



# OUTGUNNED NO MORE

The New Era of  
Firearms Industry  
Accountability

LINDA S. MULLENIX

## OUTGUNNED NO MORE

*Outgunned No More* comprehensively addresses the changed legal landscape under which governments and private citizens can sue the gun industry for contributing to and sustaining the gun violence epidemic in the U.S. and Mexico. The book canvasses federal and state efforts to regulate firearms through gun control measures, arguing that these regulatory measures have proven ineffective to stem gun violence. Instead, recourse to robust consumer protection and mass tort litigation provides the best avenue for holding the firearms industry accountable. The chapters highlight three important interventions: the 1998 Tobacco Master Settlement Agreement, the Connecticut Sandy Hook Elementary School litigation, and the recent enactment of consumer protection and public nuisance firearms statutes in nine states. These innovative statutes have created an avenue for litigation that overcomes the firearm industry's historical immunity. This book concludes that a firearms mass tort litigation, modeled after the resolution of claims in the tobacco industry, is the best path forward.

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*For my next generations, children and grandchildren*

*Robert, Joyce, Jack, Laura, William, Amy, Chris, Ben, Ned, Oliver, and Sophie*



# Contents

<i>Acknowledgments</i>	<i>page ix</i>
<b>Introduction</b>	<b>1</b>
<b>1 Limited Effective Firearms Regulation and the Second Amendment Challenge to Gun Control</b>	<b>12</b>
<b>2 Suing the Firearms Industry: The Failure of Traditional Tort Litigation through the Twenty-First Century</b>	<b>31</b>
<b>3 The 1998 Tobacco Master Settlement Agreement: A New Mass Tort Paradigm and Lessons from Tobacco for Firearms Accountability</b>	<b>53</b>
<b>4 The Firearms Industry Fights Back: Protection of Law Commerce in Arms Acts (PLCAA)</b>	<b>73</b>
<b>5 The Futility of Firearms Litigation under PLCAA</b>	<b>90</b>
<b>6 Inroads into PLCAA: The Sandy Hook Litigation and the Predicate Statute Exception</b>	<b>109</b>
<b>7 Zellnor Myrie and the New York and New Jersey Firearms Public Nuisance Statutes</b>	<b>127</b>
<b>8 California, Colorado, Delaware, Hawaii, Illinois, Maryland, and Washington: Further Firearms Public Nuisance and Industry Accountability Initiatives</b>	<b>149</b>
<b>9 The Extraterritoriality of Firearms Accountability: Mexico Sues the Firearms Industry</b>	<b>172</b>



10	<b>Firearms Industry Accountability: The Emerging Mass Tort Litigation</b>	197
	<b>Conclusion</b>	222
	<i>Index</i>	239

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## Introduction

On December 13, 1984, at the El Corral Restaurant in Tucson, Arizona, Victor James Marasco Jr., 30, took out his .44 caliber Magnum Ruger and shot his father, Victor Marasco Sr., between the eyes, killing him instantly in front of fifty to sixty people dining at the restaurant.<sup>1</sup> The elder Marasco had a reputation for being a mean, bellicose, domineering, and manipulative drunk. That day the elder Marasco had completed a divorce settlement with his second wife, who so feared her husband that she used an alias flying from Florida to Tucson to sign the divorce papers. She hired a bodyguard after arriving.

That day Marasco Sr. persuaded his sons Victor Jr. and Robert to join him at a celebratory dinner with his new girlfriend, soon to be his third wife. The father was known to carry his own gun but kept it in his truck that night. Victor Jr. arrived separately and took his handgun from his truck and put it into his boot because he feared his father's propensity for belligerent behavior when his father was drunk. At dinner, Victor Jr. got into an argument with his father. When he believed his father was reaching for a gun inside his jacket, the younger Marasco drew his gun and shot him. At trial, he claimed that the gun went off and struck his father when his brother Robert, sitting next to him, intervened and struck the gun.<sup>2</sup>

Also in 1984, Lisa Bernadette, a young newlywed and recently hired police officer with the Cerritos, California sheriff's department, went to work at her job as police dispatcher. That day she reported for required firearms training at the firing range. At some time during her training session, she shot herself to death. The death was ruled a suicide. She was twenty-one.

