Rethinking the New Public Health

Lindsay F. Wiley, American University
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ABSTRACT

This article contributes to an emerging theoretical debate over the legitimate scope of public health law by linking it to a particular doctrinal debate that has arisen in the context of public nuisance litigation brought by state and local governments against industries that allegedly interfere with the public’s health. In response to evolving scientific understanding about the determinants of health, public health advocates are rapidly implementing new law and policy tools to alter our environments and behaviors in ways that improve health at the population level. These developments have prompted disagreement over the government’s legitimate role in ensuring access not just to health care, but to healthy living conditions and lifestyles. Critics of the “new public health” movement have sought to safeguard individual liberty by disconnecting the law and politics of public health from emerging science that highlights the crucial role of social, economic, and environmental factors in constraining individual behaviors and determining health outcomes. In the theoretical debate over the legitimate scope of public health law, critics are arguing that modern health threats like heart disease and diabetes are individual concerns not sufficiently public in nature to trigger doctrines that privilege state intervention over individual rights. In the doctrinal debate within public nuisance law, courts are struggling to define the meaning of “public rights,” interference with which is a key element of the public nuisance cause of action. In both debates, critics have rightly insisted that the public must be more than the mere aggregation of private interests. But the narrower conceptions of the public that they have put forth fail to account for the full scope of the state’s authority and responsibility for public health. This article stakes out a middle position that adopts the classically liberal view of public health law critics – that state interference with individual liberty requires robust justification – while also defining the public broadly so as to justify considerable state intervention under the banner of public health. Drawing on analysis of public nuisance litigation as a public health tool, I propose that epidemiological harms – which I define as those for which causation can be established at the population level, but not necessarily at the individual level – should be understood as public bads. This conception provides a more robust justification for new public health law that more firmly grounds it in the science of social epidemiology.
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INTRODUCTION

Public health is rapidly becoming a more invasive part of our everyday lives. Walk into a Starbucks in New York City and you’ll now see calorie counts listed on the menu.1 Buy a Coke in Washington, DC and you’ll pay a sin tax on it.2 A cupcake from your local bakery might taste a little different now that trans fats

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1 See Bryan Bollinger et al., Calorie Posting in Chain Restaurants (2010), http://www.gsb.stanford.edu/news/StarbucksCaloriePostingStudy.pdf (study of data from Starbucks finding that calorie labeling on menus in compliance with New York City law decreased average calories per purchase and did not significantly harm revenues).
have been banned from the baker’s recipe. A session in your local tanning salon is now subject to a 10% federal excise tax. Soon, if you pick up a pack of cigarettes purchased in the United States, you’ll be brought face-to-face with a large, graphic image of a diseased lung, an autopsied corpse, or a mouth full of sores and rotten teeth. Public health is also becoming a more prominent litigation risk for businesses. Manufacturers and distributors of harmful products like asbestos, tobacco, lead paint, firearms are facing not only private plaintiffs, but also federal, state, and city attorneys. Governmental plaintiffs have brought suit in their parens patriae capacity to vindicate the public’s interest in health and safety, making use of innovative legal strategies.

It used to be that problems like heart disease, diabetes, and cancer were brought to our attention primarily through public service announcements and warnings from our doctors urging us to eat better, exercise, stop smoking, and slather on sunscreen. These messages sought to bring home the dire consequences that would result from our unhealthy choices. But the more subtle message was that these problems were a matter of our choices, a matter of private concern and personal responsibility. That message is changing. As the government is taking on a greater role in paying for costly medical treatment, the public’s interest in preventing disease and injury is increasing. At the same time, public health research is revealing the important role played by social, economic,

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6 See section II.B., infra.
7 See Alexander Lemann, Sheep in Wolves’ Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act, 111 COLUM. L. REV. 121, 122 (2011) (“The doctrine of parens patriae gives a state standing to sue on behalf of its citizens. Although it derives from the “royal prerogative” granted to the King of England to sue on behalf of “helpless” subjects like children and the mentally incompetent, parens patriae has been expanded in the twentieth century by a series of Supreme Court decisions, and has been an increasingly popular vehicle for state attorneys general to vindicate the rights of their constituents.”
8 See id.
and environmental factors in constraining people’s behavior choices and
determining health outcomes.\textsuperscript{10} Influenced by the “new public health”
movement,\textsuperscript{11} public health law scholars have begun to redefine their relevance to
the science and practice of public health – as well as to the broader law and policy
community – by seeking to use law as a tool to promote public health.\textsuperscript{12} The
result is an emerging debate over the legitimate scope of the government’s role in
ensuring access not just to health care, but to healthy lifestyles and living
conditions as well. Increasingly, health threats like diabetes and heart disease are
not simply viewed as personal failures to be addressed through clinical prevention
and treatment. In the new era, they are seen as public problems amenable to
structural solutions.

The law and policy strategies of new public health are generating controversy
on multiple levels. Media pundits are arguing over whether new measures are too
paternalistic.\textsuperscript{13} In the academic literature, a handful of scholars have put forward
a critique of the rapidly expanding scope of public health as a field of science,
practice, and law.\textsuperscript{14} They have argued that the politics and law of public health
should be disconnected from the science of new public health as a means of
safeguarding individual liberty. And in the courts, litigants are arguing about

\textsuperscript{10} See section I.A., infra.
\textsuperscript{11} The “new public health” label has been used by public health scientists, ethicists, and legal
scholars. See THEODORE H. TULCHINSKY & ELENA A. VARAVIKOVA, THE NEW PUBLIC HEALTH
(2d. ed 2009); Awofeso, supra note 11; NEW ETHICS FOR THE PUBLIC’S HEALTH (Dan E.
Beauchamp & Bonnie Steinbock, eds., 1999); Wendy E. Parmet & Richard Daynard, The New
Public Health Litigation, 21 ANNUAL REVIEW OF PUBLIC HEALTH 437 (2000); Richard A. Epstein,
Let the Shoemaker Stick to His Last: In Defense of the “Old” Public Health, 46 PERSPECTIVES IN
\textsuperscript{12} See LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 21 (2d. ed. 2008)
(offering “a taxonomy of legal tools available to government and private citizens to advance the
public’s health: taxation and spending, alteration of the informational environment, alteration of
the built environment, alteration of the socioeconomic environment, direct regulation, indirect
regulation through the tort system, and deregulation.”); Scott Burris, From Health Care Law to the
1649, 1651-52 (2011) (describing the role of public health law research in “identifying and
ameliorating social causes of the country’s relatively poor level and distribution of health.”).
\textsuperscript{13} See, e.g., William Saletan, Then They Came for the Fresca: The Growing Ambitions of the Food
Police, SLATE (Sept. 22, 2009), http://www.slate.com/id/2229194/; Greg Beato, The Vanity Tax:
The Trouble with the Government’s New Tax on Indoor Tanning Services, REASON FOUNDATION
(June 17, 2010), http://reason.org/news/show/vanity-tax-tanning; Mario Rizzo, The Attack on
Dignity and Moral Autonomy: The Case of Cigarettes, THINKMARKETS (June 26, 2011),
http://thinkmarkets.wordpress.com/2011/06/26/the-attack-on-dignity-and-moral-autonomy-the-
case-of-cigarettes/.
\textsuperscript{14} See section I.B., infra.
which concerns are legitimately viewed as public in nature, such that doctrines privileging the role of the state should be brought into play.15

This article contributes to an emerging theoretical debate over the legitimate scope of public health law by linking it to a particular doctrinal debate that has arisen in the context of public nuisance litigation brought by state and local governments against industries that allegedly interfere with the public’s health. Both debates focus on the meaning of the “public” as a justification for government intervention. In public health law, the theoretical dispute is over what makes any particular health threat sufficiently public in nature to come within the realm of public health. In public nuisance law, the doctrinal dispute is over the meaning of “public rights,” interference with which is a key element of the public nuisance cause of action. A public nuisance is generally defined as a substantial and unreasonable interference with a right held in common by the general public.16 But there is considerable disagreement over what kinds of interests properly fall within the realm of “public rights.”17 In both disputes, the stakes are high. If a concern is designated as a public health threat, legal doctrines that privilege state intervention over private interests come into play. If a state or city government suit in parens patriae successfully establishes interference with a public right, the door is opened to flexible doctrines of causation and fault that make liability more likely. In both debates, critics of a broad definition of the public insist that it must be more than the mere aggregation of private interests. In theorizing a narrower conception of the “public,” some have attempted to define this “something more” in terms of public and private physical spaces. Others have defined it in economic terms by linking public health and public rights to the securing of public goods.

This article stakes out a middle position that adopts the classically liberal view of public health law critics – that state interference with individual liberty requires robust justification – while also defining the public broadly so as to justify considerable state intervention under the banner of public health. I agree with the initial premise of the critics that the public must be defined in terms of something more than the mere aggregation of private interests. But as a defender of a broad scope for public health law, I argue that neither of the narrower conceptions offered by critics – the public physical spaces approach nor the public goods approach – adequately accounts for the appropriate scope of the state’s authority and responsibility for public health. Drawing on my analysis of public nuisance litigation, I propose an alternative approach to theorizing the particularly “public” nature of public health threats. I suggest that the concept of “public bads” has been underutilized in justifying state intervention to promote public health. I also

15 See section II.C., infra.
16 See section II.A, infra.
17 See section II.C, infra.
argue that the economic understanding of public bads – as negative externalities that are inflicted on the public without consent – might be supplemented by an epidemiological understanding. Epidemiological harms – which I define as those for which causation can be established at the population level, but not necessarily at the individual level – should be understood as public bads. This concept has the potential to provide a more robust understanding of the public that may invoked in justification of public health interventions. Rather than advocating for a division between the science and politics of public health as a means of protecting individual liberty, my proposal seeks to root the new public health law movement even more firmly in the science of epidemiology as a means of incorporating the communitarian vision of public health within a legal tradition that is still fundamentally liberal.

In Part I, I describe the evolution of public health law in response to changing models of public health science and practice. I also describe the emerging liberal critique of the current “new public health” model – which emphasizes the role of social and environmental interventions to promote health – and the theoretical debate over the legitimate scope of public health law that has resulted. In Part II, I shift my attention to public nuisance law to provide a brief discussion of its historical development and doctrine with emphasis on its recent use against the asbestos, tobacco, lead paint, and firearm industries. I then introduce the doctrinal debate over the proper scope of the collectively held “public rights” that are vindicated through public nuisance suits. In Part III, I link these two debates, analyzing the narrower notion of the public put forward by critics in both contexts. In Part IV, I propose that protection of the public from “public bads”—understood in epidemiological, rather than merely economic, terms – should supplement securing of “public goods” as a justification for public health interventions and public nuisance liability.

I. Public Health Law

Public health focuses on health at a population, rather than individual, level. Its core science is epidemiology, and its core mission is explicitly progressive. Rather than being concerned with the treatment of medical conditions on a case-by-case basis, public health examines trends in health, illness, and injury in an

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18 Even the definition of epidemiology as a discipline has experienced evolution. See LEON GORDIS, EPIDEMIOLOGY 3 (3d ed. 2004) (“Epidemiology is the study of how disease is distributed in populations and the factors that influence or determine this distribution…. A broader definition … has been widely accepted. It defines epidemiology as ‘the study of the distribution and determinants of health-related states or events in specified populations and the application of this study to control of health problems.’ What is noteworthy about this definition is that it includes both a description of the content of the discipline and the purpose or application for which epidemiologic investigations are carried out.”).
effort to understand their causes and develop interventions to address them. In broad terms, public health has been described as “what we, as a society, do collectively to assure the conditions for people to be healthy.” The notion of the “common good” is fundamental to this enterprise:

The health of the public is [a] shared value. Not only does each individual have an interest in staying healthy but also all of us together share an interest in having a healthy population....[W]e may disagree about the best ways to promote the public’s health and how to weigh individual liberty against the welfare of the whole. Nevertheless, reducing disease, saving lives, and promoting good health are shared values, part of the common good.

Despite wide acceptance of the value of public health, interventions to protect it frequently generate political controversy, particularly when they make use of state authority. Public health law lives in the thick of this controversy: it defines the scope of the state’s authority and obligation to protect and promote the public’s health.

A. The Evolution of Public Health Law

Public health law is experiencing a massive transformation. For much of the twentieth century, it was defined primarily as the law of communicable disease control. Compulsory vaccination and treatment, isolation and quarantine, and surveillance of health data were its main subjects. Critics have argued that the

19 See Geoffrey Rose, Sick Individuals and Sick Populations, in Public Health Ethics: Theory, Policy, and Practice 20 (Ronald Bayer et al., eds., 2007).
21 Introduction: Ethical Theory and Public Health, in Public Health Ethics: Theory, Policy, and Practice 20 (Ronald Bayer et al., eds., 2007); see also Gostin, supra note 12, at 21 (“Social justice is viewed as so central to the mission of public health that it has been described as the field’s core value.”).
22 See Gostin, supra note 12, at 39.
“old” public health law of communicable disease control represents the legitimate scope of the field. They take issue with the current focus of public health law on chronic disease as well as acute communicable disease threats. They are particularly wary of the recent emergence of social epidemiology – which has exposed the crucial role of social, economic, and environmental factors in determining health outcomes – as an influence on public health law.

