"THERE HAVE TO BE FOUR"

FRANK I. MICHELMAN*

I. THE GOOD OLD DAYS

It is with huge delight and satisfaction that I join the company paying tribute to Guido Calabresi. There is, however, a bit of a hangup, disclosed by Dean Rothenberg’s description of this Symposium as a gathering of scholars in the fields of torts and of law and economics. In neither of those crowds do I fit. When it comes to current, advanced discussion of the economic ramifications of tort law—the field of debate that The Costs of Accidents1 has done so much to organize and to anchor—I have nothing to contribute beyond possibly comic relief, assuming anyone could imagine me being funny. In fact, I do feel like the joker in the deck of speakers at this gathering. I mean, no organizer, I’ll bet, has the remotest idea of what I am going to talk about.

To be honest, I have had to scrounge a little for a topic. This event celebrates The Costs of Accidents. Even so, I soon shall be turning my remarks to another Calabresi classic, the great and famous Cathedral article in the Harvard Law Review that Guido co-authored in 1972 with A. Douglas Melamed.2 On reflection, I think it probably was scripted that I should do this. The organizers of this event—or could it have been some fine Italian hand behind the scenes?—decided that I should be here, and I have a pretty good suspicion about why. For there is a palpable reason for my participating in a celebration of The Costs of Accidents, and it is that very reason that turns my thought toward The Cathedral, which is connected to that reason in a kind of genealogical way.

The story starts somewhere in 1967 or 1968, when we were very young. I had published an article that included what I suppose could be called (for those days, anyway) an economic analysis of the problem that later came to be called “regulatory taking.”3 Not long after

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that article appeared, I received a letter from a rising star at the Yale Law School saying kind things about it. Guido Calabresi was a man I had never met, but of whom I had heard wondrous things, and I was very pleased to have gained his approval. A year or so later, Guido came to Harvard Law School for a turn as visiting professor, and we formed a friendship.

*The Costs of Accidents* appeared in 1970, and of course the editors of the *Yale Law Journal* wanted a review. I guess because of my 1967 article, they came to me, and of course I could not pass up that invitation. I was not a torts scholar, though. My common-law field was property.\(^4\) Being a property man, I conceived the idea of devoting a big hunk of my review of *The Costs of Accidents* to seeing what could be learned about private nuisance law—particularly private nuisance law regarded as an instrument of pollution control—by looking at it through the analytical prism developed by Calabresi in *The Costs of Accidents*.\(^5\)

You have to remember that this was a time when probably the leading idea in the legal academy, in the then quite primitive environmental field, was Pigovian, not Coasean. It was that the legal system’s prime contribution to holding emissions to optimal levels would lie in internalizing all the costs of emissions to emitters.\(^6\) Along with that idea had come an interest in building private nuisance litigation into a major engine of that policy—with nuisance being conceived, of course, or reconceived, as a strict liability tort.\(^7\) It was obvious to me that the arguments and analyses developed in Calabresi’s book—starting with a list of “myths” that Guido provided\(^8\)—would seriously complicate that approach, and in my review I labored to work out some of the implications.

As I got going, I had an epiphany\(^9\) (well, for a property man it was an epiphany). The term “accident” denotes a certain class of costly interactions. So does the term “pollution.” There is an obvious way in which the two classes appear to differ. It is in the nature of an acci-

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5. *See Frank I. Michelman, Pollution as a Tort: A Non-Accidental Perspective on Calabresi’s Costs, 80 YALE L.J. 647, 666-86 (1971) (book review) [hereinafter Pollution as a Tort].


7. *See id. at 667.

8. *See id. at 649-50, 667; The Costs of Accidents, supra note 1, at 17-23 (discussing, e.g., the myth that our society is “committed to preserving life at any cost”).

9. *See Michelman, Pollution as a Tort, supra note 5, at 666-67, 669-70.*
dent that you can’t prevent it by ordering the parties in advance not to have it. If you could, it wouldn’t be an accident.\textsuperscript{10} By contrast, not only can you know in advance that you have a good reason for wanting an emission of some kind not to happen, but when you do know that, you quite rationally can pursue your aim by issuing a prohibitory directive against the undesired emissions. Insert that into the setting of private litigation and what you get is this: Injunctions, which are more or less beside the point in accident litigation, are a kind of remedy bound to demand serious consideration in many pollution cases.

With that brilliant flash of insight at hand, I produced, in my review (not all that originally, as I soon was to learn\textsuperscript{11}), a threefold typology of right/remedy combinations—I called them “liability decisions”\textsuperscript{12}—for private-nuisance controversies: First, the defendant might be held liable to have its conduct enjoined at an aggrieved neighbor’s behest; second, the defendant might be held liable to such a plaintiff, but only to judgments for compensatory damages;\textsuperscript{13} third, the defendant’s conduct might not give rise to any sort of legal liability to any plaintiff.\textsuperscript{14}

<table>
<thead>
<tr>
<th>Defendant Liable</th>
<th>to injunction against emissions (Rule 1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>to damages for emissions (Rule 2)</td>
<td></td>
</tr>
<tr>
<td>Defendant Not Liable</td>
<td>case dismissed (Rule 3)</td>
</tr>
</tbody>
</table>

**Table A**

\textsuperscript{10} When defined activities are found to be unacceptably dangerous or accident-prone, governments—for that reason—can enact punishable prohibitions against engagement in such activities. \textit{See, e.g.}, Calabresi & Melamed, \textit{The Cathedral}, supra note 2, at 1097 n.19 (giving as an example a prohibition on selling cars of more than a certain horsepower). When an infraction of such a prohibition is found to be legally causative of an accident, a court—possibly at legislative direction—can treat the fact of infraction as a more or less conclusive ground for holding the violator civilly liable for the resultant costs ("negligence per se," for example). Imposition of civil liability then can be construed as a form of sanction for violation of the prohibitory rules, or it can be explained on other grounds (such as fairness between the parties), but it cannot well be regarded as a sanction for violating an order not to have an accident. \textit{Cf. id.} at 1108-09 (explaining the extreme economic undesirability of a general "property entitlement not to be accidentally injured").

\textsuperscript{11} \textit{See id.} at 1115-16 & n.53 (citing \textit{Restatement (Second) of Torts} §§ 157-215 (1965) for a "traditional," three-rule view).

\textsuperscript{12} Michelman, \textit{Pollution as a Tort}, supra note 5, at 670.

\textsuperscript{13} I did not consider the possibility of "supracompensatory" damages, \textit{see} Henry E. Smith, \textit{Property and Property Rules}, 79 N.Y.U. L. Rev. 1719, 1750-51 (2004) [hereinafter \textit{Property Rules}], and how that option might fit into the Calabresian scheme.

