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Thomas W. Merrill  
*Columbia Law School*, [tmmerri@law.columbia.edu](mailto:tmmerri@law.columbia.edu)

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## The New Public Nuisance: Illegitimate and Dysfunctional

*Thomas W. Merrill*

**ABSTRACT.** Leslie Kendrick’s defense of the new public nuisance fails to come to terms with legitimacy objections to such actions based on the rule of law and norms of democratic accountability. Nor is the new public nuisance a “second best” solution to widespread social problems. These actions rest on joint ventures between prosecutors and personal-injury lawyers that are likely to generate over- and under-deterrence and risk runaway liability.

### INTRODUCTION

Public nuisance, as Leslie Kendrick notes in her recent Article, *The Perils and Promise of Public Nuisance*,<sup>1</sup> has a long history. In its earliest manifestations, it served as a way of enforcing customary norms in local sheriff courts.<sup>2</sup> Ordering a defendant to remove a highway obstruction was the paradigmatic case. Later, it evolved into a signaling device used by legislatures to direct prosecutors to abate (i.e., shut down) objectionable enterprises, such as storing gunpowder in cities or maintaining a house of prostitution. Today, it has morphed into a third phenomenon, which I will call the “new public nuisance.”

The new public nuisance is characterized by the following four features:

1. The definition of the relevant wrong is extraordinarily broad: “an unreasonable interference with a right common to the general public.”<sup>3</sup>

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1. Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702 (2023).

2. See J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 CAMBRIDGE L.J. 55, 59-60 (1989).

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

2. Prosecutors and courts are assumed to have inherent authority to determine what is and is not a “right common to the general public” without further direction from the legislature.
3. Prosecutors seek large damages for alleged interferences with public rights rather than orders abating or enjoining the offending activities or conditions.
4. Because damages are the preferred form of relief, prosecutors can retain private law firms under contingent-fee contracts who perform much, if not all, of the legal work necessary to secure a judgment or settlement. These joint ventures also nearly always target deep-pocketed defendants.<sup>4</sup>

As Kendrick describes, the new public nuisance began with lawsuits filed by state attorneys general (AGs) in the 1990s against the major tobacco companies, which netted a settlement of some \$246 billion in present-value terms.<sup>5</sup> This bounty stimulated follow-on efforts seeking large damages against legacy producers of lead paint, gun manufacturers, and oil and gas companies, among others. These projects yielded mixed results at best.<sup>6</sup> The most recent wave of new-public-nuisance suits, now joined by the AGs of all fifty states, targets large corporate manufacturers and distributors of opioid pain medications, on the grounds that their misuse can lead to addiction, addiction can lead to the use of black-market substitutes like fentanyl, and that this, in turn, can lead to overdose and death.

Kendrick devotes most of her Article to rebutting criticisms of the new public nuisance, which she groups under the headings of “traditionalist,” “formalist,” and “institutionalist” objections. She spends less time offering an affirmative case for the new public nuisance, which she characterizes as a second-best response to regulatory failure.<sup>7</sup> Rather than following her outline, I broadly divide this Response into two parts: legitimacy objections to the new public nuisance (Part I); and a functional critique of the new public nuisance as a “second-best” regulatory strategy for our time (Part II).

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4. For convenience, I will generally refer to the moving parties in new-public-nuisance suits as “prosecutors,” without regard to whether they are state attorneys general (AGs) or county or municipal prosecutors, and without regard to whether they have teamed up with private law firms.

5. Kendrick, *supra* note 1, at 705.

6. See cases cited *infra* notes 86-87.

7. See Kendrick, *supra* note 1, at 711, 780, 789.

## I. LEGITIMACY OBJECTIONS TO THE NEW PUBLIC NUISANCE

In previous writing, I have raised questions about the legitimacy of the new public nuisance.<sup>8</sup> On reflection, these critiques have circled around the objections rather than getting to the heart of the matter. The nub of the problem is twofold: the new public nuisance (1) violates the rule of law; and (2) is inconsistent with basic norms of democratic government. These shortcomings correspond to the first two features of the new public nuisance set forth above: the extreme vagueness generates the rule-of-law objection, and the assumption that prosecutors and courts have inherent authority to define the “rights common to the general public” is inconsistent with norms of democratic government.

### A. *The New Public Nuisance Violates the Rule of Law*

The rule of law is a basic norm of all liberal constitutional democracies.<sup>9</sup> Although the complete definition of the rule of law is contested, at its core, it means that the government will exercise coercive authority against persons only when consistent with settled law.<sup>10</sup> Thus, Friedrich Hayek defined the rule of law as a system of rules “which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.”<sup>11</sup> Joseph Raz identified the “basic intuition” behind the rule of law as the idea that the law “must be capable of guiding the behavior of its subjects.”<sup>12</sup> Lon Fuller, in an influential account, specified that the law must be general, clear, publicly promulgated, stable over time, congruent as between official rules and the conduct of legal actors, apply prospectively, avoid contradiction, and not require the impossible of those subject to the law.<sup>13</sup>

The new public nuisance violates the most elemental aspect of the rule of law: that legal duties must be sufficiently predictable to guide those to whom

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8. See Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 TORT L.J. 1 (2011) [hereinafter Merrill, *Is Public Nuisance a Tort?*]; Thomas W. Merrill, *Public Nuisance as Risk Regulation*, 17 J.L. ECON. & POL’Y 347 (2022) [hereinafter Merrill, *Risk Regulation*].

9. See generally Venice Comm’n, *Report on the Rule of Law*, 86th Sess., Study No. 512 (2009) (“The rule of law in its proper sense is an inherent part of any democratic society . . .”).

10. See Thomas W. Merrill, *The Essential Meaning of the Rule of Law*, 17 J.L. ECON. & POL’Y 672 (2022).

11. F.A. HAYEK, *THE ROAD TO SERFDOM: TEXTS AND DOCUMENTS* 112 (Bruce Caldwell ed., Univ. of Chi. Press 2007) (1944).

12. JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 214 (1979).

13. LON L. FULLER, *THE MORALITY OF LAW* 46-91 (rev. ed. 1977).

they apply. Public nuisance has always referred to a grab bag of activities that were deemed to be contrary to the general welfare. But the cases tended to fall into certain conventional categories, like blocking a highway or waterway, or engaging in conduct that offends prevailing moral norms, like operating an illegal gambling operation. The concept of public nuisance was also used as a signaling device by legislatures: by declaring certain activities like growing black currant bushes or selling spirituous liquors a “public nuisance,” the legislature could instruct prosecutors and courts that these activities should be shut down.<sup>14</sup>

The new-public-nuisance cases do not rest on any conventional understanding of what constitutes a public nuisance or on any legislative determination that a particular activity is deemed to be a public nuisance. Instead, they rest on the idea that courts have inherent authority to determine that something is a public nuisance based on the court’s understanding of the public interest. The American Law Institute (ALI) led the way in advancing this conception of public nuisance. When the ALI added a new section on public nuisance to the *Restatement (Second) of Torts* in 1979, it defined public nuisance to be “an unreasonable interference with a right common to the general public.”<sup>15</sup> “Unreasonable,” in turn, was said to be any conduct that “involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience.”<sup>16</sup>

As a statement of the requirements of the law, this definition communicates no information that would allow a potential defendant to predict what constitutes a public nuisance. It is basically a Rorschach blot. Indeed, as the Second Restatement acknowledged in the comments to the new section, “If a defendant’s conduct in interfering with a public right does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting *without an established and recognized standard*.”<sup>17</sup>

State laws that prohibit public nuisances often do no better. Some define public nuisance as something which “tends to annoy the community, injure the health of the citizens in general, or corrupt the public morals.”<sup>18</sup> Others proscribe anything “which injures or endangers the public health, safety, or welfare.”<sup>19</sup> Still

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14. See Merrill, *Risk Regulation*, *supra* note 8, at 358–59.

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

16. *Id.* § 821B (2)(a).

17. *Id.* cmt. e (emphasis added).

