Three’s a Crowd: A Feminist Critique of Calabresi and Melamed’s One View of the Cathedral

Jeanne L. Schroeder
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Jeanne L. Schroeder†

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† Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. I wish to thank the faculty of the Washington & Lee Law School for their helpful comments on an early version of this Article which I presented at a faculty workshop. In particular, I wish to thank Gwen Handelman, Lash LaRue, David Millon, and Yvonne Scannell. As always, I could not have written this Article without the help and support of David Gray Carlson.
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I will do the impossible and it will work.

—Claude Monet

In his Rouen Cathedral series, Claude Monet attempted the impossible task of capturing the moment. Traditional painting fails because it has an artificial permanence that experience lacks. Life is within time, but painting is outside of time; life is a process, a painting is an event. In the moment of experience, we lose ourselves in ecstasy. We stand outside ourselves and have no consciousness that we are having the experience because we are one with the experience. The instant we become aware that we are experiencing something, we no longer enjoy it in its immediacy. Future enjoyment is always mediated by anticipation, and past enjoyment is always mediated by memory.

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2 The following is my highly idiosyncratic Lacanian analysis of Monet's series paintings. I base this analysis on theories I previously have proposed. See, e.g., JEANNE LORRAINE SCHROEDER, THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY AND THE FEMININE (1998) (articulating the Hegelian-Lacanian philosophy upon which this Article builds).

3 Monet stated, "‘[O]ne must know how to seize the moment of the landscape on the very instant, for that moment will never return.’" VIRGINIA SPATE, CLAUDE MONET 201 (1992). Sylvie Patin, Chief Curator at the Musée d'Orsay, expressed that the Rouen Cathedral "series offers the most dazzling and convincing demonstration of Monet's determination to capture instantaneousness." Alan Riding, Monet's Fixation on the Rouen Cathedral, N.Y. TIMES, Aug. 15, 1994, at C9.

4 One critic has opined that the Rouen Cathedral series illustrates Claude Monet’s resistance to Academic painting, with its linear precision and fixed structure, and reinforce his argument for the primacy of shifting and timeless nature. In his series paintings, everything seems soft and flowing, and there is no beginning, middle and end. At the same time there is a continuous sense of inevitability and finality. Where Monet found the essence of a fleeting moment, he also found a slice of eternity.

Brenson, supra note 1. This meeting of the moment, inevitability, and eternity perfectly describes the Lacanian impossible real.

5 Charles Sanders Peirce called this pure immediacy of quality "Firstness." 1 CHARLES SANDERS PEIRCE, Collected Essays, in COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 148-59 (Charles Hartshorne & Paul Weiss eds., 1960). He called the violent moment of separation or differentiation "Secondness." Id. at 161-70. He explained the contrast between Firstness and Secondness in terms of the difference between having an experience and realizing that one is having an experience. See id. at 159-61. He gave the following example of Firstness (immediacy).

Imagine me to make and in a slumberous condition to have a vague, unobjectified, still less unsusceptified, sense of redness, or of salt taste, or of an ache, or of grief or joy, or of a prolonged musical note. That would be, as nearly as possible, a purely monadic state of feeling.

Id. at 149. As soon as one becomes conscious that one is tasting something, for example, there is no longer one thing—the pure essence of the taste; rather, there are two, the taste and the taster. One no longer has an unmediated experience of the quality of taste, but one has a mediated or interpretive experience. One may speculate that a few seconds before the consciousness one might have had an immediate, purely physical experience, but one can never know this directly.

Jacques Lacan called this sense of lost immediacy "jouissance"—"feminine enjoyment." She is "Eurydice twice lost." You anticipate jouissance as that which has not yet come, but the instant you turn to try to hold her in your arms, or fix her in your gaze, you realize that she is always already gone.

Monet wanted to capture his jouissance of the Rouen Cathedral's facade, but each attempt was frustrated because it changed moment-by-moment. He devised an ingenious solution. Every day, he brought several canvasses with him to the Cathedral. He started at daybreak and painted one canvass until the lighting changed; he then moved on to a second, then to a third, and continued until sunset.

6 Jacques Lacan, The Four Fundamental Concepts of Psycho-Analysis 281 (Jacques-Alain Miller ed. & Alan Sheridan trans., 1978) (providing a definition of jouissance in the translator's note). The beautiful Eurydice had died from a snake bite at her wedding to Orpheus. Although Orpheus had lost Eurydice once through death, he could not accept that she was forever lost and persisted in the impossible dream that he again could embrace her. With this hope, Orpheus descended to the underworld, Tartarus, in order to retrieve her. Persephone, the queen of death, promised Orpheus that Eurydice would follow behind Orpheus as he climbed the long passage out of Tartarus back to life, but Persephone forbade Orpheus to turn back and look at her. Orpheus could not control himself and turned around to embrace his beloved, but as Persephone had warned, Eurydice already was gone. He only knew, from the trace of her loss, that she once had been there—the fading echo of her farewell. See Thomas Bulfinch, The Golden Age of Myth and Legend 229-32 (1993); Jeanne L. Schroeder, The End of the Market: A Psychoanalysis of Law and Economics, 112 Harv. L. Rev. 483, 485 (1998).

7 See Spate, supra note 3, at 229. "Monet's perception of the motif became more acute as he struggled to embody its transient moments in a form both stable and evanescent." Id. After weeks of working on the Cathedral series, Monet recorded that he was shocked by "the sight of my canvases which seemed to me atrocious, the lighting having changed. In short I can't achieve anything good." Id. (quoting Letter from Claude Monet, artist, to Alice Monet, his wife (Mar. 29, 1893)).

8 See id. at 227. Monet started the Cathedral series in late winter and early spring 1892 and returned the following year at about the same time in order to recapture the same light. He reworked the paintings over the next year in his studio at Giverny and exhibited 20 paintings from the series in 1895. See William C. Seitz, Claude Monet 116 (1982); Spate, supra note 3, at 226-27. Monet would paint in front of the Cathedral from
This series of views of the Cathedral constitutes, in effect, one work of art reflecting the subtle changes in color of the Cathedral's facade over the course of a day.

Monet's paintings have been reproduced with such frequency that it is hard to reclaim them from the banality of the overly-familiar. With this in mind, I recently refreshed my memory by visiting two of the Rouen Cathedral series which are displayed in the National Gallery of Art in Washington, D.C. What surprised me when viewing the originals is how nearly he succeeded despite his failure. Or more accurately, how he succeeds because he fails. The differences in coloration of even two paintings in the series illustrate that experience is so fleeting that its totality could never be captured, regardless of how many canvasses were used. 9 That was Monet's secret.

9 See Serrz, supra note 8, at 116. Monet eventually completed thirty paintings of the Cathedral, including twenty-eight of the facade. See Riding, supra note 3. As described by Georges Clemenceau, who was so impressed by the inaugural exhibition of twenty of the series that he immediately wrote an editorial on the front page of the Paris journal La Justice urging the French government to buy the entire series to keep it intact, see id., "The painter has given us the feeling . . . that he could have . . . made fifty, one hundred, one thousand, as many as the seconds in his life." Serrz, supra note 8, at 116 (quoting Clemenceau). Clemenceau continued, "[f]or each beat of his pulse he could fix on the canvas as many moments of the model." Spate, supra note 3, at 230 (quoting Clemenceau) (alteration in original). The paintings inspired in Clemenceau "a lasting vision not of twenty, but a hundred, a thousand, a million states of the eternal cathedral in the immense cycles of the sun." Id. (quoting Clemenceau).

Spate agreed with Clemenceau's interpretation. She believed that Monet chose the cathedral as his subject precisely because he thought its stone architecture would be relatively unchanging, enabling him to capture it in "a work of 'no weather and no season.'" Id. at 232 (quoting Monet). As he started to paint he realized he was wrong and became "totally absorbed in the representation of ephemeral effects." Id. Eventually, Monet sought, "to embody not only an external reality which was ceaselessly changing, but also a continuous perceptual experience of that reality, and the more intensely he focused on changing light, the more the stable reality of the cathedral disintegrated." Id. at 231 (footnote omitted).

Having grown used to countless mediocre reproductions of Monet's water lily paintings on greeting cards and posters, it is easy to dismiss him as a simple painter who merely reproduced his immediate impressions of pretty scenery. Even his contemporary Paul Cézanne declared that Monet was "only an eye, but what an eye!" John Russell, Art View: The Poet Who Kick-Started a Stalled Cézanne, N.Y. TIMES, July 28, 1991, § 2, at 27. Nonetheless, Monet understood that immediacy was impossible. The fact that Monet did not complete his Rouen series until he returned to his studio two years after he started indicates that...
The series suggests the existence of an enjoyment that can never be captured. Enjoyment of the Cathedral is not that which we view in the paintings, but our view of the paintings reminds us that an "excess enjoyment" beyond our view must have existed in the past and will again exist in the future.\(^\text{10}\) The paintings let us know feminine enjoyment not by depicting her presence, but by suggesting her absence. They are her footprints, the fading echo of her voice, the stain of her lost virginity.\(^\text{11}\) The paintings, therefore, mediate between the viewer and the impossibility of immediacy. In Monet's own words, he did not attempt to depict the Cathedral directly, but rather "to reproduce . . . what exists between the [Cathedral] and me."\(^\text{12}\)

Monet's understanding of his limitations stands in stark contrast to claims a famous law review article, which invokes his work, makes. Guido Calabresi and Douglas Melamed published their seminal analysis of environmental nuisance\(^\text{13}\) disputes, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*,\(^\text{14}\) twenty-six years ago. Their article has generated virtually endless discussion in the literature.\(^\text{15}\)


Spate accurately stated that Monet's was an "inherently terrifying vision of reality." Spate, *supra* note 3, at 231. This observation is precisely correct. Although we long for the real, our occasional contacts with it are occasions of abject, sickening terror. The real is, after all, the total obliteration of our subjectivity. Consequently, Slavoj Žižek, who has developed Lacan's psychoanalytical theory into a philosophic system, used references to science fiction, horror stories, and most frequently, the films of Alfred Hitchcock to express the disturbingly uncanny nature of the real. See Slavoj Žižek, *Looking Away: An Introduction to Jacques Lacan Through Popular Culture* 88-106, 116-22 (1991).

As E.H. Gombich noted in his classic work *Art and Illusion: A Study in the Psychology of Pictorial Representation*, in the painting that depicts the Cathedral at noon, Monet suggests "the effect of the midday sun by exploiting the dazzle that results from its glare, and such pictures will even gain in poetry from the artist's determination to achieve the impossible." E.H. Gombich, *Art and Illusion: A Study in the Psychology of Pictorial Representation* 49 (1969).

\(^\text{10}\) See Schroeder, *supra* note 6, at 485.


\(^\text{12}\) In this Article, I am not limiting the term "nuisance" to its legal meaning. Rather, for lack of another suitable term, I use the term expansively as shorthand for claims that one person is harmed by the polluting acts of another, regardless of whether such claims are based on tort, property, or other principles. My terminology reflects Calabresi and Melamed's project of developing a unified economic analysis of environmental harms.


\(^\text{14}\) One numerically inclined pair of authors recently reported that Westlaw listed over 388 law review articles citing the original Calabresi and Melamed article through 1995. See James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. Rev. 440, 440 n.4 (1995). A recent search of Westlaw's journal and law review database revealed that 595 pieces have cited the Calabresi and Melamed article. See Search of Westlaw, JLR library (Sept. 6, 1998). They speculated that there are no doubt
Their title, an allusion to Monet's Rouen Cathedral series, supposedly expressed modesty. Calabresi and Melamed claimed that their taxonomy of property rights was not an attempt to capture all of property or environmental law, but rather only one way of looking at these fields—a way that might be a useful tool for legal scholars and decision makers. They state that their "article is meant to be only one of Monet's paintings of the Cathedral at Rouen. To understand the Cathedral one must see all of them."\textsuperscript{16}

In fact, their protestations of humility are evidence of hubris. Modesty is psychoanalytically feminine in that it only exists insofar as it slips away. The moment modesty announces itself it has already been replaced by pride. Unlike Monet, who through multiple representations suggested that which cannot be captured, Calabresi and Melamed claimed to capture the immediacy of property. They claimed to give one view of the Cathedral and insisted that we can understand the Cathedral if we see all of the views.\textsuperscript{17} Monet's point, however, was that we can only understand the Cathedral when we realize that the real—excess enjoyment—can never be seen, even in an infinite number of views.

The difference between their respective approaches is the difference between metonymy and metaphor. Monet's paintings are a pictorial example of metonymy, which in Lacanian psycho-analysis is the feminine trope of signification.\textsuperscript{18} In metonymy the signifier suggests the signified through proximity. It describes not the thing itself, but parts of the thing or that which surrounds it. Calabresi and Melamed, in contradistinction, adopted the masculine trope of metaphor. In metaphor, the signifier attempts to capture the signified and to reduce signification to meaning by declaring the essential similarity or identity of the signifier and the signified. In metaphor, the signifier stands for the signified; in metonymy, the signifier stands by the signified.\textsuperscript{19} 

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\textsuperscript{16} Calabresi & Melamed, supra note 14, at 1089 n.2.
\textsuperscript{17} See id.
\textsuperscript{18} See JANE GALLOP, READING LACAN 121-31 (1985).
Perhaps because Calabresi and Melamed intuited that the immediacy they sought cannot be captured, they did not, like Monet, try to suggest immediacy through its absence. Instead, they alternated between pretending that they had captured it and claiming that it does not exist. Specifically, Calabresi and Melamed repressed the psychoanalytically feminine aspects of property law: the element of enjoyment (use) and the existence of the silent and unknown third—the “other.” This repression of the feminine third can take the form either of the refusal to acknowledge third parties who are not a party to a contractual relationship (the *jus tertii* of property law) or of the failure to recognize the mediating object of the property rights debated by two competing subjects. In Lacanian terms, this repression of the feminine third is the masculine response to the universal human experience of loss of wholeness, which Lacan called “castration,” and which I sometimes call “violation.” The masculine response inevitably and necessarily is unsuccessful, as is the alternative feminine response. As Lacan reminds us, however, repression is not destruction, and what is repressed always returns to wreak its revenge. As discussed below, the unacknowledged feminine aspects of property haunt the Calabresi and Melamed analysis.

The reader should not infer that I am suggesting that some “feminine” analysis of property would be superior. In Lacanian theory, neither of the sexuated positions is superior, they are just two different modes of failure. Nor do the Lacanian terms “masculine” and “feminine” refer to anatomy. Rather, they designate two possible strat-

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20 See Schroeder, supra note 2, at 10-11 (“This sense that part of ourselves is not ourselves but is somehow cut off from ourselves is one aspect of what Lacan called ‘castration.’”).

21 See id. at 245 (explaining that “the masculine metaphor ... perceives loss as castration” and “the feminine metaphor ... perceives loss as violation”).


23 See Schroeder, supra note 2, at 234-35 (“[T]o develop a human theory of the legal person, we need to recognize that [the masculine view of] property is a necessary, but insufficient, aspect of the legal regime of object relations.”). Indeed, in Lacanian terms, the masculine position is absolutely necessary. Without it, we literally are gibbering idiots because the masculine is the position of the speaking subject. In order to speak and write one needs to claim to have “it,” to claim that the words we use—the signifiers—in fact capture the significance of that which one intends to signify. Consequently, all human beings must at least temporarily take on the masculine position. See Elizabeth Grosz, Jacques Lacan: A Feminist Introduction 71-72 (1989).

24 Lacan thus moves as far as possible from the notion of sexual difference as the relationship of two opposite poles which complement each other, together forming the whole of “Man.” “Masculine” and “feminine” are not the two species of the genus Man but rather the two modes of the subject’s failure to achieve the full identity of Man. “Man” and “Woman” together do not form a whole, since each of them is already in itself a failed whole.

egies one can adopt to deal with the sense of loss.\textsuperscript{25} Every human being must, on occasion, adopt both of these inconsistent strategies. Nevertheless, Lacan intended the "gendered" terminology to reflect the way we map these purely symbolic concepts onto anatomy by conflating them with what seems to be their anatomical counterparts. As a result, anatomically female human beings tend to adopt the psychoanalytically feminine position, and anatomically male human beings tend to adopt the masculine. However, all human beings on occasion adopt both psychoanalytical positions.

Elsewhere, I have suggested that the legal concept of property serves a role in the creation of legal subjectivity, which parallels the role of sexuality in the creation of psychoanalytical subjectivity.\textsuperscript{26} The object of property is a form of "phallus" in the psychoanalytical sense—the object of desire possessed, enjoyed, and exchanged among subjects. "Sexuality" is the symbolic position the subject takes with respect to the phallus. The masculine position is that of claiming to possess and exchange the phallus. The feminine position is that of being and enjoying the phallus. Both sexes fail in their attempts to achieve wholeness because the phallus is not in the symbolic order of law and language. The term "phallus" stands for that which we sense has been lost forever in castration. It is our sense that there is something we cannot describe in language (the symbolic) or depict in imagery (the imaginary). It is the ephemeral essence of the Cathedral that Monet knew he could not capture.

We long for a permanence and wholeness of the real, which is unattainable in the artificial order of the symbolic. Consequently, we seek to replace symbolic concepts with real ones. We do this in the imaginary by identifying specific physical or natural "objects," which seem to serve as the "real" analogs to the symbolic. In the case of sexuality, we conflate the phallus with that which one anatomical sex has—the male organ—and which the other is and enjoys—the female body. That is, anatomic sexuality is a metaphor for symbolic sexuality, rather than the other way around.

\textsuperscript{25} See Schroeder, supra note 2, at 245.


This discussion is based on my argument in Jeanne Lorraine Schroeder, Juno Moneta: On the Erotics of the Marketplace, 59 WASH. & LEE L. Rev. 995, 1008-09, 1016-17 (1997) [hereinafter Schroeder, Juno Moneta].
We also use implicit anatomic sexual imagery to describe the psychoanalytically phallic concept of property. In this Article, I explore the persistent use of what I have called the masculine and the feminine phallic metaphors for property. The masculine metaphor relies on implicit metaphors of the male organ and envisions property as the sensuous grasp of a tangible thing to be displayed and wielded before others. The loss of property is analogized to castration—the taking away of possession. The masculine metaphor is an unsuccessful attempt to reduce property, which is necessarily a mediated trilateral (or even quadrilateral) relationship, to an immediate bilateral one. Consequently, the masculine metaphor vacillates between identifying property solely with the element of possession—seen as the relationship of the owning subject to the owned object—and identifying it solely with the element of exchange—seen as the relationship between two legal subjects to which the object is irrelevant. In exchange, the object of exchange becomes monetized and irrelevant in that each party is indifferent between retaining its object of exchange and obtaining whatever is offered in exchange. Therefore, the Calabresi and Melamed system sees property regimes (possession) and lia-

27 See Schroeder, supra note 2, at xvi, 4, 111-12; Schroeder, Juno Moneta, supra note 26, at 1022.

28 See, e.g., Jeremy Waldron, The Right to Private Property 34 (1988) (defining property as the rules of allocation of tangible resources and analyzing legal interests in intangibles as only being analogous to property). As I will discuss, the allocation of resources—the identification of the rightful owner—is the definition of possession, which is only one of the three elements of property, albeit the most primitive one. See Schroeder, supra note 2, at 37-39 (discussing possession as one of Hegel's three elements of property); see also Schroeder, Chix, supra note 26, at 264-66 (critiquing Waldron's view of property as rules of allocation).

29 See Schroeder, Juno Moneta, supra note 26, at 1024. For example, both Wesley Newcomb Hohfeld and Thomas Grey insisted that property is solely a relationship among legal actors that does not require an object. They argued further that because property without an object is indistinguishable from a number of other traditional legal rights, property is irrational and should disappear as a separately identifiable legal category. See Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning II, in Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays 65, 71, 78-86 (Walter Wheeler Cook ed., 1923) [hereinafter Fundamental Legal Conceptions]; Thomas C. Grey, The Disintegration of Property, in Property: Nomos XXII 69, 81 (J. Roland Pennock & John W. Chapman eds., 1980).

This ridiculous conclusion is based on their implicit adoption of the phallic metaphor. They both agreed that the concept of object can only be thought of as a tangible thing and that the concept of possession can only be thought of as the sensuous grasp of the tangible thing—the phallic metaphor. See Hohfeld, supra, at 85-86; Grey, supra, at 70-71. They then, correctly, concluded that this view of property is inadequate. See Hohfeld, supra, at 86; Grey, supra, at 71. It does not, for example, account for copyright or other intangibles. Rather than realizing that this view shows only the absurdity of the masculine phallic imagery of property, they believed that it means that property itself is absurd. See Hohfeld, supra, at 95; Grey, supra, at 71. They accuse others who insist on the objectivity of property as being naïve, precisely because they have a naïve view of objectivity. See Schroeder, Chix, supra note 26, at 290-95.
bility regimes (exchange) as alternatives.\textsuperscript{30} This approach reflects the two alternate and inconsistent strategies that the masculine position can take in a vain attempt to deny castration.

In contrast, the feminine phallic metaphor relies on the imagery of the female body. The owning subject identifies with the owned object in such a way that they become indistinguishable. Property is that which one enters and enjoys and that which one protects from invasion by others. Property is reduced to the single element of enjoyment. Loss of property is imagined as violation, as loss of self.\textsuperscript{31}

\textsuperscript{30} See Calabresi & Melamed, supra note 14, at 1106-10.

\textsuperscript{31} See Schroeder, supra note 2, at 4; Schroeder, Juno Moneta, supra note 26, at 1016, 1023. The feminine metaphor, with its language of protection, of entrance, of enjoyment, and of violation, creeps into much of property discussion, particularly when real estate is involved. In my experience, however, it is usually subordinate to the more common masculine metaphors.

In American jurisprudential scholarship, the most significant exception to this general rule of subordination is Margaret Jane Radin who has attempted to develop an entire jurisprudence of property, which is, \textit{unintentionally}, based on feminine bodily imagery and which privileges the element of enjoyment over those of possession and alienation. See Schroeder, Virgin Territory, supra note 26, at 62-67. The works of Radin which I critique as reflecting the feminine phallic metaphor for property include Margaret Jane Radin, \textit{The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings}, 88 Colum. L. Rev. 1667 (1988); Margaret Jane Radin, \textit{Market-Inalienability}, 100 Harv. L. Rev. 1849 (1987) \textit{[hereinafter Radin, Market-Inalienability]}; Margaret Jane Radin, \textit{Property and Personhood}, 34 Stan. L. Rev. 957 (1982) \textit{[hereinafter Radin, Property and Personhood]}; and Margaret Jane Radin, \textit{Reflections on Objectification}, 65 S. Cal. L. Rev. 341 (1991). These articles have been reproduced, with minor changes, as part of MARGARET JANE RADIN, REINTERPRETING PROPERTY (1993) (collection of articles). More recently, she rewrote some of these Articles and integrated them with new materials in MARGARET JANE RADIN, CONTESTED COMMODITIES (1996).

A recent critique of the Calabresi-Melamed trichotomy also unwittingly privileges enjoyment over the other elements. Specifically, Madeline Morris collapses Hohfeld's concepts of rights and privileges into a single right of "in-kind enjoyment of the object," thereby not only misunderstanding Hohfeld's taxonomy, which suppresses objects entirely, but also subsuming the right of possession entirely into the right of enjoyment. Madeline Morris, \textit{The Structure of Entitlements}, 78 Cornell L. Rev. 822, 830-33 (1993). Is it telling that female scholars wrote these two articles which privilege the feminine element of "enjoyment"? Is it telling that pairs of men co-authored the most important articles based on the Calabresi-Melamed trichotomy, including the original?

An interesting example in which environmental nuisances were analyzed in terms of enjoyment, rather than possession, is the recent case of López Ostra v. Spain, 303-c Eur. Ct. H.R. (ser. A) (1994), before the European Court of Human Rights. López Ostra lived near a foul smelling waste treatment plant. See \textit{id.} at 43. She sued the local municipality, which licensed the offending plant for interfering with her rights to personal integrity that the European Convention on Human Rights granted. See \textit{id.} at 50. Specifically, she relied on that part of Article 8 which declares that: "'[e]veryone has the right to respect for his private and family life, his home and his correspondence.'" \textit{id.} at 53 (quoting European Commission of Human Rights art. 8, sec. 1).

The court expressly found that environmental pollution "may affect individuals' well-being and prevent [the plaintiffs] from enjoying their homes." \textit{id.} at 54. Further, although Article 8 expressly provides that an individual's right of personal integrity can, in some circumstances, be subordinated to a state's proper imposition of its police power to assure "'the economic well-being of the country,'" \textit{id.} at 53 (quoting European Commission of Human Rights art. 8, sec. 2), in this case "the State did not succeed in striking a fair
My thesis is that the law and economics debate on environmental “nuisances,” based on Calabresi and Melamed’s trichotomy, is one of the most extreme examples of the masculine phallic metaphor for property in contemporary legal scholarship. It represses the psychoanalytically feminine aspects of property. It implicitly adopts the masculine phallic metaphor for property as either unmediated possession—the unfettered and exclusive physical custody of tangible objects by an owner—or unmediated alienation through exchange—economic bargaining for which specific objects are irrelevant. Because their trichotomy represses enjoyment, the feminine third, Calabresi and Melamed cannot accurately describe environmental disputes. Environmental nuisances involve neither the taking of possession of a single object, nor the mere exchanging of entitlements. Rather, environmental nuisances involve rival claims of enjoyment of different objects by different owners in such a way that one party claims to be violated by the other.32

Moreover, the law and economics debate represses the necessary jus tertii of property law. From the psychoanalytical position—the unrecognized third—that is, the necessity of mediation is also an aspect of the “feminine.” The debate at one moment imagines not merely that property can be reduced to possession, but that possession is a simple, immediate relation of subject to object which exists outside of law. The mediating regime of law does not define the relationship of the owner with respect to other persons in society; it merely enforces the pre-existing concept of possession. Property is seen initially as a binary relationship between subject and object, rather than the trilateral interrelationship of legal subjects with respect to a mediating object of desire. When the debate is forced to recognize the existence of another subject, the relationship once again becomes binary as the mediating object disappears and is replaced totally by the intersubjec-

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32 The literature only occasionally and sporadically recognizes this point. For example, Polinsky states that environmental nuisances involve “incompatible land use.” A. Mitchell Polinsky, Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies, 32 STAN. L. REV. 1075, 1075 (1980). Polinsky is probably the most insightful scholar working within the Calabresi-Melamed debate, and I refer approvingly to his analysis throughout the notes to this Article. Unfortunately, he did not fully internalize the fact that the logical implications of his insight form a critique of the Calabresi-Melamed taxonomy.
tive fungibility of money and economic indifference. Most importantly, the analysis of this immediate two party relationship of exchange both ignores and cannot account for the existence of third parties who are potential rival claimants for the forgotten object of desire.\textsuperscript{33} This difficulty is precisely why law and economics has embraced game theory so fervently. Although theoretically possible, multi-party games are not only extremely difficult but rarely lead to one clear solution.\textsuperscript{34} Consequently, the games played by the followers of Calabresi and Melamed involve only two parties, reducing all human relationships to unrelated series of binary relations. The recognition of the third (the feminine) is always postponed to the future.\textsuperscript{35}

The prevalence of the masculine metaphor and the repression of the feminine metaphor in the legal literature on environmental nuisances is even more remarkable considering the historic dominance of the feminine metaphor in discussions of man’s exploitation of nature.\textsuperscript{36} The very term “pollution” means “defilement” in the religious and sexual sense and was not extended to cover environmental harm until the nineteenth century.\textsuperscript{37}

This Article is not intended to be a comprehensive account of the literature begat by Calabresi and Melamed. Rather, it critiques the theoretical assumptions and implicit imagery underlying this literature. First, I introduce the Calabresi-Melamed dichotomy—or more accurately, trichotomy. I argue that it implicitly reduces property to a single element, vacillating between possession and exchange. The trichotomy thereby fails to achieve its stated goal of serving as a taxon-

\textsuperscript{33} Even as insightful an author as Polinsky, who realized that the Calabresi-Melamed taxonomy focuses only on the two-party dispute issues, see id. at 1075-76, does not recognize that property necessarily implicates third-party interests, which cannot be added on cumulatively.

\textsuperscript{34} See John Cassiday, The Decline of Economics, The New Yorker, Dec. 2, 1996, at 50. Carol Rose implicitly noted this problem of the standard economic approach. For example, she critiqued Ayres and Talley’s analysis for “remov[ing] the large numbers of participants in those cases, and instead treat[ing] nuisances as two-party matters.” Carol M. Rose, The Shadow of The Cathedral, 106 Yale L.J. 2175, 2183 (1997).

\textsuperscript{35} The other way of reducing multiparty relations to two-party games is to pit one individual player against an aggregate of other parties. An example of this can be found in the first chapter of Eric Rasmusen, Games and Information (1989), one of the standard introductory game theory text books. Rasmusen set forth an introductory game based on a hypothetical meeting of OPEC. See id. at 21-27. Although he described this as a game among five players who are playing simultaneously—Saudi Arabia, Libya, Venezuela, Kuwait, and Nigeria, in fact the game played in the text is between two parties—Saudi Arabia and “Others.” Id. at 25, 26.

\textsuperscript{36} Arguably, we can trace this tradition in Western culture back to the Biblical creation story in which God tells Adam to “subdue” the earth. Genesis 1:28. For a feminist critique of this tradition, see, for example, Carolyn Merchant, The Death of Nature: Women, Ecology and the Scientific Revolution (1980).

\textsuperscript{37} Webster’s Third New International Dictionary 1756 (1986).
CRITIQUE OF CALABRESI & MELAMED

A sea of ink has been spilled purporting to derive concrete policy recommendations from the Calabresi-Melamed taxonomy. Their

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39 See SCHROEDER, supra note 2, at 3-4.
40 For a thorough examination of psychoanalysis, see LACAN, supra note 6.
41 See supra notes 24-25 and accompanying text.
42 See, e.g., infra notes 49-56 and accompanying text.
trichotomy soon became one of the foremost schools of property analysis in contemporary American jurisdictions. The Calabresi and Melamed article richly deserves its high reputation. It is bold, elegant, concise, and thought provoking. It is also wrong. It reflects an unworkable, naive conception of property—the masculine phallic metaphor—and concentrates on the wrong elements of property—possession as both physical custody and alienation through exchange.

This Article is a critique, not a criticism, of Calabresi and Melamed. The mere recourse to phallic metaphors cannot be objectionable; it may be inevitable. My own writings are full of such imagery.43 Indeed, Lacanian linguistic theory holds that all language necessarily consists of metaphor and metonymy.44 Problems arise, however, when we unconsciously accept our metaphors and let them control analysis. Metaphors are always simultaneously true and false. They are true in that they presuppose some essential similarity between the signifier and the signified. They are false because a metaphor is, by definition, the substitution of one thing for another. Some essential dissimilarity between the signifier and the signified always exists. Otherwise, the signifier would be the signified. In this Article, I am trying to make the use of metaphors explicit so that we can be critically aware of how we use them and how they use us.

Contemporary scientific theory proposes that progress can only be made through a combination of the three logical processes of abduction, induction, and deduction.45 Through abduction a new hypothesis is proposed, which one tests by trying to falsify it through inductive and deductive reasoning.46 The growth of knowledge demands that we propose and eliminate interesting but ultimately "false" hypotheses. Consequently, the fact that a hypothesis is eventually proved wrong does not mean that it was not a valuable contribution to the search for knowledge. In the words of Professor Pierre Schlag, being wrong has a "bum rap."47 Unfortunately, the Calabresi and Melamed analysis has not been rejected but has spawned a progeny that goes beyond the original failed attempt to analyze environmental harms and misapplies it to a number of other property priority disputes.48

44 See generally LACAN, supra note 19, at 146-59 (discussing the place of metonymy and metaphor in language).
46 See id. at 180-83.
48 See Part IV.
Calabresi and Melamed tried to find a way to unify, and thereby clarify, the seemingly disparate areas of environmental property and tort law. From an economic perspective, they suggest that all environmental claims involve either assertions of entitlement or allegations of interference with an entitlement. To Calabresi and Melamed, the first task of both property and tort law is to decide which of two rivals should be awarded a disputed entitlement. Once the entitlement is allocated, the law must then decide what remedies it will use to protect this allocation. Remedies either can maintain or restore the status quo ante with respect to the entitlement or can compensate the original entitlement-claimant for the transfer or the loss of the entitlement. Sometimes the law removes the entitlement from the market entirely.

