Book Review

Alcohol, Tobacco, and Firearms: Autonomy, the Common Good, and the Courts

The New Golden Rule: Community and Morality in a Democratic Society. By Amitai Etzioni. New York: Basic Books, 1996. Pp. xx + 314.

The Limits of Privacy. By Amitai Etzioni. New York: Basic Books, 1999. Pp. 280.

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Recently, in the wake of the tragic cycle of school shootings, national attention has focused on the issue of gun control and whether government should enforce further restrictions on gun ownership and use.[1] Almost contemporaneously, shooting victims and municipalities have filed lawsuits against gun manufacturers and distributors. The lawsuits charge the defendants with negligently marketing firearms to unscrupulous dealers with awareness that the guns likely will make their way into the hands of criminals.[2] One such lawsuit, brought by family members of shooting victims, recently resulted in a four-million-dollar verdict against several of the defendant gun manufacturers.[3] Liability was premised upon the manufacturers' failure to carry out their duty to protect the public from the sale of firearms to criminals.

The municipalities' lawsuits have been modeled in part upon the prior lawsuits brought by the states against cigarette companies. Those lawsuits resulted in a collective settlement of $246 billion and an agreement to finance programs and research to discourage smoking and to impose restrictions on tobacco ad-

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1. *See, e.g.*, Albert R. Hunt, *A Discerning Population Isn't Looking to Extremes*, WALL ST. J., June 24, 1999, at A9; Michael Janofsky, *Many G.O.P. Governors Now Pushing for Greater Gun Control*, N.Y. TIMES, Sept. 4, 1999, at A7; Special Report, *Guns in America*, NEWSWEEK, Aug. 23, 1999, at 20.

2. *See infra* notes 132, 137-139, 149-157 and accompanying text.

3. Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 811 (E.D.N.Y. 1999).

vertising and marketing, including banning billboards and the cartoon figure Joe Camel.[4] Those suits sought to recover money paid by state Medicaid programs to victims of smoking-related illnesses. The complaints in these cases charged the defendant manufacturers with misrepresentation and with negligent marketing of cigarettes despite knowledge of their danger.[5] Similarly, the municipalities in the gun suits seek, inter alia, to recover costs incurred in treating gunshot victims and in providing police services.[6]

In both the cigarette and the gun suits, the plaintiffs have emphasized the public interest in addressing the social consequences of private behavior likely to cause harm.[7] Although makers and purveyors of these products do not directly cause the complained-of harm, the suits attribute legal responsibility to them under the theory that defendants aware of the potential—and often likely—consequences of their actions cannot disclaim responsibility for those untoward consequences when they occur. In each case, a third party's conscious decision to smoke or to fire a gun has intervened and directly caused injury; the plaintiffs allege that the foreseeability of that injury should not cut off proximate causation and absolve the defendants of legal responsibility.[8]

Alcohol-related driving injuries and fatalities also raise these issues. Although an individual guest makes her own choice to drink and drive, may social hosts still be liable for resulting accidents when they knowingly serve alcohol to the guest? In most states, Dram Shop acts have answered the question affirmatively with respect to commercial establishments, but ordinarily private social hosts are not liable. However, certain states, beginning with New Jersey in 1984, have imposed liability on private individual hosts who serve liquor to guests and then allow the guests to drive drunk, causing accidents and injury to plaintiffs.[9] These decisions rely on the rationale that the public good is served by imposing liability on those in the best position to prevent harm and by creating incentives to spread responsibility for harm. This rationale applies equally well to the tobacco and firearms cases.

This Review will employ the current firearms lawsuits, the states' tobacco litigation, and a New Jersey Supreme Court decision imposing social host li-

4. *See, e.g.*, Barry Meier & David Johnston, *How Inquiry into Tobacco Lost Its Steam*, N.Y. TIMES, Sept. 26, 1999, at A1 ("In the last two years, the nation's biggest tobacco companies have agreed to pay $246 billion over 25 years to settle lawsuits filed by states . . . ."); Saundra Torry & John Schwartz, *Big Tobacco, State Officials Reach $206 Billion Deal*, WASH. POST, Nov. 14, 1998, at A1; Saundra Torry & John Schwartz, *States Approve $206 Billion Deal with Big Tobacco*, WASH. POST, Nov. 21, 1998, at A1; *Big Tobacco Strikes Deal with States*, WASH. POST, Nov. 15, 1998, at A20. The Justice Department has filed a similar lawsuit. *See* David S. Cloud et al., *Justice Reverses: Lobbying Effort Wins Turnabout on Tobacco Suit*, WALL ST. J., Sept. 24, 1999, at B1.

5. *See, e.g.*, New York v. Philip Morris, 686 N.Y.S.2d 564, 567 (N.Y. Sup. Ct. 1998).

6. *See infra* notes 150-151 and accompanying text.

7. *See infra* notes 122-123, 145-146 and accompanying text.

8. *See infra* notes 114-117 and accompanying text.

9. *See infra* notes 80-82, 99 and accompanying text.

ability in drunk driving cases as case studies of the importance of emphasizing the public interest or common good in legal policy issues that traditionally have been thought to concern individual rights or freedoms. In order to account properly for both collective and individual interests, each must be weighed against the other in rendering policy determinations. This Review adopts the model of balancing employed in Amitai Etzioni's two most recent books, *The New Golden Rule*[10] and *The Limits of Privacy*.[11] Etzioni's treatment of the theme of balancing individual autonomy against the common good, as developed in those works, thus frames this Review.

I. COMMUNITARIANISM AND THE LAW

Etzioni is a prominent leader of the responsive communitarian movement in the United States.[12] The movement seeks social change in the form of a "communitarian corrective" that would pull society back from the extreme individualism that Etzioni alleges currently permeates American culture, while simultaneously respecting individual rights and subgroup autonomy: "Responsive communitarians seek to balance individual rights with social responsibilities, and individuality with community."[13]

Etzioni's major premise is correct, and his balancing scheme can provide powerful insight into the nature, causes, and cures of many of America's current social problems. Other aspects of his theories, however, fail fully to describe the problems or accurately to prescribe appropriate antidotes. Most notably, Etzioni's theory fails to take sufficient account of the constructive role of law in a communitarian polity. In particular, Etzioni's excessive wariness about the coercive aspect of law blinds him to the central role that the law can and should play in resolving issues that are not amenable to resolution by moral dialogue. The case studies of the alcohol, tobacco, and firearms show that the law can be a constructive catalyst, fueling social processes that work with it concurrently to effectuate change. While Etzioni acknowledges that law has an appropriate, albeit minor, role in social change, he assigns it a role subsidiary to that of civil society.[14] He also criticizes the prominent role that courts, law, and law enforcement currently play in American society.[15]

10. AMITAI ETZIONI, THE NEW GOLDEN RULE (1996) (hereinafter NEW GOLDEN RULE); *see also* Timothy L. Fort, *The First Man and the Company Man: The Common Good, Transcendence, and Mediating Institutions*, 36 AM. BUS. L.J. 391 (1999) (book review).

11. AMITAI ETZIONI, THE LIMITS OF PRIVACY (1999) (hereinafter LIMITS OF PRIVACY). *See also* Beverly Woodward, *The Limits of Privacy*, 27 J.L. MED. & ETHICS 194 (1999) (book review).

12. *See* David B. Kopel & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438, 441-45 (1997) (summarizing tenets of the movement).

13. LIMITS OF PRIVACY, *supra* note 11, at 198.

14. *See* NEW GOLDEN RULE, *supra* note 10, at 140-49.

15. *See id.* at 138-40.

Etzioni's premise in *The New Golden Rule*, the earlier of the two works, is that a communitarian society flourishes when the inevitable tension between social responsibility and individual autonomy is maintained in suitable equilibrium. The "New Golden Rule"—"[r]espect and uphold society's moral order as you would have society respect and uphold your autonomy"[16]—is his general formulation of the proper relationship between these two values. As expressed, the rule is a maxim an individual can use as a guideline to appropriate behavior. Because the rule is very broadly phrased, however, further culturally shared principles are needed to guide its application to particular situations, especially when the values of order and autonomy clash. Those values clash most acutely in diverse, pluralistic societies. Etzioni sets forth a number of core values shared by Americans, such as a commitment to democracy and the Constitution,[17] but those values are often too general and abstract to support actual resolutions of contentious issues. Moreover, power disparities between groups exacerbate the negative consequences of unresolved values conflicts. This Review will discuss some of the problems that can arise in such situations and how law can perform the constructive function of defining issues and harmonizing conflicting norms.

In *The Limits of Privacy,* his most recent book, Etzioni continues his attempt to balance the norms of order and autonomy, but in application to specific issues concerning individual privacy rights, such as mandatory HIV testing of infants.[18] Etzioni sets forth four further criteria to guide policymakers and decisionmakers in determining whether common interests in health and safety justify the restriction of individual privacy interests. In the process, he begins to rectify some of the vagueness of the New Golden Rule.[19] These criteria include: (1) limiting privacy only if a "well-documented and macroscopic threat to the common good" exists, corresponding to a clear and present danger;[20] (2) requiring a society to resort first to measures that will not restrict autonomy;[21] (3) making privacy-limiting measures "minimally intrusive";[22] and (4) preferring those measures that account for "undesirable side effects" over those that do not.[23] The four criteria together stand for the proposition that autonomy should be carefully safeguarded and limited as little as possible consistent with the need to protect the public interest. Examined from another per-

16. *Id.* at xviii.

17. *See id.* at 199-210.

18. Other issues addressed include sex offender registration and notification laws, deciphering encrypted messages, I.D. cards and biometric identities, and dissemination of medical records.

19. Etzioni initially sets forth these criteria in *The New Golden Rule*, but his analysis in that work is perfunctory. *See id.* at 52-55.

20. LIMITS OF PRIVACY, *supra* note 11, at 12.

21. *See id.*

22. *Id.* at 13.

23. *See id.*

spective, because autonomy is an important component of the common good, it must be considered when calculating an optimal societal balance. The criteria provide factors to guide the balancing of interests, but they provide no content to the order and autonomy interests that are weighed. Nor do they specify any means of arriving at that balance.

The New Golden Rule is addressed to individuals. A corollary to Etzioni's theory is that, in a democracy, the converse of the Rule should also hold, applied to society: a society should respect and uphold citizens' autonomy as it would have citizens respect and uphold its moral order. From this perspective, the corollary of the Rule obviously cannot literally operate as a moral admonition to guide voluntary behavior because society does not operate as a voluntary moral agent. Rather, the corollary should apply as a general standard to assess legislation, regulations, and judicial decisions to avoid an overweening social order. The four criteria of *The Limits of Privacy* begin to apply this corollary of the New Golden Rule to concrete social issues.

To apply the New Golden Rule on a societal basis, Etzioni urges individuals to engage in broad-scale moral dialogues, which he terms "megalogues," to promote positive social change.[24] He insists that the promise of the Rule can only be achieved on a voluntary basis and that law cannot effectively coerce compliance to promote a communitarian society.[25] *The Limits of Privacy* echoes this assertion. Inevitably, though, any application of values to concrete behavior will implicate both political and legal considerations. Therefore, the Rule should address collective behavior on these dimensions as well, and in doing so, it must address the role of law.

