MISFIRE: WHY THE CALIFORNIA FIREARM INDUSTRY RESPONSIBILITY ACT CANNOT RELY ON A PUBLIC NUISANCE THEORY OF LIABILITY

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INTRODUCTION

In July of 2022, California passed the Firearm Industry Responsibility Act (FIRA). This legislation imposes liability against the firearm industry for manufacturing, marketing, and distributing firearms in a manner that is abnormally dangerous and likely to create an unreasonable risk of harm to public health and safety.[1] The law expressly authorizes civil action by victims of gun violence against the firearm industry for an act or omission in violation of a newly established firearm industry standard of conduct.[2] On the one hand, FIRA has a chance at successfully piercing the firearm industry's qualified civil immunity granted by the Protection of Lawful Commerce in Arms Act (PLCAA)—that is, by operating as a so-called "predicate exception." On the other hand, courts may nevertheless dismiss FIRA actions given that FIRA invokes a theory of public nuisance liability that courts have historically been reluctant to enforce in the firearm context.

This Note will evaluate whether FIRA can survive as a predicate exception under a public nuisance theory of liability. To do so, this Note will first discuss public nuisance law generally, examining the theoretical evolution of the doctrine as well as current debates surrounding the use of public nuisance as a mass tort. Then, this Note will consider public nuisance law specifically in the context of firearm litigation. This Note will examine public nuisance claims against the firearm industry both before the passage of the PLCAA and after. Ultimately, this Note will argue that FIRA likely will fail to hold the firearm industry liable using a theory of public nuisance. Instead, this Note contends that FIRA will be more successful in holding the firearm industry liable if it targets unfair marketing.

I. THE PUZZLE OF PUBLIC NUISANCE

Modern public nuisance doctrine is paradoxical and strange. For instance, public nuisance has been called a tort[3] and a public action;[4] a

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[1] Assem. Bill 1594, 2021-2022 Reg. Sess. (Cal. 2022).

[2] *Id.*

[3] *See generally* David Bullock, *Public Nuisance is a Tort*, 15 J. TORT L., 137 (2022).

[4] Thomas W. Merrill, *Is Public Nuisance A Tort?*, 4 J. TORT L. 1, 7 (2011).

wrongful condition[5] and wrongful conduct;[6] and a problem[7] and a solution[8].[9] The doctrine used to be a lot simpler. Originally, a "public nuisance" was merely a cause of action protecting against non-trespassory interference with real property owned by the Crown.[10] Today, however, public nuisance actions encompass litigation in subject matters as far ranging as tobacco, lead paint, and climate change.[11] Public nuisance plaintiffs are both public and private, and they are permitted to seek criminal sanctions, damages, and injunctions.[12] In short, public nuisance appears now as a kind of Borgesian labyrinth in the law.[13] It is a doctrine, seemingly without bounds or coherence, that threatens, by its very ambiguity, to "devour" the entire law of tort.[14]

Part I of this Note will attempt to shed light on the "mystery"[15] of public nuisance. First, this Part will discuss the doctrine's theoretical underpinnings. Then, this Part will examine arguments both for and against the use of public nuisance as a modern-day action for mass tort. Ultimately, this Part summarizes both how public nuisance came to be so complex and why the action came to be regarded as such a useful mechanism for litigating claims against mass product manufacturers and distributors.

A. HISTORY

A public nuisance, according to the Second Restatement of Torts, is an "unreasonable interference with a right common to the general public."[16] This definition, while perhaps oversimplified, serves as an adequate starting point to understand the action. Public nuisance protects "public" rights—those belonging to the community—from "unreasonable" interference. By contrast, private nuisance protects "private" rights—those belonging to an individual—from interference with the use and enjoyment of land.[17] Thus, *nuisance*—both public and private—can best be understood as representing a particular kind of harm—interference with either a public or private right, respectively.[18]

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[5] *Id.* at 16.

[6] RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).

[7] *See* Thomas W. Merrill, *Public Nuisance as Risk Regulation*, 17 J. L. ECON. & POL'Y 347, 368 (2022) ("[P]ublic nuisance has outlived its day and should be laid to rest.").

[8] *See* Brief of Professor Catherine M. Sharkey as Amicus Curiae Supporting Plaintiff-Appellant, City of New York v. Chevron Corp., 993 F.3d 81 (2021) ("Nuisance liability plays a potentially positive and economically justified role in forcing actors to internalize the harms that their activities cause.").

[9] *See also,* Leslie Kendrick, *The Perils and Promise of Public Nuisance,* 132 YALE L. J. 702, 705 (2023) ("Public nuisance has lived many lives.").

[10] *Id.* at 73.

[11] *See, e.g.*, Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 972–73 (E.D. Tex. 1997) (illustrating one of the few tobacco public nuisance claims that did not settle before trial); State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 435 (R.I. 2008) (rejecting public nuisance claims in the context of lead paint); Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424–29 (2011) (holding federal common law public nuisance claims were preempted by the Clean Air Act).

[12] *See infra* Section I.A.

[13] PROSSER AND KEETON ON THE LAW OF TORTS 616 (W. Page Keeton ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie.").

[14] Tioga Pub. Sch. Dist. v. U.S. Gypsum, 984 F.2d 915, 921 (8th Cir. 1993).

[15] *See generally* Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984 (1952).

[16] RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).

[17] J.R. Spencer, *Public Nuisance - A Critical Examination*, 48 CAMBRIDGE L. J. 55, 57–58 (1989).

[18] *Id.* at 57.

Of course, what constitutes a "public right" is amorphous and, to a certain extent, open to interpretation; so too then has been the understanding of what conduct constitutes a public nuisance. Initially, a "public nuisance" was limited to a purpresture—an encroachment upon a public highway or waterway belonging to the Crown.[19] Then, early in its history, public nuisance law developed to protect against general interferences with public rights such as disorderly ale houses, smoke from lime pits, and the improper laying of garbage.[20] As William Prosser wrote in the Second Restatement, "[P]ublic nuisance came to cover a large, miscellaneous and diversified group of minor criminal offenses, all of which involved some interference with the interests of the community at large—interests that were recognized as rights of the general public entitled to protection."[21] Public nuisance, in other words, has long been somewhat of "a rag-bag of odds and ends" in the law;"[22] it has, from its infancy, protected against a growing variety of conduct that interferes somehow with a largely undefined public right.[23]

Additionally, public nuisance has come to be enforced by a wide range of different actors. Typically at common law, public nuisance actions were criminal in nature.[24] Correspondingly, for much of the early history of public nuisance, the action was enforceable exclusively by public officials,[25] typically to pursue criminal prosecutions.[26] Beginning with the *Anonymous* decision of 1535, however, public nuisance also came to be enforced through private action as well.[27] The *special injury rule*, which permitted this private action, was first articulated by Justice Fitzherbert as follows: where a plaintiff suffers a "greater hurt or inconvenience than the generality," then he is entitled to sue in public nuisance.[28] This "special" injury has been interpreted to mean that the plaintiff should suffer an injury different in kind and not merely in degree from the general injury.[29] Consequently, with the special injury rule, the "crime" of public nuisance became a "tort," thereby allowing private parties to sue for civil damages—albeit, under limited circumstances.[30]

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[19] RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (AM. L. INST. 1979).

[20] William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 998 (1966). See also WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 109–11 (Wilfred Prest ed. 2016) for a list of traditional common nuisances, including:

> Annoyances in highways, bridges, and public rivers; all those kinds of nuisances such as offensive trades and manufactures which when injurious to a private man are actionable . . . particularly the keeping of hogs in any city or market town; all disorderly inns or ale-houses, bawdy-houses, gaming houses, stage-plays, unlicensed booths and stages for ropedancers, mountebanks; all lotteries; cottages, if erected singly on the waste, being harbors for thieves and other idle and dissolute persons; the making and selling of fireworks and squibs or throwing them about in any street; eavesdroppers; and common scolds.

