

A JUDICIAL TEACHING POINT: THE LESSON OF THE LATE  
JUSTICE JOHN PAUL STEVENS  
IN *SONY V. UNIVERSAL CITY STUDIOS* AS A RESPONSE TO  
CIVIL LAWFARE

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I. A JUDICIAL TEACHING POINT: THE LESSON OF THE LATE JUSTICE JOHN PAUL STEVENS  
IN *SONY V. UNIVERSAL CITY STUDIOS* AS A RESPONSE TO CIVIL LAWFARE<sup>2</sup>

II. INTRODUCTION

There is a dangerous loophole in America's adversarial model: if one party in a legal conflict has very deep pockets, that party may subject its opponent to nearly endless litigation, forcing her again and again to defend herself until she collapses, exhausted and declares bankruptcy—defeated by sheer economic power, whether or not her defense would prevail on the legal merits. Attorneys have a word for this: “lawfare.” Although the term lawfare has multiple meanings, depending on the context, one typical definition in modern-day America is that lawfare is the continuation of warfare by legal means—that is, by means of litigation and legal processes.<sup>3</sup> In lawfare, as in warfare, supplies, forces, and firepower are often much more important than the justice of the cause.

Imagine what would happen if a group of American billionaires founded front organizations attacking the First Amendment. What if they targeted religious freedom so that every parochial school or synagogue or mosque in the United States faced constant litigation, forced to spend its limited resources on lawyers to defend itself against a plague of lawsuits? Under those circumstances, even though the right to exercise one's chosen religion is recognized by the terms of the First Amendment, it might prove impossible to do so in actual practice, thanks to predatory lawfare.

Over thirty years ago, this form of lawfare threatened the survival of a then-nascent and revolutionary form of technology: the VCR. And fortunately for all of us, the U.S. Supreme Court provided us with a roadmap for how to put a stop to it.

III. THE U.S. SUPREME COURT'S 1984 BETAMAX CASE: *SONY CORP. V. UNIVERSAL CITY STUDIOS, INC.*

Are you old enough to recall setting your nightly schedule by “what's on TV tonight”? Can you imagine not being able to binge watch an entire season of *Game of Thrones* or *The Bachelor*? What if there had never been any Blockbuster Video stores? That is the world two Hollywood studios aimed to give us in the early 1980s, when they sued all the way up to the U.S. Supreme

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<sup>2</sup> Portions of this paper have appeared in other writings by the author. See, e.g., MARK W. SMITH, *FIRST THEY CAME FOR THE GUN OWNERS: THE CAMPAIGN TO DISARM YOU AND TAKE YOUR FREEDOMS* (2019) (specifically Chapter 6); Mark W. Smith, *The Anti-Gun Lobby's Logic Would Have Outlawed Home VCRs – and Almost Did.*, HUMAN EVENTS (July 26, 2019), <https://humanevents.com/2019/07/26/the-anti-gun-lobbys-logic-would-have-outlawed-home-vcrs-and-almost-did/>.

<sup>3</sup> See Kevin D. Williamson, *The Lawfare Campaign against Gunmakers*, NATIONAL REVIEW (Sep. 12, 2019), <https://www.nationalreview.com/magazine/2019/09/30/the-lawfare-campaign-against-gunmakers/> (describing the use of lawfare against gun company by noting that “the effort kicked off in earnest in 1998, when Chicago mayor Richard Daley and Bridgeport, Connecticut mayor Joseph Ganim launched lawsuits against a number of gunmakers, with Mayor Ganim making explicit what usually is implicit: The point of the effort was ‘creating law with litigation,’ trying to achieve through judicial activism what Democrats had failed to achieve at the ballot box and in the legislature.”). For a more general discussions of the concept of “lawfare” see generally Leila Nadya Sadat & Jing Geng, *On Legal Subterfuge and the So-Called “Lawfare” Debate*, 43 CASE W. RES. J. INT'L L. 153 at 154 (2010); see also BROOKE GOLDSTEIN & AARON EITAN MEYER, *LAWFARE: THE WAR AGAINST FREE SPEECH* (Center for Security Policy 2011) (“An important non-violent challenge to free speech has emerged in the form of ‘Islamist lawfare,’ the use of the law as a weapon of war to silence and punish free speech about militant Islam, terrorism and its sources of financing.”).

Court attempting to make home-video recorders illegal. Why? Was it because some people were pirating copyrighted movies and making copies for their friends? No, that's not why manufacturers like Betamax sold VCRs, and it's not how most people used them. But their machines made such illegal uses possible. So, the studios wanted to make VCRs illegal.

