Book Review

Injunctions and the Irreparable Injury Rule

THE CIVIL RIGHTS INJUNCTION. By Owen M. Fiss.† Bloomington: Indiana University Press, 1978. Pp. vi, 117. $10.95.

Reviewed by Douglas Laycock*

The Civil Rights Injunction[1] is of more general legal interest than its title suggests. It is only incidentally about civil rights; its thesis concerns all injunctions[2] and, inferentially, all of equity. The book is a plea for abolition of the rules that subordinate equitable remedies to legal remedies—the irreparable injury rule, the prior restraint rule, and the dying rules that equity protects only property rights and will not enjoin a crime. These rules create a remedial hierarchy in which legal remedies are presumptively appropriate, and in which equitable remedies are used only if legal remedies are inadequate and no other subordinating rule interferes.

This review will discuss the major points of the book, focusing on their relation to Fiss' primary target,[3] the irreparable injury rule. His attack on that rule is a valuable and long-needed contribution, but the supporting argument has flaws that unnecessarily invite counterattacks. I will disagree with important parts of his argument and suggest alternative rationales for his conclusion.

I. The Book as a Whole

A. The Structure of the Argument

The great strength of the book is its conceptual and structural elegance. Fiss offers a systematic analysis of those allegedly unique char-

† Professor of Law, Yale Law School.
* Assistant Professor of Law, The University of Chicago. B.A. 1970, Michigan State University; J.D. 1973, The University of Chicago. The author wishes to express his gratitude to his colleagues at the University of Chicago Law School for comments on an earlier draft, and to Joseph Markowitz for research assistance.

1. O. FISS, THE CIVIL RIGHTS INJUNCTION (1978) [hereinafter cited by page number only].
2. P. 6.
3. P. 42.

acteristics of injunctions that differentiate them from other remedies, and the relevance of those differences to the remedial hierarchy. He concludes that none of the differences between injunctions and other remedies is sufficiently encompassing or important to justify the general subordination of injunctions to other remedies.

The sources of uniqueness to which Fiss addresses himself in Chapter II correspond closely to the arguments for subordination that he refutes in Chapter III. Thus, he discusses the allegedly unique preventive character of injunctions,[4] and then responds to the argument that injunctions should be subordinated to other remedies because of difficulty in predicting the likelihood and severity of future harm.[5] He analyzes the allocation of decisionmaking authority in injunctive litigation,[6] and then examines the argument that subordination preserves the authority of juries,[7] legislatures,[8] and—in the *Younger v. Harris*[9] context—state courts.[10] He reviews the procedure for hearing injunction cases,[11] and then considers the due process arguments for subordination,[12] arguments that are limited mainly to temporary restraining orders and preliminary injunctions. He analyzes the means of enforcing injunctions,[13] and then takes up the arguments that injunctions are a threat to liberty, either in the free speech context (the prior restraint doctrine),[14] or generally, by preventing economically desirable violations of law.[15] He considers the individualized nature of injunctions[16]—their ability to make statute-like law governing only the parties and their privies—and the allocation of standing to seek injunctions;[17] however, neither of these innocuous distinctions seems to have generated major arguments for subordination. Finally, he considers the problems of complexity inherent in some forms of injunctive litigation, although this discussion is outside the main structure of his argu-

4. Pp. 8-12.
5. Pp. 80-86.
6. Pp. 23-28.
7. Pp. 50-58.
8. Pp. 58-61.
9. 401 U.S. 37 (1971).
10. Pp. 61-68.
11. Pp. 28-32.
12. Pp. 45-50.
13. Pp. 32-37.
14. Pp. 69-74.
15. Pp. 74-80.
16. Pp. 12-18. *See, e.g.,* FED. R. CIV. P. 65(d) ("[I]njunction . . . is binding only upon the parties . . . , their . . . agents . . . and . . . persons in active concert . . . with them who receive actual notice . . . .").
17. Pp. 18-23.

ment.[18] Of course, the arguments interact in intricate ways.

The analysis is creative, insightful, and occasionally speculative. Not all of the creative insights have been checked against the details of case law,[19] but the resulting quibbles do not affect the thrust of the argument. The book is based on a set of lectures, and that format has apparently required that a meaty outline sometimes substitute for complete exposition. But Fiss has addressed the important arguments, and the analysis is, on the whole, persuasive. He demonstrates that the injunction is not the unique remedy traditional doctrine would suggest and that none of the arguments for subordination is sufficiently general to justify the existing rules.

B. The Civil Rights Paradigm

Fiss' analysis of the injunction is unfortunately commingled with elements of an intellectual autobiography. He describes his early hostility to injunctions, triggered by the history of pre-war labor and economic substantive due process injunctions, and how his personal experience with civil rights injunctions in the sixties gradually reversed this hostility.[20] This experience persuaded him that injunctions are often desirable and that one can evaluate remedies independently of the substantive rights for which they are invoked.[21]

18. Pp. 91-94.

19. *See* text accompanying notes 44-46 & 79-119 *infra*. *Compare* p. 2 (business interests challenging validity of regulation "[u]sually" raised their claim in defense of criminal prosecution) *with* Laycock, *Federal Interference with State Prosecutions: The Cases* Dombrowski *Forgot*, 46 U. CHI. L. REV. 636 (1979); *and* Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U.L. REV. 740 (1974); *compare* pp. 14-15 ("The beneficiary of the typical civil rights injunction . . . is a social group. . . . This is not due to the . . . fact that the suits are formally brought as representative actions.") *with* East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 429-30 (1976); Franks v. Bowman Transp. Co., 424 U.S. 747, 752-57 (1976); Board of School Comm'rs v. Jacobs, 420 U.S. 128 (1975); *and* Sosna v. Iowa, 419 U.S. 393, 397-403 (1975); *compare* p. 47 (requirement that preliminary injunction applicant show likelihood of success "is commonplace in America, but is being questioned now in England") *and* American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396 (H.L.), *cited at* p.47 n.13, *with* Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 822 n.15 (1973) (plurality opinion); Sonesta Int'l Hotels Corp. v. Wellington Assocs., 483 F.2d 247, 250 (2d Cir. 1973); Constructors Ass'n v. Kreps, 573 F.2d 811, 814-15 (3d Cir. 1978); Johnson v. Bergland, 586 F.2d 993, 995 (4th Cir. 1978); Compact Van Equip. Co. v. Leggett & Platt, Inc., 566 F.2d 952, 954-55 (5th Cir. 1978); Fennell v. Butler, 570 F.2d 263, 264 (8th Cir. 1978); William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 526 F.2d 86, 88 (9th Cir. 1975); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 842-45 (D.C. Cir. 1977); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948, at 449-55 (1973); *and* Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978); *compare* p. 77 ("court would surely invoke the irreparable injury requirement" in "ordinary trespass case") *with* Wheelock v. Noonan, 108 N.Y. 179, 15 N.E. 67 (1888); *and* D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES § 5.6, at 348-50 (1973).

