

5-2018

## Plaintiff Cities

Sarah L. Swan

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Public Law and Legal Theory Commons](#)

---

### Recommended Citation

Sarah L. Swan, Plaintiff Cities, 71 *Vanderbilt Law Review* 1227 (2019)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol71/iss4/3>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# Plaintiff Cities

Sarah L. Swan\*

*When cities are involved in litigation, it is most often as defendants. However, in the last few decades, cities have emerged as aggressive plaintiffs, bringing forward hundreds of mass-tort style claims. From suing gun manufacturers for the scourge of gun violence, to bringing actions against banks for the consequences of the subprime mortgage crisis, to initiating claims against pharmaceutical companies for opioid-related deaths and injuries, plaintiff cities are using litigation to pursue the perpetrators of the social harms that have devastated their constituents and their communities.*

*Many courts and commentators have criticized these plaintiff city claims on numerous grounds. They argue that, as a doctrinal matter, cities lack standing, fail to meet causation standards, and stretch causes of action like public nuisance beyond all reasonable limits. Further, they argue that, as a theoretical matter, plaintiff cities are impermissibly using litigation as regulation, overstepping their limited authority as “creatures of the state,” and usurping the political and legislative process. This Article demonstrates that each of these critiques is mistaken. Plaintiff city claims are legally, morally, and sociologically legitimate. And, as a practical matter, they are financially feasible even for cash-strapped or bankrupt cities. Moving beyond mere economic accounting, though, plaintiff city claims have value of a different sort: for plaintiff cities, litigation is a form of state building. By serving as plaintiffs and seeking redress for the harms that impact a city’s most vulnerable residents, plaintiff cities are demanding recognition not just for those impacted constituents, but also for themselves, as distinct and meaningful polities. In so doing, plaintiff cities are renegotiating the*

---

\* Law Teaching Fellow and Lecturer-in-Law, Columbia Law School. Many thanks to the following for their comments and conversations: Jamie Abrams, Anita Bernstein, Stephanie Borstein, Richard Briffault, Jenny-Brooke Condon, Jessica Bulman-Pozen, Jessica Clarke, Elizabeth F. Emens, Katie Eyer, Marie-Amelie George, Burt Huang, Ben Liebman, David Louk, Kathleen Morris, David Noll, Luke Norris, Jacob Sherkow, Jocelyn Simonson, Peter Strauss, Allison Tait, Kristen Underhill, as well as the participants of the State and Local Government Conference 2016, the Law and Society Annual Meeting 2017, the Columbia Law School Associates and Fellows Workshop, the New York Area Junior Faculty Colloquium, and the Yale Information Society Writer’s Workshop.

*practical and theoretical meaning of cities within the existing political order, and opening up new potential paths for urban social justice.*

INTRODUCTION.....	1229
I. CITIES BECOME PLAINTIFFS .....	1233
A. <i>The Litigation</i> .....	1234
1. Guns.....	1234
2. Lead .....	1236
3. Environmental Harms .....	1238
4. Subprime Mortgages .....	1239
5. The Opioid Epidemic .....	1241
B. <i>Features of Plaintiff City Claims</i> .....	1243
1. Public Health .....	1244
2. Vulnerability .....	1246
3. Slow Violence .....	1249
II. LEGITIMACY .....	1251
A. <i>Legality</i> .....	1252
1. Standing.....	1252
a. <i>Direct Standing</i> .....	1255
b. <i>Associational Standing</i> .....	1256
c. <i>Special Standing for Public</i> <i>Nuisance</i> .....	1259
2. Public Nuisance .....	1260
3. Causation.....	1265
B. <i>Moral or Political Legitimacy</i> .....	1267
1. Binding Dissenters.....	1268
2. Bypassing Democratic Regulation.....	1269
3. City-State Tensions.....	1271
C. <i>Sociological Legitimacy</i> .....	1276
III. FISCAL FEASIBILITY IN THE AGE OF MINIMAL CITIES .....	1279
IV. LITIGATION AS STATE BUILDING .....	1284
A. <i>Constructing the Polis</i> .....	1287
B. <i>Creating the Just City</i> .....	1288
CONCLUSION.....	1290

## INTRODUCTION

Traditionally, city attorneys have two basic roles.<sup>1</sup> First, they advise city officials.<sup>2</sup> Second, they defend cities when legal claims are brought against them.<sup>3</sup> And claims are indeed brought, many and often.<sup>4</sup> Because they occupy the frontline between citizen and state, cities are very frequently sued, on a wide variety of grounds.<sup>5</sup> The perpetual presence of cities as litigative defendants can create the impression that cities are “intractable defenders of awful power structures,”<sup>6</sup> who “only . . . deny, rather than support, the rights and interests of their residents.”<sup>7</sup>

But cities have another face, too. Despite the “paradigm in many public law offices . . . to be principally defensive,” in the last thirty years or so, some cities have resolved to become “so much more than that.”<sup>8</sup> These cities have added a new legal role to their roster: that of plaintiff. In contrast to their standard defensive litigative posture (but complementing their well-publicized efforts to advance socially progressive *regulation* like ordinances raising the minimum wage or prohibiting fracking<sup>9</sup>), cities have been bringing forward hundreds of mass-tort style claims seeking redress for the widespread harms that substantially injure themselves and their constituents.<sup>10</sup> Cities like San

---

1. Kathleen S. Morris, *Cities Seeking Justice: Local Government Litigation in the Public Interest*, in HOW CITIES WILL SAVE THE WORLD: URBAN INNOVATION IN THE FACE OF POPULATION FLOWS, CLIMATE CHANGE AND ECONOMIC INEQUALITY 189 (Ray Brescia & John Travis Marshall eds., 2016).

2. *Id.*

3. *Id.*

4. See, e.g., Mike Maciag, *From Police Shootings to Playground Injuries, Lawsuits Drain Cities' Budgets*, GOVERNING (Nov. 2016), <http://www.governing.com/topics/finance/gov-government-lawsuits-settlements.html> [<https://perma.cc/W65L-NK49>].

5. Morris, *supra* note 1, at 201.

6. *Id.*

7. Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 96 (2014).

8. Michael Hiltzik, *City Attorney Takes Aim at Big Banks*, L.A. TIMES (June 6, 2014, 10:34 PM), [www.latimes.com/business/hiltzik/la-fi-hiltzik-20140608-column.html](http://www.latimes.com/business/hiltzik/la-fi-hiltzik-20140608-column.html) [<http://perma.cc/2Y8V-YZUR>] (quoting Los Angeles City Attorney Mike Feuer).

9. For a discussion of these ordinances and their relationship to state legislation, see David A. Graham, *Red State, Blue City*, ATLANTIC (Mar. 2017), <https://www.theatlantic.com/magazine/archive/2017/03/red-state-blue-city/513857/> [<https://perma.cc/S827-FXBM>]. For a discussion of these initiatives and the overall balance of city power, see Richard C. Schragger, *The Political Economy of City Power*, 44 FORDHAM URB. L.J. 91, 91–92 (2017), which argues that “cities are flexing their policy-making muscle. Cities have been adopting ordinances in areas as diverse as environmental protection and health care and asserting themselves into policy spaces often considered exclusive to the state or the federal governments.”

10. After the tobacco litigation, municipal securities litigation became very popular as well. See Joe Palazzolo, *More Cities Suit Up for Legal Actions*, WALL ST. J. (May 3, 2016, 4:11 PM),

Francisco, Los Angeles, and New York now have specialized units within their law departments devoted to bringing these claims and developing their role as plaintiff cities.<sup>11</sup> Other less well-resourced cities pursue such claims as well, though often on a more ad hoc basis or through partnering with private law firms.<sup>12</sup>

The first fledgling plaintiff city claims began in the 1980s, but they were largely hidden within the broader auspices of claims brought by *state* attorneys general.<sup>13</sup> In the tobacco and asbestos litigation of that era, a small number of cities joined the high-profile and high-powered consortiums of states litigating these claims. Approximately ten years later, in the mid-1990s, cities matured into their own litigative force, as a multitude of plaintiff cities advanced controversial claims against the gun industry. Nearly a decade later, the federal Protection of Lawful Commerce in Arms Act brought an abrupt end to that line of litigation,<sup>14</sup> but plaintiff cities refocused to target a new

<https://www.wsj.com/articles/more-cities-suit-up-for-legal-actions-1462218870> [https://perma.cc/9EYZ-7ATP]. Cities have also been bringing more constitutional claims on behalf of their constituents. *See, e.g.*, David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218 (2006) (examining *Lockyer v. City & County of San Francisco*, 95 P.3d 459 (Cal. 2004), where San Francisco challenged California's same-sex marriage ban).

11. Morris, *supra* note 1, at 190. Other cities, like Buffalo, New York; Central Falls, Idaho; Philadelphia, Pennsylvania; and Washington, D.C., have also created these units. *See Divisions*, CITY BUFF., [https://www.ci.buffalo.ny.us/Home/City\\_Departments/LawDepartment/Divisions](https://www.ci.buffalo.ny.us/Home/City_Departments/LawDepartment/Divisions) (last visited Mar. 18, 2018) [https://perma.cc/W6WN-SXL3]; *Central Falls Affirmative Litigation*, CITY CENT. FALLS, [www.centralfallsri.us/affirmativelitigation](http://www.centralfallsri.us/affirmativelitigation) (last visited Mar. 18, 2018) [https://perma.cc/YHP9-DJER]; *Affirmative & General Litigation*, CITY PHILA., [www.phila.gov/law/litigation/Pages/GeneralLitigation.aspx](http://www.phila.gov/law/litigation/Pages/GeneralLitigation.aspx) (last visited Mar. 18, 2018) [https://perma.cc/54LZ-CHPY]; Rachel Dovey, *D.C. Renters Get More Legal Help for "Housing Justice" Cases*, NEXT CITY (Feb. 27, 2017), <https://nextcity.org/daily/entry/dc-renters-legal-help-housing-justice> [https://perma.cc/6X83-WP4C]. Chicago corporation counsel, Edward Siskel, told the media that Chicago was creating "an 'affirmative litigation' unit" because "[i]f the federal government is not going to play their role in enforcement, we're going to step into that void and do what we need to do to protect the residents of Chicago, to protect the economic lifeblood of the city of Chicago against any threat to it." *Chicago to Form Legal Unit to Sue Corporations*, CHI. TRIB. (Dec. 1, 2017, 1:00 PM), <http://www.chicagotribune.com/news/sns-bc-il--chicago-suing-corporations-20171130-story.html> [http://perma.cc/MRQ8-K9WJ] (internal quotation marks omitted). Other cities, like Providence, Rhode Island, for example, engage in affirmative litigation without a separate department. *See Palazzolo, supra* note 10. Some cities have also partnered with law schools to aid in affirmative litigation. San Francisco has partnered with Yale Law School and Berkeley Law School, and Detroit has partnered with the University of Michigan. *See Morris, supra* note 1, at 190; Katie Vloet, *DLaw: Class Explores Affirmative Litigation Opportunities for Detroit*, LAW QUADRANGLE, <https://www.quadrangle.law.umich.edu/spring2017/umichlaw/dlaw-class-explores-affirmative-litigation-opportunities-for-detroit> (last visited Mar. 18, 2018) [https://perma.cc/D9UA-L4XC].

12. *See infra* Part III.

13. *See* Henry Weinstein & Maura Dolan, *San Francisco Sues 6 Tobacco Firms*, L.A. TIMES (June 7, 1996), [articles.latimes.com/1996-06-07/news/mn-12618\\_1\\_san-francisco-tobacco](http://articles.latimes.com/1996-06-07/news/mn-12618_1_san-francisco-tobacco) [https://perma.cc/BW2G-AA9G].

14. 15 U.S.C. § 7901 (2012).

mass harm: lead paint. More recently, in the last ten years or so, a new wave of plaintiff city litigation has expanded to include claims against the largest oil companies for the harms of climate change, claims against banks and other financial entities for the consequences of the subprime mortgage crisis, and claims against pharmaceutical companies for the carnage wrought by the opioid epidemic.

The early plaintiff city claims did not fare well. Most were defeated on doctrinal grounds like lack of standing, failure to show causation, or nonfulfillment of the public nuisance cause of action. These issues still derail many plaintiff city claims. But some of the more recent plaintiff city cases have achieved substantial in-court and out-of-court victories. Despite these recent successes (or perhaps because of them), plaintiff city detractors continue to impugn these actions, arguing that they are doctrinally and politically suspect. In the doctrinal register, standing and causation continue to receive vehement critique, and in the political register, critics mainly argue that plaintiff cities are usurping the democratic process by regulating through litigation what they cannot regulate directly, thus grossly overstepping the appropriate city-state allotment of power.

These criticisms arise mostly piecemeal in court cases and commentary,<sup>15</sup> and scholarship has yet to fully grapple with them. In fact, scholarship has not yet offered a comprehensive descriptive and normative account of the plaintiff city trend itself.<sup>16</sup> This Article is the first to fill that gap. After descriptively accounting for the plaintiff city phenomenon, this Article addresses the controversies surrounding these claims and demonstrates that plaintiff city claims are a legitimate

---

15. Two articles not specifically about cities nevertheless offer criticisms relevant to plaintiff city claims. See Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825 (2004); Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913 (2008).

16. There is a smattering of scholarship focused on discrete issues related to city litigation. For scholarship on city standing, see, for example, Raymond H. Brescia, *On Public Plaintiffs and Private Harms: The Standing of Municipalities in Climate Change, Firearms, and Financial Crisis Litigation*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7, 21 (2010) [hereinafter Brescia, *On Public Plaintiffs*] (discussing how plaintiff cities can attain standing in gun, mortgage, and environmental litigation); Raymond H. Brescia, *When Cities Sue: The Standing of Municipalities in Nuisance Litigation to Combat Climate Change*, in GREENING LOCAL GOVERNMENT: LEGAL STRATEGIES FOR PROMOTING SUSTAINABILITY, EFFICIENCY, AND FISCAL SAVINGS 319 (Keith H. Hirokawa & Patricia E. Salkin eds., 2012) (discussing standing in environmental cases); and Caruso, *supra* note 7 (discussing associational standing for cities). There are also some helpful short pieces on the general topic. See, e.g., Morris, *supra* note 1, at 190 (arguing that cities could help “bolster civil law enforcement”); Gail Rubin, *Taking the Offensive: New York City’s Affirmative Suits*, 53 N.Y.L. SCH. L. REV. 491, 493 (2008) (describing New York City’s affirmative litigation docket); Laura L. Gavioli, Comment, *Who Should Pay: Obstacles to Cities in Using Affirmative Litigation as a Source of Revenue*, 78 TUL. L. REV. 941 (2004) (outlining city affirmative litigation and offering the views of some city attorneys general).

litigative activity: legally, morally, and sociologically. And, as a practical matter, this litigation is financially feasible, even in the current economic climate of cash-strapped or bankrupt cities. Moving beyond mere economic measurement, though, plaintiff city claims have another sort of value: they have *political* currency. In short, plaintiff cities use litigation as a form of state building. By serving as plaintiffs and seeking redress for the harms that impact a city's most vulnerable residents, plaintiff cities are defining and demanding recognition not just for those impacted constituents, but also for themselves, as distinct and meaningful polities. In so doing, plaintiff cities are renegotiating the practical and theoretical possibilities of cities in the political order and opening up new potential paths for urban justice.

Part I describes the rise of plaintiff cities.<sup>17</sup> It sketches out the most common plaintiff city claims and the nature of the harms underlying them. This descriptive account reveals three important insights. First, plaintiff city claims usually target public health injuries. Second, these public health harms tend to have their most significant impact on minority or vulnerable populations. Finally, these harms are usually forms of "slow violence."<sup>18</sup> They tend to accumulate gradually, leaving a lapse between the beginning of the injurious activity and the full manifestation of the harm.<sup>19</sup>

Part II addresses the main criticisms of plaintiff city claims, and demonstrates that plaintiff city litigation is legally, morally, and sociologically legitimate. Legally, most plaintiff city claims can meet standing requirements through a number of potential paths, including statutory standing, direct injury standing, associational standing, or special public nuisance standing. And, although the slow violence and collective nature of plaintiff city claims can create complications for causation, many plaintiff city claims can nevertheless meet causation requirements. Morally or politically, arguments that plaintiff city claims unjustly bind dissenters, or undemocratically amount to litigation as regulation, are best answered through analogies to other contexts, most notably state-driven public interest litigation.

---

17. Technically, cities are "public corporations," that is, "not-for-profit, publicly funded corporate entities" that "essentially come into being by applying to state governments for permission to exist." Morris, *supra* note 1, at 191. In the tradition of much local government scholarship, this Article uses the term "city" broadly, to refer to most "general-purpose governments below the state level," which would also generally include counties. Barron, *supra* note 10, at 2221 n.6.

18. ROB NIXON, *SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 2* (2013) ("By slow violence I mean a violence that occurs gradually and out of sight, a violence of delayed destruction that is dispersed beyond time and space, an attritional violence that is typically not viewed as violence at all.")

19. *Id.*

Sociologically, the “tort reform” movement has generally succeeded in impugning civil litigation as a whole, but litigation is eventually deemed acceptable and worthwhile if the information-forcing function reveals misconduct, as it has in many plaintiff city claims.

Part III considers the relevance of plaintiff city claims in this current time of fiscal crisis for many municipalities. It asserts that plaintiff city claims are financially feasible, even for fiscally distressed cities. Notably, in fact, the harms that plaintiff cities allege in these suits are often at least partly responsible for the cities’ precarious financial position in the first place.

In addition to their *economic* value, plaintiff city claims also have *political* worth. Part IV argues that plaintiff city claims are a form of litigation as state building. Through these claims, plaintiff cities are establishing themselves as entities responsible for and capable of achieving justice for their populations. They are both constructing their underlying polities as ones rooted in inclusivity and diversity, and constructing themselves as significant and meaningful political entities.

## I. CITIES BECOME PLAINTIFFS

Although cities have brought one-off, piecemeal litigation to advance their interests and those of their constituents since their first charters were established (including constitutional claims and other types of public interest litigation<sup>20</sup>), cities started targeting systemic, mass-tort style harms in the 1980s, first through the asbestos litigation and then through the tobacco cases.<sup>21</sup> Both the asbestos litigation and the tobacco litigation were mainly *state-driven* enterprises, with cities

---

20. For a descriptive sampling of these cases, see Morris, *supra* note 1. Californian cities, because of special authorization they have from the state of California, bring a particularly wide array of cases, including actions against banks for selling fraudulent products or engaging in consumer-related misconduct, against companies that dump toxic waste, and against companies whose products negatively affect children. *Id.* Los Angeles has also sued hospitals for patient dumping, the practice of transporting indigent and mentally ill patients to the middle of an area like skid row and leaving them there untreated, often wearing only hospital gowns and with no available money or resources. See Melinda Carstensen, *Patient Dumping in America: Hospitals Discharging Sick Homeless Back onto the Street*, FOX NEWS (May 14, 2015), <http://foxnews.com/health/2015/05/14/patient-dumping-in-america-hospitals-discharging-sick-homeless-back-onto-street.html> [<https://perma.cc/JC9T-HVUB>]. In the wake of the Donald Trump presidency, cities have also been litigating over issues like sanctuary cities. See Vikram David Amar, *Federalism Friction in the First Year of the Trump Presidency*, 45 HASTINGS CONST. L.Q. 401, 403 (2018).

21. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741 (2002); see also Richard A. Daynard, *How “Implied Express Preemption” Happened, What it Means to Trial Lawyers, and Why it Matters*, 65 N.Y.U. ANN. SURV. AM. L. 475, 480 (2010).



playing only a relatively minor role,<sup>22</sup> but the twinned successes of these two lines of litigation (tobacco, for example, resulted in one of the largest settlements in American history<sup>23</sup>) meant that a handful of pioneering plaintiff cities received substantial settlement funds.<sup>24</sup> The tobacco and asbestos litigation thus signalled to municipalities that plaintiff city litigation could be a potentially viable route for cities looking to address systemic, widespread public health harms and to recover the costs associated with them.<sup>25</sup>

### A. *The Litigation*

#### 1. Guns

Buoyed by the successes in the tobacco and asbestos litigation, plaintiff cities mobilized and initiated litigation against another systemic, widespread, and devastating public harm: gun violence.<sup>26</sup> Gun violence has been one of the most significant public harms to plague American society, “[w]hether measured by mortality or morbidity statistics, by cost to society, or by sheer grief and disruption”

---

22. Forty-six states participated in the \$206 billion Master Settlement Agreement, along with a handful of cities and counties. PAUL NOLETTE, *FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA* 1–2 (2015). The localities which were part of the 1998 Master Settlement Agreement included New York City, San Francisco, and Los Angeles, as well as Cook County, Illinois, and Erie County, New York. Gavioli, *supra* note 16, at 947.

23. David M. Cutler et al., *The Economic Impacts of the Tobacco Settlement*, 21 J. POL'Y ANALYSIS & MGMT. 1, 1 (2002). When it was entered into, the settlement's estimated value was \$105 billion. *Id.*

24. New York City, for instance, received more than \$130 million and “is the single largest recipient of asbestos bankruptcy recoveries.” Rubin, *supra* note 16, at 493.

25. Fox Butterfield, *Results in Tobacco Litigation Spur Cities to File Gun Suits*, N.Y. TIMES (Dec. 24, 1998), <http://www.nytimes.com/1998/12/24/us/results-in-tobacco-litigation-spur-cities-to-file-gun-suits.html> [<https://perma.cc/RQ4F-D445>]. The successful asbestos suits were rooted in the property ownership rights of municipalities and school boards. The suits that instead “claimed that the manufacture and distribution of asbestos products constituted a nuisance . . . were rejected by most courts.” Lindsay F. Wiley, *Rethinking the New Public Health*, 69 WASH. & LEE L. REV. 207, 238–39 (2012). Also, the most successful tobacco litigation, that in which states sued for health care cost reimbursement, was premised on “equitable grounds such as unjust enrichment” and on state consumer protection statutes. Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 337 (2001). Prior to the state tobacco claims, individual suits against tobacco companies had been almost unanimously unsuccessful: of the approximately eight hundred claims filed in state courts in the forty years between 1954 and 1994, plaintiffs succeeded at the trial level only twice, and neither success survived appeal. See Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 AM. J.L. & MED. 187, 190–91 (2000).