On September 28, 2010, a nineteen-year-old University of Texas at Austin college sophomore, Colton Tooley, began firing an AK-47 rifle at about 8:10 a.m. near the campus Littlefield Fountain. He proceeded to walk across campus, firing his weapon. The entire campus immediately went into lockdown with sirens blasting over the public address system. Campus police posted an alert on the university's

<sup>1</sup> See Mark Turner, Tucsonan Acquitted in '84 Slaying of Father, *Arizona Star Daily* (May 7, 1984).

<sup>2</sup> *Id.*

emergency website that stated, “If you are off campus, STAY AWAY. If you are on campus, lock doors, do not leave your building. All organized classes for today, September 28, are canceled.”<sup>3</sup>

The campus was immediately surrounded by SWAT teams, armored vehicles, numerous police vehicles, and helicopters. Campus police and other officers located the shooter in the Perry-Castenda Library, where he shot himself to death. The authorities continued the campus-wide lockdown for several hours as they proceeded to check all campus buildings for a possible suspected second shooter and possible explosives.

Gun violence in the United States has become so commonplace that the recitation of these gun violence narratives – domestic homicide violence, death by suicide, and a school shooting – most likely fails to evoke reactions of shock or dismay. The American public has become so numb to new episodes of gun violence that these stories are now normalized in the communal consciousness. What is different about these three episodes, however, is that they illustrate how close to home gun violence is for everyone. Victor Marasco Sr. was the author’s uncle, the Tucson shooter her cousin, the Cerritos police officer her sister-in-law, and the author was barricaded in her office during the campus lockdown.

American gun violence knows no class, race, nationality, age, gender, education, or socioeconomic status. Gun violence knows no propriety of place: It randomly strikes at schools, movie theatres, supermarkets, churches, banks, nightclubs, shopping centers, malls, dance studios, concert venues, parades, subway stations, bowling alleys, birthday parties, Dollar General stores, bars, post offices, and medical centers. Gun deaths occur at home, in our workplaces, in large metropolitan cities, suburbs, and rural communities. No place is safe; no place is immune. One of the most compelling narratives in contemporary American society is the prevalence of gun violence and the harms to individuals, families, and communities resulting from the reckless and unreasonable conduct of the firearms industry in contributing to and sustaining this crisis.

The landscape of firearms violence in the United States contributes to individual and communal harms affecting the health, welfare, and safety of society, requiring deterrence and relief, just like other epidemic communal harms. Since the mid-twentieth century, the legal system has provided just such relief for persons and communities affected by asbestos disease, tobacco-related illnesses, medical device failures, pharmaceutical toxicity, opioid abuse, lead paint poisoning, climate change, and environmental pollution.

There can be little doubt of the extent of gun violence characterized by mass shootings, suicides, homicides, accidental deaths, and other injuries. Sources documenting gun-related injuries reflect constantly changing data, with various

<sup>3</sup> See CNN Wire Staff, *Shooter at University of Texas Was a Student*, CNN (Sept. 28, 2010), at [www.cnn.com/2010/CRIME/09/28/texas.university.shooting/index.html?cid=ios\\_app](http://www.cnn.com/2010/CRIME/09/28/texas.university.shooting/index.html?cid=ios_app).

sources reporting diverse statistics. It is a challenging task to accurately describe the landscape of gun violence because it is difficult to obtain certain categories of information concerning gun sales and gun use in crime because firearm industry advocates effectively have blocked the transparency of certain information. The National Rifle Association has successfully lobbied Congress to prevent disclosure of firearms data, expressly to prevent the use of such information in civil lawsuits.

Since 2003, Congress has enacted a series of legislative riders to the Department of Justice's budget that have restricted the Bureau of Alcohol, Tobacco, Firearms, and Explosives from using appropriated funds to disclose trace data relating to firearms.<sup>4</sup> The Tiahrt Amendment prohibits the National Tracing Center of the ATF from releasing information in its firearms database to anyone other than law enforcement agencies or prosecutors for use in a criminal investigation.<sup>5</sup> Federal law has protected the firearms industry from disclosure of information relating to the origination of guns used in crimes, or wider trends in gun trafficking.<sup>6</sup> Courts have applied these statutes to prevent the disclosure of critical data under the Freedom of Information Act.<sup>7</sup>

Mass shootings in the U.S. garner a great deal of public attention. It is difficult to compile statistics relating to mass shootings because different reporting agencies use different definitions of what constitutes a mass shooting event. There is no single, agreed definition. The Federal Bureau of Investigation collects data on active shooter incidents, which it defines as "one or more individuals actively engaged in killing or attempting to kill people in a populated area."<sup>8</sup> The Gun Violence Archive defines a mass shooting as an incident in which four or more people are shot, excluding the shooter, even if no one is killed.<sup>9</sup> Notwithstanding the difficulties in obtaining accurate information about firearms sales, distribution, and use, all sources of available information reflect a constant, growing incidence of gun-related injuries from the 1990s through the twenty-first century.