The development of public health law has always been influenced by expanding models of public health science and practice. Scholars have identified four basic eras in the history of public health, each with an accompanying paradigm for understanding the determinants of health: the miasma model, the agent model, the behavioral model, and the ecological model. Each model

25 See section I.C., infra.
27 My admittedly oversimplified typology draws heavily from two sources. In an influential 1996 article in the American Journal of Public Health, Mervyn Susser and Ezra Susser described three eras in epidemiology, each with its own dominant paradigm: “(1) the era of sanitary statistics with its paradigm miasma; (2) the era of infectious disease epidemiology with its paradigm the germ theory; and (3) the era of chronic disease epidemiology with its paradigm the black box.” They also suggested that a new paradigm, which they did not label, was on the horizon. Mervyn Susser & Ezra Susser, Choosing a Future for Epidemiology: I. Eras and Paradigms, 86 AM. J. PUB. HEALTH 668 (1996). See also Niyi Awofeso, What’s New about the “New Public Health”, 94 AM. J. PUB. HEALTH 705 (2004); P. Hanlon et al., Making the Case for a ‘Fifth Wave’ in Public Health 125 PUBLIC HEALTH 30 (2011); Elizabeth Fee, The Origins and Development of Public Health in the United States in OXFORD TEXTBOOK OF PUBLIC HEALTH: VOLUME I: THE SCOPE OF PUBLIC HEALTH (Roger Detels, et al., eds) (3d ed. 1997) reprinted in LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW AND ETHICS: A READER (1st ed. 2002). In their seminal article on the revival of public health law, Lawrence Gostin, Scott Burris, and Zita Lazzarini pointed to three conceptual models of public health: “microbial,” “behavioral,” and “ecological.” Gostin, et al., supra note 24, at 69, n. 23. The typologies offered by Gostin, et al. and Susser and Susser are admittedly oversimplified, as is my own. I have followed Susser and Susser in attributing each model to a particular historical era. The “evolution” story provides a useful way of understanding the development of public health law, but it does belie considerable overlap among the three models during any given time frame. See Roger Magnusson, Mapping the Scope and Opportunities for Public Health Law in Liberal Democracies, 35 J. L. MED. & ETHICS 571, 574 (2007) (“The 20th century reflects a gradual broadening of the determinants that are understood to contribute to states of health and illness in the population, and a growing realization of their complexity and inter-relationship. “This historical shift has important implications for public health law.”). I have re-labeled the “microbial” model described by Gostin, et al. as the “agent” model to reflect its applicability to non-infectious diseases. For example, applied to the problem of heart disease, the agent model might emphasize cholesterol as the agent and point toward the use of cholesterol lowering drugs. Upon close reading 15 years after its original publication, Susser and Susser’s “black box” paradigm – which “related exposure to outcome” with less attention to
represents a particular approach to combating disease and promoting health. The relevance of law and policy tools to the project of public health has varied from model to model, as has the type of controversy generated by their use.

The history of public health’s basic objectives and methods can be traced to the earliest civilizations, but the relationship between public policy and epidemiology as an organized scientific discipline dates back to the Sanitarian movement and its “miasma” model. In early nineteenth-century Western Europe and the United States, Sanitarians studied and sought to improve the physical environment in urban slums as a means of fighting disease. Sanitarians attributed disease to “poisoning by foul emanations from the soil, water, and environing air.” They studied variation in mortality rates “by [geographic] district and in relation to housing, infant care, and specific diseases.” They also “studied a wide range of industries and occupations; detected many hazards from dusts, heavy metals, and general working conditions; and conducted national surveys of diet, parasite-infested meat, and food contamination.” Based on their studies, they championed public expenditures on “[c]losed drainage and sewage systems, supplemented by garbage collection, public baths, and housing [as] remedies that would disperse miasma, reduce mortality and morbidity (as indeed they did), and dispel the poverty of the new urban poor (as indeed they did not).” They also advocated for comprehensive legislation to establish state and local health authorities and to regulate commercial activities harmful to the public’s health. In the United States, The Slaughterhouse Cases arose out of this effort. The U.S. Supreme Court upheld the efforts of the City of New Orleans to bring slaughterhouse operations under control as a means for protecting citizens from cholera outbreaks. In doing so, the Court affirmed the

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29 See generally id. at 168-269.
30 Susser & Susser, supra note 27, at 669.
31 Id.
32 Id.
33 Id.
35 The Slaughterhouse Cases, 83 U.S. 36 (1873) (The decision consolidated three similar cases).
36 The reading of the Fourteenth Amendment put forth in the Slaughterhouse Cases has generated harsh criticism, but the public health rationale behind the slaughterhouse regulation has been rehabilitated by scholars in recent years. See generally Ronald M. Labbé & Jonathan Lurie, The
preeminence of the state’s police power as a means for protecting “the security of the social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.”

Around the turn of the twentieth century, scientists conclusively determined that diseases were attributable to specific causes rather than to general environmental miasmas. The gradual identification of the bacteria, viruses and toxins responsible for illness made effective vaccination and medical treatment possible. It also resulted in a major shift toward the “agent” model of public health. Unlike the environmentally-focused interventions of the Sanitarians, the interventions associated with the agent model were applied to individuals. “The appropriate responses were to limit transmission by vaccines, to isolate those affected, and, ultimately, to cure with chemotherapy and antibiotics.” But vaccination and treatment can only eradicate an infectious disease at the population level if a high percentage of the population is immunized, creating community, or “herd,” immunity. The risks of immunization, perhaps amplified by mistrust, led some to resist. Legislators thus adopted compulsory measures to ensure adequate uptake. This period yielded the well-known and widely taught case of Jacobson v. Massachusetts, in which the U.S. Supreme Court upheld compulsory vaccination for smallpox. Relying on the “social compact [whereby] the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the ‘common good,’” the

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38 *Slaughterhouse Cases*, 83 U.S. at 62.


40 Susser & Susser, *supra* note 27, at 670 (describing germ theory as focusing on “single agents relating one to one to specific diseases.”).

41 Susser & Susser, *supra* note 27 at 670.

42 See Nat’l Inst. of Allergy and Infectious Diseases, *Community Immunity (“Herd Immunity.”)*, http://www.niaid.nih.gov/topics/pages/communityimmunity.aspx (last accessed July 6, 2011) (“When a critical portion of a community is immunized against a contagious disease, most members of the community are protected against that disease because there is little opportunity for an outbreak. Even those who are not eligible for certain vaccines—such as infants, pregnant women, or immunocompromised individuals—get some protection because the spread of contagious disease is contained.”). Of course, this is also the reason that herd immunity presents a potential free rider problem whereby a few who go unvaccinated by choice are able to benefit from the risks borne by those who opt for vaccination. See Gil Siegal, et al., *Policy, Politics, and Collective Action: An Account of Collective Actions in Public Health*, 99 AM. J. PUB. HEALTH (No. 9) 1, 1 (2009).


44 Id. at 27.
Court made clear that public health measures occupied a special place in American law. 45

As chronic, non-infectious diseases overtook communicable diseases as leading causes of death in wealthy countries, 46 the public health model shifted once again toward the “behavioral” model. 47 Initially at least, the medical etiology of these diseases was poorly understood, making the agent model inapposite. 48 In the second half of the twentieth century, problems like ischemic heart disease, certain cancers, and type-two diabetes were associated with behaviors like poor eating and exercise habits, tobacco consumption, and excessive sun exposure. 49 Later in the same period, HIV/AIDS was similarly associated with unprotected sexual intercourse and intravenous drug use. 50 Based on these observations, the behavioral model of public health advocated individual behavior change as a preventive approach. 51 Informing people of the risks associated with smoking, lack of exercise, or risky sexual behavior was seen primarily as a task for physicians counseling individual patients. 52 It was a

45 See Gostin, supra note 12, at 578.
46 See, e.g., J.P. Machenbach, The Epidemiological Transition Theory, 48 J. EPIDEMIOLOGY & COMMUNITY HEALTH 329 (1994); Susser & Susser, supra note 27, at 670 (“Shortly after [World War II] ended, it was clear that, in the developed world, rising chronic disease mortality had overtaken mortality from infectious disease. The rise was not owed to the aging of populations alone. In middle-aged men specifically, the rises in peptic ulcer disease, coronary heart disease, and lung cancer were in each case fast and frightening enough to earn place and title as epidemics.”).
47 See id. at 669-670
48 See id.
50 In response to the association of HIV/AIDS with particular behaviors (some of which are criminalized), advocates have emphasized the role of civil and political rights in promoting population health. See, e.g., Jonathan M. Mann, et al., Health and Human Rights, 1 HEALTH & HUMAN RIGHTS 6 (1999). More recently, public health law scholars have examined the role of law itself as a social determinant of health. They have noted that the criminalization of drug use, sex work, and certain sexual behaviors has created an environment that is not conducive to an effective public health response to HIV/AIDS. See, e.g., Scott Burris, et al., Racial Disparities in Injection-Related HIV: A Case Study of Toxic Law, 82 TEMPLE L. REV. 1263 (2010).
51 See Susser & Susser, supra note 27, at 670 (“Once the major infectious agents seemed all to have been identified and communicable disease no longer overwhelmed all other mortal disorders, the force of the germ theory paradigm faded.”).
At a time when behavioral interventions dominated public health’s approach to so-called “lifestyle” diseases, public health law became a considerably less important part of the American legal landscape. Its primary statutes were left unrevised and largely unused for decades.

Stymied in their efforts to convince people to change their behaviors, advocates and researchers began to investigate the ways in which social, economic, and environmental factors influenced and even constrained people’s behavior choices and health outcomes. Their model of public health expanded yet again to encompass not only the properties of the agent of disease or injury, not only the behaviors of the individual, but also the social, economic, and physical environment in which the agent and individual interact. The development of the now-dominant “ecological” model of health has been heavily

53 A notable exception during this era was found in the area of injury prevention. Seatbelt and helmet use were mandated by law in a growing number of jurisdictions, despite arguments that the behavior of going without these protections was primarily self-regarding and thus restriction of liberty was not warranted. Challenges to seatbelt and helmet laws were upheld, however, on paternalistic grounds as well as on the basis of the negative externalities imposed by risk-takers on society. Bans on smoking, particularly in confined public spaces such as airplanes and restaurants, also began to take hold. These were justified (via the harm principle) by the nuisance and health harms attributable to secondhand smoke.

54 See Magnusson, supra note 27, at 574 (noting that “public health went into decline in the post-war period; public health practitioners became role-bound as managers of state-provided clinical services, while research money followed the biomedical model.”).

55 See INST. OF MED., supra note 21, at 10 (calling on states to review their public health statutes and make revisions necessary to, inter alia, “support a set of modern disease control measures that address contemporary health problems such as AIDS, cancer, and heart disease.”).

56 See Susser & Susser, supra note 27, at 670 (“With the emerging predominance of chronic disease of unknown cause, under any credible causal paradigm the social and physical environment had now to be reckoned with once more.”); id. at 671 (“We know which social behaviors need to change, but we know little about how to change them, even when entire societies are at stake.”); Michael G. Marmot, Understanding Social Inequalities in Health, 46 PERSP. BIOLOGY & MED. S160 (2003) (comprehensively describing the social determinants of health).

57 See TULCHINSKY & VARAVIKOVA, supra note 11, at xxiv (“The New Public Health incorporates a wide range of interventions in the physical and social environment, health behavior, and biomedical methods, along with health care organization and financing.”); Magnusson, supra note 27, at 572 (“The modern paradigm for understanding the determinants of health and illness (both communicable and non-communicable) calls attention to a cascading set of influences. These range from ‘upstream’ social, economic, and environmental factors all the way down to individual behaviors, clinical interventions, and genetics.”); U.S. DEP’T OF HEALTH & HUMAN SERV., HEALTHY PEOPLE 2010: UNDERSTANDING AND IMPROVING HEALTH 16 (2d ed. 2000) (“Individual biology and behaviors influence health through their interaction with each other and with the individual’s social and physical environments. In addition, policies and interventions can improve health by targeting factors related to individuals and their environments, including access to quality health care.”).
influenced by social epidemiology, which demonstrates that socially, culturally, and materially disadvantaged people live shorter, less healthy lives. This association persists across nearly every type and degree of disadvantage that one can imagine. It seems to be firmly entrenched even in places with universal health care, suggesting that differential access to healthy living conditions and lifestyles plays a greater role in determining health disparities than differential access to medical care.

The ecological model places supposedly private, individual choices into their social context and emphasizes structural explanations for health behaviors and outcomes. In this view, eating a diet high in calories and fat and low in nutrients is not merely a matter of personal choice. It is a behavior that is influenced by environmental factors: an information environment that is loaded with commercial marketing and a food environment saturated with unhealthy options that are cheaper and more readily accessible than healthy choices. Not getting enough physical exercise is not simply a personal failure, it is a behavior influenced by a built environment that discourages walking for transportation and provides few opportunities for active entertainment. In turn, the information, food, and built environments that one lives and works within are dependent upon underlying social and economic factors. Poor neighborhoods have more fast food establishments and fewer full service grocery stores than middle-income neighborhoods. Children from low-income families are more likely to live in communities where public parks and playgrounds are in disrepair and where the threat of violence keeps people indoors. These are only a few of the factors that

58 See Marmot, supra note 51, at S160.
64 See, e.g., Gary Bennet, et al., Safe to Walk?: Neighborhood Safety and Physical Activity Among Public Housing Residents, 4 PLOS MED. 1599 (2007); Dustin Duncan, et al., Association Between
determine supposedly personal choices, and obesity is only one of the many health outcomes in which a social gradient is in evidence. Public health science is demonstrating that “[t]he poor sicken more than the rich not simply because they encounter more microbes or engage in less healthy behavior – their exposure and their behavior have social roots.”65 The question is whether the politics of public health will keep up with the science.66

The ecological model of health has opened up expansive new frontiers for public health law.67 As public health scientists and practitioners began to explore options for altering our environments and behaviors in ways that promote population health, they found that they once again had a need for lawyers and policymakers. Public health law began to evolve from “the law of infectious disease”68 toward a much broader discipline defined by Gostin in 2000 as:

> the study of the legal powers and duties of the state to assure the conditions for people to be healthy (e.g., to identify, prevent, and ameliorate risks to health in the population) and the limitations on the power of the state to constrain the autonomy, privacy, liberty, proprietary, or other legally protected interests of individuals for the protection or promotion of community health.69

Gostin’s influential treatise refers to “law as a tool for the public’s health” and identifies multiple models for legal intervention that range far beyond the body of public health statutes and regulatory codes.70 Gostin’s text reflects developments in public health practice. Public health advocates are working to develop and implement innovative, evidence-based regulatory solutions to a wide range of health problems.71 They are also increasingly involved in the development of groundbreaking litigation strategies.72

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65 Gostin, et al., supra note 24, at 75.
67 Magnusson, supra note 27, at 574 (“The recognition that health is … the product of the interaction of environmental, socioeconomic, behavioral, and biological factors, partially modified by medical interventions – opens up a variety of possibilities for public health policy.”).
70 See GOSTIN, supra note 12, at 21.
B. The Emerging Critique of Public Health Law’s Expanding Scope

The broadening of public health law to encompass a wide range of determinants of both infectious and non-infectious disease has been characterized as a modern revolution, and it has not been without controversy. Interventions such as bans on trans fats, sin taxes on tanning beds, and graphic warning labels on cigarettes have generated heated debate over the proper role for government intervention. Criticism of the new public health was to some extent inevitable. As Roger Magnusson has explained, “[t]he use of law as a policy tool to respond comprehensively to environmental exposures, unhealthy lifestyles, and accidental injuries threatens to impinge on the interests of a wide variety of industries, and to significantly expand sites for state intervention.” As Lawrence Gostin and Gregg Bloche have put it, “The ‘new’ public health has raised political conservatives’ ire … by extending its reach beyond the traditional domain of infectious disease to social and economic influences on population-wide health. In so doing, it has inquired into causal connections between ill-health and such powerful institutions as tobacco companies, industrial polluters, firearm manufacturers, and fast-food chains.” Certainly, the critical response to new public health is motivated in part by material interests. But it also arises out of deep-seated philosophical and cultural views about whether these modern threats to health should be treated as predominantly public or private in nature.


