

ENVIRONMENTAL CONTAMINATION AS CONTINUING TRESPASS

BY

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Courts in the United States generally agree that environmental contamination can form the basis of a trespass action. However, there is disagreement amongst these courts as to how statutes of limitations should operate in such cases. Some courts, following the injury-based approach, hold that the mere presence of contaminants can constitute a “continuing trespass” that will not be barred by a general statute of limitations for tort actions. Other courts, following the conduct-based approach, hold that a continuing trespass cannot exist without continued tortious conduct of the kind that caused the contamination. This Comment begins with an exposition of the continuing trespass as contemplated by the Restatement and doctrinal writers. The Comment then analyzes the competing jurisprudential approaches to the problem of the continuing contamination trespass illustrated by opinions from the supreme courts of Colorado, Louisiana, and Massachusetts. At the conclusion of this comparative analysis, this Comment closes with the suggestion that the conduct-based approach, in general, provides the better rule.

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I. INTRODUCTION

Environmental contamination has been actionable as some form of trespass since the late medieval period.¹ Despite this ancient lineage, modern courts in the United States are still at odds over the proper application of the common law tort of trespass to cases arising from industrial pollution. This Comment addresses one narrow aspect of contemporary environmental contamination trespass law on which courts disagree: whether the continued presence or continued migration of contaminants onto a plaintiff's land can establish a "continuing trespass" that will perpetually renew the cause of action so that it will not be time-barred by a statute of limitations.

How statutes of limitations are applied to environmental contamination tort claims is a matter of significance for a number of reasons, including the difficulty of discovering the contamination, the great costs associated with environmental remediation, and the societal concern of abating pollution without inappropriately punishing industry. Indeed, even in this modern era of comprehensive federal regulation of environmental contamination, the viability of common law tort claims remains significant because the federal regulatory regimes have generally preserved private common law tort claims,² and a private plaintiff's recovery under federal statutes may be more limited than the recovery available in tort.³

Courts generally agree that environmental contamination may constitute the tort of trespass.⁴ The paradigmatic case, for the purposes of

¹ See SELDEN SOC'Y, SELECT CASES OF TRESPASS FROM THE KING'S COURTS 1307–1399, at lxxxii–lxxxiii (Morris S. Arnold ed., 1985) (noting trespass cases based on a defendant's deposit of "filth" on the plaintiff's land which contaminated the water supply and caused human illness).

² See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9659(h) (2006) (preserving common law tort claims under CERCLA).

³ See, e.g., Elizabeth Ann Coleman, Note, In re Hoery v. United States: *Compensating Homeowners for Loss of Property Value Due to Toxic Pollution Under the Continuing Tort Doctrine*, 16 VILL. ENVTL. L.J. 35, 36 (2005) (noting that CERCLA does not permit recovery for lost property values).

⁴ The focus of this Comment is indeed on the law of trespass, as opposed to other tort actions that might be applicable in environmental contamination cases, the most prominent of which being nuisance. In addressing environmental contamination cases, courts often conflate nuisance and trespass, using the same analysis to dispose of the action styled "trespass or nuisance." As will be seen, courts employing the injury-based approach to environmental contamination trespass cases, discussed *infra*, often buttress their analyses with reference to principles of nuisance law. The injury-based approach resembles, to a certain extent, the utility-balancing approach of traditional nuisance law. See *infra* Parts II, III.A; see also DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, 1 THE LAW OF TORTS § 53, at 141 (2d ed. 2011) ("Although courts sometimes speak of 'trespass' in the underground pollution cases, their actual approach

this Comment, is that of a defendant who has allowed a contaminant, like gasoline held in a leaking underground storage tank, to migrate onto a plaintiff's land. Courts disagree, however, as to whether the continued presence of contaminants on a plaintiff's land may constitute a continuing trespass that will not be time-barred by a statute of limitations.⁵ Courts also disagree as to whether the continued migration of contaminants onto a plaintiff's land, absent a continued tortious leak or dumping activity, will constitute a continuing trespass.⁶ The body of case law on these issues is somewhat confusing and not well developed,⁷ a situation that has not been helped by, and in part may be a result of, a lack of guidance from commentators.⁸

In sum, there are two primary competing jurisprudential approaches to the problem of the continuing contamination trespass: the conduct-based approach and the injury-based approach.⁹ Under the conduct-based approach, a trespass is only continuing where the tortfeasor perpetuates the injury through ongoing acts of trespass; the cause of action accrues upon the cessation of the tortious conduct.¹⁰ The conduct-based view considers the contaminated state of the land to be the continuing effect of prior wrongful conduct,¹¹ and the defendant's failure to remediate the contamination will

often more closely resembles the reasonableness approach of nuisance law in which the courts see maximum freedom for the legitimate interests of both landowners.”). Whether the conflation of nuisance and trespass in environmental contamination cases is wholly appropriate is beyond the scope of this Comment. Technically, a trespass action arises from an invasion of the interest in exclusive possession while a nuisance action arises from an interference with the interest in private use and enjoyment. RESTATEMENT (SECOND) OF TORTS § 821D cmt. d (1965). The two claims may coexist in the appropriate case, although that depends on the elements of both torts being met. *Id.* cmt. e.

⁵ Compare *Hogg v. Chevron USA, Inc.*, 45 So. 3d 991, 1007 (La. 2010) (holding that the continued presence of gasoline on the plaintiff's property did not constitute a continuing tort that suspended the running of prescription; further holding that the continued migration of contaminants onto plaintiff's property after leaking of underground tanks had ceased was similarly not a continuing trespass), with *Hoery v. United States*, 64 P.3d 214, 215 (Colo. 2003) (holding that the continued migration of toxic pollution onto, as well as the ongoing presence of that pollution on, a plaintiff's property constitutes a continuing trespass, even though the condition causing the pollution had ceased).

⁶ See cases cited *supra* note 5.

⁷ See *DOBBS ET AL.*, *supra* note 4, § 57, at 155–56 (“When it comes to hazardous wastes that fall on or percolate into the plaintiff's property, courts have considered the trespass to be temporary in some instances but permanent in others, or have left it to the defendant to demonstrate that it is not permanent.”).

⁸ See *Hoery*, 64 P.3d at 227 (Kourlis, J., dissenting) (“Admittedly, the majority is addressing this issue in something of a vacuum, with no clear guidance from other courts or from the commentators.”).

⁹ *Id.* at 224–25 (Kourlis, J. dissenting).

