

THE YALE LAW JOURNAL

LESLIE KENDRICK

The Perils and Promise of Public Nuisance

ABSTRACT. Public nuisance has lived many lives. A centuries-old doctrine defined as an unreasonable interference with a right common to the public, it is currently the backbone of thousands of opioid and climate-change suits across the United States. It was a major force behind the landmark 1998 tobacco settlements and has figured in litigation over issues as diverse as gun sales, lead contamination, water pollution, Confederate monuments, and COVID-19 safety standards. Although this common-law oddity has shaped the face of modern tort law, it is unfamiliar to the public and typically ignored, even in law schools. When discussed, it often provokes anxiety: Is it a tort at all? Whatever it is, will it swallow tort law? The regulatory state? Or separation of powers as we know it?

This Article utilizes the current opioid litigation to explore the three most common sets of objections to public nuisance: traditionalist, formalist, and institutionalist. Public nuisance can seem unusual, even outlandish. At worst, it is a potentially capacious mechanism that allows executive-branch actors to employ the judicial process to address legislative and regulatory problems. Nevertheless, its perils are easily overstated and its promise often overlooked. Historically, public nuisance has long addressed problems such as harmful products. Doctrinally, it accords better with tort law than is commonly recognized. And institutionally, it functions as a response to nonideal conditions—specifically, where regulatory mechanisms underperform.

Drawing on long-standing tort principles of duties generated by risk creation, I propose a conception of public nuisance that highlights its coherence with familiar aspects of tort law and its consistency across past and present. Public nuisance is an object lesson in the common law's balance of stability and evolution, across time and within varying regulatory contexts.

AUTHOR. White Burkett Miller Professor of Law and Public Affairs, University of Virginia School of Law. I am grateful to the many people who have offered insights on this project, including Kenneth Abraham, Charles Barzun, Vincent Blasi, Pamela Bookman, Molly Brady, David Dana, Nora Engstrom, John Goldberg, Bert Huang, Robert Rabin, Micah Schwartzman, Anthony Sebok, Catherine Sharkey, Paul Stephan, G. Edward White, Benjamin Zipursky, and attendees of a discussion at the University of Virginia School of Law. I am especially grateful to Kenneth Abraham for introducing me to the topic and discussing public nuisance with me for upwards of fifteen years. I am grateful to Julia (JJ) Citron, Erin Edwards, Meaghan Haley, Nirajé Medley-Bacon, and Amanda Rutherford for excellent research assistance and Leslie Ashbrook and John Roper of the University of Virginia Law Library for excellent research support. All errors are mine.



ARTICLE CONTENTS

INTRODUCTION	705
I. ORIGINS	711
A. Public Nuisance: A Brief History	713
1. Public Nuisance at Common Law	713
2. Public Nuisance in the United States	718
3. Contemporary American Public Nuisance	721
B. The Opioid Crisis: A Brief History	728
C. The Opioid Public-Nuisance Litigation	731
II. THE TRADITIONALIST CRITIQUE	736
III. THE FORMALIST CRITIQUE	741
A. Public Nuisance and the Nature of Tort	743
1. Public Nuisance, Common Law, and Criminal Law	745
2. Public Nuisance, Torts, and Remedies	747
3. Public Enforcement and Public Rights	749
4. Public Nuisance and Torts as “Relational” Wrongs	752
B. Public Nuisance and Tort Doctrine	755
1. Conduct, Conditions, and Tortiousness	755
2. Public Nuisance and Strict Liability	758
C. Reframing Public Nuisance	762
IV. THE INSTITUTIONAL CRITIQUE	767
A. The Perils of Public Nuisance	769
1. Delegation and Separation of Powers	769
2. Federalism and the Administrative State	771
3. Agency Costs	774
B. The Perils Without Public Nuisance	778
1. Regulatory Failures	779
2. Fraud and Noncompliance by Regulated Entities	781
	703



3. Absence of Redress from Conventional Tort	782
C. An Institutional Role	785
V. THE PROMISE OF PUBLIC NUISANCE	787
CONCLUSION	790

Why is making obscene telephone calls like laying manure in the street? Answer: in the same way as importing Irish cattle is like building a thatched house in the borough of Blandford Forum; and as digging up the wall of a church is like helping a homicidal maniac to escape from Broadmoor; and as operating a joint-stock company without a royal charter is like being a common [s]cold; and as keeping a tiger in a pen adjoining the highway is like depositing a mutilated corpse on a doorstep; and as selling unsound meat is like embezzling public funds; and as garaging a lorry in the street is like an inn-keeper refusing to feed a traveller; and as keeping treasure-trove is like subdividing houses which so “become hurtful to the place by overpestering it with poor.” All are, or at some time have been said to be, a common (alias public) nuisance.¹

INTRODUCTION

Public nuisance has lived many lives. A centuries-old doctrine generally defined as “an unreasonable interference with a right common to the general public,”² it has recently served as the backbone for more than three thousand opioid lawsuits across the country, as well as hundreds more seeking to hold producers of greenhouse gases accountable for climate change.³ Twenty-five years ago, it provided the architecture for the lawsuits that impelled the tobacco industry to historic settlements of \$246 billion with all fifty states.⁴ It has also spurred hundreds of mostly unsuccessful actions across the nation involving, among other

-
1. J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 CAMBRIDGE L.J. 55, 55 (1989).
 2. RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).
 3. See Jan Hoffman, *The Core Legal Strategy Against Opioid Companies May Be Faltering*, N.Y. TIMES (Nov. 11, 2021), <https://www.nytimes.com/2021/11/11/health/opioids-lawsuits-public-nuisance.html> [<https://perma.cc/UZ9A-WVCM>] (noting the existence of more than 3,000 opioid lawsuits); Darlene Ricker, *Lawyers Are Unleashing a Flurry of Lawsuits to Step Up the Fight Against Climate Change*, A.B.A. J. (Nov. 1, 2019, 12:00 AM CDT), <https://www.abajournal.com/magazine/article/lawyers-are-unleashing-a-flurry-of-lawsuits-to-step-up-the-fight-against-climate-change> [<https://perma.cc/CTC4-2KT5>] (“There are more than a dozen major public nuisance climate change lawsuits pending in the United States. More than 1,300 climate cases have been brought in 29 nations around the world—more than 1,000 of them in the U.S.”).
 4. See Michael J. Purcell, *Settling High: A Common Law Public Nuisance Response to the Opioid Epidemic*, 52 COLUM. J.L. & SOC. PROBS. 135, 136 (2018) (“[Public nuisance] was at the heart of litigation against tobacco companies in the 1990s, resulting in what is known as the Master Settlement Agreement—one of the most significant settlement agreements in American product liability jurisprudence.”); Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 STAN. L. REV. 285, 304-05 (2021) (“Beginning in July 1997, the four major tobacco companies . . . settled serially with the four states . . . that were closest to

things, handguns,⁵ lead contamination,⁶ water pollution,⁷ and predatory lending.⁸ Decades earlier, at the turn of the last century, officials used it to abate sewage discharge into rivers,⁹ to “repress the nuisance of bawdyhouses,”¹⁰ and to shut down a high-profile labor strike.¹¹

All of this and more stems from a single cause of action developed in medieval England to allow the Crown to remove impediments from public roads and waterways.¹² In the past decades, this common-law oddity has generated thousands of lawsuits in which state officials have sued private companies for the negative impact of their products or activities on public health and welfare. Through these actions, public nuisance has influenced American tort litigation and exerted an undeniable regulatory impact.

The opioid lawsuits highlight the two ways in which public nuisance is central to modern mass-tort litigation. First, the opioid lawsuits invariably contain public-nuisance claims. The plaintiff state, local, and tribal governments claim

trial. . . . To these states, tobacco companies shelled out some \$40 billion, to be paid out over twenty-five years. Within a year, in November 1998, the companies and the forty-six remaining states negotiated a \$206 billion [Master Settlement Agreement (MSA)] of all outstanding health care reimbursement claims.” (footnote omitted)).

5. See, e.g., *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1147-48 (Ill. 2004) (rejecting public-nuisance claim); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 93-96 (N.Y. 2003) (same). *But see City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143-44 (Ohio 2002) (reinstating public-nuisance claim where plaintiffs also alleged an “underlying tort”).
6. See, e.g., *State v. Lead Indus. Ass’n*, 951 A.2d 428, 435 (R.I. 2008) (rejecting public-nuisance claim).
7. See, e.g., *Rhode Island v. Atl. Richfield Co.*, 357 F. Supp. 3d 129, 142-43 (D.R.I. 2018) (permitting public-nuisance claims for chemical pollution of state waters to proceed).
8. See, e.g., *City of Cleveland v. Ameriquest Mortg. Sec., Inc.*, 615 F.3d 496, 505-06 (6th Cir. 2010) (rejecting the City of Cleveland’s public-nuisance claim against lenders).
9. See, e.g., *Missouri v. Illinois*, 180 U.S. 208, 248-49 (1901).
10. *State ex rel. Wilcox v. Gilbert*, 147 N.W. 953, 953 (Minn. 1914) (syllabus by the court); see also *State v. Navy*, 17 S.E.2d 626, 628 (W. Va. 1941) (holding that a “bawdy house is a public nuisance per se that may be abated by injunction”); *Crawford v. Tyrrell*, 28 N.E. 514, 515 (N.Y. 1891) (holding that the use of premises for prostitution constituted a public nuisance).
11. See *In re Debs*, 158 U.S. 564, 592-93, 599-600 (1895) (approving the use of public nuisance to shut down strikes by Eugene V. Debs and the American Railway Union (ARU)).
12. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (AM. L. INST. 1979) (“The earliest [public-nuisance] cases appear to have involved purprestures, which were encroachments upon the royal domain or the public highway and could be redressed by a suit brought by the King.”); Spencer, *supra* note 1, at 58 (describing early writers who offered as an example of public nuisance the blockage of waterways and roadways).

that the opioid products made or distributed by the defendants are a public nuisance under relevant state law—that is, that they constitute an unreasonable interference with a right held by the general public, in this case by jeopardizing public health and welfare. The plaintiffs make other claims too, such as state-law claims for fraud, deceptive marketing, corrupt practices, and unjust enrichment.¹³ Nevertheless, public-nuisance claims are a central feature of the litigation and a key to its momentum.

Second, no matter what the specific claims, public nuisance provides the template for the structure of opioid litigation and other suits like it. One striking feature of public nuisance is that it permits state officials to sue *parens patriae*—literally as “parent of the nation,” on behalf of the people of a jurisdiction—for an infringement on public rights by a private actor.¹⁴ Other types of *parens patriae* claims exist, but public nuisance was an early example (and an inspiration to other types of suits), which provides public actors with a ready and familiar template.¹⁵ In modern instances, such as tobacco, opioid, and climate-change litigation, the litigation adopts the architecture of a public-nuisance suit, with an official (such as a state’s attorney general or a locality’s district attorney) suing on behalf of the public. That these suits involve a variety of other claims should not lead us to assume that they would exist in the same manner absent the public-nuisance template. To the extent that such suits are now common, the structure of public nuisance has made a lasting imprint on American tort law.¹⁶

Although its substance and structure are embedded in modern American tort law, public nuisance occupies an uncertain, somewhat liminal position. It is virtually unknown to the general public, little discussed outside of litigation circles, and often ignored even in torts class. When it is discussed, it raises fraught questions. Is it even a tort? If not, what is it? Does its very existence threaten tort law? The regulatory state? Separation of powers as we know it?¹⁷ All in all, public

13. For an example of a case involving several claims, see Complaint at 66-100, *State ex rel. DeWine v. Purdue Pharma L.P.*, No. 17-CI-261 (Ohio Ct. Com. Pl. May 31, 2017).

14. See, e.g., *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 604-05 (1982) (discussing *parens patriae* and public-nuisance suits).

15. See *infra* Section I.A.2.

16. Indeed, it has also provided the basis for the recognition of states’ standing to enforce environmental laws. In *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), the Supreme Court reasoned that, given that states at common law inherently had standing to sue *parens patriae* for public nuisance, states also had standing to challenge agency action under the Clean Air Act. *Id.* at 520 n.17.

17. See *infra* Parts II-IV. For skeptical accounts of public nuisance, see, for example, Richard O. Faulk, *Uncommon Law: Ruminations on Public Nuisance*, 18 MO. ENV’T L. & POL’Y REV. 1, 21-22 (2010); Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 968-69 (2008); and Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 43-50 (2011).

nuisance exerts potentially powerful, but highly variable, real-world force, while provoking equally variable reactions from courts and commentators.

Here, too, the opioid litigation is illustrative. Every single state in the Union has sued opioid manufacturers or distributors, as have thousands of localities and some tribes.¹⁸ These suits have generated billions of dollars in settlements.¹⁹ At the same time, however, those proceeding to trial have met with mixed results. For example, in the first opioid case to go to trial in the country, an Oklahoma judge applying state public-nuisance law found Johnson & Johnson liable to the State of Oklahoma for \$465 million.²⁰ This trial judgment came after Oklahoma had settled identical claims with Purdue Pharma for \$270 million²¹ and with Teva Pharmaceuticals for \$85 million.²² But on cross appeal, in which the Oklahoma Attorney General claimed that the rightful amount owed by Johnson & Johnson was twenty times the trial judgment,²³ the Oklahoma Supreme Court

-
18. See Valerie Bauman, *States, Cities Eye \$26 Billion Deal: Opioid Litigation Explained*, BLOOMBERG L. (July 26, 2021, 5:31 AM), <https://news.bloomberglaw.com/health-law-and-business/states-cities-eye-26-billion-deal-opioid-litigation-explained> [https://perma.cc/C8RJ-W784] (“More than 3,000 lawsuits filed by cities and counties against the various players in the opioid supply chain have been combined into one docket known as a multidistrict litigation, or MDL.”).
 19. See *infra* notes 175-180 and accompanying text. For a comprehensive resource tracking opioid litigation and settlements in every state, see Christine Minhee, *States’ Opioid Settlement Statuses*, OPIOID SETTLEMENT TRACKER [hereinafter *Settlement Statuses*], <https://www.opioidsettlementtracker.com/globalsettlementtracker/#statuses> [https://perma.cc/P3S8-5MYZ].
 20. Jan Hoffman, *Johnson & Johnson Ordered to Pay \$572 Million in Landmark Opioid Trial*, N.Y. TIMES (Aug. 26, 2019), <https://www.nytimes.com/2019/08/26/health/oklahoma-opioids-johnson-and-johnson.html> [https://perma.cc/82CP-T7MT]. The initial \$572 million judgment was later reduced to \$465 million because of a calculation error. See Nate Raymond & Jonathan Stempel, *Oklahoma Judge Reduces Johnson & Johnson Opioid Payout to \$465 Million*, REUTERS (Nov. 15, 2019, 3:12 PM), <https://www.reuters.com/article/us-usa-opioids-litigation-oklahoma/oklahoma-judge-reduces-johnson-johnson-opioid-payout-to-465-million-idUSKBN1XP27F> [https://perma.cc/FTD7-Z5AY].
 21. Nate Raymond & Mike Spector, *Purdue Pharma Agrees to \$270 Million Settlement in Oklahoma Opioid Case*, REUTERS (Mar. 26, 2019, 1:17 AM), <https://www.reuters.com/article/us-usa-opioids-litigation/purdue-pharma-agrees-to-270-million-settlement-in-oklahoma-opioid-case-idUSKCN1R7oCH> [https://perma.cc/8L2U-FS6H].
 22. Nate Raymond, *Oklahoma Judge Approves Teva’s \$85 Million Opioid Settlement*, REUTERS (June 24, 2019, 2:51 PM), <https://www.reuters.com/article/uk-usa-opioids-litigation/oklahoma-judge-approves-tevas-85-million-opioid-settlement-idUSKCN1TP2M8> [https://perma.cc/FBM2-BAHV].
 23. See Nolan Clay, *Oklahoma AG Wants 20 Times More Money in Johnson & Johnson Opioid Case*, OKLAHOMAN (Dec. 9, 2020, 1:05 AM CT), <https://oklahoman.com/article/5677934/state-asks-court-to-order-9-billion-payment-from-johnson-johnson-in-opioid-case> [https://perma.cc/87XM-TRMS].

overturned the judgment and concluded that Johnson & Johnson could not be held liable under Oklahoma public-nuisance law at all.²⁴

Notwithstanding mixed trial results, opioid litigation has imposed billion-dollar obligations, generated what some have called “the largest civil action in U.S. history,”²⁵ and emerged as perhaps one of the few issues in these fractious times on which all fifty state attorneys general have agreed.²⁶ Whatever else the opioid litigation will ultimately accomplish, it has underscored that public nuisance’s role in the tobacco litigation was not a fluke and that we should not expect the opioid litigation to mark its last appearance. Whenever regulatory and legislative processes are perceived to have failed to address a public-health or welfare issue with catastrophic effects, public nuisance will remain an attractive option to executive-branch actors, a possible avenue for courts, and a potential liability for defendants.

Yet, the current suits and their resolutions encapsulate all of the conflicting attitudes toward public nuisance within the law. Public nuisance has driven massive and historic settlements but has, at best, a checkered record in the courtroom. It is a powerful tool, but one toward which many express ambivalence. *The Restatement (Third) of Torts: Liability for Economic Harm*, for instance, dismisses public-nuisance liability for products (such as tobacco or opioids) in a

-
24. See Barbara Hoberock, *Opioid Public Nuisance Ruling Reversed by Oklahoma Supreme Court*, TULSA WORLD (Nov. 10, 2021), https://tulsaworld.com/news/state-and-regional/opioid-public-nuisance-ruling-reversed-by-oklahoma-supreme-court/article_46eac548-4173-11ec-ab3e-1b4b39d663bb.html [<https://perma.cc/CCR8-QULJ>]. For other examples of variable trial outcomes, see *infra* Section I.C.
25. Scott Higham, Sari Horwitz & Steven Rich, *76 Billion Opioid Pills: Newly Released Federal Data Unmasks the Epidemic*, WASH. POST (July 16, 2019, 8:19 PM EDT), https://www.washingtonpost.com/investigations/76-billion-opioid-pills-newly-released-federal-data-unmasks-the-epidemic/2019/07/16/5f29fd62-a73e-11e9-86dd-d7foe60391e9_story.html [<https://perma.cc/BE9E-3UGP>]; see also Joel Achenbach, *A Hometown Lawyer Is Suing the Nation’s Largest Drug Companies over the Opioid Crisis*, WASH. POST (Oct. 14, 2019, 9:08 AM EDT), https://www.washingtonpost.com/health/a-hometown-lawyer-is-suing-the-nations-largest-drug-companies-over-the-opioid-crisis/2019/10/14/ff2551a0-e3b5-11e9-a331-2df12d56a80b_story.html [<https://perma.cc/AT83-D7U8>] (describing the national prescription-opioid multidistrict litigation as the “biggest and most complicated civil case in U.S. history”).
26. Agreement might be an overstatement, in that they have differed over settlement strategy and other issues. See, e.g., Brian Mann, *Some State Officials Say Landmark Opioid Settlement Doesn’t Do Enough to Help*, NPR (July 24, 2021, 5:04 PM ET), <https://www.npr.org/2021/07/24/1020224670/state-officials-say-landmark-opioid-settlement-doesnt-do-enough-to-help> [<https://perma.cc/RLY5-S37A>]. Nevertheless, it is striking that all fifty state attorneys general, regardless of political orientation, chose to sue over the opioid crises in their respective states.

single comment.²⁷ Some say that public nuisance is neither fish nor fowl, neither crime nor tort, and should be cast off into the box of antique legal trinkets with no modern use. Some say that to do otherwise is to ignore, and ultimately to undermine, the progress of the contemporary administrative state.²⁸

This Article uses the opioid litigation to explore the three most common forms of objection to public nuisance. These are (1) traditionalist, (2) formalist, and (3) institutionalist. Traditionalist objections hold that public nuisance should cover only the situations for which it was originally designed—for example, blockage of public roadways or waterways. I show that, to the contrary, public nuisance has for centuries addressed problems such as harmful products and services, and its modern usage can find firm roots in tradition. I explore why courts and commentators in this context feel compelled to reject both centuries of doctrinal development and the law’s generally applauded ability to evolve. I conclude that traditionalist objections often go hand in hand with, and are generally driven by, formalist and institutionalist objections.

Formalist objections take many shapes but focus on the alleged problems of public nuisance as a tort doctrine. Some contend that public nuisance has never been a tort, or that it fails to address wrongdoing between parties and should therefore no longer be classified as a tort. Others accept public nuisance as a tort, but believe that it must maintain very narrow boundaries to avoid overturning or undermining other tort doctrines. I argue that public nuisance is more familiar from other areas of tort than these objections suggest. Drawing on long-standing tort doctrine recognizing duties arising from risk creation, I contend that public nuisance is of a piece with both other tort doctrines and the overarching goals of tort law.

Institutionalist objections, on the other hand, focus on the ramifications of public-nuisance litigation for various institutions of government. To be sure, some of these objections are formalist in nature, but they focus on the ramifications of public nuisance not for tort law, but for larger legal principles, such as separation of powers and the duties or prerogatives of the regulatory state. Here,

27. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 cmt. g (AM. L. INST. 2020) (“Tort suits seeking to recover for public nuisance have occasionally been brought against the makers of products that have caused harm, such as tobacco, firearms, and lead paint. These cases vary in the theory of damages on which they seek recovery, but often involve claims for economic losses the plaintiffs have suffered on account of the defendant’s activities; they may include the costs of removing lead paint, for example, or of providing health care to those injured by smoking cigarettes. Liability on such theories has been rejected by most courts, and is excluded by this Section, because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue. Mass harms caused by dangerous products are better addressed through the law of products liability, which has been developed and refined with sensitivity to the various policies at stake.”).

28. See *infra* Parts II-IV.

public nuisance does present perils. It developed at a time of no regulatory state – indeed, little regulation at all – and its structure is not a first-best solution for our time. The question, however, is not whether public nuisance is the best tool, but whether it can still play a role, particularly when ideal processes fail. The history of the opioid debacle illustrates that regulatory failure is a reality, and public nuisance might complement rather than compete with other forms of regulation.

Finally, bringing together responses to traditionalist, formalist, and institutionalist objections, I propose a reconceptualization of public nuisance. Public nuisance has long been used to address threats to public rights, including those imposed by products. The responsibility it imposes on manufacturers and distributors is analogous to affirmative tort duties generated by creating a risk of harm. When a product imposes a risk not just to specific individuals, but to the public, public nuisance is an appropriate claim. Appropriate remedies may include abatement (including funds for abatement) and redress for harms incurred. At the same time, however, some constraints are necessary to ensure that public nuisance serves the public interest. It is important to ask whether public nuisance complements or undermines regulatory responses – but this is best answered with careful and thorough scrutiny on a case-by-case basis, not with a wholesale rejection of public nuisance.

The Article proceeds in five Parts. Part I introduces two distinct histories: the development of public-nuisance doctrine from medieval England onward, and the emergence of the United States’s current opioid crisis beginning in the late 1990s. These two disparate strands met and intertwined in public-nuisance suits brought by states and localities starting in the early 2000s and mushrooming around 2014. This potent combination spurred, highlighted, and escalated various objections to public-nuisance doctrine as a tool for addressing contemporary problems. Parts II, III, and IV address, respectively, the traditionalist, formalist, and institutionalist objections to modern public nuisance, as illustrated in the opioid litigation. Part V concludes by proposing an approach to reduce the perils of public nuisance while harnessing its promise as an encapsulation of the law’s ability to evolve and to develop overlapping but coexisting forms of regulation.

I. ORIGINS

Public nuisance, and nuisance more generally, have long provoked anxiety in courts and commentators. In 1914, Ezra Ripley Thayer called nuisance “a good

word to beg a question with.”²⁹ Prosser and Keeton called it an “impenetrable jungle,”³⁰ while Warren A. Seavey noted that “[n]uisance has been treated as if the term were so amorphous and protean as to make impossible a description of the area which it covers.”³¹ The California Supreme Court in 1941 fretted about “a continuous expansion of the field of public nuisances,”³² while Michigan courts have called nuisance “the great grab bag, the dust bin, of the law”³³ and bemoaned of public nuisance, “despite attempts by appellate courts to rein in this creature, it, like the Hydra, has shown a remarkable resistance to such efforts.”³⁴ The U.S. Court of Appeals for the Eighth Circuit warned that public nuisance might, if permitted, “become a monster that would devour in one gulp the entire law of tort.”³⁵

These expressions of anxiety span various decades across the twentieth century. Throughout that time, the law of tort continued undevoured by public nuisance and mostly untroubled by the ambiguities inherent in it. Many public-nuisance claims fail, and in areas where a claim has succeeded, few would argue that it displaced thorough and conscientious regulation, and fewer still that it destroyed tort law. Why the anxiety about public nuisance, and is such anxiety justified?

To answer these questions, and to understand the potent combination of public-nuisance law and the opioid crisis, one must know a bit about the origins of each. In the case of public nuisance, the significance of the history – and sometimes even the history itself – is a point of contention among scholars. In the case of opioids, the story is indisputably catastrophic, but some details have yet to emerge, and their significance – particularly for blame and liability – has been a point of contention, at least in courts. For both subjects, history is essential to current debates.

29. Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 326 (1914) (“It is so comprehensive a term, and its content so heterogeneous, that it scarcely does more than state a legal conclusion that for one or another of widely varying reasons the thing stigmatized as a nuisance violates the rights of others.”).

30. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 616 (5th ed. 1984).

31. Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984, 984 (1952).

32. *People v. Lim*, 118 P.2d 472, 475 (Cal. 1941).

33. *Awad v. McColgan*, 98 N.W.2d 571, 573 (Mich. 1959).

34. *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 520 (Mich. Ct. App. 1992).

35. *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

A. *Public Nuisance: A Brief History*

If nuisance is an “impenetrable jungle,” public nuisance is perhaps its most impenetrable part.³⁶ One clear and stable feature of this impenetrable jungle, however, is that a public nuisance interferes with a public right. The *Restatement (Second) of Torts* defines public nuisance as “an unreasonable interference with a right common to the general public.”³⁷ In the early thirteenth century, Henry de Bracton noted that “there may be a wrongful nuisance because of the common and public welfare.”³⁸ William Blackstone said, “Common nuisances are a species of offenses against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king’s subjects, or the neglecting to do a thing which the common good requires.”³⁹ What counts as such a nuisance, however, and how a public nuisance is addressed, are questions with more complex histories.

1. *Public Nuisance at Common Law*

Public nuisance had its origin, along with private nuisance, in twelfth-century England in the assize of nuisance, which developed to protect against non-trespassory interferences with real property.⁴⁰ By the early thirteenth century, Bracton distinguished public from private in identifying nuisances “by reason of the common and public welfare,” such as blocking up a waterway in a way that does not injure a specific landowner but harms the public in general.⁴¹ When *Britton*, the earliest summary of English law in French, appeared in the late thirteenth century, it also distinguished between private nuisance and nuisances implicating the public benefit and appropriately addressed by law enforcement.⁴² At its origin, public nuisance involved an infringement of the rights of the Crown: the first public-nuisance cases dealt with the invasion of royal property or public roads, both of which belonged to the Crown.⁴³ By the reign of Edward

36. KEETON ET AL., *supra* note 30, at 616.

37. RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. L. INST. 1979).

38. HENRY DE BRACTON, 3 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 191 (Samuel E. Thorne trans., 1977); *see also* Merrill, *supra* note 17, at 7 n.28 (citing BRACTON, *supra*, on the definition of public nuisance).

39. 4 WILLIAM BLACKSTONE, COMMENTARIES *167 (spelling modernized).

40. RESTATEMENT (SECOND) OF TORTS § 821D cmt. a (AM. L. INST. 1979); DAN B. DOBBS, THE LAW OF TORTS § 462 (2000); Janet Loengard, *The Assize of Nuisance: Origins of an Action at Common Law*, 37 CAMBRIDGE L.J. 144, 145 (1978).

41. Spencer, *supra* note 1, at 58 (translating BRACTON, *supra* note 38, at 191).

42. *Id.* (citing 1 BRITTON 402 (Francis Morgan Nichols trans., Oxford, Clarendon Press 1865)).

43. RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (AM. L. INST. 1979).

III in the mid-1300s, the concept “had been extended to the invasion of the rights of the public, represented by the Crown, by such things as interference with the operation of a public market or smoke from a lime-pit that inconvenienced a whole town.”⁴⁴

At early common law, public nuisance was a criminal action, although at that time the line between civil and criminal was less clear than it is today; in the earliest cases, the same defendant could face actions for abatement and damages from a private plaintiff, and criminal prosecution from the Crown.⁴⁵ Also, “nuisance” itself was not clearly defined.⁴⁶ Although public nuisances were matters of criminal law, criminal law at the time was common law.⁴⁷ Thus, to say that public nuisances were crimes is not to say that they had already been identified by statute as criminal. A public nuisance was conduct detrimental to the public that was deemed, through the public-nuisance process itself, to be a minor criminal offense.⁴⁸

When casebooks and treatises explain public nuisance, they note that, although it is typically the province of public officials, private parties who suffer an injury distinct from that suffered by the general public may sue for damages.⁴⁹

44. *Id.*

45. See Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 790-813 (2003).

46. RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (AM. L. INST. 1979) (stating that the term at common law “had acquired no very definite meaning other than that of something causing harm or inconvenience” and “was applied rather loosely” to various conduct).

