Daniel A. Farber

The Story of Boomer: Pollution and the Common Law

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

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

3. Id.
Does the common law have anything to contribute to environmental protection, or has it been supplanted by more sophisticated regulatory regimes?

As is often true of famous cases, the facts in Boomer were more complicated than the casebooks would suggest, and the issues correspondingly more complex. We will begin with a look at how the case arose and its progress through the New York courts. Then we will examine Boomer from three different perspectives. The first perspective involves the issue of damages versus injunctive relief and examines that issue through the lens of economic analysis. The second perspective relates to the extent of judicial discretion in remedying environmental harms. How freely should courts balance economic and environmental values? The final perspective asks about the continuing vitality of the common law in an age of statutes, and seeks to probe the complex relationship between these two sources of law. Is the common law of nuisance a living fossil in the modern age of environmental regulation or does it continue to have a vital role to play?

Each of the three perspectives has engaged the attention of courts and scholars. Boomer's continuing vitality is due in no small part to the ability of such a short, simple opinion to raise such weighty and sophisticated questions. Like a small but multifaceted crystal, Boomer reflected light in several directions, each of which remains relevant today.

I. The Boomer Litigation

The Court of Appeals' opinion gives only the most cursory version of the facts, leaving the impression that the plaintiffs were suffering more or less routine damage from air pollution. In fact, the air pollution was far from routine, and the plaintiffs also suffered from other serious impacts. Nor was the Court of Appeals' opinion the final word in the case. Viewing the opinion without considering what happened on remand also gives a misleading impression of the outcome. In this section, we will attempt to remedy those failings.

A. The Cement Company and its Neighbors

Atlantic Cement was formed in 1959 under the name “Burwell Realty Company,” but the name was changed just before construction began. Presumably, the original name was meant to avoid cuing sellers that their land might have special value to the buyer for a large

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industrial venture. Atlantic had assembled a large tract of land: a later tax appraisal lists it as 3260 acres.  

Atlantic was a joint venture of two mining companies. This was the joint venture’s only plant, but it had distribution centers all along the East Coast, served either by rail or barge. (Thus, calling it the “Atlantic” cement company was quite appropriate.) The plant employed about four hundred people, and its assessed value was about half of the total assessed value of the entire township. The Albany area had other cement plants, being rich in the necessary raw materials, with a handy source of river transportation provided by the Hudson.

Cement is composed of various minerals that are quarried, heated in a kiln, and ground into a fine powder. The primary environmental impacts are air pollution (especially particulates) and vibration from the quarrying. A significant amount of solid waste is also generated.

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

Atlantic invested more than $40 million in the plant, which incorporated what was then state-of-the-art pollution control. There is no indication of how much of this sum covered land acquisition, whether the plant machinery could have been removed and used at another site, or what value the land would have had if used for other purposes. So far as the record shows, Atlantic did what it could to mitigate the environmental impact of its operations. The $2 million dust collection equipment was allegedly considered the best in the country. Before the litigation was over, the company had spent an additional $1.6 million installing a spray system, a fiberglass bag collector, and converting from coal to oil.

Despite its mitigation efforts, Atlantic had drastic effects on its neighbors, partly due to its quarrying operation rather than the cement manufacturing operation. The quarrying operation caused severe vibra-

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5. See Blue Circle Inc. v. Schermerhorn, 652 N.Y.S. 2d 817 (1997). There is no indication of a major expansion in the intervening years between Boomer and Blue Circle.

Using what was called the “millisecond delay” method, a series of blasts would be used to remove layers sequentially, so a new blast would go off just as the previous layer of rock was falling away. Thus, a sequence of explosions would continue for some period of time, seriously affecting neighboring landowners. For example, the Millious couple lived in a ranch house about half a mile from the quarry. The blasting caused large cracks in the wells, ceiling, and even exterior of their house. Air pollution added to the troubles of the Milliouses and other neighbors. Fine dust from the cement operation coated the interior with what the Milliouses described at trial as a “plastic-like coating.” Mr. Millious also recalls today that he had to scrape the cement dust off of his windshield with a razor blade and that the gutters on his house filled with so much dust that they fell off the house. Similar harm was reported by the Venturas, who lived about the same distance from the plant and the conveyer.

The noise from the blasting was also a serious problem, causing major vibrations and sometime panicking small children who lived in the area. One woman’s testimony vividly portrays the effects of the blasting:

Well, we were sitting on the floor in the living room, playing a game when they had this awful tremble, and to me the house seemed like the whole house was rocking, and I would see the lamp shades vibrating and it just scared the children. That was one of the times that they just got up and started to run for the basement.

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

According to Mr. Boomer, he tried numerous times to reach some agreement with the company prior to bringing suit. He recalls that they wanted to shut his business down and have him come work for the company as a machinist. But Mr. Boomer said, he did not trust them “as far as he could throw them.” Mr. Millious recalls that the company denied that the dust was even coming from the plant, blaming it on a source across the river. Even today, he sounds agitated when he discusses the company’s response to his complaints.