20. Pp. 4-6, 75.

21. P. 6.

This personal history would be harmless were it merely an introductory recital, but it is much more. It explains the title and it colors Fiss' argument; at times he seems to impute to the world his view that injunctions were redeemed by the civil rights experience.[22] He treats the civil rights injunction as a paradigm that demonstrates the undesirability of a remedial hierarchy. The choice of example is unfortunate, for the book is in part a reply to critics for whom the civil rights injunction is the primary problem, for whom it is exhibit number one in the case for restraining an imperial judiciary.[23] Little of Fiss' argument depends on this paradigm, but the obvious risk is that some readers either will not realize that or will react only to the civil rights emphasis and fail to evaluate fairly the underlying argument.

The misunderstanding is avoidable because Fiss and the critics of the civil rights injunction address themselves to different issues. Critics such as Lino Graglia,[24] Raoul Berger,[25] and William Rehnquist[26] are concerned either with federalism and separation of powers issues, or with the merits of individual cases. Their occasional reliance on doctrines of equitable restraint is almost always an argument of convenience, unrelated to the critics' real motivations. Those who are unhappy when courts order massive school busing, for example, would be equally unhappy if courts instead were to levy massive damage judgments for failure to bus.

The truth is, of course, that no meaningful damage remedy is likely in the busing cases. Proof of causation and quantification of damages would be monstrously difficult; immunity defenses would pose problems; the risk of jury nullification would be high. Damage awards are a clumsy tool for inducing complicated reforms: they do not provide the control of detail that judges can exert by injunction. If the conservative critics can eliminate the equitable remedy, they can effectively eliminate the underlying right, and that is the reason for their occasional attacks on equity.

The real point of these critics is that the federal judiciary has undertaken to resolve a wide range of issues that should be left to the national political branches or to state and local governments; usually

22. *See, e.g.,* pp. 4, 10, 86, 94-95.

23. For a list of such critics, see p. 5.

24. L. GRAGLIA, DISASTER BY DECREE (1976).

25. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

26. *See, e.g.,* Rizzo v. Goode, 423 U.S. 362 (1976) (Opinion of the Court); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (Opinion of the Court); Steffel v. Thompson, 415 U.S. 452, 478-85 (1974) (Rehnquist, J., concurring).

their point is made in just those terms. Although Fiss accuses the Supreme Court of concealing its federalism judgments in the *Younger* cases in a cloak of equity rhetoric,[27] federalism rhetoric dominated the *Younger* opinion,[28] and equity rhetoric has virtually disappeared from later opinions in the *Younger* line.[29] The developing rules are far more restrictive than the equity doctrine that the Court occasionally invoked,[30] and the Court has ignored serious inadequacies in the legal remedy.[31]

Fiss does not share the view that federalism and separation of powers considerations should confine the federal judiciary to a narrow role. That disagreement is reflected in *The Civil Rights Injunction*,[32] but the book is not about that issue. It addresses itself to a much narrower, less politically charged issue—indeed, to a technical lawyer's issue.

This is not to denigrate the book's importance. Fiss proposes that the irreparable injury rule, an ancient doctrine with constitutional overtones, serves no modern purpose and should be abolished. This is an important proposition that must be considered on its own merits, free of entanglement in broader arguments about judicial activism. However active or inactive the courts may be—whether they assert authority over many problems or few—they must select remedies for each wrong they adjudge. Fiss addresses himself to the rules for selecting remedies, and his argument is as relevant to ordinary commercial litigation as it is to civil rights.

Indeed, his argument is least important to civil rights litigation, for there the legal remedy is nearly always inadequate.[33] Even if courts could award substantial money damages,[34] no one has ever suggested that money alone would be an adequate remedy for segregated and inferior education, for loss of voting rights, or for the rest of the complex web of discrimination that has created a continuing black underclass in the United States.[35] Money alone cannot undo a harm so complex and pervasive. There is no market in such rights, and no

27. Pp. 67-68. For a collection of Supreme Court cases involving Younger v. Harris, 401 U.S. 37 (1971), see Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 193 n.3. *See also* Moore v. Sims, 99 S. Ct. 2371 (1979).

28. 401 U.S. at 44-47, 51-53.

29. *See* Soifer & MacGill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEXAS L. REV. 1141, 1178-213 (1977).

30. *See* Laycock, *supra* note 27, at 224-28.

31. *Id.* at 196-222.

32. *See, e.g.*, pp. 63-67, 89-95.

33. *See* pp. 87-88.

34. *See* text accompanying notes 26-27 *supra*.

35. *See generally* W. WILSON, THE DECLINING SIGNIFICANCE OF RACE (1978).

standard or consensus exists for assigning monetary values to them. In this connection, Fiss overstates the importance of *Brown v. Board of Education*.[36] He suggests that the case functioned as an axiom, justifying many other broad injunctions against government officials.[37] This is true, but only on the federalism and separation of powers issues, and only because of the complexity of the remedy it required. Long before *Brown*, injunction and mandamus were the standard remedies for the more limited right recognized under the separate-but-equal rubric.[38] *Brown*, its progeny, and its forebears are fully consistent with the remedial hierarchy, for in each the damage remedy was plainly inadequate.

