THE DEATH OF THE IRREPARABLE INJURY RULE

Douglas Laycock

TABLE OF CONTENTS

I. INTRODUCTION ..................................................................................................................... 688
II. REDEFINING THE PROBLEM ............................................................................................... 694
   A. The Possible Meanings of the Irreparable Injury Rule ........................................... 694
      1. Functional Choices in Remedies Law ......................................................... 696
      2. The Universe of Cases in Which Choice Is Possible ........................................ 697
      3. The Historical Origins of Current Law ......................................................... 699
      4. The Definition of Adequacy ............................................................................. 700
      5. Testing the Thesis ............................................................................................... 701
   B. Further Refining the Issues ......................................................................................... 696
      1. Functional Choices in Remedies Law ......................................................... 696
      2. The Universe of Cases in Which Choice Is Possible ........................................ 697
      3. The Historical Origins of Current Law ......................................................... 699
      4. The Definition of Adequacy ............................................................................. 700
      5. Testing the Thesis ............................................................................................... 701
III. ESCAPING THE IRREPARABLE INJURY RULE ................................................................. 701
   A. Variations on the Dominant Theme: Irreplaceability As Irreparable Injury .......... 703
      1. Where the Loss Cannot Be Replaced ............................................................... 703
         (a) Real Property ............................................................................................... 703
         (b) Personal Property ........................................................................................ 705
         (c) Intangible Rights ......................................................................................... 707
      2. Where the Loss Can Be Replaced Only with Difficulty .................................... 710
      3. Where Damages Are Hard To Measure ........................................................... 711
   B. Other Sources of Irreparable Injury .......................................................................... 714
      1. The Risk of Multiple Litigation ....................................................................... 714
      2. Insolvent Defendants ....................................................................................... 716
      3. Immune Defendants ......................................................................................... 717
      4. Harms from Interim Uncertainty ..................................................................... 718
      5. Loss of Legitimate Tactical Advantage .......................................................... 720
   C. Cases Refusing To Apply the Rule .............................................................................. 722
IV. CASES APPLYING THE IRREPARABLE INJURY RULE ..................................................... 722
V. REAL REASONS FOR DENYING PLAINTIFF'S CHOICE OF REMEDY ......................... 726
   A. Preliminary Relief .................................................................................................... 728
   B. Deference to Other Tribunals and Branches of Government ................................ 732
      1. Federal Courts and State Courts .................................................................... 734
      2. Courts and Administrative Agencies ............................................................... 737
      3. Courts and the Executive .................................................................................. 740
   C. Fears of Over-Enforcement .................................................................................... 742
      1. Freedom of Speech ............................................................................................ 743
      2. Personal Service Contracts .............................................................................. 745
      3. Hardship to Defendant or Others .................................................................... 749
   D. Other Substantive Reasons ....................................................................................... 752
      1. Deference to More Particular Law ................................................................... 752
      2. Hostility to the Merits of Plaintiff's Case ...................................................... 755
   E. Other Procedural Reasons ......................................................................................... 757
      1. Jury Trial ............................................................................................................ 757
      2. Ripeness and Mootness .................................................................................... 759
      3. Decrees That Would Be Difficult To Supervise ............................................... 762
VI. THE DISPARATE USES OF IRREPARABLE INJURY TALK ............................................... 765
VII. IMPLICATIONS FOR THEORY AND PRACTICE ............................................................ 768

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THE DEATH OF THE IRREPARABLE INJURY RULE

Douglas Laycock*

The irreparable injury rule has been a fixture of Anglo-American law for half a millennium. The rule states that equity will not act if a legal remedy would be "adequate." After surveying more than fourteen hundred cases, Professor Laycock concludes that this rule is dead — dead in the practical sense that it almost never affects the results of cases. In most cases, plaintiffs can get equitable relief if they want it, because legal remedies rarely satisfy the courts' stringent definition of "adequacy." When a court denies equitable relief, it does so for reasons apart from the irreparable injury rule — reasons derived from the interests of defendants or the legal system, and not from the adequacy of plaintiff's legal remedy. Professor Laycock identifies these underlying reasons for denying equitable relief and shows that they arise in discrete subsets of cases. He argues that they do not extend to all civil litigation, and they neither illustrate nor justify a general preference for legal remedies.

I. INTRODUCTION

[Even though a plaintiff may often prefer a judicial order enjoining a harmful act or omission before it occurs, damages after the fact are considered an "adequate remedy" in all but the most extraordinary cases.

Judges have been brought to see and to acknowledge . . . . that a remedy which prevents a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it . . . .

One of these statements comes from Pomeroy's Equity Jurisprudence, a leading nineteenth-century treatise. The other comes from the United States Reports for June of 1988. Which is which? Which better describes the current state of the law?

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I presented the thesis to faculty workshops at Duke, Boston University, and Texas, and I wrote the first draft at the University of Hawaii. I am grateful for the helpful reactions of those four faculties, and for office space and library privileges at Hawaii. J.M. Balkin, Dan Dobbs, Owen Fiss, Mary Kay Kane, Jean Love, William Powers, Doug Rendleman, Thomas Rowe, and Jay Westbrook made helpful comments on earlier drafts. Debbie Backus, Karen Patton Bogle, Denise Brady, Mari Campos, Deborah Caldwell, William Cunningham, Georgia Harper, Peter Smits, Susan Waelbroeck, and Mark Walker provided indispensable research assistance.
The first statement\(^1\) — declaring damages the rule and specific relief a “most extraordinary” exception — is the recent one, from a dissent by Justice Scalia.\(^2\) But it is not the law. It is not even close to the law. It is merely a spectacular example of the confusion created by one of our archaic “rules” for choosing among remedies. It states an extreme but recognizable version of the most general and most misleading of these rules — the irreparable injury rule. But it is wildly wrong as a description of what courts do.

Pomeroy’s statement\(^3\) — that judges recognize the inherent superiority of specific relief — is not quite right either. But it captures an important insight and comes much closer to describing judicial behavior. Remedies that prevent harm altogether are better for plaintiffs, and plaintiffs should have such remedies if they want them and if there is no good reason to deny them. A general preference for damages is not a reason unless there is a reason for the preference. Judges act on these premises, whether or not they consciously acknowledge all that Pomeroy imputed to them.

The irreparable injury rule says that equitable remedies are unavailable if legal remedies will adequately repair the harm.\(^4\) Frequent repetition of the rule implies that legal remedies are generally adequate;\(^5\) otherwise, there would not be so many occasions to apply the rule. If legal remedies are generally adequate, it follows that equitable remedies are generally unavailable. Because the most common legal remedy is damages, Justice Scalia’s conclusion also seems to follow: that our legal system prefers damages after the fact to relief that specifically avoids threatened harm.

The irreparable injury rule has received considerable scholarly attention. In 1978, Owen Fiss examined the possible reasons for the rule and found them wanting.\(^6\) A vigorous debate over the economic wisdom of applying the rule to specific performance of contracts began about the same time,\(^7\) and soon came to center on the transaction


\(^{2}\) Chief Justice Rehnquist and Justice Kennedy joined the dissent.

\(^{3}\) 3 J. POMEROY, EQUITY JURISPRUDENCE § 1357, at 389 (1st ed. 1887) (emphasis in original).

\(^{4}\) See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.1, at 27; id. § 2.5, at 57.

\(^{5}\) See Rendleman, The Inadequate Remedy at Law Prerequisite for an Injunction, 33 U. Fla. L. Rev. 346, 348 (1981) (“Our materialistic society considers money an acceptable substitute for most recognized interests.”).

\(^{6}\) See O. FISS, THE CIVIL RIGHTS INJUNCTION 38–85 (1978); see also D. LAYCOCK, MODERN AMERICAN REMEDIES 335–39 (1985) (questioning whether the rule has any modern justification); Developments in the Law — Injunctions, 78 HARV. L. REV. 994, 1020 (1965) [hereinafter Developments] (“[N]o presumption in favor of one form of relief is tenable.”).

\(^{7}\) See, e.g., R. POSNER, ECONOMIC ANALYSIS OF LAW § 3.11, at 61 (1972) (arguing that specific performance prevents efficient breach, and that post-judgment transfer to a more valuable use imposes transaction costs); Kronman, Specific Performance, 45 U. CHI. L. REV. 351 (1978) (arguing that parties would bargain for specific performance only where goods are unique); Linzer, On the Amorality of Contract Remedies — Efficiency, Equity, and the Second Restate-
costs associated with the two remedies. Both Fiss and Dan Dobbs have noted that the rule is often ignored, and in a review of Fiss’ book, I argued that the stringent definition of adequacy pulls most of the rule’s teeth. The Restatement (Second) of Torts dropped the traditional version of the rule from the black letter and condemned it as misleading, but replaced it only with a long and unstructured list of factors to be considered. Doug Rendleman and Gene Shreve offered separate defenses of the rule, arguing that equitable remedies are generally more troublesome than legal remedies. But Rendleman conceded that the usual formulations of the rule divert analysis from the real policies at issue, and Shreve also seemed to think the rule is generally misunderstood. In all this policy debate, no one has extensively examined how courts actually apply the rule. Many sophisticated lawyers believe that the rule continues to reflect a serious preference for legal over

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8 See D. Laycock, supra note 6, at 369–71 (suggesting that both damages and specific performance require two transactions to reallocate resources covered by a contract, and that there is no basis to assume that costs of one generally exceed those of the other); Bishop, The Choice of Remedy for Breach of Contract, 14 J. LEGAL STUD. 299 (1985) (arguing that negotiations over specific performance will generally be more expensive than negotiations over damages); Macneil, Efficient Breach of Contract: Circles in the Sky, 68 VA. L. Rev. 947 (1982) (arguing that damages and specific performance differ only in transaction costs, that analysis of transaction costs is highly manipulable, and that emphasis on efficient breach increases litigation); Muris, Comment: The Costs of Freely Granting Specific Performance, 1982 DUKE L.J. 1053 (arguing that under certain conditions, transaction costs of specific performance exceed transaction costs of damages); Shavell, The Design of Contracts and Remedies for Breach, 99 Q.J. Econ. 121 (1984) (offering a mathematical argument for the efficiency of specific performance in certain circumstances); Ulen, The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies, 83 MICH. L. Rev. 341 (1984) (arguing that specific performance is more efficient than damages where transaction costs of further bargaining are low, and that this is generally the case in contract disputes).

9 See D. Dobbs, supra note 4, § 2.5, at 61; O. Fiss, supra note 6, at 43.


12 See id. § 936.

13 See Rendleman, supra note 5.


15 See Rendleman, supra note 5, at 358 ("[T]he legal conclusion that the legal remedy is inadequate masks the intellectual process of identifying and evaluating interests.").

16 See Shreve, supra note 14, at 388 (arguing that contemporary justifications for the irreparable injury rule “have nothing to do with” the traditional justifications).
equitable remedies. The elaborate debate over the wisdom of the rule would be pointless unless the debaters thought the rule affected the results of cases. Justice Scalia is not the only modern jurist to assume that the rule requires plaintiffs to accept remedies that are plainly inferior but in some sense "adequate."\footnote{17}

In fact the rule does no such thing. Courts have escaped the rule by defining adequacy in such a way that damages are never an adequate substitute for plaintiff's loss. Thus, our law embodies a preference for specific relief if plaintiff wants it. The principal doctrinal expression of this preference is the rule that damages are inadequate unless they can be used to replace the specific thing that plaintiff lost.\footnote{18} Damages can be used in this way for only one category of losses: to replace fungible goods or routine services in an orderly market. In that context, damages and specific relief are substantially equivalent. Either way, plaintiff winds up with the very thing he wanted, and the preference for specific relief becomes irrelevant. In all other contexts, there is ample basis in precedent and principle for holding that damages are inadequate. I document these claims with a large sample of cases; the sample is described below.\footnote{19}

Courts ignore this body of precedent, and find damages adequate, only when there is some identifiable reason to deny specific relief in a particular case. Most of these cases arise on motions for preliminary relief.\footnote{20} Although the vocabulary of adequate remedy and irreparable injury is common to both preliminary and permanent relief, the com-

\footnote{17 See supra p. 688; Carroll v. El Dorado Estates Div. Number Two Ass'n, 68o P.2d 1158, 1160 (Alaska 1984) (per curiam) (dictum) (stating that irreparable injury was not shown but that "as a practical matter injunctive relief is the only way to adequately enforce" condominium restrictions; injunction issued only because authorized by statute); Sadat v. American Motors Corp., 104 Ill. 2d 105, 117-21, 470 N.E.2d 997, 1003-04 (1984) (Simon, J., dissenting) (arguing that any legal remedy was seriously defective, but that no plaintiff could show irreparable injury); see also O. Fiss & D. Rendleman, INJUNCTIONS 77 (2d ed. 1984) ("Judges prefer to recognize most substantive rights with money, but they want people to enjoy other rights in fact."); Barnett, Contract Remedies and Inalienable Rights, SOC. PHIL. & POL'Y, Autumn 1986, at 179, 180-81 (stating that specific performance is "exceptional," and courts are "reluctan[t] to award" it); Farnsworth, Legal Remedies for Breach of Contract, 70 COLUM. L. REV. 1145, 1156 (1970) (stating that despite the trend toward specific performance of contracts, "for the present, the promisee must ordinarily be content with money damages"); Kastely, The Right To Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention, 63 WASH. L. REV. 607, 625-29 (1988) (reporting that the United States and the United Kingdom successfully moved to exempt their courts from specific performance provisions of the United Nations Convention on Contracts for the International Sale of Goods, on the grounds that specific performance was exceptional in their domestic law and also economically inefficient); Shreve, supra note 14, at 387 ("[T]he irreparability-adequacy requirement permits courts to deny injunctive relief to some plaintiffs who face certain and substantial wrongs. In such cases, the courts will devalue plaintiff's rights . . . . ").}

\footnote{18 See infra pp. 703-14.}

\footnote{19 See infra p. 701.}

\footnote{20 See infra pp. 728-32.}
peting considerations are quite different at the two stages of litigation. Denying relief at the preliminary stage protects defendant's right to a full hearing, and a stringent variation of the irreparable injury rule lets the court openly balance the risks to each side. Preliminary relief is best considered as a separate issue, only distantly related to the choice of remedy at final judgment.

At the stage of permanent relief, specific relief is problematic only occasionally. Sometimes it imposes undue hardship or interferes with countervailing rights. Sometimes it interferes with the authority of another tribunal or bypasses a more particularized remedy. Sometimes it is impractical to supervise; sometimes the case is moot or not yet ripe; sometimes the court does not really want to grant any relief at all. Courts may deny specific relief in all these cases, and they may offer the irreparable injury rule in support of these results, but that rationale is misleading. The meanings of "irreparable" and "adequate" must constantly be manipulated to achieve sensible results. "Irreparable" and "adequate" are labels for conclusions reached on other grounds.

These real reasons for denying equitable remedies are not derived from the adequacy of the legal remedy or from any general preference for damages. Some of the reasons are based on the cost of the equitable remedy in particular circumstances; others apply equally to legal remedies in similar cases. Sometimes there are good reasons to deny legal relief and grant equitable relief instead. But there is no general presumption against equitable remedies.

I conclude that the irreparable injury rule is dead. It does not describe what the cases do, and it cannot account for the results. Injunctions are routine, and damages are never adequate unless the court wants them to be. Courts can freely turn to the precedents granting injunctions or the precedents denying injunctions, depending on whether they want to hold the legal remedy adequate or inadequate. Whether they want to hold the legal remedy adequate depends on whether they have some other reason to deny the equitable remedy, and it is these other reasons that drive the decisions.

Instead of one general principle for choosing among remedies — legal remedies are preferred where adequate — we have many narrower rules. There is a rule about fungible goods in orderly markets, a rule about preliminary relief, a rule about undue hardship, and so

21 See infra pp. 749-52.
22 See infra pp. 742-49.
23 See infra pp. 732-42.
24 See infra pp. 752-55.
25 See infra pp. 762-65.
26 See infra pp. 759-61.
27 See infra pp. 755-57.
on. These rules are often stated in the cases. But when courts invoke these rules, they often go on to invoke the irreparable injury rule as well. Sometimes they rely solely or principally on the irreparable injury rule, and leave the application of some more specific rule merely implicit in their statement of the case. Analysis would be both simpler and clearer if we abandoned the rhetoric of irreparable injury and spoke solely and directly of the real reasons for choosing remedies. In this Article, I identify those reasons and their relationship to irreparable injury talk.

I aspire to be more positive than normative, more conceptual than descriptive. The analysis is positive in the sense that I describe what courts actually do. I argue for an important change in explanation, but for few changes in result. The analysis is conceptual in the sense that it is not bound by existing conceptual categories. For example, I am far more interested in the choice between specific relief and damages than in the choice between law and equity. The two sets of categories often overlap, but they are not the same. Only the choice between specific relief and damages describes a meaningful difference in the results of cases.

Law, equity, and similar conceptual categories are historical rather than functional. They are left over from a time when law and equity were administered in separate courts, or even from a time when each legal remedy was administered under a separate writ. In today's radically changed judicial system, rules derived from these categories have become obstacles to decision instead of guides. The courts have generally manipulated such rules to achieve just and functional results, but the formal rules, the vocabulary, and the conceptual categories have become dysfunctional. By emphasizing different conceptual categories, I hope to reverse the conventional relationship between the exception and the rule, and to clarify and simplify the entire field.

I seek to complete the assimilation of equity, and to eliminate the last remnant of the conception that equity is subordinate, extraordinary, or unusual. Except where a statute or constitution requires it, I would not ask whether a remedy is legal or equitable. Instead, I would ask functional questions: is the remedy specific or substitutionary, is it a personal command or an impersonal judgment, is it preliminary or permanent? On the facts of each case, does plaintiff's preferred remedy impose unnecessary costs, or undermine substantive or procedural policies?

This functional approach to the choice of remedy leads to both practical and theoretical insights. It clarifies many issues that arise in choosing among remedies. Eliminating irreparable injury talk reveals previously hidden relationships among remedial issues, and it reveals what is really at stake in each issue. Once we identify the real reasons for decision in remedies cases, we can use those reasons to explain old cases and decide new ones.
HARVARD LAW REVIEW

II. REDEFINING THE PROBLEM

A. The Possible Meanings of the Irreparable Injury Rule

The irreparable injury rule has two formulations. Equity will act only to prevent irreparable injury, and equity will act only if there is no adequate legal remedy. The two formulations are equivalent; what makes an injury irreparable is that no other remedy can repair it. Attempts to distinguish the two formulations have produced no common usage. My thesis does not require readers to accept my judgment that no significant distinction can be drawn, but clear communication requires readers to understand that I use the two formulations interchangeably.

To debate whether the irreparable injury rule is dead requires some attention to what it means to say that the rule is alive. The rhetoric of irreparable injury and adequate remedy has survived in large part because of its enormous elasticity. This elasticity threatens to make the rule non-falsifiable; the rule's supporters seem capable of assimilating any combination of results into the rule.

A non-falsifiable rule is like a non-falsifiable scientific theory. If all possible results are consistent with the rule, then no case is decided by the rule, and it is not a rule at all. For the rule to be alive, it must be at risk of being proved dead. I cannot specify the rule for its defenders, but I can specify my own understanding of the minimum possible scope of the rule. What would I accept as proof that the irreparable injury rule is dead?

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28 See, e.g., United States v. American Friends Serv. Comm., 419 U.S. 7, 11 (1974) ("[I]nadequacy of available remedies goes only to the existence of irreparable injury . . . ."); Bannercraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345, 356 n.9 (D.C. Cir. 1972) (stating that "[T]he very thing which makes an injury 'irreparable' is the fact that no remedy exists to repair it," but holding that not all irreparable injury is great enough to justify enjoining an administrative proceeding), rev'd on other grounds, 415 U.S. 1 (1974); Rhode Island Turnpike & Bridge Auth. v. Cohen, 433 A.2d 179, 182 (R.I. 1981) (stating that the requirement that any legal remedy be inadequate "is often labeled irreparable injury"); see also D. Dobbs, supra note 4, § 2.10, at 108 ("[T]he term [irreparable] is not applied literally where permanent injunctions are involved and only refers to the normal adequacy test."); O. Fiss & D. Rendleman, supra note 17, at 59 ("Irreparable injury is defined as harm that cannot be (fully? adequately?) repaired by the remedies available in the common law courts.").

29 See Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 386 (7th Cir. 1984) (stating that the irreparable injury formulation covers the case of preliminary relief, where a permanent injunction may provide an adequate remedy in equity); Bannercraft, 466 F.2d at 356 n.9 ("[T]he irreparable injury rubric is intended to describe the quality or severity of the harm necessary to trigger equitble intervention. In contrast, the inadequate remedy test looks to the possibilities of alternative modes of relief, however serious the initial injury."); see also 11 C. Wright & A. Miller, Federal Practice & Procedure § 2944, at 401 (1973) (asserting that irreparable injury "is only one basis for showing the inadequacy of the legal remedy" but not explaining how this basis differs from others); Shreve, supra note 14, at 392-94 (stating that the irreparable injury formulation covers the case where some proceeding other than an action at law or in equity might avoid the harm).
rule is still alive, and what do I mean when I claim it is dead? These questions require a brief survey of the range of possible meanings.

Adequacy seems to imply an absolute standard: does the legal remedy reach the threshold of adequacy? Such a threshold might be low or high or in-between. Alternatively, adequacy may imply a range of comparative standards: is the legal remedy as good as the equitable remedy, or nearly as good, or half as good? Adequacy could even mean something like "good enough in light of the costs of doing better," and that formulation could lead to case-by-case balancing of the effectiveness of the legal remedy against the costs of the equitable remedy. The rule has evolved in precisely this direction. It has evolved beyond the point where it can reasonably be called the irreparable injury rule.

Perhaps the clearest statement of this trend appears in Edward Yorio's new book on specific performance of contracts.30 For Yorio, "the adequacy doctrine remains the linchpin of the rules governing specific performance."31 He defends the rule at length, but he defends it as the first step of a cost-benefit analysis.32 He concludes that for specific performance to be "proper," "the marginal benefit to the promisee must be sufficiently great that it outweighs the marginal costs imposed on the promisor and on the legal system."33

I agree with that standard, but it is not the irreparable injury rule. The weakest claim recognizable as a version of the irreparable injury rule is that courts balance costs, benefits, and a preference for legal remedies. The irreparable injury rule creates a hierarchy of remedies; some are preferred over others.34 If courts are simply balancing costs and benefits and picking the most appropriate remedy in each case, then they are doing exactly what Owen Fiss urged when he proposed abolition of the rule.35 Unless some preference for legal remedies operates across a wide range of cases and actually influences results, there is no remedial hierarchy and the irreparable injury rule is dead. If a weak preference for legal remedies is only a minor factor in a general balancing of costs and benefits, the irreparable injury rule is more misleading than helpful.

In fact, except for the loss of fungible goods or services in an orderly market, there is not even a weak preference for legal remedies. Irreparable injury opinions conceal a preference for the remedy preferred by plaintiff, and they conceal the focus on countervailing considerations that can override that preference.

31 Id. § 2.1, at 27.
32 See id. §§ 2.3, 23.1-23.4.
33 Id. § 2.5, at 41.
34 See O. Fiss, supra note 6, at 1, 38.
35 See id. at 90-91.
B. Further Refining the Issues

1. Functional Choices in Remedies Law. — The irreparable injury rule distorts analysis by asking the wrong question. It purports to choose between legal and equitable remedies, but the law-equity distinction does not present a functional choice.

The most fundamental remedial choice is not between law and equity but between substitutionary and specific remedies. With substitutionary remedies, plaintiff suffers harm and receives a sum of money. Specific remedies seek to avoid this exchange. They aspire to prevent harm, or undo it, rather than let it happen and compensate for it. Substitutionary remedies include compensatory damages, attorneys' fees, restitution of the money value of defendant's gain, and punitive damages. Specific remedies include injunctions, specific performance of contracts, restitution of specific property, and restitution of the very sum of money plaintiff paid.\(^\text{36}\)

The choice between legal and equitable remedies is historical and almost wholly dysfunctional. It is not the same as the functional choice between substitutionary and specific remedies. Confusion between the two choices persists because most specific remedies are historically equitable. But some are historically legal: ejectment, replevin, mandamus, prohibition, and habeas corpus. At least one specific remedy — rescission — was historically available in either law or equity. Another, the declaratory judgment, is a statutory creation that can be either legal\(^\text{37}\) or equitable,\(^\text{38}\) depending on the circumstances. Nor is it the case that substitutionary relief is always legal. Orders to pay money were sometimes available in equity, and courts and legislators sometimes use equitable monetary relief to manipulate jurisdiction or avoid jury trial.\(^\text{39}\)

A third remedial choice, between personal commands and impersonal judgments, is also historically linked to the choice between law

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\(^{36}\) See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687-88 (1949) (contrasting damages with "specific relief: i.e., the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer's actions").

\(^{37}\) See, e.g., Simler v. Conner, 372 U.S. 221, 223 (1963) (holding that a declaratory judgment suit raising legal issues is legal, and that jury trial is therefore available).

\(^{38}\) See, e.g., Abbott Laboratories v. Gardner, 387 U.S. 136, 155 (1967) (holding that a declaratory judgment suit challenging administrative action is equitable, and that equitable defenses are therefore available).