B. Background on the Law of Nuisance

In an effort to remedy this situation, the plaintiffs filed a common law action known as a nuisance suit. A brief detour to explain this cause of action is therefore in order. Unfortunately, providing a crisp description of nuisance law is not easy. While the general concept of nuisance liability is reasonably clear, the details quickly become fuzzy. The law of

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7. This information is based on interviews conducted by Sky Stanfield with Boomer and Millious in early September of 2004.
8. Id.
nuisance has an ancient history and, according to some, an equally inscrutable one. As the leading Torts hornbook says,

There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word “nuisance.” It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition.\(^9\)

The doctrine dates back to seven centuries, and was well-established by the time of Edward III, apparently gathering complexity and difficulty as it went along.\(^10\)

One source of confusion is the distinction between public and private nuisances. A private nuisance is an ordinary tort. A public nuisance is an interference with a public right—for example, in the early cases, interference with a public road.\(^11\) Today, public nuisances are often defined by statute. Normally, the government brings actions to abate a public nuisance. But a private citizen who suffers “special damage” from a public nuisance also has standing to abate the nuisance. The same conduct can constitute a public nuisance and a private one, and sometimes actions are brought by the same plaintiff under both theories. It’s easy to understand the reasons for confusion between a private nuisance suit and a public nuisance suit brought by a plaintiff with special damages. Fortunately, we will focus only on private nuisance. With the exception of a single case discussed later (Spur Industries), the discussion will only be concerned with private nuisances.

The crux of a private nuisance is an unreasonable and substantial interference with the use of land.\(^12\) Even if the defendant’s conduct was reasonable, according to some authorities, liability can be found where the defendant interfered with the use of plaintiff’s land to the extent that justice requires compensation.\(^13\)”Unreasonable interference” sounds like a straightforward concept. Still, there is considerable confu-

\(^12\) Keeton, supra note 10, at 623, 625.
\(^13\) Id. at 629.
sion about whether to focus on the reasonableness of the defendant’s conduct or the unreasonableness of the impact on the plaintiff, about whether the utility of the defendant’s activity is relevant to liability or only to remedy, and about how important that factor might be in either context.

Once a private nuisance has been found, the question of remedy arises. Because land is considered unique and irreplaceable, the typical remedy in real estate disputes is an injunction. In the nuisance context, however, courts have been concerned about the possible adverse effects of injunctive relief. The fear is that an injunction may suppress an activity important to society, though burdensome to neighbors. For this reason, many courts will “balance the equities” in determining whether an injunction will issue.¹¹ This is said to have become the prevailing view by 1940.¹⁻¹² But other courts adhered to the view that an injunction is mandatory when a nuisance exists and damages fail to provide an adequate remedy.¹⁶ New York was generally considered to adhere to this second school of thought. (As we will see, however, the New York rule may not have actually been quite this rigid even before Boomer.) Whether to balance the equities was, of course, a key issue in Boomer.

The Second Restatement of Torts made a strong effort to bring order out of this somewhat unsettled area of doctrine. (Restatements are summaries of the law by a widely respected professional body, the American Law Institute.) The Restatement defines an interference as unreasonable if “the gravity of the harm outweighs the utility of the actor’s conduct.”¹⁷ An injunction would seem appropriate in those cases. But even where the balancing test is not met, the Restatement allows damages when “the harm caused by the conduct is serious and financial burden of compensating of this and similar harm to others would not make the continuation of the conduct not feasible.”¹⁸ Restatements are not official legal documents, but they are often followed by courts.

The extent to which the Restatement’s view of nuisance has been followed by the courts, however, is unclear. In particular, the question of how the utility of the defendant’s conduct enters into the analysis has not been settled. As of 1990, about eight states had adopted the Restatement’s approach completely; seven had adopted the balance of utilities test without expressly considering the proviso allowing compensation for serious harm; and the remaining states were happy to roll all of the relevant factors into a general “reasonableness” test, with little indica-

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¹⁴. *Id.* at 631.
¹⁵. *See, Levin supra* note 11, at 206.
¹⁷. Restatement (Second) of Torts § 826(a).
¹⁸. *Id.* § 826(b).
tion of the weight carried by any individual factor such as the social utility of the defendant’s conduct. By and large, then, nuisance doctrine is still a bit muddy, if not quite the horrendous quagmire portrayed by some commentators.

Thus, when the plaintiffs filed suit in *Boomer*, they were walking into a contested area of doctrine. The economic interest of the defendant, a major corporation, obviously was much greater than the market value of the plaintiffs’ few acres of commercially marginal land. The key issue in the *Boomer* litigation was whether this factor should enter into a determination of liability or the choice of remedy.

