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IRREPARABILITY IRREPARABLY DAMAGED

Doug Rendleman*

THE DEATH OF THE IRREPARABLE INJURY RULE. By Douglas Laycock. New York: Oxford University Press. 1991. Pp. xiii, 356. \$37.

Every lawyer who studies or participates in our curious enterprise of constitutional government through courts should scrutinize Douglas Laycock's outstanding book, *The Death of the Irreparable Injury Rule*.¹ For Laycock provides us with a means to understand and evaluate the way judges developed the most vital feature of our remedial system — personal orders, injunctions in particular — and to predict, with a fair degree of certainty, the course of their development. Laycock tells the story by analyzing the decline and, he says, the fall of the prerequisite to qualify for equitable relief: the claimant's demonstration that, absent equitable relief, she risks irreparable injury. I found myself agreeing with Laycock's major theme, that demonstrating irreparability has become otiose. Nevertheless, his method of assimilating personal orders into the remedial system by deemphasizing important differences between personal orders and compensation causes me discomfort.

We begin with a successful claimant who has proved that a wrongdoer has breached the substantive law. The claimant is entitled to something from the menu of remedies. The menu includes damages to compensate the claimant's past loss, restitution to prevent the defendant's unjust enrichment, punitive damages to punish the defendant, and personal orders to protect the claimant by telling the defendant either to unwind accomplished harm or not to cause future harm. In our survey, the claimant's quest concentrates on personal orders and alternatives. Before the judge enters a personal order telling the de-

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This review is dedicated to the memory of the late Ed Yorio, a consummate professional, who passed away at the age of 44 in January of 1992. I am sorry that Ed will not be around to participate in the dialogue. See *infra* note 35.

Truth-In-Reviewing Disclosure Statement: I have known the author since the 1970s and value him as a colleague. I read his work with interest and profit as it appears. I have been involved with his anti-irreparable injury project in several ways. I read the earlier draft in 1987 and wrote him a detailed letter. I commented on the *Harvard Law Review* article at the Remedies Section program in 1990; I believe the book responds to some of my remarks. See, e.g., pp. 14-15, 18-19. The book cites my work as defending the rule it delivers the eulogy for. See p. 4 & p. 24 n.4; p. 6 & p. 25 n.7; p. 9 & p. 28 n.18; p. 213 & p. 224 n.1 (citing Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346 (1981)).

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fendant to alter conduct, he should be assured that the altered conduct will benefit the claimant; if the defendant causes harm that is over and done with, the judge should compensate the claimant with money damages.

The judge selects a remedial solution and measures it. This inquiry has three stages: (1) define substantive law goals and consult the claimant's preferences, seeking a solution that advances both; (2) determine whether remedial policies dictate augmenting or attenuating the proposed solution; (3) measure, define, and coordinate parts of the solution to assure that it covers the claimant's injury without over- or underremedying and to assure that some parts do not duplicate or overlap others.

Laycock's analysis focuses on the first two stages of the inquiry. His study recasts these more precisely as follows: (1) beginning with the claimant's preference for a personal remedy, the judge asks which remedy — a personal order versus money, or sometimes a criminal sanction — best serves the substantive policies? and (2) if the judge selects a personal order, do any remedial policies militate against personal orders and lead him to disfavor that order? The irreparable injury rule is, or was, a remedial policy that tells the judge to reject the claimant's choice of an equitable remedy unless she establishes that the remedy at law is inadequate or, in equivalent terms, that absent equitable relief irreparable injury will occur.²

I. THE LAW-EQUITY DISTINCTION

The irreparable injury rule governs courts' choice between legal and equitable remedies. Merger of law and equity is incomplete; in most of our state systems, some parts of the field are considered permanently "equitable jurisdiction"³ where equitable attributes prevail without any irreparability test. Traditionally equitable subjects include quiet title, partition, liens and mortgages, trusts, fiduciaries, guardianship, dissolution of marriage, and adoption.

The irreparable injury prerequisite for equitable relief holds sway where legal and equitable jurisdiction is concurrent and a claimant may receive either a legal or an equitable remedy — for example in contracts, torts, and copyright. The principal equitable remedies discussed below are injunctions and specific performance.⁴ The injunc-

2. The Supreme Court stated it as follows earlier this year: "[A] court should determine the adequacy of a remedy in law before resorting to equitable relief. Under the ordinary convention, the proper inquiry would be whether monetary damages provided an adequate remedy, and if not, whether equitable relief would be appropriate." *Franklin v. Gwinnett County*, 112 S.Ct. 1028, 1038 (1992).

3. The text uses quotation marks once because "equity jurisdiction" is not jurisdictional in the usual sense of defining a court's power to act. *ZECHARIAH CHAFFEE, JR., SOME PROBLEMS OF EQUITY* 301-06 (1950).

4. Other equitable remedies are constructive trusts, resulting trusts, equitable liens, subroga-

tion is modern equity's premier remedy; it began in obscurity, dividing business between two courts and protecting property, grew into bumptious adolescence as a tool for enterprise to wield against its employees, and achieved the present stage of its growth facilitating judges' efforts to assure constitutional rights.⁵

A. *Tenuousness*

Although the irreparable injury rule is phrased as dividing the remedial world into legal and equitable spheres, the judge's functional remedial choice is between a money substitute on the one hand and a personal order, an injunction or specific performance, on the other. In concurrent jurisdiction, the historical law-equity line follows the functional money-conduct distinction, but only up to a point. Usually legal relief is money and equitable relief is a personal order.

Carrying on the great legal realist tradition of Walter Wheeler Cook,⁶ Laycock shows that courts have not maintained the law-equity distinction at the remedial stage; the line is neither functional nor congruent with the choice between money substitutes and personal orders. Some relief classified as legal lets the winner enjoy the interest-in-fact instead of a money substitute. For example, the nominally legal remedies of ejectment and replevin are personal orders in practice because they return the specific thing to its owner.⁷ While law takes in equity's wash, equity takes in law's; equitable orders frequently include money awards to compensate. Finally, some important remedies subsist in both camps. Restitution wears both legal and equitable garb. Rescission of contracts occurs under both legal and equitable rubric. And courts have referred to declaratory judgments as both legal and equitable (pp. 14-15).

B. *Consequences*

Even though the distinction is difficult to achieve and perilous to maintain, the characterization as either equitable or legal carries important consequences. Equity leads to judicial factfinding, personal orders, and contempt enforcement; law leads to jury factfinding,

tion, accounting, and reformation. *The Death of the Irreparable Injury Rule* does not address legal and equitable restitution systematically even though that irreparability prerequisite is least defensible. GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 1.6 (1978). I will focus on the all-purpose equitable remedies, injunctions and specific performance.

5. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978).

6. See generally Walter W. Cook, *The Powers of Courts of Equity* (pts. 1 & 2), 15 COLUM. L. REV. 37, 106 (1915).

7. Pp. 13-14. Ejectment and replevin are also fugitives in the modern law curriculum; a leading property casebook disclaims responsibility for them to "your course in civil procedure." JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 68 n.25 (2d ed. 1988). The modern procedure teacher greets this tender with a blank stare of disbelief or hoots of derision. Many upper-level courses in Remedies cover ejectment and replevin, however, and that may prevent future generations of lawyers from ignoring these curricular orphans completely.

money judgments, and impersonal collection.⁸ Even if historical labels no longer serve a functional purpose, these "equitable" and "legal" bundles will normally stay together. Factfinding by judges will precede personal orders and contempt enforcement. Juries will be empaneled for money judgments, which will be collected impersonally. Judges will preside over trials when injunctions are likely because policymakers in courts and legislatures will seek to avoid the spectacle of juries handing judges injunctions to administer.⁹

In addition, the constitutional jury trial right and the need for a standard external to the modern judiciary will "preserve" the jury in legal actions "at common law" — in the main, money damage actions.¹⁰ Equitable-legal distinctions raise procedural complexities because of the constitutional right to a civil jury trial. In the federal system and all but a few states, because of jury trial rights, a jury performs the binding factfinding in legal actions, the judge in equitable.¹¹ Judges administer the irreparable injury rule, with its preference for legal remedies, to sort legal from equitable in ways that protect a litigant's right to have legal actions heard by a jury. Although claimants normally seek juries to augment damages, when either plaintiffs or defendants characterize claims to secure or avoid a jury, Laycock maintains, judges are alert to interpret and administer the jury trial right in ways that protect that right without undermining the claimant's ultimate choice of the most appropriate legal or equitable remedy (pp. 213-17). Laycock might have treated the jury trial right more sympathetically; although *The Death of the Irreparable Injury Rule* discusses the civil jury, it stresses the jury's mechanics and nuisance value more than its important populist role in a pluralistic society.¹²

8. P. 12. Laycock adds several refinements, among them that preliminary relief is available in equity but not law. He may mean that preliminary money damage is not available in damage actions at law; if not, he might have also mentioned legal preliminary relief, prejudgment attachment, and replevin. Other differences that the legal-equitable characterization may affect include attachment, prejudgment interest, attorney fees, appealability, and scope of review of facts on appeal. KENNETH H. YORK ET AL., *CASES AND MATERIALS ON REMEDIES* 245 (5th ed. 1992). This review will focus on the consequences mentioned in the text.

