GUNS, PUBLIC NUISANCE, AND THE PLCAA: A PUBLIC HEALTH-INSPIRED LEGAL ANALYSIS OF THE PREDICATE EXCEPTION*

I. INTRODUCTION

Imagine the "telum." In 2006, telum in the United States killed roughly 31,000 people[1] and injured an additional 71,000.[2] From 1965 to 2004, aside from motor vehicle accidents, telum was the leading cause of injury-related death in the United States,[3] taking the lives of 1,250,803 people.[4] Throughout its history, America has sought to protect its people from environmental and social forces that unduly threaten health and safety. Whether risks to the public's health arose from unsafe working conditions, infectious disease, or dangerous products, governments in the United States have executed their duty to mitigate the harm through regulation.[5] Appropriately, telum (hereinafter "firearms" or "guns") are subject to similar intervention.

Regulation to promote public health has taken many forms: mandatory disease intervention,[6] attempts to deter risky behavior through conditional funding[7] and excise taxes,[8] categorical bans on dangerous products,[9] and regimes that ensure safer product

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1. Melonie Heron et al., *Deaths: Final Data for 2006*, NAT'L VITAL STAT. REP., Apr. 17, 2009, at 1, 89. While telum means "weapon" in Latin, the term is used here—with artistic license—as a placeholder for "firearms."

2. CTRS. FOR DISEASE CONTROL & PREVENTION, WISQARS NONFATAL INJURY REPORTS, http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html (select "All intents"; "Firearms"; then enter year "2006 to 2006"; then click "Submit Request") (last visited Aug. 10, 2011).

3. *See* LOIS A. FINGERHUT & ROBERT N. ANDERSON, NAT'L CTR. FOR HEALTH STATS., THE THREE LEADING CAUSES OF INJURY MORTALITY IN THE UNITED STATES, 1999–2005, at 2–3 (2008) (noting that, for at least the forty years prior to 2004, firearms and motor vehicle accidents were the two leading causes of death).

4. VIOLENCE POLICY CTR., NUMBER AND RATES OF FIREARM MORTALITY–UNITED STATES, 1965 TO 2004, at 2 (2004), *available at* http://www.vpc.org/fact_sht/fadeathwithrates65-04.pdf.

5. *See, e.g.*, Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. § 651 (2006) (requiring safe work environments); Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905) (holding state mandatory vaccination laws constitutional); Michelle Meadows, *Promoting Safe and Effective Drugs for 100 Years*, FDA CONSUMER MAGAZINE, Jan.–Feb. 2006, *available at* http://www.fda.gov/AboutFDA/WhatWeDo/History/CentennialofFDA/CentennialEditionofFDAConsumer/ucm093787.htm (discussing history of dangerous-drug regulations in United States).

6. *See, e.g.*, 3 PA. CONS. STAT. § 2329 (2010) (authorizing department of health to quarantine animals infected with dangerous transmissible disease); *Jacobson*, 197 U.S. at 39 (upholding mandatory vaccine program).

7. *See, e.g.*, 23 U.S.C. § 158 (2006) (withholding federal highway money to states that do not impose drinking age limit of twenty-one).

8. *E.g.*, Proposition 99, CAL. REV. & TAX. CODE §§ 30121–30130 (West 2008) (imposing excise tax on cigarettes).

9. *E.g.*, 16 C.F.R. § 1303.4 (2010) (banning lead paint).

design[10] to name a few. Litigation has also served as a crucial regulatory mechanism.[11] Some of the earliest public health legal interventions were lawsuits seeking the abatement of certain activity deemed to be a public nuisance.[12] More recently, a multistate lawsuit led the tobacco industry to institute measures aimed at reducing smoking, including restrictions on marketing, lobbying, and youth access.[13]

Firearms obviously impact the public's health and, accordingly, are regulated in the United States.[14] Nevertheless, the 30,000-plus deaths and 70,000-plus injuries guns cause annually demonstrate that mitigating the harmful effects of guns requires greater intervention than is provided for under the existing regulatory regime.

Assessing the epidemiology of gun violence[15]—its causes, incidence, and distribution[16]—is essential to addressing the public health impact of firearms. Researchers have found that firearms disproportionately affect the health of certain populations, and that particular characteristics of these populations contribute to the disparate impact.[17] Notably, in these populations illegally owned and unnecessarily dangerous firearms contribute disproportionately to gun morbidity and mortality.[18] Additionally, many of the firearms impacting high gun-violence areas, where regulations are typically stronger, were originally sold in regions with weaker gun regulations.[19]

In an attempt to fill the regulatory gaps which result in firearm design and distribution that negatively impact public health, local and state governments as well as individuals have sued firearm manufacturers and dealers.[20] Plaintiffs typically claim that defendants knowingly or negligently distributed and marketed firearms and/or manufactured unnecessarily dangerous guns.[21] Often, plaintiffs allege that these activities create a public nuisance and seek an injunction abating the nuisance.[22] The result has been an interesting intersection of law and public health.

10. *See, e.g.*, Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 355 (2006) (setting safety control standards for new drugs).

11. *See generally* REGULATION THROUGH LITIGATION (W. Kip Viscusi ed., 2002).

12. See *infra* Part II.C.1.b for a discussion of public nuisance's role in public health legal intervention in the United States.

13. Richard A. Daynard et al., *Implications for Tobacco Control of the Multistate Tobacco Settlement*, 91 AM. J. PUB. HEALTH 1967, 1968–69 (2001).

14. See *infra* notes 106–09, 282–94, and accompanying text for a discussion of U.S. firearm laws.

15. "Gun violence" in this Comment refers to all physical gunshot injuries and includes assaults, homicides, suicides, and unintentional injuries.

16. *See* AMERICAN HERITAGE SCIENCE DICTIONARY 211 (2005) (defining epidemiology as "[t]he scientific study of the causes, distribution, and control of disease in populations").

17. See *infra* notes 89–104 and accompanying text for a discussion of the epidemiology of gun violence.

18. See *infra* Part II.C.1.a for a discussion of how the distribution and design of firearms are associated with increased gun violence.

19. See *infra* note 104 and accompanying text for a discussion of research illustrating this point.

20. See *infra* Part II.C for a discussion of gun industry lawsuits.

21. *E.g.*, Johnson v. Bryco Arms, 304 F. Supp. 2d 383, 399–400 (E.D.N.Y. 2004) (alleging negligent distribution and design defect); City of Philadelphia v. Beretta U.S.A., Corp., 126 F. Supp. 2d 882, 888–89 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002) (alleging negligent distribution)

22. *E.g.*, City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 389 (2d Cir. 2008); *Johnson*, 304 F. Supp. 2d at 398; *Philadelphia*, 126 F. Supp. 2d at 888–96.

In 2005, the atmosphere of gun industry litigation changed dramatically when Congress passed the Protection of Lawful Commerce in Arms Act (PLCAA).[23] The PLCAA prohibits pending and future civil lawsuits against the gun industry, with several exceptions. This Comment will focus on one of these exceptions, called the "predicate exception," which permits lawsuits alleging violation of a statute "applicable to the sale or marketing of [firearms]."[24] Three recent appellate court decisions have examined whether a lawsuit alleging a violation of a state public nuisance statute falls within the predicate exception.[25] The Second and Ninth Circuits found that the related public nuisance statutes were not applicable to the sale or marketing of firearms and dismissed those causes of action.[26] The Indiana Court of Appeals, however, held that the Indiana public nuisance statute was applicable.[27] The three courts arrived at their decisions differently, but their analyses share a common trait: the lack of a public health perspective.

This Comment will both (1) illustrate why a public health perspective should be included when addressing whether statutory public nuisance claims qualify for the PLCAA's predicate exception and (2) demonstrate how a public health perspective would influence a court's analysis. As will be shown, incorporating a public health perspective would lead to the reasonable and judicially sound conclusion that the PLCAA's predicate exception exempts statutory public nuisance suits from federal preemption.

Before engaging in the statutory analysis, Part II.A discusses the necessity and utility of considering public health in legal decision making. This section outlines what law and public health scholar Wendy Parmet has coined "population-based legal analysis."[28] Premised on public health's rich tradition as a fundamental legal norm, a population-based legal analysis provides the analytical tools by which legal decision makers can recapture this norm.[29]

Part II.B discusses the public health impact of firearms. Part II.C provides background on gun industry lawsuits and the public health utility of gun industry litigation. It also looks at the public health tradition of public nuisance litigation. Lastly, it examines the PLCAA. Part II.D then outlines the three judicial decisions that have ruled on whether statutory public nuisance claims are exempted from the PLCAA by the predicate exception.

Part III.A argues that courts should incorporate a public health perspective in addressing this question because of the public health implications involved and the jurisprudential tradition of treating public health as a legal norm. Part III.B illustrates how a public health perspective can reveal the inherent public health objectives of the predicate exception. Part III.C demonstrates how a population-based perspective would

23. Pub. L. No. 109-92, §§ 2–4, 119 Stat. 2095 (codified at 15 U.S.C. §§ 7901–7903 (2006)).

24. 15 U.S.C. § 7903(5)(A)(iii).

25. Ileto v. Glock, Inc., 565 F.3d 1126 (9th Cir. 2009); *Beretta*, 524 F.3d 384; Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422 (Ind. Ct. App. 2007).

26. *Beretta*, 524 F.3d at 404.; *Ileto*, 565 F.3d at 1236.

27. *Smith & Wesson*, 875 N.E.2d at 434.

28. WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 2 (2009).

29. See *infra* Parts II.A.2 and II.A.3 for discussion of public health-inspired analytical devices.

expand judicial deliberations on the causes of gun violence to include the social determinants of gun morbidity and mortality. Part IV concludes by positing that a public health perspective would likely lead a court to determine that a statutory public nuisance action is not prohibited by the PLCAA.

II. OVERVIEW

A. A Population-Based Legal Analysis

Law affects public health in two basic ways.[30] First, "law forms the basis for organizing, empowering, and limiting" society's public health interventions.[31] Second, law helps create social determinants of health—the social conditions that are associated with public health outcomes.[32]

Recognizing that law has significant impacts on public health, one legal scholar, Wendy Parmet, has constructed a framework through which lawyers, judges, and policy makers can analyze legal questions and justly consider the public health ramifications of their decisions.[33] By emphasizing the importance of public health and incorporating public health's methodologies, Parmet's population-based legal analysis "offers a public health-inspired approach to law."[34] At the heart of population-based legal analysis is the recognition that protecting public health is a fundamental rationale for law in the United States.[35]

1. Population Health as a Legal Norm

Central to a public health-inspired legal analysis is the recognition that public health is and always has been "both a rationale for law and a chief value of law."[36] Because public health has played a key role in the development of law in the United

30. The Institute of Medicine defines public health as "what we, as a society, do collectively to assure the conditions for people to be healthy." INST. OF MED., THE FUTURE OF PUBLIC HEALTH 19 (1988). The term is also used to describe "'the health of the population as a whole.'" PARMET, *supra* note 28, at 7 (quoting OXFORD ENGLISH DICTIONARY (2009)). For this Comment, it is important simply to understand that public health concerns the health of the population rather than the individual and is forward looking (i.e., preventive rather than reactive).

31. PARMET, *supra* note 28, at 31. This mode includes laws that authorize public health boards, regulations directed at making the public healthier, judicial decisions balancing individual rights against the state's police power to promote health and safety, and litigation contesting liability for a party's conduct that threatened the health of others. *Id.* at 31–32.

32. *See* Scott Burris et al., *Integrating Law and Social Epidemiology*, 30 J.L. MED. & ETHICS 510, 510 (2002). Law creates social determinants of health by organizing and structuring society, thus determining the different environmental forces that impact people's health. *Id.* at 511. Law also serves as a pathway along which these social determinants of health impact people's lives. *Id.*

33. PARMET, *supra* note 28, at 52.

34. *Id.* at 52. Parmet is quick to point out that her analytical model is not a comprehensive theory of law, nor does it endeavor to provide firm answers to particular questions. *Id.* Rather population-based legal analysis presents "a set of values for and approaches to legal reasoning" that provides guidance for making and critiquing legal decisions. *Id.*

35. *Id.* at 2.

36. *Id.* at 56.

States, and the law recognizes public health as a fundamental objective, legal decision makers are justified in treating the promotion of public health as a valued legal norm.[37]

Parmet outlines three pathways along which public health has influenced the development of American law: (1) courts and lawmaking bodies have been called upon to deal with the major health threats of each era; (2) many legal doctrines, including tort law, constitutional law, and administrative law, reflect the tensions between society's efforts to safeguard both public health and individual rights; and (3) the reciprocal relationship of law and public health wherein law shapes the social and economic factors that impact public health, while the health of a population shapes the social and political agenda for law and policymaking.[38]

In all of these contexts, public health has served as a philosophical rationale for law. The common law maxim, *salus populi suprema lex*, "the well-being of the community is the highest law," encapsulates this concept.[39] Courts invoked this maxim in many of the early American public health decisions.[40] Social contract theory also underlies much of American law,[41] and its tenets provided the basis for the U.S. Supreme Court's seminal public health decision, *Jacobson v. Massachusetts*.[42] There, the Court upheld mandatory smallpox vaccination, holding that in some instances individual liberty must submit to "manifold restraints" where necessary to safeguard the public's health.[43] Later, popular legal theories about law and economics, as well as utilitarianism, relied on maximizing the well-being of the greatest number of people.[44]

Public health's value as a legal norm also derives from the American jurisprudential tradition of recognizing public health as a goal of law.[45] Lawrence Gostin emphasizes the public health objectives inherent in the federal "constitutional design."[46] He notes that the U.S. Constitution's directive to "provide for the common defence [and] promote the general Welfare," vests power in the federal government to protect public health and safety, which, during that era, was threatened predominately by epidemic disease.[47] Gostin also highlights that the Supreme Court, as early as 1824,

37. *Id.*

38. *Id.* at 36–37.

