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IRREPARABILITY IRREPARABLY DAMAGED

*Doug Rendleman**

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

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

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

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

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

1. Douglas Laycock is Alice McKean Young Regents Chair, University of Texas Law School.

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

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

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

I. THE LAW-EQUITY DISTINCTION

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

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

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

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

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

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

A. *Tenuousness*

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

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

B. *Consequences*

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

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

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

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

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

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

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

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

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

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

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

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

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C. *No Remedial Paradise*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. THE IIR'S STATE OF INSTABILITY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

32. *Id.* at 118.

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A. *Special Handling? Specific Performance and Injunctions*

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

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

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

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

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

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

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

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

B. *Interlocutory Relief*

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

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

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interlocutory personal orders.[36]

C. *The Contempt Doctrines*

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

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

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

37. *Id.* at 1004-06.

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

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

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

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

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D. *Equity and Romance*

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

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

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

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

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

44. *Id.* at 86-95.

45. *Id.*

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

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E. *Stricter Confinement Principles*

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

1. *Balancing Tests*

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

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

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

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

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

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

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

2. *Other Principles of Confinement*

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

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

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

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

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

F. *The IIR and Debris*

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

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

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

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

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

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

III. BALANCING HARDSHIPS

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

A. *Land Use Balancing*

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

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

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

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

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

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

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

B. *The Example of Employment Discrimination*

1. *Reinstatement Balancing*

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

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

54. 523 P.2d at 1024.

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

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

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

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

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

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

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

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

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

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

62. 908 F.2d at 116.

63. 908 F.2d at 116.

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

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

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

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

2. *Administering Complex Relief*

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

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

66. 908 F.2d at 117.

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

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

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

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

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

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

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

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

C. *Prior Restraint*

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

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

71. 737 F. Supp. at 1216.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. ENDING THE IIR'S REIGN

A. *Reform*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *The Law and the Enterprise*

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

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

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

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

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

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

90. P. 260 (my uppercase).

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

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

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

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

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

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

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

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

95. *Id.* at 76.

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

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

CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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TEACHING CONFLICTS, IMPROVING THE ODDS

*Gene R. Shreve**

CONFLICT OF LAWS: CASES, MATERIALS AND PROBLEMS. By *David H. Vernon, Louise Weinberg, William L. Reynolds,* and *William M. Richman.* New York: Matthew Bender & Co. 1990. Pp. xxiii, 753, and problem appendix. $39.95.

Before I first taught federal courts, I wrote to the late Professor Paul Bator. I posed different possibilities for arranging assignments from his casebook and asked for his advice concerning which he thought would work best. His reply was gracious if brief. "Don't worry about your particular approach." Professor Bator said. "Whatever you do, the material is too rich to spoil."

The same can be said for conflicts. One of the few common law courses in the upper curriculum, it invites more attention to themes of judicial lawmaking and process than courses after the first year usually do. Moreover, the topics addressed in conflicts are as challenging intellectually as a law teacher could want. They continually provide opportunities to question the "what" and "why" of law. Finally, professors have a hook to use in teaching conflicts that is not always available in highly conceptual courses. Conflicts problems inescapable in practice are really no different from those in the classroom. In perhaps no other law school course do spheres of intellectualism (dear to the legal academy) and practical understanding (dear to lawyers and judges) so overlap.

Since this makes conflicts too rich to spoil, any good casebook should do, and there have long been many good ones on the market. It is fair to ask whether we need another. Professors David Vernon,[1] Louise Weinberg,[2] William Reynolds,[3] and William Richman[4] thought so. This essay examines their book and agrees.

Part I discusses why conflicts, despite its allure, can be so frustrating to teach. Part II discusses features of the new casebook. It concludes that, while the new book does not represent a dramatic

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departure from its competitors, its assorted qualities add up to an attractive package: materials that may help conflicts professors involve and truly teach a higher proportion of their students.

I. Some Reasons Conflicts Is a Difficult Course To Teach

To understand why conflicts is hard to teach successfully, it may be best to begin with a closer look at the core of the course: the choice-of-law process. That process exists for cases in which the facts suggest two or more different sources for governing law, and laws from those sources seem to produce conflicting results.[5] A full-bodied approach to resolving conflicts emerged from American judicial decisions of the nineteenth and early twentieth centuries. This traditional approach entered a period of stagnation, followed by what has often been called a revolution in conflicts doctrine.[6]

Torts and contracts cases provided the stage for most of the struggle. The shape of dramatic change in American conflicts law was clear in the early 1970s. Local litigants began to win application of forum law by arguing that they were among those whom such law was designed to protect. In other words, they demonstrated that the forum had a legitimate interest in having its own law applied to the controversy.[7] These decisions were sensible. However, because they rejected a good deal of traditional conflicts doctrine, the decisions were revolutionary as well.

Traditional doctrine had usually been indifferent to the purposes of laws or to particular needs of litigants. It rested instead upon an increasingly unconvincing jurisprudence, a vested-rights formalism similar in its way to jurisdictional doctrine most often associated with *Pennoyer v. Neff*.[8] Geographical inquiries dominated both fields. For *Pennoyer* the question was whether service of process was completed (as it had to be) in the forum state. Under traditional conflicts doc-

5. This essay uses the phrases *conflict of laws* and *choice of laws* interchangeably to describe such issues. On the roots of the first term, see Donald T. Trautman, *The Relation Between American Choice of Law and Federal Common Law*, Law & Contemp. Probs. Spring 1977, at 105, 105 n.2, and of the second, see David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173, 179 (1933).

6. Examples of the many descriptions of the modern movement and its effect on traditional doctrine include David F. Cavers, *Contemporary Conflicts Law in American Perspective*, 131 R.C.A.D.I. 75 (1970), and Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 Colum. L. Rev. 772 (1983).

7. While sharp local interests precipitated the revolution, the idea of inquiring into the policies accounting for a rule of decision was not parochial in itself. It is not surprising, therefore, that courts soon began to use interest (policy) analysis to choose foreign over local law. For discussion of several of these cases, see Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases*, 46 Ohio St. L.J. 493, 499-501 (1985).

8. 95 U.S. 714 (1877).

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trine, the choice of law was governed by such facts as the location of physical injury or the place of contracting. For some time, courts had mitigated the harshness of traditional conflicts doctrine through different fictions. Yet these fictions — distasteful in themselves — offered unreliable protection.[9]

Pennoyer's dominance ended when the Supreme Court began permitting personal jurisdiction in forums where service of process could not be completed.[10] The conflicts revolution came only a short time later, when a significant number of courts decided that geographical indicators such as place of physical injury or place of contracting would not necessarily dictate the source of governing law.[11] As with the modification of personal jurisdiction rules, changes in choice of law doctrine reflected a shift from hard-and-fast rules to approaches that were far-ranging, supple, and policy-based.

Old geographical indicators lost their preeminence, but they did not disappear under modern theory. Courts retained them while adding others. New indicators in torts and contracts cases included places where the parties were citizens, and where relationships material to the controversy were centered.[12] Working with more indicators, courts began using a mode of analysis unthinkable under traditional doctrine. They applied in the same case geographical indicators pointing both toward and away from a source of governing law.

For traditionalist courts, a single geographical indicator decided the case. Under modern theory, however, a single indicator is but part of a larger net of geographical indicators used to gather data — raw facts from each case. No indicator is invariably significant. The same one (for example, plaintiff's place of citizenship) might illuminate data instrumental to decision in one case but not in the text.

The different role modern theory assigns to geographical indicators reflects a more profound division between the two approaches. Little of what we now think of as conflicts policy accompanied the traditional approach. Geographical indicators instead operated in a closed, mechanical system characteristic of *deus ex machina* formalism. In

9. *See* Joseph Morse, *Characterization: Shadow or Substance,* 49 COLUM. L. REV. 1027, 1056-62 (1949); Monrad G. Paulson & Michael Sovern, *"Public Policy" in the Conflict of Laws,* 56 COLUM. L. REV. 969, 970-71 (1956).

10. The pivotal case was International Shoe Co. v. Washington, 326 U.S. 310 (1945). For a description of this period in the history of personal jurisdiction, see GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 38-50 (1989).

