Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience

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DEFINING A PROPER ROLE FOR PUBLIC NUISANCE LAW IN MUNICIPAL SUITS AGAINST GUN SELLERS: BEYOND RHETORIC AND EXPEDIENCE

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I. INTRODUCTION

Lawsuits against gun manufacturers, distributors, and retailers have become familiar sights on the judicial landscape. Recently, numerous lawsuits have been brought by public entities, including cities, counties, and one state,\(^1\) in an effort to address the disturbing gun crime and injury statistics that have become an unfortunate fact of life in the United States. For example, in 1997, gun-related deaths in the United States were reported to be in excess of thirty-two thousand,\(^2\) with an additional sixty-four thousand serious injuries.\(^3\) In their suits against gun sellers, public entities have alleged injuries ranging from interference with public health and safety,\(^4\) to depletion of the public fisc,\(^5\) to creation of a hazardous condition.\(^6\) The suits involve a constellation of different theories, ranging from...

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1. To date, the following public entities have filed suits against the gun industry: Los Angeles, Compton, West Hollywood, & Englewood, CA; San Francisco, Berkeley, Sacramento, Oakland, East Palo Alto, Alameda, and San Mateo County, CA; Bridgeport, CT; Washington, DC; Wilmington, DE; Miami-Dade County, FL; Atlanta, GA; Chicago & Cook County, IL; Gary, IN; New Orleans, LA; Boston, MA; Detroit, MI; Wayne County, MI; St. Louis, MO; Camden (both the city and the county), NJ; Newark, NJ; New York City; New York State; Cincinnati, OH; Cleveland, OH; and Philadelphia, PA. The Violence Policy Center maintains an up-to-date web site that provides a useful chart containing a list of complaints, filing dates, court, defendants, theories, and current status. One can also download the complaints from that site. See Violence Policy Ctr., Litigation Against the Gun Industry, at <http://www.vpc.org/litigate.htm> (last visited Jan. 13, 2001).


6. See, e.g., Complaint, City of Boston (No. SUCV1999-02590-C); Complaint, Archer (No. 99-912-658 NZ).
public nuisance,\(^7\) to negligence,\(^8\) to product liability,\(^9\) to unfair and deceptive trade and advertising practices.\(^{10}\)

Predictably, political reaction to these lawsuits has been polarized. Those who bemoan the abject failure of our national response to gun violence cheer these suits as effecting an indirect, but nonetheless powerful, supplement to legislation. On the other side stand antigun-control forces who regard these suits as cynical end-runs around the democratic process. The blistering battery of parties and theories that have been leveled against gun sellers feeds the critics’ complaint that the suits are less about recovery for injured parties or protection of public safety and more about achieving through litigation what cannot be achieved through the legislative route.

Of the various legal theories pressed into service by municipal entities\(^{11}\) and private plaintiffs alike, in suits against gun sellers, none has generated as much puzzlement or negative reaction as that of public nuisance.\(^{12}\) To an extent, plaintiffs and their allies have created their own problem. For example, Steven Young, a gun control advocate from Chicago, lent legitimacy to the arguments of those who see

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9. See, e.g., Complaint, City of Atlanta (No. 99VS0149217J); Complaint, Morial (No. 98-18578); White v. High Point Firearms No. 1:99 CV 1134 (Ohio Ct. Com. Pl. filed Apr. 8, 1999).


11. As used throughout this section, the term “municipal” refers to cities and counties acting in their public, governmental (as opposed to proprietary) capacities. For a discussion of the possibility of a municipality’s ability to recover for damage to its property, see Note, Recovering the Costs of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry, 113 HARRY L. REV. 1521 (2000) [hereinafter Public Nuisance Abatement] and infra Part VII.B. In addition, the State of New York has recently joined the municipalities in filing suit. New York v. Sturm, Ruger & Co., No. 402586/2000. That suit, which is grounded entirely in public nuisance, will be discussed along with the municipal suits. See infra Part VI.

suits against gun sellers as "junk litigation"\textsuperscript{13} by offering a purely instrumentalist justification for a public nuisance claim:

The idea is to divide, separate and weaken the gun manufacturers; it makes them stretch out their own financial resources. We just have to try a lot of different legal approaches. What we've tried is to file suit under a "public nuisance" theory. You keep putting up a lot of different legal theories and new approaches, and sooner or later, the dam is going to crack . . . .\textsuperscript{14}

Whether courts are influenced to dismiss public nuisance claims based on such statements is, of course, a matter of speculation. Given the general confusion surrounding the theory of nuisance law, though, it is not surprising that courts are eager to avoid entertaining such claims.

Variously described as a ""wilderness' of law,"\textsuperscript{15} a "mystery,"\textsuperscript{16} a "legal garbage can,"\textsuperscript{17} and "the least satisfactory department of [tort law], both to teacher and student,"\textsuperscript{18} nuisance law may be thought best avoided. Such avoidance, however, is a large legal mistake. Indeed, for the reasons developed below, public nuisance law is the best fit for municipal complaints against gun sellers.\textsuperscript{19} Properly understood, a public nuisance claim filed by a state actor in its governmental capacity is not a tort suit; rather, it is a legitimate exercise of state police power in protecting the health and safety of the population.\textsuperscript{20} On the other hand, public nuisance suits by private plaintiffs against gun sellers are tort claims and should be remitted to other legal theories, such as negligent marketing or product defect.\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{14} Timothy A. Bumann, Gun Control Through Retailer Litigation, BRIEF, Fall 1999, at 21 (quoting On the Record, CHI. TRIB., Nov. 14, 1998).
\item \textsuperscript{15} HORACE WOOD, THE LAW OF NUISANCES, at iii (3d ed. 1893).
\item \textsuperscript{16} Warren A. Seavey, Nuisance: Contributory Negligence and Other Mysteries, 65 HARV. L. REV. 984, 984 (1952).
\item \textsuperscript{17} William L. Prosser, Nuisance Without Fault, 20 TEX. L. REV. 399, 410 (1942).
\item \textsuperscript{18} F.H. Newark, The Boundaries of Nuisance, 65 L.Q. REV. 480, 480 (1949).
\item \textsuperscript{19} As we make clear in infra Part VII, abatement relief and injunction are the remedies most closely tailored to public nuisance. Recovery of damages, apart from those incurred in abating the nuisance, are much more problematical and should be left to tort law.
\item \textsuperscript{20} Cf. Lawrence O. Gostin et al., The Law and the Public's Health: A Study of Infectious Disease Law in the United States, 99 COLUM. L. REV. 59, 103-05 (1999) (stating that in the nineteenth century the source of the state's authority to act was the police power and public health measures were dictated by necessity).
\item \textsuperscript{21} See, e.g., Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 828 (E.D.N.Y. 1999) (stating that the jury could properly have found gun manufacturers negligent for their marketing and distribution practices); Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146, 189 (Cal. Ct. App. 1999) (reversing dismissal of suits by victims of gun violence who claimed that defendant designed and marketed its "fingerprint resistant" TEC handguns to appeal to criminals).
\end{itemize}
Part II of this Article contains a brief discussion of the history and development of the law of nuisance. We differentiate between the state’s sometimes ill-defined power under public nuisance law and the private plaintiff’s ability to sue in tort for damages caused by such nuisances. Understanding the different sources of legal action is vital for analyzing the merits of the public nuisance claims in the municipal complaints. Part III considers the general objections to the government’s use of public nuisance law, including the issue of whether a municipality—as opposed to the state—may bring an action for public nuisance.

We then move to the central question of this Article: What, precisely, is the public nuisance presented by guns? Inasmuch as gun sale and ownership is legal, the conduct of gun sellers a public nuisance might seem at odds with legislative decisions. Certain practices, however, amount to public nuisances by subverting the intent of the law. After surveying the sparse canvas of gun-control litigation, Part IV illustrates this point by analogizing guns to several hypothetical cases involving the sale and marketing of automobiles. Part V then emphasizes the unique fit between public nuisance law and the municipal suits by contrasting such suits with private actions for public nuisance: the latter serve no defensible purpose and should be abolished.

Part VI then tests the allegations of the municipal complaints against the law of public nuisance, now properly understood. We demonstrate that the better-drafted of the municipal complaints—particularly that of Chicago—provide working examples of the types of conduct that might constitute a public nuisance. The point is thus underscored that making specific, conduct-based allegations can overcome the presumptive legality of gun sales.

Finally, Part VII discusses the appropriate remedy for public nuisances. This Article concludes that equitable relief is indicated and discusses the kinds of orders that might be effective. For those municipalities that seek damages, Part VII differentiates between the costs incurred in abating the nuisance and damages that would compensate the city for costs not related to abatement and concludes that only those costs reasonably assignable to abating the nuisance should be recoverable under a public nuisance theory.

Our underlying goal is to remind litigants and courts that they possess the conceptual arsenal sufficient to force gun sellers to pay the true cost of injuries.

22. See discussion infra Parts II, III.
caused by these dangerous products and that doing so does not require warping well-settled legal doctrines and principles.

II. A TARGETED HISTORY OF PUBLIC NUISANCE LAW

Understanding the root of public nuisance law requires us to begin with the law of private nuisance, which preceded it. Private nuisance was one of the three ancient assizes available to plaintiffs who alleged interference with a land interest. The assize of novel disseisin applied where one had "[w]holly . . . deprive[d] someone] of the opportunity of exercising his rights over land."25 The familiar assize of trespass was appropriate for interference with the landowner’s rights to his land not serious enough to amount to a dispossesion, as long as the defendant performed the act while on the plaintiff’s land.26 The assize of nuisance was proper for similarly less serious, but nontrespassory, invasions of another’s interest in the private use and enjoyment of land.27

Public nuisance began life by analogy to this idea of interference with another’s land use. If interference with a private right of way constituted a private nuisance, then interference with the public’s right of way (or, with relevance to the time, the King’s right of way) would come to be called a public nuisance. As Professor Newark has argued, it may be that this resemblance is only superficial;28 however, Professor Spencer has noted that early legal scholars found the analogy persuasive.29 Further, courts sometimes found the distinction necessary because defendants charged with creating a private nuisance could defend by claiming that the interference was really a public one. If that were so, the common law courts were compelled to cede jurisdiction to the criminal courts.30

Once recognized in rudimentary form, public nuisance spun off two quite unrelated developments. First, the types of interference cognizable as public nuisances grew far beyond those affecting the public right of way to match the many means by which one could interfere with the common good. Although such interferences generally involved a defendant’s use of land,31 they have come to take

25. Newark, supra note 18, at 481.
26. Id.; see also RESTATEMENT (SECOND) OF Torts § 158 (1965) ("One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other if he intentionally, (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove.").
28. Newark, supra note 18, at 482.
29. Spencer, supra note 27, at 58.
30. Id. at 59.
31. See Louise A. Halper, Public Nuisance and Public Plaintiffs: Rediscovering the Common Law (Part I), 16 ENVTL. L. REP. (ENVI. L. INST.) 10,292, 10,293 (1986) ("Generally, a nuisance is created when one violates the duty to use one’s property so as not to injure another . . . . "). It is not clear, however, whether Professor Halper means to restrict the word “property” here to real property. Id.
in such diverse unneighborly behavior as “allowing infirm animals to wander, selling unwholesome food and drink, washing hemp or flax in water used for cattle, fishing or hunting out of season, [or] operating ‘lewd ale-houses.” Thus, public nuisance became an important component of what today is called the police power, by which the state combats threats to the public health and safety.

Second, matters came full circle. Just as private nuisance had inspired the creation of public nuisance, private plaintiffs could now have a claim for public nuisance, provided they could show they had suffered injury “distinct from the harm suffered by the public in general.” Such an interference could also constitute a private nuisance when the plaintiff’s use and enjoyment of property was affected. But the encroachment might also include personal injury, such as when a plaintiff fell upon an obstacle on the public way.

Of course, a defendant who left such an encroachment was amenable to being sued in negligence, in an action on the case for indirect injuries. But, by 1840, complaints based on such conduct began to allege nuisance specifically. Thus arose the confused situation whereby one injured in a vehicular collision would bring an action in negligence, while one who drove into a pole left on the highway would have stated a claim in public nuisance. As might have been expected, this distinction produced confusion. For example, the English Court of Appeal once opined “that a skidding omnibus might be a nuisance.”

For personal injury plaintiffs, suits for public nuisance seemed to offer the substantial advantage of dispensing with the requirement of proving negligence. The logic is straightforward. Inasmuch as the King, (today, the state) can bring suit to abate a public nuisance without regard to fault, private plaintiffs’ actions are

33. See LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW 259-60 (2000) (“Today, public nuisances are usually defined by the legislature . . . . The legislative . . . definition is often broad and virtually coterminous with the police power . . . .”).
34. Halper, supra note 31, at 10,294; see also RESTATEMENT (SECOND) OF TORTS § 821C(1) (1979) (stating that to recover damages, “one must have suffered a 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 the interference”).
35. More precisely, the actions were brought on the case for indirect injury, because the tort of negligence was not recognized as such until the nineteenth century. Nonetheless, the allegations of these complaints, made clear that “the lawyers of that time conceived of them as actions for negligence.” Newark, supra note 18, at 484 (citing cases in which plaintiffs were injured by obstacles on the defendant’s property).
36. Id. at 485-86.
37. Id. at 486 (citing Wing v. L.G.O. Co., 2 K.B. 652 (1909)).
38. The word “abate” has a rich meaning in the context of nuisance, referring to a specific equitable remedy available to the state for the purpose of protecting public health, safety, and welfare. It literally means to “remove” the nuisance. See WINFIELD AND JOLOWICZ ON TORTS 635 (W.V.H. Rogers ed., 13th ed. 1989). A certain imprecision of terms creeps in, however, because the more familiar remedy of injunctive relief—whether complete or partial, permanent or temporary—will typically cause the abatement of the nuisance. The municipal complaints that seek equitable relief generally couch their requests in the language of injunction, not abatement. See, e.g., California ex rel. County of Los Angeles v. Arcadia Machine & Tool Co., No. 303753 (Cal. Super. Ct. filed July 25, 1999) (seeking injunction); California ex rel. County of San Francisco v. Arcadia Machine & Tool Co., No. BC214794 (Cal. Super. Ct. filed Aug. 6, 1999); City of Chicago v. Beretta U.S.A. Corp., No. 98-CH-15596 (Ill. Cir. Ct. filed
based on the same conduct, and thus, the syllogism concludes, should be governed by the same legal rules. However, in practice courts generally have not permitted plaintiffs to dispense with a showing that the defendant was somehow at fault. Nonetheless, the side-by-side presence of negligence and nuisance claims for personal injury has introduced unwelcome and unnecessary confusion into the decisional law.