Economic theories of either wealth or utility maximization ask whether it is more efficient to retain the status quo ante of entitlement allocation or to encourage the transfer of the entitlement. Consequently, Calabresi and Melamed suggested that, from an economic standpoint, it might be useful to classify causes of action not on the basis of the specific entitlement claimed, the nature of the harm alleged (i.e., in terms of whether the claim sounds in property or tort), or even the identity of the claimant initially allocated the entitlement, but rather on the basis of the type of remedy used to enforce the entitlement. They thought that classifying causes of action by the type of remedy involved might better enable society to achieve pareto efficiency (i.e., insuring that the entitlement remains with, or is transferred to, the highest valuing user). Calabresi and Melamed also suggested, secondarily, that an examination of remedies might enable society to determine whether the law serves distributional or "other justice reasons." Calabresi and Melamed broadly categorized all remedies into three, theoretically distinguishable subsets: property rules, liability

49 See Calabresi & Melamed, supra note 14, at 1089.
50 See id. at 1089-92.
51 See id. at 1090. Polinsky implicitly recognized that Calabresi and Melamed were incorrect in analyzing this task as an allocation of a "thing." He more accurately described the choice in the environmental nuisance situation as a decision "as to who is entitled to prevail" in a specific dispute. Polinsky, supra note 32, at 1076.
52 The concept of Pareto optimality more accurately relates to this question. Pareto optimality is not the only concept of economic efficiency, but it is the one that Calabresi and Melamed discussed, see Calabresi & Melamed, supra note 14, at 1094-98, and that the Calabresi-Melamed inspired literature expressly or implicitly adopted, see, e.g., Jules L. Coleman & Jody Kraus, Rethinking the Theory of Legal Rights, 95 YALE L.J. 1335, 1358-60 (1986).
53 See Calabresi & Melamed, supra note 14, at 1090-98.
54 See id. at 1093-94.
55 Id. at 1098-1105.
rules, and inalienability rules. As we shall see, this terminology is not merely useless, it is pernicious. The terminology not only fails to reflect any existing legal regime, but also posits a legal regime that is both empirically and theoretically impossible in a world of more than two people.

The Calabresi-Melamed trichotomy is flawed for a number of closely interrelated reasons: (1) it confuses the definition of rights with the enforcement of rights; (2) it misidentifies the element of property that classic environmental disputes invoke, concentrating on possession, and to some extent alienation, rather than enjoyment; and (3) it inaccurately characterizes property as a binary relationship, preempting description of any actual or possible property regime in which three parties (or dynamite) exist. Indeed, the distinctions between property and liability remedies, upon which Calabresi and Melamed’s taxonomy depends, break down in the real world of multiple parties and destruction of property.

Other authors partially have raised a number of these critiques. For example, Jules Coleman and Jody Kraus have chided Calabresi and Melamed both for their conflation of the definition of rights and the enforcement of rights and for their confusion of damages for prior harms with a purchase price for involuntary sales. Louis Kaplow and Steven Shavell suggested, as I do, that environmental nuisances cause harms fundamentally distinct from those caused by possessory property disputes. James Krier and Stewart Schwab noted the empirical inaccuracy of the models based on the trichotomy.

Calabresi and Melamed were perfectly aware that as an empirical matter these categories may not have clearly defined borders in the sense that some remedies may have both property-like and liability-like aspects. "It should be clear that most entitlements to most goods are mixed." Id. at 1093. As I have discussed extensively elsewhere, and will turn to again later, this uncertainty is probably true of all qualitative distinctions and is not in and of itself a reason to reject the trichotomy. See, e.g., Jeanne L. Schroeder, Never Jam To-day: On the Impossibility of Takings Jurisprudence, 84 GEO. LJ. 1531, 1554-58 (1996).

See Coleman & Kraus, supra note 52, at 1342-47. Despite this criticism, Coleman and Kraus did not accurately identify the nature of the rights involved in environmental nuisances. At least, they mentioned the right of enjoyment in passing. "Once a community settles on a set of legitimate holdings (or entitlements) [i.e., the right of possession], it needs to specify the uses to which these holdings might be lawfully or otherwise legitimately put." Id. at 1344. Unfortunately, they then lapsed back into the masculine phallic metaphor and analyzed environmental nuisances not in terms of incompatible enjoyments, but in terms of takings. Even their one sentence discussion of enjoyment immediately metamorphosizes into a discussion of alienation. "Among the uses to which right-holders may wish to put their entitlements are those which involve or require transactions. Consequently, a community requires a set of norms that specify the conditions of lawful or legitimate transfer." Id.

See id. at 1356-64.


See Krier & Schwab, supra note 15, at 477-83.
Ian Ayres and Eric Talley implicitly challenged Calabresi and Melamed's identification of property with equity.11 Dale Nance implicitly recognized a number of my criticisms including my observations that the trichotomy does not deal adequately with the possibility of the destruction of the object of entitlement, that the property/liability dichotomy cannot be applied prospectively, and that just because tortfeasors only pay limited damages does not mean they have a "call" on the entitlements of tort victims.12

Nevertheless, these authors treat these insights as quibbles. They basically accept the Calabresi and Melamed paradigm and work within its strictures. This stance is particularly surprising because Calabresi and Melamed purport to base their paradigm largely on Ronald Coase's seminal analysis of environmental nuisances, The Problem of Social Cost.13 As I briefly discuss later in this Article14 and explore extensively elsewhere,15 not only does Coase recognize that environmental disputes involve what I call the feminine element of enjoyment. Coase's primary point was to chide his fellow economists for assuming what I call the masculine phallic metaphor.

In this Article, I present a unified critique, which shows that these seemingly disparate criticisms all spring from the same fatal flaw that

61 Ayres and Talley did identify liability rules with legal remedies and property rules with equitable ones. See Ayres & Talley, supra note 38, at 1031. Their later identification of property with punitive damages undermines this dichotomy. See id. at 1037, 1050-51; infra text accompanying note 336.

62 See Dale A. Nance, Guidance Rules and Enforcement Rules: A Better View of the Cathedral, 83 Va. L. Rev. 837, 842-58 (1997). Nance's article is an interesting attempt to rescue the Calabresi-Melamed analysis. He correctly realized that the analysis ultimately breaks down as an account of remedial regimes. He suggested, instead, that many legal rules should be seen as "guidance rules," rather than "enforcement rules." Id. at 840. This argument is similar, but not identical, to my point that the legal regimes Calabresi and Melamed identified do not merely allocate and protect entitlements, but also define them. For example, Nance argued that most people do not follow the law merely out of fear of criminal punishment or civil liability. Rather, people follow the law because they believe in the rule of law for one reason or another. See id. at 860. When society requires a tortfeasor to pay damages to a tort victim it does not declare that future tortfeasors have a call option to "buy" the bodily integrity of future tort-victims. Rather, it represents a societal judgment that the act was wrongful and should be avoided. See id. at 847-50. The vast majority of the population will accept this consensus and will eschew the bad behavior rather than engage in an economic calculus as to whether the penalty for violation of the rule—the call price—is greater or less than any potential gain. See id. at 864-65.

Although Nance's thoughtful and imaginative approach deserves serious consideration, I believe that it is beyond the scope of this Article. I believe that in his attempt to reform Calabresi and Melamed, he substantially rewrites their analysis. Despite Nance's protests to the contrary, Calabresi and Melamed expressly presented their analysis as one of enforcement regimes, and its utility for law and economics depends on the proposition that the distinction between property and liability regimes can be maintained and applied prospectively. See Calabresi & Melamed, supra note 14, at 1105-10.


64 See infra Part I.D.

65 See, e.g., Schroeder, supra note 6, at 521-30.
renders the original trichotomy worthless: the trichotomy privileges the masculine phallic metaphor for property and represses the feminine metaphor for property and law. Because the trichotomy cannot recognize thirdness, it vacillates between treating property as an immediate binary relation of subject to object (possession confused with physical custody) and treating it as an immediate binary relation of subject to subject (alienation and exchange confused with the physical transfer of custody). The trichotomy ignores the feminine as "the trick of singularity"—the identification of subject with object in enjoyment. Furthermore, it ignores the feminine as trilateral relation—the necessity of mediation in all legal relations. The trichotomy presumes that property entitlements exist outside of and prior to law and that the law merely allocates and enforces property. It sees property rules and liability rules as alternate enforcement regimes. In fact, however, entitlements and law are mutually constituting. All property regimes define, rather than merely allocate, entitlements. Rather than being alternates, property rules and liability rules necessarily co-exist. I hypothesize that these errors all reflect the single perspective of the psychoanalytically masculine sexuated position.

B. The Trichotomy

1. Property Rules

Under a "property" regime, an entitlement can only be transferred with the consent of the original holder. That is, society will respect the entitlement holder's own idiosyncratic or "subjective" valuation of her entitlement and will not impose its collective valuation. In Calabresi and Melamed's words, "[p]roperty rules involve a collective decision as to who is to be given an initial entitlement but not as to the value of the entitlement."67

Property remedies are, therefore, those that prevent a second party from taking an entitlement holder's property without her consent or those that restore the status quo ante by returning the object to the original claimant if the rival already has wrested possession of the entitlement from the original holder.68 While Calabresi and Melamed did not expressly specify what actual judicial remedies would fall within these categories, they briefly discussed injunctions.69 They also suggested that meaningful criminal sanctions would seem prop-

66 WILLIAM SHAKESPEARE, TWELFTH NIGHT act 2, sc. 5 (internal quotation marks omitted).
67 Calabresi & Melamed, supra note 14, at 1092.
68 See id. at 1118.
69 See id. at 1116.
In context, however, it seems fairly clear that Calabresi and Melamed seem to have been thinking primarily in terms of the traditional equitable remedies of injunction and of specific performance and the traditional property remedy of replevin. At first blush, this analysis seems to follow from the identification of property as possession because possession can be restored.

Unfortunately, the element of property involved in environmental harms is the feminine element of enjoyment. Once enjoyment is violated, it is not clear that the status quo can ever be restored because the object itself (and the owning subject) may have been irretrievably changed by the experience. She, as well as her object, are “polluted” in the original sexual and religious sense of violated, desecrated, defiled, or made impure.

Even in the case of a true possessory dispute, the reduction of property rights to injunction and replevin is a fantasy. In our world, which has more than two possible claimants to the objects of desire, the law is often unsuccessful in preventing a taking. In addition, if a taking has occurred, it is often practically and theoretically impossible to give it back.

I say “meaningful” because, as Kaplow and Shavell correctly pointed out, some ostensibly criminal sanctions are so light that they are more accurately characterized as liability rules. See Kaplow & Shavell, supra note 59, at 753. The most obvious examples are traffic violations. The fines imposed are designed merely to discourage, rather than entirely eliminate, certain behavior. See id. For example, in my home town of New York City, even the substantial fines charged for illegal parking are treated by delivery companies as merely a cost of doing business.

For example, in one of the best analyses to come out of the Calabresi-Melamed debate, Polinsky largely avoided the property-liability terminology in favor of speaking about the relative advantages of injunctive and damage remedies. See Polinsky, supra note 32, at 1075-78.

Interestingly, at least one critic of Calabresi and Melamed implicitly recognized this feminine sexual aspect of pollution. Richard Epstein gives as an example of the absurdity of the notorious “hypothetical four,” see infra Part II.B.4, by applying it to the law of rape. The enormous risk of this rule should be seen instantly if we propound its analogy for violations to the person. Just to say that “a woman can stop a man from raping her, but if she does she must compensate him” shows how far this position is from an ordinary understanding of rights, and it is with great relief that Calabresi and Melamed do not carry their innovation to this extreme. Rather, they note elsewhere that concern with “bodily integrity” precludes the application of an ordinary liability (take and pay) in these contexts. Obviously [hypothetical four] would be still more grotesque.

Richard A. Epstein, A Clear View of The Cathedral: The Dominance of Property Rules, 106 YALE L.J. 2091, 2103-04 (1997) (footnote omitted). Epstein damns Calabresi and Melamed with the faint praise that the only reason that their analysis is not totally “grotesque” is that they do not have the courage of their convictions to apply it to hard cases. Id. Of course, Richard Posner, the most ardent believer of law and economics, does not flinch from grotesquerie (and does not recognize that the grotesquerie is itself an argument against his analysis). Posner came close to analyzing rape in the market terms Epstein condemned. See Richard A. Posner, Sex and Reason 383-95 (1992).
Recently, Ayres and Talley have suggested that property remedies can be defined as damages set so punitively high that they will discourage any rational economic actor from attempting to take another’s entitlement. Although they do not specifically so state, their theory follows from an economic analysis that considers everything monetizable in the sense that there is always some price at which a claimant can be made indifferent between any two choices. This approach is ultimately unsuccessful. It does, however, at least intuitively see as through a glass darkly that a simple equation of property with equity matches neither our existing property regime nor any theoretically possible one.

2. Liability Rules

Under a Calabresi-Melamed “liability” regime, society imposes its intersubjective valuation on entitlement holders. This means that involuntary transfers will be upheld, despite the protests of the original entitlement holder, as long as the transferee gives the intersubjective value of the thing taken to the transferor.

As I discuss in more detail below, Calabresi and Melamed’s followers debate whether a liability regime should adopt “tailored” or

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73 See Ayres & Talley, supra note 38, at 1041. Kaplow and Shavell also, in passing, included draconian damages in their definition of property remedies. See Kaplow & Shavell, supra note 59, at 723.

74 1 Corinthians 13:2.

75 See Calabresi & Melamed, supra note 14, at 1092. They referred to society’s valuation as being “objective[.]” Id. By doing so they were not invoking the definition of “objective” as to external, scientific “truth.” The English word “objective” is a chameleon of constantly changing shades of meaning. See generally Jeanne L. Schroeder, Subject: Object; 47 U. MIMK L. REV. 1 (1992) (discussing various definitions of “object,” and comparing these definitions to those used by selected legal scholars who had criticized or defended “objectivity in the law”). I believe Calabresi and Melamed are using the common alternate definition of that which is decided by intersubjective consensus, or what I have called “Community Objectivity.” Id. at 17-24. This usage is “objective” in the sense that it is the opposite of that which is unique to any one individual subject. See id. at 17. Consequently, Calabresi and Melamed also referred to the objective value as the “collective determination of the value.” Calabresi & Melamed, supra note 14, at 1106. Although I often adopt this common and useful definition, I generally avoid it in this Article as confusing for my present purposes. Unless I expressly state otherwise, when I use the word “objective” in this Article, I am limiting it to the philosophic and psychoanalytic sense of that which relates to object relations. In my terminology, the Calabresi-Melamed trichotomy is “objective” when it attempts to reduce property to the immediate relationship of subject and object—possession as physical custody—even though this attempt also requires the enforcement of the owning subject’s “subjective” valuation of the object. When Calabresi and Melamed analyzed property rights in terms of exchange and collective valuation of society, it is more accurately termed “intersubjective.”
“nontailored” damages. In this context, tailoring means that a court should attempt to set damages equal to the victim’s subjective valuation of her loss. In contrast, nontailored damages are set by an objective measure.

The concept of tailored damages ignores Calabresi and Melamed’s model, which expressly states that the victim receives society’s valuation under a liability regime. Moreover, tailored damages are inconsistent with the existing legal regime and probably with any other practical legal regime that one could devise. Calabresi and Melamed did not discuss tailored damages presumably because their goal was a descriptive taxonomy of remedies that are available under our regime of law. Property damages are set by reference to market value (intersubjective valuation) and make no attempt to determine the victim’s subjective valuation of her loss.

But even if Calabresi and Melamed were accurate in recognizing that damages are usually based on society’s intersubjective valuation of loss, their solely economic approach works another radical sea change in damages. As Coleman and Kraus have complained, Calabresi and Melamed transformed damages intended to compensate a victim for a...
loss into a purchase price payable by the tortfeasor for purchase of an entitlement from an involuntary seller. The tortfeasor is, in effect, deemed to have a call option on the tort-victim’s “entitlement” to bodily integrity. The Calabresi-Melamed description tries to achieve immediate binary relations by suppressing the objective aspect of the property relation in favor of the intersubjective. The object of property loses all independent significance because it is completely monetized. In this economy, the parties are completely indifferent between retaining the object of desire and obtaining the purchase price: the object ceases to be desired. In the final Part of this Article, I argue that this shift reflects the second masculine strategy for denying castration. When one is forced to admit that the object of desire is gone, the masculine subject claims that he only temporarily relinquished the object of desire in exchange for a future substitute object.

Moreover, if damages are equivalent to a call option for the purposes of economic analysis, it does not follow that they are equivalent for legal or philosophical purposes. This analysis fundamentally misperceives not only the nature of the property right being infringed in an environmental harm, but also the nature of the infringing action.

As I will discuss, liability remedies may be all that any law can guarantee. This result, however, can never completely be satisfactory. To pretend that monetary compensation is payment for the taken object is to pretend that one consented to castration. According to Coleman and Kraus, a super-wealth maximizer like Judge Richard Posner would consider all transfers to be “voluntary” under a proper liability regime; it is just that sometimes the consent is purchased retroactively through the payment of damages. As Coleman and Kraus previously have argued within a different philosophical tradition, such an attempt to satisfy retroactively the consensual aspect of exchange is doomed. Although we may be able to restore the economic value of the lost object of desire, it does not follow that we can relieve the psychic injury of the lost control over one’s life. That is, when something is taken without the consent of the original entitlement holder, there are two harms: first, the loss of the entitle-

80 See Coleman & Kraus, supra note 52, at 1357.
81 See infra Conclusion.
82 See infra text accompanying notes 333-36.
83 Coleman and Kraus recognized that Posner did not state this view expressly, but argued that it is implicit in, and required by, “the internal logic of his argument.” Coleman & Kraus, supra note 52, at 1358-65.
84 See id. at 1359-65. Coleman and Kraus specifically critiqued Posner for trying to interpret damages as a form of retroactive consent. See id. As they accurately stated, this insistence on consent shows a solicitude towards autonomy which is peculiar for a wealth-maximizer like Posner. A true wealth-maximizer need not concern himself with consent so long as wealth is maximized. See id. at 1361.
ment that the Calabresi and Melamed analysis identifies; and second, the injury to the claimant's personal autonomy.

To put it another way, if what is violated is not only the masculine element of possession, but also the feminine element of enjoyment, monetary compensation will not restore the lost experience. Damages are metaphor—the substitution of one term for another. Even the most rabid Benthamite recognizes the empirical difference between having clean water, on the one hand, and having dirty water plus money in the bank, on the other, regardless of their economic equivalence. Accepting arguendo that one could be indifferent between the two objects—clean water and money—provided that the price were high enough, it does not necessarily follow that one also would be indifferent between having the exclusive right and power to make this decision and having the choice thrust upon one in exchange for money. This loss of autonomy is violation—the feminine analog to castration.

Moreover, as the hypotheticals I explore in the next Part will make clear, Calabresi and Melamed are once again incorrect in identifying this as a "remedy regime." Their concept of a remedy regime necessarily presupposes that the entitlement pre-exists as an identifiable possessory right that the law merely assigns to one party and enforces. The monetization of a right, however, is by definition the division of the right between or among claimants. Consequently, a "liability" regime is necessarily a rule of entitlement definition, not merely one of entitlement enforcement.

3. **Inalienability**

As its name suggests, under an "inalienability" regime, an entitlement may not be transferred in any (or at least most) market circum-

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85 For example, I have disagreed elsewhere with Margaret Radin's concept of "personal property" as the identification of subject with object such that loss of the object of property is loss of self. See generally Schroeder, *Virgin Territory*, supra note 26 (critiquing a series of Radin's articles establishing a feminist jurisprudence of property law). The archetypical example of the object of such a "healthy" property relation is the wedding ring. See Radin, *Property and Personhood*, supra note 31, at 959-61. This relation is the feminine phallic metaphor for property which is as incomplete and inapt as the masculine version I critique in this Article.

Although I have a sentimental attachment to my wedding ring, I would not hesitate to sell it if someone made me a good offer. It does not follow from this decision that I would not feel violated if someone were to steal my ring even if I was generously compensated for its loss by insurance or otherwise—the sense of violation would relate to the thief's invasion of my personal autonomy, not the loss of the object itself.

86 Of course, the pure utilitarian would argue that violation is just another form of disutility. Consequently, if damages are designed to make the victim indifferent, they should be set not merely at the victim's subjective valuation of the entitlement itself, but at that amount plus some additional amount to compensate her for her loss of integrity.

87 See *infra* Part II.B.
stances. This means that not only will the courts refuse to enforce a contract that I might make to sell one of my kidneys, but also the state might use its police power to enjoin such a contract or to impose criminal or civil penalties on the contracting parties.

Most commentators ignore, or give cursory treatment to, this final category and treat the Calabresi-Melamed trichotomy as though it were a dichotomy. This miscategorization may occur because classic law and economics theorists usually deem all entitlements monetizable; at the appropriate price, one is indifferent between owning the entitlement or receiving the price. The fact that entitlements are monetizable suggests that, in theory, they also should be alienable. Typically, inalienability is defended in terms of paternalism or justice, about which the law and economic analysis arguably has little original to add.

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88 See Calabresi & Melamed, supra note 14, at 1111.
89 Blood is a rare exception to this rule, but even the alienation of blood tends to be highly regulated. Some body parts may be alienable in other nonmarket contexts. For example, although we generally consider it base to buy and sell kidneys, we consider it noble to donate one. Although the sale of bodies in prostitution is illegal in most jurisdictions, and gifts of the sexual use of bodies to most people is frequently illegal and deemed immoral, the contractual sexual exchange of bodies between spouses is not only permitted, it is considered rightful and beneficial. Indeed, both the medieval legal notion that each spouse had a marital lien on the sexual services of the other and the more recent late (and not lamented) doctrine that there was no such thing as rape in marriage, confirm that the law frequently has mandated these exchanges. See Jeanne L. Schroeder, Feminism Historiﬁed: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence, 75 IOWA L. REV. 1135, 1195-99 (1990).
90 For example, Richard Posner, one of the founders and foremost proponents of law and economics has championed the goal of wealth maximization. Wealth is deﬁned as "the value in dollars or dollar equivalents . . . of everything in society." Richard A. Posner, Utilitarianism, Economics, and Legal Theory, 8 J. LEGAL STUD. 103, 119-20 (1979). This deﬁnition of wealth is not limited to that which a lay person would think of as economic goods traded in the market. Rather, it includes any "good thing," tangible or intangible that a member in society would want if the member would be willing to pay to have it. Consequently, it is not necessary for there to be an explicit market for the good thing. "Even today, much of economic life is organized on barter principles; the 'marriage market,' child rearing, and a friendly game of bridge are some examples. These services have value which could be monetized by reference to substitute services sold in explicit markets or in other ways." Id. at 120. The monetary value of other good things can be determined by reference to "'hypothetical' market[s]." Id.
Since, however, the determination of value (that is, of willingness to pay) made by a court is less accurate than that made by a market, the hypothetical-market approach should be reserved for cases, such as the typical accident case, where market-transaction costs preclude use of an actual market to allocate resources efficiently.
91 Calabresi and Melamed analyze inalienability in these terms. See Calabresi & Melamed, supra note 14, at 1111-13. Of course, there is a utilitarian way of defending inalienability. The sale of body parts might so offend a portion of the population that the aggregate utility lost by society generally would exceed any utility gained by the parties to any contract for such a sale. The libertarian might argue that we should not give these
Perhaps more importantly, there seems to be something intuitively wrong with including this last category within a taxonomy of enforcement remedies. As a result, there is a tendency to exclude inalienability rules from the analysis on the grounds that they are not fundamentally similar to property and liability rules. Calabresi and Melamed somewhat sheepishly step back from their trichotomy because this third category seems to fit poorly with the other two: "Unlike [property and liability] rules, rules of inalienability not only 'protect' the entitlement; they may also be viewed as limiting or regulating the grant of the entitlement itself." 92

In contradistinction, I defend Calabresi and Melamed's initial instinct that the third category belongs with the other two, and I instead criticize their belated attempt to distinguish it. The very reason that it seems intuitively inappropriate to analyze inalienability as a remedy applies equally, albeit less obviously, to property and liability rules. Calabresi and Melamed's concept of property and liability rules implicitly assumes that entitlements pre-exist outside of law: the law just allocates and enforces entitlements. 93 This assumption is the fantasy that we can transcend the artificial, temporary order of law and language (which Lacan calls the symbolic 94) and achieve immediate contact with the natural and permanent (which Lacan calls the order of the real). 95 For this reason, Calabresi and Melamed implicitly start by reducing property to physical possession. 96 The problem is that entitlements are legal, symbolic concepts, not real ones. Although one may have an entitlement to have physical custody of a tangible thing, not all objects of desire are tangible (such as debts and copyrights) and not all possessory interests are custodial in nature (such as a secured party's perfected security interest 97). Yet, as I already have indicated, all entitlement disputes merely define—or in Calabresi and

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92 Id. at 1093.
93 See id. at 1106-10.
94 See Schroeder, supra note 2, at 64.
95 See id. at 65-66.
96 See Calabresi & Melamed, supra note 14, at 1106-07 (providing an example in which the parties focus on a park and their desire "to have it").
97 Elsewhere, I argued extensively that, from a Hegelian perspective, perfection of a security interest through filing should not be seen as a substitute for the unproblematic norm of possession as physical possession. See Schroeder, Legal Surrealism, supra note 26, at 509-21. Rather, filing is itself a form of Hegelian possession in the sense of the intersubjective recognition of the right of one subject to exclude other subjects from the object of desire. See id. at 521-24 (noting that parties can file to create security interests, which "are examples of a minimum form of Hegelian possession through positive law—intersubjectively recognizable identification of object to subject"); infra Part III.B.
Melamed’s terminology, “limit[ ] and regulat[e]”98—the scope of the entitlement. In the next Part, I demonstrate this concept by applying a standard Hohfeldian analysis to the six possible hypotheticals that the Calabresi-Melamed taxonomy can generate.

More importantly, however, the presumption underlying the Calabresi-Melamed taxonomy—that one can analyze environmental nuisances in terms of the possession and exchange of entitlements—logically requires the inalienability category. If the ability to be free from pollution or to pollute is a thing that one can possess and alienate through exchange, then this necessarily implies that these exchanges have terms and that society could impose restrictions on the terms of exchange. As we will see, however, the concept of inalienability is incoherent when the polluter is the entitlement holder. This inconsistency necessarily implies that the fundamental assumptions of the Calabresi-Melamed taxonomy also are fatally flawed.

Perhaps the reason inalienability rules are all but ignored is because they dimly reflect the repressed feminine aspect of property and of environmental nuisances. Inalienability rules deny the adequacy and potency of the masculine regime of possession and of exchange. These rules imply a unique relationship between the “entitlement claimant” and her “entitlement,” which suggests the psychoanalytically feminine position of identifying with one’s objects of desire. Unlike the masculine regimes, which pretend that castration can be cured, inalienability regimes recognize that some losses—like that of virginity—are permanent and irremediable. Inalienability—the removal of certain objects from the market regardless of the owner’s wishes—is, however, the masculine response to the imagined fragility of feminine integrity—“the forced chastity of the veil” and the gynaeceum.99

C. The Utility of the Trichotomy

Because I fundamentally disagree with not only the accuracy of but also the theoretical possibility of the Calabresi-Melamed taxonomy, I will not dwell at any length on the uses to which they and their followers put it. Suffice it to say that Calabresi and Melamed adopted the standard law and economics proposition that law should seek to be efficient in the sense of maximizing wealth or utility.100 Wealth (or

98 See Calabresi & Melamed, supra note 14, at 1093.
99 SCHROEDER, supra note 2, at 232-35.
100 See Calabresi & Melamed, supra note 14, at 1093-1101. This adoption is not to imply that Calabresi and Melamed denied that law could not or should not also consider other values. Indeed, they were very careful to admit the possibility of distributional and what they called “other justice reasons,” although they admitted that they were at a loss to imagine an example of the latter which can not be subsumed into the categories of efficiency or distribution. See id. at 1102-05. The various competing definitions of efficiency
utility) maximization requires that the good things of the world\textsuperscript{101} be transferred to the highest valuing user.\textsuperscript{102} Wealth maximization suggests that if the original entitlement holder values her entitlement less than another party, efficiency would dictate that she transfer her entitlement to that other party. Ordinarily, based on the assumption that individuals are the best judges of their own values and utilities and that values and utilities can be monetized, law and economics theorists prefer to leave these entitlement transfers to the voluntary world of contract.\textsuperscript{103}

The Coase Theorem maintains that absent “transaction costs,” parties will instantly contract so that all good things immediately end up in the hands of the highest valuing user, regardless of the original location of the entitlement.\textsuperscript{104} Indeed, they always already have done so because in the so-called Coasean universe of the perfect market there is no time.\textsuperscript{105} Needless to say, we do not, nor could we ever, live in a Coasean universe—as Coase was the first to point out.\textsuperscript{106} Various

and wealth (or utility) maximization that one should apply are beyond the scope of this Article.\textsuperscript{107} As I will discuss, we should not confuse the concept of “good things” or “objects of desire” with “goods”—tangible things. See infra text accompanying notes 228-31.

\textsuperscript{102} See Calabresi & Melamed, supra note 14, at 1093-96.

\textsuperscript{103} See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 86 (5th ed. 1998) (explaining that “the law should make property rights freely transferable” and noting that “[p]eople know their interests better than courts do”).

\textsuperscript{104} See Calabresi & Melamed, supra note 14, at 1094-95; see also Schroeder, Juno Moneta, supra note 26, at 995 (discussing the feminine and phallic nature of property). My colleague Charles Yablon has suggested somewhat facetiously, although accurately, that the Coase Theorem can translate into ordinary English as follows: “In a perfect world, law doesn’t matter. In an imperfect world, who knows whether law matters.”

For an excellent, extended, and highly amusing critique of the Calabresi-Melamed debate on similar grounds, see Krier & Schwab, supra note 15, at 482-83. Krier and Schwab concluded to the effect that although this debate is arid, jejune, and often meaningless, engaging in such debate is what all law professors (including themselves) do. See id. (“What comes along will come along, and most of it will be useless but a little of it might not be . . . . It doesn’t matter if it doesn’t matter. It’s what academics do. It’s what we do.”).

As an author who compares property to penises, I can hardly pretend that all legal scholarship be aimed at immediate, practical results. I ideistically hope, however, that theoretical analysis can lead to the growth of human knowledge and, eventually, to practical implications. Indeed, I have applied my highly abstract theories of property law not only in commercial law doctrinal scholarship, but also in legal practice in which I believe it has been very successful. In any event, I have won cases based on it.

\textsuperscript{105} In Coase’s words, “eternity can be experienced in a split second.” R.H. COASE, THE FIRM, THE MARKET, AND THE LAW, in THE FIRM THE MARKET AND THE LAW 1, 15 (1988). As Epstein stated according to the Coase theorem, “the holdout danger from a property rule would be of no consequence [in a perfect market] because the two parties could exchange an infinite number of offers within an infinitesimal period of time; in essence, that is what a world of zero transaction costs would entail.” Epstein, supra note 72, at 2092.