47. See ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 8 (6th ed. 2009) (“The main source of English criminal law has been the common law . . .”). For a description of how this played out with public nuisance in particular, see Spencer, *supra* note 1, at 61-63, which concludes that “the expression ‘public nuisance’ [has been] used more or less to describe the power of the King’s Bench and its successors to punish any behaviour, whether previously thought criminal or not, which is felt to be harmful to the public.”

48. See Gifford, *supra* note 45, at 790-813; Spencer, *supra* note 1, at 61-63 (describing the common-law process and concluding that “when we open the packages labelled ‘power of the court to create new offences,’ ‘public mischief’ and ‘public nuisance’ we find that the contents of the packages are almost interchangeable”).

49. See, e.g., RESTATEMENT (SECOND) OF TORTS § 821C cmt. b (AM. L. INST. 1979). The Second Restatement provides that only individuals with special harms may seek damages. *Id.* Abatement—an injunction against the nuisance—can be sought by public officials, by individuals with special harms, or by citizens who represent the public at large “as a citizen in a citizen’s action or as a member of a class in a class action.” *Id.* § 821C(2)(c).

This development has been traced to English courts of law in the sixteenth century⁵⁰ and is now a standard feature of both English and American public-nuisance law.⁵¹ Private suits for public nuisance, while doctrinally interesting and important,⁵² are dwarfed today by the enormous suits brought by public officials.⁵³

The more important civil aspect of public nuisance for present purposes is that, by the nineteenth century, English courts allowed private parties to bring relator actions in the name of the attorney general to enjoin public nuisances in chancery court.⁵⁴ In many of the early cases, equity injunctions appear to have been an expeditious way to end a pattern of dangerous behavior or to avoid irreparable harm while the criminal process unfolded. Illustrative is an early (if unsuccessful) case in which a plaintiff sought to enjoin a neighbor who, capitalizing on the discovery that getting smallpox once bestowed permanent immunity, set up a “hospital” where people could come to contract smallpox at their convenience; the plaintiff, understandably, did not want to catch smallpox from this establishment while awaiting the criminal process.⁵⁵ The court held that private parties could not bring a civil action to enjoin a public (as opposed to private) nuisance in their own names, but the court permitted the attorney general to bring the same type of proceeding as a relator action.⁵⁶ Eventually, the equity

-
50. See Merrill, *supra* note 17, at 13. For more on the origin of this black-letter rule, see *infra* note 54 and accompanying text.
51. See RESTATEMENT (SECOND) OF TORTS § 821C (AM. L. INST. 1979); Spencer, *supra* note 1, at 69.
52. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 (AM. L. INST. 2020) (discussing the doctrine); Catherine M. Sharkey, *Public Nuisance as Modern Business Tort: A New Unified Framework for Liability for Economic Harms*, 70 DEPAUL L. REV. 431, 432-34 (2021) (examining and proposing a resolution for the tension between private-party public-nuisance suits and the general tort prohibition on recovery for pure economic losses).
53. See Merrill, *supra* note 17, at 15 (“[T]he vast majority of public nuisance actions are brought by public authorities.”).
54. Spencer, *supra* note 1, at 66-67. J.R. Spencer estimates this to have begun in the eighteenth century and grown in the early nineteenth century, with the first reported case occurring in 1752. *Id.* at 66 & n.46.
55. *Baines v. Baker* (1752) 27 Eng. Rep. 105 (described in Spencer, *supra* note 1, at 66). According to Spencer, *Baines* appears to be the first case seeking an injunction in chancery court for a public nuisance. Spencer, *supra* note 1, at 66.
56. Spencer, *supra* note 1, at 67-68. Thus, in *Baines*, the plaintiff sought an injunction in his own name and the court rejected it, reasoning that if the inoculation hospital was a nuisance, it was a public rather than a private one and thus should be addressed by the attorney general. In later decisions, this was construed to mean that the attorney general could bring relator actions on behalf of private citizens. *Id.* at 68. Various attorneys general exerted varying levels of control over the relator function. *Id.* at 69.

courts followed the existing practice of the common-law courts in allowing private parties to sue for damages when they suffered special injury from a public nuisance.⁵⁷

Once chancery allowed injunctions through relator actions, such actions overtook criminal prosecutions as the chosen method of addressing public nuisances, in large part because they were geared toward abating the nuisance, which was often the primary objective.⁵⁸ Civil actions also proved useful in the growing number of nineteenth-century cases involving pollution by a defendant corporation, which could be enjoined more easily than it could be prosecuted.⁵⁹ With this change, public nuisance became mostly a civil rather than a criminal proceeding.⁶⁰

Although the archetypal public-nuisance cases remain the medieval actions removing impediments from public roads and waterways,⁶¹ the doctrine has contained much more diversity for centuries. *Britton* in the late thirteenth century referred to the existence of “several other nuisances” subject to public action besides “the case of a way being stopped.”⁶² In the 1660s, William Sheppard identified “common nuisances,” including

affecting public highways and waterways; polluting the air “with houses of office, laying of garbage, carrion or the like, if it be near the common high way”; victuallers, butchers, bakers, cooks, brewers, maltsters and apothecaries who sell products unfit for human consumption; running “lewd ale-houses”; and subdividing houses in good neighbourhoods “that become hurtful to the place by overpestring it with poor.”⁶³

Blackstone’s list of “common nuisances” in 1769 included eight categories:

57. *Id.* at 69.

58. *Id.* at 70.

59. *Id.* (“A corporation was difficult to prosecute, but quite easy to sue.”).

60. *Id.* at 71-72 (“To judge from the law reports, relator actions rapidly became the usual means of dealing with the more common types of public nuisance. Prosecutions then virtually died as a method of dealing with continuing health hazards, and were thereafter used mainly to deal with one-off pieces of misbehaviour—like disposing of a corpse by burning it in the kitchen grate or dumping it in the street . . .”).

61. See KEETON ET AL., *supra* note 30, at 644-45.

62. Spencer, *supra* note 1, at 58 (citing 1 BRITTON 402-03 (Francis Morgan Nichols trans., Oxford, Clarendon Press 1865)).

63. *Id.* at 60 (quoting WILLIAM SHEPPARD, THE COURT-KEEPERS GUIDE (London, W.G. 5th ed. 1662)).

1. Annoyances in highways, bridges, and public rivers, by rendering the same inconvenient or dangerous to pass: either positively, by actual obstructions; or negatively, by want of reparations. . . .
2. All those kinds of nuisances, (such as offensive trades and manufactures) which when injurious to a private man are actionable, . . . particularly the keeping of hogs in any city or market town
3. All disorderly inns or ale-houses, bawdy-houses, gaming-houses, stage-plays unlicensed, booths and stages for rope-dancers, mountebanks, and the like⁶⁴
4. . . . [A]ll lotteries are declared to be public nuisances, and all grants, patents, or licenses for the same to be contrary to law. . . .
5. Cottages are held to be common nuisances, if erected singly on the waste, being harbors for thieves and other idle and dissolute persons. . . .
6. The making and selling of fireworks and squibs, or throwing them about in any street
7. Eaves-droppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales
8. Lastly, a common scold, *communis rixatrix*, (for our law-latin confines it to the feminine gender) is a public nuisance to her neighborhood.⁶⁵

Blackstone noted that some of the above offenses had been declared a public nuisance by statute – lotteries, lone cottages on the waste, and fireworks.⁶⁶ One scholar has posited that Parliament took to declaring specific activities public nuisances to protect them from the King’s dispensing power, which once allowed

64. Here, William Blackstone further suggested a relationship between public nuisance and innkeeper liability and public-accommodations laws, noting that “[i]nns, in particular, being intended for the lodging and receipt of travelers, may be indicted, suppressed, and the innkeepers fined, if they refuse to entertain a traveler without a very sufficient cause; For thus to frustrate the end of their institution is held to be disorderly behavior.” 4 WILLIAM BLACKSTONE, COMMENTARIES *168 (spelling modernized).

65. *Id.* at *167-69 (footnotes omitted) (spelling modernized). About the “common scold,” Blackstone continued, evoking *The Taming of the Shrew* and various similarly sexist motifs from medieval times onward:

For which offense she may be indicted; and, if convicted, shall be sentenced to be placed in a certain engine of correction called the trebucket, castigatory, or *cucking* stool, which, in the Saxon language, is said to signify the scolding stool; though now it is frequently corrupted into *ducking* stool, because the residue of the judgment is, that, when she is so placed therein, she shall be plunged in the water for her punishment.

Id. at *169 (footnotes omitted) (spelling modernized).

66. *Id.* at *168-69.

him to pre-pardon individuals before they committed offenses.⁶⁷ Nevertheless, public nuisance still was, and remains, a matter of English common law.⁶⁸

Through this common-law process, the Second Restatement explains, “public nuisance came to cover a large, miscellaneous and diversified group of minor criminal offenses, all of which involved some interference with the interests of the community at large.”⁶⁹ The Second Restatement offers its own list of infringements that qualified as public nuisances at English common law:

[P]ublic nuisances included interference with the public health, as in the case of keeping diseased animals or the maintenance of a pond breeding malarial mosquitoes; with the public safety, as in the case of the storage of explosives in the midst of a city or the shooting of fireworks in the public streets; with the public morals, as in the case of houses of prostitution or indecent exhibitions; with the public peace, as by loud and disturbing noises; with the public comfort, as in the case of widely disseminated bad odors, dust and smoke; with the public convenience, as by the obstruction of a public highway or a navigable stream; and with a wide variety of other miscellaneous public rights of a similar kind.⁷⁰

These diverse categories—interferences with public health, public safety, public morals, public peace, public comfort, and public convenience—and the wide array of cases they comprised were important features of public nuisance as it continued to develop.

2. *Public Nuisance in the United States*

Public nuisance arrived in the United States with the rest of the English common law and continued to evolve. It included actions to address each of the

67. Spencer, *supra* note 1, at 63-64 (noting that, at one time, “if something was a common nuisance the King could not use the dispensing power to permit it”).

68. See *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency*, LAW COMM’N 1 (June 24, 2015), https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/lc358_public_nuisance.pdf [https://perma.cc/F2J6-EHYD].

69. RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (AM. L. INST. 1979).

70. *Id.*

above-listed categories and addressed a wide variety of things: disease-spreading ponds,⁷¹ bad odors,⁷² hog pens,⁷³ vicious dogs,⁷⁴ gambling houses,⁷⁵ and noise that frightened horses.⁷⁶ It also addressed a wide variety of activities: enclosure of public land,⁷⁷ excavation,⁷⁸ storage of explosives,⁷⁹ explosion of fireworks in the street,⁸⁰ incompetent and unlicensed practice of medicine,⁸¹ and double parking.⁸²

States and localities used public nuisance to address an array of disorderly or immoral conduct,⁸³ some of which might be protected under the First Amendment or the Due Process Clause today.⁸⁴ In the late nineteenth century, the doctrine was applied to enjoin a massive railway workers' strike that involved workers in twenty-seven states and effectively shut down rail travel in the West.⁸⁵ The

-
71. *Mills v. Hall*, 9 Wend. 315, 315 (N.Y. Sup. Ct. 1832).
72. *Acme Fertilizer Co. v. State*, 72 N.E. 1037, 1037 (Ind. Ct. App. 1905).
73. *Seigle v. Bromley*, 124 P. 191, 192 (Colo. App. 1912); *Gay v. State*, 18 S.W. 260, 261 (Tenn. 1891).
74. *Browning v. Belue*, 116 So. 509, 510 (Ala. Ct. App. 1928).
75. *State v. Patterson*, 37 S.W. 478, 478 (Tex. Civ. App. 1896).
76. *State ex rel. Detienne v. City of Vandalia*, 94 S.W. 1009, 1011 (Mo. Ct. App. 1906).
77. *State ex rel. Templeton v. Goodnight*, 11 S.W. 119, 119 (Tex. 1888).
78. *Town of Newcastle v. Grubbs*, 86 N.E. 757, 762 (Ind. 1908).
79. *State ex rel. Hopkins v. Excelsior Powder Mfg. Co.*, 169 S.W. 267, 271 (Mo. 1914).
80. *Jenne v. Sutton*, 43 N.J.L. 257, 257 (1881).
81. *State ex rel. Marron v. Compere*, 103 P.2d 273, 274 (N.M. 1940).
82. *Salisbury v. United Parcel Serv., Inc.*, 120 N.Y.S.2d 33, 36 (Mun. Ct. 1953).
83. See, e.g., *Engle v. State*, 90 P.2d 988, 989 (Ariz. 1939) (gambling); *State ex rel. Wilcox v. Gilbert*, 147 N.W. 953, 954 (Minn. 1914) ("bawdyhouses"); *State ex rel. Att'y Gen. v. Canty*, 105 S.W. 1078, 1078 (Mo. 1907) (bullfighting); *Brown v. Perkins*, 78 Mass. (12 Gray) 89, 90 (1858) (illegal sale of liquor).
84. See, e.g., *Fed. Amusement Co. v. State ex rel. Tuppen*, 32 So.2d 1, 1 (Fla. 1947) (holding that a drag show at the "Ha Ha Club" is an abatable nuisance); *Weis v. Super. Ct.*, 159 P. 464, 464-65 (Cal. Dist. Ct. App. 1916) (holding that a public exhibition of nudity in "Sultan's Harem" is so "injurious to public morals" as to constitute a public nuisance); *City of Chicago v. Shaynin*, 101 N.E. 224, 225-26 (Ill. 1913) (finding that a "museum of anatomy" is a public nuisance).
85. See *In re Debs*, 158 U.S. 564, 582 (1895). *In re Debs* involved the Pullman strike of 1894. *Id.* at 566-67, 574. Workers for the Pullman Company were suffering from layoffs and wage reductions coupled with a refusal to reduce rents in the company town of Pullman, Illinois, outside of Chicago. Eugene V. Debs, founder of the ARU and future socialist presidential candidate, attempted to organize the workers. When the company refused to recognize the ARU, the workers went on strike. The strike included violence between railroad agents and workers, killings, destruction of property, and a massive boycott of trains with Pullman cars. See generally DAVID RAY PAPKE, *THE PULLMAN CASE: THE CLASH OF LABOR AND CAPITAL IN INDUSTRIAL*

Supreme Court, affirming the use of a federal-court injunction to break up the strike, invoked public-nuisance doctrine and likened the strike's impact on interstate rail travel and mail transport to the classic "obstruction of a highway."⁸⁶

States sued private corporations, cities, and one another for public nuisance. In *Pennsylvania v. Wheeling & Belmont Bridge Co.* in 1850, Pennsylvania sued a Virginia company building a bridge across the Ohio River, alleging that the bridge blocked the river and infringed on Pennsylvania's rights to and economic interests in a free waterway.⁸⁷ In 1876, in *South Carolina v. Georgia*, the Supreme Court rejected a similar claim against one state by another, finding "no illegal obstruction."⁸⁸ In 1870, Wisconsin unsuccessfully sued the City of Duluth, Minnesota, to abate a canal for its negative impact on a Wisconsin town.⁸⁹

States also used public nuisance to address pollution. Some cases involved interstate pollution disputes, such as *Missouri v. Illinois*, where Missouri sued Illinois and the Sanitary District of Chicago over a sewage canal disposing large quantities of waste from Chicago into the Mississippi River.⁹⁰ States also sued

AMERICA (1999) (describing the factual background of the Pullman case). The federal government obtained an injunction in federal court enjoining union leaders to stop supporting the strike. The government argued that the strike interfered with interstate commerce and the mails. When Debs and others continued their activities, they were cited for contempt and federal troops moved in to break the strike. See *In re Debs*, 158 U.S. at 566-73.

86. *In re Debs*, 158 U.S. at 587.

87. 50 U.S. (9 How.) 647, 647-49 (1850). The Court referred the case to a commissioner to determine whether the bridge obstructed the waterway; its charter stated that any obstruction must be removed by the company or the bridge would constitute a public nuisance subject to abatement. *Id.* at 658. The Court later concluded that the bridge was not a nuisance after Congress passed a statute specifically stating that it was lawful. See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435-36 (1855). Similar dealings occurred in the case of the Clinton Bridge, where Congress declared a bridge across the Mississippi lawful while a public-nuisance suit was pending. See *In re Clinton Bridge*, 77 U.S. (10 Wall.) 454, 462 (1870).

88. 93 U.S. 4, 14 (1876).

89. See *Wisconsin v. City of Duluth*, 96 U.S. 379, 386-88 (1877). Because Congress had appropriated funds for the project and the War Department's engineering department had taken it over, the Supreme Court rejected Wisconsin's claim. *Id.*

90. 180 U.S. 208, 208-14 (1901). In concluding that the suit could proceed, the Court said:

The health and comfort of the large communities inhabiting those parts of the State situated on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the State. Moreover, substantial impairment of the health and prosperity of the towns and cities of the State situated on the Mississippi River, including its commercial metropolis, would injuriously affect the entire State.

private corporations for creating pollution, such as when Georgia sued two copper companies in Tennessee for releasing “large quantities of sulphur dioxid[e] which becomes sulphurous acid by its mixture with the air.”⁹¹ The Supreme Court enjoined this “pollution of the air.”⁹²

Although public nuisance was a common-law claim, by the middle of the twentieth century, most, if not all, state legislatures had passed general public-nuisance statutes, which essentially provided a statutory basis for actions that had always proceeded at common law.⁹³ States also enacted statutes designating particular things or activities as public nuisances.⁹⁴

During the early twentieth century, some courts were troubled by the potential expansiveness of public-nuisance doctrine. The California Supreme Court worried about “a continuous expansion of the field of public nuisances in which equitable relief is available at the request of the state.”⁹⁵ Nevertheless, the court permitted then-California Attorney General Earl Warren’s complaint to proceed against a gambling establishment under the state’s general public-nuisance statute.⁹⁶

3. Contemporary American Public Nuisance

In the latter part of the twentieth century, public nuisance expanded further. During the rise of the environmental movement of the late 1960s and 1970s, public nuisance offered promise as a litigation-based vector for environmental

Id. at 241. Such public-nuisance suits also marked the emergence of *parens patriae* doctrine. See Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1867 (2000) (summarizing the doctrinal history of *parens patriae*).

91. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238 (1907).

92. *Id.* (“It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.”).

93. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (AM. L. INST. 1979).

94. *Id.* (“[A]ll of the states have numerous special statutes declaring certain conduct or conditions to be public nuisances because they interfere with the rights of the general public. For example, a common type of statute declares black currant bushes or barberry bushes or other plants that harbor parasites such as rust that are destructive to grain or timber to be public nuisances. These statutes amount to a legislative declaration that the conduct proscribed is an unreasonable interference with a public right.”).

95. *People v. Lim*, 118 P.2d 472, 475 (Cal. 1941).

96. *Id.* at 477.

reforms.⁹⁷ Given its history addressing air and water pollution, public nuisance was a natural place for litigants to look to address environmental ills when regulation failed. Some of these suits met with moderate success and provided momentum for landmark legislation, such as the Clean Air Act and Clean Water Act.⁹⁸

During the same period, the contours of public nuisance became a topic of heated controversy within the American Law Institute (ALI). William Lloyd Prosser, torts expert and erstwhile Berkeley Law dean, had served as Reporter of the *Restatement (Second) of Torts* since its inception in the 1950s.⁹⁹ At the ALI's Annual Meeting in 1970, some members took issue with Prosser's assertion that a public nuisance must be a "criminal interference with a right common to all members of the public."¹⁰⁰ While some members wanted public nuisance to be even narrower than Prosser proposed, others objected that the criminal-interference requirement "was too restricted and inhibited the incipient development of the law in the field of environmental protection."¹⁰¹

The group dissolved into conflict and ultimately sent the proposed section on public nuisance back to Prosser for revision.¹⁰² Shortly afterward, Prosser resigned from the Restatement, reportedly because of this difficult experience.¹⁰³

97. See Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 828-56 (2001).

98. See, e.g., *Illinois v. City of Milwaukee*, 406 U.S. 91, 107-08 (1972) ("It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.").

99. See Antolini, *supra* note 97, at 819-20 ("In 1955, the American Law Institute ("ALI") selected Prosser as Reporter for the massive *Restatement (Second) of Torts* project.").

100. *RESTATEMENT (SECOND) OF TORTS* § 821B n. to Institute (AM. L. INST., Tentative Draft No. 16, 1970) (emphasis added). In a note to the ALI accompanying the proposed draft of § 821B, William Lloyd Prosser said that "[s]everal members of the Council have challenged the proposition that a public nuisance is always a crime. After rather intensive search, the Reporter sticks to his guns." *Id.* § 821B n. to Institute.

101. *RESTATEMENT (SECOND) OF TORTS* § 821B n. to Institute (AM. L. INST., Tentative Draft No. 17, 1971). As Denise E. Antolini describes, the other major objection to the public-nuisance draft had to do with public-nuisance claims by private citizens. See Antolini, *supra* note 97, at 835-43.

102. See *RESTATEMENT (SECOND) OF TORTS* § 821B foreword (AM. L. INST., Tentative Draft No. 17, 1971) (reporting "major controversy on the floor"); John W. Wade, *William L. Prosser: Some Impressions and Recollections*, 60 *CALIF. L. REV.* 1255, 1259 (1972) ("There ensued a rather confused babel of voices and eventually the whole topic was recommitted to the Reporter to revise, without clear directions."). For more on the Second Restatement controversy, see Antolini, *supra* note 97, at 828-56; and Gifford, *supra* note 45, at 806-09.

103. John P. Frank, *John W. Wade*, 48 *VAND. L. REV.* 591, 593 (1995) (stating that Prosser "put down the reportership in something of a spirit of indignation because of resistance from the floor").

In 1971, a new draft formulation of § 821B omitted any criminal-law constraint and added, for good measure, “the proposition that only a crime can be a public nuisance is rejected.”¹⁰⁴

The final version of the Second Restatement provided:

- (1) A public nuisance is an unreasonable interference with a right common to the general public.
- (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
 - (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
 - (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
 - (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.¹⁰⁵

The environmental public-nuisance suits provided a template for other large-scale actions. In the last few decades, even as public nuisance has continued to address classic issues such as problem properties¹⁰⁶ and indecency,¹⁰⁷ it has also taken on a central role in many lawsuits by state or municipal authorities against various industries for their negative impact on public health. These suits variously seek to enjoin offending behavior and to obtain monetary damages to

¹⁰⁴. RESTATEMENT (SECOND) OF TORTS § 821B foreword (AM. L. INST., Tentative Draft No. 17, 1970). For more on this episode, see Antolini, *supra* note 97, at 835-43.

¹⁰⁵. RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).

¹⁰⁶. See, e.g., *Benetatos v. City of Los Angeles*, 186 Cal. Rptr. 3d 46, 59 (Ct. App. 2015) (affirming the classification of a crime-plagued restaurant as a public nuisance); *Boyles v. City of Topeka*, 21 P.3d 974, 975-76 (Kan. 2001) (applying public-nuisance doctrine to unsightly property); Shane Hoover, *City Seeks to Shut Down ‘Nuisance’ House*, CANTON REPOSITORY (July 31, 2018, 1:14 PM ET), <https://www.cantonrep.com/story/news/drugs/opioid-crisis/2018/07/31/city-seeks-to-shut-down/11180967007> [<https://perma.cc/GF9J-YRWT>] (“The property is a flop-house and the site of criminal activity involving methamphetamine and heroin that drains police resources and tests the patience of neighbors, according to the Law Department and police.”); Andrew J. Campa, *Noxious Odors in Carson Declared a Public Nuisance*, L.A. TIMES (Oct. 11, 2021, 8:47 PM PT), <https://www.latimes.com/california/story/2021-10-11/carson-city-council-to-vote-on-nuisance-ordinance-for-lingering-smell> [<https://perma.cc/B88L-3FVT>] (reporting a public-nuisance declaration regarding odors from a channel “which have been likened to rotten eggs, vomit, unwashed body parts, or a ‘fart bomb’”).

¹⁰⁷. See, e.g., *Village of Winslow v. Sheets*, 622 N.W.2d 595, 604-05 (Neb. 2001) (applying public nuisance to nude dancing).

reimburse public-health expenditures. Damages became available both through statutory authorization and through approval by courts acting at common law. Some early American cases allowed recovery of remediation costs, and modern courts have permitted damages for decades.¹⁰⁸

To date, the most successful example of modern public nuisance has been the suits by all fifty states against the tobacco industry in the 1990s, which culminated in separate settlements with four bellwether states and then the \$206 billion Master Settlement Agreement with the remaining forty-six states in 1998.¹⁰⁹ Although the tobacco suits involved many different claims, public nuisance was a central one, and the structure of the entire litigation derived from the public-nuisance model. Virtually all of the tobacco litigation settled before trial,¹¹⁰ but the discovery process revealed that tobacco companies were well aware of the serious health risks of their products.¹¹¹

108. For early cases, see *infra* notes 242-247 and accompanying text. For more recent cases, see, for example, *Espinosa v. Roswell Tower, Inc.*, 910 P.2d 940, 943-45 (N.M. Ct. App. 1995), which permitted compensatory and punitive-damages claims; *United States v. Hooker Chemicals & Plastics Corp.*, 748 F. Supp. 67, 79-80 (W.D.N.Y. 1990), which denied a motion to dismiss a punitive-damages claim; *State ex rel. Dresser Industries, Inc. v. Ruddy*, 592 S.W.2d 789, 793 (Mo. 1980), which permitted the trial court to determine whether damages were “appropriate or allowable”; and *United States v. Illinois Terminal Railroad Co.*, 501 F. Supp. 18, 21 (E.D. Mo. 1980), which asserted federal common law jurisdiction over a damages claim and concluded, “[T]he Court finds nothing to support the railroad’s conclusion that equitable relief is the exclusive remedy under a public nuisance theory.”

109. See Engstrom & Rabin, *supra* note 4, at 304-05 (noting settlements of \$40 billion to Mississippi, Florida, Texas, and Minnesota within the year in advance of the MSA). For the terms of the Master Settlement Agreement, see *McClendon v. Georgia Department of Community Health*, 261 F.3d 1252, 1254-55 (11th Cir. 2001); and *The Master Settlement Agreement: An Overview*, PUB. HEALTH L. CTR. (Jan. 2019), <https://www.publichealthlawcenter.org/sites/default/files/resources/MSA-Overview-2019.pdf> [<https://perma.cc/B5ES-R9KB>].

110. One exception was *Texas v. American Tobacco Co.*, where, notably, public-nuisance liability was rejected. 14 F. Supp. 2d 956, 972-73 (E.D. Tex. 1997).

111. See, e.g., Engstrom & Rabin, *supra* note 4, at 304 (“[O]nce discovery commenced, the companies’ many secrets spilled out. The resulting picture was devastating. Among other stratagems, the discovery process revealed that the industry had supported research designed to spread disinformation about the hazards of smoking, manipulated cigarettes’ nicotine content, and specifically cultivated children, adolescents, and teens as ‘replacement’ smokers (waiting in the wings, once the current crop of users expired). Documents also underscored the extent to which the industry’s public statements, which had for so long denied or minimized the hazards of smoking, were recklessly made and incontrovertibly false.” (footnotes omitted)).