We have come, then, to the present situation in which the term “nuisance” encompasses three distinct concepts. First, and of little relevance to the municipal suits, is the original use of the term to denote a purely private, nontrespassory interference with plaintiff’s use and enjoyment of her land. Second, there are state actions against those who interfere with dangers to “health, safety, convenience [and] public peace,” rights common to the public. Historically, these actions were brought as criminal proceedings. Today, such actions may either be brought under general criminal nuisance statutes, by authority of statutes criminalizing what had

Nov. 12, 1998). Indeed, the New York complaint, which seeks abatement but provides no details as to the kinds of actions that would nullify the problem, underscores that injunctive relief will typically be indicated. New York v. Sturm, Ruger & Co., No. 402586/2000 (N.Y. Sup. Ct. filed June 26, 2000). How else would the nuisance be abated?

39. As Professor Halper explains, this was not always the case. Halper, supra note 31, at 10,294. Until recently, plaintiffs were able to avoid the difficulties of a negligence claim by suing in nuisance, which contains no fault requirement. Id. By the twentieth century, though, this tactic began to prove less successful. An often-cited example of judicial ability to pierce the allegations of the complaint to find a nuisance suit camouflaged by a claim for nuisance is McFarlane v. City of Niagara Falls, 160 N.E. 391 (N.Y. 1928). In Chief Justice Cardozo’s words, a plaintiff “may not avert the consequences of his own contributory negligence by affixing to the negligence of the wrongdoer the label of a nuisance.” Id. at 392.

The words “somehow at fault” used in the text of this Article are purposefully chosen to reflect possibilities of fault other than negligence. A defendant may also be liable to a plaintiff for actions that would otherwise bring strict liability, such as selling a defective product, see RESTATEMENT (SECOND) OF TORTS § 402A (1965), or engaging in abnormally dangerous activity, id. § 519(1). As will become clear in Part V of this Article, it is these categories to which a court should have referenced in suits brought by private plaintiffs—not nuisance.

40. See infra text accompanying notes 150-60. See generally Halper, supra note 31, at 10,297-99 (discussing movement from strict liability to a fault-based standard in private suits and the effect of that shift on suits brought by public entities).

41. “A private nuisance is a nontrespassory invasion of another’s interest in the private use and enjoyment of land.” RESTATEMENT (SECOND) OF TORTS § 821D (1977).


43. See generally Spencer, supra note 27, at 56-66 (describing the history of the crime of public nuisance); Halper, supra note 31, 10,293-94 (giving history of state public nuisance actions). Spencer’s description of the history of this vaguely defined crime is clear and enlightening. However, as discussed infra Part III.A, critics have charged that, given the open-ended definition of public nuisance as anything that is injurious to public health, the general crime of public nuisance offends “modern notions of certainty and precision in criminal law.” Spencer, supra note 27, at 55.

44. See, e.g., OKLA. STAT. ANN. tit. 21, § 1191 (West 1983) (making public nuisance a misdemeanor); MONT. CODE ANN. § 45-8-112 (1999) (allowing for an action to abate a public nuisance).
been common-law nuisances,\textsuperscript{45} or as civil actions.\textsuperscript{46} In some states, both civil and criminal actions are appropriate.\textsuperscript{47} Public nuisance actions are generally brought in equity, seeking an injunction or abatement of the nuisance.\textsuperscript{48} However, it is much less clear whether the state may recover damages.\textsuperscript{49}

Finally, private plaintiffs who have suffered a distinct injury from any proper subject of a state action for public nuisance may bring a tort claim for public nuisance. The remedies may include damages, an injunction, or abatement.\textsuperscript{50} As we shall see, however, there is good reason for abolishing the tort of public nuisance, at least where the remedy sought is personal injury damages.\textsuperscript{51}

III. PRELIMINARY OBJECTIONS TO THE USE OF PUBLIC NUISANCE THEORY

A. Public Nuisance is a Broad, Archaic Doctrine

In the time of common-law crimes, the offense of public nuisance naturally expanded outward from interference with the public’s right of way to become a kind of wastebasket, capturing offenses that did not fit neatly into any category. As Professor Spencer points out, early attempts to create a taxonomy of the criminal law resulted in “an annoying pile of bits and pieces left over.”\textsuperscript{52} According to Spencer, William Hawkins, the first “to arrange the multitude of crimes according

\textsuperscript{45} See, e.g., FLA. STAT. ANN. § 893.138 (West 2000) (allowing local action to abate drug-related or prostitution-related public nuisances and criminal street gang activity and permitting similar action to declare certain buildings and premises to be public nuisances); N.Y. PENAL LAW § 400.05(1) (McKinney 1999) (declaring the possession or use of certain weapons a nuisance).

\textsuperscript{46} See WIS. STAT. ANN. § 823.01 (West 1994) (providing for an action for damages or abatement of a public nuisance); see also Civil Litigation, supra note 42, at 1763-68 (discussing other anti-crime civil litigation). Government-driven civil litigation raises concerns of its own. See Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction, 42 HASTINGS L.J. 1325 (1990-91); Christopher S. Yoo, Comment, The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances, 89 NW. U. L. REV. 212 (1994); see also infra Part III.A (considering the concerns of government driven litigation and arguing that, properly limited, public nuisance can be a fair and effective tool in combating certain practices in which gun sellers engage).

\textsuperscript{47} See, e.g., OKLA. STAT. ANN. tit. 50, § 8 (West 2000) ("[R]emedies against a public nuisance are: 1. Indictment or information, or, 2. A civil action, or, 3. Abatement."); TENN. CODE ANN. § 29-3-102 (Supp. 2000) (conferring jurisdiction "upon the chancery, circuit, and criminal courts . . . to abate public nuisances").

\textsuperscript{48} "[R]emedies . . . such as . . . abatement of the nuisance or injunction may lie in favor of the state . . . ." RESTATEMENT (SECOND) OF TORTS § 821B, cmt. d (1977); see also Public Nuisance Abatement, supra note 11, at 1536-38 (explaining that states routinely give cities the power to abate public nuisances).

\textsuperscript{49} Public Nuisance Abatement, supra note 11, at 1531-36; see infra Part VII (exploring the issue of remedies).

\textsuperscript{50} DAN B. DOBBS, THE LAW OF TORTS § 468 (2000) (explaining the application of compensatory and punitive damages, or an injunction that might require abatement of the nuisance, or, less drastically, "ordering the defendant to minimize . . . the nuisance"). Public Nuisance Abatement, supra note 11, at 1339.

\textsuperscript{51} See infra Part V.

\textsuperscript{52} Spencer, supra note 27, at 65.
to a lofty theoretical scheme," 53 stuffed these "bits and pieces" into the residual category of common nuisance. The broad compass of the offenses comprised by common nuisance makes it "amazing that anyone should assume that Hawkins was describing a single offence, rather than making a residual category." 54 Nonetheless, this blunderbuss entity has survived to the present time, although it is now generally set forth in statute. 55

One can make a respectable argument for doing away with the general crime of public nuisance. Given the harsh sanctions of the criminal law and the concomitant requirement of precision in drafting to provide notice of the prohibited actions, 56 it may seem difficult to endorse an offense of such "staggering sweep." 57 In fact, many of the harms that were once captured under the rubric of public nuisance have since been made the subject of specific criminal or administrative law. 58 For example, environmental degradation is now comprehensively regulated at the federal level, 59 while more local concerns, such as noise, 60 the keeping of animals, 61 and the sale of spoiled food, 62 may be the subject of state law or local ordinance. Indeed, the illegal possession of handguns itself may be declared a public nuisance. 63 Because these laws provide notice of the conduct that is prohibited, the argument runs, they should be favored over the less precise law of public nuisance. 64

53. Id.
54. Id. at 66.
55. See supra note 44-46 and accompanying text.
56. Spencer, supra note 27, at 78.
57. Civil Litigation, supra note 42, at 1760. The authors of Civil Litigation are in error, however, in categorizing the state action for public nuisance as a "tort."
58. See Spencer, supra note 27, at 76-77 (listing examples from Britain).
59. See Cheh, supra note 46, at 1404 n.421 (identifying relevant statutes).
60. See, e.g., COLO. REV. STAT. § 25-12-101 to -109 (2000) (declaring "noise . . . a major source of environmental pollution" and authorizing the creation of standards for noise levels).
61. See, e.g., N.M. STAT. ANN. § 77-1-10 (Michie Supp. 1999) (making unlawful the keeping of "any animal known to be vicious and liable to attack or injure human beings" and "any unvaccinated dog or cat" and prohibiting the failure or refusal "to destroy vicious or unvaccinated dogs or cats with symptoms of rabies"); 53 PA. CONST. STAT. ANN. § 14982 (West 1998) (requiring a permit from the Board of Health as a condition of keeping or slaughtering livestock in residential premises).
62. See, e.g., CAL. PENAL CODE § 383 (West 1999) (declaring the knowing sale of adulterated food or drugs a misdemeanor offense); MASS. GEN. LAWS ANN. ch. 94, § 4 (West 1997) (prohibiting the use of spoiled or contaminated ingredients in bakery products).
63. See N.Y. PENAL LAW § 400.05(1) (McKinney 1999) ("Any weapon, instrument, appliance or substance specified in article two hundred sixty-five [including certain unlicensed firearms and loaded firearms possessed with intent to use illegally] when unlawfully possessed, manufactured, transported or disposed of, or when utilized in the commission of an offense, is hereby declared a nuisance."); see also D.C. CODE ANN. § 22-3217(a), (b) (Supp. 2000) (defining pistols as "dangerous articles" and providing that any "dangerous article unlawfully owned, possessed or carried is . . . a nuisance"). Such statutes are good policy, but should not be thought to limit or define the permissible scope of state action. For example, New York State's complaint alleges both statutory and common law nuisance. New York v. Sturm, Ruger & Co., No. 402586/2000, complaint ¶ 63-64 (statutory), ¶ 65-66 (common law) (N.Y. Super. Ct. filed June 26, 2000). Adding a common law claim avoids the problem of a statute that does not specifically capture the conduct imperiling the public health and safety.
64. See Spencer, supra note 27, at 76-80.
The question remains, though, of what should be done about serious threats to the public health that are not prohibited by specific statutes. If the state had no power beyond these laws, it would be helpless to prevent certain threats to the public health. For example, a toxic chemical useful in certain applications might endanger public health and safety through accidental release.\textsuperscript{65} Public nuisance law could justify an injunction if the behavior that led to the release were controllable and likely to be repeated, or, more likely, could justify requiring the offender to cover the cost of abating the nuisance.\textsuperscript{66} Public nuisance law could also protect citizens, for example, if emerging evidence revealed a chemical’s toxicity and that chemical then had the potential to cause great harm before the legislature could regulate its release.\textsuperscript{67} In short, some residual power, at least to abate public nuisances, is a necessary incident of the state’s obligation to protect the public health: “[T]here may be a case for a general offence of "doing anything which creates a major hazard to the physical safety or health of the public . . . .\textsuperscript{68}

The states agree. The power to abate public nuisances is broadly recognized and resides in the state’s plenary police power.\textsuperscript{69} In general, civil proceedings are indicated in the case of gun sales. The criminal law, with its focus on arrest, prosecution, and incarceration, is better suited to dealing with individual

\textsuperscript{65} In \textit{Town of East Troy v. Soo Line R.R. Co.}, 653 F.2d 1123 (7th Cir. 1980), twenty-thousand gallons of phenol, a known poison, spilled into the soil near local wells. \textit{Id.} at 1125. Because of the contamination, the city was obliged to drill a deep well that was “separated by an impermeable layer of shale from the contaminated aquifer.” \textit{Id.} at 1126. The court permitted East Troy to recover the cost of abating what was obviously a public nuisance. \textit{Id.} at 1132. As discussed in the text of this Article, it is preferable to deal with such issues legislatively.

\textsuperscript{66} In \textit{United States v. Chesapeake & Ohio Ry. Co.}, 130 F.2d 308 (4th Cir. 1942), the United States was able to recover the cost of fire-fighting under a Virginia statute that specifically authorized recovery against anyone who had “negligently or intentionally” started a fire. \textit{Id.} at 310 (quoting VA. CODE § 4435(b) (1936)). The court also noted that recovery would have been permissible under common law tort principles. \textit{Id.} at 310-11. Interestingly, the case makes no mention of public nuisance doctrine.

\textsuperscript{67} For example, in \textit{Florida v. Tampa Elec. Co.}, 291 So.2d 45 (Fla. Dist. Ct. App. 1974), the court held that it had jurisdiction to abate the nuisance created by "sulfur dioxide, sulfur trioxide and other noxious and deleterious chemicals," despite the defendant’s objection that the issue was properly within the ambit of the Department of Pollution Control, which had promulgated but not yet effectuated stringent regulation of such chemicals. \textit{Id.} at 46, 48. Language from the Florida Air and Water Pollution Control Act bolstered the court’s holding, to wit: “It is the purpose of this act to provide additional and cumulative remedies to prevent, abate, and control the pollution of the air and waters of the state. Nothing contained herein shall be construed to abridge or alter rights of action or remedies in equity under the . . . law . . . [nor] as estopping the state or any municipality . . . to suppress nuisances or to abate pollution.” \textit{Id.} at 48 n.8 (quoting FLA. STAT. ch. 403-191(1) (1971)). \textit{Cf.} Vill. of Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824 (Ill. 1981) (holding the court had authority to abate public nuisance although landfill site regulations did not strictly apply to defendant).

\textsuperscript{68} \textit{Spencer, supra note 27}, at 84.

\textsuperscript{69} \textit{See, e.g., Garcia v. Gray}, 507 F.2d 539, 544 (10th Cir. 1974) (stating the “regulation and abatement of nuisances is one of the basic functions of the police power”). For a discussion on the definition and breadth of police power and its relation to nuisance abatement, see Gostin et al., \textit{supra note 20}, at 103-05. As a general matter, the police power belongs to the state, not to local government. Where the threat to public health is specific to a particular location, however, the entity responsible for governance of that location may have power to act. \textit{See infra} notes 73-76 and accompanying text.
misconduct of a serious nature.\textsuperscript{70} Civil remedies, less constrained by the constitutional protections afforded criminal defendants,\textsuperscript{71} have greater flexibility and scope; therefore, it is not surprising that the municipal gun suits have generally taken the civil route.\textsuperscript{72} The remainder of this Part focuses on the ability of a municipality to seek the equitable remedies of abatement and injunction.

B. States, Rather Than Municipalities, Have Authority to Sue for Public Nuisance

In addition to the problem of the general legitimacy of nuisance law, critics have argued that local governments are powerless to proceed under a public nuisance theory. As mentioned above, the power to abate public nuisances is best described as an incident of the state's police power. By what authority, then, do local governments bring such suits? Often, the power is explicitly conferred on the local authorities through legislation. For example, Chicago's lawsuit is buttressed by a legislative grant of power: "The corporate authorities of each municipality may define, prevent, and abate nuisances."\textsuperscript{73} Legislative grants of authority are typical; states have been granting municipalities the authority to abate nuisances within their jurisdictional limits since the nineteenth century.\textsuperscript{74} Even absent such

\textsuperscript{70} See Cheh, supra note 46, at 1332. A corollary is that, where serious misconduct can be traced to a particular individual, such as when a gun retailer sold a gun to someone the retailer knew intended to use the weapon in a crime of violence, the sanctions of the criminal law should be invoked. For example, Chicago's "sting" operation that preceded the filing of its complaint revealed retailer conduct indicating knowledge that the guns purchased were to be used for criminal purposes. See Complaint at 27, City of Chicago, No. 98-CH-15596 (Ill. Cir. Ct. filed Nov. 12, 1998); Barry M. Neier, U.S. Appears Prepared to Indict 4 Gun Dealers in Chicago Sting, N.Y. Times, Aug. 18, 1999, at A17.