[21] Prosser, *supra* note 20, at 1000.

[22] Spencer, *supra* note 17, at 59.

[23] Kendrick, *supra* note 9, at 746 ("The definition of public nuisances thus evolved over time—it was never 'non dynamic.' ").

[24] Admittedly, as Kendrick notes, "criminal law at this time was common law." *Id.* at 714.

[25] Spencer, *supra* note 17, at 66–72.

[26] Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 745 (2003).

[27] Merrill, *supra* note 4, at 13.

[28] Gifford, *supra* note 26, at 800.

[29] Merrill, *supra* note 4, at 13. *See also* RESTATEMENT (SECOND) OF TORTS § 821C(1) (AM. L. INST. 1979).

[30] See In Re Exxon Valdez, 104 F.3d 1196 (9th Cir. 1997) for an example of a plaintiffs' failure to meet the "different in kind, and not merely in degree" requirement of the special injury rule. There, after

To make matters more confusing, by the eighteenth century, private parties seeking injunctions for the *crime* of public nuisance could initiate civil suits in the names of Attorneys General themselves.[31] As J.R. Spencer in his article *Public Nuisance – A Critical Examination* put it, these so-called *relator actions* make the story of public nuisance "curioser and curioser."[32] Typically, of course, criminal actions brought by public authorities are remedied by criminal prosecution.[33] Relator actions, on the other hand, permitted the "crime" of public nuisance to be brought by Attorneys General in civil court on behalf of private citizens, so long as the parties merely sought injunctions.[34] Relator actions became an extremely popular remedy for public nuisance, even displacing most prosecutions of the crime.[35]

When public nuisance entered the United States, the action was translated from common law into statute.[36] These statutes, as they currently exist, include a range of offenses based on some interference with the interests of the community—for example, public health, safety, morals, peace, comfort, or convenience.[37] Many public nuisance statutes in the United States are general in nature and provide merely a statutory basis for the historical common law action.[38] Other statutes specifically articulate what does or does not constitute a public nuisance.[39] Like at common law, states used public nuisance in statutory form to address a variety of wrongful conditions—from gambling houses to railway strikes.[40] As Donald Gifford explains in his article *Public Nuisance as a Mass Products Liability Tort*, "[P]ublic nuisance statutes gave the state the opportunity to terminate . . . conduct [injurious to the public welfare], either through criminal prosecutions or, more directly, through abatement actions."[41]

For much of the early part of the twentieth century, public nuisance suits for damages were exceedingly uncommon, likely because it was difficult to assert an injury different in kind and not merely in degree from the common injury.[42]

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a major oil spill, Native Alaskans sought public nuisance damages both from economic injuries caused from loss of fishing resources and from injuries caused from loss of a subsistence way of life. The Ninth Circuit upheld claims for economic damages, but not loss of their subsistence way of life damages. The court held that the Native Alaskan's subsistence way of life injury was different in degree but not different in kind from that injury sustained by the general public. *Id.*

[31] Spencer, *supra* note 17, at 66.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 70. Evidently, public nuisance complainants were more concerned with putting an end to the nuisance itself (via injunction) rather than punishing those responsible. *Id.*

[36] Prosser, *supra* note 20, at 999–1000.

[37] *Id.* at 1000.

[38] *Id.* at 999; *see, e.g.*, California's broad public nuisance statute:

> Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

Cal. Civ. Code § 3479 (Deering 2023). The law continues: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." Cal. Civ. Code § 3480.

[39] Prosser, *supra* note 20, at 1000.

[40] Kendrick, *supra* note 9, at 719.

[41] Gifford, *supra* note 26, at 804.

[42] *Id.* at 805. Gifford produces from the years 1890 through 1929, more than 750 written opinions concerning criminal prosecutions for public nuisance and more than 125 opinions involving suits for

In the 1970s, however, public nuisance doctrine underwent drastic revitalization. At this time, federal regulation of the environmental industry was not yet prominent,[43] and American environmentalists sought to use public nuisance as a cause of action to hold polluters liable.[44] Public nuisance was an appealing cause of action for environmental litigants: namely, because some public nuisance statutes—those that enshrined the action in its common law form—protected a largely undefined public right.[45] Public nuisance law, in other words, offered a tantalizing opportunity to abate a harmful condition, particularly when other regulation had not yet been able to do so.[46]

Concurrent with and not unrelated to these efforts, members at the 1970 Annual Meeting of the American Law Institute ("ALI") considered a new definition of public nuisance.[47] On the one hand, ALI member William Prosser sought to codify in the Second Restatement of Torts a definition of public nuisance as "always a crime."[48] Clearly, this definition would limit the ability of environmentalists to use public nuisance statutes to hold polluters liable with civil penalty: if the tort of public nuisance was always a crime and no laws yet regulated the environmental industry, a public nuisance civil action in the environmental context would not stand given that no crime would have yet been committed.[49] On the other hand, a second group of ALI members thought that the requirement of criminal interference was too high a standard.[50] It was this second group that ultimately won the day.[51] In order to bring the law of nuisance "out of the dark ages,"[52] this ALI majority codified an expanded definition of public nuisance that did *not* require an underlying criminal violation.[53]

Section 821B of the Second Restatement uses a three-factor approach to determine whether an interference with a right common to the public is "unreasonable." As part of this approach to determine "unreasonableness", criminality is but one of three factors. Section 821B provides:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
>
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

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injunctive relief brought by public officials against a public nuisance, as compared with an estimate of less than one hundred opinions involving actions for damages based upon public nuisance brought by individuals.

[43] Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 833 (2001) ("Federal environmental litigation was in its nascent stages. The major environmental public interest law firms that would dominate the scene for decades were taking shape.").

[44] *Id.* at 834.

[45] *Id.* Moreover, public nuisance actions for damages had the potential to circumvent normal tort doctrinal parameters like statutes of limitation and pure economic loss doctrine. *Id.*

[46] *See* Kendrick *supra* note 9, at 20–21 ("[P]ublic nuisance was a natural place for litigants to look to address environmental ills when regulation failed [to do so.]").

[47] Antolini, *supra* note 43, at 835.

[48] Gifford, *supra* note 26, at 806.

[49] To be more precise, Prosser would have still permitted common law-type public nuisance statutes to be used to remedy new social problems, so long as parties sought to remedy such problems through abatement, not civil damages. Kendrick, *supra* note 9, at 44.

[50] Gifford, *supra* note 26, at 333–41.

[51] *Id.*

[52] Antolini, *supra* note 43, at 839.

[53] Kendrick, *supra* note 9, at 21.

> (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.[54]

The ALI majority also used the Second Restatement to restructure public nuisance another way. While, Section 821C expressly articulates the special injury rule for private plaintiffs, it goes on to provide, that injunctive relief to abate a public nuisance may be sought by a public official or someone having "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."[55] This added provision, thus grants all types of civil litigants, not merely those suing through Attorney General relator actions, the ability to seek an injunction for public nuisance.[56]

In sum, to put public nuisance within the reach of the environmentalist movement, the ALI majority drafted a Second Restatement that significantly broadened the scope of the action. Section 821B expanded what conduct may count as an "unreasonable interference," and did not impose a requirement of criminal interference.[57] Section 821C granted all public nuisance litigants the ability to seek injunctions, and these actions no longer needed to be brought exclusively via criminal prosecution or Attorneys General relator actions.[58]

With the Second Restatement's backing, public nuisance began to be used in large-scale civil actions.[59] These actions, as they are still seen today, are usually levied by state or local authorities and typically seek damages.[60] Many of them involve product manufacturers and distributors.[61] Notably, in the late 1990s, public nuisance plaintiffs received a massive settlement from the tobacco industry,[62] with all fifty states settling public nuisance claims with the tobacco industry after damaging information was revealed to the public through discovery.[63] As confidence in the viability of public nuisance civil actions grew, a flurry of public nuisance claims against the firearm industry were filed by states and municipalities.[64]

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[54] RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).