39. *Id.* at 1.

40. *See, e.g.*, Boyd v. City Council, 23 So. 663, 664 (Ala. 1898) (upholding slaughterhouse regulations); Segregation of Lepers, 5 Haw. 162, 166–67 (1884) (upholding quarantine for lepers); Seavy v. Preble, 64 Me. 120, 123 (1874) (finding city physician not liable in trespass for removing wall paper likely contaminated with smallpox).

41. PARMET, *supra* note 28, at 14–15 (citing JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 123, at 15–34 (C.B. Macpherson ed., Hackett Pub. Co. 1980) (1690)).

42. 197 U.S. 11 (1905).

43. *Jacobson*, 197 U.S. at 26–27. The Court articulated this police power rationale in terms of the social compact: "[T]he whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for 'the common good.'" *Id.* at 27. In addition to affirming the state's public health authority under its police power, the Court also endorsed public health boards as key tools for protecting public health. *Id.* at 25.

44. PARMET, *supra* note 28, at 15–16.

45. *Id.* at 56–58.

46. Lawrence O. Gostin, *Public Health Law in a New Century—Part I: Law as a Tool to Advance the Community's Health*, 283 JAMA 2837, 2837–38 (2000).

47. *Id.* at 2838 (alteration in original) (quoting U.S. CONST. pmbl.).

recognized that the constitutional design reserved pervasive power in the states to protect the population's health.[48] State and federal judiciaries showed substantial deference to states' public health powers well into the twentieth century,[49] and though public health's role in U.S. law declined later in the century,[50] the Supreme Court still values deference to public health officials when population health is threatened.[51]

The practical significance of recognizing population health as a legal norm is obvious—courts will be inclined to rule in favor of promoting public health.[52] Lawyers and judges applying population-based legal reasoning will treat the promotion of public health "as akin to other widely recognized legal values such as fidelity to precedent or objectivity of the decision maker."[53]

Parmet cites *Supreme Beef Processors, Inc. v. USDA* to show how population-based legal reasoning would alter traditional analysis in a case.[54] In *Supreme Beef*, a meat plant and substantial supplier to the federal school lunch program sued the United States Department of Agriculture (USDA). The meat plant claimed the USDA lacked authority to require meat plants to limit the distribution of meat containing salmonella.[55] The USDA had statutory authority to prohibit meat processors from selling "adulterated" meat, and so the question before the Fifth Circuit was whether meat with salmonella could be considered "adulterated" under the statute.[56] Despite the fact that the statute intended to safeguard the public from unsafe meat, the court held that USDA lacked authority to enforce the regulation on the plant.[57] The court found that salmonella is not a per se adulterant because proper cooking can destroy salmonella.[58] It further reasoned that because meat arrived at the plant already contaminated, it could not be "adulterated meat" as the plant had not "rendered" the meat unsafe.[59] Parmet argues that had the court valued public health as a legal norm, it would have read the ambiguity of the meanings of "rendered" and "adulterant" "in such

48. Lawrence O. Gostin, *Public Health Law in a New Century—Part II: Public Health Powers and Limits*, 283 JAMA 2979, 2981 (2000) (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 18–23 (1824) (holding that New York's regulation of interstate commerce violated Supremacy Clause but suggesting health laws do not because states have inherent authority to protect health)).

49. *See* Deborah Jones Merritt, *The Constitutional Balance Between Health and Liberty*, HASTINGS CENTER REP., Dec. 1986, at 2, 3–8 (outlining judiciary's approach to questions of public health and individual liberty); *see also* Buck v. Bell, 274 U.S. 200 (1927) (upholding compulsory eugenic sterilization); Varholy v. Sweat, 15 So. 2d 267 (Fla. 1943) (upholding quarantine); Gamble v. State, 333 S.W.2d 816 (Tenn. 1960) (upholding mandatory vaccination).

50. *See* PARMET, *supra* note 28, at 42–43 (discussing reasons for decline of public health's role in American law).

51. *See* Sch. Bd. v. Arline, 480 U.S. 273, 288 (1987) (stating that in determining whether to permit person with infectious disease to teach "courts normally should defer to the reasonable medical judgments of public health officials").

52. PARMET, *supra* note 28, at 63.

53. *Id.* at 57.

54. *Id.* at 60–63 (citing Supreme Beef Processors, Inc. v. USDA, 275 F.3d 432 (5th Cir. 2001)).

55. *Supreme Beef*, 275 F.3d at 436.

56. *Id.* at 434.

57. *Id.* at 441.

58. *Id.* at 439.

59. *Id.* at 434.

a way to realize the statute's explicit purpose of protecting 'the health and welfare of consumers.'"[60]

2. The Importance of Populations to and Within the Law

One of the primary goals of population-based legal analysis is to incorporate public health's "population perspective" into legal reasoning.[61] The population perspective focuses on how environmental and social factors affect population health, (i.e., are social determinants of health).[62] It shifts the focus from individuals to populations as the subjects and agents of events.[63] Understanding the population perspective is indispensable to an examination of how law and public health interact.

The population perspective recognizes that there is no singular "population." Rather, populations are multiple and contingent.[64] A "population" in public health is simply any group or number of people sharing some common trait.[65] Populations are essential to the study of public health (and public health law). Specifically, understanding why a certain group of people experiences a particular health problem requires looking at the social determinants of that health problem; ascertaining the social determinants of a health problem requires comparing populations exposed to different environmental and social influences.[66] A study by epidemiologist Geoffrey Rose on the causes of hypertension in British civil servants illustrates this point.[67]

Rose initially looked at the distribution of hypertension among a discrete population—civil servants in London.[68] He next ascertained the same distribution for Kenyan nomads.[69] He found both populations had roughly the same distribution of blood pressure *variation*, but the civil servants' blood pressure *rates* were shifted upward.[70] In other words, the two populations had a similar prevalence of higher-than-normal blood pressure, but what was "normal" among the civil servants was higher than the "normal" among the nomads. This revealed that there was some influence—a social determinant of hypertension—experienced by London's civil servants which was not experienced by the nomads. Without comparing the population of civil servants to a separate population, the existence of such a health determinant could not be detected because its influence impacted every civil servant equally.[71]

Incorporating the population perspective into legal analysis requires recognizing that law acts as a social determinant of health[72] and may affect different populations

60. PARMET, *supra* note 28, at 63 (quoting 21 U.S.C. § 602 (2006)).
61. *Id.* at 52.
62. *Id.* at 17.
63. *Id.* at 19.
64. *Id.* at 18.
65. *Id.*
66. *Id.* at 20.
67. Geoffrey Rose, *Sick Individuals and Sick Populations*, 14 INT'L J. EPIDEMIOLOGY 32 (1985).
68. *Id.* at 33–34.
69. *Id.*
70. *Id.* at 34.
71. *See id.*
72. *See* Burris et al., *supra* note 32, at 510 (discussing how law influences health outcomes).

differently.[73] In this sense, population-based legal analysis differs markedly from current legal discourse, which places individuals at the center.[74] Using the *Supreme Beef* example, Parmet states that had the court considered the population most at risk from salmonella poisoning (school children), it may have been more inclined to frame the issue as one of school children's health versus industry interests, rather than as the meat plant's liberty versus the USDA's authority to regulate.[75] Moreover, a court using a population-based legal analysis would have departed from the *Supreme Beef* court's logic that salmonella is not a per se adulterant simply because consumers can reduce the risk of salmonella poisoning through proper cooking.[76] As Parmet notes, this logic "locates 'injuriousness' or responsibility for it with individuals who fail to adequately cook their meat," whereas a population-based legal analysis might locate injuriousness with an environmental trait common to a vulnerable population (e.g., consumption of school-provided lunches).[77]

3. Incorporating the Methodologies of Public Health: Empirical and Probabilistic Reasoning

If legal decision makers wish to make public health a goal of law, they must understand how the issues before them will impact public health. To obtain this understanding, judges, lawyers, and policymakers must be informed by all relevant empirical data and fully attuned to their factual context.[78] While current legal discourse does include empirical evidence (the use of which is often criticized), ordinary legal analysis still relies primarily on deductive and analogical reasoning.[79] Moreover, while legal discourse typically disdains uncertainty and tends to avoid it,[80] courts must be willing to embrace probabilities and recognize the nuances of population health: namely, that the health risks and benefits of any policy are not black and white but "matters of degree."[81]

Using the *Supreme Beef* example, Parmet notes that the court's interpretation of the word "adulterant" relied overwhelmingly on a plain-language analysis of the word "rendered."[82] Recall, the court held that the meat plant did not render the meat injurious to health because the meat arrived at the plant already contaminated.[83] A court using a population-based legal analysis, however, would have asked whether plants with substandard infection-control measures distribute meat that is more likely to contain

73. PARMET, *supra* note 28, at 54.

74. *Id.* at 54–56.

75. *Id.* at 66.

76. Supreme Beef Processors, Inc. v. USDA, 275 F.3d 432, 439 (5th Cir. 2001).

77. PARMET, *supra* note 28, at 66.

78. *Id*. at 58–59.

79. *Id*. at 58.

80. *See id.* at 58–59 (stating that, although scientific data is available, courts and lawyers prefer non-empirical methodologies).

81. *Id*. at 58.

82. *Id.* at 68 (citing Supreme Beef Processors, Inc. v. USDA, 275 F.3d 432, 440 (5th Cir. 2001)).

83. *Supreme Beef*, 275 F.3d at 441.

salmonella than meat from plants with adequate procedures.[84] If that were the case, Parmet argues, it likely would impact a determination of whether the inadequate procedures rendered the meat harmful.[85] In light of that possibility, Parmet argues that a court in this situation must examine the relevant empirical data that may inform this decision.

Parmet admits that her model is not a comprehensive legal theory, nor is it a traditional analytical scheme that explains or realizes correct results in a particular area of law.[86] While her model has been criticized for its normative assumptions and impractical aims,[87] Parmet reminds us that, rather than endeavor to provide firm answers to a particular question, population-based legal analysis presents "a set of values for and approaches to legal reasoning" that can "guide a decision maker" and "offer a way to critique legal decisions."[88]

B. Gun Violence: The Public Health Perspective

A public health approach to gun violence requires an understanding of its epidemiology—the incidence, distribution, and causes of gun harm. First, the incidence of gun morbidity and mortality is well documented. In 2006, firearms killed over 30,800 people in the United States[89] and injured an additional 71,000.[90] The vast majority of the deaths resulted from homicides (12,791) and suicides (16,883).[91] In the forty years prior to 2004, firearms were the second leading cause of injury-related death in the United States and still rank second among people age ten to thirty-four.[92] A 1998 Centers for Disease Control study found the United States ranked first among the thirty-six wealthiest nations in firearm deaths per population.[93]

Second, gun harm is distributed differently across populations, that is, guns impact the health of different populations to varying degrees. For example, homicide is the leading cause of death for African American men ages fifteen through thirty-four,[94]

84. PARMET, *supra* note 28, at 68.

85. *Id.*

86. *Id.* at 52.

87. *See* Elizabeth Weeks Leonard, Book Review, 30 J. LEGAL MED. 427, 430 (2009) (reviewing PARMET, *supra* note 28) (expressing apprehension about Parmet's proposed scope of public health in law); Edward P. Richards, Book Review, 302 JAMA 691, 691 (2009) (reviewing PARMET, *supra* note 28) (proposing that population-based legal analysis is essentially utopian and, stripped of its rhetoric, simply a way to choose public health over other values).

88. PARMET, *supra* note 28, at 52.

89. Heron et al., *supra* note 1, at 11.

90. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 2.

91. Heron et al., *supra* note 1, at 11.

92. FINGERHUT & ANDERSON, *supra* note 3, at 2–3.

93. EG Krug et al., *Firearm-Related Deaths in the United States and 35 Other High- and Upper-Middle-Income Countries*, 27 INT'L J. EPIDEMIOLOGY 214, 218–19 (1998).

