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NAACP v. AcuSport

A CALL FOR CHANGE TO PUBLIC NUISANCE LAW*

INTRODUCTION

Despite a drop over the past decade in the number of violent crimes committed with handguns, the United States has seen a simultaneous increase in the number of civil suits brought against the handgun industry.¹ Both public and private plaintiffs seek to hold the industry accountable for the crimes that continue to be committed with handguns. Various theories of liability have been articulated in these cases. One of the most prevalent of these theories is that handgun manufacturers and distributors have created a public nuisance through the negligent marketing and distribution of their products.² On the whole, such litigation has been unsuccessful, but some progress has been made in recent years. Courts appear more receptive to arguments that negligent marketing and distribution practices are foreseeable causes of handgun-related crimes.³ In the context of public nuisance cases,

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¹ Carl T. Bogus, *Gun Litigation and Societal Values*, 32 CONN. L. REV. 1353, 1356 (1999) (referencing 30 municipalities that had brought suits against handgun manufacturers as of 2000 and identifying several private plaintiffs who filed similar suits).

² *City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d 16 (Ill. App. Ct. 2002), although unsuccessful, was one of the first cases brought by a municipality against handgun manufacturers under a theory of public nuisance. *See also* Camden County Bd. of Chosen Freeholders v. Beretta, 273 F.3d 536 (3d Cir. 2001). In addition to public nuisance claims, many private individuals have brought claims of negligent marketing against handgun manufacturers. *See* Iletto v. Glock, Inc., 194 F. Supp. 2d 1040 (C.D. Cal. 2002); Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 808 (E.D.N.Y. 1999).

³ *See infra* Parts III & IV.

however, such advances have been cut short by the courts' retention and strict application of the special injury rule.

Public nuisance claims can be brought by both private plaintiffs, such as individual citizens or private organizations, or by public plaintiffs, such as states or municipalities.⁴ When a private plaintiff brings a public nuisance claim, however, he has the added burden of proving that the injury he suffered was a special injury. A special injury is one different in kind from that suffered by other members of a plaintiff's community who came or could have come into contact with the alleged nuisance.⁵ This requirement has proven to be a difficult hurdle for many private plaintiffs to overcome. Application of the special injury rule regularly leads to quick victories for defendants allegedly or actually maintaining public nuisances.⁶

A recent trilogy of cases brought in New York's state and federal courts against the handgun industry illustrates both the roads that have been paved toward a victory against the handgun industry and the harmful impact that the special injury rule has had on this progress. The disappointing outcome of the most notable of these cases, *NAACP v. AcuSport*,⁷ is a model of public nuisance law gone awry.

In July 2003, in the Eastern District of New York, District Court Judge Jack B. Weinstein dismissed *NAACP v. AcuSport*, a lawsuit brought by a private plaintiff, the National Association for the Advancement of Colored Persons ("NAACP"), against manufacturers, importers, and distributors

⁴ RESTATEMENT (SECOND) OF TORTS, § 821B(1) (1979).

⁵ *Id.*

⁶ See *Saks v. Petosa*, 584 N.Y.S.2d 321 (App. Div. 1992) in which a lessee erected a fence that violated the zoning resolution. Private citizens filed a suit claiming that the fence constituted a public nuisance. The case was dismissed on appeal. The court found the citizens did not have standing to maintain a cause of action alleging public nuisance because their damage did not differ from that of the public in general. *Id.* at 322. See also *Queens County Business Alliance, Inc. v. New York Racing Assoc.*, 469 N.Y.S.2d 448 (App. Div. 1983), in which the plaintiff, a business alliance representing merchants and others, brought suit to enjoin the defendant, a racing association, from violating city zoning ordinances. The plaintiff alleged no injury different from that suffered by other residents and merchants of the county, and the case was thus dismissed. *Id.* at 449. But see *Graceland Corp. v. Consolidated Laundries Corp.*, 180 N.Y.S.2d 644 (App. Div. 1958), in which the plaintiff, an apartment house owner, brought a nuisance action against the defendant, a laundry company. The defendant parked and stored large trucks and some passenger cars on the public sidewalk, substantially blocking the sidewalk with respect to the plaintiff's premises, but not precluding entirely pedestrian traffic. The court affirmed the trial court's injunction because plaintiff succeeded in proving a special injury. *Id.* at 645-46.

⁷ *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003).

of handguns.⁸ The NAACP brought (based) its action on a public nuisance theory under New York law. Judge Weinstein's decision to dismiss the case hinged on the NAACP's failure to establish a critical element of the claim – that members or potential members of the NAACP suffered a special injury as a result of the public nuisance created by the negligent acts of handgun manufacturers.⁹ Ultimately, the NAACP could prove that its members suffered harm of a greater degree than that suffered by the public at large.¹⁰ However, this distinction failed to satisfy the special injury rule, which requires the harm to be different in kind.¹¹

The *AcuSport* decision reveals the substantial shortcomings that the special injury rule imposes on public nuisance laws. Public nuisance laws were developed to protect public rights and values,¹² and most Americans value a society that places some responsibility on the gun industry for the high rates of crime and violence associated with its products.¹³ Legislatures, influenced by the powerful lobbies of the gun industry and the National Rifle Association, may have failed to pass certain measures for reducing gun violence that a majority of the public would support,¹⁴ but this failure need not leave Americans without remedies. Because public nuisance laws derive from the common law, courts have a unique opportunity to use these laws to articulate a level of responsibility and accountability expected of handgun manufacturers. However, by retaining the special injury rule, courts cannot effectively vindicate the rights and values of

⁸ *Id.* at 446.

⁹ *Id.*

¹⁰ *See infra* Part IV.A.

¹¹ *AcuSport*, 271 F. Supp. 2d at 451.

¹² *See infra* Part II.A.

¹³ *See* Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1251 (2001) (“Nationwide surveys conducted in 1996 and 1998 revealed majority support for laws that would restrict qualified purchasers to one gun per month and that would compel manufacturers to install locking devices in all new handguns; both measures were successfully opposed in Congress by the industry and the NRA.”).

¹⁴ *Id.* Polls have consistently recorded a public preference for stricter gun control laws. “Six in ten Americans believe that laws covering the sale of firearms should be more stringent than they are now.” Keating Holland, *Poll: Majority of Americans Favor Stricter Gun Control*, CNN, (Apr. 12, 2000) at <http://www.cnn.com/2000/ALLPOLITICS/stories/04/12/poll.guns/index.html> (last visited April 20, 2005). Seventy-two percent of Americans favor stricter laws relating to the control of handguns. *See* Humphrey Taylor, *The Gun Control Enigma*, Harris Interactive (May 13, 2000), at http://www.harrisinteractive.com/harris_poll/index.asp?PID=89 (last visited April 20, 2005).

American society. The special injury rule prevents courts from capitalizing on the full potential of public nuisance laws. Although English common law courts originally conceived of the special injury rule as an element of the tort of public nuisance, today, that very element often precludes the tort from serving the needs that its originators intended it to serve - protecting the public by abating public nuisances.

Courts articulate many reasons for maintaining the special injury rule, the most common of which is a fear that abandonment of the rule would open a floodgate of trivial litigation. While this argument does have merit in the context of private plaintiffs seeking damages, it seems misplaced in the context of private plaintiffs seeking injunctive relief. This Note argues that public nuisance laws could best protect public rights and values if states like New York eliminate the special injury rule for private plaintiffs seeking injunctive relief. This change would allow more private citizens to abate public nuisances without threatening courts with excessive litigation or undermining the public rights and values that public nuisance laws were designed to protect.

Part I of this Note will examine the current problem of gun violence in the United States and review the recent history of handgun litigation. Part II will explore the history and development of public nuisance laws. Parts III and IV will examine how recent New York litigation, specifically *AcuSport*, highlights the inadequacies of current public nuisance laws. Finally, Part V will argue that the history of the special injury rule, recent changes to the rule in other jurisdictions, and existing procedural protections against excessive litigation all point to the misplacement of the special injury rule in private actions for injunctive relief.

I. THE CURRENT STATE OF HANDGUN VIOLENCE AND HANDGUN LITIGATION IN THE UNITED STATES

Over the past decade, the United States has witnessed a steady decline in and stabilization of the number of violent crimes committed with firearms. This number peaked at 581,697 in 1993.¹⁵ Over 17,000 of those crimes were homicides.¹⁶

¹⁵ *Crimes Committed with Firearms, 1973-2002*, Bureau of Justice Statistics, at <http://www.ojp.usdoj.gov/bjs/glance/tables/gunrimetab.htm> (last visited Oct. 25, 2004).

¹⁶ *Id.*

By 2001, the number of violent crimes committed with firearms dropped significantly to 354,754.¹⁷ Of those crimes, over 11,000 were homicides.¹⁸ This decrease followed the enactment of the Brady Handgun Violence Prevention Act in November 1993.¹⁹ The federal act established a system of background checks on the eligibility of applicants to buy or otherwise acquire handguns or rifles.²⁰ Between March 1, 1994, and December 30, 2001, almost 38 million applications for firearms were made to federally licensed dealers. Roughly two percent of those applicants, approximately 840,000, were rejected.²¹ Despite the positive effects of the Brady Act, the number of gun-related deaths suffered each year in the United States remains higher than that of any other civilized nation.²²

The impact of handgun violence on the African-American community has been particularly acute, and undoubtedly led the NAACP to file its lawsuit against the handgun industry. For example, in 1999, 505 murders were committed with firearms in New York State, and 466 of those murders were committed with handguns.²³ Of the 466 victims killed by handguns in New York State in 1999, 296 were black.²⁴ This number is highly disproportionate given the fact that of the approximately 19 million people living in New York, only three million are black.²⁵ Thus, while blacks make up only 15 % of New York State's population, they represent 63.5 % of the victims of handgun homicides. This significant impact that gun-related crimes have on the black population indicates the limited ability that our current legislation has to effectively address our country's handgun problem.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921-922, 924, 925A; 42 U.S.C. § 3759) (2000)).

²⁰ 18 U.S.C. § 922 (2000).

²¹ Michael Bowling, et al., *Background Checks for Firearms Transfers*, 2001, Bureau of Justice Statistics (Sep. 19, 2002), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/bcft01.pdf> (last visited April 20, 2005).

²² E.G. Krug, et al., *Firearm-Related Deaths in the United States and 35 Other High- and Upper-Middle-Income Countries*, 27 INT'L. J. EPIDEMIOLOGY 217 (Issue 2, 1998).

²³ *1999 Crime & Justice Annual Report*, §1 Crimes Reported 21, tbl. 11, New York State Division of Criminal Justice Services, available at http://criminaljustice.state.ny.us/crimnet/ojsa/cja_99/sect1a.pdf (1999).

²⁴ *Id.*

²⁵ *United States Census 2000 Demographic Profiles*, United States Bureau of the Census available at <http://censtats.census.gov/data/NY/04036.pdf>. (2000).

Clearly, for the United States to adequately address the problem of gun violence, the government must not regulate only handgun buyers.²⁶ American citizens, as well as states and municipalities have begun to look at litigation as an opportunity to pick up the fight against handgun violence where legislation leaves off. Initially, plaintiffs saw little success.²⁷ The handgun industry has traditionally responded to litigation brought against it with a foreseeability argument.²⁸ Manufacturers and distributors maintain that they should not be held accountable for crimes committed by third parties with handguns because they could not foresee the number of handguns involved in criminal acts.²⁹ Settlements are rare.³⁰ Most manufacturers have chosen – with much success – to litigate the cases brought against them.³¹ And as most courts have given the industry’s foreseeability argument weight,³² most cases have ended on defendant-manufacturers’ motions to dismiss or motions for summary judgment.³³

²⁶ See 18 U.S.C. § 922 (1993).