\textsuperscript{71} The statement in the text invites a chorus of complaint. Constitutional protections, particularly the requirement of procedural due process, of course apply in the civil context. Professor Cheh's article provides a helpful analysis of due process issues in the civil context, making the point that constitutional scrutiny should be tied to the interest potentially affected, not solely to whether the proceeding is criminal or civil. See Cheh, supra note 46, at 1369-72. The discussion in the text of this Article assumes that the defendants will be afforded due process before any deprivation of property, or other conditions, are imposed.

\textsuperscript{72} See VIOLENCE POLICY CTR., SUMMARY OF LAWSUITS FILED BY CITIES AND COUNTIES AGAINST THE GUN INDUSTRY, at http://www.vpc.org/litigate.htm (last visited Feb. 25, 2001) (presenting Violence Policy Center municipal complaints in useful chart form); see also infra Part VII (discussing the proper remedies under a public nuisance proceeding and the difficulties in seeking damages).

\textsuperscript{73} 65 ILL. COMP. STAT. ANN. 5/11-60-2 (West 1993); see also ALA. CODE § 11-47-118 (1992) ("Municipalities may maintain a civil action to enjoin and abate any public nuisance, injurious to the health, morals, comfort or welfare of the community or any portion thereof."); CONN. GEN. STAT. ANN. § 7-148(c)(7)(B) (West 1999) (granting municipalities power to "[d]efine, prohibit and abate within the municipality all nuisances and causes thereof, and all things detrimental to the health, morals, safety, convenience and welfare of its inhabitants and cause the abatement of any nuisance at the expense of the owner or owners"); Town of East Troy v. Soo Line R.R. Co., 653 F.2d 1123, 1127 (7th Cir. 1980) (quoting WIS. STATS. § 61.34(1) (Supp. 1979-80)) (holding a grant of authority to village boards from the state of Wisconsin to act "for the health, safety, welfare and convenience of the public" supported a town's action for damages incurred in abating a nuisance).

\textsuperscript{74} See Gostin et al., supra note 20, at 104-05 ("The problem of authority to declare and abate nuisances was particularly salient for local governments .... Hence, grants of power to health officials and local governments tended to be made in broad terms.").
an express grant of authority, decisional law has recognized the implicit right of a local authority to abate nuisances within its limits.\textsuperscript{75} As one court stated, "Equitable jurisdiction to abate public nuisances is . . . of 'ancient origin,' and it exists even where not conferred by statute . . . ."\textsuperscript{76}

Of course, the ability to give is the ability to take away. In response to, or even in anticipation of, municipal lawsuits against gun sellers, some states have enacted legislation that specifically prohibits local government from bringing suit against gun sellers—often by reserving that right for the state itself.\textsuperscript{77} Where such statutes unambiguously cover the subject of the lawsuits in question, the statutes should result in dismissal of the suit. However, in cases where a public nuisance suit attempts to enjoin conduct that effects a subversion of the law, a state-wide regulatory scheme covering the sale of guns should not preclude the suit. This point was not appreciated in \textit{Penelas v. Arms Technology, Inc.},\textsuperscript{78} when Miami-Dade County's claim, including a public nuisance count, was dismissed because it conflicted with state law concerning the "manufacture, sale, and distribution of firearms."\textsuperscript{79} But the court did not spell out the nature of that conflict. Whatever the nature of this unspecified conflict, \textit{Penelas} is in error. Absent an express prohibition on suits against gun sellers, public nuisance suits and the gun-control laws of the state will often be complementary, with public nuisance allowing a city

\textsuperscript{75} See \textit{Town of East Troy}, 653 F.2d at 1123.

\textsuperscript{76} City of Chicago v. Festival Theatre Corp., 438 N.E.2d 159, 162 (Ill. 1982) (municipal authority to abate nuisance within city limits was not defined by statute).

\textsuperscript{77} See GA. CODE ANN. § 92A-4815 (Supp. 1999) ("The authority to bring suit and right to recover against any firearms or ammunition manufacturer, trade association, or dealer by or on behalf of any governmental unit . . . for damages, abatement, or injunctive relief resulting from or relating to the lawful design, manufacture, marketing or sale of firearms or ammunition to the public shall be reserved exclusively to the state."). A similar law in Pennsylvania did not stop the City of Philadelphia from filing its lawsuit against a host of gun sellers. Michael Rubinkah, \textit{Despite State Law, Philadelphia Sues Gun Makers}, SEATTLE TIMES, Apr. 12, 2000, at A3. One of the city's arguments is that the law applies only to the legal marketing of guns, whereas the suit targets illegal marketing practices. See City of Philadelphia v. Beretta U.S.A., Corp., No. 2000-CV-2463, ¶¶ 17A, 28, 60 (Pa. Ct. Comm. Pl. filed April 11, 2000) (order granting motion to dismiss entered Dec. 20, 2000).


\textsuperscript{79} Id. at *2 (quoting FLA. STAT. § 790.33). Judge Dean's opinion also reveals an incomplete understanding of public nuisance law. First, she notes that the public nuisance cases cited by the county either involved statutory violations or "a direct connection to real property owned or operated by the government entity." Id. at *4. As noted above, public nuisance may also apply when any serious threat to the public health is involved, whether or not a specific statute has been violated. Further, the comment about the "direct connection to real property" seems to succumb to the confusion between public and private nuisance discussed earlier. Judge Dean also states an independent reason for dismissing the nuisance claim: the defendants have no control over the activity which creates the nuisance. \textit{Id.} This statement is either unhelpfully circular (What is the activity creating the nuisance?) or makes an unwarranted assumption. According to Judge Dean, "The activity which creates the nuisance . . . is the criminal or reckless misuse of firearms by third parties . . . ." \textit{Id.} But it might also be defined to include recklessly supplying firearms to those who can be expected to misuse them. Whether defendants have control over, or responsibility for, such persons is an open question.
to enjoin conduct that would subvert legislative goals. The interest of a municipality in protecting the health and safety of its residents should be respected. To hold otherwise is to deny public authorities the right to use the police power, one of the basal powers of government, to protect their citizens from an identified threat.

Environmental law decisions attest to the continued vitality of municipal use of public nuisance law to protect the public health. An instructive example is City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc. The defendants, both located in Kentucky, were a recycling plant that discharged toxic chemicals into the sewer system and the sewer system that then discharged those chemicals into the Ohio River. The plaintiffs were municipal corporations situated in Indiana. Because of the interstate nature of the pollution, the plaintiffs sued under various federal laws, none of which was found to apply, and under the federal common law of nuisance. The district court dismissed all claims, and the Seventh Circuit affirmed as to all but the nuisance claim. As to that claim, the court had to decide whether municipalities have standing to sue or whether this right runs in favor of the state only.

In reaching its decision, the court focused on the confluence between the party bringing the suit and the damages sought: "They seek only to recover for themselves and other similarly situated municipal bodies damages for expenses they incurred because of defendants’ discharges of toxic chemicals . . ." Thus, although the state would typically be the party to bring suit for pollution of interstate waterways, an organ of the state was held to have standing commensurate with its own injury. Municipal standing, absent express preemption or prohibition

80. The above statement leaves open the possibility that a particular public nuisance suit will work at cross-purposes to a state statute. In such a case, the suit should be dismissed. The Penelas court erred in assuming such a conflict based solely on the presence of state regulation. See Penelas, 1999 WL 1204353, at *2. 81. An interesting question that arises is why no state other than New York has brought suit against the gun sellers. See New York v. Sturm, Ruger & Co., No. 402586/2000, (N.Y. Sup. Ct. filed June 26, 2000). More than twenty cities have filed suit against the gunsellers. This seems to be a situation in which the states and the cities have divergent interests: the cities are intimately familiar with the toll exacted by gun violence in a way that the states may not be. Suburban areas that surround cities may also profit from the sale of guns that then find their way into cities with strict gun control laws. See Public Nuisance Abatement, supra note 11, at 1533. Such divergence of interests is highlighted in states that have gone the “extra step” of prohibiting local suits against gun sellers—a step they have not taken in the context of other public nuisances. 82. 604 F.2d 1008 (7th Cir. 1979). 83. See id. at 1010. 84. See id. 85. See id. at 1010-17. 86. See id. at 1017-19. 87. See id. at 1010-11, 1019. 88. See City of Evansville, Indiana, 604 F.2d at 1017-19. 89. Id. at 1017. 90. Id. at 1019 (citing Township of Long Beach v. City of New York, 445 F. Supp. 1203, 1214 (D.N.J. 1978)). The court also had before it the issue of remedy. It summarily rejected the defendants’ claim that it lacked jurisdiction because damages for treatment, as opposed to injunctive relief, were requested. See id. The question of remedy was not relevant to jurisdiction; the request for damages (apart from whether, at trial, such damages would be awarded) was proper. See id. In so deciding, the
by the state, should be even clearer when the state’s independent interest, as distinct from the municipality’s, is less obvious than in the case of interstate pollution. As the next section demonstrates, gun violence may be one such case.

IV. DEFINING AND APPLYING PUBLIC NUISANCE TO SUITS AGAINST GUN SELLERS

A frequent objection to the use of public nuisance theory in firearms litigation is that the manufacture, distribution, and sale of guns is lawful and subject to substantial regulation. Thus, the argument goes, allowing public nuisance lawsuits to proceed amounts to stealth legislation. However, this broadside attack proves too much. If its logic were followed in every case, public nuisance would be reduced to irrelevance. The theory is most useful in those cases where regulation does not protect public health and safety. Without nuisance law, states and local governments would be helpless in the face of serious challenges to public health—challenges that their police power obligates them to meet.

That said, the critics are not entirely wrong. For example, a municipality or state that sought, through public nuisance litigation, to drive guns from the market entirely, would plainly exceed its mandate. Whether one is pleased with the achievements or not, there has been a great deal of effort devoted to gun regulation, resulting in an array of laws that prohibit the sale or ownership of certain kinds of weapons, ban the advertising of unlawful weapons, require background checks and attendant waiting periods, and disqualify certain classes of purchasers.

court recognized the flexibility of public nuisance law. Although the case does not so state, it may be reasonable to assume that the defendants had already ceased the conduct giving rise to the lawsuit, so the appropriate recovery would be, in nuisance terms, the cost of abating the nuisance. See infra Part VII.

91. See, e.g., Chicago v. Festival Theatre Corp., 438 N.E.2d 159 (Ill. 1982) (placing restrictions on lewd-dancing establishment located in the city).


93. The statement in the text should not be read as suggesting that litigation should never have the indirect effect of driving a product off the market. Indeed, if the costs of that product, properly internalized, are greater than consumers are willing to bear, the product is not cost-justified. See generally David G. Owen, Rethinking the Policies of Strict Liability, 33 VAND. L. REV. 681 (1980) (discussing the theory and limitations of cost-internalization).


96. See, e.g., WASH. REV. ANN. CODE § 9.41.110(5) (West 2000) (imposing a waiting period for granting a dealer a license and requiring background checks for dealers’ employees).

Moreover, whatever the shortcomings of the democratic process,98 the laws respond to a welter of contradictory and inconclusive information about the costs and benefits of gun ownership and sale. A particularly pointed example is the controversy concerning the use of guns for defensive purposes. Some data suggest that such defensive uses occur about two million times each year, while other social scientists have criticized the methodology used in arriving at these estimates and have placed the number much lower.99 Of course, the credence given to one conclusion over the other will dictate public policy. Other difficult factual issues concerning the use of guns abound.100 Given the superior fact-finding capabilities of legislatures, courts should be loathe to render decisions that would force them to take a position on such issues that would be in tension with legislative determination.101 In short, an overly broad use of public nuisance theory, especially if sanctioned by courts, would validate critics’ concerns about the potential for abuse of such a broadly defined power.

What, then, is the proper role of public nuisance theory? In the case of a lawful product such as guns, the public nuisance emerges from conduct that poses a threat to public health and safety beyond what the legislature contemplated. This statement is more difficult to apply than might first appear, however. What did the legislature contemplate? What can be implied from legislative silence concerning a particular practice? Courts must tread carefully, striking a balance between protection of the public health and safety on the one hand and due respect for a coordinate branch of government on the other. The political swirl surrounding the gun issue makes this task even more daunting.

In answering these difficult questions, it is appropriate to begin by briefly surveying the backdrop of laws that pertain to gun sales. Then we undertake an examination of the public nuisance presented by guns in perhaps an unusual way—by taking a deliberate step back from the gun context and analyzing instead the less politically charged example of automobiles. Through the use of three hypothetical cases—two suggested by Professor Lytton, and one of our own—we

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98. See Richard L. Abel, Questioning the Counter-Majoritarian Thesis: The Case of Torts, 49 DEPAUL L. REV. 533, 533 (2000) ("[C]ourts tend to be populist and deliberative, whereas legislatures tend to be captured by special interests, secretive, hasty, and unwilling or unable to offer reasons for their actions."); see also Mark Curriden, Putting the Squeeze on Juris, 86 A.B.A. J., Aug. 2000, at 52, 58 (describing a host of state statutes shielding various special interest defendants from tort liability).


100. Among the mostly hotly debated of these issues is what percentage of guns used in crimes is illegally obtained. See MARIANNE W. ZAWITZ, U.S. DEP’T OF JUSTICE, GUNS USED IN CRIME 3 (1995) (citing study of inmate gun possession, a study of juvenile offenders, and studies of adult and juvenile offenders by the Virginia Department of Criminal Justice Services).

101. See Timothy D. Lytton, Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry, 65 MO. L. REV. 1, 52-54 (2000). Professor Lytton is correct to note that legislatures have greater institutional capacity to engage in complex statistical analysis; however, his suggestion that claims of great statistical complexity should, for that reason, be dismissed by courts as beyond their competence is questionable. Id. Our point in the text is that the legislature should generally control when it has considered the competing data. Otherwise, courts have a duty to sift through such information, despite the difficulty of the task.
set out the proper role for public nuisance in cases involving products that pose a substantial danger to public health and safety. Only after dissecting those cases do we return to the gun issue, having by then demonstrated that public nuisance can be managed, and therefore, can be useful, even in the most politically difficult situations.

A. The Inadequacy of Current Firearms Regulation

The hazards of firearms are well documented. A recent survey showed that more than thirty-two thousand Americans suffered fatal gunshot wounds in 1997. Those fatalities included homicides, accidental shootings, and suicides. In addition, approximately another sixty-four thousand nonfatal firearm-related injuries occurred that same year. A survey conducted in 1994 placed American gun ownership at 192 million, ranging in size and firepower from small .22-caliber pistols to elaborate and sophisticated rifles. Ownership of semiautomatic handguns, which are easily concealed and feature substantial firepower, has risen dramatically since 1980. In 1980, these guns represented thirty-two percent of all handguns produced in the United States (the majority of handguns were still revolvers), but the percentage grew to seventy-five percent in 1998. Statistics demonstrate that persons acquiring handguns after 1993 have demanded larger magazine capacities and higher caliber firearms. Manufacturers have correspondingly increased the lethality of their handgun designs, even with the availability of safer alternative designs.

