BOOK REVIEW

The Death of The Irreparable Injury Rule, DOUGLAS LAYCOCK, Oxford University Press, New York, New York, 1991, pp. 356.

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Every lawyer knows that you can't get an injunction unless you prove that the plaintiff will suffer irreparable injury without one. In *The Death of The Irreparable Injury Rule*, Professor Douglas Laycock sets out to prove that what we know isn't so. The book is an obituary rather than a call to action—its thesis maintains that the irreparable injury rule is without content, except in preliminary injunction cases, because modern decisions invoking the rule to deny a permanent injunction actually rest on some other ground. By treating the rule's demise as an accomplished though hitherto unrecognized fact, Laycock focuses attention on what he considers the real reasons for which the courts deny injunctive relief. His thesis should stimulate debate on the merits of these reasons.

The irreparable injury rule can be stated in either of two ways: "no injunction without irreparable injury," or conversely, "no injunction when there is an adequate remedy at law." Money damages, of course, are the characteristic legal remedy, and the irreparable injury rule is traditionally thought to state a preference for damages over prevention or specific performance. "Our materialistic society," as one recent formulation puts it, "considers money damages an acceptable substitute for most recognized interests."[1] The law, in other words, *deems* damages to be an adequate remedy in all but the exceptional case.

Laycock opens his argument with a flat challenge to that assumption. "Our legal system," he states, "does not prefer damages." Instead, he describes how courts have evaded the irreparable injury rule without renouncing it:

> Courts have escaped the irreparable injury 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

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[1] Rendelman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 348 (1981).

> doctrinal expression of this preference is that damages are inadequate unless they can be used to replace the specific thing lost. 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.[2]

Unless money itself is what plaintiff wanted out of the transaction, damages is the plaintiff's preference only if money can buy what he wanted. Otherwise, money and what it can buy are a second best, and the rational plaintiff will prefer "the very thing itself," if he can get it. The law, says Laycock, both should and does allow that choice. Instead of a preference for money damages, we have a preference for specific relief when it is possible.

Given that damage suits are the bulk of our civil litigation, this sounds at first unlikely. It looks rather more plausible, however, once Laycock narrows the universe of cases and expands the universe of injunction equivalents. First, he concedes, the preference only matters when a choice is possible: "[s]pecific relief is impossible when the harm has been done beyond anyone's power to prevent or repair in kind. This is true of all personal injury cases. It is true of most consequential damages whatever the underlying wrong."[3] Damages are second best compensation for a life or limb lost by negligence, but they are the only compensation possible. Second, rational plaintiffs frequently do not choose specific relief because they find it quicker, cheaper and simpler to obtain substitute performance themselves and then sue for its cost. In an orderly market for fungible goods or routine services, a buyer finds it easier to cover and sue a defaulting seller for damages than to await victory in a suit for specific performance. By the same token, the owner of damaged property ordinarily finds it easier to have it repaired, and sue for the expense than to compel defendant to repair it.[4] When

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2 D. LAYCOCK, DEATH OF THE IRREPARABLE INJURY RULE 4-5 (1991).

3 *Id.* at 16.

4 *Id.* at 16-17. The well-known decision of Whelock v. Noonan, 108 N.Y. 179, 16 N.E. 67 (1888), is the limiting case. In *Whelock*, defendant had covered plaintiff's land with enormous boulders to a depth of 14 feet. *Id.* at 183, 108 N.Y. at 68. Rather than pay the high cost of removing them up front, plaintiff sought an injunction to compel defendant to do so. The court granted the injunction, emphasizing the extraordinary cost and complication for plaintiff not only to remove the stone, but also to acquire land on which to dump it lawfully. *Id.* at 68-69, 15 N.E. at 183-

transaction costs are taken into account, in these cases, specific relief is less adequate than self-help plus damages. Third, when a plaintiff does choose specific relief, the available remedies extend beyond the injunction and even beyond those remedies historically administered by the equity courts to whatever functionally gives plaintiff relief in kind. Specific performance of a contract is specific relief; so are the traditionally legal remedies of ejectment, replevin, and mandamus.[5]

To illustrate the inadequacy of damages, Laycock uses decisions which granted specific performance of ordinary commercial contracts in times of shortage. Ordinarily, he argues, damages are an adequate remedy for breach of contract to sell goods for which there is a reply market because replacements can be had in the market. Laycock concludes, "[w]hen plaintiff gets identical goods either way, the choice between legal and equitable remedies hardly matters."[6] Specific performance has been granted when the orderly market for such ordinary goods as cotton, jet fuel, and even automobiles breaks down in times of shortage precisely because plaintiff cannot use money damages to buy the equivalent replacement.[7]

Laycock's thesis, then, is that when a plaintiff has a choice between damages and specific relief, and when his own interests lead him to choose specific relief as more adequate, the courts will honor that choice unless defendant interposes some countervailing reason.

