Washington and Lee Law Review

Volume 75 | Issue 4 Article 4

2-19-2019

Rehabilitating the Nuisance Injunction to Protect the Environment

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Abstract

The Trump Administration has reversed the federal government's role of protecting the environment. The reversal focuses attention on states' environmental capacity. This Article advocates more vigorous state environmental tort remedies for nuisance and trespass.

An injunction is the superior remedy in most successful environmental litigation because it orders correction and improvement. Two anachronistic barriers to an environmental

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This Article's genesis was years of developing and teaching law school casebooks that included *Boomer v. Atlantic Cement* as a principal decision. *Boomer v. Atlantic Cement Co.,* 257 N.E.2d 870 (N.Y. 1970); DOUG RENDLEMAN, COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT 178–94 (2010); DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES 1208–14 (9th ed. 2018) and earlier editions. The casebooks comprise a rough "first draft" of this Article. A later draft was published in Europe as a book chapter with a different title; its emphasis and conclusions foreshadow this revision. Doug Rendleman, *Rejecting Property Rules-Liability Rules for* Boomer*'s Nuisance Remedy: The Last Tour You Need of Calabresi and Melamed's Cathedral*, *in* REMEDIES AND PROPERTY 43 (Presses Universitaires d'Aix-Marseille, Russell Weaver & Francois Lichere eds. 2013). This draft was also posted on SSRN in 2013, Number 2212384. From the beginning, understanding and reacting to the New York decisions and the *Cathedral* article's treatment of remedies influenced my teaching and casebooks. Over the years, qualifications and refinements surfaced, prompted by developing thought and scholarship.

injunction are the New York Court of Appeals' decision, Boomer v. Atlantic Cement*, and Calabresi and Melamed's early and iconic law-and-economics article,* One View of the Cathedral*. This Article examines and criticizes both because, by subordinating the injunction to money damages, they undervalue public health and environmental protection and militate against effective private-law remedies for environmental torts.*

This Article advocates flexible and pragmatic common-law techniques instead of law-and-economics analysis. Moreover, behavioral economists' studies have undermined and qualified many law-and-economics theories. In addition to arguing for more and better injunctions, this Article criticizes the law-and-economics mindset that nuisance-trespass parties' post-injunction negotiation will convert an injunction into an excessive money settlement. It also shows that the Cathedral *article's vocabulary and four-rule organization are both too long and too short as well as confusing and misleading.*

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I. Introduction

As the first half of the Trump Administration ends, the federal government's environmental goal is deregulation.[1] The EPA and the Departments of Energy and Interior are unraveling long-standing environmental policies through executive and administrative measures.[2] The Harvard Law School Environmental and Energy Law Program sends regular emails updating the Administration's deregulatory trajectory. Setbacks for environmental protection include rescission of or weakened federal government support for the Paris Climate accord, the Clean Power Plan, the Clean Water Rule, and national

1. *See* Nadja Popovich et al., *76 Environmental Rules on the Way Out Under Trump*, N.Y. TIMES, https://www.nytimes.com/interactive/2017/10/05/climate/trump- environment-rules-reversed.html (last updated July 6, 2018) (last visited Dec. 3, 2018) (stating that "the Trump Administration has sought to reverse more than 70 environmental regulations" in accordance with its priority of eliminating federal regulations) (on file with the Washington and Lee Law Review).

2. *See id.* (tracking policies that have been overturned, or which are in the process of being overturned, through the administrative, executive, legislative, and judicial processes).

monuments.[3] One of the most serious retreats is the proposal to freeze fuel efficiency standards for cars and trucks through 2026.[4]

The federal government's retreat focuses attention on state, local, and private initiatives.[5] As part of the complex legal environment, this Article examines remedies for private nuisances. With an eye to augmented private-law nuisance and related trespass remedies, it argues for more and more-detailed injunctions as environmental remedies. The injunction is the remedy that a court can use to forbid misconduct and order positive conduct. In public-law regulatory litigation, the court's choice is between an injunction and nothing.[6] But in the private-law litigation this Article examines, the court's choice is between an injunction and damages.[7]

Two barriers to a more robust environmental injunction have passed their fortieth birthdays and are primed for mid-life crises

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3. *See Regulatory Rollback Tracker*, ENVTL. L. AT HARV., http://environment.law.harvard.edu/policy-initiative/regulatory-rollback-tracker/ (last updated Sept. 25, 2018) (last visited Dec. 3, 2018) (tracking key regulatory rollbacks of the Trump Administration, including rollbacks having to do with the Paris Climate Agreement, Clean Power Plan, Clean Water Rule, and reduced size of national monument land) (on file with the Washington and Lee Law Review). *See also* Richard L. Revesz, Opinion, *On Climate, the Facts and Law are Against Trump*, N.Y. TIMES (Dec. 4, 2018), https://www.nytimes.com/2018/12/04/opinion/climate-report-trump.html (last visited Dec. 10, 2018) (on file with the Washington and Lee Law Review).

4. *See* Brady Dennis & Michael Laris, *California Blasts Trump Proposal to Freeze Fuel-efficiency Standards as 'Flawed' and 'Illegal'*, WASH. POST (Oct. 26, 2018), https://www.washingtonpost.com/national/health-science/california-blasts-trump-proposal-to-freeze-fuel-efficiency-standards-as-nihilistic-and-illegal/2018/10/25/86fedb76-d8a6-11e8-83a2-d1c3da28d6b6_story.html?utm_term=.eec49c826e9f (last visited Dec. 3, 2018) (discussing California's resistance to this measure) (on file with the Washington and Lee Law Review).

5. *See* Karen Sloan, *NYU Law Center to Help State AGs Protect Environment*, LAW.COM (Aug. 21, 2017, 2:30 PM), https://www.law.com/sites/almstaff/2017/08/21/nyu-law-center-to-help-state-ags-protect-environment/ (last visited Dec. 3, 2018) ("New York University initiated a State Energy & Environmental Impact Center for state governments to turn to as a resource in developing state and local efforts.") (on file with the Washington and Lee Law Review). *See generally* Mark Nevitt & Robert V. Percival, *Could Official Climate Denial Revive the Common Law as a Regulatory Backstop?*, 96 WASH. U. L. REV. 441 (2018).

6. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281 (1976).

7. *See* Boomer v. Atlantic Cement Co., 257 N.E. 2d 870, 871–75 (N.Y. 1970).

and reconsideration. These are the New York Court of Appeals' decision in *Boomer v. Atlantic Cement*[8] and Calabresi and Melamed's nearly contemporaneous *Cathedral* article.[9] This Article will re-examine both to bring some perspective to their remarkable longevity and their influence in favoring damages over injunctions, to express skepticism about each, and to develop qualifications and refinements.

Major among other pressing environmental problems, global warming and climate change defy a single solution.[10] Ameliorative techniques range from altering individual habits to local, regional, national, and international measures.[11] Both private-law approaches, like nuisance, and public-law regulation, litigation and regulation are available legal techniques against global warming and climate change.[12]

Sympathetic with augmented protection for the environment, I wrote this Article from my perspective in the remedies branch of process-oriented legal realism. By arguing for more and more-detailed injunctions, I hope to strike a small blow against environmental deterioration, including, in the long run, global warming and climate change.

After short introductions, this Article turns in Part II to the example of a neighboring property owner's particulate-pollution private-nuisance lawsuit based on *Boomer*. The Article moves in Part III to the *Cathedral* article's four options for a nuisance court's solution to the pollution problem. It discusses each of the options and the choices between them.

In brief, *Boomer* and the *Cathedral* article favor damages over injunctions and militate against optimal pollution remedies.[13] Part IV adds some further considerations and suggestions under a new

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8. 257 N.E. 2d 870 (N.Y. 1970).

9. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

10. *See Responding to Climate Change*, NAT'L AERONAUTICS & SPACE ADMIN., https://climate.nasa.gov/solutions/adaptation-mitigation/ (last updated Aug. 28, 2018) (last visited Dec. 3, 2018) (on file with the Washington and Lee Law Review).

11. *See id.*

12. *See* F. Andrew Hessick, *The Challenge of Remedies*, 57 ST. LOUIS U. L.J. 739, 741 (2013).

13. *See Boomer*, 257 N.E. 2d at 875; *see also* Calabresi & Melamed, *supra* note 9, at 1121.

general head of "Rule 5." The final Part V before the Conclusion, Part VI, explains procedural considerations related to the plaintiff's injunction remedy.

A. Remedy

A remedy, as this Article uses the term, is what a court can do for a 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.[14] "[T]he creation of a right," Justice Thomas wrote in *eBay v. MercExchange, L.L.C.*,[15] "is distinct from the provision of remedies for violations of that right."[16] The successful plaintiff's remedy should advance, at least it should not retard, the substantive law's policy. Except in one segment, this Article assumes that the defendant is liable to the plaintiff under the substantive law and examines what the court can do as a remedy for the successful plaintiff.

The court's remedial inquiry invokes its judgment on two general issues. First, the court must choose the plaintiff's remedy. In this Article, the court's principal choice is how to deploy two remedies, compensatory damages and an injunction.[17] The court's ancillary remedial choices concern punitive damages and restitution.[18] Second, after choosing the plaintiff's remedy, the court must measure or define it.[19] If the court, judge or jury, awards the plaintiff compensatory damages, what amount should they be?[20] If the court grants the plaintiff an injunction, what of the defendant's conduct should it require or forbid?[21]

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14. *See* Owen M. Fiss, *The Supreme Court 1978 Term Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 47 (1979).

15. 547 U.S. 388 (2006).

16. *Id.* at 392.

17. *See* discussion *infra* Part III.C.

18. *See* discussion *infra* Parts IV.B.3–4.

19. *See* discussion *infra* Part V.

20. *See* discussion *infra* Part V.

21. *See* discussion *infra* Part V.

B. Regulation Versus Litigation

But, someone will ask, isn't environmental administrative law top-down regulation based on federal statutes instead of litigation-based, state common law trespass and nuisance? Federal regulation is necessary and has been successful for many national problems. Decentralized private tort litigation, in addition to compensating individuals, complements public regulation.[22] As Professor Klass has shown, state common law is an important part of environmental protection.[23] Mr. Abelkop has added:

> [E]nvironmental and public health problems call for multiple policy instruments, and tort law and public regulatory rules usually operate as complements, not substitutes . . . . Ultimately, the choice of policy instruments will turn on contextual factors including the nature of the problem, the attributes of the parties involved, the political climate, the available data, and some manifestation of the evaluative criteria.[24]

The Trump Administration's retreat increases private law's role.[25] Lawyers seeking to protect the environment have numerous reasons to turn to state common law nuisance and trespass. State and federal regulation may be absent, lax, or difficult to enforce.[26]

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22. *See* Adam D.K. Abelkop, *Tort Law as an Environmental Policy Instrument*, 92 OR. L. REV. 381, 385 (2013) (stating that "tort law and public regulation are complements, not substitutes").

23. *See* Alexandria B. Klass, *CERCLA, State Law and Federalism in the 21st Century*, 41 SW. L. REV. 679, 680 (2012).

24. Abelkop, *supra* note 22, at 464; s*ee also* Lynda L. Butler, *The Resilience of Property*, 55 ARIZ. L. REV. 847, 887 (2013); Richard A. Epstein, *Modern Environmentalists Overreach: A Plea for Understanding Background Common Law Principles*, 37 HARV. J.L. & PUB. POL'Y 23, 34–35 (2014).

25. *See* Chris Mooney, *Trump Withdrew from the Paris Climate Deal a Year Ago. Here's What has Changed*, WASH. POST (June 1, 2018), https://www.washingtonpost.com/news/energy-environment/wp/2018/06/01/trump-withdrew-from-the-paris-climate-plan-a-year-ago-heres-what-has-changed/?noredirect=on&utm_term=.89f12c5a84fc (last visited Dec. 3, 2018) (on file with theWashingtonand Lee Law Review). *See generally* Nevitt & Percival, *supra* note 5.

26. *See* Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 130–33 (2005) (discussing problems with environmental regulation and jurisdiction, noting that absence, form, and enforcement of regulation pose difficulties).

Government regulation may move at a snail's pace.[27] An agency may be captured by the industry it is charged to regulate.[28] Legislators may be in thrall to campaign contributors.[29] The plaintiffs may be powerless minorities who lack representation in the legislature or a voice in the agency.[30] Regulation has gaps; examples are gasoline storage tanks and fracking.[31] The regulatory scheme may lack important remedies, compensatory damages, punitive damages, restitution, and injunctions. "Regulation" through common law courts' civil injunctions may be flexible enough to allow innovative solutions.[32] In 2017, California coastal communities filed climate-control actions for damages against energy companies because of expected costs from rising sea levels.[33] In 2017 and 2018, Boulder, Colorado, New York City, and other municipal governments prepared and filed climate-change public nuisance, private nuisance, and trespass lawsuits against

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27. *See* Stuart Shapiro, *Why does it Take so Long to Issue a Regulation?*, HILL (May 19, 2015, 7:30 AM), http://thehill.com/blogs/pundits-blog/the-administration/242468-why-does-it-take-so-long-to-issue-a-regulation (last visited Dec. 3, 2018) (on file with the Washington and Lee Law Review).

28. *See* Scott Hempling, *"Regulatory Capture": Sources and Solutions*, 1 EMORY CORP. GOVERNANCE ACCOUNTABILITY & REV. 23, 24–25 (2014) (defining regulatory capture as a situation in which the regulated entity "has more influence than what the public interest requires").

29. *See* Lynda W. Powell, *The Influence of Campaign Contributions on the Legislative Process*, 9 DUKE J. CONST. L. & PUB. POL'Y 75, 100–01 (2014).

30. *See* Amber Phillips, *The Striking Lack of Diversity in State Legislatures*, WASH. POST (Jan. 26, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/01/26/the-real-problem-with-diversifying-congress-state-legislatures-are-even-less-diverse/?utm_term=.d68adaa7cc8a (last visited Dec. 3, 2018) (on file with the Washington and Lee Law Review).

31. *See, e.g.*, Oil Pollution Prevention, 112 C.F.R. § 112 (2017) (providing only regulation for spill prevention and response to spills); *see also* PUB. CITIZEN, HYDRAULIC FRACTURING–UNSAFE, UNREGULATED 1–3 (2018), https://www.citizen.org/sites/default/files/hydraulicfracturing_fs.pdf (describing that fracking poses unregulated risks to drinking water).

32. *See* Abelkop, *supra* note 22, at 387; Stephen B Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 713 (2013); Klass, *supra* note 23, at 680.

33. Jenna Greene, *New Tactic in Climate Control Litigation Could Cost Energy Companies Billions. Or Not*, RECORDER (July 20, 2017), https://www.law.com/therecorder/almID/1202793545435/New-Tactic-in-Climate-Change-Litigation-Could-Cost-Energy-Companies-Billions-Or-Not/?mcode=1202617583589&curindex=405 (last visited Dec. 3, 2018) (on file with the Washington and Lee Law Review).

energy companies.[34] As Professor Sharkey wrote, common law courts should "effectively incorporate input from federal agencies, while at the same time ensuring that such agencies do not overreach."[35]

C. Rational Choices, Behavioral Economics, and Positive Law

This Article presents two perspectives for analyzing legal and economic decision-making. On the one hand, a theory-driven economic-analysis approach bases human decisions on economic motives and often finds clear-cut answers.[36] On the other hand, a pragmatic and empirical view recognizes that human nature is variable and that law is ambiguous and process driven.[37] The rise of behavioral economic scholarship has strengthened this

34. Eric Waeckerlin & Christopher Chrisman, *Coming to Colorado—Climate Change Nuisance Suits*, HOLLAND & HART LLP (Jan. 29, 2018), https://www.hollandhart.com/coming-to-colorado-climate-change-nuisance-suits (last visited Dec. 3, 2018) (on file with the Washington and Lee Law Review). These lawsuits raise complex defensive, proof, and procedural issues that this Article does not examine. Among them are standing, class action certification, causation, public versus private nuisance, federal preemption and displacement. *See* Good v. American Water Works Co., No. 2:14-01374, 2015 WL 3540509, at *3, *8–10 (S.D. W. Va. June 4, 2015) (discussing economic loss rule and public-private nuisance); Smith v. ConocoPhillips Pipe Line Co., 801 F.3d 921, 927 (8th Cir. 2015) (refusing a nuisance class action); Price v. Martin, 79 So. 3d 960, 977 (La. 2011) (refusing to certify state-court plaintiff class); Merrick v. Diageo Americas Supply, 805 F.3d 685, 695 (6th Cir. 2015) (finding that the federal Clean Air Act does not preempt state common law tort claims); Bell v. Cheswick Generating Station, 734 F.3d 188, 197 (3d Cir. 2013) (finding that federal Clean Air Act did not preempt state common law tort claims), *cert. denied*, 134 S. Ct. 2696 (2014); Freeman v. Grain Processing Corp., 848 N.W.2d 58, 94 (Iowa 2014) (finding that federal Clean Air Act does not preempt state common law tort claims); American Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 422–23 (2011) (stating that the Clean Air Act displaces federal common law emissions-abatement lawsuit and putting into question state lawsuits against pollution that originated outside its borders); Anderson v. Teck Metals, Ltd., No. CV-13-420-LRS, 2015 WL 59100, at *10 (E.D. Wash. Jan. 5, 2015) (finding that in a pollution lawsuit against a Canadian defendant, CERCLA displaces federal common law public nuisance, and that state public nuisance law was inapplicable outside the state).

35. Catherine M. Sharkey, *The Administrative State and the Common Law: Regulatory Substitutes or Compliments?*, 65 EMORY L.J. 1705, 1734 (2016).

36. *See* Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 762–67 (1975) (discussing economic theory and arguing that individuals engage in predictable behavior regarding the law).

37. *See* SCOTT J. SHAPIRO, LEGALITY 256 (2011).

approach. Differing basic ways of looking at the law emerge below. How does human decision-making work? Taking my cue from behavioral economic scholarship and earlier Legal Realists, Felix Cohen[38] and Leon Green,[39] I argue that the pragmatic and functional approach should supplement or replace theory.

The *Cathedral* article, which emphasized that it takes only "one" view of the Cathedral, left room for other views.[40] Judge Calabresi's 2016 book assimilates behavioral economics, another view, and rejects dogmatic economic theory that elevates micro-theory over law; his book favors economics that are flexible enough to accept positive-law developments.[41] Professor Hackney maintains that then-professor Calabresi's scholarship in the 1970s was a precursor for behavioral economics.[42] The *Cathedral* article is more tentative and nuanced than many later more theory-driven and dogmatic economic-analysis scholars.[43] This Article follows Judge Calabresi's later work and refers to the theory-driven view as economic analysis.