²⁷ Alfred C. Yen, *What Federal Gun Control Can Teach Us About the DMCA’s Anti-Trafficking Provisions*, 2003 WIS. L. REV. 649, 651 n.9 (2003).

²⁸ Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 23 (2000) (arguing that courts reject negligence claims brought against plaintiffs because they cannot satisfy the foreseeability element of the tort).

²⁹ Daniel L. Feldman, *Not Quite High Noon for Gunmakers, But It’s Coming: Why Hamilton Still Means Negligence Liability in Their Future*, 67 BROOK. L. REV. 293, 301 (2001). A plaintiff alleging a public nuisance must prove causation, but many handguns used in criminal acts are not purchased but rather are stolen from the current stock of guns in American homes—approximately 200 million. *Id.*

³⁰ See Lytton, *supra* note 13, at 1260 (“Rather than settling most manufacturers have gambled that they could defeat plaintiffs in court . . .”).

³¹ *Id.*

³² Feldman, *supra* note 29, at 293 (“With very few exceptions, American courts have not endorsed mass tort claims against handgun manufacturers. Questions of cause-in-fact and whether third parties have a duty of care to strangers have posed significant obstacles.”).

³³ See, e.g., *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 426 (3d Cir. 2002).

The causal connection between the gun manufacturers’ conduct and the plaintiffs’ injuries is attenuated and weak. Further, if we allowed this action, it would be difficult to apportion damages to avoid multiple recoveries and the district court would be faced with apportioning liability among, at minimum, the various gun manufacturers, the distributors, the dealers, the resellers, and the shooter.

Id.; *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001) (holding that dismissal of plaintiff’s complaint against gun manufacturer was appropriate because plaintiff did not allege that the act of manufacturing a gun was abnormally dangerous but rather that the use of the completed product by others was unusually dangerous); see also *Firearms Litigation Clearinghouse, Firearms Litigation Reporter: Updates in Municipal Litigation*, at <http://www.firearmslitigation.org> (last visited Dec. 26, 2003)

New data on the handgun industry has weakened the industry's defense. Recent studies have revealed that more criminals buy their guns new than steal them.³⁴ Firearm trafficking investigations performed between July 1996 and December 1998 on guns recovered from criminals revealed that although over 11,000 of the guns traced were stolen from licensed gun dealers, over 40,000 guns were trafficked by licensed dealers.³⁵ This illegal market creates opportunities for individuals to engage in crimes and violent acts that may otherwise not be committed. Despite any help these statistics offer to plaintiffs attempting to overcome the handgun industry's foreseeability arguments, the industry continues to prevail against these private plaintiffs bringing public nuisance claims because many fail to prove another necessary element of the claim: the special injury.³⁶ Without further regulations coming from legislators, public nuisance laws can offer an immediate and effective remedy to those citizens who suffer the violent repercussions of negligent manufacturing and distribution of handguns.³⁷ Eliminating the special injury rule for plaintiffs seeking injunctions could reinvigorate the remedy that public nuisance laws provide, enabling them to effectively serve as a weapon in the United States' ongoing battle against handgun violence.

(identifying nine lawsuits brought by municipalities against handgun manufacturers that were dismissed including Chicago, Cincinnati, Gary, and New Orleans).

³⁴ Feldman, *supra* note 29, at 301 (citing Glenn L. Pierce, et al., *National Report on Firearm Trace Analysis for 1996-1997*, at 11, tbl. 5 (1998)).

³⁵ *Id.* at 301-02 (citing BATF US Dept. of Treasury, *Following the Gun: Enforcing Federal Law Against Firearms Traffickers*, at 13, tbl. 3 (2000)). See also Fox Butterfield, *Gun Flow to Criminals Laid To Tiny Fraction of Dealers*, N.Y. TIMES, Jul 1, 1999, at A14 ("Until recently, it had been widely believed that for the most part, criminals and juvenile offenders stole their guns, and that with 230 million guns in America, there was little that law enforcement could do to stanch the flow to them.").

³⁶ See *supra* notes 5-13 and accompanying text.

³⁷ Daniel P. Larsen, *Combating the Exotic Species Invasion: The Role of Tort Liability*, 5 DUKE ENVTL. L. & POL'Y F. 21, 38-39 (1995) ("Th[e] adaptability of public nuisance law to many types of situations enables the law to be much less rigid than statutory regulations. Unlike public nuisance law regulatory statutes are limited in their ability to adjust to changed conditions. Change occurs through either amendments pursuant to the legislative process or, less radically, through agency or judicial interpretations. Therefore, common law public nuisance law provides the desired remedy of abatement, without the quagmire of legislation or the obsolescence of static regulations. Public nuisance may serve as either a supplement to statutory regulations for intentional introductions or as the primary tool for unintentional introductions of exotic species, perhaps the most formidable environmental pollutant not adequately addressed in the law to date.").

II. THE HISTORY OF PUBLIC NUISANCE

The history and development of public nuisance laws and the special injury rule illustrate the misplacement of the special injury rule as an element of private actions for injunctive relief against public nuisances. This section discusses the birth of public nuisance law in England and examines how the law has since expanded and changed in the United States.

A. *Public Nuisance Under English Common Law*

A public nuisance is an “unreasonable interference with a right common to the general public.”³⁸ Nuisance laws have their roots in England where a nuisance, in its earliest form, was a tort against land, or more specifically, an interference with the use or enjoyment of one’s private land.³⁹ Later, nuisance came to encompass “infringement[s] of the rights of the Crown,” acts that could only be abated by the king bringing a criminal action for nuisance.⁴⁰ These cases also involved interference with land, usually public highways, and they were labeled public nuisances. English courts distinguished the two by labeling the original tort, interference with the enjoyment of private land, a private nuisance. The owner of the private land sought to redress private nuisances, rather than the king.⁴¹ Both public and private nuisances exist today. While the tort of private nuisance has remained largely unchanged, public nuisance has changed and expanded since its origin.

Over time, the law of public nuisance has developed in several ways. First, the doctrine was expanded to redress not just the rights of the Crown, but also the rights of the public.⁴² The interferences labeled public nuisances went beyond the obstruction of public highways and came to comprise a variety of nuisances infringing on public rights such as an “interference with a market, smoke from a lime-pit, and diversion of water from a mill.”⁴³ Initially, only the king could

³⁸ RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

³⁹ *Id.* § 822.

⁴⁰ *Id.* § 821B cmt. a (stating that the remedies for public nuisance originally were criminal).

⁴¹ William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 997-98 (1966).

⁴² RESTATEMENT (SECOND) OF TORTS, § 821B cmt. a (1979).

⁴³ *Id.* at § 821B cmt. b. See Prosser, *supra* note 41, at 998-99 (“By degrees the class of offenses recognized as ‘common nuisance’ was greatly expanded to include any

redress these invasions of public rights.⁴⁴ However, in the sixteenth century, this element of the public nuisance law also changed. The second major shift in the traditional public nuisance laws was the creation of a private right of action for a public nuisance, which allowed private individuals to bring claims.

The first case of a private action for public nuisance was brought in England in 1536.⁴⁵ The plaintiff alleged that the defendant had blocked a public highway, thereby preventing him from reaching his property.⁴⁶ While the court decided that the defendant's obstruction of the highway did constitute a public nuisance, the justices disagreed as to whether the plaintiff had any right to recovery.⁴⁷ Chief Justice Baldwin held that the court should follow the established rule that such an interference could only be redressed with an action brought by the Crown. He feared that allowing one such action to be brought by a private individual would open the door to hundreds of similar actions.⁴⁸ Disagreeing with the Chief Justice was Justice Fitzherbert, who believed the court should make an exception and allow a private plaintiff to bring a suit for public nuisance if he "had greater hurt or inconvenience than any other man had."⁴⁹ Justice Fitzherbert described this greater hurt or inconvenience as a "special hurt,"⁵⁰ known today as a special injury.

'act not warranted by law or an omissions to discharge a legal duty, which inconveniences the public in the exercise of rights common to all Her Majesty's subjects.'").

⁴⁴ RESTATEMENT (SECOND) OF TORTS, § 821B cmt. a (1979).

⁴⁵ Anonymous, Y.B. Mich. 27 Hen. 8, f. 26, pl. 10 (1536).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* ("If one person shall have an action for this, by the same reason every person shall have an action, and so he will be punished a hundred times on the same case.").

⁴⁹ *Id.*

⁵⁰ Justice Fitzherbert used the following example to describe the kind of "special hurt" that could arise from a public nuisance and give rise to a private action:

I agree well that each nuisance done in the King's highway is punishable in the Leet and not by an action, unless it be where one man has suffered greater hurt or inconvenience that the generality have; but he who has suffered such greater displeasure or hurt can have an action to recover the damage which he has by reason of this special hurt. So if one makes a ditch across the highway, and I come riding along the way in the night and I and my horse are thrown into the ditch so that I have great damage and displeasure thereby, I shall have an action here against him who made this ditch across the highway, because I have suffered more damage than any other person.

Anonymous, Y.B. Mich. 27 Hen. 8, f. 26, pl. 10 (1536).

Ultimately, the courts of England adopted Justice Fitzherbert's approach and allowed private plaintiffs to bring actions for public nuisance if they could show that they had suffered some kind of special hurt.⁵¹ Such suits were labeled tort cases, as opposed to the criminal cases that could still be brought by the crown.⁵² By limiting the number of private plaintiffs who can bring a suit for public nuisance, the special hurt requirement preserved the original intent of public nuisance laws, which were developed primarily to protect the public-at-large from harm or danger.⁵³ Allowing all private plaintiffs to bring actions for public nuisance, regardless of the harm they suffered, would not necessarily protect the public so much as redress wrongs to private individuals. The implementation of the special injury rule reduced the number of private plaintiffs attempting to relieve individual harms not shared by the community through public nuisance laws.

Criminal prosecutions remained available after the development of the private action for public nuisance. However, by the mid-eighteenth century, public officials increasingly sought injunctive relief in the civil courts to avoid time-consuming criminal actions.⁵⁴ Not long thereafter, private plaintiffs, who initially sought damages to recover from their special harms, began seeking injunctive relief when bringing their private actions for public nuisance.⁵⁵ Undoubtedly, the

⁵¹ Initially there was some confusion within the English courts as to what a "special hurt" was. This confusion seems to stem from Justice Fitzherbert's use of the phrase "greater hurt or inconvenience." The disagreement was as to whether the harm a private plaintiff suffered had to be different-in-degree or different-in-kind from that suffered by the community at large. Eventually courts settled on the different-in-kind test for a special injury. However, this decision seems to have been more of a practical one as opposed to a conclusion dictated by the doctrinal underpinnings of Justice Fitzherbert's opinion or public nuisance laws in general. A different-in-kind test was simply easier for courts to administer than a different-in-degree test. See Prosser, *supra* note 41, at 1008; WILLIAM L. PROSSER, *THE LAW OF TORTS* § 89 (3d ed. 1964).

⁵² See RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1979); Prosser, *supra* note 40, at 999 (1966). See also Christopher V. Panoff, *In re the Exxon Valdez Alaska Native Class v. Exxon Corp.: Cultural Resources, Subsistence Living, and the Special Injury Rule*, 28 ENVTL. L. 701, 707-08 (1998) ("Eventually, public nuisance began to mesh with the concept of tort. The first case to break away from the concept of allowing only the king to sue for public nuisance occurred in 1536 . . . This marked the humble beginning of the special injury rule.").

⁵³ NAACP v. *AcuSport*, 271 F. Supp. 2d 435, 481-82 (E.D.N.Y. 2003).