94. CTRS. FOR DISEASE CONTROL & PREVENTION, 10 LEADING CAUSES OF DEATH, UNITED STATES, 2007, BLACK, MALES, http://webappa.cdc.gov/sasweb/ncipc/leadcaus10.html#AdvancedOptions (last visited Aug. 11, 2011) (select Census Region: "United States"; Race: "Black"; Sex: "Males"; Year(s) of Report: "2007 to 2007"; Hispanic Origin: "All").

and guns account for two-thirds of these deaths.[95] Moreover, while the national homicide rate has been relatively static, the firearm homicide rate for young black and white men has increased substantially in recent years, particularly in large metropolitan areas.[96] Studies also show that populations with greater access to guns face a greater risk of harm.[97]

A public health approach must account for the distribution of gun violence's *secondary* effects as well. Several studies have highlighted the correlation between exposure to violence and psychological ailments such as post-traumatic stress disorder and depression.[98] Experiencing or witnessing violence has been shown to stunt development.[99] Additionally, healthcare costs for gunshot patients can be exorbitant. A study of U.S. gun injuries occurring in 1994, when approximately 134,500 people suffered fatal and nonfatal gunshot injuries, found that the injuries produced $2.3 billion in lifetime medical costs.[100] The authors estimated that taxpayers would cover about $1.1 billion of these costs.[101]

Finally, epidemiological studies have revealed a multitude of causative gun-violence factors beyond the simple intentional or accidental discharge by a person. For example, studies have found that gun design can cause gun injuries to be more lethal.[102] Several surveys have also shown a significant link between increased availability of

95. Guoqing Hu et al., *Hidden Homicide Increases in the USA, 1999–2005*, 85 J. URB. HEALTH 597, 597 (2008).

96. *Id.* at 601.

97. One study found the purchase of a handgun to be associated with a twofold increased risk of homicide and suicide. Peter Cummings et al., *The Association Between the Purchase of a Handgun and Homicide or Suicide*, 87 AM. J. PUB. HEALTH 974, 977 (1997); *see also* Philip J. Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, J. PUB. ECON. 379, 387 (2006) (finding increased gun prevalence associated with increased homicide rate and intensification of criminal violence). Another study found that a disproportionately high number of children were killed by guns in states and regions where guns were more prevalent. Mathew Miller et al., *Firearm Availability and Unintentional Firearm Deaths, Suicide, and Homicide Among 5–14 Year Olds*, 52 J. TRAUMA 267, 271 (2002).

98. Kevin M. Fitzpatrick & Janet P. Boldizar, *Prevalence and Consequences of Exposure to Violence Among African-American Youth*, 32 J. AM. ACAD. CHILD. & ADOLESCENT PSYCHIATRY 424, 424 (1993) (finding children exposed to violence suffer from post-traumatic stress disorder symptoms); Linda N. Freeman et al., *Violent Events Reported by Normal Urban School-Aged Children: Characteristics and Depression Correlates*, 94 PEDIATRICS 531, 531 (1994) (finding school children who experience violence are more depressed and suffer from excessive fear).

99. Mary E. Schwab-Stone et al., *No Safe Haven: A Study of Violence Exposure in an Urban Community*, 34 J. AM. ACAD. CHILD. & ADOLESCENT PSYCHIATRY 1343, 1343 (1995).

100. Philip J. Cook et al., *The Medical Costs of Gunshot Injuries in the United States*, 281 JAMA 447, 453 (1999).

101. *Id.*

102. *See, e.g.*, Philip J. Cook, *The Technology of Personal Violence*, *in* 14 CRIME AND JUSTICE 1, 21–22 (Michael Tonry ed., 1991) (noting that certain firearm designs cause more lethality); Franklin E. Zimring, *The Medium Is the Message: Firearm Caliber as a Determinant of Death from Assault*, 1 J. LEGAL STUD. 97, 105 (1972) (finding that higher gun caliber is associated with greater fatality rate). Other studies have tracked how the firearm market has led to increasingly lethal handguns. *E.g.*, Garen J. Wintemute, *The Relationship Between Firearm Design and Firearm Violence: Handguns in the 1990s*, 275 JAMA 1749, 1749–52 (1996).

firearms and gun morbidity and mortality.[103] Recent gun-trace data shows that many firearms used in crimes were originally sold in regions with weaker gun regulations before being used in high gun-violence areas with stricter controls.[104]

Although viewing gun violence through the lens of public health is a relatively recent development,[105] policy makers have long been aware of the strain gun violence can have on public health. As far back as the early nineteenth century, states and localities began passing firearm laws, with substantial regulation occurring by the turn of the twentieth century.[106] By enacting gun control laws pursuant to their police power, states acknowledged the connection between firearms and public welfare.[107] The most comprehensive federal gun control statute, the Gun Control Act of 1968,[108] although predating the shift to viewing firearms as a public health problem, was enacted largely in response to the increasing risk guns posed to public welfare.[109]

103. *E.g.*, Cook & Ludwig, *supra* note 97, at 387; Miller et al., *supra* note 97, at 271; Cummings et al., *supra* note 97, at 977. Note that this Comment does not attempt to provide a complete survey of epidemiological research on gun violence. The goal, instead, is to provide several pertinent examples.

104. MAYORS AGAINST ILLEGAL GUNS, TRACE THE GUNS: THE LINK BETWEEN GUN LAWS AND INTERSTATE GUN TRAFFICKING 3 (2010), *available at* http://www.mayorsagainstillegalguns.org/downloads /pdf/trace_the_guns_report.pdf ("There is a strong association between a state's gun laws and that state's propensity to export crime guns. . . . The ten states that supply guns at the highest rates have, on average, only 1.6 of [the 10 surveyed] regulations in place, whereas in the ten states that supply interstate crime guns at the lowest rates, the average is 8.4."); Press Release, Brady Campaign to Prevent Gun Violence, Newly Released Crime Gun Data Shows States with Weak Gun Laws Fuel Illegal Gun Market (Aug. 5, 2009), http://www.bradycampaign.org/media/press/view/1167 (concluding that ATF firearm trace data reveals states with strong gun laws have more success preventing diversion to illegal market and states with weak gun laws are substantial exporters of crime guns to other states); *see also* DOUGLAS S. WEIL, CTR. TO PREVENT HAND GUN VIOLENCE, TRAFFIC STOP: HOW THE BRADY ACT DISRUPTS INTERSTATE GUN TRAFFICKING 17 (1997), *available at* http://www.bradycenter.org/xshare/Facts/how-brady-disrupts-trafficking.pdf (finding that gun laws, including background checks and waiting periods, can reduce interstate trafficking of illegal guns); *cf.* BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, 2008 ATF FIREARMS TRACE DATA, ILLINOIS 6 (2009) (finding close to half of guns used in Illinois crime originated outside of state); BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, 2008 ATF FIREARMS TRACE DATA, NEW YORK 6 (2009) (finding vast majority of guns used in New York state crime originated outside of state).

105. *See* Julie Samia Mair et al., *A Public Health Perspective on Gun Violence Prevention*, *in* SUING THE GUN INDUSTRY 39, 39–40 (Timothy D. Lytton ed., 2005) (noting that gun violence has only come to be seen as public health issue in past few decades). Previously, firearm-injury prevention in the United States was examined largely through the modes that brought about firearm injuries—gun-related homicides and assaults were criminal problems, gun-related suicides required mental health approaches, and accidental shootings could be prevented by exercising more caution. *Id.* at 39.

106. Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 135 (1975).

107. In *District of Columbia v. Heller*, which held that a complete federal ban on handguns violated the Second Amendment, the United States Supreme Court explained that states have historically been free to restrict or protect gun rights under their police powers. 554 U.S. 570, 620 (2008). In 2010, the Court held that the Second Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment. McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010). Although the Court refrained from examining what regulations would be unconstitutional, it expressly reserved the authority of states to regulate firearm possession and sales so long as such regulations conform to the Second Amendment. *Id.* at 3047.

108. 18 U.S.C. §§ 921–31 (2006).

109. *See* H.R. REP. NO. 90-1577 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4412–13 (citing increasing use of firearms in violent crimes as rationale for stronger firearms regulation); *see also* Franklin E.

Nevertheless, not until injury prevention became a subfield of public health did researchers begin to aggregate gun deaths in their analyses and recognize the toll that guns take on the population's health.[110] In 1980, public health legal scholars investigating the epidemiology of gun violence proposed that the moments in the "life span" of a firearm where legal intervention could provide the biggest public health return are during its manufacturing and transfer phases.[111] This hypothesis eventually transformed into the theories underlying civil actions against the gun industry.[112]

C. Gun Industry Lawsuits: A Valuable Public Health Tool

Having identified effective opportunities to mitigate the impact of guns on public health, advocates have continued to lobby for two regulatory interventions at the manufacturing and distribution level that they believe will decrease the rate and severity of gun violence: safer firearm designs[113] and stricter marketing and distribution laws.[114] Specifically, they argue that incorporating devices in guns that can prevent unintended discharge would reduce the number of accidental gun injuries,[115] while regulations that keep guns out of the hands of youth and criminals would reduce intentional and unintentional injuries.[116] Despite the overwhelming support among public health advocates for such regulations, efforts to mandate these changes through legislation have largely failed.[117] In response, municipalities, advocates, and private plaintiffs have looked to the courts.

Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 144 (1975) (noting Gun Control Act was adopted during spike in firearm availability).

110. Mair et al., *supra* note 105, at 40.

111. Susan P. Baker et al., *Firearms and the Public Health*, 1 J. PUB. HEALTH POL'Y 224, 225–27 (1980).

112. See *infra* notes 122–31 and accompanying text for a discussion of the gun industry's alleged tortious conduct.

113. *See* Jon S. Vernick et al., *"I Didn't Know the Gun Was Loaded": An Examination of Two Safety Devices That Can Reduce the Risk of Unintentional Firearm Injuries*, 20 J. PUB. HEALTH POL'Y 427, 427–28 (1999) (discussing how loaded-chamber indicators and magazine safeties would prevent gun harm); Jon S. Vernick et al., *Unintentional and Undetermined Firearm Related Deaths: A Preventable Death Analysis for Three Safety Devices*, 9 INJ. PREVENTION 307, 307–311 (2003) (discussing how personalization devices, loaded-chamber indicators, and magazine safeties can reduce gun harm). At least one commentator has argued that market forces drive gun manufacturers to make increasingly lethal guns. *See generally* Tom Diaz, *The American Gun Industry: Designing & Marketing Increasingly Lethal Weapons*, *in* SUING THE GUN INDUSTRY, *supra* note 105, at 84, 95–100.

114. Mair et al., *supra* note 105, at 52–56.

115. *Id.* at 50–51.

116. *Id*. at 52–56.

117. *See, e.g.*, Brannon P. Denning, *In Defense of a "Thin" Second Amendment: Culture, the Constitution, and the Gun Control Debate*, 1 ALB. GOV'T L. REV. 419, 427 (2008) ("[T]he fact that Congress has not passed extensive federal gun control legislation since the late 1960s, and permitted the 1994 Assault Weapons Ban to expire, even in the wake of much-publicized shootings in schools like Columbine and Virginia Tech, suggests little political support for gun legislation like that common in Europe or Canada." (citations omitted)). *But see* Daniel W. Webster et al., *Effects of Maryland's Law Banning "Saturday Night Special" Handguns on Homicides*, 155 AM. J. EPIDEMIOLOGY 406, 407 (2002) (discussing Maryland's ban of "Saturday night specials," cheap guns often used in crimes).

1. Gun Industry Lawsuits and Public Nuisance

Civil suits against gun manufacturers and dealers have taken many forms over the last thirty years.[118] Private and municipal plaintiffs have sought compensatory and injunctive relief.[119] They have brought suits under myriad legal theories including manufacturing defect, negligent entrustment, strict products liability for abnormally dangerous activities, deceptive trade practices, defective design, negligent marketing, and public nuisance.[120] Most relevant to the discussion in this Comment are actions based on negligent marketing, defective design, and public nuisance.[121]

a. Negligent Marketing and Design Defect

In negligent marketing actions, plaintiffs allege that the manufacturer has failed to exercise due care to prevent firearms from making their way into the hands of criminals.[122] One common negligent marketing claim is that the manufacturer knowingly oversupplied handguns to dealers in states with lax firearm regulations and, consequently, the extra guns are bought and resold in states with stricter gun laws to individuals who use them in criminal pursuits.[123] In one such case, plaintiffs from New York, where gun laws are relatively strict, alleged that manufacturers oversaturated markets in the Southeast.[124] Their expert testified that between 1993 and 1996, 43% of the guns used in a crime ("crime guns") in New York were originally purchased in southeastern states and that, in total, 85–90% of crime guns came from outside New York.[125]

Another negligent marketing claim, termed "overpromoting", is that the manufacturer marketed especially lethal firearms beyond the population with a legitimate reason to own, such as law enforcement and military personnel.[126] Accordingly, plaintiffs have argued that injuries resulting from criminal use of these weapons are a result of the manufacturer's lack of reasonable care.[127]

A third common negligent marketing claim is that the firearm manufacturer was negligent for not properly training and monitoring retail dealers. As a consequence, these dealers sell the guns to fraudulent or straw purchasers who resell them to owners

118. *See generally* David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMP. L. REV. 1, 14–16 (1998); Timothy D. Lytton, *Introduction: An Overview of Lawsuits Against the Gun Industry*, *in* SUING THE GUN INDUSTRY, *supra* note 105, at 1.

119. *E.g.*, Ileto v. Glock, Inc., 565 F.3d 1126, 1131–32 (9th Cir. 2009); City of Philadelphia v. Beretta U.S.A., Corp., 126 F. Supp. 2d 882, 888–89 (E.D. Pa. 2000), *aff'd*, 126 F.3d 415 (3d Cir. 2002).

120. Lytton, *supra* note 118, at 5–14.

121. This is because the facts underlying these claims are the same as the facts in the statutory public nuisance claims examined *infra* in Parts II.D and III.