Although they have been supplemented by professionally trained economists, the *Cathedral* article and other early law and economics studies were written by economic autodidacts.[44] Early law-and-economics scholars emphasized a rational-choice perspective.[45] The rational-choice model holds that people make

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38. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821–34 (1935).

39. *See generally* LEON GREEN, THE LITIGATION PROCESS IN TORT LAW (2d ed. 1977).

40. Calabresi & Melamed, *supra* note 9, at 1128.

41. *See* GUIDO CALABRESI, THE FUTURE OF LAW & ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION 4–7 (2016) (endorsing behavioral economics, adding that "there will be times when even an expanded economic theory will not be able to explain legal reality").

42. *See* James R. Hackney Jr., *Guido Calabresi and the Construction of Contemporary American Legal Theory*, 77 LAW & CONTEMP. PROBS. 45, 63–64 (2014) (asserting that Calabresi's work reflects a trend towards a more methodologically flexible approach to scholarship in the law-and-economics field).

43. This Article leaves out parts of the *Cathedral* article's analysis; for example, its discussion of the inalienable. *See, e.g.*, Calabresi & Melamed, *supra* note 9, at 1111–15.

44. *See* Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1083–84 (2012).

45. *See* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV.

planned and controlled decisions to advance their personal economic utility.[46]

Economic-analysis scholarship seeks the most efficient way to resolve a dispute.[47] In contrast to most remedies scholarship, 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.[48] Deterrence is prospective not retrospective. The seeker for deterrence may view the plaintiff's receipt of compensatory damages as almost incidental. Deterrence is less connected to either the parties' present litigation or to the plaintiff's actual or potential loss. It is more of a reason to take money from the defendant than it is a reason to give the defendant's money to the plaintiff.

Court decisions, legal reasoning based on values, policies, and legal rules, in contrast, usually examine money transfers from the defendant to the plaintiff under the heading of compensation in addition to lower-priority deterrence and punishment.[49]

Economic analysis' vocabulary is difficult even for a specialist to decode, what's more a merely educated lawyer.[50] It is too abstruse for most lawyers and judges.[51] And it is inaccessible, and sometimes imperfectly applied.[52] Written for a scholarly audience, it may cloak a conservative political agenda that favors business defendants over tort plaintiffs and de-emphasizes environmental protection.

Contemporary behavioral economics, based on empirical research, qualifies and rejects rational-choice theory:

> Standard economics assumes that we are rational—that we know all the pertinent information about our decisions, that we

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1051, 1055 (2000).

46. *See* JONATHAN LEVIN & PAUL MILGROM, INTRODUCTION TO CHOICE THEORY 2–6 (2004), https://web.stanford.edu/~jdlevin/Econ%20202/Choice%20Theory.pdf.

47. *See* Posner, *supra* note 36, at 760.

48. *Cf.* Thomas C. Galligan, Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 WASH. & LEE L. REV. 1019, 1031–33 (2001).

49. *See* Samuel L. Bray, *Remedies, Meet Economics; Economics, Meet Remedies*, 38 OXFORD J. LEGAL STUD. 71, 72 (2018).

50. *See* Jeffrey Berryman, *The Law of Remedies: A Prospectus for Teaching and Scholarship*, 10 OXFORD U. COMMONWEALTH L.J. 123, 130 (2010).

51. *See id.* at 130.

52. *Id.*

> can calculate the value of the different options we face, and that we are cognitively unhindered in weighing the ramifications of each potential choice. The result is that we are presumed to be making logical and sensible decisions . . . . On the basis of these assumptions, economists draw far-reaching conclusions about everything from shopping trends to law to public policy. But, . . . we are all far less rational in our decision making than standard economic theory assumes . . . . So wouldn't it make sense to modify standard economics and move away from naive psychology, which often fails the tests of reason, introspection, and—most importantly—empirical scrutiny? Wouldn't economics make a lot more sense if it were based on how people actually behave, instead of how they should behave?[53]

People are not always rational maximizing machines. They are emotional and error-prone cusses who often act contrary to their own pecuniary self-interest.[54] "Our species is not *Homo economicus*. At the end of the day, it emerges as something more complicated and interesting. We are *Homo sapiens*, imperfect beings, soldiering on with conflicting impulses through an unpredictable, implacably threatening world, doing our best with what we have."[55] The behavioral limits on rational choice comprise bounded rationality, bounded willpower, and bounded self-interest.[56]

One behavioral legal economist insisted that "[t]he battle to separate the economic analysis of legal rules and institutions from the straightjacket of strict rational choice assumptions has been won by the proponents of 'behavioral law and economics.'"[57] However, some readers' reactions to a draft of this Article showcased the durability of rational-choice sentiment.

"The purpose of studying economics[,]" English economist Joan Robinson wrote, "is not to acquire a set of ready-made answers to economic questions, but to learn how to avoid being

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53. DAN ARIELY, PREDICTABLY IRRATIONAL: REVISED AND EXPANDED EDITION: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 317 (2009).

54. *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 4 (2011).

55. EDWARD O. WILSON, THE SOCIAL CONQUEST OF EARTH 251 (2012).

56. *See* RICHARD H. THALER, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS 258 (2015).

57. Russel Korobkin, *What Comes After Victory for Behavioral Law and Economics*?, 2011 U. ILL. L. REV. 1653, 1653 (2011).

deceived by economists."[58] I am not a stranger to economic analysis.[59] Nevertheless, I agree with Professor Sterk's observation that "any attempt to justify legal rules exclusively in efficiency terms is fatally flawed."[60]

The major part of my analysis is common law, usually what has happened in the courts throughout the land. One impediment 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 Professor Douglas Laycock observed, "many law-and-economics scholars," who follow economic theory, exhibit disinterest "in reading cases or mastering doctrine."[61] Research in primary sources can be dull and frustrating, but it is indispensable to responsible scholarship.

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. Restatements, national treatises, and scholarship in law reviews supply some uniformity. Terminology varies within and between systems. By the time many of the decisions under study reach appeal, the legal questions are close enough to be decided either way. Moreover, judges write decisions that support the result they reach. Courts, the researcher finds, muddle through, often reaching contrasting and inconsistent

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58. JOAN ROBINSON, MARX, MARSHALL AND KEYNES 30 (1955).

59. I co-authored one of the first law school applications of Tom Schelling's game theory; see Chapter 13 of OWEN M. FISS & DOUG RENDLEMAN, INJUNCTIONS (2d ed. 1984), now Chapter 9 of DOUG RENDLEMAN, COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT (2010) (discussing the injunction and its relation to game theory). Additional economic analysis can be found in DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES 46–48 (discussing lost earning capacity), 46–48 (discussing wrongful death damages), 68–69 (discussing pain and suffering damages), 116 (discussing the collateral source rule), 360 (discussing the preliminary injunction standard), 722–25 (discussing expectancy damages for breach of contract), 786–809 (discussing "efficient" opportunistic breach of contract), 842–43 (discussing special-consequential damages), 876–84 (discussing lost-volume sellers), 884–900 (discussing liquidated damages) (9th ed. 2018).

60. Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 104 (1987).

61. Douglas Laycock, *The Neglected Defense of Undue Hardship (And the Doctrinal Train Wreck in* Boomer v. Atlantic Cement*)*, 4 J. TORT L. 1, 20 (2012).

decisions on similar facts.[62] Research in appellate and some trial-court decisions is imperfect and messy.

The positive-law writer must discover what the courts decide 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. The late Christopher Lasch observed that:

> [W]e have 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 that 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.[63]

I have tried 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, easements, pollution control, and, if a government agency is involved, eminent domain. I summarize decisions to illustrate and support my points.

II. Boomer v. Atlantic Cement

This Article turns to the archetype land-use dispute, *Boomer v. Atlantic Cement*.[64] Atlantic Cement's factory was emitting particulate pollution that distressed surrounding property owners.[65] What is neighbor Boomer to do? Although there were multiple plaintiffs, for clarity and simplification, this Article sometimes uses the singular for the plaintiff side of the lawsuit.

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62. *See* John C. McCoid II, *Inconsistent Judgments*, 48 WASH. & LEE L. REV. 487, 487 (1991) (describing how judges arrive at inconsistent opinions in lawsuits containing identical issues).

63. Casey Blake & Christopher Phelps, *History as Social Criticism: Conversations with Christopher Lasch*, 80 J. AM. HIST. 1310, 1324–25 (1994).

64. 257 N.E. 2d 870 (N.Y. 1970).

65. *Id.* at 871–72.

How should the court respond? An environmental tort is major complex litigation with several substantive theories: nuisance, trespass, negligence, strict liability, and violation of environmental statutes, such as CERCLA.[66] For clarity and simplification, this Article focuses on nuisance and trespass.

The *Boomer* court accepted Atlantic Cement's substantive tort liability for a private nuisance.[67] It focused on plaintiff Boomer's remedy.[68] The court considered the utility of Atlantic Cement's development and the plant's harm to plaintiff's use and decided that the plant had greater "value" than Boomer's use of his property.[69] The court granted the "winning" plaintiff compensatory damages instead of an injunction.[70] "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 Halper concluded.[71]

The court was influenced by the negative impact that shuttering the factory would have on the local economy.[72] As the dissent points out, however, an injunction wouldn't necessarily have ended the defendant's operation.[73] The dissent also emphasized the cement company's power to take now and pay later as well as the pollution's deleterious effect on public health.[74]

The New York Court of Appeals' *Boomer* decision has held its law school audience for generations.[75] First-year Property and Torts casebooks feature *Boomer* as a principal case along with

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66. *See* Klass, *supra* note 23, at 693–94 (explaining that on a theory of negligence per se, courts "have used federal, state, and local environmental statutes and regulations to help define the duty of care and to serve as a basis for liability").

67. *See Boomer*, 257 N.E. 2d at 871.

68. *See id.* at 871–75.

69. *See id.*

70. *Id.* at 875.

71. Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89, 130 (1998).

72. *See Boomer*, 257 N.E. 2d at 872.

73. *Id.* at 877 (Jasen, J., dissenting).

74. *Id.* at 875–77 (Jasen, J., dissenting).

75. *See* Daniel A. Farber, *The Story of* Boomer: *Pollution and the Common Law*, *in* ENVIRONMENTAL LAW STORIES 7, 8 (Oliver A. Houck & Richard J. Lazarus eds., 2005).

Spur Industries, which is discussed below.[76] Because of the court's choice between damages and an injunction in environmental litigation, *Boomer* is also a natural teaching case for upper-level

76. For property casebooks with *Boomer* and *Spur* as principal cases, see JOHN E. CRIBBET, ROGER W. FINDLEY, ERNEST E. SMITH & JOHN S. DZIENKOWSKI, PROPERTY: CASES AND MATERIALS 679–88 (9th ed. 2008) (presenting *Boomer* and *Spur*); JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, PROPERTY 742–58 (9th ed. 2018) (presenting the cases in what is probably the most widely used casebook); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 965–83 (3rd ed. 2012) (presenting *Boomer* and *Spur*). However, one casebook summarizes *Boomer* and *Spur* in Notes and names the injunction and damages as possible remedies. *See* DAVID L. CALLIES, DANIEL R. MANDELKER, & J. GORDON HYLTON, PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS 153–54 (4th ed. 2016). For torts casebooks containing either case, see GEORGE C. CHRISTIE, JOSEPH SANDERS & W. JONATHAN CARDI, CASES AND MATERIALS ON THE LAW OF TORTS 1230–40 (5th ed. 2012) (presenting *Boomer* as a principal case, with *Spur* in the notes); RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 612 (11th ed. 2016) (presenting *Boomer* as a principal case); MARC A. FRANKLIN, ROBERT L. RABIN, MICHAEL D. GREEN & MARK A. GEISTFELD, TORT LAW AND ALTERNATIVES 688–702 (10th ed. 2016) (presenting *Boomer* as a principal case, with *Spur* in the notes); JOHN C. P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 866 (4th ed. 2016) (beginning presentation of *Boomer*); VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 867–77 (13th ed. 2015) (presenting *Boomer* and *Spur* as principal cases).

courses in Remedies[77] and Environmental Law.[78] Scholars have written important chapters and leading articles about the remedies issues in *Boomer*.[79]

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77. *See* Candace S. KOVACIC-FLEISCHER, JEAN C. LOVE & GRANT S. NELSON, EQUITABLE REMEDIES, RESTITUTION AND DAMAGES: CASES AND MATERIALS 803–23 (8th ed. 2011) (presenting *Boomer* and *Spur* as principal cases); GEORGE KUNEY, EXPERIENCING REMEDIES 482–88 (2015) (presenting *Boomer*); DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 419–22 (5th ed. 2019) (presenting *Boomer* and *Spur* in note discussions); DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES: CASES AND MATERIALS 1208–15 (9th ed. 2018) (presenting *Boomer* as a principal case, referencing *Spur* in the notes); EMILY SHERWIN & SAMUEL L. BRAY, AMES, CHAFEE, AND RE ON REMEDIES: CASES AND MATERIALS 478–87 (2nd ed. 2018) (*Boomer* and *Spur* presented as principal cases); ELAINE W. SHOBEN, WILLIAM MURRAY TABB, RACHEL M. JANUTIS & THOMAS ORIN MAIN, REMEDIES: CASES AND PROBLEMS 88–94, 410–11 (6th ed. 2016) (presenting *Boomer*, with *Spur* in the notes); TRACY A. THOMAS, DAVID I. LEVINE & DAVID J. JUNG, REMEDIES: PUBLIC AND PRIVATE 137–38 (6th ed. 2017) (referencing *Boomer* within *Walgreen Co. v. Sara Creek Property Co.*, 966 F.2d 273 (7th Cir. 1992)); RUSSELL L. WEAVER, DAVID F. PARTLETT, MICHAEL B. KELLY & W. JONATHAN CARDI, REMEDIES: A CONTEMPORARY APPROACH 330–40 (4th ed. 2016) (presenting *Boomer* and *Spur* in section on experimental and conditional injunctions); s*ee also* DOUG RENDLEMAN, COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT 178–94 (2010) (presenting *Boomer*, with *Spur* in the notes). The Torts and Property courses at Washington and Lee and many other law schools have been attenuated to four credit hours each. I have sometimes found in my upper-level Remedies class that none of the students have covered *Boomer* in their first year of law school, a pity.

78. ROBERT PERCIVAL, CHRISTOPHER H. SCHROEDER, ALAN S. MILLER & JAMES P. LEAPE, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 79–80 (8th ed. 2018) (including *Boomer* as part of a discussion on private nuisance written to maintain that private nuisance is "grossly inadequate" for addressing modern industrial pollution). This Article, on the other hand, maintains that private nuisance has a role in dealing with pollution.

79. *See, e.g.*, Daniel Farber, *Reassessing* Boomer: *Justice, Efficiency, and Nuisance Law*, *in* PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 7, 17 (Peter Hay & Michael H. Hoeflich eds., 1988); Daniel A. Farber, *The Story of* Boomer*: Pollution and the Common Law*, *in* ENVIRONMENTAL LAW STORIES 7, 20, 22, 23 (Oliver A. Houck & Richard J. Lazarus eds., 2005); W. Page Keeton & Clarence Morris, *Notes on "Balancing the Equities"*, 18 TEX. L. REV. 412, 412–25 (1940); Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 571–76 (2007); Laycock, *supra* note 61, at 1–2; John P. S. McLaren, *The Common Law Nuisance Actions and the Environmental Battle—Well-Tempered Swords or Broken Reeds?*, 10 OSGOODE HALL L.J. 505, 547 (1972); A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075, 1075 (1980); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1719–21 (2004); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 974–75 (2004) (discussing information-cost theory, compensatory damages, compensated injunctions, and

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."[80] However, 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 reprobates.[81] For my pedagogical purposes, however, the *Boomer* decision performs an important service because the teaching value of a simple, but faulty, decision is clear.[82]

The reason Professor Laycock refers to the *Boomer* decision as a "train wreck" is that the Court of Appeals rewrote doctrinal history without acknowledging that it had.[83] 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."[84] 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.[85] The *Boomer* court claimed an innovation for its decision to compare plaintiffs' benefit from an injunction, which it stated as permanent

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the exclusion regime); Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1742 (2007) (employing information-cost theory to compare "the more tort-like copyright regime and the more property-like patent law"); Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285, 1285 (2008); John W. Wade, *Environmental Protection, The Common Law of Nuisance and the Restatement of Torts*, 8 F., ABA SECT. INSURANCE, NEGLIGENCE, & COMPENSATION L. 165, 174 (1972); Barton H. Thompson, Jr., Note, *Injunction Negotiations: An Economic, Moral, and Legal Analysis*, 27 STAN. L. REV. 1563, 1563 (1975) (discussing negotiations regarding property right enforcement in the form of injunctions and the contempt proceedings that may follow); Comment, *Internalizing Externalities: Nuisance Law and Economic Efficiency*, 53 N.Y.U. L. REV. 219, 219–20 (1978) (discussing economic efficiency and nuisance law with reference to *Boomer*).

80. Farber, *supra* note 75, at 42.

81. *See id.*

82. *See id.*

83. Laycock, *supra* note 61, at 7–8.

84. Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 872 (N.Y. 1970).

85. *See id.*

damages of $185,000 with defendant's cost to comply with a shutdown injunction, closing a $45,000,000 plant and dismissing over 300 workers.[86]

As Professor Halper demonstrated in 1990, however, the *Boomer* decision was really nothing new for New York.[87] The *Boomer* court had overlooked a "large body of [New York] law on undue hardship."[88] "*Boomer* was no innovation," Laycock also concluded in 2012 after he "independently reviewed" Halper's research and "further confirmed her general account."[89]

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

A. 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.[90] A negative externality means that the proprietor has captured the benefits of its operation while distributing some of its costs to others.[91]

A court may create legal responsibility for the proprietor's activity and define remedial consequences that force it to consider the affected property owners.[92] The court's remedial decision will structure the proprietor's incentives to "internalize the

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86. *See id.* at 873 n.*.

87. Louise A. Halper, *Nuisance, Courts and Markets in the New York Court of Appeals, 1850–1915*, 54 ALB. L. REV. 301, 302 (1990).

88. Laycock, *supra* note 61, at 10.

89. *Id.* at 8, 10 n.46.

90. *See Negative Externality*, FUNDAMENTAL FINANCE, http://economics.fundamentalfinance.com/negative-externality.php (last visited Dec. 3, 2018) (on file with the Washington and Lee Law Review).

