

Public Nuisance at the Crossroads: Policing the Intersection Between Statutory Primacy and Common Law

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INTRODUCTION

In a previous article, we examined recent attempts to transmute the traditional tort of public nuisance from its traditional elements into an expansive remedy that subsumes the law of product liability.¹ Only a few months after that article was published, the Rhode Island Supreme Court rejected the expansive use of public nuisance as a substitute for traditional product liability litigation regarding lead-based paints.² In so holding, Rhode Island joined other state high courts that previously reached the same conclusion.³ Of the original public nuisance claims filed in the massive controversy regarding lead paints, only those in California remain pending—and they face an exacting review under a jurisprudence with unique history and traditions.

Public nuisance, therefore, is at a “crossroads” in California. The California lead paint litigation may be the end—or a new beginning—of mass tort proceedings against product manufacturers based upon public nuisance, as opposed to traditional strict product liability. The controversy lies squarely at the intersection of statutory and common law—an interchange that has grown increasingly more complex since California’s laws were codified in 1850, and since public nuisance was codified as a tort in 1872. The dispute is framed by this singular legal history and the complex jurisprudence the state has developed to simultaneously empower and restrain the creativity of common law courts in such cases. As a result, those historical perspectives and contexts must be appreciated and studied before honest prognostications can be made.

¹ Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941 (2007).

² *State v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428, 456 (R.I. 2008).

³ *See, e.g., In re Lead Paint Litigation*, 924 A.2d 484, 494 (N.J. 2007) (recognizing that if it were to “permit these complaints to proceed, [it] would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance”); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 112–13 (Mo. 2007).

The California litigation represents the resurgence—or the ebbing—of a tide of public nuisance litigation that has swept the nation over the past decades. In those years, private citizens, cities, counties, states, and other public authorities have increasingly asked courts—as opposed to the Legislature—to solve large societal problems by characterizing problems as “public nuisances.” In the 1970s, lawyers began the movement to breathe life into the ancient tort as a tool to resolve problems, which adversely affected large numbers of people, as opposed to distinct individuals.⁴ Specifically, they invoked public nuisance to sue manufacturers for making and selling products allegedly responsible for creating public health and safety problems. Their first—and unsuccessful—attempts were filed against manufacturers of products that caused air pollution⁵ and manufacturers of asbestos products.⁶ Their efforts finally gained momentum during the tobacco litigation of the late 1990s, where it was asserted that public nuisance claims played a role in forcing the tobacco industry to the settlement table.⁷

Since then, state and local governmental authorities have increasingly championed public nuisance as a vehicle to pursue mass tort suits against manufacturers of products believed to cause harm to vast numbers of citizens.⁸ With each new lawsuit, creative attorneys have retooled and refined their legal

⁴ Up until the 1970s, the tort of public nuisance was largely consigned to the footnotes of casebooks. Faulk & Gray, *supra* note 1, at 954 (noting that public nuisance was not even included in the *Restatement (First) of Torts* when it was published in 1939 and that it was being replaced by new legislatively created “tools more suited to large-scale solutions”). During the late 1960s, however, environmental activists seized upon the idea of using public nuisance as a tool to combat pollution and successfully sought to expand its applicability through the *Restatement (Second) of Torts*. *Id.* at 955–56.

⁵ The court dismissed this case after finding that it could not simply abolish air pollution as a public nuisance and concluding that this societal problem was best resolved through the Legislature. See *Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639, 645 (Cal. Ct. App. 1971) (noting that they were not dealing with a simple dispute between a person breathing the air and a person contaminating it, and acknowledging that the real question of how to control air pollution is best left to the state and federal legislatures).

⁶ Governmental authorities claimed that asbestos products, by their very existence, were a public nuisance that interfered with the public health “because [t]he stream of commerce can carry pollutants every bit as effectively as a stream of water.” *City of San Diego v. U.S. Gypsum*, 35 Cal. Rptr. 2d 876, 882 (Cal. Ct. App. 1994) (quoting *Tioga Pub. Sch. Dist. #15 v. U.S. Gypsum*, 984 F.2d 915, 921 (8th Cir. 1993)). After acknowledging the breadth of circumstances in which California law permitted recovery in public nuisance, the court declined to turn this ancient doctrine into a super tort by holding that California law does not allow for “recovery for a defective product under a nuisance cause of action.” *Id.* at 883. The court went so far as to state that “under City’s theory, nuisance ‘would become a monster that would devour in one gulp the entire law of tort . . .’” *Id.* (quoting *Tioga Pub. Sch. Dist. #15*, 984 F.2d at 921); see also Faulk & Gray, *supra* note 1, at 957–58.

⁷ Faulk & Gray, *supra* note 1, at 958.

⁸ *Id.* at 960–61; see also Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 914 (2008).

arguments—seeking ways to overcome precedents against holding manufacturers of lawful products liable for creating public nuisance for simply marketing and selling a product.⁹ Over the past decade, public entities in California have attempted to use public nuisance as a means to address diverse and complex societal problems, such as:

- urban violence by suing gun manufacturers;¹⁰
- childhood lead poisoning caused by deteriorating paint in older housing stock by suing lead pigment manufacturers that supplied the lead used in lead paint more than thirty years ago;¹¹ and
- climate change by suing automobile manufacturers and energy-related companies whose products emit greenhouse gases.¹²

Admittedly, most citizens would like to eliminate, or at least mitigate, these problems—but that concern does not necessarily justify judicial intervention. To date, the California Supreme Court has yet to decide whether public nuisance is an appropriate vehicle for governmental authorities to redress societal harms allegedly created by product manufacturers,¹³ although it is increasingly likely that the court will have the opportunity to do so in the lead paint litigation.¹⁴

⁹ The repackaging of this ancient tort is being done using the same sympathetic reasoning that convinced common law courts to develop strict product liability. See William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1122 (1960) (landmark article advocating the demise of fault-based causes of action in favor of strict products liability).

¹⁰ *In re Firearm Cases*, 24 Cal. Rptr. 3d 659, 663 (Cal. Ct. App. 2005); *Ileto v. Glock Inc.*, 349 F.3d 1191, 1194 (9th Cir. 2003).

¹¹ *Cnty. of Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d 313, 319 (Cal. Ct. App. 2006).

¹² *Cal. v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *5 (N.D. Cal. Sept. 17, 2007). Although the State voluntarily dismissed its appeal on June 19, 2009, Unopposed Motion to Dismiss Appeal at 2, *Cal. v. General Motors Corp.*, No. C06-05755 MJJ (N.D. Cal. Sept. 17, 2007), <http://www.globalclimatelaw.com/uploads/file/California%20v%20GM%20dismissal.pdf>, the initial pursuit of the action suggests the Attorney General's potential interest in public nuisance as a vehicle to redress widespread harms. See also *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009), *appeal filed*, No. 09-17490 (9th Cir. Nov. 5, 2009).

¹³ The court had the opportunity to decide the issue in *County of Santa Clara v. Atlantic Richfield Co.*, but elected to forego review, perhaps because the issue was framed in the context of a motion to dismiss on the pleadings, as opposed to a complete factual record. In any event, the court's denial left the matter open for later challenges. *Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 331.

¹⁴ Recently, the California Supreme Court cleared the way for the lead paint litigation to proceed after a lengthy appellate challenge to the propriety of the use of contingent fee counsel by public entities to pursue public nuisance cases. *Cnty. of Santa Clara v. Superior Court*, 235 P.3d 21, 41 (Cal. 2010).

The attraction of public nuisance as a new remedy is superficially understandable, but fundamentally elusive. Perhaps private and governmental attorneys believe that public nuisance is a uniquely appropriate candidate for “remolding” into a “super tort”—appropriate because it is a nebulous, ill-defined, “catch all” tort that can be raised in virtually any situation where defendants are alleged to have engaged in broadly injurious or offensive behavior. Perhaps they believe that this vagueness makes the tort more malleable than traditional product liability claims, and hence more adaptable and flexible to meet society’s needs.¹⁵ Whatever these advocates may surmise, they should not presume that California nuisance law is not constrained by significant precedents. Any California Supreme Court decision regarding the tort’s utility and applicability certainly will not be written on a “blank slate.” Indeed, public nuisance has a long and colorful history in California, and California courts have been resolving public nuisance disputes since the early days of statehood.

This Article chronicles the use and development of the tort of public nuisance in California, focusing on the types of circumstances in which its use was approved.¹⁶ It discusses the historical foundations of California’s jurisprudence and the impact of that history on the construction and application of “common law” remedies such as public nuisance. It reviews the nature and elements of public nuisance,¹⁷ and then frames and substantiates the unique position in which California courts find themselves regarding public nuisance, particularly when product claims are involved.¹⁸ California, the state viewed by many as the origin of strict product liability, must now decide whether its courts will preside over the dissolution of its principles. Those courts stand as gatekeepers for a new mass tort theory, and they must decide whether they will—or will not—admit a transmuted cause of action that has been specifically engineered to displace long-established rules that govern the liabilities of product manufacturers.

¹⁵ The redefining of this malleable tort began after these same counsel endured decades of defeat in courts as a result of traditional common law product liability rules. See Faulk & Gray, *supra* note 1, at 957–59; see also Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 745 (2003) [hereinafter Gifford]; Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 542–43 (2006).

¹⁶ See *infra* Part I.

¹⁷ See *infra* Part II.

¹⁸ See *infra* text accompanying notes 185–203.

I. THE JURISPRUDENTIAL FOUNDATIONS OF PUBLIC NUISANCE

The law of public nuisance is ancient, as are the confusion and debates regarding its meaning. The tort can be traced to the feudalism of the Middle Ages and was transported to America by the earliest English settlers.¹⁹ Despite its persistent viability, the tort has always been difficult to understand and apply. Predictably, when Horace Wood published the first American treatise on nuisance in 1875, he described public nuisance as a “wilderness of law.”²⁰ Later, William Prosser, reporter for the *Restatement (Second) of Torts*, described nuisance law as an “impenetrable jungle,” and as a “legal garbage can’ full of ‘vagueness, uncertainty and confusion.’”²¹

Some jurists tried to dispel this confusion. For example, United States Supreme Court Justice George Sutherland once described a public nuisance as “merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard.”²² His observation is consistent with the legal maxim “*sic utere tuo ut alienum non laedas*,” which means that property is held subject to the condition that its use should not injure others or impair the public right and interests of the community.²³ This principle is the foundation of the common law of nuisance,²⁴ and, significantly, it was so recognized by California in 1872. At that time, California’s Legislature enshrined it in state law by declaring that “[o]ne must so use his own rights as not to infringe upon the rights of another.”²⁵ Since then, the California Supreme Court has held that the maxim “implies that one may make any use which he pleases of his own [property] so long as he does not injure others.”²⁶

¹⁹ Faulk & Gray, *supra* note 1, at 953; Gifford, *supra* note 15, at 745, 800–01.

²⁰ Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89, 90 (1998).

²¹ *Id.*

²² *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

²³ *Locklin v. City of Lafayette*, 867 P.2d 724, 743 (Cal. 1994); *see also* *Brendale v. Confederated Tribes & Bands of Yakima the Indian Nation*, 492 U.S. 408, 433–34 (1989); *Vill. of Euclid*, 272 U.S. at 387; *Camfield v. United States*, 167 U.S. 518, 522 (1897).

²⁴ LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 246 (1987); *CEED v. Cal. Coastal Zone Conservation Comm’n*, 118 Cal. Rptr. 315, 324 (Cal. Ct. App. 1974); *Hulbert v. Cal. Portland Cement Co.*, 118 P. 928, 930–31 (Cal. 1911); *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753, 801 (C.C.D. Cal. 1884) (stating that this maxim “is one of the fundamental maxims of the common law, more frequently cited and enforced, perhaps, than any other in the law”).

²⁵ CAL. CIV. CODE § 3514 (*Sumner Whitney & Co.* 1872).

²⁶ *Reclamation Dist. No. 833 v. American Farms Co.*, 285 P. 688, 690 (Cal. 1930) (citing *Galbreath v. Hopkins*, 113 P. 174 (Cal. 1911)); *see also* *People v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1159 (Cal. 1884) (“Every business has its laws, and these require of those who are engaged in it to so conduct it as that it shall not violate the rights that belong to others. Accompanying the ownership of every species of property is a

Despite this maxim, the California Supreme Court has not entirely avoided the complications that have plagued the tort for centuries. For example, it described a “public or common nuisance . . . [as] a species of catch-all criminal offense, consisting of an interference with the rights of the community at large.”²⁷ Moreover, it recently stated that the “doctrine is aimed at the protection and redress of *community* interests and, at least in theory, embodies a kind of collective ideal of civil life.”²⁸ Descriptions such as these, along with the unusually wide variety of cases in which judges have applied the law of public nuisance, have led scholars to describe this doctrine as “notoriously contingent and unsummarizable.”²⁹ Notwithstanding this bleak observation, and despite a host of other articles that have described the development of public nuisance,³⁰ it is still useful—indeed necessary—to review its history and, for the purposes of this article, examine how California’s Legislature has established public nuisance in its civil code, and to study how California’s courts have applied this ancient tort.