Regulation of firearms in the United States is minimal, considering these statistics and that guns are inherently dangerous because of their capability and use for killing and maiming human beings. The existing legal structure aimed at firearms generally focuses on parties other than the manufacturers—targeting those who commit gun-related crimes, those who unlawfully possess guns, or retailers who sell firearms. Various laws appear at the federal, state, and local levels. But

102. If such a danger does exist, an action for public nuisance would be proper against the entity that created it, whether or not that entity acted culpably. See discussion infra Part V. The present analysis sometimes refers to culpable conduct because a finding of such conduct might be relevant to determining that legislative will has been circumvented. But, as a doctrinal matter, the effect of the conduct is what matters.

103. Hoyert et al., supra note 2, at 68 tbl.16.

104. Id.


106. COOK & LUDWIG, supra note 99, at 5.


108. COOK & LUDWIG, supra note 99, at 5.

109. Jon S. Vernick & Stephen P. Teret, A Public Health Approach to Regulating Firearms as Consumer Products, 148 U. PA. L. REV. 1193, 1197 (2000). Vernick & Teret note that in 1985, handgun manufacturers produced 844,000 revolvers and 707,000 semiautomatic pistols, but that by 1993, the manufacturers were making 2.2 million semiautomatic pistols, compared to only 550,000 revolvers. Id. at 1198 n.27 (citing BUREAU OF ALCOHOL, TOBACCO & FIREARMS, ANNUAL FIREARMS MANUFACTURING AND EXPORT REPORT (1994)).
this patchwork quilt of legislation is inadequate to reach many of the significant acts and transactions leading to gun-related deaths and injuries.

On the federal level, the Gun Control Act of 1968, amended in 1993 by the Brady Handgun Violence Prevention Act ("the Act"), limits gun transactions to those between licensed dealers and residents of the same state as the dealer.\(^\text{110}\) The Act requires that any person "engaged in the business" of making or selling firearms be appropriately licensed.\(^\text{111}\) The Act also prohibits the sale of all firearms to persons under the age of eighteen and the sale of handguns to persons under the age of twenty-one.\(^\text{112}\) Further, the dealers must obtain information from purchasers to be used in a background check of the purchaser's criminal history.\(^\text{113}\) Whether a waiting period exists to allow for the background check varies from state to state.\(^\text{114}\) However, the secondary market in firearms is not regulated under the Act. This means that once a firearm has left the hands of a licensed dealer, any subsequent transactions are essentially unregulated.\(^\text{115}\) This lapse of regulation is particularly significant when one considers that approximately two million gun transactions occur annually on the secondary market.\(^\text{116}\)

Although the Bureau of Alcohol, Tobacco, and Firearms ("ATF") has some authority to license dealers and carry out provisions of the Act,\(^\text{117}\) as well as additional authority over taxing and exports,\(^\text{118}\) it has no general authority to regulate firearms in the United States. Nor does the Consumer Product Safety Commission ("CPSC") have any regulatory authority over firearms. Congress has stated that the CPSC "shall make no ruling or order that restricts the manufacture or sale of firearms" or ammunition.\(^\text{119}\)

While states have been involved in some licensing and sale requirements imposed on firearm dealers, the states have focused their attention on users of guns and the criminal justice system. In addition to criminal statutes prohibiting the usual array of gun crimes, states also restrict a person's ability to legally carry a firearm on their person or in their vehicle. Yet, many states allow their citizens to carry concealed firearms if they have applied and qualified for a permit.\(^\text{120}\)

Thus, regulation of firearm design, manufacture, and marketing is spotty at best. Although the Act authorizes ATF to restrict imported firearms to those adaptable to "sporting purposes,"\(^\text{121}\) this restriction has not been extended to guns


\(^{111}\) See id. § 923.

\(^{112}\) See id. § 922(b)(1).

\(^{113}\) See id. § 922(s), (t).

\(^{114}\) Vernick & Teret, supra note 109, at 1196.


\(^{116}\) COOK & LUDWIG, supra note 99, at 7 (reporting, in addition, that hundreds of thousands of guns are stolen annually from households in the United States).


manufactured in the United States. Rather, the Act bans "assault weapons" that meet certain specific design criteria and have certain large-capacity ammunition magazines. While a few states have banned certain guns frequently used in criminal activity, the design, manufacture, and marketing of many guns with little sporting utility remain unregulated.

The lawsuits brought by municipalities against the gun industry manifest the frustration with the failure of existing legislation to effectively address the hazards of guns to the public. Public costs resulting from firearm-related violence, accidents, and suicides are high. Direct costs of an incident may include law enforcement response costs, fire department response costs, medical emergency response personnel, emergency transportation, and medical and rehabilitative treatment for the victim. Shootings resulting in arrest and conviction consume public resources in the judicial and penal systems. Additional costs may include increased law enforcement surveillance and enhanced emergency response services.

It is no wonder that municipalities have been frustrated by the lack of effective federal and state legislation and the endless political debate over gun control. Meanwhile, the gun industry has continued to market increasingly dangerous products without being held responsible for the damage and costs those products incur. Thus, through these civil lawsuits, the municipalities have taken matters into their own hands to hold the industry accountable to a degree that existing regulation has not achieved.

B. The Automobile Analogy: When is a Car a Public Nuisance?

Permitting litigation against gun sellers would supposedly lead to a parade of horrible lawsuits, in which cars are often the grand marshal. Indeed, to hold a car manufacturer liable for injuries or death suffered by one struck by the car, even where the driver acted with intent to harm, would violate basic tort principles of causation and responsibility. Cars are mostly used for lawful purposes, and, at least according to some, guns are also used mostly for lawful purposes such as self-defense or recreation. So, the argument goes, the criminal misuse of a car or gun should not result in liability. It would seem to follow that public nuisance law would not apply, either. This argument is too simplistic, however. Two personal injury automobile cases suggested by Professor Lytton, although dismissed by him

122. See Vernick & Teret, supra note 109, at 1197.
124. See Vernick & Teret, supra note 109, at 1197 & n.23.
as "outlandish,"128 in fact allow us to consider the line that might be drawn in the name of public nuisance. In the first case ("Case 1"), an injured pedestrian sues the manufacturer of a stolen car for failing to design locks that would make the car more difficult to steal. In the second case ("Case 2"), a similar plaintiff sues the manufacturer of a car sold to an unlicensed driver for failure to supervise retail car sales.129

Lytton attempts to distinguish these cases from those involving guns by noting that "gun crimes differ in important ways from crimes committed with automobiles" because "gun crime [is a] more significant social problem than crimes committed with automobiles."130 Although this statement is factually correct, it does not follow that misconduct involving the sale of automobiles should never be the proper subject of tort liability. However, it may be that we operate with a lower level of confidence in the less-studied question of automobiles and injury. In the first example above, a necessary, but not sufficient, condition for liability would be a showing that drivers of stolen cars are more likely to drive negligently and run down pedestrians than are other drivers.131 Some courts appear to have made such an assumption by imposing liability on drivers who leave their keys in the ignition and whose stolen cars are then negligently driven and injure a pedestrian.132 Whether this is true is an empirical matter, and courts might be criticized for drawing such a conclusion without factual support.133 On the other hand, if it were shown that stolen cars were involved in accidents at a significantly higher rate than other cars, the case for imposing liability on a manufacturer who passed up an easy chance to design theft-proof cars might be compelling.

As for the second case, more facts would also be helpful. An isolated incident of retailer acquiescence in the purchase of a car by an unlicensed driver would certainly not be enough to impose liability on the manufacturer, even though the retailer should be liable to the pedestrian injured through the negligent driving of the unlicensed motorist. On the other hand, if a certain dealership developed a

128. See Lytton, supra note 101, at 63.
129. Id.
130. Id.
131. We have modified Professor Lytton's example slightly. In his hypothetical case, the stolen car intentionally ran someone down. Id. Given the danger of capture, it seems unlikely that the driver of such a car would do anything that would increase the risk of drawing attention. See Berko v. Freda, 412 A.2d 821, 823 (N.J. Super. Ct. Law Div. 1980) ("While it may be reasonably foreseeable that a car thief will use a car negligently, it is hardly reasonably foreseeable that he will use it in an intentional act which amounts to an assault."). As discussed further in the text, that Lytton's hypothetical might be an example of a case where liability should not be imposed is not an argument for a blanket rule against liability in the auto cases.
132. See, e.g., Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943) (imposing liability on a truck owner whose agent left the truck unattended in a public alley with the key in the ignition, leading to a theft and subsequent accident, which injured a pedestrian). This type of case involves liability against the driver, not the manufacturer. As this Article will argue, however, a case against the manufacturer might be built from sufficiently strong evidence linking predictable theft from poorly designed locks to an increased risk of subsequent accidental injury.
133. See Cornelius J. Peck, An Exercise Based Upon Empirical Data: Liability for Harm Caused by Stolen Automobiles, 1969 Wis. L. Rev. 909 (1969) (considering judge's conclusions and the issue of civil liability in light of factual data concerning the theft rate of cars with keys left inside them and the accident rate of such cars).
reputation for selling cars to unlicensed drivers, a court should impose liability on a manufacturer who continued to sell cars to that dealership.\(^{134}\)

The above cases, of course, are negligence suits brought by private plaintiffs. Before considering their relevance to public nuisance law, let us consider one additional, and purposefully outrageous, hypothetical situation ("Case 3") involving car sales. Dealer exclusively sells sport utility vehicles ("SUVs"). Over the past two years, SUVs sold by Dealer have been involved in approximately fifty cases of intentional rundowns of members of competing gangs. Nonetheless, members of those gangs continue to purchase SUVs from Dealer. Sometimes these purchasers even make statements indicating their intention to use the vehicles as instruments of homicide. Absent legislative intervention, the proper approach by Dealer and its manufacturer is difficult to determine, but some observations can be made. First, when a prospective purchaser announces an intention to criminally misuse the vehicle, the Dealer should be armed with a privilege not to sell the car. When the prospective purchaser makes no such statement, we might nonetheless want to impose a duty on the Dealer to contact law-enforcement authorities to assist in determining a course of action that would both respect the rights of the purchaser and protect the public. In either case, surely the manufacturer who does nothing should be at peril of liability. Depending on the level of complicity in such criminal activity by Dealer, the manufacturer might investigate, impose supervisory conditions on the Dealer, or terminate relations with the Dealer altogether.

The three situations presented above all involve conduct that, to one degree or another, evades at least the spirit of the law. Such conduct both grounds the tort suit by the injured party and creates the public nuisance because the otherwise lawful product is being used in a way that poses a substantial and unwarranted threat to public health and safety. Public nuisance law, as an exercise of the police power, implements the state’s obligation to protect its citizens from just such threats.

C. Applying Public Nuisance to Gun Sales

As the three aforementioned cases show, it may be difficult to determine whether given conduct amounts to a public nuisance. That difficulty, however, is no excuse for abandoning the effort to determine what is a public nuisance, in favor of a blanket rule that since gun sales are so heavily regulated, the field of public nuisance has been displaced. We will now revisit the automobile examples set forth above, this time comparing them to analogous cases involving gun sales, to determine whether, or under what circumstances, the supplemental regulation that public nuisance law enacts would be justified.

Case 1, involving negligent design and related marketing, is the hardest case among the three. For purposes of public nuisance, there do seem to be cases of design decisions so likely to lead to criminal misuse that abatement might serve as a useful supplement to regulation. Here the contrast between the gun and auto cases may be pronounced. For example, the connection between lock-design decisions

\(^{134}\) See Rabin, supra note 127, at 442 (stating that when a defendant’s negligence "enables" a subsequent wrongful act, "defendant has affirmatively enhanced the risk of harm, and as a consequence, no special relationship is required to establish responsibility").
by auto manufacturers and criminal misuse may be difficult to establish.\textsuperscript{135} However, a couple of gun-design decisions by manufacturers seem on their face to spike the chances of criminal misuse, and to do so deliberately. Consider the case of guns designed to be sold in pieces through catalogues and then assembled by the end user, thereby avoiding, at least temporarily, the whole battery of laws relating to the registration and sale of firearms.\textsuperscript{136} Or, in a well-known case, Navegar manufactured a gun designed and marketed to be "fingerprint-resistant."\textsuperscript{137} Although it is not impossible to imagine a law-abiding citizen seeking out such a gun, it is certainly reasonable for the state to protect the public health and to further law enforcement by suing in public nuisance to keep such guns out of the market, because of the high likelihood that the gun will be used for a criminal purpose. If the legislature decides, for some odd reason, that such guns are permissible to market, it may protect them through legislation, supported by facts refuting the common-sense conclusion that such weapons are designed specifically for criminal misuse. Here, then, is a case where legislative silence should not be interpreted as acquiescence.

Case 2, involving sales to unlicensed users of the product, should be analyzed the same way, regardless of whether the product is a gun or an automobile. In either case, a nuisance claim brought by the state against a retailer only seems appropriate if the conduct amounts to more than an isolated incident. Given the greater danger unlicensed gun owners impose, the state might be more likely to invoke nuisance law in a case involving guns, but the decision is properly committed to the sound exercise of executive discretion. In both cases, the desirability of invoking nuisance law against manufacturers might well turn on whether the manufacturer knew, or should have known, of a practice of selling the given product to unlicensed buyers. In the face of such knowledge, it would be hard to argue that the manufacturer does not contribute to the predictable misuse that follows.

