Oñati International Institute for the Sociology of Law
Instituto Internacional de Sociología Jurídica de Oñati
Oñati Socio-Legal Series
ISSN: 2079-5971

Oñati Socio-legal Series, v. 4, n. 4 (2014) – Law in the Age of Media Logic
ISSN: 2079-5971

Litigation, Mass Media, and the Campaign to Criminalize the Firearms Industry

WILLIAM HALTOM*
MICHAEL MCCANN*

Haltom, W., McCann, M., 2014. Litigation, Mass Media, and the Campaign to Criminalize the Firearms Industry. *Oñati Socio-legal Series* [online], 4 (4), 725-749. Available from: http://ssrn.com/abstract=2499208

Abstract

This article extends the co-authors' researches on mass media coverage of crusades against manufacturers and marketers of tobacco products in the United States to media coverage of similar crusades against manufacturers and marketers of firearms in the United States. The major contention of the article is that firearms-reformers have used civil suits and allied publicity outside courts to depict firearms producers and retailers as criminals. A major tactic that has unified reformers' efforts inside and outside courts is deployment of crimtorts, civil litigation for torts that includes elements of criminal prosecution. Crimtorts and publicity through entertainment media enabled opponents of firearms companies to lose case after case yet to damage the reputations or brands of firearms makers and marketers. The firearms interests fended off crusaders in civil action after civil action yet became portrayed as outright criminals owing mostly to crimtorts.

Key words

Tort litigation; criminalization of corporations; crimtorts; Big Tobacco; firearms commerce in the United States; media coverage of litigation

Resumen

Este artículo amplia las investigaciones de los autores sobre la cobertura mediática de las cruzadas contra productores y vendedores de tabaco en los Estados Unidos

---

Article resulting from the paper presented at the workshop *Law in the Age of Media Logic* held in the International Institute for the Sociology of Law, Oñati, Spain, 27-28 June 2013, and coordinated by Bryna Bogoch (Bar Ilan University), Keith J. Bybee (Syracuse University), Yifat Holzman-Gazit (College of Management, Rishon Lezion) and Anat Peleg (Bar Ilan University).

* Professor of Politics and Government at the University of Puget Sound, Haltom is author (with Michael McCann) *Distorting the Law: Politics, Media, and the Litigation Crisis* (Chicago, 2004) and former President of the Western Political Science Association. University of Puget Sound. 1500 N Warner St, Tacoma, WA 98416. haltom@ups.edu

* Gordon Hirabayashi Professor for the Advancement of Citizenship at the University of Washington. McCann is author of over sixty article-length publications and author, co-author, editor, or co-editor of eight books, including authoring the monographs *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago, 1994) and (with William Haltom) *Distorting the Law: Politics, Media, and the Litigation Crisis* (Chicago, 2004). He is a former President of the Law and Society Association (2011-13) and presently is Director of the Harry Bridges Center for Labor Studies at UW, a center of publicly engaged intellectuals addressing issues of working people around the world. University Of Washington. Department of Political Science. Seattle, WA. USA 98195-3530 mwmccann@uw.edu

hacia la cobertura mediática de cruzadas similares contra productores y vendedores de armas de fuego en Estados Unidos. El argumento principal del artículo sostiene que los que buscan la reforma de la legislación sobre armas de fuego han utilizado las demandas civiles y la publicidad externa a los tribunales para representar a los productores y vendedores de armas de fuego como criminales. Una táctica principal que ha unido los esfuerzos de los reformistas dentro y fuera de los tribunales es el uso de *crimtorts*, juicios civiles para acciones por responsabilidad civil extracontractual que incluyen elementos de procesos criminales. A pesar de perder caso tras caso, los *crimtorts* y la publicidad en los medios de entretenimiento permitió a los oponentes a las compañías armamentísticas perjudicar la reputación o las marcas de los fabricantes y vendedores de armas. Los intereses de las armas de fuego se defendieron de sus oponentes mediante una acción civil tras otra, sin embargo, se les representó como verdaderos criminales debido, en mayor parte, a los *crimtorts*.

Palabras clave

Tort litigation; criminalization of corporations; crimtorts; Big Tobacco; firearms commerce in the United States; media coverage of litigation; Juicios por responsabilidad civil extracontractual; criminalización de las corporaciones; crimtorts; productores de tabaco; comercio de armas de fuego en Estados Unidos; cobertura mediática judicial

Table of contents

1. Introduction

Recent mass shootings in the United States have provoked calls for renewed Litigation against the firearms industry following the model of lawsuits against Big Tobacco in the United States in the 1990s. If suits against firearms are to emulate suits against Big Tobacco, however, advocates and litigants will have to understand what made Litigation against Big Tobacco "succeed." We have demonstrated that mass Litigation against tobacco interests succeeded to the degree that it contributed to "criminalizing"[1] media coverage of companies that manufactured, marketed, or delivered tobacco. In this paper we explore how and how much mass Litigation may have similarly contributed to criminalizing firearms industries.[2] We argue that Litigation against firearms 1978-2005, like Litigation against tobacco, succeeded more in public relations than in courtrooms. "Crimtort" actions and other litigational tactics have characterized the acts and policies of manufacturers and marketers of firearms as illegal in mass media and thereby in the public mind. However, we caution that, if future crusades against firearms are to secure advances in mass media and political culture while enduring setbacks in courtrooms and in legislatures, crusaders will have to "prosecute" crimtorts under conditions that appear to be less propitious than those under which anti-tobacco crusaders worked.

We proceed as follows. In the next section, we review why and how suits against Big Tobacco induced The Master Settlement Agreement of 1998 (Master Settlement Agreement 1998).[3] Comparisons of coverage in *The New York Times* of lawsuits against tobacco interests with coverage of less litigious attempts to regulate nicotine revealed how states' attorneys general criminalized actions of corporate tobacco interests. Lawyers and allies combined tactics common in U.S. products liability suits with tactics usually found in criminal, especially white collar, prosecutions—so-called crimtorts. Crimtort actions generated publicity in print, broadcast, and other mass media that transmogrified tobacco companies into criminals who knowingly caused injury and even death and who then willfully deceived the public and state officials about that knowledge. Having rehearsed how a) states' lawsuits led by attorneys general, b) crimtorts tactics, and c) publicization through media drove tobacco to settle, we in the largest section of this paper assay similar tactics and publicity against firearms interests in the late 20th and early 21st centuries. When we compare mass media reports of lawsuits against manufacturers and marketers of firearms with mass media reports of attempts to regulate manufacturers and marketers that do not explicitly involve lawsuits, we find that coverage of Litigation yielded gains in criminalization similar to those in lawsuits

[1] In this paper as in previously published work (McCann *et al*. 2013) we use "criminalization" to label a process of framing acts, decisions, or policies as equivalent to criminal wrongdoing. In our usage "criminalization" draws attention to criminal or culpable conduct. We do **not** mean that mass efforts against either Big Tobacco or makers or marketers of firearms constructed or conjured prosecutable crimes. Instead, mass efforts uncovered fraud, conspiracies, and other corrupt practices that in other circumstances might lead to criminal prosecution or civil suits or both under U. S. or state laws. The framings most advantageous to mass efforts against tobacco and firearms, we find, **less** vilify individuals or make villains of decisionmakers than they attribute grievous wrongs to corporate entities. As we shall show, dramatized links to criminal activity were a bit different for tobacco companies from links between criminality and firearms producers and vendors.

[2] We neither counsel nor endorse lawsuits against firearms. Rather we conclude that regulating firearms through litigation and criminalization may be the best that anti-firearms forces can do but that optimistic extrapolations from lawsuits against tobacco to litigating firearms are tenuous and perhaps misleading, especially if mass media do not cover suits.

[3] The Master Settlement Agreement was an out-of-court settlement in which forty-six states ended state suits against certain tobacco companies for recovery of states' costs in health care related to consumption of tobacco products and prospectively protected the companies from tort suits related to consumption of tobacco products in return for annual compensation for medical costs and an end to certain kinds of marketing and deceptions. For our purposes in this paper, major features of the Master Settlement Agreement included participation by states' attorneys general and the surrender of multiple major tobacco companies to a political and legal campaign that amassed evidence of the companies' duplicity and mendacity over decades.

Oñati Socio-legal Series, v. 4, n. 4 (2014), 725-749
ISSN: 2079-5971

against tobacco in the same period. We find little evidence that enlisting states' attorneys general or municipalities and their attorneys or other officials or even police chiefs to litigate against manufacturing and marketing of firearms might made much difference in vilifying and criminalizing firearms interests. In a brief follow-up section, we note potential obstacles to state suits against firearms that lawsuits against big tobacco did not confront or confronted less: the National Rifle Association; the Second Amendment to the United States Constitution; states that would severely punish their attorneys general or other officials for limiting firearms; and limits to criminalization evident in polls of public opinion and in longstanding political culture.

2. How criminalization in mass media induced big tobacco to negotiate

Those who would emulate the strategies and tactics that worked for those who challenged Big Tobacco should understand the Tobacco Wars (see McCann *et al*. 2013). In this section, we hope to revive that understanding by reviewing how tobacco companies were driven to negotiate. Although many observers appreciate that waves of Litigation, especially by states' attorneys general, drove Big Tobacco to settle, far fewer appreciate how only the later waves of class action Litigation characterized the marketing and manufacture of tobacco products as quasi-criminal endeavors and how such characterizations altered frames that mass media deployed in relaying cases to readers, viewers, and listeners. Legal advocates in the 1990s succeeded where earlier tort lawsuits alone failed, we have argued, because they neutralized tobacco's appeals to "Individual Responsibility" frames even as they framed their Litigation as a calling to account of Big Tobacco for its irresponsibility and its duplicity. Deliberately or inadvertently, litigators and other crusaders induced journalists, novelists, and even movie-makers to promulgate narratives advantageous to opponents of tobacco companies and interests. If opponents of firearms are to emulate opponents of tobacco, they must be capable of shifting perceptions and understandings of the manufacturers and marketers of firearms.