A. Origins in England

It is generally agreed that English common law courts created the tort of nuisance during the twelfth century.³¹ Originally, it was only available to the Crown and was utilized to stop people from encroaching on the King’s land or blocking a public road or waterway.³² The sheriff prosecuted it as a crime,

corresponding duty to so use it as that it shall not abuse the rights of other recognized owners.”) (citing CAL. CIV. CODE §§ 3479, 3514 (West 1997)); *Barrett v. S. Pac. Co.*, 27 P. 666, 667 (Cal. 1891) (“It is a maxim of the law that one must so use and enjoy his property as to interfere with the comfort and safety of others as little as possible consistently with its proper use.”).

²⁷ *People ex rel. Clancy v. Superior Court* 705 P.2d 347, 353 (Cal. 1985).

²⁸ *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 603 (Cal. 1997).

²⁹ Halper, *supra* note 20, at 90.

³⁰ See, e.g., Faulk & Gray, *supra* note 1, at 948–51; C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 3–5 (1949); Gifford, *supra* note 15, at 743; Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359, 361–62 (1990); Schwartz & Goldberg, *supra* note 15, at 541–42; J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 CAMBRIDGE L.J. 55, 59 (1989); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 571 (1941); Eric L. Kintner, Note, *Bad Apples and Smoking Barrels: Private Actions for Public Nuisance Against the Gun Industry*, 90 IOWA L. REV. 1163, 1190–91 (2005).

³¹ Faulk & Gray, *supra* note 1, at 951 (citing FIFOOT, *supra* note 30, at 3–5); see also *Acuna*, 929 P.2d at 603 (recognizing that “[t]here are few ‘forms of action’ in the history of Anglo-American law with a pedigree older than suits seeking to restrain nuisances”).

³² See RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1979); Faulk & Gray, *supra* note 1, at 951 (citing Abrams & Washington, *supra* note 30, at 361–62); see also Philip L. Judson, *Unlawful Agricultural Working Conditions as Nuisance or Unfair Competition*, 19 HASTINGS L.J. 398, 401 (1968) (citing *James v. Hayward*, (1631) 79 Eng. Rep. 761 (K.B.)

and consequently, the tort has always been closely tied to the government's use of its police powers. The majority of early nuisance cases were brought to remedy violations of property rights.³³ On rare occasions, however, early nuisance cases were brought to remedy offensive activities not tied to property (for example, "helping a 'homicidal maniac' to escape, being a common scold, . . . selling rotten meat, [and] embezzling public funds").³⁴ Accordingly, the authority to commence public nuisance actions was not derived from a private "tort" concept, but rather from what is now known as the sovereign's "police power."³⁵

Between the twelfth and sixteenth centuries, public nuisance remained a "criminal" tort reserved for the King. Citizens were not allowed to bring nuisance claims in their own names to recover for harms inflicted by others against them and their neighbors.³⁶ This limitation ended in the sixteenth century, after a dissenting justice opined that ordinary citizens should be allowed to sue and recover damages caused by public nuisances in certain situations.³⁷ As a result, private citizens were given the right to sue for public nuisance, but only if they could prove that they "suffered a 'particular' or 'special' injury that was not common to the public."³⁸ To be special, the injury had to be "different in kind," not just more severe than that suffered by the

and W. PROSSER, TORTS §§ 87, 89 at 593, 606 (3d ed. 1964); *Acuna*, 929 P.2d at 603 (stating that a public nuisance was originally an offense against the crown).

³³ *People v. Lim*, 118 P.2d 472, 474 (Cal. 1941). Property-related activities prosecuted as "public nuisances" included: digging up a wall of a church, keeping a tiger in a pen next to a highway, leaving mutilated corpses on doorsteps, keeping treasure troves, and subdividing houses which "become hurtful to the place by overpestering it with poor." *Abrams & Washington*, *supra* note 30, at 362.

³⁴ *Abrams & Washington*, *supra* note 30, at 362.

³⁵ *Lim*, 118 P.2d at 474 (noting that it was "an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a court of equity to interfere at all . . . to put down a public nuisance which did not violate the rights of property, but only contravened the general policy.").

³⁶ Opponents to a private cause of action for public nuisance argued that, if allowed, a defendant would be brought into court multiple times to defend against a single offense. *Faulk & Gray*, *supra* note 1, at 952 (citing *Gifford*, *supra* note 15, at 800).

³⁷ The source of this change is uniformly credited to a dissenting opinion in an "anonymous" King's Bench decision. *Id.* In that case, Justice Fitzherbert opined that when a person suffers an injury that is different-in-degree (as compared to different-in-kind) from the general public, then he should be allowed to bring his own public nuisance claim. Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 792-93 (2001). For his hypothetical, he used the example of a person riding on a public highway at night and coming across a man-made ditch. *Id.* If he is merely delayed or inconvenienced the same as everyone else, then he does not have a private public nuisance cause of action. *Id.* But, if he and/or his horse are physically injured because they fell into the trench, then he should have a personal public nuisance cause of action against the person who dug the trench across the public road. *Id.*

³⁸ *Faulk & Gray*, *supra* note 1, at 952.

general public.³⁹ Another important distinction between public nuisance actions brought by the Crown and those brought by the general public was the remedy available. Private citizens were limited to seeking monetary damages because injunctive relief or abatement remedies were solely reserved for the Crown.⁴⁰ As a result, the law of nuisance began to subsume elements of criminal law, real property law, and tort law.⁴¹

Gradually, English common law courts allowed persons other than the Crown to bring public nuisance actions to address public concerns, such as “the right to safely walk along public highways, to breathe unpolluted air, to be undisturbed by large gatherings of disorderly people and to be free from the spreading of infectious diseases.”⁴² During this period, many public nuisance cases involved people blocking highways, encroaching on highways, or dumping all sorts of garbage on them.⁴³ They also addressed the blockage of waterways and flooding, as well as the pollution of streams and ponds used as a source of water for people and livestock, and problems created by allowing diseased animals to roam.⁴⁴ Finally, they also dealt with activities not directly related to property violations, such as the selling of unfit food stuffs, short-selling food or ale, inappropriate hunting practices (for example, catching immature game or hunting out of season), closing bawdy-houses and disorderly ale-houses, night-walkers, and eavesdroppers.⁴⁵ In medieval times, public nuisance was used to address conflicts between land use and social welfare because it provided judges (who lacked guidance from legislative bodies on what society deemed to be unreasonable behavior) with a flexible judicial cause of action that allowed them wide latitude and discretion to adapt their rulings to remedy wrongs.⁴⁶ It would be another couple of hundred years before the extraordinary power held by judges to use the common law tort of public nuisance to address some of society’s more pressing problems was curtailed, constrained, and limited by legislative enactments.⁴⁷

³⁹ *Id.* at 952–53.

⁴⁰ *Id.* at 950 (citations omitted). Conversely, governmental authorities are not allowed to seek damages for a public nuisance. *Id.*

⁴¹ Halper, *supra* note 20, at 99.

⁴² Schwartz & Goldberg, *supra* note 15, at 543–44.

⁴³ Faulk & Gray, *supra* note 1, at 951.

⁴⁴ *Id.*

⁴⁵ *Id.* at 951 n.46 (citing Spencer, *supra* note 30, at 59–60).

⁴⁶ *State v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428, 444 (R.I. 2008).

⁴⁷ Edwin S. Mack, *The Revival of Criminal Equity*, 16 HARV. L. REV. 389, 391–92 (1903) (suggesting that the use of injunctions to enjoin public nuisances lapsed between about 1650 and 1800 because a general distrust by the people of English courts existed).

B. Entry into American Jurisprudence

As citizens of English ancestry began colonizing America during the sixteenth and seventeenth centuries, they brought with them the English system of justice. This included the common law tort of public nuisance, which was generally adopted in Colonial America without change.⁴⁸ Early American nuisance cases typically fell into one of two categories: either dealing with people blocking highways or waterways, or stopping perceived invasions of public morals.⁴⁹ Over time, as America expanded westward and the industrial revolution took hold, our society gradually shifted from agrarian to industrial.⁵⁰ This change did not always come smoothly. While new inventions brought with them efficiency, speed, and opened new horizons, they also brought noise, air and water pollution, and many other less desirable consequences.⁵¹ Given the fact that noxious trades, and unsanitary and smelly conditions were historically treated as public nuisances in England, it is not surprising that this remedy was adopted in America to address similar conditions.

It should be remembered that before the onset of the twentieth century, there was very little state legislation regulating or prohibiting pollution or otherwise governing the activities of most businesses. Without such regulations, people engaged in business generally were free to run their operations and facilities as they pleased, and most health and safety-related restrictions were viewed by businessmen as unnecessary and unwanted restrictions that put them at a competitive disadvantage. Consequently, the only redress often available to citizens and/or governmental authorities was a public nuisance lawsuit.

Increasingly in recent times, however, legislatures, with their unique ability to weigh and balance the public interest, have sidestepped the need for public nuisance litigation. They have employed their investigative resources and diverse deliberative resources to enact a vast tapestry of statutes and regulations—provisions that set forth and define minimum

⁴⁸ Gifford, *supra* note 15, at 800.

⁴⁹ Faulk & Gray, *supra* note 1, at 953 (citing Gifford, *supra* note 15, at 800–01). The cases involving public morals and welfare involved lotteries and other forms of gambling and wagering, keeping a disorderly house or tavern, enabling prostitution, and using profane language. Gifford, *supra* note 15, at 800–01 (citations omitted).

⁵⁰ Faulk & Gray, *supra* note 1, at 953.

⁵¹ *Id.* (citing Halper, *supra* note 20, at 101) (discussing some notable nuisance cases during this period such as: *Chenowith v. Hicks*, 5 Ind. 224, 224 (1854) (water pollution from a slaughterhouse); *Commonwealth v. Brown*, 54 Mass. 365, 368 (1847) (air pollution); *Smiths v. McConathy*, 11 Mo. 517, 519 (1848) (distillery vapors and hog waste); and *Luning v. State*, 2 Pin. 215, 218–19 (Wis. 1849) (damming a waterway)).

societal norms outside of the common law process.⁵² These new laws not only set forth conduct expected from the business community and general citizenry, but also outlined comprehensive solutions to an extraordinarily wide variety of conflicts between land use and social welfare, including but not limited to pollution and public health concerns.⁵³ In many of these enactments, legislatures even specified the activities and behaviors that constituted nuisances.⁵⁴ These laws limited the judiciary's "common law" discretion because they required judges to consider whether, and to what degree, legislatures approved of an activity when determining the existence of the nuisance.⁵⁵ As we will see below, this is particularly true in California where the Legislature's role in defining public nuisances is well established.⁵⁶

C. Historical Roots of Public Nuisance Litigation in California

i. Early Days

California grew from diverse peoples and cultures—and it did so perhaps more quickly and violently than any other American state.⁵⁷ Those influences, which profoundly affected California's government and legal systems, persist today in the interactions between codified laws and the common law process—particularly regarding the law of public nuisance.

Prior to the Mexican-American War, California was a remote northern Spanish province, sparsely populated by a series of missions dedicated to spreading Christianity to the local natives.⁵⁸ When the war ended in 1848, Mexico ceded all land north of the Rio Grande River to the United States (including what is now California) in return for fifteen million dollars.⁵⁹

⁵² Faulk & Gray, *supra* note 1, at 954.

⁵³ *Id.* at 954–55.

⁵⁴ *Id.* at 954.

⁵⁵ See *infra* Part II(C).

⁵⁶ See *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 606 (Cal. 1997).

⁵⁷ See Lewis Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617, 622–25 (1994) (discussing problems with maintaining order and lack of intellectual and cultural resources in early days of statehood).

⁵⁸ See CALIFORNIA MISSIONS FOUNDATION, <http://www.missionsofcalifornia.org/foundation/index.html> (last visited Oct. 9, 2011); CALIFORNIA HISTORY ONLINE, <http://www.californiahistoricalsociety.org/timeline/chapter4/001.html> (last visited Oct. 9, 2011); CALIFORNIA HISTORY ONLINE, MEXICAN CALIFORNIA: THE HEYDAY OF THE RANCHOS, <http://www.californiahistoricalsociety.org/timeline/chapter5/index.html> (last visited Oct. 9, 2011).

⁵⁹ The Mexican-American War ended on February 2, 1848 with the signing of the Treaty of Guadalupe Hidalgo. The treaty was later ratified by the United States Senate. The Library of Congress, *The Treaty of Guadalupe Hidalgo*, <http://www.loc.gov/rr/hispanic/ghtreaty> (last updated Feb. 14, 2011).