⁵⁴ See Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 799 (2003) ("Initially, injunctive relief was seen as a supplement to the criminal prosecution . . ."). In 1819, in the case of *A.G. v. Johnson*, the Attorney General filed an information for injunctive relief in the King's Bench to abate an illegal wharf in the Thames. The injunction was granted, clearing the way for the Attorney General to bring civil proceedings to abate public nuisances. *Id.*

⁵⁵ 1752 appears to be the first year in which private parties began to seek

many potential parties involved and the various means by which they could abate a public nuisance led to some of the confusion that surrounded the tort in its development; and that confusion continues today.

B. Adoption and Expansion of Public Nuisance Laws in the United States

Public nuisance became part of early American law when the United States adopted the English common law.⁵⁶ As with most aspects of the common law, colonial America adopted England's public nuisance law without much change.⁵⁷ Early American courts typically heard two categories of public nuisance complaints. The first consisted of obstructions of public highways⁵⁸ or navigable waterways.⁵⁹ The second included minor offenses that compromised public morals or the public welfare.⁶⁰ As in England, either private individuals who suffered a special injury or criminal prosecutors brought these complaints.

Today, the Restatement (Second) of Torts ("Restatement") defines a public nuisance as "an unreasonable interference with a right common to the general public."⁶¹ For a majority of states, public nuisance laws exist in the form of criminal statutes that impose various penalties on those who create public nuisances or contribute to them. Like the Restatement, such laws tend to be broad and vague and do not

injunctive relief to abate public nuisances. In the case of *Baines v. Baker*, the defendant had opened an inoculation hospital where persons who feared catching smallpox could go and be infected under promising conditions, thereby inoculating themselves. A neighbor of the hospital, a private plaintiff, believed it was a public nuisance and sought an injunction. Lord Hardwicke denied the request for injunctive relief stating that, because the hospital was a public nuisance, it was the Attorney General's decision as to whether to file an information in the King's Bench. *Id.*

⁵⁶ Prosser, *supra* note 41, at 999.

⁵⁷ Gifford, *supra* note 54, at 802.

⁵⁸ See, e.g., *Thayer v. Dudley*, 3 Mass. 296 (1807) (placing logs in the middle of a Cambridge highway).

⁵⁹ See, e.g., *Burrows v. Pixley*, 1 Root 362 (Conn. 1792) (erecting a dam across a river that prevented boats from reaching plaintiff's house, farm, store, and shipyard).

⁶⁰ See *United States v. Holly*, 26 F. Cas. 346 (D.C. Cir. 1829) (No. 15,381) (operating gambling house); *State v. Kirby*, 5 N.C. 254 (1809) (swearing in the courtyard during the sitting of the jury); *Commonwealth v. Harrington*, 20 Mass. (3 Pickering) 26 (1825) (letting out and accommodating a part of a house for the business of prostitution).

⁶¹ RESTATEMENT (SECOND) OF TORTS § 821B (1979). See also, *Copart Indus., Inc. v. Consol. Edison Co. of New York*, 362 N.E.2d 968, 971 (N.Y. 1977) (holding that emissions from a plant could be a public nuisance but not a private nuisance).

offer a clear definition of "nuisance".⁶² Nonetheless, these statutes do make clear that, as in England, a public nuisance involves an act or omission that causes damage by invading a public interest or right.⁶³ Some states, such as New York, have not codified their public nuisance laws and continue to rely on the common law.⁶⁴ In addition to general prohibitions against public nuisances, most states have criminal statutes declaring specific acts or omissions to be public nuisances.⁶⁵

American courts continue to limit private citizens' access to claims of public nuisance by retaining the special injury rule.⁶⁶ When the American courts first adopted the public nuisance doctrine from English common law in the late 1800s, they struggled to determine the proper test for special injury.⁶⁷ The question was how to measure the "greater hurt or inconvenience" that Justice Fitzherbert suggested a private plaintiff had to prove to establish a claim. While American courts eventually settled on the different-in-kind test, the state and federal courts initially split on this issue. State courts adopted the different-in-kind test while federal courts preferred a different-in-degree test.⁶⁸ As in England, the American courts,

⁶² RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (1979). *See, e.g.*, WASH. REV. CODE § 47.42.010 (2003) ("The control of signs in areas adjacent to state highways of this state is hereby declared to be necessary to promote the public health, safety, welfare, convenience and enjoyment of public travel, to protect the public investment in the interstate system and other state highways, and to attract visitors to this state by conserving the natural beauty of areas adjacent to the interstate system . . ."); VA. CODE ANN. § 48-7 (2004) ("Whoever shall knowingly erect, establish, continue, maintain, use, own, occupy or lease any building, erection or place used for the purpose of lewdness, assignation or prostitution in the Commonwealth is guilty of a nuisance . . ."); OR. REV. STAT. § 167.090 (2003) ("A person commits the crime of publicly displaying nudity or sex for advertising purposes if . . .").

⁶³ Examples of acts or omissions held to be public nuisances under general public nuisance statutes include keeping hogpens, carrying a child with smallpox on a public highway, unlicensed prize fights, public profanity, a malarial pond, the storage of explosives, gaming houses, or the shooting of fireworks in the street. Prosser, *supra* note 41, at 1000. Conduct that causes or contributes to a public nuisance can fall within the three traditional categories of liability: intent, negligence, and strict liability. *Id.* at 1003-04.

⁶⁴ NAACP v. AcuSport, 271 F. Supp. 2d 435, 454 (E.D.N.Y. 2003).

⁶⁵ Examples of acts or omissions deemed by statutes to be public nuisances include maintaining bawdy houses, growing black currant plants, allowing narcotics to be sold in buildings, failing to attend to mosquito breeding waters, or maintaining unhealthy multiple dwellings. Prosser, *supra* note 41, at 999-1000.

⁶⁶ The special injury rule was officially adopted by the Supreme Court in 1838 when it held, "[A] plaintiff cannot maintain a stand in court of equity; unless he avers and proves some special injury." *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91, 99 (1838).

⁶⁷ Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 805-06 (2001).

⁶⁸ *Id.*

both state and federal, eventually settled on the different-in-kind test, apparently for reasons of judicial efficiency. Measuring degrees of harm tends to be more subjective and thus more time-consuming than distinguishing kinds of harm. What is most frustrating, however, is that no court suggests that the strict different-in-kind test is better aligned with the doctrinal purpose of public nuisance laws.⁶⁹ Such an arbitrary choice of definition adds credence to an argument for changing the special injury rule.⁷⁰

C. *The Elements of Common Law Public Nuisance*

Although a state may not codify a specific act as a public nuisance,⁷¹ one may still bring an action to abate an act if he can prove the elements of a public nuisance under the state's general public nuisance statute or under the common law. By way of example, New York courts applying public nuisance laws aim to deter "conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons."⁷² To establish a public nuisance under the common law in New York, a private plaintiff must prove: (1) the existence of a public nuisance; (2) conduct or omissions by a defendant that create, contribute to, or maintain that public nuisance; and (3) a particular harm suffered by the plaintiff as a result of the public nuisance that is different in kind from that suffered by the community at large.⁷³ A public plaintiff, on

⁶⁹ *AcuSport*, 271 F. Supp. 2d at 498 ("The requirement that a private plaintiff suing for public nuisance demonstrate particular harm different from that suffered by the public at large may be criticized on the ground that it inhibits adequate protection of the public when government authorities can not or will not act It does cut down potential suits by 'busybodies' having no particular interest in abating the nuisance except ideology.").

⁷⁰ Despite any vagueness in the general public nuisance laws, one can easily distinguish public nuisance from its counterpart, private nuisance, which was also adopted in the United States from the English common law and has not changed much since its English origin. A private nuisance threatens one person or a few individuals as a result of an interference with the use or enjoyment of private land. This private right of action extends to all individuals who suffer such a harm. See *Copart*, 362 N.E.2d at 971.

⁷¹ See *supra* note 62.

⁷² *Copart*, 362 N.E.2d at 971.

⁷³ *AcuSport*, 271 F. Supp. 2d at 448.

the other hand, must prove the first two elements but need not prove the third, a special injury.

1. Existence of a Public Nuisance

When bringing a claim for public nuisance, a private plaintiff must first prove the existence of a public nuisance. As stated, a public nuisance is a substantial interference with a public right. The Restatement defines a public right as one shared by all members of the general public.⁷⁴ A nuisance need not affect a set number of individuals to render it a public nuisance. Rather, a nuisance becomes public when it is “committed in such a place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience.”⁷⁵ Consequently, a plaintiff does not have to show that a nuisance affects every member of a community to prove that it is a public nuisance. Instead, a plaintiff only needs to show that the nuisance will affect every member of a community who comes into contact with it while exercising a public right.⁷⁶

The Restatement defines the term “substantial interference,” as an interference that is unreasonable. The Restatement attempts to elaborate upon the meaning of the term with the following explanation:

Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.⁷⁷

So long as an interference with a public right is reasonable, New York courts will not deem it a public nuisance. To determine whether an interference is reasonable, courts often look to the necessity, degree, and/or duration of the interference. For example, in *Hofeler v. Buck*, the Supreme Court of New York Court held that news stands on sidewalk

⁷⁴ RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979).

⁷⁵ *People v. Rubinfeld*, 254 N.Y. 245, 247 (1930).

⁷⁶ RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979).

⁷⁷ *Id.* § 821B.

corners constituted a public nuisance unless they fell under the exceptions of being either “only temporary; that is, not permanent or habitual, or . . . necessary.”⁷⁸ The defendants tried to argue that the news stands were necessary because they allowed people to purchase clean, dry newspapers. The court dismissed this argument stating that “[t]o take from the taxpayer the right to use these sidewalk spaces constructed and maintained for travel . . . in order to serve such a convenience, is a contention that needs no argument. These news stands are not . . . necessary or reasonable, but are encroachments or incumbrances upon the public street and, therefore, nuisances as matter of law.”⁷⁹ Thus, while an act or omission may simultaneously interfere with public rights and offer the public some kind of benefit or convenience, courts will deem it a nuisance unless they find it reasonable.⁸⁰

In addition to the reasonableness of the interference, courts will also consider the legality of an act that creates a public nuisance. Courts do not, however, recognize legality as a defense to an action for public nuisance, and may enjoin a defendant from engaging in otherwise legal acts if the manner in which the defendant engages in those acts creates or contributes to a public nuisance.⁸¹ The exception to this rule is that conduct fully authorized by statute, ordinance, or administrative regulation does not subject the actor to liability for a public nuisance even if that conduct creates or contributes to a public nuisance.⁸²

These questions of legality and reasonableness frequently arise in handgun litigation brought under public nuisance laws. As discussed, the gun industry must comply with many statutory and administrative regulations.⁸³ While many handgun manufacturers and distributors comply with these regulations, this compliance is not, in and of itself, a defense to a public nuisance claim. Notably, in *AcuSport*, Judge Weinstein observed that the particular marketing and

⁷⁸ *Hofeler v. Buck*, 180 N.Y.S. 563, 566 (Sup. Ct. 1920).

⁷⁹ *Id.* at 567.

⁸⁰ *Robert v. Powell*, 61 N.E. 699 (N.Y. 1901) (holding that a stepping stone in front of a house on which plaintiff injured himself was not a public nuisance because the stepping stone was not an unlawful or dangerous obstruction but a reasonable and necessary use of the street for the convenience of the homeowner and for other persons who desired to visit or enter the house for business or other lawful purpose).

⁸¹ *NAACP v. AcuSport*, 271 F. Supp. 2d 435, 484 (E.D.N.Y. 2003).

⁸² RESTATEMENT (SECOND) OF TORTS § 821B cmt. f (1979).