Does that logic sound familiar? It is precisely the same kind of argument made by those seeking to hold gun manufacturers liable for third-party criminal misuse of ordinary rifles they frequently mislabel "assault weapons," such as the commonly owned AR-15 semi-automatic rifle. Manufacturers, these activists argue, must "bear some of the blame" when their rifles are misused by homicidal maniacs, because AR-15s are "highly lethal weapons" that criminals can use to perpetrate their mayhem<sup>4</sup>—never mind the fact that the overwhelming majority of Americans use these firearms for lawful, constitutionally protected purposes including self-defense, and less than a fraction of 1% of them are ever used for unlawful killing.<sup>5</sup>

Americans use firearms for self-defense anywhere from 500,000 to 3 million times per year.<sup>6</sup> The Institute of Medicine and the National Research Council released their research results through the Center for Disease Control. They wrote that "[r]esearchers compiled data from previous studies in order to guide future research on gun violence, noting that 'almost all national survey estimates indicate that defensive gun uses by victims are at least as common as offensive uses by criminals, with estimates of annual uses ranging from about 500,000 to more than 3 million per year.'"<sup>7</sup>

A quick review of the FBI's Uniform Crime Reporting data for homicides proves the point: If one compares the number of homicides committed with any type of rifle (AR-15s and other types of rifles) in 2018 with the total homicides (firearms and non-firearms), then one can observe that only 2 percent of all murders in the U.S. are by criminals using rifles--and since AR-15s are only a fraction of all rifles in the U.S., then the percentage of AR-15s used to commit murder in the U.S. is a tiny percentage of overall murders.

A review of those same FBI Uniform Crime Reporting tables teaches that homicides with knives and cutting instruments, blunt instruments, and "personal weapons" (feet, fists, etc.) for each category far outnumber—indeed is often a multiple of—homicides using a rifle of any

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<sup>4</sup> See generally *Soto v. Bushmaster Firearms Int'l*, 202 A.3d 262, 272 (Conn. 2019).

<sup>5</sup> As to criminal use of firearms, it is estimated that there are over 423 million civilian-owned firearms in the U.S. See NSSF Releases Firearms Production Figures, December 4, 2019, <https://www.nssf.org/nssf-releases-firearms-production-figures/>. There were 10,265 homicides committed with firearms in 2018. FBI: UCR 2018, Expanded Homicide Table, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/expanded-homicide-data-table-8.xls>. In order for 1 percent of those civilian-owned firearms to be used in a murder, there would need to be approximately 3,930,000 people murdered by criminals with firearms. This obvious does not occur. Given the 423 million firearms in the United States, this means that approximately .0000242 of all firearms in the United States in 2018 were used by criminals to commit murders while approximately .999975 of the firearms in the United States were not. Furthermore, less than 1% of gun crimes are committed using AR-type long-gun (rifle) firearms. See generally GARY KLECK, TARGETING GUNS 112, 141–43 (1997). See also BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 11 (2018), <https://www.bjs.gov/content/pub/pdf/cv18.pdf>; see also Benny Johnson, *FBI Stats Show Knives Kill Far More People Than Rifles In America – It's Not Even Close*, DAILY CALLER (Feb. 19, 2018), <https://dailycaller.com/2018/02/19/knives-gun-control-fbi-statistics/>.

<sup>6</sup> *Priorities for Research to Reduce the Threat of Firearm-Related Violence* (2013), THE NATIONAL ACADEMIES PRESS, <https://www.nap.edu/read/18319/chapter/3> (last visited May 26, 2020); *Defensive Gun Uses in the U.S.*, HERITAGE (May 12, 2020), <https://www.heritage.org/data-visualizations/firearms/defensive-gun-uses-in-the-us/>; Alissa Tabirian, *CDC Study: Use of Firearms for Self-Defense is 'Important Crime Deterrent'*, CNS NEWS (July 17, 2013), <https://www.cnsnews.com/news/article/cdc-study-use-firearms-self-defense-important-crime-deterrent>.

<sup>7</sup> *Id.*

kind.<sup>8</sup> So, are we going to hold knife manufacturers liable for stabbings, and manufacturers of anything that could be used as a blunt instrument (heavy wrenches, steel pipes, frying pans, champagne bottles) liable? Although that would not make sense either—it would at least make more sense than holding AR-15 rifle manufacturers liable, at least in terms of actual deadliness.

Employing the same logic, in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), Universal City Studios and Walt Disney Productions asked the courts to ban Betamax (Sony's product and the first VCR) because the studios claimed that "some individuals had used Betamax[es]" to "record some of [their] copyrighted works" and "thereby infringed [the studios'] copyrights."<sup>9</sup> In an early example of lawfare, the studios tried to use the courts to achieve what device. These two studios came within a hair's breadth of outlawing the VCR through lawsuits seeking to hold the VCR manufacturers liable for the illegal acts of the users of their products.

Sony, with supporting testimony from Fred Rogers (who played the television character "Mr. Rogers") and a local PBS station, won initially in federal trial court. The court concluded that most people who used the Betamax were merely engaged in "fair use" of the programs they recorded—conduct expressly allowed by the copyright laws. And "Sony could not be held liable" for the few instances when the people *did* misuse their product, since it "had no direct involvement with any Betamax purchasers" who engaged in copyright infringement.<sup>10</sup> On appeal, Universal and Disney prevailed before the Ninth Circuit, which ruled that video recording devices should be banned.

Sony appealed to the Supreme Court, where the late Justice John Paul Stevens persuaded just enough members of the Court to vote his way. In 1984, the Court ruled 5-4 in *Sony v. Universal City Studios* to allow VCRs to be sold to consumers. Justice Stevens authored the Court's opinion, which changed television watching and the movie business forever. This was a huge win for consumer convenience and, dare I say, personal freedom. Justice Stevens' sensible logic was this: "[T]he sale of copying equipment [VCRs], *like the sale of other articles of commerce*, does not constitute contributory infringement if the product is *widely used* for legitimate, unobjectionable purposes."<sup>11</sup> In other words, a manufacturer of a product cannot be held indirectly responsible when its customer uses the product to infringe someone else's copyright. Indeed, [the product] need merely be *capable of substantial non-infringing uses*," the Supreme Court explained.<sup>12</sup> (Emphasis added.)