\textsuperscript{14} Michelman, \textit{Pollution as a Tort}, supra note 5, at 670. I have rearranged the order in which I stated the three variations in order to conform my numeration to that which \textit{The Cathedral} would later employ. \textit{See Calabresi & Melamed, The Cathedral}, supra note 2, at 115-16; \textit{infra} Table B1.
I did not say specifically what the remedial consequence would be of finding the defendant nonliable, but obviously I meant that any case brought against a nonliable defendant would be dismissed. I did mention that, on Calabresian principles concerned with allocative efficiency, any defendant's liability—whether to injunctions or to damages—normally would be releasable by plaintiffs and potential plaintiffs in freely bargained transactions. In my review, I tried to bring to bear on the choice among my three alternatives—case dismissed, releasable liability to injunction, releasable liability to damages—the full array of Calabresian categories and analyses: primary versus secondary versus tertiary costs, general versus specific deterrence, collectivized versus decentralized assessments of costs, cheapest cost avoider versus best briber; in short, the whole shebang.

Now I have to pick up a second strand of the story. My review appeared in 1971, and shortly thereafter I again got a letter from an interested reader. This time, the letter was not from Guido Calabresi, it was from Richard Posner, with whose own review of Guido's book—it had come out before my review was done—mine had expressed some disagreement. I haven't tried to recover the details, but Professor Posner (as he then was) and I got launched into an exchange of letters that went on for three or four rounds, with carbon copies (remember them?) going to Guido. At some point, Guido wrote a letter to both of us commenting on our exchange.

Recently, I was able to exhume my copy of Guido's letter from long-neglected files buried in a sub-basement area of the Harvard Law School. I went digging for the letter because of something I thought I remembered it contained. And, yes, just as I thought, Guido's letter does include a comment about my review's array of three "rules dealing with nuisance law." This was June of 1971. Guido wrote that I was wrong about the number three. He declared, and I quote: "There have to be four and they are, in theory, completely symmetrical." Guido added that this claim would be the subject of an article he

15. See Michelman, Pollution as a Tort, supra note 5, at 670. In the present Essay, I set aside possible "inalienability rules," see Calabresi & Melamed, The Cathedral, supra note 2, at 1111-15, for a reason soon to be mentioned. See infra note 22.
17. See Michelman, Pollution as a Tort, supra note 5, at 660 & n.25 (taking issue with Posner's objection to Calabresi's inattention to the matter of empirical support for his theoretical analysis).
18. Letter from Guido Calabresi to Richard Posner and Frank Michelman 2 (June 7, 1971) (quoted with the kind permission of Judge Guido Calabresi) (on file with author).
19. Id. Guido went on to say that "on certain assumptions of perfect cost knowledge, the four reduce to two." Id.
planned to work on over the coming summer. Needless to say, that
turned out to be the article we now know as The Cathedral, which came
out in the Harvard Law Review in April of 1972. Twenty-five years later,
speaking at a retrospect held at the Yale Law School, Guido said that
my review of The Costs of Accidents “gave inspiration” to The Cathedral.20
That certainly is a thought pleasing to me, but I must say that our
correspondence is evidence that the idea had taken root in Guido’s
mind at some time prior to my review’s appearance.

II. FROM THREE TO FIVE

A. Setting the Table

So much for reminiscence. It is time to get serious. I have a bone
to pick with Calabresi and Melamed over the number of possible “lia-
bility decisions” (my term) or “rules” (their term) for private nuisance
litigation.

Guido had written to me that my number, three, was wrong.
There have to be four, he said, calling symmetry to his support. From
The Cathedral, we can surmise that the thought guiding this remark
was one of a fourfold table, two columns intersected by two rows.21
The columns would come to be headed “Plaintiff’s Entitlement” and
“Defendant’s Entitlement.” The rows would come to be headed “Pro-
tected by a Property Rule” and “Protected by a Liability Rule.”22 Two
times two is four, not three. Nevertheless, on reflection (a tad be-
lated, I admit), I have come to believe that my naïve “three” was closer
to the truth than The Cathedral’s scientific “four.” Explaining why is
the task of what follows.

21. In a recent article, Henry Smith describes Calabresi and Melamed’s positing of
what they called the “fourth rule” (the one they added to my three) as an act of “purely
theoretical prediction.” See Henry E. Smith, Exclusion and Property Rules in the Law of Nui-
sance, 90 VA. L. Rev. 965, 1009 (2004) [hereinafter Exclusion]. Smith means it was an inference
from a conceptual model: four cells, four rules.
22. I am sidestepping “Protected by an Inalienability Rule” because doing so is already
implicit in Guido’s number, four. See also Calabresi & Melamed, The Cathedral, supra note 2,
at 1106 (noting the tight interdependence of property rules and liability rules and the
separate discussability of inalienability). In The Cathedral, Calabresi and Melamed credited
my review of The Costs of Accidents with having noticed the inalienability-rule possibility. See
id. at 1116 n.53 (citing Michelman, Pollution as a Tort, supra note 5, at 684). From today’s
distance, their acknowledgment looks generous to me. See Michelman, Pollution as a Tort,
supra note 5, at 684 (speculating that “extreme-sounding” rules, such as “all pollution
should be stopped, . . . irrespective of how the measurable costs of compliance compare
with those of non-compliance” might be justified in economic terms as a way to take ac-
count of a real social cost of uncertainty).
Immediately, I need to state with greatest care what I mean by "closer to the truth." I mean closer to the immanent truth of the Cathedral construction as originally offered and taken on its own terms; taken, that is, as an expression of a particular "way of looking at . . . legal problems,"23 filtered through a particular policy-analytic screen, that of Calabresi and Melamed, circa 1972. What follows— I must emphasize—is written in a time warp, virtually walled off from thirty-odd years' worth of follow-on work by gifted scholars proposing extensions, elaborations, refinements, corrections, and critiques of the original model's simple schematizations and supporting, policy-analytic argumentation.24 Calabresi and Melamed framed the original construction as they did in order to convey the basics of their policy-analytic outlook in a simple and transparent manner.25 What recently has struck me, though, is that their patented, fourfold framing cannot logically be maintained.26 By that statement I do not mean merely that the initial framing overlooks or suppresses some additional number of logically possible (and maybe practically significant) elementary "rules" for the assignment and form of protection of entitlements, as later writers have contended.27 I mean something stronger: that The Cathedral's simple, two-by-two frame, taken on its own terms, harbors a contradiction—is, in fact, incoherent.

