SLOUCHING TOWARDS SAN FRANCISCO: OPIOID ADDICTION AS PUBLIC NUISANCE

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INTRODUCTION

The opioid epidemic has afflicted Americans for twenty years, from California to the New York island. What began as an idealistic effort to alleviate chronic pain turned into a national nightmare: powerful, FDA-approved painkillers, liberally prescribed in the late 1990s and early 2000s, unleashed a Pandora's box of dependance and demand that south-of-the-border cartels have answered with heroin and fentanyl.[1] In 2021, more than 107,000 Americans died of drug overdoses, and an astounding 71,000 of these deaths involved fentanyl and other synthetic opioids.[2] The economic costs have been staggering: in 2020 alone, the opioid epidemic cost the United States an estimated $1.5 trillion.[3]

To help redress this catastrophe, every state in the Union, along with countless localities and tribes, has sued opioid manufacturers, distributors, and dispensers.[4] These public plaintiffs have pursued multiple claims, but public nuisance is "a central feature of the litigation and a key to its momentum."[5] To establish a public nuisance, plaintiffs must demonstrate an unreasonable interference with a right common to the public.[6] A typical interference in the early days of public nuisance consisted of blocking a highway or waterway,[7] but in the twentieth and twenty-first centuries, plaintiffs have argued that mass harms from products such as tobacco, lead paint, and handguns also interfere with public rights.[8] In these actions, the alleged interference with public rights enables states or localities to sue on behalf of the public.[9]

1. Mike Stobbe, *US Overdose Deaths Hit Record 107,000 Last Year, CDC Says*, ASSOCIATED PRESS (May 11, 2022, 8:32 AM), https://apnews.com/article/overdose-deaths-opioids-fentanyl-8cb302a70ddbb6a435f9e8fbb19f153b [https://perma.cc/EV8Y-U7QT].

2. *Id.*

3. JOINT ECON. COMM. DEMOCRATS, THE ECONOMIC TOLL OF THE OPIOID CRISIS REACHED NEARLY $1.5 TRILLION IN 2020 1 (2022), https://www.jec.senate.gov/public/_cache/files/67bced7f-4232-40ea-9263-f033d280c567/jec-cost-of-opioids-issue-brief.pdf [https://perma.cc/FV6W-TF3G]. The Joint Economic Committee Democrats calculated this amount using CDC estimates of costs of "health care, public safety, lost productivity, lower quality of life and lives lost due to opioids." *Id.* at 2 n.1.

4. Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702, 708 (2023).

5. *Id.* at 707.

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

7. *Id.* § 821B cmt. a.

8. *See* Kendrick, *supra* note 4, at 705–06.

9. *See id.* at 707 ("That these suits involve a variety of other claims should not lead us to assume that they would exist in the manner absent the public-nuisance template.").

But while these suits have generated billions of dollars in settlements,[10] some courts have rejected these claims on the basis that any harms caused by a legal product interfere with private rights rather than public rights.[11] These courts cite previous attempts to characterize handguns and lead paint as public nuisances to conclude that the misuse of a product rarely interferes with the public rights traditionally protected by the doctrine, such as the right to use a public highway without interference.[12] Moreover, these courts portend a flood of lawsuits concerning legal products should public nuisance provide a valid basis of recovery against product manufacturers for harms that should instead be redressed under product liability law.[13]

However, a successful public nuisance action brought by the City Attorney of San Francisco against Walgreens in federal district court counters the claim that legal products can cause only private harms. In August 2022, Judge Charles Breyer entered judgment in a bench trial against Walgreens for substantially contributing to a public nuisance in San Francisco by failing to comply with federal regulation in filling opioid prescriptions.[14] While California has a broader view of public nuisance than other states, the evidence at trial presented in compelling detail the social havoc that opioid addiction has inflicted on the city.[15]

To my knowledge, this Note is the first to examine this trial in detail, and I do so to demonstrate how opioid addiction interferes with public rights traditionally protected by common law public nuisance. Specifically, I examine how opioid addiction interferes with public space and public morals, forcing local governments to incur abatement costs and exposing residents to offensive activity in broad daylight. Because of this interference, courts should not categorically dismiss public nuisance claims against product manufacturers in the name of tradition.

This Note complements the scholarship of Professors Leslie Kendrick and David Dana, who have both argued that the opioid epidemic has interfered with public rights,[16] by examining this interference with public rights in greater detail. In making this argument, this Note urges skeptical courts to adopt a middle-road doctrinal approach between the broad,

10. *Id.* at 708.

11. *See, e.g.*, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719, 726–28 (Okla. 2021); City of Huntington v. AmerisourceBergen Drug Corp., 609 F. Supp. 3d 408, 473–76 (S.D. W. Va. 2022).

12. *See, e.g.*, *Johnson & Johnson*, 499 P.3d at 726–28.

13. *Id.*

14. *See* City & County of San Francisco v. Purdue Pharma L.P., 620 F. Supp. 3d 936, 938 (N.D. Cal. 2022).

15. *See id.* at 940–50.

16. *See* Kendrick, *supra* note 4, at 753–54; David A. Dana, *Public Nuisance Law When Politics Fails*, 83 OHIO STATE L.J. 61, 100 (2022).

inclusive understanding of public nuisance in California and the narrow, traditionalist understanding in states such as Oklahoma. This middle-road approach should be more amenable to states in the traditionalist camp because it retains public nuisance's common law contours but maintains its flexibility to protect public rights from novel interferences caused by harmful products that bypass regulatory oversight.

Part I will provide a brief history of public nuisance in England, the United States, and California. Part II will discuss the opioid epidemic and the litigation it has spawned. Part III will review the evidence submitted at the successful bench trial in California to highlight how opioid addiction has affected San Francisco. Lastly, Part IV will argue that opioid addiction interferes with public rights traditionally protected by common law public nuisance and address various counterarguments.

I. PUBLIC NUISANCE: A BRIEF HISTORY

A. COMMON LAW ORIGINS IN ENGLAND

Nuisance developed in the English common law as a non-trespassory tort against the land, or more specifically, an interference with the use or enjoyment of land, or with a right of easement or servitude over the land.[17] This remedy allowed private parties to seek relief from non-trespassory interferences with the use and enjoyment of their land and is the origin of the law of private nuisance today.[18] An interference with the property of the King also constituted a nuisance, and hence public nuisance was born.[19] The earliest cases concerned obstructing the King's road—a criminal infringement on the rights of the Crown and redressable by a suit brought by the King's justices—thereby interfering with a public right of way.[20] By the same reasoning, blocking a waterway constituted a public nuisance.[21] By the mid-1300s, public nuisance extended more broadly to other infringements on public rights, such as "interference with a market, smoke from a lime-pit, and diversion of water from a mill."[22]

While obstructing a public road or waterway remains the canonical example of public nuisance, the doctrine eventually encompassed "a large, miscellaneous and diversified group of minor criminal offenses, all of which

17. William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 997 (1966).
18. *Id.* at 997–98. Private nuisance is a separate doctrine that has not played a role in opioid litigation, so I will not discuss it further in this Note.
19. *Id.* at 998.
20. *Id.*
21. J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 CAMBRIDGE L.J. 55, 58 (1989).
22. Prosser, *supra* note 17, at 998.

involved some interference with the interests of the community at large."[23] For example, a description of "common nuisances" (later referred to as public nuisances) by William Sheppard in the 1660s included "pollution from noxious trades," "victuallers who [sell] unwholesome food," and "lewd ale-houses."[24] Similarly, William Blackstone's 1769 catalogue of common nuisances included "the keeping of hogs in any city or market town," "[c]ottages . . . erected singly on the waste, being harbours for thieves and other idle and dissolute persons," the "making and selling of fireworks," and "[a]ll disorderly inns or ale-houses, bawdy-houses, gaming-houses, stage-plays unlicensed, booths and stages for rope-dancers, mountebanks, and the like."[25]

Another significant feature of public nuisance in the English common law was the relator action. Public nuisances had traditionally been prosecuted in the courts of leet, local criminal courts that handled "public welfare offences."[26] But by the late eighteenth and early nineteenth centuries, people began seeking injunctions on behalf of the Attorney General in civil court.[27] Plaintiffs sought this civil remedy because "irreparable damage" might occur by the time lengthier criminal proceedings concluded and also because of the difficulty in prosecuting corporations responsible for pollution.[28] Accordingly, by the end of the nineteenth century, civil actions replaced criminal prosecutions in standard public nuisance cases concerning "general health hazards" and highway obstructions.[29] Separately, private citizens could also sue for damages if they received a "special injury" from a public nuisance.[30]

B. PUBLIC NUISANCE IN THE UNITED STATES

American courts inherited public nuisance from their English forebears, and the doctrine continued to evolve to address changing social conditions. The early American cases largely fell into two groups: obstruction of public

23. RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (AM. L. INST. 1979).

24. Spencer, *supra* note 21, at 60 (quoting WILLIAM SHEPPARD, THE COURT-KEEPERS GUIDE: OR, A PLAIN AND FAMILIAR TREATISE NEEDFUL AND USEFUL FOR THE HELP OF MANY THAT ARE IMPLOYED IN THE KEEPING OF LAW-DAYS, OR COURTS BARON (5th ed. 1662)).

25. 4 WILLIAM BLACKSTONE, COMMENTARIES *167–68.

26. Spencer, *supra* note 21, at 59.

27. *Id.* at 66.

28. *Id.* at 66, 70. "At the beginning of the nineteenth century a corporation was regarded as incapable of committing a criminal offence, and was therefore beyond the reach of criminal proceedings for public nuisance." *Id.* at 70.

29. *Id.* at 70.