18. GA. CODE ANN. § 41-1-6 (West 2022); see also FLA. STAT. § 823.01 (West 2022) (“All nuisances that tend to annoy the community, injure the health of the citizens in general, or corrupt the public morals are misdemeanors of the second degree . . .”).

19. KAN. STAT. ANN. § 231-6204 (West 2022).

others are moderately more instructive. California, for example, specifically lists the obstruction of highways or waterways but then adds a catchall comprising “[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses.”<sup>20</sup>

If public nuisance is regarded as a type of criminal liability – which was the historical understanding but has faded from view with the Restatement’s revisionism – these formulations of prohibited conduct would be deemed void for vagueness.<sup>21</sup> Whether or not they violate due process, these nebulous descriptions of duty fail to provide any effective guidance about what is and is not permitted, and they therefore violate the most basic principle of the rule of law. Are convenience stores a public nuisance because they sell sugary soft drinks that contribute to juvenile obesity? Do the distributors of water in plastic bottles commit a public nuisance because the bottles end up in the ocean? Are the makers of cell phones subject to public-nuisance liability because they lead to distracted driving and higher rates of auto accidents?<sup>22</sup> The list of possibilities is endless. How could any attorney, looking at these definitions of public nuisance, confidently advise a client that their activity is *not* a public nuisance? If the client has heard rumblings that a prosecutor is thinking of bringing a public-nuisance

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20. CAL. CIV. CODE § 3479 (defining “nuisance”); *see id.* § 3480 (defining a public nuisance as one “which affects at the same time an entire community or neighborhood, or any considerable number of persons”).

21. *See, e.g., Johnson v. United States*, 576 U.S. 591, 597 (2015) (holding that an enhanced sentence for someone who engages in conduct that involves “a serious risk of physical injury to another” violates due process). The void-for-vagueness doctrine has generally been limited to criminal prosecutions, although the Court extended it to deportation orders in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212–13 (2018). In a concurring opinion, Justice Gorsuch argued that the doctrine, with its basis in the Due Process Clause and concerns about fair notice, should logically apply to civil as well as criminal laws. *See id.* at 1223–34 (Gorsuch, J., concurring). Recall too that the Court has imposed due-process limits on punitive damages awards on the grounds that persons are entitled to fair notice “of the severity of the penalty that a State may impose.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)). Unsurprisingly, persons charged with committing a public nuisance under broadly worded state and local ordinances have often charged that these laws are unconstitutionally vague. These challenges have usually failed. *See, e.g., People ex rel. Gallo v. Acuna*, 929 P.2d 596, 613–14 (Cal. 1997) (rejecting vagueness challenge to broad injunction of activities of a street gang under California public nuisance statute). But occasionally they have succeeded. *See, e.g., State v. Golin*, 833 A.2d 660, 665–66 (N.J. Super. Ct. App. Div. 2003) (overturning judgment that tree limbs overhanging a public sidewalk were a public nuisance on vagueness grounds); *State ex rel. Faches v. Wedelsedt*, 250 N.W.2d 64, 66 (Iowa 1977) (holding a public nuisance statute prohibiting “lewdness” unconstitutionally vague).

22. *See City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004) (suggesting the last hypothetical).

suit challenging its activity, what light do these formulations shed on the answer?

The Restatement appeared to recognize the vagueness problem in its formulation of public nuisance and sought to mitigate it by grafting onto public nuisance the elements associated with the tort of *private* nuisance.<sup>23</sup> It did this notwithstanding its acknowledgement that public and private nuisance have “little or nothing” in common and are “quite unrelated.”<sup>24</sup> The Restatement’s strategy was to add a series of comments to the various elements thought to comprise the tort of private nuisance, indicating whether those elements would also apply to public nuisance. But an examination of these comments reveals that they provide virtually no guidance in identifying something as a public nuisance.

For example, Section 821F stated that an action for private nuisance will lie only if the defendant’s conduct causes “significant harm.”<sup>25</sup> Comment (a) said this element also applies to public nuisance. But then there was this qualification: “A public nuisance may be prosecuted criminally although it has not yet resulted in any significant harm, or indeed any harm to anyone.”<sup>26</sup> Similarly, Sections 822 and 826 said that liability for private nuisance will lie when the conduct is “intentional” and “unreasonable.”<sup>27</sup> Comment (a) said this requirement “may, and commonly does, apply to conduct that results in a public nuisance.”<sup>28</sup> But again, there was a qualification: “A particular statute may, however, expressly provide or be construed to mean that the interference with the public right is a criminal public nuisance without regard to the reasonableness of the conduct that has caused it. In this case, the rule stated here has no application.”<sup>29</sup> The only conclusion that can be drawn from these equivocations is that there is no such thing as a general law of public nuisance that can be distilled into something called a Restatement.

Following in the steps of the Second Restatement, some state courts have also grafted one or more elements of tort law onto the new public nuisance,<sup>30</sup> presumably to make it seem more law-like. But it does not appear that the new

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23. See Merrill, *Is Public Nuisance a Tort?*, *supra* note 8, at 22-23.

24. RESTATEMENT (SECOND) OF TORTS, ch. 40, intro. note (AM. L. INST. 1979).

25. *Id.* § 821F.

26. *Id.* § 821F, cmt. b.

27. *Id.* §§ 822, 826.

28. *Id.* § 826, cmt. a.

29. *Id.*

30. See, e.g., *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 529, 543 (Cal. App. 2017) (actual knowledge of risk to the public and causation of harm required); *City of New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 344 (E.D.N.Y. 2007) (knowledge of substantial certainty of risk required).

public nuisance has settled on any consistent understanding of the elements needed to establish liability. Even if this should happen, it would not overcome the completely open-ended description of the relevant duty (i.e., not to interfere unreasonably with a right common to the general public), which conveys little to no information at all.

The rule-of-law objection would be overcome if the state legislature were to enact a statute declaring that the production and distribution of cigarettes is a public nuisance, or that the production and distribution of fossil fuels is a public nuisance, or that the manufacture and distribution of opioid medicines is a public nuisance. But no reasonable legislature would enact any such statute.<sup>31</sup> That being the case, it violates the rule of law for courts, at the urging of prosecutors, to award hundreds of millions of dollars in damages on the grounds that the conduct in question is an “unreasonable interference with a right common to the general public.”

### *B. The New Public Nuisance Violates Norms of Democratic Government*

A second basic norm of modern constitutional government is that contested issues of social policy should be resolved by democratically accountable institutions. Like the rule of law, the norm of democratic accountability is not embodied in an express constitutional provision. Yet as John Hart Ely famously argued, democratic accountability is implicit in a number of constitutional provisions and has grown more powerful over time.<sup>32</sup> The tension between the norm of democracy and the new public nuisance exists whether public nuisance is regarded as a branch of the common law or as a delegation of discretionary authority to the judiciary by the legislature.

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31. I discuss the reasons for this with respect to opioids in Part II. The Court observed in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 139-40 (2000), that the FDA did not want to ban tobacco products because doing so would lead to serious problems of withdrawal and the use of black-market cigarettes, which would be more harmful to consumers. Similarly, courts do not have the expertise or the jurisdictional reach to regulate greenhouse gases on a global basis. See *Am. Elec. Power, Inc. v. Connecticut*, 564 U.S. 410, 427-28 (2011) (endorsing administrative action rather than judicial judgments as the preferred basis for addressing problems of climate change).

32. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).