¹⁰ See, e.g., *Vill. of Milford v. K-H Holding Corp.*, 390 F.3d 926, 932–33 (6th Cir. 2004) (construing Michigan law); *Fed. Deposit Ins. Corp. v. Laidlaw Transit, Inc.*, 21 P.3d 344, 356 (Alaska 2001); *Hogg*, 45 So. 3d at 1006; *Carpenter v. Texaco, Inc.*, 646 N.E.2d 398, 399–400 (Mass. 1995); *Sexton v. City of Mason*, 883 N.E.2d 1013, 1019 (Ohio 2008); *Breiggar Props., L.C. v. H.E. Davis & Sons, Inc.*, 52 P.3d 1133, 1135–36 (Utah 2002).

¹¹ See *Vill. of Milford*, 390 F.3d at 933; *Hogg*, 45 So. 3d at 1006.

thus not constitute continuing tortious conduct.¹² Under the injury-based approach, the classification of a trespass as continuing depends on the nature of the injury to the land, and a continuing trespass may be found even in the absence of continuing tortious conduct of the kind that caused the contamination. Under this approach, if the trespass causes a “permanent” injury to the land, then the trespass is *not* continuing; if, however, the injury is “abatable,” then the trespass is a continuing one.¹³ This Comment will explore these competing jurisprudential approaches as they are illustrated in case law from the supreme courts of Colorado, Louisiana, and Massachusetts. While not exhaustive of all issues and arguments, the opinions from the Louisiana and Colorado supreme courts represent two of the most complete examinations of the continuing contamination trespass currently available.

Part II of this Comment is an exposition of continuing trespass law as the Restatement and doctrinal writers have dealt with it. As will be seen, the traditional continuing trespass doctrine described in Part II forms the basis for the injury-based approach. Part III compares opinions from the Louisiana, Colorado, and Massachusetts supreme courts in order to illustrate how similar factual circumstances will garner different results depending on the theoretical approach to the issue of continuing trespass taken by the reviewing court. Part IV highlights the relative virtues and vices of both the conduct-based and injury-based approaches. Finally, this Comment concludes with the suggestion that the conduct-based approach may provide the better rule.

II. BLACK LETTER CONTINUING TRESPASS: DOCTRINE AND THE RESTATEMENT

The traditional formulation of the tort of trespass is such that “one who intentionally enters or causes tangible entry upon the land in possession of another is a trespasser and liable for the tort of trespass, unless the entry is privileged or consented to.”¹⁴ While there are numerous qualifications and extensions of this general rule in the totality of the modern law of trespass,¹⁵ this Part will concentrate on the principles of trespass law that necessarily

¹² See *Hogg*, 45 So. 3d at 1006–07. *But see* *Taygeta Corp. v. Varian Assocs.*, 763 N.E.2d 1053, 1065 (Mass. 2002) (construing conduct-based rule in a manner that allows for continuing liability in the case of continued migration of contaminants on plaintiff’s land).

¹³ See, e.g., *Hoery*, 64 P.3d at 218–20; *Burley v. Burlington N. & Santa Fe Ry. Co.*, 273 P.3d 825, 839–42 (Mont. 2012); RESTATEMENT (SECOND) OF TORTS, § 161 cmt. b, § 162 cmt. e (1965). Note that some courts have found continuing trespasses without examining the nature of injury, apparently considering the mere presence of contaminants sufficient to establish a continuing trespass. See, e.g., *Bradley v. Am. Smelting & Ref. Co.*, 709 P.2d 782, 791 (Wash. 1985) (en banc) (finding that “the trespass continues until the intruding substance is removed” without distinguishing permanent from abatable injuries); see also *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1556–59 (6th Cir. 1997) (construing Ohio law; since disagreed with by the Ohio Supreme Court in *Sexton*, 883 N.E.2d at 1020).

¹⁴ DOBBS ET AL., *supra* note 4, § 49, at 125.

¹⁵ For example, trespass liability may indeed attach in the case of a non-intentional trespass. See RESTATEMENT (SECOND) OF TORTS § 165 (1965).

inform an application of the tort of trespass to the environmental contamination context. As will become evident, the following rules and principles expressed in the doctrine and the Restatement lay the foundation for the injury-based approach to continuing contamination trespasses.

A trespass may be committed by “placing a thing either on or beneath the surface of [another’s] land.”¹⁶ Beyond this, under the Restatement’s formulation, a “trespass may be committed by the *continued presence* on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it.”¹⁷ While the typical trespass is complete when it is committed—at which time the cause of action accrues and the statute of limitations begins to run¹⁸—a trespasser’s failure to remove a thing he tortiously placed on the land of another generally “constitutes a continuing trespass for the entire time during which the thing is wrongfully on the land.”¹⁹ Two of the most important legal consequences of the “continuing trespass” are: 1) the plaintiff will be able to bring successive actions for the continuation of the trespass after the beginning of each of his preceding trespass actions, and 2) because the continuing trespass gives rise to successive actions, a statute of limitations will only bar a claim for so much of the trespass as occurred outside the limitations period.²⁰

However, not every trespass that continues in the manner described above will be considered a continuing trespass.²¹ The continuing trespass must be distinguished from the “permanent trespass.”²² The Restatement illustrates the distinction as follows:

A continuing trespass must be distinguished from a trespass which permanently changes the physical condition of the land. Thus, if one, without a privilege to do so, enters land of which another is in possession and destroys or removes a structure standing upon the land, or digs a well or makes some other excavation, or removes earth or some other substance from the land, the fact that the harm thus occasioned on the land is a continuing harm does not subject the actor to liability for a continuing trespass. Since his conduct has once for all produced a permanent injury to the land, the possessor’s right is to full redress in a single action for the trespass.²³

The legal consequences of a permanent trespass are the inverse of those of a continuing trespass: 1) only one action may be brought to recover

¹⁶ *Id.* § 158 cmt. i.

¹⁷ *Id.* § 161(1) (emphasis added).

¹⁸ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 83 (5th ed. 1984).

¹⁹ RESTATEMENT (SECOND) OF TORTS § 161 cmt. b (1965).

²⁰ *See* FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, 1 HARPER, JAMES AND GRAY ON TORTS § 1.7, at 31–32 (3d rev. ed. 2006).

²¹ *Id.* at 33.

