Michigan Law Review

Volume 57 | Issue 4

1959

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Recommended Citation

John P. Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495 (1959).
Available at: <https://repository.law.umich.edu/mlr/vol57/iss4/6>

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SPECIFIC PERFORMANCE IN FRANCE AND GERMANY

*John P. Dawson**

EDGAR DUFFEE studied long and closely the subject of specific performance. He taught it for many years, wrote about it and planned to write more. He conceived it broadly, as he did every subject that ever had his attention, but he had a lively interest in details, including very technical details. Long before others and much more than most, he saw the importance of our remedial system both in shaping law and as a reflection of its larger purposes. All those who learned from him will remember as long as memory lasts the insight he gave and the hidden meanings he extracted from careful study of lawyers' technique. He was also fascinated by history, and was a fine historian in his own right. This study, which will be largely historical, aims to follow one of the many lines of his own interests and to mark in small degree the lasting effects of his influence. It is also meant to express some of the sorrow felt by so many at the death of this wise, gifted and beloved man.

The casebook on Remedies used for years at the University of Michigan Law School contained an opening chapter prepared by Edgar and entitled "History of Our Remedial System." At an early point appears the statement:

"The most striking feature of English procedure from the earliest period of recorded history to the close of the twelfth century was the total absence of anything which could be called a damage remedy in the modern sense."

He then went on to describe the process by which specific relief was gradually displaced by damages: first as an incidental feature in actions to recover land and then through the increasingly popular and highly expansible action of trespass. The net result, as he described it, was that except for ejectment, replevin, and the extraordinary remedies (mandamus, prohibition, and so on), the common law system became committed to damages as its mode of relief. This growth also was gradual, but was well under way by 1450. If the common law system is viewed as a whole, there was a strange progression—from exclusive reliance on specific relief, to an almost exclusive reliance on damages, to a mixed system

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that employs them both and regulates competition between them by the adequacy test. The story is interesting in itself, still more the reasons as he described them.

Developments occurred in Roman law that were, at least externally, parallel. It is interesting to inquire why the two great legal systems of the western world should have followed, in broad outline, a similar course. Roman law also deserves some attention because of its lasting influence on the thought of western Europe, even though its two leading systems—the French and the German—solved the problems of specific performance in radically different ways.

1. *Roman Law*

It was apparently true, as Gaius said, that the praetorian procedure of classical Roman law knew only the money judgment. Writing about the middle of the second century A. D., Gaius was describing the formula that the praetor prepared after hearing the parties. The formula named the *iudex*, a layman chosen with the consent of the parties, and authorized him to render judgment on the issues defined in the formula. Gaius' comment was:

"In all formulas containing a condemnation, the condemnations are expressed through valuation in money. And so, even though the action is to recover a specific thing, such as land, a slave, a garment, gold or silver, the *iudex* does not order the defendant to deliver the specific thing, as was the practice in early times, [but] orders him to pay money after estimating its value."¹

Indirect evidence from many sources confirms the flat statement that in Gaius' own time civil actions under the praetorian system ended in money judgments. The problem comes with the cryptic suggestion that "in early times" (*olim*) specific relief was normal.

The historical problem is so fundamental that most modern Romanists have had something to say on the subject.² Full agree-

¹ GAIUS, INSTITUTES, IV 48. I believe this phrasing expresses the accepted view, though there are great difficulties with the passage, since no "but" appears in the Latin text and a change in punctuation would alter the sense of the last sentence. The problem is reviewed by Zulueta in the note to this passage in his edition of Gaius.

² A useful review of the nineteenth century literature is given by Pfaff, "Zur Lehre von der Condematio Pecuniaria im roemischen Formularprozess," 34 JURISTISCHE VIERTEL-JAHRSSCHRIFT (n.s. vol. 18) 49-71 (Wien, 1903).

ment is not yet reached, but the opinion that now seems to prevail would ascribe whatever specific relief there was, not to state-organized courts, but to private self-help. It seems clear enough that at the time of the Twelve Tables a debtor who defaulted in paying a money judgment could be killed or enslaved by the judgment creditor. If the dispute related to a specific asset detained by the defendant, the owner after establishing his ownership was free to use force to seize it.³ The original function of adjudication was to define the limits of authorized self-help, conceived as a form of vengeance. Only gradually was its severity modified and centuries passed before it was displaced. The mitigating agent was a judge-arbitrator who used a money award as a means of effecting composition and buying off the feud.⁴ If this is true, the specific relief to which Gaius referred was at the opposite end of the scale from the specific relief of twelfth century English law, which came from great kings who made available to private litigants their own large powers to command.

If this account of origins is accepted, it still does not explain the triumph of the money judgment under the late Republic and the Empire, when self-help had been largely supplanted by a state-controlled system of remedies. But one further point should be noted. Praetorian procedure was sharply divided between proceedings before the praetor, leading to issuance of the formula, and the trial itself, conducted by the *iudex*. The *iudex* was a layman, chosen ad hoc by praetor and litigants, for the particular case. He was not, like the praetor, an elected public official with a year's term of office and with a high magistrate's power to enlist public force. The persons chosen to serve as *iudex* were often men of high rank in Roman society, but it is not surprising that they were not entrusted with extensive powers in framing

³ Some authors have followed the view expressed by GIRARD, MANUEL ÉLÉMENTAIRE DU DROIT ROMAIN, 8th ed., 360-361 (1929), in finding indirect pressure to surrender specific property through the liabilities imposed on the sureties required by *legis actio* procedure. The argument was that a possessor of land or goods who failed to establish his title would not himself incur any liability on failure to surrender the object sued for but that his surety (usually a relative or friend) would be subject to seizure, slavery or possibly death. Koschaker, 50 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FUER RECHTSGESCHICHTE (roem.) 357-358 (1930), found no evidence that the surety was liable for anything more than the destruction, injury and possibly the fruits of the object sued for, so that recovery of the object itself would depend on self-help seizure by the successful party.

⁴ Koschaker, 50 ZSS (roem.) 355-357; SOHM-MITTEIS-WENGER, INSTITUTIONEN DES ROEMISCHEN RECHTS, 17th ed., §116 (1928); WENGER, INSTITUTIONEN DES ROEMISCHEN ZIVILPROZESS-RECHTS 135-136 (1925).

provisions for specific relief and in arresting or fining for disobedience of their commands. If there is a single reason for reliance on money judgments in classical procedure, it is the practice of pre-empting prominent laymen to perform judicial duties. The *iudices* were much more than jurors of the type developed by the common law, but in both systems the posting of laymen in a crucial position set limits to procedural growth and thus had lasting effects on the law itself.

But the Romans were also inventive. They discovered that money judgments could be employed not merely as simple punishment but as instruments for coercion. The technical means employed was language in the formula that gave the *iudex* freedom in fixing the sum to be paid. His freedom could be unlimited or could have an upper limit (*taxatio*) imposed. From Gaius it appears that both types of formula were in use in the second century A.D.⁵ and his testimony is confirmed by other sources, most of them somewhat later in time. They were concerned with the simple case of an order to surrender a specific object. The claimant in such a case was allowed to swear to an inflated value, apparently without penalties for perjury. If the defendant did not obey the order to surrender the object, judgment was entered for the sum thus inflated; some jurists were explicit that this was because of the defendant's "contumacy" in disobeying the command of the *iudex*.⁶ The net result was a system of money fines, payable not to the state but to the opposite party and involving incidentally a considerable enlargement of the judge's power in compelling surrender of specific assets.

For persons familiar with our equitable remedies, much greater interest attaches to controls over conduct through mandatory or negative injunction. Such injunctions, described as inter-

⁵ GAIUS, INSTITUTES, IV 51.

⁶ D. 12.3.1 (Ulpian): "We do not consider that property which is the subject of litigation is worth more, because the judgment can be augmented, on account of the contumacy of him who does not restore it, by an oath [of the plaintiff] taken in the cause. For the property is not thereby rendered of greater worth; on account of contumacy it is estimated at a price beyond its value." Similar ideas appear in D. 4.3.18 (Paul); D. 6.1.68 (Ulpian); D. 12.3.2 (Paul); D. 12.3.8 (Marcellus). Indirect confirmation comes from D. 46.1.73 (Paul) and D. 35.2.60.1 (Javolenus). Paul in D. 12.3.11 asserted that it was not customary to inquire "concerning the perjury of him who took an oath as to value through legal necessity" (*ex necessitate iuris*).

These aspects of praetorian procedure are discussed by many authors, among them BUCKLAND, TEXTBOOK OF ROMAN LAW, 2d ed., 659-660 (1932); WENGER, INSTITUTIONEN DES ROEMISCHEN ZIVILPROZESSRECHTS 138-141 (1925); SOHM-MITTEIS-WENGER, INSTITUTIONEN DES ROEMISCHEN RECHTS 694-697 (1928); BUCKLAND, EQUITY IN ROMAN LAW 28-30 (1911).

dicts, were well known and widely used. They were issued on the authority of the praetor after special hearing. To one familiar with the assumptions of Anglo-American law, it would seem that such orders, cast in emphatic terms, would engage the prestige and authority of the praetor to such a degree that special measures would have been organized to ensure compliance. There is in fact one instance, late in the classical period, where Ulpian proposed that the praetor proceed *extra ordinem* to compel a funeral to be held for a deceased person in accordance with a promise made to the deceased person in his lifetime.⁷ There was another instance in which the enforcement of a negative injunction was issued against interference with a privileged entry on land, with the statement that it was within the functions of the *iudex* to "force" the defendant to comply.⁸ But in this, as in several other instances where similar statements were made, the kind of "force" that could be used was not defined. In general, it seems quite clear that disobedience of an interdict led to a standard trial and money judgment, despite the strong language in which the interdicts were often cast.⁹

This was not the whole story, however, even for classical law. The political authority that was concentrated in Augustus and his successors was exercised increasingly by functionaries appointed by them. The powers of the ruler penetrated all phases of government and administration as the principate was transformed into empire. One symptom of change was the creation of special imperial courts, operating *extra ordinem*—outside the order of formulary procedure—and staffed with permanent officials who were delegates of the emperors. Like the English Chancellors, these magistrates created a system of remedies that persisted side by side and competed with the older formulary system, though after perhaps two centuries (unlike the English Chancellors), they ended by displacing the older system, which disappeared en-

⁷ D. 11.7.14.2 (Ulpian): "If a testator directed (*mandaverit*) a certain person to provide a funeral for him and this person does not provide the funeral after receiving money [for the purpose], Mela writes that an action for fraud should be awarded against him; but I believe that he should be compelled by the praetor *extra ordinem* to hold the funeral." Another case of compulsion to perform funeral rites is D. 40.4.44.

⁸ D. 19.2.19.5 (Ulpian).

⁹ BUCKLAND, *EQUITY IN ROMAN LAW* 28-30 (1911), referring, however, to D. 43.29.3.13 where repetition of the praetor's command, with the possibility of repeated fines, was suggested as an appropriate measure in a type of case that was especially appealing—continued detention as a slave of a person found to be free.

tirely. The extraordinary system of imperial courts was well known to classical lawyers, who made it plain that the imperial judges were ready to take on some difficult tasks. The judges specially assigned by the emperor to the enforcement of *fideicommissa* could compel the surrender of property that had been subjected to this form of charge.¹⁰ A father could be ordered to emancipate his sons or an owner to free his slaves.¹¹ Parents could be compelled to arrange marriages for their children and provide them with dowries;¹² an heir to erect a monument.¹³

In the post-classical period (after 235 A.D.) it is clear that these developments were carried still further. The imperial courts became the ordinary courts for civil litigation. During the 300 years that elapsed before Justinian's *Corpus Juris* was promulgated, the lives and energies of the whole population were increasingly constricted by the oppressive weight of a great imperial bureaucracy. It would have been strange if the imperial courts had accepted limitations that had seemed appropriate for the citizen judges of the praetorian system. Few details survive as to the procedure used for enforcement of obligations, and most of the evidence is indirect. But Justinian himself expressed amazement that a judge could accept the views of classical jurists and merely decree a money judgment against a person obligated to free a slave; he directed his judges not to be so stupid (*stultum*) in the future.¹⁴ Though the evidence is sketchy, we can be quite sure that specific performance could be awarded under the late Empire whenever imperial judges considered it suitable.

