Rejecting Property Rules-Liability Rules for Boomer's Nuisance Remedy: The Last Tour You Need of Calabresi and Melamed's Cathedral

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Rejecting Property Rules-Liability Rules for Boomer's Nuisance Remedy: The Last Tour You Need of Calabresi and Melamed's Cathedral.

Doug Rendleman*

Abstract. This draft article analyzes and criticizes the New York court’s tort remedies in its nuisance decision, Boomer v. Atlantic Cement, and Calabresi and Melamed’s famous law-and-economics article, One View of the Cathedral. From the Remedies branch of Legal Realism, this draft finds both wanting because both subordinate the winning plaintiffs’ injunction remedy to money damages.

Both the Boomer decision and the Cathedral article undervalue public health and environmental protection. This mindset militates against robust and effective private-law remedies for defendants’ environmental torts.

In addition, the Cathedral article’s four-rule organization and vocabulary are confusing and misleading. In particular its Rule 1) over-emphasizes the effect of an injunction, which, if the defendant breaches, will usually lead to compensatory contempt and a money award that converts a so-called “property right” into a so-called “liability right.”

Behavioral economists’ studies and recent events have undermined and qualified many of the market-economics theories in the Cathedral article. This draft favors a flexible and pragmatic common-law technique instead of the law-and-economics analysis that favors awarding a nuisance-trespass plaintiff damages over an injunction. Moreover, the draft maintains that the economists’ presumption of nuisance-trespass parties’ post-injunction negotiation leading to an excessive coerced money settlement is overstated and should yield to more particularized and contextual analysis.

This draft maintains that the Cathedral article’s four point array of remedies solutions is both too long and too short. Rule 3) is the liability decision that doesn’t belong in a remedies analysis at all. Rule 4)’s plaintiff-pays solution destabilizes property rights and should be abandoned in private litigation. Rule 2)’s preference for damages over an injunction should be a rare remedy. Analysis of the trespass and nuisance injunction should study structural litigation’s injunctions and emphasize flexibility and equitable discretion, in short a broadened Rule 1). Other remedies, punitive damages and restitution, should also be considered as viable options.

Taking earlier Legal Realists cue, this article seeks to replace theory with a more functional approach. By arguing in this draft for more and more detailed injunctions, the author hopes for augmented environmental protection and private-law remedies against global warming and climate change.

Please don’t cite this draft without my permission. Thanks - Doug Rendleman

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Introduction: As Calabresi and Melamed's Cathedral article passes its 40th birthday, I think it is timely to re-examine it along with the contemporaneous New York Court of Appeals's decision in Boomer v. Atlantic Cement. I seek to bring some perspective to bear on their remarkable longevity and influence and to express my skepticism about each. My conclusion in brief, is that both are eligible for phased retirement.

In aid of my analysis, I continue this article with the archetype of a neighboring property owner's private particulate pollution nuisance lawsuit, an example based on Boomer, which it criticizes. The article moves to Calabresi and Melamed's four options for a nuisance court's solution to the pollution problem. It discusses each of the options and the choices between them. It adds some further considerations under my new general head of Rule (5).

This article leaves out parts of Calabresi and Melamed's analysis, for example their discussion of the inalienable. Calabresi and Melamed's article, which emphasized that it takes only "one" view of the cathedral, left room for others; it is more tentative and nuanced than other more theory-driven and dogmatic law-and-economics scholars who come later. I address my article primarily to the latter group and secondarily to their future students.

What unfolds below are differing basic ways of looking at the law. How does human decisionmaking work? On the one hand a theory-driven approach bases human decisionmaking on economic motives and often finds clearcut answers. On the other, a pragmatic and empirical view that human nature is variable and the law is ambiguous, messy, and process driven.

I am not a stranger to economic analysis.1 Economic analysis of law is, I think, helpful as far as it goes. I agree, however, with Professor Sterk's remark that "I have suggested that any attempt to justify legal rules exclusively in efficiency terms is fatally flawed.2

This article's genesis was developing and teaching law-school casebooks that included Boomer v. Atlantic Cement as a principal decision.3 These casebooks are a "first draft" of this article.;

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Behavioral economists who have been trying to quantify and define our human experience have produced surprising and interesting conclusions, many of which are inconsistent with market economic theory. Some of these studies have penetrated the walls of this professor's tower. Behavioral economics is a branch of applied psychology that many apply to legal issues as a branch from the law-and-economics stream. Examining social context, individual psychology and basic human cussedness, it has the virtue of being based on actual experience. Some of the work has the artificial quality that comes from experimental settings. Moreover, many behavioral economics studies stretch questionable methodology to reach broad generalizations based on slender results. Once more, behavioral economics is useful as far as it goes.

Another part of my analysis is positive law, usually what has happened in the courts throughout the land. One impediment that the legal scholar encounters is the vacuum that he must fill with research. Theory-driven approaches, on the other hand, can state the problem, turn the theory's crank, and announce the result that emerges. As Laycock said, “many later law-and-economics scholars who follow economic theory exhibit disinterest “in reading cases or mastering doctrine.” Research in primary sources can be dull and frustrating, but it is indispensable to responsible scholarship.

The positive-law writer must actually discover what the courts are deciding in actual disputes. This requires him to find and read court decisions, mostly appellate, which reflect the universe of disputes. This research is difficult and imprecise. Its conclusions are often tentative. “[W]e have,” the late Christopher Lasch observed, “writing in which theory, so called, is allowed to set the questions and determine the answers in advance. Theory, so called, has become the latest panacea, the latest source of ready-made answers, the latest substitute for thought. Thinking is hard work and often very frustrating, since it only seems to yield provisional conclusions and to leave one in a greater muddle than ever, and so intellectuals yearn to be released from the burden, to find some secret formula that will give them definitive, comforting answers and make it unnecessary for them to go through this terrible labor of thought.”

The United States has no single private-law court. Each state and the District of Columbia has its own procedure, legal culture, economy, and legal system with final appellate last-word in its own supreme or other final court. Terminology varies within and between systems. By the time many of the decisions under study reach appeal, they are close enough to be decided either way. Moreover, the judges write their decisions to support the result they reach. Courts, the researcher

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finds, muddle through, reaching contrasting and inconsistent decisions on similar facts. Research in appellate and some trial-court decisions is imperfect and messy.

I have tried to be wise enough to seek only as much certainty as the subject will admit of, to find and analyze factually similar nuisance and encroachment decisions. Several related bodies of Tort, Property, Environmental, and Remedies law compete for the researcher's attention - mistaken improver, adverse possession, pollution control, and, if a government agency is involved, eminent domain. I summarize decisions to illustrate and support my points. This opens me to charges of selectivity and anecdote. My research has, however, the advantage of being based on experience. That, a critic may observe, is a fine idea in practice, but it will never work in theory.

Law-and-economics analysis examines the most efficient way to resolve a dispute. It looks to the future through deterrence, by signaling economic incentives to a potential defendant to prevent future casualties and to identify the lowest cost avoider. Deterrence is prospective not retrospective; the seeker for deterrence may view the plaintiff's compensatory damages as incidental. Deterrence is less connected to the parties' present litigation or to the plaintiff's actual or potential loss, thus it is more of a reason to take money from the defendant than a reason to give it to the plaintiff. Court decisions, legal reasoning based on values, policies, and legal rules, usually examine money transfers from the defendant to the plaintiff under the heading of compensation in addition to lower-priority deterrence and punishment.7

Law-and-economics' vocabulary is difficult even for a specialist to decode, what's more a merely educated lawyer. Written for a specialist scholarly audience, it may cloak conservative political agenda. It is too abstruse for lawyers and judges, hence inaccessible, or imperfectly applied.8 I address this article primarily to legal education and scholarship.

Sympathetic with increased environmental protection, I wrote this article from my perspective in the Remedies branch of process-oriented Legal Realism. Except in one segment, I assume that the defendant is liable to the plaintiff under the substantive law and I examine what the court can do as a remedy for the successful plaintiff.

The antecedent issue of the defendant's substantive liability is distinct from, but not divorced from, the later question of the plaintiff's remedy. "The creation of a right," Justice Thomas wrote in eBay v. MercExchange, "is distinct from the provision of remedies for violations of that right."9 For the plaintiff's remedy should advance, at least it ought not retard, the substantive law's policy.

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Assuming that the defendant is liable under substantive law, the remedy inquiry invokes the court's judgment on two issues. First, the court must choose the plaintiff's remedy. The court's principal choice below is how to deploy two remedies, compensatory damages and an injunction. Less important remedial choices concern punitive damages and restitution. Second, after choosing the plaintiff's remedy, the court must measure or define it. If the court awards the plaintiff compensatory damages, what amount should they be? If the court grants the plaintiff an injunction, what of the defendant's conduct should it require or forbid?

**Boomer v. Atlantic Cement**: This article begins with the archetype land-use dispute, Boomer v. Atlantic Cement. Atlantic's Cement's factory is emitting particulate pollution that distresses surrounding property owners. What's neighbor Boomer to do? How should the court respond?

The New York court's *Boomer* decision has held its audience for generations. First-year law school Property and Torts casebooks feature *Boomer*, above, and *Spur Industries*, which is discussed below. Because of the court's choice between damages and an injunction in environmental litigation, *Boomer* is also a natural for upper-level courses in Remedies, and


Environmental Law.14 Scholars have written important chapters and leading articles about the remedies issues in Boomer.15

The Boomer court accepted Atlantic Cement's substantive tort liability for a private nuisance. It focused on plaintiff Boomer's remedy. The court considered the utility of Atlantic Cement's development and the plant's harm to plaintiff's use. The court granted the "winning" plaintiff compensatory damages instead of an injunction.16 “From the attempt to maintain the sanctity of rights in property against social encroachment came a de facto, but not de jure, damage remedy for injuries to rights in land otherwise abatable by injunction," my late colleague Professor Louise Hapler concluded.17

Boomer, Professor Farber concludes, lives on in law school because it is "a great teaching tool." "Generations of law students have wondered whether, in this battle between David and Goliath, Goliath should walk away so apparently unscathed, leaving a battered David with nothing but a few coins for his trouble."18 Many scholars, law teachers, and other observers, including many Washington and Lee law students, favor the Boomer court's damages-only remedy, a position that this article repudiates. For my pedagogical purposes, however, the incorrect Boomer decision performs an important service because the teaching value of a simple but faulty decision is clear.

14 Robert Percival, Christopher Schroder, Alan Miller, & James Leape, Environmental Regulation: Law, Science, and Policy 74-75 (Sixth Edition 2009)(part of an introduction on private nuisance written to maintain that private nuisance is "grossly inadequate" for modern industrial pollution, a short summary of Boomer).


