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Allen K. Rostron

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SHOOTING STORIES: THE CREATION OF NARRATIVE AND MELODRAMA IN REAL AND FICTIONAL LITIGATION AGAINST THE GUN INDUSTRY

Allen Rostron*

I. INTRODUCTION

In recent years, gun manufacturers and dealers have faced a wave of tort litigation in courts across the country. Shooting victims and their families have sued, claiming that they suffered injuries attributable to gun companies designing and distributing firearms in unreasonably dangerous ways. Dozens of major cities and counties have sued as well, seeking to recover costs for law enforcement, medical, and other public services allegedly incurred as a result of gun industry practices that foster criminal possession and misuse of guns. Patterned after the lawsuits by state attorneys general that shattered the tobacco industry's aura of legal invulnerability several years earlier, these government suits received widespread attention and generated predictions of a similar breakthrough against the gun companies.

As these cases made their way through the courts, they caught the attention of writers and producers of various forms of popular entertainment. Stories about litigation against gun manufacturers and dealers became the basis for episodes of two of the most popular television courtroom dramas,¹ a Hollywood star-studded legal thriller,² a novel by a best-selling author,³ and an investigative journalist's account of the legal and political controversy surrounding guns.⁴

This Article examines these dramatic portrayals of litigation against gun companies, looks at the messages and information they conveyed to audiences, and considers what they reveal about the real legal battles that inspired them. The creators of these dramatic works used real litigation as source material. They drew facts, events, and arguments from actual cases and wove them into stories. Some strived to portray the gun litigation realistically and others relied more heavily on artistic license and imagination. While varying widely in the extent to which they aimed for realism, they shared several core goals. First and foremost, each sought to tell a compelling story that people would want to watch or read. In addition, for a mix of ideological and dramatic reasons, each strived to present a strong and convincing case against the defendant gun companies. To accomplish those goals, the creators of these works relied on techniques of melodrama. They simplified and personalized the issues, ratcheting up the

* 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 *The Practice: Target Practice* (ABC television broadcast, Mar. 7, 1999); *Law & Order: Gunshow* (NBC television broadcast, Sept. 22, 1999).

² *RUNAWAY JURY* (Twentieth Century Fox 2003).

³ RICHARD NORTH PATTERSON, *BALANCE OF POWER* (2003).

⁴ PETER H. BROWN & DANIEL G. ABEL, *OUTGUNNED: UP AGAINST THE NRA—THE FIRST COMPLETE INSIDER ACCOUNT OF THE BATTLE OVER GUN CONTROL* (2003).

pathos of plaintiffs and villainy of defendants to create a stark conflict between moral extremes.

That process of developing narratives and using dramatic techniques to enhance their impact is similar in many ways to what lawyers inevitably do in litigation. They select and arrange facts to tell stories that judges and juries will find more coherent, credible, and convincing than the competing stories created by the adversaries. Narrative and melodrama play vital roles in real litigation just as in the depictions of litigation that appear on screen and in print.

A review of popular entertainment's portrayal of lawsuits against gun manufacturers thus provides an illuminating way of approaching the real litigation and thinking about what types of claims and strategies did, or did not, work. In particular, it suggests explanations for one of the central puzzles of the gun litigation: the relatively weak results achieved by the most potentially potent litigation. Lawsuits brought by cities and counties initially appeared to pose the greatest threat to the gun industry. They were aggregative in nature, asserting claims based on a broad swath of incidents and an immense accumulation of injuries, rather than just a single event as in a conventional lawsuit brought by one, or a few, individuals. At least to date, these government lawsuits have not achieved the breakthrough results for which their proponents hoped, confounding expectations that the aggregative approach would prove more powerful than conventional, individualized claims. Examining television, film, and literary portrayals of gun litigation provides insight into what occurred in the real litigation, shedding light on significant but overlooked shortcomings of the aggregative litigation approach. The cities' and counties' lawsuits addressed the issue of gun violence in an unusually comprehensive, but abstract, way. While that initially seemed like an advantage, it ultimately undermined the cases.

In analyzing and comparing the construction of narratives in real cases and their dramatic counterparts, this Article crosses through the intersection of several subjects that have been the focus of intense academic interest and extensive writing in recent years. Scholars have lavished attention on the significance of narrative in law.⁵ In addition, scholars have begun to pay substantial attention to the relationship between law and popular culture, looking carefully at law's reflection in movies, television, and books.⁶ Popular culture not only has a profound influence on how millions of Americans view the legal

⁵ See, e.g., *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (Peter Brooks & Paul Gewirtz eds., 1996); *NARRATIVE AND THE LEGAL DISCOURSE* (David Ray Papke ed., 1991); Symposium, *Pedagogy of Narrative*, 40 *J. LEGAL EDUC.* 1 (1990); Symposium, *Legal Storytelling*, 87 *MICH. L. REV.* 2073 (1989).

⁶ See, e.g., DAVID A. BLACK, *LAW IN FILM: RESONANCE AND REPRESENTATION* (1999); ANTHONY CHASE, *MOVIES ON TRIAL: THE LEGAL SYSTEM ON THE SILVER SCREEN* (2002); *LAW AND FILM* (Stefan Machura & Peter Robson eds., 2001); *LEGAL REELISM: MOVIES AS LEGAL TEXTS* (John Denvir ed., 1996); RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* (2000); Symposium, *Civil Litigation and Popular Culture*, 50 *DEPAUL L. REV.* 421 (2000); Symposium, *Law and Popular Culture*, 48 *UCLA L. REV.* 1293 (2001).

system and legal issues, but constitutes a valuable cultural record of ideas and attitudes about lawyers and law.⁷

Part I of this Article provides a brief overview of the real lawsuits against the gun industry and, in doing so, notes a key distinction between traditional individual cases which focus on one incident, and broader, aggregative cases brought by local governments and other entities. Part II describes how gun litigation has been depicted on the television programs *Law & Order* and *The Practice*, in the film *Runaway Jury*, in Richard North Patterson's novel *Balance of Power*, and in a non-fiction account entitled *Outgunned: Up Against the NRA – The First Complete Insider Account of the Battle over Gun Control*. Part III compares the creation of narratives and the use of melodrama in the dramatic portrayals of gun litigation with the same phenomena in the real litigation. The analysis suggests that the absence of crucial melodramatic narrative features has been a fundamental deficiency in the government lawsuits and similarly expansive forms of litigation against the gun industry.

In the interests of full disclosure, I emphasize that I am by no means an impartial observer of lawsuits concerning firearms, whether the litigation is real or fictional. 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.⁸ In addition, I provided information and ideas to two writers, Brian Koppelman and David Levien, at an early stage of their work on adapting John Grisham's book *Runaway Jury* into a screenplay.⁹ Whatever one thinks about their ultimate merits, lawsuits against gun makers provide a revealing opportunity to look at the relationships between one of the most controversial types of litigation in recent years and its fictional reflections in the realm of popular culture

II. LAWSUITS AGAINST THE GUN INDUSTRY

Lawsuits against gun manufacturers and dealers are not a new phenomenon. Plaintiffs have been suing gun companies, often successfully, for centuries.¹⁰ The cases involved the standard sorts of tort claims, similar to those brought against the makers and sellers of any other products, and they provoked no particular controversy.¹¹ A new era began in the 1980s, as plaintiffs' lawyers

⁷ See Allen Rostron, *Lawyers, Law & the Movies: The Hitchcock Cases*, 86 CAL. L. REV. 211, 217 (1998).

⁸ The views expressed in this Article are strictly my own and do not necessarily represent the views of any parties to the cases discussed or any other litigation.

⁹ Other attorneys at the Brady Center, particularly its legal director Dennis Henigan, later provided extensive assistance to the makers of that film.

¹⁰ See, e.g., *Langridge v. Levy*, 2 M. & W. 519, 150 Eng. Rep. 863 (Ex. 1837) (sustaining jury's verdict against shopkeeper who falsely represented that a gun, which exploded and mutilated shooter's hand, was a high quality weapon specially made for King George IV by renowned gunsmith), *aff'd*, 4 M. & W. 337 (1838).

¹¹ See, e.g., *Favo v. Remington Arms Co.*, 73 N.Y.S. 788 (N.Y. App. Div. 1901) (holding that gun maker could be liable for negligence in manufacturing), *appeal dismissed*, 66 N.E. 1107 (N.Y. 1903); *McMillen v. Steele*, 119 A. 721 (Pa. 1923) (holding that gun dealer could be liable for negligence for selling gun to minor).

began bringing more aggressive cases asserting that gun manufacturers bear legal responsibility for the criminal use of their products. These lawyers aimed very broadly, often relying on theories that could essentially make every manufacturer liable for every harmful use of a firearm. For example, some claimed that making and selling guns is an ultra-hazardous activity, and therefore each gun manufacturer should be strictly liable for any injury inflicted by the use of its products, regardless of the amount of care the manufacturer exercised in product design and distribution.¹² The lawyers pursuing these expansive theories often made little effort to find cases with the strongest possible facts or to weed out weaker ones. One of the leading cases involved assertions that the manufacture and sale of handguns is an abnormally dangerous activity, but the case concerned a gun sold in the 1930s, and the plaintiffs offered no specific allegations about the circumstances under which the gun was sold or what had happened to the gun in the forty years between the time it left the manufacturer's hands and the time someone used it to commit a crime.¹³

The plaintiffs' lawyers seemed more concerned with the quantity of cases being brought than their quality. One of the most prominent attorneys pursuing claims against gun makers told a reporter that his barrage of lawsuits would eventually include more than two hundred cases.¹⁴ He boasted that he could force substantial increases in the gun industry's insurance costs and the price of handguns, and perhaps even drive manufacturers out of the handgun business, even if he never won a single case.¹⁵

All of the cases brought in the 1980s ultimately failed.¹⁶ Indeed, one of the most significant consequences of these lawsuits was the creation of a large body of precedent favorable to the gun industry.¹⁷ As that wave of litigation came to an end, lawyers contemplating further legal action against the gun industry realized that they would need a more refined approach. They soon developed new and more promising strategies.