**C. The Road to the Court of Appeals**

The liability issue was settled at a fairly early state of the litigation, leaving the focus on remedial interests. The trial judge found that the plaintiffs had established the existence of a nuisance:

> Although the evidence in this case establishes that Atlantic took every available and possible precaution to protect the plaintiffs from dust, nevertheless, I find that the plaintiffs have sustained the burden of proof that Atlantic in the operation of its cement plant . . . created a nuisance insofar as the lands of the plaintiffs are concerned. The discharge of large quantities of dust upon each of the properties and excessive vibration from blasting deprived each party of the reasonable use of his property and thereby prevented his enjoyment of life and liberty therein.

Note that the trial court’s analysis focused on the impact of the plant on the neighbors, rather than trying to determine whether that impact was justified by the social utility of the plant.

Although they were vindicated in this liability finding, the plaintiffs were not so lucky when it came to the remedy. Here, the social utility of the plant loomed large. The trial judge refused to issue an injunction because of Atlantic’s “immense investment in the Hudson River Valley, its contribution to the Capital District’s economy and its immediate help to the education of children in the Town of Coeymans through the payment of substantial sums in school and property taxes.” Consequently, the trial judge refused to enter an injunction and merely awarded damages instead. Nor was the damage award generous. The trial judge awarded the plaintiffs a total of $535 per month in damages for past losses but suggested that the parties settle the case for the

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19. See Levin *supra* note 11, at 234. The Restatement approach has been more popular in cases involving diversion of surface waters. See *id.* at 230–233.


21. *Id.* at 113–14.
amount of the permanent loss of market value, which he calculated as $185,000 for all the plaintiffs combined.\textsuperscript{22}

Not surprisingly, the plaintiffs appealed. The appellate division (an intermediate appeals court in the New York state system) affirmed in a brief opinion.\textsuperscript{23} It found no abuse of discretion in the denial of injunctive relief, taking into account “the zoning of the area, the large number of persons employed by the defendant, its extensive business operations and substantial investment in plant and equipment, its use of the most modern and efficient devices to prevent offensive emissions and discharges, and its payment of substantial sums of real property and schools taxes.” Remaining dissatisfied, the plaintiffs appealed again, setting the stage for the Court of Appeal’s famous opinion in the case.

D. The Boomer Decision

The plaintiffs took the case to the New York Court of Appeals (the highest court in the state). They launched a battery of challenges to the lower courts’ rulings. The first half of their argument focused on the injunction issue:

I. The trial court, as well as the Appellate Division, erred as a matter of law by depriving plaintiffs of their property rights when the courts failed to grant an injunction against the nuisances created by the Atlantic Cement Company, Inc. II. The trial court and Appellate Division in our instant cases have devised a new “economic utility doctrine,” which if left unchallenged will leave in jeopardy the rights of small property owners throughout the State of New York.\textsuperscript{24}

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

III. The trial court and the Appellate Division erred in their decision by leaving plaintiffs with an inadequate remedy at law, which results in a multiplicity of suits . . . V. The temporary damages granted by the trial court to plaintiffs were inadequate. VI. The reasonable market value of the real property of plaintiffs and of the business known as the Coach House Restaurant as well as the permanent damage found by the trial court were grossly inadequate as a matter of law.\textsuperscript{25}

\textsuperscript{22} See id. at 115–116.
\textsuperscript{24} These “points of counsel” are quoted in the official reporter, 26 N.Y.2d 219, 220 (1970)(citations omitted).
\textsuperscript{25} Id.
It is notable how much the plaintiffs emphasized the issue of damages in their argument. As it turned out, the damage issue received less attention from the Court of Appeals in this round of the litigation but then dominated the proceedings on remand.

1. The Opinion

The case was argued on October 31, 1969, and decided on March 4, 1970. This was a period of great interest in environmental law in general and air pollution in particular, as demonstrated by the passage of the federal Clean Air Act of 1970. The majority opinion was written by Judge Francis Bergan. He was a career judge, who had been born in 1902 and was elected as a city judge in 1929, only five years after passing the bar. Judge Bergan’s majority opinion begins by putting the public interest in environmental quality to the side:

[T]here is now before the court private litigation in which individual property owners have sought specific relief from a single plant operation. The threshold question raised by the division of view on this appeal is whether the court should resolve the litigation between the parties now before it as equitably as seems possible; or whether, seeking promotion of the general public welfare, it should channel private litigation into broad public objectives.

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

Effective control of air pollution is a problem presently far from solution even with the full public and financial powers of government. . . . This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant—one of many—in the Hudson River valley.26

Thus, the court carved away the larger public issues raised by the case, and trimmed it down to a dispute between neighbors, not much different in kind from a quarrel between homeowners about an overhanging tree-limb.