The defect, I shall go on to suggest, is curable. The table can be fixed by redrawing it so as to divide cleanly two questions—those of "liability" assignment and "entitlement" assignment—that the original, fourfold frame dumps together. Thus, a modest fix-up to The Cathedral's simple model is sufficient to restore its consistency and

23. See Calabresi & Melamed, The Cathedral, supra note 2, at 1089 n.2.
24. A scattering of such works are mentioned below. More extensive references to leading works in the field can be found in a pair of recent contributions by Henry Smith. See generally Smith, Exclusion, supra note 21; Smith, Property Rules, supra note 13. I proceed thus, in studied disregard of most of latter-day Cathedral-science, not because I make any assumption that the architecture envisioned by Calabresi and Melamed cannot be improved upon, but rather because my purposes here—to disclose a logical defect in their scheme and to make apparent something unexpected about the scheme's own latent structure once the defect is cleared—require that I treat the scheme from a vantage point as close to identical with theirs as I can make it.
25. See Calabresi, Simple Virtues, supra note 20, at 2202 (explaining the simplicity of the model as an invitation to comprehension).
coherence. But—and here is my bottom line—when the needed repairs are made and the “true” table stands revealed, its key, organizing number is seen to be not four (or two\textsuperscript{28}) but rather three.

I begin with a reprise of The Cathedral's cogent case for adding a fourth rule to my three. Next, I get my critique rolling by raising the bid by one, to five. I expect you will see how disruptive a bid of five could be. If I can show you five rules, none of them rejectable without contradiction by Calabresi and Melamed, then the implicit theorem of The Cathedral, that an entire world of relevant possibilities can be captured by cross-hatching two, dichotomous dimensions—Which party has the entitlement? What is the form of its protection?—must be fundamentally incomplete.

B. Getting to Four

Picture, then, The Cathedral's fourfold table. By the way, I should mention that the table is only implicit in the Cathedral article; no graphic table appears there (typewriters, remember). But picture the table: two columns, entitlement in \textit{P} for plaintiff, entitlement in \textit{D} for defendant; two rows, entitlement protected by a property rule, entitlement protected by a liability rule. Here is how I picture it:

<table>
<thead>
<tr>
<th>Plaintiff's Entitlement</th>
<th>Defendant's Entitlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protected by a Property Rule</td>
<td>\textit{P} gets injunction vs. spillover activity on \textit{D}'s land (Rule 1)</td>
</tr>
<tr>
<td>Protected by a Liability Rule</td>
<td>\textit{D} pays \textit{P} damages for spillover activity on \textit{D}'s land (Rule 2)</td>
</tr>
<tr>
<td>\textit{P}'s case against \textit{D} dismissed (Rule 3)</td>
<td></td>
</tr>
</tbody>
</table>

TABLE B1

In speaking of an “entitlement” being either in \textit{P} or in \textit{D}, the Cathedral authors had in mind approximately what Wesley Hohfeld would have meant.\textsuperscript{29} To be more exact, their term covers the pair of advantageous “jural relations” that Hohfeld denominated “rights” (often nowadays called “claim-rights”) and “privileges.”\textsuperscript{30} In every liti-

\textsuperscript{28} See supra note 19.

\textsuperscript{29} See generally Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L.J. 16 (1913). According to Thomas W. Merrill & Henry E. Smith, What Happened to Property in Law and Economics?, 111 YALE L.J. 357, 380 (2001), The Cathedral uses “entitlement” to name “the conception of property that is implicit in Coase”—by which they mean a “bundle-of-rights” conception that they trace to Hohfeld. See id. at 365-66.

\textsuperscript{30} See Hohfeld, supra note 29, at 30-33; Calabresi & Melamed, The Cathedral, supra note 2, at 1090 ("The first issue which must be faced by any legal system is . . . the problem of
gated case, some more-or-less particularly described kind of conduct on the defendant's part is at issue. For example, in a given case, the disputed conduct might be emissions of volumes of sooty smoke that interfere substantially with neighboring land uses. For convenience, we'll give the targeted conduct the name "x-pollution." The expression "x-pollution" designates emissions of smoke of a certain character, at levels of frequency and intensity exceeding certain ceilings, occurring on land owned by \( D \) and resulting in effects of a certain, detrimental character on land owned by others. Once a dispute over this category of land-linked activity arrives in court, the court, inescapably, has to assign the relevant entitlement either to \( D \) or, alternatively, to each of a number of nearby landowners; call them "\( P \)."

In what follows, bearing in mind that there may be quite a number of aggrieved neighbors, I am going to refer to them by the singular name "\( P \)."

Suppose the relevant entitlement over x-pollution is assigned to \( P \). It will have the form, then, of a Hohfeldian claim-right, held by \( P \) against \( D \), that \( D \) not conduct on his land (or responsibly permit others to conduct on his land) the indexed category of activity. This means that if \( D \) conducts such activity, he has committed a legally con-

The entitlement to make noise versus the entitlement to have silence, the entitlement to pollute versus the entitlement to breathe clean air . . . are the first order of legal decisions."); Smith, *Property Rules*, supra note 13, at 1793 (speaking of "the sense [in which] the Coasean approach as developed in the liability rule literature follows in Hohfeld's footsteps"). Some reservations are called for. First, Calabresi and Melamed never expressly invoked the Hohfeldian tradition. Second, Calabresi and Melamed’s lingo of "protected by" is non-Hohfeldian. Strict followers of Hohfeld would be barred from talking that talk. Expressions such as "protected by a liability [property, inalienability] rule" are not parts of the elementary Hohfeldian lexicon, which is supposed to be sufficient to the description of all legal relations. *See* Hohfeld, supra note 29, at 19-20 (tendering an analysis of "jural relations in general," of "the basic conceptions of the law," and of "the legal elements that enter into all types of jural interests"). Analysts strictly committed to the Hohfeldian game, and wishing to mention the various legal relations designated by "protected by a ___ rule" in terms of that game, presumably would try to do it by attributing to the involved parties apt concatenations of "powers," "liabilities," "immunities," and "disabilities," but it is not clear that they could succeed. *See* Morris, supra note 27, at 842 (maintaining that "property," "liability," and "inalienability" rules name three different classes of entitlements, as opposed to three different ways of modifying one class of entitlements); Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 Yale L.J. 1335, 1344-46, 1369 (1986) ("In the economic conception of them, property and liability rules protect rights. We have argued that they do not, that instead they specify the content of rights over the transactional domain."); Smith, *Property Rules*, supra note 13, at 1749 ("Property rules and liability rules are properly thought of as different ways of defining the scope of entitlements in the domain of transfer, rather than simply as 'remedies' protecting entitlements.").

31. *See* Calabresi & Melamed, *The Cathedral*, supra note 2, at 1100 ("[A]n entitlement to a good or to its converse is essentially inevitable.").
sequential wrong against $P$. If, per contra, the relevant entitlement is assigned to $D$, then its form will be that of a Hohfeldian privilege on $D$'s part to conduct x-pollution on his land, meaning that his doing so is not a legally consequential wrong to any $P$ in the picture.  

