The Story of *Boomer*: Pollution and the Common Law

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INTRODUCTION

*Boomer* v. *Atlantic Cement Co.* has become an established part of the legal canon. It looms large, not just in environmental law, but also in property, remedies, and torts. Its lasting fame is reflected in a law review symposium on the case some twenty years after the decision. The introductory article to the symposium observed that “for many years the case was taught in three first year courses - Property, Torts, and Civil Procedure - and in two upper class courses - Remedies and Environmental Law.” On this basis, *Boomer* was called “the great fertile crescent of the first year curriculum, and it seems that the whole first semester of law school could be taught out of that one case.” Fifteen years have passed since that symposium, making 2005 *Boomer*’s thirty-fifth birthday. Today, the case remains a staple of the law school curriculum and a constant preoccupation of legal scholars.

The staying power of the case may be partly due to historical accident, but probably owes more to the powerful simplicity of its facts. On the one hand, we have a multimillion-dollar cement plant; on the other, neighbors suffering from air pollution. These simple facts raise questions of enduring interest. Should the neighbors get an injunction, shutting down the plant, or should they only receive damages for the decreased value of their land? Should the court simply try to resolve this...
as a dispute between neighbors, or should it expand its focus to include broader public interests, such as the value of the cement plant to the local community or the harmful health effects of its pollution in the region? Does the common law have anything to contribute to environmental protection, or has it been supplanted by more sophisticated regulatory regimes?

This Essay provides an overview of the Boomer litigation and a perspective on that decision's enduring significance. As is often true of famous cases, the facts and issues in Boomer were more complicated than the casebooks suggest. We will begin with a look at how the case arose and its progress through the New York courts. Then we will examine Boomer from three different perspectives. The first perspective examines the issue of damages versus injunctive relief through the lens of economic analysis. The second perspective considers the extent of judicial discretion in remedying environmental harms. The final perspective questions the continuing vitality of the common law in an age of statutes, and probes the complex relationship between these two sources of law. Each of these perspectives has engaged the attention of courts and scholars. Boomer's continuing vitality demonstrates the ability of a short, simple opinion to raise such weighty and sophisticated questions. Like a small but multifaceted crystal, Boomer reflected light in several directions, each still relevant today.

I. THE BOOMER LITIGATION

The Court of Appeals' opinion gives only a cursory version of the facts, leaving the impression that the plaintiffs were suffering routine damage from air pollution. In fact, the air pollution was far from routine, and the plaintiffs also suffered from other serious impacts. In addition, the Court of Appeals' opinion was not the final word in the case. Viewing the opinion without considering what happened on remand also gives a misleading impression of the outcome. In this section, we will attempt to remedy those shortcomings.
A. The Cement Company and its Neighbors

Atlantic Cement, formed in 1959 under the name “Burwill Realty Company,” changed its name just before it began construction of the cement plant. Presumably, Atlantic used the original name to avoid alerting sellers to the special value that their land might have for a large industrial venture. Under the original name, Atlantic assembled a large tract of land near Albany, New York: a later tax appraisal lists it as 3,260 acres.

Atlantic was a joint venture of two mining companies. This was the joint venture’s only plant, but it had distribution centers all along the east coast, served either by rail or barge. Once in operation, the plant employed approximately four hundred people, and its assessed value was about half of the total assessed value of the entire township. Although the plant was unusually large, it was not alone in the region. The Albany area had other cement plants, because the area was rich in the necessary raw materials and the Hudson provided a handy source of river transportation.

When construction of the Atlantic cement plant began in 1961, the area was unzoned. Atlantic selected a location about a mile outside the village of Ravena, in a neighborhood composed of small houses and businesses such as the auto junkyard and body shop owned by Oscar and June Boomer. The locale sounds typical of the outskirts of towns all over the country: junkyards, inexpensive houses, roadside taverns, and so on. It seems unlikely that anyone with any political influence lived in the area. In any event, the company seems to have had no trouble with the planning authorities. Soon after the construction began, the site was zoned “heavy industrial” by the township board.

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5. Much of the information in this section is drawn from Daniel A. Farber, Reassessing Boomer: Justice, Efficiency, and Nuisance Law, in Property Law and Legal Education: Essays in Honor of John E. Cribbet 7 (Peter Hay & Michael H. Hoeflich eds., 1988). That essay proposes a presumption in favor of injunctive relief when a landowner’s activities have a severe impact on neighbors. The presumption can be overcome when granting the injunction would cause disproportionate harm to the local economy. When an injunction is denied, the neighbors should then receive damages based on the price the landowner would have had to pay to purchase their land as a buffer zone.


8. See Farber, supra note 5, at 10. Thus calling it the “Atlantic” cement company was quite appropriate.

9. See id. at 10.

10. Id. at 8.

11. See Dobris, supra note 3, at 175.
Information regarding Atlantic's pollution control efforts is frustratingly incomplete. Atlantic invested more than $40 million in the plant, which incorporated what were then state-of-the-art pollution controls.\textsuperscript{12} There is no indication of how much of this sum covered land acquisition, whether the plant machinery could have been removed and used at another site, or what value the land would have had if used for other purposes. So far as the record shows, Atlantic did what it could to mitigate the environmental impact of its operations. The $2 million dust collection equipment was allegedly the best available in the country.\textsuperscript{13} Before the litigation was over, the company had spent an additional $1.6 million installing a spray system, purchasing a fiberglass bag collector, and converting the energy supply from coal to oil.\textsuperscript{14}

Despite these mitigation efforts, Atlantic had drastic effects on its neighbors, partly due to its quarrying operation rather than the cement manufacturing operation itself.\textsuperscript{15} The quarrying operation caused severe vibration for extended intervals. Using what was called the "millisecond delay" method, Atlantic used a series of blasts to remove layers of rock sequentially, so a new blast would go off just as the previous layer of rock was falling away.\textsuperscript{16} Thus, a sequence of explosions would continue for some period of time, seriously affecting neighboring landowners. For example, Floyd and Barbara Millious lived in a ranch house about half a mile from the quarry.\textsuperscript{17} The blasting caused large cracks in the walls, ceiling, and even the exterior of their house.\textsuperscript{18} Air pollution added to the troubles of the Milliouses and other neighbors. Fine dust from the cement operation coated the interior of their house with what the Milliouses described at trial as a "plastic-like coating."\textsuperscript{19} Mr. Millious recalls that he had to scrape cement dust from his windshield with a razor blade and that the gutters on his house filled with so much dust that they fell off the house.\textsuperscript{20} Joseph and Carrie Ventura, who lived about the same distance from the plant and the conveyer as the Milliouses, reported similar harm.\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{12} See id. at 8-9.
\item \textsuperscript{13} Id. at 10.
\item \textsuperscript{14} See Boomer v. Atlantic Cement Co., Inc., 72 Misc. 2d 834, 340 N.Y.S.2d 97 (1972).
\item \textsuperscript{15} Id. at 8. Cement is composed of various minerals that are quarried, heated in a kiln, and ground into a fine powder. The primary environmental impacts of this process are air pollution (especially particulates) and vibration from the quarrying; a significant amount of solid waste is also generated.
\item \textsuperscript{16} Id. at 10.
\item \textsuperscript{17} Telephone interview by Sky Stanfield with Mr. Boomer and Mr. Millious, plaintiffs (Sept. 2004).
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Farber, supra note 5, at 9.
\item \textsuperscript{20} Telephone interview by Sky Stanfield with Mr. Boomer and Mr. Millious, plaintiffs (Sept. 2004).
\item \textsuperscript{21} See Farber, supra note 5, at 9.
\end{itemize}
Noise from the blasting was also a serious problem, causing major vibrations and sometimes panicking small children who lived in the area. One woman's testimony vividly portrays the effects of the blasting:

Well, we were sitting on the floor in the living room, playing a game when they had this awful tremble, and to me the house seemed like the whole house was rocking, and I would see the lamp shades vibrating and it just scared the children. That was one of the times that they just got up and started to run for the basement.... I heard the big blast, but the whole house just rocked, and I just wondered if it was going to stop.\(^2\)

In short, the neighbors had all the disadvantages of living right on top of the San Andreas fault, without the California climate as compensation!

According to Mr. Boomer, he tried on numerous occasions to reach some agreement with Atlantic prior to bringing suit.\(^2\)\(^3\) He recalls that they wanted to shut his business down and have him come work for the company as a machinist. But Mr. Boomer said he did not trust them “as far as he could throw them.”\(^2\)\(^4\) Mr. Millious recalls that the company denied that the dust was even coming from the plant, blaming it on a source across the river.\(^2\)\(^5\) Even today, he sounds agitated when he discusses the company's response to his complaints. In an effort to remedy this situation, the Boomers, the Milliouses, the Venturas, and other neighbors filed a common law nuisance suit against Atlantic.