11. Two watershed decisions were Auten v. Auten, 124 N.E.2d 99 (N.Y. 1954) (contracts), and Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963) (torts).

12. For example, § 145(2) the American Law Institute's RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) offers these indicators for torts cases in general: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered."

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contrast, modern theory exhibits a preference for policy-driven rather than fact-driven results. The essence of the modern approach is that a raw geographical fact weighs in the balance of a conflicts decision only when it implicates an important choice-of-law policy.

Modernists take their policies from shared goals of the choice-of-law process. Chief among these are the goals of giving rules of decision the effects intended by the sovereigns that created them and respecting the reasonable expectations of the parties. If one engages in this process of data collection and evaluation carefully, it becomes clear in many cases that only one choice promotes goals of choice of law, and the modern approach is relatively easy to justify. The approach is also useful for difficult cases, because it reveals the clash of choice-of-law goals that produces difficulties, and it gives courts as much to work with as possible in reaching a decision.

Some commentators have been more enthusiastic than others about these developments.[13] Yet two points seem clear. First, few would turn back the clock. Second, the revolution has made conflicts — never an easy subject[14] — more complex, elusive, and downright difficult.[15] Except in a handful of jurisdictions still using the old approach,[16] results now turn on particular and highly variable features of each case.

Appropriately, then, students in law school conflicts classes are likely to spend much time carefully unraveling decisions and hypotheticals. This is case method teaching of a demanding sort. For

13. *Compare* Gregory S. Alexander, *The Concept of Function and the Basis of Regulatory Interests Under Functional Choice-of-Law Theory: The Significance of Benefit and the Insignificance of Intention,* 65 VA. L. REV. 1063 (1979); John Bernard Corr, *Interest Analysis and Choice of Law: The Dubious Dominance of Domicil,* 1983 UTAH L. REV. 651; John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own,* 23 WM. & MARY L. REV. 173 (1981); William C. Powers, Jr., *Formalism and Nonformalism in Choice of Law Methodology,* 52 WASH. L. REV. 27 (1976) (each expressing apprehension) *with* Bruce Posnak, *Choice of Law: Interest Analysis and Its "New Critics,"* 36 AM. J. COMP. L. 681 (1988); Robert A. Sedler, *Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer's "Foundational Attack,"* 46 OHIO ST. L.J. 483 (1985); David E. Seidelson, *Interest Analysis: The Quest for Perfection and the Frailties of Man,* 19 DUQ. L. REV. 207 (1981) (each viewing modern developments more favorably).

14. It was to Cardozo "one of the most baffling subjects of legal science." BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 67 (1928). Professor Max Rheinstein later described the traditional approach as the "most difficult and most confused of all branches of the law." Max Rheinstein, *How to Review a Festschrift,* 11 AM. J. COMP. L. 632, 655 (1962) (book review).

15. By one stern assessment, "the antics of joyriding conflicts revolutionaries have done little to improve the image of our discipline." Friedrich K. Juenger, *What Now?,* 46 OHIO ST. L.J. 509, 515 (1985).

16. At one time, it seemed that all remaining jurisdictions would fall into line. In two jurisdictions, however, traditional conflicts doctrine recently exhibited surprising life. Owen v. Owen, 444 N.W.2d 710 (S.D. 1989); Paul v. National Life, 352 S.E.2d 550 (W. Va. 1986). For critiques of *Owen* and *Paul,* respectively, see Charles M. Thatcher, *Choice of Law in Multi-State Tort Actions After* Owen v. Owen: *The Less Things Change . . .,* 35 S.D. L. REV. 372 (1990); and Jeffrey Jackson, *No Place Like Home: Public Policy and Prudent Practice in the Conflict of Laws,* 90 W. VA. L. REV. 1195 (1988).

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the approach to be successful, students must prepare, attend class, and actively (or vicariously) participate.[17] This is also where difficulties in conflicts teaching begin.

Up to a point, the difficulties encountered are typical of those professors face in most second- and third-year courses. Law professors usually find it much harder to sustain the interest of students who are beyond their first year of law school.[18] For several reasons, however, the picture is more discouraging for conflicts.

While evidence of merely mediocre work in law school is never heartening, it is little short of horrifying in a conflicts course. Modern conflicts analysis is so demanding that a superficial "C" level understanding of conflicts is probably close to useless. Those in practice must have a mastery of the conceptual techniques to avoid fouling up even simple conflicts problems. The prospect of unleashing more "C" conflicts students on society takes a lot of the pleasure out of teaching the course.

Mastery of the subject is possible for most students only through careful reading, hard thought, and repetition of difficult mental exercises — effort disaffected second- and third-year students may be unwilling to make. Conflicts students often display cynicism about the class material and about the manner in which it is taught. That is, they dismiss conflicts decisions as unprincipled instead of attempting to understand subtle forces of conflicts policy and the common law process, and they mistake as redundant the variations posed in method-based conflicts teaching.[19]

Thus, conflicts students often slip through the course without really understanding the subject. Much of this would probably occur even if conflicts received a pro rata share of the dwindling commitment of upper-year students. Unfortunately, it may receive less. Because conflicts course work often involves the repetition of outwardly similar mental exercises instead of the information crunching charac-

17. On the strategies and difficulties of case method teaching, see Lon L. Fuller, *On Teaching Law,* 3 STAN. L. REV. 35 (1950); Edwin W. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives,* 4 J. LEGAL EDUC. 1 (1951).

18. Upperclass students are prone to "[c]ycles of extended periods of lethargy followed by bouts of cramming. During the second and third years of law study, student effort declines and disbelief in [the] value of the standard techniques and expectations of legal education increases." TASK FORCE OF THE ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 17 (1979).

19. Some readers might wonder whether there is not a rather obvious solution to the problem: make the final examination for conflicts so difficult that only students who truly grasp the subject will pass. The proposal has a certain appeal, but is unrealistic for most law schools today. Many use guidelines for grade distribution. These discourage or eliminate discretion to enlarge grade categories, particularly extreme categories like "F" or "D." As a more basic matter, such low marks are in these times of grade inflation rarely given at all. A professor who gave a conspicuously large number of low grades could expect enrollment for the course to plummet thereafter. Good students would be among those frightened away.

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teristic of many other upper-curriculum courses,[20] students may be correct when they perceive that less work is required to achieve academic mediocrity in the former.

This unsentimental picture of conflicts teaching accepts as cold truth that many students may start the course comfortable with the prospect of doing the bare minimum, and that such meager effort is likely to produce little conflicts learning. However, while some view problems of this sort as nearly unsolvable,[21] matters are not that bleak. I have explained elsewhere why few law students are genuinely beyond hope.[22] Those arguments bear on concerns raised in this essay and can be summarized as follows.

For most upper-year students, the fear and mystery of law school are gone. They know they will graduate whether or not they push themselves in their courses. But this does not mean that they clearly will not work, only that they realize they have a choice. If they feel poorly treated, or simply taken for granted, they may exercise their independence in ways disagreeable to their professors and destructive to their own learning opportunities.

The idea then — particularly for a course as difficult to teach as conflicts — is to draw a greater proportion of students into the richness of the material. Conflicts may be too rich to spoil, but it does not teach itself. To improve the odds in the sense of reaching more students requires of conflicts professors an especially large amount of hard work and dogged enthusiasm. We need every edge we can get. The Vernon, Weinberg, Reynolds, and Richman casebook seems to offer one.

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20. There is no need to suggest that other courses are less challenging intellectually than conflicts. The point is that many are much more likely than conflicts to require students constantly to absorb new, relatively technical categories of material. The difference is evident, for example, from a comparison of conflicts with a course on the Uniform Commercial Code. On the latter, see Edward A. Laing, Book Review, 30 J. LEGAL EDUC. 249 (1979) (reviewing DAVID G. EPSTEIN & JAMES A. MARTIN, BASIC UNIFORM COMMERCIAL CODE — TEACHING MATERIALS (1977)); DOUGLAS G. BAIRD, Book Review, 36 J. LEGAL EDUC. 433 (1986) (reviewing JONATHAN A. EDDY & PETER WINSHIP, COMMERCIAL TRANSACTIONS: TEXT, CASES, AND PROBLEMS (1985)).