[55] *Id.* § 821C(1).

[56] Gifford, *supra* note 26, at 809.

[57] *Id.* at 806.

[58] *Id.* at 809.

[59] Kendrick, *supra* note 9, at 23.

[60] *Id*. For example, many states and localities seek to obtain monetary reimbursement for public expenditures. Gifford, *supra* note 26, at 810.

[61] *Id.* at 745. To date, mass product public nuisance actions have been levied against manufacturers of lead paint, fossil fuels, opioids, electronic cigarettes, and, of course, firearms. Merrill, *supra* note 4, at 7–8; *see also* Consent Judgment, California v. JUUL Labs, Inc., No. RG19043543, (Super. Ct. Alameda Cty. Nov. 18, 2019).

[62] For further discussion regarding public nuisance as a cause of action against the tobacco industry, see generally Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, STAN. L. REV. 285 (Feb. 2021).

[63] Kendrick, *supra* note 9, at 23.

[64] Gifford, *supra* note 26, at 753.

B. A MONSTER TO DEVOUR THE LAW OF TORT

One of the problems with modern public nuisance, critics contend, is that the doctrine lacks formal constraints.[65] William Prosser, for instance, feared that by adopting an expanded definition of public nuisance in the Second Restatement, the 1970 ALI majority would exacerbate judicial activism and circumvent proper federalism, delegation, and separation of powers principles.[66] Prosser cautioned at the 1970 ALI Meeting, "[T]here is absolutely nothing in this [new] Restatement to limit or strangle or lock the stable door before the horse gets out . . . . [T]hat way madness lies."[67] More recently, the Eighth Circuit rejected a plaintiff's expanded interpretation of public nuisance. The court illustratively articulated its misgivings: "Under [the plaintiff's] theory, . . . [n]uisance thus would become a monster that would devour in one gulp the entire law of tort . . . ."[68]

Public nuisance doctrine, according to these critics, suffers from a fatal flaw: what constitutes a "right common to the public" and "unreasonable interference" is too ill-defined. This leaves judges too much discretion to effectively "create the law."[69] This also allows for public nuisance to be turned into a weapon—a "monster"—for compensatory damages rather than as the means for abatement of harmful conditions, as was the original focus of the action at common law.[70]

Thomas Merrill is one such critic of modern public nuisance doctrine. Merrill argued in his article *Is Public Nuisance a Tort?* that public nuisance is not, in fact, a tort, and it has "gone off the rails" in its modern incarnation as a civil action against large-scale social ills.[71] Rather, public nuisance, according to Merrill, is and always has been a public action.[72] Accordingly, in the interest of political accountability, public nuisance should be left both to the Legislature to define its bounds and to the Legislature's agents to either charge defendants criminally with it or, alternatively, to abate the harmful condition leading to the interference with the public right.[73] Merrill listed five conventional understandings of public nuisance to illustrate why public nuisance should be understood as a public action, and why, consequently, the doctrine is being improperly used as an action of mass tort today.

This Part will highlight each of Merrill's conventional understandings in turn, briefly summarizing them and subsequently articulating why Merrill believed these understandings lead to public nuisance's proper categorization as a public action. This Part will also briefly reiterate responses to Merrill's arguments by his critics. The goal here is not to resolve these points of tension. Rather, this Part hopes to provide an outline for these

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[65] *See, e.g.*, *Gifford, supra note* 26, at 834 ("To allow states and municipalities to hold manufacturers of mass products liable under a public nuisance theory would be to fundamentally alter the nature of the tort."); Kendrick, *supra* note 9, at 72 ("[P]ublic nuisance raises many questions about (and highlights many pre-existing issues related to) separation of powers, federalism, common law versus administrative law, and the proper role of courts."); Merrill, *supra* note 4, at 5 ("[M]uch of the recent expansion of public nuisance law suffers from what can be called a delegation deficit.").

[66] Antolini, *supra* note 43, at 840–41.

[67] *Id.*

[68] Tioga Pub. Sch. Dist. v. U.S. Gypsum, 984 F.2d 915, 921 (8th Cir. 1993).

[69] Gifford, *supra* note 26, at 787.

[70] *Id.*

[71] Merrill, *supra* note 4, at 4.

[72] *Id.* at 5.

[73] *Id.* at 4.

themes to better address them later in the context of public nuisance suits involving firearm manufacturers and distributors.

In short, whether public nuisance can or should be classified as a tort has major ramifications for the action's viability in contemporary mass tort litigation today. On the one hand, if public nuisance is a tort, its use as a weapon against products manufacturers and distributors is legitimized. On the other hand, if public nuisance is not a tort, then it is, as the Eighth Circuit describes it, a "monster," and it is flailing wildly out of line with its foundational principles.

1. Public v. Private Action

First, public nuisance is focused on the infringement of a public right. Whereas torts typically protect private rights—and accordingly, address relational wrongs—public nuisance law protects rights common to the public. Merrill interpreted an interference with a right common to the public to mean essentially a "public bad."[74] A public bad is non-rivalrous and non-excludable.[75] Respectively, this means that the interference does not dissipate as it spreads and it cannot be limited to certain property or members of the public.[76] Torts, by contrast, concern "private bads"— that is, wrongs directed at the individual.[77] As Merrill states, "[t]he distinctive nature of the right [of public nuisance] points toward the conclusion that public nuisance is a public action."[78] Thus, to briefly summarize: torts protect against private bads; public nuisance protects against public bads; and consequently, public nuisance is not a tort.

There are reasons, however, to think that an interference with a right common to the public does not merely equate to a "public bad." For Leslie Kendrick, writing in her article *The Perils and Promise of Public Nuisance*, "it seems more accurate to interpret the concept of 'public rights' more loosely."[79] Kendrick emphasizes that what people are referring to when discussing "rights common to the public" are "common rights."[80] These common rights need not be wholly separate from private rights, nor need they be confined to an understanding that they represent only public goods.[81] Additionally, for David Bullock, writing in an article directly in response to Merrill's, "private[] and public actions are not mutually exclusive and there is nothing unusual or problematic in the same conduct engaging both public and private interests and public and private actions."[82] Thus, to summarize Kendrick and Bullock's counterarguments: private rights, when threatened in the aggregate, can implicate a right common to the public; therefore, public nuisance is properly categorized as a tort because protection against

[74] *Id.* at 8.
[75] *Id.*
[76] *Id*.
[77] *Id.* at 9.
[78] *Id.* at 11.
[79] Kendrick, *supra* note 9, at 51.
[80] *Id.*
[81] *Id.* at 51–52.
[82] Bullock, *supra* note 3, at 152.

interference with a right common to the public is consistent with protection against private and relational wrongs.[83]

2. Criminality

Second, Merrill emphasized that, unlike torts, public nuisance depends on the existence of a crime.[84] William Prosser said that public nuisance was "always a crime."[85] Merrill takes Prosser's statement to mean that civil liability for public nuisance, at least as it was traditionally understood at common law, only emerged when a condition already existed that would also support criminal liability.[86] Even for the special injury plaintiff who suffers an injury that is different in kind from the public injury, the public injury does exist, and it needs to have existed for the special injury plaintiff to have any cause of action at all. Effectively, this means that the "tort" of public nuisance is, in a sense, parasitic on the existence of a crime. This idea of criminal necessity is a concept that is alien to other torts. For Merrill, it supports the idea that public nuisance is properly categorized as a public, not private action.[87]

Critics dispute the notion that the tort of public nuisance is beholden to the crime. Bullock argues that, while it may appear otherwise, in fact the tort and the crime run parallel to each other.[88] In the case of the special injury plaintiff, the special injury rule, which distinguishes a tortious public nuisance action from a criminal one, is merely a "standing rule . . . needed to prevent a multiplicity of trivial proceedings for the same wrong being brought by each and every member of the public."[89] Other torts do not need this type of procedural constraint because they are concerned with more "idiosyncratic"—that is, private—wrongs.[90] Therefore, while public nuisance is admittedly unique as a tort, in part because of this atypical standing rule, it is not subservient to the existence of a wholly other cause of criminal action.

