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## Statues of Fraud : Confederate Monuments as Public Nuisances

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# STATUES OF FRAUD: CONFEDERATE MONUMENTS AS PUBLIC NUISANCES

Emily Behzadi\*

*The deaths of George Floyd, Breonna Taylor, and countless other African Americans have ignited a new wave of social activism throughout the United States. Notwithstanding the existence of one of the most infectious diseases of the twenty-first century, racist and unrestrained police violence continues to plague American society. The unprecedented national uprisings resulting from the brutal killings of African Americans have positioned the United States on the precipice of immense social and political change. This period is marked by an amalgamation of social, political, and cultural influences. However, the continued exhibition of Confederate monuments stymies the ability to remedy the brutal injustices resulting from this country's racist and oppressive past. In a time where public health and safety are at the forefront of American news and politics, the ongoing Confederate monument controversy and the inability of governments to uniformly decide the fate of these divisive objects undoubtedly impacts the public's health and safety. Various localities have declared Confederate monuments as "public nuisances," and despite legal challenges, have been successful in the removal of these offensive objects. Within this context, this Article proposes that the doctrine of public nuisance may be utilized as a vehicle for the removal of Confederate monuments in public spaces. This Article further argues that the memorialization of the Confederacy, slavery, and the subordination of Black Americans through Confederate monuments continues the significant "cultural trauma" sustained by Black Americans for centuries. Ultimately, the removal of Confederate monuments serves to erase the false narrative propagated by Lost Cause enthusiasts, and most notably, to begin to cure the deep fissures of systemic racism and oppression in the United States.*

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INTRODUCTION

In a photograph that quickly went viral, Black ballerinas Kennedy George and Ava Holloway proudly pose with raised fists in front of a desecrated statue of Robert E. Lee.<sup>1</sup> The image is iconic, portraying strength and beauty in contrast to the ugly symbolism of the once-venerated General Lee. Inspired by the grass-roots response to the killings of George Floyd,<sup>2</sup> Breonna Taylor, and countless other Black Americans, the ballerinas became profound symbols of the Black

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1. Colleen Curran, *How a Photo of Young Ballerinas at the Lee Statue Became an Iconic Image of Black Lives Matter*, RICHMOND TIMES-DISPATCH (June 19, 2020), [https://richmond.com/entertainment/how-a-photo-of-young-ballerinas-at-the-lee-statue-became-an-iconic-image-of/article\\_69ab8776-bae6-511f-b5e3-e57ac1bc1b8a.html](https://richmond.com/entertainment/how-a-photo-of-young-ballerinas-at-the-lee-statue-became-an-iconic-image-of/article_69ab8776-bae6-511f-b5e3-e57ac1bc1b8a.html).

2. George Floyd was a 46-year-old Black man who was asphyxiated by a white Minneapolis police officer, who pressed his knee onto Floyd’s neck. His death was recorded by a bystander and launched an unprecedented series of protests around the world. See Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

Lives Matter movement. The sharp juxtaposition between the beauty of the ballerinas and the harshness of the granite symbolizes the ever-widening cultural divide in the United States, exacerbated by enduring reminders of this nation's monumentally problematic past. The unprecedented nationwide protests on racial injustice, police reform, and systemic racism, as well as the deep-rooted pain experienced by members of the Black community, has forced Americans to once again examine certain structures that promote racial inequality and white supremacy. These structures include the remaining 700 Confederate monuments that adorn the landscape of numerous towns and cities in the United States.

Although the Civil War ended one and a half centuries ago, the difficulty over what to do with Confederate monuments still sparks impassioned debate. These statues are not simply pieces of stone and bronze; they represent two diametrically opposed narratives of the history of the United States. While some view Confederate monuments as emblems of Southern heritage and pride, many others, especially Black Americans, see them as homages to slavery and the subjugation of an entire race of people. These objects understandably garner visceral reactions from both monument opponents and supporters. For this reason, they have become epicenters for demonstrations, threats, and even violence. The deadly and racially motivated events in Charleston, South Carolina and Charlottesville, Virginia, triggered a nationwide call to remove these symbols that "communicate a message of racial inferiority."<sup>3</sup> Yet many Southern States have impeded the ability of towns and cities to control the disposition of Confederate monuments.

The intensity of the conflict over Confederate monuments poses a significant challenge for local communities who house these structures. As protests against racism and police violence continue to pervade the nation, the focal points of that anger are Confederate statues and monuments. From graffiti and vandalism to unauthorized toppling and demolition, local communities are struggling to protect their citizens from certain risks to the public health and safety that arise from the presence of these monuments. In an effort to protect the public health and safety of citizens, some localities have been successful in removing Confederate monuments. Despite legal challenges, declaration of these Confederate monuments as "public nuisances" has provided an alternative argument against their continued exhibition and preservation.

The law of nuisance has historically been misunderstood by the courts. William Prosser has called the doctrine an "impenetrable jungle"<sup>4</sup> and a "legal garbage can"<sup>5</sup> that is "full of vagueness, uncertainty, and confusion."<sup>6</sup> Historically, actionable public nuisance claims required conduct such as the blocking of a

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3. Micah Schwartzman & Nelson Tebbe, *Charlottesville's Monuments Are Unconstitutional*, SLATE (Aug. 25, 2017), <https://slate.com/news-and-politics/2017/08/charlottesvilles-monuments-are-unconstitutional.html>.

4. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 616 (5th ed. 1984).

5. William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942).

6. KEETON ET AL., *supra* note 4, at 617.

public roadway, the discharge of waste in a river, or the permeation of a noxious odor. However, the broad nature of a public nuisance claim affords plaintiffs the ability to exploit the doctrine in new and unprecedented ways outside the scope of its traditional context. In order to put an end to public nuisances, local governments and private individuals may seek injunctions to either enjoin or abate the nuisance.<sup>7</sup> While the states attempting to remove Confederate monuments evoke the term “public nuisance,” their court filings are notably silent as to the application of the common law elements.

This Article proposes that the doctrine of public nuisance may be utilized as an alternative avenue for plaintiffs to remove Confederate statues in public spaces. Confederate monuments are hotbeds for widespread unrest and community tension and, as a result, are risks to public health and safety. The introduction offers a historical overview of Confederate monuments and elucidate the questionable origin of these objects. The emergence of the controversy surrounding these objects will be explored at length in Part I. Part II will provide a summary of public nuisance law generally and will illuminate the obstacles plaintiffs will necessarily need to overcome in order to successfully abate actionable conduct. Part III discusses the current legal challenges that localities have endured in the use of the public nuisance doctrine. Part IV provides a roadmap for how communities may use a claim of public nuisance to remove Confederate monuments and further argues that Confederate monuments are detrimental to their respective local communities.

The memorialization of the Confederacy, slavery, and the subordination of Black Americans through Confederate monuments has been the cause of cultural trauma to an entire class of litigants. These litigants have long struggled “for the right to be seen and heard as equals in social conditions that sought to deny it.”<sup>8</sup> The removal of Confederate monuments is just one step in commencing a healing of the deep wounds that continue to fester within many citizens in the United States.

## I. CONFEDERATE MONUMENTS: HISTORY AND CONTROVERSY

According to a 2019 report conducted by the Southern Poverty Law Center, there are approximately 1,747 Confederate monuments, place names, and other symbols in public spaces across the United States.<sup>9</sup> Confederate monuments are those objects devoted to the soldiers and supporters of the Confederate States of

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7. See e.g., Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 949 (2007) (examining public nuisance through the lead paint controversy).

8. Ron Eyerman, *Cultural Trauma: Slavery and the Formation of African American Identity*, in CULTURAL TRAUMA AND COLLECTIVE IDENTITY 60, 73 (Jeffrey C. Alexander et al. eds., 2004).

9. S. POVERTY L. CTR., WHOSE HERITAGE? PUBLIC SYMBOLS OF THE CONFEDERACY (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-Confederacy>.

America (the “Confederacy”) during the American Civil War.<sup>10</sup> The Confederacy—the defeated insurgency of the Civil War—sought to protect the existence of slavery in the United States, and was founded on a premise extolling white supremacy.<sup>11</sup> Understandably, the presence of Confederate monuments in the United States often engenders impassioned debate among scholars, historians, and laypeople. Accordingly, to evaluate how nuisance law may be utilized in the effort to remove Confederate monuments, it is imperative to understand the history, symbolism, and controversy surrounding their conception.

#### A. The false narrative: History and symbolism of Confederate monuments

The competing narratives about the history and legacy of the Civil War have produced a deluge of falsehoods about the “Lost Cause,” which in turn have influenced the rhetoric of arguments surrounding this controversy. The central tenets of the Lost Cause contend (1) the Confederacy’s fundamental goal was to protect states’ rights and not slavery; (2) enslaved people were content in their station and the Civil War and subsequent Reconstruction upset a natural racial hierarchy; and (3) Confederates were among the greatest soldiers in history and they were defeated only because of lack of manpower and resources.<sup>12</sup> The perpetuated falsehoods, often regarding the Civil War, the nature of slavery, and racism in the United States, serve as part of what one historian deems “a carefully fabricated version of southern history.”<sup>13</sup> The constructed narrative relied on propaganda that the Confederacy “fought a heroic struggle not for slavery but for liberty, defined as the right of states to self-determination.”<sup>14</sup> This mythical reconstruction allowed Confederates to be seen as patriots, as opposed to traitors, and provides a foundation for the arguments in favor of the display of monuments in their honor.<sup>15</sup>

One common misconception is that Confederate monuments were erected shortly after the Civil War to commemorate the large number of lives that were lost.<sup>16</sup> According to Confederate Vice President Alexander H. Stephens, the basic

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10. Ellen Hunt, *What Is a Confederate Monument?: An Examination of Confederate Monuments in the Context of the Compelled Speech and Government Speech Doctrines*, 37 MINN. J. L. & INEQ. 423, 425 (2019). Philosopher George Schedler defines a Confederate monument as “a marker or statue which uses its inscription, imagery, or symbols to refer with approval or reverence to the Confederacy or to some person, even, or doctrine closely identified with the Confederacy.” George Schedler, *Are Confederate Monuments Racist?*, 15 INT’L J. APPLIED PHIL. 287, 288 (2001). “Minimally, a monument is either a marker with an inscription or a statue with no inscription designed to recall with affection or at least with approval something or some person.” *Id.*

11. S. POVERTY L. CTR., *supra* note 9.

12. ADAM H. DOMBY, *THE FALSE CAUSE: FRAUD, FABRICATION, AND WHITE SUPREMACY IN CONFEDERATE MEMORY* 10 (2020) (ebook).

13. JAMES C. COBB, *AWAY DOWN SOUTH: A HISTORY OF SOUTHERN IDENTITY* 317 (2005).

14. DOMBY, *supra* note 12, at 11.

15. *See id.* at 10.

16. Jess R. Phelps & Jessica Owley, *Etched in Stone: Historic Preservation Law and*

premise of the insurgent and rebellious Confederacy was “the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition.”<sup>17</sup> Shortly after the Civil War, “Americans on both sides erected monuments to remember lost loved ones,” but most Confederate monuments were erected after 1889.<sup>18</sup> Between 1890 and 1924, former-Confederates-turned-governmental leaders began to propagate the falsehoods connected with the core tenets of the Lost Cause.<sup>19</sup> This allowed supporters to find legitimate means to celebrate white supremacy and to immortalize Confederate soldiers on monuments. In the 1880s, Confederate memorialization moved from cemeteries to more prominent settings, such as courthouses, city halls, parks, and other public spaces.<sup>20</sup>

The United Daughters of the Confederacy (“UDC”) performed what modern historian Karen Cox called a role of “vindication” of the Confederacy and the validity of the Lost Cause.<sup>21</sup> In the late nineteenth and early twentieth centuries, the organization and others like it began to fundraise, lobby, and subsequently construct monuments to proliferate the fabricated history of the Confederacy.<sup>22</sup> These monuments further provided ex-Confederates with a “means to celebrate white supremacy through the presentation of Confederate soldiers as an epitome of white masculinity” while “justifying and defending white hegemonic control of southern politics.”<sup>23</sup> Their creation and proliferation of “Confederate culture” controlled the collective memory of the “Old South” until the rise of the modern Civil Rights movement.<sup>24</sup>

Most existing Confederate monuments were constructed alongside the

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*Confederate Monuments*, 71 FLA. L. REV. 627, 632 (2019). The Civil War is considered the deadliest war to occur on U.S. soil, mainly due to its immense death toll. *Id.* The number of lives lost far exceeds American losses in any other war, by gross number and percentage of the population. *Id.*

17. S. POVERTY L. CTR., *supra* note 9.

18. *Id.* at 7; Phelps & Owley, *supra* note 16, at 633-34. The earliest Confederate monuments were erected in the aftermath of the Civil War. They were placed in cemeteries to commemorate fallen soldiers. Similar monuments were erected in the North to honor Union soldiers. Their meaning, however, changed shortly thereafter. KAREN L. COX, *DIXIE’S DAUGHTERS: THE UNITED DAUGHTERS OF THE CONFEDERACY AND THE PRESERVATION OF CONFEDERATE CULTURE* 1563 (2019).

19. DOMBY, *supra* note 12, at 26.

20. Jane Turner Censer, *Confederate Memorials: Their Past and Futures*, in *CONFEDERATE STATUES AND MEMORIALIZATION* 57, 58 (Catherine Clinton ed., 2019) (ebook).

21. COX, *supra* note 18.

22. The United Daughters of the Confederacy (“UDC”) were much more effective fundraisers than their male counterparts, the United Confederate Veterans and the Sons of the Confederate Veterans, who played only minor roles. The campaigns to build the monuments were predominately the efforts of the UDC. They chose the type of monument, decided where to place it, raised the money to build it, and organized the celebration of the unveiling. COX, *supra* note 18, at 1343.

23. DOMBY, *supra* note 12, at 26.

24. “Confederate culture” is a term used to describe the ideas and symbols of the Lost Cause and what the devotees associated with the Confederacy. COX, *supra* note 18, at xii. The imagery and beliefs part of this culture depended on the belief in the hierarchy of the races. *Id.*

promulgation of racist Jim Crow laws and the horrific practice of lynching.<sup>25</sup> Unlike those erected in the direct aftermath of the Civil War, these monuments served a markedly larger purpose: to uphold the political and cultural values of the former Confederacy. By placing imposing monuments in public spaces of importance, the UDC in particular desired to communicate a public statement celebrating white supremacy and racial segregation.<sup>26</sup> After *Plessy v. Ferguson* in 1896,<sup>27</sup> which upheld state segregation laws and marked the start of the Jim Crow era, hundreds of new Confederate monuments were erected.<sup>28</sup> *Plessy* appeared to validate Confederate values. These monuments recognized the Confederate soldiers as American heroes, as opposed to exclusively Confederate heroes. Their erection served as a redemption of the Lost Cause and the men that served it, reclaiming both as part of the American legacy. For this reason, these monuments were used as instruments to glorify Confederate leaders such as Robert E. Lee, Jefferson Davis, and General Thomas “Stonewall” Jackson.

The normalization of this slanted and seemingly positive view of the Lost Cause served “as part of a larger project to celebrate the success of white supremacy, remind the public of the proper order of things, maintain white racial unity, and cement white control in the South’s politics and upon the landscape.”<sup>29</sup> The Confederate monument boom resurrected during the Civil Rights era as a direct response to the Supreme Court’s decision in *Brown v. Board of Education*,<sup>30</sup> the assassination of Dr. Martin Luther King Jr., and the enactment of important civil rights laws.<sup>31</sup> During this time, forty-five monuments were erected or rededicated, similar to the number of monuments erected in the immediate aftermath of the Civil War.<sup>32</sup> Many historic Civil War sites generally cater to white audiences, notably ignoring the inextricable aspects of slavery and the prominence of Black troops in the Civil War.<sup>33</sup> Even at Gettysburg, one of the

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25. RYAN ANDREW NEWSON, CUT IN STONE: CONFEDERATE MONUMENTS AND THEOLOGICAL DISRUPTION 22 (2020).

26. COX, *supra* note 18, at xiii.

27. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the constitutionality of racial segregation under the “separate but equal” doctrine).

28. Hunt, *supra* note 10, at 426.

29. DOMBY, *supra* note 12, at 19; see also Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079, 1084-85 (1995) (discussing the memorialization of confederate figures on Richmond’s Monument Avenue).

30. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (finding that “separate but equal” educational facilities for racial minorities violate the Equal Protection Clause of the Fourteenth Amendment).

31. These important civil rights laws include the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (prohibiting discrimination in public accommodations), Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (suspending literacy tests for voting), and Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968) (prohibiting discrimination in housing).