⁸³ *See supra* Part I.

distribution practices at issue were unregulated for the most part.⁸⁴ Consequently, the next question became whether the defendants' actions were unreasonable and, if so, whether they contributed to the public nuisance created by the unlawful possession of handguns.⁸⁵

2. Conduct of Defendants Created, Contributed to, or Maintained the Nuisance

Even when a court finds substantial interference with a public right, the court will not hold the defendant liable unless the plaintiff can prove that the defendant -- either by conduct or omissions that were intentional, were negligent, or amounted to abnormally dangerous or ultra-hazardous activity -- created, contributed to, or maintained a public nuisance.⁸⁶ The elements necessary to demonstrate negligence in a public nuisance action are similar, but not identical, to those required in all tort claims for negligence. A plaintiff must show duty, breach, and causation. However, on the question of causation, two differences exist in the analysis that courts use for public nuisance claims and traditional causation analysis. First, courts can hold defendants liable for conduct that creates a public nuisance in the aggregate.⁸⁷ Second, the occurrence of multiple, or even criminal, intervening actions do not necessarily break the chain of causation in a public nuisance action as they likely would in a negligence action.⁸⁸ Thus, a court may hold a defendant liable under public nuisance law whether his actions were the impetus for the public nuisance or merely a link in the chain of events giving rise to it. This altered (broader) definition of causation directly responds to the foreseeability argument that many handgun manufacturers make in response to litigation.⁸⁹

As Judge Weinstein explained in *AcuSport*, intent, for public nuisance purposes, is present in the context of handgun

⁸⁴ *AcuSport*, 271 F. Supp. 2d at 485.

⁸⁵ *Id.* at 485-86.

⁸⁶ *Copart*, 362 N.E.2d at 971. The Restatement also links a finding of intentional or negligent interference with a public right to the unreasonableness of the interference. "If the interference with the public right is intentional, it must also be unreasonable. . . . If the interference was unintentional, the principles governing negligent or reckless conduct . . . all embody in some degree the concept of unreasonableness." RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (1979).

⁸⁷ *AcuSport*, 271 F. Supp. 2d at 493.

⁸⁸ *Id.*

⁸⁹ *Id.* at 494.

litigation when “a manufacturer, importer, or distributor of handguns knows or is substantially certain that its marketing practices have a significant impact on the likelihood that a gun will be diverted into the illegal market and used in crime, and that substantial harm to the public will result.”⁹⁰ This definition of intent can deflate a handgun manufacturer or distributor’s argument that he should not be held responsible for the crimes committed with his handguns by third parties. So long as a plaintiff can prove with substantial certainty that handgun manufacturers and distributors were aware that such crimes would be committed because of the business practices in which they engaged, then the manufacturers and distributors may be found to have the requisite intent.

3. Special Injury

Generally, state or local government authorities will bring a cause of action to prosecute a public nuisance. However, a private citizen can also bring an action for public nuisance so long as he can show that the public nuisance caused him to suffer a special injury.⁹¹ Consequently, a private actor bringing an action for public nuisance bears a greater burden than does a government actor attempting to abate the same nuisance. In New York, courts apply a different-in-kind test, rather than a different-in-degree test, to assess whether a private plaintiff has satisfied the special injury element of the public nuisance tort.⁹²

Scholars have debated the necessity of requiring private plaintiffs to prove a harm different in kind to sustain an action for public nuisance. Some have suggested that courts should allow private plaintiffs to satisfy the special injury rule by proving that they have suffered a harm of a greater degree than the community at large as long as the harm suffered was substantial and pecuniary in nature.⁹³ Alternatively, Professor Prosser has argued that courts should not discount degree

⁹⁰ *Id.* at 488.

⁹¹ *Lansing v. Smith*, 8 Cow. 146 (N.Y. 1828) (adopting and applying the special injury rule in New York); *AcuSport*, 271 F. Supp. 2d at 482.

⁹² *AcuSport*, 271 F. Supp. 2d at 497.

⁹³ See Prosser, *supra* note 41, at 1008. See also Antolini, *supra* note 67, at 793, in which the author argues that the sixteenth century anonymous case to which the development of the special injury rule is attributed seems to suggest a different-in-degree test and not a different-in-kind test as Justice Fitzherbert used the term “greater” four times in his opinion and the term “more” three times in his opinion and nowhere used language suggesting that harm must be different in kind.

because one can find correlations between degree and kind when measuring harms. For example, a person who travels down an obstructed road once a day is unlikely to prevail in a private action for public nuisance because the harm he suffers does not differ in kind from that suffered by another individual who travels down the same road once a week. He could show “nothing more than that he travels a highway a great deal more frequently than anyone else,”⁹⁴ a fact that “does not establish particular damage from loss of its use.”⁹⁵ However, if that person travels the same road a dozen times a day, “he always has some special reason to do so, and that reason will almost invariably be based upon some special interest of his own not common to the community. Substantial interference with that interest must be a particular damage.”⁹⁶ This blurred distinction between a harm different-in-kind and a harm different-in-degree contributes to the confusion surrounding the special injury rule.

Like many American courts, New York cites efficiency as justification for applying the special injury rule and the different-in-kind test.⁹⁷ Many courts believe that the special injury limits the number of suits brought against a defendant who maintains a public nuisance.⁹⁸ And courts find the different-in-kind test easier, and thus more efficient, to apply than the different-in-degree test. Courts think that distinguishing harms by degree is more subjective than distinguishing harms by kind.⁹⁹ Consequently, when no member of a community suffers “greater hurt or inconvenience

⁹⁴ Prosser, *supra* note 41, at 1010.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1011. In the 1815 case of *Rose v. Miles*, an English court allowed the plaintiff, who suffered a harm different in degree, to bring a public nuisance action against the defendant whose barge obstructed the plaintiff's use of his barges for the sale of goods, wares, and merchandises, forcing the plaintiff to use a more expensive overland route for his business. While the harm suffered was not unique, as all others crossing the river had to use the same overland route, the court found it sufficiently satisfied the special injury rule because the plaintiff's harm was “something different” given he was in the business of navigation. See Antolini, *supra* note 67, at 799.

⁹⁷ See, e.g., 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96 N.Y.2d 280, 292 (2001) (“This principle [of the special injury rule] recognizes the necessity of guarding against the multiplicity of lawsuits that would follow if everyone were permitted to seek redress for a wrong common to the public.”).

⁹⁸ Judge Weinstein noted that the different-in-kind test “cut[s] down potential suits by busybodies having no particular interest in abating the nuisance except ideology.” *AcuSport*, 271 F. Supp. 2d at 498.

⁹⁹ See *id.* at 449 (“Differences in degree do not suffice. There must be difference in ‘kind’ under New York Law.”).

than any other,”¹⁰⁰ only a public actor may bring an action to abate a public nuisance. Should a state or municipality choose not to bring an action against the actor creating the nuisance, the nuisance will simply continue to cause harm to the community.

Despite the Restatement’s description of the special injury rule as an unnecessary element of a private action for public nuisance when the plaintiff seeks injunctive relief,¹⁰¹ New York, like most states,¹⁰² requires private plaintiffs to prove a special injury whether they seek damages or an injunction to abate a public nuisance.¹⁰³ Why courts require a private plaintiff bringing an action for injunctive relief to prove a special injury remains unclear. The absence of any justification for the rule argues in favor of eliminating it in the context of equitable actions, as do the incongruous outcomes that the rule produces in litigation such as that brought against the handgun industry.

III. PRIOR LITIGATION AGAINST HANDGUN MANUFACTURERS

The *AcuSport* case is unique in that it is the first case in which a New York court held that handgun manufacturers and distributors do contribute to the public nuisance created by the unlawful possession and use of handguns in New York. Two other cases brought in New York against the handgun industry

¹⁰⁰ Prosser, *supra* note 41, at 1005.

¹⁰¹ “It has been the traditional rule that if a member of the public has not suffered damages different in kind and cannot maintain a tort action for damages, he also has no standing to maintain an action for an injunction. The reasons for this rule in the damage action are that it is to prevent the bringing of a multiplicity of actions by many members of the public and the bringing of actions for trivial injury. These reasons are much less applicable to a suit to enjoin the public nuisance.” RESTATEMENT (SECOND) OF TORTS § 821C cmt. j (1979).

¹⁰² The following cases are examples of states that require private plaintiffs to demonstrate special injury regardless of the type of relief sought. *See Harbor Beach Surf Club v. Water Taxi*, 711 So. 2d 1230, 1236-37 (Fla. Dist. Ct. App. 1998) (“Since Water Taxi cannot make [] a showing [of a special injury], it has no standing to seek injunctive relief concerning the bridge.”); *Coticchia v. City of Bay Village*, No. 73658, 1998 Ohio App. LEXIS 3297, at *5 (Ohio Ct. App. July 16, 1998) (stating that “standing to maintain a private action for injunctive relief” depends on the plaintiff’s ability to allege a special injury”); *Richmond Realty, Inc., et al. v. Town of Richmond*, 644 A.2d 831, 832 (R.I. 1994) (“In the absence of special injury an injunction will not lie for a public harm of the kind described in this case.”).

¹⁰³ *Graceland Corp. v. Consol. Laundries Corp.*, 180 N.Y.S.2d 644, 650 (N.Y. App. Div. 1958) (Valente, J., dissenting) (“Under well-established rules, a plaintiff is not entitled to injunctive relief against unlawful use of the streets unless he has sustained a special injury. In the absence of such a showing, it is for the municipality to abate or enjoin any alleged nuisance.”).

influenced Judge Weinstein's findings that while the NAACP failed to satisfy the special injury rule, it did satisfy the other elements of a public nuisance claim: the existence of a public nuisance and the defendants' contribution to that nuisance. A discussion of these two cases, *Hamilton v. Accu-Tek*¹⁰⁴ and *People v. Sturm, Ruger & Co.*,¹⁰⁵ will enhance understanding of the *AcuSport* decision and this Note's call for change to the special injury rule.

A. *Hamilton v. Accu-Tek*

Hamilton v. Accu-Tek was brought in July 1995 in the United States District Court for the Eastern District of New York before Judge Weinstein. The plaintiffs were relatives of six individuals killed by handguns and one injured survivor of a handgun shooting and his mother.¹⁰⁶ The plaintiffs claimed that the manufacturers' negligent marketing and distribution practices directly supported an illegal underground market in handguns. They argued that this market furnished the weapons used in the shootings that precipitated their lawsuit and proximately caused the six deaths and one injury for which the plaintiffs sought damages.¹⁰⁷ If for no other reason, *Hamilton* distinguished itself from other handgun litigation because it reached a jury. The jury's verdict was the first of its kind.

The jury found fifteen of the twenty-five defendants were negligent and found that nine of the defendants proximately caused the injuries suffered by one or more of the plaintiffs.¹⁰⁸ However, the jury awarded damages only to the one plaintiff who had survived his shooting.¹⁰⁹ Following the verdict for the plaintiffs, Judge Weinstein denied the defendants'

¹⁰⁴ 62 F. Supp. 2d 802 (E.D.N.Y. 1999) [hereinafter *Hamilton III*].

¹⁰⁵ 761 N.Y.S.2d 192 (N.Y. App. Div. 2003).

¹⁰⁶ *Hamilton III*, 62 F. Supp. 2d at 808.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 811. The case reached the jury after several pretrial motions by defendants to dismiss the case. Defendants first moved for summary judgment shortly after the case was brought in 1995. Judge Weinstein dismissed plaintiffs' products liability claim and fraud claim but allowed the plaintiffs to proceed on their negligent marketing theory. *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1315 (E.D.N.Y. 1996) [hereinafter *Hamilton I*]. After the parties completed discovery, defendants brought another motion for summary judgment which was also denied by Judge Weinstein in 1998. *Hamilton v. Accu-Tek*, No. 95 Civ. 0049, 1998 U.S. Dist. LEXIS 19703, at *1 (E.D.N.Y. Dec. 18, 1998) [hereinafter *Hamilton II*].

