1981

The Inadequate Remedy at Law Prerequisite for an Injunction

Doug R. Rendleman

THE INADEQUATE REMEDY AT LAW PREREQUISITE FOR AN INJUNCTION

DOUG RENDLEMAN*

INTRODUCTION

During the past century and a half, American courts have repeatedly articulated a uniform standard for the granting of an injunction instead of money damages. To win injunctive relief, the plaintiff must show that his injury is irreparable with money or that money is an inadequate remedy. Plaintiff's damage remedy is inadequate if it is less efficient, speedy and practical. Plaintiff's injury is irreparable by money when it cannot be measured, compensated, restored, or repaired.[1]

This article seeks to formulate a frame of reference for analysis of the inadequacy prerequisite. It assumes that the defendant has been injuring or is about to injure an interest protected by the substantive law; it omits the related inquiry, whether the harm is sufficiently imminent to enjoin. This article assumes also that the plaintiff seeks a final or permanent injunction after a plenary hearing on the merits, excluding another related inquiry, whether the judge should award plaintiff a preliminary injunction. After some background, the article identifies the reasons why the inadequacy prerequisite is less prominent today than it was in the early 19th century. Next, the prerequisite's contemporary role will be evaluated by examining economic and moral reasons to enjoin, as well as administrative factors that militate against an injunction. Although commentators argue that the inadequacy prerequisite has no role to play in modern equity adjudication, this article concludes that the prerequisite continues to serve an important function, although it may be applied improperly by failing to focus the decisionmaker's critical faculties on the proper issues. By identifying the crucial features in the inadequacy decision, this article hopes to persuade the chancellor to evaluate the content and policy underlying the decision to grant an injunction.

BACKGROUND

Remedial doctrine does not concern itself with defining substantive interests but, instead, concerns itself with the proper method of vindicating interests that wrongdoers have injured. The legal process remedies damage to a legal interest by punishing, extracting money, and forbidding conduct. These remedies take the form of criminal sanctions, money judgments and injunctions, respectively. The process of choosing between money judgments and injunctions is a remedial policy decision of great importance. Judges recognize that money is but a substitute which can neither restore nor replace plaintiff's right.

*J.D., 1968, University of Iowa; LL.M., 1970; University of Michigan; Godwin Professor of Law, William and Mary.

Thanks to Neil Berkhoff and Hamner Hill for helping to prepare this article.

1. *See* Boyce v. Grundy, 28 U.S. (3 Pet.) 215 (1830); Bonaparte v. Camden, 3 F. Cas. 821, 827 (C.C.D.N.J. 1830) (No. 1,617); Laycock, Book Review, 57 TEX. L. REV. 1065, 1071 (1979).

If social and procedural policy support the decision to enjoin, however, equity's "strong arm," the injunction, forbids the wrong instead of compensating for its occurrence.[2]

The courts have altered their application of the inadequacy prerequisite without changing their terminology. More and more plaintiffs seek injunctions to protect statutory, common law, and constitutional entitlements to less and less palpable interests. Commentators note that litigants raise the inadequacy prerequisite less frequently[3] and that contemporary judges grant more injunctions than their predecessors.[4] The inadequacy prerequisite has been eroded, operating today in a less formidable, more limited fashion.

There are several related reasons for the inadequacy prerequisite's less prominent role. Due to the merger of law and equity into one form of civil action, equity is now simply a set of rules instead of a subordinate, supplementary system of courts.[5] Procedural flexibility tells today's judges to award all litigants the relief or remedy appropriate on the facts, provided that prejudice can be avoided.[6] Judges possess more self-confidence in their ability to solve problems and they are more willing to protect nonpecuniary, impalpable interests. Witness the practical abolition of Lord Chancellor Eldon's prerequisite that "equity protects property rights, not personal rights."[7] Finally, constitutional litigation has increased; and, except for the injunction, judges have yet to discover a way to reapportion a legislature, desegregate a school, or restructure a mental hospital.[8]

INADEQUACY TODAY

Perceptive contemporary commentators have mounted powerful and persuasive attacks on the inadequacy prerequisite, even in its eroded state. Professor Hammond views the inadequacy prequisite as a pernicious anachronism. "This historical constraint is now grossly overstated and is one of the contemporary shibboleths of the law."[9] All agree that judges should cease choosing between money and personal remedies "according to tests devised to avoid conflicts of jurisdiction between two independent systems of courts."[10]

Remedial activists uniformly assert that it is immoral for the judge to sit

---

2. *See* W. DEFUNIAK, HANDBOOK OF MODERN EQUITY §§18-19, at 31-33 (2d ed. 1956); H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY §43, at 103 (2d ed. 1948).

3. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES §2.5, at 61 (1973).

4. W. WALSH, A TREATISE ON EQUITY §25 (1930); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 525, 548 (1978); *Developments in the Law: Injunctions*, 78 HARV. L. REV. 994, 996 (1965) [hereinafter cited as *Developments*].

5. 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §2944, at 393-94 (1973); *Developments*, *supra* note 4, at 996.

6. *See* FED. R. CIV. P. 54(c); 11 C. WRIGHT & A. MILLER, *supra* note 5, §2644.

7. *Developments*, *supra* note 4, at 998-1001.

8. O. FISS, THE CIVIL RIGHTS INJUNCTION 4-5 (1978); Laycock, *supra* note 1, at 1068-69. *See* Leubsdorf, *Remedies for Uncertainty*, 61 B.U.L. REV. 132, 167-68 (1981); *Developments*, *supra* note 4, at 1007, 1013, 1020.

9. Hammond, *Interlocutory Injunctions: Time for a New Model?*, 30 U. TORONTO L.J. 240, 276 (1980).

10. Wright, *The Law of Remedies as a Social Institution*, 18 U. DET. L.J. 376, 378 (1955).

idly while a wrong occurs and then merely compensate the victim.[11] Yet, Professor Fiss argues that injunctions are subordinated to damages on the remedial hierarchy because injunctive relief is conditioned on satisfaction of the inadequacy prerequisite while the damage remedy is not. "The inadequacy of alternative remedies must be demonstrated before the injunction can be utilized, but there is no reciprocal requirement on those alternative remedies."[12] He suggests that judges should choose between remedies without regard to hierarchy; instead, they should analyze the alternative remedies' technical advantages and the way they allocate power.[13] The Harvard Law Review finds untenable any presumption in favor of one form of relief. It asks judges to choose between remedies only after carefully studying the individual situation instead of stating a general preference for damage relief.[14]

In the face of this formidable criticism, this article assesses the inadequacy prerequisite's present foundation. The remedial policy question necessarily involved in such a discussion is whether to vindicate a substantive interest with money or seek to assure enjoyment of the interest in fact. Arguably, judges decide the remedy issue by evaluating the same factors that they considered when deciding whether to create a substantive duty. To distinguish claims for cash from those for conduct, judges ask economic, moral, and administrative questions.[15] Our materialistic society considers money an acceptable substitute for most recognized interests. But if judges view plaintiff's interest as too morally or economically important to allow defendant to simply pay for its injury and if persuasive administrative arguments against an injunction are lacking, then the remedy at law will be inadequate.[16]

ECONOMIC FACTORS

The inadequacy prerequisite expresses to judges that at times, even though a legally cognizable injury has yet to occur, they should allow the injury and then compute money damages. Thus, in deciding whether to enjoin conduct,

11. *See* W. DEFUNIAK, *supra* note 2, §19; Wright, *supra* note 10, at 382. *See generally* Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity and the Second Restatement*, 81 COLUM. L. REV. 110, 120-30 (1981); Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979).

12. O. FISS, *supra* note 8, at 39.

13. *Id.* at 91. *Accord*, RESTATEMENT (SECOND) CONTRACTS §359(1), Comment a (1981); RESTATEMENT (SECOND) TORTS, ch. 48, topic 2, introductory note (1979).

14. *Developments*, *supra* note 4, at 994, 1020-21 (1965).

15. *See generally* Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928).

16. *See* Gregory v. Nelson, 41 Cal. 278 (1871); *Developments*, *supra* note 4, at 1020. Thinkers who emphasize economics may advocate a larger role for the economic factor. They may assert that increasing society's wealth is most important, that legal doctrine is good only if it increases wealth, and that in a society where wealth is finite, waste is immoral. Moral, economic, and administrative are not hermetic categories. In fact, much of the same reasoning appears, stated differently, under these separate headings. I separate them here to achieve more analytical precision, but I realize that they are often mixed and that some emphasize one factor more than others. Economic analysis, however, may lead to a market approach that values everything in money. This supports a view which prefers money damages to injunctions, an approach I reject.

the judge must consider the damage formula which will apply if the conduct occurs. Accordingly, a short survey of monetary compensation is in order.