21. Resentment toward students who feel no obligation to work hard is widespread among law professors and has led to a number of hostile portraits. *See, e.g.*, FRANCIS A. ALLEN, LAW, INTELLECT, AND EDUCATION 73 (1979); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 278 (1983); Anthony D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461, 475 (1987).

22. Gene R. Shreve, *History of Legal Education*, 97 HARV. L. REV. 597, 604-05 (1983) (reviewing STEVENS, *supra* note 21); Gene R. Shreve, Book Review, 33 VAND. L. REV. 822, 825-33 (1980) (reviewing ALLEN, *supra* note 21); Gene R. Shreve, Book Review, 52 S. CAL. L. REV. 259, 265-68 (1978) (reviewing THOMAS L. SHAFFER & ROBERT S. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE (1977)).

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II. FEATURES OF THE NEW CASEBOOK

The authors have previously done fine individual work.[23] Two combined on an important conflicts treatise.[24] Now they demonstrate their ability to assemble course materials in a way that both recognizes the sophistication and vitality of their subject and supports conflicts teachers in meeting the challenge we have been considering.

As one would expect from such a seasoned group of collaborators, there is nothing indecisive in the design or content of their book. Topics the authors choose to address,[25] they address thoroughly and quite well, effectively combining cases, text, and problems. The fairly bold tradeoffs found in this casebook may be most appealing to professors who come to conflicts from federal courts and civil procedure backgrounds. For example, the treatments of personal jurisdiction (also in civil procedure) and federal/state conflict of laws (also in federal courts) appear in all conflicts casebooks currently in use, but are among the best here. On the other hand, professors coming to conflicts from an international law background may prefer a book giving greater emphasis to that side of the subject.[26] Or professors with an interest in corporations, estate planning, or some other area may prefer a book giving greater attention to these and other substantive fields.[27]

For teachers such as myself who do not stray far beyond the core of the subject, the book should be a delight. Undoubtedly all the authors contributed to the portions of the book treating the choice-of-law process; yet Louise Weinberg's influence seems particularly evident here.[28] Professor Weinberg recently chaired the conflict of laws section of the Association of American Law Schools. With many others, I have long admired her scholarship on choice of law itself, on choice of law and the Constitution, and on related matters concerning the intersection of state and federal law. Of those who have edited

23. *See, e.g.*, Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982).

24. WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS (1984). Another edited an earlier casebook. DAVID H. VERNON, CONFLICT OF LAWS: THEORY AND PRACTICE (2d ed. 1982).

25. The book covers all of the basic topics of a conflicts course: domicile (ch. 2); jurisdiction (ch. 3); choice of law (ch. 4); The Constitution and the choice of law (ch. 5); federal/state conflict of laws (ch. 6); and judgments (ch. 7). These topics are presented in a manner that makes them more or less interchangeable. This is important, for every conflicts professor has his or her own idea concerning the order in which the topics should be taught.

26. *E.g.*, WILLIS L.M. REESE, ET AL., CASES AND MATERIALS ON CONFLICT OF LAWS (9th ed. 1990); ANDREAS F. LOWENFELD, CONFLICT OF LAWS: FEDERAL, STATE, AND INTERNATIONAL PERSPECTIVES (1986).

27. *See, e.g.*, ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW: CASES AND MATERIALS (2d ed. 1989); GARY J. SIMSON, ISSUES AND PERSPECTIVES IN CONFLICT OF LAWS: CASES AND MATERIALS (2d ed. 1991). True to form, the one substantive area the new casebook does treat ("Domestic Relations," ch. 8) it addresses in commendable detail.

28. Professor Weinberg confirmed this in a letter to the author, dated November 25, 1991.

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casebooks, she ranks with Lea Brilmayer,[29] Russell Weintraub,[30] David Currie,[31] Arthur von Mehren, and Donald Trautman[32] in exploring the choice-of-law process from so many angles.

A source of student resistance to conflicts has been that many of the cases most important in the evolution of modern doctrine dealt with substantive issues now archaic (such as guest statutes, wrongful death liability, and married women's contracts). The new casebook confronts this problem by balancing formative with contemporary cases. Thus, although it contains many hardy perennials from the classical and revolutionary periods,[33] it also pursues conflicts issues in more contemporary settings.[34]

I am also very impressed with the commentary following the cases. It is engaging, nicely written material that pushes students to think about what they have read and supplies numerous ideas and sources for further reading. All of this should be of real help in overcoming the difficulties in drawing students into the course. So too will diagrams[35] and abundant problems[36] found in the casebook. Students are

29. LEA BRILMAYER & JAMES A. MARTIN, CONFLICT OF LAWS CASES AND MATERIALS (3d ed. 1990).

30. EUGENE F. SCOLES & RUSSELL J. WEINTRAUB, CASES AND MATERIALS ON CONFLICT OF LAWS (2d ed. 1972).

31. ROGER C. CRAMTON ET AL., CONFLICT OF LAWS: CASES — COMMENTS — QUESTIONS (4th ed. 1987).

32. ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS (1965).

33. Among the former are Alabama Great Southern Railroad Co. v. Carroll, 11 So. 803 (Ala. 1892), *reprinted at* pp. 219-21, and Milliken v. Pratt, 125 Mass. 374 (1878), *reprinted at* pp. 225-27. The latter include Auten v. Auten, 124 N.E.2d 99 (N.Y. 1954), *reprinted at* p. 293; Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963), *reprinted at* pp. 309-12; Lilienthal v. Kaufman, 395 P.2d 543 (Or. 1964), *reprinted* at pp. 321-26; and Bernhard v. Harrah's Club, 546 P.2d 719 (Cal. 1976), *reprinted at* pp. 343-47.

34. For example, product liability and mass tort cases are quite important now. *See, e.g.,* Symposium, *Conflict of Laws and Complex Litigation Issues in Mass Tort Litigation,* 1989 U. ILL. L. REV. 35; Mary Kay Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts,* 10 REV. LITIG. 309 (1991). Among the cases from this area appearing in the casebook are Edwardsville National Bank & Trust Co. v. Marion Laboratories, Inc., 808 F.2d 648 (7th Cir. 1987), *reprinted at* pp. 381-83 (product liability); Perkins v. Clark Equipment Co., 823 F.2d 207 (8th Cir. 1987), *reprinted at* pp. 405-07 (product liability); and *In re* "Agent Orange" Product Liability Litigation, 580 F. Supp. 690 (E.D.N.Y. 1984), *reprinted at* pp. 565-76 (mass tort).

35. For example, a diagram at p. 307 separates strands of law, policy, and interest-generating facts found in the famous case of Alabama Great Southern Railroad Co. v. Carroll, 11 So. 803 (Ala. 1892) reprinted at pp. 219-21. Students should find this technique quite helpful. It is reminiscent of some of the authors' earlier work. *See, e.g.,* William Richman, *Diagramming Conflicts: A Graphic Understanding of Interest Analysis,* 43 OHIO ST. L.J. 317 (1982); RICHMAN & REYNOLDS, *supra* note 24, at 178-96.

36. The end of the book contains about 125 pages of short problems. They look good and are perhaps more numerous than those found in any other casebook. It is wrong, however, for professors to be left as much in the dark about these problems as their students. As their creator, *see* p. vii, Professor Vernon must have in mind certain uses for and answers to the problems. Perhaps he will eventually prepare a manual sharing that information with those who adopt his book.

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likely to welcome periodic assignments from this problem set as a respite from case method work.[37]

Scholarship on choice of law is full of controversy, and the literature (including some casebooks) can be quite doctrinaire. I was pleased, then, to discover that this book did not attempt to foreclose discussion in controversial areas.[38] The same holds true for the later portion of the book dealing with choice of law and the Constitution. The book faced a great challenge here. "I think it difficult to point to any field," wrote Justice Jackson, "in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution."[39]

The picture has not improved. During the past decade, numerous commentators have dissected tangled Supreme Court opinions. The new casebook lays open the possibilities. It focuses on the Full Faith and Credit and Due Process Clauses, traditional inspirations for regulating choice of law.[40] The book also considers how other parts of the Constitution, such as the Commerce Clause, might apply to regulate choice of law (pp. 448-59).