Success with tobacco further encouraged the public-nuisance model in areas as diverse as handguns,¹¹² lead paint,¹¹³ carbon-dioxide emissions,¹¹⁴ water pollution,¹¹⁵ and predatory lending in the run-up to the 2008 recession.¹¹⁶ Most of these lawsuits have failed.¹¹⁷ Occasionally, however, one succeeds. For example, in 2017, ten California counties prevailed at trial and in intermediate appellate court against three lead-paint manufacturers, eventually settling for \$305 million.¹¹⁸

Currently, the public-nuisance-litigation landscape remains highly varied. Lead-paint suits continue.¹¹⁹ New applications of the doctrine arise frequently to address problems from robocalls¹²⁰ to antibiotic resistance.¹²¹ Notably, some

-
112. See, e.g., *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1148 (Ill. 2004) (rejecting the public-nuisance claim); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143-44 (Ohio 2002) (reinstating a public-nuisance claim where plaintiffs also alleged an “underlying tort”).
113. See, e.g., *State v. Lead Indus. Ass’n*, 951 A.2d 428, 435 (R.I. 2008) (rejecting the public-nuisance claim).
114. See, e.g., *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424-29 (2011) (holding that the Clean Air Act preempted eight states’ and one city’s federal common-law public-nuisance suits against utility companies for carbon emissions, but reserving state public-nuisance claims for remand).
115. See, e.g., *Rhode Island v. Atl. Richfield Co.*, 357 F. Supp. 3d 129, 142-43 (D.R.I. 2018) (allowing nuisance claims to proceed against company’s chemical pollution of state waters).
116. See, e.g., *City of Cleveland v. Ameriquest Mortg. Sec., Inc.*, 615 F.3d 496, 505-06 (6th Cir. 2010) (rejecting the city’s public-nuisance claim against lenders).
117. David A. Dana, *Public Nuisance Law When Politics Fails*, 83 OHIO ST. L.J. 61, 69 (2022) (“Courts have rejected the overwhelming number of public nuisance claims . . .”).
118. *People v. ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499 (Ct. App. 2017). The trial court ordered the defendants to pay \$1.15 billion in abatement costs, but the appeals courts remanded for recalculation on a shorter time period. *Id.* at 568-71; see also Steven Czak, Note, *Public Nuisance Claims After ConAgra*, 88 FORDHAM L. REV. 1061, 1064 (2019) (discussing the case); Joshua Schneyer, *California Finally Settles Old Public Nuisance Claim for Lead Paint Remediation*, CLAIMS J. (July 18, 2019), <https://www.claimsjournal.com/news/west/2019/07/18/292032.htm> [<https://perma.cc/WQ2Z-JQLY>] (same).
119. See, e.g., *Certain Underwriters at Lloyd’s London v. NL Indus., Inc.*, No. 650103, 2020 N.Y. Misc. LEXIS 10905, at *49 (Sup. Ct. Dec. 29, 2020) (denying lead-paint insurers’ motion for summary judgment).
120. See Jessica McLean, *Dana Nessel Shuts Down VoIP Company Supposedly Responsible for Robocalls*, OAKLAND PRESS (June 17, 2021, 4:41 AM), <https://www.theoaklandpress.com/2020/08/08/dana-nessel-shuts-down-voip-company-supposedly-responsible-for-robocalls> [<https://perma.cc/F7SB-TPQX>] (describing the Michigan Attorney General’s settlement in a public-nuisance lawsuit against a California-based Voice over Internet Protocol (VoIP) provider).
121. See Amanda Purcell, *Using the Public Nuisance Doctrine to Combat Antibiotic Resistance*, 68 AM. U. L. REV. 339, 373-76 (2018) (discussing how public-nuisance suits for antibiotic resistance could be brought by private and public actors).

localities have utilized public-nuisance laws to remove Confederate monuments.¹²² A recent lawsuit seeks redress for the 1921 Tulsa race massacre on public-nuisance grounds.¹²³ North Dakota has sued the United States for damages relating to pipeline-protest costs, claiming in part that the protests constituted a public nuisance.¹²⁴ The COVID-19 pandemic prompted public-nuisance claims by employees alleging that workplaces were unsafe and constituted a public nuisance.¹²⁵ Meanwhile, public nuisance continues to serve as a major legal avenue for environmental debates – this time, over climate change and the responsibilities of the fossil-fuel industry.¹²⁶

-
122. See, e.g., Meredith Stutz & Steve King, *Confederate Monument in Winston-Salem Removed After City Calls It a “Public Nuisance,”* WXII 12 (Mar. 12, 2019, 11:14 PM EDT), <https://www.wxii12.com/article/confederate-monument-to-be-removed-tuesday-in-downtown-winston-salem/26794260> [<https://perma.cc/38PR-2SK6>] (describing the rejected challenge to the city’s removal action in *United Daughters of the Confederacy v. Winston-Salem ex rel. Joines*, 853 S.E.2d 216, 218 (N.C. Ct. App. 2020)); R. Robin McDonald, *‘Erected to Intimidate’: Confederate Monument Removed from DeKalb County Courthouse*, LAW (June 19, 2020, 1:34 PM), <https://www.law.com/dailyreportonline/2020/06/19/erected-to-intimidate-confederate-monument-removed-from-dekalb-county-courthouse> [<https://perma.cc/WC9G-KWM2>]; Robert McClendon, *Mitch Landrieu Invokes Public ‘Nuisance’ Ordinance for Confederate Monuments*, NOLA (July 18, 2019, 12:43 PM), https://www.nola.com/news/politics/article_7ce07b64-c1f9-501c-8909-8b8b62934023.html [<https://perma.cc/N9P5-9JYS>].
123. See Elizabeth Olson, *Tulsa Race Massacre Victims See ‘Nuisance’ Suit as Justice Route*, BLOOMBERG L. (June 2, 2021, 4:17 PM), <https://news.bloomberglaw.com/business-and-practice/tulsa-race-massacre-victims-see-nuisance-suit-as-justice-route> [<https://perma.cc/P667-WBQG>]; Kaelan Deese, *Lawsuit Seeks Reparations from City of Tulsa over 1921 Massacre*, HILL (Sept. 5, 2020, 2:25 PM ET), <https://thehill.com/homenews/state-watch/515262-lawsuit-seeks-reparations-from-city-of-tulsa-over-1921-massacre> [<https://perma.cc/ZF7P-ZSH5>].
124. *North Dakota v. United States*, 480 F. Supp. 3d 917, 919 (D.N.D. 2020) (denying the United States’s motion to dismiss).
125. See, e.g., *Palmer v. Amazon.com, Inc.*, 498 F. Supp. 3d 359 (E.D.N.Y. 2020) (dismissing the suit on primary-jurisdiction grounds); *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, 459 F. Supp. 3d 1228 (W.D. Mo. 2020) (same); *Massey v. McDonald’s Corp.*, No. 20 CH 4247, 2020 WL 5700874 (Ill. Cir. Ct. June 24, 2020) (issuing a preliminary injunction on public-nuisance grounds requiring McDonald’s franchises to follow applicable COVID-19 regulations); Robert Iafolla, *McDonald’s Workers Win Virus Safeguards in ‘Dog Diaper’ Case*, BLOOMBERG L. (July 10, 2020, 4:28 PM), <https://news.bloomberglaw.com/daily-labor-report/mcdonalds-workers-win-virus-safety-order-in-dog-diaper-case> [[https://perma.cc/BK8\]-TJHL](https://perma.cc/BK8]-TJHL)].
126. See, e.g., *Mayor of Balt. v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2020) (decided on jurisdictional and removal grounds), *vacated*, 141 S. Ct. 1532 (2021); *County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020) (decided on jurisdictional and removal grounds), *vacated*, 141 S. Ct. 2666 (2021) (mem.); *Bd. of Cnty. Comm’rs v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792 (10th Cir. 2020) (same), *vacated*, 141 S. Ct. 2667 (2021) (mem.); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466,

Firearms have a notable history of public-nuisance suits, mostly unsuccessful.¹²⁷ In 2005, the Federal Protection of Lawful Commerce in Arms Act (PLCAA) immunized firearm manufacturers from a wide variety of claims.¹²⁸ Since PLCAA's enactment, private and public plaintiffs have argued (with mixed success) that PLCAA does not immunize defendants from claims of fraud, wrongful marketing, or public nuisance.¹²⁹ The State of New York recently passed a law specifically designating the illegal or improper marketing or sale of firearms a public nuisance.¹³⁰

475-78 (S.D.N.Y. 2018); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018), *vacated*, 960 F.3d 570 (9th Cir. 2020), *amended by* 969 F.3d 895 (9th Cir. 2020); *King County v. BP P.L.C.*, No. C18-758, 2018 WL 9440497 (W.D. Wash. Oct. 17, 2018); *see also* Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENV'T L. REV. 49, 50 (2018) (identifying climate-change public-nuisance cases).

127. *See, e.g.*, *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1124 (Ill. 2004); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 199-200 (App. Div. 2003); *District of Columbia v. Beretta U.S.A. Corp.*, No. 0428-00, 2002 WL 31811717, at *31-32 (D.C. Super. Ct. Dec. 16, 2002); *Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 539-40 (3d Cir. 2001); *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 906-11 (E.D. Pa. 2000). For examples of public-nuisance suits against gun manufacturers brought before the passage of the Federal Protection of Lawful Commerce in Arms Act (PLCAA), which survived motions to dismiss, *see City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1249 (Ind. 2003); and *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143 (Ohio 2002).

128. 15 U.S.C. §§ 7901-03 (2018).

129. *See, e.g.*, *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 434-35 (Ind. Ct. App. 2007) (allowing a public-nuisance claim against a gun manufacturer to proceed); *City of New York v. Bob Moates' Sport Shop, Inc.*, 253 F.R.D. 237, 242-43 (E.D.N.Y. 2008) (same); *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 337 (App. Div. 2012), *amended by* 962 N.Y.S.2d 834 (App. Div. 2013) (same). *But see, e.g.*, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 397 (2d Cir. 2008) (holding that the PLCAA bars public-nuisance suits not falling within the Act's exceptions); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135-38 (9th Cir. 2009) (same). Perhaps the best-known suit to address the preemption question is that against Remington, a manufacturer of the AR-15, by parents of the first-grade children slaughtered at Sandy Hook Elementary School. The suit involved claims of wrongful marketing that had similarities to public-nuisance claims made in other suits. After the Supreme Court of Connecticut held that the suit could proceed, Remington agreed to pay \$73 million to the victims' families and to release all discovery and deposition materials to the public. *See Tom Hals & Brendan O'Brien, Remington Arms to Pay \$73 Million to Nine Sandy Hook Families*, REUTERS (Feb. 16, 2022, 4:44 AM UTC), <https://www.reuters.com/world/us/nine-sandy-hook-families-settle-liability-claims-with-remington-arms-2022-02-15> [<https://perma.cc/GBH9-L47V>].

130. Luis Ferré-Sadurní, *It's Hard to Sue Gun Makers. New York Is Set to Change That*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/06/08/nyregion/gun-manufacturers-lawsuit.html> [<https://perma.cc/3VT5-KFEK>].

B. *The Opioid Crisis: A Brief History*

People have used opium for thousands of years and have long struggled with opioids' addictive properties.¹³¹ The history of the contemporary American opioid crisis is much shorter. The current opioid crisis traces back to 1995, when the Food and Drug Administration (FDA) first approved OxyContin, developed by Purdue Pharma and copromoted by Abbott Laboratories.¹³² OxyContin's active ingredient, oxycodone, was first synthesized in 1916.¹³³ What set OxyContin apart was that it was the first "controlled-release" version of oxycodone, which permitted dosing every twelve hours instead of every four to six hours.¹³⁴

In seeking FDA approval, Purdue claimed that OxyContin's controlled-release mechanism was believed to reduce the risk of drug abuse, and the FDA permitted Purdue to make this claim in marketing the drug.¹³⁵ Purdue lacked clinical evidence to support this claim but relied on speculation that a controlled-release drug would be less appealing to drug abusers because it would not provide a quick high.¹³⁶

Instead, precisely the opposite proved true. Users found they "could chew, crush, dissolve, or scrape the coating off the tablets, thus leaving stronger doses of oxycodone than those found in individual Percocet or Percodan tablets. They could then ingest, snort, or inject the substance," creating a risk of overdose death, primarily from acute pulmonary edema.¹³⁷ Meanwhile, other patients found that the time-release mechanism stopped relieving pain after eight hours, so they took more pills. Even some patients who were prescribed low doses and took the drug as directed still found themselves addicted.¹³⁸

131. See Bryen Jordan & Lakshmi A. Devi, *Molecular Mechanisms of Opioid Receptor Signal Transduction*, 81 BRIT. J. ANAESTHESIA 12, 12 (1998) ("The analgesic and antidiarrhoeal uses of opium were known to the Sumerians and predynastic Egyptians."). The authors further note the long and painful history of addiction, including how morphine, the primary active compound in opium, replaced opium as a treatment but quickly proved highly addictive. *Id.* Likewise, heroin was developed and originally hailed as a safer alternative to morphine. *Id.*

132. See *Howland v. Purdue Pharma L.P.*, 821 N.E.2d 141, 142-43 (Ohio 2004) (recounting OxyContin's approval and the copromotional agreement between Purdue and Abbott).

133. Engstrom & Rabin, *supra* note 4, at 308.

134. See *Timeline of Selected FDA Activities and Significant Events Addressing Opioid Misuse and Abuse*, U.S. FOOD & DRUG ADMIN. [1] (Oct. 4, 2022) [hereinafter *FDA Timeline*], <https://www.fda.gov/media/126835/download> [<https://perma.cc/2DU5-N4K4>].

135. Catherine M. Sharkey, *The Opioid Litigation: The FDA Is MIA*, 124 DICK. L. REV. 669, 672 (2020).

136. See *id.*; Engstrom & Rabin, *supra* note 4, at 308 & n.120.

137. Sharkey, *supra* note 135, at 672.

138. Engstrom & Rabin, *supra* note 4, at 309.

Although opioids had been reserved primarily for cancer and acute pain for decades,¹³⁹ doctors prescribed OxyContin generously for chronic pain. By 2000, a mere five years after its approval, OxyContin was the most prescribed schedule II narcotic in the United States, with 5.8 million prescriptions just that year.¹⁴⁰ By the early 2000s, prescription-drug overdose deaths were skyrocketing, “with OxyContin at the center of the problem.”¹⁴¹

In 2007, Purdue and three of its executives pleaded guilty to the misdemeanor of introducing a misbranded drug into interstate commerce, in violation of the Food, Drug, and Cosmetic Act (FDCA); Purdue admitted to misbranding with intent to defraud or mislead the public.¹⁴² The investigation and subsequent plea agreement found that Purdue “falsely marketed and promoted OxyContin as less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications.”¹⁴³ Purdue agreed to pay \$600 million in fines and penalties.¹⁴⁴ In 2010, Purdue reformulated OxyContin to make it less susceptible to abuse.¹⁴⁵ The FDA implemented a Risk Evaluation and Mitigation Strategy for extended-release and long-acting opioids in 2012, and for all opioid painkillers in 2018.¹⁴⁶

139. *FDA Timeline*, *supra* note 134, at [1].

140. Patrick O’Leary, *Credible Deterrence: FDA and the Park Doctrine in the 21st Century*, 68 *FOOD & DRUG L.J.* 137, 166 (2013).

141. *FDA Timeline*, *supra* note 134, at [2].

142. Engstrom & Rabin, *supra* note 4, at 315.

143. John Brownlee, U.S. Att’y for the W. Dist. of Va., Statement of United States Attorney John Brownlee on the Guilty Plea of the Purdue Frederick Company and Its Executives for Illegally Misbranding Oxycontin 2 (May 10, 2007), <https://www.documentcloud.org/documents/279028-purdue-guilty-plea> [<https://perma.cc/3X26-SK3Y>] (summarizing the investigation and plea agreement statement of facts). For example, Purdue trained sales representatives to tell doctors that it was difficult to abuse OxyContin intravenously, even though its own study showed that abusers could easily extract and inject sixty-eight percent of the oxycodone from a tablet. *Id.* at 5–6. Purdue also falsely told doctors that the product did not create a high and was less subject to abuse, addiction, and diversion than other opioids. *Id.* at 6.

144. *Id.* at 2.

145. See Amanda D’Ambrosio, *Did Reformulated OxyContin Really Discourage Abuse?*, *MEDPAGE TODAY* (Sept. 9, 2020), <https://www.medpagetoday.com/washington-watch/fdageneral/88528> [<https://perma.cc/EV7E-5NRY>].

146. *FDA Timeline*, *supra* note 134, at [7–9], [18–21].

But the damage was done: nothing made much of a dent in the opioid epidemic. At first, new generics and related medications ensured that plenty of prescription opioids were available, and at lower prices.¹⁴⁷ Then, as authorities began to take regulation more seriously and drug supplies and prescriptions fell, illicit alternatives exploded.¹⁴⁸

Over the last twenty-five years, thousands upon thousands of people have died from opioid overdoses, including specifically from prescription-opioid overdoses. The federal government estimates that more than 16,000 people died from prescription-opioid overdoses in 2020, constituting approximately 18% of all overdose deaths that year.¹⁴⁹ More than 68,000 people died from overdose of any opioid in 2020, a category that includes heroin and fentanyl.¹⁵⁰ (Prescription opioids are implicated in some portion of total opioid deaths as they sometimes lead to addiction, which can in turn lead users to seek out illicit alternatives.¹⁵¹) Opioid overdoses constituted 75% of the nation's nearly 92,000 total overdose deaths in 2020.¹⁵² For comparison, the total number of drug overdose deaths in

147. See Engstrom & Rabin, *supra* note 4, at 331 n.239.

148. See David A. McGranahan & Timothy S. Parker, *The Opioid Epidemic: A Geography in Two Phases*, U.S. DEP'T AGRIC. 3 (Apr. 2021), <https://www.ers.usda.gov/webdocs/publications/100833/err-287.pdf> [<https://perma.cc/T7QE-F5QD>].

149. *Overdose Death Rates*, NAT'L INST. ON DRUG ABUSE figs.1 & 4 (Jan. 20, 2022), <https://nida.nih.gov/drug-topics/trends-statistics/overdose-death-rates> [<https://perma.cc/QBC7-HU3H>].

150. *Id.* fig.3.

151. See Engstrom & Rabin, *supra* note 4, at 325-26. Fentanyl is a prescription synthetic opioid used for surgical and end-of-life pain, but also made and distributed illegally. Use of illicit opioids has led some to understand the opioid epidemic as having two phases: the first, prescription-drug-driven phase, dominating until around 2011; then outstripped by a second, illicit-drug phase, driven mostly by fentanyl. See, e.g., McGranahan & Parker, *supra* note 148, at i-iv. The relationship between these two phases is complex. Some proportion of illicit-opioid abuse is likely unrelated to prescription drugs. At the same time, however, prescription painkillers can act as a gateway to illicit opioids, as people become addicted and require more powerful drugs to achieve the same effects. In addition, as prescription opioids have become more heavily regulated and less frequently prescribed, fentanyl and other illicit opioids have filled the gaps. See McGranahan & Parker, *supra* note 148, at 2-3 (describing these complexities in greater detail).

152. *Overdose Death Rates*, *supra* note 149, figs.1 & 3. Sadly, those numbers have only increased during the COVID-19 pandemic. See Roni Caryn Rabin, *Overdose Deaths Reached Record High as the Pandemic Spread*, N.Y. TIMES (Nov. 17, 2021), <https://www.nytimes.com/2021/11/17/health/drug-overdoses-fentanyl-deaths.html> [<https://perma.cc/Z39A-LVZF>] (“In the 12-month period that ended in April [2021], more than 100,000 Americans died of overdoses, up almost 30 percent from the 78,000 deaths in the prior year, according to provisional figures from the National Center for Health Statistics. The figure marks the first time the number of overdose deaths in the United States has exceeded 100,000 a year, more than the toll of car crashes and gun fatalities combined. Overdose deaths have more than doubled since 2015.”).

the United States in 2000 was 17,000.¹⁵³ Estimates of the total costs of the opioid epidemic vary, but multiple studies place it in the trillions of dollars.¹⁵⁴

C. *The Opioid Public-Nuisance Litigation*

For roughly twenty years, governmental entities have employed public-nuisance litigation to attempt to address the opioid epidemic. A first round of lawsuits against Purdue began in the early 2000s, with a suit and settlement in West Virginia, followed by a class action and settlement by twenty-six other states and the District of Columbia.¹⁵⁵ A case filed in 2007 by the Commonwealth of Kentucky and Pike County, an eastern Kentucky county hard-hit by opioids, finally resolved in 2015 with a settlement.¹⁵⁶

Beginning in 2014, a second round of lawsuits targeted a much wider group of defendants, including manufacturers and distributors, as well as pharmacies that allegedly turned a blind eye to suspicious patterns indicative of drug abuse and diversion.¹⁵⁷ The plaintiffs became more diverse, too, as cities, counties, states, tribes, and other public entities filed suits. The claimants seek aid in combatting the opioid epidemic and, in some cases, compensation for the funds spent on it, including law enforcement, rehabilitation, education, and health-care costs.¹⁵⁸

153. McGranahan & Parker, *supra* note 148, at 1. Per-capita overdose-death rates tell a similar story. See Holly Hedegaard, Margaret Warner & Arialdi M. Miniño, *Drug Overdose Deaths in the United States, 1999-2015*, NAT'L CTR. FOR STAT. (Feb. 2017), <https://www.cdc.gov/nchs/data/databriefs/db273.pdf> [<https://perma.cc/DW32-5SW8>].

154. In October 2019, the Federal Council of Economic Advisers concluded that the total costs of the opioid epidemic from 2015 to 2018 topped \$2.5 trillion; this figure included lost productivity estimates, as well as costs for health care and criminal justice. *The Full Cost of the Opioid Crisis: \$2.5 Trillion Over Four Years*, COUNCIL ECON. ADVISERS (Oct. 28, 2019), <https://trumpwhitehouse.archives.gov/articles/full-cost-opioid-crisis-2-5-trillion-four-years> [<https://perma.cc/AF47-44M4>]. In a 2022 report, a bipartisan commission estimated the costs of fatal overdoses at \$1 trillion per year. Chloe Taylor, *Drug Overdoses Are Costing the U.S. Economy \$1 Trillion a Year, Government Report Estimates*, CNBC (Feb. 8, 2022, 9:28 AM EST), <https://www.cnbc.com/2022/02/08/drug-overdoses-cost-the-us-around-1-trillion-a-year-report-says.html> [<https://perma.cc/D5XG-E6ZS>].

155. Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117, 1148-49 (2014).

156. Adam Beam, *Kentucky Settles Lawsuit with OxyContin Maker for \$24 Million*, AP NEWS (Dec. 23, 2015), <https://apnews.com/article/5eba8e71298d41849a94ad1017a90aea> [<https://perma.cc/DA8Y-VX8Z>].

157. See Engstrom & Rabin, *supra* note 4, at 316-19.

158. See, e.g., *Critics Say New Ohio Bill Would Give Drug Traffickers an Out*, 47 NARCOTICS L. BULL. 1, 3 (Feb. 2020) (enumerating costs in a Michigan lawsuit).

As of October 2022, all fifty states and thousands of other entities had filed lawsuits against the opioid industry.¹⁵⁹ Approximately 3,000 federal lawsuits involving tribes and local governments were consolidated into a multidistrict litigation (MDL) in Ohio.¹⁶⁰ The defendants included hundreds of opioid manufacturers, prescribers, and distributors.¹⁶¹

In 2019, cases came to a head. In March 2019, Purdue Pharma and Teva Pharmaceuticals settled with the Oklahoma Attorney General to avoid going to trial on public-nuisance and other claims.¹⁶² In August 2019, the Oklahoma bench trial, the first trial of its kind in the country, resulted in a judgment of \$465 million against Johnson & Johnson, followed by a reversal by the Oklahoma Supreme Court in 2021.¹⁶³

Also in 2019, Purdue Pharma announced that it was filing for bankruptcy as part of a tentative settlement framework.¹⁶⁴ In bankruptcy court, Purdue sought to resolve all claims against both it and its owners. Several factors complicated these efforts, including negative reactions to the Sacklers' attempt to avoid personal liability through a corporate-reorganization plan,¹⁶⁵ allegations that the

159. See Hoffman, *supra* note 20 (discussing Oklahoma's suit and noting "more than 2,000 similar lawsuits around the country"); *Settlement Statuses*, *supra* note 19 (tracking the status of government-initiated lawsuits in all fifty states).

160. *In re Nat'l Prescription Opiate Litig.*, 290 F. Supp. 3d 1375, 1377 (J.P.M.L. 2017); see Brian Mann & Colin Dwyer, *Opioid Trial: 4 Companies Reach Tentative Settlement with Ohio Counties*, NPR (Oct. 21, 2019, 9:28 AM ET), <https://www.npr.org/sections/health-shots/2019/10/21/771847539/opioid-trial-4-companies-reach-tentative-settlement-with-ohio-counties> [<https://perma.cc/F2ED-FWQR>]; Bauman, *supra* note 18.

161. See *In re Nat'l Prescription Opiate Litig.*, 290 F. Supp. 3d. at 1375. A government-produced list identifies 659 separate defendants facing opioid-related litigation. See *Content Details: 17-2804 – In Re: National Prescription Opiate Litigation*, GOVINFO, https://www.govinfo.gov/app/details/USCOURTS-ohnd-1_17-md-02804 [<https://perma.cc/HU64-Y6AJ>].

162. Martha Bebinger, *Purdue Pharma Agrees to \$270 Million Opioid Settlement with Oklahoma*, NPR (Mar. 26, 2019, 2:20 PM ET), <https://www.npr.org/sections/health-shots/2019/03/26/706848006/purdue-pharma-agrees-to-270-million-opioid-settlement-with-oklahoma> [<https://perma.cc/3FGW-F45N>]; Shannon Van Sant, *Teva Pharmaceuticals Agrees to \$85 Million Settlement with Oklahoma in Opioid Case*, NPR (May 26, 2019, 5:05 PM ET), <https://www.npr.org/2019/05/26/727179915/teva-pharmaceuticals-agrees-to-85-million-settlement-with-oklahoma-in-opioid-cas> [<https://perma.cc/2GP7-PLNY>].

163. Because of a calculation error, the initial \$572 million judgment was reduced by \$107 million, to \$465 million. See Raymond & Stempel, *supra* note 20; Hoffman, *supra* note 20; see also Hoberock, *supra* note 24 (reporting the reversal by the Oklahoma Supreme Court).

164. Jan Hoffman, *Purdue Pharma Tentatively Settles Thousands of Opioid Cases*, N.Y. TIMES (Nov. 24, 2020), <https://www.nytimes.com/2019/09/11/health/purdue-pharma-opioids-settlement.html> [<https://perma.cc/K4FG-CVG6>].

165. See Brian Mann, *The Sacklers, Who Made Billions from OxyContin, Win Immunity from Opioid Lawsuits*, NPR (Sept. 1, 2021, 7:33 PM ET), <https://www.npr.org/2021/09/01/1031053251>

Sackler family funneled billions of dollars out of Purdue in the years preceding the bankruptcy filing,¹⁶⁶ damning emails from the Sacklers revealed in various discovery proceedings,¹⁶⁷ and revelations of a criminal investigation and ultimate guilty plea by Purdue regarding its conspiracy to defraud the federal government and violation of the FDCA.¹⁶⁸ In December 2021, a federal district court rejected a settlement approved by the bankruptcy court,¹⁶⁹ and in March 2022 the parties announced a settlement that could amount to over \$10 billion, including \$6 billion of the Sacklers' own funds.¹⁷⁰

Also during the fall of 2019, the federal district court judge presiding over the Ohio MDL encouraged global settlement and invited state attorneys general involved in cases not before it to participate in settlement talks.¹⁷¹ In the spring of 2022, Johnson & Johnson and three distributors entered a global settlement of approximately \$26 billion with states and localities that chose to opt in.¹⁷² Since

/sackler-family-immunity-purdue-pharma-oxycotin-opioid-epidemic [https://perma.cc/6KP6-2FP5].

166. See Tom Hals & Mike Spector, *Where the Purdue Pharma-Sackler Legal Saga Stands*, REUTERS (Jan. 29, 2020, 7:10 AM), <https://www.reuters.com/article/us-purdue-pharma-bankruptcy-factbox/where-the-purdue-pharma-sackler-legal-saga-stands-idUSKBN1ZS1H3> [https://perma.cc/2JHV-GXUV].
167. See Mark Morales, *Former Purdue Pharma President Called Addicted People 'Victimizers' in Emails*, CNN (May 8, 2019, 6:04 PM EDT), <https://www.cnn.com/2019/05/08/health/sackler-purdue-opioid-emails/index.html> [https://perma.cc/DMJ3-BLZD].
168. See Katie Benner, *Purdue Pharma Pleads Guilty to Role in Opioid Crisis as Part of Deal with Justice Dept.*, N.Y. TIMES (July 20, 2021), <https://www.nytimes.com/2020/11/24/us/politics/purdue-pharma-opioids-guilty-settlement.html> [https://perma.cc/D8B9-L6AT].
169. See Brendan Pierson, Mike Spector & Maria Chutchian, *U.S. Judge Tosses \$4.5 Bln Deal Shielding Sacklers from Opioid Lawsuits*, REUTERS (Dec. 17, 2021, 5:27 AM EST), <https://www.reuters.com/business/judge-tosses-deal-shielding-purdues-sackler-family-opioid-claims-2021-12-17> [https://perma.cc/EL7C-YT5N].
170. Geoff Mulvihill & John Seewer, *Purdue Pharma, US States Agree to New Opioid Settlement*, AP NEWS (Mar. 3, 2022), <https://apnews.com/article/purdue-pharma-opioid-settlement-9482fao389f68de6844d13eazebef5a> [https://perma.cc/XMN3-6NEM]. The deal also provides that the Sacklers give up control of Purdue and that the company become a new entity whose profits will fight the opioid crisis. *Id.*
171. See Tom Hals & Nate Raymond, *Judge's Unorthodox Approach Has Huge Opioid Settlement Within Reach*, REUTERS (Oct. 18, 2019, 7:04 AM), <https://www.reuters.com/article/us-opioids-litigation-judge/judges-unorthodox-approach-has-huge-opioid-settlement-within-reach-idUSKBN1WX1AT> [https://perma.cc/D6PK-WFX7]. As part of this approach, the district court employed a class-certification process that was later rejected by the Sixth Circuit, but that in the meantime facilitated settlement talks. *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 537 (N.D. Ohio 2019), *rev'd*, 976 F.3d 664 (6th Cir. 2020).
172. Jan Hoffman, *Drug Distributors and J.&J. Reach \$26 Billion Deal to End Opioid Lawsuits*, N.Y. TIMES (Nov. 11, 2021), <https://www.nytimes.com/2021/07/21/health/opioids-distributors-settlement.html> [https://perma.cc/TET3-P2XX]. The distributors were AmerisourceBergen, Cardinal Health, and McKesson. *Id.*

then, other defendants have announced plans for global settlements,¹⁷³ and various plaintiffs and defendants outside of global settlements have reached their own agreements.¹⁷⁴

Meanwhile, outcomes in court have been mixed. As mentioned previously, in 2021 the Oklahoma Supreme Court overturned the \$465 million judgment against Johnson & Johnson.¹⁷⁵ Judges have also rejected public-nuisance suits in California and West Virginia.¹⁷⁶ By contrast, juries have awarded verdicts to

173. See, e.g., Jan Hoffman, *Tribes Reach \$590 Million Opioid Settlement with J. & J. and Distributors*, N.Y. TIMES (Feb. 1, 2022), <https://www.nytimes.com/2022/02/01/health/opioids-native-american-tribes.html> [<https://perma.cc/FV29-6F62>]; Jan Hoffman, *Teva Reaches Tentative \$4.25 Billion Settlement over Opioids*, N.Y. TIMES (July 26, 2022), <https://www.nytimes.com/2022/07/26/health/teva-opioids-settlement.html> [<https://perma.cc/GF7C-WSW4>]; Jan Hoffman, *Allergan Reaches Tentative \$2.37 Billion Deal to Settle Opioid Suits*, N.Y. TIMES (July 29, 2022), <https://www.nytimes.com/2022/07/29/health/allergan-opioids-settlement.html> [<https://perma.cc/LG7Z-YTS9>]; Press Release, Off. of Att’y Gen. Maura Healey, State Attorneys General Reach \$450 Million Nationwide Settlement as Part of Opioid Maker Endo’s Bankruptcy (Aug. 16, 2022), <https://www.mass.gov/news/state-attorneys-general-reach-450-million-nationwide-settlement-as-part-of-opioid-amaker-endos-bankruptcy> [<https://perma.cc/6X2N-YR7X>].