Epstein, supra note 11, at S143.

Magnusson, supra note 27, at 572.

See Lawrence O. Gostin & M. Gregg Bloche, The Politics of Public Health: A Response to Epstein, 46 PERSP. BIOLOGY & MEDICINE S160 (2003) (“The ‘new’ public health has raised political conservatives’ ire … by extending its reach beyond the traditional domain of infectious disease to social and economic influences on population-wide health. In so doing, it has inquired into causal connections between ill-health and such powerful institutions as tobacco companies, industrial polluters, firearm manufacturers, and fast-food chains.”).

Over the last several years, a handful of legal scholars— including Richard Epstein,78 Mark Hall,79 Mark Rothstein80 and Thaddeus Pope81— have articulated coherent and principled critiques of the expansion of the scope of public health law in response to the ecological model. Although each scholar has approached the issue from his own perspective, I detect an overarching project in their work as a whole. For the purposes of this article, I will characterize this project as an emerging liberal (in the classical sense) critique of the expanding scope of public health law. The critics of new public health note with considerable wariness that designating a problem as “public” changes the rules of the game.82 Epstein has argued that by labeling health behaviors like diet, exercise, smoking, and tanning as “public health” problems, we trigger legal doctrines that privilege heavy handed state intervention over protection of individual rights. “[T]he case for government intervention … gets that extra boost of legitimacy” when framed as a public health issue.83 Rothstein has offered perhaps the most eloquent statement of this position: “The broad power of government to protect public health includes the authority to supersede individual liberty and property interests in the name of preserving the greater public good. It is an awesome responsibility, and therefore it cannot and must not be used indiscriminately.”84

On a philosophical level, the debate over new public health arises out of a tension between public health’s communitarian foundations and the liberal foundations of American law and policy. “As public health is fundamentally an effort to promote … shared goals [of reducing disease, saving lives, and promoting good health], public health is a species of communitarianism.” Broadly conceived, it thus offers a distinctly different “language” for talking about “how a society balances considerations of personal responsibility and social accountability in public policies that impact health.”86 The dominant philosophy

79 Hall, supra note 66, at S202.
81 Pope, supra note 9.
82 See Magnusson, supra note 27, at 571 (“Debate about [the] goals and definitions [of public health law] reflects competing claims about the boundaries for the legitimate exercise of political and administrative power.”); Hall, supra note 66, at S202 (“These definitional boundaries [between public health law and public health science] matter a great deal because the law operates through categories, and classification has huge effects on how legal issues are analyzed.”).
83 Epstein, supra note 78, at 1424.
84 Rothstein, supra note 80, at 148-149.
85 BAYER, ET AL., supra note 22, at 20.
of American law, however, is liberalism – “a language centered on the values of freedom, self-determination, self-discipline, personal responsibility, and limited government.” Pope, a legal scholar trained in philosophy, has articulated the tension in terms of core values: “[l]iberalism demands that liberty limitation be carefully, narrowly, and thoroughly justified. Communitarianism, in contrast, holds that individual rights and social responsibilities are equivalent, and that liberty and the common good have equal standing.”

The four critics of new public health law diverge in their reasons for being skeptical of the expanding scope of public health. Epstein generally argues against all social and economic regulation unless it is rigorously justified in terms of market failure. In contrast, Hall and Rothstein have each indicated that they generally support the social agenda promoted by social epidemiology, but feel that this agenda should not be co-opted by public health. Their concerns are civil libertarian in nature. These different versions of liberalism – Epstein’s economic libertarianism and the others’ civil libertarianism – share the basic view that the degree of government intrusion supported by decisions like Jacobson v. Massachusetts is unjustified when applied to non-communicable disease threats and the social determinants of health. Pope’s view is more accommodating. He generally agrees with the agenda of new public health law, but feels that this agenda can be justified only in terms of hard paternalism and that efforts to justify

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87 Id. See also Scott Burris, The Invisibility of Public Health: Population-Level Measures in a Politics of Market Individualism, 87 AM. J. PUB. HEALTH 1607, 1608 (1997) (“to accept the rhetorical structure of market individualism is to accept a political language that has no words for public health.”).

88 Pope, supra note 9.


90 See Hall, supra note 66, at S208 (“Beyond the public health arena, there are other good reasons for the government to pursue the more general aims of education, taxation, regulation, and redistribution, but these are broader social and economic policies or they belong to legal realms other than health. Public health advocates can be commended for calling our attention to the health implications of social disparities, but health promotion should not be the primary objective of corrective measures.”); Rothstein, supra note 80, at 86 (“concerns about social justice should play a part in priority setting for public health. My point is simply that resolution of underlying socioeconomic and political problems is beyond the domain of public health.”).

91 See Hall, supra note 66, at S207 (noting that public health interventions to improve basic sanitation, living, and working conditions, including modern environmental and occupational health regulations are less problematic because “these measures affect primarily only property or economic interests, not personal liberty.”); Rothstein, supra note 80, at 85 (“One of the main reasons that I support a narrow definition of public health is that public health laws give public health officials a range of coercive powers to protect the population. Unless the scope of permissible governmental action is carefully circumscribed, there is a threat to civil liberties by governmental confiscation of property, restraint on the movement of individuals, mandating of medical examinations and similar measures.”).
it on other grounds – for example in terms of the aggregate costs that unhealthy lifestyles impose on society – are dishonest. For this reason, Pope is perhaps less a subscriber to the liberal critique than a describer of it.

The liberal critique advocates for a disconnect between public health science and practice. Hall and Epstein begin from the proposition that regardless of the validity of social epidemiology as a scientific matter, it does not necessarily follow that state authority to intervene “under the banner of public health” should be expanded.\textsuperscript{92} Epstein draws a distinction between “the conception of public health that is internal to the public health discipline, and the conception of public health as it has been understood outside the public health field by historians and lawyers who are interested in defining the appropriate use and limitations of the state power of coercion.”\textsuperscript{93} Similarly, Hall stresses the need “to more clearly differentiate between public health analysis and public health authority.” He seeks to divide public health into two “broad responsibilities”: (1) Advancing understanding and knowledge of the causes and patterns of health conditions in society; and (2) eliminating threats to public health. The first is the domain of public health as a scientific discipline. The second is the domain of public health law.\textsuperscript{94} Hall’s “central point” is that “public health law is much more limited than public health science.”\textsuperscript{95}

Epstein has posited a choice between the “old” public health of infectious disease control (by which he clearly refers to the agent model) and the new public health (by which he seems to refer to the ecological model). But, as legal historian William Novak has pointed out, this story isn’t quite right.\textsuperscript{96} In a sense, the “ecological” model represents a return to the basic approach of the Sanitarians – who argued that health issues “were societal and that the appropriate measures thus had to be applied across society.”\textsuperscript{97} The real tension here is between the behavioral model, which supported a cultural notion of personal responsibility for health behaviors, and the ecological model, which problematizes that vision. Although the agent model drew resources and attention away from the social

\textsuperscript{92} Epstein, supra note 11, at S154.
\textsuperscript{93} Id. at S138.
\textsuperscript{94} Hall, supra note 66, at S202.
\textsuperscript{95} Id.
\textsuperscript{97} Susser & Susser, supra note 27, at 669; compare with Michael Marmot, Social Determinants of Health Inequalities, 365 THE LANCET 1099, 1103 (2005) (“if the major determinants of health are social, so must be the remedies.”). See also Awofeso, supra note 11 at 706 (“public health seems to have come full circle”).
reform movement of the Sanitarians, it was the behavioral model that solidified the idea that lifestyle diseases were beyond the reach of public health law. The association of health outcomes with individual choices has major implications for whether health is viewed as a matter of public responsibility. As Gostin, Burris and Lazzarini have noted, “seeing public health predominantly as the control of risky behavior can quickly become, for cultural and political reasons, a warrant for treating health entirely as a matter of personal responsibility.” This view presents a challenge for advocates seeking to address modern health threats under the banner of public health law.

II. PUBLIC NUISANCE

This article seeks to move the theoretical debate over the scope of public health law forward by linking it to a particular doctrinal debate that has arisen in the context of public nuisance litigation. Public nuisance law and public health law share a common heritage in the police power of the state. A public nuisance is defined as an “unreasonable interference with a right common to the general public,” including “interference with the public health, the public safety, the public peace, the public comfort or the public convenience.”

98 Susser & Susser, supra note 27, at 670.
99 Magnusson, supra note 27, at 577 (“Society looks to the state to act decisively in response to risks posed by communicable diseases, contaminated food, toxic spills, and other ‘externally caused threats.’ But debate persists around the state’s responsibility to respond to risks over which individuals are presumed to have control, including obesity, smoking, and chronic disease.”).
100 Gostin, et al., supra note 24, at 72 (emphasis added); See also PARMET, supra note 23, at 111 (“[i]f individuals are assumed to be the masters of their own health, and if populations are viewed as mere aggregations of individuals, then the health of populations can be seen as a function of individual choices.”).
101 See Wendy E. Parmet, Legal Rights and Communicable Disease: AIDS, the Police Power and Individual Liberty, 14 J. HEALTH POL. & L. 741, 743 (1989) (“In American jurisprudence the public’s interest in preserving health was embodied in the concept of the ‘police power,’ a term that has lost much of its early meaning. The concept of the police power appears to have its roots in the law of nuisance and the common law principle that property rights are limited to the extent that they injure others. Thus the public, acting through the state, could regulate the rights of real property or contract to protect the public health and safety. More importantly, basic rights of property were limited by the needs of the public.’”). Like public nuisance law, early manifestations of public health law were focused on the state’s police power to limit property rights. See Robyn Martin, Domestic Regulation of Public Health: England and Wales in Law and the Public Dimension of Health 79 (Robyn Martin & Johnson, eds. 2001) (describing longstanding English public health legislation, which “does not have as its primary focus the promotion of health, nor does it particularly address the causes of ill health. The concern is with inadequate premises, on an understanding that ill health results from identifiable bodies escaping from a physical source.”).
103 Id.
Although public nuisance has a long history, advocates recently rediscovered it as a potentially powerful tool for protecting the environment and the public’s health. Over the past two decades, public nuisance claims have been filed against industries ranging from asbestos and tobacco to lead paint and firearms. But the unique characteristics of public health have been misunderstood and misrepresented in the adjudication of these claims.

Tort law has long been identified as a source of legal tools for protecting the public’s health. But some public health law scholars have struggled with the apparent disconnect between the population focus of public health and tort law’s predominant focus on individual, private harms. In many ways, public nuisance offers an alternative vision of tort that is far more amenable to the objectives of public health. It is, at its core, a tool for addressing public harms. It is a very old cause of action that advocates have made new again by applying

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104 See generally KENNETH P. ALEX ET AL., CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT xix (Clifford Rechtschaffen & Denise Antolini, eds., 2007) (describing “how committed and creative lawyers in the first decade of the new century have reengineered the old causes of action to make them potent new tools for dealing with some of the gravest and most persistent environmental problems we face.”).

105 See, e.g., David Kairys, The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law, 32 CONN. L. REV. 1175, 1178 (2000) (“Public nuisance is the only tort designed and equipped to protect the public from activities or conduct that is incompatible with public health, safety, or peace”); DONALD G. GIFFORD, SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION (2010) (identifying public nuisance litigation against product manufacturers as a form of public health litigation).

106 See section II.B., infra.


108 See Elizabeth Weeks Leonard, Tort Litigation for the Public's Health, in RECONSIDERING LAW AND POLICY DEBATES: A PUBLIC HEALTH PERSPECTIVE 206 (John G. Culhane, ed., 2011) (“Tort law’s core focus on ensuring individual compensation and protecting freedom of action seems antagonistic to public health’s core focus on population health and the common good.”); Pope, supra note 9, at manuscript 11-12 (noting that “[t]ort law remains a fine stop-gap[,] [b]ut it cannot replace regulation” as a tool for protecting public health); PARMET, supra note 23, at 224 (“Contemporary tort doctrine … frequently overlooks the importance of populations, focusing instead on the injuries, rights, and duties of individuals. By doing so, it impedes law’s ability to promote the health of both populations and the individuals it supposedly serves.”).