²² *See id.*

²³ RESTATEMENT (SECOND) OF TORTS § 162 cmt. e (1965).

all damages, past and future; and 2) the statute of limitations runs from the date of the original trespass.²⁴

As one group of commentators has noted, “[i]t is not easy to find harmony in the case results” distinguishing continuing from permanent trespasses.²⁵ Nonetheless, these commentators suggest that classification in these cases can be generalized as “partly a matter of fact and partly a matter of policy seemingly governed by a number of factors.”²⁶ The following are identified as the most significant factors cutting against classification as permanent:

- 1) the invasion can in fact be terminated or abated, 2) the cost of termination is not wasteful or oppressive, 3) no privilege or public policy favors a continuation of the invasion, 4) [an] incentive to abate the invasion can be provided by permitting repeated suits for damages as they accrue, 5) the plaintiff prefers temporary damages, and 6) overall, it is not just to permit the defendant to acquire the permanent right to invade the plaintiff’s interests in land by paying market price for that right against the plaintiff’s wishes.²⁷

The simplest case of a permanent trespass is that of an offending structure that is a necessary part of a public utility; the utility will operate (to society’s benefit) for an indefinite duration and thus it is appropriate to allow for only one action to recover all damages that will flow from this permanent intrusion on the plaintiff’s property.²⁸ This results in what has been termed “inverse condemnation.”²⁹ The classic case of a continuing or temporary trespass, in contrast, would be that of a vehicle that has been parked on a plaintiff’s land and remains parked there though it could be removed easily.³⁰

Courts addressing whether a particular case of environmental contamination constitutes a permanent or abatable injury to the land often fail to formulate a rationale to justify their conclusions.³¹ At least one court has concluded that it is futile to attempt to classify chemical contamination of land as either permanent or temporary since it exhibits characteristics of both temporary and permanent damage, and its permanence is in large part a

²⁴ HARPER ET AL., *supra* note 20, § 1.7, at 33–34.

²⁵ DOBBS ET AL., *supra* note 4, § 57, at 154.

²⁶ *Id.* at 156.

²⁷ *Id.* at 156–57.

²⁸ Spaulding v. Cameron, 239 P.2d 625, 627 (Cal. 1952) (en banc) (Traynor, J.), *quoted with approval in* HARPER ET AL., *supra* note 20, § 1.7, at 34 n.22; *see also* Recent Cases, *Damages—Prospective—Continuing Trespass*, 11 HARV. L. REV. 268, 268 (1897).

²⁹ HARPER ET AL., *supra* note 20, § 1.7, at 34.

³⁰ DOBBS ET AL., *supra* note 4, § 57, at 155.

³¹ *Compare Hoery*, 64 P.3d 214, 222–23 & n.12 (Colo. 2003) (finding subsurface pollution plumes to be “remediable or abatable” while expressly declining “to define the legal standards to apply to a factual determination of whether the continued migration and ongoing presence of [pollutants] can be abated”), *with* Carpenter v. Texaco, Inc., 646 N.E.2d 398, 399 (Mass. 1995) (characterizing subsurface contamination caused by an underground gasoline storage tank as “permanent harm”).

function of the present state of remediation technology.³² The above-listed factors traditionally used by courts to identify continuing trespasses fail to provide sufficient guidance in the environmental contamination context, as competing considerations weigh heavily against one another. While the “invasion” in these cases can in fact be terminated through cleanup efforts, this will often entail great expense to the defendant.³³ Thus, the first factor (terminability of invasion) and second factor (wasteful or oppressive cost) are in contention. Furthermore, though a court will be unlikely to find any privilege or public policy favoring the continued presence of the contamination (as a court might find in the case of a trespassing, yet socially beneficial public utility), inverse condemnation may nonetheless be “just” when the burden of cleanup on the defendant is weighed against the market value of the land.³⁴ So, the third factor (public policy favoring continued invasion) and sixth factor (justness of letting trespasser pay market price to invade against plaintiff’s wishes) are in conflict. In addition, when the statute of limitations is raised as a defense, the fifth factor (plaintiff’s preference as to type of damages) becomes irrelevant—the plaintiff will inevitably prefer the kind of damages that will allow for recovery over those that will not.

The following Part illustrates how some courts have chosen to resolve the problem of the continuing contamination trespass. As will be seen, functionally identical factual scenarios involving environmental contamination and late-coming claimants will yield different results depending on which of the two primary competing jurisprudential approaches holds sway in the jurisdiction.

³² *Mel Foster Co. Props. v. Am. Oil Co.*, 427 N.W.2d 171, 175 (Iowa 1988). The Iowa Supreme Court stated:

Chemical contamination of land . . . encompasses aspects of both a temporary and permanent nuisance. This injury is temporary in the sense that the cause of the pollution has been discovered and abated, and the harmful chemicals in the ground will eventually dissipate. This nuisance is permanent in the sense that it constitutes damage to the ground itself and will continue for an indefinite but significant period of time. An attempt to classify chemical pollution as a permanent or temporary nuisance is further complicated by the presence of rapidly changing scientific technology. Scientific knowledge enables society to successfully clean up pollution once thought to be permanent. *Id.*

³³ *See, e.g., Corbello v. Iowa Prod.*, 850 So. 2d 686, 711 (La. 2003) (upholding award of approximately \$33 million to fulfill contract obligation of “reasonable” restoration of land worth \$108,000).

³⁴ *See* RESTATEMENT (SECOND) OF TORTS § 927 (1979) (limiting damages as a remedy for the destruction of legally protected interests in land); *see also id.* § 929 cmt. b (“If . . . the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, unless there is a reason personal to the owner for restoring the original condition, damages are measured only by the difference between the value of the land before and after the harm.”).

III. COMPETING JURISPRUDENTIAL APPROACHES

A. The Injury-Based Approach: The Colorado Supreme Court Looks to Abatability and Public Policy

In the 2003 case of *Hoery v. United States*,³⁵ the Colorado Supreme Court was asked to answer two certified questions from the U.S. Court of Appeals for the Tenth Circuit concerning Colorado tort law: 1) whether the continued migration of contaminants from a defendant's property to a plaintiff's property constitutes a continuing trespass and/or nuisance; and 2) whether the ongoing presence of contaminants on a plaintiff's property constitutes a continuing trespass and/or nuisance.³⁶ The court answered both questions in the affirmative.³⁷

In *Hoery*, the plaintiff's property was located in a neighborhood several miles north of a military base on which the United States had disposed of a number of toxic chemicals.³⁸ This activity on the part of the United States resulted in underground plumes of toxic pollution which migrated onto the plaintiff's property.³⁹ The court assumed that the release of toxic chemicals from the base ceased in September of 1994, as that appeared to be the time when the United States ceased operations involving the relevant chemicals.⁴⁰ Even though the polluting operations had been terminated, the toxic plume's migration continued.⁴¹ As a result, pollutants remained on the plaintiff's property and continued to enter it on a daily basis.⁴² The plaintiff filed suit against the United States in 1998, asserting claims for, among other things, trespass and nuisance.⁴³ The district court found that the plaintiff knew or should have known of the tortious contamination in 1995, and that his claims were thus time-barred by the two-year statute of limitations for Federal Tort Claims Act claims.⁴⁴ The district court further found that, under Colorado law, there had been no continuing tort.⁴⁵ The plaintiff appealed this ruling, arguing that the migration and presence of toxic chemicals on his property were wrongful acts in themselves constituting continuing torts under Colorado law.⁴⁶ The Tenth Circuit sought guidance from the Colorado Supreme Court.⁴⁷

The Colorado Supreme Court's analysis of these issues largely followed the traditional continuing trespass principles described above and began by

³⁵ 64 P.3d 214 (Colo. 2003).