32. Hunt, *supra* note 10, at 426.

33. Lori Holyfield & Clifford Beacham, *Memory Brokers, Shameful Pasts, and Civil War Commemoration*, 42 J. BLACK STUD. 436, 443 (2011). Instead, Black Americans had to

most well-known Civil War sites, park officials acknowledge that visitors will find scant information about slavery, the true causes for the war, or the role of Black soldiers in the Civil War.<sup>34</sup>

Given the complexity behind the construction of these monuments, it is impossible to separate the historical context from their ideological purpose. While proponents tout the historical significance of these objects, they willfully ignore that the groups responsible for their construction have ties to the Ku Klux Klan.<sup>35</sup> Similarly, these objects were constructed while the ideology of white supremacy and the Ku Klux Klan gained popularity in the South.<sup>36</sup> Jane Dailey, an associate professor of history at the University of Chicago, affirmed that “[m]ost of the people who were involved in erecting the monuments were not necessarily erecting a monument to the past . . . . But were rather, erecting them toward a white supremacist future.”<sup>37</sup> Despite this well-documented history, historical markers associated with Confederate monuments continue to promote a false narrative, extolling the heroism of Confederate soldiers. Indeed, since 2000, more than thirty-four Confederate monuments have been dedicated.<sup>38</sup> Accordingly, the preservation of these Confederate monuments will only serve to continue the ubiquity of this false narrative.

#### B. Death & destruction: The controversy over Confederate monuments

On June 17, 2015, a white supremacist gunman opened fire on a prayer service at Emanuel African Methodist Episcopal Church in Charleston, South Carolina, killing nine people.<sup>39</sup> Every single victim of the massacre was Black.<sup>40</sup> In the gunman’s confession, he told authorities that he desired to start a “race war.”<sup>41</sup> After the massacre, authorities found the gunman’s personal website, where he had published a 2,500-word manifesto endorsing the inferiority of

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create their own commemorations to Abolitionist causes, including Juneteenth. *Id.*

34. *Id.* at 444.

35. Phelps & Owley, *supra* note 16, at 637.

36. Blake Newman, Note, *America’s Scarlet Letter: How International Law Supports the Removal and Preservation of Confederate Monuments as World Heritage of America’s Discriminatory History*, 26 SW. J. INT’L L. 147, 148 (2020).

37. Miles Parks, *Confederate Statues Were Built to Further a ‘White Supremacist Future,’* NPR (Aug. 20, 2017), <https://www.npr.org/2017/08/20/544266880/Confederate-statues-were-built-to-further-a-white-supremacist-future>.

38. S. POVERTY L. CTR., *supra* note 9.

39. Jason Horowitz et al., *Nine Killed in Shooting at Black Church in Charleston*, N.Y. TIMES (June 17, 2015), <https://www.nytimes.com/2015/06/18/us/church-attacked-in-charleston-south-carolina.html>; Alan Blinder & Kevin Sack, *Dylann Roof Is Sentenced to Death in Charleston Church Massacre*, N.Y. TIMES (Jan. 10, 2017), <https://www.nytimes.com/2017/01/10/us/dylann-roof-trial-charleston.html>.

40. *Id.*

41. Polly Mosendz, *Dylann Roof Confesses: Says He Wanted to Start a ‘Race War,’* NEWSWEEK (June 19, 2015), <https://www.newsweek.com/dylann-roof-confesses-church-shooting-says-he-wanted-start-race-war-344797>.

Black people and criticizing the cowardice of white flight.<sup>42</sup> A proud white supremacist, the gunman showed an obsession with Confederate heritage, posting voluminous photographs of himself with the Confederate flag and at Confederate heritage sites and slavery museums.<sup>43</sup>

After the horrific event at the Emanuel African Methodist Episcopal Church, Confederate symbols that still peppered the Southern landscape came under intense scrutiny. Many states took action to remove the Confederate flag from public places.<sup>44</sup> The debates over Confederate imagery and monuments were not particularly new. However, the violence in the wake of the massacre posed the following question: “Why, in the year 2015, should communal spaces in the South continue to be sullied by tributes to those who defended slavery?”<sup>45</sup> With a lack of legislative action, activists began to take matters into their own hands, vandalizing statues with spray-painted messages like “Black Lives Matter.”<sup>46</sup>

In the wake of the attack, the Southern Poverty Law Center found at least 114 instances of removal of Confederate monuments, symbols, and names from public spaces.<sup>47</sup> However, Southern States were reluctant to see symbols of their “heritage” taken down. To this end, many states tightened their restrictions on any removals of Confederate monuments. For example, in July 2015, only one month after the Charleston massacre, North Carolina enacted a law to protect Confederate monuments.<sup>48</sup> Governor Pat McCrory defended the law by advancing the notion that “[t]he protection of our heritage is a matter of statewide significance to ensure that our rich history will always be preserved and remembered for generations to come.”<sup>49</sup> In the six months following the Charleston

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42. Frances Robles, *Dylann Roof Photos and a Manifesto Are Posted on Website*, N.Y. TIMES (June 20, 2015), <https://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html>.

43. *Id.*

44. See Stephanie McCrummen & Elahe Izadi, *Confederate Flag Comes Down on South Carolina's Statehouse Grounds*, WASH. POST (July 10, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/07/10/watch-live-as-the-confederate-flag-comes-down-in-south-carolina/>; Krishnadev Calamur, *Alabama Governor Orders Removal of Confederate Flags from Capitol*, NPR (June 24, 2015), <https://www.npr.org/sections/thetwo-way/2015/06/24/417162233/alabama-governor-orders-removal-of-confederate-flags-from-capitol>.

45. Ethan J. Kytly & Blain Roberts, *Take Down the Confederate Flags, but Not the Monuments*, ATLANTIC (June 25, 2015), <https://www.theatlantic.com/politics/archive/2015/06/confederate-monuments-flags-south-carolina/396836>.

46. For example, in a park near the Emanuel African Methodist Episcopal Church, someone spray-painted “RACIST” and other messages onto a statue of John C. Calhoun. Peter Holley, *‘Black Lives Matter’ Graffiti Appears on Confederate Memorials Across the U.S.*, WASH. POST (June 23, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/06/23/black-lives-matter-graffiti-appears-on-confederate-memorials-across-the-u-s>.

47. S. POVERTY L. CTR., *supra* note 9.

48. See Cultural History Artifact Management and Patriotism Act of 2015, ch. 170, 2015 N.C. SB 22 (codified as amended at N.C. GEN. STAT. §§ 100-2, 100-2.1, 144-5, 144-9, 147-36, 160A-400.13 (2015)) [hereinafter “North Carolina Heritage Protection Act”].

49. S. POVERTY L. CTR., *supra* note 9.

massacre, supporters across the country held over 350 rallies in support of Confederate symbols.<sup>50</sup>

The battle over Confederate monuments came to a head in 2017 in Charlottesville, Virginia, with one of the largest white supremacist rallies in decades.<sup>51</sup> The rally was a response to a planned removal by the City Council of a Robert E. Lee statue in Emancipation Park (formerly named “Lee Park”).<sup>52</sup> The so-called “Unite the Right Rally” included protestors from the far-right, including white supremacists, Klansmen, and neo-Nazis, many of whom chanted racist and anti-Semitic epithets and carried Confederate and Nazi symbols.<sup>53</sup> The protestors gathered at the very monument of their idealization, evidently expressing unequivocal support for white supremacy, slavery, and segregation. The event turned fatal when one white supremacist rammed his car into a crowd of counter-protesters, killing one person and injuring dozens.<sup>54</sup> The extent to which these radical far-right protestors went to protect Confederate imagery reignited the call by even more advocates to remove Confederate monuments.<sup>55</sup>

The violent attacks that occurred in Charleston and Charlottesville provoked communities to reexamine how Confederate monuments, symbols, and names “fit” into their public spaces. As a consequence of these violent attacks, more people have started to question the false narrative of the Lost Cause, and instead, acknowledge these monuments as symbols of this country’s history of racism and oppression. It is well-documented by historians that these monuments were erected to convey a message of white power and Black inferiority.<sup>56</sup> Rightfully, proponents argue that the removal of Confederate monuments is necessary to condemn white supremacy and erase the revisionist history of the Lost Cause.<sup>57</sup>

50. *Id.*

51. *Id.*; Joel Gunter, *A Reckoning in Charlottesville*, BBC NEWS (Aug. 13, 2017), <https://www.bbc.com/news/world-us-canada-40914748>.

52. S. POVERTY L. CTR., *supra* note 9; Gunter, *supra* note 51.

53. *Id.*

54. Laurel Wamsley & Bobby Allyn, *Neo-Nazi Who Killed Charlottesville Protester Is Sentenced to Life in Prison*, NPR (June 28, 2019), <https://www.npr.org/2019/06/28/736915323/neo-nazi-who-killed-charlottesville-protester-is-sentenced-to-life-in-prison>.

55. See Maya Yang & Oliverr Milman, *Charlottesville Removes Confederate Statues that Helped Spark Deadly Rally*, GUARDIAN (July 10, 2017), <https://www.theguardian.com/us-news/2017/jul/10/charlottesville-statue-;> Kelly Swanson, *After Charlottesville, more cities are moving to take down Confederate monuments*, VOX (Aug. 14, 2017) <https://www.vox.com/policy-and-politics/2017/8/14/16145038/baltimore-lexington-remove-confederate-statues-monuments>.

56. See, e.g., Amy Greenberg et al., *Historians: ‘Defending History’ Is Complicated in the US*, CNN (Aug. 19, 2017), <https://www.cnn.com/2017/08/19/opinions/historians-confederate-statues-opinion-roundup/index.html>; Perrone, *Confederate Monuments Always Embodied a White Heritage of Hate*, HAARETZ (Aug. 17, 2017), <https://www.haaretz.com/us-news/confederate-monuments-always-embodied-heritage-of-hate-1.5442691>. For further reading on the historical reasoning behind taking down Confederate monuments, see Yoni Appelbaum, *Take the Statues Down*, ATLANTIC (Aug. 13, 2017), <https://www.theatlantic.com/politics/archive/2017/08/take-the-statues-down/536727>.

57. See S. POVERTY L. CTR., *supra* note 9.

Prominent political leaders have endorsed this stance, calling for the removal of Confederate monuments from the U.S. Capitol and around the country. For example, Representative Barbara Lee, a senior member of the Congressional Black Caucus, reintroduced legislation in 2020 to remove statues from the Capitol, explaining that “Confederate statues and monuments still pay tribute to white supremacy and slavery in public spaces . . . . It is time to tell the truth about what these statues are: hateful symbols that have no place in our society and certainly should not be enshrined in the U.S. Capitol.”<sup>58</sup> According to a 2020 Quinnipiac University poll, most Americans agree that these monuments should be removed.<sup>59</sup>

However, ardent voices continue to oppose the removal of Confederate monuments. Indeed, some of the nation’s highest leaders sympathize with their cause.<sup>60</sup> Monument defenders argue that these objects are historically important and that removal of them is akin to erasure of history.<sup>61</sup> Others have taken a more extreme approach, comparing the removal of Confederate monuments to that of the iconoclastic work of ISIS militants or WWII-era Nazis.<sup>62</sup> Since 2017, with the reignition of this debate, opponents have become seemingly more protective of the preservation of these monuments. Legislatures in many former Confederate states have enacted restrictive statutes to prevent cities and counties from removing monuments without permission from respective state agencies.<sup>63</sup> In 2017, former President Trump opposed the effort to take down Confederate monuments, writing: “Sad to see the history and culture of our great country being ripped apart with the removal of our beautiful statues and monuments.”<sup>64</sup> In

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58. Benjamin Siegel, *Democrats Push to Remove Confederate Statues from US Capitol After George Floyd’s Death*, ABC NEWS (June 9, 2020), <https://abcnews.go.com/Politics/democrats-push-remove-Confederate-statues-us-capitol-george/story?id=71140758>.

59. *68% Say Discrimination Against Black Americans a “Serious Problem,” Quinnipiac University National Poll Finds; Slight Majority Support Removing Confederate Statues*, QUINNIPAC UNIV. POLL (June 17, 2020), [https://poll.qu.edu/images/polling/us/us06172020\\_unob16.pdf](https://poll.qu.edu/images/polling/us/us06172020_unob16.pdf).

60. See e.g., Savannah Behrmann & Ledyard King, *House Passes Bill to Remove Confederate Statues from Capitol*, USA TODAY (June 29, 2021), <https://www.usatoday.com/story/news/politics/2021/06/29/confederate-statues-would-removed-under-house-bill-going-vote/5371156001> (quoting Minority Leader Mitch McConnell, who said in 2020, “What I do think is clearly a bridge too far is this nonsense that we need to airbrush the Capitol and scrub out everybody from years ago who had any connection to slavery.”).

61. See John Daniel Davidson, *Why We Should Keep the Confederate Monuments Right Where They Are*, FEDERALIST (Aug. 18, 2017), <https://thefederalist.com/2017/08/18/in-defense-of-the-monuments>.

62. See Jason Berry, *Removal of Confederate Monuments Compared to ISIS*, DAILY BEAST (June 26, 2017), <https://www.thedailybeast.com/removal-of-confederate-monuments-compared-to-isis>.

63. For example, in 2017, Alabama enacted the Alabama Memorial Preservation Act, which prohibits local governments from removing, relocating, altering, or renaming monuments more than 40 years old absent permission. Alabama Stat. 41-9-230 Alabama Memorial Preservation Act of 2017, 2017 Ala. SB 60 (codified as CODE OF ALA. §§ 41-9-230–41-9-237 (2017)).

64. Siegel, *supra* note 58.

2020, the White House seemingly memorialized its stance by putting forth an Executive Order, stating that it was federal policy to prosecute anyone who “destroys, damages, vandalizes, or desecrates a monument, memorial, or statue within the United States” under the fullest extent of the law.<sup>65</sup>

The emotions spurred by the debate over removal of Confederate monuments only further exemplify the need to find a solution for their disposal. As illustrated by the onset of violence in Charleston and Charlottesville, the presence of Confederate monuments poses a risk to the country’s public health and safety, while simultaneously dehumanizing an entire class of citizens. Accordingly, the law of public nuisance is an appropriate vehicle to legally and effectively remove Confederate monuments from public spaces.

## II. THE GOVERNMENTAL APPROACH: LOCALITIES USING PUBLIC NUISANCE FOR REMOVAL OF CONFEDERATE MONUMENTS

As articulated in Part I, the controversy surrounding Confederate monuments is not a recent phenomenon. However, as radical white supremacy emerges from the shadows, the national conversation surrounding the exhibition of Confederate symbolism continues to develop nationwide. The murder of nine African Americans in a church in Charleston by a white supremacist, the events of Charlottesville, and of course, the deaths of George Floyd, Breonna Taylor, and numerous other innocent Black citizens have forcefully reignited a desire, among certain localities, to reexamine their public statuary. The national attention garnered by these horrific events served as a catalyst for debate on whether monuments to the Confederacy should remain *in situ* or whether they should be removed, destroyed, or re-contextualized. With the renewed call for police reform and social justice, the existence of Confederate monuments around the country continued to stain the efforts of communities to heal the fissures of a divided nation.

States and localities took action using public nuisance as a way to counteract the presence of Confederate monuments. Some localities have used public nuisance to successfully remove Confederate monuments that were positioned in prominent areas around cities and town centers. The successful measures implemented by some of these states and regions demonstrate that public nuisance may be an appropriate avenue for various state and local governments to remove these statues. However, laws throughout the South have frustrated efforts of many local governments to remove statues, monuments, and other markers from public view.<sup>66</sup> Accordingly, many communities attempting to remove these symbols of

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65. Exec. Order No. 13,933, 85 Fed. Reg. 40,081 (June 26, 2020). The Executive Order does not directly single out Confederate monuments. However, the Order does denounce those who “advance a fringe ideology that paints the United States of America as fundamentally unjust.” *Id.* at 40,081.

66. For a review of the legislative history of many of these monument protection statutes, see Zachary Bray, *We Are All Growing Old Together: Making Sense of America’s Monument-Protection Laws*, 61 WM. & MARY L. REV. 1259 (2020).

oppression were met with opposition, resulting in acrimonious litigation.

#### A. Louisiana

In 2015, New Orleans Mayor Mitch Landrieu drew stark criticisms for his call to discuss the potential removal of a statue of Robert E. Lee from its seat in the center of Lee Circle, a statue of Jefferson Davis on Jefferson Davis Parkway, the PGT Beauregard equestrian statue at the entrance to City Park, and the monument of the Battle of Liberty Place on Iberville Street.<sup>67</sup> As New Orleans is a majority African-American city, these monuments served as a continuous memory of past injustices. On September 28, 2016, members of “Take ‘em Down NOLA,” an organization fighting racial injustice, issued a statement articulating the pain that symbols of white supremacy brings to the Black and Brown people of New Orleans:

[T]he system protects monuments, but has no regard for proactively, consistently protecting Black lives . . . in a predominately Black city. Under these circumstances, it is a slap in the face of all people who believe in equity and justice . . .<sup>68</sup>

Landrieu formally requested that the city council remove all four monuments, relying on a 1993 ordinance authorizing the city council to declare monuments “nuisances” and to have them removed.<sup>69</sup> In particular, the ordinance declares that monuments, statues, plaques, or other structures may be considered a “nuisance” if they: (1) honor or foster ideologies that promote racial supremacy; (2) have been or may become the site of violent demonstrations or other threats to life or property; and (3) are unjustifiably expensive.<sup>70</sup>

The council must hold a public hearing and seek advice from various New Orleans agencies regarding whether the monuments should be deemed a nuisance and removed from public property.<sup>71</sup> If the object is declared a “nuisance,” then it may be removed from public display and disposed of in a manner defined under the ordinance.<sup>72</sup>

After receiving comments and recommendations for the removal of the statues from the Historic District Landmarks Commission,<sup>73</sup> the Human Relations

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67. Robert McClendon, *Mitch Landrieu Invokes Public ‘Nuisance’ Ordinance for Confederate Monuments*, TIMES-PICAYUNE (July 18, 2019), [https://www.nola.com/news/politics/article\\_7ce07b64-c1f9-501c-8909-8b8b62934023.html](https://www.nola.com/news/politics/article_7ce07b64-c1f9-501c-8909-8b8b62934023.html).