Furthermore, even if the tort of public nuisance were beholden to the crime, Kendrick maintains that this subservience does not forever ostracize public nuisance from the realm of tort.[91] To argue otherwise would be to ignore the history of the common law itself.[92] Kendrick emphasizes that all criminal law was once a function of common law.[93] Eventually, the common law evolved, and it became criminal law through statute in the United States. It would be a mistake to chain modern legal doctrine to forms it once took. Accordingly, public nuisance firmly and properly stands in the domain of tort.[94]

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[83] Kendrick argues that it's not surprising that we are seeing an expansion of public nuisance doctrine today, given that we currently have more numerous large-scale threats to personal rights in health, safety, and welfare—that is, aggregated threats to private rights. Kendrick, *supra* note 9, at 54.

[84] Merrill, *supra* note 4, at 11.

[85] Gifford, *supra* note 26, at 806.

[86] Merrill*, supra* note 4, at 11.

[87] *Id.* at 12.

[88] Bullock, *supra* note 3, at 155.

[89] *Id.*

[90] *Id.*

[91] Kendrick, *supra* note 9, at 746.

[92] *Id.*

[93] *Id.* For an examination of old English common law leet courts, *see* Spencer, *supra* note 17, at 59–61.

[94] At the very least, public nuisance has "one foot in tort." Kendrick, *supra* note 9, at 748.

3. Actionability

Third, Merrill argued that public nuisance should not be regarded as a tort because it was, and primarily remains, actionable only by public officials.[95] Initially, public nuisance actions were prosecuted exclusively by public officials through criminal prosecution. Then, private parties seeking injunctions could bring public nuisance relator actions; however, again, this was accomplished vis-à-vis attorneys general. Merrill notes two exceptions to the rule that public nuisance actions could only be brought by public officials. First, private parties could engage in self-help abatement under certain circumstances.[96] Second, private parties could bring actions for damages so long as they met the special injury requirement.[97] The former exception has largely disappeared with the emergence of the regulatory state.[98] As for the latter exception, Merrill argues that the special injury rule rests on a fundamental misunderstanding of the concepts of standing to sue and causes of action.[99] A correct interpretation of Justice Fitzherbert's concurrence in the 1535 *Anonymous* case is that it is an attempted elucidation at the preservation of an entirely different cause of action altogether.[100] If one suffers an injury different in kind and not merely different in degree from the same interference with a right common to the public, then that injury is not *preempted* from other tort liability—for example, liability in negligence.[101] Understood in this way, the special injury rule has been wrongly applied since the *Anonymous* decision itself, lending support for private-public nuisance causes of action, whereas these actions should have properly been categorized as private causes of action in something else altogether—for example, in actions for negligence.[102] What remains of public nuisance then is (or should be) a claim actionable only by public officials: that is, a purely public action.

Bullock, of course, disagrees with Merrill's argument. Bullock explains, "That public nuisance is actionable both criminally and civilly by public authorities does not disqualify it from being actionable by a private citizen who has standing, nor does it disqualify public nuisance from being a tort."[103] The fact that public nuisance is primarily prosecuted by public authorities does not mean it cannot be prosecuted by private parties—in fact, it can be and was through the special injury rule. Regarding Fitzherbert's actual intent in articulating the special injury rule, Bullock argues that if privately injured plaintiffs were arguing under other tort or non-public nuisance grounds, then it would not make sense to impose a special injury standing requirement on them, given that they would already be required to prove damage in those causes of action.[104] Thus, Bullock concludes, Fitzherbert must have imposed

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[95] Merrill, *supra* note 4, at 12.
[96] *Id.*
[97] *Id.* at 13.
[98] *See* Merrill, *supra* note 7, at 350 ("With the emergence of an alternative mode of risk regulation in the form of the administrative model, the role of public nuisance as a type of risk regulation became obsolete.").
[99] Merrill, *supra* note 4, at 13.
[100] *Id.* at 14.
[101] *Id.*
[102] If they should even be recategorized at all. See Merrill, *supra* note 4, at 19 for a discussion of the effect of the special injury rule on the traditional common law rule that recovery in tort is not possible for injuries of pure economic loss.
[103] Bullock, *supra* note 3, at 166–67.
[104] *Id.* at 166.

the special injury requirement to prevent numerous privately-wronged plaintiffs from filing public nuisance actions for interferences of public, not private, rights.[105] Accordingly, there has been no great misreading of *Anonymous*. The role of public nuisance in private tort actions via the special injury rule cannot so easily be swept under the rug.

4. Conduct vs. Condition

Fourth, Merrill contended that public nuisance is not a tort because it is concerned primarily with regulating a wrongful condition, not wrongful conduct.[106] Torts normally are aimed at regulating against a certain kind of wrongful conduct. Public nuisance, by contrast, is like a kind of strict liability in which liability rests because defendants have caused a socially unacceptable condition. For example, in the case of a purpresture, a tree belonging to a citizen falls onto a public road, and, as Fitzherbert in *Anonymous* makes clear, an action in public nuisance may be had against the owner of the tree.[107] Merrill points out:

> The action 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.[108]

Accordingly, for Merrill, public nuisance is inconsistent with a tort because it lacks many of the elements typically required for torts such as actual injury, causation, and conduct.

Bullock disputes the notion that the elements of public nuisance make it inconsistent with other torts. Bullock reminds us that some torts do impose strict liability on a condition,[109] and some do not require proof of actual injury.[110] Moreover, Bullock adds that public nuisance does, in fact, require proof of causation—granted, not causation regarding an injury, but causation regarding an interference with a right common to the public.[111] Bullock notes, "where the plaintiff needs standing to sue, the plaintiff must also prove that the special damage is caused by the defendant's interference with the public right."[112] Thus, in the case of special injury plaintiffs, plaintiffs must show a particularized harm, which is consistent with other tort causes of action.

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[105] *Id.*
[106] Merrill, *supra* note 4, at 16.
[107] Specifically, Fitzherbert described a trench dug into a public road, but the general point is the same. He writes:

> So if one makes a ditch across the highway, and I come riding along the way in the night and I and my horse are thrown into the ditch so that I have great damage and displeasure thereby, I shall have an action here against him who made this ditch across the high-way, because I have suffered more damage than any other person.

Anon., Y.B. Mich. 27 Hen. 8, f.27, pl. 10 (1535).
[108] Merrill, *supra* note 4, at 17.
[109] Bullock, *supra* note 3, at 167; s*ee, e.g.*, Rylands v. Fletcher [1868] 3 LRE & I App. (HL) 330 (appeal taken from Eng.).
[110] Bullock, *supra* note 3, at 168 (stating that plaintiffs do not need to prove actual injury for an action of trespass).
[111] *Id.*
[112] *Id.*

5. Remedies

Finally, Merrill argues that public nuisance should be understood as a public action because it was typically remedied by either criminal prosecution or injunction, rather than by damages for public officials.[113] For Merrill, this historical limitation on the remedies available for public nuisance intuitively makes sense because an award for damages for a "public bad" is extremely difficult to measure.[114] The injury inflicts different degrees of harm on all members of the public. Moreover, it remains unclear how one would measure civil damages for interference with a public right, such as, for example, loss of the option to use a public way.[115] Tort liability, by contrast, almost always yields a damages award.[116] The exception to public nuisance being remedied by criminal prosecution or injunction involves the special injury rule for private plaintiffs seeking damages. According to Merrill, however, the special injury plaintiff was, at least historically, reserved exclusively for private individuals and was never, until recently, used by public authorities.[117]

Critics argue that the remedies historically awarded to public nuisance litigants does not alienate the action from being a tort. Bullock explains that publicly prosecuted public nuisance was not remedied by damages because public officials could already obtain "damages" in the form of fines and criminal compensation.[118] Therefore, a damage remedy for public officials was unnecessary. Additionally, Kendrick emphasizes that public nuisance was remedied by damages for special injury plaintiffs.[119] She adds also that other torts may involve remedies other than damages: for example, torts like private nuisance and trespass.[120] Thus, for Bullock and Kendrick public nuisance is properly understood as a tort, despite its atypical tort remedies.