The Pew Research Center, collecting data from the Centers for Disease Control and Prevention, the Federal Bureau of Investigation, and other sources, reported that in 2021 – the most recent year for which there is collected information – more Americans died of gun-related injuries than in any other year on record.

<sup>4</sup> Pub. L. No. 108-7, § 644, 117 Stat. 11, 473 (2003).

<sup>5</sup> Pub. L. No. 108-447, 118 Stat. 2809 (2004).

<sup>6</sup> *Id.*

<sup>7</sup> *City of Chicago v. U.S. Dept. of Treasury*, 423 F.3d 777, 782, 784 (7th Cir. 2005).

<sup>8</sup> See John Gramlich, What the Data Says about Gun Deaths in the U.S., The Pew Research Center (Apr. 26, 2023), available at [www.pewresearch.org/fact-tank/2023/04/26/what-the-data-says-about-gun-deaths-in-the-us/](https://www.pewresearch.org/fact-tank/2023/04/26/what-the-data-says-about-gun-deaths-in-the-us/). Using this definition, the FBI in 2021 reported that 103 people were killed in active shooter incidents, excluding the shooters. The FBI documented an increase in active shooter incidents; in 2000 the FBI recorded three such incidents; in 2021 the FBI recorded sixty-one.

<sup>9</sup> *Id.* Using this definition, the Gun Violence Archive reported that 706 people died in mass gun violence incidents in 2021.

These included deaths resulting from murder or suicide.<sup>10</sup> In 2021, 48,830 people died from gun-related injuries in the U.S.<sup>11</sup> This total was by far the most on record, representing a 23 percent increase since 2019, before the onset of the coronavirus pandemic. On a per capita basis, in 2021 there were 14.6 gun deaths per 100,000 people. This was the highest rate of gun deaths since the early 1990s.<sup>12</sup>

Gun murders increased by 43 percent during the pandemic, and 81 percent (20,958 of 26,031) of murders involved a firearm. Gun murders in 2021 represented the highest percentage of gun murder violence since 1968 when the Centers for Disease Control and Prevention began compiling statistics. Suicides increased by 10 percent between 2019 and 2021. More than fifty-five percent of suicides in 2021 (26,328 out of 48,183) involved a gun, which represented the highest percentage of suicides by guns since 2001.<sup>13</sup> Gun deaths among children and teenagers under the age of eighteen increased by 50 percent in those two years, rising from 1,732 deaths in 2019 to 2,590 in 2021.<sup>14</sup>

In 2020, according to FBI published data, handguns were involved in 59 percent of the 13,620 murders and nonnegligent manslaughters. The FBI also reported that rifles – including weapons described as assault weapons – were used in 3 percent of firearm murders. Shotguns were involved in 1 percent of murders and the remainder of gun homicides and nonnegligent manslaughters (36 percent) involved other types of firearms.<sup>15</sup>

For 2023, the Gun Violence Archive reported a total of 43,085 gun deaths, including 18,995 murders and 24,090 suicides.<sup>16</sup> The Archive reported 36,419 injuries, 656 mass shootings, and forty-one deaths from mass murders. The Archive reported separate data for children killed or injured in firearm incidents: Three hundred children between the ages of one and eleven years had been killed in gun-related incidents and 641 had been injured. A total of 1,397 teenagers had been killed and 3,880 had been injured.<sup>17</sup>

According to the Giffords Law Center to Prevent Gun Violence, the U.S. has approximately 393 million guns, the most guns of any comparable country. Nearly every American will know a victim of gun violence during their lifetime. Over one million Americans have been shot in the past decade. The U.S. accounts for just

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* This figure from the CDC included murders, gun suicides, unintentional shootings, gun-related events involving law enforcement, and gun-related deaths where the circumstances could not be determined. The total excluded deaths in which gunshot injuries played a contributing but no principal cause of death or injury. The CDC fatality statistics were based on death certification information which lists a single cause of death.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See Gun Violence Archive 2023, available at <https://gunviolencearchive.org/past-tolls>.