The remedial hierarchy must be evaluated in a broader, politically neutral context. To allow it to be caught up in the fierce disagreements over federalism and separation of powers is a mistake. Fiss' persistent use of the civil rights paradigm obscures the general applicability of his analysis, but as he suggests,[39] his thesis can and should be abstracted from the civil rights context.

C. *The Proposed Change*

Although Fiss would effect a revolution in the way lawyers talk about remedies, and hence in the way most lawyers think about remedies, he would make only a minor change in the actual content of the formal rules. This paradox exists because the verbal formulation of the irreparable injury rule has tended to exaggerate the true extent of the preference for legal remedies.

In the first place, the rule has two formulations, and this occasionally causes a judge to think there are two requirements: that there be no adequate remedy at law and that the injury be irreparable.[40] This misunderstanding in turn leads to the suggestion that the injury itself must have some special quality—perhaps that it be especially egregious[41]—when "irreparable injury" should mean simply injury that

36. 347 U.S. 483 (1954), *reargued on remedy*, 349 U.S. 294 (1955).

37. P. 5 ("[B]y the late 1960s, *Brown* was viewed as so legitimate that it commonly functioned as . . . a decision of unquestioned correctness, a starting point for normative reasoning in domains far removed from schools and race.").

38. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Gong Lum v. Rice, 275 U.S. 78 (1927) (mandamus denied on merits); Cumming v. Board of Educ., 175 U.S. 528, 545 (1899) (injunction to close white school denied; "different questions might have arisen" had plaintiffs sought order to reopen black school).

39. Pp. 6, 90-91.

40. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434, 441-42 (1977) (dictum).

41. *See, e.g.*, O. FISS, INJUNCTIONS 9 (1972).

cannot be repaired (remedied) at law.[42] Thus, even a relatively insignificant injury is irreparable if it cannot be measured in money.

Second, adequacy is a matter of degree,[43] and the normal statement of the general rule does not specify how inadequate the legal remedy must be. That question is left to a related rule—well-settled but less well-known—of which Fiss seems to be unaware:[44] no legal remedy is adequate unless it is "as complete, practical and efficient as that which equity could afford."[45] Although this rule is sometimes overlooked and sometimes willfully ignored, it is the overwhelmingly dominant statement of the law in opinions that raise the question.[46]

Thus, the full statement of the traditional rule is as follows:

1. Equity will not act if there is an adequate remedy at law.
2. "Adequate remedy" means a remedy as complete, practical, and efficient as the equitable remedy.

This rule could be reformulated as follows:

1. Plaintiff is entitled in all cases to the most complete, practical, and efficient remedy.
2. If a legal and an equitable remedy are equally complete, practical, and efficient, the legal remedy shall be used.

Although the two formulations are logically equivalent, they are not rhetorically equivalent, especially if one assumes that under either formulation the broader first rule of the pair will be more widely known than the narrower second rule. The second formulation would make clear that the irreparable injury rule is simply a tie-breaker, and that the plaintiff is not to be disadvantaged because of it. The first formulation suggests a stronger prejudice against equity; it is responsible for judicial statements that injunctions are an extraordinary remedy.[47]

42. *See* Triebwasser & Katz v. AT&T, 535 F.2d 1356, 1359 (2d Cir. 1976); D. DOBBS, *supra* note 19, § 2.10, at 108; O. FISS, *supra* note 41, at 9.

43. P. 38.

44. *See* p. 38.

45. Terrace v. Thompson, 263 U.S. 197, 214 (1923).

46. *See, e.g.,* American Life Ins. Co. v. Stewart, 300 U.S. 203, 214-15 (1937); May v. LeClaire, 78 U.S. (11 Wall.) 217, 236 (1870); Boyce v. Grundy, 28 U.S. (3 Pet.) 210, 215 (1830); Hicks v. Clayton, 67 Cal. App. 3d 251, 264, 136 Cal. Rptr. 512, 520 (1977) (legal remedy "must reach the whole mischief . . . in a perfect manner"); Jefferson Chem. Co. v. Mobay Chem. Co., 253 A.2d 512, 515 (Del. Ch. 1969); City of Chicago v. Collins, 175 Ill. 445, 51 N.E. 907, 909 (1898); Johnson v. North Am. Life & Cas. Co., 100 Ill. App. 2d 212, 241 N.E.2d 332, 335 (1968) ("question . . . is whether the remedy at law compares favorably with" equity remedy); Mack v. Latta, 178 N.Y. 525, 531, 71 N.E. 97, 98 (1904) (quoting 1 J. POMEROY, EQUITY JURISPRUDENCE § 180, at 166-67 (1st ed. 1881)). *See* D. DOBBS, *supra* note 19, § 2.5, at 60; J. DOBBYN, INJUNCTIONS IN A NUTSHELL 38 (1974); H. MCCLINTOCK, EQUITY § 43, at 103 (2d ed. 1948); J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 33 (4th ed. 1846); 42 AM. JUR. 2D *Injunctions* § 40 (1969); 30 C.J.S. *Equity* § 25 (1965).

47. *See, e.g.,* Lewis v. S.S. Baune, 534 F.2d 1115, 1121 (5th Cir. 1976); Greater Iowa Corp. v.

Fiss proposes that we simply adopt the first rule of the second formulation. That is, in every case the court would pick the best remedy, whether legal or equitable, without an arbitrary tie-breaker for choosing between equally good remedies. Elimination of a rule that serves only as a tie-breaker is a very modest change indeed. But of course the real importance of Fiss' proposal is that it would formulate the rule more neutrally, thereby ending the verbal bias against injunctions. It would deprive courts of a slogan that is used to deny injunctions unreasonably, either from misunderstanding or from a desire to conceal the real motive behind the decision. This gain in clarity and honesty of thought and expression is itself a powerful argument in favor of Fiss' thesis.