¹² 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).

¹³ See *Martin*, 743 F.2d at 1203.

¹⁴ Elizabeth Peer et al., *Taking Aim at Handguns*, NEWSWEEK, Aug. 2, 1982, at 42.

¹⁵ *Id.*

¹⁶ The only decisions favoring plaintiffs were 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) (overruled by statute now codified at MD. CODE ANN., PUB. SAFETY § 5-402(b) (2003)).

¹⁷ See *supra* note 12.

A. Lawsuits by Private Individuals

In the 1990s, gun manufacturers faced a slew of new cases, brought under more cautious legal theories and carefully selected for their facts. Rather than asserting theories that would result in global liability for all shootings, plaintiffs argued that gun manufacturers and dealers can be held liable when they engage in conduct that is unusually and unnecessarily dangerous. The suits alleged very specific wrongdoing and targeted companies that could be painted as being among the worst in the industry. These cases would prove to be the greatest source of material for writers generating fictional accounts of gun litigation.¹⁸

For example, the defendants in *Halberstam v. S.W. Daniel, Inc.*¹⁹ sold Cobray M-11/9 assault pistol “assembly kits” through the mail.²⁰ Each “assembly kit” consisted of all the parts needed to make a Cobray M-11/9 except a gun frame.²¹ Conveniently, the defendants also sold pieces of sheet metal that could be folded into a frame,²² enabling their customers to obtain assault pistols without being subject to the legal restrictions and requirements that apply to sales of fully-assembled firearms.²³ Additionally, the case included evidence that the Cobray M-11/9 was an extraordinarily popular gun among criminals, that it was not suitable for sporting or other legitimate uses, and that defendants touted it as “The Gun that Made the ‘80s Roar” and “the controversial ‘Drug Lord’ choice” in advertisements featuring an illustration of a gangster figure.²⁴

Halberstam involved a particularly horrifying high-profile shooting. As Rashid Baz drove across the Brooklyn Bridge one day in the spring of 1994, he used a Cobray M-11/9 to spray eighteen bullets into a van carrying Hassidic Jewish rabbinical seminary students. Apparently retaliating for a recent shooting of Palestinians in Israel, Baz wounded four children, killing one.²⁵

A case litigated at the same time on the opposite side of the country, *Merrill v. Navegar, Inc.*,²⁶ arose from similarly disturbing facts. Navegar manufactured the TEC-9, a pistol specifically designed for rapidly killing multiple people at short range in military-style assaults.²⁷ Unlike a conventional handgun, the TEC-9 featured a barrel shroud and combat sling enabling a shooter to use a “hip-fire”

¹⁸ See *infra* Part II.

¹⁹ No. 95 Civ. 3323 (E.D.N.Y. 1998).

²⁰ See Timothy D. Lytton, *Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOK. L. REV. 681, 686 (1998).

²¹ *Id.* at 695.

²² *Id.*

²³ See Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1272 (2000).

²⁴ Lytton, *supra* note 20, at 695.

²⁵ *Id.* at 686; American Jewish Committee, *The Brooklyn Bridge Shooting: An Independent Review and Assessment*, at <http://www.ajc.org/InTheMedia/PubTerrorism.asp?did=138> (last visited Mar. 27, 2005).

²⁶ 89 Cal. Rptr. 2d 146 (Cal. App. 1999), *rev'd*, 28 P.3d 116 (Cal. 2001).

²⁷ Answer Brief on the Merits at 1, 5-7, *Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001) (No. S083466), available at 2000 WL 777793.

or “spray-fire” technique, rapidly firing the gun in the targets’ general direction while sweeping it back and forth.²⁸ Navegar also threaded the barrels of TEC-9s so that they could accept silencers or flash suppressors.²⁹ Navegar could not cite a single instance in which a TEC-9 had ever been used for self-defense, hunting, or organized sporting activity.³⁰ No other gun on the civilian market provided a comparable combination of concealability and firepower.³¹

Navegar advertised the gun in magazines like *Soldier of Fortune*, aiming for a market that included survivalist groups and people with military fantasies.³² Navegar’s advertising touted the gun as an “assault pistol” to emphasize that it could be used to initiate combat rather than merely return fire, and one advertisement noted that the gun’s special finish provided “excellent resistance to fingerprints.”³³ Evidence showed that Navegar knew the TEC-9 was the assault weapon most frequently used in crimes and that the gun could be easily converted to full automatic fire.³⁴ Indeed, two of the company’s officers pled guilty to federal criminal charges for participating in conspiracies to convert TEC-9s to automatic fire.³⁵ Navegar’s marketing director told newspaper reporters that the company was “flattered” when it saw reports about criminal use of TEC-9s, because it has “advertising tingle” and “[i]t might sound cold and cruel, but I’m sales oriented.”³⁶

Gian Luigi Ferri was squarely within Navegar’s target market. On July 1, 1993, he used three guns, including two TEC-9s, in a shooting rampage through the offices of a San Francisco law firm.³⁷ Shortly before the shooting, Ferri obtained false identification and traveled to Nevada to purchase the TEC-9s because California had banned the possession and sale of these guns several years earlier.³⁸ Ferri equipped the guns with “Hell-Fire” triggers to accelerate their firing speed, as well as extra large capacity ammunition magazines even bigger than the TEC-9’s standard thirty-two round clips.³⁹ He loaded the guns with “Black Talon” bullets, which have a special copper jacket designed to peel back and form six razor sharp claws for enhanced cutting action as the bullet penetrates the body.⁴⁰ In a few minutes of shooting, Ferri killed eight people and wounded six others before killing himself.⁴¹

²⁸ *Id.* at 5-6.

²⁹ *Id.* at 10.

³⁰ *Id.* at 6-7.

³¹ *Id.* at 6.

³² Answer Brief on the Merits, *supra* note 27, at 10-11.

³³ *Id.*

³⁴ *Id.* at 9.

³⁵ *Id.*

³⁶ *Id.* at 18.

³⁷ Answer Brief on the Merits, *supra* note 27, at 11-12.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Merrill*, 89 Cal. Rptr. 2d at 154; *see* *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997) (affirming dismissal of claims that “Black Talon” bullets used in mass shooting on Long Island train were defectively designed).

⁴¹ Answer Brief on the Merits, *supra* note 27, at 2.

A third case that illustrated the new style of litigation against the gun industry was *Anderson v. Bryco Arms, Inc.*⁴² It concerned nefarious activity within a gun manufacturer's distribution system. Bryco Arms was among the nation's leading manufacturers of the inexpensive, low-quality handguns commonly known as "Saturday Night Specials."⁴³ Old Prairie Trading Post, a gun dealer in Illinois, sold more than fifty Bryco pistols to Donald Fiessinger, a retired janitor, over the course of two years.⁴⁴ Old Prairie and Fiessinger carefully staggered the sales to avoid triggering the filing of a special notice that would alert law enforcement agencies if Fiessinger ever bought more than one handgun within a single week.⁴⁵ Fiessinger re-sold the guns, at nearly double the retail price, through classified advertisements in the local newspaper.⁴⁶ Fiessinger could attract customers at those inflated prices because, unlike a legitimate gun dealer, he did not require anyone purchasing a gun from him to undergo a background check.⁴⁷ Making no efforts to oversee its distribution network, Bryco did not detect the dealer's dubious activities.⁴⁸

In the summer of 1999, a few days after unsuccessfully attempting to purchase a gun from a store and failing the background check, Benjamin Smith saw Fiessinger's classified ad. Smith, a devout white supremacist, purchased a Bryco pistol from Fiessinger and soon used it in a three-day shooting spree across Illinois and Indiana.⁴⁹ Smith's targets included a group of Orthodox Jews walking home from their synagogue, an African-American family walking along the street in front of their home, and a Korean student walking to church services at Indiana University.⁵⁰ Smith killed two people and seriously injured nine others before fatally shooting himself as police surrounded him on an Illinois highway.⁵¹

The *Halberstam*, *Merrill*, and *Anderson* cases exemplified the new breed of carefully selected and tailored lawsuits being brought against gun makers and sellers. They involved extremely notorious shootings and specific allegations that defendants had done something unusually dangerous in their design, marketing, or distribution of guns. Other high-profile crimes generating lawsuits included a neo-Nazi's murder of a postal worker and shooting of children at a Jewish Community Center daycare center in Los Angeles in 1999,⁵² a seventh-

⁴² Complaint, *Anderson v. Bryco Arms, Inc.*, No. 00 L-007476 (Ill. Cir. Ct. 2000).

⁴³ Jerry Hicks, *O.C. Gun Maker Bryco Caught in Firing Range*, L.A. TIMES, Oct. 14, 1999, at B3.