The remedial theory of compensation instructs judges to aspire to place the aggrieved party in the same position as if no injury had occurred. Compensation practice, however, belies this aspiration, and countervailing considerations can often attenuate damages. For example, lost profits from a new business are too speculative to award. Aggravation from a breached contract is not recoverable. For evidentiary and administrative reasons, judges use an objective marketplace concept called value to measure consummated losses. Victims are allowed to recover what others would have paid in an open bargaining environment. Therefore, recovery for subjective losses such as sentimental attachment to a family home or pet may be barred.[17]

The language utilized to measure monetary damage is implacably imprecise. This derives, in part, from the goal of awarding plaintiff money to create a counterfactual hypothetical: the situation "as if" defendant had not violated the substantive law which protected plaintiff's interest. The terms injury, compensation, loss, and value are inextricably tied to the scope of the substantive interest. Courts, however, also use money awards to deter, to vindicate subjective interests, and to punish.[18] As part of the attempt to advance each of the foregoing policies, courts valuate intangible interests like reputation and privacy, thereby increasing the imprecision. Courts further exacerbate the confusion by presuming that plaintiff suffered the amount of damage that normally would have occurred. Finally, the terms are designed to resolve individual disputes rather than to guide parties in their conduct. Remedial rules merely focus the judge's or the jury's critical faculties on the important features of the present controversy.

Damage theory is predicated on a theory of economic inadequacy.[19] Valuation is imperfect, and it omits significant subjective impairments which deserve legal protection. The courts try to protect interests in sentiment, autonomy, continuity, and individuality that defy economic expression.[20] Objective damages determined by a judge or jury may fail to compensate the plaintiff for the total impairment the law recognizes. If substantive law protects more than remedial law recompenses, then the resulting doctrinal imbalance can be resolved by either trimming the substantive interest or by inflating the remedial measure. The courts have, however, solved this remedial problem by abandoning money damages. They enjoin to vindicate the legally recognized but subjective or sentimental impairment which damages doctrine neglects to recompense. Courts prefer to enjoin when defendant's cost to obey the injunction falls between the amount of money damage a court would award plaintiff and the plaintiff's total legal impairment. If the court simply awards monetary damages, the defendant will probably continue his actions. The injunction which forces the defendant to either stop the activity

17. D. DOBBS, *supra* note 3, §3.2 at 145.

18. *Id.* §3.1, at 135-36; 1 F. HARPER & F. JAMES, THE LAW OF TORTS §5.30, at 468 (1956).

19. Note, *Injunction Negotiations: An Economic, Moral, and Legal Analysis*, 27 STAN. L. REV. 1563, 1566-69 (1975).

20. *See* Losee v. Morey, 57 Barb. 561 (N.Y. App. Div. 1865).

or to confront plaintiff's uncompensated impairment will allocate resources more efficiently.

Pollution actions concretely illustrate the inadequacy of monetary compensation. Katz states that a property owner who is a victim of pollution and establishes his substantive case "would still have to establish a dollar equivalent for his discomfort in order to recover damages." The market test may render his valuation exceedingly difficult, as the very industrial development which polluted plaintiff's environment may also have increased the value of his property. The plaintiff may disavow his monetary interest, and convincingly characterize his home as the place in which he wishes to reside in comfort. However persuasively he argues, his subjective interest in the enjoyment of his land resists monetary valuation. "The courts are accustomed to a coldly economic calculation of damages to residential real property."[21] Money is, therefore, an inadequate remedy for pollution, because it covers only part of the impairment society seeks to protect.

Judges create legally protectable interests by affixing the term property. They enhance the protection accorded property and other interests by deciding that damages are an inadequate remedy. This inadequacy decision hinges in part on whether plaintiff's money remedy appropriately compensates his substantive right; it comprises judgments about both remedy and right. Thus, judges grant injunctions when the plaintiff's threatened interest is legally cognizable but consists of uncompensable subjective and sentimental intangibles.[22]

We tend to assume, therefore, that courts enjoin when money damages appear to undercompensate. Judges, however, may also enjoin when damages might overcompensate. This is likely to occur only when plaintiff's threatened interest is abstract or subjective. In such situations money damages may be more than merely inadequate, and the judge may grant equitable relief when legal relief would be refused.[23] The judge recognizes plaintiff's injury but realizes that "it would be harsh to impose damages for an amount conjectured by the jury where none are actually proved."[24] Therefore, in addition to protecting plaintiffs' subjective impairment, the inadequacy prerequisite insulates defendants from excessive jury verdicts.

Courts, however, generally respond to a conflict they perceive to be economic by limiting the claimant to damages. For example, in the famous decision *Boomer v. Atlantic Cement Co.*,[25] New York's court of appeals refused to enjoin operation of a cement plant even though it was a nuisance. The court admitted that money damages were inadequate; however, it balanced the equities against an injunction, and found that the defendant would have had

---

21. Note, *supra* note 19, at 1567 n.15.

22. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW §4.12 (2d ed. 1977); Note, *supra* note 19, at 1587.