Consider a recent example of endorsing tactics used against tobacco without taking seriously the role of reframing Big Tobacco in print and broadcast media. Commentator Neal Peirce after the Sandy Hook[4] slaughter offered his readers the "proven formula" of tobacco Litigation as a strategy for regulating firearms through Litigation (Peirce 2012). States, Mr. Peirce noted, could circumvent the national government by means of lawsuits by states' attorneys general as well as state taxes on especially dangerous weapons and ammunition. Mr. Peirce retold the tale of state suits that brought Big Tobacco to the Master Settlement Agreement and then stressed similarities between tobacco and firearms as sources of American deaths and injuries. He estimated the costs of treating gunshot wounds as exceeding the economic value of the firearms industry, alluding to if not invoking an argument used effectively to establish in the public mind the costs Big Tobacco sloughed onto taxpayers.

In drawing his parallels, however, Mr. Peirce overlooked the importance of the shift from tort liability to criminalization in mass media to driving tobacco giants to negotiate. Other commentators and advocates likewise miss the significance of efforts to tar the manufacture and marketing of tobacco products in the public mind. Through Litigation and other publicity-generating actions, opponents of and crusaders against tobacco interests stained Big Tobacco to the point that it became economically rational for tobacco to stanch the suits and stop the critical reframing in mass media. The result was the Master Settlement of 1998.[5]

[4] In Newtown, Connecticut, U.S.A. on December 14, 2012 a gunman killed 20 elementary school children and six adults at Sandy Hook elementary school.

[5] We provide a fuller account of litigation against Big Tobacco in McCann *et al*. (2013) and sources cited therein.

2.1. Making waves inside courtrooms

The "formula" rehearsed by Mr. Peirce, pursued in the early 21st century, and presumed by other opinion leaders is an understandable and familiar account because journalists and socio-legal scholars [including the authors of this paper] have analyzed tobacco Litigation in terms of waves of Litigation and the results of Litigation in courtrooms (see Mather 1998, Rabin 2001, Rabin and Sugarman 2001, and Haltom and McCann 2004). Waves of Litigation tell a story of anti-smoking advocates being bested by the forces of tobacco until states' attorneys general entered the fray. In a first wave of activities coalitions of government and non-government scientists amassed scientific evidence about the health hazards of tobacco use but were rebuffed by widespread belief that consumers and not companies bore responsibility for risks inherent in smoking. Smatterings of private, small-bore lawsuits on behalf of self-proclaimed victims of tobacco likewise ran into plaintiffs' assumption of risk—consumers' choices to smoke or to chew amounted to an acceptance of well-known risks of consuming tobacco—in courtrooms; outside the courthouse mounting scientific evidence foundered on widespread, deeply rooted presumptions of the responsibility of individuals for their own choices and actions. As a result, activists turned in a subsequent wave of Litigation to lawsuits that strove to answer and to vanquish this "Individual Responsibility" presumption. Those lawsuits did not wrest damages from tobacco defendants but did force tobacco defendants to release incriminating information through discovery,[6] to reveal tobacco companies' deceptions, and to explore the potential of "second hand smoke" as an industry liability. A third wave of cases was initiated alongside extralitigative developments to overcome Big Tobacco's advantageous presumptions. Outside court, investigators and tobacco insiders were blowing whistles on Big Tobacco's willful misleading of officials, news media, and citizens; congressional hearings were committing tobacco executives to ever less plausible denials of conspiracies and deceit; and the Food and Drug Administration was amassing evidence and attempting to expand its regulatory authority over tobacco (Kessler 2001). Meanwhile, across the country private attorneys pressed lawsuits on behalf of large numbers of plaintiffs even as state attorneys general joined private attorneys to recover Medicaid and other "public" costs imposed by injured or dying smokers. When this third wave of efforts in legislative, executive, and adjudicative venues led to the Master Settlement Agreement, the lesson seemed obvious that Litigation coordinated with other political arts had surmounted "Individual Responsibility" by establishing the liability, if not flat-out culpability,[7] of tobacco interests for sickness and death by means of frames that showed corporations' irresponsibility, deceptions, duplicity, conspiracies, fraudulence, and other seemingly criminal activities.

2.2. Making waves outside courtrooms

Important as waves of suits were in overcoming or neutralizing the "Individual Responsibility" advantage of tobacco interests, criminalization of manufacturers and marketers of tobacco, inside but especially outside courts, availed those who would regulate or ruin tobacco even more. As waves of Litigation and publicization of themes contrary to "Individual Responsibility" were breaking over the tobacco industry, the legal campaign against the industry was vilifying the tobacco industry (Kagan 2001) by means of crimtorts. Crimtorts combine elements of criminal prosecution and civil suits (See Koenig and Rustad 1998, 2004, Simons 2008). Pioneered in pursuit of white collar criminals, crimtorts alloyed civil liability for misconduct that injured fellow citizens with criminal culpability for conspiracy to

[6] Procedures for civil suits in the United States allow for plaintiffs and defendants to pursue documents, facts, and testimony through compulsory depositions, interrogatories, and motions. Lawyers call this "discovery."

[7] We use "liability" to betoken the likelihood of owing damages to victims who claim to be owed recompense. By "culpability" we mean moral or ethical blameworthiness.

Oñati Socio-legal Series, v. 4, n. 4 (2014), 725-749
ISSN: 2079-5971

deceive about knowing, even willful violations of persons and property. Crimtorts were litigated as civil torts—that is, noncontractual injuries for which injured plaintiffs could recover compensation from injuring defendants—but evidence and allegations presented ostensibly to justify punitive damages or other extraordinary remedies not merely fortified the liability of defendant corporations in the seemingly civil suit but portrayed them as outright criminal enterprises (Sebok 2004, Vandali 2008a, 2008b).

By crimtorts and other means (see McCann *et al*. 2013) lawsuits and allied politicking [especially in the third wave] reconceived consumption of tobacco products and thereby secured helpful coverage in mass media. These allies asserted that Big Tobacco should be publicly accountable and legally liable for spreading misinformation to mislead the public about scientific research on tobacco and to hide nicotine-boosting. Lurid allegations secured coverage and supplied journalists, editorialists, and opinion leaders with "corporate Responsibility" and "corporate duplicity" themes to counteract the "Individual Responsibility" themes that tobacco interests had exploited. Crusaders intensified conventional products liability claims about cigarettes and other systems by which nicotine was delivered to customers by adopting the language of white-collar crimes to denounce powerful corporations for frauds, misrepresentations, and conspiracies. Lurid crimtort allegations made for great "copy" for mass media and afforded challengers flexible, adaptive, and dynamic constructions with which to overcome static constructions that heaped Responsibility on consumers alone. Shifting Responsibility and surrounding opponents, tort litigants and political activists accused Big Tobacco of aiming its formidable advertising at children and minorities and of managing the addiction of consumers of nicotine. Reports during early waves of Litigation had stressed that smokers and chewers were evading Responsibility for their own choices; by the third wave of Litigation, mass media and popular culture dispensed tales of tobacco companies' dodging their own Responsibility for misrepresentation and mendacity as well as for addiction and disease.

Litigants not only added criminality to their assertions of corporate Responsibility to overcome Big Tobacco's "Individual Responsibility" advantage but also added governmental allies to their coalition, which of course "made news" further. Most actions in the first two waves of Litigation against the tobacco industry had been initiated by private attorneys representing identifiable, usually individual, plaintiffs who had suffered injuries or deaths of loved ones. In the fewer cases aimed in part to regulate corporate behavior more broadly, the lawyers acted as "private attorneys general." By the mid-1990s private attorneys like Richard Scruggs and Ron Motley brought actions on behalf of vast arrays of victims, but state attorneys general entered the fight against Big Tobacco and attracted great attention and coverage. States' officials justified their actions as defense of the general public more than of specific victims because taxpayers bore the costs of increased health service costs for tobacco consumers and thus were subjected to the fraudulent if not criminal behavior of corporate giants. Thus did officials assume the role of prosecutors representing "the people" versus Big Tobacco[8] even as they regaled news media with constructions of "public costs" that countered tobacco interests' "Individual Responsibility" formulation still further. Little surprise, then, that attorneys general and legislators who negotiated the settlement emerged in the media as focal "heroes" as often occurs in criminal prosecutions. Private attorneys were relegated to the background, except for a very short period in 1997 when industry officials saturated newspapers with stories of excessive attorneys' fees. In sum, agents driving the state Litigation and their methods resembled—in fact and even more in accounts disseminated by and in mass media—prosecutions more than civil suits.

[8] Lest our claim seem exaggerated, please see *The People Vs. Big Tobacco* (Mollenkamp *et al*. 1998).

State officials, private attorneys, and other crusaders sought remedies that matched the shifting, mutually reinforcing constructions of corporate Responsibility, duplicity, venality, and cost-shifting that crimtort amalgams of prosecution and tortious Litigation offered publics, news media, and courts alike. To compensatory damages that traditional civil litigants often seek to "make victims whole" the crimtorts coalition added requests for punitive damages that inherently blended civil and criminal elements (Simons 2008, p. 72). The almost unparalleled scale of punitive damages in the Master Settlement Agreement—almost one quarter of a trillion dollars—was represented and justified as punitive fine and regulatory deterrence, punishment that the tobacco industry must undergo to fend off further lawsuits. The pursuit of stupendous damages, too, ensured the attention of mass media and, among others, novelist John Grisham and multiple Hollywood films.