The compilers of the *Corpus Juris*, in their fidelity to ancient traditions, left untouched most of the classical texts dealing with this subject. But there was one that they corrected and brought up to date. It was a text from Ulpian, appearing in the chapter concerning an owner's action to recover specific property that was wrongfully detained (*De Rei Vindicatione*). In this standard case Ulpian had given the standard answer of the classical jurists—

¹⁰ D. 43.4.3. pr. (Ulpian).

¹¹ D. 35.1.92; D. 40.5.28.4; D. 40.5.26.7; D. 40.5.1-4. In the event of disobedience, the decree of the imperial official was, as we would say, self-executing, even as against absent persons.

¹² D. 23.2.19 (Marcian).

¹³ D. 5.3.50.1 (Papinian). The cases referred to in notes 11-13 did not involve specific enforcement of contracts; most arose through the receipt of conditional gifts by will.

¹⁴ C. 7.4.17. Other references to the late imperial period are collected by Pfaff, cited note 2 supra, pp. 97-104.

the remedy was a money judgment but the judgment could be inflated to punish a defendant whose failure to surrender was due to his own "fraud." What the compilers did was to insert a single clause—if the defendant has the property sued for, it will be taken from him "by military force on the authority of the *iudex*" (*manu militari officio iudicis*).¹⁵ This simple statement contradicted almost all the classical texts, which on this issue had been more than usually consistent. The purpose no doubt in inserting it was to make the text express the practice of Justinian's time. The compilers could hardly have foreseen all the uses that would be made of it.

Two other texts must also be mentioned, both quoting Celsus, a jurist of approximately Gaius' time (the second century A.D.). In one of them Celsus was discussing the liability of a surety who had guaranteed another promisor against loss. Celsus concluded that if loss occurred the guarantor should be condemned to pay a sum certain in money "as happens in all obligations to do."¹⁶ This casual remark was thrown off in a case where a money judgment was plainly an appropriate, if not the only possible, remedy. It seems most unlikely that Celsus was trying to express a basic distinction. As has been said, the general principle of praetorian procedure at the time he wrote was that *all* obligations were translated into money judgments, whether they involved doing, not doing, surrendering specific property or anything else. Classical jurists occasionally spoke of "doing" or "giving" as the subjects of obligations but in other discussions any effective distinction between them was washed away.¹⁷ What Celsus had

¹⁵ D. 6.1.68. The text is important enough to be reproduced in full. Brackets are placed around the interpolated passage:

"He who has been ordered to restore and does not obey the *iudex*, contending that he cannot restore; [if indeed he has the property, possession shall be transferred from him with military force by the authority of the *iudex* and there shall be judgment only as to the profits and all *causae*. But if he cannot restore] if he has acted fraudulently so as not to be able to do so, he shall be ordered to pay as much as his adversary swears to in the action, without any limitation, however high. But if he cannot restore, and has not acted fraudulently so as not to be able to, he should be adjudged to pay not more than what it is worth, that is, the value of his adversary's interest. This is the general rule and applies to all cases where anything is to be restored by decision of the *iudex*, whether in interdicts or actions *in rem* or actions *in personam*."

¹⁶ D. 42.1.13.1.

¹⁷ For example, D. 45.1.2. pr. says: "Some stipulations involve giving and some involve doing." Formulas addressed to *iudices* often said that they were to decide what the defendant was "to do or to give." But in D. 50.16.218 Paul was quoted: "The term 'to do' (*facere*) includes every kind of doing such as giving, paying, judging or walking."

in mind in his oblique and unnecessary remark is extremely hard to say. A clue may perhaps be found in another text in which Ulpian suggested that a money judgment was the appropriate solution where several persons were obligated to render an indivisible performance (as by transferring a tract of land, creating a servitude, or building a house) and the problem was to distribute the burden between them. In this context Ulpian quoted the opinion of Celsus that in obligations "to do" the obligors in the event of breach should be required to pay money.¹⁸ The passage taken as a whole gave not the least support for any sharp distinction between "doing" and "giving," for Ulpian plainly included in "doing" not only acts and abstention, but also "giving" by transferring specific land. It is surely the most amazing thing that from materials like these there could have been built a set of basic limitations on judicial power in a modern society.

The main reason that such a system was built was that the medieval schoolmen in Italy had no sense of history and believed what they read. Handicapped as they were by this double limitation, they did extremely well.

2. *Medieval Roman Law*

The study of Roman law was resumed shortly before 1100 by the glossators of Bologna. They started from the assumption that the whole of the *Corpus Juris* was still valid law in Italy. The possibility that some texts were corrupted never entered their minds. And if it had, the *Corpus Juris* had in any case been promulgated by a Holy Roman Emperor as law in his dominions; for the glossators it stated in ultimate form the rules and the values that must guide human society, past and future; it summed up the wisdom of antiquity. Contradictions and obscurities there were, but they were merely a challenge to closer study in order to explain them away. The manner of explaining them that was least acceptable to the doctors is the one that any modern reader would chiefly emphasize: there was bound to be conflict in the texts of the *Corpus Juris* because many of the rules it contained had been superseded or modified in the long stretch of time the Roman system had lasted. The doctors of Bologna had no tools that could dig through the layers of human experience recorded there, all jumbled up together.

¹⁸ D. 45.1.72.

The Bolognese doctors quickly discovered that on the subject of specific performance there was conflict in the texts. The problem that first drew their attention was the contract of sale with seller refusing to make delivery—could he be forced specifically (*praecise*) to perform? All but one of the doctors accepted the verdict of the classical texts and said he could not. The single dissenter was Martinus, one of the Four Doctors of Bologna, who was well known at the time for his advanced and somewhat radical views.¹⁹ Martinus argued that since the vendor's obligation was to transfer the specific thing, he should be compelled to do so if this was possible, and he asked the somewhat harrowing question: "If you have sold bread, have not delivered it, and I have died of hunger, will a money judgment suffice?" But the texts he was able to cite for his view were drawn from scattered sources and were not very persuasive.²⁰ As the debates progressed, Martinus invoked another text, the interpolated passage from Ulpian which authorized "military force" to recover an asset withheld from an owner. This text apparently made an impression, though the other doctors disposed of it for the moment by saying that it did not apply to contracts to sell but only to claims rested on an ownership already acquired.²¹ Then there appeared, in further support of the majority view, a contention that Justice Holmes has made familiar to us—a promisor who paid damages instead of performing was merely exercising a privilege given by law.²² Though they did not talk about "bad men."

The great summarizing gloss of Accursius (1182-1260) had as one of its principal objects the settlement of questions that had been disputed among the earlier doctors. But in this case Accursius straddled the issue. In one passage he preferred the majority view; in another he came out strongly on Martinus' side, saying that a vendor who can deliver "acts dishonestly in breaking his

¹⁹ The facts known about Martinus are collected by KANTOROWICZ, *STUDIES IN THE GLOSSATORS OF THE ROMAN LAW* 86-87 (1938). His influence in developing doctrines of unjust enrichment is discussed by DAWSON, *UNJUST ENRICHMENT—A COMPARATIVE ANALYSIS* 68-77 (1951).

²⁰ HAENEL, *DISSENSIONES DOMINORUM* 46-48, 93-94 and 597 (1834): "Quaerit enim Martinus, si panem vendideris, te non tradente mihi mortuo fame, quod interesse poterit praestari?" Martinus chiefly relied on D. 19.1.11. 1 and 2 which said that the seller "should" deliver (*rem ipsam praestare venditorem oportet*), and Martinus argued that *oportet* conveyed the notion of a "necessity."

²¹ HAENEL, *id.* at 528-530, a long discussion by Hugolinus.

²² This was suggested by Joannis Bassianus, quoted in the gloss by Accursius to D. 19.1.1.

promise" and adding an appeal to the authority of the praetor, who had said: "*pacta servabo*."²³ During the next hundred years the swing to Martinus became pronounced, with increasing reliance on the corrupted text from Ulpian. By the time of Bartolus and Baldus, in the fourteenth century, there was doubt no longer: a seller of a specific asset who was able to deliver could be compelled to do so "by military force." *Pacta servanda* and Ulpian's text should be read very broadly; the use of force was justified against *anyone* who detained a specific asset that he was obligated to deliver.²⁴

Until this conclusion was firmly established there was no particular reason for distinguishing between obligations that were enforceable specifically and those that were not. Accursius had noted the distinction suggested by Celsus, between obligations "to give" and obligations "to do" but had not made much of it.²⁵ Baldus, about a hundred years later, stated that a person who had promised to build a house could not be compelled to perform specifically (*non cogitur praecise ad factum*) because "this would be a kind of servitude."²⁶ But it seems that the first to square away, as Edgar Durfee would have phrased it, was Bartolus (1314-1357) whose views were to dominate the generations that followed. Bartolus asked the question—"Why one result in obligations to give and another in obligations to do? . . . I have searched the gloss and it gives no answer. So far as the writers discuss this question, they can give no answers that are necessarily conclusive, only some that appear to be somewhat persuasive." He then quoted the reason suggested by Baldus, that enforcement of a promise to act over an extended time would involve a kind of servitude (*quaedam species servitutis*). But Bartolus then pointed out that this was not always true, for some acts could be accomplished briefly without any kind of servitude. So he

²³ Glosses to D. 19.1.1 and Inst. 4.21.17.1. In his gloss to D. 42.1.13.1 Accursius also indicated his support for the notion that in obligations "to give" the obligor was compelled to perform *praecise*.

²⁴ Odofredus, Comm. on D. 6.1.68 (ed. 1550, Lyon), pp. 243b-244a; Cynus, Commentaria in Codicem, 266 (Frankfort, 1578), commentary on C. 4.49; Baldus, commentary on Code 4.49 and D. 6.1.68; Bartolus, commentary on D. 19.1, No. 12.

²⁵ In his gloss to D. 42.1.13.1 Accursius cited a number of conflicting texts on obligations "to do" and mentioned the view advanced by some jurists that in obligations "to do" specific performance was possible if the act was one that could be performed by a third person. He then concluded that in any case in obligations "to give" the obligor could be compelled to perform.

²⁶ BALDUS, commentary on C. 4.49.

quoted a second reason, given by some "modern" writers, that in obligations "to do" so much depended on performance at the time and in the manner promised that if default occurred the only practical remedy was an award of money damages. He described this reason as "good enough" but incapable of covering all situations. He also quoted and rejected a third reason, given by another author, that in obligations "to do" the promisee might often have no interest of his own that performance might serve. Bartolus added a fourth reason, suggested by himself, that the promisee's interest in securing "acts" might be hard to measure, whereas his damages through not securing a specific thing would be certain, or at least ascertainable. He ended this phase of his comment with the lame remark—"These could be the reasons."²⁷ After revealing thus his own mystification, he went into a long discussion, making it clear that the crucial line was between promises "to do" and promises "to give." Only promises "to give" could be directly enforced, and promises "to do" meant damages.

The authority of Bartolus was so enormous that his adoption of this distinction, reluctant though he apparently was, made it a familiar part of civilian doctrine thereafter. Indeed, if the texts of the Corpus Juris were accepted at face value, this distinction seemed to offer the only avenue of escape. The great bulk of the classical texts, untouched by the compilers of the Corpus Juris, spoke only of money judgments. The examples of specific relief in late classical and post-classical sources involved mostly some quite exceptional cases and bore the stamp of the emperor's authority, operating *extra ordinem*. The great exception was the corrupted text of Ulpian which dealt with a very standard case, with some language cast in general terms,²⁸ though in substance Justinian's compilers made him say just the opposite of what he probably meant to say. Then there was the flat statement of Celsus about obligations "to do," made at random and in its

²⁷ BARTOLUS, commentary on D. 45.1.72, No. 13. In his commentary on D. 19.1.1, No. 12, Bartolus showed his awareness that the distinction between "doing" and "giving" was artificial. He drew on grammar, and described the obligation of a seller as "participial;" its nature was in part that of an obligation "to do," so that it was discharged by money payment if performance was impossible, but it was also an obligation to give that which was specifically enforceable if performance was possible, just as a participle is both a noun and a verb. I cannot say how far this flight of fancy impressed his contemporaries.

²⁸ It should be noted that the concluding sentence of D. 6.1.68, quoted above, note 15, is: "This is the general rule and applies to all cases where anything is to be restored by decision of the *iudex*, whether in interdicts, or actions *in rem* or actions *in personam*."

context unintelligible even now. But it was a flat statement: in all obligations to do the remedy must be a money judgment. After mature reflection and extended debate, the medieval Roman lawyers accepted this statement and summed it up in the slogan: *Nemo potest praecise cogi ad factum* ("no one can be compelled specifically to act").