A new casebook offers a certain advantage for those teaching any course for the first time, since the material should be fresh, complete, and located in just one book with no supplement. This holds true for the Vernon, Weinberg, Reynolds, and Richman casebook. With it,

37. While it is doubtful whether the problem method should be the primary teaching mode for conflicts, it seems clear that students respond positively to problem intervals in case method teaching — particularly upper-year students. For general discussion of the problem method, see Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654 (1984). On the peculiar advantages of problem assignments in a conflicts course, see Gene R. Shreve, *Bringing the Educational Reforms of the* Cramton Report *into the Case Method Classroom — Two Models*, 59 WASH. U. L.Q. 793, 802-06 (1981).

38. For example, the discussion that I take to be by Professor Weinberg of the "anti-modernist" position (pp. 384-85) is informative and respectful, even though that position is at odds with her own view. For the latter, see Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67 (1988).

39. Robert H. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 16 (1945).

40. *E.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302, 320 (1981) (Stevens, J., concurring); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 816-817 (1985). Views differ concerning the extent to which these clauses warrant intervention into the choice-of-law process. *Compare* James R. Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws*, 60 S. CAL. L. REV. 1299 (1987) (arguing for the development of extensive regulatory doctrine); Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U. L. REV. 651 (1987) (same) *with* Gene R. Shreve, *In Search of Choice-of-Law Reviewing Standard — Reflections on* Allstate Insurance Co. v. Hague, 66 MINN. L. REV. 327 (1982) (arguing that the full faith and credit and due process clauses should continue to play only a minor role); Gene R. Shreve, *Interest Analysis as Constitutional Law*, 48 OHIO ST. L.J. 51 (1987) (same).

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and with the fine reference materials[41] and mind-stretching articles[42] that exist for the subject, first-time conflicts professors should have the help they need.

For experienced conflicts professors, the prospect of adopting this book may carry an added complication. To break in a different casebook costs valuable time and effort, and it usually causes the professor a small but disagreeable amount of classroom fumbling. This is why, as many disappointed publishers' representatives will attest, I hate to change casebooks. For conflicts, I have used successive editions of the same book since 1975. It is a measure of my regard for the Vernon, Weinberg, Reynolds, and Richman book that I switched to it this past fall. This essay has sketched some of the reasons for that decision. In short, this casebook is too attractive to pass up.

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41. Standard texts include ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW (4th ed. 1986); RICHMAN & REYNOLDS, *supra* note 24; EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS (1982); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (2d ed. 1980). For an excellent recent survey, see P. John Kozyris & Symeon C. Symeonides, *Choice of Law in the American Courts in 1989: An Overview*, 38 AM. J. COMP. L. 601 (1990).

42. *E.g.*, Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989); Michael Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990); Joseph W. Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731 (1990); Symposium, *New Directions in Choice of Law: Alternatives to Interest Analysis*, 24 CORNELL INTL. L.J. 195 (1991); Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991).

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CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS. By *Lea Brilmayer.* Boston: Little, Brown & Co. 1991. Pp. xvi, 240. $12.95.

According to *Ecclesiastes*, there is nothing new under the sun.[1] Nowhere are these words more apt than in the field of conflicts of laws. Each generation of conflicts scholars batters down the work of its predecessors and builds in its place a new theoretical edifice, only to have the next generation go to work mining the walls. When the walls have tumbled down and the ground is plowed with salt, the attackers begin building anew. And the ideas they use to build their new creation bear an uncanny resemblance to those that were demolished by the previous generation. Little changes in this cycle except the pace of destruction and rebuilding, which quickens with each succeeding generation. Progress is measured in original combinations of old ingredients, rather than in the discovery of truly novel ideas.

Conflict-of-law theory nevertheless has great practical importance, especially in the United States, where fifty sovereign states and a handful of territories and districts compete with the federal government to make differing and overlapping laws. The American legal system provides a natural laboratory for conflict-of-law theories and has always forced Americans to take conflicts seriously. Other nations and conglomerations of nations — for example, the European Community and the Commonwealth of Independent States — may soon have similar problems to confront, as they bundle once-unitary legal systems into newly created confederations.

Professor Lea Brilmayer's latest work, *Conflict of Laws: Foundations and Future Directions,*[2] contains an exposition and a critique of recent conflict-of-law theories. It also advances a new theory, which Brilmayer calls rights-based analysis. This new theory unsurprisingly rejects most of the theoretical underpinnings of the currently fashionable conflicts theory, governmental interest analysis. Even less surprisingly, the new theory brings back some of the elements of the previous generation's conflicts theory, vested rights. This book, which in its early chapters sets out the cyclical nature of conflicts of law, is thus ironically a product of that cycle.

Chapter One describes and attacks the vested rights theory of Joseph Beale, which culminated in the first *Restatement of the Conflict*

1. "The thing that hath been, it is that which shall be; and that which is done is that which shall be done: and there is no new thing under the sun." *Ecclesiastes* 1:9.

2. Lea Brilmayer is Nathan Baker Professor of Law, Yale University. Her previous works include AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM (1986) and JUSTIFYING INTERNATIONAL ACTS (1989).

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of Laws in 1934 (p. 18). Vested rights requires a set of conflicts rules external to the laws of individual states. Judges use these external rules, found in the general common law, to answer choice-of-law questions.[3] The courts adjudicate cases using the positive substantive law of a particular state, but they choose that substantive law by reference to general common law — a natural law concept.

Regardless of the similarities between some elements of Brilmayer's rights-based analysis and Beale's vested rights theory,[4] Brilmayer in no way advocates a return to the days of the first *Restatement*. Conflicts scholars may agree on little else, but they stand united in their antipathy toward vested rights. "We are all positivists now" might be the motto of modern conflicts scholars, including Brilmayer, who universally reject the natural law implications of vested rights.[5] Brilmayer shows that the intellectual basis of vested rights vanished with the disappearance of the belief in a general common law (pp. 35-36).

Brilmayer's book begins in earnest in Chapter Two, where she describes and provides trenchant criticism of the conflicts theory currently in vogue — governmental interest analysis. Interest analysis, first propounded by Brainerd Currie in the 1950s and 1960s,[6] has received wide scholarly support because it meets two common criticisms of the vested rights theory. First, interest analysis purports to find its source of authority in the internal, positive law of the state, not in an external, general common law that modern scholars find meaningless.[7] Second, interest analysis rejects the notion of jurisdiction-selecting rules — that is, choice-of-law rules that select a particular state's substantive rules without reference to the content or underlying policies of those rules (pp. 59-60). To interest analysts, law is a purposive activity, and choice of law makes no sense unless it takes into account the

3. For example, under the first *Restatement*, the law to be used in a dispute over contract validity is the law of the place of contract formation. RESTATEMENT OF CONFLICT OF LAWS § 332 (1934). But if the offeree mails the acceptance, the place of formation depends on whether the court applies the mailbox rule, which is not the law in every jurisdiction. How can the court make this initial determination of the place of formation without already knowing which state's contract laws should apply? Beale solved this dilemma by specifying that the court was to use the "general" law of contracts to determine the place of formation, not the law of the forum or any other state's law. Beale instructed the courts to follow the mailbox rule, which he considered to be part of the general common law of contracts. Pp. 36-37.

4. For example, as the names of the two theories imply, both endow litigants with choice-of-law rights, although the nature of these rights differs considerably. Moreover, both theories rely on norms external to the state's positive law. *See infra* notes 17-18 and accompanying text.

5. Brilmayer lists only one modern scholar, Perry Dane, who offers even a partial defense of vested rights theory. P. 194 n.10; *see* Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987).

6. P. 43. The reader can find much of Currie's work regarding interest analysis in BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

7. "The problem [with vested rights theory] was not the particular rules themselves but the 'metaphysical apparatus of the method.'" P. 44 (citation omitted).

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policies and purposes behind the applicable state's law.[8] Interest analysis seeks to select the proper law by examining whether the application of a state's law in a multistate case will further the policies of that law (p. 46).

Brilmayer believes that interest analysis suffers from one of the worst flaws of vested rights theory: the theory, as set out by Currie, turns out in practice to be jurisdiction-selecting, even while its exponents maintain that it is sensitive to the purposes of the laws it selects. Vested rights and interest analysis, she asserts, differ only in the type of contacts they consider relevant to choice of law decisions. Vested rights theory looks at territorial factors (for example, the place of injury in tort actions), while interest analysis looks at the domiciles of the parties (pp. 57-61).