23. *See* Z. CHAFEE, SOME PROBLEMS OF EQUITY at 103-48 (1950).

24. *Id.* at 132.

25. 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 341 (1970). *See also* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1120 n.60 (1972).

to spend far more to comply with the injunction than the cost of the loss the plaintiffs sustained. The court feared that the plaintiffs would exploit the injunction by threatening to close the cement plant unless the defendant settled for an amount far in excess of their property losses, yet less than the cost of the plant. Thus, the court viewed the conflict as economic and remitted the plaintiffs to an objective damage recovery because an injunction would unfairly balance settlement negotiations.[26]

Similarly, courts are reluctant to enjoin breaches of contract or to require promisors to perform contracts. Some argue that courts remit nonbreaching parties to an objective measure of lost profit to allow parties to ignore contracts when breach is cost effective. This encourages contracting parties to breach and pay damages when total profit from breach exceeds profit from completion. Accordingly, resources are allocated efficiently because they flow to those willing to pay the most for them, and performance is encouraged because the breaching party pays the nonbreaching party the resulting lost profit.[27]

Professor Kronman's recent article[28] adds an administrative dimension to this economic calculus. Courts order a breaching party to perform contracts only when the subject of its performance is unique. If the court were limited to money damages in such situations, it would have to calculate the equivalent amount of cash to substitute for the victim's loss. It would be, he says, "very difficult and expensive for a court to acquire the information necessary to make these determinations."[29] The parties cannot be relied upon to be anything but self-interested. When the information is scarce, imprecise and unreliable, the tribunal must fear that a damage award will fall short of or exceed the amount necessary to achieve reasonable compensation.

Professor Kronman concludes that uniqueness of subject matter is a proper basis for granting specific performance. He explains a great deal about one tacit economic-administrative inquiry into the inadequacy question: "a court is really saying that it cannot obtain, at reasonable cost, enough information about substitutes to permit it to calculate an award of money damages without imposing an unacceptably high risk of under-compensation on the injured [party]."[30] When the tribunal seeks to redress the impalpable and intangible impairments discussed above, any money equivalent is necessarily speculative and conjectural. To vindicate the recognized interest while avoiding the risk of either over- or under-compensating, the court concludes that money is inadequate and enjoins.

Judges often value unique and unmeasurable impairments after injury has already occurred. A ready though imprecise measure of future damages, however, will not prevent a judge from enjoining future infringement of many property and statutory monopoly interests. In addition to avoiding imprecise measurement, these injunctions advance related economic and administrative policies. Injunctions serve the economic policy of private ordering by recogniz-

26. *See generally* Note, *supra* note 19, at 1566-69.
27. *R. Posner, supra* note 22, §7.2.
28. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978).
29. *Id.* at 360.
30. *Id.* at 362.

ing that people know their wants better than judges; an injunction actually forces the parties to bargain privately. The alternative of granting damages allows a defendant to pay judicially set damages which are administratively unsound because they are both more expensive and less precise. Finally, injunctions prevent a form of compulsory licensing or private eminent domain.[31] Although economic considerations generally direct the court to advise the plaintiff to take the cash and accept the conduct, they may indicate that an injunction will enhance the substantive interest in a salutory fashion.

Moral Factors

An examination of moral factors focuses attention on the weight of the plaintiff's substantive interest. Some substantive interests are so basic that courts think people deserve to enjoy them in fact. Monetary compensation tolerates the wrong and allows the perpetrator to buy injustice. Although this may be proper in many situations, courts have identified a class of interests which are too important to sanction continued injury by merely imposing money damages. They conclude that it is "improper or unfair to allow the defendant unjustifiably to inflict harm on [a victim], leaving the latter with no alternative but to seek money compensation."[32] For example, Louisell and Hazard state in their procedure casebook, "Even though a monetary loss can be determined with relative precision, it has been considered inappropriate, perhaps unthinkable, to award damages relief in cases involving school segregation, prison and hospital mistreatment, and ecological injury."[33]

It contravenes our notion of constitutional rights to permit them to be reduced "to a series of propositions assuring the payment of money to the victims."[34] Moreover, damage redress is an insufficient remedy even when plaintiff can demonstrate no practical impairment from defendant's violation of his constitutional right. For example, in *Bell v. Southwell*,[35] after a racially discriminatory election the black minority was unable to prove that the outcome would have been more favorable had the authorities obeyed the constitution. Nevertheless, the Fifth Circuit ordered another election because such practices infect the processes of the law and diminish the interests of all.[36]

Judges passing on interlocutory injunctions conclude that constitutional violations cause irreparable injury.[37] It is unacceptable to argue that airport officials should be allowed to exclude people with political or religious

---

31. Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 U.C.L.A. L. Rev. 1107, 1128 (1977).