\(^{39}\) See, e.g., Bowen v. Massachusetts, 487 U.S. 2722, 2740 (1988) (requiring the federal government to pay sums due to a state under a cooperative state-federal health insurance scheme); Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960) (authorizing an injunction to pay wages lost due to discharge or other discrimination in violation of the Fair Labor Standards Act); Dominic v. Consolidated Edison Co., 822 F.2d 1249, 1256-59 (2d Cir. 1987) (holding that compensation for lost future wages is equitable); see also D. Laycock, supra note 6, at 1268-69 (describing how Congress avoided jury trial of civil rights claims by characterizing back pay as equitable).
and equity. Remedies that end in a personal command enforceable by the contempt power are generally equitable. The harshness of personal commands is sometimes offered as a reason for the irreparable injury rule's preference for law over equity. But there are exceptions to the association between equity and personal commands, just as there are exceptions to the association between equity and specific relief. Courts can grant specific relief without a personal command; replevin, ejectment, and declaratory judgments are examples. On the other side of the traditional equation, courts can grant personal commands at law and enforce them with the contempt power; mandamus is an example. Some specific relief requires a personal command to be effective, but whether we call such a command legal or equitable — mandamus or injunction — is a matter of history and doctrine, not a matter of function.

Sometimes the law-equity distinction is codified in statutes or constitutions, most notably in guarantees of jury trial. The law-equity distinction tracks the substitutionary-specific distinction in the most common cases, where the choice is between damages and injunctions or damages and specific performance. But replevin and ejectment are important sources of specific relief, and because they are legal remedies, they are not subject to any version of the irreparable injury rule. The belief that our law prefers damages to specific relief is less plausible when one considers ejectment and replevin as well as injunctions and specific performance. This Article is necessarily about the choice between law and equity, but it also emphasizes the more fundamental choice between substitutionary and specific relief.

2. The Universe of Cases in Which Choice Is Possible. — One reason the rhetoric of irreparable injury has survived is that it is consistent with the armchair empirical observation that courts award damages more frequently than specific relief. The reason damages are more common is that in most cases that reach our courts, there is no meaningful choice between damages and specific relief. Specific relief is often impossible, not requested, or indistinguishable from an award of damages.

Specific relief is impossible when the harm has already been done or is beyond anyone's power to prevent or repair in kind. This is true of all personal injury cases. It is also true of consequential damages, whatever the underlying wrong. Consequential damages begin to accrue immediately. Specific relief may prevent the accrual

40 See Rendleman, supra note 5, at 355-58.
41 Traditionally, replevin and ejectment do not order defendant to surrender his property, but merely order the sheriff to put plaintiff in possession. See N.Y. CIV. PRAC. L. & R. § 5102 (McKinney 1978); RESTATEMENT (SECOND) OF TORTS, supra note 11, § 945 comment a (ejectment); id. § 946 comment a (replevin); Farnsworth, supra note 17, at 1152 (replevin).
42 See infra pp. 757-59.
of future damages, but the claim for damages already suffered will remain.

In another large category of cases, plaintiff does not seek specific relief because it is not in his interest to do so. Self-help followed by a suit for damages is his quickest remedy, so that the lawsuit when it comes is limited to past harm that can be remedied only by damages. The doctrine of avoidable consequences strongly reinforces this tendency by denying recovery of consequential damages that plaintiff could have avoided by reasonable effort.\(^4\)

In a third category of cases, specific relief and damages are indistinguishable. In suits to collect debts, a fixed sum of money is the specific thing plaintiff lost. Here the key distinction is between impersonal judgment and personal command. A court will give an impersonal judgment on the debt, collectible by execution, garnishment, and the like,\(^4\) and generally dischargeable in bankruptcy.\(^45\) But except for highly preferred debts such as the support of children and spouses,\(^46\) courts will not order defendant to pay the debt, and hence they will not enforce money judgments with the contempt power.\(^47\) The policy source of this distinction is our aversion to imprisonment for debt;\(^48\) the adequacy of the legal remedy is irrele-

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\(^4\) See S.J. Groves & Sons Co. v. Warner Co., 576 F.2d 524, 528-30 (3d Cir. 1978) (stating that plaintiff cannot recover consequential damages that could have been avoided by reasonable efforts to cover, but holding that difficulties of cover and defendant’s continued promises of timely delivery made it reasonable not to cover on these facts).


\(^48\) But see Central States, Southeast & Southwest Areas Pension Fund v. Admiral Merchants Motor Freight, Inc., 511 F. Supp. 38, 43-49 (D. Minn. 1980), aff’d sub nom. Central States, Southeast & Southwest Areas Pension Fund v. Jack Cole-Dixie Highway Co., 642 F.2d 1122 (8th Cir. 1981) (ordering companies to pay pension plan contributions); ILL. REV. STAT. ch. 10, para. 2-1402(b)(3) (Supp. 1988) (authorizing courts in all cases to compel defendant to pay judgment out of income); N.Y. CIV. PRAC. L. & R. § 5226 & comment 3 (McKinney 1978) (authorizing a coercive order to pay where defendant’s apparent standard of living or seemingly undercompensated employment indicates existence of hidden income); see also supra note 39 (citing injunctions to pay money, where the injunction is used to manipulate jurisdiction or avoid jury trial, and the means of collection are not at issue).

\(^49\) See Thompson v. Thompson, 282 Ala. 248, 252-54, 210 So. 2d 808, 811-14 (1968) (holding that marital debts allocated to an ex-husband were not part of his obligation to support his ex-wife, and that therefore a contempt citation for failure to pay such debts would result in unconstitutional imprisonment for debt); Risk v. Thompson, 237 Ind. 642, 651, 147 N.E.2d 540, 545 (1958) (holding that enforcement of an order to pay an installment note would result
vant. The rule is simply that we do not use the contempt power to coerce the payment of money.

These three categories of cases — cases where specific relief is impossible, not sought, or indistinguishable from damages — account for the bulk of all litigation. They are irrelevant to the choice between substitutionary and specific relief. When they are eliminated, there remains a set of cases in which courts and litigants have a genuine choice between preventing harm and compensating for it. This Article is principally about that set of cases, and it is in that set that I believe our law treats substitutionary relief as generally inadequate.

3. The Historical Origins of Current Law. — The death of the irreparable injury rule is not the product of recent judicial activism. Declining respect for civil juries may have pushed matters along, and the merger of law and equity may have made equity judges more accessible to litigants in ordinary cases. The explosive growth of substantive protection for intangible rights created more cases in which only specific relief would do. But the erosion of the irreparable injury rule is older than the merger of law and equity. A brief history of equity shows why the irreparable injury rule came under pressure from an early date.

Equity developed in the court of chancery, which emerged in the fourteenth century, when the Chancellor began to regularize a procedure for dealing with petitions for the King's personal justice. Not surprisingly, there were intermittent complaints about this bypass of the regular courts. But the intermittent attacks on chancery did not preclude cooperation between chancery and the common law courts. Chancery was doing judicial work that the common law courts were ill-equipped to do. Gradually, the two courts reached an accommodation. Chancery would not duplicate the work of the common law courts, but it would do other judicial work that the common law courts had never done. In short, equity would take jurisdiction only if there were no adequate remedy at law. This is the origin of the irreparable injury rule.

in unconstitutional imprisonment for debt); Brown v. Brown, 287 Md. 273, 284, 412 A.2d 396, 402 (1980) (holding that a promise to support a stepchild is contractual, and enforcement by imprisonment is therefore an unconstitutional imprisonment for debt).


52 See F. MAITLAND, supra note 49, at 6-7; T. PLUCKNETT, supra note 49, at 195.

The most important thing to understand about the evolution of the rule is that its enforcement was entrusted to the equity court. Equity controlled the relationship between the two sets of courts because it had the power to enjoin proceedings at common law. The common law courts had no comparable weapon against equity. King James I confirmed this power relationship in a famous dispute between equity and King's Bench in 1616.44

4. The Definition of Adequacy. — It should not be surprising that equity interpreted the irreparable injury rule in ways that expanded its own jurisdiction. The most important and most general rule limiting the impact of the irreparable injury rule was the definition of adequacy. A legal remedy was considered adequate only if it was as complete, practical, and efficient as the equitable remedy. This definition of adequacy was well established before the merger of law and equity,55 and it prevails today.56 As one defender of the irreparable injury rule acknowledges, the legal remedy almost never meets this standard.57

Once this definition of adequacy was in place, the irreparable injury rule did not embody much preference for legal remedies. I once characterized the rule as a tiebreaker.58 If two remedies are equally complete, practical, and efficient, then the legal remedy will be used. That is true as far as it goes, and a far better approximation of reality than the usual statement that equitable remedies are unavailable if legal remedies are adequate. But to call the rule a tiebreaker puts the emphasis on the wrong point, because ties are so rare. One remedy is almost always better than the other, and equitable relief is granted or denied because of the difference. The tiebreaker functions of the irreparable injury rule rarely come into play.

Moreover, the tiebreaker function fails to explain the ubiquity of irreparable injury opinions. If the rule were only a tiebreaker, and if the tiebreaker were rarely needed, there would be few occasions to

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57 See Shreve, supra note 14, at 387 & n.33.

58 See Laycock, supra note 10, at 1071.
invoke the rule. More is going on than tiebreaking. Courts invoke the irreparable injury rule when they deny specific relief for other reasons.

5. Testing the Thesis. — Mixed reactions to oral presentations and early drafts convinced me that it would not be enough to report this thesis with a few illustrative cases. The traditional understanding had too strong a hold. I decided to test my claims about the actual operation of the irreparable injury rule against a large sample of cases selected in a quasi-random way.

In 1985, one of my students compiled a list of cases with digest entries under the principal West key numbers reciting the irreparable injury rule. She gathered from that universe the hundred most recent federal and the hundred most recent state cases granting equitable relief, and the hundred most recent federal and the hundred most recent state cases denying equitable relief. Another student updated that effort in 1988. To these lists I added the fruits of screening United States Law Week, the Supreme Court, Federal, Texas, and Northeastern advance sheets, and cases from the academic literature. Then I worked backwards and forwards through citation patterns, examining all the cases we found that granted or denied equitable relief. I took care to sample most United States jurisdictions and to get a reasonable number of cases on all issues that emerged in the sample. I found new issues and whole lines of cases I had not anticipated; I did not limit the search to a predetermined set of issues. This sample of cases does not statistically represent some larger population. But I am confident that the cases are broadly representative, and that there is no other line of cases that would give a different picture.

We collected more than fourteen hundred cases, and nearly all of them will be cited and classified in a subsequent book. This Article will describe fewer examples in the text and cite fewer cases in the notes. I can attest that the cases cited here are representative of the larger sample. Despite the invaluable help of my research assistants, I examined every case myself.

III. Escaping the irreparable injury Rule

This Part reviews how courts eliminated the irreparable injury rule as a significant obstacle to equitable relief. Occasionally, courts escape the rule by holding it inapplicable. But usually, courts work within the rule, holding legal remedies inadequate. The grounds for

59 These were *Injunctions* key numbers 14–19, *Equity* key numbers 43, 45–46, and *Specific Performance* key number 5.

60 D. Laycock, *supra* note 4.

61 See *infra* p. 722.
holding legal remedies inadequate have so expanded that the rule almost never bars plaintiff’s choice of remedy. Because damages are almost never adequate, injury is almost always irreparable. At the stage of permanent relief, any litigant with a plausible need for a specific remedy can satisfy the irreparable injury rule.

There is more than one way to say that the irreparable injury rule is satisfied, and my footnotes do not always distinguish equivalent formulations. Most commonly, courts use one of the two standard formulations: that plaintiff faces irreparable injury or that legal remedies are inadequate. Occasionally, the court will say the same thing in a nonstandard way: for example, that an injunction is the only effective remedy.

More variations arise when it becomes settled that a whole category of wrongs always inflicts irreparable injury. Courts may say any of the following:

- This wrong inflicts irreparable injury.
- This whole category of wrongs always inflicts irreparable injury.
- In this whole category of wrongs, irreparable injury is presumed.
- In this whole category of wrongs, plaintiff need not prove irreparable injury (because it is presumed).
- In this whole category of wrongs, plaintiff is entitled to an injunction whether or not he suffers irreparable injury.

Each of these formulations grows out of the one before it, and I treat them all as ways of saying that the irreparable injury rule is satisfied.

More ambiguously, statements such as the following are generally equivalent to a finding of irreparable injury:

- The prerequisites for an injunction are satisfied.
- Plaintiff has stated a claim for equitable relief.
- The proper remedy is an injunction.

Absent contrary evidence, I take these as allusions to the standard formulations of the prerequisites to an injunction, including the irreparable injury rule. Occasionally that will not be what the court meant. When it is not, we are simply left with a decision that issued an injunction without discussing irreparable injury.

I have cited a few cases that issue the injunction without alluding to irreparable injury at all, and these are identified in parentheticals. Because the rule is well known and not formally repudiated, I take these as cases where the court and parties assumed the rule was satisfied. Sometimes it is so obviously satisfied, it would be surprising if the opinion discussed it. What defense lawyer would argue irreparable injury in Brown v. Board of Education, Reynolds v. Sims, or a prison conditions case?
Alternatively, decisions that issue the injunction without discussing irreparable injury may arise in jurisdictions where the rule no longer applies to some categories of cases, or where counsel simply did not think of the rule. Each of these explanations is consistent with my claim that the rule is dead. The one thing that is clear is that the irreparable injury rule did not prevent injunctions from issuing in these cases. Given the overall pattern, there is no reason to think these are cases where the injunction might have been denied if only counsel had argued no irreparable injury. Rather, ignoring the rule is a means of escaping it.

A. Variations on the Dominant Theme: Irreplaceability As Irreparable Injury

Damages are inadequate if plaintiff cannot use them to replace the specific thing he has lost. This is by far the most important rule in determining the doctrinal relationship among remedies. The emphasis on replaceability turns the alleged preference for damages on its head. Money is an adequate remedy if, and only if, it can be used to replace the specific thing that was lost. That is to say, money is never an adequate remedy in itself. It is either a means to an end or an inadequate substitute that happens to be the best we can do at acceptable cost. But the judicial preference is to give plaintiff specific relief if she wants it — to replace her loss with as identical a substitute as possible. Irreplaceability has many applications and several formulations; some of these formulations are thought of as independent rules. But they all emphasize different facets of the same underlying principle.

1. Where the Loss Cannot Be Replaced — (a) Real Property. — The classic example of a loss that cannot be replaced is land. Thus, contracts to sell real estate are specifically enforceable.62 The traditional explanation for the rule is that no other piece of land would be an adequate replacement for the one under contract, because every parcel of real estate is unique.63 The rule originated when land was the dominant form of wealth in society and when tract houses and condominiums did not exist. Even today, an exact substitute is rarely on the market and actually available to a disappointed buyer. When

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there is such a case, plaintiff is unlikely to spend his time and money suing for specific performance.64

Most land cases involve wrongs less extensive than refusal to convey a fee simple. Courts regularly enjoin a wide range of wrongs relating to land, including encroachments,65 nuisance,66 and continuous or repeated trespasses;67 removing timber,68 minerals,69 or lateral support;70 violating restrictive covenants,71 zoning laws,72 condemning

64 See Schwartz, supra note 7, at 277.
66 See, e.g., Hart v. Wagner, 184 Md. 40, 47–48, 40 A.2d 47, 49–50 (1944) (trash fires); Scott v. Jordan, 99 N.M. 567, 572, 661 P.2d 59, 64–65 (N.M. Ct. App. 1983) (feed lot); Pate v. City of Martin, 614 S.W.2d 46, 48 (Tenn. 1981) (sewage lagoon; “[s]eldom, if ever [are damages adequate] where the nuisance gives every promise of continuing and is one that can be corrected by the expenditure of labor or money”); see also 2 J. STORY, supra note 49, §§ 924–926, at 203–05 (stating that an injunction is available if the nuisance is continuing or permanent).
67 See, e.g., Berin v. Olson, 183 Conn. 337, 340–41, 439 A.2d 357, 359–60 (1981) (diverting water onto plaintiff’s land); New York Tel. Co. v. Town of N. Hempstead, 41 N.Y.2d 691, 695, 363 N.E.2d 694, 699, 395 N.Y.S.2d 143, 149 (1977) (attaching street lights to plaintiff’s telephone poles; injunction granted without discussing irreparable injury); Terrebonne Parish Police Jury v. Matherne, 405 So. 2d 314, 319 (La. 1981) (diverting water onto plaintiff’s land); Gregory v. Sanders, 635 P.2d 795, 801 (Wyo. 1981) (use of private road on plaintiff’s land); see also 2 J. STORY, supra note 49, § 928, at 207 (“[T]here is not the slightest hesitation if the acts done or threatened to be done to the property would ... impair the just enjoyment of the property in future.”); RESTATEMENT (SECOND) OF TORTS, supra note 11, § 938 comment b (stating that an injunction is obviously the better remedy for continuing trespass to land).
68 See, e.g., Dean v. Coosa County Lumber Co., 232 Ala. 177, 183, 167 So. 566, 572 (1936); Deer Slayers, Inc. v. Louisiana Motel & Inv. Corp., 434 So. 2d 1183, 1187–89 (La. Ct. App.), cert. denied, 440 So. 2d 151 (1983); Pardee v. Camden Lumber Co., 70 W. Va. 68, 69, 73 S.E. 82, 83–85 (1911); see also 2 J. STORY, supra note 49, § 929, at 208–09 (stating that an injunction is granted “in all cases” where timber is removed by a party other than the rightful owner).
ium restrictions, or lease agreements; interfering with easements; and wrongfully foreclosing a lien. Courts offer a variety of explanations for why the injury is irreparable in these cases: that all land is unique, that any injury affecting the "substance" of the estate is irreparable, that damages are hard to measure, or that a legal remedy would require a multiplicity of suits. Whatever the rationale, courts almost never withhold injunctive relief in these cases on the ground that damages are an adequate remedy. But sometimes they withhold it on other grounds, such as the disproportionate expense of removing an encroachment or abating a nuisance.

(b) Personal Property. — Damages are often deemed an adequate remedy for the loss of goods, but this is only because plaintiff can use the money to buy identical goods.


74 See, e.g., Ammerman v. City Stores Co., 394 F.2d 950, 955-56 (D.C. Cir. 1968) (per curiam) (contract to build and lease a department store in a shopping mall); Matlock v. Duncan, 220 Ga. 200, 203, 137 S.E.2d 661, 664 (1964) (contract to lease retail space; no discussion of irreparable injury); Rigs v. Sokol, 318 Mass. 337, 342, 61 N.E.2d 538, 540-41 (1945) (contract to lease restaurant; stating that it is "well settled" that covenant to grant lease may be specifically enforced).


76 See, e.g., Sundance Land Corp. v. Community First Fed. Sav. & Loan Ass'n, 840 F.2d 653, 661-62 (9th Cir. 1988); Johnson v. United States Dept of Agric., 734 F.2d 774, 789 (11th Cir. 1984); Greater Houston Bank v. Conte, 641 S.W.2d 407, 409-10 (Tex. Ct. App. 1982).


79 See, e.g., Storey v. Patterson, 437 So. 2d 491, 495 (Ala. 1983) (encroachment); Czarnick v. Loup River Pub. Power Dist., 190 Neb. 521, 526, 209 N.W.2d 595, 599 (1973) (annual flooding of plaintiff's land); Allegheny Dev. Corp. v. Barati, 166 W. Va. 218, 221-22, 273 S.E.2d 384, 387 (1980) (per curiam) (removal of minerals); see also 3 J. POMEROY, supra note 3, § 1357, at 387 (stating that a legal remedy is inadequate "if the injury done or threatened is of such a nature that, when accomplished, the property can not be restored to its original condition").


81 See, e.g., Berin v. Olson, 183 Conn. 337, 421-42, 344, 439 A.2d 357, 360-61 (1981); Cragg v. Levinson, 238 Ill. 69, 85-87, 87 N.E. 121, 126-27 (1908); Kennedy v. Bond, 80 N.M. 734, 738, 460 P.2d 809, 813 (1969); Coatsworth v. Lehigh Valley Ry., 156 N.Y. 451, 456, 51 N.E. 301, 303 (1898); see also 3 J. POMEROY, supra note 3, § 1357, at 387-88.

82 See infra pp. 749-50.

with money, then money is not an adequate remedy for the loss. The classic illustrations of irreplaceable goods are heirlooms and works of art. 84

The same reasoning has been applied to more contemporary subjects of litigation, including unique commercial products, 85 customized cars 86 and boats, 87 a custom stereo set, 88 breeding stock, 89 franchises, 90 businesses, 91 closely held corporate stock, 92 and controlling blocks of publicly traded stock. 93


Perhaps most revealing, specific performance is available for perfectly ordinary goods that cannot be replaced because of monopoly or shortage. Thus, courts have decreed specific performance of contracts for the sale of cotton, carrots, aviation fuel, and industrial chemicals. These goods would be fungible in normal times; they are certainly not unique in the sense that heirlooms are unique. Plaintiffs do not claim sentimental or other nonmarket values. These cases show that the real ground for specific performance is irreplaceability, and that uniqueness is not the only cause of irreplaceability. Damages are inadequate unless they can be used to replace the specific thing that was lost, however ordinary that thing is.

(c) Intangible Rights. — The principle that damages are an inadequate remedy for the loss of something irrereplaceable is not limited to unique or scarce tangible property. The principle also applies to intangible rights that cannot be bought or sold in any market. This is why injunctions are the standard remedy in civil rights and environmental litigation. Plaintiff cannot use a damage award to


95 See, e.g., Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33, 39–40 (8th Cir. 1975) (propane); Bomberger v. McKelvey, 35 Cal. 2d 607, 615–17, 220 P.2d 719, 734–35 (1950) (en banc) (glass and skylights otherwise available only after 90 to 120 day wait); Paullus v. Yarbrough, 219 Or. 611, 641–42, 347 P.2d 620, 635–36 (1959) (right to cut timber on a small tract, where such rights within means of small loggers were scarce); see also U.C.C. § 2-716 official comment 2 (1987) (stating that "inability to cover is strong evidence of 'other proper circumstances' justifying specific performance"); 5A A. Corbin, supra note 62, § 1146, at 154 ("Coal and gas, automobiles, tomatoes, garnets, fish skins, silver ores, slabs of lumber are common subjects of commerce ordinarily obtainable at a price; but scarcity might make the fact otherwise; and so might the inconvenience of getting a supply elsewhere.").


97 See Campbell Soup Co. v. Wentz, 172 F.2d 80, 82–83 (3d Cir. 1948).


100 See 11 C. Wright & A. Miller, supra note 29, § 2948, at 440 (stating that when deprivation of a constitutional right is shown, "most courts hold that no further showing of irreparable injury is necessary").

replace voting rights, an adequate hearing, integrated public facilities, minimally adequate treatment in a state prison, free speech, religious liberty, freedom from employment discrimination, or freedom from unreasonable searches and seizures. Nor can a damage award replace clean air or water.


See, e.g., Reynolds v. Sims, 377 U.S. 533, 585-87 (1964) (affirming an order for legislative reapportionment; no discussion of irreparable injury); Bell v. Southwell, 376 F.2d 659, 662 (5th Cir. 1967) (voiding election results because of racial segregation at polling place); O'Connor v. Helfgott, 481 A.2d 388, 394 (R.I. 1984) (stating that "[n]o amount of monetary damages can rectify this vote dilution").

See, e.g., Gibson v. Berryhill, 411 U.S. 564, 572-75 (1973) (biased decisionmaker); United Church of the Medical Center v. Medical Center Comm'n, 668 F.2d 693, 701 (7th Cir. 1982) (same); Hein v. Marts, 295 N.W.2d 167, 171-72 (S.D. 1980) (no notice of hearing).


See, e.g., Chalk v. United States Dist. Court, 840 F.2d 701, 709-10 (9th Cir. 1988) (AIDS discrimination); EEOC v. Cosmair, Inc., 821 F.2d 1085, 1090-91 (5th Cir. 1987) (age discrimination; holding that irreparable injury is presumed from a violation of civil rights law, but not until administrative remedies have been exhausted); EEOC v. Chrysler Corp., 733 F.2d 1183, 1186 (6th Cir. 1984) (age discrimination).

See, e.g., Lewis v. Kugler, 446 F.2d 1343, 1350 (3d Cir. 1971) (finding injunction appropriate where plaintiffs showed pattern of police stops of cars driven by males with long hair); Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966) (enjoining warrantless mass searches of homes on the basis of anonymous tips); Hague v. Committee for Indus. Org., 101 F.2d 774, 790-91 (3d Cir.) (enjoining the arrest of labor organizers without probable cause), aff'd, 307 U.S. 496 (1939); cf. Mapp v. Ohio, 367 U.S. 643, 648, 651-52 (1961) (stating that remedies other than the exclusionary rule are "worthless and futile" and reduce fourth amendment to "a form of words" (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920))).


a lost forest or species, or the cautionary effects of an environmental impact statement. In all these cases, damages are obviously inadequate, awarded only as a second best in cases where it is too late for an injunction to do any good, or where there is some other reason to deny specific relief, such as disproportionate cost.

Injuries to the person are similar. Plaintiffs cannot replace defective body parts, and awards for pain and suffering do not make the pain go away. Damages are the standard remedy for personal injury only because personal injuries can rarely be anticipated in time to prevent them by injunction. But where an injunction is possible, the irreparable injury rule is obviously satisfied: if it happens, the physical injury to plaintiff will be irreparable. The most common examples are injunctions against family violence. The issue also arises when courts are asked to enjoin unlawful activity that creates a risk of serious injury. When the risk is great enough, those injunctions are routinely granted.

Courts also enjoin unlawful conduct that will cause emotional distress, occasionally noting the obvious point that emotional distress is irreparable injury.


See Canal Auth. v. Callaway, 489 F.2d 567, 575-76 (5th Cir. 1974); see also cases cited supra note 68.


See, e.g., Friends of the Earth, Inc. v. Coleman, 518 F.2d 323, 330 (9th Cir. 1975); Environmental Defense Fund, Inc. v. Froehlke, 477 F.2d 1033, 1037 (8th Cir. 1973); Scherr v. Volpe, 466 F.2d 1027, 1034 (7th Cir. 1972).