Moreover, crimtort actions and criminal actions against tobacco companies have persisted since the Master Settlement Agreement and the end of the third wave of Litigation. Private and public lawsuits have continued to allege fraud, conspiracy, misrepresentation, smuggling; racketeering, and even international protests that the tobacco industry was maliciously committing "crimes against humanity." World Health Organization's Framework Convention on Tobacco Control and dozens of lawsuits filed against tobacco producers in more than 25 nations (Cheney and Malarek 2003) each and all reveal the rippling effects of crimtorts' criminalization of tobacco corporations. The Family Smoking Prevention and Tobacco Control Act of 2009 authorized the U. S. Food and Drug Administration to regulate tobacco products, a goal long sought by those who wanted to institutionalize change (see Kessler 2001). Such actions have been newsworthy in multiple media.

In sum, legal and political actions against tobacco were, we have maintained, far more about reconceiving tobacco companies as criminal conspirators than has commonly been appreciated. In courts of mass media, public opinion, and political discourse beyond the realms of Litigation, public officials and private attorneys joined forces to prosecute companies that produced or marketed delivery systems for nicotine. Criminalization of companies made "Individual Responsibility" and "consumer sovereignty" on which crimtorts defendants relied compete with memes, themes, or frames less advantageous to the industry. Emphasis on "corporate Responsibility" and evidence of corporate irresponsibility at least compromised whatever risks that consumers had assumed. Publicity about "corporate duplicity" or deceptive practices questioned the quality and quantity of information available to consumers and society owing to tobacco's disinformation and mendacity, especially when the addictiveness of tobacco, marketing to underage consumers, and effects of secondhand smoke became widely publicized as part of Litigation. Information and inferences about costs shifted to taxpayers—the "public costs" frame—remade the sale of cigarettes into a business fraught with externalities [albeit that government coffers had benefited greatly from taxes on tobacco for decades] if not a menace to public health and solvency. Crimtorts and criminalization did **not** send executives or other individual members of tobacco companies to jail, but that would have availed crusaders little anyway. Instead, reformers used frames to reduce corporate advantages. The "formula," then, was to reduce or eliminate Big Tobacco's edge by 1) public and private class actions led by public prosecutors and attendant publicity that 2) reframed legal and political issues 3) by means of crimtort Litigation and changing narratives in popular culture.

But will the mass-mediated tobacco "formula" (Peirce 2012) work for firearms? We do not doubt that private and perhaps even public litigators might bedevil makers and marketers of firearms, but is Litigation likely to criminalize firearms interests as deceptive conspirators the way it did tobacco interests? Can those who would reform or regulate firearms reframe issues as reformers and regulators of tobacco did? The next section of this paper answers that criminalization in suits and in mass media, in concert with interventions by government and public officials and strategic frames, has worked modestly against firearms in the recent past.

Oñati Socio-legal Series, v. 4, n. 4 (2014), 725-749
ISSN: 2079-5971

3. Evidence coverage criminalized manufacturers and marketers of firearms 1978-2005

Efforts to regulate firearms through Litigation afford a ready, perhaps facile, comparison to Litigation against tobacco interests because crusaders against firearms so quickly and self-consciously emulated crusaders against tobacco that many of the lawsuits and much of the coverage overlapped (Lytton 2000, 2005). Like tobacco suits, firearms suits long had little to show for their exertions in courtrooms. Also like tobacco suits, firearms suits appeared to have achieved far more in altering frames in news and entertainment media than in verdicts or holdings or settlements. In this section we review evidence that crimtorts and a slightly different brand of criminalization in 1978-2005, and especially 1995-2000, may have shifted coverage of issues. Although this evidence hardly guarantees that "the tobacco formula" will avail those who would control firearms, it suggests that some firearms crusaders were able to emulate tobacco crusaders to a considerable extent. Crusaders against firearms who synthesized ordinary civil tactics with crimtort tactics in a coherent strategy for going after firearms merchants might have elicited criminalizing coverage in news media to re-frame issues to the benefit of firearms reformers and to the detriment of firearms defendants.

3.1. Waves inside and outside courts

Many litigants against firearms makers and marketers self-consciously applied lessons that they derived from Litigation against Big Tobacco, but their strategies and tactics varied both in their effectiveness in settlements or trials and in their "messaging" beyond courtrooms where the kind of criminalization of defendants that we are discussing would take place. Many litigants pursued conventional Litigation civil in tactics if not tone: routine theories of products liability, negligent marketing, and public nuisance attaching to firearms predated suits against tobacco companies and had achieved inside courtrooms as little success as ordinary civil Litigation against tobacco had, yet some actors adhered to such strategies. During the second term of the Clinton Presidency [1997-2001], some public officials shifted litigative and non-litigative strategies from private actors to public actors and from retrospective remuneration to prospective regulation, while other public actors began to seek regulation and retribution by adding theories of culpability or criminality to their actions for liability (see McIntosh and Cates 2009, p. 104-122). When state and local governments, mimicking efforts by states' attorneys general against tobacco, went after firearms manufacturers, they shifted theories from traditional liability for abatement of nuisance or defective product design toward attacks on deceptive advertising. Collateral revelations of deception, duplicity, and deceit by manufacturers, wholesalers, and retailers of firearms transformed lawsuits from policy disputes and compensation for externalities toward fraud and outright criminality. Still other litigators and proponents of increased regulation directed mass media to illegal distribution of firearms at weekend fairs or out of automobile trunks that speeded guns to street criminals. Such evidence and publicity connected firearms in mass-media reports not merely to white-collar, corporate criminality or frauds but also to street crime, which threatened to rebrand gun control as a crusade for law and order. The much smaller firearms companies thus became more vulnerable than the much larger tobacco companies had been as publicization of illegal promotion and dealing pushed matters even further toward criminality in combination with liability for various conventional torts. In sum, strategies and tactics ran a gamut from early and often short-lived "copycat" civil suits all the way to coordinated creative criminalization.

The earliest copying of tobacco litigation deployed disparate, uncoordinated tactics that did little to criminalize and much to fit firearms litigation into pejorative characterizations of trial lawyers in tobacco. Independent trial lawyers litigated conventionally and early to apply what they took to be lessons of litigation against tobacco. They marshaled victims of shootings, survivors of victims of shootings,

and other individuals who could serve as suitable plaintiffs in suits against makers of firearms. Some of these suits seemed pecuniary or even venal; some were efforts to recover compensation for injured individuals. Expecting discovery to yield revelations and whistleblowers as tobacco discovery and litigation had, these trial lawyers alarmed the firearms industry into lawyering up, drew the National Rifle Association and state legislatures into protecting firearms companies, and fitted trial lawyers into longstanding negative stereotypes that had not appreciably offset criminalization in litigation against Big Tobacco (see McCann *et al*. 2013). These knights errant should have been expected to produce little criminalization of manufacturers or marketers of firearms as independent litigators developed far fewer discoveries and far less systematic evidence of willful misconduct—as opposed to carelessness, inattention to unanticipated consequences, or ineptitude—than did suits against Big Tobacco (but see Rostron 2006, p. 489-493). Other conventional, crafty lawyering created or extended theories of industry liability for harms caused by firearms, but these theories did little to link manufacturers to criminality. In addition, our interviewees indicated that the independent, conventional litigators did not long stay in the fight against firearms.

At about the same time, some groups and litigators were innovating but not necessarily criminalizing. Public health initiatives showed that the ready availability of firearms plagued American society, but epidemiology and aggregate statistics did little to tie "firearms epidemics" to specific distributors or manufacturers, so reports in media need not have attached criminality or even liability to companies. Likewise, the National Association for the Advancement of Colored People organized legal actions for abatement of public nuisance and other adverse effects of firearms on African Americans. This move publicized crusades against firearms and forced firearms interests to defend themselves on yet another front but did not seem to have contributed to criminalization.

Even conventional civil and political pressure that induced Smith and Wesson in 2000 to settle with firearms crusaders evinced little potential for criminalization. In negotiations with the national Department of Housing and Urban Development, various public officials, and municipalities, Smith and Wesson agreed to design safer firearms and to police distribution. This agreement was never implemented because the National Rifle Association coordinated attacks on Smith and Wesson as a foreign-owned company consorting with anti-firearm crusaders and drove the company to withdraw its offers (Brown and Abel 2003, Ch. 11). Although this episode reiterated the power of the "gun lobby" and revealed that safety features were far more feasible than some firearms-makers had maintained (Rostron 2006, p. 497-499), if anything these efforts broadcast divisions over safety and systems of distribution, not over industry criminality.

Lawyers at the Brady Center to Prevent Gun Violence told us that the Brady Center's eventual strategy deliberately derived from litigation against tobacco a repertoire of ordinary civil actions and extraordinary innovations: coordinated tactics of conventional and crimtort litigation, mass media publicization, legislative lobbying, and calls for regulation. This repertoire promised greater criminalization of defendants than workaday suits for liability or nuisance. To be sure, the Brady Center litigated or assisted litigation for negligence or recklessness in the distribution of firearms. Indeed, staff of the Brady Center collaborated on the NAACP and HUD efforts discussed above. However, the "Legal Action Project" at the Center also waged publicity warfare, including a 48-page pamphlet ["Smoking Guns: Exposing the Gun Industry's Complicity in the Illegal Gun Market"], which counted the ways in which makers of firearms went beyond inattention, ineffectiveness, or ineptitude to criminal involvement with illicit sales of firearms (Rostron 2003). Litigation and publicization in turn accumulated evidence directing mass media to illegal distribution of firearms at weekend fairs or out of automobile trunks that speeded guns to street criminals. Such evidence and publicity

Oñati Socio-legal Series, v. 4, n. 4 (2014), 725-749
ISSN: 2079-5971

connected firearms in mass-media reports not merely to white-collar, corporate criminality or frauds but also to street crime.

