

## IS PUBLIC NUISANCE A TORT?

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### I. Introduction

Public nuisance law, after long obscurity, is very much in the news these days. With considerable fanfare, state attorneys general on the east and west coasts have filed actions against major emitters of greenhouse gases, contending that global warming is a public nuisance. The east coast suit, spearheaded by Connecticut, seeks an injunction requiring reductions of CO<sub>2</sub> emissions by major coal-burning electric utilities.<sup>1</sup> The west coast suit, filed by the California Attorney General, sought damages for CO<sub>2</sub> emissions from automobiles sold in California by six multinational firms.<sup>2</sup> Both suits were initially dismissed as presenting nonjusticiable political questions. The California suit was dropped on appeal, as part of complex settlement involving not only the state and the auto industry, but also the Obama administration.<sup>3</sup> The Second Circuit reversed the dismissal of the Connecticut judgment, allowing it to go forward under a version of

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<sup>1</sup> *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265 (S.D. N.Y. 2005), rev'd, 582 F.3d 309 (2d Cir. 2009), cert. granted, 131 S. Ct. 813 (2010).

<sup>2</sup> *California v. General Motors Corp.*, 2007 WL 2726871 (N.D. Cal. 2007).

<sup>3</sup> Unopposed Motion to Dismiss Appeal, *California v. Gen. Motors Corp.*, No. 07-16908 (9th Cir. filed June 19, 2009), available at <http://www.globalclimatelaw.com/uploads/file/California%20v%20GM%20dismissal.pdf> (citing the EPA's acknowledgment "that carbon dioxide and other greenhouse gases are a public health danger and must be regulated," President Obama's directive to the Department of Transportation to "establish higher national fuel efficiency standards," and General Motor's and Chrysler's bankruptcy filings as the reasons for voluntarily dismissing the appeal).

public nuisance law the court called “the federal common law of nuisance.”<sup>4</sup> The Supreme Court has granted certiorari to review this ruling and should decide the matter this Term.<sup>5</sup>

Litigants other than state officials have also invoked public nuisance in seeking redress for problems attributed to global warming. In Mississippi, gulf coast property owners filed a public nuisance suit against petrochemical companies for storm damage to their homes, which they claimed was exacerbated by global warming.<sup>6</sup> An Alaskan native village, represented by a prominent plaintiffs’ law firm, brought a public nuisance suit alleging that global warming is melting the ice that surrounds the village.<sup>7</sup> This action seeks \$400 million from 20 corporations to pay for the costs of relocating the village to higher ground.

Public nuisance law also played a role in the U.S. Supreme Court’s initial foray into climate change controversy. In *Massachusetts v. EPA*,<sup>8</sup> a closely divided Court held that Massachusetts had standing to challenge EPA’s refusal to regulate tailpipe emissions of greenhouse gases from motor vehicles. Although the case was brought under the Clean Air Act, the Court’s constitutional standing analysis drew upon public nuisance themes. The Court opined that a state such as Massachusetts, speaking through its public officials, is entitled to

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<sup>4</sup> *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009).

<sup>5</sup> *American Electric Power Company Inc., et al., Petitioners v. Connecticut, et al.*, No. 10-174, 131 S.Ct. 813 (2010). Justice Sotomayor, who was initially part of the Second Circuit panel, is recused in the case.

<sup>6</sup> *See Comer v. Murphy Oil Co.*, No. 05-CV-436L Q (S.D. Miss., Aug. 20, 2007), rev’d in part, 585 F.3d 855 (5th Cir. 2009), judgment vacated, rehearing en banc granted and then dismissed for want of a quorum, 607 F.3d 1049 (5th Cir. 2010). As a result of the Fifth Circuit’s action, the district court’s decision dismissing the case has been reinstated. *See id.* at 1056 (Dennis, J., dissenting).

<sup>7</sup> *See Native Village of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp.2d 863 (N.D. Cal., 2009) (granting the defendant’s motion to dismiss after concluding that plaintiffs’ federal nuisance claim was barred by the political question doctrine as well as for lack of standing under Article III). An appeal is pending in the Ninth Circuit. *Native Village of Kivalina v. Exxon Mobil Corp.*, No. 09-17490 (9th Cir. appeal docketed Nov. 6, 2009).

<sup>8</sup> 549 U.S. 497 (2007).

“special solicitude” in determining whether standing requirements have been met.<sup>9</sup> This suggestion echoes one of the features of public nuisance law, namely, that the state’s public officials always have standing to bring public nuisance actions. In intimating a similar understanding for Article III standing purposes, the Court analogized to and quoted at length from an original jurisdiction decision applying public nuisance law, *Georgia v. Tennessee Copper Co.*<sup>10</sup>

Global warming litigation is only the latest manifestation of a recent surge of interest in public nuisance by state attorneys general and plaintiffs’ law firms.<sup>11</sup> The trend appears to have started with lawsuits filed by state attorneys general in the mid-1990s against manufacturers of tobacco products, seeking recovery of state expenditures under Medicaid and related programs for tobacco-related illnesses. Many of these suits included the claim that the marketing and distribution of tobacco products is a public nuisance. Although only one court adjudicated the merits of this claim,<sup>12</sup> the cases were settled in 1998 for the mind-boggling sum of \$246 billion.<sup>13</sup> This outcome, not surprisingly, stimulated further interest on the part of both state attorneys general and private tort lawyers in the use of the public nuisance action to achieve social policy goals – and to reap large damages awards or settlements in the process.

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<sup>9</sup> Id. at 520.

<sup>10</sup> 206 U.S. 230 (1907), discussed 549 U.S. at 520.

<sup>11</sup> For overviews of the emergence of public nuisance as a vehicle for social reform litigation see DONALD G. GIFFORD, *SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION* (2010); Victor E. Schwartz and Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541 (2006).

<sup>12</sup> *Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997) (rejecting public nuisance liability).

<sup>13</sup> *Anti-Smoking Groups Urging Halt to Proposed Settlement*, PITTSBURGH POST-GAZETTE, Nov. 16, 1998, at A6.

Soon, one wave after another of public nuisance actions began appearing. The first targets were firearms manufacturers, accused in a number of suits brought by municipalities and public interest groups of creating a public nuisance by marketing and distributing handguns. Most of these suits were dismissed on various grounds.<sup>14</sup> Nevertheless, the gun industry was sufficiently alarmed that it prevailed upon Congress to enact legislation preempting these actions.<sup>15</sup> Next came a spate of suits against companies involved in the manufacture of lead paint. Although lead paint was banned by the Consumer Product Safety Commission in 1977,<sup>16</sup> the argument was that the continuing presence of lead paint in homes and buildings is a public nuisance, which should be abated by the successors to the corporations that had sold lead paint before 1977. These suits initially received a more receptive treatment, with cases in Rhode Island, California, and New Jersey going to trial,<sup>17</sup> but the Supreme Courts of Rhode Island and New Jersey later overturned these judgments.<sup>18</sup> Lead paint was followed in turn by a rash of suits claiming that the sale of gasoline containing the federally-approved additive MTBE is a public nuisance, because MTBE is highly soluble and tends to contaminate water supplies when it leaks from storage tanks. These actions were consolidated in the Southern District of New York. After the trial judge rejected a motion to dismiss the public nuisance claims and rejected

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<sup>14</sup> See, e.g., *City of Chicago v. Beretta U.S.A.*, 821 N.E. 2d 1136 (Ill. 2004); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001).

<sup>15</sup> See Protection of Lawful Commerce in Arms Act, 119 Stat. 2095 (2005), 15 U.S.C. § 7901-03. The constitutionality of the Act was upheld in *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008).

<sup>16</sup> GIFFORD, *supra* note 11 at 30.

<sup>17</sup> See Schwartz and Goldberg, *supra* note 11 at 559-560. Wisconsin also permitted these actions to go forward, but under what it called a “risk contribution” theory of products liability law. See *Thomas ex rel. Gramling v. Mallett*, 285 Wis. 2d 236, 701 N.W. 2d 523 (Wis. 2005). This theory was recently declared unconstitutional as a violation of substantive due process by a federal district judge sitting in diversity. *Gibson v. American Cyanamid Co.*, Case No. 07-C-864 (E.D. WI, decision filed June 15, 2010), *appeal filed* No. 10-3814 (7th Cir. Dec. 7, 2010).

<sup>18</sup> See *State v. Lead Industries Assn.*, 951 A. 2d 428 (R.I. 2008); *In re Lead Paint Litigation*, 924 A.2d 484 (N.J. 2007).

various defenses,<sup>19</sup> a major settlement was reached for \$423 million.<sup>20</sup> Finally, perhaps in imitation of the climate change suits, North Carolina brought an action alleging that power plants operated by the Tennessee Valley Authority in Tennessee and Alabama were a public nuisance because they caused conventional transboundary pollution injuring the citizens of North Carolina. After rejecting a motion to dismiss on sovereign immunity grounds, the Fourth Circuit recently held the action was preempted by the Clean Air Act.<sup>21</sup>

The global warming suits are thus only the most recent manifestation of a larger trend, in which state attorneys general, sometimes closely cooperating with plaintiffs law firms, have invoked public nuisance as a kind of “super tort”<sup>22</sup> authorizing courts to address a variety of social ills regarded by the plaintiffs as being inadequately regulated by more conventional political processes. Not surprisingly, defendants confronted with these aggressive applications of public nuisance law have raised a variety of affirmative defenses, including the political question doctrine, lack of standing, federal statutory preemption, conflict with the dormant commerce clause, and even substantive due process. I have previously considered some of these doctrinal issues in the context of global warming public nuisance suits.<sup>23</sup>

But the use of public nuisance law to address a laundry list of social ills ranging from smoking to handgun violence to climate change raises more fundamental issues about the very

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<sup>19</sup> See *In re Methyl Tertiary Butyl Ether (“MTBE”) Products Liability Litigation*, 175 F. Supp. 2d 593, 627-30 (S.D. N.Y. 2001). The court also rejected a variety of defenses including preemption.

<sup>20</sup> Janet Wilson, *\$423-Million MTBE Settlement is Offered*, L.A. TIMES, May 8, 2008, at B3.

<sup>21</sup> See *North Carolina v. Tenn. Valley Auth.*, 515 F.3d 244 (4<sup>th</sup> Cir. 2008) (rejecting sovereign immunity defense); *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291 (4<sup>th</sup> Cir. 2010) (holding public nuisance action preempted).

<sup>22</sup> See Schwartz and Goldberg, *supra* at 552.

<sup>23</sup> Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENV. L. 293 (2005).

concept of a public nuisance. In its modern incarnation, as reflected in the *Restatement (Second) of Torts*, public nuisance is assumed to be a tort, which in turn means courts have inherent authority to hear these actions as part of their powers as common law tribunals. The *Restatement* defines a public nuisance as an “unreasonable interference with a right common to the general public.”<sup>24</sup> Courts are invited by the *Restatement*, based on the presence of one of three very broadly defined “circumstances,” to decide what constitutes a “right common to the general public,” and to determine what sort of circumstances represent an “unreasonable interference” with this right.<sup>25</sup> If courts have this kind of authority, then it is unremarkable that they can establish programs designed to reduce smoking, impose gun control regulations, require firms that sold lead paint long ago to pay for its removal (public nuisance, being an action to protect public rights, has no statute of limitations<sup>26</sup>), order oil companies to pay for remediation of ground water supplies contaminated with MTBE, and set emissions controls on greenhouse gases.

The thesis advanced here is that public nuisance law has gone off the rails, and that the ultimate reason for this is that public nuisance is not, and never was, a tort. Public nuisance is properly regarded as a public action – an action by public authorities to criminally charge or

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<sup>24</sup> Restatement (Second) of Torts § 821B.

<sup>25</sup> Restatement (Second) of Torts, § 821B. The three circumstances are:

- (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
- (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
- (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

*Id.* at § 821B(2).

<sup>26</sup> RESTATEMENT (SECOND) OF TORTS § 821C cmt (e) (1979) (“One important advantage of the action grounded on the public nuisance is that prescriptive rights, the statute of limitations and laches do not run against the public right, even when the action is brought by a private person for particular harm.”). *But see* *Ashtabula River Corp. Group II v. Conrail, Inc.*, 549 F. Supp. 2d 981, 984 (N.D. Ohio 2008)(holding that the plaintiff’s public nuisance claims were time-barred under an Ohio statute imposing a four-year statute of limitation for an action to abate a permanent nuisance).

abate (that is, to order an end to) a condition that is deemed to be inimical to interests shared by the public as a whole. As a public action, the closest analogy to public nuisance, both historically and conceptually, is not tort but criminal law. Indeed, before the publication of the *Restatement (Second) of Torts*, public nuisance, even when brought as a civil action, was universally understood to be based on the defendant's maintenance of a condition that was also a crime.

Once we understand that public nuisance is properly regarded as a public action rather than a tort, certain critical institutional choice implications follow from this. As a public action, the proper institution to determine the parameters of public nuisance liability is the legislature – or some institution delegated authority to do so by the legislature – not courts based on a claim of common law authority. Likewise, the proper institution to determine who has authority to bring a public nuisance action is, again, the legislature, not the courts. If accepted, these propositions mean that much of the recent expansion of public nuisance law suffers from what can be called a delegation deficit. Actions have been brought challenging conduct as violating public norms in circumstances where the legislature has not delegated authority to courts to determine whether such a norm exists. And private organizations and individuals have been allowed to bring public nuisance actions in circumstances where the legislature has not provided that they have authority to commence such actions.

What follows is not an essay in tort theory. I do not take any position on whether tort law should be understood as a form of risk regulation or a species of corrective justice. Nor is it an essay in separation of powers theory. I do not claim that any particular clause of the Constitution or any particular legal doctrine like the political question doctrine condemns public nuisance law as an illegitimate form of judicial action. The argument, instead, is that public nuisance law, in

its recent incarnation as a vehicle for social reform litigation, is out of step with widely shared precepts about the proper assignment of roles among different legal institutions in our society. It can be regarded, if you will, as an administrative law professor's reaction to the idea that courts, rather than legislatures or administrative agencies, should be regarded as having inherent authority to regulate complex social problems like tobacco smoking, gun control, lead paint removal, MTBE contamination, transboundary pollution, and climate change.

Even as a thesis about institutional choice, my claim is relatively modest. I do not maintain that public nuisance law is always and inevitably an impermissible tool for addressing sharply contested social issues. My principal claim is simply that the legislature must speak before courts use public nuisance law to adjudicate lawsuits targeting controversial social harms. Conceivably, a state legislature might adopt a public nuisance statute broad enough to reach problems like climate change, or might authorize citizen groups to prosecute such actions – in which case the objection advanced here would be met. In the meantime, however, courts should exercise caution in interpreting existing statutes that speak of public nuisances. Given that most of these statutes are quite old, and were adopted with a wholly different order of problems in mind, courts should generally interpret these statutes as reaching only the kinds of obstructions that were recognized to be a public nuisance when they were enacted. Principles of institutional choice, in this context at least, dictate a norm of non-dynamic interpretation, in order to preserve the understanding that public actions are subject to legislative control.

### **I. Five Conventional Understandings About Public Nuisance**

I begin with two preliminary points. First, why does the label attached to public nuisance – public action or tort – matter? The answer is that these concepts play an important role in the



assignment of institutional authority. When one decides that a particular action is a “tort,” this implies, at least in the American legal system, that courts have a considerable degree of autonomous authority to define and revise the elements of the action and defenses to it. When one decides that a particular action is a “public action,” in contrast, the implications for the allocation of institutional authority are quite different. Efforts to identify and vindicate public rights, under widely shared norms about the proper assignment of institutional authority, are generally regarded as being matters for the politically accountable branches of government to resolve.<sup>27</sup> Determining whether public nuisance falls on the “public action” or the “tort” side of a conceptual divide thus informs the allocation of institutional roles with respect to the matters covered by this action.