6. Ramifications

Why does the categorization of public nuisance as a tort or public action matter? In sum, whether public nuisance can or should be classified as a tort has major ramifications for the action's viability in contemporary mass tort litigation. On the one hand, if a public nuisance is not a tort, then the doctrine as it currently stands is out of line with its foundational principles. It is a "monster,"[121] and its use as a mass tort today fuels concerns about judicial activism.[122] It also fails to properly give defendants fair notice and improperly permits state courts to second guess federal regulatory judgment.[123] On the other hand, if public nuisance is consistent with other torts, then its use as a mass tort today is legitimized. Just as the action did with the environmental movement in the 1970s, public nuisance has the

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[113] Merrill, *supra* note 4, at 17.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 18.
[117] *Id.*
[118] Bullock, *supra* note 3, at 169.
[119] Kendrick, *supra* note 9, at 747.
[120] *Id.* at 748.
[121] Merrill, *supra* note 4, at 4.
[122] *See also*, Gregory C. Keating, *Fidelity to Pre-existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME. L. REV. 1, 3–4 (1993) ("Legislatures are law-making bodies; courts are law-applying bodies . . . On its face, then, the principle of legislative supremacy supports judicial deference and a zealous unoriginality, as far as statutory construction is concerned.' ").
[123] Merrill, *supra* note 4, at 51.

potential to act as a kind of stopgap emergency measure when regulation and other conventional tort measures fail.

II. PUBLIC NUISANCE AND FIREARM LITIGATION

To evaluate FIRA's attempt to impose public nuisance civil liability against the firearm industry, it is necessary to briefly recount the history of public nuisance actions in the context of firearms generally. This history is intimately tied to the passage of the PLCAA. Therefore, this Part will first reiterate the history of public nuisance causes of action in the context of firearms, including the history of the PLCAA, as well as subsequent attempts made by litigants to circumvent the PLCAA's qualified civil immunity by qualifying their actions under the act's predicate exception. This Part will then evaluate FIRA's attempt at imposing public nuisance-type civil liability, incorporating both the arguments for and against public nuisance as a mass tort, as well lessons learned from past attempts at invoking public nuisance liability by way of the predicate exception.

A. HISTORY: CHIPPING AWAY AT THE PLCAA ARMOR

By the early 2000s, plaintiffs began bringing public nuisance tort actions against manufacturers and distributors of firearms.[124] These litigants were likely invigorated by the success of public nuisance actions against the tobacco industry. Like the public nuisance plaintiffs against the tobacco industry, the public nuisance plaintiffs against the firearm industry rested their theory of liability on the idea that gun manufacturers and distributors engaged in unreasonable marketing strategies.[125] Additionally, these public nuisance firearm plaintiffs asserted that gun manufacturers and distributors oversaturated the market and sold or produced guns that they knew or should have known would be used illegally.[126] This conduct, according to the plaintiffs, unreasonably interfered with the public right to health and safety.[127] While some of these early public nuisance actions met with moderate success, most failed to survive motions to dismiss.[128] Typically, courts dismissed public nuisance actions against the firearm industry on four grounds: (1) the lawful sale of products did not meet the requirement that the alleged nuisance interfered "with a right common to the general public;" (2) the plaintiffs failed to allege that manufacturers exercised sufficient control of the source of the interference with the public right; (3) the government had insufficient standing to sue; and (4) the plaintiffs failed to allege that the

[124] *See, e.g.,* Camden Cnty. Bd. of Chosen Freeholders v. Beretta USA Corp., 273 F.3d 536 (3d Cir. 2001); City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415 (3d Cir. 2002); People ex rel. Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192 (N.Y. App. Div. 2003); NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435 (E.D.N.Y. 2003); City of Chicago v. Beretta USA Corp., 821 N.E.2d 1099 (Ill. 2004); District of Columbia v. Beretta U.S.A. Corp., 872 A.2d 633 (D.C. Ct. App. 2005); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002); Ileto v. Block Inc., 349 F.3d 1191 (9th Cir. 2003); City of Gary v. Smith & Wesson, Corp., 801 N.E.2d 1222 (Ind. 2003).

[125] *See* Gregory Heinen, *How New Public Nuisance Claims are Targeting Gun Cos*, LAW 360, (Sept. 16, 2022, 6:02 PM), https://www.law360.com/articles/1530943 [https://perma.cc/AXN5-CSQR].

[126] Gifford, *supra* note 26, at 766–68.

[127] *Id.*

[128] *Id.* at 764.

defendant's conduct was intentional and unreasonable, reckless or negligent, or abnormally dangerous.[129]

Despite the lack of success of many of these early public nuisance litigants, by 2005 enough civil liability threatened firearm manufacturers and distributors that Congress passed the PLCAA.[130] The PLCAA prohibits "qualified civil liability" actions against firearm manufacturers in state and federal court.[131] The PLCAA defines "qualified civil liability" actions as civil or administrative proceedings that result from "criminal or lawful misuse" of a firearm.[132] The PLCAA contains several exceptions, including for claims of negligent entrustment, breach of contract or warranty, and product defect.[133] Additionally, and most notably, the so-called "predicate exception" permits suits to proceed where the gun manufacturer knowingly violates a state or federal statute "applicable" to the sale or marketing of firearms and, by such violation, proximately causes a gun victim harm.[134]

Courts have been divided as to whether "generally applicable" statutes—that is, those that are only generally as opposed to directly "applicable" to the sale or marketing of firearms—fall within the predicate exception of the PLCAA. For instance, the Second Circuit has taken a broad interpretation of the predicate exception's "applicable" language. In *City of New York v. Beretta U.S.A. Corp.*, the Second Circuit held that while the predicate exception was meant to apply to statutes that specifically covered the sale or manufacture of firearms, nothing in the PLCAA required a predicate statute to include such applicability in *express* language.[135] Nevertheless, the court in *Beretta* remanded with instructions to dismiss a city's public nuisance claim because New York's public nuisance statute did not encompass the type of conduct that the city complained of: marketing guns to legitimate buyers with the knowledge that those guns would be diverted into illegal markets.[136] By contrast, the Ninth Circuit in *Ileto v. Glock* took a narrower interpretation of the predicate exception's "applicable" language. Like the Second Circuit in *Beretta*, the Ninth Circuit found that California's public nuisance statute was not "applicable to the sale or marketing" of firearms such as to fall within the predicate exception of the PLCAA.[137] Unlike the Second Circuit, however, the Ninth Circuit emphasized that Congress intended to preempt general tort law claims.[138]

In 2019, a major crack in the PLCAA armor appeared. The Connecticut Supreme Court in *Soto v. Bushmaster* found that a statute of general applicability fell within the predicate exception.[139] The statute in question, the Connecticut Unfair Trade Practices Act, did not involve public nuisance.

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[129] *Id.* at 766.

[130] Bret Matthew, *Responsible Gunmakers: How a New Theory of Firearm Industry Liability Could Offer Justice for Mass Shooting Victims*, 54 SUFFOLK U. L. REV., 401, 406 (2021).

[131] Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005).

[132] *Id.*

[133] Nathan D. Harp, *Imperfect Immunity: How State Attorneys General Could Sue Firearm Manufacturers Under the Predicate Exemption to the Protection of Lawful Commerce in Arms Act*, 30 CORNELL J. L. & PUB. POL'Y 797, 804 (2021).