This Review will challenge Etzioni's explanation of the limited role of law and will argue for a broader role for law in promoting effective communitarian change in the United States. Although Etzioni occasionally concedes the useful function of law in accelerating change,[26] more often he criticizes the current American reliance on courts and lawyers to induce change. He has failed to recognize that while societal change occurs primarily on political and social levels, the law can affirmatively assist collective efforts to change public behavior. It can also help imbue individuals with a greater sense of responsibility for others harmed by dangerous but legal products. Its persuasive and even its coercive powers are sometimes necessary to overcome societal inertia or gridlock and to accomplish a suitable communitarian objective. Legal decisions can be more than rearguard actions to concretize existing norms or a weapon in an arsenal of public policy education tools; they can constructively help society reconcile clashing norms and policies and point the way to further avenues of change. The courts can engage in a balancing process that society is

24. *See* NEW GOLDEN RULE, *supra* note 10, at 106.

25. *See id.* at 138-48.

26. *See, e.g., id.* at 107 (discussing the Karen Quinlan case and the Scopes trial).

unwilling or unable to conduct.

Etzioni is overly sanguine about society's ability to arrive at consensus through discussion. Modern societies are composed of a great number of groups with incommensurate interests and values. Because megalogues alone cannot resolve clashes of incommensurate values, legal processes frequently are necessary. In fact, courts are often institutionally better suited to resolve dilemmas and to provide adequate protection for both individual rights and the common good than is the culture at large, through megalogues or otherwise. The legal system serves effectively as a societal decisionmaker in a way that dialogue and consensus simply cannot. Insistence on consensus before change can occur often simply reinforces the status quo, regardless of its morality. Etzioni's approach suffers from a majoritarian bias.

The premises of this Review differ with Etzioni's approach both empirically and theoretically. Empirically, it does not share Etzioni's belief that Americans share sufficient core values. Theoretically, it acknowledges the potential for law to play a more prominent role in resolving moral dilemmas that cannot be adequately harmonized through dialogue alone. The Review concludes that the involvement of American legal institutions can in many instances be quite beneficial to the resolution of moral dilemmas with legal dimensions. The visibility and status of the courts can help not only to educate the public about issues, but also to persuade it to accept resolutions of dilemmas that are otherwise hopelessly deadlocked. Indeed, courts themselves can engage in a version of the "megalogues" that Etzioni urges to produce constructive change. By identifying and weighing the personal autonomy and common good values underlying opposed legal positions, the courts can engage in a dialectical process that encourages productive resolutions of policy dilemmas.

II. ORDER, AUTONOMY, COMMUNITY, AND PLURALISM

Etzioni's work focuses on and details many of this country's current problems stemming from our culture's overemphasis on individualism and concomitant lack of a vocabulary to discuss community. Framing the problem with issues of order, autonomy, and community is a fitting way to begin devising a discourse of American collective life. Etzioni's diagnosis in *The New Golden Rule* is largely accurate but incomplete, failing to account fully for the problems arising from a pluralistic diversity of values and the necessarily coercive role of law in resolving intractable values conflicts. The further elaboration of these themes in *The Limits of Privacy*, while helpful, does not solve the basic problem. Although Etzioni's four criteria give some indication of the relative values to be accorded to order and (at least certain) autonomy interests, they cannot fully resolve fundamental substantive conflicts. Nor do they specify further means of achieving a suitable balance.

A. The Social Order, the Public Good, and Their Relationship to Autonomy

Although many Americans are instinctively repelled by the notion of a social order that can trump individual preference, and therefore may recoil at Etzioni's prioritization of social order in a communitarian democracy, order need not be oppressive. Order can merely refer to the collective determination of appropriate moral conduct and the preservation of public health and safety.[27] The same concept can be rephrased as "the public interest." A decent community must, of course, promote the well-being of its individual members. A primary method for a society to do so is to establish standards of appropriate behavior. In a constitutional democracy, citizens may participate to define its content, both politically and morally, with constraints produced by recognition of individual rights, a commitment to constitutionalism, adherence to fair procedures, and a fundamental respect for others' subcultural values.[28] Consequently, a social order may exist that adequately recognizes and protects individual rights, particularly the rights of less powerful members of society. Therefore, as Etzioni repeatedly emphasizes, protecting the social order need not threaten individual rights that are necessary to encourage an optimal degree of individual autonomy.[29]

Further, the need for order may be reconceptualized not as the need of an abstract, coercive entity—society—over and against the individual, but rather as reflecting the individual's need for community (mutuality, connectedness, and participation in a joint enterprise). So conceived, "order" gives appropriate weight to social needs and recognition to the socially constructed aspects of human identity, the ways in which our identities are determined by our relationships.[30] "Order" is an abstraction of some of those needs. From this perspective, order is necessary to sustain individual flourishing and is also essential to the public interest.

It is helpful to view the issue not only from the perspective of the individual, but also from a collective vantage point. That is, individuals are inevitably part of many communities—national, ethnic, religious, and the like. Any complete picture of human life must capture the individual embedded within those larger structures, since no one can live in complete isolation. Thus recast, the issue becomes not whether we as individuals desire communal life, or whether

27. *See* LIMITS OF PRIVACY, *supra* note 11, at 4.

28. *See* NEW GOLDEN RULE, *supra* note 10, at 199-210. Many of our core values are both moral and political. The two interpenetrate on many levels.

29. *See id. passim.*

30. *See id.* at 25-26 (quoting CHARLES TAYLOR, SOURCES OF THE SELF 500-01 (1989), and MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 179 (1982)). Etzioni draws not only on political theory, but on developmental psychology as well, referring to studies demonstrating the effects of isolation on people. *See generally* URIE BROFENBRENNER, THE ECOLOGY OF HUMAN DEVELOPMENT (1979); ERIK H. ERIKSON, CHILDHOOD AND SOCIETY (1963); JEAN PIAGET, THE CHILD'S CONCEPTION OF THE WORLD (1929).

we think it is good, but what sort of community or communities we want. How can communities best ensure that they promote human flourishing and well-being? The individual is no more fundamental or primary than the communities in which she is embedded. Etzioni appropriately emphasizes the need to balance autonomy with concern for order.

A viable community entails reciprocity and mutually respectful interactions between individuals and those institutions that embody the relevant moral order. These relationships promote the flourishing and well-being of individual members. Individuals flourish when they are able to exercise autonomy, or the positive liberty that enables self-development.[31] Etzioni's formulation of the optimal societal balance recognizes this need for autonomy.[32] Much of that individual development occurs only in relationship to others. In turn, the well-being of individuals, premised in part on the exercise of their autonomy, promotes the flourishing of the society as a whole.[33]

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31. *See* Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 131 (1969). Berlin's distinction between positive and negative liberty assists in understanding the relationship between autonomy and order as formulated by Etzioni. Berlin defines negative liberty as that which prohibits interference by others with one's actions. *See id.* at 122. Positive liberty, on the other hand, is the power that promotes self-development and self-realization. *See id.* at 131. A proper balance of autonomy and order would allow citizens the negative liberty to pursue their own inclinations up to the point of harming others by interfering with both their negative and positive liberty. (Of course, positive liberty includes much more than a noninterference guarantee.) To deter and punish such unacceptable conduct, the social order must ensure sanctions against those who harm others.

32. *See* LIMITS OF PRIVACY, *supra* note 11, at 10; NEW GOLDEN RULE, *supra* note 10, at 23-28. In its balancing of order and autonomy, Etzioni's general formulation of the New Golden Rule and his application of the principles in *The Limits of Privacy* are generally harmonious with John Stuart Mill's approach as set forth in his classic essay *On Liberty*. *See* John Stuart Mill, *On Liberty*, *in* J.S. MILL ON LIBERTY IN FOCUS (John Gray & G.W. Smith, eds., 1991). Although Mill is generally thought of as a libertarian, his utilitarianism balances liberty with responsibility to promote the "permanent interests of man as a progressive being." *Id.* at 31. At least insofar as an obligation to prevent harm is concerned, Mill's and Etzioni's views accord. One is free to determine one's own actions only insofar as they do not harm others, Mill argues, because "[a]ll that makes existence valuable to any one, depends on the enforcement of restraints upon the action of other people. Some rules of conduct, therefore, must be imposed, by law . . . ." *Id.* at 26. Mill further articulates this harm principle as follows:

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.

Id. at 30. Accordingly, one may not directly cause harm to another. Mill further interprets the principle to justify an obligation requiring "joint work necessary to the interest of the society of which he enjoys the protection." *Id.* at 32. One may even be compelled "to perform certain acts of individual beneficence, such as saving a fellow creature's life, or interposing to protect the defenceless against ill-usage . . . ." *Id.* The latter may be required because "[a] person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury." *Id.*

In sum, Mill argues that others' well-being and interests must be protected in order that they may fully exercise their own autonomy: "The means of development which the individual loses by being prevented from gratifying his inclinations to the injury of others, are chiefly obtained at the expense of the development of other people." *Id.* at 79. The articulation and enforcement of these obligations is a major function of the social order. The social order may not, however, interfere with one's private actions that cause no harm to others. Like Etzioni, Mill does not treat individual autonomy as primary. He recognizes a duty to rescue because the relevant moral perspective is the individual within society.

33. *See generally* ALBERT BANDURA, SOCIAL LEARNING THEORY (1977); ROBERT SEARS, ET AL., IDENTIFICATION AND CHILD REARING (1965).

Etzioni refers to this reciprocal relationship as "inverting symbiosis."[34] Both autonomy and order enhance each other to a degree. Optimally, they interact symbiotically to promote the overall social good. Etzioni's point in *The New Golden Rule* is that this constructive balance has been broken in recent years by an overemphasis on individualism, so that a "communitarian corrective" is now needed. As Etzioni points out, American collective life has suffered in recent decades, probably because of the preeminence of libertarian notions of maximum individual autonomy and the centrality of the market in economic and political life.[35] When social and cultural bonds are weakened, individuals' willingness to assume duties to others tends to weaken as well. One consequence is increasing anomie and alienation from others.

A superficially counterintuitive result of this alienation is a net reduction of individual liberty. To the extent that social and cultural bonds forge individual identity and promote well-being and self-realization, the lack of collective bonds will diminish the autonomy they nurture. That is, liberty and autonomy suffer when individuals avoid taking responsibility sufficient to maintain the social order.[36] The disintegration of community thus reduces the quality of life. History demonstrates, however, that social order easily can become dominant and oppressive as well; hence the need for a balance that fits current circumstances and that respects autonomy.

Following these principles, the opposition between autonomy and order is not as dualistic as initially posed. As Etzioni recognizes, the relationship between the two is much more complex, mediated by cultural norms that are produced in significant part by intermediate institutions such as families, neighborhoods, ethnic and religious affiliations, workplaces, and the institution of law.[37] Any achievable balance between order and autonomy is dependent upon and must be worked out initially in intermediate communities between individual members. Thus, as Etzioni emphasizes, that balance is easiest to maintain when individuals voluntarily assume responsibilities that help ensure social cohesion or, in other words, when "autonomy [is] fully respectful of order."[38] According to this model, megalogues provide the optimal process for resolving clashes of values.

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34. NEW GOLDEN RULE, *supra* note 10, at 36.

35. *See id.* at xv.

36. For instance, in a highly publicized incident occurring a couple of years ago, a student refused to intervene to prevent his college student friend from killing a seven-year-old girl in a Las Vegas restroom and failed to report the crime afterwards. *See* Don Terry, *Mother Rages Against Indifference,* N.Y. TIMES, Aug. 24, 1998, at A10.

37. Lately, legal scholars have begun to realize the importance of norms in understanding how law works in society. *See generally* Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947 (1997); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Cass R. Sunstein, *Social Norms and Social Roles,* 96 COLUM. L. REV. 903 (1996).