Second, what method of inquiry should be used in determining whether public nuisance is a public action or a tort? I will not attempt to posit essentialist definitions of “public action” or “tort.” These are contestable concepts, and no one is likely to be persuaded by insisting on a particular definition of terms.<sup>28</sup> Instead, I will consider a variety of conventional understandings associated with public nuisance law. These understandings have been developed and maintained over a significant period of time (eight centuries more or less<sup>29</sup>), through the interaction of legislatures and courts. Standing alone, any one of these factors might not be decisive in causing us to say public nuisance is more naturally regarded as a public action rather than a tort. But cumulatively, they make what I regard as an overwhelming case that public nuisance is very

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<sup>27</sup> See, e.g., Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 562 (2007) (“At least in the absence of public authorization...American courts have generally refused to entertain private lawsuits about matters in which the whole body politic was concerned and in which every individual has the same legal stake.”).

<sup>28</sup> The *Restatement of Torts*, for example, makes no effort to define “tort.”

<sup>29</sup> The earliest recorded use of a judicial process to resolve public nuisance disputes dates from the reign of Henry II. Donald G. Gifford, *Public Nuisance as Mass Liability Tort*, 71 U. CIN. L. REV. 741, 790-01 (2003).

different from what we ordinarily regard as a tort, and that it much more comfortably falls within the category of a public action.

Specifically, I will consider five conventional understandings: (1) The commonly-accepted definition of the right protected by the public nuisance action. (2) The historical understanding that public nuisance is a species of criminal law. (3) The historical practice that public officials are the primary enforcers of public nuisance law. (4) The historical understanding that public nuisance liability is determined by the existence of a condition rather than by the conduct of the defendant. (5) The historical understanding that public nuisance liability results in a directive requiring the defendant to abate the offending condition rather than in an award of damages.

#### **A. Public Nuisance Protects Public Rights.**

All accounts of public nuisance agree on the description of the right the action is designed to protect: the right of the general public. The description of the nature of the right has held constant from Bracton, to Hawkins, to Prosser.<sup>30</sup> The *Restatement of Torts*, which I argue in Part II is the source of the erroneous understanding that public nuisance is a tort, defines a

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<sup>30</sup> Bracton described a public nuisance as “a nuisance by reason of the common and public welfare.” Henry de Bracton, 3 Bracton on the Laws and Customs of England 191, f. 232b (Samuel E. Thorne ed. 1977). According to Hawkins, a public nuisance is “an Offence against the Publick, either by doing a Thing which tends to the Annoyance of all the King’s Subjects, or by neglecting to do a Thing which the common Good requires.” 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 197, ch. 75, § 1 (photo. reprint 1978) (1716) . Prosser states that “[t]he crime [of public nuisance] comprehends a very miscellaneous and diversified group of petty offenses, all based on some interference with the interests of the community, or disruption of the comfort or convenience of the general public.” William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1000 (1966).

public nuisance as an interference “with a right common to the general public.”<sup>31</sup> So on this point, there is no disagreement.

Tort actions, as generally understood, are nearly always designed to protect private rights, not rights of the general public. Actions for personal injury, assault and battery, malpractice, defamation, and violations of privacy are interferences with rights of particular persons. Actions for damage to property, trespass, and fraud are interferences with particular rights of property. In all these cases tort law seeks to protect and vindicate what are conventionally regarded as private rights. The government, of course, can and sometimes does sue in tort.<sup>32</sup> But when it does it is to recover damages for injuries to particular government-owned assets – government property, as distinct from a right belonging to the public as a whole.

The distinction between public and private rights is admittedly a variable one. “Public right” means different things in the context of the public trust doctrine, than it does in the law of eminent domain, than it does if we are asking whether a particular regulation is a legitimate exercise of the police power.<sup>33</sup> Historically speaking, however, the reference to “rights common to the general public” in public nuisance law has had a reasonably clear meaning, and it is a meaning that is readily distinguishable from the types of interests protected in tort.

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<sup>31</sup> Restatement (Second) of Torts, § 821B(1).

<sup>32</sup> See, e.g., *Rex Trailer Co. v. United States*, 350 U.S. 148, 151 (1956) (noting that “for the protection of its property rights, [the government] may resort to the same remedies as a private person”); *Cotton v. United States*, 52 U.S. 229, 231 (1850) (“The United States have the same right as any other proprietor to sue for trespasses on the public lands . . .”); *United States v. Silliman*, 167 F.2d 607, 610 (3rd Cir. 1948) (“The United States can sue those who commit tortious acts which result in pecuniary loss to the United States . . .”); Cf. *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301 (1947) (rejecting a claim in tort that was not authorized by statute).

<sup>33</sup> For an overview of different conceptions of public rights, see Thomas W. Merrill, *Private Property and Public Rights*, in *RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW* (Kenneth Ayotte and Henry E. Smith. Eds. 2011) (forthcoming).

When the cases speak of an interference with a right common to the general public, what they mean is that the offending condition is what we might call, borrowing an economic concept, a “public bad.” That is to say, the condition produces undesirable effects that are nonexcludable and nonrivalrous. The undesirable effect, given existing technology, cannot be limited to particular members of the community or particular parcels of property – it is nonexcludable. And the undesirable effect does not dissipate as it spreads – it is nonrivalrous. As the Rhode Island Supreme Court observed in concluding that the presence of lead based paint in private homes should not be regarded as a public nuisance, “a public right is the right to a public good, such as ‘an indivisible resource shared by the public at large, like air, water, or public rights of way.’”<sup>34</sup>

In sharp contrast, the typical tort is a “private bad.” It affects particular members of the community or particular parcels or items of property, but not others. And the typical tort has effects that diminish with distance from the point of original application of the wrongful conduct. This is often reflected in ideas about proximate or intervening cause. If the injury is too “remote” from the defendant’s conduct, then it is not deemed to be tortious.<sup>35</sup>

Here, it is worth pausing to emphasize the distinction between a public and a private nuisance. A public nuisance is an injury to the entire community. A private nuisance – which is clearly a tort – is an injury to the use and enjoyment of particular land.<sup>36</sup> Thus, public nuisance

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<sup>34</sup> State v. Lead Industries Assn., 951 A2d 428, 448 (R.I. 2008) (citations omitted).

<sup>35</sup> RESTATEMENT (SECOND) OF TORTS § 431 (1965) (“The actor’s negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.”); RESTATEMENT (THIRD) OF TORTS § 29 (Proposed Final Draft No. 1, 2005) (“An actor’s liability is limited to those physical harms that result from the risks that made the actor’s conduct tortious.”).

<sup>36</sup> RESTATEMENT (SECOND) OF TORTS § 822 (1979) (limiting private nuisance action to one who has an “interest in the private use and enjoyment of land”).

protects public rights, whereas private nuisance protects private rights. Often – and this is no doubt a major reason why courts and commentators have often confused the distinction between these two sources of liability – the same conduct can give to actions for both public and private nuisance. Consider a defendant who releases a cloud of toxic gas over a community. Insofar as the gas diminishes the use and enjoyment of particular tracts of land, it is actionable as a private nuisance. Insofar as the gas makes it impossible to use public roads, parks or buildings, it is a public nuisance, because it has interfered with rights common to the entire community.<sup>37</sup>

The classic example of a public nuisance is what used to be called a purpresture – blocking or obstructing a public road or navigable waterway.<sup>38</sup> The right to use a road or navigable stream has always been understood to be a public right, in the sense of a privilege enjoyed by all members of the community. The blockage is therefore an injury common to the general public. It does not matter whether the road or the waterway is actually used by everyone or indeed by anyone at all. The point is that it is available to all members of the community, and this open access feature provides a right common to all. We might say that a public highway or waterway has, at a minimum, an option value for all members of the public, and the interference with this option value is a public bad, in the sense that the injury to the option value is nonexcludable and nonrivalrous.

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<sup>37</sup> In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), Justices Holmes and Brandeis debated, among other things, whether a Pennsylvania statute designed to limit the risk of surface subsidence from mining coal was a public nuisance regulation. Justice Holmes said damage even to a large number of private houses would not be a public nuisance, because the damage would not be “common or public.” *Id.* at 413. Justice Brandeis countered that the statute also protected against subsidence damage to public buildings, streets, and utility lines, which meant that it qualified as a form of public nuisance regulation. *Id.* at 421–422 (Brandeis, J., dissenting).

<sup>38</sup> Restatement (Second) of Torts § 821B. cmt. a.

Extensions of public nuisance liability beyond the core case of purprestures have continued to recognize that the injury must be a public bad. One extension important historically was to the storage in cities of large quantities of gunpowder.<sup>39</sup> If the only danger was explosion, it could be argued that the gunpowder threatened only persons and property in the immediate vicinity. But it was universally recognized that entire cities were at risk of incineration from fire, making a large cache of gunpowder, and the threat of explosion, a threat to public and private rights alike.<sup>40</sup>

Later, almost invariably by legislation rather than judicial action, public nuisance was extended to cover offenses to common morality, like keeping a house of prostitution or a gambling den.<sup>41</sup> Here too, we can see the common intuition as to why the offending activity is a public bad. The condemned activities were understood as offending the common moral code of the community, and hence were regarded as violations of public rights, without regard to whether the activity caused any identifiable harm to particular persons or property.

It is also telling that the case law and the commentaries agree that the rights protected by public nuisance law are not simply aggregations of private rights.<sup>42</sup> A mass tort, such as

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<sup>39</sup> See WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA* 60-66 (1996).

<sup>40</sup> See MARK TEBEAU, *EATING FIRE: FIRE IN URBAN AMERICA, 1800-1950* at 4 (2003).

<sup>41</sup> See Prosser, *supra* note 30 at 1000-01 (discussing and listing extensions of public nuisance doctrine). For an example of a statute broadening the definition of public nuisance, *see. e.g.*, Nuisance Abatement Law, NEW YORK CITY ADMIN. CODE § 7-701 (2009).

<sup>42</sup> Restatement (Second) of Torts § 821B comment g (“Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons.”).

distributing a defective product to millions of consumers, violates a large number of private rights. But this does not convert such a tort into the violation of a public right.<sup>43</sup>

Thus we see that both verbally and conceptually public nuisance has been understood to protect a type of interest quite different than the interest ordinarily protected in tort – public as opposed to private rights. The distinctive nature of the right points toward the conclusion that public nuisance is a public action.

### **B. Public Nuisance is “Always a Crime”**

The second conventional feature is that the cases and commentaries insisted – at least traditionally – that public nuisance is “always a crime.”<sup>44</sup> This proposition, unfortunately, was repeated more often than it was explained. What I believe the proposition meant is that liability for public nuisance lies only for a condition that will also support an indictment for a crime. In other words, public nuisance includes both criminal and what we would now regard as a form of

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<sup>43</sup> This is the critical distinction between a public nuisance claim and a class action. *See generally* AMERICAN LAW INSTITUTE, AGGREGATE LITIGATION § 1.02 (2009) (Reporter’s Note). So-called *parens patriae* actions embrace an ambiguously defined category of civil actions brought by public officials. They can include both public nuisance-type claims, *see, e.g.*, Missouri v. Illinois, 180 U.S. 208 (1901) (holding that Missouri could sue Illinois and the Chicago sanitation district for pollution of Mississippi River allegedly causing typhoid epidemics in St. Louis), and representational actions advancing the interests of large numbers of citizens, *see, e.g.*, Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945) (holding that State could sue as *paren patriae* to seek injunction against discriminatory railroad rates).

<sup>44</sup> Prosser, *supra* note 30 at 997; *see also* J. A. JOLOWICZ & T. ELLIS LEWIS, WINFIELD ON TORT 392 (7th ed. 1963) (“a nuisance is a crime, while a private nuisance is only a tort”); JOHN SALMOND, THE LAW OF TORTS 83 (14th ed. 1965) (“A public nuisance is a criminal offense”). Cf. D.J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 100-104(1999) (noting that the assize of nuisance, the writ of nuisance, and later the action on the case for nuisance were all “distinct” from “criminal presentments that could be made in manorial or other local courts” where the concern was with “the diversion or stopping of watercourses, the raising or razing of dykes or walls or ponds, the blocking or narrowing of roads”).

civil liability, but always covers the same set of circumstances. Hence civil liability for public nuisance lies only for conduct that is also a crime.<sup>45</sup>

Of course, the commission of a crime, such as an assault, will often give rise to liability in tort.<sup>46</sup> But there is this important difference: the commission of the crime of public nuisance (at least historically) was both a necessary and a sufficient condition for civil liability for public nuisance. One had to create a condition that could give rise to a criminal indictment in order to be subject to an action for abatement of this condition. In contrast, the commission of a crime is neither a necessary nor a sufficient condition for tort liability.

The identification of public nuisance as grounded in a type of criminal liability powerfully reinforces the conclusion that public nuisance is a public action, not a tort. Criminal law, at least in modern times, is understood to be a public action, initiated by public authorities, designed to condemn conduct which has been identified as violating basic community norms. It is an aspect of the police power – one which employs the judiciary as an instrument of social control. If public nuisance is always based on conduct that would support a criminal indictment, then this strongly suggests that it too is a public action.

### **C. Public Nuisance is Usually Enforced by Public Officers**

A third feature of public nuisance that supports the conclusion it is a public action is that public nuisance actions are overwhelmingly prosecuted by public authorities. For several centuries after its inception, public nuisance actions apparently were prosecuted exclusively by

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<sup>45</sup> This is still the understanding in England. See J.R. Spencer, *Public Nuisance – A Critical Examination*, 48 Camb. L. J. 55, 80 (1989) (noting that if the crime of public nuisance were abolished, the possibility of obtaining an injunction or, in cases of special injury damages, would also go).

<sup>46</sup> For a discussion of negligence per se and the use of criminal statutes to establish negligence in tort, see 3 FOWLER V. HARPER ET. AL., HARPER, JAMES AND GRAY ON TORTS 702-741 (3rd ed. 2006).



local public officials or the attorney general on behalf of the Crown.<sup>47</sup> This is especially notable because, at the time, the vast bulk of criminal prosecutions were privately initiated.<sup>48</sup> Starting in the late sixteenth century, courts began to permit private parties to file relator actions in the name of the attorney general seeking injunctions against public nuisances.<sup>49</sup> Still later, courts began to permit private parties to bring damages actions for public nuisances if they could prove “special injury.”<sup>50</sup> But even after this last innovation (which I shall argue momentarily was based on a mistaken reading of an old precedent), the dominant mode of initiating a public nuisance action continued to be, and remains to this day, an action by public legal officers.<sup>51</sup>

Historically, there have been two exceptions to initiation of public nuisance actions by public authorities. The first exception, which is no longer of any significance, allowed private citizens to engage in self help to abate a public nuisance in certain circumstances.<sup>52</sup> Suppose the defendant’s wagon broke down in the highway, blocking traffic. If the defendant failed to remove the wagon, and public officials took no action, then a private citizen was privileged to

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<sup>47</sup> See Spencer, *supra* note 45.

<sup>48</sup> John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEG. HIST. 313, 317-318, 321-323 (1973).

<sup>49</sup> See Spencer, *supra* note 45.

<sup>50</sup> See F.H. Newark, *The Boundaries of Nuisance*, 65 L. Q. Rev. 480, 483 (1949).

<sup>51</sup> Donald Gifford, based on an electronic sampling of reported public nuisance actions between 1890 and 1929, reports that the ratio of public official to private damages actions was about 9 to 1. Gifford, *supra* note 29 at 805.