¹⁰⁹ *Hamilton III*, 62 F. Supp. 2d at 808.

motion to dismiss on the ground of collateral estoppel¹¹⁰ and their motion for judgment as a matter of law.¹¹¹

Much of the language Judge Weinstein used in upholding the jury's verdict foreshadowed the conclusions he drew in *AcuSport*. Regarding the manufacturers and distributors' responsibility for the crimes committed with their products, Judge Weinstein declared: "It cannot be said, as a matter of law, that reasonable steps could not have been taken by handgun manufacturers to reduce the risk of their products' being sold to persons likely to misuse them."¹¹² Judge Weinstein concluded that handgun manufacturers and distributors have the ability to detect, and thus prevent, the risks associated with their products.¹¹³ This ability to detect and prevent risks imposes on manufacturers and distributors a special duty vis-à-vis any individual foreseeably and potentially placed in harm's way by the use of handguns.¹¹⁴ Although the *Hamilton* plaintiffs did not bring their case on a public nuisance theory, Judge Weinstein's findings on negligence directly impacted his findings in *AcuSport*. To successfully bring a public nuisance action, the NAACP, like the plaintiffs in *Hamilton*, had to prove that manufacturers and distributors negligently created, contributed to, or maintained the public nuisance allegedly created by handguns.¹¹⁵

Despite Judge Weinstein's strong statement of the validity of the jury's verdict in *Hamilton*, the Second Circuit Court of Appeals reversed Judge Weinstein on appeal.¹¹⁶ To reach its decision, the Second Circuit certified what it described as two novel questions of state law to the New York Court of Appeals. The first question was whether the defendants owed the plaintiffs a duty to exercise reasonable care in the marketing and distribution of the handguns they manufactured. The second question was whether liability could be apportioned by market share, and, if so, how.¹¹⁷ The Court of

¹¹⁰ *Id.* at 815.

¹¹¹ *Id.* at 839. ("[T]here was sufficient evidence to persuade a rational jury that criminal misuse of handguns was a reasonably foreseeable result of defendants' negligent marketing and distribution practices . . . easy access to illegal guns increases gun violence and homicide.")

¹¹² *Id.* at 820.

¹¹³ *Id.* at 821.

¹¹⁴ *Hamilton III*, 62 F. Supp. 2d at 821.

¹¹⁵ See *supra* Part II.C.2.

¹¹⁶ *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001) [hereinafter *Hamilton IV*].

¹¹⁷ *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1068 (N.Y. 2001)

Appeals answered both questions in the negative, ultimately leading the Second Circuit to overturn the jury's verdict.

In spite of this outcome, the Court of Appeals notably remarked that the case had challenged the justices to rethink the traditional notions of duty, liability, and causation in the context of handgun litigation.¹¹⁸ The Court of Appeals did not reject the argument that handgun manufacturers could be found negligent for handgun crimes. Instead, the court noted that plaintiffs could possibly succeed in a negligence cause of action if they could prove that manufacturers supplied wholesalers knowing that they regularly trafficked guns into illegal markets.¹¹⁹ These findings left the door open to the possibility of a favorable outcome in the future for a plaintiff seeking to hold manufacturers and distributors liable on either a negligence theory or a public nuisance theory.

B. People of the State of New York v. Sturm, Ruger & Co., et al.

In June 2000, the Attorney General of the State of New York brought another significant case against handgun manufacturers and wholesalers in New York Supreme Court.¹²⁰ In *Sturm, Ruger*, proceeding on a theory of public nuisance, the Attorney General, a public plaintiff, brought an action for injunctive relief. Specifically, the State sought to abate the "alleged public nuisance arising from the manufacture and distribution of handguns that are unlawfully possessed and used in New York."¹²¹ As a public plaintiff, the Attorney General did not have to allege a special injury. Rather, the Attorney General only needed to allege conduct by the defendants that created, contributed to, or maintained an interference with or injury to the public in the exercise of common rights.¹²² Despite the lesser burden that the Attorney General faced compared to a private plaintiff contending with the special injury rule, the State Supreme Court granted defendants' motion to dismiss for failure to state a cause of action.¹²³ The court found that the

[hereinafter *Hamilton V*].

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1064.

¹²⁰ *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 457-58 (E.D.N.Y. 2003).

¹²¹ *Id.* at 458 (citing *People v. Sturm, Ruger & Co.*, Index No. 402856/00 (N.Y. Sup. Ct. Aug. 10, 2001), *aff'd*, 761 N.Y.S.2d 192 (App. Div. 2003)).

¹²² *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 206 (App. Div. 2003).

¹²³ *Id.* at 194.

State could not survive a motion to dismiss because it failed to sufficiently state specific facts showing how the defendants had contributed to the creation of the alleged public nuisance, illegally possessed handguns.¹²⁴ The Appellate Division, First Department affirmed the decision on appeal.¹²⁵

Together, *Accu-Tek* and *Sturm, Ruger* set the stage for the *AcuSport* litigation. While the special injury rule did not lead to the demise of either case, both cases impacted Judge Weinstein's findings in *AcuSport*. Each case influenced the *AcuSport* decision with regard to the other two elements of a public nuisance claim: the existence of a public nuisance created by an illegal market of handguns, and causation.

IV. *NAACP v. ACUSPORT, INC.*

A. *Facts and Findings*

The NAACP initiated its action in the Eastern District of New York in July 1999 by filing a complaint against approximately 80 manufacturers and importers of firearms. The organization subsequently filed a second action against 50 distributors of firearms in October 1999. The two actions were consolidated in May 2002.¹²⁶ The NAACP used the following language to describe the public nuisance created by the handgun industry:

[L]arge numbers of handguns are available to criminals, juveniles, and other people prohibited by law from possessing and using them in New York state; that their availability endangers the people of New York and interferes with their use of public space; that the defendants negligently and intentionally cause this nuisance although they were on notice . . . that this would be a consequence of their imprudent sales and distribution practices throughout the United States; and that defendants negligently and intentionally failed to take practicable marketing steps that would have avoided

¹²⁴ *Id.* In the complaint, plaintiff had alleged that trace requests from the Bureau of Alcohol, Tobacco and Firearms (BATF) put the defendants on notice that certain guns manufactured and guns sold in certain locations were used disproportionately in the commission of crimes. *Id.* BATF conducts gun traces to determine the distribution history of a gun used in a crime or recovered by police. Plaintiff alleged that this information showed that defendants knowingly contributed to the number of guns in illegal markets through their manufacturing and distribution practices. *Id.* at 199. However, the court ultimately held that this information was not sufficient to demonstrate defendants' contribution to the alleged public nuisance because defendants had limited access to this information. *Id.* at 200.

¹²⁵ *Id.* at 194.

¹²⁶ *NAACP v. AcuSport*, 271 F. Supp. 2d 435, 499 (E.D.N.Y. 2003).

or alleviated the nuisance by substantially reducing the pool of illegally possessed handguns in New York and in states where handguns were obtained for illegal transport to [New York].¹²⁷

The NAACP sought to enjoin handgun manufacturers, distributors, and importers from engaging in these activities. In its complaint, the organization proposed various precautions that the defendants could take to avoid maintaining this public nuisance.¹²⁸ For example, the NAACP argued that defendants should limit certain activities such as multiple retail sales of guns to the same person and unsupervised sales of new guns at gun shows.¹²⁹ The organization also suggested that the defendants should cut off sales of new guns to retailers that sell a disproportionate number of handguns traced by the Bureau of Alcohol Tobacco and Firearms (“BATF”), because traces usually indicate a connection between a gun and criminal activity.¹³⁰ Finally, the NAACP argued that the defendants should train retailers to detect straw purchases.¹³¹ Although the NAACP brought this action as a private plaintiff, each of these proposed injunctions would result in fewer guns being diverted into illegal markets which would benefit the New York community at large and not just the members of the NAACP.

In response to the NAACP’s allegations, the defendants individually and collectively contended that their manufacture and sale of handguns fully complied with all applicable federal and state laws.¹³² Furthermore, the defendants argued that they conducted their business responsibly and often went beyond the dictates of the law to ensure that their handguns did not end up in the hands of criminals.¹³³ Most importantly, however, the defendants claimed that because gun crimes plague the New York community at large, the NAACP, a private plaintiff, could not prove that its members or potential members suffered

¹²⁷ *Id.* at 446-47.

¹²⁸ *Id.* at 447.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ A straw purchase occurs when a person legally entitled to purchase a gun does so for a person who is not legally entitled. *See AcuSport*, 271 F. Supp. 2d at 447. Other suggested precautions included “insisting that a retailer not operate under various names to avoid surveillance as an unusual source of traced guns; inspecting retail outlets to see that they are managed appropriately to avoid any overt connection to criminal elements; and taking other inexpensive and effective steps to stop their new guns from being diverted from the legal to the illegal market.” *Id.*

¹³² *Id.*

¹³³ *Id.*

a harm different in kind from that suffered by the rest of the public.¹³⁴ Ultimately, this argument led to dismissal.

In reaching his decision to dismiss the case, Judge Weinstein relied, in part, on the findings of an advisory jury.¹³⁵ Judge Weinstein deemed an advisory jury particularly appropriate in an action such as *AcuSport* where “the issues at stake are of some public interest, and the relief requested could have a considerable effect on the New York public.”¹³⁶ The advisory jury sat for six weeks and returned verdicts for each company listed on the verdict sheet. The jury found 45 of the defendants not liable and reached no verdict as to 23 defendants.¹³⁷ While Judge Weinstein relied on these findings in his decision to dismiss the case, he noted that advisory jury’s verdicts would not interfere with his role as the ultimate trier of fact.¹³⁸

Judge Weinstein’s own findings led to the case’s dismissal. He ultimately held that the NAACP’s claim failed because the organization could only prove two of the three elements necessary to prevail on a private claim of public nuisance. First, the NAACP had established the existence of a public nuisance in the form of the “criminal possession and use of handguns in New York [causing] many unnecessary deaths and much unnecessary injury.”¹³⁹ Next, Judge Weinstein determined that the NAACP satisfied the second element of the public nuisance test, establishing that the negligent or intentional conduct or omissions by the defendants created, contributed to, or maintained the public nuisance. The judge found that the defendants often acted carelessly in their marketing and distribution practices, which lacked appropriate precautions, resulting in a significant diversion of handguns from the legal market into an illegal market.¹⁴⁰ In turn, this

¹³⁴ *Id.*

¹³⁵ Under the Federal Rules of Civil Procedure, a judge sitting in an equitable action is both the trier of law and the trier of fact. *AcuSport*, 271 F. Supp. 2d at 469. However, the judge may empanel an advisory jury to sit through a trial and render a verdict as if it were the ultimate trier of fact. *Id.* at 470-71. While the verdict is not binding, the judge considers the verdict when ruling on the case. *Id.* at 472. *See* FED. R. CIV. P. 52(a).

¹³⁶ *AcuSport*, 271 F. Supp. 2d at 499-500.

¹³⁷ *Id.* at 500.

¹³⁸ *Id.* at 469.

¹³⁹ *Id.* at 449.

¹⁴⁰ *Id.* at 450.

substantial market of illegally obtained handguns led to increased use of handguns in criminal activities.¹⁴¹

Additionally, Judge Weinstein concluded that manufacturers and distributors could significantly reduce the flow of handguns into the illegal markets by taking some “obvious and easily implemented steps” to increase the responsibility of the retailers with whom they contract.¹⁴² Suggested by the plaintiff, these steps included “requiring retailers to avoid multiple or repeat sales to the same customers.”¹⁴³ Judge Weinstein reasoned that the handgun industry could readily institute such a practice by contract with its retailers.¹⁴⁴ Thus, Judge Weinstein had little trouble identifying the defendants’ contribution to the public nuisance that illegally obtained handguns created in New York.