38. NEW GOLDEN RULE, *supra* note 10, at 18.

B. *The Balancing Process: Achieving the Symbiosis of Order and Autonomy*

In *The New Golden Rule*, Etzioni does not specify precisely how a society should conduct the megalogues that theoretically yield an appropriate balance of order and autonomy. Rather, he attempts to capture the essence of these large-scale moral dialogues by examining certain salient features. Their central defining feature may be the good faith attempt of participants to search for, listen to, and heed the "moral voice" that encourages adherence to deeply held values.[39] Moral dialogues, as distinguished from rational deliberations, rely on an appeal to overarching shared values to reach agreement on more discrete normative issues.[40]

Etzioni similarly does not endorse defined procedures for megalogues, but instead sketches out certain desirable general rules. These include not demonizing other participants and not affronting the "deepest moral commitments of the other groups."[41] Further rules include emphasizing needs and interests rather than rights and leaving certain irresolvable issues out of the dialogue.[42] These moral dialogues become megalogues when they are expanded to ever-larger concentric circles of communities. Megalogues can take place on a national, or even international, level.[43]

The megalogue notion apparently is partially inspired by Martin Buber's conception of the I-Thou relationship.[44] True dialogue can enlighten participants, allowing them to reach a joint result transcending the original insights of participating individuals. Presumably, the megalogue process encourages mutual accommodations according with shared values. In a process like osmosis, harm and benefit flow through and between individuals in the social matrix.

While *The New Golden Rule* provides a number of examples indicating a substantive balance of order and autonomy that Etzioni considers appropriate in certain situations, it does not elaborate standards to judge the appropriateness of a particular balance. *The Limits of Privacy* is more successful than *The New Golden Rule* in reaching concrete solutions to particular problems. Etzioni applies his principles to issues ranging from mandatory HIV testing of infants to deciphering encrypted messages. But once again, while the principles supply general guidance, they do not substantially assist in assigning agreed-upon ascertainable values to the various interests involved.

For example, Etzioni analyzes the issue of mandatory infant HIV testing

39. *See id.* at 120-26.

40. *See id.* at 85-104.

41. *Id.* at 104.

42. *See id.* at 105.

43. *See id.* at 106-10.

44. *See* Edward W. Lehman, *From Compliance to Community in the Works of Amitai Etzioni*, 9 THE RESPONSIVE COMMUNITY 38, 43 (1999); William R. Lund, *Taking Autonomy Seriously: Some Liberal Doubts About* The New Golden Rule, 9 THE RESPONSIVE COMMUNITY 10, 19 (1999).

using his four factors: limiting privacy only in the face of great danger; resorting first to measures that do not restrict autonomy; using only minimally intrusive measures; and treating undesirable side effects.[45] He concludes with respect to the first factor that while privacy is compromised, in that the infant's HIV status will reveal the mother's, the danger of not making tests mandatory is quite substantial, given the risk of undetected infection. Factor two requires consideration of alternatives such as voluntary testing of pregnant women. Etzioni reasons that the safeguard of infant testing is required in addition to voluntary testing to assure that no HIV-positive cases are missed.[46] This measure, as the only conclusive test, is therefore the least intrusive. Finally, Etzioni proposes safeguards such as the use of PIN numbers and audits to minimize the dangers of unwarranted access to a particular mother's and child's HIV status.[47] Etzioni thus concludes that the optimal balance of privacy (autonomy) and the public good (social order) lies in imposing a program of mandatory infant testing.

Concrete illustrations of this nature, which apply the balancing factors to actual public policy issues, help flesh out Etzioni's notion of the proper substantive balance, but many issues remain. For instance, Etzioni does not link the megalogue notion of *The New Golden Rule* to the particular balances he endorses in *The Limits of Privacy*, leaving the reader to wonder whether an actual megalogue on one of these issues might lead to a less desirable balance or to no balance at all. In addition, who is to judge when a particular result renders a correct balance? Who is to ensure that accurate empirical information is obtained and that the appropriate process is followed in a genuine moral debate on a particular issue? Indeed, there is no assurance whatsoever that a result better, or even different, than the status quo will obtain.

C. Critique of Etzioni's View

Notwithstanding the obvious appeal of the voluntary consensus model, it is not a workable solution to the problems of pluralism. First, this model of voluntariness necessarily assumes that basic needs of members are met. People lacking necessities or struggling to maintain a minimally acceptable standard of living generally cannot afford the luxury of looking beyond their immediate survival. It also assumes that basic agreement on a set of core social values can be attained. Without a common reference point, no arbiter of disputes exists to harmonize or mediate disagreements. When they exist, core values can operate as a meta-standard, providing an agreed-upon substantive and procedural frame of reference that can be applied to more discrete dilemmas on a lower order of

45. *See* LIMITS OF PRIVACY, *supra* note 11, at 17-42.
46. *See id.* at 24-40.
47. *See id.* at 41-42.

specificity. According to Etzioni, Americans do share a number of basic values, such as a substantive belief in democracy[48] and a commitment to the Constitution, including its protection of rights and its structuring of decisionmaking power.[49] The question remains, however, whether these values are in themselves sufficiently thick to promote mediation of moral conflict.

Absent both of these conditions—that basic needs are met and that sufficient shared values exist—fruitful moral dialogues are unlikely to occur on more than a small scale. The more pluralistic the society, the larger the area of disagreement on values and, thus, the greater the tension between values. Indeed, after a certain point, disparate values become incommensurable. Lacking significant common ground, participants have difficulty sustaining meaningful conversations that reach accord, whether they converse as individuals or as members of intermediate communities. In the United States in particular, tension between important values tends to be expressed in the polarity between autonomy and social responsibility for the common good. Although there are disagreements about the definition or scope of autonomy rights and social responsibilities, the major fault line lies between individual freedom and obligations to others or to society.[50] Even if there were general adherence to the principle that personal freedom cannot extend to the point of harming others, endless moral, political, and empirical disagreements would erupt concerning the nature and definition of the harm that one may not cause others.[51]

Gun control provides a good example. Many Americans believe that guns should be much more heavily regulated than is currently the case because of the immense harm they can cause both to individuals and to society. Others believe, equally strongly, that impinging on the individual right to bear arms causes immense harm. A shared commitment to democracy, fair procedures, and constitutionalism has not sufficed, and probably cannot suffice, to resolve the standoff. Etzioni elides this issue when he concludes that, because most Americans favor gun control, legislation should be enacted.[52] He fails to ac-

48. *See* NEW GOLDEN RULE, *supra* note 10, at 199-200.

49. *See id.* at 200-02.

50. *See, e.g.*, Edward Rothstein, *Dethroning Freedom as a Nation Builder*, N.Y. TIMES, Jan. 1, 2000, at F1 (reviewing unpublished dissertation of James E. Block). Rothstein summarizes Block's view as follows:

> American history has always involved a tension between individual freedom and collective demands. From the start, untethered liberty was seen as a danger; it was indulgent and potentially disruptive. But servitude to an unquestioned authority was just as troubling. So iconoclasm and conformity continually clash. The compromise is a notion of agency where freedom freely serves a common cause.

Id. at F1.

51. *See* Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778, 796 (2000) (reviewing STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999)) ("In today's more diverse society, no single, simple definition of the common good is attainable.").

52. *See* NEW GOLDEN RULE, *supra* note 10, at 146.

count for the significant number of citizens who are adamantly opposed to attempts to regulate firearms. It is this strong difference of opinion that frequently makes court intervention helpful. Merely having a majority in favor of a certain aim does not ensure the normative support that Etzioni believes necessary to justify legislative measures. If the opposition, such as the National Rifle Association, is well-funded and organized, it can stall legislation indefinitely and foment continued normative opposition on many fronts. Etzioni's apparent faith that Americans share sufficient values to adopt largely unitary positions, and that this majority sentiment will prevail legally, is unfounded. Recent American history does not support such faith.

Problems arise when applying Etzioni's framework to particular, intractable historical situations. On a descriptive or empirical level, participants may define differently the nature of the particular dilemma, its origins, consequences, and cures. On a normative level, participants often differ in their hierarchy of relevant values and principles, notwithstanding agreement on a few core values. Thus, members of society may well disagree on what compromises are necessary to achieve an appropriate balance. In such cases, the New Golden Rule is unhelpful.

The New Golden Rule may assume, or even require, more social homogeneity than currently exists. As applied to small-scale, discrete problems, it may work as an ideal model to guide voluntary compliance with its principle, but it is unlikely to effectuate large-scale compliance. The four criteria enumerated in *The Limits of Privacy* for limiting encroachments on autonomy provide scant assistance because the relevant values must still be precisely identified, prioritized, and weighed against each other. Each step in the process requires sufficient agreement to reach an ultimate shared conclusion. Given the subjectivity of the values involved, a shared conclusion is unlikely to be reached by any but a small, homogeneous group.

Affirmative action, for instance, and race relations in general, seem to pose irresolvable conflicts. Abortion provides another example. More shared substantive values, or at least more shared perceptions of the world, seem necessary to reach agreed-upon resolutions. Although Etzioni correctly disputes those individualists who believe that agreed-upon procedures and the application of reason alone can resolve serious substantive disputes,[53] his suggested alternative suffers from similar defects. For instance, general agreement that municipalities should democratically decide zoning questions does not mean that residents will accept a group home for developmentally disabled adolescents in a residential neighborhood.

Given these overwhelming difficulties, the question presented here is whether the tension between autonomy and social responsibility realistically

53. *See id.* at 97-101.

can be reduced or held in a more constructive balance in this society at this time by following the New Golden Rule, with the assistance of the four limiting principles of *The Limits of Privacy*. One should not conclude, however, that the Rule is nothing but an aspirational ideal; rather, its promise is achievable only on a modest scale. As Etzioni correctly points out, the determination of appropriate balance is never final because of the complexity of the issues and the diversity of values involved. The tension must instead be resolved in a given situation, through a highly contextualized process; thus, the balance will vary depending on the individual situation.

In fact, however, a national balance on virtually any truly contentious issue is probably impossible to achieve, given the diversity and often incommensurability of people's values and interests. One must focus instead on specific issues and smaller dilemmas to find feasible resolutions, using a pragmatic contextualism. Any answer will be provisional, highly dependent on the nature of a particular dilemma and the values conflict fueling it. An answer appropriate this year may not be appropriate five years hence, or a solution may work only on a regional or local level. Thus, while the tensions probably can be reduced to some extent, moral suasion is unlikely to lead to a fundamental or final resolution of the basic tension between the values of order and autonomy as applied to polarized issues. We can only grope towards tentative solutions to narrowly framed problems.

III. THE ROLE OF LAW IN PROMOTING A PROPER BALANCE OF VALUES

What, then, is the role of law in defining and resolving the tension between individual and community interests when moral dialogue alone does not suffice? Can legal measures and discourse actually further the communitarian objective of achieving a livable equilibrium between the values of individual freedom and the common good? Is the legal system too inherently coercive to contribute to the voluntary acquiescence of individuals to the social order or to bring about effective social change that honors individual autonomy?

Etzioni's articulation of the limited role of law in a communitarian society assumes the primacy of preexisting moral commitments in bringing about effective social change or resolving particular dilemmas. It also implicitly assumes stable moral institutions in which dialogues can occur, since dialogues require a forum and rules of engagement. Etzioni argues that law should not attempt to coerce commitment to a certain policy objective or course of action that holds insufficient social support.[54] He contends that law hinders positive social development if it coerces individuals to act for the public good in a manner that exceeds widely held normative commitments:

[L]aw in a good society is first and foremost the continuation of moral-

54. *See id.* at 139-40, 143-48.