This logic makes sense across a wide variety of products and industries. Surely the government cannot ban image scanners just because someone could use them to make illegal digital copies of copyrighted novels; and the manufacturers of nanny cams cannot be held liable when those cameras are used to endanger children or unlawfully record unwitting adult victims. After all, these products are "widely used for legitimate, unobjectionable purposes."<sup>13</sup>

Justice Stevens recognized that any other rule "would block the wheels of commerce." He said: "[w]hen a charge of contributory infringement is predicated entirely on the sale of an article of commerce that is used by the purchaser to infringe a [copyright], the public interest in access to

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<sup>8</sup> 2018 Crime in the United States, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/expanded-homicide-data-table-8.xls> (last visited May 26, 2020) (showing for 2018 that rifles were used in 297 homicides, knives or other cutting instruments were used in 1,515 homicides, blunt objects were used in 443 homicides and personal weapons (feet, fists, hands) were used in 672 homicides).

<sup>9</sup> *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 420 (1984).

<sup>10</sup> *Id.* at 426.

<sup>11</sup> *Id.* at 442.

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

<sup>13</sup> *See id.*

that article of commerce is necessarily implicated.”<sup>14</sup> Sony had no involvement in any copyright infringement other than manufacturing a product that *could* be used for the purpose—even though it also could be, and predominantly was, used for entirely lawful purposes. If that limited contract “at the moment of sale” was enough to result in contributory liability, virtually *no* common product would be safe. As the district court and Justice Stevens recognized, “selling ... a typewriter, a recorder, a camera, a photocopying machine technically contributes to any infringing use subsequently made thereof, but this kind of ‘contribution,’ if deemed sufficient as a basis for liability, would expand the theory beyond precedent and arguably beyond judicial management.”<sup>15</sup> Justice Stevens thus directly made an analogy to “other articles of commerce” in his decision.<sup>16</sup> The logic of his ruling as a precedent applies to much more than VCRs. I submit it also applies to firearms.

#### IV. APPLYING JUSTICE STEVENS’S BETAMAX TEST TO CONTEMPORARY LITIGATION CONCERNING THE MOST POPULAR RIFLE IN AMERICA

One can easily apply the Justice Stevens Test (and the Betamax precedent) to lawsuits involving third-party misuse of AR-15s and similar semi-automatic rifles, which are mislabeled “assault rifles.”<sup>17</sup> The AR-15 is the most popular rifle in America.<sup>18</sup> About 1.3 million are sold every year, and Americans own 15 to 20 million “modern sporting rifles” of this type.<sup>19</sup> The National Shooting Sports Foundation estimates that approximately 17% of the firearms manufactured each year in the United States are AR-style rifles (referred to as a modern sporting

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<sup>14</sup> *Id.* at 440.

<sup>15</sup> *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. at 426.

<sup>16</sup> *Id.* at 442.

<sup>17</sup> *Stenberg v. Carhart*, 530 U.S. 914, 1001 (2000) (Thomas, J., dissenting) (“Prior to 1989, the term ‘assault weapon’ did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of ‘assault rifles’ so as to allow an attack on as many additional firearms as possible on the basis of undefined ‘evil’ appearance”) (quoting, in another context, Kobayashi & Olson et al., *In re 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of “Assault Weapons”*, 8 STAN. L. & POL’Y REV. 41, 43 (1997)).

<sup>18</sup> Mark Fisher, *The AR-15; “America’s rifle” or illegitimate killing machine?*, WASHINGTON POST (Feb. 15, 2018), [https://www.washingtonpost.com/politics/the-ar-15-americas-rifle-or-illegitimate-killing-machine/2018/02/15/743e66ca-1266-11e8-9065-e55346f6de81\\_story.html](https://www.washingtonpost.com/politics/the-ar-15-americas-rifle-or-illegitimate-killing-machine/2018/02/15/743e66ca-1266-11e8-9065-e55346f6de81_story.html).

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



rifle).<sup>20</sup> They are used for sport shooting, hunting, and self-defense.<sup>21</sup> The percentage of such rifles used in crimes such as murders is extremely small.<sup>22</sup>

By any objective measure, the AR passes the Supreme Court’s “Stevens Test” since, in the language of the *Betamax* decision, it “*is widely used for legitimate, unobjectionable purposes.*” And what of the manufacturers and sellers of these firearms? If you simply substitute “AR-15” for “copying equipment” and “illegal activity” for “infringement,” the Stevens Test again makes the proper conclusion clear: “[T]he sale of [AR-15s], like the sale of other articles of commerce, does not constitute contributory [illegal activity] if the product is widely used for legitimate, unobjectionable purposes.”<sup>23</sup> Anti-gun activists might argue that due to their supposed lethality, AR-15s have no legitimate, unobjectionable purpose, but that is false. The guns’ legitimate, unobjectionable purposes include sport shooting, hunting, and self-defense.<sup>24</sup>