32. *Developments*, *supra* note 4, at 1020. *See also* Leubsdorf, *supra* note 8, at 160-61.

33. D. Louisell & G. Hazard, Cases and Materials on Pleading and Procedure 109 (4th ed. 1979); *but see* R. Posner, *supra* note 22, §27.2 at 258.

34. O. Fiss, *supra* note 8, at 75. *See also* Bell v. Hood, 327 U.S. 678, 684 (1946) (dicta); Dobbs, *Should Security Be Required as a Pre-condition to Provisional Injunctive Relief?*, 52 N.C.L. Rev. 1091, 1117-18 (1974).

35. Bell v. Southwell, 376 F.2d 659 (5th Cir. 1967).

36. *Id.* at 665. *See* Leubsdorf, *supra* note 8, at 165-69.

37. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 373 (1976); Sampson v. Murray, 415 U.S. 61 (1974).

leaflets by simply paying damages. Thus, equitable relief is no longer supplementary or extraordinary in this category of adjudication. This approach substitutes a preference for performance in constitutional and civil rights litigation.[38]

The inadequacy prerequisite may also be judicially or legislatively attenuated, or eliminated to express the public policy that there are certain rights which people should enjoy in fact. California's water control act provides that in actions seeking equitable relief "it shall not be necessary to allege or prove . . . that the remedy at law is inadequate. . . ."[39] California's air pollution legislation is similar.[40] The legislature responded explicitly to the public's strong desire to protect and enhance the environment. As the *Boomer* decision illustrates, however, the strong countervailing consideration to resolve economic controversies with money damages militates against injunctions, and the factors that render damages adequate may emerge in new form at a later stage when the judge balances the equities.

Constitutional interests may also induce a judge to allow damages and deny an injunction. For example, assume that defendant's 200 page book devoted to important comment on political affairs includes all 16 lines of plaintiff's copyrighted poem. Plaintiff sues charging copyright infringement and seeks damages and to enjoin dissemination of the book. The public interest in reading the offending work may persuade the judge to award plaintiff money damage but refuse to enjoin the defendant. This solution allows readers to receive defendant's work and advances the first amendment; but it also pays the copyright proprietor for his creation.[41] Thus, a strong constitutional interest overrides the copyright proprietor's generally unquestioned power to enjoin an infringer.

As the foregoing discussion has illustrated, today's remedial law has broken through many of yesterday's doctrinal limitations. Judges usually comprehend their obligation to decide remedy in light of public aspirations. The law has grown in response to external pressures articulated through the experience and skill of advocates and judges. Although this movement is not completely amenable to logical analysis, it can safely be concluded that courts are sidestepping constrictive and anachronistic doctrine and are considering current policy and process realities.

ADMINISTRATIVE FACTORS

Process cannot be eliminated from substantive or remedial decisions. As Leon Green said of tort law, "[d]uties must await the court's finding a workable method by which they can be given meaning. Morals, justice, business, and purification of the social stream by prophylactic treatment, must all abide

38. O. FISS, *supra* note 8, at 92; Laycock, *supra* note 1, at 1069.

39. CAL. WATER CODE §13361(c) (West 1971).

40. CAL. HEALTH & SAFETY CODE §§39437, 41513 (West Supp. 1971).

41. *See* Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1030 (1970); Note, *Constitutional Fair Use*, 20 WM. & MARY L. REV. 85, 119 (1978).

the time when the court has adjusted its scheme of things to the exigencies of its internal affairs."[42]

Courts prefer to award damages partly because judges believe that injunctions create more potential process and procedural burdens. Administrative concerns loom larger in equity than in law. It is difficult to adjudicate, formulate, administer, and enforce injunctions.[43] Monetary compensation may avoid the additional administrative expense of injunctions. Thus, the inadequacy prerequisite prevents litigants from shifting these costs to the court system, and ultimately to the taxpayers, unless absolutely necessary.[44]

Two major administrative factors, jury trial and enforcement, persuade courts to award money damages. Chancellor Kent expressed his preference for money damages on these two grounds in the 1823 decision, *Jerome v. Ross*:

> "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."[45]

The contemporary efficacy of a policy that favors jury trials and *in rem* enforcement will be examined below.