> ity by other means. The law may sometimes lead to societal change to some extent, but if the moral culture . . . does not closely follow, the social order will not be voluntarily heeded and the society will be pushed . . . ultimately, beyond its limits of tolerance, transforming into an authoritarian society.[55]

He would agree that the law can advance communitarian goals if it reflects the moral underpinnings of society, and if it "further express[es], articulate[s], and help[s] enforce moral commitments, when those are in place."[56] Etzioni further refers to "[t]he need to lead, accompany, and follow legislation with moral underpinning" as the "values primacy sociological law."[57] In this limited role, law can serve the function of reducing the tension between autonomy and the common good by applying and enforcing existing moral resolutions of dilemmas to real-world situations. That is, law serves a social good when it reinforces existing norms of the culture.[58]

At times, Etzioni's analysis of legal changes that precede changes in a majority's normative commitments seems to conflate the roles of legislatures, courts, and police, blurring relevant distinctions among them.[59] This conflation occasionally confuses his analysis, leading to the apparent conclusion that brute force underlies all law not reflecting a majority's strongly held values.[60] A more nuanced analysis would distinguish situations in which law enforcement must continually compel compliance, such as that presented by Prohibition, from situations in which the law operates primarily persuasively, backed up by its enforcement power. Employment discrimination laws provide a good example of the latter category. Enactment of Title VII of the 1964 Civil Rights Act preceded widespread cultural opposition to many illegal forms of race and sex discrimination in the workplace. Nonetheless, the law has been effective in producing normative commitments that disapprove of such discrimination. While many cultural forces have worked together to produce this change, it seems intuitively evident that the law has played a prominent role.

Thus, while legal change admittedly cannot produce effective social change when it significantly contravenes a majority's strongly held values, the law should not for that reason be limited to a supporting role. In many ways, legal institutions are better suited than the culture at large to resolve disputes based on underlying moral dilemmas. Megalogues cannot guarantee closure because the rules of engagement are not explicit, nor can any external authority ensure that either rules or outcomes are observed. Moral dialogue can continue indefi-

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55. *Id.* at 143 (emphasis omitted).

56. *Id.* at 145.

57. *Id.*

58. *See id.* ("As I see it, the main issue is not whether we legislate morality, but the distance between the values we affirm as an inclusive community and those expressed in law.").

59. *See id.* at 138-39, 143, 146-48.

60. *See, e.g., id.* at 140, 143.

nitely with no assurance that any dialectical opposition will ever reach a synthesis. Law, by contrast, can serve effectively as a cultural decisionmaker. The legal system provides a forum for dispute resolution with relatively ascertainable rules, a relative degree of finality of outcomes, and a means of enforcing its decisions. By identifying and harmonizing opposed values in a forum this society normally recognizes as legitimate to resolve disputes, legal decisions can validate the particular resolution achieved. That validation in turn performs symbolic functions beyond the expressive. The American constitutional system, with its protection of minority rights, also can often preserve rights of personal freedom from an oppressive majority.[61] Procedural rights can help ensure that those substantive rights are vindicated and enforced. The civil rights movement recognized this fact early and was thus able to use the courts effectively both to protect the rights of movement activists and to advance the cause of civil rights for blacks more generally.[62]

The power of law to influence norms is magnified in American society because our culture is so highly legalized. Our current cultural discourse contains many categories and values adapted from legal discourse. Indeed, this has been a notable feature of American culture at least since the time of Tocqueville, who observed:

> Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate; hence all parties are obliged to borrow the ideas, and even the language usual in judicial proceedings, in their daily controversies. . . . The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law . . . gradually penetrates . . . into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and the tastes of the judicial magistrate.[63]

Legal discourse is itself reciprocally affected by cultural norms and discourse. It tends to crystallize and reflect larger social issues and tensions between conflicting norms. When legal discourse mixes with general discourse, legal categories and outcomes become part of public moral dialogue insofar as they filter back into the general culture.[64] Pervasive media coverage of prominent trials and hearings and passage of new and controversial legislation enhance this effect. Because of this interdependent relationship, American legal processes are even more likely to contain and reflect cultural paradoxes and incongruities

61. *See generally* Anderson v. Celebrezze, 460 U.S. 780, 793 n.16 (1983); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

62. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 148-65 (1991); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practices in Post-Civil Rights America*, 95 MICH. L. REV. 821, 844-45 (1997); *see generally* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW (3d ed., 1992); RICHARD KLUGER, SIMPLE JUSTICE (1975).

63. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Phillips Bradley, ed., 1945).

64. *See* Michael Sandel, *Moral Argument and Liberal Toleration*, *in* NEW COMMUNITARIAN THINKING 87 (Amitai Etzioni ed., 1995); Charles Taylor, *Liberal Politics and the Public Sphere*, *in id.* at 212.

than legal processes in general. The heightened status of American law increases the likelihood of resolving these tensions in part because the receive public attention and provide categories and procedural mechanisms to decide disputes. American legal decisions can therefore alter public discourse and influence normative development. While Etzioni likely would agree generally with this assertion, he would not conclude that legal changes should play an active role in efforts to effect cultural change.

The coercive aspect of law can also augment its persuasiveness by adding the imprimatur of the state to legal mandates. Etzioni acknowledges that individuals' moral assessments of events can be influenced by knowledge of the law's mandates.[65] Particularly when disseminated by the media, legal decisions can educate the public. In the current cultural climate of uncertainty about the reconciliation of competing values, this educational function may be especially valuable.[66] Thus, American law effects social change by infiltrating cultural discourse and by conferring the heightened status of judicial decisions on an outcome. The law cannot by itself accomplish massive cultural or social change, but it can act to prime the cultural pump and act in tandem with other cultural forces to further incremental change. Its role is consequently integral, rather than merely auxiliary, to cultural discourse.

For example, the early sexual harassment litigation in the 1980s paved the way for current sensitivity to the issue. Once courts recognized sexual harassment as legally actionable, decisions in favor of victims came down.[67] Gradually, the culture began to acknowledge the reality of sexual harassment, the culpability of its perpetrators, and the right of its targets to a remedy. Similar arguments can be made about domestic violence and the self-defense rights of battered women.[68] In both these instances, the courts' realization that law must recognize and redress the injuries suffered by victims of harassment and violence led the way to greater public awareness and political action. Consequently, the general culture, legislatures, and courts provide redress for these injuries that would have been unthinkable several decades ago. Individual

65. *See* NEW GOLDEN RULE, *supra* note 10, at 145.

66. At other times, when insufficient normative support exists, coercion undermines constructive resolution of disputes by instilling resentment, a point Etzioni relies on to urge an ancillary role for law. *See id.* at 148.

67. Catharine MacKinnon made an early and persuasive case for the viability of sexual harassment claims under Title VII. *See* CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979). Before that time, only a few courts had found sexual harassment actionable. *See, e.g.*, Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976). In 1980, the EEOC issued guidelines specifying that sexual harassment is a form of sex discrimination prohibited by Title VII, and the Supreme Court ruled in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), that hostile environment sexual harassment claims are actionable under Title VII. Since that time, of course, the culture has widely accepted that sexual harassment is wrong and should be prohibited.

68. *See* KATHARINE T. BARTLETT, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 525-40 (1993).

Americans also recognize injuries that previously were invisible, thus altering the balance between order and autonomy.

In short, law can perform educational and symbolic functions, playing a formative and causal role in the reform and evolution of social norms and moral commitments. Etzioni thus unreasonably requires the law to be in lockstep with cultural change.[69] By overemphasizing voluntary moral dialogue and underemphasizing legal change, Etzioni gives short shrift to an important, demonstrable role for the American legal system.

What, then, are the roles of law and morality in reconciling order and autonomy when opposed moral norms clash in application to a particular situation? Both values of social order or community and those of autonomy are often in place in our pluralistic society. Their general formulations may not conflict, but a collision may occur in application to a particular dilemma, such as gun control or school desegregation. How does law play a constructive, reconciling role of mediating norms in such situations, when the culture has not yet achieved a conciliation?

The arguments contained in this Review lead to the conclusion that legal decisions help to harmonize and prioritize values in a fashion that has cultural currency and influence. Once a court decides a novel legal issue that also has a corresponding moral dimension, and the media disseminate the result, the public can begin to debate and consider the court's solution, incorporating it into general cultural discourse. The legal framing of the relevant issues gives them a salience and focus they might not otherwise have. Issues that are joined are then potentially more susceptible of resolution, even if powerful groups within the culture hold diametrically opposed values. And if the public vehemently disagrees with the outcome, the decision can foment further political, social, or legal action that could render a different result. In the absence of a judicial resolution, and sometimes even in the face of a court's decision, power disparities that overlook the rights of the less powerful are more likely to determine an outcome, with the most powerful groups prevailing.[70] Thus, any theory addressing the appropriate balance between order and autonomy in the United States must take account of the affirmative and supplemental role law can play in its development.

IV. THREE CASE STUDIES: THE COURTS' ROLE IN BALANCING AUTONOMY AND THE COMMON GOOD

This section presents case studies applying my thesis to three controversial issues that have overlapping moral, political, and legal dimensions: alcohol and the responsibility of social hosts for guests' drunk driving accidents; the re-

69. *See* NEW GOLDEN RULE, *supra* note 10, at 146.

70. *See generally* BELL, *supra* note 62; *see also* Yamamoto, *supra* note 62, at 846-47.

sponsibility of tobacco companies for damages caused by smoking-related illnesses; and the responsibility of the firearms industry for the foreseeable injuries that criminals cause when using guns illegally. Etzioni's methodology is used to examine the opposed autonomy and public-good strands of justification in each case. The applications illustrate the cogency of Etzioni's theory and its efficacy in revealing the fault lines of fundamental social dilemmas.

Next, the alcohol, tobacco, and firearms examples are used to demonstrate that law can play an active and sometimes even a leading role in effectuating social change. By framing and defining the opposed individual and collective interests in a controversial normative debate, the legal process can overcome cultural inertia and jumpstart a process culminating in productive communitarian change. It has done so in all three of the case studies. The legal process can thus instigate change without necessarily following the lead of civil society. For significant, permanent change to occur, the culture must adopt the changes, as Etzioni observes. But he relegates the law to a lesser role than it can effectively take.

The relevant legal questions in each case study coalesce around the central issue of assigning responsibility to individuals or entities that did not directly and immediately cause the harm asserted. When drunk drivers directly cause accidents, smokers contribute to their own illnesses, and criminals fire guns illegally, should these intervening causes break the chain of liability? Identifying the embedded autonomy and common good interests can reveal many of the underlying concerns that should drive policy and legal analysis. Imposing liability on those who are not the immediate cause of the harm could diminish overall personal autonomy; to the extent that our society shifts responsibility from individuals to external, attenuated causes, it could proportionally diminish the individual liberty that accompanies personal responsibility.[71] More generally, imposition of liability on manufacturers, distributors, or dealers can discourage production and drive up the cost of consumer goods, arguably further diminishing individual economic freedom.

Notwithstanding the possibility of some diminution of personal freedom, greater public interests require a broader weighing of the costs and benefits of imposing liability in these instances. Because an individual's ostensibly private choice to serve alcohol to guests who drink and drive, to sell cigarettes, or to make and sell guns tends to have foreseeable social ramifications, those consequences should not be disregarded when deciding these fundamental public policy questions. The public and society as a whole frequently end up bearing the burden of the consequences of these dangerous activities.