68. Public Statement, *Take ‘Em Down NOLA, Take ‘Em Down Action* (Sept. 28, 2016), <https://www.takeemdownnola.org/updates/2016/9/28/take-em-down-nola-take-em-down-action-public-statement>.

69. McClendon, *supra* note 67.

70. New Orleans, La., Code of Ordinances § 146-611(b) (1995).

71. *Id.* § 146-611(d).

72. *Id.* (“The thing removed may then be displayed indoors at an appropriate facility, such as a museum or stored, donated (if it has no monetary value) or otherwise disposed of in accordance with provisions of law.”).

73. The Historic District Landmarks Commission voted 11-1 to recommend removal of

Commission,<sup>74</sup> and various public officials,<sup>75</sup> in December 2015, the city council voted 6-1 to remove the statues in question.<sup>76</sup> Shortly thereafter, three preservation groups and a chapter of the Sons of Confederate Veterans requested injunctive relief against Mayor Landrieu and the City of New Orleans, demanding that the four Confederate statues be barred from removal, destruction, or otherwise moved in any way from their original places.<sup>77</sup> The plaintiffs also maintained that the removal of the statues constituted a violation of various federal statutes designed to protect historic sites, including the Department of Transportation Act,<sup>78</sup> the Veterans Memorial Preservation and Recognition Act,<sup>79</sup> and the National Historic Preservation Act,<sup>80</sup> as well as violations of the United States Constitution, the Louisiana Constitution, and state law.<sup>81</sup>

The U.S. District Court for the Eastern District of Louisiana denied the plaintiffs' motions for injunctive relief. The Eastern District of Louisiana confirmed that the plaintiffs failed to demonstrate a likelihood of success on the merits for any of their claims. In particular, the court emphasized that there were "emotion and passions" embroiled in this case.<sup>82</sup> However, the court's job was not to act

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each monument. *See Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 581 (E.D. La. 2016).

74. The Human Relations Commission also voted to recommend removal of the monuments. *Id.*

75. For example, the City Attorney observed that the monuments were inconsistent with constitutional principles of equal protection and further constituted a nuisance. *Id.* at 581. The Police Superintendent Michael Harrison affirmed that the sites had been the location of criminal activity and violent protest. *Id.* "The Director of Property Management advised the City Council that the City had spent several thousand dollars removing graffiti from the monuments in 2015" alone. *Id.*

76. Christopher Mele, *New Orleans Begins Removing Confederate Monuments, Under Police Guard*, N.Y. TIMES (Apr. 24, 2017), <https://www.nytimes.com/2017/04/24/us/new-orleans-confederate-statue.html>.

77. Complaint at 1, *Monumental Task Comm., Inc.* 157 F. Supp. 3d 573 (No. 2:15-cv-06905).

78. Plaintiffs claim that the Federal Defendants violated the Department of Transportation Act ("DOT Act") by failing to conduct a section 4(f) analysis of the effect of the totality of the streetcar network in New Orleans on the monuments. *Id.* at 18-19. The provision of the DOT Act declares it to be the national policy of the United States that there must be a special effort made to preserve the natural beauty of the countryside, including historic sites. 49 U.S.C. § 303 (2020).

79. The Veterans Memorial Preservation and Recognition Act ("VMPRA") makes it a crime to willfully injure or destroy any monument on public property commemorating the service of any person in the armed forces of the United States if, in committing the offense, the defendant uses an instrumentality of interstate or foreign commerce, or if the monument is located on property owned by, or under the jurisdiction of, the federal government. 18 U.S.C. § 1369 (2020).

80. Pursuant to 54 U.S.C. § 306108 (2020), federal agencies are obligated to assess and take into account the effect of proposed federal or federally assisted "undertakings" on historic property.

81. Complaint at 33-47, *Monumental Task Comm., Inc.*, 157 F. Supp. 3d 573 (No. 2:15-cv-06905).

82. *Monumental Task Comm., Inc.*, 157 F. Supp. 3d at 605.

as a political body.<sup>83</sup> The plaintiffs appealed to the Fifth Circuit and were likewise unsuccessful. The Fifth Circuit similarly did not opine on the merits of the removal, instead affirming:

We do not pass on the wisdom of this local legislature’s policy determination, nor do we suggest how states and their respective political subdivisions should or should not memorialize, preserve, and acknowledge their distinct histories. Wise or unwise, the ultimate determination made here, by all accounts, followed a robust democratic process. Appellants here have failed to put forward even a prima facie showing in support of their two claims that this federal court must interfere with this local political process, which required consideration of heated and disagreeing viewpoints.<sup>84</sup>

The courts’ decisions paved a way for the four Confederate monuments to be removed in the Spring of 2017.

While the monuments’ removal was met with demonstrations by protestors for and against them, the legality of such removal was validated by the courts’ decisions. These decisions epitomize the ordinance’s goal—to remove the nuisance from the public space. After the courts’ decisions and the ensuing removals, the lingering question remained: What should be done with the tainted statues to avoid further nuisance? The statues are currently housed in a city storage facility,<sup>85</sup> with plans to store and preserve them until an “appropriate” place to display them is determined.<sup>86</sup>

## B. Maryland

In Baltimore, Maryland, a similar controversy erupted over the removal of three Confederate monuments and a statue of Chief Justice Roger Taney, who authored the majority opinion in *Dred Scott v. Sandford*.<sup>87</sup> The contentious conversation over symbols of the Confederacy necessitated then-Mayor Stephanie Rawlings-Blake to commission a task force to determine what to do with the

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83. *Id.*

84. Monumental Task Comm., Inc. v. Chao, 678 F. App’x 250, 252 (5th Cir. 2017).

85. *Confederate-Monument Removals Slowed by Knot of Legal Issues*, AM. BAR ASS’N (Dec. 2019), <https://www.americanbar.org/news/abanews/publications/youraba/2019/december-2019/efforts-to-remove-confederate-monuments-slowed-by-knot-of-legal/>.

86. *New Orleans Starts Tearing Down Confederate Monuments, Sparking Protest*, NBC NEWS (Apr. 24, 2016), <https://www.nbcnews.com/news/us-news/new-orleans-starts-taking-down-confederate-monuments-sparking-vigils-n750036>.

87. The monuments included a Lee-Jackson Monument, a monument to Chief Justice Roger B. Taney at Mount Vernon Place, the Confederate Soldiers and Sailors Monument on Mount Royal Avenue and the Confederate Women’s Monument on West University Parkway. Colin Campbell & Luke Broadwater, *Citing ‘Safety and Security,’ Pugh Has Baltimore Confederate Monuments Taken Down*, BALTIMORE SUN (Aug. 16, 2017), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-monuments-removed-20170816-story.html>.

monuments.<sup>88</sup> While Maryland never seceded from the Union during the Civil War, there was still widespread support for the Confederacy in Baltimore and southern parts of the state.<sup>89</sup> Located in a city with a predominantly Black community, these monuments served as an oppressive connection to slavery and the Confederacy.

After the events of Charlottesville, the Baltimore City Council unanimously passed a resolution calling for the removal of all four statues.<sup>90</sup> Mayor Catherine Pugh cited public nuisance as the argument for removing the monuments. Pugh cited “safety and security” of the city as the rationale for ejecting the Confederate monuments.<sup>91</sup> Unlike New Orleans, Baltimore provided no public notice, no fundraising efforts, and no plans for the monuments’ permanent location.<sup>92</sup>

The lack of formalities made many question the legality of these removals. The monuments’ continued presence was of the result of a 1984 contract between the Maryland Historical Trust (MHT) and the City of Baltimore.<sup>93</sup> According to the MHT, the contract gave the MHT final authority over any changes to the monuments.<sup>94</sup> City officials justified their decision to remove the monuments by stating that the city was within its rights to remove the monuments as it was “an emergency”<sup>95</sup> and the statues posed threats to public safety.<sup>96</sup> While no litigation has ensued, the use of “public safety” and “public interests” seemingly worked, politically, as a legal and public policy vehicle to accomplish the removal of these monuments.<sup>97</sup>

### C. North Carolina

In 2015, the Republican-controlled state legislature of North Carolina passed

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88. *Id.*

89. Nicholas Fandos et al., *Baltimore Mayor Had Statues Removed in ‘Best Interest of My City,’* N.Y. TIMES (Aug. 16, 2017), <https://www.nytimes.com/2017/08/16/us/baltimore-confederate-statues.html>.

90. *See* Campbell & Broadwater, *supra* note 87.

91. *Id.*

92. Fandos et al., *supra* note 89.

93. *See* Ian Duncan, *Baltimore Lacked Authority to Take Down Confederate Statues, and State Says It Could—but Won’t—Order Them Restored*, BALTIMORE SUN (Oct. 26, 2017), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-confederate-monuments-letter-20171026-story.html>.

94. *Id.*

95. *Id.*

96. Jean Marbella, *It’s Been a Year Since Baltimore Quietly Took Down Its Confederate Monuments*, WASH. POST (Aug. 18, 2018), [https://www.washingtonpost.com/local/its-been-a-year-since-baltimore-quietly-took-down-its-confederate-monuments/2018/08/18/979cc894-a174-11e8-8e87-c869fe70a721\\_story.html](https://www.washingtonpost.com/local/its-been-a-year-since-baltimore-quietly-took-down-its-confederate-monuments/2018/08/18/979cc894-a174-11e8-8e87-c869fe70a721_story.html) (citing Mayor Catherine Pugh’s statement that she ordered the statues removed because of safety concerns).

97. *But see* Blake Alderman, Comment, *Baltimore’s Monumental Question: Can the Heightened Social Conscience Against The Confederacy Rewrite The Constitutional Right to Due Process?*, 5 U. BALT. J. LAND & DEV. 131 (2016) (addressing the legality of the removal of the Confederate monuments from a constitutional law standpoint).

the Cultural History Artifact Management and Patriotism Act of 2015, prohibiting the removal, relocation, or alteration of any “object of remembrance located on public property.”<sup>98</sup> In order to effectuate any modification or removal of an “object of remembrance,”<sup>99</sup> any entity must seek approval from the North Carolina Historical Commission.<sup>100</sup> The broad language of “public property” essentially eliminates the power of local governments to control their own monuments.<sup>101</sup> The statutory limits on removal, modification, and relocation, however, do not apply to “[a]n object of remembrance that a building inspector or similar official has determined poses a threat to public safety because of an unsafe or dangerous condition.”<sup>102</sup>

Notwithstanding the presence of this restrictive act, in March 2019, the city of Winston-Salem declared a Confederate monument in front of its Historic Forsyth County Courthouse a “public nuisance” and removed it from its resting place.<sup>103</sup> The City alleged that the Forsyth Monument was a threat to public health and safety and its removal was authorized in accordance with Winston-Salem City Code Section § 62-3(c):

[T]he assistant city manager/public works or his authorized representative shall have the authority to summarily remove, abate or remedy everything in the city limits, or within the extraterritorial jurisdiction

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98. See North Carolina Heritage Protection Act, *supra* note 45, § 3.(c). In particular, the Act states:

An object of remembrance that is temporarily relocated shall be returned to its original location within 90 days of completion of the project that required its temporary removal. An object of remembrance that is permanently relocated shall be relocated to a site of similar prominence, honor, visibility, availability, and access that are within the boundaries of the jurisdiction from which it was relocated. An object of remembrance may not be relocated to a museum, cemetery, or mausoleum unless it was originally placed at such a location.

99. As defined in the Act, “the term ‘object of remembrance’ means a monument, memorial, plaque, statue, marker, or display of a permanent character that commemorates an event, a person, or military service that is part of North Carolina’s history.” *Id.*

100. *Id.*

101. Kasi E. Wahlers, *North Carolina’s Heritage Protection Act: Cementing Confederate Monuments in North Carolina’s Landscape*, 94 N.C. L. REV. 2176, 2189 (2016).

102. North Carolina Heritage Protection Act, *supra* note 48, § 3(c).

103. The statue was a monument of a man in Confederate uniform with a rifle on a stone pedestal. The pedestal contained a block with words stating “Our Confederate Dead” in relief. Brief of Plaintiff-Appellant at 4-5, *United Daughters of the Confederacy v. City of Winston-Salem*, 853 S.E.2d 216 (N.C. Ct. App. 2020) (No. COA19-947); see also Jordan Green, *N.C. Ban on Removal of Confederate Monuments is Challenged as Local Councils Continue to Bring Down Statues*, WASH. POST (Nov. 29, 2019), [https://www.washingtonpost.com/national/nc-ban-on-removal-of-confederate-monuments-is-challenged-as-local-councils-continue-to-bring-down-statues/2019/11/29/ab45fe0a-1050-11ea-9cd7-a1becbc82f5e\\_story.html](https://www.washingtonpost.com/national/nc-ban-on-removal-of-confederate-monuments-is-challenged-as-local-councils-continue-to-bring-down-statues/2019/11/29/ab45fe0a-1050-11ea-9cd7-a1becbc82f5e_story.html). In August, Chatham County followed suit, with its Board of Commissioners voting to remove its copper statue from its position in front of a museum. *Id.* However, this decision was not based on the doctrine of public nuisance.

of the city, that is dangerous or prejudicial to the public health or which has been declared to be a nuisance.<sup>104</sup>

As a result of this nuisance declaration and subsequent statue removal, the United Daughters of the Confederacy, which sponsored the monument in the early twentieth century,<sup>105</sup> sued both the City of Winston-Salem and Forsyth County.<sup>106</sup> The complaint alleged that the monument, as an “object of remembrance,” was subject to the provisions of North Carolina’s Cultural History Artifact Management and Patriotism Act and therefore could not be relocated or removed except for under the exceptions delineated in the statute.<sup>107</sup> The lawsuit was dismissed with prejudice for lack of standing to challenge a declaration of the statue as a nuisance.<sup>108</sup>

In August 2019, the UDC appealed to the Court of Appeals, arguing in part taxpayer standing and standing based on ancestry.<sup>109</sup> In its brief, the UDC further claimed that the nuisance must be “an imminent danger to the public health or safety, creating an emergency necessitating the structure’s immediate demolition.”<sup>110</sup> It alleged that there was no evidence to support a finding of a nuisance, stating “[w]hile it is true that there have been two instances in which the monument was spray painted, the paint was easily removed, and there were no instances of violence or another direct threat to public safety.”<sup>111</sup> In its response, the City of Winston-Salem argued that UDC had no standing to challenge “the City’s public nuisance declaration, the process used to declare the Statue a nuisance, or the removal of the Statue.”<sup>112</sup> While litigation is pending, the controversy turns on whether the plaintiff even has a basis to contest whether the statues are against public health and safety, not whether the statues are public nuisances.

Public nuisance has also been cited as a rationale for the removal of Confederate monuments in other parts of North Carolina. In September 2020, the city

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104. Brief of Defendant-Appellee City of Winston-Salem at 9-10, *United Daughters of the Confederacy*, 853 S.E.2d 216.

105. In particular, the Local Chapter of the UDC raised funds for the commission of the statue and erected it on property owned by the county. However, on March 18, 2014, the property on which the statue stood was acquired by a private landowner. The land was previously a courthouse and then converted to private residences. *Id.* at 5.

106. *Id.* at 1.

107. Brief of Plaintiff-Appellant at 11, *United Daughters of the Confederacy*, 853 S.E.2d 216.

108. *United Daughters of the Confederacy*, 853 S.E.2d at 218.

109. Brief of Defendant-Appellee City of Winston-Salem at 21-22, *United Daughters of the Confederacy*, 853 S.E.2d 216.

110. Brief of Plaintiff-Appellant at 17, *United Daughters of the Confederacy*, 853 S.E.2d 216.

111. *Id.* at 18.

