assets that can be used to satisfy the victim's claim. Assume that the dealer and consumer also lack assets (although the argument in favor of manufacturer liability also can support liability for each of these links in the chain). Under these facts, should the manufacturer or the victim bear the \$1 million loss?

The manufacturer argues that, because it acted properly, it should not bear the loss. It does not deserve to pay for the victim's injury at the hands of the felon any more than it deserves to pay for the rest of society's ills. Bad things happen to people, but the responsible party is neither the manufacturer nor its customers in general, to whom the manufacturer will pass on any cost. The victim's loss is a tragedy, but not the manufacturer's tragedy. There is no reason to distribute the loss from the victim to the manufacture or its customers.

This is not the entire story, however. If victims are left to bear losses, the price of guns will not reflect the victims' injuries. Guns will be cheap. More will be manufactured and sold. In economic terms, more of society's resources will be allocated to gun production. This will no doubt have some positive societal effect, as all the good that guns generate—protection and sense of security for the owners, for example—will increase with each sale. But there will be a negative effect as well. The greater the number of guns, the more often a gun will be abused or misused, and the greater the number of innocent victims.

In principle, the marketplace can balance the good and bad effects of guns. The mechanism is price. Price accomplishes allocative efficiency, however, only *if* it adjusts so that purchasers pay for the harm caused by the product sold, or in economic terms, only if the gun users internalize the costs of the use. Where the manufacturer does not bear the cost of victims' injuries and thus does not pass the loss on to consumers—that is, where the purchasers can externalize costs—the price will be too low and the scale will be tipped inappropriately in favor of gun production. As a result, there will be too many guns and too much injury relative to the good.

To be sure, strict manufacturer liability will not yield perfect results. Sometimes manufacturers will be held liable for injuries that would have occurred without the use of a gun, such as where a vendetta would have been settled with a knife or a bat. Strict liability, moreover, does not account for any benefit gun ownership might confer on others, such as where the neighbor of a known gun owner is protected from crime. One might argue, as well, that there are circumstances where the prospect of manufacturer liability will cause potential victims to take too little care. Despite these potential qualifications, however, most (though certainly not all) would agree, I think, that a broad spectrum of societal harm is fairly attributed to the availability of guns (albeit combined with the malfeasance of gun users). When the gun user cannot compensate a victim, the manufacturer, and ultimately gun purchasers as a group, should (at least absent compelling evidence that society would thus be ill served).¹

¹ As part of an exhaustive empirical analysis, John Lott argues that permits to carry concealed weapons decrease the amount of violent crime. See JOHN R. LOTT, JR., *More Guns, Less Crime* (2nd ed. 2000). Lott claims that, in addition to gun owner self protection, there are "benefits to general crime deterrence produced by concealed-carry laws, for they also help protect others indirectly, as criminals do not know which people can defend themselves until they attack." *Id.* at 177. Lott's analysis is controversial, as evidenced by Lott's own account of his findings. *Id.* at 122-58, 202-33. Some of Lott's critics seem politically motivated, while others are more scholarly. As to the best criticisms of the latter, time and future research will resolve the debate. To the extent Lott's conclusions are valid, they militate against strict liability for gun manufacturers. Even so, any positive externality from gun production may fail to overcome the undoubted presence of negative externalities.

In sum, the case for strict manufacturer liability rests not on any prejudice against guns, or on any preference for victims over manufacturers or their customers. The case instead relies on a simple idea that the price of a product should reflect its true cost to the extent possible. If a law-abiding citizen purchases a gun and reaps the full benefit of gun ownership, it seems not unreasonable that the honest citizen should pay for her share of the misery gun manufacture and distribution inevitably impose on society. Otherwise, the misery will overwhelm the benefit.