26. Butterfield, *supra* note 25.

to communities.<sup>27</sup> Since cities bear much of the economic cost associated with such violence, and witness the human and social cost for victims and their families, they have long sought solutions for this problem. In the 1990s, given the already-recognized overwhelming lobbying power of the gun industry, litigation appeared to be a good option.<sup>28</sup>

In 1998,<sup>29</sup> New Orleans brought the first plaintiff city gun suit, using product liability laws to claim that gun manufacturers had “defectively designed” their firearms because they lacked easily implementable safety mechanisms like child safety locks.<sup>30</sup> Shortly after New Orleans filed, Chicago brought its own plaintiff city gun suit, this time framing the claim as one of public nuisance, not product liability.<sup>31</sup> An onslaught of plaintiff city suits followed: nearly two years after the New Orleans and Chicago filings, thirty local governments had filed gun litigation claims.<sup>32</sup>

The bulk of these claims were dismissed,<sup>33</sup> and the few that did survive were eventually terminated by legislation.<sup>34</sup> In addition to the

---

27. Julie Samia Mair et al., *A Public Health Perspective on Gun Violence Prevention*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL & MASS TORTS* 39, 39 (Timothy D. Lytton ed., 2006).

28. *Id.*

29. Howard M. Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs’ Attorneys in Municipal Gun Litigation*, in *SUING THE GUN INDUSTRY*, *supra* note 27, at 129, 137.

30. Ausness, *supra* note 15, at 840. New Orleans sought damages for “the costs of police protection, emergency services, medical care, lost tax revenue, and other losses attributable to gun-related violence.” *Id.* It also sought “injunctive relief in the form of design standards and marketing restrictions.” Timothy D. Lytton, *Introduction: An Overview of Lawsuits Against the Gun Industry*, in *SUING THE GUN INDUSTRY*, *supra* note 27, at 1, 3.

31. Erichson, *supra* note 29, at 130. The case was *City of Chicago v. Beretta U.S.A. Corp.*, No. 98 CH 15596, 2000 WL 35509506 (Ill. Cir. Ct. Sept. 15, 2000), *rev’d*, 785 N.E.2d 16 (Ill. App. Ct. 2002), *rev’d*, 821 N.E.2d 1099 (Ill. 2004).

32. Michael I. Krauss, *Public Services Meet Private Law*, 44 SAN DIEGO L. REV. 1, 3 (2007). States and other governmental actors also subsequently became more active in this area. At the state level, in 1999, the New York and Connecticut Attorneys General started investigating “several” gun manufacturers. The same year, at the federal level, the then-Secretary of Housing and Urban Development (Andrew Cuomo) and the then-President (Bill Clinton) “jointly announced that they were planning a lawsuit against gun manufacturers on behalf of 3,200 public housing authorities across the country, based on the notion that the actions of gun manufacturers had increased federal expenditures.” Paul Nolette, *Law Enforcement as Legal Mobilization: Reforming the Pharmaceutical Industry Through Government Litigation*, 40 LAW & SOC. INQUIRY 123, 143 (2015).

33. A few claims settled, though sometimes the success was more regulatory than compensatory. San Francisco’s case, for example, cost \$1 million to bring, but “[i]n a settlement, gun distributors paid only \$70,000 to the dozen cities and counties [involved].” Lee Romney, *Activism Defines S.F. City Attorney’s Office*, L.A. TIMES (Mar. 23, 2004), [articles.latimes.com/2004/mar/23/local/me-cityatty23](https://perma.cc/B3V2-ETCS) [https://perma.cc/B3V2-ETCS]. However, the distributors and dealers also “agreed to certain restrictions on sales and better training to prevent firearm sales to criminals.” *Id.*

34. As one commentator noted, “One problem is that powerful interests, when poked with the stick of a municipal lawsuit, sometimes can get higher government entities to snarl back on their

many state bills that were enacted to prohibit such lawsuits,<sup>35</sup> in 2005 Congress passed the Protection of Lawful Commerce in Arms Act, which effectively foreclosed nearly all municipal civil suits against the gun industry.<sup>36</sup>

## 2. Lead

Before Congress killed the gun litigation, plaintiff cities had already begun litigating against another public health harm: lead paint.<sup>37</sup> Lead paint remains “the most significant childhood environmental health problem”<sup>38</sup> in many states, as even very low levels of exposure cause decreased IQ, reduced attention span, damage to reproductive organs, and neurological damage.<sup>39</sup> Lead poisoning has no cure; “once the damage is done, it is irreversible.”<sup>40</sup>

To stop childhood lead paint poisoning and remediate tainted properties, many cities and other local public authorities sued lead paint companies in the early 2000s, alleging that the lead paint companies knew as early as the 1920s or 1930s of the dangers lead paint

---

behalf.” Hiltzik, *supra* note 8. A similar phenomenon occurred in relation to obesity, when “[r]elatively quick action by many state legislatures immunized the food industry to tort lawsuits seeking obesity-related damages.” Paul A. Diller, *Obesity Prevention Policies at the Local Level: Tobacco's Lessons*, 65 ME. L. REV. 459, 460 (2013).

35. Louisiana and Georgia are examples of states that enacted gun litigation prevention statutes. In *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1 (La. 2001), the city unsuccessfully challenged the Louisiana statute.

36. Gary, Indiana, has had some success in arguing around the statute's edges. See *Morris*, *supra* note 1, at 200–01. And while city attorneys may have lost the litigation battle, they continue to fight the larger war. Today, “prosecutors from 30 major cities” have formed “a new coalition,” Prosecutors Against Gun Violence, to “exchang[e] expertise and tactics” on how best to address the “urgent public health and safety issue” of gun violence. This coalition is cochaired by Los Angeles City Attorney Mike Feuer. Editorial Board, *When Prosecutors Align on Guns*, N.Y. TIMES (Oct. 27, 2014), <https://www.nytimes.com/2014/10/29/opinion/when-prosecutors-align-on-guns.html> [<https://perma.cc/WP7L-D5UT>].

37. Cases included: *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *City of Chicago v. American Cynamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007) (where the plaintiff was the city of Newark); *City of Milwaukee v. NL Indus., Inc.*, 691 N.W.2d 888 (Wis. Ct. App. 2004). Columbus City (Ohio), Philadelphia (Pennsylvania), Houston (Texas), and a number of other municipalities in Ohio also filed suit. Eric Tucker, *R.I. Lead Paint Loss Gives Industry Huge Win*, USA TODAY (July 6, 2008), [http://www.usatoday.com/money/economy/2008-07-06-1044394103\\_x.htm?csp=34](http://www.usatoday.com/money/economy/2008-07-06-1044394103_x.htm?csp=34) [<https://perma.cc/ZJ8Y-CZNT>].

38. CAL. HEALTH & SAFETY CODE § 124125 (West 2018).

39. *Childhood Lead Poisoning*, WORLD HEALTH ORG. 11–12 (2010), [http://apps.who.int/iris/bitstream/10665/136571/1/9789241500333\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/136571/1/9789241500333_eng.pdf) [<https://perma.cc/PWL2-WK4D>]; Erin Schumaker & Alissa Scheller, *Lead Poisoning Is Still a Public Health Crisis for African-Americans*, HUFFINGTON POST (July 13, 2015, 1:48 PM), [https://www.huffingtonpost.com/2015/07/13/black-children-at-risk-for-lead-poisoning-\\_n\\_7672920.html](https://www.huffingtonpost.com/2015/07/13/black-children-at-risk-for-lead-poisoning-_n_7672920.html) (last updated Dec. 6, 2017) [<https://perma.cc/TL2C-T58R>].

40. Schumaker & Scheller, *supra* note 39.

posed, but deliberately hid this information.<sup>41</sup> Like the gun litigation, most of this initial plaintiff city litigation against lead manufacturers failed.<sup>42</sup> However, in 2013, one plaintiff city claim, involving a consortium of ten Californian cities and counties, had a remarkable victory, receiving a \$1.15 billion damage award.<sup>43</sup> In 2017, the appellate court affirmed that verdict.<sup>44</sup> While the lead paint companies have indicated that they will pursue a further appeal,<sup>45</sup> the holding and tenor of the judgment may invigorate other cities still fighting on this and other fronts.<sup>46</sup>

---

41. Ausness, *supra* note 15, at 853–54; *see also infra* note 42.

42. Ausness, *supra* note 15, at 854. The early litigation was described as “uniformly unsuccessful.” *Id.* In 2007, though, it looked like a state-led suit had managed a victory when a Rhode Island jury issued a \$2.4 billion verdict against a number of lead paint companies. *Rhode Island v. Lead Indus. Ass’n*, No. PC 99-5226, 2007 WL 711824 (R.I. Super. Ct. Feb. 26, 2007), *rev’d in part*, 951 A.2d 428 (R.I. 2008); *see also* Abha Bhattarai, *Rhode Island Court Throws Out Jury Finding in Lead Case*, N.Y. TIMES (July 2, 2008), <https://www.nytimes.com/2008/07/02/business/02paint.html> [<https://perma.cc/B6SN-NVML>] (“Cleanup costs in Rhode Island had been estimated at \$2.4 billion.”). The Rhode Island Supreme Court overturned this verdict a year later. 951 A.2d at 452–58. The Rhode Island suit itself was an exception to the typical state-level response to lead paint, which did not use litigation. Instead, “most state attorneys general [were] cautious about getting involved with lead paint.” Alan Greenblatt, *Lead Into Gold?*, GOVERNING (May 2006), <http://www.governing.com/topics/health-human-services/Lead-Gold.html> [<https://perma.cc/DM6F-NDFS>]. Indeed, “[i]n 2003, 47 of the 50 AGs signed an agreement with paint makers calling for tougher warning labels about the danger of stirring up lead paint dust in home renovation” and “[t]hat seemed to dampen their enthusiasm for further litigation.” *Id.*

43. *People v. Atl. Richfield Co.*, No. 1-00-CV-788657, 2014 Cal. Super. LEXIS 1426, at \*189 (Jan. 7, 2014).

44. *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 598 (Ct. App. 2017). However, the court did narrow the verdict slightly, to cover only houses constructed before 1951, not 1978. *Id.* at 546–47. According to one media report about the decision, “It isn’t clear how much the abatement fund would be reduced by the order, though an attorney for the plaintiff counties and cities estimated that the companies still would be on the hook for about \$600 million.” Michael Hiltzik, *In Landmark Ruling, Court Orders Paint Companies to Pay to Clean Lead Paint out of California Homes*, L.A. TIMES (Nov. 15, 2017, 1:55 PM), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-lead-paint-ruling-20171115-story.html> [<https://perma.cc/N2NS-3SJV>].

45. *See* Hiltzik, *supra* note 44.

46. *Id.* Baltimore is one such city. It is currently urging state legislators to pass the Maryland Lead Poisoning Recovery Act, which would allow the city to sue lead paint companies based on a market-share liability theory, rather than the standard “personal injury”-style causation requirement. *See* Jack Chavez, *Lead-Paint Bill Would Let Baltimore Sue for Past Damages*, U.S. NEWS (Mar. 8, 2017, 3:34 PM), <https://www.usnews.com/news/best-states/maryland/articles/2017-03-08/lead-paint-bill-would-let-baltimore-sue-for-past-damages> [<https://perma.cc/U8RE-TSEA>]. For an example of the opposite dynamic, where the state is seeking to pass legislation that would limit a plaintiff city suit, *see* Carole Carlson, *Senate Bill Targets Gary Gun Lawsuit*, CHI. TRIB. (Feb. 16, 2015, 7:42 PM), [www.chicagotribune.com/suburbs/post-tribune/news/ct-ptb-gary-gun-suit-bill-focus-st-0217-20150216-story.html](http://www.chicagotribune.com/suburbs/post-tribune/news/ct-ptb-gary-gun-suit-bill-focus-st-0217-20150216-story.html) [<https://perma.cc/6UBQ-FKPX>].

### 3. Environmental Harms

The success of the California counties and cities in the recent lead paint appeal may impact another active area of plaintiff city litigation: litigation targeting climate change and other environmental harms.<sup>47</sup> Advancements in the science of climate change, new information about how much oil companies knew and how long they knew it for, and the ever-growing cost of responding to climate change have prompted cities like San Francisco, Oakland, and Imperial Beach to sue the five largest oil conglomerates for their role in creating climate change.<sup>48</sup>

In January 2018, New York City joined this group of plaintiff cities, announcing that it would be both suing the oil companies and divesting its approximately \$5 billion of pension investments from them.<sup>49</sup> This announcement has been heralded as a watershed moment, with many environmentalists noting the fact that the “financial capital of the world”<sup>50</sup> is suing and divesting from fossil fuel companies is “one of the . . . most important moments in [the] 30-year fight” to stop climate change<sup>51</sup> and “should be a galvanizing moment for cities around the world.”<sup>52</sup>

Water pollution is also a major area of plaintiff city litigation.<sup>53</sup> For instance, San Jose, Berkley, and Oakland have initiated suits against Monsanto for polluting the bay water of their surrounding areas with polychlorinated biphenyls, which “have been linked to cancer, neurotoxic and mutagenic health effects.”<sup>54</sup> San Francisco Bay, San

---

47. Hiltzik, *supra* note 44.

48. Corinne Ramey & Mara Gay, *New York City Sues Oil Companies over Climate Change*, WALL ST. J. (Jan. 10, 2018, 4:49 PM), <https://www.wsj.com/articles/city-sues-oil-companies-over-climate-change-1515607107> [<https://perma.cc/6R59-K3SW>].

49. Chris Mooney & Dino Grandoni, *New York City Sues Shell, ExxonMobil and Other Oil Companies over Climate Change*, WASH. POST (Jan. 10, 2018), [https://www.washingtonpost.com/news/energy-environment/wp/2018/01/10/new-york-city-sues-shell-exxonmobil-and-other-oil-majors-over-climate-change/?utm\\_term=.f743a1efab40](https://www.washingtonpost.com/news/energy-environment/wp/2018/01/10/new-york-city-sues-shell-exxonmobil-and-other-oil-majors-over-climate-change/?utm_term=.f743a1efab40) [<https://perma.cc/QA5C-6WFY>].

50. Karen Savage, *New York City Files Climate Lawsuit Against Five Biggest Oil Companies*, CLIMATE LIABILITY NEWS (Jan. 10, 2018), <https://www.climateabilitynews.org/2018/01/10/new-york-city-climate-lawsuit-liability-bill-de-blasio/> [<https://perma.cc/WVU7-ZG9B>] (quoting activist Naomi Klein).

51. Mooney & Grandoni, *supra* note 49 (quoting environmental activist Bill McKibben).

52. Savage, *supra* note 50 (quoting Annie Leonard, the executive director of Greenpeace).

53. Des Moines is suing neighboring counties for polluting the water with “[t]oo much nitrate,” which “can be a health risk, especially for infants under the age of 6 months.” Dan Charles, *Iowa’s Largest City Sues over Farm Fertilizer Runoff in Rivers*, NPR (Jan. 12, 2015, 3:26 AM), <https://www.npr.org/sections/thesalt/2015/01/12/376139473/iowas-largest-city-sues-over-farm-fertilizer-runoff-in-rivers> [<https://perma.cc/2NH3-G366>].

54. Ed Barrena, *City Sues Monsanto*, E. COUNTY MAG. (Mar. 18, 2015), <http://www.eastcountymagazine.org/city-sues-monsanto> [<https://perma.cc/4BMS-PYH3>].

Diego, Spokane, Seattle, Long Beach,<sup>55</sup> and Portland<sup>56</sup> have also sued in this regard. Similarly, in the early 2000s, many plaintiff cities sued companies for the damaging effects of the gas additive methyl tertiary butyl ether (“MTBE”) on water supplies.<sup>57</sup>

#### 4. Subprime Mortgages

Plaintiff cities have also targeted the financial institutions responsible for the subprime mortgage crisis.<sup>58</sup> The subprime mortgage crisis brutalized both the physical and the metaphorical landscapes of hundreds of U.S. cities.<sup>59</sup> In addition to the financial ruin of individuals and families,<sup>60</sup> cities were stuck “bearing the brunt of the fallout from [this] crisis.”<sup>61</sup> Foreclosures caused “massive property devaluations”<sup>62</sup> resulting in a plundered tax base for cities, and the abandoned properties themselves demanded extensive city resources in the form of

55. “[S]even cities have hired the Dallas firm Baron & Budd and the San Diego firm Gomez Trial Attorneys. The defendants – Monsanto, Solutia and Pharmacia – call the cases a ‘super tort.’” John O’Brien, *Monsanto Fighting ‘Super Tort’ Brought by West Coast Cities and Trial Lawyers*, FORBES (June 22, 2016), <https://www.forbes.com/sites/legalnewsline/2016/06/22/headline/#3e62a18667ad> [<https://perma.cc/UHG5-AK3V>].

56. *Port of Portland v. Monsanto Co.*, No. 3:17-cv-00015-PK, 2017 U.S. Dist. LEXIS 156369 (D. Or. Sept. 22, 2017).

57. The exact nature of the MTBE harm was unclear: it was said that at best, it made water stink and taste terrible, and at worst, it caused cancer. Elizabeth Thornburg, *Public as Private and Private as Public: MTBE Litigation in the United States*, in *CLASS ACTIONS IN CONTEXT: HOW CULTURE, ECONOMICS AND POLITICS SHAPE COLLECTIVE LITIGATION* 342, 344 (Deborah R. Hensler et al. eds., 2016). Municipal water districts and state governments were plaintiffs that sued many major oil and gas companies, which led to a settlement in 2008. New York City sued ExxonMobil, the case went to trial, and they got \$104.7 million in compensatory damages. *Id.*

58. Of course, cities are not the only entities seeking to redress the consequences of the subprime mortgage crisis through litigation. State attorneys general have initiated claims alleging violation of state laws, individuals have come together to bring class action litigation, investor groups have commenced litigation, and other associations, like the NAACP, have also brought suit. See Raymond H. Brescia, *Tainted Loans: The Value of a Mass Torts Approach in Subprime Mortgage Litigation*, 78 U. CIN. L. REV. 1, 35 (2009). Many of the class action cases have been brought under the auspices of multidistrict litigation. *Id.* The state attorney general litigation resulted in a \$26 billion settlement. NOLETTE, *supra* note 22, at 2.

59. Kathleen C. Engel, *Local Governments and Risky Home Loans*, 69 SMU L. REV. 609, 609 (2016).

60. The fact that these consequences were in many cases the results of racially discriminatory acts is a further source of injury. The Supreme Court in *Curtis v. Loether*, 415 U.S. 189, 195 n.10 (1974) indicated that emotional harm arising from housing discrimination was similar to “defamation or intentional infliction of emotional distress in tort law.” Victor M. Goode & Conrad A. Johnson, *Emotional Harm in Housing Discrimination Cases: A New Look at a Lingering Problem*, 30 FORDHAM URB. L.J. 1143, 1153 (2002).

61. Brescia, *On Public Plaintiffs*, *supra* note 16, at 21.

62. Ngai Pindell, *The Fair Housing Act at Forty: Predatory Lending and the City as Plaintiff*, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 169, 170 (2009).

police and fire services.<sup>63</sup> For example, Cleveland, in 2014, had 12,000 condemned or abandoned buildings that required demolition, at an estimated cost of approximately \$120 million.<sup>64</sup> It is estimated that each abandoned property in a city generally costs “between \$7,000 and \$30,000” to address.<sup>65</sup>

Nearly a dozen plaintiff cities have commenced litigation to redress these harms.<sup>66</sup> While no municipality has yet achieved a final court victory in this area, some have achieved handsome settlements<sup>67</sup> and many cases are still active and pending.<sup>68</sup> One case, *Bank of America Corp. v. City of Miami*, reached the Supreme Court, where the Court confirmed that the Fair Housing Act can provide a font of standing for cities seeking to bring such claims.<sup>69</sup> Less auspiciously, though, the Court reaffirmed that a rigorous causation standard will apply, and the city will have to show “some direct relation between the

63. Brescia, *On Public Plaintiffs*, *supra* note 16, at 21.

64. Engel, *supra* note 59, at 629.

65. *Id.*

66. They include Los Angeles, Miami Gardens, Memphis, Baltimore, Birmingham, Miami City, Buffalo, New York City, Cincinnati, and Cleveland. See *City of Los Angeles v. Wells Fargo & Co.*, 22 F. Supp. 3d 1047 (C.D. Cal. 2014); *City of Miami Gardens v. Wells Fargo & Co.*, No. 14-22203-CIV, 2014 WL 6455660 (S.D. Fla. Oct. 1, 2014); *Memphis v. Wells Fargo N.A.*, No. 09-2857-STA, 2011 U.S. Dist. LEXIS 48522 (W.D. Tenn. May 4, 2011); *City of Birmingham v. Citigroup Inc.*, No. CV-09-BE-467-S, 2009 WL 8652915 (N.D. Ala. Aug. 19, 2009). Cobb County and DeKalb County have also brought suit. See *Cobb County v. Bank of Am. Corp.*, No. 1:15-CV-04081-LMM, 2016 WL 2937467 (N.D. Ga. May 2, 2016); *DeKalb County v. HSBC N. Am. Holdings, Inc.*, No. 1:12-CV-03640-SCJ, 2013 WL 7874104 (N.D. Ga. Sept. 25, 2013). Plaintiff city litigation for the subprime mortgage crisis tends to adopt one of three potential framings: cities like Baltimore have framed the claim as an FHA violation, cities like Cleveland have framed the claim as public nuisance, and cities like Buffalo have argued that the banks violated local ordinances and created a public nuisance by failing to maintain foreclosed properties. Brescia, *supra* note 58, at 38.

In addition to litigation, cities have also begun trying other techniques, including “responsible banking ordinances, so-called ‘Community Impact Report Cards’ for financial institutions, and the use of eminent domain to address underwater mortgages.” Ray Brescia, *Cities and the Financial Crisis*, in *HOW CITIES WILL SAVE THE WORLD*, *supra* note 1, at 11, 11.

67. Memphis received a “substantial financial settlement.” Jonathan L. Entin, *City Governments and Predatory Lending Revisited*, 40 *FORDHAM URB. L.J. CITY SQUARE* 108, 113 (2014), <http://urbanlawjournal.com/files/2014/01/Entin-FINAL-1.22.141.pdf> [<https://perma.cc/JTE2-W6V7>]. Baltimore’s suit was dismissed, but it received approximately \$175 million from a lawsuit the federal government filed. *Id.* at 112–13 & n.35; Liz Farmer, *Why Few Cities Will Take the Supreme Court Up on Their Right to Sue Banks*, *GOVERNING* (May 11, 2017), <http://www.governing.com/topics/finance/gov-cities-banks-miami-supreme-court.html> [<https://perma.cc/MY94-WVZS>]. Massachusetts and Nevada also received settlement funds, but from state-led suits. Entin, *supra*, at 113. Los Angeles received \$50 million in settlement funds from Wells Fargo in September 2016. Debbie Hoffman & Alexandria Decatur, *Part 1: The Fallout of the Bank of America vs. City of Miami Decision*, *HOUSINGWIRE* (Sept. 26, 2017), <https://www.housingwire.com/blogs/1-rewired/post/41394-part-1-the-fallout-of-the-bank-of-america-vs-city-of-miami-decision> [<https://perma.cc/P439-KEUL>].