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85. The innocent owner of a newly discovered toxic waste dump may find herself in a similar predicament and seek the same relief; the innocent owner of a car with a dented fender will simply pay the body shop and sue for damages.

5 LAYCOCK, *supra* note 2, at 22. Laycock categorizes remedies as either "substitutionary," which provide money in recompense for harm, or "specific," which aspire to prevent harm or undo it rather than let it happen and compensate for it. The former include compensatory and punitive damages, attorneys' fees, and restitution of the money value of defendant's gain. Specific remedies include injunctions, specific performance and restitution of specific property or money. *Id.* at 12-13.

6 *Id.* at 39.

7 *Id.* at 40 nn.46-55. The automobile cases cited by Laycock illustrate the importance of being able to buy an equivalent replacement. Manufacture of civilian cars was prohibited during World War II from 1942 through 1946. Several courts during and immediately after this era granted specific performance of contracts to buy a car on the ground that a substitute car could not be had; others denied it on the ground that substitutes were available on the grey market, albeit at a higher price. *Id.* at 140 n.52. *See also* Heidner v. Hewitt Chevrolet Co., 166 Kan. 11, 14, 199 P.2d 481, 483 (1948); Boeing v. Vandover, 240 Mo. App. 117, 130, 218 S.W.2d 175, 177-78 (1949); DeMoss v. Conart Motor Sales, 72 N.E.2d 158, 160 (Ohio Com. Pl. 1947), *aff'd for want of proper record*, 149 Ohio St. 2d 299, 73 N.E.2d 675 (1948).

Damages that cannot buy the equivalent of defendant's rightful behavior are not "as complete, practical and efficient" as specific relief and are therefore not an adequate remedy.[8] The question to be addressed in every case where the plaintiff seeks some kind of specific relief therefore becomes, in Laycock's view, "why not the best remedy" rather than "why the extraordinary one?" Rather than a global reason — the absence of irreparable injury — he finds specific procedural or substantive reasons restricted to particular cases.

Laycock substitutes for a unitary irreparable injury rule approximately fifteen distinct reasons why specific relief will not be granted even though it is superior to damages.[9] Unique among them, and amounting in Laycock's view to the bulk of the cases invoking the irreparable injury rule,[10] are the cases denying preliminary relief. Those are distinct from cases involving final relief because they are decided on relatively short notice, with less than a full hearing and in circumstances where it is unclear whether plaintiff will establish a claim to permanent relief of any kind on the merits. The familiar balancing tests for preliminary relief therefore weigh the severity of plaintiff's injury and the strength of her claim against the defendant's right to a full hearing, its interest in continuing conduct not yet shown to be unlawful and the court's interest in avoiding error through premature decision. Although damage relief is inferior to prevention, plaintiffs may thus be compelled to await damage relief for preventable injury by the court's uncertain knowledge of the legal and factual basis of their claim at the preliminary stage. The uncertainty is real, and in Laycock's view provides the basis for the irreparable injury rule in interlocutory relief cases.

Laycock strongly contrasts the permanent injunction stage where "the merits are resolved, defendant is a known wrongdoer,"

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8 LAYCOCK, *supra* note 2, at 22.

9 *Id.* at 265-76. According to Laycock, these reasons include deference to another forum ("Our Federalism," exhaustion of administrative remedies, arbitration, and separation of powers); avoiding "over-enforcement" (balancing the equities, the rule against prior restraints, and refusal to enforce personal service contracts); substantive hostility (labor injunctions); harm to innocent third parties; protection of civil or criminal jury trial; ripeness and mootness; and practical difficulty of enforcement. Laycock summarizes his general rule that plaintiff may choose specific or substitutionary relief, together with the exceptions, as a "tentative restatement" in his final chapter. *Id.*

10 *Id.* at 110-11. Laycock notes that of the cases citing "irreparable injury" in the West Digest System between January 1980 and December 1989, approximately 1166 of the headnotes are from decisions denying interlocutory injunctions. *Id.* at 110-11 n.9. While he considers the number of headnotes "only a crude proxy for the number of cases," he is confident that a "substantial majority of cases invoking the rule involve interlocutory relief." *Id.*

and the court has eliminated the option of "no remedy at all." When a court invokes the irreparable injury rule to deny permanent specific relief, it has some particular reason for making plaintiff take what Laycock regards as the inferior remedy. For example, the first amendment doctrine of "no prior restraint" openly admits the superior effectiveness of preventive relief, but denies it because of the substantive law's doctrine that some injury to defendant is preferable to complete prevention of plaintiff's conduct.[11] Other concepts, such as the "Our Federalism" doctrine,[12] require plaintiff to accept the collateral costs of proceeding in a hostile forum by deeming those costs nonexistent and hence not irreparable. This doctrine is justified on the grounds that policy requires plaintiff to use the forum it wants to avoid.[13] In *City of Los Angeles v. Lyons*[14] and *O'Shea v.*