One of the reasons Professor Douglas Laycock refers to the *Boomer* decision as a “train wreck” is that the Court of Appeals rewrote doctrinal history. The court started with the inaccurate premise that the New York common law of nuisance remedies required a judge to grant a nuisance plaintiff an injunction when the plaintiff's loss from the defendant's activity was “substantial.” Thus, if the plaintiff's loss surmounted that minimum threshold, the judge would grant an injunction without considering what it cost the defendant to abate the nuisance. The *Boomer* court claimed an innovation for its decision to compare plaintiff's benefit from an injunction, which it stated as permanent damages of $185,000, with the defendant's cost to comply with a shutdown injunction, closing a $45,000,000 plant and unemploying over 300 workers.19

As Professor Halper demonstrated in 1990, however, the *Boomer* decision was really nothing new for New York.20 The *Boomer* court had overlooked a “large body of [New York] law on undue hardship.” “Boomer was no innovation,” Laycock concluded in 2012 after he “independently reviewed” Halper's research and “further confirmed her general account.”21

This article will, in addition, criticize the *Boomer* decision below as badly reasoned and incorrectly decided.

**Pollution, Nuisance, and Trespass:** Should a property owner like Boomer who lives on the edge of an industrial site be subjected to the health hazards and uncompensated property depreciation caused by a cement factory's particulate pollution? The factory's operation interferes with the owner's enjoyment, indeed his possession, of his land.

In economists' parlance, an industrial proprietor's negative externality is the incidental harmful effect that its activity has on others, an effect that the proprietor is not legally responsible for and may ignore. A negative externality means that the proprietor has captured the benefits of its operation while distributing some costs to others. A court may create legal responsibility for the proprietor's activity and define remedial consequences that force it to consider the affected property owners. The court's remedial decision will structure the proprietor's incentives to "internalize the externality." Courts have used nuisance and trespass substantive law and injunctions and damages remedies to constrain neighbors' nuisances and trespasses, to suppress externalities.22

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A landowner plaintiff sues a defendant for a nuisance to protect his right to use and enjoy his property. Nuisance involves less-palpable invasions, for example defendant's noise, odor, and vibrations. Courts adopted nuisance as the private-law foundation for modern environmental law. Even so, a legal researcher will find the substantive law of private nuisance a puzzle. Both Restatements of Torts will cause more of a muddle.

Trespass to land is a related tort that blends into the tort of nuisance. A trespass involves a defendant casting something with size and weight that impinges on the plaintiff landowner's land. Many of the decisions we review below stemmed from defendants' encroachments on plaintiffs' property. A court will use the trespass tort to protect the owner's right to use and possess the land and its physical integrity.

The plaintiff's substantive theory in *Boomer* was nuisance, based on the factory's particulates, less tangible invasions than the explicit invasion of trespass. Nuisance is a more complex substantive tort than trespass because the court compares the litigants' uses. A court will treat a nuisance defendant better and more leniently in both substance and remedy than a trespass defendant. This leads plaintiffs' lawyers to develop interested trespass-tort characterizations that test the borderline between the torts to achieve favorable treatment for their clients. Particulate pollution from a defendant's dust, smoke, and gas might fit into either. In Oregon in 1960, for example, a court held that a defendant who disseminated particulates and gasses with fluorides had committed a trespass. In 2011, a Minnesota state intermediate appellate court found that the

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24 Prosser referred to nuisance as a "legal garbage can," William L. Prosser, Nuisance Without Fault, 20 Tex.L.Rev. 399, 410 (1942). In the Fourth Edition of his Torts treatise, mellowed by the intervening years, Prosser said that nuisance was merely an "impenetrable jungle." William L. Prosser, Law of Torts 571 (1971). Confirmation for these conclusions will be found in John W. Wade, 8 Forum 165 (1972) and the Restatement (Second) of Torts § 40 (1977).


defendant's oversprayed pesticides that drifted from its field to an organic farmer's field were a trespass and that an injunction was a possible remedy. In 2012, the state Supreme Court held that the invasions of drifting pesticide wasn't a trespass because the pesticide wasn't a tangible item that invaded the plaintiff's land and interfered with their possession of it. But the defendant's invading pesticide could be a nuisance subject to an injunction because it interfered with the plaintiff's ability to use their land. There are numerous decisions on both sides.

The Permanent-Temporary Distinction: Courts classify a defendant's nuisance or trespass invasion of a plaintiff's land as permanent or temporary. This must include the important cavaet that "[t]he terms 'permanent' and 'temporary' are somewhat nebulous in that they have practical meaning only in relation to particular fact situations and can change in characterization from one set of facts to another." The permanent-temporary distinction governs the applicable statute of limitations, the choice between or combination of damages and an injunction, the measure of damages, and the definition of a cause of action for preclusion. We are concerned here with the plaintiff's remedies, the choice between, or combination of, damages and an injunction and with the measure of plaintiff's damages.

If the court classifies the defendant's invasion of plaintiff's property as permanent, the landowner's single cause of action accrued and the statute of limitations period commenced to run when the defendant's invasion began or when the plaintiff's injury became apparent. If the statute of limitations period has expired, the owner's suit against the defendant's permanent invasion is time-barred.

A landowner has one cause of action for past and future damages for the defendant's permanent invasion. The court will measure a successful plaintiff's permanent damages by diminution, the value that the plaintiff's property lost because of the defendant's invasion. By paying the plaintiff his permanent damages, the defendant acquires something like an easement on the plaintiff's property. The defendant, moreover, exercises something like eminent domain over the plaintiff's property. The New York court's remedy for plaintiff Boomer was, in effect, permanent damages; the court's conditional injunction formally enjoined Atlantic Cement’s


32 Johnson v. Paynesville Farmers Union Co-op, 819 N.W.2d 693, 705 (Minn. 2012).


35 Burley v. Burlington Northern & Santa Fe Ry., 273 P.3d 825 (Mont. 2012) (continuing tort doctrine allowed plaintiffs to maintain their damage claims from defendant's reasonably abatable contamination.).

36 Burley v. Burlington Northern & Santa Fe Ry., 273 P.3d 825 (Mont. 2012). (continuing tort doctrine allowed plaintiffs to maintain their damage claims from defendant's reasonably abatable contamination).
nuisance but the court stayed the injunction, apparently for eighteen months; the injunction would never be effective if defendant paid plaintiff’s damages which in turn created an easement.  

A defendant's temporary invasion is divided into two subdivisions, the defendant's repeated invasions or its continuing invasion of the plaintiff's property. Each day of a defendant's temporary invasion of the plaintiff's land is a self-contained cause of action for statute-of-limitations purposes. The owner may sue the defendant to recover for his temporary damages that occurred during the statute-of-limitations period immediately preceding his lawsuit.

Instead of damages, the owner's future remedy for the defendant's continuing trespass is often an injunction that orders the defendant to cease or to ameliorate its tort. The court may couple a future-oriented injunction with awarding the plaintiff a rental-value measure of damages for the defendant's past invasions. A court is more likely to measure a plaintiff’s temporary damages by the cost to restore the land or by the land’s rental value than by its diminution in value. If the judge doesn't grant the plaintiff an injunction, the plaintiff may, in the future, sue the defendant in a second action for his damages that occurred after the first judgment.

**Economics and the Environment:** A landowner-plaintiff who relies on the traditional torts of nuisance and trespass may be both a conservative property-rights opponent of an industrial defendant and a progressive paladin for the environment. Two of the reasons Professor Halper gave for the legal and economic complexity are prominent in Boomer: How should a court adopt the common law of nuisance to the forces of economic development? What role does the public interest in a wholesome environment play?

The Boomer court's minimalist opinion emphasized economic development and subordinated the larger public issue of environmental control:

"A court performs its essential function when it decides the rights of parties before it. * * * It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.

"Effective control of air pollution is a problem presently far from solution even with the full public and financial powers of government.

"It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of

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close regulation; and of the actual effect on public health. It is likely to require massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls.

“...A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant—one of many—in the Hudson River valley.”

The court added that the "public health or other public agencies" are not foreclosed from "seeking proper relief." These authorities have diligently pursued efforts to reduce pollution and clean up the air. Cement plants continue to be heavily regulated industries. Private plaintiffs' nuisance litigation continues apace along with the public environmental regulatory law that legislatures have developed in the meantime.

A counterbalancing decision also from the early years of the environmental era was Harrison v. Indiana Auto Shredders. In defendant's appeal from plaintiffs' judgment in a neighbors' nuisance lawsuit against a huge automobile shredder, the Court of Appeals was due to reverse because the trial judge's remedy, permanent damages plus a shut-down injunction, was duplicative and overreaching.

Writing for the United States Court of Appeals, Justice Tom Clark dealt with several features of the common-law technique and environmental law in ways that contrast with the Boomer court:

“This case is representative of the new breed of lawsuit spawned by the growing concern for cleaner air and water. The birth and burgeoning growth of environmental litigation have forced the courts into difficult situations where modern hybrids of the traditional concepts of nuisance law and equity must be fashioned. Nuisance has always been a difficult area for the courts * * * [E]nvironmental consciousness may be the saving prescript for our age. Thus the right of environmentally-aggrieved parties to obtain redress in the courts serves as a necessary and valuable supplement to legislative efforts to restore the natural ecology of our cities and countryside.

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“Judicial involvement in solving environmental problems does, however, bring its own hazards. Balancing the interests of a modern urban community may be very difficult. Weighing the desire for economic and industrial strength against the need for clean and livable surroundings is not easily done, especially because of the gradations in quality as well as quantity that are involved. There is the danger that environmental problems will be inadequately treated by the piecemeal methods of litigation. It is possible that courtroom battles may be used to slow down effective policymaking for the environment. Litigation often fails to provide sufficient opportunities for the expert analysis and broad perspective that such policymaking often requires.

“As difficult as environmental balancing may be, however, some forum for aggrieved parties must be made available. If necessary, the courts are qualified to perform the task. The courts are skilled at “balancing the equities,” a technique that traditionally has been one of the judicial functions. Courts are insulated from the lobbying that gives strong advantages to industrial polluters when they face administrative or legislative review of their operations. The local state or federal court, because of its proximity to the individual problem, is often in a better position to judge the effect of a pollution nuisance upon a locality. For all of these reasons, the balancing in this case, although difficult, was nonetheless a proper function for the court below to perform. All other forums for obtaining relief were cut-off from the claimants and they understandably turned to the courts for relief.”

I endorse Professor Klass's unfavorable contrast of the Boomer court's to the Harrison court's attitudes and approaches to the judicial role in applying common-law doctrines to develop a remedy for a large environmental problem.

Similarly, Professor Farber questioned whether the Boomer majority's "balancing" weighed everything relevant to its decision. He pointed out that the majority considered the cement plant's investment and its employees but that it ignored the deleterious effect of the factory's pollution on the health of the people in the vicinity. The court, he wrote, “refers to one third-party interest favoring the defendant—the number of employees at the plant—but ignores the third-party interest favoring the plaintiffs, the regional impact of the defendant's air pollution.”

Denying Boomer an injunction and remitting him to permanent damages downgraded public health. Favoring awarding the plaintiff diminution damages over granting him an injunction means forcing him, in effect, to exchange his health for the defendant's money. Mr. Bill Futrell

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43 Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107, 1120–1121 (7th Cir. 1975).


concluded that the Boomer majority incorrectly subordinated the injunction to damages and “vitiates the law of private nuisance.”