In addition to formulating and coordinating strategy, the Brady Center cooperated with dozens of municipal lawsuits. Cities, counties, and states in combination with public and private lawyering advanced ordinary regulatory or public interest themes as well as criminalization themes that succeeded well enough to elicit immunity statutes from states and Congress. When state and local governments, mimicking efforts by states' attorneys general against tobacco, went after firearms manufacturers, starting with the Castano Group in New Orleans and the City of Chicago and Cook County in 1998, they shifted theories from traditional liability for abatement of nuisance or defective product design toward attacks on deceptive advertising. As noted above, none of these theories need have criminalized makers of firearms, although denunciations of straw purchasers, illicit traffickers, and other fatal flaws in distribution of firearms may have tainted firearms companies. However, once cities and counties and their allies connected firearms to street crime, violence, and tragic injuries, they attached to firearms companies misdeeds that went beyond and beneath negligence or even recklessness (Siebel 1999).[9] This connection in turn elicited participation by local prosecutors, police chiefs, and other agents and symbols of law enforcement as leaders of efforts to stamp out street crime. Securing such visible crime-fighters was part of the strategy of the Brady Center to link firearms directly and powerfully to crime and other social ills that legislators and regulators must care about. This tweaking of public health arguments might be expected to generate coverage as advantageous to regulation of firearms as it was disadvantageous to firearms merchants who wanted to dodge culpability even more than negligence.

Strategists and activists also attended and contributed to criminalizing gun-makers through popular culture. Indeed, popular culture may have criminalized or at least sullied firearms companies far more than the strategies and tactics of many crusaders and free-wheeling litigators. Some cultural productions were based on the criminalizing strategies we have described above and were even shaped by firearms strategists attentive to messaging. Episodes of widely watched television shows such as "The Practice" and "Law and Order" drew on crimtort actions and actors. John Grisham's condemnation of jury-tampering by tobacco interests in *The Runaway Jury* (Grisham 1996) became, after the Master Settlement Agreement of tobacco cases, a cinematic denunciation of jury-tampering by firearms interests in the screenplay for "Runaway Jury" (2003). The filmic Rankin Fitch [a jury consultant for firearms defendants played with fiendish élan by Gene Hackman] was not merely criminal but evil, perhaps even nihilistic. "Runaway Jury" dramatically emphasized "straw purchases" and other sorts of deceptive marketing by which firearms merchants profited. Other media messenging was, to the best of our knowledge, independent of the strategies and tactics of the criminalizers but criminalized firearms nonetheless. Columbine High School and other school shootings, especially as amplified by the Oscar-winning documentary "Bowling for Columbine" (2002) asked whether makers or marketers were responsible or indeed culpable for readily available tools of violence. "Thank You for Smoking" (Reitman

[9] For example, authorities in Chicago, Detroit, and Gary (Indiana) ran sting operations to reveal just how flawed distribution of firearms could be in practice (Rostron 2006:491-493). For a second example, Judge Weinstein allowed a New York City suit to go forward for a while based on gun distributors' deliberate violations of laws. After that suit was barred by the national Protection of Lawful Commerce in Arms Act of 2005, Mayor Michael Bloomberg took to U. S. court over gun dealers' allowing "straw purchases." Firearms crusades were deliberately, strategically criminalizing firearms merchants (see Williamson 2007, Lytton 2000, but see Lytton 2005). While the Congressional immunity statute (2005) left manufacturers and dealers still potentially liable for damages resulting from defective products, breach of contract, criminal misconduct, and other actions for which they are directly responsible in much the same manner that any U.S. based manufacturer of consumer products might be liable or responsible but not culpable. That is, conventional, routine litigation remains open and thus may make criminalizing actions less likely.

2006), a movie based on *Thank You for Smoking: A Novel* (Buckley 2006), brought viewers the "Merchants of Death," lobbyists for alcohol, tobacco, and firearms interests who reveled in their cunning and mendacious defenses for peddling disease and death.

The combination of searing depictions of firearms interests in popular culture and lurid charges in legal venues encouraged the expectation that coverage of firearms suits would wound firearms interests as it had tarred tobacco interests. Indeed, many of the actions against firearms transpired at the same time as some actions against tobacco, so firearms actions might follow tobacco actions so closely as to draft on them as if racecars.

Despite similarities to tobacco cases, however, crusades and lawsuits against guns featured differences that might have obviated criminalization in coverage. First, tobacco corporations are far larger and financially more secure than gun companies, so negotiations or settlements for big money were far less likely. Second, the right to keep and bear arms was written into the Second Amendment of the United States Constitution as smokers' rights were not, so criminalization might have to overcome Constitutional principle as well as commercial interests. The National Rifle Association and other advocates for firearms seem far less commercial and far more rigidly ideological, which makes them less amenable to compromise; they are undoubtedly far more effective than tobacco's profit-driven public defenders were in the 1990s. Moreover, defenders of firearms could parry the claim that illicit distribution of firearms fed street crime by insisting that arming good citizens was the best antidote to armed criminals—a riposte scarcely available to tobacco companies.[10] In a related development, national and state legislatures moved quickly to quash many crimtort suits, so public or official actors were arrayed on multiple sides.

The major difference between firearms actions and tobacco actions, of course, was that almost all firearms actions had been stymied while some tobacco actions settled and some tobacco plaintiffs prevailed in ways that survived appeals. Could a persistent albeit exaggerated (Rostron 2006) record of losing nonetheless loose criminalization on firearms manufacturers in major U. S. newspapers? Did actors and actions and even popular culture result in coverage that darkened reputations of firearms manufacturers and distributors beyond negligence, indifference, recalcitrance, and recklessness and blackened them as criminals?

3.2. Lawsuits versus other efforts to regulate firearms

To investigate reporting of efforts to reform the manufacture, marketing, and ownership of firearms, we followed protocols similar to our study of tobacco new coverage. We thus sampled newspaper coverage of firearm-reform efforts in legislatures, courts, and elsewhere over previous decades. Our research strategy was to contrast newspaper coverage concerning firearms reform in reports most and least concerned with specific lawsuits to assess the difference that intensive, episodic reports of lawsuits might make relative to features about issues. Articles that reported specific lawsuits sparely if at all would provide a rough baseline of what one might expect of and in reports of firearms issues in the absence of specific disputes or suits. Articles focused on specific lawsuits or settlements would, in contrast, concentrate tendencies in defining responsibilities and in describing reformers so that one could begin to understand what differences litigation might work in papers. For the foregoing reasons, our purposive sampling represents not

[10] Lest we be thought to exaggerate this defense, we note that after Adam Lanza killed 26 people at Sandy Hook Elementary School (see note 4 *supra*), Wayne LaPierre, Executive Vice President of the National Rifle Association, proposed armed guards at every school as a remedy and posited that the best solution to bad people with guns was good people with guns. Mr. LaPierre repeated his proposition on 4 May 2013 before a national meeting of the NRA: "… the only way to stop a bad guy with a gun is a good guy with a gun" (Miller 2013).

Oñati Socio-legal Series, v. 4, n. 4 (2014), 725-749
ISSN: 2079-5971

thousands of newspaper articles over decades but hundreds of articles least and most concerned with litigation.

We drew contrasting samples from Lexis Nexis Academic's "Major Papers" subset under "General News."[11] One sample sought articles that most featured litigation: suits, threats of suits, or other negotiations "in the shadow of the courthouse." We call this the "Litigation-Heavy Sample" *infra*. The contrasting "Litigation-Light Sample" garnered those articles, features, editorials, and commentaries that mentioned lawsuits least and usually not at all. This sampling strategy seems to have succeeded in creating suitable contrasts: coders identified 669 lawsuits explicit or implicit in the 437 articles of the Litigation-Heavy Sample [153 suits per 100 articles] but only eight suits total among the 270 articles in the Litigation-Light Sample [3 suits per 100 articles].[12]

In general—that is, pooling Litigation-Light and Litigation-Heavy Samples—findings below show that coverage of campaigns against firearms resembled coverage of crusades against tobacco. Characterizations of major actors and agents trended overwhelmingly neutral, just as characterizations of agents in tobacco articles had. When coders were able to detect valences, corporate defendants trended decidedly negative, as had been the case in tobacco articles. As with frames in tobacco articles so with frames in firearms articles: frames that benefit plaintiffs and reformers appear more often than frames more useful to defendants and companies and appear more prominently in headlines or in opening paragraphs of articles. That is, personal vilification of firearms actors or decision-makers was at most mildly net-negative, while framings in newspapers were far more net-negative for firearms interests and ideology. When we contrasted articles concerned with specific suits with articles concerned with firearms policies and issues but not with particular litigation, the Litigation-Heavy Sample more often featured plaintiff-friendly framing[13] than the Litigation-Light Sample. This too was the case with tobacco suits. Coverage of suits with municipal plaintiffs in articles focused on specific cases emphasized the deceptions and duplicity of firearms companies much as they had in tobacco cases but with far less dramatic roles for officials in anti-firearms causes. In sum, the findings that follow tend to support the thesis that publicized firearms litigation emulated publicized tobacco litigation, especially after 1996. We turn now to specific findings.

3.3. Characterizations of individual actors or agents were almost always neutral across litigation-heavy and litigation-light samples

Coders detected more than 32,000 actors in more than 700 articles between 15 March 1978 and 16 August 2005.[14] They reported that they were unable to hazard a judgment whether 93.3% of the actors had been characterized positively or negatively. Litigation-Heavy and Litigation-Light Samples alike were dominated by references in which a coder detected an agent or actor but could not detect a

[11] Appendix A at <http://www.pugetsound.edu/faculty-pages/haltom> provides the commands by which samples were created at LexisNexis Academic and reproduces the coding instructions that operationalize "frames" and "actors" in this research. LexisNexis Academic has since altered its interface.