122. Lytton, *supra* note 118, at 8–11.

123. *See, e.g.*, Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1058–60 (N.Y. 2001) (alleging oversupply). For further discussion of this case, see Lytton, *supra* note 118, at 9–10.

124. *Hamilton*, 750 N.E.2d at 1060.

125. Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 830 (E.D.N.Y. 1999), *judgment vacated by*, Hamilton v. Beretta U.S.A. Corp., 264 F.3d 21 (2d Cir. 2001).

126. *E.g.*, Merrill v. Navegar, Inc., 28 P.3d 116, 121 (Cal. 2001).

127. *Merrill*, 28 P.3d at 121.

intent on using guns in a crime.[128] Plaintiffs argue that the manufacturer can refuse to sell to dealers who sell a large percentage of guns used in crimes, as documented by statistics compiled by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).[129]

In design defect actions, a common theory for manufacturer liability is that "foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design."[130] In cases against the gun industry, plaintiffs have argued that the failure to incorporate modifications into gun designs—such as indicators for when the gun's chamber is loaded, trigger locking devices, and "smart gun" technologies that make the gun inoperable in the hands of someone other than the owner—should render manufacturers liable for injuries suffered from accidental discharges or discharges from a stolen gun.[131]

b. Public Nuisance and Its Public Health Roots

Many plaintiffs have alleged that conduct underlying defective design and negligent marketing claims against the gun industry create a public nuisance.[132] The Restatement of Torts defines public nuisance as "an unreasonable interference with a right common to the general public."[133] The public nuisance strategy is interesting because public nuisance is one of the original public health legal devices, utilized as far back as the fourteenth century,[134] to halt activities that negatively impact community health and welfare.[135] Adopting English common law, U.S. courts have similarly applied public nuisance to protect the public from risks to health[136] and safety.[137] The

128. *See, e.g.*, Bloxham v. Glock Inc., 53 P.3d 196, 198 (Ariz. Ct. App. 2002) (recounting facts of case where licensed firearm dealer sold gun to unlicensed dealer who thereupon sold gun at gun show to man who murdered plaintiffs' children).

129. Lytton, *supra* note 118, at 11.

130. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998).

131. *See* Lytton, *supra* note 118, at 7 (discussing litigation alleging alternative design).

132. *See, e.g.*, City of Philadelphia v. Beretta U.S.A., Corp., 126 F. Supp. 2d 882, 886 (E.D. Pa. 2000), *aff'd*, 126 F.3d 415 (3d Cir. 2002) (alleging public nuisance).

133. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

134. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 543–44 (2006) (noting that English courts in fourteenth century extended public nuisance doctrine to include rights of public, not just rights of Crown).

135. *See* SIR JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 105 (2d ed. 1890) (noting public nuisances included spreading disease, polluting air, and creating or neglecting duty to correct conditions threatening physical harm).

136. *See, e.g.*, Seigle v. Bromley, 124 P. 191, 193–95 (Colo. App. 1912) (affirming injunction because hog pen created public nuisance endangering health of community); Fevold v. Bd. of Supervisors, 210 N.W. 139, 144 (Iowa 1926) (upholding law requiring tuberculosis testing for cattle because keeping diseased cattle posed public nuisance at common law as threat to public health); City of Ludlow v. Commonwealth, 56 S.W.2d 958, 958–59 (Ky. Ct. App. 1933) (finding faulty sewage system that pushed sewage into basements sickening tenants a public nuisance); Mich. State Chiropractic Ass'n v. Kelley, 262 N.W.2d 676, 677 (Mich. Ct. App. 1977) (holding unlicensed medical practice a public nuisance because harmful to public safety); State *ex rel.* Marron v. Compere, 103 P.2d 273, 279 (N.M. 1940) (holding unlicensed medical practice that harmed public health cognizable as public nuisance); Mills v. Hall & Richards, 9 Wend. 315, 316 (N.Y. Sup. Ct. 1832) (affirming finding that contaminated watter from dam was public nuisance).

Restatement of Torts provides "interference with the public health" as the first example of possible public nuisances.[138]

The public health utility of public nuisance doctrine, however, derives not simply from the types of conduct that can instigate an action, but from the doctrine's regulatory nature. To show public nuisance, a plaintiff only needs to prove that the defendant interfered with a public right; the plaintiff does not need to prove fault.[139] Permanent injunctive relief (i.e., abatement of the interfering activity) has always been an available remedy for public nuisance.[140] Because public nuisance provided the opportunity to permanently halt conduct without a showing of negligence or misconduct, local and state governments, particularly during the rapid urbanization of the Industrial Revolution, initiated public nuisance suits as a means of regulating public health threats.[141] Throughout the nineteenth century, for example, "nuisance law remained a potent weapon for regulating noxious industrial manufactories."[142] Moreover, nuisance law provided the basis for many future public health regulations[143] and zoning laws.[144]

Recognizing that public nuisance could effectively halt harmful activity that could not be anticipated and hence regulated, many towns enacted statutes that broadly defined public nuisance or specified certain activities as nuisances.[145] Soon, every state had enacted a public nuisance statute.[146] As New Deal era regulation expanded, however, the use of public nuisance litigation as a regulatory device waned.[147] Nevertheless, in recent years state and local governments have resurrected public

137. *See, e.g.*, State *ex rel.* Hopkins v. Excelsior Powder Mfg. Co., 169 S.W. 267, 271 (Mo. 1914) (holding as public nuisance storage of explosives near residents); Long v. Crystal Refrigerator Co., 277 N.W. 830, 834–35 (Neb. 1938) (holding as public nuisance negligently maintained and constructed building on public street); Landau v. City of New York, 72 N.E. 631, 634 (N.Y. 1904) (holding firework use can be public nuisance).

138. RESTATEMENT (SECOND) OF TORTS § 821B(2)(a).

139. David Kairys, *The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 CONN. L. REV. 1175, 1178 (2000).

140. *See* RESTATEMENT (SECOND) OF TORTS § 821C (providing relief in form of damages or abatement of nuisance); Schwartz & Goldberg, *supra* note 134, at 544–45 (noting that initially only the Crown, not individuals, could seek injunctions).

141. *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 217–27 (1996) (surveying history of nuisance litigation as means of regulating certain industries harmful to public health in nineteenth century); Schwartz & Goldberg, *supra* note 134, at 545–46 (discussing government use of public nuisance to regulate interferences caused by Industrial Revolution).

142. NOVAK, *supra* note 141, at 221.

143. *See id.* (noting that nuisance law provided basis for industrial regulations).

144. *See* Joseph Schilling & Leslie S. Linton, *The Public Health Roots of Zoning: In Search of Active Living's Legal Genealogy*, 28 AM. J. PREVENTIVE MED. 96, 97–98 (2005) (discussing zoning regulations' roots in public health and public nuisance); *see also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387–88 (1926) (noting analogous analyses and common foundation of zoning regulations and public nuisance law).

145. Schwartz & Goldberg, *supra* note 134, at 546.

146. Lexis 50 State Multi-Jurisdictional Surveys, LEXISNEXIS, http://www.lexisnexis.com/lawschool/research/default.aspx (follow "50 State Multi-Jurisdictional Surveys" hyperlink; then click LexisNexis 50 State Surveys, Legislation & Regulations; then click "Torts"; then click "Nuisance") (password required) (last visited Aug. 30, 2011).

147. Schwartz & Goldberg, *supra* note 134, at 546.

nuisance as a tool to regulate such public health threats as tobacco,[148] lead paint,[149] and firearms,[150] with varying success.

2. Public Health Benefits of Gun Industry Litigation

Gun industry litigation offers the potential for advocates to make significant public health strides concerning gun violence. First, liability can cause the firearm industry to curb its risky behavior—specifically, the design and marketing activities that create environments where people who should not have firearms can easily obtain them.[151] Additionally, settlement and injunctive relief can achieve the public health regulatory measures that legislatures have been reluctant to prescribe.[152] The settlement in the multistate tobacco industry litigation demonstrated this regulatory potential for lawsuits against manufacturers of dangerous products, especially for actions brought by states and municipalities.[153]

Another major justification for regulatory tort litigation is the great potential to access otherwise hidden information necessary to inform regulatory decisions.[154] In the tobacco industry litigation, information extracted during discovery not only showed industry knowledge of tobacco's dangers, but also helped change the public's attitude toward the industry that many commentators believe was crucial to securing the settlement agreement.[155]

Proponents of gun industry litigation also argue that these civil actions allow reasonable regulations to be conceived and imposed without undue political influence by powerful lobbying groups like the National Rifle Association (NRA).[156] Whether or not groups like the NRA actually unduly influence legislators, gun industry litigation

148. *See, e.g.*, Complaint, Moore *ex rel.* State v. Am. Tobacco Co., No. 94-1429 (Miss. Ch. Ct. May 23, 1994), *available at* http://www.library.ucsf.edu/sites/all/files/ucsf_assets/ms_complaint.pdf.

149. *See, e.g.*, State v. Lead Indus. Ass'n, 951 A.2d 428, 443–58 (R.I. 2008) (demonstrating state's willingness to use public nuisance to regulate lead paint).

150. *See, e.g.*, City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1141–44 (Ohio 2002), *superseded by statute*, OHIO REV. CODE ANN. 2307.71(A)(13) (West 2010) (reversing dismissal of public nuisance claim). *But see* City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 420–22 (3d Cir. 2002) (affirming dismissal of state public nuisance claim).

151. Timothy D. Lytton, *The Complimentary Role of Tort Litigation in Regulating the Gun Industry*, *in* SUING THE GUN INDUSTRY, *supra* note 105, at 250, 263–64.

152. *See, e.g.*, City of New York v. Bob Moates' Sport Shop, Inc., 253 F.R.D. 237, 238–39 (E.D.N.Y. 2008) (discussing settlement where gun dealer agreed to adopt stricter sales practices).

153. *See generally* Daynard et al., *supra* note 13.

154. *See* Wendy Wagner, *Stubborn Information Problems & the Regulatory Benefits of Gun Litigation*, *in* SUING THE GUN INDUSTRY, *supra* note 105, at 271, 274–76 (discussing litigation's ability to uncover hidden information). *See generally* Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L. J. 693, 696–701 (2007) (discussing how litigation provides information symmetry needed to properly regulate).

155. Stephen D. Sugarman, *Comparing Tobacco & Gun Litigation*, *in* SUING THE GUN INDUSTRY, *supra* note 105, at 196, 215–19; Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 L. & SOC. INQUIRY 897, 921–25 (1998).

156. *See* Timothy D. Lytton, *The NRA, the Brady Campaign, & the Politics of Gun Litigation*, *in* SUING THE GUN INDUSTRY, *supra* note 105, at 152, 154 (indicating that gun control advocates resort to litigation because of "NRA corruption of the legislative process").

offers real opportunities to improve regulation and enforcement.[157] First, by encouraging risk avoidance within the industry, litigation serves to supplement the limited resources of the ATF, the federal firearm regulating agency.[158] Second, litigation helps close loopholes and fill in statutory and regulatory gaps that some manufacturers and dealers exploit to the public's detriment.[159] Finally, litigation offers a decentralized and federalist approach to firearm industry regulation.[160]

Though little empirical data is available to gauge the effects of gun industry litigation on public health, data suggests that the regulatory objectives of this litigation, when achieved through legislation, does produce positive public health outcomes. In 1988, for example, the state of Maryland banned small, inexpensive handguns referred to as "Saturday night specials" because of their disproportionately high rate of use in crimes.[161] A study later found that the ban correlated with a decreased homicide rate.[162]

Empirical data also exists that supports the premise that regulatory interventions can stop the illegal flow of guns. As previously noted, many studies have concluded that crime guns in areas with stronger gun regulations are purchased predominantly in jurisdictions with weak controls.[163] Another study found that the announcement of police stings and lawsuits against suspected gun dealers significantly reduced the supply of new guns to criminals in Chicago.[164]

3. Protection of Lawful Commerce in Arms Act

Despite the opportunities presented by gun industry litigation to decrease gun injuries and deaths and improve public health, these suits have had very little success. Compounding these failures, in 2005 Congress passed the Protection of the Lawful Commerce in Arms Act (PLCAA), which bars most civil liability actions against manufacturers, distributors, and dealers of firearms or ammunition products.[165] In addition to prohibiting future civil actions, the PLCAA also dismissed existing suits. The Act's expressed purpose is "[t]o prohibit causes of action against [the gun industry] . . . for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended."[166]

157. Lytton, *supra* note 151, at 263–64.

158. *Id.*

159. *Id.*

160. *Id. But see* Richard A. Nagareda, *Gun Litigation in the Mass Tort Context*, *in* SUING THE GUN INDUSTRY, *supra* note 105, at 176, 177–78 (arguing that litigation-induced regulation lacks cost-benefit analysis and inter-agency coordination elemental to legislative regulation); Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and* Parens Patriae *Product Litigation*, 49 B.C. L. REV. 913 (2008) (arguing that litigation-induced regulations are inferior to legislative regulations).

161. Webster et al., *supra* note 117, at 406–07.

162. *Id.* at 409.

163. See *supra* note 104 and accompanying text for a discussion of research on this issue.

164. D W Webster et al., *Effects of Undercover Police Stings of Gun Dealers on the Supply of New Guns to Criminals*, 12 INJ. PREVENTION 225, 227–29 (2006).