112. Brief of Defendant-Appellee City of Winston-Salem at 11, *United Daughters of the Confederacy*, 853 S.E.2d 216.

of Lexington filed a complaint against Davidson County to remove a Confederate monument located in a prominent part of town.<sup>113</sup> The litigation evolved from a dispute between city council members and county commissioners. In July 2020, city council members passed a resolution to relocate the statue, contending that the statue was a threat to public safety due to recent protests.<sup>114</sup> The county commissioners denied that request and declared in an official statement that removal was not warranted.<sup>115</sup> The county commissioners did not find that “a threat to public safety” fell under the limited exceptions enumerated under the statute.<sup>116</sup>

After the county’s failure to remove the statue, the city filed a complaint, calling the Confederate monument a “figurative powder keg” and a “public nuisance” that “must be abated quickly.”<sup>117</sup> In particular, the city claims that the continued exhibition of the monument “poses an imminent threat to public safety; is endangering lives; is dangerous to and has a detrimental effect on the public health, safety and welfare in the City of Lexington and is injuring and causing discomfort to the community at large.”<sup>118</sup> According to the lawsuit, the monument has been a gathering point for white supremacists in the region, specifically for members of the Ku Klux Klan between the 1930s and the 1980s.<sup>119</sup> And in recent years, members of the “Proud Boys” have gathered around the monument.<sup>120</sup>

The City of Lexington and the local UDC chapter subsequently entered into a settlement agreement to allow for the removal of the statue from Lexington’s

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113. See Sharon Myers, *The Man Rises Again: Confederate Statue Removed from Uptown Lexington Finds New Home Near Denton*, DISPATCH (Sept. 22, 2021), <https://www.the-dispatch.com/story/news/2021/09/22/confederate-statue-removed-lexington-installed-denton-nc-davidson-county-civil-war-protests-lawsuit/5796679001>.

114. The statue was erected by the Robert E. Lee Chapter of the Daughters of the Confederacy in 1905. Sharon Myers, *Lexington Files Lawsuit Against Davidson County to Remove Confederate Statue*, DISPATCH (Aug. 19, 2020), <https://www.the-dispatch.com/story/news/crime/2020/08/19/lexington-files-lawsuit-against-davidson-county-remove-Confederate-statue/5604074002>; Grace Holland, *‘This Has Become a Nuisance’: City of Lexington Taking Legal Action Over Confederate Monument*, WCNC (Aug. 13, 2020), <https://www.wcnc.com/article/news/local/lexington-sues-davidson-county-over-Confederate-monument/83-d858afe8-4f12-4412-9003-0eb43c480bdd>.

115. *Id.*

116. Holland, *supra* note 114.

117. Andrew Dye, *Lexington Calls Confederate Monument ‘Figurative Powder Keg’ That Must Be Moved for Public Safety*, GREENSBORO NEWS & REC. (Sept. 30, 2020), [https://greensboro.com/news/local/lexington-calls-Confederate-monument-figurative-powder-keg-that-must-be-moved-for-public-safety/article\\_28380792-033e-11eb-b570-1b143541d789.html](https://greensboro.com/news/local/lexington-calls-Confederate-monument-figurative-powder-keg-that-must-be-moved-for-public-safety/article_28380792-033e-11eb-b570-1b143541d789.html).

118. Myers, *supra* note 114.

119. *Id.*

120. *Id.* The “Proud Boys” are an extremist, far-right group with ties to white supremacy. They have a history of racism and violence. See Joel Shannon, *Who Are the Proud Boys? Far-Right Group Has Concerned Experts for Years*, USA TODAY (Sept. 30, 2020), <https://www.usatoday.com/story/news/nation/2020/09/30/who-proud-boys-group-mentioned-debate-has-violent-history/5868406002>.

city limits, though the county commissioners said they were not involved.<sup>121</sup> The settlement provides, in pertinent part, that the UDC local chapter will “retain possession of the statue and elect where it will go, while the city of Lexington will pay for its removal, delivery, and any reasonable storage costs.”<sup>122</sup>

#### D. Georgia

In 2020, Gwinnett County Solicitor General Brian Whiteside filed a complaint in Gwinnett Superior Court to remove a Confederate monument in Lawrenceville, Georgia.<sup>123</sup> The monument was presented in 1993 by local chapters of the Sons of the Confederate Veterans and the UDC.<sup>124</sup> The complaint states that the monument is an “impetus for protests and rallies; and most importantly, an urgent impending threat to public safety.”<sup>125</sup> It further contends that the community does not want what has become a “figurative powder keg” and as such, relocation of the Confederate monument “will prevent injury and unrest while at the same time protecting and preserving the Monument in compliance—and indeed fulfillment of—Georgia law.”<sup>126</sup> Whiteside effectively argues public nuisance in order to prevent clashes between supporters of Confederate monuments and those who rightfully oppose them.

However, as in North Carolina, complainants in Georgia must overcome statutory obstacles that prevent the removal of Confederate monuments. Georgia’s statute is particularly problematic, as it protects all monuments on public property that honor state, U.S., or Confederate military service.<sup>127</sup> The statute prohibits state and local officials from removing or concealing an applicable monument with the intent to prevent its display on public property.<sup>128</sup> Standing under the statute is also incredibly broad for removal of monuments on private land, allowing “any person or entity who suffers injury or damages” as a result of removal, relocation, or obscurement to bring an action against “the person or persons committing such violations to seek to recover general and exemplary damages sustained as a result of such person’s or persons’ unlawful actions.”<sup>129</sup> Georgia’s statute does not specify any exceptions for public health and safety, even upon review of a state agency.<sup>130</sup>

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121. Chris Venzon, *Lexington to Move Confederate Monument ‘Without Delay,’* WFMY NEWS2 (Oct. 15, 2020),

<https://www.wfmynews2.com/article/news/local/Confederate-statue-lexington-remove-relocate/83-09586684-6246-434c-a1de-fddeb8cdd5e9>.

122. *Id.*

123. Complaint, *Whiteside v. Gwinnett County*, No. 20-A-04424-2 (Ga. Super. Ct. June 30, 2020).

124. *Id.* at 1.

125. *Id.* at 2.

126. *Id.*

127. GA. CODE ANN. § 50-3-1(b) (2021).

128. *Id.* § 50-3-1(b)(2).

129. *Id.* § 50-3-1(b)(6).

130. *See* GA. CODE ANN. § 50-3-1(b) (2021).

The City of Decatur was successful in using a variation of public nuisance to overcome the broad language of the statute in an action against Dekalb County. In a complaint filed June 2020, Decatur argued that an obelisk in Decatur Square honoring the Lost Cause had become an “urgent, impending threat to public safety” during recent protests about racism and police brutality.<sup>131</sup> The complaint argues that the Decatur Monument has become an immediate public nuisance because “of what it stands for, because of the societal friction it engenders, and because it is increasingly the subject of acts of graffiti and vandalism.”<sup>132</sup> In effect, the argument is that the continued exhibition of the Decatur Obelisk will inspire more protests, leading to increased violence and exposure to COVID-19.<sup>133</sup>

Georgia’s nuisance statute contradicts Georgia’s Monument Protection Law. Georgia’s Nuisance Statute authorizes a superior court judge of the county to abate any “immediate annoyance of the public in general” that is “manifestly injurious to the public health or safety, or tends greatly to corrupt the manners and morals of the public.”<sup>134</sup> Notably, the public nuisance statute may generally only be invoked by the city attorney, the county attorney, the district attorney, or the county solicitor.<sup>135</sup> However, under Georgia’s Monument Protection Law, “no publicly owned monument erected, constructed, created, or maintained on the public property of this state or its agencies, departments, authorities, or instrumentalities or on real property owned by an agency or the State of Georgia shall be relocated, removed, concealed, obscured, or altered in any fashion by any officer or agency.”<sup>136</sup> The law does permit removal for such purposes as “preservation, protection, and interpretation.”<sup>137</sup> The law similarly permits relocation for construction projects.<sup>138</sup> However, in the event of such a relocation, the monument must be placed in a site of “similar prominence, honor, visibility, and access.”<sup>139</sup>

Superior Court Judge Clarence F. Seeliger agreed that the Decatur Obelisk constituted a public nuisance, writing: “[T]he Confederate obelisk was an increasingly frequent target of graffiti and vandalism, a figurative lightning rod for friction among citizens, and a potential catastrophe had individuals attempted to forcibly remove or destroy it.”<sup>140</sup> Judge Seeliger acknowledged that the removal

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131. Complaint at 2, *Downs v. Dekalb County*, No. 20CV4505-3, 2020 Ga. Super. LEXIS 2458 (Ga. Super. Ct. June 12, 2020).

132. *Id.* at 15.

133. *Id.* at 16.

134. GA. CODE ANN. § 41-2-1 (2021).

135. *Id.* § 41-2-2.

136. *Id.* § 50-3-1(b)(2).

137. *Id.* § 50-3-1(b)(3).

138. *Id.* § 50-3-1(b)(7).

139. *Id.*

140. Order Granting Emergency Motion for Interlocutory Abatement of Public Nuisance, *Downs v. Dekalb County*, No. 20CV4505-3, 2020 Ga. Super. LEXIS 2458 (Ga. Super. Ct. June 12, 2020).

of the statue may violate Georgia's Monument Protection Law, and thus, clarified that "[t]hrough the Obelisk will be stored out of public view, abatement . . . is not for the purpose of preventing public display of the Obelisk, but instead is an appropriate measure to abate a public nuisance and protect the Obelisk."<sup>141</sup> While the removal of the Confederate monument was possible under the doctrine of public nuisance, where to relocate it to comply with the statutory requirements remains an inveterate concern.

#### E. Tennessee

The City of Memphis used a different and unique approach to effectuate the removal of Confederate statues in its public parks. In 2013, before the Confederate monument controversy gained initial momentum in the United States, Tennessee enacted its own restrictive Confederate removal statute.<sup>142</sup> The Tennessee Heritage Protection Act ("HPA") prohibits any local government from removing, renaming, relocating, altering, rededicating, or otherwise disturbing any monument "regarding a historic conflict, historic entity, historic event, historic figure, or historic organization" located on public property.<sup>143</sup> The only exception under the Tennessee HPA is that local governments are permitted to petition for a waiver to the Tennessee Historical Commission.<sup>144</sup> The waiver, however, requires a two-thirds vote of commissioners as well as a lengthy notice and hearing procedure.<sup>145</sup>

In 2017, the City of Memphis attempted to seek a waiver from the Tennessee Historical Commission for the removal of a statue of Nathan Bedford Forrest from its Health Science Park.<sup>146</sup> The Memphis City Council approved an ordinance that would remove the Confederate statue, calling the statue a "public nuisance" and violation of African Americans' right to enjoy the park.<sup>147</sup> The Tennessee Historical Commission denied the waiver and, as a response, the City of Memphis sold the public land to a private entity, Memphis Greenspace, Inc.<sup>148</sup> The conveyance of the Confederate monument to a private entity allowed the City of Memphis to circumvent the Tennessee Historical Heritage Act, which

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141. Complaint, *Downs v. DeKalb County*, No. 20CV4505-3, 2020 Ga. Super. LEXIS 2458 (Ga. Super. Ct. June 12, 2020).

142. Tennessee Heritage Protection Act of 2013, TENN. CODE ANN. § 4-1-412 (2013).

143. TENN. CODE ANN. § 4-1-412(b)(1) (2021).

144. *Id.* § 4-1-412(c)(1).

145. *See id.* §§ 4-1-412(a)(1), (c); *see also* Phelps & Owley, *supra* note 16, at 664-65.

146. Daniel Connolly & Vivian Wang, *Confederate Statues in Memphis Are Removed After City Council Vote*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/us/statue-memphis-removed.html>.

147. *Memphis City Council Votes on Ordinance to Remove Confederate Statues*, WREG (Sept. 5, 2017), <https://www.wreg.com/news/report-memphis-spent-thousands-guarding-confederate-monuments-last-month>.

148. Phelps & Owley, *supra* note 16, at 665.

prohibited monument removal on public land.<sup>149</sup> The private landowners immediately removed the statues and placed them in storage.<sup>150</sup> In response to the City's strategic maneuvering, the Republican-led state legislature amended the Tennessee HPA to impose financial penalties on a city or town that attempts to remove monuments subject to the statute.<sup>151</sup> The amendment further prohibited "the sale or transfer of a memorial or public property containing a statue without first obtaining a waiver from the state Historical Commission."<sup>152</sup>

State monument laws pose a significant obstacle to the removal and disposition of Confederate monuments. However, the doctrine of public nuisance remains a viable option under common law. States have found creative avenues to intertwine the common law doctrine of public nuisance with statutorily available mechanisms to remove and dispose of Confederate monuments. While the states invoke the term "public nuisance" as justification for removal of these monuments, their court filings are notably silent as to the application of the common law elements. It is within this context that states should utilize public nuisance as an appropriate avenue to begin the disposal of monuments dedicated to the oppression and disenfranchisement of Black Americans.

### III. FRAMING THE CAUSE OF ACTION: PUBLIC NUISANCE

The term "nuisance" is colloquially perceived as something that may be annoying, offensive, or even inconvenient.<sup>153</sup> While this usage remains prevalent in popular culture, its definition in the legal sphere is, of course, notably distinctive. Public nuisance extends beyond the mere confines of private damage to property and seeks to remedy inconvenience or interferences.<sup>154</sup> In particular, public nuisance is defined as an "unreasonable interference with a right common to the general public."<sup>155</sup> Common examples of public nuisances are those acts that interfere with public health, safety, morals, or convenience.<sup>156</sup>

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149. *Id.*

150. *Id.*

151. *Id.* at 666-67.

152. *Id.*

153. RESTATEMENT (SECOND) OF TORTS § 821A cmt. b (AM. L. INST. 1979) ("The term frequently is used in several different senses. In popular speech it often has a very loose connotation of anything harmful, annoying, offensive or inconvenient, as when it is said that a man makes a nuisance of himself by bothering others. Occasionally this careless usage has crept into a court opinion. If the term is to have any definite legal significance, these cases must be completely disregarded.")

154. See *id.* § 821B cmt. g ("Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right.")

155. *Id.* § 821B(1).

156. See *W. PAGE KEETON ET AL., supra* note 4, at 643-44; *Leppink v. Water Gremlin Co.*, 944 N.W.2d 493, 499-501 (Minn. Ct. App. 2020) (affirming district court's determination that that migration of lead from manufacturing plant was a public health nuisance); *Commonwealth v. McGovern*, 75 S.W. 261, 266 (Ky. 1903) (finding building that hosted "prize-fights" was dangerous to public morals and safety, and therefore constituted a public nuisance).

To prevail in a public nuisance action, a plaintiff must prove that something interferes with a “public” right and that such interference was “unreasonable.”<sup>157</sup> Virtually anything could be considered a public discomfort or inconvenience. Indeed, the Illinois Supreme Court providently quantified that the “concept of common law public nuisance does elude precise definition.”<sup>158</sup> The scope of public nuisance invites divisive commentary regarding the threshold of fault necessary to warrant tort liability.

#### A. Who may bring a public nuisance claim?

The aim of the public nuisance doctrine is to provide “protection and redress of community interests and, at least in theory, embod[y] a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century.”<sup>159</sup> Historically, public nuisance law was developed to allow public officials to abate public nuisances and to criminally prosecute individuals for activities considered harmful to the public.<sup>160</sup> The Restatement (Second) of Torts now empowers government authorities to bring public nuisance claims for harmful activities that do not arise to the level of criminal conduct.<sup>161</sup> As those charged with serving and protecting the community, government officials have the authority to use the public nuisance doctrine to lend a voice to the harms imposed on communities and, therefore, to create safer public spaces. It is the “community aspect” of the public nuisance doctrine that distinguishes it from its sister doctrine, private nuisance.<sup>162</sup>

As governmental authorities are endowed with the power to bring forth public nuisance claims, they have frequently done so in cases where the defendant may be detrimentally impacting public health and safety.<sup>163</sup> Early public nuisance

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157. Restatement (Second) of Torts § 821B. There is also some debate among courts as to whether public nuisance requires the defendant has control of the instrumentality causing the nuisance. The Restatement (Second) of Torts § 821B does not include this requirement. *See e.g., In re Lead Paint Litig.*, 924 A.2d 484, 510-11 (N.J. Sup. Ct. 2007) (Zazzali, C.J., dissenting) (providing an overview of cases that reject the “control” requirement); *see generally* Peter Tipps, *Controlling the Lead Paint Debate: Why Control Is Not an Element of Public Nuisance*, 50 B.C. L. REV. 605 (2009).

158. *City of Chicago v. Festival Theatre Corp.*, 438 N.E.2d 159, 164 (Ill. 1982).

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

160. *In re Lead Paint Litig.*, 924 A.2d at 494-95.

161. RESTATEMENT (SECOND) OF TORTS § 821C(2)(b) (AM. L. INST. 1979).

162. *Gallo*, 929 P.2d at 604 (emphasis omitted).