109 Some have suggested that the public nuisance cause of action, at least when brought by state and local government officials suing in parens patriae, is not properly understood as a tort at all, but is more closely related to the state’s exercise of its police power. See, e.g., Thomas Merrill, Is Public Nuisance a Tort? (forthcoming 2011); Karol Boudreaux & Bruce Yandle, Public Bads and Public Nuisance: Common Law Remedies for Environmental Decline, 14 FORDHAM ENVTL. L.J. 55, 74-75, 82 (2002) (“In public nuisance cases involving a private plaintiff, the action is in tort. These cases are conceptually different from a public nuisance brought by the sovereign, which is more analogous to an exertion of the police power of the state, as noted above, rather than tort.”).

110 The modern private nuisance cause of action originated as one of the three ancient assizes in twelfth century England – alongside trespass and disseisin – which a private landowner could use
it to some of the most complex problems of our time: the costs of tobacco use, gun violence, the contamination of our housing stock with lead paint, and climate change. These new applications have regenerated an old debate over the legitimate uses of public nuisance law. Most courts have been anxious to prevent these claims from going forward and they have sought to do so by tethering the cause of action using a wide range of procedural and substantive doctrines. This article focuses instead on the substantive dilemma at the heart of these cases: can the harm to health and welfare caused by industries that manufacture and distribute dangerous products be legitimately understood as interference with a public right?

A. The Doctrine of Public Nuisance

Public nuisance is perhaps best explained by way of reference to its cousin, private nuisance. Lawyers are generally much more familiar with private nuisance doctrine. For example, the owner of a hog farm producing noxious odors and other unpleasantness gets sued by neighboring property owners who argue that their right to enjoy their own property is being infringed upon by the defendant’s allegedly unreasonable use of its property. One kind of public nuisance claim is a fairly modest extension of this private nuisance doctrine. Imagine the hog farm is not just affecting its neighbors, but an entire town. At a certain point, this property-based private nuisance becomes a public one simply by virtue of the large number of people affected. But there is also another kind of public nuisance claim that does not necessarily have anything to do with the


111 See, e.g., Village of Pine City v. Munch, 44 N.W. 197, 197-98 (1890) (a nuisance is public “if it affects the surrounding community generally or the people of some local neighborhood.”).

defendant’s property use or the plaintiffs’ property enjoyment. It is this broader kind of claim that has sparked most of the legal and political controversy over nuisance.

In general, a public nuisance of the broader type is defined as a substantial and unreasonable interference with a right common to the general public. This right is sometimes referred to as a right “of the community at large,” or a “public right.” Section 821B of the Second Restatement of Torts “sweeps

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113 58 Am. Jur. 2d Nuisances § 31, at 592 (2002) (“A public nuisance, unlike a private nuisance, does not necessarily involve an interference with the use and enjoyment of land, or an invasion of another's interest in the private use and enjoyment of land, but encompasses any unreasonable interference with a right common to the general public. Thus, an action for public nuisance may lie even though neither the plaintiff nor the defendant acts in the exercise of private property rights.”); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002) (holding that nuisance claims are not limited to real property and can be maintained for injuries caused by a product’s design, manufacturing, marketing, or sale if the defendant’s conduct interfered with a common right of the general public).

114 Of course, even the more limited doctrine of private nuisance has generated its share of controversy. So much so that in the great majority of states, our hog farm would be able to proceed with little concern for private or public nuisance liability of the first kind. In all fifty states, “right to farm” statutes provide some degree of immunity from nuisance suits for farming operations that meet certain criteria, even where their industrial methods impose considerable burdens on the health and welfare of surrounding communities. See Rusty Rumley, A Comparison of the General Provisions Found in Right to Farm Statutes, 12 VT. J. ENV'T'L. L. 327 (2011).


116 Prosser, supra note 103, at 999; see also Ozark Poultry Prods. Inc. v. Garman, 472 S.W.2d 714, 716 (Ark. 1971); Fisher v. Zumwalt, 128 Cal. 493, 495-96 (both noting that public nuisance is usually limited to “an invasion of a right which is common to every person in the community”); see also People v. Rubenfeld, 172 N.E. 485, 486 (N.Y. 1930) (noting that to qualify as a public nuisance, “the number of persons affected need not be shown to be ‘very great.’ Enough that so many are touched by the offense and in ways so indiscriminate and general that the multiplied annoyance may not unreasonably be classified as a wrong to the community.”).

117 See, e.g., Ganim v. Smith & Wesson Corp., 780 A.2d 98 (Conn. 2001) (“Nuisances are public where they violate public rights, and produce a common injury, and where they constitute an obstruction to public rights, that is, the rights enjoyed by citizens as part of the public. . . . If the annoyance is one that is common to the public generally, then it is a public nuisance. . . . The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights.”); City of Phoenix v. Johnson, 75 P.2d 30, 34 (Ariz. 1938) (“A nuisance is common or public when it affects the rights which are enjoyed by its citizens as a part of the public, while a private nuisance is one which affects a single individual or a definite number of persons in the enjoyment of some private right which is not common to the public…. The distinction does not arise from any necessary difference in the nature or the character of the thing which creates a nuisance, but is based on the difference between the rights affected thereby.”); Copart Indus., Inc. v. Consol. Edison Co., 362 N.E.2d 968 (N.Y 1977) (quoted in City of New York v. A-J Jewelry & Pawn, Inc., 247 F.R.D. 296 (S.D.N.Y. 2007) (A public nuisance “consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all, in a manner such as to offend public morals, interfere with the use by the
broadly in defining a ‘public right,’”¹¹⁸ to include rights to “the public health, the public safety, the public peace, the public comfort, or the public convenience.”¹¹⁹ In the United States, the non-property based public nuisance claim has developed into a cause of action that can be brought primarily by state and local governments in their parens patriae role,¹²⁰ to address the contributions of a private actor to unhealthy living conditions or other unreasonable interference with collective interests.¹²¹ In the view of its proponents, “[a] public nuisance claim is the vehicle provided by civil law for executive-branch officials to seek immediate relief to stop and remedy conduct that is endangering the public.”¹²² In the view of its critics, it threatens to become “a tort where liability is based upon unidentified ills allegedly suffered by unidentified people caused by unidentified products in unidentified locations.”¹²³ The public nuisance cause of action has a venerable and distinguished pedigree that predates much of the rest of tort law. But its jurisprudence has appeared to most courts and commentators to be a hopeless hodge-podge that fails to provide any meaningful basis for determining when a party may legitimately avail itself of the cause of action. In earlier decades, it was ridiculed in colorful language by derisive commentators and distressed courts. It has been called a “monster that threatens to swallow whole the entire law of torts,”¹²⁴ “the dust bin of the law,”¹²⁵ and a collection of the “rag

¹¹⁹ RESTATEMENT (SECOND) TORTS § 821B(2)(a).
¹²⁰ Private plaintiffs can also bring suit if they are able to satisfy the “special injury” rule. See REST. (SECOND) TORTS § 821C(1) (1979) (stating that to recover damages, a private plaintiff must have “suffered a harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of the interference”). See also 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, 291(2001) (arguing that private actions for public nuisance “serve no defensible purpose and should be abolished”).
¹²¹ See, e.g., City of Miami v. Coral Gables, 233 So.2d 7, 8 (Fla. Dist. Ct. App. 1970) (public nuisance action brought by Coral Gables on behalf of its citizens against air pollution from an incinerator owned and operated by Miami); Village of Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824, 827 (Ill. 1981) (chemical waste disposal site alleged to be a public nuisance threatening “the health of the citizens of the village, the county, and the State”); Maryland v. Galaxy Chem., 1 Env’t Rep. Cas. (BNA) 1660, 1661-64 (Md. Cir. Ct. 1970) (public nuisance action brought by state on behalf of neighbors exposed to air pollution from a nearby chemical plant, some of whom claimed to have been injured by its emissions of toxic fumes).
¹²² Kairys, supra note 105, at 1176.
ends of the law.”

The same anxiety is palpable in court opinions adjudicating modern public nuisance claims – particularly the more novel claims against product manufacturers and distributors.

Public nuisance has been described by Victor Schwartz as a “super tort.”

It triggers standards of fault and causation that are less rigorous than those applied to personal injury claims. Public nuisance is generally understood as a form of strict liability,

at least in the context of suits brought by governmental plaintiffs.

But in recent decades, some courts have imposed a fault requirement on public nuisance claims.

Although the causation requirements are technically the same for nuisance as for any other tort, the way in which a nuisance claim is framed – as a claim based on a collective harm – alters the analysis. At least in theory, public nuisance plaintiffs, who are alleging harm to the public at large rather than to any particular individual or class of individuals, need only prove causation at the population level. They should not be required to establish causation with respect to any particular individual. In recent cases, however,


127 See, e.g., Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536 (3d Cir. 2001) (“If public nuisance law were permitted to encompass product liability, nuisance law ‘would become a monster that would devour in one gulp the entire law of tort.’”); In re Lead Paint Litigation, 924 A.2d 484, 494 (N.J. 2007) (“To permit these complaints to proceed … would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance.”); People ex rel Spitzer v. Sturm, Ruger & Co., Inc., 309 A.D.2d 91, 96 (N.Y. App. Div. 2003) (“Giving a green light to a common-law public nuisance cause of action today will … likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities.”).


129 Id.

130 Boudreaux & Yandle, supra note 109, at 62-63 & n.24 (arguing that “[i]n suits brought by the sovereign, liability for public nuisance is strict, however in private action on public nuisances cases the liability is based upon the defendant's negligence” but noting that “the liability issue in public nuisance is confused”).


132 Class action suits are like public nuisance suits in that they provide a means for collectivizing private claims. See Developments, The Paths of Civil Litigation, Part II - The Use of the Public Nuisance in Tort Against the Hand Gun Industry, 113 Harv. L. Rev. 1752, 1758-59 (2000). But class action suits are based on the aggregation of individual claims, unlike the claims at issue in public nuisance litigation, which are fundamentally collective.
some courts have misunderstood this point and imposed a requirement that governmental plaintiffs trace the harm from particular defendants to particular individuals.  

133 See, e.g., City of Chicago v. American Cyanamid Co., 823 N.E.2d 126, 134 (Ill. App. 1 Dist. 2005) (“plaintiff has failed to allege causation in fact because plaintiff has not identified any specific defendant as the source of any lead pigment or paint at any particular location.”); Whitehouse v. Lead Indus. Ass’n Inc., 2003 WL 1880120 (R.I. Super. Ct. Mar. 20, 2003); Lewis v. Lead Indus. Ass’n, 793 N.E.2d 869, 878 (Ill. App. 2003) (“the plaintiffs’ failure to identify the defendants who supplied the lead pigment used in the paint to which their children were exposed constituted a failure to allege facts in support of the causation element of the claim.”).

B. The Evolution of Industry-wide Public Nuisance Litigation

The great majority of public nuisance cases are of the property-based type, which involve the defendant’s use of its property in way that interferes with the rights of others. Beginning in the 1980s, however, advocates began to draw more heavily on the doctrine of “public right” nuisance, in circumstances where the harm to the public’s interest is not mediated via property in the possession or control of the defendant. This approach first took hold in the context of asbestos litigation. As asbestos building products deteriorate, they release fibers that are carcinogenic when inhaled. The dangers of asbestos became widely known in the 1980s and 1990s as a generation of (mostly) men, exposed to the material through their work decades earlier, began to be diagnosed with a rare and lethal cancer called mesothelioma. In response, regulations were adopted requiring the removal or other abatement of asbestos in school buildings. Property owners became concerned about potential tort liability for allowing asbestos to deteriorate on their properties. At the same time, individual victims of asbestos-related illnesses sued the asbestos industry, though their claims were often stymied by their inability to tie the injuries of individual plaintiffs to the products of particular manufacturers.

Eventually, public nuisance claims were filed against asbestos manufacturers by several municipalities and school districts suing in their capacity as property owners to recover abatement costs. These claims were not based on the argument that asbestos-containing buildings constituted a property-based nuisance. Rather, they claimed that the manufacture and distribution of asbestos products themselves constituted a nuisance. These non-property-based claims were

rejected by most courts. In *Detroit Board of Education v. Celotex Corp.*, for example, the court concluded that products liability, not public nuisance, was the proper avenue for bringing such a claim and that a product could not constitute a nuisance. Courts also relied on the argument that nuisance liability requires that the defendant have “control” of the nuisance. They concluded that this element could not be established in a case against a product manufacturer based on the harmfulness of its products because the product is in the control of another party (in these cases, the plaintiff property owners themselves) at the time that it caused harm.

“The watershed event” for industry-wide public nuisance litigation came in the 1990s, when several state attorneys general added public nuisance claims to their suits against tobacco manufacturers, shortly before the Master Settlement Agreement (MSA) was reached. Most of these suits had not yet resulted in a court ruling prior to the MSA, but one federal district court did rule on a public nuisance claim in *Texas v. American Tobacco Co.* The plaintiffs framed the claim in terms of intentional interference with “the public’s right to be free from unwarranted injury, disease, and sickness” and alleged that the defendants had “caused damage to the public health, the public safety, and the general welfare of

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138 *Celotex Corp.*, 493 N.W.2d at 513.


141 Schwartz & Goldberg, *supra* note 124, at 554. Others dispute the importance of public nuisance claims in turning the tide of tobacco litigation. See, e.g., Faulk, *supra* note 119, at 958 (noting that “many people wrongly credit the use of public nuisance claims with turning the tide against the tobacco industry” and arguing that “[t]he real turning point followed two dramatic events: the disclosure that tobacco companies concealed documents showing their knowledge of the addictive nature of smoking, and the nationwide coordinated effort of state-sponsored lawsuits.”). In any case, David Kairys has said that he saw the state tobacco litigation as a model for addressing the role of manufacturers and distributors to contributing to the problem of rampant gun violence. See Kairys, *supra* note 105, at 1172.

the citizens.” The federal district court dismissed the claim on the grounds that it was unsupported by Texas case law. Overall, however, the MSA was hailed as an enormous achievement by the state attorneys general. Many have pointed to this practical success as generating a groundswell of interest in public nuisance litigation, even though it had not produced any court opinions supporting its use.