Brilmayer arrives at this conclusion by analyzing a series of hypothetical multistate cases under Currie's theory (pp. 56-60). Currie divides all conflicts cases into one of three categories: false conflicts, true conflicts, and unprovided-for cases (p. 47). Brilmayer points out that Currie's false conflict cases usually occur when the two parties share the same domicile (p. 58). In these cases, the court simply chooses the law of the common domicile. True conflicts occur when the parties have different domiciles and the two states have conflicting laws (p. 58). Currie's solution is to apply the law of the forum. Unprovided-for cases occur when the parties have different domiciles, and neither state has an interest in applying its law (p. 59). Currie's solution is again to apply the law of the forum. Brilmayer points out that the domiciles of the parties alone supply the correct choice of law. The court need not actually look at the policies or interests behind the laws. Thus, Currie's theory is jurisdiction-selecting.[9]

Brilmayer's analysis contains valid criticism of Currie's theory. Thirty years have passed since Currie presented the theory, however, and other scholars have continued to refine it. Her criticisms of Currie do little to weaken the analysis of these later scholars. For example, Professor Larry Kramer asserts that Currie was wrong in hypothesizing the unprovided-for case; Kramer maintains that no such category actually exists.[10] He asserts that most of Currie's supposedly unprovided-for cases are actually either true or false conflicts.[11] Under

8. "The courts simply will not remain always oblivious to the true operation of a [vested rights] system that, though speaking the language of metaphysics, strikes down the legitimate application of the policy of a state . . . ." CURRIE, *supra* note 6, at 181.

9. Pp. 59-60. Brilmayer offers two qualifications to her charge that Currie's theory is jurisdiction-selecting: territorially triggered interests and the interest in interstate restraint might cause the forum to look at state policies. P. 61. But she considers these considerations "anomalous" to Currie's method.

10. Larry Kramer, *The Myth of the "Unprovided-for" Case*, 75 VA. L. REV. 1045 (1989).

11. According to Kramer, in the rare case where there really is no state that has an interest in applying its laws, the plaintiff simply has no cause of action. Kramer considers this situation

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Kramer's analysis, interest analysis is no longer jurisdiction-selecting. To decide whether the cases that Currie thought fell into the unprovided-for category are true or false conflicts, the analyst must examine the policies behind the laws of the two states. Knowledge of the domiciles of the parties is no longer sufficient to choose the correct law.

Brilmayer also criticizes Currie's theory because of its shortsighted view of state interests (p. 71). Currie intended to create a theory allowing a state to pursue its own interests in its choice-of-law policies, just as that state does in applying its substantive law. Thus, Currie's solution to a true conflict — a case in which both the forum and another state have an interest in applying their own laws — is to apply forum law (p. 47). Currie believed that each state furthers its own interests by applying forum law. This solution, however, fails even on its own terms. If Michigan courts ruthlessly apply Michigan law in every multistate case in which its laws conflict with the laws of other states, Michigan can expect no cooperation from Ohio when Ohio litigates a multistate case with important Michigan connections. Brilmayer points out that Michigan may sometimes pursue its long-term interests more effectively by deferring occasionally to the interests of other states. By deferring, Michigan can expect reciprocity from other states in cases litigated in the courts of other states (p. 71). Thus, a state's interest in cooperation is often as substantial as its interest in applying its own laws.

Chapters Four and Five provide Brilmayer's response to her criticisms of interest analysis. In Chapter Four, she offers her thoughts on improving interest analysis. She discusses various game theory models of cooperation that would induce a state to defer to foreign law (pp. 155-60). In the end, Brilmayer comes to the unhappy conclusion that the enlightened self-interest of the state courts is unlikely to generate sufficient cooperation to further each state's interests optimally (p. 163). She believes that an outside group will have to create a structure of cooperation that each state can adopt (pp. 181-84). Her favored choice is a uniform act adopted by all states, preferably a new restatement from the American Law Institute (pp. 185-89).

Brilmayer seems less than optimistic that her solutions will solve the problems of interest analysis.[12] Chapter Five, in which she sets out a new theory of rights-based analysis, shows why. Brilmayer's heart simply isn't in improving interest analysis. Even if scholars correct the shortcomings of interest analysis discussed above — the shortsighted view of state interests and the jurisdiction-selecting nature of the anal-

to be equivalent to a purely domestic case in which the plaintiff fails to establish a cause of action. He sees no reason to invent an exotic name for this unsurprising occurrence. *Id.* at 1063-64.

12. For example, she only discusses her proposed improvements to interest analysis after suspending some of her strongest reservations about the theory. P. 145.

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ysis — Brilmayer believes interest analysis is incapable of taking into account considerations necessary to a just choice of law system.

The facts of *Allstate Insurance Co. v. Hague*[13] illustrate the flaws Brilmayer sees in interest analysis. *Hague* was a wrongful death suit brought in a Minnesota court by the widow of a man who was killed in a motorcycle accident. The accident occurred in Wisconsin, and both the plaintiff's decedent and the defendant were residents of Wisconsin. The Minnesota trial court applied pro-plaintiff Minnesota law, rather than the more restrictive Wisconsin law, even though the plaintiff could point to only one relevant connection with Minnesota: she had moved to Minnesota after the accident.[14]

Under interest analysis, the court's choice of Minnesota law was perfectly proper. The plaintiff was a resident of Minnesota, and Minnesota tort law sought to protect Minnesota plaintiffs. Thus, Minnesota had an interest in applying its law. That the plaintiff became a Minnesota resident only after the accident is irrelevant to the analysis.[15]

The reader who is something other than an interest analyst will probably find something intuitively wrong with this result. Why should Minnesota be able to impose its law on a defendant with such a tenuous connection to the state? Interest analysts may respond that the court was indeed wrong; if the court had a clearer idea of Minnesota's true interests, it would defer to Wisconsin, so that Wisconsin would reciprocate in cases that implicated important Minnesota interests. But Brilmayer would claim that this response does not meet our real objection. The court was not wrong because it misunderstood Minnesota's true interests; it was wrong because subjecting the defendant to Minnesota law was *unfair* (p. 198).

This intuition is the basis of Brilmayer's fundamental criticism of interest analysis. The theory is inadequate because unfairness is simply not in its vocabulary. According to Brilmayer, interest analysis is consequentialist: if applying a law would further its values, the state has an interest in its application.[16] As Brilmayer points out, "the problem with consequentialist reasoning is that it is indifferent to what the parties deserve" (p. 202).

The deficiencies of interest analysis lead Brilmayer to rights-based

13. 449 U.S. 302 (1981). Brilmayer sets out a hypothetical with facts similar to *Hague* on page 197.

14. 449 U.S. at 305-06.

15. Currie himself rejected applying local law in cases of after-acquired domicile. *See* p. 197. He therefore would have disagreed with the result in *Hague*. Brilmayer correctly points out, however, that Currie was unable to justify his rejection in terms of interest analysis; he found the need to explain his rejection in terms of vested rights. P. 197 n.23.

16. P. 200. For example, one of the values of state tort law is compensation of state residents who are victims of torts. The Minnesota court could thus properly find an interest applying Minnesota law to the plaintiff in *Hague* by virtue of her Minnesota residence alone.

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analysis. Brilmayer wishes to endow litigants with choice-of-law rights that "arise out of the fact that the state's legitimate authority is finite . . ." (p. 206). These are negative rights; they grant a party the right to be let alone (p. 195). Her theory is not consequentialist; she looks not to the consequences of her theory on the furtherance of state policies, but to the fairness of a state's applying its law to an individual. Brilmayer's rights-based analysis thus reverses the concerns of interest analysis: rights-based analysis focuses on the party who suffers the burdens of the law, not on the party who enjoys its benefits (p. 213).

