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## Public Nuisance Claims Against Gun Sellers: New Insights and Challenges

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## **PUBLIC NUISANCE CLAIMS AGAINST GUN SELLERS: NEW INSIGHTS AND CHALLENGES<sup>†</sup>**

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*Gun violence continues unabated. Regulation of these deadly instruments is woefully inadequate, and legislatures are compounding the problem by barring or restricting access to the courts for the death and injuries that guns cause. In short, Congress and state legislators have repeatedly acquiesced to the demands of the gun lobby.*

*During the past several years, cities have struck back by filing public nuisance claims against those gun sellers whose practices pose a risk to the public's health and safety. After a slow start, public nuisance claims have recently gained traction in state appellate courts, which are increasingly coming to realize and respect the core mission of public nuisance law. Such claims differ in essential ways from private claims as they do not seek to recover for injuries caused by guns, but rather allow municipalities to protect their citizens from the gun violence. Indeed, such nuisance abatement is a central component of the state's police power, which requires states and their political divisions to protect public health, safety, and welfare. Several public nuisance claims seeking to compel gun makers and sellers to refrain from practices that increase the already high risk of death or injury from their products have been permitted to survive the pleading stage. This is a salutary development and reflects better judicial understanding of the difference between nuisance law and tort law. This Article lauds these developments while undertaking a critical assessment of recent cases.*

*Part I provides an overview of public nuisance law and discusses some important differences between claims brought by public entities and those brought by private citizens. Part II goes into detail regarding the nature of the public nuisance caused by the conduct of gun sellers. In Part III, the Authors examine some of the recent decisions in which public nuisance claims against these gun dealers have been allowed to survive a motion to dismiss, a previously insuperable hurdle, while in Part IV they analyze the significance of these small victories for the future of similar litigation. Finally in Part V, the Authors describe legislative efforts to shield gun makers from these lawsuits and note flaws in the purported justifications for such legislation.*

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## INTRODUCTION

On March 2, 2004, the United States Senate overwhelmingly defeated a bill that would have granted a sweeping and unprecedented civil immunity to those who manufacture, market, and sell guns.<sup>1</sup> In so doing, the Senate dealt the gun lobby a rare and unexpected setback. Had the advocates of sensible gun control laws finally regained momentum?

In fact, that vote revealed the true strength of the gun lobby. In a test vote a few days earlier, the immunity bill had seemed unstoppable; three-fourths of the chamber had voted for its passage,<sup>2</sup> many Democrats had sided with Republicans in supporting the measure,<sup>3</sup> and the bill appeared destined to become law. Its subsequent failure was attributable not to a last-minute shift in position by proponents on the immunity issue, but rather to the utter intransigence of the gun lobby.

By varying majority votes, Senators interested in some form of gun control had managed to attach significant amendments to the bill—amendments that most Americans support.<sup>4</sup> These would have extended the ban on assault weapons and closed a loophole that exempts gun show sales from background checks.<sup>5</sup> Once those amendments were in place, however, the gun industry lobbyists urged Senators to vote against the bill, and in keeping with the trend of disturbing legislative acquiescence to the lobby's wishes, the Senate complied.<sup>6</sup> So empowered are the pro-gun forces that

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1. Sheryl Gay Stolberg, *Senate Leaders Scuttle Gun Bill Over Changes*, N.Y. TIMES, Mar. 3, 2004, at A1 (reporting that the bill was defeated by a 90–8 margin).

2. Sheryl Gay Stolberg, *Bill to Block Gun Lawsuits Moves Ahead*, N.Y. TIMES, Feb. 26, 2004, at A23.

3. *Id.*

4. A poll taken for the Consumer Federation of America showed that more than three-quarters of all Americans support a strong ban on assault weapons, including a solid majority (57%) of gun owners. Press Release, Consumer Federation of America, CFA Survey Shows Gun Owners Support Assault Weapons Ban (Feb. 23, 2004), available at <http://www.jointogether.org/gv/news/alerts/reader/0,2061,569370,00.html> (on file with the University of Michigan Journal of Law Reform). According to a 2001 Zogby poll, 86% of Americans and 78% of gun owners supported closing the gun-show loophole. Jennifer Beazley, *Texas Gun-Show Loophole an Invitation to Terrorists*, HOUSTON CHRON., Sept. 30, 2001, available at <http://www.texansforgunsafety.org/articles/loophole.htm> (on file with the University of Michigan Journal of Law Reform).

5. CNN, *Senate Kills Bill Protecting Gun Makers*, Mar. 2, 2004, at <http://www.cnn.com/2004/ALLPOLITICS/03/02/senate.guns/index.html> (on file with the University of Michigan Journal of Law Reform).

6. See Editorial, *Gun Lobby Orders the Senators*, HARTFORD COURANT, Mar. 8, 2004, at A6 (opining that the “charade” in the Senate “ought to end any doubts about the enormous clout” of the National Rifle Association, and describing how the “NRA instructed Senators . . . that they should kill the entire bill” once the amendments were attached); see also

any compromise, no matter how broadly supported or sensible, is unacceptable.

Given the overwhelming power of the gun lobby, it is not surprising that the current firearms regulations in the United States remain inadequate to prevent gun-related violence that kills or injures thousands of people annually in this country.<sup>7</sup> Notwithstanding the sporadic ability of legislatures to control the access to and use of firearms by persons likely to commit crimes of violence,<sup>8</sup> the national record of violent gun crimes continues unabated. Both individuals and public entities—cities, counties, and states—have resorted to the judicial system to remedy injuries resulting from gun violence that better gun control measures might have averted.

Plaintiffs have alleged various claims in their suits against the gun industry including public nuisance,<sup>9</sup> negligence,<sup>10</sup> product liability,<sup>11</sup> and deceptive trade and advertising practices.<sup>12</sup> Of these, perhaps the most criticized claim brought by public entities has

Stolberg, *supra* note 1, at A20 (reporting that the lead sponsor of the assault weapons ban, Sen. Dianne Feinstein, Democrat of California, said of the NRA, "They had the power to turn around at least 60 votes in the Senate. That's amazing to me.").

7. In 1997, for example, more than 32,000 Americans were fatally shot in homicides, suicides, and accidental shootings. Donna L. Hoyert et al., *Deaths: Final Data for 1997*, 47 NAT'L VITAL STAT. REP. 19, 68 tbl. 16 (1999). See generally Thomas M. Scalea & Sharon M. Henry, *Demographics of Firearm Injury: Implications for Medical Practice*, 4 J. HEALTH CARE L. & POL'Y 114 (2000) (presenting data on gun violence in the United States and analyzing the public health costs associated with that violence).

8. Despite the attention and concern of the public and the legislators during the period after the 1999 shootings at Columbine High School in Littleton, Colorado, no significant federal legislation emerged in the aftermath of the tragedy. See Jean Macchiaroli Eggen & John G. Culhane, *Gun Torts: Defining a Cause of Action for Victims in Suits Against Gun Manufacturers*, 81 N.C. L. REV. 115, 117–18 nn.1–2 (2002) [hereinafter Eggen & Culhane, *Gun Torts*] (discussing various bills before Congress in aftermath of Columbine).

9. See, e.g., *New York v. Sturm, Ruger & Co.*, (N.Y. Sup. Ct. filed June 26, 2000) (No. 402586/2000); Compl., *City of Boston*, (No. SUCV 1999-02590-C); Compl., *City of Chicago* (No. 98-CH-15596)). The trend has been towards public nuisance and away from other theories of recovery. For example, New York City's complaint, which originally alleged several theories of liability and sought damages, Compl., *City of New York v. B. L. Jennings, Inc.*, (filed Aug. 25, 2000) (No. 00-CV-3641), has been amended to claim only public nuisance and seeks the remedy of abatement only. As discussed throughout this Article, public nuisance is the theory that best suits state and municipal actions.

10. See, e.g., *City of Atlanta v. Smith and Wesson Corp.*, (State Ct. of Fulton County, Ga. filed Feb. 4, 1999) (No. 99VS0149217J) (alleging failure to act with reasonable care in gun safety design); *Morial v. Smith Wesson Corp.*, (La. Civ. Dist. Ct. filed Oct. 30, 1998) (No. 98-18578).

11. See cases cited *supra* note 10.

12. See, e.g., *Ganim v. Smith & Wesson Corp.*, No. CV 99-036-1279, 1999 WL 1241909 (Conn. Super. Ct. Dec. 10, 1999), *motion to dismiss aff'd*, 780 A.2d 98 (Conn. 2001); *City of Cincinnati v. Beretta U.S.A. Corp.*, No. A9902369, 1999 WL 809838 (Ohio Ct. Com. Pl. Oct. 7, 1999).

been the public nuisance claim.<sup>13</sup> Despite this criticism, courts have recently begun to demonstrate a willingness to allow public nuisance claims to run their course in the civil judicial process, as evidenced by recent decisions.<sup>14</sup>

The law of public nuisance, and nuisance law in general, has been poorly understood by courts and has been the subject of heated debate among legal scholars<sup>15</sup> for more than a century. While public nuisance doctrine originated as a remedy for non-trespassory interferences with the public's right of way on public land, the doctrine has evolved to encompass other kinds of injuries resulting from interference with public health and safety.<sup>16</sup> Under contemporary law, public nuisance actions may be brought by the state or a political subdivision of the state under criminal nuisance statutes<sup>17</sup> or as civil actions,<sup>18</sup> depending upon the jurisdiction. The state brings such actions in its capacity as *parens patriae*—literally “father of the country”—to protect its citizens from threats to public health, safety, and welfare. Unfortunately, the term “public nuisance” is also used to describe a private cause of action that injured private plaintiffs can bring, albeit under limited circumstances, for the same incidents that give rise to the state's claim for public nuisance.<sup>19</sup> The goal in these personal suits is redress in the form of damages or injunctive relief, not the

13. See, e.g., *Penelas v. Arms Tech., Inc.*, No. 99-1941, 1999 WL 1204353, at \*2 (Fla. Cir. Ct. Dec. 13, 1999) (dismissing Miami-Dade County's claims, including a public nuisance claim, on the vague ground that they conflicted with a state law concerning the “manufacture, sale, and distribution of firearms”); Winifred Weitsen Boyle, Comment, *There's No Smoking Gun: Cities Should Not Sue the Firearm Industry*, 25 DAYTON L. REV. 215, 238–39 (2000) (confusing public nuisance with tort claim).

14. See, e.g., *Ileto v. Glock Inc.*, 349 F.3d 1191 (9th Cir. 2003); *City of Gary v. Smith & Wesson Corp.*, 2003 Ind. LEXIS 1096 (Ind. Dec. 23, 2003). For discussion of these and other public nuisance cases, see *infra* Parts III, IV.

15. E.g., HORACE WOOD, *THE LAW OF NUISANCES* iii (3d ed. 1893) (referring to the law of nuisance as a “‘wilderness’ of law”); William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942) (referring to nuisance law as a “legal garbage can”); Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984, 984 (1952) (characterizing nuisance law as a “mystery” (quoting *Delaney v. Philhern Realty Holding Co.*, 21 N.E.2d 507, 510 (N.Y. 1939))).

16. See John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S.C. L. REV. 287, 292–93 (2001) [hereinafter Culhane & Eggen, *Public Nuisance*].

17. See, e.g., FLA. STAT. ANN. § 893.138 (2003) (authorizing action to abate drug- or prostitution-related public nuisances and criminal street gang activity); N.Y. PENAL LAW § 400.05 (1) (McKinney 1999) (declaring possession or use of certain weapons a nuisance).

18. See WIS. STAT. ANN. § 823.01 (2003) (providing that any person, county, city, village, or town may bring an action for damages or abatement of a public nuisance).

19. See DAN B. DOBBS, *THE LAW OF TORTS* § 468 (2000) (noting that private plaintiff suits for public nuisance require injuries distinct from those for which the public entity may sue); *infra* notes 60–76 and accompanying text.

protection of the public. These dual missions of public nuisance lend more complexity to an already murky doctrine.

The right protected under public nuisance doctrine stems from the state's police power and safeguards the public's right to be free from interferences with public health, safety, and welfare.<sup>20</sup> Where such interferences are not prohibited by statute, the common law has assumed a role in abating public nuisances,<sup>21</sup> either through direct injunctions or by requiring the offenders to cover the cost of abatement.<sup>22</sup> Although the power to abate nuisances is an incident of the state's police power, the municipalities, in the absence of express legislation to the contrary,<sup>23</sup> implicitly have the same power.<sup>24</sup> In addition, courts recently have become more amenable to private citizen claims for public nuisance in suits against the gun industry. While such claims are often substitutions for more difficult negligence or strict liability claims, making their continued recognition more problematic, the facts alleged in complaints help to demonstrate that the public hazards created by gun violence do indeed represent a nuisance subject to state regulations.

This Article takes the position that state and municipal public nuisance suits against gun sellers are often an appropriate response to the gun violence that results from the inadequate or easily circumvented firearms control laws. We canvass the

20. See generally RESTATEMENT (SECOND) OF TORTS § 821B(1), (2)(a) (1979).

21. The power of the courts to abate public nuisances is inherent in the state's plenary police power. See *Garcia v. Gray*, 507 F.2d 539, 544 (10th Cir. 1974) (stating that the "regulation and abatement of nuisances is one of the basic functions of the police power."); 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) (discussing the breadth of the police power and its basis for abating nuisances).

22. See *Town of East Troy v. Soo Line R.R. Co.*, 653 F.2d 1123, 1132 (7th Cir. 1980) (allowing municipality to recover cost of abating public nuisance).

23. Some state statutes are specific to suits against the gun industry. See, e.g., GA. CODE ANN. § 16-11-184 (2002). The Georgia statute provides:

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.

GA. CODE ANN. § 16-11-184(b)(2) (2002). State statutes limiting actions against the gun industry are discussed *infra*, notes 272-86 and accompanying text; see also *Penelas v. Arms Tech., Inc.*, No. 99-1941, 1999 WL 1204353, at \*2 (Fla. Cir. Ct. Dec. 13, 1999), *aff'd*, 778 So.2d 1042 (Fla. Ct. App. 2001) (dismissing Miami-Dade County's public nuisance and other claims against gun industry on ground that claims conflicted with state statute governing "manufacture, sale, and distribution of firearms").

24. See *Town of East Troy v. Soo Line R.R. Co.*, 653 F.2d 1123, 1132 (7th Cir. 1980).

emerging body of case law that interprets public nuisance law in this context and demonstrate that the courts that have dismissed such claims have generally misunderstood the requirements of the doctrine. Courts that have permitted the claims to go forward, however, as well as judges in dissent, have evinced a more sophisticated understanding of the important role that public nuisance continues to play in the protection of the public's safety, health, and welfare. Private claims for public nuisance, on the other hand, are unnecessary and run the risk of further confusing an already difficult issue. Careful attention to the mission of public nuisance also counsels against legislation that limits or denies municipalities the right to seek abatement of gun violence. Legislatures should not be handcuffing the cities that deal with the consequences of gun violence on a daily basis.<sup>25</sup>

Part I of this Article provides an overview of the law of public nuisance, emphasizing those aspects of the doctrine most relevant to suits against gun sellers. We also explore the distinctions between claims brought by public entities and those brought by private citizens and note that the continued existence of the private claim contributes to judicial confusion on the proper role of public nuisance. Part II explores the nature of the public nuisance created by the conduct of gun sellers. Part III examines recent decisions in which public nuisance claims against the gun industry have withstood the defendants' motions to dismiss. Special attention is given to the courts' analysis of the plaintiffs' complaints and the nature and specificity of the allegations referenced by the courts. Part IV analyzes the significance of these recent decisions for future litigation against the gun industry. Part V discusses legislative efforts to shield the gun industry from lawsuits, noting the flaws in the purported justification for such legislation.

## I. APPLICABILITY OF PUBLIC NUISANCE DOCTRINE TO GUN SALES

In an earlier article, we argued that the law of public nuisance is poorly understood and applied by courts and legislatures.<sup>26</sup> Since that time, an increasing number of courts have addressed public nuisance allegations brought specifically against the gun

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25. See Michael R. Bloomberg, Richard M. Daley, James K. Hahn, & Scott L. King, *Lawyers, Guns and Mayors*, N.Y. TIMES, Feb. 24, 2004, at A27 (op-ed piece by mayors of major U.S. cities, arguing against legislative immunity for gun sellers).

26. See Culhane & Eggen, *Public Nuisance*, *supra* note 16.

industry by municipalities<sup>27</sup> and, in at least one instance, by a state.<sup>28</sup> The results have been decidedly mixed. The decisions in these cases frequently demonstrate the confusion that exists in the use of public and private nuisance,<sup>29</sup> impose unduly restrictive causation requirements,<sup>30</sup> and indicate a general fear that public nuisance law is simply too broad.<sup>31</sup> Recently, however, a growing number of courts have permitted allegations that the purposeful conduct of gun sellers has created a public nuisance sufficient to survive a motion to dismiss.<sup>32</sup>

The discussion that follows begins by establishing the general framework of public nuisance doctrine, with explanatory emphasis placed on those aspects of the law that have assumed special relevance in gun litigation. We then consider the misguided arguments that have been most often deployed against using public nuisance law in the context of gun sales and distribution. Exposing the deficiencies of these arguments highlights the unique propriety of public nuisance claims, as opposed to private claims, as a vehicle for dealing with the consequences of gun violence.

### A. The "Office" of Public Nuisance<sup>33</sup>

Public nuisance law empowers the state to put a stop to actions that substantially interfere with the public's health, safety, and

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27. Some cases have been dismissed. *See* *City of Philadelphia v. Beretta, U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002); *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001); *Ganim v. Smith and Wesson Corp.*, 780 A.2d 98 (Conn. 2001). More recently, the trend has been to permit the claims to go forward. For recent discussion of cases illustrating this trend see *infra* Parts III, IV.