68. Hoffman & Decatur, *supra* note 67.

69. 137 S. Ct. 1296 (2017).

injury asserted and the injurious conduct alleged” if it is to be successful.<sup>70</sup> To date, then, plaintiff city claims in this area have faced significant hurdles,<sup>71</sup> but litigative success remains possible.<sup>72</sup>

### 5. The Opioid Epidemic

Most recently, there has been an uprising of plaintiff city litigation in response to the opioid epidemic.<sup>73</sup> Since 2000, “[n]early 165,000 people have died from overdoses of prescription narcotics,”<sup>74</sup> and drug overdoses are now the “leading cause of death among Americans under 50.”<sup>75</sup> An estimated “2.1 million people are addicted to prescription painkillers.”<sup>76</sup> Addiction to prescription painkillers is a frequent precursor to other drug use: “75% of heroin users started using

70. *Id.* at 1306 (quoting *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 268 (1992)).

71. Entin, *supra* note 67, at 114. Two weeks after the Supreme Court’s ruling in *Bank of America Corp. v. City of Miami* (though without citing to it), the United States Court of Appeals for the Ninth Circuit held, in an unpublished opinion, that Los Angeles had “failed to show a ‘robust’ causal connection between any disparity and a facially-neutral Wells Fargo policy.” *City of Los Angeles v. Wells Fargo & Co.*, 691 F. App’x 453, 454 (9th Cir. 2017). A companion case, *City of Los Angeles v. Bank of America Corp.*, 691 F. App’x 464 (9th Cir. 2017), met a similar fate: the Ninth Circuit, in an unpublished opinion, held that Los Angeles failed “to show a ‘robust’ connection between this [racial] disparity and any BOA or Countrywide facially-neutral policy.” *Id.* at 465. Raymond Brescia also notes that subprime mortgage litigation faces an additional problem: “[M]any of the subprime lenders . . . were so aggressive in extending subprime loans [that they] are now bankrupt.” Brescia, *supra* note 66, at 56.

72. See, e.g., Engel, *supra* note 59, at 650 (proposing possible procedural reforms to better enable municipalities to enjoin lenders). Also, two weeks after the *Bank of America v. Miami* decision, Philadelphia filed a similar suit against Wells Fargo. Hoffman & Decatur, *supra* note 67.

73. The CDC has officially labeled the problem an “epidemic.” *Understanding the Epidemic*, CTNS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/epidemic/index.html> (last visited Mar. 20, 2018) [<https://perma.cc/YY56-S798>]. In addition to these plaintiff city claims, cities have also created a coalition similar to that created in response to the failure of gun litigation. Eliza Gray, *Cities Ask the Federal Government to Fight Painkiller Deaths*, TIME MAG. (Sept. 16, 2014), <http://time.com/3387136/painkiller-deaths/> [<https://perma.cc/PM3D-752J>]. The Big Cities Health Coalition has banded together to lobby the federal government to help address the problem. *Id.* The Public Health Commissioner of Boston, Barbara Ferrer, noted the importance of this lobbying effort: “We don’t come forward a lot . . . . When big cities say there is need for [a] federal policy agenda, people should stand up and listen.” *Id.* (second alteration in original) (internal quotation marks omitted).

74. Lenny Bernstein, *Pfizer Reaches Agreement with Chicago to Limit Opioid Marketing*, CHI. TRIB. (July 6, 2016, 7:41 PM), <http://www.chicagotribune.com/business/ct-pfizer-opioid-marketing-20160705-story.html> [<https://perma.cc/RT9H-9RC4>]; see also John Schwartz, *Chicago and 2 California Counties Sue Over Marketing of Painkillers*, N.Y. TIMES (Aug. 24, 2014), <https://www.nytimes.com/2014/08/25/us/chicago-and-2-california-counties-sue-drug-companies-over-painkiller-marketing.html> [<https://perma.cc/PWZ4-RWP9>].

75. Josh Katz, *Drug Deaths in America Are Rising Faster Than Ever*, N.Y. TIMES (June 5, 2017), <https://www.nytimes.com/interactive/2017/06/05/upshot/opioid-epidemic-drug-overdoses.html> [<https://perma.cc/2M5A-JQR2>].

76. Bernstein, *supra* note 74.



heroin after getting into opioid painkillers first.”<sup>77</sup> The scale at which towns and cities have been flooded with opioids is staggering: for example, “drug wholesalers shipped 9 million opioid pills to a pharmacy in Kermit, WV, a town of just 400 people.”<sup>78</sup>

In addition to the profound human costs, opioid addiction poses significant costs to cities. For instance, as Chicago alleged in their claim, opioid abuse caused “about 1,100 emergency room visits” in 2009 and resulted in “\$12.3 million in insurance claims for painkiller prescriptions” between 2008 and 2015.<sup>79</sup> Over one hundred additional cities and counties have now brought suit to recover these and other costs of providing opioid-related services, with more continually joining their ranks.<sup>80</sup> Dayton, Ohio, for example, commenced a suit, noting that their “law enforcement, fire and EMS personnel have already responded to more than 1,800 calls related to suspected overdoses since the start of 2017,” a “remarkable number in a city with around 140,000

---

77. Eliza Gray, *Chicago Blames Big Pharma for Epidemic Addictions to Painkillers*, TIME MAG. (June 4, 2014), <http://time.com/2822381/chicago-blames-big-pharma-for-epidemic-addictions-to-painkillers/> [https://perma.cc/J45W-52H7].

78. *9 Million Painkillers Shipped to Tiny West Virginia Town*, MSNBC (Mar. 10, 2017), <https://www.msnbc.com/all-in/watch/9-million-painkillers-shipped-to-tiny-west-virginia-town-895420995808> [https://perma.cc/2WT8-3M9R].

79. Bernstein, *supra* note 74.

80. Schwartz, *supra* note 74. Other plaintiffs include Everett, Washington; Stockton, California (along with its fire department and the county); Orange and Santa Clara counties in California; and Huntington, West Virginia. See Jerry Mitchell, *Mississippi Sets Tone as Opioid Drugmakers Face Rising Tide of Lawsuits*, CLARION LEDGER (June 10, 2017, 4:58 PM), <http://www.clarionledger.com/story/news/2017/06/11/mississippi-sets-tone-opioid-drugmakers-face-rising-tide-lawsuits/346518001> [https://perma.cc/QSN3-85TF]; Roger Phillips, *Stockton SJ, Fire District Sue Drug Companies over Opioid Crisis*, RECORDNET.COM (June 23, 2017, 6:28 PM), <http://www.recordnet.com/news/20170623/stockton-sj-fire-district-sue-drug-companies-over-opioid-crisis> [https://perma.cc/3L5A-FANW]. Tacoma, Washington, is contemplating a suit as well. Editorial Board, *Tacoma Has Big Work to Do Before Suing Big Pharma*, NEWS TRIB. (June 10, 2017, 5:00 PM), <http://www.thenewstribune.com/opinion/article155389204.html> [https://perma.cc/ZSW7-ZQYV]. The Cherokee nation has also sued. Alana Semuels, *Are Pharmaceutical Companies to Blame for the Opioid Epidemic?*, ATLANTIC (June 2, 2017), <https://www.theatlantic.com/business/archive/2017/06/lawsuit-pharmaceutical-companies-opioids/529020/> [https://perma.cc/9PGD-FKV9]. Much of the opioid plaintiff city litigation is now managed by U.S. District Judge Dan Polster, who is “overseeing more than two hundred cases filed by local governments” against opioid manufacturers and distributors. Jef Feeley, *Opioid Judge Wants ‘Meaningful’ National Accord on Cities’ Suits*, BLOOMBERG (Jan. 9, 2018, 1:52 PM), <https://www.bloomberg.com/news/articles/2018-01-09/opioid-judge-wants-meaningful-national-accord-on-cities-suits> [https://perma.cc/4S3P-CLXT]. Judge Polster is hearing the multitude of cases as a result of an order by the Judicial Panel on Multidistrict Litigation. Eric Heisig, *Cleveland Federal Judge to Hear Dozens of Lawsuits Filed Against Big Pharma Nationwide*, CLEVELAND.COM (Dec. 5, 2017), [http://www.cleveland.com/court-justice/index.ssf/2017/12/cleveland\\_federal\\_judge\\_to\\_hear\\_1.html](http://www.cleveland.com/court-justice/index.ssf/2017/12/cleveland_federal_judge_to_hear_1.html) [https://perma.cc/5L5K-A8UQ]. The order noted Judge Polster’s previous experience handling “lawsuits involving injuries sustained by people exposed to a chemical element called gadolinium during MRIs.” *Id.* Judge Polster is encouraging settlement. Feeley, *supra*.

residents.”<sup>81</sup> In Delray Beach, Florida, (a state where “[b]etween 72 and 82 opioid prescriptions are written for every 100 people”<sup>82</sup>) the mayor noted that litigation was one thing that the city could do to address the problem: “With virtually no help from our federal government and little from our state . . . cities like ours are now frantically searching for answers for our own population.”<sup>83</sup> Delray Beach, like many other cities struggling to cope with the challenges of an addicted population, hopes litigation might be one of those answers.

### B. Features of Plaintiff City Claims

By situating themselves as plaintiffs in these cases, plaintiff cities are emphasizing the *public* nature of the underlying harms. Plaintiff cities hope that the current litigation will benefit from an important lesson learned from the tobacco suits: when governmental entities become plaintiffs, potential defensive arguments based on individual litigants can be neutralized. The tobacco litigation experience taught that when *individual* litigants brought claims, “juries often blame[d] the smoker and [were] unwilling in most cases to reward smokers for their [perceived] self-imposed harm.”<sup>84</sup> When the plaintiff was a government entity, “[i]t [was] much more difficult to blame the state for the lung cancer of many of its citizens.”<sup>85</sup> In other words, changing the plaintiff changed how the harm was understood. Rather than being understood as the result of individual choices for which individuals should bear the cost, plaintiff city claims are reframed as harms to the *public*, which are the result of third-party wrongdoing, and for which, accordingly, those third-party wrongdoers should bear the cost.<sup>86</sup>

---

81. Matthew Rozsa, *An Ohio City Is Suing Pharmaceutical Companies over the Opioid Epidemic*, SALON (June 7, 2017, 10:52 AM), <https://www.salon.com/2017/06/07/an-ohio-city-is-suing-pharmaceutical-companies-over-the-opioid-epidemic/> [<https://perma.cc/SU4N-A8FY>].

82. Lulu Ramadan, *Breaking: Delray Will Sue Big Pharma for ‘Scourge of Opioid Addiction,’* PALM BEACH POST (July 19, 2017, 8:58 AM), <http://www.palmbeachpost.com/news/local/breaking-delray-will-sue-big-pharma-for-scourge-opioid-addiction/2ksA0mBceTdRfprEL2JR1J/> [<https://perma.cc/D7BW-YVYU>].

83. *Id.* (alteration in original).

84. Erichson, *supra* note 29, at 142.

85. *Id.* Many individual litigants suing gun manufacturers faced a similar obstacle: courts and juries found that the blame for gun violence fell on individual shooters, rather than on the gun industry. *Id.* at 142–43. One much-publicized 1995 case, though, *Hamilton v. Accu-Tek*, appeared to buck this trend, garnering a jury verdict awarding the plaintiff approximately \$4 million. 62 F. Supp. 2d 802, 854 (E.D.N.Y. 1999). This case, though, was overturned on appeal. *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21, 26 (2d Cir. 2001).

86. Butterfield, *supra* note 25.

In fact, as this Section will outline, plaintiff city litigation tends to center around a specific type of public harm: those that impact public health. More specifically, plaintiff city claims usually focus on public health harms that have either deliberately targeted or have most injured vulnerable populations. Finally, the public health wrongs underlying plaintiff city litigation often inflict their injuries through a process of “slow violence,” a gradual accretion and development of injury that is temporally distanced from its cause.<sup>87</sup>

## 1. Public Health

Lead and opioids are easily recognized as stereotypical public health harms.<sup>88</sup> But, less obviously, gun violence, environmental harms, and the subprime mortgage crisis are all matters of public health as well. In the 1990s, when plaintiff cities first brought the gun litigation, the idea that gun violence could be a public health problem, and not merely a problem of individual criminal wrongdoing, was new.<sup>89</sup> The seeds of the idea began in the 1960s and 1970s, with the release of the 1964 Report to the Surgeon General regarding tobacco<sup>90</sup> and the publication of Ralph Nader’s groundbreaking book *Unsafe at Any Speed*.<sup>91</sup> Both writings helped to shape the idea of “public wrongs,”<sup>92</sup> and contributed to important theoretical and methodological shifts that were occurring in the field of public health.<sup>93</sup> Most notably, injury

---

87. See *infra* Section I.B.3.

88. There is, though, a politics behind what gets categorized as a public health harm. The white population benefits from a much more humane “public health” response to the social problem of opioids than African Americans did when the crack epidemic tore through those communities and received a “criminal law” response. See Andrew Cohen, *How White Users Made Heroin a Public Health Problem*, ATLANTIC (Aug. 12, 2015), <https://www.theatlantic.com/politics/archive/2015/08/crack-heroin-and-race/401015/> [https://perma.cc/D2L6-CD55].

89. Public health is commonly defined as “what we, as a society, do collectively to assure the conditions in which people can be healthy.” Wendy E. Parmet, *Tobacco, HIV, and the Courtroom: The Role of Affirmative Litigation in the Formation of Public Health Policy*, 36 HOUS. L. REV. 1663, 1665 (1999) (internal quotation marks omitted) (quoting Barry S. Levy, *Twenty-First Century Challenges for Law and Public Health*, 32 IND. L. REV. 1149, 1150 (1999)) (noting this common definition from the Institute of Medicine).

90. *Id.* at 1700.

91. See *id.* at 1675 n.65 (explaining Samuel Jan Brakel, *Using What We Know About Our Civil Litigation System: A Critique of “Base-Rate” Analysis and Other Apologist Diversions*, 31 GA. L. REV. 77, 157 (1996), as “finding that in the 1960s, consumer advocates such as Ralph Nader helped shift public attitude”).

92. See *id.* (parenthetically discussing “consumer advocates such as Ralph Nader” and citing Samuel Jan Brakel, *Using What We Know About Our Civil Litigation System: A Critique of “Base-Rate” Analysis and Other Apologist Diversions*, 31 GA. L. REV. 77, 157 (1996)).

93. Another corresponding legal evolution was that “as part of the development of environmental law in the 1970s and 1980s, courts began to allow for mass product torts that were not limited solely to individuals suffering a discrete injury, but that were conceived as collective

prevention was emerging as an important heuristic and subfield.<sup>94</sup> Public health researchers began to examine “violence as a source of injury,” which led to the consideration of the connections between gun violence and widespread injury.<sup>95</sup> Then, using the methodological tools of public health, and its particular focus on *populations*, rather than individuals, public health scholars performed the then-novel act of thinking about gun deaths in the aggregate.<sup>96</sup> As basic as that idea sounds to contemporary ears, this different view of injury revealed the theretofore unknown fact that after motor vehicle deaths, guns were the next leading cause of injury-related death in the United States.<sup>97</sup>

With epidemiological tools, public health scholars were then able to “identify the causes and distribution of gun violence injury” that differed from the usual narrative that gun violence was simply a result of individual choice.<sup>98</sup> They discovered that the way firearms were designed (i.e., without easily implemented safety mechanisms) and marketed (i.e., with manufacturers and dealers overlooking obvious regulatory breaches and highlighting factors that would only be of interest to people intending to use guns for interpersonal violence) was a significant factor in the high rate of gun violence.<sup>99</sup> These insights formed the basis of the litigation.

The subprime mortgage crisis also has a significant public health dimension. The physical abandoned homes themselves give rise to several public health harms. As the Miami police detailed in their amicus brief in *Miami v. Bank of America*, the homes became breeding grounds for a whole host of disturbing criminal activities, dangers, and diseases. The houses were used to “hide dead bodies and to advertise child sex trafficking,”<sup>100</sup> and “[i]n one heartbreaking case, a toddler drowned in the swimming pool of his neighbor’s vacant house.”<sup>101</sup> Some public health officials suggest that “untended pools in foreclosed homes

---

harms that could be governed by other areas of the law (namely public nuisance).” Sarah Staszak, *Private Power and Public Policy: Rights Enforcement in the Modern Litigation State*, 47 TULSA L. REV. 77, 83 (2011) (book review).

94. Lytton, *supra* note 30, at 4; see also Richard J. Bonnie & Bernard Guyer, *Injury as a Field of Public Health: Achievements and Controversies*, 30 J.L. MED. & ETHICS 267, 271 (2002).

95. Lytton, *supra* note 30, at 4.

96. Mair et al., *supra* note 27, at 40.

97. *Id.*

98. Lytton, *supra* note 30, at 4.

99. *Id.* at 7–9.

100. Farmer, *supra* note 67.

101. *Id.*

became breeding grounds for swarms of mosquitos and ‘created the epicenter for America’s first Zika outbreak.’”<sup>102</sup>

Further, as detailed in a Harvard School of Public Health Special Report, *The Financial Crisis as a Public Health Crisis*, the financial crisis is not only related to the usual stress and stress-related diseases to be expected following the loss of or foreclosure on one’s home.<sup>103</sup> There are also surprising spillover effects, including an associated increase of 0.2 body mass index units for those living “within 100 meters of a foreclosed home.”<sup>104</sup> Other harms not immediately identifiable as involving public health shed additional light on this relationship. For instance, the American Psychiatric Association’s president has argued that the BP oil spill’s impact on mental health should be compensable.<sup>105</sup> He notes that “[m]ental illnesses brought on by difficult situations surrounding the BP oil spill may be less visible than other injuries, but they are real. An entire way of life has been destroyed, and this is causing anxiety, depression, post-traumatic stress disorder, substance use disorders, thoughts of suicide and other problems” in much of the population affected.<sup>106</sup>

## 2. Vulnerability

Looking at plaintiff city claims through a public health/public harms lens reveals that many of the litigated harms are felt most deeply by vulnerable populations, including racial minorities and the disabled. Many of the impugned harms have significant racial dimensions. Gun violence, for instance, is a public harm “disproportionately affecting the country’s African American population.”<sup>107</sup> In fact, “[b]lack Americans are more than twice as likely to die from gun violence than whites.”<sup>108</sup>

---

102. *Id.*

103. Amy Gutman, *Failing Economy, Failing Health*, HARV. PUB. HEALTH MAG. (2017), [https://www.hsph.harvard.edu/magazine/magazine\\_article/failing-economy-failing-health/](https://www.hsph.harvard.edu/magazine/magazine_article/failing-economy-failing-health/) [<https://perma.cc/75CK-ZS36>] (explaining how untended swimming pools on foreclosed properties fostered growths of West Nile strains).

104. *Id.*

105. Michael L. Rustad & Thomas H. Koenig, *Parans Patriae Litigation to Redress Societal Damages from the BP Oil Spill: The Latest Stage in the Evolution of Crimtorts*, 29 UCLA J. ENVTL. L. & POL’Y 45, 58–59 (2011).

106. *Id.* at 59 n.55 (internal quotation marks omitted) (quoting Press Release, Am. Psychiatric Ass’n, American Psychiatric Association Calls for Payment of Oil Spill Mental Health Claims (Aug. 13, 2010)).

107. Roberto A. Ferdman, *The Racial Divide in America’s Gun Deaths*, WASH. POST (Sept. 19, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/09/19/the-racial-divide-in-americas-gun-deaths/?utm\\_term=.4e4b25482a14](https://www.washingtonpost.com/news/wonk/wp/2014/09/19/the-racial-divide-in-americas-gun-deaths/?utm_term=.4e4b25482a14) [<https://perma.cc/M79L-SJT8>].

108. *Id.* (noting that “[b]etween 2000 and 2010, the death rate due to firearm-related injuries was more than 18.5 per 100,000 among blacks, but only nine per 100,000 among whites”).

This, stunningly, is actually an *improvement* on the situation almost thirty years ago, in the early 1990s, when “African Americans were more than *three* times as likely to die from gun violence than white Americans.”<sup>109</sup> The Hispanic community, too, suffers disproportionately from gun violence: they are the victims of homicide almost twice as often as whites, and two-thirds of those homicides involve firearms.<sup>110</sup>

The subprime mortgage crisis shares a similar racialized pattern. It also had its greatest impact on minority populations, and specifically on African American homeowners. Up until the 1990s, banks discriminated against minority would-be homeowners mainly through redlining, meaning they would not issue loans in majority-minority neighborhoods.<sup>111</sup> As part of this redlining practice, banks “collected reliable data on the most economically vulnerable households.”<sup>112</sup> Years later, banks used that same data “to flood minority neighborhoods with high-cost subprime loan offers.”<sup>113</sup> As a result, in the ten-year period from 1996 to 2006, “the national subprime loan market grew from \$97 billion to \$640 billion.”<sup>114</sup> Through subprime lending, banks lent to “black and Hispanic borrowers” at rates that were on national average “three times and two-and-a-half times more than whites, respectively.”<sup>115</sup> Then, “when the . . . housing market collapsed,”<sup>116</sup> minority homeowners were “hit hardest,”<sup>117</sup> and “were much more likely than Caucasians to lose their homes.”<sup>118</sup> Finally, “adding insult to injury, after the economic meltdown the same lenders disproportionately refused minority borrowers’ requests to refinance the original loans so they could stay in their homes,” which “meant that majority-minority neighborhoods saw more foreclosures than majority-Caucasian neighborhoods.”<sup>119</sup> In Los Angeles, for example, a loan made to a homeowner “in a majority-minority neighborhood [was] more than twice as likely to result in foreclosure as a loan in a majority Caucasian

---

109. *Id.* (emphasis added).

110. Josh Sugarmann, *Gun Violence Kills More Than 3,000 Hispanics Per Year*, *New Study Finds*, HUFFINGTON POST (Aug. 6, 2015, 10:54 AM), [https://www.huffingtonpost.com/josh-sugarmann/gun-violence-kills-more-t\\_b\\_7948560.html](https://www.huffingtonpost.com/josh-sugarmann/gun-violence-kills-more-t_b_7948560.html) [<https://perma.cc/5TWJ-VNY4>].