<sup>52</sup> The assize of nuisance (a precursor of private nuisance) permitted self-help abatement, Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775, 779 (1986), provided the victim of the nuisance acted immediately. William A. McRae Jr., *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 30, 33 (1948). Whether a similar rule applied in public nuisance actions brought in local sheriff’s courts is unclear. Some American courts later assumed that self-help abatement was also available for public nuisances. See *State v. Keller*, 189 N.W. 374, 375 (Neb. 1922) (“At common law, either by official authority or when a person was acting in his individual capacity, there was the right to abate a public nuisance without a hearing and without a notice”); *Gaskins v. People*, 84 Colo. 582, 587 (1928) (“A private individual may abate a public nuisance without judicial proceedings if he has suffered special injury.”).

use self help to remove the wagon. There is evidence the privilege was available for only a limited period of time, after which presumably the public authorities would take action.<sup>53</sup> The privilege of self-help abatement, like other forms of offensive self help, such as forcibly evicting a tenant in default, has effectively disappeared.<sup>54</sup> The growth of public enforcement resources, and the perception that public enforcement is less apt to be abused or to lead to violence, has eliminated recourse to offensive self help, either through legislative prohibition, judicial expressions of hostility, or both.<sup>55</sup>

The second exception has proved more durable. This was the understanding that not only public officials, but also private persons who suffer “special injury” – an injury different in kind and not merely in degree from the public injury – are entitled to prosecute public nuisance actions. This exception is widely recognized, and is enshrined, once again, in the *Restatement of Torts*.<sup>56</sup> But it rests on a classic confusion between standing to sue and cause of action. Just because one has standing to invoke the power of the courts, it does not follow that one has a cause of action. Eliminating the confusion would change the outcome of relatively few cases, and would bring the nature of the public nuisance action more clearly into focus.

The idea that private persons have standing to sue for damages for public nuisance violations, provided they have suffered an injury different in kind from the general public, has

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<sup>53</sup> See C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 9 (1949) (stating that the period of self help abatement was limited to four days).

<sup>54</sup> Defensive self help, such as installing locks and burglar alarms to protect property, is of course widespread and uncontroversial.

<sup>55</sup> Courts have said self-help abatement is limited to situations of “urgent or extreme necessity” and only if the action will not breach the peace. *Cook Industries v. Carlson*, 334 F.Supp. 809, 815 (D.C.Miss., 1971). Further, the actor “assumes all liability for exceeding the right.” *Id.*

<sup>56</sup> Restatement (Second) of Torts § 821C(1).

been justified by reference to an anonymous Year Book decision of 1535.<sup>57</sup> The holding of the case was that a private action will *not* lie for a public nuisance, based on the concern that this would lead to duplicative recoveries. In a separate opinion, one of the judges, Fitzherbert, argued that under certain circumstances private persons should be allowed to sue for what would otherwise constitute a public nuisance. He offered the hypothetical of a defendant who digs a trench across a highway, causing injury to a horse and rider. The obstruction of the highway would be a public nuisance, subject to indictment in local criminal court (the “leet”). Fitzherbert thought that the injured rider would nevertheless also have an action “to recover his damages that he had by reason of this special hurt.”

Fitzherbert’s hypothetical was cited much later by later by English and American courts, and by the authors of the *Restatement*,<sup>58</sup> to mean that the injured rider could sue for public nuisance.<sup>59</sup> What Fitzherbert more likely meant was that the action for public nuisance did not preclude the rider from bringing a separate action for damages based on what in his day was called an action on the case or what we would today call negligence. In other words, digging the trench in the road gave rise to two causes of action: a public action to abate the injury to the general public, and a private action to recover damages for personal injury. This interpretation is reinforced by the fact that the two actions would be tried in different courts, as Fitzherbert acknowledged. They would also result in different remedies. The only remedies for public

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<sup>57</sup> Y.B. Mich., 27 Henry 8, f. 27 pl. 10.

<sup>58</sup> The *Restatement* gives the wrong year for the decision (1536), and erroneously characterizes the holding as allowing a private party who has suffered particular harm to bring a public nuisance action. Restatement (Second) of Torts § 821C comment a.

<sup>59</sup> On the centrality of the 1535 Year Book case to the development of the special injury rule, see Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 790-796 (2001); Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 *U. CIN. L. REV.* 741, 799-800 (2005); Denise E. Louise A. Halper, *Untangling the Nuisance Knot*, 26 *B.C. ENVTL. AFF. L. REV.* 89, 98-100 (1998).

nuisance in 1535 were criminal punishment or an order of abatement, whereas the only remedy for the personal injury, as Fitzherbert also acknowledged, would be damages. Consequently, allowing both actions to proceed would not result in any duplication of actions or excessive recovery.

Correctly interpreted, what has come to be called private “standing” to prosecute a public nuisance was therefore most likely an understanding about different causes of action. If the only injury is to the general public, then only public officials may prosecute the perpetrator or seek an order of abatement. If in addition there is an injury to a private right of person or property, then the public nuisance action does not preempt the private tort action. The private right may be vindicated independently of the public right. English legal historians have recognized that this is the correct way to understand the point Fitzherbert was making.<sup>60</sup> The most recent edition of Prosser’s hornbook on *Torts*, edited by Page Keeton, also argues that this is the correct understanding.<sup>61</sup>

How many decided cases would come out differently if we interpret the “special injury” exception to be a point about the preservation of ordinary tort actions, as opposed to the conferral of standing to vindicate public rights? Not very many. In the highway and waterway cases, for example, any obstruction that causes personal injury or property damage would continue to be cognizable, as would any blockage that interferes with access to private property, which would give rise to an action for private nuisance. The only cases that might come out differently would

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<sup>60</sup> See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 361-62 (2d ed. 1979); Newark, *supra* note 50.

<sup>61</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 650 -52 (5th ed. 1984). See also Restatement (First) of Torts, ch. 40, pp. 217-18 (1939) (“An individual cannot maintain an action for a public nuisance as such . . . . The private action for personal injuries from a public nuisance, like the action for private nuisance, is an action on the case, and it is often called an action for nuisance.”).

be those in which the plaintiff suffers no physical injury but a large economic loss. Consider, for example, a restaurant or shop which loses trade because of diminished traffic. As it turns out, the cases are badly divided as to whether this kind of economic loss qualifies as “special injury.”<sup>62</sup> So aside from a few lucky plaintiffs who have used the special injury exception to skirt the general rule against recovery in tort for economic losses, it is not clear that the recharacterization would have much impact on the pattern of outcomes.<sup>63</sup>

Again, the main point is that the vast majority of public nuisance actions are brought by public authorities. This reinforces the conclusion that they are public actions. The Supreme Court has stated (in another context) that “a matter of public rights must at a minimum arise ‘between the government and others.’”<sup>64</sup> Whether the presence of the government as a party is in fact necessary condition for identifying a public action is open to dispute. One could fairly argue that a citizen suit seeking to enforce an environmental statute or a qui tam suit seeking to recover monies for the government are properly regarded as public actions. Still, it is undeniably true as an empirical matter that most public actions are brought by public authorities. The predominance of public initiation of public nuisance suits therefore reinforces the conclusion this is a public action.

#### **D. Public Nuisance Liability is Not Based on Conduct.**

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<sup>62</sup> See Antolini, *supra* note 58, at 786–90; Jeremiah Smith, *Private Action for Obstruction to Public Right of Passage* (pts I & II), 15 COLUMBIA L. REV. 1, 142 (1915).

<sup>63</sup> *Accord*, Spencer, *supra* note 45 at 83 (concluding “[i]f we abolished civil liability for damages for public nuisance the law of tort would be no less fair, and clearer and simpler as a result.”).

<sup>64</sup> *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) (plurality opinion). The Court was discussing the “public rights” exception to the requirement that adjudication of disputes by the federal government must take place in an Article III court. For a more detailed discussion of public rights doctrine under Article III, *see generally* Nelson, *supra* note 27.

Yet another feature of public nuisance law which suggests it is not properly regarded as a tort is that courts often say liability rests on maintaining an unlawful condition, not on any particular type of conduct. As the Rhode Island Supreme Court has written, the “essential element” in public nuisance is that “persons have suffered harm or are threatened with injuries that they ought not bear”; liability, in other words, is predicated “upon unreasonable injury” not “unreasonable conduct.”<sup>65</sup> Thus, a defendant is guilty of committing a public nuisance if he blocks a public highway or waterway, stores a large quantity of gunpowder in a city, pollutes a stream or the air, or maintains a drug den or house of prostitution. These states of affair are understood to interfere with rights common to the general public. Often, little or no attention is devoted to how the offending condition has come about.<sup>66</sup> If the defendant’s house falls onto the road, and the government brings an action to order the obstruction removed, the court will not ask whether the collapse was due to negligent maintenance or an Act of God. Either way, it is an interference with a right common to the general public, and should be eliminated.

Tort law typically proceeds very differently. Tort law focuses on the defendant’s conduct. It requires that the defendant perform some act or fail to perform an act she is under a duty to perform. It considers whether the defendant acted negligently, recklessly or intentionally. It asks whether the defendant’s act caused an actual injury sustained by the plaintiff.

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<sup>65</sup> Wood v. Picillo, 443 A.2d 1244, 1247 (R.I. 1982). See also Copart Indus. v. Consol. Edison Co., 362 N.E. 2d 968, 971 (N.Y. 1977); Wagner v. Regency Inn Corp., 463 N.W. 2d 450, 453 (Mich. Ct. App. 1990).

<sup>66</sup> An early case in which authorities sought to declare a storehouse of gunpowder a public nuisance without any statutory authority for such an action held that it was necessary to prove that the gunpowder was stored in a dangerous manner. People v. Sands, 1 Johns 78 (N.Y. 1806) (Livingston, J.). Later, after several explosions and fires – and more legislation declaring the storage of gunpowder a public nuisance – courts clarified that proof of negligence was not required. See Myers v. Malcolm, 6 Hill 292 (N.Y. 1844).

Public nuisance, in contrast, is a form of strict liability for creating a condition deemed to be inimical to the public welfare. It does not require proof of actual injury. Consequently, proof of causation is not required. Nor does public nuisance typically require that the defendant be shown to have engaged in particular acts giving rise to the condition or that the defendant did so in breach of some duty or standard of care. In effect, public nuisance is a type of command and control regulation enforced by judicial action. This further suggests that public nuisance is very different from the typical tort.

#### **E. Public Nuisance Typically Is Not Remedied By Damages**

Finally, public nuisance is not historically associated with a damages remedy. Public nuisance liability traditionally gave rise to criminal sanctions or an order requiring the defendant to abate the condition deemed to be a public nuisance. Throughout the long history of public nuisance law, there is no recorded instance, until very recently, of any public nuisance action initiated by public officials yielding an award of damages.<sup>67</sup> The intuition behind this implicit limitation, although never spelled out, seems reasonably clear. If a public nuisance involves a public bad, then there is no feasible method of calculating the damages caused by this condition, since the condition will inflict varying degrees of injury on all members of the community, if only the loss of the option value of using an open access resource. Certainly there is no known method of calculating damages within the capacities of the judicial system. Criminal liability and abatement orders, designed to prevent or eliminate the public bad, make far more sense. Mandatory relief provides relief for all, preserving whatever portion of the public good each

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<sup>67</sup> See Gifford, *supra* note 29 at 782 (“There is no historical evidence . . . that the state (or its predecessor under English law, the Crown) was ever able to sue for damages to the general public resulting from a public nuisance.”).

member of the community has been or may want to consume without any need to calculate its aggregate value in monetary terms.

Tort liability, in contrast, nearly always yields a damages award. Tort actions typically involve harm to persons and property, and damages are computed based on standard measures of recovery such as medical expenses, lost earnings, and costs of repair or replacement of damaged property. Moreover, most tort actions involve discrete events in the past, not ongoing conditions. Where on-going conditions are at issue, only in exceptional cases can one obtain an injunction against a tort. Historically, the primary reason for this was that equity would intervene only to protect property rights, not rights of persons. Thus, for example, equity would not enjoin the publication of a libel, since this involved reputation, a right of the person, not property.<sup>68</sup> Where property was at issue, this limitation did not apply, but most torts that involve property were also one shot intrusions or destructions, where again damages were the only plausible form of redress. Only rarely did tortious conduct involve an on-going threat to property rights, repeated trespasses or on-going private nuisances being the principal examples. In these cases, of course, equity did intervene. But damages were and remain the overwhelmingly dominant form of relief in tort.

Damage awards have been available historically only in public nuisance actions brought by private individuals pursuant to the special injury exception. The *Restatement of Torts*, despite all its revisionism, is consistent with this understanding. It mentions damages only in the context of an individual action pursuant to the special injury exception. There is not a word in the

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<sup>68</sup> See Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916); Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295 (2001).



*Restatement* about public officials recovering damages.<sup>69</sup> The internal inconsistencies in this position are patent. If public nuisance is a single cause of action – as the *Restatement* implicitly insists – and private parties can in some circumstances obtain damages under this cause of action, what possible argument supports the conclusion that public officials cannot obtain damages? If the injury is to a right of the public, and damages are sometimes appropriate for such an injury, why not allow public officials recover damages on behalf of the public? At the same time, if public nuisance is a single cause of action, and public officials cannot obtain damages, what possible argument supports awarding damages to private parties for the same violation? If the undifferentiated interference with the public right means that it is not feasible to calculate damages, why carve out an exception for a subclass of the public that can show some impossible-to-define higher-than-normal damages?<sup>70</sup>

The anomalies increase when we consider the traditional common law rule that recovery in tort is not possible for purely economic loss.<sup>71</sup> If we allow private parties to sue for public nuisance, either we are simply replicating the actions these individuals could bring under ordinary tort principles – for personal injury, property damage, private nuisance, and the like – or we are creating an exception that allows recovery for purely economic loss. The *Restatement* dances around the problem. It says that a “pecuniary loss” is an injury different in kind from that suffered by the general public – unless of course “the pecuniary loss is common to an entire community and the plaintiff suffers it only in a greater degree than others,” in which case it is not

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<sup>69</sup> See *Restatement (Second) of Torts* § 821C.

<sup>70</sup> As previously argued, the way out of this conundrum is to recognize that the “special injury” cases are really just assertions of conventional tort liability for personal injury, property damages, or private nuisance. The damages are awarded for the violation of these independent duties in tort, not for any portion of the injury to the general public.

<sup>71</sup> See American Law Institute, *Restatement (Third) of Economic Torts and Related Wrongs* (Council Draft No. 2, October 5, 2007), at 4-9, 31-38 for an excellent discussion of the rationale for the historical rule.

different in kind recoverable under public nuisance.<sup>72</sup> Small wonder the cases that wade into these waters are all over the place, with no clear or predictable results.

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In summary, public nuisance law contains a number of features that are atypical of tort law. (1) Public nuisance law protects public rights, not private rights. (2) Public nuisance liability was historically said to lie only for activity indictable as a crime. (3) Public nuisance is predominantly enforced by public officials, not private claimants. (4) Public nuisance has traditionally focused on the maintenance of a condition, not the defendant's conduct. (5) Public nuisance liability typically does not result in an award of damages, and never did so in actions brought by public authorities. The cumulative force of these features is greater than any one in isolation. Without attempting to prescribe any canonical definition of a tort, these features mean that public nuisance, as conventionally conceived, is not a tort.<sup>73</sup>

The same five features also point to the conclusion that public nuisance is properly regarded as a public action. Again, I will not insist or even attempt to prescribe a definition of public action. But an action brought in court to enforce public rights, closely associated with criminal liability, typically initiated by public officials, focused on eliminating undesirable conditions rather than sanctioning conduct, and implemented primarily through criminal sanctions and mandatory relief, would seem to fall fairly comfortably within a generalized notion of a public action.

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<sup>72</sup> Restatement (Second) of Torts § 821C comment h.