California then became an official territory of the United States with a population estimated between 7300 and 14,000.⁶⁰ The Treaty of Guadalupe Hidalgo, under which Mexico ceded California to the United States, guaranteed the protection of property interests vested previously under Mexican law.⁶¹

During this period, California's only source of governmental authority was the American military, which proved wholly inadequate after gold was discovered at Sutter's Mill on the American River in 1848.⁶² Because of the gold rush, California's population jumped to more than 90,000 people by the end of 1850, and then leaped to more than 300,000 by 1854 as people from around the world rushed to California.⁶³ This dramatic influx of settlers, coupled with the extreme wealth to be made, resulted in violence and ethnic conflicts—as well as hosts of disputes regarding mineral interest claims and property interests.⁶⁴ As a result, Congress was urged to establish a civilian government.⁶⁵ Californians held a constitutional convention in Monterey in 1849 to draft a constitution establishing the state's government.⁶⁶ Shortly thereafter, Congress agreed to admit California as the thirty-first state on September 9, 1850.⁶⁷ Shortly thereafter, the property interest guarantees provided by the Treaty of Guadalupe Hidalgo were finally implemented by the California Land Act of 1851, which provided a commission to resolve private land claims regarding titles “derived from the Spanish or Mexican government”⁶⁸ using,

⁶⁰ See *California Becomes the 31st State in Record Time*, HISTORY.COM, <http://www.history.com/this-day-in-history/california-becomes-the-31st-state-in-record-time> (last visited Oct. 9, 2011); Andrea Franzius, *California Gold—Migrating to California: Overland, Around the Horn, and via Panama* (Nov. 1997), <http://www.duke.edu/~agf2/history391/migration.html>.

⁶¹ Treaty of Peace, Friendship, Limits, and Settlement, U.S.-Mex., art. VIII, Feb. 2, 1848, 9 Stat. 22.

⁶² Steve Wiegand, *A Zigzag Path Led to Statehood*, SACRAMENTO BEE (Jan. 18, 1998), http://www.calgoldrush.com/lb_sets/04statehood.html; JANELLE WISE & LARISA SOMSEL, STAY EAST YOUNG MAN: CALIFORNIA GOLD RUSH LETTER SHEETS, CALIFORNIA HISTORICAL SOCIETY 6 (1999), available at http://www.californiahistoricalsociety.org/programs/pdf/stay_east.pdf (describing the Gold Rush, which began on January 24, 1848).

⁶³ WISE & SOMSEL, *supra* note 62, at 7.

⁶⁴ See California History Online, Diversity and Conflict (last visited Oct. 9, 2011), <http://www.californiahistoricalsociety.org/timeline/chapter6/c001.html> (detailing the ethnic conflicts that existed during the gold rush). To deal with this lawlessness, citizens sometimes banded together forming vigilance committees to impose justice as they saw fit. See WISE & SOMSEL, *supra* note 62, at 11–12 (describing the activities of California's Committees of Vigilance).

⁶⁵ WANDERINGLIZARD.COM, <http://www.inn-california.com/articles/history/californiastatehood.html> (last visited Oct. 9, 2011) (discussing the establishment of a civilian government).

⁶⁶ *Id.*

⁶⁷ *Id.*; see also California History Online, *supra* note 64.

⁶⁸ Act of March 3, 1851, ch. 41, § 8, 9 Stat. 631, 632 (1851).

among other authorities, “the laws, usages, and customs of the government from which the claim is derived.”⁶⁹

ii. Creating a Legal System

One of the first issues Californians faced was deciding upon a foundation for their legal system. With its historical ties to Mexico, the Civil Code system was familiar to many citizens—but others, especially newly arrived citizens who emigrated to the United States, were acclimated to English common law systems.⁷⁰ Since there were—and still are—important differences between the civil law and common law systems, uniformity was essential to ensure personal, property and financial stability.⁷¹ The civil law relies on codes to establish controlling principles, while the common law derives its precepts from decisions by judges.⁷² Another fundamental divide concerns the rights to confront witnesses and jury trials, which are guaranteed in most common law nations.⁷³ By contrast, juries are generally not used in civil law and evidence is regularly presented to the court in written statements.⁷⁴

After some debate, Californians decided to adopt the English common law,⁷⁵ partially because they believed there was insufficient time to create and enact a codified system of laws.⁷⁶ Despite this concern, however, California’s first Legislature actually codified substantial portions of the common law,

⁶⁹ *Id.* at 633; see also Peter L. Reich, *Western Courts and the Privatization of Hispanic Mineral Rights Since 1850: An Alchemy of Title*, 23 COLUM. J. ENVTL. L. 57, 65 (1998).

⁷⁰ See René D. Zentner, Comment, *Positive and Natural Law in California, 1846–1849*, 45 CALIF. L. REV. 59, 61–62 (1957).

⁷¹ *The Common Law and Civil Law Traditions*, THE ROBBINS COLLECTION, <http://law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf> (last visited Oct. 19, 2011).

⁷² Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 10 MICH. ST. U. DET. C.L.J. INT’L L. 205, 212, 222 (2001); MALCOLM EBRIGHT, *LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO* 69 (1994) (comparing and contrasting civil and common law systems).

⁷³ EBRIGHT, *supra* note 72, at 69.

⁷⁴ *Id.*

⁷⁵ The Mexican system of justice in place in California was superseded by the adoption of the common law on April 13, 1850. *People ex rel. Vantine v. Senter*, 28 Cal. 502, 505 (1865).

⁷⁶ “The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.” CAL. CIV. CODE § 22.2 (Deering 2008) (the predecessor of this section, section 4468 of the California Political Code, was adopted in 1850); see also *Stiles v. Laird*, 5 Cal. 120, 122 (1855) (noting that the “rules of the common law were so far adopted in this State as to supply any defect which might exist in the statute laws by furnishing additional remedies for the correction of wrongs”); Ralph N. Kleps, *The Revision and Codification of California Statutes 1849–1953*, 42 CALIF. L. REV. 766, 766 (1954).

creating a framework that, to a greater or lesser extent, appeared to constrain judicial creativity with legislative definitions and guidance. Laws were enacted regarding crimes,⁷⁷ criminal procedure,⁷⁸ civil procedure,⁷⁹ probate procedure,⁸⁰ and corporations,⁸¹ “with the result that substantial portions of the law were in effect codified for the time being.”⁸² The complex codes provided detailed standards that were intricately divided into parts, titles, and chapters, and consisted of hundreds of sections.⁸³ As a result, California’s new “common law” courts were not entirely “free” to derive and circumscribe new “common law” rights and remedies in all areas of the law; instead, they could only do so when the codes were silent.⁸⁴ Although California courts have departed from this rule in certain contexts over the years,⁸⁵ this deferential tradition has persisted in California’s jurisprudential history regarding public nuisance.⁸⁶

Although the first Legislature’s reasoning is not documented thoroughly,⁸⁷ it is tempting to speculate that the codifications reflected a reluctance to entirely abandon the certainty of firm legal rules—which characterized the Mexican Civil Code—to the discretion of common law courts informed by the principles of *stare decisis*.⁸⁸ Perhaps because of that reluctance, they rushed

⁷⁷ 1850 Cal. Stat. 229.

⁷⁸ *Id.* at 275.

⁷⁹ *Id.* at 428. The 1850 procedural statutes “were based almost entirely on the 1848–1849 FIELD CODES OF CIVIL PROCEDURE AND CRIMINAL PROCEDURE,” American products prepared in New York. See Kleps, *supra* note 76, at 766 n.4; see also Rosamond Parma, *The History and the Adoption of the Codes of California*, 22 LAW. LIBR. J. 8, 12 (1929).

⁸⁰ 1850 Cal. Stat. 377.

⁸¹ *Id.* at 332.

⁸² Kleps, *supra* note 76, at 766.

⁸³ *Id.* at 766 n.4.

⁸⁴ *Sesler v. Montgomery*, 21 P. 185, 185 (Cal. 1889).

⁸⁵ See generally Izhak England, *Li v. Yellow Cab Co.—A Belated and Inglorious Centennial of the California Civil Code*, 65 CALIF. L. REV. 4 (1977) (analyzing historical basis for common law creativity in comparative negligence cases).

⁸⁶ See *infra* Part II(A).

⁸⁷ See generally Kleps, *supra* note 76, at 766–67. The primary document substantiating the decision is a report by the California Senate Committee on the Judiciary. See CALIFORNIA SENATE COMMITTEE ON THE JUDICIARY, REPORT ON CIVIL AND COMMON LAW, 1 Cal. 588, 588–604 (1850). Although Kleps interpreted the report as a “stirring defense of the common law system,” Kleps, *supra* note 76, at 766, another authority viewed the report as a “vehement dismissal” of the civil law that evinced an intent to create a “cultural barrier.” Susan Scafidi, *Native American and Civic Identity in Alta California*, 75 N.D. L. REV. 423, 439 (1999).

⁸⁸ In view of the need for firm and settled legal principles in the difficult days of early statehood, it is not unreasonable to speculate that even those who advocated “common law” systems preferred codification. In that sense, they became *de facto* advocates of statutory primacy—and adopted a “civil law” perspective for the “common law” principles they valued. Indeed, if, as Professor Scafidi opines, the Senate majority’s intent was to create “cultural barriers” by rejecting the civil law system, the codification of common law rules might be construed as an attempt to ensure the continued

to replace the abandoned Civil Code with statutes enshrining many common law principles they valued from the United States and its territories. Unlike common law nations,⁸⁹ civil law systems⁹⁰ generally eschew judicial discretion. Common law legal principles reflect a “preference for pluralism” and the “prominence of ‘reasonableness’”—qualities that are largely foreign to civil law jurisprudence.⁹¹ Unlike the civil law, the common law does not always insist on the “right answer”; instead, only a reasonable approach is required, defined as an approach that accepts that a problem may have “many reasonable answers” depending on a controversy’s facts.⁹² Civil law systems, on the other hand, primarily depend upon specific statutes, regulations and rules—principles adopted in the parliamentary process and enforced by a relatively inflexible judiciary.⁹³ Whatever their reasoning, the first Legislature decided to give the “common law” a framework that, to a greater or lesser extent, appeared to *guarantee* the applicability of certain legal rules, rather than depending on the courts to recognize them on a case-by-case basis.

Although the Mexican Civil Code did not officially survive in California, the primacy of codified laws regarding certain issues nevertheless persisted after its demise, and led to the creation of a “hybrid” system that was neither fully codified nor completely “common law.”⁹⁴ Despite the decision to adopt a common law

prominence of the majority’s traditions. Scafidi, *supra* note 87, at 439.

⁸⁹ Common law systems exist today in Australia, Canada, Great Britain, Ireland, New Zealand, and the United States, and have “substantial influence on the law of many nations in Asia and Africa.” JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITIONS: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 4 (1969). The traditional date marking the beginning of the common law is 1066 A.D., the year of the Norman Conquest. *Id.*

⁹⁰ The civil law tradition is the dominant legal structure in most of Western Europe, all of Central and South America, substantial portions of Asia and Africa, and “a few enclaves in the common law world (Louisiana, Quebec, and Puerto Rico).” *Id.* at 3. It dates back to at least 450 B.C., the approximate date when the XII Tables of Roman Law were published. *Id.* at 2–3.

⁹¹ George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 699 (1998).

⁹² *Id.*; see also George C. Christie, *Some Key Jurisprudential Issues of the Twenty-First Century*, 8 TUL. J. INT’L & COMP. L. 217, 230 (2000).

⁹³ MERRYMAN, *supra* note 89, at 23–24 (noting that, consistent with Roman and French legal traditions, written constitutions, specific statutes and decrees, criminal, civil and commercial codes, as well as international treaties, generally constitute the *exclusive* sources of law in civil law nations, as opposed to judicial precedents).

⁹⁴ Scafidi, *supra* note 87, at 440; see also Gordon Morris Bakken, *Mexican and American Land Policy: A Conflict of Cultures*, 75 S. CAL. Q. 237, 237 (1993); Iris H.W. Engstrand, *The Legal Heritage of Spanish California*, 75 S. CAL. Q. 205, 231 (1993); Iris H.W. Engstrand, *California Ranchos: Their Hispanic Heritage*, 67 S. CAL. Q. 281, 281–90 (1985); Myra Ellen Jenkins, *Spanish Land Grants in the Tewa Area*, 47 N.M. HIST. REV. 113 (1972).

system, the banishment of the Mexican legal system was “neither absolute nor immediate,”⁹⁵ and “fragments of civil law penetrated the 1850 common-law barrier, at least in the area of property law.”⁹⁶ For example, although the Mexican-American War threw the Mexican “Alcalde system” of local administration into disarray, the system was restored by the American military government.⁹⁷ Wherever a population of Americans assembled, an American Alcalde was formed.⁹⁸ Significantly, the California Supreme Court recognized these Alcaldes and melded them into the state’s legal system using common law techniques.⁹⁹ The court also applied civil law principles to resolve disputes.¹⁰⁰ Hence, aspects of the civil law persisted “by preference and legal necessity for some time after California” adopted a common law system.¹⁰¹

iii. The Interpretation of California’s Codes

The first Legislature’s initial codification was quickly deemed imperfect. Less than two years after the first session, state officials began calling for “an entire revision” of the code,¹⁰² and the debate raged almost continuously throughout California’s first twenty years of statehood.¹⁰³ During those

⁹⁵ See Scafidi, *supra* note 87, at 439.

⁹⁶ *Id.* at 428.

⁹⁷ *Id.* at 440.

⁹⁸ “On every bar, and in every gulch and ravine, where an American crowd was collected, there an American Alcalde was elected.” Scafidi, *supra* note 87, at 440. The American Alcaldes imitated their Hispanic predecessors by resolving disputes informally and assigning land grants. *Id.* The system was described as “inartificial and rude” but “wonderfully efficient.” *Id.*

⁹⁹ See, e.g., Reynolds v. West, 1 Cal. 322, 328 (1850) (affirming land grant as part of Alcalde functions); Mena v. LeRoy, 1 Cal. 216, 220 (1850) (recognizing judicial powers of Alcaldes).