9. In *C & K Engg. Contractors v. Amber Steel Co.*, 587 P.2d 1136 (Cal. 1978), Justice Newman in dissent referred to "a basic policy concern; that is, the typically more continuing and more personalized involvement of the trial judge in specific performance and injunctive decrees than in mere judgments for damages." 587 P.2d at 1143 (Newman, J., dissenting). For a contrary view, see Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 75.

10. Carrington, *supra* note 9, at 33, 74 (quoting U.S. CONST. amend. VII).

11. In *Texas and North Carolina*, juries find the facts in equity. See, e.g., *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 676 n.1 (Tex. 1990), *cert denied*, 111 S. Ct. 755 (1991); *Allan S. Meade & Assocs., Inc. v. McGarry*, 315 S.E.2d 69 (N.C. App. 1984) (anticipating a jury trial of the equitable remedy of reformation).

12. Pp. 166, 213-17. Through our national history, the prevailing sorting mechanisms for legal and equitable remedies have expressed the preference for civil juries. Until Congress revised the judicial code in 1948, § 16 of the Judiciary Act of 1789 told the federal courts to avoid "suits in equity . . . in any case where a plain, adequate and complete remedy may be had at law." Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82 (repealed 1948). Section 16's first draft forbade

C. No Remedial Paradise

Fulfillment of the remedial promise of the merger of law and equity has escaped us. Reformers argued at least as early as 1848 that the judge should grant the winning claimant relief consistent with the pleading and proof.¹³ The Federal Rules of Civil Procedure repeated in Rule 54(c) the mergermeisters' aspiration to give winning litigants their just deserts: "every final judgment shall grant the relief to which the [claimant] is entitled."¹⁴ The Advisory Committee's notes reinforced the idea that "a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both."¹⁵ "Modern procedural reforms," our contracts restaters console us without clarifying, "have blurred the distinction between remedies at law and equity."¹⁶ Two generations after procedural merger, the leading practice work observed: "Eventually it may well be that courts will feel free to ask only: 'What remedy is best adapted to making the plaintiff whole?'"¹⁷

We continue to project the golden age farther into the future because the civil jury trial right has embalmed the "ancient and irrational intricacies" of eighteenth-century law and equity for future generations.¹⁸ Lack of an adequate remedy at law remains an element of the plaintiff's case for an injunction or specific performance.¹⁹

Perhaps the golden age is dawning. Laycock examines the dis-

equity "suits . . . where remedy may be had at law." The limiting words "plain, adequate, and complete" were added before "remedy" to circumscribe equity courts; the language was intended to prevent litigants from resorting to equity to avoid jury trials. A supporter of the amendment, Senator Maclay of Pennsylvania, said, "The trial by jury is considered as the birthright of every American. It is a privilege they are fond of, and let me add, it is a privilege they will not part with." WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789*, at 144, 175-77 (Wythe Holt & L.H. LaRue eds., 1990).

Modern litigants may pay a high price to claim their birthright. The constitutional test for the jury trial right is an inflexible mechanism. Functional considerations have been laid to one side, leading to historical doctrine that Professor Carrington referred to as a "dusty cobweb" and a "large, intricate web of judge-made constitutional anachronism." Carrington, *supra* note 9, at 74. Farther down on the same page Carrington "embalmed" the webs. *Id.* at 74-75.

Stressing the word *preserved* in the Seventh Amendment, Professor McCoid found that even the Supreme Court loses its anachronisms in the dust. It confuses its inquiry into premerger custom by converting analysis of remedy into a separate question. It exacerbates this confusion by equating preferences with fraudulent conveyances. John C. McCoid II, *Right to Jury Trial in Bankruptcy*: *Granfinanciera, S.A. v. Nordberg*, 65 AM. BANKR. L.J. 15, 19-28 (1991).

13. See THE FIRST REPORT OF THE (NEW YORK) COMMISSIONERS ON PRACTICE AND PLEADING § 231, at 194-95 (1848), quoted in Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 934 (1987).

14. FED. R. CIV. P. 54(c). See also FED. R. CIV. P. 2.

15. FED. R. CIV. P. 54(c) advisory committee's note.

16. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. b (1979).

17. 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1043 (1987).

18. Carrington, *supra* note 9, at 74-75.

19. 5 WRIGHT & MILLER, *supra* note 17, § 1256.

putes in concurrent legal and equitable jurisdiction where the claimant seeks an injunction or specific performance and there is a genuine choice between compensation and a personal order. The words *irreparable injury* tell us that a formidable barrier confronts a plaintiff who seeks an injunction. The reality differs. Under the cover of reciting the irreparable injury rule, courts have changed it. "A legal remedy," Laycock says, "is adequate only if it is as complete, practical, and efficient as the equitable remedy" (p. 22). Laycock's research demonstrates that, in the main, claimants who need one may choose an injunction or specific performance over money damages. Courts treat the compensatory substitute as inadequate.

As well they should. For few of us answer yes to Pomeroy's question: Should a judge stand idly by, watch a wrongdoer inflict harm, and only later tell him to pay the victim?²⁰ The sum of the words *irreparable* and *injury* is less than the meaning of each separately.

Under Laycock's suggested approach, the claimant may select damages or equitable relief, an injunction or specific performance. The claimant's choice of remedy governs unless "countervailing interests outweigh the plaintiff's interest in the remedy he prefers" (p. 266). This statement of the test appears to deemphasize the judge's role in evaluating the substantive law and remedial policies. Apparently the relevant reasons for a judge to deny injunctions and specific performance are to be raised as affirmative defenses and the defendant will bear the burden of refuting the plaintiff's request for specific relief.

In the finest tradition of legal realism, Laycock analyzes the received doctrine in light of what courts actually decide to determine whether the stated rules are the operating rules.²¹ He begins by stressing the necessity of articulating the real reasons for remedial choices; he discovers that, while the irreparable injury rule created the appearance of a principle of confinement on equity, in reality it failed to serve that purpose (pp. 237-43). Statements of the irreparable injury rule are more than mere linguistic antisynergy. The rule, Laycock shows, covers up the way disputes are decided, allows the judge to escape the constraint of stating reasons, lulls us into a false sense of certainty where none exists, prevents us from formulating better rules, and may deceive some poor literally minded chumps into doing the wrong thing (pp. 237-43).

We assimilate, process, and assess new knowledge and information in ways that constrain us to change preexisting beliefs as little as possible. The iron grip of obsolete ideas is a major theme of Laycock's

20. Paraphrased from 3 JOHN M. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 1357, at 389 (1883), which Laycock quotes on p. 3.

21. See Cook, *supra* note 6, at 106 ("examin[ing] a series of concrete cases and see[ing] exactly what it is that the chancellor does and does not do").

work.²² The mental habits developed by filtering the legal profession's thinking through the dual system of law and equity interfered with the creation of a functional system of remedies. But *The Death of the Irreparable Injury Rule* may contribute to the development of a more precise terminology. As the profession learns that the legal-equitable distinction is not functional and no longer useful except for analyzing the constitutional right to a civil jury, it may replace the more general terms *equitable jurisdiction* and *equitable remedy* with the name of the particular remedy — injunction or specific performance. Except for the jury trial right, postmerger policymakers in legislatures and courts might omit the megaclassifications, legal and equitable, and decide questions like scope of review based on policies discrete to each subject. Characterization as legal or equitable, if necessary for one purpose, need not carry over to others.²³ The choice should be a practical one for functional rather than historical reasons.

II. THE IIR'S STATE OF INSTABILITY

Perhaps the irreparable injury rule has been operating in a reduced sphere for some time, formally unrepudiated but awaiting reformulation. The rule has statutory antecedents and previously had jurisdictional attributes, but it may have been subject to the same form of erosion as an obsolete common law substantive rule. Common law courts rarely abandon doctrines outright; instead they chip away with qualifications and exceptions until a new rule emerges — if they leave anything of the former rule, it is as an exception.²⁴ In 1976, Professor Chayes, discussing the injunction's role in constitutional and particularly structural litigation, observed: "It is perhaps too soon to reverse the traditional maxim to read that money damages will be awarded only when no suitable form of specific relief can be devised. But surely, the old sense of equitable remedies as 'extraordinary' has faded."²⁵

22. See, e.g., pp. 277, 281.

23. See generally Moffatt Hancock, *Fallacy of the Transplanted Category*, 37 CAN. B. REV. 535 (1959).

24. See *Moore v. McAllister*, 141 A.2d 176, 179 (1958) (detailing the gradual demise of the rule against the use of equitable remedies in real property disputes unless legal title had been proved); Edward H. Rabin, *The Law Favors the Vesting of Estates. Why?*, 65 COLUM. L. REV. 467, 473 (1965).

25. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292 (1976). Even then, however, the irreparable injury rule existed in a tenuous state of blissful insouciance, a state that Professor Eisenberg later named "instability." See generally MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988). The merger of law and equity had obviated the need for a law-equity test between court systems. When legal rules are inconsistent with other policies, scholars will develop that incongruity in the professional literature. *Id.* at 64. Nearly a century before, Pomeroy pointed out that the irreparable injury rule was inconsistent with an activist judiciary's remedial goal of preventing harm. P. 3 (quoting 3 POMEROY, *supra* note 20, § 1357, at 389). Soon after Chayes wrote, Professor Fiss called on policymakers to abolish the remedial hierarchy that subordinated the injunction to other remedies. FISS, *supra*

Change in legal doctrine occurs when judges exempt certain types of activity from the established but unstable rule.²⁶ Citizens ought to enjoy constitutional rights in fact, not money substitutes; courts perforce ceased analyzing constitutional rights under the irreparable injury rule.²⁷ Courts can effectuate constitutional rights only by granting an injunction that seeks to assure that the citizen enjoys the rights in fact. The federal injunction was the premier remedy courts used during the civil rights era to specify and secure civil and constitutional rights.²⁸ The injunction's majestic role in the post-*Brown* era is, to put it euphemistically, "in jeopardy."²⁹ I believe that constitutional adjudication through injunctions will return. Although I hope to be around when dawn breaks, I cannot perceive the prospect to be an immediate one. Accordingly this review emphasizes the injunction's perils more than its potential. Whether an exception to the irreparable injury rule exists generally under statutes that define substantive rights is less clear, but courts administering some statutory schemes neutralize the rule by presuming the plaintiff's irreparable harm from the defendant's violation.³⁰

Legal rules inconsistent with society's understanding unravel because lawyers and judges cannot justify the results that those rules seem to compel. The irreparable injury rule's words had not changed, but courts had formulated and established new principles, in Eisenberg's words, "not only because they explain anomalous precedents in a way that prior principles cannot, but also because they reflect applicable social propositions in a way that prior principles do not."³¹ The irreparable injury rule failed to reflect applicable norms, policies, and experience appropriately. Because of the new principles, the rule no longer meant what its words conveyed; it survived nominally and with reduced force.³² Just as someone who "could care less" really could *not* care less, the words *irreparable*, *injury*, and *inadequate* became transmogrified into idiom and lost their ordinary meaning in the professional vernacular.

note 5, at 6. My inquiry into the state of what I called the inadequacy prerequisite found the decisions departing from the professed rule without adequate statements of reasons. Rendleman, *supra* note *.

26. EISENBERG, *supra* note 25, at 68.

27. See, e.g., *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Other examples include *Nester's Map & Guide Corp. v. Hagstrom Map Co.*, 760 F. Supp. 36 (E.D.N.Y. 1991); *PHE, Inc. v. Dept. of Justice*, 743 F. Supp. 15, 26 (D.D.C. 1990); *Robbins v. Budke*, 739 F. Supp. 1479, 1485 (D.N.M. 1990).

28. See FISS, *supra* note 5, at 86-90.

29. Owen Fiss, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 49, 50 (1991).

30. See, e.g., *Nester's Map & Guide Corp. v. Hagstrom Map Co.*, 760 F. Supp. 36 (E.D.N.Y. 1991).

31. EISENBERG, *supra* note 25, at 79-80.

32. *Id.* at 118.

A. *Special Handling? Specific Performance and Injunctions*

Even though the monolithic irreparable injury rule no longer exists, courts have several reasons to single out injunctions for special handling. Interlocutory relief through temporary restraining orders and preliminary injunctions follows attenuated, even *ex parte*, procedure creating a greater than usual chance of error. Citizen participation in finding facts and applying the law is absent from the injunction process because judges hear requests for injunctions. If the alternative to an injunction is a criminal prosecution, the civil burden of proof by a preponderance of the evidence is easier for the plaintiff than the criminal standard of proof beyond a reasonable doubt. Tailoring relief to the plaintiff's discrete needs creates real administrative and potential enforcement burdens. If violations are charged, the judge who granted the injunction will usually preside over the contempt issue. An injunction defendant charged with criminal contempt cannot argue as a defense that the injunction is substantially erroneous or even that it is unconstitutional. For fair or for foul, the injunction process concentrates power in the judge to find the facts, apply the law, formulate relief, and enforce the order.

The reader may find a discussion of specific performance, the other major "equitable remedy," helpful here. A buyer's right to have the property she bargained for is not a substantive right like a constitutional right that courts think she must enjoy in fact. Nevertheless, specific performance has become a routine remedy for breach of a sales contract. The remedial policies that signal special handling for injunctions are attenuated for specific performance. Two backup doctrines obviate the injunction's hazards in granting and enforcing specific performance. Equitable cleanup is a greatly reduced threat to the defendants' jury trial right.³³ Federal Rule 70 and state equivalent appointive and vesting rules or statutes supplant harsh contempt remedies.³⁴ I join Laycock in arguing that courts ought to respect the claimant's preference for specific performance.³⁵

On this salutary and uncontroversial point, Laycock's research turns up an anomaly. He examines reported decisions administering the irreparable injury rule and discovers that courts usually let the

33. See *Ziebarth v. Kalenze*, 238 N.W.2d 261 (N.D. 1976) (postmerger application of cleanup doctrine).

34. See FED. R. CIV. P. 70.

35. Professor Ed Yorio has argued, on the other hand, that the party seeking specific performance ought to carry the burden. EDWARD YORIO, *CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS* § 2.5, at 41 (1989). His principal reasons to disfavor specific performance emerged from difficulties of enforcement, and he emphasized the possibility of harsh contempt sanctions. *Id.* § 3.2. Unlike Yorio, I prefer to subordinate specific performance's risks to breaching parties to its benefits to claimants. I adjure to courts an approach that favors claimant's desire for specific performance unless defendant develops considerations discrete to the dispute that militate against a personal order.

plaintiffs choose personal orders in the teeth of the rule's language. However, "the principal remnant of the irreparable injury rule" is an inexplicable welter of decisions declining specific performance of breached contracts to sell goods that appear to be fungible or difficult to replace (pp. 100-01). Why do nonbreaching buyers seek specific performance when they could spend a damage award to replace the item instead? Why do judges decline to issue a routine specific performance order that is easy to adjudicate and administer? Empirical research might shed some light on this conundrum of remedies. I speculate that, to the buyer who has pursued specific performance to an appeal or to a reported trial court opinion, the dispute has achieved a momentum of its own or the goods are subjectively not fungible.

The injunction, as summarized above, is not a routine remedy. In my judgment, the injunction requires special handling through principles of containment because of its potential both to benefit claimants and to overreach defendants. A question I asked myself about the thesis of *The Death of the Irreparable Injury Rule* is whether the principles of containment must include the irreparable injury rule. Even if we abandon the remedial hierarchy and the irreparable injury prerequisite to injunctions, the idea that courts enjoin when money is inappropriate will survive. The idea that money will be an unsatisfactory remedy for some injuries lies at the base of two complex bodies of doctrine: interlocutory injunctions and contempt.

B. *Interlocutory Relief*

Interlocutory injunctive relief, with temporary restraining orders and preliminary injunctions, is founded on an intractable dilemma that grows out of the determination that money will be an inadequate remedy. The plaintiff requires a court order to control the defendant's conduct right now because if the defendant violates or persists in violating the plaintiff's substantive interest, retrospective money damages will be unsatisfactory. But the procedural process has not functioned fully; entering an interlocutory order to protect the plaintiff's right from "irreparable injury" entails an unusually high risk of judicial error. And an erroneous interlocutory injunction may inflict legally improper harm on the defendant.

Courts have developed procedures and standards for interlocutory injunctions. These attempt to accommodate the plaintiff's importunate request for procedural haste to prevent irreparable injury to herself with procedural protections that reduce the risk of error and prevent harm to the defendant. Laycock says that the irreparable injury analysis retains vitality at the interlocutory stage; he suggests that judges use the irreparable injury rule only to decide whether to issue

interlocutory personal orders.³⁶

C. *The Contempt Doctrines*

The contempt doctrines, particularly the coercive ones, are also inextricably related to the idea that money is sometimes an inappropriate solution. Once the judge grants an injunction, the system is committed to securing the defendant's obedience. Coercive contempt is an elaborate mechanism to assure that the defendant's behavior will be modified to let the claimant enjoy her rights in fact rather than a money substitute.³⁷ Coercive campaigns are fraught with potential for overreaching. A single trial judge, who may be caught up emotionally in the struggle, exercises the power to imprison (perhaps indefinitely) without any of the checks that usually precede imprisonment.³⁸ Laycock's brief treatment of contempt's dangers (pp. 14-15, 18) does not highlight coercive contempt's risks to individual liberty; one of the decisions he cites, that of the contemnor who "claimed to have lost \$18,000 in cash while bird hunting,"³⁹ is an archetype of coercion careening out of control, in which a judge is led to confine, potentially forever, someone who probably told an improbable truth but was disbelieved.⁴⁰

The collateral bar rule in criminal contempt is a conspicuous merit-avoidance technique and another reason for caution before enjoining. When enjoined and charged with criminal contempt for violation, a defendant is barred from arguing as a defense that the injunction is incorrect under substantive law, or even that it is unconstitutional. Based on the policy of punishing disrespect for the court, the collateral bar rule means that a contemnor may be punished for criminal contempt for conduct that is legal under substantive law, perhaps even constitutionally protected.⁴¹ In contrast, a defendant who had breached a criminal statute will be exonerated if the statute is unconstitutional. But the collateral bar rule does not cross the pages of *The Death of the Irreparable Injury Rule*.