111. Morris, *supra* note 1, at 196.

112. *Id.* at 195.

113. *Id.*

114. *Id.*

115. David D. Troutt, *Disappearing Neighbors*, 123 HARV. L. REV. FORUM 21, 24 (2010).

116. Morris, *supra* note 1, at 195.

117. Engel, *supra* note 59, at 630.

118. Morris, *supra* note 1, at 195; *see also* Engel, *supra* note 59, at 630 (“Communities of color have been hit hardest by foreclosures because many predatory and subprime lenders targeted people of color with the worst loans.”).

119. Morris, *supra* note 1, at 195.

neighborhood.”<sup>120</sup> Further, “since home equity represents a disproportionately high percentage of overall wealth, these actions will impact generations.”<sup>121</sup>

Vulnerability is a theme in the opioid litigation as well, though opioids targeted a different vulnerable population: people in pain.<sup>122</sup> Patients experiencing pain and difficulty functioning are the most common victims of opioid addictions, and a new “growing body of studies” suggests that patients with mental illnesses receive approximately half of all opioid prescriptions, creating a situation where “[t]he very folks who are most vulnerable to opioids’ deadliest effects are unusually likely to get a long-term supply of the drugs.”<sup>123</sup> Their access to opioids was fueled by pharmaceutical companies “aggressively marketing the drug to providers and patients as . . . safe alternative[s] to short-acting narcotics.”<sup>124</sup>

Lead paint poisoning also has noticeable race and class dimensions.<sup>125</sup> Most notably, lead poisoning is “a disease that primarily impacts African-Americans.”<sup>126</sup> There is “a correlation between cities with high percentages of African-American residents and elevated lead

---

120. *Id.*

121. *Id.*

122. Ironically, racism actually ended up protecting minority populations from opioid addiction. Put bluntly, “[b]lacks have been undertreated for pain for decades,” since “physicians’ prejudice leads many to prescribe opioids at a lower rate to black and Latino patients than to whites.” Steven Ross Johnson, *The Racial Divide in the Opioid Crisis*, MOD. HEALTHCARE (Feb. 24, 2016), <http://www.modernhealthcare.com/article/20160224/NEWS/160229947> [https://perma.cc/DYN6-W8LY]; see also Sophie Gilbert, Warning: This Drug May Kill You Offers a Close-Up of the Opioid Epidemic, ATLANTIC (May 1, 2017), <https://www.theatlantic.com/entertainment/archive/2017/05/warning-this-drug-may-kill-you-opioid-epidemic-hbo/524982/> [https://perma.cc/HH54-SY29]. However, that gap is now waning. See Josh Katz & Abby Goodnough, *The Opioid Crisis Is Getting Worse, Particularly for Black Americans*, N.Y. TIMES (Dec. 22, 2017), <https://www.nytimes.com/interactive/2017/12/22/upshot/opioid-deaths-are-spreading-rapidly-into-black-america.html> [https://perma.cc/K5DL-YX7Y].

123. Francie Diep, *We’re Giving the Most Vulnerable People the Most Potent Opioid Painkiller Prescriptions*, PAC. STANDARD (Jan. 31, 2017), <https://psmag.com/news/were-giving-the-most-vulnerable-people-the-most-potent-opioid-painkiller-prescriptions> [https://perma.cc/7MRJ-Z37G].

124. Celine Gounder, *Who is Responsible for the Pain-Pill Epidemic?*, NEW YORKER (Nov. 8, 2013), <http://www.newyorker.com/business/currency/who-is-responsible-for-the-pain-pill-epidemic> [https://perma.cc/5F72-Q8MY]. In fact, cities are themselves somewhat vulnerable entities, with relatively little regulatory power. “This vulnerability is a function of the city’s—all cities—liminal status in American law.” Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 60 (2018).

125. In some ways this is not surprising, since “[c]urrent tort law contains incentives to target individuals and communities based on race and gender.” Ronen Avraham & Kim Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661, 661 (2017).

126. Schumaker & Scheller, *supra* note 39 (internal quotation marks omitted).

poisoning rates,”<sup>127</sup> and one study found that in the five-year period from 1999 to 2004, “[b]lack children were nearly three times more likely than white children to have highly elevated blood-lead levels, the type of lead poisoning where the most damaging health outcomes occur.”<sup>128</sup> In Detroit, for example, “where the population is 84 percent black,” over 1,500 children were found to have lead poisoning in 2014.<sup>129</sup> In Baltimore, Freddie Gray, whose death in the back of a police van led to the criminal prosecutions of six officers, was a “lead kid,” “one of thousands of children in the city with toxic levels of lead in their blood from years of living in substandard housing.”<sup>130</sup> Currently, in wealthy neighborhoods, lead hazards have been “largely eliminated,” but in poorer ones, it remains a widespread problem with devastating consequences.<sup>131</sup>

### 3. Slow Violence

Lead paint is but one example of the broader connections between environmental harms, vulnerable populations, and public health. Another is climate change, which affects air quality. In the U.S., air pollution is responsible for “200,000 early deaths each year. Men, poor people and African-Americans are disproportionately at risk. According to a comprehensive Harvard University study last year of air pollution in the U.S., black people are about three times more likely to die from exposure to airborne pollutants than others.”<sup>132</sup>

Harms like lead poisoning and air pollution, and indeed like most of the plaintiff city claims, share another characteristic. Just as

127. *Id.* “According to the Centers for Disease Control and Prevention, children of color whose families are poor and who live in housing built before 1950 have the highest lead poisoning risk.” *Id.*

128. *Id.*

129. *Id.* Unfortunately, the now-bankrupt Detroit only had “enough money for 100 to 200 lead paint abatements each year.” *Id.*

130. *Id.*

131. For example, “[a]larming levels of brain-damaging lead are poisoning more than a fifth of the children tested from some of the poorest parts of Chicago, even as the hazard has been largely eliminated in more prosperous neighborhoods.” Michael Hawthorne, *Lead Paint Poisons Poor Chicago Kids as City Spends Millions Less on Clean Up*, CHI. TRIB. (May 1, 2015), <http://www.chicagotribune.com/news/ct-lead-poisoning-chicago-met-20150501-story.html> [https://perma.cc/9GG9-NZRK]. Chicago brought an unsuccessful lead case in 2003. Twelve years later, Chicago is still struggling to absorb the cost of addressing that harm and has now slashed its lead-abatement budget, essentially “leaving certain neighborhoods to fend for themselves.” *Id.* (internal quotation marks omitted).

132. Julia Craven, *Even Breathing Is a Risk in One of Orlando’s Poorest Neighborhoods*, HUFFINGTON POST (Jan. 23, 2018, 5:46 AM), [https://www.huffingtonpost.com/entry/florida-poor-black-neighborhood-air-pollution\\_us\\_5a663a67e4b0e5630072746e](https://www.huffingtonpost.com/entry/florida-poor-black-neighborhood-air-pollution_us_5a663a67e4b0e5630072746e) [https://perma.cc/R8KN-LDK3].



the harms are most visible at the collective level of a population, rather than on the individual level, so too do they share a temporal scale: the harms are aggregative, accretive, and longitudinal, taking a long time to manifest or become visible. This makes them difficult to represent,<sup>133</sup> both literally and figuratively. Rather than the discrete, relatively quick harms that the law is most adept at addressing, these harms are forms of “slow violence,” “a violence that occurs gradually and out of sight, a violence of delayed destruction that is dispersed across time and space.”<sup>134</sup> Indeed, this “attritional violence” is not usually understood “as violence at all.”<sup>135</sup> Violence or injury is most commonly “conceived as an event or action that is immediate in time, explosive and spectacular in space, and as erupting into instant sensational visibility.” Slow violence, on the other hand, “is neither spectacular nor instantaneous.”<sup>136</sup> It is “incremental and accretive, its calamitous repercussions playing out across a range of temporal scales.”<sup>137</sup>

This “temporal dispersion of slow violence affects the way we perceive and respond” to it,<sup>138</sup> and makes it difficult for the law to fully address these harms. One challenge of harms arising from slow violence is that

in the long arc between the emergence of slow violence and its delayed effects, both the causes and the memory of catastrophe readily fade from view as the casualties incurred typically pass untallied and unremembered. Such discounting in turn makes it far more difficult to secure effective legal measure for prevention, restitution, and redress.<sup>139</sup>

Vulnerable populations are most often the “long-term casualties of . . . ‘slow violence.’”<sup>140</sup> Through it, these populations are “discounted as

---

133. NIXON, *supra* note 18, at 2–6 (discussing the “representational challenges” of slow violence).

134. *Id.* at 2.

135. *Id.* The harbinger of plaintiff city litigation, asbestos, is a quintessential example of slow violence, as the diseases caused by asbestos exposure “often appear only many years after initial exposure.” Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 257–58 (2005). Nixon’s theory of slow violence is rooted in environmental harms. For a detailed examination of a particular interaction between slow violence, environmental injustice, and race, see Craven, *supra* note 132 (discussing how the extreme air pollution in an Orlando neighborhood is “the sum of a series of choices made over the course of a century, the effect of which was to transmute formal segregation into the very air certain people breathe,” and noting that “in the U.S., black people are about three times more likely to die from exposure to airborne pollutants than others”).

136. NIXON, *supra* note 18, at 2.

137. *Id.* at 2.

138. *Id.* at 3.

139. *Id.* at 8–9.

140. *Id.* at 2.

political agents” and are the bearers of injuries that tend to go “unobserved . . . untreated,” and unaddressed.<sup>141</sup>

## II. LEGITIMACY

Because they are the level of government closest to the people and “interact with their residents each day,” cities and municipal governments have “an excellent vantage point for recognizing patterns of harm affecting their communities.”<sup>142</sup> Through their ordinary, day-to-day operations like “running a hospital or identifying blighted properties—cities become potent information aggregators.”<sup>143</sup> Also, because “a city’s welfare is intimately intertwined with that of its residents,” cities are motivated to “take remedial action, including suing to protect [their] residents from things like fraud, public nuisance, and infringement of their rights.”<sup>144</sup> In other words, they can see the problem, and they suffer injury from the problem. It therefore seems logical that they would also be a good choice for attempting to remedy the problem. But even though cities are in a good structural position to be litigants, the legitimacy of them bringing these kinds of mass-tort, public interest suits is hotly contested. Thus far, a city’s potential power to bring claims has been quite circumscribed: “[A] city’s power to sue for those collective harms is minimal and often subordinate to state enforcement by attorneys general.”<sup>145</sup>

In fact, “the current political environment is quite hostile to cities.”<sup>146</sup> Cities have no “ally in the Oval Office, or in any of the branches of the federal government, and they have few allies in the states.”<sup>147</sup> Not surprisingly, then, when cities do try to bring these claims, critics argue that they “exceed[] the City’s legal or political authority.”<sup>148</sup> In terms of doctrine, critics argue that plaintiff cities cannot meet standing requirements; that they fail to establish causation; that, if public nuisance is relied on, it is an inappropriate cause of action; and that a variety of municipal-specific rules prevent

---

141. *Id.* at 2, 6.

142. Caruso, *supra* note 7, at 61.

143. *Id.*

144. *Id.*

145. Troutt, *supra* note 115, at 27.

146. Schragger, *supra* note 9, at 131.

147. *Id.*

148. Kathleen S. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, in *WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY* 51, 57 (Liman Pub. Interest Program at Yale Law Sch. 2008), [https://law.yale.edu/system/files/documents/pdf/liman\\_whyTheLocalMatters.pdf](https://law.yale.edu/system/files/documents/pdf/liman_whyTheLocalMatters.pdf) [<https://perma.cc/GST7-DENU>].

cost recovery.<sup>149</sup> In political terms, they argue that plaintiff city claims violate the relationship between cities and states, impermissibly use litigation as regulation, and are generally undemocratic.

This Part argues against those critiques. It explicates the many reasons why plaintiff cities are in fact legitimate: legally, politically, and sociologically. Although “legitimacy” means many different things to different people, Richard Fallon has offered a useful framework for unpacking arguments related to legitimacy, identifying the three submeanings that the term is most often meant to encompass: (1) legal legitimacy, (2) moral or political legitimacy, and (3) sociological legitimacy.<sup>150</sup> These three are “interrelated and not always distinguishable from one another,” but they “[n]evertheless . . . provide valuable ways of thinking about this contested term.”<sup>151</sup> And, as Alexandra Lahav demonstrated in the class action context, they can be a useful architecture for analyzing controversial legal mechanisms.<sup>152</sup>

### A. Legality

Legal legitimacy refers to whether the impugned mechanism can meet the spirit or letter of the usual doctrinal standards. It is “measured by compliance with legal norms.”<sup>153</sup> Normally, a claim that complies with civil procedural rules will be deemed legally legitimate (though not necessarily morally or sociologically legitimate).<sup>154</sup> Standing presents the biggest doctrinal hurdle of legal legitimacy for plaintiff cities.<sup>155</sup>

#### 1. Standing

The threshold doctrinal hurdle regarding the legal legitimacy of plaintiff city claims concerns the city’s standing. In general, “[m]any U.S. cities have explicit authorization to sue under their city

---

149. See, e.g., Ausness, *supra* note 15.

150. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790 (2005).

151. Alexandra Lahav, *The Political Justification for Group Litigation*, 81 FORDHAM L. REV. 3193, 3195 (2013).

152. *Id.*

153. *Id.*

154. *Id.*

155. Some defendants have argued that certain cost recovery rules that prevent municipalities from recovering for the costs of governmental services should be a bar to plaintiff city suits. Most of these arguments have been rejected on the grounds that the rule is limited to premises-liability-type situations. See Ausness, *supra* note 15, at 892–95; Caruso, *supra* note 7, at 81.

charters.”<sup>156</sup> These cities can thus bring claims in both federal and state courts qua cities,<sup>157</sup> as, for instance, they often do when making claims based on their proprietary interests.<sup>158</sup>

The situation becomes more complicated when cities bring mass-tort style, public interest litigation.<sup>159</sup> States typically carry their version of this litigation into federal court through the door of *parens patriae*. Cities, however, cannot use this same entry point. Courts have almost uniformly held that cities have no *parens patriae* power to bring claims related to the general health and welfare of their citizens.<sup>160</sup> The reason for this denial of *parens patriae* status is that *parens patriae* is rooted in the *state’s quasi-sovereign* interest “in the well-being of its residents,”<sup>161</sup> and the city, lacking sovereignty, has no such privilege.<sup>162</sup>

To many observers and scholars, it seems like cities should of course have *parens patriae* powers. Thus, off-the-cuff comments in scholarship often refer to the *parens patriae* powers of cities.<sup>163</sup> More explicitly, many scholars offer compelling arguments that cities “plainly have [such] a ‘quasi-sovereign’ interest in protecting the well-being of their residents”<sup>164</sup> and therefore should also be granted *parens patriae* standing. Until these academic arguments are more widely accepted or adopted, however, the current legal consensus denying municipalities *parens patriae* powers means that legal legitimacy is not readily available through this route.

Even without *parens patriae*, though, plaintiff cities can establish standing and demonstrate legal legitimacy in other ways. As the Supreme Court affirmed in *Bank of America v. Miami*, statutes like the Fair Housing Act can provide cities with paths to standing.<sup>165</sup> In addition to statutory standing, other available avenues include direct

156. Gavioli, *supra* note 16, at 945. Laura Gavioli notes that the “typical language states that a city ‘may sue and defend in all matters and proceedings.’” *Id.*

157. Engel, *supra* note 59, at 618.

158. *Id.*

159. Kathleen Morris calls these “Constituent Cases.” Morris, *supra* note 148, at 52.

160. Caruso, *supra* note 7, at 65.

161. *Id.*

162. Ausness, *supra* note 15, at 861–62. The *parens patriae* doctrine does not let states “step into the shoes of [their] residents,” but instead allows states to bring actions if they can identify a “broader interest” or “widely shared” harm. Caruso, *supra* note 7, at 66 & n.30.

163. See, e.g., Wiley, *supra* note 25, at 212 (“If a state or city government bringing suit in *parens patriae* . . .”); see also Rustad & Koenig, *supra* note 105, at 78 (“Federal courts have been more receptive to the long-established remedy of *parens patriae* environmental tort actions filed by states and municipalities than to comparable class actions.”).

164. Barron, *supra* note 10, at 2243; see also Gavioli, *supra* note 16, at 959 (“Arguably, a city as a governmental entity has an interest in the health and welfare of its citizens . . .”).

165. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017).

standing rules, associational standing doctrine, and common law public nuisance standing. Each of these emphasizes a different facet of cities. Direct standing focuses on cities as landowners; associational standing focuses on cities as public corporations;<sup>166</sup> and public nuisance standing focuses on cities as public or governmental entities. In addition to these differing emphases, these three ways of establishing standing also reflect different understandings of the kind of representational litigation cities are engaged in when they bring plaintiff city claims.<sup>167</sup> Though they vary in emphases and framing, these three forms of standing—direct standing, associational standing, and public nuisance standing—are all paths to legal legitimacy.

---

166. Unfortunately, a city's corporate rights are currently not as robust as a private corporation's. As Richard Schragger explains:

The relative thinness of a municipality's corporate rights is a function of the rise of the public/private distinction in the nineteenth century. Almost a generation ago, legal scholars Gerald Frug and Hendrik Hartog described how the municipal corporation lost its corporate privileges and became an arm of the state, while the private business corporation attained property and constitutional rights.

Schragger, *supra* note 124, at 67.

167. Margaret Lemos has argued that state *parens patriae* actions are similar to class actions, and thus should attract similar procedural protections. Margaret Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 499–511 (2012). However, Lemos's view "that public compensation is a government form of class action litigation" is not universally accepted. See Prentiss Cox, *Public Enforcement Compensation and Private Rights*, 100 MINN. L. REV. 2313, 2316 (2016). Howard Erichson, for example, argues that "the nature of the litigative representation differs significantly in the two types of cases." Erichson, *supra* note 29, at 142. Similarly, Prentiss Cox argues that Lemos relies on a "mistaken premise," and that "[t]he decision by a government enforcer to pursue public compensation does not diminish the public nature of the enforcement action and does not convert public officials into representatives of private interests." Cox, *supra*, at 2316. In the context of state opioid litigation, at least one court has agreed with Erichson and Cox. In the context of a state and county public action where Kentucky and Pike County sued pharmaceutical manufacturer Purdue for its role in the opioid crisis, there was much wrangling over whether the case properly belonged in state or federal court, with the case bouncing between the two. Purdue wanted the case heard in federal court and argued that it belonged there because it was essentially a class action and subject to the Class Action Fairness Act. *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 210 (2d Cir. 2013). It argued that the Attorney General was "assert[ing] representative claims for restitution on behalf of individual OxyContin users." Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117, 1155 (2013). The court, however, found that "*parens patriae* actions, such as the one in question, had few, if any, class-like characteristics." *Id.* at 1155. "Accordingly, the court concluded that '[i]n form as well as in function, *parens patriae* suits' differed from class actions. *Id.* at 1155.

*a. Direct Standing*

Because cities own property,<sup>168</sup> they can sue when another party “diminish[es] the value of that property.”<sup>169</sup> These “city cases” are generally the least controversial basis for city litigation,<sup>170</sup> as they rely on a city’s “private” rights as a landowner.<sup>171</sup>

Property rights are a capacious category here. Cities and residents have deeply entangled interests, and their close relationship means that a harm to residents almost inevitably affects the city, often in its proprietary capacity. Cities therefore have successfully argued that a harm to their property interests gives them standing, even when that harm also affects a city’s residents. For instance, in *City of Olmsted Falls v. Federal Aviation Administration*, a federal appellate court held that the city had standing to bring an action challenging a Federal Aviation Administration decision about an airport runway project.<sup>172</sup> The court found that the city’s argument that its citizens would be impacted by the environmental pollutants entering the air and water supply did not give the city standing, but that standing could be based on the city’s allegation of “harm to its own economic interests based on the environmental impacts of the approved project.”<sup>173</sup>

Ever since the Supreme Court found in *Massachusetts v. EPA* that Massachusetts had standing to bring a claim against the Environmental Protection Agency because of its status as a landowner “with property allegedly affected by rising sea tides due to climate change,”<sup>174</sup> cities have been putting forth arguments that, as property owners, too, they have similar standing rights.<sup>175</sup> Indeed, New York City and Baltimore were actually plaintiffs in *Massachusetts*, “but their standing was not passed upon.”<sup>176</sup> As these property-based

---

168. Such property often includes “commercial real estate where municipal offices can be found, properties seized for delinquent taxes, or park land.” Brescia, *On Public Plaintiffs*, *supra* note 16, at 45.

169. *Id.*

170. Morris, *supra* note 1, at 221.

171. Ausness, *supra* note 15, at 883.

172. 292 F.3d 261, 268 (D.C. Cir. 2002).

173. *Id.*

174. Brescia, *On Public Plaintiffs*, *supra* note 16, at 28 (explaining the holding of *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007)).

175. See, e.g., *id.* at 32 (describing a suit brought by New York City and eight states against six power companies).

176. Caruso, *supra* note 7, at 66 n.34.

environmental cases become more common, they may make it easier for other types of plaintiff city claims to come under this rubric as well.<sup>177</sup>

*b. Associational Standing*

As Kaitlyn Ainsworth Caruso has persuasively argued, associational standing provides an additional doctrinal basis for plaintiff city standing.<sup>178</sup> Associational standing emphasizes the city's corporate nature, and would allow cities to pursue associational standing in the same way that any other corporation or not-for-profit can have associational standing.<sup>179</sup> Associational standing allows "associations to assert their members' rights"<sup>180</sup> and "sue on its members' behalf"<sup>181</sup> when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."<sup>182</sup>

Courts have differing opinions regarding whether cities can meet this test.<sup>183</sup> In Justice Brennan's concurring opinion in *Snapp v. Puerto Rico*,<sup>184</sup> four members of the Supreme Court suggested that they can. In deciding whether Puerto Rico had *parens patriae* powers to bring a suit based on discrimination against its citizens, Justice Brennan noted, "At the *very* least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations."<sup>185</sup> He then cited a number of cases in support of this

---

177. As outlined in Part I, plaintiff city environmental claims have included suits against companies for polluting waterways with polychlorinated biphenyls ("PCBs") and for harms connected to MTBE. San Jose, Berkeley, Oakland, San Francisco Bay, San Diego, Spokane, Seattle, Portland, and Long Beach have sued Monsanto, Solutia, and Pharmacia for depositing their PCBs. See Barrena, *supra* note 54. For a discussion of the MTBE litigation, see Thornburg, *supra* note 57.