### 1. *Public Nuisance as Common Law*

There is no question that the common law comprises a significant form of legal authority in the United States. For present purposes, we can define common law as the rules and standards that derive from prior judicial decisions.<sup>33</sup> When a dispute is governed by common law, it is understood that courts have inherent authority to articulate the rules of decision used to resolve the matter. In practice, the authority of courts to proceed in this fashion is largely a function of their adherence to decisional rules previously advanced. Modifications in the rules and standards occur over time, but overrulings and sharp course corrections must be limited in order to assure compliance with judicial precedents.<sup>34</sup>

In England, where public nuisance started, public nuisance is still regarded as a type of common-law criminal liability. In the United States, this understanding became problematic when the idea of common-law crimes fell out of favor. This shift was based in significant part on principles of separation of powers and the understanding that only the legislature has the authority to make conduct a crime.<sup>35</sup> As a result, all states now have statutes authorizing prosecutors to bring public-nuisance suits.<sup>36</sup> All this was well understood by William Prosser, who served as the initial Reporter for the *Restatement (Second) of Torts*. His draft, presented to the ALI, defined public nuisance as a “criminal interference” with a right common to the general public. When some members of the ALI challenged this definition as too narrow, Prosser offered extensive research showing that no action could be brought for a public nuisance unless the conduct in question was regarded as a crime.<sup>37</sup>

As I have described in previous writing, Prosser’s definition was rejected by the membership of the ALI; he resigned his position as Reporter, and the new Reporter changed the definition from a “criminal interference” to an “unreasonable interference.” The clear objective was to make public nuisance, in addition

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33. Frederick Schauer has defined common law as entailing the following features: (1) it has no canonical formulation, unlike legislation; (2) it is created by courts simultaneously with its application in actual cases; (3) it applies in the very cases where it is formulated, which means it is applied retroactively to facts occurring prior to its formulation; and (4) it includes the authority to modify or replace previous governing rules based on the conclusion that the old rule would generate “a malignant result in the case at hand.” Frederick Schauer, *Is the Common Law Law?*, 77 CALIF. L. REV. 455, 455 (1989).

34. See, e.g., MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 3-4 (2008) (referring to “a golden rule of precedent—justices must be prepared to treat others’ precedents as they would like their own to be treated or risk their preferred precedents being treated with the same kind of disdain they show others”).

35. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33-34 (1812).

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

37. Merrill, *Is Public Nuisance a Tort?*, *supra* note 8, at 24.

to its role as a type of criminal offense, a “common law tort.”<sup>38</sup> By declaring public nuisance a tort, the Second Restatement clearly intended that courts should enjoy the same degree of discretion to refine and extrapolate the meaning of public nuisance that they enjoy under the common law more generally. In effect, the Second Restatement sought to confer inherent authority on courts to declare what is a “right common to the general public.”<sup>39</sup>

The relevance of this expansion of judicial authority to the issue of democratic accountability should be obvious. By long tradition, courts in the United States have significant common-law authority to refine and extrapolate the decisional rules applicable to fields of law like contracts, torts, and property. But these domains of judicial lawmaking are discrete and fairly well settled. There is no similar tradition of judicial lawmaking in defining what constitutes an “unreasonable interference with a right common to the general public.” Through its revisionism, the Second Restatement sought to empower courts to exercise broad discretionary authority over a potentially vast range of contested social policy issues.<sup>40</sup>

Kendrick also seeks to rehabilitate the idea that public nuisance can be regarded as a legitimate species of tort liability by citing examples from contemporary tort law that entail the imposition of affirmative duties to protect the public from foreseeable harms. But these examples do not entail the open-ended articulation of social duties in the manner of the new public nuisance. Kendrick’s primary example involves a vehicle that breaks down on the highway, through no fault of the operator, which causes injury to other vehicles when the operator

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38. RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (AM. L. INST. 1979). I review the episode in more detail in Merrill, *Is Public Nuisance a Tort?*, *supra* note 8, at 20-29.

39. The assumption that courts have broad discretionary authority to modify the common law is a widespread but largely unexamined premise of the American legal system. *See, e.g.*, *Li v. Yellow Cab Co. of Cal.*, 532 P. 2d 1226, 1233 (Cal. 1975) (justifying a dramatic change in the California law of torts – the adoption of comparative negligence – on the ground that the California Civil Code, which seemed to require contributory negligence, was merely declarative of the common law and was not intended to foreclose “continuing judicial evolution”).

40. Kendrick’s efforts to cite miscellaneous instantiations of early public nuisance found in Blackstone or Shepard as illustrations of the “common law” nature of the idea is anachronistic. *See* Kendrick, *supra* note 1, at 713-18. Blackstone, in keeping with the understanding of the day, regarded the common law as something discovered by judges, not made. Its authority derived from “general immemorial custom” as “declared in the decisions of the courts of justice.” 1 WILLIAM BLACKSTONE, COMMENTARIES \*73-74. His definition of a public nuisance as “the doing of a thing to the annoyance of all the king’s subjects, or the neglecting to do a thing which the common good requires,” 4 *id.* at \*167, was not an attempt to articulate a general social duty to be given content by judges in an evolutionary fashion (the modern conception of the common law); rather it was his effort to devise a synthetic description of the hodgepodge of customary offenses then known as public nuisances.

fails to take reasonable step to warn others of the obstruction.<sup>41</sup> Here, the failure to warn violates a highly consensual social norm that should be obvious to all drivers on public roads. The relevant duty has long been recognized by case law and by the *Restatement of Torts*.<sup>42</sup> Moreover, liability is hedged by other elements common to tort law: namely, the need to show not only a recognized duty but also intentional or negligent breach of that duty, causation, and actual harm to the plaintiff.

It is true, of course, that contested issues of social policy are sometimes resolved by courts as matters of constitutional or statutory interpretation. But when this happens, the ultimate authority for judicial action is that it is required by a good-faith interpretation of the constitutional or statutory provision in question. So the ultimate source of authority for these forms of judicial action is the enactment of a controlling text by a majority or supermajority of persons elected by the people. It is also true that contested policy issues are sometimes resolved by administrative agencies. But when this happens, the agency's action must be traced to a delegation of authority from the elected legislature. Agencies have no inherent authority to act with the force of law,<sup>43</sup> nor does the chief executive, except perhaps temporarily in an emergency.<sup>44</sup> The new public nuisance violates this basic norm of democratic governance insofar as the authority of the court to declare something a public nuisance is based on a claim of inherent common-law authority.

What is wrong with the idea of inherent judicial authority to declare the rights of the general public? Two things. First, under the norm of democratic governance, the public interest must be determined through a process of deliberation and compromise by public institutions that are accountable, through elections, to the people. This includes the promulgation and revision of constitutions, the enactment of statutes, and action by administrative agencies taken pursuant to delegated authority by legislatures. The norm of democratic governance rests on the premise that the identification of the public interest is inherently contestable. Some people (or factions or interest groups) will prefer *X*, while others will prefer not-*X*. In a democratic system, the way to resolve such disagreements is by voting and, after the votes are counted, by deliberation and compromise in politically accountable venues.<sup>45</sup>

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41. Kendrick, *supra* note 1, at 762-65.

42. See *Montgomery v. Nat'l Convoy & Trucking Co.*, 195 S.E. 247, 251 (S.C. 1938); RESTATEMENT OF TORTS § 321 (AM. L. INST. 1934).

43. See THOMAS W. MERRILL, THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 18-24 (2022).

44. On the possibility of a narrow exception for emergencies, see Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 24-38 (1993).

45. See JEREMY WALDRON, THE DIGNITY OF LEGISLATION 158-62 (1999).

Other than their role in interpreting enactments by politically accountable actors, courts have no authority to declare what is and is not in the public interest. One reason is that courts are understood to have an unwavering duty to resolve disputes in accordance with settled law.<sup>46</sup> This applies without regard to whether judges are appointed by other public officials or must stand for election or reappointment. Courts are duty bound “to say what the law is,” not to make it up.<sup>47</sup> Another is that courts, by design, do not have the capacity to sift through conflicting ideas about what constitutes the public interest with the objective of reaching a compromise. They are designed to resolve discrete disputes between adverse parties, which entails determining the relevant facts and applicable law.<sup>48</sup> The historical model of *A v. B* has been stretched with the emergence of class actions, multidistrict litigation, and amicus curiae briefs. But courts still fall far short of the mechanisms available to the political branches, including legislative hearings and notice-and-comment rulemaking by agencies, which can be used to identify the public interest through democratically accountable processes.<sup>49</sup>

All of this was clear to the California Supreme Court in the era before the new public nuisance arrived. Overturning an attempt by the state AG to enjoin a gambling operation in Monterey as a public nuisance, the Court wrote:

‘It is also competent for the Legislature, within the constitutional limits of its powers, to declare any act criminal and make the repetition or continuance thereof a public nuisance . . . or to vest in courts of equity the power to abate them by injunction; but it is not the province of the courts to ordain such jurisdiction for themselves. . . .’ In a field where the meaning of terms is so vague and uncertain it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity. Activity which in one

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46. PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 103-47; 283-326 (2008).

47. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

48. See Thomas W. Merrill, *Legitimate Interpretation – Or Legitimate Adjudication?*, 105 CORNELL L. REV. 1395, 1412-17 (2020).

49. Legislatures, which proceed by bargaining and compromise, are imperfectly democratic, in the sense that their actions and inactions do not always conform to majoritarian preferences. Yet, as John Hart Ely put it, “we may grant until we’re blue in the face that legislatures aren’t wholly democratic, but that isn’t going to make courts more democratic than legislatures.” ELY, *supra* note 32, at 67. The fact that many state-court judges are elected – as indeed are most state AGs and even local prosecutors – does not obviate objection based on democratic accountability. The basic job of prosecutors, whether elected or appointed, is to enforce the law in a fair and impartial manner. The basic job of courts, whether elected or appointed, is to resolve cases that come before them according to their best understanding of existing law. The task of identifying the rights common to the general public should be undertaken by legislature.

period constitutes a public nuisance, such as the sale of liquor or the holding of prize fights, might not be objectionable in another. Such declarations of policy should be left for the legislature.<sup>50</sup>

## 2. *Public Nuisance as Delegated Lawmaking*

Given that every state has enacted one or more public-nuisance statutes, another possible justification for the new public nuisance is that these statutes have delegated authority to courts to exercise broad authority to determine the rights common to the general public. These statutes unquestionably delegate authority to prosecutors and courts to bring and enforce public-nuisance actions. But exactly what sort of authority did the legislatures intend to delegate? Conceivably, these statutes could be interpreted as delegating authority to courts to develop the scope of public nuisance law in the common-law fashion. An analogy might be the federal antitrust statutes, which have been interpreted as delegating authority to courts to determine what constitutes an “unreasonable restraint of trade” in interstate commerce.<sup>51</sup> But delegation of such common-law authority to courts is rare.<sup>52</sup> Far more plausible is the supposition that the legislatures enacted public-nuisance statutes because they intended to preserve public authority to bring actions to abate the kinds of conditions that had long been understood to be public nuisances (e.g., blocking highways) and to indict activities added to the conventional list by the legislature (e.g., storing gunpowder in cities).

The question of how to interpret these delegations links up with the theme of democratic governance. Both federal and state courts have long worried about broad delegations of authority by legislatures, primarily to executive actors and administrative agencies. The Supreme Court has reaffirmed many times that the Constitution gives Congress—the most democratic of the branches—the exclusive power to legislate.<sup>53</sup> This means that Congress cannot transfer its legislative power to another branch.<sup>54</sup> The Court has interpreted these propositions to

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50. *Lim*, 118 P.2d at 476 (quoting *State v. Ehrlick*, 64 S.E. 935, 940 (W. Va. 1909)).

51. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 51 U.S. 877, 899 (2007) (“From the beginning the Court has treated the Sherman Act as a common-law statute.”).

52. The Rules Enabling Act, 28 U.S.C. § 2072 (2018), comes to mind as an express delegation of authority to courts “to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.” *Id.* § 2072(a). But the delegation to formulate rules of procedure arguably falls within an area of concurrent legislative and judicial authority. See *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 43 (1825).

53. See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001).

54. *Id.*

mean that Congress may not delegate too much discretion to another branch.<sup>55</sup> The standard formula for determining whether Congress has conferred too much discretion is to ask whether the legislation in question includes an “intelligible principle” for guiding the actions of the delegatee.<sup>56</sup> Several Justices, led by Justice Gorsuch, have argued that this approach is too lax and have recently argued that the doctrine should be reformulated to limit permissible delegations to those that require an agency to “fill up the details” in a statutory scheme, or to other limited circumstances.<sup>57</sup> Perhaps in response to concerns about excessive delegation of discretion to entities outside the legislative branch, the Court has even more recently held that “major questions” of economic and political significance may not be delegated to agencies absent clear authority by Congress.<sup>58</sup> Many state courts interpret the nondelegation doctrine under their state constitutions more strictly than does the Supreme Court with respect to the federal Constitution.<sup>59</sup>

Given the longstanding unease about legislation that delegates too much discretion to administrative agencies, how likely is it that state legislatures, when they passed statutes authorizing prosecutors and courts to prosecute public nuisances, imagined they were conferring open-ended authority on courts to determine what conduct constitutes “an unreasonable interference with a right common to the general public”? If Congress enacted such a statute conferring this power on an agency, the current Court would likely hold it unconstitutional.<sup>60</sup> There is no reason to suppose state courts, which have always been stricter about delegations, would have any different response to a delegation of such authority

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55. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2122-27 (2004).
56. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).
57. *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting). The other permissible delegations, according to the dissent, are for factfinding and the performance of “non-legislative” functions. *Id.* at 2136-37.
58. *West Virginia v. EPA*, 142 S. Ct. 2587, 2605, 2613-14 (2022).
59. See generally Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619 (2018) (describing the use of nondelegation doctrine by the states); Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211 (2022) (same).
60. Such a delegation would seem to confer “omnicompetent” authority on a single entity, which has been plausibly argued was the feature of the National Industrial Recovery Act that led a unanimous Court to declare it unconstitutional. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (holding unconstitutional as an unlawful delegation an act conferring authority on the President to adopt “codes of fair competition” for any industry affecting interstate commerce). See Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 11 TEL AVIV U. STUD. L. 9, 22-24 (1992) (advancing the thesis that the fatal flaw in *Schechter Poultry* was the delegation of “omnicompetent” authority to a single nonlegislative entity).

to state courts.<sup>61</sup> There is no need, of course, for state courts to declare statutes conferring authority on prosecutors to bring public nuisance suits unconstitutional on nondelegation grounds; it is perfectly plausible to interpret these laws as authorizing suits to abate activity traditionally regarded as a public nuisance, plus conduct specifically identified by the legislature as being a public nuisance.<sup>62</sup>

## II. THE MISPLACED FUNCTIONAL JUSTIFICATION

When Kendrick turns from rebutting objections to offering justifications for the new public nuisance, she essentially argues that public nuisance is better than nothing. The argument is familiar and has been advanced by others.<sup>63</sup> Our society faces a number of serious social problems, like smoking-related illnesses, climate change, and opioid addiction. The traditional institutions we expect to do something about such serious social problems—legislatures and administrative agencies—have failed to take effective action. Hence, there is a need for the new public nuisance to fill the gap.<sup>64</sup>

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61. See, e.g., *Fawbush v. Bond*, 613 S.W.2d 414 (Ky. 1981) (invalidating on nondelegation grounds a statute giving the state judiciary complete discretion to redraw electoral districts); *Turner Cnty. v. City of Ashburn*, 749 S.E.2d 685 (Ga. 2013) (striking down a statute allowing state courts to settle disputes among counties over the allocation of jointly collected taxes). As Margaret H. Lemmos has observed, broad delegations to courts are if anything more problematic than broad delegations to agencies, on grounds of public accountability, expertise, and ability to make corrective changes. See Margaret H. Lemmos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 443-55 (2008). See generally Silver, *supra* note 59, for decisions that strike down on nondelegation grounds statutes that delegate legislative functions to state courts.

62. I have previously argued that this reasonable supposition means that these delegations should be interpreted “non-dynamically.” Merrill, *Is Public Nuisance a Tort?*, *supra* note 8, at 51-53.

63. See, e.g., David A. Dana, *Public Nuisance Law When Politics Fails*, 83 OHIO ST. L.J. 61, 67 (2022); cf. Catherine M. Sharkey, *Common Law Tort as a Transitional Regulatory Regime: A New Perspective on Climate Change Litigation*, in CLIMATE LIBERALISM: PERSPECTIVES ON LIBERTY, PROPERTY, AND POLLUTION (Jonathan Adler ed., forthcoming 2023), <https://ssrn.com/abstract=4107970> [<https://perma.cc/6GCM-5PES>] (emphasizing the information-generating potential of the new-public-nuisance actions).