But it is not *Fiss'* argument: he cannot urge it because he sees the remedial hierarchy as something more threatening than just a tie-breaker. Although he acknowledges a gap between civil rights practice and his conception of the doctrine,[48] he views the doctrinal subordination of injunctions as a serious restriction on their proper use. His authority for taking subordination seriously is the Supreme Court's recent equity-cum-federalism cases.[49]

I have already mentioned my view that those cases have little to do with equity,[50] and that mingling the equity and federalism issues risks a misunderstanding of the central argument.[51] These cases are simply the most dramatic recent examples of the irreparable injury rule as a prop for decisions on other grounds. Whether such cases are abuses of a generally toothless rule, as I believe, or ordinary applications of an overly stringent rule, as Fiss seems to believe, the same conclusion follows: the irreparable injury rule is troublesome enough to require that it be justified by something more than the historical accident that it once allocated jurisdiction between courts that have long since been merged.

McLendon, 378 F.2d 783, 799 (8th Cir. 1967); Wybrough & Loser, Inc. v. Pelmor Labs., Inc., 376 F.2d 543, 547 (3d Cir. 1967); Western Electroplating Co. v. Henness, 172 Cal. App. 2d 278, 283, 341 P.2d 718, 721 (1959); State *ex rel.* Outrigger Club, Inc. v. Barkdull, 277 So. 2d 15, 17 (Fla. 1973); Plasti-Drum Corp. v. Ferrell, 70 Ill. App. 3d 441, 452, 388 N.E.2d 438, 447 (1979); Haught v. City of Dayton, 34 Ohio St. 2d 32, 36 n., 295 N.E.2d 404, 406 n. (1973); Oregon State Bar v. Fowler, 278 Ore. 169, 172, 563 P.2d 674, 676 (1977); Pye v. Commonwealth Ins. Dept., 29 Pa. Commw. Ct. 545, 547, 372 A.2d 33, 35 (1977); H. McCLINTOCK, *supra* note 46, § 22.

48. P. 43.

49. Pp. 42-43 (citing O'Shea v. Littleton, 414 U.S. 488 (1974); Younger v. Harris, 401 U.S. 37 (1971); and Douglas v. City of Jeannette, 319 U.S. 157 (1943)).

50. *See* text accompanying notes 27-31 *supra*.

51. *See* text accompanying notes 20-39 *supra*.

II. The Specifics of the Argument

A discussion of each of Fiss' specific arguments would be nearly as long as the book. I will confine myself to three of them.

A. Preventive, Reparative, and Structural Injunctions

One strength of Fiss' analysis is its account of the practical differences between the various uses of injunctions. An order to quit stealing plaintiff's rocks[52] differs in important ways from an order to rerun a tainted election,[53] and both differ from a complex series of orders designed to fully integrate a public school system.[54] Fiss would label these three examples preventive, reparative, and structural injunctions, respectively.[55] The distinctions are a helpful and original contribution and a significant improvement over earlier attempts at such categorization.[56]

Nevertheless, Fiss makes too much of his categories; they describe differences in degree, not in kind. The preventive injunction prevents a future harmful act. The reparative injunction prevents the future harmful effects of a past act. The structural injunction is simply a long series of preventive and reparative injunctions in a single case presenting a complex fact situation; each individual order is part of a continuing attack on a larger problem. Thus, all three categories serve the classic role of the injunction: all prevent future harm.[57]

While he does not "wholly deny" this analysis, Fiss insists that it "is false" in an "important sense" and that it "strain[s] and obscure[s] the underlying social realities."[58] He correctly insists that the future harm avoided by reparative and structural injunctions is derivative

52. Jerome v. Ross, 7 Johns. Ch. 315 (N.Y. 1823).

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

54. *See, e.g.,* United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969). Lower court opinions prior to the Supreme Court decision are reported in Montgomery County Bd. of Educ. v. Carr, 402 F.2d 782 (5th Cir. 1968), *denying petition for rehearing of* 400 F.2d 1 (5th Cir. 1968), *modifying* 289 F. Supp. 647 (M.D. Ala. 1968); 12 RACE REL. L. RPTR. 1200 (M.D. Ala. 1967); 11 RACE REL. L. RPTR. 1716 (M.D. Ala. 1966); 253 F. Supp. 306 (M.D. Ala. 1966); 232 F. Supp. 705 (M.D. Ala. 1964). The docket sheet, several unpublished orders, and many of the pleadings for this period are reprinted in O. FISS, *supra* note 41, at 415-81. Lower court opinions subsequent to the Supreme Court decision are reported at 511 F.2d 1374 (5th Cir. 1975), *aff'g* 377 F. Supp. 1123 (M.D. Ala. 1974); Gilmore v. City of Montgomery, 473 F.2d 832 (5th Cir. 1973), *remanding with directions* 337 F. Supp. 22 (M.D. Ala. 1972); Carr v. Montgomery County Bd. of Educ., 429 F.2d 382 (5th Cir. 1970). These orders were entered under a variety of case captions, but all relate to desegregation of the Montgomery schools.

55. Pp. 8-12.

56. *See* O. FISS, *supra* note 41, at 1 (preventive, regulatory, and structural injunctions); Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1143-44 (1977) (statutory and administrative injunctions).

57. *See* p. 8; 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 154-55 (2d ed. 1839).

58. Pp. 8, 11.

from some past wrongful act or from an institutional structure that is itself wrongful. Fiss and I do not disagree over that description, but over its significance. For him, what is important is that the harm is derivative from a wrong done or created in the past; for me, what is important is that the harm will accrue in the future.

Our disagreement is thus over a nuance, but it is not without potential consequences. Those consequences are suggested by the following sentence: "The reconceptualization of the reparative injunction [as preventing future harm] is no more persuasive than would be the claim that the damage award is preventive because it prevents the future wrong of leaving the victim uncompensated for his injuries."[59] This equating of damages and injunctive relief ignores the difference between avoiding harm altogether and compensating for harm actually suffered. It carries potential for confusion in litigation about the scope of relief and about mootness, especially when damages and an injunction are sought in the same case.

A reparative injunction is appropriate only when plaintiff will suffer additional harm in the future—when the total accrued loss as of Tuesday will be greater than it is on Monday—and when it is possible to prevent that additional harm from happening. Damages may be substituted for a reparative injunction; the court may let the harm happen and order compensation. But the converse is not true: reparative injunctions cannot always substitute for damages. Damages alone can compensate for harm suffered prior to the court's order and for future harm that cannot be prevented, such as pain and suffering from a lingering injury.