178. Caruso, *supra* note 7.

179. *Id.*

180. *Id.* at 71.

181. *Id.* at 72.

182. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Associations can also have organizational standing, on behalf of themselves, if "(1) some or all of the association's members have suffered individual injury, or (2) the association, likened to a single person, has suffered an injury comparable to one to which an individual could be vulnerable." Heidi Li Feldman, Note, *Divided We Fall: Associational Standing and Collective Interest*, 87 MICH. L. REV. 733, 733 (1988).

183. Caruso, *supra* note 7, at 74-75.

184. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) (Brennan, J., concurring).

185. *Id.* at 611.

proposition, some where the plaintiffs were private organizations, and some where the plaintiffs were *municipalities*.<sup>186</sup> Justice Brennan explicitly likened Puerto Rico's interest to those of private organizations and municipalities, saying, "There is no doubt that Puerto Rico's interest in this litigation compares favorably to interests of the private organizations, and municipality, in the cases cited above."<sup>187</sup> Thus, for Justice Brennan at least, organizations, states, *and municipalities* all had representational legitimacy.<sup>188</sup> Additionally, the Seventh Circuit has suggested municipalities can have standing if they can meet the requirements of associational standing, stating that "where a municipal corporation seeks to vindicate the rights of its residents, there is no reason why the general rule on organizational standing should not be followed."<sup>189</sup>

The initial threshold matter is whether a city is, in fact, an "association."<sup>190</sup> It is becoming fairly evident that, whether or not they have always been so, cities have become associations.<sup>191</sup> In the current political order, cities are "distinct, democratic communities of interest. Even the Supreme Court of the United States has at times described cities this way."<sup>192</sup> They are acknowledged as "sites of association," as distinct "polities,"<sup>193</sup> and as "important political institutions that are directly responsible for shaping the contours of 'ordinary civic life in a free society.'"<sup>194</sup> As Richard Briffault put it:

Localities are not simply arbitrary collections of small groups of people who happen to buy public services or engage in public decision making together. They are often communities, that is, groups of people with shared concerns and values, tied up with the history and circumstances of the particular places in which they are located. People live in localities, raise their children there, and share many interests related to their homes, families, and immediate neighborhoods. Much of the power of the idea of home rule is connected to the

186. Caruso, *supra* note 7, at 75.

187. *Alfred L. Snapp & Son*, 458 U.S. at 612 (Brennan, J., concurring).

188. See also Caruso, *supra* note 7, at 66.

189. *City of Milwaukee v. Saxbe*, 546 F.2d 693, 698 (7th Cir. 1976). *Milwaukee v. Saxbe* is somewhat odd in that the court raised the issue of the city's standing *sua sponte*. *Id.* at 697. The court used the analogy to organizations to find that the city did not have standing, but the analogy remains apt. *Id.* at 697–98. Although the Seventh Circuit accepted that cities could in some circumstances achieve associational standing, the D.C. Circuit in *City of Olmstead Falls v. Federal Aviation Administration*, 292 F.3d 261, 267–68 (D.C. Cir. 2002) held the opposite. See also Caruso, *supra* note 7, at 74–75.

190. Caruso, *supra* note 7, at 76.

191. Caruso, *supra* note 7, at 77–78 (arguing that the city-resident relationship should satisfy requirements to treat city residents as members of a city association); see also Josh Bendor, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL'Y REV. 389, 391 (2013).

192. Barron, *supra* note 10, at 2238.

193. Bendor, *supra* note 191, at 391.

194. David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 490 (1999) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)).



idea of the locality as “home” and of the distinctive connection of government as “rule” with place-based association.<sup>195</sup>

Indeed, through its physical situs, a city is a “specialized group—though geographically rather than (necessarily) ideologically or economically specialized.”<sup>196</sup> And, as Carol M. Rose has suggested, living in a “locality presents a choice,” even more so than states or nations.<sup>197</sup> In many ways, municipal “residence . . . [is] a reflection of one’s own needs and wants.”<sup>198</sup> People tend to “emotionally affiliate with their city of residence,” and “[a] city can argue that its residents chose where to live” and who “to affiliate with,” and thus, in some sense, have also chosen “to be represented by[ ] that city.”<sup>199</sup> Indeed, “the idea that cities compete for capital and residents,” and residents sort themselves accordingly, has been relied on in “local government scholarship and even some case law.”<sup>200</sup> Such mobility, for some commentators, makes these “territorially based relations akin to voluntary contracts.”<sup>201</sup> When people “move to a given city [they may bring] certain expectations—such as a safe environment or a health care safety net—and may expect cities to defend those expectations however necessary.”<sup>202</sup> Moreover, “city residents alone elect, comprise, and at least partially finance their local government. This gives city residents a better claim to ‘membership’ than many members of litigating associations, who may donate to an organization but have no real further hand in its activities.”<sup>203</sup>

After clearing this threshold hurdle, many plaintiff city claims could plausibly meet the three-part test for associational standing.<sup>204</sup> To meet the first prong and show that a city’s “members would otherwise have standing to sue in their own right,”<sup>205</sup> a city attorney could “readily present the individual stories of multiple residents to show both the breadth of the harm and the concreteness of the

---

195. Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 259 (2004).

196. Caruso, *supra* note 7, at 74.

197. *Id.* at 76 n.94 (citing Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-federalism from the Attack on “Monarchism” to Modern Localism*, 84 NW. U. L. REV. 74, 97–98 (1989)).

198. *Id.* at 76 n.94.

199. *Id.* at 76.

200. *Id.*

201. Richard T. Ford, *Law’s Territory (a History of Jurisdiction)*, 97 MICH. L. REV. 843, 844 (1999).

202. Caruso, *supra* note 7, at 77.

203. *Id.* at 78.

204. *Id.*

205. *Id.* at 75 (quoting *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977)).

injury.”<sup>206</sup> To meet the second prong and show that the interests being protected are germane to the city’s purposes, cities could point to their grants of home rule, which often explicitly state the purposes of cities,<sup>207</sup> and to numerous court decisions stating that one of the city’s purposes is to “protect the ‘health and welfare’ of their residents.”<sup>208</sup> To meet the third prong and show that neither the claim asserted nor the relief requested requires the participation of individual members, cities could show that the suit was “properly authorized” and that the proceeding was generally consistent with “the important policy considerations behind associational standing.”<sup>209</sup>

*c. Special Standing for Public Nuisance*

For plaintiff city claims that rely on public nuisance, an additional font of standing is sometimes available. In the particular context of public nuisance cases, the common law has traditionally offered a kind of plenary public nuisance standing to municipalities.<sup>210</sup> In many judicial common law decisions, courts have held that “local governmental bodies have the ability to commence public nuisance actions on their own, independent of grants of power by the legislature.”<sup>211</sup> In these cases, “regardless of whether the city suffered some harm to its own interests,” courts “did not question the ‘standing’ of municipal plaintiffs.”<sup>212</sup> Instead, they “simply assessed these claims on the merits to determine whether the municipal plaintiff had, in fact, proven that the defendant was causing a public nuisance.”<sup>213</sup> Although this traditional common law standing rarely receives mention by contemporary courts, it suggests that municipalities bringing public nuisance claims might legitimately be subject to a different kind of

---

206. *Id.* at 75.

207. *Id.* at 82 n.123 (explaining that “[a] home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare . . .” (second alteration in original) (internal quotation marks omitted) (citing ILL. CONST. art VII, § 6), and that “[a]lthough the Illinois Constitution refers to regulating rather than litigating in the public interest, the provision still illuminates the ‘purpose’ of a city”).

208. *Id.* at 82 & n.123 (describing the holding of *City of Stamps v. ALCOA, Inc.*, No. CIV. 05-1049, 2006 WL 2254406, at \*4–8 (W.D. Ark. Aug. 7, 2006) as “finding that a city satisfied the organizational standing requirements and that a suit for site cleanup was germane to the city’s purpose, ‘which is, at least in part, to provide for the welfare of its citizens under its police powers’”).

209. *Id.* at 80–81.

210. Brescia, *On Public Plaintiffs*, *supra* note 16, at 43.

211. *Id.*

212. *Id.* at 8.

213. *Id.*

standing test, one that would not require them to demonstrate that they “suffered some special and individualized injury sufficient to grant . . . standing under the *Lujan* analysis.”<sup>214</sup> Rather than the so-called private-law model for standing, which “espouses a view of standing recognizing only the types of ‘cases’ and ‘controversies’ that were available under ‘traditional’ causes of action, and typically requires some sort of direct harm to a litigant in order for that litigant to have standing to sue,” this public-law model would “recognize[ ] municipal plaintiffs as the proper parties to challenge . . . the action of private actors carrying out a public nuisance.”<sup>215</sup>

Public nuisance standing and associational standing are legitimate possibilities for establishing plaintiff city standing. However, unless statutory standing is available, cities are “most likely in their strongest position when they characterize the injuries they suffer as ‘private’ harms,” rooted in the rights of property ownership, rather than as “harms suffered by them as ‘public,’—that is, governmental—litigants.”<sup>216</sup> Courts are generally more receptive when the legal harm focuses on the city as property owner or tax collector, “even when other forces might also negatively affect” property values.<sup>217</sup> The entanglement of public and private inherent in most plaintiff city claims means that plaintiff cities can often accentuate the private nature of the injury, and reasonably characterize the harm as impacting the city’s direct or proprietary interests.

## 2. Public Nuisance

Along with standing issues, plaintiff city detractors argue that public nuisance is an illegitimate cause of action.<sup>218</sup> To be clear, many plaintiff city claims do not actually rely on public nuisance at all, or if they do, they do not rely on it exclusively,<sup>219</sup> so this critique is somewhat limited in scope. In the abstract, public nuisance can at first sound like “[t]he best ‘general’ legal theory available to all cities.”<sup>220</sup> It protects

---

214. *Id.* at 45.

215. *Id.* at 8. Brescia notes that “at least two federal circuit courts have already held that municipalities have standing in their own right to pursue public nuisance actions under federal common law.” *Id.* at 44. The two cases are *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009), *aff’d in part and rev’d in part*, 564 U.S. 410 (2011); and *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979).

216. Brescia, *On Public Plaintiffs*, *supra* note 16, at 9.

217. *Id.*

218. This critique is generally not limited to when cities are plaintiffs, but is made in relation to any government entity bringing such a claim. *See, e.g.*, Gifford, *supra* note 21.

219. *Id.* at 749–53.

220. Morris, *supra* note 1, at 202.

against “an ‘unreasonable interference with a right common to the general public,’ including ‘interference with the public health, the public safety, the public peace, the public comfort or the public convenience.’”<sup>221</sup> It often allows for “flexible fault and causation doctrines,”<sup>222</sup> sometimes creating space for “epidemiological harms”: those that “can be established at the population level [through the tools of public health], but not necessarily at the individual level.”<sup>223</sup>

Although public nuisance seems attractive in theory, in practice, state and local governments “have been largely stymied in their efforts to use public nuisance litigation against harmful industries to vindicate collectively held, common law rights to non-interference with public health and safety.”<sup>224</sup> While the recent appellate victory in the lead paint litigation may signal a shift in public nuisance’s usefulness, public nuisance has thus far been mostly unsuccessful.<sup>225</sup>

The flexibility of public nuisance doctrine has, ironically, been one of the biggest impediments to its success. Many courts have dismissed public nuisance claims on the paradoxical basis that these claims are *too* powerful. For instance, one court dismissed a gun litigation suit because allowing the “common-law public nuisance cause of action . . . [would] open the courthouse doors to a flood of limitless, similar theories of public nuisance . . . against a wide and varied array” of potential defendants.<sup>226</sup> Another court stated that if gun litigation could proceed as a public nuisance claim, it “would become a monster that would devour in one gulp the entire law of tort.”<sup>227</sup> This alleged

---

221. Wiley, *supra* note 25, at 232 (quoting RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979)).

222. *Id.* at 247.

223. *Id.* at 213.

224. *Id.* at 207.

225. *Id.* at 239–40:

The ‘watershed event’ for industry-wide public nuisance litigation came in the 1990s, when several state attorneys general added public nuisance claims to their suits against tobacco manufacturers, shortly before the Master Settlement Agreement (MSA) was reached. Most of these suits did not produce a court ruling prior to the MSA, but one federal district court did rule on a public nuisance claim in *Texas v. American Tobacco Co.* . . . The federal district court dismissed the claim on the grounds that it was unsupported by Texas case law. Overall, however, the MSA was hailed as an enormous achievement by the state attorneys general. Many have pointed to this practical success as generating a groundswell of interest in public nuisance litigation, even though it had not produced any court opinions supporting its use.

226. *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (App. Div. 2003); *see also* Ausness, *supra* note 15, at 852.

227. *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) (quoting *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993)); *see also* Daniel Fisher, *Lead-Paint Ruling Helps Push California to Top of U.S. ‘Judicial Hellholes’ List*, FORBES (Dec. 17, 2015, 12:04 PM), <https://www.forbes.com/sites/danielfisher/2015/12/17/lead->

fear that public nuisance could become too large has tempered public nuisance's potential potency.

Complimenting these concerns with public nuisance as a cause of action, there is a school of scholarship that debates the "true nature" of public nuisance law. Virtually all commentators agree that in its early common law form, public nuisance protected things like "the right to safely walk along public highways, to breathe unpolluted air, to be undisturbed by large gatherings of disorderly people and to be free from the spreading of infectious diseases."<sup>228</sup> From this history, some scholars argue that public nuisance is a property-based action<sup>229</sup> or a special form of public action,<sup>230</sup> some emphasize its quasi-criminal aspects,<sup>231</sup> some argue it is simply a tort,<sup>232</sup> and others argue that it is not a tort at all, but is instead an exercise of police power.<sup>233</sup>

These scholarly contests are best resolved by acknowledging that these categories are not necessarily mutually exclusive, and public nuisance may have elements of each of these identified features, without any single one defining the cause of action in its entirety.<sup>234</sup> Plaintiff city claims fit into this plurality of public nuisance categories. The lead litigation is at its heart about property—whether paint companies should have to pay to remediate the properties that contain toxic paint.<sup>235</sup> And focusing on the quasi-criminal nature of traditional public nuisance reveals an interesting feature of plaintiff city claims: many of them retain some of this quasi-criminal nature. In both the mortgage and opioid contexts, defendant corporations were also prosecuted criminally. Criminal charges were brought in the opioid

paint-ruling-helps-push-california-to-top-of-u-s-chambers-judicial-hellholes-list/#79e4ee2f1936 [https://perma.cc/72NT-W7KE] (discussing the influx of class action litigation in California); Kimberly Stone, *Public Nuisance Lawsuits Spiraling out of Control*, SAN DIEGO UNION-TRIB. (June 14, 2016, 4:06 PM), <http://www.sandiegouniontribune.com/opinion/commentary/sdut-public-nuisance-lawsuits-2016jun14-story.html> [https://perma.cc/3T2Z-3TG8] (discussing the influx of public nuisance lawsuits in California).

228. Joseph W. Cleary, *Municipalities Versus Gun Manufacturers: Why Public Nuisance Claims Just Do Not Work*, 31 U. BALT. L. REV. 273, 277 (2002), quoted in Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 543–44 (2006).

229. Gifford, *supra* note 21, at 818.

230. Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L., no. 2, 2011, at 1, 11.

231. Rustad & Koenig, *supra* note 105, at 96 (arguing that "the conduct that [public nuisance] enjoins is a crime as well as a tort").

232. Gifford, *supra* note 21, at 820.

233. Margaret S. Thomas, *Parens Patriae and the States' Historic Police Power*, 69 SMU L. REV. 759, 790 (2016).

234. Albert C. Lin, *Public Trust and Public Nuisance: Common Law Peas in a Pod?*, 45 U.C. DAVIS. L. REV. 1075, 1077 (2012).

235. See *supra* Section I.A.2.

context, and “[i]n 2007, Purdue pleaded guilty to criminal charges of misleading physicians, regulators and the public about the drug’s addictive qualities.”<sup>236</sup> Purdue paid \$634.5 million dollars to resolve the case, and “[t]hree company executives were also charged with felonies but avoided paying fines.”<sup>237</sup> The subprime mortgage crisis resulted in very few successful criminal prosecutions,<sup>238</sup> but it was widely agreed that much of the preceding activity was criminal.<sup>239</sup>

Plaintiff city claims thus often function like “crimtorts,” which are “civil actions that simultaneously advance societal purposes such as punishment, deterrence, and the social control of corporate wrongdoers.”<sup>240</sup> As Professors Rustad and Koenig explain, crimtorts attempt to “vindicate [the] societal injuries” that lax or nonexistent regulation and “the limitations of the criminal justice system” leave unaddressed.<sup>241</sup> Many state attorney general *parens patriae* actions are crimtorts and thus “fill in the interstices between criminal law, tort law, and regulation.”<sup>242</sup> Plaintiff city claims are starting to fulfill this role as well.

To succeed on a public nuisance theory, plaintiff cities generally have to establish that there was an unreasonable interference with a public right, which *directly* resulted in an injury, and that the injury

236. Lenny Bernstein, *Pfizer Agrees to Truth in Opioid Marketing*, WASH. POST (July 5, 2016), [https://www.washingtonpost.com/national/health-science/pfizer-agrees-to-truth-in-opioid-marketing/2016/07/05/784223cc-42c6-11e6-88d0-6adee48be8bc\\_story.html?utm\\_term=.e57517e9e274](https://www.washingtonpost.com/national/health-science/pfizer-agrees-to-truth-in-opioid-marketing/2016/07/05/784223cc-42c6-11e6-88d0-6adee48be8bc_story.html?utm_term=.e57517e9e274) [https://perma.cc/44S-LLM8].

237. Chris Elkins, *Kentucky Takes Purdue Pharma to Court over OxyContin Addiction*, DRUGWATCH (Dec. 7, 2015), <https://www.drugwatch.com/2015/12/07/purdue-pharma-and-oxycontin-addiction/> [https://perma.cc/C45X-98AK].

238. One small New York City bank that mostly served the Asian American community was prosecuted. See Alan Yu, *After 2008 Financial Crisis, Only One Bank Faced Criminal Charges. Why?*, WHYY (June 9, 2017), <https://whyy.org/articles/after-2008-financial-crisis-only-one-bank-faced-criminal-charges-why/> [https://perma.cc/T9EP-KGS8] (discussing the racial bias Chinese Americans faced during the Great Recession investigation).

239. See, e.g., William D. Cohan, *How Wall Street’s Bankers Stayed out of Jail*, ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/how-wall-street-bankers-stayed-out-of-jail/399368> [https://perma.cc/G6Z8-G27D] (discussing how bankers avoided criminal prosecution after the 2008 financial crisis); Matt Taibbi, *Why Isn’t Wall Street in Jail?*, ROLLING STONE (Feb. 16, 2011), [www.rollingstone.com/politics/news/why-isnt-wall-street-in-jail-20110216](http://www.rollingstone.com/politics/news/why-isnt-wall-street-in-jail-20110216) [https://perma.cc/MX73-RS8L] (explaining why some bankers did not face criminal prosecution).

240. Rustad & Koenig, *supra* note 105, at 95.

241. *Id.* at 96.

242. *Id.* Public nuisance tends to become popular during times of regulatory failure. For instance, the “comprehensive statutory and regulatory” reform of the New Deal era limited the need to utilize the tort of public nuisance to correct social ills.” Matthew R. Watson, Note, *Venturing into the “Impenetrable Jungle”: How California’s Expansive Public Nuisance Doctrine May Result in an Unprecedented Judgment Against the Lead Paint Industry in the Case of County of Santa Clara v. Atlantic Richfield Company*, 15 ROGER WILLIAMS U. L. REV. 612, 616 (2010).

was to the “city itself” (not just to its constituents).<sup>243</sup> But even before getting to these elements, there are initial arguments over what counts as “public” in public nuisance.<sup>244</sup> Courts generally insist that the “public” part of public nuisance is not synonymous with “widespread.”<sup>245</sup> In other words, mere “aggregated private harms” are not equivalent to a public nuisance.<sup>246</sup> there must be something about the right that “is collective in nature.”<sup>247</sup> The question is whether “the harm to health and welfare caused by industries that manufacture and distribute dangerous products [can] be legitimately understood as interference with a *public* right?”<sup>248</sup> Usually, impairing public health or safety, which plaintiff city claims often allege, is understood to satisfy this collective requirement.<sup>249</sup>

Public nuisance actions allow for a long temporal span and a longer backward look than many other causes of action. In this sense, public nuisance is particularly well-suited to the “slow violence” nature of plaintiff city claims. Statute of limitations problems often plague actions alleging harms which arose long after the injurious conduct,<sup>250</sup> but “[p]ublic nuisance allows plaintiffs to focus on harm occurring today, even if the product was used a long time ago” and the “manifestation of harm is delayed.”<sup>251</sup>

However, this positive feature comes with a cost: it creates difficulties for the causation requirement. “[T]he causation requirement significantly limits cities’ ability to halt and remedy corporate malfeasance,”<sup>252</sup> and many public nuisance suits are dismissed on the basis of no causation.<sup>253</sup> As one scholar wrote in the context of gun litigation, many courts recognized “the substantial public costs” and significant harm of gun violence.<sup>254</sup> But they required a “more ‘direct’ causal link” connecting “specific gun-industry conduct . . . to such

---

243. Morris, *supra* note 1, at 202.

244. Wiley, *supra* note 25, at 212.

245. *Id.* at 254 (quoting Mark A. Hall, *The Scope and Limits of Public Health Law*, 46 *PERSP. BIOLOGY & MED.* S199, S204 (2003)).

246. Wiley, *supra* note 25, at 255.

247. *Id.*

248. *Id.* at 233–34.

249. *Id.* at 212.

250. *Is the Public Nuisance Universe Expanding?*, BLOOMBERG BNA (Jan. 31, 2017), <https://www.bna.com/public-nuisance-universe-n57982083122/> [<https://perma.cc/2KE7-CG9W>]

251. *Id.* (internal quotation marks omitted) (quoting Professor Albert C. Lin).

252. Morris, *supra* note 1, at 202.

253. Eric L. Kintner, Note, *Bad Apples and Smoking Barrels: Private Actions for Public Nuisance Against the Gun Industry*, 90 *IOWA L. REV.* 1163, 1166–67 (2005).

