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2006

### **Lawyers, Guns, & Money: The Rise and Fall of Tort Litigation Against the Firearms Industry**

Allen K. Rostron

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BOOK REVIEW

**LAWYERS, GUNS, & MONEY: THE RISE AND FALL OF TORT LITIGATION AGAINST THE FIREARMS INDUSTRY**

*Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts.* Edited by Timothy D. Lytton. University of Michigan Press, 2005. Pp. 418. Cloth. \$49.50.

*Reviewed by Allen Rostron\**

As the twentieth century came to a close, the gun industry was under siege. The murders of twelve students and a teacher at Columbine High School in April 1999 brought a chorus of new calls for legislation limiting access to guns.<sup>1</sup> A year later, demonstrators gathered in front of the U.S. Capitol building for the Million Mom March, the largest rally ever held in support of gun control measures.<sup>2</sup>

The industry's greatest concern, however, arose in another arena. Gun manufacturers found themselves being pulled into courts by an array of tort lawsuits across the country. Many of those asserting claims were individuals injured in shootings or the families of people killed in shootings.<sup>3</sup> In addition, more than thirty government

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\* Associate Professor of Law, University of Missouri–Kansas City School of Law. B.A. 1991, University of Virginia; J.D. 1994, Yale Law School. Thanks to Nancy Levit for helpful comments and criticism. The UMKC Law Foundation generously supported this research.

1. See Alison Mitchel, *The Politics of Guns: Tilting Toward the Democrats*, N.Y. TIMES, May 14, 1999, at A22.

2. See Susan Levine, *Many Moms' Voices Are Heard on Mall; Rally Supporting Stricter Gun Laws Draws Thousands*, WASH. POST, May 15, 2000, at A1.

3. Allen Rostron, *The Supreme Court, the Gun Industry, and the Misguided*

entities, principally major cities and counties, filed lawsuits seeking to recoup law enforcement expenses and other costs they allegedly incurred because of gun industry practices fueling gun violence and crime.<sup>4</sup> Even the NAACP joined the crusade, filing an unusual lawsuit accusing gun makers of creating a public nuisance with disproportionate adverse effects on its African-American members and potential members.<sup>5</sup> The industry faced a legal onslaught of remarkable intensity.

Six years later, the storm of litigation over guns appears to have come to an end. On October 26, 2005, President Bush signed the Protection of Lawful Commerce in Arms Act, a measure giving the gun industry a broad and unique exemption from most legal liability that otherwise might be imposed under state tort law.<sup>6</sup> The new immunity created by this federal statute will not just block the filing of new claims against gun makers, but will wipe out cases already pending as well.<sup>7</sup> If the law survives constitutional challenges, it will end one of the most interesting and controversial chapters in modern American tort law.<sup>8</sup>

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*Revival of Strict Territorial Limits on the Reach of State Law*, 2003 L. REV. M.S.U.-D.C.L. 115, 152-53.

4. *Id.* at 152. For an overview of the governmental plaintiffs' theories, see Brian J. Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Gun Industry Misconduct*, 18 ST. LOUIS U. PUB. L. REV. 247 (1999).

5. *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003).

6. See Protection of Lawful Commerce in Arms Act, S. 397, 109th Cong. (2005).

7. Pub. L. No. 109-92, § 3(b), 119 Stat. 2095, 2097 (2005) (codified at 15 U.S.C. § 7902(b) (LexisNexis 2006)).

8. In the first significant test of the new statute's validity and effect, Judge Jack Weinstein held that the enactment is constitutional but does not bar New York City's claims against the gun industry. See *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244 (E.D.N.Y. 2005). The statute contains an exception preserving claims that a defendant knowingly violated a statute applicable to the sale or marketing of firearms. 15 U.S.C. § 7903(5)(A)(iii). Judge Weinstein ruled that the City's claims fell within that exception because the City contends that gun manufacturers have violated a New York statute prohibiting creation of a nuisance endangering public health and safety. See N.Y. PENAL LAW § 240.45 (McKinney 2005); *Beretta U.S.A.*, 401 F. Supp. 2d at 258-71. However, even if Judge Weinstein's ruling on that point could withstand appeal, Congress recently enhanced the gun industry's immunity from liability by imposing severe restrictions on the use of firearm trace data in civil litigation, and that enactment may bar New York City's case from proceeding. See Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-108, 119 Stat. 2290, 2295-96 (2005); *City of New York v. Beretta U.S.A. Corp.*, No. 00-CV-3641, 2006 WL 288244

As the era of tort litigation over firearms comes to a close, scholars already have begun to look back on it in an effort to explain what happened and to assess its significance.<sup>9</sup> The most comprehensive effort to date is *Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts*, a collection of essays edited by Timothy Lytton of Albany Law School.<sup>10</sup> The book provides a comprehensive and well-balanced overview of gun litigation, bringing together work by scholars and other experts who view gun litigation from diverse perspectives. The contributors range from a lawyer who represents gun rights groups such as the National Rifle Association (“NRA”),<sup>11</sup> to a policy analyst for a gun control organization,<sup>12</sup> with most of the authors falling somewhere closer to the middle ground. The essays include careful analyses of specific legal matters such as the constitutional<sup>13</sup> and liability insurance<sup>14</sup> issues raised by the lawsuits, as well as examinations of broader questions surrounding the

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(E.D.N.Y. Feb. 8, 2006).

9. Tort claims have been brought against gun makers and sellers for centuries, but the significance of those claims increased dramatically in the 1980s when plaintiffs began asserting more aggressive legal theories and increased again in the late 1990s when government entities began filing lawsuits. See Allen Rostron, *Shooting Stories: The Creation of Narrative and Melodrama in Real and Fictional Litigation Against the Gun Industry*, 73 UMKC L. REV. 1047, 1049-56 (2005).

10. SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS (Timothy D. Lytton ed., 2005) [hereinafter SUING THE GUN INDUSTRY]. Professor Lytton has written extensively on the gun lawsuits in the past. See, e.g., Timothy D. Lytton, *Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOK. L. REV. 681 (1998); Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247 (2000); Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1 (2000).

11. Don B. Kates, *The Limited Importance of Gun Control from a Criminological Perspective*, in SUING THE GUN INDUSTRY, *supra* note 10, at 62; see, e.g., *Nordyke v. King*, 44 P.3d 133, 135 (Cal. 2002) (representing California Rifle & Pistol Association); *Harrott v. County of Kings*, 25 P.3d 649, 650 (Cal. 2001) (representing National Rifle Association).

12. Tom Diaz, *The American Gun Industry: Designing & Marketing Increasingly Lethal Weapons*, in SUING THE GUN INDUSTRY, *supra* note 10, at 84.

13. Brannon P. Denning, *Gun Litigation & the Constitution*, in SUING THE GUN INDUSTRY, *supra* note 10, at 315.

14. Tom Baker & Thomas O. Farrish, *Liability Insurance & the Regulation of Firearms*, in SUING THE GUN INDUSTRY, *supra* note 10, at 292.

litigation, such as public health<sup>15</sup> and criminological assessments<sup>16</sup> of gun violence.

Despite the diversity of the authors' disciplines, topics, and overall outlooks on guns, the essays in *Suing the Gun Industry* reflect a surprising degree of consensus on one major point. They share a conviction that the gun litigation has been an unequivocal failure.<sup>17</sup> According to this consensus view, the lawsuits not only failed to produce ultimate victories for plaintiffs through verdicts or settlements, but also failed to uncover significant new information, to establish favorable legal precedent, or to move public opinion.<sup>18</sup>

This Review will examine how the essays in *Suing the Gun Industry* portray the achievements and failures of the plaintiffs and attorneys who brought the gun lawsuits. It will show how and why the consensus view of the gun litigation overlooks important ways in which the suits were more effective than most observers have acknowledged.<sup>19</sup>

Carefully and accurately evaluating the consequences of gun lawsuits is important because they are a pivotal example of a new breed of tort litigation emerging in recent decades. These "regulatory" or "public policy" litigation efforts strive to achieve broad reforms aimed at alleviating a social problem, rather than simply trying to obtain justice for particular injured individuals.<sup>20</sup> Other examples include the immense

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15. Julie S. Mair et al., *A Public Health Perspective on Gun Violence Prevention*, in *SUING THE GUN INDUSTRY*, *supra* note 10, at 39, 43 (explaining that the public health perspective "recognizes gun injury as a significant source of morbidity and mortality and promotes policy interventions aimed at gun design and marketing as the preferred strategy for reducing gun death and injury").

16. Kates, *supra* note 11, at 62 (arguing that "criminological research does not support claims that gun availability to ordinary people promotes violence").

17. *See infra* Part I.

18. *See infra* Part I.

19. *See infra* Part II.