V. IN 2005, THE UNITED STATES CONGRESS ENACTED THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT, MOTIVATED IN PART BY THE CONSIDERATIONS IDENTIFIED BY JUSTICE STEVENS IN *BETAMAX*

Manufacturers of the AR-15 should not be subject to civil liability or legal harassment when an AR-15 is misused by third parties to commit a crime. The situation should be no different than

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<sup>20</sup> The so-called “assault weapon” that has become the boogeyman of those who wish to ban ordinary semi-automatic rifles mostly refers to the AR-15 style rifle platform. See MARK W. SMITH, #DUPED: HOW THE ANTI-GUN LOBBY EXPLOITS THE PARKLAND SCHOOL SHOOTING—AND HOW GUN OWNERS CAN FIGHT BACK 90 (Bombardier Books 2018) (“The gun most labeled an ‘assault weapon’ is probably the AR-15, the most popular rifle in America today.”) (cites omitted). The AR-15 style platform has been called America’s Rifle as well as a Modern Sporting Rifle. See Alain Stephens, *Why The AR-15 Is America’s Rifle*, NPR (Feb. 15, 2018), <https://www.npr.org/2018/02/15/586172062/why-the-ar-15-is-americas-rifle>; Ali Watkins, John Ismay & Thomas Gibbons-Neff, *Once Banned, Now Loved and Loathed: How the AR-15 Became ‘America’s Rifle’*, THE NEW YORK TIMES (Mar. 3, 2018), <https://www.nytimes.com/2018/03/03/us/politics/ar-15-americas-rifle.html>; *Understanding America’s Rifle*, NSSF, <https://www.nssf.org/msr/> (last visited May 26, 2020) (“The term ‘modern sporting rifle’ was coined to describe today’s very popular semiautomatic rifle designs, including the AR-15 and its offspring. These rifles are used by hunters, competitors, a lot of Americans seeking home-defense guns and by many others who simply enjoy going to the range.”). Without getting into a debate about the invented term “assault weapon” here, it suffices to note that over 15% of all firearms sold in the United States annually consist of these so-called AR-15-style rifles. See *NSSF Releases Firearms Production Figures*, NSSF (Dec. 4, 2019), <https://www.nssf.org/nssf-releases-firearms-production-figures/> (explaining that of the 7,901,218 firearms sold in the U.S. in 2017, one half of the 2,821,945 rifles (or 1,410,972 rifles) consisted of the AR-15 or Modern Sporting Rifle style).

<sup>21</sup> Mark W. Smith, *Assault Weapon Bans: Unconstitutional Laws for a Made-Up Category of Firearms*, 43 HARV. J.L. & PUB. POL’Y 357, 368 (2020).

<sup>22</sup> *2018 Crime in the United States*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/expanded-homicide-data-table-8.xls> (last visited May 26, 2020); *Number of murder victims in the United States in 2018, by weapon*, STATISTA (Sep. 30, 2019), <https://www.statista.com/statistics/195325/murder-victims-in-the-us-by-weapon-used/> (297 rifles were used in murders out of over 14,000 murders in the United States in 2018).

<sup>23</sup> Some may argue that willful copyright infringement is not a “real” crime and cannot be fairly compared with criminal misuse of firearms. But in fact, willful copyright infringement is a felony punishable by large fines and imprisonment for five years. See generally 18 U.S.C. § 2319 (2008).

<sup>24</sup> Smith, *supra* note 18 at 368. It also bears mentioning that the U.S. government, during the Presidency of Barack Obama, described or considered so-called AR-15 “assault weapons” to be personal protective devices. As the Heritage Foundation’s Amy Swearer explained to Congress in 2019, “federal law enforcement agencies refer to even select-fire AR-15 style rifles as “personal defense weapons.” See Amy Swearer, *Protecting America from Assault Weapons*, THE HERITAGE FOUNDATION (Sep. 28, 2019), <https://www.heritage.org/testimony/protecting-america-assault-weapons>; see also DEPARTMENT OF HOMELAND SECURITY, HSCMS-12-R-00011, PERSONAL DEFENSE WEAPONS SOLICITATION (2012).

the legal protections given to manufacturers of a VCR or DVD player if such a device is used to break the law.

Congress seemed to follow this logic in 2005 when it passed the PLCAA, which was meant to stem the tide of liability suits filed against gunmakers and sellers for the criminal misuse of guns.<sup>25</sup> The PLCAA was enacted to protect manufacturers, distributors, dealers, and importers of firearms from vexatious litigation seeking to blame industry members for the criminal acts being committed with their legal and lawfully sold products by remote unaffiliated third parties.<sup>26</sup>