[12] Appendix B at http://www.pugetsound.edu/faculty-pages/haltom displays some useful, elementary frequencies for the resulting samples.

[13] We consistently but not invariably use "framing" instead of "frame(s)" lest we mislead readers both as to the nature of our coding and as to what we think that coding captures. In our reading, the noun "frame(s)" too often reifies construction of meaning(s) into seemingly objective, concrete, and static categories. [We are not sure that "frame" or "frames used as a verb is as static or reifying.] We deploy the noun "framing" to remind ourselves and our readers that to frame is to negotiate meanings that are dynamic, indeterminate, contingent, and highly contextual. When activists and journalists frame, they need not resort to preexisting, prefabricated forms or formulas. Our coding aimed to record constructions that related definitions of situations to flexible, even protean "problems" and "solutions." We cannot, of course, account for how people process, interpret, or make meaning from these framings. Rather, we strive to document constructions that are circulating in and beyond the news.

[14] See Appendix A at http://www.pugetsound.edu/faculty-pages/haltom for coding directions and Appendix C at the same location for coding of actors

positive or negative connotation or denotation. Neutral references ranged from expert witnesses and commentators [99.8% neutral] and defense attorneys [98.8% neutral] to attorneys for victims and plaintiffs [89.8% neutral] and owners, collectors, buyers, and sellers of firearms [84.8% neutral]. As we noted *supra*, crimtorts and criminalization are not targeted at this or that scapegoat but at corporate enterprises. Indeed, for the sake of corporate bottom lines the sacrifice of a decision-maker or other scapegoat might be preferred to PR setbacks.

3.4. Non-neutral characterizations trended negative, especially for corporate defendants and to a lesser extent plaintiffs' attorneys

Except for victims of firearms, in the rare instances in which descriptions were not neutral characterizations trended negative more than positive. Corporate defendants were the most frequently cited actors negative as well as positive, a result to be expected when across articles one reference in three pertained to companies that made or marketed firearms. Corporate defendants constituted nearly half of all strongly negative, weakly negative, and weakly positive characterizations but nearly 60% of all strongly positive characterizations, so the frequencies with which companies and corporations were cited pejoratively or melioratively greatly exceeded their overall incidence in the samples.[15]

3.5. Across litigation-heavy and litigation-light samples, anti-firearms framing greatly outnumbered pro-firearms framing

What newspapers did not do in characterizing individual or corporate actors, they did decisively in promulgating frames. Table One arrays the six most common sorts of framing from our two samples taken together in a manner that enables us to contrast reform-friendly themes with themes more advantageous to firearms companies.[16] We draw attention to the following specific findings:

- Attributions of Responsibility or irresponsibility to corporations and companies proved to be modal responses in our newspaper articles. Coders found 683 instances of "Corporate Responsibility" framing in 707 articles in Litigation-Heavy and Litigation-Light Samples taken together. These were nearly one-third of the six most common sorts of framing across samples. This is about twice the distribution that one would expect if the six varieties of framing ranged evenly across articles.
- Framing connoting makers' or marketers' duplicity or deceits, when combined with "Corporate Responsibility" framing, constituted a majority of all the framing the coders detected. By themselves, "Corporate Duplicity/Disclosures" framing made up about one-fifth [22.5% or 495] of the framing that coders found most often.
- If "Public Costs" to states and localities is grouped with "Corporate Responsibilities" and "Corporate Duplicity/Disclosures," more than two out of every three kinds of framing that coders found would favor challengers of firearms or plaintiffs or disadvantage manufacturers or marketers of

[15] Of course, non-neutral descriptions were so few that distributing them over time or dividing them by Litigation-Heavy Sample and Litigation-Light Sample yielded little or no useful information.

[16] Appendix B at http://www.pugetsound.edu/faculty-pages/haltom specifies definitions of all eight categories of frames and reproduces instructions from which trained coders proceeded and supplies frequencies across all eight categories of frames.

"Shared Responsibility," a complicated compromise perspective that might have assigned responsibility to makers, marketers, owners, collectors, and customers alike, was almost negligible and so, with the truly negligible "Racial Aspects," is overlooked in the rest of this report. The paucity of any sharing of responsibilities among owners, collectors, makers, and marketers of guns may suit the conventions of newspapers far more than it suits a realistic allocation of responsibility in society. Adversaries in courts and other venues tend to emphasize themes that advantage advocates and their interests and to de-emphasize more measured, more inclusive, and more complex perspectives. To convey accurately what adversaries are claiming and to focus accounts of conflicts, reporters will tend to report partial rather than nuanced or balanced perspectives.

Oñati Socio-legal Series, v. 4, n. 4 (2014), 725-749
ISSN: 2079-5971

firearms. Claims that firearms cost communities in ways not included in the price of firearms appeared 334 times [15.2%, just a bit less than the one out of six one might expect by chance] by themselves.[17]

- Relative to framing just discussed, framing that might be advantageous to firearms makers or sellers—that is, defendants in firearms actions—was sparse. "Individual Responsibility" framing [345 or 15.4% of all six framings] and "Attorneys' Fees/Motives" framing [264 or 3.5%] together accounted for less than one-fifth of all framing that coders detected.[18]
- "Government Responsibility"[19] accounted for about one in eight framings [264 or 12%].

In sum, 31.3% of framing across our two samples might **not** accrue against firearms marketers or makers. Perhaps it is needless to add that if "Government Responsibility" framing be reckoned to assist neither crusaders nor companies, more than 78% of the five remaining varieties of framing coded [n=1936 framings detected] would militate against firearms makers and sellers.

[17] We did not code for mentions of police chiefs in particular or law enforcement in general so we cannot be certain how such "allies" played in coverage of firearms politicking in litigation or otherwise. We hope that follow-on research will search for such connections.

[18] This important finding may matter even more than is apparent. We did not code for the presence or absence of the slogan "Guns don't kill people. People kill People." or similar appeals. This finding seems to us to suggest that, whatever the instant forensic value of such slogans, they do not much avail defenders of firearms in coverage.

[19] Because responsibility that might be shouldered by governments made up but one frame in eight, litigation against firearms manufacturers does **not** seem particularly effective in making the case for more government regulatory or compensatory action where citizens are injured by mass manufactured products. This finding, incidentally, corresponds to results from tobacco crusades and disputes as well.

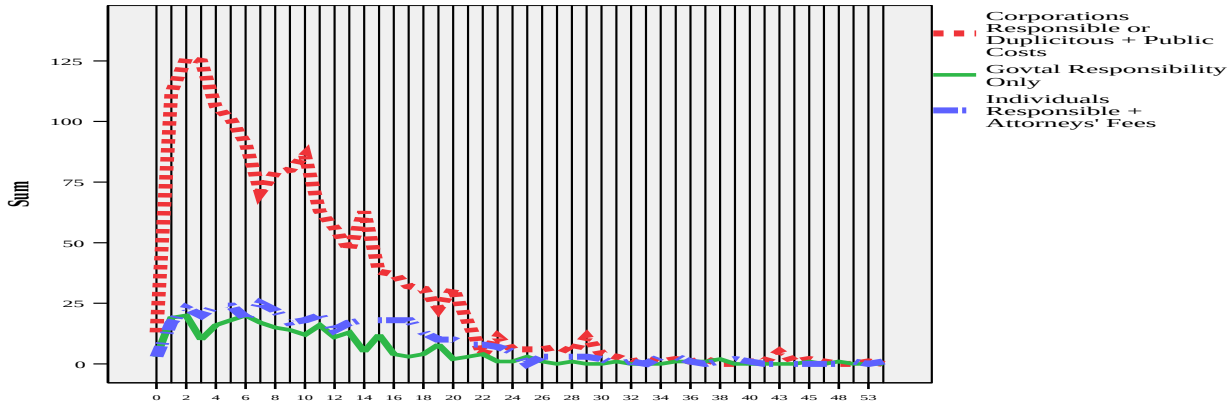
Table One – Six Sorts of Framing across Litigation-Heavy and Litigation-Light Samples

	Count	Of All Framing	Cumulative Percentage
Framing that might advantage Reformers or Plaintiffs:			
Corporate Responsibility Firearms manufacturers & retailers held responsible for safety, accuracy, reliability, & distribution.	683	31.0%	31.5%
Corporate Duplicity/Disclosures Firearms manufacturers/retailers knowingly engaged in lax or negligent practices.	495	22.5%	53.5%
Public Costs Firearms cost communities money and agony.	334	15.2%	68.7%
Framing that might advantage Makers, Marketers, or Defendants:			
Individual/User Responsibility Gun owners held responsible for safe handling & proper use of guns; accidents attributed to individual carelessness; criminals blamed for violence.	345	15.7%	84.4%
Attorneys' Fees / Motives Lawyers or fees are a great problem or a greater problem than firearms manufacturing or marketing.	79	3.6%	88.0%
Framing concerning the responsibilities of Governments:			
Government Responsibility Government must protect citizens from gun violence and corporations from frivolous lawsuits.	264	12.0%	100%
Totals	2200	100.0 %	

We stress, however, that "Corporate Responsibility" need not represent any criminal judgment by reporters or editorialists. Attributions of Responsibility to firearms companies may set them back when they are civil defendants but do not make firearms companies or their executives criminal defendants any more than characterizations of actors or agents did. Indeed, even "Corporate Duplicity/Disclosures" framings need not attribute felonious conduct. Rather we interpret these data to show that reporting between 1978 and 2005 sullied companies' reputations and moved companies away from innocent victims of absurd suits and toward blameworthy culprits apprehended at last. Whether the companies were guilty of sharp commercial practices, cunning capitalistic competition, or civil or criminal fraud would, in our judgment, lie with the beholders of coverage.