Notice, next, that either of those two possible, initial assignments of the entitlement is convertible into the other by exchange. If $P$ initially is assigned a claim-right over x-pollution, $P$ can grant $D$ an "affirmative easement" to x-pollute, which would amount to a replacement of $P$'s claim-right with $D$'s congruent privilege. If $D$ is initially assigned a privilege over x-pollution, $D$ could grant $P$ a restrictive "real covenant" (or "covenant running with the land") investing $P$ with access to a judicial remedy in case of x-pollution occurrent on $D$'s land, thus replacing $D$'s privilege with $P$'s congruent claim-right. In the vocabulary of *The Cathedral*, the initially assigned entitlement is protected by a property rule if its conversion by transfer can be brought about only on terms, if any, that both parties agree to; in other words, the initial assignee of the entitlement can name his price for reassignment. The initially assigned entitlement is protected by a liability rule if the initially non-entitled party can effectively gain the entitlement, regardless of the consent of the initially entitled party, by paying an amount of compensation determined by a court or similar arbiter. (Think of eminent domain.) Thus, if $P$ holds the entitlement initially as a claim-right, and it is protected by a property rule, that means that $P$ can secure injunctions against x-pollution occurrent on $D$'s land, unless and until $P$ releases the entitlement to $D$ in exchange for a price offer from $D$ that is acceptable to $P$. If $P$'s claim-right is protected only by a liability rule, $P$ will be restricted to actions for damages—in effect, freeing $D$ to x-pollute at a price that the court decides will compensate $P$ adequately for the resulting burden or loss. If, conversely, $D$ holds the entitlement initially as a privilege, $P$ simply has no cause of action against $D$; so if $P$ wants relief against $D$'s x-

32. Commentators have sometimes construed *The Cathedral*’s notion of a property-rule-protected entitlement in $D$ to encompass a claim-right of $D$ against $P$. See Coleman & Kraus, *supra* note 30, at 1338 ("If the court decides in favor of the polluter, it may protect its right to pollute by a property rule, . . . which enjoins [P] from reducing [D's] pollution without first securing [D's] consent."). I have found it more natural to construe their notion of $D$'s entitlement-protected-by-a-property-rule as a naked privilege vis-à-vis $P$. Accord Smith, *Exclusion*, *supra* note 21, at 1008-09. This point will be significant below. See *infra* text following note 45; text accompanying and following note 61.

33. See, e.g., *JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY* 170-71 (2001).

34. See, e.g., *id*.


36. *Id*.

37. *See id.* at 1093, 1106-08 (using eminent domain to exemplify liability rules).
polluting, P will have to buy that relief from D at a mutually acceptable price.

That was as far as the analysis went in my review of *The Costs of Accidents*. Three possibilities: P gets an injunction against x-pollution on D's land, P gets damages for x-pollution on D's land, P's suit against D is dismissed. But Calabresi and Melamed, having set up their two-by-two table, were able to point out that something must be missing.

<table>
<thead>
<tr>
<th>Plaintiff's Entitlement</th>
<th>Defendant's Entitlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protected by a Property Rule</td>
<td>injunction vs. x-pollution on D's land (Rule 1)</td>
</tr>
<tr>
<td>Protected by a Liability Rule</td>
<td>damages for x-pollution on D's land (Rule 2)</td>
</tr>
<tr>
<td></td>
<td>case dismissed (Rule 3)</td>
</tr>
</tbody>
</table>

[something missing]

TABLE B2

"Missing," they said, "is a fourth rule representing an entitlement in [D] to [x-pollute], but an entitlement which is protected only by a liability rule."

What this would mean in practice, they said, is that P can "stop" x-pollution on D's land, but only on condition that P pays to D an amount sufficient to compensate D for any resulting wealth loss, that amount to be determined by the court—a form of remedy that became known to the literature as a "compensated injunction."

38. See supra Table A.
40. Id.
41. Id.
42. E.g., Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681, 738 & n.202 (1973); see Smith, *Exclusion*, supra note 21, at 1009 & n.137 (crediting Ellickson with introducing the term "compensated injunction"). In their statements of Rule 4 in *The Cathedral*, Calabresi and Melamed did not speak specifically of a compensated injunction, but they did, with seeming equivalence, speak of empowering plaintiffs to "stop" defendants from polluting. Calabresi & Melamed, *The Cathedral*, supra note 2, at 1116, 1120. In his 1997 recollection, Douglas Melamed reported that "Rule 4 is alive and well—at least in Washington." A. Douglas Melamed, *Remarks: A Public Law Perspective*, 106 Yale L.J. 2209, 2209 (1997). He meant that Rule-4-type solutions could be found in public-law settings in which statutes and administrative rulings stand in for common-law adjudication and the government stands in for private plaintiffs. All of the instances adduced by Melamed involved the government receiving from the private actor, in return for compensation flowing from the government to the actor, a permanent stoppage of the actor's targeted activity. See id. at 2209-10. My reason for stressing this point will appear soon below.
Plaintiff’s Entitlement | Defendant’s Entitlement
---|---
Protected by a Property Rule | injunction against x-pollution on D’s land (Rule 1)
case dismissed (Rule 3)
Protected by a Liability Rule | damages for x-pollution on D’s land (Rule 2)
compensated injunction (Rule 4)

| TABLE B3 |

C. Getting to Five

I put it to you that, once we have come this far, it is obvious that something still is missing. Here we are, in the lower-right cell of the fourfold table: entitlement in D, protected by a liability rule. “Protected by a liability rule” means not protected by a property rule. It means that D may be required to put up with the negation of his entitlement—he may be required to put up with the conversion of his erstwhile Hohfeldian privilege to x-pollute, into P’s claim-right against x-pollution—in exchange for judicially assessed compensation from P. But notice that, by Calabresi and Melamed’s own analysis, such a negation of privilege could imply either of two forms of future judicial remediation against D’s possible x-pollution. The court could negate D’s privilege by placing D under pain of contempt sanctions for future emissions, in other words by issuing a permanent injunction against D’s future emissions for the issuance of which P will have to compensate D in the amount set by the court. That is Calabresi and Melamed’s Rule 4 as widely understood. But the court also could negate D’s privilege by skipping the injunction and, instead, stripping D of his immunity against future suits for damages by P, for which act of judicial stripping P will have to compensate D ex ante for expected, resulting net-worth loss, in a lump-sum amount to be assessed by the court. This is Michelman’s Rule 5.