<sup>73</sup> See also James A. Sevinsky, *Public Nuisance: A Common-law Remedy Among the Statutes*, 5 NAT. RES. & ENVT, 29, 29 (1990) (“At heart, public nuisance is not a tort; rather, when asserted by the sovereign, it is essentially an exercise of the police power to protect public health and safety.”).

## II. The *Restatement* Makes Public Nuisance a Tort

The idea that public nuisance is a form of tort liability is today regarded as self evident. It is repeated by courts and commentators without qualification. It forms the basis for the claim that courts have inherent authority to adjudicate claims for injunctive relief and even damages arising out of phenomena like tobacco smoking, gun ownership, lead paint residue, MTBE contamination, and global warming. Yet, the understanding that public nuisance is a form of tort liability is of relatively recent origin. It is a product of the *Restatement (Second) of Torts*,<sup>74</sup> the relevant provisions of which were approved by the American Law Institute in 1971 and published in 1977.

The first *Restatement of Torts* appeared between 1934 and 1939. Volume four, published in 1939, featured a chapter on private nuisance, but did not include any black letter provisions on public nuisance. The “Introduction” to the private nuisance chapter explained that public nuisance was not included because public nuisance is “an offense against the State,” unlike private nuisance, which is a tort.<sup>75</sup> Thus, as recently as 1939 it was assumed that public nuisance was a type of liability that fell outside the scope of a comprehensive restatement of principles of tort law.

When the ALI decided to revise the *Restatement of Torts* in the 1950s, it appointed William L. Prosser, Professor of Law at Berkeley, as reporter. Prosser was at the time generally

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<sup>74</sup> For further background on this episode, see Antolini *supra* note 58, at 819-28; Gifford, *supra* note 29 at 806-09.

<sup>75</sup> The Introduction explained:

A public nuisance is an offense against the State, and as such is subject to abatement or indictment on the motion of the proper governmental agency. A private nuisance is a tort to a private person, and actionable by him as such.

*Restatement (First) of Torts*, ch. 40, pp. 216-17 (1939).

regarded as America's foremost expert on torts. He was also practically the only living expert on public nuisance, having written two articles that touch on aspects of the subject.<sup>76</sup> Prosser was determined to add public nuisance to the *Restatement of Torts*. His reasons for doing so – aside from his personal interest in the topic – were not convincingly explained. Prosser told the ALI members that the nuisance chapter in the first *Restatement* had been initially assigned to the *Restatement of Property*. When it was decided to move it to the *Restatement of Torts*, the drafting group was composed almost entirely of property scholars who, Prosser claimed, had “no interest in public nuisance.”<sup>77</sup> In other words, Prosser's published explanation was that public nuisance had been omitted from the first *Restatement* due to an accident of authorial assignments.

Prosser's explanation does not jibe with what was said in the first *Restatement*: the authors of the first *Restatement* said public nuisance was omitted because it is not a tort. Moreover, his explanation is implausible on its face. Public nuisance liability nearly always attaches to owners of land. A group of property scholars sufficiently engaged to write an entire chapter on private nuisance would surely have an interest in and appreciation of public nuisance as a restriction on the discretion of land owners. Prosser's statement was equivalent to saying a drafting group of property scholars omitted zoning from the *Restatement of Torts* because they had “no interest in zoning.” The mystery deepens given that Prosser insisted to his dying day that public nuisance is always a crime. In his published explanations to the members of the ALI Prosser never offered a reason why, if public nuisance is always a crime, it was imperative to include it in the *Restatement of Torts*.

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<sup>76</sup> See Prosser, *supra* note 44; William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 411–14 (1942).

<sup>77</sup> American Law Institute, *Restatement (Second) of Torts*, Tentative Draft. No. 15 at 6 (April 15, 1969).

My guess, which is necessarily speculative, is that Prosser believed it was appropriate to include public nuisance in a volume on torts because of the “special injury” exception that appeared to allow private persons to seek damages based the defendant’s commission of a public nuisance. Prosser likely regarded public nuisance in its typical incarnation as a form of criminal liability. But when private parties who suffered special injury were allowed to sue for damages, public nuisance was transformed into a tort.<sup>78</sup> As such, it belonged in the *Restatement of Torts*. If one takes the special injury cases at face value, as Prosser clearly did (but, for reasons previously given, I do not), this was an understandable position to take.

Once Prosser decided to include public nuisance in the *Restatement*, he faced a serious expositional problem. Most public nuisance cases, as we have seen, proceed on the basis of a very un-tortlike analysis. They are essentially a form of strict liability based on the maintenance of a condition deemed to be inimical to the public interest, such as blocking a highway or storing a large amount of gunpowder in a city. There was little differentiation in the cases between intentional and unintentional actions, little discussion of whether liability was always strict or sometimes based on reckless or negligent conduct, no suggestion that injury or causation had to be proven, no discussion of possible defenses. Given the dearth of authority addressing these issues, how was Prosser going to recast public nuisance into something that looked like a tort?

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<sup>78</sup> As Prosser stated at the ALI’s plenary session:

[W]hat we are trying to do here--and we have under consideration the public nuisance section, 821C--is to state a very narrow thing, which is when a private citizen may bring an action for damages--for his own damages --in tort, suffered as a result of the public nuisance. We are not concerned in this Restatement with whether a private citizen can bring some kind of action to penalize the crime, to abate it, to enjoin it, or anything else of the sort, by virtue either of special statutory authority or by virtue of some court-made rule which permits him to do so.

Presentation of Restatement of Law, Second, Torts, Tentative Draft No. 16, A.L.I. Proc. 297 (remarks of William Prosser).

The strategy Prosser devised for overcoming this problem was clever.<sup>79</sup> He did not draft a series of sections, stipulating for public nuisance what is required in terms of act, duty, standard of care, injury, causation, and defenses. This would have required citing authority for a variety of legal elements when such authority did not exist. Instead, he inserted a new comment, “comment a.,” in front of each section of the *Restatement* setting forth the elements of the action for *private* nuisance, as these elements had been set forth by the 1939 *Restatement*. These comments indicated whether or to what extent each element for private nuisance should also be deemed to apply to public nuisance. For some elements, “comment a.” made the equation complete. Thus, liability for public nuisance, like private nuisance, was said to require proof of “significant” harm.<sup>80</sup> And liability for public nuisance, again like private nuisance, required that the defendant perform an act or fail to perform an act the defendant had a duty to perform.<sup>81</sup> More often, however, the equation of public and private nuisance was hedged somewhat, employing the formulation that a particular requirement of private nuisance law “may, and commonly does, apply to conduct that results in a public nuisance.”<sup>82</sup> Through constant repetition of this phrase in a long string of “comment a.’s,”<sup>83</sup> Prosser engrafted onto public nuisance the notion that the defendant must perform an “intentional and unreasonable” act or an act that is “unintentional and otherwise actionable under the principle controlling liability for

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<sup>79</sup> The strategy is foreshadowed in Prosser’s 1966 article on public nuisance. *See* Prosser, *supra* note 30 at 1002-04.

<sup>80</sup> Restatement (Second) of Torts § 821F comment a. Prosser’s original draft used the word “substantial” rather than “significant.” *See* American Law Institute, Restatement (Second) of Torts, Tentative Draft. No. 15 at 58 (April 15, 1969).

<sup>81</sup> Restatement (Second) of Torts § 824 comment a.

<sup>82</sup> *See, e.g.*, Restatement (Second) of Torts § 826 comment a.

<sup>83</sup> *See* Restatement (Second) of Torts § 827 comment a; *id.* § 828 comment a; *id.* § 829 comment a; *id.* § 829A, comment a; *id.* § 830 comment a; *id.* § 831 comment a.

negligent or reckless conduct, or for abnormally dangerous conditions or activities;”<sup>84</sup> the idea that whether an interference is unreasonable should be determined primarily by a “weighing of the gravity of the harm against the utility of the conduct;”<sup>85</sup> and so forth. In the end, public nuisance was transformed into an action that looked more or less exactly like another tort – private nuisance.

Prosser’s explanation to the ALI for why the elements of public nuisance liability were virtually indistinguishable from those for private nuisance liability was quite remarkable. Prosser had written in his draft “Introduction” to the revised nuisance chapter that public and private nuisance have “little or nothing” in common; that they “describe two quite different things;” and that they are linked by nothing more than the “historical accident” that the same word applies to each.<sup>86</sup> Yet, he immediately added that “[t]he use of the word ‘nuisance’ to apply to both has...resulted in the development of rules that, with minor differences, are the same for the two.”<sup>87</sup> In other words, Prosser claimed courts had been fooled by the common use of the word “nuisance” into treating two forms of liability, which have “little or nothing” in common, as if they were the same. The unstated implication was that since courts had been fooled, the *Restatement*, being ever faithful to settled authority, would dutifully follow suit.

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<sup>84</sup> American Law Institute, Restatement (Second) of Torts, Tentative Draft. No. 17 at 23 (April 26, 1971).

<sup>85</sup> *Id.*, citing Restatement (Second) of Torts §§ 822, 826-31. Section 826 offers as the primary definition of “unreasonable” for private nuisance purposes that “the gravity of the harm outweighs the utility of the actor’s conduct.” Sections 827-31 offer further specification of the factors relevant in determining “gravity” and “utility” and how they are to be weighed.

<sup>86</sup> American Law Institute, Restatement (Second) of Torts, Tentative Draft. No. 15 at 10 (April 15, 1969). The same language is retained in the final published version. Restatement (Second) of Torts, Chapter 40, Introduction, at 80.

<sup>87</sup> *Id.* See also *id.* § 821B, comment e.

Neither Prosser nor his successor as Reporter, John Wade, stopped to ask the obvious question: What is the point of having twin torts, one limited to interferences with the use and enjoyment of land, and the other applicable to interferences with public rights? Why not have just one action, called “nuisance,” which can be triggered by different categories of plaintiffs? Or why not do away with private nuisance altogether, and treat it as being subsumed under public nuisance? Or (better yet), why not do away with public nuisance altogether, leaving only private nuisance? An even more obvious problem was that not one treatise or precedent was cited by Prosser (or Wade) in support of the proposition that public and private nuisance historically followed the same mode of analysis in determining liability. The only basis for assuming they did was a long string of *ipse dixits* set forth in “comment a.” after each section dealing with private nuisance.

Although Prosser’s “comment a.” strategy laid the groundwork for turning public nuisance into a tort, the transformation was of limited significance given that Prosser’s draft also imposed an important restriction on the potential scope of public nuisance liability: conduct charged as a public nuisance had to be a crime. Prosser’s draft presented for consideration by the American Law Institute offered the following succinct definition of public nuisance:

A public nuisance is a *criminal interference* with a right common to all members of the public.<sup>88</sup>

Prosser’s explanatory note acknowledged that “[s]everal members of the Council have challenged the proposition that a public nuisance is always a crime. After rather

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<sup>88</sup> American Law Institute, Restatement (Second) of Torts, Tentative Draft. No. 15 at 16 (April 15, 1969) (emphasis added).



intensive search, the Reporter sticks to his guns.”<sup>89</sup> There followed an impressive collection of authorities, including eight English and American commentaries and nine American judicial decisions (which Prosser said were representative of many more), all of which equated public nuisance with criminal liability. Prosser added that he had failed to “uncover a single case in which it was held that there was a public nuisance although there was not a crime,” although he added there was one case in which the criminal character of the conduct was not mentioned and another case where the defendant, a municipal corporation, was immune from criminal prosecution.<sup>90</sup> In sharp contrast to his “comment a.” strategy of assimilation, for which he cited no authority, the limitation of public nuisance liability to conduct that was criminal was backed by a massive show of doctrinal support.

Prosser’s draft of the new provisions pertaining to public nuisance was scheduled to be taken up by the Institute at its plenary session in May of 1969. Other matters consumed too much time, however, and the discussion was postponed for a year. This proved to be fateful. The plenary session of 1970 occurred immediately after the first “Earth Day” on April 22, 1970, at a time when the news media was full of fervent entreaties to save the planet.<sup>91</sup> Although Prosser assumed that his effort to add public nuisance to the *Restatement of Torts* would secure routine approval, he was blindsided by a revolt from the floor.

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 18.

<sup>91</sup> See generally PHILIP SCHABECOFF, *A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT* 111-28 (1993) for an account of Earth Day 1970 and its aftermath.

The objections came from two sides. One group, lead by Charles A. Bane of Illinois, argued that recent statutory developments designed to protect the environment counseled in favor of “removing entirely from the concept of nuisance those activities that are subject to regulation.”<sup>92</sup> Another group, lead by John P. Frank of Arizona, argued that the proposed language, especially the description of public nuisance as a “criminal interference” with public rights, failed to offer sufficient support to the nascent environmental movement. As Frank stated:

What is happening at the moment all over America is that the people are asking to deal with pollution of air and of water and land, that in this connection a developing body of law is beginning to formulate which is breaking the grounds of traditional public nuisance. What is happening is that we are clamping a ceiling down, and by this restatement of public nuisance we are making it impossible to use the courts for the most important single social function which at this moment law in its civil reach ought to have....

Pollution may be crime against God and nature, but it is not usually a crime against the laws of the state, so that by putting in that definition we make it impossible to reach the problem of the black cloud of filth which hangs over my community and, I suspect, yours.<sup>93</sup>

Frank also objected to the proposed draft’s language limiting private actions for public nuisance to individuals who have suffered an injury “different in kind” from other members of the public. Frank said this was out of step with “modern” developments regarding standing to sue.

The Frank’s passion won the day; at least, his group proved to have more votes than Bane’s group. After a heated debate, in which Prosser’s defense of the draft as a faithful restatement of the weight of authority was parried by earnest calls for the Institute to go on

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<sup>92</sup> Presentation of Restatement of Law, Second, Torts, Tentative Draft No. 16, A.L.I. Proc. 287, 288-89 (remarks of Charles A. Bane).

<sup>93</sup> Presentation of Restatement of Law, Second, Torts, Tentative Draft No. 16, A.L.I. Proc. 287, 291 (remarks of John P. Frank).

record in support of the emergent environmental movement, a motion was passed recommitting the provisions on public nuisance to the reporter for further consideration.<sup>94</sup>

Prosser was distraught by the plenary session's rejection of his draft on public nuisance.<sup>95</sup> He subsequently submitted his resignation as reporter, and a year later would be dead. Prosser was replaced by John C. Wade, Dean of the Vanderbilt Law School. Wade was also a torts scholar, indeed he was the co-author with Prosser of the leading torts' casebook.<sup>96</sup> Unlike Prosser, Wade had never engaged in any sustained study of public nuisance law. His political skills, however, would prove to be superior.

Wade redrafted the definition of public nuisance, substituting the word "unreasonable" for the word "criminal." Thus, the new definition read:

A public nuisance is an *unreasonable interference* with a right common to all members of the public.<sup>97</sup>

With one deft stroke, Wade transformed public nuisance from a form conduct defined by criminal law into something that sounded like the quintessential tort – albeit a tort having a virtually limitless expanse. He made no effort to show that the new definition was supported by precedent. He did try to discredit the many authorities cited by Prosser for the proposition that public nuisance is always a crime, asserting that these were “casual statements not necessary to

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<sup>94</sup> Presentation of Restatement of Law, Second, Torts, Tentative Draft No. 16, A.L.I. Proc. 287, 304-305. The vote to recommit was 85-51. *Id.*

<sup>95</sup> *See* Antolini, *supra* note 62.

<sup>96</sup> WILLIAM L. PROSSER & JOHN W. WADE, *CASES AND MATERIALS ON TORTS* (5th ed. 1971).