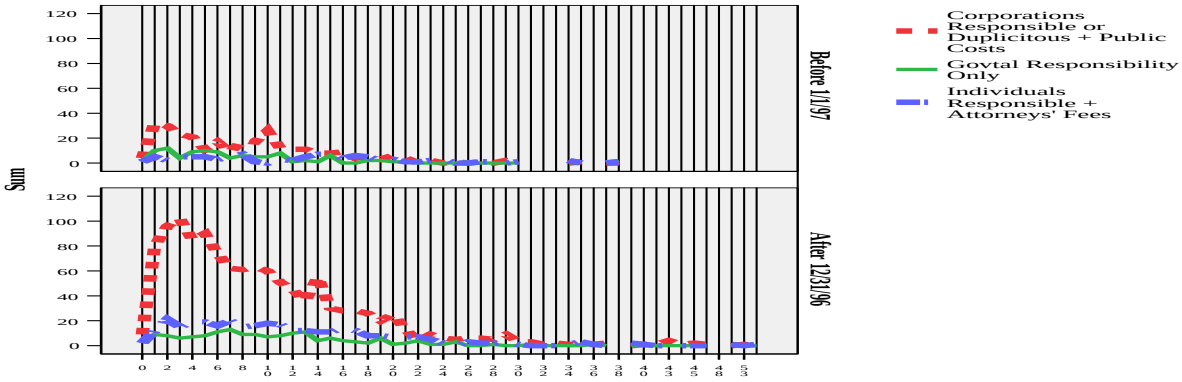
Oñati Socio-legal Series, v. 4, n. 4 (2014), 725-749
ISSN: 2079-5971

Graph One – Placement of Frames within Articles



Paragraph Placement 0-Headline

Graph Two – Placement of Frames within Articles by Periods



Paragraph Placement 0-Headline

3.6. Across litigation-heavy and litigation-light samples, anti-firearms framing appeared more prominently than pro-firearms framing

Reform-friendly themes not only appeared in articles far more often than themes more advantageous to firearms companies but appeared far earlier in articles from each of our samples. Graph One trichotomizes framing into those that tend to favor firearms' opponents ["Corporate Responsibility," "Corporate Duplicity/Disclosures," and "Public Costs"]; those that tend to favor firearms' defenders ["Individual Responsibility" and "Attorneys' Fees"]; and "Governmental Responsibility." When we then distributed these three sorts of framing across the paragraphs in which they were found—we assigned the number zero [0] to headlines; set lead paragraphs to one [1]; and counted so on—results were telling. Framing beneficial to defenders of firearms companies and framing assigning Responsibility to government(s) hovered below 25, meaning that those themes totaled fewer than 25 in the headlines or lead paragraphs of articles. Themes beneficial for attackers of firearms companies, by contrast, never summed to fewer than 25 until the 19th paragraph overall.[20] Pro-opponent framing made up about two-thirds of all frames detected but about three-quarters of all lead paragraphs and more than three-quarters of second paragraphs. In sum, pro-challenger framing that appeared much more often [Table One] also appeared more often in headlines or lead paragraphs of articles.

[20] Headlines are excepted from this description.

3.7. Anti-firearms framing became more prominent absolutely and relatively across litigation-heavy and litigation-light samples

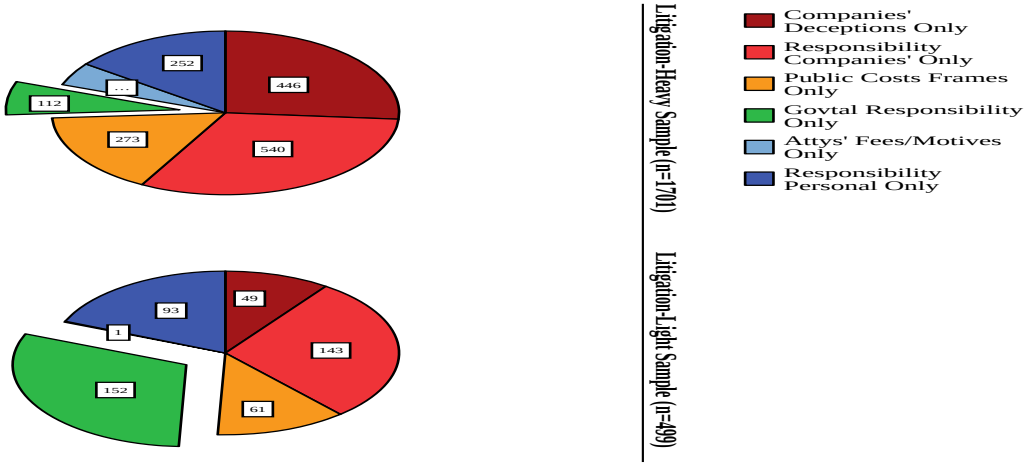
Differences in prominence between anti-firearms framing and other framing were more pronounced 1997-2005 than before 1997. Graph Two shows that anti-firearms framing stood out in the earlier period but not overwhelmingly. From 1997 on, framing that militated against the interests of firearms makers and marketers outpaced "Governmental Responsibility" and the combination of "Individual Responsibility" and "Attorneys' Fees."

3.8. Framing in articles focused on lawsuits disadvantaged firearms defendants far more than framing in articles not focused on lawsuits

Pie Chart One shows that articles focused on one or more specific lawsuits furnished far more framing inimical to firearms merchants or defendants than did articles not concerned with specific lawsuits. We have separated the slice associated with "Government Responsibility" to stress that "Government Responsibility" frames were more numerous in the Litigation-Light Sample than in the Litigation-Heavy Sample despite the latter sample's featuring more than three times as many frames detected. Pursuit of judicial remedies, it appears, distracts reporters and commentators from other uses or duties that might be assigned to government. Please notice as well that:

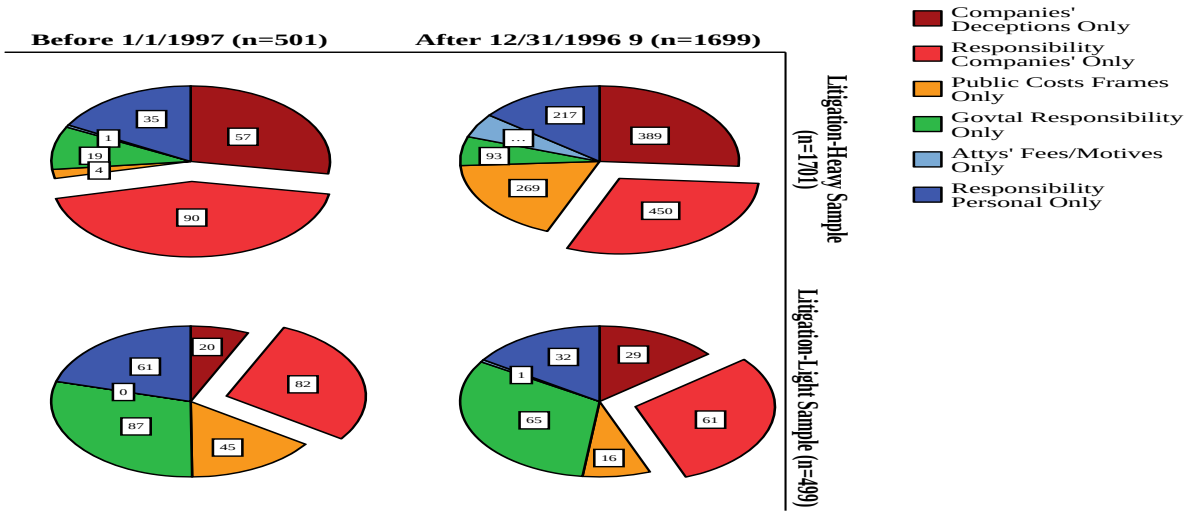
- Taken together, "Corporate Responsibility," "Corporate Duplicity/Disclosures," and "Public Costs" framing made up a slight majority of the Litigation-Light Sample, while those three constituted a far greater majority [1259 frames to 442 frames not advantageous to challengers or plaintiffs] of the Litigation-Heavy Sample.
- Slices connoting "Corporate Responsibility" and "Individual Responsibility" were comparable across the two samples.
- "Corporate Duplicity/Disclosures" framing in the Litigation-Heavy Sample outnumbered such framing in the Litigation-Light Sample more than nine to one and constituted more than a quarter of Litigation-Heavy Sample framing but less than one-tenth of Litigation-Light Sample framing. This striking disparity seems to us to confirm that coverage of crimtort Litigation provides proponents of firearms regulation public relations dividends.