³⁶ *Id.* at 215.

³⁷ *Id.*

³⁸ *Id.* at 216.

³⁹ *Id.*

⁴⁰ *Hoery*, 64 P.3d at 216 n.3.

⁴¹ *Id.* at 216.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 216–17. See Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401(b)(2006).

⁴⁵ *Hoery*, 64 P.3d at 217.

⁴⁶ *Id.*

⁴⁷ *Id.* at 215.

distinguishing “continuing” from “permanent” trespasses and nuisances.⁴⁸ The “typical” trespass or nuisance, said the court, is complete when it is committed, and the statute of limitations begins to run at that time.⁴⁹ But where a defendant places something on or underneath a plaintiff’s land, “the defendant’s invasion continues if he fails to stop the invasion and to remove the harmful condition.”⁵⁰ In that case, “there is a continuing tort so long as the offending object remains and continues to cause the plaintiff harm.”⁵¹ Citing to the Restatement, the court reiterated: “In the context of trespass, an actor’s failure to remove a thing tortiously placed on another’s land is considered a ‘continuing trespass’ for the entire time during which the thing is wrongfully on the land.”⁵²

The court went on to explain that not every trespass that meets the above description will necessarily be considered a continuing trespass.⁵³ Colorado jurisprudence recognizes the category of “permanent trespass” in “those unique factual situations . . . where the trespass or nuisance would and should continue indefinitely.”⁵⁴ The court characterized these permanent torts by reference to earlier Colorado cases finding irrigation ditches and railway lines to be permanent invasions of property.⁵⁵ In the case of a “permanent trespass,” the action to recover for present and future damages accrues when the “lands [are] first visibly affected.”⁵⁶ That is to say, “permanent” trespasses operate more like “typical” trespasses for statute of limitations purposes.

From the court’s discussion, it is clear that a “permanent trespass” is an exception to the “continuing trespass” rule; however, it is less clear when the exception should apply. The relevant considerations identified by the Colorado Supreme Court in this case were: 1) the possibility of remediation or abatement;⁵⁷ and 2) a public policy determination of whether the property invasion should be allowed to continue because it is “socially beneficial” or “vital to the future development of the state.”⁵⁸ The court concluded that the tortious contamination in *Hoery* was not a permanent trespass for two reasons. First, the record indicated that the contamination was “remediable or abatable” in comparison to the irrigation ditches and railway lines that Colorado courts had previously determined to be permanent, in part because

⁴⁸ *Id.* at 218.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* (citing KEETON ET AL., *supra* note 18, § 13, at 83).

⁵² *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 161 cmt. b (1965)).

⁵³ *Id.* at 219.

⁵⁴ *Id.*

⁵⁵ *See id.* at 219–20. For example, in *Middelkamp v. Bessemer Irrigating Ditch Co.*, 103 P. 280 (Colo. 1909), the Colorado Supreme Court held that an irrigation ditch was a permanent nuisance because it was a permanent improvement and the nuisance seepage would “continue indefinitely absent extraordinary measures.” *Hoery*, 64 P.3d at 219 (describing the holding of *Middelkamp*, 103 P. at 283).

⁵⁶ *Hoery*, 64 P.3d at 219–20.

⁵⁷ *Id.* at 222–23.

⁵⁸ *See id.* at 220.

of the “extraordinary measures” that would be necessary to remove them.⁵⁹ The court did not provide any standard for determining when the migration and presence of contamination can be “abated.”⁶⁰ Second, the court declined to extend permanent-trespass protection to the continued contamination because there was “no sound public policy” reason for doing so.⁶¹ The court found instead that “public policy favors the discontinuance of both the continuing migration and the ongoing presence of toxic chemicals” on plaintiffs’ land.⁶² Continuing trespass liability would be appropriate, then, because it gives the tortfeasor “an incentive to stop the property invasion and remove the cause of the damage.”⁶³

Combining Restatement principles with its conclusion that the contamination was not a “permanent trespass,” the Colorado Supreme Court ultimately identified two distinct grounds upon which to subject the United States to continuing trespass liability:

First, TCE pollution remains on Hoery’s property. The failure of the United States to remove the pollution from Hoery’s property which it wrongfully placed there constitutes a continuing property invasion for the entire time the contamination remains. Second, the toxic pollution continues to migrate onto his property on a daily basis. The failure of the United States to stop the toxic pollution plume that it created from entering Hoery’s property also constitutes a continuing property invasion.⁶⁴

The court explicitly rejected the argument put forth by the United States that its wrongful conduct had been the *release* of the pollutants, and that the contamination of the plaintiff’s property was simply the damage resulting from that prior conduct.⁶⁵ The court based this decision on the “fundamental principles of tort law” which find that a “failure to act” or an omission can be the basis for tortious conduct.⁶⁶

Thus, through a more or less strict application of traditional continuing trespass principles, the Colorado Supreme Court concluded that both the continued presence and continued migration of the subsurface contaminants constituted continuing trespasses. In reaching this conclusion, though, the court assumed without discussion that the contamination was an abatable, rather than permanent, injury to the land.⁶⁷ The subsurface contamination in *Hoery* was thus given the status of an imprescriptible tort in part on the basis of this unexplored assumption and in part on the court’s public policy

⁵⁹ See *id.* at 222–23, 219.

⁶⁰ *Id.* at 223 n.12 (“We express no opinion nor were we asked to define the legal standards to apply to a factual determination of whether the continued migration and ongoing presence of the toxic pollution can be abated.”).

⁶¹ *Id.* at 223.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 222 (citations omitted).

⁶⁵ *Hoery*, 64 P.3d at 222.