36. P. 241. OWEN M. FISS & DOUG RENDLEMAN, *INJUNCTIONS* (2d ed. 1984) first called for separate terminology for interlocutory and permanent injunctions and reserved the word *irreparable* for interlocutory relief. *Id.* at 59.

37. *Id.* at 1004-06.

38. Doug Rendleman, *Disobedience and Coercive Contempt Confinement: The Terminally Stubborn Contemnor*, 48 WASH. & LEE L. REV. 185, 190 (1991).

39. P. 33 n.58 (citing *Drake v. National Bank of Commerce*, 190 S.E. 302, 304 (Va. 1937)).

40. FISS & RENDLEMAN, *supra* note 36, at 1092. For an example of the police mentality misplaced in coercive contempt, consider a Michigan law student's reaction to a recalcitrant depression-era contemnor who had been imprisoned for civil contempt following civil procedure: "[I]t is evident that the purposes of justice will be served best by keeping such persons as defendant under lock and key. She may well spend her life in confinement, unless her attitude changes." Recent Decision, *Equity-Contempt-Duration of Imprisonment*, 36 MICH. L. REV. 1016, 1018 (1938).

41. *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

D. *Equity and Romance*

The mystique of equity and injunctions persists. The idea endures that equity is separate, distinctive, and superior. One of the ways the legal profession uses the word *equity* is to describe flexible and discretionary decisionmaking, crafting discrete solutions for particular problems when inflexible rules would create harsh results.⁴² The warm and fuzzy connotations of individualized justice will continue to influence the way we evaluate and discuss other parts of equity's jurisdiction.

Professor Fiss has reminded us of another reason to single injunctions out. Injunctions are crucial because they are "the primary remedy in civil rights litigation."⁴³ Money is a uniquely unsuitable solvent to dissolve Jim Crow. Judges may use injunctions to effect massive changes in government bureaucracies, to halt constitutional deprivations, and to ameliorate the status of social groups.⁴⁴ While the necessities of the 1990s may lead liberals to draw down our reserves of patience as we await broad constitutional reform initiatives from the federal judiciary, the evidence of the injunction's role as a tool of an active judiciary is apparent, especially in education.⁴⁵ However, *The Death of the Irreparable Injury Rule's* development of injunctions to advance constitutional goals is cursory.⁴⁶

I can conceive of two reasons to feel nostalgia for the irreparable injury prerequisite for an injunction: a civil libertarian's trepidation about procedural overreaching and a liberal's affection for the injunction's potential for constitutional reform. Laycock has convinced me that neither is a realistic reason to retain the irreparable injury rule. The irreparable injury rule failed to prevent concentration of state power where power threatens individual rights; statutes, the Constitution, and judicial restraint have served the cause of individual liberty not perfectly, but better. The argument for retaining the irreparable injury rule as a safeguard for equitable flexibility, discretion, and dispensation contends for a principle that reduces its champion. One unintended consequence of an idealistic quest for individualized "equitable" justice may be to preserve the irreparable injury rule, a nonfunctional barrier to granting the remedy best tailored to winning litigants' needs. A better (but also ultimately unpersuasive) argument may be advanced for using the irreparable injury rule to ration scarce judicial resources, to preserve the injunctive process for important disputes such as constitutional issues.

42. Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 20-22 (1905).

43. FISS, *supra* note 5, at 86.

44. *Id.* at 86-95.

45. *Id.*

46. *See* p. 41. Laycock provides half a paragraph of text.

E. *Stricter Confinement Principles*

After limning the irreparable injury rule's present state and proposing an alternative approach, Laycock turns his attention to several more precise principles that have grown in the shadow of the desiccating larger rule. Laycock hopes that these tests will develop from their roots in the policies that inform the choice between specific relief and alternatives. He develops the "countervailing interests" judges will consider to determine when to decline personal relief. Your reviewer's search for principles of containment continues.

1. *Balancing Tests*

Balancing plays a major role in the rules that will operate in Laycock's post-irreparable injury rule world.⁴⁷ If awarding the claimant a personal order will create undue hardship, burden innocent nonparties, or create practical burdens to implement, then the judge should ask whether these putative handicaps "outweigh the disadvantage to the plaintiff of receiving only substitutionary relief" (pp. 268-69). Additionally, balancing is central to Laycock's proposed replacement for the irreparable injury rule, which lets the claimant choose between a personal order and a money substitute unless the defendant shows that a countervailing interest outweighs the claimant's interest in the personal order he prefers (p. 266).

How much will judges, lawyers, and litigants gain if the obsolete irreparable injury test is scuttled in favor of ubiquitous balancing? Judges may analyze disputes by identifying the interests that a decision one way or another will advance or retard by identifying the interests, assigning values to the interests, comparing the quantum of value on each side, and deciding which side prevails. Criticism of balancing tests focuses on their potential, while purporting to consider both sides, to cloak subjective choices, and to submerge debate in pseudo-mathematical jargon.⁴⁸ Decisionmakers cannot assign objective "weights" to the values or interests a decision affects; they can, however, decide which outcome they prefer, select the variables to consider, and mold them to reach the previously selected preferred result.

The Death of the Irreparable Injury Rule uses balancing tests in two general ways: first, to choose whether to enjoin or do nothing, as whether to issue a preliminary injunction or not; and second, to decide between an injunction and a different remedy, damages or a criminal prosecution. Using the term *balancing* interchangeably to describe these two different decisions erodes whatever meaning it had. In both,

47. If *The Death of the Irreparable Injury Rule* were in database, I would use the SEARCH key and count all the times the words *balance*, *balancing*, *weigh*, and *outweigh* are used.

48. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

moreover, the claimant's substantive right and stated preference support an injunction, but a balancing test may deflate that substantive right by converting it to just another factor to be weighed on one side of the scales. Balancing may be an errant way to decide at the policy stage whether to subordinate substantive interests and the claimant's choice of a personal order to a remedial policy that militates against an injunction. One alternative not mentioned in *The Death of the Irreparable Injury Rule* is that a thumb on the substantive side will nobble the remedial policy's ability to tip the scales.

Observers have long criticized equitable decisionmaking as too subjective, varying from chancellor to chancellor like the length of their various feet.⁴⁹ Perhaps, instead of assuming that judges can balance, we might develop ways of stating the process of decision to focus judges' critical judgment on choice — on who wins and why. Rights, principles, and structures defined externally may provide more guidance for future decisionmakers. Evaluating remedial policy in light of substantive rights and the claimant's choices will lead to difficult decisions with winners and losers. "To be sure," Justice Harlan said, "as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good."⁵⁰ Balancing tests are less than redoubtable principles for those who seek to circumscribe the hazards of the injunction process. As Professor Aleinikoff reminded us, quoting Cardozo, metaphors like balancing start "as devices to liberate thought, [but] they end often by enslaving it."⁵¹

2. Other Principles of Confinement

Several of Laycock's more precise tests are not stated as balancing rules. The judge choosing between money awards and personal orders ought to decline personal orders that will either: (1) force individual employees to perform personal services or unnecessarily compel employers to accept services; (2) impose an unconstitutional prior restraint; (3) treat one creditor of an insolvent debtor better than other similarly circumstanced creditors; (4) fail to defer to more appropriate decisionmakers, undermining another tribunal's or branch's orderly business; (5) "inappropriately evade or override the more particular provisions of other applicable law" (p. 271); or (6) coerce someone through contempt to pay money unless the debt is for family support or a statute authorizes coercion (pp. 269-74). I consider bringing these principles of confinement together and organizing them around the

49. FISS & RENDLEMAN, *supra* note 36, at 104-08.

50. *Barr v. Matteo*, 360 U.S. 564, 576 (1959) (Harlan, J.).

51. Aleinikoff, *supra* note 48, at 1005 (quoting *Berkey v. Third Ave. Ry.*, 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.)).

core of more precise alternatives to the irreparable injury rule to be one of the book's primary contributions.