20. *See, e.g.*, CHARLES FRIED & DAVID ROSENBERG, *MAKING TORT LAW: WHAT SHOULD BE DONE AND WHO SHOULD DO IT* (2003); REGULATION THROUGH LITIGATION (W. Kip Viscusi ed., 2002); Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825 (2004); Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087 (2004); Deborah Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy – Some Preliminary Thoughts on a New Research Project*, 51 DEPAUL L. REV. 493 (2001); Peter D. Jacobson & Soheil Soliman, *Litigation as Public Health Policy: Theory or Reality?*, 30 J.L. MED. & ETHICS 224 (2002); Lynn

legal offensive mounted against tobacco companies<sup>21</sup> and the recent spate of lawsuits seeking to hold fast-food vendors accountable for obesity.<sup>22</sup> Legal scholars have begun to devote a great deal of attention to this highly controversial new phenomenon,<sup>23</sup> and gun litigation will undoubtedly be an example cited on all sides of this debate for many years to come.

Part I of this Review describes how the essays in *Suing the Gun Industry* consistently portray firearms litigation as failing to achieve any of its significant objectives. Part II challenges that consensus view, arguing that it overlooks a number of ways in which the litigation had a positive impact. The lawsuits uncovered important new information about the gun industry's conduct,<sup>24</sup> generated dramatic new legal precedent,<sup>25</sup> produced favorable outcomes in some cases, including several recent million-dollar settlements,<sup>26</sup> and shifted public perception of the gun industry and its business practices.<sup>27</sup> Part III suggests several reasons why commentators have reached unduly negative conclusions about gun litigation. Comparisons to litigation against tobacco companies generated unrealistic expectations for gun lawsuits and many observers of gun litigation have badly misconstrued what it was meant to accomplish. Finally, Part IV argues that the enactment of federal legislation giving the gun industry special immunity from legal liability challenges the notion that a legislature's ability to handle these sorts of complex public policy issues is superior to that of courts.

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Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897 (1998); Andrew P. Morriss et al., *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 203-10 (2005); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941 (1995); Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215 (2001); Edward T. Schroeder, Note, *A Tort by Any Other Name? In Search of the Distinction Between Regulation Through Litigation and Conventional Tort Law*, 83 TEX. L. REV. 897 (2005).

21. See, e.g., Symposium, *Torts and Tobacco*, 33 GA. L. REV. 693 (1999).

22. See, e.g., Pelman *ex rel.* Pelman v. McDonald's Corp., 396 F.3d 508 (2d Cir. 2005).

23. See *supra* note 20 (citing various law review articles).

24. See *infra* Part II.A.

25. See *infra* Part II.B.

26. See *infra* Part II.C.

27. See *infra* Part II.D.

This Review argues that contrary to what some essays in *Suing the Gun Industry* suggest, the principal aim of the gun lawsuits was not to reap a huge financial bonanza, to end the controversy over guns in America, or to destroy the gun industry by driving companies out of business.<sup>28</sup> Rather, the principal aim was simply to reduce the number of injuries and deaths attributable to misuse of guns by encouraging or forcing gun manufacturers and dealers to act more carefully.

I do not pretend to be an impartial observer of the gun litigation. While working as a staff attorney for the Brady Center to Prevent Gun Violence, I helped represent plaintiffs or *amici curiae* in many of the cases discussed here.<sup>29</sup> That experience provides me a unique, inside view of the litigation, but certainly not an unbiased one.

## I. THE EMERGING CONSENSUS ABOUT THE FAILURE OF GUN LITIGATION

The contributors to *Suing the Gun Industry* examine their subject from a variety of different angles and have widely varying attitudes toward the policy issues surrounding guns. Despite this, they are generally united in their negative assessment of the tort litigation brought against gun makers in recent years.<sup>30</sup> As one of the essays in the book states, “the weight of scholarly opinion seems to be turning against the litigation.”<sup>31</sup>

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28. See *infra* Parts III-IV.

29. The views expressed in this Review are strictly my own and do not necessarily represent the views of any parties to the cases discussed or any other litigation.

30. See, e.g., Dan M. Kahan et al., *A Cultural Critique of Gun Litigation*, in *SUING THE GUN INDUSTRY*, *supra* note 10, at 105, 121-26 (asserting that gun litigation cannot possibly reduce cultural conflict over guns and that, in fact, tort lawsuits will only exaggerate that conflict); Timothy D. Lytton, *Introduction: An Overview of Lawsuits Against the Gun Industry*, in *SUING THE GUN INDUSTRY*, *supra* note 10, at 1, 3 (describing how judges have dismissed “all but a few” suits and how most states have passed legislation immunizing the gun industry from suits); Wendy Wagner, *Stubborn Information Problems & the Regulatory Benefits of Gun Litigation*, in *SUING THE GUN INDUSTRY*, *supra* note 10, at 271 (stating that “[b]y all accounts, the gun litigation has been an utter failure” and describing how plaintiffs’ legal theories stumbled in courts and how the cases prompted a strong legislative backlash).

31. Wagner, *supra* note 30, at 271. Similarly negative assertions about gun litigation have begun to appear frequently in law journals and in the popular media. See, e.g., Stephen P. Halbrook, *Suing the Firearms Industry: A Case for Federal Reform?*, 7 *CHAP. L. REV.* 11, 22, 38 (2004) (contending that plaintiffs’

Perhaps the harshest assessment comes from Yale law professor Peter Schuck, who contends that the gun litigation “must be considered an almost total failure.”<sup>32</sup> He notes that the plaintiffs’ lawyers “invested a great deal of time and money on this campaign with very little to show for it in terms of either new liability-promoting legal doctrine or jury awards sustained on appeal.”<sup>33</sup> Indeed, Schuck suggests that initiating the litigation may have backfired and produced results worse than doing nothing because the plaintiffs’ lawyers were “drilling dry holes at great cost, creating adverse legal precedents, and further energizing already militant pro-gun groups.”<sup>34</sup>

A few of the essays in *Suing the Gun Industry* offer slightly more favorable appraisals, but they do not depart radically from the consensus view that gun litigation was a failure. For example, while Berkeley law professor Stephen Sugarman agrees that the cases have not fared well, he leaves open the possibility that they might begin to achieve some modest successes on the most conventional types of products liability claims being asserted.<sup>35</sup>

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claims in gun cases have been based on unprovable and false allegations and have been rejected by most courts); Jesse Matthew Ruhl et al., *Gun Control: Targeting Rationality in a Loaded Debate*, 13 KAN. J.L. & PUB. POL’Y 413, 452-57 (2004) (criticizing “shaky grounds” for tort lawsuits against gun makers); Frank J. Vandall, *A Preliminary Consideration of Issues Raised in the Firearms Sellers Immunity Bill*, 38 AKRON L. REV. 113, 114-17 (2005) (describing how gun lawsuits have been “floundering” in courts); Ryan VanGrack, Recent Development, *The Protection of Lawful Commerce in Arms Act*, 41 HARV. J. ON LEGIS. 541, 547 (2004) (stating that gun lawsuits have consistently failed because of their tenuous legal claims and the pro-gun political environment); Brian DeBose, *Gun Dealer Protection Advances*, WASH. TIMES, May 26, 2005, at A8 (suggesting that gun claims have been overwhelmingly rejected by courts); Zell Miller, *Firearms Firms Need Protection*, BOSTON GLOBE, July 29, 2005, at A15 (contending that tort cases have been brought by a “tripartite alliance” of the “gun-ban crowd,” “greedy trial lawyers who seek big paydays,” and “big-city mayors who lack the will to get tough with criminals,” and stating that the firearms industry has “basically” won every case); *The Wrong Target*, PITTSBURG TRIB. REV., Dec. 18, 2004 (noting that the lawsuits drove at least two gun makers into bankruptcy).

32. Peter H. Schuck, *Why Regulating Guns Through Litigation Won’t Work*, in *SUING THE GUN INDUSTRY*, *supra* note 10, at 225, 226.

33. *Id.* at 226 (footnote omitted).

34. *Id.* Although Schuck acknowledges that the litigation produced a few outcomes that might be portrayed as victories by gun control advocates, he finds those add up to very little compared to the ways in which the litigation failed. *See id.*

35. Stephen D. Sugarman, *Comparing Tobacco & Gun Litigation*, in *SUING*



The most sympathetic appraisal of gun litigation in *Suing the Gun Industry* comes from the book's editor, Timothy Lytton, but even his attitude toward the lawsuits is decidedly mixed. Lytton suggests that certain tort claims against gun manufacturers could serve as a valuable complement to legislative policy-making and administrative rule-making.<sup>36</sup> For example, he acknowledges that products liability claims against gun manufacturers could promote safety improvements in the designs of guns, just as potential tort liability encourages enhancement of the safety features of all sorts of other products.<sup>37</sup> At the same time, he contends that those seeking to impose liability on the gun industry have gone too far by aggregating too many incidents within a single lawsuit,<sup>38</sup> seeking complex regulatory injunctions,<sup>39</sup> and pressuring defendants to enter into settlements aimed at achieving regulatory measures that reach beyond remedies likely to be obtained from courts.<sup>40</sup> While seeing both positive and negative potential in tort litigation against gun companies, Lytton ultimately finds fault with most of the legal activity pursued against the industry in recent years.