\textsuperscript{106} Although it is common to call the hypothetical world without transaction costs a Coasean universe, Coase always insisted that this was a misnomer. One of Coase’s primary points in his seminal work The Problem of Social Cost is that economists should stop using the model of the perfect market precisely because it is impossible and has little to tell us about actual markets. See Coase, supra note 63, at 43 (“But the whole discussion [of ideal worlds]
circumstances, generally referred to as "market failures," prevent or at least hinder negotiation and contract. As a result, Calabresi and Melamed asked whether, given the existence of various types of transaction costs, we can manipulate remedial regimes in order to mitigate market failure and can encourage good things to flow to higher valuing users. Although I believe that Calabresi and Melamed's idea is a dead horse, which their followers sadistically continue to beat, at least it once seemed a fruitful mare of an idea; unfortunately, she foaled a barren herd of intellectual mules.

The entire debate generated by the Calabresi-Melamed taxonomy assumes that the parties competing for an entitlement bargain in the shadow of a remedy regime. Consequently, parties always must know which regime would apply to them if a dispute were to arise. In fact, in a world with more than two parties and with the possibility of destruction—our world—no party can ever have this certainty. As I will show, property rules devolve by necessity into liability rules.

D. A Brief Word on Coase

Although Calabresi and Melamed purport to base their trichotomy largely on the Coase Theorem, Coase himself almost entirely avoided their errors. Indeed, Coase expressly emphasized not only the symbolic nature of legal rights but also what I identify as the feminine aspect of environmental disputes. Coase did not, of course, use my Lacanian terminology. The tendency to repress the feminine is so largely irrelevant for questions of economic policy since whatever we may have in mind as our ideal world, it is clear that we have not yet discovered how to get to it from where we are.

Coase was asserting that because costs always exist, economists should concentrate on the real world of costs, not a hypothetical perfect costless world. This approach requires that economics adopt an appropriate definition of costs.

A better approach would seem to be to start our analysis with a situation approximating that which actually exists, to examine the effects of a proposed policy change and to attempt to decide whether the new situation would be, in total, better or worse than the original one. In this way, conclusions for policy would have some relevance to the actual situation.

Id.

See Calabresi & Melamed, supra note 14, at 1119-21.

107 Legal scholars have, on occasion, recognized the impossibility of applying the trichotomy prospectively. See, e.g., Emily Sherwin, Introduction: Property Rules as Remedies, 106 Yale L.J. 2083, 2086 (1997) ("[I]n the absence of fairly determinate rules dictating the choice of remedy in classes of cases, the court's eventual selection of a property rule or a liability rule will have little effect on a potential defendant's decision whether to bargain or to take without consent."). As I discussed, Nance is one of the few who have recognized that this impossibility totally vitiates the utility of the Calabresi-Melamed analysis as an account of remedy regimes. See Nance, supra note 62, at 842-58. Consequently, he quite heroically tries to rewrite their analysis in terms of guidance rules. See id. at 908-17. Although interesting, this revision is a radically different project than that Calabresi and Melamed and their followers undertook.

109 I develop my analysis of Coase more thoroughly in Schroeder, supra note 6.
strong, however, that legions of law professors continue to ignore the precise language of Coase's argument.

Coase's primary points were to chide economists for conflating economic costs and legal harm and for assuming that legal rights are pregiven. For example, suppose B has a widget factory next to A's consumer plot, which has a spring that she uses for drinking water. According to this hypothetical, economists tend to assume that A has a pre-existing right to clean water. When B pollutes, A, by definition, will suffer a legal harm. From the conclusion that A suffered a legal harm, traditional economists would infer the non sequitur that B also caused an economic loss. Widget production becomes an externality by definition because it interferes with A's pregiven right.

Coase thought that this analysis was wrong for three reasons. First, economic costs should be defined in terms of economic goals, just as legal harms should be defined in terms of legal norms. While economics and law are not necessarily in conflict, there is no a priori reason to think that they share identical goals. To Coase, economics has the limited goal of the maximization of total production in society. In Coase's view, the law (included in the broader concept of "welfare economics") should consider broader ideals (like "justice," however defined), which are, strictly speaking, irrelevant to economists. Economic costs should, therefore, be defined as those things that interfere with profit maximization. Legal harms are, presumably, those things that create injustice. Consequently, there is no a priori

110 In Coase's words, economists "obscure the nature of the choice" which needs to be made. Coase, supra note 63, at 2. The heart of Coase's article is a critique of the Pigouvian tax, which seeks to make producers internalize costs. See id. at 28-29.

111 For convenience I will continue to use my clean water-widget production hypothetical. Coase used a variety of other hypotheticals to illustrate necessarily inconsistent rights of enjoyment such as the rival claims of a cattleman whose roaming herd tramples the crops of a neighboring farmer, see id. at 6-8; a doctor whose waiting room abuts a noisy confectioner's factory, see id. at 8-9; a coconut-fiber weaver whose mats are stained by the emissions from a nearby chemical plant, see id. at 10; and a farmer growing combustible crops next to a railway that emits sparks, see id. at 29-34.

112 Coase uses the example of a smoke nuisance to make this point.

The judges' contention that it was the man who lit the fires who alone caused the smoke nuisance is true only if we assume that the wall is the given factor. This is what the judges did by deciding that the man who erected the higher wall had a legal right to do so... judges have to decide on legal liability but this should not confuse economists about the nature of the economic problem involved. Id. at 13; see also Schroeder, supra note 6, at 523-26 (noting that economists "conflate[ ] the legal status quo with economic reality").

113 Consequently, Coase defined efficiency as the maximization of the aggregate value of production in society. See Coase, Notes on the Problem of Social Cost, in THE FIRM THE MARKET AND THE LAW, supra note 105, at 157, 158; Coase, supra note 63, at 15, 94.

114 See Coase, supra note 63, at 15 (noting that "many of the factors on which [a court] decision turns are, to an economist, irrelevant").
reason to think that legal harms always will be the same as economic costs.

Second, law is not pregiven, closed, and symmetrical. That is, it is not "imaginary," in the Lacanian sense.\textsuperscript{115} Thus, if the law grants $B$ a right to make widgets and to dump the resulting industrial waste in $A$'s water, then there are no legal externalities to $B$'s production because, by definition, $A$ did not lose anything (i.e., one cannot lose that to which one is not entitled). While this formulation may make sense from a legal perspective, it obviously does not from an economic one. Law focuses on the individual harm caused to specific rights holders. Whether a harm has occurred depends on how rights are allocated. In contradistinction, economics examines the aggregate production of the economy. The allocation of wealth per se does not necessarily increase or decrease the total wealth of society. Economics, as understood by Coase, is concerned with the size of the pie, while law may also be concerned with how the pie should be divided.\textsuperscript{116}

Coase's final criticism flows from his understanding that environmental nuisances do not involve disputes over possession or exchange of a single thing. Rather, they involve disputes over necessarily incompatible enjoyments of different things.

Consequently, he ends The Problem of Social Cost by stating:

A final reason for the failure to develop a theory adequate to handle the problem of harmful effects stems from a faulty concept of a factor of production. This is usually thought of as a physical entity which the businessman acquires and uses (an acre of land, a ton of fertilizer) instead of as a right to perform certain (physical) actions. We may speak of a person owning land and using it as a factor of production but what the land-owner in fact possesses is the right to carry out a circumscribed list of actions. The rights of a land-owner are not unlimited.\textsuperscript{117}

\textsuperscript{115} For example, Coase emphasized that a judge's decision that one party had harmed another is true only if we assume that the first party's right is the given factor. See id. at 13.

\textsuperscript{116} Of course, the allocation of resources can affect the total amount of production. Coase argued that if society only considers economics, it should allocate resources to maximize production. Society (or the broader study of "welfare economics"), however, may consider other goals equally important. The libertarian, who believes that humans have a natural right to property, would resist the forcible reallocation of property for the public good of wealth maximization. Indeed, one might characterize Epstein's trenchant critiques of the Calabresi-Melamed analysis, which incorporates the law and economics view of the Coase theorem, as the libertarian's insistence on the importance of property rights, which we cannot simplistically sweep away on economic grounds. See Epstein, supra note 72, at 2093 ("Over time, the inefficiencies of a liability system cascade until the security of possession and the security of exchange needed for complex commercial life and a satisfying personal one are no longer available."). An egalitarian might argue that it is preferable for society to produce a smaller pie equitably divided, than the largest pie possible.

\textsuperscript{117} Coase, supra note 63, at 43-44.
To translate Coase's critiques into my terminology: the economic theory of environmental nuisances is inadequate precisely because it implicitly reduces property to the single element of possession imagined as an immediate binary sensuous relationship with a tangible thing. Indeed, economic theory often confuses the right of possession with the thing itself. We need to remember not only that property consists of elements other than possession, but also that it is inherently relational. Environmental nuisances, specifically, involve rival claims to necessarily competing enjoyments of different objects of property. Economists (and lawyers) are responsible for determining the relative boundaries of each rival's rights.

Coase demonstrated this idea with the example of an individual who had a chimney of a certain height attached to her fireplace. A neighbor built a wall on the top of his adjacent house which partially blocked the chimney so that smoke from the first person's fireplace billowed into her flat rather than escaping up the chimney. The chimney owner argued that the neighbor had harmed her by building the wall. The court found that one could not assume that either party caused harm to another as a matter of law. Many but-for causes of the "harm" to the first party existed. For example, "but for" the neighbor's enjoyment of his own premises by building a wall, the smoke would not have entered the chimney owner's apartment. It is equally true, however, that there would have been no smoke "but for" the chimney owner's enjoyment of her fireplace by building a fire.

The smoke nuisance was caused both by the man who built the wall and by the man who lit the fires. Given the fires, there would have been no smoke nuisance without the wall; given the wall, there would have been no smoke nuisance without the fires. Eliminate the wall or the fires and the smoke nuisance would disappear.

In Coase's terminology, the problem in the chimney case lies in the parties' relative claims to enjoyment being "reciprocal" in the sense that "[t]o avoid the harm to B would inflict harm on A." On the one hand, the neighbor's enjoyment of his property (the ability to build a wall) necessarily made it impossible for the chimney owner fully to enjoy her property (the use of the fireplace). On the other hand, recognition of the chimney owner's right to enjoy her fireplace would impede the ability of the neighbor to enjoy his property (i.e., the neighbor would have to both refrain from building walls and tear

118 See Bryant v. Lefever, 4 C.P.D. 172, 173 (1879); see also Coase, supra note 63, at 11-13 (presenting Bryant as an example).
119 See Bryant, 4 C.P.D. at 173.
120 See id.
121 See id. at 176.
122 Coase, supra note 63, at 13.
123 Id. at 2 (italics added).
down any wall he already built.) As I will discuss below, it is this con-
cept of necessarily inconsistent claims to enjoyment of two different
objects, which Coase called reciprocity, that Calabresi and Melamed
misinterpreted as disputes regarding mirror image or symmetrical
claims to possession of a single object.\footnote{124}

Coase intuitively replicated Hohfeld's observation that legal
rights do not exist in a vacuum, but can only be understood as rela-
tions between and among specific legal actors.\footnote{125} Coase took a step
beyond Hohfeld, however, and approached the Hegelian-Lacanian
conclusion.\footnote{126} If rights do not pre-exist, then they must be granted.
Law is a matter of creation not discovery; the legal universe is not
static, but at least potentially, dynamic. This theory implies both that
law is open and may create and delineate legal rights and that the
rights it creates will never be perfectly symmetrical because of the nec-
essarily inconsistent competing values. In my terminology, environ-
mental nuisance analysis is trapped in the masculine phallic
metaphor. This metaphor represses the fact that environmental nui-
sances involve disputes over the feminine element of enjoyment, not
the masculine elements of possession and exchange.

II
THE APPLICATION OF THE CALABRESI AND
MELAMED TRICHOTOMY

A. Introduction

As a prelude to my Lacanian-Hegelian critique of the Calabresi-
Melamed trichotomy, I provide a detailed description of the six para-
digmatic hypothetical situations that the trichotomy generates using
Hohfeldian terminology. Their trichotomy presupposes that there is
a pre-existing thing—which they called an entitlement—which is to
be allocated to one of two rivals.\footnote{127} If the party who does not own
the entitlement infringes on the entitlement held by the other, this in-
fringement is deemed a taking of the entitlement by and the transfer
of the entitlement to the infringing party.\footnote{128} In their original article,
Calabresi and Melamed stated that their system generates four hy-
potentially, although one is rare in the private realm.\textsuperscript{129} In fact, however, if their taxonomy is viable, it generates six hypotheticals because there are two possible allocations of entitlements and three possible remedy regimes. As I have already argued,\textsuperscript{130} if the right to clean water and the right to pollute are things that could be alienated in market relations, then this necessarily implies that society could impose limitations on such alienation. Consequently, the coherence of the Calabresi-Melamed taxonomy depends on there being at least a possibility of inalienability regimes.

The Calabresi-Melamed analysis implicitly envisions property as a relation between an owner and a desired object. This view implicitly reduces property to the single element of possession and imagines possession as the immediate physical custody of a tangible object by a human being. Because only one individual at a time physically can hold an object, such a custodial image of property is inherently exclusive. It imagines any interference with a property right in terms of wrestling the desired object away from the physical custody of the original holder—as reflected in the terminology that refers to such a loss as a “taking.” Before the environmental tort, the victim held something, which now is gone. Note that the necessary corollary to imagining property as custody of a thing and the interference of property as the taking of a thing is that the interferer also is imagined as obtaining the object of desire. In other words, an interference with property is not only the loss of something by the victim, but also is the transfer of something \textit{from} the victim to the injurer. Consequently, any damages payable are imagined not only as compensation for the loss of the thing, but also as the purchase price payable by the taker for the privilege of obtaining the thing transferred.

In my initial analysis of the Calabresi and Melamed hypotheticals, I will apply the well known system of jural correlatives developed by Wesley Newcomb Hohfeld.\textsuperscript{131} Although I am highly critical of Hohfeld’s particular analysis of property\textsuperscript{132} and his assumptions of complementarity,\textsuperscript{133} I believe his taxonomy of jural correlatives is a powerful tool of analysis. Hohfeld’s primary point is that it is meaningless to speak of a legal right as though it pre-exists and only needs

\textsuperscript{129} See id. at 1116-17; Krier & Schwab, supra note 15, at 442-45.
\textsuperscript{130} See supra text accompanying notes 80-81.
\textsuperscript{131} See generally, Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning I, in Fundamental Legal Conceptions, supra note 29, at 23, 50-51 (articulating Hohfeld’s system of jural correlatives).
\textsuperscript{132} I set forth my critique of Hohfeld’s property jurisprudence in Schroeder, Chix, supra note 26, at 290-99, and SCHROEDER, supra note 2, at 1-7, 168-79.
\textsuperscript{133} See infra text accompanying note 176.
to be identified and allocated. Rather, legal rights can only be thought of as combinations of rights and obligations between and among legal subjects. Hohfeld developed his taxonomy to aid identification and definition of traditional categories of legal relations. No doubt we could invent other taxonomies, and we probably could break down his eight primary categories into subcategories of rights. Hohfeld’s system nevertheless has the advantage of being generally familiar. It has met the test of time because it displays that rare quality called elegance—displaying the right balance of simplicity and sophistication. It is easily understood and can be usefully applied to a wide variety of legal topics.

I will use Hohfeld’s system to show several things. First, Calabresi and Melamed were naive in thinking that they could identify regimes that merely enforce pre-existing legal rights. Rather, enforcement regimes are part and parcel of the more primitive, necessary task of defining legal rights. Consequently, these regimes correctly lump

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134- This obvious point was, of course, not novel to Hohfeld. His taxonomy is, however, such a succinct illustration of this point that it has become linked to his name.
136- See Hohfeld, supra note 131, at 27-28 (arguing that ambiguous terminology impedes legal analysis), 35-36 (arguing that his system of jural relations solve the problem of the ambiguity of legal terminology).
137- Although Hohfeld’s project seems unique to our eyes, Joseph Singer has shown that our judgment is an anachronism. Proposing taxonomies of legal categories was a standard academic exercise in the late nineteenth and in the early twentieth century. Scholars almost immediately recognized Hohfeld’s system as so superior to those of his rivals, that their systems were virtually forgotten. See Joseph William Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 Wis. L. Rev. 975, 979 (“Hohfeld effectively annihilated both the Benthamite and Austinian views of legal rights and liberties.”). Consequently, Hohfeld, a precursor to the legal realists, is not, as is often thought, the first modern commercial jurisprude. Rather, he serves as the link between the nineteenth and twentieth century because he epitomized, and closed, the earlier era. See id. at 1049-59.

Morris suggested that Hohfeld’s taxonomy “is so broad as to be of only limited analytic value” and proposed her own alternate taxonomy of the structure of legal entitlements. Morris, supra note 31, at 834. I believe that the test of time had proven Morris wrong even before she began writing. My disagreements with Morris’s analysis are so thorough that they are beyond any simple criticism. Suffice it to say, I believe that her analysis conflates different distinct elements of property (for example, subsuming the masculine element of possession entirely within the feminine element of enjoyment) and conflates the effects of defining and allocating property rights with the structure of the rights itself (for example, confusing the identification of which party would most likely initiate negotiations for changes in property rights with the property rights themselves). Perhaps most mysteriously, Morris incorrectly identified the right to monetary compensation as a unique and separate right. See id. at 857. In fact, as I discuss in this Article, virtually all if not all legal rights in our society, at least those arising under the so-called “private law” of “contract, property and tort,” ultimately devolve into the remedy of monetary compensation.

Consequently, when Morris tried to apply her taxonomy she ended up with several null sets: categories which she admitted are incoherent. See id. at 875-76. The legal regimes they generate do not merely fail to describe any existing legal regime, they are theoretically unthinkable. As Calabresi and Melamed understood, the existence of such null sets characterizes a fundamentally flawed taxonomy. See infra note 161 and accompanying text.
"inalienation," which is expressly a matter of limiting and defining rights, with property and liability rules, which are implicitly matters of limiting and defining rights. Second, an application of Hohfeldian terminology to the six possible hypotheticals derived from the Calabresi-Melamed taxonomy reveals that Calabresi and Melamed misinterpreted the elements of property involved in environmental nuisances by concentrating on possession and alienation instead of the relevant element of enjoyment. Finally, although Calabresi and Melamed attempted to create a correlative legal system, their understanding of correlative legal conceptions is inaccurate. For example, it may follow from the assertion that A has a right to clean water that B has a duty not to dirty A's water, but it does not follow that if B were to violate his duty by polluting A's water, then B has taken A's right. Even if, after the fact, a court were to find that A's only remedy against B were damages, it does not necessarily follow that B's violation constitutes a taking.

The heart of the Calabresi-Melamed error is the conflation of the initial definition and subsequent modification of rights with the taking of rights. This conflation directly follows from the exclusively objective nature of the Calabresi-Melamed analysis, which fundamentally conflicts with the exclusively intersubjective analysis, which is its mirror image. Calabresi and Melamed's imaginary ideal of symmetrical rights with respect to a single object misconstrues Coase's concept of the reciprocity of rights. This conflation is a common misunderstanding made as frequently by Coase's detractors as by his defenders.

In fact, nothing could be further from Coase's point than symmetry. Coase asserted that in the case of environmental nuisances, the respective ability of two parties to enjoy their respective objects of desire are necessarily mutually inconsistent. A and B are not arguing about the same right; rather, A's ability fully to enjoy her water necessarily impacts B's ability to use his factory, and B's ability fully to use his factory necessarily impacts A's ability to enjoy her water. The empirical ability to enjoy, however, is not the same as the legal right to enjoy. Coase argued that economists cannot assume that either A or B has the right to enjoy his or her object and thereby to prevent the other from enjoying his or her object. Only the law can establish this right. B's use of his factory and consequent pollution of A's water is a legal harm to A only if and insofar as the law gives A the right to

\[138\] See infra text accompanying notes 148-50.


\[140\] See Coase, supra note 63, at 8-15 (providing several examples of this inconsistency).

\[141\] See id. at 13-15; Schroeder, supra note 6, at 524-25.
The law could, at least theoretically, grant B the right to enjoy his factory. If it did so, any attempt by A to interfere with B's production (e.g., by insisting on a right to clean water) would violate B's right. Harm, and therefore causation, is a legal or economic judgment, not a natural determination. Moreover, because legal and economic goals are not necessarily identical, legal harm may not be the same thing as economic cost. A's and B's desires are not only qualitatively different—A wants water and B wants widgets—but also necessarily inconsistent. Therefore, the law of environmental nuisance cannot be symmetrical. The following hypotheticals demonstrate this nonsymmetrical reciprocity.

Consequently, Calabresi and Melamed's taxonomy is not merely unsuccessful, but also pernicious because it both fails to create hypotheticals that reflect actual legal problems and generates hypotheticals that do not reflect realistic legal problems.

B. The Six Calabresi-Melamed Hypotheticals

Six simple examples demonstrate how the Calabresi-Melamed model applies in the context of environmental disputes. Suppose that A and B own adjoining plots of land. A, a consumer, resides on her plot, which has a spring to supply her with drinking water.

B, a producer, owns a widget factory on his adjoining plot. The production of widgets releases pollutants into the spring on A's land.

Coase stated that:

The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.

Coase's choice of the word "reciprocal" is arguably unfortunate. Its primary meaning is "alternating," and its secondary meanings include "inversely related" and "complementary." 

The example in the Calabresi and Melamed article is the right to clean air versus the right to pollute. See Calabresi & Melamed, supra note 14, at 1115-24. I replace air with water to make it slightly more intuitive with regard to the masculine phallic metaphor. It is easier to think of taking water because it is more tangible than air. For simplicity, throughout this Article I refer to the party who pollutes as a "producer," and the party who is subjected to pollution caused by another as a "consumer." In the real world, however, consumers also pollute, such as when one burns one's leaves or drives one's car, and producers are affected by pollution caused by others.

The literature that has developed under the Calabresi-Melamed trichotomy explores possible relations that might exist between production and pollution in order to
present each regime separately, allocating "the entitlement" first to A and second to B. For simplicity, each case assumes a pure liability, property, or inalienability regime. In the real world, however, a variety of mixed regimes are more likely to exist.147

1. Hypothetical One: Consumer Entitlement Protected by Property Rules

If A had the initial entitlement but a property rule applied, then if B polluted, A would have the ability to stop B from polluting. In Hohfeldian terms, A would have a right to clean water, and B would have the duty not to pollute. Presumably, this right and this duty would be specifically enforceable against B. A could obtain an injunction and perhaps invoke the criminal penalties of the state to prevent an involuntary taking. Additionally, A could exercise her right of replevin to reclaim any entitlement wrongfully taken. B could not hold off A through the payment of objectively (i.e., intersubjectively) calculated damages. Calabresi and Melamed described this scenario as a regime in which society respects an entitlement holder's subjective valuation of her entitlement and does not impose its own valuation.148

The effect of such a regime is not that transfers of entitlements will not occur, but that all transfers will be voluntary on the part of the homeowner-transferor. Under a property rule, the producer-transferee could not obtain the desired entitlement unless he contracted for it with the homeowner-transferor. In Hohfeldian terms, A has the power to sell her entitlement and the privilege to retain it. In other words, B has no right to force A to sell her entitlement and, therefore, suffers the liability that A might arbitrarily refuse to contract for such a sale, leaving B disabled from, and A immune from, any involuntary taking of it.

At first blush, this hypothetical seems successful. The relative rights and obligations of the two parties seem to fit properly within the Hohfeldian correlative system. If we assume that all rights of pos-

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147 Calabresi and Melamed clearly understood this point. My rights with respect to a given object of desire against one person may be protected by a property rule, while my rights with respect to the same object of desire may only be protected by a liability rule vis-à-vis the state, which can take my property and pay me just compensation under its power of eminent domain. Alternatively, one's rights against one specific individual could have both liability and property aspects. For example, the remedy for minor violations of rights might be damages, while for major violations, it would be equitable remedies.

148 See Calabresi & Melamed, supra note 14, at 1092-93.
session are assigned to one party who can effectively remain in possession, then a property rule seems like a pure enforcement regime, not a means of defining property rules. As I discuss below, further inspection reveals that this hypothetical is inappropriate because environmental nuisances involve inconsistent rights of enjoyment, not the taking of a single entitlement. Additionally, environmental nuisances do not exist, even in the case of true takings of possessory interests, in a world containing potential third party claimants.

Specifically, if B violates the law and does "take" A's entitlement to clean water, it is not clear that any remedies could restore the status quo ante. The traditional remedy of replevin (getting back the object taken) is unavailable because, in fact, nothing has been "taken." A no longer has clean water, but not because B now has the water. Consequently, the law can only order B to pay damages for the past pollution and enjoin B to clean up the water and to prevent future pollution. In the environmental arena, it may be impossible or impracticable as an empirical matter to restore A to her status quo ante through these remedies. This analysis provides the first hint that something is seriously wrong with the Calabresi-Melamed trichotomy.

2. Hypothetical Two: Producer Entitlement Protected by Property Rules

In the second hypothetical, B has an entitlement to pollute enforced by a property regime. If B pollutes, A can neither stop him nor receive damages. Although we could state this in terms of Hohfeldian rights and duties, it is probably better to understand it as B having a privilege to pollute and A having no right to stop him; as B having the power to pollute and A suffering the liability of pollution; and finally, as A having the inability to stop B, who has an immunity from A.

Once again, at first blush, this hypothetical seems like a successful description of a common fact situation. For example, when I wrote the first draft of this Article, I was visiting on a campus plagued by fraternities and located in a town with an antinoise rule, which did not come into effect until 11:00 p.m. I was informed that the fraternities and the police would ignore noise complaints until that time, but would send an officer to make the fraternities turn down the music if I complained afterwards. Calabresi and Melamed would say that the

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149 See infra text accompanying notes 157-58.
150 See infra text accompanying notes 257-58.
151 Calabresi and Melamed used the example of the competing entitlements to make noise and to have silence. See Calabresi & Melamed, supra note 14, at 1102-04. This example might indicate that they recognized that these nuisances do not involve disputes over possession of a single entitlement, but competing rights to enjoy different objects—my right to my ears and the fraternities' rights to their stereo systems. Nevertheless, even in this obvious case, Calabresi and Melamed quickly slid into conflating the two objects of property and, thereby, changed the right from enjoyment to possession. For example, they
fraternities were granted an entitlement to make noise be enforced by a property regime until 11:00, and I was granted an entitlement to quiet enforced by a property regime after 11:00.152

After a little thought, however, one realizes that, in contrast to hypothetical one, it is more than a little odd to call this an enforcement or remedy regime when the entitlement belongs to the producer. When the consumer is the entitlement holder, as in hypothetical one, the producer can violate the consumer's rights through "self help"—by producing widgets. The consumer must, therefore, turn to the law's enforcement regime if she wishes to actualize her rights—by obtaining an injunction or other equitable remedy that prevents B from polluting or restores A to the status quo.

When the allocations are reversed, however, the producer's right, privilege, and power to pollute do not require judicial enforcement to be actualized. He exercises his right through self-help (e.g., B just engages in the business of widget manufacture). A cannot violate B's rights through either self-help153 or legal proceedings. If A were to haul B into court, B's rights would not be vindicated by granting a remedy enjoining A to take or not take any action. Rather the judge merely would find that A had no cause of action and would make no award. Indeed, the judge might impose sanctions for abuse of process by the plaintiff and her lawyer.

This lack of symmetry between hypothetical one and two provides the second hint that something is wrong with Calabresi and Melamed's attempt to view the clean water/pollution dispute as the allocation of a single entitlement, which may or may not be taken (reallocated) either voluntarily or involuntarily with the rights of damages. The Hohfeldian analysis shows that there is no symmetry be-

152 The first weekend we stayed in town after the undergraduate semester had begun, we learned the hard way that the property right to throw loud beer parties began as early as 9:00 a.m. on Saturdays. The only solution, of course, was to assure that our ears were never in the vicinity of the fraternities on weekends.

153 Now that the age of Druids is past, A cannot by the unilateral act of drinking water miraculously stop B from polluting and make the water clean. One might be tempted to argue that A can resort to the self-help of sabotage—she can break into B's plant at night and take a hammer to the widget-making machines. Unfortunately, this action changes the hypothetical. A is no longer just interfering with (taking) B's entitlement to pollute. A also is violating a number of B's other legal rights; for example, he is violating B's possessory right to exclude A from his factory.
tween A and B. Consequently, when one allocates entitlements in a property regime, one also defines the entitlement.

Moreover, the lack of symmetry demonstrates that, in the context of environmental nuisances, A and B cannot possess, and therefore cannot transfer, a single “thing.” Because the entitlement that the consumer could have is very different from that which the producer could have, there can never be a simple transfer of A’s entitlement to B. The debate generated by the Calabresi-Melamed trichotomy, however, assumes just such conveyances of entitlements. This assumption is an unintentional perversion of Hohfeldian correlation.

Kaplow and Shavell recognized that environmental nuisances, which they call “harmful externalities,” are different in kind from what they call takings or possessory disputes. They implicitly observe the lack of symmetry between the two possible allocations of the entitlement in the environmental situation. They fail, however, to identify fully the nature of the difference. For example, they intuited that a polluter has no particular interest in the object owned by the consumer (the clean water), but cares only about his own property (the widget factory). If the producer desired the clean water, then he presumably would not pollute it. The “taking” of the consumer’s property merely is incidental to the producer’s enjoyment of his property. In contradistinction, in a true “taking,” environmental nuisances arise because both the taker and the original owner desire the same object.

This observation is valid equally whether the regime allocates the entitlement to the consumer or to the producer. The consumer has no particular desire to own the producer’s factory, but her ability to enjoy her clean water impinges on the producer’s ability to enjoy his factory—the impingement is incidental but necessary. In order for the consumer’s water to remain potable, the producer must refrain or be prohibited from using his factory. The difference between this case and the case in which the producer has the entitlement—the difference between hypotheticals one and two—is the practical ability of

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154 Kaplow & Shavell, supra note 59, at 716 n.2.
155 Specifically, in a footnote, they recognized that the person who throws loud parties would not move in order to live next to someone who loves silence. See id. at 766 n.168. In the usual case the noise maker may interfere with the silence lover’s “entitlement” to silence (or enjoyment of his ears), but the noise maker does not care about the silence lover’s entitlement (or enjoyment) let alone want the entitlement (or enjoyment) for herself. She does not even bear any animus toward the silence lover, which might lead her to make noise purely to cause him distress by taking his entitlement or destroying his enjoyment. All she wants to do is party. I have generalized this point to all environmental nuisances. The polluting producer, for example, does not want the consumer’s clean water—he just wants to produce widgets despite the effect of production on the consumer and her water.
the entitlement holder to actualize her property right—the ability to enjoy the property—without state intervention on either's behalf.

Jettisoning my arcane academic jargon, we are talking about differences in brute power. The producer does not need the state's assistance to pollute. He does very well, thank you, in a Hobbesian war-of-all-against-all world. The consumer, however, needs societal cooperation—either the good will of the producer or the enforcement power of the state—to enjoy clean water. When B enjoys, he violates A, but for A to enjoy, she must ask B to remain chaste.

3. Hypothetical Three: Consumer Entitlement Protected by a Liability Rule

If A had the initial entitlement and a liability rule applied, A would have the right to clean water, but if B polluted, A's sole remedy would be money damages. Calabresi and Melamed have described this regime as one in which society imposes its own valuation upon entitlement holders. Accordingly, they and their progeny analyzed this as a regime under which B may force A to involuntarily transfer her entitlement, provided he pays damages—the societally imposed purchase price. In Hohfeldian terms, A has a right to clean water, and B has a corresponding duty not to pollute, but the remedy for violating the duty is limited exclusively to money damages. B has the privilege and power to cause an involuntary sale, and as long as he

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156 The famous case of Boomer v. Atlantic Cement Co., 257 N.E.2d. 870 (N.Y. 1970), has a holding that is similar in effect to hypothetical three, although based on different reasoning. In this case, the lower court found that a cement plant was a public nuisance that had caused actual harm to neighboring home owners. See id. at 872-73. Because the cost to the manufacturer of closing down the plant, however, was disproportionately high compared to the harms suffered by the homeowners, the lower court refused to grant an injunction, but merely ordered damages for past harms. See id. The Court of Appeals disagreed and held that under New York's common law of nuisance, the homeowners were entitled to injunctive relief despite the cost to the defendant. See id. at 872. The court claimed to be analyzing the case in terms of hypothetical one (entitlement in the consumers' hands, protected by property rules). Nevertheless, the court found that the defendant could postpone imposition of the injunction—keep polluting—so long as it continued to pay the homeowners permanent damages to compensate them for the continuing harm of future pollution. See id. at 875.