26. Id. at 223.
Having eliminated the public interest aspect of the case, the court observed that there was a large economic disparity between the stakes of the parties but stated that the injunction could not be denied on this basis without overruling a line of previous New York decisions.\textsuperscript{27} (As we will see, this may have been an over-reading of the precedents.) Nor was the majority attracted to the idea of a delayed shut-down order to allow the defendant to abate the nuisance, which it thought would only put pressure on the defendant to settle without doing anything to improve pollution control at the plant. The court observed that the “parties could settle this private litigation at any time if defendant paid enough money and the imminent threat of moving the plant would build up the pressure on the defendant.”\textsuperscript{28} The court was skeptical that the defendant, as a single company in a large industry, could do much to accelerate the technological advances needed for effective control of the problem.

In contrast, the court said, “to grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the contending parties.”\textsuperscript{29} To ensure against later litigation between the parties or future owners of the property involved, the court required the judgment to contain a term providing that “the payment by defendant and the acceptance by plaintiffs of permanent damages found by the court shall be in compensation for a servitude on the land.”\textsuperscript{30} Without specifically addressing the measure of damages, the court remarked that the lower court “should be entirely free to re-examine this subject.”\textsuperscript{31}

Judge Matthew Jasen alone dissented. (Jasen’s sparse court biography indicates little, beyond the facts that he attended the “Harvard University Civil Affairs School” rather than law school, and that he had served as a military judge in occupied Germany and as a state trial judge before joining the Court of Appeals.) Judge Jason stressed the seriousness of the air pollution problem and the contribution of dust from cement plants to that problem. He also argued that the majority was “in effect, licensing a continuing wrong”—“It is the same as saying to the cement company, you may continue to do harm to your neighbors so long as you pay a fee for it.”\textsuperscript{32} He also argued that giving the cement company an easement was essentially allowing it to exercise the power of eminent

\begin{itemize}
\item \textsuperscript{27} Id. at 224.
\item \textsuperscript{28} Id. at 225.
\item \textsuperscript{29} Id. at 226.
\item \textsuperscript{30} Id. at 228.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id at 230 (Jasen, J., dissenting). 
\end{itemize}
domain, but for its one private benefit rather than for public use.\textsuperscript{33}
Having been well aware of the plaintiffs' presence when it opened the
plant, the company should have the burden of coming up with a
technological solution within eighteen months.\textsuperscript{34}

Quite apart from the question of whether it reached the right result,
the majority opinion was less than a model of judicial craftsmanship. The
Boomer court's treatment of precedent was quite unsatisfactory and
received little correction from the dissent. The main point on which the
majority and dissent agreed was that prior New York law would have
entitled the plaintiffs to an injunction against operation of the plant. But
this actually was not completely clear. The majority cited Whalen v.
Union Bag & Paper Co.\textsuperscript{35} as the authority for the "rule that had been
followed in this court with marked consistency."—that rule being that
"whenever the damage resulting from a nuisance is found not 'insub-
stantial,' viz $100 a year, injunction would follow."\textsuperscript{36} But the case law
was not so unequivocal as this language from Whalen would suggest.\textsuperscript{37}
Even in Whalen itself, the court said that "'[i]t is not safe to attempt to
lay down any hard and fast rule for the guidance of courts of equity in
determining when an injunction will issue.'\textsuperscript{38}

The court cited three other cases as following the Whalen rule. Those
cases uphold the issuance of injunctions, but they gave little
indication that an injunction would be required when the effect would be
to render a large industrial facility worthless. Instead, the earlier opin-
ions had made it clear that nothing so drastic was involved in those
cases.

The first of the three earlier cases, McCarty v. Natural Carbonic Gas
Company, involved a plant discharging sulfur dioxide fumes, and the
court did hold that injunctive relief was warranted despite the expense of
compliance by the defendant.\textsuperscript{39} But the injunction, as modified by the
court of appeals, did not involve an undue burden on the defendant:

\begin{itemize}
\item \textsuperscript{33} Id. at 231.
\item \textsuperscript{34} Id. at 232.
\item \textsuperscript{35} 101 N.E. 805 (1913).
\item \textsuperscript{36} Boomer, 26 N.Y.2d at 224.
\item \textsuperscript{37} See Louis A. Halper, Nuisance, Court and Markets in the New York Court of
Appeal, 850–1915, 54 A.L.R. 301, 301 (1990) (arguing that a survey of earlier New
York case law concludes that Boomer's preference for damages had "centenarian ancestors
in the New York Court of Appeals").
\item \textsuperscript{38} Whalen, 101 N.E. at 805. The Whalen court quoted language from an Indiana
case to the effect that, before locating a plant where it would discharge large amounts of
pollutants into a small stream, the defendant should have taken into account the rights of
downstream owners. Id. at 806.
\item \textsuperscript{39} McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40 (1907).
\end{itemize}
This is not a case where the defendant cannot carry on its business without injury to neighboring property, for all damage can be avoided by the use of hard coal, as is done by one of its competitors in the same kind of business in the same locality, or perhaps by the use of some modern appliance such as a smoke consumer, although either would involve an increase in expense. It is better, however, that profits should be somewhat reduced than to compel a householder to abandon his home, especially when he did not "come to the nuisance," but was there before.\(^40\)

Requiring the defendant to use available methods of pollution reduction, which were apparently already in use by competitors, can hardly be considered so harsh as to call for any judicial relief.