<sup>97</sup> American Law Institute, Restatement (Second) of Torts, Tentative Draft. No. 17 at 3 (April 26, 1971) (emphasis added).

the decision.”<sup>98</sup> Moreover, he suggested these decisions were ambiguous, because, as he flippantly put it, it was unclear whether something is a public nuisance because it is a crime, or is a crime because it is a public nuisance.<sup>99</sup> The principal reason for abandoning the linkage to criminal law, he nevertheless acknowledged, was that the plenary session of the ALI had rejected this on the ground it was “too restricted and inhibited the incipient development in the field of environmental protection.”<sup>100</sup> Wade’s revision was approved in principle in May, 1971, and finally adopted in 1972.<sup>101</sup>

Wade’s suggestion that the many cases equating public nuisance with criminal liability might mean that something is criminal because it is a public nuisance does not bear scrutiny. The notion that someone could be convicted of a crime based on a judicial determination that her activity was an “unreasonable interference” with a public right would, at least by 1970, almost certainly be held void for vagueness.<sup>102</sup> What the many courts that equated public nuisance with criminal liability almost certainly meant is that a condition indictable as the crime of public nuisance will also give rise to a civil action to abate the public nuisance.

Also in response to the rebellion against Prosser’s draft, Wade sought to liberalize the circumstances in which private individuals can seek injunctions against public nuisances. He

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<sup>98</sup> American Law Institute, Restatement (Second) of Torts, Tentative Draft. No. 17 at 11 (April 26, 1971).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 4.

<sup>101</sup> American Law Institute, Restatement (Second) of Torts, Tentative Draft. No. 18 at 1 (April 26, 1972).

<sup>102</sup> *See, e.g.,* Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972) (holding vagrancy statute unconstitutional on vagueness grounds). There is no reason to believe a different conclusion would be reached today. *See* Skilling v. United States, 130 S.Ct. 2896, 2931 (2010) (holding that a statute making it a crime to deprive another of the “intangible right to honest services” would be void for vagueness if not limited to bribes and kickbacks).

drafted a new Section 821C(2) to eliminate the special injury requirement in this context.<sup>103</sup> As Denise Antolini has documented, however, only one court has ever followed the *Restatement* in allowing any citizen to sue to enjoin a public nuisance. The Restatement’s effort to “modernize” standing to sue for public nuisance is effectively a dead letter.<sup>104</sup>

By turning public nuisance into a tort, the *Restatement* also implicitly adopted the position that courts have inherent authority to identify new forms of conduct as public nuisances, as well as inherent authority to determine when private parties can serve as enforcement agents to secure these rights. Lest there be any doubt about the matter, the claim of inherent authority was also set forth explicitly.

The conferral of explicit authority on courts to determine what is a public nuisance arose, somewhat ironically, when members of the ALI council overseeing Wade’s revisions expressed reservations about the extreme breadth and vagueness of Wade’s definition of public nuisance as an “unreasonable interference” with public rights. In response, Wade set forth a further elaboration of the definition, in the form of what he described as three “factors conducing toward a determination that an interference with a public right is unreasonable.”<sup>105</sup> In his initial draft given to the council, two of Wade’s three factors were anchored in history, making explicit reference to whether the interference “sufficed to constitute the common law crime of public nuisance” or had been “proscribed by a statute, ordinance, or administrative regulation.”<sup>106</sup>

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<sup>103</sup> Restatement (Second) of Torts § 821C(2).

<sup>104</sup> Antolini, *supra* note 62 at 856. It should be noted that Antolini regrets this development, and argues strenuously (and at great length) for universal citizen standing to assert public nuisance claims.

<sup>105</sup> American Law Institute, Restatement (Second) of Torts, Tentative Draft. No. 17 at 3 (April 26, 1971).

<sup>106</sup> *Id.* The draft read:

Having tacked to the right to overcome the council's qualms about vagueness, Wade then tacked to the left as the anticipated encounter with the environmentalists in the plenary session approached. The reference to conduct considered a crime at common law was quietly dropped, and was replaced by the sweeping proclamation that liability would lie when "the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience."<sup>107</sup> This was surely broad enough to give courts inherent authority to condemn any form of environmental degradation as a public nuisance – or any other social ill for that matter. Authority to condemn activity as a public nuisance was severed from any link to history or legislative proscription, and given over to courts based on their independent analysis of the needs of the public.

The question of identifying the proper enforcement agent followed a similar pattern. After setting forth provisions allowing public officials or persons who have suffered special injury to seek injunctions, Wade added a new provision stating that a private citizen could also seek injunctive relief provided she had "standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action."<sup>108</sup> The comments acknowledged that this was contrary to the "traditional rule," but argued that courts had failed to

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Factors conducing toward a determination that an interference with a public right is unreasonable, include the following:

- (a) The circumstance that the conduct involves the kind of interference with the public health, the public safety, the public peace, the public comfort or the public convenience which sufficed to constitute the common law crime of public nuisance,
- (b) the circumstance that the conduct is proscribed by a statute, ordinance or administrative regulation, or
- (c) the circumstance that the conduct is of a continuing nature or has produced a permanent or long-lasting effect, that its detrimental effect upon the public right is substantial, and that the actor know or has reason to know of that effect.

<sup>107</sup> Restatement (Second) of Torts § 821B(2)(a). For the full text, see note 25 supra.

<sup>108</sup> Restatement (Second) of Torts § 821C(2)(c).

perceive that the rule restricting standing to sue for damages did not apply to actions seeking injunctive relief. The comments concluded with the observation that “[t]he Subsection is worded so as to leave the courts free to proceed with developments regarding standing to sue without the restrictive effect that would be imposed by a categorical statement of the traditional rule....”<sup>109</sup> In other words, at least with respect to injunctive relief, courts were deemed to have inherent authority to expand the universe of potential enforcement agents to include any “representative of the general public” – if courts thought this was a good idea.

Notwithstanding the strenuous efforts of John Frank, Dean Wade, and their friends in the environmental movement,<sup>110</sup> the effort to remake public nuisance law into an all-purpose tool for environmental protection proved largely inconsequential. After the *Restatement* revisions, public nuisance was no more a factor in protecting the environment than it had been before.<sup>111</sup> Although it is possible to find post-*Restatement* cases holding environmental harms to be public nuisances,<sup>112</sup> the progress of environmental law after 1970 was almost entirely driven by the enactment of statutory regimes such as the National Environmental Policy Act, Clean Air Act, the Clean Water, the Endangered Species Act, the Resource Conservation and Recovery, and so forth. The consequences of the ALI revolt, and John Wade’s completion of William Prosser’s

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<sup>109</sup> Restatement (Second) of Torts § 821C comment j.

<sup>110</sup> See John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 Ecology L. Q. 241 (1972) (article by two lawyers for the Natural Resources Defense Council highlighting the *Restatement*’s version of public nuisance law as a new tool for environmentalists).

<sup>111</sup> As Denise Antolini observes:

[A] survey of case law since the Restatement rebellion thirty years ago confirms that only one court - the Hawai’i Supreme Court in *Akai* - has ever expressly adopted the proposed change to the special injury rule/different-in-kind test for public nuisance cases. Although many courts have bent or confused the rule, and some jurisdictions have created an important exception for commercial fishing, the Restatement has not been rejected but, worse yet, simply ignored by courts.

Antolini, *supra* note 58 at 856.

<sup>112</sup> See, e.g., *Village of Wilsonville v. SCA Services, Inc.*, 426 N.E. 2d 824 (Ill. 1981).

transformation of public nuisance into a tort, were not fully realized until much later with emergence of the state Attorney Generals' campaign against "neglected" social issues, beginning with the tobacco settlement.

### **III. Institutional Choice Implications**

If public nuisance is a public action, rather than a tort, then this has important implications for determining which institution in society is charged with prescribing the elements of public nuisance liability and designating who may institute a public nuisance action. The short answer is that it is the legislature that should exercise this authority, not the courts acting in a common law capacity – or the American law Institute. Before courts enforce a public action they should be able to point to some provision of enacted law authorizing that action. Courts should decline to exercise any authority, derived from the common law or otherwise, to declare rights common to the general public or to determine who shall enforce them.

Of course, no one is going to deny that the legislature has the final word on the elements of public nuisance liability, or whether we have something called public nuisance law at all. We operate in a legal system in which legislatures have the power to trump common law.<sup>113</sup> So even if public nuisance is a tort, or some other species of common law, the legislature has the authority to revise public nuisance law or even abolish it altogether. The Second Circuit's recent decision upholding federal legislation preempting the application of public nuisance law to handgun manufacturers indicates that, as long as an adequate nexus to interstate commerce can be shown, the U.S. Congress also has the power to trump state public nuisance law.<sup>114</sup>

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<sup>113</sup> Daniel E. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283-284 (1989).

<sup>114</sup> *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 392-97 (2d Cir. 2008).



The real issue of institutional choice implicated by classifying public nuisance as a public action rather than a tort is whether the judiciary has inherent authority to establish public nuisance liability without any prior legislative authorization to do so. Under current institutional understandings, state courts of general jurisdiction have inherent authority to recognize causes of action in tort and to revise the elements of these actions without any specific delegation of authority from the legislature. Enough authority, for example, to eliminate the requirement of contractual privity in holding manufacturers liable for defective products that injure consumers,<sup>115</sup> or to jettison contributory negligence in favor of comparative negligence.<sup>116</sup> Whether this is because of state statutes “receiving” the common law as part of the law of the state, or because state courts inherited the power to revise the common law as part of the judicial power they were granted upon independence from England, I leave for another day.<sup>117</sup>

With respect to public actions, the understanding is otherwise. Here, it is generally recognized that courts cannot entertain actions to vindicate public rights without prior legislative authorization. I will call this understanding the “enacted law” constraint, meaning that judicial power to impose binding judgments must come from some enacted law adopted by an authority exercising sovereign power – either the people acting to ratify constitutions, the legislature passing statutes, or administrative agencies adopting rules with the force of law pursuant to delegated authority.

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<sup>115</sup> See *McPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (extending duty of care of manufacturer to ultimate purchaser notwithstanding absence of privity of contract).

<sup>116</sup> See, e.g., *Alvis v. Ribar*, 421 N.E. 2d 886 (Ill. 1981) (rejecting contributory negligence and adopting comparative negligence based on inherent judicial authority to revise the common law).

<sup>117</sup> For a brief discussion, see Thomas W. Merrill, *Judicial Prerogative*, 12 PACE L. REV. 327, 346-347 (1992).

I advance this claim not on the basis of any essentialist (or originalist) understanding of separation of powers. The requirement that public actions must be grounded in enacted law is, rather, one of those shared assumptions about the division of governmental power that have been worked out over time.<sup>118</sup> American law rests on somewhat schizophrenic assumptions, in which propositions of legislative supremacy and judge-made common law co-exist.<sup>119</sup> The matter is incredibly complex, especially when we attempt to generalize about more than fifty political jurisdictions. And it would be misleading to insist that any settled understanding of the relationship between these postulates was incorporated in founding documents.<sup>120</sup> Nevertheless, what has happened over time is that enacted law has come to be the exclusive source of public rights, and judge-made common law has retreated to private law, especially areas of private law defined by state law.<sup>121</sup>

In saying this, I do not deny that significant pockets of discretionary judicial policy-making continue to exist in public law. Some striking examples include judicial oversight of school desegregation, school funding, state mental health systems, prisons, abusive police

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<sup>118</sup> It is closely related to what I have called the disposing power of the legislature, that is, the understanding that the legislature has exclusive power under the Constitution to “determine[] who has the authority to make law and under what circumstances.” Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 454 (2010).

<sup>119</sup> For a valuable historical exploration of these two roots of legal duty in America, see PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 327-357 (2008).

<sup>120</sup> I largely agree with John Manning that the text and original understanding of the Constitution do not include a well-defined principle of separation of powers. John F. Manning, *Separation of Powers as Ordinary Interpretation*, \_\_\_ HARV. L. REV. \_\_\_ (forthcoming). Certainly, one cannot devine from these sources an answer to the question whether courts can entertain public actions without prior legislative authority.

<sup>121</sup> See, e.g., *United States v. Standard Oil Co.*, 332 U.S. 301, 316 (1947) (declining to recognize a new cause of action on behalf of the United States for lost services due to injuries inflicted on a soldier, and noting that the matter might well be different in an action where “the courts stood as arbiters between citizens, neither of whom could determine the outcome or the policy properly to be followed.”).

practices, and housing and land use decisions.<sup>122</sup> Significantly, however, in all these areas of judicial policy-making, judicial intervention is justified in the name of some specific statute or constitutional provision like the Equal Protection Clause. In other words, “reform litigation” is not justified in the name of inherent judicial authority grounded in the common law. Courts feel compelled to cite one or more provisions of enacted law to justify their intervention. Which is the only point I seek to make: insofar as public actions and matters of public right are concerned, courts understand that they must identify some authoritative source of enacted law – typically a statute or a constitutional provision – in order to entertain a public action. This by itself is enough to isolate what is problematic about the recent wave of public nuisance litigation addressed to controversial social problems: there is in most cases no legislative authorization for these actions.

### **A. The Democratic Roots of the Enacted Law Constraint**

The sources of the triumph of the enacted law constraint in matters of public right are various. The first and most basic is a growing attachment to the democratic ethos, already pronounced at the founding (at least relative to other nations) and becoming increasingly strong during and after the Jacksonian era.<sup>123</sup> The chosen instrument of democratic control, throughout our history, has been the legislature. Today, it is widely understood that insofar as controversy surrounds a question of public rights, it should be resolved by the institution most closely associated with popular control, that is, the legislature. When the question involves the provision

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<sup>122</sup> For an overview, see Charles F. Sabel and William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1022-1052 (2004).

<sup>123</sup> See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 7 (1980) (“rule in accord with the consent of a majority of those governed is the core of the American governmental system”); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 24-27 (1985).

of public goods, including the regulation of “public bads” as under the traditional law of public nuisance, there will nearly always be controversy. At the very least, people will disagree about how the costs of regulating public bads should be apportioned among different members of the community. Either taxes must be raised, or the costs of regulations must be borne by private actors and passed along (in part) to consumers, or some combination of both. These questions of public finance have always been understood to be ones the people themselves must answer acting through their elected representatives in the legislature.<sup>124</sup>

It is no answer to say that popular sovereignty is preserved as long as the legislature can override the judgments of courts. This ignores the institutional reality that, given their crowded agendas, legislatures are far more likely not to act than to act with respect to any particular issue presented for their attention. In practice, allowing courts to recognize public rights and to deputize private parties to enforce those rights subject to legislative override would represent a major shift in policymaking power from popularly-accountable legislatures to courts.<sup>125</sup>

Permitting judicial intervention in advance of legislative authority would also inevitably shift the baseline understanding about the scope and content of public rights. Consequently, even when the legislature did override the courts, the final equilibrium would likely not be identical to the one that would have been reached absent judicial intervention. Put another way, the courts would be setting the agenda, not the legislature.

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<sup>124</sup> The U.S. Constitution, for example, requires that all bills for raising revenue originate in the House of Representatives, U.S. CONST. art. I, § 7, cl. 1, and provides that no money shall be drawn from the Treasury without an appropriation made by law, id. § 9, cl. 7. The latter clause, according to the Supreme Court, was designed to “assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants.” *OPM v. Richmond*, 496 U.S. 414, 428 (1990).

<sup>125</sup> Merrill, *supra* note 123 at 22–23.

A second source of the triumph of the enacted law constraint is the nondelegation doctrine. This is the idea that the legislature must provide guidance to executive and judicial actors by laying down an “intelligible principle” for them to follow in matters of public right.<sup>126</sup> The doctrine is rarely enforced at the federal level,<sup>127</sup> but is treated more seriously in some state legal systems.<sup>128</sup> Whether strictly enforced or not, the doctrine highlights the importance of legislative enactments that constrain the discretion of other government actors. It is important for the public to know when power has passed from legislative to executive or judicial actors, and it is important for courts reviewing executive action (or lower court action) to have some idea where the boundaries of delegated authority have been set.<sup>129</sup> All this, of course, presupposes that there must be some enacted law for executive and judicial actors to follow in the first place.<sup>130</sup>

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<sup>126</sup> *J.W. Hampton, Jr. & Co. v United States*, 276 U.S. 394, 409 (1928).