⁶⁶ *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 158 cmt. 1 (1965) (“A trespass on land may be by a failure of the actor to leave the land of which the other is in possession”).

⁶⁷ See *id.* at 222–23.

determination favoring continued tort liability as a means of encouraging remediation.⁶⁸ Though summarily rejected by the court with its reference to tortious omissions,⁶⁹ the defendant's argument that its tortious conduct was coterminous with its release of contaminants would have carried the day in a jurisdiction subscribing to the conduct-based approach to addressing continuing contamination trespasses described in the following Section.

B. The Conduct-Based Approach: The Louisiana Supreme Court Looks to the "Operating Cause" in Hogg v. Chevron

The Louisiana Supreme Court addressed the questions of whether the continued migration of contaminants onto a plaintiff's land, or the continued presence of those contaminants on a plaintiff's land, would constitute a continuing tort in the 2010 case of *Hogg v. Chevron USA, Inc.*⁷⁰ The plaintiffs in that case owned property neighboring a gasoline service station.⁷¹ Prior to February 1997, the defendant service station had three underground gasoline storage tanks; these tanks were replaced in 1997 after it was discovered that the tanks were leaking gasoline.⁷² In December 2001 and April 2002, the Louisiana Department of Environmental Quality (LDEQ) informed the plaintiffs and all other surrounding property owners by letter that environmental contamination resulting from a leaking underground storage tank had been detected in the vicinity of the defendant's service station.⁷³ The December 2001 letter made clear that the contamination had been detected in the subsurface soil and groundwater, and that the contaminants were migrating in the direction of the plaintiffs' land.⁷⁴ The April 2002 letter informed the plaintiffs that ambient air testing had revealed the presence of chemicals associated with gasoline in an area near an unnamed stream; a map attached to the letter showed that the tests had been conducted on the plaintiffs' property.⁷⁵

In September of 2006, the plaintiffs were contacted by a LDEQ contractor seeking permission to access the plaintiffs' property in order to conduct environmental remediation services.⁷⁶ Nearly a full year later, the plaintiffs filed a tort suit seeking damages for the diminution of property value and the stigma attached to the contaminated property, as well as punitive damages.⁷⁷ Once the Louisiana Supreme Court ruled that the LDEQ letters had, five years earlier, instilled in the plaintiffs sufficient knowledge of the property damage to begin the running of the one-year prescriptive

⁶⁸ *Id.* at 223.

⁶⁹ *Id.* at 222.

⁷⁰ 45 So. 3d 991 (La. 2010).

⁷¹ *Id.* at 994.

⁷² *Id.* at 995.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Hogg*, 45 So. 3d at 995.

⁷⁶ *Id.*

⁷⁷ *Id.*

period,⁷⁸ all of the plaintiffs' hopes of recovery rested on their arguments that: 1) "the presence of contamination on their property is a continuing trespass on which prescription does not begin to run until the trespass is abated,"⁷⁹ or, alternatively, 2) the continued migration of the contaminants onto their property constituted a separate and distinct tort that was not prescribed because no knowledge of it was communicated by the LDEQ letters.⁸⁰

In addressing the continued-presence issue, the Louisiana Supreme Court explained that "[a] continuing tort is occasioned by [continual] unlawful acts, not the continuation of the ill effects of an original, wrongful act."⁸¹ As the court further explained, "[t]he inquiry is essentially a conduct-based one, asking whether the tortfeasor perpetuates the injury through overt, persistent, and ongoing acts."⁸² The court recognized that a trespass may be continuous: "A continuous trespass is a continuous tort; one where multiple acts of trespass have occurred and continue to occur; where the tortious conduct is ongoing, this gives rise to successive damages."⁸³ The court cautioned that the continuing trespass "is to be distinguished from a trespass which causes continuing injury by permanently changing the physical condition of the land,"⁸⁴ because when a trespass permanently changes the physical condition of the land, "no additional causes of action accrue merely because the damage continues to exist or even progressively worsens."⁸⁵ The court then articulated its standard for identifying a continuing trespass as follows:

To determine whether a trespass is continuous, a court must engage in the same inquiry used to determine the existence of a continuing tort; i.e., the court must look to the operating cause of the injury sued upon and determine whether it is a continuous one giving rise to successive damages, or whether it is discontinuous and terminates, even though the damage persists and may progressively worsen.⁸⁶

Applying these principles, the Louisiana Supreme Court held that the continued presence of the gasoline on the plaintiffs' property was *not* a continuing trespass.⁸⁷ The court found that the "operating cause" of the plaintiffs' injury was the leaking of the underground storage tanks, *not* the continued presence of the gasoline on the property.⁸⁸ The continued presence of the gasoline in the subsurface of the plaintiffs' property was

⁷⁸ *Id.* at 1001.

⁷⁹ *Id.* at 996.

⁸⁰ *Id.*

⁸¹ *Id.* at 1003 (quoting *Crump v. Sabine River Auth.*, 737 So. 2d 720, 728 (La. 1999)).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Hogg*, 45 So. 3d at 1003–04.

⁸⁷ *Id.* at 1006.

⁸⁸ *Id.*

merely “the continued ill effect of the original tortious incident—the leaking of gasoline, which ceased in 1997 when the tanks were replaced.”⁸⁹ The court concluded:

There was a discrete encroachment which was not repeated after the tanks were replaced and which allegedly resulted in permanent harm to plaintiffs’ property. Because the operating cause of the injury—the damage-causing conduct—is not continuing, there is no continuing tort. As a result, the theory of continuous trespass/continuous tort cannot operate to suspend the running of prescription.⁹⁰

In addressing the continued-migration issue, the court was brief. In a single-paragraph disposition of the issue, the court first noted that the LDEQ letters provided sufficient knowledge to commence the running of prescription “regardless of whether that damage resulted from the failure to prevent the storage tanks from leaking or the failure to contain/remediate the leakage before it reached plaintiffs’ property.”⁹¹ More importantly, the court went on to state that “the breach of a duty to right an initial wrong simply cannot be a continuing wrong that suspends the running of prescription, as that is the purpose of every lawsuit and the obligation of every tortfeasor.”⁹² Because the court found that the “initial wrong” was the leaking of the storage tanks, the defendant’s failure to contain or remediate the resultant subsurface pollution did not operate to suspend the running of prescription.⁹³

Thus, the Louisiana Supreme Court resolved both the continued-presence and continued-migration issues by relying on continuing tort principles rather than the traditional trespass principles expressed by doctrinal writers and the Restatement. The “operating cause” analysis employed by the Louisiana Supreme Court would appear to preclude the possibility of a continuing trespass based on the “continued presence on the land of a . . . thing which the [tortfeasor] has tortiously placed there,”⁹⁴ as the operating cause of such a trespass would be the act of placing rather than the continued presence of the thing. The operating cause approach provides a hard rule that avoids the difficult policy determination of whether the resultant injury to the land is permanent or abatable. Under this approach, the distinction between continuing and permanent trespasses does not turn on a mix of policy considerations, but rather on the presence or absence of continued trespassory conduct on the part of the defendant.