The second case cited by the *Boomer* court, *Strobel v. Kerr Salt Company*, involved massive pollution of a stream by a salt manufacturer.\(^41\) But again, the relief was not a shut-down order:

> It does not follow from these views that, if upon another trial the facts are unchanged, the defendant and the other salt manufacturers will be compelled to make such terms as they can, for a court of equity, with its plastic powers, can require, as a condition of withholding a permanent injunction, the construction of a reservoir on the upper sources of the stream, to accumulate water when it is plentiful for use in times of scarcity, and thus neutralize the diminution caused by the manufacture of salt. The court may also require, on the like condition, greater care in preventing the escape of salt water and salt substances into the stream, as the defendant attempted to do during the trial, and thus prevent or minimize the pollution.\(^42\)

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

The third case, *Campbell v. Seaman*, involved a brick kiln that killed hundreds of a neighbor’s trees because of its sulfuric acid fumes.\(^43\) The court held that an injunction was warranted, even though the trees were merely ornamental rather than having commercial value. But the circumstances were a far cry from *Boomer*:

> We know that material for brick making exists in all parts of our State, and particularly at various points along the Hudson river. An injunction need not therefore destroy defendant’s business or inter-

\(^{40}\) McCarty, 81 N.E. at 551.

\(^{41}\) 164 N.Y. at 303 (1900).

\(^{42}\) Strobel, 164 N.Y. at 323.

\(^{43}\) Campbell v. Seaman, 63 N.Y. 568 (1875).
fere materially with the useful and necessary trade of brick making. It does not appear how valuable defendant’s land is for a brick-yard, nor how expensive are his erections for brick-making. I think we may infer that they are not expensive. For ought that appears, his land may be put to other use just as profitable to him. It does not appear that defendant’s damage from an abatement of the nuisance will be as great as plaintiffs’ damages from its continuance.44

“Hence,” the court said, “this is not a case within any authority to which our attention has been called, where an injunction should be denied on account of the serious consequences to the defendant.”45 Thus, while the injunction would regard discontinuing the current use of the property (unlike the other two cases), it would not have an especially harsh economic impact on the defendant.

Fairly read, these cases stand for the proposition that the default remedy in a nuisance case is injunctive. These cases also make it clear that an injunction may be appropriate even if the monetary benefit to the plaintiff is smaller than the monetary cost to the defendant. But they do not seem to foreclose the possibility that, in extreme cases, hardship to the defendant or the public might justify denial of an injunction in a nuisance case.46 The Boomer court should not have leaped to the conclusion that these cases stood in its way.

Thus, the Boomer opinion’s analysis of precedent was clumsy at best. Moreover, it is not completely clear how the outcome in Boomer itself was supposed to relate these earlier cases. On a first reading of the opinion, the impression is that Boomer is overruling the Whalen rule in favor of a damage remedy for nuisance.

But on a closer reading, Boomer seems to leave Whalen generally intact. The court says that the action of the lower courts was “a departure from a rule that has become settled; but to follow the rule literally in these cases would be to close down the plant at once.”47 The court then discusses two alternatives to avoiding this result: postponing the injunction or conditioning it on the defendant’s failure to pay damages. The ultimate relief granted was “to grant an injunction which shall be vacated upon payment by defendant of such amounts of permanent damage to the respective plaintiffs as shall for this purpose be

44. Id. at 586.
45. Id.
46. See Halper, supra note 37, at 353–354 “It is simply not possible to read New York nuisance law as having internalized a general view that large-scale industry is liable to be shut down at the behest of a smallholder, which required modification through balancing tests that became ever more incoherent until the rescue of nuisance doctrine by Boomer.”
determined by the court.” The court could have remitted the plaintiffs to their remedy at law, a damage action, but instead seemed to feel compelled to play at least lip service to the Whalen rule that the plaintiffs were entitled to some form of injunctive relief. Nowhere does the court explicitly state that it is overruling Whalen or any other prior opinion. Thus, one tenable reading is that Boomer merely placed a gloss on the Whalen rule: the plaintiff is always prima facie entitled to an injunction, but in the case of highly disproportionate harm to the defendant or the public, the injunction can be made defeasible by a damage payment.