<sup>127</sup> *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-76 (2001); *Field v. Clark*, 143 U.S. 649, 692-94 (1892).

<sup>128</sup> Approximately twenty states take a “strong approach” to nondelegation by requiring “specific standards in legislation.” *See* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1191-1201 (1999). *See, e.g.*, *Bd. of Trustees of the Judicial Form Retirement Sys. v. Attorney General*, 132 S.W.3d 770, 782 (Ky. 2003) (noting Kentucky strictly adheres to the nondelegation doctrine).

<sup>129</sup> *See Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., Concurring) (noting that the nondelegation doctrine serves three important purposes: “that important choices of social policy are made by Congress;” that Congress “provides the recipient [of delegated] authority with an “intelligible principle” to guide the exercise of the delegated discretion;” and that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards”); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 319-21, 342 (2000) (arguing that nondelegation aspires to create political accountability and rule of law values); Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663, 665 (2004) (arguing for a “Penalty Default Canon [that] requires courts to declare responsibility-shifting statutory provisions unconstitutional delegations of legislative authority”).

<sup>130</sup> A directive to courts to determine what constitutes an “unreasonable interference with a right common to the general public” presses the limits of even the most elastic conception of the nondelegation doctrine. When the directive is not even written law, but rather the ALI’s attempt to restate inherent common law authority, the limits have clearly been exceeded.

A third factor explaining the rise of the enacted law constraint is the need for effective coordination of public law as the scale and complexity of government have mushroomed. In matters of institutional choice, only the legislature has the full range of power to allocate responsibility among subordinate institutions on a comprehensive basis.<sup>131</sup> Also, of course, insofar as the enforcement of public rights has been increasingly given over to administrative bodies, only the legislature has the resources to create and fund the appropriate administrative offices. In contrast, courts are highly constrained in the remedies they can provide. They lack the kind of investigatory and fact finding ability necessary to make meaningful determinations of institutional choice. And they have no authority to commandeer significant public resources, or to create new institutions.<sup>132</sup>

Here again, we can see that the legislative power to override judicial initiatives cannot serve as a basis for preserving control over matters of institutional choice. If a court takes it upon itself to regulate tobacco sales, or set up a program of restitution for persons exposed to lead paint, or to restrict the emission of greenhouse gases, an institutional choice will have been made. Resources will have been expended – if only by judges and other court personnel and by parties seeking to comply with judicial orders. Expectations will have changed. New interest groups will have coalesced. The legislature may not be able to keep up with any meaningful oversight of the process. Even if it does, its choices will be constrained relative to what they

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<sup>131</sup> See Merrill, *supra* note 118 at 471.

<sup>132</sup> The Fourth Circuit's recent decision concluding that issues of transboundary pollution should be resolved by administrative agencies rather than courts employing public nuisance law, *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291 (4<sup>th</sup> Cir. 2010), contains many insights reflecting a similar institutional choice analysis. As Judge Wilkinson wrote: "It was certainly open to the legislative branch to authorize various private causes of action as the primary means of arriving at emissions standards. Congress, however, thought the problem required a very high degree of specialized knowledge in chemistry, medicine, meteorology, biology, engineering, and other relevant fields that agencies rather than courts were likely to possess." *Id.* at 304-05.

would have been without judicial intervention. In short, our commitment to popular sovereignty requires that the legislature be given the first word on determining what rights are common to the public as a whole, not the last word.

### **B. The Federal Example.**

The question of judicial authority to entertain public actions has been most fully considered at the federal level, and here the answer is increasingly clear that federal courts lack any inherent power to define or initiate such actions. There is of course no principle of separation of powers reflected in the federal Constitution that is binding on the states.<sup>133</sup> Nevertheless, there is little doubt that the way in which separation of powers has come to be understood at the federal level provides an instructive example for the states, all of whom operate under constitutions that reflect separation of powers principles to a significant degree.

When our nation was founded, something called common law crimes were widely recognized and served as a basis for criminal prosecutions.<sup>134</sup> The U.S. Supreme Court repudiated this practice, as a matter of federal law, early in the nineteenth century.<sup>135</sup> Before a federal criminal prosecution can commence, the Court held, “[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”<sup>136</sup> This judgment has never been revisited. *Erie R. Co. v.*

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<sup>133</sup> *Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980) (noting that “[t]he Court has held that the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States”). *See also* *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 225 (1908).

<sup>134</sup> *See* Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1016–17 (1985).

<sup>135</sup> *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

<sup>136</sup> *Id.* at 34.

*Tompkins*,<sup>137</sup> of course, held that federal courts lack authority to propound general common law rules, which broadened the principle to the civil context. Something called specialized federal common law survived after *Erie*, but these pockets of judge-made law are largely confined to matters of conventional private law concern – contract, tort, and property – where some uniquely strong federal interest is thought to exist.<sup>138</sup> Even these pockets of federal common law are increasingly regarded with skepticism, and are largely limited to grandfathered applications.<sup>139</sup>

Also relevant are the understandings that pertain to other legal actors, including the President and the multitude of federal administrative agencies that have been created to enforce public rights. These entities, even more clearly than the judiciary, are understood to lack inherent lawmaking authority. The President, as Henry Monaghan has argued, may have a narrow range of authority to act to protect the nation in emergencies, in anticipation of legislative action.<sup>140</sup> But the dominant message of the modern era, from the *Steel Seizure Case*<sup>141</sup> to the controversies surrounding Guantanamo detainees,<sup>142</sup> is that the President must have legislative authority in hand when he acts in the name of the public right. With respect to administrative agencies, the understanding is even clearer. Agencies are understood to be creatures of statute

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<sup>137</sup> 304 U.S. 64 (1938).

<sup>138</sup> See *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (recognizing federal common law contractor defense in tort); *Clearfield Trust v. United States* 318 U.S. 363 (1943) (holding that federal, not state law, applies to commercial paper of the United States); *D'Oench, Duhme & Co. v. Federal Deposit Ins. Co.*, 315 U.S. 447 (1942) (validity of note payable to bank taken over by federal government determined by federal common law).

<sup>139</sup> See, e.g., Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. Rev. 895 (1996).

<sup>140</sup> Henry P. Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1 (1993).

<sup>141</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>142</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (absent specific legislation establishing and providing procedures for special military commissions, the general provisions of the Uniform Code of Military Justice must be applied in determining the status of detainees); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion) (finding executive had authority to detain enemy combatants under congressional authorization of use of military force and declining to reach question whether such authority might exist based directly on Article II of the Constitution).



and are strictly limited to the powers and processes conferred upon them by statute. An agency found to be acting beyond its legal authority will be slapped down.<sup>143</sup> The principle of legality – *nulle poena sine lege* – reigns supreme.

When we turn to enforcement authority, a similar pattern can be discerned at the federal level. The appointment of U.S. Attorneys has usually been vested in the President, occasionally in the courts.<sup>144</sup> But it has always been understood to be controlled by Congress through appropriate legislation. For a time the Supreme Court undertook to recognize implied private rights of action under federal regulatory statutes, based on the Court’s assessment of whether such an action would advance the purposes of Congress.<sup>145</sup> But this is increasingly regarded as illegitimate, and such actions are now also limited to grandfathered applications.<sup>146</sup> The new understanding, which appears to be widely shared among the Justices, is that private actions exist only when they have been expressly created by statute.<sup>147</sup> The issue of standing to sue is also relevant here. Although many battles have raged over whether Congress can confer standing on private parties to vindicate public rights, all assume that private parties do not have standing to

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<sup>143</sup> See, e.g., *Gonzales v. Oregon*, 546 U.S. 243 (2006) (invalidating regulation found to be outside agency jurisdiction).

<sup>144</sup> See Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275 (1898).

<sup>145</sup> See *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

<sup>146</sup> See *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>147</sup> See *id.* at 286-87 (“[P]rivate rights of action to enforce federal law must be created by Congress . . . Without [statutory intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.”). See also Brian D. Galle, *Can Federal Agencies Authorize Private Suits Under Section 1983?: A Theoretical Approach*, 69 BROOKLYN L. REV. 163, 165 (2003) (“the Court has become increasingly reluctant to allow private rights of action without express congressional authorization”).

vindicate public rights absent some legislation by Congress conferring this authority on them.<sup>148</sup>  
Standing to enforce public rights exists only when delegated by Congress.

In short, evolving principles of institutional choice at the federal level are rapidly converging to the understanding that authority to define and enforce public rights must be traced to some source in enacted law. This understanding is enough to doom the proposition endorsed by the Second Circuit in *American Electric Power*<sup>149</sup> -- that there is some general federal common law of public nuisance which can be invoked by state attorneys general to challenge the emission of greenhouse gases.

### **C. The History of Criminal Law Enforcement**

Whether or to what extent federal understandings of separation of powers have been embraced by the states would take us too far afield, and too far beyond the limits of a single essay. I will confine my comments to a single question of particular relevance – whether state courts have inherent authority to identify conduct as criminal, and to designate who may institute a criminal prosecution. As we have seen, public nuisance began as a form of criminal liability; was thought before 1970 to rest on the existence of circumstances indictable as a crime; and it is still today regarded as resting on criminal liability in England.

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<sup>148</sup> Nelson, *supra* note 27 at 627 n.223; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1468 (1988). For a discussion relating this understanding to the traditional law of public nuisance, see Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 701-04 (2004).

<sup>149</sup> *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009), cert. granted, 131 S.Ct. 813 (2010).

State courts did not immediately follow the lead of the U. S. Supreme Court when it disclaimed authority to enforce common law crimes in 1812.<sup>150</sup> But over the course of the next 100 years or so, judicial crime creation disappeared at the state level as well. Criminal liability is now universally understood to require the prior adoption by the legislature of a law identifying the conduct as criminal.<sup>151</sup> To some extent, this movement toward codification in criminal law has been motivated by concerns about fair notice. But it is also grounded in structural constitutional considerations and intuitions about the importance of legislative identification of conduct that is criminal. The most fundamental explanation for the elimination of common law criminal liability is the understanding that criminal law extends to conduct as to which strongly conflicting views are held.<sup>152</sup> The appropriate institution for resolving these conflicts is the legislature, not the courts.

Just as common law crimes have vanished from the scene, so has the private prosecutor. During the colonial era up through the first half of the nineteenth century, many states continued to allow private prosecutions of crime, evidently because this was the practice inherited from England.<sup>153</sup> With the rise of Jacksonian democracy, the prosecution of crime increasingly was given over to elected officials. Starting with Massachusetts in 1849, states began questioning the

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<sup>150</sup> This disclaimer of authority came in *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812). For states continuing to enforce common law crimes, *see, e.g.*, *State v. Cummings*, 33 Conn. 260 (1866) (enforcing the common law offense of larceny); *State v. Pulle*, 12 Minn. 164, 164 (1866) (“conspiracy, though not declared a crime by our statute law, is punishable in this State”).

<sup>151</sup> John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 194 n. 13 (1985).

<sup>152</sup> *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 359-360 (1994) (disdain for federal common law crimes derived from skepticism of judicial policy-making and the “discretionary character of judge-made criminal law”).

<sup>153</sup> *See generally* Allen Steinberg, *From Private Prosecution to Pleas Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 Crime & Delinquency 568 (1984).

propriety of private prosecution.<sup>154</sup> Soon, a number of state supreme courts refused to affirm convictions procured by private prosecutors; other states enacted legislation outlawing private prosecutors. Today, only three states allow private prosecutions without the consent or supervision of a public prosecutor.<sup>155</sup> More to the point, the question of who can prosecute a crime is understood to be a question to be resolved by the legislature. As public prosecution has become the norm, and as the matter has come to be recognized to be one subject to the control and direction of the legislature, the idea that courts have inherent authority to determine who is the appropriate person to prosecute a crime has come to seem bizarre, if not unconstitutional.<sup>156</sup>

The relevance of these developments to the allocation of institutional authority over public nuisance actions should be obvious. The argument can be put syllogistically. First, assume that Prosser was right – and there is every reason to believe he was right – when he concluded that public nuisance is “always a crime.” Second, assume that, by the beginning of the twenty first century, it has been recognized in all states that only the legislature can create criminal liability and only the legislature can designate who will enforce the criminal law. It would seem to follow from these propositions that only the legislature can create public nuisance liability and only the legislature can designate who has authority to bring a public nuisance action.

These conclusions are of course consistent with the broader pattern of evolved understanding, previously discussed, that courts have no inherent authority to create public

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<sup>154</sup> *Commonwealth v. Williams*, 56 Mass. (2 Cush.) 582, 585 (1849).

<sup>155</sup> See John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 529–30 (1994).

<sup>156</sup> See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809 (1987) (invalidating judicial appointment of a private prosecutor for a criminal contempt, and noting constitutional objections to the appointment raised by the executive branch).

actions or to indicate who is entitled to enforce public rights. Although this understanding is most fully realized in the federal system, and less so in the states, it has been fully realized in the states with respect to criminal law, and this is the type of public action most closely associated historically with public nuisance.

#### **D. The Historical Role of the Legislature in Public Nuisance Law**

The conclusion that only the legislature can create public nuisance liability is also far more congruent with historical practice than might seem based on a reading of the *Restatement of Torts*. The complete history of public nuisance law in the United States has yet to be written. Nevertheless, prior to the adoption of the *Restatement* it appears that the principal mechanism for identifying conduct as constituting a public nuisance was a determination by the legislature – either the state legislature or municipal legislative bodies exercising delegated or home rule powers – that particular conditions should be condemned as public nuisances. Blocking a public road or navigable waterway was universally regarded as a public nuisance based on precedent from time immemorial. But extensions of public nuisance liability to other circumstances was primarily undertaken by legislatures.

To cite just one illustration, consider the early nineteenth century history of municipal laws designed to reduce the risk of catastrophic fires. As discussed by William Novak, one type of public nuisance law, that prohibiting storage of gunpowder in cities, began as legislation applicable to particular cities (e.g., New York), was extended by judicial decision to other cities (e.g., Brooklyn), but the extension was later ratified by further legislation.<sup>157</sup> Another type of law, prohibiting the construction of wooden buildings in fire zones, was apparently always

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<sup>157</sup> Novak, *supra* note 39 at 60-66.

initiated by legislation declaring such structures to be a public nuisance, or was justified by other legislation.<sup>158</sup> A third type of activity – pulling down structures to break the spread of fire – was thought to be justified by the common law doctrine of overruling necessity, a power that was understood to be vested in the executive, not the courts.<sup>159</sup> As this history suggests, different institutions contributed to the development of public regulation of fire hazards, and evidence of punctilious observance of institutional roles is lacking. But the legislative role was a large one even in the early nineteenth century, and in certain sensitive areas – like declaring ordinary wooden structures to be public nuisances – courts instinctively refused to act without legislative authority.

Today, evidence of statutory activity in defining public nuisances remains in virtually every state code. New York, for example, has statutes declaring as public nuisance maintaining any object near an airport that creates a flight hazard; erecting a billboard on the New York Thruway without a permit; or cultivating or selling black currants.<sup>160</sup> Certainly this legacy of legislative activity refutes the notion that the identification of public nuisances is inherently or even primarily a judicial function.

The identification of who is entitled to bring a public nuisance action is also a matter more suited to legislative determination. This can be seen by reverting again to the example of criminal law. Most states have both a state legal officer – the attorney general – and local legal

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<sup>158</sup> *Id.* at 66-71.

<sup>159</sup> *Id.* at 71-79.