See infra pp. 749-50.

See, e.g., Carpenter v. Carpenter, 252 So. 2d 591 (Fla. Dist. Ct. App. 1971) (holding an ex-husband in contempt of injunction that ordered him not to "molest" his ex-wife); Keller v. Keller, 158 N.W.2d 694 (N.D. 1976) (enjoining a husband from "molesting... or annoying" his wife or children; no discussion of irreparable injury); Marquette v. Marquette, 686 F.2d 990, 997 (Okla. Ct. App. 1984) (enjoining an ex-husband from "abusing, injuring, threatening or harassing" his ex-wife, and rejecting challenges to a statute authorizing such orders; no discussion of irreparable injury). Forty-eight states now authorize such orders by statute. See Finn, Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse, 23 FAM. L.Q. 43 (1989).


See, e.g., Bowen v. City of New York, 476 U.S. 467, 483-84 (1986) (finding termination
2. Where the Loss Can Be Replaced Only with Difficulty. — There is no bright line between what is replaceable and what is not. Specific relief is not limited to goods like the Mona Lisa, which is certainly and absolutely irreplaceable. In commercial and consumer cases, replaceability is often a matter of degree. Even in severe shortages, some goods are produced and some customers will be supplied. Plaintiff may argue only that her ability to cover is uncertain, unreliable, or difficult. Defendant may argue that similar but not identical goods would be adequate, or that plaintiff could get identical goods if she would go to enough trouble and pay a high enough price.

At this point, courts begin to divide. A significant minority hold that damages are adequate if replacement is merely difficult. But most courts have not required a showing that replacement is impossible at any price; they have granted specific performance merely on the ground that replacement would be difficult.

Courts have generally recognized the difficulty and unreliability of procuring scarce goods, and they have recognized plaintiff’s need for a steady supply. In an early case involving a farmer’s contract to sell his crop to a tomato cannery, the court noted that the purpose of buying the entire crop was to keep the cannery running at full capacity through the short harvest season, and it commented that the very existence of such contracts showed the need for their specific enforcement. Similarly, in a case involving aviation fuel during the embargo occasioned by the Yom Kippur War, the court saw only “chaos” of disability benefits to mental patients to inflict irreparable injury; Mooney v. Cooledge, 30 Ark. 640, 642–43 (1875) (finding removal of ancestors’ bodies from family cemetery to inflict irreparable injury); Mental Health Info. Servs. v. Schenectady County Dep’t of Social Servs., 128 Misc. 2d 282, 290, 488 N.Y.S.2d 335, 340 (Sup. Ct. 1985) (finding that service of process on a mental patient can cause irreparable injury).

119 See, e.g., Klein v. PepsiCo, Inc., 845 F.2d 76, 80 (4th Cir. 1988) (denying specific enforcement of a contract to sell a jet plane, even though only a few similar models were available); Duval & Co. v. Malcom, 233 Ga. 784, 788, 214 S.E.2d 356, 359 (1975) (denying specific performance of a contract for purchase of cotton in a shortage; the court assumed that buyer could cover if it paid “an unreasonable price”); Fortner v. Wilson, 202 Okla. 563, 566, 216 P.2d 299, 301 (1950) (denying specific enforcement of a contract to sell an automobile; “new Chevrolet automobiles were not available on the open market at that time, and could only be obtained at great expense and inconvenience from used-car dealers; but the fact remains that they could be obtained.”).

120 See, e.g., Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33, 40 (8th Cir. 1975) (granting specific performance although propane was “readily available,” because a long-term contract for propane was “probably” not available); Bomberger v. McKelvey, 35 Cal. 2d 607, 613–16, 220 P.2d 729, 733–35 (1950) (enforcing a salvage contract when replacement materials would take 90 to 120 days to obtain); Heidner v. Hewitt Chevrolet Co., 166 Kan. 11, 13, 199 P.2d 481, 483 (1948) (enforcing an automobile sales agreement where equivalent could not be “readily purchased” on the market); see also 5A A. Corbin, supra note 62, § 1146, at 154 (discussing the “inconvenience of getting a supply elsewhere”).

if the plaintiff airline were left to scramble for fuel in the spot market. Accordingly, both of these courts granted specific performance.

The shortage cases rest on the ground that replacement is at least difficult and may be impossible. Occasionally, replacement is plainly possible and the unambiguous ground of decision is that a damage remedy would shift some significant difficulty from defendant to plaintiff. An example is Thompson v. Commonwealth, which specifically enforced a contract to build roll call voting machines. The evidence was that "any first class machine shop" could build the machines, but that only defendant was experienced at doing so. The court held that in these circumstances the task of recruiting an alternate provider was sufficiently difficult to make the damage remedy inadequate. One explanation for the case is that part of what plaintiff had bought was defendant's expertise, which was not replaceable in the market. The court made the point somewhat differently: damages would force plaintiff to "assume the responsibility and risk which properly belong to defendants." It may have helped that plaintiff was the state, but the court did not say so. Other courts have applied similar reasoning to private plaintiffs.

3. Where Damages Are Hard To Measure. — Damages are inadequate when it is too hard to measure them accurately. Any case where the loss is irreplaceable on the market can also be described as a case where damages are hard to measure. The actual cost of cover is the most easily applied measure of damages. Value can be easily and reliably determined in an active market for a fungible item.

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124 Id. at 214, 89 S.E.2d at 68.

125 See, e.g., First Nat'l State Bank v. Commonwealth Fed. Sav. & Loan Ass'n, 610 F.2d 164, 173–74 (3d Cir. 1979) (specifically enforcing a contract to permanently finance a failed shopping mall, placing hardship on the party that agreed to bear the risk); Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33, 40 (8th Cir. 1975) (specifically enforcing a contract for sale of propane; even if plaintiff could replace propane, "it would still face considerable expense and trouble which cannot be estimated in advance"); Wheelock v. Noonan, 108 N.Y. 179, 184–85, 15 N.E. 67, 68–69 (1888) (ordering defendant to remove boulders from plaintiff's land; damage remedy would compel plaintiff "to do in advance for the trespasser what the latter is bound to do").

126 See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (enjoining seizure of steel mills); Southwest Village Water Co. v. Fleming, 442 So. 2d 89, 92 (Ala. 1983) (specifically enforcing a promise to keep leased premises in good repair); Hines Corp. v. City of Albuquerque, 95 N.M. 311, 313, 621 P.2d 1116, 1118 (1980) (specifically enforcing a restrictive covenant); see also 2 J. STORy, supra note 49, § 718, at 27; id. § 722, at 29; Restatement (Second) of Torts, supra note 11, § 944 comments c, d; Developments, supra note 6, at 1002–04.

127 For an argument equating uniqueness with valuation difficulties, see Kronman, cited above in note 7, at 355–65.
But value is difficult to determine in an inactive or nonexistent market, and if plaintiff is unable to replace the lost item, there may be no actual transaction to support an assessment of value. Inability to replace what was lost is also the source of consequential damages, and they are often hard to measure.

Whether courts describe these as uniqueness cases or hard-to-measure damages cases is partly a matter of habit, partly a matter of how the case is presented, and partly a matter of whether plaintiff's loss is commercial or personal. We tend to think of heirlooms as unique, although we could just as easily say that damages are hard to measure because heirlooms are difficult to value. Similarly, it is hard to value irreplaceable rights that never trade in any market. This is another way to explain the civil rights, environmental, personal injury, and emotional distress cases, and the opinions are occasionally written on the ground that damages would be too difficult to measure.128

In commercial cases, where all parties are concerned primarily with the bottom line, courts are more likely to emphasize the difficulty of measuring damages. In the largest set of these cases, courts say that lost profits would be too difficult to measure.129 With equal accuracy but greater abstraction, they could say that the lost transaction that would have generated the profits was unique. It can perhaps be replaced with some other transaction, but that transaction will not be exactly the same; it may produce more profit or less, and the difference will be hard to estimate. Where plaintiff has available an alternative transaction that is identical or nearly so — where the cannery can buy the same quantity of tomatoes from the farmer down the road — lost profits are not so difficult to measure.

But a deal of any complexity can never be replaced with an identical deal. It is therefore not surprising that output and requirements contracts are specifically enforced, whether or not there is a


129 See, e.g., Triple-A Baseball Club Assocs. v. Northeastern Baseball, Inc., 832 F.2d 214, 225 (1st Cir. 1987) (enforcing a contract to sell a minor league baseball franchise), cert. denied, 108 S. Ct. 1111 (1988); Bio-Medical Laboratories, Inc. v. Trainor, 68 Ill. 2d 540, 548-49, 370 N.E.2d 223, 227 (1977) (enjoining suspension of medical laboratory from eligibility for Medicaid reimbursement); American Mut. Liab. Ins. Co. v. Fisher, 58 Wis. 2d 299, 304-05, 206 N.W.2d 152, 156 (1973) (enforcing a landlord's promise to provide parking for the tenant's customers); see also Restatement (Second) of Torts, supra note 11, § 944 comment c (stating that compensation is often inadequate for loss of commercial profits, because they cannot be proved with reasonable certainty). But see City Centre One Assocs. v. Teachers Ins. & Annuity Ass'n, 656 F. Supp. 658 (D. Utah 1987) (denying specific enforcement of an equity participation loan) (discussed at p. 724 below).
shortage. Variations in the market price and in the quantity of goods produced or required make the damages too hard to measure, and a court will avoid measuring them if it can. As Pomeroy said of long-term contracts over a century ago, plaintiff should not be forced "to sell his possible profits at a price depending upon a mere guess."

Tortious interference with income-producing property gives rise to similar questions about volume and profit margin: how much business was irreplaceably lost? After the fact the court has no choice but to estimate such damages as best it can. But when there is time, the court will enjoin the interference on the ground that damages would be too hard to measure accurately.

Similarly, damages from commercial torts are notoriously difficult to measure. Injunctions are a routine remedy for misappropriation of trade secrets; infringement of patents, copyrights, or trade-

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132 See, e.g., Danielson v. Local 275, Laborers Int'l Union, 479 F.2d 1023, 1036–37 (2d Cir. 1973) (enjoining unlawful picketing which caused construction delays); Justices of the Inferior Court of Pike County v. Griffin & W. Point Plank Rd. Co., 11 Ga. 246, 250–51 (1852) (enjoining trespass causing the destruction of toll gates on a private road; "[w]ho will prove what will be the income of this road for a day, or a week, or a year?"); McDaniel v. Moyer, 662 P.2d 309, 313 & n.13 (Okla. 1983) (enforcing plaintiff's right to drill oil well on defendant's land).

133 See, e.g., Winston Research Corp. v. Minnesota Mining & Mfg. Co., 350 F.2d 134, 143 (9th Cir. 1965) (finding irreparable injury without explanation); Lane v. Commonwealth, 401 Mass. 549, 517 N.E.2d 1281 (1988) (issuing an injunction; no discussion of irreparable injury); Valco Cincinnati, Inc. v. N & D Machining Serv., Inc., 24 Ohio St. 3d 41, 47, 492 N.E.2d 814, 819 (1986) ("Injunctions are, of course, the appropriate remedy . . . ."); UNIF. TRADE SECRETS ACT § 2(a), 14 U.L.A. 541, 544 (1980) ("Actual or threatened misappropriation may be enjoined.").


135 See, e.g., Apple Computer, Inc. v. Formula Int'l, Inc., 725 F.2d 521, 525–26 (9th Cir. 1984) (stating that irreparable injury is presumed when copyright is infringed); Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 620 (7th Cir.) (same), cert. denied, 459 U.S. 880 (1982); Wainwright Sec., Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977) (same), cert. denied, 434 U.S. 1014 (1978); see also 3 M. Nimmer & D. Nimmer, NIMMER ON COPYRIGHT § 14.05[B], at 14-56.1 (1988) ("[I]t would appear to be an abuse of discretion to deny a permanent injunction where liability has been established and there is a threat of continuing infringement."); 2 J. Story, supra note 49, §§ 930–935.
marks;136 violations of antitrust laws137 or covenants not to com-
pe;138 interference with contract;139 and other kinds of unfair com-
petition.140 In all these cases, damages and restitution are the usual
remedies only for past violations beyond the reach of injunctions.

B. Other Sources of Irreparable Injury

1. The Risk of Multiple Litigation. — A legal remedy is inadequate
if it would require a “multiplicity of suits.”141 The largest group of
such cases are those where plaintiff might have to sue repeatedly for
successive increments of damage. This rationale is often applied in
trespass142 and nuisance143 cases. Damages might not deter repeated

136 See, e.g., American Cyanamid Co. v. Campagna per la Farmacie in Italia S.P.A., 847
F.2d 53, 55 (2d Cir. 1988); Hartford House, Ltd. v. Hallmark Cards, Inc., 846 F.2d 1268,
1271, 1275 (10th Cir.), cert. denied, 109 S. Ct. 260 (1988); International Kennel Club, Inc. v.
Mighty Star, Inc., 846 F.2d 1079, 1091-92 (7th Cir. 1988); see also RESTATEMENT (SECOND)
of TORTS, supra note 11, § 938 comment b (commenting that injunctions are routine in trademark
disputes).

137 See, e.g., United States v. BNS Inc., 848 F.2d 945, 947 (9th Cir. 1988) (enjoining
corporate acquisition of a competing business); Roland Mach. Co. v. Dresser Indus., Inc., 749
F.2d 380, 386, 391 (7th Cir. 1984) (enjoining an exclusive-dealing agreement where plaintiff’s
business may be destroyed, or lost profits may be hard to calculate); Schwartz v. Laundry &
Linen Supply Drivers’ Union, Local 187, 339 Pa. 353, 357, 14 A.2d 438, 440 (1940) (enjoining
price-fixing where this might impair or destroy plaintiff’s business).

138 See, e.g., Capraro v. Lanier Business Prods., Inc., 466 So. 2d 212, 213 (Fla. 1985)
(presuming irreparable injury); A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 406, 302 S.E.2d
754, 761-64 (1983) (finding damages too hard to measure); John G. Bryant Co. v. Sling Testing
& Repair, Inc., 471 Pa. 1, 7-9, 369 A.2d 1164, 1167-68 (1977) (finding “incalculable damage”
and holding that “where a covenant of this type meets the test of reasonableness, it is prima
facie enforceable in equity”).

139 See, e.g., Paul L. Pratt, P.C. v. Blunt, 140 Ill. App. 3d 512, 519, 488 N.E.2d 1062,
1067 (1986) (enjoining solicitation of former employer’s clients); Pure Milk Prods. Coop. v.
National Farmers Org., 64 Wis. 2d 241, 262, 219 N.W.2d 564, 575 (1974) (finding irreparable
injury without giving reasons).

(misleading comparative advertising); Quabaug Rubber Co. v. Fabiano Shoe Co., 567 F.2d 154,
1238, 1255-56 (D. Ariz. 1981) (misleading comparative advertising), aff’d, 681 F.2d 1159 (9th
Cir. 1982); see also RESTATEMENT (SECOND) OF TORTS, supra note 11, § 938 comment b (stating
that injunctions for unfair competition are routine).

141 Lee v. Bickell, 292 U.S. 415, 421 (1934) (enjoining collection of tax on all memoranda
of transfer for corporate securities); accord Howell Pipeline Co. v. Terra Resources, Inc., 454
So. 2d 1353, 1357-58 (Ala. 1984) (enjoining failure to pay for natural gas as it was pumped);
Winrock Enters., Inc. v. House of Fabrics of N.M., Inc., 91 N.M. 661, 664, 579 P.2d 787,
790 (1978) (enjoining breach of a covenant not to compete); see also RESTATEMENT (SECOND)
of TORTS, supra note 11, § 944 comments g, h; Developments, supra note 6, at 1021.

142 See, e.g., Donovan v. Pennsylvania Co., 199 U.S. 279, 304-05 (1905) (enjoining hackmen
from crowding plaintiff’s railroad station to solicit passengers); cases cited supra note 81.

143 See, e.g., Hart v. Wagner, 184 Md. 49, 47, 40 A.2d 47, 51 (1944) (trash fires); Scott v.
Jordan, 90 N.M. 567, 572-73, 661 P.2d 59, 64-65 (Ct. App. 1983) (feed lot); Pate v. City of
violations, and mounting litigation costs might deter plaintiff from suing before they deterred defendant from violating the law.

Some of these cases say that inability to prove any actual damages "often furnishes the very best reason why a court of equity should interfere in cases where the nuisance is a continuous one." This and similar comments clarify an important point: irreparability has to do with the nature of the injury, not its severity or extent. An irreparable injury is one that cannot be cured with money. That an injury has little monetary value is often a cause of irreparability, not an antidote.

The maxim that the law will not take notice of trifles applies to common law as well as equity. If the injury is big enough for courts to remedy at all, there is no reason to say that damages are available but injunctions are not. To the contrary, courts often grant


145 See, e.g., Cragg v. Levinson, 238 Ill. 69, 86, 87 N.E. 121, 127 (1908) ("If the plaintiff's legal remedy may be vexatious, harassing, and hence inadequate, when he recovers substantial damage, reparable or irreparable, injunction is only way to protect plaintiff's right."); A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 407, 302 S.E.2d 754, 763 (1983) (holding that despite failure to show damage, reparable or irreparable, injunction is only way to protect plaintiff's right).

146 See Canal Auth. v. Callaway, 486 F.2d 567, 575 (5th Cir. 1974) ("Assuming that the threatened harm is more than de minimis, it is not so much the magnitude but the irreparability that counts for purposes of a preliminary injunction."); Berin v. Olson, 183 Conn. 337, 341, 439 A.2d 357, 360 (1981) (stating that whether injury is irreparable "depends more upon the nature of the right which is injuriously affected than upon the pecuniary loss suffered") (quoting Burroughs Wellcome & Co. v. Johnson Wholesale Perfume Co., 126 Conn. 596, 604–05, 24 A.2d 841, 845 (1942)); Board of Educ. v. Board of Educ., 112 Ill. App. 3d 212, 217, 445 N.E.2d 464, 469 (1983) ("Irreparable injury does not mean that the . . . injury . . . is great. Rather, it denotes transgressions of a continuing nature, of such constant and frequent recurrence that redress cannot be had at law.").

147 See Christian v. Fry, 108 Colo. 394, 396, 118 P.2d 459, 460 (1941) (applying the maxim to a one-day delay in paying a fifty-cent filing fee); Smith Oil & Ref. Co. v. Department of Fin., 371 Ill. 405, 408–09, 27 N.E.2d 292, 294 (1939) (applying the maxim to reject a claim of tax exemption for oil used in manufacturing, even though minute portions seeped into the finished product); Bristol-Myers Co. v. Lit Bros., 336 Pa. 81, 91, 6 A.2d 843, 848 (1939) (applying the maxim in equity; refusing to treat trading stamps as unlawful price cutting); see also 1 AM. JUR. 2D Actions § 67, at 596 (1962); Annotation, De Minimis Non Curat Lex, 44 A.L.R. 168, 169–74 (1926). Exceptions to the maxim also apply to both law and equity. See, e.g., Reeves v. Jackson, 207 Ark. 1089, 1093, 184 S.W.2d 256, 258 (1944) (holding that the maxim does not apply to trespass); Whittaker v. Stangvick, 100 Minn. 386, 388–89, 111 N.W. 295, 296 (1907) (holding that the maxim does not apply to trespass in either law or equity); Mosley v. National Fin. Co., 36 N.C. App. 109, 113, 243 S.E.2d 145, 148 (holding that the maxim does not apply where construction of a statute is at issue), cert. denied, 295 N.C. 467, 246 S.E.2d 9 (1978); see also D. DOBBS, supra note 4, § 3.8, at 191–94 (discussing nominal damages).
injunctions where plaintiff has suffered no provable damages whatsoever.\footnote{148} Some cases suggest that injury is not irreparable unless it is especially great or serious.\footnote{149} These statements usually appear in cases where defendant would suffer greater hardship from an injunction than plaintiff suffers from defendant’s wrongdoing. Comparing hardships in this manner makes sense,\footnote{150} but the dictum that plaintiff’s injury must pass some threshold of seriousness, more than de minimis, does not.

2. Insolvent Defendants. — Damages are no remedy at all if they cannot be collected, and most courts sensibly conclude that a damage judgment against an insolvent defendant is an inadequate remedy.\footnote{151} However, when plaintiffs sue for specific relief to cure injuries already suffered, courts sometimes say that an uncollectible judgment is adequate.\footnote{152} In fact, these decisions are not based on the adequacy of the remedy but rather on the policy of fairness to other creditors.\footnote{153}

Where a tort is completed, or where plaintiff has paid or performed under a contract and defendant has not yet performed in return,
plaintiff has already suffered his loss. Now he is simply a creditor. If a court orders defendant to repair the harm or perform the contract, plaintiff will be preferred over other creditors as effectively as if he and only he collected his damages in full.\textsuperscript{154} Thus, a bankruptcy court will not order the bankrupt estate to specifically perform a pre-bankruptcy contract,\textsuperscript{155} and it will not order the estate to undo the effects of a pre-bankruptcy tort, except in extraordinary circumstances involving danger to public safety.\textsuperscript{156} But these rules merely protect the bankrupt estate and serve the policy of treating all creditors equally. The bankruptcy court does not pretend to award adequate remedies; its purpose is to give all general creditors equally inadequate remedies.

Threatened injuries are very different. There is no reason for a court to stand aside while an insolvent inflicts harm for which he can never pay. An insolvent can obey an order not to commit a threatened tort, and such an injunction will not prefer plaintiff over other creditors. Even a bankruptcy court will enjoin the estate from committing new torts.\textsuperscript{157} Similarly, insolvent defendants may be able to specifically perform a contract in exchange for the unpaid price, even though they could not pay plaintiff's damages from the breach. Debtors in bankruptcy are given a choice of performing or repudiating such contracts, but again this rule serves bankruptcy policies and has nothing to do with the adequacy of bankruptcy damages.\textsuperscript{158}

3. Immune Defendants. — Government defendants are often immune from suits for damages but not from injunctions. This distinction is central to the Supreme Court's interpretation of the eleventh amendment\textsuperscript{159} and of the scope of federal sovereign immunity.\textsuperscript{160} Many states have similar rules, giving the state more protection from damage awards than from injunctions.\textsuperscript{161} These rules flatly reverse

\textsuperscript{156} See Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 506–07 & 507 n.9 (1986) (holding that a bankrupt estate may not abandon a toxic waste dump without adequately protecting public health and safety from "imminent and identifiable harm").
\textsuperscript{157} See Ohio v. Kovacs, 469 U.S. 274, 285 (1985) (dictum) (noting that anyone in possession of land, including bankrupt and trustee in bankruptcy, must comply with environmental laws).
\textsuperscript{158} See generally Westbrook, supra note 155.
\textsuperscript{160} See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687–90 (1949).
\textsuperscript{161} See, e.g., Bio-Medical Labs. v. Trânior, 68 Ill. 2d 540, 548, 370 N.E.2d 223, 227 (1977) (distinguishing between suits to enforce a claim against the state, barred by sovereign immunity, and suits to prevent the state from violating plaintiff's protected legal interests); Beck v. Kansas
the traditional relationship between legal and equitable remedies. Courts have concluded that damage judgments for violating the law are a greater judicial intrusion into the running of government than injunctions requiring government to comply with the law henceforth.

The nonexistent damage remedy against an immune defendant is plainly inadequate, and the cases so hold. The immune defendant is just like an insolvent defendant, except that there is no concern about preferring plaintiff over other creditors. Thus, unlike a bankrupt estate, government defendants who are immune from damages are subject to reparative and structural injunctions ordering them to undo the consequences of past wrongs.

4. Harms from Interim Uncertainty. — A common form of irreparable injury arises from uncertainty about legal rights. Suits to enjoin enforcement of unconstitutional statutes are a familiar example. If plaintiffs comply with the statute, they forfeit their asserted constitutional rights and perhaps also suffer monetary losses that cannot be recovered in a damage action. They can avoid these losses by violating the law, but only at the risk of substantial penalties if the court rejects their constitutional challenge. The legal “remedy” is to violate the law, wait to be prosecuted, and then defend on the ground that the law is unconstitutional. This is a remedy in the sense that it will sooner or later produce a ruling on the constitutional claim, but it will not avoid the risk of penalties if the constitutional claim is rejected. The specific remedy is an injunction against enforcing the statute or a declaratory judgment that the statute is unconstitutional. Either avoids the need to forfeit rights or risk penalties.

162 See, e.g., Toomer v. Witsell, 334 U.S. 385, 391-92 (1948) (finding no adequate remedy at law when the state was immune from suit for commercial losses that would be incurred by compliance with a statute); American Trucking Ass'ns v. State, 512 N.E.2d 920, 923-25 (Ind. T.C. 1987) (enjoining collection of a disputed tax where refund procedure might not apply); Long v. Kistler, 72 Pa. Commw. 547, 552, 457 A.2d 591, 593 (1983) (granting injunction where there was no provision in the state tax law for challenging discriminatory assessments). But see Black United Fund, Inc. v. Kean, 763 F.2d 156, 159-62 (3d Cir. 1985) (holding that eleventh amendment immunity does not make an injury irreparable; however, mootness, hardship to defendant, preliminary stage of proceedings, and doubt whether plaintiff was entitled to the remedy requested also contributed to the decision).

163 The labels are developed in O. Fiss, supra note 6, at 7. A reparative injunction “compels the defendant to engage in a course of action that seeks to correct the effects of a past wrong,” id.; a structural injunction “seeks to effectuate the reorganization of an ongoing social institution,” id.

164 See Milliken v. Bradley, 433 U.S. 267, 288-90 (1977) (holding that requiring the state to pay for remedial education is a prospective remedy for school segregation, and not damages barred by eleventh amendment).