This formulation makes clear, as Fiss' does not, that the overlapping purposes served by reparative injunctions and damages remain quite distinct. Plaintiff may obtain both in the same case, without necessarily, or even probably, receiving a double recovery. Were the injunctive claim rendered moot, the suit would survive, for damage claims can never be moot.[60]

The election case will serve as an illustration. In *Bell v. Southwell*,[61] the court ordered an election for justice of the peace rerun because of racial intimidation at the polling place. The injunction was reparative because it did not prevent the wrongful conduct. But neither

59. Pp. 11-12. *See also* p. 55 ("The jury can be easily integrated with the reparative injunction since it is like an in-kind damage judgment."); p. 56 ("the command [of reparative injunctions] is roughly analogous to the command to pay money damages").

60. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 495-500 (1969); Klein v. Califano, 586 F.2d 250, 255 n.7 (3d Cir. 1978).

61. 376 F.2d 659 (5th Cir. 1967).

did it compensate for the harm already done—the humiliation suffered by black voters on election day and their subjection to the authority of an illegally elected justice of the peace for the two years between his installation and the court's decision, and for the additional time between the injunction and the installation of his successor. Some of those harms might have been compensated, although inadequately, by damages;[62] they appear, however, to have gone unremedied. In the absence of a damage award, the injunction did nothing about the "harm of remaining uncompensated" for those injuries. Rather, it prevented the harm of subjecting plaintiffs to the illegally elected justice of the peace for the rest of his term. It probably altered beneficially the balance of racial power in the community. But it could not undo the past; it could only prevent or ameliorate future effects. Like all injunctions, it was a future-oriented remedy.

A complete remedy would have required a second election plus damages. Had the case dragged on until the end of the official's term, the claim for a second election arguably would have been moot.[63] But if damage were measured by the length of time the illegally elected official served, and not by the number of elections in which the right to vote was denied, the delay would have maximized the damage recovery. A double remedy problem would have arisen only if plaintiffs had sought compensation for some item of damage that would be avoided by the injunction, such as damages for a full term of office despite an early second election.

A more familiar example of simultaneous compensatory and preventive relief is the combined claim for specific performance of the executory portion of a breached contract, and damages for the harm already suffered.[64]

Fortunately, Fiss' insistence that not all injunctions are preventive

62. *See* Carey v. Piphus, 435 U.S. 247, 264 n.22 (1978) (prerequisites to recovery for deprivation of right to vote unsettled) (dictum); Nixon v. Herndon, 273 U.S. 536, 540 (1927) (damages for denial of right to vote); Annot., 40 A.L.R.3d 1290 (1971); *cf.* Carey v. Piphus, 435 U.S. at 260-64 (damages for meutal and emotional distress from deprivation of procedural due process); *id.* at 266-67 (nominal damages for deprivation of procedural due process without proof of actual injury); Baskin v. Parker, 588 F.2d 965, 970-71 (5th Cir. 1979) (damages for humiliation, embarrassment, and emotional distress from illegal search).

63. *But see* Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463 (1968) (suit by Secretary of Labor under Landrum-Griffin Act, challeuging union election, not mooted by expiration of winner's term).

64. *See, e.g.,* Saffron v. Department of the Navy, 561 F.2d 938 (D.C. Cir. 1977); 330 Michigan Ave., Inc. v. Cambridge Hotel, Inc., 183 So. 2d 725, 728 (Fla. App. 1966); Ruhl v. F.A. Bartlett Tree Expert Co., 245 Md. 118, 121, 128, 225 A.2d 288, 290, 294 (1967); Miller v. Talbott, 239 Md. 382, 391-94, 211 A.2d 741, 747-48 (1965); U.C.C. § 2-716(2); *cf.* Roberts v. Sears, Roebuck & Co., 573 F.2d 976 (7th Cir. 1978) (damages for past and rescission for future).

plays only a minor role in his response to the argument that difficulties of predicting future harm justify subordination. He primarily relies on other, stronger arguments.[65] He correctly notes that the problem of predicting future harm is as severe in many damage cases as in injunction cases, and that issues of motive and cause are much more important in damage cases and as difficult to litigate as the predictive elements of injunction claims. In addition, he argues persuasively that an injunction against an illegal and harmful act, which is erroneous only in the sense that defendant would not have committed the act anyway, is harmless error. Fiss concedes that lack of confidence in essential predictions is sometimes reason to deny injunctive relief, but he demonstrates that such problems are associated only with some kinds of substantive rules; they do not justify a general rule of subordination.

B. The Economic Analysis of Law

Fiss' analysis of "The Argument from Liberty"[66] as a support for the remedial hierarchy is in two parts. The first is an attack on contemporary prior restraint doctrine and will not be discussed here. The second is addressed to the economists and their allies in the economic analysis of law. The economists argue that absolute prohibitions of conduct are inefficient because violations of law sometimes result in net social gains. One way to permit these desirable violations is to enforce the law with liability rules, which merely require the actor to compensate his victims. If the violation is still profitable after defendant pays full compensation, the economists' view is that defendant's conduct will and should continue.[67] This critique does not lead to an irreparable injury rule, but it has superficially similar implications. It suggests that a rule requiring compensation is sometimes preferable to a statutory or injunctive prohibition of conduct.

Fiss' response to the economic critique has some bright spots, but is generally disappointing. He hints at, but does not state, the fundamental limit on normative applications of economic analysis: its oft-forgotten acknowledgement that efficiency might not be our only value and that economics cannot determine values.[68] Law in a democracy

65. Pp. 80-85.
66. Pp. 68-80.
67. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW 88-93, 122-23, 164-72 (2d ed. 1977); Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 199 (1968); Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105-10 (1972).
68. *See* R. POSNER, *supra* note 67, at 10. *But see* Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

must reflect the values of the people, and although efficiency is undoubtedly important to Americans, so are other values, such as personal autonomy, fairness, morality, and distributive justice.[69] These values lack the illusion of mathematical precision that surrounds the analysis of efficiency, and their policy implications are not always clear. But they are strongly and widely held, and they underlie the widespread resistance to making efficiency the touchstone of legal analysis.