174. See, e.g., Dietrich Knauth, *West Virginia Cities Reach \$400 MLN Opioid Distributor Settlement*, REUTERS (Aug. 1, 2022, 4:19 PM EDT), <https://www.reuters.com/business/healthcare-pharmaceuticals/west-virginia-cities-reach-400-mln-opioid-distributor-deal-2022-08-01> [<https://perma.cc/ZJ89-2FH5>]; *Oklahoma Reaches \$250 MLN Opioid Settlement with Drug Distributors*, REUTERS (June 27, 2022, 8:25 PM EDT), <https://www.reuters.com/world/us/oklahoma-reaches-250-mln-opioid-settlement-with-drug-distributors-2022-06-27> [<https://perma.cc/D987-AGAP>]; Press Release, Wash. State Off. of the Att’y Gen., AG Ferguson: Opioid Distributors to Pay \$518 Million to Washington (May 3, 2022), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-opioid-distributors-pay-518-million-washington> [<https://perma.cc/JBT8-3Q47>]; Press Release, Ala. Att’y Gen.’s Off., Attorney General Steve Marshall Announces \$276 Million in State of Alabama Settlements with Opioid Manufacturers, Distributor (Apr. 19, 2022), <https://www.alabamaag.gov/newsviewer/e000276a-e011-4c6e-8d33-472bco1fcc31> [<https://perma.cc/KW9G-5WA9>]. For a resource that tracks settlements in each state, see *Settlement Statuses*, *supra* note 19.

175. State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719, 731 (Okla. 2021).

176. See, e.g., *People v. Purdue Pharma L.P.*, No. 30-2014-00725287, 2021 WL 7186146, at *4 (Cal. Super. Ct. Dec. 14, 2021) (rejecting four California counties’ suit against four drug companies); *City of Huntington v. AmerisourceBergen Drug Corp.*, No. 17-01362, 2022 WL 2399876, at *57 (S.D.W. Va. July 4, 2022) (rejecting claims by the city and county against drug distributors). Both the West Virginia trial and a successful California bench trial, *City & County of San Francisco v. Purdue Pharma L.P.*, No. 18-CV-07591, 2022 WL 3224463, at *60 (N.D. Cal. Aug. 10, 2022), were bellwether trials set through the Ohio multidistrict litigation (MDL). See *In re Nat’l Prescription Opiate Litig.*, Nos. 17-MD-2804, 18-OP-45032, 18-OP-45079, 2022 WL 3443614, at *1 (N.D. Ohio Aug. 17, 2022).

plaintiffs in Ohio¹⁷⁷ and New York,¹⁷⁸ and a bench trial in federal district court in California resulted in liability for Walgreens.¹⁷⁹ As of this writing, appellate resolutions are likely and new claims are being tried or filed.¹⁸⁰

All in all, then, the opioid litigation has yielded billions in funding for state, local, and tribal entities, most of it thus far through settlements rather than trial. Although the opioid settlements are not of the same magnitude as the \$246 billion tobacco settlements, the two share some important features: they are large, mostly secured through out-of-court negotiations, and occurring against the

-
177. Jury Verdict Form, County of Lake v. Purdue Pharma, L.P., No. 18-OP-45032 (N.D. Ohio Nov. 23, 2021); Jury Verdict Form, County of Trumbull v. Purdue Pharma, L.P., No. 18-OP-45079 (N.D. Ohio Nov. 23, 2021); see also Jan Hoffman, CVS, Walgreens and Walmart Fueled Opioid Crisis, *Jury Finds*, N.Y. TIMES (Nov. 23, 2021), <https://www.nytimes.com/2021/11/23/health/walmart-cvs-opioid-lawsuit-verdict.html> [<https://perma.cc/5UEN-F49Z>]. Judge Polster of the Ohio MDL presided over the jury trial and a subsequent bench trial on remedies. *In re Nat'l Prescription Opiate Litig.*, 2022 WL 3443614, at *2. The court ultimately ordered the defendants to pay \$650.6 million toward abatement over fifteen years. *Id.* at *3.
178. See Sarah Maslin Nir, Jan Hoffman & Lola Fadulu, *Pharmaceutical Company Is Found Liable in Landmark Opioid Trial*, N.Y. TIMES (Dec. 30, 2021) [hereinafter *Landmark Opioid Trial*], <https://www.nytimes.com/2021/12/30/nyregion/teva-opioid-trial-verdict.html> [<https://perma.cc/6W53-ZM8C>]. The New York jury verdict was the culmination of a suit originally so large that the trial was once planned to take place in a law-school auditorium because the relevant jurisdiction did not have a courthouse big enough for all the defendants and their attorneys. Most defendants in that litigation settled before or during trial for hundreds of millions of dollars. See Sarah Maslin Nir, *Johnson & Johnson to Pay New York \$230 Million to Settle Opioid Case*, N.Y. TIMES (Nov. 9, 2021), <https://www.nytimes.com/2021/06/26/nyregion/johnson-johnson-opioid-lawsuit-new-york.html> [<https://perma.cc/AB9F-QSK8>]; Sarah Maslin Nir, *Drug Distribution Companies to Pay N.Y. More than \$1 Billion to Settle Opioid Lawsuit*, N.Y. TIMES (Nov. 9, 2021), <https://www.nytimes.com/2021/07/20/nyregion/new-york-opioid-settlements.html> [<https://perma.cc/G8C3-GDVN>]; Sarah Maslin Nir, *Drug Company Settles with N.Y. for \$200 Million in Sprawling Opioid Case*, N.Y. TIMES (Dec. 8, 2021), <https://www.nytimes.com/2021/12/08/nyregion/allergan-settlement-opioid.html> [<https://perma.cc/Y7BJ-RG8G>]. All told, various lawsuits across New York State resulted in \$1.7 billion in settlement money. See Nick Reisman, *AG James: Final Opioid Trial Concludes in New York*, SPECTRUM NEWS 1 (Dec. 14, 2021, 5:00 PM ET), <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2021/12/14/ag-j-es-final-opioid-trial-concludes-in-new-york> [<https://perma.cc/8TBQ-AW7Q>].
179. *City & County of San Francisco*, 2022 WL 3224463, at *60 (holding “Walgreens substantially contributed to an opioid epidemic with far-reaching and devastating effects across San Francisco,” and setting a second trial to determine responsibility for abatement).
180. See, e.g., Brendan Pierson, *Pharmacy Operators Walmart, Walgreens, Kroger Begin Opioid Trial in New Mexico*, REUTERS (Sept. 6, 2022, 6:04 PM ET), <https://www.reuters.com/legal/pharmacy-operators-walmart-walgreens-kroger-begin-opioid-trial-new-mexico-2022-09-06> [<https://perma.cc/R6AG-C9WR>]; Press Release, Tenn. Off. of the Att’y Gen., AG Slatery Sues Walgreens for Unlawful Distribution and Sale of Opioids (Aug. 3, 2022, 4:03 PM), <https://www.tn.gov/attorneygeneral/news/2022/8/3/pr22-29.html> [<https://perma.cc/S9CZ-U9UW>].

backdrop of an uneven trial record. More importantly, the opioid litigation confirms the role of public nuisance as a de facto apparatus for addressing major public-health issues.

II. THE TRADITIONALIST CRITIQUE

Contemporary applications of public-nuisance doctrine face many objections. One set of objections can be categorized as traditionalist. Traditionalists claim that public nuisance was never meant to address the types of problems it now confronts. Traditionalists also argue that public-nuisance law should be limited to what it covered at some earlier point in time.

For example, the New Jersey Supreme Court relied heavily on tradition in rejecting a public-nuisance claim against lead-paint producers.¹⁸¹ In an opinion that repeats cognates of the word “tradition” twelve times and “history” twenty-three, the court concluded that virtually every aspect of twenty-six localities’ claims against lead-paint manufacturers and distributors was contrary to tradition: that lead paint in individual homes arguably did not implicate a “public right” as traditionally understood;¹⁸² that public nuisance exclusively addressed “the use of land by the one creating the nuisance”;¹⁸³ that public entities cannot claim damages for a public nuisance;¹⁸⁴ that lawful, unregulated sales cannot constitute a public nuisance;¹⁸⁵ and that products can never constitute a public nuisance.¹⁸⁶ In another lead-paint case, the Supreme Court of Rhode Island put it bluntly: “The law of public nuisance never before has been applied to products, however harmful.”¹⁸⁷

Likewise, in overturning the judgment of \$465 million imposed against Johnson & Johnson by a judge in an Oklahoma bench trial, the Oklahoma Supreme Court stated that it was adhering to the “traditional limits on nuisance liability.”¹⁸⁸ Favorably citing the New Jersey lead-paint decision and others like it, the court stated that the common law of public nuisance “covered conduct, performed in a location within the actor’s control, which harmed those common rights of the general public” and that it “has historically been linked to the use

181. *In re Lead Paint Litig.*, 924 A.2d 484, 505 (N.J. 2007).

182. *Id.* at 502.

183. *Id.* at 495.

184. *Id.* at 502.

185. *Id.* at 501-02.

186. *Id.*

187. *State v. Lead Indus. Ass’n*, 951 A.2d 428, 456 (R.I. 2008).

188. *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 731 (Okla. 2021).

of land by the one creating the nuisance.”¹⁸⁹ The court interpreted the Oklahoma public-nuisance statute as a codification of this common law and concluded that the statute pertained only to “defendants (1) committing crimes constituting a nuisance, or (2) causing physical injury to property or participating in an offensive activity that rendered the property uninhabitable.”¹⁹⁰ The court also cited approvingly unpublished opinions from North Dakota and South Dakota rejecting opioids-related public-nuisance claims, on the ground that public-nuisance liability did not historically extend to products.¹⁹¹ A federal district court likewise concluded that public-nuisance liability under West Virginia law does not extend to products but only to interferences with “public property or resources.”¹⁹²

Scholars have similarly argued that public-nuisance liability should stay within some traditional set of bounds that excludes many contemporary public-nuisance actions. A few argue that it pertains only to land.¹⁹³ Others argue that

189. *Id.* at 724 (citations omitted).

190. *Id.* The Oklahoma law provides:

A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:

First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or

Second. Offends decency; or

Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or

Fourth. In any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities.

OKLA. STAT. tit. 50, § 1 (2022). The law adds that a public nuisance “is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal.” *Id.* § 2.

191. See *Hunter*, 499 P.3d at 730–31 (discussing *State ex rel. Stenehjem v. Purdue Pharma, L.P.*, No. 08-2018-CV-01300, 2019 WL 2245743, at *13 (N.D. Dist. Ct. May 10, 2019); and *State ex rel. Ravensborg v. Purdue Pharma, L.P.*, No. 32CIV18-000065, 2021 WL 5636563, at *17–24 (S.D. Cir. Ct. Jan. 13, 2021)). The South Dakota court also concluded that public-nuisance liability does not extend to one who lacks control over the nuisance. *State ex rel. Ravensborg v. Purdue Pharma, L.P.*, No. 32CIV18-000065, 2021 WL 5636563, at *17–24 (S.D. Cir. Ct. Jan. 13, 2021).

192. *City of Huntington v. AmerisourceBergen Drug Corp.*, No. 17-01362, 2022 WL 2399876, at *57 (S.D. W. Va. July 4, 2022).

193. See, e.g., Richard A. Epstein, *The Private Law Connections to Public Nuisance Law: Some Realism About Today’s Intellectual Nominalism*, 17 J.L. ECON. & POL’Y 282, 285 (2022) (“[T]he stable, long-term use of the term nuisance to cover unreasonable interferences with the use and enjoyment of land has been a constant in the discussion.”). Richard A. Epstein filed an amicus

it cannot extend to products.¹⁹⁴ Some argue that, not only did public-nuisance liability not include products, but it *cannot* include products because product-based injuries do not implicate a public right. Instead, they remain exclusively private in nature.¹⁹⁵

Thus, one traditionalist objection is that public-nuisance liability should not extend to products like opioids, because (1) products were not public nuisances at common law and (2) they do not fit the common-law definition of public nuisance. Any comprehensive analysis of this objection will have both descriptive and normative dimensions.

Descriptively, writings such as Sheppard's and Blackstone's give the lie to the common assertion, repeated by the Oklahoma Supreme Court and others, that public nuisance pertained only to the use of the land. Several of Sheppard's and Blackstone's examples are not land-based, including setting off fireworks, being an eavesdropper, and being a common scold.¹⁹⁶

And what are we to make of the fact that, as early as the 1660s, Sheppard included in his list of "common nuisances" "victuallers, butchers, bakers, cooks, brewers, maltsters and apothecaries who sell *products* unfit for human consumption"?¹⁹⁷ Was Sheppard wrong? Is there some fine distinction between the *activity* of selling products and *products* themselves? If so, each of the current public-nuisance cases could be reformulated as targeting activity; indeed, the claims in the opioid cases typically are not about the products themselves but about the defendants' actions in marketing and selling them.¹⁹⁸

brief in the Oklahoma litigation making the same claim. See Amicus Curiae Brief of Competitive Enterprise Institute at 5-6, *Hunter*, 499 P.3d 719 (No. 118,474) ("These public nuisance principles apply to harm to public lands, to obstructions of traffic on land or sea, and to the discharge of pollution into public waters, i.e. waters that are open to all.").

194. See, e.g., Gifford, *supra* note 45, at 835 ("For more than 900 years, the law of public nuisance did not sanction actions against product manufacturers.").

195. See, e.g., *id.* at 817 ("The manufacture and distribution of products rarely, if ever, causes a violation of a public right as that term has been understood in the law of public nuisance."); Czak, *supra* note 118, at 1094-95 (arguing that lead-paint claims should fail because they do not present an infringement on a public right as that term was understood at common law); Merrill, *supra* note 17, at 10 ("A mass tort, such as distributing a defective product to millions of consumers, violates a large number of private rights. But this does not convert such a tort into the violation of a public right.").

196. See *supra* notes 63-68 and accompanying text.

197. Spencer, *supra* note 1, at 60 (emphasis added) (citing SHEPPARD, *supra* note 63, at 16).

198. For example, the Oklahoma case involved allegations that Johnson & Johnson engaged in various types of false and misleading marketing, including minimizing safety risks, taking data out of context, omitting material information, overstating safety and efficacy, and broadening the product indication. See *State v. Purdue Pharma L.P.*, No. CJ-2017-816, 2019 WL 4019929, at *12 (Okla. Dist. Ct. Aug. 26, 2019).

Sheppard's list does not encompass all products. It does, however, include all products sold for human consumption: food, beverages, medicines, and other preparations sold by apothecaries. Here is a seventeenth-century list that, far from supporting the view that public nuisance excluded products, suggests just the opposite *and* affirmatively includes medications – the very type of product at issue in the opioid lawsuits.

Other types of modern-day products – lead paint or firearms, for example – would not find explicit support in Sheppard's list. But by Blackstone's time, his list included “offensive trades and manufactures” and both the “making and *selling* of fireworks and squibs,” as well as “throwing them about in any street.”¹⁹⁹ This suggests that public nuisance could encompass noisome manufacturing processes, sales of dangerous products, and deployment of the same.

In any case, the inclusion of products at all in both Sheppard's and Blackstone's lists flatly contradicts the oft-repeated claim that public nuisance at common law simply did not extend to products. According to Sheppard and Blackstone, it did. Of equal importance, the inclusion of any type of product throws into question the other common traditionalist contention that the sale of products *cannot* constitute a public nuisance because it does not implicate a public right. Examples such as Sheppard's and Blackstone's suggest that a right “common to the public” was more expansive than some current commentators claim. For such commentators, the sale of adulterated products falls squarely under the heading of a private right, addressed historically by warranty and other contract principles (and, in the twentieth century, by tort principles of products liability).²⁰⁰ Sheppard nevertheless counts it as a common right. This does not necessarily mean that it could not also be a private right inhering in a person injured by such a product, but apparently being so did not preclude it from also being considered a public right.

Indeed, Blackstone counts among public nuisances “[a]ll those kinds of nuisances, (such as offensive trades and manufactures) *which when injurious to a private man are actionable*, are, when detrimental to the public, punishable by public

199. 4 WILLIAM BLACKSTONE, COMMENTARIES *167-69 (emphasis added). Blackstone further notes that fireworks had been declared a public nuisance by statute, but this does not give rise to an inference that they could not have been covered at common law. As Spencer notes, Parliament may have legislated about certain items for other reasons, including to avoid the Crown's dispensing power. See *supra* note 67 and accompanying text. In addition, legislation on a particular activity could equally be understood as Parliament's recognition that the activity fit in with the common-law tradition of public nuisance.

200. See, e.g., RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (AM. L. INST. 1965) (addressing the history of products liability).

prosecution, and subject to fine according to the quantity of the misdemeanor.”²⁰¹ This explicitly acknowledges that the same pattern of conduct can constitute an interference with a public and a private right. Surely “the keeping of hogs in any city or market town” was mostly an annoyance to the neighbors, which is to say a private nuisance, but Blackstone says it can also count as a public nuisance.²⁰² Likewise, eavesdroppers and “common scolds” likely harmed or annoyed particular victims, but Blackstone saw them as a general menace.²⁰³

Thus, examples of public nuisance from as early as the seventeenth and eighteenth centuries contradict the traditionalist objections repeated by both scholars and courts. These examples show that the English common-law tradition was much more expansive than objectors suggest. The specific common law of New Jersey and Oklahoma might be another story. But given that many present-day opinions begin with, and claim to be informed by, English common law,²⁰⁴ early evidence of public nuisance having included products is a serious complication for contemporary doctrine.

Although public nuisance might have begun with interference to public waterways and roadways, it expanded well beyond that before American jurisdictions began to import and codify the common law. Both Sheppard and Blackstone include products, and they each classify as infringements on public rights certain activities and products that commentators today would classify as implicating exclusively private rights. Already in the thirteenth century, *Britton* referred to “several other” common nuisances besides “the case of a way being stopped.”²⁰⁵ Courts and commentators have failed to recognize these inclusions.

This question leads us to the normative dimensions of the traditionalist objection. If we ought to honor the traditions of public nuisance, they appear broader than many traditionalists have suggested. This fact raises difficult questions about what it means to honor tradition in this context. Whose traditions, and when? Do we go back to the twelfth century? And why should twenty-first-

201. 4 WILLIAM BLACKSTONE, COMMENTARIES *167 (emphasis added) (spelling modernized).

202. *Id.*

203. *Id.* at *168.

204. See, e.g., *In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007) (“By carefully examining the historical antecedents of public nuisance and by tracing its development through the centuries, clear and consistent parameters that define it as a cognizable theory of tort law become apparent.”); *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 723-24 (Okla. 2021) (stating that “Oklahoma’s nuisance statute codifies the common law” and beginning the analysis of the “origins and history of Oklahoma public nuisance law” with twelfth-century England (capitalization normalized)).

205. Spencer, *supra* note 1, at 58 (citing 1 BRITTON 402-03 (Francis Morgan Nichols trans., Oxford, Clarendon Press 1865)).

century American common law depend upon the state of the doctrine in thirteenth-, seventeenth-, or eighteenth-century English common law? Is it not relevant that American law has evolved independently for centuries? Or that, already fifty years ago, the ALI was so committed to an expansive view of public-nuisance doctrine that it essentially staged a revolt against its longtime Reporter? Why would we ignore indications that, at common law, public nuisance included products and public rights overlapped with private rights? Why would we venerate Blackstone in other areas yet ignore him here?

The challenges of answering these questions suggest that it is not enough to honor tradition for tradition's sake. The tradition is too lengthy and diffuse – and in any case, it is the nature of the common law to evolve, such that properly honoring the “tradition” of the common law might require acknowledging its ability to change over time. Rather than tradition, whether courts ought to freeze public nuisance at a particular moment in time depends on other values we hold. In general, many traditionalist arguments have deeper roots, grounded in larger views about the doctrine or about legal institutions generally. In the case of public nuisance, many traditionalist objections are intertwined with formalist or institutionalist objections. We will next examine each of those in turn.

III. THE FORMALIST CRITIQUE

Arguments that public nuisance should adhere to “tradition” often derive from prior jurisprudential commitments. They do not fetishize the past for its own sake but instead arise from a belief that the law at some time in the past better reflected what law should be and what it should do.²⁰⁶ Such arguments need not always be formalist in character, but in the case of public nuisance they often are.

Formalism has many definitions, but here I refer to an approach to legal analysis that (1) takes legal rules seriously and adopts an internal point of view toward them, and (2) prioritizes principles, consistency, and conceptual coherence, though not necessarily to the exclusion of other values.²⁰⁷ “Formalism” is often

206. See, e.g., Epstein, *supra* note 193, at 313 (“The careful common law definitions [of nuisance] were not just adopted for aesthetic reasons. They represented the first serious and precise efforts to demarcate the line between law and unlawful conduct and next an effort to distribute the enforcement function between public and private parties.”).

207. For various useful definitions of formalism, see, for example, OXFORD HANDBOOK OF THE NEW PRIVATE LAW 92, 252-54, 465-75 (Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith eds., 2021). See generally Paul Miller, *The New Formalism in Private Law*, 66 AM. J. JURIS. 175 (2021) (defining the methodology of “new formalism” as distinct from previous forms of legal formalism). For an example of how formalist approaches

a pejorative, and a good deal of public-nuisance scholarship disregards formalist critiques, whether because of active disinterest or more pressing interest in other matters. Although I will criticize particular arguments, I start from the premise that formalist approaches to tort are worthy of consideration, although not the only worthy approach.

Generally speaking, formalist approaches to public nuisance find fault with the doctrine's relationship to a larger set of tort and public-law principles. They align with the oft-repeated criticisms – that public nuisance is “impenetrable,”²⁰⁸ “amorphous and protean,”²⁰⁹ a “grab bag” or “dust bin,”²¹⁰ a “creature” that, “like the Hydra,” must be “rein[ed] in,”²¹¹ or a “monster that would devour in one gulp the entire law of tort.”²¹²

We have already encountered one formalist view in Prosser's contention that a public nuisance must constitute a crime.²¹³ A related argument is that public nuisance cannot be a tort and should be reconceptualized as a public action – in fact, that it has “gone off the rails” and “the ultimate reason for this is that public nuisance is not, and never was, a tort.”²¹⁴ Still others object not to public nuisance in its entirety but to specific instances of its purported expansion, such as public nuisance for products.²¹⁵ Various formalist approaches thus have important differences, but their ultimate conclusion is generally the same: public-nuisance doctrine must be heavily restricted, typically by returning it to how it supposedly looked at some time in the distant past.

In this Part, I examine formalist objections to public nuisance, those that take issue with it as compared with the overall structure of tort law and those that take issue with its implementation of certain elements of the doctrine of tort law.

often manifest in critiques of public nuisance, see Gifford, *supra* note 45, at 746, which states, “The analysis here does not focus on the respective virtues or vices of public officials My goal is different: to assess whether the ‘new’ public nuisance tort has resulted from a sufficiently principled and intellectually rigorous common law development of torts theory.”

208. KEETON ET AL., *supra* note 30, at 616.

209. Seavey, *supra* note 31, at 984.

210. Awad v. McColgan, 98 N.W.2d 571, 573 (Mich. 1959).

211. Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513, 520 (Mich. Ct. App. 1992).

212. Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915, 921 (8th Cir. 1993) (rejecting the plaintiff's interpretation of public-nuisance doctrine as one that would render the doctrine a “monster that would devour in one gulp” all of tort law); *see also* Epstein, *supra* note 193, at 313 (“[O]nce those common definitional constraints are lost, the modern law of public nuisance becomes a literal bull in the China shop on both questions of liability and damages.”).

213. *See supra* notes 100-104 and accompanying text.

214. *See, e.g.,* Merrill, *supra* note 17, at 5.

215. *See, e.g.,* Gifford, *supra* note 45, at 834 (“To allow states and municipalities to hold manufacturers of mass products liable under a public nuisance theory would be to fundamentally alter the nature of the tort.”).

I also propose how public nuisance might be understood to appeal to or conform with a formalist approach to tort law.

A. Public Nuisance and the Nature of Tort

Some courts and critics argue that public nuisance must be constrained because it fundamentally strains against the nature of tort.²¹⁶ At least one scholar, Thomas W. Merrill, has argued that public nuisance is in fact not a tort but a form of “public action.”²¹⁷ These criticisms suggest that there is something fundamentally different about public nuisance – and that it must not be allowed to “devour” tort.²¹⁸

As always, critiques vary, as do their implications. For example, Prosser held that public nuisance was only a tort when private parties sought damages for special injury,²¹⁹ but he nevertheless said that he was open to general public-nuisance statutes being applied to address new problems, so long as it was done through abatement rather than damages.²²⁰ Thus, even though Prosser supported only abatement as a remedy, he might view the general public-nuisance statutes that exist in virtually every American jurisdiction as plausible bases for addressing new harms.²²¹

216. See, e.g., *infra* notes 224-229 and accompanying text.

217. See, e.g., Merrill, *supra* note 17, at 5 (“As a public action, the closest analogy to public nuisance, both historically and conceptually, is not tort but criminal law.”).

218. *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

219. William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1005 (1966).

220. Antolini, *supra* note 97, at 840 (“Prosser’s comments [during the 1970 ALI annual meeting] drew a sharp distinction between the private tort law world he had worked in and on for so long and the public law world that was emerging as the dominant litigation paradigm. Prosser conceded that his statement of the rule was ‘very narrow,’ but stated that it was limited to cases involving damages – not injunctive relief where a statute or ‘some court-made rule’ permits it. He pointed out that many states have statutes permitting a private citizen to bring an abatement action for certain types of nuisances, but the *Restatement* was not at all concerned about those statutory remedies. Instead, it was concerned with damages actions only, and he offered that ‘there is absolutely nothing in this Restatement to limit or strangle or lock the stable door before the horse gets out [meaning incipient environmental litigation] . . . We are concerned only with tort liability, which means liability for damages.’” (footnote omitted)).

221. See, e.g., Steven T. Catlett, *Enjoining Obscenity as a Public Nuisance and the Prior Restraint Doctrine*, 84 COLUM. L. REV. 1616, 1617 (1984) (“At common law, any activity injurious to the safety, health, or morals of the public constituted a public nuisance and was subject to abatement by judicial injunction. This common law doctrine has been codified in virtually every state . . .”); Brigid W. Massaro, *Navigating the “Impenetrable Jungle”: Statutory Limits on Wisconsin Public Nuisance Actions*, 90 MARQ. L. REV. 95, 100 (2006) (“Most states have enacted

In Merrill's view, by contrast, if public nuisance is a public action, then current practice suffers from a "fatal delegation deficit."²²² In his view, not only must public nuisance be grounded in statute, but broad public-nuisance statutes should be construed "non-dynamically," "as ratifications by the legislature of settled understandings of the scope and authority conferred by public-nuisance doctrine at the time they were enacted."²²³ Similar premises thus might have more or less drastic implications.

legislation covering public nuisances. Such public nuisance statutes are typically very broad and general in nature and have been interpreted to prohibit anything that would have been a public nuisance at common law."). For example, California law provides,

Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

CAL. CIV. CODE § 3479 (West 2022). It goes on to provide, "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." *Id.* § 3480. For another example, see OKLA. STAT. tit. 50, § 1 (2022).