\section*{B. Background on the Law of Nuisance}

The law of nuisance has an ancient history and, according to some, an inscrutable nature. Unfortunately, providing a crisp description of nuisance law is not easy. While the general concept of nuisance liability is reasonably clear, the details quickly become fuzzy. According to the leading torts hornbook,

There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word “nuisance.” It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition.\(^2\)\(^6\)

\begin{itemize}
\item \(^2\) Id.
\item \(^3\) Telephone Interview by Sky Stanfield with Mr. Boomer, plaintiff (Sept. 2004).
\item \(^4\) Telephone interview by Sky Stanfield with Mr. Boomer and Mr. Millious, plaintiffs (Sept. 2004).
\item \(^5\) Id.
\item \(^6\) W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 616 (5th ed. 1984). One source of confusion is the distinction between public and private nuisances. A private nuisance is an ordinary tort. A public nuisance is an interference with a public right, for example, in the early cases, interference with a public road. For a detailed discussion on the public nuisance doctrine, see Robert Abrams & Val Washington, The Misunderstood Law of Public
The doctrine dates back seven centuries, and was well-established by the time of Edward III, apparently becoming more complex as it developed. 27

The crux of a private nuisance is an unreasonable and substantial interference with the use of land. 28 According to some authorities, even if the defendant's conduct was reasonable, liability can be found where the defendant interfered with the use of the plaintiff's land to the extent that justice requires compensation. 29 "Unreasonable interference" sounds like a straightforward concept. Still, there is considerable confusion about whether to focus on the reasonableness of the defendant's conduct or the unreasonableness of the impact on the plaintiff, about whether the utility of the defendant's activity is relevant to liability or only to remedy, and about how important that factor might be in either context.

Once a private nuisance has been identified, the question of remedy arises. Because land is considered unique and irreplaceable, the typical remedy in real estate disputes is an injunction. In the nuisance context, however, courts have been concerned about the possible adverse effects of injunctive relief. The fear is that an injunction may suppress an activity important to society, though burdensome to neighbors. For this reason, many courts will "balance the equities" in determining whether to issue an injunction. 30 This is said to have become the prevailing view by the late 1930s. 31 Yet other courts viewed an injunction as mandatory when a nuisance exists and damages fail to provide an adequate remedy. 32 New York generally adhered to this second school of thought. Whether to balance the equities in determining the appropriate remedy was, of course, a key issue in Boomer.

Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer, 54 ALB. L. REV. 359 (1990). Today, public nuisances are often defined by statute. Normally, the government brings actions to abate a public nuisance, but a private citizen who suffers "special damage" from a public nuisance also has standing to abate the nuisance. The same conduct can constitute a public nuisance and a private one, and sometimes the same plaintiff brings an action under both theories. It is easy to understand the reasons for confusion between a private nuisance suit and a public nuisance suit brought by a plaintiff with special damages. Fortunately, with the exception of a single case discussed later (Spur Industries), this discussion will focus only on private nuisances.


28. KEETON, supra note 26, at 623, 625.
29. Id. at 629.
30. Id. at 631.
31. See Lewin, supra note 27, at 206.
32. KEETON, supra note 26, at 632, 640.
The Second Restatement of Torts made a strong effort to bring order to this somewhat unsettled area of the doctrine.\textsuperscript{33} The Restatement defines an interference as unreasonable if “the gravity of the harm outweighs the utility of the actor’s conduct.”\textsuperscript{34} An injunction would seem appropriate in those cases. Where the balancing test is not met, the Restatement allows damages when “the harm caused by the conduct is serious and the financial burden of compensating this and similar harm to others would not make the continuation of the conduct not feasible.”\textsuperscript{35} Thus, issuance of an injunction requires a balancing test, but the test for obtaining damages is easier to satisfy.

The extent to which the courts have followed the Restatement’s view of nuisance is unclear. In particular, the question of how the utility of the defendant’s conduct enters into the analysis has not yet been settled. As of 1990, eight states had adopted the Restatement’s approach completely, seven had adopted the balance of utilities test without expressly considering the proviso allowing compensation for serious harm, and the remaining states were happy to roll all of the relevant factors into a general “reasonableness” test with little indication of the weight carried by any individual factor, such as the social utility of the defendant’s conduct.\textsuperscript{36} By and large, nuisance doctrine is still a bit muddy, even if it is not the horrendous quagmire portrayed by some commentators.

When the plaintiffs filed suit in \textit{Boomer}, they walked into a highly contested area of legal doctrine. The economic interest of the defendant, a major corporation, obviously was much greater than the market value of the plaintiffs’ few acres of commercially marginal land. The key issue in the \textit{Boomer} litigation was whether this factor should enter into a determination of liability or remedy.

\textbf{C. The Road to the Court of Appeals}

The trial court resolved the liability issue at a fairly early stage of the litigation, leaving the focus on the parties’ remedial interests. The trial judge found that the plaintiffs had established the existence of a nuisance:

Although the evidence in this case establishes that Atlantic took every available and possible precaution to protect the plaintiffs from dust, nevertheless, I find that the plaintiffs have sustained the burden of proof that Atlantic in the operation of its cement plant... created a nuisance insofar as the lands of the plaintiffs are concerned. The

\begin{footnotes}
\item[33] Restatements are summaries of the law by the American Law Institute, a widely respected professional body. Restatements are not official legal documents, but courts often follow them.
\item[34] \textit{RESTATEMENT (SECOND) OF TORTS} § 826(a) (1979).
\item[35] \textit{Id.} at § 826(b).
\item[36] See Lewin, \textit{supra} note 27, at 234. The Restatement approach has been more popular in cases involving diversion of surface waters. See \textit{id.} at 230-33.
\end{footnotes}
discharge of large quantities of dust upon each of the properties and excessive vibration from blasting deprived each party of the reasonable use of his property and thereby prevented his enjoyment of life and liberty therein.\textsuperscript{37}

Note that the trial court's liability analysis focused on the plant's impact on its neighbors, rather than whether the social utility of the plant justified the impact.

Although the court's liability finding vindicated the plaintiffs, the plaintiffs were not so lucky when it came to the remedy. Here, the social utility of the plant loomed large. Citing Atlantic's "immense investment in the Hudson River Valley, its contribution to the Capital District's economy, and its immediate help to the education of children in the Town of Coeymans through the payment of substantial sums in school and property taxes,"\textsuperscript{38} the trial judge refused to enter an injunction and merely awarded damages. The damage award was not generous. The trial judge awarded the plaintiffs a total of $535 per month in damages for past losses, but suggested that the parties settle the case for the amount of the permanent loss of market value, which he calculated as $185,000 for all the plaintiffs combined.\textsuperscript{39}

The plaintiffs appealed the trial court's denial of injunctive relief, but the appellate division affirmed in a brief opinion.\textsuperscript{40} The appellate division found no abuse of discretion in the trial court's denial of injunctive relief, taking into account the "zoning of the area, the large number of persons employed by the defendant, its extensive business operations and substantial investment in plant and equipment, its use of the most modern and efficient devices to prevent offensive emissions and discharges, and its payment of substantial sums of real property and schools taxes."\textsuperscript{41} Remaining dissatisfied, the plaintiffs appealed again, setting the stage for the Court of Appeals' famous opinion.

In seeking review, the plaintiffs launched a battery of challenges to the lower courts' rulings in their Court of Appeals case. The first half of their argument focused on the injunction issue:

I. The trial court, as well as the Appellate Division, erred as a matter of law by depriving plaintiffs of their property rights when the courts failed to grant an injunction against the nuisances created by the Atlantic Cement Company, Inc.

II. The trial court and Appellate Division in our instant cases have devised a new "economic utility doctrine," which if left unchallenged

\textsuperscript{38} Id. at 114.
\textsuperscript{39} Id. at 115-16.
\textsuperscript{40} Boomer v. Atlantic Cement Co., 294 N.Y.S.2d 452 (1968).
\textsuperscript{41} Id. at 453.
will leave in jeopardy the rights of small property owners throughout the State of New York.\footnote{42}{These points of counsel are quoted in the official reporter. Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 870 (1970) (citations omitted).}

The injunction was not, however, the only focus of the plaintiffs' attack. The second half of their argument focused on the question of how to measure damages:

III. The trial court and the Appellate Division erred in their decision by leaving plaintiffs with an inadequate remedy at law, which results in a multiplicity of suits....

V. The temporary damages granted by the trial court to plaintiffs were inadequate.

VI. The reasonable market value of the real property of plaintiffs and of the business known as the Coach House Restaurant as well as the permanent damage found by the trial court were grossly inadequate as a matter of law.\footnote{43}{Id.}

It is notable how much the plaintiffs emphasized the issue of damages in their argument. As it turned out, the damage issue received less attention from the Court of Appeals in this round of the litigation but then dominated the proceedings on remand.

II. THE BOOMER DECISION

The New York Court of Appeals, the highest court in the state, ruled against the plaintiffs. It rejected their effort to obtain injunctive relief because their damages were so small compared with the cost of shutting down the plant, but the court did leave the door open for a damage award. After briefly considering the plaintiffs' claims on appeal, this section will analyze the opinion in depth and trace its fascinating aftermath. The door left open by the Court of Appeals turned out to be significant because it enabled a generous method of damage calculation on remand. Thus, the litigation was reasonably successful in compensating the plaintiffs for their harm. It had little apparent impact, however, on the pollution caused by the plant.

A. The Opinion

Boomer attracted attention in part because of its relationship to broader social and environmental trends during the time period, but the court made every effort to disassociate the case from those trends. The case was argued on October 31, 1969, and it was decided on March 4, 1970. This was a period of great interest in environmental law in general...
and air pollution in particular, as demonstrated by the passage of the federal Clean Air Act of 1970.\textsuperscript{44} Despite these important developments in environmental law, the court remained focused on the specific facts and issues raised in the \textit{Boomer} case.

Judge Francis Bergan wrote the majority opinion in \textit{Boomer}. He was a career judge who was born in 1902 and was elected as a city judge in 1929, only five years after passing the bar. Judge Bergan's opinion began with the pivotal question of how much the court should seek to advance the public policy of air pollution control, as opposed to resolving a private dispute between neighbors. Judge Bergan's majority opinion firmly set aside the public's interest in environmental quality; he characterized the litigation as involving individual property owners challenging the operation of a single plant. He considered whether the case should merely be resolved between the parties as fairly as possible or whether it should be used as a vehicle to achieve broader public policies. He maintained that the dispute should be viewed as a purely private dispute:

\begin{quote}
A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.\textsuperscript{45}
\end{quote}

The court considered the larger problem of pollution to be well beyond judicial competence to address:

Effective control of air pollution is a problem presently far from solution even with the full public and financial powers of government.... This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant - one of many - in the Hudson River valley.\textsuperscript{46}

Thus, the court carved away the larger public issues and trimmed the case down to a dispute between neighbors. It reduced the controversy to a conflict not much different from a quarrel between homeowners about an overhanging tree-limb.