30. *Id.* at 74. The special-injury action has elicited much controversy and scholarship. *See generally* Prosser, *supra* note 17 (discussing the history of public nuisance and the special-injury rule); F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480 (1949) (arguing that the special-injury rule blurs the distinction between negligence and public nuisance).

highways and navigable waterways, and a "loose amalgamation of minor offenses involving public morals or the public welfare," including gambling, "keeping a disorderly house or tavern," and "enabling prostitution."[31] But as the economy industrialized, courts applied public nuisance to new conditions such as air and water pollution.[32] In the late nineteenth and early twentieth centuries, state legislatures responded to this changing landscape by adopting statutes that defined public nuisance in broad language or enumerated activities constituting a public nuisance.[33] These statutes enabled public authorities to use public nuisance as a "stopgap measure" and abate unforeseen activities that "might injure or annoy the general public."[34] However, beginning in the Progressive Era, state governments adopted comprehensive statutes and regulations that diminished their reliance on public nuisance as a stopgap measure, thus resulting in fewer public nuisance actions.[35]

By the early twentieth century, individual states as *parens patriae*—"parent of the country"—sued parties in federal court to enjoin or abate public nuisances.[36] *Parens patriae* standing rests on a state's "interest in the abatement of public nuisances, instances in which the injury to the public health and comfort [is] graphic and direct."[37] *Parens patriae* standing later provided the "architecture" of the tobacco litigation in the 1990s and the opioid litigation in the twenty-first century, with "an official (such as a state's attorney general or a locality's district attorney) suing on behalf of the public."[38]

In 1979, the American Law Institute published the influential *Restatement (Second) of Torts* ("*Second Restatement*"), which included a

31. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 800–01 (2003).

32. *Id.* at 802.

33. *Id.* at 804. For an example of a broad public nuisance statute, see California's nuisance statute, *infra* Section I.C. For a hypothetical example of the statutory approach that enumerates activities constituting a public nuisance, see RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (AM. L. INST. 1979) ("[A] common type of statute declares black currant bushes or barberry bushes or other plants that harbor parasites such as rust that are destructive to grain or timber to be public nuisances. These statutes amount to a legislative declaration that the conduct proscribed is an unreasonable interference with a public right.").

34. Gifford, *supra* note 31, at 804; *see also* RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (AM. L. INST. 1979) ("With the elimination of common law crimes, general statutes have been adopted in most of the states to provide criminal penalties for public nuisances, often without defining the term at all, or with only a very broad and sometimes rather vague definition.").

35. Gifford, *supra* note 31, at 805–06.

36. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 592, 600, 604–05 (1982).

37. *Id.* at 604.

38. Kendrick, *supra* note 4, at 705–07.

comprehensive overview of public nuisance.[39] Section 821B states:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
>
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.[40]

The *Second Restatement* further defines a "public right" as a right "common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured."[41] Scholars have criticized the *Second Restatement's* definition of public nuisance as overly broad, vague, and partially responsible for the subsequent increase in public nuisance lawsuits involving novel harms, such as those caused by products.[42]

In the decades that followed the *Second Restatement* and in the backdrop of a burgeoning environmental movement,[43] some states successfully sued defendants under a public nuisance theory for creating an injurious and ongoing condition even though the defendants no longer contributed to the condition or, because they had sold the land, could no longer abate it.[44] In one prominent case, *United States v. Hooker Chemicals & Plastics Corp.*, a federal district court ruled that a chemical company's formerly owned toxic-waste dump, from which hazardous chemicals later

39. Public nuisance was not discussed in the *Restatement (First) of Torts* in 1939. *See* Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 20 (2011).

40. RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979). Eminent torts scholar William Prosser had served as reporter for the *Second Restatement* but resigned after his first draft of section 821B was sent back to him for revision by members who disagreed with his view that a public nuisance must always be criminal. *See* Kendrick, *supra* note 4, at 722. These dissenting members believed such a narrow definition would inhibit the doctrine's use against novel environmental harms. *See id.*

41. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. L. INST. 1979).

42. *See e.g.*, Gifford, *supra* note 31, at 809 ("[Section 821B] serves instead as an invitation for judges and jurors to provide their own definitions of what constitutes 'unreasonable interference' and 'a right common to the general public' without the guidance generally provided by precedents."); Merrill, *supra* note 39, at 4 ("Courts are invited by the *Restatement*, based on the presence of one of three very broadly defined 'circumstances,' to decide what constitutes a 'right common to the general public,' and to determine what sort of circumstances represent an 'unreasonable interference' with this right.").

43. Kendrick, *supra* note 4, at 721.

44. Gifford, *supra* note 31, at 810.

seeped into surrounding surface and groundwater, was a public nuisance and that the company was liable to the State of New York for abatement costs.[45] The court rejected the chemical company's argument that upon its sale of the property to the City of Niagara Falls Board of Education—which included notice of the waste in the deed—its liability ended.[46] The court instead adopted a rule that the creator of a harmful condition cannot evade restitution liability for abatement costs simply by selling the land.[47] *Hooker II* and its progeny gave states a framework to recover public health expenditures, incurred to abate an alleged public nuisance, as damages.[48]

Hooker II also exemplifies how damages, as opposed to an injunction, emerged as a viable remedy in public nuisance actions brought by states. At the common law, only plaintiffs who suffered "harm [from a public nuisance] of a kind different from that suffered by other members of the public" could recover damages.[49] In the nineteenth and twentieth centuries, some courts did allow government entities to recover damages by demonstrating "peculiar and special damage" from a public nuisance.[50] Kendrick has argued that these earlier cases seem "analogous to contemporary courts allowing governmental entities to pursue damages for the extensive funds that they have spent on treating and seeking to remediate harms such as opioid addiction and tobacco-related illnesses."[51]

Public nuisance famously provided a breakthrough in twentieth-century tobacco litigation. After four decades of unsuccessful personal injury suits brought by individual plaintiffs,[52] the tide turned when state attorneys general sued tobacco companies on a variety of claims, including public

45. United States v. Hooker Chems. & Plastics Corp., 722 F. Supp. 960, 961–62, 971 (W.D.N.Y. 1989) [hereinafter *Hooker II*].

46. *See id.* at 968–70.

47. *See id. But see* RESTATEMENT (SECOND) OF TORTS § 834 cmt. e (AM. L. INST. 1979) ("When the vendor or lessor has created the condition his liability continues until the vendee or lessee discovers it and has reasonable opportunity to take effective precautions against it."). The court in *Hooker II* considered the public interest at stake and the nature of the activity as reasons to find an exception to the rule in section 834 of the *Second Restatement*. *See Hooker II*, 722 F. Supp. at 969.

48. *See* Kendrick, *supra* note 4, at 723–24; *see also* Gifford, *supra* note 31, at 813 ("[T]he focus of public nuisance law shifted dramatically from its origins as a means of forcing the termination of conduct found harmful to public health or public welfare toward becoming a new source of compensatory damages for a wide variety of arguably injurious conditions that fall within the amorphous definition of the tort.").

49. *See* RESTATEMENT (SECOND) OF TORTS § 821C(1) (AM. L. INST. 1979).

50. Kendrick, *supra* note 4, at 748.

51. *Id.* at 748–49.

52. Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 291 (2021). These early suits brought by smokers largely failed due to Big Tobacco's vigorous "no matter the cost" defense as well as legal obstacles relating to assumption of risk, contributory negligence, causation, and damages. *Id.* at 296–97.

nuisance, to recoup public health costs.[53] These suits survived early dismissal and got to discovery, unearthing incriminating evidence of Big Tobacco's dishonest marketing practices.[54] As a result, the tobacco companies first settled individually with four states, and then in 1998, collectively settled with the remaining forty-six states—known as the Master Settlement Agreement—for $206 billion.[55] While the public nuisance claims were not tried on the merits in these suits, their success incentivized states to pursue similar claims against companies that make and sell handguns, lead paint, carbon-emitting energy, and opioids.[56]

C. PUBLIC NUISANCE IN CALIFORNIA

California's expansive view of public nuisance can be traced to the broad definition of "nuisance" in its 1872 statute:

> Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway . . . .[57]

Section 3480 further defines a "public" nuisance as one that "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."[58] To establish a public nuisance in California, a plaintiff must prove that a defendant knowingly created or assisted in the creation of a substantial and unreasonable interference with a public right.[59]

In 1997, the California Supreme Court clarified the meaning of a "public right" by quoting the *Second Restatement's* five categories that are protected from interference: "[T]he public health, the public safety, the public peace, the public comfort or the public convenience."[60] In upholding an injunction against disruptive gang activity in a San Jose neighborhood, the court articulated the purpose of public nuisance: "[T]o protect the quality

53. *Id.* at 303.
54. *Id.* at 304.
55. *Id.* at 304–05.
56. *See* Kendrick, *supra* note 4, at 724–25.
57. CAL. CIV. CODE § 3479 (West 2023).
58. *Id.* § 3480.
59. People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 518, 525 (Ct. App. 2017).
60. People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 604 (Cal. 1997) (citing RESTATEMENT (SECOND) OF TORTS § 821B(2)(a)).

of organized social life."[61] The gang activity at issue included open drug use and dealing, loud music, appropriation of public space, vandalism, and violence.[62]

This understanding of public rights underpins the enduring use of public nuisance in California to abate problem properties. In 2015, the Second District Court of Appeals affirmed the classification of a restaurant as a public nuisance because of ongoing loitering, drinking, drug dealing, prostitution, and violence that occurred on the property.[63] The court dismissed the owner's argument that he should not be held responsible for the crimes of third parties in a high-crime area because the owner failed to make reasonable operational changes to discourage such activity.[64] In other words, the owner was liable for the blighted condition of his property since it attracted morally offensive and dangerous behavior that degraded the quality of life of the surrounding community.