91. *Id.*

92. *See* J. William Futrell, *The Transition to Sustainable Development Law*, 21 PACE ENVTL. L. REV. 179, 192 (2003).

externality."[93] Courts have used nuisance and trespass substantive law and injunction and damages remedies to constrain neighbors' nuisances and trespasses and to suppress externalities.[94]

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 a defendants' noise, odor, and vibrations.[95] Courts adopted nuisance as the private-law foundation for modern environmental law.[96] Most decisions discussed below are nuisance-based. A legal researcher will find the substantive law of private nuisance a puzzle.[97] Both Restatements of Torts will cause more puzzlement.[98]

Trespass to land is a related tort that blends into the tort of nuisance.[99] A trespass involves a defendant casting something with size and weight that impinges on the plaintiff landowner's land.[100] Many of the decisions we review below stemmed from defendants' encroachments on plaintiffs' property. A court will use

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93. *Id.*

94. *See id.* at 192 n.37.

95. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS: PRACTITIONER TREATISE SERIES § 402 (2d ed. 2011).

96. *See id.* § 398. *See generally* Nevitt & Percival, *supra* note 5.

97. *See* William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942) (referring to nuisance as a "legal garbage can"). 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, HANDBOOK OF THE LAW OF TORTS 571 (4th ed. 1971). Confirmation for these conclusions will be found in John W. Wade, *Environmental Protection, The Common Law of Nuisance and the Restatement of Torts*, 8 F., ABA SECT. OF INSURANCE, NEGLIGENCE, & COMPENSATION L. 165, 170–72 (1972) (describing the complex evolution of private nuisance law), and the RESTATEMENT (SECOND) OF TORTS § 822 (AM. LAW INST. 1979).

98. Professor Halper explained why this puzzlement occurs in Louise A. Halper, *Untangling the Nuisance Knot*. *See* Halper, *supra* note 71, at 119–28, 130 (considering the Restatement in light of the assertion that nuisance is unprincipled); *see also* Farber, *supra* note 75, at 10–13. Professor Fraley maintains that the Second Restatement of Torts' negligence approach to nuisance was a mistake. *See* Jill Fraley, *Liability for Unintentional Nuisances* 1 (Wash. & Lee Pub. Legal Stud. Res. Paper Series No. 2018-14, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3216539 (forthcoming publication in the West Virginia Law Review).

99. *See* DOBBS ET AL., *supra* note 95, § 51.

100. *Id.* § 57.

the trespass tort to protect the owner's right to use and possess the land and its physical integrity.[101]

Although Boomer might have characterized Atlantic's migrating particulates as trespasses, the plaintiff's substantive theory in *Boomer* was nuisance, based on the factory's particulates, as less tangible invasions than the explicit invasion of trespass.[102] Nuisance is a more complex substantive tort than trespass because the court compares the litigants' uses.[103] A court will treat a nuisance defendant better and more leniently in both substance and remedy than a trespass defendant.[104] This leads creative plaintiffs' lawyers to develop interesting trespass-tort characterizations that test the borderline between the two torts to achieve favorable treatment for their clients.[105]

In a decision finding that projecting a critical message onto a building wasn't a trespass, a Nevada court's "review of trespass law in other jurisdictions reveals two lines of cases. Jurisdictions that adhere to the traditional rule of trespass hold a trespass only occurs 'where the invasion of land occurs through a physical, tangible object.'"[106] The decision continued that "[j]urisdictions that adhere to the modern theory hold that a trespass may also occur when intangible matter, such as particles emanating from a manufacturing plant, cause actual and/or substantial damage to the res (sic.)."[107] Particulate pollution from a defendant's dust, smoke, and gas might fit into either tort.[108]

In Oregon in 1960, for example, a court held that a defendant who disseminated particulates and gasses with fluorides had

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101. *Id.* § 52.

102. *See* Boomer v. Atlantic Cement Co., Inc., 257 N.E.2d 870, 875 (N.Y. 1970).

103. *See* DOBBS ET AL., *supra* note 95, § 51.

104. *See id.* at 133.

105. *See id.* at 134.

106. Int'l Union of Painters & Allied Trades Dist. Council 15 Local 159 v. Great Wash Park, LLC, No. 67453, 2016 WL 4499940, at *2 (Nev. App. Aug. 18, 2016) (quoting Babb v. Lee Cty. Landfill SC, LLC, 747 S.E.2d 468, 477 (S.C. 2013)).

107. *Id.* at *2. Judge Tao wrote in a concurring opinion that the two torts overlap: "[E]xpanding the tort of trespass to cover such things as light, gas, or odors effectively blurs the two torts together and makes them one." *Id*. at *7 (Tao, J., concurring).

108. *See id.* at *7 (Tao, J., concurring).

committed a trespass.[109] In 2011, a Minnesota state intermediate appellate court found that defendant's over-sprayed pesticides that drifted from its field to an organic farmer's field were a trespass and that an injunction was a possible remedy.[110] In 2012, however, the state supreme court held that the invasion of defendant's drifting pesticide wasn't a trespass because the pesticide wasn't a tangible item that invaded plaintiffs' land and interfered with their possession of it.[111] But the court said that defendant's invading pesticide could be a nuisance remedied by an injunction because it interfered with plaintiffs' ability to use their land.[112] There are numerous decisions on both sides.[113]

B. The Permanent-Temporary Distinction

Courts classify a defendant's nuisance or trespass invasion of a plaintiff's land as permanent or temporary.[114] This must include the important caveat that "[t]he terms 'permanent' and 'temporary'

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109. *See* Martin v. Reynolds Metals Co., 342 P.2d 790, 797 (1959) (stating that a "defendant's conduct in causing chemical substances to be deposited upon the plaintiffs' land fulfilled all of the requirements under the law of trespass"), *cert. denied*, 362 U.S. 918 (1960).

110. *See* Johnson v. Paynesville Farmers Union Coop. Oil Co., 802 N.W.2d 383, 392 (Minn. App. 2011), *aff'd in part, rev'd in part*, 817 N.W.2d 693 (Minn. 2012).

111. *See* Johnson v. Paynesville Farmers Union Coop. Oil Co., 817 N.W.2d 693, 714 (Minn. 2012).

112. *See id.* at 705. The Minnesota litigation may be a harbinger of litigation about dicamba, an herbicide for genetically modified soybeans and cotton that drifts when sprayed above ground and damages unmodified crops, including an estimated 3.6 million acres of soybeans. *See* Eric Lipton, *Crops in 25 States Damaged by Unintended Drift of Weed Killer*, N.Y. TIMES (Nov. 1, 2017), https://www.nytimes.com/2017/11/01/business/soybeans-pesticide.html (last visited Dec. 3, 2018) (elaborating on the damage done by the weed killer dicamba) (on file with the Washington and Lee Law Review). In addition to farmers and farm groups, environmental groups, the federal EPA, pesticide and chemical companies, and state and local regulators are concerned about the herbicide. *See id.*

113. *See* Babb v. Lee Cty. Landfill, LLC, 747 S.E.2d 468, 480 (S.C. 2013) (finding that physical invasion is required for trespass, not odor); Larry D. Schaefer, Annotation, *Recovery in Trespass for Injury to Land Caused by Airborne Pollutants*, 2 A.L.R. 4th 1054 (1980 & Cumulative Supp.) (collecting decisions on both sides).

114. *See* DOBBS ET AL., *supra* note 95, § 57.

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."[115]

The permanent-temporary distinction governs four issues: the applicable statute of limitations,[116] the choice between (or combination of) damages and an injunction, the measure of damages, and the definition of a cause of action for preclusion.[117] We are primarily concerned here with the plaintiff's remedies, the court's choice between, or combination of, damages and an injunction and with the measure of the plaintiff's damages.

If the court classifies the defendant's invasion of the 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.[118] If the statute of limitations period has expired, the owner's suit against the defendant's permanent invasion is time-barred.[119]

If the plaintiff's lawsuit against the defendant's permanent invasion isn't time barred, the landowner has one cause of action for past and future damages.[120] 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.[121] By paying the plaintiff his permanent damages, the defendant acquires something like an easement or servitude on the plaintiff's

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115. Mel Foster Co. Props. v. American Oil Co., 427 N.W.2d 171, 175 (Iowa 1988) (quoting Note, *Stream Pollution—Recovery of Damages,* 50 IOWA L. REV. 141, 153 (1964)); *see also* DOBBS ET AL., *supra* note 95, § 57.

116. *See* Burley v. Burlington N. & Santa Fe Ry. Co., 273 P.3d 825, 844 (Mont. 2012).

117. *See* DOBBS ET AL., *supra* note 95, § 57.

118. *See Burley*, 273 P.3d at 827.

119. *See* DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 5.11(1) (3d ed. 2018); *see also* Bethpage Water Dist. v. Northrop Grumman Corp., 884 F.3d 118, 125 (2d Cir. 2018) (stating that the "limitation only applies to claims for damages, not claims for injunctive relief"); Forest Lakes Cmty. Ass'n v. United Land Corp. of Am., 795 S.E.2d 875, 881–82 (Va. 2017) (evaluating plaintiff's damages claim for statute of limitations purposes and holding that the accrual of permanent nuisance and trespass occurred when the injury began).

120. *See* DOBBS ET AL., *supra* note 95, § 57.

121. *See Forest*, 795 S.E. 2d at 883 n.12.

property.[122] The defendant, moreover, exercises something like eminent domain over the plaintiff's property.[123]

The New York court's remedy for plaintiff Boomer was, in effect, permanent damages. The court's conditional injunction formally enjoined Atlantic Cement's nuisance, but the court stayed its injunction, apparently for eighteen months; the injunction would never become effective if defendant paid plaintiff's damages which in turn created an easement.[124]

A defendant's temporary invasion is divided into two subdivisions: the defendant's repeated invasions or its continuing invasion of the plaintiff's property.[125] 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.[126] The owner may sue the defendant to recover for his temporary damages that occurred during the statute-of-limitations period immediately preceding his lawsuit.[127]

Instead of damages, the owner's future remedy for the defendant's continuing trespass is often an injunction that orders the defendant to either cease or ameliorate its tort.[128] The court may couple a future-oriented injunction with awarding the plaintiff a rental-value measure of damages for the defendant's past invasions.[129] 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.[130] 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.[131] This was the trial judge's decision in *Boomer v. Atlantic Cement* that the Court of Appeals reversed.[132]

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122. *See* DOBBS ET AL., *supra* note 95, § 57.
123. *See id.* at 153.
124. *See* Boomer v. Atlantic Cement Co., 257 N.E. 2d 870, 873–75 (N.Y. 1970).
125. *See* Hoery v. United States, 64 P.3d 214, 222 (Colo. 2003).
126. *See id.* at 223.
127. *See* DOBBS ET AL., *supra* note 95, § 57.
128. *See id.* § 57, at 154 n.9.
129. *See id.* § 404, at 647.
130. *See id.* § 57, at 155.
131. *See id.* § 57, at 154.
132. *See Boomer*, 257 N.E. 2d at 871.

C. Economics and the Environment

Two of the reasons Professor Halper gave for nuisance's legal and economic complexity are prominent in *Boomer*: How, first, should a court adopt the common law of nuisance to the forces of economic development?[133] A landowner-plaintiff who relies on the traditional torts of nuisance and trespass may be a conservative property-rights opponent of industrial progress.[134] Second, what role does the public interest in a wholesome environment play?[135] The plaintiff may also be a progressive paladin fighting to protect the environment.

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 presently 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 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

133. *See* Halper, *supra* note 71, at 91.

134. *See id.*

135. *See id.* at 102 (quoting John P.S. McLaren, *Nuisance Law and the Industrial Revolution: Some Lessons from Social History*, 3 OXFORD J. LEG. STUD. 155, 161 (1983)).

> dispute between property owners and a single cement plant—one of many—in the Hudson River valley.[136]

The court added that the "public health or other public agencies" are not foreclosed from "seeking proper relief."[137] These authorities have diligently pursued efforts to reduce pollution and clean up the air.[138] Cement plants continue to be heavily regulated industries.[139] Private plaintiffs' nuisance litigation continues apace along with the public environmental regulatory law that legislatures have developed in the meantime.[140]

A counterbalancing decision also from the early years of the environmental era was *Harrison v. Indiana Auto Shredders*.[141] Defendant appealed from plaintiffs' judgment in a neighbors' nuisance lawsuit against defendant's huge automobile shredder.[142] The Court of Appeals was due to reverse the trial judge because the judge's remedy, permanent damages plus a shut-down injunction, was duplicative and overreaching.[143]

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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136. Boomer v. Atlantic Cement Co., 257 N.E. 2d 870, 871 (N.Y. 1970).

137. *Id.* at 873.

138. *See* Farber, *supra* note 75, at 15.

139. *See* PORTLAND CEMENT ASS'N, OVERVIEW IMPACT OF EXISTING AND PROPOSED REGULATORY STANDARDS ON DOMESTIC CEMENT CAPACITY 1 (2011), http://www2.cement.org/econ/pdf/impacteparegs22011.pdf.

140. *See* Farber, *supra* note 75, at 11.

141. *See* Harrison v. Ind. Auto Shredders Co., 528 F.2d 1107, 1109 (7th Cir. 1975).

142. *See id.*

143. *See id.* at 1127.

> 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.[144]

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.[145]

Similarly, Professor Farber questioned whether the *Boomer* majority's "balancing" weighed everything relevant to its decision.[146] 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

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144. *Id*. at 1120–21.

145. *See* Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 571–76 (2007); *see also* Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1733–34 (2004).

146. *See* Farber, *supra* note 75, at 20.

people in the vicinity.[147] The court, he wrote, "refers to one third-party interest favoring the defendant—the number of employees at the plant—but it ignores the third-party interest favoring the plaintiff, the regional impact of the defendant's air pollution."[148] Denying plaintiff Boomer an injunction and remitting him to permanent damages downgraded public health.[149] Favoring awarding Boomer diminution damages over granting him an injunction means forcing him, in effect, to exchange his health for the defendant's money.[150] Mr. Bill Futrell concluded that the *Boomer* majority incorrectly subordinated the injunction to damages and "vitiated the law of private nuisance."[151]

The public interest would have been better served if the *Boomer* court had chosen different remedies.[152] The New York court under-valued the injunction and overlooked the public health and the environment.[153] The court should have enjoined, ordering the harmful activity modified or stopped.[154] Instead of compensatory damages, the court, as will be discussed below, might have awarded damages for past injury and ordered a "standards" injunction that required the cement company to install and maintain available pollution-control technology.[155]

Laycock, who faults the *Boomer* court's "terrible opinion," reached a different conclusion about its result.[156] He agreed with the court's choice of a damages remedy.[157] The *Boomer* court, he wrote, reached an "entirely predictable result" through historical

147. *See id.*

148. *Id.*

149. *See id.* at 24.

150. *See* Boomer v. Atlantic Cement Co., 257 N.E. 2d 870, 876 (N.Y. 1970) (Jasen, J., dissenting).

151. J. William Futrell, *The Transition to a Sustainable Development Law*, 21 PACE ENVTL. L. REV. 179, 192–93 (2003); *see also* Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 17 (1989) (considering the likelihood of receiving an injunction in a *Boomer*-style case).

152. *See Boomer*, 257 N.E.2d at 875–76 (N.Y. 1970) (Jasen, J., dissenting).

153. *See id.* at 877 (Jasen, J. dissenting).

154. *See id.* (Jasen, J. dissenting).

155. *See id.* (Jasen, J. dissenting).

156. Laycock, *supra* note 61, at 7–19.

157. *See id.* at 33 (noting the "wisdom" of the "undue hardship defense," a defense that Laycock believes was utilized, albeit poorly, by *Boomer*).

and analytical error.[158] Because of the disparity in values, the choice the court saw for itself between a shut-down injunction and damages is a close one that may favor damages.[159] In my judgment, the choice discussed below between a standards injunction and damages favors a standards injunction.

D. The Common Law, Judgment, and Discretion

The court decides the defendant's liability first, then whether to grant a plaintiff any remedy.[160] The court makes two decisions about a successful plaintiff's remedy: (1) it chooses which remedy and (2) it measures-defines the chosen remedy.[161] 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's major choice of remedy for a defendant's pollution is between compensatory damages and an injunction.[162] After the court chooses the plaintiff's remedy, it decides how to measure or define it, the amount of damages and the injunction's terms.[163] The court's discretion in choosing a plaintiff's remedy is more circumscribed than its discretion in measuring-defining it.[164] After the judge decides to grant the plaintiff an injunction, her discretion increases when considering the injunction's terms.[165]

The New York Court of Appeals decided *Boomer* under the court-made common law tort of nuisance.[166] A court applying the

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158. *Id.* at 7.

159. *See id.* at 35.

160. DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES 1 (9th ed. 2018).

161. *Id.* at 1–2.

162. *See* DOBBS ET AL., *supra* note 95, § 404, at 644.

163. *See id.* at 649.

164. *See* Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1434–38, 1449, 1451 (2015); Doug Rendleman, *The Trial Judge's Equitable Discretion Following* eBay v. MercExchange, 27 REV. LITIG. 63, 93 (2007).

165. *See* Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1434–38, 1449, 1451 (2015); Doug Rendleman, *The Trial Judge's Equitable Discretion Following* eBay v. MercExchange, 27 REV. LITIG. 63, 93–94 (2007).

166. Boomer v. Atlantic Cement Co., 257 N.E. 2d 870, 871 (N.Y. 1970).

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.[167]

Does the judge have discretion to find that a defendant violated the plaintiff's substantive right, to decline to grant the plaintiff an injunction, and to substitute money damages for the plaintiff's property right? A negative answer and a minority view came from Professors Kraus and Coleman: "It is surely odd to claim that an individual's right is protected when another individual is permitted to force a transfer at a price set by third parties. Isn't the very idea of a forced transfer contrary to the autonomy or liberty thought constitutive of rights?"[168]

Professor Plater articulated the majority approach that approves a common-law court's flexibility in choosing a plaintiff's remedy.[169] He wrote that in a non-statutory 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."[170] "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."[171] 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.[172]

In a statutory decision, *Weinberger v. Romero–Barcelo*,[173] the Supreme Court cited the New York court's common-law decision in

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167. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 177 (1991).

168. Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1338–39 (1986).

169. *See* Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524, 543 (1982).

170. *Id.* 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. *See id.* at 525–26 ("[A] court has no discretion or authority to exercise equitable powers so as to permit violations of statutes to continue.").

171. Winter v. Nat. Res. Def. Council, 555 U.S. 7, 32 (2008).

172. *See Boomer*, 257 N.E. 2d at 871–75; Brown v. Voss, 715 P.2d 514, 518 (Wash. 1986).

173. 456 U.S. 305 (1982).