Having eliminated the public interest aspect of the case, the court turned to the issue of how to remedy the plaintiffs' private injury. The strongest argument against issuing an injunction was the large economic disparity between the stakes of the parties. The court stated, however,

\begin{footnotesize}
\textsuperscript{44} Clean Air Act, 42 U.S.C. §§ 7401-7515 (2000).
\textsuperscript{45} \textit{Boomer}, 257 N.E.2d at 871.
\textsuperscript{46} \textit{Id.} at 871-72.
\end{footnotesize}
that the injunction could not be denied on this basis without overruling a line of previous New York decisions. \footnote{47} Nor was the court attracted to the idea of a delayed shut-down order to allow the defendant to abate the nuisance, as it thought such an order would only put pressure on the defendant to settle without doing anything to improve pollution control at the plant. The court observed that the parties could settle this private litigation at any time if defendant paid enough money. \footnote{48} The court was skeptical that the defendant, as a single company in a large industry, could do much to accelerate the technological advances needed for effective control of the problem.

The court decided to grant the injunction unless the defendant paid plaintiffs such permanent damages, as fixed by the court, that seemed to do justice between the contending parties. \footnote{49} To ensure against later litigation between the parties or future owners of the property involved, the court required the judgment to contain a term providing that the payment by the defendant and the acceptance by the plaintiffs of permanent damages should be in compensation for a servitude on the land. \footnote{50} Without specifically addressing the measure of damages, the court remarked that the lower court could reconsider the amount of damages. \footnote{51}

Judge Matthew Jasen dissented, \footnote{52} stressing the seriousness of the air pollution problem and the contribution of dust from cement plants to that problem. He argued that the majority was, in effect, licensing a continuing wrong: “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.” \footnote{53} He also argued that giving the cement company a servitude was essentially allowing it to exercise the power of eminent domain, but for its own private benefit rather than for public use. \footnote{54} Having been well aware of the plaintiffs’ presence when it opened the plant, Judge Jasen asserted that the company should have the burden of coming up with a technological solution within eighteen months, or else be subject to an injunction. \footnote{55}

\begin{itemize}
\item \footnote{47} Id. at 872-73.
\item \footnote{48} Id. at 873.
\item \footnote{49} Id.
\item \footnote{50} Id. at 875.
\item \footnote{51} Id.
\item \footnote{52} Judge Jasen’s sparse court biography indicates little, beyond the facts that he attended the Harvard University Civil Affairs School rather than law school, and that he had served as a military judge in occupied Germany and as a state trial judge before joining the Court of Appeals.
\item \footnote{53} Id. at 876.
\item \footnote{54} See id. at 877.
\item \footnote{55} Id.
\end{itemize}
B. Questions of Judicial Craftsmanship

Quite apart from the question of whether it reached the right result, the majority opinion was less than a model of judicial craftsmanship. The majority's treatment of precedent was quite unsatisfactory and received little correction from the dissent. The main point on which the majority and dissent agreed was that prior New York law would have entitled the plaintiffs to an injunction against operation of the plant. The majority cited *Whalen v. Union Bag & Paper Co.* as authority for the rule that courts must grant an injunction whenever the damage resulting from a nuisance is substantial, viz $100 a year. But New York case law was not as unequivocal as the Boomermajority suggested. Even in *Whalen* itself, the court said that "[i]t is not safe to attempt to lay down any hard and fast rule for the guidance of courts of equity in determining when an injunction will issue."

The court cited three other cases as following the *Whalen* rule. Those cases upheld the issuance of injunctions but gave little indication that an injunction would be required when the effect would be to render a large industrial facility worthless. Instead, the earlier opinions had made it clear that those cases did not involve drastic economic impacts on the defendant.

The first of the three earlier cases involved a plant discharging sulfur dioxide fumes, and the court held that the facts warranted injunctive relief despite the expense of compliance by the defendant. However, the modified injunction did not involve an undue burden on the defendant:

This is not a case where the defendant cannot carry on its business without injury to neighboring property, for all damage can be avoided by the use of hard coal, as is done by one of its competitors in the same kind of business in the same locality, or perhaps by the use of some modern appliance such as a smoke consumer, although either would involve an increase in expense. It is better, however, that profits should be somewhat reduced than to compel a householder to abandon his home, especially when he did not come to the nuisance, but was there before.

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56. 101 N.E. 805 (1913).
57. *Boomer*, 257 N.E.2d at 872.
59. *Whalen*, 101 N.E. at 805. The *Whalen* court quoted language from an Indiana case basically stating that, before locating a plant where it would discharge large amounts of pollutants into a small stream, the defendant should take into account the rights of downstream owners. *Id.* at 806-07.
61. *Id.* at 50.
Requiring the defendant to use available methods of pollution reduction, which were apparently already in use by competitors, can hardly be considered a harsh remedy.

The second case cited by the Boomer court involved massive pollution of a stream by a salt manufacturer. Again, the relief was not a shut-down order. Instead, the court was careful to outline more flexible injunctive relief:

It does not follow from these views that, if upon another trial the facts are unchanged, the defendant and the other salt manufacturers will be compelled to make such terms as they can, for a court of equity, with its plastic powers, can require, as a condition of withholding a permanent injunction, the construction of a reservoir on the upper sources of the stream, to accumulate water when it is plentiful for use in times of scarcity, and thus neutralize the diminution caused by the manufacture of salt. The court may also require, on the like condition, greater care in preventing the escape of salt water and salt substances into the stream, as the defendant attempted to do during the trial, and thus prevent or minimize the pollution.

In modern terms, what both of these decisions require is that the defendant uses the best available technology, not that the plant be shut down.

The third case involved a brick kiln that emitted sulfuric acid fumes, killing hundreds of a neighbor's trees. The court held that an injunction was warranted, even though the trees were merely ornamental rather than having commercial value. But the circumstances were a far cry from Boomer:

We know that material for brick making exists in all parts of our State, and particularly at various points along the Hudson river. An injunction need not therefore destroy defendant's business or interfere materially with the useful and necessary trade of brick making. It does not appear how valuable defendant's land is for a brick-yard, nor how expensive are his erections for brick-making. I think we may infer that they are not expensive. For ought that appears, his land may be put to other use just as profitable to him. It does not appear that defendant's damage from an abatement of the nuisance will be as great as plaintiffs' damages from its continuance.

Hence, the court said, this was not a case where an injunction should be denied on account of the serious consequences to the defendant. Thus, while the court issued an injunction requiring that the defendant

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63. Id. at 148.
64. Campbell v. Seaman, 63 N.Y. 568, 576 (1875).
65. See id. at 583-86.
66. Id. at 586.
67. Id.
discontinue the previous use of the property, unlike the other two cases, the injunction would not have an especially harsh economic impact on the defendant.

Fairly read, these cases stand for the proposition that the default remedy in a nuisance case is injunctive relief. These cases also make it clear that an injunction may be appropriate even if the monetary benefit to the plaintiff is smaller than the monetary cost to the defendant. But they do not seem to foreclose the possibility that, in extreme cases, hardship to the defendant or the public might justify denial of an injunction in a nuisance case.\(^6\) As a result, the *Boomer* court should not have leapt to the conclusion that these cases mandated an injunction in the case before it.

Considering these three cases, the *Boomer* opinion's analysis of precedent was clumsy at best. Moreover, it is not completely clear how the outcome in *Boomer* itself was supposed to relate to these earlier cases. On a first reading of the opinion, *Boomer* appears to overrule the *Whalen* rule in favor of a damage remedy for nuisance. But on a closer reading, *Boomer* seems to leave *Whalen* generally intact. The court determined that the action of the lower courts was a departure from a rule that had become settled, but maintained that to follow that rule literally in these cases would result in an immediate closure of the plant.\(^6\) The court then discussed two alternatives to avoid this result: postponing the injunction or conditioning it on the defendant’s failure to pay damages.\(^7^0\) Ultimately, the court ruled that on remand the lower court should grant a temporary injunction, to be vacated once the defendant paid the court-determined permanent damages to the plaintiff.\(^7^1\) The court could have directly awarded damages, but instead the court seemed to feel compelled to pay lip service to the *Whalen* rule that the plaintiffs were entitled to some form of injunctive relief. Nowhere did the court explicitly state that it was overruling *Whalen* or any other opinion. Thus, one tenable reading is that *Boomer* merely placed a gloss on the *Whalen* rule: the 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 conditional on a damage payment.

The *Boomer* opinion is also cursory in its discussion of balancing the equities. It refers to one third-party interest favoring the defendant - the number of employees at the plant, but it ignores the third-party interest

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68. See Halper, supra note 58, at 353-54: “It is simply not possible to read New York nuisance law as having internalized a general view that large-scale industry is liable to be shut down at the behest of a smallholder, which required modification through balancing tests that became ever more incoherent until the rescue of nuisance doctrine by *Boomer*.”
70. *Id.*
71. *Id.* at 875.
favoring the plaintiff - the regional impact of the defendant's air pollution. This seems like an obvious inconsistency. Moreover, the *Boomer* opinion fails to consider the possibility of equitable relief that would mitigate the harm to the plaintiffs, such as a lower level of operation, changes in the scheduling of blasting, construction of barriers between the plaintiffs' land and the plant, and so forth. Presumably, the court assumed that none of these remedies would be feasible or effective. However, nothing in the opinion indicates that these alternatives were even considered. The court's disposition also left the lower courts without a clear indication of how to handle the remand. The court invited a further consideration of damages on remand, but with no explanation of why the previous determination was unsatisfactory or what standards should be used.