## II. CHALLENGING THE CONSENSUS VIEW ABOUT THE FAILURE OF GUN LITIGATION

The failure of the lawsuits to achieve significant positive results thus becomes a central theme winding its way through *Suing the Gun Industry*. In fact, the outcome of the litigation was not as simple or one-sided as much of *Suing the Gun Industry* would suggest. In several important respects, gun litigation achieved significant progress toward reforming industry practices in ways that may reduce firearm deaths

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THE GUN INDUSTRY, *supra* note 10, at 196, 219-22 (suggesting that the most promising claim would be that an accidental shooting occurred because the gun was not designed as safely as possible); *cf.* Mair et al., *supra* note 15, at 61 (explaining why public health experts support litigation aimed at reducing gun violence, but not addressing the successes or failures of litigation that has occurred).

36. See Timothy D. Lytton, *The Complementary Role of Tort Litigation in Regulating the Gun Industry*, in *SUING THE GUN INDUSTRY*, *supra* note 10, at 250, 252-59 [hereinafter Lytton, *The Complementary Role of Tort Litigation*].

37. See *id.* at 255-57.

38. *Id.* at 260-61.

39. *Id.*

40. *Id.* at 261-62.

and injuries.

A. *Evidence Uncovered Against the Gun Industry*

In her essay *Stubborn Information Problems & the Regulatory Benefits of Gun Litigation*, University of Texas law professor Wendy Wagner focuses closely on the evidentiary side of the cases.<sup>41</sup> She recognizes that litigation can be a vital means of uncovering information that will have significant repercussions beyond the lawsuit in which it is discovered.<sup>42</sup> Through the discovery process, defendants can be forced to produce “stubborn information” that otherwise would never be disclosed, but that can inform and improve legislative and regulatory agency decision making.<sup>43</sup>

With that in mind, Wagner analyzes the evidentiary achievements in gun litigation. She offers a “best-case interpretation of the litigation and its results” from a “deliberately sympathetic” point of view.<sup>44</sup> Despite this, Wagner ultimately concludes that gun lawsuits produced little new privately held information of any significance.<sup>45</sup> She characterizes the lawsuits as uncovering only evidence of “corporate inattention to the harms that might flow from careless design and distribution practices.”<sup>46</sup> In Wagner’s view, litigation has produced only “modest informational progress.”<sup>47</sup>

Wagner does not totally give up hope on the gun litigation. Instead, she notes that some significant, incriminating evidence finally began to emerge at a point when gun litigation seemed to be experiencing its “last dying gasps.”<sup>48</sup> She leaves open the possibility that new information might ultimately resuscitate gun litigation and start moving it toward achieving some small measure of success.<sup>49</sup>

Wagner’s essay understates the extent to which tort

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41. See Wagner, *supra* note 30.

42. See *id.* at 274-76.

43. *Id.* at 275-77.

44. *Id.* at 271.

45. *Id.* at 284-86.

46. *Id.* at 285 (footnote omitted).

47. Wagner, *supra* note 30, at 285.

48. *Id.* at 290.

49. See *id.* at 290-91.

litigation has uncovered information relevant to the public policy debate over guns. Wagner arrives at her negative conclusions about the evidentiary achievements of the litigation by starting with extraordinarily high expectations inspired by the tobacco cases.<sup>50</sup> She observes that gun companies produced nothing akin to “the secret industry memos uncovered in the tobacco litigation that revealed, for example, the industry’s manipulation of the addictive properties of cigarettes.”<sup>51</sup> No plaintiff found “smoking gun memoranda and meeting notes that reveal a strategic effort to saturate the criminal gun market to increase profits.”<sup>52</sup>

The information generated by gun litigation is relatively modest by the standards of tobacco litigation’s successes, but these are extreme standards. No one should have expected documents of that sort to be found in the gun litigation. Indeed, the plaintiffs’ allegations suggested that a “strategic effort” to profit from criminal access to guns has never been necessary because the industry’s established distribution channels and practices ensure that a large volume of guns will steadily flow into the underground market and into the hands of convicted felons and others legally prohibited from possessing them.<sup>53</sup> Profiting from the diversion of guns to criminals did not require a “strategic effort” by gun manufacturers; it simply required their indifference and unwillingness to alter the status quo.<sup>54</sup> Wagner dismisses the litigation as having proven no more than mere “corporate inattention” to the dangers of careless design and distribution practices,<sup>55</sup> but that carelessness and inattention was essentially the heart of the plaintiffs’ claims.

While the sort of corporate conspiracy that Wagner envisions could be demonstrated with “smoking gun” documents or testimony, proof of corporate inattention principally comes in negative and less dramatic form. The

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50. *See id.* at 285.

51. *Id.*

52. *Id.*

53. *See* LEGAL ACTION PROJECT, BRADY CTR. TO PREVENT GUN VIOLENCE, SMOKING GUNS: EXPOSING THE GUN INDUSTRY’S COMPLICITY IN THE ILLEGAL GUN MARKET 9-11 (2003) [hereinafter SMOKING GUNS], <http://www.bradycenter.org/xshare/pdf/reports/smokingguns.pdf>.

54. *See, e.g.*, NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 499-526 (E.D.N.Y. 2003); SMOKING GUNS, *supra* note 53, at 3-16.

55. Wagner, *supra* note 30, at 285.

plaintiffs proved that gun manufacturers failed to take reasonable precautions, such as training dealers to spot suspicious “straw purchase” transactions,<sup>56</sup> prohibiting dealers from engaging in high-risk sales practices like selling huge quantities of guns to customers blatantly involved in gun trafficking,<sup>57</sup> and determining which of their dealers were selling grossly disproportionate numbers of guns recovered from criminals.<sup>58</sup> The principal way the plaintiffs proved these points was simply to ask corporate representatives in depositions whether the defendants were doing these things.<sup>59</sup> Time and time again, the defendants admitted their failure to take appropriate precautions.<sup>60</sup>

At the same time, gun litigation also generated rather dramatic new proof of the scope and severity of the flaws within the firearm makers’ distribution systems. For instance, in evaluating whether the lawsuits produced significant new information, Wagner overlooks three municipal undercover sting operations that produced evidence supporting tort claims.<sup>61</sup> Chicago struck first, sending pairs of undercover police officers to gun stores to make blatant “straw purchases” of weapons.<sup>62</sup> Posing as drug dealers or motorcycle gang members, one of the officers would openly admit that he wanted to purchase guns but that he could not legally do so because he was a juvenile or convicted

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56. See SMOKING GUNS, *supra* note 53, at 8-9. A “straw purchase” occurs when “a person with a clean record buys a gun for someone who is a convicted felon, a juvenile, or otherwise prohibited from legally acquiring the gun.” *Id.* at 6. In the midst of the litigation, the gun industry essentially acknowledged that it had failed in this respect and began providing some marketing assistance to a Bureau of Alcohol, Tobacco and Firearms (ATF) program seeking to train dealers to spot and avoid selling guns to straw purchasers. *See id.* at 9.

57. *See id.* at 9-11. For example, discovery in one lawsuit revealed how an Illinois dealer not only sold approximately sixty-five pistols to a neo-Nazi gun trafficker, but staggered the transactions to avoid the issuance of a notice that would have gone to law enforcement agencies if the customer ever took more than one of the guns during any period of five business days. *See id.* at 10.

58. *See id.* at 32-37. The litigation revealed for the first time that the ATF had specifically encouraged a gun manufacturer to use data about law enforcement traces of guns to determine whether certain dealers had sold unusually large numbers of guns associated with crimes. *See id.* at 36.

59. *See, e.g., id.* at 5 & nn.23-26, 8 & nn.29-30, 9 & nn.36-38, 10-11 & nn.47-49.

60. *See id.* at 5-16.

61. *Id.* at 6-7.

62. SMOKING GUNS, *supra* note 53, at 6-7.

felon; thus, he had brought along a friend with a clean record to fill out the paperwork and undergo the background check for him.<sup>63</sup> In almost every instance, dealers in the Chicago area were willing to make the sale, even though they believed the gun would ultimately wind up in the hands of a person prohibited by law from having it.<sup>64</sup> Dealers did not hesitate even when the undercover officers acknowledged their criminal intentions for the use of the guns.<sup>65</sup> For example, one officer stated that he needed a gun to replace the one he had to discard the previous night while fleeing from police, and that he needed ammunition as well to "settle up" with the person who had "ratted" him out to the police.<sup>66</sup> Another officer bought a TEC-9 assault pistol while explaining to the sales clerk that someone had failed to repay a debt and he needed to "get a Tec for his ass" before the delinquent borrower could leave town.<sup>67</sup>

The Chicago sting received a substantial amount of national publicity, including a segment on the CBS program *60 Minutes*.<sup>68</sup> Despite the publicity, gun dealers did not take heed, and a similar sting in Detroit produced the same results, with nine out of ten dealers agreeing to make the sale.<sup>69</sup> Videotape of the Detroit sting airing on NBC's *Dateline* included a scene in which a gun dealer mocked the cries of parents grieving the loss of a child to gun violence, and another scene in which a clerk twice emphasized that the transaction was "*highly illegal*" before going ahead with the sale.<sup>70</sup> Even after the Detroit footage hit the national airwaves, a third sting conducted in Gary, Indiana, produced the same outcome.<sup>71</sup>

In her essay, Wagner acknowledges that the litigation eventually produced important new information when an industry insider, former gun lobbyist and trade association chief Robert Ricker, stepped forward to provide support for

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63. *Id.* at 6.