28. *See* *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192 (App. Div. N.Y. 2003) (affirming dismissal of State's public nuisance claims).

29. *See* *infra* notes 225–40 and accompanying text.

30. A good discussion of the causation issue can be found in *NAACP v. Acusport, Inc.*, 271 F. Supp. 2d 435, 492–97 (E.D.N.Y. 2003). The case also highlights the problems that arise when private plaintiffs attempt to use public nuisance law. *See* Part I.B. *infra* and accompanying text.

31. *See* *infra* notes 35–40 and accompanying text.

32. *See* cases discussed *infra* Parts III, IV.

33. In *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 603 (Cal. 1997), the California Supreme Court provided an unusually comprehensive justification for the state's exercise of public nuisance. *Id.* The court stated, in part: "[A] principal office of the centuries-old doctrine of the 'public nuisance' has been the maintenance of public order—tranquillity [sic], security and protection—when the criminal law proves inadequate." *Id.*



convenience.<sup>34</sup> Because of this broad definition, courts have sometimes expressed a legitimate concern that the reach of public nuisance is almost limitless. In *People v. Sturm, Ruger & Co.*,<sup>35</sup> the New York appellate court summarized the general judicial wariness toward the doctrine:

[W]e see on the horizon, were we to expand the reach of the common-law public nuisance tort in the way plaintiff urges, the outpouring of an unlimited number of theories of public nuisance claims for courts to resolve and perhaps impose and enforce—some of which will inevitably be exotic and fanciful, wholly theoretical, baseless, or perhaps even politically motivated and exploitative. Such lawsuits could be leveled not merely against these defendants, but, well beyond them, against countless other types of commercial enterprises, in order to address a myriad of societal problems . . . .<sup>36</sup>

The New York court reached the wrong result in dismissing the public nuisance claim,<sup>37</sup> but the general concern is not without merit. Public nuisance doctrine reflects the state's inherent police power, arguably government's most basic authority.<sup>38</sup> Since that power enables states to take whatever steps are needed to protect both the state itself and its citizens,<sup>39</sup> broad discretion is the

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34. DAN B. DOBBS, *THE LAW OF TORTS* 1334 (2000) (defining public nuisance as "a substantial and unreasonable interference with a right held in common by the general public, in use of public facilities, in health, safety, and convenience"). The Restatement similarly identifies public nuisance as "a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience." *RESTATEMENT (SECOND) OF TORTS* § 821B(2)(a) (1979). The Restatement adds, "conduct . . . proscribed by a statute, ordinance or administrative regulation," *id.* § 821B(2)(b), or "conduct . . . of [either] a continuing nature or [that] has produced a permanent or long-lasting effect, and . . . has a significant effect on the public right," *id.* § 821B(2)(c). These latter alternatives have not been the subject of suits brought against gun sellers, however, and the discussion throughout this Article centers on the core definition of interference with public health, safety and welfare.

35. *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192 (App. Div. N.Y. 2003).

36. *Id.* at 202–03.

37. We discuss this matter more fully in notes 71–76, *infra*, and accompanying text.

38. *See, e.g.*, Gostin et al., *supra* note 21, at 103–05 (discussing the definition and breadth of the police power and its relation to nuisance abatement); *see also* *Garcia v. Gray*, 507 F.2d 539, 544 (10th Cir. 1974) (stating that the "regulation and abatement of nuisances is one of the basic functions of the police power").

39. While the state's interest in abating public nuisances is an incident of its police power, its standing to protect the health and safety of its citizens in judicial proceedings is known as the *parens patriae* (parent of the country) power. LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW* 54 (2000). This doctrine enables the state to sue in a case in which no citizen would be able to allege a specific injury. In the case of public nuisance, we shall see that the *parens patriae* power to vindicate the interest of all citizens makes the state a better fit as a plaintiff than membership organizations, such as the NAACP, to challenge public nuisances.

doctrine's central characteristic. Although this discretion is checked in many jurisdictions by requiring that the plaintiff prove public nuisance by clear and convincing evidence,<sup>40</sup> the potential breadth of public nuisance is obvious.

In addition to imposing a heightened evidentiary burden, the law has also addressed this concern by explicitly prohibiting certain potential nuisances by statute. For example, specific statutes and regulations now address such disparate problems as environmental degradation,<sup>41</sup> noise,<sup>42</sup> unwholesome food,<sup>43</sup> and—with special relevance here—the illegal possession of handguns.<sup>44</sup> Such statutes provide a safety floor for certain regulated conduct, but these still leave room for public nuisance proceedings as a supplemental remedy. The state must retain its plenary power to protect the public's health and safety. Without this power, the state could find itself without means to address serious public health threats. These threats may arise because of jurisdictional problems, such as instances where the effects of a permitted nuisance in one state spill over into a neighboring state.<sup>45</sup> Additionally, when the

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As a corollary, states and municipalities may find their complaints dismissed if they do not sue in a representative capacity, to prevent prospective or on-going harm to their citizens. The failure to sue in such capacity may have doomed the complaint in *Ganim v. Smith and Wesson Corp.*, 780 A.2d 98 (Conn. 2001). See *infra* notes 237–39 and accompanying text.

40. A good discussion of the point is found in *NAACP v. Acusport, Inc.*, 271 F. Supp. 2d 435, 477–80 (E.D.N.Y. 2003).

41. 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, 1404 n.421 (1991) (identifying relevant federal environmental laws).

42. See, e.g., COLO. REV. STAT. § 25-12-101 to -109 (2003) (declaring noise “a major source of environmental pollution” and authorizing the creation of noise-level standards). Noise pollution often is regulated through local ordinances. See, e.g., Philadelphia Noise and Excessive Vibration Regs., *promulgated pursuant to* PHILADELPHIA, PA. CODE Chap. 10-400 § 10-406 (2003).

43. See, e.g., CAL. PENAL CODE § 383 (2004) (classifying the knowing sale of adulterated food a misdemeanor offense); MASS. ANN. LAWS ch. 94, § 4 (2004) (prohibiting the use of spoiled or contaminated ingredients in bakery products).

44. See, e.g., N.Y. PENAL LAW § 400.05(1) (McKinney 1999) (“Any weapon, instrument, appliance or substance specified in article [265] [including specified unlicensed firearms and loaded firearms possessed with the intent to use illegally], when unlawfully possessed, manufactured, transported or disposed of, or when utilized in the commission of an offense, is . . . a nuisance.”) Such statutes are instructive in that they establish only a floor for state action, which public nuisance can supplement. New York State's complaint against various gun sellers alleged negligence both under the above statute *and* in common law nuisance. Compl. at ¶¶ 63–64 (statutory) and ¶¶ 65–66 (common law), *New York v. Sturm, Ruger & Co.* (No. 402586/2000). Nonetheless, the complaint was dismissed. *New York v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192 (App. Div. N.Y. 2003) (affirming trial court dismissal). The case is discussed further at notes 71–76 and accompanying text.

45. In *Missouri v. Illinois*, 180 U.S. 208 (1901), for example, the State of Missouri was held to have standing to sue the Chicago sanitation district in federal court for the alleged public nuisance created by Illinois's decision to create a channel to divert sewage from Lake

threat or injury to the public's health arises within a state's own borders, a public nuisance action for abatement or an injunction might be the only, or best, means of proceeding. For instance, a toxic chemical may have useful industrial applications, but may present a danger when accidentally spilled.<sup>46</sup> An action for public nuisance may then be the most expeditious remedial course.

In the case of gun sales, the nuisance may arise from any number of activities that unnecessarily increase the health risk posed by these already-dangerous products. The most outrageous cases are easy to imagine. For example, a seller who markets and sells a mail-order gun in pieces, to be assembled by the purchaser, does so for the purpose of avoiding the whole battery of regulation for the sale and registration of firearms.<sup>47</sup> Such an action clearly imposes a public health risk, and the state (or the municipality with authority to act)<sup>48</sup> needs abatement authority unless and until legislation addresses the issue.

The more common allegation by municipalities suing gun sellers under a public nuisance theory is that the sellers create a nuisance by marketing, distributing, and selling firearms in a manner that allows criminals to come into possession of them.<sup>49</sup> As to the

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Michigan to the Mississippi River, where it would pollute Missouri's "side" of that river. For a thorough discussion of the continued vitality of the *parens patriae* doctrine as applied to states or the federal government suing on behalf of their citizens, see Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in Parens Patriae*, 92 Nw. U. L. REV. 111 (1997).

46. See, e.g., *Town of East Troy v. Soo Line R.R. Co.*, 653 F.2d 1123 (7th Cir. 1980). In this case, where thousands of gallons of a known toxin spilled into the soil near local wells, and East Troy was obliged to drill a deep well, the town was permitted to recover the cost of abating the public nuisance.

47. A case involving such facts is *Halberstam v. Daniel* (E.D.N.Y. 1998) (No. 95-C3323), discussed in Timothy D. Lytton, *Halberstam v. Daniel and the Uncertain future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOK. L. REV. 681 (1998).

48. The states are the principal repositories of the public nuisance power, but both statutes and case law often permit local governments to deal with nuisances that arise within their territorial limits. With special relevance in suits against gun sellers, Illinois law expressly grants its municipalities the right to bring actions for public nuisance: "The corporate authorities of each municipality may define, prevent, and abate nuisances." 65 ILL. COMP. STAT. ANN. 5/11-60-2 (2004); see also ALA. CODE § 11-47-118 (2003) (permitting local governments to "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."). Statutes depriving local governments of this power to abate public nuisance are discussed in Part V.B, *infra*. In *Town of East Troy v. Soo Line R.R. Co.*, 653 F.2d 1123, 1127 (7th Cir. 1980), the court interpreted a grant from the state of Wisconsin to village boards to authorize a nuisance claim even where the words "public nuisance" did not appear, because the statute spoke of the health and safety of the public.

49. See, e.g., *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143 (Ohio 2002). As we have argued, the most powerful complaints are those, such as Chicago's, that detail particular cases of gun seller misconduct. Culhane & Eggen, *Public Nuisance*, *supra* note 16, at 320-22. The trial judge's decision dismissing the city's complaint was reversed on

argument that gun sales are already regulated, the simple response is that “the law does not regulate the distribution practices alleged . . . .”<sup>50</sup> Gun regulation is far from comprehensive and “leave[s] room for [gunsellers] to be in compliance with [laws] while still acting unreasonably and creating a public nuisance.”<sup>51</sup> In other words, the defendants’ practices are alleged to imperil public safety, and the state is therefore obliged to abate the nuisance unless there is explicit statutory authority to the contrary.<sup>52</sup>

As the foregoing discussion suggests, abatement is the principal remedy in public nuisance claims brought by states or their local agents.<sup>53</sup> This usual remedy follows naturally from the very “office” of public nuisance law, which is to eliminate the interference with the public’s health or safety. Thus, the focus is on the interference and its removal, not on the culpability of the defendant’s conduct.<sup>54</sup> In the context of guns that make their way into the hands of criminals, abatement might require manufacturers and distributors to monitor dealers—particularly those who have a history of selling guns to criminals—and require gun sellers to cooperate in studies that seek to determine the market for the lawful use of firearms.<sup>55</sup>

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appeal. *City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d 16 (Ill. App. Ct. 2002), *rev’d*, 2004 Ill. LEXIS 1665 (Nov. 18, 2004).

50. *City of Cincinnati*, 768 N.E.2d at 1143.

51. *City of Gary v. Smith & Wesson, Corp.*, 801 N.E.2d 1222, 1235 (Ind. 2003). The court cited the homely example of a hog farm that could become a public nuisance because of its locality or the manner of its operation, even though hog farming is a lawful enterprise. *Id.* at 1234 n.9 (citing *Yeager & Sullivan, Inc. v. O’Neill*, 324 N.E.2d 846, 852 (Ind. App. 1975)).

52. See Culhane & Eggen, *Public Nuisance*, *supra* note 16, at 302 (“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.”).

53. See *supra* note 48.

54. See *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 208 (App. Div. N.Y. 2003) (Rosenberger, J., dissenting) (“[S]tate-initiated public nuisance abatement claims are founded on the theory that the State can obtain abatement of a condition that is injurious to the public. As such they are not negligence actions, nor are they governed by negligence concepts.”). Nevertheless, the connection between conduct and culpability is quite close in cases involving gun sellers’ creation of public nuisances.

55. The Chicago complaint seeks just such relief. Compl. at ¶ 4 (a)–(c) (prohibiting certain kinds of illegal sales), ¶ 4 (d) ¶ 4 (e) (asking court to require training, supervision and monitoring of dealers, and to terminate uncooperative dealers), ¶ 4 (g) (asking that manufacturers and distributors “participate in a court-ordered study of lawful demand for firearms and . . . cease sales in excess of lawful demand”), *City of Chicago v. Beretta U.S.A. Corp.* (Ill. Cir. Ct. filed Nov. 12, 1998) (No. 98-CH-15596).

Damages may also be appropriate in public nuisance cases, but only insofar as they contribute to the abatement.<sup>56</sup> For example, a city should be able to recover the costs of cleaning up a toxic spill from the party that created it, whether the spill was caused by negligence or not, and regardless of whether the defendant was engaged in an abnormally dangerous activity. Where the city has taken steps to abate the nuisance that the sale of guns has caused, damages might properly be recoverable for expenses that can be reasonably traced to doing so. Thus, if a city could demonstrate that it needed a certain number of additional police officers to deal with the increased violence caused by gun sellers' supplying an illegal secondary market, a link might be made between the expenditure and the abatement—decreased violence. The city would face a daunting challenge on demonstrating the causal link, but that difficulty should not result in the dismissal of the complaint, especially since the concern for the public good, embodied by nuisance law, counsels in favor of an expansive view of causation.<sup>57</sup>

On the other hand, damages that do not contribute to the abatement are not properly recoverable by a governmental entity under public nuisance law. Thus, for example, while the increased expenditure on emergency room costs and other medical treatment incurred as a result of gun violence do cost cities dearly, their recovery may not be proper under public nuisance doctrine. Of course, if a city could show property damage or economic loss, it could sue under theories of *tort* law—but not under public nuisance.<sup>58</sup> To the extent that the damages are the result of negligence, liability for a defective product, or carrying on an abnormally dangerous activity, for instance, the city could recover for its loss to the extent that a private plaintiff would. Economic loss claims are also possible, but face a much more difficult path.<sup>59</sup>

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56. The recently defeated federal immunity bill would have had an uncertain effect on municipal suits for public nuisance. See *supra* notes 1–6 and accompanying text. The bill prohibited actions for damages, but did not speak to the issue of abatement or injunctive relief. The interesting issue is whether damages *incident* to abatement or injunctive relief would have been possible. We discuss the bill in greater detail in Part VA, *infra*.

57. NAACP v. Acusport, Inc., 271 F. Supp. 2d 435, 497 (E.D.N.Y. 2003) (“[W]here the welfare and safety of an entire community is at stake, the cause need not be so proximate as in individual negligence cases.”).

58. For a discussion of the distinction between suits by public entities in their capacities as property owners and in their purely public roles, see Note, *Recovering the Costs of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry*, 113 HARV. L. REV. 1521 (2000).

59. When the defendant's misconduct causes “only” economic loss, courts are reluctant to grant recovery. The reasons for this reluctance are well-summarized in FRANCIS TRINIDADE & PETER CANE, *THE LAW OF TORTS IN AUSTRALIA* 370–75 (3d ed. 2000). In cases

B. *Outside the "Office"?: Confining Public Nuisance  
Claims to Their Proper Sphere*

As described above, public nuisance is an incident of the state's police power and not a tort. This statement would not need to be made, except that, by a quirk of legal history, public nuisance is also the basis of a private tort claim. Elsewhere, we have summarized the serpentine route by which this entity came to serve dual purposes,<sup>60</sup> and have argued that the *tort* of public nuisance serves no important purpose,<sup>61</sup> leads to unnecessary confusion,<sup>62</sup> and should be abolished.<sup>63</sup> The unfolding gun litigation has reinforced this conviction.

By the middle of the nineteenth century, private plaintiffs had begun to sue under a public nuisance tort theory,<sup>64</sup> and were successful when the public nuisance visited a harm on them different in kind from that suffered by the general public.<sup>65</sup> To use a dramatic example, one court held that people who developed leukemia as a result of groundwater pollution could state a claim for public nuisance, because their injury was obviously different and greater than that suffered by others in the town.<sup>66</sup> This *tort* of public nuisance continues to be generally recognized today, and

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involving a limited class of especially foreseeable plaintiffs, recovery may be permitted. *See, e.g., J'Aire Corp. v. Gregory*, 598 P.2d 60, 64 (Cal. 1979); *People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107 (N.J. 1985). Municipal plaintiffs might have difficulty establishing such status, but the outcome is far from certain.

60. Culhane & Eggen, *Public Nuisance*, *supra* note 16, at 292–95.

61. *Id.* at 312 (noting that courts have not permitted litigants to avoid the requirements of fault by pleading public nuisance).

62. *Id.* at 311–12.

63. *Id.* at 311.

64. *Id.* at 293.

65. *See* RESTATEMENT (SECOND) OF TORTS § 821C(1) (1979). The Second Restatement's rule is for damage actions only. *Id.* But, a private individual has the right to seek an injunction where he or she has "the right to recover damages," (by having a special injury different in kind) or "[has] standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action." *Id.* § 821C (2) (a) & (c). In *comment j* to this section, the Restatement notes that statutes may provide individuals with a right to sue on the public's behalf, and then cryptically adds that "extensive general developments regarding class actions and standing to sue are . . . pertinent." To the extent that the plaintiff may have standing to assert the interests and rights of a governmental entity, this Article's objection to private suits for public nuisance does not apply. Neither of the private suits for public nuisance discussed in Part III concerns such a situation, even though *NAACP v. Acusport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003), involves an organization's effort to stand in the shoes of its members—a group that is large, but less than the entire population. The devastating findings of fact made by the court in that case, though, should be used by the state or municipal government in a proper public nuisance suit.