254. *Id.* at 1167 & n.9.

harm,” or a showing that the gun industry had “ ‘control’ over[ ] the gun violence that result[ed] in harm to the public.”<sup>255</sup>

Some courts, however, have been open to plaintiff city public nuisance claims.<sup>256</sup> As noted above, the Californian city and county consortium’s victory in the lead paint litigation relied on public nuisance. Some of the gun litigation (before the legislative prohibition) was allowed to proceed on a public nuisance basis,<sup>257</sup> and several more contemporary cases, particularly those alleging environmental harm, have also withstood challenges to their public nuisance basis.<sup>258</sup> These successes, while perhaps relatively few and far between, demonstrate that although not every case will successfully make out the element of public nuisance, the cause of action is generally accepted and within the bounds of legal legitimacy.

### 3. Causation

Causation challenges in plaintiff city claims are not limited to the public nuisance context, and causation is often the most difficult part of any plaintiff city claim. This critique is thus trenchant, but it identifies a challenge of the traditional American legal system writ large, rather than a particular shortcoming of plaintiff city claims. American law focuses on “the centrality of individuals over groups,”<sup>259</sup> and, accordingly, tort law as currently constituted does a much better job of handling individual issues. Tort law emphasizes “individual plaintiffs, individual causation, and individual responsibility,”<sup>260</sup> and plaintiff city claims are an awkward fit within this mold.<sup>261</sup>

255. *Id.* at 1167.

256. *Is the Public Nuisance Universe Expanding?*, *supra* note 251.

257. These cases include *White v. Smith & Wesson*, 97 F. Supp. 2d 816 (N.D. Ohio 2000); *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003); *James v. Arms Tech., Inc.*, 820 A.2d 27 (N.J. Super. Ct. App. Div. 2003); and *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002). *See also* Ausness, *supra* note 15, at 872 (discussing gun-related public nuisance claims).

258. *See, e.g.*, *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009); *aff’d in part and rev’d in part*, 564 U.S. 410 (2011); *City of Evansville v. Ky. Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979).

259. WENDY E. PARMET, *POPULATIONS, PUBLIC HEALTH, AND THE LAW* 65 (2009).

260. *Id.*

261. Indeed, mass torts in general struggle with this. Mass tort claims arise from injuries inflicted on a wide range of people, often from a particular product, practice, or action. . . . According to [Deborah Hensler’s] definition, mass torts share some of the following features: numerosity, commonality, interdependence of case values, controversy over causation, emotional or political heat, and higher than average claim rate. . . . The more important hallmarks of the mass torts approach are class action treatment; multi-district litigation procedures; aggregating techniques used to



Plaintiff city claims are based on a series of collectivities: many constituents, together, and those many constituents and a city, together.<sup>262</sup> Individual causation requirements do not map well onto these collective or public health harms. While public health has led to a greater acceptance of using “statistical and epidemiological evidence” in some contexts,<sup>263</sup> courts have generally been “reluctan[t] to dispense with notions of individual responsibility and individual causation.”<sup>264</sup> The “ontological shift[ ] from individual to population,” which looking at things in the collective or from a public health perspective requires, “creates significant tension both within the population perspective and between it and much of American law, which largely reflects the influence of liberal individualism.”<sup>265</sup>

Moreover, parsing out how much of a social injury is due to corporate wrongdoing, and how much may be due to other factors, is a difficult task. In the opioid context, for instance, opioid deaths have sometimes been described as “deaths of despair”: deaths less about fraudulent marketing by pharmaceutical corporations and more about a response to “economic dispossession” and “erosion in . . . wages, marriage rates, job quality, social cohesion, cultural capital, and

---

adjudicate questions of liability, causation and damages, as well as to establish mechanisms for compensating plaintiffs through settlement; and collaboration among plaintiffs’ and defense counsel handling similar cases to share information about claims values, relevant evidence, discovery strategy, litigation strategy, expert witnesses, and to spread and share the costs of litigation. Many of these aspects of the mass tort approach are present in mass torts litigation because significant economies of scale can be achieved through their use . . . .

Brescia, *supra* note 58, at 13–14 (footnotes omitted).

262. There is another additional, important collective layer often at play as well: many plaintiff city claims are pursued through informal litigation networks of cities and sometimes other interest or advocacy groups. See *infra* Section IV.A.

263. PARMET, *supra* note 259, at 230.

264. *Id.* at 231. The debate regarding the appropriateness of market-share liability reflects this. Since the courts used market-share liability in the DES cases twenty-five years ago, they have been strongly reluctant to expand the use of that approach to cases involving other products, albeit with some exceptions such as lead paint. *Id.* at 229.

265. *Id.* at 19–20; see also Alexandra D. Lahav, *Mass Tort Class Actions—Past, Present, and Future*, 92 N.Y.U. L. REV. 998, 1004 (2017):

From the perspective of tort doctrine, epidemiology has a significant drawback: It cannot be used to prove specific causation but instead is only able to show risk and probability. This is a problem because tort law is focused on the *specific cause* of an individual plaintiff’s realized harm, rather than on the *risk* of harm.

(footnote omitted). Scientific developments, though, can sometimes assist, as they do in environmental litigation. As one commentator phrased it, it is now possible to look at a PCB in the water and say, “these are Monstanto’s PCB’s.” *Is the Public Nuisance Universe Expanding?*, *supra* note 251.

perhaps, racial privilege.”<sup>266</sup> New research, however, suggests that “economic conditions can explain only 10 percent of the increase in drug overdose deaths since 1999,”<sup>267</sup> but the calculus and ascription of causation involved with the enormous temporal, geographical, and demographic scope of these harms is no easy feat in any of these contexts.

As we saw in *Miami v. Bank of America*, where the Court imposed a stringent causation standard on a Fair Housing Act claim, courts are frequently unsure that plaintiff city actions can meet traditional causation requirements.<sup>268</sup> Nevertheless, legal legitimacy does not require legal success. Rather, it only demands that a case fall generally within the established parameters of being worthy of determination.<sup>269</sup> While causation may, in some plaintiff city cases, prove a challenging obstacle, some plaintiff city claims have overcome it, and it seems likely that at least some others eventually will as well.<sup>270</sup>

### *B. Moral or Political Legitimacy*

Critics of plaintiff city claims have issued three main critiques that sound in the moral or political legitimacy register. One concern is the role that plaintiff cities play “in the larger political order,”<sup>271</sup> and the extent to which they advance certain accepted political and moral values, including democracy. Critics argue that plaintiff city claims are problematic because they bind dissenters, they bypass democratic regulation, and they are a task best left to states. These arguments falter in the following ways: first, plaintiff city claims do, in some sense, bind dissenters, but no more so than occurs in any number of analogous contexts in which the practice is accepted as legitimate. Second, the argument that plaintiff cities bypass democratic regulation fails to acknowledge that the only parties affected are those who choose to be bound by the negotiated terms of a settlement agreement, and it does not account for why cities should be any less entitled to negotiate these

---

266. Eric Levitz, *Did Americans Turn to Opioids Out of Despair—or Just Because They Were There?*, N.Y. MAG. (Jan. 16, 2018, 12:00 AM), <http://nymag.com/daily/intelligencer/2018/01/is-the-opioid-crisis-driven-by-supply-or-demand.html> [https://perma.cc/QB3L-K6X9].

267. *Id.*

268. As one commentator noted, “[W]hat [the case] leaves open right now is, can cities who brought this kind of case establish the kind of proximate cause the court has flagged in this decision?” Farmer, *supra* note 67 (internal quotation marks omitted).

269. Fallon, *supra* note 150, at 1819.

270. See, e.g., *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 598 (Ct. App. 2017).

271. Lahav, *supra* note 151, at 3194.

settlements than any other litigating party. Finally, because of the structural relationship between cities and states, states almost always have the legal authority to prohibit or prevent city litigation (though whether they can feasibly do so as a political matter is a different question).

### 1. Binding Dissenters

For some critics, plaintiff cities raise democratic concerns. One problem involves the possibility of dissenting constituents.<sup>272</sup> Some critics “argue that cities lack the legitimacy to sue on behalf of their constituents and bind them to positions with which some may disagree.”<sup>273</sup> To be sure, it would be highly unlikely that every single constituent would wish to support every single plaintiff city claim. It is even entirely possible that “not all cities have a *majority* of constituents who would want their city law offices to pursue public interest cases.”<sup>274</sup> Indeed, there are specific examples of constituent interests not always aligning: in Cincinnati, “a group of citizens . . . threatened to sue the city for misuse of public funds if its safe gun lawsuit went forward,” and in Texas, the Citizens Against Lawsuit Abuse organization regularly “opposes Houston’s affirmative litigation efforts.”<sup>275</sup>

Internal disagreement within a polis or an organization, however, happens in virtually every context where there is a collective component to litigation. In these other contexts, though, we accept this as politically legitimate. Neither “*parens patriae* [nor] associational standing doctrine . . . require perfect consensus.”<sup>276</sup> *Parens patriae* requires only that “a problem . . . impact a ‘substantial portion’ of a state’s population, and an attorney general need not have anyone in particular’s blessing to sue.”<sup>277</sup> Associational standing doctrine also

---

272. There might also be dissenting voices in municipal government: “[T]he city government, with dozens of elected officials, does not always speak with one voice.” Michael A. Cardozo, *The New York City Corporation Counsel: The Best Legal Job in America*, 53 N.Y.L. SCH. L. REV. 459, 465 (2008).

273. Morris, *supra* note 148, at 62.

274. Morris, *supra* note 1, at 190 (emphasis added).

275. Gavioli, *supra* note 16, at 967 n.169.

276. Caruso, *supra* note 7, at 79.

277. *Id.*

allows for a plurality of opinions.<sup>278</sup> The same standard can fairly be applied to plaintiff cities.<sup>279</sup>

Moreover, dissension can also occur when cities *defend* themselves in litigation. When cities mount vigorous, expensive defenses in response to allegations of police brutality or other civil rights violations, many citizens would prefer that cities instead acknowledge these harms, settle the claim for an appropriate amount, and adopt safer procedures for the future.<sup>280</sup> Nevertheless, just as plaintiff city actions bind dissenters, the litigative choices of defendant cities do so as well.

Indeed, the vocal resistance of plaintiff city claim detractors can be heralded as a moment of democratic deliberation.<sup>281</sup> It ensures that the issue will be discussed publicly, with both sides offering their viewpoints.

## 2. Bypassing Democratic Regulation

One reason why cities turn to litigation is because they are unable to regulate the harmful conduct. City leaders have sometimes explicitly stated that failed attempts to regulate have driven them to seek alternatives, one of which is litigation.<sup>282</sup> Because of industry capture and limitations on their legislative authority, cities often cannot implement ordinances to target the wrongs that most impact their residents and themselves.<sup>283</sup> Although cities often seem powerful in the cultural imagination, in truth, “[w]hat is striking about city

278. *Id.* This does not present a problem for associational standing, either: “The presence of contradictory interests within an association does not create problems under prong (c).” Bendor, *supra* note 191, at 421 n.214 (citing *Nat’l Mar. Union v. Commander, Military Sealift Command*, 824 F.2d 1228, 1233 (D.C. Cir. 1987)).

279. *See* Bendor, *supra* note 191, at 420 n.214 (“A municipality will usually be able to meet the three-prong test for associational standing.”).

280. *See, e.g.*, Giri Nathan, *James Blake Settles NYC Police Brutality Case on Condition that City Creates Fellowship to Take on Cop Misconduct*, DEADSPIN (June 23, 2017), <http://deadspin.com/james-blake-withdraws-his-claim-in-nyc-police-brutality-1796368567> [<https://perma.cc/3JRX-NVHD>] (noting that Blake “had a sound case against the city,” but chose to withdraw his claim and pass up a considerable settlement on the condition that the city establish a legal fellowship to perform outreach in neighborhoods with a high volume of police complaints).

281. *See* Lahav, *supra* note 151, at 3203.

282. “For example, in the New Orleans [gun] litigation, Mayor Marc Morial stated that a motivation for the gun litigation was the city’s failed lobbying attempts in the state legislature.” Gavioli, *supra* note 16, at 951.

283. For example, “a number of cities attempted to regulate lending standards in the lead-up to the sub-prime mortgage crisis, but state courts invalidated municipal predatory lending laws as inappropriate exercises of local power.” Schragger, *supra* note 9, at 110.

power is how constrained it actually is.”<sup>284</sup> Their “legislative efforts” are easily thwarted and “subject to challenge under preemption and powers doctrines.”<sup>285</sup> Indeed, “[a] city’s legislative departures from state legislation will be deftly torpedoed by a preemption challenge when that departure affects a business interest,”<sup>286</sup> and municipalities are generally “severely limited in their ability to act against commercial interests that cause harm to their communities.”<sup>287</sup>

The turn to litigation as a solution, however, is not an affront to democracy. First, the idea that regulation is somehow more purely “democratic” is belied by contemporary political realities. Taking the opioid epidemic as an example, the lack of regulation over opioids was not because of the political will of the people. Instead, it was the result of a massive financial operation to discourage any regulatory efforts. The Associated Press and the Center for Public Integrity report that opioid manufacturers “spent more than \$880 million” in antiregulatory lobbying efforts over the last decade, “supported 7,100 candidates for state-level offices[,] and funded an average of 1,350 lobbyists nationwide.”<sup>288</sup> This easily dwarfed the \$4 million spent on the other side, by those in favor of increased opioid regulation.<sup>289</sup>

Second, the American system of political and legal governance is *set up* to rely on litigation as a mode of governance. America is rooted in what Robert Kagan “famously described” as “adversarial legalism,” meaning that “lawyer-dominated litigation” is a primary means of “policymaking, policy implementation, and dispute resolution.”<sup>290</sup> The powerful role of litigation in American society is a deliberate choice of legislators: “private litigation [is] a means of enforcing or even establishing government policy”<sup>291</sup> because legislators often want it to be.<sup>292</sup>

Third, the choice to settle under terms that look like regulation is one that corporate defendants can choose to take or forego. Corporate

---

284. *Id.* at 93.

285. Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 *FORDHAM URB. L.J.* 1903, 1912 (2013).

286. *Id.* (footnotes omitted).

287. Engel, *supra* note 59, at 611.

288. Charles Lane, *A Mega-Case Puts Opioids on Trial*, *WASH. POST* (Oct. 5, 2016), [https://www.washingtonpost.com/opinions/a-mega-case-puts-opioids-on-trial/2016/10/05/d8409a6c-8b12-11e6-875e-2c1bfe943b66\\_story.html?utm\\_term=.3db48b089ef0](https://www.washingtonpost.com/opinions/a-mega-case-puts-opioids-on-trial/2016/10/05/d8409a6c-8b12-11e6-875e-2c1bfe943b66_story.html?utm_term=.3db48b089ef0) [https://perma.cc/PWU5-RDV4].

289. *Id.*

290. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3 (2001).

291. Staszak, *supra* note 93, at 78.

292. Paul Nolette attributes the rise of states bringing an increasing amount of litigation to both adversarial legalism and cooperative federalism. See generally NOLETTE, *supra* note 22.

defendants have massive, sophisticated means of assessing what sort of risk tolerance they are comfortable with and what actions are in their best interest. They typically have more legal and economic resources available than cities do<sup>293</sup> and could easily continue a path of litigation if they thought that would yield a better outcome. As sophisticated, well-resourced parties and skilled negotiators, their choice to be bound by particular terms is not aptly described as “undemocratic.”<sup>294</sup> Corporations weigh the likelihood of legal liability against the terms of a negotiated settlement, and make an independent decision that best serves their interests.<sup>295</sup>

Moreover, the lever that creates the possibility of litigation functioning as regulation is a violation of existing law.<sup>296</sup> The regulatory effects of litigation are only possible when corporations open themselves up to litigation through wrongdoing. And only these specific parties are bound by the terms of the agreement: a negotiated settlement has no impact on other industry actors not party to the lawsuit.<sup>297</sup>

### 3. City-State Tensions

In contemporary America, cities are no longer tiny microcosms of states (if in fact they ever were). Many have their own independent political identities. Arguably, cities are the new states: “[T]he states’ role as our most salient community has decreased,”<sup>298</sup> and states “no longer play the role in today’s polity that they did at the time of the Founders.”<sup>299</sup> In many instances, cities now occupy that politically salient role. And cities may differ from states in their understanding of what harms most affect themselves and their constituents.<sup>300</sup> “Home

---

293. See *infra* Part III.

294. John Abraham, *Scientific Expertise and Regulatory Decision-Making: Standards, Evidential Interpretation and Social Interests in the Pharmaceutical Sector*, in EXPERTISE IN REGULATION AND LAW 51, 55 (Gary Edmond ed., 2017).

295. *Id.*

296. *Id.*

297. *Id.*

298. Caruso, *supra* note 7, at 87.

299. Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & POL’Y REV. 187, 209–11 (2010), quoted in Caruso, *supra* note 7, at 87.

300. See Barron, *supra* note 10, at 2239 n.77:

The City of Santa Cruz’s amicus brief in [*Lockyear v. City & County of San Francisco*, 95 P.3d 459 (Cal. 2004)] suggested that cities, by virtue of their closeness to the community and their responsibility for carrying out myriad governmental functions—from law enforcement to schooling—are acutely aware of the social consequences of constitutional judgments. For that reason, the city argued, cities might be expected to

rule government is based on the theory that local governments are in the best position to assess the needs and desires of the community and, thus, can most wisely enact legislation addressing local concerns.”<sup>301</sup> It is no great stretch to say that this applies to litigation addressing local concerns, as well.

In the regulatory context, “federal, state, and local [governments] have sometimes collaborated and sometimes competed for regulatory pieces of various problems.”<sup>302</sup> Again, the same holds true in the litigation context. Collaboration is a frequent occurrence in the often multilevel attempts to redress major social harms. For instance, in the opioid litigation, plaintiff cities are not the only litigants: individuals, classes of individuals, and states have all brought claims, and sometimes they have shared expertise.<sup>303</sup> Thus far, the individual suits have “almost always failed because the company has successfully argued lack of causation, misuse, wrongful conduct and expiration of the statute of limitations.”<sup>304</sup> Class actions on this front “have also failed, primarily because class representatives have been unable to satisfy the Rule 23 requirements of numerosity, commonality, typicality and adequacy.”<sup>305</sup> States’ *parens patriae* suits, to date, “have been somewhat more successful, despite the weakness of their doctrinal foundations, primarily because the company has chosen to settle these suits in order to avoid the bad publicity and expense of protracted litigation.”<sup>306</sup> Plaintiff city suits often draw from the legal expertise developed in these other suits, and many city and state suits coexist peacefully. Even in these situations of peacefully coexisting claims, there is still value in cities proceeding independently. When issues are “sensitive or politically contentious,” consensus at the local level might happen “long before a statewide one, and so the city may be easier to

---

have insight into the actual lived consequences of a ban on same-sex marriage well before the state as a whole would.

301. *Quilici v. Village of Morton Grove*, 695 F.2d 261, 267–68 (7th Cir. 1982); see also Josh Blocher, *Firearm Localism*, 123 YALE L.J. 82, 127 n.243 (2013).

302. Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 638 (2016).

303. The federal government, too, is trying new approaches to the problem, such as declaring the opioid epidemic a national emergency in August 2017. Joel Achenbach, John Wagner & Lenny Bernstein, *Trump Says Opioid Crisis Is a National Emergency, Pledges More Money and Attention*, WASH. POST (Aug. 10, 2017), [https://www.washingtonpost.com/politics/trump-declares-opioid-crisis-is-a-national-emergency-pledges-more-money-and-attention/2017/08/10/5aaaae32-7dfe-11e7-83c7-5bd5460f0d7e\\_story.html?utm\\_term=.f2ee67d52f54](https://www.washingtonpost.com/politics/trump-declares-opioid-crisis-is-a-national-emergency-pledges-more-money-and-attention/2017/08/10/5aaaae32-7dfe-11e7-83c7-5bd5460f0d7e_story.html?utm_term=.f2ee67d52f54) [<https://perma.cc/CCN6-5HVT>].

304. Ausness, *supra* note 167, at 1165.

305. *Id.*

306. *Id.* (concluding that the overall effectiveness of civil litigation in this area is highly questionable).

mobilize to action than a state.”<sup>307</sup> Because cities are so “close to the ground,”<sup>308</sup> they often can best ensure that the needs of communities and constituencies are met.

Sometimes, though, plaintiff city suits and state suits are in competition. Such was the case in *State v. City of Dover*.<sup>309</sup> There, both cities and the state of New Hampshire had sued various defendants for the harms caused by the gasoline additive MTBE. The State sued to have the city stop their suit. The city argued that it “ha[d] a compelling interest in maintaining separate litigation because the State’s suit d[id] not represent their interests.”<sup>310</sup> Specifically, the cities argued that “the State’s suit name[d] fewer defendants, fail[ed] to allege a number of theories of liability alleged by the cities, fail[ed] to seek the remedies sought by the cities, and [wa]s subject to defenses based upon the State’s history of regulating MTBE which [we]re not applicable to the cities.”<sup>311</sup> The court ultimately held that the cities’ suit “must yield” to the state’s *parens patriae* suit.<sup>312</sup> Even though the “cities were pursuing different legal theories and seeking different types of compensation,” the court found that the cities’ suit was redundant because “[t]here is no reason for the Court to conclude . . . that the State will not seek to obtain full compensation for all communities, including the [c]ities.”<sup>313</sup> The court acknowledged that the nature of the compensation that the State sought differed from that sought by the city, but held that such a difference was not equivalent to “an interest that is not properly represented by the State.”<sup>314</sup>

This type of disagreement over the best way to bring litigation is not uncommon. A similar disagreement over who to sue and which approach to adopt arose in the opioid litigation context, where the state of Ohio has sued opioid manufacturers, and two Ohio cities, Dayton and Lorraine, have sued not only the manufacturers, but also doctors and distributors.<sup>315</sup> When asked about the city’s decision to litigate despite the state’s action, the mayor of Dayton asserted that the city lacked faith in the state’s approach, claiming the cities were “taking matters

---

307. Caruso, *supra* note 7, at 62.

308. Barron, *supra* note 10, at 2239.

309. 891 A.2d 524, 531 (N.H. 2006).

310. *Dover*, 891 A.2d at 531.

311. *Id.*

312. *Id.* at 531–32.

313. *Id.* at 531; Lemos, *supra* note 167, at 509 n.99.

314. *Dover*, 891 A.2d at 531 (quoting the trial court).