165. Pub. L. No. 109-92, §§ 2–4, 119 Stat. 2095 (codified at 15 U.S.C. §§ 7901–7903 (2006)).

166. 15 U.S.C. § 7901(b)(1). PLCAA's "findings" section provides that such industry lawsuits are attempts to regulate commerce in firearms, thereby circumventing the legislative process. *Id.* § 7901(a)(8). It

The statute, however, provides for exceptions to the bar.[167] Many plaintiffs focused on one in particular in attempts to avoid dismissal. Section 7903(5)(A)(iii), hereinafter referred to as the "predicate exception,"[168] provides that the bar does not apply to "an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought."[169] For the purpose of illustration, the predicate exception provision provides two examples of qualifying actions.[170] Example I refers to record-keeping requirements[171] and false-statement prohibitions.[172]

Example II refers to federal regulations prohibiting sales to certain individuals.[173]

also provides that the actions are "based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law." *Id.* § 7901(a)(7).

167. *Id.* § 7903(5)(A). These exceptions include: (i) civil actions alleging harm from a violation of federal or state criminal law that proscribes knowingly transferring a firearm that will be used in a violent or drug-related crime; (ii) actions for negligent entrustment or negligence per se; (iii) actions alleging violations of other statutes that apply to the gun industry; (iv) actions for breach of contract or warranty; (v) actions alleging harm caused by a design or manufacturing defect, "except where discharge of the weapon was caused by a volitional act that constituted a criminal offense"; and (vi) actions commenced by the Attorney General to enforce federal firearm laws. *Id.*

168. *See* City of New York v. Beretta U.S.A. Corp., 401 F. Supp. 2d 244, 260 (E.D.N.Y. 2005) (referring to 15 U.S.C. § 7903(5)(A)(iii) as "predicate exception" because its operation requires predicate statutory violation).

169. § 7903(5)(A)(iii).

170. *Id.* The two examples are as follows:

> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
>
> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18.

Id.

171. This language closely parallels section 922(m) of the Gun Control Act of 1968. *See* 18 U.S.C. § 922(m) (making it unlawful for a federally licensed firearm manufacturer or seller "knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder"). These records are mandated by 18 U.S.C. §§ 923(g)(1)(A), 923(g)(2), and regulation 27 C.F.R. § 478.124 (2009), which require, generally, that sellers and manufacturers collect and maintain records of any receipt, sale, or disposition of a firearm, including the name and personal information of the entity providing or receiving the firearm. Most states have similar provisions. *See, e.g.*, ALA. CODE § 40-12-143 (2010) (requiring that sellers of handguns maintain detailed record of every sale, including purchaser information).

172. This language parallels the section of the Gun Control Act dealing with false statements associated with the purchase of firearms. 18 U.S.C. § 924(a)(1)(A).

173. *See id.* § 922(d) (proscribing provision of firearms to any individual prohibited from possessing them, including, inter alia, felons, fugitives, mental defectives, and those convicted of any domestic abuse).

D. Public Nuisance Under the Predicate Exception: A Statute Applicable to the Sale or Marketing of Firearms?

The PLCAA affected numerous and varying pending lawsuits. Plaintiffs contested PLCAA-based motions to dismiss by arguing that the Act was unconstitutional and that some or all of their claims were expressly exempted from the bar on qualified civil actions.[174] This Comment addresses only the question of whether the PLCAA's predicate exception exempts statutory public nuisance claims; this Part, therefore, discusses only the cases examining that question.

1. *City of New York v. Beretta U.S.A.*

In 2000, the City of New York, under its police powers and public health responsibilities,[175] sued every major gun manufacturer alleging that they, inter alia, violated New York's criminal public nuisance statute.[176] The City averred that these companies had a reasonable ability to monitor, supervise, train, and regulate their "downstream distributors" to prevent firearms from flowing into the illegal secondary market, and that their failure to do so resulted in widespread access to illegal guns in New York City.[177] The City sought an abatement of the nuisance but no compensatory damages.[178] After Congress enacted the PLCAA, the defendants moved to dismiss the suit.[179] One of the main questions for the court—the central question for the discussion in this Comment—was whether the state public nuisance statute is a "statute applicable to the sale or marketing of [firearms]"[180] under the predicate exception.[181]

The United States District Court for the Eastern District of New York, following long-established precedent on statutory construction, began its interpretation by analyzing the plain meaning of the word "applicable."[182] Citing prior statutory construction case law and its own interpretation, the court found that the plain meaning of the word "applicable" was "capable of being applied."[183] The court found that though courts had yet to apply New York's criminal public nuisance statute to the sale and marketing of firearms, New York courts had applied the common law public

174. *E.g.*, Adames v. Sheahan, 909 N.E.2d 742, 764–65 (Ill. 2009).

175. City of New York v. Beretta U.S.A. Corp., 401 F. Supp. 2d 244, 251 (E.D.N.Y. 2005), *rev'd*, 524 F.3d 384 (2d Cir. 2008).

176. *Beretta*, 401 F. Supp. 2d at 252. New York's criminal public nuisance statute is codified at N.Y. PENAL LAW § 240.45 (McKinney 2008).

177. *Beretta*, 401 F. Supp. 2d at 252.

178. *Id.* at 257.

179. *Id.* at 252.

180. 15 U.S.C. § 7903(5)(A)(iii). The statute refers to the sale or marketing of firearms products and ammunition products. Hereinafter, this Comment will use "firearms" or "guns" to denote all products encompassed by the statute.

181. *See Beretta*, 401 F. Supp. 2d at 258–60 (outlining parties' opposing statutory constructions).

182. *Id.* at 261 (citing Smith v. United States, 508 U.S. 223, 228 (1993) ("'When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.'"); INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) (noting that legislative purpose "is expressed by the ordinary meaning of the words used").

183. *Beretta*, 401 F. Supp. 2d at 261–62 (quoting Snyder v. Buck, 75 F. Supp. 902, 907 (D.D.C. 1948); Interwest Constr. v. Palmer, 923 P.2d 1350, 1359 (Utah 1996) (internal quotation marks omitted)).

nuisance doctrine in such cases,[184] and ultimately denied defendants' motion to dismiss.[185]

On appeal, the Second Circuit, though refusing to accept the defendants' argument that predicate-exception statutes must *specifically* regulate the sale or marketing of firearms, held that "applicable" statutes were those "that clearly can be said to regulate the firearms industry,"[186] and thereby dismissed the suit pursuant to the PLCAA.[187] The court also began its analysis with the plain meaning of "applicable," but found the district court erred in not examining the term "applicable" within the context of the predicate exception and the PLCAA as a whole.[188] The court noted that the examples of predicate statutes referred to in subsections (I) and (II) of the Act were laws specifically regulating the gun industry.[189] Accordingly, the court found "applicable" to be ambiguous because both the plaintiff's and defendants' interpretations were reasonable within the statutory context.[190]

The court then examined the language in light of three canons of statutory construction.[191] First, the Court reasoned that the general phrase "applicable to the sale and marketing of [firearms]" followed by two examples referring to requirements on gun suppliers regarding record keeping and sales to prohibited buyers, reflected Congress's intent to narrow the scope of qualifying predicate statutes to those that "clearly can be said to regulate the firearms industry."[192] The court based this finding on the following two canons of construction: *noscitur a sociis* ("the meaning of doubtful terms or phrases may be determined by reference to their relationship with other associated words or phrases") and *ejusdem generis* ("where general words are accompanied by a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated").[193]

The court also referenced the canon of construction that courts should avoid statutory interpretations that produce absurd results.[194] In light of this standard, the court examined the purpose and findings of the PLCAA[195] and found that, because

184. *Id.* at 262 (citing City of New York v. Beretta U.S.A. Corp., 315 F. Supp. 2d 256, 277, 283–84 (E.D.N.Y. 2004) (applying common law public nuisance to gun industry claim); NAACP v. Acusport, Inc., 271 F. Supp. 2d 435, 480–99, 526 (E.D.N.Y. 2003) (dismissing suit for failure of plaintiff to prove all elements of public nuisance cause of action).

185. *Id.* at 298.

186. City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 402 (2d Cir. 2008).

187. *Id.* at 404.

188. *Id.* at 400 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); Bailey v. United States, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme.")).

189. *Id*. at 401–02.

190. *Id.*

191. *Id.* at 401–03.

192. *Id.* at 402.

193. *Id.* at 401 (internal quotation marks omitted).

194. *Id.* at 401, 402–03.

195. Specifically, the court cited three provisions of the PLCAA. *Id.* at 402. First, the court cited 15 U.S.C. § 7901(b)(1), which states that the purpose of the Act is "[t]o prohibit causes of action against

Congress intended to protect the gun industry from vicarious liability for harm caused by lawfully sold and designed products, construing the predicate exception to include any statute capable of being applied to the sale or marketing of guns would cause the exception to "swallow the statute."[196]

Finally, the Second Circuit examined the PLCAA's legislative history. It noted that the bill's sponsor, Senator Larry Craig, cited the case at hand as an example of a lawsuit the PLCAA would eliminate.[197] The court also noted that Congress rejected attempts to expand the predicate exception.[198] Though the court eventually held that a statute of general applicability could qualify under the predicate exception, it found New York's public nuisance statute did not because it could not be said to "implicate the purchase and sale of firearms."[199]

Judge Katzmann dissented, arguing, inter alia, that the statute was unambiguous and so the plain meaning of "applicable" should have governed the analysis.[200] The United States Supreme Court denied certiorari.[201]

2. *Ileto v. Glock, Inc.*

In *Ileto v. Glock, Inc.*,[202] private plaintiffs sued the gun industry for compensatory and injunctive relief under several causes of action, including California's public

manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended." Next, the court discussed § 7901(a)(5) of the Act. Section 7901(a)(5) provides that:

> Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

Finally, the court looked at § 7901(a)(4), which states that "[t]he manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act [26 U.S.C. § 5801 et seq.], and the Arms [Export] Control Act."

196. *Id.* at 402–03.

197. *Id.* at 403 (quoting 151 CONG. REC. S9374-01, 9394 (daily ed. July 29, 2005) (statement of Sen. Craig)). The court recognized, however, that comments by the sponsor of legislation are "by no means controlling in the analysis of legislative history." *Id.* at 403 (quoting Berger v. Heckler, 771 F.2d 1556, 1574 (2d Cir. 1985)).

198. *Id.* at 403–04 (citing 151 CONG. REC. S9374-01 (daily ed. July 29, 2005) (statement of U.S. Sen. Thune)).

199. *Id.* at 404. The Second Circuit held:

> [T]he exception created by 15 U.S.C. § 7903(5)(A)(iii): (1) does not encompass New York Penal Law § 240.45; (2) does encompass statutes (a) that expressly regulate firearms, or (b) that courts have applied to the sale and marketing of firearms; and (3) does encompass statutes that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms.

Id.

200. *Id.* at 404–05 (Katzmann, J., dissenting).

201. City of New York v. Beretta U.S.A. Corp., 129 S. Ct. 1579 (2009).

202. 565 F.3d 1126 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3320 (2010).

nuisance statute,[203] for the injuries and death resulting from a crazed gunman's shooting spree in 1999.[204] The plaintiffs alleged that the defendants

> knowingly created, facilitated, and maintained an over-saturated firearms market that makes firearms easily available to anyone intent on crime. . . . Their conduct has thereby created and contributed to a public nuisance by unreasonably interfering with public safety and health and undermining California's gun laws, and it has resulted in the specific and particularized injuries suffered by plaintiffs.[205]

While the Ninth Circuit had to address virtually the same question about the predicate exception as the Second Circuit,[206] a difference in the procedural posture of the cases is worth noting. In 2003, before Congress enacted the PLCAA, the Ninth Circuit ruled that the plaintiffs in *Ileto* had successfully pleaded that the defendants violated California's public nuisance statute.[207] Unlike the Second Circuit, therefore, the Ninth Circuit was foreclosed from ruling that because no court had yet applied California's public nuisance statute to the gun industry, the statute was not *applicable* to the sale and marketing of firearms.

The court, like the Second Circuit, began its analysis by interpreting the meaning of "applicable."[208] Unlike the Second Circuit, however, the court found that "applicable," whether taken alone, in the context of the predicate exception, or in the context of the PLCAA as a whole, has a "spectrum of meanings" and is therefore ambiguous.[209] On one hand, the court found that the plaintiffs' asserted definition of "applicable"—capable of being applied—appeared too broad as the two examples of predicate statutes referenced by the Act specifically pertain to the manufacturing and sale of firearms.[210] On the other hand, the court found that the defendants' proffered definition—that the statute must be exclusively applicable to firearm sales and marketing—was too narrow because some of the examples do not apply exclusively to the firearm industry.[211]

Next, the court examined the legislative purpose of the PLCAA, noting the Act's stated primary purpose is to prohibit imposing liability on gun manufacturers and suppliers for harm solely caused by unlawful misuse of properly functioning firearm products.[212] The court also noted that in enacting the PLCAA, Congress found that many actions against the gun industry "are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not

203. *Ileto*, 565 F.3d at 1132–33 (noting that plaintiffs sued defendants for violation of California's public nuisance statute, CAL. CIV. CODE § 3480 (West 2009), as well as other California statutes).