In his courses in Securities Edgar Durfee discussed for years another well-known slogan: *Nemo plus juris transferre potest quam ipse habet* ("no one can transfer a greater right than he himself has"). He called it Little Nemo and in a lengthy text discussion that is familiar still to many, he explored the truths, half-truths and falsehoods summed up in this short sentence.* The post-glossators' slogan on the subject of specific performance likewise contained a core of truth and through constant repetition it came to seem like ancient wisdom. It expressed the outside limit that students of Roman law in the late middle ages thought was imposed by the Roman texts, despite the bias toward specific performance that some expressed in another slogan, *pacta servanda*.

The slogan *nemo potest praecise* had many vicissitudes in western Europe during later centuries. Its fate in France has greatest interest, for in France it wandered into the Civil Code.

3. France

a. *The Old Regime*. The judicial system organized by the French crown in the thirteenth century was subject to none of the limitations of praetorian procedure in Roman law. The royal courts were organized in a hierarchy—courts of first instance, intermediate courts of appeal, and high courts of appeal called Parlements, of which there came to be thirteen located in different regions of France. Courts of first instance were clearly empowered to order delivery of specific land or goods involved in litigation, to overcome resistance to such orders through direct action by their own officers and to punish by fine and imprisonment persons who interfered.²⁹ Special classes of depositaries could be compelled by imprisonment to surrender objects deposited with them.³⁰ Injunctions against trespass to land were freely awarded.³¹

* See p. 459 *supra*.—Ed.

²⁹ I IMBERT, *PRACTIQUE JUDICIAIRE*, c. 64 (1620), described the procedure against defendants in such cases who had been declared to be "contumacious."

³⁰ PAPON, *ARRESTS NOTABLES*, XI, tit. 8, no. 2 (1622), citing a decree of the Parlement of Paris in 1526 against a "depositaire de justice."

³¹ 5 *JOURNAL DES AUDIENCES* 521, reports a decree of April 4, 1705; in which the Parle-

There was, it is true, a distinction between ordinary remedies and those exceptional forms of "equitable" relief that required royal dispensation, but in the course of time the distinction became purely formal.³² The judicial authority of the crown was vested as a whole in royal judges, who clearly had power to use money fines or arrest to ensure compliance with their commands.³³ Included among the commands that were issued by the Parlements were decrees that were plainly legislative in character—regulations of the trades and professions, provisions for internal security, prohibitions of usury, of disorderly assemblies, or of wasteful expenditures. In their role as subordinate legislatures the Parlements asserted in the clearest terms their powers to punish with money fine or arrest any disobedience by members of the public to whom their orders were directed.³⁴ Against this general background it would have been strange if the royal courts, especially the Parlements, had recognized any insurmountable barriers to the specific enforcement of contracts.

As to the contract to "give" (i.e., to transfer a specific asset), French courts and writers of the intermediate period were ap-

ment of Paris affirmed a lower court decree enjoining a group of local residents from cutting wood on land of the Seminary of Rheims, under penalty of £1000 fine or imprisonment for any violation. The case had special interest because the remedy awarded was in effect specific performance of a contract between the Seminary and the local inhabitants, by which the latter had surrendered their right to cut wood in exchange for cancellation of the Seminary's right to tithes.

MAYNARD, *NOTABLES ET SINGULIÈRES QUESTIONS DE DROIT* (1751), 336, reports a decree of the Parlement of Toulouse in 1565 forbidding assemblies on certain land "on pain of the whip and arbitrary fine."

³² Dawson, "The Equitable Remedies of the French Chancery before 1789," *FESTSCHRIFT FUER ERNST RABEL* 99 (1954).

³³ PAPON, *ARRESTS NOTABLES*, XVIII, tit. 5, no. 42 (1622), fine of 100 francs and imprisonment until compliance ordered in 1555 against a party who refused to carry out a partition ordered by the court; XIX id., tit. 8, no. 1, Bishop of Constance in 1548 subjected to "great fines" payable in part to the crown and in part to the other litigant for being "disobedient and intractable toward the court," and "a gentleman of Poitou" condemned in 1583 to pay 2000 crowns to the opposite party and to be imprisoned because of his disobedience.

³⁴ There were hundreds of such decrees. An example is the decree of the Parlement of Paris in 1611 mentioned by I BRISSON, *DICIONNAIRE DES ARRETS* 168 (1711). It forbade the "youth" of Soissons from assembling every May, as had been their practice, under a leader who was called *le Prince de la Jeunesse*; the decree in terms carried the death penalty against the youth who so assembled and corporal punishment against their parents. The series of reports known as the *Journal des Audiences* has numerous decrees from the seventeenth and early eighteenth centuries that purport to regulate conduct in a variety of ways and threaten fine, corporal punishment or imprisonment for disobedience. JOUY, *ARRESTS DE REGLEMENT* (1752), is a convenient collection of regulatory decrees of the Parlement of Paris; LA ROCHE-FLAVIN, *ARRESTS NOTABLES DU PARLEMENT DE TOULOUSE* (1682) for the Parlement of Toulouse.

parently in full agreement—if the asset was available a seller could be forced to surrender it.³⁵ More than this, if he contracted to convey a clear title and a defect in title was removable, he could be forced by fine or imprisonment to remove it.³⁶ And the remedy was mutual, as Lord Justice Fry would have put it—i.e., a seller of land could compel the purchaser to complete the contract by signing the necessary papers.³⁷ As to contracts to “do,” not involving the surrender of a specific asset, a distinction was drawn between promises that were and were not under oath. Bartolus’ conclusion as to contracts to “do” was well enough known, but, as one reporter expressed it, in promises that had been made under oath “an act that is possible . . . must be carried out specifically and he who has obligated himself can be specifically compelled to satisfy the said obligation and cannot escape by an offer of damages.”³⁸

There was no inherent reason, in other words, why French law could not have developed a rational system of contract remedies and freed itself from the hampering restrictions that the glossators had derived from Roman law. The powers of French courts were ample. The notion that promises under oath were entitled to special treatment seems to have been accidental; though suggested for promises to “do,” it was ignored in promises to “give” (i.e., to transfer specific assets).³⁹ This kind of distinction could have been brushed aside by an original mind, well in-

³⁵ 1 D’ESPEISSES, *OEUVRES* 41-42 (1778), citing several French authors and a decision of the Parlement of Paris on Dec. 18, 1557; 1 *BOURJON, DROIT COMMUN DE LA FRANCE* 471 (1780); 1 *JOURNAL DES AUDIENCES* 733 (ed. 1757), decision of the Parlement of Paris on May 28, 1658 (the same case appears in the 1667 edition of 2 *JOURNAL DES AUDIENCES* 77); 4 *JOURNAL DES AUDIENCES* 731 (ed. 1757), decision of Parlement of Paris on July 19, 1697.

³⁶ PAPON, *ARRESTS NOTABLES*, XI, tit. 4, no. 14 (1622), reporting a decision of the Parlement of Paris in 1542; DUMOULIN, *EXTRICATIO LABYRINTHI DIVIDUI ET INDIVIDUI*, no. 28-29 (*Opera Omnia*, 1681, III 94-95): “tanquam falsi venditores pignoratione personae carceribusque coercentur.”

³⁷ 6 *JOURNAL DES AUDIENCES*, Part I, 207 (Paris, April 22, 1712).

³⁸ CHRESTIEN, *PLUSIEURS ARRESTS NOTABLES* 174 (1558), citing a decree of the Parlement of Paris of October 13, 1539, but giving, unfortunately, no details; PAPON, *ARRESTS NOTABLES*, X, tit. 1, no. 3 (1622): “Par disposition de droit commun, celui qui est obligé de faire quelque chose, n’est précisément tenu au fait par luy promis et n’y peut estre contraint (citing Celsus); toutefois si telle promesse est jurée, il y sera précisément contraint” (citing, without details, decrees of the Parlement of Grenoble, Sept. 12, 1460, and of the Parlement of Paris, July 11, 1585). Papon also mentions in the same place a decree of June 1532 where a promisor had undertaken to build a mill but when he declared it was “impossible” to do so, he was held only for damages.

³⁹ The decision of 1658, cited above, note 35, involved a simple promise in writing, not under oath, and the writers cited by D’Espeisses (same note) made nothing of the distinction.

formed on French practice and capable of undertaking a fresh analysis of the problem. In short, there is a villain in this story. The villain was Pothier (1699-1772). It was from Pothier that the draftsmen of the Code of 1804 derived their ideas on specific performance, as well as on most of the law of obligations. Pothier was a routine compiler of other men's ideas. His style was very readable and gave the appearance of lucidity, but the appearance was delusive. What he did was to give a superficial semblance of order to the dispersed elements he brought together—classical Roman law, glossators' doctrines and French custom of the eighteenth century. In modern France his writings still inspire immense respect. But the quality of his intelligence can be measured by the fact that in reproducing Bartolus' distinctions he did not show the slightest trace of the doubts that had tortured Bartolus.

Pothier drew a basic distinction between obligations "to give a thing" and obligations "to do something." In the latter class, the obligor could only be forced to pay damages, for "*nemo potest praecise cogi ad factum*." The same was true, he said, of an obligation "not to do," with the qualification that if in breach of such a negative obligation the obligor had done something that could be destroyed, the promisee could be authorized to do the work of destruction at the obligor's expense.⁴⁰ The only difficulty that Pothier felt was over the question whether a seller or lessor could be compelled to perform by direct execution against specific property sold or leased, without violating the "rule" that *nemo potest*. . . . But he concluded that this "rule" (also called a "maxim of law") was not violated by direct execution and that the use of force to deprive an owner of specific property was not "uncivil." He defined the problem as one merely of construing the meaning of *nemo potest*, which he treated as a binding rule. Only in one place, among several where he discussed it, did he even attempt an explanation of *nemo* itself, and this indirectly, when he said that *nemo* applied to "a bodily act by the debtor's person, to which he could not be constrained without outrage to his person and his liberty."⁴¹ He drew no other distinction between types or classes, between obligations that were hard to enforce and

⁴⁰ 1 POTHIER, TRAITÉ DES OBLIGATIONS §§141, 146, 156-157, and for the suggestion last mentioned, §158 (Oeuvres, 1824).

⁴¹ 2. POTHIER, TRAITÉ DU CONTRAT DE VENTE §§68, 480 (Oeuvres, 1824); 3 TRAITÉ DU CONTRAT DE LOUAGE §66, the last-cited section containing the language quoted.

those that were not. Above all he misrepresented the practice of his own time.

The commissions that approved the proposed draft of the Civil Code of 1804 accepted Pothier's bland statement, apparently without debate. The only statement of motives that dealt with it was merely a paraphrase of Pothier: "No one can be constrained to do or not to do a thing, and if it were possible such constraint would constitute violence, which cannot be a means for enforcing contracts."⁴² In considering the reasons why the draftsmen of the Code were so uncritical in following Pothier we must remember the libertarian ideas that were still in circulation and the reaction of the Revolution against arbitrary power, unregulated by rules of law. But there was also a more specific distrust, a distrust of judges. For the high courts of France before 1789 were oligarchies. Judicial offices were owned through outright sales by the crown, were saleable by their owners and inheritable by their heirs. Possessing the large powers of legislation that have already been mentioned, irremovable and immune to external controls, the judges were a symbol of privilege and a danger to the reorganized state. Pothier's simple formulas had the virtue, if it was a virtue, of severely restricting judicial powers. In the scramble to meet Napoleon's deadlines it is not surprising that no one paused to reconsider the implications of *nemo potest praecise*.

b. *From 1804 to 1940.* The relevant provisions of the French Civil Code (they are still in effect) start with a basic distinction—"every contract" has as its object either something that the obligor has promised to give or something he has promised "to do or not to do" (article 1126). As to the latter type, article 1142 provides: "Every obligation to do or not to do is resolved in damages in case of non-performance by the obligor." In the next two articles (1143 and 1144) there appears a qualification that was suggested in part by Pothier. The promisee can be authorized to accomplish at the defaulting promisor's expense either (1) the destruction of anything done in violation of an obligation "not to do" or (2) the performance of an affirmative act that the obligor promised "to do."