One can argue that this result is not merely consistent with hypothetical three, but only can be understood in terms of hypothetical three. By the standard conditions of equitable relief, the court never should have issued the injunction, the remedy under property rules. It is black-letter law that equitable relief should not be granted unless the plaintiff would suffer irreparable harm for which no adequate legal remedy, damages, is available. Specifically, the appellate court found that an injunction should be granted because the lower court had found that the cement plant was a nuisance and had caused substantial damage to the plaintiffs. See id. at 872. The fact that the appellate court found that the defendant could delay the imposition of the injunction so long as it paid permanent continuing damages to the plaintiffs, however, implies that the court thought that the plaintiffs' harms could be adequately addressed by damages. Consequently, the plaintiffs should not have been granted an injunction, and a property rule should not have applied.
pays the objective purchase price, A has no right to stop the involuntary sale and suffers the liability that B has forced.

This use of Hohfeldian terminology provides our third hint that something is wrong with Calabresi and Melamed's theory. Hohfeld easily could restate hypothetical one as follows: B has the initial right or privilege to pollute provided he pays damages, and A has the duty to put up with B's pollution, but has no right to stop him. Moreover, B has the power to pollute, if he pays damages, and A is subject to the liability that he will do so. Finally, A is disabled from stopping B from polluting, if he pays damages, and B is immune from any such attempts. That is, there is no single entitlement which can be allocated to either party. The Calabresi-Melamed analysis, however, assumes there is a single, allocable entitlement because it implicitly conflates a property entitlement with a single, pre-existing thing that is necessarily in the sole custody of one of two rivals.

Consequently, Ayres and Talley correctly note that a liability regime cannot be thought of as an exclusive allocation of a single entitlement to one party, as Calabresi and Melamed assumed. Rather, a liability regime is an allocation of a number of legal rights between two parties. Unfortunately, Ayres and Talley did not recognize the necessary implications of this observation. They still adopted the masculine phallic metaphor that property (an entitlement) is a real thing existing outside of the law, which the law merely allocates and enforces. They did not fully internalize that the law cannot merely allocate entitlements, but must also define the nature and scope of the entitlement. Therefore, they still assumed that parties in an environmental nuisance fight over a single thing, which has been divided among them, reducing the dispute to one of possession.

In Part IV below, I consider how hypothetical three would operate in a "true" takings context. Calabresi and Melamed devised their taxonomy to analyze environmental nuisances, which I argue do not involve true takings. Other writers, however, have generalized the Calabresi-Melamed taxonomy to the seemingly more appropriate situation in which one party truly wishes to acquire some thing that another party owns. This characterization has become so common that Kaplow and Shavell express surprise that the distinction between environmental nuisances, which they call harmful externalities, and

157 See Ayres & Talley, supra note 38, at 1041. Calabresi and Melamed, of course, recognized that regimes can be mixed, and that allocations can be divided. See Calabresi & Melamed, supra note 14, at 1093. Nevertheless, they assumed that in the simple polar hypotheticals one can theoretically have exclusive allocations in a liability regime. This assumption is incorrect.

158 See Ayres & Talley, supra note 38, at 1041.

159 See, e.g., Kaplow & Shavell, supra note 59, at 757-71.
the taking of things “has not been carefully evaluated.” The application of a hypothetical three legal regime to the taking of things would require, however, a radical change, not merely in substantive law, but in procedural law as well.

Of course, an economist does not care whether a regime that is efficient as an economic matter is an existing empirical legal regime or even is consistent with other existing legal principles. The existence of an empirical example is relevant, however, to Calabresi and Melamed’s goal of developing a taxonomy that accurately describes American law. More importantly, consistency with other legal principles is relevant to policy discussions among lawyers concerning legal reform.

As a self-styled, radical feminist, I do not argue that a proposed change in the law should be opposed merely because it is a sharp break from the past. Indeed, if the existing regime is unjust or immoral—as it was in the case of slavery—the sharpness of the break is an argument for the reform. What I do argue, however, is that one must be critically aware of the implications of one’s proposals. Calabresi, Melamed, and their followers present themselves as analyzing the structure of American property law for the conservative purpose of increasing both economic efficiency and economic wealth. In fact, their proposals require radical changes in two of American culture’s most important legal institutions: judicial respect for the status quo ante, including the idea that courts only can be used to address injuries, and private property rights. These proposals may be good or bad, but their radicalness needs to be addressed directly. The radicalness of these proposals has not been addressed precisely because the proposals are not serious.

4. Hypothetical Four: Producer Entitlement Protected by a Liability Rule

If the initial entitlement belonged to $B$, the producer, and if a liability rule applied, then $B$ would have the right to pollute, but $A$ would have the right and ability to stop him by paying damages. This payment of damages is conceptualized as forcing $B$ involuntarily to sell his entitlement to $A$ in exchange for a purchase price equal to society’s intersubjective valuation. Although theoretically conceivable, this regime seems bizarre within our legal system, at least when $A$ is a private citizen. Calabresi and Melamed were refreshingly honest both in admitting that empirical examples of this “fourth case” may be rare or nonexistent in the private market, as opposed to in governmental

\[160\] Id. at 717. Kaplow and Shavell suggested that liability rules might be more appropriate to environmental nuisances, and property rules more appropriate to takings of things. See id.
actions, and in understanding that finding such examples, or at least formulating plausible hypothetical four regimes, is essential to the validity of their taxonomy.\footnote{See Calabresi & Melamed, supra note 14, at 1117. They insist on its plausibility even though this possibility is “easily ignored.” Id.; see also Krier & Schwab, supra note 15, at 443-45 (discussing the plausibility of notorious hypothetical four).}

Once again, it is hard to envision hypothetical four as merely an enforcement regime. Rather, it defines rights rather than merely allocating and enforcing them. In hypothetical three, which reverses the entitlements with the liability rule in place, the entitlement holder, the consumer, is the passive party, and the taker initially is the active. \(B\) does not need recourse to the court system in order to take \(A\)’s entitlement—he just starts producing widgets thereby incidentally causing pollution. The consumer, the original entitlement holder, must go to court to force \(B\) to pay the involuntary purchase price.

Hohfeld’s terminology clarifies why hypothetical four is not precisely parallel to hypothetical three. When \(A\), the homeowner, is the entitlement holder, \(A\) has a right to clean water, and \(B\) has a duty not to pollute. When \(B\), the producer, is the entitlement holder, saying that \(B\) has a right to pollute and that \(A\) has a duty to tolerate it is inaccurate precisely because we think of duty as requiring affirmative action. Rather, \(B\) has a privilege to pollute, and \(A\) has no right to stop him unless she pays damages. One can easily restate this scenario as an entitlement in favor of \(A\). \(A\) has the right or privilege upon the payment of damages to stop \(B\) from polluting and \(B\) has the duty to stop, or no right to refuse to stop, if \(A\) pays damages. Finally, we could say either that \(A\) has the power to stop \(B\) from polluting (upon the payment of damages) or that \(B\) is disabled from preventing \(A\) from stopping him (so long as \(A\) pays damages) and \(A\) is immune from any attempt to do so.

This hypothetical might be realistic in the public realm; it accurately describes so-called “regulatory takings.”\footnote{Calabresi and Melamed themselves gave the state’s power of eminent domain as an example of hypothetical four, see Calabresi & Melamed, supra note 14, at 1106-08, and described a potential hypothetical four regime as a “partial eminent domain coupled with a benefits tax.” Id. at 1116. Coleman and Kraus referred to a hypothetical four private right of action as a “private takings.” Coleman & Kraus, supra note 52, at 1357.} These takings occur when a court finds that a government regulation, limiting certain uses of property, interferes with the rights of the owner to commercially exploit—enjoy—her property to such an extent that the court deems the regulation a taking.\footnote{See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (indicating that a taking has occurred when land-use regulation denies an owner all economically viable use of his land).} Consequently, either the regulation is invalidated (the result under a Calabresi-Melamed property regime) or, if the conditions of the sovereign’s right of eminent domain are met,
the government can maintain the regulation by paying the owner "just compensation."164

The coherence of the Calabresi-Melamed trichotomy depends on this hypothetical being at least theoretically possible in the private sector. If the right to pollute is an entitlement that can be possessed and transferred, and if all entitlements can be enforced either by a property regime or by a liability regime, then it must be possible to imagine a liability regime that protects the right to pollute.

Once again, however, it is hard to imagine how such a liability regime could arise within traditional legal principles and procedures. A liability regime arises in the public sector because of the government's unique power to "infringe" on a producer's "right" to pollute through use of its police power and its unique eminent domain power, which allows the government to force involuntary transfers of entitlement. These rights and powers do not exist in the private realm.

When A has the initial entitlement to fresh water, she need not act to enjoy it—she can passively let the water flow. When B has the initial entitlement to pollute, however, he cannot passively enjoy his entitlement. Thus, A is not hurt by the mere fact that B has the right to pollute. Rather, A is only hurt if B exercises his right to pollute. Also, in contradistinction to hypothetical three and similar to hypothetical two, A cannot, as a practical matter, use "self-help" to infringe. But here, unlike in hypothetical two, which operates under a property regime, A must be able to invoke the police power of the state to take B's original entitlement.

Under hypothetical four, for A to take the entitlement she needs the right and power to cause a court to issue an injunction prohibiting B from polluting upon A's tender of the purchase price—damages—to B. Recognizing the right of a litigant to initiate a legal action to change the status quo would constitute a radical departure from American legal principles, which generally leave the status quo in place and only recognize private actions to redress changes to the status quo. Although Calabresi and Melamed recognized that hypothetical four would be unusual in the empirical world, they failed to recognize how radical its occurrence would be because they conceived of damages as the payment of the purchase price for involuntary transfers.165 This conception is based on the assumption that an award of damages for polluting a consumer's water against a producer and in favor of a consumer is economically equivalent to a judicial enforcement of a change in the status quo—a forced transfer of an entitle-

164 U.S. CONST. amend. V.
165 See Calabresi & Melamed, supra note 14, at 1120.
ment. They incorrectly assume that economic equivalence means legal equivalence as well. This conclusion is a non sequitur.

Calabresi and Melamed's followers have been keen to find an example of hypothetical four to demonstrate the accuracy and usefulness of the taxonomy. Consequently, they have seized on the case of Spur Industries, Inc. v. Del E. Webb Development Co. Unfortunately, as Krier and Schwab have so eloquently shown, this case does not demonstrate the two-party hypothetical proposed by the taxonomy. These analysts have repressed the fact that this case involves three parties. I discuss this case at length below when I argue the impracticality, if not outright impossibility, of the legal regimes suggested by the Calabresi-Melamed taxonomy.

5. Hypothetical Five: Consumer Entitlement Protected by an Inalienability Regime

If $A$ has the original entitlement and an inalienability rule applies, then $A$ may not give up her entitlement to clean water, and $B$ may not pollute, regardless of whether $A$ agrees that $B$ may pollute or whether $B$ agrees to pay damages or otherwise compensate $A$ for the pollution. Applying Hohfeld, $A$ has the right to clean water, and $B$ has the duty not to pollute, which is specifically enforceable. But Hohfeld's correlatives break down when we look at other aspects of the relationship. $A$ has a disability because she has no power to transfer her property. Hohfeld would say this circumstance means that someone else, such as $B$, must have a corollary immunity. I suppose we could say that if $A$ entered into an illegal contract to sell her entitlement to $B$, and $B$ defaulted, $B$ would be immune from $A$'s attempt to enforce the contract because it would be void as against public policy. This formulation seems so forced as to be inaccurate.

As I have said, even Calabresi and Melamed recognized that this rule does not seem to jibe with the property and liability rules. But our analysis already has shown that the inalienability rule fits. Prop-

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166 494 P.2d 700 (Ariz. 1972) (holding that a developer of country property was obliged to pay reasonable shutdown costs to the owner of a nearby cattle feed lot whose operations were intolerable to the residents of the development on the theory that he had "come to the nuisance"). As Epstein trenchantly argues, Spur Industries does not exemplify hypothetical four, or indeed any other rules—it is, in fact, a sui generis case. See Epstein, supra note 72, at 2104-05. As I will argue, this case may indeed be "rogue" in the sense that, although it may have resulted in rough justice given the facts of the case, it does violence to both legal substance and legal procedure.

167 Actually, Krier and Schwab introduced this case as an example of hypothetical four. See Krier & Schwab, supra note 15, at 444-45. Later in their discussion, however, they distinguish it from the archetypical hypothetical four. See id. at 469-70 (noting that Spur Industries involves multiple parties whereas hypothetical four contemplates a simplistic, two-party situation).

168 See infra Part IV.A.1(b).
Property and liability rules are not, as Calabresi and Melamed suggested, merely regimes that enforce pre-existing rights, but also are means for defining and limiting entitlements. Moreover, although they have the opposite result, an inalienability rule is similar to a liability rule in that society decides that it will impose its own intersubjective valuation of the entitlement in A's hands over A's own subjective valuation. That is, in a liability regime, society forces a transfer on A even if A values the entitlement. In an inalienability regime, by contrast, society prevents a transfer by A even if A ascribes a low value to the entitlement. Consequently, one's intuitive discomfort with the Calabresi-Melamed analysis of inalienability puts us on warning that the difficulty may lie more generally with the assumptions underlying the trichotomy.

Let us briefly consider what an inalienability rule might mean in practice. We are told that A does not have the right to alienate her right to clean water. Presumably, this rule means that any contract that A attempts to make with B to sell her right would be void as against public policy. An attempt to make such a contract might even subject A, B, or both to civil or criminal sanctions. What if B goes ahead and produces widgets and pollutes A's water with or without A's consent? To say that A's entitlement is inalienable must mean that she theoretically retains the right to the entitlement; even though in fact, she is not in a position to exercise that entitlement because she no longer has clean water which she can drink. The state's only recourse at this point is to punish B, and perhaps A, and to attempt to return A to the status quo ante. A court could order B to stop production and restore the cleanliness of A's water (a property regime). Or, as is likely in the case of environmental nuisances, it may be impossible to restore the status quo ante and the court will order B to pay damages to A (a liability regime). Inalienability fits with property and liability rules not because it is an alternate enforcement regime, but because inalienability ultimately devolves into property, and property ultimately devolves into liability. That is, they are not three mutually exclusive ways of dividing entitlements, but are three mutually dependent aspects of defining property rights.

6. Hypothetical Six: Producer Entitlement Protected by an Inalienability Regime

The sense of unease in the Calabresi-Melamed trichotomy graduates to discomfort when one considers some of the bizarre consequences that would result if we were to allocate the entitlement to B, the polluting factory owner, in an inalienation regime. Neither Calabresi and Melamed, nor the resulting debate have considered this em-
barrassing hypothetical. However, if Calabresi and Melamed were right that their property-liability dichotomy necessitates at least the theoretical possibility of hypothetical four, then the validity of their property-liability-inalienability trichotomy requires the theoretical possibility of hypothetical six. That is, if the right to pollute is to be conceptualized as a thing that can be either taken or transferred to a consumer—as something theoretically alienable—then it follows that we also should be able to impose restraints on its alienation. The inability to formulate a realistic hypothetical six is presumably why Calabresi and Melamed half-heartedly suggested that an inalienability regime is substantially different from property and liability regimes, implying that their trichotomy is not really a trichotomy, but is a dichotomy plus an inalienability anomaly.70

The last potential regime—in which B would have an inalienable entitlement to pollute—is the most obviously fanciful. If analysts only pay lip service to the possibility of a homeowner having an inalienable right to clean water, they pass over hypothetical six in embarrassed silence.

What could this possibly mean as a practical matter? I have suggested in my discussions of hypotheticals two and four that a right of a producer to pollute is more accurately a Hohfeldian privilege or power to do so or an immunity from A’s attempts to stop him. But saying that this right, privilege, power, or immunity is inalienable suggests not only that any contract not to pollute that B enters into would be void as against public policy, and therefore, unenforceable by A against B. It also means that if B tries to obey a voluntary contract not to pollute, the Government would use its police power to save B from himself. But, how can society keep one from alienating one’s privilege, right, or power to take certain action, let alone one’s immunity from being forced to stop?

Does this mean that the State would force B to exercise his rights, privileges, powers, and immunities? Must B pollute? It is hard to imagine any realistic legal regime that would so require. To require such action would so impinge on B’s personal autonomy and ability to enjoy his factory that it is not only inappropriate, but also likely to raise constitutional questions of involuntary servitude and regulatory takings.171 Such an absurd result inevitably flows from the conflation of property rights and the object of the property rights, from the con-

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169 See Calabresi & Melamed, supra note 14, at 1115-16 (listing the four hypotheticals they discussed).
170 See id. at 1093, 1111 (separating inalienability rules from their discussion of property and liability rules).
171 Admittedly, slavery is a legal regime that this and other societies have adopted in the past. It is not, however, consistent with contemporary political philosophy or moral values; therefore, I refuse to entertain this as a realistic legal regime.
ceptualization of entitlements as pre-existing things that are merely assigned to one person or another, and from the analysis of interferences with property rights as takings and transfers. In other words, alienability and inalienability refer to the ability of a claimant to sever his right to possess an entitlement. In the environmental nuisance arena, however, we are speaking not of possession, but of enjoyment.

III

PROPERTY

A. The Conflation of Property with Object

Calabresi and Melamed not only reduced property to the single element of possession epitomized by physical custody of tangible things, but also treated property as though it were itself the thing. A Hohfeldian analysis of the Calabresi-Melamed trichotomy drives home the essential point that an entitlement, like any legal right, is a set of relationships between and among legal subjects. When the entitlement is a property right, these relationships concern the possession, enjoyment, and alienation of objects. \(^{172}\) Calabresi and Melamed, however, treated property entitlements not as the right to possess, enjoy, and alienate objects, but as the object that is possessed and alienated.

This construction is similar to, albeit slightly more subtle than, the common error that Thomas Grey called the "lay conception" of property—confusing property and object. \(^{173}\) Grey referred specifically to the habit of referring to one's home, car, or whatever as one's property when, from a legal point of view, one's property is the rights one has against others with respect to these things. \(^{174}\) Calabresi and Melamed went further and entirely ignored the object underlying property entitlements (in their hypotheticals, the consumer's water and the producer's factory), and instead, reified the property entitlement. Both arguments, however, are variations on the masculine phallic metaphor, which tries to replace the symbolic concept of property with the real fact of physically holding a thing. As a result, Calabresi and Melamed confuse the modifications and readjustments of parties' rights and responsibilities within a property relationship as the conveyance of the property relationship.

\(^{172}\) See infra notes 215-17 and accompanying text.

\(^{173}\) Grey, supra note 29, at 69-70. I criticize Grey's prediction that property is disintegrating as a meaningful legal concept in Schroeder, supra note 2, at 156-85 and Schroeder, Chix, supra note 26, at 271-305. Grey is right that property is not the thing, but he (and Hohfeld) are wrong in concluding from this point that things are irrelevant to property. An abbreviated version of my argument is discussed infra notes 228-30 and accompanying text.

\(^{174}\) See Grey, supra note 29, at 69.
1. No Object Is Transferred in the Hypotheticals

Frequently, one party transfers her entire property interest with respect to a specific thing to another party; it happens millions of times each day in grocery stores. It is often the case that two parties claim inconsistent property rights with respect to the same object, such that for one party to succeed in asserting her property claim, the other necessarily loses her property claim. Examples of these classic priority disputes include situations in which both A and B claim to own the same good purportedly transferred by a double-dealing third party or in which two secured parties claim first-perfected security interests in the same collateral.\textsuperscript{175}

It does not necessarily follow that every interference by one party with a property right of another is equivalent to a transfer of a thing. Even if one accepts Hohfeld’s proposition that the legal universe is closed and complementary,\textsuperscript{176} it does not follow that all shifts or changes in entitlements are complementary in the way Calabresi and Melamed implied.\textsuperscript{177} Hohfeld would argue that if A loses a Hohfeldian right, B is necessarily released from his corresponding Hohfeldian duty to A: right becomes no right and duty becomes privilege. He would not argue, as did Calabresi and Melamed, that A's old right is transferred to B, which would imply that B's duty is now imposed upon A or another party.\textsuperscript{178} The legal act that results in the destruction of A's right might also result in the imposition of a Hohfeldian responsibility upon her. This obligation, however, would probably not be the mirror-image duty of her lost right, but would be either a no-right, a liability, or a disability. Correspondingly, B might have acquired a privilege, power, or immunity.

Comparing hypotheticals three and four, which illustrate a liability regime, and hypotheticals five and six, which illustrate an inalienability regime, vividly illustrates this last point. Calabresi and Melamed would describe the difference between these two sets of cases as the allocation of the entitlement.\textsuperscript{179} As we have seen, this characterization is not precisely correct. "The" entitlement differs depending on whether the regime assigns it to A or assigns it to B. A's entitlement relates to drinking clean water while B's relates to producing widgets, which incidentally cause pollution. In addition, one might accurately say that A has a Hohfeldian right that imposes a corresponding

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\textsuperscript{175} I discuss the application of the Calabresi-Melamed taxonomy in priority disputes in Part III.D.2.

\textsuperscript{176} According to Hohfeld, the legal universe is complementary in the sense that every entitlement in favor of one party, whether a right, privilege, power, or immunity, necessarily requires that at least one counterparty bears an equal but opposite responsibility.

\textsuperscript{177} See Calabresi & Melamed, supra note 14, at 1118-20.

\textsuperscript{178} See id.

\textsuperscript{179} See id. at 1120.
Hohfeldian duty on B. When B is the entitlement holder, however, one might more accurately describe him as having a Hohfeldian privilege, rather than a right. One might make this distinction because A seems to be subject to a Hohfeldian "no-right" and not a duty. The difference is even more stark in the inalienability example. When A holds the entitlement, she is forced to remain in possession of the cleanliness of her water, but she remains free to drink it or not—she is disabled from alienating the cleanliness of water, but she has the right to possess it and has the right and privilege to drink it. When B holds the entitlement, being forced to retain possession seems equivalent to a greater loss of freedom. B is not merely disabled from alienating his possession of his polluting production, but also his right to pollute now seems to have become a duty to pollute!

The reader no doubt had intuited that something was distinctly odd about my foregoing description of the inalienability hypotheticals. The Calabresi-Melamed analysis of entitlements requires me to use such noneuphonious constructions as "possession of the cleanliness of water" or "possession of polluting production" to describe that which is inalienable. I cannot say that in an inalienability regime the consumer is prohibited from alienating her clean water because Calabresi and Melamed obviously were not proposing that society forbid A from bottling and selling her water or from selling the residence on which the spring is located. Similarly, society would not prohibit the producer from alienating his factory. This distinction once again should indicate that we are not talking about possessory rights at all. Rather, we are talking about enjoyment rights.

More importantly, because of the relational nature of legal rights, including property interests, it is not always accurate to speak of one person owning a property interest or other entitlement to the exclusion of another person. For example, hypotheticals three and four illustrate that under a liability regime it is not true, as Calabresi and Melamed asserted,180 that we either allocate the entitlement to clean water to A or the entitlement to pollute to B. Rather, in both hypotheticals both parties have entitlements (to clean air and to pollute, respectively), but such entitlements are subject to conditions.

Ayres and Talley suggested that a liability regime is the splitting of an entitlement between two parties.181 This suggestion does not go far enough. There is no single thing, no "entitlement," that is shared by two persons. In our hypotheticals, the consumer never shared her clean water with the producer, and the producer never split the profits from the widget factory with the consumer. Each party merely interfered with the other party's ability to enjoy their exclusive property.

180 See id. at 1118.
181 See Ayres & Talley, supra note 38, at 1032-33.
The question, therefore, is how far these mutually inconsistent enjoy-
ments extend. In other words, a liability regime can only be thought
of as a means of defining, not enforcing, property rights.

2. Property as Object and the Pernicious Physicalist Metaphor

Although environmental harms do not literally involve the physi-
cal taking of immediate custody of tangible things, one might be
tempted to argue that this metaphoric language helps. It aids by
forming an argument from analogy. Indeed, all language consists of
metaphor and metonymy. I freely admit that we often retreat to
the language of tangibility precisely because of our impoverished vo-
cabulary for intangible property rights. Elsewhere I argue extensively
that the use of the terms “object” and “thing,” and by extension “ent-
itlement,” are not metaphoric when we apply them to intangibles. From a philosophic and jurisprudential standpoint, objects are not
natural physical things that exist “out there.” Rather, an “object” is
anything distinguishable from a “subject”—a legal actor, a speaking
consciousness. Object is an artificial category, existing in the sym-
bolic realms of law and language in the sense that an object, as so
defined, only exists insofar as it is designated as such by speech or law.
Therefore, it is as appropriate to designate artificial constructs of the
law and language, such as debts, copyrights, and other intangibles, as
objects or property, as it is to designate physical things as objects.
Although this technical definition may seem foreign to colloquial
“lay” conversation, it crops up all the time. For example, we have no
problem speaking of money or investment securities as “things” we
“hold,” even though virtually any educated person recognizes these as
intangible rights, which are distinguishable from the pieces of paper
that frequently evidence them. Moreover, for certain purposes, the
law refuses to designate many natural things as objects. For example,
as I already have discussed, I may not sell my kidney to the highest
bidder because American law deems it inappropriate to consider the
human body to be (the object of) property for commercial

182 See Lacan, supra note 19, at 147-49.
183 See, e.g., Schroeder, supra note 2, at 35-37, 163-68, 170-75 (discussing the interaction
of “objects” and possession); Schroeder, Chix, supra note 26, at 280-81 (discussing
Blackstone’s use of the word “things”); Schroeder, The Vestal and the Fasces, supra note 26, at
857-60 (discussing Hegel’s use of the words “things,” “objects,” and “possession”).
184 For example, see Hegel’s definition of the object of property. “What is immedi-
ately different from the free spirit is, for the latter and in itself, the external in general—a
thing [Sache], something unfree, impersonal, and without rights.” G.W.F. Hegel, Elements
of the Philosophy of Right 73 (Allen W. Wood ed. & H.B. Nisbet trans., 1991) (1820)
(alteration in original).
185 See supra note 89 and accompanying text.
And so my complaint is not with the use of metaphors or reification per se. My concern is that if one chooses to use such metaphoric vocabulary, one needs also remain critically aware that she is doing so in order to avoid falling into false (or, perhaps more accurately, useless) analogies.\(^{186}\)

B. The Property Rights Involved in Environmental Nuisances

Before continuing, it is necessary to consider the concept of property in greater detail. From the standpoint of Hegelian jurisprudence, legal subjectivity is intersubjectivity mediated by objectivity.\(^{187}\) Hegel argues that the abstract, atomistic individual, posited by classical liberalism as the state of nature, is not capable of being a legal actor bearing rights.\(^{188}\) Hegel’s argument precisely follows Hohfeld’s insight that both law and rights are social. Therefore, legal subjectivity is artificial in the sense that it is a human creation. One moment in the creation of legal subjectivity is property, defined as the legal regime of the relative rights of subjects with respect to the possession,

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\(^{186}\) In two Articles, I have shown how the use of the phallic (physical) metaphor for property had pernicious effects on the law of investment securities. See Jeanne L. Schroeder, Is Article 8 Finally Ready This Time? The Radical Reform of Secured Lending on Wall Street, 1994 Colum. Bus. L. Rev. 291, 303-08; Schroeder, Legal Surrealism, supra note 26, at 456-57; see also Jeanne L. Schroeder & David Gray Carlson, Security Interests Under Article 8 of the Uniform Commercial Code, 12 Cardozo L. Rev. 557, 587-94 (1990) (suggesting implicitly how the use of this metaphor has negatively effected the law of security interests under Article 8). Investment securities are intangibles, which cannot literally be physically held. Nevertheless, because the common law had difficulty with the concept of alienation of intangibles, legislation passed in the nineteenth century that enabled securities to be evidenced by negotiable certificates. Physical custody of the evidentiary token established possessory rights in the security, and alienation of the security required delivery of the evidentiary token. This use of the physical metaphor was beneficial in a simple market when investors tended actually to hold their security certificates.

By the 1970’s, however, brokers and other intermediaries held the majority of investments in securities indirectly. The 1978 Amendments to Article 8 of the Uniform Commercial Code (“UCC”) governing property interests in investment securities continued to view physical custody of certificates as the archetype of possessory interest in securities. Therefore, it tried to analyze the relationship among investors, brokers, and other parties in the securities industry in terms of vicarious custody through agents and bailees. A few spectacular broker-dealer bankruptcies proved that these assumptions were not merely wrong empirically, but largely unworkable even as a legal fiction. The 1994 Amendments to Articles 8 and 9 abandoned the physical metaphor when securities are “held” indirectly through intermediaries and now analyze modern investment “holding” as a new sui generis form of intangible property. I analyze this regime exhaustively in Schroeder, supra, at 349-502. See also James Steven Rogers, Policy Perspectives on Revised U.C.C. Article 8, 43 UCLA L. Rev. 1431 (1996) (discussing security law policy and Revised Article 8 by Reporter for revision project).

\(^{187}\) See infra notes 223-26 and accompanying text, for a brief explanation of this phrase.

I developed my theory exhaustively in SCHROEDER, supra note 2, which consists, in large part, of the refinement of ideas first introduced in Schroeder, Chix, supra note 26; Schroeder, Legal Surrealism, supra note 26; Schroeder, supra note 56; Schroeder, The Vestal and the Fasces, supra note 26; Schroeder, Virgin Territory, supra note 26.

\(^{188}\) See SCHROEDER, supra note 2, at 20-24, 27-30.
enjoyment, and alienation of objects. Below, I discuss the nature of these three elements in greater detail. Before this discussion, I must identify the object(s) of property involved in environmental nuisance disputes and then identify the rights that claimants exercise and infringe with respect to such object(s).

C. Identifying that Obscure Object of Desire

As I have discussed, Calabresi and Melamed identified the object of contention in environmental harms as the entitlement granted to one party or to the other. Insofar as the entitlement is itself a property right, however, it must be a legal relationship with respect to some other object. I am not arguing that a legal relationship cannot be "reified" in the sense of treating it as the object of a property right. No "natural" concept of what may or may not be a res of property exists—the concept is totally artificial in that it is defined purely by positive law. Familiar commercial transactions such as the sale of accounts receivable or, for that matter, all trading on the New York Stock Exchange involve just such reification.

To describe the mutual rights and obligations of individuals involved in a two-party relationship in terms of property is risky. It often adds little to, and in this case actually distracts from, a legal analysis of two-party relationships that do not involve the conveyance of an object. These rights remain the same regardless of whether we label them contract or property. I would agree with Hohfeld that, in our legal system, the term "property" has significance only in the three-party context. Accordingly, Hohfeld defined property as being "multital"—enforceable against "the world" in the sense of a relatively large class of persons.