¹⁰⁰ See Sunol v. Hepburn, 1 Cal. 254, 255–56 (1850) (applying both Mexican and common law to resolve property disputes).

¹⁰¹ Scafidi, *supra* note 87, at 440. Civil law principles, therefore, continued to permeate California law, even though community property rights, as a component of marital relationships, were the only element of the civil law expressly preserved by California legislators. See generally Dana V. Kaplan, *Women of the West: The Evolution of Marital Property Laws in the Southwestern United States and Their Effect on Mexican-American Women*, 26 WOMEN’S RTS. L. REP. 139, 153–54 (2005) (discussing importance of retaining civil law community property rules to ensure stability of property rights and avoiding political problems associated with depriving women of property vested under Mexican law).

¹⁰² Kleps, *supra* note 76, at 767.

¹⁰³ In 1863, Governor Leeland Stanford delivered a particularly colorful plea for reform, remarking that:

[c]itizens not versed by constant familiarity with their contents, and desirous of investigating the laws, stand aghast as they survey the fourteen ponderous tomes that constitute the statutes of this youthful state, and young aspirants to professional fame tremble as they cross the threshold that leads into this intricate abyss.

years, all attempts to revise the early codes were unsuccessful, but eventually an agency was created in 1870 to revise and codify all of California's laws.¹⁰⁴ Ultimately, a comprehensive code was enacted in 1872, and it was hailed as "an example which will be speedily followed by all her sister states, adding new laurels to the fame which she has already so justly acquired."¹⁰⁵ Thus began California's extended affair with comprehensive codification—an affair whose long and tortured history has already been chronicled by others in masterful detail.¹⁰⁶

It is important to note that the tension between California's codifications and traditional "common law" ideas has produced a unique jurisprudence—one which, in the context of public nuisance, creatively accommodates both statutory primacy and the common law. The intersection between statutory and common law, which has been decisive in resolving attempts to transmute public nuisance principles in other states,¹⁰⁷ is even more critical in California. Previously, we have written about the great legal "tapestry" that exists in America, woven with strands of legislative enactments, administrative regulations, and the common law.¹⁰⁸ All modern courts construing this network of principles are necessarily influenced by their interrelationships,¹⁰⁹ but no American courts have a longer history of working within the tapestry than those of California. California was the very *first* state in America to codify its laws comprehensively.¹¹⁰ In California, unlike many other common law jurisdictions, codes have *always* been an essential part of the legal system. As a result, the interaction between California's codes and common law principles has more than historical interest.¹¹¹ Indeed, the dynamic interplay between codified and common law is so compelling that "[i]t is difficult, if not impossible, to find another topic in American legal history with

Kleps, *supra* note 76, at 769; *see also* Parma, *supra* note 79, at 13.

¹⁰⁴ *See* Kleps, *supra* note 76, at 768–72.

¹⁰⁵ 3 APPENDIX TO JOURNALS OF SENATE AND ASSEMBLY OF THE NINETEEN SESSION OF THE LEGISLATURE OF THE STATE OF CALIFORNIA 8 (Sacramento, T.A. Springer 1872).

¹⁰⁶ *See generally* Aniceto Masferrer, *The Passionate Discussion Among Common Lawyers About Postbellum American Codification: An Approach to Its Legal Argumentation*, 40 ARIZ. ST. L.J. 173, 245–56 (2008); Kleps, *supra* note 76, at 766; Parma, *supra* note 79, at 12.

¹⁰⁷ *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 445–47, 455–56 (R.I. 2008).

¹⁰⁸ Faulk & Gray, *supra* note 1, at 952, 1014.

¹⁰⁹ *Id.* at 1010–13.

¹¹⁰ Masferrer, *supra* note 106, at 246.

¹¹¹ *See* Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 502–06, 511–13 (2000).

so many and different implications and consequences for the development of American law and jurisprudence.”¹¹²

Although California plainly intended that its early codifications should control over common law principles to the extent of a conflict, the codes were plagued by uncertainties, vagueness, and incompleteness.¹¹³ They were severely criticized for those conditions, but the Legislature generally failed to revise and correct them promptly and adequately.¹¹⁴ For this reason, promoters of the codes advocated a compromise between statutory primacy and the common law. The compromise suggested that courts could, for the time being, cure the codes’ deficiencies by construing them, when possible, consistently with common law principles. As John Norton Pomeroy, one of the compromise’s architects,¹¹⁵ stated:

We thus reach the conclusion that the element of certainty should not be attained in a code by a sacrifice of all these other peculiar features which belong to the common law; but on the contrary, these distinguishing excellencies of the common law should be preserved and maintained in connection with the “certainty” which, it is claimed, accompanies statutory legislation.¹¹⁶

Pomeroy, a professor at the University of California Hastings College of the Law, was one of the greatest advocates of codification,¹¹⁷ and he clearly believed that the common law and the codes were compatible.¹¹⁸ He was concerned, however, that the authors of California’s Civil Code had not sufficiently defined and retained many material aspects of the common law.¹¹⁹ To

¹¹² Masferrer, *supra* note 106, at 173. Although other states may not share California’s lengthy history of codifications, most jurisdictions have woven their own complex “tapestries” as legislative, executive and judicial branches have become more interactive over the past century. For that reason, the California model may provide insights into how the judiciary can maintain the traditional “separation of powers” while accommodating the necessary influences of statutory and regulatory law.

¹¹³ *See id.* at 247.

¹¹⁴ *See id.*

¹¹⁵ *Id.* at 248–49.

¹¹⁶ JOHN NORTON POMEROY, LL.D., *THE “CIVIL CODE” IN CALIFORNIA* 54 (New York, Bar Association Building 1885).

¹¹⁷ *See* David Dudley Field, *Codification—Mr. Field’s Answer to Mr. Carter*, 24 AM. L. REV. 255, 265 (1890) (stating that Pomeroy was one of the “most pronounced advocates of the codification of private law, and continued to be so to the end of [his life]”).

¹¹⁸ POMEROY, *supra* note 116, at 52–59 (“All the really able jurists of the highest authority in England and in this country, who have advocated the system of codification, have expressly recognized and fully admitted this peculiar excellence of our common law. They have insisted that the same excellence *can* be preserved in a code; and that a national code, in order to accomplish its beneficial design, should be drawn up by its authors, and interpreted by the courts, so as to preserve this distinctive feature of the common law, *in connection with the element of certainty belonging especially to codification.*”) (second emphasis added); *see also* Masferrer, *supra* note 106, at 249 n.439.

¹¹⁹ POMEROY, *supra* note 116, at 58–59 (“[The Code] does not purport to embody the

cure this problem, he proposed that the courts interpret the codes consistently with the common law, “regarding the code[s] as being declaratory of the common law’s definitions, doctrines and rules.”¹²⁰

Pomeroy’s compromise therefore incorporated *both* statutory primacy and common law principles as a means to interpret and, if necessary, develop and clarify the Code’s provisions. Clearly, in the Code’s incomplete and ambiguous state, courts could not regard the text alone as the only authority.¹²¹ He therefore derived a “fundamental proposition” that provided:

Except in comparatively few instances where the language is so clear and unequivocal as to leave no doubt of an intention to depart from, alter, or abrogate the common law rule concerning the subject-matter, the courts should avowedly adopt and follow without deviation the uniform principle of interpreting all the definitions, statements of doctrines, and rules contained in the code in complete conformity with the common law definitions, doctrines, and rules, and as to all the subordinate effects resulting from such interpretation.¹²²

In this manner, the power of the Code as a statute guaranteeing “certainty” was maintained—together with the flexibility of common law courts to construe “new, hitherto unused, and ambiguous phraseology” as not intended to change existing rules “unless the intent to work such a change was clear and unmistakable.”¹²³ Since the new California Code contained many departures from the common law,¹²⁴ Pomeroy’s thesis

entire jurisprudence of the State; it contains only portions of that jurisprudence, and even those portions are given in a fragmentary manner.”). This was a “clear defect” of the Code, which required “constant support from the courts.” Masferrer, *supra* note 106, at 250 n.444.

¹²⁰ Masferrer, *supra* note 106, at 250.

¹²¹ *Id.* at 252.

¹²² POMEROY, *supra* note 116, at 51. This idea was not especially novel or revolutionary. David Dudley Field proposed a comparable interpretative approach for his New York codification in 1865. See DAVID DUDLEY FIELD, *THE CIVIL CODE OF THE STATE OF NEW YORK* xix (Albany, Weed, Parsons & Co. 1865) (“[I]f there be an existing rule of law omitted from this Code, and not inconsistent with it, that rule will continue to exist in the same form in which it now exists . . . and if new cases arise, as they will, which have not been foreseen, they may be decided, if decided at all, precisely as they would now be decided, that is to say, by analogy to some rule in the Code, or to some rule omitted from the Code and therefore still existing, or by the dictates of natural justice.”). Pomeroy, like Field, clearly insisted on statutory primacy whenever the Code’s language required it, and deferred to the common law when the Code’s language necessitated it.

¹²³ POMEROY, *supra* note 116, at 50; see also Masferrer, *supra* note 106, at 252–53.

¹²⁴ Indeed, the Code’s many alterations of common law rules made it a “radical” instrument to some observers. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 118 (1992); see also Lewis Grossman, *Codification and the California Mentality*, 45 *HASTINGS L.J.* 617, 620 n.15 (1994) (“It is important to note that there were more than a few departures from the common law in the California Civil Code, reflecting substantive innovations contained in the Field Code (which served as the Californians’ model) and in previous California statutes and case law.”).

elegantly empowered the Code's new ideas, guaranteed the stability of surviving common law principles, and provided guidance to courts entrusted with interpreting and applying its rules.¹²⁵ His reasoning proved so persuasive that California courts explicitly adopted it in 1888.¹²⁶ As a result, the compromise between statutory primacy and common law was formally enshrined in California's jurisprudence, where it remains today as a declaration of democratic priorities and a guide for judicial discretion.

Since 1901, history has demonstrated that California's codes are no less dynamic than the common law itself. As Kleps so aptly observed, "[i]f any rule is to be deduced from California's one hundred years of statutory revision, it is that change is the condition of our existence and that a continuous modification of our statutes must be expected."¹²⁷ Because of this dynamism, and because of the state's historic roots in statutory primacy, California's judiciary is continuously refreshed, informed and guided by the people's representatives regarding codified concerns—perhaps more so than the courts of any other state. Indeed, as we have seen with recent decisions, the people may even instruct them directly by propositions.¹²⁸

As a result of these situations, California courts seldom truly wear a pure "common law" hat. Instead, depending on the issue and the degree to which it has been clearly stated in the Code, courts operate as an integrated part of a collaborative system of justice—a system that is "separate" in terms of their exclusive power to decide cases and controversies within their jurisdiction, but not "distinct" because their "common law" creativity and

¹²⁵ "Pomeroy's reputation as the man who killed the California Civil Code" and as the "chief enemy of the California codification movement" is unwarranted, principally because his compromise *saved* Californians from excessively rigid and uninformed applications of an otherwise incomplete and dangerously vague codification. Grossman, *supra* note 124, at 619–20 (noting Pomeroy's reputation as the Code's "greatest nemesis," among other misleading titles).

¹²⁶ *Sharon v. Sharon*, 16 P. 345, 350, 354–55 (Cal. 1888); *see also* CAL. CIV. CODE § 5 (1876) ("The provisions of this Code, so far as they are substantially the same as existing statutes or common law, must be construed as continuations thereof, and not as new enactments.").

¹²⁷ Kleps, *supra* note 76, at 802.

¹²⁸ *See, e.g., In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008) (holding that statutes defining marriage as between a man and a woman are unconstitutional), *abrogated by* *Strauss v. Horton*, 207 P.3d 48, 59, 120, 122 (Cal. 2009) (upholding constitutionality of Proposition 8, a ballot initiative adding section 7.5 to article one of the California Constitution, providing that "[o]nly marriage between a man and a woman is valid or recognized in California"). Nonetheless, a Federal District Court in San Francisco overturned Proposition 8 holding that it violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991, 995, 1003 (N.D. Cal. 2010). This case is currently on appeal in the Ninth Circuit Court of Appeals.

flexibility is informed and influenced by legislative and regulatory provisions, and at times, directed by legislative primacy.

iv. The Intersection of Statutes and the Common Law

Although the “common law” may have originated within the judiciary, citizens have increasingly imposed legislative and regulatory policies to guide and regulate its discretion. These began as early as the Magna Carta, proceeded through the industrial revolution, and matured into today’s complex legislative and regulatory environment. In today’s legal landscape where conduct and business activities are thoroughly regulated by statutes and administrative rules, there are comparatively few areas where a “common law” court is free to act without legislative influence.¹²⁹ Over the last century, common law and codification systems began to converge. To a greater or lesser extent, codified systems departed from their rigidity and became more “fact-specific” in their approaches, and common law systems increasingly stressed the advantages and importance of “structure, coherence, and predictability” in judicial administration.¹³⁰ Today, scholars recognize that societies and economies are so “complex and interrelated” that jurists need to draw upon the universe of common law and statutory codifications to administer justice effectively.¹³¹ Accordingly, the influence of statutory primacy in California’s judicial system may be distinctive, but it would be a mistake to presume that it is a completely unique phenomenon.