The sloppiness of the opinion suggests that the court did not view the case as particularly important. If this is true, then the amount of attention scholars have since given the case must have come as something of a surprise. Perhaps, as one commentator suggests, the opinion's shortcomings actually made the case more attractive to teachers and scholars: "The opacity of the court's opinion leaves room for provocative questioning and dialogue in the classroom and for more refined analysis in academic journals, especially by the economically-oriented commentators...."72

C. The Aftermath

As it turns out, the proceedings on remand suggest that the Court of Appeals' decision was actually more favorable in its ultimate effect on the plaintiffs than one might have expected. Taking advantage of the Court of Appeals' open-ended invitation to reconsider damages, the lower courts were generous in their appraisal of the plaintiffs' claims. On remand, the trial judge agreed with the plaintiffs that damages should not be limited to the decrease in fair market value. On the other hand, he rejected their theory that damages should be set at the level that the plaintiffs would have demanded before they agreed to lift a permanent

72. Lewin, *supra* note 27, at 221. Those who consider *Boomer* insensitive to environmental concerns should consider a later Idaho decision, Carpenter v. Double R Cattle Co., Inc., 701 P.2d 222 (1985). The Idaho court held that no remedy, not even the payment of damages, is available if the utility of the defendant's activity outweighs the harm to the plaintiff. *Id.* at 227-28. It observed that "Idaho is sparsely populated and its economy depends largely upon the benefits of agriculture, lumber, mining and industrial development." *Id.* at 228. To make damages available would "place an unreasonable burden upon those industries." *Id.* The dissenting judge tartly observed that "[i]f humans are such a rare item in this state, maybe there is all the more reason to protect them from the discharge of industry." *Id.* at 229. At least *Boomer* offered the plaintiffs a damage award, though the stingy estimate of damages by the trial court left some doubt about the significance of this "consolation prize."

injunction. He considered this unduly punitive. In setting damages, he
appeared to seek a middle ground. The judge considered the above-
market prices that Atlantic had spent in acquiring other property in the
neighborhood, as well as the conflicting expert testimony about market
value. All but one of the cases settled before the judge fixed the amount
of damages. In the one remaining case, he found the decline in market
value to be $140,000 and awarded $175,000 in damages.\footnote{Id. at 844.}

The appellate division upheld this amount as a reasonable estimate
of the loss of market value due to the servitude.\footnote{Kinley v. Atlantic Cement Co., 42 A.D.2d 496, 498 (1973).} Interestingly, all five of
the judges joined a concurring opinion by Judge Herlihy,\footnote{It seems odd that a \textit{unanimous} concurrence was filed. Presumably another judge was
assigned to write the opinion (perhaps, as in some courts, in advance of the oral argument), and Herlihy felt more strongly about the case and was willing to contribute a more involved analysis, which the other judges then joined.} arguing that
the defendant should have to pay more than an independent third-party
would have been willing to pay for the land. The court commented on the
much higher prices available to a seller when the buyer was trying to
assemble a package of land as part of a development project. The court
saw this potentially higher price as relevant to the determination of
damages:

\begin{quote}
While such sales are sometime referred to in a derogatory manner as
hold-ups, there is nothing which would seem immoral or illegal in
assessing value as between private citizens upon a consideration of
business facts. The plaintiffs have not created the situation which
required the necessity for the defendant to obtain a legal interest in
the fee simple absolute title of the plaintiffs' premises. While the
public interest may dictate that the defendant be offered an
opportunity to acquire a servitude, there is no apparent reason to
assume that the purchase is being either made by or on behalf of the
public, and accordingly the value of the servitude should reflect the
private interests of the parties to the lawsuit.\footnote{Kinley, 42 A.D.2d at 499.}
\end{quote}

Although it has not received much attention from commentators, the
damage determination is intriguing. The question was how to calculate
the value of the land absent the nuisance, which constitutes the baseline
for establishing the damages. The most obvious answer was the amount
that the plaintiffs could have gotten if they had put their property on the
market before Atlantic was on the scene by selling to another
homeowner or small business. But this measure of damages would have
provided no incentive for the defendant to seek voluntary transactions
with its neighbors. In effect, this stingy measure of damages would have
given a neighboring landowner the option of acquiring the plaintiffs' land
at market value without making any effort to buy it first. A second

\footnote{Id. at 844.}
\footnote{Kinley v. Atlantic Cement Co., 42 A.D.2d 496, 498 (1973).}
\footnote{It seems odd that a \textit{unanimous} concurrence was filed. Presumably another judge was
assigned to write the opinion (perhaps, as in some courts, in advance of the oral argument), and Herlihy felt more strongly about the case and was willing to contribute a more involved analysis, which the other judges then joined.}

\footnote{Kinley, 42 A.D.2d at 499.}
measure of damages would be the amount that Atlantic would have been willing to pay to lift the injunction. But if that was the measure of damages, the courts might just as well have given the plaintiffs an unconditional injunction and left Atlantic to bargain with them on its own. Thus, the trial court seems to have been right to reject both of these possible measures of damages.

The lower courts adopted a more nuanced measure of damages, apparently based on the premise that Atlantic should have purchased a buffer zone for its operations. As in establishing any large package of real estate, Atlantic would have had to pay a premium to get the land it needed. If the court had merely required Atlantic to pay what an ordinary buyer would have been willing to pay, it would have unjustly enriched Atlantic in the amount of the premium it would otherwise have had to pay for the buffer zone. Thus, the damage award was 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.\(^7\)

The plaintiffs were not completely satisfied with the outcome. To this day, Mr. Boomer and Mr. Millious believe that the judge should have shut the plant down entirely.\(^7\) Mr. Millious complains that he ended up with a smaller house on less land with a bigger mortgage.\(^8\) Even though he now lives four or five miles from the plant, he says that there is still dust in the air occasionally.\(^8\) Mr. Boomer sold his land to Atlantic at a price negotiated by his lawyer, and then moved his business a few miles away.\(^8\) He still believes that the judge should have "taken the bull by the horns" and issued the injunction.\(^8\)

In contrast, David Duncan, the lawyer who represented all but one of the plaintiffs, is more favorable in his assessment of the outcome of the case. He feels that "upon reflection, it was fair."\(^8\) Overall, he thinks

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\(^7\) Some considerations that might support restitution in this situation are discussed in James Gordley, The Purpose of Awarding Restitutionary Damages: A Reply to Professor Weinrib, 1 THEORETICAL INQUIRIES IN LAW 39 (2000). Gordley mentions Boomer, but not surprisingly, seems unaware of the restitutionary nature of the damages that were ultimately assessed in the lower courts. See id. at 47-49. Gordley mentions an interesting English case, involving violation of a covenant rather than a nuisance, where the court awarded such damages as "might reasonably have been demanded by plaintiff" if the defendant had tried to obtain advance permission. Id. at 49. Gordley aptly refers to these damages as a "pragmatic effort to deal with the problem" while avoiding windfall profits to the plaintiff or giving the defendant a bargain-basement price for the plaintiff's acquiescence. Id. at 50. Much the same seems to be true of the damages awarded in Boomer.

\(^8\) Telephone interviews by Sky Stanfield with Mr. Boomer and Mr. Millious, plaintiffs (Sept. 2004).
"virtually all of the plaintiffs got very good settlements for the value of their land." He was particularly happy with the outcome for one family, the Kenleys, who were able to get nearly the entire value of their house in exchange for an equitable easement that was never properly filed by the company. His recollection is that the case actually led the state to pursue an enforcement action against the company that resulted in some improvements in pollution control.

According to the long-time Technical Manager of the plant, Atlantic would not have moved even if the court had issued an injunction. In his opinion, if anyone relocated, it would have been the plaintiffs. Atlantic belatedly purchased most of the plaintiffs' properties to create a buffer zone, and several of the plaintiffs moved away after receiving damages. Nonetheless, at age 80, Mr. Boomer himself still runs a business in the area.

After the damage award, Atlantic became involved in litigation with its insurance company over whether its policy covered the damages. Fourteen years after the Court of Appeals's initial decision, the same court ruled in Atlantic's favor in the insurance litigation. By that time, Atlantic had paid out a total of $710,000 in damages and settlements, about four times more than the damage estimate mentioned in the first Court of Appeals's decision. As part of a settlement with the insurance company, Atlantic agreed to convey quitclaim deeds and easements to the insurance company for some of the property that Atlantic had acquired through settlements with some of the plaintiffs. Because the parties were unable to agree on the language of the easements, the insurer ultimately got a court order eliminating language in the easements that would have authorized Atlantic to render the premises uninhabitable, unmarketable, and not useable for any purpose. In 1989, some twenty years after the Boomers originally filed suit, the litigation over the property finally came to an end.