Congress enacted this legislation recognizing that the Second Amendment's constitutional right to keep and bear arms would be effectively destroyed if the country's gun industry were crushed under the burdens of civil lawsuits.<sup>27</sup> Equally important, legal protection is needed to prevent destruction of the American arms industry, which would cripple our military abilities. Producing firearms in large numbers requires factories with specialized machine tools, knowledgeable designers, and highly skilled workers. These things do not spring into existence overnight when needed to protect our nation. On what foreign power are we to depend for the millions of firearms necessary if the United States finds itself in a major war or other violence conflict, once our own firearms makers have been litigated out of existence? Just imagine if the United States had to acquire small arms for its military from the same countries who shut off the country's importation of masks, personal protection equipment and the like?<sup>28</sup> This vital concern is why shortly before PLCAA was passed, "the bill was endorsed by the U.S. Department of Defense, which said it 'strongly supports' passage to 'help safeguard our national security by limiting unnecessary lawsuits against an industry that plays a critical role in meeting the procurement needs of our men and women in uniform.'"<sup>29</sup>

Such "immunity" is hardly unprecedented. Congress has passed limitations on liability for many other specific groups, including light aircraft manufacturers, food donors, corporations affected by "Y2K" computer problems, charitable volunteers, government contractors, health officials, medical implant manufacturers, and makers of anti-terrorism technology.<sup>30</sup>

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<sup>25</sup> See, e.g., 15 U.S.C §§ 7901-7903 (2005) ("The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.")

<sup>26</sup> *Id.*

<sup>27</sup> 15 U.S.C. § 7901 (2005).

<sup>28</sup> James Comer, *Its time to examine our dependence on China*, MARSHALL-COUNTY TRIBUNE-COURIER, May 22, 2020 (stating "Not only has the [Chinese Communist Party] lied, but they also left the rest of the world vulnerable to coronavirus by both hoarding essential medical supplies and exporting counterfeit supplies—including masks—across the globe.")

<sup>29</sup> *Id.*

<sup>30</sup> See generally *Boyle v. United Tech.'s*, 487 U.S. 500, 512 (1988); Theodore W. Ruger, *Preemption of Vaccine Injury Lawsuits Upheld*, REG. REV. (April 5, 2011), <https://www.theregreview.org/2011/04/05/us-supreme-court-rules-in-favor-of-preemption-for-vaccine-injury-lawsuits/>; James R. Copland, *Tragic Solutions: The 9/11 Victim Compensation Fund, Historical Antecedents, and Lessons for Tort Reform*, CTR. LEGAL POL'Y (Jan. 13, 2005), [https://media4.manhattan-institute.org/pdf/clpwp\\_01-13-05.pdf](https://media4.manhattan-institute.org/pdf/clpwp_01-13-05.pdf).

Section 230 of the Communications Decency Act of 1996 provides a grant of immunity to websites and Internet service providers for something a user posts on their platforms.<sup>31</sup> Just as Section 230 protects people involved in creating an open Internet, and thus protects First Amendment rights, the PLCAA protects people involved in making and distributing firearms, and thus protects the fundamental constitutional right to keep and bear arms.

## VI. YEARS OF LAWFARE AGAINST THE GUN INDUSTRY SUMMARIZED

In the decade before the passage of the PLCAA, activists and politicians filed more than thirty municipal lawsuits against the makers and sellers of firearms.<sup>32</sup> These suits cost the firearms industry hundreds of millions of dollars in legal fees and threatened to bankrupt some companies.<sup>33</sup>

Such lawfare against the firearms industry is “premised on the theory that federal and state firearms laws do not go far enough and that the industry is to blame for not creating a more perfect world than the Congress or the state legislatures have devised.”<sup>34</sup> “This onslaught of litigation is primarily promoted by special interest lobbies that have failed to prohibit firearms ownership through the legislative process and have turned to the courts to obtain judicial legislation.”<sup>35</sup> As U.S. District Court Judge Jerry Buchmeyer described the legal theories of the plaintiffs suing gun companies: “the plaintiff’s attorneys simply want to eliminate handguns.”<sup>36</sup>

Gun-control proponents and politicians wanted—and still want—to hold the firearms industry liable for the criminal behavior of third parties. But it is a basic legal principle that you cannot be held liable for the criminal conduct of a third party when her actions constitute a supervening, intervening cause that breaks the chain of legal responsibility. Put more simply, you cannot be held liable for the criminal activities of a third party over whom you have no control. If I manufacture baseball bats, and you buy one of my bats and then use it to bludgeon someone, I cannot legally be held responsible for that assault. The criminal who wields the bat cannot escape (or even share) responsibility based on some notion that the bat made him do it. As David Kopel, research director at the Independence Institute in Colorado, puts it, “Suits against gun makers because of what a criminal did with a gun are equivalent to suits against printing press and word processing software manufacturers because of what a libeling reporter did with a word processor and a printing press. The chain of causation is simply too remote. One might as well hold liable the mining company which supplied the ore that was eventually used in the gun and in the printing press.”<sup>37</sup>

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<sup>31</sup> *Immunity for Online Publishers Under the Communications Decency Act*, DIGITAL MEDIA L. PROJECT, <http://www.dmlp.org/legal-guide/immunity-online-publishers-under-communications-decency-act>.

<sup>32</sup> Sharon Walsh, *Gunmakers Up in Arms Over HUD Plan to Sue Them*, WASH. POST (Dec. 9, 1999), <https://www.washingtonpost.com/wp-srv/WPcap/1999-12/09/056r-120999-idx.html?noredirect=on>.

<sup>33</sup> See generally *Protection of Lawful Commerce in Arms Act Before the Subcomm. On Commercial and Admin. Law of the H. Comm. on the Judiciary*, 109th Cong. (2005) (testimony of Lawrence G. Keane, Senior Vice President, National Shooting Sports, Inc.).