163. *See e.g., City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1229 (Ind. 2003) (suing gun manufacturers, distributors, and dealers for public nuisance on public safety grounds); *City of Madison v. Fam. Bus.*, 855 N.W.2d 903, 903 (Wis. Ct. App. 2014) (per curiam) (unpublished table decision) (suing for abatement of a nuisance for a bar in Madison, Wisconsin, that interfered with public health and safety); *City of Benton City v. Lorz*, No. 15401-7-III, 1997 Wash. App. LEXIS 669, at \*5-8 (Wash. Ct. App. May 1, 1997) (affirming summary judgment for city for the abatement of a public nuisance in the form of “junk” on the landowner’s property); *Finkelstein v. City of Sapulpa*, 234 P. 187, 188-89 (Okla. 1925) (holding that the city properly declared a junk yard a public nuisance under the city’s ordinance).

claims involved both torts tied to land, such as obstruction of public highways or waterways,<sup>164</sup> as well as claims involving public “morals,” such as gambling and prostitution operations.<sup>165</sup> Governmental plaintiffs began to expand the scope of public nuisance, filing various claims against industrial defendants, including claims against the tobacco industry,<sup>166</sup> lead-based paint companies,<sup>167</sup> and handgun manufacturers.<sup>168</sup> Regardless of the type of claim, public nuisance still functions as a protective measure for rights common to the public.<sup>169</sup>

While the doctrine of public nuisance is wide in scope for public entities, private parties may also set forth claims, albeit under narrower circumstances. In order to sustain a private action for public nuisance, an individual must prove that they have “suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.”<sup>170</sup> Many states require plaintiffs to meet this so-called “special injury” requirement, necessitating a private individual to prove that the harm or interference suffered is of a different extent or degree than that suffered by the general public.<sup>171</sup> This special injury may be based on (1) harm

164. *See, e.g.*, *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91, 94-95 (1838) (claiming public nuisance for clogging the channel and damaging Georgetown harbor).

165. *See, e.g.*, *Commonwealth v. Harrington*, 20 Mass. (3 Pick.) 26, 27, 29 (1825) (setting forth a claim for public nuisance based on the presence of a house of prostitution); *Van Valkenburgh v. Torrey*, 7 Cow. 252, 252 (N.Y. Sup. Ct. 1827) (applying a statute that made horseracing a public nuisance); *see also* John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 266 (2001).

166. Mark D. Fridy, Note, *How the Tobacco Industry May Pay for Public Health Care Expenditures Caused by Smoking: A Look at the Next Wave of Suits Against the Tobacco Industry*, 72 IND. L.J. 235, 247 n.94, 249 (1996) (examining public nuisance claims brought by Mississippi and West Virginia against tobacco companies among other governmental responses to rising cases of smoking-related illnesses and diseases).

167. *See, e.g.*, *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 126-27 (Ill. App. Ct. 2005) (holding that city unsuccessfully claimed public nuisance against paint manufacturers).

168. *See, e.g.*, *Hamilton v. Accu-tek*, 935 F. Supp. 1307, 1314-15 (E.D.N.Y. 1996) (claiming public nuisance against forty-nine gun manufacturers); *see also* Eric L. Kintner, Note, *Bad Apples and Smoking Barrels: Private Actions for Public Nuisance Against the Gun Industry*, 90 IOWA L. REV. 1163, 1166 (2005) (listing examples of public utility plaintiffs that have relied on public nuisance doctrine in actions against gun industry); *Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1759-82 (2000) (describing the use of common-law public nuisance against the handgun history).

169. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 776 (2003).

170. RESTATEMENT (SECOND) OF TORTS § 821C(1) (AM. L. INST. 1979). The Restatement gives the following as an example of a successful private action for a public nuisance claim: “A digs a trench across the public street, which not only prevents travel on the street but also blocks the entrance to B’s private driveway, so that B cannot get his car out of his garage. B can recover for the public nuisance.” *Id.* § 821C cmt. f, illus. 4.

171. *Id.* § 821C cmt. b; *see, e.g.*, *Tesoro Refin. & Mktg. Co. v. City of Long Beach*, 334 F. Supp. 3d 1031, 1055 (C.D. Cal. 2017) (finding under California law that the plaintiff pled sufficient facts showing special injury to support public nuisance claim); *Hopi Tribe v. Ariz. Snowbowl Resort P’ship*, 430 P.3d 362, 363-64 (Ariz. 2018) (denying the private action for

to the plaintiff's person or property;<sup>172</sup> (2) interference with access to the plaintiff's land;<sup>173</sup> or (3) pecuniary loss.<sup>174</sup> In addition to proving a special injury, private claimants also are required to prove that the alleged nuisance interfered with a right common to the general public.<sup>175</sup> The special injury rule imposes a substantial burden on plaintiffs.<sup>176</sup> Courts view this limitation as a way to prevent limitless and frivolous suits brought against a defendant who maintains a public nuisance.<sup>177</sup>

#### B. What is an unreasonable and substantial interference?

Generally, to state a claim for public nuisance, a public or private plaintiff must show that the defendant's conduct constitutes substantial (also referred to as "significant") and unreasonable interference with a public right, elements which effectively overlap.<sup>178</sup> The harm must be more than trivial and should rise to, at a minimum, a threat of substantial harm.<sup>179</sup> The Second Restatement of Torts ("the Restatement") outlines three circumstances that may constitute an interference with a public right, including:

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public nuisance because the plaintiff failed to show under Arizona law that the alleged nuisance caused them a special injury); 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1104 (N.Y. 2001) (holding plaintiff failed to show under New York law special injury beyond that suffered by the community at large).

172. RESTATEMENT (SECOND) OF TORTS § 821C cmt. d (AM. L. INST. 1979); *see e.g.*, *Bubalo v. Navegar, Inc.*, No. 96-3664, 1997 U.S. Dist. LEXIS 8551, at \*13 (N.D. Ill. June 13, 1997) (denying motion to dismiss public nuisance against manufacturer of semi-automatic weapon convertible into fully automatic weapon that caused plaintiffs' injuries).

173. RESTATEMENT (SECOND) OF TORTS § 821C cmt. f (AM. L. INST. 1979); *see, e.g.*, *Graveley Ranch v. Scherping*, 782 P.2d 371, 373 (Mont. 1989) (holding "that the presence of exposed lead batteries on defendants' property resulting in a series of livestock deaths is potentially injurious to health and sufficiently interfered with plaintiff's use of property for grazing so as to constitute a nuisance under" state law).

174. RESTATEMENT (SECOND) OF TORTS § 821C cmt. h (AM. L. INST. 1979); *see, e.g.*, *Tosco Corp. v. Koch Indus.*, 216 F.3d 886, 895-96 (10th Cir. 2000) (finding that the current site owner, who had paid all the cost of an environmental investigation and remediation at oil refinery, sufficiently maintained a cause of action for public nuisance against contributors for the pecuniary loss).

175. *See* William B. Johnson, Annotation, *What Constitutes Special Injury that Entitles Private Party to Maintain Action Based on Public Nuisance—Modern Cases*, 71 A.L.R. 4th 13 § 2(a) (1989).

176. *See* Megan O'Keefe, Note, *NAACP v. AcuSport: A Call for Change to Public Nuisance Law*, 70 BROOK. L. REV. 1079, 1080, 1084 (2005) (arguing that states should eliminate the special injury rule for private plaintiffs seeking injunctive relief under public nuisance law).

177. *See, e.g.*, 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1104 (N.Y. 2001) ("This principle recognizes the necessity of guarding against the multiplicity of lawsuits that would follow if everyone were permitted to seek redress for a wrong common to the public.").

178. RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. L. INST. 1979); Albert C. Lin, *Deciphering the Chemical Soup: Using Public Nuisance to Compel Chemical Testing*, 85 NOTRE DAME L. REV. 955, 977 (2010).

179. Lin, *supra* note 178, at 977.

- (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
- (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
- (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.<sup>180</sup>

Multiple jurisdictions have held that a public nuisance claim requires a substantial interference with a public right.<sup>181</sup> The nuisance cannot be a “petty” annoyance; it cannot be a “trifle,” or a “disturbance of everyday life.”<sup>182</sup>

As in other areas of tort law, courts measure the behavior of a defendant by objectively evaluating the degree of reasonableness.<sup>183</sup> The Restatement offers various definitions of how to demarcate conduct as “unreasonable.” Conduct may be considered unreasonable if the harm “resulting from the invasion is severe and greater than the other should be required to bear without compensation.”<sup>184</sup> Unreasonable conduct includes harm “contrary to common standards of decency.”<sup>185</sup> Conduct may also be considered unreasonable if “it would be practicable for the actor to avoid the harm in whole or in part without undue hardship,”<sup>186</sup> or if “the particular use or enjoyment interfered with is well suited to the character of the locality” and “the actor’s conduct is unsuited to the character of that locality.”<sup>187</sup> The Restatement seemingly favors a balance-of-harm test, requiring a balance of the “gravity” of the harm versus “the utility of the actor’s conduct.”<sup>188</sup> In weighing the gravity of the harm, “it is necessary to consider the

180. RESTATEMENT (SECOND) OF TORTS § 821B(2) (AM. L. INST. 1979).

181. *See, e.g.*, *Young v. Bryco Arms*, 821 N.E.2d 1078, 1083 (Ill. 2004) (affirming that a substantial and unreasonable interference with a public right is a requisite element of a public nuisance claim); *State v. Lead Indus.*, No. 99-5226, 2005 R.I. Super. LEXIS 95, at \*4-6 (R.I. Super. Ct. June 3, 2005) (requiring plaintiffs to show that defendant’s conduct was a “substantial factor” in causing injury to the public in order to establish a public nuisance claim in Rhode Island).

182. *See* *Faulk & Gray*, *supra* note 7, at 964 (citing WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 557-58 (1941)).

183. *See, e.g.*, *United States v. Luce*, 141 F. 385, 415 (C.C.D. Del. 1905) (“The principal question after all is whether the defendants, in view of their obligations to others, are making a reasonable use of the premises occupied by them.”).

184. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 829A (AM. L. INST. 1979) (pertaining to intentional invasions of “another’s interest in the use and enjoyment of land”).

185. *Id.* § 829. The comments extend this rule to conduct that results in public nuisance, as well as private nuisance. *Id.* § 829 cmt. a (“[I]n determining whether the gravity of the interference with the public right outweighs the utility of the actor’s conduct (see § 826, Comment a), the fact that the conduct . . . is contrary to common standards of decency, will normally be sufficient to make any significant interference unreasonable.”).

186. *Id.* § 830 (pertaining to intentional invasions of land).

187. *Id.* § 831.

188. *Id.* § 827 cmt. a. However, it should be noted that some commentators believe that the balancing of the utilities test is not a requirement in determining reasonableness for public

extent and character of the interference, the social value that the law attaches to it, the character of the locality involved and the burden of avoiding the harm placed upon members of the public.”<sup>189</sup>

The extension of the public nuisance doctrine varies state by state, depending on the location and factual circumstances of the case. Some states, such as California and Iowa, have enacted specific public nuisance statutes.<sup>190</sup> The statutes tend to take a more conservative approach to public nuisance, requiring anything “injurious to health,” “indecent,” “unreasonably offensive to the senses” that interferes “with the comfortable enjoyment of life or property,” or “unlawfully obstructs the free passage or use” of public spaces to be considered a public nuisance.<sup>191</sup> In the former Confederate state of Georgia, the statute defines nuisance as “one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals.”<sup>192</sup> For those states that do not rely on a civil public nuisance statute, like Florida, the approach is more relaxed, requiring only “something that causes ‘any annoyance to the community or harm to public health.’”<sup>193</sup> By contrast, Rhode Island’s Supreme Court has found that liability for public nuisance should be “imposed only in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances.”<sup>194</sup> In West Virginia, courts have implied that conduct that may be considered offensive to “the view of average persons of the community” may satisfy the substantial interference element of a public nuisance claim.<sup>195</sup> It is difficult to find a given trend or pattern between states. However, invariably each

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nuisance claims. *See* Lin, *supra* note 178, at 978 (“In contrast to private nuisance, where the reasonableness inquiry calls for a weighing of the gravity of the harm to the plaintiff against the utility of the defendant’s conduct, public nuisance involves no such balancing of the utilities.”); *see also* Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359, 378 (1990) (“[T]he Restatement’s balancing of the utilities test in section 826 should not be viewed as relevant in cases of public nuisance; rather, the list of reasonableness factors found in section 821B of the Restatement should be regarded as the appropriate reflection of the law of public nuisance as interpreted by the courts.”).

189. RESTATEMENT (SECOND) OF TORTS § 827 cmt. a (AM. L. INST. 1979).

190. Gifford, *supra* note 169, at 775, 775 n.166.

191. CAL. CIV. CODE § 3479 (West 2021); IOWA CODE § 657.1 (2021); *see also* Gifford, *supra* note 169, at 775 (examining the vague definitions of public nuisance in various jurisdictions).

192. GA. CODE ANN. § 41-1-2 (2021).

193. *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1036 (Fla. 2001) (citation omitted). To be clear, under Florida’s laws of civil practice and procedure, “Abatement of nuisances” may be effectuated by “the Attorney General, state attorney, city attorney, county attorney, or any citizen of the county.” *Id.*

194. *Citizens for Pres. of Waterman Lake v. Davis*, 420 A.2d 53, 59 (R.I. 1980) (citing RESTATEMENT (SECOND) OF TORTS § 822 cmt. g (AM. L. INST. 1979)).

195. *See Parkersburg Builders Material Co. v. Barrack*, 191 S.E. 368, 371 (W. Va. 1937). Indeed, this court even implied that aesthetic nuisances may be actionable, noting that “[c]ourts must not be indifferent to the truth that within essential limitations aesthetics has a proper place in the community affairs of modern society.” *Id.* However, that fact alone will not substantiate an entire public nuisance claim.

state has a variation of the Restatement's definition of nuisance.

Consequently, the intrinsically vague and often varying definitions courts have imposed for public nuisance claims have allowed them to extend liability to a wide range of harmful activities, including activities that have been deemed to violate public peace, comfort, and morals.<sup>196</sup> While courts will weigh the harm the interference creates on the public or the individual plaintiff versus the harm on the defendant and the public, the degree to which a court finds conduct an “unreasonable” and “significant” interference is largely discretionary.<sup>197</sup>

### C. Defining the “public right”

The *sine qua non* of a cause of action for public nuisance is the impact on the “public.”<sup>198</sup> Public nuisance law is discernible from the types of interests protected in other torts. Public nuisance is a cause of action that purports to stop harm to members of a community at large for a “public bad.”<sup>199</sup> A public nuisance claim requires an unreasonable interference with a right common to the general public.<sup>200</sup> The Restatement defines a “public right” as one that is “common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.”<sup>201</sup> It is more than an “assortment of claimed private individual rights,” and instead, is the right to a public good that is “an indivisible resource shared by the public at large, like air, water, or public rights of way.”<sup>202</sup>

A nuisance is considered “public,” if the conduct “occurs in a public place, or where the public frequently congregates, or where members of the public are likely to come within the range of its influence.”<sup>203</sup> The nuisance-like activity does not need to impact the entire public at large; rather, it must affect either

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196. Lin, *supra* note 178, at 982-83.

197. See *United States v. Rainbow Fam.*, 695 F. Supp. 314, 328 (E.D. Tex. 1988) (combining an analysis of unreasonableness with a balance of the equities, the court determined that the “general fear” of alleged nudity, disorderly conduct, or use of illicit drugs was insufficient for the basis of a claim for public nuisance). *But see* *Mark v. State Dep’t of Fish & Wildlife*, 974 P.2d 716 (Or. Ct. App. 1999) (holding that plaintiffs sufficiently stated a claim for public nuisance when defendant state agencies failed to prevent routine public nudity and sexual activity on public lands adjacent to plaintiffs’ property).

198. *State v. Lead Indus. Ass’n*, 951 A.2d 428, 447 (R.I. 2008).

199. See *Thomas W. Merrill, Is Public Nuisance a Tort?*, 4 J. TORT L., no. 2, 2011, at 8-10.

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

201. *Id.* § 821B cmt. g; see e.g., *Narragansett Real Est. Co. v. Mackenzie*, 82 A. 804, 810 (R.I. 1912) (holding that in this particular case, the plaintiff could only sustain a public nuisance claim if there was an interference with the public’s right to navigate public waterways).

202. *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 131 (Ill. App. Ct. 2005).

203. 58 AM. JUR. 2D *Nuisances* § 30 (2021); see also *Burns v. Simon Props. Grp.*, 996 N.E.2d 1208, 1212 (Ill. App. Ct. 2013) (citing the same language); *Reg’l Airport Auth. v. LFG, LLC.*, 255 F. Supp. 2d 688, 692 (W.D. Ky. 2003) (citing the same language).

those who “come in contact with it in the exercise of a public right” or the interests of the community at large.<sup>204</sup> However, an interference of a “public right” does not necessarily require that the conduct occur on public property.<sup>205</sup> An actionable public nuisance may occur on private property if it affects the rights of the public.<sup>206</sup> In defining the “public right,” the court must examine whether the public will be injured by the offending conduct.<sup>207</sup> The Connecticut Supreme Court clarified that it is “not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence.”<sup>208</sup>

The degree to which the “public” is impacted plays a significant role in a public nuisance case. Invariably, rights related to the maintenance of health and safety of the general public fall on the stronger end of the “public” spectrum.<sup>209</sup> Columbia Law School Professor Thomas W. Merrill provides an instructive illustration of the extent of the “public” right:

Consider a defendant who releases a cloud of toxic gas over a community. Insofar as the gas diminishes the use and enjoyment of particular tracts of land, it is actionable as a private nuisance. Insofar as the gas makes it impossible to use public roads, parks or buildings, it is a public nuisance, because it has interfered with rights common to the entire community.<sup>210</sup>

Prime examples of nuisances considered “public” are forms of conduct that block or obstruct public roads or navigable waterways.<sup>211</sup> As roads and waterways are available to all members of the community (though not necessarily used by everyone), their obstruction or blockage is an injury common to the general public.<sup>212</sup> The expansion of the “public right” has proven unsuccessful in cases

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204. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g. (AM. L. INST. 1979); Amanda Purcell, *Using the Public Nuisance Doctrine to Combat Antibiotic Resistance*, 68 AM. U. L. REV. 339, 356 (2018) (examining public nuisance as a strategy for combating the improper use of antibiotics in livestock).