Litigation against firearms manufacturers and distributors provided the first opportunity for significant numbers of courts to adjudicate public nuisance claims based on products inherently harmful to the public’s health and safety. Products liability had long been an avenue (though often a difficult one) for plaintiffs suing the firearms industry based on the harms associated with gun violence, but this litigation was different. David Kairys, a legal scholar who played a significant role in developing the public nuisance strategy, has described its origin and development. Kairys explains that in 1996, he was asked to serve on a gun violence taskforce for the city government of Philadelphia. The group also included police officers, prosecutors, and community and religious activists. They sought to address gun violence, not as a “regrettably normal phenomenon in our society,” but rather as an “intolerable, unacceptable” problem that they sought to “figure out.” Ultimately, the task force traced gun violence to an environment in which guns are readily available on the black market, thanks to the distribution practices of gun manufacturers and their wholesale distributors.

The public nuisance claims against gun manufacturers differed from the asbestos claims in that they were not based on allegations that the manufacture of guns by itself constituted a nuisance. Instead, the allegation was that specific distribution practices contributed to a public nuisance by facilitating an illegal

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143 Id. at 956.
145 Schwartz & Goldberg, supra note 124, at 554-55.
147 Kairys, supra note 105, at 1164. The public nuisance litigation strategy was first developed in Philadelphia, but the mayor of Philadelphia eventually backed away from filing suit and chose instead to collaborate with the National Rifle Association to lobby for additional federal funds for law enforcement. The strategy was quickly picked up by other city and state governments, however. See Carl T. Bogus, Gun Litigation and Societal Values, 32 CONN. L. REV. 1353, 1353-1356 (2000).
148 Id. (emphasis in original).
149 Id.
market for guns. Manufacturers and wholesale distributors were alleged to contribute to the nuisance through two principal means: First, by continuing to sell to a small number of distributors that were known to be responsible for a vastly disproportionate share of guns used in crime. Second, by knowingly distributing more guns to areas with loose gun laws that were geographically close to areas with strict gun laws.\textsuperscript{150} Although the majority of these suits were unsuccessful,\textsuperscript{151} a few courts allowed them to proceed to trial.\textsuperscript{152} Those that did typically followed the plaintiffs’ lead in focusing on the characterization of the defendants’ particular marketing and distribution practices, and not the products themselves, as contributing to a nuisance. For example, the Ninth Circuit held that a nuisance claim brought by a group of private plaintiffs was “not about the manufacture or distribution of a defective or properly functioning product … but rather allege[d] affirmative conduct on the part of manufacturers and distributors that fosters” a nuisance.\textsuperscript{153} Similarly, the Supreme Court of Ohio emphasized the argument that the defendants “control the creation and supply of [the] illegal, secondary market for firearms, not the actual use of the firearms that cause injury.”\textsuperscript{154} However, this approach was far from universally successful. Ultimately, the litigation was effectively cut off by Congress via the Protection of Lawful Commerce in Arms Act.\textsuperscript{155}

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\textsuperscript{150} Kairys, supra note 105, at 1170-71. See also City of Gary ex rel. King v. Smith & Wesson Corp., 801 N.E.2d 1222 (2003) (“The City has alleged that (1) dealers engage in illegal sales, and (2) the distributors and manufacturers know of their practice and have it within their power to curtail them but do not do so for profit reasons.”). Plaintiffs in these cases submitted evidence that the “movement of guns from the industry’s lawful distribution channels into the illegal market” was discussed in industry meetings and that the industry has “long known that greater industry action to prevent illegal transactions is possible and would curb the supply of firearms to the illegal market.” Eric Kitner, Bad Apples and Smoking Barrels: Private Actions for Public Nuisance Against the Gun Industry, 90 IOWA L. REV. 1163, 1187 (quoting Robert Ricker).


\textsuperscript{152} See City of Gary ex rel. King, 801 N.E.2d at 1222 (holding that plaintiff's allegations were sufficient to allege an unreasonable chain of distribution of handguns sufficient to give rise to a public nuisance generated by defendants); City of Boston v. Smith & Wesson Corp., No. 1999-02590, 2000 Mass. Super. Ct. LEXIS 352, at *63-64 (July 13, 2000) (“To be sure, the legal theory is unique in the Commonwealth but ... that is not reason to dismiss at this stage of the proceedings.”); Cincinnati, 768 N.E.2d at 1136 (allowing a public nuisance claim to proceed).

\textsuperscript{153} Ileto v. Glock Inc., 349 F.3d 119, 121 (9th Cir. 2003).

\textsuperscript{154} Cincinnati, 768 N.E.2d at 1136.

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manufacturers, distributors, and dealers based on criminals’ unlawful use of guns. It also called for the immediate dismissal of pending suits.\textsuperscript{156}

A couple of years into the firearms litigation, advocates sought to use a similar strategy against the lead paint and pigment industry in several states.\textsuperscript{157} When lead paint deteriorates, it produces dust and flakes that can easily be ingested by small children. Ingestion of lead, even in small quantities, during the early years of life when children’s brains are developing rapidly, has been associated with “measurable changes in children’s mental development and behavior” including “hyperactivity; deficits in fine motor function, hand-eye coordination, and reaction time; and lowered performance on intelligence tests.”\textsuperscript{158} Although the link between lead paint and childhood lead poisoning was established more than a century ago,\textsuperscript{159} it wasn’t until 1971 that the United States Congress passed the Lead-Based Paint Poisoning Prevention Act,\textsuperscript{160} and the ban didn’t go into effect until 1978. The ban has meant that newly-built homes are lead-free, but much of housing stock in the United States pre-dates the ban.\textsuperscript{161} Although average blood lead levels (BLLs) among Americans declined rapidly in the years immediately following bans on lead in gasoline and paint, approximately 2.2% of children between the ages of one and five still have BLLs associated with significant health impacts.\textsuperscript{162}

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\item[156] Id.
\item[157] Faulk, supra note 119, at 1013 (describing suits in Wisconsin, California, Rhode Island and New Jersey); Schwartz & Goldberg, supra note 124, at 559 (describing the partnership between the Rhode Island Attorney General’s office and private, contingency-fee counsel).
\item[159] Child lead poisoning was first diagnosed in 1897, and was linked to lead-based paints in 1904. GOLDFRANK, GOLDFRANK’S TOXICOLOGIC EMERGENCIES 1310 (8th ed., McGraw-Hill Professional 2006). A handful of European countries banned the use of interior white-lead paint in 1909. The League of Nations adopted a similar ban in 1922. GILBERT, SG & WEISS, B, A Rationale for Lowering the Blood Lead Action Level from 10 to 2 microg/dL., 27 NEUROTOXICOLOGY 693, 693–701.
\item[161] Joseph Pargola, Childhood Lead Poisoning—Combating a Timeless Silent Killer, 37 RUTGERS L. REC. 300, 301 (citing U.S. Census Bureau, http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2008_3YR_G00_DP3YR4&-ds_name=ACS_2008_3YR_G00_&-_lang=en&_sseq=on, (last visited Apr. 6, 2010)).
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Advocates had attempted to use a variety of legal strategies to require – and in some cases subsidize – the abatement of lead paint in housing. They also filed lawsuits on behalf of children with elevated BLLs, but these proved even more difficult than asbestos suits. Because there is no “signature” injury that is linked to lead exposure in the way that mesothelioma is linked to asbestos, establishing causation was particularly difficult. Reduced intellectual capacity and behavioral problems can be caused by a wide range of factors, many of which are frequently present simultaneously for any particular child who has an elevated BLL. Epidemiological data strongly supports the association between exposure to lead paint and increased prevalence of low IQ and behavioral problems at the population level. But it can be extremely difficult to establish causation with respect to any particular individual.

Public nuisance litigation offered a potential alternative to suits based on individual harms, but its success has been limited. The public nuisance claims were based on the theory that the presence of lead pigment in homes and other buildings constitutes an unreasonable interference with public health and safety and that the defendant manufacturers and distributors contributed to this nuisance. The Rhode Island Attorney General achieved a highly publicized victory in the form of a jury verdict that was initially upheld by the state trial court. But the verdict was later overturned by the Rhode Island Supreme Court and courts in other jurisdictions rejected similar claims. The lead paint plaintiffs had a more difficult time than the firearms plaintiffs in framing the nuisance at issue as associated with the defendants’ affirmative conduct rather than the product itself. For example, the New Jersey Supreme Court characterized the defendants’ conduct as “merely offering an everyday household product for sale.” This framing of the nuisance at issue as the product itself left the claims susceptible to dismissal on the grounds that the defendants lacked control over the nuisance at the time that it caused harm. To the extent that the nuisance is understood to

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165 Richard L. Canfield et al., Intellectual Impairment in Children with Blood Lead Concentrations below 10 g per Deciliter, 348 NEW ENG. J. MED. 1517 (2003).
168 In re Lead Paint Litig., 924 A.2d 484.
169 See, e.g., id. at 499 (N.J. 2007); Lead Indus Ass’n, Inc., 951 A.2d at 455 (overturning jury verdict and trial court order because plaintiffs had failed to establish that the manufacturers
be the product itself, manufacturers cannot be said to control it after it is sold to consumers. Nonetheless, despite an overall trend toward rejection of industry-wide public nuisance liability, as recently as June 2011, several California municipalities reached an $8.7 million settlement in a suit against the lead paint industry.170

Industry-wide public nuisance claims also received a recent boost from the decision of the Second Circuit to allow a public nuisance suit to proceed against the coal-fired power plant industry based on the harms associated with climate change.171 The decision was ultimately overturned, however, by the Supreme Court in June 2011.172 Climate change public nuisance litigation has been split between more typical environmental nuisance litigation based on emissions from the defendants’ property and innovative industry-wide nuisance litigation based on greenhouse gas emissions from defendants’ products. The suit that was eventually rejected by the U.S. Supreme Court after being allowed to proceed by the Second Circuit was a more traditional property-based environmental nuisance case.173 The defendants were operators of coal-fired power plants that emit greenhouse gasses from their properties. A suit that was withdrawn by the plaintiffs in 2009 after an adverse federal district court ruling was more akin to the suits against the lead paint and firearms industries. The defendants in California v. General Motors were automobile manufacturers and the public

interfered with a public right or that they were in control of the lead pigment at the time that it caused harm to Rhode Island children. Courts dismissing firearms public nuisance claims relied on similar arguments. See, e.g., Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055 (N.Y. 2001) (finding no duty because gun manufacturers did not control criminals with guns, and injuries were too remote); Camden, 273 F.3d 536 (holding the causal chain between manufacture of handguns and municipal crime-fighting costs was too attenuated to attribute sufficient control to manufacturers to make out a public-nuisance claim); City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415 (3d Cir. 2002) (holding that even though illegal use of firearms may constitute a public nuisance, defendant was not liable because the firearms were no longer under its control).


171 Connecticut, 582 F.3d at 367 (alleging that emissions from smokestacks of coal-fired power plants contributed to the public nuisance of climate change).


173 Conn v. AEP (alleging that emissions from smokestacks of coal-fired power plants contributed to the public nuisance of climate change).
nuisance claim was based on the contribution of the defendants’ products to climate change via their emissions after they were sold and used by consumers.174

C. The Scope of Public Rights in Public Nuisance Law

The uniquely public nature of public nuisance is in danger of being lost amid the current backlash against the cause of action. A handful of tort law scholars – including Donald Gifford,175 Victor Schwartz, and Phil Goldberg176 – have articulated a scathing (and influential) critique of what they view as a proposed expansion of public nuisance liability. They have argued that public nuisance claims against products manufacturers should be dismissed because they can only be properly brought under products liability law. Several courts have reached the same conclusion,177 effectively rejecting the non-property based, “public rights” version of the public nuisance tort. Public nuisance advocates have disagreed sharply with this view, arguing that products liability is simply not the proper framework for understanding the harm that these suits have attempted to address.178 They have viewed public nuisance claims as a means of addressing the underlying causes of social ills, not as a means of marginally increasing the safety of particular products.179

Courts sense (rightly, I think) that they must be cautious about when plaintiffs are allowed to take advantage of the flexible fault and causation doctrines associated with public nuisance.180 They have been anxious to dismiss industry-

176 Schwartz, supra note 24, at 552.
177 See, e.g., City of Chicago v. American Cyanamid Co., 823 N.E.2d. 126 (Ill. App. 2005) (finding persuasive defendants’ argument “that plaintiff cannot escape the requirement of showing causation in fact by stylizing a products liability claim as a public nuisance action”).
178 See, e.g., Kairys, supra note 105, at 1172 (“preliminary research showed that product liability, I thought, was problematic because handguns aren’t defective. That’s not the problem; they work quite well – too well, by my light.”).
179 Developments, The Paths of Civil Litigation, Part II - The Use of the Public Nuisance in Tort Against the Hand Gun Industry, 113 HARV. L. REV. 1752, 1758-59 (2000) (describing municipal suits against tobacco firms and handgun manufacturers as novel forms of collectivization: “Such litigation takes advantage of the civil law’s flexibility to respond to newly recognized problems and exploits its substantive reach to go beyond the crimes at issue to address their alleged underlying causes.”). Public nuisance suits differ from class action suits however, in that class action suits are fundamentally premised on the aggregation of individual claims, whereas public nuisance suits are premised on a collective harm.
wide public nuisance claims, but their opinions taken as a whole fail to articulate a consistent, principled basis for doing so. In many cases, courts have applied more stringent doctrines of fault and causation from personal injury law to public nuisance claims, effectively watering down the power of public nuisance by making it less different from negligence analysis. Public nuisance advocates have attempted to clarify the principled distinctions between public nuisance claims arising out of public harms and private claims arising out of similar harms to individuals. But many courts have remained unpersuaded. The result is that most courts have dismissed industry-wide public nuisance claims without determining how best to define “public rights” as a means of delineating the boundary between a properly alleged public nuisance and other kinds of tort claims.