⁴⁴ Plaintiffs' Memorandum in Opposition to Defendant Old Prairie Trading Post's Motion to Dismiss at 6, 9-11, *Anderson v. Bryco Arms, Inc.*, No. 00 L-007476 (Ill. Cir. Ct. Mar. 1, 2001).

⁴⁵ *Id.* at 8-9.

⁴⁶ *Id.* at 7.

⁴⁷ *Id.*

⁴⁸ Complaint, *Anderson*, No. 00 L-007476.

⁴⁹ *Id.*

⁵⁰ *Killer's Victims Included Blacks, Asians and Jews*, BALTIMORE SUN, July 6, 1999, at 5A.

⁵¹ *Id.*

⁵² *Ileto v. Glock Inc.*, 349 F.3d 1191 (9th Cir. 2003) (reversing summary judgment for gun manufacturer).

grade student's killing of a teacher in a Florida classroom in 2000,⁵³ and the series of sniper shootings that terrorized the Washington, D.C. area in 2002.⁵⁴

B. Lawsuits by Government Entities

In addition to the suits brought by private individuals, the gun industry faced an onslaught of lawsuits brought by government entities. New Orleans became the first city to sue, filing a complaint in October 1998.⁵⁵ Approximately thirty major cities and counties around the country eventually did the same, as did the District of Columbia and the state of New York.⁵⁶ These plaintiffs asserted that the gun industry's irresponsible practices forced them to incur substantial increased costs for law enforcement, medical care, and other services. While most plaintiffs never precisely specified the amount of costs they sought to recoup, those that made estimates suggested that as much as \$100 million to \$800 million might be at stake in each case.⁵⁷

These government lawsuits were aggregative in nature.⁵⁸ None of the claims in these cases were based on an itemized list of particular shootings or other crimes. Instead, each plaintiff relied on more general assertions that it had experienced a substantial number of such incidents and that they generated significant costs. In addition, each plaintiff brought its claims against a large number of defendants, often including two dozen or more manufacturers. The complaints generally relied upon allegations about the practices of the industry as a whole rather than individualized allegations about the conduct of each company.⁵⁹

The government lawsuits received an avalanche of publicity and were widely perceived to be the preeminent threat facing gun manufacturers. That perception arose in part from the remarkable outcome of earlier, similar litigation brought against tobacco companies by state attorneys general, ultimately

⁵³ Grunow v. Valor Corp. of Fla., 2005 WL 1278838 (Fla. Ct. App. June 1, 2005); Noah Bierman, *Teacher's Widow Sues, Targets Guns*, PALM BEACH POST, Oct. 5, 2000, at 1A.

⁵⁴ Johnson v. Bull's Eye Shooter Supply, No. 03-2-03932-8, 2003 WL 21639244 (Wash. Super. Ct. June 27, 2003).

⁵⁵ Michael Perlstein, *Morial Files Suit Against Gun Makers; City Seeks Compensation for High Cost of Violence*, TIMES-PICAYUNE, Oct. 31, 1998, at A1.

⁵⁶ Bill Miller, *District Suing the Gun Industry; Damages Sought for City's Carnage*, WASH. POST, Jan. 21, 2000, at A1; *Gun Industry Hit with First Suit to Be Filed by a State*, CHI. TRIB., June 27, 2000, at 6.

⁵⁷ See Stephanie Ebbert, *Boston Files Lawsuit over Guns, Prompting Industry to Cry Foul*, BOSTON GLOBE, June 4, 1999, at A1 (reporting that city estimated its damages at over \$100 million); Gary Washburn & Abdon Pallasch, *City Takes on Gun Industry; Daley's \$433 Million Suit Aims to Hit "Where It Hurts"*, CHI. TRIB., Nov. 13, 1998, at 1; *Wayne, Detroit Sue Gun Makers: County, City Seek \$800 Million*, DETROIT NEWS, Apr. 27, 1999, at 1A.

⁵⁸ For an overview of the general shift in recent decades toward viewing cases in aggregated rather than individualized ways, see Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5 (Summer 1991).

⁵⁹ See, e.g., Complaint, City of Boston v. Smith & Wesson Corp., No. SUCV1999-02590-C (Mass. Super. Ct. Jan. 26, 2000).

resulting in settlements totaling \$206 billion.⁶⁰ These government lawsuits also had the backing of an array of prominent plaintiffs' attorneys from around the nation, an assemblage of legal resources far greater than any that had ever been brought to bear against the gun makers.

C. Hybrid Lawsuits

Other lawsuits presented a mixture of individualistic and aggregative features. For example, the plaintiffs in *Hamilton v. Accu-Tek*⁶¹ were private individuals, but they brought innovative claims seeking to impose a broad, industry-wide form of liability.⁶² The plaintiffs were families of victims from seven different shootings.⁶³ Most could not identify the manufacturer of the gun used and therefore asserted that all manufacturers that might have made the weapon could be held liable for the damages on a proportional basis under a market share liability theory.⁶⁴ Each claim thus depended on allegations and proof about the conduct of the entire gun industry, rather than just a single, discrete story about one manufacturer and how a particular gun came to be used to injure the plaintiff.

Likewise, families of several murder victims brought suit in *Young v. Bryco Arms*,⁶⁵ but they asserted claims with a strong aggregative or collective flavor. They sought to represent a class of all those injured or killed with handguns in Chicago.⁶⁶ Each plaintiff also asserted claims against all major handgun makers, not just the manufacturer of a particular gun.⁶⁷ Plaintiffs contended that each manufacturer contributed to the existence of the illegal, underground market that supplies handguns to juvenile criminals and therefore bore part of the responsibility for any shooting that occurs, regardless of which one made the gun actually used in the shooting.⁶⁸

A lawsuit brought against gun makers by the National Association for the Advancement of Colored People (NAACP) represented an even more extreme form of aggregation than the government cases. This case was not limited to a single city's or county's problems with guns.⁶⁹ The NAACP sued a large collection of the nation's major manufacturers, wholesale distributors, and

⁶⁰ Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 340 (2001).

⁶¹ *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999), *questions certified sub nom.*, *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36 (2d Cir. 2000), *certified questions answered*, 750 N.E.2d 1055 (N.Y. 2001), *vacated*, 264 F.3d 21 (2d Cir. 2001).

⁶² *See generally id.*

⁶³ *Id.* at 808-10.

⁶⁴ *Id.* at 839-46; *see* Allen Rostron, *Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products*, 52 UCLA L. REV. 151, 186-90 (2004).

⁶⁵ *Young v. Bryco Arms*, 765 N.E.2d 1 (Ill. App. Ct. 2001), *rev'd*, 821 N.E.2d 1078 (Ill. 2004).

⁶⁶ *Id.* at 7.

⁶⁷ *Id.*

⁶⁸ *Id.* at 19-20.

⁶⁹ *NAACP v. Acusport, Inc.*, 271 F.Supp.2d 435 (E.D.N.Y. 2003).

importers of handguns.⁷⁰ Not focused on any particular shooting or crime, the case instead addressed the overall impact that widespread illegal access to handguns has on the organization, its members, and African-American communities.⁷¹

The gun industry thus faced an array of cases brought by different types of plaintiffs and varying widely in their reach. Some lawsuits aimed narrowly at either a single manufacturer, single gun, or single shooting, while others addressed the gun violence issue in a far more comprehensive manner.

III. DRAMATIC PORTRAYALS OF LAWSUITS AGAINST THE GUN INDUSTRY

Lawsuits against gun manufacturers soon caught the attention of writers looking for dramatic new subject matter, eventually becoming the basis for several television, film, and literary works.⁷² In every instance, the writers strived to present a strong case against a gun manufacturer, regardless of their personal views about the issue, to assure the presentation of a compelling story. A case too lopsided in either direction does not create real dramatic tension. Given that most of the audience would begin with a skeptical attitude toward lawsuits against a gun manufacturer,⁷³ the writers had to be particularly careful to make the plaintiffs' claims sufficiently credible.

A. *The Practice*

The first depiction of litigation against a gun manufacturer appeared in an episode of *The Practice*, a dramatic television series about a small Boston law firm.⁷⁴ First aired in March 1999, the episode follows two of the firm's attorneys through a trial in which they represent parents of a shooting victim.⁷⁵ The parents claim that a gun manufacturer is liable because it negligently marketed and distributed the "TAC-10" firearm that took their daughter's life.⁷⁶

The writers and director crafted the program to encourage viewers to favor the plaintiffs' side of the case, but they did not do that by inventing entirely fictional evidence against the manufacturer.⁷⁷ Instead, the evidence in the lawsuit

⁷⁰ *Id.* at 446.

⁷¹ See *NAACP v. Acusport, Inc.*, 210 F.R.D. 446 (E.D.N.Y. 2002) (addressing NAACP's standing to sue on its own behalf and as associational representative of its members).

⁷² In addition to the works discussed in detail here, an episode of *Lyon's Den*, a short-lived drama set in a Washington law firm, had a minor side-plot about a character helping to represent the District of Columbia in its lawsuit against gun manufacturers. *Lyon's Den: Hubris* (NBC television broadcast, Oct. 19, 2003).

⁷³ Karlyn Bowman, *Firearms Makers Not Responsible for Gun Violence, Americans Say*, ROLL CALL, July 15, 1999 (describing results of several opinion polls indicating majority of Americans oppose holding manufacturers liable for costs of gun violence).