Boomer as well as an Arizona common-law decision[174] that this Article discusses below to illustrate the judge's equitable discretion.[175] Professor Farber wrote in 2005 that "[u]nfortunately, the Supreme Court has done little to clarify the availability of environmental injunctions in the twenty years since *Weinberger*, so we still cannot be completely certain about the extent to which *Boomer* carries over to statutory injunctions."[176] The common-law *Boomer* court drew on its equitable discretion to deny plaintiff an injunction that would forbid an activity that the court conceded is improper.[177] "Despite its approving citation of *Boomer*," Farber speculates, "the *Weinberger* Court probably did not mean to endorse open-ended judicial discretion."[178] Because the Supreme Court has not revisited equitable discretion since *Weinberger*, we continue to lack a definitive answer.[179]

III. Calabresi and Melamed's One View of the Cathedral

Since the 1970s, the early days of law-and-economics scholarship, economic-analysis scholars have discussed the New York court's choice in *Boomer* between damages and an injunction under the rubric of liability rule versus property rule, the vocabulary in the famous *Cathedral* article.[180] Tours of the Cathedral are a "cottage industry" in the law reviews.[181] These discussions occupy a major corner of economic-analysis scholarship.[182]

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174. Spur Indus. v. Del E. Webb Dev. Co., 494 P.2d 700, 108 Ariz. 178 (1972).

175. *See Weinberger*, 456 U.S. at 326 n.7 (1982); Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1426–28 (2015).

176. Farber, *supra* note 75, at 29.

177. *See* Boomer v. Atlantic Cement Co., 257 N.E. 2d 870, 873 (N.Y. 1970).

178. Farber, *supra* note 75, at 29.

179. *Id.*

180. *See* Calabresi & Melamed, *supra* note 9, at 1105–06 n.34.

181. WARD FARNSWORTH, THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW 193 (2007).

182. Several critical articles accept its basic structure but suggest refinements. *See, e.g.*, Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285, 1290 (2008); Frank I. Michelman, "*There Have to Be Four*", 64 MD. L. REV. 136, 140 (2005).

The *Cathedral* article presented a court like the *Boomer* court with four possible solutions or "Rules."[183] Rule 1 is a "property rule."[184] The court finds that a nuisance exists; the plaintiff prevails on the defendant's nuisance.[185] Then the court grants the plaintiff an injunction closing the defendant's factory.[186] Rule 2 is a "liability rule."[187] The court finds that a nuisance exists; the plaintiff prevails on the defendant's nuisance.[188] Then the court awards the plaintiff the damages that the judge or jury sets.[189] Requiring the defendant to pay the plaintiff damages allows the defendant's tortious activity to continue.[190] The New York court's *Boomer* decision for permanent damages is a Rule 2 solution.[191] Rule 3 is a "no-nuisance" rule.[192] The court finds that a nuisance does not exist.[193] The losing plaintiff takes nothing.[194] The court allows the defendant's activity to continue unscathed.[195] Rule 4 is a "plaintiff-pays" rule.[196] The court finds that the defendant's nuisance exists.[197] It enjoins the defendant's activity only if, however, the plaintiff pays the defendant, perhaps measured by the defendant's cost to comply.[198]

This Article turns to applying the *Cathedral* article's alternatives to Boomer and Atlantic Cement. It will delve into normative matters of policy and principle, actual court decisions as positive law, and vocabulary. It will qualify and criticize the *Cathedral* article's analysis because it circumscribes the injunction remedy, leads to questionable results, and neither aids analysis

183. *See* Calabresi & Melamed, *supra* note 9, at 1115–16.
184. *See id.* at 1116.
185. *Id.*
186. *Id.*
187. *See id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *See* Boomer v. Atlantic Cement Co., 257 N.E. 2d 870, 875 (N.Y. 1970).
192. *See* Calabresi & Melamed, *supra* note 9, at 1116.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 1121.

nor helps predict the results in many of the core situations it purports to cover. This Article will conclude that scholars should develop more precise vocabulary and better policy justifications which will lead to sounder injunction decisions in actual pollution disputes.

A. The Cathedral *Article's Rule 3*

This Article takes Rule 3 out of order and discusses it first before Rules 1 and 2 because it makes more remedies sense to examine the threshold liability question, whether a defendant is liable or not to a plaintiff under substantive law, before turning to the subsequent question of the plaintiff's remedy. Rule 3 does not present the court with a choice of remedy.[199] The court finds no tort, no substantive liability.

It may be neither wise nor desirable for a court to restrict or prohibit a landowner's activity merely because it affects another person.[200] 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.

A court could compare or balance the plaintiff's and the defendant's interests and find that, where the defendant's activity is useful to the community, no nuisance exists.[201] 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?[202] If particulate pollution from the cement plant is held to be a homeowner's cost, will resources be allocated efficiently? I think not. In addition to the health and environmental hazards, if the price of cement excludes the

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199. *See id.* at 1116.

200. *See id.* at 1118.

201. *See* RESTATEMENT (SECOND) OF TORTS §§ 826, 827, 828 (AM. LAW INST. 1979); Laycock, *supra* note 61, at 16; DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 5.7(2), at 533 (3d ed. 2018). *But see* Jost v. Dairyland Power Coop., 172 N.W.2d 647, 652 (Wis. 1969) ("While there are some jurisdictions that permit the balancing of the utility of the offending conduct against the gravity of the injury inflicted, it is clear that the rule permitting such balancing, is not approved in Wisconsin where the action is for damages.").

202. *See* RESTATEMENT (SECOND) OF TORTS § 827 (AM. LAW INST. 1979).

negative externality, it will be lower than it would be otherwise which will lead to over-consumption of cement.[203]

"A nuisance may be merely the right thing in the wrong place, like a pig in the parlor instead of the barnyard."[204] Both whether a nuisance exists and its remedy depend on the context and discrete situation.[205]

We will return to pig pens below, but first, staying in a rural landscape, here is the French court of appeals' response to a plaintiff's complaint about a flock of chickens kept by another resident of a rural village:

> [T]he 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 of 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.[206]

The New York court may have retreated from *Boomer* in *Copart Industries v. Consolidated Edison*,[207] a similar dispute. Copart prepared and stored new automobiles next to Consolidated Edison's ("Con Ed") generating plant.[208] Fly ash containing acid

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203. *See, e.g.*, DOBBS ET AL., *supra* note 95, § 404, at 648–49.

204. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

205. *See id.*

206. Russell L. Weaver, Guilhem Gil, Didier Poracchia & Francois Lichère, *The Law of Private Nuisance: French and American Perspectives*, *in* REMEDIES AND PROPERTY 9, 24 (Presses Universitaires d'Aix-Marseille, Russell Weaver & Francois Lichère eds., 2013) (quoting Cour d'appel [CA] Riom, Sept. 7, 1995, JCP G 1996, II, n° 22625, note Djigo A). The leading United States decision that invading chickens are not a nuisance is the Iowa Supreme Court's decision in *Kimple v. Schaefer*, 143 N.W. 505, 508 (Iowa 1913). The complicated and contested subject of wandering animals is discussed in the Comments to the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 21 cmt. a-i (AM. LAW INST. 2010). Wild alligators are not a nuisance either. *See Christmas v. Exxon Mobil Corp.*, 138 So. 3d 123, 127–28 (Miss. 2014).

207. 362 N.E. 2d 968 (N.Y. 1977).

208. *Id.* at 969.

allegedly from the plant marred the finishes on Copart's new cars.[209] Copart went out of business.[210] Copart sued Con Ed for damages.[211] The jury found for Con Ed.[212] The court of appeals affirmed.[213] It approved jury instructions that required plaintiff Copart to have shown that Con Ed had negligently or intentionally harmed Copart.[214]

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 . . . ."[215] The dissent argued that the plant was a nuisance that the court ought to remedy, as in *Boomer*, with permanent damages.[216]

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.[217] No nuisance, the court held, no liability.[218] "The State of Idaho is sparsely populated and its economy depends largely upon the benefits of agriculture, lumber, mining and industrial development."[219] The dissent quipped that "[i]f humans are such a rare item in this state, maybe there is all the more reason to protect them," at least with damages.[220]

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209. *Id.* at 970.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 973.

214. *See id.* ("Negligence and nuisance were explained to the jury at considerable length and its attention was explicitly directed to the two categories of nuisance, that based on negligence and that dependent upon intentional conduct."); *see also* Ross v. Lowitz, 120 A.3d 178, 194 (N.J. 2015) (citing the Second Restatement of Torts for the position that nuisance-trespass must show either fault, negligence, recklessness, intentional misconduct, or abnormally dangerous-ultrahazardous activity). Professor Fraley maintains that the Second Restatement of Torts' addition of a negligence approach to nuisance was a mistake. Fraley, *supra* note 98.

215. Benjamin v. Nelstad Materials, 625 N.Y.S.2d 281, 282 (1995).

216. *See id.* at 283 (Friedmann, J., dissenting).

217. Carpenter v. Double R Cattle Co., 701 P.2d 222, 224 (Idaho 1985).

218. *See id.* at 228.

219. *Id.*

220. *Id.* at 229 (Bistline, J., dissenting); s*ee also* Payne v. Skaar, 900 P.2d

Perhaps the New York and Idaho courts above have rejected the flexibility of adjusting damages and injunction remedies and retreated to a rigid binary "nuisance"-"no nuisance" analysis. If so, this approach may circumscribe courts' use of nuisance and injunctions as methods of environmental amelioration. This may be an unsatisfactory way to respond to people affected by pollution.[221]

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."[222]

B. The Cathedral *Article's Rules 1 and 2*

Once the court has found that the defendant is liable under the substantive law of nuisance or trespass, it turns to the successful plaintiff's remedy. This Article will next discuss the court's choice between granting the plaintiff an injunction, Rule 1, and awarding damages, Rule 2.[223]

The *Cathedral* article defined the vocabulary in Rule 1 as the "property rule," and continued 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 value of the entitlement is agreed upon

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1352, 1356, 1358–60 (Idaho 1995) (finding that a feedlot is a nuisance, that there should not be damage or a shut-down injunction, but a conditions injunction limiting the number of cattle and the type of feed and requiring manure removal).

221. *See* Comment, *Internalizing Externalities: Nuisance Law and Economic Efficiency*, 53 N.Y.U. L. REV. 219, 230 (1978).

222. James L. Oakes, *The Judicial Role in Environmental Law*, 52 N.Y.U. L. REV. 498, 499 (1977); *see also* John P. S. McLaren, *The Common Law Nuisance Actions and the Environmental Battle—Well-Tempered Swords or Broken Reeds?*, 10 OSGOODE HALL L.J. 505, 506 (1972).

223. *See* Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L J. 1397, 1429–31 (2015); DOBBS & ROBERTS, *supra* note 201, at 533–37.

by the seller."[224] Thus, 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.[225] She can refuse any buyer's offer.[226] The property's price is completely within its owner's control, whim, or discretion.[227]

Explaining Rule 2, the "liability rule," the *Cathedral* article continued that the court may decline to grant the successful plaintiff an injunction that forbids the polluting tortfeasor from continuing its nuisance.[228] The owner may recover damages from that defendant.[229] If so, the owner must accept the court's money judgment for the property's "value" as the court determines the damages "objectively."[230]

The *Cathedral* article's "property rule"-"liability rule" vocabulary and definitions have become part of the economic-analysis 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.

C. Balancing the Hardships, Injunction Versus Damages

Since the *Cathedral* article's first two solutions or rules involve the court's choice of remedies between granting the plaintiff an injunction and awarding him damages, this Article will treat them together along with the doctrine of balancing the hardships, or a close synonym, a crucial mediating principle.[231] Professor Laycock uses the phrase "undue hardship" to launch essentially the same inquiry as balancing the hardships.[232] As part

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224. Calabresi & Melamed, *supra* note 9, at 1092.

225. *See id.*

226. *See id.*

227. *See id.*

228. *See id.*

229. *See id.*

230. *Id.*

231. *See* DOBBS & ROBERTS, *supra* note 201, at 533; *see also* Laycock, *supra* note 61, at 29–30.

232. Laycock, *supra* note 61, at 3.

of its discrete decision whether to grant the successful nuisance or trespass plaintiff an injunction, the court compares or balances the plaintiff's hardships without an injunction and the defendant's hardships from one.[233] When the defendant's comparative hardship from an injunction is "undue," the judge declines to grant the plaintiff an injunction and defaults to awarding him damages instead.[234]

Balancing may be disreputable. As Professor Farber observed, "[t]he defendant in an injunction proceeding who asks the court to balance the remedies in his favor is, in effect, asking the court to approve of his decision not to comply with the duties that law-abiding citizens comply with voluntarily. Thus, the court is being asked to voice its approval of lawless conduct."[235]

In 1948, Professor McClintock evaluated the court's choice between granting the successful 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 great weight of authority, equity still has discretion in adjusting the relief to be awarded to the needs of the fact situation.[236]

This Article follows McClintock in accepting the necessity of the balancing-the-hardships doctrine.[237] It "balances" rather than

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233. *See* eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (examining the four-factor test for granting a permanent injunction, which includes balancing the hardships).

234. *See id.* ("A plaintiff must demonstrate . . . that remedies available at law, such as monetary damages, are inadequate to compensate for [his] injury. . . .").

235. Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513, 535–36 (1984).

236. HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 51–52 (2d ed. 1948).

237. *See* Olivia L. Weeks, *The Law Is What it Is, But Is it Equitable? The Law of Encroachments Where the Innocent, Negligent, and Willful Are Treated the Same*, 39 CAMPBELL L. REV. 287, 342 (2017); *see also* RESTATEMENT (SECOND) TORTS §§ 936, 941 (AM. LAW INST. 1979).

"compares" the parties' hardships primarily because balance is the more common term. It balances the parties' "hardships" instead of their "equities" because "hardships" is more accurate and because it eliminates a confusing definition and usage of "equity."

At this point, it is propitious to confess an analytical and vocabulary difficulty. The factors the court "balances" are not commensurable. Balancing is a metaphor that means comparing the parties' benefits and detriments. The two sides of the "scale" don't contain identical, comparable, or even similar things. Balancing, Justice Scalia wrote, "is more like judging whether a particular line is longer than a particular rock is heavy."[238] Balancing the hardships, although not a complete analysis, focuses the court's judgment on the critical issues in the decision.

What would legal life be like without balancing the hardships? An example comes from France.[239] "Under trespass, even a minor encroachment on the neighbor's land justifies the cessation or demolition of 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."[240] Litigation without balancing the hardships that leads to termination, destruction, or removal would create harsh results for defendants who made innocent and minor mistakes.[241]

A North Carolina court's decision in *Williams v. South & South Rentals*[242] introduces another possibility. Defendant's "apartment building encroaches approximately one square foot on plaintiff's land."[243] Defendant's encroachment was apparently inadvertent.[244] Plaintiff's tract "has never been used for any purpose, is oddly shaped, is located substantially in a creek bed, is

238. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

239. Weaver, Gil, Poracchia & Lichère, *supra* note 206, at 13.

240. *Id.* In two decisions in 2017 and 2018, the Cour de cassation, after considering both the Civil Code and the European Convention on Human Rights, reaffirmed its rigid no-encroachment position and destruction remedy. *See* LAETITIA TRANCHANT, REMEDIES FORUM: CASES IN FRENCH LAW 1–3 (n.d.) (on file with the Washington and Lee Law Review).

241. *See* Kratze v. Indep. Order of Oddfellows, Garden City Lodge No. 11, 500 N.W.2d 115, 124 (Mich. 1993).

242. Williams v. S. & S. Rentals, Inc., 346 S.E.2d 665 (N.C. 1986).

243. *Id.* at 668.

244. *Id.* at 666.

practically unusable and consists of one-fourth to one-third of an acre."[245] Plaintiff offered to sell his tract to defendant for "a sum in excess of $45,000.00."[246]

After settlement negotiations failed, plaintiff sued defendant for an injunction.[247] The Tarheel State's intermediate court of appeals rejected the doctrine of balancing the hardships.[248] It concluded that:

> [S]ince the encroachment and continuing trespass have been established, and since defendant is 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.[249]

If the court had balanced these parties' hardships, this defendant's encroachment would probably have qualified for permanent damages and, perhaps, an easement.[250] Instead, after the court of appeals's decision, defendant purchased the disputed portion from plaintiff for several thousand dollars.[251] This observer concludes that plaintiff may have employed a threat to make the injunction effective to create an 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

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245. *Id.*

246. *Id.*

247. *Id.*

248. *See id.* at 669.

249. *Id.*

250. *See* Capodilupo v. Vozzella, 704 N.E.2d 534, 537 (Mass. App. 1999); Kratze v. Indep. Order of Oddfellows, Garden City Lodge No. 11, 500 N.W.2d 115 (Mich. 1993); Zerr v. Heceta Lodge No. 111, Indepen. Order of Odd Fellows, 523 P.2d 1018, 1024 (Or. 1974); Proctor v. Huntington, 238 P.3d 1117, 1123 (Wash. 2010), *cert. denied*, 562 U.S. 1289 (mem.) (2011).

251. Olivia Leigh Weeks, Comment, *Much Ado About Mighty Little—North Carolina and the Application of the Relative Hardship Doctrine to Encroachments of Permanent Structures on the Property of Another*, 12 CAMPBELL L. REV. 71, 93 n.238 (1989); *see also* Weeks, *supra* note 237, at 344.

between damages and an injunction needs to have the doctrine available to prevent rigor and asperity for a defendant or a possible unbalanced settlement.[252]

But a *Boomer*-Rule 2 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.[253]

Many economic-analysis scholars support the permanent-damages remedy in *Boomer*. They argue 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.[254] The most extreme pro-damages, anti-injunction scholar is Professor Lewin:

> [E]fficiency concerns predominate in the selection of an appropriate [nuisance] remedy, with a general presumption against unconditional injunctive relief for prevailing plaintiffs. Plaintiffs generally would be limited to recovering damages, with injunctive relief being available only when the defendant's conduct was egregious or when it threatened the safety or personal liberty of the plaintiff.[255]

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252. *See* Laycock, *supra* note 61, at 24–26; Henry Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1042 (2004).

253. DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 160 (1991).

254. *See* Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703, 706–07 (1996); *see also* Ian Ayres & Eric L. Talley, *Solomonic Bargaining*: *Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1032–33 (1995); Keith N. Hylton, *The Economic Theory of Nuisance Law and Implications for Environmental Regulation*, 58 CASE W. RES. L. REV. 673, 687 (2008); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 717–18 (1996); Mark A. Lemley, *Contracting Around Liability Rules*, 100 CAL. L. REV. 463, 463 (2012); *see also* Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541, 1574–75 (1998).

255. Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775, 802 (1986).

The formulation of Rule 2, which compares values and utilities to favor the defendant if its value is merely larger than the plaintiff's, puts too high of a 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 States common law.[256]

The judge in McClintock's formulation quoted above 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."[257]

For Laycock, 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.[258] 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.[259] 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."[260]

Professor Henry Smith has also challenged the economic-analysis approach that favors awarding a nuisance plaintiff damages.[261] Smith maintains that judges should utilize an injunction remedy more frequently than many of the

256. *Infra* notes 257–271 and accompanying text.

257. MCCLINTOCK, *supra* note 236, at 51–52.

258. Laycock, *supra* note 61, at 1.

259. *Id.*; *see also* Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2102 (1997) (arguing that an injunction should be denied only if the balance of hardships "strongly" favors defendant).