66. *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219, 1233 (D. Mass. 1986).

there appears to be no serious movement underway to dislodge it from the law.

Nonetheless, public nuisance as a tort should be eliminated for two broad reasons. First, it serves no useful purpose. Those injured by tortious conduct have other avenues of redress available—negligence; strict liability for an abnormally dangerous activity; product liability theories; and *private nuisance* claims for interferences with the use and enjoyment of land that do not amount to trespasses.<sup>67</sup> More significantly, if the defendant's conduct is not culpable in some way, principles of corrective justice do not permit the private plaintiff to recover from the defendant.<sup>68</sup> In practice, courts have not permitted recovery by private plaintiffs in public nuisance suits without a showing of some fault.<sup>69</sup> What purpose, then, does the tort of public nuisance serve that cannot be accomplished by other claims?<sup>70</sup>

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67. One confusion that exists in the cases is the view that only interferences with the land can constitute a public nuisance. But such interferences are properly the subject matter of actions for private nuisance. In contrast, public nuisance may, but need not, involve an unreasonable interference with the land. *See, e.g., Iletto v. Glock, Inc.*, 194 F. Supp. 2d 1040, 1058 (C.D. Cal. 2002), *rev'd in part, aff'd in part, remanded*, 349 F.3d 1191 (9th Cir. 2003).

68. See sources cited in Culhane & Eggen, *Public Nuisance*, *supra* note 16, at 314 n.167. *See also* John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 *RUTGERS L. REV.* 1027, 1073 (2003) [hereinafter Culhane, *Two Kinds of Justice*] (discussing and defending an expanded notion of corrective justice). Corrective justice also requires a showing that the defendant's conduct caused the plaintiff's injury. *Id.* It is debatable, however, whether corrective justice imposes any particular evidentiary threshold for demonstrating the causal link between conduct and injury. *See* Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 214, 232–36 (Gerald J. Postema ed., 2001). The showing required may be more or less stringent, depending on such factors as the availability of evidence, *see* *Summers v. Tice*, 199 P.2d 1 nn.3–5 (Cal. 1948) (shifting burden of proof on causation to two negligent defendants where conduct of only one could have caused plaintiff's injury), and the role of the defendant in creating obstacles to establishing the causal connection, *see, e.g., Haft v. Lone Palm Hotel*, 478 P.2d 465 (Cal. 1970) (drowning in hotel pool where negligence consisted of failing to provide either a lifeguard or a warning; emphasizing that lack of evidence was attributable to hotel's negligent failure to provide lifeguard). Judges have sometimes stated that the causal connection needed for a public entity's success in a public nuisance claim is less powerful than that required in a private action. *See, e.g., NAACP v. Acusport, Inc.*, 271 F. Supp. 2d 435, 495–97 (E.D.N.Y. 2003); *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 209–10 (App. Div. N.Y. 2003) (Rosenberger, J., dissenting) (suggesting that remoteness is relevant only to what abatement actions may be appropriate). This position is justifiable for at least two reasons. As just noted, causation requirements are flexible in the first place. Further, even though corrective justice concepts are at best fitfully applied to claims by public entities to abate nuisances, the public's interest combines with the defendant's injurious conduct to argue for an expansive view of causation in public nuisance claims.

69. *See* Culhane & Eggen, *Public Nuisance*, *supra* note 16, at 312.

70. One possibility is that courts would use the requirements for establishing a public nuisance as a way of specifically defining the duty that is needed for a negligence claim. To the extent that doing so provides a focus for the otherwise amorphous duty analysis, the

The second problem with the tort of public nuisance is made manifest in the gun suits filed by public entities: Courts have too often confused the exercise of the state's police power with the private tort claim, and with tort principles more generally. Nowhere was this error more evident than in *People v. Sturm, Ruger & Co.*,<sup>71</sup> the suit brought by the State of New York against gun sellers. In this case, the court's reasons for affirming the dismissal of the public nuisance claim reflected a dismaying conflation of negligence and nuisance doctrine. First, the court undertook a duty analysis more appropriate to a negligence claim, and agreed with another court that had dismissed a public nuisance claim against gun sellers on the basis that public nuisance could otherwise "devour in one gulp the entire law of tort."<sup>72</sup> But actions undertaken by municipalities to deal with threats to public health and safety have nothing to do with tort, and the fear of limitless liability the court mentioned has no relevance to a true public nuisance claim. As long as the threat to public health remains, the state must deal with it.

Compounding the error, the *Sturm, Ruger* court then noted problems with proximate cause because of the intervention of third-party criminal actors.<sup>73</sup> Such intervention is not even fatal to a private tort claim,<sup>74</sup> but its relevance to a public nuisance claim is slighter still. Nowhere does the court evince awareness that the public health mission of public nuisance law commends a more expansive view of causation.<sup>75</sup>

Only Judge Rosenberger, in an incisive dissent in *Sturm, Ruger*, fully understood the differences between private nuisance, a private action for public nuisance, and a true public nuisance claim brought by a public entity:

While private nuisance claims and public nuisance claims for damages incorporate traditional negligence notions of foreseeability, proximate cause and fault, state-initiated public nuisance abatement claims are founded on the theory that

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Authors do not object to its use, but continue to believe it is preferable that confusion be avoided by abandoning the separate *tort* of public nuisance.

71. 761 N.Y.S.2d 192 (App. Div. N.Y. 2003).

72. *Id.* at 197, quoting *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001).

73. *Id.* at 200–02.

74. See Eggen & Culhane, *Gun Torts*, *supra* note 8, at 203–04.

75. Cf. *NAACP v. Acusport, Inc.*, 271 F. Supp. 2d 435, 496–97 (E.D.N.Y. 2003) (stating that proximate cause determination for public nuisance is "less restrictive" than for individual tort claims).



the State can obtain abatement of a condition that is injurious to the public. As such they are not negligence actions, nor are they governed by negligence concepts.<sup>76</sup>

As we shall demonstrate in Part III, courts have yet to fully appreciate these distinctions.

## II. THE PROBLEM: LEGAL CONDUCT, ILLEGAL MARKET

Public nuisance complaints typically indict gun manufacturers and dealers for their conduct that contributes to the illegal secondary market for guns. The loose patchwork of laws that regulate the sale and distribution of guns creates fertile ground for exploitation by criminals. The laws also enable gun sellers to facilitate such exploitation. The following discussion describes the interplay of scant regulation and wrongful conduct that fosters the development of the illegal secondary market and that provides the foundation for the public nuisance claims.

Guns are lethal products and enhancement of this inherent lethality has been on the rise. A disturbing trend in gun design has emerged since 1980, in which guns have been designed to increase firepower and provide easier concealability. For example, in 1980, semiautomatic handguns constituted only thirty-two percent of all guns produced in the United States.<sup>77</sup> In 1999, that number had increased to seventy-five percent.<sup>78</sup> Researchers have reported that public demand for higher caliber guns and guns with larger ammunition magazines has risen since 1993.<sup>79</sup> In response, manufacturers have made and marketed more lethal guns, even though safer alternative designs have been available.<sup>80</sup> For example, statistics collected in the 1980s and 1990s demonstrated that in 1985, the ratio of revolvers to semiautomatic pistols produced was 8.44 revolvers to 7.07 semiautomatic pistols; by 1993, that ratio had

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76. *Sturm, Ruger*, 761 N.Y.S.2d at 208 (Rosenberger, J., dissenting).

77. VIOLENCE POLICY CENTER, FACTS ON FIREARMS, [http://www.vpc.org/fact\\_sht/firearm.htm](http://www.vpc.org/fact_sht/firearm.htm) (citing data obtained from BATF, with percentages calculated by the Violence Policy Center) (on file with the University of Michigan Journal of Law Reform).

78. *Id.*

79. Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, in NATIONAL INSTITUTE OF JUSTICE RESEARCH IN BRIEF 5 (May 1997).

80. Jon S. Vernick & Stephen P. Teret, *A Public Health Approach to Regulating Firearms as Consumer Products*, 148 U. PA. L. REV. 1193, 1197 (2000).

shifted dramatically to 22 semiautomatic pistols for every 5.5 revolvers produced.<sup>81</sup>

In addition to the general increase in production of more lethal firearms, manufacturers have designed certain guns with specific features that appeal to criminals and that do not have legitimate uses.<sup>82</sup> Navegar, Inc.'s semiautomatic assault weapons, the TEC-9 and TEC-DC9, provide an example. These guns were modeled on military and police assault weapons; they have no legitimate use for hunting or other sports, or even self-defense, due to their inaccuracy and danger to the shooter.<sup>83</sup> The manufacturer claimed that it marketed them to survivalists and persons wanting to "play military."<sup>84</sup> These guns could be fired at high velocity, spray-fired, and broken down into easily concealable parts. Furthermore, they could be easily modified to become fully automatic.<sup>85</sup> Not surprisingly, according to experts, these weapons are at the top of the list of assault weapons used in crimes in the United States.<sup>86</sup> It is impossible to imagine that manufacturers cannot foresee this outcome.

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81. *Id.* at 1198 n.27. In absolute numbers, this means that in 1993, gun manufacturers produced 2.2 million semiautomatic pistols, compared to 550,000 revolvers. *Id.* (citing BUREAU OF ALCOHOL, TOBACCO & FIREARMS, ANNUAL FIREARMS MANUFACTURERS AND EXPORT REPORT (1994)); see also Garen G. Wintemute, *The Relationship Between Firearm Design and Firearm Violence: Handguns in the 1990s*, 275 J.A.M.A. 1749, 1749 (1996) ("For fatal shootings and nonfatal violence alike, semiautomatic pistols have increasingly replaced revolvers among crime-involved firearms.").

82. *Cf.* Wintemute, *supra* note 81, at 1752–53 (discussing popular new features on handguns to reduce recoil and allow for fast target acquisition, but noting that manufacturers claim that these features are helpful when guns are used for defense).

83. *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 154–55 (Cal. Ct. App. 1999), *rev'd*, 28 P.3d 116 (Cal. 2001). This weapon was used in shootings in an office building in San Francisco by an individual who had told the gun dealer that he was interested in the weapon for home defense or target practice. *Id.* The two opinions in this case offer summaries of substantial testimony about the lethal features of this weapon and its uselessness for any purpose other than a shooting rampage. *Id.* One expert witness characterized this weapon as "mass-produced mayhem." *Id.* at 155. This weapon was also used by the killers in the Columbine High School shootings in Littleton, Colorado. See Michael Janofsky, *Both Sides See Momentum in Congress for Gun Control*, N.Y. TIMES, Nov. 15, 2000, at A18.

84. *Merrill*, 89 Cal. Rptr. 2d at 156 (quoting testimony of manufacturer's national sales and marketing director from 1989 to 1993).

85. *Id.* at 154.

86. The California Court of Appeal in *Merrill v. Navegar, Inc.*, stated:

Just ten models account for 90 percent of the crimes in which assault weapons are used, and one out of every five was a TEC-9, putting it at the top of the list. According to BATF's Tracing Center, the TEC-9 or TEC-DC9 accounted for 3,710 of the firearms traced to crime by law enforcement officials nationwide during 1990–1993, mainly cases involving narcotics, murder and assault, and these weapons were in the top ten firearms traced.

While some federal and state laws regulate the sale and use of firearms, the incomplete system of laws is insufficient to prevent guns from presenting a threat to the public's safety. In general, regulations focus on the conduct of parties other than the manufacturers. The federal Gun Control Act of 1968, as amended by the Brady Handgun Violence Protection Act ("Brady Act"),<sup>87</sup> provides a system of dealer licensing<sup>88</sup> and limits gun sales to those between licensed dealers and residents of the dealer's state.<sup>89</sup> The Act also prohibits sales to certain categories of persons, such as felons and persons formerly confined in mental hospitals,<sup>90</sup> and requires background checks on all purchasers.<sup>91</sup> Finally, the Act establishes the authority of the federal Bureau of Alcohol, Tobacco and Firearms ("BATF") to carry out certain licensing, taxing, and export tasks.<sup>92</sup> The Act and the BATF regulations apply almost exclusively to sales by manufacturers and licensed firearms dealers. They do not provide any upstream regulation.

State regulation adds little to the pattern of minimal regulation. As with federal law, state gun laws generally regulate gun purchases, not matters related to manufacturing or marketing. While a few states, as well as the District of Columbia, ban certain kinds of handguns,<sup>93</sup> generally the state bans duplicate the ban in the Brady Act. Some states impose their own requirements on gun sales,<sup>94</sup> while others impose restrictions on the carrying of a gun on

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*Id.* at 155 (discussing the Cox Newspaper report, BATF tracing data, and testimony of expert in firearms). The court rejected Navegar's challenge of this data. *See id.* at 166.

87. Brady Handgun Violence Protection Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended in scattered sections of 18 U.S.C.). In September, 2004, Congress allowed a 1994 assault-weapon ban amending the Act to expire. David Olinger, *Debate Doesn't Expire with Assault-Weapon Ban*, DENVER POST, Sept. 14, 2004, at A-1.

88. 18 U.S.C. § 923 (2004).

89. *Id.* § 922(a)(5), (b)(3).

90. *See id.* § 922(g)(1)–(8).

91. *Id.* § 922(s), (t). In addition, the Act 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. *Id.* § 922(b)(1).

92. 27 C.F.R. §§ 47, 53 (2003).

93. *See, e.g.*, D.C. CODE ANN. § 7-2502.02 (2004) (banning sawed-off shotguns, machine guns, short-barreled rifles, and new acquisitions of handguns); MINN. STAT. § 624.716 (2003) (making selling of a "Saturday Night Special" a gross misdemeanor); N.J. STAT. ANN. § 2C:39-5(f) (2004) (prohibiting possession of assault weapons). Shortly before the election of 2004, the House of Representatives passed the ill-named D.C. Personal Protection Act (H.R. 3193) by a vote of 250 to 171 that would effectively repeal the D.C. ban. *See* Spencer S. Hsu, *House Votes to Repeal D.C. Gun Limits*, WASH. POST, Sept. 30, 2004, at B1. Widely believed to have been an election-year maneuver, the measure has little chance of passage in the Senate. *Id.*

94. *See, e.g.*, MASS. ANN. LAWS ch. 140, § 129C (2002) (requiring firearm identification cards); MD. REGS. CODE tit. 29, § 03.01.09(A) (2001) (requiring reporting of gun sales to state officials); N.J. STAT. ANN. § 2C:58-2(a)(5)(a) (2004) (imposing seven-day waiting period for purchase of a handgun).

one's person or in a vehicle.<sup>95</sup> Nothing, however, prevents guns with little or no sporting utility from moving freely across state lines, as they often do, and being used in the commission of crimes.<sup>96</sup>

Most significantly, once a gun has left the hands of a licensed dealer, no regulation applies. This means that a purchaser can turn around and sell the gun to anyone, including any person to whom a licensed dealer is not permitted to sell.<sup>97</sup> This "secondary market" occurs on the streets and at gun shows.<sup>98</sup> Also contributing to the secondary market are straw purchases by which a licensed dealer legally sells to a person who is merely standing in for another person who would not be permitted to acquire the gun on the legal primary market. A substantial number of the guns acquired on the unregulated secondary market are used to commit crimes. Indeed, many of the purchasers are convicted criminals or persons who intend to use the gun in the commission of a crime. Some experts have estimated that about half of the gun transactions annually are on the unregulated secondary market.<sup>99</sup>

While most legal purchasers prefer to deal on the primary market, federal and state regulation makes the secondary market appealing to many persons, including those who cannot legally acquire firearms in the primary market and those who prefer the convenience of an unregulated market.<sup>100</sup> Some statistics have shown that approximately two million gun transactions occur annually on the secondary market.<sup>101</sup>

There are numerous ways for a person to skirt the legal channels for purchasing a gun. One way is to purchase guns from an unlawful dealer.<sup>102</sup> Some dealers shamelessly supply guns to persons known to

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95. See, e.g., OHIO REV. CODE ANN. § 2923.12(C) (2003) (allowing carrying of concealed weapon for certain defensive purposes, among others); TEX. GOV'T CODE ANN. § 411.172 (2004) (defining eligibility to carry concealed weapon).

96. For example, the guns used in the shootings forming the basis of the claims in *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146 (Cal. Ct. App. 1999), *rev'd*, 28 P.3d 116 (Cal. 2001) were purchased in Nevada, while the shootings occurred in California. *Id.* at 153–54.

97. See Cook & Ludwig, *supra* note 79, at 5.

98. See *infra* notes 112–15 and accompanying text.

99. Philip J. Cook, Stephanie Molliconi & Thomas B. Cole, *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 69–70 (1995).

100. *Id.* at 71–72.

101. Cook & Ludwig, *supra* note 79, at 7 (reporting that, in addition to secondary market sales, hundreds of thousands of guns are stolen annually from households in the United States).