Judges decide factual issues in equitable actions, including those for injunctions. In contrast, litigants have a right to a jury in actions at common law.[46] This is a product of history: the English court that granted equitable remedies operated without a jury, and our constitution adopted that system.[47] The inadequacy decision determines whether to preclude a binding jury verdict.[48] The debate about the civil jury will be with us for some time.[49]

---

42. Green, *supra* note 15, at 1045.

43. *See* 11 C. WRIGHT & A. MILLER, *supra* note 5, §2944, at 394; *Developments*, *supra* note 4, at 1020; Note, *supra* note 19, at 1566 n.13.

44. Kronman, *supra* note 28, at 373. *See also* Schwartz, *supra* note 11, at 294 (masters paid by parties).

45. 7 John Ch R 315, 333 (1823).

46. F. JAMES & G. HAZARD, CIVIL PROCEDURE §8.1 at 347-51 (2d ed. 1977). Qualifications will be found in Van Hecke, *Trial by Jury in Equity Cases*, 31 N.C.L. REV. 157 (1953); McCoid, *Procedural Reform and the Right to Jury Trial: A Study of* Beacon Theatres, Inc. v. Westover, 116 U. PA. L. REV. 1, 10-15 (1967) (discussing the relation between procedural inadequacy and the seventh amendment). Professor Hammond regards this as an "archaic" distinction which impedes the development of a more modern approach. *See* Hammond, *supra* note 9, at 277.

47. O. FISS, *supra* note 8, at 50-51.

48. D. DOBBS, *supra* note 3, §2.5, at 61. *Developments*, *supra* note 4, at 1004-1019. *See also* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (allowing a nonparty to an equitable action to preclude the losing defendant from relitigating issues before a jury in a later damage action against the equitable defendant).

49. *Compare* Griswold, *1962-63 Dean's Report: Harvard Law School* 5 (1963) *with* Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482 (1965). Readers may consult my views in Rendleman, *Chapters of the Civil Jury*, 65 KY. L.J. 769 (1977).

Elitists view jurors as incompetent or biased, and favor judicial factfinding. However, the idea of life-tenured federal judges interpreting the constitution to check the excesses of other more populistic branches of government, is itself elitist. Nonetheless, few who favor judicial activism will view injunctive relief from deprivation of constitutional rights with alarm. Conversely, others feel that jurors inject common sense and the public's concern into the litigation process. They tend to be suspicious about massive changes brought about by judges alone.

Judges consider some important substantive interests too basic to be compensable with money. They perceive the same interests to be too important to be frustrated by jurors. Perverse jury verdicts damage substantive interests and nullify substantive law. Preventing distorted factfinding preserves the substantive law's integrity. Thus, as the potential for social harm from an incorrect jury verdict increases, the likelihood that the judge will defer to the jury decreases. The decision that the remedy at law is inadequate in a category of lawsuits may reflect the moral determination that the jury should not be permitted to frustrate the underlying substantive law.[50]

Three other features of the jury system may influence the inadequacy decision. New jurors are picked for each trial, jury members lack expertise, and juries deliberate secretly until they achieve unanimity. These characteristics become pivotal when it is realized that many equity actions last for years. Federal judges have undertaken to reform schools, mental hospitals, and prisons with what Professor Fiss calls structural injunctions.[51] These judges have learned that reorganizing a social institution is no easy task. Deciding where substantive rights exist, formulating satisfactory remedial standards for future conduct, and enforcing the remedy become coextensive tasks. In asking whether the remedy at law is adequate, the judge compares the jury's amateurism with judicial professionalism, accountability, and continuity.[52] Thus, the characteristics of juries determine, in part, whether a remedy at law is inadequate. As juryless equity is somewhat a contradiction in terms, some jurisdictions established binding equity juries.[53] But the candid observer must ask whether the federal judiciary could perform many of the tasks it presently undertakes, particularly structural injunctions, with an equity jury.

Judges deciding whether to prefer monetary compensation over an injunction must also examine the way the winner enforces the remedy.[54] Money remedies are enforced impersonally. A judgment debtor owes no obedience to a money judgment. The sheriff with a legal writ seizes and sells the debtor's property, the law extinguishes the debtor's ownership, and the money is paid to the judgment creditor.

One covering the methods available to collect a money claim travels over

---

50. *See* Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 903-09 (1971).

51. O. FISS, *supra* note 8, at 7.

52. *Id.* at 55-58.