64. See Kendrick, *supra* note 1, at 778-87. Kendrick also nods to the argument that public-nuisance suits can serve as a catalyst for legislative or regulatory action. *Id.* at 786. No doubt high-profile public-nuisance suits draw additional attention to particular social problems. But whether such suits will consistently act as a spur to “first-best” regulation is an empirical question, not something to be assumed. We know that in some cases these suits have served as a catalyst for a legislative backlash. See Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901-03 (2018)) (preempting public-nuisance suits against the gun industry). Another possible response is to create an ex-

Given that new-public-nuisance actions typically proceed by seeking damages rather than abatement, the argument is essentially based on the deterrent effect of significant ex post damages awards. I have no doubt that large damages awards can have a deterrent effect.<sup>65</sup> But the question is whether damages will effectively deter conduct that we want to deter. In order to explore that question, we need to look more closely at the nature of the social problems at issue in the new-public-nuisance cases and the institutional incentives for seeking damages for harms arising out of those problems. Here I will follow Kendrick in focusing primarily on the opioid crisis, although analogous points can be made about cigarettes, guns, climate change, and the other targets of the new public nuisance.

### A. *The Complexity of the Opioid Crisis*

The incidence of addiction and deaths from opioids is a public-health problem of the first magnitude. But Kendrick either ignores or underplays several aspects of the crisis.<sup>66</sup>

One such aspect is that opioids are an indispensable pharmaceutical product. They are used by millions of Americans and others worldwide suffering from excruciating pain, whether from cancer, severe burns, or medical procedures.<sup>67</sup>

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cuse for legislative or regulatory inaction, on the ground that public-nuisance suits demonstrate that the government is on the case. In a recent article, Nora Freeman Engstrom and Robert L. Rabin argue that the AG suits in the tobacco and opioid litigation uncovered damaging facts about the respective industries that helped galvanize support for public regulation. Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 STAN. L. REV. 285, 292 (2021). But it is unclear how much specific facts uncovered in litigation, as opposed to journalistic exposés, legislative hearings, and the like, are responsible in any given case for stimulating more vigorous legislative and administrative action. In any event, unearthing bad facts cannot be guaranteed, especially when the objective of the litigation is to secure a large monetary settlement rather than to go to trial.

65. See Zenon Zabinski & Bernard S. Black, *The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform* 29 (Nw. U. L. Sch., L. & Econ. Rsch. Paper No. 13-09), <http://ssrn.com/abstract=2161362> [<https://perma.cc/5WKC-S2JB>] (analyzing medical-malpractice claims and finding “strong evidence consistent with classic tort law deterrence theory” that “[l]iability for harm induces greater care and relaxing liability leads to less care”).
66. For overviews of the crisis, see PATRICK RADDEN KEEFE, *EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY* (2021); and Abbe R. Gluck, Ashley Hall & Gregory Curfman, *Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis*, 46 J.L., MED. & ETHICS 351 (2018).
67. Deborah Dowell, Kathleen R. Ragan, Christopher M. Jones, Grant T. Baldwin & Roger Chou, *CDC Clinical Practice Guideline for Prescribing Opioids for Pain—United States, 2022*, CDC MMWR RECOMMENDATIONS & REPS. (Nov. 4, 2022), <https://www.cdc.gov/mmwr/volumes/71/rr/rr7103a1.htm> [<https://perma.cc/5YTB-CDMK>]; *Opioids for Cancer Pain*, AM. CANCER SOC’Y (Jan. 13, 2019), <https://www.cancer.org/treatment/treatments-and-side->



There are currently no good substitutes.<sup>68</sup> So we do not want to ban opioids. Instead, we want better oversight of their distribution and use. This is not a public bad like the classic public nuisances of blocking a highway or contaminating the local water supply. Rather, it is a complex problem of how best to regulate the risks associated with distributing an indispensable product.

A second aspect downplayed by Kendrick is that a very large number of actors bear significant blame for the opioid crisis. Yes, Purdue Pharma and the Sackler family engaged in excessively aggressive marketing to doctors and wrongly believed that their initial slow-release pill would reduce the risk of addiction.<sup>69</sup> But the Federal Drug Administration (FDA) and the Drug Enforcement Agency (DEA) were also derelict in their oversight of the marketing and distribution of OxyContin (as Kendrick acknowledges).<sup>70</sup> So-called “pill-mill doctors” willing to prescribe opioids to virtually anyone sprang up in many parts of the country, and the states, which are primarily responsible for regulating the practice of medicine, were derelict in not revoking their licenses.<sup>71</sup> Some pharmacies failed to adopt adequate systems for detecting improper prescriptions generated by pill-mill doctors.<sup>72</sup> Many of the addicted themselves are responsible, at least in part, for their plight, especially if they stole opioids from medicine cabinets or other sources in order to experiment with getting high.<sup>73</sup> The federal

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effects/physical-side-effects/pain/opioid-pain-medicines-for-cancer-pain.html [https://perma.cc/3NW2-DAVH].

68. Dowell et al., *supra* note 67; Gluck et al. *supra* note 68, at 351 (“Although over-utilized, opioids are indispensable in medical practice, a fact which complicates theories of liability.”).
69. Kendrick’s discussion of the opioid crisis summarizes the derelictions of Purdue Pharma, *see* Kendrick, *supra* note 1, at 728-31, but does not detail what the other producers and distributors of opioid medications, who are the current targets of public-nuisance litigation, have done that can be said to have contributed to the current crisis.
70. *Id.* at 779-80.
71. Keith Humphreys et al., *Responding to the Opioid Crisis in North America and Beyond: Recommendations of the Stanford-Lancet Commission*, 399 LANCET 555, 569 (Feb. 5, 2022), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2821%2902252-2> [https://perma.cc/9BYS-VB8H] (“[H]ad the second line of [state] regulators who come into play after a drug is approved ([e.g.], medical boards, accreditation organisations) acted more quickly, lives might have been saved.”).
72. *See, e.g.*, *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, No. 18-CV-07591, 2022 WL 3224463, at \*60 (N.D. Cal. Aug. 10, 2022) (holding Walgreens liable under California public-nuisance law for failing to comply with federal regulations requiring pharmacies to maintain an adequate system for identifying illicit prescriptions of opioids).
73. *See Policy Impact: Prescription Painkiller Overdoses*, CTRS. FOR DISEASE CONTROL 7 (Nov. 2011), <https://www.cdc.gov/drugoverdose/pdf/PolicyImpact-PrescriptionPainkillerOD-a.pdf> [https://perma.cc/RGQ6-K99L] (“More than three out of four people who misuse prescription painkillers use drugs prescribed to someone else.”). Kendrick, like other proponents of the new public nuisance, notes that suits by addicted individuals against manufacturers of opioids have generally failed due to arguments about assumption of risk and contributory

government failed to secure the southern border, which has allowed criminal cartels easy access in transporting illegal fentanyl into the country.<sup>74</sup> The list goes on. This is a polycentric problem, to use Lon Fuller's phrase,<sup>75</sup> not a case in which one actor or industry is responsible for creating a condition that they alone have the capacity to control—which again characterizes the classic public nuisance.

Third, in contrast to the problem of gun violence and the threat of climate change, the regulatory failure underlying the opioid crisis cannot be attributed to political deadlock or a lack of public consensus. There is universal outcry about the addiction epidemic and growing evidence that federal agencies, state regulators, and medical societies are moving to correct their past failings.<sup>76</sup> Nor is the opioid crisis like the tobacco litigation. Large diversified pharmaceutical companies and pharmacy chains will not fight tooth and nail to preserve the profits they make from selling opioids. The greater danger is that they will exit the market altogether because of litigation risk, as nearly happened some time ago with the production of childhood vaccines.<sup>77</sup>

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negligence. See Kendrick, *supra* note 1, at 782-84. She attributes this to superior litigation resources of the manufacturers. *Id.* But surely at least some part of the explanation for the failure of these suits must be that factfinders in such cases have concluded that the defenses grounded in individual responsibility are meritorious.