Fiss, however, makes a far more serious error than merely understating his objection: he accuses the economists of a mistake they do not make, and calls that nonexistent error their "central fallacy."[70] He notes that the injunction does not absolutely prevent the enjoined conduct, for the parties can settle after the injunction is issued. Thus, the injunction merely substitutes a freely bargained price for the court's assessment of damages.

The accusation that economists have overlooked this possibility is simply mistaken.[71] Indeed, the law and economics literature assumes that parties will bargain out of bad law whenever possible; much of it is devoted to making law duplicate the bargaining process so that bargaining will be unnecessary, or at least facilitated.[72] In discussing the very category of examples Fiss uses to illustrate his point, Professor Posner says: "In conflicting-use situations in which . . . transaction costs are low, injunctive relief should normally be allowed as a matter of course . . . ."[73] Fiss and the economists disagree over the frequency of high transaction costs,[74] but they agree that when such costs are low and economic values are dominant, an injunction will not prevent the parties from bargaining their way to an efficient result.

69. *See* J. DAVIS, GENERAL SOCIAL SURVEYS, 1972-78: CUMULATIVE CODEBOOK 69-73, 79-80, 107-10, 120, 124-25 (1978); R. POSNER, *supra* note 67, at 23; Calabresi & Melamed, *supra* note 67, at 1098-105, 1111-15; Crowe, *Complainant Reactions to the Massachusetts Commission Against Discrimination*, 12 LAW & SOC'Y REV. 217, 224-29 (1978); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 199-201 (1974); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 200-04 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Posner, *supra* note 68, at 109-10, 128, 133-35, 138-39; Janowitz, *Observations on the Sociology of Citizenship: Obligations and Rights* 36-39 (Working Paper # 2—Workshop in Community and Society, Univ. of Chicago, 1979) (publication forthcoming in SOCIAL FORCES).

70. P. 77.

71. *See, e.g.*, R. POSNER, *supra* note 67, at 34-35, 69, 180; Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13 (1972).

72. *See, e.g.*, R. POSNER, *supra* note 67, at 36-39; Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 365-69 (1978); Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 88-89, 98 (1977).

73. R. POSNER, *supra* note 67, at 51; *see also id.* at 95-97.

74. *Compare* pp. 79-80 *with* R. POSNER, *supra* note 67, at 44-46, 96-97.

The equity rule that most nearly implements the economic critique is not irreparability,[75] but the doctrine of comparative hardship, or balancing the equities. Equity will not issue an injunction if the cost of compliance would greatly exceed the benefit to plaintiff, unless defendant was especially culpable.[76] The fit with economic analysis is far from perfect, but the underlying ideas are quite similar. A widely noted pollution case recently suggested an even better fit by de-emphasizing culpability when the disproportion between cost and benefit was especially large.[77] Fiss does not mention the comparative hardship doctrine in *The Civil Rights Injunction*, but elsewhere he has implied that it too might ignore the potential for bargaining.[78]

In short, the economists have something to say about the use of injunctions, but their critique does not support the remedial hierarchy. It is incorrect to attribute to economists a doctrinaire preference for damages or injunctions. And sometimes their teachings should not control anyway, for values other than efficiency are dominant.

C. The Irreparable Injury Rule and the Right to Jury Trial

The most important objection to Fiss' proposal is that abolition of the irreparable injury rule might infringe upon the right to jury trial. The seventh amendment to the federal constitution and similar provisions in most state constitutions preserve the right to jury trial in suits at common law. Neither the federal courts, nor most states,[79] recognize a right to jury trial in equity. Thus, the constitutional right could be eviscerated if too many cases were diverted to equity. One can argue that the irreparable injury requirement prevents such diversion and is therefore an essential component of the right.[80] Language in opinions of the Supreme Court supports such an argument,[81] although the Court has subsequently denied that this language announced a constitutional

75. *But see* Kronman, *supra* note 72 (attempting to reconcile details of irreparable injury rule, as applied to specific performance, with economic analysis).

76. D. DOBBS, *supra* note 19, § 2.4, at 52-54, §§ 5.6-.7, at 355-62.

77. Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870 (1970).

78. O. FISS, *supra* note 41, at 91.

79. For the exceptions, see F. JAMES & G. HAZARD, CIVIL PROCEDURE § 8.1, at 351 n.13 (2d ed. 1977); Van Hecke, *Trial by Jury in Equity Cases*, 31 N.C.L. REV. 157 (1953).

80. *See* D. DOBBS, *supra* note 19, § 2.6, at 67, § 5.6, at 350-51; O. FISS, *supra* note 41, at 12-13; McCoid, *Procedural Reform and the Right to Jury Trial: A Study of* Beacon Theatres, Inc. v. Westover, 116 U. PA. L. REV. 1, 10-15 (1967).

81. Ross v. Bernhard, 396 U.S. 531, 539 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478-79 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-10 (1959); Schoenthal v. Irving Trust Co., 287 U.S. 92, 94-95 (1932).

rule.[82]

Fiss responds at a policy level. He reasons persuasively about what the law should be, but makes no effort to demonstrate that his proposal is consistent with constitutional text or existing case law.[83] He suggests that a recent decision requiring jury trial as a prerequisite to nonpetty punishments for criminal contempt[84] could be extended to civil contempt and to the issuance of injunctions. However, he says, these extensions are unlikely to occur because we have come to think of the civil jury as a nuisance. Finally, he says that if we are unwilling to extend the jury to equity, then "it would be impermissible to use the absence of the jury . . . as a justification for subordinating the injunction . . . ."[85]

The argument reflects an important insight about modern attitudes toward juries, but it begs the real question. Fiss is surely right that, in the abstract, it would be unfair and inconsistent to deny injunctions because of a procedural defect that we willfully refuse to correct. However, because of the seventh amendment and its state counterparts, the matter is not abstract at all. Fiss' argument amounts to the suggestion that we ignore the seventh amendment in this situation because we no longer agree with it.