The public interest would have been better served if the Boomer court had chosen different remedies. Instead of compensatory damages, the court might have ordered an “oversight,” “standards,” or “technical adjustments” injunction that required the defendant to install and maintain available pollution-control technology and techniques. The court could oversee the defendant’s progress by requiring it to submit periodic reports and plans. The court order could anticipate time, place, and manner limits on pollution and reserve the judge's ability to modify the order in light of changed circumstances.

Laycock who faults the Boomer court's “terrible opinion," reached a different conclusion about its result. He agreed with the court's choice of a damages remedy. The Boomer court, he wrote, reached an “entirely predictable result” through historical and analytical error.

The structural injunction is a judicial technique to bring a large complex institution into compliance with the law. Courts use structural injunctions to end legal race segregation where it was required or permitted. Another branch of the structural injunction that courts developed beginning in Arkansas in the 1970s brought prisons and jails into compliance with the law. Industrial pollution is another large and complex legal problem that is amenable to the structural injunction process. Perhaps in the early 1970s, the New York court wasn't ready to transfer judicial experience in operating institutions from school desegregation to industrial management and pollution control.

The Common Law, Judgment and Discretion: A court makes two remedies decisions, choice and measurement-definition. An economist might state these important decisions as whether a defendant’s activity is an externality and, if so, whether and how the defendant will internalize its externality.

The court decides defendant's liability first, whether to grant or deny a nuisance plaintiff any remedy. The court's major choice of remedy for a defendant's pollution is between compensatory damages and an injunction. If the court grants the plaintiff a remedy, the court decides how to measure or define it, the amount of damages and the injunction's terms. The court's

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47 Restatement (Second) Torts § 941, Comment e (1979).


discretion in choosing a plaintiff's remedy is more circumscribed than its discretion in measuring-defining it.\textsuperscript{51} After the judge decides to grant the plaintiff an injunction, her discretion increases when considering the injunction's terms.\textsuperscript{52}

The New York Court of Appeals decided \textit{Boomer} under the court-made common law tort of nuisance. A court applying the common law to a dispute that isn't controlled by a precedent literally creates the law as it consults existing similar decisions to decide both the substance and the successful plaintiff's remedy.\textsuperscript{53}

Does the judge have discretion to find a defendant's substantive violation, but to decline to grant the plaintiff an injunction? Professor Plater approved a common-law court's flexibility in choosing a plaintiff's remedy. He wrote that in a nonstatutory lawsuit governed by court-made common-law rules, the judge may find that the defendant violated the substantive rule yet not grant an injunction because "abatement was decided anew in each case."\textsuperscript{54} "An injunction," the Supreme Court said in 2008, emphasizing Plater's point, "is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."\textsuperscript{55} The judge has discretion to find the defendant liable for a tort, but to decline to grant the plaintiff an injunction and instead award him damages.\textsuperscript{56}

In a statutory decision, Weinberger v. Romero–Barcelo, the Supreme Court cited the New York court's common law decision in \textit{Boomer} as well as an Arizona common law decision that this article discusses below \textit{Spur Industries}, to illustrate the judge's equitable discretion. Professor Farber wrote in 2005 that "unfortunately, the Supreme Court has done little to clarify the availability of environmental injunctions in the twenty years since \textit{Weinberger}, so we still cannot be completely positive about the extent to which \textit{Boomer} carries over to statutory injunctions."\textsuperscript{57}

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\textsuperscript{52} Doug Rendleman, The Trial Judge's Equitable Discretion Following eBay v. MercExchange, 27 Rev. Litig. 63 (2008).

\textsuperscript{53} Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 177 (1991).

\textsuperscript{54} Zygmunt J.B. Plater, Statutory Violations and Equitable Discretion, 70 Cal. L. Rev. 524, 543 (1982). In contrast, Plater wrote that a court dealing with a provision in a constitution or a statute starts with a baseline premise that may circumscribe its discretion.


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would forbid an activity that the court conceded is improper. "Despite its approving citation of Boomer," Farber speculates, "the Weinberger Court probably did not mean to endorse open-ended judicial discretion." Because the Supreme Court has not revisited equitable discretion since Weinberger, we lack a definitive answer.58

**Calabresi and Melamed's One View of the Cathedral:** Since the early 1970s, the early days of law-and-economics scholarship, law-and-economics scholars have discussed the New York court's choice in Boomer between damages and an injunction under the rubric of liability rule vs. property rule, the vocabulary in Calabresi and Melamed's famous Cathedral article.59 These discussions occupy a major corner of Law-and-economics scholarship.60

Calabresi and Melamed's Cathedral article presented a court like the Boomer court with four possible solutions or Rules: Rule (1) a "property rule." The plaintiff prevails on the defendant's nuisance. The court finds that a nuisance exists. Then the court grants the plaintiff an injunction closing the defendant's factory. Rule (2) a "liability rule." The court finds that a nuisance exists, the plaintiff prevails on the defendant's nuisance. Then the court awards the plaintiff the damages that the judge or jury sets. Requiring the defendant to pay the plaintiff damages allows the defendant's tortious activity to continue. Rule (3) a "no-nuisance" rule. The court does not find that a nuisance exists. The losing plaintiff takes nothing, and the court allows the defendant's activity to continue. Rule (4) a "plaintiff-pays" rule. The court finds that the defendant's nuisance exists. It enjoins the defendant's activity if, however, the plaintiff pays the defendant, perhaps measured by the defendant's cost to comply.61

This article turns to applying the Cathedral article's alternatives for Boomer and Atlantic Cement. It will delve into normative matters of policy and principle, actual court decisions as positive law, and vocabulary. It will maintain that the Cathedral article proposes unsound analysis that leads to questionable results and neither aids analysis nor helps predict the results in many of the core situations it purports to cover. It will conclude that the Cathedral article has ceased to be helpful, if it ever was, and that scholars should develop better vocabulary and policy justifications that will lead to sounder decisions in actual disputes.

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60 Tours of Calabresi and Melamed's Cathedral are a cottage industry in the law reviews. Examples of scholars' critical articles that accept its basic structure, but suggest refinements are Stewart Sterk, Property Rules, Liability Rules and Uncertainty About Property Rights, 106 Mich.L.Rev. 1285 (2008); Frank Michelman, There Have to Be Four, 64 Md.L.Rev. 136 (2005).

Calabresi and Melamed's Rule (3): Rule (3) does not present the court with a choice of remedy. The court finds no tort, no substantive liability. This article takes Rule (3) out of Calabresi and Melamed's order and discusses it first because it makes more Remedies sense to examine the threshold question of whether a defendant is liable or not to the plaintiff under substantive law before turning to subsequent question of the plaintiff's remedy.

A court could find that, where the defendant's activity is useful to the community, that no nuisance exists.\(^{62}\) The court will consider several questions about land use, enterprise, and the environment: What are the proper "costs" or "expenses" of a defendant's enterprise? If particulate pollution from the cement plant is held to be a homeowner's cost, will resources be allocated efficiently? I think not. The price of cement will be lower than it would be otherwise and that will lead to over-consumption of cement.

It may be neither wise nor desirable for a court to restrict or prohibit a landowner's activity merely because it affects another person. Adjoining landowners may adopt or may have adopted a solution to maximize the value of both tracts. Perhaps the plaintiff's house was cheaper or more desirable in the first place because of the defendant's industrial site next door.

Context matters. Both whether a nuisance exists and its remedy depend on the discrete situation. "A nuisance may be merely the right thing in the wrong place,—like a pig in the parlor instead of the barnyard."\(^{63}\) We will return to pig pens below, but first, staying in a rural landscape, here's the French court of appeals's response to a plaintiff's complaint about a flock of chickens kept by another resident of a rural village. "The chicken is an ordinary and stupid animal, the truth of the matter being that no one, not even a Chinese circus, has ever been able to train it; living near a chicken implies a lot a silence, some tender clucks and some cackles ranging from happiness (laying of an egg) to serenity (tasting a worm) and including panic (seeing a fox); this peaceful neighboring has never disturbed no one but those who, for wholly different reasons, hold a grudge against the owners of the gallinaceans; this court shall not rule that the ship bothers the sailor, flour disturbs the baker, the violin puts out the orchestra leader and a chicken inconveniences an inhabitant of the hamlet of La Rochette (402 souls) in the district of Puy-de-Dôme.\(^{64}\)

The New York court may have retreated from Boomer in Copart Industries v. Consolidated Edison, a similar dispute. Copart prepared and stored new automobiles next to Con Ed's generating plant. Fly ash containing acid allegedly from the plant marred Copart's new cars' finishes, and Copart went out of business. Copart sued Con Ed for damages. The jury found for Con Ed. The

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Court of Appeals affirmed. It approved jury instructions that required plaintiff-Copart to have shown that Con Ed had negligently or intentionally harmed Copart.65

Another New York cement plant, this one a legal, nonconforming use, was not, the court held, a nuisance because the trial judge had found "the best and most modern equipment has eliminated most of the noise, dust and bright lights." The dissent argued that the plant was a nuisance that the court ought to remedy, as in Boomer, by permanent damages.66

The Idaho court compared the economic utility of the defendant's industrial feedlot, with 9,000 "odiferous" cattle and found that it outweighed the plaintiff's olfactory and other harm from the defendant's business. No nuisance, the court held, no liability. "Idaho is sparsely populated and its economy depends largely upon the benefits of agriculture, lumber, mining and industrial development." The dissent quipped that "if humans are such a rare item in this state, maybe there is all the more reason to protect them," at least with damages.67

Perhaps the New York and Idaho courts above have rejected the flexibility of adjusting damages and injunction remedies and retreated to a rigid nuisance-no nuisance analysis. If so, this approach may circumscribe courts' use of nuisance as a method of environmental control. This may be an unsatisfactory way to respond to people affected by pollution.68

The common law is flexible enough for a creative court to mold substantive nuisance doctrine and remedies to meet changed conditions. "Whatever the legitimacy of the oft-voiced fear of judicial activism in other areas, in the environmental field a complex of political, legal, and social factors makes judicial sensitivity and creativity pivotally important to the way in which all of us work, play, eat, sleep, and die."69

**Calabresi and Melamed's Rules(1) and (2):** Once the court has found that defendant is liable, it turns to the successful plaintiff's remedy. This article will next discuss the court's choice between granting the plaintiff an injunction and awarding him damages.

Defining the vocabulary in Rule (1) as the "property rule," Calabresi and Melamed wrote that "An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the

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value of the entitlement is agreed upon by the seller.” Thus, according to the authors, a property entitlement is impeccable until the owner parts with or sells the property voluntarily. The property owner's power to set the property's value is exclusive. He can refuse any buyer's offer. The property's price is completely within its owner's control, whim, or discretion.

Explaining Rule (2), the “liability rule,” Calabresi and Melamed wrote that the court may not grant the successful plaintiff an injunction to forbid the polluting tortfeasor from continuing the nuisance. The owner may recover damages from that defendant. If so, the owner must accept the court's money judgment for the property's “value” as the court determines the damages “objectively.”