California's broadly worded nuisance statute and expansive understanding of public rights set the stage for successful public nuisance suits involving products. In *People v. ConAgra Grocery Products Co.*, the Sixth Court of Appeals held that three companies created a public nuisance by promoting lead-based paint in the past and remanded the case to the trial court to recalculate abatement damages.[65] Looking exclusively to California's public nuisance statute and prior precedent, the court was not persuaded by the defendants' argument that lead-paint poisoning causes "private harm" that, even in the aggregate, does not interfere with public rights.[66] Rather, the court held that lead paint interferes with the "community's 'public right' to housing that does not poison children," and that "[r]esidential housing, like water, electricity, natural gas, and sewer services, is an essential community resource."[67] The defendants ultimately settled for $305 million.[68]

Other states have refused to follow California in holding that lead paint poisoning is a public nuisance. In 2008, the Rhode Island Supreme Court reversed a trial court judgment against lead paint manufacturers and a trade association, holding that, among other reasons, the Attorney General had

61. *Id.* at 602, 604.
62. *See id.* at 601.
63. Benetatos v. City of Los Angeles, 186 Cal. Rptr. 3d 46, 58–59 (Ct. App. 2015).
64. *Id.* The recommended changes included changing the restaurant's hours of operation and hiring a security guard. *Id.* at 53.
65. People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 518, 598 (Ct. App. 2017).
66. *Id.* at 552.
67. *Id.*
68. Kendrick, *supra* note 4, at 725.

failed to prove that lead poisoning interferes with a public right.[69] In the court's view, lead poisoning harms a private right rather than public right, which it defined as a right to "indivisible resources shared by the public at large, such as air, water, or public rights of way."[70] The court reasoned that to conclude otherwise would be antithetical to the common law, extend liability to any legal product that interferes with a private right, and blur the boundaries between public nuisance and product liability law.[71]

Commentators also share this traditionalist stance and find support in the *Second Restatement*'s description of a public right as "collective in nature and not like the individual right that everyone has not to be . . . negligently injured."[72] Thus, some scholars contend that a product might violate a person's right to not be negligently injured, but this harm cannot, in aggregate, violate a public right.[73] More fundamentally, they view these public nuisance claims involving products as democratically illegitimate attempts to bypass state product liability law, which state legislatures have set forth in statutes.[74] The *Restatement (Third) of Torts* similarly states that mass harms caused by dangerous products should be redressed through the law of product liability.[75]

II. THE OPIOID EPIDEMIC

A. A BRIEF HISTORY

The origin of America's opioid epidemic can be traced to 1995 when the FDA approved OxyContin, a powerful prescription painkiller made by Purdue Pharma L.P. ("Purdue").[76] In the late 1980s, Purdue began developing a replacement for its successful painkiller MS Contin, a morphine pill with a patented controlled-release mechanism that was soon to

69. State v. Lead Indus. Ass'n, 951 A.2d 428, 435 (R.I. 2008).
70. *Id.* at 453.
71. *Id.* at 454–56.
72. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. L. INST. 1979).
73. *See, e.g.*, Gifford, *supra* note 31, at 818 ("[T]he exposure to lead-based paint usually occurs within the most private and intimate of surroundings, his or her own home. Injuries occurring in this context do not resemble the rights traditionally understood as public rights for public nuisance purposes . . . ."); Merrill, *supra* note 39, at 10 ("A mass tort, such as distributing a defective product to millions of consumers, violates a large number of private rights. But this does not convert such a tort into the violation of a public right.").
74. *See* Dana, *supra* note 16, at 99 (footnote omitted) ("Because (according to this argument) products liability law is legislatively authorized and hence democratically legitimate, the attempt to use public nuisance in what is the realm properly reserved for products liability law is illegitimate. Product-based nuisance claims are an improper effort to avoid state tort law, as duly established by the legislature.").
75. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 cmt. g (AM. L. INST. 2020).
76. Engstrom & Rabin, *supra* note 52, at 307.

expire.[77] Purdue's chemists applied this controlled-release mechanism to oxycodone, an opioid twice as powerful as morphine, and named the resulting pill OxyContin.[78] The delayed-release feature enabled Purdue to sell the pill in high dosages and convince the FDA to allow a package insert suggesting OxyContin was less prone to abuse.[79] Following FDA approval, Purdue launched an unprecedented marketing campaign that successfully persuaded doctors to prescribe OxyContin as a general treatment for chronic pain.[80] Colossal returns followed: annual sales of OxyContin reached $1 billion within five years and ultimately generated $35 billion for the company.[81]

But Purdue's bonanza birthed a national catastrophe. OxyContin initiated an epidemic of addiction from the hollers of West Virginia to the hills of San Francisco. Patients prescribed OxyContin soon learned that its advertised twelve-hour relief lasted eight hours, causing them to experience withdrawal symptoms and seek more pills at higher doses.[82] The pills could also be crushed into powder, removing their delayed-release coating, that could then be ingested or, when mixed with water, intravenously injected for an immediate, euphoric high.[83] As a result, OxyContin made many unsuspecting patients addicted and was widely abused.[84]

In response, Purdue ultimately reformulated the drug in 2010 to make it nearly impossible to crush, and doctors reversed their liberal prescribing habits, but this did little to ameliorate the damage done: users turned to illicit alternatives such as heroin and fentanyl for their fix. Even though opioid prescriptions from retail pharmacies fell from a peak of 255 million in 2012 to about 143 million in 2020,[85] overall opioid overdoses increased, first with heroin,[86] and then to a much greater degree with fentanyl.[87] In total, from

77. Patrick Radden Keefe, *The Family That Built an Empire of Pain*, NEW YORKER (Oct. 23, 2017), https://www.newyorker.com/magazine/2017/10/30/the-family-that-built-an-empire-of-pain [https://web.archive.org/web/20240122052118/https://www.newyorker.com/magazine/2017/10/30/the-family-that-built-an-empire-of-pain].

78. Engstrom & Rabin, *supra* note 52, at 308.

79. Keefe, *supra* note 77. The package insert stated the delayed-release mechanism "is believed to reduce the abuse liability." *Id.*

80. *Id.*

81. *Id.*

82. *See* Engstrom & Rabin, *supra* note 52, at 309.

83. *Id.*

84. *See* Keefe, *supra* note 77.

85. *See* Arian Campo-Flores & Jon Kamp, *Fentanyl's Ubiquity Inflames America's Drug Crisis*, WALL ST. J. (Sept. 30, 2022, 10:54 AM), https://www.wsj.com/articles/fentanyls-ubiquity-inflames-american-drug-crisis-11664549424 [https://perma.cc/MPD8-XV29].

86. *See, e.g.*, William N. Evans, Ethan Lieber & Patrick Power, *How the Reformulation of OxyContin Ignited the Heroin Epidemic* 1–2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24475, 2018); Engstrom & Rabin, *supra* note 52, at 327.

87. *Opioids: Understanding the Epidemic*, CDC (Aug. 8, 2023), https://www.cdc.

1999 to 2021, nearly 645,000 people died from overdoses involving prescription and illicit opioids.[88]

B. THE OPIOID LITIGATION

Opioid litigation has followed a similar trajectory to tobacco litigation. Individual plaintiffs pursued the first claims against Purdue, alleging the company breached its duty of care in deceptively promoting a drug with inadequate warnings and defective design, but these suits rarely survived summary judgment.[89] In contrast, public nuisance claims fared much better. West Virginia's Attorney General brought the first public suit alleging multiple claims, including public nuisance, that induced Purdue to settle for $10 million in 2004.[90] Purdue settled similar suits in 2007, paying $19.5 million to twenty-six states and the District of Columbia, and $24 million to Kentucky.[91]

Starting in 2014, a new wave of litigation ensued against a wider group of defendants—other opioid manufacturers, distributers, and retail pharmacies—and filed by a more diverse group of public plaintiffs—cities, counties, states, and tribes.[92] This litigation has occurred in both federal and state courts and features a range of claims, including public nuisance and violations of the Controlled Substances Act ("CSA").[93] In federal court, three thousand federal lawsuits were consolidated into a multidistrict litigation ("MDL") in Ohio.[94] The magnitude of potential liability facing these defendants has encouraged many to settle. Drugmaker Johnson & Johnson and distributors AmerisourceBergen, Cardinal Health, and McKesson finalized a nationwide settlement in February 2022.[95] Purdue, which has since declared bankruptcy, and its owners, the Sackler family, reached a nationwide settlement in March 2022.[96] And lastly, Walgreens,

gov/opioids/basics/epidemic.html [https://perma.cc/2JHY-GBT7].

88. *Id.*

89. *See* Engstrom & Rabin, *supra* note 52, at 310–11. The plaintiffs faced many obstacles in proving their claims: Purdue's attorneys argued the drug had been approved by the FDA, prescribing doctors had been adequately warned about the drug's danger, the plaintiffs had illegally abused the drug, and various other causation issues. *See id.* at 311–12.

90. *See id.* at 314.

91. *See id.* at 314–16.

92. *See* Kendrick, *supra* note 4, at 731.

93. Engstrom & Rabin, *supra* note 52, at 316–19.

94. Kendrick, *supra* note 4, at 732.

95. Geoff Mulvihill, *J&J, Distributors Finalize $26B Landmark Opioid Settlement*, ASSOCIATED PRESS (Feb. 25, 2022, 8:43 AM), https://apnews.com/article/coronavirus-pandemic-business-health-opioids-camden-dec0982c4c40ad08b2b30b725471e000 [https://perma.cc/EJ3X-SHMC].

96. Geoff Mulvihill & John Seewer, *Purdue Pharma, US States Agree to New Opioid Settlement*, ASSOCIATED PRESS (Mar. 3, 2022, 11:34 AM), https://apnews.com/article/purdue-pharma-opioid-settlement-9482fa0389f68de6844d13ea2ebefe5a [https://perma.cc/ZDV3-XUYB].