53. Van Hecke, *supra* note 45, at 158.

54. *Developments*, *supra* note 4, at 1004, 1019.

rough terrain.[55] Nevertheless, the remedy at law is a cleaner, more impersonal remedy to enforce.[56] Judges enforce injunctions personally by assuming that the defendant will obey and, failing obedience, by holding the defendant in contempt. Judges employ coercive fines and imprisonment to induce the contemnor to obey. Contempt contains significant peaks and ravines. Judges and plaintiffs deal with stubborn people, and they wield the law's blunt tools to forge not simple acquiesence but compliance. While tracing the progress of Christianity in Europe during the late Roman Empire, Gibbon said "It is incumbent on the authors of persecution previously to reflect whether they are determined to support it in the last extreme. They excite the flame which they strive to extinguish; and it soon becomes necessary to chastise the contumacy, as well as the crime of the offender."[57] The problems of breach and enforcement should be considered before turning to any personal remedy.[58]

In deciding whether to enjoin someone from interfering with domestic relations,[59] to order an act out of the jurisdiction,[60] or to grant an injunction against a political body,[61] courts have asked whether it will be difficult or impossible to secure compliance. Disobedience will cause the court to lose prestige, and the risk may compel reluctance to enjoin.[62] Considering the likelihood of obedience in adjudicating remedy, however, improperly renders plaintiff's substantive right a hostage to defendant's obduracy.

Further, the judge's commitment to securing obedience exacerbates the consequences of incorrect factfinding.[63] If the debtor tells the judge that he lost the creditors' $20,000 while hunting birds, the judge may disbelieve him. To encourage the debtor to remember where the money is, the judge may declare the debtor in contempt and imprison him.[64] The shadow of the prison walls quickens many memories. But what if the debtor told the truth? How long must the debtor remain in jail before the judge concludes that his tale, though unlikely, was not untrue?

Coercive enforcement is psychologically taxing, protracted, and costly to all

---

55. V. COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR 1-179 (1974).

56. Impersonal enforcement at law may become personal in supplementary or interrogatory proceedings where judges use *in personam* orders enforced with coercive contempt. *Id.* at 100-109.

57. 2 E. GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE ch. 37, at 373-74 (Modern Library).

58. Structural injunctions are a noteworthy exception. They are enforced with motions to modify. What judges and litigants call contempt in the structural process is usually maneuvering for position and invitation to parley. *See* Drake, *Judicial Implementation and* Wyatt v. Stickney, 32 ALA. L. REV. 299, 308 (1981); Rendleman, *Prospective Remedies in Constitutional Adjudication*, 78 W. VA. L. REV. 155, 168-70 (1976).

59. Hadley v. Hadley, 323 Mich. 555, 36 N.W.2d 144 (1949).

60. *See, e.g.*, Penn v. Lord Baltimore, 27 Eng. Rep. 1132 (Ch. 1750); 11 C. WRIGHT & A. MILLER, *supra* note 5, §2945, at 402-03.

61. *See, e.g.*, Giles v. Harris, 189 U.S. 475, 487-88 (1903).

62. *See, e.g.*, Kenyon v. City of Chicopee, 320 Mass. 528, 534, 70 N.E.2d 241, 244 (1946). *See also* W. WALSH, *supra* note 4, §18, at 80; Kronman, *supra* note 28, at 374.

63. *See* Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 266 (1971).

64. Drake v. National Bank of Commerce, 168 Va. 230, 190 S.E. 302 (1937). *See also* Dobbs, *supra* note 63, at 220 n.145.

concerned. Moreover, coercive imprisonment imposes the cost of the contemnor's lost enterprise on society. The judge may also face the embarrassing problem of a contemnor who steadfastly refuses to comply, regardless of the consequences. In response, judges have developed a number of ingenious devices to discourage obduracy and to reduce the embarrassment of incorrect factfinding and terminally stubborn contemnors.[65] In contrast, the inadequacy prerequisite obviates the need to resort to these devices where money damages will suffice.

Remedial activists base their preference for injunctions on the unstated premise that defendants obey injunctions. They tell judges to enjoin when damages are difficult to compute[66] or when defendant cannot pay a money award.[67] The defendant, however, may critically evaluate the consequences of noncompliance and choose to disobey. The defendant has already demonstrated the willingness and ability to thwart the substantive right. He may, therefore, treat the resulting remedy with similar irreverence. An injunction stops conduct only as well as a stop sign halts a car; the defendant must apply the brakes and obey.[68]

Personalizing the substantive standard in an injunction may only postpone the necessity of dealing with the lawbreaker. Granting an injunction when plaintiff's damages are difficult to compute may only reschedule the computation for the compensatory contempt proceeding which follows defendant's noncompliance.[69] If the insolvent defendant breaches an injunction, a compensatory contempt award may amount to little more than an inadequate uncollectable money judgment.[70] Simply calling a contempt award compensatory will not cause nonexistent assets to materialize. A daily fine cannot effectively coerce an insolvent to pay a compensatory award, and resort to coercive imprisonment may amount to incarceration for a civil debt.[71] Analyzing the injunction from the perspective of enforcement reveals some logic in Chancellor Kent's preference for cash.