IRREPARABLE INJURY

The Supreme Court first clearly articulated this type of irreparable injury in *Ex parte Young*,\(^\text{166}\) so I call the choice it presents the *Young* dilemma.\(^\text{167}\) The Court has since granted relief from the *Young* dilemma in scores of cases,\(^\text{168}\) including some where the penalty for violation was nominal.\(^\text{169}\) The Court created some confusion about this form of irreparable injury in the 1940's and again in the 1970's; the best known of these cases are *Douglas v. City of Jeannette*\(^\text{170}\) and *Younger v. Harris*.\(^\text{171}\) *Douglas* generally forbids federal injunctions against enforcement of state laws after the constitutional issue has been authoritatively resolved, and *Younger* generally forbids federal injunctions if state court proceedings are already pending. Each opinion was written in broad terms that cast doubt on whether the risk of prosecution was a form of irreparable injury that justified federal injunctions against enforcement of state law.

But after both *Douglas* and *Younger*, the Court soon reaffirmed the need to grant relief from the *Young* dilemma. In *Steffel v. Thompson*,\(^\text{172}\) the Court again described the *Young* dilemma, this time calling it a Scylla and Charybdis.\(^\text{173}\) The Court made clear that lower courts have general authority to grant relief from the dilemma where no state prosecution is pending, cautioning only that there is no need to enjoin enforcement if a declaratory judgment of invalidity will suffice.\(^\text{174}\) Both declaratory judgment and injunction give specific relief; they differ in the means of enforcement and in the visibility of the threat to personally coerce defendant. The basic insight of *Ex parte Young* remains unchanged: a remedy that does not address the dilemma of risking penalties or forfeiting constitutional rights is not an adequate remedy.

Arguments about federalism are the reason that relief from the *Young* dilemma has been controversial in federal suits to enjoin enforcement of state laws. The same principle has been applied with less controversy to ordinary civil litigation. Suppose *A* claims that *B*’s plans are illegal, and that if *B* goes through with them, *A* will

\(^{166}\) 209 U.S. 123, 161–67 (1908).
\(^{168}\) See id. at 641–59, 664–65.
\(^{169}\) See, e.g., *Two Guys, Inc. v. McGinley*, 366 U.S. 582, 585–86, 589 (1961) (deciding the constitutionality of a statute that imposed a $100 fine for violating one section and a $4 fine for violating another section).
\(^{170}\) 319 U.S. 157 (1943).
\(^{172}\) 415 U.S. 452 (1974).
\(^{173}\) See id. at 462. For the reaffirmation of injunctive relief in the wake of *Douglas*, see *Toomer v. Witsell*, 334 U.S. 385, 391–92 (1948); and *AFL v. Watson*, 327 U.S. 582, 593–95, 599 (1946).
\(^{174}\) See *Steffel*, 415 U.S. at 462–75.
sue for large damages. \( B \) would often prefer to find out whether his plans are illegal without incurring the risk of damage liability. Today \( B \) is likely to sue for a declaratory judgment.\(^{175}\) But \( B \) also has an older option: \( B \) can sue to enjoin \( A \) from suing him.\(^{176}\)

A variation on this scenario produced the dissent quoted at the beginning of this Article. Massachusetts and the United States disagreed over details of the state’s right to reimbursement for Medicaid expenditures. The dissenters thought it adequate that Massachusetts could sue to recover the disputed sums after the United States refused to pay.\(^{177}\) But the majority was “not willing to assume, categorically, that a naked money judgment against the United States” would be an adequate remedy.\(^{178}\) The Medicaid program was continuing and complex, and the state’s “interest in planning future programs . . . may be more pressing than the monetary amount in dispute.”\(^{179}\) The state needed the flexibility of an injunction or a declaratory judgment to settle the dispute for the future as well as the past.

The holding that damage remedies were inadequate created jurisdiction in the United States District Court for Massachusetts, instead of in the Claims Court; it is this collateral consequence that appears to have motivated the dissent.\(^{180}\) Thus, Justice Scalia’s stringent statement of the irreparable injury rule illustrates my thesis: he invoked the rule to justify the jurisdictional result he wanted to reach.

5. Loss of Legitimate Tactical Advantage. — Courts occasionally grant injunctions on the ground that any other remedy would disadvantage plaintiff, either procedurally or tactically. This is the most direct explanation for the rules that courts will specifically enforce agreements to arbitrate\(^{181}\) or to settle litigation.\(^{182}\) If plaintiff bar-

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\(^{175}\) See, e.g., Grain Processing Corp. v. American Maize-Prosds. Co., 840 F.2d 901, 905-06 (Fed. Cir. 1988) (seeking a declaration that plaintiff had not infringed defendant’s patents; relief denied on ripeness grounds); Pain Prevention Lab, Inc. v. Electronic Waveform Labs, Inc., 657 F. Supp. 1486, 1491-92 (N.D. Ill. 1987) (seeking a declaration that plaintiff had not infringed defendant’s patents or trade secrets).

\(^{176}\) See, e.g., Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 502-03 (1959) (seeking an injunction against defendant’s threatened antitrust suit and a declaration that plaintiff had not violated antitrust laws).


\(^{178}\) See id. at 2750-51 (Scalia, J., dissenting) (claiming that “the jurisdiction of the Claims Court has been thrown into chaos”).


gained for arbitration or for compromise, he is entitled to those procedures if he wants them.

More idiosyncratic examples sometimes produce more express statements of the rationale. For example, Justice Kennedy enjoined a local election, pending clearance under the Voting Rights Act.\textsuperscript{183} The election could have been set aside and re-run if plaintiffs ultimately prevailed. But “[p]ermitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect,”\textsuperscript{184} and, in Justice Kennedy’s view, this would be an irreparable injury.\textsuperscript{185}

The principal issue in these and similar cases\textsuperscript{186} is the legitimacy of the tactical advantage plaintiff seeks to preserve. If a court shifts tactical advantage without sufficient justification, it is defendant who may be irreparably harmed.\textsuperscript{187} Litigants and negotiators will always seek to shift burdens of inertia and delay to the other side. For a court to allocate such burdens with an injunction, it must be quite confident that it knows where the burdens belong. In the arbitration and settlement examples, the entitlements come from contracts and from public policy supporting such contracts. In the voting rights example, Justice Kennedy had already found that plaintiffs were likely to prevail, and the whole point of the statute was to overcome a century of inertia with remedies that would actually work. These are substantive issues, and they are often unclear. But when one side is substantively entitled to a procedural or tactical advantage, loss of that advantage is plainly irreparable harm.


\textsuperscript{184} Id. at 1765.

\textsuperscript{185} See id.

\textsuperscript{186} See, e.g., Porter v. Lee, 328 U.S. 246, 250–51 (1946) (holding that a federal court can enjoin an eviction that violates a rent control law, where it would be inconvenient and sometimes impossible for the federal Price Administrator to intervene in state eviction proceedings); James v. Grand Trunk W.R.R., 14 Ill. 2d 356, 366, 152 N.E.2d 858, 864 (protecting plaintiff from litigation in an undesirable forum with resulting pressure for unjust settlement), cert. denied, 358 U.S. 915 (1958); Sanford v. Boston Edison Co., 316 Mass. 631, 633–34, 56 N.E.2d 1, 3 (1944) (ordering specific performance of a contract to check off union dues, thereby avoiding “continuous litigation or long delay”). But see Lewis v. S.S. Baune, 534 F.2d 1115, 1122–23 (5th Cir. 1976) (denying an injunction against settling without the consent of plaintiff’s attorney, because settlement could be set aside and injunction was wrong on the merits).

\textsuperscript{187} See Foxboro Co. v. Arabian Am. Oil Co., 805 F.2d 34, 36–37 (1st Cir. 1986) (denying plaintiff’s request to enjoin a letter of credit payment, with the result that plaintiff could recover the payment only through arbitration in Saudi Arabia; holding that contract gave defendant that advantage); Powell v. National Football League, 690 F. Supp. 812, 817 (D. Minn. 1988) (holding that a preliminary injunction permitting football players to change teams without restriction “would wholly subvert the collective bargaining process”).
C. Cases Refusing To Apply the Rule

When a judge believes that the irreparable injury rule requires a wrong result, he may do what he thinks is right whether or not he can explain it. The court may escape the rule by giving a declaratory judgment instead of an injunction.188 Or it may simply say that this is a case to which the irreparable injury rule should not apply.189 The most common example of this practice has itself grown to the status of a rule: where a statute provides for injunctions against violations, courts say the irreparable injury rule does not apply.190 Sometimes this is explained on the ground that the legislature presumed that any violation would cause irreparable injury.191 Some courts go further, asserting inherent equitable power to enforce legislative policy.192

IV. CASES APPLYING THE IRREPARABLE INJURY RULE

There are very few cases not subject to at least one of these doctrines for finding legal remedies inadequate or inapplicable. If plaintiff has any plausible need for specific relief, she can describe that need as irreparable injury and find ample precedent to support her claim. Yet there are still some cases denying specific relief and invoking the irreparable injury rule to support their decision. The results in the great bulk of these cases have nothing to do with a

188 See, e.g., Steffel v. Thompson, 415 U.S. 452, 462-75 (1974) (authorizing federal courts to declare that it would be unconstitutional to enforce state statutes); Exxon Corp. v. FTC, 411 F. Supp. 1362, 1376 & n.56 (D. Del. 1976) (declaring that an administrative agency's discovery order violated plaintiff's rights).

189 See, e.g., In re Martin-Trigona, 737 F.2d 1254, 1262 (2d Cir. 1984) (holding that the rule does not apply to the issuance of an injunction against repeated frivolous litigation), cert. denied, 474 U.S. 1062 (1986); Gillette v. Pepper Tank Co., 694 F.2d 369, 373 (Colo. Ct. App. 1984) (holding that equitable relief will be granted despite the existence of an adequate remedy at law, where equity is more consistent with "right, justice, [and] morality" (quoting Brewster v. Lanyon Zinc Co., 140 F. 801 (8th Cir. 1905) (brackets inserted by state court)); Petraboro v. Zontelli, 217 Minn. 536, 554-55, 15 N.W.2d 174, 184 (1944) (stating that the irreparable injury rule has been modified in cases of violation of riparian rights).


preference for legal remedies and can be explained on other grounds. These are analyzed in Part V.

There remain a handful of cases that can be explained on no ground other than the traditional understanding of the irreparable injury rule. These are cases in which plaintiff seeks some equitable remedy, and is remitted to a legal remedy instead, on the ground that the legal remedy would be adequate. These opinions do not reveal any special difficulty with the equitable remedy or any judicial hostility to the merits of plaintiff's case. There are remarkably few of these cases — fewer than I expected to find when I began this research — but they do occur. These remnants of the irreparable injury rule do not make a persuasive case for retaining the rule.

In a few of these cases, plaintiff is remitted to some legal form of specific relief, such as replevin, that will accomplish exactly what equity could have accomplished. The remedies may differ in means of enforcement, and sometimes these differences are important. But these cases do not present a choice between specific and substitutionary relief — plaintiff gets specific relief either way.

Most of the remaining cases refuse specific performance of contracts to sell goods. In some, it appears that the goods are fungible and the market is orderly; so far as the opinion reveals, plaintiff can easily and immediately exchange money damages for identical goods. Where that is true, the distinction between specific and substitutionary relief disappears. Unless the opinions are omitting critical facts, it is hard to see why plaintiff seeks specific performance in such a case, why defendant resists it, or why we have a rule that encourages the parties to litigate it.

In these cases, the legal remedy really is just as good as the equitable remedy. Either way, plaintiff gets identical goods, and with damages for any difference in price, he gets the goods at the same effective cost. If he measures damages by the difference between the contract price and the cover price, the amount of damages does not even depend on anyone's estimate of value. These cases arise either from bad lawyering or from critical undisclosed facts. If critical facts that drive the litigation are omitted from the opinion, it can only be

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193 See, e.g., Oxequip Health Indus., Inc. v. Canalmar, Inc., 94 Ill. App. 3d 955, 419 N.E.2d 625 (1981) (denying a preliminary injunction against transfer of land where *lis pendens* would be equally effective); Alger v. Davis, 345 Mich. 635, 76 N.W.2d 847 (1956) (denying a constructive trust and receivership because replevin would be an adequate remedy to recover personal property); Repka v. American Nat'l Ins. Co., 143 Tex. 542, 550, 186 S.W.2d 977, 981-82 (1945) (reversing an injunction against one of two parallel suits, because res judicata would eliminate the risk of multiple litigation).

because the irreparable injury rule has diverted the court’s attention from the real issue.

These cases shade into those where the goods are replaceable only with difficulty, or only with similar but not identical goods. Plaintiff argues that cover is difficult or impossible; the court finds that cover is possible and damages are adequate. Where cover is difficult, a majority of cases grant specific relief, but a substantial minority do not. So long as the rule persists that damages are an adequate remedy for breach of a contract to sell goods that are available elsewhere, some cases will fall near the line and some of these will be decided each way. We can argue whether this line is worth drawing and litigating over, but for now it survivés. It is the principal remnant of the irreparable injury rule.

In the very few cases remaining, damages are plainly not as good for plaintiff as specific relief, but the court fails to recognize the inadequacy or considers it insufficient to satisfy the rule. Plaintiff is worse off for being remitted to damages, and the opinion does not indicate any way in which defendant or the judicial system is better off. Unless there are countervailing considerations that do not appear in the opinions, the irreparable injury rule leads the court to a bad result in these cases. Remarkably, I have found only three modern cases of this sort. Surely there are more, but I have not found them. Only one appeared in the original sample of four hundred cases.

The most recent of these cases is City Centre One Associates v. Teachers Insurance & Annuity Association. The court refused to specifically enforce a contract to borrow money, reasoning that because the lender wanted only interest, damages were wholly adequate. But the lender’s expected return included a share of the profits in the real estate to be acquired with the loan proceeds, a sum that depended on long-term developments and therefore would have to be estimated in a damage award. Ample authority holds that long-term profits are too difficult to measure and that a damage award is therefore inadequate. The lender’s fears of a low estimate apparently exceeded its hopes of a high estimate, because it sought specific performance instead of damages. The court forced the lender to bear the risk of a low estimate, for reasons that are not apparent but that it explained in terms of the “common law reluctance to order specific performance.”

The second example is Sadat v. American Motors Corp., a suit in state court under the federal Magnuson-Moss Warranty Act.

195 See supra notes 120–22.
196 See supra note 119.
198 See supra pp. 712–14.
199 City Centre One, 656 F. Supp. at 662.
Defendant's dealer had failed in seven attempts to repair serious defects in plaintiff's fully warranted new car. On these facts, the statute required that defendant either refund plaintiff's money or replace the car without charge, at plaintiff's election.202 Plaintiff sued for an injunction ordering defendant to deliver a new car or its cash equivalent. The court dismissed the complaint for failure to plead irreparable injury.

Plaintiff's legal remedy was to recover the value of the car as warranted, less the actual value of the car on the date of purchase.203 The legal remedy is adequate in theory, but the problem is proving the value of the defective car. That should not be an insuperable obstacle, but neither is it easy.204 It adds a substantial additional issue to every case, it makes some otherwise undefendable cases worth defending, and it may require plaintiff to hire an expert witness whose fees are often not recoverable.205 The risk of erroneous valuation bears heavily on plaintiff with a single case, but not on the manufacturer who can expect errors to balance out over many cases.206 The uneven allocation of risk may be expected to hold down settlement values. The perceived ineffectiveness of contract damage remedies had led to a wave of consumer protection legislation,207 including the federal refund-or-replace remedy. When the court remitted plaintiffs to the damage remedy, it pro tanto repealed the statute.

The final example is Wiles v. Wiles.208 Defendant advertised an estate sale, including several items of livestock and farm equipment belonging to plaintiff. Some of these items were on defendant's land, some on plaintiff's. Plaintiff sought an injunction against the sale of his goods and against the trespass required to sell the items that were on his own land. Plaintiff did not claim that the items were unique or of particular value to him. The court dismissed, holding that detinue would be an adequate remedy for the loss of the goods,209 that damages would be adequate for the trespass,210 and that because

202 See id. § 2304(a).
204 See Muris, supra note 8, at 1064 (arguing against specific performance where damages are easy to measure, but conceding that measurement may be difficult where expert appraisal is required); see also Sadat, 104 Ill. 2d at 119, 470 N.E.2d at 1004 (Simon, J., dissenting).
208 134 W. Va. 81, 58 S.E.2d 601 (1950).
209 See id. at 88-89, 58 S.E.2d at 605.
210 See id. at 92-93, 58 S.E.2d at 607.
defendant would trespass only once, there was no danger of a multi-

plicity of suits. 211

The case unambiguously holds that damages are an adequate rem-

edy for the trespass. Plaintiff might have recovered the goods them-

selves in detinue, but the court held that damages would be adequate

if the goods were damaged or destroyed. 212 The court did not note

the risk that the goods might pass into the hands of a bona fide

purchaser; presumably it would have said that damages would be

adequate in that event as well. The court did not consider whether

plaintiff could use his damage recovery, based on depreciated value,
to replace the items.

Plaintiff alleged that "physical combat" was the only way to save

his goods, and that he had neither the desire nor the capacity for

that. 213 The court appeared unconcerned about the risk of physical

confrontation. The court acknowledged that plaintiff could not re-

cover for mental suffering, but said that equity could not remedy

mental suffering either. 214 It failed to see that preventing the sale

would prevent most of the mental suffering.

Wiles is the classic case contemplated by the quotation that opened

this Article. The law stood by and let a wrong be committed, remit-
ting plaintiff to compensation after the fact. Plaintiff is hurt, and it

is hard to see who is benefited. Perhaps the court wanted a jury trial

on the issue of ownership, 215 but it did not mention that. Perhaps it
did not believe plaintiff's allegations, but it did not hint at that either.
The opinion is grounded solely on the irreparable injury rule.

These three cases — City Centre, Sadat, and Wiles — are consis-
tent with the formal statement of the irreparable injury rule, but

inconsistent with the great mass of cases. They are aberrational re-

sults of the rhetoric of irreparable injury. They show that if many
judges keep reciting a dead rule, some judges will actually apply it.
But most judges recite it only to justify decisions reached on other

grounds.

V. REAL REASONS FOR DENYING PLAINTIFF'S CHOICE OF REMEDY

In this Part, I identify the rules that courts actually use to decide
the cases nominally subject to the irreparable injury rule. My thesis

is simply this: whenever a court cites the irreparable injury rule and
denies the remedy that plaintiff seeks, there is some other reason for

211 See id. at 93, 58 S.E.2d at 607.
212 See id. at 88–89, 58 S.E.2d at 605.
213 See id. at 84, 58 S.E.2d at 603.
214 See id. at 89, 58 S.E.2d at 605.
the decision — the operative rule or the real reason. The relevant policy has nothing to do with a general preference for legal remedies.

I have already identified two operative rules. Except for certain privileged claims, courts do not use the contempt power to collect money.216 Similarly, courts do not grant specific relief against insolvent defendants where the effect would be to prefer plaintiff over other creditors.217 These are important rules for choosing among remedies, but neither has anything to do with the adequacy of legal remedies or with a preference for substitutionary relief over specific relief.

Several of the real reasons for denying specific relief are embodied in familiar doctrines, such as balancing the equities or refusing to enforce personal service contracts. I obviously do not claim to have discovered that these doctrines are often reasons for denying specific relief. What I have discovered is that courts find plaintiff’s legal remedy adequate only when one of these other reasons justifies the decision, and that the rhetorical role of the irreparable injury rule varies with each real reason for denying specific relief.

Some defenders of the rule might deny that I have identified a set of operative rules capable of replacing the irreparable injury rule, and claim instead that I have merely identified the policy reasons for the traditional rule. That is, perhaps the irreparable injury rule survives, and what I call the real reasons for decision are its modern justifications. The Shreve, Rendleman, and Yorio defenses of the traditional rule may be read in this way.218 If they would agree that the policy reasons for the rule should control and limit its application, then the difference between us is one of characterization rather than substance. They see a single broad rule serving multiple policies; I see several narrower rules, each serving its own policy. Only one of these characterizations fits the cases.

The irreparable injury rule is stated as a rule of general applicability for choosing between legal and equitable remedies, expressing a preference for legal remedies over the whole range of litigation. Even if it is shorthand for a variety of policies that interact in a variety of ways, it makes little sense to state the rule in such general terms unless one or more of its policies applies to substantially all cases. But none of the underlying policies apply to the vast range of cases described in Part II. Each of the operative rules that I identify applies to a specific and limited set of cases. It is helpful to describe

216 See supra pp. 698–99.
217 See supra pp. 716–17.
218 See E. Yorio, supra note 30; Rendleman, supra note 5; Shreve, supra note 14, at 394–95 (suggesting that the irreparable injury rule should be part of “a framework of considerations that is sensitive to the way factors in the injunction dispute will register and combine differently in each case”).
operative rules for each of these sets of cases; it is simply misleading to describe in global terms a rule that is far from global.

Even within their scope, the operative rules do not express any consistent preference for legal remedies. The real reasons for decision are to avoid difficulties in particular cases, and these difficulties are not limited to equity. Some operative rules prefer legal remedies, but a few prefer equitable remedies, and others use different categories altogether. These rules cannot be derived from any coherent version of the irreparable injury rule, and the irreparable injury rule cannot account for the results. Irreparable injury rhetoric has survived only as a label, to be affixed to opinions after the court has identified the appropriate remedy on other grounds.

A. Preliminary Relief

Far and away the most common occasions for irreparable injury opinions are motions for preliminary relief: temporary restraining orders, preliminary injunctions, and appointments of receivers. These cases have almost nothing in common with the choice of remedy at final judgment. If preliminary relief is thought of as a completely separate category, with a completely different meaning for "irreparable," the phrase "irreparable injury" can actually be useful here.

The reasons a court may be cautious in awarding preliminary relief are clear. The court must act without a full trial, sometimes with only sketchy motion papers and affidavits to guide its decision. A preliminary order may inflict serious costs on a defendant who has had little time to prepare a defense or to present all that he could have prepared. Plaintiff faces similar procedural handicaps; this makes the proceeding more equal but not more reliable. Acting without a full presentation from either side and without time for reflection, the court is more likely to err.

The legal system could avoid these risks by barring preliminary relief altogether, but that would impose intolerable costs on plaintiffs. The inevitable solution is a balancing test that takes account of the harm to plaintiff if preliminary relief is erroneously denied and the harm to defendant if preliminary relief is erroneously granted.

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The policy here is not fear of specific or equitable relief, but fear of preliminary relief. This is shown most clearly by the nearly absolute rule against preliminary orders to pay damages or debts. This rule is sometimes explained as a corollary of the irreparable injury rule: if plaintiff seeks only money, damages are presumed to be as adequate after final judgment as before. Whatever the explanation, the fact is that courts will grant preliminary specific relief, but they will not grant preliminary substitutionary relief. This pattern belies any general preference for substitutionary relief.

The language of irreparable injury figures prominently in the various formulations of the test for preliminary relief, but it has a different meaning than at the permanent injunction stage. First, there is a temporal difference that is obvious and uncontroversial: the only injury that counts is injury that cannot be prevented after a more complete hearing at the next stage of the litigation.

Second, and more important, courts at the preliminary relief stage routinely find that damages will be an adequate remedy for injuries that would be considered irreparable after a full trial. Pending

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224 See, e.g., Enercons Virginia, Inc. v. American Sec. Bank, 720 F.2d 28 (D.C. Cir. 1983) (per curiam) (vacating a temporary restraining order ordering defendant to honor cashier's check); In re Arthur Treacher's Franchisee Litig., 689 F.2d 1137, 1144-45 (3d Cir. 1982) (reversing a preliminary award of past due royalties); Compute-a-Call, Inc. v. Telleson, 285 Ark. 355, 687 S.W.2d 129 (1985) (reversing a temporary injunction ordering payment of money). There is a little-recognized exception in the cases enjoining termination of a stream of payments to which plaintiff is specifically entitled. Most of these cases protect welfare and similar benefits; they are essential to implement the right to a pretermination hearing announced in Goldberg v. Kelly, 397 U.S. 254 (1970). See, e.g., Sockwell v. Maloney, 554 F.2d 1235, 1237 (2d Cir. 1977) (enjoining termination of foster care benefits). Sometimes such injunctions are issued in other contexts as well. See, e.g., Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 399 Mass. 640, 641, 506 N.E.2d 140, 140 (1985) (granting a preliminary injunction to make payments on an agreement to build a nuclear power plant).

225 For the presumption of adequacy, see Arthur Treacher's, 689 F.2d at 1145-46; Conway v. Stratton, 434 So. 2d 1197, 1198-99 (La. Ct. App. 1983). For a showing that irreparable injury can result from delay in collecting damages, see Wasserman, Equity Transformed: Preliminary Injunctions To Require the Payment of Money, 70 B.U.L. Rev. (forthcoming 1990).

226 See, e.g., Public Serv. Co. v. Town of W. Newbury, 835 F.2d 380, 382–83 (1st Cir. 1987) (refusing to consider the effect of defendant's actions on plaintiff's licensing proceeding, where a claim for a permanent injunction against defendant could be heard before the licensing proceeding would be decided); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 386 (7th Cir. 1984) ("Only if he will suffer irreparable harm in the interim — that is, harm that cannot be prevented or fully rectified by the final judgment after trial — can he get a preliminary injunction."); Sun Oil Co. v. Whitaker, 424 S.W.2d 216, 218 (Tex. 1968) (holding that a plaintiff seeking a preliminary injunction must show "probable right on final trial . . . and probable injury in the interim").