The Boomer court’s opinion is also cursory in its discussion of the balancing of the equities. It refers to one third-party interest favoring the defendant—the number of employees at the plant—but ignores the third-party interest favoring the plaintiff, the regional impact of the defendant’s air pollution. This seems like an obvious inconsistency. Moreover, the majority opinion fails to consider the possibility of equitable relief that would mitigate the harm to the plaintiffs, such as a lower level of operation, changes in the scheduling of blasting, construction of barriers between the plaintiffs’ land and the plant, and so forth. Presumably, the court assumed that none of these remedies would be feasible or effective, yet nothing in the opinion indicates that these alternatives were even considered. The court’s disposition also left the lower courts somewhat at large about how to handle the remand. The court of appeals invited a further consideration of damages on remand but with no explanation of why the previous determination was unsatisfactory or what standards should be used on remand.

The sloppiness of the opinion suggests that the court did not view the case as particularly important; if so, the amount of attention given the case by scholars must have come as something of a surprise. But perhaps, as one commentator suggests, the shortcomings of the opinion actually made the case more attractive to teachers and scholars: “The opacity of the court’s opinion leaves room for provocative questioning and dialogue in the classroom and for more refined analysis in academic journals, especially by the economically-oriented commentators….”

48. Id. at 875.

49. Lewin, supra note 11, at 221. Those who consider Boomer insensitive to environmental concerns should consider a later Idaho decision, Carpenter v. Double R Cattle Company, Inc., 701 P.2d 222 (Idaho 1985). The Idaho court held that no remedy—not even the payment of damages—is available if the utility of the defendant’s activity outweighs the harm to the plaintiff. It observed that “Idaho is sparsely populated and its economy depends largely upon the benefits of agriculture, lumber, mining and industrial development.” Id. at 225. To make damages available would “place an unreasonable burden upon those industries.” Id. The dissenting judge only observed that “[i]f humans are such a rare item in this state, maybe there is all the more reason to protect them from the discharge of industry.” Id. at 229. At least Boomer offered the plaintiffs a damage award, though the
2. The Aftermath

As it turns out, the proceedings on remand suggest that the Court of Appeals decision was actually more favorable in its ultimate effect on the plaintiffs than one might have expected. Taking advantage of the Court of Appeals’ open-ended invitation to reconsider damages, the lower courts were generous in their appraisal of the plaintiffs’ claims.

On remand, the trial judge agreed with the plaintiffs that damages would not be limited to the decrease in fair market value. On the other hand, he also rejected their theory that damages should be set at the level that the plaintiffs would have demanded before they would have agreed to lift a permanent injunction. He considered this unduly punitive. In setting damages, he appeared to seek a middle ground. He considered the above-market prices that Atlantic had spent in acquiring other property in the neighborhood, as well as the conflicting expert testimony about market value. All but one of the cases settled before the judge fixed the amount of damages. In the one remaining case, he found the decline in market value to be $140,000 and awarded $175,000 in damages.\(^{50}\)

The appellate division upheld this amount as a reasonable estimate of loss of market value due to the servitude.\(^{51}\) Interestingly, all five of the judges joined a concurring opinion by Judge Herlihy,\(^{52}\) arguing that the defendant should have to pay more than an independent third-party would have been willing to pay for the land:

> The present record contains proof offered by the plaintiff of a sale which demonstrated the ability of a seller to obtain the price of $32,500 for a small parcel of land which only the year before had been purchased for $3,438 when the buy was an adjoining landowner needing the land for business expansion purposes. While such sales are sometime referred to in a derogatory manner as “hold-ups,” there is nothing which would seem immoral or illegal in assessing value as between private citizens upon a consideration of business facts. The plaintiffs have not created the situation which required the necessity for the defendant to obtain a legal interest in the fee simple absolute title of the plaintiffs’ premises. While the public interest may dictate that the defendant be offered an opportu-

\(^{50}\) Boomer v. Atlantic Cement Co., 72 Misc.2d 834, 340 N.Y.S.2d 97 (1972).


\(^{52}\) It seems odd that a unanimous “concurrence” was filed, but the answer is presumably that another judge was assigned to write the opinion (perhaps, as in some courts, in advance of the oral argument), but that Herlihy felt more strongly about the case and was willing to contribute a more involved analysis, which the other judges then joined.
nity to acquire a servitude, there is no apparent reason to assume that the purchase is being either made by or on behalf of the public, and accordingly the value of the servitude should reflect the private interests of the parties to the lawsuit.\textsuperscript{51}

Although it has not received much attention from commentators, the damage determination is intriguing. The question is how to calculate the value of the land absent the nuisance, which constitutes the baseline for establishing the damages. The most obvious possibility is the amount that the plaintiffs could have gotten if they had put their property on the market before Atlantic was on the scene—the amount they could have obtained at that earlier point by selling to another homeowner or small business. But this measure of damages in effect would provide no incentive for the defendant to seek voluntary transactions with its neighbors. In effect, this stingy measure of damages would give a neighboring landowner the option of acquiring the plaintiff’s land at market without making any effort to buy it first. A second measure of damages would be the amount that Atlantic would have been willing to pay to lift the injunction. But if that was supposed to be the measure of damages, the courts might just as well have given the plaintiffs an unconditional injunction and left Atlantic to bargain with them on its own. Thus, the trial court seems to have been right to reject both of these possible measures of damages.