It does become meaningful to reify the relationship between two parties into property when one of the two parties purports to assign her rights to a third party. For example, assume that B sells a good to A on credit so that A owes B the purchase price. In commercial law we

189 See infra Part III.D.2-4.
190 See Schroeder, supra note 2, at 35–37, 170–75.
191 From a Hegelian philosophical position, all contracts involve property and serve an important function in the dialectic of recognition. Indeed, if an object can be anything that we agree to conceptualize as other than a legal subject, then because one's obligation can be distinguished from the concept of the obligor, the obligation can be reified as an object.
192 As we will see, Hohfeld argued that property was not unique and lumped it into his more general category of "multital rights." Hohfeld, supra note 29, at 85; see infra text accompanying notes 280–81. Hohfeld uses multital rights as opposed to "paucital" rights, such as contract, which are enforceable against a specifically identifiable person(s). See id. at 72. I believe that property must be intersubjectively recognizable for it to perform its philosophical function of recognitions. It must be observed and honored by—enforceable against—others. See Schroeder, Legal Surrealism, supra note 26, at 455–59.
call A's obligation an account;\textsuperscript{193} in accounting and ordinary business parlance it would be an account receivable. At this point these are just terms for A's half of the contract. Now imagine that B assigns his rights against A to C. It now becomes analytically helpful to think of A's account as a specific object that B conveyed to C, enabling the parties to identify exactly what C obtained. Most importantly, it helps distinguish the terms of the assignment contract—the relationship between B and C—from that which is assigned pursuant to that contract—the relationship between A and B. Accordingly, Article 9 of the Uniform Commercial Code ("UCC") treats an assigned account as an object that is every bit as capable of serving as collateral as a good.\textsuperscript{194}

Another example of how reification only becomes useful in three-party transactions can be seen in Article 9's treatment of chattel paper.\textsuperscript{195} A chattel paper is a right to payment coupled with a property interest in a specific good—that is, either a security interest or a lease.\textsuperscript{196} For example, in the immediately preceding hypothetical, if B retained a security interest in the good he sold to A, the relationship would no longer fall within Article 9's definition of an account, but would fall within its definition of chattel paper. The drafters of Article 9 invented this term solely for the purpose of reifying it in the three-party context. In the two-party relationship between A and B, the term "chattel paper" is redundant because the expressions "security interest" and "lease" already adequately describe their relationship. When B conveys this security interest to a third party, however, it helps to reify the security interest as chattel paper to distinguish the thing transferred (B's rights against A) from the contract through which B transfers the chattel paper to C (C's rights against B). Because it involves not only the notoriously confusing two-tiered, double-debtor problems but also double layers of collateral, this reification is perhaps more important in the case of the sale of chattel paper than for the sale of accounts.

In my hypothetical, B retained a purchase money security interest in a good he sold to A. Assume A takes possession of the good, so that B must perfect its security interest in the good by filing against A in the appropriate location.\textsuperscript{197} B assigns this security interest, which is now called a chattel paper, to C. Because virtually all assignments of

\textsuperscript{193} See U.C.C. § 9-106 (1995) (defining the term "account" for purposes of Article 9).

\textsuperscript{194} "Except as otherwise provided . . . this Article applies (a) to any transaction (regardless of its form) which is intended to create a security interest in personal property . . . including . . . accounts; and also (b) to any sale of accounts. . . ." Id. § 9-102(1).

\textsuperscript{195} I present another similar analysis of chattel paper in SCHROEDER, supra note 2, at 171-72.

\textsuperscript{196} See U.C.C. § 9-105(1)(b).

\textsuperscript{197} See id. § 9-302(1).
chattel paper fall within the rubric of Article 9.\textsuperscript{198} C must perfect its interest by either taking possession of the chattel paper or filing against B, not A, in the proper location.\textsuperscript{199} Now assume that B defaults in his obligations to C. C's collateral is the chattel paper, not the good securing the chattel paper. Therefore, C may only repossess the chattel paper itself and then either collect or sell the chattel paper in a foreclosure sale.\textsuperscript{200} Conversely, if A were to default in her obligations under the security interest, B, not C, would have the right to repossess the good.\textsuperscript{201} Moreover, such a default by A under the lower-tier security interest in the good would not automatically be a default under the upper-tier security interest in the chattel paper giving C the right to repossess the chattel paper.\textsuperscript{202} C may not repossess the good that secures the chattel paper so long as A is current in her obligations to B under the purchase money security interest that constitutes the chattel paper. In other words, the object of A and B's relationship is the good, but the object of B and C's relationship is the chattel paper. Distinguishing the chattel paper, by reification, from the collateral under the chattel paper clarifies this otherwise confusing situation.

The reification of debts and other intangibles becomes even more important in transactions that involve more than three parties. In my hypothetical, assume that B is dishonest—a lamentably common circumstance. After assigning the chattel paper to C, B turns around and purports to sell the same chattel paper to D. This scenario is a variation on the classic priority dispute to which I have already alluded. Two "innocent" parties, C and D, assert inconsistent property rights in the same "thing." Because there is only one "thing," one claimant will be awarded the "thing," while the other will have to settle for some form of damages. Article 9 governs this particular dispute through the priority rules of sections 9-308 and 9-312.\textsuperscript{203}

Returning to the Calabresi-Melamed context of the two-party environmental nuisance, it is misleading to speak of the object of the consumer’s property right as A's entitlement—the right to drink clean water. To do so leads to Calabresi and Melamed's misperception that if A contracts to allow B to pollute subject to payment of compensation, then A is transferring something to B. This misperception not

\textsuperscript{198} See id. § 9-102(1)(b).

\textsuperscript{199} See id. §§ 9-304(1), 9-305.

\textsuperscript{200} See id. § 9-502(2) & cmt. 4 (noting that the secured party may recover on the "collateral" and explaining that the secured party may sell the "chattel paper"—not the good—to recover on its interest).

\textsuperscript{201} See id. § 9-503 (giving the secured party the right to self-help repossession).

\textsuperscript{202} Although, it is not unusual for parties to a chattel paper security agreement to provide contractually that the parties also will consider a default by the account debtor, A, in its secured obligation an event of default under the upper-tier security agreement.

\textsuperscript{203} See U.C.C. §§ 9-308, 9-312.
only assumes, without analysis, that the contract between A and B is a conveyance, but it also conflates the contract to convey and the thing conveyed. This conflation is precisely the evil that the drafters of the UCC tried to prevent by abandoning the common-law analysis of title while preserving the concept of title—ownership—which is fundamental to any account of sales.\(^{204}\)

Karl Llewellyn, the Chief Reporter and primary architect of the UCC, argued that the common law of sales had become hopelessly confused because common-law title analysis conflated the contract and conveyance aspects of sales.\(^{205}\) He thought that carefully distinguishing the two would clarify and rationalize the law.\(^{206}\) The contract for sale, which is two party in nature, should be entitled to the usual degree of freedom we grant to contracting parties.\(^{207}\) In contradistinction, the conveyance of the good sold under the contract is a property transaction enforceable against third parties and, therefore,

\(^{204}\) I discussed the UCC’s treatment of “title” in Jeanne L. Schroeder, Death and Transfiguration: The Myth That the U.C.C. Killed “Property,” 69 Temp. L. Rev. 1281 (1996). In that Article I disproved the old canard that the UCC disaggregated or abandoned the concept of title. See id. at 1282-83, 1289-91. Indeed, Articles 2 and 9 are packed with references to title precisely because title (ownership) is the sine qua non of a sales contract and a security interest. No sale or security interest can occur unless the transferor (the seller or the debtor) initially has a property right in the thing to be conveyed (the good or the collateral), which she is able to convey to another party (the buyer or the secured party). See infra text accompanying notes 317-22.

\(^{205}\) I presented this analysis based on Llewellyn’s writings on property in Schroeder, supra note 204. The works of Llewellyn on which I relied were Karl N. Llewellyn, Cases and Materials on the Law of Sales 64-67 (1930) [hereinafter, Llewellyn, Sales]; Karl N. Llewellyn, Jurisprudence (1962) (collection of articles); K.N. Llewellyn, Across Sales on Horseback, 52 Harv. L. Rev. 725 (1939); K.N. Llewellyn The First Struggle to Unhorse Sales 52 Harv. L. Rev. 873 (1939); Karl N. Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222 (1931); K.N. Llewellyn, Through Title to Contract and a Bit Beyond, 15 N.Y.U. L. Q. Rev. 159 (1938) [hereinafter Llewellyn, Through Title to Contract]; Karl Llewellyn, Why a Commercial Code?, 22 Tenn. L. Rev. 779 (1955).

\(^{206}\) See Schroeder, supra note 204, at 1294-1304. In Llewellyn’s words, “Title-thinking [is] Sales law viewed as property law . . . .” Llewellyn, Through Title to Contract, supra note 205, at 191.

[T]he property concept is repeatedly used by courts as a device to settle various issues which in themselves are contract and not “property” issues: i.e., they are matters which the parties have power to arrange at will by express contractual clauses, if they want to, and think about it.

Llewellyn, Sales, supra note 205, at 64. In contradistinction, he characterized his analytical approach as being rooted

in the proposition that the modern law of Sale is a law of contract for future delivery; that the present sale [i.e., the conveyancing of the property right in the good sold] plays little part today in litigation; and that most problems commonly dealt with under the heading of “title” are obscured rather than clarified by that dealing.

Id. at xiv.

\(^{207}\) See Schroeder, supra note 204, at 1297-1301.
should be subject to certain objective (in the sense of societally imposed) rules.\textsuperscript{208}

Despite this framework, Calabresi and Melamed characterized \textit{A and B}'s pollution contract as a conveyance of \textit{A}'s entitlement to \textit{B}.\textsuperscript{209} But this characterization would mean that upon payment of the purchase price, \textit{B} would acquire what \textit{A} possessed. What \textit{A} "possessed," according to Calabresi and Melamed, was an entitlement to drink clean water at her residence.\textsuperscript{210} \textit{B}, however, does not seek to obtain a right to drink \textit{A}'s clean water, and the \textit{A/B} contract would not be enforceable against a class of third parties, as it would be if a conveyance occurred. If \textit{A} had conveyed her possessory right to clean water at her residence to \textit{B}, then she would no longer have that right against the world. \textit{A} no longer would have any right to complain if \textit{C}, \textit{D}, and \textit{E} were to dump toxic waste into her water supply. Indeed, if the right had been conveyed to \textit{B}, \textit{B} would possess the claim against these other polluters. This obviously is not the case.

It is equally absurd to think of the entitlement as an object of property and a pollution contract as a conveyance when Calabresi and Melamed declare \textit{B} to be the entitlement holder. In hypotheticals two, four, and six, \textit{B} possesses the right to make widgets and, incidentally, to pollute \textit{A}'s water. As we have seen, Calabresi and Melamed asserted that if \textit{A} pays \textit{B} not to pollute then \textit{B} transfers the entitlement to \textit{A}. In fact, \textit{A} does not acquire \textit{B}'s right to pollute, and \textit{B} does not lose his right or privilege to pollute \textit{A}'s water.

The problem is that the Calabresi-Melamed analysis assumes that \textit{A}'s and \textit{B}'s property rights relate to the same object. In fact, \textit{A}'s rights relate to one object—her residence, or the water at her residence—and \textit{B}'s rights relate to another object—his factory or his widget business. Consequently, the right of possession is not involved at all, and the parties are not exercising rights of alienation. Possessory disputes involve mutually inconsistent claims of the right of exclusion with respect to a \textit{single} object. Environmental disputes involve mutually inconsistent claims of the right to enjoy different objects.

D. Identifying the Relevant Element of Property

1. Defending the Property Trinity

Several legal scholars have suggested that the modern rubric "property" has come to describe such a wide variety of different combinations that it retains little meaning.\textsuperscript{211} To these scholars, the cliche

\textsuperscript{208} See id.

\textsuperscript{209} See Calabresi & Melamed, supra note 14, at 1116.

\textsuperscript{210} See id. (noting that what is possessed "is an entitlement to be free from pollution").

\textsuperscript{211} See, e.g., Grey, supra note 29, at 70-73 (suggesting that the idea that "property rights are a distinct category from other legal rights . . . cannot withstand analysis").
that property is a combination of rights, or "bundle of sticks," means that property has no essence.\(^{212}\) Elsewhere, I have argued extensively that this conclusion is a non sequitur akin to saying that compounds do not exist because molecules can be broken down into atoms.\(^{213}\)

I do not deny that contemporary law recognizes a bewildering array of manifestations of property as an empirical matter.\(^{214}\) One should not, however, confuse variety with the impossibility of category. For example, we have no problem identifying the categories "snowflake" and "fingerprint" even though each individual example is supposedly unique. Characterization is precisely the abstraction from inconsequential, specific, and individual detail and the identification of salient, common, and general traits.

Of course, at some level of generality almost "everything" is the same, and at some level of specificity no two things are alike. The identification of hidden similarities between apparently different things and hidden differences between apparently similar things is a primary tool of legal argument. The proper level of abstraction in any given case depends on both theoretical and practical considerations.

Being heavily influenced by Hegelian property theory, I believe that the tradition of dividing property into three elements—possession, enjoyment, and alienability—can be logically derived from the dialectic of property.\(^{215}\) I also believe that the many rights of property recognized by our legal system and itemized by the critics of property can all be abstracted into these three general categories.\(^{216}\) These categories remain distinguishable as a theoretical matter, even though

\(^{212}\) I set forth this critique in extensive detail in Schroeder, supra note 2, at I-7, 114, 156-61, 299-301; Schroeder, Chix, supra note 26, at 239-44.

\(^{213}\) See Schroeder, supra note 2, at 168-70; Schroeder, Chix, supra note 26, at 283-85.

\(^{214}\) See Schroeder, supra note 2, at 300-01. For an example of a manifestation of a property, see U.G.C. § 9-105 cmt. 3 (1995) (describing the array of "tangible and intangible property" that can serve as collateral).

\(^{215}\) See Schroeder, supra note 2, at 37-52. Hegel set forth his argument in The Philosophy of Right, supra note 184, at 75-114.

\(^{216}\) For example, Lawrence C. Becker (following A.M. Honoré) identified at least thirteen—or ten, depending on how one counts subdivisions—possible elements of property rights, not all of which need be present for a right to be considered property. These rights are: (1) "The right (claim) to possess"; (2) "[t]he right (liberty) to use"; (3) "[t]he right (power) to manage"; (4) "[t]he right (claim) to the income"; (5) "[t]he right (liberty) to consume or destroy"; (6) "[t]he right (liberty) to modify"; (7) "[t]he right (power) to alienate"; (8) "[t]he right (power) to transmit"; (9) "[t]he right (claim) to security"; (10) "[t]he absence of term"; (11) "[t]he prohibition of harmful use"; (12) "[t]he right to execution"; and (13) "[t]he residuary rules." See Lawrence C. Becker, The Moral Basis of Property Rights, in Property: Nomos XXII, supra note 29, at 187, 190-91 (citing A.M. Honoré, Ownership, in Oxford Essays in Jurisprudence 107-47 (A.G. Guest ed., 1961)).

A Hegelian would argue, however, that these thirteen "elements" are more accurately described as specific empirical manifestations of the three more general elements of property or of limitations of the three elements imposed by positive law. For example, rights one, six, nine, and 10 are different actualizations of the Hegelian concept of possession. See Schroeder, supra note 2, at 224-25.
many specific manifestations seem to fall in between the abstract ideals. In Hegelian terms, the categories are discrete qualities, even though there are quantitative differences in the manifestations of these rights and even though continuous quantitative differences eventually result in changes in the qualities. For example, we can distinguish between the concept of possession and of enjoyment even though many empirical property rights seem to fall somewhere in between.

In Hegelian theory, property is not a "natural" right that pre-exists law. Property, instead, is created by law. Or, more accurately, law and property are mutually constituting in that the recognition of property and contract constitutes the most primitive originary moment of abstract right—property is artificial in the sense of being a human creation. It is tempting to assume from this explanation that property has no essential characteristics but is totally malleable. This assumption is a grave error.

Property is created to serve specific functions in any given society. The requirements of property's functions, therefore, limit the forms which property can take. To give an analogy, take steel beams which are not natural. Not only is steel the term for a class of man-made alloys of iron and other elements, which have different degrees of strength, flexibility, and malleability, but also steel objects, such as knives and beams, take on different characteristics depending on the manufacturing process. If one wants to build a skyscraper, one cannot arbitrarily use steel of just any quality or shape. Rather, one must

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218 For example, Jack Balkin assumed that the implication of Hohfeld's system, when read together with Saussure's theory of the arbitrary nature of signification, is that society can arbitrarily re-adjust the relative rights and responsibilities of parties in our legal system as long as we couple each change, such as the creation of a new right, with another equal but opposite change, such as the imposition of a new duty, to balance it out. See J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1120-26 (1990). As I have argued elsewhere, this proposition is based on a grave misunderstanding of Saussure, specifically, and postmodernism, generally. The arbitrary nature of signification (and law) constrains as well as frees us. See Schroeder, supra note 2, at 220-25; Schroeder, *Chix*, supra note 26, at 285-90. Law and language are artificial in the sense that they are human creations, but not in the sense that they are unreal. A building is artificial, but it does not follow from this artificiality that one can make arbitrary changes to its structural elements.

219 As every home cook who shops for quality knives knows, there is a trade off between strength and brittleness, sharpness and malleability.
consider the function the steel will serve in holding up the building. Hegel believed that the function of property was the actualization of human freedom and the creation of subjectivity through mutual recognition.\textsuperscript{220} Hegel argued that the three elements of property are necessary to accomplish this function.\textsuperscript{221} One might disagree with Hegel's specific designation of the function of property, but the general point that function constrains form remains valid.

At this point, one might be tempted to argue that regardless of whether I am right about property from a philosophical point of view, my technical distinctions have no practical implications for the Calabresi-Melamed trichotomy. If, however, property must have certain essential characteristics for other reasons, does not property function externally from enforcement regimes? Who cares whether property functions this way because of nature or because of other external constraints, such as the Hegelian actualization of human freedom?

I would counter that there is an important difference. The Hegelian concept of essential elements of property is theoretical and idealized and can only be understood in an abstract, acontextual way. For empirical and practical purposes, however, property rights may take on an unlimited variety of concrete forms in specific contexts. It is positive law—enforcement regimes—that defines, or in Calabresi-Melamed terminology "limits,"\textsuperscript{222} the parameters of empirical manifestations of the theoretical concept of property.

For example, in some contexts, the grouping of rights into these three elements may be of only theoretical interest and of little practical value. The property claimants, which Article 9 calls a "debtor" and a "secured party," both have rights to alienate the object, called the "collateral," of their property relation. However, every commercial lawyer knows that the respective concrete rights of the debtor and the secured party to alienate the collateral are quite different.\textsuperscript{223} Consequently, when I advise a secured party how to run a proper foreclosure sale under Article 9, I am not concerned that the right to hold a foreclosure sale is qualitatively a right of alienation. Rather, I want to know the precise limits and conditions applicable to this specific manifestation of alienability.

What does this analysis mean for a critique of Calabresi and Melamed? First, the abstract, triune, Hegelian analysis clarifies that Calabresi and Melamed made a category mistake, as a qualitative matter,
when they chose to analyze environmental nuisances in terms of possession rather than enjoyment. Second, the corollary of Hegelian analysis is that \textit{actual} manifestations of property rights have wide variations as an \textit{empirical} or practical matter. Identifying whether a right is better analyzed as a form of possession, enjoyment, or alienability is, consequentially, only the necessary \textit{first} step in our analysis. Proper characterization does not tell us the actual contours of the specific rights of any individual claimant. Consequently, because Calabresi and Melamed did not recognize that they must first define and limit the rights they are discussing, they misinterpret all changes in such rights as conveyances of an unchanging, pre-existing object they call an entitlement.

To return to my example, a secured party with a perfected security interest is a property claimant with certain possessory rights in the collateral. We intersubjectively recognize that the secured party has the right to exclude a class of third parties from the collateral.\(^2\) This recognition alone does not tell us what class of third parties the secured party may exclude and under what circumstances. For example, in a hypothecation, the debtor has competing possessory rights in the collateral: the intersubjectively recognized right to retain physical custody, to continue to use and, under some circumstances, to alienate the collateral prior to default.

Consequently, the conclusion that a legal dispute invokes property principles, the identification of the object(s) of the property dispute, and the identification of the element(s) of property involved in the dispute, does not obviate the difficult task of defining and limiting the specific parameters of the property rights subject to dispute. Indeed, the resolution of a property dispute often involves precisely the determination of these definitions and limits. Calabresi and Melamed, in contradistinction, assumed that once a legal regime allocates a property right or "entitlement," its definition is predetermined.\(^2\) Accordingly, they confuse the different, albeit interrelated, tasks of defining the property right and prescribing an enforcement regime. My point, once again, is that property exists within law not, as Calabresi and Melamed implied, outside of or prior to law.

\(^{224}\) As I discuss below, this concept is the Hegelian definition of possession. In the case of a security interest, the parties that the secured party is most concerned about excluding are the debtor (after default), the debtor’s bankruptcy trustee or receiver, other secured creditors of the debtor (perhaps most importantly, the Internal Revenue Service), and unsecured creditors of the debtor who may wish to attach the debtor’s assets to pay judgments.

\(^{225}\) See Calabresi & Melamed, \textit{supra} note 14, at 1090-92 ("The entitlement to make noise versus the entitlement to have silence, the entitlement to pollute versus the entitlement to breathe clean air, the entitlement to have children versus the entitlement to forbid them—these are the first order of legal decisions.")
In Lacanian terms, property is symbolic, not real, meaning that the law never merely allocates and enforces entitlements; rather, the law always defines entitlements.

The third and final reason that the theoretical or practical classification is important for a critique of Calabresi and Melamed is the corollary to the abstraction and idealism that underlies my Hegelian jurisprudence of property, which is pragmatism. The Calabresi and Melamed debate, indeed most so-called law and economic analysis, seeks an objective "scientific" means of deciding specific legal questions, in this case, whether "environmental entitlements" initially should be allocated to consumers or producers and how these allocations should be protected. The dialectic or any other form of mathematical logic cannot algorithmically solve answers to the practical questions that lawyers face. Rather, answers to practical questions require practical reasoning and "political" decisions. Logic can only be applied at a level too abstract for concrete life. As I have mentioned above and have argued extensively elsewhere, the Hegelian dialectic establishes that possessory claims must be intersubjectively recognizable as a condition of general enforceability.226 The dialectic, however, cannot determine whether society should or should not recognize something. Only intersubjective agreements—positive law—can make such determinations. The determination of positive law is necessarily a matter of politics, not science. Indeed, Coase concluded from his analysis of environmental torts that "problems of welfare economics must ultimately dissolve into a study of aesthetics and morals."227

2. Possession

Calabresi and Melamed have been misled by their use of phallic metaphors. The masculine metaphors initially reduce the complex set of relations we call property to one element, possession, and implicitly imagine possession as the immediate physical custody of a tangible thing (sensuous grasp). Calabresi and Melamed did not analyze possessory rights in intangibles in their own terms but rather by analogy to sensuous grasp. Property as sensuous grasp is exclusive—only one party can hold the object of desire in his hand at one time. One violates the property right of sensuous grasp by taking or by wresting the object from the grasp of another. Consequently, property as sensuous grasp risks seeming functionally equivalent to identifying property with the grasped object itself, rather than with the interrelationship of legal subjects with respect to the object. Conse-

226 See supra note 184 and accompanying text. I set forth the Hegelian argument at length in Schroeder, supra note 2, at 38-43, 144-56 and Schroeder, Legal Surrealism, supra note 26, at 504-34.

227 Coase, supra note 68, at 43.
quently, Calabresi and Melamed imagined a property regime, requiring that if \( A \) has a property right in some object that is taken, then the actual valued object must be returned to \( A \).

All property rights necessarily relate to objects. I have shown that the Calabresi and Melamed analysis merges the property rights with respect to objects with the underlying objects themselves. This analysis is obviously wrong—a variation on what Grey called the naive lay conception of property,\(^{228}\) and what I call the positive masculine phallic metaphor for property.\(^{229}\)

Objects are not, as Hohfeld supposed, irrelevant to property. Property rights can, and often do, include the exclusive right to physical possession of tangible things. For example, individuals ordinarily have the exclusive right to physical possession of their household goods. Even in this case, however, one's property rights cannot be reduced to physical custody. The ordinary owner has additional rights in her goods (as the term “consumer” implies). Additionally, the right of possession cannot be reduced to an immediate binary relationship between subject and object epitomized by the sensuous grasp. As I discuss at length elsewhere, we are rarely actually in physical contact with the goods we possess nor do we possess many of the goods with which we are in physical contact.\(^ {230}\) When I started this Article, I was spending a sabbatical in Lexington, Virginia. Most of my consumer goods remained in the apartment I “possess” as owner in New York City,\(^ {231}\) although I brought some of them with me and kept them in the apartment I “possessed” as a renter in Lexington. The distinction between possession and physical contact, let alone the difference between property and possession, is even more obvious when the object of desire is an intangible.\(^ {232}\)

\(^ {228}\) See Grey, supra note 29, at 69-70.

\(^ {229}\) See supra note 26 and accompanying text.

\(^ {230}\) See Schroeder, Legal Surrealism, supra note 26, at 486-88.

\(^ {231}\) During my time in Virginia, I continued to “possess” my apartment in New York even though I was not then physically occupying it and had sublet it to another professor. I possessed it in the sense that the co-op that owns my apartment building recognized me as the owner, and I had legally enforceable rights to exclude most persons from it as trespassers. I also had the right to repossess physical custody of the apartment at the end of the sublease, or sooner if my subtenant defaulted on his rent. My subtenant had a temporary possessory interest in that he had a right enforceable against me to remain in physical custody of the apartment and to exclude me during the rental period.

\(^ {232}\) As I discussed elsewhere, to a Hegelian, physical custody is not “possession” per se, but is only one way of actualizing possession in the sense of making a claim of possession intersubjectively recognizable. See Schroeder, supra note 2, at 144-47; Schroeder, Legal Surrealism, supra note 26, at 512-16. Physical custody of tangible things may be the most determinate actualization of possession in the sense that it is easily recognized. See Hegel, supra note 184, at 84. But it is also the most inadequate, in that it can be easily destroyed by a thief who has no right to possession. Hegel identified marking and altering the object as other ways of actualizing possession. See id. at 85-88. From this analysis, the provisions of Article 9 of the UCC, which permit perfection of security interests by filing, are not a
What does it mean, then, to recognize that an object is possessed by (assigned to) a subject? . . . Property, like all legal claims, is relational. . . . Possession is not merely the objective relationship of assignment of object to a subject, therefore. Although my property interest in an apple might include the right to possess it, in the sense of holding it in my hand, and the right to enjoy it, in the sense of eating it, my legal right cannot be reduced to the brute fact of my holding and eating it. A monkey can hold and eat an apple, but it cannot own it. Possession, as a legal right, as opposed to a brute fact, is the intersubjective relationship whereby a specific object is assigned to an identifiable subject as opposed to another subject. [Following Hegel's property jurisprudence,] "possession" is the intersubjective recognition that a specific object is identified to a specific subject in the sense that the subject has some legal entitlement and ability to exclude others from [the claim of possession].

I say "some ability" because, as an empirical matter, [a claim of possession] might include different combinations of Hohfeldian rights, privileges, powers, and immunities. The highest manifestation of this [possession] may be free and clear "ownership" by an individual of those personal goods which are exempt property in bankruptcy—such as a wedding ring or glass eye. That is, the owner has the right, power, and privilege to exclude almost everyone else from these objects and the immunity from having her property interests taken or violated by others. Most possessory rights are much more constrained. Even "fee simple absolute" ownership of real property is not absolutely perfect possession.

Calabresi and Melamed's definition of a property regime is equivalent to the first part of this definition of "possession"—the identification of an object to a specific subject. By recognizing only the first half of the Hegelian definition, they repressed the mediated in-

233 Elsewhere, I argue extensively that intersubjective recognition is a necessary and essential element of possession because it furthers both the classical liberal value of autonomy and the Hegelian theological purpose of the actualization of freedom. See Schroeder, Legal Surrealism, supra note 26, at 517-18. This definition is similar to Blackstone's famous definition of property as that "which one man claims and exercises... in total exclusion of the right of any other individual in the universe." 2 WILLIAM BLACKSTONE, COMMENTARIES *2. Elsewhere, I have defended Blackstone from Grey's charge that Blackstone adopted the naive lay conception of property as object. See Schroeder, supra note 2, at 161-81; Schroeder, Chix, supra note 26, at 275-85. As the language of Blackstone's definition makes clear, he thought that property was a claim—a legal relation—asserted by one legal subject against other legal subjects. Nevertheless, Blackstone did not entirely escape the allure of the masculine phallic metaphor. His definition of property is almost identical to the Hegelian definition of possession. Insofar as Blackstone's volume on property consists in large part of the arcane common-law rules of conveyancing, he clearly also recognized the right of alienation. He repressed, however, the right of enjoyment.

234 SCHROEDER, supra note 2, at 41-42 (footnotes omitted and footnote added).
tersubjective aspect of property and erroneously reduced possession to an immediate relationship between owning subject and owned object. Consequently, they declared that in a property—possession—regime, society does not impose its intersubjective valuation of the property relationship.\textsuperscript{235} The existence of third parties, however, requires the mediation of society and the imposition of its values. Although possession necessarily involves a relationship between subject and object, possession cannot be reduced to that relationship. Empirically no subject ever has perfect possession in terms of a complete and total right and power to exclude all other subjects, under any and all circumstances, from the object of possession.

For example, Anglo-American real property law posits a theoretical subject called the "sovereign" to stand in for the impossible position of the one and only subject having such an alodial title. Not even the United States government, the most powerful sovereign of the contemporary world, has complete possessory rights in its property. The fiction of feudalism, on which our real property law is built, is that the sovereign conditionally cedes some of his original possessory rights to his vassals in exchange for vows of fealty and service, thereby creating society.\textsuperscript{236}

Law cannot merely assign the right of possession to one party and then enforce that right, as Calabresi and Melamed presumed. Law must also define possession in terms of detailing those whom the possessor can exclude and under what circumstances she can exclude them. As we will see when I discuss the application of property rules in a world in which third parties or dynamite exist, any limitation of a possessory right is equivalent to imposing an intersubjective valuation on the possessor.\textsuperscript{237} Property remedies inevitably merge into liability remedies, and liability regimes presuppose a property regime.

If one thinks of possession as the right of the possessor to exclude some other subject from asserting some property interest or interests in the same object, then possession is not necessarily exclusive as a theoretical matter. In the Calabresi-Melamed hypotheticals, it does not necessarily follow from the assignment of an entitlement to a party that the entitlement should be analyzed in terms of the single property right of possession, let alone that any possessory right should be exclusive to the party. Nor does it follow that interference with that entitlement constitutes a transfer of that entitlement to the violator. Not all changes in legal rights consist of, or can be usefully analogized to, a conveyance.

\textsuperscript{235} See supra notes 67-70 and accompanying text.
\textsuperscript{237} See infra Part IV.B.1.
3. Alienation

Alienability is the ability of the subject to sever her relation to the object. Although it is a cliche of American law that we abhor restraints on alienation, most manifestations of alienability are not absolute.\textsuperscript{238} Even a fee simple owner of real estate is limited by fraudulent transfer principles from alienating her estate in a way that would work a fraud on her creditors.\textsuperscript{239} Additionally, when I have relatively broad rights of alienation, I may choose to alienate only a portion of my property rights. For example, when I lease an object to another, I divest myself of and transfer to another, my possessory right to physical custody and sensuous use of the object, temporarily and conditionally on the receipt of my rent.

The Calabresi-Melamed hypotheticals ostensibly invoke the right of alienation—the ability of a subject to sever her relationships concerning the object. Calabresi and Melamed vacillated between privileging possession and seeing property as a binary subject-object relation, which they called a property regime, on the one hand, and privileging alienation through exchange and seeing property as a binary subject-subject relation, a liability regime, on the other.\textsuperscript{240}

In the property regime and liability regime hypotheticals (hypothesals one and two, and three and four, respectively), the owner supposedly retains the right to alienate her entitlement by contracting. In fact, however, no transfer of property occurs. For example, even if the homeowner contracts away her right to drink clean water, she still owns her water. The producer obtains no property right in A's water that he can further convey to the world. The polluting producer obtains neither the right to drink the clean water himself (enjoyment) nor the right to exclude rivals (including other polluters) from drinking or polluting the water (possession). In addition, the homeowner-consumer retains the right to exclude from her water all persons other than the contracting producer. Rather than severing her relationship with the object or any portion of the object, she simply has changed the nature of the relationship. In the liability regime, the nonowner also has the power to sever the owner's relationship with her object—to "take" her entitlement—provided the nonowner pays damages. This arrangement, however, should be seen

\textsuperscript{238} See Radin, Market-Inalienability, supra note 31, at 1917-21 (critiquing the assumption that free alienability is the norm in American law by discussing "incomplete commodification"). I discuss the Hegelian analysis of alienation in SCHROEDER, supra note 2, at 46-52.