102. See BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, FOLLOWING THE GUN: ENFORCING FEDERAL LAWS AGAINST FIREARMS TRAFFICKERS 12 (2000) ("Licensed dealers, including pawnbrokers, have access to a large volume of firearms, so a corrupt licensed dealer can illegally divert large numbers of firearms.").

be trafficking in the illegal secondary market.<sup>103</sup> Many gun manufacturers do not curtail their supply of guns to such dealers, even where the dealer has a history of numerous federal law violations.<sup>104</sup>

In certain circumstances, even dealers who obey the law can sell guns to persons who cannot legally purchase them. The Brady Act requires a waiting period of three days to allow for a background check on the purchaser before the sale can be completed.<sup>105</sup> The dealer can finalize the sale at the expiration of the three days, even if the background check has not been completed by that time. There are numerous instances in which the background check ultimately reveals a criminal record or other information that should have prevented the purchaser from acquiring the gun, but by then it is too late.<sup>106</sup> Additionally, lawful dealers often contribute to the secondary market problem by having lax security, which leads to theft and the flow of stolen weapons into the unregulated market.<sup>107</sup>

Another method of circumventing federal and state firearms laws is the straw purchase. Dealers could be trained to detect these purchases, and many would be prevented. But some of the sales are egregiously illegal transactions carried out by dealers who are complicit in the transaction. Here, for example, is a description of a sting operation undertaken by the police department for the City of Chicago, which was caught on videotape:

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103. An extreme example of such dealer misconduct is provided in *BRADY CENTER TO PREVENT GUN VIOLENCE LEGAL ACTION PROJECT, SMOKING GUNS: EXPOSING THE GUN INDUSTRY'S COMPLICITY IN THE ILLEGAL GUN MARKET 3* (2003) [hereinafter *BRADY CENTER, SMOKING GUNS*]. Notwithstanding the fact that this dealer was arrested for violating federal firearms law and even trained its employees to skirt the provisions of the law, gun manufacturers continued to supply the dealer with products. *Id.* Some gun manufacturers take the position that if a dealer continues to hold a federal firearms license, the manufacturer will continue to supply guns to that dealer regardless of the dealer's history of violations. *Id.* at 5.

104. *Id.* at 3.

105. See 18 U.S.C. § 922(s), (t) (2004). The Brady Act states that "[A] licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter unless . . . (B)(ii) 3 business days . . . have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section . . . ." *Id.* § 922(t)(1)(B)(ii) (citations omitted).

106. *BRADY CENTER, SMOKING GUNS*, *supra* note 103, at 13. The Brady Center report details information on manufacturer and dealer practices regarding the sale of firearms in the United States that have been revealed by gun industry insiders, mostly in the course of testifying in litigation. See *id.* at 17–25.

107. *Id.* at 13–14.

[P]olice in the Chicago area conducted an undercover sting operation prior to that city's filing of a lawsuit against the gun industry. Pairs of undercover officers went to gun stores to make straw purchases, with one officer expressly stating that he was a convicted felon or juvenile and asking if the other person could fill out the legal paperwork so that he could obtain a gun despite the laws prohibiting him from doing so. In almost every instance, the dealers were willing to supply guns to a person they believed to be an unlawful buyer.<sup>108</sup>

In another deception, a dealer sold an undercover officer a TEC-9 assault pistol when the officer said he was looking to purchase a gun and intended to kill a person who owed him money.<sup>109</sup> Similar sting operations were conducted in other cities.<sup>110</sup> The Brady Center to Prevent Gun Violence has reported that BATF held a meeting in 1995 with representatives of gun manufacturers and firearms trade associations at which BATF urged that the industry make the problem of straw purchases a priority.<sup>111</sup> Yet, this problem has persisted.

Gun shows have provided another means for circumventing the regulation of sales. Licensed dealers must still follow all regulations while making sales at a gun show, but sales by collectors at such shows are unregulated. Gun shows are known to be a major source of guns for criminals.<sup>112</sup> Without background checks that are required for licensed dealers, criminals and other persons who could not otherwise obtain guns legally may easily acquire them.<sup>113</sup> Some licensed dealers operate illegally at gun shows by selling firearms without following the state and federal regulations that apply to them.<sup>114</sup> Although a small number of gun manufacturers

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108. *Id.* at 6–7.

109. *Id.* at 6 (describing various guises used by undercover Chicago police officers to purchase guns, virtually all of which made clear to the dealer that the purchaser intended to use the guns illegally).

110. *Id.* at 7.

111. *Id.* at 9.

112. See ATF & DEPARTMENT OF JUSTICE, GUN SHOWS: BRADY CHECKS AND CRIME GUN TRACES 6–9 (1999) [hereinafter ATF & DOJ, GUN SHOWS]. The ATF report states: “Together, the ATF investigations paint a disturbing picture of gun shows as a venue for criminal activity and a source of firearms used in crimes.” *Id.* at 7.

113. The guns used in the 1999 Columbine High School shootings in Littleton, Colorado, were purchased at gun shows. Michael Janofsky, *Both Sides See Momentum in Congress for Gun Control*, N.Y. TIMES, Nov. 15, 2000, at A18.

114. ATF & DOJ, GUN SHOWS, *supra* note 112, at 8.

has attempted to prohibit their products from being sold at gun shows,<sup>115</sup> most have not taken any steps to do so.

Finally, the practice of lawful dealers selling guns in large volumes to legal purchasers supplies the secondary market with much of its inventory.<sup>116</sup> Although the Brady Act requires licensed dealers to report multiple sales of handguns to law enforcement agencies,<sup>117</sup> this provision has no teeth to prevent the sales in the first instance. It is easy to conceive of any number of controls that could be put into place to minimize the flow of guns to the secondary market through multiple gun sales. For example, these controls could entail dealer policies limiting such sales, or manufacturer policies limiting sales to dealers known to market large volumes of guns to some purchasers. These policies, of course, would be voluntary measures established by the manufacturers and dealers. Virtually none of these measures has been put into place, however.<sup>118</sup>

The gun industry is well aware of these practices that feed and facilitate the secondary market and place guns in the hands of criminals and other persons likely to use them irresponsibly.<sup>119</sup> Furthermore, the tracing of firearms by the BATF entails communication between BATF and gun manufacturers, making the manufacturers aware of which of their guns were used in crimes and where they were used.<sup>120</sup> Thus, manufacturers can determine which of their dealers were implicated in the movement of the guns used in crimes and, presumably, determine undesirable patterns. Ideally, the manufacturers would curtail their own mar-

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115. BRADY CENTER, SMOKING GUNS, *supra* note 103, at 12. The Brady Center report noted, in particular, that gun manufacturer Heckler & Koch put in place a policy of not selling directly to dealers known to be operating at gun shows, though no controls were placed on sales to wholesale distributors who then sold to such dealers. *Id.*

116. See BUREAU OF ALCOHOL, TOBACCO & FIREARMS YOUTH CRIME GUN INTERDICTION INITIATIVE, CRIME GUN TRACE REPORTS (2000), NATIONAL REPORT ix (2002) ("The acquisition of handguns in multiple sales can be an important trafficking indicator. Handguns sold in multiple sales reported to the National Tracing Center accounted for 20 percent of all handguns sold and traced in 2000.") The ATF report also observes that although "most crime guns were bought from [a licensed dealer] by someone other than their criminal possessor, many crime guns were recovered soon after their initial purchase." *Id.* This short "time-to-crime" suggests the intent of the purchaser to sell the gun on the secondary market or otherwise divert it into the hands of a criminal. *Id.*

117. 18 U.S.C. § 923(g)(3)(A) (2004). The Brady Center has reported that some dealers avoid these reporting requirements by transferring possession of purchased handguns on separate days, separated by the required five-day waiting period. BRADY CENTER, SMOKING GUNS, *supra* note 103, at 10.

118. See BRADY CENTER, SMOKING GUNS, *supra* note 103, at 10–11.

119. See generally *id.* at 17–28 (discussing dealer surveys and trade association memoranda).

120. *Id.* at 34–35.

ket practices that are likely to put their guns in the hands of criminals. Because they have not done so, the secondary market remains as strong and as unregulated as ever. Lawsuits, particularly those brought by municipalities to abate the practices leading to gun violence, can play a valuable role in deterring manufacturer and dealer conduct that supplies the secondary market.

### III. WINDS OF CHANGE: RECENT CASES ALLOWING PUBLIC NUISANCE CLAIMS

#### *A. Suits by Public Plaintiffs*

Public entities have recently withstood motions to dismiss public nuisance claims arising out of the activities of gun sellers. In 1998, in *City of Chicago v. Beretta U.S.A. Corporation*,<sup>121</sup> the City of Chicago and Cook County, Illinois, brought an action against various gun manufacturers, distributors and dealers. The core of the plaintiffs' amended complaint was a claim for public nuisance based upon alleged marketing practices of the defendants. The allegations stated that the defendants knowingly and unreasonably caused the establishment of an illegal market in guns including, among other things, oversupplying the market with guns in geographic areas where regulations are weakest and failing to take steps to minimize the danger.<sup>122</sup> The plaintiffs sought monetary damages to reimburse the public entities for costs incurred in dealing with the public nuisance, including hospital and related emergency costs, criminal justice system costs, and health care costs. In addition, the plaintiffs sought punitive damages and a permanent injunction to abate the nuisance.<sup>123</sup> The trial court, in an oral ruling, granted the defendants' motion to dismiss the second amended complaint in its entirety, focusing largely on the causation issue.<sup>124</sup>

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121. 785 N.E.2d 16 (Ill. App. Ct. 2002), *rev'd*, 2004 Ill. LEXIS 1665 (Nov. 18, 2004).

122. *Id.* at 21.

123. *Id.* at 22.

124. *Id.* at 22–23 (quoting trial court's oral ruling of Sept. 15, 2000). The trial court rejected the statistical information submitted by the plaintiffs as proof of causation. *Id.* Noting that the state of Illinois has an "aversion to statistical bases for causes of actions," the court held that the statistical data regarding the gun industry generally did not provide proof of misconduct on the part of any particular defendant. *Id.* at 22 (quoting the trial court as saying that "[t]his is not the basis that an Illinois court can use as essentially almost the sole basis for deciding whether individual parties are responsible for a public nuisance"). This statement is reminiscent of arguments made by defendants in toxic torts cases, another area of law in which statistical evidence has provided a large portion of the proof submitted by



On appeal, the court focused on the arguments of the defendants that the allegations of the plaintiffs did not amount to an unreasonable interference with a public right. The court applied the principles set forth in the Second Restatement of Torts, and emphasized that the requirements to state a public nuisance are "not strenuous" because the concept of public nuisance is broad.<sup>125</sup> Quoting extensively from the plaintiffs' second amended complaint, the appellate court concluded that the allegations sufficiently pleaded an interference with a public right by stating that citizens have been placed in "'unreasonable jeopardy . . . from conduct that creates a disturbance and reasonable apprehension of danger to person and property.'" <sup>126</sup> The court noted the particulars of the allegations, including the statement that the defendants "'caus[ed] thousands of firearms to be possessed and used in Chicago illegally, which results in a higher level of crime, death and injuries to Chicago citizens, a higher level of fear, discomfort and inconvenience to the residents . . . and increased costs to the plaintiffs to investigate and prosecute crimes. . . .'" <sup>127</sup>

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plaintiffs in support of their cases. Epidemiological evidence, which has been defined as the statistical "study of relationships between the frequency and distribution, and the factors that may influence frequency and distribution, of diseases and injuries in human populations," UNITED STATES CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, *REPRODUCTIVE HEALTH HAZARDS IN THE WORKPLACE* 163 (1985), results in a determination of risk factors only. Thus, epidemiological evidence submitted in support of personal-injury claims in toxic torts suits has been criticized because it does not prove definitively that the exposure in question caused the occurrence of the disease in the plaintiff, notwithstanding a statistical connection between the exposure and the illness. See generally Jean Macchiaroli Eggen, *Toxic Torts, Causation, and Scientific Evidence After Daubert*, 55 U. PITT. L. REV. 889, 897-903 (1994) (discussing the challenge of probabilistic evidence, including epidemiology, in toxic torts cases and judicial resistance to its use in the courtroom). For a criticism of the strict separation between statistical and individual causation, see John G. Culhane, *The Emperor Has No Causation: Exposing a Judicial Misconstruction of Science*, 2 WIDENER L. SYMP. J. 185, 195-98 (1997). Nevertheless, many courts have used statistical evidence of risk in allowing plaintiffs' tort claims to proceed. See, e.g., *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986) (accepting "frequency, regularity, and proximity" test to support reasonable inference of causation); *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984), *rev'd on other grounds*, 816 F.2d 1417 (10th Cir. 1987) (recognizing the challenge of statistical evidence and providing a list of other factors to assist plaintiffs in establishing causation); *Sindell v. Abbott Labs.*, 607 P.2d 924 (1980) (establishing market share liability when defendant cannot be determined); see also Jean Macchiaroli Eggen, *Toxic Reproductive and Genetic Hazards in the Workplace: Challenging the Myths of the Tort and Workers' Compensation Systems*, 60 FORDHAM L. REV. 843 (1992) (discussing problems of scientific uncertainty in tort and workers' compensation systems and recommending judicial and legislative reforms). Some of the steps taken in the area of toxic torts causation could provide a basis for judicial use of statistical information in public nuisance cases against the gun industry.

125. 785 N.E.2d at 24.

126. *Id.* (quoting plaintiffs' complaint at 84).

127. *Id.* at 24-25 (quoting plaintiffs' complaint at 84).

The defendants' arguments focused primarily on the assertion that the gun sellers' activities were legal. While regulation of the enterprise alleged to create a public nuisance may be relevant to a determination of the existence of a nuisance, compliance with regulations does not preclude a finding of nuisance.<sup>128</sup> The court indicated that the allegations in this complaint focused on the creation of an illegal secondary market, which existed precisely to sidestep the regulatory requirements.<sup>129</sup> Thus, according to the plaintiffs, the defendants could comply with regulatory mandates while taking advantage of gaps in the legislation to undermine the regulatory purpose. Similarly, the court discounted the defendants' argument that they could not be held liable for public nuisance because they had no control over the actions of the third parties using the guns at the times the violence occurred.<sup>130</sup> Though perhaps relevant to negligence, the court ruled that this fact did not relieve the defendants of liability for public nuisance.<sup>131</sup>

Similarly, in *City of Gary v. Smith & Wesson Corp.*,<sup>132</sup> the City brought suit against companies involved in the distribution and sale of guns, naming in the amended complaint eleven manufacturers,

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128. *Id.* at 27–28.

129. *Id.* at 30.

130. The defendants' argument relied upon cases in other jurisdictions dismissing suits against gun-industry defendants for lack of control over their guns after the guns were sold. The court distinguished these cases as all involving claims other than public nuisance, typically negligence and strict liability. Public nuisance, the court stated, has a different set of requirements. *Id.* at 26–27.

131. *Id.* at 30. As this article was going to press, the Illinois Supreme Court handed down its ruling in the case just discussed in the text. The court reversed the appellate court's decision, and dismissed the city's public nuisance lawsuit. *City of Chicago v. Beretta U.S.A. Corp.*, 2004 Ill. LEXIS 1665 (Nov. 18, 2004). Although the opinion was not to become final until 21 days later (at the conclusion of the period in which the city could petition for rehearing), the unanimity of the decision makes a different outcome unlikely. In holding that the city had not stated a claim for public nuisance, the court stated that in cases involving heavily regulated industries, a court would declare an activity a public nuisance only if the statutes were themselves violated, or "where the defendant was otherwise negligent." *Id.* 2004 Ill. LEXIS 1665 (Nov. 18, 2004), \*58, quoting *Gilmore v. Stanmar*, 633 N.E.2d 985, 993 (Ill. App. 1994). *Gilmore*, however, was a private action for damages. In that context, courts have routinely prevented plaintiffs from using nuisance law as an end-run around the requirement that the defendant's conduct be culpable as a condition of liability. See Culhane & Eggen, *Public Nuisance*, *supra* note 16, at 312. The Illinois Supreme Court's reliance on a case involving a private claim for public nuisance again emphasizes the point that we have made here and in *Public Nuisance*: that private claims for public nuisance serve no legitimate purpose, lead to confusion, and should be abolished. The court made the same error—conflating nuisance and negligence principles—as that decried by Judge Rosenberger in *Sturm, Ruger*. See *supra* note 76 and accompanying text.

132. *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003).

one wholesaler, and five retailers.<sup>133</sup> The complaint alleged claims of public nuisance, negligent distribution of guns, and negligent design. The allegations centered upon certain distribution and sales practices that provided access to guns for illegal purchasers—such as criminals and juveniles—including “straw purchases” and failure of dealers to comply with federal requirements.<sup>134</sup> The City further alleged that the manufacturers knew of the illegal practices in the chain of distribution and failed to change the system even though they had the ability to do so.<sup>135</sup> The Indiana Supreme Court held that the City stated a claim against all defendants for public nuisance and negligence.<sup>136</sup>

The court began its discussion with the Indiana nuisance statute, originally enacted in 1881, which provides that a nuisance is something that is “‘(1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property . . . .’”<sup>137</sup> The court interpreted the statute to contain an implicit requirement that the activities alleged be unreasonable.<sup>138</sup> The City’s chief allegation of public nuisance was that “‘[d]efendants affirmatively rely upon the reasonably foreseeable laxness of dealers, and employees, and the ingenuity of criminals to ensure that thousands of handguns find their way into their expected place in the illegal secondary market.’”<sup>139</sup> After analyzing the defendants’ arguments, the court held that the City stated a claim for public nuisance.<sup>140</sup>

The defendants raised two familiar arguments—that their activities were lawful and that public nuisance claims should be confined to activities involving the use of real property. Put otherwise, as stated by one retailer-defendant, must a defendant’s conduct constitute an independent tort to allow a public nuisance claim?<sup>141</sup> According to the court, no such tort need exist. Although the defendants correctly indicated that Indiana had a long history of applying public nuisance law in situations of illegal activity or in

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133. *Id.* at 1227–28.

134. *Id.* at 1228.

135. *Id.*

136. *Id.* at 1241, 1249.