The public interest in preserving health and safety is extremely strong. The

71. Thus, smokers should bear their own costs, and drunk drivers cannot blame social hosts for their own drunk driving.

pain and suffering involved are immense. Moreover, individual smokers and their families frequently are unable to reimburse the government's costs of providing medical care or lost tax revenues. Even more starkly, criminals are likely to be judgment-proof, especially after conviction, and therefore it is highly unlikely many criminals could reimburse a municipality for its costs related to criminal misuse of firearms. A cost/benefit calculation that counts costs beyond the circle of immediate players reveals the inadequacy of a narrow calculation. Accounting for the broader ripple effects brings a larger perspective to bear on the legitimacy of making purveyors liable. Of course, individual autonomy, protected by legal rights, must also be preserved. But its preservation cannot be at the expense of the social good.

The case studies elaborated below illustrate how courts and litigators have employed some of these public policy concerns to adjust traditional standards of causation. Historically, Anglo-American tort law has refused to hold makers and suppliers of products such as alcohol, tobacco, and firearms liable for harms that were caused directly by an individual's decision to use the product.[72] A strong countervailing policy interest in providing incentives to makers and suppliers to monitor the sale and use of their products, however, can prompt courts to reach contrary results.

A. Alcohol and Social Host Liability: Kelly v. Gwinnell

This section examines a major judicial decision imposing a duty to rescue or protect potential victims of another's actions, focusing specifically on a social host's liability for allowing a drunken guest to drive when the guest then causes an accident injuring a third party. The relevant legal issue is whether the host, after serving liquor to the guest, has a duty to protect the public from the drunk driver by refusing to allow the guest to drive. I argue that this decision is a good representative example of constructive judicial decisionmaking that can assist the process of beneficial communitarian social change.

Generally speaking, there is no American common law or constitutional duty to rescue or protect another.[73] The narrow band of exceptions includes situations in which one has legally caused the harm, or in which one has a specified, individual relationship with the victim or perpetrator that invokes a duty of care.[74] Our law generally has embodied highly individualistic presuppositions regarding a potential rescuer's complete liberty to decide whether or not to aid another, even when the victim is faced with imminent death.[75] Some

72. *See* RESTATEMENT (SECOND) OF TORTS §§ 440, 441 (1965).

73. *See* RESTATEMENT (SECOND) OF TORTS § 314 (1965 and 1977) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.").

74. *See id.* §§ 315 (a)-(b), 321-23.

75. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 375 (5th

of the reported cases present horrendous crimes or accidents causing acute suffering, but hold that even defendants who easily could have rescued a victim had no legal duty to do so, despite knowledge of the harmful event and the ability to prevent it.[76]

But because of the tension between individual rights and the common good of requiring at least easy rescue efforts, a few courts have reached further in creating exceptions, basing them not on "special" relationships or creation of danger, but rather on a victim's detrimental reliance on the defendant's actions,[77] a defendant's commission of the slightest affirmative act that exacerbated an existing harm,[78] and even mere foreseeability by the defendant.[79] Social host liability for those providing alcohol to guests who drive falls into the latter two categories.

Some of the judicial opinions imposing a new or broader duty in these circumstances struggle mightily with the tension between allowing individual defendants the liberty to decide whether or not to protect a victim and the obvious common good in promoting at least easy rescue efforts. In many cases, the precedents are sufficiently indeterminate to call forth the underlying policy questions and to foreclose easy decision. The wiser of the decisions provide guidance to possible reconciliations of diametrically opposed values in our culture.

For instance, in *Kelly v. Gwinnell*[80] the New Jersey Supreme Court became the first to impose liability judicially on a social host "who serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle[. The host] is liable for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the adult guest when such negligence is caused by the intoxication." [81]

No statute or common law principle imposed this duty. Rather, the Court considered the foreseeability of the drunken guest causing an accident and concluded that New Jersey public policy favored creation of a duty of reasonable care in these cases.[82] Weighing the "fairness" of imposing this new duty involved consideration of "the relationship of the parties, the nature of the risk, and the public interest in the proposed solution."[83] The Court balanced the con-

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ed. 1984) (concluding that "the law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger[.]").

76. *See, e.g.*, Yania v. Bigan, 155 A.2d 343 (Pa. 1959); Handiboe v. McCarthy, 151 S.E.2d 905 (Ga. App. 1966).

77. *See, e.g.*, Marsalis v. La Salle, 94 So. 2d 120 (La. App. 1957).

78. *See, e.g.*, Parvi v. City of Kingston 362 N.E.2d 960 (N.Y. 1977).

79. *See, e.g.*, Farwell v. Keaton, 240 N.W.2d 217 (Mich. 1976).

80. 476 A.2d 1219 (N.J. 1984).

81. *Id.* at 1224.

82. *See id.* at 1222.

83. *Id.* (quoting Goldberg v. Hous. Auth. of Newark, 186 A.2d 291, 293 (N.J. 1962)).

flicting interests involved to determine the outcome.[84] Chief Justice Wilentz declared that the balance of interests favored imposition of liability on the social host. First, the social goal of reducing drunk driving was an extremely weighty one, in light of the undisputed evidence of the causal role alcohol played in highway fatalities.[85] Second, that goal, being "practically unanimously accepted by society[,]" was strong enough to constitute a social norm.[86]

Opposing considerations included "the belief . . . that when people get together for a friendly drink or more, the social relationships should not be intruded upon by possibilities of litigation[,]"[87] as well as the notion that drunk driving is the fault of the driver, not the host.[88] Despite the social hosts' interests in protecting the privacy of their home and personal relationships, and despite the corresponding notion of guests' own responsibility for their condition and actions, the court held that the balance favored imposition of a duty of reasonable care:

> The policy considerations served by [the] imposition [of the duty] far outweigh those asserted in opposition. While we recognize the concern that our ruling will interfere with accepted standards of social behavior; will intrude on and somewhat diminish the enjoyment, relaxation, and camaraderie that accompany social gatherings at which alcohol is served; and that such gatherings and social relationships are not simply tangential benefits of a civilized society but are regarded by many as important, we believe that the added assurance of just compensation to the victims of drunken driving as well as the added deterrent effect of the rule on such driving outweigh the importance of those other values.[89]

Substantively, the result in this case exemplifies exactly the sort of communitarian balance the New Golden Rule could produce in operation.[90] Arguably, this decision also comports with Etzioni's four criteria in *The Limits of Privacy*. First, the privacy and autonomy of social hosts can only be interfered with because the threat of harm is so serious. Second, alternative measures that do not restrict autonomy have failed. Third, the court left open a means for further restrictions on liability beyond that the host must have served alcohol to the driver and knowingly allowed the guest to drive (rendering the decision minimally intrusive). Fourth, undesirable side effects are minimized by restricting liability. The means of achieving this result, however—litigation—is

84. *See id.* (citing Portee v. Jaffee, 417 A.2d 521, 528 (1980)).

85. *See id.* at 1222.

86. *Id.* This particular means of reducing drunk driving did not necessarily have the status of a social norm, however.

87. *Id.* at 1223.

88. *See id.*

89. *Id.* at 1224.

90. *Cf.* NEW GOLDEN RULE, *supra* note 10, at 150 (citing Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649 (1995)).

not endorsed by Etzioni.

The court decided that the individual interest in privacy and the right to choose private behavior with friends and guests is outweighed by a responsibility to the general public, that is, to the common good. Undoubtedly the normative status of drunk driving helped tip the balance. Although before the accident the harm is uncertain (that is, no identifiable victim of the driver exists), and although the host does not cause the harm directly, creation of a duty is nonetheless appropriate. The social order maintained by erecting all viable barriers to drunk driving supports the court's conclusion. While the driver herself is still directly liable to the accident's victims, the *Kelly* decision brought new potential defendants into the picture as an additional zone of responsibility.

The threat of liability can present a significant deterrent to drunk driving, as it creates an incentive to monitor guests' drinking, or at least to reduce the risk of their driving drunk. The decision also places an additional moral stigma on hosts who violate the new rule. The New Jersey Supreme Court in *Kelly* thus achieved its own reconciliation of the competing values of minimizing drunk driving and protecting the privacy of personal relationships.[91]

The balancing test the court employed may be the most reasonable method to resolve normative conflict if consensus cannot be reached. It is a utilitarian approach to resolving conflict in that the stronger interests, judged with reference to the social good, prevail. While individuals' negative liberty carries great weight, it is not dispositive when measured against the potential harm of allowing drunk drivers on the road. The test is accordingly consistent with Mill's general principle of supporting the overall human good. The result is also consistent with his harm principle.[92] Coercion may be exercised to prevent harm to another—in this case, potential victims of the drunk driver. Moreover, a failure to prevent harm may make the driver as culpable as his actively causing harm.

The *Kelly* decision to hold social hosts responsible in defined circumstances is not one society necessarily would have or could have reached absent legal intervention. Despite the strong public sentiment against drunk driving, the equally strong opinion supporting individual privacy and the right of association creates a stalemate. While a strong social movement opposing drunk

91. The New Jersey legislature later limited the holding by statute. *See* N.J. STAT. ANN. § 2A:15-5.5-5.8 (West 1999) (defining the scope of social host liability and creating an exclusive remedy). Under the statutory three-part test, (1) The host must have wilfully and knowingly served alcohol to either: (a) a visibly intoxicated guest who was in the presence of the host, or (b) a visibly intoxicated guest with reckless disregard to the safety of others; (2) The host must have served alcohol to a visibly intoxicated guest creating a foreseeable risk of harm to others and failed to exercise reasonable care to prevent such foreseeable harm from occurring; and (3) The damages caused to the third party must have resulted from the inebriated guest's negligent operation of a motor vehicle. *See* Greg K. Vitali, Note, *An In-Depth Analysis of the Development and Ramifications of New Jersey's Social Host Liability Statute*, 20 SETON HALL LEGIS. J. 532, 556 (1996).

92. *See supra* note 32.

driving—headed most prominently by Mothers Against Drunk Driving—existed at the time of the *Kelly* decision,[93] the freedom of social hosts also taps into the American individualist values of protecting personal privacy and the right of association. This standoff generates a gridlock whose resolution requires an external impetus. The *Kelly* decision provided that impetus.

That the legislature later clarified and limited the court's holding does not defeat, but rather supports, this conclusion.[94] Courts do not act alone in producing change, but in tandem with social and political forces. In this instance, the court initiated the process of change and the legislature later engaged in a broader dialogue that modified the initial result. Perhaps the *Kelly* decision is therefore more important as a term in a larger dialectic than for the court's own internal balancing process.

Notwithstanding the court's ability to achieve an appropriate balance between order and autonomy, Etzioni argues that coercion prohibits the effective application of law to promote a communitarian society. Instead, he proposes relying on voluntary compliance, facilitated and accelerated by means of broad moral dialogues. While the social norm of opposition to drunk driving supported the court's decision in *Kelly,* it could not achieve the result alone, given the opposing norms of personal privacy embedded in American law. The court thus reached a result that exceeded a current normative stasis, rather than merely expressing or enforcing it. In effect, the court engaged in a dialectical process that operated much as a megalogue would. Etzioni therefore would not endorse the court's activist result in *Kelly*. In fact, Etzioni expressly mentions normative conflict with respect to drunk driving to illustrate law's assertedly ancillary role. He refers to conflicting public attitudes about the moral impropriety of drunk driving and ambivalence about sobriety checkpoints, concluding that the latter, appropriately, are not widely employed because there is insufficient normative support for their use. While the balance may shift in the future as the anti-drunk driving movement gains ground, he asserts that the current situation correctly reflects the social balance.[95]

The argument of this Review, however, has been that the law sometimes can appropriately propel a society into accepting positive communitarian change, and that its coercive power can be useful to accomplish that objective. Coercion that exceeds currently held normative commitments may be appropriate when the society is unlikely to achieve the result independently, or to achieve indeed any coherent result, because of normative conflict or similar

93. *See* Joey Kennedy, *Drunk Driving Makes a Comeback*, REDBOOK, May, 1997, at 89 ("[T]he anti-drunk-driving campaign—begun by MADD in 1980 and joined by legislators, the law enforcement community, and other public safety groups—can look back on notable successes. Public awareness of the issue has dramatically improved.")