43. Cf. Krier & Schwab, supra note 26, at 468 (“[R]ule four is paradoxical in that it reintroduces the very problem it is meant to solve.”).
44. Rule 5 is no more readily dismissible as merely theoretical than Rule 4 is. Calabresi and Melamed have argued that Rule 4 will fit some situations aptly, and will sometimes be approximated by public-law solutions that break the mold of the private lawsuit. See Calabresi & Melamed, The Cathedral, supra note 2, at 1117, 1122-23 & n.62; Calabresi, Simple Virtues, supra note 20, at 2204; Melamed, supra note 42, at 2209-10. Just so may I argue that Rule 5 demands recognition as a genuine possibility that conceivably might have its uses. I will mention here one fairly obvious, Calabresian sort of reason for considering that a compensated judicial negation of D’s initially assigned privilege may sometimes be better cast in the form of exposing D to a series of future damages judgments or compensatory fines than in the form of a releasable, absolute ban against emissions. As between P and D, the court may have not a clue, ex ante, about which will prove to be the cheaper cost avoider, and exposing D to a future stream of damages liabilities may be, in some circum-
THERE HAVE TO BE FOUR

Plaintiffs Entitlement

| Protected by a Property Rule | injunction against x-pollution on D's land (Rule 1) |
| Protected by a Liability Rule | damages for x-pollution on D's land (Rule 2) |

Defendant's Entitlement

case dismissed (Rule 3)

compensated restrictive real covenant

specifically enforced (Rule 4)

enforced by damages (Rule 5)

TABLE C

Both Calabresi and Melamed's Rule 4 and Michelman's Rule 5 contemplate a forced sale by D to P, at a judicially determined price, of a servitude or "restrictive real covenant" barring x-pollution on D's land. The difference is that Rule 4 contemplates a specifically enforceable covenant, whereas Rule 5 contemplates a covenant enforceable only by collection of damages for breach. Calabresi and Melamed are committed to count these two variations as two "rules," not just one. They count for two when they appear on the "Plaintiff's Entitlement" side of the ledger, so how can they not count for two when they appear on the "Defendant's Entitlement" side?

III. GETTING TO SIX

A. Diagnosis: Conflation of Entitlement Assignment with Liability Assignment

We are left, it seems, with an asymmetrical result. Pace Calabresi and Melamed, it appears that P's possible claim-right entitlement and D's conversely possible privilege entitlement are not symmetrical with respect to the number of their possible remedial entailments. In the world of The Cathedral, possible remedial entailments of "P has a claim-right" (we are oversimplifying here, but harmlessly) are of two types: specific and compensatory, injunction and damages. By contrast, the remedial entailment of "D has a privilege" is one and one only: case dismissed. (You will notice, please, that two plus one is three, not four.)

stances, the choice that will economize on the sum of information costs, transaction costs, and their correlative error costs. Cf. Calabresi & Melamed, The Cathedral, supra note 2, at 1120-21 ("[T]he assessment of the objective damage to Taney from [forgoing] his pollution may be cheap and so might the assessment of the relative benefits to all Marshalls of such freedom from pollution. But the opposite may also be the case.").

45. See Smith, Exclusion, supra note 21, at 1009, 1012-13 (pointing out how the alignment of P's and D's entitlements in nuisance cases is "asymmetric," contrary to Calabresi and Melamed's claim of symmetry).
Something has gone wrong with the table. Calabresi and Melamed, it seems, did not notice how their Rule 4 attacks the table’s ostensible principle of left/right division, according to which the left side is reserved for solutions in which plaintiff has the entitlement and the right side is for solutions in which defendant has the entitlement. The \textit{Cathedral} authors never mentioned that their Rule 4 is a mutant form—involving, as it does, a transformation of D’s privilege into P’s claim-right—that opens the right-hand side of the table to invasion by the left-hand side.\footnote{Cf. Krier \& Schwab, supra note 26, at 470 (“Rule four entails what aptly can be called reverse damages, since in such cases nominal plaintiffs end up liable to nominal defendants.”).}

To help us gain a clearer grip on what is going on here, I want to introduce a bit of Calabresian terminology from \textit{The Costs of Accidents}. In that book, Calabresi used the expression “is liable”—as in “defendant is liable” and “plaintiff is liable”—in an illuminating way. To be “liable” there meant to be the one of the interacting parties who will be required to bear the costs of the interaction between them that is the subject of the lawsuit. In this supple terminology, plaintiffs as well as defendants can be held liable.\footnote{See, e.g., \textit{The Costs of Accidents}, supra note 1, at 137 (“If pedestrians [injured by cars that hit them] were held liable, they would bear $100 in accident costs.”).} A plaintiff always is a party to an interaction who will bear certain costs of the interaction if he cannot succeed in shifting them to a defendant by the means of a lawsuit. Accordingly, a court imposes liability on a plaintiff by the simple means of denying that plaintiff any civil legal remedy against any defendant, thereby leaving the costs on the plaintiff, where they fell.

\textit{The Costs of Accidents} considers at length, and \textit{The Cathedral} treats more briefly, the sorts of reasons a court might have for deciding that a particular party or parties, out of two or more plausible contenders, should be the one or ones to be held liable in this cost-bearing sense of the term. In no case, of course, is it possible for a court, or the law, simply to avoid this choice.\footnote{See Calabresi \& Melamed, \textit{The Cathedral}, supra note 2, at 1091 (“When a loss is left where it falls in an auto accident, it is not because God so ordained it. Rather it is because the state has granted the injurer an entitlement to be free of liability . . . .”).} Among the possibly decisive considerations for casting it one way or the other are moralistic reasons of distributive or corrective justice, including reasons of responsibility and fault.\footnote{See id. at 1098 \& n.21 (distinguishing between “distributive” and “corrective” justice and treating both as falling under a broader head of distributional “goals” or “concerns”).} However, the list of possibly decisive considerations does not end there—nor does it really even begin there in the \textit{Cathedral} view. \textit{The Cathedral} teaches that judges concerned solely with allocative effi-
ciency can always derive from that aim a nonarbitrary basis for assignment of cost-bearing responsibilities among parties to various classes of costly interactions. Efficiency-focused considerations of "general deterrence," 50 loss spreading, 51 and minimization of administrative costs, in some combination, can always be summoned to guide and to explain such judicial choices. 52 Such choices, therefore, can always be defended as reasoned or nonarbitrary without any need to bring in extra-economic considerations of justice. 53 Even granting that distributional and "other justice" factors 54 demand attention in their own right—and The Cathedral's view is that, inevitably, they do 55—the fact remains that efficiency considerations will always be sufficient to decide liability assignments, as a default. The result is that, given any instance of a judicial assignment of cost-bearing liability to P or to D, we as observers may be quite unable to say with certainty whether that assignment is based strictly on a judicial calculus of efficiency, or is based strictly on judicium perceived demands of a justice beyond efficiency, or is based on some conjunction of the two.