222. Merrill, *supra* note 17, at 43.

223. *Id.* at 51; see also Thomas W. Merrill, *Public Nuisance as Risk Regulation*, 17 J.L. ECON. & POL'Y 347, 369 (2022) ("In previous writing, I have advocated that public nuisance liability should be interpreted in a 'non-dynamic' fashion. Assuming that public nuisance statutes remain on the books in every state, they should be interpreted either as referring to the sorts of activity understood to be a public nuisance at the time they were enacted, or they should be limited to the specific conduct they reference as being a public nuisance.").

Similarly, jurisdictions vary in how they interpret public-nuisance statutes and how they relate them to the common law. Many jurisdictions interpret general public-nuisance statutes broadly.²²⁴ Many conclude that statutory enactments do not eradicate common-law public nuisance,²²⁵ though not all agree.²²⁶ All of this is to say that courts and critics vary widely in how they understand the form of public nuisance and its normative implications. In what follows, I do not seek to synthesize all views; I will instead focus on some of the central features of public nuisance that recur in critiques.²²⁷

1. *Public Nuisance, Common Law, and Criminal Law*

Some critics argue, as Prosser did before the ALI, that public nuisance is “always a crime.”²²⁸ At English common law, a noisome condition could give rise to both criminal prosecution and civil liability to abate the condition as a public nuisance. In England, to this day, public nuisance is still regarded as a common-law crime.²²⁹ Some critics infer from this history that contemporary American public nuisance should only lie against conduct that is already designated as

224. See, e.g., *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 614 (Cal. 1997) (upholding the application of a public-nuisance statute to the conduct of street gangs).

225. See, e.g., 58 AM. JUR. 2D *Nuisances* § 47 (2022) (“Statutes defining nuisances generally do not change the common-law definition of the term. . . . Such statutes do not modify or abrogate the common law of nuisance and do not supersede the common law as to other acts that constitute a public nuisance at common law. Thus, it may be that even though the legislature has codified nuisance law, nuisance theory sounds in general tort principles.” (footnotes omitted)); *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d. 499, 553-54 (Ct. App. 2017) (holding that the absence of a regulation or statute declaring interior residential lead paint to be unlawful does not bar a court from declaring it to be a public nuisance); *City of Chicago v. Festival Theatre Corp.*, 438 N.E.2d 159, 162 (Ill. 1982) (same); *Helmkamp v. Clark Ready Mix Co.*, 214 N.W.2d 126, 129 (Iowa 1974) (same).

226. See, e.g., *Jerry Harmon Motors, Inc. v. Farmers Union Grain Terminal Ass’n*, 337 N.W.2d 427, 432 (N.D. 1983) (holding that common-law public nuisance does not survive the enactment of a statute in North Dakota).

227. Thomas W. Merrill, for example, relies on five characteristics to conclude that public nuisance is not a tort: (1) public nuisance protects public rights, Merrill, *supra* note 17, at 7; (2) it is always a crime, *id.* at 11; (3) it is usually enforced by public officers, *id.* at 12; (4) it is not based on conduct, *id.* at 16; and (5) it is typically not remedied by damages, *id.* at 17.

228. Prosser, *supra* note 219, at 997.

229. See *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency*, *supra* note 68, ¶ 1.3; Merrill, *supra* note 17, at 11 n.43 (citing Spencer, *supra* note 1, at 80).

criminal. Merrill further argues that this criminal focus transforms public nuisance into a public action rather than a tort.²³⁰

But this approach discounts certain aspects of both public nuisance's long-standing history and its evolution over time. In examining English common law, J.R. Spencer notes that the leet courts – the local criminal-law courts that originally dealt with nuisance – addressed not only minor crimes but also legislative functions and what we would now view as administrative regulation.²³¹ Judicial, legislative, and executive functions were combined in a single body, and it is not clear that our contemporary conceptions map well onto historical practice. Later, as we have seen, attorneys general allowed private relators to bring civil public-nuisance actions, and eventually the criminal side of public nuisance virtually disappeared.²³²

In addition, public nuisances might originally have been crimes, but criminal law in England was itself a matter of common law (and remains so today). The definition of public nuisance thus evolved over time – it was never “non-dynamic.”²³³ The classic cases were at one time novel, and common-law evolution explained the development of public nuisance centuries ago as much as it does today. Thus, to say that public nuisance must be criminal today is to take a particular historical view of public nuisance – but to go on to say that it must therefore be defined by statute is to take an ahistorical view of the criminal law, disregarding the common-law flexibility it used to possess.

230. Merrill, *supra* note 17, at 29 (“[I]t is the legislature that should [prescribe the elements of public-nuisance liability], not the courts acting in a common law capacity – or the American Law Institute. . . . Courts should decline to exercise any authority, derived from the common law without more, to declare rights common to the general public or to determine who shall enforce them.”).

231. Spencer, *supra* note 1, at 60 (“The leet also dealt with pollution from noxious trades: for example, washing hemp or flax in streams or ponds used for watering cattle. It also fined those who let animals wander suffering from the scab, and victuallers who sold unwholesome food; fine purveyors who sold short measure or broke the assize of bread and ale; punished those who caught immature fish or hunted out of season; and put down bawdy-houses, disorderly ale-houses, night-walkers, eavesdroppers and common scolds. Its criminal jurisdiction shaded into administrative duties; thus it was also supposed to make sure the locals practised archery, destroyed crows’ nests and maintained the parish stocks. Finally it had legislative functions as well: it could enact bye-laws for the hundred, which it enforced by fining those who broke them.”).

232. See *supra* notes 54, 67-70 and accompanying text. In the United Kingdom today, although activities that can be abated as public nuisances must count as crimes, there is no requirement that they be prosecuted as such. See *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency*, *supra* note 68, ¶ 2.17. Functionally, public-nuisance law and criminal law therefore operate separately.

233. See *supra* note 214 and accompanying text (quoting Merrill, *supra* note 17, at 51).

Reading this history today, we need not conclude that public nuisance must become a creature of criminal statute. One could as easily go in other directions. For example, England today maintains public nuisance as a common-law crime.²³⁴ Meanwhile, American states have generally rejected common-law crimes but have also divorced public nuisance from its criminal-law antecedents, maintaining both its historic flexibility and the civil-action component that has long been more frequently in use.²³⁵ And although American courts could exercise common-law authority over public nuisance, they generally adjudicate it not as a matter of pure common law but under a broad statutory delegation. This seems a reasonable way to explain the evolution of both the criminal law and public-nuisance doctrine over centuries of American development.

2. *Public Nuisance, Torts, and Remedies*

Formalists also contend that public-nuisance claims differ from other tort claims because they are not typically remedied by damages but by abatement.²³⁶ Yet, other torts can involve remedies other than damages. Some, like trespass and private nuisance, are historically subject to injunction.²³⁷ Their remedies do not make these actions non-torts.²³⁸ Why would it do so in the case of public nuisance? And it is black-letter law that public nuisance includes a damages remedy because private plaintiffs suffering special injury may sue for damages.²³⁹ It was this feature of public nuisance that convinced Prosser that public nuisance was an appropriate topic for the Second Restatement.²⁴⁰ The special-injury rule suggests that public nuisance has long functioned in tort fashion, providing

234. *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency*, *supra* note 68, ¶ 1.3.

235. See 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 2.1(c) (3d ed. 2022) (“[A] great many states have enacted comprehensive new criminal codes, and in the process they have usually but not always abolished common law crimes.” (footnotes omitted)). On the historic flexibility of public nuisance, see *supra* Section I.A.

236. See, e.g., Merrill, *supra* note 17, at 11, 17-18.

237. See, e.g., RESTATEMENT (SECOND) OF TORTS § 937 cmt. a (AM. L. INST. 1979) (noting that equitable injunctions historically extended to both personal and property interests).

238. Indeed, the Second Restatement includes a section on injunction as a tort remedy. See *id.* § 936 (setting out factors for the “appropriateness of the remedy of injunction against a tort”).

239. *Id.* § 821C (“In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.”).

240. Prosser, *supra* note 219, at 997 (“A public or ‘common’ nuisance is always a crime. It may also be a tort, provided that the plaintiff can plead and prove that he has suffered some ‘special’ or ‘particular’ damage.”).

damages for private individuals. This might not have been its only function, but it has at least one foot in tort.²⁴¹

Some might say that this is irrelevant to the core of public nuisance, which is made up of enforcement actions by public officials that did not involve damages remedies.²⁴² Yet, in the United States in the nineteenth and twentieth centuries, courts relied on the special-injury rule to allow governmental entities to recover damages for public nuisance. The common situation was a private actor whose activities flooded or otherwise blocked a roadway; in such cases, towns brought civil claims not just for abatement but also for damages for the costs associated with remedying the public nuisance.²⁴³ One such case, authored by Justice Holmes for the Massachusetts Supreme Judicial Court, involved a dam rebuilt by defendants, which regularly flooded a public way.²⁴⁴ Holmes observed that “[t]he town complains of a public nuisance by reason of which it has suffered a peculiar and special damage,” and the court upheld a jury award for the plaintiff-town.²⁴⁵ In these cases, courts recognize that governmental entities may suffer “peculiar and special damage” by a public nuisance, and they may be entitled to damages just like any other plaintiff suffering such an injury.²⁴⁶ This

241. Merrill thinks the special-injury rule rests on a misreading of an English decision from 1535. Merrill, *supra* note 17, at 13-16. He posits that the best understanding of what has come to be known as the special-injury rule is not a special rule that a private plaintiff can bring a public-nuisance claim; rather, it is an observation of the commonplace idea that private plaintiffs may have another tort claim – say, in negligence – for injuries they suffered from a course of conduct that also gives rise to a public action in public nuisance. *Id.* at 14-15. Merrill’s reading of the history is an intriguing one, though the fact remains that the 1535 case has been interpreted otherwise, and the special-injury rule is long-established black-letter law. See, e.g., Spencer, *supra* note 1, at 73-74.

242. See Prosser, *supra* note 219, at 997 (distinguishing the tort of public nuisance, which requires special injury to a specific plaintiff, from the crime of public nuisance); see also Merrill, *supra* note 17, at 12 (stating that public nuisance should be viewed as a public action because it is usually enforced by public officers).

243. See, e.g., *Inhabitants of Calais v. Dyer*, 7 Me. 155, 157 (1830) (concluding that a statute for landowners was not the appropriate avenue for a town to recover damages from flooding, but a town obligated to maintain a public road being regularly flooded by a private defendant could bring a tort action to obtain compensation of their costs); *Inhabitants of Charlotte v. Pembroke Iron-Works*, 19 A. 902, 904 (Me. 1890) (affirming jury award of damages to plaintiff-town); *Inhabitants of New Salem v. Eagle Mill Co.*, 138 Mass. 8, 8 (1884) (same).

244. *Inhabitants of New Salem*, 138 Mass. at 10.

245. *Id.*

246. See, e.g., *Inhabitants of Calais*, 7 Me. at 157 (“But is the town of Calais without remedy? They have certainly been injured; and though the easement [i.e., the public road] belongs to the public, it is the duty of the town to preserve and continue it. The town, therefore, seems entitled to damages by way of reimbursement. And why may they not recover such damages in a special action on the case?”).

seems analogous to contemporary courts allowing governmental entities to pursue damages for the extensive funds that they have spent on treating and seeking to remediate harms such as opioid addiction and tobacco-related illnesses.²⁴⁷

Thus, public nuisance does not look so different from some other parts of tort. Other torts utilize injunctive relief and public nuisance has utilized damages since the sixteenth century. Indeed, earlier American courts saw no issue in granting damages to towns that bore special costs from having to remedy a public nuisance.

3. *Public Enforcement and Public Rights*

Another aspect of public nuisance that troubles courts and critics is that it involves public officials vindicating so-called public rights. Courts have struggled with what this means, and suspicion that public rights are a constricted category has led to conclusions that public nuisance must be, too.²⁴⁸ In addition, “public rights” seem impliedly to contrast with private rights. And if tort is the province of private wrongs, then public nuisance sits uneasily within it.

At least one court has concluded that a “public right” is “the right to a public good, such as an indivisible resource shared by the public at large, like air, water, or public rights of way.”²⁴⁹ Similarly, Merrill argues that an invasion of a public right amounts to

borrowing an economic concept, a “public bad.” That is to say, the condition produces undesirable effects that are nonexcludable and nonrivalrous. The undesirable effect, given existing technology, cannot be limited

²⁴⁷ Cf. *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 116 (Mo. 2007) (construing the city’s position on lead paint as that of a special-injury claimant, but rejecting liability on causation grounds). One might regard a special-injury paradigm as running afoul of the free public-services doctrine, which prohibits a governmental entity from recovering the costs of addressing a tort from the wrongdoer; however, Timothy D. Lytton has observed that the doctrine exempts nuisance actions. Timothy D. Lytton, *Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors?: Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine*, 76 TUL. L. REV. 727, 741 (2002) (“[F]ederal common law, considered by some courts as a source for the doctrine, has produced two exceptions to the doctrine allowing recovery where government services are necessary to abate a nuisance or to protect public property.”). Lytton identifies a Massachusetts public-nuisance case rejecting the applicability of the doctrine. *Id.* at 742 (discussing *City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at *1 (Mass. Super. Ct. July 13, 2000)).

²⁴⁸ See, e.g., Gifford, *supra* note 45, at 817 (arguing that products generally do not implicate public rights); Czak, *supra* note 118, at 1094-95 (same); Merrill, *supra* note 17, at 10 (same).

²⁴⁹ *State v. Lead Indus. Ass’n*, 951 A.2d 428, 448 (R.I. 2008) (internal quotation marks omitted).

to particular members of the community or particular parcels of property—it is nonexcludable. And the undesirable effect does not dissipate as it spreads—it is nonrivalrous.²⁵⁰

There is a certain elegance in a definition that relates public rights to public goods. Likewise, it would be satisfying to distinguish cleanly between public and private rights. And yet, what are the chances that a medieval cause of action would map neatly onto a twentieth-century economic concept? Or that a long-standing, highly varied cause of action would coincide perfectly with our own understandings of a public/private distinction?

Instead, it seems more accurate to interpret the concept of “public rights” more loosely. Recall that “public right” is not a term of art designed to contrast with “private” rights. “Public rights” are also termed “common rights.” And although the early definitions of common rights certainly emphasize their community-oriented nature, they do not suggest that they must be wholly separate from private rights or that they are confined to public goods in any way. Bracton, for example, asserted that “there may be a wrongful nuisance because of the common and public welfare.”²⁵¹ Blackstone defined “common nuisances” as “offenses against the public order and economical regimen of the state.”²⁵² These definitions do not imply that impositions on the common welfare must implicate public goods or be wholly different from private nuisances. To the contrary, Blackstone explicitly states that the category includes “[a]ll those kinds of nuisances, (such as offensive trades and manufactures) *which, when injurious to a private man are actionable.*”²⁵³ In other words, an action that would constitute a private tort is a public nuisance when it threatens common interests. Sheppard, too, includes in his list of public nuisances activities that seem to implicate what we would think of as “private” rights, such as the marketing of adulterated food, drink, and drugs.²⁵⁴

Blackstone and Sheppard thus suggest that the category “public rights” may encompass both rights that are inherently “common” (such as public rights of way)²⁵⁵ and more individualized rights when threatened in the aggregate. Gossips will only slander particular people; lonely cottages that harbor thieves and vagabonds will only result in injury to certain victims; and adulterated products

250. Merrill, *supra* note 17, at 8.

251. 3 BRACTON, *supra* note 38, at 191.

252. 4 WILLIAM BLACKSTONE, COMMENTARIES *167 (spelling modernized).

253. *Id.* at *167–69 (emphasis added).

254. Spencer, *supra* note 1, at 60 (citing SHEPPARD, *supra* note 63).

255. 4 WILLIAM BLACKSTONE, COMMENTARIES *167 (counting as “common” nuisances “[a]nnoyances in highways, bridges, and public rivers, by rendering the same inconvenient or dangerous to pass” (emphases omitted)).

will only injure certain consumers. Yet these activities pose risks toward a larger group than those ultimately injured. This imposition of the risk of injury on a larger group is sufficient to make the injuries common, or public, nuisances implicating common, or public, rights.

This broader definition has carried over into American statutory definitions of public nuisance. Thus, for example, California uses the same definition for public and private nuisance and specifies that a public nuisance is “one which affects at the same time an entire community or neighborhood, *or any considerable number of persons*, although the extent of the annoyance or damage inflicted upon individuals *may be unequal*.”²⁵⁶ This definition expressly contemplates that the nature of a public nuisance may be identical to that of a private nuisance; that it may become “public” by affecting a large number of persons; and that the impact on individuals need not be equal (which further confirms that the nuisance need not interfere with an equally shared public good).

Moreover, early American case law also recognizes this broader definition of public nuisance. In *Wesson v. Washburn Iron Co.*, the Massachusetts Supreme Judicial Court noted that the category of public nuisance included instances where “a public right or privilege common to every person in the community is interrupted or interfered with,” such as the blockage of a public way.²⁵⁷ But the court went on to say that there was another category of “common nuisance”:

But there is another class of cases in which the essence of the wrong consists in an invasion of private right, and in which the public offence is committed, not merely by doing an act which causes injury, annoyance and discomfort to one or several persons who may come within the sphere of its operation or influence, but by doing it in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may be properly the subject of a public prosecution.²⁵⁸

The court concludes that, in such a situation, the individuals actually injured may bring claims for damages and that the “wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance.”²⁵⁹

²⁵⁶. CAL. CIV. CODE § 3480 (West 2022) (emphases added).

²⁵⁷. 95 Mass. (13 Allen) 95, 102 (1866).

²⁵⁸. *Id.*

²⁵⁹. *Id.* at 103; *see also* *Sullivan v. Am. Mfg. Co. of Mass.*, 33 F.2d 690, 692 (4th Cir. 1929) (citing *Wesson* for the same rule).

It thus seems possible that, in the quest to define “public rights,” our contemporary formalist tendencies have gone too far. This term was never meant to map neatly onto economic concepts of public goods or to cleave cleanly from private rights. Both early and later writings state clearly that a public nuisance includes both infringements of inherently common rights *and* large-scale threats to individual rights in health, safety, and welfare. With the arrival of mass production, our society may include many more risks of that kind. But early courts perceived the possibility in their own society of what were essentially mass torts, and they viewed activities creating such risks as public nuisances. As with demands that public nuisance be entirely statutory, here, again, we may be seeking to impose modern concepts onto legal forms that look different from what we expect.

4. *Public Nuisance and Torts as “Relational” Wrongs*

A related concern about public nuisance is that the vindication of “public rights” puts it at odds with the sphere of tort law, which concerns redress of relational wrongs. The idea of tort law as relational appears in corrective-justice and civil-recourse conceptions that view tort as fundamentally about redressing wrongs.²⁶⁰ To be clear, not every conception of tort starts from such premises: deterrence-based views of tort, for example, focus on the prospective deterrent effect of tort rules rather than on the retrospective examination of the potential wrong visited by one party on another.²⁶¹ For those who view tort law as relational, however, the fact that public nuisance vindicates “public rights” might suggest that it is essentially regulatory in nature and does not address the duty relationships between parties that are the hallmark of tort.

The features of public nuisance already foregrounded in this Section might help to dispel these concerns. First, we have seen that courts and commentators

260. The literature on torts as wrongs is too voluminous to survey. For examples, see JULES L. COLEMAN, *RISKS AND WRONGS* 197-98 (1992); ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 64 (1999); JOHN GARDNER, *TORTS AND OTHER WRONGS* (2019); JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* 25-30 (2020); Ernest J. Weinrib, *Causation and Wrongdoing*, 63 *CHI.-KENT L. REV.* 407, 410-11 (1987); Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 *J. LEGAL STUD.* 421, 422-23 (1982); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *IOWA L. REV.* 449, 453 (1992); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 *TEX. L. REV.* 917, 918-19 (2010); and Anthony J. Sebok, *What Is Wrong About Wrongdoing?*, 39 *FLA. ST. U. L. REV.* 209, 209, 217-21 (2011).

261. For an excellent recent description of the different views, see generally Catherine M. Sharkey, *Modern Tort Law: Preventing Harms, Not Recognizing Wrongs*, 134 *HARV. L. REV.* 1423 (2021), which reviews GOLDBERG & ZIPURSKY, *supra* note 260, and contrasts their civil-recourse perspective with a deterrence perspective.

have long recognized that public nuisances include large-scale threats to individual interests.²⁶² In other words, the same activity that constitutes a private tort can constitute a public nuisance. This aligns public nuisance with relational views of tort by suggesting that it is in part a vehicle for preventing and redressing violations of relational duties toward individual community members.

Second, we have seen that earlier courts viewed towns as capable of suffering special injury at the hands of a public nuisance.²⁶³ This view recognizes that public nuisances can impose unique costs on the municipal and state entities that must remediate them. Commentators have observed that a large part of what public plaintiffs are trying to do in contemporary cases is to seek redress for exactly such injuries.²⁶⁴ This makes them no different from the run-of-the-mill tort plaintiff.

In the opioids context, David A. Dana has argued that “[p]roduct liability claims . . . are focused on the harms specifically borne by discrete individuals, such as individual loss of earning power, medical expenses, and pain and suffering.”²⁶⁵ By contrast, public-nuisance claims focus on the distinct “harms to the public—such as overstrapped, underresourced hospitals and addiction-treatment facilities, as well as the destabilization of whole neighborhoods.”²⁶⁶ As Dana’s list suggests, those harms can include funds paid to address opioid-related addiction (just like the funds paid to address flooded roads in earlier centuries), as well as more intangible harms to the community. Opioids can affect entire communities with waves of addiction, abuse, trafficking, crime, unemployment, family issues, and more.²⁶⁷ A county-level survey commissioned by Purdue (in an attempt to change venues in a Kentucky suit) revealed that “[n]ine out of 10 [people surveyed] agreed that OxyContin had a ‘devastating effect’ on

²⁶². See *supra* Section III.A.3.

²⁶³. See *supra* Section III.A.2.

²⁶⁴. See Matthew J. Sanders, *How and Why State and Local Governments Are Suing the Fossil-Fuel Industry for the Costs of Adapting to Climate Change*, A.B.A. (May 7, 2020), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2019-2020/may-june-2020/how-and-why-state [<https://perma.cc/ZD3D-6CWQ>] (“But tort cases, on the one hand, and legislation and regulation on the other, serve different functions; the former address past wrongful behavior and seek relief for particular injured parties, while the latter set broadly applicable, forward-looking policies. Thus, local governments are not using their lawsuits to tackle climate change; they’re instead trying to recoup some of the staggering losses that result from it.”). For an examination of the somewhat haphazard appearance of the special-injury rule in modern cases, see Sharkey, *supra* note 52.

²⁶⁵. Dana, *supra* note 117, at 100.

²⁶⁶. *Id.*

²⁶⁷. Cf. RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (AM. L. INST. 1979) (listing common-law public nuisances similarly interfering with public health, safety, and morals).

the community.”²⁶⁸ “Illegal drug deals went down in hospital parking lots and school zones,” and “[c]oal miners snorted painkillers on the job.”²⁶⁹ Commenting on the suit, the Kentucky Attorney General said, “We have lost an entire generation. Half the pharmacies in Pike County have bulletproof glass. We had FedEx trucks being knocked off. It was the Wild West.”²⁷⁰

Third, the states and municipalities bringing public-nuisance claims are not impersonal entities; they represent their citizens. The eighteenth- and nineteenth-century special-injury cases emphasized that the harm was to the citizens of the town: the cases were often in the name of the “inhabitants of” a particular town as plaintiffs, and the decisions state that the towns operate roads for the public.²⁷¹ This rendering highlights that the interests at issue, whether common or aggregate, inhere in people. A noisome defendant violates the duty he owes to other citizens. Thus, Anthony Sebok has argued, “I would not want to banish public nuisance from tort law” because public nuisance “has the same basic private law character as other rights in tort: it is a private relational right running between persons. Unlike other tort rights, a right common to the public is ‘common’ in that it runs from every member of society to every other member of society.”²⁷² On this view, “[t]o the extent that public nuisance deals with relational rights held by persons (and not the state), it would seem to be consistent with tort law.”²⁷³

Undoubtedly, public nuisance is a strange creature by modern standards. It began as a low-level common-law criminal offense with a regulatory flavor but for centuries has functioned as a civil action for public officials and private persons. It has long afforded injunctive relief, as well as damages for those suffering special injury. American courts long ago permitted public plaintiffs to seek damages for special injury,²⁷⁴ and for decades, modern courts have authorized damages for public plaintiffs generally.²⁷⁵

268. David Armstrong, *Kentucky OxyContin Case Against Purdue Pharma Leads Fight over Opioid Abuse*, INS. J. (Oct. 22, 2014), <https://www.insurancejournal.com/news/national/2014/10/22/344370.htm> [<https://perma.cc/M5BQ-S3K8>].

269. *Id.*

270. *Id.*

271. See, e.g., *Inhabitants of Charlotte v. Pembroke Iron-Works*, 19 A. 902, 903 (Me. 1890).

272. Anthony Sebok, *Law’s Duct Tape? Using Public Nuisance to Fix the Holes in Administrative Law*, JOTWELL (Jan. 3, 2022), <https://torts.jotwell.com/laws-duct-tape-using-public-nuisance-to-fix-the-holes-in-administrative-law> [<https://perma.cc/WLR4-FR3F>] (reviewing Dana, *supra* note 117).

273. *Id.*

274. See *supra* Section III.A.2.

275. See, e.g., *State ex rel. Dresser Indus., Inc. v. Ruddy*, 592 S.W.2d 789, 793 (Mo. 1980).

Our modern-day categories do not easily account for the variety of the past, and public nuisance underscores this as few actions do. Its defiance of easy categorization is a source of anxiety, but there are many ways to resolve this. We can choose to ignore aspects of its history in the service of formalism, to embrace the messy entirety of past practice at the expense of formalism, to preserve one moment in the past at the expense of present doctrine, or to attempt to incorporate the past and present—that is, the evolution of public nuisance—into our conceptions of tort and public law. In thinking about recasting public rights as relational and accepting the long history of public nuisance as a matter of common-law tort, I propose the last of these alternatives. This is not to reject a formalist paradigm, but to try to account for public nuisance’s features within one.

B. *Public Nuisance and Tort Doctrine*

Other formalist objections to public nuisance focus less on the structure of public and private law and more on the particulars of tort doctrine. These objections argue that public nuisance is missing certain crucial features of tort doctrine and thereby threatens to undermine the existing contours of tort liability. These claims include that public nuisance, unlike tort, addresses conditions rather than conduct and that it imposes strict liability regardless of fault.

1. *Conduct, Conditions, and Tortiousness*

Courts and commentators have observed that public nuisance focuses on a condition rather than on conduct—that is, on whether a particular condition interferes with a public right, not on whether someone *acted* unreasonably (or worse) in bringing it about.²⁷⁶ The implication is that public nuisance is “essentially a form of strict liability based on the maintenance of a condition deemed to be inimical to the public interest.”²⁷⁷ This puts it at odds with any conception that requires torts to be wrongs.²⁷⁸ It also creates asymmetries that bother courts and commentators: an actor who does not act negligently, or makes or distributes a nondefective product, could still hypothetically face public-nuisance liability.

Relevant to these concerns is the fact that, although public nuisance does hypothetically reach “reasonable” conduct that imposes “unreasonable” conditions, in reality it gains a great deal of its shape from other tort doctrines. The

²⁷⁶ Merrill, *supra* note 17, at 16-17.

²⁷⁷ *Id.* at 22.

²⁷⁸ For examples, see *supra* note 260.

Second Restatement, for instance, takes the view that an unreasonable interference requires either (1) activity that is intentional and unreasonable, or (2) activity that is unintentional but otherwise tortious under existing tort standards of negligence, recklessness, or strict liability (e.g., for abnormally dangerous activities).²⁷⁹ The second category explicitly ties public-nuisance liability to other tort standards,²⁸⁰ and many courts have implemented that view.²⁸¹

Meanwhile, “intentional” in the first category has its usual tort meaning of having as a purpose *or* knowing that a consequence is substantially certain to result.²⁸² Defendants are thus open to liability if they intended to or knew they were substantially certain to cause a deleterious consequence that amounted to an invasion.²⁸³ This would mean that defendants could be liable if they were aware of substantially certain consequences (e.g., damage to public health and safety) that were objectively unreasonable.²⁸⁴ Furthermore, the Second Restatement says that when an actor at first unintentionally invades a public right, but

279. RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (AM. L. INST. 1979). In addition, a statute may declare particular behavior to be a public nuisance, “even though [the] interference with the public right was purely accidental and unintentional.” *Id.* It is not clear how many statutes create specific strict-liability public nuisances, let alone how often they are enforced in true strict-liability situations, but to the extent they exist and are enforced, they at least have the virtue of statutory enactment and fair notice and thus appear to meet Merrill’s nondelegation criteria. *See supra* Section III.A.

280. RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (AM. L. INST. 1979) (stating that existing tort standards “all embody to some degree the concept of unreasonableness”).

281. *See, e.g.,* Iletto v. Glock, Inc., 194 F. Supp. 2d 1040, 1058 (C.D. Cal. 2002) (holding that the sale of a product that is not independently tortious cannot constitute a public nuisance); James v. Arms Tech., Inc., 820 A.2d 27, 51 (N.J. Super. Ct. App. Div. 2003) (rejecting a motion to dismiss a public-nuisance claim when a negligence claim was allowed to move forward, reasoning that if the behavior of the defendant was found to be negligent, it could also be a public nuisance, but without such negligence there would be no public nuisance because a public nuisance requires some tortious conduct); White v. Smith & Wesson, 97 F. Supp. 2d 816, 829 (N.D. Ohio 2000) (asserting that “[p]laintiffs’ nuisance claims will likely rise or fall with their negligence claims”); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1143 (Ohio 2002) (reinstating a public-nuisance claim where plaintiffs also alleged an “underlying tort”).

282. RESTATEMENT (SECOND) OF TORTS § 825 (AM. L. INST. 1979); *cf.* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 1 (AM. L. INST. 2010) (offering the same definition of intentional action); RESTATEMENT OF TORTS § 825 (AM. L. INST. 1939) (same).

283. RESTATEMENT (SECOND) OF TORTS § 825 (AM. L. INST. 1979); *cf.* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 1 (AM. L. INST. 2010) (offering the same definition of intentional action); RESTATEMENT OF TORTS § 825 (AM. L. INST. 1939) (same).

284. *See, e.g.,* City of New York v. A-1 Jewelry & Pawn, Inc., 247 F.R.D. 296, 344 (E.D.N.Y. 2007) (“The intentionality requirement in the context of a suit against the gun industry requires that a firearms manufacturer, importer or distributor knows or is substantially certain that its marketing practices have a significant impact on the likelihood that a gun will be diverted into the illegal market and used in crime, and that substantial harm to the public will result.” (quoting NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 488 (E.D.N.Y. 2003))).

later becomes aware of the harm and continues the same conduct, then “further invasions are intentional.”²⁸⁵

This explains why information about a defendant’s awareness of risks can be central to public-nuisance litigation. This is one way in which the revelations of tobacco companies’ level of knowledge of the risks of their products helped to bring about the Master Settlement Agreement of the 1990s.²⁸⁶ It also helps to explain the significance of internal memos and emails suggesting that the Sackler family was aware of and sought to downplay opioids’ addiction risks.²⁸⁷ In such cases, defendants are not being held strictly liable. They are being tested against state-law standards where their standards of conduct are quite relevant—and appear quite lacking.

Many courts taking a different approach have been *more* demanding. For instance, courts in firearms litigation have eschewed liability for firearms manufacturers that would have been based on their awareness of a substantial risk that a court deemed unreasonable. This standard could lead to liability against firearms manufacturers, so courts have instead adopted tighter definitions of what constitutes a public nuisance. For example, the Supreme Court of Illinois held that, in the case of “highly regulated” activities such as firearms, public-nuisance liability would only lie if “(1) the defendant violated the applicable statutes or regulations, (2) the defendant was otherwise negligent in carrying out the enterprise, or (3) the law regulating the defendant’s enterprise is invalid.”²⁸⁸

285. RESTATEMENT (SECOND) OF TORTS § 825 cmt. d (AM. L. INST. 1979).

286. See, e.g., Chuck Salter, *Jeffrey Wigand: The Whistle-Blower*, FAST CO. (Apr. 30, 2002), <https://www.fastcompany.com/65027/jeffrey-wigand-whistle-blower> [<https://perma.cc/2EAH-TX3X>] (“[T]obacco executive [Jeffrey Wigand] made front-page news when he revealed that his former employer knew exactly how addictive and lethal cigarettes were. He delivered a damning deposition in a Mississippi courtroom that eventually led to the tobacco industry’s \$246 billion litigation settlement.”).

287. See, e.g., Casey Ross, *Purdue’s Richard Sackler Proposed Plan to Play Down OxyContin Risks, and Wanted Drug Maker Feared ‘Like a Tiger,’ Files Show*, STATNEWS (Dec. 2, 2019), <https://www.statnews.com/2019/12/02/purdue-richard-sackler-proposed-plan-play-down-oxycontin-risks> [<https://perma.cc/A2QL-VEEG>] (discussing emails from the Sackler family revealed in Kentucky court records); Morales, *supra* note 167 (detailing emails revealed in a Connecticut litigation); Barry Meier, *Sackler Scion’s Email Reveals Push for High-Dose OxyContin, New LawsUIT Disclosures Claim*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/2019/01/31/health/opioids-purdue-pharma-sackler.html> [<https://perma.cc/G7T5-9W9F>] (detailing Sackler emails revealed in a Massachusetts litigation).

288. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1124 (Ill. 2004); see also *District of Columbia v. Beretta U.S.A. Corp.*, No. 0428-00, 2002 WL 31811717, at *30 (D.C. Super. Ct. Dec. 16, 2002) (holding that an action for public nuisance could not arise from behavior that did not violate any criminal or civil law or regulation); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 199 (App. Div. 2003) (refusing to impose liability where firearms

Thus, the Second Restatement, and many states, require either (1) that a defendant be aware of an unreasonable risk or (2) otherwise have acted tortiously. Some other courts go further and require either negligence or violation of an applicable statute. Under the law of many states, then, defendants' conduct is in fact a primary focus of public-nuisance liability, and only wrongful conduct warrants liability.

Strict liability's role is further diminished by the fact that, frankly, as to the products most frequently targeted by litigation, defendants' conduct has often met the bar for negligence or more. It has often come to light that manufacturers had a good idea of the risk that their products posed and went to great lengths to conceal it from regulators, intermediaries, the public, or all of the above.²⁸⁹ In this respect, too, strict liability does not play a large role in application.

2. *Public Nuisance and Strict Liability*

Nevertheless, the possibility of strict liability remains, and not only hypothetically. Rhode Island, for example, has consistently held that "plaintiffs may recover in nuisance despite the otherwise nontortious nature of the conduct which creates the injury."²⁹⁰ In New York, too, "allegations of fault have generally been found to be irrelevant under New York law."²⁹¹ On this view, behavior that is otherwise noncriminal and nontortious can lead to liability: the focus is on the noisome condition, not on the actions or intentions of the defendant.²⁹²

Does this mean public nuisance must be rejected by those who view torts as wrongs? It might help to contextualize public nuisance still further within tort. Of course, torts and wrongs are closely related: the word "tort" means

were "wholly lawful," "heavily regulated," and "non-defective"); *City of Gary ex rel. King v. Smith & Wesson, Corp.*, No. 45D05-005-CT-243, 2001 WL 333111, at *4 (Ind. Super. Ct. Jan. 11, 2001) (rejecting a public-nuisance claim where handgun manufacturers' conduct did not otherwise violate state law).

289. See, e.g., *Engstrom & Rabin*, *supra* note 4 (discussing an extensive history of concealment by tobacco and opioid companies of the risks of their products); *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 530 (Cal. Ct. App. 2017) (recounting evidence that the risks of lead paint were "well known in the paint manufacturing industry" by 1914).

290. *Wood v. Picillo*, 443 A.2d 1244, 1247 (R.I. 1982).

291. *City of New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 343 (E.D.N.Y. 2007); see also Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359, 373 (1990) ("New York courts have historically required no finding of negligence, intentional conduct, or an ultrahazardous activity in assigning liability for a public nuisance – the decisions carry with them the assumption that liability is strict."), cited in *A-1 Jewelry*, 247 F.R.D. at 343.

292. See *A-1 Jewelry*, 247 F.R.D. at 343; see also *Wagner v. Regency Inn Corp.*, 463 N.W.2d 450, 453 (Mich. Ct. App. 1990) (holding that public-nuisance liability does not depend on independent tortiousness).

“wrong.”²⁹³ But strict-liability public nuisance is a potential problem only for those who think tort is *exclusively* the province of wrongful conduct (or, if you believe that not all wrongful conduct is culpable, then possibly even only those who think tort is the province of culpable conduct). If you think that tort can survive with some pockets of strict liability, then the possibility that some jurisdictions might treat public nuisance as one should not bother you overly much.

If, on the other hand, you think that tort is exclusively the province of wrongs, such as negligent action and intentional torts, then you have a larger problem of which public nuisance is only a part. Private nuisance presents identical questions about how to define unreasonable interferences. Notably, private nuisance is often treated as a form of strict liability, unconcerned with the negligence of the actor and interested only in the unreasonableness of the action.²⁹⁴ To the extent that private-nuisance cases do examine the defendant’s state of mind, it is common for defendants to be held liable for intentional interference when they know their conduct is substantially certain to invade another’s use and enjoyment of their land.²⁹⁵ This is not so different from actors liable for knowing their products or activities were substantially certain to pose risks to public health or welfare.

Nor is private nuisance the only example. Strict liability has long existed for certain uses of land and for so-called abnormally dangerous activities.²⁹⁶ So has strict liability for defamation.²⁹⁷ In the twentieth century, tort evolved to contain still more variety, including strict liability for certain types of invasions of privacy and for manufacturing defects.²⁹⁸ There are even “pocket[s] of strict liability” in

293. See, e.g., *Tort*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/203665> [<https://perma.cc/X8C5-VG9E>]; *Tort*, BLACK’S LAW DICTIONARY (11th ed. 2019); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 463 (1897) (referring to the “law of civil liability for wrongs[] – what we lawyers call the law of torts”).

294. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 FORDHAM L. REV. 743, 752 (2016) (“[N]uisance liability is in some sense strict.”).

295. See RESTATEMENT OF TORTS § 825 (AM. L. INST. 1939) (“An invasion of another’s interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct.”); see, e.g., *Watts v. Pama Mfg. Co.*, 124 S.E.2d 809, 813 (N.C. 1962) (holding that a private nuisance may lie where a defendant “knows” that the invasion of another’s use or enjoyment of his land “is substantially certain to result from his conduct”); *Copart Indus., Inc. v. Consol. Edison Co.*, 362 N.E.2d 968, 973 (N.Y. 1977) (same); *Hall v. Phillips*, 436 N.W.2d 139, 142 (Neb. 1989) (same).

296. See, e.g., RESTATEMENT OF TORTS §§ 504–524 (AM. L. INST. 1938).

297. E.g., *id.* §§ 579–581.

298. E.g., *id.* § 867; RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965).

“negligence” law, including respondeat superior and instances where a defendant (or, sometimes, any defendant) is incapable of doing better in the circumstances.²⁹⁹

We could go even further with respect to the public-nuisance claims that turn not just on selling but on falsely marketing a product, such as tobacco and opioids. In such cases, we could look to Section 402B of the Second Restatement, which imposes liability on sellers for false representations about products, “even though [the falsehood] is not made fraudulently or negligently.”³⁰⁰ In other words, this rule contemplates strict liability for products in *exactly* the types of situations at issue in many modern public-nuisance suits.

A conception of tort that makes negligence liability the default and everything else a problematic deviation will have to wrestle with its own descriptive inaccuracy and defend its normative commitments on grounds much broader than simply the question of public nuisance.

Branching out further, we might note that Congress has imposed strict liability on regulation of Superfund sites under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).³⁰¹ CERCLA empowers the Environmental Protection Agency to clean up hazardous sites and to identify responsible parties who must aid in cleanup. “Potentially Responsible Parties” (PRPs) under CERCLA include both present and past owners and operators, regardless of actual contribution to the pollution.³⁰² This is a robust form of strict liability, with very limited affirmative defenses.³⁰³ As an enacted law, CERCLA is instructive only as an analogy, but it is a strong one. Like public-nuisance

299. See Kenneth S. Abraham, *Strict Liability in Negligence*, 61 DEPAUL L. REV. 271, 283 n.35, 288-89 (2012) (describing areas of strict liability in negligence and discussing the rationale for the approach).

300. RESTATEMENT (SECOND) OF TORTS § 402B (AM. L. INST. 1965).

301. 42 U.S.C. §§ 9601-9657 (2018).

302. *Id.* § 9607(a); 40 C.F.R. § 304.12(m) (2021) (“Potentially responsible party or PRP means any person who may be liable pursuant to section 107(a) of CERCLA, 42 U.S.C. 9607(a), for response costs incurred and to be incurred by the United States not inconsistent with [the National Contingency Plan].” (emphasis omitted)).

303. There are statutory defenses for acts of God or war or a third-party stranger with no relationship to the Potentially Responsible Party (PRP) (where the PRP must also have exercised due care). 42 U.S.C. § 9607(b) (2018). In addition, later owners may be able to establish an innocent-landowner defense if they “did not know or have reason to know” of the contamination at the time of purchase. *Id.* § 9607(q)(1)(A)(viii). They must also comply with all other pre- and post-purchase requirements, including cooperating with the Environmental Protection Agency (EPA) and taking reasonable steps to address the pollution on their property. *Id.* § 9601(35)(A)(i). These are affirmative defenses, which the PRP must prove by a preponderance of the evidence. *Id.* § 9607(b).

doctrine, CERCLA is designed to address ongoing risks to public health and welfare. Congress saw fit to do so by imposing strict liability on all past and present owners and operators, regardless of their current control over the property or their contribution to its condition (with limited exceptions). Although CERCLA differs from the common law in providing advance notice of liability through statute, its existence suggests that Congress, at least, did not think that this level of liability offended standards of justice: the priority is abating the dangerous condition. Why may not a judicially interpreted, broad public-nuisance statute (or even common-law public nuisance) do the same?

CERCLA is certainly not an instance of tort, but the fact is that public nuisance historically acted in much the same way. Even if most American jurisdictions today require negligence or more, at common law, public nuisance was strict liability; courts did not seem the least concerned about how reasonably a defendant acted.³⁰⁴

One response is to conclude that public nuisance cannot be a tort, and to attempt to shift it to the criminal-law side of the ledger. The problem is that modern criminal-law theorists would be even more revulsed by this approach than tort theorists are, as they reject strict liability for crimes even more fervently.³⁰⁵ The fact is that public-nuisance actions have existed for centuries and used both criminal and civil claims to address bothersome conduct on something like a strict-liability basis. The premodern conflation of noisome behavior and criminality allowed this to continue for hundreds of years, with nothing like the level of scrutiny that criminal and tort theorists now give to concepts such as wrongfulness and culpability. Perhaps nowadays we can try to claim that strict liability should only exist for “regulatory offenses.” But this is not a category that existed traditionally. Instead, strict liability is built into the history of criminal law and tort—and, in the latter at least, it remains in several respects.

304. See Merrill, *supra* note 17, at 16 (explaining that in early cases “little or no attention is devoted to how the offending condition has come about. If the defendant’s house falls onto the road, and the government brings an action to order the obstruction removed, the court will not ask whether the collapse was due to negligent maintenance or an Act of God. Either way, it is an interference with a right common to the general public, and should be eliminated” (footnote omitted)).

305. See, e.g., 21 AM. JUR. 2D *Criminal Law* § 130 (2022) (“Strict liability crimes are the exception and not the rule. . . . Criminal statutes requiring no mens rea are generally disfavored.” (footnotes omitted)); see also Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1075-80 (1997) (“Strict liability appears to be a straightforward case of punishing the blameless, an approach that might have consequential benefits but is unfair on any retrospective theory of just deserts.”).

C. Reframing Public Nuisance

Although most of public-nuisance law is not actually strict liability and more of tort is strict liability than we often acknowledge, it is possible to reframe public nuisance as something familiar even to those who view torts as wrongs. This might also assist those who worry that it could swallow the rest of tort: if it already is domesticated, then we need not worry that it might run wild.

Strict liability for public nuisance seems analogous to long-recognized affirmative tort duties to take reasonable care to mitigate a risk one imposes on others.³⁰⁶ Here is the First Restatement's formulation of this affirmative duty, in 1934:

If the actor does an act, which at the time he has no reason to believe will involve an unreasonable risk of causing bodily harm to another, but which, because of a change of circumstances or fuller knowledge acquired by the actor, he subsequently realizes or should realize as involving such a risk, the actor is under a duty to use reasonable care to prevent the risk from taking effect.³⁰⁷

Here is the most recent formulation, from the Third Restatement:

When an actor's prior conduct, even though not tortious, creates a continuing risk of physical harm of a type characteristic of the conduct, the actor has a duty to exercise reasonable care to prevent or minimize the harm.³⁰⁸

And here is a common scenario, exemplifying this affirmative duty:

The Stranded Driver: A driver, through no fault of his own, must abandon his vehicle because of dangerous road conditions. Because of these conditions, the driver is not able to pull the vehicle entirely off the road. Even though the driver breached no duty by leaving his vehicle as he did, he now has a duty to exercise reasonable care to protect others from the haz-

306. Elsewhere, Kenneth S. Abraham and I have questioned whether "affirmative" is the best label for such duties. See Kenneth S. Abraham & Leslie Kendrick, *There's No Such Thing as Affirmative Duty*, 104 IOWA L. REV. 1649, 1652 (2019) ("Both the term 'affirmative duty' and the distinction between misfeasance and nonfeasance fail to draw meaningful distinctions between the cases to which tort law applies these notions.").

307. RESTATEMENT OF TORTS § 321 (AM. L. INST. 1934). The Second Restatement's formulation follows closely the First's. See RESTATEMENT (SECOND) OF TORTS § 321 (AM. L. INST. 1965).

308. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 39 (AM. L. INST. 2012).

ard caused by his automobile. In some instances, that duty may be satisfied by notifying the authorities, but it might involve other actions, such as setting out flares.

Even if the driver acted entirely reasonably by leaving his vehicle where he did, if it poses a danger to others (or, we might say, an unreasonable danger), then he has a duty to mitigate that risk.³⁰⁹ Similarly, even if a manufacturer acted reasonably in introducing a certain product into the stream of commerce, if that product turns out to pose an unreasonable danger to the public, the manufacturer could have a duty to mitigate – or to abate – that danger, or at least to take reasonable steps to do so.

Is this an example of strict liability within negligence? Not exactly. The First and Second Restatements explicitly stipulate that the defendant “subsequently realizes or should realize” that his conduct posed a risk, at which point he is “under a duty to use reasonable care to prevent the risk from taking effect.”³¹⁰ This is a situation where the original conduct may be reasonable, but an unreasonable condition arises and creates a duty to take reasonable steps to address that condition. Public-nuisance liability for later-discovered harm works the same way. Moreover, the affirmative-duty analogy provides support for a feature of public nuisance already stated explicitly in the Second Restatement: that when an actor at first unintentionally invades a public right but later becomes aware of the harm and continues the same conduct, then “further invasions are intentional.”³¹¹

On the affirmative-duty analogy, the question of “unreasonable interference” assumes multiple dimensions. The question is not just whether the defendants behaved reasonably at Time 1, for example, when they sold the product or created the condition that would later become a nuisance. Even if they did act reasonably, they have a duty that arises at Time 2, when it becomes clear that the product they sold imposes unreasonable risks to a public right. This approach decouples the question of the reasonableness of the defendants’ behavior from the question of whether their product or activity imposed an unreasonable risk. Even if the defendants acted reasonably at Time 1, they might have a responsibility for an unreasonable risk at Time 2. Some courts conclude that, so long as defendants acted reasonably at Time 1, they have satisfied their obligations (and let us set aside for a moment the reality that defendants often knew much more

309. See Abraham & Kendrick, *supra* note 306, at 1656 (discussing the well-known case of *Montgomery v. National Convoy & Trucking Co.*, 195 S.E. 247, 250-52 (S.C. 1938), on which this hypothetical is based).

310. RESTATEMENT OF TORTS § 321 (AM. L. INST. 1934); RESTATEMENT (SECOND) OF TORTS § 321 (AM. L. INST. 1965).

311. RESTATEMENT (SECOND) OF TORTS § 825 cmt. d (AM. L. INST. 1979).

about the risks at Time 1 than they let on, as discovery often reveals).³¹² Stipulating that defendants did act reasonably at Time 1, may they not still have a special responsibility for an unreasonable risk that arises at Time 2 from their activities? Courts, scholars, and all three Restatements of Torts take this to be an uncontroversial statement of black-letter law in the context of after-arising risks.³¹³ Why should public nuisance be treated differently? The question is not just whether the defendants acted reasonably when manufacturing or selling a product; the question is also, did they *continue* to act reasonably when an unreasonable risk—or, in some cases, a catastrophic national crisis—emerged?

One might further object that public-nuisance liability does not explicitly ask about the conduct of defendants at Time 2. This is not strictly true: the Second Restatement provides that defendants act intentionally if they become aware of the harm caused by the condition they created and still persist in the same activity.³¹⁴ Nevertheless, it is an open question what a court would do with defendants who at Time 2 did in fact respond reasonably—that is, by taking reasonable steps to mitigate the nuisance. This question is difficult to answer, mostly because in modern litigation it is hard to find a real example of a defendant who even arguably exercised reasonable care at Time 2. In the case of opioids, for example, a great deal of evidence suggests that, far from seeking stronger warnings from the FDA, reining in their own marketing, or alerting authorities to irregular sales patterns, many defendants reaped the benefits of sales while attempting to conceal much of what they knew about risks.³¹⁵ Defendants also raise issues such as preemption and primary jurisdiction to argue, effectively, that they had no duties or that courts have no authority to assess what duties they had at Time 2.³¹⁶ Perhaps someday we might have an opportunity to see whether courts believe that public nuisance extends to a defendant who, after acting reasonably at Time 1, also behaves reasonably at Time 2. But there is no evidence at present that such liability is imposed.

312. See, e.g., *In re Lead Paint Litig.*, 924 A.2d 484, 502 (N.J. 2007) (“[T]he suggestion that plaintiffs can proceed against these defendants on a public nuisance theory would stretch the theory to the point of creating strict liability to be imposed on manufacturers of ordinary consumer products . . .”); cf. *District of Columbia v. Beretta U.S.A. Corp.*, No. 0428-00, 2002 WL 31811717, at *30 (D.C. Super. Ct. Dec. 16, 2002) (emphasizing the lawfulness of firearm sales); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 199 (App. Div. 2003) (same); *City of Gary ex rel. King v. Smith & Wesson, Corp.*, No. 45D05-005-CT-243, 2001 WL 333111, at *4 (Ind. Super. Ct. Jan. 11, 2001) (same).

313. See *supra* notes 307-311 and accompanying text.

314. RESTATEMENT (SECOND) OF TORTS § 825 cmt. d (AM. L. INST. 1979).

315. See Engstrom & Rabin, *supra* note 4, at 307-21; BETH MACY, *DOPESICK: DEALERS, DOCTORS, AND THE DRUG COMPANY THAT ADDICTED AMERICA* 31-56 (2018); BARRY MEIER, *PAIN KILLER: AN EMPIRE OF DECEIT AND THE ORIGIN OF AMERICA’S OPIOID EPIDEMIC* 172-87 (2d ed. 2018).

316. These and other doctrines are explored in Part IV, *infra*.

One objection embodied in some states' doctrines is that public-nuisance defendants could not possibly have such a duty, because they are no longer in "control" of the product once they introduce it into the stream of commerce. In some jurisdictions, continued control is a statutory or common-law requirement for public nuisance, and other courts consider it as part of the proximate-cause inquiry.³¹⁷ Here, again, however, the affirmative-duty paradigm pushes back. Imagine this slightly different scenario:

The Stranded Cargo: A truck driver, through no fault of his own, must abandon his cargo because of dangerous road conditions. Unable to advance without uncoupling his semitrailer, and unable to pull it entirely off the road, he leaves the trailer sticking out in the road and moves on to seek shelter.

Even though the driver breached no duty by leaving his cargo as he did, he now has a duty to exercise reasonable care to protect others from the hazard it causes. This is true even if the driver now lacks control over the trailer and is unable to move it by himself. And it is true even if the driver and his employer would prefer to abandon the trailer and cargo and relinquish all claims of ownership. Control is irrelevant.

Here is another example, this time from the First Restatement:

A is playing golf. He sees no one on or near a putting green and drives to it. While the ball is in the air, B, another player, suddenly appears from a bunker directly in the line of A's drive. A is under a duty to shout a warning to B.³¹⁸

Yet again, defendant A's original action was reasonable. He lacks control over the risk. Indeed, another person's actions contribute to the creation of the risk. Nonetheless, A still has a duty of reasonable care. The affirmative-duty cases illustrate that someone who has lost control over an instrumentality can still very much have a responsibility to mitigate the risks associated with it. If this is true in widely accepted, garden-variety negligence examples, then it can equally be true of public nuisance.

Of course, many public nuisances come about through more complex sequences of events than a golf ball hitting a golfer. Some risks or harms involve choices or failures by multiple actors. In some cases, a risk or harm might be too

317. See, e.g., *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 724 (Okla. 2021) (noting continued control as a requirement of public-nuisance liability); *State v. Lead Indus. Ass'n*, 951 A.2d 428, 435, 451 (R.I. 2008) (relying on both control and remoteness to reject a public-nuisance claim).

318. RESTATEMENT OF TORTS § 321 illus. 1 (AM. L. INST. 1934).

attenuated from the defendant's original conduct, such that liability is not appropriate. There might be other cases where the chain of causation is such that the defendant is not the *only* entity responsible for a public nuisance, but it is one such party, and should be held responsible for a portion of the problem. Responsibility is difficult (though not impossible) to apportion when the remedy is abatement, but in situations where defendants must contribute toward an abatement scheme or pay damages to compensate for past harms, it is much simpler.

For example, in the recent New York trial—the second opioid case nationwide to be tried by a jury—the jury was asked to apportion liability among all entities it found responsible, including any defendants that had settled, the plaintiff-state, and the two plaintiff-counties.³¹⁹ The jury imposed liability on defendants Teva and its subsidiaries, but also assigned ten percent of responsibility to the state, which was supposed to have monitored excessive prescriptions.³²⁰ Holding an actor liable to abate or compensate for a public nuisance does not exonerate other parties. In some cases, there will be enough responsibility to go around. This is quite different, however, from rejecting the concept of public nuisance entirely, because it imposes so-called strict liability, or because it imposes liability on one who no longer “controls” the nuisance, or because that actor was not the only one involved.

As often as public nuisance creates anxiety for being unlike and threatening the rest of tort, it is possible to tell another story. In this story, public-nuisance law simply recognizes the black-letter principle that one might have later duties if one's reasonable conduct generates later-arising unreasonable risks. In this regard, public nuisance fits right alongside general tort principles. The only deviation is that public authorities can seek to mitigate a risk before it manifests as harm: they can seek to remove the obstacle from the highway before it causes a wreck. The picture that emerges is a fairly coherent one: states and municipalities bring actions against invasions of the public's inherently common rights and large-scale infringements of individual rights in health, safety, and welfare. These plaintiffs may seek to abate such activities in the name of the public and may seek damages for their own special injuries incurred in remediating and responding to the nuisance. The basic principles include that (1) public rights are broad and relational; (2) liability for originally nontortious conduct is part of tort law; and (3) responsibility and control are not, and have never been, coextensive.

When it comes to heavily regulated products such as opioids, another important piece of the puzzle involves other governmental institutions, besides the executive officials suing in public nuisance and the judges deciding these cases.

319. *Landmark Opioid Trial*, *supra* note 178.

320. *Id.*

How should public nuisance account for the actions or inactions of legislatures and executive agencies tasked with overseeing potentially unreasonable products or conduct? In the affirmative-duty analogy, if a regulator like the FDA approves and monitors a product, is the manufacturer acquitted of any continuing duty of reasonable care by complying with all regulatory requirements? This is essentially a question about preemption, and it and several other doctrines can bear on these questions in certain cases. We will turn to them next.

In this Part, however, the question has been whether liability for public nuisance accords with doctrines and principles internal to tort law. As I have argued, public nuisance is less foreign to tort law than often suggested, and it may even be capable of being framed in terms quite familiar to tort, in both the rights protected and the standards applied to protect them.

IV. THE INSTITUTIONAL CRITIQUE

Public nuisance also provokes institutional objections. Critics could argue that, in this day and age, it is at best unnecessary and at worst actively harmful. Many have argued that although public nuisance acted as a protoregulatory stop-gap, it is no longer needed, given the state of modern criminal, tort, and regulatory law.³²¹ Because public nuisance addressed “policy” questions that other actors now address, public nuisance is unnecessary.³²²

At worst, critics could argue, public nuisance disrupts the proper channels for addressing risks to public interests. Public nuisance is a legal action brought by executive-branch actors, asking courts to resolve what look like legislative or regulatory questions. In some cases, the executive-actor plaintiffs work for state or local governments, and they make claims about products or activities purportedly regulated by state authorities, federal authorities, or both. In these ways, public nuisance raises many questions about (and highlights many pre-existing issues related to) separation of powers, federalism, common law versus administrative law, and the proper role of courts. This Part ventures beyond the realm of tort itself to consider some important objections to public nuisance based on its implications for legal institutions generally.