As to obligations to "give" (i.e., obligations to transfer specific

⁴² Statement by M. Bigot-Préameneu, quoted by Meynial, "De la Sanction Civile des Obligations de Faire ou de Ne Pas Faire," 56 REVUE PRATIQUE DE DROIT FRANCAIS 385 at 400 (1884).

assets), the principle expressed, covering sales, gifts and exchanges, is that title passes by mere agreement (articles 1136, 1138, 1583, 938, 1703). As to both land and goods, the title so acquired is sufficient basis for an action to recover possession, with direct execution to seize the asset promised. Title to land that rests merely on a contract of sale is somewhat precarious, since it can be cut off by a sale to a second purchaser (whether with or without notice) who first records his contract. As against creditors of the seller, however, protection is more complete; since French law has no procedural distinction between legal and equitable remedies, the remedy of the land contract purchaser is apparently a simple declaration of invalidity as against a seizure in execution by a creditor of the seller, at the suit of a purchaser whose contract antedated the seizure.⁴³ It is difficult to find in French law reports judicial decisions that illustrate clearly the procedure employed in other situations. The specific remedies given to buyers of either land or goods are blanketed in under the general rules for protection of ownership. The doctrinal writers, at least, all claim that direct execution is available to buyers of *both* land and goods,⁴⁴ and the fact that so little litigation on the subject has spilled into the law reports seems to lend some support for the claim. By judicial construction, furthermore, a promise to lease specific land, whose possession can be physically transferred by action of court officers, is subjected to the same procedure—the lessor can be forced to “give” by seizure of the asset.⁴⁵ It would seem at first glance that French law had solved most of the problems of specific performance of contract in the simplest possible way, allowing direct execution in sales of both land or goods, in contracts of exchange, promises of gift (when duly notarized),

⁴³ Sem. Jur. 1948.4403 (Cass. April 10, 1948), where the seizure had occurred, as we would say, by foreclosure of a mortgage, where the mortgagee had had notice of a prior option to buy. The note by Becqué gives a useful summary of the literature on this and related questions. A general discussion of buyers' remedies in land contracts appears in 11 BAUDRY-LACANTINERIE ET BARDE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL, 2d ed., §364 (1900); of the recording system introduced by the law of March 23, 1855, id., §§368-397; and of remedies of buyers of goods, id., §§408-417.

⁴⁴ 7 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANCAIS, 2d ed., §779 (1954); 4 GARSONNET ET CÉZAR-BRU, TRAITÉ DE PROCÉDURE CIVILE ET COMMERCIALE §6 (1913); BAUDRY-LACANTINERIE ET BARDE, cited in previous note. An illustrative case, involving a buyer of movables, appears in S. 64.2.183.

⁴⁵ DALLOZ, RÉPERTOIRE DE JURISPRUDENCE, 30, p. 294, no. 1 (Cass., 1853); 18 BAUDRY-LACANTINERIE ET BARDE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL, 2d ed., §308 (1900).

and promises to lease—and all this without the harassing nuisance of an adequacy-of-alternative-remedies test.

But there remained that bothersome group of promises “to do or not to do,” which were “resolved in damages.” For them too a mode of coercion began to emerge in the decades after 1804. The judges serving under Napoleon were men who had been trained during the Old Regime and they were apparently not ready to surrender the powers to command that were a prominent feature of the old procedure. Within the first decade after 1804 there were reports of judgments rendered for fixed sums of money to be paid unless within a specified interval litigants performed certain acts, such as rendering an account, filing a document, or surrendering property to a coheir. These cases did not arise out of contract and seemed to raise no problems in interpreting article 1142. The question raised before the high court, the Court of Cassation, was whether these judgments could be revoked when compliance occurred after the time limit stated; the Court of Cassation approved such revocation, saying that the judgments could be held to be merely “comminatory,” i.e., merely threats.⁴⁶ A full-scale discussion of the issue occurred in 1824 in a case that again did not involve specific performance of contract but a demand by a wife, after separation from her husband, for the surrender by him of a document needed by the wife to enforce a claim against a third party. The trial court in 1818 had ordered the husband to surrender the document within a specified time limit and in default of so doing to pay 10 francs a day for each day of delay. Five years later the 10 francs a day had totalled 18,000 francs. The Court of Appeal of Paris found that the wife had not suffered substantial injury through the delay and it had some doubt as to where the fault lay, so it cancelled the execution that the wife had sued out to collect the judgment. The Court of Cassation passed without comment the question whether the lower court originally should have issued a money judgment payable in installments, and approved the action of the Court of Appeal. The order to pay 10 francs a day was only “provisional and comminatory,” the wife should not recover more than the damages she had actually suffered, and revocation of the decree did not offend the rules of *res judicata*.⁴⁷ Then in 1832 and 1834

⁴⁶ 8 DALLOZ, JURISPRUDENCE GÉNÉRALE, *Chose Jugée*, §386 (1847).

⁴⁷ DALLOZ, *id.*, §390 (Cass., Dec. 28, 1824).

there were cases involving orders to surrender (1) goods acquired by an agent in breach of duty and (2) a private family document without intrinsic value.⁴⁸ After the Court of Cassation in these cases approved the use of the same technique, French courts were indeed off to the races, with the excitement increased by uncertainty as to who would eventually win.

The first objection raised to these solutions was that subsequent revision or cancellation of a money judgment violated rules of *res judicata*. The objection gathered force in cases that began to appear, ordering promisors to undertake affirmative acts, in which judgments payable in installments (so much per day or week or year) were on an external view ambiguous: they could be merely coercive and revocable or could possibly be a final assessment of damages if non-performance produced continuing injury.⁴⁹ To the main objection based on *res judicata* the answer given was that rules of *res judicata* apply only to final judgments, not to those that were intended by the issuing court to be provisional and revocable. The problem of ambiguity was solved by declaring that in cases of doubt it was for the issuing court to "interpret" the decree as final or merely provisional, and in numerous decisions the Court of Cassation asserted that such "interpretations" were in general not subject to its review.⁵⁰

The second objection raised was not so easily disposed of, the objection that French law did not authorize penalties for the misconduct consisting of mere disobedience of a judicial order, especially not arbitrary penalties that were fixed at discretion. The developing practice of assessing cumulative money fines for disobedience therefore violated that basic idea inherited from the Revolution—*nulla poena sine lege*. The objection became more

⁴⁸ S. 32.1.669 (Cass., July 10, 1832), where the lower court had revoked a lump sum judgment after defendant had complied with the order by surrendering the goods; S. 34.1.129 (Cass., Jan. 29, 1834), where the court refused to quash a decree for payment of 100 francs a day despite the fact that the lower court in the same decree had found unenforceable the contract evidenced by the document.

⁴⁹ An example was *Dejardin v. Charpentier*, S. 45.2.293 (Court of Appeal of Douai, Aug. 28, 1844), where a lessee of farm land who had failed to fertilize the land was ordered to restore it or pay 1000 francs "damages" a year for the three years remaining of the lease period.

⁵⁰ Lower court decisions holding earlier decrees to be merely "comminatory" and subject to revocation: S. 83.1.345 (July 25, 1885); D. 89.1.259 (Nov. 7, 1888); S. 1909.2.272 (June 30, 1909). Lower court decisions interpreting judgments as final and therefore not subject to revision: S. 89.1.264 (Jan. 9, 1889); S. 96.1.67 (July 3, 1893); S. 1902.1.487 (March 2, 1898); S. 1906.1.390 (April 19, 1904).

impressive after the Court of Cassation suggested that such judgments did not need to have any relation to the plaintiff's injury, since the defendant's "unlawful resistance becomes a more serious wrong and it is proper, in order to overcome it, to decree a judgment in accordance with the interests involved, a proportion which it is the function of the lower court to measure in its unlimited discretion."⁵¹ The famous *affaire de Beaufremont* involved a dispute in the 1870's between two well-known members of café society over custody of their children. The judgment against the disobedient wife, Princess Bibesco, was at first 500 francs a day, was then raised to 1,000 francs a day, and totalled at one stage 1,000,000 francs (about \$200,000 at the then existing rate of exchange). In their opinions in this case the French courts used language of surprising bellicosity.⁵² With this and other examples of money awards by French courts that were plainly punitive, it became a hollow pretense to assert that these obligations were being resolved in the "damages" that were authorized by article 1142. Although confusion persisted in many court opinions, it became increasingly clear in the opinions of the Court of Cassation that the *astreintes*, as they were beginning to be called, were purely threats, coercive in purpose, provisional and revisable, and therefore exempt from review or control. The result was a strong reaction among doctrinal writers. Some condemned the *astreinte* as wholly illegal. Others, while sympathizing with the motive, insisted that if courts were to issue installment judgments, conditioned on performance by defendants of judicial orders, they should be confined to the plaintiff's loss through delay in performance, where such continuing loss could be proved.⁵³

The *astreinte* was already too well entrenched in court practice to be threatened by these protests from academic sources. And even among the academic profession the tide was somewhat turned by an article of the well-known historian, Professor Esmein, writing in 1903. He admitted that it was no longer possible to explain the *astreinte* as a form of damages under article 1142. He defended it nevertheless as a necessary means of reenforcing judicial author-

⁵¹ D. 57.1.215 (March 25, 1857), a child custody case.

⁵² This famous affair has been discussed by many. Meynial, "De la Sanction Civile des Obligations de Faire ou de Ne Pas Faire," 56 REVUE PRATIQUE DE DROIT FRANCAIS 385 at 449-450 (1884), gives the essential information.

⁵³ Meynial, cited in the preceding note, reviews the literature up to the date of his excellent article and states his own conclusion in these terms.

ity. He quoted some general language, though no details, from writers under the Old Régime, asserting that courts had power to issue commands and injunctions. His appeal to history aimed to show that the *astreinte* was a revival of the historic *imperium* possessed by French courts, an *imperium* that survived both Revolution and Civil Code. Since this argument standing alone could hardly be expected to impress French lawyers, he unearthed in the Code of Civil Procedure an obscure clause (article 1036) which authorized courts "of their own authority (*même d'office*) to pronounce injunctions, suppress writings, declare them defamatory, and order the printing and publication of their judgments." With the help of this article he asserted that "damages employed as a means of constraint" were not penalties but merely an expression of judicial power to issue "injunctions," the deposit left from an ancient heritage.⁵⁴

To an American reading all these discussions the remarkable thing is that all effort was expended in finding some justification for the issuance of threats and none on making the threats effective. In the stereotyped formulas used by the Court of Cassation and imitated by the lower courts, it was becoming clear by 1900 that the *astreinte* could not be more than a means of constraint, provisional, and necessarily revocable. This was why the amounts could be so fantastically inflated and could even be increased if disobedience continued. This was why an appeal did not suspend the order: no harm was done because in the end the *astreinte* would be "liquidated" and reduced to simple damages. The only object of an *astreinte* was to "break" the defendant's resistance. What if the defendant, well advised by counsel, ignored the order and his resistance was not "broken"? The answer was clear to any attentive reader of the orders themselves—the court would then award damages. Wasn't the *astreinte* an empty threat if it must be revoked in any event? The writers like Esmein who defended the *astreinte* consistently praised its effectiveness. Why was this? Perhaps persons trained in American law are handicapped by their long exposure to contemnors of a sturdier type. Perhaps Frenchmen were more credulous, though they rarely showed this in other ways.

⁵⁴ Esmein, "L'Origine et la Logique de la Jurisprudence en Matière d'Astreintes," *REVUE TRIM.* 1903, 1. The quotation in the text, with the persistent confusion of damages and "constraint," appears at the end of the article, p. 53, though certainly his main argument aimed to distinguish sharply between the two.

There was one way out—deliberate deception. If the defendant could be made to think that the award was a final judgment for damages, he might be more ready to comply with the order. But if the judgment was made cumulative as most of them were, the defendant and his counsel would not be misled if his breach of the order would not in fact cause increased damages through the delay. This solution required above all that the sums assessed have some relation to the plaintiff's loss; the menace would have to be moderate in order to leave the defendant in serious doubt.