In California, statutory priorities were incorporated into the very foundations of the state’s legal system, and there literally is no point in the state’s history when judicial discretion has been governed exclusively by common law traditions. When the legislative and executive branches act to codify or modify common law rules by defining expectations, the judiciary cannot

¹²⁹ See Arthur T. von Mehren, *Some Reflections on Codification and Case Law in the Twenty-First Century*, 31 U.C. DAVIS L. REV. 659, 660 (1998) (“Codification and case law embody two contrasting, yet complimentary, principles of justice. . . . In every legal system, regardless of where it falls on the spectrum between a pure system of codified law and a pure system of case law, the principles of these two approaches are in tension.”).

¹³⁰ *Id.* at 667.

¹³¹ *Id.* at 670 (“The experience of the twentieth century makes clear that, as societies and economies become increasingly complex and interrelated, legal orders need to draw on both the civil-law and the common-law traditions in thinking about law and its administration. . . . The twenty-first century will doubtless witness a continuation of this tendency.”); see also Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification*, 19 YALE J.L. & HUMAN. 149, 163 (2007) (“Modern civil law theorists . . . have assumed an increasingly flexible attitude toward traditional civil law principles.”).

ignore the impact of these statutes and regulations merely because the plaintiff's cause of action originated at "common law." More so in California than anywhere else in America, the common law does not operate in a vacuum, but rather exists within a dynamic and interactive democracy that informs, guides and, at times, constrains its creativity.

As early as 1908, Roscoe Pound was convinced that judges should take a more responsive attitude toward legislation.¹³² Pound demonstrated that antiquated ideas, such as "statutes in derogation of the common law are to be construed strictly," were inappropriate, and that courts should refer to the principles set forth by legislators when applying the common law.¹³³ As he stated:

Courts are fond of saying that they apply old principles to new situations. But at times they must apply new principles to situations both old and new. The new principles are in legislation. The old principles are in common law. The former are as much to be respected and made effective as the latter—probably more so as our legislation improves.¹³⁴

Justice Harlan Stone demonstrated the continuity of this view in 1936 when he concluded: "I can find in the history and principles of the common law no adequate reason for our failure to treat a statute much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning."¹³⁵

Since California's broad codifications in 1850, the opportunity to use statutes as a basis for "legal reasoning"—as opposed to narrow prescriptive or proscriptive devices—has proliferated as a source for adjusting, maintaining, contracting, or eliminating rights and obligations at common law. As we shall see below, public nuisance has been a fertile field for exploring these ideas.¹³⁶ Historically, legislative and regulatory enactments have been used to inform and guide the judiciary in the context of property rights, especially those involving expectations that landlords should be responsible for maintaining property in a healthy condition. For example, even

¹³² Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383–84 (1908) (noting with disdain, even at that early date, the "indifference, if not contempt, with which [legislation] is regarded by courts and lawyers.").

¹³³ *Id.* at 387.

¹³⁴ *Id.* at 406–07.

¹³⁵ Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 13–14 (1937) ("Apart from its command, the social policy and judgment, expressed in legislation by the lawmaking agency which is supreme, would seem to merit that judicial recognition which is freely accorded to the like expression in judicial precedent.").

¹³⁶ See *infra* Part II.

Justice Cardozo stressed the importance of legislative policies, such as housing codes. Although the common law imposed no duty to repair, and required tenants to pay rent even when housing was unsuitable, the widespread adoption of housing codes led courts to discard those principles. In one of the first cases to do so, then-Judge Cardozo held that the Code “changed the measure of [the landlord’s] burden,” and used the statute to guide and inform his decision regarding whether to reform a common law doctrine.¹³⁷ Other common law developments regarding the duties landlords owed to tenants adopted the same approach. For example, in allowing tenants to sue landlords for injuries caused by defective premises, Judge Bazelon recognized that legislatively established duties reflect contemporary community values and that “[t]he law of torts can only be out of joint with community standards if it ignores the existence of such duties.”¹³⁸

When an alleged public nuisance is involved, and there are legislative and regulatory policies that define and deal with the issue, those policies must be considered before determining who, if anyone, is responsible for creating and, ultimately, for abating a public nuisance on the owner’s premises.¹³⁹ Such a decision is fundamentally one of public policy, and in the judicial sphere, it can only be explained if it can be plausibly derived from policies that originate outside the courtroom. As Justice Linde explained in his critical article: “[T]he explanation must identify a public source of policy outside the court itself, if the decision is to be judicial rather than legislative. A court may determine some facts as well or better than legislators, but it cannot derive public policy from a recital of facts.”¹⁴⁰ According to Justice Linde:

¹³⁷ *Altz v. Leiberson*, 134 N.E. 703, 703–04 (N.Y. 1922).

¹³⁸ *Whetzel v. Jess Fisher Mgmt. Co.*, 282 F.2d 943, 943–46 (D.C. Cir. 1960); *see also Pines v. Persson*, 111 N.W.2d 409, 412–13 (Wis. 1961) (“[T]he legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards.”); *Boston Hous. Auth. v. Hemmingway*, 293 N.E.2d 831, 840 (Mass. 1973) (“Thus, we are confronted with a situation where the legislation’s ‘establishment of policy carries significance beyond the particular scope of each of the statutes involved.’” (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 390 (1970))).

¹³⁹ *See People ex rel. Gallo v. Acuna*, 929 P.2d 596, 614–15 (Cal. 1997) (discussing legislative efforts to address gang activity); *State v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428, 438–39 (R.I. 2008) (discussing the legislative response to childhood lead poisoning); *In re Lead Paint Litig.*, 924 A.2d 484, 491–94 (N.J. 2007) (reviewing legislative efforts to address childhood lead poisoning).

¹⁴⁰ Hans A. Linde, *Courts and Torts: “Public Policy” Without Public Politics?*, 28 VAL. U. L. REV. 821, 852 (1994).

Style shapes how a court functions as well as how it is perceived. The decisive difference, to repeat, is that legislation is legitimately political and judging is not. Unless a court can attribute public policy to a politically accountable source, it must resolve novel issues of liability within a matrix of statutes and tort principles without claiming public policy for its own decision. Only this preserves the distinction between the adjudicative and the legislative function.¹⁴¹

Consistent with this observation, “common law” courts must fully and fairly consider the complete “matrix” of the jurisdiction’s statutes, regulations and common law principles before rendering their judgments. In such a complex and interactive environment, courts cannot appropriately rest their decisions solely on “common law” grounds. Courts are not “free” to disregard legislative choices and create their own “common law” remedies merely because the Legislature does not expressly forbid public nuisance liability in a particular context. Especially in California, where judicial creativity in public nuisance cases is restrained by legislative definitions, courts are required to evaluate claims within the context of priorities previously declared by California’s elected representatives—and to consider the extent to which those policies would be impacted by its decision.¹⁴²

If such an inquiry is made under California law, the search should predictably result in judicial deference—not wholesale and unilateral “common law” reform. Such questioning will typically expose

the limits within which courts, lacking the tools of regulation and inspection, of taxation and subsidies, and of direct social services, can tackle large-scale problems of health care for injured persons, of income replacement, of safe housing and products and medical practices, of insurance, of employment, and of economic efficiency.¹⁴³

If, as Justice Holmes counsels, the development of the common law should be “molar [and] molecular,”¹⁴⁴ the wholesale

¹⁴¹ *Id.* at 855.

¹⁴² See Harvey S. Perlman, *Thoughts on the Role of Legislation in Tort Cases*, 36 WILLAMETTE L. REV. 813, 859 (2000) (“If a statute was enacted to protect a class of persons from a specified risk, courts should not assume from legislative silence that the legislature meant to reject private liability any more than courts should imply a legislative intent to create liability. Such a protective statute calls for formulation of a principled response, taking into account the respective roles and competencies of the court and the legislature.”).

¹⁴³ See Linde, *supra* note 140, at 853.

¹⁴⁴ See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (“I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.”); see also BENJAMIN N. CARDOZO, LL.D., *THE NATURE OF THE JUDICIAL PROCESS* 113 (1921) (stating that courts make law only within the “gaps” and “open spaces of the law”). Neither Holmes nor

transmutation of “public nuisance” concepts to authorize, for example, a massive judicially-created, maintained, and controlled public health and environmental bureaucracy—answerable only to a single judge—requires more rumination and digestion than the judiciary alone can prudently provide.

Moreover, when California’s historical respect for the primacy of statutory law in public nuisance cases is considered, together with the corresponding deference of the California judiciary in such disputes, such a judicially-created bureaucracy is neither supplemental nor complimentary. If created by judicial fiat, it would effectively displace and usurp the Legislature’s prerogative to define the scope and applicability of public nuisance. In such a situation, the “intersection” between statutory and common law, which has been controlled by the Legislature, would be equally patrolled by both the Legislature and the Judicial Branch—an unpredictable and perilous conflict that the founders of California’s legal system wisely intended to avoid. As we will see in detail below, to avert this collision, California courts consistently have deferred to the supremacy of the Code in deciding the nature, elements, and application of public nuisance. As discussed more fully below, the California courts should continue to do so.

II. PUBLIC NUISANCE UNDER CALIFORNIA LAW

A. The Civil Code

The beginning point for any study of public nuisance in California must be the Civil Code. Between 1850 and 1872, none of California’s statutes addressed the issue of public nuisance. After 1872, however, public nuisance became a creature of statute. Although California’s first effort in 1872 to codify the common law of nuisance lasted only two years,¹⁴⁵ the revised

Cardozo can be cited to support deliberate, large-scale reversals of doctrine in the name of public policy.

¹⁴⁵ The California Civil Code of 1872 codified and defined nuisance as follows:

A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:

1. Annoys, injures, or endangers the comfort, repose, health, or safety of others; or,
2. Offends decency; or,
3. Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, or navigable river, bay, stream, canal, or basin, or any public park, square, street, or highway; or,
4. In any way renders other persons insecure in life, or in the use of property.

CAL. CIV. CODE § 3479 (Sumner Whitney & Co. 1872) (amended 1874); *see also* Kelps, *supra* note 76, at 772–73. Through this language, the California legislature adopted,

1874 law remains essentially unchanged.¹⁴⁶ Today, California's Civil Code defines a nuisance broadly as:

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.¹⁴⁷

The Code further states that a nuisance is a *public* nuisance only if it “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.”¹⁴⁸ It then provides that every nuisance that does not qualify as a “public” nuisance is statutorily deemed to be a “private” nuisance.¹⁴⁹ Both at common law and by statute, a public nuisance is also a criminal offense.¹⁵⁰ The Code provides that “[t]he remedies against a public nuisance are: (1) [a criminal] [i]ndictment or information; (2) [a] civil action; or, (3) [a]batement.”¹⁵¹

almost verbatim, New York's Field Code. Jamee Jordan Patterson, *California Land Use Regulation Post Lucas: The History and Evolution of Nuisance and Public Property Laws Prolong Little Impact in California*, 11 UCLA J. ENVTL. L. & POL'Y 175, 188–89 (1993).

¹⁴⁶ The 1874 Code was amended in 1901, but that amendment was declared unconstitutional and void. 1901 Revisions Act, ch. 157, § 366; *see also* Lewis v. Dunne 66 P. 478, 482 (Cal. 1901). It was successfully amended in 1996 to insert the phrase “including, but not limited to, the illegal sale of controlled substances.” 1901 Revisions Act, ch. 658 (A.B. 2970), § 1 (amended 1996) (emphasis omitted).

¹⁴⁷ CAL. CIV. CODE § 3479 (Deering 2005). The 1872 Code was amended in 1874. Am. 1873–74, ch. 612, § 284.

¹⁴⁸ CIV. § 3480. This section of the 1872 code was amended in 1874 to its current language. The common law also distinguishes between private and public nuisances. The *Restatement (Second) of Torts* defines a public nuisance as “an unreasonable interference with a right common to the general public.” RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979); *see also*, Faulk & Gray, *supra* note 1, at 962. The key difference between a public and private nuisance claim is whether the “inconvenience,” “damage” or “interference” being complained about is harming the public or private individual. *Id.*

¹⁴⁹ CIV. § 3481 (“Every nuisance not included in the definition of the last section [CAL. CIV. CODE § 3480] is private.”).

¹⁵⁰ *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 607 (Cal. 1997) (noting that “a public nuisance is always a criminal offense”); *see also* CAL. PENAL CODE § 372 (Deering 2008) (stating that it is a misdemeanor to maintain a public nuisance).

¹⁵¹ CIV. § 3491. In civil jurisprudence, these have been the only remedies allowed to address a public nuisance in California since 1880. This section of the Code was enacted in 1872 and amended in 1880. *See* Code Am. 1880, ch. 11, § 1 (adding the remedy of information). An indictment is used to abate the public nuisance and to punish the offenders, while an information is used to “redress the grievance by way of injunction.” *Acuna*, 929 P.2d at 603–04 (citing 2 JOSEPH STORY, EQUITY JURISPRUDENCE § 1250 (14th ed. 1918) (1835–36)). In criminal matters, anything that “interfere[s] with the . . . enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons” may be prosecuted as a public nuisance. PENAL § 370.