On one point the Court of Appeals was indubitably right: Atlantic's environmental problems were not going to be solved within the eighteen

85. Id.
86. Id.
87. Id.
88. See Mogill, supra note 7, at 9-10.
89. Id.
90. Telephone interview by Sky Stanfield with Mr. Boomer and Mr. Millious, plaintiffs (Sept. 2004).
91. Id.
94. Atlantic Cement Co., Inc. v. Fidelity & Casualty Co. of New York, 547 N.Y.S.2d 287, 288-89 (1989). Thus, the Boomer court seems to have been wrong if it assumed that the nature of the easements would be self-explanatory.
months following the decision. On the contrary, like many other pollution problems, this one dragged on with some improvement but no definitive solution. EPA has been involved in complex rule-making dealing with the cement industry for many years. The D.C. Circuit remanded EPA’s first set of standards in 1973, but EPA succeeded in getting its standards approved two years later. After setting those standards, EPA’s focus shifted to the hazardous air pollutants emitted by cement plants, such as hydrochloric acid, dioxins, and metals. In 2000, the D.C. Circuit upheld standards requiring the industry to use the “maximum achievable control technology” for these hazardous pollutants. Later revisions of the rule stretched into 2002. This rulemaking process contained useful evidence of the significance of cement plant emissions and the costs of controlling them.

In the early 1990s, Blue Circle Industries, a British company that had acquired Atlantic in 1985 for $145 million, introduced new technology to control dust emissions. Nevertheless, groups assessing pollution problems scrutinized the plant through the 1990s, and the plant often appeared near the top of lists of regional polluters. According to a 1997 report, Blue Circle’s annual emissions included ten thousand tons of sulfur dioxide (the seventh-highest in the state of New York), approximately 11,000 tons of nitrogen oxide (the highest in the state), and 954 tons of particulate matter (the third-highest).

In 2001, Blue Circle sold the facility to Lafarge S.A. In 2002, the plant reported emissions of 142,000 pounds of hydrochloric acid, 29 pounds of lead, 37 pounds of mercury compounds, and small amounts of dioxins. In 2000, the state environmental agency, which had issued small fines against the company for high levels of dust emissions and

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99. The EPA claims that the rule will reduce emissions of air toxics by 90 tons per year, particulate emissions by 5,200 tons per year and hydrocarbons from new kilns by 220 tons per year, at an initial capital cost of $108 million and a recurring annual cost of $37 million. EPA, Fact Sheet: Final Air Toxics Rule for Portland Cement Manufacturing Plants, available at http://epa.gov/ttn/atw/pcem/portf_fs.html (last visited April 8, 2005).
101. See LINKman Improves Quality at Raven; LINKman Process Control and Optimization System at Blue Circle Cement’s Ravena Plant, WORLD CEMENT, Jan. 1992, at 34.
103. Id.
other violations, said it was investigating complaints by local residents regarding dust deposits and respiratory problems they blamed on the plant. The present-day equivalents of Oscar and June Boomer, Jill Sampson and her husband Lott Charles, live less than a mile from the plant. Lott Charles complained of their daughters’ year-long “deep, barking cough, which is really alarming.... There is a peculiar dust that coats things around here. It ate the finish off my porch chairs.” It appears that the plant’s environmental harms and impact on neighbors have not yet been resolved.

III. THE THREE FACES OF BOOMER

Part of Boomer’s fame is due to its dramatic facts and its influence on other courts. But Boomer has also attracted attention because it raises deep doctrinal and theoretical issues. We will focus on three of those issues in this section.

The first issue relates to remedies for environmental violations. The question Boomer raises is whether balancing the equities is limited to common law cases, or whether that process applies to all environmental injunctions. Nuisance actions are only the tip of the iceberg in terms of environmental litigation. Can courts use their equitable discretion to postpone or exempt polluters from statutory requirements? Or do environmental concerns trump economic interests in framing remedies against polluters? Obviously, this is a question of some importance in an era when so many environmental statutes authorize injunctions as a remedy against violators.

The second issue is whether the Boomer court was right to favor damages over an injunction on economic grounds. Legal scholars have devoted great attention to the economic implications of remedies, and Boomer has figured prominently as an example. At first blush, given the disparity in economic interests between the Boomer plaintiffs and the defendant, the economic answer to the case may seem obvious. It turns out, however, that the economic analysis is considerably more involved, and the conclusions are less clear.

The final issue is whether the common law continues to have any relevance in today’s environmental law, given the predominance of environmental statutes. The New York Court of Appeals decided Boomer at the beginning of what some consider to be the “golden age” of environmental law, when legislatures enacted almost all of today’s

106. Id. Currently, LaFarge is proposing to burn millions of tons of tires as fuel in its cement kilns. Matt Pacenza, Tire Burning Plan Draws Critics; Kinderhook Residents Downwind of Proposed Site Raise Health, Habitat Concerns, Times Union (Albany, N.Y.), Feb. 8, 2004, at D1.
complex regulatory schemes. The *Boomer* court cut back on the scope of its inquiries in deference to the state's statutory pollution scheme. A few years later, the U.S. Supreme Court abolished the federal common law of nuisance in favor of a purely statutory approach. Today, environmental law courses focus almost exclusively on statutory regulation, with the common law receiving much less attention. How much room, one might well wonder, is left for the common law today? Was the *Boomer* court correct in thinking that the common law has no further contribution to make to environmental policy?

A. *Boomer* and Equitable Discretion

We begin with the first of these three issues, examining *Boomer* through the lens of remedies law. *Boomer* is a notable affirmation of the discretionary nature of equitable remedies and the judge's power to balance the equities in crafting a remedy. This approach to the issuance of injunctions originated in cases where courts were the source not only of the relief but also of the underlying legal rule. Today, environmental law is largely based on statute. Often, these statutes authorize courts to issue injunctions against violators. How should the *Boomer* tradition of equitable discretion operate in this new setting? Should traditional canons of equitable discretion apply to statutory injunctions, or should *Boomer* be limited to the common law context?

This issue was presented to the Supreme Court in dramatic form in *Tennessee Valley Authority v. Hill,* the famous snail darter case. Having found that completion of a multimillion dollar dam would threaten an endangered species, Chief Justice Burger observed that a judge is "not mechanically obligated to grant an injunction for every violation of law." That statement calls to mind the traditional doctrine of equitable balancing, and seemed to signal that the Court was going to deny the injunction in *Boomer*-like terms because of the huge investment in the dam. But then the Court took a different turn:

But these principles take a court only so far. Our system of government is, after all, a tripartite one, with each branch having certain defined function.... [It is] the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive

107. For discussions of this problem, see Peter Shane, Rights, Remedies and Restraint, 64 CHI.-KENT L. REV. 531 (1988); Daniel A. Farber, Equitable Discretion, Legal Duties, and Environmental Injunctions, 45 U. PITZ. L. REV. 513 (1984); Zygmunt Plater, Statutory Violations and Equitable Discretion, 70 CAL. L. REV. 524 (1982).
109. Id. at 193.
to administer the laws and for the courts to enforce them when enforcement is sought.\textsuperscript{110}

Because Congress had spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, the \textit{TVA v. Hill} Court declined the request to shape a reasonable remedy.\textsuperscript{111}

\textit{TVA v. Hill} seemed to establish a firm rule in favor of statutory injunctions, but the Court soon muddied the picture in a Clean Water Act decision, \textit{Weinberger v. Romero-Barcelo}.\textsuperscript{112} The facts were somewhat offbeat compared to the normal pollution case, which is one of the reasons the case is hard to interpret. In \textit{Weinberger}, the district court held that the Navy needed to obtain a Clean Water Act permit before conducting certain exercises on the coast of Puerto Rico.\textsuperscript{113} The theory was that by foreseeably releasing munitions into the sea, the Navy was discharging "pollutants" from point sources (muzzles and bomb bays), thereby triggering the permit requirement. The trial judge refused to issue an injunction, however, viewing the violation as purely a technical one with no adverse environmental impact.\textsuperscript{114} The question before the Court was whether the judge had discretion to deny the injunction while the Navy applied for a permit, or whether \textit{TVA v. Hill} required the judge to enjoin the statutory violation.

Justice White's opinion for the Court began with reminders of the broad discretion of equity courts.\textsuperscript{115} He distinguished \textit{TVA v. Hill} as an exceptional case in which only an immediate injunction could accomplish the goals of the statute.\textsuperscript{116} In contrast, he viewed such an injunction as unnecessary to achieve the goals of the Clean Water Act. After all, the purpose of the statute was clean water, not the issuance of permits for their own sake. And unlike the Endangered Species Act, the Clean Water Act displays a concern about feasibility and practicality in many of its provisions, making it more legitimate for a court to consider these factors in issuing an injunction.\textsuperscript{117} The sole dissenter, Justice Stevens, criticized the Court for granting an "open-ended license to federal judges to carve gaping holes" in the statutory scheme.\textsuperscript{118}

\textit{Weinberger} may look like a revival of \textit{Boomer} in the statutory context. The court emphasized the parallel with traditional nuisance law
where courts have “fully exercised their equitable discretion and ingenuity in ordering remedies.” What did the Court cite as an example? Boomer! It was little wonder that the dissent accused the majority of reducing the statute to little more than a “codification of the common law of nuisance.”

But does Weinberger really transfer Boomer to the statutory context? This would seem an odd transplant, if indeed it was what Justice White had in mind. It would be peculiar if the only effect of violating the Clean Water Act was to allow the government to bring a nuisance suit, leaving it up to the trial judge to decide whether compliance with the statutory requirements was really worthwhile. Of course, the Clean Water Act contains other sanctions, which might not be equally discretionary. Still, it seems peculiar for a court to second-guess Congress about whether a defendant should comply with statutes.

Despite its approving citation of Boomer, the Weinberger Court probably did not mean to endorse open-ended judicial discretion. One clue is the Court’s disposition of the case. Notably, the Court did not affirm the district court’s exercise of equitable discretion, as Justice Powell urged in a separate concurring opinion. If the decision involved pure Boomer-type balancing, Justice Powell’s proposed disposition would have made complete sense. Under Boomer, it seems obvious that an injunction should not be issued. Instead, the Court held that the question was whether the district court had abused its discretion, and remanded the case to the court of appeals to consider that question.