227 See, e.g., Loretangeli v. Critelli, 853 F.2d 186, 196 n.17 (3d Cir. 1988) (holding that defendant's insolvency makes monetary damages irreparable at final judgment, but not at the preliminary injunction stage); Town of W. Newbury, 835 F.2d at 381 (emphasizing the difference between preliminary and permanent injunctions against interference with real estate); Doster v. Estes, 126 Mich. App. 497, 501, 507-10, 337 N.W.2d 549, 551, 554-55 (1983) (denying prelim-
trial, plaintiff must accept damages even though he cannot use them to replace the specific thing he has lost, and he must accept estimates of damage that would be considered too difficult to measure if a permanent injunction could avoid the need to measure them.

A good example of the difference comes from the motions for preliminary and permanent injunctions ordering the National Football League (NFL) not to interfere with the transfer of the Raiders football team from Oakland to Los Angeles. The Ninth Circuit reversed a preliminary injunction for lack of irreparable injury. It affirmed a permanent injunction without even discussing irreparable injury. Both results are correct, although the preliminary injunction opinion does not fully state the arguments that make it correct.

The Los Angeles Coliseum Commission requested a preliminary injunction that would order the NFL to allow the Raiders to play in Los Angeles pending trial. There is no doubt that the injury shown at the preliminary injunction hearing would have been considered irreparable under the standards for permanent injunctions. Damages could not be used to replace the specific thing the Coliseum was about to lose. In finding that this irreplaceable loss was not irreparable, the Ninth Circuit noted that the Coliseum had college football, that it would not go broke without the Raiders, and that it had not proved its allegation that delay would kill the deal permanently. These observations go to the severity and duration of the injury, and it is reasonable to balance them against defendant's interest in a full trial. But there is no pretense that without a preliminary injunction the Coliseum could ever be placed in the position it would have occupied.

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228 See, e.g., Chisom v. Roemer, 853 F.2d 1186, 1188-89 (5th Cir. 1988) (vacating a preliminary injunction of a judicial election, notwithstanding a possible violation of the Voting Rights Act); James A. Merritt & Sons v. Marsh, 791 F.2d 328, 331 (4th Cir. 1986) (vacating a preliminary injunction that prevented the government from suspending the eligibility of contractors to bid on government contracts); Shodeen v. Chicago Title & Trust Co., 162 Ill. App. 3d 667, 672-75, 515 N.E.2d 1339, 1343-45 (1987) (refusing to grant an injunction requiring defendant to convey title deeds to a developer).

229 See, e.g., Baker's Aid v. Hussmann Foodservice Co., 830 F.2d 13 (2d Cir. 1987) (holding that a court can adequately measure lost profits from breach of a covenant not to compete); Proimos v. Fair Automotive Repair, Inc., 808 F.2d 1273, 1277 (7th Cir. 1987) (holding that a court can adequately measure lost profits from competition by former franchisees); Allstate Amusement Co. v. Pasinato, 96 Ill. App. 3d 306, 308-10, 421 N.E.2d 374, 375-76 (1981) (holding that a court can adequately measure lost profits from diversion of an employer's business opportunity).

230 See Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1202-03 (9th Cir. 1980).


232 On replaceability as the dominant test of irreparable injury, see pp. 703-14 above.

233 See Los Angeles Memorial Coliseum Comm'n, 634 F.2d at 1202-03.
but for the wrong. But for the NFL's antitrust violation, the Coliseum would have had college football plus the Raiders, and it would have had the Raiders immediately instead of later. An accurate explanation of the result would have been that doing without the Raiders for two seasons is irreparable injury, but not an injury severe enough to justify a preliminary injunction in light of the costs to defendants and the uncertain probability of success on the merits.

The Coliseum also alleged financial losses that would be difficult to measure. The Coliseum alleged lost profits from ticket sales and concessions, lost market value and good will, and lost financing for stadium renovations. The court said that all of these were monetary injuries that could be remedied by damages. The court did not explain how it planned to measure these damages.

The court could measure these damages if it had to, and it eventually did. But if liability were established, any court would issue the permanent injunction and let the Raiders move rather than litigate the damage issues. The trial court in the Raiders case did grant a permanent injunction and the Ninth Circuit affirmed. Then came a nine-month jury trial and another appeal to determine the damages suffered by the Coliseum and the Raiders during the two years the Raiders were prevented from moving to Los Angeles.

The Raiders case is an unusually clear illustration of the different meanings of "irreparable," because the stakes were high enough to support separate appeals of the preliminary injunction, the permanent injunction, and the damage award. But there is nothing unusual about the two meanings of irreparable injury in the case. It is universally true that courts are more willing to grant permanent injunctions than preliminary injunctions, and a common way to explain the results is to find no or insufficient irreparable injury at the prelim-

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234 Even short-term losses are irreparable if they are irreplaceable. See Carson v. American Brands, Inc., 450 U.S. 79, 88-89 (1981) (finding that delay in receiving a promised transfer or promotion to a better job might cause "serious or irreparable harm"); Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion) (stating that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); Van Buren Public School District v. Wayne Circuit Judge, 61 Mich. App. 6, 232 N.W.2d 278, 284 (1975) (holding that an administrative remedy was inadequate because it "was not immediately available, a primary consideration in passing on the adequacy of any legal remedy" (emphasis in original) (footnote omitted)).

235 See Los Angeles Memorial Coliseum Comm'n, 634 F.2d at 2202.

236 See supra pp. 711-14 (discussing cases on hard-to-measure damages).


238 For another one-case example, compare ABA Distribs., Inc. v. Adolph Coors Co., 661 F.2d 712 (8th Cir. 1981), reversing a preliminary injunction against termination of a beer distributorship, with ABA Distribs., Inc. v. Adolph Coors Co., 542 F. Supp. 1272, 1293 (W.D. Mo. 1982), granting a permanent injunction, and interpreting the court of appeals' opinion to require that result if plaintiff succeeded on the merits.
inary injunction stage. Preliminary injunctions are hotly contested and often denied in substantive areas where all injury is irreparable and permanent injunctions are routine, such as intellectual property,239 civil rights and civil liberties,240 and environmental law.241

The irreparable injury rule has teeth at the preliminary injunction stage because it still serves a purpose there. At the preliminary injunction stage, the merits are unresolved, plaintiff may be undeserving, and it is still possible that plaintiff will not get any remedy at all. Defendant has legitimate interests in a full hearing and in freedom to act in ways not yet shown to be unlawful. These interests coincide with the court's interest in avoiding error and being fair to both sides. These interests may also coincide with less savory interests, such as defendant's desire to force a cheap settlement by means of delay and litigation costs. Unfortunately, the court may not be able to screen out such interests until it hears the merits.

At the permanent injunction stage, the merits are resolved, defendant is a known wrongdoer, and the court has eliminated the option of no remedy at all. Now the choice is between damages and injunction, and in most cases, neither the court nor the defendant prefers a damage remedy. Moreover, the court has heard the merits and is now in a position to assess the legitimacy of any reasons defendant does offer for preferring damages. Where damages are a better remedy, the court can usually explain why. But as we shall see, it may also invoke the irreparable injury rule.

B. Deference to Other Tribunals and Branches of Government

The irreparable injury rule is often invoked to serve its original purpose of allocating jurisdiction among decisionmakers.242 Litigants ask courts to enjoin arbitrations243 and administrative agency pro-


241 See, e.g., Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987) (“Environmental injury, by its nature, can seldom be adequately remedied by money damages”; preliminary injunction reversed because the probability that the environment would be damaged was low); Citizens Comm. v. Volpe, 297 F. Supp. 804, 807 (S.D.N.Y. 1969) (holding that loss of homes, businesses, and schools due to highway construction can be compensated in damages).

242 See supra pp. 699-700.

243 See, e.g., Board of Educ. v. Warren Township High School Fed’n of Teachers Local 504, 128 Ill. 2d 155, 538 N.E.2d 524, 528-29 (1989) (reversing an injunction against arbitration of a labor grievance, on the ground that an administrative agency had exclusive jurisdiction
ceedings; they ask federal courts to enjoin proceedings in state courts; they ask state courts to enjoin proceedings in other jurisdictions; they ask courts with equity powers to prevent civil or criminal enforcement proceedings in the same court system; they ask appellate courts to prevent proceedings in trial courts; and they ask courts to restrain the collection of taxes and enjoin improper conduct by the executive branch.

over the question whether the grievance was arbitrable; cf. International Ass'n of Machinists Dist. Lodge No. 19 v. Soo Line R.R., 850 F.2d 368, 380–82 (8th Cir. 1988) (reversing an injunction against an employer, on the ground that a binding arbitration agreement governed the dispute), cert. denied, 109 S. Ct. 1118 (1989).


See, e.g., Lipari v. Owens, 70 N.Y.2d 731, 732–33, 514 N.E.2d 378, 379, 510 N.Y.S.2d 958, 959 (1987) (denying a writ of prohibition to correct pre-trial error where an appeal is an adequate remedy); State ex rel. P.O.B., Inc. v. Hair, 23 Ohio St. 3d 50, 491 N.E.2d 306 (1986) (affirming a decision to deny mandamus to prevent a trial judge from exceeding her jurisdiction, where an appeal was an adequate remedy); see also City of Lincoln v. Cather & Sons Constr., Inc., 206 Neb. 10, 13–16, 290 N.W.2d 798, 801–02 (1980) (dismissing a suit in district court to enjoin a suit in county court).

See, e.g., California v. Grace Brethren Church, 457 U.S. 393, 407–19 (1982) (refusing to enjoin enforcement of an unemployment tax or declare its constitutionality as applied to religious schools); Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 512–28 (1981) (holding that a suit for a refund would be an adequate remedy for a disputed payment of property tax, even though the refund would not include interest and would come after a two-year delay); American Trucking Ass'ns v. Gray, 280 Ark. 258, 259–60, 657 S.W.2d 207, 208 (1983) (refusing to enjoin the distribution of state motor fuel tax from the state treasury to local governments).

Sometimes these litigants seek to prevent irreparable injury that cannot be prevented by any procedure available in the other forum; sometimes they seek a quicker resolution than the other forum can provide; sometimes they hope to move the dispute to a friendlier forum. These motivations overlap and the same litigant may act on all of them, but for tactical reasons he will emphasize the inadequacy of the other forum's remedy.

The results in these cases depend largely on the relationship between the court and the other decisionmaker. When the relationship between the two tribunals is unsettled, the cases are often argued in terms of irreparable injury. The fundamental issue is whether and how much the court will defer to the other tribunal. If necessary to achieve the desired degree of deference, the court will distort its analysis of irreparable injury. Eventually the relationship between the tribunals will become settled by a new set of rules. Subsequent cases can be decided by reference to these rules, with or without mentioning irreparable injury. Sometimes the rules that emerge require case-by-case balancing of the adequacy of plaintiff's remedy against the costs of intervention. But often, they are simply flat rules for or against intervention in various situations.

1. Federal Courts and State Courts. — Federal suits to enjoin enforcement of unconstitutional state laws have cycled through this sequence three times. The need for such injunctions first received sustained attention as a result of judicial interference with economic regulation at the turn of the century. The Court first settled the issue in *Ex parte Young*, which found state remedies inadequate and cleared the way for routine federal injunctions against enforcement of unconstitutional state laws.

The issue was reopened in the wake of the New Deal. Judges appointed to overrule the economic due process cases also attacked the remedy associated with those cases. But the injunction against enforcing state law was not just a tool of laissez-faire; it was equally important to the protection of emerging civil and political constitutional rights. There was a series of inconsistent cases in the early forties, but the reasoning of *Ex parte Young* was reestablished by

251 See, e.g., *McKart v. United States*, 395 U.S. 185, 192-201 (1969) (excusing failure to exhaust administrative remedies where the benefits of exhaustion would have been limited and the consequence of requiring exhaustion would be the loss of the only defense to criminal prosecution); *Public Util. Comm'n v. Pedernales Elec. Coop.*, 678 S.W.2d 214, 220 (Tex. Ct. App. 1984) ("[C]orrect application of the exhaustion doctrine in specific circumstances depends upon a balancing of the underlying purposes of the doctrine against the injury claimed by the applicant for relief in equity." (emphasis in original)), writ refused, no reversible error.

252 For a detailed review of the cases, see Laycock, cited above in note 167, at 641-64.

253 250 U.S. 123, 161-68 (1908).

1948,255 That resolution lasted until the expansion of section 1983 liability256 and the pressures of civil unrest in the sixties reopened the issue just in time for the arrival of the Burger Court.257

From 1971 to 1977 the Supreme Court decided at least thirty-four cases involving federal interference with state law enforcement.258 In most of these cases, the majority relied on the irreparable injury rule to reinforce its view that deference to state courts was more important than federal protection of federal rights. Once again, the Court found that defense of a pending prosecution was an adequate remedy for most constitutional claims, and that there was therefore no irreparable injury justifying a federal injunction.259 As I have argued elsewhere, the Court distorted its analysis of irreparable injury, ignoring injury that it recognized in cases where no prosecution was pending.260 But the rhetoric of irreparable injury served the Court's purposes. The rules became settled again, the adversaries learned to play by the new rules, and the flood of litigation slowed. The more recent cases on federal injunctions against state laws deal mainly with marginal issues and details of implementation.261

The new rules, known as the Younger rules,262 are easily summarized. Litigants who avoid being prosecuted can challenge state

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257 See Younger v. Harris, 401 U.S. 37, 43–54 (1971) (holding that except in extraordinary circumstances, a federal court may not enjoin enforcement of a state law at the request of a litigant against whom a state prosecution is pending); Dombrowski v. Pfister, 380 U.S. 479, 483–89 (1965) (stating that an injunction against enforcement of state law is exceptional, but is available where the risk of prosecution would chill first amendment rights).

258 The cases are collected in Laycock, cited above in note 165, at 193–94 nn.1–3.

259 See Laycock, supra note 167, at 684–85 (concluding, after a detailed review of the cases, that only Chief Justice Stone ever acknowledged that refusal to enjoin enforcement of state law remitted federal plaintiffs to a state remedy that could not fully protect asserted constitutional rights).

260 See Laycock, supra note 165, at 199–222.

261 See Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 10–17 (1987) (refusing to enjoin enforcement of a state civil judgment pending appeal in state court); Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 625–29 (1986) (refusing to enjoin state administrative proceedings against a religious school that asserted a first amendment right to be wholly free from the agency's jurisdiction); In re Special March 1981 Grand Jury, 753 F.2d 575, 581 (7th Cir. 1985) (refusing to enjoin the use in state enforcement proceedings of business records supplied to a federal grand jury and then turned over to the state).

262 The name comes from a leading case, Younger v. Harris, 401 U.S. 37 (1971).
laws in federal court and get preliminary injunctions against threatened state prosecutions. Litigants who violate state law before obtaining such an injunction may be prosecuted in state criminal court, and if that happens, federal declaratory and injunctive remedies are barred. These rules do not require balancing; they flatly bar specific relief in certain situations.

The Younger rules apply to declaratory judgments as well as to injunctions, even though the irreparable injury rule historically applied only to injunctions. The Younger rules may eventually apply to damage actions; that extension has already been made with respect to federal challenges to state taxation. Such extensions make sense to the extent the underlying rules do, because these are rules about relations between state and federal courts. They are not about relations between law and equity, and the historical scope of the irreparable injury rule is irrelevant.

As the rules defining the relationship between state and federal courts became settled again, federalism arguments came to dominate the opinions, and irreparable injury rhetoric faded to an undeveloped factor in the litany of "equity, comity, and federalism." Sometimes "equity" disappeared altogether, and the litany was shortened to "comity and federalism." The majority had used the irreparable injury rule as a prop in its attempt to change the federal-state relationship.

263 See Steffel v. Thompson, 415 U.S. 452, 460–75 (1974) (holding that a federal declaratory judgment is available even if an injunction is not).

264 See Doran v. Salem Inn, Inc., 422 U.S. 922, 930–31 (1975) (affirming a preliminary injunction because the practical effect of an injunction is "virtually identical" to that of a declaratory judgment but there is no remedy of preliminary declaratory judgment).

265 See Hicks v. Miranda, 422 U.S. 332, 348–50 (1975) (holding that federal injunctive relief is barred by a subsequent state prosecution filed before substantial proceedings on the merits in federal court); Roe v. Wade, 410 U.S. 113, 125–27 (1973) (holding that a pending state prosecution for one past violation bars a federal injunction against enforcement of a statute with respect to contemplated future violations); Younger v. Harris, 401 U.S. 37, 43–54 (1970) (holding that a federal court cannot enjoin a pending state prosecution absent extraordinary circumstances).

266 See Doran v. Salem Inn, Inc., 422 U.S. 922, 929 (1975) (holding that a federal declaratory judgment was barred by a state prosecution filed while the federal case was in an "embryonic stage"); Samuels v. Mackell, 401 U.S. 66, 73 (1971) (denying declaratory judgment under rules applicable to injunctions, because "ordinarily . . . the practical effect of the two forms of relief will be virtually identical").


268 See Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 113–17 (1981) (refusing to entertain a suit for damages from unconstitutional administration of state tax laws).


When settled rules were no longer under active attack, the prop was not needed. The emphasis in the opinions shifted to the real grounds for decision, with their greater explanatory power.

2. Courts and Administrative Agencies. — Litigants file similar suits to bypass administrative agencies. Courts generally refuse relief, and the rules governing these decisions are mature enough to be stated independently of the irreparable injury rule. Courts say that litigants must first exhaust administrative remedies, or that they must invoke the primary jurisdiction of the agency. The usual distinction between these two formulations is that pending administrative proceedings must be exhausted, and that primary jurisdiction must be invoked when no administrative proceeding is pending. The two rules serve quite similar policies, and I use "exhaustion rules" to refer to them together.

The exhaustion rules began as an application of the irreparable injury rule: courts would not issue an injunction if the administrative remedy would be adequate. But as courts developed experience in dealing with agencies, the exhaustion rules took on a life of their own. Precedents that governed the relationship between law and equity would not produce the right results if applied directly to the relationship between courts and agencies. First, the exhaustion rules have a broader scope: they apply at law as well as in equity, and to declaratory judgments as well as injunctions. Second, the exhaus-


274 See Berger, Exhaustion of Administrative Remedies, 48 YALE L.J. 981, 985-88, 1006 (1939) ("From the beginning, the exhaustion rule was formulated in terms of equity jurisdiction . . . ." (emphasis in original)).

275 See, e.g., McGee v. United States, 402 U.S. 479, 483-91 (1971) (barring a defense to a criminal prosecution because the defendant failed to exhaust administrative remedies); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51 n.9 (1938) ("[B]ecause the rule is one of judicial administration — not merely a rule governing the exercise of discretion — it is applicable to proceedings at law as well as suits in equity."); J. & J. Enters., Inc. v. Martignetti, 369 Mass. 535, 539, 341 N.E.2d 645, 648 (1976) (holding that where an agency cannot award damages, an action for damages should be stayed rather than dismissed, pending plaintiff’s exhaustion of administrative remedies).

276 See, e.g., Abbott Laboratories v. Gardner, 387 U.S. 136, 146 (1967) ("[A] court would not grant injunctive or declaratory judgment relief unless the appropriate administrative pro-
tion rules rarely pose a choice between specific and substitutionary relief. Rather, they usually pose a choice between immediate judicial relief on a de novo judicial record, and much later judicial relief on an administrative record. The same permanent remedial options are usually available at either stage, but the exhaustion rules often foreclose important possibilities for preliminary relief.

Most important, the exhaustion rules must take account of the relative responsibility and expertise of court and agency. When Kenneth Culp Davis attempted to reconcile the conflicting decisions on exhaustion, he concluded that the "key factors are three: extent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction."

Louis Jaffe emphasized a fourth factor in primary jurisdiction cases: the pervasiveness of the agency's regulation.

Davis' first two factors resemble the irreparable injury and probability-of-success inquiries from the preliminary injunction cases. But his third factor is different, and so is Jaffe's fourth factor. The emphasis on the specialized expertise and policy responsibility of the agency, and on the superior legal expertise and responsibility of the court, is a special feature of judicial review of agencies. These factors have only the most attenuated resemblance to the relationship between trial courts and appellate courts, and no resemblance to the relationship between law courts and equity courts.

The exhaustion rules also differ from the Younger rules, because the relationship between court and agency differs from the relationship between state and federal courts. The primary jurisdiction rule is more stringent than the Younger rules, which never require federal litigants to initiate state proceedings if none are pending. On the other hand, courts have created far more exceptions to the exhaustion rules than to Younger.

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277 Davis, supra note 273, at 450. Professor Davis confined his analysis to cases involving a challenge to the agency's jurisdiction.

278 See Jaffe, Primary Jurisdiction, 77 Harv. L. Rev. 1037, 1040–41 (1964) ("It is not merely the presence of expertness, but the wide-reaching and systematic character of agency regulation which tends to choke out the normal jurisdiction of the courts.").

279 See McKart v. United States, 395 U.S. 185, 194 (1969) (stating that the exhaustion requirement is justified by "a notion peculiar to administrative law").


281 See, e.g., Mathews v. Eldridge, 424 U.S. 319, 329–30 (1976) (refusing to apply the exhaustion requirement to a constitutional challenge to an agency's administrative review sys-
Courts are generally far more deferential to agency remedies than they are to legal remedies. In ordinary litigation over permanent injunctions, most injuries are deemed irreparable and injunctions are routinely available. But if administrative agencies are to function, exhaustion must usually be required. If the test were stated in terms of irreparable injury, most injuries would have to be deemed repairable, so that exhaustion could generally be required. Not surprisingly, an early article by Raoul Berger found the equity analogy “misleading” in exhaustion cases; he thought the standard was not “comparative inadequacy,” but rather the “almost complete absence of the administrative remedy.”

Even so, many statements of the exhaustion rule recognize an exception for irreparable injury, or for inadequate administrative remedies. At least some courts continue to equate the exhaustion and irreparable injury rules. And attempts to create exceptions

282 Berger, supra note 274, at 987.

283 See, e.g., Mathews, 424 U.S. at 331 n.11 (stating that even statutory “finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered”); Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974) (“Without a clear showing of irreparable injury, failure to exhaust administrative remedies serves as a bar to judicial intervention in the agency process.” (citations omitted)); Roadway Express, Inc. v. Kingsley, 37 N.J. 136, 142, 179 A.2d 729, 732 (1962) (finding exhaustion required where “[n]othing before us in anywise suggests that pursuit of the administrative remedies will entail any undue delay or expense or any irreparable harm to the plaintiff” (citations omitted)).

284 See, e.g., Gibson v. Berryhill, 411 U.S. 564, 574-75, 578-79 (1973) (holding that an administrative remedy is not adequate where the agency is biased by prejudice or pecuniary interest); United States v. Anthony Grace & Sons, Inc., 384 U.S. 424, 429-30 (1966) (dictum) (“[P]arties will not be required to exhaust the administrative procedure if it is shown by clear evidence that such procedure is ‘inadequate or unavailable.’” (quoting United States v. Joseph Holpuch Co., 328 U.S. 234, 240 (1946))); Mercy Hosp. v. Pennsylvania Human Relations Comm’n, 499 Pa. 132, 136-37, 451 A.2d 1357, 1359 (1982) (“[E]quitable intervention is appropriate where the administrative process is for some reason inadequate to resolve the dispute . . . .”); see also 4 K. Davis, supra note 271, § 26:11, at 464 (“One need not exhaust administrative remedies that are inadequate.”).

285 The test to determine whether injunctive relief should be granted to relieve a party from administrative action is the same as that which courts have otherwise used in determining whether to grant injunctive relief: the party applying for same must make a showing of the likelihood of irreparable harm; such a showing depends upon the unavailability of an adequate remedy at law, or, as here, the absence of an adequate administrative remedy to cure allegedly egregious agency error.

Criterion Ins. Co. v. State Dep’t of Ins., 458 So. 2d 22, 27 (Fla. Dist. Ct. App. 1984); accord Illinois Bell Tel. Co. v. Allphin, 60 Ill. 2d 350, 358, 326 N.E.2d 737, 742 (1975) (“[E]xceptions to the exhaustion doctrine have been fashioned in recognition of the time-honored rule that equitable relief will be available if the remedy at law is inadequate.”); School Dist. v. Michigan
to exhaustion rules are often argued in terms of irreparable injury. 286

3. Courts and the Executive. — Courts are generally more willing to enjoin misconduct by executive officers than to enjoin litigation before another tribunal. These categories are not wholly distinct; in the modern administrative state, executive action blurs into administrative adjudication. I do not claim any sharp distinction, but only that courts are less deferential at the nonadjudicatory end of this continuum.

Courts do defer when they believe that the costs of interference with the executive outweigh the benefits of the injunction. Usually the court explicitly states the need for deference, and sometimes the opinion stops there, 287 but courts are often tempted to add that no injunction is available because the injury is not irreparable. 288

A clear example of deference to the executive is Sampson v. Murray, 289 where a discharged federal employee sought reinstatement pending Civil Service review. The Court said that “insufficiency of savings or difficulties in immediately obtaining other employment . . . will not support a finding of irreparable injury, however severely they may affect a particular individual.” 290 The Court’s other formulation

State Tenure Comm’n, 367 Mich. 689, 692–93, 117 N.W.2d 181, 183 (1962) (stating that plaintiff “has an adequate legal remedy and has failed to exhaust the administrative remedy” and “there is no proof that complainant would suffer irreparable injury” (quoting the trial court opinion)).

286 See, e.g., Bowen v. City of New York, 476 U.S. 467, 483–84 (1986) (reasoning that exhaustion would inflict irreparable injury where mental patients might suffer severe medical harm from the “ordeal” of the administrative appeal process); Pechner v. Pennsylvania Ins. Dept’, 499 Pa. 139, 144 n.8, 452 A.2d 230, 232 n.8 (1982) (rejecting the arguments that an administrative remedy could not result in a refund of money claimed, and that an inability to litigate on behalf of the class made the administrative remedy inadequate); Brown v. Amaral, 460 A.2d 7, 10 (R.I. 1983) (holding that a police chief, discharged for misconduct, failed to show irreparable injury where a collective bargaining agreement provided for grievance procedures and arbitration).