Pie Chart One – Framing by Litigation-Heavy Sample & Litigation-Light Sample



Oñati Socio-legal Series, v. 4, n. 4 (2014), 725-749
ISSN: 2079-5971

Pie Chart Two – Framing by Litigation-Heavy Sample and Litigation-Light Sample and by Period



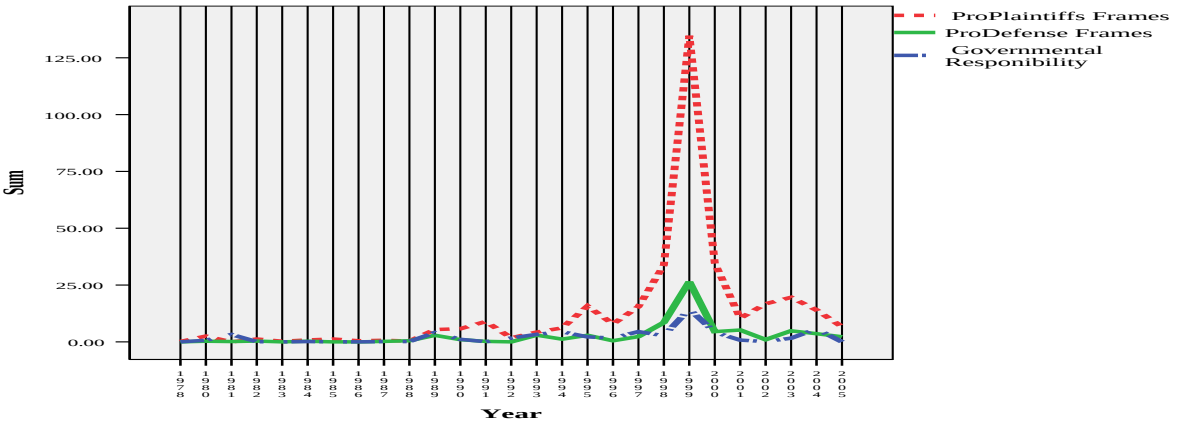
3.9. Framing in articles published after 1996 differed from framing in articles published prior to 1997 only slightly

We expected the Litigation-Heavy and Litigation-Light Samples to incorporate "period effects," the very different contexts based on increasingly "criminal" orientations, strategies, and tactics. In Pie Chart Two we separated "Corporate Responsibility" framing from other framing to note how that "Corporate Responsibility" dominated before 1997 among lawsuit-heavy articles. Other noteworthy period effects from Pie Chart Two include:

- "Public Costs" framing greatly increased in Period Two relative to Period One among Litigation-Heavy Sample articles but decrease substantially, relatively, and absolutely from Period One to Period Two in the Litigation-Light Sample. Lawsuits promulgated "Public Costs" framing to a far greater extent, it seems, than was the case in articles about firearms that did not prominently feature specific suits.
- Articles featuring "Corporate Duplicity/Disclosures" framing were nearly constant across periods and samples and smaller than "Corporate Responsibility" slices. This reiterates that articles were more likely to carry attributions of Responsibility than they were assignments of criminality.[21]
- "Attorneys' Fees" themes appeared almost exclusively in latter-period, Litigation-Heavy Sample articles. Claims that trial lawyers were profiteering off class actions, spread by Big Tobacco, public relations firms, and friendly columnists, appear to have availed firearms defendants in reducing attention to or distracting attention from "Corporate Responsibility." This triumph of counter-framing was perhaps limited but from our data actual.

[21] We emphasize again that by "criminality" and "criminalization" we do **not** mean commission of criminal or felonious offenses. Instead, we intend to notice that litigants and crusaders were moving beyond traditional civil liability to the sorts of fraud, perfidy, or venality that demean commercial activity but could seldom if ever be proved beyond a reasonable doubt for a given decision-maker or agent.

Graph Three – Pro-Plaintiff, Pro-Defendant, and Governmental Responsibility Frames by Year of Publication of Article



3.10. Pro-plaintiff framing "crested" 1997-2001

Graph Three reveals the period within which themes contrary to the interests of firearms companies—that is, deceit or duplicity by companies or their representatives; assignment of Responsibility to companies rather than individuals or governments; and costs of marketing or manufacturing firearms allegedly borne by states or localities—dominated coverage. Until 1994 these three themes were neck and neck. Pro-plaintiff themes edged ahead 1994-1997, then outdistanced the other two themes 1997-2001.[22] Readers might notice as well that:

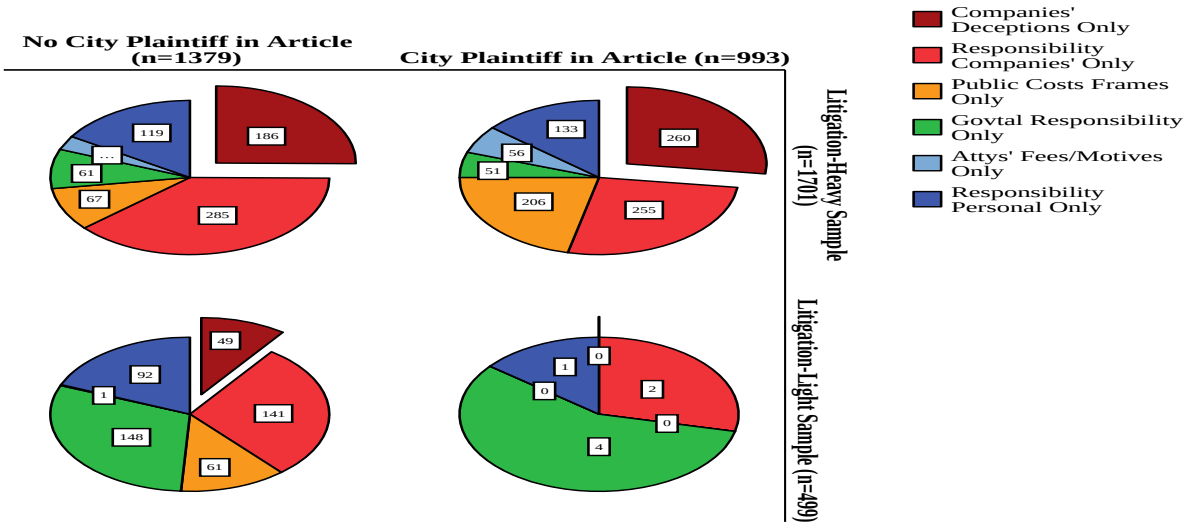
- News articles disseminated each sort of framing relatively and absolutely seldom prior to the 1990s.
- Dissemination of themes, especially themes favoring reformers and plaintiffs, increased noticeably before municipalities started to sue firearms companies but at about the time that governmental entities started to sue tobacco companies.

Articles that mentioned tobacco or tobacco litigation were about twice as likely to emphasize pro-plaintiff themes as articles that did not.

[22] Of course, articles published between 1994 and 2001 constituted about 60% our samples. If instead arithmetic averages were used, the line-graph would look very different. Please see Appendix D at <http://www.pugetsound.edu/faculty-pages/haltom>. We believe that representing the spike of litigation 1997-2001 better conveys the framing that would reach newspaper readers.

Oñati Socio-legal Series, v. 4, n. 4 (2014), 725-749
ISSN: 2079-5971

Pie Chart Three – Six Frames by Litigation-Heavy Sample and Litigation-Light Sample and by Presence/Absence of Municipal Plaintiff



3.11. Municipal plaintiffs highlight cumulative growth in "corporate duplicity/disclosures" frames

A look at Pie Chart Three discloses a few visually grabbing differences among articles bereft of specific lawsuits. We have "exploded" the "Corporate Duplicity/Disclosures" slice to draw attention to its absolute and relative increase as the eye moves from the lower left [Litigation-Light articles without mention of municipal plaintiffs] to the upper left [Litigation-Heavy articles without mention of municipal plaintiffs] and thence to the upper right [Litigation-Heavy articles with municipal plaintiffs mentioned]. This result signifies, we presume, the compound influence of articles that focus on lawsuits and mention municipal plaintiffs' suits. We deemed the presence of municipal officials to be at most mixed: "Corporate Deception" frames constituted 21% of framings in Litigation-Heavy articles that mentioned no municipal litigants but 26% of framings in Litigation-Heavy articles that mentioned municipal litigants; in contrast, Litigation-Heavy articles without city litigants were substantially likelier to attach Responsibility to firearms companies [roughly 32% of framings] than were Litigation-Heavy articles with city litigants [about 26% of framings]

3.12. Summary

In the findings above, then, we explain the criminalization of firearms products much as we explained the criminalization of tobacco products (McCann *et al.*, Haltom, and Fisher 2013). If they reported on challenges or lawsuits at all, reporters were bound to convey some major allegations of challengers or plaintiffs. As challengers and plaintiffs adjusted their claims from allegations of liability toward accusations of venal or criminal misconduct, challengers' and plaintiffs' framing may have been bound to appear early and often in reports and features. Against these less civil, more criminal claims, the usual defenses of challenged corporations and accused defendants were of less and less utility. Those who misused firearms were individually responsible for their accidents or crimes, but "Individual Responsibility" for deaths and injuries did not exonerate or insulate manufacturers or marketers for their misdeeds on a far larger scale.[23] Moreover, litigative discovery and other

[23] And, as we noted already, makers and marketers of firearms have thousands of innocent victims who cannot validly be scored for irresponsibility or assumption of risk in showing up for school or jobs. Those who defended tobacco might attribute some responsibility to teens or their parents; defenders of firearms far less so.

revelations meant that even crimtort defendants who dodged adverse judgments in court were liable to adverse judgments among attentive citizens. The best for which makers and sellers of firearms could hope, it seems, was the Scottish Verdict: "Not Proved." The Scottish verdict seems less than a public relations bonanza.

This review of firearms coverage in newspapers has led us to a like Scottish Verdict: "Not Implausible." Campaigns against firearms appear to have elicited coverage similar to reporting of campaigns against tobacco. Framing that benefited plaintiffs and reform abounded and appeared prominently in headlines and in opening paragraphs; framing that bolstered defendants and companies proved far rarer and often as an afterthought deep in articles. Governments and officials appear to assist private attorneys in publicizing themes that favored control of firearms. Although characterizations of major actors tended to balance out as seldom pejorative or meliorative, corporate defendants and plaintiffs' attorneys fared the worst. Firearms litigators, from the data reported above, emulated tobacco litigation in coverage as well as in tactics.

4. Qualifications and contingencies

We must qualify the findings above [and thus the plausibility of regulating firearms through litigation] in at least two ways. First, for neither tobacco litigation nor firearms litigation are we able to distinguish the potency of factors that combined to generate the coverage. Second, the confluence of crimtorts, states and municipalities, and class actions occurred in a specific context. In addition to those qualifications we must remind readers that firearms interests have powerful, well positioned allies on which to rely.