260. Laycock, *supra* note 61, at 23–24.

261. *See* Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1722 (2004); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 970 (2004); Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1781 (2007).

economic-analysis scholars suggest.[262] 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.[263] Smith prefers an injunction to damages because of information costs, a court's measurement of a plaintiff's damages is expensive and imprecise.[264]

Farber wrote that the judge should enjoin an egregious nuisance like the one in *Boomer* except "where the balance tilts very strongly against the 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 or conditional by a damage payment."[265]

"Where," the United States Supreme Court wrote, "substantial redress can be afforded by the payment of money and issuance of an injunction would subject the defendant to grossly disproportionate hardship, equitable relief may be denied although the nuisance is indisputable."[266]

Later New York decisions bear out McClintock, Laycock, Smith, Farber, and the Supreme Court. These decisions show that the New York courts are reluctant to employ *Boomer*'s nuisance

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262. *See* Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1740 (2004).

263. *Id.* at 1797.

264. *Id.* at 1773.

265. Daniel Farber, *Reassessing* Boomer*: Justice, Efficiency, and Nuisance Law*, *in* PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 7, 17 (P. Hay & M. Hoeflich eds., 1988); *see also* Daniel Farber, *The Story of* Boomer*: Pollution and the Common Law*, *in* ENVIRONMENTAL LAW STORIES 7, 20, 22–23 (Richard Lazarus & Oliver Houck eds., 2005). In 1999, Farber's proposed approach to the court's injunction-damages choices in a nuisance was to

> favor a baseline of protection against such invasive activities. Rather than leaving the remedy to the unrestrained balancing of the court, we would begin with a presumption in favor of injunctive relief. In [*Boomer*], the presumption might have been overcome by other compelling social interests. Even if no injunction was appropriate, we would argue for using a WTA [willingness to accept] rather than a WTP [willingness to pay] measurement in order to uphold the [plaintiffs'] baseline entitlement against [the defendant's] outrageous nuisances.

DANIEL FARBER, ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD 113 n.36 (1999).

266. City of Harrisonville v. W.S. Dickey Mfg. Co., 289 U.S. 334, 338 (1933).

remedy of no injunction but 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.[267] Because another defendant's racetrack was also a public nuisance, *Boomer*-balancing was inapplicable.[268] A third court enjoined the nuisance because the defendant's activity violated a pollution permit.[269] A New York court also enjoined because less than a "vast" economic disparity existed between the plaintiff and the defendant.[270] A final court enjoined the defendant's activity because it also violated the zoning ordinance.[271]

Other states' courts' Rule 2 decisions, which find a nuisance, refuse an injunction and award 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*,[272] the trial judge had granted the plaintiff an injunction that protected him from the city's pipe that leaked human sewage.[273] The Illinois Appellate Court rejected plaintiff's bad argument that defendant's nuisance triggers an injunction without comparative hardships.[274] It held that, for now, temporary damages would be adequate.[275] The court thought, however, that the sewage leak should stop, that the defendant should repair or remove the pipe, and, in short, that the

267. *See* State v. Monoco Oil Co., 713 N.Y.S.2d 440, 446 (N.Y. Sup. Ct. 2000).

268. *See* Hoover v. Durkee, 212 A.D.2d 839, 842 (N.Y. App. Div. 1995).

269. *See* Flacke v. Bio–Tech Mills, Inc., 463 N.Y.S.2d 899, 900 (N.Y. App. Div. 1983), *appeal denied*, 454 N.E.2d 1317 (1983).

270. *See* State v. Waterloo Stock Car Raceway, Inc., 409 N.Y.S.2d 40, 45 (N.Y. Sup. Ct. 1978).

271. *See* Little Joseph Realty, Inc. v. Town of Babylon, 363 N.E.2d 1163, 1168 (N.Y. 1977).

272. 542 N.E.2d 402 (Ill. App. Ct. 1989).

273. *Id.* at 408.

274. *Id.* at 413–14.

275. *Id.* at 414.

nuisance should be abated.[276] Thus plaintiff could sue again if and when the offending sewage pipe leaked.[277]

In *Weinhold v. Wolff*,[278] the Iowa court dealt with defendant's large-scale hog-feeding operation under the Hawkeye State's right-to-farm statute, a rural tort reform that attenuates a private plaintiff's nuisance litigation and remedies.[279] 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.[280] The court later struck that statute down.[281]

In the Alabama court's *Baldwin v. McClendon*,[282] the court cited the "comparative-injury" doctrine in refusing an injunction that would "bring a severe blow" to defendants.[283] The court's remedy was a conditional injunction that would shut defendant's hog feeding operation down if defendant didn't pay plaintiff $3,000 permanent damages.[284] Because the trial judge had visited defendant's operation, the Supreme Court emphasized his equitable discretion.[285]

Feed-lot defenders have responded to critics' turned-up noses at farmers' feedlots by invoking "the smell of money." In short, rural pigs are the social and economic equivalent of chickens in the French village above.[286] Since then, the dramatic trend to industrial feedlots with thousands of animals has created a difference in kind, not one of degree. In addition to polluting

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276. *Id.*

277. *Id.*

278. 555 N.W. 2d 454 (Iowa 1996).

279. *See id.* at 458.

280. *Id.* at 462.

281. *See* Gacke v. Pork Xtra, 684 N.W. 2d 168, 185 (Iowa 2004); *see also* Bormann v. Bd. of Supervisors, 584 N.W. 2d 309, 321 (Iowa 1998). For later developments in Right-to-Farm legislation and litigation and analysis of North Carolina's statute, see also Cordon M. Smart, Comment, *The "Right to Commit Nuisance" in North Carolina: A Historical Analysis of the Right-to-Farm Act*, 94 N.C. L. REV. 2097, 2100–03 (2016).

282. 288 So. 2d 761 (Ala. 1974).

283. *Id.* at 764.

284. *Id.* at 766.

285. *See id.* at 764.

286. *Supra* note 206 and accompanying text.

streams and rivers, these titanic feedlots offend at least four of the five senses and lower both property value and quality of life.[287] Distance and the wind are the only antidotes to their odor. Their public health effects include "antibiotic resistance and disease, epidemic and pandemic influenza, and asthma and airway obstruction."[288]

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 shutters a defendant's feedlot nor regulates its operation—that is if it relegates 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 in diminution damages seems stingy; indeed, I think, woefully deficient. The Iowa court had added special damages to permanent diminution damages; plaintiffs' temporary damages were rent-based and included their discomfort.[289] The Iowa court's less parsimonious diminution plus special damages, might, if defendant forced the family to abandon their home, let them build or buy a replacement.

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 didn't award damages.[290] A huge feeding operation in Nebraska ended with the feedlot enjoined "from producing offensive odors," failing that of a shutdown order.[291] A Rhode Island municipality was given time to relocate its sewage pumping station; the court coupled this future injunction with damages until relocation.[292] Under the doctrine of anticipatory nuisance, the Alabama court affirmed a "don't-build-it" injunction after the trial

287. *See* Smart, *supra* note 281, at 2107.

288. James Merchant & David Osterberg, *Iowa View: DNR Scoring System for Hog Farms Fails to Protect Our Health*, DES MOINES REGISTER, Sept. 11, 2017, at 9A.

289. *See* Weinhold v. Wolff, 555 N.W. 2d 454, 465–66 (Iowa 1996); *see also* Oglethorpe Power Corp. v. Estate of Forrister, 774 S.E. 2d 755, 770 (Ga. Ct. App. 2015); Babb v. Lee Cty. Landfill SC, LLC, 747 S.E. 2d 468, 481 (S.C. 2013).

290. *See* Payne v. Skaar, 900 P.2d 1352, 1357 (Idaho 1995).

291. Goeke v. Nat'l Farms, 512 N.W. 2d 626, 629, 632 (Neb. 1994).

292. *See* Harris v. Town of Lincoln, 668 A.2d 321, 329 (R.I. 1995).

judge's personal inspection.[293] 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.[294]

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. In the long run, a court might be careful about extending the buffer zone because "self pollution," although harmful, isn't a tort.[295]

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 economic-analysis view that the party whose use is more valuable should prevail.[296] The courts' analysis is perforce broader and considers more factors than economic utility. It includes environmental values like health, protecting a species, water, or air.[297] 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.[298]

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 to balance or compare to favor an intentional tortfeasor, future defendants build cement plants, feedlots, and racetracks on purpose.[299]

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293. *See* Parker v. Ashford, 661 So. 2d 213, 215 (Ala. 1995).

294. *See* Ryan Teel, Note, *Not in My Neighborhood: The Fight Against Large-Scale Animal Feeding Operations in Rural Iowa, Preemptive Tactics, and the Doctrine of Anticipatory Nuisance*, 55 DRAKE L. REV. 497, 538–39 (2007).

295. *See* RICHARD EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 277 (1995).

296. *See* Laycock, *supra* note 61, at 23.

297. *See* DOBBS & ROBERTS, *supra* note 201, at 536; Laycock, *supra* note 61, at 1, 24.

298. *See* DOBBS & ROBERTS, *supra* note 201, at 536.

299. Ordinarily a court will disqualify an intentional encroacher from balancing the hardships. *See* Welton v. 40 E. Oak St. Bldg. Corp., 70 F.2d 377, 382–83 (7th Cir. 1934), *cert. denied*, 293 U.S. 590 (1934); Brown Derby Hollywood Corp. v. Hatton, 395 P.2d 896, 899 (Cal. 1964); Missouri Power & Light Co. v.

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"[300] and my "balancing the hardships,"[301] for similar comparisons.

Nor is it clear whether the impetus to balance the hardships comes from the plaintiffs' side as an element of their prima facie case or if it is an affirmative defense for the defendant to interpose. The Torts Restatement's "factors" for granting a plaintiff an injunction lump together the plaintiff's case for an injunction and the defendant's affirmative defenses.[302] In *eBay v. MercExchange, L.C.C.*, the Supreme Court stated a standard for a permanent injunction that includes the plaintiff's burden of proof to balance the hardships in his favor.[303] I have maintained elsewhere that affirmative-defense status for balancing the hardships makes more sense.[304] Laycock says several times that what he names undue hardship is a defense.[305] However stated and located, we agree that courts usually apply the doctrine "in plausible ways."[306]

The *Cathedral* article, in what Laycock calls a "quite different and rather stylized account of the law,"[307] doesn't mention

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Barnett, 354 S.W.2d 873, 878 (Mo. 1962); Papanikolas Bros. Entrs. v. Sugarhouse Shopping Ctr. Assocs., 535 P.2d 1256, 1259 (Utah 1975); *see also* DOBBS & ROBERTS, *supra* note 201, at 534; Laycock, *supra* note 61, at n.8. An intentional encroachment by a mistaken improver led to an injunction to remove regardless of restitution and balancing the hardships. *See* Stuttgart Elec. Co. v. Riceland Seed Co., 802 S.W.2d 484, 488–89 (Ark. Ct. App. 1991). But not always. Although one defendant's encroaching building extended over the plaintiff's boundary line eighty-eight 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. *See* Morrison v. Jones, 430 S.W.2d 668, 675 (Tenn. Ct. App. 1968). Posner tells us why a court should treat an intentional encroaching defendant differently. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 70 (9th ed. 2014).

300. *Supra* note 232 and accompanying text.

301. *Supra* Part III.C and accompanying text.

302. *See* RESTATEMENT (SECOND) OF TORTS § 941 (AM. LAW INST 1979).

303. *See* eBay v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

304. RENDLEMAN, *supra* note 77, at 86 (arguing that the Court in *eBay Inc. v. MercExchange, L.C.C.*, would have "been better advised to classify [balancing the hardships] as [an] affirmative defense[] with the burden on the defendant").

305. *See, e.g.*, Laycock, *supra* note 61, at 1.

306. *Id.* at 19.

307. *Id.* at 20.

balancing the hardships-undue hardship. Laycock maintains that both the *Boomer* court and economic-analysis scholars under-utilize the doctrine of undue hardship.[308] The reason for their omission is difficult to grasp. If a court balances the hardships in the defendant's favor, declines to enjoin, and awards the plaintiff damages instead of an injunction, that court has, in the *Cathedral* article's vocabulary, converted the plaintiff's property-rule interest into his liability-rule interest. This advances the *Cathedral* article's and the *Boomer* court's goal.

The modest suggestions above will clear the air in both the literal and the metaphorical sense by encouraging more and more detailed injunctions. An overemphasized law-and-economics approach circumscribes common law evolution, for example, to deal with climate change.[309] If injunctions reduce particulate and other pollution, our environment will improve and the rate of climate change leading to global warming may be reduced.

D. The Cathedral *Article's Vocabulary of Property Rights and Liability Rights*

In addition to disfavoring the injunction remedy in ways that undervalue plaintiffs with environmental interests, the *Cathedral* article's Rules 1 and 2 introduce confusing vocabulary deficiencies. The *Cathedral* article called granting the plaintiff an injunction Rule 1, a "property rule" and the second, Rule 2, awarding the plaintiff damages, a "liability rule."[310] I disagree below with the property rule–liability rule vocabulary of the first two parts of the *Cathedral* article's choices; that being the court's choice between an injunction and damages.

In the *Cathedral* article's lexicon, the words "property" and "liability" don't have the usual torts, property, and remedies meanings of property and liability. These usual meanings follow.

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308. *See id.* at 19.

309. *See* Lynda L. Butler, *The Resilience of Property*, 55 ARIZ. L. REV. 847, 876 (2013).

310. Calabresi & Melamed, *supra* note 9, at 1116.

1. Property

A person's property is her substantive interest.[311] The owner of the house and lot on 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.[312] If a second defendant's pickup truck jumps the curb and destroys her gazebo, the court will award her damages measured by diminution or cost-to-repair.[313] 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 plus an injunction that forbids defendant's future invasions.[314]

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. Liability means that the defendant is responsible for injuring the plaintiff's substantive interest, which the court will protect with a remedy, damages or an injunction 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 the *Cathedral* article'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.[315]

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311. *See, e.g.*, RESTATEMENT (THIRD) OF PROPERTY § 24.1 (AM. LAW INST. 2011).

312. *See, e.g.*, Osborn v. Bank of U.S., 22 U.S. 738, 799 (1824).

313. *See, e.g.*, Vintage Rockland Realty Tr. v. Smiths Medical ASD, Inc., 287 F. Supp. 3d 126, 130 (D. Mass. 2018), *appeal dismissed*, No. 18-1159, 2018 WL 4042462 (1st Cir. Apr. 9, 2018).

314. *See, e.g.*, Douglaston Manor, Inc. v. Bahrakis, 678 N.E. 2d 201, 202 (N.Y. 1997).

315. *See* Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1791 (2004).

2. Liability

The *Cathedral* article names its second, or Rule 2, solution a "liability rule."[316] The defendant's trespass or nuisance activity invades the plaintiff's property interest, but the defendant pays the plaintiff money damages set by the court.[317] "Liability" used this way is inaccurate Remedies terminology to analyze a plaintiff's remedies because the court always holds that the defendant is liable to the plaintiff under substantive law before turning 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, a third is restitution.[318] In addition to being inaccurate, "property rule" and "liability rule" are imprecise, too abstract, and too general. "Injunction remedy" and "damages remedy" are more accurate and descriptive names than "property rule" and "liability rule."[319] Because the analysis omits restitution, an important money remedy that will be discussed below, a more precise vocabulary would use "damages" in the vernacular sense of all money remedies and break "damages" down into "compensatory damages," "punitive damages," and "restitution."

"Property rule" and "liability rule" combine the court's first step, the defendant's threshold substantive liability for its tort, with the court's second step, the remedy the court will employ on behalf of the plaintiff. 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 *Cathedral* article's 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

316. Calabresi & Melamed, *supra* note 9, at 1092.

317. *See id.* at 1105–06.

318. *See* RESTATEMENT (SECOND) OF TORTS § 951 (AM. LAW INST. 1979).

319. *See* Jeanne L. Schroeder, *Three's a Crowd: A Feminist Critique of Calabresi and Melamed's One View of the Cathedral*, 84 CORNELL L. REV. 394, 469 (1999); Laycock, *supra* note 61, at 1.

defendant must pay to continue its activity.[320] The idea is that a plaintiff's injunction protects and values her property like, my metaphor, an impenetrable stone wall that prevents any encroachment without the owner's consent. "When an injunction issues," the Harvard Law Review opined, "the possible severity of the penalty for disobedience renders the defendant's freedom of choice virtually nonexistent."[321]

The *Cathedral* article's reason is based on the view that an injunction is inviolable and self-enforcing.[322] But this view is an incorrect statement about an injunction as a remedy in actual disputes.[323] Many real-life defendants violate their real-life plaintiffs' real-life injunctions.[324] 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; "[A]n injunction stops conduct only as well as a stop sign stops a car; the defendant must apply the brakes and obey."[325] For an injunction to work, the defendant must obey it.

If an errant motorist drives over the curb and wrecks an owner's gazebo, a court will find him liable under negligence law; as a remedy, the court will tell him to pay the owner 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.[326]

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320. Louis Kaplow & Steven Shavell, *supra* note 254, at 718.

321. Note, *Developments in the Law–Injunctions*, 78 HARV. L. REV. 994, 1005 (1965).

322. *See* Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 593 (2008).

323. *See id.*

324. *See* RENDLEMAN, *supra* note 77, at 625–1104 (presenting Chapters 8 through 12; discussing contempt as an enforcement mechanism for a defendant's breach of an injunction, coercive contempt, compensatory contempt, and criminal contempt).

325. RENDLEMAN, *supra* note 77, at 127. The original injunction metaphor was Professor Charles Wright's: "The injunction is not a set of handcuffs. In itself it cannot prevent the defendant from doing the criminal act." Charles Alan Wright, *The Law of Remedies as a Social Institution*, 18 U. DET. L.J. 376, 391 n.65 (1955).

326. *See* Doug Rendleman, *Compensatory Contempt: Plaintiff's Remedy When Defendant Violates an Injunction*, 1980 U. ILL. L.F. 971, 971 (1980); RENDLEMAN, *supra* note 324, at 834–71.

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 injunction plaintiff post-violation compensatory contempt converts the plaintiff's injunction-right from being entitled to the defendant's obedience into 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.[327] "The defendant's violation of [the] injunction convert[ed] the plaintiff from a person with rights entitled to be enjoyed in fact to a person with a claim" to recover money for compensatory contempt to redress his past harm.[328]

If the *Cathedral* article'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."[329]

The judge has more contempt options than compensatory contempt. An injunction defendant may also be charged with coercive contempt or criminal contempt.[330] The judge may also impose coercive contempt, a staged fine or confinement, pending the defendant's future obedience; coercive contempt will structure the defendant's incentive to comply in the future.[331] Criminal contempt punishment is the third option.[332] But for many violations, the plaintiff's remedy will be compensatory contempt.[333] If experience from structural injunctions against government defendants carries over to environmental injunctions, unless there are several iterations of disobedience, coercive contempt and

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327. *See* Doug Rendleman, *Compensatory Contempt: Plaintiff's Remedy When Defendant Violates an Injunction*, 1980 U. ILL. L.F. 971, 974 (1980).