Walmart, and CVS agreed to a nationwide settlement in November 2022.[97]

For the few cases that have gone to trial, courts have disagreed on whether the opioid epidemic constitutes a public nuisance. For example, following a bench trial in Oklahoma that resulted in a $465 million judgment against Johnson & Johnson, the Supreme Court of Oklahoma reversed, holding that the district court erred in extending Oklahoma's public nuisance statute to harms from prescription opioids.[98] Likening opioids to lead paint and handguns (the subjects of previous public nuisance litigation), the court explained that the harm from a legal product does not interfere with a public right, which it defined as a "right to a public good, such as 'an indivisible resource shared by the public at large, like air, water, or public rights-of-way.' "[99] Rather, the court viewed the essence of the state's claim as "a private tort action for individual injuries sustained from use of a lawful product and in providing medical treatment or preventative treatment to certain, though numerous, individuals."[100] The court also expressed concerns that if it affirmed the trial court, then the misuse of any prescription medicine or legal product could give rise to a public nuisance claim.[101]

Following the decision in Oklahoma, two bench trials also held defendants not liable for public nuisance. In a bellwether bench trial in the Ohio MDL,[102] a federal district court in West Virginia followed the traditionalist reasoning of the Oklahoma Supreme Court in finding that the distribution of prescription opioids does not interfere with a public right.[103] Similarly, a state court in California entered judgment in favor of various opioid manufacturers but did so because the People did not present evidence that the manufacturer's allegedly false marketing caused medically inappropriate prescriptions.[104] But unlike the district court in West Virginia, the court made clear that the opioid epidemic was a substantial interference with "collective social interests" and that a showing of unreasonable conduct could constitute a public nuisance.[105]

97. Sharon Terlep & Sarah Nassauer, *Walmart to Pay $3.1 Billion to Settle Opioid Lawsuits*, WALL ST. J. (Nov. 15, 2022, 3:01 PM), https://www.wsj.com/articles/walmart-to-pay-3-1-billion-to-settle-opioid-lawsuits-11668514958 [https://perma.cc/73XQ-4S33].

98. State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719, 720 (Okla. 2021).

99. *Id.* at 726–27 (quoting City of Chicago v. Am. Cyanamid Co., 823 N.E.2d 126, 131 (Ill. App. Ct. 2005).

100. *Id.* at 727.

101. *Id.*

102. *See In re* Nat'l Prescription Opiate Litig., 622 F. Supp. 3d 584, 584 (N.D. Ohio 2022).

103. *See* City of Huntington v. AmerisourceBergen Drug Corp., 609 F. Supp. 3d 408, 473–76 (S.D. W. Va. 2022).

104. People v. Purdue Pharma L.P., No. 30-2014-00725287-CU-BT-CXC, 2021 Cal. Super. LEXIS 31743, at *2, *10 (Dec. 14, 2021).

105. *See id.* at *9, *31.

However, two other bellwether MDL cases succeeded on the merits: *City & County of San Francisco v. Purdue Pharma L.P.*, discussed in Part III, and *County of Lake, Ohio v. Purdue Pharma L.P.*[106] In the former, Walgreens was found to have substantially contributed to an opioid epidemic in San Francisco,[107] and in the latter, CVS, Walmart, and Walgreens were found liable for contributing to an opioid epidemic in Ohio.[108]

III. THE OPIOID EPIDEMIC IN SAN FRANCISCO

The San Francisco City Attorney filed claims in the U.S. District Court for the Northern District of California against dozens of opioid manufacturers, distributors, and dispensers, and by the trial's close in July 2022, only Walgreens remained.[109] The city pursued a single public nuisance claim at trial.[110] Judge Charles Breyer held that the city proved by a preponderance of the evidence that Walgreens knowingly engaged in unreasonable conduct that was a substantial factor in creating an opioid epidemic in San Francisco.[111] A subsequent remedies trial was scheduled to begin on November 7, 2022, but Judge Breyer vacated this date after Walgreens announced a tentative nationwide opioid settlement for nearly $5 billion.[112] Separately, Walgreens settled with the city for $230 million to be paid across fifteen years.[113]

Judge Breyer's lengthy opinion described a city under siege from opioid addiction. The epidemic in San Francisco unfolded in three waves.[114] The first wave, from 2000 to 2010, consisted of an increase in opioid addiction and overdose deaths following a rise in opioid prescriptions.[115] By 2010, San Francisco's rate of opioid overdoses was 2.23 times the national average despite the city's "significant investment in public health programs designed

106. *In re Nat'l Prescription Opiate Litig.*, 622 F. Supp. 3d at 590–91.

107. City & County of San Francisco v. Purdue Pharma L.P., 620 F. Supp. 3d 936, 939 (N.D. Cal. 2022).

108. *In re Nat'l Prescription Opiate Litig.*, 622 F. Supp. 3d at 593.

109. *City & County of San Francisco*, 620 F. Supp. 3d at 938.

110. *Id.*

111. *Id.*

112. *See* Dave Simpson, *SF-Walgreens Opioid Trial Called Off Amid Settlement Talks*, LAW360 (Nov. 4, 2022, 9:16 AM), https://www.law360.com/articles/1546999/sf-walgreens-opioid-trial-called-off-amid-settlement-talks [https://perma.cc/G4TY-KKSE]; Sharon Terlep, *CVS, Walgreens to Pay More Than $10 Billion to Settle Opioid Lawsuits*, WALL ST. J. (Nov. 2, 2022, 11:00 AM), https://www.wsj.com/articles/cvs-to-pay-5-billion-to-settle-opioid-lawsuits-11667358371 [https://perma.cc/7Y5W-SE8H].

113. Alene Tchekmedyian, *Walgreens Agrees to Pay San Francisco Nearly $230 Million to Settle Opioid Lawsuit*, L.A. TIMES (May 17, 2023, 9:15 PM), https://www.latimes.com/california/story/2023-05-17/walgreens-san-francisco-settlement [https://perma.cc/CD3C-D2MP].

114. *City & County of San Francisco*, 620 F. Supp. 3d at 941.

115. *Id.* at 943.

to combat opioid abuse."[116] In the second wave, beginning in the early 2010s, prescriptions declined while heroin use and overdose deaths increased.[117] The city had faced a heroin problem in the late 1990s, but in this second wave, the problem became "significantly worse."[118] Evidence suggests heroin returned to the city because of prescription-opioid addiction. The Chief of Emergency Medicine at Zuckerberg San Francisco General Hospital testified that "approximately two-thirds of the patients who present[ed] to the [emergency department] with an opioid-related medical condition report[ed] that their addiction started with pills."[119] The third wave began in 2015 with the arrival of fentanyl, a dangerous synthetic opioid fifty times more potent than heroin.[120] All in all, the demand for prescription opioids, heroin, and fentanyl caused deaths to skyrocket: from 2015 to 2020, opioid-related emergency room visits tripled, and overdoses increased 478%, from 101 in 2015 to 584 in 2020.[121]

The evidence at trial revealed the epidemic's tremendous toll on city workers and resources. The Fire Department's Emergency Medical Services ("EMS") team received so many overdose calls that it created a special response team to answer them.[122] Encountering unconscious individuals on the streets, many of whom were "frequent callers who rotate from the street to the emergency room and back to the street," became the "new normal" for EMS.[123] Similarly, Public Works faced a "significantly more challenging" job cleaning streets and sidewalks because of the large number of opioid users who "often vomit, have diarrhea, and leave used needles in public right of ways."[124] These crews collected 95,000 used syringes annually in recent years, often encountered people experiencing overdoses, and sometimes came across deceased opioid users on their rounds.[125]

The epidemic especially impacted San Francisco's public parks. The Recreation and Parks Department ("RPD") created special teams to respond to the harms caused by opioid use in the city's parks.[126] Its outreach team engaged with homeless individuals living in parks, and according to Sergeant Maja Follin, a Head Park Ranger in RPD, the "vast majority" of these

116. *Id.*
117. *See id.* at 944.
118. *Id.*
119. *Id.* at 945.
120. *See id.* at 945–46.
121. *Id.* at 946.
122. *Id.* at 947.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 948.

individuals suffer from substance abuse.[127] Meanwhile, RPD's environmental services team removed biohazards such as used syringes and human feces.[128] In 2019, the team recovered 10,360 syringes from Golden Gate Park.[129] Their work could be high-stakes and laborious: at Dolores Park, needles were thrown into a children's play area, requiring RPD to "sift through the sand" and recover them.[130] Because of these biohazards, RPD regularly closed off sections of parks.[131] And at Jose Coronado Park, so many people "obstruct[ed] the sidewalk using drugs and spending the day . . . lying across the sidewalk and making it impossible for people to . . . access the park or . . . walk down the sidewalk" that the city had to install barricades to create safe passage for park goers.[132]

The San Francisco Public Library ("SFPL") system also faced "serious health and safety risks for library visitors and staff" due to the opioid epidemic.[133] Library staff routinely discovered patrons using and overdosing on opioids outside the building, in the stacks, and in the bathrooms.[134] Similarly, staff found needles in the stacks, in bathrooms, on shelves, inside of books, and in children's reading areas.[135] On occasion, staff were even stuck with used syringes.[136] Damage to plumbing from flushed syringes caused multiple library closures and cost tens of thousands of dollars to fix.[137] Because of the epidemic, SFPL incurred additional expenses, such as hiring a full-time social worker to connect those suffering from opioid addiction with support services.[138] SFPL also contracted with the San Francisco Police Department to provide officers to patrol the libraries and help respond to the proliferation of drug use and overdoses.[139]

At the trial, the aforementioned evidence demonstrated that the opioid epidemic, defined as "high rates of opioid abuse, addiction, and overdoses," constitutes a public nuisance that interferes with all five categories of public rights recognized by the California Supreme Court: the public health, the

127. *See id.* For Sergeant Follins's full declaration detailing drug use in the city's parks, see Declaration of Maja Follin, City & County of San Francisco v. Purdue Pharma L.P., 620 F. Supp. 3d 936 (N.D. Cal. 2022) (No. 3:18-cv-07591-CRB).