64. *Id.* at 6-7.

65. *See id.* at 6.

66. *Id.*

67. *Id.*

68. SMOKING GUNS, *supra* note 53, at 7.

69. *Id.*

70. *Id.*

71. *Id.*

plaintiffs' claims.<sup>72</sup> Ricker confirmed what discovery in the lawsuits already had been showing: that the industry was well aware of flaws in its distribution channels but chose not to take reasonable measures to curb the flow of guns to the illegal market.<sup>73</sup> He also described in detail how the NRA and gun manufacturers closed ranks and suppressed dissent whenever someone within the industry suggested significant reforms.<sup>74</sup> Ricker's decision to speak out against his former employers and allies garnered widespread publicity, becoming the focus of major newspaper stories across the nation and a segment on the *60 Minutes* television program.<sup>75</sup> At the same time, it had no momentous impact on the course of litigation because again it essentially confirmed what other evidence had already shown.

To the contrary, Wagner credits Ricker's statements as prompting two developments with which they actually had no close connection: a settlement of litigation against several California dealers and the enactment of an amendment to California's handgun safety law.<sup>76</sup> Wagner misstates the effect of Ricker's testimony because she overlooks the extent and importance of the information that was already being produced by the gun litigation.<sup>77</sup> The gun lawsuits may not have produced evidence comparable to what was found in the tobacco litigation, but very few cases ever will.

### *B. Precedent Established in Favor of Gun Litigation Plaintiffs*

*Suing the Gun Industry* also portrays gun litigation as failing to break new legal ground. For example, Peter Schuck

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72. See Wagner, *supra* note 30, at 290.

73. Declaration of Robert A. Ricker at 4:18-23, *People v. Arcadia Mach. & Tool, Inc.*, Judicial Council Coordination Proceedings No. 4095 (Cal. Super. Ct. Feb. 3, 2003), <http://www.bradycampaign.org/xshare/pdf/020403.pdf>.

74. *Id.* at 4:22-23.

75. Fox Butterfield, *Gun Industry Ex-Official Describes Bond of Silence*, N.Y. TIMES, Feb. 4, 2003, at A14; *A Gun Lawsuit's Smoking Gun*, N.Y. TIMES, Feb. 14, 2003, at A16; Steve Lopez, *A Whistle-Blower Who Has the Gun Industry in Its Sights*, L.A. TIMES, Feb. 7, 2003, (metro section), pt. 2, at 1; Frank Main, *City Gun Suit May Have New Ally*, CHI. SUN-TIMES, Feb. 10, 2003, (News Special Edition), at 12; *60 Minutes* (CBS television broadcast May 11, 2003), transcript [available at](http://www.cbsnews.com/stories/2003/05/09/60minutes/main553147.shtml) <http://www.cbsnews.com/stories/2003/05/09/60minutes/main553147.shtml>.

76. See Wagner, *supra* note 30, at 290.

77. See *SMOKING GUNS*, *supra* note 53.

describes the lawsuits as producing “very little” in terms of “new liability-promoting legal doctrine.”<sup>78</sup> He insists that “almost every appellate court that has addressed the issue has concluded that existing legal principles cannot properly be stretched so far” as to support tort claims against gun makers.<sup>79</sup> Similarly suggesting that the legal theories asserted in the gun litigation rarely withstood scrutiny, Wendy Wagner describes plaintiffs as “appear[ing] pleasantly surprised when their case survives a motion to dismiss.”<sup>80</sup>

Admittedly, many cases against gun makers have been rejected on legal grounds before or after trial.<sup>81</sup> Emphasizing that alone, however, ignores how much the state of legal precedent on this issue has changed in recent years.

In the late 1990s, when cities and counties first began to file lawsuits against gun makers, no valid precedent existed anywhere in the nation for a gun manufacturer to be held liable under tort law for conduct contributing to criminal use of a gun.<sup>82</sup> There were many published opinions rejecting such claims, and none sustaining them.<sup>83</sup>

Most of the precedent existing in the late 1990s arose from cases in which plaintiffs’ lawyers asserted extremely far-

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78. Schuck, *supra* note 32, at 226.

79. *Id.* at 246.

80. Wagner, *supra* note 30, at 271; *see also* Richard A. Nagareda, *Gun Litigation in the Mass Tort Context*, in *SUING THE GUN INDUSTRY*, *supra* note 10, at 180 (noting that many, but not all, government lawsuits against gun makers have been dismissed on legal grounds).

81. *See, e.g.*, *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001); *Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001); *Grunow v. Valor Corp. of Fla.*, 904 So. 2d 551 (Fla. Dist. Ct. App. 2005); *Young v. Bryco Arms*, 821 N.E.2d 1078 (Ill. 2004); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001).

82. The only decisions favoring plaintiffs had been reversed on appeal or quickly abrogated by statute. *See Richman v. Charter Arms Corp.*, 571 F. Supp. 192 (E.D. La. 1983), *rev'd sub nom.*, *Perkins v. FIE Corp.*, 762 F.2d 1250 (5th Cir. 1985); *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985), *superseded by statute*, MD. CODE ANN., PUB. SAFETY § 5-402(b) (LexisNexis 2006).

83. *See, e.g.*, *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532 (11th Cir. 1986); *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326 (9th Cir. 1986); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771 (D.N.M. 1987); *Delahanty v. Hinckley*, 564 A.2d 758 (D.C. 1989); *Coulson v. DeAngelo*, 493 So. 2d 98 (Fla. Dist. Ct. App. 1986); *Addison v. Williams*, 546 So. 2d 220 (La. Ct. App. 1989), *writ denied*, 550 So. 2d 634 (La. 1989); *Richardson v. Holland*, 741 S.W.2d 751 (Mo. Ct. App. 1987); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661 (Wash. Ct. App. 1988).

reaching theories that would essentially make every manufacturer liable for every harmful use of a firearm.<sup>84</sup> For example, some claimed that selling guns is an ultra-hazardous activity, and therefore each manufacturer should be strictly liable for all harm attributable to the use of its products, regardless of how carefully the manufacturer acted in designing and distributing them.<sup>85</sup> While the caselaw was overwhelmingly in the industry's favor and firmly established that a gun manufacturer is not liable simply because it makes weapons that can be used to hurt people, it generally did not address whether liability could be imposed where a plaintiff showed that a gun maker engaged in conduct that was particularly egregious and unnecessarily and unreasonably dangerous.<sup>86</sup>

Today, the state of precedent on these issues is remarkably different. A significant number of federal and state appellate courts have recognized that a gun manufacturer can be held liable if its tortious conduct in designing or distributing its products led to the plaintiff being injured by criminal use of a gun.<sup>87</sup> The legal battle is no longer one-sided, as both sides now enter litigation equipped with considerable precedent on which to rely.<sup>88</sup>

To be sure, gun litigation in recent years has also produced precedents favorable to defendants.<sup>89</sup> Most of the decisions are far less useful as precedent than the decisions imposing liability, however, because many of the decisions dismissing claims have been based on state statutes rather than general tort law principles.<sup>90</sup> Some have rejected

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84. *See supra* note 83 (citing cases).

85. *See id.*

86. *See id.*

87. *See* *Ileto v. Glock Inc.*, 349 F.3d 1191 (9th Cir. 2003); *White v. Smith & Wesson*, 97 F. Supp. 2d 816 (N.D. Ohio 2000); *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003); *James v. Arms Tech., Inc.*, 820 A.2d 27 (N.J. Super. Ct. App. Div. 2003); *Smith v. Bryco Arms*, 33 P.3d 638 (N.M. Ct. App. 2001); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002). Several trial court rulings that were never tested on appeal provide some precedential support as well. *See City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568 (Mass. Super. Ct. July 13, 2000); *Johnson v. Bull's Eye Shooter Supply*, No. 03-2-03932-8, 2003 WL 21639244 (Wash. Super. Ct. June 27, 2003).

88. *See supra* notes 83 & 87; *infra* notes 90 & 91.

89. *See supra* note 81.