<sup>34</sup> Stephen P. Halbrook, *Suing the Firearms Industry: A Case for Federal Reform?*, 7 CHAP. L. REV. 11 (2004).

<sup>35</sup> *Id.*

<sup>36</sup> *Patterson v. Gesellschaft*, 608 F. Supp. 1206, 1212 (N.D. Tex. 1985)

<sup>37</sup> David Kopel, *The Sullivan Principles: Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEGIS. J. 737 (1995), [http://www.davekopel.org/2A/LawRev/Protecting\\_the\\_Second\\_Amendment\\_from\\_Civil\\_Abuse.htm](http://www.davekopel.org/2A/LawRev/Protecting_the_Second_Amendment_from_Civil_Abuse.htm).



## VII. FINDING LOOPHOLES IN THE PLCAA

Gun rights supporters welcomed the PLCAA's passage as the death knell for politically motivated predatory lawsuits. While the Act restrained that torrent, creative attorneys have concocted new legal theories to circumvent the PLCAA. They allege that the sale of what they mislabel as "military style" rifles to the public is somehow "negligent," even though such sales are perfectly legal.

One need look no further than the Connecticut Supreme Court's 2019 decision in the Sandy Hook shooting case.<sup>38</sup> In that civil lawsuit, the victims' family members are trying to hold gun manufacturers responsible for the actions of the shooter.<sup>39</sup> Plaintiffs appealed to two exceptions in the PLCAA—one which preserves liability for claims based on negligent entrustment, and another that allows plaintiffs to potentially recover from "a manufacturer or seller of a qualified product that knowingly violates a federal or state statute applicable to the sale or marketing of the product, when the violation is a proximate cause of the harm in question."<sup>40</sup> As their basis for the latter claim, the Sandy Hook plaintiffs argued that the gun manufacturer violated the Connecticut Unfair Trade Practices Act "by marketing the [rifle] to civilians for criminal purposes, and that those wrongful marketing tactics caused or contributed to the Sandy Hook massacre."<sup>41</sup>

Connecticut's highest court dismissed the Sandy Hook plaintiffs' negligent entrustment claim in 2019, but a narrow majority (4-3) of the Supreme Court of Connecticut allowed the Unfair Trade Practices Act claim to go forward.<sup>42</sup> The Connecticut Supreme Court, presiding in and selected out of a deep blue (politically, that is) state that has elected a Democratic governor, two Democratic U.S. Senators and two Democratically-led chambers in the state legislature, allowed the lawsuit to move forward even though: "There is no evidence that the shooter in the Newtown massacre ever saw a Bushmaster advertisement, and neither the maker nor the retailer ever engaged in any trade at all with the shooter, much less unfair trade: The rifle used in the crime belonged to the murderer's mother."<sup>43</sup> In fact, the murderer Adam Lanza stole the firearm he used in the Sandy Hook murders from his mother before murdering his mother.<sup>44</sup>

The Connecticut court's decision potentially opens the door for the anti-gun political movement to harass gun manufacturers and distributors with burdensome and expensive litigation, and then to try to persuade a jury to nullify the PLCAA and award bankrupting damages based on

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<sup>38</sup> Dave Altamari, *State Supreme Court overturns lower court ruling, says Sandy Hook families can sue gun manufacturer Remington*, HARTFORD COURANT (Mar. 14, 2019), <https://www.courant.com/news/connecticut/hc-news-sandy-hook-gun-ruling-20190314-pwew3qncazb7zkitbbkocmplka-story.html>.

<sup>39</sup> *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 272 (Conn. 2019).

<sup>40</sup> 15 U.S.C. § 7903(5)(A)(iii) (2005).

<sup>41</sup> *Soto*, 202 A.3d at 275, cert. denied, 140 S.Ct. 513 (2019). In 2019, defendant Remington Arms asked the U.S. Supreme Court to intervene into the case but the Supreme Court refused to do so. *Gunmaker Denied Supreme Court Detour on Sandy Hook Suit*, COURTHOUSE NEWS SERVICE (Nov. 12, 2019), <https://www.courthousenews.com/gunmaker-denied-supreme-court-detour-on-sandy-hook-suit/>.

<sup>42</sup> *Id.* at 283.

<sup>43</sup> Kevin D. Williamson, *The Lawfare Campaign against Gunmakers*, NATIONAL REVIEW (Sep. 12, 2019), <https://www.nationalreview.com/magazine/2019/09/30/the-lawfare-campaign-against-gunmakers/>; see also *Connecticut Supreme Court*, BALLOTPEdia, [https://ballotpedia.org/Connecticut\\_Supreme\\_Court](https://ballotpedia.org/Connecticut_Supreme_Court) (last visited May 26, 2020).

<sup>44</sup> *This Day in History: Sandy Hook school shooting*, HISTORY (Dec. 11, 2019), <https://www.history.com/this-day-in-history/gunman-kills-students-and-adults-at-newtown-connecticut-elementary-school> (stating "[p]olice soon learned that sometime earlier that morning, before arriving at Sandy Hook, Lanza had shot and killed his 52-year-old mother at their home. She owned the weapons her son used in his deadly rampage.").

emotion and sympathy for the plaintiffs. And this is another reason why the typical anti-gun politicians seek to repeal the PLCAA.<sup>45</sup>

And here is perhaps the most insidious aspect of lawfare: the prospects for actually *winning* the lawsuits on the merits do not matter much.