328. RENDLEMAN, *supra* note 77, at 193.

329. *Id.* at 128.

330. *See* Rendleman, *supra* note 327, at 971.

331. *See id.* at 974.

332. *See id.* at 971.

333. *See id.*

criminal contempt are unlikely to be severe in complex litigation with an established business defendant.[334]

Professor John Golden also refutes the *Cathedral* article's vocabulary that property rule and liability rule are hermetic closed categories.[335] Golden's analysis is similar to mine, although his metaphor differs. Because a defendant's violation converts an injunction into money, an injunction, he has written, isn't an "off switch."[336] He criticizes other observers' dichotomy between damages and injunction as "misleading."[337] Because there is no criminal contempt to speak of for defendants' violations of patent injunctions, realistically an injunction threatens compensatory contempt for violation.[338] This, Golden maintains, is insufficient deterrence.[339] 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 compensatory contempt's higher-than-normal monetary sanctions delivered with higher-than-normal speed."[340]

Scholars who understand its vocabulary but recognize its analytical shortcomings have cracked the *Cathedral* walls.[341] In

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334. *See* Doug Rendleman, *Prospective Remedies in Constitutional Adjudication*, 78 W.VA. L. REV. 155, 169 (1976) ("A single generalization emerges: courts hesitate to use contempt against government officials.").

335. *See, e.g.*, John M. Golden, *Injunctions as More (or Less) than "Off Switches": Patent-Infringement Injunctions' Scope*, 90 TEX. L. REV. 1399, 1402 (2012).

336. *Id.* at 1401.

337. *Id.*

338. *See id.* at 1410–13 n.43, 60.

339. *See id.* at 1413 n.62.

340. *Id.* at 1471.

341. *See* MERRILL & SMITH, *supra* note 76, at 971 (discussing *Cathedral*'s "flawed conception"); Epstein, *supra* note 259, at 2091 (discussing the flaws in Calabresi and Melamed's argument regarding property rules and liability rules); Golden, *supra* note 335, at 1401 (acknowledging the varying functions of injunctions outside of the strict Calabresi and Melamed interpretation); Laycock, *supra* note 61, at 1 (noting that Calabresi and Melamed fail to take into account "the in-between cases of punitive damages, disgorgement of profits, and other monetary remedies that are more than compensatory"); Daphna Lewinsohn-Zamir, *The Choice Between Property Rules and Liability Rules Revisited: Critical Observations From Behavioral Studies*, 80 TEX. L. REV. 219, 220 (2001) ("Recently, however, [Melamed and Calabresi's] conventional wisdom has been questioned."); Smith, *supra* note 79, at 1007–11, 1019–21 (explaining that the premise Calabresi and Melamed rely on in the Cathedral article is

his piece about the gulf between remedies and law and economics in the Oxford Journal of Legal Studies, Professor Sam Bray maintained that scholars of remedies generally ignored the "featherweight" *Cathedral* article which has had "little influence" in remedies.[342] Remedies scholars' perspectives and goals differ from law-and-economics scholars': remedies scholars emphasize plaintiffs' compensation, economics scholars favor reducing costs and deterrence of future defendants' breaches.[343]

The *Cathedral* article, Bray showed, got the injunction backwards. The injunction, contrary to the *Cathedral* article, is not exclusive, not automatic, and not tied tightly to the plaintiff's substantive entitlement. The judge has more discretion to choose and shape an injunction. A judge will favor an injunction when market valuation is difficult, not when it is easy. An injunction requires more, not less, judicial involvement. An injunction is not difficult to dissolve or amend.[344]

So far, this Article has parted with the *Cathedral* article on several grounds. It leads the court to under-value an injunction. The *Cathedral* article downgrades protecting the public health and the environment, which are better protected by ordering the harmful activity modified or stopped instead of awarding money damages. Its 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. Its vocabulary is abstract and confusing. It oversimplifies and doesn't understand the injunction as a remedy administered by courts.

One point a skeptic might make is that the foregoing critique is irrelevant and beside the point because the law-and-economics property-right, liability-right vocabulary exists only where professors talk exclusively to other professors and to law students; but it hasn't found its way into lawyers' and courts' traditional

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"questionable at best").

342. Bray, *supra* note 49, at 73. Professor Bray's footnote 14 identifies the author's work as an exception to the paucity of law-and-economics in the field of remedies. *See* Bray, *supra* note 49, at 73 n.14 (stating that although the *Cathedral* article is largely ignored, "[t]here are exceptions, such as the critiques offered by Laycock and Rendleman . . . as well as E Sherwin").

343. *See generally* Bray, *supra* note 49.

344. *See id.* at 80.

doctrinal vernacular where actual decisions occur.[345] The response is that professors use property-right, liability-right vocabulary to express a narrow and parsimonious view of the injunction, the most effective remedy. Graduates may leave the vocabulary at the law school but take the circumscribed injunction into practice. Law reform may start in law school classrooms and faculty lounges.

E. Post-Injunction Negotiation and Hold Outs

Many economic-analysis writers who argue in favor of awarding a nuisance plaintiff damages emphasize transaction costs.[346] The first risk is that the plaintiff will actually enforce the injunction. The Cour de cassation's rigid destruction remedy for a defendant's encroachment illustrates this potential risk.[347] 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 an unbalanced settlement like the one above in *Williams v. South & South*.[348] This Article speculated that those parties' post-injunction negotiation may have ended with a large cash settlement.[349]

The *Boomer* court's majority opinion feared that plaintiff and 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."[350]

The Coase theorem supports parties' post-injunction negotiation; it maintains that, without transaction costs, people will exchange and trade and that resources will end up owned by

345. *See, e.g.*, *supra* notes 50–52 and accompanying text.

346. *See, e.g.*, Calabresi & Melamed, *supra* note 9, at 1094.

347. *Supra* notes 239–240 and accompanying text.

348. 346 S.E.2d 665 (1986).

349. *See supra* notes 242–251 and accompanying text.

350. Boomer v. Atlantic Cement Co., Inc., 257 N.E. 2d 870, 873 (N.Y. 1970); *see also* DOBBS & ROBERTS, *supra* note 223, at 541–43. A potential unbalanced settlement is the principal reason Laycock gives to agree with the damages remedy in *Boomer*. *See* Laycock, *supra* note 61, at 21–22.

the person who values them the most.[351] 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.[352]

The rational-choice idea that people uniformly make decisions to maximize their economic self-interest convinces many economic-analysis 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 observers even borrow the criminal law's adjective to say an "extortionate" settlement.[353]

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.[354]

The economic-analysis scenario becomes even more grim in its third act. Each of several nuisance-tort victims has an incentive not to settle until after the others have, then to become a "holdout" and raise the defendant's price even more. 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 be difficult and expensive for the court to locate all affected people and to calculate and distribute their damages.

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351. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 16 (1960).

352. *See* Ayres & Balkin, *supra* note 254, at 706–07; Ayres & Talley, *supra* note 254, at 1032–33; Kaplow & Shavell, *supra* note 254, at 717–18; James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 479 (1995) ("[A]ntagonists can often negotiate to efficient outcomes."); Lemley, *supra* note 254, at 473; Rachlinski & Jourden, *supra* note 254, at 1574–75.

353. *See* RESTATEMENT (SECOND) OF TORTS § 941, cmt. c (AM. LAW INST. 1979).

354. *See supra* note 352 and accompanying text.

Some economic-analysis 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 low, [because of only one or few plaintiffs] . . . injunctive relief should normally be allowed as a matter of course . . . But when transaction costs are high, [because of the plethora of plaintiffs] . . . the allocation of resources to their most valuable uses is facilitated by denying an injunction and instead remitting the plaintiff to damages equal to the cost to him of the violation of his rights, thus enabling the violation to continue if it is worth more to the violator than it costs to the victim.[355]

A bilateral monopoly of two persons with no other market alternatives combined with a large disparity in values or benefits may lead negotiations to break down if each person claims a large share of the difference. Economists also consider this breakdown to be a transaction cost.[356]

How valid is the extensive 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 coerce an unbalanced settlement?

Other scholars register doubts about the *Boomer* court's money-damages remedy and the economic-analysis arguments that support it. What behavioral economists have named the "endowment effect" teaches us that its owner values property

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355. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 3.9, at 70 (9th ed. 2014); *see also id.* § 4.12, at 140–44; A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075, 1076 n.7 (1980) (citing Posner's discussion of transaction costs as they relate to injunctive relief); THOMAS SCHELLING, STRATEGIES OF COMMITMENT AND OTHER ESSAYS 195 (2006)

> It will be the rare environmental externality that permits us, at no exorbitant expense, to identify all the victims and assess damages individually. We probably have a crude aggregate estimate of damage, and at the level of an individual victim there may be no reliable way of determining how much of any apparent costs is actually due to the regulated emissions.

356. *See, e.g.*, Ayres & Talley, *supra* note 254, at 1037.

higher than the market does.[357] A court that refuses to grant a plaintiff an injunction to exclude a trespasser or to stop a polluter is ignoring this subjective aspect of the landowner-plaintiff's interest.[358] A judge, Professor Henry Smith wrote, enjoins a defendant not to engage in cost-benefit analysis, but to vindicate the landowner's previously existing right to use and exclude.[359] The economic-analysis scholars and the *Boomer* court's fear that 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 undermine the traditional legal principles that an owner's real property is unique and that money damages are an inadequate remedy to protect that property.[360] Robust property rights require effective remedies. "From at least the early 19th century," Chief Justice Roberts wrote, concurring in *eBay v. MercExchange, L.L.C.*,[361]

> courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases. This 'long tradition of equity practice' is not surprising, given the difficulty of protecting a right to *exclude* through monetary remedies that allow an infringer to *use* an invention against the patentee's wishes . . . .[362]

A money award communicates to an owner that his "unique" interest, protected by a right to exclude, is merely economic, readily converted to currency. As the dissenting opinion charges, the court in *Boomer*, in effect, allowed the cement company to continue its tort and to buy a license to pollute.[363] It also, in effect,

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357. *See* Rachlinski & Jourden, *supra* note 254, at 1544; Jennifer Arlen, Comment, *The Future of Behavioral Economic Analysis of Law*, 51 VAND. L. REV. 1765, 1771 (1998).

358. Keith N. Hylton, *The Economics of Public Nuisance Law and the New Enforcement Actions*, 18 SUP. CT. ECON. REV. 43, 65 (2010).

359. Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1023 (2004).

360. Laycock, *supra* note 61, at 22.

361. 547 U.S. 388 (2006).

362. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring).

363. *See* Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 876 (N.Y. 1970) (Jasen, J., dissenting).

granted eminent domain power to a private interest.[364] The court's majority favored the defendant's commercial development even when that development exacted a toll on residents and property owners.[365]

Yes, but what about the plaintiff who uses an injunction to leverage an excessive settlement?

To begin with, a plaintiff may not have an opportunity to negotiate a settlement because the defendant will appeal rather than negotiate.[366]

Also, a generous settlement may not be that undesirable. If the judge grants a successful landowner plaintiff an injunction, that injunction implements the endowment effect and 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.[367] 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.[368]

Will, however, a landowner-plaintiff employ an 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 which risks judicial under-compensation? Laycock favors awarding the plaintiff damages "when the transaction costs of such renegotiation would be high."[369]

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364. *See id.* The Torts Restatement disagrees. *See* RESTATEMENT (SECOND) OF TORTS § 941, cmt. d (AM. LAW INST. 1979).

365. *See Boomer*, 257 N.E. 2d at 876 (Jasen, J., dissenting) ("It is the same as saying to the cement company, you may continue to do harm to your neighbors so long as you pay a fee for it.").

366. *See* Lemley, *supra* note 254, at 475.

367. *See supra* note 357.

368. *See* Richard A. Epstein, *Too Pragmatic by Half*, 109 YALE L.J. 1639, 1648 (2000) (reviewing DANIEL A. FARBER, ECO–PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD (1999)); Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2012 (1997).

369. Laycock, *supra* note 61, at 21.

Taking a different and perhaps more salutary approach, Mr. Barton Thompson, as he was in 1975, maintained 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.[370] Moreover, he maintained that courts should expand equitable estoppel and laches to bar a plaintiff who either led defendant on or who waited too long to sue.[371]

Justice Charles Fried, as he was then, wrote an opinion in *Goulding v. Cook*[372] 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.[373] After the trial judge denied the plaintiff Gouldings' motion for a preliminary injunction, the defendant Cooks buried their septic tank under the disputed triangle.[374]

At the later plenary hearing, however, the trial judge held that the Gouldings owned the land.[375] 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.[376]

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370. *See* Thompson, *supra* note 79, at 1582. Mr. Thompson is now the Robert E. Paradise Professor of Natural Resources Law. "Buzz" Thompson is still at Stanford. *Barton H. "Buzz" Thompson, Jr.*, STAN. L. SCH., https://law.stanford.edu/directory/barton-thompson/ (last visited Dec. 3, 2018) (on file with the Washington and Lee Law Review).

371. *See* Thompson, *supra* note 79, at 1582 n.69; s*ee also* Henry L. McClintock, *Discretion to Deny Injunction against Trespass and Nuisance*, 12 MINN. L. REV. 565, 569 (1928) ("[T]he remedy to which plaintiff would otherwise be entitled may be denied where he has delayed seeking it for a period which, under all the circumstances, amounts to laches.").

372. 661 N.E. 2d 1322 (Mass. 1996).

373. *Id.* at 1323.

374. *Id.*

375. *Id.*

376. *Id.*

The SJC reversed.[377] Justice Fried's opinion begrudgingly recognized balancing the hardships, but rejected its application. The Cooks must remove the septic tank and pay the Gouldings damages.[378] "[T]he concept of private property represents a moral and political commitment that a pervasive disposition to balance away would utterly destroy."[379] 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."[380]

The SJC refuted the lower courts' reasoning about the Cooks' "good faith," the Gouldings' lack of harm, and the trial judge's equitable discretion.[381] The Cooks undertook the excavation project aware that the Gouldings' lawsuit was still pending.[382] An underground septic tank isn't always invisible and harmless. And the trial judge lacked equitable discretion to act on an error of law.[383]

Justice Fried was aware that the parties' negotiation had preceded the lawsuit.[384] 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 the Cooks 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.[385]

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.

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377. *Id.* at 1325.

378. *Id.*

379. *Id.* at 1324.

380. *Id.* at 1325; *see also* Brandao v. DoCanto, 951 N.E.2d 979, 987 (Mass. App. 2011) (citing *Goulding v. Cook* in granting an encroachment-removal injunction).

381. Goulding v. Cook, 661 N.E.2d 1322, 1325 (Mass. 1996).

382. *Id.*

383. *See id.*

384. *Id.* at 1323.

385. *See id.* at 1325.

The order created three apparent risks. First, that the litigants' 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.[386] In June of 2012, the Gouldings still lived next-door to the Cooks. The Gouldings and the Cooks were, however, "unfriendly."[387] What about the Cooks' septic tank under the Gouldings' land? Neither a buyout nor exhumation had occurred.[388] 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.[389] Property-lawyer John Wyman's general observation that neighbor versus neighbor litigation leads to "awful acrimony" and "no compromise"[390] 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, as he was then, now Dean, Ward Farnsworth located twenty appealed nuisance lawsuits and asked the lawyers whether the parties had negotiated a settlement after an appellate decision.[391] None had.[392] The litigants, Farnsworth

386. Telephone Interview with John Wyman, Attorney for Plaintiffs, in Goulding v. Cook, 661 N.E.2d 1322 (Mass. 1996) (June 2012) (notes on file with author).

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*

391. Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 373 (1999).

392. *Id.*

learned, just didn't bargain.[393] Because the parties' mutual enmity grew and hardened during protracted litigation, Farnsworth concluded that the opponents simply did not negotiate after their respective courts decided.[394] For an actual human being litigant, the acrimony of a protracted dispute militates against any discussion, amicable or otherwise, afterwards.[395] Coase's bargaining never occurred. Professor Thaler took Farnsworth's study to its logical conclusion: that it refutes the Coase theorem.[396]

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.[397] His conclusions were similar to Farnsworth's later study of the parties' post-injunction negotiation after nuisance injunctions. Van Hecke contacted forty-four lawyers in twenty-nine lawsuits and received replies from thirty-one lawyers concerning twenty-five injunctions.[398] He concluded that seventy-five percent of the injunctions were effective and that little evidence existed that the injunctions had been used to coerce settlements.[399] Attorneys who participated in "extortionate" settlements might not, however, have responded to the professor's survey.

In an email to the author, Professor John Golden suggested a "likely" argument: the judge should not grant an injunction "when the likelihood of later negotiation is very small (i.e., when transaction costs can be understood to be very large—perhaps in these cases because the relevant parties simply cannot bear to deal

393. *Id.*

394. *Id.*

395. *Id.* at 384 ("Frequently the parties were not on speaking terms by the time the case was over (sometimes much earlier)."); *see also* RICHARD THALER, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS 268 (2015); Lemley, *supra* note 254, at 475; Daniel A. Farber, *The Story of* Boomer*: Pollution and the Common Law*, 32 ECOLOGY L.Q. 113, 141 (2005) ("In reality these negotiations may be impossible [because] . . . the parties are too angry to negotiate at all . . . .").

396. THALER, *supra* note 395, at 268.

397. S*ee* Maurice T. Van Hecke, *Injunctions to Remove or Remodel Structures Erected in Violation of Building Restrictions*, 32 TEX. L. REV. 521, 521 (1954).

398. *Id.* at 535.

399. *Id.* at 535, 538.

with one another)?"[400] Courts exist to resolve bitter disputes that the parties cannot. In a civilized society, the court cannot let the lawbreaker's enmity and obduracy, even mutual enmity, hold the plaintiff's rights prisoner.

Laycock commented that "small-scale studies cast doubt on [the] assumption [of the parties' post-injunction negotiation]."[401] 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 are not.[402]

The economic-analysis picture of nuisance builds on the parties' post-injunction negotiation that may not happen in real life. In other words, it is based on an over-simplified theory-based view of human nature that exaggerates litigants' "rational" economic behavior and decision-making based on economic motives of self-interest and de-emphasizes real litigants' emotional and cultural responses to actual conflict.[403]

Humans are quirky and unpredictable critters often blown off a rational course 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 the parties' self-interest will lead them to post-injunction negotiation. There should be no presumption, no blanket rule, about negotiation. Many "more mundane" nuisance lawsuits like neighborhood conflicts "display claims in which feelings and a sense of right and wrong predominate over economic concerns . . . . The time has not yet arrived when the idiosyncratic, emotional side of the law can be ignored . . . ."[404] The judge should decide whether to predict negotiation anew in the factual context of each discrete dispute.