204. *Id.* at 1130.

205. Ileto v. Glock Inc., 349 F.3d 1191, 1198 (9th Cir. 2003).

206. *Ileto*, 565 F.3d at 1133.

207. *Ileto*, 349 F.3d at 1215.

208. *Ileto*, 565 F.3d at 1133–34.

209. *Id.* at 1134, 1135.

210. *Ileto*, 565 F.3d at 1134 (citing 15 U.S.C. § 7903(5)(A)(iii)(I)–(II) (2006)). See *supra* note 170 for language of these subsections.

211. *Id.*

212. *Id.* at 1135 (citing 15 U.S.C. § 7901(b)(1)).

represent a bona fide expansion of the common law."[213] The court concluded that Congress clearly intended to prohibit traditional common law claims including "general tort theories of liability."[214] Although California codified its public nuisance common law in 1872, the Ninth Circuit held it did not fall within the predicate exception.[215] First, California intended to allow codified tort actions, such as public nuisance, to continue to evolve as a common law doctrine, rendering this cause of action the type of non-bona fide expansion of common law that concerned Congress.[216] Second, because Congress found that the gun industry was already "heavily regulated by Federal, State, and local laws,"[217] the court believed Congress intended for statutes specifically regulating the industry, and not common law tort actions, to fall within the predicate exception.[218] The court also noted that to allow an action under a codified public nuisance statute in one state but prohibit it under the common law of another state would contravene Congress's intent to establish national uniformity.[219]

Lastly, the court found that the legislative history suggested an understanding by Congress that the PLCAA would limit the gun industry's liability to violations of firearm statutes only.[220] Adding support to this interpretation, the court noted that Congress had specifically referred to the *Ileto* case as one the PLCAA would preempt.[221]

In her dissent, Judge Berzon argued, inter alia, that "applicable" should be construed broadly because Congress had elsewhere included a heightened pleading requirement that the statutory violation be "knowing."[222] Also, Berzon emphasized that by limiting the scope of PLCAA preemption to actions for harm "solely" caused by others, Congress only intended to prohibit vicarious and strict liability.[223] Thus, if the plaintiffs alleged that the defendants knew their statutory violations were causing harm, PLCAA preemption should not apply.[224]

213. *Id.* (quoting 15 U.S.C. § 7901(a)(7)).

214. *Id.*

215. *Id.* at 1136.

216. *Id.* (citing Li v. Yellow Cab Co., 532 P.2d 1226, 1233 (Cal. 1975)).

217. 15 U.S.C. § 7901(a)(4).

218. *Ileto*, 565 F.3d at 1136.

219. *Id.*

220. *Id.* at 1136–37 (citing 151 CONG. REC. S9087-01 (daily ed. July 27, 2005) (statement of Sen. Craig) ("This bill does not shield [those who] . . . have violated existing law . . . and I am referring to the Federal firearms laws.")); *id.* (citing 151 CONG. REC. S9217-02 (daily ed. July 28, 2005) (statement of Sen. Hutchison) ("[Lawsuits] would also be allowed where there is a knowing violation of a firearms law.")).

221. *Id.* at 1137 (citing 151 Cong. Rec. E2162-03 (daily ed. Oct. 25, 2005) (statement of Rep. Stearns) (indicating *Ileto* is precisely the type of case Congress intended PLCAA to preempt)). At the same time, the court acknowledged that comments by a single legislative sponsor are not controlling. *Id.* (citing Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980)).

222. *Id.* at 1158 (Berzon, J., dissenting).

223. *Id.* at 1158–59.

224. *Id.* at 1159.

3. *Smith & Wesson Corp. v. City of Gary*

In 1999, the city of Gary, Indiana sued a number of gun manufacturers, distributors, and retailers alleging, among other claims, that the negligent design of handguns, and the knowing retail sale to prohibited purchasers along with industry complicity in such sales, created a public nuisance in violation of section 32-30-6-6 of the Indiana Code.[225] The defendants moved to dismiss pursuant to the PLCAA. After the trial court denied the motion, the Indiana Court of Appeals was asked to rule on whether Indiana's public nuisance statute was applicable to the sale or marketing of firearms.[226]

Prior to the passage of the PLCAA, the Indiana Supreme Court affirmed that the City of Gary had sufficiently alleged its nuisance violation,[227] creating a posture similar to the *Ileto* case where the Ninth Circuit had denied a pre-PLCAA motion to dismiss.[228] Accordingly, in *Smith & Wesson Corp. v. City of Gary*,[229] the City argued that the statute was "applicable" to the sale or marketing of firearms because the Indiana Supreme Court had previously applied it as such.[230] To resolve the issue, the Indiana appeals court measured the ambiguity of "applicable to the sale or marketing of firearms" by analyzing its plain meaning, its context within the predicate exception, and its context within the PLCAA.[231] First, the court found the unambiguous, plain meaning of the word "applicable" was "[c]apable of being applied."[232]

Regarding its context in the predicate exception, the defendants argued that examples I and II of predicate violations demonstrate a requirement that predicate statutes specifically regulate the sale and marketing of firearms.[233] The plaintiffs countered that the aiding and abetting and conspiracy elements of the examples invoke general laws that say nothing about firearms.[234] The court declined to resolve the dispute. Instead, assuming arguendo that the predicate exception requires violations of statutes facially applicable to the firearm industry, the court relied on the previous determination of the Indiana Supreme Court and held that the city had satisfied this requirement by pleading facts alleging such statutory violations.[235] The court concluded that the meaning in the context of the entire predicate exception was not ambiguous.[236]

With respect to the broader context of the PLCAA, the court concluded that because the public nuisance statute was a legislative enactment, and because the

225. Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 424–25 (Ind. Ct. App. 2007).

226. *Id.* at 424.

227. City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1241 (Ind. 2003).

228. *Ileto*, 565 F.3d at 1130.

229. 875 N.E.2d 422 (Ind. Ct. App. 2007).

230. *Smith & Wesson*, 875 N.E.2d at 430.

231. *Id.* at 431.

232. *Id.* (alteration in original) (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 63 (1981)) (internal quotation marks omitted).

233. *Id.* at 431–32.

234. *Id.* at 432.

235. *Id.* (citing City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1234–35 (Ind. 2003)).

236. *Id.* at 433.

Indiana Supreme Court interpreted it as applying to the sale and marketing practices of the defendants, the claim was not an unfounded expansion of common law intended as an end run around the legislative process in contravention of the PLCAA's purpose and findings.[237] Because the court found that the predicate exception was unambiguous in the broader context of the PLCAA,[238] it declined to engage in further analysis of statutory construction or legislative history.[239] Accordingly, the court held that the City's public nuisance action fell within the predicate exception.[240]

III. DISCUSSION

The judicial treatment of public nuisance lawsuits vis-à-vis the Protection of Lawful Commerce in Arms Act (PLCAA) reveals a gap in legal reasoning. In this gap lies the recognition that gun violence and the PLCAA are determinants of public health with all of the necessary implications that flow therefrom. This does not mean that a court which recognizes the public health ramifications of its decision must rule in favor of safeguarding public health. Filling in this gap in reasoning, however, will ensure that courts account for the underlying public health objectives in both the PLCAA and relevant jurisprudence and thereby come to the most appropriate legal conclusion. One way a court hearing a PLCAA-based preemption claim can fill this gap is to utilize the analytical tools articulated in Wendy Parmet's population-based legal analysis.[241] The following discussion will both demonstrate the necessity of using a population-based analysis when addressing the scope of the predicate exception and illustrate its implications.

A. Why a Public Health Perspective in This Case?

1. Safeguarding Public Health Is a Fundamental Legal Norm

The justification for a public health perspective in legal reasoning is grounded in American jurisprudential history.[242] Courts invoked the maxim, *salus populi suprema lex*, "the well-being of the community is the highest law," in many of the early American public health decisions.[243] In *Jacobson v. Massachusetts*,[244] the United States Supreme Court gave its imprimatur to the concept that promotion of the public's health is an independent legal value. In the landmark public health decision, the Court upheld mandatory smallpox vaccination, declaring that in some instances individual liberty must submit to "manifold restraints" where necessary to safeguard the public's

237. *Id.* at 434.

238. *Id.*

239. *Id.* at 434 n.12.

240. *Id.* at 434–35.

241. *See generally* PARMET, *supra* note 28.

242. *Id.* at 37–41, 57–58. See *supra* Part II.A.1 for a review of public health's role as a traditional rationale and goal of American law.

243. See *supra* note 40 for citations to some of these early public health decisions.

244. 197 U.S. 11 (1905).

health.[245] The Court rationalized its decision in terms of the social compact: "[T]he whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for 'the common good.'"[246]

Public health has also significantly influenced the evolution of American law.[247] Constitutional, tort, and administrative law experienced much of their early development in the context of public health risks, which dealt frequently with the tension between public health objectives and countervailing individual interests.[248] Still today, the health of a population shapes the social and political agenda.[249]

The U.S. legal system has also long recognized public health as a legitimate *goal* of law as well, though that objective is not as prominent today.[250] States obviously have the power to regulate behavior in order to safeguard the health, safety, and welfare of its people,[251] but as Lawrence Gostin notes, the "constitutional design" entrusts the federal government with public health obligations as well.[252] Additionally, state and federal judiciaries gave substantial deference to public health boards well into the twentieth century.[253]

2. Gun Violence, the PLCAA, and Public Nuisance Litigation All Implicate Public Health

As demonstrated in Part II.B, firearms are a serious public health concern in the United States. Causing approximately 30,000 deaths a year,[254] firearms are the third leading cause of injury-related death and second among people age ten to thirty-four.[255] These deaths coupled with the 70,000-plus yearly gun injuries result in an estimated $2.3 billion in lifetime medical costs in a single year, $1.1 billion of which is borne by

245. *Jacobson*, 197 U.S at 26–27. In addition to affirming the state's public health authority under its police power, the Court also endorsed public health boards as important mechanisms for protecting public health. PARMET, *supra* note 28, at 39.

246. *Jacobson*, 197 U.S. at 27.

247. See *supra* notes 38–44 and accompanying text for a discussion of public health's influence on U.S. law.

248. PARMET, *supra* note 28, at 36–37.

249. *See id.* at 37 ("[T]he public health threats of an era have always found their way before the courts and lawmaking bodies of the time.").

250. *Id.* at 42–45 (discussing decline of public health's influence on law).

251. *See, e.g.*, *Jacobson*, 197 U.S. at 25 (indicating it is settled law that states' police powers embrace legislation to protect public health and safety).

252. *See* Gostin, *supra* note 46, at 2837–38 (discussing roles of each branch of federal government in safeguarding public health and safety). Gostin notes that the Constitution charges the federal government with "provid[ing] for the common defence" and "promot[ing] the general Welfare." *Id.* at 2838 (quoting U.S. CONST. pmbl.). See *supra* notes 46–48 and accompanying text for further discussion of the public health objectives inherent in the U.S. Constitution.

253. See *supra* note 49 and accompanying text for a discussion of judicial deference to public health board initiatives.

254. *See* Heron et al., *supra* note 1, at 89 (finding 30,896 gun deaths in 2006).

255. FINGERHUT & ANDERSON, *supra* note 3, at 2–3.

taxpayers.[256] Furthermore, gun violence has been linked to higher rates of mental illness[257] and developmental problems in children.[258]

The public health impact of firearms differs across populations. Notably, young African American men in urban areas suffer gun injuries at a much higher rate than other groups.[259] Populations with greater access to guns are also at a higher risk for harm.[260] Examining the incidence, distribution, and causes of gun morbidity and mortality has revealed areas in which regulation could considerably reduce the negative health outcomes related to firearms.[261] Public health advocates have focused on marketing and design regulations.[262]

Litigation against the gun industry became the mechanism through which municipalities sought to achieve these regulations, implicating the benefits that litigation can have as a public health tool.[263] As the tobacco industry litigation demonstrated, litigation provides the opportunity to access otherwise suppressed information necessary to inform regulatory decisions.[264] Moreover, this "hidden" information informs the public about dangerous behavior and products and may change the way people think about regulating such behavior or products.[265] Additionally, potential liability might encourage risk avoidance by the gun industry, essentially closing regulatory loopholes that gun dealers exploit to the detriment of the public.[266]

As illustrated above, public nuisance litigation is particularly geared to induce regulatory change in areas that impact public health.[267] Public nuisance not only provided the basis for many U.S. public health regulations, but also has a tradition in western jurisprudence as a device to halt activity that threatens community health.[268]

Considering the public health implications of gun regulation and gun industry litigation, the PLCAA necessarily implicates, and appears to thwart, public health. In enacting the PLCAA, Congress may have failed to recognize that public health is a

256. *See* Cook et al., *supra* note 100, at 453 (estimating lifetime medical costs for all gunshot injuries in 1994).

257. See *supra* note 98 and accompanying text for a discussion of research on the impact of gun violence on mental health.

258. Schwab-Stone et al., *supra* note 99, at 1343.

259. Hu et al., *supra* note 95, at 597, 601. See *supra* notes 89–101 and accompanying text for a discussion of the primary and secondary effects of gun violence on different populations.

260. See *supra* note 97 and accompanying text for research on the link between gun access and gun-related violence.

261. See *supra* notes 111–12 and accompanying text for a discussion on the public health approach to examining the epidemiology of gun violence and determining areas fit for intervention.