<sup>17</sup> *Id.*

4 percent of the world's population but 35 percent of global firearms suicides. An American is twenty-five times more likely to be killed in a gun homicide than people in any other high-income country.<sup>18</sup> Approximately 43,000 Americans have died from gun violence, an average of 116 persons a day. Many gun deaths are suicides and access to guns triples the suicide risk. Many suicides – 59 percent – involve a gun.<sup>19</sup>

The Gifford Law Center also documents demographic information relating to the victims of gun violence. Gun homicides disproportionately affect Black Americans, and domestic violence victims are five times more likely to be killed when their abuser has access to a gun. American women are twenty-one times more likely to be killed with a gun than women in other high-income countries. Twenty-five million American adults have been threatened or nonfatally injured by a partner with a firearm.<sup>20</sup> Three million children annually are directly exposed to gun violence that results in injury, death, or trauma; guns are the leading cause of death for children under eighteen.<sup>21</sup>

The United States stands alone worldwide among countries not only for gun ownership and lack of effective regulatory constraints but also for resulting gun injuries and deaths. According to the Pew Research Center, the gun-related death rate is much higher in the United States than in most other developed nations.<sup>22</sup> The U.S. gun death rate has been higher than death rate statistics in Canada, Australia, France, Germany, and Spain. The Giffords Law Center reports that America leads high-income nations in gun violence.<sup>23</sup>

\* \* \*

The emergence of widespread firearms casualties in the 1990s developed contemporaneously with the advent of other massive personal injury harms arising from the manufacture, marketing, distribution, and retail sale of consumer products. The increasing nationwide incidence of deaths and injuries from firearms-related events presented regulators and the plaintiffs' bar with the opportunity to hold accountable participants in the manufacture, marketing, distribution, and sale of firearms. As ensuing chapters will discuss, beginning in the 1990s through the early twenty-first century, regulators and plaintiffs' attorneys made repeated attempts to hold accountable actors engaged in the firearms industry. The firearms industry

<sup>18</sup> See Giffords Law Center, Statistics, available at <https://giffords.org/lawcenter/gun-violence-statistics>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Gramlich, *supra* note 8, citing Katherine Leach-Kemon, Rebecca Sirull, and Scott Glenn, On Gun Violence, the United States is an Outlier, Institute for Health Metrics and Evaluation (Oct. 31, 2023)(study of 195 countries and territories). The authors report that the U.S. gun-related death statistics, however, are still far below those of some Latin American countries, notably El Salvador, Venezuela, Guatemala, Colombia, and Honduras.

<sup>23</sup> Giffords Law Center, *supra* note 18.



and their lobbying allies aggressively resisted both regulation and litigation. Unlike other product manufacturers, distributors, and sellers, the history of gun violence in the United States is a narrative of an industry that largely has remained impervious to regulatory constraint or litigation enforcement.

Over the past five decades, American society has developed two means for protecting consumers, either through regulatory controls and enforcement or through public and private judicial remedies. Where regulatory measures largely have proven ineffective or failed to deter injurious consequences, mass tort litigation has successfully held other industry defendants accountable for harms resulting from products such as asbestos, pharmaceuticals, medical devices, tobacco, lead paint, opioids, environmental pollution, and vaping. Only the firearms industry has resisted and evaded accountability. Unlike almost every other industry that has contributed to widespread community harms, the firearms industry – the manufacturers, wholesalers, distributors, retailers, private sellers, gun show marketers, and end users – has proven impervious to accountability for the harms the industry actors have contributed and sustained.

The unrelenting chronicle of American gun violence is a story of the ineffectiveness of governmental regulation and enforcement, the Second Amendment constitutional barrier to successful gun control, and industry legislated statutory immunization from legal liability. No public crisis has been as documented as the daily incidence of gun violence, nor has any problem proved as intractable as addressing firearms violence in the United States. Firearms injuries to individuals and large populations represent one of the very few industry-wide harmful consequences that have remained stubbornly invulnerable to effective regulation and enforcement, as well as individual and mass tort litigation.