128. *City & County of San Francisco*, 620 F. Supp. 3d at 948.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 949. The SFPL system consists of twenty-eight libraries across the city and had recently drawn over six million annual visitors. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

public safety, the public peace, the public comfort, and public convenience.[140] The city also successfully proved that Walgreens had knowledge that its unreasonable conduct caused the nuisance.[141] As the "last line of defense" against the diversion of controlled substances,[142] the pharmacy failed to perform due diligence on over 1.2 million red flag prescriptions in a fifteen-year period.[143] Large volumes of these prescriptions came from "rogue pain clinics and rogue doctors": from 2006 to 2020, Walgreens pharmacies in the Bay Area filed 161,696 prescriptions from prescribers who later "faced discipline for their prescribing practices and several of whom lost their medical licenses."[144] This failure to perform due diligence violated CSA regulation, so the court concluded this failure was unreasonable.[145] Moreover, the CSA's regulatory scheme was sufficient to demonstrate that Walgreens "must have known" about the harms of opioid diversion, notwithstanding external Drug Enforcement Agency ("DEA") investigations and internal correspondence among executives that revealed Walgreens executives had actual notice of harms from prescription-drug abuse.[146]

The court also held that the evidence proved factual and proximate causation. "[C]ircumstantial evidence of sufficient substantiality"—namely that Walgreens, the largest dispenser of opioids in San Francisco, had failed to perform due diligence on thousands of suspicious prescriptions from 2006 to 2020 as the city experienced an opioid epidemic—satisfied causation in fact.[147] And the "cycle of addiction," and its downstream burden on the city and the public, was foreseeable.[148] As a part of its proximate cause analysis, the court concluded that extending liability to Walgreens would not open the "floodgates" of litigation against any seller of a product with a known risk of harm because Walgreens's liability stemmed from its unique fifteen-year

140. *Id.* at 1008.

141. *Id.* at 998.

142. *See id.* at 996.

143. *Id.* at 985. Red flag prescriptions are "objective warning signs that indicate that a prescription may not be legitimate." *Id.* at 979. The city's expert identified fourteen categories commonly used to identify these prescriptions. *Id.* For example, some categories flagged "Long Distance Travel," "Doctor-Shopping," and "Cash Payment." *Id.* at 980.

144. *Id.* at 993.

145. *Id.* at 998–1000. Specifically, the court found that Walgreens violated 21 C.F.R. § 1306.04(a). *Id.* at 999 ("[A] prescription issued not in the usual course of professional treatment . . . is not a prescription within the meaning and intent of [21 U.S.C. § 829] and the person knowingly filling such a purported prescription . . . shall be subject to the penalties provided for violations . . . .") (alteration in original) (quoting 21 C.F.R. § 1306.04(a))).

146. *Id.* at 1000–02. The court noted that the CSA and its implementing regulations "were put in place precisely because of the harms that result when opioids are diverted," thus giving Walgreens notice that its failure to comply with these regulations would result in harmful opioid diversion. *Id.* at 1001.

147. *Id.* at 1003–04.

148. *Id.* at 1007.

failure to comply with federal regulation.[149]

IV. OPIOID ADDICTION INTERFERES WITH PUBLIC RIGHTS

The decision in *City & County of San Francisco v. Purdue Pharma L.P.* rebukes the traditionalist, categorical stance that public nuisance should not be extended to products. As demonstrated in San Francisco, opioid addiction interferes with public rights because addiction drives behavior that obstructs public space, forcing local government to incur substantial abatement costs. Moreover, this behavior can essentially turn entire neighborhoods into dangerous public drug dens featuring behavior that is offensive to witness.

Because California broadly defines public nuisance and public rights, the court did not base its judgment on a finding that Walgreens's conduct interfered with public rights as traditionally understood in the common law.[150] This Note seeks to do so in order to demonstrate how products such as opioids can interfere with traditionally protected public rights in the hopes that states that have rejected public nuisance suits against product-caused harms in the name of tradition might be persuaded otherwise.

A. OPIOID ADDICTION INTERFERES WITH PUBLIC SPACE

Courts have refused to extend public nuisance liability in the opioid epidemic because opioids, like lead paint, do not interfere with public rights. For example, the Supreme Court of Oklahoma viewed the state's public nuisance claim as a "private tort action for individual injuries sustained from use of a lawful product."[151] This rationale largely stems from the *Second Restatement*'s definition of a public right as "collective in nature and not like the individual right that everyone has not to be assaulted or . . . negligently injured."[152]

But the opioid epidemic cannot be reduced to individual cases of private injury. It is frequently observed that a public nuisance is a condition rather than conduct,[153] so it should be emphasized that, here, the condition is opioid addiction. Addiction inflicts private harm, especially in instances of overdose and death, but as demonstrated in San Francisco, it also inflicts substantial civic harm.

149. *Id.*
150. *See id.* at 1008–09.
151. State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719, 726–27 (Okla. 2021).
152. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. L. INST. 1979).
153. *See, e.g.*, Kendrick, *supra* note 4, at 755 ("Courts and commentators have observed that public nuisance focuses on a condition rather than on conduct—that is, on whether a particular condition interferes with a public right, not on whether someone *acted* unreasonably (or worse) in bringing it about.").

An aspect of opioid addiction's civic harm resembles a classic common law public nuisance. The archetypal public nuisance is obstruction of a highway,[154] and this is often referred to as an interference with the "public convenience" because the highway's purpose is to improve travel for the public.[155] Similarly, municipalities set aside space for the public convenience: sidewalks make it easier to walk around town safe from motor vehicles; parks provide a place of respite and leisure from concrete city blocks; and libraries facilitate free access to information in a quiet environment.

Opioid addiction interferes with the public's right to use these spaces as intended. In San Francisco, residents must navigate sidewalks strewn with health hazards, such as feces and needles, and obstructed with the bodies of individuals who are unconscious, and sometimes deceased, from opioid use.[156] Similarly, the prevalence of biohazards in parks impacts the safety of residents, especially infants.[157] This is not an abstract danger: in November 2022, a ten-month-old toddler was hospitalized after being exposed to fentanyl in a San Francisco park.[158] Moreover, these biohazards cause closures until they can be removed.[159] People addicted to opioids can also obstruct access while in an opiated stupor, as shown in one park where the city built a barricade to provide safe access for parkgoers because of the number of opioid users lying about.[160] And in libraries, visitors who seek quiet access to books and computers must contend with people overdosing outside the building, in the stacks, and in the bathrooms; needles left everywhere from bookshelves to children's reading areas; and closures due to plumbing damage from flushed syringes.[161]

1. Opioid Addiction and Homelessness

Opioid addiction's interference with public space stems from, at least in part, its significant relationship with homelessness. In making this connection, I do not intend to dehumanize homeless individuals; I simply point out the obvious impact a substantial, concentrated homeless population can have on a city's public space and resources. While homelessness has

154. *See id.* at 716.

155. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (AM. L. INST. 1979).

156. City & County of San Francisco v. Purdue Pharma L.P., 620 F. Supp. 3d 936, 947–48 (N.D. Cal. 2022).

157. *Id.* at 948.

158. Robert Handa, *Baby Exposed to Fentanyl at San Francisco Park, Family Says*, NBC BAY AREA (Dec. 5, 2022, 1:50 PM), https://www.nbcbayarea.com/news/local/baby-exposed-fentanyl-san-francisco/3092940 [https://perma.cc/E2QK-TNNG].

159. *City & County of San Francisco*, 620 F. Supp. 3d at 948.

160. *Id.*

161. *Id.* at 949.

many causes, the evidence at trial made clear that many of San Francisco's homeless residents suffer from addiction. RPD's outreach teams submitted that the vast majority of the homeless people living in San Francisco's parks struggle with substance abuse.[162] Similarly, the Fire Department's EMS team described "frequent callers who rotate from the street to the emergency room and back to the street," also suggesting that many of those suffering from opioid addiction are homeless.[163] The EMS team further noted that a majority of individuals who die of overdose deaths in the city had prior contact with EMS.[164] This underlines the terrifying power that opioids hold over the addicted when one considers that repeated overdose emergencies failed to stop these individuals from abusing opioids.

Unsurprisingly, the opioid epidemic in San Francisco corresponded with an increase in its homeless population. Between 2005 and 2020—the same period of time in which Walgreens's conduct was examined at trial—the estimated homeless population in San Francisco rose from 5,404 to 8,124, and the unsheltered homeless population rose from 2,655 to 5,180.[165] And between 2010—the year of OxyContin's reformulation, which contributed to an increase in heroin use[166]—and 2020, the number of calls to the city's 311 line complaining about used hypodermic needles rose from 224 to 6,275.[167] Assuming that housed opioid users would not be discarding needles in public spaces, this increase in 311 complaints may indicate greater opioid use among the homeless population. Similarly, from 2013 to 2016, complaints about homeless encampments also increased from two per day to sixty-three per day.[168] While correlation does not equal causation and many persuasively argue that the primary driver of homelessness in California is a lack of affordable housing,[169] it cannot be disputed that a relationship exists between the city's visible increase in homelessness and drug use, as addiction can cause a person to spurn employment, housing, and family assistance.

Moreover, homelessness has become one of California's top issues among voters, reflecting, at least in part, a public exasperated with ubiquitous

162. *Id.* at 948.
163. *Id.* at 947.
164. *Id.*
165. MICHAEL SHELLENBERGER, SAN FRANSICKO: WHY PROGRESSIVES RUIN CITIES 5 (2021).
166. *See supra* Section II.A.
167. SHELLENBERGER, *supra* note 165, at 7.
168. *Id.* at 3.
169. *See, e.g.*, Jerusalem Demsas, *The Obvious Answer to Homelessness*, ATLANTIC (Dec. 23, 2022, 2:52 PM), https://www.theatlantic.com/magazine/archive/2023/01/homelessness-affordable-housing-crisis-democrats-causes/672224 [https://perma.cc/R6V9-TF7N] (arguing that the primary cause of homelessness in Los Angeles and San Francisco is a lack of affordable housing due to incumbent homeowners who oppose development).

encampments that feature harrowing spectacles of suffering and depravity. In a 2021 poll conducted by Los Angeles County—before the pandemic and then inflation became top concerns—94% of respondents said homelessness was "a serious or very serious problem."[170] And in a 2022 survey asking California voters to rank the top issue in California, 13% selected homelessness, just below the 15%—the largest cohort in the study—who selected "inflation or the rising cost of living."[171] The fact that voters expect the government to take greater action on homelessness highlights the issue's public impact, much like a traditional public nuisance.[172]

2. Opioid Addiction and Methamphetamine Use

One might counter that the increase in homelessness in cities such as San Francisco owes more to the concurrent rise in street use of the psychostimulant methamphetamine. Beginning in the mid-2000s, DEA chemists noticed a new form of street methamphetamine, one made with phenyl-2-propanone ("P2P"), which can be created in a lab using variety of legal, cheap chemicals that have various industrial uses.[173] An unlimited supply of P2P spurred industrial-scale production by Mexican cartels, making this new form of methamphetamine plentiful and cheap across America.[174]

Alarmingly, this new methamphetamine is far more debilitating to the mental health of its users: professionals who work with recovering addicts and homeless people have noticed a startling spike of severe, methamphetamine-induced psychosis, even in those with no prior history of mental illness.[175] Methamphetamine also causes paranoia and antisocial

170. *See id.*

171. *USC Schwarzenegger Institute—USC Price California Issues Poll Fall 2022 General Election Poll*, USC SCHWARZENEGGER INST. (Nov. 4, 2022), https://schwarzenegger.usc.edu/institute_in_action/usc-schwarzenegger-institute-usc-price-california-issues-poll-fall-2022-general-election-poll [https://perma.cc/QGA9-YKEJ].