94. *See supra* note 91.

95. *See* NEW GOLDEN RULE, *supra* note 10, at 147.

impediments. In that case, the law performs the function of mediating or harmonizing conflicting norms.[96] The result can then have the salutary effect of educating the public to accept the new reconciliation. This activist role for courts need not be unlimited. In order to ensure that a decision will be accepted and followed, there should already be some normative backing for the result. Indeed, courts that attempt to forge new norms that the general community is not ready to accept sadly may see the intended results backfire. Some of the more controversial desegregation cases failed to produce hoped-for results because of this phenomenon.[97]

This limited role for legal coercion does not undermine the corollary of the New Golden Rule that requires a society to accept and uphold citizens' autonomy as it would have citizens uphold its moral order. Autonomy is not better upheld by leaving to individual discretion the decision whether or not to allow drunk guests to drive.[98] Because freedom has a positive component as well as a negative one, protecting the positive (as well as negative) liberty of potential victims of the drunk driver better promotes overall autonomy than inhibiting the negative liberty of the social host. To prevent harm, individuals sometimes must be coerced into protective action. That is what the *Kelly* decision accomplishes. In this instance, the unlikelihood of broad voluntary compliance and the widely shared agreement concerning the social good the decision furthers combine to justify the result.

In the fifteen years since the decision came down, a number of states have followed New Jersey's lead by imposing social host liability, although some states limit liability to situations involving minors.[99] Many states have also increased criminal penalties for drunk driving.[100] In the meantime, drunk driving fatalities have declined significantly.[101] It is impossible to isolate the causes of this reduction, but one can surmise that the legal changes exerted an influence, rather than merely reflecting cultural change. Widespread efforts to promote

96. The parties before the court themselves represent conflicting moral positions. *Amici curiae* can multiply the number of positions represented.

97. *See generally* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 1996). A more comprehensive analysis of this issue would distinguish between local, regional, and national communities.

98. One might also ask whether the common good is better served when a democratically elected legislature enacts social host liability, rather than a court deciding the issue.

99. *See, e.g.*, Hickingbotham v. Burke, 662 A.2d 297, 302 (N.H. 1995) (considering the merits of such a limitation); Clark v. Mincks, 364 N.W.2d 226, 230-31 (Iowa 1985) (extending liability to situations involving adults); Ashlock v. Norris, 475 N.E.2d 1167, 1169 (Ind. 1985) (recognizing civil action in situations involving minors); *see also* Cravens v. Inman, 586 N.E.2d 367, 416-17 (Ill. App. 1991) (listing states imposing social host liability for serving alcohol to minors).

100. *See* James B. Reed, et al., Environment, Energy, and Transportation Program, *State Legislative Progress in Improving Traffic Safety, 1997*, <http://www.ncsl.org/programs/esnr/transer8.htm> (visited Feb. 17, 2000) at 15-17; Bruce Keppel, *More Criticism, Less Consumption: Alcohol Under Attack by 'New Temperance'*, L.A. TIMES, Sept. 8, 1985, at 1.

101. For example, since New Jersey enacted its social host liability statute in 1987, drunk driving fatalities have decreased 50%. *See* Vitali, *supra* note 91, at 537.

public recognition of the harms accompanying drunk driving probably affected the reduction as well. The point is not that law acts alone to cause change, but rather that it acts in conjunction with other social and political forces, frequently in a secondary role, but sometimes in a leading role. It is a mistake always to relegate the law to an ancillary status out of fear of coercion. Law can assist in the effort to harmonize conflict and can allow us to move forward in a less halting and fragmented manner than would otherwise be achievable through moral dialogue alone.

B. Tobacco and the Attorney Generals' Medicaid Litigation

The lawsuits recently settled by the states against the major American tobacco companies further illustrate the constructive role that courts can play in achieving social change by recognizing the role of the common good in issues previously thought to involve primarily individual rights and responsibilities. These lawsuits were brought under a variety of legal theories, but most of the states have sought reimbursement for Medicaid outlays to provide medical care for victims of smoking-related diseases.[102] Acting assertedly in "the public interest,"[103] many of the attorneys general have sought not just restitution or indemnification for Medicaid expenses,[104] but injunctive relief in the form of requiring the tobacco companies, for example, to cease targeting minors in marketing campaigns, and affirmatively to assist future public health anti-smoking efforts.[105]

In most cases, these lawsuits were settled early in the litigation process.[106] The settlements, however, came on the heels of other recent legal victories against the tobacco companies, and in the wake of evidence uncovered in prior suits concerning the tobacco industry's suppression of evidence of nicotine's addictiveness.[107] Additional evidence indicated that the industry may actually

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102. *See* David A. Hyman, *Tobacco Litigation's Third-Wave: Has Justice Gone Up In Smoke?*, 2 J. OF HEALTH CARE L. & POL'Y 34, 36 (1998). The Justice Department recently filed a similar lawsuit. *See supra* note 4.

103. *See, e.g.*, Complaint, State of New Jersey v. R.J. Reynolds Tobacco Co., ¶¶ 2, 17 (N.J. Super. Ct. Ch. Div., Middlesex County, Sept. 9, 1996), available at <http://stic.neu.edu/Nj/NJcomplaint.htm> [hereinafter New Jersey Complaint].

104. *See, e.g.*, *id.* ¶¶ 217, 223; New York v. Philip Morris, 686 N.Y.S.2d 564, 567 (N.Y. Sup. Ct. 1998) (detailing allegations of New York Attorney General's complaint)

105. *See* Demand for Relief, New Jersey Complaint, *supra* note 103.

106. *See* The State Tobacco Information Center, *Attorneys General Bringing the Tobacco Industry to Justice: State Suit Summary*, <http://stic.neu.edu/summary.htm> (visited Feb. 21, 2000).

107. *See* Richard L. Cupp, Jr., *A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in "Third Wave" Tobacco Litigation*, 46 U. KAN. L. REV. 465, 474 (1998). Cupp notes:

> [A] feature common to all of the [attorneys general and other recent] tobacco lawsuits is their reliance on new evidence of tobacco industry misconduct not available to previous plaintiffs. In the mid-1990s, plaintiffs' lawyers obtained documents indicating that the tobacco industry knew nicotine is addictive at the same time it was representing to consumers that nicotine is not addictive. Evidence has also surfaced that tobacco companies may have manipulated nicotine levels in cigarettes to enhance consumers' addiction.

have manipulated nicotine levels to encourage addiction,[108] and decided not to develop a lower-nicotine, healthier cigarette for fear it would implicate existing brands of cigarettes as unhealthy.[109] The final, and in some ways most pernicious, indictment of the industry arose from evidence clearly indicating that young people were targeted as potential smokers.[110]

It is likely that the evidence of industry suppression of the emerging evidence of the addictive properties of nicotine played a large role[111] in inducing the early settlements for such a significant amount of money.[112] This recent evidence has influenced public perception of tobacco companies and contributed in turn to a growing social norm of opposition to smoking and "Big Tobacco."[113] The public interest in a reduction of smoking and its attendant diseases is evident. The developing new norm is increasingly to consider the common good, rather than focus exclusively on individual fault. Prior lawsuits almost always resulted in defense verdicts because factfinders concluded that plaintiff smokers assumed the risk of contracting a smoking-related disease when they chose to smoke.[114] Particularly given the warning labels on all cigarette packs and the growing body of independent evidence of the link between

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Id. (footnote omitted).

108. *See id.*

109. *See* Daniel Givelber, *Cigarette Law*, 73 IND. L.J. 867, 891 (1998). Gevilber writes:

> [C]igarette manufacturers [were effectively immunized] from liability under a negligence regime as long as there was neither a claim that manufacturers continued to have superior knowledge about the properties of cigarettes which they exploited in their marketing, nor a claim that less lethal cigarettes could be produced and marketed. In fact, cigarette companies did have additional information about cigarettes—particularly relating to the addictive nature of nicotine—and they did work on developing cigarettes which promised to be less lethal than brands on the market. The attorneys general's complaints assert, with considerable documentary support, that the companies acted in a manner designed to ensure that neither consumers nor regulators would be in a position to demonstrate that this was so.

Id. (footnotes omitted).

110. *See Transcript of the Florida Tobacco Litigation Symposium—Fact, Law, Policy, and Significance*, 25 FLA. ST. U. L. REV. 737, 787-89 (1998).

111. In 1996, a Florida jury awarded $750,000 to a smoker suing a tobacco company after contracting a smoking-related disease. *See* Carter v. Brown & Williamson Tobacco Co., No. 95-00934CA (Fla. Cir. Ct., Duval County, Aug. 9, 1996). Jurors "indicated that they based their judgment largely on cigarette manufacturer[s'] misconduct in lying about tobacco's addictiveness." Cupp, *supra* note 107, at 466. This verdict contrasts sharply with the vast majority of prior verdicts for defendants in tobacco cases. The evidence of tobacco company misrepresentation had not yet surfaced when those cases went to trial. *See id.* at 489-90.

112. Notwithstanding the injunctive relief agreed upon, numerous commentators found the settlement disappointing, as its package of relief was much less extensive than that contained in the settlement proposal that Congress defeated in 1997. *See, e.g.*, Torry & Schwartz, *supra* note 4, at A7.

113. *See* Cupp, *supra* note 107, at 490, 500 (citing polls); Erin Myers, Note, *The Manipulation of Public Opinion by the Tobacco Industry: Past, Present, and Future*, 2 J. HEALTH CARE L. & POL'Y 79, 93 (1998).

114. *E.g.*, Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3d Cir. 1965); *see* Adam Levy, *Announced to Trounced: A Journalist's Comments on the Demise of the Tobacco Settlement*, 2 J. HEALTH CARE L. & POL'Y 1, 3-4 (1998) ("In four decades of tobacco litigation, no plaintiff collected damages from any of the tobacco industry giants based on health problems resulting from tobacco products.").

smoking and disease, many if not most Americans have held smokers responsible for their own conduct.[115] This traditional focus on individual responsibility may well have blinded people to the broader causal forces contributing to smoking, as well as to the severe associated social consequences.[116]

Evidence of industry misconduct, however, has undermined both the traditional social norm and the assumption of risk defense in a number of ways. First, it makes the defendants too blameworthy and generally not credible. Second, the misconduct concerned misrepresentation of industry knowledge of nicotine's addictive qualities. If cigarettes are actually addictive, the argument that smokers assumed the risk of contracting illness is considerably weakened. It is further weakened if the industry concealed knowledge of addictiveness from the public, specifically from those considering whether or not to begin smoking. Finally, industry targeting of young people destroys any remaining vestige of the assumption of risk defense and places significant responsibility for smoking and its consequences on the industry as a whole.