The public right element has been described as “the sine qua non of a cause of action for public nuisance.” It has its basis in the same community-focused theory that animated the foundation of American public health law. In his 1893 Treatise on the Law of Nuisance, H.G. Wood referred to public nuisance as “a part of the great social compact to which every person is a party, a fundamental and essential principle in every civilized community, that every person yields a portion of his right of absolute dominion.” As one of the courts most amenable to public nuisance claims, the California Supreme Court has similarly defined

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182 See, e.g., American Cyanamid Co., 823 N.E.2d at 134 (“[T]he Plaintiff asserts that because it is a governmental plaintiff it is not required to identify which defendant manufactured the paint found on each surface in Chicago where lead-based paint now constitutes a hazard…. Plaintiff notes that, in the present case, it is not seeking to recover for an injury to a particular person or property but, instead, it is asserting the right of the public as a whole to be free from threats to its health and safety.”).
183 See id. (rejecting the plaintiff’s causation analysis and, in doing so, falling back on requiring a tie to property via the causation requirement: “there is no reported Illinois public nuisance case involving a viable lawsuit brought by any municipality in which identification and causation, including the specific location of the nuisance, were not known.”).
184 See, e.g., City of Chicago, 821 N.E.2d at 1113 (noting that although the majority of public nuisance firearms suits had been dismissed on some grounds, no court had dismissed a public nuisance suit against firearms manufacturers and distributors on the basis of “failure to properly plead the existence of a public right affected by the alleged nuisance.”).
185 58 Am.Jur.2d Nuisances § 39 (2002) (quoted in City of Chicago at 1115); see also City of Chicago, 821 N.E.2d at 1113-14 (“the first element that must be alleged to state a claim for public nuisance is the existence of a right common to the general public”).
186 H. Wood, A Practical Treatise on the Law of Nuisances, In Their Various Forms; Including Remedies Therefore at Law and in Equity § 1, at 1-3 (3d ed. 1893).
public nuisance as an “interference with collective social interests,” noting that it is this “community aspect of the public nuisance … that distinguishes it from its private cousin, and makes possible its use, by means of the equitable injunction, to protect the quality of organized social life.” The court similarly noted that “[t]he public nuisance doctrine … embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century.”

Despite wide agreement that interference with a public right is the central element of a public nuisance, courts and commentators have struggled in their attempts to use the public right element as a potential means for defining the substantive scope of the cause of action. The Restatement’s broad formulation of a public nuisance as involving “a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience” has been widely quoted but rarely dispositive. The criteria set forth in the second edition of American Jurisprudence are only slightly more instructive. A public nuisance “must affect an interest common to the general public, must produce a common injury, or be dangerous or injurious to the general public, or it must be harmful to the public health, or prevent the public from a peaceful use of their land and the public streets, or there must be some direct encroachment on public property.”

In the context of recent litigation against the firearms and lead paint industries, courts that have considered the application of the public right requirement in detail have been split as to whether public rights are implicated. Courts allowing public nuisance claims to proceed have typically framed the public right at issue in broad terms that echo those of the Restatement. In Young v. Bryco Arms (a firearms case), for example, an Illinois court was swayed by the plaintiffs’ fairly broad assertion that “the rights of plaintiffs and others to use the streets and public

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188 People ex rel. Gallo v. Acuna, 929 P.2d 596, 603 (1997) (California S.C. enjoined, at the suit of San Jose, a widely described number of street gang members from conducting their violent and intimidating gang-like activities in a San Jose neighborhood. The court found that citizens had suffered particular damage through the gang activities that constituted a public nuisance.).
189 See, e.g., Young v. Bryco Arms, 765 N.E.2d 1 (Ill. App. 2001) (“[t]he first element that a plaintiff must allege in order to state a claim for public nuisance is the existence of ‘a right common to the general public.’”).
191 For the rare exception, see, e.g., Ileto v. Glock, Inc., 349 F.3d 1191 (9th Cir. 2003) (noting that California had adopted the Restatement’s five categories of public rights, [public health, safety, peace, comfort, or convenience] and then parroting without discussion the plaintiffs’ complain that the plaintiffs’ gunshot injuries were violations of their public rights to “health, safety, and welfare”).
ways without fear, apprehension and injury” amounted to a public right. 193 Similarly, in *Lewis v. Lead Industries Ass’n* (a lead paint case), another Illinois court noted that “[t]he public health and safety are common rights an interference with which is sufficient to support a public nuisance claim.” 194 For the most part, however, courts that have explicitly considered the public right element have rejected such broad assertions. In a firearms case, the Illinois Supreme Court rejected a public right to be “free from unreasonable jeopardy to health, welfare, and safety, and from unreasonable threats of danger to person and property, caused by the presence of illegal weapons in the city of Chicago.” 195 Similarly, in overturning the jury verdict for the plaintiffs in the Rhode Island lead paint case, the state Supreme Court rejected the public right “to be free from the hazards of unabated lead,” noting that “this contention falls far short of alleging an interference with a public right as that term traditionally has been understood in the law of public nuisance…. The state’s allegation that defendants have interfered with the ‘health, safety, peace, comfort or convenience of the residents of the [s]tate’ standing alone does not constitute an allegation of interference with a public right.” 196 This argument ignores near-universal adoption of the Restatement’s formulation of substantial interference with the public’s health as firmly entrenched within the scope of interference with a public right. It also disregards the role of state and local government officials suing in their *parens patriae* role, which has long been understood to encompass public health protection as a goal.

## III. Theorizing the Public

Although the theoretical debate over new public health law and the doctrinal debate over industry-wide public nuisance litigation have each generated substantial scholarly commentary, no one has noted the parallels between them. 197

193 *Bryco Arms*, 765 N.E.2d 1; accord *Ganim*, 780 A.2d 98. Other courts have held, however, that the concept of unreasonable interference with public rights does not include the sale and distribution of handguns that pose a threat to public safety. See, e.g., *Philadelphia*, 277 F.3d at 421-22; *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 541-42 (3d. Cir. 2001).


195 *City of Chicago*, 821 N.E.2d at 1114.

196 Id.

197 Although Epstein has written separately about public nuisance law, see Richard A. Epstein, *Federal Preemption, and Federal Common Law, In Nuisance Cases*, 102 NW U. L. Rev. 551 (2008) (discussing property-based public nuisance claims), he has not explicitly connected his two critiques. He specifically includes “public nuisances like widespread pollution” as among the proper objects of “old” public health law. But in his work on the scope of public health law, he has not referred to public nuisance litigation against product manufacturers. Epstein, *supra* note 78, at 1425. In arguing that the “new” public health approach “extends regulation into
In both contexts, as described above, designating a concern as “public” alters the way in which it is balanced against protections for individual rights and interests. To borrow William Novak's formulation, the public label designates “a special sphere of social activity, distinctively cognizable as an object of governance.”\(^{198}\)

Both debates have been triggered by advocates’ efforts to reach beyond the immediate causes of modern social problems to address their underlying roots. In doing so, advocates have attempted to make use of venerable legal tools for addressing public problems. In response to perceived overreaching, critics of a broader scope for public health and public rights have argued for a more circumscribed understanding of the “public.”

While Hall, Epstein, Pope and Rothstein have focused on what happens “When Epidemiologists Become Lawmakers,”\(^ {199}\) public nuisance litigation to address product-caused harms might be understood as what happens When Epidemiologists Become Litigators. Kairys, in his role as public nuisance advocate, explicitly turned to the terminology of public health to describe the firearms market:

> What was clear to me was that the... moving force for demand in this industry is fear. You can think of it as an epidemic, as the public health people might think of it, but it’s an epidemic that’s spread not by a virus or a bacteria. It’s an epidemic that’s spread by fear. And unlike most epidemics, the cause is also posed as the solution. The solution – more guns – just further spreads the epidemic.

This use of the term “epidemic” with respect to non-communicable threats to health has been decried by Epstein as fostering a predisposition toward government intrusion as an appropriate response.\(^ {200}\) For Epstein, modern public health epidemics like obesity and diabetes are not “epidemics” at all. Indeed, Epstein points to the “epidemic” label as having implications similar to those of the public label: “There are no non-communicable epidemics..... [T]he designation of obesity as a public health epidemic is designed to signal that state coercion is appropriate, and it is just that connection that is missing.”\(^ {201}\)

Writing about the scope of public health law, Hall cautions that the public health perspective tends toward a “habit of thought” whereby “having identified a causal connection to a widespread health problem, action is necessary to eradicate the


\(^{199}\) Hall, *supra* note 66, at S202.

\(^{200}\) Epstein, *supra* note 11, at S154.

\(^{201}\) *Id.*
cause and eliminate the problem at its source, and it falls within the authority of public health or other government officials to take the necessary actions.” He could just as easily have been describing David Kairys’s story about the gun violence task force.

David Kairys’ account of how the firearms public nuisance litigation came to be, described above, suggests that it arose out of exactly the sort of “root cause” analysis that the ecological model of public health has sought to promote. The distinction between the product liability strategy and the public nuisance strategy maps nicely onto the contrasting models of public health described above. Products liability claims aimed at altering the design of particular firearms, for example, are more in line with an agent model of gun violence. If the gun is the specific cause of the injury, then the solution is to alter the gun itself. The individually-oriented causation analysis applied to products liability also maps onto the agent model of public health by focusing on establishing clear ties between specific causes and specific outcomes. On the other hand, public nuisance claims against the firearms industry as a whole to address marketing and distribution practices that influence where guns are located is more in line with an ecological model. The public nuisance suits put forward an alternative lens for understanding harmful products such as firearms as posing “an environmental threat as well as [being] the object of a series of commercial transactions that caused a clustering of individual illnesses through product exposure.”

The efforts of public health and public nuisance critics to theorize a narrower vision of the public have proceeded from the presumption that it must be more than the mere aggregation of individual interests, rights, or harms. Efforts to define what this “something more” might be have thus far proceeded along two main paths. Some have turned to theoretically specious means for designating a private sphere in which harms cannot be conceived of as “public.” Others have turned to the conception of indivisible public goods. Both conceptions lead to relatively narrow grounds of justification for restraints on liberty, even in the hands of proponents of a broader understanding of public health.

A. Aggregation Is Insufficient

Hall has described the “key insight” of his critique of public health law as follows: “in the legal arena, public has a specialized meaning that is quite different from ordinary parlance. In the legal arena, public does not simply mean

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202 Gifford, supra note 105, at 84 (emphasis added).
Pope puts a similar insight in terms of identifying an appropriate liberty limiting principle for public health interventions. He notes the argument by Mary Ann Glendon and others that many behaviors that are seemingly purely self-regarding behaviors (those posing no risk of harm to others and thus properly conceived of as “private”) in fact impose economic costs on society in the form of medical expenses and lost productivity. But Pope disputes this as a justification for government intrusion: “[W]hile there may be cases in which aggregate de minimus self-regarding harm becomes collective harm, more is needed before the mere invocation of ‘the community’ justifies limiting liberty.”

Dan Beauchamp, a pioneer in theorizing the ethical foundations of the ecological model of public health, expressed a similar sentiment in championing a broad conception of public health. And he did so decades before Hall and Epstein offered the same notion as a critique.

The public or the people were presumed to have an interest, held in common, in self-protection or preservation from threats of all kinds to their welfare. The central principles underlying the police or regulatory power were the treatment of health and safety as a shared purpose and need of the community and (aside from basic constitutional rights such as due process) the subordination of the market, property, and individual liberty to protect compelling community interests. In this scheme, public health and safety are not simply the aggregate of each private individual’s interest in health and safety, interests which can be pursued more effectively through collective action.

Notably for my purposes, Beauchamp’s statement could just as easily have been written in reference to the definition of public rights in public nuisance law.