The focus on conduct, of course, demands an answer as to why a defendant’s failure to act to remediate the contamination cannot constitute trespassory conduct, as was suggested by the *Hoery* court.⁹⁵ The Louisiana

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 1007.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ RESTATEMENT (SECOND) OF TORTS § 161(1) (1965).

⁹⁵ See *Hoery*, 64 P.3d 214, 222 (Colo. 2003).

Supreme Court supplied a strong response: the continued presence and migration of the contaminants is merely the harm resulting from prior tortious conduct, because the breach of a duty to right an initial wrong cannot itself constitute a continuing wrong that tolls the statute of limitations.⁹⁶ If the failure to remediate the harm resulting from tortious conduct could suspend the running of a statute of limitations, then no tort could ever be time-barred.

C. Splitting the Difference: The Massachusetts Supreme Court Subscribes to a Conduct-Based Approach that Allows for Continuing Liability in Continued-Migration Cases

While the Louisiana Supreme Court and the Colorado Supreme Court answered the continued-presence and continued-migration questions such that the same result for limitations purposes would obtain in the presence of either circumstance,⁹⁷ the two issues need not necessarily be resolved in this manner. The Supreme Judicial Court of Massachusetts, for example, has determined that the continued presence of contaminants on a plaintiff's land will *not* constitute a continuing trespass,⁹⁸ while the continued migration of contaminants onto a plaintiff's land will constitute a continuing trespass or nuisance.⁹⁹

In *Carpenter v. Texaco, Inc.*, an underground storage tank at the defendant's service station leaked gasoline onto the plaintiffs' property.¹⁰⁰ The tank was removed, and by 1984 there was neither further release of gasoline on the defendant's property nor any continued seepage of gasoline onto the plaintiffs' property.¹⁰¹ The plaintiffs learned of the contamination in 1982 yet did not commence an action until 1991, six years after the three-year statute of limitations had run.¹⁰² The plaintiffs argued that the continued presence of the gasoline on their property amounted to a "continuing trespass" that would allow them to recover for damages occurring within three years of the commencement of their action.¹⁰³ The plaintiffs claimed that the continued presence of the gasoline was analogous to cases involving the continued presence of an unauthorized structure erected on another's land.¹⁰⁴ The Supreme Judicial Court of Massachusetts rejected this argument "because a continuing trespass or nuisance must be based on recurring tortious or unlawful conduct and is not established by the continuation of

⁹⁶ *Hogg*, 45 So. 3d 991, 1007 (La. 2010).

⁹⁷ That is to say, both the continued presence and continued migration of contamination would *alone* be sufficient to suspend the statute of limitations in Colorado, and neither would be sufficient to do so in Louisiana.

⁹⁸ *Carpenter v. Texaco, Inc.*, 646 N.E.2d 398, 399–400 (Mass. 1995).

⁹⁹ *Taygeta Corp. v. Varian Assocs.*, 763 N.E.2d 1053, 1064–65 (Mass. 2002).

¹⁰⁰ *Carpenter*, 646 N.E.2d at 399.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

harm caused by previous but terminated tortious or unlawful conduct.”¹⁰⁵ Thus, similar to the *Hogg* court, the court in Massachusetts found there was no continuing tort because the continued presence of the contaminants on the plaintiffs’ property was “the consequence of tortious conduct and of seepage” that had in fact ceased.¹⁰⁶

In *Taygeta Corp. v. Varian Associates, Inc.*,¹⁰⁷ the Supreme Judicial Court of Massachusetts was presented with a subsurface pollution case in which the defendant’s release of contaminants had ceased, though the contaminants continued to migrate onto the plaintiff’s property.¹⁰⁸ The plaintiff claimed that this continued migration constituted a continuing nuisance;¹⁰⁹ however, the trial judge concluded that “the ongoing contamination was a product of previously terminated tortious conduct and, thus, was not a continuing nuisance.”¹¹⁰ The Supreme Judicial Court of Massachusetts disagreed. The court first reiterated the rule set down in *Carpenter* that a continuing trespass or nuisance must be based on continued tortious conduct and will not be established by the continuation of harm caused by terminated prior conduct.¹¹¹ However, the court distinguished *Carpenter* on the fact that the plaintiffs’ claim in *Carpenter* was “essentially for a single encroachment that had resulted in permanent harm.”¹¹² The court had noted in *Carpenter* that the result would have been different if there had been migration of gasoline onto the plaintiffs’ property within the limitations period preceding the commencement of the plaintiffs’ action.¹¹³ For support, the court cited a comment from the Restatement’s nuisance liability rules, which states in pertinent part that if “activity has resulted in the creation of a physical condition that is *of itself harmful* after the activity that created it has ceased, a person who carried on the activity that created the condition . . . is subject to the liability for a nuisance, for the continuing harm.”¹¹⁴ In light of the ongoing seepage, the court concluded that the plaintiff was able to state a claim for a continuing nuisance.¹¹⁵

The Massachusetts Supreme Judicial Court’s reference to the Restatement’s nuisance liability principles allowed it to resolve the

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 399–400.

¹⁰⁷ 763 N.E.2d 1053 (Mass. 2002).

¹⁰⁸ *Id.* at 1064–65.

¹⁰⁹ *Id.* at 1064. While the *Taygeta* plaintiff stated its claim in nuisance, the case nonetheless evidences a refinement of the *Carpenter* trespass rule. The court utilized the rule from *Carpenter* to establish the legal framework for resolving the issue in *Taygeta*. *Id.* at 1064–65. It should be remembered that the *Carpenter* court explicitly suggested that continued seepage onto the plaintiff’s property would have “present[ed] a different case.” *Carpenter*, 646 N.E.2d at 400 n.5.

¹¹⁰ *Taygeta*, 763 N.E.2d at 1058.