4.1. We cannot isolate crimtorts from other factors

The findings reported above may instill some confidence that lawsuits pursued by coalitions of governments, prominent officials, and private attorneys and publicized in and through media managed through crimtorts tactics to criminalize firearms manufacturers and marketers, just as that combination of forces and tactics had criminalized making and marketing tobacco. News media reports of litigation, it seems clear, exacerbated the negatives and neutralized the positives of firearms interests. Still, these confluences of coalitions, class actions, mass media, and tactics permit no isolation of crimtorts from other factors. We cannot persuasively argue the force of crimtorts or criminalization independent of municipal suits, interventions by attorneys general, and other contingencies. As with our previous research on media reporting, we cannot claim to know how various constituencies make sense of framings that saturate the public space; that would require a type of study different from what we offer. That limit of this study is as well a limit on confidence that crimtorts actions, criminalization efforts, or officials' lawsuits [or other factors that we have not discussed] will work in the absence of the others.

4.2. Contexts matter

Moreover, findings regarding firearms as well as findings regarding tobacco issued from 1997-2005. Coverage of firearms litigation overlapped coverage of the Master Settlement Agreement and other developments in litigation against Big Tobacco. After the Master Settlement Agreement of 1998, anti-tobacco litigation entered a more dormant phase (see McCann *et al*. 2013). Whatever spillover from tobacco that Litigation against firearms might have enjoyed in 1997-2005 need not have persisted since. Commentators and other generals urging new attacks by governments and officials may be fighting a previous war under changed conditions.

What conditions might have changed? Potentially most significant, the Supreme Court of the United States in *District of Columbia versus Heller* (2008) declared that the Second Amendment to the United States Constitution protected an individual's

right to keep and bear arms and in *McDonald versus Chicago* (2010) extended that right against states.[24] We cannot augur whether or how these Constitutional developments may affect crimtort litigation. Second Amendment concerns barely surfaced in newspaper coverage analyzed earlier in this paper [because articles were drawn from 2005 or before]. We find it unlikely that criminalization of those who make or market firearms via crimtorts is likely to be abated owing to assertions of Constitutional rights of those who keep or bear arms. Still, the Supreme Court has changed the cultural setting.

States and Congress have passed legislation to protect firearms interests from some sorts of lawsuits, so some crimtorts tactics and some agents of prosecution and publicization may be less effective in or even banned from firearms frays.

The ability of the National Rifle Association and other pro-firearms forces to defend companies or deflect suits or other attempts at regulation seems to have ebbed little even after recent slaughter, so we cannot dismiss such contingencies either.

A perhaps singular contingency that barely overlapped with our data may have been that Al Gore, a strong advocate of regulation of firearms, was denied the Presidency and George W. Bush, a strong advocate of firearms owners and rights, was awarded it. Had Gore won, the executive branch might have built on and added greatly to momentum for change, perhaps even setting up clashes with and in the Supreme Court of the United States. The justice appointed to that Supreme Court would not likely have sided with Justices Scalia, Kennedy, and Thomas on individual rights to possess firearms, but we cannot presume that President Gore would have been re-elected. The attacks of 11 September 2001 and the War on Terror may have changed the context in ways favorable to gun ownership; we cannot say whether or in what form each development would have taken in a Gore Administration. The crimtort, criminalizing litigation and framing of issues that occurred during the latter term of Bill Clinton, a president vilified by the political right and pro-firearms groups, might have characterized the term or terms of Barack Obama, but we cannot know that Senator Obama would have run for office in 2008 nor can we know in what shape the economy might have been in 2007-2008.

5. Conclusion

However the contingencies and qualifications may work out or might have worked out, the utility of class actions against firearms, of coalitions of public officials, private attorneys, and public interest advocates, and of targeted criminalization of makers and marketers of firearms appears from the data reviewed in this paper to be established. Whether that influence can be replicated in the current context is a complex question beyond the scope of this research and of us researchers.

References

Bowling for Columbine, 2002. Director, writer, Michael Moore. United States: MGM.

Brown, P.H., and Abel, D.G., 2003. *Outgunned: Up Against the NRA – The First Complete Insider Account of the Battle Over Gun Control*. New York: The Free Press.

Buckley, C., 2006. *Thank You for Smoking: a Novel*. New York: Random House Trade Paperbacks.

Cheney, P., and Malarek, V., 2003. Tobacco Executives Charged in $1.2-Billion Fraud. *Globe and Mail* [online], 1 March

[24] We did direct coders to record references to the Second Amendment or to allied concerns for firearms rights. Such references were few before criminalization and became relatively and absolutely rarer once crimtorts and criminalization were rampant. We cannot anticipate whether the Court's more recent rulings may alter that feature in reports, columns, and editorials after 2008.

http://www.theglobeandmail.com/news/national/tobacco-executives-charged-in-12-billion-fraud/article1158912/ [Accessed 9 September 2014].

District of Columbia versus Heller. 2008. 554 U. S. 570.

Grisham, J., 1996. *The Runaway Jury*. New York: Random House Bantam Dell.

Haltom, W., and McCann, M., 2004. *Distorting the Law: Politics, Media, and the Litigation Crisis*. University of Chicago Press.

Kagan, R.A., 2001. *Adversarial Legalism: The American Way of Law*. Cambridge: Harvard University Press.

Kessler, D., 2001. *A Question of Intent: A Great American Battle with a Deadly Industry*. New York: Public Affairs.

Koenig, T.H., and Rustad, M.L., 1998. "'Crimtorts' as Corporate Just Deserts." *University of Michigan Journal of Law Reform,* 31 (2), 289–352.

Koenig, T.H., and Rustad, M.L., 2004. Toxic Torts, Politics, and Environmental Justice: The Case for Crimtorts. *Law & Policy*, 26 (2), 189-207.

Lytton, T.D., 2000. Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry. *Missouri Law Review* [online], 65 (1), 1-89. Available from: http://ssrn.com/abstract=201729 [Accessed 9 September 2014].

Lytton, T.D., 2005. *Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts*. Ann Arbor: University of Michigan Press.

Master Settlement Agreement. 1998. Available from: http://publichealthlawcenter.org/topics/tobacco-control/tobacco-control-litigation/master-settlement-agreement [Accessed 9 October 2014].

Mather, L., 1998. Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation. *Law & Social Inquiry*, 23 (4), 897-937.

McCann, M., Haltom, W. and Fisher, S., 2013. Criminalizing Big Tobacco: Legal Mobilization and the Politics of Responsibility for Health Risks in the United States. *Law & Social Inquiry*, 38 (2), 288-321.

McDonald versus Chicago. 2010. 561 U. S. 3025.

McIntosh, W.V., and Cates, C.L., 2009. *Multi-Party Litigation: The Strategic Context*. Vancouver, B.C.: UBC Press.

Miller, J., 2013. NRA CEO Wayne LaPierre: "Boston proves" gun control is dangerous. *CBS News* [online], 4 May. Available from: http://www.cbsnews.com/8301-250_162-57582905/nra-ceo-wayne-lapierre-boston-proves-gun-control-is-dangerous/ [Accessed 7 September 2014].

Mollenkamp, C. *et al*., 1998. *The People Vs. Big Tobacco: How the States Took on the Cigarette Giants*. Princeton, N.J.: Bloomberg Press.

Peirce, N., 2012. Time to Enlist State Powers to Curb Deadliest Guns. *Citiwire.net* [online]. Available from: http://citiwire.net/columns/time-to-enlist-state-powers-to-curb-deadliest-guns/#more-3856 [Accessed 29 April 2013].

Rabin, R.L., 2001. The Third Wave of Tobacco Tort Litigation. *In*: R.L. Rabin and S.D. Sugarman, eds. *Regulating Tobacco*. New York: Oxford University Press, 176-206.

Rabin, R.L., and Sugarman, S.D., 2001. *Regulating Tobacco*. New York: Oxford University Press.

Reitman, J., 2006. *Thank You for Smoking: The Shooting Script*. New York: Newmarket Press.

Rostron, A., 2003. *Smoking Guns: Exposing the Gun Industry's Complicity in the Illegal Gun Market. Legal Action Project* [online]. Washington: Brady Center to Prevent Gun Violence. Available from: http://ssrn.com/abstract=2111318 [Accessed 9 September 2014].

Rostron, A., 2006. Lawyers, Guns, & Money: The Rise and Fall of Tort Litigation Against The Firearms Industry. *Santa Clara Law Review* [online], 46 (2), 481-511. Available from: http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1173&context=lawreview [Accessed 9 September 2014]-

Runaway Jury, 2003. Film. Directed by Gary Fleder, screenplay by Brian Koppelman *et al*. Beverly Hills: 20th Century Fox.

Sebok, A.J., 2004. The Federal Government's RICO Suit Against Big Tobacco: An Unprecedented Case Begun by the Clinton DOJ, And Continued by the Bush DOJ. *Findlaw* [online], 4 October. Available from: http://writ.news.findlaw.com/sebok/20041004.html [Accessed 9 September 2014].

Siebel, B.J., 1999. City Lawsuits against the Gun Industry: A Road Map for Reforming Gun Industry Misconduct. *Saint Louis University Public Law Review*, 18 (1), 247-290.

Simons, K.W., 2008. The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives. *Widener Law Journal*, 17 (3), 720-732.

Vandali, F.J., 2008a. The Criminalization of Products Liability: An Invitation to Political Abuse, Preemption, and Non-enforcement. *Catholic University Law Review* [online], 57, 341-374. Available from: http://scholarship.law.edu/lawreview/vol57/iss2/2/ [Accessed 9 September 2014].

Vandali, F.J., 2008b. Should Manufacturers and Sellers of Lethal Products Be Subject to Criminal Prosecution? *Widener Law Journal*, 17 (3), 877-889.

Williamson, C., 2007. Murder and the Gun Maker: A Local Case is at the Heart of the National Debate on Firearms. *Worcester Magazine* [online], 18 January. Available from: http://worcestermag.com/2007/01/18/murder-and-the-gun-maker/3648 [Accessed 9 September 2014].