Fiss need not avoid the constitutional issue, for history and authority appear to support him. The history is long and convoluted; the cases are numerous and conflicting. Only a preliminary investigation can be reported here, but that is enough to support a reasonably confident claim that Fiss' proposal would not violate the federal constitution.

Although the framers seem to have constitutionalized the law-equity distinction,[86] there is no reason to believe they intended to freeze every detail of the 1791 boundary between the two jurisdictions.[87] That boundary varied dramatically from state to state and was poorly defined almost everywhere.[88] Nor was the boundary stable over time;[89]

82. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 333-36 (1979); Katchen v. Landy, 382 U.S. 323, 339 (1966).

83. Pp. 50-58.

84. Bloom v. Illinois, 391 U.S. 194 (1968).

85. P. 55. *See also* pp. 51, 56.

86. *But see* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 731-47 (1973).

87. Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 459 (1977) (dictum).

88. THE FEDERALIST No. 83 (A. Hamilton) 501-04, 506-07 (Rossiter ed. 1961); F. JAMES & G. HAZARD, *supra* note 79, § 8.2, at 352; Wolfram, *supra* note 86, at 658-66.

89. F. JAMES & G. HAZARD, *supra* note 79, § 8.2, at 352-54; Wolfram, *supra* note 86, at 736-39.

Blackstone, for example, reported that "from that time to this [1673-1768], the power and business of the [equity] court have increased to an amazing degree."[90] The framers surely did not mean to halt this evolution. Colonial hostility to equity focused on executive rather than legislative control of the creation and staffing of equity courts; there was consensus that equitable doctrines and remedies were desirable.[91] The scope of both equity and admiralty has expanded substantially since adoption of the constitutional guarantees of jury trial.[92]

Although the right to jury trial occasionally figured in decisions or demands to leave particular disputes at law,[93] these were exceptions; protection of jury trial was not an important function of the porous boundary between law and equity.[94] This conclusion is largely based on negative evidence—that is, the relative absence of references to jury trial in this context. In addition, certain doctrines surely would have developed differently had protection of jury trial been a major concern. These include the overlapping jurisdiction of law and equity here and in England,[95] and equity's early assumption of jurisdiction over matters "incidental" to disputes already within its domain.[96] Further support comes from the discretionary nature of the feigned issue procedure, by which the Chancellor sent some fact issues to law for jury trial, and from the nonbinding force of the resulting verdicts.[97] Under the equitable cleanup doctrine, equity would decide legal claims that arose in an otherwise equitable case,[98] and would retain a jurisdiction once as-

90. 3 W. BLACKSTONE, COMMENTARIES *55.

91. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in LAW IN AMERICAN HISTORY 257 (5 PERSPECTIVES IN AMERICAN HISTORY Series, D. Fleming & B. Bailyn eds. 1971).

92. On equity, see Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 459-60 (1977) (dictum); F. JAMES & G. HAZARD, *supra* note 79, § 8.2, at 353-56. On admiralty, see Moragne v. States Marine Lines, 398 U.S. 375 (1970); Fretz v. Bull, 53 U.S. (12 How.) 466, 468 (1851); The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 459 (1851); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 1-11, at 31-32, § 7-12, at 522-24 (2d ed. 1975); Sprague, *The Extension of Admiralty Jurisdiction and the Growth of Substantive Maritime Law in the United States Since 1835*, in 3 LAW, A CENTURY OF PROGRESS 294 (A. Reppy ed. 1937).

93. Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442, 456 n.52 (1971); Wolfram, *supra* note 86, at 654-55.

94. F. JAMES & G. HAZARD, *supra* note 79, § 8.2, at 356-57; Shapiro & Coquillette, *supra* note 93, at 456 n.52; Wolfram, *supra* note 86, at 738 n.291.

95. W. BLACKSTONE, *supra* note 90, at *434-42; F. JAMES & G. HAZARD, *supra* note 79, § 8.2, at 354.

96. W. BLACKSTONE, *supra* note 90, at *437.

97. Langbein, *Fact Finding in the English Court of Chancery: A Rebuttal*, 83 YALE L.J. 1620 (1974).

98. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937); F. JAMES & G. HAZARD, *supra* note 79, § 8.2, at 353, 355-56.

serted even if the law courts later created an adequate remedy.[99] These last two doctrines arguably have been repudiated by the Supreme Court;[100] the relevance of those decisions will be considered below.[101]

This summary of the relevant history parallels the findings of a more thorough study of a similar issue: whether the seventh amendment froze the division of power between juries and common-law judges.[102] That investigation found no settled practice in 1791 and no evidence that the amendment was intended to affect the matter.[103] With respect to claims that judges' control over juries cannot be increased, the Court has concluded that the seventh amendment "was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among the common-law jurisdictions."[104] The irreparable injury rule, a rule that legitimately serves only as a tie-breaker,[105] governs a similar procedural detail and deserves similar treatment. Fiss' proposal to eliminate that rule would not divert enough cases to equity to subvert any "fundamental element" of the right to jury trial.

The decisions emphasizing the role of the irreparable injury rule in protecting jury trials[106] do not preclude this conclusion, for none of them held that plaintiff must forgo the form of relief he requested. Rather, each of them addressed only the question of whether a jury should try some or all of the issues raised by the suit. In two of those cases, *Schoenthal v. Irving Trust Co.*[107] and *Ross v. Bernhard*,[108] the relief sought was a money judgment. The issues were whether jury trial could be avoided because the claim was to recover a voidable preference (*Schoenthal*), or because the claim was asserted in a shareholder's derivative suit (*Ross*). *Dairy Queen, Inc. v. Wood*[109] was similar: the issue was whether plaintiff could avoid jury trial of a claim for money by demanding an accounting for trademark infringement rather than

99. Wolfram, *supra* note 86, at 740-41 n.299.

100. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-11 (1959). *But see* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 453 n.10 (1977).

101. *See* text accompanying notes 107-13 *infra*.

102. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966).

103. *Id.* at 290.

104. Galloway v. United States, 319 U.S. 372, 392 (1943), *quoted with approval in a related context*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 336-37 (1979); *see* Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494 (1931); Fidelity & Deposit Co. v. United States, 187 U.S. 315, 319-21 (1902).