Despite these positive findings, the NAACP’s case ultimately failed on the third element of the public nuisance test, the special injury rule. The NAACP did successfully prove, by clear and convincing evidence, that its members suffered a variety of harms. These harms ranged from a fear of gun violence preventing NAACP members from attending meetings to a host of violent crimes committed against NAACP members with illegally obtained handguns.¹⁴⁵ Nonetheless, these findings could not sufficiently sustain a cause of action because “[t]here was no proof that men and women were afraid because of handguns to go out at night only to attend NAACP meetings.”¹⁴⁶ Instead, to the NAACP’s detriment, Judge Weinstein concluded that “[a]ll population groups in New York are potential homicide victims from illegal handguns in New York.”¹⁴⁷

Although Judge Weinstein did find that the NAACP and its members suffered “greater adverse effects”¹⁴⁸ from the public nuisance created by the defendants than did other members of the community, harms of a greater degree do not satisfy the special injury rule. The NAACP failed to prove that the harm it suffered from the public nuisance was different in kind from that suffered by other persons in New York.¹⁴⁹ “Ironically,”

¹⁴¹ *AcuSport*, 271 F. Supp. 2d at 450.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 449.

¹⁴⁵ *Id.* at 508.

¹⁴⁶ *AcuSport*, 271 F. Supp. 2d at 508.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 451.

¹⁴⁹ *Id.*

Judge Weinstein observed, “the demonstration that all New Yorkers would gain from [the proposed] method[s] of reducing a dangerous public nuisance prevents the NAACP from obtaining relief under New York law on the ground that it suffers a special kind of harm from irresponsible handgun marketing.”¹⁵⁰ This conclusion highlights the problems with public nuisance law’s application of the special injury rule in equitable actions. More often than not, as in *AcuSport*, the special injury rule defeats rather than furthers the purpose of the public nuisance law: protecting the public at large.

B. Distinguishing AcuSport from Hamilton and Sturm, Ruger

Much of the significance of the *AcuSport* decision lies in Judge Weinstein’s findings on the second factor of the public nuisance test: that the manufacturers and distributors had contributed to a public nuisance, the illegal market of handguns in New York. This finding distinguished *AcuSport* from *Hamilton* and *Sturm, Ruger*. In those cases, both the Second Circuit and the Appellate Division of New York found that the plaintiffs could not prove the defendants had created, contributed to, or maintained the alleged public nuisance, the same illegal gun market complained of in *AcuSport*.¹⁵¹ This finding of causation has a tremendous impact on the future of handgun litigation brought on a theory of public nuisance. Now, only the special injury rule potentially stands in the way of a private plaintiff bringing a successful public nuisance claim against the handgun industry.

The plaintiffs in *Sturm, Ruger* and *AcuSport* brought their cases on a theory of public nuisance. Although *Sturm, Ruger*, like *AcuSport*, was dismissed, Judge Weinstein distinguished the cases in several ways. Most significantly, he compared findings on the second element of the public nuisance test. Judge Weinstein discussed, at some length, the timing of the *Sturm, Ruger* case and the evidence available to the Attorney General when he brought the case.¹⁵²

The Attorney General of New York brought *Sturm, Ruger* in New York Supreme Court in June 2000, almost one

¹⁵⁰ *Id.*

¹⁵¹ *Sturm, Ruger, & Co.*, 761 N.Y.S.2d at 201; *Hamilton V*, 750 N.E.2d at 1059.

¹⁵² *AcuSport*, 271 F. Supp. 2d. at 458.

year after the NAACP filed *AcuSport* in the Eastern District but three years before Judge Weinstein issued his opinion.¹⁵³ As far as the New York Supreme Court knew, the only evidence that would have been available to the Attorney General in connection with the second element of the public nuisance claim, that the defendants had contributed to a public nuisance through negligent marketing and distribution, was the same BATF trace evidence presented to the court by the plaintiffs in *Hamilton I*.¹⁵⁴ Since that evidence failed to withstand appeal in *Hamilton I*, the Supreme Court reasoned that the same evidence could not sufficiently support a claim of public nuisance in *Sturm, Ruger*. In reaching its decision, the Appellate Division assumed that the level of knowledge flowing from the instant trace requests at the time *Sturm, Ruger* was brought was no greater than it was when *Hamilton I* was decided.¹⁵⁵ Therefore, despite the fact of a public nuisance created by the unlawful possession of handguns in New York, the State did not have sufficient evidence to prevail on the element of causation.

However, Judge Weinstein viewed this conclusion as rash on the part of the Appellate Division. He criticized the court for failing to take into account the fact that, as a part of the federal discovery practice in the *AcuSport* case, much more extensive and more recent data from the BATF database was released to the parties than was available during *Hamilton I* or any prior litigation against the handgun industry.¹⁵⁶

Judge Weinstein's findings have significant implications for the most recent lawsuit brought in New York against the handgun industry. In June 2000, the City of New York brought a public nuisance claim against the handgun industry in the Eastern District of New York.¹⁵⁷ In an opinion denying the defendants' motion to dismiss, Judge Weinstein remarked that new BATF data that helped the NAACP satisfy the causation element of its public nuisance claim in *AcuSport* would likewise allow the City to satisfy that element in contesting the defendants' motion to dismiss. This decision suggests that the City has a significant chance of succeeding in its lawsuit, especially since, as a public actor, the City need not satisfy the

¹⁵³ *Id.* at 457-58. See also *supra* note 123 and accompanying text.

¹⁵⁴ *Id.* at 458.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 458-59.

¹⁵⁷ *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 262 (2004).

special injury element of the tort. The City seeks no damages against the handgun industry, only injunctive relief that would require the handgun industry to implement “a variety of prudent marketing practices to help prevent defendants' guns from diversion into illegal markets.”¹⁵⁸ The relief which the City seeks – and which it has a better chance of winning than any other plaintiff who has brought a public nuisance action against the handgun industry – highlights the inefficiency of the special injury rule for those private plaintiffs who bring equitable public nuisance claims. The injunctive relief that the City of New York seeks mirrors that which the NAACP sought in its lawsuit. Without the special injury rule to contend with, the NAACP may have won the injunctive relief it sought, abated the public nuisance created by the handgun industry, and thereby eliminated the need for the City of New York to continue to pour time and money into its current handgun litigation.

V. ANALYSIS: ELIMINATING THE SPECIAL INJURY RULE FOR PRIVATE ACTIONS FOR INJUNCTIVE RELIEF

The outcome of *AcuSport* argues persuasively for the elimination of the special injury rule for those private plaintiffs seeking injunctive relief from a public nuisance. While the decision left the door open for the State of New York to bring another public nuisance action against the handgun industry, there is no guarantee that the State will do so as such litigation is expensive and time-consuming. Consequently, so long as the courts continue their strict application of the special injury rule, the public will remain vulnerable to the pervasive and dangerous nuisance created by the illegal handgun market. Both the history of the special injury rule and the nature of injunctive relief argue in favor of the courts abandoning their adherence to the special injury rule in cases of private action for public nuisance.

An early New York court observed that damages awarded to a plaintiff absent a special injury would distort the purpose of the public nuisance laws because they would “[give] every man a separate right of action for what damnifies him in common only with the rest of his fellow-citizens.”¹⁵⁹ However, this fear of a multiplicity of lawsuits flooding courts in the

¹⁵⁸ *Id.* at 263.

¹⁵⁹ *Doolittle v. Superiors of Broome County*, 18 N.Y. 155, 160 (1858).

absence of a special injury rule should not penetrate equitable suits. Were courts to abandon completely their use of the special injury rule, they may indeed face an infinite number of private plaintiffs seeking damages as relief from a public nuisance. But when one plaintiff receives damages for the harm he suffered, those damages offer no relief for the harm that his neighbor suffers in the face of the same public nuisance. Consequently, that neighbor must bring his own separate suit for damages to remedy his harms. Thus, courts clearly need some toll with which they can manage the number of private plaintiffs seeking damages as relief from a public nuisance. On the other hand, injunctive relief is a management tool in itself. In eliminating a public nuisance, an injunction would simultaneously eliminate the need for future litigation. Whether sought by a private or public plaintiff, injunctive relief protects all citizens by eliminating the nuisance unreasonably interfering with their shared rights and interests.

A. *The Application of Public Nuisance Law to Handgun Litigation*

Abandoning the special injury rule in cases where private plaintiffs seek injunctive relief to abate a public nuisance could better protect the interests, health, and safety of the public – as the law was designed to do – without opening the floodgates of frivolous litigation. Despite the disappointing outcome of the *AcuSport* case – in which but for the court’s use of the special injury rule the NAACP would have had a viable claim for public nuisance against the handgun industry¹⁶⁰ – the tort of public nuisance offers an effective means of regulating the sale of handguns in the United States. While Judge Weinstein’s *AcuSport* opinion was unique in its findings that the handgun industry has contributed to the public nuisance caused by unlawfully possessed handguns,¹⁶¹ its uniqueness should not militate against the suitability of public nuisance claims against the handgun industry. One of the benefits of the common law is that it “is not static.”¹⁶² Notwithstanding the

¹⁶⁰ See *supra* Part IV.B.

¹⁶¹ See *supra* Part IV.B (explaining that new BATF data relied on by the plaintiffs in *AcuSport* led Judge Weinstein to find proof of the gun industry’s contribution to a public nuisance that had been absent in prior cases).

¹⁶² *State v. Schenectady Chems, Inc.*, 459 N.Y.S.2d 971, 977 (Sup. Ct. 1983). The court goes on to observe that “[s]ociety has repeatedly been confronted with new inventions and products that, through foreseen and unforeseen events, have imposed

handgun industry's arguments to the contrary,¹⁶³ scholars support the use of public nuisance laws as effective means of controlling the devastating effects of handgun violence in the United States.¹⁶⁴

Throughout its existence, public nuisance law has expanded its reach beyond those evils it was first developed to combat. While early English courts may not have foreseen public nuisance laws being used to abate the plague of handgun violence, the fact that it has survived the virtual demise of many of the nuisances it was developed to abate – such as horses falling into ditches – evinces the law's adaptability.¹⁶⁵

In the context of the illegal handgun market, the adaptability of public nuisance laws put them at an advantage over specific state and federal regulations of the handgun industry. The legislative process is slow, and state statutes or local regulations are “limited in their ability to adjust to changed conditions.”¹⁶⁶ Conversely, the common law of public nuisance can readily combat problems that may unexpectedly plague our society. As the outcome of *AcuSport* evidences, the special injury rule severely limits the adaptability of public nuisance law. Clearly, the illegal handgun market constitutes a public nuisance as it compromises all of the public rights listed in the Restatement: the public health, the public safety, the public peace, the public comfort, and the public convenience.¹⁶⁷ So long as courts continue to strictly apply the special injury

dangers upon society,” and “courts have reacted by expanding the common law to meet the challenge.” *Id.*

¹⁶³ See John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S.C. L. REV. 287, 289 (2001) (stating that both the handgun industry and anti-gun control organizations believe litigation against the gun industry to be an attempt to “achiev[e] through litigation what cannot be achieved through the legislative route” thereby circumventing the “democratic process”).

¹⁶⁴ See *id.* at 290 (“[P]ublic nuisance law is the best fit for municipal complaints against gun sellers.”); Lytton, *supra* note 28, at 5 (“Tort liability can complement legislative regulation, providing gun sellers and manufacturers with incentives to take reasonable measures to prevent gun sales to criminals, instead of looking for legal ways to increase them.”).