F. *The IIR and Debris*

Judges, Laycock learned, have been talking about the irreparable injury rule incessantly and using it to make all kinds of decisions. Laycock mentions other reasons, good and bad, that judges have furnished when citing the irreparable injury rule to decline relief. Like a Michigan March thaw, Laycock's careful work exposes the debris; it shows us — to continue the metaphor — how much trash needs to be hauled off in May. If courts use the irreparable injury rule at all in passing on final relief, they should first reserve it for disputes where the plaintiff is entitled to some relief; within that sphere of cases, the rule can help identify disputes where the plaintiff is entitled to damages, but, because irreparable injury is lacking, not an injunction. If, however, the court finds the claimant is entitled to no final relief at all, the irreparable injury rule is misplaced as an explanation.

For example, some claimants request injunctions that would be premature because the defendant has neither injured the claimant nor threatened unlawful conduct harmful to the claimant in the future. Others would seek injunctions that arrive too late to do anything about an injury the defendant has already caused. These requests frequently inspire courts to say that the claimant lacks an irreparable injury. This is true but both superfluous and deceptive. If the claimant's claim is unripe or moot, she is not entitled to any remedy at all. Introducing the irreparable injury rule adds nothing but confusion to an already difficult inquiry (pp. 220-26). Ripeness and mootness are not ways to choose between a legal and an equitable remedy — they are reasons to decline all relief.

When the way a rule is expressed differs from the way it is administered, hapless attorneys and judges may read the rule literally and naively think it means what it says. This probably occurs in law offices and in negotiations; it undoubtedly *does* happen in trial and appellate courts (pp. 100-04).

Courts disguise hostility to the merits behind distorted conclusions that the plaintiff lacked irreparable injury (pp. 196-99). "Hostility to the merits" does not appear to be a rule against equitable relief (p. 238). This phrase ought not to mean that a judge declined relief and used lack of irreparable injury as a cloak, improperly donned, to decide against a plaintiff who is asserting sound theories to which the judge is hostile.

Laycock wraps it up with an anti-Restatement comprising three rules he does not commend, set in brackets to warn the unwary reader. Judges, he argues first, should be allowed to enter prejudgment money relief. He next proposes to abolish the doctrine that deprives a buyer

of specific performance of a contract to buy fungible goods from a solvent seller. Apparently the basic premise of a plaintiff's choice lets the buyer choose either specific performance and the goods or a money judgment with which to buy the identical goods from another (pp. 274-75). Finally, Laycock reprobates the rules that disfavor injunctions to substitute for or to supplement criminal prosecutions on the ground that they are largely superannuated.⁵²

III. BALANCING HARDSHIPS

Two of the subjects discussed in the overenforcement chapter — balancing the hardships or equities in land use allocations and personal relief in the employment relation — show how the irreparable injury rule and the more precise tests operate today. Developing these two doctrines, further than the chapter does, to include fear of “extortionate” settlements will reveal the way a related principle of confinement militates against an injunction in both. Another doctrine that attenuates personal orders, dislike of protracted supervision, segues into employment orders.

A. Land Use Balancing

A claimant may seek an injunction to unbalance settlement negotiations with a wrongdoer and to achieve a larger amount of money. If the judge concludes that the dispute is economic, he may prefer a neutrally set money award to a personal order that the claimant may exchange for disproportionate cash consideration. For example, suppose that the defendant has built an elaborate stone fence along the property line between him and his neighbor. Because of a surveyor's error, the defendant's fence encroaches on several square feet of the neighbor's property; while the neighbor's land is worth about \$5, rebuilding the defendant's fence will cost around \$1000.

In the inevitable lawsuit, the neighbor seeks a mandatory injunction to force the defendant fence owner to remove the fence. The fence owner unsuccessfully interposes the traditional first-line defenses to an injunction: that equity declines to try title and that the remedies at law, damage or ejectment, are adequate. There are no fact questions about title. Realty is unique, and the interest cannot be compensated; ejectment also is unsatisfactory because the sheriff cannot or will not remove the fence. The judge will enjoin temporary trespass,

52. A potential criminal defendant's right to criminal procedure — including a criminal jury — comes under a bar verbally more precise than the irreparable injury rule: *equity will not enjoin a crime*. With but one significant exception, Laycock argues, courts that enjoin crimes articulate the importance of preventing violations and protecting the public interest. Reticence to enjoin criminal activity, he asserts, is a variation on requiring irreparable injury and just as dead. Pp. 217-20. Your reviewer joins the mourners.

repeated or continuing, to obviate the landowner's need to maintain multiple damage actions.

Balancing the hardships is the defendant's second-line objection to an injunction. An order to remove the fence will "cost" the defendant \$1000 but "benefit" the neighbor only \$5. In addition, destruction may be a "wasteful" way to employ resources. The judge will balance the hardships when an injunction compelling a good faith tortfeasor to remove an encroachment has a disparate effect; comparing the plaintiff's loss absent an injunction with the defendant's cost to obey an injunction, the judge will ask whether it will cost the defendant a lot more to obey an injunction than the plaintiff's benefit from the injunction. If the defendant's balancing-the-hardships defense succeeds, the judge will allow the encroaching fence to remain in place, but the defendant will compensate the landowner and receive either an easement over or ownership of the encroached-upon property. *The Death of the Irreparable Injury Rule* develops balancing the hardships up to this point.

In addition to the wastefulness of reconstructing the fence, another reason cautions against an injunction. If the judge grants an injunction, the neighbor may threaten to enforce it to coerce the defendant to settle on her terms; her starting figure will be \$999. In *Zerr v. Heceta Lodge Number 111*,⁵³ for example, the plaintiff, claiming pie-in-the-sky damages, may have been seeking an opportunistic settlement. The judge balanced the hardships and declined to enter an injunction that would have unbalanced settlement negotiations.⁵⁴

But balancing the hardships to deny an injunction that may unfairly skew settlement negotiations is based in part on the premise that the dispute is primarily economic. The policies that led to the irreparable injury rule have emerged in another guise. The staple classroom questions emerge: Does balancing the equities balance the owner's property right away? Does it undermine the owner's right to possess land and to protect the land's physical integrity? Based on the premise that real estate is an economic tool, does balancing the equities erode the concept that each parcel of real estate is unique?⁵⁵

B. *The Example of Employment Discrimination*

1. *Reinstatement Balancing*

Employees' remedies for violations of civil rights statutes present similar remedial policy conflicts. Two important recent sex discrimination decisions have ordered plaintiffs' reinstatements, one with ten-

53. 523 P.2d 1018 (Or. 1974).

54. 523 P.2d at 1024.

55. DUKEMINIER & KRIER, *supra* note 7, at 800-11.

ure at a university,⁵⁶ and the second as a partner in an accounting firm.⁵⁷ The courts' remedial policy reasons consist of placing the plaintiffs where the defendants' compliance would have, and assuring the substantive law's integrity.⁵⁸ In addition, the trial judge in *Hopkins v. Price Waterhouse*, the accounting firm litigation, registered skepticism "whether monetary relief alone provides a sufficient deterrent against future discrimination for a group of highly-paid partners"⁵⁹ — one way to tell the defendants they cannot discriminate even if they are willing to pay for it. When the accounting firm argued against reinstatement because there was too much hostility to work together effectively, the trial judge observed that a large business entity "lacks the intimacy and interdependence of smaller partnerships."⁶⁰

The policies behind the irreparable injury rule and balancing the hardships — that some disputes are economic and should end with damages set by a neutral factfinder instead of with an exorbitant settlement coerced in the shadow of an injunction — reemerge in adjudicating reinstatement orders. Judge Posner wrote a third recent employment discrimination opinion in *McKnight v. General Motors Corp.*⁶¹ He inferred that the employee-plaintiff "want[ed] to be reinstated in order to induce GM to buy him out," and declared that "if the employee desires reinstatement for strategic purposes, that is a valid basis for denial."⁶² Posner, noting that the plaintiff's replacement position paid more than the one he lost, speculated that the plaintiff might exchange a reinstatement order for valuable consideration.⁶³

Judge Posner's opinion in *McKnight* compares reinstatement with money alternatives and discusses the remedial solution as a whole. But policy reasons to reinstate the wrongfully discharged employee are nowhere stated prominently.⁶⁴ The *McKnight* decision takes up the need to develop a remedy that will make the victim "whole" only to ask whether, if Congress intended a whole and not a half loaf, the judge may substitute money, called front pay, for reinstatement.⁶⁵

56. *Brown v. Trustees of Boston Univ.*, 891 F.2d 337 (1st Cir. 1989), *cert. denied*, 111 S. Ct. 1306 (1991).

57. *Hopkins v. Price Waterhouse*, 920 F.2d 967 (D.C. Cir. 1990).

58. *See Hopkins*, 920 F.2d at 976.

59. *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1211 (D.D.C.), *affid.*, 920 F.2d 967 (D.C. Cir. 1990).

60. *Hopkins*, 737 F. Supp. at 1210.

61. 908 F.2d 104 (7th Cir. 1990).

62. 908 F.2d at 116.

63. 908 F.2d at 116.

64. *Cf. Hopkins*, 920 F.2d at 976 ("[T]o the fullest extent possible, Title VII authorizes courts to put a victim of discrimination in the position that she or he would have been in but for the unlawful discrimination").