For purposes of my argument here, it does not matter. All that matters is a point that I am not the first to make, to wit: Judicial assignments of liability—regardless of whether driven by efficiency concerns, by distributional concerns, or by "other justice" concerns—are fully detachable from judicial assignments of entitlement going forward in time from the date of the judgment. 56 As we have seen, the famous Rule 4 proves the point. Rule 4 vests the contested entitle-

50. See The Costs of Accidents, supra note 1, at 69 (using the term "general deterrence" to denote the disciplinary effect on harm-producing activities of forcing people to choose between (a) engaging in such activities and bearing the resultant costs, and (b) avoiding the costs by avoiding the activity—in other words, the array of methods represented by widely applicable tort doctrines of strict liability, negligence liability, contributory and comparative negligence defenses, etc.).

51. See id. at 39 (introducing reasons for believing that costs often can be lightened by spreading them or by funneling them to those with relatively greater financial resources).

52. If other efficiency-based considerations are indecisive, efficiency then favors leaving liability where it fell, on the plaintiff, because shifting liability via litigation is costly. See Calabresi & Melamed, The Cathedral, supra note 2, at 1093.

53. See id. at 1096-97 (summarizing a series of five efficiency-focused guidelines for setting entitlements in accident law); id. at 1118-21 (showing how, in the pollution context, a choice among Rules 1-4 may be fully determined by efficiency considerations, prior to any "introduction of distributional considerations").

54. See id. at 1102-05 (raising and analyzing the possibility that there are valid considerations bearing on assignments of entitlement and liability that are distinct from both efficiency and distributional concerns).

55. See id. at 1098 ("Difficult as wealth distribution preferences are to analyze, it should be obvious that they play a crucial role in the setting of entitlements.").

56. See Ayres & Goldbart, supra note 27, at 8-9 (emphasizing that judges can "decouple" allocative and distributive goals); Krier & Schwab, supra note 26, at 467 (noting how Rule 4
ment in the plaintiff as a claim-right, even as the Rule's attendant demand for compensation of the defendant by the plaintiff is explicable only in terms of a judicial determination that the plaintiff, not the defendant, is the one who should be held liable to bear the costs of their interaction. Rule 4, in other words, is a case of entitlement assignment decidedly detached from liability assignment.

In setting up *The Cathedral*, Calabresi and Melamed used the language of entitlement-assignment to name the columns in their table. I am making bold to suggest that this was a slip of the pen and what they really were thinking about was liability assignment. That would explain why they did not notice how the insertion of Rule 4 in the lower-right cell contradicts the nominal reservation of the right-hand side for "entitlement in D." The contradiction evaporates—although you may glimpse another difficulty arising in its place—\textsuperscript{57}—if we let Column Left be for "D is liable, so P is not" while Column Right is for "P is liable, so D is not" (it being assumed that one or the other of P and D is the one who, for some good and sufficient reason, should be made to shoulder the costs).\textsuperscript{58}

<table>
<thead>
<tr>
<th>D's Liability =</th>
<th>P's Liability =</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protected by a Property Rule</td>
<td>Protected by a Liability Rule</td>
</tr>
<tr>
<td>injunction against x-pollution on D's land (Rule 1)</td>
<td>damages for x-pollution on D's land (Rule 2)</td>
</tr>
<tr>
<td>case dismissed (Rule 3)</td>
<td>compensated restrictive real covenant specifically enforced (Rule 4)</td>
</tr>
</tbody>
</table>

\textsuperscript{57} See infra text following Table E1.

\textsuperscript{58} Making this substitution has the further advantage of idling the objection that liability rules impair entitlements rather than "protect" them, insofar as the notion of entitlement connotes autonomous disposition over the fate of an asset. See Morris, *supra* note 27, at 842 & n.51 (citing Coleman & Kraus, *supra* note 30, at 1338-39).
costs—it will have to assign a relevant entitlement to $P$ in the form of a claim-right. Lacking a claim-right, $P$ would have no legal footing upon which to approach a court for cost-shifting. The court still must choose, though, between protecting $P$'s claim-right by a property rule or by a liability rule. It can give $P$ an injunction or it can restrict her to damages. Since the court can do either, it must choose between these available alternatives, on the basis of some set of criteria the court takes to be controlling—just as the court must already have assigned cost-bearing liability to $D$ on the basis of some supposedly applicable set of criteria.59

Now suppose the set of criteria we regard as controlling (it does not matter what they are) tells us that $P$ is the one who should bear the costs of the parties’ interaction—in other words, that $D$ ought to be held nonliable. The court may carry out that judgment by assigning the relevant entitlement to $D$, as a Hohfeldian privilege. However, it doesn’t have to do it that way, and that is the insight represented by Calabresi and Melamed’s Rule 4. The court can hold $D$ nonliable and $P$ liable even while leaving $P$ invested with a claim-right for the future (thus denying $D$ the correlative privilege), as long as it makes $P$ compensate $D$ in cash for $D$'s resulting loss. If, however, the latter alternative is chosen, then we are back to the situation where a further choice has to be made, again on the basis of some adequately decisive criterion, about whether $P$'s bought-and-paid-for claim-right entitlement is to be one that’s specifically enforceable or rather one that’s enforceable only by suits for damages.

Calabresi and Melamed, I conclude, saw symmetry where (for the moment) I have detected asymmetry because, in constructing their table they did not attend sufficiently to the distinctness of two questions, those of liability placement and entitlement placement. Overlooking the deviance of Rule 4, they assumed that entitlement follows nonliability. I have been suggesting that, while this indeed is so when the party held nonliable is the plaintiff (meaning the one who will be left holding the bag if there is no lawsuit), it is not so when the party held nonliable is the defendant. When liability is assigned to the plaintiff, then either an entitlement in the form of a privilege is assigned to the defendant with only one attendant possible form of remedy—dismissal of the plaintiff’s case—or a counter-entitlement in the form of a claim-right is assigned to the plaintiff who, as the party being held liable, is required to make the defendant financially whole by a cash transfer. Either of those choices carries out a decision that the

59. See supra text accompanying notes 47-55.
plaintiff ought to be the cost-bearer.60 The choices differ, though, in that one of them leaves P with a claim-right heading into the future (although D's past conduct is treated as privileged), while the other leaves D with a privilege for all time.61 The apparent result is that there are two possible entitlement/remedy packages when defendants are held liable, but three possible packages when plaintiffs are held liable. Two plus three makes five.