At this point, one might be tempted to interpose an objection that the cause of the injury is the criminal misuse of the gun, not the conduct of the manufacturer or distributor or even of the retailer. Even if the public nuisance claim were a tort action—which, again, it is not—this conclusion would be open to question, if not incorrect. Sound tort principles support imposing liability against those who negligently furnish dangerous instruments, including guns, to those likely to cause

\begin{itemize}
\item \textsuperscript{135} Bear in mind, though, that the state is not required to show the same kind of causal connection as would a private plaintiff. To prevail in an action for public nuisance, it should suffice to show that auto theft presents a threat to public health, maybe because of the likelihood of resulting personal injuries, or maybe for some less obvious reason—such as the diversion of police resources from other concerns.
\item \textsuperscript{136} See Halberstam v. Daniel, No. 95-C3323 (E.D.N.Y. 1998) (concluding that it is a jury question whether manufacturer's marketing of a mail-order parts kit for a pistol amounted to negligent marketing). For a thorough discussion of the case, see Timothy D. Lytton, Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers, 64 BROOK. L. REV. 681 (1998).
\end{itemize}
harm to others.\textsuperscript{138} Even an \textit{intentional} criminal misuse of a gun should not absolve negligent sellers of liability because the responsibility entailed in selling a gun should suffice to create a special relationship between the seller and the injured party, and at least one court has so held.\textsuperscript{139} But if the gun sellers' causation argument is problematic in personal injury suits, it is simply without relevance in a municipal action to abate a public nuisance. Liability is based on the \textit{creation} of a nuisance, which, as we have seen, is rooted in the gun sellers' actions that subvert laws designed to minimize illegal gun violence. Once this nuisance is created, the authority to abate it and to recover costs incurred in connection with that abatement follows.\textsuperscript{140}

Professor Halper put the matter succinctly:

> It is no excuse . . . to such liability that the potential for harm inherent in an enterprise has been realized by the acts of strangers. One may not for the sake of private interest create or benefit from a condition which could threaten the public and then evade liability when the threat becomes present through the acts of others.\textsuperscript{141}

In the typical nuisance case involving the defendant's use of land, Halper's point applies even when the defendant is wholly unaware of the condition that the

\textsuperscript{138} The Restatement (Second) of Torts states that liability is imposed upon a seller who "knows or has reason to know" that a purchaser, because of "youth, inexperience or otherwise" is apt to use a dangerous instrument "in a manner involving unreasonable risk of physical harm to himself or others whom the supplier should expect to . . . be endangered by its use." RESTATEMENT (SECOND) OF TORTS § 390 cmt. b (1979). This section was invoked by the court in \textit{Kalina v. Kmart Corp.}, No. CV-90-2699205, 1993 WL 307630 (Conn. Super. Ct. Aug. 5, 1993) to support the denial of the defendant's motion for summary judgment, where plaintiff's decedent was shot by her estranged husband, who had used a gun purchased at Kmart. A thorough discussion of the negligent entrustment point, and its relation to prohibited gun sales, is found in \textit{Heatherton v. Sears, Roebuck & Co.}, 445 F. Supp. 294, 301-05 (D. Del. 1978), rev'd, 593 F.2d 526 (3d Cir. 1979). For a case involving an instrumentality other than a "real" gun, see \textit{Goldhirsh v. Majewski}, 87 F. Supp. 2d 272, 279 (S.D.N.Y. 2000) (holding that it was a question of fact whether paintball gun was a dangerous instrumentality in hands of a fifteen-year-old when parents knew their son had the gun).

\textsuperscript{139} See \textit{Hamilton v. Accu-Tek}, 62 F. Supp. 2d 802, 821 (E.D.N.Y. 1999). Of course, in such a case the proper plaintiff would be the injured party, not the municipality. But this observation only underscores the point that the public nuisance claim is different in origin and goal from a tort claim.


\textsuperscript{141} \textit{Id.} at 10,045; see also RESTATEMENT (SECOND) OF TORTS § 824 cmt. b (1979) (stating that liability under public nuisance is proper where "one person's acts set in motion a force or chain of events resulting in [an] invasion"). This point was not appreciated by two of the courts that have dismissed public nuisance claims against gun sellers. In \textit{Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.}, 123 F. Supp. 2d 245 (D.N.J. 2000), the court stated that the public nuisance claim improperly depended upon "the acts of third parties, i.e., criminals." \textit{Id.} at 266. Further, the court stated that "defendants have no duty to control the misconduct of third parties." \textit{Id.} The court appears to have confused proximate cause analysis under tort law with the requirements of a public nuisance suit brought by a municipal entity. See also \textit{City of Gary v. Smith & Wesson Corp.}, No. 45-D02-9908-CT-0035 (Ind. Super. Ct. Jan. 12, 2001) (order granting motion to dismiss) ("to be liable for a public nuisance, one must be in control of the offending item or activity at the time of the injury").
defendant’s land has created. The same is true in gun sales. Even if manufacturers, distributors, and retailers were unaware of the deadly potential of selling to unlicensed users, doing so regularly would amount to a nuisance. When such knowledge may fairly be inferred, the threat to the public health is even more apparent.

Case 3 is the simplest. It is easy to imagine why the state or municipality might have a right to bring suit, either in criminal or civil law. If the Dealer sells to one who announces an intention to use the car for a violent purpose, the proscription against facilitating a crime would make prosecution proper.142 If there were only a strong statistical association between the Dealer’s sales and the subsequent use of those cars in violent crimes, a civil action to abate the nuisance would be proper. The issue of how to abate this nuisance is difficult. Depending on the circumstances,143 the court might order greater screening of buyers; law enforcement surveillance; or, in the case of persistent non-compliance, shutting down the dealership. Any costs incurred in pursuing this remedy might also be recoverable.144

In an analogous case involving gun sales—a buyer announcing the intention to use the gun for illegal purposes—the nuisance claim might be easier. No unusual facts need be imagined where guns are involved. Unlike automobiles, guns are sold against a legal and social background that recognizes their frequent misuse and consequent potential for criminally inflicted injury and death.145 That recognition has spurred the law requiring the registration of every gun purchase,146 as well as implied prohibitions against allowing straw purchases.147 Other regulations vary from state to state.148 In a particularly egregious case involving dealer acquiescence

142. See MODEL PENAL CODE § 242.4 (1980) (“A person commits an offense if he purposely aids another to accomplish an unlawful object of a crime.”).

143. One such circumstance would be the court’s interpretation of constitutional constraints restricting the right to purchase a car based on membership in a particular “gang.” Absent evidence in an individual case, singling out such a group for disparate treatment might prove constitutionally troublesome. See generally Yoo, supra note 46 (discussing the constitutionality of anti-gang injunctions).

144. See infra notes 151-55 and accompanying text.

145. See Lyton, supra note 101, at 63 n.305 (noting that the role of automobiles in violent crimes has not been empirically studied and that the misuse of guns has been the subject of legislation in a way that the misuse of automobiles, except in the case of drunk driving, has not been).

146. See, e.g., FLA. STAT. ANN. § 790.33 (West 2000) (preempting local ordinance, yet permitting counties to maintain waiting periods of up to, but not more than, three days); N.J. STAT. ANN. § 2C:58-4c (West 1995) (mandating that the applicant for a handgun permit must not be subject to any statutory disability, and must demonstrate that the appellant “is thoroughly familiar with the safe handling and use of handguns, and that he has a justifiable need to carry a handgun”); N.Y. PENAL LAW § 400.00 (McKinney 2000) (setting forth licence requirements including one of “good moral character” and stating one county’s requirement that applicants take a firearms safety course).

147. The term “straw purchase” refers to sales made to those legally entitled to own a gun, but who buy the weapon for the intended use of another who is often, but not necessarily, not entitled because of age or criminal record. See David Kairys, The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law, 32 CONN. L. REV. 1175, 1183 (2000). As Professor Kairys points out, there is no specific federal law against such purchases, but federal misrepresentation laws have sometimes been construed as applicable. Id. (citing 18 U.S.C. §§ 922 (a)(6), 924(a)(1)(A), 1001 (1994)).

148. See supra Part IV.A.
in, or outright encouragement of, illegal use, criminal sanctions would be appropriate. However, when the source of misconduct is elusive or when authorities prefer the practical flexibility inherent in public nuisance, the civil action may commend itself. As with the automobile case, the precise nature of remedy sought will vary with the conduct. In the most intractable cases, an order shutting down the business would be appropriate. In cases of less persistent or serious violations, court-ordered supervision might be the answer. As to manufacturers who remain willfully blind to persistent misconduct by retailers or distributors with whom they deal, an injunction against further dealings with certain retailers might be the necessary response.

V. REJECTING PRIVATE SUITS FOR PUBLIC NUISANCE: STRENGTHENING THE CASE FOR PUBLIC SUITS

As noted earlier, private tort suits for public nuisance have been long recognized and, in fact, sprang directly from public suits. However, despite the long history of this tort, it is time for its abandonment in personal injury cases. Absent an unwarranted change in the basic tenets of tort law, plaintiffs suffering personal injury through gun use will gain nothing of value from the addition of a public nuisance claim, nor should they. Further, such a claim has the potential to cause unnecessary confusion. The contrast between public and private claims for public nuisance emphasizes that the municipal claim for nuisance furthers the legitimate interest of the state while the private suit for public nuisance is an ill-fitting artifact.

First, recall that private suits for public nuisance require the plaintiff to show an injury different in kind from that suffered by the general public. Interpreting this requirement has proven difficult. For example, leukemia victims of groundwater pollution were held to have stated a claim for public nuisance in one case, while plaintiffs claiming respiratory problems lost on a public nuisance theory in another case because the problems affected everyone in town. Even if the distinction between these two situations seems plausible, what should be done when some, but not all, have suffered the same kind of "special damage'? Professor Spencer discusses a Canadian case in which fishermen sued for loss of livelihood when the defendant's polluting of the water killed local fish. The court denied recovery under a public nuisance theory because others had suffered the same

149. See supra note 70 (discussing Chicago "sting" operation).
150. See supra Part II.
151. Often the harm done to a plaintiff involves interference with her use and enjoyment of property, not personal injury. Where property interests are implicated, a suit for private nuisance would also lie. See supra Part II. Therefore, the tort of public nuisance is unnecessary regardless of the injury claimed. Our discussion that follows in the text is concerned with personal injury suits only.
152. DOBBS, supra note 50, at 1337; see supra note 34 and accompanying text.
154. Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr. 350, 356 (Ct. App. 1971). On its face, the Restatement (Second) of Torts seems to disagree with the result in cases such as Venuto: "When the public nuisance causes personal injury to the plaintiff . . . the harm is normally different in kind from that suffered by other members of the public and the tort action may be maintained." RESTATEMENT (SECOND) OF TORTS § 821C cmt. d (1979).
loss.\textsuperscript{155} But what if there had been only one fisherman in the area, or only ten? Indeed, another court did permit recovery by fishermen under similar circumstances without specifying either the number injured or how many would have been too many.\textsuperscript{156}

Perhaps the difficulty in interpreting the requirement that the plaintiff suffer an injury different from that of the general public would be tolerable if the public nuisance suit for personal injury damages served a unique purpose, but it does not. Despite some early confusion on the matter,\textsuperscript{157} courts now seem to have settled on the position that the personal injury plaintiff suing under public nuisance must establish that the defendant was somehow at fault under tort rules \textit{independent} of nuisance.\textsuperscript{158} The context of gun litigation is particularly apt for considering how such tort rules might suggest recovery given particular facts. For example, a negligence theory would be appropriate if negligent marketing or sale could be shown;\textsuperscript{159} or a nominally strict product liability theory might apply to a defectively designed gun.\textsuperscript{160} Even if courts permitted plaintiffs to proceed under a public nuisance theory, the courts would not be likely to allow the plaintiffs to make an “end run” around the liability rules established for each of the categories mentioned above, nor should they, because the interest invaded is the same whatever the legal theory employed.

One might object to the call to eliminate private suits for public nuisance while simultaneously arguing for state suits based on the same theory. Inasmuch as both cases involve the same conduct, why should the private plaintiff need to make an

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  \item \textsuperscript{155} Spencer, \textit{supra} note 27, at 75 (discussing Hickey v. Elec. Reduction Co. of Canada, 21 D.L.R. (2d) 368 (1970), involving purely economic loss). As a general rule, plaintiffs in negligence cases cannot recover for pure economic loss. In \textit{Barber Lines A/S v. M/V Donau Maru}, 764 F.2d 50 (1st Cir. 1985), the court set forth the policy reasons undergirding the rule, and discussed the reach of and justifications for the exceptions that have been recognized. By alleging nuisance, a plaintiff might be able to avoid this stumbling block. Inasmuch as the cases filed against gun sellers by individual plaintiffs involve personal injury, discussion of the economic loss rule is somewhat besides our purposes. Nonetheless, it does seem preferable to address the issue of economic loss in a conceptually unified way, rather than countenancing the presence of different and inconsistent rules based on the formal tort pleaded.
  \item \textsuperscript{157} Spencer, \textit{supra} note 27, at 75-76 (discussing highly specific categories of cases yielding different results).
  \item \textsuperscript{158} See, e.g., McFarlane v. City of Niagara Falls, 160 N.E. 391 (N.Y. 1928); see also John G. Fleming, \textit{The Law of Torts} 427 (8th ed. 1992) (“In most situations there is no longer any liability without some measure of fault.”).
  \item \textsuperscript{159} See Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 820 (E.D.N.Y. 1999).
  \item \textsuperscript{160} See Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1153 n.10, 1154 (Md. 1985) (holding that a cheap handgun known as a “Saturday night special” could be considered a defective product, when an executive of the National Rifle Association, among others, testified in Congressional hearing that the weapons “have no sporting purpose, . . . are frequently poorly made, and . . . do not represent value received to any purchaser”). Under a design-defect theory, liability is not truly strict, but is based on a balancing of the product’s risks and utilities. \textit{Restatement (Third) of Torts: Products Liability} § 2, cmt. a (1998) (noting that standards for determining whether a product is defectively designed, or accompanied by inadequate warnings, “achieve the same general objectives as does liability predicated on negligence”). The \textit{Third Restatement} also allows for the possibility of liability for designs that are “so manifestly unreasonable . . . that they have low social utility and a high degree of danger.” \textit{Id.} § 2 cmt. e.
\end{itemize}
independent showing of fault, which, as discussed above, results in the practical collapse of her claim into other available torts, whereas the public authority need not prove culpable conduct? The simple answer is that the interests involved are different. The state’s public nuisance claim discharges its commitment to ensure the health and safety of its populace, arguably the most basic reason for state existence. Protecting the interest of the public may require putting an end to, or placing conditions upon, actions that are not otherwise considered culpable. While generally the nuisance must be “an unreasonable interference with a right common to the general public,” a finding of unreasonableness may be based on a determination that the conduct involves a significant interference with the public health or the public safety. Thus, “unreasonableness” is defined not by reference to the defendant’s conduct, but with respect to the effect of that conduct. The unreasonableness requirement acknowledges that a risk-free society is neither possible nor desirable. To use a familiar example, there could be very low speed limits or a requirement that automobiles be designed to not exceed those speeds, if the only goal were to reduce automobile accidents to zero. Similarly, society could adopt a “zero tolerance” policy toward pollutants, requiring their complete elimination.

Instead, society regulates and manages dangers within agreed-upon tolerance limits. When those limits are exceeded, the risks imposed become unreasonable. Going beyond acceptable risks can be unintentional, as when a truck carrying toxic waste overturns, even without negligence, or as may be the case with certain practices relating to guns, intentional. In either case, the result is an unreasonable threat to public health, and public nuisance is therefore the indicated treatment. In each instance, unreasonableness stands out against a background of acceptable risks, principally, but not exclusively, as defined through legislation and regulation. The task of public nuisance law is to eliminate this excess risk and the danger it poses to public health and safety.