The measure that the lower courts adopted was more nuanced. It seems to have been based on the premise that Atlantic should have purchased a buffer zone for its operations; as in establishing any large package of real estate, Atlantic would have had to pay a premium to get the land it needed. If Atlantic had merely been required to pay what an ordinary buyer would have been willing to pay, it would be unjustly enriched in the amount of the premium it would otherwise have had to pay for the buffer zone. Thus, the damage award can be considered a form of restitution, putting the parties in the same position that they would have been in if Atlantic had done the right thing in the first place and purchased a buffer zone.\textsuperscript{54}

\textsuperscript{53.} Kinley, 349 N.Y.S.2d at 202.

\textsuperscript{54.} See James Gordley, The Purpose of Awarding Restitutionary Damages: A Reply to Professor Weinrib, 1 Theoretical Inquiries 39 (2000) (enumerating some consideration, that might support restitution in this case). Gordley mentions Boomer, but not surprisingly, seems unaware of the restitutionary nature of the damages that were ultimately assessed in the lower courts. Id. Gordley mentions an interesting English case, involving violation of a covenant rather than a nuisance, where the court awarded such damages as “might reasonably have been demanded by plaintiff” if the defendant had tried to obtain advance permission. Id. Gordley aptly refers to these damages as a “pragmatic effort to deal with the problem” while avoiding windfall profits to the plaintiff or giving the defendant a bargain-basement price for the plaintiff’s acquiescence. Much the same seems to be true of the damages awarded in Boomer.
The plaintiffs were not completely satisfied with the outcome. To this day, Boomer and Millious believe that the judge should have shut the plant down entirely. Millious complains that he ended up with a smaller house on less land with a bigger mortgage. Even though he now lives four or five miles from the plant, there is still occasionally dust in the air. Boomer sold his land to the company at a price negotiated by his lawyer. He then moved his business a few miles away. He still believes that the judge should have “taken the bull by the horns” and issued the injunction.55

In contrast, David Duncan, the lawyer who represented all but one of the plaintiffs, is more favorable in his assessment of the outcome of the case. He feels that “upon reflection, it was fair.” Overall, he thinks “virtually all of the plaintiffs got very good settlements for the value of their land.” He was particularly happy with the outcome for one family, the Kenleys, who were able to get nearly the entire value of their house in exchange for an equitable easement that was never properly filed by the company. His recollection is that the case actually led the state to pursue an enforcement action against the company that resulted in some improvements in pollution control.56

After the damage award, Atlantic became involved in litigation with its insurance company over whether the damages were covered by its policy. Fourteen years after the Court of Appeals’ initial decision, the same court ruled in Atlantic’s favor in the insurance litigation.57 Atlantic had paid out a total of $710,000 in damages and settlements, about four times more than the damage estimate mentioned in the first Court of Appeals decision.58

According to the long-time Technical Manager of the plant, Atlantic itself would not have moved even if an injunction had been issued.59 Instead, if anyone relocated, it was the plaintiffs. Atlantic belatedly purchased most of the plaintiffs’ properties to create a buffer zone. Several of the plaintiffs moved away after receiving damages. But at age 80, Mr. Boomer himself still runs a business in the area.

As part of a settlement with the insurance company, Atlantic agreed to sell the insurance company some of the property that Atlantic had received in settlements with some of the plaintiffs. Atlantic agreed to convey quitclaim deeds and easements. But the parties were unable to do

55. This information is taken from interviews conducted by Sky Stanfield in early September 2004.
59. See Mogill, supra note 7, at 9–10.
so on the language of the easements. Fidelity was ultimately able to get a court order eliminating some of the language from the easements which would have authorized Atlantic to “render the Premises uninhabitable, unmarketable and not useable for any purpose.”60 (Thus, the Boomer court seems to have been wrong if it assumed that the nature of the easements would be self-explanatory.) Thus, in 1989, some twenty years after the Boomers originally filed suit, the litigation over the property finally came to an end.

In the meantime, the Atlantic Cement Company itself went through some changes. In 1973, Atlantic was sold to the Newmount Mining Company.61 In turn, Newmount sold the operation to a British company, Blue Circle Industries, for $145 million.62 By 2001, the facility had been sold again, to Lafarge S.A.63

On one point the Court of Appeals was indubitably right: the solution to Atlantic’s environmental problems was not going to be found within eighteen months. On the contrary, like many other pollution problems, this one dragged on with some improvement but no real solution. EPA embarked on a complex series of rule-making dealing with the cement industry. EPA’s first set of standards was remanded by the D.C. Circuit in 1973,64 but EPA succeeded in getting its standards approved two years later.65 Later, the focus shifted to hazardous air pollutants emitted by cement plants such as hydrochloric acid, dioxins, and metals. In 2000, the D.C. Circuit upheld standards requiring the industry to use the “maximum achievable control technology” for these hazardous pollutants.66 The Fact Sheet accompanying the rule says that it will reduce particular emissions by 5200 tons per year, and hydrocarbons by 220 tons per year, at an initial capital cost of $108 million and a recurring annual cost of 37 million.67 Later revisions of the rule stretched into 2002.68