Then why undertake this unseemly deception? Why not include in the ultimate damage award an extra sum—punitive damages for the defendant's defiance? The Court of Cassation in some of its earlier decisions had seemed to encourage this practice. In any case the avenue seemed open to lower courts through the limited power of the Court of Cassation in reviewing facts, especially findings as to the quantum of damages. But when the Court of Cassation, in 1927, was directly presented with the question whether damages, in effect punitive, could be granted in cases where no compensable losses were proved, it emphatically denied that such damages were justified under French law.⁵⁵ This solution had the approval of Professor Esmein himself, though to an outside observer it would seem to go far to undermine the whole system.⁵⁶

A still more remarkable feature of the whole development was the unquestioned assumption that direct coercion was inadmissible, except in the cases of enforced surrender of a specific asset where "military force" was justified. There was, it is true, another exception, one that seems to modern minds the least

⁵⁵ D.H. 1927.274 (March 14, 1927), involving an order, under an *astreinte* of 50 francs a day, to remove a monument erected by defendant to commemorate her son, who had been killed in the war, on a "concession" owned jointly by plaintiff and defendant. The court's decision placed no stress on the human appeal of the case but merely pointed out that the lower court had not found that there was any injury whatever to the plaintiffs and then stated that it was not enough for the lower court to say that the *astreinte* had not been intended to be "purely comminatory" since "the bare affirmation of the intent or will of the judge" gave no legal basis for a damage award.

⁵⁶ Esmein, in the article cited above, note 54, had been very clear (p. 52) that his argument was not intended to justify the imposition of "penalties" not provided by law, especially "arbitrary penalties . . . which are repugnant to the principles proclaimed by the Revolution." Other authors who reject the notion of "private penalty": 11 BAUDRY-LACANTINERIE ET BARDE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL*, 2d ed., §§479-480 (1900); 7 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS*, 2d ed., §§792-795 (1954); and numerous others involved in the discussion of the eviction cases, considered below.

admissible of all. As late as 1931 it was held, in accordance with earlier cases, that a wife who had left her husband without legal cause and taken shelter with her father could be forced *manu militari* to return to her husband's domicile.⁵⁷ But in other obligations "to do or not to do" the courts and authors were perfectly clear that any pressure exerted on the person of the promisor was forbidden not only by article 1142 but by the ethos of modern society. No distinctions were drawn between affirmative and negative obligations, between conduct of long or short duration, between those cases in which minimum pressure would quite certainly be effective and those in which torture was the only alternative. For example, where the stockholders of a corporation proposed to hold a business meeting not authorized by the corporate by-laws, a decree that authorized plaintiff to prevent the meeting "with the help of the police commissioner if necessary" was held to be improper, since the obligation was one "not to do" which must be resolved in damages.⁵⁸ One writer mentioned the case of an actor who insisted, without justification, on appearing in a play and the theater owner was authorized by the Paris trial court to call on the police to help him exclude the over-zealous performer. Other writers were unable to find any record of this outlandish case and were sure at least that if it ever occurred this "illegality" would have been corrected by an appellate court.⁵⁹

The Civil Code (articles 1143 and 1144) had recognized one other line of attack in obligations "to do" and "not to do"—substituted performance by the plaintiff at defendant's expense,

⁵⁷ S. 1932.2.14 (Court of Appeal of Chambéry, Oct. 27, 1931), where the trial court had refused to permit such measures because of their "brutality" as well as their ineffectiveness, but the court of appeal insisted that this was clearly the husband's right, based both on "law and equity." Earlier decisions reaching the same conclusion are referred to in the note to the case. Some authors, admitting that this was "the law," expressed distaste: e.g., Meynial, cited above, note 52, pp. 425-427. I have found no references to cases since 1931 that preserve this medieval practice.

⁵⁸ D. 95.2.521 (Dec. 14, 1894).

⁵⁹ This is the comment of Garsonnet et César-Bru, 4 TRAITÉ THÉORIQUE ET PRATIQUE DE PROCÉDURE CIVILE ET COMMERCIALE §8 (1913). Meynial, cited above, note 52, pp. 416-417, also expressed his disapproval of the rumored decision, though Professor Meynial was willing that public force be used to prevent the expulsion from leased premises of a lessee by the lessor and even to overcome interference with the use of a right of way across another's land (*id.* at 417-419).

A fair sample of the attitudes expressed by the authors appears in the section of GARSONNET ET CÉSAR-BRU that is cited in the preceding paragraph. They argued that article 1142 of the Civil Code was really unnecessary anyway: "What is the use of saying that physical or moral violence will not be used to compel a debtor to perform? This

approved by court order in advance. A judiciary persuaded of its mission might have made much of this authority. Could it not have been inferred, for example, that "military force" could be used in support of the measures specifically authorized? At least it might be possible to use local police in preventing physical interference by the defendant. But this sort of extensive interpretation did not meet the mood of the times. The lower courts often drew back from using substituted performance at all. The Court of Cassation supported them, declaring that substituted performance was an exceptional mode of enforcement, and its use rested strictly in the lower courts' discretion. It was refused not only for the kind of reason that might animate our courts of equity—e.g., that the cost of performance was disproportionate to the advantage to be gained⁶⁰—but in cases where so far as appeared there were no moral or physical obstacles whatever. There are a few cases in French law reports in which articles 1143 and 1144 were resorted to, but most of the time the *astreinte* was used.⁶¹

Prior to 1940 French law thus shifted increasingly to the use of the *astreinte* as its primary mode of enforcing promises, outside the group of promises to "give" (sell, lease or donate) specific assets. It might be thought that this was a shift in the same direction as that taken in classical Roman law. But the difference was plain. Before the end of the Roman classical period the money judgment of the praetorian system had come to include, quite frankly, substantial awards of punitive damages against disobedient suitors. These judgments were final, fully collectible and payable to the successful party, despite the enrichment thus brought about. But the French *astreinte* was tentative, necessarily revocable, a simple threat that faded away if it was not ambiguous enough to intimidate; any punitive element had to be smuggled in. To the inclusion of any punitive element the the-

would be at once useless, immoral, and inhumane; no one would even for a moment consider that an obligor should be put to torture or separated from his children in order to secure from him the execution of a judgment directing him to procure a ratification by a third party or the release of a mortgage, to act in a theatrical performance, to sing in a concert, to paint a picture, to draw a map, to retire from an office that he owned and has transferred to another."

⁶⁰ S. 1920.282 (March 18, 1914); S. 1904.1.389 (Feb. 2, 1904).

⁶¹ 7 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS, 2d ed., §783 (1954); 11 BAUDRY-LACANTINERIE ET BARDE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL, 2d ed., §§436-439 (1900).

orists objected strenuously, the Court of Cassation objected at least formally, and the Court made its objection effective where it had means to intervene. The Code language on which the results depended was due simply to an unfortunate accident—the shallowness of Pothier's mind—but the Code language, it seems, had been invested and surrounded with some deep-lying convictions that no one was disposed to challenge.⁶²

c. *Since 1940.* These convictions were exposed to an unexpected test by events that followed World War II. The central problem came from a severe housing shortage, aggravated by the population movements caused by the war. The post-war governments tried to requisition housing but much of the program was held by the courts to be illegal. Owners of residential property secured eviction orders against occupants whose intrusion turned out to be illegal, against wartime refugees and other hold-over tenants. But the administration refused to issue the necessary documents and authorize the use of local police. Enforcement of eviction orders was paralyzed all over France. Exasperated by the weakness of the executive and by what they believed to be betrayal for political advantage, the courts undertook to enforce their own eviction orders by using the *astreinte*.

The obligations of hold-over tenants to vacate could seldom arise from express promises "to do or not to do." The main object was to protect rights of occupancy derived from ownership. But this caused no real difficulty. The revocable, installment money judgment, when it first appeared 140 years before, had been in no way tied to article 1142, and in the interval *astreintes* had been used in a great variety of cases—protection of trade names, orders to remove obstructions to easements and encroachments by neighboring landowners, injunctions against nuisances, and so on. It had become generally available, in other words, as a device for enforcement of tort obligations and for the protection of ownership.⁶³ It could even be used against the administration of the

⁶² This thesis is developed in a lively way by Pekelis, "Legal Techniques and Political Ideologies," 41 MICH. L. REV. 665 at 667-673 (1943). The account of the *astreinte* by Brodeur, "The Injunction in French Jurisprudence," 14 TULANE L. REV. 211 (1940), accepts the view commonly expressed by French authors at that time that the *astreinte* was an effective means of coercion.

⁶³ 3 MAZEAUD, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE, 3d ed., 629 (§2507-4) (1937). For example, protection of a trade name on dissolution of a joint-venture (D. 59.1.248); injunctions against interference with rights of way (D. 87.1.176; D. 1900.1.167; D. 1921.1.195; Sem. Jur. 1941.II.1641); order to restore a right of way by

state itself to compel the performance of their duties by public officers.⁶⁴ It was therefore no great innovation to use it now to assist an owner in recovering possession after the government had defaulted, through timidity or favoritism, in providing basic protection to rights of ownership.⁶⁵

The crisis to some seemed great enough to threaten the legal order itself. The academic profession rallied to support the courts. Lingering doubts as to whether the *astreinte* was "legal" were resolved by all, except for two hardy spirits who still insisted that it was "illegal" despite the fact that the courts had used it for more than a century.⁶⁶ The view of Esmein now prevailed. No one seriously believed that the power to issue "injunctions," tucked away in the Code of Civil Procedure, had been originally intended to convey very much more than the power to maintain courtroom order. But to some this language seemed quite good enough.⁶⁷ Others described the *astreinte* as a product of a "decisional custom" (*coûtume jurisprudentielle*) or simply a product of necessity. In any case, it plainly offered the only hope of preserving that respect for judicial authority that the weakness of the executive had undermined.

erecting a covered passage (D. 89.1.259); order to remove a building encroachment (S. 1948.2.109); order to level land after subsidence through mining operations (Gaz. Pal. 1941.1.567); order to install an electric motor in defendant's phonograph so as not to interfere with plaintiff's radio reception (Gaz. Pal. 1930.1.609). Still more interesting were decrees that ordered specific reparation: by a depositary (the Bank of France) that lost certificates of stock through failure to take precautions during the German advance into France (Gaz. Pal. 1945.2.75), and by automobile repairmen through whose negligence tires or wheels were stolen from automobiles in their custody (S. 1937.1.141; Gaz. Pal. 1945.2.65; D. 1947.379).

⁶⁴ § MAZEAUD, cited in previous note, 628 (§2507-3); Kayser, "L'Astreinte Judiciaire et la Responsabilité Civile," *REVUE TRIM.*, 1953, 209 at 222-223.

⁶⁵ The literature of the late 1940's, some of which is cited below, is full of denunciations by legal writers of the administration for failure to give support in the enforcement of eviction orders. The language of the Tribunal Civil of Sables d'Olonne was much quoted: "It is harrowing to have to assert that the provisions ordering judgments to be put into execution are frustrated every day by the default or ill will (*mauvais vouloir*) of the prefectural administration which thus disturbs instead of ensuring the public order that is placed in its charge." D. 1948.34 (Nov. 24, 1947).

⁶⁶ 2 COLIN ET CAPITANT, *COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS*, 10th ed., 134-135 (1948).

⁶⁷ Vizior in Sem. Jur. 1948.689, after pointing out that article 1036 of the Code of Civil Procedure had almost certainly not been intended to give general powers to issue injunctive orders: "But this objection does not deserve to be supported. Being respectful of the law even in their boldest creations, French courts by instinct search for a legal provision behind which they can find shelter. Why should they not use article 1036, whose text is sufficient in itself? It is hardly necessary to divine the intention of its draftsmen, which remains an enigma."

It was therefore a still greater shock to discover that the whole technique was most ineffective when needed most. "Evicted" tenants all over France remained in possession, secure in the knowledge that in the end the owner could recover no more than his provable damages. The more the courts expressed their exasperation by piling the money awards higher and higher, the more secure the tenants could be. So trial courts shifted to another line, declaring that their money awards were final judgments for damages—"astreintes non-comminatoires."⁶⁸ At this point the legislature intervened, siding with the executive, and passed the statute of July 21, 1949, which declared that every *astreinte* attached to an order for eviction from housing was necessarily merely "comminatory" and must be reduced to simple damages after the tenant had finally left.⁶⁹ This reaffirmation of classical theory compounded the problem. Was there anything else that could be done?

One possibility was to issue execution to collect the *astreinte*, seizing goods or garnishing wages on what we would call mesne process, in order to exert immediate pressure. The objection of course was that under the classical theory the *astreinte* was so tentative and provisional as to provide no basis for execution. The Court of Cassation had so declared as early as 1860.⁷⁰ There was another objection—that many of the eviction orders were issued initially in interlocutory proceedings (*en référé*), and the Court of Cassation had held in 1898 that an *astreinte* could not be issued at this early stage. In 1950 the Court of Cassation changed its mind on this particular issue.⁷¹ Well before that time under various pretexts the lower courts had begun to hold that execution could issue at once to collect *astreintes*. This meant that the goods or wages thus collected must be impounded to await the final outcome, or if they were turned over to the judgment creditor, he

⁶⁸ Sem. Jur. 1946.II.3079 (March 5, 1946); D. 1948.135 (Nov. 7, 1947).

