



Visiting Professor

Rights and Remedies in Private Law

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The Sigmund Gutter conference room (303) Trubowicz Building,
The Buchmann Faculty of Law



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Guido Calabresi and Douglas Melamed ("C&M") categorize remedies as either property rules, implemented by injunctions, or liability rules, implemented by damage awards. In the C&M scheme, the state should protect an entitlement with the remedy that has the lowest implementation cost. The C&M method thus decouples the question what the properties of an entitlement are from the question which remedy best protects the entitlement. We first show that decoupling is a mistake because a low cost remedy is not a remedy if it does not protect the entitlement at issue. Rather, a court must first ask which remedy is implied by the properties of the relevant entitlement. Implementation costs, at best, function as a constraint, ruling out theoretically best remedies only when they are too expensive to provide. Put simply, choosing a remedy is an interpretive rather than a policy making exercise. Also, C&M, as most analysts, consider existing entitlements. In contrast, we also consider a neglected issue in private law: how the decision maker should construct an entitlement. Here we show that when the state's goal is to encourage rights holders to maximize the value of their property, the state should construct entitlements such that property rule protection is best implied. But when the state's goal is to encourage rights holders to trade assets to higher valuing users, the state should construct entitlements such that liability rule protection is best implied. This distinction is consequential. For example, the goal in the market for corporate control is to facilitate the movement of corporate assets from lower valuing targets to higher valuing acquirers. Corporate law, however, protects the shareholders' entitlement with a property rule because it delegates the power to reject bids to a company's board. In the asymmetric information environment that characterizes corporate acquisitions, boards, as do sellers generally, reject too many ex ante efficient offers to purchase their companies. The resultant control market exchange inefficiency is large. Finally, we show, contrary to C&M's claim, that most productive property in modern economies is in fact liability rule rather than property rule protected. To summarize, our focus on how existing entitlements are best protected, how commercial entitlements should be constructed, and how society actually protects most entitlements together constitute an attempt, preliminary to be sure, to reconstruct the relation between rights and remedies in private law.

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