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In the early 1990s, Blue Circle did introduce new technology to control dust emissions. Nevertheless, throughout the 1990s, the plant was the focus of scrutiny by groups assessing pollution, and it often appeared near the top of lists of regional polluters. According to a 1997 report, Blue Circle’s operation emitted ten thousand tons of sulfur dioxide (the seventh-highest in the state of New York), another ten thousand tons of nitrogen oxide (the highest in the state), and it ranked third for particulate matter at 954 tons.

What about the situation today? The plant remains the second largest cement facility in the United States. The plant’s most recent TRI report lists 142,000 pounds of hydrochloric acid, 29 pounds of lead, 37 pounds of mercury compounds, and small amounts of dioxins in 2002. In 2000, the state environmental agency said it was investigating complaints by local residents about dust deposits and respiratory problems, although the agency had previously issued small fines against the company for high levels of dust emissions and other violations. The present-day equivalents of Oscar and June Boomer, Jill Sampson and her husband Lott Charles, live less than a mile from the plant. Lott Charles complained of their daughters’ year-long “deep, barking cough, which is really alarming. . . . There is a peculiar dust that coats things around here. It ate the finish off my porch chairs.”

II. The Three Faces of Boomer

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

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69. See LINKman Improves Quality at Raven; LINKman Process Control and Optimization System at Blue Circle Cement’s Ravena Plant, World Cement, Jan. 1992, at 34.


71. See Id.

72. See EPA Fact Sheet, supra note 66.


75. Id. Currently, LaFarge is proposing to burn millions of tons of tires as fuel in its cement kilns. See Matt Pacenza, Tire Burning Plan Draws Critics; Kinderhook Residents Downwind of Proposed Site Raise Health, Habitat Concerns, Times Union (Albany, N.Y.), February 8, 2004, at D1.
The first issue relates to remedies for environmental violations. The question *Boomer* raises is whether “balancing the equities” is limited to common law cases, or whether that process applies to all environmental injunctions. Nuisance actions are only the tip of the iceberg in terms of environmental litigation. Can courts use their equitable discretion to postpone or exempt polluters from statutory requirements? Or do environmental concerns trump economic interests in framing remedies against polluters? Obviously, this is a question of some importance in an era when so many environmental statutes authorize injunctions as a remedy against violators.

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

The final issue is whether the common law continues to have any relevance in today’s environmental law, given the predominance of environmental statutes. *Boomer* was decided at the very beginning of what some consider to be the “golden age” of environmental law, when almost all of today’s complex regulatory schemes were enacted. The *Boomer* court cut back on the scope of its inquiries in deference to the state’s statutory pollution scheme. A few years later, the U.S. Supreme Court abolished the federal common law of nuisance in favor of a purely statutory approach. Environmental law courses focus almost exclusively on statutory regulation, with the common law getting much scantier attention. How much room, one might well wonder, is left for the common law today? Was the *Boomer* court right in thinking that the common law has no further contribution to make to environmental policy?

A. *Boomer* and Equitable Discretion

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

This issue was presented to the Supreme Court in dramatic form in TVA v. Hill, the famous snail darter case discussed in a later chapter. Having found that completion of a multimillion dollar dam would threaten an endangered species, Chief Justice Burger’s opinion for the Court observes that a judge “is not mechanically obligated to grant an injunction for every violation of law.” That statement calls to mind the traditional doctrine of equitable balancing, and seems to signal that the Court was going to deny the injunction in Boomer-like terms because of the huge investment in the dam. But then the opinion takes a different turn:

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

Because Congress had spoken “in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities,” the Court declined the request to shape a “reasonable” remedy. Thus, Boomer seemed to have been excluded from the statutory sphere.

TVA v. Hill seemed to establish a firm rule in favor of statutory injunctions. But the Court soon muddied the picture in a Clean Water Act decision, Weinberger v. Romero–Barcelo. The facts were somewhat offbeat compared to the normal pollution case, which is one of the reasons the case is hard to interpret. In Weinberger, the district court held (probably correctly) that the Navy needed to obtain a Clean Water Act permit before conducting exercises on the coast of Puerto Rico. The

76. See Peter Shane, Rights, Remedies and Restraint, 64 Chi.-Kent L. Rev. 531 (1988); Daniel A. Farber, Equitable Discretion, Legal Duties, and Environmental Injunctions, 45 U. Pitt. L. Rev. 513 (1984); Zygmunt Plater, Statutory Violations and Equitable Discretion, 70 Cal. L. Rev. 524 (1982).
78. Id. at 193.
79. Id. at 194.
80. Id.