<sup>160</sup> See N.Y. Gen. Mun. Law §§ 355, 356; N.Y. Pub. Auth. Law § 361-a(6); N.Y. Envtl. Conserv. Law 9-1301(1). Black currants were declared a public nuisance in 1911 in New York because of fear that the berry carried a disease that “afflicted white pine trees, called white pine blister rust.” Lisa D. Foderaro, *Is This New York's Idaho Potato?; Entrepreneur Has Grand Plans for Black Currants*, N.Y. TIMES, Oct. 16, 2003, at § B2, Metropolitan Desk at 1.

officers – often called county or district or state’s attorneys.<sup>161</sup> Often both sets of legal officers have litigating authority, sometimes overlapping, sometimes sharply differentiated. With respect to criminal prosecutions, there can be no doubt that the legislature has the ultimate responsibility to determine which of these offices has the authority to proceed with respect to different types of crimes. Vindication of the public right may suggest that one office or the other is the better enforcer in particular circumstances, and the proper body to make these determinations is the legislature.

The same holds true for public nuisance enforcement actions, which are simply a different form of public action. The legislature may conclude that an officer with statewide authority is better positioned to initiate such actions, or it may conclude that local officers have a comparative advantage.<sup>162</sup> These are judgments that the legislature, as the representative of all the people, can and should make. If the legislature has authority to decide which public officer may bring a public nuisance suit, then it follows – *a fortiori* I would claim – that the legislature has authority to decide whether or when private parties can institute such actions.

Legislative specification of enforcement authority is a common feature of modern environmental statutes. The U.S. Congress, for example, has decided to include “citizen suit”

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<sup>161</sup> For example, ALA. CODE § 12-17-184 (West 2010) empowers a district attorney to prosecute offenses in the territory in which he or she was elected, although the Attorney General may still decide to intervene and direct the prosecution. Id. § 36-15-14. California also creates the district attorney as the public prosecutor CAL. GOV’T CODE § 26500 (West 2010), but allows the attorney general to “take full charge of any investigation or prosecution” “where he deems it necessary. Id. § 12550.

<sup>162</sup> See, e.g. CONN. GEN. STAT. § 15-173(a) (West 2010) (“any docking facility in violation of any requirement or order of the commissioner . . . shall be deemed a public nuisance. The Attorney General shall, at the request of the commissioner, institute proceedings to enjoin or abate any such nuisance.”); 16 PA. CONS. STAT. § 12912 (2010) (“If any abandoned well on private property is contributing pollution, acid or salts to waters to be stored or used by a County Water Supply Authority in its water supply business, a suit in equity or at law to abate the nuisance may be instituted by the authority in the court of common pleas . . . . [But] the Attorney General [] shall have the right to intervene in such proceedings on behalf of the Commonwealth.”).

authority in most of the major federal environmental law statutes.<sup>163</sup> There is much to be said in support of allowing such suits as a supplement to public enforcement. Resources for public enforcement may be limited, and private citizen groups may have a keen interest in protecting certain resources that makes them especially effective enforcers of public rights. On the other hand, there are reasons to be wary of citizen enforcement of public rights, particularly when citizen groups have strong ideological views that do not reflect the balance of public opinion on a matter. Concern about single-minded or over-zealous enforcement has undoubtedly been a factor in the move away from allowing private prosecutions of crimes. Given the balance of considerations, it is not surprising that Congress has limited citizen suits under the environmental laws to enforcement of nondiscretionary duties and individual permit requirements.<sup>164</sup> Discretionary enforcement actions are limited to publicly-accountable officials. Again, the point is that these judgments are ones that should be made by the legislature. They should not be made by insisting that the common law bequeaths inherent authority on private citizens to bring public nuisance suits.

In short, once we recognize that public nuisance is a public action, many applications of public nuisance law suffer from a delegation deficit. By this, I do not mean that public nuisance actions rest on vague or indeterminant statutory authority – the classic nondelegation concern<sup>165</sup> – although this is also a problem.<sup>166</sup> I mean that many applications of public nuisance law rest

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<sup>163</sup> For an overview, see Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185.

<sup>164</sup> See, e.g., 33 U.S.C. § 1365 (citizens suits under the Clean Water Act); 42 U.S.C. § 7604 (citizen suits under the Clean Air Act).

<sup>165</sup> See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-76 (2001); Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2098, 2106-09 (2004).

<sup>166</sup> See *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291, 302 (4<sup>th</sup> Cir. 2010) (describing public nuisance as “an ill-defined omnibus tort of last resort”).



on *no enactment at all*. The Second Circuit’s recent decision upholding the action of state Attorneys General to challenge greenhouse gas emissions as a federal public nuisance fits this description. The principal authority cited for the proposition that courts have inherent power to decide whether global warming is a public nuisance is – surprise! – the *Restatement of Torts*.<sup>167</sup> Since the *Restatement* was wrong about this, the Second Circuit is too.

#### **IV. Counter Arguments**

No jurisprudential question is entirely one sided. What are the arguments in favor of preserving a judicial power, having no warrant in enacted law, to address matters of public right? That is to say, what are the arguments against my claim that public nuisance law suffers from a fatal delegation deficit? I perceive three such arguments: emergency, necessity, and political stalemate.

##### **A. Emergency**

One possible argument for retaining inherent judicial authority to protect the general public is that this might be useful in the event of an unanticipated emergency, for which no legislative or administrative response has been provided. *In re Debs*<sup>168</sup> presents a possible illustration. The case arose out of the Pullman strike of 1894, when workers sought to block the movement of trains with Pullman cars in and out of Chicago.<sup>169</sup> Rolling stock was destroyed,

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<sup>167</sup> See *American Electric Power*, 582 F.3d at 326-29 (invoking *Restatement* for the proposition that public nuisance law provides a “discoverable and manageable standard” for resolving the case and hence that the action does not present a nonjusticiable political question); *id.* at 352 (concluding that the court would “apply the Restatement’s principles of public nuisance as the framework within which to examine the federal common law of nuisance question presented by the instant cases”).

<sup>168</sup> 158 U.S. 564 (1895).

<sup>169</sup> For background, see OWEN M. FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 (1993) 60-74; ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE

tracks torn up, and a general atmosphere of mob violence prevailed. Federal troops were called in to restore order. In addition, the U.S. Attorney General sought and obtained an injunction against the leaders of the strike, including Eugene V. Debs, a future Socialist Party candidate for President. When Debs and others were held in contempt for violating the injunction, they challenged the authority of the federal court to issue the injunction.

The Supreme Court, speaking through Justice Brewer, sustained the contempt conviction. He analogized the matter to the obstruction of a highway, which he noted could be enjoined as a public nuisance.<sup>170</sup> Just as the United States has plenary authority over navigable waterways, and could seek to enjoin an obstruction of such a waterway, so it has plenary authority over interstate highways by rail, and could seek to enjoin the obstruction of interstate commerce by rail. The defendants argued that an injunction was unnecessary, because the executive had sufficient authority to respond to the emergency with force. But Justice Brewer observed that it was possible the strikers would respond more willingly to a court order, thereby avoiding bloodshed and further destruction of property.<sup>171</sup> In effect, the injunction was upheld as an effort to abate a public nuisance that was subject to exclusive federal jurisdiction, and the superior efficacy of a court order relative to force was cited as one reason in support of recognizing such authority.

*In re Debs* can be read as suggesting that there are circumstances in which judicial authority to enjoin public nuisances, without regard to statutory authority, is useful in responding

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RULE OF LAW 131-58 (1960); ALMONT LINDSEY, *THE PULLMAN STRIKE* (1942). Years later Debs was convicted of violating the Espionage Act for giving a speech in which the government charged he had incited resistance to the draft. *Debs v. United States*, 249 U.S. 1 (1919).

<sup>170</sup> 158 U.S. at 586-92.

<sup>171</sup> *Id.* at 597-98.

to emergencies. There are several reasons to think that this not the right lesson to draw from the case.

First, *Debs* was decided at a time when legislatures met infrequently and modes of transportation made it difficult to call legislatures into emergency session, making emergency legislation difficult to obtain. Today, absent a complete collapse of the transportation network, emergency legislation is a much more realistic option in most cases.<sup>172</sup> Indeed, between the executive, the legislature, and the courts, the courts are today probably the most ponderous institution, and hence the least likely to be useful in an emergency. Second, when *Debs* was decided, there was relatively little federal law regulating interstate commerce. Today, the web of positive law is much thicker, making it less likely that an emergency will arise that cannot be addressed under existing statutory authority.<sup>173</sup> Third, as *Debs* itself acknowledges, the executive has inherent power to respond to emergencies, and this power is independent of any authority to abate public nuisances.<sup>174</sup>

Perhaps most fundamentally, although *Debs* invoked public nuisance law as authority for the injunction, it is far from clear that the decision stands for the proposition that courts have inherent authority to enjoin public nuisances. The episode occurred far enough along in the

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<sup>172</sup> Consider the quick enactment of Troubled Asset Relief Program (“TARP”) legislation in the fall of 2008 in response to the Lehman Brothers bankruptcy and the perceived threat of a collapse of the banking system. TARP was signed into law less than three weeks after the Lehman Brothers bankruptcy and only two weeks after the Treasury Department introduced draft legislation. FED. RESERVE BANK OF ST. LOUIS, THE FINANCIAL CRISIS: A TIMELINE OF EVENTS AND POLICY ACTIONS 7–9 (2011), available at <http://timeline.stlouisfed.org/pdf/CrisisTimeline.pdf> (last visited Mar. 26, 2011).

<sup>173</sup> Federal statutes contain a host of grants of power to seek injunctions in emergencies. See, e.g., 33 U.S.C. § 1354 (granting EPA emergency powers to obtain injunction against any water pollution source presenting an imminent and substantial endangerment to health or welfare); 42 U.S.C. § 6973 (granting EPA authority to seek order against any person contributing to the handling of solid or hazardous waste in such a way as to present and imminent and substantial endangerment to health or welfare).

<sup>174</sup> *Id.* at 582 (“If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.”).

evolution toward the understanding that matters of public right are governed exclusively by enacted law that the judges were anxious to point to some source of authority for the injunction in written law. The Circuit Court relied on the Sherman Act, characterizing the defendants as being engaged in a conspiracy to restrain trade.<sup>175</sup> Although the Supreme Court declined to rest on this ground, its opinion can be read as holding that the Commerce Clause, of its own force, authorizes courts to enjoin obstructions of interstate commerce.<sup>176</sup> Whether this is a correct reading of the Clause is debatable; but at the very least the Court seemed to recognize that some authority in enacted law is required before an injunction to abate a public nuisance may issue.

## **B. Necessity**

Another argument for retaining inherent judicial authority to define public nuisances is that there may be circumstances in which there is no other source of authority to resolve the dispute in a satisfactory way. Transboundary disputes between political jurisdictions provide a possible illustration. Suppose State A is blocking a navigable river that State B uses to gain access to the wider world, or State A is polluting the air to the injury to citizens of State B.<sup>177</sup> It would be undesirable to have the courts of State A resolve the dispute using the law of State A, or to have the courts of State B resolve the disputes using the law of State B, because neither State could be trusted to do so in a way that would be fair and impartial toward the other. Indeed, either State A or State B might jigger the rules in order to determine the outcome. In

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<sup>175</sup> *See id.* at 600.

<sup>176</sup> *Id.* at 581. The Court observed that state action will be enjoined if it obstructs interstate commerce, under what we would today call the dormant Commerce Clause. It asked rhetorically: “If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any merely voluntary association of individuals within the limits of that State has a power which the State itself does not possess?” *Id.*

<sup>177</sup> *See, e.g.,* Wisconsin v. Illinois, 278 U.S. 367 (1929) (right to withdraw water from common lake); North Dakota v. Minnesota, 263 U.S. 365 (1923) (apportionment of interstate river); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (interstate air pollution); Missouri v. Illinois, 200 U.S. 496 (1906) (interstate water pollution).

these circumstances, it is generally thought to be desirable to have the dispute resolved by some higher level tribunal, such as the U.S. Supreme Court in a dispute between American States, or perhaps an international tribunal in a dispute between nation states. Nevertheless, if we turn to a higher level tribunal to decide the case, there may be no enacted law that can be called upon for a rule of decision, either because the tribunal is part of a government of limited powers, or the tribunal is part of no governmental authority at all.<sup>178</sup> In these circumstances, the argument runs, higher level tribunal must draw upon its own authority to develop an appropriate rule.<sup>179</sup> The only alternative may be recourse to armed conflict, which is far more costly.<sup>180</sup>

This argument, like the argument from emergency, has a dated quality. At one time the U.S. Supreme Court was required to develop federal common law rules of transboundary nuisance, water apportionment, and the like, in order to resolve disputes between States under its original jurisdiction.<sup>181</sup> But these matters are increasingly covered by general statutory frameworks, interstate compacts, and specific congressional legislation addressing the source of the conflict, with the result that enacted law is much more likely to provide an appropriate rule of decision.<sup>182</sup> The same is true at the international level, where today a plethora of bi-national and multi-national treaties are available to provide benchmarks for international adjudication.<sup>183</sup> Even if there is no enacted law on point, the critical requirement is an impartial tribunal, not

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<sup>178</sup> See Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L. J. 931 (1997) (discussing minimal sources of positive law that apply specifically to trans-border pollution).

<sup>179</sup> See Steven D. Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573, 581-82.

<sup>180</sup> See *Missouri v. Illinois*, 200 U.S. 496, 518 (1906) (noting that had the conflict arisen between two “independent sovereigns,” the result may likely have been war).

<sup>181</sup> See, e.g., *Hinderlider v. LaPlata Co.*, 304 U.S. 92, 110 (1938).

<sup>182</sup> Merrill, *supra* note 178 at 954-58, 965-67.

<sup>183</sup> *Id.* at 961-68.

national or international law. An impartial tribunal, through judicious resolution of choice of law issues, can usually find a way to resolve the dispute in a way that is perceived as being fair to all parties.

Finally, even if we acknowledge that there may be cases in which judicial articulation of a rule of decision is compelled by necessity, this does not justify the use of judge-made rules in cases where no such necessity exists. Recent public nuisance cases involving tobacco use, handgun sales, lead paint, and MTBE cannot plausibly be said to be cases of necessity, in the sense that no political jurisdiction could fairly exercise authority over the issue. Global warming presents a different conundrum, but here the problem is that only a truly global tribunal could be said to be in a position to adjudicate the matter in a truly impartial fashion. No such tribunal exists that is likely to obtain jurisdiction over the necessary parties in the foreseeable future. What is needed is a diplomatic solution or, failing that, national action to mitigate expected harms from climate change.

### **C. Political Stalemate**

The proponents of using public nuisance law to address social problems like tobacco use, handgun possession, lead paint, MTBE contamination, and climate change do not claim that these are unforeseen emergencies. Nor do they argue that judicial resolution of these matters is compelled by necessity. The claim, rather, is that these problems represent chronic conditions that have failed to elicit a satisfactory response by political institutions.<sup>184</sup> Indeed, it is hard to

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<sup>184</sup> See Jonathan Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. REV. 1827, 1829 (2008) (arguing that public nuisance is a “reasonable substitute in the absence of political action”); Robert H. Cutting & Lawrence B. Cahoon, *The Reality of Carbon Taxes in the 21st Century: The “Gift” That Keeps on Giving: Global Warming Meets the Common Law*, 10 VT. J. ENVTL. L. 109 (2008) (arguing that common law actions such as public nuisance help induce action in the political realm). Those filing suit also state that their primary objective is not to create law through the courts, but to convince polluters to negotiate and accept

find a partisan of the recent public nuisance campaigns who sincerely believes that courts are the best institution for addressing these problems. The argument in favor of public nuisance liability is instead expressed in terms of a perceived need to break a political stalemate that prevents action by conventional political institutions.<sup>185</sup> The idea is that high-profile litigation challenging tobacco, guns, lead paint, MTBE or CO<sub>2</sub> emissions will serve as a catalyst inducing conventional political institutions to take the painful steps necessary to overcome these problems.