¹⁶⁵ See Larsen, *supra* note 37, at 42 (“As society’s values shift such as from promoting a strong national defense to environmental cleanliness, formerly accepted practices which damage goals important to present-day society will more likely become prohibited as public nuisances.”).

¹⁶⁶ *Id.* at 38. The author continues, “common law public nuisance law provides the desired remedy of abatement, without the quagmire of legislation or the obsolescence of static regulations.” *Id.* at 38-39.

¹⁶⁷ RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1979).

rule, public nuisance law will, like existing statutory regulations of the handgun industry, remain limited in its ability to effectively abate this nuisance.

While the outcome of the *AcuSport* case does leave the door open for a public authority to bring a public nuisance action against handgun makers,¹⁶⁸ the inefficiency of this outcome cannot be overlooked. The State of New York may not have needed to bring its own action had the special injury rule not prematurely ended the NAACP's quest for injunctive relief. Whether sought by a private or a public plaintiff, injunctive relief has been suggested to be the most effective way to protect the interests of the public threatened by a public nuisance.¹⁶⁹ Because injunctive relief benefits the community at large, as opposed to damages which only benefit the plaintiff in a private suit for public nuisance, it follows that limiting a private plaintiff's access to injunctive relief in claims for public nuisance hurts not only the plaintiff, but also the entire community. This outcome is illogical, as public nuisance law distinguishes itself from private nuisance law by extending protection to the community at large.¹⁷⁰ Scholars have noted that eliminating the special injury rule for private plaintiffs to seek injunctive relief from a public nuisance may actually be a boon to a city or state that either lacks the resources to initiate such litigation on behalf of its citizens or simply chooses not to.¹⁷¹

The unsettling effect of the special injury rule is that the more members of a community who are harmed by a public

¹⁶⁸ See *supra* Part IV.B.

¹⁶⁹ See Culhane, *supra* note 163, at 323 ("Inasmuch as the purpose of public nuisance law is to safeguard the public health and safety, the equitable remedies of injunction and abatement commend themselves as the most appropriate. Traditionally, in order to stanch the problem at its source, the public plaintiff has sought just such remedies.").

¹⁷⁰ See Conrad G. Touhey & Ferdinand V. Gonzalez, *Emotional Distress Issues Raised by the Release of Toxic and Other Hazardous Materials*, 41 SANTA CLARA L. REV. 661, 714 (2001) ("The greater the catastrophe, the greater immunity the tortfeasor may obtain. This is not a logical interpretation or application of the law or any societal goal, nor is it sound public policy. Under the statutory definition of nuisance, a public nuisance is distinguished from a private nuisance where an 'entire community or neighborhood, or any considerable number of persons' are affected.").

¹⁷¹ See Panoff, *supra* note 52, at 712-13 ("[P]rivate actions complement those actions brought by public officials. Public officials often lack the resources to bring an action for public nuisance. Also inertia, political pressures, or vested interest in nuisance frequently inhibit many political officials. Accordingly, they cannot always be relied upon to seek adequate redress for a community."); see also Culhane, *supra* note 163, at 324 (noting that most municipalities bringing suits against gun manufacturers have focused on damages rather than injunctive relief).

nuisance, the more difficult it is for them to seek relief from those harms.¹⁷² Under the special injury rule, the private party best suited to bring an action for public nuisance is the one who is least representative of the community whose rights have been compromised. Eliminating the special injury rule in public nuisance claims for injunctive relief would do away with many of the paradoxical outcomes that the law currently produces.

B. Historical Support for a Modern Change to the Special Injury Rule

Reasons for altering the special injury rule stem back to its 1536 origin. Chief Justice Baldwin's fear that "if one person shall have an action for this, by the same reason every person shall have an action, and so [the defendant] will be punished a hundred times [over] on the same case,"¹⁷³ led Justice Fitzherbert to suggest that private plaintiffs should show some "special hurt" when bringing an action for public nuisance.¹⁷⁴ But English courts following the precedent of *Anonymous* did not conceive of the different-in-kind formulation of the special injury rule as the proper interpretation of Justice Fitzherbert's special hurt requirement.

One scholar attributes the development of the different-in-kind test to a series of railroad compensation cases brought in the courts of England in the late 1800s.¹⁷⁵ Acts of Parliament allowed private plaintiffs to seek compensation when railroad expansions encroached on their property so long as the

¹⁷² See *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 451 (E.D.N.Y. 2003) ("Ironically, the demonstration that all New Yorkers would gain from this method of reducing a dangerous public nuisance prevents the NAACP from obtaining relief under New York law on the grounds that it suffers a special kind of harm from irresponsible handgun marketing.").

¹⁷³ *Anonymous*, Y.B. Mich. 27 Hen. 8, f. 26, pl. 10 (1536).

¹⁷⁴ In the 1681 case of *Hart v. Basset*, a private plaintiff in England brought suit against the defendant for obstructing the way to plaintiff's barn by placing a ditch and a gate in a public road. The court did not require the plaintiff to show a different kind of injury from that suffered by the community at large and rejected the defendant's multiplicity argument. The court held that it was sufficient for the plaintiff to claim that the ditch and gate caused him a greater inconvenience than they caused to the community at large. Similarly, in the 1738 case of *Chichester v. Lethbridge*, the plaintiff's carriages were blocked by defendant's obstruction of a highway. Unlike the public at large, the plaintiff traveled the particular road several times a day, and the court concluded that the plaintiff had sufficiently shown a special injury because his harm was greater in degree than the harm suffered by the public. Antolini, *supra* note 67, at 797.

¹⁷⁵ Antolini, *supra* note 67, at 800.

plaintiffs could demonstrate an injury different in kind.¹⁷⁶ The test was later ascribed to the special injury element of a private claim for public nuisance even though courts interpreting Justice Fitzherbert's opinion had been using a different-in-degree test.¹⁷⁷ The ease of applying a different-in-kind test apparently accounts for the English courts' importation of the test into private actions for public nuisances.¹⁷⁸ While courts must often adopt tools of judicial management at a cost to potential plaintiffs, the cost borne by those suffering harms from nuisances as serious as unlawfully possessed handguns seems too excessive and in need of curtailment.

Without question, the special injury rule limits the number of private claims brought for public nuisance. However, the confusion that surrounded the special injury rule after its development in England¹⁷⁹ and adoption in the United States,¹⁸⁰ supports the argument that the rule is not the most effective way to preclude excessive numbers of private actions. Indeed, several American jurisdictions have already reached this conclusion and have begun to modify the special injury rule.¹⁸¹ These jurisdictions have recognized that the special injury rule often leads to results that undermine the purpose of public nuisance law: "safeguard[ing] the public health and safety."¹⁸²

¹⁷⁶ *Id.* at 800-01.

¹⁷⁷ *Id.* The author argues that the different-in-degree test was applied by the courts of England until the late 1800s and that the different-in-kind test was formulated in railroad compensation cases that did not involve public nuisance laws but rather acts of Parliament allowing:

[C]ompensation for legislatively-authorized railroad companies' expansion projects that "injuriously affected" private lands. The litigants and the House of Lords looked to the injury rule in public nuisance to guide their determination of compensable injuries under the acts. Even though the Lords acknowledged that the rule of public nuisance was a different-in-degree test, the more conservative different-in-kind rule that emerged from these railroad cases ultimately bounced back into public nuisance law and, ironically, became the foundation for the modern different-in-kind test.

Id.

¹⁷⁸ *See supra* note 51.

¹⁷⁹ *See supra* note 51.

¹⁸⁰ *See supra* Part II.B.

¹⁸¹ *See infra* Part V.C.

¹⁸² Culhane & Eggen, *supra* note 163, at 323. The authors juxtapose two cases in which the application of the special injury rule led to conflicting results. In *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219, 1232-34 (Mass. Dist. Ct. 1986), leukemia victims, whose illness stemmed from groundwater pollution caused by defendants, were held to have stated a claim for public nuisance. However, in *Venuto v. Owens-Corning Fiberglass Corp.*, 99 Cal. Rptr. 350, 356 (Ct. App. 1971), the court dismissed a claim for public nuisance brought by plaintiffs suffering respiratory problems because those problems affected all town residents. Culhane & Eggen, *supra* note 163, at 311.

C. *Modern Changes to the Special Injury Rule*

Responding to the often inequitable results that the special injury rule can produce, some jurisdictions have altered their application of the rule, specifically by eliminating the different-in-kind test. One example is the *Burgess v. M/V Tamano* case, which was brought as a class action suit in federal district court in Maine in 1973.¹⁸³ The plaintiffs, commercial fishermen and clam diggers, sought to recover damages for losses they incurred after an oil tanker, defendant M/V Tamano, discharged 100,000 gallons of oil into the waters of the Cosco Bay. For their livelihood, the plaintiffs fished and harvested for clams in the Cosco Bay.¹⁸⁴ The plaintiffs brought their claim on a theory of public nuisance alleging “loss of profits and impairment of earning capacity.”¹⁸⁵ The defendants moved to dismiss the claim arguing that the plaintiffs’ damages were not different in kind from those sustained by members of the community at large.¹⁸⁶ The court denied the motion.¹⁸⁷

First declaring the right to fish and harvest clams in Maine’s coastal waters a “public right[] . . . held by the State of Maine in trust for the common benefit of all of the people,”¹⁸⁸ the court went on to discuss the role the special injury rule should play when that right is infringed. The court observed that absent a special injury,¹⁸⁹ a private plaintiff had no standing to bring a public nuisance action. In this case, the plaintiffs had not suffered damages different in kind from the general public. Nevertheless, the court held that:

It would be an incongruous result . . . to say that a man engaged in commercial fishing or clamming, and dependent thereon for his livelihood, who may have had his business destroyed by the tortious act of another, should be denied any right to recover for his

¹⁸³ *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973).

¹⁸⁴ *Id.* at 248.

¹⁸⁵ *Id.* at 249.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* The court did, however, grant the motion with regard to claims brought by a third plaintiff class, owners of motels, trailer parks, camp grounds, restaurants, grocery stores, and similar establishments whose businesses depended on tourist trade, with the exception of those owning shore property injured by the spill. These plaintiffs asserted no “interference with their direct exercise of a public right” and could show no “distinct harm” from the oil spill. *Id.* at 251.

¹⁸⁸ *Burgess*, 370 F. Supp. at 250.

¹⁸⁹ *Id.*

pecuniary loss on the ground that his injury is no different in kind from that sustained by the general public.¹⁹⁰

The court gave no heed to the traditional justification for the special injury rule (the fear of a multiplicity of frivolous lawsuits) in rendering its decision, perhaps underscoring the frailty of that argument. The court's alteration of the scope of the special injury rule has since been adopted by other jurisdictions.¹⁹¹

The Supreme Court of Hawaii has also altered its treatment of the special injury rule. In 1982, the court decided *Akau v. Olohana Corp.*,¹⁹² another class action suit in which the plaintiffs sought to enforce alleged rights-of-way along once-public trails to the beach that crossed defendants' property.¹⁹³ The court identified two subclasses of plaintiffs, each of which had lived or fished near the beach.¹⁹⁴ The lower court had denied the defendants' motion to dismiss for failure to state a claim, rejecting defendants' argument that the plaintiffs lacked standing because their injury did not differ in kind from that sustained by the general public.¹⁹⁵

The Supreme Court affirmed the lower court's ruling and held that:

A member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means, including a class action.¹⁹⁶

The court found that the plaintiffs had suffered an injury in fact, because not having access to the public rights-of-way impaired and in some instances prevented their use of the

¹⁹⁰ *Id.*

¹⁹¹ See *Golnay Barge Co. v. M/T Shinoussa*, 841 F. Supp. 783, 785 (S.D. Tex. 1993); *Louisiana ex rel. Guste v. M/V Testbank*, 524 F. Supp. 1170, 1171 (E.D. La. 1981). In both cases the courts allowed commercial fishermen to bring claims for public nuisance after oil-spills caused environmental damage to waterways even though the plaintiffs could not show damages different in kind. See also *In re Starlink Corn Products Liab. Litig.*, 212 F. Supp. 2d 828, 848 (N.D. Ill. 2002) (holding that commercial farmers had standing to bring a public nuisance claim against seed companies that disseminated genetically modified corn that contaminated the entire United States' corn supply because the commercial corn farmers were affected differently than the general public since they relied on the integrity of the corn crops for their livelihood).