Calabresi and Melamed's property rule-liability rule vocabulary and definitions have become part of the law-and-economics vernacular. Scholars use them to describe the nuisance or trespass court's choice between an injunction and damages. This article returns below to the question of whether the vocabulary and definitions describe the actual remedies accurately. The definitions will be criticized.

Balancing the Hardships, Rule (1), Rule (2), Injunction vs. Damages: Since Calabresi and Melamed's first two solutions or Rules involve the court's choice of remedies between granting the plaintiff an injunction and awarding him damages, we will treat them together along with the doctrine of balancing the hardships, a crucial mediating principle. As part of its discrete decision whether to grant the successful nuisance or trespass plaintiff an injunction, the court compares or balances the plaintiff's and the defendant's hardships.

In 1948, Professor McClintock evaluated the court's choice between granting a plaintiff an injunction and awarding him damages and justified balancing the hardships:

“[P]ractical experience has shown that in the administration of specific relief there must be more discretion vested in the judge than in the allowance of money damages for the injury suffered. In the latter there can never be any greater injury inflicted on defendant by allowing recovery than would be inflicted on plaintiff by denying it. But it very often happens that the award of specific relief would inflict a hardship on the defendant which is out of all proportion to the injury its refusal would cause to plaintiff. In these cases, by the

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great weight of authority equity still has discretion in adjusting the relief to be awarded to
the needs of the fact situation.\textsuperscript{74}

This article follows McClintock in accepting the necessity of the balancing-the-hardships
doctrine. It "balances" rather than "compares" the parties hardships for economy in vocabulary
primarily because balance is more common. It balances the parties' "hardships" instead of their
"equities" because "hardships" is more accurate and because it eliminates yet another confusing
usage of "equity."

Laycock uses the phrase "undue hardship" for essentially the same inquiry as balancing the
hardships entails.\textsuperscript{75} The judge, he wrote, should grant a nuisance or trespass plaintiff an injunction
"except when cost is prohibitive," because an injunction will impose "hardship [on defendant]
greatly disproportionate to the benefits it would confer on plaintiff," that is when "fears of
extortionate holdouts become great enough to outweigh the value of enforcing [plaintiff's]
property rights."\textsuperscript{76} When the defendant's cost to comply with an injunction is "greatly
disproportionate" to the plaintiff's benefit from it, the judge may decline to grant the plaintiff an
injunction and remit him to compensatory damages.

What would legal life be like without balancing the hardships? Another example comes
from France. "Under trespass, even a minor encroachment on the neighbor's land justifies the
cessation or demolition of the offending conduct as the Cour de cassation has noted many times,
including a case in which a wall overlapped by half a centimeter upon the neighbor's land."\textsuperscript{77}
Litigation without balancing the hardships that leads to termination, destruction, or removal would
create harsh results for defendants who made innocent and minor mistakes.

A North Carolina court's decision in Williams v. South & South Rentals introduces another
possibility. Defendant's "apartment building encroaches approximately one square foot on
plaintiff's land." Defendant's encroachment was apparently inadvertent. Plaintiff's tract "has never
been used for any purpose, is oddly shaped, is located substantially in a creek bed, is practically
unusable and consists of one-fourth to one-third of an acre." Plaintiff offered to sell his tract to
defendant for "a sum in excess of $45,000.00."

After settlement negotiations failed, plaintiff sued defendant for an injunction. The Tarheel
State's intermediate court of appeals rejected the doctrine of balancing the hardships. It concluded
that "since the encroachment and continuing trespass have been established, and since defendant is

\textsuperscript{74} Henry L. McClintock, Handbook of the Principles of Equity 51–52 (Second Edition 1948).

\textsuperscript{75} Douglas Laycock, The Neglected Defense of Undue Hardship (And the Doctrinal Train Wreck in Boomer v.

\textsuperscript{76} Douglas Laycock, The Neglected Defense of Undue Hardship (And the Doctrinal Train Wreck in Boomer v.

\textsuperscript{77} Russell Weaver, Guilhem Gil, Didier Poracchia & Francois Lichere, The Law of Private Nuisance: French and
not a quasi-public entity, plaintiff is entitled as a matter of law to the relief prayed for, namely removal of the encroachment. Accordingly, we remand this case to the Superior Court for entry of a mandatory injunction ordering defendant to remove that part of its apartment building that sits upon plaintiff's land as shown on the plat contained in the record.  

If the court had balanced these parties' hardships, this defendant's encroachment would probably be appropriate for permanent damages and, perhaps, an easement. Instead, after the court of appeals's decision, defendant purchased the disputed portion from plaintiff for several thousand dollars. This observer concludes that plaintiff may have employed a threat to make the injunction effective to create advantage in negotiating a generous cash settlement.

Balancing the litigants' hardships and retaining the alternative of awarding the plaintiff damages are indispensable to fair judicial decisions about whether to grant a trespass or nuisance plaintiff an injunction. A judge administering the choice between damages and an injunction needs to have the doctrine available to prevent rigor and asperity for a defendant or a possible unbalanced settlement.

But a Boomer permanent-damages solution should be rare. Decisions awarding a successful plaintiff permanent damages instead of an injunction are, Laycock wrote, sometimes correct, sometimes based on special features, sometimes reveal a preference for money based on superannuated notions of irreparable injury, and sometimes quite muddled in their analysis.

Many law-and-economics scholars, in support of the permanent damages remedy in Boomer, argue, however, that a court should favor awarding a plaintiff damages instead of an injunction when the defendant's cost to comply merely exceeds the plaintiff's benefit, that is when the value or utility of the defendant's nuisance activity is larger than the harm it causes to the plaintiff.

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The formulation of Rule (2) that compares values and utilities to favor the defendant if its value is merely larger than the plaintiff's puts a high burden on a plaintiff seeking an injunction and favors damages over injunctions more than leading scholars, McClintock, Laycock, Smith, and Farber, as well as United Kingdom common law. The judge in McClintock's formulation should grant the plaintiff an injunction unless "the hardship on the defendant * * * is out of all proportion to the injury its refusal" would cause the plaintiff.84

For Laycock, the judge would enjoin unless defendant's hardship is "greatly disproportionate" to the plaintiff's benefit from the injunction. If an injunction costs the defendant quite a lot more than it benefits the plaintiff, then the judge may balance the parties' hardships and award the plaintiff damages instead of an injunction.85

Professor Henry Smith has also challenged the Law-and-economics approach that favors awarding a nuisance plaintiff damages. Smith maintains that judges should utilize an injunction remedy more than many of the law-and-economics scholars suggest. He encourages a judge to grant a plaintiff an injunction, particularly when the defendant has trespassed, but also for the defendant's nuisance where the defendant's encroachment on the plaintiff's property is less palpable. Smith prefers an injunction to damages because of information costs, a court's measurement of a plaintiff's damages is expensive and imprecise.86

Farber wrote that the judge should enjoin an egregious nuisance like the one in Boomer except "where the balance tilts very strongly against plaintiffs" and an injunction is "infeasible. * * * [T]he plaintiff is always prima facie entitled to an injunction, but in the case of highly disproportionate harm to the defendant or the public, the injunction can be made defeasible by a damage payment."87

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Perhaps the most comprehensive statement of the defense is Lord Judge Smith's "good working rule" in 1895 in Shelfer v City of London Electric Lighting:

"(1) If the injury to the plaintiff's legal rights is small,
(2) And is one which is capable of being estimated in money,
(3) And is one which can be adequately compensated by a small money payment,
(4) And the case is one in which it would be oppressive to the defendant to grant an injunction:_Then damages in substitution for an injunction may be given."88

Later New York decisions bear out McClintock, Laycock, Smith, Farber, and Lord Judge Smith. These decisions show that the New York courts are reluctant to employ Boomer's nuisance remedy, no injunction, permanent damages, and a servitude. Instead the Empire State's courts have given several reasons to grant nuisance plaintiffs injunctions. An asphalt plant that was a public nuisance was shuttered without comparing economic consequences.89 Because the defendant's racetrack was another public nuisance, Boomer-balancing was inapplicable.90 A third court enjoined the nuisance because the defendant's activity violated a pollution permit.91 Another New York court enjoined because less than a "vast" economic disparity existed between the plaintiff and the defendant.92 A final court enjoined the defendant's activity because it also violated the zoning ordinance.93

Courts' Rule (2) decisions from other states, finding a nuisance, refusing an injunction and awarding damages, are not clear-cut. Research is difficult. Courts, which often rely on decisions from their jurisdiction, may not cite out-of-state decisions. Their decisions raise numerous factors and points. The courts' terminology varies. The courts’ discussions of injunctions are often brief. I have tried to stay with similar nuisance decisions.

In Tamalunis v. City of Georgetown, the trial judge had granted the plaintiff an injunction that protected him from the city's pipe that leaked human sewage. The Illinois appellate court rejected plaintiff's bad argument that defendant's nuisance triggers an injunction without comparative hardships. It held that, for now, temporary damages will be adequate. The court thought, however, that the sewage leak should stop, that the nuisance should be abated. Thus plaintiff could sue again if and when the offending sewage pipe leaked.94

94 Tamalunis v. City of Georgetown, 542 N.E.2d 402, 413-14 (Ill.App. 1989). (A few years earlier the trial judge,
In Weinhold v. Wolff, the Iowa court dealt with defendant's large-scale hog-feeding operation under the state right-to-farm statute, a rural Tort Reform that attenuates a private plaintiff's nuisance litigation and remedies. Citing the importance of pork to the state economy, the court said that diminution in value plus special damages would be an adequate remedy for the plaintiff and that closing the defendant's feedlot would be contrary to the right-to-farm statute.95 The court later struck that statute down.96

In the Alabama court's Baldwin v. McClendon, the court cited the “comparative-injury” doctrine in refusing an injunction that would "bring a severe blow" to defendants. The court's remedy was a conditional injunction that would shut down hog feeding operation if defendant didn't pay plaintiff $3,000 permanent damages. Because the trial judge had visited the defendant's hog-feeding operation, the Supreme Court emphasized his equitable discretion.97

On a personal note, before 1974 while I was growing up in rural and small-town Iowa, my mother responded to our turned-up noses at farmers' feedlots by invoking “the smell of money.” In short, Iowa's pigs were the social and economic equivalent of chickens in the French village above. Since then, the dramatic trend to industrial feedlots with thousands of animals has created a difference in kind, not one of degree. These titanic feedlots offend all five senses. Distance and the wind are the only antidotes to their odor.

Reading appellate reports sometimes leads me to turn up my nose again, this time because of my idea that, in aid of defendants' economic activity, some courts ignore the feedlot proprietors' failures to provide sufficient buffer zones. If a court neither shuts a defendant's feedlot nor regulates its operation -- that is if it relieves its neighbor to damages -- then the better measure of damages is a buy-out or moving-expenses measure. Even in Alabama in 1974, $3,000 diminution damages seems stingy, indeed, I think, woefully deficient. The Iowa court had added special damages to permanent diminution damages; the plaintiffs' temporary damages were rent-based and include their discomfort.98 The Iowa court's less parsimonious diminution plus special damages, might, if the defendant forced the family to abandon their home, let them build or buy a replacement.