172. *See, e.g.*, Benjamin Oreskes & Doug Smith, *L.A. Voters Are Angry, Think Elected Officials Aren't Equipped to Solve Homelessness*, L.A. TIMES (Feb. 10, 2022, 5:00 AM), https://www.latimes.com/homeless-housing/story/2022-02-10/new-survey-underscores-anger-about-homelessness-among-los-angeles-voters [https://perma.cc/CE96-6JRH] ("The professional pollsters who led the conversations [about homelessness] with 39 people in six groups said they were stunned by the depth of feeling and unanimity across party affiliation, socioeconomic standing, race and ethnicity.").

173. Sam Quinones, *'I Don't Know That I Would Call It Meth Anymore*,*'* ATLANTIC (Oct. 18, 2021), https://www.theatlantic.com/magazine/archive/2021/11/the-new-meth/620174 [https://perma.cc/FE3P-GFVA]. Methamphetamine had previously been made with the ingredient ephedrine in the 1980s and 1990s, but due to government clampdowns on ephedrine in the United States and Mexico, acquiring ephedrine in large quantities became less feasible. *Id.*

174. *See id.*

175. *See id.* For example, Susan Partovi, a physician who treats homeless people in Los Angeles, noticed increasing cases of schizophrenia and bipolar disorder in her clinics starting in 2012 and commented, "Now almost everyone we see when we do homeless outreach on the streets is on meth." *Id.*

behavior that might explain the visible increase in tent encampments in San Francisco and Los Angeles, since tents provide privacy.[176] As a result, this new methamphetamine has presented difficulties for homeless-service workers and has thus complicated city efforts to abate the obstruction of public space caused by encampments.

However, "the increases in methamphetamine availability and harms are intertwined with the ongoing opioid overdose crisis."[177] Opioid involvement in psychostimulant overdoses increased from 34.5% of overdose deaths in 2010 to 53.5% in 2019.[178] Surveys of recovering addicts reveal that methamphetamine, a stimulant, is often used with opioids, a depressant, to achieve a synergistic high and counteract the negative effects that arise once the opioid high subsides.[179] Thus, the rise in methamphetamine use and its severe mental health effects, at the least, cannot be understood independent of the opioid epidemic and, at the most, can be understood as a direct outgrowth of the epidemic. In either interpretation, opioid addiction has played a significant role in the recent increase of homelessness and the related rise in methamphetamine use that has made government efforts to convince people to accept services and leave encampments a Sisyphean challenge.

3. Opioid Addiction and the High Cost of Abatement

Because of the opioid epidemic and the related interference with public space and rise in homelessness, San Francisco has incurred significant abatement costs. In 2019, the city spent nearly $100 million on street cleaning—an amount four times more than Chicago, which has 3.5 times as

176. *See id.* ("Tents protect many homeless people from the elements. But tents and the new meth seem made for each other. With a tent, the user can retreat not just mentally from the world but physically."). Los Angeles Superior Court Judge Craig Mitchell, who founded the Skid Row Running Club, attributes much of Los Angeles' "visible homelessness"—people sleeping on sidewalks and in tents—to meth. *Id.*

177. Christopher M. Jones, Debra Houry, Beth Han, Grant Baldwin, Alana Vivolo-Kantor & Wilson M. Compton, *Methamphetamine Use in the United States: Epidemiological Update and Implications for Prevention, Treatment, and Harm Reduction*, 1508 ANNALS N.Y. ACAD. SCIS. 3, 4 (2022).

178. *Id.*

179. *See, e.g.*, *id.* at 12 (summarizing a study of individuals with opioid-use disorder from 170 treatment facilities in which 51% of respondents stated their primary reason for co-occurring use of the two drugs was "high seeking and synergistic effects" and 38.6% of respondents stated their primary reason was "to balance the effect between the two drugs"); Matthew S. Ellis, Zachary A. Kasper & Theodore J. Cicero, *Twin Epidemics: The Surging Rise of Methamphetamine Use in Chronic Opioid Users*, 193 Drug & Alcohol Dependence 14, 18 (2018); Public News Video, *Homeless Addict in San Francisco Describes Violence on Street and Stealing to Feed His Habit*, YOUTUBE (Apr. 12, 2022), https://www.youtube.com/watch?v=koLD091dQ4U (interviewing a homeless man in San Francisco who states that "meth is just a given mostly[, since] you gotta [sic] do something to counteract the downer [of heroin]").

many people and a surface area 4.5 times as large.[180] Opioid related conditions "overwhelm the city's hospitals" and "tax[] the city's emergency service teams."[181] San Francisco's Fire Department, Public Works, Recreation and Parks, and Public Library all have created special teams and allocated resources to respond to the unique challenges presented by the epidemic.[182] Additionally, the city has made a "significant investment in public health programs designed to combat opioid abuse."[183] Moreover, because of the link between opioid addiction and homelessness in San Francisco, the staggering $367.7-million budget for the city's Department of Homelessness and Supportive Housing for 2019–2020 also reflects some of the costs of the opioid epidemic.[184]

Because of this significant investment, the opioid epidemic also underlines the enduring, important role of public nuisance as a stopgap measure when regulation fails to protect the public. Scholars have argued that public nuisance no longer serves an important stopgap measure in an era of comprehensive regulation.[185] But, as Dana has noted, "[t]he administrative state has never been perfect at protecting the public from harm, but we do appear to be living in a time when notable regulatory failure and inaction is becoming more, not less, common."[186]

The opioid epidemic thus reveals the important role of public nuisance in the event of such regulatory failure:

> [I]n opioids, an alphabet soup of federal governmental agencies (including the FDA, DEA, and Department of Justice) had significant authority to address the burgeoning opioid problem. In creating a comprehensive regulatory scheme, the legislative branch seemingly did its work. But numerous agencies nevertheless stood by, even as pill mills proliferated, the death toll spiked, and millions of painkillers were pumped into, and decimated, certain communities.[187]

Even though Walgreens paid $80 million to settle investigations brought by the DEA and Department of Justice for CSA violations at a

180. SHELLENBERGER, *supra* note 165, at 3.

181. City & County of San Francisco v. Purdue Pharma L.P., 620 F. Supp. 3d 936, 1009 (N.D. Cal. 2022).

182. *See supra* Part III.

183. *City & County of San Francisco*, 620 F. Supp. 3d at 943.

184. *HSH Budget*, DEP'T OF HOMELESSNESS & SUPPORTIVE HOUS., https://hsh.sfgov.org/about/budget [https://perma.cc/2JVA-BUXR].

185. *See, e.g.*, Merrill, *supra* note 39, at 32 (arguing that the legislature, rather than the courts, is best equipped to determine how the "costs of regulating public bads should be apportioned among different members of the community").

186. Dana, *supra* note 16, at 63.

187. Engstrom & Rabin, *supra* note 52, at 337.

distribution center and six retail pharmacies in Florida,[188] the company failed to adequately reform its operations and prevent opioid diversion.[189] In other words, despite extensive regulation, Walgreens's San Francisco pharmacies, more likely than not, failed to conduct due diligence on red flag prescriptions from 2006 to 2020, an oversight that forced San Francisco to foot the bill.[190]

B. OPIOID ADDICTION INTERFERES WITH PUBLIC MORALS

Opioid addiction also interferes with community interests in a manner that resembles problem properties, which were traditionally treated as public nuisances in England and America. William Sheppard identified "lewd-ale houses" as a common nuisance in the 1660s,[191] and William Blackstone in 1769 listed as public nuisances "all disorderly inns or ale-houses, bawdy-houses, gaming-houses" and "cottages . . . erected singly on the waste, being harbors for thieves and other idle and dissolute persons."[192] Similarly, early public nuisance cases in America addressed not only obstructions of highways and waterways but also a "loose amalgamation of minor offenses involving public morals or the public welfare."[193] William Prosser, who served as reporter of the *Second Restatement*, categorized problem properties—"houses of prostitution, illegal liquor establishments, [and] gaming houses"—as interfering with public morals.[194] Thus, the common law in England and America treated properties that attracted illicit, immoral behavior as public nuisances because they were offensive and disruptive to the surrounding community.

California courts have long abated the type of immoral, illicit activity associated with problem properties in public nuisance claims. In 1997, the California Supreme Court upheld an injunction against a San Jose gang for open drug use and dealing, loud music, appropriation of public space, vandalism, and violence.[195] Despite widespread criticism of the case among academics,[196] the court persuasively articulated that the purpose of public

188. Press Release, U.S. Attorney's Office, Southern District of Florida, Walgreens Agrees to Pay a Record Settlement of $80 Million for Civil Penalties Under the Controlled Substances Act (June 11, 2013), https://www.justice.gov/usao-sdfl/pr/walgreens-agrees-pay-record-settlement-80-million-civil-penalties-under-controlled [https://perma.cc/N6V3-KD6Q].