This rejection of the “public” as merely “widespread” has been equally crucial in courts’ and commentators’ rejection of the existence of a public right in the firearms and lead paint litigation. Courts have expressed the idea that aggregated private harms are not grounds for a “public rights” public nuisance claim. For example, in City of Chicago v. Beretta U.S.A. Corp, the court “quer[ied] whether

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204 Hall, supra note 66, at S204.
205 Pope, supra note 9, at manuscript 32.
206 See, e.g., Dan E. Beauchamp, Public Health As Social Justice, in NEW ETHICS FOR THE PUBLIC’S HEALTH 101 (Dan E. Beauchamp & Bonnie Steinbock, eds., 1999) (article originally appeared in 1976) (“our most intractable public problems … result in significant part from arrangements that are providing substantial benefits or advantages to a majority or to a powerful minority of citizens…. It is not sufficiently appreciated that these same bleak realities plague attempts to protect the public’s health.”).
the public right asserted by plaintiffs is merely an assertion, on behalf of the entire community, of the individual right not to be assaulted.\textsuperscript{208} Similarly, the New Jersey Supreme Court, in In re Lead Paint Litigation, expressed skepticism as to “whether the condition addressed [lead paint exposure] truly affects a common right rather than merely affecting many people.”\textsuperscript{209} In overturning a jury verdict holding lead paint manufacturers liable for contributing to a public nuisance, the Rhode Island Supreme Court noted that the meaning of “public right” could not be so broad as “to encompass all behavior that causes a widespread interference with the private rights of numerous individuals.”\textsuperscript{210}

The collective/individual distinction is referenced in a comment to the Restatement, which cautions that a public right “is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.” Donald Gifford and others have built on this distinction to argue that conduct that harms a large number of people does not necessarily interfere with a public right. In many cases, widespread harms are better understood as a simple aggregation of individual harms without any special significance for communal interests. Gifford uses the example of contaminated hamburgers to illustrate the point:

> Even if the owners of a fast-food chain were to sell millions of defectively produced hamburgers causing harm to millions of people who ate them, the violation of rights is a series of separate violations of private rights – typical tort or contract rights that the consumers might have – not a violation of the rights of the general public, or of the public as the public. The sheer number of violations does not transform the harm from individual injury to communal injury.\textsuperscript{211}

The critics of new public health would likely take issue with Gifford’s characterization of contaminated meat as outside the legitimate scope of distinctly public harms. They have typically included actions to ensure the safety of the food supply as among the legitimate functions of “old” public health.\textsuperscript{212}

\textsuperscript{208} City of Chicago, 821 N.E.2d at 1115 (Illinois supreme court holding defendants’ marketing of firearms did not constituted a public nuisance).  
\textsuperscript{209} In re Lead Paint Litig., 924 A.2d at 501 (Ultimately, however, the court deferred to the legislature’s interpretation of a broader meaning of “common right” that would encompass a public nuisance created by lead paint and dismissed the claim on other grounds.).  
\textsuperscript{210} Rhode Island, 951 A.2d at 453.  
\textsuperscript{211} GIFFORD, supra note 105, at 146. See also In re Lead Paint Litig., 924 A.2d 484. In In re Lead Paint Litigation, expressed skepticism as to whether lead paint poisoning “truly affects a common right rather than merely affecting many people.” but ultimately deferred to the legislature’s interpretation of a broader meaning of “common right” that would encompass a public nuisance created by lead paint. Id at 453.  
\textsuperscript{212} See Hall, supra note 66, at S204.
devil, it seems, is in the details – if the “public” requires something more than simple aggregation, then how should that “something more” be defined and theorized?

B. Public Spaces

Gifford’s conception of that “something more” appears to rely on a notion that at least some problems cannot be properly deemed “public” simply by virtue of their originating in private places at the hands of private actors. In 2003, Gifford wrote that “[p]roducts generally are purchased and used by individual consumers, and any harm they cause – even if the use of the product is widespread and the manufacturer’s or distributor’s conduct is unreasonable – is not an actionable violation of a public right.”²¹³ For Gifford, there is nothing “public” about contaminated hamburgers consumed in privately owned establishments by individual consumers. His commentary has been particularly influential in the lead paint cases. In critiquing the lead paint public nuisance claims, Gifford argues that “[t]he concept of public right as that term has been understood in the law of public nuisance does not appear to be broad enough to encompass the right of a child who is lead-poisoned as a result of exposure to deteriorated lead-based paint in private residences or child-care facilities operated by private owners.”²¹⁴ His reasoning is baffling to anyone familiar with the thorough critical deconstruction of the public-private distinction: “Despite the tragic nature of the child’s illness, the exposure to lead-based paint usually occurs within the most private and intimate of surroundings, his or her own home.”²¹⁵ Feminist scholars and others have harshly and thoroughly critiqued the carving out of the home as a private sphere in which the public interest should have no influence.²¹⁶ Nonetheless, Gifford’s reasoning is apparently appealing to courts, at least two of which have quoted the above language in dismissing lead paint nuisance claims.²¹⁷

²¹³ Gifford, supra note 169, at 816.
²¹⁴ Id. at 818.
²¹⁵ Id.; see also Faulk, supra note 119, at 983-84 (“the alleged problems did not threaten the exercise of any rights held by the public at large, such as the use of public buildings or resources, but rather related to the exercise of private rights by private individuals in their private abodes”) (emphasis in original).
²¹⁷ So influential, in fact, that the same Illinois Appeals Court that had found a public right in an earlier case, Lewis v. Lead Indus. Ass’n, 793 N.E.2d 869 (Ill. App. 2003), was so swayed by Gifford’s reasoning and the defense arguments inspired by it, that it renounced Lewis’s conclusion. See American Cyanamid Co., 823 N.E.2d 126. The court quoted Gifford and noted that “plaintiff alleges that the nuisance, if one exists, occurs in unidentified buildings owned by private property owners. Defendants argue that plaintiff’s allegations implicate an assortment of claimed private individual rights that do not belong to the public at large because the alleged
Gifford applies similar reasoning to the tobacco litigation. He rejects the argument that public nuisance liability could attach to harms experienced by primary smokers, but he draws a distinction when it comes to harms associated with second-hand smoke, on quite unconventional grounds: “Conceivably, a victim of tobacco related-illness who could prove that her disease resulted from “second-hand” smoke, particularly in public places such as public parks or while walking on public thoroughfares, could satisfy this first requirement of public nuisance.” The typical distinction between being the primary smoker and being exposed to secondhand smoke is that self protection (choosing not to smoke) is not possible for the person exposed to secondhand smoke. But Gifford’s emphasis on the notion that harms associated with secondhand smoke are particularly actionable through public nuisance where the exposure occurs in “public parks” or “public thoroughfares” offers a novel spin on that distinction. Gifford’s focus on public spaces may also provide some explanation for his acceptance of the public right argument with respect to the firearms litigation. Perhaps Gifford is swayed by the framing of the public right violation in the firearms litigation as interference with the public’s “peaceful use of public streets, sidewalks, parks, and other public places.” In any case, this place-based view of the public/private distinction has not taken hold among the liberal critics of new public health. Even Epstein agrees that environmental pollution and contamination of the food supply are legitimate concerns of his favored “old” public health. Presumably this holds for Epstein even when these threats are experienced by people within private homes or as a result of purchases from private businesses.

C. Public Goods

A more theoretically sound basis for the public/private distinction is offered by Epstein and Hall, who have emphasized the indivisible nature of public goods

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218 Id.
219 Id.
(such as clean air or herd immunity) in defining what it is that sets the truly public apart from the aggregation of private concerns. Epstein, not unexpectedly, defines the difference between “old” public health and new public health in economic terms:

For its part, the old public health tracks the idea of public goods in economics, namely, those non-excludable goods that cannot be supplied to one unless they are also given to another… It thus invokes an analogous concept for “public bads”: those harms inflicted on others without their consent, as, for example, both communicable diseases and pollution.222

By contrast, in Epstein’s view, the modern conception of public health has become “unmoored from the economic conception of a (non-excludable) public good.”223 Similarly, Hall has argued that “[i]n the legal arena, public … invokes a special set of justifications for government intervention and coercion that rely on concepts that economists refer to as ‘public goods.”224 Proponents of public health intervention have also described public health in terms of protecting public goods. Michael Walzer, for example, defined public health law as “focus[ing] on the provision and protection of public goods, without specific allocation to individuals.225 Similarly, James Childress and Ruth Gaare Bernheim have written that “the health of the public is a public good because it is not just the sum of individual health indices and cannot be attained through individual actions alone.”226 For Hall and Epstein, however, the public goods criteria amounts to a narrow justification for “old” public health measures to address communicable infectious disease threats, pollution of the natural environment, and contaminated food.227

A parallel argument has been made with respect to public nuisance law. Some have argued that the scope of public rights should be limited to the sorts of

222 Epstein, supra note 11, at S139.
223 Id. at S148.
224 Hall, supra note 66, at S205. What he calls “the public fallacy”.
227 Hall, supra note 66, at S205 (“The classic subjects of public health law are communicable diseases, personal hygiene, sanitary water and sewer systems, safe food, and injury prevention. These disparate situations all involve significant collective action problems, meaning that individuals acting in their own self-interest, even if fully informed and rational, will not effectively address the problem because they do not internalize some of the major costs or benefits of action or non-action, or for other reasons a centralized response is much more cost-effective… Identifying and eliminating the source of contagion for a communicable disease requires more effort and cost than any one individual or small group is likely to undertake. A public agency is necessary to garner the resources needed for collective action and to wield the authority for coercive restrictions on liberty or property.”).
obviously public goods harmed by environmental pollution. Modern courts and commentators have read early cases as limiting the recognition of “public rights” to “those indivisible resources shared by the public at large, such as air, water, or public rights of way.”\footnote{228} This conception of public rights as public goods first emerged from the application of public nuisance to environmental pollution. It harkens back to the environmental nuisance cases that recognized rights to clean air and water and safe and unobstructed use of public rights of way, but it fails to reach back to the earlier conception of collectively held rights to public health and welfare out of which those more specific environmental rights arose. The application of public nuisance to problems like lead paint in homes and the illegal firearms market put pressure on the public goods formulation. As described above, advocates and courts have increasingly eschewed broad statements of a right to public health and welfare in favor of narrower (and increasingly awkward) assertions of rights to specific public goods stated in affirmative terms. Recently asserted public goods include “a climate that will not drastically change as a result of greenhouse gas ‘pollution,’ thereby devastating the ecology and the human population”\footnote{229} and “the benefits of the laws governing the unlawful possession and use of firearms.”\footnote{230} When the interests at issue are framed in this way, it’s not difficult to see why courts have been quick to dismiss the argument that they are protected by longstanding common law rights.

### IV. EPIDEMIOLOGICAL HARMAS PUBLIC BADS

The implementation of measures that integrate new public health science and practice into public health law and policy is proceeding rapidly. Measures aimed at altering the social environment in ways that influence health behaviors and outcomes are supported by public health science,\footnote{231} but they are perhaps rushing ahead of adequate theorization in terms of values other than population health.

\footnote{228} Rhode Island, 951 A.2d at 454. (“The term public right is reserved more appropriately for those indivisible resources shared by the public at large, such as air, water, or public rights of way.”); American Cyanamid Co., 823 N.E.2d at 131, 139 (persuaded by the defendants’ argument to this effect); City of Philadelphia v. Beretta U.S.A. Corp., 126 F.Supp.2d. 882, 908-09 (E.D. Pa. 2001), aff’d, 277 F.3d 415 (3d. Cir. 2002) (comparing plaintiffs’ assertion of a public “right to be free from guns and violence” to a public right to unpolluted water and then rejecting the plaintiff’s argument.). \textit{See also} Gifford, \textit{supra} note 169, at 793, (noting “obstruction of highways or diversion of watercourses” as classic public nuisances); Phila. Elec. Co. v. Hercules, Inc., 762 F.2d 303, 316 (3d Cir. 1985) (right to pure water is a public right); \textit{Celanese Corp. v. Coastal Water Auth.}, 475 F.Supp.2d 623, 639 (S.D. Tex. 2007) (public rights to enjoyment of clean air or water); Graham Oil Co. v. BP Oil Co., 885 F.Supp. 716, 723 (W.D.Pa. 1994) (right to soil and water free of contamination).

\footnote{229} American Elec. Power Co., 582 F.3d at 367.

\footnote{230} City of Chicago, 885 F.Supp. at 1115.

\footnote{231} \textit{See} note 71, \textit{supra}.
For the most part, the defense of new public health has relied on the overarching value of health as the justification for placing community needs on equal footing with individual rights. But this vision is in tension with the liberal foundations of American law, which requires rigorous justification of community needs before they are allowed to trump individual rights. What is required is a middle position between critics, who support only the narrowest articulation of public health law as the law of infectious disease control, and defenders of new public health, who appear to understand any widespread health problem as legitimately falling within the realm of public health law.

Designating a concern as a public health threat has important legal consequences. To the extent that the “public” is invoked as a liberty-limiting principle, it should be thoughtfully defined and theorized. The problem, of course, is defining what special quality marks an interest as sufficiently collective or communal, beyond the large number of people affected. The justification provided by the public goods and public places theories of the public are dissatisfying in their narrowness. I propose that part of the solution to more fully theorizing the “public” as a justification for public health intervention is supplementation of the public goods formulation with an enhanced conception of public bads. This enhanced conception moves beyond a purely economic understanding by drawing on the science of epidemiology. I argue that epidemiological harms – those for which causation can be established at the population level, but which cannot necessarily be traced to any individual victim – should be understood as public bads. This conception offers an expanded understanding of the public as a justification for public health intervention. It also promotes an even firmer rooting of public health law and policy in the science and practice of new public health, rather than seeking (as Hall and Epstein do) to divide the politics of public health from its science.

A. A Broader Conception of the Public

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232 This is a hugely important caveat. An important response to the liberal critique of “new” public health law is that many of the legal tools that it promotes are not coercive. Hall’s description of why environmental and occupational health regulations are not troubling – that “they affect primarily only property or economic interests, not personal liberty” – also applies to many “new” public health legal interventions to address threats like obesity. A longer discussion of the extent to which particular “new” public health law tools are coercive enough to even require a robust liberty-limiting principle is outside of the scope of this article. See Gostin & Bloche, supra note 76, at *172 (“The ‘new’ public health is less coercive, in the conventional sense, than its 19th-century regulatory antecedents. It eschews physical compulsion, such as quarantine and coerced therapy, except as a last-ditch step, and it sees synergies between health promotion and respect for human rights.”). In this article, however, I am concerned with those instances in which the “public” is invoked to justify significant state intrusion.
In a subtle but fundamental way, the division between science and law championed by Hall and Epstein would disconnect public health from the explicitly progressive mission that has been integral to its disciplinary identity for centuries. The dichotomy relied upon by Hall and Epstein misses important distinctions within the discipline of public health. “Eliminating threats to public health” involves multiple activities. This project is far from solely “the domain” of law. There are at least four broad categories of activity at issue here: science, practice, policy, and law. The lines are necessarily blurred among them. It is not possible for the science of public health (the activity of “[a]dvancing understanding and knowledge of the causes and patterns of health conditions in society”) to exist in a vacuum. The questions it seeks to answer (and the answers it eventually provides) are informed by practice, policy, and law. The identification of causal pathways is intimately tied to developing and evaluating potential interventions within them. The practice of public health (by which I mean the activity of implementing interventions to protect and promote health, only some of which make use of legal tools) is useless unless it is informed by science and guided by policy. And public health policy (by which I mean the body of defined objectives of public health science and practice) easily blends into the law, in which it is expressed. As Daniel Goldberg has written in response to the critique of new public health put forth by Mark Rothstein, “either the social epidemiologists’ contention that socioeconomic disparities are a primary factor in causing good public health is accurate, or it is not.” “[I]f socioeconomic disparities are truly productive of public health, policies consistent with the narrow model, which by definition do nothing to ameliorate social conditions, will do little to actually improve health in the aggregate…. If public health practice is not intended to facilitate the public’s health, it is unclear what use such a practice has and why public monies should be forthcoming to support it.” To the extent that the liberal critics of new public health seek to apply a narrow definition to all efforts to “eliminate threats to public health,” their critique would disconnect not only public health law, but also public health policy and practice, from the reformist mission of improving population health.