90. *See, e.g., Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001); *Sturm, Ruger*



liability based on the inadequacy of plaintiffs' allegations in particular cases without shutting the door to potential liability in other cases involving different facts or legal theories.<sup>91</sup>

*Suing the Gun Industry* overlooks this dramatic shift in legal precedent achieved by the lawsuits in recent years. In just a few years, the notion that gun makers can be held liable for tortious conduct that fosters criminal use of guns went from being completely unprecedented to being a well-supported and viable proposition. Indeed, the defendants' inability to prevail on legal grounds in all lawsuits brought against them was a key reason the industry and its allies lobbied so hard to obtain statutory immunity from Congress.<sup>92</sup>

### C. Outcomes Achieved in Favor of Gun Litigation Plaintiffs

The strongest basis for characterizing the gun litigation as a failure is that the cases have ultimately resulted in victories for the defendants. The essays in *Suing the Gun Industry* note that few of the lawsuits resulting in verdicts for plaintiffs have been sustained on appeal<sup>93</sup> and that "those gun executives who were even slightly receptive to a settlement of the municipalities' claims found themselves either out of business or out of a job due to the gun owners' hostile reaction to their concessions of industry responsibility."<sup>94</sup>

The moment when the litigation appeared to be tipping decisively in the plaintiffs' favor came in March 2000, when one of the nation's largest and oldest gun makers made a bold

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& Co. v. City of Atlanta, 560 S.E.2d 525 (Ga. Ct. App. 2002); Mayor of Detroit v. Arms Tech., Inc., 669 N.W.2d 845 (Mich. Ct. App. 2003).

91. See, e.g., *In re Firearm Cases*, 126 Cal. App. 4th 959 (Cal. Ct. App. 2005) (finding insufficient evidence of a causal connection between manufacturers' unfair business practices and gun dealers' dangerous conduct, where plaintiffs sought to prove causation for a large number of gun incidents in an aggregate manner rather than proving causation on an incident-by-incident basis); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1062 (N.Y. 2001) (rejecting claims for which plaintiff could not identify the manufacturer of the gun used in the shooting that injured plaintiff, but not ruling out a different result in a future case where plaintiff makes "a more tangible showing that defendants were a direct link in the causal chain that resulted in plaintiffs' injuries, and that defendants were realistically in a position to prevent the wrongs").

92. Cf. 15 U.S.C. § 7901(a)(7) (LexisNexis 2006) (indicating that Congress responded to the gun industry's fear that "a maverick judicial officer or petit jury" would sustain plaintiffs' claims in tort litigation).

93. See Schuck, *supra* note 32, at 226.

94. Wagner, *supra* note 30, at 271.

move. Smith & Wesson entered into a settlement agreement with the United States Department of Housing & Urban Development and a number of state and local government entities.<sup>95</sup> In exchange for escaping the governments' pending and potential claims, Smith & Wesson committed itself to make significant reforms to its gun design and distribution practices.<sup>96</sup> For example, the company agreed to add built-in locks and other new safety features to guns and to institute a vigorous new regime for training and supervising its dealers.<sup>97</sup>

Public reaction to the settlement was strongly positive. Shortly after the announcement of the agreement, the firearm industry's trade association commissioned a nationwide survey that included questions about the settlement.<sup>98</sup> The survey indicated not only that the public overwhelmingly favored the settlement, but that every subgroup of respondents in the survey approved of it—even a majority of NRA members.<sup>99</sup> Not surprisingly, the trade association did not release the survey results.<sup>100</sup> They came to light later only because a manufacturer produced a copy of them during discovery in the tort litigation.<sup>101</sup>

The NRA's leadership and the most militant gun enthusiasts bitterly opposed the deal, even though it enjoyed strong support from the public in general.<sup>102</sup> The NRA and its allies denounced Smith & Wesson as a British-owned company that had surrendered to the Clinton administration and gun control forces.<sup>103</sup> Many boycotted the company's products.<sup>104</sup> With sales dropping precipitously, Smith & Wesson repudiated the agreement and refused to implement its terms.<sup>105</sup> Smith & Wesson wound up being sold to new owners at a rock-bottom price, but has rebounded

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95. See SMOKING GUNS, *supra* note 53, at 28-29.

96. See *id.* at 29-30.

97. See *id.* at 30.

98. *Id.* at 31.

99. *Id.*

100. See *generally id.* at 31 & n.201.

101. See SMOKING GUNS, *supra* note 53, at 31 & n.201.

102. *Id.* at 30.

103. *Id.*

104. Matt Bai, *A Gunmaker's Agony*, NEWSWEEK, May 22, 2000, at 32.

105. See Steve Bailey, *Summer Sizzler*, BOSTON GLOBE, Aug. 11, 2004, at C1.

financially.<sup>106</sup>

On this point, *Suing the Gun Industry* again demonstrates the difficulty of characterizing a development as a simple positive or negative result for either side. For example, Timothy Lytton's critical assessment emphasizes the fact that the agreement never took effect.<sup>107</sup> Likewise, other essays point out that Smith & Wesson's adverse experience after signing the agreement deterred any other manufacturer from similarly going out on a limb and negotiating with plaintiffs.<sup>108</sup>

Nonetheless, the Smith & Wesson episode is arguably devastating proof of much of what plaintiffs have alleged in gun litigation. The company's willingness to enter into the agreement demonstrates that a major gun manufacturer thought it was feasible to implement the measures required by the agreement, even if it was ultimately unwilling to honor its commitments. This implication runs directly counter to positions the industry has taken throughout gun litigation. Gun manufacturers have insisted that they cannot develop technology like the built-in locks that Smith & Wesson agreed to integrate into every one of its guns,<sup>109</sup> or that they cannot undertake the supervision of dealers that Smith & Wesson agreed to perform.<sup>110</sup>

In addition, the organized opposition to Smith & Wesson's settlement perfectly illustrates what gun control advocates had long been claiming about the NRA's influence over the gun industry. When Smith & Wesson took steps that

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106. *Id.*

107. See Lytton, *The Complementary Role of Tort Litigation*, *supra* note 36, at 261-62.

108. See Wagner, *supra* note 30, at 271; Sugarman, *supra* note 35, at 220-21.

109. SMOKING GUNS, *supra* note 53, at 14 (noting that gun manufacturers long denied it was possible to equip guns with locks or other technology that would "personalize" them and prevent unauthorized use, but that many finally began to offer guns with internal locks after being sued for failing to do so).

110. See, e.g., Debbi Mack, *DC Lawsuit Targets Gun Manufacturers*, CORP. LEGAL TIMES, Apr. 2000, at 74 (citing claims by a gun industry attorney that "as a practical matter, gun manufacturers cannot oversee all levels of sales and distribution but can only verify that they are selling to someone who is operating lawfully"); Sharon Walsh, *Gun Industry Views Pact as Threat to Its Unity*, WASH. POST, Mar. 18, 2000, at A10 (reporting that other gun manufacturers were most upset by Smith & Wesson's agreement to monitor gun distribution more closely because the industry has long denied it has responsibility for the actions of dealers).

clashed with the NRA's interests, the NRA did not hesitate to do what it could to destroy one of America's oldest and most revered gun companies.<sup>111</sup> The NRA punished Smith & Wesson for straying from the fold and sent a warning to other manufacturers that might think of doing the same. After Smith & Wesson repudiated the settlement agreement, its new president explained the company's situation in terms strikingly reminiscent of dialogue from *The Godfather* or *The Sopranos*: "The firearms industry is a family. We need to be part of that family. We can't be separate from that family."<sup>112</sup>

Despite the intense pressure within the industry discouraging further settlements, they have continued to occur. Indeed, plaintiffs in gun cases have recently obtained a string of large settlements:

- In a suit arising from the sniper shootings by John Allen Muhammad and John Lee Malvo that terrorized the Washington, D.C., area, the rifle manufacturer and dealer agreed to pay more than \$2.5 million to settle claims brought by victims of the shootings and their families.<sup>113</sup> The manufacturer also agreed to institute new measures for educating its dealers on safer business practices.<sup>114</sup>
- A Pennsylvania dealer that sold guns to a middleman paid \$850,000 to settle a claim brought by the mother of a seven-year-old boy killed when another child found one of those guns, which police believed to have been stashed under a parked car on a Philadelphia street by a drug dealer, and pulled the trigger.<sup>115</sup>
- A West Virginia gun store agreed to pay \$1,000,000 to two police officers shot with one of a dozen pistols sold to a woman participating in a "straw purchase" and gun trafficking scheme.<sup>116</sup>

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111. See SMOKING GUNS, *supra* note 53, at 25-27

112. *Id.* at 31 (quoting Smith & Wesson president Robert Scott).

113. Tom Jackman, *Gunmaker, Store Agree to Payout in Sniper Case*, WASH. POST, Sept. 10, 2004, at A1.

114. *See id.*

115. *Gun Dealer Must Pay in Shooting of 7-Year Old*, NAT'L L.J., Aug. 30, 2004, at 19.

116. *Gun Shop Will Pay \$1M in Shooting; Weapon Wounded Two N.J. Officers*, REC. (Bergen County, N.J.), June 24, 2004, at A3.

The dealer also agreed to institute a “one gun per customer per month” policy to reduce the likelihood of again becoming a source of supply for traffickers.<sup>117</sup>

These settlements, occurring after *Suing the Gun Industry* went to press, are further evidence contradicting the book’s depiction of gun litigation as having little promise of delivering any significant payoffs to plaintiffs.