⁶⁹ 7 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANCAIS, 2d ed., §795 *quater* (1954).

⁷⁰ D. 61.1.462 (Dec. 31, 1860). In the famous case of DeBauffremont v. Princess Bibesco a trial court had issued an order sequestering the property of the nomadic Princess, but this was held by the Court of Appeal of Paris to be "an improper invasion of property rights." D. 78.2.125. In some other cases of this type seizure of the wife's property has been authorized as an exercise of the husband's powers of administration over his wife's property.

⁷¹ D. 1950.377 (Cass., March 28, 1950), the chief reason given being, again, that since the *astreinte* was "provisional" and "always subject to revision," no harm could be done in issuing such an order in advance of trial on the merits.

would become accountable for any excess received when the judgment was finally "liquidated." But in the meantime, the defendant could be put under pressure if he had some assets that could be found. Though this procedure has been very much used, it is still an open question whether the Court of Cassation will approve it.⁷²

The second possibility was the one that had already been so much discussed—why not punitive damages? If awarded to the judgment plaintiff they would, it is true, enrich him. Their amount could not readily be fixed by law or measured by some objective standard, so they would in that sense be "arbitrary." Almost all the writers agreed that in practice, where some damages were proved, the judges in their final "liquidation" threw in something extra against disobedient defendants. Sometimes this was called a "moral prejudice" that the plaintiffs had suffered through seeing court decrees flouted. Yet almost all the writers were agreed—the *peine privée* was intolerable. Whatever money penalties might be imposed must be disguised under the name of damages—though the damages might be "rigorously" assessed.⁷³ And the decisions since 1950 come to about the same result. The Court of Cassation has repeatedly said that an award of damages must be "justified." This means that if no evidence of substantial loss to the plaintiff appears in the record, the *astreinte* though called final

⁷² Lower court decisions employing immediate execution appear in Gaz. Pal. 1947.I.221 (April 2, 1947); S. 1950.2.94 (Jan. 19, 1950); Gaz. Pal. 1949.II.409 (Oct. 27, 1949) and 1950.I.283 (March 14, 1950). As the notes to some of these cases indicate, there were contrary decisions in some lower courts and the Court of Cassation had rejected this possibility in some fairly recent decisions. In a sober review of the subject in the Sem. Jur. 1951, Doctrine, 910, II, Professor Fréjaville concluded that any form of execution, whether final (conditionally final) or merely "conservatory," is improper. This seems to be the view of 3 MAZEAUD, RESPONSABILITÉ CIVILE, 3d ed., 623 (§2501) (1937), but 7 PLANIOL ET RIPERT, TRAITÉ PRATIQUE, 2d ed., §795 *ter* (1954), could only conclude that opinions were "divided." The contrary view was vigorously urged by Savatier, D. 1951. Chron. 10. Kayser in REVUE TRIM., 1953, 209 at 228-230, concluded that "final" execution is improper but "conservatory" execution may be used.

⁷³ Fréjaville in D. 1948.35 and Sem. Jur. 1951. Doctrine 910, with the further suggestion that the "rigorous" assessment of damages was justified by returning to the notion that civil liability has a "repressive" as well as compensatory function (if this does not mean disguised punishment, I misunderstand his argument). Kayser, REVUE TRIM., 1953, 209 at 243-244, concluded that the *astreinte* is not and cannot be a *peine privée*, though in fact the courts do include "un élément de peine privée" in their final award of damages when the defendant's resistance "aggravates his initial fault"; apparently the argument is that the courts should be blamed for this, not the *astreinte* itself. 7 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANCAIS, 2d ed., §§793-795 *bis* (1954) likewise express their disapproval of the *peine privée* though admitting that *peines* creep in.

must be reversed.⁷⁴ It also means that if the lower court is candid and discloses that some part of the money awarded exceeds the loss, the decree must likewise be reversed.⁷⁵ Yet the Court of Cassation has refused to reverse in several cases where some substantial damages were shown but the totals awarded were suspiciously large.⁷⁶ As clearly as language can do it, the Court of Cassation has announced that it will not tolerate in civil judgments any "private penalty" that the Court itself has the means to detect. The lower courts keep trying, adding various forms of punitive damages despite the high court's disapproval. We are so unused to this freedom of subordinate judges to disagree with their appellate superiors, though in the French system this freedom is conceded. We would call them insubordinate. But if it is a case of insubordination, the lower courts have had but little help from the academic profession. So far as I have ascertained, the only ones that urge them on are those independent gentlemen, the brothers Mazeaud.⁷⁷

So we return to the question—if punitive damages are inadmissible, why not assess real penalties, money fines payable, not to the private party but to the state as punishment? This suggestion has indeed been made, though with no great enthusiasm.⁷⁸ The draftsmen of a revised Code of Civil Procedure included such a proposal in an early draft. It is most doubtful whether it will ever be adopted. A critic of this proposal, writing in 1953, expressed the view that may well prevail—penalties, no matter to whom they are paid, are arbitrary and cannot be subjected to any kind of definite rule. "It does not seem advisable to cause the state thus to intervene between obligee and obligor," when "a simple measure of constraint"—the *astreinte*—so readily assures the obligor's performance.⁷⁹ Another thoughtful writer in 1951 ex-

⁷⁴ Sem. Jur. 1951.2.6089 (Nov. 30, 1950); S. 1953.1.196 (Feb. 27, 1953); Bul. des Arrêts de la Cour de Cassation, 1957.4.363 (May 9, 1957).

⁷⁵ Bul. des Arrêts de la Cour de Cassation, 1955.2.286 (Oct. 27, 1955).

⁷⁶ Bul. des Arrêts de la Cour de Cassation, 1955.1.50 (Feb. 2, 1955); id., 1956.4.125 (Feb. 17, 1956, despite the slip made by the lower court in saying part of the sum awarded was for the "bad faith" of the defendant); id., 1956.2.213 (June 7, 1956).

⁷⁷ The only encouragement I have found has come from the brothers Mazeaud, who in the *REVUE TRIM.*, 1954, 107 applauded a court of appeal which declared the measure of damages should be defendant's fault, not plaintiff's loss, despite a plain decision to the contrary by the Court of Cassation the previous year.

⁷⁸ Esmein, *Gaz. Pal.* 1941.1.81 and 1949.2. Doctrine, 15. The note in Sem. Jur. 1958.II.10906 cites M. Pierre Mazeaud as another who approves this suggestion.

⁷⁹ Kayser, *REVUE TRIM.*, 1953, 209 at 243-244.

pressed the view that the responsibilities cast on the *astreinte* had become an overload. In the earlier period when the *astreinte* was less used, he said, it was a valuable means of intimidation. But by 1951 the secret was out; litigants knew or were told by their lawyers that the *astreinte* was not a "very serious" threat. The writer described the situation as a "crisis of the *astreinte*," whose use had come to undermine the judicial prestige that it had been intended to protect. What was the remedy he proposed—to confer on courts a power to arrest or fine? Not at all. His remedy essentially was to use the *astreinte* less and when it was used to keep the sums down.⁸⁰

So what is the French law of specific performance? As to one class of promises—to transfer land or goods that can be reached by a bailiff—specific relief is available, it seems, to any promisee who wants it if rights of third parties have not intervened. This is a large percentage of the potentially enforceable promises, and its importance should not be minimized. Outside this group, for promises in general, the authors have been saying for more than a century that the "principle" is always specific performance. The only reservation that is usually admitted is for that very rare case where the performance promised involves a high degree of personal creativity—the usual illustration is the artist who promised to paint a picture. That French law is committed "in principle" to specific performance was asserted in the nineteenth century by those very persons who disapproved of the *astreinte*. Still more is it asserted by modern authors who accept the *astreinte* and praise it.⁸¹ Some recent authors have advanced an even broader principle, that specific reparation where feasible must be given also in tort obligations—e.g., the driver who negligently injures another's car must be ordered to repair it—and recent decisions of the Court of Cassation are reaching out in this direction.⁸² And the means for realizing the "principle"? Almost exclusively, the *astreinte*. An outside observer will be excused, I hope, for describing such a

80 Fréjaville, "La Valeur Pratique de l'Astreinte," Sem. Jur. 1951. Doctrine. 910.

81 24 DEMOLOMBE, COURS DE CODE NAPOLEON §§488-497 (1870); Meynial, "De la Sanction Civile des Obligations de Faire ou de ne Pas Faire," 56 REVUE PRATIQUE DE DROIT FRANCAIS 398ff (1884); 4 GARSONNET ET CÉZAR-BRU, TRAITÉ THÉORIQUE ET PRATIQUE DE PROCÉDURE §10 (1913); 7 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANCAIS, 2d ed., §776 (1954).

82 3 MAZEAUD, TRAITÉ DE LA RESPONSABILITÉ CIVILE, 4th ed., §§2303-2308 (1947), and cases cited above, note 63.

principle as almost wholly meaningless where the *astreinte* is the only means employed for its realization.

4. Germany

The practice and the attitudes current in French law have been described at such length because they differ so completely from those familiar to us. When we move across the boundary to Germany, the world of ideas does not seem so topsy-turvy. On the contrary, the modern German solutions differ from our own chiefly in being more tightly organized and more carefully thought through. The contrast between the French and the German treatment of specific performance is one among many demonstrations of the great differences between the "civil law" systems. Despite their long exposure to ideas derived from Roman law, each of the "civil law" systems is the product of independent, conscious choices. Each has drawn important values and objectives from the society it purports to regulate.

Indeed through the eighteenth and nineteenth centuries Germany was far more exposed to a revised and modernized Roman law than France had ever been. The large-scale reception of Roman law, beginning in the German states in the sixteenth century, had certainly familiarized German lawyers with the distinction between "doing" and "giving." Their main struggle was to preserve specific relief in the contract of sale. Though some purists disagreed, most of the writers concluded, and generally the courts agreed, that the buyer could have specific performance if the asset could be reached by physical seizure.⁸³ But it was taken for granted that obligations "to do" were in general not specifically enforceable. Express legislation in some of the German states provided some specific remedies that were available for enforcement of contracts, but the influence of the nineteenth century Pandectists, with their better understanding of the classical texts, tended if anything to exaggerate the influence of classical Roman law and to increase reliance on damage remedies.⁸⁴

Perhaps Germany was fortunate in approaching the whole

⁸³ ZASUS, *DE ACTIONIBUS* 260 (1571, Lyons); I FACHINAEUS, *CONTROVERSIAE IURIS*, ch. 8 (ed. 1679); HUBER, *PRAELECTIONES IURIS CIVILIS*, comm. on D. 19.1.1, no. 5 (Leipzig, 1707); VINNIUS, *COMM. ON INSTITUTES*, III, tit. 24 (ed. 1676). References to opposing views are collected by ZIEBARTH, *DIE REALEXECUTION UND DIE OBLIGATION* §16 (1866).

⁸⁴ Some of the extreme views advanced in his own time are described, and also combatted, by Ihering in his *RECHTSGUTACHTEN*, *JHERINGS JAHRBUCH*, p. 1 (1880).

problem initially as a problem of procedure. The effort to prepare a national Code of Civil Procedure began in the 1860's under the North German Confederation. Many drafts were exchanged, some of which omitted all reference to the enforcement of judgments ordering acts or abstentions. A draft that included provisions on the subject was considered by the drafting commission that met in the spring of 1870. The commission unanimously agreed that "delegable" acts (i.e., acts performable by third persons) could be ordered performed by the plaintiff himself, with the cost charged to the defendant in the manner provided by the French Civil Code. It was also agreed that personal arrest of the judgment defendant was improper in the case of delegable acts, this being considered a necessary inference from a statute passed two years before (in 1868) forbidding imprisonment for debt. The question then raised was whether arrest or fine could be used to compel acts or abstentions that could not be delegated to others. The commission was divided, but a majority agreed to the proposition that "it is intolerable and inconsistent with the basic principles of the modern law of obligations that an obligor without property should be able to defeat the execution of a judgment merely through his own disobedience." It was also pointed out that with some acts, if the obligor's own personal performance could not be secured, the obligation would be wholly defeated.⁸⁵ The commission's official statement of motives, published in 1872, pointed out that the draftsmen had made every effort to limit the use of fine or arrest to cases in which enforcement could not be accomplished by any other means, and that if the object was to extract money from the defendant, arrest or fine could not be used since the object was not to "punish insolvency." In support of its conclusions the commission referred to legislation of the various German states that had come to admit fine and arrest as sanctions in particular cases. But the basic argument, again, was that a judgment defendant should not be allowed, in violation of a court order, to render his obligation "illusory" through his insolvency or through inability to measure the loss caused by his breach of duty.⁸⁶ When a committee of the Reich-

⁸⁵ PROTOKOLLE DER KOMMISSION ZUR AUSARBEITUNG DES ENTWURFS EINER CIVILPROZESSORDNUNG FÜR DIE STAATEN DES NORDDEUTSCHEN BUNDES, 320th and 321st meetings, pp. 2057-2064 (1870).