65. *McKnight*, 908 F.2d at 116-17.

The *McKnight* court instructed the trial judge on remand to examine reinstatement and to decide, if reinstatement is denied, whether to award "front pay" — that is, whether to compensate the plaintiff with money set by a factfinder as an alternative to a large sum negotiated to settle a reinstatement order.⁶⁶

The question of when a court's statutory power to remedy employment discrimination will override reticence such as Judge Posner's will apparently remain on the agenda.⁶⁷ For it is part of the larger question of when to subordinate the substantive law's policies to the remedial system's. When a chary court declines to reinstate a civil rights plaintiff because it anticipates a coerced settlement, it raises questions perhaps more acute than the questions about balancing the hardships in land use disputes. Does fear of a hard settlement balance the victim's civil rights away? Does it undermine the policy of overcoming employment discrimination? Does declining to reinstate convert a plaintiff's right to work free from discrimination into an economic interest that money will meliorate? If we believe that employees have the right to be free from discrimination, should the judges grant the injunction and let the employee, if she chooses, negotiate from a position of strength?

2. *Administering Complex Relief*

Another equitable practice emerges in selecting employment discrimination remedies. If, after an injunction, the parties do not compromise remedial goals by settling for money, the judge will be responsible for administering compliance. Judges who refuse to grant personal relief despite finding a risk of irreparable injury may describe complex enforcement as too impractical to administer or too difficult to supervise (pp. 222-24). Judge Posner stated the antisupervision impulse in *McKnight* when he remonstrated trial judges to try to avoid supervising an "ongoing and possibly long-term relationship," almost as an alternative reason to decline reinstatement.⁶⁸ He touched on the judicial instinct to avoid supervising protracted acrimonious dealings between parties to a poisoned relationship as bearing upon the trial judge's discretionary decision to reinstate or not.

Meanwhile, back at the trial court in *Hopkins*, the plaintiff had sought an injunction to "bar like discrimination in the future."⁶⁹ Antisupervision emerged there as well. The trial judge felt that enjoining

66. 908 F.2d at 117.

67. See *Hopkins*, 920 F.2d at 980.

68. *McKnight*, 908 F.2d at 115.

69. *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1216, *aff'd*, 920 F.2d 967 (D.C. Cir. 1990) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965))).

the defendant to adopt an antidiscrimination policy was too intrusive, too activist, too much: it is

unreasonable to place the Court in a continuing monitoring role in respect to the ill-defined area of sex stereotyping which the proof shows may occur without intention and is difficult to ascertain. . . . This is an area of sex discrimination that must evolve through more than the experience of one obviously atypical case before affirmative injunctions that can be fairly and evenly enforced can issue with any confidence.⁷⁰

And so he was content to exhort: "Both male and female partners are on notice to avoid" sex stereotyping.⁷¹

Developing reinstatement and hardships-balancing one step farther than does *The Death of the Irreparable Injury Rule* discloses the relationship between the doctrines. Moreover, two doctrines that lead courts to eschew injunctions — fear of coerced settlement and antissupervision — may function alternatively, one based on the projection that the plaintiff will not enforce the order, the other that she will. Each is easier to wield once a judge decides that the dispute is primarily economic. The policies that undergird the irreparable injury rule resurface at a later stage of analysis. Skeptics may inquire whether placing the antissupervision impulse on the scales will undercut substantive interests and the claimant's preferences in the same way as balancing the hardships because of fear of "extorted" settlements.

How the judicial preference to avoid supervision will affect decisions depends upon the particular dispute, upon the strength of the substantive standard, and upon the individual judge, the chancellor's foot. Scholarship and decisions will, I hope, clarify some of the most muddled doctrine in the advance sheets. For example, a judge rejected a shopping center's request for a preliminary injunction to compel a retail tenant to continue in business under a twenty-year lease: "CBL has no chance of prevailing on the merits and getting a permanent injunction because of the well-settled principle that equity will not order the specific performance of a contract where doing so would require the continuous supervision of the court."⁷² So much for purists who thought that not prevailing on the merits meant losing on the substantive law, instead of being refused a remedy because of a remedial policy.

C. *Prior Restraint*

In the chapter on "Avoiding Over Enforcement," Laycock makes several important points about the prior restraint rules (pp. 164-68). The irreparable injury rule does not come directly into play with prior restraint; in fact, the plaintiff's noninjunctive damage or criminal rem-

70. *Hopkins*, 737 F. Supp. at 1216.

71. 737 F. Supp. at 1216.

72. *CBL & Assocs., Inc. v. McCrory Corp.*, 761 F. Supp. 807, 808-09 (M.D. Ga. 1991).

edy is usually palpably inadequate. While prior restraint may be related to irreparable injury in perverse ways, the prior restraint rules provide a freestanding reason to disfavor injunctions and select another remedy instead. Following adversary procedure, courts issue injunctions against unprotected "speech" to suppress sexually explicit movies and commercial disparagement, protect discovery material, regulate securities and advertising, and stop copyright infringement.⁷³ Laycock's explanatory statement that the "prior restraint rules limit plaintiffs to less effective remedies because we fear over enforcement of rules against tortious or criminal speech" (p. 165) assumes that the defendant's conduct will breach a constitutional rule of substantive law and that, because of the prior restraint rule, courts attempting to vindicate the plaintiff's substantive interest will favor retrospective damage judgments and criminal sanctions over injunctions that allow plaintiffs to enjoy their rights in fact.

While not formally staking out a position in the prior restraint debate, Laycock appears to support the doctrine. He uses prior restraint as a synonym for injunction: "It is not the law that the plaintiff can get a prior restraint only when no other remedy is as clear, practical, and efficient as a prior restraint" (p. 165). The prior restraint doctrine militates against an injunction that the plaintiff requests and that, aside from the doctrine, the substantive law may support. Sometimes, as the following example shows, judicial prejudice against an injunction is difficult to discern.

A male college student surreptitiously tapes an office conversation with a new woman professor. He then mixes her distinctive voice on the tape with other material to concoct a second tape that purports to be one of her engaging in a sexual misadventure. Plans are developed to play the hoax tape over the campus radio station. The professor learns about the tape and seeks an interlocutory injunction to bar the student from broadcasting or disseminating the tape and to force him to turn it over to the court. The professor asserts, with support from professionals' affidavits, that the tape is false and defamatory and that playing it will undermine her relationships with her students and her spouse, as well as devastate her personally.

Playing the tape would be defamatory, and the professor could recover damages. Precedent under state constitutions, however, supports a judge who declines to enjoin the broadcast. "Defamation alone is not a sufficient justification for restraining an individual's right to

73. See *Ocasek v. Heggland*, 116 F.R.D. 154, 160 (D. Wyo. 1987) (excusing plaintiff from establishing irreparable injury).

speak freely.”⁷⁴ Contrary authority is scarce and attenuated.⁷⁵ If the defendant violates the substantive law and if the victim prefers an injunction now to damages later, what remedial policy might lead a judge to say or assume that a damages judgment will be appropriate but that an injunction will not? Prior restraint rules tell courts to decline to enjoin because of a preference to let the misconduct happen and let the victim pursue a civil damages judgment. The prior restraint doctrine may stand for the idea that, while this is misconduct the state can regulate, attempts to enjoin it will cause other people in the future not to engage in important conduct that the state cannot regulate. So the judge will stand idly by and let the defendant injure the plaintiff because otherwise some hypothetical future conduct may not occur. Perhaps Cornford expressed the notion best: “The *Principle of the Dangerous Precedent* is that you should not do an admittedly right action for fear you, or your equally timid successors, should not have the courage to do right in some future case, which, *ex hypothesi*, is essentially different, but superficially resembles the present one.”⁷⁶

Why should courts subordinate the plaintiff’s preference and the substantive law? Four hazards of the injunction process are: interlocutory injunction procedure may be attenuated, even *ex parte*; the request for an injunction will be heard by a judge without a jury; injunction breaches are tried, normally by the judge, as contempt; and an injunction’s incorrectness, even unconstitutionality, will not be a defense to criminal contempt.

Constitutional decisions have curbed, but perhaps not eliminated, *ex parte* procedures where expression may be enjoined.⁷⁷ Nonjury trials and contempt enforcement continue to distinguish injunctions from damage actions. In asserting that “[j]ury trial rarely protects speech in a republic” (p. 166), Laycock stresses the civil jury’s vital function of interpreting the public will to the courts less than I would. But I focus on whether courts ought to retain the prior restraint doctrines as principles of containment to hinder promiscuous issuance of injunctions if those doctrines would allow the campus radio station to broadcast the defamatory hoax tape.⁷⁸

74. *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983). *Willing v. Mazzone*, 393 A.2d 1155 (Pa. 1978), goes a little farther, assuming that, even if the defendant is unable to pay a damage judgment, plaintiff will not receive an injunction; for “the economic status of the individual asserting that right” cannot affect “the constitutional right to freely express one’s opinion.” 393 A.2d at 1158. See also *Kramer v. Thompson*, 947 F.2d 666 (3d Cir. 1991), a careful and thorough decision holding that Pennsylvania law does not allow injunctions against future libel.