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400. E-mail from John M. Golden, Loomer Family Professor in Law, University of Texas School of Law, to Doug Rendleman, Robert E. R. Huntley Professor of Law, Washington and Lee University School of Law (Apr. 12, 2013 2:58 PM) (on file with author).

401. Laycock, *supra* note 61, at 32.

402. *See* RENDLEMAN, *supra* note 77, at 770–71.

403. *See* Lewinsohn-Zamir, *supra* note 341, at 228–29.

404. DOBBS & ROBERTS, *supra* note 231, at 543–44.

Post-injunction negotiation between opponents in commercial litigation, patent disputes for example, seems more likely. Although some 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.[405] 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 or after it is decided. In *eBay v. MercExchange, L.L.C.*,[406] the parties' negotiation continued after the trial judge, on remand from the Supreme Court, denied eBay's motion for an injunction.[407] The parties settled this bitter and protracted lawsuit.[408]

F. Rule 4: Winner Pays

We have examined three of the *Cathedral* article's solutions: Rule 3 no-liability, holding for the defendant; Rule 1 granting the plaintiff an injunction; and Rule 2 awarding the plaintiff damages. The *Cathedral* article's fourth solution is Rule 4, a hybrid remedy: the court grants the plaintiff an injunction, but it orders the "winning" plaintiff to pay the defendant, hence a "compensated injunction."[409]

In the universal example of Rule 4, the Arizona Supreme Court employed a compensated injunction in *Spur Industries, Inc. v. Del E. Webb Development Co.*[410] Del Webb developed and built

405. *See* Golden, *supra* note 335, at 1448 ("[T]he over-whelming majority of patent-infringement disputes settle before an injunction issues . . . .").

406. 500 F. Supp. 2d 556 (E.D. Va. 2007).

407. *Id.* 559.

408. RENDLEMAN, *supra* note 77, at 87. Party acrimony affects post-judgment bargaining concerns. Consider different hostile parties: a Jewish ex-husband who refuses permission to remarry, a "get," and his ex-wife who, seeking her ex's get, obtains a money judgment for the tort or breach of contract of get-refusal. Reversing the parties in post-nuisance-injunction bargaining, the ex-wife who exchanges her money judgment for his get is freed to remarry. Benjamin Shmueli, *Post-Judgment Bargaining with a Conversation with the Honorable Professor Guido Calabresi*, 50 WAKE FOREST L. REV. 1181, 1183 (2015).

409. Calabresi & Melamed, *supra* note 9, at 1116–23; *see also* DOBBS & ROBERTS, *supra* note 231, at 538.

410. Spur Indus. Inc v. Del E. Webb Dev. Co., 494 P.2d 700, 708 (Ariz. 1972).

Sun City, which catered to retired people in what was then a sparsely populated area near defendant's cattle feedlot.[411] The developer expanded its residential development toward defendant's feedlot.[412] Litigation followed in the advance's wake.[413]

Although the retired homeowners had "moved to the nuisance," because of flies, insects, or disease, the feedlot was a nuisance.[414] The homeowners were, the court held, entitled to an injunction.[415] However, the homeowners' position tempered the remedy.[416] The court required the developer, who was more at fault than the homeowners, to pay defendant's expenses of shutting down its feedlot and moving it.[417] Although the court held that defendant's feedlot was an enjoinable nuisance, it used defendant's "coming-to-the-nuisance" defense at the remedy stage to require the developer-plaintiff to pay the cost of moving defendant's feedlot away from residential areas.[418]

Law school casebooks often include *Spur* after *Boomer* as a principal nuisance case.[419] 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.[420] Del Webb, the developer, was the source of the funds, not the homeowners; given time for a

411. *Id.* at 704.

412. *Id.* at 705.

413. *Id.*

414. *Id.* at 706.

415. *Id.*

416. *See id.* at 707.

417. *See id.* at 708.

418. *See id.*

419. *See, e.g.*, JOHN E. CRIBBET, ROGER W. FINDLEY, ERNEST E. SMITH & JOHN S. DZIENKOWSKI, PROPERTY: CASES AND MATERIALS 679–91 (9th ed. 2008) (presenting *Spur* after *Boomer*); DUKEMINIER ET AL., *supra* note 76, at 749–58 (including *Spur* immediately after *Boomer*); CANDACE S. KOVACIC-FLEISCHER, JEAN C. LOVE & GRANT S. NELSON, EQUITABLE REMEDIES, RESTITUTION AND DAMAGES: CASES AND MATERIALS 804–23 (8th ed. 2011) (presenting *Spur* after *Boomer*); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 965–80 (3d ed. 2017) (presenting *Spur* after *Boomer*); VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 867–77 (13th ed. 2015) (presenting *Spur* after *Boomer*); SHERWIN & BRAY, *supra* note 76, at 484–87 (including *Spur* immediately after *Boomer* in its discussion on injunctions); WEAVER ET AL., *supra* note 77, at 335–40 (including *Spur* after *Boomer*).

420. *See* FARNSWORTH, *supra* note 181, at 196–97 (working out an elaborate, apparently counter-factual, example that Farnsworth considers bizarre).

transition, if no new calves were added and finished steers were sold, it wouldn't be too complex and expensive for the feedlot to leave vacant lots where new lawns would be greener.[421]

Spur "has not been followed by other courts."[422] The possibility of a plaintiff-pays solution would repel possible plaintiffs.[423] Because so far as a legal researcher can learn, no other court has ever followed it in private nuisance or trespass litigation, the attention scholars and casebook editors pay to *Spur* needs to be explained. *Spur*, if not a one-off solution, is an outlier.[424] Is casebook coverage misplaced, even odd?[425] *Boomer* and *Spur*, even if the instructor criticizes both, are beneficial teaching cases because they show students courts' flexibility in choosing between damages and an injunction followed by developing the injunction's terms.[426]

In my opinion, the *Spur* approach also fails in private trespass and nuisance litigation because it doesn't consider proportion, fairness, and the utility of the parties' activity. *Spur* deserves to be isolated in private nuisance and trespass litigation because the notion that the winning plaintiff should pay the losing defendant destabilizes owners' private property rights.[427] Professor Richard Epstein called Rule 4 "[an] enormous risk," "grotesque," "misguided," and "wholly subversive of any account of ordinary property rights."[428]

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421. *See* Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 704 (Ariz. 1972).

422. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 514 (4th ed. 2017); *see also* FARNSWORTH, *supra* note 181, at 195 (noting that Rule (4) is "rarely" used in litigation); DOBBS & ROBERTS, *supra* note 119, at 538 ("So far, however, other courts have not had occasion to employ the compensated injunction, much less to extend it."). Professor Bray, however, finds an analogy to the compensated injunction in the Maxim "those who seek equity must do equity." Bray, *supra* note 49, at 78.

423. *See* CALABRESI, *supra* note 41, at n.51 (explaining that reverse damages create a "free-rider" problem where many potential plaintiffs in a nuisance action would not join in litigation in hopes that others would bear the cost).

424. *See* SPRANKLING, *supra* note 422, at 514.

425. *See* Smith, *supra* note 252, at 1007–10.

426. *See Spur*, 494 P.2d at 707.

427. *See* Smith, *supra* note 252, at 1010, 1044.

428. Epstein, *supra* note 259, at 2103–05.

Spur Industries' compensated-nuisance 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, however, isn't dead.[429] A comprehensive, accurate view of legal reality includes settlements, other private remedies, and public regulation.[430]

The parties in a land-use dispute could negotiate a *Spur*-type compensated injunction as a private settlement. Before mutual enmity develops, 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.

Another possible plaintiff-pays solution occurs in employment litigation about a former employee's covenant not to disclose or compete. Requiring an employer who is enforcing a 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.[431]

Finally, 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.[432] These examples, he says, demonstrate that "Rule 4 is alive and well—at least in Washington."[433]

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

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429. *See* CALABRESI, *supra* note 41, at 20.

430. *See id.*

431. *See* Sonya P. Passi, Note, *Compensated Injunctions: A More Equitable Solution to the Problem of Inevitable Disclosure*, 27 BERKELEY TECH. L.J. 927, 941–55, 949 (2012).

432. *See* A. Douglas Melamed, *Remarks: A Public Law Perspective*, 106 YALE L.J. 2209, 2209–10 (1997).

433. *Id.* at 2209.

IV. Rule 5: Does the Cathedral *Have Too Many or Too Few Rooms?*

The *Cathedral* article's four approaches are both too many and too few.

A. Too Many Rooms

The *Cathedral* article's four approaches to remedies are too many because, as noted above, Rule 3, a court's no-liability decision, isn't a remedy.[434] Also common law courts' decisions that implement Rule 2, find a nuisance exists, decline to enjoin, and grant the plaintiff damages are scarce.[435] Moreover, since the single example of *Spur*, Rule 4, the winner-pays, compensated injunction, is rare indeed today, perhaps extinct in private trespass and nuisance litigation.[436]

B. Too Few Rooms

The *Cathedral* doesn't have enough rooms to house the court's possible remedies for a defendant's trespass or nuisance. In litigation that sheds light on the question of the defendant's liability, as well as the choice of remedy, in 2007 in *Fancher v. Fagella*,[437] the Virginia Supreme Court dealt with a next-door neighbor's lawsuit about the defendant's sweet-gum tree's encroaching roots.[438] The existing Virginia precedent for a neighbor's tree-root invasion was a no-nuisance, Rule 3, approach that limited the encroached-upon landowner to self-help at the property line.[439] The Virginia court, after concluding that the earlier precedent was obsolete in an urban setting,[440] adopted a trespass-based substantive rule leading to the defendant's liability

434. *See supra* notes 199–222 and accompanying text.
435. *See supra* notes 227–230 and accompanying text.
436. *See supra* notes 409–433 and accompanying text.
437. 650 S.E.2d 519 (Va. 2007).
438. *See id.* at 520.
439. *See id.* at 521.
440. *See id.* at 522.

for an encroachment and to a possible injunctive remedy that hinged on the judge's equitable discretion, exercised in the particular context.[441]

After appearing to balance the hardships, the *Boomer* court had moved from an injunction remedy to a no-injunction remedy.[442] The *Fancher* court abandoned a no-remedy, no-injunction rule and adopted an opening for an injunction remedy.[443] In the view taken here, *Fancher*'s liability decision and its broadened remedies present a superior approach for modern-day nuisance and trespass disputes as compared to *Boomer v. Atlantic Cement*'s move from an injunctive to a damages approach for a nuisance.

We don't know how later litigation and the Virginia trial 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, which effectively mooted Fancher's prayer for an injunction.[444]

This bemused observer speculates that if the dispute had continued to an injunction, Fancher and Fagella would have been less than effusive to negotiate a settlement. Between amiable neighbors, however, a negotiated settlement would eliminate the time and expense of litigation and, if the non-tree owner agreed to split the cost of removal, might include a "winner-pays" Rule 4 feature.[445]

1. The Standards Injunction

The *Boomer* court's bipolar choice between a shutdown injunction and damages is oversimplified. After selecting the plaintiff's remedy, the second part of the court's remedial analysis

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441. *See id.* at 523.

442. *See* Boomer v. Atlantic Cement, 257 N.E.2d 870, 875 (N.Y. 1970).

443. *See supra* notes 437–441 and accompanying text.

444. *See* Brigid Schulte, *Va. High Court Breaks New Ground on Tree Liability*, WASH. POST, (Sept. 15, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/09/14/AR2007091401340.html?noredirect=on (last visited Dec. 3, 2018) (on file with the Washington and Lee Law Review).

445. *See supra* notes 409–433 and accompanying text.

is to measure and define that remedy.[446] The judge's choice of remedy is broader than either a shutdown injunction or permanent damages.[447] Positing a court's choice of remedy as one 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 the *Cathedral* article neglect an important intermediate possibility 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, a "standards" injunction.[448] In 1927, Judge Learned Hand demonstrated this method of accommodating the conflicting interests of landowner and manufacturer in *Smith v. Staso Milling Co.*[449] 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."[450]

The judge has equitable discretion to employ a pragmatic experimental-conditional standards injunction that orders the defendant to add technology to control or reduce undesirable or unhealthy features as well as to limit the times and magnitude of operations and types of activity.[451] The order may set time, place, and manner limits on pollution.[452] The judge may require periodic reports and set timetables and goals.[453]

The judge's standards-injunction script may read something like this: call for the parties to negotiate a consent decree, to come

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446. *See Fancher*, 650 S.E.2d at 523.

447. *See id.*

448. *See* RESTATEMENT (SECOND) OF TORTS § 941 cmt. e (AM. LAW. INST. 1979); DOBBS & ROBERTS, *supra* note 119, at 540–41.

449. *See* Smith v. Staso Milling Co., 18 F.2d 736, 738 (2d Cir. 1927).

450. Farber, *supra* note 75, at 20.

451. *See* Payne v. Skaar, 900 P.2d 1352, 1354 (Idaho 1995); Goeke v. Nat'l Farms, 512 N.W. 2d 626, 632 (Neb. 1994).

452. *See Payne*, 900 P.2d at 1354.

453. *See Goeke*, 512 N.W.2d at 632.

back to the courtroom with plans to abate and coordinate. Conduct a hearing on the parties' plans or their proposed consent decree. Based on the best features of the plans, order the defendant to change the way it operates to end offensive features. Limit times, limit type of activity, require ameliorative devices. Call for a later periodic report. Set goals. Schedule another cycle of plans and hearings.

The injunction will reserve the judge's ability to modify the order in light of changed circumstances.[454] Because of defendant's improvements, the Iowa court, citing changed factual conditions, vacated an injunction that shut a cement plant down.[455] The Supreme Court in 1907 granted the state of Georgia a "standards" injunction,[456] which several years later became a stop-unless-standards-are-met injunction.[457]

The standards injunction resembles a structural injunction in constitutional litigation. The structural injunction is a judicial technique to bring a large and complex institution into compliance with the law.[458] Courts have used structural injunctions to end school segregation where it was required or permitted.[459] Another branch of the structural injunction, developed by courts in Arkansas in the 1970s, brought prisons and jails into compliance with the law.[460] Industrial pollution is another large and complex legal problem that is amenable to the structural injunction process.

Courts' experience with structural injunctions against government defendants should convince judges that concern about supervision, about becoming managers rather than judges, is exaggerated.[461]

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454. *See* FED. R. CIV. P. 60(b)(5)–(6) (allowing relief from final judgment in instances where applying the judgment prospectively would be inequitable, or for "any other reason that justifies relief"); RESTATEMENT (SECOND) OF TORTS § 941, cmt. e (AM. LAW INST. 1979).

455. *See* Helmkamp v. Clark Ready Mix Co., 249 N.W.2d 655, 657 (Iowa 1977).

456. *See* Georgia v. Tenn. Copper Co., 206 U.S. 230, 239 (1907).

457. *See* Georgia v. Tenn. Copper Co., 237 U.S. 474, 477–78 (1915).

458. *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 7, 9 (1978).

459. *See id.* at 13–14.

460. *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 78 (Alfred Blumstein & David Farrington eds., 1998).

461. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 2.5(4), at 143–44 (2d ed. 1993).

In the 1970s, courts didn't have as much experience managing institutions as they do today. Federal school-desegregation litigation in the South was emerging from freedom-of-choice;[462] courts had not begun to grant complex prison injunctions.[463] Perhaps in the early 1970s, the New York Court of Appeals wasn't ready to transfer judicial experience in operating institutions to industrial management and pollution control. That time has passed; the time is ripe for courts to grant structural-standards injunctions to ameliorate and control pollution.

2. Damages

A nuisance plaintiff's damages aren't a set amount, diminution, or value before less value after. In 2016, Judge Calabresi rejected the idea that the nuisance plaintiff's damages "should mimic or approach the negotiated price that would obtain in a free market."[464] Instead damages might vary according to "collective" judgments, sometimes below, sometimes equaling, sometimes above compensatory damages levels.[465] The court can consider a plaintiff's special damages, her personal injury damages, and damages based on buffer-zone value.[466] The Iowa court, after first balancing the hardships to refuse plaintiffs an injunction,[467] then added special damages to their permanent diminution damages: the plaintiffs' temporary damages may be rent-based and include their discomfort.[468]

Farber wrote that a judge who denies a nuisance plaintiff an injunction should measure his money recovery by the market value for buffer-zone rights instead of by value before less value after.[469] On remand, Atlantic Cement, perhaps prodded by the trial court's

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462. *See* FISS, *supra* note 459, at 9.

463. *See* FEELEY & RUBIN, *supra* note 460, at 78.

464. CALABRESI, *supra* note 41, at 118.

465. *See id.* at 118–20.

466. *See* DOBBS ET. AL., *supra* note 131, § 404.

467. *See* Weinhold v. Wolff, 555 N.W.2d 454, 467 (Iowa 1996).

468. *See id.* at 466.

469. *See* Daniel Farber, *Reassessing* Boomer: *Justice, Efficiency, and Nuisance Law*, *in* PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 19 (Peter Hay & Michael H. Hoeflich eds., 1988).

apparent buffer-zone measure of damages, bought out most of the plaintiffs to create the buffer zone that some observers think it should have purchased before it built its cement plant.[470]

Courts have flexible injunction-damages options for nuisance and trespass remedies. Consider, for example, the spectrum of options that the trial judge in *Harrison*, discussed above, had for defendant's automobile shredder after the Court of Appeals remanded.[471] The options included: (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 a shut-down 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 plaintiffs sue for damages in the future if defendant's nuisance continued; or (d) The judge could find a permanent nuisance and refuse to grant plaintiffs an injunction, but award plaintiffs permanent damages for the diminished value of their property, the solution in *Boomer*.[472] The Court of Appeals seemed to favor (e) an experimental-conditional standards injunction as discussed above.[473]

The court's possible remedial solutions for a defendant's trespass or nuisance aren't limited to the injunctions and compensatory damages that this Article has considered above. Two other money remedies for a successful plaintiff are punitive damages and restitution.

3. Punitive Damages

A nuisance or trespass plaintiff may recover punitive damages.[474] Punitive damages add complex recalculation to our

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470. *See* Laycock, *supra* note 61, at 34; Smith, *supra* note 252, at 1039.

471. *See* Harrison v. Ind. Auto Shredders Co., 528 F.2d 1107, 1125 (7th Cir. 1975).

472. *See* Boomer v. Atl. Cement Co., 257 N.E.2d 870, 875 (N.Y. 1970).

473. *See Harrison*, 528 F.2d at 1125.