[134] *Id.* at 799. It should be remembered that the PLCAA does not prevent Attorneys General from prosecuting firearm manufacturers who violate state laws. The PLCAA only frustrates civil litigants.

[135] City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 399–400 (2d Cir. 2008).

[136] *Id.* at 400.

[137] Ileto v. Glock, Inc., 565 F.3d 1126, 1145 (9th Cir. 2009).

[138] *Id.* at 1136.

[139] Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 308 (Conn. 2019).

It had, however, previously been applied to firearms; as such, it "clearly" implicated the sale and manufacture of firearms given that it was an established mechanism for regulating the marketing and advertising schemes of firearm manufacturers.[140] Relying on the Second Circuit's broad interpretation of the predicate exception's "applicable" language, the Connecticut Supreme Court found that the Connecticut Unfair Trade Practices Act did not need to *expressly* regulate firearms.[141] In distinguishing its holding from the Ninth Circuit's holding in *Ileto*, the Connecticut Supreme Court emphasized that California's general common law public nuisance statute was "in a sense, merely general tort theories masquerading as a statute."[142] As such, its public nuisance statute could not be sufficiently "applicable" to the sale or marketing of firearms such as to fall within the predicate exception. Finally, and perhaps most significantly, the U.S. Supreme Court denied certiorari in the *Soto* appeal, presenting a novel and conspicuous opening for litigants to circumvent the PLCAA by using statutes of general applicability to fall within the predicate exception.[143]

More recently, two state legislatures attempted a new strategy to circumvent the PLCAA, this time using statutes that explicitly and directly are applicable to the sale or manufacture of firearms. In 2021, New York passed a public nuisance law that prohibits gun industry members from knowingly engaging in unlawful or unreasonable conduct that endangers public health or safety "through the sale, manufacturing, importing or marketing" of a firearm.[144] Under the law, all gun industry members must "establish and utilize reasonable controls and procedures to prevent [firearms] from being possessed, used, marketed or sold unlawfully in New York state."[145] Violations resulting in harm to the public constitute a public nuisance under the statute.[146] In May of 2022, a New York state court upheld the law and found it to fall within the predicate exception of the PLCAA.[147] Similarly, in 2022, California passed FIRA[148] which prohibits firearm industry members from "manufacturing, marketing, importing, offering for wholesale sale, or offering for retail sale a firearm-related product that is abnormally dangerous and likely to create an unreasonable risk of harm to public health and safety . . . ."[149] FIRA authorizes a person who has suffered harm in California, the State Attorney General, or city or county attorneys to

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[140] *Id.* at 306.

[141] *Id.* at 308.

[142] *Id.* at 306 n.47. *See also* Linda S. Mullenix, *Outgunned No More? Reviving a Firearms Industry Mass Tort Litigation*, 49 SW. L. REV 390, 409 (2021).

[143] Interestingly, in contrast to both the Second and Ninth Circuits, the Indiana Court of Appeals in *Smith & Wesson Corp v. City of Gary* permitted public nuisance suits to proceed against firearm manufacturers, reasoning that their state's public nuisance statute fell within the predicate exception given that it had previously been applied to firearms. *See* Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 434–35 (Ind. Ct. App. 2007). The public nuisance statute in question did not expressly regulate firearms. Nevertheless, the court reasoned that even if the PLCAA required a predicate statute to be facially applicable to the sale or marketing of a firearm, the plaintiffs had sufficiently alleged such a violation because they argued that the defendants were "on notice of the concentration of illegal handgun sales in a small percentage of dealers, and the ability to control distribution through these dealers . . . continu[ing] to facilitate unlawful sales by failing to curtail supply." *Id.* at 433.

[144] N.Y. Gen. Bus. Law §§ 898-a–e (Consol. 2023).

[145] *Id. See also* Heinen, *supra* note 125.

[146] N.Y. Gen. Bus. Law §§ 898-a–e (Consol. 2023).

[147] Nat'l Shooting Sports Found., Inc. v. James, 604 F. Supp. 3d 48 (N.D.N.Y. 2022).

[148] Assem. Bill 1594, 2021–2022 Reg. Sess. (Cal. 2022).

[149] Heinen, *supra* note 125.

bring civil actions to enforce violations of the statute.[150] California State Assemblyman Phil Ting, a sponsor of the FIRA, said that the law would ensure distributors and manufacturers are not causing a "public nuisance" with their products or "engaging in unfair business practices."[151]

B. Analysis of FIRA and its Theory of Public Nuisance Civil Liability

This Note begins its analysis with two preliminary observations.

First, the fact that FIRA does not explicitly refer to violations of the act as "public nuisances" does not negate the fact that FIRA invokes a public nuisance theory of civil liability. Like New York's law, which does explicitly name violations as public nuisances, FIRA authorizes civil actions for damages by victims and the State Attorney General for unreasonable interferences with rights common to the public, such as the rights to health and safety. FIRA actions effectively work the same as those under the New York law, given that they also are intended to threaten manufacturers and distributors with civil litigation to invoke regulatory change. Thus, for purposes of this analysis, the implications of an implicit, as opposed to an explicit, invocation of a public nuisance theory of civil liability will largely be the same.[152]

Second, it should be reiterated that, even assuming FIRA works as a predicate exception, an analysis of FIRA and its theory of public nuisance-type liability is still appropriate and necessary given that courts may still feel reluctant to hold the firearm industry liable for what may be argued is effectively public nuisance. Whether their claims rest on statutes that are expressly or implicitly applicable to the sale or manufacture of firearms, plaintiffs will still need to convince courts that the cited statutes *should* be used as theories of liability in the first place. If they do not, courts may continue to dismiss the actions for the same reasons that they did in the early public nuisance cases of the 2000s.

This Part, therefore, will articulate both the advantages and the disadvantages of using FIRA to invoke public nuisance civil liability via the predicate exception to the PLCAA. Much of the debate centers around public nuisance's suitability as a mass tort generally, a topic that this Note has already discussed at length. Public nuisance in the context of the FIRA, however, adds additional complications and nuance to the analysis that will need to be examined further. Accordingly, this Part includes arguments that have been levied against the tort of public nuisance generally, effected now in the context of FIRA.

1. Advantages of FIRA's Invocation of Public Nuisance Civil Liability

First, the fact that FIRA expressly refers to a firearm industry standard of conduct avoids concerns about judicial activism and the need for fair

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[150] *Id.*

[151] Hannah Wiley, *California Lawmakers Unveil Plan to Hold Gun Makers Liable for Shootings*, L.A. TIMES (Jan. 4, 2022, 1:28 PM), https://www.latimes.com/california/story/2022-01-04/california-lawmakers-unveil-plan-to-hold-gun-makers-liable-for-shootings [https://perma.cc/B2V9-GKTA].

[152] Press Release, California State Assembly Democratic Caucus, Governor Signs Ting's Bill Allowing Private Citizens & Others to File Civil Lawsuits Against Gun Industry (July 12, 2022), https://a19.asmdc.org/press-releases/20220712-governor-signs-tings-bill-allowing-private-citizens-others-file-civil [https://perma.cc/HBF6-ESS4].

notice to defendants. Critics of modern public nuisance are concerned that the doctrine lacks formal constraints.[153] They think that without added limitations, public nuisance has gone off the rails as a kind of super tort, or "monster," thereby allowing judges to interpret for themselves what constitutes a "right common to the public" and "unreasonable interference."[154] Under FIRA, however, firearm manufacturers and retailers face liability specifically by manufacturing and distributing firearms in a way that creates an unreasonable risk of harm to public health and safety,[155] particularly, by an act or omission in violation of a firearm industry standard of conduct. This standard of conduct is now enshrined in California state law.[156] Responsibilities include background checks, the prevention of straw purchases, the requirement to sell safety devices with each firearm, and a ban on the sale or manufacturing of assault weapons.[157] Thus, the legislature has properly exercised its authority and has articulated exactly what conduct authorizes private action. This alleviates vagueness concerns, as well as fears that judges are being granted unfettered discretion to "create" the law.