#### D. Public Perceptions Changed by Gun Litigation

Regardless of which side ultimately prevails, gun lawsuits have affected the way people think about firearms and the industry that produces them. Through the lawsuits, the gun industry’s contribution to gun violence became the center of public attention. Television and print news outlets not only provided extensive coverage of the lawsuits, but also began to run major stories exploring topics like the feasibility of designing “personalized” guns that can be fired only by authorized users,<sup>118</sup> the extent to which gun makers enhanced the lethality of their products to boost flagging sales,<sup>119</sup> and what government data reveals about how guns move from dealers into the illegal market and into the hands of juveniles and convicted criminals.<sup>120</sup>

In addition, the litigation inspired fictional portrayals of legal action aimed at gun industry wrongdoing, such as in the novel *Balance of Power*,<sup>121</sup> the film *Runaway Jury*,<sup>122</sup> and

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117. Toby Coleman, *Shop Settles Lawsuit; Gun Control Group Says W. Va. Case Is a First*, CHARLESTON DAILY MAIL, June 23, 2004, at 1A.

118. See, e.g., David B. Ottaway, *A Boon to Sales or a Threat? Safety Devices Split Industry*, WASH. POST, May 20, 1999, at A1; Edmund Walsh, *Smart Guns, More Lawsuits; A New Technology May Trigger Legal Trouble for Gun Manufacturers*, WKLY. STANDARD, Feb. 14, 2000, at 16; *Safe Guns, Weekend Edition Sunday* (NPR radio broadcast Mar. 12, 2000), available at <http://www.npr.org/templates/story/story.php?storyId=1071451>.

119. See, e.g., Fox Butterfield, *To Rejuvenate Gun Sales, Critics Say, Industry Started Making More Powerful Pistols*, N.Y. TIMES, Feb. 14, 1999, § 1, at 16.

120. See, e.g., Editorial, *Firearms Trafficking; New Report Traces Weapons, Shows How Kids Get Guns*, DALLAS MORNING NEWS, Feb. 27, 1999, at 28A; *Young People and Firearms*, *Good Morning America* (ABC television broadcast Feb. 22, 1999), available in LEXIS “News, All” database, Transcript 99022202-j01.

121. RICHARD NORTH PATTERSON, *BALANCE OF POWER* (2003).

122. *RUNAWAY JURY* (Twentieth Century Fox 2003) (based on the 1997 novel *THE RUNAWAY JURY* by John Grisham).

episodes of the *Law & Order*<sup>123</sup> and *The Practice* television series.<sup>124</sup> Seen by millions, these dramatic representations of gun litigation further advanced the notion that it is reasonable for gun manufacturers to be held accountable when they do business in unreasonably dangerous ways.<sup>125</sup>

Several of the essays in *Suing the Gun Industry* acknowledge that the litigation had the effect of reshaping the debate over gun violence. For example, Timothy Lytton observes that the “[l]awsuits against gun manufacturers have focused attention on allegations of industry misconduct, and, in doing so, they have deemphasized the role of criminal assailants and discussion of gun ownership rights.”<sup>126</sup> He recognizes how gun litigation changed the terms of the public and legislative debate to the extent that “the language of the legal claims themselves—defective design, negligent marketing, and nuisance” became part of the common discourse about the problem of gun violence and potential solutions to it.<sup>127</sup>

The litigation thus has brought about a broad and significant change in perceptions about the problem of gun violence. The press and the public no longer regard it as simply a crime issue, and instead focus on specific ways in which the industry contributes to the danger. It remains to be seen whether the litigation will have any lasting effect on attitudes toward the industry and gun violence, especially now that federal immunity legislation could put an end to tort litigation concerning guns.

### III. EXAMINING THE MOTIVES UNDERLYING THE GUN LITIGATION

Most assessments, including essays in *Suing the Gun Industry*, have substantially understated what the gun

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123. *Law & Order: Gunshow* (NBC television broadcast Sept. 22, 1999) (on file with author).

124. *The Practice: Target Practice* (ABC television broadcast Mar. 7, 1999) (on file with author).

125. See Rostron, *supra* note 9, at 1056-65.

126. Timothy D. Lytton, *The NRA, the Brady Campaign, & the Politics of Gun Litigation*, in *SUING THE GUN INDUSTRY*, *supra* note 10, at 152, 164 [hereinafter Lytton, *The NRA*]; see also Sugarman, *supra* note 35, at 214 (describing how litigation can be used to create or maintain an industry's negative image and put it at a disadvantage in legislative battles).

127. See Lytton, *The NRA*, *supra* note 126, at 162.

lawsuits managed to achieve. The consequences of the effort to use tort law against gun manufacturers and dealers were neither as simple nor as one-sided as they appear in most descriptions. A close examination of *Suing the Gun Industry* suggests several reasons for this underestimation of the gun litigation's achievements.

*A. Unrealistic Expectations Generated by the Tobacco Litigation*

Cities and counties began suing gun makers in the wake of extraordinary outcomes in litigation against tobacco companies, including settlements with state governments totaling over \$200 billion.<sup>128</sup> Lawyers and journalists soon began referring to guns as the "next tobacco."<sup>129</sup>

Berkeley law professor Stephen Sugarman's essay in *Suing the Gun Industry* lays out many of the key similarities and differences between guns and tobacco, both as public health problems and as subjects of litigation.<sup>130</sup> He describes how many of the same goals could be pursued in each set of cases, such as compensating injured victims, creating incentives for greater safety, and ensuring that prices of products reflect their true societal costs.<sup>131</sup> In Sugarman's view, litigation did not effectively reduce the harms resulting from tobacco use, despite the huge financial windfalls reaped by state governments.<sup>132</sup> Sugarman suggests that gun litigation was unlikely to do much better at reducing gun deaths and injuries.<sup>133</sup>

Sugarman says little about how the gun litigation was actually affected by the earlier wave of legal action against tobacco companies. The comparisons to tobacco gave a tremendous boost to the gun litigation in its early stages.<sup>134</sup>

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128. See Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 340 (2001).

129. See, e.g., Carolyn Barta, *Cities Look to Courts in Fight Against Gun-Related Crimes*, DALLAS MORNING NEWS, June 6, 1999, at 1A; Adam Cohen, *Are Lawyers Running America?*, TIME, July 17, 2000, at 22; Richard Turbin, *Gun Manufacturers in Plaintiffs' Sights*, NAT'L L.J., Aug. 9, 1999, at B20.

130. Sugarman, *supra* note 35, at 196.

131. *Id.* at 205-15.

132. *Id.* at 215-19.

133. *Id.* at 219-22.

134. See, e.g., Carl T. Bogus, *Gun Litigation and Societal Values*, 32 CONN. L. REV. 1353 (2000) (analyzing myriad ways in which tobacco litigation made gun

They made the threat posed by the lawsuits seem much greater, attracted media and public attention, and increased the interest of plaintiffs' attorneys.<sup>135</sup>

The tobacco comparisons later came back to haunt gun cases in several ways. The astronomical amounts of money paid by the tobacco companies, and particularly the immense contingency fees claimed by some plaintiffs' lawyers in the tobacco cases, made it easy for critics to characterize gun litigation as simply the next in a series of grabs for cash by greedy trial lawyers, rather than a genuine effort to enhance public safety.<sup>136</sup> The analogy tainted gun lawsuits even in the eyes of some judges. For example, a judge dismissing claims brought by a Connecticut city scornfully described how plaintiffs contemplating the tobacco settlements must have envisioned "the dawning of a new age of litigation during which the gun industry, liquor industry and purveyors of 'junk' food would follow the tobacco industry in reimbursing government expenditures and submitting to judicial regulation."<sup>137</sup>

The comparisons to tobacco litigation set unrealistically high expectations for the outcomes of gun litigation. The potential financial recovery in the gun cases was never more than a tiny sliver of the amounts at stake in tobacco cases because gun industry assets and profits pale in comparison to those of the tobacco companies.<sup>138</sup> Indeed, all of the companies in the American gun industry added together would not be large enough to make the Fortune 500 list.<sup>139</sup>

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litigation possible).

135. See, e.g., Paul M. Barrett, *Evolution of a Cause: Why the Gun Debate Has Finally Taken Off*, WALL ST. J., Oct. 21, 1999, at A1; Peter J. Boyer, *Big Guns*, NEW YORKER, May 17, 1999, at 53; Douglas McCollam, *Long Shot*, AM. LAW., June 1999, at 86.

136. See, e.g., James K. Glasman, *Publicity, Politicians, Legal Fees Corrupt Law*, BIRMINGHAM NEWS, Mar. 4, 2001; Merrill Matthews Jr., *Courtroom Predators Prey on Us All: Huge Contingency Fees Erode Democracy and Subvert Faith in Impartial Justice*, PHILA. INQUIRER, Aug. 19, 1999; Barbara Olson, WASH. TIMES, *Legislating by Litigating*, May 13, 1999, at A21; Bill Pryor, *Government "Regulation by Litigation" Must Be Terminated*, LEGAL BACKGROUNDER (Wash. Legal Found.), May 18, 2001, available at <http://www.wlf.org/upload/051801LBPryor.rtf>.