\textsuperscript{239} See, e.g., 11 U.S.C. § 548 (1994) (fraudulent transfer provision of Bankruptcy Code); UNIF. FRAUDULENT CONVEYANCE ACT § 4, 7A U.L.A. 652-53 (1985); UNIF. FRAUDULENT TRANSFER ACT § 7, id. at 509. For an argument that fraudulent conveyance law belies the very distinction between in rem and in personam rights, see Julie Sirota Karchin, Note, Fraudulent Conveyance Law as a Property Right, 9 CARDOZO L. REV. 843 (1987).

\textsuperscript{240} See supra Part I.
neither as a limitation of the owner’s right of alienation, nor as a right of alienation granted to the nonowner. Rather, it is a limitation of the possessory rights of the “owner” and the grant of conditional possessory rights to the “nonowner.”

Hypotheticals five and six purport to place limitations on the owner’s right and power to alienate her entitlement. In the more realistic hypothetical five, A could not give up her right to clean water. If the conflict between A and B cannot be analyzed in terms of the allocation of a possessory interest in a single object, neither can this paternalistic limitation on A be analyzed in terms of her right to alienate her object. A, as a homeowner, has the usual rights to sell her home and, subject to obtaining any appropriate licenses, to bottle and sell her water. Consequently, if it is inaccurate to analyze the environmental nuisance hypotheticals in terms of disputes of possession, it is equally inaccurate to analyze them in terms of rights of alienation.

4. Enjoyment

It is the third element of property, the “feminine” element of enjoyment, which is at stake. Enjoyment is the right of a subject to use, consume, collect, or otherwise exploit the object of the property right. In Hegelian terms, enjoyment is the actualization of the subject’s mastery over the object. Possessory rights indicate those whom the owner can exclude from the object of desire. Alienability rights indicate how the owner rids herself of the object once desired. Enjoyment rights indicate what the owner may do with and to her object of desire.

Once again, it is common to assume that an owner usually has the unfettered right to do whatever he wants with “his” property—that “a

242 See HEGEL, supra note 184, at 88-90; SCHROEDER, supra note 2, at 43-45.
243 See SCHROEDER, supra note 2, at 43-44.

Just as possession should not be equated with physical custody, enjoyment cannot be limited to sensuous consumption. The nature of the right of enjoyment varies with the type of object involved. A tomato can be eaten, but one can also admire its beautiful color or fragrance or even use it as a weapon by throwing it at some politician. Although during the term of a lease, the lessee has the right to sensuous exploitation of the leased object, the lessor also retains a right of enjoyment in the form of economic exploitation (i.e., the right to rent). Enjoyment is often conflated with possession in the sense of physical custody, because one frequently, or even usually, needs to be in immediate physical contact with, or at least close proximity to, a tangible object in order to enjoy it. But even in the case of tangible goods, the rights of possession and enjoyment are distinguishable. As reflected in the cliché that you can’t have your cake and eat it too, it is often the case that enjoyment destroys the object of desire and, therefore, also destroys the other two property elements. Consumption is the ultimate form of enjoyment.

Id. at 43-44.
man's home is his castle." However, rights of enjoyment, like those of possession and alienation, often are limited. For example, although I might say that I own my body, in most jurisdictions it is illegal for me to enjoy it in sexual relations with persons other than my husband (particularly if the enjoyment is commercial in nature), or to abuse it by ingesting certain drugs, or to consume it entirely by committing suicide. More importantly, for the purposes of this Article, moralistic or paternalistic restrictions are not the only limitations on enjoyment. Enjoyment is also self-limited by the demands of its fundamentally relational nature.

From a Hegelian viewpoint, the logic of property is recognition—it always involves other persons. Therefore, in accord with the Hohfeldian analysis, all legal rights, including property rights, must be intersubjective in nature. Enjoyment, however, seems inherently subjective and solipsistic in nature. Consequently, I have criticized Margaret Radin's privileging of enjoyment over the other elements of property as implicitly individualistic, even virginal.

In what way is enjoyment necessarily what I call "relational," and Coase called "reciprocal"? One could argue that enjoyment is relational because, as total enjoyment cannot be shared, it necessarily envelopes the right of exclusion. Two people cannot eat the same piece of cake. But, we already have characterized the right of exclu-

245 Not all object relations are by nature, property relations. As a Hegelian, I question whether it is appropriate to analyze one's relationship with one's own body in terms of property. See Schroeder, Virgin Territory, supra note 26, at 67-69, 80-81, 100-01, 147-49 (arguing that we should view this relationship as one of "bodily integrity"). Nevertheless, there is a long and respectable jurisprudential tradition of considering the body to be property for at least some purposes. This tradition dates at least back to John Locke's famous assertion that "every Man has a Property in his own Person." John Locke, Two Treatises of Government 305 (Peter Laslett ed., 1960) (1690). In more modern times, some law and economic scholars have concluded that because we have a property right in our bodies, we should be able to buy and sell our body and body parts, as well as our infants. See Posner, supra note 103, at 167-70; Posner, supra note 72, at 409-17; Elizabeth M. Landes & Richard A. Posner, The Economics of the Baby Shortage, 7 J. Legal Stud. 323, 344 (1978). Although Margaret Jane Radin also analysed the legal relationship of the body and property, she argued that the body should be market inalienable. See Margaret Jane Radin Property and Personhood, in Reinterpreting Property, supra note 31, at 40-43; Radin, Market-Inalienability, supra note 31, at 1921-36; see also Schroeder, supra note 2, at 178-79, 280-83 (critiquing Radin's theory from a Hohfeldian and Hagelian perspective); Schroeder, Virgin Territory, supra note 26, at 67-69, 73-76 (same). See generally Alan Hyde, Bodies of Law 48-79 (1997) (providing an analysis of the body and property).
246 See supra note 191 for a brief discussion and Schroeder, supra note 2, for an in-depth analysis of this theory.
247 See supra note 2, at 42-43.
248 See generally Schroeder, Virgin Territory, supra note 26 (critiquing Radin's imagery of personal property as the inviolate feminine body).
sion as part and parcel of the right of possession. But, as I have expressed previously, "to say that enjoyment presupposes exclusion is only another way to say that possession is the most primitive element of property." 250

Enjoyment is intersubjective not just because the mutual enjoyment of the same object by two different subjects can be inconsistent, but because one's enjoyment of one's own object can hinder or even preclude the ability of another to enjoy his own object. To give an easy example, even rabid libertarians would probably agree that society can legitimately limit the rights of car owners to enjoy their cars by driving them on the side walk because that would interfere with the rights of pedestrians to enjoy their bodily integrity. . . . Exactly what these limitations are (i.e., what degree of interference we will tolerate as a legal matter) must be determined by practical reasoning (i.e., positive law). 251

In the case of environmental nuisances, B's enjoyment of his object is inconsistent with A's enjoyment with her object. A's object of desire in our hypothetical is her residence (or at least the well at her residence or the water in the well). One of the ways she can enjoy this object is by drinking its water. B's object of desire is his widget factory and business. One of the ways he can enjoy this object is by producing widgets. The problem is that the production of widgets pollutes A's water. A's complete enjoyment of her water, therefore, is inconsistent with B's complete enjoyment of his factory. Coase insisted that rival claims in environmental disputes are reciprocal in nature because of the impossibility of simultaneous complete mutual enjoyment. 252

The question in environmental nuisance is not, therefore, which party possesses an entitlement that may or may not be alienated to the other party. Rather, the question is, what are the borders separating the relative rights of the two parties to enjoy their separate objects?

This analysis partially explains why this problem has been so mysteriously intractable for so long. Legal scholars have tried to analyze the problem in terms of proper allocation of possession and in terms

difference between the adjudication of property disputes involving private persons and the distribution of entitlements among members of a body politic."). 250 Schroeder, supra note 2, at 44. Although one cannot enjoy or alienate an "object" unless one first possesses it, one can theoretically have the right to possess without either of the other two rights, such as in a bailment. A bailee is someone rightfully in the possession of property of another. In the simple case of a bailment for storage—as when one leaves one's coat at the cloakroom of a restaurant—the bailee has the temporary and conditional right to possess the coat, but has no right to enjoy or alienate it. Sometimes the bailee does have other rights—in the general, as opposed to the technical Hohfeldian sense—in the bailed good. For example, if the bailee is an entrustee under U.C.C. § 2-403(2) (1995), under some circumstances he has the Hohfeldian power, but not the Hohfeldian right, to alienate it.

251 Schroeder, supra note 2, at 44-45 (footnotes omitted).

252 See supra Part I.D.
of when or if society should force onto owners involuntary alienation or inalienability despite the fact that our property system has worked out priority and alienation regimes. Their suggestions, therefore, seem like alien, even radical, intrusions into some of our most cherished legal institutions—those institutions that are central to the American economic and political system and mythology. These are the related institutions of private property, which requires, with limited exceptions, the security of first possession, and the freedom of contract, which generally presupposes both free alienability of property and that owners determine if, when, and on what terms alienation will occur. In contradistinction, I argue that the feminine element of enjoyment is repressed by the symbolic order of law that is psychoanalytically masculine. The law of boundaries of enjoyment is less worked out than the rules of possession and alienation. Consequently, the Calabresi-Melamed debate can be recast as an attempt to resolve long-standing issues within the existing property regime, not as proposals to throw out time-honored legal principles.

5. Empirical Overlaps Between the Elements of Property

Kaplow and Shavell observed that although some property conflicts fall clearly within the rubric of the classic environmental nuisance, and others fall clearly within the rubric of classic priority disputes, many cases fall somewhere in between. The examples they gave, however, reveal confusion as to the nature of property. Specifically, they claimed that one can alternatively view the environmental nuisance hypothetical as the polluting producer interfering with or taking the consumer's property rights. They stated that a polluter can be described as "taking clean air . . . from the victim." For a neighbor to block the view from the windows of a building on an adjoining plot of land is, according to Kaplow and Shavell, even more analogous to a "taking of a thing." As we already have seen, however, this interpretation is not strictly correct. In the typical environmental nuisance case, there is no voluntary or involuntary transfer of any right from the consumer to the producer—merely a readjustment of their relationship. The producer may destroy the consumer's possession by precluding her enjoyment, or even by destroying the object of desire, but the producer has not taken the ob-

253 See, e.g., Kaplow & Shavell, supra note 59, at 715-16 (providing the framework for the article's argument and amplifying their point by suggesting that if one has "rightful possession of some thing—such as an automobile or a home—another person ordinarily cannot take it without [her] permission").
254 See id. at 771-73.
255 See id. at 772-73.
256 Id. at 772.
257 Id. at 772-73.
ject of desire. In Kaplow and Shavell’s examples, the polluter may have made it impossible for the victim to breathe freely, but her lungs are still full of air; the builder may have made it impossible for her neighbor to enjoy an ocean view, but the neighbor’s building and its windows are still intact. It is true that, in the building example, the first party lost a view, and the second has a view, but not because the second party gained the first party’s view. Rather, the means by which the second party chose to enjoy her land—commercial exploitation in the form of building a hotel so that others will pay to enjoy the view—necessarily interfered with the first party’s enjoyment of her land by blocking her view.

As mentioned above, the three abstract elements of property are qualitatively different. These elements concretely can manifest in many different, and more or less adequate, ways. Although under Hegelian theory, the concept of qualities is discrete—something either is or is not a quality—gradual quantitative changes can cause differences in qualities. The classic example, which I discuss at length elsewhere, is the comparison of the qualities of hirsuteness and baldness. One either is or is not bald. Losing hair, however, is a gradual, quantitative change. For a hairy man to lose one hair does not make him bald, just less hairy—a gradual quantitative change has occurred. But at some point, he will realize that he has lost so much hair, that he is now a bald man. The quantitative change eventually becomes a qualitative change, although one cannot, as a logical matter, determine the exact moment when the change occurred. Rather, determining the moment of change will be a practical judgment about which reasonable people may disagree. I may consider a man with a receding hairline to be bald, while a man with a comb-over may insist that only the “Mr. Clean” look qualifies as baldness. To Hegel, the relation between quality and quantity is not merely an empirical observation; rather, it is logically mandated by the working of his dialectic method. In the Hegelian dialectic, the resolution of contradiction, known as sublation (aufhebung), occurs instantaneously, as with changes in quality, but one cannot identify the moment of transition, as with changes in quantity. For this reason, pragmatism is the corollary of Hegelian idealism.

Consequently, the identification of the qualitative categories of possession, enjoyment, and alienation does not preclude, but requires, that empirical actualization of these qualities be quantitatively

258 See id. at 772.
259 See HEGEL’S SCIENCE OF LOGIC, supra note 217, at 335; Schroeder, supra note 56, at 1554-55.
260 See HEGEL’S SCIENCE OF LOGIC, supra note 217, at 334-35, 368 (discussing resolution in the context of the sublation of quality and quantity); Schroeder, supra note 56, at 1558-66.
related. Some manifestations will be more or less possession-like and more or less enjoyment-like. The most obvious case may be of intangible rights such as copyrights. I have defined possession as the intersubjectively recognized identification of an object or res to a subject and enjoyment as the rightful exploitation of the res. Because copyright can only be understood as the right of commercial exploitation—the right to copy, to sell, or to use—of the expression of an idea, the enjoyment of the copyright, and the act that marks the identification of the object to the subject, overlap. On the other hand, other aspects of copyright clearly relate to possession. For example, to be enforceable against third parties, copyrights must be registered with the U.S. Patent and Copyright Office. Like perfection of a security interest, the requirement of registration relates to the intersubjective recognition of the subject’s claim to the object and, therefore, is a form of Hegelian possession.

Similarly, the empirical boundaries between enjoyment and alienation can be blurred. For example, one enjoys a debt by realizing its value. One can do this by presenting it for payment to the debtor. But this act, which also extinguishes the debt, is equivalent to alienating it back to the debtor (as when a corporation buys back its publicly issued bonds on the open market to avoid paying a prepayment premium). Conversely, one can alienate a debt to a third party by selling it, as in the assignment of accounts discussed previously. By selling the account, however, the seller realizes its value. Consequently, the alienating act is equivalent to enjoyment. Alternately, one can enjoy some objects by consuming them, as when one eats a piece of cake. To do so, of course, also severs any continuing relationship between the subject and the consumed object. You can’t have your cake and eat it too. Consequently, the act of enjoyment is equivalent to alienation.

My Hegelian analysis cannot provide a logical method for definitively categorizing any of these actualizations of property as possession, enjoyment, or alienation. My analysis can only provide a general framework for the application of practical reasoning. Ultimately, this decision, like all legal decisions, necessarily contains a subjective political component.

261 See 17 U.S.C. § 411(a) (1994) (noting that with few exceptions, “no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title”).
262 See generally Schroeder, Legal Surrealism, supra note 26 (arguing that the requirement of registration relates to intersubjective recognition of the claim to the object).
IV
PROCEDURAL AND SUBSTANTIVE CRITIQUES OF THE CALABRESI AND MELAMED TRICHOTOMY

One might be tempted to argue that, although my argument is technically correct, it is irrelevant given the purposes for which Calabresi and Melamed developed the trichotomy. In the previous Part, I spoke extensively about the importance of pragmatism. Might not the trichotomy have practical uses despite its theoretical flaws? Whether we analyze the problem in terms of a single entitlement allocated between two parties or in terms of the determination of the boundaries of two different entitlements held by the two parties, would not the Coase theory still suggest that the party who valued the disputed right more will negotiate to pay the other party to allow him to have the right? We may expect this result whether the disputed right is the right to possess a single object or the right to enjoy two separate objects. For example, if A valued her enjoyment of her water more than B valued his enjoyment of his widget factory, then the parties would bargain so that B would refrain from enjoyment so that A could indulge in enjoyment, and vice versa. This argument would, in effect, accuse me of conflating a semantic dispute with a substantive one.

I will show, however, that the Calabresi and Melamed analysis fails in its stated goal of presenting a taxonomy of existing and possible legal remedy regimes. In particular, analyzing a producer’s ability to pollute as the allocation of an entitlement is unworkable both in theory and in practice. I have already argued\textsuperscript{263} that hypothetical six, in which the producer’s “entitlement” to pollute is inalienable, is absurd, and therefore is never discussed in the literature, even though it is logically required by the taxonomy. More importantly, the implementation of either a property or a liability regime protecting such an entitlement (hypotheticals two and four respectively), would require not merely the recognition of new rights, but also the adoption of radical new legal procedures. Although theorists sometimes recognize this result with respect to hypothetical four, I will show that it applies equally to hypothetical two. Whether or not Calabresi and Melamed’s analysis is amusing as a matter of economic theory, it does not represent a serious alternative for American law. As Krier and Schwab already have suggested, although couched in the rhetoric of policy recommendations, the Calabresi and Melamed inspired debate is purely an aesthetic exercise with no real world implications.\textsuperscript{264}

Even if one agrees with my critique when it tries to allocate the entitlement to the producer, one might respond by suggesting that it

\textsuperscript{263} See supra Part II.B.6.

\textsuperscript{264} See Krier & Schwab, supra note 15, at 482.
is irrelevant to the bulk of the analysis flowing from Calabresi and Melamed's theory. Do not most analysts expressly or implicitly focus on the two most realistic hypotheticals—numbers one and three? Assuming the status quo—that the consumer has a right to clean water—would efficiency be better served if we protected her right through property or liability rules? Whether or not Calabresi and Melamed are right in describing this problem as the transfer of a thing, their suggestion does not affect this more fundamental question. Moreover, whatever qualms one may have in applying Calabresi and Melamed's taxonomy in its original context of environmental nuisances, surely it is applicable in other contexts in which the parties are contesting the ownership of a single thing.

In the following sections, I show that a Calabresi-Melamed analysis is misleading for even these more limited purposes. Their analysis requires that the parties negotiate in the shadow of an enforcement regime, which requires that they know what enforcement regime will apply. Negotiation under this condition is not possible because in the real world of third parties and dynamite, property and liability regimes are indistinguishable.

A. The Empirical Validity of the Trichotomy

The regime that Calabresi and Melamed denominate "property" bears little resemblance to the American property regime. Is this distinction merely a semantic quibble? Perhaps Calabresi and Melamed's choice of the word "property" was unfortunate because the term has other well-understood meanings. This imprecision alone, however, does not mean that the concept designated by this unfortunate term is defective. If I am worried that the term "property" has misleading connotations, perhaps I should merely suggest alternate terminology such as "injunctive" regime, which seems better to fit with the term "liability" regime. Or why not change the names of both of these categories to the more traditional "equitable" and "legal" remedies?

My objection to Calabresi and Melamed's concept, which they call a property regime, is not simply that it does not describe the existing property regime, but that it does not describe any remedial regime that does or could exist under any legal system in which the property right can be irretrievably destroyed or in which there are more than two parties. Consequently, the trichotomy Calabresi and Melamed proposed is fundamentally unworkable. To see why, we

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265 For example, Polinsky reduced the Calabresi and Melamed analysis to the simpler issue of when we should impose legal remedies and when we should impose equitable ones. See Polinsky, supra note 32, at 1075-80.
must consider Calabresi and Melamed's definition of a property regime in slightly more detail.

One should intuit that the problem with Calabresi and Melamed's property regime is its incompleteness. A property regime, they stated, is one in which society respects an entitlement holder's subjective valuation of her property and does not impose its own valuation. Consequently, in a property regime, a transfer of an entitlement can only be made with the consent of the entitlement holder—through contract. This characterization describes the goal of the regime, but fails to describe the remedies it adopts to further its goal. In order to understand what a property regime is, one may wish to look at Calabresi and Melamed's description of what it is not—a liability regime. The Calabresi and Melamed analysis subtly has changed the traditional nature of damages.

1. Calabresi and Melamed's Liability Analysis as the Revaluation of Theft

In a liability regime, society imposes its valuation on an entitlement holder. That is, the law enforces an involuntary transfer against the original entitlement holder so long as the transferee pays the socially imposed value to the entitlement holder. This seems to mean that in a liability regime the only remedy available in the case of a taking is money damages. By negative pregnant, this paucity of remedies implies that the remedy available in a property regime is something other than money damages or "legal" remedies—such as one of the traditional "equitable" remedies.

In law, courts customarily impose damages upon a wrongdoer to compensate the victim for the loss caused by the wrongful act. Calabresi and Melamed suggested that, in economic terms, this remedy is equivalent to setting an objective—societally imposed—purchase price for an entitlement so a rival claimant can force an involuntary transfer on the original entitlement holder. Most acolytes of Calabresi and Melamed treat these damages in this way.

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266 See Calabresi & Melamed, supra note 14, at 1092.
267 See supra text accompanying notes 76-81. Radin made a similar critique of the American tort regime, which she frames in terms of a denial of commensurability. She agreed with the law and economics approach that requiring a tortfeasor to pay damages, supposedly equivalent to the loss, to the tort victim is tantamount to establishing a market for bodily integrity. Implicitly adopting what I call the feminine phallic metaphor, Radin argued that personal injury is a violation of selfhood that cannot be cured through exchange or the payment of damages. All society can do is acknowledge the victim's loss in a way that respects her dignity. See RADIN, CONTESTED COMMODITIES, supra note 31, at 185-205.
268 See supra note 75.
This interpretation, however, ignores the fact that economic equivalence is not necessarily the same as legal, practical, or ethical equivalence. Quantity is not quality. As Coleman and Kraus have argued, the Calabresi and Melamed analysis changes the valuation of a taking. Under traditional legal principles, a taking is wrongful. The fact that the payment of damages retroactively heals this wrong does not in-and-of-itself change this judgment. In the Calabresi-Melamed trichotomy, however, a taking in which the taker pays the original owner the societally imposed value of the property taken is implicitly rightful. Indeed, if the taker is the higher valuing user, a utilitarian concerned with wealth maximization would go further and say that the taking is an affirmatively good thing, which we should encourage.

But note the legal implications of this valuation. Calabresi and Melamed suggested that the law should adopt a liability regime if it would result in more efficient transfers than a property regime. Under a Calabresi and Melamed liability regime, however, the claimant should be able to tender the societally imposed “purchase” price to the entitlement holder and take the property. Any attempt by the entitlement holder to sue the taker would be dismissed for failure to state a claim or, at most, a valuation proceeding would be ordered. This arrangement may or may not be a good idea, but it is clearly a radical change from our current legal system. This system tends not only to protect the status quo, but also to guard jealously the right of first possession because of the certainty of private property as an institution.

Calabresi and Melamed’s conception of such a liability rule is at least theoretically possible in the area of environmental nuisances. The producer can easily “take” the coveted entitlement by going about its usual business of producing widgets. It does not have to enter the consumer’s premises or otherwise breach the peace. This description is, of course, hypothetical three in which the producer “takes” the consumer’s entitlement to clean water by producing widgets and, incidentally, pollutes. Polluters do not have to make use of the law’s enforcement mechanism to actualize their “right” to pollute—they have the practical ability to exercise self-help. This self-help ability is why I have suggested that it is not just odd, but erroneous to analyze this as an enforcement regime.

This implicit but radical departure from the traditional solicitude towards private property is subtly signalled by Calabresi and Melamed’s novel terminology, which changes the meaning of traditional.

269 See Coleman & Kraus, supra note 52, at 1352-65.
270 See Calabresi & Melamed, supra note 14, at 1093-98.
271 See supra Part II.B.3.
categories. First, they label this regime a "liability," rather than a "damages," regime, thereby avoiding the implications that this remedy is compensation paid for a wrongful act. More importantly, they distinguished this regime from a "property" regime. This distinction is exactly correct. Compensation of involuntary takings is both rightful and desirable as a weakening, if not an outright rejection, of the concept of possession—the right to exclude others. It is impossible to have the other two elements of property without the most primitive element, possession. Hence, Calabresi and Melamed used the weak economic term "entitlement," rather than the resonant legal and philosophic term "property," to describe legal rights.

This terminology is consistent with the utilitarian philosophy underlying law and economics. Unlike the Libertarian strand of liberalism associated with John Locke, private property in law and economics is not a fundamental natural right of man.\(^\text{272}\) Unlike the contractarian strand of liberalism associated with Thomas Hobbes, property under law and economics theory is not a fundamental right, established by the positive law of the social contract, to prevent the war of all against all.\(^\text{273}\) Unlike Hegelianism, law and economics does not view property as a necessary step in the creation of the individual and the state and the actualization of human freedom.\(^\text{274}\) To a utilitarian, these justifications of a substantive conception of property are mere sentimental prejudices—the "other justice concerns" to which Calabresi and Melamed gave lip service.\(^\text{275}\) The desire for freedom is a preference, a mere matter of taste, which one can reduce to either "utility" or market value. The institution of property is merely a tool, like any other, which may be used to fulfill the fundamental goal of utility or wealth maximization.

In an extreme example, Kaplow and Shavell asserted that regardless of whether property is a "natural right," we only care about natural rights if we can justify them for utilitarian reasons.\(^\text{276}\) This assertion is true only if we broaden the definition of utility so far that it becomes analytically useless. The assertion that society should respect natural rights because to do so is "right" in some ethical, moral, or religious sense would translate into utilitarian terms as follows: "If one


\(^{273}\) See Minogue, supra note 272, at 18; Rosenfeld, supra note 272, at 790-92.

\(^{274}\) See Schroeder, supra note 2, at 15. For a description of the Hegelian view, see id. at x-vi, 3-4, 15, 19-20, 34, 37-52, 271-73, 294-95, 319-21; Schroeder, supra note 56, at 1533-44, 1566-69.

\(^{275}\) See Calabresi & Melamed, supra note 14, at 1102-05.

\(^{276}\) See Kaplow & Shavell, supra note 59, at 746.
CRITIQUE OF CALABRESI & MELAMED

has a preference for ethics, morality, or religion, then complying with ethics, morality, or religion increases one's utility." It is difficult to fathom how one could factor such a concept of utility into a practical economic or legal discussion, which necessarily uses wealth (market valuations) as a surrogate for utility.277 According to Calabresi and Melamed, society should adopt a so-called "property" regime only insofar as it encourages more efficient transfers of entitlements to the highest valuing user.278 Although a "property regime" ostensibly privileges possession in that the owner has an absolute claim to exclude others, possession is only tentatively justified so long as it encourages efficient alienation. Consequently, as in a "liability regime," the element of possession is subordinated to that of alienation through exchange. This subordination is inconsistent with our earlier discussion, which demonstrated that alienation through exchange requires the more primitive element of possession. A rival claimant need not negotiate for exchange in a liability regime unless the first buyer has an enforceable right of possession, and the rival claimant will not pay for the entitlement unless he is assured that he will receive some level of possession (security of title). Moreover, the element of enjoyment is once again repressed and not discussed. The primary reason why one party would value the object of desire more than another is because of the anticipated enjoyment that the higher valuing party would have in the object—whether the commercial enjoyment of producing widgets or the sensuous enjoyment of drinking clean water. This unacknowledged feminine ghost of enjoyment is precisely the element of property involved in environmental

277 This concept of utility also reverses the usual philosophic understanding that utilitarianism is only a pragmatic philosophy without its own independent justification.

278 Calabresi and Melamed's policy conclusion reflects common misreadings of Coase. For example, Barbara White stated that, "Coase asserts that courts, when ruling on entitlement disputes, must assign the property right not on the basis of traditional notions of property rights, but on the basis of maximizing total product." Barbara White, Coase and the Courts: Economics for the Common Man, 72 Iowa L. Rev. 577, 586 (1987). Unfortunately, White mischaracterized the Coasean language she quoted to support her interpretation. What Coase did say is that different allocations of rights can be expected to have different effects on economic efficiency. Moreover, legal decisions are based on a variety of considerations that may differ from the goals of economics. Consequently, there is no a priori reason to assume that the status quo is the most efficient allocation because transaction costs may have prevented correction of inefficiencies. Coase did not suggest, however, that courts should therefore decide cases based on economic efficiency alone. He expressly stated that economic and legal decisions "should be carried out in broader terms than [merely consideration of efficiency] and that the total effect of these arrangements in all spheres of life should be taken into account." Coase, supra note 63, at 43. He expressly thought society should examine aesthetic and moral considerations. See supra text accompanying notes 113-14. Consequently, Coase's analysis has plenty of room for respect of "traditional notions of property rights." Id.
nuisances. In the words of Lacan, what is repressed in the symbolic (law) always returns in the real.279

This hostility toward property results from the implicit adoption of the phallic metaphor of property as possession and of possession as sole and unfettered custody of a tangible thing—property as sensuous grasp. For example, Hohfeld thought he had to reject property as irrational or as impossible precisely because he could not imagine it any other way.280 As we have seen, the phallic metaphor pops up most explicitly in the Calabresi-Melamed model's assumption that the entitlement is a thing that is assigned to one party or the other. If one holds this view of property, property must be disparaged in any situation in which these absolutist views are unworkable or absurd. Consequently, Hohfeld thought that traditional property analysis was illogical and proposed the abandonment of property as a separate legal category. His theory would lump rights traditionally falling within the rubric of "property" with a number of other rights, such as traditional torts, into a new category, which he called "multital rights." In contrast, Calabresi and Melamed merely declared that a liability rule is nonproperty.

a. Procedural Implications in True Takings

Regardless of one's judgment of either the ethical implications of the Calabresi and Melamed liability analysis or the usefulness of the analysis in the limited situation of an environmental entitlement allocated to a consumer, the proposal becomes fanciful when we apply it to true possessory disputes. For example, suppose that the object of desire is a diamond ring that A, the owner, always wears. In order to take the ring from an unwilling A through self-help, B would have to assault her physically.281 This behavior would interfere with other rights of A, such as the rights of autonomy and bodily integrity, in addition to the entitlement, which is the subject of the dispute. Consequently, Calabresi and Melamed must have been proposing that B be able to enforce his right to impose an involuntary sale on A through the courts, by utilizing an "enforcement regime." For example, B would be able to tender the "purchase price," or pay it into the court and then obtain an injunction ordering A to turn over the ring. A regime that gives a plaintiff the right to use the courts to change the

279 See supra note 22 and accompanying text.
280 See supra note 29 and accompanying text. Grey made a similar conceptual error. See Schroeder, supra note 2, at 163-79; Schroeder, Chix, supra note 26, at 242-44, 271-75, 299-300.
281 I am not accusing Calabresi and Melamed of promoting assault, trespass or other wrongful behavior as a means of self-help.
status quo, is alien to our capitalist legal system that jealously defends property rights.

Of course, no one is seriously suggesting that we institute a Calabresi-Melamed liability regime in the case of consumer goods. Let us, therefore, consider the implications of the regime in a situation that theorists debate in the literature: the efficient allocation of commercially productive property.

Suppose that X owns a widget-producing corporation that Y could operate more profitably. Standard economic analysis suggests that because Y is the higher valuing user, society would benefit from the transfer of control of the corporation from X to Y. Under current law and practice, Y cannot take the business away from X without X's consent. This protection exists in part because a property regime protects X's entitlement. X has an enforceable right of possession in the corporation and its assets. As a result, the only way Y can acquire the corporation or its assets is by bargaining with X.

To describe a traditional liability regime within Calabresi-Melamed terminology, the rival uses self-help to "take" the object of desire from the original owner who then sues the taker for damages. The Calabresi and Melamed debate, however, goes further. It analyzes a liability regime as the ability of Y to force onto X an involuntary transfer of the object of desire by paying X society's intersubjective valuation of the object. In the case of a corporation, however, there is no practical way for Y to "take" X's object through self-help. Consequently, in order to impose a liability regime in this case, we must devise a procedure whereby Y could invoke the enforcement power of the state.