288 See, e.g., Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–15 (1982) (refusing to enjoin Navy artillery practice, reciting the irreparable injury rule but emphasizing deference and balance of hardships); Rizzo v. Goode, 423 U.S. 362, 378–79 (1976) (refusing to order procedures to reduce police brutality, emphasizing federalism and interference with the executive branch, but also stating generally that “principles of equity nonetheless militate heavily against the grant of an injunction except in the most extraordinary circumstances”); Chisom v. Roemer, 853 F.2d 1186, 1188–89 (5th Cir. 1988) (refusing preliminary injunction against election of state judges, emphasizing deference and hardship, and refusing to hold that violation of voting rights always causes irreparable injury).

289 415 U.S. 61 (1974). The injunction sought would not have bypassed the pending administrative proceeding. Rather, it would have forced the executive to retain the employee until the administrative proceeding was completed. See id at 63.

290 Id. at 92 n.68; see also Morton v. Beyer, 822 F.2d 364, 371–73 (3d Cir. 1987) (finding
was more to the point: even assuming financial distress and harm to reputation, plaintiff had not shown "the type of irreparable injury . . . necessary . . . in this type of case."291

Despite the Court's claim to the contrary, the injury from financial distress is often irreparable.292 The government would not be liable for the value of a home or goods lost to creditors, or even for interest paid on borrowed funds.293 Even if the government would pay, the loss of real estate is always irreparable.294 Similarly, the Court has correctly held that bankruptcy is an irreparable injury.295 But in the Court's view, these irreparable injuries do not justify judicial interference with the government's control over its own work force. These injuries could not suffice because they were "common to most discharged employees,"296 and an injunction would undermine Congress' intent that the Back Pay Act297 be "the usual, if not the exclusive, remedy for wrongful discharge."298

The policy of deference has little to do with a preference for law over equity; it applies with equal force to legal remedies. Government

no irreparable injury from loss of income and reputation to a discharged prison guard with a son attending an out-of-state university and with unpaid debts); Morgan v. Fletcher, 518 F.2d 236, 238–40 (5th Cir. 1975) (holding that loss of medical insurance and probable foreclosure of mortgage on a home are not irreparable injury).

291 Sampson, 415 U.S. at 91–92 (emphasis added).


293 The United States would be liable only for lost salary and attorneys' fees. See United States v. Testan, 424 U.S. 392, 400–02 (1976) (limiting recovery for wrongful loss of salary to the express provisions of the Back Pay Act, 5 U.S.C. § 5596(b) (1988)). Even for private defendants, the traditional rule is that there is no liability for consequential damages resulting from failure to pay money. Exceptions are emerging, but the rule retains considerable force. See D. Laycock, supra note 6, at 125–31.

294 See supra pp. 703–05.


296 Sampson, 415 U.S. at 92 n.68.


298 Sampson, 415 U.S. at 91.
and government itself, enjoy broad immunities from damage liability. Occasionally courts will withhold specific relief but make the government pay; the most common example is the government's immunity from specific performance of its contracts. But it is far more common for courts to deny damages for the past and grant specific relief for the future. When deference is considered especially important, courts will not grant either form of remedy. Despite the frequent talk of irreparable injury in suits to enjoin the executive branch, the rule has little power to explain the patterns of deference.

C. Fears of Over-Enforcement

Sometimes, courts deny specific relief for fear of over-enforcement. In the largest group of such cases, the specific remedy seems unduly expensive, and the argument is whether the remedy is worth the cost. In other cases, defendant relies on a countervailing substantive policy,
such as freedom of speech or freedom to choose employment. Seeking remedies for plaintiffs that do not destroy the rights of defendants, courts are drawn to half measures. In these cases, courts prefer legal remedies because they are less effective — not because they are adequate, but because they are inadequate.

1. Freedom of Speech. — Two related rules inhibit injunctions against unlawful speech. One is the constitutional rule against prior restraints, and one is the non-constitutional rule that equity will not enjoin a libel. For convenience, I will refer to the two rules collectively as the rules against prior restraints. Neither rule absolutely bans injunctions against speech, and in fact a surprising number have been upheld.

Courts usually invoke the rules against prior restraints on their own terms, without additional talk about irreparable injury or adequate remedies. But occasionally, a court feels compelled to say that the subsequent remedy is adequate. The real policy basis of these rules is our commitment to freedom of speech and the traditional belief that prior restraints are more dangerous to free speech than subsequent penalties. Whether prior restraints are really a greater threat to liberty has been the subject of much debate, but the belief...
that they are a greater threat is embedded in our precedents and supports both of the rules against prior restraints.

The important point here is that these rules cannot possibly be derived from the irreparable injury rule, and in fact have very little to do with it. It is not the law that plaintiff can get a prior restraint only when no other remedy is as clear, practical, and efficient as a prior restraint. Indeed, that is almost exactly backwards. The justification for the rules against prior restraints depends precisely on the claim that other remedies are not as effective. The prior restraint rules limit plaintiffs to less effective remedies because we fear overenforcement of rules against offensive speech.

On the usual criteria of irreparable injury, both damages and criminal prosecution are grossly inadequate. Money damages cannot replace a reputation once lost, or erase emotional distress once suffered. Neither can be accurately valued in dollars. Consequential damages from defamation are usually speculative and always uncertain in amount. Both because the thing lost is irreplaceable and because the loss is hard to measure, damages are an obviously inadequate remedy for defamation.

The same analysis could be applied to any other category of unprotected speech. If seditious speech harms the nation, that harm is unmeasurable. Once secrets are revealed, they cannot be recalled, and the harm of their revelation can rarely be valued in dollars.

\[^{309}\text{See, e.g., } \text{Gibson v. Berryhill, } 411 \text{ U.S. } 564, 577 \text{ n.16 (1973) (stating that negative publicity from revocation of optometrists' licenses "would cause irreparable damage" (quoting Berryhill v. Gibson, 332 F. Supp. 122, 126 (M.D. Ala. 1971))); City of Waterbury v. Commission on Human Rights & Opportunities, 160 Conn. 226, 231, 278 A.2d 771, 774 (1971) (enjoining unauthorized investigation of alleged civil rights violations, to prevent harm to the city's reputation); Menard v. Houle, 298 Mass. 546, 548-49, 11 N.E.2d 436, 437 (1937) (holding legal remedies inadequate for false statements to the effect that an automobile dealer had sold a lemon and refused to repair it); see also } \text{RESTATEMENT (SECOND) OF TORTS, supra note 11, § 944 comment b (stating that money is obviously inadequate compensation for loss of personal reputation); } \text{R. Smolla, supra note 305, § 9.13[1][b], at 9-36 ("[D]efamation is precisely the form of nonquantifiable injury for which damages are ill-suited."); Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640, 641 (1916) ("[N]o pecuniary measure can possibly be applied to the interest and no pecuniary standard to the wrong.").}^\]

\[^{310}\text{See supra note 118.}^\]

\[^{311}\text{See, e.g., } \text{Snep v. United States, } 444 \text{ U.S. } 507, 514 (1980) (per curiam) (stating that in a case involving unauthorized publication by a former intelligence agent, compensatory damages are "unquantifiable" and punitive damages may bear no relation to the government's "irreparable loss"); Maness v. Meyers, 419 U.S. 449, 460 (1975) (stating that compelled testimony "could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released"); United States v. Progressive, Inc., 467 F. Supp. 990, 999 (W.D. Wis.) (holding that publication of information essential to the construction of hydrogen bombs would inflict "direct, immediate and irreparable damage to the United States"), appeal dismissed mem., 610 F.2d 819 (7th Cir. 1979).}^\]
Nor is criminal punishment an adequate remedy. Criminal punishment neither undoes the harm nor compensates for it. It may provide revenge or deterrence, but it is not a remedy. Thus, the subsequent remedies for speech torts and speech crimes are grossly inadequate, in the sense in which adequacy is usually measured under the irreparable injury rule. Courts do not forbid prior restraints because other remedies are adequate, but because they are affirmatively hostile to prior restraints.

2. Personal Service Contracts. — It is generally said that equity will not specifically enforce a contract for personal services. This maxim is related to several policies: that enforcement would be prohibitively difficult, that enforcement against employees would be involuntary servitude, and that enforcement against employers would lack mutuality and deprive employers of the right to choose agents in whom they have confidence. The maxim has become misleading as a maxim, but it survives to the extent of its policies.

312 See, e.g., Sampson v. Murray, 415 U.S. 61, 83 (1974) (relying on "the traditional unwillingness of courts of equity to enforce contracts for personal service either at the behest of the employer or of the employee"); see also 5A A. CORBIN, supra note 62, § 1204, at 398-402 ("It is almost universally held that a contract for personal services will not be specifically enforced."); 11 S. WILLISTON, supra note 62, § 1423, at 782-88 (stating that personal services contracts are "generally not enforceable by affirmative decree"). For a useful history of this doctrine's evolution and of prior law, see West, The Case Against Reinstatement in Wrongful Discharge, 1988 U. ILL. L. REV. 1, 10-12.

313 See, e.g., Bethlehem Eng'g Export Co. v. Christie, 105 F.2d 933, 934-35 (2d Cir. 1939) (denying specific enforcement of plaintiff's right to be an exclusive selling agent); Bloch v. Hillel Torah N. Suburban Day School, 100 Ill. App. 3d 204, 205, 426 N.E.2d 976, 977 (1981) (denying specific enforcement of a private school's contract to teach a student); State ex rel. Schoblov v. Anacortes Veneer, Inc., 42 Wash. 2d 338, 341-42, 255 P.2d 379, 381 (1953) (en banc) (denying specific enforcement of a stockholder's right to be employed by a corporation).

314 See, e.g., The Case of Mary Clark, 1 Blackf. 122, 123-25 (Ind. 1821) (denying specific enforcement of a promise to serve employer for twenty years); H.W. Gossard Co. v. Crosby, 132 Iowa 155, 170, 109 N.W. 483, 488-89 (1906) (denying specific enforcement of a promise to sell plaintiff's product for three years); American Broadcasting Cos. v. Wolf, 52 N.Y.2d 394, 401-02, 420 N.E.2d 365, 366, 438 N.Y.S.2d 482, 485 (1981) (refusing to enjoin a sports announcer from moving to another network). See generally Stevens, Involuntary Servitude by Injunction, 6 CORNELL L.Q. 235, 244-50 (1921).

315 See, e.g., Shubert v. Woodward, 167 F. 47, 59 (8th Cir. 1909) (refusing to reinstate a discharged theater manager); Ex parte Jim Dandy Co., 286 Ala. 295, 299-300, 239 So. 2d 545, 548-49 (1970) (refusing to grant specific performance of a corporate executive's employment contract, on grounds of mutuality, long supervision of performance, and adequate remedy at law); Poultry Producers, Inc. v. Barlow, 189 Cal. 278, 288-89, 208 P. 93, 96-97 (1922) (en banc) (refusing to enforce a cooperative marketing agreement).

316 See, e.g., Greene v. Howard Univ., 271 F. Supp. 609, 615 (D.D.C. 1967) ("It would be intolerable for the courts to . . . require an educational institution to hire or to maintain on its staff a professor or instructor whom it deemed undesirable."); aff'd in pertinent part, 412 F.2d 1128, 1135-36 (D.C. Cir. 1969); Zannis v. Lake Shore Radiologists, Ltd., 73 Ill. App. 3d 901, 905, 392 N.E.2d 126, 129 (1979) ("Courts will avoid the friction that would be caused by compelling an employee to work, or an employer to hire or retain someone against their wishes.");
Courts still will not make a human being work, although they will enforce other provisions of personal service contracts, such as reasonable covenants not to compete. The principal reason for not making defendants work is a substantive-law commitment to free labor. The difficulties of enforcement are real but secondary. Courts usually rely on one or both of these reasons, but occasionally they invoke the irreparable injury rule as well.

The substantive policy in favor of free labor has nothing to do with the adequacy of the legal remedy. As in the prior restraint cases, we deny specific relief because it would be a more effective remedy than we are willing to give. Indeed, the disappointed employer rarely gets any remedy at all. For reasons of cultural attitude and of constitutional right, we fear over-enforcement of promises to labor. Employers rarely seek damages for breach of the promise to work, and they get a hostile reception from the courts when they do.

The other side of the maxim — not forcing employers to hire employees against their will — has been largely superseded by modern regulation of employment. Specific remedies, including orders to hire, retain, reinstate, and promote, are standard in unfair labor practice.

See also D. Dobbs, supra note 4, § 12.25, at 929–30 (stating that one reason for the rule against specific performance is the necessity of cooperation between employer and employee).

See, e.g., St. Joseph School v. Lamm, 288 Ala. 68, 70, 257 So. 2d 318, 319 (1972) (per curiam) (denying specific enforcement of a contract to admit a student to a private school, on the ground that the contract required the school to perform personal services); Pierce v. Douglas School Dist. No. 4, 297 Or. 363, 371, 686 P.2d 332, 337 (1984) (en banc) (stating that despite a statutory notice requirement, a school teacher may quit "at any time and may not be compelled specifically to perform an employment contract"); Pingley v. Brunson, 272 S.C. 421, 423, 252 S.E.2d 560, 561 (1979) (denying specific enforcement of an organist's contract to play at a restaurant); see also RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (1981) ("A promise to render personal service will not be specifically enforced.").

See cases cited supra note 138.

See, e.g., Infusaid Corp. v. Intermedics Infusaid, Inc., 739 F.2d 661, 668–70 (1st Cir. 1984) (refusing to grant specific performance of a joint venture agreement between two corporations, unless legal remedies were inadequate and performance did not require the personal services of the principals in either corporation); Bloch v. Hillel Torah N. Suburban Day School, 100 Ill. App. 3d 204, 205–06, 426 N.E.2d 976, 977 (1982) (refusing to reinstate a student expelled from a private school, on grounds that the contract required personal services from the school and that the legal remedy was adequate).


See 29 U.S.C. § 160(c) (1982) (providing that the National Labor Relations Board shall
IREPARABLE INJURY

employment discrimination, and civil service cases, and in discharge cases submitted to arbitration. These remedies are the practical equivalent of specific performance of personal service contracts.

Courts no longer presume that friction between employer and employee will make reinstatement unworkable. Courts consider evidence of such friction, especially in cases where plaintiff must work closely with the employer or a particular supervisor, and occasionally deny reinstatement if it appears to be an unworkable remedy. But some courts go to extraordinary lengths to compel working relationships in the face of bitter resentment.

order "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter"; see also NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 381 (1967) ("If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement."); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 189-97 (1941) (holding that the NLRB can order reinstatement even if employees have found equivalent work elsewhere, if it states its reasons for doing so).

322 See 42 U.S.C. § 2000e-5(g) (1982) (providing that, in order to remedy employment discrimination, a court may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay"); see also Franks v. Bowman Transp. Co., 424 U.S. 747, 763-66 (1976) (stating that adequate relief will "ordinarily" require reinstatement with seniority); Darnell v. City of Jasper, 730 F.2d 653, 655 (11th Cir. 1984) (stating that "except in extraordinary cases," reinstatement is "required") (quoting Allen v. Autauga County Bd. of Educ., 685 F.2d 1302, 1305 (11th Cir. 1982)).

For a state example, see MASS. GEN. L. ch. 151B, § 5 (1983), which authorizes a court to order "hiring, reinstatement or upgrading of employees." Id.


325 See, e.g., Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1553 (10th Cir. 1988) (permitting damage award instead of reinstatement where there was "tension and animosity between the parties in a working environment in which there were relatively few employees and close contact with supervisors"); EEOC v. Red Baron Steak Houses, 47 Fair Empl. Prac. Cas. (BNA) 49, 52 (N.D. Cal. 1988) ("It would be impossible to reinstate Ms. Amick to her former position without substantial distress to her and to the defendant."); Zahler v. Niagara County Chapter of the N.Y. State Ass'n for Retarded Children, Inc., 112 A.D.2d 707, 708, 491 N.Y.S.2d 880, 881 (1985) ("In light of the hostility between the parties, it would be inappropriate to order reinstatement of plaintiff to her employment position.").

326 See, e.g., Anderson v. Group Hospitalization, Inc., 820 F.2d 465, 473 (D.C. Cir. 1987) (stating that "ill will" toward plaintiff on the part of "management generally" is common, and is not a sufficient reason to deny reinstatement, and that hostility "such that no meaningful work relationship could be re-established" with plaintiff's supervisors is irrelevant where plaintiff
The risk of friction and the difficulties of reinstatement are unrelated to the adequacy of back pay or damages. No two jobs are identical, and an employee who wants his job back can never be exactly compensated for taking some less desirable job instead.327 Damages compensate for lost pay and little else. But sometimes the difficulty of coercing close personal relationships is a powerful reason for denying specific relief, even if damage remedies are inadequate. Not surprisingly, when courts refuse reinstatement for these reasons, they often invoke the irreparable injury rule to justify the result.328

The old rule against specific performance survives in common law actions for breach of contract or wrongful discharge,329 and in that context it is codified in some states.330 An absolute rule against reinstatement in common law actions, side by side with routine reinstatement in statutory and arbitral actions, is an unstable combination. Already a few courts have explicitly rejected the common law rule, can be assigned to “an equivalent position” elsewhere in the company); Holt v. Continental Group, Inc., 708 F.2d 87, 91 (2d Cir. 1983) (stating that “considerable hostility” between plaintiff attorney and other attorneys in a corporate legal department does not bar reinstatement in a retaliation case, but trial court can give it some weight at the preliminary injunction stage), cert. denied, 465 U.S. 1030 and 465 U.S. 1039 (1984) and 479 U.S. 839 (1986); Taylor v. Teletype Corp., 648 F.2d 1129, 1138-39 (8th Cir.) (reinstating a plaintiff found to have lied at trial, on the ground that “[t]o deny reinstatement to a victim of discrimination merely because of the hostility engendered by the prosecution of a discrimination suit would frustrate the make-whole purpose of Title VII”), cert. denied, 454 U.S. 969 (1981); NLRB v. Yazoo Valley Elec. Power Ass'n, 405 F.2d 479, 480 (5th Cir. 1968) (per curiam) (reinstating an employee who had, in obscene language, challenged a supervisor to a fight).


328 See, e.g., Cahill v. Board of Educ., 187 Conn. 94, 97-98, 444 A.2d 907, 910 (1982) (finding a $24,180 jury award to be an adequate remedy); Zahler v. Niagara County Chapter of the N.Y. State Ass'n for Retarded Children, Inc., 112 A.D.2d 707, 708, 491 N.Y.S.2d 880, 881 (1985) (holding that damages are never an adequate remedy for loss of an employment contract, but denying specific performance on grounds of mutuality); Clark v. Pennsylvania State Police, 496 Pa. 310, 312-14, 436 A.2d 1383, 1384-85 (1981) (holding, in a case involving an alleged contract to promote plaintiff from corporal to captain upon completion of law school, that damages were readily calculable by difference in pay).


ordering reinstatement without the authority of either a statute or an arbitration award. And courts regularly order reinstatement of public employees discharged in violation of their first amendment rights, without statutory authority and without noting that they are doing something that is supposed to be unusual.

I cannot predict the future course of the law in this area. But I expect future developments to depend on arguments about the workability and effectiveness of reinstatement, about the reasonableness and deterrent effect of damage awards, and about the proper balance between the employee's need for job security and the employer's need for discipline and productivity. I doubt that developments will be significantly influenced either by the irreparable injury rule or by the maxim that personal service contracts cannot be specifically enforced.

3. Hardship to Defendant or Others. — Specific relief sometimes costs more than it is worth. Courts take account of that danger under a long-standing but poorly defined defense: if specific relief would impose serious hardship disproportionate to the benefit to plaintiff, then specific relief may be denied and plaintiff remitted to damages. This doctrine is commonly called balancing the "equities" or "hardships." "Hardship" is a better label for the countervailing considerations that trigger the defense, but "balancing the equities" may be the better label for the whole process. Once a plausible showing of hardship is made, courts inquire into all sorts of things, including


333 For one analysis of the advantages and disadvantages of the two remedies, see West, cited above in note 312.

334 See, e.g., Ariola v. Nigro, 16 Ill. 2d 46, 51-52, 156 N.E.2d 536, 540 (1959) (balancing the equities); see also D. DOBBS, supra note 4, § 2.4, at 52-54, §§ 5.6-5.7, at 355-64; (balancing the equities and hardships); D. LAYCOCK, supra note 6, at 908-29 (undue hardship defense); Keeton & Morris, Notes on "Balancing the Equities," 18 TEX. L. REV. 412 (1940). For proposals to restrict the courts' power to deny injunctive relief because of undue hardship, see Farber, Reassessing Boomer: Justice, Efficiency, and Nuisance Law, in PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET (P. Hay & M. Hoeflich eds. 1988); and Schoenbrod, The Measure of an Injunction: A Principle To Replace Balancing the Equities and Tailoring the Remedy, 72 MINN. L. REV. 627, 636-70 (1988).
defendant's culpability, plaintiff's delay or other conduct that aggravated the risk of hardship, and the disadvantage to plaintiff of getting damages instead of specific relief.

Undue hardship matters doctrinally only when damages are inadequate. That is, if the legal remedy is adequate, plaintiff is not entitled to an equitable remedy, and any hardship caused by such a remedy is theoretically not at issue. In fact, a claim of hardship is nearly always relevant, because the legal remedy is hardly ever adequate. To deny equitable relief on grounds of undue hardship is to remit plaintiff to an inadequate remedy.

Not surprisingly, courts balance the hardship to defendant from specific relief against hardship to plaintiff from a less than adequate remedy. Inevitably, courts that deny specific relief often add irreparable injury talk as well. A similar pattern appears in cases that deny specific relief because of hardship to innocent parties.

See, e.g., Welton v. 40 E. Oak St. Bldg. Corp., 70 F.2d 377, 381-83 (7th Cir.) (ordering the demolition of a twenty-story building deliberately constructed in violation of a setback ordinance), cert. denied, 293 U.S. 590 (1934); Tyler v. City of Haverhill, 272 Mass. 313, 315-16, 172 N.E. 342, 342-43 (1930) (ordering removal of a wall, where defendant continued building despite plaintiff's objections that the wall was on the wrong side of the boundary); Soergel v. Preston, 147 Mich. App. 585, 590, 367 N.W.2d 366, 368-69 (1985) (ordering removal of sewer line across plaintiffs' property, where defendant erroneously believed it had an easement and continued building despite plaintiffs' objections).

See, e.g., City of Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334, 338 (1933) (refusing to enjoin pollution from municipal sewer plant and stating that "[w]here an important public interest would be prejudiced, the reasons for denying the injunction may be compelling" (footnote and citations omitted)); Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 225 & n.*, 257 N.E.2d 870, 873 & n.*, 309 N.Y.S.2d 312, 316 & n.* (1970) (refusing to enjoin operation of a cement plant that employed over three hundred people); Storey v. Central Hide & Rendering Co., 148 Tex. 509, 514-15, 226 S.W.2d 615, 618-19 (1950) (refusing to enjoin operation of a rendering plant on the ground that "[s]ome one must suffer these inconveniences rather than that the public interest should suffer" (quoting 31 Tex. Jur. Nuisances § 35, at 448)).

See, e.g., 40 E. Oak St. Bldg. Corp., 70 F.2d at 379 (considering plaintiffs' protest of a building permit and their suit to prevent construction); Ariola, 16 Ill. 2d at 56, 156 N.E.2d at 541-42 (finding that "plaintiffs at no time lulled defendants into proceeding with the construction").

This relationship is also noted in Schoenbrod, cited above in note 334, at 669 n.195.

See, e.g., W.S. Dickey, 289 U.S. at 338-39 (holding that damages for pollution of land give "substantial redress" and that an injunction against nuisance would impose "grossly disproportionate hardship"); Green v. Advance Homes, Inc., 293 N.Y.2d 204, 208-09 (Iowa 1980) (finding that the trial court had abused its discretion in ordering defendant to restore lateral support for land, where a $48,000 retaining wall would add only $6,000 in value); In re Burke v. Bowen, 40 N.Y.2d 264, 267, 353 N.E.2d 587, 569 (1976) (refusing to order a city, "in the throes of a grave financial crisis," to specifically perform a contract to employ a fixed number of firefighters).

See, e.g., Liza Danielle, Inc. v. Jamko, Inc., 408 So. 2d 735, 738-40 (Fla. Dist. Ct. App. 1982) (arguing at length that the difficulty of proving lost profits does not make a legal remedy inadequate, and subsequently recognizing hardship as the "most compelling reason" to deny an injunction); Conger v. New York, W.S. & B.R.R. Co., 120 N.Y. 29, 23 N.E. 983 (1890) (denying specific enforcement of a contract to build a railroad station on the side of a
A good example is *Van Wagner Advertising Corp. v. S & M Enterprises*. Van Wagner held a ten-year lease on advertising space on a wall facing an exit from the Midtown Tunnel into Manhattan. S & M bought the building and others on the block, planning to tear them down and erect a large new building. S & M terminated the advertising lease, and Van Wagner sued for specific performance.

There was nothing fictional about the uniqueness of this real estate; no other building faced the tunnel exit in the same way. But to give Van Wagner the specific thing it was promised would certainly limit, and perhaps prevent, the plan to redevelop the block. Not surprisingly, the court denied specific performance on the ground that it "would disproportionately harm S & M." A major real estate development trumps a billboard.