75. See *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1203, 1208 (6th Cir. 1990).

76. FRANCIS M. CORNFORD, *MICROCOSMOGRAPHIA ACADEMICA: BEING A GUIDE FOR THE YOUNG ACADEMIC POLITICIAN* 23 (6th ed. 1964) (1908).

77. *Carroll v. President & Commrs. of Princess Anne*, 393 U.S. 175 (1968).

78. If the tape had been played once privately and adjudicated to be defamatory, would the prior restraint doctrines caution the judge to decline to enjoin? The answer may be no. See

The analysis does not differ if the judge cites the prior restraint doctrine to decline to enjoin on the ground that the authorities may pursue criminal alternatives — “subsequent punishment or penalties.” Laycock adds that “[t]he policy base of the rules against prior restraint is our commitment to freedom of speech and the traditional belief that prior restraints are more dangerous to free speech than subsequent penalties” (p. 165). The prior-subsequent distinction is questionable because an injunction, a personalized minicriminal statute, is just as subsequent as the presumed alternative, a criminal statute. If common words have common meaning, both are prior. An injunction is a piece of paper with the defendant’s name on it that forbids conduct. Like the paper threat in the statute book, an injunction does not literally prevent a crime; injunctions and criminal statutes *do*, however, structure the defendant’s incentives by warning of a sanction, contempt, or a criminal prosecution.

The prior-subsequent distinction assumes that the defendant will obey the injunction. Bickel’s well-known but overblown metaphor posits: “A criminal statute chills, a prior restraint freezes.”⁷⁹ In making the point that criminal punishment is inadequate, Laycock appears to assume the defendant’s compliance with an injunction: “Criminal punishment neither undoes the harm nor compensates for it. It may be good for revenge or deterrence, but it is not a remedy” (p. 166). A criminal statute with a certain punishment — 100 years in solitary for littering — also “freezes” expressive conduct that may be constitutionally protected and unconstitutionally regulated.⁸⁰

A criminal statute and an injunction are prior and intended to deter; a criminal prosecution and a contempt prosecution are subsequent and intended to punish. If we take prior restraint out of the refrigerator and discuss what the words *prior* and *restraint* mean separately, we learn quickly they do not mean much. Nor do we know what they mean combined. While the Court has said the proponent confronts the “heavy burden” or “heavy presumption” against a prior restraint, “there remains no canonical formulation of the prior restraint standard.”⁸¹

I prefer to dispense with the thought-stopping shibboleth *prior restraint* and to approach the matter like other injunction-noninjunction decisions. The plaintiff seeks an injunction against conduct by the de-

Lothschuetz v. Carpenter, 898 F.2d 1200, 1206 (6th Cir. 1990); 898 F.2d at 1208-09 (Wellford, J., concurring in part and dissenting in part); 898 F.2d at 1209 (Hull, J., concurring in part and dissenting in part); RESTATEMENT (SECOND) OF TORTS § 623 (1977) & app. (1981) (Special Note On Remedies for Defamation Other Than Damages). But, given the mystical power of the words *prior restraint*, prudence counsels against definitive prediction.

79. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 61 (1975).

80. Frederick Schauer, *Parsing the Pentagon Papers* 3 (May 1991) (Joan Shorenstein Barone Center Research Paper R-3).

81. *Id.* at 11 n.62.

fendant that is expression-related and arguably constitutionally protected. Perhaps the court will find that the defendant's speech is constitutionally protected and end its analysis. If not, substantive violation found, the court will proceed to remedy, looking first at the policies of the substantive law scheme the defendant is charged with violating. The judge will favor the plaintiff's choice of an injunction if it advances the interests the substantive law protects. Questions here will include predictive inquiries about how likely it is that the defendant will violate the law again in the future and whether this breach will cause the plaintiff harm.

Reallocating the existing "burden" or "presumption" against prior restraints, however, the defendant may show that remedial policies militate against an injunction. Reasons to disfavor injunctions against expression-related conduct seemingly are a specialized version of the reasons for the irreparable injury rule; we seek principles of containment because we fear undiscerning interlocutory procedure, lack of a citizen jury to ward off government overreaching, a preponderance burden of proof, and contempt maintained by the very judge who adjudicated liability, with the injunction insulated by the collateral bar rule from substantive scrutiny. An important lesson of *The Death of the Irreparable Injury Rule* is that we should examine principles of containment directly instead of filtering them through distorting clichés like prior restraint.

IV. ENDING THE IIR'S REIGN

A. Reform

We can approach reform of the irreparable injury rule in several ways. First, the rule may be constitutionally based: the judicial power to choose between damages and injunctions in ways that subordinate injunctions because of their adjudicative shortcuts and administrative burdens may be an inherent part of Article III and equivalent state judicial power that cannot be abrogated except by constitutional decisions or constitutional amendment.⁸² The judicial erosion of the irreparable injury rule, particularly by decisions that enjoin to protect constitutional rights without considering alternatives, diminishes the prospect that the irreparable injury rule is an inherent part of the judicial power.

Second, the courts themselves may possess common law adjudicatory authority to develop and circumscribe a doctrine like the irreparable injury rule that structures a judge's choice between remedies. *The Death of the Irreparable Injury Rule* suggests that courts have curbed the rule; it is itself part of the reform process (pp. 37-98).

82. See *Chambers v. Nasco, Inc.*, 111 S. Ct. 2123, 2132 (1991). Professor Gene Shreve suggested this to me.

Through professional criticism, judicial exceptions, and attrition, scholars and judges have diminished the irreparable injury rule to nominal survival and prepared the way for the bold Professor Laycock to write its epitaph.⁸³

Laycock is not persuaded that the courts' work described in the prior paragraph completes the rule's demise. He suggests a third option: legislatures, including Congress, should enact statutes to negate the irreparable injury rule (pp. 276-78). He commends to them a draft statute that neutralizes the irreparable injury rule without codifying the interests and specific rules.

Some questions about political practicality spring to mind. When developing platforms and legislative agendas, what political parties, interest groups, and lobbyists will rally to extirpate the irreparable injury rule? What coalitions will form to support this worthy reform? What constituent interest groups will emerge to petition, buttonhole, and importune legislators to eradicate this pest? What members of Congress and state legislatures will assign staff, sponsor bills, and schedule hearings on this riveting topic? Which networks and newspapers will cover these hearings?

"An important reason for court rulemaking," Professor Carrington, Reporter to the Advisory Committee on the Civil Rules, observed, "is that complex technical issues of judicial practice cannot sustain attention through the political process."⁸⁴ Unless an outrage causes public clamor, the status quo possesses monumental inertia. The legislator's need to tax, spend, and secure reelection virtually assure the legislative proposal's oblivion.

Amendment of procedural rules is a fourth possibility. I suggest additions to Federal Rule 8 and state equivalent rules. The first suggestion is a second paragraph in the rule on claims for relief:

A claimant requesting an injunction, specific performance, or any other equitable relief or personal order need not allege or prove that the damages or other relief are inadequate or that irreparable injury will occur without the order. The defending party may object to personal relief on any ground that makes it less appropriate than another remedy.

For neatness and consistency, the second sentence might be added to defenses.⁸⁵ An additional affirmative defense would be "adequate remedy at law, lack of irreparable injury."⁸⁶

Laycock specifically rejects procedural amendments to abolish the irreparable injury rule. "[R]ules of civil procedure are not supposed to change substantive law," he writes, "and I have little doubt that the

83. The phrase *nominal survival* comes from EISENBERG, *supra* note 25, at 118.

84. Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281, 282.

85. FED. R. CIV. P. 8(b).

86. FED. R. CIV. P. 8(c).

[irreparable injury rule] is substantive" (p. 278). In addition, however, to the subject's technicality, mentioned above, using a procedural amendment to neutralize the irreparable injury rule would update Federal Rule 2, which set a "civil action" as "one form of action."⁸⁷

One of Laycock's reasons for choosing legislation — that courts have treated remedies as substantive — may be less than dispositive. He cites a state-versus-federal choice of law decision.⁸⁸ He appears to conclude that substance-procedure characterization made in the context of deciding whether to select state or federal law carries over to another context — namely, whether a subject is amenable to rules amendment or statute. One substantive characterization does not overcome the richness and complexity of procedural reform. This assumption may yield to more particularized decisionmaking where meaning and classification depend on the function and policy environment of each particular decision. A classification as substantive that is animated by federalism principles may not compel a similar decision where separation of powers policies inform the discussion.⁸⁹

B. *The Law and the Enterprise*

Laycock has an invigorating intellect, for after he observes courts using the irreparable injury rule incongruently, he assumes an air of injured innocence and proceeds with assiduity to set the matter right. The legal realist is the nemesis of a legal rule that was a ruse. The words *irreparable injury* did not mean what they sounded like they should mean. And by any standard of what those words meant, the courts were not deciding disputes the way the rule told them to decide. Finally, Laycock reorganizes the doctrine to comport with the trend of decisions and to improve the way courts could administer the choice of remedies.