State appellate courts' decisions granting the plaintiffs injunctions are, like the New York decisions, nuanced and multi-factored. Many appear to be based on inadequate buffer zones.

Rita Garman, had been the author's law-school classmate; Judge Garman was later elected to the Illinois Supreme Court).


96 Gatke v. Pork Xtra, 684 N.W.2d 168 (Iowa 2004); Bormann v. Board of Supervisors, 584 N.W.2d 309 (Iowa 1998).

97 Baldwin v. McClendon, 288 So.2d 761 (Ala. 1974).

Another feedlot under an Idaho right-to-farm statute led the court to refuse a shut-down injunction but to approve a conditions injunction that capped the number of animals and limited the type of feed but no damages. A huge feeding operation in Nebraska ended with the feedlot enjoined “from producing offensive odors,” failing that a shutdown order. A Rhode Island municipality was given time to relocate its sewage pumping station; the court coupled this future injunction with damages until relocation. Under the doctrine of anticipatory nuisance, the Alabama court affirmed a “don't-build-it” injunction after the trial judge’s personal inspection. A student note writer in Iowa recommended the anticipatory-nuisance doctrine because, if a plaintiff sues before the defendant's project begins, that deprives the proprietor of its investments’ economic weight in the balance.

On the most general level, a court may decline to grant a plaintiff an expensive and perhaps wasteful remedy. For courts, the parties' rights under the positive law determine the results more than the law-and-economics view that the party whose use is more valuable should prevail. The courts' analysis is perforce broader and considers more factors than economic utility. It includes environmental values like protecting a species, water, or air. The defendant's state of mind affects a court's decision. Both courts and economists reprobate defendants' “Take now, pay later” tactics because of the destabilizing effect they have on property rights. Establishing and maintaining an industrial nuisance is intentional, but developing a business is not what we think of when we think of an intentional tort. Although a court should refuse the comparison in favor of an intentional tortfeasor, future defendants build cement plants, feed lots, and racetracks on purpose.

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102 Parker v. Ashford, 661 So.2d 213 (Ala. 1995).


The courts’ analysis differs from classical economic analysis. The courts’ vocabulary is imprecise and considers multiple factors. Witness the differing vocabulary, Laycock’s “undue hardship,” and my “balancing the hardships” for similar comparisons.

Nor is it clear whether the impetus to balance the hardships comes from the plaintiff’s side as an element of his prima facie case or is an affirmative defense for the defendant to interpose. The Torts Restatement’s “factors” for granting a plaintiff an injunction, lump together plaintiff’s case for an injunction and defendant’s affirmative defenses. In eBay v. MercExchange, the Supreme Court stated the standard for a permanent injunction to include the burden of proof on the plaintiff to balance the hardships in his favor. I have maintained that affirmative-defense status makes manifestly more sense. Laycock says several times that what he names undue hardship is a defense. However stated and located, we agree that courts usually apply the doctrine “in plausible ways.”

Calabresi and Melamed, in their “quite different and rather stylized account of the law” don’t mention balancing the hardships-undue hardship. Laycock maintains that both the Boomer court and law-and-economics scholars under-utilize the doctrine of undue hardship. As well they might, for if a court balances the hardships in the defendant's favor and awards the plaintiff damages instead of an injunction, that court has, in Calabresi and Melamed's terms, converted a plaintiff’s property-rule interest into a liability-rule interest.

The modest suggestions above will clear the air in both the literal and the metaphorical senses by encouraging more and more detailed injunctions. If injunctions reduce particulate and other pollution, our environment will improve and climate change leading to global warming may be reduced.

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the plaintiff’s boundary line 88 inches and the trial judge had found that the defendant was either willful or reckless, the court, after comparing benefits and hardships, refused to grant the plaintiff a mandatory or removal injunction and remanded for calculation of the plaintiff’s damages. Morrison v. Jones, 58 Tenn.App. 333, 430 S.W.2d 668 (1968). Posner tells why a court should treat an intentional encroaching defendant differently, Richard A. Posner, Economic Analysis of Law 70 (Eighth Edition 2011).

In addition to disfavoring the injunction remedy in ways that undervalue plaintiffs with environmental interests, Calabresi and Melamed's Rules (1) and (2) introduce confusing vocabulary deficiencies. Calabresi and Melamed called granting the plaintiff an injunction Rule (1), a "property rule" and the second, Rule (2), awarding the plaintiff damages, a "liability rule." I disagree below with the property rule–liability rule vocabulary of the first two parts of Calabresi and Melamed's choices, the court's choice between an injunction and damages.

In the Calabresi and Melamed lexicon, the words "property" and "liability" don't have the usual Torts, Property, and Remedies meanings of property and liability. These usual meanings follow. The owner of the house and lot on 506 Highland Road has a property interest in her land. If a future defendant commits a repeated or continuing trespass, the court will grant her an injunction that forbids the defendant's future trespasses. If a second defendant's pickup truck jumps the curb and destroys her gazebo, the court will award her damages against that defendant. If a third defendant trespasses on plaintiff's land repeatedly to fish in her stream, the court will award her damages for her past harm as well as an injunction that forbids defendant's future invasions.

The usual meaning of the words property and liability distinguishes the defendant's substantive liability from the plaintiff's remedy, as between Rule (3) and Rules (1) and (2). The landowner has a property interest in all three examples in the paragraph above. The defendant is subject to liability for his tort in all three examples. The court will find that the defendant is liable in tort for each trespass on the plaintiff's property before moving to her remedy. But in Calabresi and Melamed's usage, the second defendant's tort transmogrified the plaintiff's "property" interest in preventing a future tort into a "liability" interest in recovering damages. Calling the first example a property rule and the second a liability rule changes the usual meaning of the words property and liability.113

Calabresi and Melamed called their second solution a "liability rule." The defendant's nuisance activity could invade the plaintiff's property interest but the defendant could pay the plaintiff money damages set in court. "Liability" is inaccurate Remedies terminology to analyze a plaintiff's remedies because a defendant is always liable to the plaintiff under substantive law before the court turns to the plaintiff's remedy.

After the court establishes that the defendant is liable to the plaintiff, one remedy for the defendant's nuisance or trespass is an injunction, another is damages. In addition to being inaccurate, "property rule" and "liability rule" are imprecise, too abstract, and too general. "Injunction remedy" and "damages remedy" would be more accurate labels than property rule and liability rule.114

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Property rule and liability rule combine the court's first step, defendant's threshold liability, for its tort with the court's second step, the remedy the court will employ. By calling the solutions "rules," the property rule-liability rule distinction assimilates the court's remedy or solution into substantive law rather than keeping it in the separate realm of remedies. Again, professional understanding would be better served with the more precise remedies terms "injunction" and "damages."

The reason to name the plaintiff's injunction remedy a "property" rule is that, after the judge grants the plaintiff an injunction, the plaintiff can set the price that the defendant must pay to continue its activity. The idea is that a plaintiff's injunction protects and values her property like, my metaphor, an unassailable stone wall that prevents any encroachment without the owner's consent.

Calabresi and Melamed's reason, based on the view that an injunction is inviolable and self-enforcing, is an incorrect statement about an injunction as a remedy in actual disputes. Many real-life defendants violate their real-life plaintiffs' real-life injunctions. A more accurate metaphor is that an injunction resembles a stop sign with the defendant's name on it more than it resembles an immovable stone wall. For an injunction to work, the defendant must obey it.

If an errant motorist drives through a stop sign and damages someone's gazebo, a court will find him liable under negligence law and, as a remedy, tell him to pay the victim money damages. If a trespass- or nuisance-injunction defendant violates or drives through an injunction-sign and injures the plaintiff or her property, the court will tell it to pay its victim money for compensatory contempt.

A court will measure the plaintiff's compensatory-contempt money recovery by the plaintiff's loss from the defendant's violation of the injunction. Awarding the plaintiff post-violation compensatory contempt converts the plaintiff's injunction-right from the defendant's obedience to a damages-right to recover money from the defendant. Compensatory contempt reduces the plaintiff's remedy from the defendant's conduct to the defendant's cash. The defendant's violation of the injunction converted the plaintiff from a person with rights entitled to

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116 Doug Rendleman, Complex Litigation: Injunctions, Structural Remedies, and Contempt, Chapters 8-12 (2010).


be enjoyed in fact to a person with a claim to recover money for compensatory contempt to redress the past harm.\textsuperscript{119}

If Calabresi and Melamed's "property rule" leads to an injunction remedy and a "liability rule" leads to a money damages remedy, an enjoined defendant can transmogrify the plaintiff's right. "The defendant can violate an injunction and convert the plaintiff's irreparable right into a cause of action for compensatory contempt, money. By breach, the defendant has remitted the plaintiff to that inadequate remedy, for it is now too late for the plaintiff to enjoy the substantive right."\textsuperscript{120} An injunction defendant may also be exposed to coercive contempt or criminal contempt, but, for many violations, the plaintiff's remedy is compensatory contempt.

Professor Golden also refutes Calabresi and Melamed's argument that property rule and liability rule are hermetic closed categories. Golden's thinking is similar to mine, although his metaphor differs.\textsuperscript{121} Because defendant's violation converts an injunction into money, an injunction, he has written, isn't an "off switch." He criticizes other observers' dichotomy between damages and injunction as "misleading." Because there is no criminal contempt to speak of for defendants' violations of patent injunctions, an injunction threatens compensatory contempt for violation.\textsuperscript{122} This, Golden maintains, is insufficient deterrence.\textsuperscript{123} Back to metaphors, since an injunction is not an "off switch," in my metaphor a stone wall, "an injunction operates essentially as a mere gateway to higher-than-normal monetary sanctions delivered with higher-than-normal speed."\textsuperscript{124}

So far this article has disagreed with Calabresi and Melamed on several grounds. Their analysis is out of order, placing the plaintiff's remedy ahead of the defendant's liability. It leads to analysis that favors damages over an injunction in many lawsuits where an injunction would be a superior remedy. It downgrades protecting the public health and the environment. And its vocabulary is abstract and confusing. There's more.

**Post-injunction Negotiation and Hold Outs:** Many law-and-economics writers arguing in favor of awarding a nuisance plaintiff damages emphasize transaction costs. The first transaction cost is the risk that the plaintiff will actually enforce the injunction. Cassation's

\begin{footnotesize}
\textsuperscript{119} Doug Rendleman, Complex Litigation: Injunctions, Structural Remedies, and Contempt 193 (2010).

\textsuperscript{120} Doug Rendleman, Complex Litigation: Injunctions, Structural Remedies, and Contempt 128 (2010).

\textsuperscript{121} John M. Golden, Injunctions as More (Or Less) than "Off Switches": Patent-infringement Injunctions' Scope, 90 Tex. L. Rev. 1399 (2012).