Private plaintiffs in tort actions, by contrast, seek monetary damages for injuries incurred. For compelling reasons, the transfer of money from defendant to

161. See Halper, supra note 31, at 10,292, 10,299 (noting that strict liability “applies categorically only to public nuisance actions brought by the sovereign pursuant to the police power”).
162. See Gostin et al., supra note 20, at 103-05.
164. Id. § 821B(2)(a). Unreasonableness may also be based on a finding that the conduct at issue is “proscribed by a statute, ordinance or administrative regulation,” or “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.” Id. § 821B(2)(b), (c). Only one clause in all of section 821B has any reference to conduct (“knows or has reason to know”), but comment e to that section notes that “[i]n the awarding of an injunction less weight may be placed on the aspect of knowledge.” Id. § 821B cmt. e. The tie between conduct and remedy is explored further infra Part VII.A.
165. The examples of gun seller conduct discussed throughout this Article and as alleged by the municipal plaintiffs, do involve culpable conduct. As a practical matter, conduct that creates a public nuisance generally involves a decision to avoid the law and thereby to render guns more dangerous than contemplated by the legislature. However, as a theoretical matter, any conduct that in fact contributes to such increased danger is the proper subject of a public nuisance suit.
166. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (1998) (“Society does not benefit from [excessive safety]—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky.”).
plaintiff is thought to require some culpable conduct by the defendant. As noted above, that conduct might be a single negligent act or voluntary participation in an activity that is deemed "abnormally dangerous." In either case, the defendant's conduct results in an unjust gain, in money, in time saved, or otherwise, at the plaintiff's expense. Tort law seeks to achieve corrective justice by restoring the ex ante holdings of the parties. Thus, a plaintiff injured by culpable conduct has, or should have, one or more theories of recovery available. However, when such culpable conduct is absent, maximum respect for each person's freedom of action counsels against recovery. To the extent that a private action for public nuisance would cut against this principle by allowing recovery against a defendant who has not acted culpably, it should be disfavored. At minimum, any such major change in tort law should result from robust debate and should not be smuggled in through artful pleading.


168. Indiana Harbor Belt R.R. v. American Cyanamid Co., 916 F.2d 1174 (7th Cir. 1990), illustrates the line between private and public lawsuits. The Illinois Department of Environmental Protection required the plaintiff to decontaminate its property, and the plaintiff sought to recover the cost of doing so from the defendant, whose "flammable . . . highly toxic, and possibly carcinogenic" chemical had spilled on plaintiff's land. Id. at 1175. Applying the factors used to determine whether an activity is abnormally dangerous, set forth in Restatement (Second) of Torts, § 520, the court held that placing this chemical into a rail shipment that would pass through a major metropolitan area did not give rise to strict liability and, therefore, remanded for a determination of whether the defendant had acted negligently. Id. at 1176, 1183. If negligence could not be established, then the defendant would not be liable, despite having created the dangerous condition. If, however, the State of Illinois had brought a claim against that same defendant for public nuisance, that claim should have been proper, even absent culpable conduct of any sort. Again, the state is charged with the responsibility of protecting the public health, and ordering the defendant to clean up its mess would discharge that responsibility.

169. The statement in the text has less intuitive plausibility in the case of so-called strict liability actions than it does in negligence cases. One effort to make sense of the notion of compensation for those injured by abnormally dangerous activities has been advanced by George P. Fletcher, Fairness and Utility in Tort Theory, 85 HARV L. REV. 537 (1972). Fletcher observed that strict liability tends to be imposed for categories of activities in which the defendant imposes on the plaintiff "threats of harm that exceed the level of risk to which all members of the community contribute in roughly equal shares." Id. at 547. Such "non-reciprocal" risk imposition can be seen as a form of culpable conduct, or, at minimum, conduct that leads us to think it fair to require the defendant to pay for damages she has caused.


171. Thompson, supra note 167.
VI. TESTING THE ALLEGATIONS OF THE COMPLAINTS AGAINST THE LAW OF PUBLIC NUISANCE

Given that municipalities are generally competent to bring public nuisance suits to protect public health and safety, the practical question then presents itself: Do the complaints that have been filed state a cause of action?\textsuperscript{172} Answering this question requires carefully matching the allegations against the requirements of law.

Reviewing the municipal complaints unearthed a surprising diversity of approaches to the public nuisance issue, and it is unnecessary to review all of the two dozen or so actions filed to date. Instead, what follows is a division of the complaints into rough categories, with reference to two different aspects of the public nuisance claim.\textsuperscript{173} First, we discuss the stated \textit{basis} of the public nuisance claim: What did the gun sellers allegedly do to create a public nuisance? Second, we consider what might be called the \textit{style and support} of the complaint: How is it organized and presented? What factual support have the plaintiffs mustered in support of their allegations? Our conclusions and observations are intended to encourage courts to allow complaints that respect the mission of public nuisance law to proceed, while providing incentives to state and local plaintiffs to seek, where possible, amendments of nuisance counts that are insufficient.

\textbf{A. The Bases of the Complaints}

At the risk of oversimplification, the public nuisance claims can be divided into three rough categories. The first is almost universal: Gun sellers have created and supplied an illegal market in firearms. It is claimed that sellers contribute to types of sales known to increase the likelihood of illegal gun use\textsuperscript{174}—such as straw...
purchases, multiple purchases, and "kitchen table" sales.\textsuperscript{175} These allegations should also be understood against a backdrop of specific gun-control laws. Thus, in a jurisdiction with strict handgun laws, such as Chicago, the complaints allege that manufacturers have oversupplied surrounding areas with weapons that then make their way into the city.\textsuperscript{176} In other jurisdictions, the illegality is tied to the predictable criminal use of an otherwise lawful firearm.\textsuperscript{177}

A few cities have also claimed that a public nuisance arises from the negligent design of certain guns or from failure to warn of their risks. Chicago claims that some manufacturers design and sell types of guns known to be attractive to criminals,\textsuperscript{178} while Boston, Cleveland, and Gary, Indiana, complain that guns lack safety devices, thereby rendering them unnecessarily dangerous.\textsuperscript{179}

Finally, Boston and Gary add the related claim that guns are deceptively marketed to people who, it must be inferred, might not purchase them if in possession of accurate information. For example, these cities challenge the claim that gun ownership increases safety in the home, citing empirical studies to the contrary.\textsuperscript{180}

Of the three categories discussed above, the first most closely fits the goals of public nuisance. To the extent that gun manufacturers have actual or constructive knowledge that the weapons they produce and sell are being used to fuel an illegal, secondary market, and the manufacturers take no remedial action, they contribute to the evasion of laws designed to limit the dissemination and use of firearms. Traces conducted by the ATF of guns used for illegal purposes, which find their way back through the chain of sales to the manufacturer, may supply such knowledge, as alleged by the State of New York in its complaint.\textsuperscript{181} Distributors, in supplying these same guns to retailers, might have more specific knowledge of which retailers were most often involved in illegal sales and are also involved in ATF traces.\textsuperscript{182} Retailers, who have the most specific knowledge of particular illicit gun sales and use, should also be amenable to suit where, as in the instances alleged

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  \item constructive knowledge of sales, while, as detailed throughout the Chicago complaint, dealer "contribution" is direct, through actual sales. Complaint, \textit{City of Chicago} (No. 98-CH-15596).
  \item \textsuperscript{175} "Kitchen-table" dealers are those who have no store, but are nonetheless licensed to sell guns. Of the hundreds of thousands of gun dealers, only a "very small proportion . . . actually have a store." David Kairys, \textit{The Origin and Development of the Governmental Handgun Cases}, 32 \textit{CONN. L. REV.} 1163, 1169 (2000). For a discussion of straw purchasers, see \textsuperscript{supra} note 147.
  \item \textsuperscript{176} Complaint, at \textsection 1, \textit{City of Chicago} (No. 98-CH-15596) ("[D]efendants' conduct undermines the City's efforts to protect the public health, safety and welfare through stringent gun control ordinances which make it illegal to possess most types of guns in the City.").
  \item \textsuperscript{177} This allegation appears in virtually every complaint. See, e.g., Complaint \textsection 5, James v. Arcadia Machine & Tool, No. ESX-L-6059-99 (Essex County Ct. filed June 9, 1999); Complaint \textsection 50, City of Boston v. Smith & Wesson Corp., No. 99-2590-C (Mass. Super. Ct. filed June 3, 1999).
  \item \textsuperscript{178} Complaint \textsection 60-62, \textit{City of Chicago} (No. 98-CH-15596).
  \item \textsuperscript{179} Complaint \textsection 71, \textit{City of Boston} (SUVC1999-02590-C); Complaint \textsection 84, White v. Smith & Wesson Corp., No. 1:99 CV 1134 (Ohio Ct. Com. Pl. filed April 8, 1999); Complaint \textsection 72, City of Gary v. Smith & Wesson Corp., No. 45-D02-9908-CT-00355 (Ind. Super. Ct. filed Aug. 27, 1999).
  \item \textsuperscript{180} Complaint \textsection 72, \textit{City of Boston} (SUVC1999-02590-C); Complaint \textsection 73, City of Gary v. Smith & Wesson Corp., No. 45-D05-005-CT-243 (Ind. Super. Ct. filed Aug. 27, 1999).
  \item \textsuperscript{182} \textit{Id.} \textsection 43-44.
\end{itemize}
in the Chicago complaint, they disregard their duty to sell guns responsibly.\textsuperscript{183} Of course, the relief ordered will vary depending on the class of entity involved, but the common “theme” of these allegations is sound under public nuisance doctrine: Willful subversion of the law increases gun violence and, therefore, amounts to an offense to public health and safety.

Unlike these potentially strong claims of fueling an illicit market, the design defect claims must be carefully parsed to determine whether they amount to second-guessing of legislative choices. Thus, the omission of safety locks, while it may be the proper subject of a design defect claim by a personal injury plaintiff, should be approached warily in the context of public nuisance litigation.\textsuperscript{184} For presumably sound reasons, neither states nor the federal government require safety locks. It may be that, as some have argued, safety locks prevent guns from being discharged quickly when needed for self-defense purposes.\textsuperscript{185} On the other hand, allegations of sales of guns designed specifically to appeal to criminals, such as the now infamous “fingerprint-resistant” gun\textsuperscript{186} or guns sold in parts to be assembled by the buyer,\textsuperscript{187} are a different matter. Such actions plainly evade legislative action and pose a clear threat to the public health with no apparent compensating gain.\textsuperscript{188} One advantage of public nuisance law is that it permits the state, or the state’s designee, to exercise abatement power without a specific demonstration that the defendant’s marketing practices were intentionally designed to appeal to criminals—the effect of these practices should suffice.

A similar conflict in the empirical evidence suggests that the claims grounded in marketing and promotion decisions be approached with caution. That said, the empirical evidence at times overwhelmingly suggests misleading conduct on the part of manufacturers. For example, the Boston complaint accuses manufacturers of deceiving the public by advertising that guns in the home are “‘insurance,’ ‘tip

\textsuperscript{183} Complaint \[22-32, City of Chicago\] (No. 98-CH-15596).

\textsuperscript{184} One might justifiably ask why a design defect tort claim brought by an injured party should be permitted to proceed, while the public nuisance claim should not. The answer is that the conscious decision of a rationally acting legislative body not to impose a particular requirement should be given deference by a coordinate state actor, such as the state attorney general. This deference should be at its apogee when there is a record that the legislature considered, but rejected, passing a law that would have done what the executive now seeks to achieve through litigation. Private tort claims, on the other hand, have long been acknowledged to have an incidental regulatory effect. Whether viewed through the lens of corrective justice or the law and economics imperative of internalization of costs, such an effect may be necessary to achieve the two central goals of tort law: compensation and deterrence. Further, a public plaintiff that brought suit under a product liability theory would face the additional difficulty of showing that it was the ultimate user or consumer of the product, as required for product defect claims.

\textsuperscript{185} See Lytton, supra note 101, at 20 (citing Jonathan Lowy,\textsuperscript{186} Litigating Gun Violence Cases:\textsuperscript{188} Liability for Design Defects, at 8 (unpublished paper, on file with Author)). If safety locks do inhibit the use of a gun for self-defense purposes, it could still be argued that a warning should be given about the consequences of not having such a lock, among other risks imposed by guns. See Complaint \[62, City of Boston v. Smith & Wesson Corp.,\] \textsuperscript{187} No. SUCV1999-02590-C (Mass. Super. Ct. filed June 3, 1999).


\textsuperscript{187} See supra note 136 and accompanying text.

\textsuperscript{188} If there is some good to such design, it would be open to the seller to so demonstrate. But prima facie the allegations should be sufficient to allow the public entity to proceed with the claim.
the odds in your favor,’ [are] ‘your safest choice for personal protection,’ and [enable one to] ‘have a good night.’ These claims may be proven false by data demonstrating that guns in the home pose a danger, not a benefit. However, the data may undercount the instances in which guns provide effective self-defense without being fired. Again, where the conduct of the seller is not intended to evade regulation, courts should be wary. That does not mean, however, that claims should not be permitted to proceed. If facts suggested, for example, that manufacturers themselves either knew or believed that guns in the home posed a threat rather than a benefit but continued to tout their safety, the public entity’s nuisance suit might sensibly seek an injunction against further advertisements to the contrary. Similarly, if the data were not capable of reasonable interpretation in support of the manufacturers’ position, a court would be justified in allowing the public nuisance claim to proceed, in recognition of the potential of such a suit to remedy legislative inaction.

B. Stating a Proper Claim: The Viability of the Municipal Complaints

Determining which allegations are proper subjects of a public nuisance claim is only the first step. Given the likelihood of judicial unfamiliarity with the subject matter of these suits, public plaintiffs will increase their chances of surviving motions to dismiss, and perhaps of ultimately prevailing, by structuring their complaints to present their claims clearly and in a favorable light, and by offering concrete facts that, if proven, would justify a public nuisance remedy. This section considers, in alphabetical order, the ABC’s of complaint style and substance: Atlanta, Boston, and Chicago.

I. The Atlanta Complaint

The public nuisance count in Atlanta’s complaint is incomplete and difficult to piece together, and therefore unlikely to commend itself to the court. Part of the problem is that the public nuisance complaint was added by amendment. The amendment begins with the public nuisance claim, which incorporates by reference the original complaint. That complaint, in turn, focuses the energy of its General Allegations on issues of defective design and failure to warn. As discussed

190. Id. ¶ 64 (summarizing data that shows guns in the home are far more likely to kill or injure someone in the home than an intruder; “for every time a gun in the home was used in a self-defense or legally justifiable shooting, there were four unintentional shootings, seven criminal assaults or homicides, and eleven attempted or completed suicides”).
192. See Merrill, 89 Cal. Rptr. 2d at 146.
194. Amended complaint ¶¶ 104-113, City of Atlanta (No. 99VS0149217J) (nuisance count).
195. Complaint ¶¶ 24-75, City of Atlanta (No. 99VS0149217J). Of course, marketing and advertising issues necessarily surface as a means of selling these defective products. See id. ¶¶ 25, 28-31, 33, 62, 64, 69.
above,\textsuperscript{196} such allegations are generally less powerful under a public nuisance theory than marketing issues. Perhaps aware of that problem, the public nuisance count makes no mention of these initial allegations, instead impugning the manufacturers' conduct in the marketing and distribution of guns. However, neither the General Allegations nor the public nuisance count detail such conduct, thus rendering the claim conclusory. After noting that Atlanta citizens have a "right to be free from conduct that creates an unreasonable infringement upon the public health, safety and welfare,"\textsuperscript{197} the complaint states, in substance, that defendants sell firearms to persons whom they "should know will bring [them] into Atlanta, causing these firearms to be possessed and used in Atlanta illegally."\textsuperscript{198} A claim for negligent marketing and distribution is another new count in the amended complaint,\textsuperscript{199} but it follows the public nuisance claim and is therefore not incorporated by reference therein. Further, neither claim provides anything beyond general statements—not one defendant is cited for any specific act. The court might well find such a complaint insufficient given the need to show the gun seller's purposeful evasion of applicable law.