It is, however, important for Laycock to say what is and is not The Law.⁹⁰ Laycock evidences his loyalty to the concept of Uppercase Blackletter by ending *The Death of the Irreparable Injury Rule* with a tentative restatement, the rules offered in bold print (pp. 265-76). Laycock looks out over a legal landscape where remedial rules are certain and exist in texts.

Concluding that the legal process is not formulated so canonically, those with more fluid and less fixed views about the enterprise of government through courts — as well as about the injunction's potential peril and profit — will direct their attention to the wide potential range of possible practical solutions to particular disputes. Viewing

87. FED. R. CIV. P. 2.

88. Pp. 278 & 285 n.14 (citing *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988)).

89. See Carrington, *supra* note 84, at 284-85.

90. P. 260 (my uppercase).

the study of remedies as not restricted to a "discrete normative domain distinguishable from the entire normative universe,"⁹¹ they will call for additional remedial research on constitutional adjudication and principles of containment as well as on the moral, economic, political, and administrative values that inform judges' choices between alternative remedies.

Judges create remedial solutions called rules and simultaneously apply them to events that occurred before the rule was promulgated; they may modify and supplant standards the litigants previously thought applied. A precedent is a present signal to unknown future disputants: *this decision decides your dispute also*. Remedies decisions differ as precedent from substantive decisions. They provide scant basis for planning primary conduct; no one should rely on an earlier remedial solution to violate the substantive law.⁹² Remedies opinions also have an uncanny tendency to approach and recede as precedents under the pressure of the adversary technique leading to adjudication. For difficult remedial decisions contain a justification or background, a standard, and a discrete solution; a lawyer or judge may articulate each as the opinion's "rule."

Because it illustrates the preceding discussion of our different ways of looking at the law and the judicial enterprise in the context of legal education, I will not resist one lapse from my repugnance at revisiting the scenes of my youthful delinquencies. Laycock's discussion of whether judges will enjoin a trespass includes a summary of Chancellor Kent's artful 1823 decision, *Jerome v. Ross*.⁹³ In the course of concluding that Kent stumbled, Laycock observes that "[t]he opinion still appears in a well-known casebook" (p. 39). As a coeditor of that "well-known casebook,"⁹⁴ I feel constrained to, first of all, thank the author for the adjective, but second to observe that I aspire for Note 1 following *Jerome* in the casebook to be even better known. For that Note cites and quotes authorities to the effect that "modern" decisions subscribe to another approach.⁹⁵

In a law school casebook the pedagogical value of a well-reasoned but "incorrect" decision cannot, in my opinion, be gainsaid. Understanding *Jerome's* social and political environment against the cited precedential matrix is worth the effort. Whether Chancellor Kent decided *Jerome* correctly is less important today than whether he identified the issues and formulated the arguments correctly. The chancellor's discussion of the damage measures (including punitive

91. Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455, 456 (1989) (reviewing EISENBERG, *supra* note 25); EISENBERG, *supra* note 25, at 153.

92. See EISENBERG, *supra* note 25, at 110-11.

93. P. 39 (discussing *Jerome v. Ross*, 7 Johns. Ch. 315 (N.Y. Ch. 1823)).

94. FISS & RENDLEMAN, *supra* note 36.

95. *Id.* at 76.

damages) directs our attention to the alternatives to an injunction. In one felicitous but long-winded sentence, alone worth the price of admission, Chancellor Kent reminded us that the lack of a jury and the harshness of contempt militated against an injunction:

The objection to the injunction, in cases of private trespass, except under very special circumstances, is, that it would be productive of public inconvenience, by drawing cases of ordinary trespass within the cognizance of equity, and by calling forth, upon all occasions, its power to punish by attachment, fine and imprisonment, for a further commission of trespass, instead of the more gentle common law remedy by action, and the assessment of damages by a jury.⁹⁶

CONCLUSION

The curious reader who turns to the copyright page of the first printing of *The Death of the Irreparable Injury Rule* will notice the Library of Congress cataloging data on a sticker pasted over an earlier set of data. Instead of scraping the sticker off and making a mess like I did, read on. The call numbers below differ. The cataloguer who selected the original numbers had taken a cue from the words *death* and *injury* in the title. The original numbers would have located *The Death of the Irreparable Injury Rule* on the Washington and Lee library shelf ignominiously tagging behind the *Lawyers' Medical Cyclopaedia-Personal Injuries and Allied Specialties*, a humbling location for all of us who love equity and believe that what we do is important. A correction Library of Congress sticker was prepared and pasted over the old. *The Death of the Irreparable Injury Rule* is now ensconced next to Chafee, the equity giant of the first half of the century.

A trip to the advance sheets was just as humbling as scraping off a pasted-in Library of Congress sticker. A trial judge in a corporate dispute, which should have been well-briefed, managed to get almost everything backwards.⁹⁷ Here are the court's incorrect statements, with countercitations to correct statements in *The Death of the Irreparable Injury Rule*: adequate remedy at law and irreparable harm are distinct tests;⁹⁸ the inadequate remedy at law prerequisite for preliminary and permanent injunction is the same;⁹⁹ "Injunctions are extraordinary remedies that are generally not favored";¹⁰⁰ mandatory injunctions are more disfavored "since they compel a person to act rather than simply maintain the status quo," and the plaintiff must

96. *Id.* at 67 (quoting *Jerome*).

97. *Justin Indus. v. Choctaw Sec.*, 747 F. Supp. 1218 (N.D. Tex. 1990).

98. 747 F. Supp. at 1220. *But see* pp. 8-9.

99. 747 F. Supp. at 1220. *But see* pp. 110-32.

100. 747 F. Supp. at 1220. *But see* p. 5 n.6 & p. 253.

show a *clear* legal and factual *entitlement*.¹⁰¹ Finally, the judge decided against the claimant, because the substantive law did not support relief; but in describing the result he stated that the claimant lacked irreparable harm and had an adequate remedy at law.¹⁰²

This review began by commending *The Death of the Irreparable Injury Rule* to the widest possible professional audience. Laycock's carefully researched and clearly written statements of present doctrine push back the frontiers of learning; they will, if they find their way into the professional vernacular, improve students' and lawyers' understanding, judges' decisions, and the administration of justice.

In a preceding paragraph, I left *The Death of the Irreparable Injury Rule* on the shelf next to Chafee, where it ought to be classified — but not remain. Additional reasons to read and evaluate it clamor for attention. Laycock's important contributions include demonstrating that the legal-equitable vocabulary is remedially nonfunctional; describing what courts actually decide under the irreparable injury test; suggesting that the courts' approach be changed by putting on the defendant the onus of opposing personal relief; shining the spotlight of his research on silliness and redundancy; and organizing and formulating more precise principles of containment.

The irreparable injury rule deceived us into thinking that judges were making discerning remedial choices; we can now turn our attention to more effective analysis of principles of confinement and ways, when its time comes round again, to use the injunction as a vehicle for social reform without endangering important libertarian values. Policymakers must consider carefully the reforms Laycock advocates.

Finally, the injunction against Operation Rescue in Wichita hit the front page just as I was rereading *The Death of the Irreparable Injury Rule* to write this review.¹⁰³ Wichita had it all. A divisive issue. Bible-quoting preachers. Protesters in the hundreds. Counterdemonstrators. An injunction that wasn't working. An off-balance federal judge. A reluctant federal executive. Does any of this sound familiar?

Then, while I was writing this review, *Bray v. Alexandria Women's Health Clinic* was argued before the Supreme Court.¹⁰⁴ Why is the injunction, particularly the federal injunction, worth fighting for and against? The question *Bray* raises is whether, under the theory that blocking access to abortion clinics violates *patients'* right to travel, the federal court possesses federal question jurisdiction under section 1985 to enjoin protesters? The clinic protesters prefer to face state criminal

101. 747 F. Supp. at 1220. *But see* pp. 242-43.

102. 747 F. Supp. at 1223. *But see* pp. 196-200.

103. *See Women's Health Care Servs. v. Operation Rescue-Natl.*, 773 F. Supp. 258 (D. Kan. 1991).

104. *See Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991) (granting writ of certiorari).

charges — with jury trials. The controversies reveal to me how the injunction's expedited procedure, lack of a jury, and contempt enforcement concentrate judicial power and create the need for principles of containment to curb abuses and excesses. Chancellor Kent, where are you when we need you?

Professor Laycock has developed his functional analysis of remedies to the "operative rule . . . that equitable relief is not extraordinary" (p. 243). I put *The Death of the Irreparable Injury Rule* down believing that, despite all the contributions Laycock makes, he thinks the injunction is just another remedy. Readers whose remedial topography has higher peaks and deeper valleys than *The Death of the Irreparable Injury Rule's* will examine it in vain for the injunction's unique concentration of power with its dual potential for articulating public, particularly constitutional, values and for threatening individual liberties.