474. *See* Oglethorpe Power Corp. v. Estate of Forrister, 774 S.E.2d 755, 763 (Ga. App. 2015). As this Article goes to press, three of the twenty-six lawsuits brought in North Carolina by 500 plaintiffs against Smithfield Foods's pork production facilities have reached jury verdicts. The plaintiffs' verdicts in the

topic.[475] Judge Calabresi wrote in 2016 that punitive damages deter short of a criminal sanction and approach inalienability.[476] Professor Henry Smith wrote that "supra-compensatory" punitive damages convert a "liability" or damages rule into a "property" or injunction rule.[477]

"Inalienability" and "supra-compensatory" aren't accurate ways to describe punitive damages.[478] A court will impose punitive damages after, perhaps long after, the defendant's tort.[479] 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, nuisance or trespass, and to deter that defendant and others from similar misconduct in the future.[480] Punitive damages don't affect alienability. On the other hand, the judge grants the plaintiff an injunction to forbid the defendant's future misconduct.[481]

Considering several ways to measure a nuisance plaintiff's compensatory damages helps us to understand that punitive damages don't prevent alienation and aren't an injunction. In *Boomer,* the lowest compensatory general damages measure was value before less value after, apparently the trial judge's initial

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three trials included punitive damages of $23 million, $25 million, and $450 million. Because of a tort-reform cap on punitive damages in North Carolina, the trial judges reduced the punitive damages to $250,000 for each plaintiff. Greg Blount, William Droze & Kathryn Warihay, *Punitive Damages in North Carolina Hog Farm Cases Reduced*, ENVTL. L. & POL'Y MONITOR (Aug. 7, 2018), https://www.environmentallawandpolicy.com/2018/08/punitive-damages-north-carolina-hog-farm-cases-reduced/#page=1 (last visited Dec. 3, 2018) (on file with the Washington and Lee Law Review). *See also* DOBBS ET. AL., *supra* note 131, § 404, at 644. The Constitution and tort-reform statutes limit the amount of punitive damages. *Id.* § 485, at 48, § 486, at 57.

475. *See* Calabresi & Melamed, *supra* note 9, at 1126 n.71; DOBBS ET. AL., *supra* note 131, § 56, at 152, § 404, at 644.

476. *See* CALABRESI, *supra* note 41, at 120.

477. Smith, *supra* note 252, at 983, 1008. This common idea may have originated with Calabresi and Melamed: "[P]unitive damages provide an extra compensation for the victim." Calabresi & Melamed, *supra* note 9, at 1126 n.71; *see also* Golden, *supra* note 335, at 1415 n.70 (citing economic-analysis scholars who view punitive damages as property rules).

478. *See* Laycock, *supra* note 61, at 35.

479. *See* Tuttle v. Raymond, 494 A.2d 1353, 1354 (Me. 1985).

480. *See id.* at 1355.

481. *See* Okla. Pub. Emp. Ass'n v. Okla. Dep't. of Cent. Servs., 55 P.3d 1072, 1081 (2002).

$185,000.[482] The damages measure based on the defendant's cost to secure a buffer zone was $710,000, which was result on remand.[483] A defendant like Atlantic Cement with a $45 million investment would clearly prefer to pay either measure of compensatory damages instead of an injunction.[484] 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.

4. Restitution

In addition to an injunction, compensatory damages, and punitive damages, a court's major remedy is restitution to reverse or prevent the defendant's unjust enrichment, a remedy that the *Cathedral* article does not discuss. Courts have based several important restitution decisions on defendants' property torts, conversions and trespasses.[485]

When a court discusses a plaintiff's nuisance remedies, however, the traditional answer has been that that the nuisance plaintiff's money recovery comprises only compensatory damages and perhaps punitive damages, but does not include restitution.[486] Should a contemporary court expand its nuisance-remedies options to include awarding the plaintiff restitution? A positive answer follows.

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482. *Boomer*, 257 N.E. 2d at 873.

483. Daniel Farber, *Reassessing* Boomer*: Justice, Efficiency, and Nuisance Law*, *in* PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 12 (Peter Hay & Michael H. Hoeflich eds., 1988).

484. *See id.* at 18.

485. *See* Edwards v. Lee's Adm'r, 96 S.W.2d 1028, 1032 (Ky. 1936); Raven Red Ash Coal Co. v. Ball, 39 S.E. 2d 231, 238 (Va. 1946); Olwell v. Nye & Nissen Co., 173 P.2d 652, 654 (Wash. 1946).

486. *See* GEORGE E. PALMER, THE LAW OF RESTITUTION 137 (1978); *see also* Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504, 509 n.28 (1980); Nicholas McBride, *Restitution for Wrongs*, *in* THE RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT: CRITICAL AND COMPARATIVE ESSAYS 251, 259 (Charles Mitchell & William Swadling eds., 2013) ("[A]llowing [a party] to sue for the 'saved cost of abatement would be inequitable' . . . . Therefore, [the party] will be entitled to sue . . . for license fee damages instead.").

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."[487] A few years later, after Kull became Reporter for the Third Restatement of Restitution, the Restatement included an Illustration based on *Boomer*'s facts.[488] The Illustration concludes that for the defendant's nuisance, "the court might award [plaintiffs] restitution . . . measured by the reasonable value of a license . . . to continue the [defendant's] challenged operations."[489]

Professor Farber also 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.[490]

> [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.[491]

Farber's formulation isn't easy to fit into technical restitution learning.[492] Perhaps a better way to articulate a restitution measure for nuisance or trespass that reaches the same result is

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487. Andrew Kull, *Restitution and the Noncontractual Transfer*, 11 J. CONT. L. 93, 104 (1997).

488. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 44, illus. 15 (AM. LAW INST. 2011).

489. *Id.*; *see also* Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748, 764 (8th Cir. 2006) (Arnold, J., dissenting).

490. *See* Daniel Farber, *Reassessing* Boomer: *Justice, Efficiency, and Nuisance Law*, *in* PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 18 (Peter Hay & Michael H. Hoeflich eds., 1988); *see also* Farber, *supra* note 75, at 22.

491. Farber, *supra* note 75, at 22.

492. Laycock cites RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 (AM. LAW INST. 2011), which requires a defendant to disgorge profits. Laycock, *supra* note 61, at 34.

the Restatement's: to measure the plaintiff's restitution by the reasonable value of a license.[493]

Both punitive damages and restitution are potential remedies for a defendant's trespass or nuisance, opening a new wing on the Cathedral.

V. Procedure, the Jury, and Equitable Cleanup

Whether the judge ought to grant the plaintiff an injunction or award him damages and how to combine and measure the remedies follows a tricky procedural path that complicates the judge's remedial decisions in nuisance and trespass litigation. Avoiding a jury may explain the form of relief.

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.[494] Before the separate courts of Chancery-Equity and Common Law were merged, two trials might have been necessary, one in Chancery for an injunction and another at Common Law for damages.[495]

The federal and almost all state court systems have merged the Chancery and Common Law courts.[496] Merger of Chancery and Common Law means only one potential plenary trial on the plaintiff's nuisance or trespass claims because the merged court has power to award a successful plaintiff damages and to enter an injunction.[497] The litigants' constitutional right to a jury trial for damages adds procedural and remedial complexity.[498]

In a merged court, if the plaintiff moves for interlocutory equitable relief, a temporary restraining order or a preliminary

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493. *See* DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES 1216–17 (9th ed. 2018).

494. *See* GEOFFREY C. HAZARD, JR., JOHN LEUBSDORF & DEBRA LYN BASSETT, CIVIL PROCEDURE 532–33 (6th ed. 2011).

495. *See id.* at 552–53.

496. *See id.* at 543 ("Unification came about in many of the states through adoption of the Field Code in the nineteenth century. Unification came about in the federal court system through adoption of the Federal Rules in 1938.").

497. *See id.*

498. *See id.* at 543–47.

injunction, the judge will conduct a juryless pre-trial hearing, then grant or deny the plaintiff's motion.[499]

At the plenary trial where the plaintiff seeks both damages and an injunction, either party would be entitled to a constitutional 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 or other equitable relief.[500] The judge may, however, empanel an advisory jury to evaluate the equitable claims.[501]

Professor Klass's experience supported the idea that a carefully instructed jury could sort out complex multiple substantive claims.[502] Suppose a jury trial ends with a plaintiff's jury verdict that a nuisance exists and the amount of the plaintiff's past damages. Then the judge alone would decide whether to grant the plaintiff's motion for a permanent injunction.[503] If there had been an advisory jury, the judge would decide whether to accept the jury's advisory findings.[504] Under federal and some state precedents, the judge's permanent-injunction decision must be consistent with the jury's findings of fact.[505] 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.

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499. *See id.* at 556–59.

500. *See* Tamalunis v. City of Georgetown, 542 N.E.2d 402, 413 (Ill. App. Ct. 1989) ("The granting of an injunction is a matter of discretion for a circuit court."); Weinhold v. Wolff, 555 N.W.2d 454, 458, 462 (Iowa 1996) (noting that the parties elected for a bench trial); Goeke v. Nat'l Farms, 512 N.W.2d 626, 632 (Neb. 1994) (noting that an action for an injunction is equitable). *But see* Payne v. Skaar, 900 P.2d 1352, 1354 n.1 (Idaho 1995) (noting that an advisory jury was employed because public and private nuisance claims are equitable).

501. *See* Klass, *supra* note 23, at 715.

502. *See id.* at 680.

503. *See* eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006); *Tamalunis*, 542 N.E.2d at 413; *Weinhold*, 555 N.W.2d at 458 ("Weinholds sued at law and asked for damages and injunctive relief. The case was therefore triable at law, but the appropriateness of injunctive relief was solely for the district court to decide.").

504. *See Payne*, 900 P.2d at 1354 n.1.

505. *See* Beacon Theatres v. Westover, 359 U.S. 500, 510–11 (1959); HAZARD ET. AL., *supra* note 494, at 565; Eric J. Hamilton, Note, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 868 (2013) (explaining that twenty-two states follow the federal rule created by *Beacon Theatres*, while eighteen follow the traditional approach).

Equitable cleanup is a second one-trial possibility which many state courts would follow.[506] 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.[507] Then the judge will "clean the case up," that is decide the damages issues also without a jury.[508] The skeptics' question about equitable cleanup is whether, in aid of consistency and judicial economy, it undervalues the litigants' constitutional rights to a jury trial.[509]

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].[510]

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 trial."[511]

The form of relief in *Boomer* has puzzled observers.[512] As mentioned above, the court granted plaintiffs an injunction but stayed its effect as long as the defendant paid plaintiffs' damages.[513] Laycock questioned the court's "circumlocution" for refusing an injunction.[514] He speculated that the conditional

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506. *See* Hamilton, *supra* note 505, at 856.

507. *See id.*

508. *See, e.g.*, *Goeke*, 512 N.W.2d at 632–633 (upholding the trial judge's assessment of damages); *see also* DOBBS, *supra* note 119, at 169 (2d ed. 1993); HAZARD, LEUBSDORF & BASSETT, *supra* note 494, § 12.2, at 533–55.

509. *See* Ziebarth v. Kalenze, 238 N.W.2d 261, 266–268 (N.D. 1976); DOBBS, *supra* note 119, at 169; HAZARD, LEUBSDORF & BASSETT, *supra* note 494, § 12.2, at 533–39.

510. Boomer v. Atlantic Cement Co., Inc., 257 N.E.2d 870, 874 (N.Y. 1970) (quoting N. Ind. Pub. Serv. Co. v. Vesey, 200 N.E. 620, 627 (1936)).

511. Baldwin v. McClendon, 288 So.2d 761, 766 (Ala. 1974).

512. *See, e.g.*, Daniel A. Farber, *The Story of* Boomer*: Pollution and the Common* Law, 32 ECOLOGY L.Q. 113, 121, 133 (2005).

513. *See Boomer,* 257 N.E.2d at 877.

514. *See* Laycock, *supra* note 61, at 17–19.

injunction may have allowed the judge to retain jurisdiction and supervise the cement company while it ameliorated its nuisance.[515] Another possibility in *Boomer* is that the court may have used the conditional injunction to keep the lawsuit in Chancery-Equity in order to grant the plaintiff permanent damages instead of an injunction without a jury.[516] More specifically, granting the injunction and suspending it may have rationalized equitable cleanup and lack of a jury.[517]

VI. Conclusion

Every profession has its array of public perceptions that are widely held, deeply believed, and oft-stated but, at best, misleading; in legal-latin, these are *ignis fatuus*, delusive guiding principles. In aid of expanding and broadening the injunction remedy, this Article has challenged a well-established way of looking at the law of nuisance and trespass. It has criticized the *Boomer* decision[518] and the *Cathedral* article[519] and suggested refinements that increase plaintiffs' injunctions.[520] By proving an existing theory wrong, we refine our understanding of what our models can and cannot explain.

The *Boomer* decision and the *Cathedral* article are influential sources. Timely and easy to understand, both were formative for law-and-economics scholars who were ready for their powerful simplicity and conservative, business-protective solutions.[521] Have they stood the test of time?

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515. *See id.* at 18.

516. *See id.* (explaining that once a case was filed in equity, the court had authority to decide the entire case, and therefore, the authority to assess damages without a jury relied on the plaintiff's decision to merely request an injunction).

517. *See id.* at 17–18 (reconciling *Boomer's* "absurd" rules with the history of equity courts that denied the right to a jury and stating that the claim of equitable jurisdiction perhaps "felt more secure if the court actually issued the injunction, even if that injunction was issued conditionally or suspended immediately").

518. *See supra* Part II.

519. *See supra* Part III.

520. *See supra* Part IV.

521. *See* Butler, *supra* note 24, at 879 n.187.

An analogy from science to law invoked by Thomas Kuhn's *The Structure of Scientific Revolutions*[522] will be evocative here. A comfortable intellectual life favors an exemplar or paradigm like the *Cathedral* article's four-category system that enables people to think that a piece of the world makes sense.[523] But as things change, shift happens. Anomalies accumulate that do not make sense within the earlier paradigm. The conventional wisdom is durable, not shaken by a few unexplained applications. The paradigm changes only when insiders believe that the current paradigm doesn't explain many anomalies. 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.

This Article maintains that analysis based on the *Cathedral* article needs to be refined.[524] It places liability after remedy.[525] It combines remedy and liability.[526] 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,"[527] 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 microeconomic analysis based on cash-preferred motives.

A 2011 "concise" property casebook "suitable and teachable in a one-semester Property course" may foreshadow what the future portends.[528] Both *Boomer* and *Spur* are reduced to footnote status;

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522. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (4th ed. 2012).

523. *See id.* at 23 ("[T]he paradigm functions by permitting the replication of examples . . . . In a science . . . a paradigm is rarely an object for replication. Instead, like an accepted judicial decision in the common law, it is an object for further articulation and specification under new or more stringent conditions.").

524. *See supra* Parts III–IV.

525. *See supra* Part IV.

526. *See supra* Part IV.

527. FARNSWORTH, *supra* note 181, at 193.

528. DAVID L. CALLIES, J. GORDON HYLTON, JOHN MARTINEZ & DANIEL R.

moreover, the nuisance material does not cite the *Cathedral* article.[529] The 2017 edition of a Remedies casebook references *Boomer* only within another principle decision.[530] New ideas begin to percolate through the profession and 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 will continue to reason "Cathedral all the way down," that is, the court should favor damages because an injunction is absolute protection, a stone wall, and the court should prefer a "liability rule" that merely "discourages violations" because litigants will bargain around an injunction.[531]

"[Q]uarrels over language and terminology mask, and sometimes reveal, quarrels over world view . . . ."[532] Changing nomenclature changes ideas.[533] So, more than changing the profession's vocabulary, I wrote this Article 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.

"[R]eorganizing a field of law," Laycock wrote, "is hard—hard to figure out, hard to disseminate, hard to implement."[534] The law's creative-destructive process never ends. An optimist seconds Lord Mansfield's observation that, in the long run, "the common law . . . *works itself pure* . . . ."[535]

MANDELKER, CONCISE INTRODUCTION TO PROPERTY LAW, at v (2011).

529. *See id.* at 340 (discussing *Boomer* and *Spur* in note 4). Three of the editors' casebooks cite *Boomer* and *Spur* only in notes, employs injunction-damages to describe remedies, and does not cite the *Cathedral* article in the discussion at all. DAVID L. CALLIES, DANIEL R. MANDELKER, & J. GORDON HYLTON, PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS 153—54 (4th ed. 2016).

530 TRACY A. THOMAS, DAVID I. LEVINE & DAVID J. JUNG, REMEDIES: PUBLIC AND PRIVATE 137–38 (6th ed. 2017) (referencing *Boomer* within *Walgreen Co. v. Sara Creek Property Co.*, 966 F.2d 273 (7th Cir. 1992)).

531. *See* Kaplow & Shavell, *supra* note 320, at 715–18.

532. IRVING HOWE, A MARGIN OF HOPE: AN INTELLECTUAL AUTOBIOGRAPHY 77 (1982).

533. *See id.*

534. Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 267 (2008).

535. *See* Omychund v. Barker (1744) 26 Eng. Rep. 15, 23; 1 Atk. 22, 34.

Number six in all-time citations, the iconic *Cathedral* article has a well-established place in the firmament.[536] As the late Professor Leach reminded us, however, "great men and their great books create problems. They tend to freeze things in antique patterns."[537] 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 and trespass remedies. Nobel-prize winning economist Tom Schelling reminded us that "[t]he 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."[538] But I do hope that this modest effort will play a part in a process of refining and displacing outmoded analysis. For one thing, our law students are confused enough. Their professors should exit the four-room Cathedral and refute its analysis. This Article may be the last tour of the Cathedral they need to take.

This Article is part of a process of creative reconstruction of granting injunctions in nuisance, trespass, and other environmental litigation. The court should ask three questions. First, is the defendant liable under properly defined substantive law? Second, what remedy should the court grant; an injunction, compensatory damages, or perhaps punitive damages and restitution? Balancing the parties' hardships may be necessary to choose between damages and an injunction, but a narrow and precise test is a crucial principle of confinement. Finally, how should the court measure or define the injunction or money recovery? Questions two and three will not always be discrete or separate. The judge might consider what an injunction ought to require or forbid along with whether to grant it. Denying a nuisance or trespass plaintiff an injunction may often be unsound for health or environmental reasons. A standards injunction may be the most propitious remedy.

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536. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012).

537. W. Barton Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 973 (1965).

538. SCHELLING, *supra* note 355, at 231; s*ee also* KAHNEMAN, *supra* note 54, at 277.

A reinvigorated private law remedial approach may counter the federal regulatory retreat. More and more detailed standard injunctions in private litigation will improve our shared environment; moreover, the private-law example may work its way into public-law environmental litigation, where it may contribute to reducing global warming and climate change.