2. **The Boston Complaint**

Boston's complaint presents a more user-friendly face. The complaint begins with a narrative discussing the ways in which gun sellers create and encourage the illicit secondary market in illegal weapons.\textsuperscript{200} The section reads like a well-crafted opening argument, establishing a background against which a court can then consider the more specific allegations that follow. Paragraphs 41-67 feature a mix of national and local facts and statistics supporting the conclusion that gun sellers knowingly contribute to the proliferation of illegal guns in the United States. One reading the complaint might question how well the local data have been integrated into the national statistics that form the thread of this section, but the connection is made explicit in several paragraphs of the complaint.\textsuperscript{201} These facts are followed by the Public Nuisance count, which uses them to reach the conclusion that this illegal secondary market, as well as the defective design of guns and misleading advertising practices, "has created and maintained a public nuisance in the City of Boston."\textsuperscript{202} Public health gives this conclusion heft, as "the Boston Public Health Commission . . . has declared that guns manufactured by defendants and found on the streets of Boston are a public health nuisance."\textsuperscript{203}

Unless the court simply decides that public nuisance law cannot apply to the sale of guns under any circumstances, Boston's complaint is, and should be, likely

\textsuperscript{196} See supra notes 184-88 and accompanying text.
\textsuperscript{197} Amended complaint \textsuperscript{1} 105, City of Atlanta (No. 99VS0149217J).
\textsuperscript{198} Id. \textsuperscript{1} 106; see also id. \textsuperscript{2} 107, 109 (adding nothing of substance to allegations).
\textsuperscript{199} Id. \textsuperscript{2} 132-36.
\textsuperscript{201} See id. \textsuperscript{3} 46 (discussing percentages of guns possessed by juveniles), 47 (discussing the short time between retail sale and criminal misuse), 48e. (discussing the percentage of guns used in crime whose serial numbers had been "obliterated").
\textsuperscript{202} Id. \textsuperscript{3} 70.
\textsuperscript{203} Id. \textsuperscript{3} 73.
to survive a motion to dismiss. The allegations are stated with sufficient specificity as to be reasonably capable of proof. One criticism of the complaint, however, is that, with one exception,204 it does not tie any of its allegations to the conduct of any particular defendant. Part of the problem is that the complaint names only manufacturers and industry trade associations with particularity.205 Retailers and distributors are named only as Does 50-100 and 101-225, respectively.206 As discussed in the consideration of the Chicago complaint to follow, it is far more difficult to pin specific bad practices on manufacturers and distributors than on retailers, at least before discovery is conducted. Chicago’s complaint also shows, though, that Boston missed a chance to conduct pre-filing investigation against particular retailers, which would have implicitly strengthened the complaint as a whole. A court presented with numerous instances of outrageous retailer misconduct will be, and should be, more likely to allow claims that distributors and manufacturers participate in such illegality to survive. It is difficult to believe that flagrant violations of law go unnoticed by those who supply the lawbreakers with guns, and courts can be expected to permit factual development on that issue. The invitation to do so is made more appealing by the single supporting fact that Boston, as well as Chicago and numerous other cities, use relentlessly against the manufacturers: a sworn statement by Robert Haas, former Senior Vice-President of Marketing and Sales for Smith & Wesson. Haas states that both his company “and the industry as a whole are fully aware of the extent of the criminal misuse of handguns,” yet “take no independent action to insure responsible distribution practices.”207

3. The Chicago Complaint

Finally, we turn to Chicago’s complaint, which is grounded entirely in public nuisance.208 Following sixty-six pages of detailed allegations, paragraphs 54-66 detail the legal claim. These detailed allegations set forth a multitude of specific “bad acts” by defendants at every level of gun sales. The complaint alleges that manufacturers know of, and contribute to, the illegal market by saturating the market just outside of Chicago, which has strict laws prohibiting the possession of

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204. See id. ¶ 52.
205. Id. ¶¶ 4-34.
208. Interestingly, Chicago was also the first public entity to claim public nuisance. New York State’s complaint takes the same course of action, claiming only under a public nuisance theory. Complaint ¶¶ 63-64, New York v. Sturm, Ruger & Co., No. 402586/2000 (statutory public nuisance claim) (N.Y. Sup. Ct. filed June 26, 2000); id. ¶¶ 65-66 (common law public nuisance claim).
most handguns.\textsuperscript{209} Distributors sell to retailers whom they know to be involved in illegal sales.\textsuperscript{210} Dealers, as the complaint thoroughly sets forth, have engaged in a variety of illegal sales practices, ranging from failing to complete the required forms,\textsuperscript{211} to ignoring statements evincing intent to use the weapon for illegal purposes,\textsuperscript{212} to failing to enforce the requirement of a valid identification card.\textsuperscript{213} These facts against retailers were established through a “sting” operation carried out by undercover police officers and other investigators before the complaint was filed.\textsuperscript{214} 

At the risk of overstating the point, if the actions alleged in the Chicago complaint do not amount to a public nuisance, it is difficult to see how such a claim could ever be stated.\textsuperscript{215} As noted earlier, some of these retailers have been subjected to criminal prosecution for their flagrant violations of gun-control laws.\textsuperscript{216} The nuisance action can supplement these criminal proceedings, targeting derelict businesses for remedies that respect the right of the public to be free from unnecessary threats to its safety, health, and welfare.\textsuperscript{217} Chicago’s complaint followed an intensive investigation into practices that resulted in a flood of illegal guns into the city, where it is illegal to possess them. As one of an array of harrowing examples, the complaint details the criminal complicity of a retailer

\textsuperscript{209} Complaint ¶ 1, 16, City of Chicago, (No. 98-CH-15596).
\textsuperscript{210} Id. ¶ 43.
\textsuperscript{211} Id. ¶ 27.
\textsuperscript{212} Id. ¶ 28 (undercover officer told clerk that he planned to “settle up with” whomever had “ratted [him] out”).
\textsuperscript{213} Id. ¶ 28.
\textsuperscript{214} Id. ¶ 27-28.
\textsuperscript{215} The well-pleaded nature of the complaint did not stop the Cook County court from dismissing the complaint. See City of Chicago v. Beretta U.S.A. Corp., No. 98-CH-15596 (Ill. Cir. Ct. filed Nov. 12, 1998). However, the court’s conclusion appears to be based on a misunderstanding of public nuisance law. In fact, another judge in Cook County recently denied a motion to dismiss a public nuisance claim in a private lawsuit against the firearms industry. See Todd Lighty & Robert Becker, Families’ Suit Against Gunmakers Can Proceed; Judge Allows Claim of Public Nuisance, Chi. TRIBUNE, Feb. 15, 2001 at MC1. Given the conflict between the two holdings, the judge in the private suit “signaled to the firearms industry that it could immediately take her ruling to the Illinois Appellate Court, which is considering Chicago’s appeal.” Id. As of this writing, therefore, the status of public nuisance law, as applied to the gun industry, is unsettled. As to the claims against the manufacturers and distributors, the court in this suit brought by the City of Chicago grounded its decision on the lack of “immediacy and proximity” of injury. Id. However, the court’s causation concerns are more appropriately raised in questioning a tort action, not one based on public nuisance. At the very least, the causation requirements should be relaxed in a public nuisance claim, but that is not mentioned. As to the claims against the dealers, the court’s decision is even more perplexing. The court notes that the complaint “asserts serious allegations of fact which suggest evasion and violation of applicable law.” Id. Nonetheless, these allegations were also dismissed with only the following cryptic statement: “[N]o showing has been made nor has an assertion . . . been made that applicable enforcement of criminal sanctions have been attempted and, if attempted, have been shown to be inadequate.” Id. Aside from the fact that criminal prosecutions have been notoriously unsuccessful against “bad” dealers, see City of Chicago v. Beretta U.S.A. Corp., No. 98-CH-15596 (Ill. Cir. Ct. Nov. 12, 1998), the complaint’s allegations, read fairly, are that the existing laws, even if enforced, are simply inadequate to deal with the public nuisance presented by certain practices relating to the sale, distribution and marketing of guns.

\textsuperscript{216} See supra note 70 and accompanying text.
\textsuperscript{217} See Complaint ¶¶ 72-73, City of Chicago (No. 98-CH-15596) (detailing specific injunctive relief necessary to abate the nuisance).
known as B&H Sports, Ltd., located in the Chicago bedroom community of Oak Lawn. For seven pages, the complaint describes a course of illegal conduct that includes encouraging the buyer, an undercover agent, to lie about where he keeps his guns; backdating and revising purchase orders; distracting a sheriff who was asking questions; encouraging an illegal straw purchase; and, in response to an officer’s comment that he needed a weapon to “deal with” someone before he left town (“get . . . his ass”), advising purchase of a certain weapon that would “take care of business.”

Chicago’s complaint then works hard to tie these and many similar actions to the manufacturers’ design decisions to make and market the very weapons that the complaint earlier showed were used for criminal purposes (including the fingerprint-resistant TEC-DC9) and to their steadfast denial of responsibility for dealer’s actions, including the much-used Haas statement. The complaint also links these actions to deliberate decisions by both manufacturers and distributors to oversupply high crime areas and areas just outside of Chicago. Of course, all of these allegations demand proof, and the claims against the more remote sellers require an inference that the dealer claims do not. This well-pleaded complaint makes a sufficient allegation of public nuisance.

VII. FINDING CONSISTENCY BETWEEN THE PUBLIC HEALTH IMPERATIVE AND A REMEDY FOR GUN VIOLENCE

Most of the public complaints seek both damages for the costs associated with the public nuisance and injunctive relief to abate the nuisance. The damages claims are perhaps irresistible, especially given the success states have enjoyed in collecting the health-related costs of smoking from the tobacco industry. The prospect of paying the costs associated with gun violence can also be expected to push manufacturers and distributors toward settlement of the cases against them, particularly since the gun industry is much smaller, and therefore financially weaker, than the tobacco business. On the other hand, equitable, injunctive relief to abate the nuisance guns create may be less likely to have an in terrem effect against gun sellers, but is more specifically designed to carry out the cities’ responsibility to protect the public health and safety.

This subsection describes the relief sought in the various complaints and considers whether such relief is appropriate under a public nuisance theory. Equitable relief is, in principle, appropriate, and barring other deficiencies, courts should allow such claims to proceed. However, to the extent that the suits seek damages to recover the costs associated with gun violence, courts must tread more carefully. Damage suits under a public nuisance theory are beset by both doctrinal and practical problems that are difficult to solve. This subsection considers these

218. Id. ¶ 28.
220. See Master Settlement Agreement, at <http://www.naag.org/tobac/cigmsa.rtf>; see also GOSTIN, supra note 33, at 295-96 (summarizing principal provisions of settlement).
221. However, note that the tobacco industry faced an increasingly hostile constellation of state laws, while the gun industry lobby appears to have succeeded in winning legislation, making city suits more, not less, difficult.
problems and suggests that courts would be justified in countenancing those damage claims most associated with the costs of abating public nuisance, while dismissing those that are not so associated.\footnote{222}

\textbf{A. Relief to Enjoin or Abate the Nuisance}

Inasmuch as the purpose of public nuisance law is to safeguard the public health and safety, the equitable remedies of injunction and abatement commend themselves as the most appropriate.\footnote{223} Traditionally, in order to stanch the problem at its source, the public plaintiff has sought just such remedies. As stated by the California Supreme Court in \textit{Gallo v. Acuna},\footnote{224} the action fulfills its “principal office” of maintaining public order through “\textit{civil suits in equity to enjoin} public nuisances at the instance of public law officers.”\footnote{225} Indeed, a criticism often raised against tort actions—that the remedy, usually damages, is ill-matched to the harm\footnote{226}—is inapt here because a properly crafted remedy will directly solve the problem identified in the pleading. Thus, a pond breeding pestilence may be ordered dredged; explosives stored in the middle of a populated area may be ordered removed to a safer location; and helicopters creating excessive noise may be ordered rerouted.\footnote{227}

The tricky part, of course, comes in crafting the appropriate remedy for public nuisance. Courts will be better equipped to do so when the complaining public authority has done the investigative work necessary to pinpoint the problem and has tailored the request for relief accordingly. As seen earlier, the municipal complaints against the gun sellers disclose varying levels of sophistication. The same range is evident in the request for relief. Hampered by their own lack of specificity in allegations, most of the complaints provide the court with only a nonspecific and unenthusiastic invitation to abatement, requesting, for example, “abatement of the public nuisance and an injunction restraining defendants from continuing the conduct complained of herein.”\footnote{228} Some provide a bit more guidance,\footnote{229} but, again, Chicago’s complaint sets the standard. In the fourth paragraph of the request for relief, the City sets forth nine specific forms of injunctive relief needed “to abate

\footnote{222. See \textit{supra} note 11 (discussing the public versus proprietary issue); see \textit{supra} note 24 (listing the California Complaints).}

\footnote{223. See \textit{DOBBS, supra} note 50, at 1334.}

\footnote{224. 929 P.2d 596 (Cal. 1997).}

\footnote{225. Id. at 603.}

\footnote{226. See sources cited \textit{supra} note 170.}

\footnote{227. The first two examples are inspired by the \textit{Restatement (Second) of Torts} § 821B cmt. b (1979). The final example, and remedy, represents one author’s wish fulfillment.}


\footnote{229. See, \textit{e.g.}, Complaint ¶ 161(f), James v. Arcadia Machine & Tool, No. ESX-L-6059-99 (Essex Co. Ct. filed June 9, 1999) (requesting “appropriate injunctive relief to prohibit Defendants from continuing to engage in the conduct alleged herein, including . . . prohibiting [them] from introducing into commerce . . . firearms without adequate safety devices and warnings, and from distributing or selling guns without appropriate and reasonable care.”).}
the public nuisance caused by the defendants." These requests, which are informed by the investigative work of the city, are divided into several groups. One group targets the dealers themselves, demanding that they cease various kinds of illegal sales and be subjected to city monitoring to ensure compliance with the injunction and relevant legislation. A second group is directed against the manufacturers and distributors and asks the court to require training, supervision, and monitoring of dealers to boost the likelihood of compliance with the law (as well as a requirement that those dealerships found uncooperative be terminated) and requests that manufacturers and distributors "participate in a court-ordered study of lawful demand for firearms and ... cease sales in excess of lawful demand." The remaining two requests seek changes in the design of the weapons. As noted earlier, only those designs and related marketing decisions specifically targeted for criminal misuse should be impeachable.