74. See *Facts About Fentanyl*, U.S. DRUG ENF'T ADMIN., <https://www.dea.gov/resources/facts-about-fentanyl> [<https://perma.cc/ZL37-BPPS>] (“Illicit fentanyl, primarily manufactured in foreign clandestine labs and smuggled into the United States through Mexico, is being distributed across the country and sold on the illegal drug market . . . [For the 12 month period ending January 31, 2021,] [o]verdose deaths involving synthetic opioids (primarily illicitly manufactured fentanyl) rose 55.6 percent and appear to be the primary driver of the increase in total drug overdose deaths.”).
75. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 371 (1978).
76. See *The Opioid Crisis and Recent Federal Policy Responses*, CONG. BUDGET OFF. 21-32 (Sept. 2022), <https://www.cbo.gov/system/files/2022-09/58221-opioid-crisis.pdf> [<https://perma.cc/2XQT-4VDF>] (surveying recent federal policy responses to the opioid epidemic); *States Have Taken Action To Address the Opioid Epidemic*, U.S. DEP'T HEALTH & HUM. SERVS. 13-29 (Oct. 2020), <https://oig.hhs.gov/oas/reports/region9/92001000.pdf> [<https://perma.cc/M7U6-HWA5>] (summarizing policies addressing the opioid epidemic in a sample of states); *2022 Overdose Epidemic Report*, AM. MED. ASS'N 5-9 (2022), <https://www.ama-assn.org/system/files/ama-overdose-epidemic-report.pdf> [<https://perma.cc/3VNU-JKB7>].
77. See *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 227 (2011) (noting that an upsurge in liability claims against manufacturers of childhood vaccines caused “two of the three domestic manufacturers to withdraw, and the remaining manufacturer . . . estimated that its potential tort liability exceeded its annual sales by a factor of 200”). The crisis caused Congress to enact the National Childhood Vaccine Injury Act substituting an administrative compensation scheme for tort liability. 42 U.S.C. §§ 300aa-10 to -34 (2018).

The foregoing factors – that opioids are an indispensable form of pain relief, culpability is widespread, and there is now widespread public demand for solutions to the addiction crisis – suggest that what is needed is a carefully calibrated set of reforms that would establish a better system of controls on the distribution of opioid medications going forward. Transferring large sums of money from deep-pocketed pharmaceutical companies and pharmacy chains to state and local jurisdictions may gratify an impulse to punish someone for the present calamity. But it is unlikely to generate the type of improved system of controls needed to do better. Legislative action to establish a better system of oversight, supplemented by giving administrative agencies adequate resources to enforce the legislative mandate, is a far more promising course of action.<sup>78</sup>

*B. The Political Economy of the New Public Nuisance*

Kendrick also fails to adequately consider what I call the political economy of the new-public-nuisance litigation.<sup>79</sup> She discusses aspects of this political economy toward the end of her Article as a cautionary consideration under the heading of “agency costs.”<sup>80</sup> But the political economy of public nuisance is its most important feature and dates back to the tobacco litigation. It also flows directly from the third and fourth characteristics listed at the beginning of this Response:<sup>81</sup> the turn to damages as opposed to mandatory relief and the creation of joint ventures between public prosecutors and private law firms to pursue new-public-nuisance cases.

The most startling feature of the new-public-nuisance litigation is that its objective is to obtain damages. This is a clear departure from the history of public-nuisance litigation. Until the tobacco litigation, public-nuisance suits, insofar as they were brought by public prosecutors (as roughly ninety percent were), always sought mandatory relief – that is, orders for defendants to stop whatever

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78. See Merrill, *Risk Regulation*, *supra* note 8, at 361–64.

79. What I am calling the political economy of the new-public-nuisance litigation could be anchored in a variety of theories of liability, such as alleged violations of consumer protection laws, common-law fraud, and federal Racketeer Influenced and Corrupt Organization Act violations. Indeed, the tobacco cases that pioneered the joint ventures discussed here put as much or more weight on these other causes of action as they did on public nuisance. I nevertheless agree with Kendrick that public nuisance serves as a kind of template for these actions. See Kendrick, *supra* note 1, at 707. Public nuisance also appears to be an increasingly favored claim in recent cases, perhaps because it does not require any proof of fraud or deception.

80. *Id.* at 774–78.

81. See *supra* note 3 and accompanying text.

they were doing.<sup>82</sup> The tobacco litigation broke new ground by seeking massive damages on behalf of states. The theory was that smoking had increased costs under Medicaid and similar public-health programs and that states were entitled to recover these excess costs.<sup>83</sup>

When money was put on the table, a new set of actors entered the picture: the plaintiffs' personal-injury bar. Plaintiffs' personal-injury lawyers generally operate on contingency fees.<sup>84</sup> They only get paid if there is a money judgment from which their fees can be deducted. Hence, they are generally uninterested in cases that seek only injunctions or other types of mandatory relief.

The new-public-nuisance litigation rests on what are effectively joint ventures between public prosecutors and personal-injury firms, in which the prosecutor sues on behalf of the government as the named plaintiff, but most of the work (e.g., discovery, motions practice, briefing) is performed by the personal-injury firms. These joint ventures are made possible by the innovation of seeking large amounts of damages rather than mandatory relief. To be sure, the prosecutors—the nominal plaintiffs in these cases—want to claim credit for “doing something” about a perceived public harm. But they also want to create a new

82. The rationale for limiting actions by prosecutors to mandatory relief was to avoid “the multiplicity of actions that might follow if everyone were free to sue for the common wrong,” especially when individual injuries were likely to be minor. RESTATEMENT (SECOND) OF TORTS § 821C cmt. a. It was assumed that mandatory relief would fix the common problem prospectively—and fix it for the benefit of all. The Restatement discussed the possibility of damages as a remedy, see § 821B cmt. i, but in context, it is clear it was talking about the exception that would allow individuals to sue for damages if they incurred “special injury.” See *id.* § 821C(1) (“In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.”).

83. Kendrick suggests that the exception allowing private individuals to sue for damages when they incur “special injury” from a public nuisance may authorize public prosecutors to obtain damages for expenses caused by widespread opioid addiction. Kendrick, *supra* note 1, at 743–44, 753–54. But this does not work. To obtain damages for special injury one must show injury different in kind from that imposed on the public at large. See, e.g., 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1100, 1105 (N.Y. 2001). The economic injuries the local political entities claim due to opioid addiction do not differ in kind from those experienced by other entities like the federal government, school districts, hospitals, insurance companies, private employers, and families who have the misfortune of dealing with addicted family members. A similar analysis applies to tobacco smoking and climate change. See *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 116 F. Supp. 2d 610 (1999), *aff'd*, 228 F.3d 429, 446 (3d Cir. 2000) (dismissing public-nuisance suit by hospitals seeking reimbursement for expenses incurred in treating nonpaying patients suffering from tobacco-related diseases on the ground that the hospitals did not suffer injury different in kind from other entities).

84. Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 16 tbl.5 (1996).

funding stream for the government, either to augment their own budgets or to enhance their prestige as a provider of public revenues.<sup>85</sup> The personal-injury firms hope to achieve enough success to score a large settlement and, hence, a big payout under their contingent-fee contracts.

This novel form of joint venture has seen several failures: the lead-paint and gun litigation largely went nowhere,<sup>86</sup> and climate litigation may be headed in the same direction.<sup>87</sup> But the new public nuisance has achieved enough success—the tobacco and opioid settlements—to keep the business model going as it moves from one cause to the next. There are several reasons to be concerned with the emergence of this phenomenon.