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[11] *Id.* at 164-68. In this category Laycock includes the doctrine that a plaintiff will not be specifically compelled to perform a personal services contract. In addition to the traditional explanation that a court cannot effectively enforce the competent performance of highly skilled duties provided by an entertainer, athlete or executive, he adds his conclusion that the substantive law now rarely enforces either a damage remedy against a valued employee who jumps his contract or a covenant not to work for a competitor where no trade secrets or proprietary information are involved. *Id.* at 168-72 nn.55-73. Laycock sees a "prevailing ethos" in the substantive law that no person should be directly or indirectly compelled to work against his will, with the result that the breach of employment contract by even the most unique and irreplaceable workers has become *damnum abusque injuria*. The injury, real and irreparable in fact, is deemed tolerable by modern mores and hence by the courts. *Id.*

[12] *See* Younger v. Harris, 401 U.S. 37 (1974).

[13] The classic example of this approach is Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), one of the leading cases stating the rule requiring exhaustion of administrative remedies. Bethlehem had a NLRB election enjoined on the ground that it was not engaged in interstate commerce and that the Board therefore lacked jurisdiction. *Id.* at 46-47. As irreparable injury, Bethlehem asserted the disruption to its operations, the expense of contesting the election before the Board and the expense of ultimately having the election set aside on appeal for lack of jurisdiction. *Id.* at 47-48. The Supreme Court set aside the injunction on the ground that Congress had vested the NLRB, and not the District Court, with the exclusive power to decide the jurisdictional issue in the first instance. *Id.* at 50. Justice Brandeis brushed aside the irreparable injury claim: "[l]awsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact." *Id.* at 51-52.

In fact, there are several such ways, one being the motion to dismiss for lack of jurisdiction, another being the motion for summary judgment. Bethlehem could not avail itself of these procedures before the Board and tried to get the equivalent by preliminary injunction, only to be told that it would have to absorb the cost of litigating in the forum Congress had established. Its case was not helped by the fact that after the district court had issued its injunction, the Supreme Court repudiated the narrow reading of the commerce clause on which Bethlehem's jurisdictional argument rested. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 43 (1937)

Littleton,[15] the Court refused to place the defendant under judicial control on the ground that the plaintiffs had not shown any potential future injury that needed prevention.[16] All, Laycock argues, can be explained without reference to the irreparable injury rule.

From his survey, Laycock concludes not only that the irreparable injury rule has ceased to control the case results, but that it should be abolished by decision or statute, as an obstruction to clear judicial thinking and as a deterrent to the bringing of winnable cases for preventive relief.[17] He would recognize in its place a "tentative restatement of current decisional law" consisting of a general rule that "a plaintiff who has prevailed on the merits is presumptively entitled to choose either a substitutionary or specific remedy" unless there is one of sixteen specific countervailing reasons to deny her the choice.[18]

The book is a remarkable feat of collection, analysis and synthesis. Almost in passing, it throws off ideas that deserve much lengthier exploration than the book gives them.[19] In the best inductive tradition of the common law, Laycock takes the existing body of decisions as observed facts and erects upon them a comprehensive theoretical structure as a guide to future decisions. Even if Laycock's descriptive scheme is not accepted wholesale, it will challenge every advocate and judge to explain the grant or denial of an injunction in terms that respond to the specific categories for denying injunctive relief, rather than by blanket reference to lack of irreparable injury.

The scheme, however, is not purely descriptive. Instead, it

(upholding the constitutionality of the National Labor Relations Act under Congress's commerce power).

14 461 U.S. 95 (1983).

15 414 U.S. 488 (1974).

16 *Id.* at 220-24.

17 *Id.* at 276-83.

18 *Id.* at 267-74.

19 For example, Laycock suggests that different parcels of real estate viewed in the capacity of mass-produced housing are far more fungible than the traditionally based view of land as a unique asset, and that the right to specific performance of a contract to buy such real estate should therefore be open to question in some circumstances. *Id.* at 38.