⁸⁶ BEGRÜNDUNG DES ENTWURFS EINER DEUTSCHEN CIVILPROZESSORDNUNG 573-577 (1872).

stag then reviewed these issues, in 1875, one deputy argued strongly for the adoption of the French Code article 1142, claiming that abrogation of imprisonment for debt necessarily meant that "arrest as a means for enforcing civil claims was excluded." But he was told by a government spokesman that this rule of French law, originally derived from Roman law, "does not correspond to the German legal conscience." Another deputy spoke up and said: "Much as he and the members of his party desire to protect the freedom of the citizen, . . . personal freedom does not include a right to commit the wrong of violating wilfully the legally operative judgment of a court."⁸⁷ The proposed draft was then adopted by the parliamentary commission, and later by the Reichstag. The new Code of Civil Procedure was promulgated on January 30, 1877, with an effective date of October 1, 1879. It certainly could not be thought that the decisions thereby reached, in discussions lasting more than ten years, were made hastily, or without full awareness of their larger implications.

The Code of Civil Procedure, in its provisions for execution of judgments, defines a series of categories that are conceived as mutually exclusive. One category is the judgment ordering surrender of a specific asset—movable goods, an immovable (land), or a ship—and here the procedure prescribed is direct execution through seizure by a court officer.⁸⁸ A second category is the judgment ordering "delegable" acts, which can be performed by third persons; the remedy here is an order authorizing the plaintiff to have the act performed at defendant's expense (article 888). A third category is the judgment ordering a "declaration of will"—e.g., a conveyance of title to land—where the judgment itself is self-executing (articles 894-896). For present purposes the most interesting category is the judgment ordering an act that cannot be performed by a third person and that "depends exclusively on the will" of the defendant; here the remedy is body arrest or a money fine, limited originally to 1500 marks but since 1924 unlimited (article 889). Associated with this main category of non-delegable acts is the judgment ordering the defendant "not to do," i.e., where the obligation is "to refrain from acting or to permit the performance of an act"; here the sanction is again arrest, not

⁸⁷ PROTOKOLLE DER KOMMISSION DES REICHSTAGS 413-414 (1875).

⁸⁸ ZPO, articles 883 and 886, with a similar provision in article 884 for "a definite quantity of fungible property or documentary securities."

to exceed two years, or a money fine originally limited to 1500 marks but since 1924 unlimited (article 890). To make these sanctions perfectly explicit, it is then provided that if the judgment defendant resists the performance of any act that he is bound to permit (whether "delegable" or not), court officials can call on the police or the army, if the army is needed (article 892, plus articles 758 and 759). Finally there was added a set of provisions for temporary injunctions, subjected to the same basic tests as to the sanctions to be used, but including the power to award sequestration of property (articles 935-938).

That the various categories of judgments were meant to be mutually exclusive appears expressly in two articles of the Code.⁸⁹ It also appears by clear implication from the provision for acts that "depend exclusively on the defendant's will." If the result aimed at by the court's order can be achieved by direct execution against specific assets, through a self-executing decree, or by act of the plaintiff or a third party, then it does not depend "exclusively" on the defendant's will and fine or arrest are not authorized. This clause has likewise been construed to exclude direct coercion by fine or arrest where external obstacles make performance impossible or very difficult; the act or acts then do not depend "exclusively" on the defendant since they are beyond his control.⁹⁰ It is primarily through this key clause that the draftsmen gave effect to their declared object of confining direct coercion to the narrowest possible compass, making it a last resort. It should be noted also that an express provision of article 888 excluded the use of fine or arrest in orders to enter marriage contracts, orders for restitution of conjugal rights and orders for the performance of services under a personal service contract.

Armed with powers so broadly expressed, German courts in the period between 1879 and 1900 proceeded to give specific relief in cases where the substantive law was at least debatable. Particularly interesting were two cases arising from the Rhineland, where the French Code was still in effect. The Reichsgericht, the highest German Court of Appeal, skirted the road-block of the French Code article 1142 and issued injunctions against (1)

⁸⁹ ZPO, article 887 on "delegable" acts says in ¶3: "The above provisions have no application to forced execution which aims to accomplish the surrender or production of tangible property." Article 888a excludes fine or arrest and also substituted performance in judgments for damages.

⁹⁰ Seufferts Archiv, 51, no. 243 and 306 (1895); 52, no. 279 (1896); 60, no. 113 (1904).

unfair competition and (2) nuisance by an adjoining landowner. The Reichsgericht's argument was that since the interests of the plaintiffs were given legal protection against these types of intentional injury, the court must infer that the protection was meant to be effective, i.e., something more than money damages.⁹¹ Perhaps similar steps would have been taken in the enforcement of express promises. They proved to be unnecessary, for the Civil Code, adopted in 1897 with an effective date of January 1, 1900, set all doubts at rest. The draftsmen of the Civil Code in the clearest terms declared in their statement of motives the belief that specific enforcement of promises was the normal and preferred procedure. The means had already been supplied by the Code of Civil Procedure, regulating means of enforcement after judgments had been entered.

The basic principle of specific enforcement, applicable to both contract and tort obligations, was expressed in the Civil Code by article 241:

"By virtue of an obligation the obligee is entitled to demand performance from the obligor. The performance may also consist of an abstention."

So far was this principle carried that damages were made to appear exceptional and had to be specifically authorized in cases of "injury to a person or damage to a thing" (article 249), in cases where specific relief was "impossible or insufficient to compensate" the obligee (article 251), and in cases where the injured party gave formal notice that he demanded money damages and fixed a reasonable time in which the performance due might be rendered (articles 250, 283, and 326). There was also a fourth type of case in which the obligor was allowed, by way of privilege, to substitute money compensation—i.e., where the performance called for could be accomplished only with "disproportionate expenditure" (article 251, para. 2).

Limitations of space make it impossible to describe here in detail the solutions worked out by the courts under these general provisions. But one main point should be noted. The Code sets limitations on resort to damage remedies in contract cases, requiring at least a formal notice with demand for performance and in some cases a formal court order fixing a time limit for rendition of

⁹¹ 25 RGZ 347 (1890) and 38 RGZ 379 (1897).

the promised performance. But despite such formal limitations the damage remedy is in fact resorted to, by the choice of litigants, in a high percentage of cases, especially in sales of goods and other commercial transactions that are standard subjects of damage actions with us. Another main point, however, is that in contract cases where specific enforcement is desired for any reason by the promisee, the courts have not claimed for themselves a discretion to refuse specific relief that is appropriate and possible. Unlike French courts, they have not felt free to refuse substituted performance, to be carried out by the plaintiff at defendant's expense where this solution is practicable. Unlike our own equity courts, German courts in general have not asserted a discretionary power to refuse specific performance, through a morality too delicate and refined to satisfy the more robust tests used in damage actions. The double standard of morality that is so characteristic of our system simply does not exist in German law. This is mainly because, in ways that are too complex and pervasive to be documented here, specific performance, not the damage remedy, is conceived as the normal recourse. In short, the legislative mandate is accepted and applied. When a judgment has been rendered and the case has reached the stage of execution—a stage that is formally distinct from the pre-judgment stage—the court entrusted with execution will normally be ready, without hesitation, to order specific enforcement when requested by the judgment plaintiff. The main reservations are for cases where specific relief is impossible, would involve disproportionate cost, would introduce compulsion into close personal relationships or compel the expression of special forms of artistic or intellectual creativity. Presumably German courts, like French courts and our own, would not affirmatively order painters to paint pictures or singers to sing.⁹²

Difficulties have of course appeared, as they were bound to do under a system in which the choice of sanctions was so closely con-

⁹² 1 STEIN-JONAS, KOMMENTAR ZUR Z.P.O., art. 888. Actually reported cases of the latter type are hard to find. In a case in 1897 (39 RGZ 420) the Reichsgericht dealt with the question whether a chemist who had invented a process for manufacturing mirrors could be forced through arrest or fine under article 888 to turn over his invention. Since the invention had been fully worked out and written down in a document, the court held it to be proper to use direct coercion to compel surrender of the document. The court made it clear by implication that the inventor would not have been ordered to invent, though the Code of Civil Procedure itself was not too helpful on this issue.

trolled. What should be done, for example, with an order to surrender a child? Should the child be considered "movable goods"? Enforced surrender of the child *could* be accomplished by a third person, but if emotional factors (especially the child's emotions) could be taken into account, it might be better to threaten the adult who wrongfully detained him and to say, as some decisions did, that performance depended "exclusively" on the defendant's will.⁹³ Similarly, what if the object was to compel surrender of land or goods that were located in a foreign country where German court officers had no official status; should practical difficulties of execution override the Code classifications and permit resort to money fines, collectible perhaps against the defendant's local assets?⁹⁴ There were various other situations where the choice of appropriate modes of execution was hampered by the efforts of Code draftsmen to narrow the range of judicial discretion, by constructing categories that were sharply defined and mutually exclusive.⁹⁵ A severe test of the system came in the inflation that occurred during and after World War II. Shortages of goods, outside the sectors that were strictly controlled by requisitioning and rationing, brought a shift to barter as a mode of exchange; money became almost worthless and damage judgments illusory. Most of the cases involved tort claims for injury to or loss of movable property and therefore do not concern us now. It is interesting to note, however, that the principle of specific reparation was carried so far that many courts leaped over the barriers between the various modes of execution that were erected by the Code of Civil Procedure. They ordered defendants, sometimes under threats of fine or imprisonment, to find and deliver substitutes for cars, horses, bicycles, turkeys, watches and other goods that had been wrongfully taken or destroyed.⁹⁶ Under the stress of a national

⁹³ Using the "movable goods" clause: *Juristische Wochenschrift*, 1923, 849; *Seufferts Archiv*, 59, no. 140. *Seufferts Archiv*, 38, no. 289 had held the other way.

Using the "delegable act" clause (article 887, ZPO): *Seufferts Archiv*, 38, no. 195. Using money fines under article 888 because of the practical obstacles in the other solutions: *Juristische Wochenschrift*, 1929, 869, and 1934, 50.

⁹⁴ The Reichsgericht in 1902 held that direct execution was the only permissible recourse to reach goods located in Riga and thus in effect refused execution. *Juristische Wochenschrift*, 1902, 396. But a lower court in 1922, confronted with a similar problem, was willing to hold that the transfer of an asset located abroad depended "exclusively" on the defendant's will. *Juristische Wochenschrift*, 1922, 400.

⁹⁵ E.g., *Juristische Wochenschrift*, 1916, 656 and 690; *RGZ*, 55, p. 58; *RGZ*, 31, p. 412; *Juristische Wochenschrift*, 1923, 1042.

⁹⁶ An extensive literature developed and numerous decisions were rendered prior to

economic crisis, judicial discretion was reasserted in adapting means to attain the end, specific enforcement, on which all agreed.

5. Implications for American Law

The solutions adopted in French and German law have some implications for us. Even more significant than the particular solutions are the attitudes that have produced them.