Moreover, Boomer-style balancing would substantially undermine the statutory scheme as well as the government’s enforcement needs. Although the Clean Water Act is admittedly attentive to issues of feasibility, it does set deadlines, and the legislative history makes it clear that Congress wanted enforcement to be “swift and direct.”

Furthermore, a Boomer-type holding would have been most unwelcome to the party resisting the injunction in Weinberger, which was the federal government. Of course, in its capacity as a defendant in that case the government would have welcomed broad equitable discretion, but in its

119. Id. at 314 n.7.
120. Id. at 330-31 n.12 (Stevens, J., dissenting) (citing the majority’s references to Boomer and Spur).
121. See id. at 321-322.
122. Id. at 320.
123. See S. REP. No. 92-414, at 64, 65, 80 (1971).
124. Consider, for example, the extensive civil and criminal sanctions against violators, and the direct review of regulations in the court of appeals, clearly designed to expedite implementation.
far more frequent capacity as an enforcer such discretion would have been a great hindrance. Thus, the government likely sought circumscribed discretion for trial courts, not a blank check for judges to balance at will.

Unfortunately, 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.\(^{125}\) Probably the most enlightening recent decision about equitable discretion and statutory injunctions is a non-environmental case, United States v. Oakland Cannabis Buyers’ Co-Op.\(^{126}\) In Oakland Co-Op, the Court held that the lower court had discretion over whether to issue an injunction to enforce the Controlled Substance Act.\(^{127}\) Nevertheless, the Court held that it could not use that discretion to exempt medically necessary use of marijuana from the injunction, because a court cannot “override Congress’ policy choice, articulated in a statute, as to what behavior should be prohibited.”\(^{128}\) Equitable discretion, according to the Court, applied only to choices between injunctions and other enforcement methods, not to non-enforcement of the statute.\(^{129}\) Although it did not arise in an environmental context, Oakland Co-Op suggests by analogy that equitable discretion cannot be used to excuse statutory violations in environmental cases. Of course the statute in question was quite different from any environmental regulation, making the decision’s environmental implications unclear.

In any event, the lower courts have not read Weinberger as giving them carte blanche to excuse or postpone compliance with environmental statutes. In a thoughtful opinion in a Safe Drinking Water Act (“SDWA”) enforcement case, the First Circuit remarked:

Under the SDWA, it should be a rare case in which a violation of regulatory standards does not lead to an injunction if the responsible enforcement agency requests one.... Expressions by Congress of this sort, once identified, must be respected by courts, lest equitable discretion become the judiciary’s preferred method of reshaping policy determinations made by other branches of government that are better equipped to make them.\(^{130}\)

\(^{125}\) In Amoco Prod. Co. v. Village of Gambell, the Court held that procedural violations do not necessarily constitute the irreparable injury needed for a preliminary injunction, but that an environmental injury would normally do so. 480 U.S. 531, 544-45 (1987).


\(^{127}\) Id. at 496-99.

\(^{128}\) Id. at 497.

\(^{129}\) Id. at 495-98.

\(^{130}\) United States v. Massachusetts Water Resources Auth., 256 F.3d 36, 57 (1st Cir. 2001).
The court contrasted this situation with that presented in common law cases such as *Boomer*.

Courts asked to issue an injunction must ordinarily assume the role of a court of chancery - a role that requires them to determine whether the equities of the case favor, and whether the public interest would be served by, the granting of injunctive relief. But in the context of statutory injunctions, the court's freedom to make an independent assessment of the equities and the public interest is circumscribed to the extent that Congress has already made such assessment with respect to the type of case before the court.  

Thus, injunctions remain the default remedy for environmental violations, and *Boomer* is probably limited to common law cases. But, given the Court's invocation of *Boomer* in *Weinberger*, it may have ripple effects in statutory cases as well.

**B. Boomer and Economic Analysis**

Another aspect of *Boomer*, and one that has loomed large in legal scholarship, involves the economics of the decision. Recall that the plaintiffs in *Boomer* warned against the adoption of a new economic utility doctrine. Their warning was prescient. The court decided *Boomer* at the start of the law and economics movement in legal scholarship, which would re-conceptualize wide areas of the law in terms of economic utility. *Boomer* (often in conjunction with *Spur Industries*) became a standard citation in this new area of scholarship. In short, later events proved that economic utility and *Boomer* were deeply connected.

*Boomer* owes some of its fame to an equally famous law review article published two years after it was decided. In 1972, Guido Calabresi and A. Douglas Melamed published a piece entitled, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*. The subtitle was a reference to a series of paintings by Monet showing the same cathedral in a variety of lighting and weather, implying that the

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131. *Id.* at 47. Nevertheless, the district court concluded that the case before it was just such a rare case, and the court of appeals affirmed, rejecting the argument that it was in effect allowing a permanent exemption from a statutory requirement. *Id.* at 55-58.

132. See United States v. Wheeling-Pittsburgh Steel Corp., 818 F.2d 1077 (3d Cir. 1987) (refusing to delay compliance with Clean Air Act requirements on basis of hardship); Little Joseph Realty v. Town of Babylon, 363 N.E.2d 1163 (1977) (finding that *Boomer* does not apply to injunctions enforcing a zoning ordinance, where balancing of equities is impermissible).

133. See text accompanying note 46 supra.


Despite the modest implications of the subtitle, the goal of the article was ambitious: to provide a unified perspective of tort and property law. \textit{Boomer} was one of the cases on the minds of the authors. They offered \textit{Boomer} as an example of the choice between tort-like rules (damages) and property-like rules (injunctions). The final portion of the article includes an analysis of a stylized pollution problem involving two neighbors that is loosely based on \textit{Boomer}.

Calabresi and Melamed discuss four remedial regimes that might apply to the holder of an entitlement. The following is a list of possible remedies with brief descriptions.

The \textbf{first} possibility is that no remedy exists. Thus, victims receive no assistance from courts. Their only option is to negotiate with the polluter to abate the nuisance. Although this is referred to as a remedial option, what it really means is that for all practical purposes the victims have no rights.

A \textbf{second} possibility is a liability rule, under which victims receive compensation for the harm they suffer but no injunctive relief. In other words, invading the entitlement is a tort. Under a liability rule, there is some sense that entitlement is not a full-fledged right. It is permissible to invade the entitlement at will, so long as you pay for any resulting harm.

The \textbf{third} possibility is a property rule. Victims have the right to ask a court to abate the nuisance. This time it is the polluter whose only remedy is to bribe the other party by acquiring an easement or by settling the lawsuit with a cash payment.

The \textbf{fourth} possibility is that victims may obtain an injunction abating the nuisance, but must compensate the polluter for the losses caused by the injunction. This remedy combines an injunction (for the victims) with damages (for the polluter).

By coincidence, the one significant case supporting the last (and most esoteric) of these remedies was decided at the same time as the Calabresi and Melamed article. The fourth option may seem peculiar, but

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136. \textit{Id.} at 1089 n.2. Monet produced a number of such series of paintings, but presumably it would have been less dignified to have subtitled the article another view of the haystacks or another view of the lily pond.
137. \textit{Id.} at 1089-90.
138. \textit{Id.} at 1105-06 & n. 34.
139. \textit{Id.} at 1115-1128.
140. \textit{Id.} at 1115-25.
141. This approach led the dissenters in \textit{Boomer} to express concerns that the neighbors' rights were being undermined by a damage remedy. \textit{Boomer}, 257 N.E.2d at 875-76.
it was utilized by the Arizona Supreme Court in *Spur Industries*, a decision issued a couple of years after *Boomer*. That case has received great attention from law-and-economics scholars, and is often taught and discussed in conjunction with *Boomer*. To digress briefly, a quick look at that case may help make the Calabresi and Melamed proposal more understandable.

*Spur Industries* involved two activities that continue to cause significant environmental problems—leap-frog urban development and animal feedlots.\(^{143}\) Del Webb, a real estate development company, brought suit against Spur, which operated a nearby feedlot. The feedlot existed first, but had greatly expanded its operations.\(^{144}\) In the meantime, Del Webb built Sun City—a retirement community, which steadily grew in the direction of the feedlot.\(^{145}\) The two activities were destined to collide. By bringing the nuisance to the populace, Spur had converted what would otherwise have been a private nuisance in a sparsely populated area into a public nuisance for the people of the new city.\(^{146}\) In a sense, much of the fault was Spur's for unexpectedly expanding the feedlot into an urban area, and the court allowed a permanent injunction against the feedlot as a public nuisance.\(^{147}\)

The court's decision involved a bold remedial innovation. The court granted the injunction against the feedlot but also awarded damages against the plaintiff in favor of the feedlot. The court concluded, "[i]t does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result."\(^{148}\) But, unlike *Boomer*, *Spur Industries* was apparently a unique response to unusual circumstances rather than a doctrinal milestone.\(^{149}\) Still, it


\(^{144}\) Id. at 703-04.

\(^{145}\) Id. at 704-05.

\(^{146}\) See id. at 705-06. For a discussion of the difference between public and private nuisance, see note 17 supra.

\(^{147}\) Id. at 706.