205. *See State v. Lead Indus. Ass’n*, 951 A.2d 428, 447-48 (R.I. 2008).

206. *Id.* (citing *Braun v. Iannotti*, 175 A. 656 (R.I. 1934) (finding greenhouse on private property could constitute a public nuisance)); *see also Am. Cyanamid Co.*, 823 N.E.2d at 132 (“A public nuisance is actionable even where the nuisance is present on private property.”) (citations omitted).

207. Faulk & Gray, *supra* note 7, at 963.

208. *Higgins v. Conn. Light & Power Co.*, 30 A.2d 388, 390 (Conn. 1943) (citation omitted).

209. Matthew Russo, Note, *Productive Public Nuisance: How Private Individuals Can Use Public Nuisance to Achieve Environmental Objectives*, 2018 U. ILL. L. REV. 1969, 1988 (2018).

210. Merrill, *supra* note 199, at 9.

211. *Id.*

212. *Id.* at 9-10.

involving health hazards in private homes.<sup>213</sup> Thus, while conduct may be harmful to many individual members of the public, the distinctive nature of public nuisance requires harm “to the public generally.”<sup>214</sup>

#### D. The “control” requirement

A hurdle facing potential litigants is the requirement that the defendant actually control the instrumentality causing the public nuisance. Traditionally, liability for nuisance required “control” of the instrumentality.<sup>215</sup> The Restatement notably does not require control to give rise to a nuisance claim. Instead, its broad definition invites judicial discretion as to the type of activity actionable for public nuisance. Thus, in theory, under the Restatement, an actor who no longer controls the nuisance-causing instrumentality, but whose conduct was a “cause” of the interference with a public right, could be held liable for public nuisance.<sup>216</sup>

Courts, on the other hand, tend to find that the element of control is required in some context to maintain a public nuisance claim. While one court considered the control element as vital to public nuisance liability,<sup>217</sup> other courts see it only as a “consideration.”<sup>218</sup> Courts upholding the importance of the control element reason that abatement of a nuisance can only occur by the party who has control over the instrumentality.<sup>219</sup> As a result, a party with no control over the instrumentality may not be liable under common law public nuisance.<sup>220</sup> On the other hand, those courts that consider control as a mere “consideration” construe it as “a relevant factor in both the proximate cause inquiry and in the ability of the

213. See *State v. Lead Indus. Ass’n*, 951 A.2d 428, 443, 454 (R.I. 2008) (holding that a public nuisance claim brought against lead paint manufacturers should have been dismissed, given that plaintiffs could not allege that defendants’ conduct interfered with a public right or that defendants were in control of lead pigment at the time it caused harm to children inside their Rhode Island homes).

214. *Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1115 (Ill. 2004) (finding no nuisance where the “harm alleged was harm to individual members of the public, not to the public generally”); see also Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 563 (“It is clear from case law that ‘harm to individual members of the public’—no matter how many—is not the same as harm ‘to the public generally.’”).

215. See, e.g., *City of Manchester v. Nat’l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986) (noting that control is required to constitute a nuisance for nuisance created by asbestos materials).

216. Peter Tipps, Note, *Controlling the Lead Paint Debate: Why Control Is Not an Element of Public Nuisance*, 50 B.C. L. REV. 605, 627 (2009).

217. *Nat’l Gypsum Co.*, 637 F. Supp. at 656 (“[L]iability for damage caused by a nuisance turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise”).

218. *Beretta*, 821 N.E.2d at 1129 (noting that control may be a consideration but not necessarily “a prerequisite to the imposition of nuisance liability”).

219. *Tipps*, *supra* note 216, at 624-25.

220. *Id.*

court to fashion appropriate injunctive relief.”<sup>221</sup> Whether control is its own factor, or whether it is considered as part of the proximate cause analysis, courts are seemingly in agreement that it is a necessary condition for liability.

#### E. Proximate causation

A fundamental principle of tort law is causation, and the tort of public nuisance is no exception. While the Restatement does not explicitly require causation, most courts infer this requirement.<sup>222</sup> To prove causation, there must be “some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.”<sup>223</sup> Courts will often dismiss claims for public nuisance that are too remote and derivative.<sup>224</sup> The causation need not be as proximate as in individual negligence cases,<sup>225</sup> but the complained harm cannot be tenuously related to the defendant’s conduct.

However, absence of proof of proximate cause is not necessarily fatal to a public nuisance claim.<sup>226</sup> Instead, proximate cause can “rest on the coincidence of the occurrence of the nuisance and a change in defendant’s . . . practices.”<sup>227</sup> According to Professor Louise Halper, the key inquiry is not the test traditionally used for proximate cause, “but rather one which has at its core an inquiry into defendant’s *use* of the land.”<sup>228</sup> Causation may be proven if the use of the land is “the dominant and relevant fact . . . bearing upon the forces and conditions producing the public nuisance.”<sup>229</sup> As a result, parties may satisfy the proximate cause element even if they cannot prove that a particular defendant caused the plaintiff the resulting harm.<sup>230</sup>

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221. *Beretta*, 821 N.E.2d at 1132.

222. *See, e.g.*, *Young v. Bryco Arms*, 821 N.E.2d at 1089 (Ill. 2004) (“[L]egal cause will be found if reasonable persons in the business of manufacturing and selling firearms would have seen the creation of a public nuisance in the City of Chicago as a likely result of their conduct.”).

223. *KEETON ET AL.*, *supra* note 4, § 41 at 263.

224. *See, e.g.*, *McGhee v. Norfolk & S. Ry. Co.*, 60 S.E. 912, 917 (N.C. 1908) (holding that stored dynamite was a public nuisance, but the plaintiff still needed to prove proximate cause); *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 647 (D.C. 2005) (dismissing a claim for public nuisance based on a tenuous causal chain).

225. *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 497 (E.D.N.Y. 2003) (“Where the welfare and safety of an entire community is at stake, the cause need not be so proximate as in individual negligence cases.”).

226. Gwyn Goodson Timms, Note, *Statutorily Awarding Attorneys’ Fees in Environmental Nuisance Suits: Jump Starting the Public Watchdog*, 65 S. CAL. L. REV. 1733, 1752 (1992).

227. *Id.* at 1753.

228. Louise A. Halper, *Public Nuisance and Public Plaintiffs: Ownership, Use, and Causation (Part II)*, 17 *Envtl. L. Rep.* (Envtl. L. Inst.) 10044, 10045 (1987).

229. *Commonwealth v. Barnes & Tucker Co.*, 353 A.2d 471, 478 (Pa. Commw. Ct. 1976).

230. Timms, *supra* note 226, at 1753.

## F. Remedies

Public nuisance was historically treated as a crime, thus, remedies were reserved for criminal punishment.<sup>231</sup> As public nuisance shifted from criminal to tort liability, so did the remedies for the civil action. There are a variety of remedies available to the plaintiff, including an injunction against the nuisance, abatement of the nuisance, and damages.<sup>232</sup> Generally, plaintiffs favor abatement of nuisance as a remedy.<sup>233</sup> To be afforded the injunction, the key inquiry is “whether the activity itself is so unreasonable that it must be stopped.”<sup>234</sup>

Damages are also available to plaintiffs if the court finds that it “is unreasonable [for the defendant] to engage in the conduct without paying for the harm done.”<sup>235</sup> In an action for public nuisance, damages may come in the form of a diminution in market value of property, personal injury, emotional distress, or annoyance resulting from the nuisance.<sup>236</sup> Regardless of whether it is a public or private plaintiff, damages may be recovered for a public nuisance. For example, in *Lansco Inc. v. Department of Environmental Protection*, the New Jersey Superior Court, in awarding damages to the State of New Jersey for harm caused by a large oil spill, noted that “courts of this jurisdiction and elsewhere have recognized that the state has the right to obtain damages for an injury to public resources and the environment.”<sup>237</sup>

This fluidity of remedies provides courts with wide discretion to balance the good served by the defendant’s conduct against the harm it creates. A remedy of money damages allows defendants to continue the harmful conduct that may be useful to society, while simultaneously compensating plaintiffs that are harmed by the conduct.<sup>238</sup> Abatement and injunctions cease all harmful activity that does not reasonably have social utility. Indeed, courts can apply public nuisance to otherwise lawful conduct that is unreasonable. This expansion of tort liability enables plaintiffs to thwart harmful activities that were otherwise beyond the scope of tort doctrines.

Scholarship in the area of public nuisance is varied, focusing heavily on products liability and environmental law. As tort law has developed during the twentieth century, scholars have attempted to construe the “vaguely defined and poorly understood” doctrine of public nuisance.<sup>239</sup> Within the scope of tort law, scholars support the use of public nuisance as an effective tool to stymie handgun

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231. See L. Mark Walker & Dale E. Cottingham, *An Abridged Primer on the Law of Public Nuisance*, 30 TULSA L.J. 355, 364-65 (1994).

232. RESTATEMENT (SECOND) OF TORTS § 821B cmt. i (AM. L. INST. 1979).

233. Lisa M. Ivey, Note, *Losing the Battles, Winning the War: Public Nuisance as a Theory of Gun Manufacturer Liability in Tort*, 34 CUMB. L. REV. 231, 237 (2004).

234. RESTATEMENT (SECOND) OF TORTS § 821B cmt. i (AM. L. INST. 1979).

235. *Id.*

236. See *Lew v. Superior Court*, 25 Cal. Rptr. 2d 42, 46 (Cal. Ct. App. 1993).

237. *Lansco, Inc. v. Dep’t of Env’t Protection*, 350 A.2d 520, 524 (N.J. Super. Ct. Ch. Div. 1975).

238. See Ivey, *supra* note 233, at 237.

239. Gifford, *supra* note 169, at 774.

violence and secondhand smoke.<sup>240</sup> As scholars and courts continue to expand public nuisance, courts should similarly apply the doctrine to non-traditional forms of harmful conduct.

#### G. Nuisance as a vehicle for marginalization

Nuisance causes of action, while effective for eliminating hazards to health and safety, have also been effectuated to perpetuate marginalization of Black Americans. Since at least 1882, whites have attempted to use nuisance laws as a medium to exclude Black Americans from occupation of public and private spaces.<sup>241</sup> In the case of *Falloon v. Schilling*, a white family filed suit against another white family for erecting a tenement house and then renting it to a Black family.<sup>242</sup> In rejecting the plaintiffs' claim, the court established that:

A negro family is not, *per se*, a nuisance, and a white man cannot prevent his neighbor from renting his home to a negro family any more than he can to a German, an Irish, or a French family. The law makes no distinction on account of race or color, and recognizes no prejudices arising therefrom. As long as that neighbor's family is well-behaved, it matters not what the color, race, or habits may be, or how offensive personally or socially it may be to plaintiff; plaintiff has no cause of complaint in the courts.<sup>243</sup>

Notwithstanding this seminal decision, in subsequent cases, white families attempted to assert nuisance claims for occupation of shacks by Black and Mexican families, as well as whites of a lower economic status.<sup>244</sup> While these cases were largely unsuccessful, one court lamented the failure of nuisance claims to extend to race-based occupation, stating:

We earnestly deprecate the inexorable mandate of the law forbidding us the privilege of following our personal sentiments, which, as individuals, we are frank to admit, are wholly with the appellee, and

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240. See O'Keefe, *supra* note 176, at 1109; George P. Smith II, *Cigarette Smoking As A Public Health Hazard: Crafting Common Law And Legislative Strategies For Abatement*, 11 MICH. ST. J. MED. & L. 251, 300 (2007).

241. Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. 863, 897 (2020). For further exploration of "race nuisance" cases, see generally Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505 (2006).

242. *Falloon v. Schilling*, 29 Kan. 292 (1883).

243. *Id.* at 297.

244. See, e.g., *Worm v. Wood*, 223 S.W. 1016, 1018 (Tex. Civ. App. 1920) (rejecting the nuisance claim based on presence of "negroes and Mexicans and a low class of white people"); *Lancaster v. Harwood*, 245 S.W. 755 (Tex. Civ. App. 1922) (rejecting nuisance claim based on "close proximity" of defendant's servants' quarters, which housed Black servants, to white plaintiffs' property).

which, if we were at liberty to follow, would result in granting appellee the relief sought. But we, as a court, must follow, as our only guide, the rules of law applicable alike to all, bearing in mind that the law is no respecter of persons and was not made to apply to one caste to the exclusion of another.<sup>245</sup>

Scholars have suggested that, even between the end of Reconstruction and *Brown v. Board of Education*, appellate courts were reluctant to find the “mere presence” of racial minorities to be a nuisance.<sup>246</sup> Furthermore, courts have rejected nuisance claims based on the specific uses by Black people, including operation of Black churches, funeral homes, parks, orphanages, nursing homes, hospitals, dance halls, crowded housing, and saloons.<sup>247</sup> However, the cache of such a large jurisprudence of “race nuisance” claims, successful or not, demonstrates a larger societal concern—white people using the mere presence of Black people to set forth nuisance claims.

Professors Taja-Nia Y. Henderson and Jamila Jefferson-Jones, in their pinnacle article, *#LivingWhileBlack: Blackness as Nuisance*, examine the roots of nuisance claims as a tool of Black exclusion and oppression.<sup>248</sup> Henderson and Jefferson-Jones potentially delve into the long history of “race-nuisance” claims and ultimately argue that such claims, like contemporary *#LivingWhileBlack* cases, “arise from discomfort with racial integration and perceived Black physical mobility.”<sup>249</sup> Henderson and Jefferson-Jones’s article notes that even with the unsuccess of these cases, they are “emblematic of efforts by whites in the Jim Crow era to alternately establish or preserve ‘racial exclusivity’ in the face of perceived Black property incursions.”<sup>250</sup> For this reason, the doctrine of “nuisance” must be reappropriated to combat the continued “casting of Blackness as a property harm.”<sup>251</sup>

#### IV. REAPPROPRIATION OF THE PUBLIC NUISANCE DOCTRINE: THE REMOVAL OF CONFEDERATE MONUMENTS

The common narrative among proponents of the continued exhibition of Confederate monuments is that they must be preserved, *in situ*, as symbols of “Southern heritage and culture.”<sup>252</sup> This argument reduces to the false dichotomy

245. *Lancaster*, 245 S.W. at 756-57.

246. *Godsil*, *supra* note 241, at 519.

247. *Id.* at 520.

248. Henderson & Jefferson-Jones, *supra* note 241, at 871.

249. *Id.* at 863. “*#LivingWhileBlack*” refers to incidents in which white people report Black people to the police even though they had the right to be present and to engage in those activities. See Lolita Buckner Inniss, Response, *Race, Space, and Surveillance: A Response to #LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. F. 213, 216 (2020).

250. Henderson & Jefferson-Jones, *supra* note 241, at 898.

251. *Id.* at 870.

252. See Sarah Beetham, *Confederate Monuments: Southern Heritage or Southern Art?*, 6 PANORAMA: J. ASS’N HISTORIANS AM. ART., no. 1, Spring 2020, at 5.

that to appreciate history we must continue to exhibit reminders of it. Scholars have attempted to reconcile the removal of Confederate monuments with a number of legal theories.<sup>253</sup> However, the common law doctrine of public nuisance remains an underdeveloped area as it relates to Confederate monuments. As vestiges of an oppressive and violent past, a Confederate monument is more than a mere annoyance or inconvenience.<sup>254</sup> Historian Kevin M. Levin explains that Confederate monuments were not meant to commemorate the past, but rather “helped do the work of justifying segregation and relegating African Americans to second-class status.”<sup>255</sup> These symbols of white supremacy damage the community at large and interfere with the way that a majority of citizens enjoy public spaces. Likewise, the use of the public nuisance doctrine can serve as a reclamation of the doctrine’s oppressive past and counter anti-Blackness within our property law system. In applying the common law elements of public nuisance, the following analysis demonstrates that Confederate monuments unreasonably and substantially interfere with the public’s right to health and safety as well as the right to enjoy public spaces.