Second, like the tobacco industry public nuisance litigation, the private action authorized by FIRA may abate a harmful condition where regulation and other conventional tort actions have failed. Nora Freeman Engstrom and Robert L. Rabin in their article *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids* articulate a "catalyst theory" regarding the value of litigation. According to the authors, litigation, both successful and unsuccessful, leads to changes in regulation because litigation draws attention to a problem's existence, uncovers otherwise concealed information to establish accountability, and affects public opinion to spur political activity.[158] In the public nuisance cases involving tobacco, litigation incentivized manufacturers and distributors to come to the negotiating table and accept further regulation over their products.[159] The catalyst theory may be especially applicable to situations of regulatory failure and noncompliance by regulated entities.[160] This is, arguably, the current regulatory landscape with the firearm industry,[161] and there are indications that FIRA's purpose was to initiate such regulatory changes. For example, Kris Brown, President of Brady and promoter of FIRA, said of the act on the day of its passage, "This law will create a powerful incentive for the industry to change its practices and promote public safety and put the interests of the people over profits." Thus, a catalyst theory of litigation against the firearm industry may be desirable, intended, and necessary to enact meaningful change in firearm regulation; public nuisance, as a civil cause of civil action, may be instrumental in manifesting that change.

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[153] *See infra* Section I.B.
[154] *Id.*
[155] Mark Oliva, *California's Public Nuisance Is Admission State DOJ Background Checks Are Failure*, NSSF, (July 15, 2022), https://www.nssf.org/articles/californias-public-nuisance-law-is-admission-state-doj-background-checks-are-failure [https://perma.cc/7R53-6EYQ].
[156] Press Release, California State Assembly Democratic Caucus, Governor Signs Ting's Bill Allowing Private Citizens & Others to File Civil Lawsuits Against Gun Industry (July 12, 2022), https://a19.asmdc.org/press-releases/20220712-governor-signs-tings-bill-allowing-private-citizens-others-file-civil [https://perma.cc/L53U-AL2Q].
[157] *Id.*
[158] Engstrom & Rabin, *supra* note 62, at 350–61.
[159] *Id.*
[160] *Id.*
[161] *See also*, Kendrick, *supra* note 9, at 88.

Lastly, public nuisance as a predicate exception under FIRA may alleviate traditional public nuisance concerns about conduct, causation, and actual injury. Merrill, for instance, took issue with the fact that public nuisance lacked typical elements found in other traditional torts. When a tree falls onto a public road, a public nuisance might exist even if there is no actual injury to a plaintiff or conduct caused by a defendant. In the case of FIRA as a predicate exception, however, the predicate statute of the PLCAA itself explicitly requires that a gun manufacturer "knowingly" violate a statute "applicable to the sale or marketing of firearms," and, by such violation, proximately cause a gun victim harm. Thus, FIRA—and any predicate exception for that matter—by definition *requires* a showing of actual injury, conduct, and causation, alleviating some of the concerns of modern public nuisance critics that the doctrine has "gone off the rails."[162] Accordingly, courts may decide future FIRA suits on the merits rather than through outright dismissal since the elements of causation, conduct, and injury are now more firmly protected by the PLCAA and FIRA in typical tort tradition.[163]

2. Disadvantages of the FIRA's Invocation of Public Nuisance Civil Liability

Admittedly FIRA plaintiffs grounded on a theory of public nuisance avoid many pitfalls; however, they will likely still face much of the same criticisms public nuisance firearm plaintiffs did in the early 2000s. These criticisms were principally that public nuisance was fundamentally ill-suited as a doctrine for mass tort against products manufacturers and distributors.[164] As such, courts will probably dismiss FIRA actions resting on public nuisance grounds for the following reasons: a lack of control of instrumentalities leading to the interference with the right common to the public, an inappropriateness of holding products manufacturers and

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[162] Interestingly, FIRA's requirement of an underlying criminal violation hearkens back to William Prosser's articulation at the ALI meeting of 1970 that a public nuisance is "always a crime."

[163] David A Dana argues that the conduct at issue for most product-based public nuisance claims supports the use of an expanded theory of public nuisance in tort, given that defendants' conduct often helped create the lack of regulation. He writes:

> [P]roduct-based public nuisance claims differ from standard product liability claims, to the extent that they build on the proposition that the producers of the harmful products were able to inflict harm on the public for profit because they misrepresented what they knew about the risks inherent in their products and thereby undermined the ability of the government . . .to protect the public, as well as undermining the ability of members of the public to protect themselves. Deliberate misinformation campaigns on the part of producers provide courts with an additional reason why they need not defer to the regulatory state to address the problem at hand, because (if the allegations are true) it is the defendants' conduct that in part created a situation where there was and is an insufficient regulatory structure in place to address, contain, and resolve that problem.

David A. Dana, *Public Nuisance Law When Politics Fails*, 83 OH. ST. L.J. 61, 100 (2022).

[164] The Oklahoma Supreme Court's dismissal of a public nuisance action in State ex rel. Hunter v. Johnson & Johnson, 499 P.3d 719, 726–31 (2021) is illustrative:

> [P]ublic nuisance is fundamentally ill-suited to resolve claims against product manufacturers . . . . The district court's expansion of public nuisance law allows courts to manage public policy matters that should be dealt with by the legislative and executive branches; the branches that are more capable than courts to balance the competing interests at play in societal problems. Further, the district court stepping into the shoes of the Legislature by creating and funding government programs designed to address social and health issues goes too far. This Court defers the policy-making to the legislative and executive branches and rejects the unprecedented expansion of public nuisance law.

distributors liable under public nuisance, and a lack of intent to interfere with a right common to the public.[165] These concerns can be traced to what are essentially concerns about conduct, actual injury, and causation. As discussed above, these concerns have been somewhat alleviated by FIRA's articulation of public nuisance; they have not, however, been altogether eradicated.

Principally, the fact that manufacturers and distributors no longer control the instrumentality that led to an interference with a right common to the public poses an especially significant problem for mass product public nuisance litigants hoping to show wrongful conduct and causation.[166] As the issue relates to members of the firearm industry, Donald Gifford explains, "The harm or injurious condition allegedly created by the public nuisance clearly is not within the control of the defendants. Further, the injury does not even result from the proper use of the product. Instead, it arises from a third-party's actions—the criminal use of handguns . . . ."[167] Accordingly, courts may be reluctant to hold the firearms industry responsible for the illegal actions of third parties.[168]

A possible solution is that courts find that the firearm industry sufficiently controls the instrumentalities leading to the unreasonable interference of rights common to the public under an "affirmative duty" theory of liability. Leslie Kendrick, in her article *The Perils and Promise of Public Nuisance*, argues that public nuisance effectively creates an affirmative duty on defendants to mitigate *unreasonable risks* that lead to interferences with rights common to the public.[169] Kendrick argues that even though manufacturers and distributors do not breach a duty for introducing their products into the stream of commerce, they later owe a duty of reasonable care to protect others from the risk of harm that their products cause.[170] As Kendrick explains, "The question is not just whether the defendants acted reasonably when manufacturing or selling a product; the question is also, did they continue to act reasonably when an unreasonable risk—or, in some cases, a catastrophic national crisis—emerged?"[171] This concept of an "affirmative duty" to mitigate risk is a familiar one in negligence law.[172] Accordingly, if courts see FIRA as creating an affirmative duty on the firearm industry to mitigate unreasonable risk, they might decide FIRA civil suits on the merits rather than through outright dismissal.

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[165] Gifford, *supra* note 26, at 766.

[166] *Id.* at 822. Note that in some jurisdictions, continued control is a statutory or common-law requirement for public nuisance, and other courts consider it as part of the proximate cause inquiry. *See* Kendrick, *supra* note 9, at 69.

[167] Gifford, *supra* note 26, at 822.