Some institutional objections to public nuisance have a formalist cast, and others a more functionalist one. More specifically, some object because public nuisance offends their conception of separation of powers or federalism, while others may be more agnostic as a matter of first principles but think that in practice, public nuisance is not an adequate mode of regulation. And some objections

321. See, e.g., Spencer, *supra* note 1, at 76-83.

322. Cf. Hunter, 499 P.3d at 731 (complaining about the expansion of public nuisance into spaces reserved for policymakers).

are hybrid: one may adopt a particular formalist conception in part *because* it seems to function better than other alternatives.³²³

Concerns about institutional design and competence sometimes seem to motivate traditionalist approaches to public nuisance. For example, the Oklahoma Supreme Court asserted that “[p]ublic nuisance is fundamentally ill-suited to resolve claims against product manufacturers.”³²⁴ The court concluded:

The district court’s expansion of public nuisance law allows courts to manage public policy matters that should be dealt with by the legislative and executive branches; the branches that are more capable than courts to balance the competing interests at play in societal problems. Further, the district court stepping into the shoes of the Legislature by creating and funding government programs designed to address social and health issues goes too far. This Court defers the policy-making to the legislative and executive branches and rejects the unprecedented expansion of public nuisance law.³²⁵

At the same time, some commentators justify public nuisance on institutional grounds, particularly the failure of legislative and administrative bodies to regulate harmful products effectively.³²⁶ These competing narratives offer a place to begin the institutional analysis of public nuisance, but they do not end it. The full variety of the doctrine’s institutional ramifications presents a complicated picture – one that argues for caution with regard to certain risks in certain cases, however, rather than wholesale rejection.

323. See Merrill, *supra* note 223, at 369 (stating, in support of a “non-dynamic” interpretation of public-nuisance statutes, that “[t]here is some hope that judges, acting in fifty different jurisdictions, will exercise self-restraint when called upon to enforce settled law, since this is the very foundation of their authority. There is less hope of self-restraint if judges are told by self-interested actors that the law gives them unfettered discretion, and that they have an opportunity to use this discretion to strike a blow for the public good”).

324. *Hunter*, 499 P.3d at 726.

325. *Id.* at 731.

326. See, e.g., Dana, *supra* note 117, at 63; Engstrom & Rabin, *supra* note 4, at 353–61; Sharkey, *supra* note 135, at 671; Michael L. Rustad & Thomas H. Koenig, *Reforming Public Interest Tort Law to Redress Public Health Epidemics*, 14 J. HEALTH CARE L. & POL’Y 331, 351 (2011) (arguing for public nuisance as a second-best approach in the context of public-health epidemics where the legislative branch and administrative agencies frequently fail).

A. *The Perils of Public Nuisance*

Public nuisance raises many concerns about the proper roles of legal actors and their proper relationships to each other. It is impossible to canvass every concern here, but, in what follows, I attempt to capture the major ones.

1. *Delegation and Separation of Powers*

Public nuisance raises many concerns regarding delegation and separation of powers. First, it provokes the obvious objection of judicial legislation recently articulated by the Oklahoma Supreme Court.³²⁷ The traditional remedy in a public-nuisance suit is abatement. Abatement has two different remedial aspects: one, it enjoins the nuisance and, two, it requires defendants to bear the burden of removing it. Courts are regulating prospectively, and this is not a step to be taken lightly. Even other remedial forms, such as damages or abatement funds, while not literally enjoining an activity, in effect articulate a standard for all actors in a field. The same, of course, could be said for class actions and mass-tort claims by private litigants: in this regard, public nuisance is far from unique but still raises objections regarding judicial legislation.

Second, apart from standard concerns about legislating from the bench, public nuisance presents more unusual separation-of-powers issues. To the extent that judges are making what could be characterized as policy decisions, they are doing so not in response to the claims of private litigants, but at the behest of the executive branch. This axis between the judicial and executive branches subverts the commonplace notion that, while the judiciary construes and the executive enforces, it is the legislature that makes the law. Instead, in these actions, the executive originates potential legal rules in the form of legal claims, which the judiciary either approves or rejects.

Nor does the executive generally pursue this regulatory role under specific legislative delegation. Most public-nuisance statutes are brief, general, and vague.³²⁸ In addition, several jurisdictions recognize the continuing viability of common law as well as statutory public nuisance, with the effect that executive officials need not derive their regulatory authority from the legislative branch at all.³²⁹ Thus, public nuisance can be characterized as lawmaking between the executive and judicial branches, without involvement from legislative authorities.

327. *Hunter*, 499 P.3d at 726.

328. See *supra* note 221 and accompanying text.

329. See *supra* note 225 and accompanying text.

This model presents a variety of perils, including moral hazard. The legislature might well prefer not to regulate various products or activities, whether directly or through indirect measures such as taxation, because doing so might be unpopular with donors or constituents. For allegedly harmful products or activities, legislative regulation would likely involve either direct regulation or taxation, either of which would impose costs on the legislature's constituency. Legislatures that impose regulatory costs on citizens are likely to find some of those costs shifted back to them: citizens might vote their displeasure at increased taxation or regulation, with the result that those responsible for the regulation find themselves unemployed. Citizens might also choose to exit the jurisdiction completely, or to travel to less regulated jurisdictions to make purchases or engage in activities, thereby reducing state revenue. While regulation might have the positive effect of saved public-health costs, those savings are offset by the financial and political costs of regulation – costs more directly borne by politicians.

Executive actors, too, might prefer to take their case to the judiciary rather than to the legislature. To the extent that the executive helps to set the legislative agenda, it will face the same costs associated with direct and indirect regulation and may prefer to work with courts *ex post* rather than to initiate regulation *ex ante*.

By comparison with other forms of regulation, public nuisance might enable governments to regulate harmful products and activities with fewer costs to themselves. A public-nuisance suit demanding damages rather than abatement allows a state or municipality to shift public-welfare costs to outsider defendants. Citizens are not required to internalize costs such as taxation or direct regulation of nuisance-causing products. True, industry defendants will pass on the costs of public-tort suits to their consumers in the form of higher prices, but these higher prices will be spread across the industry's entire consumer base, rather than concentrated on the litigating jurisdiction. Although the executive branch will have to absorb the political consequences, if any, of bringing a public-nuisance suit, presumably they will only bring suits in response to serious public-health or welfare issues. Sadly, there might be more political support for lawsuits *ex post* than for regulation *ex ante*, because the public in the meantime has suffered the consequences of underregulation. In many ways, then, public nuisance allows states and municipalities to recoup public-welfare costs while offloading many of the costs of regulation.

The picture grows more complicated when we add regulatory agencies into the mix. (For the moment, let us put aside additional federalism issues and stay within one level of government.) With some complex activities or products, it is entirely possible that a regulatory agency – often an executive agency – is supposed to play some role in regulation. Public nuisance could offer the executive branch an opportunity to sue others for problems that it was supposed to help

prevent. For example, in New York, the state had a duty to enforce controlled-substances laws that could have helped to mitigate the opioid epidemic.³³⁰ In finding a public nuisance in a 2021 jury trial, the jury imposed most of the responsibility on pharmaceutical companies but assigned plaintiff New York State ten percent of the responsibility (and none for the two plaintiff-counties).³³¹

While I see this as a potentially acceptable if nonideal outcome that, with proper tools for apportionment of liability, can promote fair responses to complex public-health catastrophes, some will understandably recoil at the prospect of a state suing the very industries it was supposed to regulate. In addition, again, there are moral-hazard problems: an ill-intentioned or ill-funded administrative apparatus could cut corners across all its regulatory targets and wait and sue wherever major problems emerge. The interim costs would be borne by public health and safety.

This kind of externalization presents many problems. For one, on a normative level, one might believe that the state should largely internalize the costs of regulation and embrace deliberation and accountability. For another, as a consequentialist matter, the public-nuisance model might cause suboptimal outcomes, as governmental actors make choices that are less costly to them but more costly to public welfare as a whole. Third, one might object on either consequentialist or nonconsequentialist grounds to what amounts to a good-cop/bad-cop governmental strategy, in which light legislative or regulatory action *ex ante* is unpredictably followed by more stringent executive action *ex post*. For all of these reasons, public nuisance presents hazards from a separation-of-powers perspective.

2. *Federalism and the Administrative State*

In the modern administrative state, some public-nuisance suits also implicate federalism. To be clear, various products or activities potentially subject to public-nuisance suits are not regulated at a federal level, at least not to a degree that is material to a public-nuisance suit.³³² But public-nuisance suits regarding heavily regulated products such as prescription drugs will implicate the respective roles of state public-nuisance statutes or common law and federal administrative regulation.

330. N.Y. COMP. CODES R. & REGS. tit. 10, § 80.122 (2022) (imposing a duty on the New York Health Department to enforce its controlled-substances laws).

331. See *Landmark Opioid Trial*, *supra* note 178.

332. Examples include lead paint, firearms, and the myriad examples of “classic” public nuisance previously discussed. See *supra* Section I.A.

In such cases, the separation-of-powers picture painted above will be further complicated by the action or inaction of a federal agency charged with regulating the product or activity at issue. One risk will be that states use public nuisance to second-guess federal regulatory judgments. Another risk, albeit perhaps an unlikely one, is that federal regulators will be less vigilant because of the fallback possibility of regulation through public nuisance. And, from a more formalist perspective, the role of public nuisance might offend conceptions of federal authority or of who is responsible for what.

Some legal doctrines reflect these objections. For example, primary jurisdiction provides that a court will not adjudicate a claim because the issues raised are under the primary purview of a federal agency.³³³ In two recent cases, courts have dismissed complaints about COVID-related conditions in an Amazon warehouse and a meatpacking facility by concluding that the Occupational Safety and Health Administration (OSHA) has primary jurisdiction over workplace conditions.³³⁴ Primary jurisdiction does not require that an agency has done or will do anything about a risk, merely that it could.³³⁵

Meanwhile, federal preemption provides a basis for rejecting a public-nuisance claim if it would conflict with a standard set by federal legislation or regulation.³³⁶ There is a complex relationship between common law on the one hand and legislation-regulation on the other. There is general agreement that legislative-regulatory schemes do not preempt common-law tort claims,³³⁷ except

333. See, e.g., Bryson Santaguid, *The Primary Jurisdiction Two-Step*, 74 U. CHI. L. REV. 1517, 1517 (2007).

334. *Palmer v. Amazon.com, Inc.*, 498 F. Supp. 3d 359, 368-71 (E.D.N.Y. 2020) (dismissing suit on primary jurisdiction grounds); *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, 459 F. Supp. 3d 1228, 1240-41 (W.D. Mo. 2020) (same). Both cases are discussed in detail in Dana, *supra* note 117, at 94-97.

335. See Dana, *supra* note 117, at 78-79.

336. Federal preemption is a broad field that includes both express and implied preemption, the latter of which comprises field and conflict preemption, with conflict preemption including obstacle and so-called impossibility preemption. See, e.g., *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018); *Wyeth v. Levine*, 555 U.S. 555, 563-65 (2008); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992); JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, *FEDERAL PREEMPTION: A LEGAL PRIMER 2* (2019). The types of cases at hand in this Article are most likely to raise conflict claims, and I focus primarily on such examples.

337. See, e.g., *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 500 (1987) (holding that the Clean Water Act does not preempt a common-law nuisance claim under the law of the source state); *City of Modesto Redevelopment Agency v. Superior Ct. of S.F.*, 13 Cal. Rptr. 3d 865, 871 (Ct. App. 2004) (finding that an environmental law did not alter the common law of nuisance); *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 614 (Cal. 1997) (finding that the California Street Terrorism Enforcement and Prevention Act did not preempt a public-nuisance claim against street

where regulation addresses the matter at issue so specifically as to leave little question that it has definitively settled the liability question.³³⁸ While there is agreement that legislative pronouncements do not often actually preempt common law, there is still the question of what weight to give them when determining the substantive contours of common-law public nuisance.

When assessing activity that is under heavy statutory regulation, some courts evince no discomfort in imposing liability for behavior that complies with statutory law.³³⁹ Other courts, however, have refrained from adding to elaborate statutory schemes on institutional grounds, holding that the legislative and executive branches working in concert are “better suited to address the societal problems concerning the already heavily regulated commercial activity at issue.”³⁴⁰ Even on issues where the legislature has been relatively silent, some courts have found that public nuisance would impose rules so significant and so different from either statutory or traditional tort law that they must run counter

gangs); *Galaxy Carpet Mills, Inc. v. Massengill*, 338 S.E.2d 428, 429-30 (Ga. 1986) (finding that the issuance of a permit from the State Environmental Protection Division did not preempt a common-law nuisance claim); *Sharon Steel Corp. v. City of Fairmont*, 334 S.E.2d 616, 622 (W. Va. 1985) (holding that a public-nuisance claim was not preempted by the Federal Resource Conservation and Recovery Act and the Hazardous Waste Management Act). *But see* *Twitty v. North Carolina*, 527 F. Supp. 778, 781 (E.D.N.C. 1981) (holding that the Federal Toxic Substances Control Act preempts local public-nuisance law).

338. *See, e.g., New Eng. Legal Found. v. Costle*, 666 F.2d 30, 32 (2d Cir. 1981) (failing to reach the “broad question of whether the Clean Air Act totally preempts federal common law nuisance actions” but finding that the EPA’s approval of defendant’s emissions variance precluded the specific public-nuisance claim at issue). The federal courts have also held that certain federal regulations preempt the federal common law, but leave state common law intact. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 329-32 (1981) (holding that the Federal Water Pollution Act Amendments of 1972 preempted federal common-law nuisance).
339. *See, e.g., State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 979 (Sup. Ct. 1983) (finding defendants in compliance with an environmental statutory scheme but nonetheless remaining open to public-nuisance claims); *In re Lead Paint Litig.*, No. A-1946-02T3, 2005 WL 1994172, at *5 (N.J. Super. Ct. App. Div. Aug. 17, 2005) (finding the imposition of public-nuisance liability consistent with rather than preempted by state lead-paint statute), *rev’d*, 924 A.2d 484 (N.J. 2007); *James v. Arms Tech., Inc.*, 820 A.2d 27, 51-53 (N.J. Super. Ct. App. Div. 2003) (finding that behavior in compliance with statutory handgun regulations could still be tortious under a negligence, products-liability, or public-nuisance theory); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002) (holding that compliance with statutory handgun regulations is not dispositive of liability).
340. *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 194-95 (App. Div. 2003); *see also Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005) (“[C]ases presenting political questions are consigned to the political branches that are accountable to the People, not to the Judiciary, and the Judiciary is without power to resolve them.”); *Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639 (Ct. App. 1971) (“[T]he court lacks facilities or competency to undertake the problem of abating air pollution within the Los Angeles Basin . . .”).

to legislative intent.³⁴¹ Such decisions reflect a hesitancy to craft legal rules too strikingly different from anything the legislature appears to have contemplated.

3. Agency Costs

Given that public-nuisance suits are ultimately supposed to vindicate the rights of the public, they present various agency costs. For one, in bringing public-nuisance suits, executive officials exercise what I will frame as an analogue of prosecutorial discretion. Executive officials determine whom to sue and what relief to seek. State and local governments bear costs associated with all sorts of circumstances and activities, and yet not all such activities spawn public-nuisance suits. For the most part, defendants in public-nuisance suits have been major industries, yet other types of activities probably also infringe on public rights. For example, one California court declared street gangs in the Rock-springs neighborhood of San Jose to be a public nuisance,³⁴² but despite widespread academic attention, the suit failed to inspire a flood of anti-gang litigation.

Litigation patterns suggest that executive officials prefer to enforce rights that yield damages or abatement funds rather than injunctions; they also prefer the financial recoveries to be large and the defendants to be able to pay.³⁴³ This is not to say that those being sued are not valid defendants, but the activities that represent the biggest potential payouts are not necessarily those that are the most harmful to public welfare. How to evaluate this issue depends in part on a matter of perspective. Do states pursue particular public-nuisance claims because they are more likely to yield funds or because those particular activities cost the state a disproportionate amount of money? These two features may frequently coexist, as they did in the case of both tobacco and opioids, making motivations more difficult to untangle.

Another potential cause for concern is the involvement of private lawyers. Most recent public-nuisance cases involve not only government attorneys but

341. See *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (characterizing a broad reading of a nuisance statute, which would “totally rewrite North Dakota tort law” as “a development we cannot imagine the North Dakota legislature intended when it enacted the nuisance statute”).

342. *Acuna*, 929 P.2d at 597.

343. Cf. Esmé E. Deprez & Paul Barrett, *The Lawyer Who Beat Big Tobacco Takes on the Opioid Industry*, BLOOMBERG (Oct. 5, 2017, 4:00 AM EDT), <https://www.bloomberg.com/news/features/2017-10-05/the-lawyer-who-beat-big-tobacco-takes-on-the-opioid-industry> [<https://perma.cc/762Q-QHEJ>] (tracing the overlap in attorneys leading the tobacco and opioid litigations and stating that these attorneys “hope to corral at least 25 states to exert enough pressure, collect enough evidence, and drive potential damages so high that it will be cheaper for opioid manufacturers to back down”).

also private lawyers, who may participate in identifying defendants, setting strategy, and funding and litigating cases, in exchange for a contingency fee paid out of any monetary award or settlement.³⁴⁴ This arrangement first became widespread in the tobacco litigation of the 1990s and is now a common feature of many public-nuisance suits.³⁴⁵ Many of the lawyers now involved in the opioid litigation were also involved in the tobacco litigation.³⁴⁶

On the whole, most courts seem to have given contingency-fee arrangements little thought. The Maryland Supreme Court upheld a contingency-fee agreement in a state tobacco suit under a statutory provision that allowed the State Attorney General to hire assistant counsel “in an extraordinary or unforeseen case or in special county work.”³⁴⁷ The court held that the Attorney General and Governor had discretionary authority to determine what constituted “extraordinary” litigation.³⁴⁸ In the Rhode Island lead-paint litigation, the court allowed a contingency-fee arrangement between the State Attorney General and private counsel but rejected a retainer agreement which showed that the state “vest[ed] total decision making authority in Contingent Fee Counsel as to who the Defendants should be, and as to what causes of action should be brought.”³⁴⁹ In 1985, the Supreme Court of California forbade the participation of private attorneys in a public-nuisance suit seeking damages,³⁵⁰ but in 2010, the court severely

344. See, e.g., Daniel Fisher, *For an Emerging Class of Lawyer Kings, Litigation Is a Cash Cow*, CHIEF EXEC. (Feb. 19, 2020), <https://chiefexecutive.net/courtroom-as-coffer> [<https://perma.cc/YC8F-ZB94>].

345. See Leah Lorber, *A Defectively Designed Suit: Deputized Trial Lawyers Twist Tort Law in Rhode Island*, WASH. LEGAL FOUND. 1-2 (Oct. 7, 2005), <https://s3.us-east-2.amazonaws.com/wash-legal-uploads/upload/100705LBLorber.pdf> [<https://perma.cc/K7VD-3KVV>].

346. See, e.g., Fisher, *supra* note 344; Deprez & Barrett, *supra* note 343 (profiling an attorney who sued tobacco companies as a state attorney general and is now suing opioid companies as a private attorney).

347. *Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1237 (Md. 1998) (citing to MD. CODE ANN., STATE GOV'T § 6-105(b)(1) (LexisNexis 2018)).

348. *Id.* at 1239.

349. *State ex rel. Lynch v. Lead Indus. Ass'n*, No. PB 99-5226, 2003 WL 22048756, at *2 (R.I. Super. Ct. Aug. 29, 2003). The court held that “as a constitutional officer of this State . . . the Attorney General cannot totally cede to Contingent Fee Counsel the powers of his office as he does in the manner set forth.” *Id.* at *3. The court conditionally denied private attorneys’ fees until the state submitted an amendment to the retainer agreement, asserting retroactively that the “Attorney General made the ultimate determination as to who the Defendants should be and as to the causes of action to be asserted against them.” *Id.*

350. *People ex rel. Clancy v. Superior Ct. of Riverside*, 705 P.2d 347, 350 (Cal. 1985) (finding such arrangements “antithetical to the standard of neutrality that an attorney representing the government must meet”).

limited its earlier holding.³⁵¹ Citing the Rhode Island Supreme Court approvingly, the California court signaled that such arrangements would generally be permissible when private attorneys were working under the supervision of public employees.³⁵²

Contingency-fee agreements change governments' institutional capacities. Historically, an attorney general or district attorney's office pursued each of their cases in-house and thus had to make enforcement decisions based on the office's financial and human resources.³⁵³ The availability of outside co-counsel can greatly enlarge the capacity of an office to undertake complex, large-scale civil litigation. This could be a good thing: government offices tend not to be richly funded, and as litigation becomes more complex and specialized, being able to partner with experienced co-counsel might enable government offices to participate in litigation that would otherwise swamp their normal operations.

In addition, recovery in a public-nuisance suit is generally quite speculative. As in other contexts, contingency-fee arrangements here allow plaintiffs to pursue plausible claims without fronting enormous expenses out of their own pockets. In the case of public-nuisance suits, that spending would come from public coffers. By partnering with outside counsel, state and local governments can seek recovery for public-welfare expenses while minimizing the additional public funds required to pursue recovery.

On the other hand, contingency-fee arrangements mean that a sizable portion of any settlement or judgment goes to the plaintiffs' attorneys rather than into public coffers. Granted, most public-nuisance suits ultimately fail, with private attorneys bearing the cost rather than the public coffers. Nevertheless, when the state prevails and a large fraction of the proceeds go to private attorneys, the public goes undercompensated for the public-health costs it suffered.³⁵⁴ This is the price of the expanded bandwidth to pursue actions that the attorney general or district attorney's office could not pursue on its own. This is a cause for concern and an indication that public nuisance, as it currently exists, is not a first-best solution. In a second-best world, this reduced recovery, in exchange for the capacity to pursue recovery in the first place, might be better than nothing.

351. *County of Santa Clara v. Superior Ct. of Santa Clara*, 235 P.3d 21, 34-36 (Cal. 2010).

352. *Id.* at 36.

353. See, e.g., MD. CODE ANN., STATE GOV'T § 6-105(b) (West 2022) (permitting the appointment of outside counsel in Maryland in "extraordinary" cases).

354. Attorney's fees have yet to be announced in most opioid settlements. One recent major agreement provided for less than 10% of settlement amounts to go to fees and costs. See Amanda Bronstad, *Who Gets the \$2.3 Billion in Legal Fees in the Global Opioid Deal?*, LAW (Mar. 11, 2022, 2:03 PM), <https://www.law.com/2022/03/11/who-gets-the-2-3-billion-in-legal-fees-in-the-global-opioid-deal> [<https://perma.cc/47L9-KAMP>] (noting \$2.3 billion in fees and costs as part of the \$26 billion global settlement by Johnson & Johnson and three distributors).

A final type of agency cost relates to the disposition of damages awards. The ability of executive officials to seek damages in public nuisance has generally outstripped any constraint or oversight as to how those damages are used.³⁵⁵ When the remedy is abatement, the relationship between claim and remedy is clear. When the remedy is money, it can far too easily go astray and fail to address the interference with a public right that generated the recovery in the first place.

This was one of the primary lessons learned in the aftermath of the Tobacco Master Settlement Agreement.³⁵⁶ As part of the Agreement, the tobacco companies were to make payments to state governments indefinitely, in proportion to the number of cigarettes they each sold.³⁵⁷ As of 2017, the tobacco companies had paid \$119.5 billion under the master settlement and another \$25.4 billion to four states outside the Agreement.³⁵⁸ The money was supposed to cover the costs of smoking-related illnesses in each state. Instead, it has funded a wild array of government interests, often plainly unrelated to tobacco costs.³⁵⁹ A Government Accountability Office study of the years 2000 to 2005 showed that although states allocated 30% of the funds (the largest single portion) to health care, they allocated 22.9% (the second-largest portion) to cover general budget shortfalls.³⁶⁰ Other categories included unallocated funds, general purposes, infrastructure,

355. See, e.g., Patrick LaKamp, *\$2 Million Wrongly Charged to Tobacco Fund*, BUFFALO NEWS (Apr. 19, 2002), https://buffalonews.com/news/2-million-wrongly-charged-to-tobacco-fund/article_3e4006fa-d3ae-5a5d-b1e7-1b49505c74cc.html [https://perma.cc/G8HR-JHPP] (reporting objectionable expenditures of tobacco settlement funds, including \$145,000 spent on new furniture for county executive's office and \$600,000 for road salt); U.S. GEN. ACCT. OFF., GAO-01-851, TOBACCO SETTLEMENT: STATES' USE OF MASTER SETTLEMENT AGREEMENT PAYMENTS 26, 7 fig.1 (2001), <https://www.gao.gov/assets/gao-01-851.pdf> [https://perma.cc/B4DZ-JMKH] (stating that the MSA did not require states to spend funds for any particular purpose and that payouts between 2000 and 2001 were 7% for tobacco control and 6% for tobacco growers and tobacco state economic development).

356. Much has been written about this failure. See, e.g., Engstrom & Rabin, *supra* note 4, at 342-44; Derek Carr, Corey S. Davis & Lainie Rutkow, *Reducing Harm Through Litigation Against Opioid Manufacturers? Lessons from the Tobacco Wars*, 133 PUB. HEALTH REPS. 207, 209 (2018); Micah L. Berman, *Using Opioid Settlement Proceeds for Public Health: Lessons from the Tobacco Experience*, 67 U. KAN. L. REV. 1029, 1036-38 (2019).

357. See Spencer Chretien, *Up in Smoke: What Happened to the Tobacco Master Settlement Agreement Money?*, CITIZENS AGAINST GOV'T WASTE: THE WASTEWATCHER (Dec. 12, 2017), <https://www.cagw.org/thewastewatcher/smoke-what-happened-tobacco-master-settlement-agreement-money> [https://perma.cc/7YA]-ABXG].

358. *Id.*

359. See, e.g., LaKamp, *supra* note 355; Berman, *supra* note 356, at 1040 (noting that funds in Ohio were used for tobacco-abatement purposes in the short term but were soon diverted to other purposes).

360. U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-534T, TOBACCO SETTLEMENT: STATES' ALLOCATION OF PAYMENTS FROM TOBACCO COMPANIES FOR FISCAL YEARS 2000 THROUGH 2005, at 6 tbl.2 (2007), <https://www.gao.gov/assets/120/115580.pdf> [https://perma.cc/3HNY-PJ39].

and education.³⁶¹ Only 3.5% of the funds went to tobacco control.³⁶² A peer-reviewed paper examining data from all fifty states and the District of Columbia concluded that higher tobacco-settlement disbursements in a state were associated with weaker tobacco controls overall.³⁶³ A 2014 investigative report detailed some jurisdictions' decision to seek cash up front by issuing capital-appreciation bonds, for which they received immediate payments from investors in exchange for much larger shares of future tobacco-settlement money down the road.³⁶⁴ In such a scheme, the bulk of the funds ultimately went to private investors rather than to public projects.

This aspect of public nuisance raises major concerns. It is true that states and cities in crisis had to use funds they could otherwise have spent on other projects. And the temptation to use the funds to cover those other projects, or to backfill budget shortfalls, could be strong. But to allow governments an unfettered hand contradicts the basis of their original claim: that the funds are necessary to address the crisis they face. When funds are not devoted to the problem that occasioned the suit, the rule of law can be undermined, along with the public trust.

B. *The Perils Without Public Nuisance*

Although public nuisance raises questions of institutional design and competence, there is another side to the story. Lawyers, scholars, and commentators have compellingly demonstrated that the institutions with which public nuisance supposedly interferes often fail, sometimes catastrophically so. Therefore, the question is not just what damage public nuisance might cause, but what damage might occur, or go unaddressed, in its absence. Here, I briefly examine that question with reference primarily to opioids, as well as to other cases.

361. *Id.*

362. *Id.*; see also Jim Estes, Opinion, *How the Big Tobacco Deal Went Bad*, N.Y. TIMES (Oct. 6 2014), <https://www.nytimes.com/2014/10/07/opinion/how-the-big-tobacco-deal-went-bad.html> [<https://perma.cc/K9FS-HE9K>] (detailing how tobacco settlement funds were spent on sprinkler systems, docks, office buildings, and jails).

363. Jayani Jayawardhana, W. David Bradford, Walter Jones, Paul J. Nietert & Gerard Silvestri, *Master Settlement Agreement (MSA) Spending and Tobacco Control Efforts*, 9 PLOS ONE art. no. e114706, at 1, 18 (2014).

364. Cezary Podkul, *How Wall Street Tobacco Deals Left States with Billions in Toxic Debt*, PROPUBLICA (Aug. 7, 2014, 8:00 AM EDT), <https://www.propublica.org/article/how-wall-street-tobacco-deals-left-states-with-billions-in-toxic-debt> [<https://perma.cc/8ZWW-DBK9>].