137. IND. CODE § 32-30-6-6 (2004) *quoting City of Gary*, 801 N.E.2d at 1229.

138. The statute does not expressly state that the conduct must be unreasonable. *City of Gary*, 801 N.E.2d at 1229–30. The court reasoned, however, that because the language of the statute is broad and potentially inclusive of activities that would not be actionable as nuisances, the legislature would have intended that an unreasonableness requirement be read into the provision. *Id.* Moreover, the Indiana courts have always construed the statute as including a reasonableness standard. *Id.*

139. *Id.* at 1231 (quoting City’s complaint).

140. *Id.* at 1241.

141. *Id.* at 1231.

the use of land, the court determined that previous applications simply reflected the evolving history of the doctrine in the state, not any specific legal requirements.<sup>142</sup> Further, the court rejected any need for an independent underlying tort. Noting that the City did, in fact, allege a negligence claim distinct from the public nuisance claim, the court expressly stated, “a nuisance claim may be predicated on a lawful activity conducted in such a manner that it imposes costs on others.”<sup>143</sup> The court offered the following justification for its ruling:

[T]he law of public nuisance is best viewed as shifting the resulting cost from the general public to the party who creates it. If the marketplace values the product sufficiently to accept that cost, the manufacturer can price it into the product. If the manufacturers and users of the offending activity conclude that the activity is not worthwhile after absorbing these costs, that is their choice. In either case, there is no injustice in requiring the activity to tailor itself to accept the costs imposed on others or cease generating them.<sup>144</sup>

In examining the City’s complaint, the court observed that existing gun regulations permit the defendants to nominally comply with the law, but create a public nuisance through unreasonable conduct that results in foreseeable harm. In any event, much of the conduct alleged by the City was in violation of existing gun regulations.<sup>145</sup>

The *City of Gary* court also addressed the remedies available to the City. The defendants argued that the City was barred by several statutes from bringing an action to abate a public nuisance.<sup>146</sup> They also argued that a state statute authorizing a municipal corporation to enjoin certain conduct was limited to the examples addressed in the statute.<sup>147</sup> The court rejected all of the arguments, choosing instead to read the statutes as lacking the intention to

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142. *Id.* at 1232. The court also cited the Second Restatement, which states several circumstances that would constitute a public nuisance, only one of which is illegal conduct. *Id.* at 1233 (referencing RESTATEMENT (SECOND) OF TORTS § 821B (1977)). Nor does the Restatement limit the doctrine to activities involving real property. *See id.*

143. *City of Gary*, 801 N.E.2d at 1234.

144. *Id.*

145. *Id.* at 1235.

146. *Id.* at 1238.

147. *Id.* at 1239.

limit the circumstances under which the City could seek an injunction.<sup>148</sup>

The court also ruled that money damages may be available to the City to reimburse it for public expenditures such as health care expenses, emergency services, increased criminal justice costs, and reductions in tax revenues and property values.<sup>149</sup> While the court acknowledged that such damages may end up barred on proximate cause grounds,<sup>150</sup> the allegations in the complaint were sufficient to withstand a motion to dismiss. The court stated: "This is a conventional tort pleading subject to no requirement of specificity. What form the City's proof will take is currently not before us and we cannot say as a matter of law it cannot establish some items of damage if liability is proven."<sup>151</sup>

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148. *Id.*

149. *Id.* at 1240.

150. Elsewhere in the opinion, the court addressed the proximate cause problems associated with the City's claims for negligent distribution and design. *Id.* at 1243–44. The court explicitly referenced this discussion of proximate cause in addressing the damages issues for public nuisance, stating that the proximate cause discussion "applies equally" to public nuisance damages. *Id.* at 1240. The court's holding on this issue reinforces our argument that the central role of public nuisance is the abatement of damages. If relief for public nuisance is thus limited, the issue of proximate cause recedes, because the public entity must be able to do whatever is needed to abate the nuisance and thereby protect the safety of its citizens. When a prayer for damages that do not abate the nuisance is added, public nuisance risks collapsing into other theories, and becomes ripe for arguments such as those made by the defendants in this case. First, they argued that the City could not recover for the damages alleged because they were "municipal costs incurred in the course of ordinary governmental functions." *Id.* at 1242. The court rejected such a categorical bar, stating that the question of what costs may be recoverable is a matter for case-by-case analysis. *Id.* at 1243. Second, the defendants argued that the criminal's use of the gun in each instance was a superseding cause of the harm. A substantial amount of time may pass between the defendant's actions and the criminal use of the gun. *Id.* at 1244. The court noted some significant problems that the City faces in proving proximate cause for the purpose of recovering the costs alleged. *Id.* The court stated:

A wide variety of intervening circumstances may contribute to the ultimate unlawful use. And of course lawfully purchased handguns are also used in crimes, so any attempt to recover costs attributable to unlawfully distributed weapons must address that fact . . . . As a matter of law, in the absence of other facts, it is not a natural and probable consequence of the lawful sale of a handgun that the weapon will be used in a crime . . . . The City's general description of its damages would presumably embrace a vast number of different unspecified claims arising from a variety of widely different circumstances.

*Id.* Despite the substantial problems of proof, the procedural posture of the case did not permit the court to rule that money damages could not be recovered. *Id.* at 1245. Had public nuisance been confined to its proper sphere, these complications could have been avoided.

151. *Id.* at 1240. Because the court was discussing the request for damages at this point in the opinion, it was appropriate to refer to the claim as based on tort law. Again, when it comes to damages, the city is situated similarly to any private plaintiff.

In a more succinct opinion, the Ohio Supreme Court reached a similar conclusion in the earlier case of *City of Cincinnati v. Beretta U.S.A. Corp.*<sup>152</sup> The defendants—fifteen handgun manufacturers, three trade associations, and a distributor—raised the same arguments seen in the cases previously discussed. Because the City had included claims for strict product liability based upon design defect and failure to warn,<sup>153</sup> the court expressly addressed the applicability of the public nuisance doctrine to situations involving the design and manufacture of products. The court held that such matters are within the scope of the public nuisance doctrine.<sup>154</sup> The court also ruled that the defendants' compliance with the regulatory scheme for distribution of firearms did not preclude the City's claim for public nuisance, as the acts alleged involving the illegal secondary market in guns were not specifically regulated by law.<sup>155</sup>

The *City of Cincinnati* court also addressed issues related to the injuries alleged by the City. First, the court held that the injuries claimed—interference with public rights for which an injunction was sought and reimbursement for emergency, health, and criminal justice system expenses<sup>156</sup>—demonstrated a direct relation with the conduct alleged.<sup>157</sup> Moreover, the injuries were direct expenses incurred by the City itself.<sup>158</sup> The court then considered three other factors—whether the expenses would be difficult to prove; whether there was a risk of double liability; and whether public policy was served by allowing the action.<sup>159</sup> The expenses claimed by the City passed scrutiny under all of these factors. The court concluded that the expenses were easily calculated, and that no

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152. 768 N.E.2d 1136 (Ohio 2002). On April 30, 2003, the Cincinnati City Council voted to drop the city's lawsuit. The city's motion to do so was granted, without prejudice, on May 14, 2003. Because the court's decision heralded a change in the outcome of public nuisance suits, however, we discuss it here. See BRADY CENTER, REFORMING THE GUN INDUSTRY: CITY OF CINCINNATI V. BERETTA U.S.A. CORP. (2004), available at <http://www.gunlawsuits.org/docket/cities/cityview.php?RecordNo=11> (on file with the University of Michigan Journal of Law Reform).

153. See *City of Cincinnati*, 768 N.E.2d at 1145–47. The court held that the City's strict product liability claims were barred by the Ohio Product Liability Act, which prevented recovery solely for economic damages. *Id.* at 1146. Nevertheless, the court held that the City stated a claim for negligent design defect and negligent failure to warn under Ohio common law, which did not limit the kinds of damages available. *Id.*

154. *Id.* at 1142.

155. *Id.* at 1143.

156. *Id.* at 1140.

157. *Id.* at 1148.

158. *Id.*

159. See *id.* at 1149 (deriving the factors from the U.S. Supreme Court's decision on remoteness in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992)).

other person would have standing to bring an action for the same injuries against the defendants,<sup>160</sup> thus avoiding a risk of multiple liability for the defendants.<sup>161</sup> Further, the court held that the public interest would be served by allowing the lawsuit, the purpose of which was to secure public safety and health and also to reimburse the City for direct harms it allegedly suffered.<sup>162</sup>

### *B. Suits by Private Plaintiffs*

The suits described above generally represent a positive trend, although confusion between the mission of public nuisance and tort continues. Before these important rulings, courts had more often dismissed public nuisance claims for reasons that frequently betrayed a misunderstanding of the basic mission of the doctrine. But these recent advances could be stanching by an unlikely source—success by private plaintiffs in claims for public nuisance. As stated earlier, the private suit for public nuisance serves no useful or justifiable purpose and may be contributing to the needless confusion surrounding the doctrine. The two decisions discussed below are instructive in different ways.

The Ninth Circuit's decision in *Ileto v. Glock Inc.*,<sup>163</sup> reinstating the plaintiffs' claims for public nuisance and negligence, actually demonstrates that culpable conduct by gun sellers can be handled through a garden-variety negligence suit, without resorting to public nuisance. And the magisterial decision by Judge Weinstein in *NAACP v. Acusport, Inc.*,<sup>164</sup> establishing the defendants' role in creating a public nuisance—but denying recovery because of the plaintiffs' inability to show an injury different in kind from that suffered by the general public—underscores the strength of parallel efforts by public governmental entities to abate public nuisances. The courts' decisions are discussed below, while analysis

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160. *Id.*

161. The court referred to this factor as the risk of "double recovery," but the concern is more appropriately characterized as one of double or multiple liability on the part of the defendants. No danger existed that the City might have a double recovery. Rather, the question the court seemed to address was whether, if the City recovered for these expenses, private citizens or other parties might be able to recover for the same elements of damages. This clearly could not happen. But the City's claim for damages under public nuisance should be granted only to the extent that such damages contribute to abatement.

162. *City of Cincinnati*, 768 N.E.2d at 1149. This Article has already discussed the problem with allowing costs that do not abate the nuisance. See notes 56–59 and accompanying text.

163. 349 F.3d 1191 (9th Cir. 2003).

164. 271 F. Supp. 2d 435 (E.D.N.Y. 2003).

of the broader implications of these holdings is deferred until Part IV.

In November 2003, the United States Court of Appeals for the Ninth Circuit reversed a lower-court dismissal of public nuisance and other claims brought by private plaintiffs against gun industry defendants in *Ileto v. Glock Inc.*<sup>165</sup> The Ninth Circuit reinstated claims for negligence and public nuisance brought by the estate of a United States Postal worker who was killed and the representatives of three young children who were injured in a 1999 shooting spree in California.<sup>166</sup> At the time of these events, the shooter had been subject to a federal law that prohibited him from purchasing, possessing, or using firearms.<sup>167</sup> Nevertheless, he had purchased the guns in his possession—a collection of handguns and rifles—through the secondary market.<sup>168</sup>

The plaintiffs in *Ileto* focused their public nuisance claim on the marketing, distribution, and sale of the defendants' firearms. In particular, the plaintiffs alleged that the defendant gun sellers knew of a secondary market in their products that catered to, among others, persons prohibited by federal law from purchasing guns, and that they should have made an effort to conduct their marketing and distribution practices so as to restrict access by such prohibited purchasers.<sup>169</sup> Further, the plaintiffs alleged that the

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165. 349 F.3d 1191 (9th Cir. 2003).

166. *Id.* at 1194.

167. *Id.* at 1195 n.4. Prior to purchasing the guns used in these shootings, the shooter had been confined to a psychiatric hospital, indicted on a felony charge, and convicted of second-degree assault. *Id.* The federal Brady Handgun Violence Protection Act prohibits the sale of any firearms to a person who "has been committed to any mental institution . . ." 18 U.S.C. § 922(d)(4) (2004), or who is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year, *id.* § 922(d)(1).

168. *Ileto*, 349 F.3d at 1197. Federal law provides no regulation for the secondary gun market. *See supra* notes 97–120 and accompanying text. The Brady Act contains some requirements directed at gun transfers, but a gun is unregulated by the Act once it leaves the hands of a licensed dealer. *See* 18 U.S.C. § 922(a)(3), (5) (2004). The Bureau of Alcohol, Tobacco and Firearms ("BATF") has some narrow authority over firearms, but has no general authority to regulate the purchase, transport, or use of guns in the United States. *See* 27 C.F.R. § 47, 53 (2003) (circumscribing BATF's authority over guns to certain licensing activities, taxing, and exports). Likewise, the Consumer Product Safety Commission ("CPSC") has no authority over firearms. Congress has expressly excluded firearms from the jurisdiction of the CPSC. Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, § 3(e), 90 Stat. 503, 504 (1976) (stating that the CPSC "shall make no ruling or order that restricts the manufacture or sale of firearms"). State laws also fail to regulate or restrict the secondary gun market. *See generally* Eggen & Culhane, *Gun Torts*, *supra* note 8, at 130–32 (describing state regulation of firearms, which does not extend to the secondary market).

169. *Ileto*, 349 F.3d at 1198. In the amended complaint, the plaintiffs alleged: "The particular firearms used in these incidents were marketed, distributed, imported, promoted,



defendants “‘knowingly establish[ed], suppl[ied], and maintain[ed] an over-saturated firearms market that facilitates easy access for criminal purposes, including access by persons prohibited to purchase or possess firearms under state or federal law.’”<sup>170</sup> These activities, the plaintiffs alleged, constituted a public nuisance by interfering with the public safety, health, and peace in a manner that “‘adversely affects the fabric and viability of the entire community.’”<sup>171</sup>

The *Ileto* court first held that the plaintiffs met the “special injury” test to allow them, as private citizens, to bring a public nuisance claim. Relying on the statement of public nuisance doctrine in the *Restatement (Second) of Torts*,<sup>172</sup> which had been adopted by the California Supreme Court,<sup>173</sup> the court concluded that the plaintiffs had met the pleading requirements for a public nuisance claim because they had suffered injuries different in kind, not merely in degree, from other members of the general public.<sup>174</sup> The court characterized the specific traumatic physical injuries and mental shock of the plaintiffs as different in kind from the more generalized fear and inconvenience suffered by the general public as a result of the defendants’ conduct.<sup>175</sup>

Further, the court determined that the defendants’ acts as alleged by the plaintiffs in support of their public nuisance claim created a question of fact from which a reasonable jury could conclude that the defendants’ actions were the proximate cause of the plaintiffs’ injuries.<sup>176</sup> Defendant Glock had asserted that proximate cause in a nuisance action is dependent upon the gun seller having control over the gun at the time of the shootings, which was clearly not the case.<sup>177</sup> The Ninth Circuit, as had the district court before it, concluded that California law does not require control and that the California Supreme Court, if given the opportunity, would merely require a showing of proximate cause.<sup>178</sup> Proximate cause, the court further concluded, was sufficiently stated in the amended

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and sold by defendants in a manner . . . which defendants knew or should have known facilitates and encourages easy access by persons intent on murder, mayhem, or other crimes, including illegal purchasers . . . .” *Id.* (quoting plaintiffs’ first amended complaint).

170. *Id.* (quoting plaintiffs’ first amended complaint).

171. *Id.* at 1199 (quoting plaintiffs’ first amended complaint).

172. *See* RESTATEMENT (SECOND) OF TORTS § 821B, C (1979).

173. *Ileto*, 349 F.3d at 1209–10 (citing *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 604 (Cal. 1997)).

174. *Id.* at 1212.

175. *Id.* One of the plaintiffs, a minor, suffered no physical injuries, but was mentally and emotionally traumatized by the incident.

176. *Id.* at 1212–13.

177. *Id.* at 1212.

178. *Id.*

complaint through allegations that the defendants' actions foreseeably resulted in the creation of a secondary gun market that made guns available to prohibited purchasers such as the shooter in this case.<sup>179</sup>

The Ninth Circuit then turned its attention to the scope of public nuisance doctrine in California. The district court had held that a valid claim for nuisance must be associated with property; thus, because this case involved a non-property matter, the action must be dismissed.<sup>180</sup> In contrast, the Ninth Circuit concluded that California does recognize nuisance claims unassociated with property.<sup>181</sup> *The Restatement (Second) of Torts*, the court noted, expressly states that “[u]nlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land.”<sup>182</sup> In a related argument, the defendant asserted that the activities of legal, regulated industries were not valid subjects of a public nuisance claim. The court rejected this argument as well, finding that the facts alleged by the plaintiffs in their complaint presented a situation uniquely suited to public nuisance. The court stated: “[A]lthough gun manufacturing is legal and the sale of guns is regulated by state and federal law, the distribution and marketing of guns in a way that creates and contributes to a danger to the public generally and to the plaintiffs in particular is not permitted under law.”<sup>183</sup> The plaintiffs' public nuisance claims were not based on the legal manufacture and sale of guns, the court observed, but on the specific acts of the defendants that led to the creation and maintenance of an illegal secondary gun market.<sup>184</sup> The plaintiffs further alleged that the defendants knew or should have known that their promotion and sales activities would make their guns available to persons such as the shooter in this case and that they might be used illegally in the manner alleged by the injured plaintiffs.<sup>185</sup> The court concluded that these factual allegations fell within the doctrine of public nuisance as described in the Second Restatement and recognized by the California Supreme Court.<sup>186</sup>

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179. *Id.*

180. *Ileto v. Glock, Inc.*, 194 F. Supp. 2d 1040, 1058–59 (C.D. Cal. 2002) (noting that nuisance cases usually involve property, not products, and concluding that “[p]laintiffs may not state a public nuisance claim for the distribution of firearms”).

181. *Ileto*, 349 F.3d at 1213–14.

182. RESTATEMENT (SECOND) OF TORTS § 821B cmt. h (1979).

183. *Ileto*, 349 F.3d at 1214–15.

184. *Id.* at 1214.

185. *Id.* at 1215.