#### VIII. THE REAL COST OF LAWSUITS IS ENORMOUS—EVEN IF THEY ARE MERITLESS

There are real costs to litigation, even if the litigation is frivolous.

Two illustrations of the out-of-pocket costs of meritless litigations can be seen in the lawsuit against the ammunition manufacturer in Colorado arising from the Aurora movie theatre shooting as well as the costs awarded against the plaintiffs in the Ringling Brothers and Barnum and Bailey litigation asserting various forms of animal cruelty.

Defending against the meritless lawsuit arising from the Colorado shooting cost the ammunition company Lucky Gunner approximately \$203,000. That's a big number for Lucky Gunner, considering that this lawsuit was dismissed at a very early stage of the litigation on a motion to dismiss, and Lucky Gunner won the lawsuit.<sup>46</sup> Despite this, defendant Lucky Gunner incurred over \$200,000 in legal fees alone. The lawsuit brought against Feld Entertainment, the owner of Ringling Bros. and Barnum and Bailey Circus, cost Feld over \$20 million in legal fees successfully defending against claims that it abused its elephants.<sup>47</sup>

The costs of litigation extend well beyond the obvious financial outlays.<sup>48</sup> Firearms manufacturing company Remington explained in a statement to its shareholders that “litigation of this nature is expensive and time consuming and may divert the time and attention of our management.”<sup>49</sup> That last point is crucial. If a company needs to deal with a major lawsuit, it cannot devote nearly as much time and mental energy to pursuing its key objectives, *i.e.*, growing the business, creating new products and earning profits. Litigation proves to be a stress and a distraction. “These disruption costs are rarely quantified and often overlooked, even though they are costs that cannot be recovered—win, lose or draw.”<sup>50</sup>

The anti-gun movement's politically motivated lawfare has already driven some companies out of business. When Maryland's highest court imposed strict liability on the manufacturers of

<sup>45</sup>Morgan Gstalter, *Shooting victims could sue gun industry under Democrats' legislation*, THE HILL (June 12, 2019), <https://thehill.com/homenews/house/448083-shooting-victims-could-sue-gun-industry-under-democrats-legislation>.

<sup>46</sup> See Lonnie and Sandy Phillips, *We Lost Our Daughter to a Mass Shooter and Now Owe \$203,000 to His Ammo Dealer*, HUFFPOST (Sep. 25, 2015), [https://www.huffpost.com/entry/lucky-gunner-lawsuit\\_b\\_8197804](https://www.huffpost.com/entry/lucky-gunner-lawsuit_b_8197804); compare with Rober Farago, *“We Lost Our Daughter to a Mass Shooter and Now Owe \$203,000 to His Ammo Dealer” And?*, THE TRUTH ABOUT GUNS (OCT. 1, 2015), <https://www.thetruthaboutguns.com/we-lost-our-daughter-to-a-mass-shooter-and-now-owe-203000-to-his-ammo-dealer-and/>.

<sup>47</sup> Debra Cassens Weiss, *Animal rights groups to pay attorney fees after losing suit against Ringling Bros. producer*, ABA JOURNAL (Apr. 2, 2013), [http://www.abajournal.com/news/article/animal\\_rights\\_groups\\_will\\_have\\_to\\_pay\\_attorney\\_fees\\_for\\_lost\\_suit\\_against\\_c](http://www.abajournal.com/news/article/animal_rights_groups_will_have_to_pay_attorney_fees_for_lost_suit_against_c).

<sup>48</sup> *The True Cost of Litigation*, EINTERZ & EUNTERZ, <https://www.einterzlaw.com/blog/true-cost-litigation> (last visited May 26, 2020).

<sup>49</sup> *Annual Report*, REMINGTON OUTDOOR COMPANY (Dec. 31, 2016), [https://www.remingtonoutdoorcompany.com/sites/default/files/2016\\_10\\_K-2.pdf](https://www.remingtonoutdoorcompany.com/sites/default/files/2016_10_K-2.pdf).

<sup>50</sup> Matthew Critchley, *Australia: The real cost of litigation to your business: Five lessons to manage it*, MONDAQ (Nov. 26, 2014), <https://www.mondaq.com/australia/Litigation-Mediation-Arbitration/356636/The-real-cost-of-litigation-to-your-business-Five-lessons-to-manage-it>.

handguns referred to as “Saturday-night specials,”<sup>51</sup> one manufacturer went out of business—even though the state legislature later overturned the court’s decision.<sup>52</sup> In another case, a firearms company didn’t even have to lose to go under; the costs of litigation drove it into bankruptcy.<sup>53</sup> The president of the company, which made a trigger attachment, explained the decision to shut down operations: “Since we cannot afford the huge legal fees required to defend this ridiculous claim, and since a successful defense still put us out of business, we are left with no alternative other than closing the doors.”<sup>54</sup>

Lawsuits filed after the Parkland school and Sandy Hook shootings, both committed by seriously mentally-ill young men, likely helped drive gun manufacturer Remington into bankruptcy as well. As a result of litigation, thirty lenders refused to do business with Remington, and the company could no longer make its debt payments.<sup>55</sup> An American company that had been in business for more than two hundred years was then forced to file for bankruptcy.<sup>56</sup>

This is what many activists dream of doing to the entire firearms industry, as they sometimes state openly.