105. *See* text accompanying notes 43-48 *supra*.

106. *See* note 81 *supra*.

107. 287 U.S. 92 (1932).

108. 396 U.S. 531 (1970).

109. 369 U.S. 469 (1962).

damages for breach of a contract licensing the trademark. The Court noted that the judge should decide plaintiff's claims for temporary and permanent injunctions against further use of the trademark.[110]

Beacon Theatres, Inc. v. Westover[111] was a bit more complicated, but otherwise no different. Plaintiff sought a declaratory judgment that it had no antitrust liability to defendant and an injunction preventing defendant from suing or threatening suit against plaintiff. Defendant responded with an antitrust counterclaim for damages. The Court held that the counterclaim must be tried first, and to a jury. But it emphasized that if plaintiff needed temporary or permanent injunctions against defendant's suits or threats, the judge could give this relief[112] and that plaintiff was entitled to protection "in all respects . . . from irreparable harm."[113]

Thus, despite the emphasis in these cases on adequacy of the legal remedy, none of them addresses the question of how adequate the legal remedy must be. In each the legal remedy was identical to—not merely as good as—all or some substantial part of the equitable remedy; to the extent of any difference, plaintiff was entitled to the equitable remedy. The Court could plausibly view each of these cases as an attempt to avoid a jury by artful pleading, even though the insistence that the case was in equity had no effect on relief.

These cases do not constitutionalize any rule concerning the quite different situation that Fiss' proposal addresses: the case in which there is a difference between the legal and equitable remedies, and in which one remedy seems about as good as the other, but the plaintiff claims that on close analysis the equitable remedy is slightly better. So long as that claim is not a transparent attempt to avoid jury trial, courts should consider it on its own merits, without a bias in favor of the legal remedy.

Nor can one argue that the four decisions just discussed exemplify a strong pro-jury approach to seventh amendment issues with significance beyond their narrow holdings, and that Fiss' proposal is contrary to that approach. Several recent seventh amendment cases have been resolved against the claim to jury trial. The Court has permitted Congress to transfer legal claims to equity[114] and to administrative agen-

110. *Id.* at 479 n.20.
111. 359 U.S. 500 (1959).
112. *Id.* at 508.
113. *Id.* at 510.
114. *Compare* Katchen v. Landy, 382 U.S. 323 (1966), *with* Schoenthal v. Irving Trust Co., 287 U.S. 92 (1932).

cies,[115] and to avoid jury trial in employment discrimination cases by creating an equitable right to back pay instead of making back pay the measure of legal damages.[116]

These cases may have been influenced by judicial deference to Congress, and thus may be distinguishable from identical judicial innovations. That distinction, however, is entitled to little weight, for the seventh amendment was aimed as much at Congress as at the judiciary; its drafters feared that Congress would entrust enforcement of unpopular laws to courts without juries.[117] Moreover, in the most recent case, it was the Court that extended a procedural rule in a way that denied jury trial. The Court gave collateral estoppel effect in a damages case to an earlier injunction suit by another plaintiff.[118] The earlier findings would not have been binding in 1791, and the change was made by the judiciary. In fact, the first Supreme Court holding that such findings could be binding came in 1979, in the very same case.[119]

The rule that seems to emerge from all this is that both judges and legislators can make procedural and remedial improvements that impinge on jury trial, provided they are made for reasons other than jury avoidance, and perhaps subject to some limit on the proportion of cases diverted to nonjury fora. Fiss' proposal to give the best remedy possible in every case fits well within this rule.

III. Conclusion

Parts of this review are in effect a supplement to the book. Persuaded by Fiss' conclusion, I have attempted to fill gaps in his argument and to insulate the conclusion from passages that are sure to antagonize potential critics.

One might ask why so much effort should be expended attacking a rule that makes so little difference when properly applied. The answer, of course, is that the rule most often makes a difference when *improperly* applied. The irreparable injury rule serves far more often as a cloak or prop for hostility to the plaintiff's claim than as a way of choosing between two remedies of roughly equal attractiveness. Even

115. *See* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977); Pernell v. Southall Realty, 416 U.S. 363, 383 (1974) (dictum); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937); Block v. Hirsch, 256 U.S. 135, 158 (1921).

116. *See* Lorillard v. Pons, 443 U.S. 575, 583-85 (1978) (dictum); Albemarle Paper Co. v. Moody, 422 U.S. 405, 441-47 (1975) (Rehnquist, J., concurring); Curtis v. Loether, 415 U.S. 189, 196-97 (1974) (dictum).

117. Wolfram, *supra* note 86, at 664-65, 706-07.

118. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 333-37 (1979).

119. *Id.* at 326-33.

when legitimately applied, the choice it dictates is essentially arbitrary. The potential advantage of simplicity in making marginal choices is largely swallowed in the confusion engendered by the rule's normal formulation and is heavily outweighed by the standing invitation to abuse. It is time to abolish the rule.

This does not mean that courts should prefer injunctions to damages, or that plaintiffs should have a free choice of remedy. The disadvantages associated with injunctions in certain contexts are relevant to selection of the best remedy. Sometimes injunctions are economically inefficient, burdensome, difficult to enforce, or difficult for appellate courts to supervise. Sometimes prediction is difficult, and sometimes the interest in jury trial is especially strong. Interlocutory injunctions will always be special because they compromise the defendant's right to a full hearing.

However, none of these problems apply to all injunctions, nor do all of them taken together justify a general presumption against injunctions. For legal remedies have their own problems: damages may be difficult or impossible to quantify; the measure of damages may be undercompensatory; the parties may have to litigate difficult issues of cause, motive, and immunity; multiple suits may be required to recover successive increments of damage; collection may be difficult or impossible; inflation, taxes, and collateral benefits create risks of windfall or undercompensation; or plaintiff may be interested in freedom, or dignity, or a cherished object instead of money.

What is needed is not a simple presumption in favor of either legal remedies or equitable remedies, but a willingness to weigh the advantages and disadvantages of each remedy in particular cases or categories of cases. The courts can develop reliable and desirable rules only if they openly address the real issues. That is what Fiss is urging them to do.