186. *Id.* Both the district court and the Ninth Circuit dissenter cited a California case that expressly stated, “[N]uisance cases ‘universally’ concern the use or condition of

In another case brought by private citizens against the gun industry, a federal district court in New York held that New York law recognized the applicability of public nuisance to the activities of gun sellers. In *NAACP v. Acusport, Inc.*,<sup>187</sup> the NAACP alleged that its members were disproportionately affected by gun violence resulting from the conduct of the gun industry in marketing, promoting, and selling their products.<sup>188</sup> While the court determined that the activities of the gun sellers met the definition of a public nuisance, ultimately the court dismissed the NAACP's public nuisance claim on the ground that the NAACP did not suffer a harm different in kind from the harm suffered by the general public as a result of the defendants' activities.<sup>189</sup>

The *Acusport* court recognized that a wide variety of activities fall within the definition of public nuisance in New York. Under the district court's analysis of New York law, a public nuisance is created "when the health, safety, or comfort of a considerable number of persons . . . is endangered or injured, or interference with the use by the public of a public place . . . occurs."<sup>190</sup> This definition is sufficiently broad to extend the doctrine beyond activities traditionally associated with the land. Several factors enter into the determination of whether the interference is substantial. These factors include the nature and degree of the harm, the na-

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property, not products." *City of San Diego v. U.S. Gypsum Co.*, 35 Cal. Rptr. 2d 876 (Cal. App. 1994) (alteration in original); see *Ileto*, 349 F.3d at 1223 (Hall, J., dissenting); *Ileto*, 194 F. Supp. 2d at 1058–59. The Ninth Circuit found it significant that this interpretation was expressed only in a decade-old intermediate appellate court decision and that the California Supreme Court had not ruled on the issue. More important than this isolated case, the Ninth Circuit opined, was the California Supreme Court's espousal of the Second Restatement's broad definition and application of public nuisance. *Ileto*, 349 F.3d at 1214 n.30. The court also distinguished *City of San Diego* on the ground that that case was a traditional product liability action brought in the "guise" of a public nuisance claim, whereas the allegations presented in *Ileto* were of an entirely different nature. *Id.* n.29.

187. 271 F. Supp. 2d 435 (E.D.N.Y. 2003).

188. *Id.* at 446–47.

189. The court stated that "the extensive and severe harm proven by plaintiff to be suffered by the NAACP, its members, and the African-American community in the state of New York is not 'different in kind' . . . ." *Id.* at 499. Thus, the court had no need to consider which persons were to be considered members of the NAACP for the purpose of being represented in the action. *Id.* The court also stated: "African-Americans do suffer greater harm from illegal handguns for complex socioeconomic and historical reasons. But to say that they suffer a greater amount of harm is not enough under New York law." *Id.* Instead, the plaintiff was required to show harm of a different kind from that suffered by the general public. See *id.* at 497. The defendants have filed an appeal to the Second Circuit in the *Acusport* case, notwithstanding their win. Alison Frankel, *Sore Winners*, AMERICAN LAWYER, Jan. 2004. The defendants will seek to have the court's findings of fact vacated as not being essential to the judgment. The defendants apparently are concerned that the City of New York will attempt to make use of the findings, through collateral estoppel, in its similar suit against the gun industry. *Id.*

190. *NAACP*, 271 F. Supp.2d at 484.

ture of the interference, whether the defendants' activities are illegal or are expressly permitted by statute, the duration of the activities and/or harm, and whether the risk of harm to the public could be minimized.<sup>191</sup> In essence, the interference "must be real and appreciable, not imagined or petty."<sup>192</sup>

The main issue raised by the defendants in *Acusport* was that the promotion and sales of guns in New York is lawful. The defendants argued that their activities were legal and did not constitute a public nuisance.<sup>193</sup> The court stated that the legality of the defendants' activities is one factor in determining whether they constitute a public nuisance. More important, however, is the manner in which the defendant conducts its business. The manner or circumstances of the defendants' otherwise legal activities could be considered a public nuisance where there is an interference with a public right.<sup>194</sup> The fact that the defendants' industry is regulated does not immunize the defendants from a suit in public nuisance.<sup>195</sup> With respect to the allegations in the complaint, the court noted that "the particular marketing and distribution practices engaged in by defendant manufacturers and distributors remain almost wholly unregulated,"<sup>196</sup> thus rendering irrelevant the regulated nature of the industry in general. Moreover, the court noted, the New York criminal statutes expressly declare the unlawful possession and use of guns to be a nuisance.<sup>197</sup>

The *Acusport* court then concerned itself—in more detail than any other court previously had—with the underlying conduct that constituted the public nuisance. The gun sellers, according to established law, must have either intentionally or negligently caused or contributed to the interference with a public right.<sup>198</sup> The court focused most of its discussion on determining whether the defendants' conduct could be characterized as negligent. In holding that the defendants had a duty to members of the public, the court

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191. *Id.* The court noted that all factors should be evaluated in deciding whether the interference is substantial. *Id.*

192. *Id.*

193. *Id.* at 447.

194. *Id.* at 484.

195. *Id.* at 485.

196. *Id.*

197. N.Y. PENAL LAW § 400.05(1) (McKinney 2002) (stating that a weapon, "when unlawfully possessed, manufactured, transported or disposed of, or when utilized in the commission of an offense, is hereby declared a nuisance").

198. *Acusport*, 271 F. Supp. 2d at 487. The underlying conduct could also constitute an abnormally dangerous or ultrahazardous activity, but under the circumstances presented in the case, the court determined that negligent and intentional conduct were the only options. *Id.*

was careful to point out that duty for public nuisance purposes is different from duty in a negligence action:

[T]he burden on a private plaintiff seeking to abate a public nuisance . . . does not include showing, where the nuisance is based on negligence, that the defendant owes a particular injured person, as opposed to the public, a duty of care. At issue in a public nuisance action is a duty of care to the public or to a substantial number of persons.<sup>199</sup>

The court clarified this reasoning by distinguishing *Hamilton v. Beretta U.S.A. Corp.*,<sup>200</sup> an earlier case against the gun industry also governed by New York law, but involving a negligent marketing claim. One of the questions certified by the Second Circuit to the New York Court of Appeals in *Hamilton* had been whether the defendant gun manufacturers owed a duty of care to the private plaintiffs in the marketing and distribution of their handguns.<sup>201</sup> The Court of Appeals concluded that no such duty existed, stating that “[f]oreseeability, alone, does not define duty.”<sup>202</sup> The Court of Appeals left open the possibility that a duty could be found in a case with sufficient proof that the negligent marketing itself caused the injuries alleged.<sup>203</sup>

The *Acusport* court focused on certain statements made by the *Hamilton* court, which defined the parameters of gun manufacturer duty. The *Hamilton* court had stated that duty requires a “‘tangible showing that defendants were a direct link in the causal chain that resulted in plaintiffs’ injuries and . . . defendants were realistically in a position to prevent the wrongs.’”<sup>204</sup> The *Hamilton* court explained that gun suppliers that deal with retailers who engage in dangerous sales practices—and where the suppliers know or reasonably could know of those practices—could have a duty to refrain from such dealings, or be subject to liability.<sup>205</sup> The plaintiffs in *Hamilton* did not offer such evidence. In contrast to

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199. *Id.* at 490. That the court couched its analysis in the language of duty points out the opportunity for confusion between public nuisance and the tort of negligence.

200. 750 N.E.2d 1055 (N.Y. 2001). Judge Jack B. Weinstein of the Eastern District of New York presided over the jury trial in *Hamilton* on the plaintiffs’ negligent marketing claims against gun-industry defendants. The trial resulted in an award of damages against three of the gun manufacturers. *Id.* at 1059. Judge Weinstein wrote the opinion for the court in the *Acusport* case discussed here in the text.

201. *Id.* at 1059.

202. *Id.* at 1060.

203. *See id.* at 1062.

204. *Acusport*, 271 F. Supp. 2d at 491 (quoting *Hamilton*, 750 N.E.2d at 1062).

205. *Hamilton*, 750 N.E.2d at 1062.

*Hamilton*, which involved individual plaintiffs' claims of negligent marketing and entrustment, the *Acusport* case sought recovery for danger to the public. The *Acusport* court held that the plaintiff pleaded sufficient—and indeed exhaustive—facts supporting the existence of a duty owed by the defendants. These facts included statistical information on the existence of an illegal secondary market in guns based upon tracing reports issued by BATF and other sources, including information available from the defendant gun manufacturers.<sup>206</sup>

The court also addressed the causation issues presented by the case. Regarding cause in fact, the court analogized this situation to the textbook case of multiple tortfeasors whose independent actions combine to create a single injurious result.<sup>207</sup> The court held that, on this basis, all of the defendants could be ordered to abate the nuisance.<sup>208</sup> Moreover, the multiple actors could be held liable for public nuisance notwithstanding the intervening criminal act that caused harms of which the plaintiff complained. The court stated that “a defendant may be held liable for setting in motion or being a force in a chain of events resulting in injury to the public.”<sup>209</sup> On the matter of proximate cause, the court emphasized that in public nuisance actions, limitations on causation should be “less restrictive” than in other suits brought by individuals.<sup>210</sup>

#### IV. ASSESSING JUDICIAL PERFORMANCE IN PUBLIC NUISANCE SUITS AGAINST GUN SELLERS

We have discussed in an earlier article the various kinds of actions (and inactions) alleged to constitute public nuisances by gun sellers and argued that the claim involving the creation of illegal secondary markets “most closely fits the goals of public nuisance.”<sup>211</sup> The preceding section makes clear that the case law has now begun to coalesce around this central thesis. But further

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206. See *Acusport*, 271 F. Supp. 2d at 501–19. The court's factual findings were extensive.

207. The court instanced the situation of multiple defendants discharging waste into a stream, collectively causing significant pollution. *Id.* at 493.

208. *Id.* The court noted that “contributions differ[ent] in kind or in degree [among the tortfeasors] does not change the equation.” *Id.*

209. *Id.* at 494.

210. *Id.* at 496. “The boundary will be extended as the dangers to be protected against increase.” *Id.* at 497.

211. Culhane & Eggen, *Public Nuisance*, *supra* note 16, at 316.

questions arise regarding the scope of these actions, as well as the advisable course of action for plaintiffs.

### *A. Proper Pleading of the Public Nuisance Claim*

As courts begin to allow proper public nuisance claims to be brought against the gun industry, one important question is the type and extent of claim pleading that plaintiffs must make to survive a motion to dismiss. In the cases recognizing the public nuisance claims, the complaints varied significantly, from those containing broad and general allegations to those setting forth specific facts and practices. These cases suggest that formal rules of notice pleading may be less important than the need to articulate the course of conduct and the relationship between the primary market and the secondary market in firearms.

Under modern rules of pleading, plaintiffs ordinarily need not provide details in the complaint, plead evidence, or otherwise pack the complaint with factual allegations so long as the information contained in the complaint places the defendant on sufficient notice of the claims against it.<sup>212</sup> The complaint in *City of Cincinnati v. Beretta U.S.A. Corp.*<sup>213</sup> apparently fit this more relaxed requirement perfectly. As described by the Ohio Supreme Court, Cincinnati's complaint simply charged defendant gun manufacturers and sellers with conduct causing "handguns to be used and possessed illegally".<sup>214</sup>

As procedurally correct as such pleadings may be, there seems to be greater value in more specific allegations. As between the complaints in *City of Gary* and *City of Cincinnati*, on the one hand, and the second amended complaint in *City of Chicago* and the private plaintiffs' complaint in *Acusport* on the other, the latter are preferable. While the *City of Gary* court is accurate in its statement that modern pleadings generally are "subject to no requirement of specificity,"<sup>215</sup> the kind of detail contained in the *City of Chicago* and *Acusport* complaints is more desirable in public nuisance cases be-

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212. See, e.g., *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (stating that the "Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim"); FED. R. CIV. P. 8(a)(2) (the complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief,") and 8(e)(1) (all averments in a pleading shall be "simple, concise, and direct"); RICHARD H. FIELD ET AL., *CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE* 32-41 (8th ed. 2003).

213. 768 N.E.2d 1136 (Ohio 2002).

214. *Id.* at 1141.

215. *Id.*

cause the power of public nuisance law and its corresponding potential for abuse understandably make courts wary. Thus, complaints that reflect pre-filing investigation into the defendants' conduct in contributing to the illegal sales and trafficking of guns are likelier, as a practical matter, to commend themselves to courts. The *City of Chicago* complaint, for example, presents a long string of allegations that clearly set forth the plaintiffs' theory regarding the gun manufacturers' role in facilitating the movement of guns into the secondary market and, ultimately, into the hands of criminals.<sup>216</sup>

A recent federal court case demonstrates the important role of careful pleading in public nuisance claims. In *Johnson v. Bryco Arms*,<sup>217</sup> Judge Weinstein, in the wake of his ruling in *Acusport*, allowed a victim's private claim for public nuisance to go forward.<sup>218</sup> Noting that the same court had dismissed an earlier claim by a victim against gun manufacturers and distributors,<sup>219</sup> Judge Weinstein distinguished that earlier case on the basis of specific factual information. He explained that because the gun in the earlier case had never been recovered, the plaintiff was forced to name all defendants who produced or sold .38 caliber semiautomatic pistols.<sup>220</sup> As a result, the plaintiff was not able to make a connection between the special injuries suffered and the defendants. In contrast, the plaintiff's allegations in *Johnson v. Bryco Arms* stated not only that the gun had been recovered, but also traced the path of possession of

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216. For example, paragraph 64 of the second amended complaint stated: "The defendant gun manufacturers and distributors distribute quantities of their firearms through low-end retailers such as pawn shops and gun stores that are known to be frequented by criminals and gang members." *City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d 16, 21 (Ill. App. Ct. 2002), *rev'd*, 2004 Ill. LEXIS 1665 (Nov. 18, 2004). In reversing the appellate court's decision, the Illinois Supreme Court noted that Illinois was a fact-pleading jurisdiction. Accordingly, pleadings were subject to a higher standard of review than those in Ohio, which requires only notice-pleading. *City of Chicago v. Beretta U.S.A. Corp.*, 2004 Ill. LEXIS 1665 (Nov. 18, 2004). Even under this strict standard, the court noted, the allegations of misconduct against the dealers were detailed. *Id.* at \*24. The allegations against other defendants were comparatively "sparse," *id.*, but the court did not decide the case on that issue.

217. 304 F. Supp. 2d 383 (E.D.N.Y. 2004).

218. As detailed in the discussion of the private claims for public nuisance, *see infra* Part III.B, this Article takes the view that personal injury claims are better suited to other tort theories, and that public nuisance should be left to municipal and state efforts to safeguard their citizens. The discussion of *Johnson* in the text makes the broader point that more specific allegations are likelier to engender favorable judicial treatment, whatever the identity of the plaintiff.

219. 304 F. Supp. 2d at 391 (referencing *Johnson v. Beemiller*, 2003 U.S. Dist. LEXIS 12420 (E.D.N.Y. July 21, 2003)).

220. *Id.* at 391-92.



the gun.<sup>221</sup> Citing *Ileto*, the court allowed the public nuisance claim to withstand the defendants' motion to dismiss.<sup>222</sup> The allegations in the *Johnson* complaint set forth significant information on which the court's ruling turned.

As previously discussed,<sup>223</sup> public nuisance claims brought by public entities do not have the same problems as private claims for public nuisance, such as *Johnson*. More generalized pleading may be sufficient to state a claim by a public entity. But *Johnson* still provides a valuable pleading lesson. Complaints like that in *City of Chicago* set a high standard, but in recommending it, we do not suggest that dismissal is warranted in cases involving less specific allegations. The numerous and highly detailed descriptions of misconduct by gun sellers add valuable credibility to cities' assertions that their primary interest is in protecting the public safety of their residents. Over the course of some sixty-six pages, the Chicago complaint set forth instance after instance of specific misconduct by manufacturers, distributors, and especially dealers. Through the City's "sting" operation, undercover police officers were able to uncover a host of illegal practices, the most serious of which were dealers' ignoring statements revealing an undercover purchaser's stated intent to use the weapon for an illegal purpose, and actual facilitation of a buyer's illegal purposes by such conduct as "revising" purchase orders and encouraging illegal straw purchases.<sup>224</sup>

The response to these allegations by the lower court, which had dismissed the complaint, unwittingly exposed the fallacy of the defendants' "guns are already regulated" argument. The trial judge took the position that the City should rely on the criminal laws in existence instead of suing for public nuisance. But one reason for public nuisance claims is that abatement of the nuisance can achieve a broader protection of the public's safety than law enforcement efforts, which are often only possible after injury has occurred. The "sting" can't be used everywhere. In our view, the Chicago complaint sets the standard for public nuisance claims against gun sellers.

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221. See *id.* at 389–90.

222. *Id.* at 392.

223. See *supra* notes 60–76 and accompanying text.

224. See *supra* notes 121–31 and accompanying text.

*B. The Continuing Mismatch of Private  
Plaintiffs and Public Nuisance*

Although the *Acusport* case was ultimately unsuccessful, well-pleaded complaints allowed the two private actions for public nuisance discussed in Part III to advance beyond the pleading stage. Inasmuch as the federal courts were interpreting state laws that follow the universal rule allowing private actions for public nuisance, it is neither surprising nor objectionable that they were allowed to proceed. Taken together, though, *Ileto* and *Acusport* underscore the point that public nuisance is better left to governmental entities in their efforts to safeguard public health. Further, requiring private suits to proceed on a different theory, such as negligence or product liability, can reinforce the point that gun seller misconduct causes both public and private injury, and that these categories of injuries, as well as the recovery appropriate to each, are quite distinct from each other.