137. *Ganim v. Smith & Wesson Corp.*, No. CV 990153198S, 1999 WL 1241909, at \*5 (Conn. Super. Ct. Dec. 10, 1999), *aff'd*, 780 A.2d 98 (Conn. 2001).

138. See Sugarman, *supra* note 35, at 207.

139. 151 CONG. REC. S9074 (daily ed. July 27, 2005) (statement of Sen. Frist); 151 CONG. REC. S9063 (daily ed. July 27, 2005) (statement of Sen.



Despite that, the higher the expectations set by the “next tobacco” characterization, the more of a failure the gun litigation appeared to be when billion dollar verdicts and settlements failed to materialize.

*B. Litigation’s Inability to Resolve the Gun Debate*

Another essay in *Suing the Gun Industry* reflects a different sort of unrealistic expectation about the litigation’s effect. In several recent works, Yale law professor Dan Kahan has advanced a “cultural theory” argument about the gun control debate.<sup>140</sup> He contends that people’s views about gun issues depend more on their overall “cultural allegiances and outlooks”—such as the extent to which they are egalitarian, individualistic, communitarian, or solidaristic—than on any facts or arguments they have heard about the issues being debated.<sup>141</sup> As a result, Kahan believes that the only way to make real progress toward resolving the controversy over guns is to stop dwelling on factual arguments about the effects of guns on society and instead work toward developing ways of understanding, discussing, and accommodating the cultural differences that underlie the gun debate.<sup>142</sup>

In an essay in *Suing the Gun Industry*, Kahan and co-authors Donald Braman and John Gastil apply the “cultural theory” approach to litigation against gun makers.<sup>143</sup> In their view, lawsuits could never help to resolve the national debate over guns and instead serve only to exacerbate the cultural conflict underlying that debate.<sup>144</sup> Litigation is “culturally obtuse” because it ignores the broader cultural significance of guns and focuses entirely on factual evidence and

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Coburn); 151 CONG. REC. S8910 (daily ed. July 26, 2005) (statement of Sen. Sessions). For example, when cities and counties first began filing lawsuits against gun makers, the gun industry had revenues of approximately \$1 billion per year, far less than the tobacco industry’s \$45 billion in annual sales. Paul Barrett, *Jumping the Gun? Attacks on Firearms Echo Earlier Assaults on Tobacco Industry*, WALL ST. J., Mar. 12, 1999, at A1.

140. See Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003); Dan M. Kahan, *The Gun Control Debate: A Culture-Theory Manifesto*, 60 WASH. & LEE L. REV. 3 (2003).

141. Kahan, *supra* note 140, at 4.

142. See Kahan & Braman, *supra* note 140, at 1311-23.

143. Kahan et al., *supra* note 30, at 105.

144. See *id.*

consequentialist arguments.<sup>145</sup> It is therefore highly unlikely to produce the kind of “constructive cultural deliberation” that Kahan and his colleagues see as crucial to defusing the furor over guns.<sup>146</sup>

Kahan is surely correct that a barrage of tort claims against gun makers was certain to intensify the controversy over guns. However, this becomes a criticism of gun litigation only if one assumes, as Kahan does, that the overriding goal should be to end the debate. In fact, the ultimate goal should be to implement sensible policies that reduce the amount of harm resulting from misuse of guns without unduly interfering with legitimate use of guns. Ending the cultural division over guns might be a way to move toward that goal, but it is by no means the only way.

If an end to the controversy over guns appeared on the horizon, it might be wise to follow Kahan’s advice and forego steps that would improve public policy concerning guns but exacerbate the cultural division over them. However, Kahan has gone much further in diagnosing the cultural problem than in prescribing a cure for it. He urges moderate citizens to pay attention to the cultural values that gun laws express and to do so “through a deliberative process that makes it possible for individuals of diverse cultural orientations to see their identities affirmed rather than denigrated by the law.”<sup>147</sup> It is a beautiful idea, but it is an extraordinarily abstract one that Kahan does not support with a specific or detailed explanation of how it can be achieved.<sup>148</sup>

Contrary to the premise of the Kahan essay, no one expected that the tort litigation against gun makers would end the conflict over guns or even ease tensions within that debate. In fact, it appeared rather obvious that it would inflame them. That was a price that seemed reasonable to

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145. *See id.*

146. *Id.* at 106.

147. *Id.* at 126.

148. *See* Kahan, *supra* note 140, at 11-12 (encouraging anthropologists, sociologists, philosophers, and other scholars to start developing a new “expressive idiom” for Americans to use in debating gun control); Kahan & Braman, *supra* note 140, at 1318-23 (same). *But see* Sanford Levinson, *What Follows Putting Reason in Its Place? “Now Vee May Perhaps to Begin. Yes?”*, 151 U. PA. L. REV. 1371, 1381 (2003) (noting that it is difficult even to imagine the sort of dialogue that Kahan desires, particularly because Kahan offers no examples of what he envisions).

pay when litigation held the promise of reducing gun deaths and injuries and when the notion of ending the controversy over guns remained only a theoretical aspiration with no real-world plan through which it could be achieved.

*C. Erroneous Assumptions About the Motives Behind Gun Litigation*

Several essays in *Suing the Gun Industry* reach negative conclusions about gun litigation because they focus too heavily on the supposed motives of plaintiffs and their counsel. Judging the litigation in that manner is highly problematic, given the multiplicity and complexity of the motives underlying these suits and the inherent difficulty in accurately ascertaining them.

Much of Timothy Lytton's assessment of gun litigation turns on the plaintiffs' motivations. For example, Lytton contends that it is wrong to assert a claim, even a legally viable one, if the motive for doing so is to "circumvent the legislative process" by obtaining a court ruling that contradicts legislative policy choices.<sup>149</sup> Likewise, Lytton criticizes the Smith & Wesson settlement because he thinks cities inappropriately sought to apply settlement pressure by filing separate lawsuits in different jurisdictions.<sup>150</sup> He criticizes some attorneys for "shamelessly tout[ing]" the fact that lawsuits could impose crushing litigation costs on the industry.<sup>151</sup>

In each instance, Lytton draws a line between proper and improper motives of the plaintiffs. His objections would dissolve if the plaintiffs filed the same lawsuits and litigated them the same way, but did so for reasons other than the motives that Lytton finds objectionable.

Motive is a subjective phenomenon that is often extremely difficult to ascertain. This is particularly true in circumstances involving litigation as complicated as the lawsuits directed at the gun industry, with many cases, many interested parties, and many different lawyers involved. Indeed, Seton Hall law professor Howard Erichson's entire

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149. Lytton, *The NRA*, *supra* note 126, at 160-61.

150. Lytton, *The Complementary Role of Tort Litigation*, *supra* note 36, at 261-62.

151. Lytton, *The NRA*, *supra* note 126, at 160, 163.

essay in *Suing the Gun Industry* is devoted to the question of who represented the plaintiffs in the gun litigation and why they did so.<sup>152</sup> He rightly concludes that it was a “story of mixed motives—moral, political, and financial—by diverse actors on plaintiffs’ side.”<sup>153</sup>

Lytton’s assertions about the gun litigation demonstrate the difficulty of determining the extent to which any particular purpose motivated the lawsuits. For example, Lytton contends that plaintiffs were entitled to use the threat of legal liability to pressure the gun industry to reform, but not the threat of litigation costs.<sup>154</sup> To support his view that a number of cities improperly filed their lawsuits simultaneously “to increase the industry’s defense costs so as to pressure them into settlement,” Lytton cites remarks by two government officials who warned the industry that many lawsuits might be filed, but who did not mention defense costs and who ultimately never participated in the filing of any lawsuit.<sup>155</sup> The idea that plaintiffs conspired to inflate litigation costs and extort settlements from defendants is Lytton’s inference, not something for which he can offer proof.

Many of the other essays in *Suing the Gun Industry* reflect an even more dubious assumption about plaintiffs’ motives, suggesting that a principal aim of the lawsuits was to drive gun makers out of business. For example, the essay on liability insurance issues by Tom Baker and Thomas Farrish asserts that the gun litigation “had the goal of shutting down entire businesses.”<sup>156</sup> In his essay, Peter Schuck assumes that plaintiffs in the gun litigation cheered reports that legal costs helped push a small manufacturer into bankruptcy and prompted Colt’s Manufacturing to discontinue production of several models in its handgun line.<sup>157</sup>

Despite gun makers’ assertions that the litigation aimed to destroy the industry and stop the production of firearms,

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152. Howard M. Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs’ Attorneys in Municipal Gun Litigation*, in *SUING THE GUN INDUSTRY*, *supra* note 10, at 129.

153. *Id.* at 131.

154. See Lytton, *The NRA*, *supra* note 126, at 163.

155. Lytton, *The Complementary Role of Tort Litigation*, *supra* note 36, at 261.

156. Baker & Farrish, *supra* note 14, at 314.

157. Schuck, *supra* note 32, at 226.

the plaintiffs in these cases did not intend or expect that to happen.<sup>158</sup> The central point of the lawsuits was not to ban the sale of guns, but to require that guns be designed and distributed in safer ways.<sup>159</sup> When the contributors to *Suing the Gun Industry* suggest the litigation fell short because it did not put gun makers out of business, they condemn the plaintiffs and their counsel for failing to achieve an objective they never had.