⁷⁴ *The Practice*, *supra* note 1.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See *id.*

on *The Practice* was a blend of real facts from the *Merrill v. Navegar* and *Halberstam v. S.W. Daniel* cases.⁷⁸ The episode underscores that the gun was a military-style spray-fire assault weapon designed for offensive rather than defensive use. Further imitating the facts of *Merrill*, the plaintiffs on *The Practice* accused the manufacturer of marketing the gun in ways that appealed to criminals, including running ads in *Soldier of Fortune* and touting the gun as having “excellent resistance to fingerprints.”⁷⁹ Echoing the facts of *Halberstam*, they also claimed that the manufacturer catered to the criminal market by selling parts kits that enabled buyers to assemble their own TAC-10s without undergoing background checks.⁸⁰

The program emphasized that causation was the weak link in the plaintiffs’ case.⁸¹ The plaintiffs could not prove how the person who shot their daughter obtained his TAC-10, nor could they prove that he ever saw any of the manufacturer’s advertising.⁸² From the outset, one of the attorneys repeatedly warns her co-counsel that they are going to trial in a case they cannot possibly win.⁸³

Rather than exaggerating the evidence against the manufacturer, *The Practice* builds a compelling case for the plaintiffs through the manner in which it presents the characters and story.⁸⁴ The program introduces the plaintiffs, grieving parents Susan and Doug Kimbro, before revealing any information about the case.⁸⁵ Throughout the episode, the show presents the Kimbros as nervous, overwhelmed, and out of their element in the bustle of a busy courthouse and in the pressured atmosphere of litigation.⁸⁶ Omitting opening statements or other preliminaries, the show cuts immediately to the testimony of Susan Kimbro, who describes the evening when the family was out having dinner for a special celebration and the shooting occurred.⁸⁷ Throughout the episode, the plaintiffs receive a series of escalating settlement offers, but reject each one because they brought the case to honor their daughter’s memory and want to send a message to the gun company with a verdict.⁸⁸

⁷⁸ See *id.*; see also *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146 (Cal. App. 1999), *rev’d*, 28 P.3d 116 (Cal. 2001); Lytton, *supra* note 20.

⁷⁹ See *supra* notes 32-33 and accompanying text.

⁸⁰ See *supra* note 22 and accompanying text.

⁸¹ Proving causation was a dilemma for plaintiffs in both of the cases from which the episode drew inspiration. In *Halberstam*, Baz denied having seen any Cobray advertisements or having purchased the gun or any parts directly from the defendants. See Lytton, *supra* note 20, at 686, 692. In *Merrill*, Ferri killed himself and police investigators failed to save most of the gun magazines that littered his residence, meaning there was no definitive proof that Ferri saw any of Navegar’s advertisements. See *Merrill*, 89 Cal. Rptr. 2d at 155-56.

⁸² *The Practice*, *supra* note 1.

⁸³ *Id.*

⁸⁴ See *id.*

⁸⁵ *Id.*

⁸⁶ See *id.*

⁸⁷ *The Practice*, *supra* note 1.

⁸⁸ *Id.*

The Practice presents the defense side in a far different light.⁸⁹ The gun company's president and its attorney are continually angry and sour, as though they could barely contain their contempt for everyone and everything around them.⁹⁰

Virtually every lawsuit concerning guns involves a key third party—the person who either accidentally or intentionally misused the gun. In *The Practice*, that person is virtually nonexistent.⁹¹ He has a generic name, Ray Brown, mentioned a few times during the episode, but no more tangible existence.⁹² The episode never depicts him and does not explain anything about him or what happened to him before or after the shooting.⁹³ Even when the victim's mother testifies about the shooting, she describes it in the most indistinct terms, saying that suddenly there was screaming and someone firing a gun everywhere.⁹⁴ With the shooter having so little presence in the story, the program leaves all attention focused on the gun itself, an object very tangibly present in the hands of witnesses and attorneys throughout the trial, establishing a simple opposition between the grieving parents and the manufacturer. The program thus effectively manages to turn the greatest legal weakness in the plaintiffs' case, lack of evidence about the shooter's means of and motives for obtaining that particular gun, into one of the strongest narrative qualities favoring the plaintiffs' side of the case.

At one point, as a plaintiffs' attorney prepares a witness to testify, she tells him to forget about maintaining a neutral demeanor, saying "I think we should lead with outrage. Emotion is our strength here."⁹⁵ That epitomizes the approach taken by the program itself in telling its story. At the episode's end, the jury returns a \$7 million verdict for the plaintiffs.⁹⁶

B. *Law & Order*

Television's next depiction of litigation against a gun manufacturer appeared a few months later in the 1999 season-opening episode of *Law & Order*, a series frequently featuring "ripped from the headlines" plots loosely based on real events.⁹⁷ Drawing inspiration from the Columbine High School massacre, as well as the growing controversy over tort lawsuits against the gun industry, the episode begins with a scene depicting the bloody aftermath of a mass shooting on a sunny afternoon in New York's Central Park.⁹⁸

Since it is a show about the criminal justice system, *Law & Order* took the issue of gun manufacturer liability and transplanted it into that arena. In the

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² *The Practice*, *supra* note 1.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Law & Order*, *supra* note 1.

⁹⁸ *Id.*

course of tracking down the killer, police learn how easy it was for him to convert the gun, a “Rolf 9” semi-automatic pistol, to automatic fire using instructions and parts purchased at a gun show.⁹⁹ Apparently trying to minimize its chances of facing a civil suit by the shooting victims, the gun manufacturer hampers the investigation by refusing to produce technical data about the gun that could help police match the gun recovered from their suspect to ballistic evidence from the crime scene.¹⁰⁰

After obtaining a guilty plea from the killer despite the manufacturer’s intransigence, prosecutor Jack McCoy decides to bring negligent homicide charges against the manufacturer.¹⁰¹ While principally focused on the gun’s easy conversion to automatic fire, the prosecution’s case also includes evidence that the manufacturer distributes guns through irresponsible “kitchen table” dealers,¹⁰² the gun had special “fingerprint resistant” grips,¹⁰³ and the manufacturer flooded the guns into states with weak gun laws while knowing that large quantities would be trafficked to criminals in New York.¹⁰⁴

In an interview, the episode’s writer insisted that he “wasn’t pushing one agenda or another,” but acknowledged that he aimed to convince viewers that gun advertising manipulates consumers and that manufacturers work to ensure that guns get to those who want them, including criminals.¹⁰⁵ To make that point, the program strained the boundaries of plausibility in one crucial respect. Using gruesome photographs of the shooting victims, McCoy shames the manufacturer’s former marketing director into handing over an internal memorandum indicating that the company realized it could easily make the gun more difficult to convert to automatic fire but chose not to do it because it would mean significant lost sales to the criminal market.¹⁰⁶ Although the judge excludes the memorandum from trial based on attorney-client privilege, the memorandum constitutes more blatantly damning evidence of malfeasance by the manufacturer than anything uncovered in a real case.¹⁰⁷

While the program never puts the gun manufacturer in an even remotely favorable light, it does include the expression of credible misgivings about

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See, e.g., Mark D. Polston, *Civil Liability for High Risk Gun Sales: An Approach to Combat Gun Trafficking*, 19 SETON HALL LEGIS. J. 821, 835-37 (1995) (describing “kitchen table dealer” issue). The dealer that sold the murder weapon conducted business out of his house and admitted that he broke the law by shipping the gun to an out-of-state buyer. See 18 U.S.C. § 922(b)(3) (2000) (prohibiting dealers from selling handguns to purchasers residing in other states).

¹⁰³ See *supra* note 33 and accompanying text.

¹⁰⁴ See *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1060 (N.Y. 2001) (describing plaintiffs’ assertion that “gun manufacturers have oversaturated markets in states with weak gun control laws (primarily in the Southeast), knowing those ‘excess guns’ will make their way into the hands of criminals in states with stricter laws such as New York”).

¹⁰⁵ *TV Writers Take a Fresh Look at Guns*, PROFILE (Entertainment Industries Council on-line newsletter), at <http://eiconline.org/creative/profile/profile47.html> (last visited Mar. 28, 2005).

¹⁰⁶ *Law & Order*, *supra* note 1.

¹⁰⁷ See *id.*

whether McCoy's prosecution of the manufacturer was an appropriate way to address the gun violence problem. Even the prosecutor assisting McCoy scorns the case in their private discussions, and the trial judge repeatedly accuses McCoy of misusing his prosecutorial authority in an effort to make social policy on guns.¹⁰⁸

The program also significantly enhances the manufacturers' side of the issues by giving the shooter a substantial presence throughout the episode.¹⁰⁹ The episode not only depicts him, but also delves into his motivation for the crime. In addition to an extensive interrogation scene early in the episode, he shows up again at the manufacturer's trial to testify about how he converted the gun to automatic fire.¹¹⁰ His presence lends far greater impact to the defense counsel's suggestion that the shooter bears exclusive responsibility for the shooting:

Fifteen people were killed. Now, Mr. McCoy wants you to believe there's a straight line between their shattered bodies and my client's factory. There isn't. There's just Dennis Trope. He was the one who broke the law when he bought the gun, modified it, and fired it into that crowd. Horrifyingly simple.¹¹¹

Unlike the absent killer from *The Practice*, the shooter is a tangible character rather than just a name, and his presence disrupts the creation of a simple dichotomy between sympathetic victims and a cold-hearted manufacturer.