In other words, we would have to permit Y to bring a legal action against X seeking an injunction, which would force X to transfer title to his equity in the corporation to Y upon Y paying X the "purchase price." This transfer is involuntary with regard to X, and thus the purchase price would not reflect X's valuation, but would reflect society's valuation. Consequently, the action would include some form of

282 Nevertheless, I will argue in Part IV.A.2 below that we do, in fact, protect consumers' property rights by liability as well as property regimes. More specifically, in both theory and practice, we cannot distinguish liability and property regimes.

283 For example, Ayres and Talley started their article with an analysis of a piece of real estate. The real estate begins in the hands of an owner who uses it for one purpose, and it is desired by another party who believes that he could develop the property in a more profitable manner. See Ayres & Talley, supra note 38, at 1030-31.

284 If the business is a public company, then X would not be an individual, but a collective of individual shareholders. Y could "bargain" with these shareholders by negotiating a merger or other business combination with the managers of the business who would then, in most cases, be required to submit the proposal to the vote of the shareholders. Alternatively, Y could circumvent management and make a tender offer directly to the shareholders X.
valuation proceeding. Every corporate and bankruptcy lawyer, however, knows that judicial valuation proceedings are time consuming and that the corporate world has little confidence in their accuracy.

As Zohar Goshen suggested in a very interesting paper, society arguably adopts a modified liability rule, requiring a valuation proceeding in the very limited area of "squeeze-out" mergers.\textsuperscript{285} Under state law, disgruntled minority stockholders can bring an action in which interested officers and directors have the burden of proof for showing both the procedural and substantive fairness of the transaction.\textsuperscript{286} Goshen suggested that this action is equivalent to allowing the majority to take the minority's interest under a liability rule—the minority receives a societally imposed price for its entitlement.\textsuperscript{287}

It is questionable, however, whether anyone in the Calabresi-Melamed debating society really believes that any state legislature would, in the foreseeable future, consider extending the liability rule of squeeze-outs to all corporate acquisitions, thereby creating a whole new class of complex and expensive lawsuits. I do not believe so. Indeed, upon further reflection it is apparent that the squeeze-out rule Goshen described is not the exception that proves the rule. It is not a rejection of the more fundamental proposition that a property regime generally applies to stockholding, but is an attempt to deal with the unique problems that arise in collective ownership. The squeeze-out rule is a relatively recent alternative to earlier corporate law, which applied a rigid property regime to shareholders individually. Until the early twentieth century, a merger could not occur unless approved unanimously by all of the shareholders on the grounds that to do otherwise would violate dissenting stockholders' property rights in their stock.\textsuperscript{288} Even under current law, a merger can only trigger this squeeze-out procedure \textit{if} the acquirer \textit{first} purchases, in voluntary transactions with the original owners, the requisite number of shares to force a merger, allowing the original owners to receive a \textit{subjective} valuation for their shares.\textsuperscript{289}

\textsuperscript{286} See id. at 4-5.
\textsuperscript{287} See id. at 19-20.
\textsuperscript{288} Obviously, this limitation gave tremendous holdout power to individual stockholders and rendered the negotiation of mergers of widely held public corporations extremely difficult, if not impossible. Recognizing that property rights need not be absolute, we now acknowledge that the extent of a stockholder's property rights may be limited by statute or by the corporate charter. Consequently, reflecting the fact that corporations are a collective means of transacting business and holding property, modern corporate law now provides that many decisions are appropriately made collectively—i.e., by voting.
\textsuperscript{289} Goshen also suggested that Delaware has further modified this "liability" rule with respect to squeeze-outs by layering on top of it a modified "property" regime in favor of the minority as a class. Specifically, parties interested in a squeeze-out can shift the burden of
Moreover, a valuation proceeding instituted through equitable remedies would be necessary to implement a liability rule. This necessity weakens Calabresi and Melamed’s distinction between a liability and a property regime. Calabresi and Melamed might try to defend their distinction on the ground that the original entitlement holder only obtains damages. Our Hohfeldian analysis, however, has already indicated the flaw in this reasoning. We have seen that enforcing possessory rights through a liability regime is equivalent to dividing possession between the two parties. Consequently, although Calabresi and Melamed would maintain that the party who originally has custody of the object of desire has an entitlement protected by a liability regime, which is equivalent to saying that the other party has an entitlement—the right to custody conditioned on paying the purchase price—enforceable by a property regime.

b. The Notorious Hypothetical Four and a Reconsideration of the Spur Industries Case

Despite its obvious procedural and substantive novelty, Calabresi and Melamed actually suggested a regime similar to my takeover hypothetical in which B, the producer, has an entitlement to pollute which is protected by a liability regime. This scenario is, of course, their notorious hypothetical four. It is difficult to find examples of hypothetical four in the private realm. A, the homeowner, cannot “take” B’s entitlement to pollute by tendering the purchase price and seeking self-help because she cannot shut down widget production unless she trespasses. A’s limitation is in sharp contrast with the government’s ability to execute a taking as a practical matter under its police power and right of eminent domain. Therefore, for this regime to work, A would need the right to obtain an injunction to change the property status quo; essentially, we would have to impose a “private” takings regime. Participants in the Calabresi and Melamed debate have assumed that they finally found an example of such a private takings regime in Spur Industries, Inc. v. Del E. Webb Development Co. They base this conclusion, however, on a careless reading of this case.

\[\text{fairness by obtaining the approval of a majority of the minority. See Goshen, supra note 285, at 21. Because this approval is voluntarily given by voting after full disclosure, the price received by the minority as a class will be the class’s subjective valuation. See id. Note, however, that this regime is still arguably a liability regime for class members as individuals because dissenting minority members will not receive their idiosyncratic valuation.} \]

\[\text{As in the assault case, by entering B’s property A would not only be taking B’s right to possess his entitlement, she would be infringing on other rights as well.} \]

\[\text{Most commentators assume that this case is, indeed, an example of hypothetical four. See, e.g., Ayres & Talley, supra note 38, at 1040 n.46; Coleman & Kraus, supra note 52, at 1338; Krier & Schwab, supra note 15, at 444-45. Epstein is one of the few analysts who agree with me that this case is, instead, sui generis. See supra note 166.} \]
In *Spur Industries*, a plaintiff real estate developer brought an action to enjoin the neighboring defendants from continuing their cattle fattening business. The court agreed that the defendants must shut down their operation, but required the plaintiff to compensate those defendants for their resulting losses. This situation, however, is not the two-party conflict one imagines in Calabresi and Melamed’s hypothetical four. The Calabresians repress the fact that this was a three-party dispute in which one bad actor had harmed two comparatively innocent ones. In reality, the court merely fashioned a custom-fit remedy to ensure that the two innocent parties be made whole at the expense of the wrongdoer.

*Spur Industries* involved more than just the developer and the cattlemen; the unscrupulous developer built a retirement community next to a cattle fattening operation. Needless to say, the resident-retirees were horrified by the stench and vermin caused by their neighbor’s business and complained to the developer. The developer, trying to protect his investment, sued the cattle operation. The judge was in a difficult position because the cattle operation had done nothing wrong. Cattle fattening is, by necessity, an insalubrious business, which is why the cattlemen originally located their business far from any residential communities. It was the developer who chose to move in next to the cattlemen. He moved there because he was able to buy cheap land precisely because it was next to a cattle fattening operation. Moreover, the retirees, although perhaps negligent, were clearly more innocent than the developer, who had misrepresented the quality of the homes.

The usual remedy in a lawsuit like the one that the developer brought would be to preserve the status quo ante for the innocent cattle fatteners and to permit the old folk to sue the developer for damages equal to the difference between the value of the houses as warranted and the value of houses next to a cattle feeding opera-

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292 See *Spur Industries*, 494 P.2d at 705.
293 See id. at 706-07.
294 The court noted that “There is no doubt that some of the citizens of [the retirement community] were unable to enjoy the outdoor living which Del Webb had advertised” and that they had made “strong and consistent complaints.” 494 P.2d at 705. The odor and flies from the operation were “annoying if not unhealthy.” *Id.* Nothing in the reported opinion indicates whether any of the residents had attempted to bring legal action against the developer.
295 Not only were odor and vermin from the operation causing complaints from existing residents, it was causing “sales resistance from prospective purchasers.” *Id.*
296 See id. at 708 (“[The cattle operation] is required to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public.”).
297 See *id.* at 707.
This result seems peculiarly unsatisfactory in this case as a human, if not legal, matter. After all, these elderly people had just sunk their life savings into the dream of spending the lay end of their years in quiet contemplation of the Arizona desert. Industrious workers hoard their life savings precisely so that they can spend it on what they want in retirement, such as a nice retirement home. During retirement, people are more interested in consumption (enjoyment) than in saving. The judge recognized, law and economics to the contrary, that giving these retirees smelly, disgusting homes plus money damages would not make them whole, although it might ultimately please their laughing heirs. The court noted that if the residents had been parties to the action, they would have been entitled to an injunction against the cattle operation as a public nuisance.

On the other hand, the cattle feeders interest was primarily commercial in nature. Economic theory more nearly fits their situation. They should be indifferent between continuing their operations at the same location, on the one hand, and receiving damages equal to lost profits and expenses incurred in relocating, on the other. Reversing the usual remedy, therefore, seems to make sense in this case. The question was how to reach this result. The court solved this problem not by inventing new substantive rights (a la hypothetical four), but by implicitly creating a new procedure.

The express language of the opinion indicates that the court did not allocate a single entitlement between the developer and the cattle operation. In addition, this case is not an example of a liability regime as described by hypothetical four. The court stated that if this were a classic, two-party case between the developer and the cattle operation, it would not have granted an injunction because the situation was a classic "coming to the nuisance case." In Calabresi and Melamed's terminology, between the cattle operation and the developer, the former had the entitlement, protected by a property rule, to raise cattle on its property. The court suggested, however, that if this were a classic, two-party case between the residents and the cattle operation, it would have granted an injunction in favor of the residents and against the cattle operation—but would not have also granted damages payable by the residents to the cattle operation—because, vis-à-vis the residents, the cattle operation was a classic "public nuisance." In Calabresi and Melamed's terminology, between the cat-

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298 See id. at 706 ("[T]he citizens of Sun City... could have successfully maintained an action to abate the nuisance.").
299 See id.
300 See Coase, supra note 105, at 158; Coase, supra note 63, at 15, 34.
301 See Spur Industries, 494 P.2d at 706-07.
302 Id.
303 Id. at 706.
the operation and the residents, the latter had a right to clean air enforced by a property regime. The court, however, recognized that, although there were only two named parties to the litigation, the dispute, in fact, involved three parties.304

Under conventional procedure, the court should have dismissed the developer's suit against the cattle operation because it found that the cattle operation did not violate any rights of the developer. The residents would then have had the option of bringing a suit for violation of their rights either against the developer for damages or against the cattle operation for an injunction. If the residents chose the latter route and obtained an injunction, the cattle operation could have brought an action against the developer for damages.305 The court, instead, invented a novel short-cut procedure to, in effect, consolidate these three potential actions. The court implicitly allowed the developer to act as a proxy for the residents in order to enforce the residents' property rights against the cattle operation. The cattle operation then, in effect, sued the developer in its individual capacity as a third-party defendant. The court concluded that:

[The developer] is entitled to the relief prayed for (a permanent injunction), not because [he] is blameless, but because of the damage to the people who have been encouraged to purchase homes in [the retirement community]. It does not equitably or legally follow, however, that [the developer], being entitled to the injunction, is then free of any liability to [the cattle operation] if [the developer] has in fact been the cause of the damage [the cattle operation] has sustained.306

When described as a three-party case, we can see that the case is a procedural anomaly. It is not, however, either a substantive novelty or an illustration of a Calabresi-Melamed two-party liability regime. *Spur Industries* represents a rare case in which a court could craft an equitable resolution of a competing, inconsistent enjoyment dispute by implicitly applying familiar three-party possessory dispute principles. That is, *Spur Industries* is the (perhaps *sui generis*) case in which one

304 See id.
305 See id. at 708 ("Having brought people to the nuisance to the foreseeable detriment of [the cattle operation], [the developer] must indemnify [the cattle operation] for a reasonable amount of the cost of moving or shutting down."). The court was insistent that it was not recognizing any entitlement with respect to the developer itself, but was merely using the developer as a proxy to assert the rights of the residents.

It should be noted that this relief to [the cattle operation] is limited to a case wherein a developer has, with foreseeability, brought into a previously agricultural or industrial area the population which makes necessary the granting of the injunction against a lawful business and for which the business has no adequate relief.

*Id.*
306 *Id.*
can analogize nuisances (interferences with enjoyment) to the, arguably, most empirically common type of possessory conflict: the three-party conflict known as a priority dispute. As I show in Part III.C above, the Calabresi-Melamed taxonomy, which they designed to explain possessory conflicts, utterly fails in three-party disputes.

In the classic priority hypothetical, we start with an object first in the possession of an innocent rightful owner, Y. A bad person, X, wrongfully obtains the object from Y, perhaps by fraud. X then purports to convey the object to another innocent party, Z. The defrauded Y finds the object and brings an action in replevin against Z. In this case, we agree that the law should make Y and Z whole, and X should bear the loss. Y and Z both claim property rights to the object. Our society rarely makes rival property claimants share the object. Rather, courts generally apply a priority rule and award to one claimant the object, and order the wrongdoer to pay property damages to the other. If, and this is a big if, X, the wrongful party, is solvent, the two remedies should be economically equivalent. It is not true, as Calabresi and Melamed asserted, that in a property regime the property claimant receives her original entitlement back. Even though we recognize that a claimant may be theoretically entitled to the original entitlement, frequently that entitlement is no longer available. Accordingly, a property right gives the claimant the right to acquire damages calculated according to the property damages formula, as opposed to acquiring either contract or tort damages.

To analyze the Spur Industries case within the framework of traditional three-party conveyance law, the evil developer bilked two innocent classes out of their property rights. Because there is only one property right to go around, the judge must give it to one of the two innocent parties and make the developer pay property damages to the other. Under the usual priority regime, the cattle feeders would likely get the entitlement, and the retirees would likely get contract damages for breach of warranty.307 However, the judge in Spur Industries decided that equity would be served better if the remedies were reversed.308

307 See id. at 706.
308 Two colleagues at Washington and Lee Law School suggested two unique cases that might be closer to hypothetical four than Spur Industries.

Professor Gwen Handelman identified the notorious takings case, Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (1981). In this case, a citizen’s group sought to enjoin the City of Detroit from condemning a residential neighborhood and conveying the property to General Motors. See id. at 457. The citizen’s group argued that the purpose of the taking was to further the private financial purposes of General Motors, in violation of the Fifth Amendment requirement that the City exercise eminent domain only for proper public purposes. See id. at 458. The Michigan Supreme Court accepted the City’s argument that the condemnation served the public purposes of alleviating unemployment and revitalizing the economic base of the community, and that the private benefits to Gen-
2. The Ayres and Talley Critique

Ayres and Talley have made a different critique of Calabresi and Melamed's concept of a liability regime. They argued that although many, if not most, analysts accept Calabresi and Melamed's assumption that property regimes are more likely to encourage efficient contracting than liability regimes, they can invent a game in which the opposite is true. Ayres and Talley argued first that, despite what Calabresi and Melamed suggested, one cannot conceptualize liability regimes as the allocation of an entitlement to a single party. Rather, one can better analyze a liability regime as a division of the entitlement between two claimants. They argued that it is precisely this division—so that neither party is assured of her rights or knows whether she will be the buyer or the seller in any resulting contract—that can lead to successful negotiations. They suggested not only that it would be efficient to adopt liability regimes, but also that a wide variety of other divisions of property interests, such as joint tenancies or temporal divisions, might be efficient in a number of cases.

Ayres and Talley called their proposal "Solomonic bargaining"—an homage to the famous Biblical account of baby splitting and,
implicitly, to their own wisdom. Unfortunately, this story does not support their thesis that a Solomonic division of title will result in the two parties bargaining to transfer the entitlement to the highest-valuing user. In the Biblical story, when two women claimed to be the mother of a single baby, King Solomon ruled that the child be split in half and divided among the claimants. Immediately upon hearing this order of infant bifurcation, however, the higher valuing user (the “true” mother) transferred her interest in the entitlement (her half of the baby) to the lower valuing user (the “false” mother). It was only Solomon’s wise rescission of this “liability” regime and his institution of an undivided “property” regime, which gave the exclusive and specifically enforceable entitlement to the true mother, that achieved a resolution, which was not merely efficient or just, but compassionate.314

More significant than their use of an inappropriate Biblical allusion, however, is the fact that the Ayres-Talley approach breaks down when one considers third-party claimants.315 Their analysis represses third-party consideration because they insisted on resorting to game theory. As I have already mentioned, a fundamental problem of game theory, as developed to date, is that it is extremely difficult to structure a three-party game that leads to definitive results.316 Consequently, in the Ayres-Talley games only two parties play at any one time. All external (objective, in my terminology) conditions are temporarily frozen and called “nature.” In Lacanian terms, the games treat the world outside of them, the symbolic, as the real, an unknowable event be-

314 Ayres and Talley argued that the Biblical story is “suggestive” of their game analysis in that the division of the entitlement caused the disputants to reveal private information. Id. The problem is that this revealed information did not encourage bargaining, as Ayres and Talley suggested.

315 Rose also recognized this problem. See Rose, supra note 34, at 2183. A full account of my objections to the Ayres and Talley analysis is beyond the scope of this Article. For an interesting critique of their game theory analysis, see Louis Kaplow & Steven Shavell, Do Liability Rules Facilitate Bargaining? A Reply to Ayres and Talley, 105 YALE L.J. 221 (1995). I only note at this point that Ayres and Talley seem to conflate the principle of Pareto optimality—when an “entitlement” is owned by someone other than the higher valuing user, it would be more efficient if the parties contracted to transfer the entitlement from the lower to the higher valuing user—with the conclusion that contracts to transfer entitlements are a good thing per se. They sought to show that dividing entitlements leads to more contracts to transfer entitlements. See Ayres & Talley, supra note 38, at 1029 & n.6. This analysis devolves into the banal truism that if one were to increase the amount of conflicts in the legal universe, thereby presumably decreasing utilities, one would necessarily increase the number of opportunities for conflict resolution, even if the percentage of successful resolutions compared to conflicts went down. One way of resolving conflicts is through contractual transfers. Consequently, depending on one’s empirical assumptions, one could speculate that increasing conflicts might result in an increase in the number of contractual transfers. It does not follow from this increase, however, that a world that starts with more conflicts (more divisions of entitlements) will end up with a higher aggregate utility than a world that starts with fewer conflicts (fewer divisions of entitlements).

316 See supra note 35 and accompanying text.
yond time and space. The best that game theory can do to try to account for three parties is to posit a series of separate two-party games (for example, first A competes with B; then A competes with C; but A, B, and C never compete against each other at the same time). Tripartite relations are, therefore, thoroughly dualized—recognition of the third is always postponed to the future. To say the same thing in Lacanian terms, the feminine is always repressed. Unfortunately, property and society—third parties—are not real, but symbolic. They cannot be frozen during any game, as nature can be, because they are constantly interacting with the game players—they are part of the three-party game of life and law. No determinate optimal solution emerges where there are three or more players.

The Ayres-Talley model presupposes that actors in their legal universe do not have exclusive possession of their entitlements. Neither party can be sure of her entitlement, therefore, unless she buys out the other.\(^3\)\(^{17}\) Ayres and Talley ignored the fact that no party will pay her full subjective valuation for an entitlement, unless she can assure "security of title."\(^3\)\(^{18}\) That is, a sale presupposes that the transferor has something to sell—the title in the thing to be sold (a right to exclude others including the transferee). Consequently, all liability regimes presuppose some form of property regime. This blindness is particularly glaring because Ayres and Talley raised this problem in passing in the case of the two-party scenario. They expressed concern that if the property regime divides an entitlement between two parties, then both parties may underinvest in the entitlement.\(^3\)\(^{19}\) We cannot solve this underinvestment, however, by having the first party transfer her interest to the second party unless the second party also receives the right to exclude other potential rival claimants.

For example, under applicable law, absent an effective disclaimer, a seller gives an implied warranty of good title to any buyer of a good.\(^3\)\(^{20}\) Similar rules apply with respect to other forms of property. When the seller is unsure of the state of the title, she will disclaim this

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317 The game that forms the heart of their Article, involves a generic "entitlement." See Ayres & Talley, supra note 38, at 1048-50. Elsewhere in the Article, they apply their analysis to a variety of possible fact situations including environmental nuisances. See id. at 1078-80.

318 Others have made similar points. See, e.g., Kaplow & Shavell, supra note 59, at 722. See Coleman & Kraus, supra note 52, at 1351, for a similar point that liability and property regimes complement each other.

319 See Ayres & Talley, supra note 38, at 1084-86.

warranty, as when real estate is conveyed under a "quit claim" deed. Every "deal lawyer" recognizes that a buyer will not pay as much for an unclear title as she would for a clear one. In New York, no one consummated a substantial real estate purchase without first obtaining a title search from a responsible insurance company.\footnote{It is my understanding that other practices are followed in other states. For example, I have been told by friends in practice that in some states, attorneys, rather than insurers, do the title searches.} In corporate acquisitions, it is common for buyers to "hold back" or escrow part of the purchase price for a negotiated period to allow rival claimants to step forward. In finance, negotiable instruments trade at higher prices than nonnegotiable ones precisely because holders of negotiable instruments in due course cut off any "adverse claims" of rival parties. Finally, in securities trading, the drafters of the 1995 Amendments to Article 8 of the UCC gave unprecedented protections to buyers of investment securities against claims of any and all third parties because the drafters believed that such security of title was essential for continued confidence in the stock exchanges.\footnote{In the words of James Steven Rogers, the Reporter for the 1995 Amendments to Articles 8 and 9, "The basic policy of present law and Revised Article 8 is that the commercial law rules should be designed to ensure finality. They should protect the security of title of those who acquire securities." Rogers, supra note 186, at 1539.}

Property regimes are essential to contract because obtaining security of title is the \textit{raison d'être} of sales. In order for a conveyance contract to occur, the seller must have some enforceable right to the thing to be conveyed, otherwise the buyer will just take the thing. The buyer will not offer to pay the purchase price unless he obtains a right to the thing, enforceable against other persons, including the seller.\footnote{I discuss the necessity for title at greater length in Schroeder, supra note 204, at 1292-94.} Because Ayres and Talley did not recognize that their model necessarily reflects this truism, their argument devolves into an infinite regress.

For example, they described as Solomonic the familiar fact pattern in which one party has a conditional estate or an estate for a term of years in a particular parcel of real estate and another has the reversion.\footnote{See Ayres & Talley, supra note 38, at 1080-82.} If it is necessary to hold a fee estate in order to develop the property economically, it would probably be efficient for one party to buy out the other's estate. Note, however, that in order for such a contract to occur, each party must have an enforceable right of possession in her own estate that she could convey. This analytical flaw exists no matter how finely one divides up the estates. Assume, for example, that the reversionary interest is owned by two parties as tenants in common. At first blush, this scenario seems like a Solomonic
division. Closer examination, however, reveals that each cotenant has an undivided claim in his own cotenancy.

This example is another implicit reliance on the phallic metaphor. Ayres and Talley conflated the symbolic concept of property with the real object of the property interests (the land). Consequently, they thought that these parties each would have a divided property interest because the object itself is divided. The tripartite relationship of property is then analyzed as a division of a single binary relation. In fact, each party has an undivided property interest in her own estate. The parties' entitlement is not the land, but their respective legal rights to possess, to enjoy, and to alienate the land. Once again, we have an example of trying to turn the tripartite relation of property (legal rights between two or more subjects with respect to an object) into a binary relationship (in this case, recognizing the relation of each subject to the object and forgetting about the legal interrelationship between subjects).

This description should illustrate how Ayres and Talley's analysis of liability regimes fundamentally diverges from mine despite some surface similarities. As I discussed above, I, like Ayres and Talley, chide Calabresi and Melamed for assuming that in a liability regime there is a single entitlement that is allocated to one of two parties. But, Ayres and Talley could not get beyond the phallic metaphor that conceptualizes property disputes in terms of the possession of a single, pre-existing, "real" thing. Consequently, they still believed that there is a single entitlement that is temporarily divided up between the two parties. They can only conceptualize changes in legal relations in terms of the conveyance of this single thing.

In contradistinction, I argue that although property necessarily concerns an object, one cannot analyze property in terms of the object alone. Property, like all legal rights, is a relation between and among subjects. There is no single "thing" called an entitlement that can be divided between claimants. Rather, each claimant has her own entitlement in the sense of a set of legal rights and liabilities relating to either the same or two separate objects. Changes in legal relationships can involve conveyances of the right to possess the object of the property rights, but other changes in legal relations are possible as well. For example, the readjustment of the parties' respective rights to enjoy different objects in the environmental nuisance context constitutes a change in legal relations with regard to an object or objects.

Moreover, a liability regime is not an alternative to a property regime. Rather, for a liability regime to function, it requires a prop-

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325 See supra Part I.A.2.
326 See Ayres & Talley, supra note 38, at 1030-31 (discussing entitlements as things).
To determine that one party has "taken" something from another and must, therefore, pay damages, one must first determine that prior to the alleged taking, the second party was the owner of the thing in the sense of some right to exclude others, including the taker, unless the taker pays the "purchase price."

Even if one agrees with Ayres and Talley's assertion that entitlements can be shared between two claimants, there is a fatal flaw in their analysis which results from the repression of the feminine third. If we had a world in which entitlements were shared, as Ayres and Talley proposed, then buying out one rival to the buyer's title will not necessarily buy out all rivals. As a consequence, it would be highly unlikely that two party bargaining could come to a successful conclusion.

The problem is that Ayres and Talley thought of entitlements in terms of possession. There are, however, an unlimited number of potential rivals for possession of an object. Even if B successfully bargains with A, C, and D for title, so long as title is divided, as Ayres and Talley hypothesized, E can come along the next day to claim title and extort title from B. Obviously, Ayres and Talley's model cannot anticipate an unlimited number of parties sharing title. Unfortunately, they did not offer any theory or explanation of how this class of claimants could be limited. Alternately, if the class is limited and if bargaining occurs, one expects that the highest valuing party eventually will buy out the entitlements of all other claimants. As a result, the system quickly will return to the starting point they are challenging—allocation of the entitlement to one party. The Ayres and Talley system is ultimately a one-shot game between two people.

If, alternatively, we analyze environmental nuisances in terms of inconsistent enjoyments of separate objects, we more successfully create the system that Ayres and Talley sought. The enjoyment analysis reflects the fact that we can expect there to be empirical, if not theoretical, limitations on the class of subjects with conflicting enjoyments. That is, B's pollution of the water supply can be expected to affect only those who occupy land within some geographic limit. Consequently, if B is the highest valuing enjoyer, it may be practical for him to bribe all persons who claim inconsistent enjoyment to forego their enjoyment, thereby creating the security of title B requires for investment. An analysis of environmental nuisance as inconsistent enjoyment both presupposes an initial dispersal of rights among different claimants that might promote efficient bargaining and ensures that

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327 As I argue elsewhere, rights of possession are a prerequisite to any contractual exchange. See Schroeder, supra note 204, at 1299; see also Coleman & Kraus, supra note 52, at 1351 (indicating "how liability rules might strengthen the integrity of the property rule").
the highest valuing user can buy out all inconsistent users, thereby assuring for herself the benefit of her bargain.

B. The Theoretical and Empirical Impossibility of Calabresi and Melamed's Distinction Between Property and Liability

The analytical utility of the liability-property dichotomy (let us temporarily put aside the pesky inalienability embarrassment), is that the parties must know which regime applies to any specific entitlement. The Calabresi and Melamed analysis assumes that the parties always bargain within the shadow of a known remedy regime. They must, therefore, be reasonably sure which regime is likely to apply in any given case. The problem, however, is that regardless of the property regime, the parties can never have this assurance in a world in which either (1) the property can be destroyed by the "taker" or (2) third party claimants are possible. Because this scenario describes our world, injunctive and monetary remedies are both necessary and complementary remedies of a single property regime.\(^{328}\)

This conclusion is a variation on the familiar proposition that we only really care about the difference between property and contract when a scarcity exists. If multiple substitutes for the object of desire are available on the market, and if the defendant is rich enough to pay damages, then the plaintiff should be indifferent between getting the original object back and receiving damages sufficient for her to go to the market and buy a substitute object.\(^{329}\) Unfortunately, when there is scarcity, there often is an inadequate number of objects to satisfy all property claimants—as is often the case with destruction or with third-party claimants. In this section, I show that property is often unavailable or inadequate precisely when it is needed.

\(^{328}\) Polinsky correctly argued that although there is a distinction between injunctive and monetary relief, this distinction breaks down because entitlements are rarely, if ever, absolute. See Polinsky, supra note 32, at 1086-87. I am making a slightly different point.

\(^{329}\) As I discuss above, this indifference does not mean that she would be indifferent between never having had the original object taken from her and receiving these remedies after the object was taken. To make her truly whole, we probably would have to give her an additional remedy to compensate for the outrage to her autonomy caused by the taking. See supra note 31 and accompanying text. Consequently, one should not analogize a remedy for a wrongful taking to an involuntary sale.

From a purely economic point of view, this requirement of an additional remedy would be the case even if the object of desire were what Margaret Radin would call "personal property"—that is, objects to which the owner has a sentimental attachment or for which the owner otherwise has an idiosyncratic subjective valuation. See Radin, Property and Personhood, supra note 31, at 959-61. For that plaintiff, the object is scarce in that no, or few, adequate substitutes exist in the marketplace. To Radin, not just any gold ring could replace a lost or stolen wedding ring. See RADIN, supra note 245, at 36-37. In my Pulp Fiction hypothetical, infra text accompanying note 355, as far as Bruce Willis is concerned, no market substitute can replace his father's watch.
1. *Dynamite*

The law and economics theorist might argue that although a party to a property dispute might destroy the coveted object of desire in the messy empirical world, destruction cannot occur in their hypothetically perfect market in which all actors are economically rational. The parties fight over possession of a valuable entitlement. It would be irrational for either party to destroy the entitlement they both desire. To do so would be the irrational act of the jealous lover who murders his beloved shouting, "If I can't have you, then nobody will!"

My use of this misogynistic analogy is intentional. These analysts repress the feminine. They want to see property as possession of the phallic object of desire (analogous to the male organ and the female body). Perhaps the rational lover will not destroy what he desires—but since when is desire rational? As the song suggests, if not always, then you all too frequently hurt the one you love. Calabresi and Melamed’s analysis represses the fact that the classic environmental nuisance does not involve the masculine rights to possess and alienate the (feminine) object of desire. Rather, it involves the feminine rights to identify with and enjoy the object.

Enjoyment often destroys the object of desire. The ultimate form of enjoyment is consumption. If the object of desire is a limited resource—the old growth forests of the Pacific Northwest, for example—enjoyment in the sense of commercial exploitation eventually will destroy the resource.

Probably more importantly, in the case of the classic environmental nuisance, enjoyment by one party of his object of desire may permanently and irreparably destroy the other party’s ability to enjoy her quite separate object of desire. Indeed, the enjoyment of the first may destroy the second object altogether. If environmentalists are correct, then the lumber company’s commercial enjoyment of the old

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331 From a Lacanian viewpoint, this consumption goes both ways. Not only does the owner seek to consume the object of desire, but there is also the danger that the object of desire will consume the owner.

332 Of course, modern logging practices in this country frequently include reforestation. If one thinks of the forest purely as an economic resource, logging, therefore, no more destroys the “forest” than harvesting this season’s wheat crop destroys the farm. If, however, one views a forest as an ecosystem, then an old growth forest may be very different from a reforested one, meaning that logging destroys the desired resource. Much of the irreconcilable conflict in this area springs precisely from the fact that loggers and environmentalists do not value the forest in the same way.