As can be seen, California's general public nuisance statute retains some of the vagueness that plagued the original common law remedy. It uses terms such as "injurious to health" and "indecent or offensive to the senses" and "any considerable number of persons" when describing a public nuisance.¹⁵² This terminology is problematically imprecise—especially for jurists and fact-finders. What exactly do these terms mean? Just how "injurious," "indecent," or "offensive" does something have to be to be deemed a nuisance? Just how many people need to be affected to be deemed "considerable?" Without legislative clarification, these vague terms seem—at first blush—to be the "gaps" and "open spaces" in which Justice Cardozo noted that courts make law; thus, delegating substantial discretion to judges and juries to find and award relief against persons who create a broadly subjective array of offensive conditions.¹⁵³ In a jurisdiction with a different tradition, such a broad statute might serve as an invitation and inspiration for judicial creativity, and it might also encourage creative attorneys and governmental authorities to advocate expansive interpretations and applications.¹⁵⁴ California jurisprudence, however, took a different path.

Consistent with California's traditions, the Legislature has declared and codified many specific forms of conduct to be public nuisances *per se*,¹⁵⁵ thereby illustrating the Legislature's original intent and informing the judiciary regarding how public nuisance claims should be defined. These codified public nuisances generally fall into the following broad categories:

- violating community moral standards;¹⁵⁶

¹⁵² CIV. § 3479.

¹⁵³ See Cardozo, *supra* note 144, at 113.

¹⁵⁴ But even then, every appellate court that has addressed the issue outside of California has refused to accept arguments seeking to creatively expand public nuisance as a common law remedy outside of its traditional limits. See *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 455 (R.I. 2008) (agreeing with the New Jersey Supreme Court that if it were "to permit these complaints to proceed, [it] would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance").

¹⁵⁵ An activity is a nuisance *per se* when a competent legislative body decides to exercise its police powers by expressly declaring "a particular object or substance, activity, or circumstance, to be a nuisance." *Beck Dev. Co. v. S. Pac. Transp. Co.*, 52 Cal. Rptr. 2d 518, 549 (Cal. Ct. App. 1996).

¹⁵⁶ See, e.g., PENAL § 186.22a(a) (West 1999) (buildings or places used to further specified gang activities or criminal conduct are nuisances); PENAL § 11225(a) (operating buildings or places used for illegal gambling, lewdness, assignation, or prostitution); PENAL § 11305 (gambling ships); CAL. GOV'T CODE § 39561 (West 2008) (allowing weeds to grow upon streets, sidewalks, or private property in cities or allowing rubbish, refuse, and dirt to accumulate on parkways, sidewalks, or private property in cities); GOV'T § 61002(g) (graffiti); CAL. HEALTH & SAFETY CODE § 11570 (West 2007) (a "building or place used for

- using or maintaining buildings and/or real property in a manner that threatens the public health or safety;¹⁵⁷
- possessing or using personal property or improvements in a manner that threatens the public health or safety;¹⁵⁸
- polluting the environment;¹⁵⁹
- possessing or using dangerous goods;¹⁶⁰
- businesses unlawfully operating or violating rules and regulations;¹⁶¹ and

the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance” (*i.e.*, drugs)); CAL. VEH. CODE § 22659.5 (West 2000) (authorizing local governmental authorities to adopt pilot program-ordinances declaring vehicles used to solicit prostitution to be public nuisances).

¹⁵⁷ See, *e.g.*, PENAL § 11225(b) (operating a bathhouse (*i.e.*, a business that provides spa services, “whirlpool, communal bath, sauna, steam bath, mineral bath, mud bath, or facilities for swimming”) that allows conduct that can transmit AIDS); CAL. PUB. RES. CODE § 4171 (West 2001) (conditions that create a fire hazard in building); HEALTH & SAFETY § 2002(j) (unnatural property condition that allows mosquitoes or other vectors to develop, attract, or find harbor); HEALTH & SAFETY § 17060 (substandard labor camp housing); GOV’T § 50485.1 (declaring any structure, tree, or use of land which interferes with airspace required to land or takeoff from an airport to be a public nuisance); GOV’T § 50231 (abandoned excavations); CAL. WATER CODE § 8608 (West 1992) (violating standards established for maintaining and operating levees, channels, and other flood control works); WATER § 8598 (diverting the water from streams in a manner that increases the flow of water in the Sacramento or San Joaquin Rivers); WATER § 305 (uncapped artesian wells); CAL. FOOD & AGRIC. CODE § 5551 (West 2001) (neglected or abandoned crops that pose a menace because of pests, ability to host pests or other condition).

¹⁵⁸ See, *e.g.*, FOOD & AGRIC. § 12642 (produce with excess pesticide residue levels and its containers); CAL. STS. & HIGH. CODE § 723 (West 2005) (an encroachment (*i.e.*, building, sign, tower, pole pipe, or fence) over or under a public street or highway); HEALTH & SAFETY § 4762 (the continued use of cesspools in an area being serviced by a sewage treatment system); WATER § 13950-51 (same for Lake Tahoe Basin); PUB. RES. § 4170 (any uncontrolled outdoor fire started without proper precaution to prevent spreading).

¹⁵⁹ See, *e.g.*, WATER §§ 31143.2, 31144.2(a) (violating onsite wastewater disposal systems regulations in certain water districts); HEALTH & SAFETY § 5411 (discharging sewage or other waste in any manner which creates contamination, pollution or a nuisance); HEALTH & SAFETY § 5411 (violating on-site wastewater disposal zone regulations); HEALTH & SAFETY § 41700 (allowing detrimental air pollution of any type); HEALTH & SAFETY § 116670 (“[a]nything done, maintained, or suffered as a result of failure to comply with any primary drinking water standard.”).

¹⁶⁰ See, *e.g.*, PENAL § 12307 (the possession or use of destructive device (*i.e.*, bombs, grenades, explosive missiles, rockets and/or launchers, and weapons of a caliber greater than 0.60 caliber)).

¹⁶¹ Some examples of this category include: (1) operating certain businesses without the appropriate licenses or permits. See, *e.g.*, CAL. BUS. & PROF. CODE § 25604 (West 1997) (keeping, maintaining, operating or leasing any premises used to sell alcoholic beverages to the public); CAL. PUB. UTIL. CODE § 5133(c) (West 2010) (a household goods carrier operating a motor vehicle to move household goods and personal effects without a permit or operating license); PUB. RES. § 3967 (operating a placer mine (*i.e.*, a type of gold mine) without a permit); CAL. INS. CODE § 1845 (West 2005) (unauthorized acting as a life and disability insurance analyst); (2) packing, storing, delivering for shipment, loading, shipping, transporting or selling honey in violation of state provisions. See FOOD & AGRIC. § 29731; see also FOOD & AGRIC. § 26733 (stating that honey found to be a public nuisance may be seized, condemned and destroyed); FOOD & AGRIC. § 27601 (stating similar rules

- interfering with the use of solar collectors.¹⁶²

Generally, making such declarations requires the legislative body to “consider[] and balanc[e] . . . a variety of factors.”¹⁶³ A non-exclusive list of some of the factors to weigh in this balancing process are:

- the character of the community, neighborhood or persons being impacted;
- the nature and characteristics of the activity causing the alleged nuisance;
- the distance between the people being impacted and the alleged nuisance;
- the frequency, duration and permanence of the activity causing the alleged nuisance;
- the nature and extent of the injury;
- the ability to “eliminat[e] or reduc[e] the objectionable aspects of the [offending] activity,” short of a complete ban;
- whether a more suitable location exists to perform the activity;
- the role and “importance of the activity to . . . the community”;
- the amount of money invested in the activity; and
- the amount of time the activity has been occurring at its current location.¹⁶⁴

In addition to these specific declarations, the California Legislature granted similar authority to local governments.¹⁶⁵ However, the authority granted to local government authorities is not unlimited. If the state Legislature statutorily allows, or

for eggs deemed to be a public nuisance); FOOD & AGRIC. § 43031 (stating similar rules for fruits, nuts, and vegetables); FOOD & AGRIC. § 25556 (same for poultry meat); FOOD & AGRIC. § 52511 (same for agricultural or vegetable seeds); CAL. FISH & GAME CODE § 9007 (West 1998) (unlawful trapping of finfish and crustaceans); (3) unlawful placement or maintenance of advertising on public property. PENAL § 556.3; STS. & HIGH. § 1460(c); BUS. & PROF. § 5461 (non-conforming billboards and other advertising); (4) unlawful maintenance of a junkyard. STS. & HIGH. §§ 754, 756; and (5) wrongfully placed oil or gas wells. PUB. RES. §§ 3600, 3604, 3608.

¹⁶² PUB. RES. § 25982 (allowing no shrub or tree to grow to where it “cast[s] a shadow greater than 10 percent of the [solar] collector absorption area . . . at any one time between the hours of 10 a.m. and 2 p.m.”).

¹⁶³ *Beck Dev. Co., Inc. v. S. Pac. Transp. Co.*, 52 Cal. Rptr. 2d 518, 549 (Cal. Ct. App. 1996).

¹⁶⁴ Michael M. Berger, *Nobody Loves an Airport*, 43 S. CAL. L. REV. 631, 638 (1970) (citing ROSS D. NETHERTON, CONTROL OF HIGHWAY ACCESS 142 (1963)).

¹⁶⁵ See, e.g., CAL. GOV'T CODE § 25120 (West 2003) (giving counties the right to adopt ordinances); GOV'T § 61060 (giving the same right to community service districts); GOV'T § 38771 (giving city legislative bodies the right to declare nuisances); see also *Ex parte Mathews*, 214 P. 981, 982 (Cal. 1923).

requires, an act, condition, or circumstance to exist or occur, then local authorities cannot declare it to be a public nuisance.¹⁶⁶

B. The Application of Statutory Primacy in Public Nuisance Cases

Although the law of public nuisance is ancient, its use by governmental authorities to enforce public policy is a relatively recent development.¹⁶⁷ As society developed, courts increasingly found complexities of the industrial revolution to be “public nuisances” that should be abated with injunctive relief. Not surprisingly, courts held that “public and social interests, as well as the rights of property, are entitled to the protection of equity.”¹⁶⁸ What followed was a “continuous expansion” of the “public nuisance” definition in the United States—to include activities that were not necessarily criminal, and which did not necessarily implicate property rights or enjoyment.¹⁶⁹

But this “solution” had its own problems. As public nuisance definitions expanded and as injunctions proliferated in the early 1900s, authorities warned about problems caused by using public nuisance to remedy broad societal problems such as overreaching monopolies, restraint of trade activities, prevention of criminal acts, and labor controversies such as strikes.¹⁷⁰ They argued that the main reasons used to justify allowing governmental authorities to use public nuisance to enforce public policy—its remarkable effectiveness and “that [otherwise] there [is] no adequate remedy provided at law”—are inadequate and its continued expansion would eventually result in abuses that would weaken the judicial system.¹⁷¹

¹⁶⁶ See CAL. CIV. CODE § 3482 (West 1997) (“Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.”).

¹⁶⁷ See *People v. Lim*, 118 P.2d 472, 475 (Cal. 1941) (citing Edwin S. Mack, *The Revival of Criminal Equity*, 16 HARV. L. REV. 389, 392 (1903)); see also Henry Schofield, *Equity Jurisdiction to Abate and Enjoin Illegal Saloons as Public Nuisances*, 8 ILL. L. REV. 19, 20 (1913).

¹⁶⁸ *Lim*, 118 P.2d at 475 (citations omitted).

¹⁶⁹ *Id.* (citations omitted).

¹⁷⁰ See, e.g., Edwin S. Mack, *The Revival of Criminal Equity*, 16 HARV. L. REV. 389, 392–93 (1903). Mr. Mack observed that courts of equity during that time period failed to observe their traditional jurisdictional limits because of the ever-expanding boundaries of public nuisance law. *Id.* at 397 (noting that the Supreme Court of Georgia enjoined stealing oysters from public beds and the Supreme Court of Texas “sanctioned an injunction to prevent the alienation of a wife’s affections”).

¹⁷¹ *Id.* at 400–03. These same arguments are again resurfacing as governmental authorities employ public nuisance litigation to address complex problems such as urban violence and public health issues. See *supra* notes 10–12; see also Faulk & Gray, *supra* note 1, at 974.

Not long after this warning was issued, the use of public nuisance as a regulatory tool to redress widespread social issues waned, and Congress and state Legislatures intervened to create the beginnings of a regulated society. They enacted a vast tapestry of statutes, often implemented by regulations issued by the Executive Branch, to define minimum societal norms, and they created remedies for violations of these standards. These statutes and regulations included declarations that specific violations of these standards and norms are deemed public nuisances to be enjoined by courts.¹⁷² As a result of these enactments, the “discretion” of equity courts was both informed and curtailed. Judges were required to consider the range of permissible activities and those deemed unreasonable when determining the existence of the nuisance and when designing a remedy. These laws meant that courts were no longer free to ignore applicable legislative enactments or empowered to create their own “flexible judicial remedies.”