In some versions, the political stalemate argument relies upon a preference-shaping claim. Litigation will raise awareness of an issue, change public perceptions, mobilize support among groups that have previously not been engaged with the issue, and all this will cause the political process to move in a new direction.<sup>186</sup> The civil rights movement and the early environmental movement are cited as examples of this version of stalemate theory.<sup>187</sup> More recently, supporters of the use of public nuisance litigation to challenge global warming have made a different type of argument. This is the claim that the prospect of judicial regulation of

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regulation. See Amanda Little, *Public Nuisance No. 1: A Bold Lawsuit May Have Utilities Reconsidering Their Fight Against Regs*, Grist.org, July 30, 2004, <http://www.grist.org/news/muck/2004/07/30/griscom-lawsuit/>; John Carey & Lorraine Woellert, *Global Warming: Here Come the Lawyers*, BUSINESSWEEK, Oct. 30, 2006, at 34.

<sup>185</sup> This is what my colleagues Chuck Sable and Bill Simon call “destabilization rights.” See note 122 at 1062. See also Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-thinking the Judicial Role in New Governance*, 13 Colum. J. Eur. L. 565 (2007).

<sup>186</sup> See Cutting & Cahoon, *supra* note 184 at 131 (“These cases serve an important public information function. This, in turn puts pressure on a recalcitrant administration and legislature to enact more comprehensive but politically palatable solutions, such as cap-and-trade.”); Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197 (2010) (Public nuisance suits have “been an enormous step forward” by “drawing attention to vulnerable populations that have been victimized by climate change impacts and [] underscor[ing] the urgent need for a viable remedy.”)

<sup>187</sup> See Abate, *supra* note 186, at 244 (“the creative use of common law remedies was an important precursor to raise awareness of the need for comprehensive federal and state statutory-based schemes to address these problems, and the need to allow citizens to play meaningful roles in enforcing new legislative schemes through citizen suit provisions.”).

greenhouse gases will be so frightening to political and industry leaders that it will induce them to embrace public regulation as a lesser evil.<sup>188</sup> In other words, judicial control is such an obviously bad idea it will serve as the stimulus for a movement to adopt a better one.

In either version, the basic assumption of the political stalemate theory is a prediction about the future course of history. Today, position *x* enjoys only minority support, in the broad sense that it lacks sufficient political support to move conventional political institutions grounded in periodic elections and interest group lobbying. Tomorrow, position *x* will command majority support, again in the broad sense of being a position that will be sustained by conventional political institutions. What is needed is some device or mechanism for hastening the day when tomorrow, in the form of majoritarian support for *x*, arrives.

There is of course nothing wrong with interest groups telling themselves some version of this story of historical inevitability. This is to be expected as part of their efforts to motivate their members. But as a premise for the design of institutions, and in particular for determining the allocation of authority to courts, it is deeply problematic.

For one thing, there is no basis – at least none grounded in legal doctrine and reasoning – by which judges can tell which claims of historical inevitability are sound and which are spurious. Consider a judge in 2004 confronted with earnest claims by municipal attorneys and their allies that greater regulation of the sale of handguns would be a good idea. The judge is

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<sup>188</sup> See Kristen H. Engel, *Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets Into Common Law Remedies*, 155 U. PA. L. REV. 1563, 1572-1577 (2007) (arguing that state-by-state judicial regulation, like state-by-state legislative regulation, will create a hodgepodge of regulation and will prompt firms subject to regulation to demand federal regulation); Amanda Little, *Public Nuisance No. 1: A Bold Lawsuit May Have Utilities Reconsidering Their Fight Against Regs*, Grist.org, July 30, 2004, <http://www.grist.org/news/muck/2004/07/30/griscom-lawsuit/> (“The hope, too, is that . . . defendant companies -- which have put considerable resources into lobbying against greenhouse-gas regulations -- will realize that, ultimately, regulations are a far better prospect for their bottom line than remaining vulnerable to liability suits.”).



aware that the plaintiffs would not be in his courtroom if they could achieve the same result by going to the state legislature. But he thinks, “perhaps if I rule that handgun distribution is a public nuisance, and threaten to impose judicial limits on handgun sales, this will stimulate the legislature to get involved and pass a more effective regime of handgun regulation.” So the judge declares handgun sales a public nuisance. The next year, handgun manufacturers go to Congress and get a law passed that preempts any application of public nuisance law to handgun manufacturers. In other words, the ruling serves not to break a stalemate preventing a move to a future of gun regulation, but as a stimulus for backlash. And the backlash serves only to further entrench the status quo and the perception that the opponents of handgun regulation command overwhelming political support.

I am not claiming, of course, that backlash is the inevitable result of a campaign to use public nuisance law to achieve social reform. The point is that judges have no way of knowing the balance of political forces tomorrow or the next day, and hence have no basis for making rulings grounded in such predictions. If judges have no basis in law for assessing claims of political stalemate, then judges have no justification for rendering rulings grounded in arguments that public nuisance judgments will overcome such stalemates.<sup>189</sup> And, it should go without saying, there is no basis for allocating institutional authority to courts in order to facilitate such rulings.

Another point is that litigation is not the only device for drawing attention to causes that enjoy minority support today but whose proponents earnestly believe will command majority

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<sup>189</sup> Lest this is regarded as fanciful, consider the comments of Second Circuit Judge Peter Hall, who authored the decision allowing the Connecticut climate change suit to go forward. After noting that “[y]ou really don’t want a district judge supervising your relief in all this stuff,” he added that “[t]o the extent there is out there...some opportunity to pursue or continue to pursue a nuisance action, that may help in a political sense.” *Key Judge Downplays Prospects for Successful Climate Change Suits*, Clean Air Report, Vol. 21 Issue 5, March 2, 2010.

support tomorrow. Indeed, litigation is a rather implausible candidate for this role. Litigation is slow, often dull, and frequently yields ambiguous results. Other devices for dramatizing issues include editorial writing, posting advertisements and flyers, circulating petitions, blogging, working for and against the election of candidates, holding demonstrations and rallies, and engaging in acts of civil disobedience. Civil rights marches, mass demonstrations, and sit ins were probably more of a catalyst for the enactment of the civil rights laws of the 1960s than was the litigation activity of the NAACP Inc. Fund.<sup>190</sup> So it is difficult to make any claim that our legal system requires an open-ended “super tort” in order to provide a method by which interest groups can dramatize the need for or stimulate political action. Even if we posit that the mechanism by which public nuisance litigation will lead to climate change legislation is inducing fear about sub-optimal regulation, there are many other ways to engage in sub-optimal regulation -- such as enacting state and local climate change laws that will do little to address the problem and create high compliance costs for industry.

If litigation is not a necessary mechanism for facilitating social movements, there would seem to be little justification for assigning authority to judges in order to allow them to promote social movements. Far better to ask courts to do what they do best – resolving disputes fairly and impartially in light of existing law and an honest assessment of historical facts.

## **V. The Future of Public Nuisance**

Public nuisance law no longer serves a constructive function. At one time, it provided a useful shorthand legislatures could adopt for signaling that particular activity was prohibited and

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<sup>190</sup> MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 435, 467 (2004); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 42-71 (1991).

was subject to criminal prosecution and abatement by public authorities. But given the efforts of the American Law Institute to recast public nuisance as a tort, to encourage courts on their own authority to identify activities as public nuisances, and to deputize private citizens as public enforcement agents, the concept has become associated with dubious ideas that can only cause mischief going forward. Ideally, all public nuisance liability and all statutory references to public nuisance should be repealed.<sup>191</sup> In their place legislatures should enumerate what kinds of activities are prohibited, what penalties apply to violators, and who may institute an enforcement action. This is the standard public law model used to regulate activities that unreasonably interfere with rights common to the general public, and should be generalized to govern the set of circumstances, like obstructions of highways, traditionally regulated by public nuisance law.

In the meantime, what should a judge do if presented with a public nuisance case? The main point I have tried to make is that public nuisance law suffers from a delegation deficit. Public actions should be authorized by the legislature, not advanced by courts on the basis of a claim of inherent common law authority. Courts should take the position that they have no authority to establish something called public nuisance liability and to define its contours through a process of common law adjudication, absent a delegation from the legislature. Judicial authority to hear public nuisance suits should thus be limited to what has been authorized by statute.

Over the years all American states have adopted one or more statutes that condemn conduct as a public nuisance. Assuming these laws are not repealed, how should they be interpreted? Here, I would suggest that courts adopt a general presumption favoring control and

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<sup>191</sup> *Accord*, Spencer, *supra* note 45 (urging that Parliament repeal public nuisance liability).

direction of public actions by publically accountable authorities. This could be seen as a generalization of the doctrine of lenity, which instructs that ambiguities in criminal laws should be construed in favor of the accused.<sup>192</sup> Or it could be seen as type of exclusive delegation doctrine, requiring that statutes be construed to confine public authorities – including courts – to act within the scope of their delegated authority, at least insofar as they seek to implement public actions.<sup>193</sup>

These two interpretative ideas dovetail to the same conclusion. As Dan Kahan has argued, the rule of lenity is best explained in terms of delegation concerns, not perceptions about the need to provide fair notice to potential violators or prevent government arbitrariness.<sup>194</sup> Given that the legislature is the proper institution to resolve fundamental value conflicts over what type of conduct should be criminalized, this task should not be taken on by courts. This is essentially the exclusive delegation idea – that executive and judicial authorities lack inherent authority to make public law, and must confine themselves to the implementation of powers delegated by the legislature.

In the particular context of interpreting statutes that prohibit “public nuisances,” the proposition that statutes should be interpreted to favor control and direction of public actions by publically accountable authorities means that these laws should be interpreted non-dynamically.<sup>195</sup> In other words, such laws should be regarded as ratifications by the legislature

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<sup>192</sup> See Kahan, *supra* note 152.

<sup>193</sup> Sunstein, *supra* note 129, at 330-335. On the exclusive delegation doctrine, see generally Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004).

<sup>194</sup> Kahan, *supra* note 152, 349-67.

<sup>195</sup> Cf. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994) (endorsing dynamic interpretation for most public laws).

of settled understandings of the scope and authority conferred by public nuisance doctrine at the time they were enacted. They should not be regarded as invitations to generalize, extend, or elaborate on legal authority in light of future developments and evolutions in social norms.

Application of the canon of non-dynamic interpretation of public nuisance law would depend on the particular situation encountered by a court. I would distinguish three situations.

First, what if the state has a general statute declaring that the commission of a public nuisance is a crime?<sup>196</sup> Here, I suggest that courts should treat the statute as an implicit ratification by the legislature of the common law of public nuisance as of the time the statute was adopted. Established forms of liability would be covered, and close analogues. Absent some clear directive that the legislature intends to delegate authority to the courts to read the statute in a dynamic fashion, however, the list of proscribed circumstances should be regarded as closed. New applications would require more specific legislative authorization. Such a general criminal statute should also be regarded as authorizing actions by public officials to enjoin public nuisances. But absent evidence that the legislature intended to ratify the special injury rule, these statutes should not be construed as allowing private actions for either injunctive relief or damages. Private actions presumptively should be confined to private torts, including actions for personal injury, property damages, and private nuisance.

Second, what if the state has a statute that lists a number of circumstances as constituting the crime of public nuisance?<sup>197</sup> Courts should enforce these statutes by their terms, but should

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<sup>196</sup> See, e.g., OKLA. STAT. tit. 21, § 1191 (West 2011) (“Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor.”); MINN. STAT. § 609.74 (West 2011) (declaring public nuisance a misdemeanor); CAL. PENAL CODE § 373a (West 2011) (same).

<sup>197</sup> See, e.g., UTAH CODE ANN. § 76-10-803 (West 2011):

not read them as implicitly authorizing public nuisance actions for other types of conditions not covered by the statute. Public injunctions should again be allowed for specifically proscribed conditions. But absent an indication of legislative intent to the contrary, private actions for equitable relief or damages would not be allowed, unless the conduct independently establishes the conditions for a private tort action.

Third, what about a state that has a statute authorizing private actions for injunctive relief or damages for public nuisances?<sup>198</sup> Here, such actions should obviously be allowed. But absent some clear indication that the legislature intends the courts to read the statute dynamically, the list of circumstances covered would be regarded as fixed by the common law in effect when the statute was adopted.

### **Conclusion**

Public nuisance law is an atavism. Its traces its origins to the thirteen century, when English sheriffs held “court” overseeing a variety of local problems, including road blockages,

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- (1) A public nuisance is a crime against the order and economy of the state and consists in unlawfully doing any act or omitting to perform any duty, which act or omission:
- (a) annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons;
  - (b) offends public decency;
  - (c) unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, stream, canal, or basin, or any public park, square, street, or highway;
  - (d) is a nuisance as defined in [a separate provision]; or
  - (e) in any way renders three or more persons insecure in life or the use of property.

<sup>198</sup> See, e.g., WIS. STAT. § 823.01 (West 2011) (“Any person . . . may maintain an action to recover damages or to abate a public nuisance from which injuries peculiar to the complainant are suffered . . . .”); MONT. CODE. § 27-30-203 (West 2011) (“A private person may maintain an action for a public nuisance if it is specially injurious to that person, but not otherwise.”).

overgrazing the commons, and dumping animal wastes on the village square.<sup>199</sup> It evolved into a low level criminal charge, and then, after the passage of time, into an action allowing either criminal indictment or public injunctions. Still later, private citizens were allowed, in limited circumstances, to sue for damages for the same conditions that gave rise to public actions. By 1970, the activity that historically had been regulated as public nuisances had largely been brought under the control of a much larger and more articulated system of government, wielding new legislative and administrative powers. Public nuisance, which entails judicial enforcement, had been effectively displaced by the police power, which implies legislative and administrative action. Given accumulated ambiguities about what it means to call something a public nuisance, it was time to begin phasing this law out.

Instead, the American Law Institute, in adopting the *Restatement (Second) of Torts*, decided to remake public nuisance as a common law tort. The objective was to transform public nuisance, without any legislative authorization, into a weapon that could be wielded by judges to do battle on behalf of the environment. The strategy failed to achieve its objective.

Environmental issues after 1970 were rapidly subjected to comprehensive new federal and state statutory regimes, and objections to environmental degradation by advocacy groups were channeled into citizen suits authorized by these statutes. The public nuisance provisions of the *Restatement* were largely forgotten.

At the beginning of the twenty-first century, the *Restatement's* handiwork was rediscovered by state attorneys general, working in close collaboration with plaintiffs' law firms.

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<sup>199</sup> We have little specific knowledge about the process followed or the remedies available in these early public nuisance actions. As in the case of other criminal actions, "we know almost nothing before the sixteenth century, not nearly enough until the eighteenth." S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 360 (1969).

These new public nuisance plaintiffs have cited the sweeping language of the *Restatement* as authority for obtaining far-reaching judicial mandates, including massive damage awards and settlements, designed to redress a variety of chronic social problems such as tobacco addiction, unauthorized hand gun sales, lead paint residue in older homes, MTBE contamination of ground water, and even global warming. With the notable exception of the Second Circuit, courts have generally been skeptical of these claims. The suits have been dismissed on a variety of grounds, including the nonpublic nature of the harms asserted, failure to establish causation, lack of standing, and the political question doctrine.

The more fundamental objection is that public nuisance never was, and ought not to be, regarded as a tort. It is a public action, and as such should be subject to the control and direction of the legislature. Given the confusion sown by the *Restatement*, existing statutory authority condemning activity as a “public nuisance” should be interpreted non-dynamically, as ratifying understandings of that term when the law was enacted. For the future, legislatures should avoid speaking of public nuisances, and should instead spell out what is prohibited, the sanctions for violation, and which entities have authority to enforce the law.