333 I, regrettably, know too little about this issue to take sides. Purely for the sake of illustrating a point, I am presenting a simplistic version of the environmentalist position.
growth forests through logging will destroy not only the forest as object of desire, but also the spotted owl.\textsuperscript{334}

For example, in our hypothetical, let us assume that the water our hapless consumer drinks comes from an underground river that passes under the neighboring widget factory. Assume that the word "widget" refers to plutonium batteries that power space vehicles. Their production irradiates the aquifers under the factory. This radiation lasts longer than the expected life of the consumer and of her children, and it is so difficult to clean out of the aquifers, that it lasts for the economic equivalent of "forever."

Therefore, once B violates A's rights, it becomes impossible to put A back in the same empirical position she was in before the violation. The only remedy that a court can give A is damages. Consequently, as in a liability regime, we have (in Calabresi-Melamed terminology) a "forced sale." One can give the consumer the right to get an injunction to prevent B from opening his plant, but defendants can, and often do, ignore injunctions. When they do, the plaintiffs must go back to court and get some other form of relief.

Consequently, the only way to make a property regime truly distinguishable from a liability regime in many environmental nuisance situations is not to impose equitable remedies. Rather, courts must impose sanctions for violation of the property right, which are so draconian that no rational actor would ever risk them.\textsuperscript{335} Consequently, Ayres and Talley were correct in assuming that a true property remedy (in the Calabresi-Melamed sense of the term) must be either exorbitant damages or significant criminal sanctions.\textsuperscript{336} The government can impose damages or penalties large enough to prevent, rather than remedy, environmental harms. Environmental harms and theft of property rights are often crimes. We also permit punitive damages in some cases in which we believe the defendant acted egregiously. The economist would argue that theoretically, it is possible to impose a

\textsuperscript{334} Ayres and Talley noted that the competing rights with respect to the spotted owl and old growth forests are "qualitatively incompatible." Ayres & Talley, supra note 38, at 1091. Their discussion, however, reveals that they do not fully realize that this problem of qualitatively incompatible uses and that the possibility of destruction of the object of desire are general to environmental nuisances. Nor do they understand the implications of this problem for the validity and utility of the Calabresi-Melamed trichotomy.

\textsuperscript{335} For example, although Kaplow and Shavell seem to assume that a property regime consists primarily of equitable remedies and criminal sanctions, their description is broad enough to cover draconian damages as well. See Kaplow & Shavell, supra note 59, at 723 ("We might imagine, for instance, that an injurer would suffer such a stringent sanction if he caused harm that he would not dare to cause it . . . .").

\textsuperscript{336} See Ayres & Talley, supra note 38, at 1036 & n.35. These, of course, are the options available in our legal system. In other systems—such as those established by organized crime—other options are not only available but used, such as threatening to kidnap the taker's kids or to send the taker to "sleep[ ] with the fishes." THE GODFATHER (Paramount Pictures 1972).
Calabresi-Melamed property regime by criminalizing or by imposing punitive damages for all property violations, although the lawyer would question whether we could, and the jurisprude whether we should. This regime may be a good idea, but it certainly would be a radical proposal. For example, to impose punitive damages on a secured party who loses a priority dispute, let alone to throw her in jail, would be a radical departure from current practice.

2. True Takings and Third-Party Claims

Even if the property-liability dichotomy is unworkable for analyzing environmental nuisances when a risk of irrevocable destruction of the innocent party's object of desire (or, at least, of her ability to enjoy it) exists, one might be tempted to argue that it remains workable in other property disputes that truly are possessory in nature. No rational claimant would destroy the single object of desire being fought over. Although this lack of action may be theoretically true in a universe of two economically rational parties, in the real world of more than two potential claimants, the dichotomy breaks down for another reason—the impossibility of giving Calabresi-Melamedian property remedies to more than one person. The existence of a third party in a possessory dispute is equivalent to dynamite in the enjoyment dispute. From a Hegelian-Lacanian perspective, property is a hysterically erotic relation. In property, as in love, three is a crowd.

I wish to go back to the basic priority dispute I already have introduced because it is so basic that it forms the first lesson in the typical, introductory commercial-law class. On day one, the object of desire is assigned to A—A has the exclusive right of possession. On day two, B somehow obtains power over the object under such circumstances that A does not consent to B becoming the permanent possessor of the object. This transfer of possession could happen in a number of ways. Because of the absolutist rules American law applies to theft, for simplicity we will posit that B did not "steal" the object, but obtained the power in some other way. For example, B may have purchased the object from A on credit extended against fraudulent misrepresentations to A as to his ability or intent to pay for the object.

337 For example, the first chapter of the Farnsworth, Honnold, Harris and Mooney commercial law casebook, which I use, is devoted to variations on this problem under Articles 2, 3 and 7 of the UCC. See E. ALLAN FARNSWORTH ET AL., COMMERCIAL LAW: CASES AND MATERIALS (5th ed. 1993).

338 In other words, he did not sneak into A's house in the middle of the night and carry off the television.

339 I will punt at this juncture as to what "power" over the object means. In the classic priority dispute involving goods (tangible things)—the unspoken archetypical object under the masculine phallic metaphor—however, power usually is also assumed to be physical custody. Possession is confused with sensuous grasp.
Another classic example of obtaining power over an object is when A entrusts a good to B as a bailee.

In any event, when B fails to live up to his contractual obligations with respect to the object (B fails either to pay the purchase price for the object, in my first example, or to return the entrusted goods, in my second), he violates A's property right. One of the classic rights available to A is replevin—the court will order B to return the good to A, restoring the status quo. This scenario seems to be a classic Calabresi-Melamed property regime.

But even in this simple two-party regime, things are not so simple. Another classic remedy for violation of property rights is available—trover. That is, the court will treat B's interference with A's property right as a sale and will order B to pay a determined purchase price—the valuable object is "put" to B. Calabresi and Melamed would argue, persuasively at this juncture, that so long as the election of remedies belongs to the original owner, this result is totally consistent with their definition of a property regime. As the reader will remember, a property regime is one in which society never forces its intersubjective valuation down A's throat. Although the conversion remedy is an intersubjective valuation, A will never elect conversion over replevin unless she expects that the intersubjective valuation of the object will be greater or equal to her subjective valuation.

But, the universe of property is never two party in nature. There always will be other potential claimants for possession of the object. All but the totally self-sufficient hermit has creditors who have inchoate claims to one's assets in the event that one does not pay one's debts. A defender of Calabresi and Melamed might argue that the mere theoretical existence of these potential claimants with their inchoate claims does not necessarily impinge on their system. If A has taken whatever steps necessary to protect her property rights in the valuable thing, then A should retain her alternate claims of replevin and trover and prevail over the creditors. But, the fact that certain creditors will prevail over certain "owners" does not change this analysis so long as the valuable thing is still in B's hands when the dispute arises. The problem with this is contingency. The validity of the dichotomy requires that the parties know what remedy would apply before bargaining begins. This validity is lost if the remedy depends on the later facts.

Let us now be more realistic. People who cheat other people frequently, if not usually, do so for financial gain. Consequently, if B takes A's object without paying for it, more likely than not, he will try to monetize his gain by "selling" the object to a third party. Moreover, one bad act may be evidence of a bad heart. A is aware that B's violation of her property rights makes it likely that B has cheated other
people as well. If B has not paid his debt to A, chances are he will not or cannot afford to pay his debts to others.

In the classic priority hypothetical, therefore, B purports to transfer A's object of desire to C, who may be a very sympathetic character. He may be not merely unaware of B's wrongdoing, and his actions even may have been "as pure as grace,/As infinite as man may undergo." He may have paid cash for the object. He may be a tort victim who seeks to attach the good in order to pay a judgment obtained against B. Either way, the problem is the same: we now have three claimants for the same object.

It is easy to dispose of B, the crook. But, we must decide which of A's and C's innocent but mutually inconsistent claims of possession should prevail. We have fairly well worked out rules for deciding these cases. For most categories of property, the original "owner" prevails unless the second-in-time claimant can sustain the burden of proving that she qualifies as a preferred transferee such as a buyer in the ordinary course of business or a holder in due course. The specific rule does not concern us for the purposes of this Article.

The point is that only one of the two parties can get the object back and exclude the other rival—Calabresi and Melamed's definition of property. Calabresi and Melamed might counter that their description of property is accurate in the sense that, in a dispute between A and C, the court will decide that only one of the parties has a property right and will cut off the property claims of the other. Consequently, property and specific performance seem to go together.

The problem is that this analysis considers only one leg of the triangle at any given time and represses the feminine third. The dispute that Calabresi and Melamed examined is not that between A and

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340 I say "purports" because a sale is the conveyance for value of title from one party to another. The dishonest B often does not have title. He may only have the fact of actual custody and voidable title—as in the fraudulent misrepresentation case—or no title, but a limited conditional right of possession in the form of custody—as in the entrustment case. In most, but not all, areas of American property law, the background or default rule is "derivation"—a conveyancee's rights derive from the conveyancer so that the former only gets what the latter had. Most areas of property law also have a "negotiation" rule, which is procedurally and substantively an exception to derivation pursuant to which the conveyancee gets more than the conveyancer has. In our case, if a derivation rule applied, B's attempted conveyance would not be a sale; if a negotiation rule applied, it would. Consequently, in this context, a priority dispute is precisely the determination of whether something that the conveyancer purported to be a sale, was a sale.

341 William Shakespeare, Hamlet act 1, sc. 4.

342 It is incorrect to deduce from the fact that as a legal matter this "derivation" rule (first in time, first in right) is the default rule, and the "negotiation" rule (favored buyers prevail over first-in-time claimants) is an exception, that it is the norm for owners to prevail. Who prevails in the "normal" situation is an empirical question. In the case of inventory financing and check clearing, the negotiation rule (subsequent purchaser prevails) is by far the more common.
C, a third-party claimant. It is the original two-party dispute between A and B. There is no question that A has a property claim enforceable against B, even if a court finds that A's claim against C is cut off. Indeed, A's loss of her claim against C confirms B's act as wrongful, yet there is no way for A to regain the object. A cannot go against C under the relevant priority rules; B no longer has the object and, as the wrongdoer, cannot replevy the good from C.

A's enforceable property claim against B can only take the form of money damages. Although a court will calculate these money damages according to property law principles, they will result in the imposition of society's intersubjective valuation upon the unfortunate A. A will retain her option of remedies: replevin and trover. Conversion, as we have seen, is precisely the type of forced sale that Calabresi and Melamed called a liability regime. A will be able to deem the taking a sale of the object to B as of the date of the taking and will be entitled to the market price on that date.

It is the replevin remedy that necessarily changes in the "lost object" scenario. A has the right to have the object back—the meaning of possession. But, there is no object in B's hands to return. Consequently, the most that she can get is restitution damages. The goal of restitution is to place the plaintiff in the identical economic position she would have been in if the taking had never taken place. She is entitled to the value of the lost object as of the date of the judgment. In other words, if the lost object goes down in value between the date of the taking and the date of the judgment, then the plaintiff should prefer the conversion action and its turnover remedy—sale as of the date of the taking. If, on the other hand, it goes up in value, she should prefer the remedy of restitution damages—sale as of the date of judgment. In either case, society imposes its intersubjective valuation on the plaintiff—the plaintiff only gets to choose the date of valuation.

It is impossible in a society with more than one potential claimant to impose the liability/property dichotomy, which Calabresi and Melamed proposed. Because we can never assure a property owner ahead of time that she will be able to recover an object taken from her, claimants must consider the remedy for a taking to be money

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343 As I discussed in Part IV.A.1(b), the Spur Industries case is not an example of hypothetical four in which there is one entitlement divided between two parties protected by a liability rule. Rather, it is a third-party case similar to a priority dispute. In both cases, two innocent parties each have an entitlement enforceable against a third-party wrongdoer under a property rule. When it is impossible for both parties to obtain the equitable remedy of replevy or injunction against the wrongdoer, one of the parties must be awarded damages.
damages. A property regime is not an alternative to a liability regime, it requires a liability regime to function.\textsuperscript{344}

Ayres and Talley intuited that the only practicable way to make the Calabresi-Melamed dichotomy meaningful is to substitute its implicit damages-injunction dichotomy with a new theory based entirely on damages. In a perfect Calabresi-Melamed property regime—one in which society's valuations are never forced on original claimants—courts would award a prevailing plaintiff damages equal to her subjective valuation of the lost object. This solution probably is unworkable in the real world. Aside from the problem of proof (in many, if not most, cases the only evidence of the victim's subjective valuation will be her self-serving testimony), it is doubtful whether we want to impose such potentially unlimited damages.

3. Subjective or “Tailored” Damages

Ayres and Talley assumed that subjective (tailored) damages are a form of the Calabresi-Melamed liability rule.\textsuperscript{345} I argue that they are better understood as falling within Calabresi and Melamed's definition of a property regime in which society never imposes its intersubjective valuation upon an owner. In any event, a discussion of subjective damages belongs in Cloud-Cuckoo Land, not in the late twentieth century United States.

Pursuant to the Coase Theorem, society need only care about the allocation of entitlements and the choice of remedy regimes if there is market failure.\textsuperscript{346} Ayres and Talley asserted that tailored and nontailored remedies are alternate ways of addressing market failure. The former are “market-mimicking substitutes” that try to replicate what would have resulted absent market failure.\textsuperscript{347} Probably because they mistrust attempts to reproduce a hypothetical “subjunctive” universe, Ayres and Talley suggested instead that nontailored damages facilitate negotiations and therefore restore something closer to an efficient market—adding a new “failure” might counterbalance the

\textsuperscript{344} As I briefly discussed supra notes 92-93 and accompanying text, the Calabresi and Melamed regime of inalienability also requires property to function, and property ultimately devolves into liability (the right to damages). Consequently, I disagree with Morris's attempt to identify the right of "monetary compensation" as a unique element of the structure of entitlements. Morris, supra note 31, at 837. Morris argued that many entitlements do not carry such a right, such as when something—like a human kidney—is declared market inalienable. See id. at 837. As we have seen, however, in our modern legal system all rights ultimately devolve into the right to monetary compensation for the violation or the original right.

\textsuperscript{345} See Ayres & Talley, supra note 38, at 1033.

\textsuperscript{346} See Calabresi & Melamed, supra note 14, at 1094-95 (“In such a frictionless society, transactions would occur until no one could be made better off as a result of further transactions without making someone else worse off.”).

\textsuperscript{347} Ayres & Talley, supra note 38, at 1038.
original market failure.348 Curiously, participants in this debate as-
sume that tailored damages are the norm, and nontailored damages
only comprise exceptions, such as liquidated damages.349

In our legal system, property damages are not “tailored” but are
set by a societally imposed standard—usually market value.350 At first
blush, contract remedies seem to respect subjective valuations in that
they are set with respect to the contract price. The Calabresi and Me-
lamed concept of a liability regime, however, presumes that no con-
tract exists. In addition, upon further consideration, it is clear that
even contract damages are not purely subjective. A contract price is
not the broadly intersubjective valuation of society; rather, it is the
more limited intersubjective valuation of the two contracting parties.
The contract price may or may not, therefore, be equal to the actual
subjective valuation of either party. One would expect that one of the
most common reasons that a party breaches a contract is that the con-
tract price no longer reflects her subjective valuation at the time of
breach. Moreover, the contract price may no longer reflect the sub-
jective valuation of the party seeking to enforce the contract
(although presumably he would not seek to enforce it unless the con-
tact price was equal to or greater than his subjective valuation).

348 See id. at 1038-39. Much of Ayres and Talley’s article is just such an attempt to
justify nontailored damages as a partial “cure” for market failure. Their argument is a
classic economist’s attempt to deal with the problem of the “second best.” The doctrine of
the second best holds that if the conditions of a perfect market do not exist, it does not
follow that restoring one of the conditions will make the market more efficient. See Pos-
nier, supra note 103, at 301 n.1 (providing an example of the problem of the “second
best”). Consequently, some economists, like Ayres and Talley, suggest that rather than
trying to remove any one inefficiency in any market, one should try to devise mechanisms
that counteract the inefficiencies.

349 See, e.g., Ayres & Talley, supra note 38, at 1040 n.48 (assuming tailored damages are
the norm). One may more accurately analyze many liquidated damages clauses as special
cases of tailored damages, reflecting one party’s highly idiosyncratic valuation of the harm
that a breach would cause. As a result, a court will only enforce a liquidated damages
clause when the enforcing party can show that the liquidated amount has some relation to
some conventional intersubjective measurement of damages, such as a reasonableness test.
See, e.g., U.C.C. § 2-718(1) (1995) (enforcing a liquidated damage clause in a sales contract
only in “an amount which is reasonable in the light of the anticipated or actual harm
caused by the breach, the difficulties of proof of loss, and the inconvenience or
nonfeasibility of otherwise obtaining an adequate remedy” and noting that “[a] term fixing
unreasonably large liquidated damages is void as a penalty”).

350 I believe much of this confusion between tailored and untailored damages results from
a basic confusion between property and contract damages. Tailoring of damages is,
of course, the norm in contract law in which damages are set with respect to the “benefit of
the bargain” reached by the parties. For example, in their discussion of tailored damages,
Ayres and Talley give the example of Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145
(1854), type of lost profits recoverable under contract law. See Ayres & Talley, supra note
38, at 1066. The courts do not grant these “lost profits,” however, for property violations.
When courts award contract damages, they make no attempt to ascertain the enforcing party's actual valuation.

Moreover, in contrast to Ayres and Talley's assertion, liquidated damages are disfavored precisely because they are based on suspicious subjective valuation of harm rather than on the market valuation of harm. Even "lost profits" are not based on the subjective valuation of the nonbreaching party. The UCC and common law require that lost probes be either "reasonably foreseeable" by the breaching party or that the breaching party had actual knowledge of potential damages at the time of entering the contract.\(^{351}\) Consequently, the debate over tailored and nontailored damages either reflects a mistaken and highly inaccurate description of current law or represents an unconscious policy debate over proposed radical changes in American law.

This error once again seems to spring from repression of the (feminine) third. Ayres and Talley never discuss where nontailored damages come from. To them, the only way to tailor damages is by reference to the victim's subjective valuation.\(^{352}\) The court, therefore, randomly sets nontailored changes.\(^{353}\) Despite all their talk about restoring markets, Ayres and Talley have been incapable of incorporating markets into their analysis. Ayres and Talley based their analysis on game theory which, by its own terms, only deals with the behavior of the two playing parties. The rest of the world is frozen in time and labeled "nature."\(^{354}\) Markets, however, are not frozen in nature. They include a potentially unlimited set of "others" who simultaneously act and thereby set a market price.

4. The Impracticality of Subjective Damages in a Property Regime

Let us consider what a tailored liability regime would look like. Those who have had the dubious pleasure of seeing the movie \textit{Pulp Fiction}\(^{355}\) will remember that the character Bruce Willis played places a seemingly limitless subjective value on a wristwatch that his father, a POW, left to him, and his father's friend, Christopher Walken's char-

\(^{351}\) This, of course, is the famous rule of \textit{Hadley v. Baxendale}. Even incidental damages are limited by the intersubjective test of reasonableness. \textit{See}, e.g., U.C.C. § 2-715(1).

\(^{352}\) \textit{See} Ayres & Talley, \textit{supra} note 38, at 1065-69.

\(^{353}\) In the games Ayres and Talley presented to demonstrate untailored damages, the judge only knows the range of valuations for the entitlement in the community and sets the liability amount within this range. \textit{See} \textit{id}. Apparently, the judge sets the damages randomly within this range because Ayres and Talley merely presented alternate games with different untailored damages and no reference as to how this number is set. \textit{See} \textit{id}. For example, they presented one game in which the polluter values the entitlement at $60 and the damages are $40. \textit{See} \textit{id}. at 1067. If these damages represented the market price, why didn't the polluter just go into the market and buy the entitlement, rather than taking the entitlement and paying the same amount in damages?

\(^{354}\) \textit{See supra} discussion at notes 313-16.

\(^{355}\) \textit{Pulp Fiction} (Miramax 1994).
acter, preserved for him at great sacrifice of physical integrity. Willis risks not only his ill-gotten gambling gains, earned by not throwing a fixed prize fight, but also death at the hands of the gangsters he betrayed and rape and murder at the hands of a pair of sexual perverts.

Now imagine a parallel universe in which Bob Dole won the 1996 presidential election. Hollywood buckles to White House pressure to clean up its act. One result of this is that Quentin Tarantino makes a very boring sequel to *Pulp Fiction* called *Legal Fiction*. Scene one begins with Willis living off his ill-gotten gains in the lap of luxury in Cloud-Cuckoo Land, enjoying blueberry pancakes with his ditzy girlfriend. She accidentally, but charmingly, drops his prized watch and breaks it. In scene two, Willis brings the watch to the local jewelry shop for repair. As is not unusual, the jeweler not only repairs watches, but also is in the business of selling pre-owned watches and other jewelry. In scene three, a stranger walks into the jewelry store and buys Willis's watch. In scene four, Willis meets with his lawyer. It turns out that Cloud-Cuckoo Land has adopted the UCC. The lawyer gives him the bad news that when he brought the watch to the jeweler, Willis was an "entrustor" and the jeweler was an "entruste" within the meaning of U.C.C. § 2-403(2). Moreover, the facts indicate that the stranger was a "buyer in the ordinary course of business" within the meaning of U.C.C. § 1-201(9), and the jeweler was a merchant in the business of selling previously owned watches. Consequently, the stranger would prevail over Willis pursuant to the priority rules of U.C.C. § 2-403(2). The good news, however, is that Willis has a property claim against the jeweler. Unfortunately, because the jeweler no longer has the watch, and the stranger has the right to keep the watch, Willis will not be able to get it back and can only obtain money damages.

Scene five is the climactic courtroom scene. Willis has established the jeweler's liability, and the parties are now arguing about damages. In Cloud-Cuckoo Land, unlike in the United States, damages are tailored. Usually, a plaintiff can only establish her subjective valuation by testimony, which juries may discount as being self-serving. Luckily for Willis, however, he can corroborate his testimony by showing out-takes from *Pulp Fiction*. The jury agrees and awards him his actual subjective damages—one zillion dollars. In the denouement, we see Willis and his ditzy girlfriend in an even more luxurious and exotic location eating even higher stacks of blueberry pancakes. The End.

This scenario, obviously, does not comport with our concept of civil damages. In fact, the law bases restitutionary damages on the market value of the lost object.356 In other words, even if we say that

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356 As I mentioned earlier, Ayres and Talley included lost profits as a type of tailored damages. This inclusion is correct, but irrelevant to their analysis. Courts do not award
Willis has sole possessory rights in the object of desire and that he is, therefore, entitled to equitable remedies, we cannot practically establish Calabresi and Melamed’s property regime prospectively. Willis cannot know ahead of time whether he will be able to get his property back if someone attempts to take it or whether society’s intersubjective valuation of the watch will be forced upon him. He can only know this post hoc, when all of the facts are available.

Indeed, even in our parallel universe in which the Legal Fiction regime of subjective damages is in place, we cannot assure Willis that he will ever get his subjective valuation. It is unlikely that the jeweler (or her insurer) will have one zillion dollars. That is, Willis will not only have to compete with the jeweler and the stranger for physical possession of the watch, but he also will have to compete with the jeweler’s future creditors for both the watch and its value. Indeed, insolvency is dynamite. When the jeweler goes broke, he effectively destroys not only the object of desire, but also all potential substitutes therefor.

5. Punitive Damages

The impartiality of subjective damages discussed above probably explains Ayres and Talley’s intuition that in order for the Calabresi-Melamed dichotomy to be workable, it cannot rely on the traditional legal-equitable remedy dichotomy. Yet, they did not propose the cumbersome regime of Legal Fiction (in which subjective valuations are actually litigated) as a property regime. Rather, they suggested that tailored damages are a form of liability regime. They implied that we can achieve the substantive effects of a property regime—that society’s intersubjective valuation is never forced upon a holder—another way. As a practical matter, it should be sufficient if the societally imposed damages were sufficiently draconian—so disproportionate vis-à-vis the market value of the object as effectively to prevent any rational rival claimant from attempting a taking and so big as to presumptively exceed the original claimant’s subjective valuation.

We presumably could achieve this result in one of two ways. On the one hand, we could impose enormous punitive damages on the loser of all priority disputes. On the other, we could criminalize all

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lost profits for interference with property rights; rather, they are a contract remedy. Contract, unlike property, sets damages by reference to the subjective valuation of the parties, but even then, only insofar as the valuation is incorporated into the terms of the contract or, in the case of lost profits, is reasonably foreseeable by the breaching party. See Thomas S. Ulen, The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies, 83 Mich. L. Rev. 341, 376 (1984) (“[C]ontracting parties would stipulate remedies that, at the most reasonable cost, adequately protected the value they anticipated from completion of the contract.”).
property law and make all priority disputes subject to extensive civil and criminal penalties.

Whatever its theoretical virtues, it seems highly unlikely that our society would adopt the former. Of course, many types of property disputes are criminalized—this is the law of theft and fraud. But, to require the state to criminalize all property disputes or all property disputes of a certain kind would require the state to bear all of the costs. Today, we leave most priority disputes to the parties in interest. If the increased costs associated with criminalizing all property disputes are substantial and if this really is the "end of the era of big government," this change in the law seems unlikely from a political standpoint.

We do impose civil and criminal sanctions on polluters in many situations, but in most cases, criminal pollution laws are not Calabresi-Melamed property regimes, but inalienability regimes. To go back to the six original hypotheticals, in a property regime the state would enforce either the consumers' entitlement to clean water or the producer's entitlement to pollute. Because the enforcement decision belongs to the state, the individual entitlement holders cannot contract away their entitlements.

Of course, assigning control of all pollution and priority disputes to the state does not by itself preclude the possibility of contract, nor does it necessitate an increase in government expense. We could create a legal regime that would mimic a property regime with entitlements allocated to the consumers. For example, the state could hold the homeowner's entitlement to clean water, somewhat like a trustee. The state would, therefore, charge the expenses of enforcing environmental rights against the homeowner-beneficiaries, rather than against the general tax coffers. The state could, as trustee, also contract away entitlements on behalf of the homeowner-beneficiary.

Unfortunately, it is probably impracticable to administer such a system as a true Calabresi-Melamed property regime. In a property regime, each homeowner is entitled to her individual subjective valuation of her entitlement. The state would therefore have to set up some procedure to determine the subjective valuation of each homeowner. If, however, the state used some other means of setting the sales price for the entitlement, the regime would be a liability regime.

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357 This view is, of course, my personal opinion. The virtues of a punitive damage-property regime are beyond the scope of this Article. I note, however, that we generally do not allow juries to impose punitive damages unless they believe the defendant's behavior was particularly heinous. Even business groups increasingly attack these damages as unjust precisely because the damages are disproportionate.

The competition between pragmatic arguments for, and outrage over, a punitive damage-property regime disproportionality fuels much of the debate about class actions as well.
because the intersubjective valuation—the valuation set by "society," in this case the state—would be imposed on the homeowner.

One could attempt to save this system, rhetorically, by saying that it is a property regime, but the entitlement holder is the state—the collective of consumers, producers and others—not the individual consumer. This scenario, in fact, more nearly matches certain existing environmental programs in which firms are allowed, in effect, to purchase the right to pollute. This result is, however, quite different than the law and economic philosophy reflected by Calabresi and Melamed that identifies individuals (both natural persons and firms) as the proper subject of law and that wishes to harness the impartial mechanisms of the market.

Consequently, the Ayres-Talley solution to the problem with the Calabresi-Melamed trichotomy would be the adoption of one of two possible radical changes in the law. In one, all takings of a certain kind would result in draconian punitive damages. In the other, the government would be trustee for all entitlement holders with the power to contract on their behalf, but only after determining each homeowner’s subjective valuation of her entitlement.

The liability-property taxonomy that Calabresi and Melamed offered to analyze takings of entitlement does not and cannot match the American property system in theory or in practice. As a practical matter, all property claimants must consider that damages will be the only remedy available in a dispute over possession of an entitlement.

CONCLUSION: THE PHALIC METAPHOR

The difficulty with Calabresi and Melamed’s dichotomy springs from their adoption of the phallic metaphor. They analyzed environmental nuisances in terms of disputes over the possession of entitlements, essentially making it a priority dispute. Because priority disputes always have the possibility of third-party claimants, no priority regime could be a Calabresi-Melamed property regime.

The classic environmental nuisance is not, however, a priority dispute at all. The parties are not contesting possession of a single thing. They are contesting necessarily inconsistent enjoyments of different

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358 Firms can make these purchases in a number of ways. The government can try to determine how much abatement of pollution would be efficient and then charge a fee to all polluters designed to increase the average marginal cost of their production. Each polluter would then decide, based on its own costs of production, whether it is more efficient to continue production with its current equipment and pay the fee, or to invest in scrubbers or other new equipment and avoid the fee. This technique is little used because of the difficulties in determining the proper amount of the fee. Recently, the government has initiated an alternative. It has caused the Environmental Protection Agency to auction off transferable licenses (marketable pollution allowances) to produce sulfur dioxide emissions. See James E. Krier, Marketable Pollution Allowances, 25 U. Tol. L. Rev. 449, 449 (1994).
things. As we have seen, these enjoyment disputes do not presuppose a theoretically unlimited class of third-party claimants. It is, therefore, theoretically and often pragmatically, possible to impose a regime whereby one set of enjoyers always has an injunctive right against the limited universe of conflicting enjoyers. For example, homeowner A could always get an injunction to stop widget-maker B from polluting her water, regardless of whether B has made a contract with C to pollute his water.\footnote{Of course, if we grant an entitlement to be free from pollution to a large class of consumers, it may be impracticable for a potential polluter to contract with all of them. Negotiating with large classes raises the possibility of both hold-outs and free riders—two of the classic market failures, which Calabresi and Melamed suggested a liability regime may mitigate. \textit{See} Calabresi & Melamed, \textit{supra} note 14, at 1107-08.}

Therefore, it is possible to have a variation of a pure Calabresi-Melamed “property” (injunctive remedy) regime applicable to classic environmental torts. Unfortunately, because the Calabresi-Melamed taxonomy confuses environmental disputes with priority disputes, it does not and cannot describe American environmental law. This shortcoming is why several of the six possible hypotheticals generated by Calabresi-Melamed are not just alien, but are absurd.

From a Lacanian standpoint, property is phallic. It is the creation of subjectivity with respect to the possession, enjoyment, and exchange of an object of desire. Property, being legal, is symbolic. As with subjectivity, however, our desire to achieve the wholeness Lacan called the real leads us to try to identify the symbolic with natural analogs. We are drawn, therefore, to identify property with the physical. When we stand in the masculine position, we concentrate on the masculine elements of possessing and alienating. We confuse possessing and alienating with holding, exchanging, and taking tangible things that remind us of the penis and the female body. Furthermore, when we stand in the masculine position, we tend to repress the feminine element of enjoyment. As we have seen, despite the fact that environmental nuisances involve disputes over the feminine element of enjoyment, analysts have persisted in analyzing it in terms of the obviously inapplicable masculine elements of possession and alienation. But, whatever is repressed in the symbolic returns in the real. And so, a feminine phallic metaphor for property is also implicit, but usually hidden, in property discourse.

The Calabresi-Melamed analysis necessarily fails as a taxonomy of enforcement regimes because the remedies they proposed do not relate to the harm committed. The trichotomy is not only an inadequate description of the legal relationship known as property, but also it cannot serve as a limited analytical tool in a universe of more than two legal actors. As a result, what at first blush seems like a politically
conservative debate about the increase of economic efficiency, is in fact a call for a radical restructuring of American legal principles.

In other words, Calabresi and Melamed do not present a view of that Cathedral we call property. Rather, in order to present something that can be viewed, they clandestinely attempt to destroy the actual, sublime Cathedral and replace it with something simple and banal. Monet used metonymy to frame human experience, depicting only that which is proximate to it. Calabresi and Melamed erected a metaphor to stand in for experience, claiming to have captured its essential qualities through similarity. Monet tried to suggest how human beings experience the Cathedral’s facade; Calabresi and Melamed built a facade and called it a cathedral.