The formulation of public health and public rights as limited to securing public goods ignores the wider diversity of harms that public health law and public nuisance law have been used to address, not just in the past decade, but for centuries. Earlier courts addressing public nuisances in the form of viscous

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233 Hall, supra note 66, at S202.  
234 Id.  
236 Id. at 75.  
237 Hall, supra note 66, at S202.
dogs,\textsuperscript{238} fireworks,\textsuperscript{239} and snake handling\textsuperscript{240} were far more comfortable with broad statements of the state’s authority to enjoin and seek redress for unreasonable interferences with public health and welfare. In \textit{State ex rel. Swann v. Pack},\textsuperscript{241} for example, the Tennessee Supreme Court defined a public nuisance as “a condition of things which is prejudicial to the health, comfort, safety, property, sense of decency, or morals of the citizens at large, resulting either from an act not warranted by law, or from neglect of a duty imposed by law.”\textsuperscript{242} In holding that the defendants’ practice of snake handling amounted to a public nuisance, the court apparently felt no need to assert a public right “to a community free of unrestrained venomous snakes.” Rather, it emphasized the impact of this practice on the safety of the community as a whole in broad terms. When state legislatures codified public nuisance law around the turn of the century, they too framed their definitions of nuisance in ways that relied heavily on a broad conception of collective interests in public health and welfare.\textsuperscript{243} The state’s police power – its authority and responsibility for securing the public’s health and welfare – has always been greater in scope than the liberal critique suggests.

The great appeal of public nuisance for advocates eager to take on problems like the illegal gun market, the contamination of urban housing stock with lead paint, and climate change is that (in theory at least) it allows plaintiffs to establish causation at the population, rather than individual, level. The doctrinal framework that should make this possible is, in a sense, liberty-limiting in its own way.\textsuperscript{244} By allowing for recovery of damages and or injunctive relief against private actors in the absence of proof that traces the actions of any individual defendant to the harms suffered by any individual person, public nuisance arguably threatens to infringe on economic liberty. But for decades, centuries even, this intrusion has been deemed acceptable based on the notion of the state’s role (through the courts as well as through governmental plaintiffs representing the executive branch of states and municipalities) in protecting uniquely collective interests in healthy living conditions. In many cases, the collective interest in healthy living conditions has been framed in terms of the natural environment – as in cases involving air or water pollution. But in others it has been understood in terms of the built environment – as in cases involving obstruction of roadways or watercourses, for example. And even the social environment has been implicated.

\textsuperscript{239} PPC Enterprises, Inc. v. Texas City, 76 F.Supp.2d 750 (S.D.Tex.1999).
\textsuperscript{240} Tennessee ex rel Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), cert. denied, 424 U.S. 954 (1976).
\textsuperscript{241} Id.
\textsuperscript{242} Id.
\textsuperscript{243} See, e.g., \textsc{Cal. CIV. Code} § 3479 (2011) (originally enacted 1872).
\textsuperscript{244} See Coleman & Ripstein, \textit{supra} note 180.
in cases involving gang violence, snake handling, or brothels. The collectively held public rights recognized in the common law of public nuisance allow for vindication of harms that are suffered by the public as a whole, harms that cannot easily be broken down into an aggregation of private harms. In a public nuisance cause of action the plaintiff may be able to establish that the defendant’s actions have contributed to unhealthy living conditions, which have resulted in harms that are quantifiable at the population level by epidemiologists, even if the plaintiff cannot establish that any particular individual is identifiable as the victim of those harms. It is out of this vision of public nuisance that I draw my proposal of epidemiological harms as a supplement to the economic conception of public bads.

A. The Economic Conception of Public Bads

Traditionally, public bads have been understood in economic terms. In nuisance law, for example, the distinction between a private nuisance and a public one can be understood in terms of the distinction between private bads and public bads. Private bads are “external costs that affect, and are confined to, easily defined economic agents.” The classic private nuisance example is that of a factory that is spewing soot and ashes on clothes strung up to dry at the neighboring laundry. The doctrine of public nuisance gives a private right of action to the owner of the laundry, which allows him or her to negotiate with the owner of the factory. But the same approach doesn’t work for public bads. The nature of a public bad “is such that there is no low-cost way to insulate and partition the affected individuals in the group from the negative externality. What one group member receives, all receive.” For example if an entire village is affected by emissions from a local copper smelter, there is a free rider problem posed by the potential use of a private cause of action by any individual homeowner. Because any solution (in the form of abating the pollution) would benefit everyone equally, whether they had helped bear the costs of litigation or not, it is difficult for any individual homeowner to bring suit. “The cost of organizing and the tendency for individuals to free ride works against the individual’s success.”

This concept of public bads as indivisible negative externalities is intimately linked to the economic concept of public goods that has played a prominent role in public health law and public nuisance law. It is perhaps more natural to describe the copper smelter problem in negative terms that focus on the public

245 Boudreaux & Yandle, supra note 109.
246 Id. at 58.
247 Id.
248 Id.
nature of the harm suffered by the homeowners of the village, rather than in affirmative terms that focus on a right to the public good of clean air, but the concept is essentially the same. Both ways of thinking about the problem emphasize economic concerns about collective action. Public health can also be conceptualized in economic terms. Advocates of the new public health have identified the central importance of economic concepts like public goods and negative externalities in defining the scope of public health law at the beginning of its modern revival. “Public health has as its chief duty the unenviable tasks of providing common goods and controlling negative externalities, both difficult at best.”

The herd immunity achieved through compulsory vaccination programs is readily understood as a public good that requires individual sacrifices for the common benefit. By contrast, it is more difficult to frame “lifestyle” diseases—which we have been conditioned by to think of in terms of individual behavior choices—in terms of public goods. In response to Hall’s and Epstein’s critiques, Lawrence Gostin and Gregg Bloche have emphasized the “continued role of externality analysis in justifying governmental responses to environmental toxins, insufficient time and space for exercise, and nutritionally adequate food in public schools.” They have also pointed to insufficient information about health risks, and economic actors’ ability to influence people’s preferences through marketing efforts. This statement provides a helpful starting point, but it fails to fully elaborate a substantive response to the liberal critique. For the most part, the Gostin/Bloche response focuses on revealing the classical liberal politics that underlies the emerging critique. But that only takes us so far.

B. An Epidemiological Conception of Public Bads

The population focus of epidemiology provides a unique lens for analyzing legal problems, similar to that provided by economics. I propose that “epidemiological harms”–which I define as those for which causation can be established at the population level, but which are not necessarily traceable to any particular individual as either cause or victim—should be understood as a type of public bads. A fundamental tension in the application of tort law as a tool for protecting the public’s health is that “the most potent determinants of a disease or

249 Gostin, et al., supra note 24, at 68.
250 Gostin & Bloche, supra note 76.
251 See generally PARMET, supra note 23.
252 Cf. id. at 228-238 (describing the difficulties of using tort law to address harms that can be proven at the population level); Samuel Issacharoff, Private Claims, Aggregate Rights, 2008 SUP. CT. Rev. 183 (2008) (discussing the harms caused by Vioxx, which were subject only to epidemiological proof, as among a category of “underlying substantive claims which, either formally or as a practical matter, do not fit within the framework of identifiably individual claims”).
injury are those that are distal and incidental, observable only by comparing the incidence of a disease or injury in one population to that in another population which is not exposed to that variable." As my examination of industry-wide public nuisance litigation indicates, tort law has struggled to find an appropriate framework for adjudicating claims arising out of these kinds of harms. For a variety of reasons, it is also difficult to motivate sufficient political will to address these harms, even when there is substantial scientific evidence documenting their burden on society.

My vision of epidemiological harms as public bads builds on the social epidemiological evidence that problematizes the voluntariness of supposedly “personal” health behavior choices. The classical understanding of “public bads” defines them primarily as indivisible harms inflicted on the public without consent. Epidemiological harms can be partly conceptualized in similar terms, but in a way that is informed by social epidemiology. Ultimately, it comes down to how the harm is framed. If the “public bad” at issue in obesity is the ingestion of large quantities of high-calorie, low-nutrient food, then it is difficult to conceive of that interaction between the individual consumer and the food he or she eats in terms of an “indivisible” harm imposed in the absence of consent. On the other hand, if the public bad at issue here is an information and food environment that has been shown to increase obesity at the population level, the calculus looks different. There is no meaningful consent to the overrepresentation of fast food outlets and underrepresentation of full service grocery stores in low income neighborhoods. There is no meaningful consent to exposure to advertising on the sides of city busses extolling the virtues of dollar-menu cheeseburgers. Social epidemiology also suggests that these harms are indivisible, in much the same way that the pollution emitted from a copper smelting mill affects an entire community. Scientific study can establish links between the social environment and health outcomes at the population level, but not at the individual level.

The securing of public goods and redress of public bads requires collective action – no individual, acting alone, has the ability to adequately address these issues. But protecting public health also requires actions that no individual is fully incentivized to take, even if it were within one’s power to do so – because it is impossible to know which individuals will benefit. Indeed, the uniquely collective focus of public health is the very root of its frequent politicization. Geoffrey Rose, a prominent epidemiologist, characterized the central dilemma of

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253 See PARMET, supra note 23, at 228.
254 Neiman, supra note 66; Hodge, Jr. & Eber, supra note 71.
public health as the “prevention paradox.” Interventions that have the greatest potential to improve health at the population level are virtually always impossible to link to individual benefits. We know that convincing people not to use tobacco saves lives. We can document how many fewer people are smoking today than were smoking twenty years ago. We can even document the impact of cigarette taxes on smoking prevention. But it is impossible to point to any individual and say “this person’s life was saved because the cigarette tax was high enough to keep her from taking up smoking.” Similarly, we know that exposure to deteriorating lead paint causes intellectual impairment. We can document how many children have blood lead levels that are unsafe. At the population level, we may even be able to estimate how much intellectual disability is attributable to lead paint exposure. But it is exceedingly difficult to prove that any given individual would not be intellectually disabled but for her exposure to lead paint.

By framing the issue in terms of the nonconsensual and indivisible nature of the social, economic, and environmental determinants of health, the epidemiological harms concept offers an approach to incorporating a communitarian vision of public health within a predominantly liberal framework. The liberal framework tends to discount social, economic, and environmental determinants of health in its efforts to emphasize the importance of individual rights and choices. This position is no longer fully tenable in the public health context, in light of the findings of social epidemiologists. Epstein’s and Hall’s arguments for a division between the science and the law of public health do not present a viable solution to this conundrum. The solution is to root new public health law more deeply in the science of social epidemiology. Legal advocates must find more compelling ways to convey the power of scientific insights about the social, economic, and environmental determinants of health. These insights ultimately provide the strongest source of support for understanding an expanding range of health threats as legitimately public in nature and as amenable to structural solutions.

CONCLUSION

The emerging liberal critique of new public health law has far reaching implications. It calls into question the full range of strategies for using law as a tool to address modern public health threats outside of communicable diseases, environmental pollution, and contaminated food. Liberal critics apply their

256 Rose, supra note 20, at 25.
reasoning to “fat taxes,”^259 tanning bed taxes,^260 litigation against food manufacturers or retailers,^261 tobacco control strategies that seek to associate social stigma with smoking,^262 anti-poverty policies aimed at reducing health disparities,^263 seat belt laws, firearms regulation, regulation of alcohol consumption, parental abuse and neglect, consumer product safety, and regulation of the fast food industry.\(^{264}\) In many ways, the failed efforts of public health advocates – of “epidemiologists as litigators” – to use public nuisance law as tool for public health offer a concrete context in which to examine how persuasive the liberal critique might be for courts, and possibly also for policymakers. As such, public health advocates would be wise to cull insights from the public nuisance debate that might be helpful in the public health battles on the horizon.

If the ecological model of public health intervention is ultimately going to gain political and legal traction, then advocates will have to find more powerful ways of justifying it in the face of a longstanding classical liberal political tradition.\(^{265}\) They must find new ways of conveying the impact of public health threats on communities – as distinct from the sum of the impacts on individuals within them. The gun violence that David Kairys described is not merely the aggregation of the effects of guns on individual friends and family members of those who are killed or injured. It is different in kind and it is described in ecological terms: “a climate of fear that undermines our communities and the positive sense of community.”\(^{266}\) The communitarian foundations of public health law and the insights of social epidemiology are unlikely to lead to revolution. It is not only infeasible, but also inadvisable, to attempt to somehow surmount the liberal tradition in American law. But that liberal tradition can be supplemented by the communitarian language of public health. Legal analysis using a lens that draws on the objectives and methodology of public health offers a means for doing so.

\(^{259}\) Epstein, supra note 11, at S154.
\(^{260}\) Pope, supra note 9.
\(^{261}\) Epstein, supra note 11, at S154.
\(^{262}\) Hall, supra note 66, at S200.
\(^{263}\) Id. at S201.
\(^{264}\) Id. at S202.
\(^{265}\) See, e.g., Lawrence Wallack & Regina Lawrence, supra note 81.
\(^{266}\) Kairys, supra note 105, at 1165.