In the context of this discouraging reality, however, state legislators have turned to revolutionary, novel initiatives to begin to hold firearms defendants accountable for harms to individuals and communities affected by gun violence. On July 6, 2021, Governor Andrew Cuomo signed a bill amending the New York state public nuisance law to subject gun sellers and gun manufacturers to liability for public nuisance if they failed to implement reasonable controls to prevent the unlawful sale, possession, or use of firearms in New York.<sup>24</sup> The statute allows gun manufacturers and distributors to be held liable for actions that harm public safety. The public nuisance statute specifically regulates the marketing, distribution, and sale of firearms.

The legislation reflected a carefully crafted state workaround of the Protection of Lawful Commerce in Arms Act (PLCAA)<sup>25</sup> in a bold and innovative attempt to end

<sup>24</sup> N.Y. S7196, An Act to Amend the General Business Law, in Relation to the Dangers to Safety and Health and Creation of a Public Nuisance Cause by the Sale, Manufacturing, Distribution, Importing and Marketing of Firearms, Art.39-DDDD.

<sup>25</sup> Pub. L. 109-92, 119 Stat. 2095, codified at 15 U.S.C. §§ 7901–3.

the firearms industry's immunity from liability for the use and misuse of firearms resulting in injury or death. In January 2022, California followed New York's lead and introduced legislation declaring that gun manufacturers have created a public nuisance if their failure to follow state and local gun laws results in injury or death.<sup>26</sup> Since the enactment of the New York and California statutes, seven other states have followed these initiatives and enacted firearms accountability statutes.

In August 2021, Mexico filed a \$10 billion lawsuit in Massachusetts federal district court against gun manufacturers Smith & Wesson, Sturm, Ruger & Co., Beretta USA, Barrett Firearms Manufacturing, Colt's Manufacturing Co., and Glock Inc.<sup>27</sup> The lawsuit accused the major U.S. gun makers of facilitating weapons trafficking to drug cartels, leading to thousands of deaths in Mexico. The complaint set forth several claims alleging that the defendants' conduct created and contributed to a public nuisance by unreasonably interfering with public safety and health and undermining Mexico's gun laws, resulting in the specific and particularized injuries suffered by the government.

The complaint further alleged that the Mexican government and its residents had the right to be free from conduct that created an unreasonable risk to the public health, welfare, and safety, and to be free from conduct that created a disturbance and reasonable apprehension to persons and property. Thirteen states and three Latin American and Caribbean countries filed amici briefs in support of Mexico. The district court initially dismissed the lawsuit on sovereign immunity and other grounds, but in January 2024, a First Circuit three-judge panel reversed that dismissal, allowing Mexico's lawsuit to proceed.<sup>28</sup> The firearms defendants have appealed to the United States Supreme Court.<sup>29</sup>

This book focuses on the revolution in the firearms legal landscape that is now occurring with the enactment of firearms accountability and public nuisance statutes in nine states between 2021 and 2023, as a workaround of the 2005 federal firearms immunity statute, PLCAA, and state analogue legislation. State legislatures in New York, New Jersey, Delaware, California, Colorado, Hawaii, Illinois, Maryland, and Washington state have enacted new firearms accountability and public nuisance laws intended to empower state attorneys general, private attorneys, as well as individuals to sue firearms defendants.

The book surveys the landscape of the nine states' firearms accountability and public nuisance statutes that state legislatures have enacted and how state attorneys generals have sued under these new statutes. The book analyzes the basis for these

<sup>26</sup> Cal. Assembly Bill AB 1594 (June 27, 2022); Cal Civ. Code Div. 3, Part 4, Title 20: Firearms Industry Responsibility Act.

<sup>27</sup> *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., et al.*, Case 1:21-cv-11269-FDS (D. Mass 2021).

<sup>28</sup> *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 91 F.4th 411 (1st Cir. 2024).

<sup>29</sup> *Petition for a Writ of Certiorari, Smith & Wesson Brands, Inc., et al. v. Estados Unidos Mexicanos*, No. 23-1141 (S. Ct. Apr. 18, 2024).

novel statutes as an outgrowth of emerging mass tort public nuisance law, the firearms defendants' constitutional and statutory challenges to these statutes, and the developing judicial support for lawsuits pursued under these public nuisance, consumer protection, and firearms accountability laws.

The discussion of these new statutes describes a growing coalition of state attorneys general who have united in support of the firearms accountability statutes and litigation pursued by sister states. It analyzes litigation brought under these statutes and the gun industry's aggressive constitutional and statutory challenges to these statutes. In the face of the industry's hostile opposition to statutory firearms accountability laws, the text chronicles the growing federal and state court support for these laws.