1. *Regulatory Failures*

Although in theory, regulatory apparatuses should address serious risks before they manifest as serious harms, regulatory failure occurs at both the federal and state levels. In the case of opioids, commentators have identified several regulatory failures that contributed to the crisis.³⁶⁵ Nora Freeman Engstrom and Robert L. Rabin have outlined these in compelling detail and have also offered a succinct summary:

[I]n opioids, an alphabet soup of federal governmental agencies (including the FDA, [Drug Enforcement Administration (DEA)], and Department of Justice) had significant authority to address the burgeoning opioid problem. In creating a comprehensive regulatory scheme, the legislative branch seemingly did its work. But numerous agencies nevertheless stood by, even as pill mills proliferated, the death toll spiked, and millions of painkillers were pumped into, and decimated, certain communities.

Among other failings, from the beginning, the FDA permitted Purdue to boast (without evidence) that the delayed-release nature of its formula was believed to reduce its appeal to drug abusers. In addition, between 2009 and 2015, the FDA approved twenty-seven new opioids for sale, via a process that's since come under fire, and simultaneously failed to ensure that a program designed to curb the excessive distribution of opioids actually worked. For its part, the DEA failed to monitor drug flows or diversion trends, neglected to conduct even rudimentary criminal background checks of applicants, and, from 2003 to 2013, as the catastrophe mounted, inexplicably authorized a dramatic increase in oxycodone production. Finally, the Department of Justice also bears blame. Most notably, in 2007, when there was still time to stem this crisis, the Department of Justice's career prosecutors apparently wanted to indict Purdue executives on felony charges, but they were overruled by political appointees — and, when all was said and done, the executives merely got a slap on the wrist.³⁶⁶

In a similar vein, an FDA request for recommendations from the National Academy of Medicine yielded a 2017 report criticizing the agency for taking too

365. For full-scale treatments, see MACY, *supra* note 315; and MEIER, *supra* note 315. Many articles also address these problems, including Dana, *supra* note 117, at 63-64; Engstrom & Rabin, *supra* note 4, at 337-38; and Sharkey, *supra* note 135, at 672-77.

366. Engstrom & Rabin, *supra* note 4, at 337-38 (internal quotation marks and footnotes omitted).

narrow a view of its responsibilities in the premarket approval process and failing to account for risks such as addiction and diversion.³⁶⁷ Some of the FDA's own experts submitted a petition to the agency demanding that it halt new drug approvals for opioids until its process was overhauled.³⁶⁸ A former member of the FDA drug-safety committee opined: "There's not one opioid that's been approved in the last 10 or 20 years that has any significant advantage in pain relief over existing ones and doesn't just add to the probability of people getting addicted and abusing the drug."³⁶⁹ Engstrom and Rabin conclude that "the scope and intensity of this calamity stands as a monument to the colossal failure of executive-branch personnel."³⁷⁰

Moreover, it is difficult to imagine, in this case, that the availability of public nuisance facilitated this regulatory failure in any meaningful way. Approval for the distribution and marketing of prescription opioids did not rest with the present plaintiffs: it rested with the federal government. To the extent that states had monitoring duties they failed to execute, that failure can be captured through tools of comparative responsibility, as was the case in the New York opioid jury verdict.³⁷¹ In addition, states and localities have taken various steps to curb the crisis, such as increasing the availability of overdose treatments and creating rehabilitation and education programs.³⁷² These efforts, however, cannot fix the opioid crisis on their own and add additional health and welfare costs to those that the jurisdictions have already borne.³⁷³

The unfortunate realities of regulatory failure complicate the question of whether public nuisance is necessary in the modern administrative state. Dana, for example, has reframed the question as "how public nuisance, a doctrine that emerged before the regulatory state, should be conceived now, in a time of regulatory inaction and failure."³⁷⁴

367. See NAT'L ACADS. OF SCIS., ENG'G & MED., PAIN MANAGEMENT AND THE OPIOID EPIDEMIC: BALANCING SOCIETAL AND INDIVIDUAL BENEFITS AND RISKS OF PRESCRIPTION OPIOID USE (2017); Chris McGreal, *Opioid Crisis: FDA's Own Staff Demand Agency Halt Approval of New Painkillers*, GUARDIAN (Mar. 21, 2019, 4:59 PM EDT), <https://www.theguardian.com/us-news/2019/mar/21/fda-opioid-approvals-halt> [<https://perma.cc/9AHG-5ZA6>].

368. McGreal, *supra* note 367.

369. *Id.*

370. Engstrom & Rabin, *supra* note 4, at 338.

371. See, e.g., *Landmark Opioid Trial*, *supra* note 178.

372. See, e.g., Purcell, *supra* note 4, at 145.

373. See *id.*

374. Dana, *supra* note 117, at 68.

2. *Fraud and Noncompliance by Regulated Entities*

One complication in the opioid case, and possibly other cases of regulatory failure, is that regulators did not have full information from the regulated entities. The tobacco litigation was a monumental example of the potentially stark disparities between an industry's public statements and its internal knowledge and attitudes.³⁷⁵ When such disparities exist in the context of heavily regulated entities, regulators are hobbled.

In the case of opioids, illegal conduct has come to light through civil suits and criminal prosecutions. As already noted, in 2007, Purdue and three of its executives pleaded guilty to violating the FDCA through false and misleading marketing of OxyContin.³⁷⁶ Again in 2020, Purdue pleaded guilty to conspiracy to defraud the United States and to violate the FDCA.³⁷⁷ As part of its guilty plea, Purdue admitted that for at least ten years, it had conspired to defraud the DEA:

Purdue represented to the DEA that it maintained an effective anti-diversion program when, in fact, Purdue continued to market its opioid products to more than 100 health care providers whom the company had good reason to believe were diverting opioids. Purdue also reported misleading information to the DEA to boost Purdue's manufacturing quotas.³⁷⁸

The conspiracy also involved "aiding and abetting violations of the Food, Drug, and Cosmetic Act by facilitating the dispensing of its opioid products, including OxyContin, without a legitimate medical purpose, and thus without lawful prescriptions."³⁷⁹

375. See, e.g., *supra* note 111 and accompanying text; SARAH MILOV, *THE CIGARETTE: A POLITICAL HISTORY* 110-15 (2019); Margo Snipe, *A Nationwide Ban on Menthol Cigarettes Could Be Coming, and It's Dividing Racial Justice Advocates*, CAP. B (Feb. 19, 2022, 9:00 AM EST), <https://capitalnews.org/menthol-cigarette-ban-racial-justice> [https://perma.cc/BML9-J3HS] (quoting an anonymous tobacco executive, who, explaining in 1992 why company leaders did not smoke, said "[w]e don't smoke that s—t. We just sell it. We reserve the right to smoke for the young, the poor, the Black and stupid").

376. See *supra* notes 142-146 and accompanying text.

377. Press Release, U.S. Dep't of Just., Opioid Manufacturer Purdue Pharma Pleads Guilty to Fraud and Kickback Conspiracies (Nov. 24, 2020), <https://www.justice.gov/opa/pr/opioid-manufacturer-purdue-pharma-pleads-guilty-fraud-and-kickback-conspiracies> [https://perma.cc/GWS8-UV5C].

378. *Id.*

379. *Id.*

Much federal regulation – whether by the FDA, the DEA, the Securities and Exchange Commission, or other units – is predicated on receiving accurate information from regulated entities. In the FDA’s case, the agency does not test new drugs itself; the approval process for new drugs depends on complete and accurate information from the manufacturer, and post-approval monitoring efforts depend largely on manufacturer compliance as well.³⁸⁰ In addition, approval of a new drug requires that the manufacturer follow standards for drug composition, labeling, and marketing set by the approval process.³⁸¹ Although the federal government devotes resources to detecting fraud and other illegal conduct, those resources can be outstripped by those of bad-faith actors with strong incentives to evade accountability. Regulated entities acting in bad faith undermine the picture of a well-functioning modern regulatory state.

3. *Absence of Redress from Conventional Tort*

Another frequent suggestion is that, to the extent that modern regulation fails, personal injury and other traditional tort claims provide a sufficient backstop. The *Restatement (Third) of Torts: Liability for Economic Harm*, for example, mentions public nuisance in passing only to disparage it, saying that “[m]ass harms caused by dangerous products are better addressed through the law of products liability, which has been developed and refined with sensitivity to the various policies at stake.”³⁸² Yet, like regulation, traditional tort sometimes fails – and it has failed in some major crises.

First, it is worth reiterating that individual personal-injury claims, even when aggregated through class actions, may not address all harms to the public. A neighbor annoyed by a blighted and overgrown property next door might sue for private nuisance, but that suit will not capture the public risks imposed by the property, such as risks to public safety. Likewise, a wrongful-death suit captures one type of harm imposed by opioids but not all the harms to the community at large. Granted, not all lawsuits distinguish these harms carefully, and

380. For a description of this process, see, for example, *New Drug Development and Review Process*, U.S. FOOD & DRUG ADMIN. (Feb. 18, 2022), <https://www.fda.gov/drugs/cder-small-business-industry-assistance-sbia/new-drug-development-and-review-process> [https://perma.cc/E3LS-NDLF].

381. See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 570-71 (2009) (describing the responsibilities of drug manufacturers and the Food and Drug Administration (FDA)).

382. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 cmt. g (AM. L. INST. 2020).

given potential overlap, doing so may be very difficult.³⁸³ It is not the case, however, that products liability and public nuisance address completely identical issues.

Second, many traditional tort doctrines are limited in their ability to address major societal crises, even when the defendants have admitted to actual crimes. When the crisis at issue involves selling an addictive product and failing to provide sufficient information about its addictiveness, many potential plaintiffs will be rooted out by their own behavior, whether through contributory/comparative negligence or the wrongful-conduct rule, which in some jurisdictions bars recovery for injuries arising from the plaintiff's criminal conduct.³⁸⁴ When plaintiffs did file suit, their own conduct became a centerpiece of the litigation: Purdue, for instance, "was quick to stigmatize plaintiffs – and, in briefs and public arguments, missed no opportunity to emphasize individual victims' own shortcomings and personal responsibility for their current plights."³⁸⁵ Focus on the plaintiffs leaves the wrongful conduct of defendants unaddressed and underdeterred.

More generally, tort claims in the context of heavily regulated products are difficult to win. Product-defect claims, such as failure to warn, are subject to regulatory-compliance defenses and, in some cases, preemption.³⁸⁶ These defenses may apply even if an agency has in reality exercised little or deficient oversight.³⁸⁷

383. See *supra* Section III.B.2. For an opinion that does distinguish between private and public wrongs, see *California v. Purdue Pharma L.P.*, No. SACV 14-1080-JLS, 2014 WL 6065907, at *3 (C.D. Cal. Nov. 12, 2014), which distinguishes direct harm to opioid users from indirect harm to communities, an argument put forth by one of the parties.

384. See, e.g., Engstrom & Rabin, *supra* note 4, at 297, 312, 346; Samuel Fresher, *Opioid Addiction Litigation and the Wrongful Conduct Rule*, 89 U. COLO. L. REV. 1311, 1320 (2018) (describing cases where the wrongful-conduct rule barred recovery).

385. Engstrom & Rabin, *supra* note 4, at 312.

386. The role of preemption in prescription-drug cases is complex. The Supreme Court has held that claims of failure to warn against brand-name producers are not preempted unless the manufacturer can show with clear evidence that the updated warning at issue would not have been approved by the FDA. *Merck Sharpe & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1678 (2019); *Wyeth*, 555 U.S. at 571. Meanwhile, failure-to-warn claims against generic producers are preempted because such producers have no power to change their labels but must match the brand-name label. *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 618 (2011). The preemption questions seem much less certain in the context of public-nuisance claims, and Catherine M. Sharkey has provided a detailed account of the role of preemption in the opioid litigation. See Sharkey, *supra* note 135, at 676-86. She notes that, despite manufacturers' vigorous pursuit of preemption defenses, most courts have ignored or rejected preemption claims, and she examines several important cases that have done so. *Id.*

387. Sharkey has discussed the difficulties of policing even outright fraud on the FDA, let alone deficient oversight by the agency itself. See Catherine M. Sharkey, *The Fraud Caveat to Agency Preemption*, 102 NW. U. L. REV. 841 (2008). She identifies "the need for some regulatory mechanism to police fraud on the agency." *Id.* at 841.

Suits directly against agencies such as the FDA for negligently approving or monitoring a drug are generally barred by sovereign immunity.³⁸⁸ In addition, the Supreme Court has rejected state-law suits by injured individuals against manufacturers for alleged “fraud on the FDA,” based on manufacturer misbehavior such as providing incomplete or misleading information to the agency.³⁸⁹ In short, modern tort law is built on the assumption that the regulatory state works well; it is not primed to address its failures.

Finally, even when individual tort claims have merit on paper, many litigants find them to be an uphill battle in practice. In the cases of tobacco and opioids, private lawsuits were and continue to be mostly failures, even after evidence of misleading and fraudulent conduct has come to light. This is in part due, as others have noted, to the enormous resources and aggressive litigation postures of industry defendants. Both tobacco and opioid companies devoted virtually inexhaustible resources to litigation and refused to settle regardless of the merit of the claims.³⁹⁰ Tobacco companies moved seamlessly from concealing the danger of their products to arguing that those dangers were commonly known, such that plaintiffs should not be entitled to recover.³⁹¹ Opioid defendants utilized procedural tactics, such as when Purdue sought to transfer a Kentucky public-nuisance case to federal court in New York; the Second Circuit eventually upheld an order to send the case back to Kentucky, but the process took six years.³⁹² Many private litigants and their attorneys lack the resources to weather the time and volume of motions that well-resourced defendants can put into cases. Some have argued that, for both tobacco and opioids, the involvement of state attorneys general began to level what had been an extremely uneven playing field.³⁹³

It is impossible to gauge the “right” level of litigation success, and in any given case, failure might be appropriate on the merits. At a macro level, however, a claim that private litigation could have sufficiently addressed either the tobacco or the opioid crisis is wrong. That tool was tried, and it failed.

388. See Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (2018).

389. See *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 348 (2001).

390. See, e.g., *Engstrom & Rabin*, *supra* note 4, at 296; *Ausness*, *supra* note 155, at 1163 (noting Purdue’s “policy of refusing to settle individual lawsuits”).

391. See, e.g., *Waterhouse v. R.J. Reynolds Tobacco Co.*, 162 F. App’x 231, 233-35 (4th Cir. 2006) (upholding a grant of summary judgment for the defendant tobacco company, which argued that the risks of cigarettes were common knowledge when the plaintiff smoked).

392. See *Armstrong*, *supra* note 268.

393. *Ausness*, *supra* note 155, at 1121 (“[S]tate officials can muster more effective legal resources than individual litigants.”); *Engstrom & Rabin*, *supra* note 4, at 349-50.

C. An Institutional Role

In summary, it is easy to say that the modern administrative state should use other tools to regulate risks to the public. In reality, however, those tools sometimes fail us. When they fail, the public suffers. The question is what to do. When public officials have turned to public-nuisance law, they have seemingly done so, quite simply, because other regulatory tools have failed.

When regulation fails, officials are faced with choices. One option is to leave regulators to play catch-up, investigating criminal activity and revising regulatory standards prospectively. Another option is to leave states and localities to spend millions (or billions), beyond what they have already lost to the crisis, to try to abate the damage. All of this has occurred in the opioid crisis. None of it addresses the noncriminal contributions of industry actors, and none of it causes them to internalize their massive externalities or holds them accountable for wrongs committed. Thus, another option is to add public nuisance to the array of tools available. While imperfect, it can hold defendants accountable for past behavior and secure their assistance in abating an ongoing crisis.

From an institutional perspective, public nuisance involves some unusual features. At its worst, it could be described as a mechanism by which some private individuals (i.e., plaintiffs' lawyers) effect a redistribution of wealth to themselves from other private individuals (corporations and, ultimately, their consumers). For allowing themselves to be the conduit in this transaction, state and local governments obtain a share of the proceeds. By participating, the states and localities avoid many of the burdens of regulating, and they obtain funds over which they exercise wide discretion. Meanwhile, constituents of the litigating government do not bear the costs of the transaction (except for the higher prices experienced by consumers as a whole), but neither do they necessarily enjoy its benefits. This is a far cry from traditional pictures of regulation, wherein the people through their representatives evaluate the benefits and burdens of regulation. Where regulation once might have occurred within the boundaries of a jurisdiction, public nuisance breaks through that wall, shifting both costs and benefits away from one jurisdiction's citizens.

These issues make clear that public nuisance would rarely be a first-best solution to public crises. Its critics, however, would go further to say that it should not exist as a potential tool for addressing contemporary problems. This goes too far. In cases where regular regulation fails, public nuisance has a role. Historically, in such contexts—most famously tobacco and now opioids—(1) producers possessed and downplayed information about risk and, perhaps relatedly, (2) traditional regulation lagged behind the realities of those risks.

As such, public nuisance should be considered part of a larger arsenal of tools to accomplish goals in the public interest. Although public nuisance itself is possibly subject to exploitation, it has proved most useful in cases where more standard regulatory tools have failed or been exploited. The availability of public nuisance, like the availability of toxic-tort or products liability, is not a reason for lawmakers to abdicate regulatory responsibility in the first place. But in cases where regulation fails, it can provide states and localities – and, ultimately, citizens – with some modicum of relief. Moreover, courts have experience with managing the relationship between litigation and regulation, as the issues raised by public nuisance are not so different from those raised by class actions, products liability, toxic torts, and other features of contemporary civil litigation. How one feels about courts in this arena probably depends upon how one feels about courts versus regulatory bodies generally.³⁹⁴ For present purposes, it is enough to note that such a role is neither unusual nor new.

This understanding of public nuisance accords with views of tort and regulation as complementary, rather than competing.³⁹⁵ Some think public nuisance is particularly important because of the dangers of administrative failure.³⁹⁶ Some propose a catalyst theory, whereby public-health litigation reframes regulatory problems and hastens solutions.³⁹⁷ All of these approaches conclude that the rise of the modern administrative state has not eliminated the role of public nuisance.

394. See, e.g., Dana, *supra* note 117, at 65-67; Sharkey, *supra* note 135, at 686-87 (observing complementary roles for litigation and regulation). Compare Victor E. Schwartz, *Rendering Justice in Key Areas of Tort Law in the Next Decade*, 49 SW. L. REV. 378, 384 (2021) (criticizing “regulation through litigation” in the tort context), and David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 403 (2019) (criticizing MDLs as de facto administrative programs with governance deficits), with Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2010 (1997) (offering a complimentary view of Judge Weinstein’s attempts to broker global resolutions to multijurisdictional litigation as the creation of a “temporary administrative agency”).

395. See Sharkey, *supra* note 135, at 686 (“[T]ort and regulation work in tandem . . .”).

396. See, e.g., Dana, *supra* note 117, at 65-67; Rustad & Koenig, *supra* note 326, at 351 (arguing for public nuisance as a second-best approach in the context of public-health epidemics where the legislative branch and administrative agencies frequently fail).

397. See, e.g., Engstrom & Rabin, *supra* note 4, at 350-61; Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 350 (2011) (using climate public-nuisance litigation to argue that “the constitutional division of authority also may be seen as a system of ‘prods and pleas’ in which distinct governmental branches and actors can push each other to entertain collective political action when necessary”); Melissa Mortazavi, *Tort as Democracy: Lessons from the Food Wars*, 57 ARIZ. L. REV. 929, 931 (2015) (“[T]ort law may be best understood as playing a critical balancing role in supporting democratic deliberation. Tort suits bring forth new ideas, create new forums for debate, force fact-finding, and increase back and forth dialogue amongst the public and private institutional actors to develop sound law and policy.” (citation omitted)).

At the same time, however, there are some discrete aspects of public nuisance that courts could consider to foster the best uses and outcomes for this cause of action. The concluding Part of this Article sketches an approach to public nuisance aimed at both confirming its conceptual legitimacy and enhancing its institutional efficacy.

V. THE PROMISE OF PUBLIC NUISANCE

Imagine public nuisance as a way of enforcing duties we owe to each other by virtue of our status as members of the public. If I block a public roadway or own an overgrown, unsafe property, I place my fellow citizens at risk and impede normal commerce. I have a duty to take reasonable care to address the risk I am imposing on others; if I fail to, I can be required by law to fix or abate it.

Public nuisance is not the source of this duty, but it is an articulation of it and, at times, a mechanism for enforcing it. Public nuisance acknowledges that we have duties not to interfere with public rights. When we create a condition that gives rise to such an interference, we have a duty of care to mitigate it through reasonable steps, just as a person who abandons his car in the middle of the road has a duty of reasonable care to ensure others are not injured by it. Those who contribute to conditions unsafe to the public have an ongoing obligation to address those conditions. This is not a revolutionary idea. It is a familiar one that has been stigmatized, and at times defanged, in the context of public nuisance through doctrines such as control requirements. But the duty on which public nuisance is founded is more familiar than conversations about it would suggest.

Moreover, within this framing, defendants in public-nuisance suits are not being held “strictly liable” in any concerning way. They are no more strictly liable than the motorist who abandons his vehicle. Both are being held to a duty which they themselves created, by taking action that imposed risk on others. So long as that risk remains, they must act with reasonable care to abate it. In this regard, the Second Restatement articulated a sound standard when it defined an unreasonable interference as requiring either (1) activity that is intentional and unreasonable or (2) activity that is unintentional but otherwise tortious.³⁹⁸ Either an entity is aware that its conduct imposes an unreasonable risk, or the entity has behaved unreasonably in imposing the risk. If public nuisance is understood as a variety of affirmative duty to mitigate a risk, problematic conduct will take one or the other of these forms.

What the actor owes are reasonable steps toward mitigating the risk. Failures to do so resulting in public injury could rightly be redressed through damages.

398. RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (AM. L. INST. 1979).

Also, ongoing risk imposition is properly addressed through abatement. To the extent that some are still troubled by the notion of damage awards to public entities in public nuisance, structured abatement funds provide an alternative. In many instances of complex social problems, one actor will not be in the position to abate a nuisance singlehandedly. This does not mean that the actor does not share responsibility for the nuisance (again, control and responsibility are independent), and it does not mean that they cannot contribute toward abatement. Although the difference between property rules and liability rules is an important one, in this case, they are much alike in practice. The owner of a car blocking a roadway might be unable to move it himself; instead, he might pay a third party or the state to remove it. Joint owners of a blighted property might all contribute financially to hiring a third party to clean it up – or, if they lack the funds, they might auction the property and let someone else pay for cleanup (or let it go to the state). At the end of the day, even mundane public-nuisance defendants are often paying money to facilitate abatement, rather than performing abatement themselves.

Moreover, participation in an abatement fund makes it possible to apportion responsibility. On the affirmative-duty analogy, each participant must only take reasonable care to remove the risk. This could amount to less responsibility than abating the nuisance completely. An abatement fund allows one actor to be made to contribute partially toward abatement and multiple actors to share responsibility jointly (including possibly plaintiffs or nonparties who contributed to the condition). In this regard, the Oklahoma Supreme Court was perhaps misguided to be so troubled by the lower court's setting up an abatement fund. Perhaps the court setting up a mechanism for abatement and requiring one defendant to pay for one out of twenty years of its operation was a reasonable translation of public nuisance's traditional features for today's problems.³⁹⁹

If this conception of public nuisance serves to bring it within the fold of contemporary tort law, there is still more that can safeguard its workings from an institutional standpoint. The solution is not to reject public nuisance out of hand but to address it on a case-by-case basis, particularly with the following considerations in mind:

Policy Questions, Preemption, and the Role of Public Nuisance: Some, though not all, public-nuisance cases raise questions about the respective roles of litigation and regulation. Where this is the case, both litigants and courts must recognize that they do not write on a clean slate. Certain doctrines – such as preemption – channel these concerns. In certain instances, public-nuisance suits

399. See *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 722 (Okla. 2021) (“The district court ordered that J&J pay \$465 million to fund one year of the State’s Abatement Plan, which consisted of the district court appropriating money to 21 government programs for services to combat opioid abuse.”).

might amount to second-guessing the considered views of a legislature or administrative agency. In complex contemporary endeavors such as the making and marketing of prescription drugs, a certain level of risk is inevitable, and agency experts with complete information may well be in the best possible position to decide what is a reasonable risk level.

Existing preemption rules try to identify these cases to some degree. These rules, however, like many of the other doctrines we have addressed, tend to assume a well-functioning regulatory state to perhaps an optimistic degree. Professor Catherine M. Sharkey has proposed an “agency-reference” model for preemption, which would take input from, but not necessarily defer to, regulators.⁴⁰⁰ Sharkey begins with the premise that “tort and regulation work in tandem” and proposes “hard look” review for agency action, which would safeguard against ideologically driven regulatory decisions and try to ensure that agency decision-making was evidence-based.⁴⁰¹ In public-nuisance cases, such an approach would facilitate courts’ understanding of the actual regulatory history in a given instance, including the possibility of regulatory failure. This is superior to assuming that because regulation ideally would address some question, it has in fact been addressed.

Doctrines such as preemption exist precisely because courts do not simply cede the field: they consider their authority in more case-bound, contextual ways. It is at this level that courts can and do address concerns about separation of powers. Preemption is not a blunt instrument; it is a discerning tool that can channel separation-of-powers principles in individual cases.

Transparency: Aspects of public nuisance, such as suit selection and contingency-fee arrangements, require transparency with the public and the courts. Officials pursuing public-nuisance suits should explain their rationales and provide context for how the suit relates to other forms of government action. Retainer agreements should be public, including contingency-fee arrangements. Courts should follow the leads of California and Rhode Island in ensuring that decision-making authority resides with the government, not with private counsel.⁴⁰²

Earmarking of Monetary Awards and Settlements: Governmental discretion in spending monetary awards undercuts the claim that the awards are needed for public health and welfare. Funds obtained from settlements or damage awards

400. Sharkey, *supra* note 135, at 686-93. See generally Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449 (2008) (proposing the agency-reference model in the context of products-liability litigation).

401. Sharkey, *supra* note 135, at 686.

402. See, e.g., *County of Santa Clara v. Superior Ct. of Santa Clara*, 235 P.3d 21, 34 (Cal. 2010); *State ex rel. Lynch v. Lead Indus. Ass’n*, No. PB 99-5226, 2003 WL 22048756, at *3 (R.I. Super. Ct. Aug. 29, 2003).

should be earmarked to serve the public purposes for which the government ostensibly sued.⁴⁰³ For example, the \$26 billion global settlement with Johnson & Johnson and three distributors expressly provides that at least 70% of the settlement funds must be used for opioid remediation efforts and includes examples of qualifying expenditures.⁴⁰⁴ The agreement further provides that a wide range of settlement information must be posted on a designated website, including the amount and uses of any settlement funds not used for remediation.⁴⁰⁵

Like all matters of common law, public nuisance is subject to evolution, and it accommodates considerations of public policy that arise in particular cases. Along with the features listed here, there are likely other constraints and improvements that would be relevant to public nuisance in general or to particular suits. These could constrain the more concerning aspects of public nuisance while allowing it to play a useful role in our imperfect world.

CONCLUSION

Modern public nuisance raises traditionalist, formalist, and institutionalist objections. Each of these, in turn, raises a response. As hundreds of years have shown, public nuisance continues to evolve, and courts continue to reflect on its doctrinal boundaries and its relationship to other aspects of the law. This ancient cause of action arose to address infringements of public rights as those were understood at the time, and it has continued to evolve to address new problems. Moreover, although it predates our modern negligence regime, its features can be translated into terms—for instance, of relational and affirmative duties—that bring it within the realm of the familiar and argue for its continued recognition as a tort.

Almost by definition, public nuisance is not a first-best solution: it comes into play when an activity is allegedly infringing a public right. If this is the case, clearly other forms of regulation have failed to prevent it—whether the “it” in question is a noisome property unremedied by zoning laws or a nationwide addiction scourge. It might not be ideal, but in some cases it manages to alleviate risks or harms to public interests and to require actors to internalize the public costs of their activities. When public nuisance is needed, courts should retain the discretion to identify its appropriate usage, just as they have for centuries.

403. See, e.g., Bronstad, *supra* note 354 (noting earmarking of funds in opioid settlement).

404. *Frequently Asked Questions About the National Opioid Settlement [Subject to Ongoing Corrections and Updates]*, NAT'L OPIOID SETTLEMENT, <https://nationalopioidsettlement.com/faq> [<https://perma.cc/UM6W-9X3V>].

405. *Id.* This publicity requirement includes amounts spent on attorney's fees. *Id.* In addition, the settlement provides separate funds of \$1.95 billion for private attorneys' fees to prevent siphoning off substantial amounts of abatement funds. *Id.*

Public nuisance has some unusual features from an institutional perspective. Other forms of regulation are more familiar to us today. But calling it an outlier or calling for its rejection requires particular assumptions about our lawmaking baseline. Another orientation would be to consider that public nuisance has existed for centuries. And even as the regulatory state has emerged around it, neither litigants nor courts have concluded that it has outlived its usefulness. Instead, public nuisance remains a part of our legal institutions, just as much as some more familiar parts. Public nuisance demonstrates how the common law, and law generally, evolves to address perceived failures; in so evolving, it creates, and sometimes recreates, its own boundaries.