Brilmayer uses these principles to derive several bases for legitimate state coercion of a party who is disadvantaged by the application of local law. The most important of these is consent. A state should not apply a law unless the party burdened has consented to its application (p. 210). This consent, however, need not be express; Brilmayer would accept domicile or voluntary engagement in local conduct as a sufficient expression of consent to allow a court to apply local law (p. 230). Another basis of legitimate state coercion is mutuality. By this, Brilmayer means that a state should not hold a party to the burdens of a rule "except in situations where it would help him or her if the tables were turned" (p. 223). Brilmayer's example of a choice-of-law rule that fails the mutuality test is one that requires the court to apply the law of the state that is more advantageous to in-staters and disadvantageous to out-of-staters (p. 223).

Rights-based analysis has several limitations, only some of which Brilmayer acknowledges. First, as in interest analysis, rights-based analysis will often point to more than one state whose law a court may legitimately apply (p. 194). The problem of rights-based true conflicts will thus arise. Brilmayer suggests that courts apply her rights-based theory in conjunction with interest analysis. She would apparently have the courts apply rights-based analysis as an initial screening device to eliminate inappropriate states' laws, and then apply interest analysis to eliminate other states (p. 194). But even this method will not eliminate all ambiguities in choice of law: the application of the laws of more than one state may satisfy both theories.

Second, rights-based theory, like vested rights, is external and objective.[17] That is, the rights granted by the theory, such as "the right to be let alone," do not come from an internal lawmaking body of the state, such as the state legislature. The legislature would probably like to see its law applied to the greatest extent possible. The theory thus faces the same objection as vested rights theory: Where do these external norms come from, if not from positive law?

Brilmayer, of course, claims to be a positivist. She does not advo-

17. "[R]ights are *supposed* to be objective. The forum is entitled not merely to disagree with other states on their concepts of rights but to conclude that other states are *wrong*." P. 205 n.39.

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cate a judge's ruling contrary to the positive law of the state. She wants the judge to use her rights-based analysis only as a guide to fill gaps in positive law, which are legion in conflicts cases (p. 205). Unlike interest analysis, however, her theory does not purport to guide a judge in ascertaining legislative intent.[18] Rights-based analysis provides a separate normative guide to lawmaking. The theory thus sounds something like the natural rights theories for which Beale was roundly criticized. Brilmayer claims to adhere to positivism, but, as she points out in Chapter One, so did Beale (pp. 18-19).

Regardless of these shortcomings, Brilmayer's rights-based theory offers insights lacking in current theories. It provides a framework for discussing fairness to the burdened party, which is excluded from interest analysis. By excluding such considerations, interest analysis may suffer the fate of vested rights under the First Restatement: it may end up riddled with exceptions and escape devices that allow judges to reach what they consider the just result in spite of the theory.

If Brilmayer does no more than enlarge the vocabulary of judges, she may perform a valuable service. A judge who talks about fairness to a burdened party is likely to be more restrained in his application of local law than one who can speak only of state interests and policies. This might indirectly create a climate of interstate cooperation, leading to greater reciprocity between states and a furthering of state interests. Rights-based analysis may in this way further the consequentialist goals of interest analysis, even though the theory was devised for a different purpose.

In the end, Brilmayer finds traditional interest analysis fundamentally flawed because it lacks a notion of fairness to balance its preoccupation with state interests and policies. Her perceptive criticisms of the theory shed light on its limitations. Perhaps she believes she has mortally wounded the theory. If such was her goal, she did not succeed; the beast has more life in it than she supposes. Her rights-based analysis, however, is an important break with current theories and deserves the careful attention of conflicts scholars and judges. That alone is a high achievement.

—*Craig Y. Allison*

18. P. 47. Brilmayer would argue that interest analysts are being disingenuous when they claim they are trying to ascertain legislative intent. P. 94. She believes that they, too, are imposing objective, external standards on judges. P. 99.

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THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT. By *Welsh S. White.* Ann Arbor: University of Michigan Press. 1991. Pp. 223. Cloth, $34.50; paper, $17.95.

During the 1990-1991 Term, the U.S. Supreme Court held in *Tennessee v. Payne*[1] that the Eighth Amendment does not prohibit a prosecutor from arguing, nor a capital sentencing jury from considering, victim impact evidence concerning the victim's personal characteristics and the emotional impact of the murder on the victim's family. During the same Term, in *McCleskey v. Zant,*[2] the Court limited a prisoner's right to file a second petition for a writ of habeas corpus if the petition contains a claim presented for the first time.

While these cases are too recent to be included in Professor Welsh S. White's book, *The Death Penalty in the Nineties: An Examination of the Modern System of Capital Punishment,*[3] they arguably reinforce White's two major themes. First, White emphasizes the continuing arbitrariness of the death penalty's application. He declares that "[t]he death penalty is arbitrarily imposed if it is imposed on the basis of factors that have no relationship to either the crime committed or the character of the offender" (p. 157). Under this analysis, the *Payne* decision, by allowing increased attention on the victim rather than on the offender, appears to contribute to continuing arbitrariness. Second, despite such arbitrariness, the Supreme Court is placing greater priority on expeditious executions at the cost of a criminal defendant's Eighth Amendment guarantee (pp. 8-23). Under White's rubric, the *Zant* decision represents another step in this direction.[4]

According to White, the arbitrary application of the death penalty

1. 111 S. Ct. 2597 (1991).

2. 111 S. Ct. 1454 (1991).

3. Welsh S. White is Professor of Law, University of Pittsburgh. Professor White is the author of THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT (1987) and LIFE IN THE BALANCE: PROCEDURAL SAFEGUARDS IN CAPITAL CASES (1984).

In the introduction to *The Death Penalty in the Nineties,* White notes that his latest book differs from his earlier work, *The Death Penalty in the Eighties,* primarily due to the addition of two chapters: one discussing the Supreme Court's monitoring of the capital punishment system and the other discussing which convicted murderers are most likely to receive the death penalty. P. 1.

4. In arguing that the Supreme Court has placed a higher priority on the smooth function of the capital punishment system than on protecting capital defendants' rights, White relies on Wainwright v. Sykes, 433 U.S. 72 (1977). In *Sykes,* the Supreme Court limited a defendant's ability to allege a constitutional claim in a federal habeas corpus petition when he has failed to raise that same claim in the appropriate manner in the state courts. P. 16. In *Zant,* the Court adopted the *Sykes* standard as the same standard limiting a defendant's ability to present a claim for the first time in a second habeas corpus petition. *Zant,* 111 S. Ct. at 1470.

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continues today despite the Supreme Court's pronouncements in *Furman v. Georgia*[5] and *Gregg v. Georgia*[6] regarding the unconstitutionality of arbitrary capital punishment procedures. As an example, White points to the Baldus study that concluded the killer of a white victim is more likely to receive the death penalty than the killer of a nonwhite victim (p. 150). In *McCleskey v. Kemp*,[7] the Supreme Court stated that even though race might play a role in the criminal justice system, racial discrepancies revealed in the Baldus study fall short of the procedural defects identified in *Furman* (p. 158). Contrarily, White argues that because the victim's race has nothing to do with the nature of the crime or the character of the offender, taking such a factor into account results in arbitrariness (p. 157). A victim's race "has no more relevance to the nature of the crime or the character of the offender than the color of the defendant's eyes or the day of the week on which the crime was committed" (p. 157). One can surmise from White's analysis that allowing a capital sentencing jury to consider victim impact statements would result in arbitrariness as it would focus the jury's attention on the victim rather than on the nature of the crime or the character of the offender. Nonetheless, in *Payne,* the Supreme Court stated that a victim impact statement informs the sentencing authority of the harm caused by the convicted defendant and that such harm is an appropriate factor in determining punishment.[8]

Unfortunately, some of White's arguments supporting the death penalty's continuing arbitrary application appear as masked attacks on the entire criminal justice system. One may assume that the entire criminal justice system is not perfect because it contains elements of arbitrariness. It naturally follows that the death penalty will have some of these unfortunate elements as well. Yet, White singles out the arbitrariness of capital punishment as if it is the only worm in the apple. For example, White asserts that court-appointed attorneys are often inexperienced, and as a result the indigent defendant will more

5. 408 U.S. 238 (1972). In *Furman,* the Court, in a five-to-four decision, struck down as unconstitutional the then-existing capital punishment system. As each Justice issued an opinion, there was no one opinion of the Court. Nonetheless, it has been commonly agreed that the decisive ground of the *Furman* ruling "was that, out of a large number of persons 'eligible' in law for the punishment of death, a few were selected as if at random, by no stated (or perhaps statable) criteria, while all the rest suffered the lesser penalty of imprisonment." CHARLES BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 20 (1981).