#### A. The “public right”

To successfully plead an action for public nuisance, a plaintiff must prove the existence of a right common to the public, which must be “common to all members of the general public” or must affect the interests of the community at large.<sup>256</sup> The public right to be free from the public harms attributable to the continued presence of Confederate monuments is multifaceted. In filing claims in state courts, localities have used variations of the term “safety” to set forth a public right. For example, in Decatur, Georgia, the City Attorney contended that the continued presence of the Confederate monument was “‘manifestly injurious to the public health and safety’ . . . as the Monument inspires outrage . . . [which] could result in substantial violence, injury, and death to individuals.”<sup>257</sup>

Public safety is one of the public rights explicitly delineated in the Restatement.<sup>258</sup> In the motion to dismiss stage, when the plaintiff pleads a public right in accordance with the Restatement, courts will likely find this sufficient to sustain a claim.<sup>259</sup> The public rights embodied in the Restatement, as well as in state public nuisance statutes, are often broad and undefined. For example, in *Lewis v.*

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253. See, e.g., Jessica Owley & Jess Phelps, *The Life and Death of Confederate Monuments*, 68 BUFF. L. REV. 1393, 1471 (2020).

254. See Faulk & Gray, *supra* note 7, at 964.

255. Kevin M. Levin, *Richmond’s Confederate Monuments Were Used to Sell a Segregated Neighborhood*, ATLANTIC (June 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/its-not-just-the-monuments/612940>.

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

257. Complaint at 16, *Downs v. Dekalb Cnty.*, No. 20CV4505-3, 2020 Ga. Super. LEXIS 2458 (Ga. Super. Ct. June 12, 2020).

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

259. Kintner, *supra* note 168, at 1198.

*Lead Industries Association*, an Illinois court concluded that “[t]he public health and safety are common rights an interference with which is sufficient to support a public nuisance claim.”<sup>260</sup> The wide breadth of public rights may elicit arbitrary application of the public nuisance doctrine.<sup>261</sup> For this reason, any impact on the “public health and safety” must be pleaded in a sufficiently detailed way that shows a direct and significant effect on the interests of the community at large. The courts in Decatur and Winston-Salem seemingly accepted the contentions that injury to the “public health and safety” were sufficient to meet these broad thresholds.<sup>262</sup>

As applied to other potential scenarios, the public right to “health and safety” is perhaps the strongest argument. In many instances, the sites of Confederate monuments have been a hotbed of unrest, violence, and even death. One is hard-pressed to ignore that the far-right rally in Charlottesville, Virginia, resulting in the killing of one and injury of dozens of individuals by a white supremacist, was a result of a protest of the removal of a Robert E. Lee statue from Emancipation Park.<sup>263</sup> Elsewhere, cities and states have faced the challenge of quelling unrest resulting from diametrically opposed viewpoints over Confederate monuments. In many cities around the United States, the sites where monuments stand have become hubs for protests and counter-protests.<sup>264</sup> Similarly, protestors have vandalized or toppled monuments, resulting in potential hazards for nearby individuals.

While cynics may claim that the reason for the risks to public health and safety is the contentious removal of the monuments, such an argument is unfounded. In 2020, at least ninety Confederate statues were removed from public spaces.<sup>265</sup> Many of the removals have occurred with little to no fanfare. For example, in Jacksonville, Florida, Mayor Lenny Curry ordered the removal of a bronze statue of a Confederate soldier.<sup>266</sup> The removal was unannounced and occurred at night.<sup>267</sup> The example in Florida shows that the removal of confederate monuments can be accomplished strategically.

In addition to public health and safety, an argument can be made that the

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260. *Lewis v. Lead Indus. Ass’n*, 793 N.E.2d 869, 878 (Ill. App. Ct. 2003).

261. See Kintner, *supra* note 168, at 1199.

262. See *supra* Part III(iii) and (iv).

263. See *supra* Part II(b).

264. Fadel Allassan, *Confederate Monuments Become Flashpoints in Protests Against Racism*, AXIOS (June 7, 2020), <https://www.axios.com/Confederate-monuments-racism-flashpoint-07bd1074-5635-4939-9a55-e572543483b7.html>.

265. Bonnie Berkowitz & Adrian Blanco, *A Record Number of Confederate Monuments Fell in 2020, but Hundreds Still Stand. Here’s Where*, WASH. POST (Mar. 12, 2021), <https://www.washingtonpost.com/graphics/2020/national/confederate-monuments>.

266. John Reid et al., *‘We hear your voices’: Jacksonville Takes Down 122-Year-Old Confederate Monument on Historic Day in Florida’s Largest City*, FLA. TIMES-UNION (June 10, 2020), <https://www.jacksonville.com/story/news/nation/2020/06/09/jacksonville-florida-takes-down-confederate-monument-122-years/5330515002>.

267. *Id.*

public has the right to enjoy public spaces free from symbols of hate and oppression. According to constitutional law professor Alexander Tsesis, the Thirteenth Amendment supports the removal of Confederate symbols as “badges of slavery.”<sup>268</sup> Additionally, he opines that 42 U.S.C. § 1983 provides an affirmative defense to any violation of state monument statutes through the removal of Confederate monuments. Section 1983 provides every citizen “the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”<sup>269</sup> As such, Tsesis argues that residents of any given city have the “right to enjoy public parks unencumbered by badges of slavery.”<sup>270</sup> As Confederate monuments are predominantly stationed on public property, the public at large is exposed to them indiscriminately. Indeed, everyone in a given community, including visitors, commuters, and residents alike, may suffer from the discomfort of having to view Confederate monuments in public spaces. The right to public spaces is a well established and vital liberty safeguarded by the U.S. Constitution.<sup>271</sup>

It is for this reason that modern courts and commentators recognize the public’s right to public nuisance remedies arising from interferences with resources shared by the public at large, such as public rights of way.<sup>272</sup>

The condition or activity that interferes with the use or enjoyment of a public space may derive from non-physical activities. During the nineteenth century, nuisance law was evoked to curtail certain “moral nuisances,” including brothels, gambling parlors, and places of ill-repute in public spaces.<sup>273</sup> This public right to be free from “immoral” nuisances may be an additional tool for conditions or activities outside the traditional context of public nuisance. A cause of action for immoral activities under public nuisance raises significant constitutional questions; however, cases involving illegal drug activities<sup>274</sup> and dilapidated conditions in low-income neighborhoods have been previously set forth.<sup>275</sup> While morality is unquestionably subjective, Confederate monuments support a vision of

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268. Alexander Tsesis, *Confederate Monuments as Badges of Slavery*, 108 KY. L.J. 695, 698 (2020).

269. 42 U.S.C. § 1982 (2018).

270. Tsesis *supra* note 268, at 711.

271. U.S. CONST. amend. I; *see also* Schwartzman & Tebbe, *supra* note 3.

272. *See* Gifford, *supra* note 169, at 793 (identifying “the obstruction of highways or diversion of watercourses” as a historical example of public nuisance); *State v. Lead Indus. Ass’n*, 951 A.2d at 453 (“The term public right is reserved more appropriately for those indivisible resources shared by the public at large, such as air, water, or public rights of way.”).

273. Nagle, *supra* note 165, at 266.

274. *See* *Lew v. Superior Ct.*, 25 Cal. Rptr. 2d 42 (Cal. Ct. App. 1993) (finding a public nuisance against an apartment complex where residents feared for their safety due to an abundance of criminal enterprises, including drug dealing and prostitution occurring on the premises); *see also* CAL. HEALTH & SAFETY CODE § 11570 (West 2021) (specifying that public or private nuisance claims may be set forth for actions involving controlled substances on the premises).

275. Nagle, *supra* note 165, at 317.

American society reliant on white supremacy. The presence of Confederate monuments may arguably be seen as more morally reprehensible than the respective nineteenth century moral nuisances.

Additionally, plaintiffs have made public nuisance claims arguing that nearby cemeteries would “subject them and their families to the constant evidences and reminders of their own mortality.”<sup>276</sup> One California court even stated that “mental suffering . . . is compensable under a nuisance theory.”<sup>277</sup> In *DeBorde v. St. Michael & All Angels Episcopal Church*, the court, in discussing a public nuisance claim, noted that “[e]motions caused by the constant reminder of death may be just as acute in their painfulness as suffering perceived through the senses.”<sup>278</sup> As will be discussed in Part VI, Confederate monuments have the ability to conjure similar, if not more intense, feelings of pain and suffering.<sup>279</sup> The physical and psychological harms associated with the continued presence of Confederate monuments is symptomatic of the greater monolithic structure generated by decades of systemic racism. Virginia State Senator Jennifer L. McClellan (D-Richmond) sums up the pain engendered by viewing these monuments:

Everybody in my family, in Senator [Lionell] Spruill’s family and Senator Lucas’s family and Senator Locke’s family has a story about the trauma inflicted on them solely because of the color of their skin. . . . And these monuments, some of these monuments, trigger that trauma for every single one of us.<sup>280</sup>

Because the right to public space can be argued to be a fundamental principle under both U.S. and international law,<sup>281</sup> the right to enjoy public spaces free from symbols of hate and oppression unquestionably impacts the “community at large.”<sup>282</sup>

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276. *Hardin v. Huckabay*, 6 La. App. 640, 641 (La. Ct. App. 1927).

277. *Lew*, 25 Cal. Rptr. 2d at 46.

278. *DeBorde v. St. Michael & All Angels Episcopal Church*, 252 S.E.2d 876, 882 (S.C. 1979) (per curiam) (citing *Young v. Brown*, 46 S.E.2d 673, 679 (S.C. 1948)).

279. See Scott R. Stroud & Jonathan A. Henson, *Memory, Reconstruction, and Ethics in Memorialization*, 33 J. SPECULATIVE PHIL. 282, 296 (2019) (discussing the complex and often problematic approach to memorials and the reconstructive narratives experienced by viewers).

280. Laura Vozzella, *Virginia Confederate Monuments: ‘We’re Going to Hold Hands on This Journey as Brothers and Sisters,’* WASH. POST (Mar. 5, 2020), [https://www.washingtonpost.com/local/virginia-politics/confederate-monuments-debate-takes-personal-painful-turn-in-virginia/2020/03/05/a15a924c-5ea8-11ea-b014-4fafa866bb81\\_story.html](https://www.washingtonpost.com/local/virginia-politics/confederate-monuments-debate-takes-personal-painful-turn-in-virginia/2020/03/05/a15a924c-5ea8-11ea-b014-4fafa866bb81_story.html).

281. See e.g., Gerald Korngold, *Land Use Regulation as a Framework to Create Public Space for Speech and Expression in the Evolving and Reconceptualized Shopping Mall of the Twenty-First Century*, 68 CASE W. RESV. L. REV. 429, 454 (2017) (discussing the importance of the public space as essential for free speech, expression, and democracy).

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

## B. Substantial interference

The second prong of an action for public nuisance requires the court to examine whether the defendant's conduct unreasonably interfered with the aforementioned public rights. While the crux of the first prong relies on the definition of the public rights, the second prong focuses on the conduct of the defendant.<sup>283</sup> In accordance with the Restatement, a defendant is liable for a public nuisance if their "interference with the public right was intentional or was unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct or for abnormally dangerous activities."<sup>284</sup> In other words, if a defendant locality only negligently interfered with the public's right to health and safety or the right to public spaces, a public nuisance cannot be maintained.

With regard to the public right to health and safety, Confederate monuments are hotbeds for widespread unrest and community tension. The risk to health and safety is multidimensional. As previously noted, most Confederate monuments were constructed decades after the Civil War, where lynchings and fatal violence against Black Americans were rampant.<sup>285</sup> Indeed, meetings of the Ku Klux Klan have occurred at the site of some of these Confederate monuments.<sup>286</sup> In addition, opposing demonstrations at the site of these Confederate monuments almost certainly welcome violent clashes. Individuals have also reported that these monuments invoke racist sentiments by white supremacists. One individual in Lexington, North Carolina, recounted:

"That statue is not for our people, it is a symbol of oppression . . . [e]very time we go out there to protest we get called the n-word or told to 'Go back to Africa'. This statue is bringing out hatred right here in Lexington."<sup>287</sup>

The "Unite the Right" rally in Charlottesville even utilized the Lee monument as a rallying point for white supremacist organizations.<sup>288</sup>

Likewise, those who are opposed to the presence of continued monuments may take action into their own hands and attempt to dismantle the statues, risking

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283. *Id.* § 821B(2).

284. *Id.* § 821B cmt. e.

285. *See supra* Section II(A).

286. For example, the Ku Klux Klan would meet on Georgia's Stone Mountain, where portraits of Lee, Davis, and Stonewall Jackson are etched in the mountainside. Andrew J. Yawn et al., 'This Is Not Just About Symbols': America's Reckoning over Confederate Monuments, *DAILY HERALD* (Aug. 1, 2020), <https://www.columbiadailyherald.com/story/news/2020/08/01/8216this-is-not-just-about-symbols8217-america8217s-reckoning-over-Confederate-monuments/112815140/>.

287. Sharon Myers, *Lexington City Council Approves Resolution Asking for Removal of Confederate Statue*, *DISPATCH* (July 14, 2020), <https://www.the-dispatch.com/story/special/2020/07/14/lexington-city-council-approves-resolution-asking-for-removal-of-confederate-statue/112230674>.

288. Tsesis, *supra* note 268, at 701.

themselves and those around them. For example, in Portsmouth, Virginia, a man was injured when people toppled a Confederate monument.<sup>289</sup> In Durham, North Carolina, protesters used a rope to pull down a Confederate monument dedicated in 1924, resulting in the arrest of at least one protester.<sup>290</sup> Governor Roy Cooper emphasized the potential danger associated with self-help removals, stating, “I am concerned about the dangerous efforts to pull down and carry off large, heavy statues.”<sup>291</sup> Thus, the continued display of Confederate monuments can be considered both an intentional and reckless risk to the public health and safety of nearby individuals.

Furthermore, the continued presence of Confederate monuments may substantially interfere with the “right to enjoy public spaces free from symbols of hate and oppression.” As a vestige of the country’s past, these monuments are enduring reminders to all citizens of the legacy of slavery, racism, and racial inequality in our country. However, these reminders are psychologically damaging to Black Americans. A study completed by University of North Carolina indicated that these objects communicate a socio-political message of exclusion and disconnection.<sup>292</sup> Also according to the study, these objects and the laws that protect them decrease feelings of belonging among Black southerners.<sup>293</sup> Chair of the North Carolina Black Caucus, O.J. McGhee, affirmed that the Confederate monument Silent Sam “was erected purposefully to remind all who walked in its shadow, that no matter our advancements as a people, we would always be viewed as not equal and unwelcome.”<sup>294</sup>

As witnessed in Charlottesville, localities are keenly aware of the innate potential for violence at the sites of these controversial symbols. The continued presence of these symbols of the Confederacy involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience, as articulated by the Restatement.<sup>295</sup> As these statues continue to widen deep racial fissures, the significant and substantial interferences with public rights may reap permanent damage to cultural and societal relations in this country.

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289. Dennis Romero, *Man Injured in Toppling of Confederate Statue in Virginia*, NBC NEWS, (June 10, 2020), <https://www.nbcnews.com/news/us-news/man-injured-toppling-Confederate-statue-virginia-n1229706>.

290. Jesse J. Holland, *Deadly Rally Accelerates Ongoing Removal of Confederate Statues Across U.S.*, CHI. TRIB. (Aug. 15, 2017), <https://www.chicagotribune.com/nation-world/ct-Confederate-statue-removal-20170815-story.html>.

291. Virginia Bridges et al., *NC Governor Orders Confederate Monuments Removed at Capitol After Statues Toppled*, NEWS & OBSERVER (June 20, 2020), <https://www.newsobserver.com/news/local/article243682477.html>.

292. LUCY BRITT ET AL., CTR. FOR THE STUDY OF THE AM. S., EFFECTS OF CONFEDERATE MONUMENTS ON POLITICAL ATTITUDES AND BEHAVIOR (Feb. 12, 2019), <https://south.unc.edu/wp-content/uploads/sites/1092/2019/02/CSAS-Presentation.pdf>.

293. *Id.*

294. Lisa Philip, *Debate Over Silent Sam Reveals Differing Views of University’s History*, WUNC (Nov. 16, 2017), <https://www.wunc.org/post/debate-over-silent-sam-reveals-differing-views-universitys-history>.

295. RESTATEMENT (SECOND) OF TORTS § 821B(2)(a) (AM. L. INST. 1979).

## C. The special injury: Cultural trauma &amp; Confederate monuments

While the majority of public nuisance claims for Confederate monuments have been effectuated by local governments, individuals harmed by the continued display of Confederate monuments may also bring a private action for public nuisance. In order to sustain a private action for public nuisance, an individual must prove that the individual has “suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.”<sup>296</sup> This “special injury” requirement necessitates that a private individual prove that the harm or interference suffered is of a greater extent or degree than that suffered of the general public.<sup>297</sup> This author proposes that the “special injury” requirement to satisfy a public nuisance claim is satisfied by the “cultural trauma” suffered by Black Americans in the United States.<sup>298</sup> Cultural trauma is a unique phenomenon that occurs during or after a negatively perceived event or situation and affects the social impact, and ethical and political dimensions of traumatized communities. The general public may experience a disruptive event; however, not every group within the public will be impacted the same way. The disruptive events from slavery to Jim Crow, has formed an essential part of Black American identity, and the memorialization of that suffering has formed part of this special injury within the Black community.