In denying specific relief, the court held that damages were an adequate remedy, even though the subject matter of the contract was unique real estate. This required considerable modification of the irreparable injury rule. The court distinguished leases from sales, stating that leases of real estate are not specifically enforced "as a matter of course." It cited one trial court decision and dropped a "but see" citation to *Corbin, Williston, Pomeroy, and the Restatement (Second) of Contracts*. The court conceived uniqueness solely in terms of the difficulty of measuring damages and the consequent risk of undercompensation; the site's unique location did not "entitle" plaintiff to specific performance. Plaintiff had subleased the space for three of the ten years, and the rental in the sublease was used to measure damages for the whole ten-year period. The court did not suggest a way to measure damages in a subsequent suit by the actual advertiser who subleased the space.

*steep mountain in a sparsely settled district, where the station would delay travel and inconvenience the public); Vermont Nat'l Bank v. Chittenden Trust Co., 143 Vt. 257, 266–68, 465 A.2d 284, 290–91 (1983) (refusing to extend a lease as a specific remedy for earlier violations of a restrictive covenant, on the ground that such relief would run against an entity not party to the suit, and because plaintiff had not shown that damages would be an inadequate remedy; court enjoined further violations of the covenant without discussing irreparable injury).*

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342 Id. at 195, 492 N.E.2d at 761, 501 N.Y.S.2d at 633.
The court did not explicitly link its irreparable injury holding to its undue hardship holding, but the opinion makes no sense unless such a link is implied. If there were no reason to withhold specific performance, there would be no need to estimate profits from the last seven years of the lease, no need to make plaintiff do without the specific exposure to the tunnel for which it had bargained, and no need to override the received rules on unique real estate. It is perfectly sound to say that damages were good enough in light of the cost of specific performance; it is not true that the damage remedy was equally complete, practical, and efficient.

D. Other Substantive Reasons

i. Deference to More Particular Law. — Litigants sometimes appeal to a court’s general equity powers to evade more particular rules of law. The court may cooperate if it considers the more particular law unjust, inapplicable, or not exclusive. Thus, the real question in these cases is whether the more particular law controls, and the answer to that question is the proper ground of decision. But courts often add that the more particular law provides an adequate remedy that precludes equity jurisdiction.

An example is Sheets v. Yamaha Motors Corp., U.S.A. Plaintiff sued for theft of an alleged trade secret; the suit failed because he had not kept the device secret. A second count alleged that defendant was unjustly enriched by use of plaintiff’s device. The court dismissed this claim for several reasons, one of which was that an equitable claim for unjust enrichment would lie only if there were no adequate remedy at law. The court also acknowledged the real reason for its decision: “An action for unjust enrichment must not be allowed to defeat the purpose of a rule of law directed to the matter at issue.” It might also have said that defendant’s enrichment was not unjust if it acquired the device in a manner consistent with the policies of patent and trade secret law. If the court had allowed recovery on the unjust enrichment count, it would have effectively repealed the rule of trade secret law that the owner of a secret must do all he can to keep it secret.

346 See, e.g., Hoyne Sav. & Loan Ass’n v. Hare, 60 Ill. 2d 84, 88–90, 322 N.E.2d 833, 836–37 (1974) (granting equitable relief from a grossly excessive and fraudulent tax assessment where inadequate and untimely notice caused plaintiff to miss the deadline for a legal remedy); Hatcher v. Graddick, 500 N.E.2d 258, 260 (Ind. Ct. App. 1987) (granting a preliminary injunction against reducing a court’s budget, where the statutory remedy entailed substantial delay); Long v. Kistler, 72 Pa. Commw. 547, 457 A.2d 591 (1983) (allowing a suit to enjoin discriminatory assessments, where the state tax assessment law made no provision for such challenges).

347 849 F.2d 179 (5th Cir. 1988).

348 See id. at 184.

349 Id. (citation omitted).
In this and similar cases, plaintiff lost on the merits. The court did not deny one remedy in favor of another; it rejected two substantive theories and denied any remedy at all. Viewed as of the time of decision, the reason for denying relief on the more general theory is to avoid undermining the substantive restrictions in the more particular theory. Equitable relief is denied, not because some other remedy is adequate, but precisely because no other remedy is available.

Similar analysis applies when plaintiff asserts his general equity claim before it is clear that he has no claim under the more particular law. Courts will dismiss the equity claim if the dispute is one that should be governed by the more particular substantive law or decided under a more particular procedure, or if plaintiff has irretrievably elected another remedy by filing an earlier action. In all these sets of cases, courts sometimes reinforce their result with talk about adequate remedies at law.

Viewed ex ante, from the beginning of the controversy, there is a connection between these cases and the irreparable injury rule. The proper course for plaintiff in Sheets was to keep his device secret until he could license it for compensation. If we conceive of this option as a remedy, it would have been adequate if it had not been neglected. Plaintiffs are required to use such "remedies," and that requirement would be illusory if plaintiffs could neglect such "remedies" and seek an equitable remedy later. The denial of later equitable relief coerces plaintiffs into the preferred "remedy," just as the irreparable injury rule coerced plaintiffs into law courts before the merger. The analogy is even clearer when plaintiff is still free to try the more particular remedy.

350 See, e.g., Rodgers v. Easterling, 270 Ark. 255, 603 S.W.2d 884 (1980) (holding that the Chancery Court cannot enjoin a tax assessment where the taxpayer could have sought adjustment before an administrative board and judicial review of the assessment in County Court); Emry v. American Honda Motor Co., 214 Neb. 435, 334 N.W.2d 786 (1983) (dismissing a bill in equity to reopen a suit dismissed for nonprosecution, where plaintiff could not meet requirements for the statutory remedy in such cases); Sprecher v. Weston's Bar, Inc., 78 Wis. 2d 26, 50, 253 N.W.2d 493, 504 (1977) (denying an injunction against a transfer of a liquor license to a third party, where the plaintiff failed to mitigate the loss by purchasing an identical liquor license when the chance to do so was offered).

351 See, e.g., Stewart v. General Motors Corp., 756 F.2d 1285, 1291–93 (7th Cir. 1985) (holding that the regularized promotion system created by a collective bargaining agreement provided a legal remedy for informal and discriminatory promotions, eliminating the need for an injunction against the informal system); Punohu v. Sunn, 66 Haw. 485, 666 F.2d 1133 (1983) (refusing declaratory and injunctive relief against a reduction in welfare benefits where administrative review would be an adequate remedy); Truby v. Broadwater, 332 S.E.2d 284 (W. Va. 1985) (refusing to grant injunction against enforcement of scholastic eligibility rules, where an administrative remedy for challenging grades would be adequate).

352 See, e.g., Myshko v. Galanti, 453 Pa. 412, 416, 309 A.2d 729, 730–32 (1973) (stating that, by suing for damages, plaintiffs "not only manifested their belief that there was an adequate remedy at law but also precluded themselves from bringing a simultaneous action in equity" to recover specific property and an accounting of defendant's profits).
The analogy is clear enough to explain why courts invoke it, but it diverts attention from the real basis for decision. It does not matter whether the choice is between two remedies or two substantive theories. It does not matter whether the less particular theory is legal or equitable. What matters is the policy of the more particular law. If plaintiff’s more general theory undermines a policy that the court or legislature is committed to preserving, relief should be denied. If the more general theory fills a gap or corrects an injustice that the court is empowered to correct, and if the corrective is a good thing on balance, then the court should probably correct it. This is indeed a traditional function of substantive equity; it was Aristotle’s conception of equity. But the courts will perform it best if they focus directly on the competing substantive policies. The more particular remedy is important, not because it might be adequate, but because it might be barred, and equity should not undercut the more particular law.

The policy of preventing evasion of other substantive law plainly applies to damage remedies as well as to specific relief. If a legislature creates a cause of action specifying certain elements of recovery, plaintiffs generally cannot evade those limits by tacking common law measures of recovery onto the statutory cause of action. If a legislature creates a set of remedies that it intends to be exclusive, plaintiffs cannot invoke other remedies, whether legal or equitable. Where the substantive provisions of constitutions or statutes do not specify remedies, judicial conservatives have been more resistant to judicially implied damage remedies than to judicially implied equitable remedies. When protection of other substantive law requires courts to

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353 See ARISTOTLE, NICOMACHEAN ETHICS 1137b (W. Ross trans., in 2 THE COMPLETE WORKS OF ARISTOTLE 1796 (J. Barnes ed. 1984)) ("[T]his is the nature of the equitable, a correction of law where it is defective owing to its universality."); ARISTOTLE, RHETORIC 1374a (W. Roberts trans., in 2 THE COMPLETE WORKS OF ARISTOTLE, supra, at 2188) ("[F]or equity is regarded as just; it is, in fact, the sort of justice which goes beyond the written law.").

354 See, e.g., DeGrace v. Rumsfeld, 614 F.2d 796, 808 (1st Cir. 1980) (prohibiting compensatory or punitive damages under an employment discrimination statute that authorizes only back pay, reinstatement, and other equitable relief); see also M. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 5.67b, at 445 (1988).


356 See, e.g., Carlson v. Green, 446 U.S. 14, 42–43 (1980) (Rehnquist, J., dissenting) (conceding that “federal courts have historically had broad authority to fashion equitable remedies,” but insisting that judicially created damage remedies for constitutional violations were a usurpation of legislative authority). For an account of the conservative campaign to extirpate implied
deny an equitable remedy, they may talk about the irreparable injury rule. But that is not the real reason for decision.

2. Hostility to the Merits of Plaintiff’s Case. — Courts frequently invoke the irreparable injury rule when they are hostile to plaintiff’s case on the merits. Sometimes the hostility is justified, because the case is very weak; sometimes, the hostility is more akin to prejudice. Either way, once a court is inclined against plaintiff on the merits, it will often also conclude that plaintiff faces no irreparable injury.

Sometimes the court’s hostility to plaintiff’s case stems from a well-considered deference to private arrangements or activities that the court is loath to disrupt. For example, courts are reluctant to enjoin payment on a letter of credit, because much international trade depends on nearly absolute certainty of payment.357 So courts solemnly say that plaintiff has an adequate remedy by suing to get its money back in some foreign court, often in the third world.358 United States courts do not really mean that the foreign remedy is as complete, practical, and efficient as the domestic remedy. Rather, they mean that plaintiff agreed to the risk of foreign litigation when it put up the letter of credit, and now it must be held to its bargain.359 Litigation in the United States is likely to be equally inconvenient and disconcerting for the foreign trading partner, and the letter of credit is a way of allocating that risk. It is the substantive law of commercial transactions that forbids these injunctions, not the irreparable injury rule.

More generally, courts sometimes decide cases on the merits, in favor of defendant, and then add lack of irreparable injury as an additional ground.360 Occasionally a court will treat a defect in plain-damages remedy, see D. Laycock, cited above in note 6, at 1055–85; and id. at 117–19 (Supp. 1989).


358 See, e.g., Foxboro Co. v. Arabian Am. Oil Co., 805 F.2d 34, 36–37 (1st Cir. 1986) (Saudi Arabia); Enterprise Int’l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 474–75 (5th Cir. 1985) (Ecuador; stating that “showing of a substantial threat of irreparable injury” is “to be strictly exacted” in letter of credit cases); KMv1W Int’l v. Chase Manhattan Bank, N.A., 605 F.2d 10, 14–17 (2d Cir. 1979) (Iran). But see Itel Corp. v. First Nat’l Bank, 730 F.2d 19, 22 (1st Cir. 1984) (granting an injunction because a suit in revolutionary Iranian courts on a contract with the former Imperial government would not provide an adequate remedy).

359 See Trans Meridian Trading Inc. v. Empresa Nacional de Comercializacion de Insumos, 829 F.2d 949, 956 (9th Cir. 1987) (remitting plaintiff to a suit in Peru, on the ground that plaintiff knowingly undertook that risk).

360 See, e.g., Thorbus v. Bowen, 848 F.2d 901, 903–04 (8th Cir. 1988) (refusing to enjoin plaintiff’s exclusion from eligibility for Medicare and Medicaid reimbursement, on the grounds that he had received an adequate hearing and that he had failed to show irreparable injury); Ingraham v. University of Maine, 441 A.2d 691, 692–93 (Me. 1982) (refusing to order a prosecutor to expunge a criminal conviction, on grounds of failure to state a claim, prosecutorial immunity, and no irreparable injury); Vermont Div. of State Bldgs. v. Town of Castleton Bd. of Adjustment, 415 A.2d 188, 193 (Vt. 1980) (refusing to enjoin enforcement of valid zoning laws, reciting that injunctions will be issued only to prevent irreparable injury).
tiff's case on the merits as precluding the possibility of irreparable injury. The reasoning here is that injury cannot be irreparable if it is not legally cognizable. A variation is to find that plaintiff has shown no injury at all, and to conclude that therefore he has shown no irreparable injury. This conclusion is true enough, but misleading. In such a case, plaintiff gets no remedy at all, not a legal remedy instead of an equitable remedy.

Most troubling are cases where the court appears to be motivated by hostility to plaintiff's position on the merits, but decides the case only on the ground that there is no irreparable injury. In these cases, the court's reaction to the merits is not tested by the discipline of writing an opinion, and the court's avoidance of the merits may signal that an opinion for defendant would be hard to write. The holding of no irreparable injury is usually dubious or worse.

Covert grounds for decision are easy to suspect but hard to prove. I have included cases in this category only when the court's hostility to plaintiff's position is apparent in its statement of the case, or when the court dismisses solely on the ground of no irreparable injury but the legal remedy is grossly inadequate, or when individual Justices are being inconsistent. In this last category, consider the liberal dissenters from the Younger cases invoking the irreparable injury rule in Snepp v. United States. Or consider Justice Bren-

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361 See, e.g., Anne Arundel County v. Whitehall Venture, 39 Md. App. 197, 200-01, 384 A.2d 780, 783 (1978) ("The existence of some right, which will be irreparably injured, is a prerequisite to the extraordinary relief of an injunction." (citation omitted) (emphasis in original)); Hollenkamp v. Peters, 358 N.W.2d 108, 111-12 (Minn. Ct. App. 1984) ("[T]he trial court's finding appellants would not suffer irreparable harm was not clearly erroneous because appellants did not even demonstrate an interest in the [disputed] name or trademark.").

362 See, e.g., New Castle Orthopedic Assocs. v. Burns, 481 Pa. 460, 467-69, 392 A.2d 1383, 1387-88 (1978) (holding that violation of a covenant not to compete did no harm where plaintiff had more customers than it could serve); Rhode Island Turnpike & Bridge Auth. v. Cohen, 433 A.2d 179, 182-84 (R.I. 1981) (finding that the operator of a toll bridge had failed to show that resale of fare tokens reduced its revenues); Parkem Indus. Servs., Inc. v. Garten, 619 S.W.2d 428, 430-31 (Tex. Civ. App. 1981) (holding that violation of a covenant not to compete did no harm where defendants solicited only one customer, and that customer gave plaintiff as much business as before).

363 See, e.g., Skates v. Hartsfield, 216 Ala. 518, 114 So. 10 (1927) (refusing to order sheriff to return plaintiff's slot machines, on the ground that damages would be an adequate remedy for loss of personal property); Perkins v. Village of Quaker City, 165 Ohio St. 120, 133 N.E.2d 595 (1956) (refusing to enjoin enforcement of the village weight limit against trucks that were destroying streets); Griscom v. Childress, 183 Va. 42, 31 S.E.2d 309 (1944) (refusing to order specific performance of sale to the high bidder at a sale foreclosing a lien on personal property, on the grounds that damages would be an adequate remedy, and that even if damages were inadequate, plaintiff could not get specific performance because he had concealed his insolvency and failed to pay the amount of his bid in a timely fashion).

364 See, e.g., Stewart v. Walton, 254 Ga. 81, 82, 326 S.E.2d 738, 739 (1985) (refusing to enjoin an alleged fraudulent transfer of all defendant's assets, on the ground that damages would be an adequate remedy; court appeared not to believe the allegations of the complaint).

nan’s suggestion that bankruptcy would be an acceptable result for Texaco but not for the NAACP. How adequate a remedy you are entitled to may depend on who you are and which side of the dispute you are on.

E. Other Procedural Reasons

1. Jury Trial. — Perhaps the most plausible defense of the irreparable injury rule is that it protects the right to jury trial. The federal and most state constitutions guarantee the right to jury trial in criminal cases and in suits at common law, but not in suits in equity. Whether a suit is at law or in equity often depends on the remedy sought. If plaintiffs had a free choice between legal and equitable remedies, they could sometimes use that choice to deprive defendant of jury trial. The irreparable injury rule could prevent this abuse by restricting plaintiffs’ choice of remedy. Thus, plaintiffs can avoid jury trial if, and only if, their legal remedies are inadequate. Thirty years ago, the Supreme Court took this argument to great lengths in two famous opinions by Justice Black, *Beacon Theatres, Inc. v. Westover* and *Dairy Queen, Inc. v. Wood*.

However, the argument does not apply to the great bulk of civil cases. In most civil litigation, it is plaintiffs and not defendants who demand juries. A few plaintiffs may manipulate the choice of

from a judgment upholding the right of the Central Intelligence Agency to review writings of former agents prior to publication). The *Younger* cases invoked the irreparable injury rule against civil liberties plaintiffs seeking to enjoin proceedings in state courts; these cases are reviewed at pp. 735-37 above.


367 See, e.g., Buzard v. Houston, 119 U.S. 347, 351 (1886) (holding that if the legal remedy is adequate, plaintiff must proceed at law, to preserve defendant’s constitutional right to a jury); Cappetta v. Atlantic Ref. Co., 74 F.2d 53, 55 (2d Cir. 1934) (same), *cert. denied*, 294 U.S. 730 (1935); see also D. DOBBS, supra note 4, § 2.5, at 61 (“The main reason today for observing the adequacy test as a limit on equitable relief is that the plaintiff who gets his case into equity has foreclosed the possibility of a jury trial for the defendant.”); Rendleman, *supra* note 5, at 354–55 (“The inadequacy decision determines whether to preclude a binding jury verdict.”).

368 See U.S. CONST. amend. VII.


372 The party whose position arouses more human sympathy is likely to benefit from jury trial. Of more general importance, jury trial exposes defendant to the risk of a much higher assessment of damages, and thus increases the settlement value of the case. These beliefs are based on the practical experience of the litigation bar; systematic empirical studies are difficult, few, and focused on personal injury litigation. A recent study of damages for conscious pain and suffering prior to death found that juries award five times as much as judges if all cases are considered, and two-and-one-half to three times as much as judges if the largest awards are

HeinOnline -- 103 Harv. L. Rev. 757 1989-1990
remedy to deprive defendants of their right to jury trial, but this risk does not extend widely across the range of civil litigation. This risk of manipulation in a small number of cases cannot justify a preference for legal remedies in all cases. Indeed, it is more common for defendants to manipulate the law-equity distinction to eliminate the jury, a tactic that sometimes succeeds.\footnote{See Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 307 (1989). A generation ago, The University of Chicago Jury Project found that in personal injury cases in which the judge and jury agreed that plaintiff should prevail, the jury's assessment of damages was on average 20% higher than that of the judge. See Kalven, *The Dignity of the Civil Jury*, 50 Va. L. Rev. 1055, 1065 (1964). The Project found less evidence than expected of jurors' presumed pro-plaintiff bias, perhaps because 85% of the sampled cases were "easy" to decide, according to ratings by the trial judges. See id. at 1064 n.22. The investigators did conclude that most of the judge-jury disagreement they observed resulted from "the jury's sense of equity." *Id.* at 1065. Another illustration of prevailing views is that in debate over tort reform, it is the plaintiffs' bar that vigorously defends juries.}

Sometimes the parties' usual preference for juries is reversed, as when a large corporation sues a consumer or small business, or when a potential defendant sues for a declaration of non-liability. Courts sometimes invoke the irreparable injury rule to protect jury trial in these contexts, but they do not force plaintiff to accept a less effective remedy. This was true even at the peak of the Supreme Court's solicitude for jury trial. Both *Beacon Theatres* and *Dairy Queen* involved the reversed alignment where defendant wanted jury trial and plaintiff did not.\footnote{See, e.g., Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978) (holding that the legal remedy is inadequate if the case is too complex for a jury to understand; but changing only the mode of trial and not the remedy); Hill v. State, 382 Mich. 398, 170 N.W.2d 18 (1969) (refusing to grant plaintiff's request that the state be ordered to file a condemnation proceeding triable to a jury where plaintiff had adequate remedy by inverse condemnation suit in the Court of Claims, triable to court). More often, the argument fails. See, e.g., Ross v. Bernhard, 396 U.S. 531 (1970) (holding that the right to jury trial extends to a shareholder's derivative suit for damages); Arbor Acres Farm, Inc. v. Benedict, 278 Ark. 14, 15-17, 642 S.W.2d 893, 894-95 (1982) (dismissing defendant's counterclaim for reformation and transferring the case from chancery court to circuit court, where plaintiffs sought only damages and claimed no interest in land, so that reformation would be a "useless act"); Raeveke v. Gibraltar Sav. & Loan Ass'n, 10 Cal. 3d 665, 673-75, 517 P.2d 1157, 1161-63, 111 Cal. Rptr. 693, 697-99 (1974) (holding that plaintiff was entitled to a jury trial on a promissory estoppel claim where he also alleged an ordinary breach of contract).} The Court refused to let the plaintiff in either case manipulate the pleadings for the sole purpose of eliminating the

\footnote{For other cases where defendant wanted jury trial, see Granfinanciera, S.A. v. Nordberg, 109 S. Ct. 2782 (1989), in which a trustee in bankruptcy sought to recover alleged fraudulent conveyances; Mitchel v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960), in which defendant demanded jury trial as a means of severing individual back pay suits from a government enforcement suit; Sun Oil Co. v. Fleming, 469 F.2d 211, 213-14 (10th Cir. 1972), in which an oil company sought to recover possession of service station premises from a lessor; and Christian v. Porter, 340 Mich. 300, 65 N.W.2d 779 (1954), in which an executor sought to recover treasury bonds allegedly given to a person who had cared for the deceased.}
jury. But as I have shown elsewhere, the Court did not require either plaintiff to accept less relief than it sought.\textsuperscript{375}

Criminal defendants often demand jury trial, and this was an important reason for the rule that equity will not enjoin a crime.\textsuperscript{376} But that rule is nearly as dead as other variations of the irreparable injury rule.\textsuperscript{377} It is worn away by exceptions,\textsuperscript{378} often ignored,\textsuperscript{379} and occasionally invoked to serve some other policy.\textsuperscript{380} For better or worse, plaintiffs threatened with conduct subject to criminal punishment get an injunction if they need one.

2. Ripeness and Mootness. — A court may deny specific relief because plaintiff seeks it either too early or too late. A plaintiff may

\textsuperscript{375} See Laycock, supra note 10, at 1078–83.

\textsuperscript{376} See, e.g., West Allis Memorial Hosp., Inc. v. Bowen, 852 F.2d 251, 254, 256 (7th Cir. 1988) (refusing to enjoin an allegedly unlawful discount program in the absence of a national emergency, widespread public nuisance, or specific statutory authority); City of Chicago v. Festival Theatre Corp., 91 Ill. 2d 295, 312–15, 438 N.E.2d 159, 167–68 (1982) (refusing to enjoin live sex shows); Commonwealth v. Stratton Fin. Co., 310 Mass. 469, 474, 38 N.E.2d 640, 643 (1941) (refusing to enjoin usury, and denouncing “criminal equity” and “government by injunction”); see also Developments, supra note 6, at 1013–19 (discussing injunctive relief as a supplement to criminal sanctions).

\textsuperscript{377} See Leffar, Equitable Prevention of Public Wrongs, 14 TEX. L. REV. 427, 428 (1936) (commenting that the tendency to enjoin threatened crimes “seems constantly to be broadening and extending itself”); Note, The Statutory Injunction As an Enforcement Weapon of Federal Agencies, 57 YALE L.J. 1023, 1024 (1948) (noting that rule against enjoining crime “has been so whittled away that the government can obtain such an injunction to protect the general welfare” (footnote omitted)).

\textsuperscript{378} See, e.g., In re Debs, 158 U.S. 564, 593–96 (1895) (enforcing an injunction against blocking trains, stating that jurisdiction to enjoin acts interfering with property rights “is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law”); Harvey v. Prall, 250 Iowa 1111, 1118, 97 N.W.2d 306, 310 (1959) (stating that an ordinance forbidding unlicensed garbage collection “is regulatory in nature,” and “the penal provision thereof is merely incidental”); State v. Red Owl Stores, Inc., 253 Minn. 236, 250–52, 92 N.W.2d 103, 113–14 (1958) (enjoining the unlicensed sale of non-prescription drugs because of an asserted threat to public health).

\textsuperscript{379} See supra p. 722 (discussing use of injunctions to enforce statutes); see also Farber, Equitable Discretion, Legal Duties, and Environmental Injunctions, 45 U. PITTS. L. REV. 513, 514, 522 n.64, 536 (1984) (urging nondiscretionary use of injunctions to enforce statutes, and mentioning criminal law only to note that it is reserved for the most egregious cases and is usually irrelevant); Plater, Statutory Violations and Equitable Discretion, 70 CALIF. L. REV. 524, 545 n.70 (1982) (arguing that courts should enjoin violations of statutes; treating the rule against enjoining crimes as a “lowered barrier” and giving it only passing mention).

\textsuperscript{380} See, e.g., West Allis Memorial Hosp., Inc. v. Bowen, 852 F.2d 251, 254–56 (7th Cir. 1988) (finding no private right of action, doubting that defendant’s conduct was unlawful, and stating that equity would not enjoin a crime); Arkansas State Bd. of Pharmacy v. Trolley, 249 Ark. 1098, 1101, 463 S.W.2d 383, 385 (1971) (finding that because a law against the unlicensed sale of condoms was widely ignored, enforcement would be better handled by the state’s many criminal judges than by its twenty-three chancellors); Eagle Books, Inc. v. Jones, 130 Ill. App. 3d 407, 415–16, 474 N.E.2d 444, 450 (1985) (refusing to enjoin picketers from harassing customers of an adult book store, invoking the rule against enjoining a crime only after concluding that picketers were protected by the first amendment), cert. denied, 474 U.S. 920 (1985).
fear wrongful conduct and seek an injunction against it before he can convince a court that his fear is reasonable; in this case, his suit is not ripe. Or he may continue to seek an injunction after the danger has passed or after it is too late either to prevent the harm or repair it in kind. In this case, his suit is moot. The two doctrines have in common that the injunction will be denied if there is not a sufficient threat of future harm.