6. The plurality in Gregg v. Georgia, 428 U.S. 153, 199 (1976), read *Furman* as requiring that the decision to impose the death penalty "be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." Because Georgia's death penalty statute provided for a bifurcated proceeding in which the sentencing authority was provided with standards to guide its use of the information relevant to imposing the sentence, the death penalty statute was upheld.

7. 481 U.S. 279, 313 (1987).

8. 111 S. Ct. 2597, 2606 (1991).

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likely be sentenced to death.[9] However, inexperienced court-appointed attorneys will increase the chances of a defendant being convicted of any crime. Perhaps the answer lies not with abolishing the death penalty but with revising the system of court-appointed attorneys.

White's discussion of plea bargaining provides another example of a masked attack on the criminal justice system. White contends that a prosecutor's willingness to enter into plea bargaining discussions in a capital case is affected by factors unrelated to the nature of the crime committed or the strength of the evidence against the defendant (p. 62). Instead, factors such as whether the prosecutor is seeking reelection, the location of the crime, and the funds available to the prosecutor to prosecute the case influence the prosecutor's decision to extend a plea bargain invitation to the capital defendant (p. 55). Yet, such factors may influence a prosecutor's decision whether to plea bargain in any criminal case. White also argues that, even if offered a plea bargain, a defendant may reject it because he distrusts his attorney who encourages acceptance of the offer or because the defendant believes a jury verdict will be more favorable than the plea bargain offer. Thus, the ones who receive the death penalty are more likely to be less culpable than the ones who plea bargain (p. 61). Accepting White's assertion as valid, the same can be said for any defendant charged with any crime who declines a plea bargain invitation. Thus, although White's assertions may be evidence of the arbitrariness of the entire criminal justice system, abolishing capital punishment will not resolve these systemic problems. He could have responded as one commentator does by saying that even though the entire criminal justice system may contain elements of arbitrariness, such arbitrary elements are much more severe with capital punishment due to its permanence.[10]

White also does not raise and discuss an interesting premise pro-

9. P. 37. Considerable time and money is required for defense counsel to discover and present mitigating evidence during the sentencing phase. Such presentation depends on the attorney's ability to understand the dynamics of the death penalty trial. Pp. 76, 91.

10. *See* BLACK, *supra* note 5, at 39 (our legal system has accepted "the specialness of death and the appropriateness of requiring, for death, more careful procedures than for any lesser punishment"). Dr. Ernest van den Haag, a death penalty proponent, responds to Black by saying: "In the application of any law some capriciousness is unavoidable. If this were to make laws unconstitutional, we would have to do without laws, indeed, without the Constitution, for it too is unavoidably applied capriciously." ERNEST VAN DEN HAAG, THE DEATH PENALTY: A DEBATE 206 (1983). Supreme Court justices have made similar observations:

> Petitioner's argument that there is an unconstitutional amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment, a lesser penalty, or are acquitted or never charged, seems to be in final analysis an indictment of our entire system of justice. . . . I decline to interfere with the manner in which Georgia has chosen to enforce [the death penalty] on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner.

Gregg v. Georgia, 428 U.S. 153, 225-26 (1976) (White, J., concurring); *see also* McCleskey v. Kemp, 481 U.S. 279, 315 (1987) ("The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with simi-

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posed by one death penalty proponent — Dr. Ernest van den Haag. Van den Haag initially makes his point in a non-death penalty context. He argues that selecting only bearded speeders for ticketing while allowing the clean-shaven to escape is not unjust; what is unjust is the escape of the clean-shaven. To restate it in a more relevant context: "No murderer becomes less guilty, or less deserving of punishment, because another murderer was punished leniently, or escaped punishment altogether. . . . A group of murderers does not become less deserving of punishment because another equally guilty group is not punished, or punished less."[11] Thus, the distribution of punishment is offensive because some of those who deserved the death penalty did not receive it, not because some who deserved it did receive it.

Perhaps one can argue van den Haag's assertion is not constitutionally relevant. The Supreme Court seemed to say in *Furman* that the death penalty is unconstitutionally administered when certain convicted defendants receive it as if by random chance.[12] The constitutional concern seems to be that of selective punishment: the courts focus on why a convicted defendant was sentenced to death rather than focus on why a convicted defendant was not sentenced to death. Although van den Haag proposes an interesting philosophical argument, it may not exist as a constitutionally relevant inquiry because it may ignore the ruling in *Furman.* A book analyzing the death penalty almost seems incomplete without raising this particular assertion by van den Haag and then, perhaps, refuting it in a manner suggested above.

In addition to arguing the death penalty's continuing arbitrary application, White suggests that the Supreme Court is now more interested in the smooth functioning of the capital punishment system than in protecting the rights of capital defendants (p. 207). He argues that *Lockhart v. McCree,*[13] in which the Supreme Court held that the Sixth Amendment does not prohibit prosecutors and defense attorneys from asking prospective jurors about their attitudes toward the death penalty during voir dire in capital cases, exemplifies the Court's new priority (p. 207). White cites studies that suggest a pro-death penalty

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lar claims as to other types of penalty.") (citations omitted). But other commentators have taken issue with this analysis:

> [T]hough death is the most severe punishment in our legal system, it appears to be unnecessary for protecting citizens, while punishments generally are thought to promote our safety and well-being. . . . Most of us believe that if all punishments were abolished, there would be social chaos . . . . Hence, even though the system is not a just one, we believe that we must live with it and strive to make it as fair as possible. On the other hand, if we abolish capital punishment, there is reason to believe that nothing will happen.

Stephen Nathanson, *Does It Matter if Death Penalty Is Arbitrarily Administered?,* 14 PHIL. & PUB. AFF. 149, 162 (1985).

11. Ernest van den Haag, *Refuting Reiman and Nathanson,* 14 PHIL. & PUB. AFF. 165, 174 (1985).

12. *See supra* note 5.

13. 476 U.S. 162 (1986).

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jury will give less protection to a defendant during the guilt trial; for example, a death-qualified jury (one in which no juror is opposed to the death penalty on principle) may be more likely to convict a defendant (pp. 191-92). Yet, as White states, because the Court is reluctant to take action that would temporarily frustrate the operation of the capital punishment system, the Court went out of its way to decide that a death-qualified jury does not offend the Sixth Amendment (p. 207).

White discusses other recent Supreme Court cases to support his contention that capital punishment jurisprudence is now engaged in what he calls Phase II — a period begun in 1983 in which the Supreme Court started promoting expeditious executions.[14] Phase I, by contrast, was the period from 1976 until 1983, in which the Court defined protections for the defendant (p. 5). However, by declaring the existence of two distinct and perhaps somewhat divergent phases of Supreme Court death penalty jurisprudence, White does not seem to have contemplated that perhaps Phase II is merely an extension of Phase I. Expediting executions may promote a prisoner's Eighth Amendment rights. As one opponent of the death penalty has noted: "It would be an obvious violation of the letter and the spirit of the eighth amendment to keep prisoners under a sentence of death for many years, even decades, with only the slightest probability that they will ever be executed."[15] This quotation suggests that White's contention that an emphasis on expediting executions results in a deemphasis on a convicted murderer's constitutional rights (pp. 11, 21) may not always be correct.

In addition to his two themes criticizing current death penalty application, White discusses propositions and tactics of interest to practitioners. Defense attorneys reading his book will find Chapter Four particularly helpful, as it suggests death penalty trial strategies for them. For example, White recommends provoking jury empathy for

14. P. 8. *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880 (1983); Blystone v. Pennsylvania, 494 U.S. 299 (1990). In *Barefoot*, the Supreme Court allowed appellate courts to adopt summary procedures in death penalty cases such as deciding the merits of an appeal together with the application for a stay. The Court declared that capital defendants do not have a right to use habeas corpus to delay executions indefinitely. 463 U.S. at 887. The statute at issue in *Blystone* stated that the capital sentencing jury must choose the death sentence if it finds at least one aggravating circumstance and no mitigating circumstances. The defendant argued that the requirement of individualized sentencing signifies that a jury must be allowed to determine whether the aggravating circumstances are sufficiently serious to warrant the death penalty. The Court stated that allowing the sentencing jury to consider mitigating evidence satisfies the Eighth Amendment's individualized sentencing requirement. 494 U.S. at 307. White says that "[t]he tone of the Court's opinion exemplifies its present approach to capital punishment issues. Although *Blystone* was a five-to-four decision, the majority made no effort to elaborate the basis for its decision. . . . The majority's tone was curt, conclusory, and final." P. 13.