One is effective deterrence of the most culpable actors. The new-public-nuisance model is based on who can pay the most money, not on who is the most in

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85. Several incumbent AG campaign websites highlight the amount of money candidates have secured through opioid settlements. *See, e.g., Priorities*, LETITIA JAMES FOR ATT’Y GEN. (2022), <https://www.jamesforny.com/priorities> [<https://perma.cc/C5LH-5RUC>] (“[Letitia James] scored historic wins against the big pharmaceutical companies behind the opioid crisis, delivering more than \$2 billion to communities to invest in recovery.”); *Priorities*, PHIL FOR COLO. (2022), <https://www.philforcolorado.com/priorities> [<https://perma.cc/DS9B-ZA2T>] (“[Phil Weiser] led efforts to combat the opioid epidemic, including a \$573 million settlement with McKinsey Company for its role in helping opioid companies sell their drugs.”). Kendrick cites some of the studies about where the tobacco settlement money has been spent. Kendrick, *supra* note 1, at 777–80.

86. The lead paint cases mostly resulted in judgments in favor of the corporate defendants. *See, e.g., State v. Lead Indus., Ass’n*, 951 A.2d 428 (R.I. 2008); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *City of St. Louis v. Benjamin Moore & Co.*, 26 S.W.3d 110 (Mo. 2007); *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005); *City of Milwaukee v. NL Indus.*, 762 N.W.2d 757 (Wis. App. 2008). *But see, e.g., People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51 (Cal. Dist. Ct. App. 2017) (finding lead paint manufactures liable for public nuisance). Cases brought against gun manufacturers were more mixed. *See, e.g., City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004) (rejecting a public-nuisance claim against a gun manufacturer); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143–44 (Ohio 2002) (reinstating public-nuisance claim against a gun manufacturer); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1248 (Ind. 2003) (same). Congress largely put an end to these cases in 2005 with preemptive legislation. Protection of Lawful Commerce in Arms Act, Pub. L. No. 109–92, 119 Stat. 2095 (codified at 15 U.S.C. §§ 7901–03 (2018)).

87. *See, e.g., Connecticut v. Am. Elec. Power Co.*, 564 U.S. 410 (2011) (holding that public-nuisance claims based on federal common law are displaced by the Clean Air Act); *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021) (holding state public-nuisance claims are preempted by the Clean Air Act). Recent decisions have focused on whether public-nuisance claims should be heard in federal or state court. *See, e.g., Rhode Island v. Shell Oil Prod. Co.*, 35 F.4th 44, 57 (1st Cir. 2022); *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022); *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022); *Bd. of Cnty. Comm’rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022).

need of being deterred. This is an increasing problem with tort litigation in general,<sup>88</sup> especially with the advent of comparative fault combined with either joint-and-several or several liability, which puts a premium on bringing cases based on the prospect of large damage awards from particular asset-rich or well-insured defendants rather than who is most at fault.<sup>89</sup> With respect to the new-public- nuisance cases, the only defendants that get sued are corporations with fat balance sheets.<sup>90</sup> Some undoubtedly deserve to be deterred. But the response is likely to be either that they declare bankruptcy (as Purdue did),<sup>91</sup> abandon the market to avoid further liability,<sup>92</sup> or simply settle and pass the costs on to their stockholders and consumers. Meanwhile, other bad actors—like pill-mill doctors and drug smugglers—do not get sued because they do not have enough assets or because it would be too hard to collect a judgment if one were obtained.<sup>93</sup> As a result, smaller, less-visible bad actors do not get deterred.

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88. See generally Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 OKLA. L. REV. 359 (2018) (citing increases in “deep pocket jurisprudence,” where courts award damages against wealthy entities who have no or only an attenuated connection to the alleged harm, in pharmaceutical innovator-liability litigation, government public- nuisance litigation, liability for hirers of independent contractors, and in car-accident cases).
89. See *DeBenedetto v. CLD Consulting Eng’rs, Inc.*, 903 A.2d 969, 977 (N.H. 2006) (“The joint and several liability rule has the ancillary effect of enabling injured plaintiffs to seek out and sue only ‘deep pocket’ defendants—tortfeasors with significant assets but a potentially low degree of fault . . .”).
90. 4 LAWRENCE G. CETRULO, TOXIC TORTS LITIGATION GUIDE § 47:18 (2022-2023 ed.), (noting that most litigation is directed at drug manufacturers, distributors, and pharmacies). Charges have been filed against individual doctors and other medical professionals, but not through public- nuisance litigation. See, e.g., Press Release, U.S. Dep’t of Just., National Health Care Fraud Takedown Results in Charges Against 601 Individuals Responsible for Over \$2 Billion in Fraud Losses (June 28, 2018), <https://www.justice.gov/opa/pr/national-health-care-fraud-takedown-results-charges-against-601-individuals-responsible-over> [<https://perma.cc/TG39-EXD5>].
91. Voluntary Petition for Non-Individuals Filing for Bankruptcy at 5, *In re Purdue Pharma L.P.*, No. 19-23649 (Bankr. S.D.N.Y. Sept. 15, 2019).
92. For example, Johnson & Johnson agreed to stop distributing opioids as part of a settlement with New York State. See Sarah Maslin Nir, *Johnson & Johnson to Pay New York \$230 Million to Settle Opioid Case*, N.Y. TIMES (Nov. 9, 2021), <https://www.nytimes.com/2021/06/26/nyregion/johnson-johnson-opioid-lawsuit-new-york.html> [<https://perma.cc/U3K5-PUYS>]. Similarly, McKesson agreed to suspend sales of controlled substances. See Press Release, U.S. Dep’t of Just., McKesson Agrees to Pay Record \$150 Million Settlement for Failure to Report Suspicious Orders of Pharmaceutical Drugs (Jan. 17, 2017), <https://www.justice.gov/opa/pr/mckesson-agrees-pay-record-150-million-settlement-failure-report-suspicious-orders> [<https://perma.cc/UX94-NG7J>] (detailing settlement requiring McKesson to suspend sales of controlled substances).
93. The wave of public- nuisance suits has primarily targeted drug manufacturers, distributors, and pharmacies. Gluck et al., *supra* note 66, at 354. Doctors were targeted earlier in the opioid

A related problem is that many bad actors are immune from liability. Quite arguably, the FDA, DEA, and AG offices themselves that are responsible for policing the medical profession are more at fault than the big pharmaceutical companies (other than Purdue) and pharmacy chains, many of whom acted in compliance with the law.<sup>94</sup> But the government actors are generally immune from liability under principles of sovereign immunity.<sup>95</sup>

Another problem, again from a deterrence perspective, is the extreme vagueness of the new public nuisance in terms of the clarification of social duties.<sup>96</sup> Tort law seeks, with varying degrees of success, to clarify social duties by using doctrines like negligence per se and custom, and through the gradual accretion of precedents about what constitutes negligence in different circumstances. But beyond certain clear-cut cases like obstructing a highway or contaminating the water supply, public nuisance in its most recent incarnation provides little information about what is or is not a “right common to the general public.”

These problems of inadequate notice are compounded by the ex post nature of public-nuisance judgments. After the fact, it is clear that Purdue’s slow-release OxyContin pills did not reduce the risk of addiction. But this was not clear to the FDA when it reviewed the application for pre-market approval.<sup>97</sup> This problem is pervasive in matters that involve predictive judgments about untested products or ideas. The FDA in particular has been roiled in controversy for years over whether its demand for controlled studies establishing the safety and efficacy of new drugs and medical devices has been too strict, thereby depriving critically ill persons of potentially valuable therapeutics, or not strict enough, thereby failing to detect potentially serious side effects.<sup>98</sup>

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epidemic before lawsuits began targeting deeper pockets. *Id.* Pill-mill doctors may still be subject to criminal liability.

94. Kendrick cites a New York jury determination that the state was ten percent responsible for the addiction epidemic, Kendrick, *supra* note 1, at 766, but this ignores the federal government, the counties, the pill-mill doctors, the pharmacies, the individual addicts, and so forth. In any event, this kind of apportionment of fault is not available in all state tort systems.

95. The Federal Government, for example, is immune from liability for any action of employees in executing with due care a statute or regulation, without regard to whether the statute or regulation is valid, or in performing a “discretionary function.” 28 U.S.C. §2680(a) (2018).