\(^{149}\) In another part of the litigation, a dissenting judge argued that "[i]f these Spur cases are adhered to by this Court in the future, every operator of a nuisance which sends smoke, fumes, dust, stench, etc. onto his neighbors may be guaranteed economic protection should anyone be annoyed or harassed enough to try and stop the wrongful activity by court action." Spur Feeding Co. v. Superior Court of Maricopa County, 505 P.2d 1377,1380 (Ariz. 1973) (Holohan, J., dissenting). This alarm turned out to unjustified in relation to *Spur Industries*. The decision has been read narrowly by later Arizona courts, which have never found occasion to provide similar relief. See Salt River Valley Water Users' Ass'n v. Giglio, 549 P.2d 162, 177 (Ariz. 1976); Brenteson Wholesale, Inc. v. Arizona Pub. Serv. Co., 166 Ariz. 519, 803 P.2d 930, 936 (Ariz. Ct. App. 1990). Elsewhere, the decision does not seem to have fared even that well. As of 1990, *Spur Industries* was said to be the "only reported decision in which a court has held a . . . compensated
demonstrates that Calabresi and Melamed's "compensated injunction" option is more than just an academic's pipe-dream.

The other remedies are more familiar than the *Spur Industries* use of option four, but Calabresi and Melamed provided a new economic perspective on each of them. Some simple examples may help to sort out these remedies and their economic implications. Consider two scenarios. In both, imagine that there are only two parties, Atlantic and Boomer, and that the only options are either to shut down the cement factory or leave it in its present state of operation.

In one scenario, which we could call the *excess harm* scenario, the harm to Boomer from the pollution is greater than the benefit to Atlantic from keeping the plant open. To make this concrete, assume Atlantic's profits are $500,000, but the harm to Boomer is $1,000,000. In this scenario, a cost-benefit analysis would tell us to shut down the cement plant, since its harm outweighs its benefits. This would clearly happen with a property rule (Boomer gets an injunction) or under a liability rule (Atlantic chooses to close rather than pay the damages, which are large enough to wipe out the plant's profits). At least some of the other rules - for example, the "no liability" rule under which Boomer has no legal rights - would seem to lead to the contrary outcome in which the plant stays open even though it flunks a cost-benefit test. Calabresi and Melamed took the analysis one step further, however, by asking how other rules might shape negotiations between the parties.

Potentially, negotiations could produce the same outcome as the injunction rule even under the other legal rules. For instance, the plant may end up being closed under a "no liability" rule - at least if we assume that everyone behaves rationally and there are no barriers to negotiation. Rather than suffer $1,000,000 in damages, Boomer can bribe Atlantic $500,001 to shut down. That's a good deal for both sides: it increases Atlantic's profits, though only slightly, and saves Boomer from $1 million in harm at the cost of a $500,001 bribe. For similar reasons, the plant would also be shut down under the compensated injunction rule. Boomer would be willing to get a compensated injunction, closing the plant at the cost of $500,000 to themselves but eliminating a $1,000,000 worth of damages. Note that these outcomes are "the same" as the injunction rule in terms of whether the plant closes down, but depending on the legal rule, one side or the other may be placed in a better financial position.

We can contrast this with another scenario, in which a cost-benefit analysis would favor keeping the plant open. In this *excess benefit* scenario, the benefit to Atlantic from operating the plant is greater than the harm to Boomer from the pollution. Assume Atlantic's profits are

injunction to be the appropriate remedy in civil litigation." Lewin, * supra* note 27, at 248-49. I have not located any more recent cases, and *Spur Industries* is rarely cited.
$1,000,000 and Boomer’s harm is only $500,000. Clearly, a cost-benefit analysis would support keeping the plant open - its benefit to Atlantic outweighs its harm to Boomer. The plant would stay open under a liability rule, because Atlantic simply would pay the damages and keep operating. Under the no liability rule or the compensated damage rule, Boomer would have to pay $1,000,000 to get Atlantic to agree to shut the plant, but he would not be willing to do so because his own damages are only $500,000. The final remedy is the property rule, under which Boomer can get a cost-free injunction. This would seem to result in shutting down the plant, but once again we have to consider the possibility of negotiations. In the actual Boomer case, the New York court forecast that an injunction would result in a monetary settlement, under which the plant would stay open after Atlantic made a sufficiently large payment to Boomer. Thus, as was true in the excess harm scenario, under ideal conditions the outcome (in terms of the extent of pollution) does not depend on the legal rule: if the benefit to Atlantic is greater than the harm to Boomer, the plant stays open regardless of which legal rule is in effect.

The key word in the last sentence, of course, was “ideal.” Under ideal circumstances, it makes no economic difference (in terms of the level of pollution and the level of cement production) which rule applies. From an economic point of view, the ways in which circumstances fall short of the ideal will dictate the choice of rule. In an ideal world, litigation is instantaneous, cost-free, and infallible. This is hardly the world in which lawyers actually operate. The extent to which these conditions are not met has a direct impact on remedies. For example, a liability rule requires that a court be able to accurately calculate Boomer’s damages, but this may not always be possible. Similarly, a court may not be able to accurately calculate how much an injunction will harm Atlantic, which is necessary for the compensated injunction remedy. Or the litigation costs may be different for various remedies.

Also, in several of the situations discussed in the previous two paragraphs, reaching the economically optimum outcome depends on negotiations between the parties. In reality these negotiations may be impossible for various reasons: the parties are too angry to negotiate at all, there are multiple victims of pollution who cannot coordinate their negotiations, or the parties end up in a stalemate as a result of destructive negotiating tactics. Thus, when a legal rule leads to inefficient results, negotiation might not be available as a solution. If so, the choice of legal rule becomes decisive. A no-liability rule might result in the plant remaining open, even in the first (undue harm) scenario, whereas a property rule might result in an injunction and a plant closure even in the second (excess profits) scenario.
Because of the various imperfections in the litigation and bargaining processes, the choice of legal rule does matter. The question is what rule to adopt for nuisance cases. Calabresi and Melamed lean toward a liability rule for nuisance cases, or at least most nuisance cases:

The case of nuisance seems different, however. There the polluter knows what he will do and, often, whom it will hurt. But... freeloader or holdout problems may often preclude any successful negotiations between the polluter and the victims of pollution; additionally, we are often uncertain who is the cheapest avoider of pollution costs. In these circumstances a liability rule, which at least allowed the economic efficiency of a proposed transfer of property to be tested, seemed appropriate, even though it permitted the nonaccidental and unconsented taking of an entitlement. It should be emphasized, however, that where transaction costs do not bar negotiations between polluter and victim, or where we are sufficiently certain who the cheapest cost avoider is, there are not efficiency reasons for allowing intentional takings, and property rules, supported by injunctions or criminal sanctions, are appropriate.\(^5\)

Thus, they favor a liability rule except where there is a small number of pollution victims (making negotiations more feasible) or the victims' damages are highly subjective (making it hard for the polluter to take them into account). This seems to be a stronger preference for a damage remedy over an injunction than the court expressed in Boomer itself, where the court selected damages because of the dramatic disparity in the impact of an injunction on the plaintiffs and the defendants.

The Calabresi and Melamed article turned out to be highly influential. A citation study concluded that in fact the article's influence has probably increased over time, which is quite unusual for legal scholarship.\(^151\) Some of the ideas in the article had roots in earlier work by others, but what particularly distinguished the article was “its rigorous and systematic approach to topics that before had been handled rather haphazardly, if at all.”\(^152\) The authors' use of a paradigm case rendered this analytic framework even more understandable - a case that has become familiar to most law students and teachers alike. As with the “cathedral” article itself, in many of the later works, “a particular explanatory example looms in the foreground,” that being “an instance of environmental pollution, grounded on a classic nuisance case, Boomer v.

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150. Calabresi and Melamed, supra note 122, at 1127. By “cheapest cost avoider,” Calabresi and Melamed mean the party who is in a “better position to balance the costs of polluting against the costs of not polluting.” Id. at 1118.


152. Id. at 2134.
In short, at least partly because of Calabresi and Melamed, *Boomer* has become a law-and-economics classic.

In the end, Calabresi and Melamed added some degree of clarity to the notoriously confused field of nuisance law, but there is continuing dispute among economists over the relative merits of property and liability rules. The law and economics literature on nuisance has been most useful not in providing a solution to the problems of nuisance law but in clarifying those problems. In particular, the economic analysis focuses attention on transaction costs of various kinds, especially the costs of bargaining between the parties at various points in their interactions and the cost of obtaining accurate valuation information in order to assess damages. Higher costs of bargaining favor liability rules, whereas valuation difficulties by the court make liability rules less feasible. So long as these issues remain unresolved, *Boomer* will continue to have a place in the law and economics literature.

C. *Boomer and the Common Law Tradition*

We have examined *Boomer* through the lenses of remedies law and economic analysis. It can also be usefully examined through a jurisprudential lens. Jurisprudentially, the question the case raises is what role the common law should continue to play in an "age of statutes."

In seeking to establish the optimal pattern of land use and pollution control, we rely on statutes today much more than the common law. We do not by and large rely on nuisance law to control conflicting land uses or to control spillover effects. Instead, we have a complex body of environmental and land use statutes. One of the key arguments in *Boomer* was that the court should ignore the larger issues of pollution control presented by the case, leaving those issues to regulatory agencies. Academic discussion of the case tends to by-pass the jurisprudential issues raised by the court's refusal to use the common law to address widespread pollution problems.

The question of how to coordinate the common law and modern regulatory regimes is pervasive not merely in state courts but also at the federal level. Indeed, as we will see, at roughly the same time that the

New York Court of Appeals decided *Boomer*, the United States Supreme Court claimed a large role for the federal common law of nuisance in addressing pollution issues. Only a few years later, the Court retreated and seemed to call for a complete withdrawal by the federal courts, only to qualify its ruling a few years later and leave those courts a continuing (though circumscribed) role.