Although California’s traditional reliance on statutory primacy provided a bulwark against unrestricted expansion of public nuisance, it was not immune from such pressures.¹⁷³ Eventually, the California Supreme Court addressed the issue of whether public nuisance could be expanded beyond statutory definitions by the “common law” process. Noting the amorphous, vague, and uncertain nature of the term “nuisance,” the court concluded in *People v. Lim* that “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” because what society deems to be a nuisance may change over time.¹⁷⁴ This is particularly true where the activity can be remedied by applying criminal law, unless the Legislature specifically provides for an equitable remedy.¹⁷⁵

¹⁷² See, e.g., *supra* Part II(A) (listing examples of statutory public nuisances).

¹⁷³ See, e.g., *Lim*, 118 P.2d at 475.

¹⁷⁴ *Id.* at 476 (noting that “[a]ctivity which in one period constitutes a public nuisance, such as the sale of liquor or the holding of prize fights, might not be objectionable in another”); see also *Schur v. City of Santa Monica*, 300 P.2d 831, 835 (Cal. 1956) (“[U]nless the conduct complained of constitutes a nuisance as declared by the Legislature, equity will not enjoin it even if it constitutes a crime.”). In *Lim*, a prosecutor asked the court to enjoin the defendant’s gambling operations. The prosecutor did not allege that gambling fell within the general nuisance statute set forth in section 3479 of the California Civil Code, but instead claimed that the court was empowered to look outside of California’s nuisance statutes to the common law for its jurisdiction, where gambling was historically considered a public nuisance because it encouraged idle and dissolute habits. *Lim*, 118 P.2d at 473–74.

¹⁷⁵ *Id.* at 474. The court stated that it is not impermissible to enjoin criminal activity when a clear case is present. But it was concerned about bypassing a criminal trial, thereby depriving the defendant of the protection of the higher standard of proof and leaving open the possibility that the defendant remain criminally liable for the same

The ideas and principles espoused in *Lim* are not antiquated or outdated. Indeed, they were affirmed by the California Supreme Court in the last major public nuisance opinion it issued in 1997,¹⁷⁶ where the court once again expressly recognized the statutory “supremacy” that has permeated California jurisprudence since it was admitted to the Union in 1850.¹⁷⁷ Under these authorities, once the Legislature decides the condition or activity is a nuisance, a court cannot usurp the legislative power by determining that a violation is insignificant.¹⁷⁸ Instead, courts are bound to only determine “whether a statutory violation in fact exists, and whether the statute is constitutionally valid.”¹⁷⁹ Courts are not to expand the scope of the tort beyond the limits prescribed by the statute, and are not to decide for itself that a condition outside the statute’s intent constitutes a public nuisance.¹⁸⁰

As a result of these decisions, public nuisance occupies a unique place in California tort jurisprudence insofar as statutory primacy is concerned. For other codified tort concepts, such as negligence, courts have adopted a more “elastic” attitude.¹⁸¹ As Professor Van Alstyne observed:

[The Codes] incompleteness, both in scope and detail, have provided ample room for judicial development of important new systems of rules, frequently built upon Code foundations. In the field of torts, in particular, which the Civil Code touches upon only briefly and sporadically, the courts have been free from Code restraint in evolving the details of such currently vital rules as those pertaining to last clear chance, the right of privacy, *res ipsa loquitur*, unfair competition, and the “impact rule” in personal injury cases.¹⁸²

As a result, regarding most torts other than public nuisance, the Code was interpreted to not only permit, but also *encourage* appropriate common law development:

activity. *Id.* at 476.

¹⁷⁶ *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 606 (Cal. 1997) (stating that “[t]his lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a ‘public nuisance’”).

¹⁷⁷ *See Acuna*, 929 P.2d at 606 (discussing the role of the Legislature to “declare a given act or condition a public nuisance” and the Judiciary’s need to defer to the Legislature’s supremacy to declare the law).

¹⁷⁸ *City of Bakersfield v. Miller*, 410 P.2d 393, 398 (Cal. 1966).

¹⁷⁹ *Id.*

¹⁸⁰ *Lim*, 118 P.2d at 476 (citation omitted).

¹⁸¹ *See, e.g., Li v. Yellow Cab Co.*, 532 P.2d 1226, 1234–39 (Cal. 1975) (establishing a common law system of comparative negligence in California notwithstanding the Code’s provision of contributory negligence defense); England, *supra* note 85, at 8.

¹⁸² ARVO VAN ALSTYNE, *THE CALIFORNIA CIVIL CODE* 36–37 (West 1954).

In short, the Civil Code has not, as its critics had predicted, restricted the orderly development of the law in its most rapidly changing areas along traditional patterns. That this is true is undoubtedly due in large measure to the generality of Code treatment of its subject matter, stress being placed upon basic principles rather than a large array of narrowly drawn rules. In addition, the acceptance of Professor Pomeroy's concept of the Civil Code as a continuation of the common law created an atmosphere in which Code interpretation could more easily partake of common law elasticity.¹⁸³

Relying on this reasoning, statutory primacy generally has not been afforded significant deference in tort cases outside the public nuisance context. For example, the codification of contributory negligence as an "all or nothing" affirmative defense did not prevent the California Supreme Court from creating a common law system of comparative negligence—even though the Code's provisions regarding negligence actions were entirely silent on the subject.¹⁸⁴ It is, therefore, important to understand why, of all torts, the California Supreme Court has chosen to defer to the Code's "statutory supremacy" in refusing to extend the tort of public nuisance.

C. The Relevance of Concerns Regarding "Standardless" Liability

Although no California court has elaborated on the issue, it seems clear that the importance of statutory primacy in public nuisance cases arises from California's aversion to "standardless" liability.¹⁸⁵ According to the California Supreme Court the purpose of the tort of public nuisance is to protect "the public interest in tranquility, security, and protection" from individuals.¹⁸⁶ Citing Montesquieu, John Locke, and James Madison, the court recognized that, with respect to public nuisances, courts are required to balance and reconcile the competing rights of a community's desire for security and protection with individual freedoms.¹⁸⁷ Ultimately, the court said, a principal use of the law of public nuisance is to maintain public order "when the criminal law proves inadequate."¹⁸⁸ It "is

¹⁸³ *Id.* at 37.

¹⁸⁴ *See Li*, 532 P.2d at 1232–33.

¹⁸⁵ *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 606 (Cal. 1997).

¹⁸⁶ *Id.* at 602–03 (discussing the trade off between the public interest and individual liberty and noting that "[l]iberty unrestrained is an invitation to anarchy"). The court also said that states "not only [have] a right to 'maintain a decent society,'" they have an obligation to maintain one. *Id.* (citing *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964)).

¹⁸⁷ *Id.* at 603.

¹⁸⁸ *Id.* (citing CHARLES DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151 (Thomas Nugent trans., 1975) (1748); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* §§ 122, 140, 211, 227 (Peter Laslett ed., 2d ed. 1967) (1689); JAMES MADISON, *THE FEDERALIST* NO. 51,

a species of catch-all criminal offense, consisting of an interference with the rights of the community at large.”¹⁸⁹ This use is reflected in section 370 of the California Penal Code which prohibits any act that is “injurious to health . . . or is indecent, or offensive to the senses” which interferes “with the comfortable enjoyment of life or property” by “an entire . . . neighborhood or a considerable number of persons.”¹⁹⁰

Nevertheless, California’s general public nuisance statute seeks to accomplish those ends in extraordinarily vague terms—terms which, because of their fluidity, could create unpredictable liability risks if an unrestrained common law approach is applied. Those risks are exacerbated by the statute’s quasi-criminal nature, under which many traditional defenses to private tort claims do not apply. For example, the fact that others are similarly situated, performing the same or a similar activity, or even contributing to create the same nuisance, does not preclude a court from enjoining a defendant to abate the activity that is contributing to the nuisance.¹⁹¹ Likewise, an established custom or practice may, over time, become unreasonable by threatening public safety or threatening to destroy public rights, thereby creating a public nuisance that cannot be lawfully continued.¹⁹² When this occurs, the

324–25 (Clinton Rossiter ed., 1961) (1788)).

¹⁸⁹ *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 353 (Cal. 1985) (quoting WILLIAM L. PROSSER & W. PAGE KEETON, *THE LAW OF TORTS* § 86 (W. Page Keeton et al. eds., 5th ed. 1984)).

¹⁹⁰ *Acuna*, 929 P.2d at 604 (citing *People ex rel. Busch v. Projection Room Theater*, 550 P.2d 600, 608 (Cal. 1976)); *In re Englebrecht*, 79 Cal. Rptr. 2d 89, 93 (Cal. Ct. App. 1998) (noting the similarity between section 370 of the Penal Code and section 3479 of the Civil Code) (emphasis added).

¹⁹¹ *People v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1157–58 (Cal. 1884) (stating that just because the court could not say that defendant’s operations alone materially contribute to the public nuisance does not preclude the court from abating that defendant’s contribution to the public nuisance). It is not a defense to claim “that a great many others are committing similar acts of nuisance. Each and every one is liable to a separate action, and to be restrained.” *Id.* at 1158; see also Patterson, *supra* note 145, at 191 (describing the importance of *People v. Gold Run Ditch & Mining Co.*). Of course, as the lead paint controversy has revealed in other states, merely providing a legal and useful product does not justify, “create” or “cause” a public nuisance if the condition to be abated is caused by another party’s neglect. See *State v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428, 449–50 (R.I. 2008) (noting that “although defendants need not control the nuisance at all times, they must have, minimally, controlled the nuisance at the time of the damage”); *City of Bloomington, Ind. v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989) (noting the absence of cases “holding manufacturers liable for public or private nuisance claims arising from the use of their product subsequent to the point of sale”); *In re Lead Paint Litig.*, 924 A.2d 484, 499 (N.J. 2007) (holding that control at the time of the damage is a “time-honored element[] of the tort of public nuisance”); see also *State ex rel. Dresser Indus., Inc. v. Ruddy*, 592 S.W.2d 789, 792 (Mo. 1980); *Town of Hooksett Sch. Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126, 133 (D.C.N.H. 1984).

¹⁹² *Woodruff v. N. Bloomfield Gravel Mining Co.*, 18 F. 753, 777 (C.C.D. Cal. 1884) (“Mere failure to act—failure to prohibit the acts complained of—is an entirely different

traditional defenses of custom, prescription, and statute of limitations are not available.¹⁹³ In this way, the rights of the community may take priority over the rights of individuals—but they do so in ominous ways that override the significance of individual considerations traditionally litigated in private tort actions.¹⁹⁴

To avoid this jurisprudential minefield, the California Supreme Court wisely chose to defer to statutory primacy:

[S]ubject to overriding constitutional limitations, the ultimate legal authority to declare a given act or condition a public nuisance rests with the Legislature; the courts lack power to extend the definition of the wrong or to grant equitable relief against conduct not reasonably within the ambit of the statutory definition of a public nuisance. *This lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a “public nuisance.”*¹⁹⁵

Hence, in dealing with these quasi-criminal actions, judges are “not wholly free . . . to innovate at pleasure.”¹⁹⁶ Indeed, the vagueness of California’s general definition of public nuisance raises serious questions regarding whether defendants have “fair warning” regarding whether their conduct is tortious.¹⁹⁷ Additionally, the indefiniteness of the general public nuisance statute—as opposed to the many specific provisions enacted to address particular situations—creates opportunities for

thing from affirmative action authorizing them. And a failure to prohibit the nuisance and impose penalties does not prevent its being a public nuisance.”).

¹⁹³ CAL. CIV. CODE § 3490 (West 2011) (“No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right.”); *Eaton v. Klimm*, 18 P.2d 678, 680–81 (Cal. 1933) (noting that where a neighborhood has built up around a business, the business must eventually “give way to the rights of the public”); *Gold Run Ditch & Mining Co.*, 4 P. at 1158–59. Even the Legislature’s failure to adequately regulate or outlaw the custom does not preclude the court from abating the custom as a nuisance. *Id.* at 1159 (noting that “neither state nor federal legislatures could, by silent acquiescence, or by attempted legislation, . . . divest the people of the state of their [public] right[s] . . .”); see also *Ex parte Taylor*, 25 P. 258, 259 (Cal. 1890) (citing *Hoadley v. San Francisco*, 50 Cal. 265 (1875)); *North Bloomfield Gravel Mining Co.*, 18 F. at 787 (“[A]t common law, no right could be acquired by prescription to commit, or continue, a public nuisance.”); *Id.* at 798 (rejecting the defense of laches because each day the public nuisance exists “affords new grounds for equitable relief”); *Id.* at 800–02 (rejecting the defense of custom).

¹⁹⁴ See Gifford, *supra* note 15, at 788–89 (discussing the impact of vagueness as exacerbated by other tort doctrines forfeiting traditional defenses in public nuisance cases, particularly when public authorities are plaintiffs).

¹⁹⁵ *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 606 (Cal. 1997) (emphasis added).

¹⁹⁶ *Cf.* Gifford, *supra* note 15, at 786 (citing CARDOZO, *supra* note 144, at 141) (observing limitations regarding judicial abilities to “create” or “discover” law).