More generally, the attorneys general's lawsuits have circumvented assumption of risk and broadened the culture's outlook by adopting the perspective of the public as a whole. That is, the financial consequences of smoking-related disease frequently are borne by the entire community in the form of increased taxes or insurance premiums.[117] Because the states, rather than individuals, have sought reimbursement of costs associated with smoking-related disease, no question of voluntariness arises. Rather, the issues are whether the tobacco companies were unjustly enriched or whether the public was defrauded by industry deception. Are the harms too attenuated to attribute to an industry at one remove from the smoker whose illness occasioned the medical costs? Should the foreseeability of the harm make any difference? The issues have been reframed to raise broad public policy questions, rather than examine individuals' personal decisions under a microscope.

Given that the emerging weight of public opinion is less willing to place the onus solely on individuals, and more willing to attribute some culpability to the industry, trials in these cases easily could have resulted in large verdicts for the plaintiff states. It would have been the juries' responsibility to hold the

115. *See* Cupp, *supra* note 107, at 500.

116. Rephrasing the dichotomy between individual and corporate responsibility for disease in terms of the tension between autonomy and the common good, one could argue that holding smokers, rather than tobacco companies, responsible for their own choices best upholds individual freedom, as long as the individuals retain some real freedom to decide. (The strength of this argument, however, correlates inversely with the addictiveness of cigarettes.) Noninterference with the ability to purchase consumer items such as cigarettes on the market may preserve the purest and most absolute form of individual liberty. Conversely, however, overall autonomy, assessed in a utilitarian fashion, could converge with the common good and be best served when those who may have manipulated nicotine levels and public knowledge of nicotine's addictive properties are held responsible for the foreseeable results.

117. Of course, the public's concern with the costs of treating smoking-related diseases does not mean the public is unanimous in its opposition to smoking generally. Once again, the culture as a whole is ambivalent about the appropriate direction to take to mitigate the dangers of smoking.

megalogue that decided the issue. The decision as to which party bears primary culpability is not one that necessarily should be kept out of the courts until the society as a whole has made an independent decision. Jurors' decisions are, rather, an important part of the process of societal norm-setting. Their opinions are influenced by existing norms, but, in a sort of symbiotic process, they in turn further influence shifting norms, particularly when verdicts are widely publicized.

The courts have played a further role in changing attitudes toward smoking. Although the attorneys general's suits settled rather than proceeding to trial, the courts in each state have had to approve the settlements and enter orders dismissing the cases.[118] These courts accordingly have clarified the issues and the significance of the settlements by issuing opinions amplifying the underlying reasons.[119] Additionally, while the growing public sentiment attributing at least partial responsibility for smoking-related injuries to the tobacco companies exists independent of the current spate of litigation, knowledge of the misdeeds of the industry likely would not have surfaced absent discovery in previous lawsuits.[120] To that extent, the public interest is served by utilizing the discovery function of the courts to uncover misdeeds of which the public should be aware.

The publicity and media coverage associated with every aspect of the lawsuits, from filing of the complaints to settlement, have further contributed to positive communitarian change. With widespread media coverage, the public has been saturated with litigation-related stories of industry manipulations that contributed to the incidence of smoking-related disease.[121] And the notion of the public interest has figured prominently. The courts have adverted frequently to the public interest in approving the settlements.[122] The attorneys general have also emphasized their role as acting in the public interest.[123]

Recasting the public debate according to the tension between individual and societal interests is a strongly positive development. It frames the debate to allow airing of the full range of social consequences of destructive private behaviors, and it brings to the surface the underlying questions of proper attribu-

118. This function is much narrower than that of a court fully deciding the viability of a novel legal claim, as in *Kelly v. Gwinnell*, which means that the reviewing courts ordinarily could not engage in as full a weighing of the underlying opposed norms.

119. *See* New York v. Philip Morris, 686 N.Y.S.2d 564, 566-67 (N.Y. Sup. Ct. 1998).

120. *See generally* Cupp, *supra* note 107.

121. *See* Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 L. & SOC. INQUIRY 897, 924 (1998) ("In the case of tobacco litigation, government and plaintiffs' lawyers seemed to be succeeding in constructing a public to oppose the long-standing political strength of the tobacco industry.").

122. *See, e.g.*, New York v. Philip Morris, 686 N.Y.S.2d at 568, 573; Settlement Agreement and Stipulation for Entry of Consent Judgment, Minnesota v. Philip Morris, No. C1-94-8565 (Minn. D. Ct., Ramsey County, May 8, 1998) (on file with Yale Law & Policy Review).

123. *See, e.g.*, New Jersey Complaint, *supra* note 103, at ¶¶ 2, 17.

tion of responsibility in the aggregate. One therefore need not agree with the outcome to agree that promotion of a public dialogue about the role of the common good in the cigarette debate is constructive.

It would also be difficult to argue, either normatively or descriptively, that the role of the law in promoting this social debate about smoking is merely ancillary to that of civil society. Rather, this example demonstrates that courts and litigators have taken an aggressive role in the overall effort to effect a reduction in smoking-related disease. Litigation has accomplished this in part by unearthing evidence of tobacco industry misdeeds, galvanizing opposition to the industry and its manipulation of the public. While Etzioni's method of balancing autonomy and the common good provides a highly useful tool to investigate social problems, his account of the limited role of law fails to assess fully the complex interactions between American cultural attitudes and high-profile litigation.

C. *The Municipal Firearms Suits and* Hamilton v. Accu-Tek

The lawsuits recently filed by twenty-six municipalities against leading firearms manufacturers, distributors, and dealers echo in many ways the state lawsuits against the tobacco companies. Not surprisingly, therefore, the order and autonomy interests to be balanced in this context also resemble those in the tobacco context, with similar ramifications and significance. This section examines the claims in the suit filed by the City of Chicago, as well as the recent jury verdict for a plaintiff gunshot victim against gun manufacturers, the first such verdict in a case not involving a particular defective gun.[124] This examination demonstrates once again, contrary to Etzioni's assertions, that courts are and should be centrally involved in the process of public dialogue that assists positive communitarian change.

Historically, manufacturers have not been held liable for gunshot injuries. Guns generally function as intended; that is, they are made to cause injury, which defeats any product liability claims.[125] Product liability and negligence claims have also failed because it is criminals, not gun manufacturers or distributors, who illegally shoot the plaintiffs.[126] As with the assumption of risk defense in cigarette cases, the notion of supervening cause has prohibited imposition of legal responsibility.[127] Absent evidence of an individual defendant's

124. *See* Hamilton v. Accu-Tek, 62 F. Supp. 2d 802 (E.D.N.Y. 1999); *see also* Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1314 (E.D.N.Y. 1996); David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMP. L. REV. 1, 12 (1998).

125. *See, e.g.*, McCarthy v. Olin Corp., 119 F.3d 148, 155 (2d Cir. 1997).

126. *See, e.g.*, Armijo v. Ex Cam, Inc., 656 F. Supp. 771, 775 (D.N.M. 1987). One exception exists where a dealer sells a gun or ammunition to an obviously unstable buyer, who then shoots the plaintiff. *See* Coker v. Wal-Mart Stores, Inc., 642 So. 2d 774, 778 (Fla. D. Ct. App. 1994).

127. *See supra* notes 114-16 and accompanying text. The normative corollary is the general social reluctance to impose responsibility on those whose role apparently has been only secondary.

specific intervention in illegal harms, courts[128] have been reluctant to attribute actions of criminals to gun makers or purveyors.[129] In addition, our cultural enchantment with guns and the mystique of firepower (ostensibly to protect one's home and family) ensures vigorous resistance to anything potentially threatening to individual gun ownership.[130] Until recently, the approach of the courts has been highly individualistic, focusing almost exclusively on the interests and actions of individual participants. The legal system has not considered the issues from a common good or public interest perspective; nor, much of the time, have legislatures.

As in the tobacco cases, the municipal firearms suits and the recent decision for a plaintiff in *Hamilton v. Accu-Tek*[131] have shifted the focus from direct, individual actions to the overall actions of an entire industry and the market in which it operates. The plaintiffs in *Hamilton*—an injured survivor, his mother, and relatives of six people killed by handguns—sued twenty-five handgun manufacturers for negligence in 1995. They alleged "that the manufacturers' indiscriminate marketing and distribution practices generated an underground market in handguns, providing youths and violent criminals like the shooters in these cases with easy access to the instruments they have used with lethal effect."[132] In January, 1999, the case was tried to a jury, which found fifteen of the defendants to have marketed or distributed guns negligently, with proximate cause found for the injuries of three plaintiffs.[133] Damages, however, and therefore liability, were awarded only in favor of the injured, surviving plaintiff and his mother against three defendants, in the amount of $4,000,000.[134] Assisted by the jury instructions, the jury essentially weighed the conflicting order and autonomy interests involved.[135] Because the gun that seriously wounded the prevailing plaintiff was never found, damages were apportioned according to each defendant's share of the national handgun market.

While market share liability is itself controversial,[136] the real novelty of the case was the legal theory that a negligently functioning firearms market caused the plaintiffs' injuries. Normally, a duty of care is not imposed on defendants in these cases, but in *Hamilton*, the court "recognized a duty of care in connec-

128. In an unusual case that reached a jury prior to *Hamilton*, the jury was also reluctant to impose liability. *See* Timothy D. Lytton, Note, Halberstam v. Daniel *and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOK. L. REV. 681, 682 (1998).

129. *See, e.g.*, First Commercial Trust Co. v. Lorcin Eng'g, Inc., 900 S.W.2d 202, 204-05 (Ark. 1995).

130. *See* Kairys, *supra* note 124, at 3.

131. 62 F. Supp. 2d 802 (E.D.N.Y. 1999); *see also* Roberto Suro, *N.Y. Jury Finds Gunmakers Negligent in Shootings*, WASH. POST, Feb. 12, 1999, at A1.

132. *Hamilton*, 62 F. Supp. 2d at 808.

133. *See id.* at 811.

134. *See id.*

135. *See id.* at 848-50.

136. *See* City of Philadelphia v. Lead Indus. Ass'n, 994 F.2d 112, 125 (3d Cir. 1993).

tion with the marketing and distribution of a non-defective but highly dangerous product"[137] in order to "guard against the risk of its criminal misuse."[138] The defendants' marketing techniques and methods of sale and distribution of handguns were held accountable for unreasonably increasing the likelihood that criminals would obtain guns.[139]

Ruling on post-trial motions and upholding the verdict, the court, per Judge Weinstein, affirmed the jury's finding that an illegal gun market had caused the plaintiffs' injuries. Appreciable evidence indicated that easy access to handguns greatly increases the likelihood of gun violence.[140] Further substantial evidence linked criminals' guns to sales by federal firearms licensees. A large percentage of crime weapons had been sold by federal licensees within three years of the crime.[141] In addition, the rapid diversion of guns from the legitimate retail market—the so-called "time to crime" rate—indicated significant firearms trafficking.[142] The defendants, who must have been aware of the diversion, nonetheless continued to employ production, marketing, and distribution methods that encouraged the sale of guns to criminals. For instance, manufacturers did not restrict gun sales from their distributors to legitimate retailers alone.[143] Although they were capable of stanching the flow of guns into criminals' hands, they did nothing when they could have "declin[ed] to do business with careless or unscrupulous [federal firearms licensees], limit[ed] sales at unregulated gun shows, and requir[ed] that first sales of handguns to the public take place only in fully stocked, responsibly operated stores."[144]

The court weighed the public and private policy interests at stake, concluding that the balance appropriately created a new duty.