[168] In the words of Jonathan Turley, writing in his op-ed in *The Hill*, "Guns are lawful products, . . . [y]ou might as well sue an axe manufacturer for the Lizzy Borden murders." Jonathan Turley, *Why Gun Claims by Joe Biden and Democrats Make Little Sense*, THE HILL (Feb. 27, 2020, 11:00 AM), https://thehill.com/opinion/campaign/484913-why-gun-claims-by-joe-biden-and-democrats-make-little-legal-sense [https://perma.cc/MKQ2-9KJ9].

[169] Kendrick, *supra* note 9, at 66.

[170] To analogize an "affirmative duty," Kendrick discusses a stranded driver on a road who, through no fault of his own, must abandon his vehicle. Even though the driver has not breached a duty by leaving his vehicle on the road (that is, causing a dangerous condition), he still owes an affirmative duty to mitigate the risk of harm caused by his actions: for instance, by notifying officials. *Id.* at 66–67.

[171] *Id.* at 68.

[172] *Id.* at 70 ("The affirmative-duty cases illustrate that someone who has lost control over an instrumentality can still very much have a responsibility to mitigate the risks associated with it. If this is true in widely accepted, garden-variety negligence examples, it can equally be true of public nuisance.").

Nevertheless, there are troubling policy concerns with using public nuisance liability as a form of risk regulation. First, the risks associated with unreasonable interferences with rights common to the public today are large and encompass multiple jurisdictions; as such, they may require coordinated, top-down regulation to mitigate. Kendrick may be correct, *morally*, that out of the creation of such interferences emerges an affirmative duty on defendants to act; *realistically*, however, her argument says more about punishing an unreasonable interferer and less about abating a harmful condition, as was the original focus of the public nuisance action. Given that FIRA seeks to address a statewide epidemic of gun violence and its objective is to abate a harmful condition, courts may see attempts to regulate the firearm industry through civil litigation authorized by FIRA as, practically, better left to the legislature as they can best enact meaningful change. As Merrill, in his article *Public Nuisance as Risk Regulation*, writes:

> Public nuisance made sense at a time when the relevant risks were local and largely defined by custom, and government was a skeletal affair. With the emergence of an alternative mode of risk regulation in the form of the administrative model, the role of public nuisance as a type of risk regulation became obsolete.[173]

As it relates to wrongful conditions, litigation, unfortunately, can be slow and uncertain;[174] it may even lead to *unhelpful* regulatory change.[175] Second, unlike with those risks associated with garden-variety negligence, the risks associated with the mass tort public nuisance actions of today are inherently *political*. Accordingly, indirect regulation through litigation poses a particular kind of moral hazard given that legislators may prefer it as opposed to direct regulation.[176] Kendrick herself writes:

> The legislature might well prefer not to regulate various products or activities, whether directly or through indirect measures such as taxation because doing so might be unpopular with donors or constituents. . . . Sadly, there might be more political support for lawsuits ex post than for regulation ex ante . . . .[177]

In sum, while regulation through litigation authorized by legislation avoids judicial activism and nondelegation concerns, it still raises issues regarding separation of powers. Legislators are permitted to avoid accountability by externalizing the political cost of regulation onto litigants. Additionally, the government may "make choices that are less costly to them but more costly to the public welfare."[178] Again, this comes at the cost of abating of the harmful condition: by evading responsibility to directly abate an interference with a right common to the public, legislators may thereby be permitting those interferences to continue, so long as it means that they will not have to face the consequences for their actions and omissions.

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[173] Merrill, *supra* note 7, at 370; *see also*, Luis Ferre-Sadurni, *It's Hard to Sue Gun Makers. New York is Set to Change That.*, NEW YORK TIMES, (June 8, 2021) ("We aren't going to litigate our way to public safety.") (quoting Will Barclay, Republican minority leader in the New York Assembly) https://www.nytimes.com/2021/06/08/nyregion/gun-manufacturers-lawsuit.html [https://perma.cc/EW28-N7WF].

[174] Merrill, *supra* note 7, at 370.

[175] *Id.* at 366. See, for example, the PLCAA. *Id.*

[176] *See* Kendrick, *supra* note 9, at 75.

[177] *Id.*

[178] *Id.* at 77.

III. DECEPTIVE MARKETING

Considering the foregoing analysis, this Note argues that the better basis to defend FIRA is on grounds of unfair marketing, not based on public nuisance-type liability.

First, while this Note has assumed for the sake of argument that FIRA will qualify as a predicate exception there are reasons to think that it will have at least some difficulty in doing so. The Ninth Circuit in *Ileto* expressly held that the predicate exception does not apply to claims brought by California civil codes pertaining to nuisance, public nuisance, and negligence.[179] This likely explains the difference between the New York law, which expressly articulates violations to be public nuisances, and FIRA, which does not. Thus, because the strategy of implicitly invoking public nuisance may or may not be convincing to the Ninth Circuit, FIRA litigants inevitably have a hill to climb if they seek to successfully qualify FIRA as a predicate exception on public nuisance grounds.

Second, as discussed, even if the FIRA qualifies as a predicate statute—for example, in the same way that the New York state court upheld New York General Business Law Section 898-a–e in 2022[180]—courts will likely still dismiss FIRA actions. Prior to the passage of the PLCAA, public nuisance actions against the firearm industry were summarily dismissed. Principally, plaintiffs had difficulty showing firearm defendants sufficiently controlled instrumentalities that led to the unreasonable interferences with the right common to the public. Courts had trouble finding that lawful firearm manufacturers and distributors maintained control over the weapons that ended up in the hands of criminals. Accordingly, courts did not favor finding public nuisance liability against defendants who had no part in bringing about the unreasonable interferences with the right common to the public. The same will likely be true of public nuisance actions against the firearm industry under FIRA.

FIRA is better positioned to survive because it targets deceptive marketing. Like the Connecticut Unfair Trade Practices Act in *Soto*, FIRA "clearly implicates" the sale and manufacture of firearms, given that it is an established mechanism by which to regulate firearms sales and marketing. Moreover, unlike the Connecticut Unfair Trade Practices Act, FIRA regulates firearms expressly, which increases the odds that it will be found to fall under the predicate exception. As a predicate exception, FIRA has a stronger chance of surviving motions to dismiss, given that courts will likely have an easier time believing that defendants control their marketing practices and should face accountability for their advertising.

CONCLUSION

FIRA increases the likelihood that firearm manufacturers and distributors will face civil liability. This liability, however, would be more persuasively argued on unfair marketing rather than public nuisance grounds, given that the Supreme Court recently denied certiorari in the *Soto* appeal

[179] Linda S. Mullenix, *Outgunned No More? Reviving Firearms Industry Mass Tort Litigation*, 49 SW. L. REV 390, 407 (2021).

[180] *See generally* Nat'l Shooting Sports Found., Inc. v. James, 604 F. Supp. 3d 48 (N.D.N.Y. 2022).

and FIRA is well-positioned to fall into the predicate exception on similar grounds as the Connecticut Unfair Trade Practices Act.

Because the Ninth Circuit has shown distaste for what the Second Circuit called "California's general tort theories masquerading as statutes," FIRA construed as a public nuisance statute has a chance of being preempted by the PLCAA. If it is not, FIRA alleviates some concerns that public nuisance doctrine has "gone off the rails," specifically regarding judicial activism, injury in fact, causation, and conduct. Additionally, FIRA assists in abating interferences with rights common to the public under a "catalyst theory" of litigation. Nevertheless, there remain legitimate concerns regarding defendants' control of instrumentalities, conduct, and intent to cause interferences to rights common to the public that may lead some courts to continue to dismiss public nuisance-grounded FIRA complaints outright. Ultimately, given that FIRA authorizes civil litigation for prosecutors and private parties, courts may view the law as improperly externalizing risk regulation, allowing legislatures to avoid enacting meaningful regulatory change, thereby violating separation of powers principles.