262. *See* Baker et al., *supra* note 111, at 225–27 (arguing that regulations on design and distribution would be most effective).

263. See *supra* Part II.C.2 for discussion on the public health utility of litigation.

264. See *supra* notes 153–54 and accompanying text for a discussion on litigation's ability to uncover hidden information.

265. *See* Sugarman, *supra* note 155, at 198–200, 214–15 (illustrating how litigation can change social norms in part by highlighting moral culpability of defendants).

266. Lytton, *supra* note 151, at 263–64.

267. See *supra* Part II.C.1.b for a discussion of how public nuisance is a capable regulatory tool.

268. *See* NOVAK, *supra* note 141, 217–27 (surveying history of nuisance litigation as means of regulating certain industries harmful to public health).

fundamental legal norm traditionally valued in American jurisprudence, and that litigation has historically performed an important role in improving public health. Courts, however, can recapture this norm in addressing public nuisance claims under the predicate exception, in part by utilizing the tools outlined in Parmet's population-based legal analysis.[269]

B. "Applicable to the Sale or Marketing of Firearms" in the Context of the Predicate Exception

In *Smith & Wesson v. City of Gary*,[270] the Indiana Court of Appeals found "applicable" unambiguously meant "[c]apable of being applied,"[271] although nothing in the opinion suggests the court applied a public health perspective in any part of its reasoning. Though the *Smith & Wesson* analysis came to a reasonable conclusion, its simplicity is problematic in that it does not fully reconcile what the Ninth and Second Circuits found so troubling—that "applicable to the sale or marketing of [firearms]" seems to derive some of its meaning from its context within the predicate exception and the PLCAA as a whole.[272] The Second and Ninth Circuits' contextual analyses, however, neglected to incorporate a population health perspective to the detriment of the body of law and public health.

Population-based legal analysis, as Parmet describes, is not a comprehensive theory of law but rather works alongside traditional doctrinal analysis.[273] Therefore, a court desiring to incorporate a public health perspective in addressing this question would still begin its contextual statutory analysis by examining the term "applicable to the sale and marketing of [firearms]" in the context of the predicate exception,[274] as did the Second and Ninth Circuit courts.[275]

The courts in *Ileto v. Glock, Inc.*[276] and *City of New York v. Beretta U.S.A. Corp.*[277] focused their predicate exception analyses on the two examples of predicate lawsuits provided in the Act. [278] They concluded that because these examples refer to specific gun-supplier regulations, the plaintiffs' proposed "all-encompassing,"[279] and

269. See *supra* Part II.A for an outline of Parmet's population-based legal analysis.

270. 875 N.E.2d 422 (Ind. Ct. App. 2007).

271. *Smith & Wesson*, 875 N.E.2d at 431 (alteration in original) (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 63 (1981)).

272. *See* Ileto v. Glock, Inc., 565 F.3d 1126, 1133–34 (9th Cir. 2009) (finding "applicable" requires contextual examination); City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 401 (2d Cir. 2008) (same).

273. PARMET, *supra* note 28, at 52.

274. *See* Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). See *supra* notes 169–70 and accompanying text for the language of the predicate exception, codified at 15 U.S.C. § 7903(5)(A)(iii) (2006).

275. *Ileto*, 565 F.3d at 1134; *Beretta*, 524 F.3d at 401.

276. 565 F.3d 1126 (9th Cir. 2009).

277. 524 F.3d 384 (2d Cir. 2008).

278. *Ileto*, 565 F.3d at 1134; *Beretta*, 524 F.3d at 401–02. The examples are found at 15 U.S.C. §7903(5)(A)(iii)(I)–(II). See *supra* note 170 for the text of these subsections.

279. *Ileto*, 565 F.3d at 1134.

"far too-broad reading"[280] of the word "applicable" was incorrect. As the *Beretta* court noted, these examples reflected Congress's intent to narrow the scope of the predicate exception to statutes that "clearly can be said to regulate the firearms industry."[281]

While the courts looked to the examples in the Act to glean Congress's intended boundaries of the predicate exception, they never discussed or even acknowledged that the primary purpose of the predicate exception is to maintain liability for certain conduct by the gun industry. A court incorporating a public health perspective into its analysis would not ask "what types of lawsuits did Congress wish to preempt," but rather "what types of industry conduct did Congress wish to deter through civil liability?" This alternate approach is justified by the inherent public health objectives of the predicate exception, which have yet to be recognized by courts.

Examples I and II of the predicate exception mirror current federal and state firearm regulations.[282] The first half of Example I, referring to records that sellers are required to keep, closely parallels section 922(m) of the Gun Control Act of 1968[283] and several state law equivalents.[284] The latter half parallels the section of the Gun Control Act dealing with false statements associated with the purchase of firearms,[285] but adds the aiding, abetting, or conspiring element to make it applicable to sellers.[286] Example II parallels section 922(d) of the Gun Control Act, which criminalizes selling a firearm while having a reasonable belief that the actual buyer is prohibited from possessing a gun under federal law. [287] While the *Ileto* and *Beretta* courts correctly characterize these statutes as specifically directed toward the gun industry,[288] they never considered that a fundamental objective of these and all gun laws is to protect the health of the public.

State gun laws are created under the state's police power and thus have an expressed connection to the *health*, *safety*, and *welfare* of the people.[289] The Gun Control Act of 1968, the United States most comprehensive gun control statute, was

280. *Beretta*, 524 F.3d at 403.

281. *Id*. at 402.

282. 15 U.S.C. § 7903(5)(A)(iii)(I)–(II). See *supra* notes 170–73 and accompanying text for the language of the examples and the federal regulations they parallel.

283. See *supra* note 171 for the text of section 922(m) from the Gun Control Act.

284. *See, e.g.*, ALA. CODE § 40-12-143 (2010) (requiring that sellers of handguns maintain detailed record of every sale, including purchaser information).

285. 18 U.S.C. § 924(a)(1)(A).

286. In *Smith & Wesson*, the plaintiff relied on this fact to argue that the nature of the examples reflect Congress's intent to allow statutes of general applicability under the predicate exception. 875 N.E.2d at 431–32 (Ind. Ct. App. 2007). The court declined to resolve this issue and instead found that even if the predicate exception requires statutes specifically regulating the firearm industry, the Indiana public nuisance statute would satisfy this requirement. *Id.* at 432.

287. 18 U.S.C. § 922(d). Section 922(d) makes it unlawful to provide a gun to any individual prohibited to possess a gun under section 922(g), including felons, fugitives, mental defectives, and those convicted of any domestic abuse, among others.

288. Ileto v. Glock, Inc., 565 F.3d 1126, 1133–34 (9th Cir. 2009); City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 399, 403 (2d Cir. 2008).

289. See *supra* note 107 for discussion of how the Supreme Court in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010), held that states maintain the authority under their police power to regulate firearms manufacturing, sale, and use so long as the regulations do not violate the Second Amendment.

created pursuant to Congress's commerce power.[290] The Gun Control Act predated the articulated shift to framing gun violence in terms of public health,[291] but congressional concern about the public health risks posed by gun violence clearly underlay the Act. The Act was adopted during a spike in both firearm availability[292] and firearm-related violence,[293] and the House Report's "General Statement," which accompanied the bill, cited this increase in gun-related violence as the impetus for the Act's comprehensive reform of interstate gun commerce.[294] Among the figures cited to demonstrate the damage firearms had caused in 1967, the House Report included the number of gun-related suicides (10,000) and accidental deaths (2,600), which topped the number of gun-related murders (6,500).[295] Moreover, Congress recognized, and expressed as justification for the Act, that under-regulated distribution of firearms posed a serious risk to the population separate from the crime problem guns posed.[296]

The concerns underlying Congress's passage of the Gun Control Act parallel the public health conception of gun violence that scholars articulated a decade later.[297] Thus, even if Congress intended to limit the predicate exception to statutes that "clearly can be said to regulate the firearms industry,"[298] it included within that sphere gun marketing and distribution statutes, like the Gun Control Act, that are aimed at decreasing firearm morbidity and mortality. A public nuisance statute can also be included in this sphere; as discussed earlier, public nuisance has served for centuries as a device for regulating the practices that harm the public's health.[299]

Considering that explicit gun statutes, including those listed in examples I and II of the predicate exception,[300] intend to safeguard the public's health, courts should recognize that public nuisance statutes and "gun laws" share the same general end. Even stronger evidence, however, that public nuisance lawsuits are cognizable under the predicate exception is the fact that gun laws and public nuisance actions share much of the same means to reach this end. Both the Gun Control Act and gun-industry public nuisance claims seek to prevent firearms from reaching the individuals who would use them to commit violence—criminals, suicidal and mentally unstable individuals, and those susceptible to accidental shootings.[301] In fact, a large influx of inexpensive

290. 18 U.S.C. §§ 921–31.

291. See *supra* note 105 and accompanying text for discussion on the shift to framing gun violence as a public health problem.

292. Zimring, *supra* note 106, at 144.

293. *See* H.R. REP. NO. 90-1577 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4412–13 (citing increasing use of firearms in violent crimes as rationale for stronger firearms regulation).

294. *Id.*

295. *Id.* at 4413.

296. *Id.*

297. See *supra* note 105 and accompanying text.

298. City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 402 (2d Cir. 2008).

299. See *supra* Part II.C.1.b for a discussion of public nuisance's utility as a public health regulatory tool.

300. 15 U.S.C. § 7903(5)(A)(iii)(I)–(II) (2006). See *supra* note 170 for language of the examples accompanying the predicate exception.

301. *See, e.g.*, City of Philadelphia v. Beretta U.S.A., Corp., 126 F. Supp. 2d 882, 888–89 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002) (noting plaintiffs' "insist that the nuisance is the distribution practice itself"); City of Boston v. Smith & Wesson, No. 1999-02590, 2000 WL 1473568, at *14 (Mass. Super. Ct. July

foreign rifles and handguns in the 1950s and 1960s may have contributed to the higher gun violence rates that precipitated the Gun Control Act.[302] The essence of these public nuisance suits is that an undue flood of guns has created an unsafe environment for the public.[303]

Simply because a statutory public nuisance claim and the examples referenced in the predicate exception share common methods and objectives does not mean that courts must accept that a public nuisance statute is cognizable as a statute "applicable to the sale and marketing of [firearms]" similar to the examples. After all, Congress has explicitly qualified the firearm statutes as necessary for the promotion of public health and safety by adopting them, whereas a public nuisance lawsuit presumes without express legislative confirmation that the statute proscribes the gun industry's conduct.

The public health methods of empirical and probabilistic reasoning would illuminate this step by ascertaining whether abatement of the alleged violative conduct would achieve better health outcomes.[304] Studies have shown that some of the injunctive relief obtained through public nuisance litigation has, in the form of state-level regulation, succeeded in promoting public health.[305] For instance, a ban on "Saturday night specials" in Maryland correlated with a decrease in homicides.[306] Another study found that publicizing police stings and lawsuits against questionable gun dealers significantly reduced the supply of new guns to criminals in Chicago.[307] Data also show that guns used for crime in areas with stronger gun regulations are purchased, with significant regularity, in jurisdictions with weaker controls.[308]

By recognizing the intrinsic public health aims of the predicate exception and relying on available gun possession and health outcome data, a statutory public nuisance claim appears analogous to the examples provided in the predicate exception in both its means and ends. If this does not persuade a court that public nuisance is "applicable to the sale and marketing of [firearms]," it should at least persuade a court recognizing public health as a legal norm to resolve ambiguity in favor of promoting the intrinsic public health objectives of the predicate exception.[309]

13, 2000) (describing plaintiffs' public nuisance claim as based on allegation that gun manufacturer "created and maintained an illegal, secondary firearms market" that significantly interfered with public health, safety, and peace).

302. *See* Zimring, *supra* note 106, at 144–45 (noting influx of inexpensive, foreign guns without "redeeming social virtue" may have influenced the passing of Gun Control Act).

303. *E.g.*, City of New York v. Beretta U.S.A. Corp., 401 F. Supp. 2d 244, 251 (E.D.N.Y. 2005) (alleging industry had the ability but failed to prevent firearms from flowing into illegal secondary market, and that their failure to do so resulted in widespread access to illegal guns in New York City).

304. *See* PARMET, *supra* note 28, at 58–59, 68–72 (discussing public health methods of empirical and probabilistic reasoning and how these methods can be incorporated into judicial analysis). See also *supra* Section II.A.3 for a discussion of these methodologies.

305. See *supra* notes 161–64 and accompanying text for a discussion of studies that suggest public nuisance remedies can positively impact gun-harm outcomes.

306. Webster et al., *supra* note 117, at 406–07.

307. Webster et al., *supra* note 164, at 227–29.

308. See *supra* note 105 and accompanying text for a discussion of research tracing the origin of firearms used to commit crime.

309. *See* PARMET, *supra* note 28, at 63 (noting that valuing public health as legal norm would lead judges to read statutory ambiguities in favor of realizing statute's public health objectives).