315. See Alan Johnson, *Doctors, Cardinal Health Included in Cities’ Lawsuits over Opioid Epidemic*, COLUMBUS DISPATCH (June 5, 2017), <http://www.dispatch.com/news/20170605/doctors-cardinal-health-included-in-cities-lawsuits-over-opioid-epidemic> [<https://perma.cc/AH6F-ELK3>].



into our own hands to get things done right . . . We can't wait for the state to do the right thing."<sup>316</sup>

In these instances, cities and states both agree that litigation is appropriate, but they disagree about how to go about it. In other instances, cities may mobilize because they are unhappy with the results that states have achieved. The financial disaster caused by the subprime mortgage crisis, for instance, prompted a response at multiple levels. Federal and state agencies and attorneys general mobilized to try to hold the relevant banks and financial entities responsible for the predatory lending practices and other misconduct that created the mortgage crisis, but for the most part that action has resulted in settlements that sound good at first blush, but have been heavily criticized for being extremely lenient. For instance, in 2012, five major banks—Wells Fargo, Bank of America, Citi, JPMorgan, and Ally Financial—settled a federal and forty-nine-state complaint about fraudulent mortgage practices for what was touted as a \$25 billion settlement.<sup>317</sup> However, the fine print revealed that the banks were actually “on the hook for only \$5 billion in cash,” a “tiny fraction of the cost to individuals and communities.”<sup>318</sup> One analyst estimated that this settlement “set a price for forgeries and fabricating documents” of approximately \$2000 per loan,” the “equivalent of a ‘rounding error’ to the banks.”<sup>319</sup> Plaintiff cities were dissatisfied with this achievement, and have initiated their own litigation instead.

In still other instances, plaintiff cities and states may disagree about whether litigation is an appropriate response at all. Not infrequently, cities and states have divergent interests. For instance, Pennsylvania is currently considering initiating a claim against opioid manufacturers. But Pennsylvania is “home to 76 firms that manufacture a variety of drugs and employ 12,700 people,”<sup>320</sup> a fact that many other cities in Pennsylvania may weigh differently than the state.

Further, states may be more subject to industry capture.<sup>321</sup> For instance, in “a departure from the usual role of the state attorney

---

316. *Id.* (alteration in original) (internal quotation marks omitted).

317. Hiltzik, *supra* note 8.

318. *Id.*

319. *Id.*

320. Steve Esack & Colt Shaw, *Pennsylvania Lawmaker Wants to Sue ‘Big Pharma’ over Opiate Epidemic*, MORNING CALL (June 17, 2016, 11:15 PM), [www.mcall.com/news/nationworld/pennsylvania/mc-pa-drug-company-lawsuit-resolution-20160617-story.html](http://www.mcall.com/news/nationworld/pennsylvania/mc-pa-drug-company-lawsuit-resolution-20160617-story.html) [https://perma.cc/625A-6VXK].

321. *See id.* (noting that “[a] lawsuit against pharmaceutical companies could be much more difficult, especially in Pennsylvania, home to 76 firms that manufacture a variety of drugs and employ 12,700 people”).

general, who traditionally sues companies to force compliance with state law,” Republican “attorneys general in at least a dozen states are working with energy companies and other corporate interests” to “back lawsuits and other challenges against the Obama administration on environmental issues, the Affordable Care Act and securities regulation.”<sup>322</sup> In return, those companies “are providing them with record amounts of money for their political campaigns, including at least \$16 million [in 2014].”<sup>323</sup> Known as the “Rule of Law campaign,” these states and attorneys general “operate like a large national law firm” and join with industries that they regulate (or, perhaps more accurately, do not regulate) to bring these claims.<sup>324</sup>

As we saw in the gun litigation context, if states do not want plaintiff city litigation, they usually have the authority to stop it.<sup>325</sup> Policy clashes frequently occur at all levels of government: between city and state, between state and federal, and between city and federal.<sup>326</sup> Local governments are at the bottom of the governmental hierarchy, and given this placement, they “are seriously constrained by the domination of state and corporate imperatives.”<sup>327</sup> States have significant power over much local government activity, and they routinely exercise it.<sup>328</sup>

In this sense, plaintiff city claims are continually bounded by the state’s power to neutralize them. Although whether states have such a power, whether it is politically feasible to use it in any given moment, and whether states should continue to have this power in light of the

322. Eric Lipton, *Energy Firms in Secretive Alliance with Attorneys General*, N.Y. TIMES (Dec. 6, 2014), <https://www.nytimes.com/2014/12/07/us/politics/energy-firms-in-secretive-alliance-with-attorneys-general.html> [<https://perma.cc/XB4X-J642>].

323. *Id.*

324. *Id.*

325. The tobacco litigation Master Settlement Agreement, for example, preempted many municipal lawsuits. See Kristin E. Cormier, *New Tobacco Settlement May End Municipal Lawsuits in Eight States*, NATION’S CITIES WKLY., Nov. 30, 1998, at 25. Some plaintiff city suits are also preempted by federal legislation, as was the case when Los Angeles’s case against JPMorgan for predatory lending was preempted by the Financial Institutions Reform, Recovery, and Enforcement Act. See Jonathan Stempel, *JPMorgan Wins Dismissal of Los Angeles Lawsuit over Mortgage Lending*, REUTERS (Aug. 6, 2014, 3:17 PM), <https://www.reuters.com/article/us-jpmorganchase-losangeles-lawsuit/jpmorgan-wins-dismissal-of-los-angeles-lawsuit-over-mortgage-lending-idUSKBN0G62AT20140806> [<https://perma.cc/ZP5W-9EWY>]. For a discussion of city-state powerlessness, see Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

326. See KAGAN, *supra* note 290, at 23 (detailing policy conflicts between various levels of government).

327. Iris Marion Young, *City Life as a Normative Ideal*, in PHILOSOPHY AND THE CITY: CLASSIC TO CONTEMPORARY WRITINGS 163, 169 (Sharon M. Meagher ed., 2008). Cities are typically given more deference in matters of land use and zoning. *Id.*

328. See Schragger, *supra* note 9, at 99 (describing local power under federalism).

growing importance of cities are all different questions, this framework provides the structure that plaintiff cities currently operate within.<sup>329</sup> Plaintiff cities do lay claim to pursuing justice on behalf of themselves and their constituents, but they do so from within the confines of this extant edifice.

### C. Sociological Legitimacy

After legal legitimacy and political legitimacy, the third type of legitimacy is sociological legitimacy. Sociological legitimacy is about “public acceptance”<sup>330</sup> and “the extent to which members of the relevant political community regard a law as justified.”<sup>331</sup> Largely as a result of the efforts of the probusiness tort reform movement, which seeks to minimize civil litigation generally, litigation is often maligned in American popular culture.<sup>332</sup> Stories of abusive or frivolous litigation abound, and even meritorious suits, like the “hot coffee” case, for example, are told as tales of plaintiff greed and overreaching.<sup>333</sup> “Tort reform long ago declared war on the citizen-initiated complaint generally,”<sup>334</sup> and the city-initiated complaint has been similarly impugned.

In fact, although the story most often circulated is that America is an overly litigious society,<sup>335</sup> numerous scholars have demonstrated that the problem is actually one of *too little* litigation.<sup>336</sup> Specifically, a plethora of factors operate to deter those who actually do suffer tortious injury from bringing suit. First, they often “don’t realize that they are

329. There is also the question, of course, whether states should have this power.

330. Michael L. Wells, “*Sociological Legitimacy*” in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1016 (2007).

331. Lahav, *supra* note 151, at 3195.

332. *Cf. id.* at 3195–96 (discussing three different forms of measuring legitimacy in law).

333. *Id.*

334. Anita Bernstein, *Complaints*, 32 MCGEORGE L. REV. 37, 47 (2000).

335. SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 3 (2010).

336. Comparatively, on the international stage the United States “barely cracks the Top 5 of most litigious countries in the world.” *Risk Management: The Most Litigious Countries in the World*, CLEMENTS, <https://www.clements.com/resources/articles/The-Most-Litigious-Countries-in-the-World> (last visited Feb. 24, 2018) [<https://perma.cc/E87N-ESR2>] [hereinafter *Most Litigious Countries*]. On a per capita basis, Germany, Sweden, Israel, and Austria, respectively, win. See Christian Wollschlager, *Exploring Global Landscapes of Litigation*, in *SOZIOLOGIE DES RECHTS: FESTSCHRIFT FÜR ERHARD BLANKENBURG ZUM 60 GEBURTSTAG* (Jürgen Brand et al. eds., 1998); *Most Litigious Countries, supra*; see also DAVID M. ENGEL, *THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON’T SUE* (2016). And although the popular perception is that tort suits are clogging courthouses, in fact, by far the most common type of civil litigation in state courts is contractual disputes. See ALEXANDRA LAHAV, *IN PRAISE OF LITIGATION* 10 (2017).

injured.”<sup>337</sup> Particularly when injuries involve the slow violence of toxic substances like lead, “where . . . years [may] elapse between exposure and the ultimate manifestation of injury,” it is difficult to conceptually connect those dots.<sup>338</sup> Moreover, “even if a victim realizes she’s hurt, she may not realize that the injury was tortiously inflicted.”<sup>339</sup> Continuing the lead example, the parents of “a child dismissed as ‘slow’ may not realize her trouble is traceable to chipped paint.”<sup>340</sup> Further, “even when victims have the information they need to make sensible choices,” their very injury often prevents many victims from taking action. “Often suffering from depression, disorientation, and anxiety—and sometimes overcome by guilt and self-blame—for some injury victims, ‘[d]ecisive action and follow-through may seem nearly impossible.’”<sup>341</sup> And

[f]inally, even if an injury victim navigates the various hurdles above and *decides* to claim, she still has to overcome several structural impediments to make that desire a reality. Most notably, she has to know how to find a decent lawyer . . . [and] convince the lawyer to take her case. And that’s tough—as the majority of lawyers reject the vast majority of would-be claimants who come calling. Last but not least, the would-be claimant has to do all of the above within a short period, lest the statute of limitations expire.<sup>342</sup>

As a result of these factors, and because of the significant psychological and legal consequences of serving as a plaintiff,<sup>343</sup> many potential plaintiffs with viable claims simply bear the loss and do not litigate them.<sup>344</sup> In some cases the “harms are [simply] too diffuse” and “the expense of litigation too great.”<sup>345</sup>

Plaintiff cities take on responsibility for pursuing claims against the entities that cause these harms. Doing so has some benefits for sociological legitimacy. First, “according to a recent 2012 Pew Research Center poll, Americans trust local governments at a significantly higher level than both state and federal government.”<sup>346</sup> City attorneys thus

337. Nora Freeman Engstrom, *ISO the Missing Plaintiff*, JOTWELL (Apr. 12, 2017), <https://torts.jotwell.com/iso-the-missing-plaintiff/> [<https://perma.cc/T5W3-TYQE>] (reviewing ENGEL, *supra* note 336).

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* (quoting ENGEL, *supra* note 336, at 43).

342. *Id.*

343. See Pam A. Mueller, *Victimhood and Agency: How Taking Charge Takes its Toll*, 44 PEPP. L. REV. 691 (2017) (examining the psychological and legal toll that participation in the legal system exacts on victims).

344. ENGEL, *supra* note 336, at 5.

345. Caruso, *supra* note 7, at 90, 61.

346. Ray Brescia & John Travis Marshall, *Introduction to HOW CITIES WILL SAVE THE WORLD*, *supra* note 1, at 1, 8.

may be able to imbue these claims with sociological legitimacy by virtue of generally being seen as bona fide actors. With the imprimatur of local government, city attorneys may be “well positioned to gain the attention and sympathies of the mass media.”<sup>347</sup> City actors “are in a strong position to gain media standing unavailable to private litigators and thus exert meaningful pressure through their legal mobilization campaigns.”<sup>348</sup>

Plaintiff city claims also benefit from past litigative moments that demonstrate that when litigation “produce[s] privately held industry information that documents important public harms in the face of regulatory failure . . . the litigation is reluctantly acknowledged as legitimate.”<sup>349</sup> For example, in the asbestos and tobacco cases, “as information surfaced to validate the claims,” the litigation gained in public acceptance and sociological legitimacy.<sup>350</sup>

Contemporary plaintiff city claims may follow this same trajectory, with informational transparency translating into sociological legitimacy. For instance, a lead plaintiff lawsuit with an individual plaintiff, filed in 1999, led to the release of a trove of historical letters and documents offering a series of repugnant and disturbing revelations regarding what company officials knew about the toxicity of their product and the populations affected. The documents showed that in the 1950s, Baltimore city officials “sent weekly reports to the lead paint industry’s top health official . . . alerting him to the harm being caused,” and informing him of the “dozens of Baltimore children dead from lead poisoning.”<sup>351</sup> “He responded with mockery.”<sup>352</sup> Referring to those who lived in housing poisoned by the toxic paint as “Baltimore’s little human rodents,” he blamed not the toxicity of his product, but instead the lack of education of black and minority parents.<sup>353</sup> He joked about the children ingesting lead paint, acknowledging that “there appears to be all too much ‘gnawledge’ among Baltimore babies,” but refusing to make any industry

---

347. NOLETTE, *supra* note 22, at 139.

348. *Id.*

349. Wendy Wagner, *Stubborn Information Problems & the Regulatory Benefits of Gun Litigation*, in *SUING THE GUN INDUSTRY*, *supra* note 27, at 271, 286.

350. *Id.* at 291.

351. Luke Broadwater, *Advocates Say Lead Paint Industry Should Be Held Liable in Poisoning of Baltimore Children*, *BALT. SUN* (Feb. 27, 2016, 4:14 PM), <http://www.baltimoresun.com/news/maryland/sun-investigates/bs-md-ci-lead-poisoning-20160227-story.html> [<https://perma.cc/QAG9-2Z6R>].

352. *Id.*

353. *Id.* (internal quotation marks omitted).

changes to prevent or curb the toxic exposure.<sup>354</sup> Shortly after these letters were publicized, numerous media articles were published denouncing these actions and suggesting that both the litigation that drove the document discovery and future city litigation are positive developments.<sup>355</sup>

Similar revelations occurred in the subprime mortgage context. Baltimore and Memphis both brought claims that specifically alleged that Wells Fargo engaged in reverse redlining.<sup>356</sup> In that litigation, the plaintiffs “produced sworn statements from former Wells Fargo employees that revealed that bank officials would refer to subprime loans as ‘ghetto loans’ and borrowers of color as ‘mud people.’”<sup>357</sup> These claims settled, with Wells Fargo “agreeing to make hundreds of millions of dollars of loans in Memphis and Shelby County and \$7 million in loans in Baltimore.”<sup>358</sup>

### III. FISCAL FEASIBILITY IN THE AGE OF MINIMAL CITIES

Plaintiff city cases are not only sociologically, morally, and legally legitimate; they are also fiscally feasible. Well-resourced cities can pursue litigation through their own city attorney offices or specialized units.<sup>359</sup> Cities with less financial resources can also pursue plaintiff city litigation, albeit through a slightly different means. Currently, many cities are in significant financial distress,<sup>360</sup> and there are an unprecedented number of municipal bankruptcies.<sup>361</sup> Even though these cities “are often so cash-strapped it may be difficult for

354. *Id.* (internal quotation marks omitted).

355. *See, e.g., id.*

356. Brescia, *supra* note 66, at 20.

357. *Id.*; *see also* Michael Powell, *Bank Accused of Pushing Mortgage Deals on Blacks*, N.Y. TIMES (June 6, 2009), [www.nytimes.com/2009/06/07/us/07baltimore.html](http://www.nytimes.com/2009/06/07/us/07baltimore.html) [<https://perma.cc/MJV6-TP54>].

358. Brescia & Marshall, *supra* note 346, at 20 (citations omitted).

359. *See* Morris, *supra* note 1, at 202.

360. *See, e.g.,* Amy Goldstein, *In the Tennessee Delta, a Poor Community Loses Its Hospital—and Sense of Security*, WASH. POST (Apr. 11, 2017), [https://www.washingtonpost.com/national/health-science/in-the-tennessee-delta-a-poor-community-loses-its-hospital--and-sense-of-security/2017/04/10/6c550492-1941-11e7-855e-4824bbb5d748\\_story.html?utm\\_term=.b69dfcbc44cc](https://www.washingtonpost.com/national/health-science/in-the-tennessee-delta-a-poor-community-loses-its-hospital--and-sense-of-security/2017/04/10/6c550492-1941-11e7-855e-4824bbb5d748_story.html?utm_term=.b69dfcbc44cc) [<https://perma.cc/XLU7-DEJ2>] (discussing the “epidemic of dying hospitals across rural America”).

361. *See* Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1120 (2014) (noting Detroit was “the twenty-eighth city to declare municipal bankruptcy or to enter a receivership for fiscal crisis since late 2008, a window of time that has seen five of the six largest municipal bankruptcies in American history”). Puerto Rico has also declared bankruptcy. Nathan Bomey, *Puerto Rico Declares Bankruptcy. Here’s How It’s Going to Unfold*, USA TODAY (May 3, 2017, 1:39 PM), <https://www.usatoday.com/story/money/2017/05/03/puerto-rico-bankruptcy/101243686/> [<https://perma.cc/9U7D-XFXB>].

their law offices to imagine”<sup>362</sup> doing something like “creat[ing] public interest units or even pursu[ing] the occasional public interest case,”<sup>363</sup> private-public partnerships with private plaintiffs’ law firms offer a viable option. Bringing a plaintiff city claim for the most distressed cities, where “the city government itself is no longer pursuing a vision beyond public safety in true emergencies,”<sup>364</sup> might be unrealistic, but for all except these worst hit cities, and “[p]articularly for smaller cities, with smaller law departments, private contractual agreements allow cities to attempt affirmative litigation without the burden of significant expenditures in developing the cases.”<sup>365</sup> Indeed, “a carefully-constructed affirmative litigation docket should pay for itself with recouped damages, costs, and civil penalties.”<sup>366</sup>

Cities sometimes partner with plaintiffs’ attorneys who have developed particular expertise in relevant areas to help them bring their cases.<sup>367</sup> Such arrangements are frequently done on a contingency fee basis, a practice which has been controversial. However, at least one court has held governmental entities can legitimately use private counsel, “as long as the entities exercise control over the case.”<sup>368</sup>

In addition to this judicial stamp of approval, these public-private partnerships are in fact a ubiquitous practice in public enforcement generally, with public enforcers in a variety of domains routinely employing outside counsel.<sup>369</sup> As John Coffee notes, these

362. Morris, *supra* note 285, at 1922.

363. Morris, *supra* note 1, at 191.

364. Anderson, *supra* note 361, at 1122.

365. Gavioli, *supra* note 16, at 966.

366. Morris, *supra* note 148, at 61.

367. This can be understood as part of coalition building generally. Tove Dannestam, *Rethinking Local Politics: Towards a Cultural Political Economy of Entrepreneurial Cities*, 12 SPACE & POLITY 353, 365–66 (2008):

[D]ecision-making processes take place in interactions between a variety of actors (including private), rather than only inside the formal institutions of government. These actors form policy networks or coalitions, based on the different kinds of resources they bring together (material, institutional and so on). The coalitions are often formed on an informal basis with the purpose of creating a *power to act* or are centered on a specific discourse. . . . This concept highlights the idea that coalitions can be based on a common world of imaginations, rather than on a shared interest and that they might exercise “discursive power” rather than generate governing capacity.

(citations omitted).

368. The California Supreme Court has so held. See Amanda Robert, *Opioid Suit Is Latest Brought by Calif. County with Help from Contingency Fee Attorneys*, LEGAL NEWSLINE (July 14, 2014, 7:06 PM), <https://legalnewsline.com/stories/510517879-opioid-suit-is-latest-brought-by-calif-county.html> [<https://perma.cc/UW8S-ZTJA>].

369. See John C. Coffee, Jr., “When Smoke Gets in Your Eyes”: *Myth and Reality About the Synthesis of Private Counsel and Public Client*, 51 DEPAUL L. REV. 241, 242–43 (2002) (“In short, as the stakes got higher, all sides turned to outside counsel.”). He notes that the Private Securities

partnerships are mutually beneficial and “creat[e] enormous synergy.”<sup>370</sup> Public actors “gain specialized human capital that they could not otherwise afford,” and private attorneys “gain[] the legitimacy, credibility, and home field advantage that only the state can confer . . . .”<sup>371</sup> Most importantly, though, contingency fee arrangements transfer the risk of financial loss from the public to the private.<sup>372</sup> Essentially, in these arrangements, “the state is . . . compensating the private attorney with lottery tickets.”<sup>373</sup>

In fact, even though there may be a perception that governments have almost limitless resources, multinational corporations are often able to rally significantly more legal and financial resources than local governments can. For instance, even at the state level, in the Rhode Island lead paint litigation, “there were more attorneys working for the defense than in the entire attorney general’s office.”<sup>374</sup> Orange County’s district attorney made a similar observation about being out-staffed and out-resourced in its pharmaceutical litigation. She noted that “[w]hen you fight multi-billion dollar companies, we’re the little guy.”<sup>375</sup> The multinational corporations “have substantial funds” and “try to wear [plaintiffs] down, basically, with paperwork.”<sup>376</sup> The corporate behemoths that are defendants in plaintiff city cases have access to extensive reserves of both financial and intellectual capital. Hiring private counsel allows plaintiff cities to come closer to achieving a symmetry of scope and scale with the massive resources of these large corporate actors.

Through such partnerships, even financially distressed cities can tap into plaintiff city claims as a potential source of revenue that can help minimize the extensive expenditures resulting from the impugned harms, without requiring significant financial investment to

---

Litigation Reform Act of 1995 lets a “lead plaintiff” control securities class actions. That plaintiff is typically a state pension fund, which relies on private counsel. *Id.* at 242. For example, the Federal Justice Department hired private attorney David Boies when they sued Microsoft for antitrust violations. *Id.*

370. *Id.* at 252.

371. *Id.* at 242.

372. *See id.* at 251 (“[T]he contingency fee agreement is less an end run around the legislature than a risk sharing arrangement that allocates both economic and political risks from the elected official to the party most able to bear it: namely, the plaintiffs’ attorney.”).

373. *Id.* at 252.

374. Greenblatt, *supra* note 42.

375. David Whiting, *Lawsuits Against Pharmaceuticals Effective Weapon in War Against Prescription Opioids*, ORANGE COUNTY REG. (June 8, 2017, 11:14 AM), <https://www.oregister.com/2017/06/08/cavalry-coming-in-war-against-prescription-opioid-epidemic/> [<https://perma.cc/9BWF-EUGL>] (internal quotation marks omitted) (quoting Susan Kang Schroeder, Orange County District Attorney Chief of Staff).