189. City & County of San Francisco v. Purdue Pharma L.P., 620 F. Supp. 3d 936, 998 (N.D. Cal. 2022) ("The evidence presented at trial makes clear that Walgreens, the dominant retail pharmacy chain in San Francisco, which had a history of failing to comply with federal regulations, filled a significant volume of illegitimate opioid prescriptions.").

190. *Id.* at 1000.

191. Spencer, *supra* note 21, at 60.

192. 4 WILLIAM BLACKSTONE, COMMENTARIES *110.

193. *See* Gifford, *supra* note 31, at 800–01.

194. Prosser, *supra* note 17, at 1000 (footnote omitted).

195. People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 601, 604 (Cal. 1997).

196. *See* Gifford, *supra* note 31, at 777.

nuisance is to "protect the quality of organized social life."[197] This principle justified the abatement of problem properties in the days of Sheppard and Blackstone and thus marks a common law continuance, not a departure. And in 2015, the Second District Court of Appeals in *Benetatos v. City of Los Angeles* affirmed the classification of a restaurant as a public nuisance because its operation created a condition of lawless blight that attracted loitering, drinking, drug dealing, prostitution, and violence on the property.[198]

Opioid addiction has similarly ravaged the quality of organized social life in cities by turning parks and neighborhoods into lawless dens of drug use, petty crime, and antisocial behavior. In San Francisco, open-air drug markets have taken over the Tenderloin neighborhood and United Nations Plaza, exposing local residents and visitors to blatant drug deals and drug use in streets strewn with garbage, feces, and needles.[199] Judge Breyer even noted that "outside this courthouse, people suffering from severe opioid addiction buy, sell, and use opioids in plain sight."[200] At United Nations Plaza, street vendors sell allegedly stolen goods on the sidewalk,[201] and some commentators have attributed San Francisco's increase in property crimes such as larceny, beginning in 2012, to people seeking money to purchase drugs.[202]

Opioid conditions thus interfere with the public morals by facilitating the type of petty criminality and vice that justifies the abatement of problem properties. One might criticize a common law conception of "public morals" as antiquated in the twenty-first century; certainly, public sentiment is far more understanding and lenient towards drug use and prostitution and far more critical of moralistic judgment. But even so, people still seem to respond negatively to illicit behavior in public. To provide just one example, in *Benetatos v. City of Los Angeles*, the record included a citizen's declaration from nearby residents and business owners lamenting the

197. *Gallo*, 929 P.2d at 604.

198. Benetatos v. City of Los Angeles, 186 Cal. Rptr. 3d 46, 58–59 (Ct. App. 2015).

199. *See, e.g.*, SHELLENBERGER, *supra* note 165, at 231; Trisha Thadani, *Disaster in Plain Sight*, S.F. CHRONICLE (Feb. 2, 2022, 7:30 PM), https://www.sfchronicle.com/projects/2022/sf-fentanyl-opioid-epidemic [https://perma.cc/3L34-3QEG]; *City Officials Detail Efforts to Target Open-Air Drug Dealing*, SF.GOV (Oct. 5, 2022), https://sf.gov/news/city-officials-detail-efforts-target-open-air-drug-dealing-0 [https://perma.cc/ZSK2-VJNK].

200. City & County of San Francisco v. Purdue Pharma L.P., 620 F. Supp. 3d 936, 946 (N.D. Cal. 2022).

201. *See* J.D. Morris, *San Francisco to Crack Down on Stolen Goods Resold on Sidewalks*, S.F. CHRONICLE (Mar. 9, 2022, 6:25 PM), https://www.sfchronicle.com/sf/article/San-Francisco-seeks-to-crackdown-on-stolen-goods-16985089.php [https://perma.cc/CXE2-EAD3].

202. *See* SHELLENBERGER, *supra* note 165, at 192–94.

violence and prostitution outside the restaurant.[203] In fact, the Los Angeles Police Department launched its nuisance investigation *in response* to "recent complaints,"[204] presumably from neighbors. And in San Francisco, the successful recall in June 2022 of progressive San Francisco District Attorney Chesa Boudin, who was criticized as being soft on crime, suggests an increasing frustration among residents with quality of life and lawless behavior that the government has failed to address.[205]

C. DISTINGUISHING OPIOIDS WITH OTHER PRODUCTS

The courts and critics that categorically refuse to apply public nuisance to products might be right to note that California's recognition of a public right "to housing that does not poison children"[206] is essentially the same as a right to not be negligently injured, which the *Second Restatement* explicitly characterizes as a private, rather than public, right.[207] This reasoning adheres to a traditionalist understanding of public nuisance and distinguishes it from legislatively authorized product liability law.

Other critics have argued the history of public nuisance paints a more complicated picture. Kendrick has looked to the "common nuisances" William Sheppard listed in the 1660s—"victuallers, butchers, bakers, cooks, brewers, maltsters and apothecaries who sell *products* unfit for human consumption"—and questioned whether "there [is] some fine distinction between the *activity* of selling products and *products* themselves."[208] And Dana has argued that while product liability law has been legislatively authorized, it is also a "common law creation of the courts," so courts should have the authority to "interpret it to leave space for products-based public nuisance claims."[209]

But this Note primarily argues that opioid addiction has obstructed public space much like the canonical highway blockage and offended public morals much like the canonical problem property. Opioids can therefore be

203. *Benetatos*, 186 Cal. Rptr. 3d at 53 ("[W]e have our babies over there in that community, and we need to look out for our babies that's our future, and something need to be done. I mean, it's no way that should be going on." (quoting a citizen in the declaration)).

204. *Id.* at 49.

205. *See* Nellie Bowles, *How San Francisco Became a Failed City*, ATLANTIC (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/how-san-francisco-became-failed-city/661199 [https://perma.cc/AXP7-9X4R] ("During his campaign, Boudin said he wouldn't prosecute quality-of-life crimes.").

206. People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 552 (Ct. App. 2017).

207. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. L. INST. 1979). *But see* Kendrick, *supra* note 4, at 750 (arguing that the common law conception of public rights, as outlined by Sheppard and Blackstone, encompassed "individualized rights when threatened in the aggregate").

208. Kendrick, *supra* note 4, at 738.

209. Dana, *supra* note 16, at 99.

readily distinguished from other products such as lead paint. The former causes tangible harm to the public square, while the latter causes harm within the privacy of the home. The condition of opioid addiction, not unlike the toxic waste in *Hooker II*, has spilled over onto public sidewalks, parks, and libraries, requiring expensive clean up, emergency response, and social services to abate. And as in *Hooker II*, in which the chemical company was still liable after selling the toxic dump site, those responsible for the opioid epidemic should not escape liability on the basis that they no longer control the condition that gave rise to the nuisance. Accordingly, the categorical stance against products fails to protect long-recognized public rights from interference.

Thus, the California court of appeal holding in *ConAgra Grocery Products*, that lead paint interferes with a public right "to housing that does not poison children,"[210] is incongruous with the common law understanding of public nuisance. But California's flexible treatment of public rights should not encourage other states to dismiss public nuisance claims concerning products if those products interfere with traditionally recognized public rights, as opioids do.

D. ADDRESSING COUNTER ARGUMENTS

This Section will address three counterarguments[211]: (1) opioid defendants are not the proximate cause of the interference with public rights, (2) misguided city policy, rather than opioid addiction, is responsible for the public nuisance in San Francisco, and (3) a flood of litigation will ensue if public nuisance is extended to harms caused by legal products.

1. Proximate Cause Objection

This Note argues that opioid addiction interferes with public rights; nonetheless, even accepting that such an interference has taken place, one might counter that defendants such as Walgreens are not the proximate cause of the interference. In California, proximate causation is an element of a prima facie public nuisance claim,[212] and in a typical action, the causal chain is quite clear: a defendant's unreasonable conduct creates a harmful condition, and that condition interferes with public rights. For example, a man who digs a ditch in a road has created a condition that interferes with

210. People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 552 (Ct. App. 2017).

211. This Section does not address all potential critiques to my argument. For a thorough overview of the critiques of public nuisance claims in the context of opioids, see generally Kendrick, *supra* note 4 (summarizing traditionalist, formalist, and institutionalist objections to public nuisance claims against products and rebutting them in turn).

212. City & County of San Francisco v. Purdue Pharma L.P., 620 F. Supp. 3d 936, 1002 (N.D. Cal. 2022).

public convenience. However, a defendant's conduct in opioid cases—whether that be misleading advertising by manufacturers or negligent supervision of red-flag prescriptions by pharmacies—results in an interference with public rights only because of the intervening action of opioid users. The principle of *novus actus interveniens* would suggest that opioid manufacturers and pharmacies could not be held liable for the behavior of opioid users because their independent wrongdoing marks a break in the causal chain.

However, the stranglehold of opioid addiction can cause a person to spurn employment, family, shelter, and ultimately life itself, distinguishing opioids from other products such as guns that bear no influence over the free will of their user. As Judge Breyer noted, opioids can ensnare even unsuspecting patients into helpless addiction, making downstream consequences such as "crime, homelessness, and destruction of city property" foreseeable.[213] Moreover, just as the crimes of intervening third parties did not absolve the restaurant owner in *Benetatos v. City of Los Angeles* of public nuisance liability because the owner failed to ameliorate the blighted condition of his property, here, the intervening behavior of opioid addicts should not absolve manufacturers, dispensers, and pharmacies from contributing to the underlying condition that perpetuates this behavior.

2. The Role of Public Policy

One could also argue that progressive policies, rather than manufacturers and pharmacies, are the cause of the interference with public rights in San Francisco. At least since the Summer of Love in 1967, San Francisco has earned a worldwide reputation for being tolerant towards drug use and homelessness.[214] But following the punitive and, in retrospect, controversial state response to the 1980s crack-cocaine epidemic and the violence it generated, California voters embraced policies more lenient towards drug possession and use. In 2000, voters passed Proposition 36, which required that "people convicted of the possession, use, or transportation of controlled substances and similar parole violations, except sale or manufacture of drugs, receive probation and drug treatment, rather than incarceration."[215] Similarly, in 2014, voters passed Proposition 47, which recategorized a variety of nonviolent crimes, including personal use of most illegal drugs and shoplifting of property less than $950, as

213. *Id.* at 1007.