15. Victor L. Streib, *Executions Under The Post-Capital Punishment Statutes: The Halting Progression From "Let's Do It" to "Hey, There Ain't No Point In Pulling So Tight,"* 15 RUTGERS L.J. 443, 487 (1984).

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the defendant and having the defendant express his remorse at murdering human beings (p. 87). Unfortunately for prosecutors, he only offers advice for the defense; nonetheless, a prosecutor can discover what tactics a defense attorney might employ at a death penalty trial. White's discussion is also presented from the defense side as he devotes much more analysis to the types of mitigating evidence a defense attorney can present during the penalty trial (Chapter Five) than to the types of aggravating evidence a prosecutor can present. White notes that although a defendant has broad rights to present mitigating evidence at a penalty trial,[16] the constitutional limits are not so clear (p. 108). Because of the unclear constitutional restraints, he suggests that states can limit the type of mitigating evidence the defendant can present, such as preventing the disclosure of lie detector test results and prohibiting arguments about the appropriateness of the death penalty in general (pp. 108-09).

A prosecutor also may be unhappy with White's recommendation that courts should impose a more rigorous restraint on a prosecutor's closing argument at the death penalty trial than on a defense attorney's closing argument (p. 113). White suggests courts should limit a prosecutor to commenting on mitigating and aggravating circumstances in the case at hand and on how a jury is to weigh these circumstances; courts should prohibit a prosecutor from appealing to emotions during the closing argument, such as arguments that arouse a jury's fear of the defendant.[17] A jury's weighing of aggravating and mitigating circumstances, as required by statute, is to ensure that the jury will condemn only those capital felons the legislature considered the most heinous; a closing argument that diverts the jury's weighing of such circumstances undermines the goal of obtaining an even-handed application of the death penalty (p. 121). By contrast, a defense attorney, whose role is to argue for mercy, should have more leeway in arguing emotions to the jury. White predicts his suggestions will lead to an objective determination and weighing of the circumstances by the jury (p. 120). A prosecutor can breathe a sigh of relief, though, as White acknowledges that the Supreme Court is unlikely to adopt his recommendations (p. 121).

White also presents an intriguing exploration of convicted defendants who actually desire the death penalty (Chapter Eight). He gives illustrations of convicted murderers who desire execution in order to preserve their macho image (p. 177). Alarmingly, White proposes that individuals might commit murder in the first instance in order to re-

16. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978).

17. Pp. 120-21. White bases these suggestions on his reading of Caldwell v. Mississippi, 472 U.S. 320 (1985). In *Caldwell*, the Court held it is a violation of the Eighth Amendment for a prosecutor to tell the jury that its decision was automatically reviewable by the state supreme court; this is because such a statement diminishes the jury's sense of responsibility and misleads a jury into believing appellate review is less limited than it actually is.

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ceive the death penalty (pp. 178-79). Under such a scenario, the death penalty may be a less effective deterrent than life in prison. He warns, though, that a convicted murderer who says he prefers the death penalty does not mean he preferred it before he committed the crime (p. 180); thus, there is no accurate way of determining the deterrence effect of capital punishment in such situations (p. 179). Nonetheless, White's hypothesis that capital punishment is a less effective deterrent in such circumstances is something death penalty proponents do not consider.[18]

By interviewing various defense attorneys, White reports tactics that defense attorneys who are personally opposed to capital punishment employ to change their clients' insistence on seeking the death penalty. By developing a close rapport with a client, some defense attorneys are able to change a client's mind (p. 166). White discusses how one attorney, when faced with a client who insists on accepting execution, persuades the client to change his decision by suggesting the effect the execution will have on his family members (p. 166). Shockingly, some defense attorneys will attempt to change a client's mind by saying that confinement in the general prison population offers a better chance for escape than on death row (p. 167). One attorney tells alcoholic clients that alcohol can be obtained through illegal sources in the general prison population but not on death row (p. 167). Another attorney, who is also a law school professor, completely ignores a client's wish to seek the death penalty; the client's wish is unimportant to the attorney because he believes that capital punishment is immoral (p. 168). Even when a client tells the professor not to present mitigating evidence or not to appeal a death penalty sentence, the professor responds that the state law requires him to do so; yet, the professor admits to White that the state law is unclear on these matters so his representations to his client may be incorrect (p. 168). These stories are all appalling and require strong condemnation. However, White does not explicitly criticize the attorneys who encourage their clients to break the law nor does he state that the proper forum for the law school professor to express his personal opposition to death penalty is the state legislature. White also neglects to mention that the professor's questionable behavior unnecessarily clogs the criminal justice system as the professor insists on adjudicating measures for his own pleasure rather than fulfilling his client's needs and desires.

Although White quotes the relevant section of the ABA Code as declaring that "the lawyer should always remember that the decision whether to forego legally available objectives or methods because of

18. P. 179. White notes that this proposition may undermine van den Haag's incessant advocacy of the death penalty's deterrence factor. P. 179.

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non-legal factors is ultimately for the client and not for himself,"[19] White states that the ethical guidelines do not specifically identify the decision to seek the death penalty as one to which the defendant has ultimate authority (p. 166). Eventually, White states that protecting a capital defendant's individual autonomy is an important consideration (p. 171). Thus, only implicitly and using the weakest possible language does White disapprove of the attorneys' behavior he vividly describes. Such questionable defense counsel behavior deserves much more analysis of potential violations of ethical (and even criminal) codes. Otherwise, in the absence of strong condemnation of such deplorable activity, defense attorneys reading such accounts may not feel any remorse at trying such controversial techniques themselves.

Intriguing as White's analysis is of why defendants desire the death penalty, other commentators also have suggested and analyzed this phenomenon.[20] Additional themes that White discusses similarly have been analyzed by other commentators.[21] Rather than viewing *The Death Penalty in the Nineties* as a book full of original, thought-provoking ideas, one can view White's book as a collection of sources illustrating the vices of the death penalty. White supplements his summary of the works of others with lively and descriptive case studies which maintain the reader's attention, and he gives his own analysis of some Supreme Court decisions[22] as well as recommendations on death penalty trial tactics for defense attorneys (Chapter Four). At first glance, White's book can be viewed as an introduction to the vices of the death penalty; however, it lacks too many arguments and counterarguments to be considered a comprehensive work.

Most unfortunately, White's book lacks a solid conclusion. The reader does not know what to do with White's assertions. One commentator who argues, as does White, of the continuing arbitrariness of the death penalty declares that, " 'guided discretion' is not working and, perhaps, cannot work. If this is correct and if the argument from arbitrariness is accepted, then it would appear that a return from *Gregg* to *Furman* is required. That is, the Court should once again condemn capital punishment as unconstitutional."[23] The reader of White's book can only infer such a conclusion. White's book would

19. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1981).

20. *See, e.g.*, William J. Bowers & Glenn L. Pierce, *Deterrence or Brutalization: What Is the Effect of Executions?*, 26 CRIME & DELINQ. 453 (1980).

21. White's theme of the Supreme Court's current emphasis on expediting executions has been discussed by other commentators such as Streib, *supra* note 15, at 484. White's theme of the death penalty's continuing arbitrary application has been discussed by other commentators such as BLACK, *supra* note 5; William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563 (1980); Nathanson, *supra* note 10.

22. In chapter 5, for example, White discusses his own interpretation of Supreme Court cases as to what a defendant can present as mitigating evidence at the death penalty trial.

23. Nathanson, *supra* note 10, at 150.

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have a more powerful effect on the reader if White had linked all his different assertions together to form one grand conclusion.

— Thomas L. Shaevsky

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