If ultimately proven, the conduct in *Ileto*<sup>225</sup> could establish that the defendants had acted negligently, or perhaps even recklessly within the Restatement's definition: "A person acts with recklessness . . . if the person knows of the risk of harm created by [certain] conduct or knows facts that make that risk obvious . . . ."<sup>226</sup> If reckless conduct were indeed proven, punitive damages would be appropriate.<sup>227</sup> Public nuisance cases brought by governmental bodies, by contrast, should require no such showing of fault.<sup>228</sup> This rule follows from the "office" of public nuisance, which concerns itself with the *effect* of the nuisance—not with the conduct itself.<sup>229</sup>

225. See *supra* notes 163–86 and accompanying text.

226. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No. 1, 2001) § 2(a).

227. *Id.* § 2 cmt. b ("[T]he standard for awarding punitive damages commonly refers to the defendant's reckless conduct").

228. See Louise A. Halper, *Public Nuisance and Public Plaintiffs: Rediscovering the Common Law (Part I)*, 16 ENVTL. L. REP. 10,292, 10,299 (Oct. 1986) ("[Strict liability] applies categorically only to public nuisance actions brought by the sovereign pursuant to the police power.").

229. It is nonetheless true that public nuisance claims against gun sellers all allege culpable conduct. These allegations are consistent with the claims' basic underpinnings—that the sellers allow the illegal secondary market to flourish. In other cases of public nuisance, however, the state may seek abatement even in the absence of fault. Requiring the cleanup of a toxic spill would be appropriate even if the railroad car carrying the toxin were derailed through no one's fault, and even if transporting hazardous materials via rail were not considered to fall within the definition of abnormally dangerous activity. *Cf.* *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990) (declining to impose

Setting forth the conduct that gives rise to the public nuisance might be a useful way of focusing the court's attention on the pertinent facts in a private suit for damages, but this goal could be achieved without recognizing a private claim for public nuisance as a separate cause of action. A court might use the allegations stated in support of a public nuisance claim to establish the defendant's duty to the private plaintiff in a negligence claim. But negligence, and not public nuisance, should ground such a lawsuit.

In addition to culpable conduct, the private plaintiff needs to show the requisite causal connection between conduct and injury—and there is no call for relaxing the causal showing in the private claim, as there would be in the sovereign's public nuisance claim.<sup>230</sup> In short, the public nuisance claim is not necessary to the plaintiff's success in *Ileto*; it serves instead as a kind of alloy to strengthen the case already pleaded. Although such reinforcement is doubtless useful to the plaintiff, the claim would neither depend on public nuisance nor gain from the relaxed requirements available to the state-actor plaintiff.

The *Ileto* case also reminds us that tort plaintiffs typically seek money damages. In contrast, the state or municipal plaintiff in a public nuisance claim ordinarily seeks abatement of the nuisance. While many of the municipal complaints also seek damages, such damages are appropriate only to the extent that they discharge the state's responsibility for safeguarding the public's safety and welfare. When "public nuisance" is used to describe both a tort and an exercise of the police power, though, it is too easy for courts to elide the distinctions between them and misconstrue as a tort what should be a straightforward exercise of the police power. Damages might therefore be awarded whether or not they play any role in abating the nuisance. The confusion is exacerbated by the possibility of the state's suing in its proprietary capacity.<sup>231</sup> In that event,

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strict liability on a defendant who transported dangerous chemicals via rail). Under such circumstances, the private plaintiff injured would have no public nuisance claim, but the state would.

230. Indeed, the *Ileto* court cross-referenced its discussion of proximate cause in the section on negligence when analyzing the private plaintiffs' public nuisance claim, indicating that the court deemed this element to be a necessary component in both claims. *Ileto v. Glock Inc.*, 349 F.3d 1191, 1216–17 (9th Cir. 2003). See also *supra* notes 176–79 and accompanying text.

231. In *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 117 (Conn. 2001), the court dismissed the public nuisance claim because it was not brought in the state's role as *parens patriae*. The failure by the City of Bridgeport to sue in this representative capacity was unfortunate because the complaint did allege a public nuisance that could have been abated (or at least reduced) had the case proceeded to trial. In addition to the money damages sought for the cost to the city of gun violence, the plaintiffs had alleged that the conduct would

tort is the proper vehicle, and damages will usually be both the requested and proper remedy. This possibility only underscores the virtue of removing public nuisance from the realm of “tort” altogether. If that were done, the state could sue in public nuisance for abatement of the nuisance and in a separate cause of action sounding in a recognized theory of tort law for the damage to property that it owns or, within the strict limits of tort doctrine, for economic loss. In that situation, the state would be suing in two distinct capacities, and the outcomes could well differ.

*Acusport* makes an even stronger case for limiting public nuisance to its proper sphere. The findings of fact proving certain defendants’ contributions to the illegal secondary market<sup>232</sup> were so devastating against certain gun sellers that they sought to appeal the judgment, even though they won the case.<sup>233</sup> The defendants’ concern is understandable. New York City is the plaintiff in another gun suit pending before Judge Weinstein, the author of the *Acusport* decision.<sup>234</sup> Even though he has stated that he will not give collateral estoppel effect to the findings in the *Acusport* case,<sup>235</sup> the course of tobacco litigation clearly showed the corrosive effect of damning discovery on subsequent cases.<sup>236</sup>

One of the factors that drove the court’s decision in *City of Cincinnati*—that no one besides the city would have standing to sue for the kind of harm the city alleged—impelled the court in precisely the other direction in *Acusport*. For the societal harms gun violence causes, a public entity, and *not* the NAACP—or any other private entity—is the competent party to bring a public nuisance claim because the state or city sues in its *parens patriae* capacity, on behalf of its citizens. Private groups or private citizens do not have this authority. This point surfaced in a dramatic fashion in *Acusport*, because a membership organization is highly unlikely to be able to demonstrate the kind of particular harm that private tort

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“continue to threaten the health, safety and welfare of the residents of Bridgeport.” *Id.* at 115.

232. NAACP v. Acusport, Inc., 271 F. Supp. 2d 435, 501–08 (E.D.N.Y. 2003) (articulating extensive findings of fact regarding the secondary market in firearms).

233. Alison Frankel, *Sore Winners*, AMERICAN LAWYER, Jan. 2004, (discussing defendants’ plan to ask the appellate court to vacate the findings of fact “on the grounds that they were not necessary to his final judgment.”).

234. City of New York v. Beretta U.S.A. Corp., 315 F. Supp.2d 256 (E.D.N.Y. 2004). It is significant that the complaint, which originally requested damages, now seeks only injunctive relief to abate the nuisance created by gun violence. New York v. Arms Technology, Inc. (E.D.N.Y.) (No. 00-CV-3641) (second amended complaint filed Jan. 13, 2004).

235. See Leigh Jones, *Top Cases of 2003*, N.Y.L.J., Feb. 23, 2004, at m15.

236. See Gordon Fairclough, *Tobacco Firms Ordered to Pay Ex-Smoker*, WALL ST. J., Mar. 21, 2000, at A3.

claims for public nuisance require. The NAACP's case failed for exactly this reason. But the generalized showing of harm that the organization *did* make will likely anchor future suits brought by municipal entities, and not only in New York City. Given the network of manufacturing, distribution, and retail gun sales, the findings of the *Acusport* court are likely to have a far-reaching impact. The individualized harm that is the raw material of tort law was lacking, however, and the case failed for that reason.

In an important way, *Ganim v. Smith & Wesson Corp.*<sup>237</sup> is a mirror-image of *Acusport*. In *Ganim*, the City of Bridgeport, Connecticut, and its mayor sued for public nuisance but sought to recover damages for particular injuries that it had allegedly suffered as a result of the gun defendants' conduct. Because the city was not suing as a representative of the city's populace under the *parens patriae* doctrine,<sup>238</sup> the court held that the injuries alleged were too remote from the defendants' alleged conduct.<sup>239</sup> Thus, the court's decision in *Ganim* implicitly supports our view that the central mission of public nuisance is the vindication of the public's right to be free from substantial threats to, and interferences with, health and safety. When public plaintiffs venture beyond the core remedy of abatement, they risk dismissal of their claims.

In sum, *Acusport* reads like a municipal suit for public nuisance brought by the wrong entity. In addition to the impossibility of proving injury to its members different in kind from that suffered by the public, the remedy that the court thought would have been appropriate also reflects a "pure" public health claim, not a claim based in tort. The court noted that the problem of multiple tortfeasors makes recovery for damages against any one of them problematic. But while it might be impossible to separate out acts done by any one defendant and declare them a "substantial interference" with the public's rights, "an equitable action . . . to abate the nuisance will lie against them all."<sup>240</sup> In its own public nuisance suit, the City of New York awaits its opportunity to convince the court that the rights of its citizens have suffered such "substantial interference" from the conduct of gun sellers.

The city cases discussed above represent a salutary trend in the law of public nuisance, which remains a powerful and important legal doctrine. Modern society is filled with mass-marketed dangers that cause unreasonable interferences with the public health,

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237. 780 A.2d 98 (Conn. 2001).

238. *Id.* at 117.

239. *Id.* at 118–30.

240. *NAACP v. Acusport, Inc.*, 271 F. Supp. 2d 435, 493 (E.D.N.Y. 2003).

safety, and welfare, and public nuisance is the logical and ideal doctrine with which to address those public hazards. The recent public nuisance cases are also about pleading, and provide a useful lesson for plaintiffs' attorneys seeking to articulate public nuisance claims against the gun industry, whether their clients are public entities or private citizens. The private complaints are strong on their merits, but would better have been brought under another theory, as in *Ileto*—in which other theories were also alleged—or, as in *Acusport*, by a different entity. The ill fit of these cases to public nuisance highlights the strength and special mission of the doctrine.

## V. LEGISLATIVE IMMUNITY EFFORTS

This Article has demonstrated that courts are beginning to acknowledge the important role that public nuisance claims brought by the state and its constituent cities can play in abating the scourge of gun violence. But this very success, as well as the limited advances made through private litigation, have spawned a disturbing development: legislative initiatives and enactments, on both the federal and state levels, that provide immunity from at least some lawsuits brought against the gun industry. In general, these statutes are unwarranted incursions into both the proper sphere of the judiciary and the discretion of state executives to seek abatement of gun violence. This type of federal legislation would rule out many gun lawsuits—even those pending—while the state laws are, with minor exceptions, a grab-bag of legislative giveaways to the gun industry. Even though existing regulation does nothing to reach the vast unregulated secondary market, and manufacturers and dealers are well aware of the likelihood that many of their guns will end up in the hands of criminals through that route,<sup>241</sup> an increasing number of states are apparently willing to bear those costs to placate the gun lobby.

The discussion below begins with an analysis of the recently defeated federal legislation that would have become the first nationwide law to exempt a specific industry from vast swaths of liability.<sup>242</sup> The Article then discusses a few of the growing number

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241. See *supra* Part II.

242. Even though the bill's chief sponsor was pessimistic about its chances for reconsideration in an election year, see Stolberg, *supra* note 1, the gun lobby's demonstrated power over Congress makes likely the reappearance of the bill, or something quite like it, in

of state laws and proposals that offer various—and mostly unwarranted—legal immunities to the gun industry. To the extent that these initiatives choke off recovery for injury that would be justified under unexceptionable principles of tort law, or divest government of its ability to abate gun violence, they are indefensible. The fear that drives their enactment indirectly supports the argument, increasingly recognized by appellate courts, that nuisance abatement actions are an apt vehicle for dealing with the threat to public safety presented by the illegal secondary market in guns.

### A. Federal Legislation

In 2003, a bill was introduced in the House of Representatives to provide gun sellers significant immunity from civil suits.<sup>243</sup> The bill was passed by a large margin that same year,<sup>244</sup> but its counterpart in the Senate<sup>245</sup> encountered significant opposition and was ultimately defeated.<sup>246</sup> The proposed legislation used broad language, claiming that it was intended to “prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products for the harm caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.”<sup>247</sup>

Congress sought to justify the use of such broad language by including an expansive “findings” section that contained various incorrect or misleading statements about the industry and the attempts of cities and individuals to use the legal system for redress. These so-called “findings” supported a pro-industry agenda by declaring gun rights that do not exist, mischaracterizing the industry as blameless, and demeaning the long-standing role of litigation in American society. Indeed, the statements in this section more

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the near future. Compensation schemes, even though they typically restrict tort claims, are quite different. *See infra* note 269.

243. H.R. 1036, 108th Cong. (2003).

244. *See* Chris Cox, *Political Report*, available at <http://www.nraila.org> (statement by Executive Director of NRA praising House passage of bill by vote of 285 to 140 and noting that White House supported the bill) (on file with the University of Michigan Journal of Law Reform).

245. Protection of Lawful Commerce in Arms Act, S. 659, 108th Cong. (2003).

246. *Senate Votes Down Gun Bill*, Mar. 2, 2004, at <http://cnn.com> (on file with the University of Michigan Journal of Law Reform).

247. S. 659 108th Cong. § 2(b)(1) (1997).

properly fell into the category of “arguments” than that of “findings.”

One stated “finding” was that “[c]itizens have a right, protected by the Second Amendment to the United States Constitution, to keep and bear arms.”<sup>248</sup> The United States Supreme Court has decided only a few cases involving the Second Amendment, but it is clear from those cases that the right is qualified and that both the federal government and the states may impose limitations controlling the distribution and use of firearms.<sup>249</sup> Another “finding” set forth in the bill stated that the “[t]he manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws.”<sup>250</sup> As demonstrated elsewhere in this Article,<sup>251</sup> the regulation is far from “heavy,” and, indeed, is completely inadequate in many areas. That the industry may perceive any amount of regulation as too heavy does not create a valid basis for federal legislation to immunize sellers.

The section also referred to the “possibility of imposing liability on an entire industry for harm that is solely caused by others.”<sup>252</sup> This statement incorrectly characterizes the lawsuits that have been filed against gun sellers, which target practices in the industry that are unreasonable or negligent.<sup>253</sup> Further, the bill stated that “liability actions . . . are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the

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248. *Id.* § 2(a)(1). Gun industry advocates have long characterized the Second Amendment right in these absolute terms.

249. *See* *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding that the federal government has the right to regulate firearms); *Miller v. Texas*, 153 U.S. 535, 539 (1894) (holding that a statute prohibiting the carrying of dangerous weapons did not violate the Second Amendment); *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (upholding a state law forbidding unauthorized military groups from parading with firearms). Although the Bush Justice Department has expressed an interest in overturning this long-standing jurisprudence and has advocated for an absolute right of individual citizens to own and carry firearms, the Supreme Court has not changed its consistent position. *See* Linda Greenhouse, *U.S., in a Shift, Tells Justices Citizens Have a Right to Guns*, N.Y. TIMES, May 8, 2002, at A1 (discussing briefs filed by Government in Supreme Court cases which advocated broader interpretation of Second Amendment right). For an overview of the debate on the interpretation of the Second Amendment, see Steven H. Gunn, *A Lawyers Guide to the Second Amendment*, 1998 B.Y.U. L. REV. 35.

250. S. 659, § 2(a)(3).

251. *See supra* notes 87–120 and accompanying text.

252. S. 659, § 2(a)(5).

253. *See, e.g.,* *NAACP v. Acusport, Inc.*, 271 F. Supp. 2d 435, 495–97 (E.D.N.Y. 2003); *City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d 16 (Ill. App. Ct. 2002), *appeal granted*, 788 N.E.2d 727 (Ill. 2003).



common law.”<sup>254</sup> As discussed above, public nuisance law is grounded in centuries-old doctrine, and the practices of certain members of the gun industry fit well within the doctrine’s prohibition of unreasonable interferences with the public health, safety, and welfare. Moreover, public nuisance claims do not strictly constitute “liability actions,” a term properly descriptive of ordinary tort actions for damages. Gun defendants have been free to make their arguments in court that public nuisance should not apply to them, but their arguments belong just there—in court. They do not belong in the findings section of a proposed federal act. Nor is it appropriate or fair to characterize, as the legislation expressly did, judges or juries that conclude liability is proper as “maverick judicial officer[s] or petit jur[ies].”<sup>255</sup> This is simply opinion, unsupported by the case law and out of place in federal legislation.

Also troubling was the “finding” that lawsuits against the gun industry improperly burden interstate commerce. Courts have considered this argument<sup>256</sup> and rejected it. For example, in *City of Cincinnati v. Beretta U.S.A. Corp.*, the Ohio Supreme Court quickly disposed of the defendants’ Commerce Clause argument finding it untenable under existing United States Supreme Court Commerce Clause jurisprudence.<sup>257</sup>

The legislation would have provided that “[a] qualified civil liability action may not be brought in any Federal or State court” and also would have required the dismissal of any such actions pending at the time of enactment.<sup>258</sup> The bill defined a “qualified civil liability action” as “a civil action brought by any person against

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254. S. 659, § 2(a)(6).

255. *Id.*

256. In *Ileto v. Glock Inc.*, the defendants had argued that the plaintiffs’ broad complaint indicated that the lawsuit was intended to regulate the defendants’ lawful activities conducted nationwide. 349 F.3d 1191, 1216–17 (9th Cir. 2003).

257. 768 N.E.2d 1136, 1150 (Ohio 2002). Examining the U.S. Supreme Court’s decision in *BMW of N. America v. Gore*, 517 U.S. 559 (1996), the case relied upon by the defendants, the Ohio Supreme Court distinguished the claims against the gun industry. In *BMW*, the Supreme Court held, among other things, that a punitive damages judgment imposed in Alabama for claims that arose outside the state to persons who were not Alabama residents constituted a violation of the Commerce Clause. *Id.* at 572. The Ohio Supreme Court noted that the U.S. Supreme Court was concerned that the punitive damages award was targeted toward altering the defendant’s conduct outside Alabama, when that conduct was not necessarily unlawful outside the state. *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1150 (Ohio 2002). In contrast, the Ohio case presented a situation in which the harm alleged was suffered by the citizens of Cincinnati. *Id.* Moreover, that multiple lawsuits have been brought against members of the gun industry in different jurisdictions does not minimize this point. Rather, it emphasizes that legal redress has been sought in the specific locales where the defendants’ conduct is alleged to have caused the specific harm.