Consider further the lawsuit commenced against the makers of the bump stock device used in the 2017 Las Vegas shootings.<sup>57</sup> The lawsuit was brought with the support of the Brady Center to Prevent Gun Violence.<sup>58</sup> Speaking to NPR, Robert Eglet, senior partner at Eglet Prince, the firm representing the plaintiffs, proclaimed, “We want to sue these people out of business and send a message to any future manufacturers that that’s what will happen to them if they try to make and sell these devices to the public.”<sup>59</sup> In 2018, the lawsuit was dismissed by a Nevada court,<sup>60</sup> but the case was reinstated in 2019.<sup>61</sup>

#### IX. CONCLUSION: JUSTICE STEVENS: A TRUE FRIEND OF ECONOMIC LIBERTY WHEN PRESIDING OVER POLITICALLY-MOTIVATED LAWSUITS AGAINST PRODUCT MANUFACTURERS

It is ironic, but despite his decision in *Sony v. Universal City Studios*, Justice Stevens later showed himself to be no friend of the right to keep and bear arms. After he retired from the bench,

<sup>51</sup> Adam Winkler, *Adam Winkler, “Gun Fight” Author, On Gun Control’s Racism*, THE DAILY BEAST (Oct. 9, 2011), <https://www.thedailybeast.com/adam-winkler-gun-fight-author-on-gun-controls-racism>.

<sup>52</sup> David B. Kopel & Richard E. Gardiner, *The Sullivan Principles: Protecting The Second Amendment From Civil Abuse*, 19 SETON HALL LEGIS. J. 737 (1995), <http://www.guncite.com/journals/kgcivila.html>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Eliza Ronalds-Hannon & Tiffany Kary, *Remington Was Turned Down by 30 Lenders After School Shooting*, BLOOMBERG NEWS (Mar. 29, 2018), <https://www.bloomberg.com/news/articles/2018-03-29/gunmaker-gets-loan-from-jpmorgan-franklin-after-others-said-no>.

<sup>56</sup> Eliza Ronalds-Hannon, Polly Mosendz & Laura J. Keller, *Cerberus Hands Bankrupt Gunmaker to Wall Street Creditors*, BLOOMBERG NEWS (Feb. 27, 2018), <https://www.bloomberg.com/news/articles/2018-02-27/cerberus-hands-gunmaker-to-wall-street-creditors-at-tense-moment>.

<sup>57</sup> *Class Action Suit Against “Bump Stock” Manufacturer*, EGLET ADAMS, <https://www.egletlaw.com/bumpstock/>.

<sup>58</sup> Aaron Smith, *Brady Center sues bump stock maker Slide Fire*, CNN BUSINESS (Oct.10, 2017), <https://money.cnn.com/2017/10/10/smallbusiness/brady-bump-stocks-slide-fire/index.html>.

<sup>59</sup> Vanessa Romo, *Bump Stock Manufacturer Is Shutting Down Production*, NATIONAL PUBLIC RADIO (Apr. 18, 2018), <https://www.npr.org/sections/thetwo-way/2018/04/18/603623834/bump-stock-manufacturer-is-shutting-down-production>.

<sup>60</sup> Paul Roupe, *Las Vegas Bump Stock Class Action Dismissed*, COURTHOUSE NEWS SERVICE (Sept. 18, 2018), <https://www.courthousenews.com/las-vegas-bump-stock-class-action-dismissed/>.

<sup>61</sup> Matthew Seeman, *Suit filed against bump stock maker in Las Vegas mass shooting moves forward*, 3 NEWS LAW VEGAS (Sept. 27, 2019), <https://news3lv.com/news/local/suit-filed-against-bump-stock-maker-in-las-vegas-mass-shooting-moves-forward>.

he called for the repeal of the Second Amendment.<sup>62</sup> This occurred after his dissent in the Supreme Court's *District of Columbia v. Heller* decision, which, in a quintessentially originalist ruling, upheld the individual right of law-abiding citizens to possess firearms.

But judges can articulate legal principles that are truer than they know. And whether he would have recognized the implications, the sound logic of Justice Stevens' decision in the *Betamax* case—that lawful industries are not to blame for the third-party misuse of their products—should vindicate gunmakers and gun sellers today. In the *Betamax* case, Justice Stevens proved a true friend of liberty. His reasoning should serve as a judicial teaching point for judges today when asked to hold the gun industry – or any industry – responsible for harms caused by third parties over whom they have no control.

Congress embraced Justice Stevens' logic in enacting the PLCAA to stem the use of lawfare against respected and law-abiding American businesses. Courts today must honor Congress's choice, not ignore it.

And as for those jurists presiding over cases involving the application of the PLCAA, they would do well to heed the learned reasoning of Justice Stevens in *Betamax*.

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<sup>62</sup>John Paul Stevens, *Repeal the Second Amendment*, THE NEW YORK TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html>.