\textsuperscript{122} John M. Golden, Injunctions as More (Or Less) than "Off Switches": Patent-infringement Injunctions' Scope, 90 Tex. L. Rev. 1399, 1410-13 nn. 43, 60 (2012).


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destruction remedy for a defendant's encroaching wall illustrates this potential risk. In an industrial nuisance, the risk is that the defendant's operation will be shut down.

The second risk is that the parties' post-injunction negotiation will lead to a settlement like the one above in Williams v. South and South. This article speculated above that those parties' post-injunction negotiation may have ended with a healthy cash settlement.

The *Boomer* majority opinion feared that the plaintiff and the defendant might negotiate leading the defendant polluter to override the injunction by purchasing the right to continue: "The parties could settle this private litigation at any time if defendant paid enough money and the imminent threat of closing the plant would build up the pressure on defendant."125

The parties' negotiations after an injunction are a foundation of many economists' analysis of nuisance remedies. If the court grants a successful plaintiff an injunction that benefits him less than it will cost the losing defendant to comply, the defendant will, they predict, negotiate with the plaintiff to settle the injunction.126

The idea that people uniformly make decisions to maximize their economic self-interest convinces law-and-economics scholars that the *Boomer* plaintiffs were likely to relinquish their rights under an injunction for more than their loss but less than Atlantic Cement's $45,000,000 investment. The plaintiffs would employ a shut-down injunction as a bargaining threat to leverage an "excessive," money settlement; some even borrow the criminal law's adjective to say an "extortionate" settlement.127

If, as they assume, the property owner's interest is really money, then, the scholars maintain, the court ought to limit him to recovering damages set in court by a judge or jury instead of allowing him to use the injunction as leverage to extract a windfall settlement from the cement company.128

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127 Restatement (Second) of Torts § 941, Comment c (1979).

The law-and-economics scenario becomes even more grim in the third act. Each of several tort victims has an incentive not to settle until after others have, that is to become a "holdout," and to raise the defendant's price. A victim's delay in coming to terms with the defendant will facilitate his ability to become, in effect, a nuisance troll and to exact an even larger toll from the defendant. In many conflicting use situations, where a defendant does a little harm to each of a lot of people, it will, they maintain, be difficult and expensive for the court to locate all affected people and to calculate and distribute their damages.

Some law-and-economics commentators employ a variation that favors the nuisance plaintiff's right to use and enjoy his property a little more. They favor granting the plaintiff an injunction but only where the defendant's negotiations with a few plaintiffs are feasible because of low transaction costs. "In conflicting-use situations in which transaction costs are high, [because of the plethora of plaintiffs] the allocation of resources to their most valuable uses is facilitated by denying owners of property an injunctive remedy against invasions of their rights and instead limiting them to a remedy in damages ***. If, however, transaction costs are low, [because of only one plaintiff or few plaintiffs] injunctive relief should normally be allowed as a matter of course ***."129

How valid is the extensive law-and-economics literature that emphasizes court-set damages, a "liability" rule, over an injunction, a "property" rule? How persuasive is the argument that subordinates an injunction to damages because of the fear that injunction plaintiffs will tend to coerce an unbalanced settlement?

Other scholars register doubts about the Boomer court's money-damages remedy and the law-and-economics arguments that support it. What behavioral economists have named the endowment effect teaches us that its owner values property higher than the market does.130 A court that refuses to grant an injunction to exclude a trespasser or to stop a polluter is ignoring this subjective aspect of the landowner-plaintiff's interest.131 A judge, Henry Smith wrote, enjoins a defendant to vindicate the landowner's previously existing right to use and exclude.132 The law-and-economics scholars and the Boomer court's fear that the a homeowner may use an injunction to extract an excessive settlement downgrades or ignores that subjective aspect.


Awarding a nuisance or trespass plaintiff damages instead of an injunction may violate the traditional legal principles that an owner's real property is unique and that money damages are an inadequate remedy to protect that property. The money award communicates to an owner that his interest is merely economic. The court in Boomer, in effect, allowed the cement company to buy a license to pollute. It also, in effect, granted eminent domain power to a private interest. The court favored the defendant's commercial development even when that development exacted a toll on residents and property owners.

Yes, but what about the plaintiff who uses an injunction to leverage an excessive settlement? A generous settlement may not be that undesirable. If the judge grants a successful landowner plaintiff an injunction, that injunction allows the plaintiff to negotiate with the defendant from a position of strength that recognizes the endowment effect and the unique quality of the plaintiff's property interests. If a judge cannot consider the full subjective value of a landowner's sentiment, attachment, discomfort and annoyance in setting damages, then granting the owner an injunction will be a better way to assure the plaintiff's full compensation.

Will a landowner plaintiff employ the injunction to punish the defendant or to achieve over-compensation? There is another way to frame this issue: Is the risk of a plaintiff either closing a defendant's valuable enterprise or leveraging an excessive money settlement a sufficient reason to deny the plaintiff an injunction and risking judicial under-compensation? Laycock favors awarding the plaintiff damages "when the transaction costs of such renegotiation would be high."

Taking a different and perhaps more salutary approach, Mr. Thompson argued in 1975 in his Stanford Law Review Note that, instead of assuming an excessive coerced settlement, the judge could prevent plaintiffs' over-compensation by supervising negotiations and approving settlements. Moreover, courts should, he maintained, expand equitable estoppel and laches to bar plaintiffs who led defendants on or who waited too long to sue.

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Justice Charles Fried, as he was then, wrote an opinion in Goulding v. Cook for the Massachusetts Supreme Judicial Court (SJC) that, with context, provides a helpful way to examine the litigants' post-injunction negotiation and other remedies issues. To resolve a dispute with the Cooks about a 3,000 square-foot triangle of land in a residential neighborhood where the Cooks were preparing to sink a septic tank, the Gouldings sought a declaration of ownership and an anti-trespass injunction. After the trial judge denied the plaintiff Gouldings' motion for a preliminary injunction, the defendant Cooks buried their septic tank under the disputed triangle. At the later plenary hearing, however, the trial judge held that the Gouldings owned the land. But, apparently acceding to the Cooks' fait accompli, the improvement, the lower courts granted the Cooks an easement for their tank, its price to be set by the parties' negotiation, failing their agreement, apparently, by the judge.

The SJC reversed. Justice Fried's opinion begrudgingly recognized balancing the hardships, but rejected its application. The Cooks must remove the septic tank and pay plaintiffs damages. "[T]he concept of private property represents a moral and political commitment that a pervasive disposition to balance away would utterly destroy." Rejecting the Cooks' invitation to balance the hardships, the court refused to "obliterate [property rights] in favor of a general power of equitable adjustment and enforced good neighborliness." The SJC refuted the lower courts' reasoning about the Cooks' "good faith," the Gouldings' lack of harm, and the trial judge's equitable discretion. The Cooks undertook the excavation project aware that the Gouldings' lawsuit was still pending. An underground septic tank isn't always invisible and harmless. And the trial judge lacked equitable discretion to act on an error of law.

Justice Fried was aware that the parties' negotiation had preceded the lawsuit. The lower courts had balanced the hardships in the Cooks' favor. But, although they declined to order the Cooks septic tank on the Gouldings' property exhumed, the lower courts had recognized the Gouldings' property interest in the triangle by requiring defendants to pay for the septic-tank easement through what appeared to be supervised negotiation. The Gouldings' could not, under their view, exploit a mandatory injunction to negotiate an unbalanced settlement.

The SJC's mandatory order based on the Gouldings' property right left them in a powerful monopoly position to vindicate or to be "compensated" for their property interest. There were three risks. First, that mutual antipathy would prevent a value-maximizing solution. Second, that the Gouldings would exploit their monopoly to extract an excessive and over-compensatory settlement. Third, that the Gouldings would exploit their mandatory injunction to deprive the Cooks of a workable sewage system and indeed of the ability to utilize their property as a residence. What unfolded?


A phone conversation with the Gouldings' lawyer, Mr. John Wyman, answered some of my questions. In June of 2012, the Gouldings still lived next-door to the Cooks. The Gouldings and the Cooks are, however, "not friendly." What about the Cooks' septic tank under the Gouldings' land? Neither a buyout nor exhumation had occurred. When the SJC decided for the Gouldings in 1996, a sewer line was expected in their costal town. The Cooks planned to hook up and abandon the septic tank. The Gouldings, it turned out, rested on their victory in principle; they didn't take advantage of their injunction to force the issue. The sewer-line was slow, more than a decade, in coming. The Cooks' septic tank was in use in the Gouldings' land until "recently" when the sewer line finally came to the vicinity. Property-lawyer John Wyman's general observation that neighbor vs. neighbor litigation leads to "awful acrimony" and "no compromise" bears out Professor Farnsworth's points below about nuisance litigants.

The rational-choice theory that supports the likelihood of parties' post-injunction negotiation and settlement founders in the face of many actual nuisance litigants' behavior observed in two scholars' studies. Professor Ward Farnsworth located 20 appealed nuisance lawsuits and asked the lawyers whether the parties had negotiated a settlement after an appellate decision. None had. The litigants, Farnsworth learned, just didn't bargain. Because the parties' mutual enmity grew and hardened during protracted litigation, Farnsworth concluded, the opponents simply did not negotiate after their respective courts decided. For an actual human being-litigant, the acrimony of a protracted dispute militates against any discussion, amicable or otherwise, afterwards.

Professor Maurice Van Hecke had earlier examined actual litigation to learn whether mandatory injunctions against defendants' encroachments on plaintiffs' property were effective and whether the injunctions had led to "extortionate" settlements. His conclusions were similar to Farnsworth's later study of the parties' post-injunction negotiation after nuisance injunctions. Van Hecke contacted 44 lawyers in 29 lawsuits and received replies from 31 lawyers concerning 25 injunctions. He concluded that 75% of the injunctions were effective and that little evidence existed that the injunctions had been used to coerce settlements. Attorneys who participated in "extortionate" settlements might not, however, have responded to the professor's survey.

Laycock comments that "small-scale studies cast doubt on [the] assumption [of the parties post-injunction negotiation]." I invite empirical study, though designing an experiment to study prolonged and bitter interpersonal conflict in the real or experimental world will be, to say the
least, difficult. One approach, game theory, is based on rational adversaries, which many disputants aren't.145

The law-and-economics analysis of nuisance is based on the parties' post-injunction negotiation that may not happen in real life. In other words, it is based on an over-simplified view of human nature that exaggerates litigants' "rational" economic behavior and decisionmaking based on economic motives and de-emphasizes real litigants' emotional and cultural responses to conflict.146

Humans are quirky and unpredictable critters often blown from side to side by emotional whims and crosscurrents. A court deciding whether to grant a nuisance or trespass plaintiff an injunction or to award damages should de-emphasize, sometimes ignore, the scholars' rational-choice theory that self interest will lead parties to post-injunction negotiation. There should be no presumption, no blanket rule about negotiation. The judge should decide whether to predict negotiation anew in the factual context of each discrete dispute.