Surely French and German experience confirm what we already knew, that the adequacy-of-alternative-remedies test is an unnecessary and irksome restriction on specific performance. The adequacy test has a function, as will be suggested, but as framed and usually applied it is arbitrary and irrational. It fades out completely in contracts for the sale of land, through the artificial but useful "presumption" that it is impossible to value interests in land. It is a severe limitation in sales of other things than land. Why not, as in both French and German law, give specific performance as to any physical object that can be found and is reachable by direct execution? It is true that wherever speed is a factor and markets reasonably organized, promisees will not often ask for it, as has proved true in Germany (and I think also in France). But why not leave this to the promisee's choice? The adequacy test is so much a part of our historical tradition that to get rid of it entirely in specific performance cases will clearly require express legislation. The mild provision of the Uniform Sales Act, applicable to buyer's suit, has gotten us nowhere, and the Uniform Commercial Code will probably make it worse.⁹⁷ As to sellers' actions the choice is between different kinds of money judgment remedies, and the arguments for specific performance center on the risks and uncertainties of self-help measures that are usually presupposed in damage actions. These arguments are persuasive, but our uniform legislation, from Sales Act through to Commercial Code, has progressively restricted the seller's action for the price, for reasons that seem unpersuasive.⁹⁸

the stabilization achieved in 1948. Bruns in the *SUED-DEUTSCHE JURISTEN ZEITUNG*, 1947, 302 described the economic background. Illustrative cases appear in the *MONATSSCHRIFT FUER DEUTSCHES RECHT*, 1947, 101 and 102 and the *SUED-DEUTSCHE ZEITUNG*, 1946, 179 and 180; 1948, 195.

⁹⁷ Uniform Sales Act, §68, discussed in 100 *UNIV. PA. L. REV.* 769 (1952); Uniform Commercial Code, §2-716, despite the exhortations of the official comment.

⁹⁸ Uniform Sales Act, §63; Uniform Commercial Code, §2-709.

Outside the area of promises to "give," where direct execution is appropriate and feasible, different considerations arise. Our own solution is an uneasy compromise. Damages of course are the only remedy in a large percentage of cases, even though the difficulties of evaluation and proof may be serious. When these difficulties become too great, under tests that are highly variable, the case can move into equity. Then discretion rules. Not only the initial decision whether or not to grant specific performance, and on what terms, but the choice and the severity of the sanctions imposed are all remitted to the judge's discretion. Particularly after studying the provisions of German law one is struck with our own failure to analyze and organize our system of sanctions. Instead of a carefully adjusted scale in which each mode of enforcement is assigned to its special task, we have almost no rules at all to regulate the choice or severity of sanctions. In particular, the historic confusion between civil and criminal contempt remains a confusion and very few of our courts have even made a serious effort to disentangle it.

The real contrast in practices and attitudes, of course, is not with Germany but rather with France. To a person trained in American law it seems hard to believe that so large a percentage of French judicial decisions should be left without effective sanction. Even the alarming experience with the post-war eviction cases has apparently not brought a wide-spread demand for change, through new legislation or otherwise. It is true that French lawyers have been inhibited mainly by a principle of legality—*nulla poena sine lege*—that we likewise accept. But we have taken it for granted, without much conscious thought, that the penalties for disobeying judges' commands were exempt from this principle, since contempt of court is a special offense—not quite a crime though for certain purposes treated as though it were a crime. This view has survived the abolition of imprisonment for debt, occurring in most states in the nineteenth century. With a few exceptions (decrees ordering payment of simple money debts), equity orders can be enforced by imprisonment despite the constitutional prohibitions. This is so plain it is seldom discussed, though the problem seems to be worth discussion. Is there not some analogy?

The common law treatment of contempt of court, contrasting so greatly with French practices, has led an Italian writer to ascribe the differences to racial factors. In his view the idea of con-

tempt was a "Germanic" idea. For this there is some historical basis, at least in the sense that it first appeared in the early middle ages as an undifferentiated notion of disobedience, to rulers who were mostly Germanic. His argument is that this idea, with its desirable German attributes, reached Italy through the Lombards, and returned through Italianized canon law to England, where it was preserved and expanded by the national character of the English—their admirable balance between discipline and freedom. He claimed that somehow these migratory ideas went around or over or under France, which had never conferred enforcement powers on its courts at any stage.⁹⁹ Quite apart from the exaggerations of the racial theory, I have tried to argue that there is nothing congenital about Frenchmen that makes them prefer weakness or paralysis of judicial authority. Fine and arrest were widely used to enforce court orders in France under the Old Regime, and the reaction of the Revolution against arbitrary penalties must in part be explained by the great and irresponsible power of French courts before 1789. I have tried to pin the fault on Pothier, who slavishly copied a slogan that had originated in the late middle ages through an understandable misreading of Roman texts.

Yet who can doubt that in the basic choices made, especially those made in modern times, there were some factors of social psychology? The Germans in the 1870's who drafted and adopted the Code of Civil Procedure were consciously rejecting the procedural limitations of classical Roman law. They also made a conscious choice, with real discrimination, between the claims on behalf of individual freedom that were strongly asserted before them and the claims of society to an essential kind of obedience. Not only to maintain judicial authority but to protect private rights conferred by law and established after fair hearing, penalties, they concluded, were justified—even the severest penalty, personal arrest, which had already been eliminated for other breaches of civil duty. There is no sign that they ever considered the Anglo-American version of an adequacy test, which reflected merely the working compromise between competing tribunals that historical accident had created. The adequacy (or inadequacy) test that the German draftsmen adopted instead is one that seems

⁹⁹ DI ROSSI, *IL CONTEMPT OF COURT E LA SPECIFIC PERFORMANCE NEL DIRITTO INGLESE* 179-194, 248-258 (1934), of which an abbreviated version appears in 51 *ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT* 233 (1937).

far more rational—body arrest and money fines shall be used as modes of coercion only when all other measures will be inadequate.

At the very time that these decisions were being made in Germany, French courts were struggling to escape the strait jacket of the Code, but French authors were urging in the most extreme form the principles of individualism.¹⁰⁰ In the end, in the twentieth century, the impulse shown by French courts to use the *astreinte* as a form of punitive damages was held in check and the logic of the authors very largely prevailed—as fully as the Court of Cassation with its limited powers could make its views effective. Did all this happen because of a distrust of judges, inherited from the eighteenth century and translated to the level of unconscious belief? Was it because the claims of self-assertion against external authority had really been accepted in French society as fully as some of the authors seemed to say? Or was it because lawyers' minds were imprisoned by lawyers' doctrines, constructed to explain and justify the rules of the Civil Code? All of these factors may have been at work, but my own emphasis would fall on the last.

But before we conclude that the societies molded by the common law have special and inherent capacities for social discipline, we should recall some other features of Anglo-American equity. The adequacy-of-alternative remedies test, as we now use it, could hardly have been framed by a freely rational mind, but it has in fact an important function. Since most equitable remedies are specific remedies, aiming at something more than execution against property, the practical effect of the adequacy test is to limit the area in which coercion will be employed. But there are some other self-denying ordinances also that are employed by equity courts. In contract cases, as in other equity cases, higher standards of fairness and morality are regularly employed. This double standard of morality is a clumsy and ineffective way of

¹⁰⁰ 16 LAURENT, *PRINCIPES DE DROIT CIVIL FRANCAIS*, 3d ed., no. 198 (1878): "Liberty is not involved in an obligation to give: public force is addressed to an object and not to a man. But in obligations to do, human liberty is involved in the sense that the obligation cannot be enforced through violence to a person who has obligated himself 'not to do'; this would be an assault on liberty, a crime. Man is free not to perform his promises, subject to incurring the consequences of his default: one could not take away this freedom through using violence. It is true that the text of the Code does not say this, but the spirit of the law leaves no doubt." A similar view, much more briefly stated, appears in 2 AOLLAS, *MANUEL DE DROIT CIVIL* 720-721 (1869).

alleviating hardship or discouraging sharp bargainers, if the contract whose enforcement in equity is refused is left open for enforcement by way of damage remedy.¹⁰¹ It is in fact surprising that the special scruples shown in administering equitable relief should have lasted so long after our chancellors had laid aside their ecclesiastical robes. The vague tests employed in equity, especially in specific performance cases, are not framed so as to take into account in any way the coercive features of equitable relief. Yet there may be an obscure connection between the "exceptional" nature of specific performance—the formal reason usually given for these special tests—and the greater weight of the public force that is mobilized by equity procedure. Whether this is true or not, the effect of this type of self-denying ordinance is, like the effect of the adequacy test, to narrow the area in which direct coercion can be used.

Related to these higher standards of morality are the requirements of mutuality. Mutuality of remedy, that artificial creation of Lord Justice Fry, was unbelievably academic. It was sufficiently dealt with by Edgar Durfee in one of his most influential and discriminating articles.¹⁰² Mutuality of performance, the substitute that Edgar urged and helped to formulate, is now increasingly used and is likely to stay with us, for it has much appeal. The essential thought is that it is unfair to coerce a promised performance unless adequate guarantees can be framed that the defendant will receive the promised counter-performance or else be assured of a safe withdrawal through restitution. In this formulation there emerges somewhat nearer the surface the notion that the coercive powers of equity should not be used if they will leave their victim at a serious disadvantage—their variety and severity are reasons for using them with restraint.

Another self-denying ordinance, used very widely in contract cases and very seldom in injunction against tort, is the doctrine that specific performance should be refused where difficulties of enforcement or supervision are to be expected. Some of the earlier decisions applying this doctrine can hardly be read without exasperation. Specific performance of a railroad's promise to

¹⁰¹ Comment, 32 MICH. L. REV. 518 (1934). A different view on this issue is suggested by Frank and Endicott, "Defenses in Equity and 'Legal Rights,'" 14 LA. L. REV. 380 (1954).

¹⁰² Durfee, "Mutuality in Specific Performance," 20 MICH. L. REV. 289 (1922).

build a railroad station and to stop trains at the station is refused because the court has not the time to build the station or flag the trains and the railroad doesn't know how. A building contractor will not be ordered to repair a structure because no one will be able to tell whether the repairs conform to the contract. In their origins these ideas carried a load of snobbery, expressed in distaste for menial tasks—"how can a master judge of repairs in husbandry?"¹⁰³ They often disguised the courts' concern for interests of third persons or the general public—a legitimate concern, though somewhat hard to formulate.¹⁰⁴ There also entered, to a degree that is hard to estimate, a psychological factor—the feeling that an equity decree was an expression of the judge's own personal will, so that his prestige and thus the prestige of all the courts was threatened in any disobedience. There is much confusion here, I suggest, that is a reflection of the larger confusion over the contempt power itself. An affront to the court may be involved, but not necessarily, any more than in a judgment debtor's non-payment of a money judgment. In cases of this kind we find an expression of judicial timidity and self-distrust, which took an extravagant form in nineteenth century cases though it is somewhat diminished in more recent cases. But the net effect is to exclude the coercive powers of equity courts from those situations in which (1) conflict and resistance might embroil the courts unduly and (2) the absence of clear standards would make undefined threats of punishment unfair to the defendant. Which of these two themes is predominant in most of the cases would be hard to say, since both are usually involved.

The interesting question is whether we, like the French, have become prisoners of our own system—or, more accurately, whether we have become confused by our lack of system. Would our courts be more willing to grant specific performance if a sharp line were drawn and firmly maintained between civil and criminal contempt—between execution process for the benefit of the litigant and punishment for attack on judicial authority?

¹⁰³ *Rayner v. Stone*, 2 Eden 128, 28 Eng. Rep. 845 (1762).

¹⁰⁴ This appears, for example, in *Blanchard v. Detroit, L. & L. M. R. Co.*, 31 Mich. 43 (1875), where the indefiniteness of the railroad's obligations and the court's preoccupation with other matters were the reasons given, but the court was also quite evidently concerned with the long-term burden on a public utility in being required to stop trains after the need for local railroad service had diminished.

Why must every equity order, except some decrees establishing simple money debts, be thought of as carrying implicitly the threat of arrest, money fine, sequestration—the whole panoply of coercive devices that our equity courts draw on at their discretion? Our courts could surely have made a much wider use of substituted performance, by plaintiff, by third parties or by receivers and other persons that they temporarily invest with a limited public authority. This could be done without any commitment to go further with money fines and especially with arrest. If limited means were adapted to limited ends, with greater selectivity, more might be attempted and the barriers to specific performance that we have inherited might be reduced. As to some classes of promises—e.g., promises to transfer specific assets—they might disappear.

I have no statistics and would find them hard to collect, but, apart from land contracts, it appears to me that specific performance is still in fact what the courts have described it to be in theory—an exceptional remedy. Apart from land contracts, the adequacy-of-alternative-remedy test cuts off vast numbers of contracts, and those that pass this test will then meet a whole series of additional tests. We have in fact cut down the area in which direct coercion is possible, using a number of self-denying principles that are expressed in different terms. We entrust great power to our judges, but then proceed by other means to destroy most of the opportunities for the exercise of power. The question one is left with is whether there is any connection between the magnitude of the power and the reluctance to employ it.