The episode ends with a guilty verdict, after a powerful closing argument in which McCoy dumps a stream of bullets onto a courtroom table to illustrate how drastically the conversion of the gun to automatic fire increased the killer's firepower.¹¹² The judge immediately directs a verdict acquitting the manufacturer, declaring that the jury's decision and the prosecution's case rested on emotional outrage rather than facts and cogent reasoning.¹¹³

C. Runaway Jury

The notion of holding firearm manufacturers accountable for violent crimes perpetrated with their products reached movie screens in October 2003 with the release of *Runaway Jury*.¹¹⁴ Based on a best-selling novel by John Grisham about a trial against a tobacco company,¹¹⁵ the filmmakers switched the subject from cigarettes to guns. Grisham's book, published in 1997, dramatized the extreme lengths to which the tobacco industry would go to maintain its flawless

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*

¹¹⁰ *Id.*

¹¹¹ *Law & Order*, *supra* note 1.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *RUNAWAY JURY* (Twentieth Century Fox 2003).

¹¹⁵ JOHN GRISHAM, *RUNAWAY JURY* (1997).

record in tort litigation.¹¹⁶ That plot became a historical relic just months after the book's release, as the cigarette makers began offering to pay hundreds of billions of dollars in settlements.¹¹⁷ In addition, Hollywood had already plowed the tobacco field in 1999 with *The Insider*, a movie about a controversial *60 Minutes* episode featuring an interview with a former tobacco industry scientist.¹¹⁸ That film generated tepid box-office results and further reduced the appeal of making another "Big Tobacco" picture.¹¹⁹ As *Runaway Jury* moved toward production, tobacco litigation was old news and gun lawsuits were the next big thing.

In early versions of the *Runaway Jury* screenplay, the plaintiff was a woman who accidentally shot herself in the head while cleaning her "Lady Auto" pistol.¹²⁰ Having removed the ammunition magazine, she mistakenly assumed the gun was unloaded, unaware that a single round remained in the gun's firing chamber.¹²¹ Wounded but not killed, she claimed that the manufacturers did not adequately warn her about the danger and could have eliminated it by re-designing the gun so that it would not fire without the ammunition magazine inserted.¹²²

That scenario posed several problems, including the risk that most viewers would be likely to blame this woman for her own misfortune, finding it implausible that anyone could hold the manufacturer responsible. While hundreds of people die and thousands more suffer injuries in unintentional shootings every year, and many of those accidents occur just as in the *Runaway Jury* script,¹²³ most people can easily convince themselves that they would never be foolish enough to make such a mistake.¹²⁴ Moreover, as tragic as it is, a woman accidentally shooting herself while cleaning her own gun does not offer the sort of visual excitement that usually fills blockbuster films.

The makers of *Runaway Jury* eventually decided on a much more cinematic, violent event. Echoing the *Merrill* case and similar instances of mass

¹¹⁶ *Id.*

¹¹⁷ See, e.g., Felix H. Kent, *Reviewing 1997: Tobacco Settlement*, N.Y.L.J., Dec. 19, 1997, at 3; Martin Merzer & Elinor J. Brecher, *Big Tobacco Agrees to Pay \$349 Million*, MIAMI HERALD, Oct. 11, 1997, at A1.

¹¹⁸ THE INSIDER (Buena Vista Pictures 1999).

¹¹⁹ *Id.*

¹²⁰ See Darwin Mayflower, *Script Review: Runaway Jury*, Screenwriter's Utopia, at <http://www.screenwritersutopia.com/modules.php?name=Content&pa=showpage&pid=266> (June 20, 2001); *The Stax Report: Script Review of Runaway Jury*, FilmForce, at <http://filmforce.ign.com/articles/301/301656p1.html> (July 25, 2001).

¹²¹ Mayflower, *supra* note 120.

¹²² Courts have split on whether the absence of a "magazine disconnect safety" can make a pistol defective. See, e.g., *Bolduc v. Colt's Mfg. Co.*, 968 F. Supp. 16 (D. Mass. 1996); *Smith v. Bryco Arms*, 33 P.3d 638 (N.M. Ct. App. 2001); *Hurst v. Glock, Inc.*, 684 A.2d 970 (N.J. Super. Ct. App. Div. 1996).

¹²³ See 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, 1738-39 (1999).

¹²⁴ See, e.g., Jeffrey J. Rachlinski, *Misunderstanding Ability, Misallocating Responsibility*, 68 BROOK. L. REV. 1055 (2003).

murder in the workplace,¹²⁵ the film depicts a shooting rampage by a disgruntled day trader.¹²⁶ Although he kills eleven people, the film makes the event more intensely personal by focusing entirely on one victim, stockbroker Jacob Wood.¹²⁷ The film opens with grainy home-video footage of Jacob, the day before his death, celebrating at his young son's birthday party.¹²⁸ When Jacob arrives at work the next morning and the shooting begins, the film depicts the incident from Jacob's point of view, solidifying the audience's identification with him.¹²⁹ Jacob tries to bar the door to his office, while peeking cautiously into the hallway through window blinds.¹³⁰ While the gun continues to fire somewhere off screen, the hallway remains empty.¹³¹ At this point, the audience can see only what Jacob sees and know only what he knows. In an instant, the door bursts open and the film freezes on Jacob's terrified face before fading away to end the scene.¹³² During closing arguments near the film's end, *Runaway Jury* returns to the birthday party video, a way to give Jacob a tangible place in the picture even after his death.¹³³

While cementing that intimate connection with the shooting victim, the film just as carefully diminishes the killer's existence. He does not say a word and is seen only for a split second in the film, as a dark silhouette against a blinding white flash of light in the moment before Jacob's death.¹³⁴ Even for that instant when he is on screen, he is just an indistinct shadow behind an ominous gun.¹³⁵ The film soon reveals that he committed suicide at the end of his shooting spree, eliminating him as a satisfying target at which to aim the outrage over the tragedy.¹³⁶

Jacob's widow brings a lawsuit against the manufacturer of the gun, based on a mixture of evidence drawn from the *Merrill* and *Anderson* cases.¹³⁷ The gun is a high-capacity assault pistol marketed through advertisements boasting of the weapon's "print resistant finish."¹³⁸ The killer obtained it from a black-market gun trafficker who bought dozens of guns each month from a shady dealer.¹³⁹ Rather than investigating the dealer's suspicious sales patterns, the manufacturer rewarded him with a free vacation trip for doing such high-volume business.

¹²⁵ See Jonathan Foreman, *A Dead Ringer? Atlanta Mass Murder Recalls 1993 Michael Douglas Movie*, N.Y. POST, July 31, 1999, at 19 (comparing shootings at Atlanta office by day-trader Mark Barton to fictional rampage in *FALLING DOWN* (Warner Bros. 1993)).

¹²⁶ *RUNAWAY JURY*, *supra* note 2.

¹²⁷ *See id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *RUNAWAY JURY*, *supra* note 2.

¹³² *Id.*

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ *Id.*

¹³⁶ *RUNAWAY JURY*, *supra* note 2.

¹³⁷ *Id.*

¹³⁸ *See supra* notes 26-33 and accompanying text; *see also* *RUNAWAY JURY*, *supra* note 2.

¹³⁹ *See supra* notes 42-48 and accompanying text; *see also* *RUNAWAY JURY*, *supra* note 2..

The manufacturer's villainy does not end there. Most of the plot concerns the gun industry's elaborately sinister machinations to guarantee a favorable outcome at trial by any means necessary, from unscrupulous surveillance to outright extortion of jurors. *Runaway Jury* thus takes the notion that gun manufacturers have prevailed in much of the litigation against them and turns it against the industry, suggesting that the outcomes owe more to power and manipulation than to any deficiencies in the merits of the claims. The film closes with a \$111 million verdict against the gun manufacturer, a decision unmistakably treated as a triumph of good over evil.

D. *Balance of Power*

Arriving in bookstores the same week in October 2003 that *Runaway Jury* made its debut in theaters, Richard North Patterson's novel *Balance of Power* also focuses on manipulation, but it is manipulation that starts within the world of politics and spills over into the civil justice system. The book's heroic central figure is President Kerry Kilcannon, a liberal Democrat trying to persuade a Republican-majority Congress to pass a package of new gun control measures, while fending off a tort reform bill that would give the gun industry immunity from liability.¹⁴⁰

While the novel reflects an enormous amount of research and an acute understanding of the contemporary debate over guns,¹⁴¹ the book's author, former trial lawyer Richard North Patterson, does not pretend to be neutral about the subject. As he noted in the novel's afterword, he serves on the board of directors of the Brady Campaign to Prevent Gun Violence and is a staunch advocate of stronger regulation of guns.¹⁴² *Balance of Power* arrived in bookstores in the midst of a real fight in Washington over proposed legislation that would give the gun industry special protection from tort liability. Patterson helped to lobby against that legislation, which came tantalizingly close to passing in March 2004.¹⁴³

At the outset, the book mentions the existence of more than a dozen lawsuits brought against gun manufacturers by cities,¹⁴⁴ but those cases play no real part in the story that ultimately unfolds in *Balance of Power*. The city lawsuits never become anything more than a part of the background legal landscape facing the gun makers. Instead, the book focuses on a single shooting that claims the lives of several members of the First Lady's family and generates a lawsuit in which President Kilcannon has a deep personal as well as political

¹⁴⁰ PATTERSON, *supra* note 3.