Finally, administrative celerity may favor equity, for injunctions may serve efficient, economical administration. Consider the defendant who carries a good joke too far. Courts have said that when plaintiff requires multiple damage actions to halt continuing or repeated harmful conduct, the remedy at law is inadequate.[72] Enjoining these invasions serves the economic and admin-

---

65. *See, e.g.*, Maggio v. Zeitz, 333 U.S. 56 (1948) (incorrect factfinding); *In re* Cueto, 443 F. Supp. 857 (S.D.N.Y. 1978) (stubborn contemnor).

66. *Developments, supra* note 4, at 1020 (1965).

67. *See* Pound, *The Progress of the Law—Equity*, 33 HARV. L. REV. 420, 430 (1920). *See generally* Newman, *The Effect of Insolvency on Equitable Relief*, 13 ST. JOHN'S L. REV. 44 (1938) (stressing effect on defendant's other creditors).

68. Professor Wright expressed this insight earlier with a different metaphor. "The injunction is not a set of handcuffs. In itself it cannot prevent the defendant from doing the criminal act." Wright, *supra* note 10, at 391 n.65. *See also* Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685, 729 (1978).

69. *E.g.*, Sunbeam Corp. v. Golden Rule Appliance Co., 252 F.2d 467 (2d Cir. 1958).

70. *See, e.g.*, Chapel v. Hull, 60 Mich. 167, 26 N.W. 874 (1886).

71. Potter v. Wilson, 609 P.2d 1278 (Okla. 1980).

72. W. DEFUNIAK, HANDBOOK OF MODERN EQUITY, §20 (2d ed. 1956); H. MCCLINTOCK,

istrative goal of freeing expensive judicial machinery for other controversies. Most defendants obey injunctions. Converting a civil standard from a damage rule into a personalized criminal statute and introducing the risk of criminal contempt may persuade the defendant to become a better citizen.

CONCLUSION

This article attempts to bring some order to the judicial inquiry into when to enjoin instead of award money damages. Perhaps courts have failed to articulate the considerations that enlighten the choice between equitable and damage remedies because, as the reader has learned, it is a difficult, if not impossible task. A series of shadowy and overlapping economic, moral and administrative criteria compete for attention. In a vital society, certainty and definiteness are illusory. In fashioning rules for a particular controversy or for a healthy future, policymakers may conclude that in certain instances, specific relief will vindicate an important interest better than damages. Some interests worth recognizing are speculative and conjectural, and are too difficult to valuate. Some interests may be both noneconomic and impalpable, while others are simply too important to be valued only in money. The remedy, however, often fails to comport with the substance of the interest.

Some progress could be made by discarding the hypothetical approach to the remedial inquiry. Courts employ the term remedy to describe a world where the defendant complied with the substantive standard. This approach welds remedy to violation. A more fluid view of law, the legal process, and remedies instructs us that this model masks many aspects of reality. More realistic remedial goals are pluralistic: to decide disputes, to express values, to advance substantive purpose, to allocate risks, to encourage private ordering, and to maintain and restore legitimacy. We should not insist upon a remedy congruent with the violation.[73] We should, in short, adopt remedial goals that coincide more closely to the economic, moral, and administrative inquires that this article urges courts to undertake in deciding whether damages are inadequate.

In particular, the inadequacy prerequisite is neither a technical or mechanical test, nor a callous subordination of injunctions to damages. Inadequacy is a pliable term that describes a matter of degree. Its definition has changed and will continue to change in response to policy and process. In some substantive areas, the commentator flirts with inaccuracy by referring to a prequisite. Unfortunately, the legal conclusion that the legal remedy is inadequate masks the intellectual process of identifying and evaluating interests. Moreover, though the inadequacy prerequisite has proved flexible enough to adopt to changed conditions, it grants excessive discretion and is too imprecise to ensure predictability. To expose that intellectual process and to constrain discretion with a rude set of standards are the modest goals of the present effort.

HANDBOOK OF THE PRINCIPLES OF EQUITY §46 (2d ed. 1948); *Developments, supra* note 4, at 1001.

73. Fiss, *The Supreme Court 1978 Term, Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 46-50 (1980); Leubsdorf, *supra* note 8, at 170.