¹¹¹ *Id.* at 1065.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* (emphasis added) (quoting RESTATEMENT (SECOND) OF TORTS § 834 cmt. e (1979)); see also *Burley v. Burlington N. & Santa Fe Ry. Co.*, 273 P.3d 825, 839 (Mont. 2012) (“A defendant’s failure to stop the continuing migration of a nuisance onto a plaintiff’s property, where it reasonably can be stopped, constitutes a continuing property invasion.”).

¹¹⁵ *Taygeta*, 763 N.E.2d at 1065.

continued-migration question in a manner that provides continuing liability while at the same time holding to the general rule that a continuing trespass or nuisance must be based on continued tortious conduct, not the continuation of harm caused by terminated prior conduct.¹¹⁶ The continued migration was a condition that was “of itself harmful,” and thus constituted a tort rather than the resultant damage of a tort, as was held by the Louisiana Supreme Court in *Hogg*.¹¹⁷ A more straightforward way of finding the continued migration of contaminants to constitute a continuing trespass would be to define the “wrong” as the invasion of the plaintiff’s property, and thus find the continuing invasion of contaminants to constitute repeated tortious conduct, as was done by one court in another conduct-based jurisdiction.¹¹⁸ The disagreement between the conduct-based jurisdictions over whether the continued migration of contaminants can be the basis of continued tortious conduct will be examined below.¹¹⁹

IV. EVALUATING THE APPROACHES

While the supreme courts of a number of states have spoken definitively as to their preferred approach to the problem of continuing contamination trespass claims, many jurisdictions are still without a controlling decision. Due to the prevalence of unclear and confusing case law on the issue, and the absence of direction from commentators and the Restatement, future courts considering such claims will be in a somewhat difficult position. The purpose of this Part is to explore the costs and benefits of the primary approaches to the problem so as to give some guidance to future courts faced with continuing contamination trespass claims.

A. The Conduct-Based Approach

1. The Conduct-Based Approach Generally

The most significant aspect of the conduct-based approach to environmental contamination trespass that should recommend it to future courts is the level of certainty it provides. Under the conduct-based approach, all singular acts of trespassory contamination are permanent, and so in every case the statute of limitations will begin to run upon the concurrence of the cessation of the defendant’s tortious conduct and the plaintiff’s discovery of the damage. One of the widely recognized purposes of statutes of limitations is to provide repose to defendants.¹²⁰ Through this repose, statutes of limitations create “desirable security and stability in

¹¹⁶ *Id.*

¹¹⁷ *See Hogg*, 45 So. 3d 991, 1007 (La. 2010).

¹¹⁸ *See Cook v. DeSoto Fuels, Inc.*, 169 S.W.3d 94, 104–06 (Mo. Ct. App. 2005).

¹¹⁹ *See discussion infra* Part IV.A.2.

¹²⁰ *See, e.g., Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965).

human affairs.”¹²¹ Defendants in jurisdictions adopting the conduct-based approach will be provided with such repose, while similar defendants in jurisdictions adopting the injury-based approach would never be certain of whether they had become free of trespass liability. As noted above, a weighing of the factors traditionally used by courts to distinguish permanent from continuing trespasses under the injury-based approach would seem to result in a wash when applied to environmental contamination cases with relatively large cleanup costs.¹²² Any determination made by a court as to the permanent or temporary nature of chemical contamination will inevitably be the result of an off-the-cuff public policy determination, a situation creating significant uncertainty for potential defendants as to their future trespass liability in injury-based jurisdictions.

A second aspect of the conduct-based approach that should make it attractive to courts is its compatibility with statutes of limitations applicable to tort actions generally. Even if jurisdictions employing the injury-based approach adopted a clear rule providing more certainty as to which contamination trespasses would be permanent and which ones would be continuing,¹²³ a further problem exists in the creation of an imprescriptible tort in the face of a statute of limitations that purports to establish a limitations period for all tort actions. In classifying environmental contamination as a continuing trespass, a court removes the defendant’s tortious conduct from the purview of the statute of limitations for tort actions promulgated by the legislature and gives the plaintiff an unlimited period in which to bring a claim based on this conduct. As Justice Kourlis keenly noted in his dissent in *Hoery*, “[s]hould the legislature wish to carve out an exception to the statutes of limitation for permanent toxic torts, it may do so.”¹²⁴

Another consideration supporting the adoption of the conduct-based approach is the fact that plaintiffs are already protected by the discovery rule, which prevents a tort action’s limitations period from running until the plaintiff knows or reasonably should know of the existence of his cause of action.¹²⁵ The discovery rule highlights the decided *lack* of inequity in

¹²¹ *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1099 (Colo. 1996).

¹²² See *supra* text accompanying notes 31–34.

¹²³ For example, a jurisdiction might adopt the rule that certain contaminants create continuing trespasses while others do not.

¹²⁴ *Hoery*, 64 P.3d 214, 228 (Colo. 2003) (Kourlis, J., dissenting); see also *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 79 So. 3d 246, 276 (La. 2011) (“We find the rules of discovery and prescription are deliberate legislative choices which ultimately limit otherwise imprescriptible torts and which maintain certainty in transactions involving immovable property.”); *Breiggar Props., L.C. v. H.E. Davis & Sons, Inc.*, 52 P.3d 1133, 1136 (Utah 2002) (finding that an injury-based approach runs counter to legislative intent behind state statute of limitations); *Carpenter v. Texaco, Inc.*, 646 N.E.2d 398, 400 (Mass. 1995) (declining to find a continuing trespass based in part on the legislature’s “guiding public policy” expressed in the statute of limitations for trespass).

¹²⁵ See 42 U.S.C. § 9658 (2006) (providing a discovery-rule exception to state statutes of limitations for actions arising from injuries caused by exposure to hazardous substances). In *Federal Deposit Insurance Co. v. Laidlaw Transit, Inc.*, 21 P.3d 344 (Alaska 2001), the Alaska Supreme Court noted that although “injuries from seeping pollutants may be difficult to

applying statutes of limitations to environmental contamination trespass cases. Although the discovery of the contamination trespass may be difficult, the plaintiff is not harmed by this difficulty as his discovery of the injury is the trigger for the running of the limitations period.