¹⁴¹ *Id.* at 607-11.

¹⁴² *Id.* at 607.

¹⁴³ See Protection of Lawful Commerce in Arms Act, S. 1805, 108th Cong. (2004). Although a narrow majority of the Senate supported the legislation restricting lawsuits, the NRA killed the bill after gun control advocates succeeded in adding amendments that would have extended the ban on assault weapons and required background checks on the sale of all firearms at gun shows. *Pry Congress from Cold, Deadly Clutch of the NRA*, ATLANTA J.-CONST., Mar. 5, 2004, at 18A.

¹⁴⁴ PATTERSON, *supra* note 3, at 74, 86-91.

interest.¹⁴⁵ The gun used in the shooting, as in the *Merrill* case,¹⁴⁶ is an assault pistol banned in California but available in neighboring Nevada, loaded with “Black Talon” style bullets.¹⁴⁷ The killer obtains the weapon at a gun show, where background checks are not required for purchases from those ostensibly selling guns only from their “personal collections or for a hobby.”¹⁴⁸ He finishes his shooting spree with a bullet to his own head.¹⁴⁹ The crime occurs in an airport terminal as the killer’s targets wait at the baggage claim, a setting that undercuts any attempt to attribute the tragedy to the fact that the victims were not armed to defend themselves.¹⁵⁰

While creating a scenario that could be used to flail the gun’s manufacturer, Patterson employs it to a different end. The real villain in *Balance of Power* is not the manufacturer, but the “Sons of the Second Amendment,” a thinly disguised version of the National Rifle Association. The book depicts gun makers as decent people who just want to carry on business but who are caught in the grip of the gun lobby and terrified to resist its extremism.¹⁵¹

Much of what the book suggests about the relationship between the industry and the NRA derives directly from real events of recent years. President Kilcannon manages to convince the heads of the leading gun companies to join him for a Rose Garden ceremony announcing a voluntary commitment to provide safety locks with new guns,¹⁵² just as Bill Clinton and major handgun makers did in 1997.¹⁵³ That infuriates the hardliners at the Sons of the Second Amendment, who soon reassert their dominance of the industry and force the termination of the trade association chief who helped orchestrate the deal with the White House,¹⁵⁴ just as the NRA used its considerable muscle to silence dissent and drive out industry leaders it regarded as too willing to compromise when the Clinton administration and lawsuits began increasing the heat under the gun industry.¹⁵⁵ President Kilcannon tries to convince the CEO of one gun company to break ranks and agree to a package of design and distribution reforms in exchange for relief from the lawsuits being brought against it by cities across the country,¹⁵⁶ just as Smith & Wesson agreed to do in 1999.¹⁵⁷ When the Sons of

¹⁴⁵ *Id.*

¹⁴⁶ See *supra* notes 26-41 and accompanying text.

¹⁴⁷ See PATTERSON, *supra* note 3, at 102-03.

¹⁴⁸ 18 U.S.C. § 921(a)(21)(C) (2000); see Anthony A. Braga & David M. Kennedy, *Gun Shows and the Illegal Diversion of Firearms*, 6 GEO. PUB. POL’Y REV. 7, 8-10 (2000) (describing current regulation of firearm sales at gun shows).

¹⁴⁹ PATTERSON, *supra* note 3, at 120-21.

¹⁵⁰ *Id.*

¹⁵¹ See generally *id.*

¹⁵² *Id.* at 39-41, 43.

¹⁵³ James Bennet, *Gun Makers Agree on Safety Locks*, N.Y. TIMES, Oct. 9, 1997, at A1.

¹⁵⁴ PATTERSON, *supra* note 3, at 51.

¹⁵⁵ See Matt Bai, *Aiming at Each Other*, NEWSWEEK, May 31, 1999, at 28; Declaration of Robert A. Ricker, ¶¶ 18-21, *People v. Arcadia Mach. & Tool, Inc.*, Judicial Council Coordination Proceedings No. 4095, 2003 WL 21184117 (Cal. Super. Ct. Apr. 10, 2003), available at <http://www.gunlawsuits.org/pdf/immunity/020403.pdf>.

¹⁵⁶ PATTERSON, *supra* note 3, at 66-69, 73-75.

the Second Amendment gets wind of the settlement talks, it whips its members into a frenzy of protests and boycotts to drive the wavering manufacturer back into line,¹⁵⁸ just as the NRA helped drive Smith & Wesson to the brink of ruin in retribution for straying from the fold.¹⁵⁹

Rather than a heartless manufacturer callously trading lives for profits, the overriding image in *Balance of Power* is an industry and a nation held hostage by the NRA. The book eventually pushes that idea to the extreme when the Sons of the Second Amendment literally blackmails the President.¹⁶⁰ In doing so, the book ascribes a unique and immense significance to tort lawsuits against gun manufacturers. Not just a tool to achieve justice between victims and gun makers, litigation becomes the only instrument that can wrench the gun industry out of the NRA's grip and change the dynamics of the gun debate in America.

E. Outgunned

Although it is not a work of fiction, Peter Brown's and Daniel Abel's *Outgunned: Up Against the NRA—The First Complete Insider Account of the Battle over Gun Control* also provides a dramatic portrayal of the litigation against gun manufacturers.¹⁶¹ Brown started writing the book after abandoning work on a screenplay about tobacco litigation.¹⁶² He began his research by gaining the cooperation of lawyers in New Orleans spearheading the gun litigation efforts of the "Castano" group, a coalition of prominent trial lawyers that initially came together to wage war on cigarette makers but later opened a second front against gun companies.¹⁶³ Brown eventually recruited Abel, one of those lawyers, to co-author the book.¹⁶⁴ The book is written in a journalistic style, embellished with personal details about the Castano lawyers and other characters, striving to tell its story in a way that would interest a wide audience rather than serve as a dry legal treatise or policy tract.¹⁶⁵

The Castano lawyers represented the City of New Orleans, the first government entity to file a case against gun manufacturers,¹⁶⁶ as well as about a half a dozen of the other cities that later followed suit.¹⁶⁷ Rather than focusing closely on those cases, *Outgunned* ranges far and wide across the entire legal,

¹⁵⁷ See Edward Walsh & David A. Vice, *U.S., Gunmaker Strike a Deal; Smith & Wesson Plans Safety, Sales Steps; Suit Threats Dropped*, WASH. POST, Mar. 18, 2000, at A1.

¹⁵⁸ PATTERSON, *supra* note 3, at 95-98, 579-80.

¹⁵⁹ Matt Bai, *A Gunmaker's Agony*, NEWSWEEK, May 22, 2000, at 32; Jackie Koszczuk, *Smith & Wesson Finds Itself in the Cross Hairs; NRA Paints Gun Maker as Traitor to Its Industry*, CHARLESTON GAZETTE, Mar. 23, 2000, at 1A.

¹⁶⁰ PATTERSON, *supra* note 3, at 582.

¹⁶¹ BROWN, *supra* note 4.

¹⁶² Susan Larson, *Lawyers, Guns and Money*, TIMES-PICAYUNE, Jan. 19, 2003, Books section, at 6.

¹⁶³ See BROWN, *supra* note 4, at ix. The group takes its name from the case of *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

¹⁶⁴ BROWN, *supra* note 4, at ix.

¹⁶⁵ See generally *id.*

¹⁶⁶ See Perlstein, *supra* note 55 and accompanying text.

¹⁶⁷ BROWN, *supra* note 4, at 290.

political, and cultural landscape concerning guns. Virtually any significant event relating in some way to guns makes it into the book's story, from the Columbine High School shootings,¹⁶⁸ to talk show host Rosie O'Donnell haranguing her guest Tom Selleck about his NRA membership,¹⁶⁹ to controversy about the relationship between guns and terrorism after the hijackings on September 11, 2001.¹⁷⁰ The government lawsuits, ostensibly the book's principal subject, simply do not provide enough grist for the writers' mill. After describing the origin of the New Orleans case in some detail, the book has virtually nothing new to say about any other government case. The cities and counties do not each have a unique story. The allegations underlying the New Orleans case are not dramatically different from those in, say, Cleveland or Newark or Wilmington.

No matter what it discusses, *Outgunned* continually returns to a single theme: the overwhelming influence of the NRA. The book describes the NRA with a mixture of loathing and awe, portraying it as the ultimate root of evil on all matters concerning guns. The mayor of New Orleans files the lawsuit against gun makers because "the muscular lobby of the National Rifle Association blocked all of his proposals" to strengthen the state's gun laws.¹⁷¹ The Castano lawyers find themselves constantly "look[ing] over their shoulders toward Fairfax, Virginia, and the headquarters of the National Rifle Association—the organization that *Forbes* magazine would soon call 'the most powerful organization in the United States.'"¹⁷² The book describes Chicago mayor Richard Daley telling his city attorneys to launch a legal crusade against the gun makers, but ending his instructions with the admonition, "Let's keep from angering the NRA."¹⁷³

When the NRA acts, it does so with "explosive" force, unless it is acting quietly with its "considerable stealth."¹⁷⁴ When it does nothing, it is a "sleeping giant" on the verge of waking and doing something explosive or stealthy.¹⁷⁵ The NRA's lobbyists do not go to state legislatures; they "descend upon" them.¹⁷⁶ The NRA's criticism of the lawyers suing the gun companies is a campaign of "character assassination."¹⁷⁷ The beleaguered gun manufacturers do not always agree with the NRA's "highly belligerent" tactics, but they ultimately cower behind it for protection from their tormenters.¹⁷⁸ The NRA's power "created a

¹⁶⁸ *Id.* at 88-103.