Post-injunction negotiation between opponents in commercial, for example, patent, litigation seems more likely. Although some plaintiffs' patent litigation is between "strangers," most serious patent disputes start with negotiation for a license and, if parley founders, proceed to a cease-and-desist or demand letter before suit is filed. Since the parties are usually business entities that have been negotiating all along, no-one should be too surprised to learn that negotiation continues after preliminary injunctions, permanent injunctions, and while an appeal is pending. In eBay v. MercExchange, the parties negotiation continued after the trial judge, on remand from the Supreme Court, denied eBay's motion for an injunction. The parties settled this bitter and protracted lawsuit.147

Rules (1), (2), and (3): In 2007, in Fancher v. Fagella, the Virginia Supreme Court dealt with a next-door neighbor's lawsuit about the defendant's sweet-gum tree's encroaching roots that sheds light on the first question, the defendant's liability, as well as the second, the choice of remedy. The existing Virginia precedent for a neighbor's tree-root invasion was a no-nuisance no-remedy, Rule (3) approach, that limited the encroached-upon landowner to self-help at the property line. The Virginia court, after concluding that the earlier precedent was obsolete in an urban setting, adopted a trespass substantive rule leading to defendant's liability for an encroachment and a possible injunctive remedy that depended on the judge's equitable discretion, exercised in the particular context.148


147 Doug Rendleman, Complex Litigation: Injunctions, Structural Remedies, and Contempt 87 (2010).

After appearing to balance the hardships, the Boomer court had moved from an injunction remedy to a no-injunction remedy. The Fancher court abandoned a no-remedy, no-injunction rule and adopted an opening for an injunction remedy. In the view taken here, Fancher v. Fagella's liability decision and its broadened remedies present a superior approach for modern-day trespass and nuisance disputes than Boomer v. Atlantic Cement's move from an injunctive to a damages approach. We don't know how later litigation and the Virginia judge's equitable discretion might have resolved the choice of remedy because, shortly before the Virginia Supreme Court's decision, Fagella, with a damages trial pending, cut down the aggressive sweet-gum and effectively mooted the injunction. This bemused observer speculates that if the dispute had continued to an injunction, the parties would have been less than effusive to negotiate a settlement.

**Rule (4):** We have examined three of Calabresi and Melamed's solutions, Rule (3) holding for the defendant, Rule (1) granting the plaintiff an injunction, and Rule (2) awarding the plaintiff damages. Calabresi and Melamed's fourth solution is Rule (4). It is a hybrid remedy: the court grants the plaintiff an injunction but orders the "winning" plaintiff to pay the defendant, hence a "compensated injunction."

In the universal example of Rule (4), the Arizona Supreme Court employed a compensated injunction in Spur Industries v. Del E. Webb Development. Del Webb developed and built Sun City catering to retired people in what was then a sparsely populated area near to the defendant's cattle feedlot. The developer expanded its residential development toward the defendant's feedlot. Litigation followed the advance. Although retired homeowners had "moved to the nuisance," they were, the court held, entitled to an injunction. However, the homeowners' transitions tempered the remedy: the court required the developer to pay the defendant's expenses of shutting down its feedlot and moving it. Although the court held that the defendant's feedlot was an enjoinable nuisance, it used the defendant's "coming-to-the-nuisance" defense at the remedy stage to require the developer-plaintiff to pay the cost of moving the defendant's feedlot away from residential areas.

Law-school casebooks often include Spur after Boomer as a principal case. However, not even in a classroom hypothetical could we expect the homeowners in Boomer to be able to pay to move Atlantic Cement's plant.

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“Spur, “has not been followed by other courts.”154 Because so far as a legal researcher can learn, no other court has ever followed suit in private trespass or nuisance litigation, the attention scholars and casebook editors pay to Spur seems misplaced, even odd.155 Spur, if not a one-off solution, is an outrider. In either event, it doesn't deserve to occupy 33% of anyone's nuisance-remedies matrix.

The Spur approach fails to consider proportion, fairness, and the utility of the parties' activity. Spur deserves to be isolated in private trespass and nuisance litigation because the notion that the winning plaintiff should pay the losing defendant destabilizes owners' private property rights.156 Professor Richard Epstein called Rule (4)'s “enormous risk," “grotesque," and “misguided." and “wholly subversive of any account of ordinary property rights.”

Spur Industries' compensated injunction has joined nuisance parties' post-injunction negotiation in law-school classroom hypotheticals. But does it otherwise rest idly on the economists' shelf? Rule (4) isn't dead.

The parties in a land-use dispute could negotiate a Spur-type compensated injunction as a private settlement. They might consider a plaintiff-pays-defendant solution when anticipated litigation costs will be high and the plaintiff's gain from ending the defendant's tort exceeds the defendant's loss from ceasing its challenged activity.

Requiring an employer who is enforcing a nondisclosure covenant against a former employee to pay the former employee's salary and benefits during her period of unemployment, Ms. Passi uses the Rule (4) compensated injunction as an analogy to the United Kingdom doctrine of garden leave.158

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153 Professor Ward Farnsworth worked out an elaborate, apparently counter-factual, example that he refers to as "bizarre" in Ward Farnsworth, The Legal Analyst: A Toolkit for Thinking about the Law 196-97 (2007).


Also, the Cathedral's co-architect, Mr. Melamed cites examples based on his experience in the Antitrust Division of the Department of Justice, in the inner-beltway's world of government regulation. These examples, he says, demonstrate that "Rule 4 is alive and well—at least in Washington." 159

Rule (4), however, should not qualify as a viable solution in assessing positive-law remedies for trespass and nuisance in the real world of private litigation.

**Rule (5), Does the Cathedral Have Empty Rooms?** Calabresi and Melamed's four approaches are both too many and too few.

The four approaches are too many because, as noted above, common law courts' decisions implementing Calabresi and Melamed's Rule (2), find a nuisance exists, decline to enjoin and grant the plaintiff damages, are scarce. Moreover, since the single example of *Spur*, Rule (4), the winner-pays, compensated injunction, is rare indeed today, probably extinct in private trespass and nuisance litigation.

In addition, the Cathedral's rooms don't exhaust the court's possible remedies for a defendant's trespass or nuisance. The bipolar choice between an injunction and damages is oversimplified. After selecting the remedy, the second part of a court's remedial analysis is to measure and define that remedy. The judge's choice of remedy is broader than shutdown injunction, permanent damages, or the extinct winner-pays solution. Positing a court's choice as between a shuttering injunction and awarding permanent diminution damages overlooks the refinements that grow out of the distinction between a defendant's permanent trespass or encroachment and its temporary-continuing tort.

The court's injunction may take many forms. Both the *Boomer* court and Calabresi and Melamed neglect intermediate possibilities between the defendant's continuation and its shut-down. A court may deal with the defendant's nuisance by allowing it to continue operation after minimizing its harmful or offensive activity. 160 In 1927, Judge Learned Hand demonstrated this method of accommodating the conflicting interests of landowner and manufacturer in Smith v. Staso Milling Co. 161

As Farber observed, the *Boomer* court's majority opinion fails to consider the possibility of an injunction "that would mitigate the harm to the plaintiffs, such as a lower level of operation, changes in the scheduling of blasting, [or] construction of barriers between the plaintiff's land and the plant." 162

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160 Restatement (Second) Torts § 941, Comment e (1979).

161 Smith v. Staso Milling Co., 18 F.2d 736 (2d Cir. 1927).

In particular, the judge has equitable discretion to employ a pragmatic experimental-conditional injunction that orders the defendant to add technology to control or reduce undesirable or unhealthy features, to limit the times and magnitude of operations and types of activity, to require periodic reports, and to set timetables and goals.  

A nuisance plaintiff's damages aren't a set amount, value before less value after. The court can consider a plaintiff's special damages, her personal injury damages, and damages based on buffer-zone value. The Iowa court after balancing the hardships to refuse the plaintiffs an injunction added special damages to their permanent diminution damages; the plaintiffs' temporary damages will be rent-based and include their discomfort.

Farber wrote that a judge who denies a plaintiff an injunction should measure his money recovery by the market value for buffer-zone rights instead of by diminution, value before less value after. On remand, Atlantic Cement, perhaps prodded by the trial court's apparent buffer-zone measure of damages, bought out most of the plaintiffs to create the buffer zone that sage observers think it should have purchased before it built its cement plant.

Consider the options that, for example, the trial judge in *Harrison, above*, had for the defendant's automobile shredder after the Court of Appeals's remanded. (a) The judge could find that no nuisance exists. (b) The judge could change the earlier permanent nuisance decision to a temporary nuisance with temporary damages dating from its beginning to the date of trial and an injunction stopping the shredder's hammers in the future. (c) The judge could find a temporary nuisance, award the homeowners damages down to the date of trial, and let the plaintiffs sue for damages in the future if the defendant's nuisance continues. (d) The judge could find a permanent nuisance and refuse to grant the plaintiffs an injunction, but award plaintiffs permanent damages for the diminished value of their property, the solution in *Boomer*. The Court of Appeals seemed to favor (e), an experimental-conditional injunction as discussed above.

**Procedural Considerations:** Whether the judge ought to grant the plaintiff an injunction or award him damages and how to combine and measure the remedies follow a convoluted

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168 Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107, 1120–1121 (7th Cir. 1975).
procedural path that complicates the judge's remedial decisions in nuisance and trespass litigation. To begin with, a dispute where the plaintiff sought both an injunction and damages was complex to try earlier because of separate courts of Chancery or Equity and Common Law. Before the separate courts of Chancery-Equity and Common Law were merged, two trials might have been necessary, one in Chancery for an injunction, another in Law for damages. 169 A pre-merger Virginia decision that illustrates the dual courts' complexity is Stanardsville Volunteer Fire Company v. Berry. Volunteer Fire sued Berry for trespass alleging continuing trespass, seeking damages. Berry sued Volunteer Fire in Chancery seeking to enjoin interference with an easement. The Chancellor granted Berry's motion to transfer the law action to Chancery and to consolidate. The Virginia Supreme Court disapproved the Chancellor's transfer because of Volunteer Fire's right to a jury trial in its trespass action for damages. Berry should have asked the Chancellor to enjoin the law action until the equitable easement issue was decided in Chancery. If Berry's Chancery action were successful, the injunction would become permanent. If Berry were unsuccessful, Volunteer Fire's damages action at law would proceed. 170

The federal and almost all state court systems have merged the two courts. Merger of Chancery and Law means only one potential plenary trial on the plaintiff's nuisance claims because the merged court has power to both award a successful plaintiff damages and enter an injunction. 171 Today the litigants' constitutional right to a jury trial for damages adds procedural and remedial complexity.

If the plaintiff moves for interlocutory equitable relief in a merged court, the judge will conduct a juryless pre-trial hearing, then grant or deny the plaintiff's motion for a temporary restraining order or preliminary injunction.