> Recognition of a duty on the part of handgun manufacturers . . . would not be unfair—in light of the serious consequences of a failure to do so—or inefficient. Manufacturers who market and distribute handguns negligently set the stage for their criminal misuse. They place at risk innocent persons who derive no gain from easy access to these

137. *Hamilton*, 62 F. Supp. 2d, at 824.

138. *Id.*

139. *See id.* at 825-27.

140. *See id.* at 825.

141. *See id.* at 825-26.

142. *Id.* at 826. Frequently, these crime weapons are sold to sellers who falsify transaction forms or to "straw purchasers" who in turn hand them over to criminals. *Id.*

143. *See id.* at 823; *see also* Kairys, *supra* note 124, at 4:

> New studies and investigations by local and national law-enforcement agencies, coupled with recent research and studies now generally recognized in the field of public health, establish more concretely and convincingly than previously available evidence that the manufacturers of handguns: (1) produce, market, and distribute substantially more handguns than they reasonably expect to sell to law-abiding purchasers, saturating urban areas and consciously and knowingly participating in the criminal handgun market; and (2) market and distribute to lawful purchasers for purposes and in circumstances they know, but do not reveal, to be dangerous to purchasers, their families, and the public at large.

144. *Hamilton*, 62 F. Supp. 2d at 826.

> products. Unlike users and consumers of handguns, injured bystanders exercise no control over their exposure to risk. . . .
>
> To the extent manufacturers' negligent marketing or distribution practices allow them to profit from the acquisition of handguns by those likely to misuse them, they must be deemed to have benefitted wrongfully at the expense of those injured or killed. Fairness mandates restoration of the balance through the imposition of a duty to market and distribute handguns responsibly.[145]

As in the tobacco cases, the litigation set up the opposed individual and community interests inherent in the issue. Examining the defendants' operations from the perspective of the market casts the question of their legal and moral responsibility in a new light. The common good or public interest in a reduction of violence outweighed the private interests of gun manufacturers, distributors, dealers, and owners who benefit from an uncontrolled market.

According to the court, the public interest is a strong one.[146] Injuries to many members of the public—the amorphous, prospectively unidentifiable class of gunshot victims—are both clearly foreseeable and direct in that they flow in an unbroken line from the negligently operated market. Focusing on the broad operations of the firearms market brings into sharp relief the links between manufacturers, distributors, dealers, and criminal purchasers. Furthermore, when the market facilitates criminals' acquisition of guns, manufacturers and purveyors are in the best position to change those market practices that contribute to social ills. The doctrine of supervening cause was thus also overcome: "criminal misuse of handguns by third parties was not only a reasonably foreseeable consequence of defendants' negligent marketing and distribution practices, it was the precise risk; failure to take reasonable steps to guard against it is what made defendants' conduct negligent."[147]

The creation of this new legal duty, based in part on the strength of the public interest, resolved this particular case, but it also helps reconfigure the public debate to take the common good into consideration. The opinion in *Hamilton v. Accu-Tek* delineated the role of the firearms market in handgun violence, and thus reframed the debate. One could legitimately take issue with the legal result in this case and the extension of a tort duty of care to firearms manufacturers; because the new duty represents an expansion of the legal doc-

145. *Id.* New York courts had previously constructed sophisticated standards to govern determination of the existence and scope of tort duties. *See id.* at 822-24. These included references to the public good and social norms. *See* Palka v. Servicemaster Management Servs. Corp., 634 N.E.2d 189, 193 (N.Y. 1994) (stating that the factors to balance include reasonable expectations of society generally, and public policies affecting new channels of liability); Waters v. New York City Hous. Auth., 505 N.E.2d 922, 923-24 (N.Y. 1987) ("While moral and logical judgments are significant components of the analysis, we are also bound to consider the larger social consequences of our decisions . . . .").

146. In fact, the court explicitly recognized its protective role, postulating that expansion of the tort law's coverage in cases such as this "is a necessary aspect of the law's role as protector of the public against massive delicts." *Hamilton*, 62 F. Supp. 2d at 842.

147. *Id.* at 835.

trine surrounding the concept of duty, it may well be reversed on appeal. One could also contest the court's empirical conclusion that the firearms market causes the harms of gun violence. The point, however, is not that the result is necessarily legally or even empirically correct, but rather that courts can be well suited to distill or reframe issues and to balance individual rights and social responsibilities. The verdict received a great deal of publicity,[148] generating a public dialogue that is likely to continue for some time. That public dialogue in turn can, over time, change the cultural, political, and legal landscape, as Etzioni suggests. Unlike Etzioni, however, I maintain that this example demonstrates how courts can help set in motion a chain of events culminating in the sort of communitarian change that Etzioni envisions.

Meanwhile, numerous cities, beginning with New Orleans, have filed tort suits against gun manufacturers, distributors, and dealers as well.[149] The cities seek damages or reimbursement of the expenses they have incurred as a result of handgun violence.[150] These expenses include police, emergency personnel, human services, courts, prisons, sheriffs, and the like.[151] Many of the cities allege that the manufacturers', distributors', and dealers' marketing practices seek a high volume of sales and easy public access to handguns, particularly in urban areas, without screening out criminals, and without regard for other consequences.[152] Thus, for example, small handguns that can easily be carried concealed are manufactured and marketed in large quantities and shipped into markets that supply high-crime urban areas.[153]

These lawsuits resemble the attorneys general's tobacco suits in that public entities are seeking reimbursement of expenses paid to preserve the health of victims of the alleged unlawful practices. Just as the tobacco suits have changed the terms of public debate on cigarettes, the gun suits can reconfigure the public debate on the easy availability of handguns. Avoiding the doctrine of supervening cause, the municipalities adopt, in many cases, negligent marketing allegations similar to those in *Hamilton v. Accu-Tek.* The lawsuit filed by the City of Chicago merges negligent marketing allegations into the larger tort of public nuisance. The City's complaint alleges that manufacturers, distribu-

148. *See, e.g.*, Fox Butterfield, *Verdict Against Gun Makers Is Likely To Prompt More Suits*, N.Y. TIMES, Feb. 13, 1999, at B1.

149. *See* Paul M. Barrett, *Other Cities May Follow New Orleans in Antigun Suit, but Fight Will Be Hard*, WALL ST. J., Nov. 2, 1998, at A16.

150. *See id.*

151. *See* Kairys, *supra* note 124, at 13.

152. *See id.* at 6:

> They do not limit, or require or encourage their dealers and retailers to limit, the number, purpose, or frequency of handgun purchases. Nor do they take any meaningful measures to determine the training, skill, or suitability of any purchaser. For example, the manufacturers encourage and promote purchase by the general public of very small, inexpensive, powerful, and rapid-firing handguns for concealed carrying in public places.

153. *See* Kairys, *supra* note 124, at 6 & n.13; *see also infra* notes 154-57 and accompanying text.

tors, and dealers have created a public nuisance by engaging in a number of practices that ensure "the continuing availability of illegal firearms in Chicago."[154] The alleged practices include "design[ing] weapons better suited for criminal than lawful uses"[155]; "distribut[ing] . . . guns so as to ensure that they are available to persons who live in areas where guns are impermissible [such as Chicago, which has strict gun control ordinances]"[156]; and selling guns "to persons whom any reasonable person would understand intend to possess or use them improperly."[157]

The *Restatement (Second) of Torts* defines a public nuisance as an unreasonable interference with a right common to the general public.[158] The tort of public nuisance is thus by definition focused on the public good. A particular action may be found unreasonable if it involves a significant interference with public health and safety,[159] if it is unlawful,[160] or if it is continuing or permanent.[161] The public right to be free from ongoing unlawful gun violence could bring this case into the first or third category. Sales that fail to comply with Chicago's strict gun control ordinances conceivably could fall in the second category. If the plaintiffs can adequately demonstrate the chain of causation that satisfied the court in *Hamilton*, they might prevail. Juries could determine that the public price of an untrammeled firearms market is unacceptable. The cost of the market's consequences would have to be absorbed by those who profit from it.

It is too early to predict the outcome of these lawsuits, but for purposes of this Review, they provide yet another illustration of the proactive role that litigation can play in social change that accounts for the public interest. Even more than *Hamilton v. Accu-Tek,* then, these municipal lawsuits provide an institutional forum to address the consequences to the overall community of not restraining a firearms market that is allegedly solely concerned with maximizing profits rather than balancing profit with safety and the public good. By providing incentives to firearms manufacturers and purveyors to concern themselves with more than the bottom line, the lawsuits can address some of the

154. Office of the Mayor, City of Chicago, *The Concept of Public Nuisance* (visited Feb. 16, 2000) <http://www.ci.chi.il.us/Mayor/GunIndustry/SummaryGunLawSuit.html> [hereinafter *The Concept of Public Nuisance*]; Complaint, City of Chicago v. Beretta U.S.A. Corp., (Ill. Cir. Ct., Ch. Div., Cook County, 1999), available at <http://www.ci.chi.il.us/Mayor/GunIndustry/> (visited July 16, 1999) (on file with *Yale Law & Policy Review*).

155. *The Concept of Public Nuisance, supra* note 154.

156. *Id.*

157. *Id.* This lawsuit is of particular interest because, prior to filing, Chicago police had engaged in an extensive sting operation that revealed widespread dealer disregard of the laws regulating handgun purchases. For example, dealers would advise prospective purchasers on how to avoid criminal liability for unlawful shootings. *See id.*

158. RESTATEMENT, *supra* note 72, at § 821B(1).

159. *See id.* at § 821B(2)(a).

160. *See id.* at § 821B(2)(b).

161. *See id.* at § 821B(2)(c).

more deleterious consequences of the untrammeled operation of a free market in guns. Although public opinion also seems to be shifting in favor of additional regulation of firearms,[162] the courts also can be instrumental in promoting communitarian change. Some evidence already exists that these lawsuits are causing firearms manufacturers to change their practices.[163] In the absence of social homogeneity sufficient to produce a unified approach to firearms proliferation, litigation can perform the salutary function of joining issues, sharpening the terms of debate, and otherwise propelling the nation to come to terms with the consequences of unregulated handgun production and distribution. Etzioni's focus on social processes and dialogue obscures this function.

V. CONCLUSION

Amitai Etzioni's theory of the proper interplay between social order and individual autonomy appropriately emphasizes the need to balance the two concepts, rather than leaving one element out of the equation or considering either element in isolation. Contemporary American culture tends to collapse the tension by recognizing only individual, rather than collective, interests. As Etzioni points out, in many instances individual and public interests can be harmonized by recognizing their mutuality. For instance, knowledge of tobacco industry misrepresentation and manipulation benefits individuals as much as the public. In other instances, however, promotion of individual autonomy interests can undermine the public interest. Regulation of the firearms market provides a good, albeit controversial, example. In neither case, however, would the United States necessarily be able to reach a workable consensus by relying solely on social processes. The country is too diverse culturally, economically, and politically to place primary reliance on cultural dialogue. Nor can the political process always reach a legislative resolution. It often remains for the courts, with their powers to frame, interpret, and determine issues, and to coerce compliance with their orders, to resolve difficult cases in which order and autonomy interests directly conflict.

162. *See supra* note 146-47 and accompanying text.

163. Paul M. Barrett & Alexei Barrionuevo, *Handgun Makers Recoil as Industry Shakes Out*, WALL ST. J., Sept. 20, 1999, at B1:

> A group of California handgun manufacturers, whose small, inexpensive weapons police often associate with crime, are retreating from the cheap-gun market. The little-noticed development began several years ago and could be the first stage of a substantial shakeout in the gun business. A wave of municipal lawsuits against the entire handgun industry appears to be accelerating the restructuring.