¹⁶⁹ *Id.* at 147-49.

¹⁷⁰ *Id.* at 280-86.

¹⁷¹ *Id.* at 3; *see also id.* at 5 (quoting the New Orleans mayor's description of the Louisiana state legislature as being "in the National Rifle Association's pocket"); *id.* (describing how state legislatures continually "caved in to the demands of NRA lobbyists").

¹⁷² BROWN, *supra* note 4, at 19; *see also id.* at 18 (explaining how the Castano group recruited help from gun control experts to counter "the mighty National Rifle Association").

¹⁷³ *Id.* at 30.

¹⁷⁴ *Id.* at 31.

¹⁷⁵ *Id.* at 30.

¹⁷⁶ *Id.* at 32.

¹⁷⁷ BROWN, *supra* note 4, at 163; *see also id.* at 181.

¹⁷⁸ *Id.* at 48; *see also id.* at 144-46 (describing "the undertow that the NRA had swirled" around the legs of "the gun company leaders who were trying to seek peace" with the Clinton administration);

mystique that spilled over into the justice system,” tainting courts’ decisions about the responsibility of gun makers under tort law.¹⁷⁹

Outgunned describes the NRA as a “damn near invincible foe” because any blow to the organization only makes it stronger.¹⁸⁰ The book concludes that the litigation brought against the gun companies ultimately had the effect of energizing and “aiding the National Rifle Association in its drive to become the most powerful lobby group in the nation,”¹⁸¹ and wound up helping to usher in President Bush’s election as well.¹⁸² The NRA looms like an immense monster over every story unfolding in *Outgunned*.

IV. NARRATIVE AND MELODRAMA IN REAL AND FICTIONAL LAWSUITS AGAINST THE GUN INDUSTRY

Telling a compelling story is the quintessential task of trial lawyers as well as screenwriters, novelists, and journalists. Litigators must draw elements from the confused, incomplete jumble of facts available to them and shape them into coherent, logical narratives for their unique audience of jurors and judges.

The stories that have been told about lawsuits against gun manufacturers through film, television, and books invariably have been melodramas, a special form of drama distinguished by its sensational plots, stock character types, and blatant emotional appeals.¹⁸³ Melodramas do not strive for realism. They forsake nuanced characterizations, presenting unambiguous heroes and villains rather than striving to expose the complexity and contradictions of human nature.¹⁸⁴ Melodramas personalize everything, addressing wider, abstract social phenomena only as translated into immediate, intimate forms. Unlike tragedies, melodramas can have happy endings, although they do not necessarily do so. Although the term “melodramatic” is often used loosely today in a pejorative sense to denote overreaching or banal efforts to generate emotion, melodrama has endured for centuries as an art form because it can be captivating and powerful when executed well.¹⁸⁵

id. at 150-51 (recounting how gun companies “rushed into the arms of the NRA” after being sued); *id.* at 171-72 (explaining how the NRA stifled independence of industry trade association leaders); *id.* at 188, 213-14, 217-18, 291-92 (describing how the NRA precluded settlements by terrifying gun makers and punishing the lone manufacturer that agreed to settlement).

¹⁷⁹ *Id.* at 163; *see id.* at 261-62 (describing how legal system betrayed plaintiffs’ lawyers by bowing to NRA’s wishes).

¹⁸⁰ *Id.* at 239-40.

¹⁸¹ *Id.* at 251, 296-97.

¹⁸² BROWN, *supra* note 4, at 233-34, 250-51, 294-95, 297-98.

¹⁸³ *See, e.g.*, PETER BROOKS, THE MELODRAMATIC IMAGINATION: BALZAC, HENRY JAMES, MELODRAMA, AND THE MODE OF EXCESS 11-12 (1976); DANIEL C. GEROULD, AMERICAN MELODRAMA 8-9 (1983); JEFFREY D. MASON, MELODRAMA AND THE MYTH OF AMERICA 15-19 (1993); FRANK RAHILL, THE WORLD OF MELODRAMA xiii-xiv (1967).

¹⁸⁴ MASON, *supra* note 183, at 16 (explaining how “essential action of melodrama is to polarize its constituents, whatever they may be – male and female, East and West, civilization and wilderness, and most typically, good and evil”).

¹⁸⁵ RAHILL, *supra* note 183, at xiii.

The film, television, and literary portrayals of litigation against gun manufacturers have been quintessential melodramas.¹⁸⁶ They starkly demarcate sympathetic victims and heroic plaintiffs' lawyers from the evil institutions against which they fight, whether it is the industry or the NRA. The characters are instantly recognizable stock types, like the broken-hearted widow who does not care about money but sues to send a message, or the conscience-stricken employee who finally reveals evidence the corporation tried to suppress. The plots are willfully unrealistic, containing wilder twists and turns than any real case. The stories include familiar, almost obligatory types of scenes that strike particular emotional notes. For example, every depiction of a trial against a gun maker includes a scene in which the gun company's top executive loses his temper while testifying. He does splendidly on direct examination, giving a gentle, well-coached and rehearsed presentation that puts a warm, kind face on the company. An aggressive cross-examination, however, eventually exposes his dark side, as he grows increasingly agitated until his anger overwhelms him and he explodes. The attorney questioning him inevitably stops the questioning, letting the witness's outburst about the Second Amendment hang in the air, as everyone in the courtroom stares at the witness shifting uncomfortably in his seat and realizing what he has done.

The stories personalize as well as emotionalize the issues they address. They present the sprawling, multifarious problem of gun violence in America through the prism of a narrow, simple tort lawsuit about one gun and one crime. Even *Outgunned*, ostensibly an insider account of the city government lawsuits, repeatedly turns to more intimate stories about particular shootings and smaller lawsuits brought by private individuals.¹⁸⁷ Personalizing the subject enables the creators of all these works to gloss over the complexity of the effects, good and bad, that the widespread presence of guns has in this country. Larger social issues do not intrude into simple stories posing stark moral contrasts.

Melodrama does not appear only in works of entertainment. Neal Feigenson has written the most extensive treatment of the role that melodramatic narratives play in tort litigation.¹⁸⁸ Drawing on evidence from the field of social psychology, Feigenson asserts that jurors have an overriding tendency to view accidents in simplified, personalized, and polarized ways.¹⁸⁹ They seek to assign a single cause to each accident rather than recognizing the multiplicity of diffuse conditions underlying each event. Moreover, jurors have a strong tendency to believe that an accident's cause was highly personal in nature. In other words, someone did something wrong, whether it was the plaintiff or defendant or a third party. Finally, jurors have a strong tendency to divide the world into good

¹⁸⁶ One critic speculated that *Runaway Jury* might spark a revival of melodrama in Hollywood, restoring it to its place as one of the principal genres in American cinema. See Kirk Honeycutt, *Runaway Jury*, HOLLYWOOD REP., Oct. 13, 2003.

¹⁸⁷ See BROWN, *supra* note 4, at 80-103, 130-40, 153-56, 201-04, 251-55, 271-74.

¹⁸⁸ NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS (2000); see also Thomas C. Galligan, Jr., *The Tragedy in Torts*, 5 CORNELL J.L. & PUB. POL'Y 139 (1996); Jeffrey O'Connell & Joseph R. Baldwin, *(In)Juries, (In)Justice, and (Il)Legal Blame: Tort Law as Melodrama—or Is It Farce?*, 50 UCLA L. REV. 425 (2002).

¹⁸⁹ FEIGENSON, *supra* note 188, at 87-95, 211-23.

and evil characters and to believe that the latter do the bad things that cause accidents and injure themselves and others. In sum, jurors regarding an accident as melodrama inexorably look for one “bad guy” to blame.¹⁹⁰

Lawyers try to frame their cases in ways that will appeal to juries’ expectations, and tort litigation thus becomes a battle over which side can tell a story that better suits jurors’ melodramatic preconceptions.¹⁹¹ When litigation is as novel, highly publicized, and controversial as the cases against gun makers, the fight to craft and communicate those stories must begin long before the case ever reaches a jury, as the plaintiffs struggle to give the cases credibility in the minds of skeptical judges or legislatures, as well as in the court of public opinion.

Lawsuits against gun makers have varied widely in the extent to which they have had the elements for creation of convincing melodrama. The lawsuits by private individuals, like the *Halberstam*, *Merrill*, and *Anderson* cases,¹⁹² contained the basic building blocks. Each enabled plaintiffs’ lawyers to tell a simple, highly personal story focused narrowly on one gun and one crime, targeting particularly egregious misdeeds within the gun industry, and posing a stark opposition between sympathetic, innocent victims and callous defendants.

The outcomes in the lawsuits by private individuals have been mixed, but reasonably impressive considering the odds facing any plaintiffs breaking such thoroughly new ground. While some cases have been dismissed¹⁹³ and a few have made it to trials ending in defense verdicts¹⁹⁴ or hung juries,¹⁹⁵ other cases have produced substantial settlements or verdicts.¹⁹⁶

¹⁹⁰ *Id.* at 89.