214. *See* SHELLENBERGER, *supra* note 165, at 54–55.

215. *California Proposition 36, Probation and Treatment for Drug-Related Offenses Initiative (2000)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_36,_Probation_and_Treatment_for_Drug-Related_Offenses_Initiative_(2000) [https://perma.cc/SAT9-ZPJN].

misdemeanors.[216] And beginning in 2009, cities such as Los Angeles and San Francisco implemented a "Housing First" approach to homelessness that offers housing with no condition on sobriety.[217] Critics of these policies argue that it has prevented law enforcement from compelling drug treatment for offenders and from policing crimes such as shoplifting and petty theft that provide those suffering from addiction with the cash to fund their drug use.[218]

While these policies have likely exacerbated the opioid epidemic's impact on civic order, evidence suggests that opioid addiction has inflicted similar community harm in other states. For example, in the red state of Kentucky, a "county-level survey commissioned by Purdue . . . revealed that '[9] out of 10 [people surveyed] agreed that OxyContin had a 'devastating effect' on the community.' "[219] Thus, it would be inaccurate to categorically claim that opioid addiction does not interfere with public rights.

3. Concerns About a Flood of Litigation

Many critics contend that if courts extend public nuisance to opioids, then courts would be flooded with product liability suits disguised as public nuisance suits for potentially any legal product that, when misused, causes harm. The middle-road understanding of public nuisance that this Note champions recognizes two primary constraints that should assuage this concern.

First, a product must interfere with a public right to create a public nuisance. As Dana has noted, this requirement distinguishes public nuisance from product liability law because the latter is "focused on the harms specifically borne by discrete individuals, such as individual loss of earning power, medical expenses, and pain and suffering."[220] By categorically refusing to apply public nuisance to harms from products, courts may hamper government ability to counteract actual infringements on public rights.

Opposing this categorical view, some critics argue that a dogmatic, traditionalist understanding of public nuisance inhibits the doctrine's potential as a stopgap measure when regulation fails to protect the public. Kendrick has stated that courts and scholars should "interpret the concept of

216. *California Proposition 47, Reduced Penalties for Some Crimes Initiative (2014)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_47,_Reduced_Penalties_for_Some_Crimes_Initiative_(2014) [https://perma.cc/K27L-UMZV].

217. *See* SHELLENBERGER, *supra* note 165, at 58.

218. *See, e.g.*, *id.* at 57–58.

219. Kendrick, *supra* note 4, at 753–54 (detailing "[i]llegal drug deals . . . in hospital parking lots and school zones," "[c]oal miners snort[ing] painkillers on the job," and "FedEx trucks being knocked off").

220. *See* Dana, *supra* note 16, at 100.

'public rights' more loosely" and believes that an aggregation of a large number of private harms from products should support a public nuisance claim.[221] Citing early common law cases and broadly worded public nuisance statutes in America, she argues "contemporary formalist tendencies have gone too far."[222] California's statute supports her view.[223]

Kendrick's approach, while persuasive, would likely not convince skeptical courts concerned about a flood of litigation. Such concerns are warranted: in the decades following the successful Master Settlement Agreement with tobacco companies, public nuisance claims have proliferated against companies for harms the doctrine has not traditionally redressed.[224] Take opioids: the consolidated MDL litigation in federal court consists of 3,000 lawsuits brought by tribes, municipalities, counties, and states as of October 2022 while separate actions have been brought in state court.[225] Unlike the tobacco litigation, in which the attorneys general of all fifty states sued tobacco companies and coordinated an all-encompassing settlement, the opioid litigation features a far greater number of plaintiffs and defendants, complicating an efficient pathway to settle all future claims. Understandably, this litigation presents a "genuinely terrifying" prospect for defendants.[226]

The public nuisance litigation against Juul Labs Inc., which allegedly marketed its e-cigarette and fruit-flavored vapor to youth and downplayed the vapor's high nicotine content, is another example. Even though these lawsuits have garnered over $1 billion in settlements with forty-seven states and territories and more than five thousand individuals, school districts, and local governments, once Juul withdrew many of its popular flavors in response to regulatory and public pressure, competitors swarmed the market with fruit-flavored alternatives, presenting "an enforcement dilemma" for the FDA, which has only authorized "fewer than two dozen vaping products."[227] Unlike the centralized state-led tobacco litigation, plaintiff lawyers representing *school districts* joined the fray and shared in the

221. *See* Kendrick, *supra* note 4, at 750.

222. *See id.* at 750–52.

223. *See id.* at 751. California's statute states that a nuisance is public (rather than private) if it affects a "considerable number of persons." CAL. CIV. CODE § 3480 (West 2023).

224. *See, e.g.*, Kendrick, *supra* note 4, at 705–06 (footnotes omitted) ("[Public nuisance] has also spurred hundreds of mostly unsuccessful actions across the nation involving, among other things, handguns, lead contamination, water pollution, and predatory lending.").

225. *Id.* at 732.

226. Engstrom & Rabin, *supra* note 52, at 339–40.

227. *See* Christina Jewett & Julie Creswell, *Juul Reaches $462 Million Settlement with New York, California and Other States*, N.Y. TIMES (Apr. 12, 2023), https://www.nytimes.com/2023/04/12/health/juul-vaping-settlement-new-york-california.html [https://web.archive.org/web/20231011202337/https://www.nytimes.com/2023/04/12/health/juul-vaping-settlement-new-york-california.html].

settlements under a tenuous public nuisance theory, and now these plaintiff lawyers and school districts are bringing similar actions against social media companies.[228]

Thus, critics hold legitimate concerns that public nuisance gives plaintiff lawyers "the ability to intimidate market participants and reshape the economy without ever scoring a conclusive win in a courtroom (never mind a legislature)."[229] Indeed, the uncoordinated nature of the opioid and Juul litigation and the substitution of prescription opioids and Juul e-cigarettes with alternatives that evade a similar state crackdown raise important questions about whether these suits are more about abatement or more about sharing in the spoils of a company's downfall, like some communal feast on the savanna after a large lion is outnumbered and slain. Because a public nuisance doctrine in which a large number of private injuries could satisfy the public rights element might result in even more litigation, public nuisance should only redress harms that interfere with traditional public rights.

Second, the other elements in a prima facie public nuisance claim should prevent a flood of litigation against makers of legal products. For example, in California, public nuisance claims require a showing that a party has "knowledge that its unreasonable conduct caused a substantial interference with a right common to the public."[230] Even if a state can prove a defendant interfered with a public right, the state still must demonstrate the defendant's conduct was unreasonable and the cause of the interference. For example, a California state court held that opioid manufacturers were not liable for creating a public nuisance because the state's evidence of a statistical increase in statewide prescriptions did not prove that false marketing caused medically inappropriate prescriptions.[231] With no evidence of inappropriate prescriptions, the court found that the marketing was reasonable because the social utility of medically appropriate prescriptions outweighs any harm they might cause.[232] The *Second Restatement* and many states also require, at a minimum, knowledge of unreasonable risk for a

228. Cyrus Farivar, *School Districts Took on Juul with a Novel Legal Strategy. Now They're Going After Social Media Giants*, FORBES (Apr. 18, 2023, 6:30 AM), https://www.forbes.com/sites/cyrusfarivar/2023/04/18/school-districts-took-on-juul-with-a-novel-legal-strategy-now-theyre-going-after-social-media-giants [https://perma.cc/2FNG-2J8V].

229. David B. Rivkin Jr. & O.H. Skinner, Opinion, *The 'Public Nuisance' Menace*, WALL. ST. J. (Aug. 16, 2023, 1:25 PM), https://www.wsj.com/articles/public-nuisance-gun-pharma-car-theft-pollution-fossil-fuels-trial-lawyer-settlement-abuse-power-f45a8581 [https://archive.ph/xL6fX].

230. City & County of San Francisco v. Purdue Pharma L.P., 620 F. Supp. 3d 936, 998 (N.D. Cal. 2022).

231. People v. Purdue Pharma L.P., No. 30-2014-00725287-CU-BT-CXC, 2021 Cal. Super. LEXIS 31743, at *2, *10 (Dec. 14, 2021).

232. *Id.* at *18.

defendant to be liable for public nuisance, so this same burden of proof applies elsewhere.[233] Therefore, if a product has social utility and is sold legally, then a plaintiff must satisfy a high burden of proof to show a defendant acted unreasonably.

CONCLUSION

A daunting drug epidemic confronts the United States and its institutions. Drug overdose deaths are at historic highs, and more than four out of five Americans who need treatment for illicit drug use do not receive it.[234] Voracious demand for drugs has poured billions into coffers of drug traffickers, who internationally "threaten[] global stability" and domestically "contribute to public health challenges and violence."[235] *City & County of San Francisco v. Purdue Pharma L.P.* provides an indelible account of the impact of addiction on civic order. Those who argue that legal products cannot interfere with public rights need only visit San Francisco's sidewalks, parks, and libraries. There, opioid addiction interferes with public rights by obstructing public space and exposing residents to illicit behavior that, at the least, is offensive to witness in broad daylight and, at the most, poses a legitimate threat to safety and health.

While the opioid litigation appears to be in its final phase,[236] public nuisance should have the flexibility to address infringements on traditional public rights—even if caused by a legal product. Future products may pose novel threats to public rights and, like opioids, may require action from all branches of government. The middle-ground approach to public nuisance outlined in this Note would achieve this end.

233. *See* Kendrick, *supra* note 4, at 756–58. Some states require a higher burden of proof: either negligence or violation of a statute. *See id.*

234. *Fact Sheet: Addressing Addiction and the Overdose Epidemic*, WHITE HOUSE: BRIEFING ROOM (Mar. 1, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/01/fact-sheet-addressing-addiction-and-the-overdose-epidemic [https://perma.cc/FSN4-98CN].

235. *Id.*

236. *See supra* Section II.B (detailing the comprehensive settlements that many of the largest manufacturers, distributers, and pharmacies have reached with public plaintiffs).