B. Six

Five is prime, a defiantly asymmetrical number. We cannot get back to four. If we want to reestablish symmetry, we shall have to raise the bid to six. And, folks, I am here to tell you that there have to be six. A properly articulated table shows this to be so:

<table>
<thead>
<tr>
<th>P's Claim-Right (Entitlement in P)</th>
<th>D's Liability = P's Nonliability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protected by a Property Rule</td>
<td>injunction against x-pollution on D's land (Rule 1)</td>
</tr>
<tr>
<td>Protected by a Liability Rule</td>
<td>damages for x-pollution on D's land (Rule 2)</td>
</tr>
<tr>
<td>D's Privilege (Entitlement in D)</td>
<td>[something missing]</td>
</tr>
<tr>
<td>case dismissed (Rule 3)</td>
<td></td>
</tr>
</tbody>
</table>

Table E1

How did we get from Table D to Table E1? The answer is that something is screwy in Table D, and Table E1 repairs the defect. The trouble with Table D is that it forces us into expressions such as "D is nonliable protected by a property rule," or "P is nonliable protected by a liability rule," which make no clear sense. "Protection" of these

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60. No doubt, there will be inevitable inaccuracies of measurement of the compensation required to make D whole in case the controlling considerations dictate assignment of both the cost burden and the entitlement to P. The fact that judicially assessed compensation can only be approximately accurate does not mean that its award fails to carry out a considered decision to place cost-bearing liability on P, not D. Cf. Calabresi & Melamed, The Cathedral, supra note 2, at 1108 (explaining that "benefits taxes" can be justified when the case is that the taxes "do not accurately measure each individual's desire for the benefit," but "the market alternative seems worse").

61. See Krier & Schwab, supra note 26, at 446 ("From the standpoint of efficiency, a judge should (if possible) assign the entitlement . . . such that it ends up in the hands of that party . . . who values it most (or can do without it at least cost). From the standpoint of justice, the judge should assign the entitlement such that it starts out in the hands of the party who is most deserving in light of the applicable justice norm . . . .")
kinds is attachable only to Hohfeldian entitlements of a certain class, namely, the class of claim-rights, and we have seen that the choice of entitlement assignments is detachable from the choice of liability assignments. Our task, then, is to reconstruct the table in a form that conveys graphically the detachability of each of the three sets of choices that Cathedral-style policy analysis requires: (1) the choice of which party bears the cost burden ("is liable"); (2) the choice of which party is to have the entitlement going forward in time from the close of the lawsuit (P's claim-right or D's privilege); and (3) in case, but only in case, choice (2) is for P's claim-right, the choice between protecting that claim-right by a property rule and protecting it by a liability rule. Thus, Table E1.

But Table E1 reveals that something still is missing. There is no entry yet in the lower-left cell of what has now become a three-row-by-two-column, six-cell table. If we follow the deductive method of The Cathedral, we must "predict" a sixth rule to feed that cell.\(^{62}\) Now, what rule possible could do so? What rule could possibly deny P both a claim to stop the conduct of x-pollution of D's land and a claim to compensation from D for harms to be suffered in consequence of x-pollution conducted on D's land, and yet carry out a judgment that not P but D is the one who should shoulder the costs corresponding to those harms? Clued by The Cathedral's discovery of Rule 4, we can detect the answer, which is: judicial investment of D with a permanent, affirmative easement to x-pollute regardless of any resulting, future impairment of P's use and enjoyment of nearby land, for which D will be required now to pay to P a judicially assessed, compensatory sum of money.

<table>
<thead>
<tr>
<th>P's Claim-Right (Entitlement in P)</th>
<th>Protected by a Property Rule</th>
<th>injunction against x-pollution on D's land (Rule 1)</th>
<th>D's liability = P's nonliability</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Protected by a Liability Rule</td>
<td>damages for x-pollution on D's land (Rule 2)</td>
<td>compensated restrictive real covenant, specifically enforceable (Rule 4)</td>
</tr>
<tr>
<td>D's Privilege (Entitlement in D)</td>
<td>compensated affirmative easement (Rule 6)</td>
<td></td>
<td>compensated restrictive real covenant, damages for breach (Rule 5)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>P's liability = D's nonliability</th>
</tr>
</thead>
<tbody>
<tr>
<td>case dismissed (Rule 3)</td>
</tr>
</tbody>
</table>

**Table E2**

\(^{62}\) See supra note 21 and accompanying text.
But, you may ask, are there really six distinct rules here? What, in practice, is the difference between Rule 2 and Rule 6? Under both Rule 2 and Rule 6, D gets to x-pollute and P gets to be compensated by D for the resulting losses, in judicially determined amounts. Nevertheless, it proves useful to pry Rules 2 and 6 apart, as the sixfold Table E2 forces us to do. Doing so helps us see that “damages” (unmodified) is too gross a term for use in a Calabresian compilation of the arsenal of remedies available to private-law adjudicators in pollution cases where the liability (cost-bearing) decision goes against a polluter. Let us suppose the judge in such a case has rejected injunctive relief for the plaintiff, on allocative grounds learned from Calabresi and Melamed. Having done so, that allocation-minded judge still faces the choice between permanent and periodic damages. Rule 6 represents a solution in which D pays to P permanent (lump-sum) damages in exchange for a privilege to x-pollute of indefinite duration (i.e., an “easement in fee simple”), whereas Rule 2 represents a solution in which D’s future x-polluting is nonprivileged (although also non-enjoinable), and accordingly is exposed to an indefinite series of periodic, retrospective damages claims asserted by P. For a judge seeking, Calabresi-style, to economize on the sum of pollution costs, avoidance costs, transaction costs, and information costs, the choice between those two solutions quite evidently is one that demands attention.

63. See Calabresi & Melamed, The Cathedral, supra note 2, at 1106-07 (explaining and illustrating that use of a liability rule instead of a property rule may be beneficial because the liability rule overcomes prohibitive transaction costs of bargaining around a property rule).

64. For examples, consider the ditch easement, anti-checkerboard easement, and “easement by necessity” instances described and discussed by Smith, Property Rules, supra note 13, at 1737-38.

65. Of course, res judicata rules regarding claim-splitting will have to be shaped accordingly.

66. For example, Rule 2 solutions are facially less vulnerable than Rule 6 solutions—and to that extent less prone to being rejected in favor of a property-rule alternative—to the objection that, whereas property rules allow for “waiting and seeing” about currently undeveloped values that a nuisance-like affliction of land might impair, “liability rules share with market transactions the feature of settling up now,” thus requiring public valuations of the plaintiff’s asset now, even though “[t]he optimal time for this determination may be in the future.” Smith, Property Rules, supra note 13, at 1768.
IV. Three at Last!