¹⁹¹ *Id.*; see also Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991) (arguing that the central cognitive process in juror decision making is story construction, meaning that jurors attempt to create various narratives out of conflicting evidence and decide in favor of the most coherent story). For an example of another article comparing narrative techniques in real and fictional litigation, see Leonard M. Baynes, *A Time to Kill, the O.J. Simpson Trials, and Storytelling to Juries*, 17 LOY. L.A. ENT. L. REV. 549 (1997).

¹⁹² See *supra* Part I-A.

¹⁹³ See, e.g., *Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001).

¹⁹⁴ *Gunmaker Absolved in Killings*, WASH. POST, Mar. 30, 1998, at A16 (describing verdict for defendants in *Halberstam* case).

¹⁹⁵ Glenn Chapman, *Gun Case Declared a Mistrial Due to Hung Jury; Jurors Split on Beretta's Culpability*, OAKLAND TRIB., Dec. 24, 2003.

¹⁹⁶ *Gun Dealer Must Pay in Shooting of 7-Year Old*, NAT’L L.J., Aug. 30, 2004, at 19 (reporting on \$850,000 settlement); *Gun Shop Will Pay \$1M in Shooting; Weapon Wounded Two N.J. Officers*, RECORD (Bergen County, N.J.), June 24, 2004, at A3; *Gunmaker, Store Agree to Payout in Sniper Case*, WASH. POST, Sept. 10, 2004, at A1 (describing \$2.5 million settlement). Some verdicts have been thrown out by judges or stymied by defendants fleeing into bankruptcy. *Grunow v. Valor Corp. of Fla.*, 2005 WL 1278838 (Fla. Ct. App. June 1, 2005) (affirming trial judge’s order overturning \$1.2 million verdict against gun distributor); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001) (reversing verdict for \$522,000 against three manufacturers); Mike Anton, *Gun Foes Might Buy Arms Firm; Legal Team for Boy Shot by a Handgun May Bid for the Bankrupt O.C. Company and Close It*, L.A. TIMES, June 17, 2004, at B1 (Orange County edition) (discussing how California gun maker Bryco Arms declared bankruptcy after a jury found it liable for more than \$24 million in damages to a boy who was accidentally shot by his babysitter).

The cases brought by governments proved much more difficult to translate into melodramatic narrative form. Indeed, any case brought against gun makers by a city, county, or state government was bound to be anything but simple, personal, or an unambiguous clash of moral extremes. Each government case sought redress for a broad, diffuse collection of unspecified incidents and alleged wrongdoing by a long list of gun companies rather than singling out a lone bad actor. The harm suffered by a city, escalated costs of providing municipal services, was budgetary, bureaucratic, and bloodless in nature compared to the injuries of individuals cut down by gunfire and the emotional consequences for their survivors. The government claims inevitably led into the entire morass of issues surrounding the role of guns in America, from the extent to which a city's problems stemmed from inadequacy of its own law enforcement efforts, to the relative social impact of beneficial uses and detrimental misuses of guns.¹⁹⁷ The stories that lawyers could craft about these claims inevitably sounded more like editorial analyses of complex social problems than simple melodramatic tales of a "bad guy" who grievously injured an innocent victim.

While generating several significant legal precedents recognizing the potential liability of gun makers,¹⁹⁸ none of the government lawsuits have ended successfully or even made it to trial so far.¹⁹⁹ State legislatures blocked some suits.²⁰⁰ Several cities dropped their cases when the burden of litigating them proved too much.²⁰¹ The only major settlement, a deal by Smith & Wesson that initially appeared to be a significant breakthrough, was never implemented because the company changed hands and its new management repudiated the agreement.²⁰² The NAACP's case, even broader in scope than any of the

¹⁹⁷ The Supreme Court of Connecticut suggested that an endless list of factors complicated the story of how gun manufacturers' conduct affected a city:

The scourge of illegal drugs, poverty, illiteracy, inadequacies in the public educational system, the birth rates of unmarried teenagers, the disintegration of family relationships, the decades long trend of the middle class moving from city to suburb, the decades long movement of industry from the northeast "rust belt" to the south and southwest, the swings of the national and state economies, the upward track of health costs generally, both at a state and national level, unemployment, and even the construction of the national interstate highway system, to name a few.

Ganim v. Smith & Wesson Corp., 780 A.2d 98, 124 (Conn. 2001).

¹⁹⁸ See, e.g., *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002).

¹⁹⁹ Several cases remain pending, either in trial courts or on appeal. See Andrew Harris, *How Senators Shot Down Protection for Gun Makers*, NAT'L L.J., Mar. 15, 2004, at 7.

²⁰⁰ See *Sturm, Ruger & Co. v. City of Atlanta*, 560 S.E.2d 525 (Ga. Ct. App. 2002); *Morial v. Smith & Wesson Corp.*, 785 So.2d 1 (La. 2001); *Mayor of Detroit v. Arms Tech., Inc.*, 669 N.W.2d 845 (Mich. Ct. App. 2003).

²⁰¹ See Fred Bayles, *Boston Becomes 1st City to Drop Its Lawsuit Against Gun Industry*, USA TODAY, Mar. 29, 2002, at 4A; *Cincinnati's Council Decides to Drop Suit Against Gun Makers*, N.Y. TIMES, May 1, 2003, at A24.

²⁰² See Charles C. Sipos, Note, *The Disappearing Settlement: The Contractual Regulation of Smith & Wesson Firearms*, 55 VAND. L. REV. 1297 (2002).

government lawsuits, went to trial but ended with both an advisory jury and the trial judge deciding the case in the industry's favor.²⁰³

To the extent courts have rejected the cases, they have often done so on grounds that reflected the difficulty of transforming a city's claims into the simple, streamlined format of a conventional tort case.²⁰⁴ For example, in the case that proceeded farthest, a consolidated action brought by a dozen California cities and counties, the final battle essentially boiled down to how far the plaintiffs could go in aggregating rather than individualizing the evidence in support of their claims.²⁰⁵ Gun manufacturers insisted that the plaintiffs had to prove the case on a gun-by-gun, crime-by-crime basis. For instance, the plaintiffs would have to present proof about the specific circumstances surrounding the use of a particular gun, how a defendant's tortious conduct contributed to the gun's misuse, and what costs a plaintiff city or county incurred as a result.

Unable to present such atomized evidence in a case of such immense scope, the plaintiffs sought to prove the defendants' contributions to the problem of urban gun violence at a more general, global level, based primarily on statistical evidence and expert opinions.²⁰⁶ In addition, the plaintiffs attempted to recast the case as a dramatic story of an entirely different kind. Echoing *Silkwood*²⁰⁷ or *The Insider*,²⁰⁸ former gun industry spokesperson Robert Ricker submitted a declaration acknowledging that gun makers know quite well how their distribution systems pour guns into the illegal market and they choose to let it continue rather than sincerely trying to curtail it.²⁰⁹ Ricker's revelations were not enough to save the California cities' and counties' case from dismissal, since the evidence left the trial and appellate courts unpersuaded that the manufacturers' conduct was a substantial factor contributing to gun violence in California.²¹⁰ The case covered so much that, in the judges' eyes, it persuasively established too little.

²⁰³ Although the case arose under the court's equitable jurisdiction only, the trial judge empanelled an advisory jury, which found 45 defendants not liable and failed to reach a verdict against 23 others. See *NAACP v. Acusport, Inc.*, 271 F.Supp.2d 435, 500 (E.D.N.Y. 2003). While finding that the defendants' sales and distribution practices created a public nuisance, the trial judge concluded that the NAACP was not entitled to injunctive relief because it suffered no special injury or harm different in kind from that suffered by anyone else. *Id.* at 451.

²⁰⁴ See, e.g., *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245 (D.N.J. 2000) (finding county's claims not simple, direct, or personal enough to permit recovery), *aff'd*, 273 F.3d 536 (3d Cir. 2001); *Baker v. Smith & Wesson Corp.*, No. Civ. A. 99C-09-283-FS, 2002 WL 31741522, *7 (Del. Super. Ct. 2002) (concluding that trial would amount to a "wildly expensive referendum on handgun control" rather than a genuine tort case).

²⁰⁵ *People v. Arcadia Mach. & Tool, Inc.*, Judicial Council Coordination Proceedings No. 4095, 2003 WL 21184117 (Cal. Super. Ct. Apr. 10, 2003), *aff'd sub nom.*, *In re Firearm Cases*, 24 Cal. Rptr. 3d 659 (2005).

²⁰⁶ *Id.* at *5-13.

²⁰⁷ *SILKWOOD* (Twentieth Century Fox 1983).

²⁰⁸ *THE INSIDER*, *supra* note 118.

²⁰⁹ *People v. Arcadia*, 2003 WL 21184117, at *8-9.

²¹⁰ *Id.* at *14.

V. CONCLUSION

The representations of controversial legal issues and events in popular culture deserve careful scrutiny. Millions of people learn and make assessments about lawyers, the legal system, and legal issues from what they watch on television shows like *Law & Order* or *The Practice*, what they see in films like *Runaway Jury*, and what they read in novels like *Balance of Power*.

Examining how gun litigation has been portrayed in these dramatic works provides a revealing way to look at the real cases that have been brought against gun manufacturers and dealers. The objectives and tactics of those who crafted fictional accounts of the litigation mirror in important ways the work of lawyers who litigated the real cases and sought to transform them into compelling narratives for judges and juries. The most potent stories depend heavily on the techniques of melodrama, whether the case is real or only imagined.