258. S. 659, § 3.

a manufacturer or seller of a qualified product, or a trade association, for damages resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.”<sup>259</sup> A “qualified product” included firearms (including antique firearms), ammunition, and component parts thereof that have been placed in the stream of interstate or foreign commerce.<sup>260</sup> Several exemptions were set forth in the bill including, among other things, negligent entrustment or negligence per se actions against a seller<sup>261</sup> (but not a manufacturer), an action based on a design or manufacturing defect when the product is used as intended,<sup>262</sup> and actions in which a manufacturer or seller “knowingly and willfully violated a State or Federal statute applicable to the sale or marketing of the product.”<sup>263</sup>

This bill was part of a broader set of initiatives backed by business to limit or eliminate certain civil actions, which have included medical malpractice,<sup>264</sup> asbestos,<sup>265</sup> and class actions.<sup>266</sup> But the other bills, involving other categories of litigation, arose in response to many years of litigation that proved problematic in the courts and, in at least some cases, in the insurance system. For example, thousands of asbestos lawsuits have clogged the system, and many companies have been forced to seek the protection of the bankruptcy laws, while their insurers have disputed coverage.<sup>267</sup> Significantly, none of the proposed asbestos bills has come to fruition despite the problems that this area of civil liability faces. In contrast, suits against the gun industry have not proved to be problematic for the civil justice system or for the industry. Regardless of the vocal complaints from industry quarters and their supporters, there is no indication that gun manufacturers will suffer unfairly as a result of lawsuits that may or may not ultimately be successful in

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259. *Id.* § 4(5)(A).

260. *Id.* § 4(4).

261. *Id.* § 4(5)(A)(ii).

262. *Id.* § 4(5)(A)(v).

263. *Id.* § 4(5)(A)(iii).

264. Ceci Connolly, *Cheney Urges Cap on Malpractice Awards*, Wash. Post, July 20, 2004, at A6.

265. Kristina Herrndobler, *Senate Blocks Trust Fund for Asbestos Victims*, CHI. TRIB., Apr. 23, 2004, at C13. For a discussion of the need for federal asbestos litigation by a representative of a manufacturers' trade association, see Jan Amundson, *How a Congressional Answer to Asbestos Litigation Would Help Litigants, Courts, and the American Economy*, 44 S. TEX. L. REV. 925 (2003).

266. See Class Action Fairness Act of 2004, S. 2062, 108th Cong. (2004) (including provisions to shift most class-action lawsuits to federal court).

267. See, e.g., *Amchem Prods. v. Windsor*, 521 U.S. 591, 597–99 (1997).

the courts.<sup>268</sup> At the federal level, at least, this kind of protective measure for a specific industry is unprecedented.<sup>269</sup>

Supporters of the failed federal legislation are likely to reintroduce a similar bill in the future.<sup>270</sup> As noted earlier, the bill's defeat in the Senate was largely because several amendments were tacked onto it in the few days prior to its demise—not because members of Congress rejected the premise of immunity for gun sellers.<sup>271</sup>

### B. State Legislation

Many states have enacted legislation to bar suits against the gun industry. Some of this legislation has reached broadly,<sup>272</sup> while other acts have directly targeted certain kinds of suits against gun manufacturers and distributors. A typical version of this latter type of statute is exemplified by the Montana immunity statute:

The governmental right to bring suit against a firearms or ammunition manufacturer, trade association, or dealer for abatement, injunctive relief, or tort damages resulting from

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268. To the extent that a particular manufacturer, distributor, or retailer may be held liable for the creation of a public nuisance, or under any other applicable theory, that entity may indeed experience financial loss. But this “suffering” is consistent with principles of civil liability that demand recourse for those injured by culpable conduct. In the unlikely event that a particular manufacturer were driven out of business by litigation, that outcome would not be unjust, but the result of injuries and death that its conduct caused.

269. A limited number of federal displacements of tort law do exist, but all of these are compensation initiatives that represent a trade-off of some kind. For a detailed discussion of some of these initiatives, particularly the Vaccine Injury Compensation Program, see Culhane, *Two Kinds of Justice*, *supra* note 68, at 1058–61, 1084–87, 1091–1102. Such measures reflect a compromise that pays injured parties, but at a lower level than they might have received if successful in a tort suit. By contrast, the gun immunity bill would have conferred no offsetting benefit to those injured by gun violence, even if they could prove conduct that would ordinarily be compensable under tort law.

270. In the 2004 fight over the Senate Bill, Senators on both sides were clearly establishing their constituent base with their voting record. Many of the Senators who initially voted in favor of the bill intended to load it with gun-control amendments before the final vote. Many of the Senators who voted in favor of the amendments had no intention of approving a bill containing them. For example, Senator Tom Daschle of South Dakota voted with the majority of 75 to allow the debate over the bill to go forward, but backed the amendments that were sure to lead to defeat of the measure. Sheryl G. Stolberg, *Senate Bill To Block Gun Lawsuits Moves Ahead*, N.Y. TIMES, Feb. 26, 2004, at A23.

271. See *supra* notes 2–6 and accompanying text.

272. The Arizona gun immunity statute contains broad language that is almost identical to the failed Senate bill, see *supra* notes 245–63 and accompanying text, including the “findings,” but bars only suits by political subdivisions of the state. See ARIZ. REV. STAT. § 12-714 (2004).

or relating to the design, manufacture, marketing, or sale of firearms or ammunition sold to the public is reserved exclusively to the state and may not be exercised by a local governmental unit. The state may sue under this section on its own behalf or on behalf of a local governmental unit, or both.<sup>273</sup>

Such statutes that designate the state as the sole public entity with a right to bring suit against the gun industry assure political consistency within the state. Also, with a statute like Montana's, the state is not limited to suing on its own behalf—and, presumably, having to make the argument that the defendants' course of conduct impacted the public welfare statewide—but may sue on behalf of a particular city.<sup>274</sup>

Another variation is the Utah statute, which reads:

A person who lawfully designs, manufactures, markets, advertises, transports, or sells firearms or ammunition to the public may not be sued by the state or any of its political subdivisions for the subsequent use, whether lawfully or unlawfully, of the firearm or ammunition, unless the suit is based on the breach of a contract or warranty for a firearm or ammunition purchased by the state or political subdivision.<sup>275</sup>

This statute provides for broad immunity from suits brought by the state or any municipalities or other subdivisions, but does not apply to actions brought by private citizens.<sup>276</sup> It does, however, strip the state—not just its subdivisions—of a specific use of its police power. Such an act is perhaps without precedent, and for good reason. As stated earlier,<sup>277</sup> the police power is one of the most basic

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273. MONT. CODE ANN. § 7-1-115 (2003).

274. Other statutes omit the provision permitting the state to bring such an action on behalf of a municipality. For example, the Virginia statute makes clear that “[a]ny action brought by the Commonwealth pursuant to this section shall be brought by the Attorney General on behalf of the Commonwealth.” VA. CODE ANN. § 15.2-915.1 (2003).

275. UTAH CODE ANN. § 78-27-64(2) (2003).

276. Immunity statutes of this sort may very well encourage courts to accommodate private plaintiffs' claims for public nuisance. Because the state and its subdivisions are unable to sue in public nuisance on their own accord, private plaintiffs may attempt to step into their shoes and sue for abatement of a public nuisance. Of course, the private plaintiffs would still be required to prove that they have suffered a special injury—in essence, that they have an underlying tort action. But in the gap created by such immunity statutes, courts may become more amenable to private plaintiffs' claims for public nuisance. This may be particularly true when the private party is a civic group, such as the NAACP.

277. See *supra* note 20 and accompanying text.

elements of the state's ability to protect the safety, health, and welfare of its citizens. Legislation that deprives state executives of the ability to seek abatement for serious threats to the public's health is a uniquely bad idea and reflects irrational capitulation to the gun lobby. A bill introduced in the Vermont Senate that would require General Assembly approval of any lawsuit against a firearms manufacturer, dealer, or importer<sup>278</sup> is only a slightly better response.

As evidenced by the Utah statute, some state statutes contain an exception to the bar on municipal suits for direct warranty or contract claims brought by a political subdivision.<sup>279</sup> Such provisions primarily allow for public entities to enforce contracts for firearms and ammunition to equip their law enforcement departments. The availability of warranty claims goes directly to the performance of the firearms or ammunition as intended or otherwise promised. But such claims do not include other types of product liability claims against the gun industry that have proved to be problematic in the courts.<sup>280</sup>

Some state immunity statutes contain broad language specifically about product liability claims. The South Dakota statute explicitly states that "serious injury, damage, or death as a result of normal function does not constitute a defective condition of the product."<sup>281</sup> The Alaska statute expressly reserves some product liability claims against the gun or ammunition manufacturers or dealers: negligent design claims, manufacturing defects, breach of contract claims, and warranty claims.<sup>282</sup> Notably absent from the list of reserved claims are strict liability claims (except manufacturing defects) and claims for failure to warn of the hazards of the products. The Colorado statute provides that "[a] person or other

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278. See 2003 LEXIS Bill Tracking VT S.B. 151 (introduced March 11, 2003).

279. The Nevada statute provides:

The provisions of this section do not prohibit a county, city, local government or other political subdivision of this state . . . from commencing a lawsuit against a manufacturer or distributor of a firearm or ammunition for breach of contract or warranty concerning a firearm or ammunition purchased by the . . . political subdivision.

NEV. REV. STAT. ANN. § 12.107(2) (2004).

280. The Nevada statute also tracks the Montana law in limiting the right to bring public nuisance suits to the state itself. *Id.* § 12.107(1). For a thorough discussion of product liability law in relation to suits against the gun industry and a proposal, see Eggen & Culhane, *Gun Torts*, *supra* note 8, at 133–210.

281. S.D. COD. LAWS § 21-58-4 (2003) (providing that "[a] firearm may not be deemed defective on the basis of its potential to cause serious injury, damage, or death when discharged").

282. ALASKA STAT. § 09.65.155 (2003).

public or private entity may not bring an action in tort, other than a product liability action,” against a member of the gun industry.<sup>283</sup> This statute also contains a provision permitting suits against gun or ammunition manufacturers, importers, or dealers for violation of state or federal statutes or regulations.<sup>284</sup>

Other categories of claims have also been excluded by some states. The Georgia law provides: “The General Assembly . . . declares that the lawful design, marketing, manufacture, or sale of firearms or ammunition to the public is not unreasonably dangerous activity and does not constitute a nuisance per se.”<sup>285</sup> This provision applies only to suits brought by a “city, county, or urban-county government,” but does not apply to suits brought by individuals.<sup>286</sup> It would seem that “nuisance per se” would leave open the possibility of a public entity demonstrating the existence of a public nuisance through conduct that circumvents or transgresses the parameters of legal distribution.

### *C. Legislation as an End-Run Around the Judiciary*

These statutes reflect two common purposes. First and foremost is to protect an industry with national clout and a vast lobbying network. In addition to this political goal, however, lies the broader aim of achieving “tort reform”<sup>287</sup> more generally. Initiatives that tie the wish list of the gun lobby to this broader agenda have just begun to surface. A bill introduced in Virginia in early 2004, for example, illustrates this point clearly. The proposed measure would exempt from liability not only gun manufacturers, but tobacco companies, fast food restaurants, and other companies selling “‘inherently unsafe products’” with well-known hazards.<sup>288</sup> The bill also includes a section severely restricting a plaintiff’s ability to bring claims against a product manufacturer that has complied with existing state or federal regulations, provided that

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283. COLO. REV. STAT. § 13-21-504.5(1) (2003). This law should not prevent a state from suing for public nuisance because such an action does not sound in tort.

284. *Id.* § 13-21-504.5(4).

285. GA. CODE ANN. § 16-11-184(a)(2) (2002); *accord* TENN. CODE ANN. § 39-17-1314(b) (2003).

286. GA. CODE ANN. § 16-11-184(2) (2002).

287. “Tort reform” is in quotations to reflect the authors’ view that these statutes, while presented as reform initiatives, are too often unjustified by principles of tort law, or by broader principles of fairness.

288. Jo Becker, *Virginia Bill Aims to Limit Liability Suits*, WASH. POST, Jan. 21, 2004, at B5.

the manufacturer was unaware of the product defect.<sup>289</sup> This kind of legislation is a familiar form of tort reform that has circulated in a number of states and in Congress since the 1980s. The efforts have achieved mixed results. Repeated efforts at federal general tort reform have not succeeded.<sup>290</sup> State tort reform measures have been challenged successfully in some states, leaving a rocky and unstable landscape.<sup>291</sup>

So single-minded are the tort reformists that they are attempting to reform a system that does not yet have a problem. Unlike the asbestos litigation that has clogged the judicial system for decades and forced numerous firms into bankruptcy, for example, gun industry litigation is in its infancy. There is no indication, at least at this juncture, that a problem of such proportions would ever arise. And now the groundswell in favor of immunity for gun sellers threatens to engulf other industries, as well. The Virginia potpourri of protection has already proven an appealing solution. In an effort to find a problem to solve, the U.S. House of Representatives recently voted to immunize fast food restaurants from liability.<sup>292</sup>

This obsession with tort reform reflects a deeper issue—a fundamental distrust, in some quarters, of the judicial system. Tort law performs an important supplemental role to existing legislation. The argument that compliance with the existing state and federal regulations should render manufacturers and distributors beyond the reach of the tort system is disingenuous. Still less do such arguments apply to state-initiated claims for public nuisance. The interference with public safety and welfare can come from actions undertaken that circumvent the incomplete statutes and regulations that are in place. As Judge Calabresi has stated, “legality of an

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289. *Id.*

290. For an example of a typical measure introduced in Congress, see Product Liability Reform Act of 1997, S. 648 105th Cong. (1997). Tort compensation schemes have been enacted to cover certain classes of injuries, but these reflect trade-offs in compensation levels for greatly enhanced prospects of recovery, not the removal of all recourse for injured parties. See Culhane, *Two Kinds of Justice*, *supra* note 68, at 1055–61.

291. See, e.g., *State ex. rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1073 (Ohio 1999) (holding Ohio tort reform act unconstitutional); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997) (holding unconstitutional multiple amendments to Illinois tort reform act). *But cf.* *Evans v. State*, 56 P.3d 1046 (Alaska 2002) (upholding provision in state tort reform act that placed caps on non-economic and punitive damages awards).

292. See Carl Hulse, *Vote in House Offers a Shield for Restaurants in Obesity Suits*, N.Y. TIMES, Mar. 11, 2004, at A1 (“The measure was the latest Republican-led effort to provide legal immunity for a specific industry after efforts to impose broader limits have been blocked.”). The article goes on to describe failed efforts to immunize gun sellers, producers of gasoline additives, and the tobacco industry.

act does not insulate it from possible tort liability.”<sup>293</sup> Especially in a climate of lax regulation, the judicial system may step in and provide a remedy. This is all the more important when effective regulation of the gun industry does not appear to be forthcoming, particularly on the federal level.

Moreover, statutes that grant immunities to particular industries are not justified under principles of tort law. To put the matter in simplest terms, “plaintiffs have been forced to give up rights that seem required by . . . principles of corrective justice, and they gain nothing in return.”<sup>294</sup> On occasion, courts have pierced the special-interest pleading that drives such laws, and have held industry-specific protections to violate state constitutional guarantees. In a show of justice and common sense, the New Hampshire Supreme Court said of a bill protecting health care providers: “It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation.”<sup>295</sup> The same could be said of the general public, whose members are the direct and indirect victims of gun violence.

## CONCLUSION

Legal doctrine should not be frozen in ancient and unbending forms. Tort law has long been moving towards the complete abandonment of the writ system because of its unfair impact on plaintiffs with legitimate claims and its unworkability in a developing civilization.<sup>296</sup> Recent developments in the law of public nuisance reflect positively on the law’s ability to adapt. Although most of the early cases decided by courts called upon to apply the law to claims against gun sellers resulted in defeat for the municipalities, recently courts have demonstrated a more sophisticated and nuanced understanding of the special role of public nuisance, and have permitted claims to proceed without imposing unduly strict pleading requirements. Inasmuch as public nuisance remains a flexible doctrine subject to abuse, however, public entities are

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293. *McCarthy v. Olin Corp.*, 119 F.3d 148, 163 n.14 (2d Cir. 1997) (Calabresi, J., dissenting).

294. Culhane, *Two Kinds of Justice*, *supra* note 68, at 1084.

295. *Carson v. Maurer*, 424 A.2d 825, 837 (N.H. 1980).

296. For a succinct discussion of the writ system and its eventual abolition, see RICHARD A. EPSTEIN, *TORTS* 75–84 (1999).



well-advised to state their case as powerfully and specifically as possible.

The onslaught of cases against gun sellers continues to present challenges to courts attempting to distinguish theories and to determine which parties are competent to bring particular actions. It is vital that the special mission of public nuisance be respected and that private claims be supported by other theories more properly within the realm of tort. If public entities restrict themselves to suits for abating public nuisances, and if courts are able to follow established principles of duty, culpability, and causation in assessing private claims, it will be more difficult for legislatures to justify the kind of harsh and unfairly preclusive laws that have begun to emerge.

The gun lobby has shown again and again that it enjoys power out of proportion to the percentage of Americans that share its absolutist views. Thus, efforts at reasonable restrictions on guns and those who sell them face difficulty, frustration, and—too often—failure. At a time when federal and state legislators seem more beholden to the industry than ever, the ancient action for abatement of the public nuisance has begun to enjoy a welcome renaissance.