The lack of direct evidence relating to manufacturer conduct makes claims against manufacturers more difficult. Given the "office" of public nuisance law, however, a court may be more willing to resolve doubts on the evidence in favor of the public plaintiff, at least where the relief sought requires only the kind of reasonable supervision and training that should be taking place anyway. In short, by focusing on the kind of injunctive relief designed to abate the nuisance, the cities carry out their mission of protecting the health and safety of the public. Courts should permit public plaintiffs to discharge their responsibilities.

Not surprisingly, however, most cities have devoted their attention to requests for damages. Indeed, the equitable claim often has the appearance of an add-on, inserted to provide the public nuisance claim with legitimacy. Thus, Chicago's example is the better one to follow. Even if damages are found appropriate, public nuisance law should focus on the kind of equitable relief that will abate the nuisance. But to what extent is an award of damages proper in a public nuisance suit?

Although the action for public nuisance is primarily concerned with arresting the harm or threat to the public health and safety, courts have come to agree, despite silence on the part of the Restatement (Second) of Torts, that any costs that the municipality incurs in abating the nuisance are compensable. Thus, in Town of

231. Id. ¶4(a) (prohibiting gun sales to people who live in Chicago, unless they can prove they have a place to maintain a gun outside of the City), ¶4(b) (prohibiting straw sales and sales indicating the weapon will be used for illegal purposes), ¶4(c) (prohibiting sales to those who have purchased a weapon within the past thirty days).
232. Id. ¶4(f).
233. Id. ¶4(d) & (e).
234. Complaint ¶4(g), City of Chicago (No. 98-CH-15596).
235. Id. ¶4(f) (requesting the cessation of shipment of firearms "that by their design are unreasonably attractive to criminals"), ¶4(h) (requiring the marketing of "personalized firearms that can only be used by the lawful purchaser").
236. See supra notes 136-37 and accompanying text.
237. United States v. Illinois Terminal R.R. Co., 501 F. Supp. 18, 21 (E.D. Mo. 1980) (acknowledging the silence of the Restatement (Second) of Torts on the issue of recovering costs for abatement, but noting that "[r]ecent federal court decisions reflect a growing recognition of suits by

https://scholarcommons.sc.edu/sclr/vol52/iss2/2
East Troy v. Soo Line Railroad Co.\textsuperscript{238} the plaintiff town was entitled to recover the costs incurred in constructing a public water supply. The new system enabled residents to avoid drinking water that had been contaminated by the defendant railroad’s toxic chemicals.\textsuperscript{239} Also consider City of Manchester v. National Gypsum Co.,\textsuperscript{240} which provides the familiar example of asbestos removal. In City of Manchester the city was permitted to recover the expenses of the costly removal of the asbestos.\textsuperscript{241}

The above discussion begs important questions. First, why may the public entity recover the costs it incurs in abating a nuisance? Recall that the principal purpose of public nuisance law is to protect the public health and safety by eliminating or restricting the nuisance. Therefore, an order requiring the creator of the nuisance to cease operations is often the indicated solution. The defendant may incur costs in doing so, but those costs are properly considered the responsibility of the entity that created the nuisance.\textsuperscript{242} Often, however, the municipality itself will be better positioned to abate the nuisance than the defendant. In that case, one might say that the public entity incurs a cost that could properly have been assigned to the defendant in the first place, so that the cost should be shifted back to that same, responsible party. For example, in the Soo Line case the defendant could have been ordered to abate the nuisance it created by contaminating the groundwater. Instead, the town undertook the abatement because it was better able

government agencies under federal common law for the abatement of public nuisances\textsuperscript{2}); see also City of Flagstaff v. Atchinson, Topeka & Santa Fe Ry. Co., 719 F.2d 322, 324 (9th Cir. 1983) (listing abatement of public nuisance as one exception to rule that government may not recover the costs of its services); Town of East Troy v. Soo Line R.R. Co., 653 F.2d 1123, 1128 (7th Cir. 1980) (holding town was obligated to act as it did “to alleviate a threat to the public health” and therefore may recover the costs incurred in doing so); City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008, 1019 (7th Cir. 1979) (leaving open possibility of recovering for expenses incurred because of defendants’ discharge of toxic chemicals into sewer system).

238. 653 F.2d 1123 (7th Cir. 1980).

239. The town was benefited by an applicable Wisconsin statute that authorized an injured party to bring an “action to recover damages or to abate a public nuisance from which injuries peculiar to the complainant are suffered.” \textit{id}. at 1127 (quoting Wis. Stats. § 823.01). The court read the requirement of injury “peculiar to the complainant” broadly, authorizing recovery for costs in light of the “actual present danger to the public health and welfare” that the town was obliged to end. \textit{id}. at 1131.


241. We do not use the term “abating the nuisance” because the court in City of Manchester found that a nuisance claim could not be maintained. The logic seems to have been that, because the defendant was no longer in control of the asbestos and therefore could not carry out the removal program itself, it was not liable under that theory. \textit{id}. at 656. This conclusion makes little sense. The issue of remedy should be considered independently from the antecedent question of whether the defendant created a nuisance. However, losing the nuisance claim posed no practical problem to the plaintiff. The court found the defendant liable under a host of other theories, including product liability and liability for abnormally dangerous activity. \textit{id}. at 657. The bottom line is that the defendant was made to pay to abate the “nuisance” that it had caused.

242. See, e.g., Wisconsin v. Ketter, 569 N.W.2d 589 (Wis. Ct. App. 1997) (upholding summary judgment and thereby placing the cost of nuisance abatement on a property owner who received notice of opportunity to abate the nuisance herself, but did not); Lydecker v. Eels, 3 N.Y.S. 323 (2d Dep’t 1888) (holding that noncompliance with order compelling nuisance removal empowers local board of health to abate nuisance and to charge the one maintaining the nuisance for the cost of doing so).
to do so and then required the defendant to pay the costs it might have had to pay in the first place.\footnote{243}

The next question is: What does it mean to "incur costs in abating a nuisance"? In one of the leading cases supporting the notion of recovery of costs, Justice Kennedy (then Judge Kennedy of the United States Court of Appeals, Ninth Circuit) denied recovery for the costs of emergency services needed to evacuate residents near the site of a toxic railcar spill,\footnote{244} yet noted that a governmental entity may recover the costs of its services incurred in abating a nuisance.\footnote{245} But does evacuating people from a dangerous area not honor the city's obligation to safeguard the public health and welfare, just as would other remedial actions such as dredging swamps, removing asbestos, or cleaning up the water supply? There are two possible "short" answers to this question, but neither is wholly satisfactory. First, the city of Flagstaff did not sue under a public nuisance theory, but for negligence and liability for abnormally dangerous activities.\footnote{246} Thus, one might simply say that the plaintiff made an error in pleading. Assuming, then that the plaintiff had added a public nuisance count to its complaint, would the result have been different? The second "short" answer is still no because evacuating people from the scene of an accident does not solve (or even work toward the solution of) the nuisance itself. Thus, had the plaintiff asserted a claim to recover the costs of cleaning up the spill—preferably under a public nuisance theory—that claim would presumably have been permitted.

The second "short" answer, though, leaves two problems of its own. The first is practical: Is it possible to determine whether a cost incurred truly works toward abatement of the nuisance? Considering some of the claims for relief against gun sellers in this light, it appears that, although difficult questions are presented, courts are capable of determining which remedial actions further the goal of abating the nuisance. This discussion leads to the second question: Should recovery under a public nuisance theory be extended to all costs that a municipality incurs as the

\footnote{243. One criticism of this view is that it does not seem to give the municipality any incentive to act reasonably in spending what turns out to be the defendant's money. This problem can be eliminated, or at least mitigated, by permitting the defendant to challenge the reasonableness of the expenses in court. Given the practical difficulty of succeeding in such a suit, one might prefer a rule that requires the defendant to initially abate the nuisance, thereby ensuring the proper incentive to do so at a reasonable cost. The great practical advantages that will often attach to having the city abate the nuisance itself must be weighed against this possibility. Such advantages seem to have been present in \textit{Soo Line}, where the inherent powers of the town, which included the ability to form a district and buy land, enabled it to orchestrate the construction quite efficiently. \textit{Town of East Troy v. Soo Line R.R. Co.}, 653 F.2d 1123 (7th Cir. 1988).}

\footnote{244. \textit{City of Flagstaff v. Atkinson, Topeka & Santa Fe Ry. Co.}, 719 F.2d 322, 323 (9th Cir. 1983).}

\footnote{245. \textit{Id.} at 324. Anne Giddings Kimball & Sarah L. Olson are misleading in their discussion of this case. See Anne Giddings Kimball & Sarah L. Olson, \textit{Municipal Firearms Litigation: Ill-Conceived from Any Angle}, 32 CONN. L. REV. 1277 (2000). They note only the court's holding that costs were unrecoverable under tort theories of negligence and liability for ultrahazardous activities, but never mention the court's statement that such recovery would be proper under a public nuisance theory. \textit{Id.} at 1296. Their work is more in the style of brief than of scholarship, which is not surprising in light of their disclosure that they "have extensively represented firearm manufacturers in a wide variety of matters, including the defense of municipal lawsuits." \textit{Id.} at 1277, n.*.}

\footnote{246. \textit{City of Flagstaff}, 719 F.2d at 323.}
result of a defendant’s nuisance, even those that do not strictly contribute to abating the nuisance? Given the purpose and history of public nuisance, those costs not reasonably assignable to abating the nuisance should be disallowed. However, such damages might be recoverable under tort law theories such as negligence or liability for abnormally dangerous activities.  

B. Defining Nuisance Abatement in Municipal Gun Litigation

Most of the municipal complaints allege that the city or county has incurred substantial costs in dealing with the effects of gun violence. Although there would be problems assigning a percentage of costs incurred to defendants’ illegal actions, it is reasonable to assume that at least some plaintiffs could convince a fact-finder that some portion of emergency medical services, emergency room costs, and other medical treatment costs are the responsibility of one or more of the defendants. The same might also be said of the costs of investigating and prosecuting violations of the applicable gun-control laws.

Requiring the defendants to pay these costs, however, would do nothing to abate the nuisance. Indeed, even if the defendants were to assume all of these costs, the nuisance could continue. By contrast, some of the steps suggested by Chicago and other cities—enjoining illegal sales, requiring manufacturer and distributor supervision of dealers, requiring participation in studies to determine lawful demand for firearms, and authorizing the city to monitor compliance with the injunctive relief ordered—stand a reasonable chance of reducing the incidence of a defendant’s nuisance, even those that do not strictly contribute to abating the nuisance? Given the purpose and history of public nuisance, those costs not reasonably assignable to abating the nuisance should be disallowed. However, such damages might be recoverable under tort law theories such as negligence or liability for abnormally dangerous activities.  

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Requiring the defendants to pay these costs, however, would do nothing to abate the nuisance. Indeed, even if the defendants were to assume all of these costs, the nuisance could continue. By contrast, some of the steps suggested by Chicago and other cities—enjoining illegal sales, requiring manufacturer and distributor supervision of dealers, requiring participation in studies to determine lawful demand for firearms, and authorizing the city to monitor compliance with the injunctive relief ordered—stand a reasonable chance of reducing the incidence of a defendant’s nuisance, even those that do not strictly contribute to abating the nuisance? Given the purpose and history of public nuisance, those costs not reasonably assignable to abating the nuisance should be disallowed. However, such damages might be recoverable under tort law theories such as negligence or liability for abnormally dangerous activities.  

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of illegal gun violence. The result may be that the gun sellers can efficiently assume many of the costs involved. However, to the extent that the public entity participates in achieving these goals, the costs it incurs in so doing should be recoverable against the responsible defendants.

Given the points emphasized throughout this section, our conclusion that public nuisance law is an inappropriate vehicle for the recovery of damages emerges naturally. When the state, or its authorized actor, brings a public nuisance action, it acts as a supplement to legislation, further implementing the responsibility of the state to safeguard the public health and safety. Abating the nuisance discharges this obligation most directly by eliminating, or reducing to acceptable limits, the peril to public health. Actions for damages, on the other hand, compensate an injured party for losses incurred through a defendant’s wrongful conduct. In a given case, a city may be able to show such a loss. The clearest case of such loss would involve damages to the city’s own property, but, in an appropriate case, a court might also permit recovery for pure economic loss.

Even if recovery for economic loss is appropriate in municipal suits against gun sellers, it should not be permitted under a public nuisance theory. As public nuisance plaintiff, the city stands as defender of the populace, and the city’s actions should be aimed at eliminating the risk at its source. As a private plaintiff in a tort action, the city seeks recovery for its own losses. The two should be kept separate.

VIII. CONCLUSION

Public nuisance law has had a tortuous history. It has been both civil and criminal, confused with private nuisance, and used to describe both a tort and an exercise of the police power. No wonder, then, that its deployment in litigation against gun sellers creates undue optimism in both private and public plaintiffs and panic, often with accompanying derision, in the gun industry.

As this Article has shown, public nuisance law is indeed a powerful weapon, and, under ancient and sound law, an appropriate means of calling to task gun sellers whose actions threaten the health and safety of the public. Municipal entities

they distribute handguns, for the purpose of eliminating or substantially reducing the illegal secondary market").

252. See supra notes 20-27 and accompanying text.

253. See Public Nuisance Abatement, supra note 11.

254. This point is insufficiently appreciated in Kairys, supra note 147, at 1178. While one court that was uncomfortable with the rule against recovery for pure economic loss suggested that “public nuisance law would be a good source of limits,” Id. at 1178 n.10 (citing Dundee Cement Co. v. Chemical Lab., Inc., 712 F.2d 1166, 1172 n.4 (7th Cir. 1983)), this is not the same as saying that a public nuisance claim can be stated simply by virtue of economic loss suffered. A public plaintiff might recover for such loss under some other theory such as negligence, but public nuisance is the wrong vehicle. Two important decisions permitting recovery for pure economic loss are J’Aire Corp. v. Gregory, 398 F.2d 60 (Cal. 1979) and People Express Airlines, Inc. v. Consol. Rail Corp., 495 A.2d 107, 118 (N.J. 1985). However, these cases involved a limited class of particularly foreseeable plaintiffs, and municipal plaintiffs might have difficulty obtaining such status. It is interesting to note that the district court of New Jersey, while dismissing the public nuisance claim, nonetheless took an expansive position on the issue of recovery of economic loss damages under a nuisance theory. Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245 (D.N.J. 2000) (“the municipal cost rule does not bar damages in public nuisance actions”).

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should continue to press, and courts should continue to permit, such suits to the extent that they are directed toward furthering health and safety. The strongest cases are those in which gun manufacturers, distributors, and retailers are shown to have participated in the subversion of legislative will by facilitating an illicit market in these deadly products.

At the same time, the very power of public nuisance law counsels against its promiscuous use. Personal injury plaintiffs should not be permitted to use public nuisance theory as an “end run” around the strictures imposed by other doctrines, nor should municipalities be able to unleash it in order to recover costs. Respecting the public health mission of public nuisance law is vital.