## 1. What is cultural trauma?

Cultural sociologists such as Jeffrey Alexander, Ron Eyerman, Bernard Giesen, Neil Smelser, and Piotr Sztompka have developed a rich literature of the phenomenon known as “cultural trauma.”<sup>299</sup> According to Jeffrey Alexander’s widely used definition, “[c]ultural trauma occurs when members of a collectivity feel they have been subjected to a horrendous event that leaves indelible marks upon their group consciousness, marking their memories forever and changing their future identity in fundamental and irrevocable ways.”<sup>300</sup> Cultural trauma is “an empirical, scientific concept” that connects “new meaningful and causal re-

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296. *Id.* § 821C(1).

297. *Id.* § 821C cmt. b.

298. As opposed to “general trauma,” which is caused by a severe violation of integrity and can apply to an individual’s physical and psychological wounding or apply to a collective group in the form of memories and on-going events. See Björn Krondorfer, *Unsettling Empathy: Intercultural Dialogue in the Aftermath of Historical and Cultural Trauma*, in *BREAKING INTERGENERATIONAL CYCLES OF REPETITION: A GLOBAL DIALOGUE ON HISTORICAL TRAUMA AND MEMORY* 90, 91 (Pumla Gobodo-Madikizela ed., 2016).

299. Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 *SOCIO. THEORY* 335, 336 (2016).

300. Jeffrey C. Alexander, *Toward a Theory of Cultural Trauma*, in *CULTURAL TRAUMA AND COLLECTIVE IDENTITY* 1, 1 (Jeffrey C. Alexander et al. eds., 2004).

relationships between previously unrelated events, structures, perceptions, and actions.”<sup>301</sup> This type of collective trauma produces so-called “counter-memories,” which compound interactions of “social, political, and cultural agreement and disagreement about the past and present.”<sup>302</sup> This means that trauma resulting from these “counter-memories” can have an impact on a person, whether or not they lived through a specific historical experience.

Cultural trauma is caused by an “invasive or overwhelming event that is believed to undermine or overwhelm one or several essential ingredients of a culture or the culture as a whole.”<sup>303</sup> The sociological process of experiencing such trauma significantly alters a collective’s identity, resulting in an ongoing “re-remembering” of a memory that is deeply connected to the current sense of self.<sup>304</sup> Generally, in order for cultural trauma to manifest, three elements must be present: (1) a longstanding history of routine harm where the subordinated group expects the cultural-trauma-inducing injury; (2) widespread awareness of the routine occurrence of the harm that, if not “shocking,” is “halting or unique enough to inspire broad media coverage;” and (3) “public discourse about the meaning of the routine harm,” which “usually occurs in the form of governmental or legal affirmation of the subordinated group’s marginal status.”<sup>305</sup> In short, the trauma intertwines with the crisis and enters the core of a collective’s sense of identity.<sup>306</sup>

According to Jeffrey C. Alexander, cultural trauma thus becomes a collective’s new master narrative, quantified by the nature of the pain, nature of the victim, relation of the trauma victim to the wider audience, and attribution of responsibility.<sup>307</sup> Alexander asserts that, members of the collective “assume such moral responsibility,” and “define their solidary relationships in ways that, in principle, allow them to share the sufferings of others.”<sup>308</sup> At the same time, Alexander contends that there is also the refusal to recognize the existence of others’ trauma. By refuting that acknowledgement, “people not only diffuse their own responsibility for the suffering but often project the responsibility for their own suffering on these others.”<sup>309</sup> Thus, the bellwether of identifying cultural trauma is how society attributes the harm—is it connected to a certain collective either through religion, mass media, science, laws, or government bureaucracy?

301. *Id.*

302. Cynthia Fabrizio Pelak, *Institutionalizing Counter-Memories of the U.S. Civil Rights Movement: The National Civil Rights Museum and an Application of the Interest-Convergence Principle*, 30 SOCIO.F. 305, 308 (2015); see generally Neil J. Smelser, *Psychological Trauma and Cultural Trauma*, in CULTURAL TRAUMA AND COLLECTIVE IDENTITY 31 (Jeffrey C. Alexander et al. eds., 2004).

303. Smelser, *supra* note 302, at 38.

304. See Alexander, *supra* note 300, at 22; see also Smelser, *supra* note 302, at 41 (characterizing the “long-lastingness” of cultural trauma).

305. Onwuachi-Willig, *supra* note 299, at 336.

306. See Alexander, *supra* note 300, at 10.

307. *Id.* at 13-15.

308. *Id.* at 1.

309. *Id.*

Government plays an inextricable role in the cultural trauma phenomenon. For example, a government actor or entity may create the trauma, deny or highlight its existence, expand or narrow solidarity within a collective, or even attempt to alleviate the trauma.<sup>310</sup> Governments further have the ability to rewrite the traumatizing event, leaving gaps in a society's appreciation of the cultural trauma of a collective. A government can create laws that memorialize trauma, such as the case with Confederate monuments in public spaces. The memorialization of such trauma essentially reinforces that trauma anew. Society at large may generally cope with the cultural trauma of a collective by essentially denying its existence, suppressing its effect, or by displacing the trauma.<sup>311</sup> Such activities may thereby increase the cultural trauma, resulting in significant suffering of a collective at large, and the individual identified within it. Memorials and monuments, in particular, reinforce and exacerbate cultural trauma. Accordingly, objects such as monuments, museums, and historical artifacts may aid in the normalization of the trauma and further injure the collective.

## 2. Confederate monuments as a "special injury" inflicted by cultural trauma

The damage associated with the continued presence of Confederate monuments is that of a "different in kind or quality . . . suffered by the public in common."<sup>312</sup> Monuments are physical manifestations of collective memories, aiding in the creation of "social identities, power hierarchies, and cultural discourses and practices."<sup>313</sup> Through these processes, monuments may externalize the centuries-long struggle Black Americans endured and continue to endure in the United States. As described previously, these objects "symbolize, celebrate, and endorse white supremacy, privilege, and power."<sup>314</sup> Heidi Beirich of the Southern Poverty Law Center maintains that "Confederate sites play to the white supremacist imagination . . . They are treated as sacred by white supremacists and represent what this country should be and what it would have been."<sup>315</sup> This memorialization of white supremacy denies Black Americans self-autonomy and perpetuates a message of dehumanization, devaluation, and inferiority.

The memorialization of the Confederacy through Confederate monuments reinforces the cultural trauma suffered by Black Americans as a collective in the United States. One is hard-pressed to find one "event" that triggers the cultural

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310. *See id.* at 19.

311. *See Smelser, supra* note 302, at 47.

312. *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs.*, 712 P.2d 914, 918 (Ariz. 1985) (affirming a claim for public nuisance, as patrons of a neighborhood sustained damages "special in nature" from a service provider providing daily free meals to indigent persons).

313. Pelak, *supra* note 302, at 308.

314. *Id.* at 305.

315. Brian Palmer & Seth Freed Wessler, *The Costs of the Confederacy*, SMITHSONIAN MAG. (Dec. 2018), <https://www.smithsonianmag.com/history/costs-confederacy-special-report-180970731>.

trauma of Black Americans. Angela Onwuachi-Willig argues that “the longstanding history of a routine harm against a subordinated group creates a constant simmering of individual and collective distress, tension, and psychological trauma underneath the surface for the subordinated group’s members.”<sup>316</sup> Black Americans’ collective cultural trauma began with slavery, endured through Reconstruction and the Civil Rights movements, and lingers with the continuation of structural and systemic racism.<sup>317</sup> However, slavery, as a widespread “event,” effectuated the cultural trauma that “grounded the identity-formation of a people” and “formed the root of an emergent collective identity through an equally emergent collective memory, one that signified and distinguished a ‘race,’ a people, or a community.”<sup>318</sup>

Slavery formed an essential part of Black American identity and formed the catalyst of Black Americans’ cultural trauma.<sup>319</sup> The forced enslavement and complete subordination of Black Americans is the traumatizing “event” that forcibly altered the autonomous sense of self. According to K-Sue Park, slavery further entrenched an ideological “anti-Blackness” that profoundly shaped the social order of the colonies and later the present-day United States.<sup>320</sup> Slavery was not experienced by all in society. However, as critical race theorist and professor of civil rights and civil liberties Cheryl Harris articulated, “although not all Africans were slaves, virtually all slaves were not white. It was their racial otherness that came to justify the subordinated status of Blacks.”<sup>321</sup> The degraded status of Black Americans and the deprivation of their liberty merged into their social and legal status, becoming ingrained in their collective memory.

The Emancipation Proclamation and the end of slavery did not terminate this collective cultural trauma. As Reconstruction ended, it brought the nostalgia of

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316. Onwuachi-Willig, *supra* note 299, at 341.

317. This article provides only a flashpoint of the immense cultural trauma inflicted in Black Americans in the United States. The entirety of the pain and suffering cannot be summarized in one article. For more reading on the cultural trauma experienced by Black Americans in the United States, see Ron Eyerman, *supra* note 8; Karida Brown, *The ‘Hidden Injuries’ of School Desegregation: Cultural Trauma and Transforming African American Identities*, 4 AM. J. CULTURAL SOCIO. 196 (2016); Michael Yu, *Violence and Community: Collective and Cultural Trauma in Black America*, 6 LUMEN ET VITA, no. 2, 2016.

318. Eyerman, *supra* note 8, at 60.

319. *See id.* The extent to which slavery impacted our legal system, and in turn the cultural trauma derived from its existence, must be considered. After the American Revolution, there were approximately 700,000 enslaved Africans in the United States. This constituted less than twenty percent of the total U.S. population at the time. By 1774, the total value of “property” in humans throughout the colonies equated to almost \$3.2 billion by today’s standards. By around 1860, the enslaved population had grown by nearly six hundred percent, leaving four million enslaved persons in the United States. K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Property Law Course*, 131 YALE L.J. \_\_\_, \_\_ (forthcoming).

320. Park, *supra* note 319, at 36.

321. Cheryl L. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1717 (1993).

the antebellum South which eventually formed the roots of the “cult of the Confederacy.”<sup>322</sup> Lost Cause nostalgia became prominent, especially in the South, and the idea of Confederacy as heritage emerged with force.<sup>323</sup> The continued economic, legal, social, and political subordination of Black Americans, as well as the prevalence of racial violence in the late nineteenth and early twentieth centuries, is crystalized in these monuments. Racial violence is used as a mechanism to intimidate Black Americans, and thus subjugate them in political, social, and economic spheres.<sup>324</sup> Furthermore, the lack of accountability, including the extensive history of non-indictments and acquittals for white men who have terrorized Black Americans in the South, plays a central role in creation of this shared suffering.<sup>325</sup> Events such as the murder of Emmett Till and the subsequent trial exacerbated the collective and cultural trauma of Black Americans through the denial of their humanity and civil rights.<sup>326</sup>

The enactment of the Civil Rights Acts and subsequent legislation only put a Band-Aid on the deep wounds that continue to be inflicted on Black Americans. The murders of Trayvon Martin, George Floyd, Breonna Taylor, and countless other Black Americans produced their own separate, cultural trauma. The advent of mass media further advances cultural trauma, allowing individuals to witness the triggering events.<sup>327</sup> Mass media may also dramatize or understate events, allowing competing narratives to trigger a stronger occurrence of trauma.<sup>328</sup>

Confederate monuments, in particular, contribute to a “climate of opinion that is injurious” to not only the community, but specifically Black Americans.<sup>329</sup> The physical harm is important to consider for the “special injury” requirement. The special injury requirement is frequently met when there is evidence of personal injury or damage to property. The deaths and serious injuries that occurred in Charlottesville and the African Methodist Episcopal Church in Charleston, South Carolina, were the direct result of the idolization of Confederate monuments and symbols.

Just as a public nuisance claim can be maintained for personal injury due to

322. Eyerman, *supra* note 8, at 84.

323. See Clint Smith, *Why Confederate Lies Live On*, ATLANTIC (June 2021) <https://www.theatlantic.com/magazine/archive/2021/06/confederate-lost-cause-myth/618711>.

324. Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 L. & INEQ. 263, 267 (2003).

325. See Onwuachi-Willig, *supra* note 299, at 337; Joëlle Anne Moreno, *Flagrant Police Abuse: Why Black Lives (Also) Matter to the Fourth Amendment*, 21 BERKELEY J. CRIM. L., no. 2, 2016, at 36, 59-61 (providing an overview of the many cases of police brutality and non-indictments that the media has spotlighted over the years, which has led to the Black Lives Matter movement).

326. See Onwuachi-Willig, *supra* note 299, at 337.

327. See Alexander, *supra* note 300, at 18-19.

328. For example, Black victims of police brutality are often demonized or dehumanized, despite innocence. See Calvin John Smiley & David Fakunle, *From “Brute” to “Thug:” The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV’T 350 (2016).

329. JEREMY WALDRON, *THE HARM IN HATE SPEECH* 72 (2012).

conduct or activity constituting a nuisance,<sup>330</sup> a corollary to said damage is emotional, psychological, and social pain.<sup>331</sup> Only a small composite of citizens may claim this “special injury” of the cultural trauma, which results from the presence of Confederate monuments in their locality. Even though not all Black Americans experienced slavery and these subsequent traumatizing “events,” this does not stop these institutions from playing a vital role in the construction of individual identity. Sociologist Ron Eyerman writes that “it is not the experience itself that produces traumatic effect, but rather the remembrance of it.”<sup>332</sup> For this reason, the memorialization of these events through the continued display of Confederate monuments inflicts cultural trauma on the collective of Black Americans.

Of course, that is not to say every individual Black citizen may be able to sue for the existence of a Confederate monument somewhere in the United States. Public nuisance claims may arise from smaller, community-based problems.<sup>333</sup> The individual or group of individuals may have standing if one “can demonstrate some injury to a recognized interest such as economic or *aesthetic*, and is himself among the injured and not merely airing a political or intellectual grievance.”<sup>334</sup> In New Orleans, for example, local activist Terri Coleman recounted her experience running into monuments each day walking her children to school: “What I see when I see those monuments is the state that I live in and the country I live in reminding me that at any given point it can take away my humanity because my humanity is provisional because that’s the core of white supremacy.”<sup>335</sup> This visceral reaction to the monuments is the core of the cultural trauma experienced by each Black American in this country and meets the “special injury” requirement for public nuisance.

The cultural trauma inflicted on Black Americans is symptomatic of the larger institutional “legitimacy” of racial oppression. Such legitimacy occurred through the reinforcement of property laws, such as the nuisance doctrine, to restrict Black ownership, occupation, and use of public and private spaces. The acknowledgement of the cultural trauma inflicted on generations of Black Americans alone cannot serve as the remedy. The weaponization of race and the incalculable harm derived from the continued presence of Confederate monuments epitomizes the need to recontextualize the public nuisance doctrine. By removing

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330. See RESTATEMENT (SECOND) OF TORTS § 821C cmt. d (AM. L. INST. 1979).

331. See *Acadia, California, Ltd., v. Herbert*, 353 P.2d 294, 299 (Cal. 1960) (“It is settled that, regardless of whether the occupant of land has sustained physical injury, he may recover damages for the discomfort and annoyance of himself and the members of his family and for mental suffering occasioned by fear for the safety of himself and his family when such discomfort or suffering has been proximately caused by a trespass or a nuisance.”).

332. Eyerman, *supra* note 8, at 62.

333. Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 782 (2001).

334. *Akau v. Olohana Corp.*, 652 P.2d 1130, 1135 (Haw. 1982) (emphasis added).

335. *The Stream, Hate or History? Debating the Value of Confederate Monuments in the US*, YOUTUBE (May 26, 2017), <https://www.youtube.com/watch?v=yynIkW0H5qo&t=964s>.

Confederate monuments from public spaces as “public nuisances,” we are not only acknowledging cultural trauma, but also reappropriating a tool once used to oppress and harass Black Americans.

### CONCLUSION

One hundred and fifty-seven years after the end of the Civil War, white supremacists continue to venerate the Lost Cause, the Confederacy’s secessionist government, and the enslavement of millions of people through Confederate monuments. The debate surrounding Confederate monuments is derived from structural anti-Blackness—a harm that can only be rectified through institutional changes, which must start at a governmental level. The effort of state legislators to make it more difficult for local governments to remove monuments erodes the ability of Black Americans to counter-memorialize the cumulative effects of cultural trauma.

These objects are public nuisances. Not only do they risk the public’s health and safety, they also create a sense of exclusion for an entire class of citizens. Racism is central to the continued existence of Confederate monuments. The removal of the Confederate monuments can serve as a counter-memory and marshal a new narrative that will reveal the true history of Black Americans in this country. However, removing the monuments is only one step in coming to terms with the cultural trauma experienced by Black Americans. Through the appreciation of the counter-memories and cultural trauma of Black Americans, society must recognize the “difficult racial past, including the accumulative effects of cultural trauma and the state-sponsored collective forgetting, misremembering, and disremembering.”<sup>336</sup> Consequently, the removal of Confederate monuments will aid in the erasure of the false narrative propagated by Lost Cause enthusiasts, and more importantly, will facilitate the healing of a nation plagued by uncompromising division.

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336. Pelak, *supra* note 302, at 324.