Citing a then-unpublished article, Laycock also suggests that the abolition of the law-equity distinction should allow interlocutory damage relief in cases where liability is probable and plaintiff's financial need, such as medical expenses, is great. *Id.* at 112 nn.11-13. *See also* Wasserman, *Equity Transformed—Preliminary Injunctions to Require the Payment of Money*, 70 B.U.L. REV. 623 (1990). Such relief, he concedes, is almost uniformly disallowed in the cases. LAYCOCK, *supra* note 2, at 112. Laycock's assertion that personal service contracts have become essentially unenforceable, *see supra* note 11, also deserves fuller exposition than he gives it.

rests on the prescriptive view that except for what can be completely replaced in an orderly market, money is never an adequate recompense, that an award of damages is in effect a forced sale to defendant of the specific condition plaintiff enjoyed, and that if it can be avoided, such a sale should never be forced without some countervailing reason. Laycock is what one might call "tenure minded;" he extends the idea of secure possession in kind from Blackacre to the most intangible human rights and relations, including contracts. He rejects the "exchange minded" view that all rights can be effectively valued and that efficiency should be served by permitting the exchange and paying the value. His tenure orientation appears explicitly in the chapter entitled "Holmes, Posner and Efficient Breach."[20] There, Laycock sets out both economic and moral arguments against the position that the ordinary contract is merely an option to perform or pay compensatory damages, and that this option furthers efficiency by permitting contracting parties to divert their performance to the customer willing to pay most.[21]

Laycock casts contract rights as "entitlements" that allocate both scarce resources and the risks of changing market values. In economic terms, efficient breach denies to contracting parties the certainty they intended to obtain by contracting. If a buyer cannot cover in times of scarcity, damages based on replacement cost or even lost profit do not compensate for the consequential injuries of disrupted customer relations or the transaction costs of finding an emergency substitute for what the buyer had supposed to be a reliable source of supply. Valuing these costs as consequential damages is speculative, and the buyer bears both the risk that they will be undervalued by the courts and the burden of the transaction costs, such as attorney's fees and time value of delay, in getting them valued and recovered.[22] A rule that gives the buyer the option of performance in kind when she does not want to bear the risk of less than full compensation encourages long term planning by contract to reduce uncertainty. Allocation of risk by contract reduces the cost associated with uncertainty, and efficiency is served when those who have done so have their expectations confirmed.

In addition to efficiency, Laycock argues that society's ethical norms require that promises be kept.[23] Holmes' "bad man" is, in

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[20] *Id.* at 245.

[21] *Id.* at 245-60.

[22] *Id.* at 254.

[23] *Id.* at 255-59. He cites for this proposition a diverse miscellany of sources, from the Bible through Hume and Kant to Hannah Arendt and John Rawls. *Id.* at 255-57 nn.23-32.

his view, exactly that, for our ordinary understanding is not that a promise implies the alternative of performance or damages. Rather, Laycock notes, "[t]he dominant cultural understanding appears to match the ordinary meaning of the language—that a promise of carrots creates a moral entitlement to carrots."[24]

It is unclear whether the "common moral understanding," at least in some business communities, is as Laycock believes. After all, "so sue me" is as much a part of the language as "I have promises to keep." What is clear is that the exchange-minded perspective that Laycock was exposed to at the University of Chicago did not take. While he believes that the courts cannot accurately value an exchange, he also finds profoundly repugnant the idea that defendant can force an exchange upon the plaintiff. His argument puts little weight on the power that specific performance or an injunction allows the buyer to set the price at which she will agree to forego performance. Instead, even his economic argument against efficient breach focuses on the moral concept of contract as an "entitlement."[25] By asserting that money as such is never adequate compensation, he attempts to reduce contract damages to the supposedly trivial, albeit numerically common, case where the plaintiff would voluntarily buy a substitute rather than await a decree of specific performance. Laycock sees in every plaintiff, even the business man, the old curmudgeon who won't sell Blackacre to developers at all, or at least at any price a rational buyer would freely pay for it. For the most part, Laycock wants to protect the old curmudgeon's tenure as a thing in itself, without concern for the exchange value of what he holds.

Protecting tenure, however, always involves a commitment by the court to go beyond even perfect compensation in order to en-

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[24] *Id.* at 259.