C. The Purpose of the PLCAA

Along with examining the meaning of "applicable to the sale or marketing of [firearms]" within the context of the predicate exception, courts have also examined its meaning within the context of the PLCAA as a whole.[310] This step requires analyzing legislative intent because much of the PLCAA is comprised of express congressional purpose and findings.[311] Incorporating a population perspective into this analysis would expand a court's understanding of the causal factors associated with gun violence and the regulatory nature of public nuisance actions, which would, in turn, provide a richer understanding of the purposes underlying the PLCAA.

1. Toward a Comprehensive Understanding of the Causes of Gun Violence

The courts in *Ileto* and *Beretta* focused their analysis on the stated primary purpose of the PLCAA,[312] namely: "To prohibit causes of action against [the gun industry] . . . for the harm *solely* caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended."[313] Both courts found this language to express Congress's intent to preempt common law vicarious liability tort claims, like public nuisance.[314] This interpretation is a prime example of how legal reasoning that fails to recognize the role populations play in legal determinations can render an analysis incomplete and negatively impact public health.[315]

Public health focuses on the well-being of the population, not the individual.[316] Accordingly, one of the principle elements of a population-based legal analysis is recognizing the importance of populations to health outcomes.[317] In *Ileto* and *Beretta*, the courts construed the purpose of the PLCAA as prohibiting lawsuits against the gun industry for harm resulting from a gunshot when the shooter—the person *causing* the

310. Ileto v. Glock, Inc., 565 F.3d 1126, 1133 (9th Cir. 2009) (citing Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (holding "plainness or ambiguity of statutory [text] is determined by reference to the [text] itself, the specific context in which that [text] is used, and the broader context of the statute as a whole." (alterations in original))); City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 400 (2d Cir. 2008); Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 433–34 (Ind. Ct. App. 2007).

311. 15 U.S.C. § 7901 (2006). Examination of legislative intent is typically conducted only after the language is determined to be ambiguous. *E.g.*, Jonah R. v. Carmona, 446 F.3d 1000, 1005 (9th Cir. 2006). The Ninth Circuit, *Ileto*, 565 F.3d at 1135, and Second Circuit, *Beretta*, 524 F.3d at 402, addressed legislative intent after finding "applicable" was ambiguous. The Indiana Court of Appeals addressed legislative intent in its analysis of "applicable" within the context of PLCAA and found the term unambiguous. *Smith & Wesson*, 875 N.E.2d at 433–34. It is not material for the purposes of this Comment whether a court looks to the legislative purpose of PLCAA to decide if "applicable" is ambiguous or whether it looks to legislative purpose after finding "applicable" to be ambiguous. Both analyses share the same objective—to deduce whether Congress intended to preempt statutory public nuisance claims.

312. *Ileto*, 565 F.3d at 1135; *Beretta*, 524 F.3d at 402.

313. 15 U.S.C. § 7901(b)(1) (emphasis added).

314. *Ileto*, 565 F.3d at 1135–36; *Beretta*, 524 F.3d at 402–03.

315. *See* PARMET, *supra* note 28, at 13–22, 53–56, 65–68 (discussing population perspective and its function in population-based legal reasoning).

316. *Id.* at 14. Parmet points out, however, that underlying the aim of public health is the view that public health determines individual well-being. *Id.* at 13–14.

317. *Id.* at 53–54.

harm—is the real culprit.[318] A population-based analysis would broaden a court's understanding of the *causes* of gun violence and demonstrate that public nuisance actions are directed at the gun industry's causative behavior, and thus are different from the claims Congress intended to preempt.

The population perspective is derived from public health's objective of ascertaining the social determinants of health—the factors in the social environment that impact health.[319] This requires looking beyond the individual traits of the people experiencing the health effect, to the traits of the population experiencing the effect.[320] Failing to ascertain the social determinants of a given health problem can obscure key causal forces of that problem.[321] Recall the study by epidemiologist Geoffrey Rose.[322] He demonstrated that by looking only at the individual risk factors for hypertension within one population, a factor impacting the entire population's blood pressure would remain undetected because that factor—a social determinant of hypertension—impacted everyone in that population equally.[323]

Like the first step in Rose's etiological examination, where he examined only individual risk factors, the Second and Ninth Circuits neglected to consider the social determinants of gun violence. To ascertain the *cause* of the gun violence suffered by the plaintiffs, the Second and Ninth Circuits essentially asked, "why do some individuals get shot?" and answered "because people shoot them." This individual-based logic places all causal responsibility on the shooter. As a result, the courts mistakenly found that because the PLCAA was intended to preclude liability for "harm solely caused by the criminal or unlawful misuse" of a firearm,[324] public nuisance claims against the gun industry must be dismissed.

A population-based analysis would acknowledge the possibility that environmental factors also *cause* gun violence and therefore would ask, "why do some populations suffer from gunshots more than others?"[325] These public nuisance actions effectively posit that gun industry conduct is a social determinant of gun violence. Plaintiffs allege that the gun industry creates an environment harmful to the public by

318. In regard to the purpose of the PLCAA, the *Ileto* court stated: "Congress found that manufacturers and sellers of firearms 'are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.' Congress found egregious '[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others.'" *Ileto*, 565 F.3d at 1135 (quoting § 7901(a)(5)–(6)) (internal citations omitted). The *Beretta* court inferred from the Act's stated purpose that "Congress clearly intended to protect from vicarious liability members of the firearms industry who engage in the 'lawful design, manufacture, marketing, distribution, importation, or sale' of firearms." *Beretta*, 524 F.3d at 402 (quoting § 7901(a)(5)).

319. PARMET, *supra* note 28, at 20.

320. *Id.*

321. *See* Rose, *supra* note 67, at 32 (arguing that doctors should not only ask "[w]hat is the diagnosis, and what is the treatment?" but should also ask "[w]hy did this happen, and could it have been prevented?" (internal quotation marks omitted)).

322. See *supra* notes 67–71 and accompanying text for a discussion of Rose's study.

323. Rose, *supra* note 67, at 34.

324. 15 U.S.C. § 7901(b)(1) (2006).

325. *Cf.* Rose, *supra* note 67, at 33 (noting that ascertaining social determinants of hypertension requires asking not simply "[w]hy do some individuals have hypertension?" but also "[w]hy do some populations have much hypertension, whilst in others it is rare?" (internal quotation marks omitted)).

flooding it with cheap, unduly dangerous firearms that inevitably enter illicit channels of commerce.[326] Put simply, the harm alleged is not *solely* caused by a third party, but by the gun industry as well.[327] From this perspective, a public nuisance claim against the gun industry falls squarely outside the stated purpose of the PLCAA.

2. Public Nuisance and Its Foundation in Common Law

The Ninth and Second Circuits also relied on the statute's findings in their analyses of whether Congress intended to preempt a statutory public nuisance action.[328] One of the findings provides that the kinds of lawsuits being filed against the gun industry were attempts to regulate commerce in firearms, thereby circumventing the legislative process.[329] Another states that the actions are "based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law."[330] The Ninth Circuit interpreted this to mean that Congress intended to preempt common law tort actions like public nuisance.[331] Furthermore, it held that because California's public nuisance law had been codified with the intent of maintaining its common law nature as an evolving doctrine, a nuisance action under the statute was precisely the type of non-bona fide expansion of common law that Congress sought to prohibit.[332]

Neither court, however, examined whether extending public nuisance to a claim like this actually lacked foundation in U.S. common law. As discussed in detail *supra*, common law public nuisance has a rich pedigree as a legal device used to regulate behavior injurious to the public's health.[333] Granted, during its heyday as a public health regulatory tool, public nuisance was not invoked to regulate the firearm industry. At that time, however, gun violence was not considered a threat to public health.[334]

326. *See, e.g.*, Ileto v. Glock Inc., 349 F.3d 1191, 1210 (9th Cir. 2003) (alleging defendants knowingly marketed and sold products "with reckless disregard for human life and for the peace, tranquility, and economic well being of the public" and that their conduct "unreasonably interfered with public safety and health").

327. In her dissent, Judge Berzon made this very point, but by informing her decision with a population perspective, she would have added external support to what was otherwise a simpler plain language rationale. *See* Ileto v. Glock, Inc., 565 F.3d 1126, 1158–59 (9th Cir. 2009) (Berzon, J., dissenting) (finding "solely" demonstrates Congress's intent to preempt only vicarious and strict liability).

328. *Ileto*, 565 F.3d at 1135–56; City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 402–03 (2d Cir. 2008).

329. *Ileto*, 565 F.3d at 1135–56 (citing 15 U.S.C. § 7901(a)(8)).

330. *Id*. at 1135 (quoting 15 U.S.C. § 7901(a)(7)).

331. *Id.*

332. *Id.* at 1136.

333. See *supra* notes 138–49 and accompanying text for a discussion of public nuisance's foundation as a public health regulatory intervention.

334. *See* Mair et al., *supra* note 105, at 39–40 (noting gun violence became viewed as public health problem only in last few decades); *see also* Linda L. Dahlberg & James A. Mercy, *History of Violence as a Public Health Problem*, 11 AM. MED. ASS'N J. ETHICS (VIRTUAL MENTOR) 167, 167 (2009) (discussing how violence became recognized as public health problem in second half of twentieth century).

The common law foundation of these gun industry actions lies in how public nuisance functioned historically.[335] Because public nuisance does not require fault[336] and because the traditional remedy was injunctive relief,[337] municipalities utilized public nuisance as a way to regulate activity that threatened the public's health and safety.[338] Recognizing the action's utility in regulating harmful conduct that could not be anticipated, states codified their public nuisance law.[339] Presumably these public nuisance statutes were enacted so municipalities could easily tailor restraints on conduct interfering with a right of the public. Today, every state has a public nuisance statute.[340] In this light, state public nuisance statutes can clearly be said to regulate the firearm industry when the firearm industry is creating a public nuisance. Moreover, by these lawsuits, municipalities are not attempting to "circumvent the Legislative branch,"[341] but rather to supplement regulation in a manner consistent with public nuisance doctrine and municipalities' public health responsibilities. Because public nuisance traditionally regulated conduct threatening public health, so long as a public nuisance lawsuit is aimed at mitigating a serious public health risk, it surely has a "foundation in hundreds of years of the common law and jurisprudence of the United States."[342]

In sum, the PLCAA as a whole certainly expresses hostility toward common law civil actions against the gun industry for injuries caused by other people. But it does not call for preemption of a civil action alleging that the gun industry, in violation of statute, created an environment dangerous to the public's health.

IV. CONCLUSION

Courts and other legal decision makers will regularly be called upon to answer questions that implicate public health. It is not necessary to undertake a "public health perspective" in order to give proper weight to the fundamental legal norm that the well-being of the population is the highest law.[343] The exercise of incorporating the principals of the public health approach, however, brings to light the real way in which legal decisions and population health relate.

To some, suing the gun industry for harm caused by guns may look a little like shooting the messenger. This is why a population perspective is necessary. There are environmental conditions in the United States, found particularly in high-crime urban

335. See *supra* notes 133–37 and accompanying text for a brief discussion of the history and development of public nuisance doctrine.

336. Kairys, *supra* note 139, at 1178.

337. RESTATEMENT (SECOND) OF TORTS § 821C (providing for relief of damages or abatement of the nuisance); Schwartz & Goldberg, *supra* note 134, at 544 (noting English courts initially only awarded abatement relief).

338. See *supra* note 134–35 and accompanying text for a discussion of how public nuisance litigation has been used to protect public health and safety.

339. Schwartz & Goldberg, *supra* note 134, at 546.

340. Lexis 50 State Multi-Jurisdictional Surveys, *supra* note 146.

341. 15 U.S.C. § 7901(a)(8) (2006).

342. *Id.* § 7901(a)(7).

343. For instance, the court in *Smith & Wesson* did not have to pay tribute to the public health ramifications in the question presented in order to reach a result that best safeguards public health.

areas, that can justly be described as having contributed to one's injury or death, even if the final blow came from a gun. Law in the United States has a rich tradition of regulating such environmental forces that threaten public health, and it is well equipped to do so.[344] A public nuisance statute is a particularly apt mechanism.[345]

With the Protection of Lawful Commerce in Arms Act (PLCAA),[346] Congress may have forgotten the value that law historically accords the well-being of the people. Courts can recapture this norm, however, in ruling on whether a public nuisance statute is a predicate statute under the PLCAA's predicate exception.[347] By incorporating a population health perspective in analyzing whether a public nuisance statute is "applicable to the sale or marketing of [firearms]," a court can develop a more complete understanding of the public health rationale underlying firearm regulation. Courts should recognize that public nuisance has traditionally played an important regulatory role in public health, and accordingly, should realize that lawsuits brought pursuant to public nuisance statutes seek to achieve the same ends—by similar means—as laws specifically regulating firearms.

Moreover, a population health perspective can bring to light the causal factors of gun violence that exist in the environments of those harmed. The PLCAA certainly prohibits vicarious and strict liability for gun manufacturers and dealers, but armed with an understanding of the social determinants of gun violence, courts can comply with the congressional intent of the PLCAA while enforcing statutes that expressly prevent anyone, including the gun industry, from creating an environment that unduly risks the public's health and safety.

344. See *supra* notes 6–10 and accompanying text for a discussion of various laws designed to promote public health.

345. See *supra* Part II.C.1.b for a discussion of public nuisance's utility as a public health regulatory intervention.

346. 15 U.S.C. §§ 7901–7903 (2006).

347. *Id.* § 7903(5)(A)(iii).