The book suggests that the litigation avenues opened by statutory firearms accountability laws may inspire and contribute to a new firearms mass tort litigation, finally holding the firearms industry accountable for the harms resulting from gun violence. A firearms mass tort litigation conceivably might follow the model resolution of tobacco, pharmaceuticals, medical devices, opioids, lead paint, environmental pollution, vaping, and other community-based mass tort litigation.

The virtue of pursuing firearms relief through targeted consumer protection and public nuisance statutes accomplishes two chief goals: It effectively undermines classic institutional separation-of-powers arguments against judicial recognition of such claims, and it provides a basis for application of PLCAA's predicate statute exemption from the industry's blanket immunity. Because PLCAA has long presented the most formidable barrier to judicial relief for victims of firearm violence, the creation of effective predicate statutory grounds for a PLCAA exemption presents a tremendous inroad on victims' ability to sue the firearms industry.

In addition, the judicial trend to refuse to invalidate or dismiss firearms litigation, and the courts' rejection of sweeping constitutional challenges, suggests that state attorneys general have made substantial advances in holding firearms defendants accountable for an array of reckless and injurious conduct. Thus, suing the firearms industry finally has become a viable means for inducing reform and achieving remediation for injured individuals and communities affected by gun violence. As such, the book documents a revolutionary jurisprudential path forward for individuals and communities to finally hold the firearms industry accountable for societal harms.

The emergence of the role of targeted firearms consumer protection and public nuisance claims represents the newest frontier and battleground in resolving mass tort litigation. Conceptually, a public nuisance interferes with the public as a class, not merely one person or a group of persons. A model public nuisance statute, based on the state's police power to protect the general health and welfare of its citizens, addresses an actor's behavior that threatens or harms a community's health, safety, comfort, convenience, or a right common to the public. The right to sue for and recover monetary damages should be available to individuals as well as public

authorities responsible for protecting the rights of the public, including federal and state agencies. The fact that these lawsuits arise from events relating to harmful products does not lessen the fundamental communitywide harmful consequences to public health and welfare, nor the police powers to protect citizens.

In other mass tort litigation, courts currently are split concerning the viability of public nuisance claims and the theories underlying these claims, amply illustrated by inconsistent rulings in attempted state and federal public nuisance lawsuits. The advent of public nuisance claims has generated a battle between plaintiff and defense counsel and their allies concerning the legitimacy of public nuisance doctrine to remediate mass tort litigation. Whether modern public nuisance claims in mass tort litigation are viable remains to be seen. But there is evidence that the threat of a public nuisance claim has served to encourage or induce mass tort settlements before trial.

\* \* \*

The book explores four themes. First, the book reviews the concept of mass tort litigation as a procedural means for holding bad actor defendants accountable for harms to communities, surveying examples of historical mass torts and judicial reception to collective redress remedies. The purpose is to locate the complex problem of accountability for gun violence in the landscape of historical mass tort litigation. This discussion compares the history of firearms litigation to tobacco litigation, noting the inflection point represented by the 1998 Tobacco Master Settlement Agreement. Like tobacco litigation, firearms litigation represents of the few industries that had long been impervious to becoming a target of mass tort litigation. The book then focuses on the pivotal role that the Connecticut Sandy Hook Elementary School gun shooting litigation played in illustrating a path forward to suing gun manufacturers in firearms litigation. This narrative suggests that the new firearms accountability statutes may finally provide an inroad to inspire a firearms mass tort litigation against the firearms industry.

Second, the book argues that the case of pervasive firearms violence represents a classic example where recourse to judicial relief through public and private tort litigation is entirely appropriate in the face of repeated regulatory ineffectiveness and failure. Various regulatory initiatives that federal and state governments have undertaken to control the firearms industry have proven largely ineffective to stem the tide of gun injuries and deaths. Layering even more regulations and gun control measures, it is argued, will not effectively inhibit the ever-increasing incidence of everyday gun violence.

Thus, the problem of addressing the consequences of firearms violence recommends recourse to private tort remedies in the face of regulatory ineffectiveness and failure. A proper role of the judiciary is to provide relief where governments fail in their role of protecting people and communities from harms through appropriate regulation and enforcement. In this regard, the Second Amendment and legislative