96. See *supra* Section I.A.

97. *Timeline of Selected FDA Activities and Significant Events Addressing Opioid Misuse and Abuse*, U.S. FOOD & DRUG ADMIN. (Jan. 4, 2023), <https://www.fda.gov/drugs/information-drug-class/timeline-selected-fda-activities-and-significant-events-addressing-opioid-misuse-and-abuse> [<https://perma.cc/A65J-M5CK>] (“At the time of approval, FDA believed the controlled-release formulation of OxyContin would result in less abuse potential, since the drug would be absorbed slowly and there would not be an immediate ‘rush’ or high that would promote abuse.”).

98. See, e.g., Julie Dorais, *The Cost of Evidence: Examining the FDA’s Treatment of Critically-Needed Drugs from an Ex Ante Perspective*, 8 BIOTECHNOLOGY & PHARM. L. REV. 39, 39-40 (2015);

Another serious problem is the potential for overdeterrence. Imposing damages liability on the oil-and-gas industry for every ill plausibly connected to climate change would function like a massive excise tax, driving up the costs of gasoline and home heating for ordinary consumers. With respect to opioids, the concern is that large diversified pharmaceutical firms and pharmacy chains may simply stop selling opioids because of the liability risk. But opioids are indispensable forms of pain relief for persons suffering from cancer, serious accidents, or major surgery.<sup>99</sup> It is a tricky problem to figure out how to regulate their distribution to reduce the risk of addiction without harming those who desperately need them for relief from severe pain.

A final source of concern is distorted incentives that exist for public prosecutors such as state AGs. When the only remedy for a successful public-nuisance action was mandatory relief, AGs weighed the costs of devoting in-house-lawyering resources to the problem against the prospective benefit to the public of a successful effort. But once the prospect of large monetary recoveries is added to the picture, public-nuisance law may come to be regarded as a significant source of revenue for the government. Some of this revenue is likely to devolve, directly or indirectly, to the prosecutor's office itself.<sup>100</sup> At the very least, public-nuisance revenue will magnify the prestige, and hence the influence, of prosecutors within the state government. So prosecutors will be tempted to give undue emphasis to pursuing these actions. Moreover, the joint-venture model requires that decisions about who to sue (and for what) are made with the concurrence of one or more personal-injury law firms. This may require prosecutors to modify their priorities from what they would be without the need to secure the cooperation of private firms.<sup>101</sup>

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Shiela Weiss Smith, *Sidelining Safety—the FDA's Inadequate Response to the IOM*, 357 NEW ENGLAND J. MED. 960 (2007).

99. Gluck et al., *supra* note 66, at 351.

100. The tobacco master settlement agreement allowed each state to determine how to spend the settlement funds allocated to it. However, \$861 million per year was allocated to a "Strategic Contribution Fund" which was "intended to reflect the level of the contribution each state made toward final resolution of the state lawsuits" as determined by "a panel of former state attorneys general." GENERAL ACCOUNTING OFFICE, TOBACCO SETTLEMENT: STATES' USE OF MASTER SETTLEMENT AGREEMENT PAYMENTS 14 (June 2021). And \$50 million was set aside to fund the National Association of State Attorneys General which was "responsible for assisting states in the implementation and enforcement" of the settlement. *Id.* at 8-9.

101. Ctr. for Legal Pol'y, *Trial Lawyers, Inc.: Attorneys General—A Report on the Alliance Between State AGs and the Plaintiffs' Bar 2011*, MANHATTAN INST. 6, <https://media4.manhattan-institute.org/sites/default/files/TLI-ag.pdf> [<https://perma.cc/GYJ3-YQCV>] ("[I]n many instances the lawsuits do not originate with the state officials; rather, private attorneys approach state attorneys general with ideas." (citing John Beisner, Jessica Davidson Miller & Terrell McSweeney, *Bounty Hunters on the Prowl: The Troubling Alliance of State Attorneys General and Plaintiffs' Lawyers*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM 1-2 (May 26, 2005),



### C. *The Danger of Runaway Liability*

The great danger of the new public nuisance should now be apparent. State AGs are elected politicians. Their prescribed task is to enforce the law as written. But they are also anxious to get reelected or, as is often the case, to move on to a higher office such as governor, U.S. senator, or even President. The new public nuisance presents a tempting way to score points with the electorate – that is, by blaming large corporations for major social problems and then taking them to task. It also provides a way to reward a key donor group – personal-injury lawyers – who contribute heavily to state AG election campaigns and stand to reap huge fee awards if public-nuisance suits yield major monetary settlements.<sup>102</sup> It is telling that once the liability ball starts rolling downhill, as it did in the tobacco cases and, more recently, in the opioid cases, *every* state AG (and many local elected prosecutors) joined the effort.<sup>103</sup> This does not suggest that the social problems that triggered these cases are too divisive to sustain ordinary regulatory responses. Instead, it suggests that the political costs of being left out of a prospective bonanza for the state treasury and personal-injury lawyers are too great to stay on the sidelines.

The insidious nature of this exercise in rent-seeking is magnified by what passes for the legal justification for these actions. The legal duty asserted in these cases is so broad it can be made to describe virtually any widespread social problem. And if the legitimacy of such a “super tort” is challenged, select aspects of the long history of public nuisance can be invoked as giving it a patina of respectability. Thus, authorities as remote as Bracton, Britton, and Blackstone can be cited in support of a vague and open-ended conception of the relevant action,<sup>104</sup> ignoring the emergence of separation-of-powers and democratic-accountability precepts in the intervening centuries that render their accounts inapt. Kendrick adds to the effort of selective justification by suggesting that the

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<https://www.federalismproject.org/resources/BeisnerFINAL.pdf> [https://perma.cc/NH9U-NV7L]).

<sup>102</sup>. See Danny Hakim, *Law Firm Is Big Donor to Attorney General Hopeful*, N.Y. TIMES (May 18, 2010), <https://www.nytimes.com/2010/05/19/nyregion/19rice.html> [https://perma.cc/A7SD-RRF4]; Kevin Sack, *Tobacco Industry's Dogged Nemesis*, N.Y. TIMES (Apr. 6, 1997), <https://www.nytimes.com/1997/04/06/us/tobacco-industry-s-dogged-nemesis.html> [https://perma.cc/EV8S-CA8V] (noting that Mississippi AG Mike Moore chose his top campaign contributor to work on the state's suit against the tobacco companies); Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. TIMES (Dec. 18, 2014), <https://www.nytimes.com/2014/12/19/us/politics/lawyers-create-big-paydays-by-coaxing-attorneys-general-to-sue-.html> [https://perma.cc/B7DQ-ZVS9].

<sup>103</sup>. As Kendrick notes, all fifty state AGs have chosen to pursue opioid litigation. Kendrick, *supra* note 1, at 709 & n.26. Not all states have hired outside counsel, but most have. *Id.* at 775.

<sup>104</sup>. See *id.* at 713.

new public nuisance is analogous to the established tort duty to put out warning flares when a truck stalls on the highway.<sup>105</sup>

## CONCLUSION

We live in a world in which many rights common to the general public are inadequately addressed. Impatience on the part of those who have no doubt about the correct answer to these problems is understandable. But I have argued that this impatience does not justify asking courts to award hundreds of millions of dollars in damages against corporations that have some connection to these problems in the name of public nuisance. This new public nuisance is illegitimate, whether viewed from the perspective of the rule of law or democratic accountability. It is also doubtful that the new public nuisance is a “second-best” response to these problems. These cases rest on a joint-venture model between government prosecutors and personal-injury law firms that raises dangers of under- and overdeterrence and distorted incentives for public prosecutors. Consequently, it is far from clear that this form of liability is functional as a type of regulatory policy (as “second best” implies), as opposed to being dysfunctional. The hard work of convincing the public to demand change is, as always, the only approach that promises stable and well-calibrated solutions to these sorts of problems.

*Charles Evans Hughes Professor, Columbia Law School. Many thanks to Anna Tripp Scheibmeir for excellent research assistance.*

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105. *Id.* at 762-63.