#### IV. LEGISLATION VERSUS LITIGATION

In the end, gun litigation may have been just successful enough to doom itself. The lawsuits posed a threat sufficient to provoke enactment of the federal statute giving the gun industry special immunity from tort liability.<sup>160</sup> If courts uphold that law, it will represent an unequivocal victory for the gun industry over tort law challenges.<sup>161</sup>

At the same time, Congress's action casts serious doubt on the notion, espoused by several contributors to *Suing the Gun Industry*, that legislatures are far better suited than tort litigation to create sound public policy on complex matters like the distribution and design of firearms. For example, Peter Schuck argues forcefully that courts are poorly equipped, compared to legislative and administrative entities, for the enterprise that gun lawsuits invited them to undertake.<sup>162</sup> According to Schuck, courts have less ability to assemble vital information, less sensitivity to political preferences, less sophisticated means of implementing their policy views, less ability to react to new developments and to reassess their past determinations, and less legitimacy in the public's eyes.<sup>163</sup> Schuck thus condemns the gun litigation as "a remarkably indirect, indiscriminate, crude, and unpromising remedy for the plague of gun-related violence" and a "costly and institutionally inappropriate distraction

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158. See Sugarman, *supra* note 35, at 205-07 (suggesting that "given ease of entry into the handgun business by companies with very limited capitalization, even if existing gun makers were driven out of business, they might readily be replaced by waves of newcomers who, in turn, would earn a quick profit and then disappear").

159. See *id.* at 209-11.

160. See *supra* notes 6-7 and accompanying text.

161. See *supra* note 8.

162. Schuck, *supra* note 32, at 227-47.

163. *Id.*

from the real political and policy tasks before us.”<sup>164</sup>

Likewise, Vanderbilt law professor Richard Nagareda’s essay contends that gun lawsuits have ignored several of the most important lessons learned in recent decades about sensible regulatory policymaking.<sup>165</sup> While sound policy decisions must be based on a comprehensive comparison of the costs and benefits of all potential actions, Nagareda believes that gun lawsuits focused too narrowly on what results would flow from imposing various new requirements on gun makers and dealers. The lawsuits disregarded the costs and benefits of other actions that might be taken instead to address gun violence problems.<sup>166</sup>

However valid those observations about the relative institutional competence of courts and other policymaking bodies may be in general, they look highly questionable in view of the ultimate resolution of lawsuits against the gun industry. No court in any of the lawsuits came close to imposing any form of sweeping, categorical liability on gun makers or sellers. Instead, even the courts that took some steps in plaintiffs’ direction engaged in very careful, subtle line-drawing, identifying situations where liability could be justified while shielding defendants where it could not.<sup>167</sup> The judicial decisions thus generally reflected a high level of sensitivity to the complexity of the policy issues presented by the cases.

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164. *Id.* at 249.

165. Nagareda, *supra* note 80, at 176. In addition, Nagareda believes that insufficient political accountability exists where cities and other government entities initiate lawsuits, but finance them by retaining private counsel with contingent fee arrangements. *Id.* at 177, 180-81, 187-88.

166. *See id.* at 177, 186-87.

167. *See, e.g.,* City of Gary v. Smith & Wesson Corp., 801 N.E.2d 1222 (Ind. 2003) (reversing dismissal of city’s public nuisance and negligence claims, but ruling that the city could not rely on “market share” liability theory to prove damages); Smith v. Bryco, 33 P.3d 638, 643 (N.M. Ct. App. 2001) (explaining that distinctive aspects of handguns, including the fact that they are the subject of a constitutional right to bear arms, can be reasonably accommodated and accounted for in applying tort law to them); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1150-51 (Ohio 2002) (reversing dismissal of the city’s claims, but recognizing that plaintiffs may not ultimately prevail and that “no one should believe that lawsuits against gun manufacturers and dealers will solve the multifaceted problem of firearm violence”) (quoting Jon S. Vernick & Stephen P. Teret, *New Courtroom Strategies Regarding Firearms: Tort Litigation Against Firearm Manufacturers and Constitutional Challenges to Gun Laws*, 36 HOUS. L. REV. 1713, 1754 (1999)).

In contrast, Congress did not even attempt to make similarly sophisticated distinctions when it passed legislation giving the gun industry broad immunity from liability. Instead, proponents of the immunity legislation relied on sweeping generalizations, insisting that none of the recent tort lawsuits against gun manufacturers had any merit.<sup>168</sup> The measure broadly sweeps away state tort law, rather than simply refining the conditions or standards under which liability should be imposed.<sup>169</sup> Indeed, the chief contention made by the legislation's lead supporters in the Senate was the incredible claim that tort litigation threatened national security because gun makers were on the verge of collapsing and leaving the U.S. armed forces with no domestic source to supply firearms for military use.<sup>170</sup> Moreover, Congress did not consider the costs and benefits of alternative methods of achieving the safety enhancements and harm reduction that the lawsuits had been designed to accomplish.<sup>171</sup>

Congress's decision to give the gun industry special immunity from tort law makes sense as a political matter, but it did not emerge from a well-informed, sophisticated, or

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168. See, e.g., 151 CONG. REC. S9389 (daily ed. July 29, 2005) (remarks by Sen. Allen); 151 CONG. REC. S9221 (daily ed. July 28, 2005) (remarks by Sen. Hutchison); 151 CONG. REC. S9062-63, S9074, S9076-77, S9088 (daily ed. July 27, 2005) (remarks by Sen. Coburn, Sen. Frist, Sen. Hatch, and Sen. Craig); 151 CONG. REC. S8910 (daily ed. July 26, 2005) (remarks by Sen. Sessions). The immunity legislation enacted by Congress includes a "finding" that gun lawsuits "are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law," but nevertheless might be sustained by a "maverick judicial officer or petit jury." Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, § 2(a)(7), 119 Stat. 2095, 2096 (2005) (codified at 15 U.S.C. § 7901(a)(7) (LexisNexis 2006)).

169. Protection of Lawful Commerce in Arms Act, §§ 3-4, 119 Stat. at 2096-97 (codified at 15 U.S.C. §§ 7902-7903).

170. See 151 CONG. REC. S9074 (July 27, 2005) (remarks by Sen. Frist); 151 CONG. REC. S8590 (daily ed. July 21, 2005) (remarks by Sen. Frist) ("Given the profusion of litigation, the Department of Defense faces the very real prospect of outsourcing sidearms for our soldiers to foreign manufacturers."); see also Roxana Tiron, *Frist: Lawsuits Threaten Gun Supply*, THE HILL, July 28, 2005 (reporting that the U.S. military is not facing any real risk of shortage of small arms, despite Senator Frist's "alarming claims" to the contrary).

171. Congress added a provision to the Protection of Lawful Commerce in Arms Act requiring a trigger lock or other secure storage device to be provided with every handgun sold. § 5, 119 Stat. at 2099-2101 (codified at 18 U.S.C. §§ 922(z), 924(p) (LexisNexis 2006)). Almost all major manufacturers have been voluntarily doing that already for nearly a decade. See James Bennet, *Gun Makers Agree on Safety Locks*, N.Y. TIMES, Oct. 9, 1997, at A1.

sensitive policymaking process.<sup>172</sup> The immunity legislation significantly undermines the premise of those who argue, in *Suing the Gun Industry* and elsewhere, that legislatures are better suited to make public policy decisions on important issues like those at stake in the gun litigation.

## V. CONCLUSION

*Suing the Gun Industry* looks back at gun litigation in diverse and provocative ways, providing tentative suggestions about how the litigation will be characterized and what lessons will be drawn from it in the years to come. While the gun industry appears likely to emerge victorious through the passage of federal immunity legislation, the consequences of gun litigation were far more complicated than portrayed in *Suing the Gun Industry*. Contrary to much of what *Suing the Gun Industry* suggests, gun litigation actually achieved significant progress in several key respects. The gun lawsuits generated significant new information about the gun industry's conduct, produced important new legal precedent, and altered public perception of the gun industry.

By bringing the era of litigation over firearms to an end, Congress has accepted the notion that tort claims were threatening to destroy the entire gun industry. In doing so, Congress succumbed to the same erroneous assumption often made in *Suing the Gun Industry* about the purposes of the litigation. The lawsuits were never meant to bring the gun industry to its knees. Rather, they were intended to bring the gun industry to its senses. For a time, they made substantial progress toward that goal. The future soon will reveal how the industry chooses to conduct itself once free of the prospect of potential tort liability.

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172. Cf. Lytton, *supra* note 126, at 153, 166-68 (arguing that "sweeping statutory immunity for the gun industry" improperly politicizes tort law, usurps judicial power, and diminishes the ability of litigation to play a regulatory role complementing actions of legislative and administrative entities).