[25] *Id.* at 254. For example, Laycock's "economic" argument often alludes to moral imperatives. He argues: "[t]hose who plan ahead when shortage is merely a risk *should* reap the benefits when shortage comes to pass. Converters and breaching sellers *should* not be able to reallocate the risk after the fact by taking or keeping the specific thing and paying damages that cannot be used to replace it." *Id.*

But his "economic" argument emphasizes protecting settled expectations rather than who can most effectively find the exchange value of performance in disturbed conditions. Laycock also touches in passing on the point that specific performance is a better exchange remedy than damages. The market price is what a willing buyer and seller will pay and accept. Instead of a *post hoc* approximation of market value, specific performance gives the buyer the option to resell the goods, either to the defaulting seller or to a third-party, at an agreed price. It can therefore allocate scarce goods more efficiently, with greater accuracy, than allowing the defaulting seller to resell and then having the court reconstruct the value of the goods to buyer as a measure of her damages. *Id.* at 253.

sure specific relief. An injunction does not prevent injury or compel performance merely by virtue of having been issued. It commands defendant to act or forebear at the pain of sanctions if he disobeys. These go beyond the compensatory contempt "fine"—in effect, damages for violating the injunction—to include punitive fine or definite imprisonment as a punishment for having disobeyed, and open ended fine, imprisonment or sequestration of property to coerce obedience in the future. Without the meaningful threat of coercion and punishment, preventive relief will in many cases be no different than damages.

Assume, for example, that plaintiff has obtained a decree that defendant specifically perform a contract to supply particular goods that turn out to be otherwise unobtainable during a critical shortage. If defendant has the goods on hand and delivers, well enough. If he has them on hand but does not deliver, the court may send its own officer to put plaintiff in possession by writ of assistance or its equivalent.[26] No personal compliance is required beyond non-resistance to the officer. This result amounts only to an execution for a money judgment. But what if defendant has already sold and delivered his supply to a good faith purchaser,[27] or what if he never had the goods and contracted on the speculation that he would be able to buy at a lower price than the one at which he was reselling to plaintiff? Seller can still specifically perform if he, rather than the plaintiff-buyer, covers and absorbs the price demanded in the disturbed market. But if he refuses, the court's recourse is some combination of punitive and open-ended fine or imprisonment. If these are not used to coerce defendant's compliance, plaintiff is left with only the remedy of a "compensatory fine," in effect damages.

Whether and how strongly a court will use punitive and coercive measures are matters of discretion. In practice, it depends upon the court's balancing of the importance of the right at issue, the flagrancy of defendant's conduct, the harm sanctions will inflict on defendant, and the value of the court's dignity and authority. Much depends on the temperament of the individual judge and the value she places on these factors. As long as the court may refuse to

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26 *See* FED. R. CIV. P. 70. In addition to a writ of assistance, Rule 70 permits the court to perform an act in the defendant's stead as if he had done it. One example of this power is conveyance of land by marshall's deed or by judgment for title when defendant disobeys a decree for specific performance. *See generally* 12 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3022 (1973) (detailing the remedies available in the "enforcement of judgment for specific relief").

27 Plaintiff will ordinarily have sought preliminary relief restraining defendant from disposing of the goods but will not necessarily have gotten it.

apply the force needed to make its order effective, however, it is not accurate to say that the law ordinarily gives a plaintiff preventive or specific relief at her choice.

Nor is it obvious that the court should commit itself to using imprisonment simply because plaintiff prefers prevention or relief in kind. To be obeyed as a matter of routine, authority must be seen to be obeyed by others. Any time a court grants an injunction, it risks its own prestige.[28] If it backs down in the face of a recalcitrant defendant, it encourages defiance in future cases. Conversely, it may sometimes impose exemplary punishment for contempt as a general deterrent to others even when it is no longer possible to compel defendant to obey. A court should not grant preventive relief unless it is willing to commit to using whatever force at hand is necessary to compel obedience or make an example. Once committed, it can retreat only at the cost of embarrassment to the institution. One may doubt whether our supposed moral principle that contracts ought to be kept should make it a crime to breach one no matter how little plaintiff is injured or inconvenienced.

The irreparable injury rule survives, at least in rhetoric, because it expresses the factual proposition that preventive or specific relief implies coercion by fine and imprisonment, and the moral proposition that those sanctions should not be available simply because an injured plaintiff wants them, even if specific relief makes the plaintiff more completely whole than an imperfectly computed sum of money would. Even if exchange is not the virtue that the efficient breach hypothesis would have it, secure tenure comes with costs that may make exchange an acceptable second best. Laycock identifies specific situations where the courts will only give second best relief, but he does not establish that there can or should be no others. Beyond the specific categories Laycock identifies, the irreparable injury rule stands for a residual distrust, which he evidently does not share,[29] of the contempt power that gives specific relief its effect. The irreparable injury rule can no longer be taken for granted, but this report of its death may be premature.

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28 Rendleman, *supra* note 1, at 356.

29 LAYCOCK, *supra* note 2, at 14-15.