The federal common law of nuisance dates back to the early years of the last century. In *Georgia v. Tennessee Copper Company*, the state of Georgia filed suit against an out-of-state smelter whose pollution was causing widespread damage in Georgia and elsewhere. The Court held that the state was entitled to a federal forum because “[w]hen the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done.” This ruling provided states with a federal forum to hear interstate nuisance claims.

Seeking to take advantage of right to a federal forum, the state of Illinois filed a nuisance complaint against the city of Milwaukee at a time when Milwaukee was discharging 200 million gallons of raw sewage into Lake Michigan on a daily basis. In *Illinois v. City of Milwaukee [Milwaukee I]*, the Court unanimously dismissed this case on the ground that Illinois had an adequate remedy in federal district court because its nuisance claim arose under federal law - namely, the federal common law of nuisance. The Court argued that the quasi-sovereign nature of the state’s interest justified the application of federal common law, as did the need for a uniform rule governing nuisance in interstate waters and the strong congressional concern over water pollution. Ironically, it was the very strength of that congressional concern that later convinced the Court to overrule *Milwaukee I*.

On remand, the lower federal courts attempted to harmonize common law remedies with the newly enacted Clean Water Act. In contrast to *Boomer*, the Seventh Circuit took a more constructive view of the relation between pollution statutes and the common law rather than seeing the pollution statute as eliminating the common law’s ability to respond to the public interest in pollution cases. Judge Tone’s opinion for the Seventh Circuit repeatedly turned to the federal regulatory scheme as

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156. 206 U.S. 230 (1907).
157. *Id.* at 236. The Supreme Court had jurisdiction over this suit, without any previous proceeding being held in a lower court, because it was filed by a state government against a noncitizen.
158. *Id.* at 237.
160. *Id.* at 108.
161. *Id.* at 101-102, 104-107.
a source of guidance. In Judge Tone's view, the Clean Water Act implied the undesirability of discharging untreated sewage, and the EPA regulations indicated a presumptive balance between cost and water quality needs. In short, he viewed the statute as informing the application of the common law, not as displacing it.

The Supreme Court disagreed and overruled *Milwaukee I*. In *Milwaukee II*, the Court emphasized that the federal courts, unlike state courts, are not courts of general jurisdiction and that the creation of a federal rule of decision is generally the job of Congress. Hence, it noted that federal law is the exception rather than the rule. The Court concluded that the Clean Water Act displaced the "often vague and indeterminate nuisance concepts and maxims of equity jurisdiction" embodied in the federal common law of nuisance. "It would be quite inconsistent" with the Clean Water Act, the Court said, "if federal courts were in effect to 'write their own ticket' under the guise of federal common law after permits have already been issued and permittees have been planning and operating in reliance on them." Thus, the ruling seemed to be based primarily on jurisprudential concerns about the relationship between statutes and federal common law, rather than on any specific feature of the statutes.

Justice Blackmun wrote a strong dissent, joined by Justices Marshall and Stevens. The dissent demonstrates convincingly that Congress did not contemplate the result in *Milwaukee II*. In particular, Justice Blackmun relied on section 505(e) of the Clean Water Act, which provides that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law... to seek any other relief." As Justice Blackmun pointed out, the legislative history of this section provides further evidence that Congress meant to leave common law remedies intact. Blackmun pointed out that the Senate Report on section 505(3) states that "the section would specifically preserve any rights or remedies, under any other law - and the Report adds that A[c]ompliance with requirements under this Act would not be a defense to a common law action for pollution damages. Moreover, EPA and the Justice Department had consistently taken the

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163. *See id.* at 170-75.
165. *Id.* at 312-13.
166. *Id.* at 312, 317.
167. *Id.* at 326.
168. *Id.* at 332.
view that the federal common law remained effective despite the statute.\footnote{171}{Id. at 346.} But these arguments were to no avail.

\textit{Milwaukee II} might give the impression that federal regulation completely displaced the federal common law of nuisance. A few years later, however, the Court made it clear that this conclusion was too hasty, even in connection with federal courts. In \textit{International Paper Company v. Ouellette},\footnote{172}{479 U.S. 481 (1987).} the Court allowed a diversity action in federal court against an interstate polluter based on state nuisance law. The Court held that the Clean Water Act preempts the federal common law and the nuisance law of downstream states, but not the nuisance law of the state where the discharge took place.\footnote{173}{Id. at 493-94, 500.} Finding complete preemption of state nuisance law would have flown in the face of the Clean Water Act’s powerful savings clauses.\footnote{174}{33 U.S.C. 1365(e), 1370.}

Since state law created the remedy and the district court had jurisdiction under its diversity jurisdiction, the case could be brought in the federal district court located in the downstream state. Thus, we seem to have come almost full circle: \textit{Milwaukee I} preempted state law in favor of the federal common law of nuisance, \textit{Milwaukee II} preempted the federal common law of nuisance, and \textit{Ouellette} reinstated state law. Given what the \textit{Milwaukee II} Court had to say about the vagueness of nuisance law, replacing federal common law with state common law probably makes limited practical difference. Either way, the federal judge hearing the case has a great deal of discretion to impose requirements on sources that exceed the Clean Water Act. In short, after hanging by its fingernails from a cliff in \textit{Milwaukee II}, the common law came roaring back in the final episode.

A contrary ruling in \textit{Ouellette} would also have left pollution victims without any damage remedy. The Clean Water Act does allow citizen suits for injunctions and other relief, but damages for pollution-caused injuries are not an available remedy. The Supreme Court’s ultimate decision in \textit{Ouellette} to preserve common law remedies is also consistent with the pattern among the states.\footnote{175}{For state-by-state information see Andrew Jackson Heimert, \textit{Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution}, 27 ENVTL. L. 403 (1997).}

Only a few states limit nuisance suits under their environmental statutes. Two states allow suit only if a source is not complying with its permits. There is no clear statutory or judicial guidance in three others. In the remaining forty-five states, the nuisance

\footnotesize{171. Id. at 346.} 
\footnotesize{172. 479 U.S. 481 (1987).} 
\footnotesize{173. Id. at 493-94, 500.} 
\footnotesize{174. 33 U.S.C. 1365(e), 1370.} 
\footnotesize{175. For state-by-state information see Andrew Jackson Heimert, \textit{Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution}, 27 ENVTL. L. 403 (1997).}
action is available regardless of permit compliance. Thus, the nuisance tort remains available as a backstop to pollution statutes.

How often is this backup to statutory regulation used? Historical statistics show a large increase in the number of common law environmental suits brought in state and federal court, beginning around the time of Boomer. After rapidly expanding, the number of state court cases tapered off over the next twenty years, but the federal courts took up part of the slack. Thus, in 1994, there were twenty-three reported state decisions (about half of the peak year, 1973), and thirty-three reported federal decisions of common law environmental cases. By contrast, in the year when the court decided Boomer, there had been twenty-five reported state cases but only four federal cases.

The common law is not merely a supplement to modern statutes but has also been given a role within those statutes. For example, the federal statute regulating hazardous waste contains an imminent hazard provision, which authorizes injunctive relief but gives little guidance about the form of that relief. The courts have therefore relied on the common law tradition of broad equitable discretion in crafting remedies. Similarly, courts have turned to the common law to resolve liability issues under the Superfund statute particularly those involving joint liability and contribution.

Thus, the common law has continued to play a role in environmental law, even in this pervasively statutory era. Announcements of the demise of the common law in the modern regulatory state apparently have proved exaggerated. To the extent that Boomer might be thought to signal the irrelevance of the common law to the larger social issues raised by environmental law, that signal has turned out to be misleading.

CONCLUSION

It is unfortunate that only the Court of Appeals's opinion has attracted the attention of scholars and law students. The appellate court's

176. Id. at 435-536 & nn. 207, 210.
177. In addition, some states have recognized a related cause of action, for abnormally dangerous activities, in the case of hazardous waste sites. See State v. Ventron Corp., 468 A.2d 150 (N.J. 1983).
179. Id. at 98-99. It should be noted that the rest of the civil docket expanded more quickly, so that common law environmental cases accounted for a diminishing percentage of litigation.
180. Id. at 98-99.
decision on damages, with its pragmatic effort at achieving fairness, is equally intriguing. Taking the litigation as a whole, the New York courts did a creditable job of blending economic concerns, which dominated the resolution of the injunction issue, with fairness to the victims, which dominated the damage phase. The final outcome achieved a greater balance than most scholars and students realize. However, perhaps a deeper understanding of the case would deprive it of dramatic impact and diminish its academic appeal.

*Boomer* survives in the law schools in part because the New York Court of Appeals's opinion is such a great teaching tool. *Boomer* has a drama that is deeply appealing. 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. As one *Boomer* aficionado put it, "We must not forget that *Boomer* is about cement. It is a very concrete problem, if you will." Another part of the opinion's appeal is its apparent simplicity, which ironically is due in large part to the court's failure to deal adequately with the facts, the New York precedents, and the measure of damages. This simplicity is a great asset in the classroom, and a stark contrast with the immense complexity of many statutory environmental cases.

Part of *Boomer*'s fame is also due to timing. It was decided at the beginning of the modern environmental era, but it presaged what would turn out to be continuing remedial, economic, and jurisprudential issues: the scope of judicial discretion, the tradeoffs between environmental values and economic costs, and the role of the common law in an age of statutes. *Boomer* was also decided at the beginning of the modern law and economics movement, and it became a paradigm case for discussing the economics of entitlements and remedies. Thus, *Boomer* was emblematic of the issues that would preoccupy a whole generation of legal thinkers, issues that continue to shape environmental debate today. It is likely to remain a prominent case so long as those issues continue to perplex scholars, students, and policymakers.

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