¹⁹⁷ *Cf. id.* (citing HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 568–69 (William N. Eskridge & Philip P. Frickley eds., 1994)) (discussing general importance of “fair warning” in jurisprudence).

inconsistent and arbitrary” interpretations—not only by courts, but increasingly by “state attorneys general who file recoupment actions against mass product manufacturers.”¹⁹⁸

In addition to these jurisprudential concerns, judges presiding over a “catch-all criminal offense,” such as public nuisance in California, may be constrained, or at least informed and influenced, by concerns that the general statute may be unconstitutionally vague. As the United States Supreme Court has held:

Vague laws offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.¹⁹⁹

Although these vagueness arguments generally apply only in criminal proceedings, their fundamental rationale is also implicated in public nuisance litigation, where generalities may obscure the borders of permissible enforcement.²⁰⁰ These concerns are especially applicable when public officials file public nuisance claims that target industries in massive recoupment actions.²⁰¹

As a quasi-criminal tort that deals with “community” interests, public nuisance entails problems that, if unrestrained, threaten the democratic process. It is one thing for citizens, through their elected legislators, to define and declare that specified conduct or conditions are public nuisances before the injurious conduct occurs. It is quite another thing, however, for a

¹⁹⁸ *Cf. id.* (remarking on difficulties regarding public nuisance litigation generally).

¹⁹⁹ *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972); *see also* *Rubin v. City of Santa Monica*, 823 F. Supp. 709, 713 (C.D. Cal. 1993) (public nuisance ordinance held unconstitutionally vague under *Grayned* standards); Gifford, *supra* note 15, at 787 (quoting and citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972)).

²⁰⁰ *See, e.g., State ex rel. Rear Door Bookstore v. 10th Dist. Ct. of App.*, 588 N.E.2d 116, 120–21 (Ohio 1992) (noting that the test for providing “sufficiently definite warning” in a public nuisance case as “measured by common understanding and practices . . . is particularly applicable in a civil case where the state is granted wider latitude than may be applicable in a criminal case”).

²⁰¹ *See* Gifford, *supra* note 15, at 787 (“When, however, a state’s attorney general, a state official, selects an industry and files a massive legal action seeking recoupment for hundreds of millions of dollars against a defendant alleging liability under a particularly vague tort, the principles behind the void for vagueness doctrine are implicated.”).

single “common law” judge to declare and impose liability for public nuisances retrospectively. When the Legislature acts, the “community” has spoken in its most authoritative manner, and its enactments necessarily provide “fair notice” to citizens that proscribed conduct will result in liability. When a court rules in a private dispute, however, even with the assistance of a jury, the scope and scale of democratic guarantees are diminished substantially.

An individual judge is not a comparable substitute for a body of elected representatives. There is no meaningful assurance that a court’s creative declaration in a controversy framed solely by litigants truly reflects the democratic will of the “community” of citizens—a guarantee that is essential for the promulgation of quasi-criminal standards, such as public nuisance. Unlike legislation, lawsuits are framed by records generated by private litigants, and those records are necessarily limited to disputes between the particular parties, not broad community concerns. The records of such proceedings are constrained by the parties’ resources—reserves typically dwarfed by the collective assets of legislative bodies—and courts lack the authority and assets to supplement that record with their own inquiries.²⁰²

Unless courts are informed by legislation that defines the proscribed conduct, there are serious questions regarding whether they can constitutionally or practically assess “community” interests sufficiently to declare the existence of an unprecedented nuisance, evaluate the causal connections necessary to hold particular parties responsible, or implement abatement orders requiring the cooperation of absent parties.²⁰³ Moreover, as we have seen, there are serious fairness and notice problems associated with imposing quasi-criminal liability for conduct that was previously lawful. As a result, there are powerful reasons for “common law” courts to be cautious about imposing liability in public nuisance cases in contexts where the Legislature has failed to provide adequate definitions of the offensive behavior, especially when liability is imposed retrospectively. These concerns fully justify the California judiciary’s profound reluctance to base public nuisance liability on “standardless” behavior, and they strongly support its corresponding deference to statutory primacy in lieu of common law creativity.

²⁰² See Faulk & Gray, *supra* note 1, at 1016 n.353.

²⁰³ In Rhode Island, for example, any abatement order dealing with lead paint removal or remediation necessarily would have required the cooperation of property owners who were not parties. Without such cooperation, which could not be constitutionally compelled, any abatement order would be ineffective. *Id.* at 990–92.

CONCLUSION

As this Article has shown, California jurisprudence has carefully policed the intersection between the common law and the legislative sphere throughout its history, particularly in the area of public nuisance. The tort of public nuisance has an extensive track record in California—and that record demonstrates an aversion to collective liability under “standardless” notions of what constitutes a public nuisance. The California Supreme Court has consistently insisted that public nuisances involve specific issues affecting specified properties, not generalized concerns affecting more nebulous interests.²⁰⁴

Consistent with this narrow focus, and in line with the State’s legal history, the California Supreme Court made a unique commitment to “statutory supremacy” in interpreting and applying public nuisance—a decision designed to *restrain* common law discretion in this vague area—not to encourage it. Accordingly, before a public nuisance may be declared judicially, the impacted properties must be clearly delineated, and the proscribed conduct must be defined primarily by legislative standards—not solely by common law creativity.

Even if these principles are not necessarily voiced in every public nuisance decision, their deferential spirit should inspire a cautious approach. Expanding public nuisance to encompass ordinary claims against product manufacturers, for example, displaces a well-defined and manageable tort—strict product liability—with a vague and “standardless” cause of action constrained only by the imagination of advocates and the ingenuity of judges. Literally any product or any course of conduct that allegedly causes some type of “public health problem” or “environmental problem” may be labeled as a “public nuisance”—irrespective of its original legality—allowing attorneys to create mass suits against entire industries.²⁰⁵

²⁰⁴ See, e.g., *People v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1155 (Cal. 1884) (declaring hydraulic mining a public nuisance, but only in the limited context of a single mining operation’s effect on a single river); *Woodruff v. N. Bloomfield Gravel Mining Co.*, 18 F. 753, 794–96 (C.C.D. Cal. 1884) (addressing other instances of hydraulic mining separately). Even when the judiciary held that gang activity created a public nuisance, the court focused on a discrete neighborhood and the activities being carried out on identifiable public streets and sidewalks. See *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 614–15 (Cal. 1997).

²⁰⁵ “Going to court has become the ‘American Way’ to affect social change.” John Alan Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 WIDENER L.J. 103, 130 (2003) (observing that “[t]he goal of social policy torts is to permit ordinary people to change corporate practices”); see also John Gray, *Cheeseburger Wars: No Diet in Courtroom Food Fights*, FT. WORTH BUS. PRESS, June 4, 2004, at 37; Jennifer L. Pomeranz et al., *Innovative Legal Approaches to Address Obesity*, 87 MILBANK Q. 185, 200 (2009) (suggesting that “[t]he sale and vigorous promotion of calorie-dense, nutrient-

Even in the “limited” context of a controversy involving a single product or condition, such as lead paint, the issues extend far beyond the courtroom to encompass many sources of harmful exposures, especially when the alleged nuisance arose many years after the product was sold.²⁰⁶ In most situations involving product manufacturers and sellers, especially those regarding nuisances allegedly arising from deterioration, it is impossible to find meaningful “affirmative acts” by sellers that truly give rise to the nuisance. Regardless of whether “statutory supremacy” is voiced by the courts, its spirit is evident in the judiciaries’ reluctance to extend liability in these situations.

Indeed, it is the very vagueness of public nuisance, and the inherent lack of standards by which offensive conduct can be measured at common law, that motivates the courts to defer to statutory guidance.²⁰⁷ Because litigation is framed by the pleadings—as opposed to the broader perspective of legislative considerations—courts must focus solely on the litigants before it, and it can consider only the record generated by those parties. When “public” concerns are at issue, courts risk imposing liabilities arbitrarily on some persons merely because they are joined as parties, while unnamed persons escape responsibility solely because the dispute is narrowly framed by the “four corners” of the complaint.²⁰⁸ Such scenarios entail the same potential abuses that often arise when the judiciary attempts to resolve broad societal issues instead of resolving discrete disputes.²⁰⁹

poor foods, especially if the promotion is geared toward a vulnerable group such as children, when combined with the emerging knowledge of the massive harms associated with obesity, can arguably be deemed a nuisance that can and should be controlled by the courts”); *Pelman v. McDonald’s Corp.* (Pelman I), 237 F. Supp. 2d 512, 519–20 (S.D.N.Y. 2003); *Pelman v. McDonald’s Corp.* (Pelman III), 396 F.3d 508, 510 (2d Cir. 2005); *Pelman v. McDonald’s Corp.* (Pelman V), 452 F. Supp. 2d 320, 326 (S.D.N.Y. 2006).

²⁰⁶ See Faulk & Gray, *supra* note 1, at 994–95. See, e.g., *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009), *appeal filed*, No. 09-17490 (9th Cir. Nov. 5, 2009) (climate change concerns based upon 150 years of greenhouse gas emissions); *Conn. v. Am. Elec. Power Co.*, 582 F.3d 309, 314 (2d Cir. 2009), *rev’d*, 131 S. Ct. 2527 (2011) (climate change concerns based on greenhouse gas emissions).

²⁰⁷ See *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 606 (Cal. 1997) (noting that courts refuse to grant public nuisance-related injunctions unless they are backed by an act of the legislature).

²⁰⁸ John S. Gray & Richard O. Faulk, “*Negligence in the Air?*” *Should “Alternative Liability” Theories Apply in Lead Paint Litigation?*, 25 PACE ENVTL. L. REV. 147, 185–88 (2008) (discussing the problem of defining the appropriate market).

²⁰⁹ *Id.* at 195–97. In his comments to section 821B, Dean Prosser, the official reporter, warned that “[i]f 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.” RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (1979) (emphasis added). Dean Prosser’s concerns were recently reinforced by one of the reporters for the Third Restatement, Professor James A. Henderson, who warned about the “lawlessness”

These realities expose:

the limits within which courts—lacking the tools of regulation and inspection, of taxation and subsidies, and of direct social services, can tackle large-scale problems of health care for injured persons, of income replacement, of safe housing and products and medical practices, of insurance, of employment, and of economic efficiency.²¹⁰

In contrast, when the Legislature addresses complex societal problems, it has the power to consider *all* the issues and the role of *all* potentially responsible parties before making public policy decisions. The Legislature can make a complete record because, unlike courts, it is not bound by the narrow record developed by the litigants. Instead, it is empowered to consider all facts and circumstances that contribute to the controversy.

In our system of government, the responsibility for addressing broad societal problems has been entrusted to the political branches of government—and the wisdom of that decision is especially evident when the resolution may have major economic consequences.²¹¹ As an institution, the Legislature “is far better equipped than the judiciary to ‘amass and evaluate the vast amounts of data’ bearing upon . . . complex and dynamic [issues].”²¹² Unlike courts, the political branches can consider all pertinent issues in their entirety through either hearings or required notice and comment procedures. As a result, political policy choices can strike fairer and more effective balances among competing interests, because they can be based on broader perspectives and ample information rather than being limited to issues raised only by litigants.²¹³ Moreover, in contrast to courts, which lose jurisdiction upon rendition of final

of expansive tort liability, including public nuisance litigation. James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 330 (2005). According to Professor Henderson, these amorphous tort theories have the potential to be lawless not simply because they are non-traditional or court-made, or because the financial stakes are high. *Id.* at 337–38. “Instead, the lawlessness of [these] aggregative torts inheres in the remarkable degree to which they combine sweeping, social-engineering perspectives with vague, open-ended legal standards for determining liability and measuring damages.” *Id.*

²¹⁰ Linde, *supra* note 140, at 852.

²¹¹ See Faulk & Gray, *supra* note 1, at 1016 n.353.

²¹² *Turner Broad. Sys., Inc. v. Fed. Comm’n Comm’n*, 512 U.S. 622, 665–66 (1994); see also *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (acknowledging legislative bodies are “in a better position than the Judiciary to gather and evaluate data”).

²¹³ See *Helvering v. Davis*, 301 U.S. 619, 642–44 (1937) (noting that instead of just improvising a judgment when confronted with a national problem, legislatures hold hearings to gather “[a] great mass of evidence” considering the problem from many perspectives and ultimately “supporting the policy which finds expression in the act”); see also Timothy D. Lytton, *Lawsuit Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1271 (2000).

judgment, political branches have continuing authority to revisit statutes and rules to modify or tailor their provisions.²¹⁴

Under California's singular principle of "statutory supremacy," public authorities must first demonstrate a legislative source for a public nuisance that adequately sets forth standards by which the claim is defined and applied. Hence, governmental entities pursuing novel claims previously unaddressed by the legislative process are obliged to use the political process to ask that the respective legislative body adopt their solution.²¹⁵ Such decisions are fundamentally ones of public policy, and in the judicial sphere, they can only be explained if they are plausibly derived from policies that originate outside the courtroom.²¹⁶ These extra-judicial sources are an essential part of California's public nuisance jurisprudence. With them, the flow of jurisprudential traffic can be controlled and the intersection between the branches of government can be traversed without incident. Without them, innovative appeals to common law discretion risk uninformed collisions between governmental branches.

²¹⁴ See *Bartnicki v. Vopper*, 532 U.S. 514, 541 (2001) (Rehnquist, C.J., dissenting).

²¹⁵ Cf. *People v. Lim*, 118 P.2d 472, 476 (Cal. 1941) ("Such declarations of policy should be left for the legislature.").

²¹⁶ Linde, *supra* note 140, at 852–54.