¹⁹² 652 P.2d 1130 (Haw. 1982).

¹⁹³ *Id.* at 1132.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1132-33.

¹⁹⁶ *Id.* at 1134.

beach.¹⁹⁷ Moreover, the court found that while its ruling had expanded the standing for public nuisance, the other elements of the claim would prevent the multiplicity of frivolous claims feared by courts in absence of the traditional special injury rule. In this case the court noted that a proper class action would reduce such a risk.¹⁹⁸ The court rightly observed that injustice results when members of the public are denied “the ability to enforce the public’s rights when they are injured.... The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”¹⁹⁹

The practice of limiting public nuisance claims – absent a special injury – to public authorities was more appropriate at the time of the law’s development than it is today. During the time of the early English common law, “a harm to the public order, decency, or morals was considered a crime against the king.”²⁰⁰ Therefore, it followed that only the king could bring an action against the perpetrator.²⁰¹ Today, however, a harm to the public order, decency or morals is a harm to the public, which, as the *Akau* court noted, should have access to the courts to redress the harm. Modern public nuisance laws should reflect these changes.²⁰² By reconfiguring the special injury rule, the *Burgess* and *Akau* courts have allowed public nuisance law the flexibility to encompass the shape and scope of modern society.

D. *Other Protections Against Frivolous Litigation*

The multiplicity of frivolous litigation, cited as the rationale for the special injury rule, does not threaten courts when plaintiffs seek injunctions; this threat only emerges when plaintiffs seek damages.²⁰³ Public nuisance laws protect rights

¹⁹⁷ *Akau*, 652 P.2d at 1135.

¹⁹⁸ *Id.* at 1134. (“Another reason for allowing liberal standing is that the danger of a multiplicity of suits is greatly alleviated by a proper class action.”).

¹⁹⁹ *Id.* (quoting *Marbury v. Madison*, 5 U.S. 87, 102 (1803)).

²⁰⁰ *Id.* at 1133.

²⁰¹ See Gifford, *supra* note 54, at 819 (“History demonstrates that the core purpose underlying public nuisance has been to assure that public authorities have a legal remedy available to terminate conduct of a defendant that is violating a public right and injuring the public safety, health or welfare.”).

²⁰² *Akau*, 652 P.2d at 1133-34 (noting other areas of the law in which courts have moved away from focusing on whether an injury is shared by the public, such as taxpayer suits and actions challenging administrative decisions).

²⁰³ See RESTATEMENT (SECOND) OF TORTS § 821C cmt. j (1979) (arguing that the reasons for maintaining a special injury rule are “much less applicable to a suit to enjoin the public nuisance”). See also Tim E. Sleeth, *Public Nuisance: Standing to Sue*

common to all. A private plaintiff who brings a suit for damages does not necessarily look to protect a right shared by him and his community as much as he looks to protect his own interests by recovering for losses that he alone has suffered. Paying damages – whether they are paid to a private or public plaintiff²⁰⁴ – may have some deterrent effect on a defendant responsible for a public nuisance. When a private plaintiff seeks damages for a minor injury caused by a public nuisance, however, such damages will likely do little to abate the public nuisance and, therefore, will leave the courts subject to further suits.²⁰⁵ Therefore, although the special injury rule may be unduly strict when applied to private actions for damages, it does serve a necessary screening function. On the other hand, once an injunction abates a public nuisance, the nuisance ceases to cause further damages to potential plaintiffs, eliminating the courts' need to stringently screen equitable actions. Furthermore, restricting private actions for damages makes sense since, unlike equitable actions, they do not further the purpose of public nuisance law by protecting interests shared by community members.

In the absence of the special injury rule, proper application of the procedural elements surrounding public nuisance claims will help to eliminate potentially frivolous lawsuits by private plaintiffs requesting injunctive relief absent a special injury rule. First, in New York, a plaintiff bringing an action for injunctive relief from an alleged public nuisance must contend with a higher burden of proof than a plaintiff seeking damages. A plaintiff seeking an injunction must prove each element of a public nuisance claim by clear

without Showing "Special Injury", 26 U. FLA. L. REV. 360, 366 (1973-74) ("Even where an actual injury was recognized or the action was for abatement or injunction and the multiplicity factor could not be relevant, the courts unhesitatingly followed the established rules and refused to grant redress or relief."); Antolini, *supra* note 67, at 889 ("The concern about burdensome multiplicity is applicable primarily, if not exclusively, to damages suits, where the likelihood of duplicative litigation would depend, in part, on the extent of the injury and the size of the initial award.").

²⁰⁴ Courts agree that costs incurred by a municipality in the face of a public nuisance are compensable with damages. See *City of Flagstaff v. Atchinson, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 324 (9th Cir. 1983) ("Recovery [of damages] has also been allowed where the acts of a private party create a public nuisance which the government seeks to abate."); *United States v. Illinois Terminal R.R. Co.*, 501 F. Supp. 18, 21 (E.D. Mo. 1980) ("Recent federal court decisions reflect a growing recognition of suits by government agencies under federal common law for the abatement of public nuisances.").

²⁰⁵ See *Culhane & Eggen*, *supra* note 163, at 327 ("Indeed, even if the defendants were to assume all costs, the nuisance could continue.").

and convincing evidence rather than by a preponderance of the evidence, the standard that typically applies in civil litigation.²⁰⁶ Judge Weinstein noted that this higher burden is appropriate in equitable actions because “the interests at stake are deemed more significant than ordinary.”²⁰⁷ Injunctive relief places a burden not only on defendants, but also on courts, which bear the responsibility of monitoring a defendant's compliance.²⁰⁸ Unlike the special injury rule, the clear and convincing standard can deter frivolous litigation without simultaneously undercutting the purpose of public nuisance law protecting the public at large.²⁰⁹

Furthermore, as the *Akau* court suggested, the procedural requirements of a class action can preclude excessive litigation absent the special injury rule.²¹⁰ Class actions lend themselves well to public nuisance suits. Every member of a community is a potential plaintiff since, by definition of a public nuisance, each is harmed or potentially harmed by the existence of a public nuisance.²¹¹ Moreover, class actions ensure finality because “a judgment in a class action consisting of the people actually injured will bind the members who are all those allowed to sue.”²¹² Similarly, the procedural bar of *res judicata* can also prevent multiple or trivial litigations in the context of public nuisance cases as it does in all areas of litigation.²¹³

²⁰⁶ NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 478 (E.D.N.Y. 2003) (“Many of the cases in which plaintiffs have been required to prove a claim for public nuisance by clear evidence involve applications for injunctive relief.”).

²⁰⁷ *Id.* at 479 (citing New York Pattern Jury Instruction 1:64 cmt., at 85). See also California *ex rel.* Cooper v. Mitchell Bros’ Santa Ana Theater, 454 U.S. 90 (1982), in which the Supreme Court held that California state law could require the application of a beyond a reasonable doubt burden of proof, usually reserved for criminal cases, when a plaintiff brings a public nuisance action for obscenity because of the freedom of speech interests at stake in such actions.

²⁰⁸ FED. R. CIV. P. 65(d).

²⁰⁹ See *supra* note 197 and accompanying text.

²¹⁰ *Akau* v. Olohana Corp., 652 P.2d 1130, 1134 (Haw. 1982) (“Another reason for allowing liberal standing is that the danger of a multiplicity of suits is greatly alleviated by a proper class.”). See also Panoff, *supra* note 52, at 711 (“Multiplicity of suits can be discouraged by general requirements of standing in addition to the procedural mechanisms of class actions.”).

²¹¹ RESTATEMENT (SECOND) OF TORTS § 821C cmt. j (1979) (noting “a distinction between an individual suit for damages and a suit in behalf of the public or a class action”).

²¹² *Akau*, 652 P.2d at 1134.

²¹³ *Save Sand Key, Inc. v. United States Steel Corp.*, 281 So. 2d 572, 575 (Fla. App. 1973) (“[T]he increasing number of well-trying class actions tend to further limit litigation because of the principles which inhere within the doctrine of *res judicata*.”).

In addition to these procedural bars to excessive litigation, there are the practical bars imposed by the nature of our modern legal system. Most notably, the monetary burdens associated with any litigation will likely prevent those plaintiffs who have suffered minor damages from a public nuisance from bringing an action for injunctive relief.²¹⁴ Given the expense and time involved in bringing a lawsuit, a plaintiff such as the NAACP is more likely to bring an action to enjoin a public nuisance than an individual private citizen. The NAACP, a nationally renowned organization, has substantial monetary and legal resources at its disposal, making the undertaking of such complex litigation more feasible for the organization than it would be for the majority of private citizens. Finally, the remedy itself, injunctive relief, would simply dispense with much of the need for further private actions. Once a private plaintiff enjoins a public nuisance, that nuisance ceases to cause further damages that could give rise to additional litigation.

Given these additional protections against frivolous lawsuits, the effects of the special injury rule are simply overbroad in the context of private actions for injunctive relief. And the bar to litigation imposed by application of the special injury rule is unnecessary in the face of the other procedural and practical bars to excessive private actions for public nuisance.

CONCLUSION

As illustrated by the unsatisfactory outcome of the *AcuSport* case, the special injury rule unnecessarily hinders the modern evolution of public nuisance law. While the special injury rule has a long history dating back to the sixteenth century, Oliver Wendell Holmes once rightly observed that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind

²¹⁴ Antolini, *supra* note 67, at 809 (arguing that a multiplicity of lawsuits would never arise in the absence of a special injury rule "because of the practical impediments to plaintiffs bringing such cases, including the rules on costs, which 'generally fall short of making the plaintiff whole,' the necessity to pay for counsel, the out-of-pocket costs, the reluctance of lawyers to sue when damages are small, and the risk of monetary loss even with a win on the merits").

imitation of the past.”²¹⁵ The threat of excessive and trivial lawsuits that spurred the development of the special injury rule is not present in cases in which private plaintiffs seek injunctive relief to abate a public nuisance, a relief that would benefit an entire community and, in itself, thwart the risk of excessive litigation.

As demonstrated by the outcome of *AcuSport*, barring access to injunctive relief via the special injury rule may in fact result in additional litigation. This pays a disservice to both the public who look to the law for protection, and the courts who look to the rule to decrease the number of lawsuits arising from a given nuisance. The injustice of the incongruous results that the special injury rule can produce becomes clear in the face of cases such as *AcuSport*. But for the *AcuSport* court’s adherence to the special injury rule, the NAACP may have won its injunction against the handgun industry, making the State of New York safer not only for NAACP members but for all citizens. As other procedural and practical elements of our legal system can sufficiently siphon the trivial actions thought to go hand in hand with a private action for public nuisance, the special injury rule no longer serves the same practical or doctrinal purposes it may have once served. States such as New York should follow the lead of other jurisdictions that have already altered their applications of the special injury rule and abandon this element of the public nuisance tort for private plaintiffs seeking injunctive relief.

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²¹⁵ Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

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