376. Schwartz, *supra* note 74.



do so. In general, insolvent cities (or those close to it) have “very little that [they] can do to increase revenues . . . .”<sup>377</sup> Since “state law largely controls eligible sources of revenue and withholds self-governance,” “asset-poor cities” have “limited flexibility to raise revenues in creative ways.”<sup>378</sup> Cities can see plaintiff city claims as, among other things, an opportunity to “recover for proven injuries and use damage awards to fund needed city services and social welfare programs.”<sup>379</sup> This “need for revenue is more urgent than ever due to decades of urban decline, the new federal emphasis on local solutions to social problems, and new demands on city revenue like the costs of homeland security.”<sup>380</sup>

Plaintiff city claims can serve as a source of revenue, one that maps neatly onto some of the reasons for city insolvencies in the first place. Many of the parties targeted in plaintiff city claims significantly contributed to the city’s distress: part of the very reason why many cities are in financial distress connects to the wrongs alleged in plaintiff city litigation. The subprime mortgage crisis, in particular, emptied many cities’ coffers. Since “the single largest source of local revenues” is property taxes,<sup>381</sup> and the subprime mortgage crisis meant that many residents could not pay property taxes, it had a particularly significant effect on city finances. Between 2009 and 2010, city revenue from property taxes fell by \$11.9 billion, and between 2010 and 2011, it fell another \$14.6 billion.<sup>382</sup> Already-struggling cities were hit particularly hard by this, since “long-term structural challenges and high rates of poverty” meant that these cities depended more on property taxes and employment related to housing than they should have or otherwise would have.<sup>383</sup>

Additionally, the subprime mortgage crisis created “steep population loss,” a phenomenon that is “dramatically bad for budgets.”<sup>384</sup>

The housing market crashed particularly hard in poor cities, because subprime lending disproportionately affected poor neighborhoods and middle-class neighborhoods of color.

---

377. Anderson, *supra* note 361, at 1126.

378. *Id.* at 1145–46 (“For asset-poor cities . . . these constraints allow local governments limited flexibility to raise revenues in creative ways, such as using payroll or commuter taxes to claim revenue from persons who use the city (and thus, its services) during their working hours.”).

379. Gavioli, *supra* note 16, at 942.

380. *Id.* at 944; *see also* TIM WU, *THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS* (2016) (describing how some municipalities are selling advertising in schools to corporations).

381. Anderson, *supra* note 361, at 1128.

382. *Id.* at 1142.

383. *Id.* at 1143.

384. *Id.* at 1125.

Spatially-concentrated lending patterns triggered spatially-concentrated foreclosures, which in turn caused rising numbers of vacant and neglected homes as well as downward pressure on remaining residents' housing values.<sup>385</sup>

It is telling that in Michelle Wilde Anderson's study of insolvent cities, she found that "16 of the 28" cities in insolvency were majority-minority cities.<sup>386</sup> She notes that "these cities were hit extremely hard by subprime lending. Empirical evidence has shown that such high-cost, high-risk loans were concentrated in minority neighborhoods for reasons beyond class and creditworthiness."<sup>387</sup> Instead, "persistent discriminatory mortgage lending," along with a history of "racially restrictive covenants [and] white flight," is an "important cause[ ] of urban decline in many majority-minority cities, including the intensification of concentrated poverty and population loss."<sup>388</sup>

Further, the high rates of poverty and the structural challenges of many insolvent cities connect to other targeted plaintiff city claims. For instance, Gary, Indiana, a "high-poverty, insolvent city" which is currently grossly underpoliced,<sup>389</sup> has been trying, for nearly twenty

385. *Id.* at 1143.

386. *Id.* at 1140.

387. *Id.*

388. *Id.* at 1141. Cities have often participated in creating this structural inequality. Of particular note, although Baltimore sued Wells Fargo for issuing subprime mortgages that resulted in massive foreclosures in predominantly minority-majority areas, Wells Fargo noted:

The City's . . . own tax lien sales . . . have resulted in over 19,000 foreclosure actions being filed against City homeowners during this same seven-year period . . . The City places liens on homes for any type of unpaid municipal bill over \$100, and then sells the liens to private investors, knowing the investors will threaten to foreclose on the homes unless the homeowners agree to pay exorbitant fees . . . The City's tax lien sales, moreover, have disproportionately injured minority homeowners in the City's poorest neighborhoods. Over half of the 2006 tax lien sales based only on small unpaid water bills or municipal fees involved properties in census tracts that are more than 80% African-American and over two-thirds involved properties in tracts that are over 60% African-American, but fewer than 11% involved properties in tracts that are 20% or less African-American.

Richard E. Gottlieb & Andrew J. McGuiness, *When Bad Things Happen to Good Cities: Are Lenders to Blame?*, BUS. L. TODAY, July/Aug. 2008, at 12, 16 (alterations in original) (quoting Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint at 1–2, Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A., 631 F. Supp. 2d 702 (D. Md. 2009) (No. 1:08-CV-0062-BEL), 2008 WL 760447).

389. Anderson, *supra* note 361, at 1161–62:

The most underpoliced city in the country is the high-poverty, insolvent city of Gary, Indiana, which has 266 officers per 100,000 population, nearly the same staffing ratio as the 261 officers per 100,000 population in Cambridge, Massachusetts. Yet the annual cost of crime per capita—a measure that estimates the private costs of crime, such as injury, lost income, and stolen property—is more than 15 times higher in Gary than it is in Cambridge. Because of this high cost of crime, the benefits of public spending on law enforcement in Gary are dramatically higher than they are in Cambridge. Every additional dollar spend on policing in Gary would yield \$14 in benefits of reduced crime,

years, to hold the gun industry responsible for the damages it inflicted on that city. Back in 1999, Gary filed a public nuisance suit against various gun dealers and manufacturers, alleging that their “negligent marketing, deceptive advertising, and negligent design . . . increased violent crimes and required [Gary] to pay more for crime-related expenditures.”<sup>390</sup> The now-bankrupt cities of Detroit and Camden had also brought gun litigation.<sup>391</sup> “Fairness dictates that cities, which [despite their current struggles] overwhelmingly produce the wealth of this country,”<sup>392</sup> should not be left with the disproportionate financial burdens that others’ misconduct has visited upon them. Through partnering with private attorneys, these distressed cities that have been injured by the various forms of misconduct targeted in plaintiff city claims can and should pursue claims against them.

#### IV. LITIGATION AS STATE BUILDING

Even the new “minimal” cities,<sup>393</sup> by partnering with private firms, may find that bringing forward plaintiff city claims is in fact financially feasible and can help to recoup some of the expenses that cities undertake in trying to address or stem these impugned harms. But economic impact is not the only meaningful yardstick by which to judge the desirability of a particular course of action.<sup>394</sup> Other factors, like furthering goals of equality and enhancing the quality of life for all city citizens, also matter.<sup>395</sup> In fact, in the current contemporary context of social inequality, increasingly concentrated poverty, and growing political alienation, “attention to justice—not only economic efficiency—as the criterion for evaluating urban policies is more important than ever.”<sup>396</sup> Along with fiscal concerns, municipal decisionmaking should

---

whereas every new dollar spent on policing in Cambridge would yield only 30 cents in such benefits.

(footnotes omitted).

390. Ausness, *supra* note 15, at 851.

391. *See id.* at 840 (“[A] number of local governments brought suit against gun manufacturers to recover for gun-related expenses. The plaintiffs included . . . Camden County . . . and Detroit.” (footnote omitted)).

392. Gavioli, *supra* note 16, at 967.

393. *See generally* Anderson, *supra* note 361 (discussing new “minimal” cities).

394. Susan S. Fainstein, *Planning and the Just City*, in *SEARCHING FOR THE JUST CITY: DEBATES IN URBAN THEORY AND PRACTICE* 19, 28–29 (Peter Marcuse et al. eds., 2009).

395. *Id.*

396. Justin Steil & James Connolly, *The Just City*, in *THE WILEY-BLACKWELL ENCYCLOPEDIA OF URBAN AND REGIONAL STUDIES* (Anthony M. Orum ed., forthcoming May 2018), <https://steil.mit.edu/sites/default/files/documents/Steil%20Connolly%20Forthcoming%20The%20Just%20City%20Encyc%20Urban%20Regional%20Studies.pdf> [https://perma.cc/JAF4-AHBZ] (emphasis added).

also be governed by questions like “whether actions are consistent with democratic norms, whether their outcomes enhance the capabilities of the comparatively disadvantaged, and whether they recognize and respect who benefits from a [particular] policy” or course of action.<sup>397</sup>

The decision to engage in plaintiff city litigation reflects a consideration of these additional criteria, and a rejection of the stark “ideology and practice of market primacy.”<sup>398</sup> Taking this political position is part of a larger process of cities forging their political identity through their litigative activities. Through serving as plaintiff cities, cities are establishing themselves as entities responsible for and capable of achieving justice for their populations. In other words, plaintiff cities are using litigation “as a source of statebuilding.”<sup>399</sup> The litigation is a means through which cities construct themselves as meaningful political entities.<sup>400</sup> By taking on litigation similar to that which is sometimes taken on by states in the public interest, cities are defining themselves as *like* states, as governmental entities that can and will act on behalf of vulnerable constituencies.

Perhaps ironically, the inertia and gridlock that has occurred at multiple levels of government has helped to create the political space for this kind of local state building to occur. The inability of states, “the nation-state[, and] the transnational corporation . . . to address the political alienation and economic instability felt by many citizens in the U.S. and elsewhere”<sup>401</sup> has left an opening for public-interest minded cities. State-building moments often coincide with shifting “boundaries between public and private,”<sup>402</sup> and cities, with their lack of the full panoply of “public” powers (like *parens patriae*, for example), nevertheless manage to make good use of this space. Plaintiff city litigation straddles the border between public and private: a public actor brings the claim, but with virtually no special public actor privileges. Instead, plaintiff cities resourcefully use private law tools to

---

397. *Id.*

398. Schragger, *supra* note 9, at 95.

399. See MEGAN MING FRANCIS, *CIVIL RIGHTS AND THE MAKING OF THE MODERN AMERICAN STATE* 13 n.34 (2014) (describing FARHANG, *supra* note 335). In some ways, the plaintiff city phenomenon may be a flip of the enforcement dynamic that Sean Farhang analyzed. See FARHANG, *supra* note 335. Rather than private actors enforcing public law, which was the subject of his study, plaintiff cities could be understood as public actors enforcing *private* law.

400. In so doing, plaintiff city litigation acts as a “form of state building in which courts and judges—sometimes even the mere existence or threat of them—play a crucial role.” Staszak, *supra* note 93, at 78.

401. Schragger, *supra* note 9, at 95.

402. Carol Nackenoff & Julie Novkov, *Introduction* to *STATEBUILDING FROM THE MARGINS: BETWEEN RECONSTRUCTION AND THE NEW DEAL* 1, 1 (Carol Nackenoff & Julie Novkov eds., 2014).

help offer their citizens a different form of justice-seeking and governance.

By stepping into this void, and trying to solve harms like climate change, gun violence, and opioid addiction, harms that directly impact localities but are by no means unique to them, cities are pushing against another boundary: the idea of “natural and static layers of political and territorial organization.”<sup>403</sup> The local, state, national, and international spheres are not static and immutable, but are instead “socially constructed in negotiations and struggles between different actors.”<sup>404</sup> There is, accordingly, continual contestation of the boundaries and appropriate sphere of activity for local, state, federal, and global levels.<sup>405</sup>

Plaintiff city litigation represents one such contestation. Plaintiff cities are using the litigative pursuit of redressing wrongs which are simultaneously both local and large-scale as a form of state building. This is part of the larger project of the “on-going [self-]construction of ‘the city’ as a relevant [and increasingly important] political category.”<sup>406</sup> The litigation can be seen as part of a general movement of municipal empowerment and maturation, and as a renegotiation of the meaning of a city, both in a theoretical and practical sense. “Political entities, such as cities and regions, are gaining in importance,”<sup>407</sup> and at least “[i]n the international literature, there is a near consensus that fundamental changes in the policy orientation of local governments are occurring.”<sup>408</sup> Cities are scaling up: they now pass regulations about national social issues, publicly take stances on international issues, agree to international protocols, and collaborate to form vast municipal networks that span the nation and beyond. Indeed, networks inform much of plaintiff city litigation, as cities share strategies, expertise, and sometimes the same private counsel.<sup>409</sup>

Such coalitions allow cities to “becom[e] actors on different political levels, linked together in various networks which increasingly bypass the nation-state.”<sup>410</sup> In the United States, for instance, former New York City Mayor Michael Bloomberg has pledged \$200 million to fund the American Cities Initiative, a foundation “which aims to

---

403. Dannestam, *supra* note 367, at 366.

404. *Id.*

405. *Id.*

406. *Id.* at 367.

407. *Id.* at 353.

408. *Id.* at 356.

409. *See supra* note 55.

410. Dannestam, *supra* note 367, at 353–54.

empower city governments and mayors to innovate and solve problems, such as gun violence, climate change and addiction.”<sup>411</sup> Such alliances may become “instrumental in the creation of new public powers and administrative capacities.”<sup>412</sup>

### A. Constructing the Polis

At the same time as many plaintiff cities are scaling up, plaintiff city litigation is also deeply and fundamentally rooted in the on-the-ground, lived realities and experiences of localities and their constituencies. The attention to the harms that vulnerable individuals and populations suffer is a key feature of plaintiff city claims, and an important part of their state-building effect. Plaintiff city claims have important framing, shaping, and relational functions. They frame the harmed individuals underlying them into a population or a collectivity, and not just any collectivity, but one with stature and dignity *that the city will defend*. The claims that plaintiff cities bring can be viewed as *defensive*, as a “cry of protest”<sup>413</sup> made to defend particularly vulnerable groups from the injuries inflicted by various corporate actors. In recognizing that these groups are not disposable, and demanding redress for the harms that impact those populations, cities are affirming the place and inherent value of these groups within the polity itself. The claims create the city as “a *polis*, a political collectivity, a place where public interest is defined and realized,”<sup>414</sup> and define that political collectivity to decisively include often marginalized groups.

By so doing, plaintiff city claims can help to reduce the “legal estrangement” that some minority groups may otherwise experience.<sup>415</sup> “Legal estrangement” is a concept that incorporates both “objective structural conditions” and the “legal cynicism” that results from those conditions—the “cultural orientation . . . in which the law and the

---

411. Kurtis Lee, Q&A: *Michael Bloomberg Talks Gun Control, Empowering Cities and Trump: 'I Was a Manager, He Was Not,'* L.A. TIMES (July 28, 2017, 3:00 AM), <http://www.latimes.com/nation/la-na-pol-michael-bloomberg-20170728-htmstory.html> [<https://perma.cc/M3JB-N9X3>].

412. Nackenoff & Novkov, *supra* note 402, at 1, 4.

413. Bernstein, *supra* note 334, at 37.

414. Mustafa Dikeç, *Justice and the Spatial Imagination*, in SEARCHING FOR THE JUST CITY, *supra* note 394, at 72, 83 (quoting ÉTIENNE BALIBAR, *ÉCRITS POUR ALTHUSSER* 66 (1991)).

415. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2066 (2017).

agents of its enforcement, such as the police and courts, are viewed as illegitimate, unresponsive, and ill equipped to ensure public safety.”<sup>416</sup> Legal estrangement is concerned with the exclusionary aspects of contemporary regimes, and how such regimes often “operate to effectively banish whole communities from the body politic.”<sup>417</sup>

Legal estrangement also considers the “signaling function of . . . law to groups about their place in society.”<sup>418</sup> Often, the signal to vulnerable or minority groups (sometimes even sent by cities themselves, in different contexts) is one of “symbolic community exclusion.”<sup>419</sup> There is often “*legal closure*, a means of hoarding legal resources for the socially and socioeconomically advantaged” while simultaneously “locking marginalized groups out of the benefits of law enforcement.”<sup>420</sup>

Plaintiff city litigation resists this legal estrangement.<sup>421</sup> Instead, it “reassure[s] community members that society has not abandoned them, that they are engaged in a collective project of making the social world.”<sup>422</sup> These benefits accrue even when plaintiff city litigation is unsuccessful.<sup>423</sup> Even when plaintiff cities do not ultimately emerge legally victorious, the signaling function and community-building impact remains. Further, they signal to corporate wrongdoers that cities are willing to litigate these kinds of claims, which itself may encourage corporations to engage in less injurious behaviors.

### B. *Creating the Just City*

Plaintiff city claims may bring cities one step closer towards the aspirational goal of the “just city.”<sup>424</sup> The just city seeks to overcome “the injustices that have come with rapid urbanization—the violence,

416. *Id.* (internal quotation marks omitted) (quoting David S. Kirk & Andrew V. Papachristos, *Cultural Mechanisms and the Persistence of Neighborhood Violence*, 116 AM. J. SOC. 1190, 1191 (2011)).

417. *Id.* at 2067.

418. *Id.* at 2088.

419. *Id.* at 2099.

420. *Id.* at 2114–15.

421. This may be an example of tort law building community in a different way. For a discussion of community values in tort, see Christina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1321 (2017).

422. Bell, *supra* note 415, at 2085 (discussing “law that is well designed and properly enforced”).

423. In fact, other benefits often accompany losing. See Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 941 (2011) (identifying “social movement effects rooted in the unique attributes of litigation loss”).

424. SUSAN S. FAINSTEIN, *THE JUST CITY* 23 (2010).

insecurity, exploitation, and poverty that characterize urban life for many, as well as the physical expressions of unequal access to social, cultural, political, and economic capital that arise from intertwined divisions between race, class, and gender categories.”<sup>425</sup> Three lodestars—equity, diversity, and democracy<sup>426</sup>—guide cities out of this unhappy state, and towards a “richer account of democratic life”<sup>427</sup> for their citizens.

Although usually theorized as a trio of useful directives for urban planning, plaintiff cities show that litigation can play an important role in furthering these objectives, as well. First, plaintiff city claims can advance the goal of equity. Equity is similar to equality, but differs in that equity is a “realistic” goal which acknowledges that urban policies do not unilaterally have the capacity to create equality writ large.<sup>428</sup> Like equality, though, equity demands distributive justice, and insists that municipal public policy decisions must benefit more than just the already well-off.<sup>429</sup>

Second, plaintiff city claims affirm the value of diversity. Diversity here “go[es] beyond encouraging acceptance of others to include the social composition of places” and focuses on building capacity for all community members.<sup>430</sup>

Finally, democracy “invokes the idea of meaningful public participation and reasoned public deliberation about the best measures to secure the general community interest.”<sup>431</sup> Meaningful participation is only possible if populations are “healthy enough to participate in civil life and pursue their own life’s goals.”<sup>432</sup> Plaintiff city claims, and their attempted protection of public health, try to ensure this circumstance. The “‘ecological’ model of health” has demonstrated that “socially, culturally, and materially disadvantaged people live shorter, less healthy lives,”<sup>433</sup> and are often unable to vigorously participate in civic

---

425. James Connolly & Justin Steil, *Introduction to SEARCHING FOR THE JUST CITY*, *supra* note 394, at 1, 8.

426. FAINSTEIN, *supra* note 424, at 23.

427. Schragger, *supra* note 9, at 132.

428. FAINSTEIN, *supra* note 424, at 36.

429. *Id.*

430. *Id.* at 67.

431. David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315, 322 (2001). But, as Dan Kahan noted in his brilliantly titled piece *Democracy Shmemocracy*, “democracy is an essentially contested concept: there is not just one, but rather a plurality of competing conceptions of democracy, each of which emphasizes a different good commonly associated with democratic political regimes.” Dan M. Kahan, *Democracy Shmemocracy*, 20 CARDOZO L.J. 795, 795 (1999).

432. PARMET, *supra* note 259, at 1.

433. Wiley, *supra* note 25, at 222.



life.<sup>434</sup> Plaintiff city claims try to stop this cycle, and give political expression to “a right to inclusion and social responsibility—a right that suggests that one’s illness . . . [or injury] is not solely one’s own concern,”<sup>435</sup> but the concern of a just polity as well. Like most public health litigation, plaintiff city claims “ha[ve] an important role to play in the political struggle to protect the rights of the community and its more vulnerable members.”<sup>436</sup> Through this litigation, cities are state building and constructing themselves in the image of the just city.

### CONCLUSION

Plaintiff cities rise on the swell of two developing strands, one political, and one legal. At the political level, cities are in a moment of emergent state building. Cities are becoming increasingly important actors, and citizens are increasingly expecting their local governments to further their opportunity for human flourishing. “[T]he city is the scale where questions of justice are felt concretely as part of everyday life,”<sup>437</sup> and as nimble and often progressive public actors, cities are well-positioned to bring claims to redress injuries from harms like lead paint toxicity, the subprime mortgage crisis, and the opioid epidemic.

Indeed, “the public health threats of an era have always found their way before the courts and lawmaking bodies of the time,”<sup>438</sup> usually through tort law. “[T]ort law showcases the most salient activities or agents of disease and injury in an era”: the railroad cases of the nineteenth century gave way to the motor vehicle claims of the early twentieth, and then to the toxic chemical cases as that century came to a close.<sup>439</sup> In this new millennium, mammoth economic harms, like those at issue in the financial crisis, and massive health harms, like those of the opioid epidemic, demand a response. As with the harms of eras past, tort law will almost inevitably be asked to grapple with these injuries and will also almost inevitably change and develop “as a result of [this] encounter.”<sup>440</sup>

Plaintiff cities find themselves at the nexus of these two evolutions. The claims are legitimate—legally, politically and sociologically—but it remains to be seen whether they will ultimately

---

434. Cf. *supra* notes 311–315 and accompanying text.

435. Parmet, *supra* note 89, at 1711–12.

436. *Id.* at 1665.

437. Connolly & Steil, *supra* note 425, at 6.

438. PARMET, *supra* note 259, at 37.

439. *Id.* at 36.

440. *Id.*

lead to legal victory. At the very least though, advancing these claims expressively communicates to the vulnerable populations who are most harmed by these wrongs, to society writ large, and to corporate and industrial actors, that these wrongs will not go unnoted. This communicated “[a]wareness of exploitation, and [the] attempt[] to challenge it, bring us closer to realizing the too often unfulfilled promise that cities have long represented—the promise of liberation and opportunity.”<sup>441</sup> Plaintiff cities are not, by any means, perfect cities, but their litigative acts press for political recognition, both for vulnerable populations within the polis, and for the city itself.

---

441. Connolly & Steil, *supra* note 425, at 1.

\*\*\*