Ripeness cases frequently rely on the irreparable injury rule. In light of the doctrinal structure, it is easy to see why. There are two doctrinal requirements: that injury be threatened, and that the threatened injury be irreparable. These are analytically distinct, but they can be verbally combined into a single sentence: there must be a ripe threat of irreparable injury. It is tautologically true that if there is no ripe threat of any injury, then there is no ripe threat of irreparable injury. Thus, a court may summarize its conclusion either way. But “irreparable” is surplusage in a ripeness holding.

This distinction is not just verbal hairsplitting. A finding of injury that is not irreparable remits plaintiff to damages; a finding of no ripe threat of injury leaves plaintiff with no remedy at all unless or until something further happens. If the threat ripens and there is still time before it comes to fruition, plaintiff may return to court and get an injunction. In most ripeness cases, the feared injury will be irreparable if it happens at all. A court that finds no ripe threat of injury, and says that there is no ripe threat of irreparable injury, does not really mean that if the threat comes to fruition the damage remedy will be adequate.

A dramatic example is City of Los Angeles v. Lyons, a suit to enjoin the Los Angeles police from using chokeholds that had killed fifteen people. The Supreme Court said that plaintiff had not shown a threat of irreparable injury. Plainly it did not mean that being choked to death is not irreparable. Rather, the Court unambiguously meant that plaintiff had not shown a sufficient likelihood that he would ever again be choked. Many invocations of the

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381 See generally 13A C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3532-3532.6 (2d ed. 1984).
382 See generally id. § 3533-3533.11.
383 See, e.g., Flowers Indus. v. FTC, 849 F.2d 551, 552 (11th Cir. 1988) (concluding that plaintiff "would suffer irreparable injury if its assets were divested," but holding that "no immediate danger of divestiture exists"); Humble Oil & Ref. Co. v. Harang, 262 F. Supp. 39, 42-43 (E.D. La. 1966) (holding that plaintiff must show "potential irreparable injury" plus "real danger" that it will occur); System Concepts, Inc. v. Dixon, 669 P.2d 421, 428 (Utah 1983) (observing that plaintiff must show "the likely or threatened occurrence of such harm and the irreparability thereof").
385 See id. at 100.
386 See id. at 111.
387 See id.
irreparable injury rule fit this pattern of ripeness holdings in which the court says that there is no threat of irreparable injury.\textsuperscript{388}

Mootness cases present similar issues. Indeed, whether a case is categorized in terms of mootness or ripeness is a matter of emphasis. Mootness focuses on the past, and ripeness on the future, but cases look both ways when plaintiff's fears for the future are based on an incident in the past. Consider Lyons, in which the police had already choked plaintiff once. A suit to enjoin that choking was moot; a suit to enjoin future chokings was not ripe.

Courts are more likely to talk of irreparable injury when they focus on the future and conceive of these cases as ripeness cases. But sometimes they say the case is moot and the legal remedy is adequate. An example is Rondeau v. Mosinee Paper Corp.\textsuperscript{389} The Court said it granted certiorari "to determine whether a showing of irreparable harm is necessary" in a private suit under section 13(d) of the Securities Exchange Act.\textsuperscript{390} But the case had nothing to do with threatened harm that would not be irreparable. Defendant had committed one technical violation, had promptly complied when the violation was pointed out, and seemed likely to comply in the future. The Court concluded that there was no cognizable danger of recurrent violation,\textsuperscript{391} and that anyone who claimed to have been hurt by the original violation had an adequate damage remedy.\textsuperscript{392}

The Court did not say that damages would be adequate if there were still a choice between damages and prevention. Damages were the only remedy still possible, and the Court commented that they would be adequate. Despite the talk of irreparable injury and adequate remedy at law, the holding is that any claim for an injunction against the original violation was moot, and that no claim directed to future violations was ripe. Other cases are similar.\textsuperscript{393}

\textsuperscript{388} See, e.g., O'Shea v. Littleton, 414 U.S. 488, 502 (1974) (refusing to enjoin "conjectural" threat of racial discrimination by state criminal judges); Flowers Indus. v. FTC, 849 F.2d 551, 552-53 (11th Cir. 1988) ("Because no immediate danger of divestiture exists, [plaintiff] cannot suffer irreparable harm."); Grein v. Board of Educ., 216 Neb. 158, 168-69, 343 N.W.2d 718, 725 (1984) (refusing to enjoin violations of Public Meetings Law, where the court did not believe that one past violation showed a propensity to further violations).

\textsuperscript{389} 422 U.S. 49 (1975); cf. Hecht Co. v. Bowles, 321 U.S. 321, 325-26 (1944) (refusing to grant an injunction where defendant was diligently working to comply with a complex statute; no discussion of irreparable injury).

\textsuperscript{390} Rondeau, 422 U.S. at 50.

\textsuperscript{391} See id. at 59.

\textsuperscript{392} See id. at 60.

\textsuperscript{393} See, e.g., Teleprompter of Mobile, Inc. v. Bayou Cable TV, 428 So. 2d 17 (Ala. 1983) (refusing to enjoin one cable company from cutting another's cables, where cables had been cut during installation of competing cable in same right-of-way, and installation was complete); Gross v. Connecticut Mut. Life Ins. Co., 361 N.W.2d 259, 264-67 (S.D. 1985) (refusing to enjoin diversion of polluted water onto plaintiffs' land, where defendants had repaired their dam and had thus ended the flow of water); Orwick v. City of Seattle, 103 Wash. 2d 249, 252--
3. Decrees That Would Be Difficult To Supervise. — It is commonly said that equity will not specifically enforce a contract that is too difficult to supervise, or issue an injunction that is impractical to enforce. Like undue hardship, these rules matter doctrinally only when plaintiff's legal remedy is inadequate.

Both practicality and adequacy are matters of degree. Forced to choose between one remedy that is inadequate and another that is impractical, any mature legal system must ask how inadequate and how impractical. It is one thing to deny specific performance of a commercial contract where the legal remedy will be a substantial damage award with some uncertainty in the measurement; it is quite another thing to deny an injunction where plaintiff will lose fundamental political rights and defendant is immune from damages.

Plainly our courts distinguish such cases. Sometimes they specifically enforce construction contracts, and sometimes not, depend-
ing on the difficulty of supervising the job, plaintiff’s need for specific performance, and the court’s willingness to get involved. But specific relief is routine in cases that are much more complex, such as restructuring prison systems,\textsuperscript{400} school districts,\textsuperscript{401} or public housing authorities,\textsuperscript{402} reapportioning state legislatures,\textsuperscript{403} breaking monopolies into competing companies,\textsuperscript{404} and reorganizing insolvent businesses.\textsuperscript{405} The less adequate the damage remedy, the more willing courts are to undertake complex specific relief. Surprisingly few cases make the point explicitly, but some do.\textsuperscript{406}

Once a court has decided that the impracticality of the equitable remedy outweighs the inadequacy of the legal remedy, it is almost inevitable that the opinion will maximize the impracticality of the one and minimize the inadequacy of the other. Sometimes impracticality

\textsuperscript{400} See, e.g., Hutto v. Finney, 437 U.S. 678, 683–85 (1978) (reviewing judicially supervised reform of the Arkansas prison system); Eng v. Smith, 849 F.2d 80 (2d Cir. 1988) (ordering state to provide mental-health services in state prison).


\textsuperscript{403} See, e.g., Reynolds v. Sims, 377 U.S. 533, 585–87 (1964) (directing courts to ensure, except in unusual cases, that no further elections are conducted under apportionment plans found to be invalid).


\textsuperscript{406} See, e.g., Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33, 39 (8th Cir. 1975) (“The public interest in providing propane to the retail customers is manifest, while any supervision required will be far from onerous.”); Kearns-Gorsuch Bottle Co. v. Hartford-Fairmont Co., 1 F.2d 318, 319 (S.D.N.Y. 1921) (specifically enforcing patent license, and stating that “[e]verything depends on how insistently the justice of the case demands the court’s assumptions of difficult, unfamiliar, and contentious business problems”); Gerety v. Poitras, 126 Vt. 153, 154–55, 224 A.2d 919, 921 (1966) (stating that, with respect to construction contracts, “[w]here the inadequacy of damages is great, and the difficulties not extreme, specific performance will be granted” (citing 5 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1423 (rev. ed.))”).

HeinOnline -- 103 Harv. L. Rev. 763 1989-1990
opinions specifically invoke the irreparable injury rule as an additional ground of decision. The claim of no irreparable injury is sometimes plausible, where damages are readily measurable and money can be used to replace the very goods or services plaintiff seeks from defendant. But often, the court simply assumes the adequacy of the legal remedy, or ignores serious inadequacies.

An example is Northern Delaware Industrial Development Corp. v. E.W. Bliss Co., which involved a contract to modernize a steel plant. Plaintiffs sought specific performance of a promise to put on a second shift to minimize the amount of time the plant would have to be shut down. The court denied specific performance for fear that it would wind up supervising the whole project. It briefly commented that plaintiffs could "resort to law for a fixing of their claimed damages." It did not consider whether the law court could accurately measure lost profits, or whether the delay would cause a permanent loss of customers.

The policy of the rule against impractical decrees is clear enough. It protects courts from dissipating their authority and resources in failed attempts to reach beyond their grasp. The irreparable injury rule cannot serve this policy, because the harms that are most difficult to remedy in kind are equally difficult to compensate in damages.

407 See, e.g., McCormick v. Proprietors of Cemetery, 285 Mass. 548, 550–51, 189 N.E. 585, 586 (1934) (denying specific relief in part because plaintiff could hire another contractor to raise the grade of a cemetery monument, and recover the cost from defendant); Continental & Vogue Health Studios, Inc. v. Abra Corp., 369 Mich. 561, 564–67, 120 N.W.2d 835, 837–38 (1963) (calculating damages from a landlord's refusal to reconstruct a destroyed building as the difference between the rent plaintiff paid and the rent plaintiff charged sublessees); Gerety v. Poitras, 126 Vt. 153, 155, 224 A.2d 919, 921 (1966) (denying specific performance where defendant refused to honor a warranty on a house sold to plaintiff, noting that plaintiff had already retained another contractor who had itemized the necessary work).

408 See, e.g., Dworman v. Mayor of Morristown, 370 F. Supp. 1056, 1078 (D.N.J. 1974) (commenting that specific performance of construction contracts is generally impractical and damages are generally adequate); Suchan v. Rutherford, 90 Idaho 288, 410 P.2d 434 (1966) (denying specific performance of a promise to buy land, where damages based on market value would be an adequate remedy and it would be difficult to supervise the buyer's payments over a term of years); King Features Syndicate v. Courrier, 241 Iowa 870, 873–74, 43 N.W.2d 718, 721 (1950) (stating the general rule that contracts for the delivery of services are not specifically enforced because of the impossibility of supervision "and of course the adequacy of the legal remedy").

409 See, e.g., Thayer Plymouth Center, Inc. v. Chrysler Motors Corp., 255 Cal. App. 2d 309, 306–07, 63 Cal. Rptr. 148, 152 (1967) (claiming that damages from the termination of an automobile dealership agreement can be measured, albeit with difficulty); London Bucket Co. v. Stewart, 314 Ky. 832, 834–35, 237 S.W.2d 509, 510 (1951) (stating that construction contracts are hard to supervise and that the remedy at law is adequate, even where damages are hard to measure); Petry v. Tanglwood Lakes, Inc., 514 Pa. 51, 54–60, 522 A.2d 1053, 1054–57 (1987) (finding damages to be an adequate remedy for failure to build a lake in front of plaintiff's cottage).

410 245 A.2d 431 (Del. Ch. 1968).

411 Id. at 433.
For example, judicial efforts to guarantee an adequate and desegregated education to all students have largely failed, and may have been counterproductive. But no one suggests that courts should have awarded damages to all the school children instead, or that damages would be an adequate remedy for loss of basic education. The policy of avoiding impractical decrees is best served by an operative rule that implements the policy directly. Once again, the irreparable injury rule is a very ill-fitting proxy.

VI. THE DISPARATE USES OF IRREPARABLE INJURY TALK

The reasons for denying plaintiff's choice of remedy are themselves rather specific. A fairly short list accounts for nearly all the cases, but it is hard to generalize about the items on the list. They are a quite miscellaneous group. Courts invoke the irreparable injury rule in a variety of different ways.

In some cases, courts more or less consciously balance the costs to defendant or the judiciary of granting equitable relief against the costs to plaintiff of denying it. The cases on preliminary relief, undue hardship, and impracticality fit this pattern, as do some of the cases on deference to other tribunals or branches of government. These are the cases in which the traditional understanding of the irreparable injury rule most nearly applies. Plaintiff is required to accept a less desirable or less effective remedy, because a better remedy would impose more costs than benefits. In these cases, the relative adequacy of the legal remedy actually affects the analysis.

Even these cases do not fit the traditional rule. The standard for denying equitable relief is not that the legal remedy meets some threshold of adequacy, but that the costs and risks of granting equitable relief in the particular case outweigh the costs and risks to plaintiff of having to make do with the legal remedy, when all costs and risks are measured according to the balancing test appropriate to the case. The "balancing test appropriate to the case" varies, because the policies at stake vary. But a general preference for legal remedies does not affect the balance in any of these cases.

In most of the other cases denying specific relief, courts apply a rule that does not require balancing and in which the relative adequacy of other remedies is largely irrelevant. Cases that fit this pattern are those decided on grounds of personal service contracts, prior restraint, ripeness and mootness, evasion of other law, and hostility to the merits, and many of the cases deferring to the jurisdiction of other tribunals. The rules applied in these cases may be simple or complex; they may serve substantive, jurisdictional, or procedural policies. But their application does not vary with the adequacy of other remedies, and the adequacy of other remedies is not a significant policy basis for the rule.
Thus, courts will not specifically enforce personal service contracts against employees, or against employers where the resulting personal friction would be too disruptive. The application of this rule does not depend on the court's assessment of the adequacy of damage remedies. Similarly, exceptions to the rule against prior restraints turn on free speech policies, not on variations in the adequacy of legal remedies. Policies of ripeness and mootness are connected to irreparable injury talk only by their common connection to the risk of injury. Surely the seriousness and irreparable nature of the injury sometimes matters to courts, but the probability of injury matters more. Remedial choices based on preventing evasion of substantive law or on the court's reaction to the merits are obviously driven by substantive law policies.

Courts will generally not interfere with the jurisdiction of an administrative agency until administrative remedies have been exhausted, and a showing of unusual hardship in a particular case is usually insufficient to create an exception. When courts do interfere, the relevant policy reasons are usually found in the relationship between the court and the agency, or in the substantive law committed to the agency. Inadequacy of the administrative remedy is relevant but not sufficient.

In some of these cases, the legal remedy is preferred precisely because it is inadequate; specific relief is denied because it is too effective. This is most obviously true in the rules against prior restraint and involuntary servitude. In these cases, plaintiff's claim conflicts with countervailing constitutional rights, and we fear overenforcement. The undue hardship cases are a little different, but they also reflect fears of unduly burdensome enforcement.

In several of these cases, the reasons for denying specific relief also apply to damages. Courts will not give preliminary damage relief; they create immunities that often insulate governments and government employees from damage liability; and they will not allow plaintiffs to evade specific provisions of applicable law either with generalized equity or generalized damage remedies. The governing policies in these cases are full deliberation before decision, deference to other branches of government, and adherence to particularly applicable law. These policies may sometimes have different implications for specific relief than for damages, but a general bias against specific relief is not part of the relevant policies.

The same pair of phrases — "irreparable injury" and "adequate remedy at law" — is used to describe all these different cases. Obviously, these phrases cannot have a consistent meaning. Their meaning must vary with the circumstances, and courts must assess the circumstances first to determine the meaning. When there is no reason to deny specific relief, legal remedies are inadequate unless they are as complete, practical, and efficient as equitable remedies. When
there is a reason to deny specific relief, legal remedies are much more likely to be judged adequate. The catchphrases can label the conclusion, but they are not much help in reaching it. If a judge thinks in terms of "irreparable injury" without first deciding on other grounds what the phrase should mean or how the case should come out, he has only a very small chance of reaching the right result. As Judge Friendly once said, the phrase "generally produces more dust than light." 412

Judicial citations to irreparable injury opinions sometimes emphasize other factually similar cases, so that the cases cited are actually on point. More often, the citation is simply to the catchphrase, and the case itself is wholly irrelevant. A good example is the Supreme Court's string cite in Weinberger v. Romero-Barcelo. 413 The Court said it "has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." 414 It then cited Rondeau v. Mosinee Paper Corp., 415 a mootness case; Sampson v. Murray, 416 a case about preliminary relief and deference to administrative agencies; Beacon Theatres, Inc. v. Westover, 417 a jury trial case; and Hecht Co. v. Bowles, 418 a case that does not even mention the irreparable injury rule. Weinberger itself is about undue hardship and deference to the military. 419 Each of these cases is cited in a different section of this Article; they have almost nothing in common except the phrase "irreparable injury." Hecht does not even have that; Hecht denied an injunction on the ground that it would be futile. The Court miscited it in Weinberger. Perhaps the law clerk assumed that any case that denied an injunction and mentioned discretion must have been an irreparable injury case.

The only context in which the phrase may do more good than harm is the stage of preliminary relief. In that context, "irreparable injury" nicely captures the fundamental point: courts will balance the risk of injury against the risk of error, and injury does not count for much if it can be repaired or replaced in kind, even approximately, by a permanent injunction or with a damage award, or if it can be valued in dollars even approximately, or if it is temporary and the temporary loss is not especially compelling. The equally complete, practical, and efficient standard does not apply; plaintiff cannot de-

412 Studebaker Corp. v. Gittlin, 360 F.2d 692, 698 (2d Cir. 1966).
413 See 456 U.S. 305, 312 (1982).
414 Id.
mand a complete remedy before he proves his case. It would eliminate much confusion if we eliminated all other uses of the irreparable injury rule, all other uses of the phrases “irreparable injury” and “adequate remedy,” and all other definitions of either phrase. Phrases with so many different meanings cannot convey any of them.

VII. IMPLICATIONS FOR THEORY AND PRACTICE

This review of the cases reveals judicial behavior very different from what the black letter irreparable injury rule would predict. The irreparable injury rule is not a significant barrier to equitable relief, because the legal remedy is almost never adequate. Principled doctrine and ample precedent support any articulable need for equitable relief. Courts rarely deny plaintiff’s preferred remedy without a functional reason. In the post-realist age, this should not be a surprise. The surprising thing is that courts actually do deny specific relief without a functional reason in cases of contracts for the sale of fungible goods.

If courts were to formally abolish the irreparable injury rule and explicitly replace it with the operative rules identified in Part V, they would sharply revise legal doctrine while changing the results of very few cases. Realists of a certain stripe might ask whether such a change is worth making. Doctrine does not control results; if the results are satisfactory, why worry about doctrine?

Every competent lawyer understands that rules are sometimes swallowed by their exceptions. Where the judicial sense of justice matches the exceptions, remarkably few cases are incorrectly decided under the nominal rule instead of the exceptions. We can expect that judicial intuitions will match the exceptions. It is the judges’ sense of justice that caused them to proliferate the exceptions that swallowed the rule.

At some point, it makes sense to describe the exceptions as the rule, and the former rule as the exception. But this shift is a matter of relative advantage rather than necessity. Our language and modes of reasoning are flexible enough to describe the rule as a preference for legal remedies, and then describe a series of exceptions that cover 95% of the cases, or 99%, or even 100%. The legal system can function in this cumbersome way for decades without conforming the rhetoric of rule and exception to the reality of decided cases.

The system can function in this way, but the costs are substantial. Most obviously, it is hard for legal actors to understand what they are doing. A principal claim of this Article is that we can understand the law of remedies more clearly when we state the rules directly — that we can see relationships and explanations that were hidden by the irreparable injury rule. I hope that readers found such insights throughout the Article. The rhetoric of irreparable injury distracts
analysis from the real relationships among remedial choices, and from the relationships between remedy and substance and between remedy and procedure. It highlights the obsolete distinction between law and equity, and subordinates more functional schemes for classifying remedies.

One theoretical implication goes well beyond the law of remedies. The rebuttable preference for specific relief if plaintiff wants it has implications for the economic analysis of remedies, and especially for efficient breach of contract. Only if there is a shortage, so that one side must do without, does it become meaningful to speak of contract remedies allocating a scarce resource to its most efficient use. But in the event of a shortage, damages are inadequate and the positive law allocates the resource to the party who was first promised it under a valid contract. Whatever its normative or heuristic merits, the concept of efficient breach does not describe the law in shortage cases.

The consequences of formally abolishing the irreparable injury rule would be practical as well as theoretical. As matters stand, the side that benefits from the nominal rule will sometimes invoke the rule and litigate the issue. The side that benefits from the exceptions must identify the appropriate exception and fit the case into it. The opinion must recite the nominal rule and then the exception. There is much wasted effort as lawyers and judges who know the rule puzzle through to the appropriate exception. Most of the cases cited in this Article reflect the time of at least one judge and two lawyers — usually more lawyers and one or two panels of appellate judges — working on the irreparable injury rule. Clients and taxpayers pay for that effort.

The lawyers, the court, or both may get confused in this ritual; a few opinions will reach bad results, and many more will say strange things. As Grant Gilmore once noted, courts will reach sound decisions despite bad doctrine, but the cost will often be opinions that are “patently absurd.” Some irreparable injury opinions are patently absurd by any standard: consider the cases holding that an uncollectible damage judgment is an adequate remedy for defamation.

There are probably more bad results than we can identify from reading the opinions. The opinions we read are all from cases where a judge went to the trouble of writing for publication, and mostly from cases where the parties went to the trouble of briefing an appeal.

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420 See supra pp. 707, 710–11.
422 See G. Gilmore, Security Interests in Personal Property 551–52 (1965) (“It is a fairly reliable rule of thumb that, when courts with some regularity begin to assign patently absurd reasons for their decisions, the decisions themselves are sound and the underlying rule of law has fallen out of touch with reality.”).
These are the cases in which the most legal effort was invested. The error rate is presumably higher in unappealed and unpublished trial court judgments. Overburdened trial judges must often rely on their memory of black letter rules; bad doctrine can lead them into error.

Bad results can be invisible even in published opinions. If the focus on irreparable injury distracts the court and the parties from more important reasons for choosing among remedies, the opinions may not reveal the facts that should have produced a different result. For example, I continue to puzzle over the cases seeking specific performance of contracts to sell fungible goods in an orderly market. Why would the parties litigate that issue through trial and appeal? Are they just mad and fighting over the principle of the thing? Are their lawyers focused on a theoretical victory or a higher fee, and oblivious to the lack of practical consequences? Or is there something else at stake that the court never tells us about? Reading only the published opinions, we have no way to know.

The reasons for choosing one remedy over another cannot be reliably applied by trial judges or openly argued by counsel unless they are openly stated in opinions. One infinitely elastic phrase — "irreparable injury" — is not an adequate proxy for sound doctrine. Many of the realists understood this perfectly well. It was the great realist Karl Llewellyn who said that "[c]overt tools are never reliable tools." The system will function better when doctrine reflects reality. Lawyers will prepare cases better, try them and argue them better, and settle them more efficiently. Judges will decide cases more efficiently and sometimes more justly. Those lawyers who defend weak cases by confusing the issues will have one less tool with which to work.

Once the rhetoric of irreparable injury is removed from the debate, further litigation and scholarship will refine our understanding of the real reasons for remedial choices. Already those reasons are susceptible to approximate restatement. But this process cannot begin as long as courts reflexively explain their holdings in terms of irreparable injury.

Covert tools must suffice when nothing better is available. The problem is how to get the covert tools out of the way after we come to understand the problem well enough to devise better tools. The judges' intuitive sense of justice creates pressure to get the results right, but it creates no similar pressure to get the doctrine right. Because the irreparable injury rule no longer constrains results, judges feel no pressure to abandon it. What is needed is a single event that will crystallize the developments that have already occurred and focus judicial attention on a new line of development. A sweeping Supreme Court opinion might work, but a more promising solution is a statute.

Llewellyn, Book Review, 52 Harv. L. Rev. 700, 703 (1939).
Suppose Congress and each state enacted the following statute: "The existence of another adequate remedy does not preclude a final judgment of injunction, specific performance, or other equitable relief, in cases where such relief is appropriate." This language is modeled directly on Rule 57 of the Federal Rules of Civil Procedure, which governs declaratory judgments. Such a statute would abolish the irreparable injury rule while encouraging continued judicial development of the real reasons for remedial choices under the rubric of appropriateness. Precedent under the declaratory judgment acts would ensure that the statutes were not taken to give plaintiffs a free choice of remedy, and defendants would have strong incentives to argue functional objections to equitable remedies instead of the irreparable injury rule. Such a statute is no panacea, but it surely deserves serious consideration.

With or without such a statute, and whatever happens to judicial rhetoric, the pattern of results in the cases is clear. Courts weigh the advantages and disadvantages of alternative remedies in individual cases. They do not weigh the legal and equitable origin of the alternatives; there is no hierarchy in which law is preferred to equity. As a real factor in the results of cases, the irreparable injury rule is dead.

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425 Rule 57 provides in part: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." FED. R. CIV. P. 57.