COLEMAN & RIPSTEIN: We're always happy to hear economic arguments that would make America's streets and schools safer. While on its face Professor Adler's argument appears to endorse an easier path to recovery for the victims of gun related violence, it approaches a problem of moral responsibility with the wrong kind of principle, making gun manufacturers pay for injuries for the same reason that drivers are expected to pay for toll roads. For Adler, giving the victims of gun violence the right to recover in torts is not primarily a matter of doing justice for them. It is a way of making those who benefit from an activity pay for it. Among the costs of guns, in his view, are the costs of gun related violence, both those borne directly by innocent victims and those borne by cities whose police forces must provide added security and whose hospitals must care for indigent victims. Once the costs are placed on gun manufacturers and users, the market will work to determine how much gun use people are willing to pay for at what price. Thus, happily for lawyers, victims, and economists, safer streets and schools result from proper pricing of guns.

Unfortunately, the situation is more complicated than Adler supposes. In the process of sidestepping the question of whether gun manufacturers have done any wrong, his economic argument removes all questions of responsibility and replaces questions of liability with questions concerning how much violence gun users would be willing to pay for. Provided gun users are willing to pay for it, Adler's approach treats injury and death as part of the cost of doing business.

Both of the premises on which Adler's argument rest are mistaken. Tort liability is not a matter of fixing prices; it is a matter of doing justice. Moreover, although we can all agree that people have no right to impose the costs of their activities onto others, we cannot know where to place the increased health and safety costs of gun manufacture without first determining how people should treat each other. The manufacture and use of guns causally contribute to the injuries when they occur. But so do the innocent actions of many victims of violence; had they stayed off the streets (or home from school) they would not have been injured. The question is one of responsibility, not causation.

Adler's argument not only goes astray in treating violence as a cost of doing business. In sidestepping the question of whether gun manufacturers have done anything wrong, he suggests that our judgments of liability need not reflect a concern for wrongdoing or culpability. In fact, our liability judgments quite rightly reflect a concern with responsibility and wrongdoing. That is why the core of the moral and legal case against gun manufactures is that they focus so much of their marketing efforts on areas where sales are inadequately regulated, knowing full well that, as result, many guns will fall into the hands of criminals.

Most people think of questions of liability in this more familiar and more moralized way, supposing it to be a matter of simple justice that when one person wrongs another, the wrongdoer should make up the victim's loss. That is why so much tobacco litigation has centered around assumption of risk. Adler points out that gun manufacturers cannot avail themselves of that defense. But no matter how we decide the question of whether smokers have undertaken the risk of illness, most victims of gun related violence do not consent to risk injury or death (at least since duelling was outlawed). However, gun manufacturers do appear to have another, equally familiar defense. They can claim that the wrongful acts are not performed by gun manufacturers, but by individual criminals, and that they cannot be held responsible for the wrongful acts of others. Answering that argument is the real challenge for those who endorse private rights of action against gun manufacturers.

The correct way to address that challenge is to meet it head on, rather than by abandoning familiar ideas of responsibility and wrongdoing. There is a limit to the extent to which one person can avoid responsibility for the act of another in cases where they provide an opportunity to do evil which they knew that this person (or someone like them) was likely to take. For example, those who leave dangerous things within the reach of small children are responsible for the results. Other cases, involving fully responsible agents, have the same structure. In many jurisdictions, the person who leaves keys in his car is liable for any damage done to others by a joyrider who takes advantage of the opportunity provided, even though the joyrider is also, indeed primarily, responsible. If guns are dangerous because of the dangers posed by intermediaries that manufacturers cannot control, it is legitimate to hold those who provide the opportunities responsible for the results. One person is not entitled to provide opportunities for others to do wrong and then evade responsibility for the wrongs by pointing to those others. Both those who provide opportunities and those who seize them are responsible.

In short, lawsuits by the victims of gun violence against manufacturers can comfortably fit into the familiar categories of tort law. The

gun issue does not force us to abandon deep-seated ideas of responsibility, wrongdoing, and justice between the parties.

Still, if tort law can handle the gun issue, it is not obvious that it should. The same issues of responsibility suggest that the sale and use of guns should be regulated more effectively. The fact that this path has not been pursued reflects a failure of nerve on the part of legislatures.