Finally, the conduct-based approach is superior to the injury-based approach in that it will always require a plaintiff to assert his claim promptly. Justice Kourlis suggested in his *Hoery* dissent that “statutes of limitation are of particular importance in environmental cases, where early discovery and remediation of injury benefits everyone.”¹²⁶ However, it may be the case that early remediation does *not*, in fact, benefit everyone, and this is what makes the operation of a statute of limitations imperative. If a continuing trespass theory is allowed to create an imprescriptible tort, as may occur in the application of the injury-based approach, then a plaintiff may find it beneficial to exploit his position as the victim of an imprescriptible tort by allowing his injury to worsen, thereby causing his damages to mount, in an effort to maximize his potential recovery (and thus the settlement value of his claim). This possibility is particularly important in jurisdictions where the recovery for injury to land is not limited by the market value of the land.¹²⁷ The statute of limitations, then, will operate to ensure a certain mitigation of damages by the plaintiff and will prevent the plaintiff from exploiting his status as tort victim at the expense of the defendant and the environment.¹²⁸

2. The Louisiana Conduct-Based Approach vs. the Massachusetts Conduct-Based Approach: Should Continued Migration Constitute “Conduct”?

What distinguishes the pure conduct-based approach adopted in Louisiana from the more nuanced conduct-based approach adopted in Massachusetts is that the Massachusetts approach allows for continuing liability based on the migration of contaminants onto a plaintiff’s land. This approach thus affords the casual observer a certain visceral satisfaction in that invasions, in the plain sense of the word, of a plaintiff’s property will give rise to trespass liability.¹²⁹ Yet, the disagreement between the Louisiana and Massachusetts conduct-based approaches over whether the continued migration of contaminants can be the basis of continued tortious conduct is not one that can be resolved when contemplating continued migration as

discover,” that characteristic “does not militate in favor of describing the defendants’ alleged actions as a continuing nuisance or trespass” because “the discovery rule adequately addresses this problem by delaying a cause of action’s accrual until the plaintiff is aware, or reasonably should be aware, of its existence.” *Id.* at 356.

¹²⁶ *Hoery*, 64 P.3d at 229 (Kourlis, J., dissenting).

¹²⁷ See JACOB A. STEIN, *STEIN ON PERSONAL INJURY DAMAGES* § 5:62 (Gerald Boston ed., 3rd ed. 1997) (noting the propensity of courts to award restoration costs in environmental contamination cases even where such costs are well in excess of the property’s pre-tort value).

¹²⁸ Cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 173 (8th ed. 2011) (discussing the duty to mitigate as a check on the monopoly power of the non-breaching party in the case of a breach of contract).

¹²⁹ See *Cook v. DeSoto Fuels, Inc.*, 169 S.W.3d 94, 104–06 (Mo. Ct. App. 2005).

“conduct” in the general sense of the word. As the opinions from the Louisiana and Massachusetts supreme courts show, competing analogies may be drawn to paint the continued migration of contamination as either tortious conduct in itself or the mere resultant damage of prior tortious conduct. The relative strengths of these analogies will largely be in the eye of the judicial beholder. However, a more narrow analysis reveals that the Massachusetts approach suffers from the fatal flaw of treating practically identical “conduct” (or, more precisely, non-conduct) differently. When the continued migration of contaminants is contemplated as “conduct” with reference to activity that has already been classified as non-conduct—namely, the continued presence of contaminants—the arbitrariness of the distinction becomes apparent. What real basis can be put forth for distinguishing between a defendant passively allowing contaminants to remain on a plaintiff’s land and a defendant passively allowing contaminants to continue to migrate after he has terminated the leak or dumping at the root of the problem?

Beyond this conceptual problem, the policy considerations counseling against the creation of an imprescriptible tort, discussed above,¹³⁰ are equally applicable to the Massachusetts conduct-based approach, which would render the trespass imprescriptible as long as migration persists. As long as knowing plaintiffs may wait to bring their trespass claims, the aforementioned concerns of uncertainty, incongruence with legislative policy, and strategic exploitation by plaintiffs are implicated.

B. The Injury-Based Approach

Despite the inadequacies of the injury-based approach discussed above,¹³¹ there are certain aspects of that approach that some courts may find particularly virtuous. At the heart of these virtues would necessarily rest a court’s determination that continued tort liability for environmental contamination is so important, at least in certain cases, that its benefits will outweigh the problems described above.

The first virtue of the injury-based approach is the flexibility it provides to the court. Under this approach, the court is able to assess all the facts before it and determine on a case-by-case basis when continued trespass liability for environmental contamination is appropriate and when it is not. The conduct-based approach, in contrast, is inflexible, precluding continuing trespass liability without regard to the kind of contamination or the relative cost of cleanup (factors that would inform the societal benefits of continued liability). A court employing the injury-based approach has wide discretion to make policy determinations as to which defendants deserve repose and what tortious contamination should create continued liability. The possibility of perpetual tort liability for environmental contamination leads

¹³⁰ See discussion *supra* Part IV.A.1.

¹³¹ See discussion *supra* Part IV.A.1.

us to the injury-based approach's second virtue—encouraging remediation of environmental contamination.

Continuing trespass liability after the cessation of tortious leaking or dumping, which would be wholly unavailable under Louisiana's conduct-based approach, may encourage remediation of the contamination in two ways. First, the victim will always be able to bring an action for damages based on the contamination, and this action may result in remediation.¹³² Second, the tortfeasor himself may undertake remediation without demand from the victim in order to foreclose future liability. This effect may be undercut, however, by the tortfeasor's knowledge of the court's discretion in determining continued liability in each particular case. That is to say, the tortfeasor may be encouraged to gamble on the likelihood that a court will not saddle him with continued liability based on the facts of his particular case. Furthermore, when weighing the remediation-encouraging effect of continuing tort liability, whether under the injury-based approach or the Massachusetts conduct-based approach, a court should take care to consider that a defendant's remediation obligations may persist under federal regulatory regimes despite the fact that the trespass victim's tort claim is time-barred.

V. CONCLUSION

The two primary, competing approaches to defining continuing trespasses both have their advantages and disadvantages when applied to cases of environmental contamination. Future courts faced with choosing between the two approaches have a number of significant considerations to weigh. The conduct-based approach offers certainty, compliance with apparent legislative policy (as expressed in statutes of limitations), and an impetus for mitigation of damages through prompt action on the part of the plaintiff. The injury-based approach, on the other hand, offers the court flexibility in discerning continuing trespasses on a case-by-case basis while simultaneously furthering the policy goal of environmental remediation through the availability of perpetual trespass liability. The benefits of each approach may only be had at the expense of the benefits offered by the other. However, because plaintiffs are already protected by the discovery rule, and the remediation-encouraging effects of the injury-based approach will be redundant where a defendant has similar remediation obligations under a federal regulatory regime, it would therefore seem that the conduct-based approach offers the better rule in the abstract.

¹³² See STEIN, *supra* note 127.