Now allow me to propose one further permutation of the table:

<table>
<thead>
<tr>
<th></th>
<th>Entitlement Coupled to Nonliability</th>
<th>Entitlement Decoupled from Nonliability</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>P</strong>'s Claim-Right (Entitlement in <strong>P</strong>)</td>
<td>Protected by Property Rule</td>
<td>injunction against x-pollution on <strong>D</strong>'s land (Rule 1)</td>
</tr>
<tr>
<td></td>
<td>Protected by Liability Rule</td>
<td>pay-as-you-go damages for x-pollution on <strong>D</strong>'s land (Rule 2)</td>
</tr>
<tr>
<td><strong>D</strong>'s Privilege (Entitlement in <strong>D</strong>)</td>
<td>case dismissed (Rule 3)</td>
<td>lump-sum compensated easement (Rule 6)</td>
</tr>
</tbody>
</table>

**Table F**

This version clearly discloses the sense in which my initial bid of three rules is closer to the truth than Calabresi and Melamed's bid of four. Their fourth rule, it turns out, is a harbinger of a group of three (Rules 4, 5, and 6) that compose an exact match for my initial three. Each of the three rows of Table F covers one of three, basic remedial possibilities in a pollution case—two for when **P** holds the entitlement as a claim-right and one for when **D** holds the entitlement as a privilege. In each row, both of the two entries name or point to exactly the same remedial response when the next case comes to court. The sole difference between the two entries in any row is that right-hand entries cover cases of entitlements awarded to holders who simultaneously are being held liable for cost-bearing, whereas the left-hand entries cover cases of entitlements awarded to holders who simultaneously are being held nonliable.

When the dust has settled, therefore, I think the correct answer to the question posed by Calabresi and Melamed is "two matching sets of three rules, totaling to six."\(^{67}\)

Okay, but so what? In our traversal of the path from three to four (two times two) to five to six (two times three), what useful understanding has been gained? We have brought to the visible surface of the tabulation a choice between permanent and periodic damages that appears to merit notice by Cathedral-style policy analysis. Is that all? Does our armchair digging turn up anything deeper?

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4 and 5. See id. In effect, I am treating each of Rules 4, 5, and 6 as a placeholder for a package of four Rules—4(a), 4(b), 4(c), 4(d), etc.

67. Note that I have adduced six rules without any reference to "put-option" rules included in the sixfold table presented by Ayres & Goldbart, id. at 6.
I began by linking *The Cathedral* to Hohfeld,⁶⁸ even as I took note of a perception in prior scholarship of a mismatch between Cathedral-talk and Hohfeld-talk.⁶⁹ I want to end by noting how our work here confirms the perception and by suggesting a pragmatic explanation for the mismatch.

The world according to Hohfeld displays a relentlessly duple structure. Everything, really, is contained within two, similarly structured pairs of conversely advantaged positions: claim-right/privilege, power/immunity.⁷⁰ By assigning names to the negations or "opposites" of these four—no-right/duty, disability/liability—the Hohfeldian lexicon enables the construction of two, parallel, fourfold tables of "jural correlatives" and "jural opposites,"⁷¹ but these "opposites" are inessential. The two converse pairs of claim-right/privilege and power/immunity cover all the conceptual material this universe contains. In fact, to get really reductive about it, the Hohfeldian universe contains two substantive elements only—claim-right and power—considering that privilege can be derived from claim-right, and immunity from power (or, in either case, vice-versa) by purely formal operations of denial and negation.⁷² The Hohfeldian world, to repeat, is duple to the core.

In the view of it I have offered here, *The Cathedral*’s world is organized by threes, not twos. Its structure is triple, not duple. *The Cathedral*’s world thus is not only trans-Hohfeldian, in the sense that it churns up instrumental questions that Hohfeld-talk can handle only awkwardly at best,⁷³ it is non-Hohfeldian in the profounder sense that the two systems display radically disparate organizing structures. Behind this disparity, I suggest, lies an equally radical disparity in the respective cash-values or pragmatic cores of the two systems, to which their remarkable staying powers in our jurisprudential culture doubtless are attributable.

Hohfeld’s system works beautifully to lay bare the ineluctable component of policy choice in every possible legal decision. There

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⁶⁸. See supra text accompanying note 29.
⁶⁹. See supra note 30.
⁷⁰. In calling the positions "conversely advantaged," I mean that where one of the advantaged positions is, its converse is not. Claim-right contradicts congruent privilege, immunity contradicts congruent power.
⁷². "D holds a privilege as against P to x" is exactly equivalent to "P does not hold a claim-right against D that D not x." There is nothing that the term "privilege" enables us to say that cannot be said using only "claim-right" (or vice-versa), as long as we also have available the notions of denial and negation. The same relation of converse equivalence holds between "power" and "immunity."
⁷³. See supra note 30.
are no free lunches. To expand license ("privilege," "immunity") is, always and necessarily, to constrict security ("claim-right," "power"), and vice-versa. At every turn, bar none, the law-sayer, willy-nilly, sets one competing socioeconomic interest at relative advantage and another at relative disadvantage, when the choice might have been different had the policy preference (including justice) been different or had the related assessment of consequences been different. That is the lesson that latter-day consumers of Hohfeld especially cherish in his teaching.\(^4\) What is on one’s mind while doing Hohfeld is not how law most deftly can be deployed to serve a more-or-less complex set of posited societal goals (such as efficiency under certain constraints of distribution and "other justice"), it is how legal rule-choices inevitably favor and disfavor contending socioeconomic interests. The focus, accordingly, is entirely on winning and losing, not at all on the niceties of remedy. (*The Cathedral*'s conflation of liability placement with entitlement placement is what we may call its Hohfeldian slip.) Both the Hohfeldian system’s relentlessly duple construction and its opacity to remedy-talk are a reflection of what it is there to do.

The view from *The Cathedral* is different. From *The Cathedral* we view law, not in its aspect of a field of struggle for life,\(^7\) but rather in its aspect of a forum of public-minded, policy-analytic intelligence. In the view from *The Cathedral*, society’s aims are set (granting that their exact contours and means of implementation remain in many respects debatable): efficiency, fair distribution, "other justice." Law is a chief medium through which these aims are better and worse served. In their service, the law—inescapably—has the task of assigning cost-bearing responsibility ("liability") for problematic interactions of the sort presented by nuisance cases. But so, in such cases, has the law the task—the distinct task—of selecting the remedial consequence of future iterations of the contested activity. And regarding future iterations there are, in the view from *The Cathedral*, typically three basic remedial options, not two, from which the law must make its choice: (1) leaving the contested activity unscathed; (2) making repetitions unlawful, suppressible, and punishable acts ("injunction"); or (3) permitting repetitions while requiring compensatory payment for resulting harms to others ("damages"). Insofar as we thus lock in on

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\(^{74}\) E.g., Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 Wis. L. Rev. 975, 1058-59. Early consumers, too. See Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle For Life*, 27 Yale L.J. 779 (1918); Merrill & Smith, *supra* note 29, at 365 ("[T]he motivation behind the realists’ fascination with the bundle-of-rights conception was mainly political. They sought to undermine the notion that property is a natural right . . . .").

\(^{75}\) See Cook, *supra* note 74.
remedy (which is to say, on policy), and insofar as we thus think in terms of three, the Hohfeldian conceptual universe cannot contain our thought. Three into two won't go.