At the plenary trial where the plaintiff seeks both damages and an injunction, either party would be entitled to a jury trial on the plaintiff's claim for money damages, but neither party has a jury-trial right for the plaintiff's demand for an injunction. 172

Suppose a jury trial ends with a plaintiff's jury verdict that a nuisance existed and the amount of plaintiff's past damages. Then the judge alone would decide whether to grant plaintiff's

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motion for a permanent injunction. Under federal and some state precedents, the judge's permanent-injunction decision must be consistent with the jury's findings of fact.

If the judge were to refuse to grant the plaintiff a permanent injunction, the jury could be recalled to set the plaintiff's permanent or future damages.

A second one-trial possibility is called "equitable cleanup." The judge hears the parties' evidence in Chancery without a jury and decides the defendant's substantive liability and whether to grant the plaintiff a permanent injunction. Then the judge will "clean the case up," that is decide the damages issues also without a jury.

The Boomer majority quoted the Indiana court's Vesey equitable-cleanup decision: "When the trial court refused injunctive relief to the [plaintiff] upon the ground of public interest in the continuance of the gas plant, it properly retained jurisdiction of the case and awarded full compensation to the [plaintiff]. This is upon the general equitable principle that equity will give full relief in one action and prevent a multiplicity of suits."

The skeptical question about equitable cleanup is whether, in aid of consistency and judicial economy, it undervalues the litigants' constitutional rights to a jury trial.

The form of relief in Boomer has puzzled observers. As mentioned above, the court granted plaintiff an injunction but stayed its effect if the defendant paid the plaintiff's damages. Laycock questioned the court's "circumlocution" for refusing an injunction. He speculated that the conditional injunction may have allowed the judge to retain jurisdiction and supervise the defendant while it ameliorated its nuisance.

Approving a conditional injunction as part of equitable cleanup, the Alabama court observed that "a court of equity has power to mold its relief to meet the equities developed in the

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Another possibility in *Boomer* is that the court may have used the conditional injunction to keep the lawsuit in Equity to grant the plaintiff permanent damages instead of an injunction without a jury. More specifically, granting the injunction and suspending it may have rationalized cleanup and lack of a jury.

**More Remedies and Rooms: Punitive Damages and Restitution:** The court's possible remedial solutions for a defendant's trespass or nuisance aren't limited to the compensatory damages and injunctions this article has considered above. Two other money remedies are punitive damages and restitution.

The possibility of a trespass or nuisance plaintiff recovering punitive damages introduces complex recalculation. Henry Smith wrote that "supra-compensatory" punitive damages convert a liability rule into a property rule, in remedial terms damages into an injunction.

"Supra-compensatory" isn't an accurate way to describe punitive damages. Courts base punitive damages on an entirely different policy foundation than compensatory damages. A court awards a plaintiff punitive damages to punish the defendant's completed, aggravated wrong, trespass or nuisance, and to deter that defendant and others from similar misconduct in the future. The judge grants the plaintiff an injunction to forbid the defendant's future misconduct.

Considering several ways for a court to measure a nuisance plaintiff's compensatory damages helps us to understand that punitive damages aren't an injunction. In *Boomer*, the lowest compensatory general damages measure was value before less value after, the trial judge's $185,000. The damages measure based on the defendant's cost to secure a buffer zone was $710,000, which was result on remand. A defendant like Atlantic Cement with a $45 million

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185 Daniel Farber, Reassessing *Boomer*: Justice, Efficiency, and Nuisance Law, Property Law and Legal
investment would clearly prefer to pay either measure of compensatory damages to an injunction. A court would have to add a gigantic punitive damages verdict to the compensatory damages to take the plaintiff's money recovery out of the realm of damages and into the realm of an injunction.

In addition to an injunction, compensatory damages and punitive damages, a court's third major remedy is restitution based on the defendant's unjust enrichment. Several important restitution decisions are based on defendants' conversions and trespasses.\textsuperscript{186}

When a court discusses a plaintiff's nuisance remedies, the traditional answer has been that it should conclude that the plaintiff's money recovery comprises only compensatory damages and perhaps punitive damages, but not restitution.\textsuperscript{187} Should a contemporary court expand its nuisance-remedies smorgasbord to add awarding the plaintiff restitution measured by the defendant's savings?

Taking a fresh look in 1997, Professor Andrew Kull wrote that "restitution for the economic benefits [defendant] derived from a private nuisance makes a perfectly intelligible claim in any case where the nuisance could have been enjoined, so long as the defendant can be shown to have acted willfully in invading the plaintiff's property."\textsuperscript{188} A few years later, Kull became Reporter for the Third Restatement of Restitution. The Restatement includes an Illustration based on Boomer's facts. The Illustration concludes, that for the defendant's nuisance, "the court may award [plaintiffs'] restitution measured by the value of a license to continue the [defendant's] challenged operations."\textsuperscript{189}

Professor Farber formulated a restitution remedy for the Boomer nuisance plaintiffs: If the trial court had measured plaintiff's money recovery by the amount an ordinary buyer would have had to pay, that measure would have been a "bargain" for a buyer like Atlantic Cement that was assembling a large tract. Atlantic "would be unjustly enriched in the amount of the premium it would otherwise have had to pay for the buffer zone. Thus the [plaintiffs' buffer-zone] damage award can be considered a form of restitution, putting the parties in the same position that they would have been in if Atlantic had done the right thing in the first place and purchased a buffer zone."\textsuperscript{190} Farber's formulation isn't easy to fit into technical restitution learning.\textsuperscript{191} Perhaps a

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\item \textsuperscript{186} Edwards v. Lee's Adm'r, 92 S.W.2d 1028 (Ky. 1936); Raven Red Ash Coal Co. v. Ball, 39 S.E.2d 231 (Va. 1946); Olwell v. Nye & Nissen, 173 P.2d 652 (Wash. 1946).
\item \textsuperscript{187} 1 George Palmer, The Law of Restitution 137 (1978); Daniel Friedmann, Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong, 80 Colum.L.Rev. 504, 509 (1980).
\item \textsuperscript{188} Andrew Kull, Restitution and the Noncontractual Transfer, 11 J. Contract L. 93, 104 (1997).
\item \textsuperscript{189} Restatement (Third) of Restitution and Unjust Enrichment § 44, Interference with Other Protected Interests, Illustration 14 (2011). See also Judge Arnold's dissent in Marmo v. Tyson, 457 F.3d 748, 764 (8th Cir. 2006).
\item \textsuperscript{190} Daniel Farber, Reassessing Boomer: Justice, Efficiency, and Nuisance Law in Property Law and Legal Education: Essays in Honor of John E. Cribbett 7, 17 (P. Hay & M. Hoeflich eds., 1988); Daniel A. Farber, The Story of Boomer: Pollution and the Common Law, in Environmental Law Stories: An In–Depth Look at Ten Leading Cases
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better way to articulate a restitution measure for nuisance or trespass that reaches about the same result is to apportion the plaintiff's restitution to the defendant's savings.  

**Conclusion:** Every profession has its array of public perceptions that are widely held, deeply believed, oft-stated and, at best, misleading; in legal-latin, these are ignis fatuus, delusive guiding principles. This article has taken on a well-established way of looking at the law of nuisance and trespass. It has criticized the *Boomer* decision and Calabresi and Melamed's Cathedral article.

The *Boomer* court's decision and the Cathedral article are influential sources. Timely and easy to understand, both were formative for law and economics which was ready for their powerful simplicity and conservative, business-protective solutions.

An analogy from science to law invoked by Thomas Kuhn's Structure of Scientific Revolutions is evocative. A comfortable intellectual life favors an exemplar or paradigm like Calabresi and Melamed's four-category world that enables people to think that the world makes sense. But things change, shift happens. Anomalies accumulate that do not make sense within the earlier paradigm. When a set of ideas is no longer up to the task of explaining the world and needs to be replaced, people develop a new bundle of beliefs to put events in a different light.

Scholars who use its vocabulary but recognize its shortcomings have cracked the Cathedral walls. A 2011 “concise” property casebook “suitable and teachable in a one-semester Property course” may foreshadow what the future portends; both *Boomer* and *Spur* are reduced to Note status, moreover, the nuisance material does not cite Calabresi and Melamed. The new ideas begin to percolate through the academy and fall into place. But the change comes slowly because people who are mentally within the former paradigm cannot understand what is happening. Many
of these scholars will continue to reason “Cathedral all the way down” - that is, an injunction is absolute protection, a stone wall, and a liability rule that merely “discourages violations” should be preferred.\footnote{195}{Louis Kaplow & Steven Shavell, Property Rules Versus Liability Rules: An Economic Analysis, 109 Harv.L.Rev. 713, 717-18 (1996).}

This article is part of a process of creative destruction and reconstruction. Denying a nuisance plaintiff an injunction may often be unsound for health or environmental reasons. Augmented environmental protection through creative use of injunctions will improve the quality of life and may reduce global warming and climate change.

In addition, Calabresi and Melamed place liability after remedy. The vocabulary is misleading and inaccurate. It combines remedy and liability. The real world is complex and nuanced instead of being primary and theoretical. The parties' post-injunction negotiation may, but doesn't always, occur. The four-category world of solutions is both too simple and not simple enough. Despite the scholarly "cottage industry," it doesn't describe court decisions or positive law. Instead it points courts in the wrong remedial direction. The faulty theorizing in law schools has diverted teaching and scholarship into theoretical conundrums. Human nature is too ambiguous and variable to explain with all-purpose micro-economic analysis based on cash-preferred motives.

Quarrels over language and terminology mask, and sometimes reveal, quarrels over world view. Changing nomenclature changes ideas.\footnote{196}{Irving Howe, A Margin of Hope: An Intellectual Autobiography 77 (1982).} So more than changing the profession's vocabulary, this article is written to change the way the profession thinks about the issues involved in nuisance and trespass remedies. It doesn't seek merely new categories, but to break the mold to develop a more functional approach.


As the late Professor Leach reminded us "great men and their great books create problems. They tend to freeze things in antique patterns."\footnote{199}{W. Barton Leach, Perpetuities: The Nutshell Revisited, 78 Harv.L.Rev. 973, 973 (1965).} Number six in all-time citations, Calabresi and Melamed's Cathedral article has a well-established place in the firmament.\footnote{200}{Fred R. Shapiro and Michelle Pearse, The Most-Cited Law Review Articles of All Time, 110 Mich. L. Rev. 1483, 1489 (2012).} I don't entertain for
an instant the notion that this modest piece will overthrow two generations of vested intellectual interest, entrenched “knowledge,” and vocabulary about nuisance-trespass remedies. Nobel-prize winning economist Tom Schelling wrote that "The lesson that may need to be learned over and over, a lesson that possibly no one can ever apply, is the extraordinary difficulty of pulling out of a situation in which one has invested heavily."\(^{201}\) But I do hope that this effort will be part of a process of displacing outmoded analysis. For one thing, our law students are confused enough. Their professors should exit the four-room Cathedral and refute its analysis.

\(^{201}\) Thomas Schelling, Strategies of Commitment and Other Essays 231–32 (2006).