1992

Book Review. The Premature Burial of the Irreparable Injury Rule

Gene R. Shreve

Indiana University Maurer School of Law, shreve@indiana.edu

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Civil Procedure Commons, and the Legal Remedies Commons

Recommended Citation

https://www.repository.law.indiana.edu/facpub/703

This Book Review is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
The considerable merits of Douglas Laycock's new book will not surprise readers. Before it appeared, the author had already become America's leading authority on injunctions. The work is lucid, forceful, and erudite. At times, the author's imagination in reconceptualizing injunctions invites comparisons to the great Henry McClintock. Best of all, perhaps, this book is certain to stimulate a good deal of thought on remedies and to rekindle useful discussion about the proper role of injunctions.

Yet the enthusiasm of many for The Death of the Irreparable Injury Rule may exceed mine. I am troubled by the premise that opens the book.

† Alice McKeen Young Regents Chair in Law, The University of Texas School of Law. B.A. 1970, Michigan State University; J.D. 1973, The University of Chicago.
‡ Hereinafter cited by page number only.
* Professor, School of Law, Indiana University-Bloomington. B.A. 1965, University of Oklahoma; LL.B 1968, LL.M. 1975 Harvard Law School. Support for this piece came from a summer grant provided by Indiana University and the School of Law. For their helpful comments on the draft, I am grateful to Doug Rendleman, Lauren Robel, and David Schoenbrod. My thanks to Joyce Saltalamachia for providing me with a place to work and write at New York Law School.


2. See, e.g., Henry L. McClintock, Adequacy of Ineffective Remedy at Law, 16 MINN. L. REV. 233 (1932). This is not to say that their views are the same. McClintock sought to recast rather than to reject the irreparable injury rule. See id. at 254-55 (arguing that the question of adequacy of a remedy at law should be based on practical instead of theoretical grounds).

3. Praise appearing on the dust jacket of the book includes: "I was reminded of Cardozo, of
and provides its title. The idea that the irreparable injury rule is dead is not entirely plausible. Nor is that premise in itself particularly interesting. However, one of the accomplishments of this book is the manner in which it survives those problems. In spite of a weak opening premise, this is a welcome and important work.

The irreparable injury rule blocks an injunction when the harm that the injunction would have averted is compensable.\(^4\) Whether stated this way, or that one seeking an injunction must have no adequate remedy at law,\(^5\) the rule assigns injunctions an inferior place within a remedial hierarchy by making them more difficult to obtain than damages. Laycock correctly observes that courts invoke the irreparable injury rule to prevent a plaintiff from realizing his preference for an injunctive remedy.\(^6\) Of course, the rule is but one of many capable of frustrating a plaintiff in this way.\(^7\) Important questions emerge regarding whether or how the hierarchy held in place by these rules should exist. I only wish that the author had spent more time on those questions and less on his avowed purpose of proving the demise of the irreparable injury rule.

Laycock's argument here is not easy to follow. Legal concepts have no measurable heartbeat, and life-death metaphors describing them risk a certain imprecision.\(^8\) Worse, to the extent this imagery does fit, it seems to point away from the author's conclusion that the irreparable injury rule is dead. As Laycock jousts with the rule throughout much of the book and in numerous contemporary settings, it is difficult to avoid the conclusion that the rule is in robust (if undeserved) good health. Numerous cases cited in the book suggest that the rule is alive in the minds of judges.

---

4. As Laycock puts it, "[i]njury is irreparable if plaintiff cannot use damages to replace the specific thing he has lost." P. 37.
5. I have tried to demonstrate why, "similar as the tests are, they do not express quite the same idea." Gene R. Shreve, Federal Injunctions and the Public Interest, 51 GEO. WASH. L. REV. 382, 393 (1983). For the sake of the reader, however, I will follow Laycock's convention and "use the two formulations interchangeably." P. 9.
Additional federal and state decisions\(^9\) and the impressions of many commentators\(^{10}\) support the same conclusion.

Of course, Professor Laycock is not suggesting that the irreparable injury rule has disappeared. He is attempting to use death imagery in a different way. The irreparable injury rule is dead to Laycock because he finds it misleading,\(^{11}\) feels there are better rules to explain what courts

\(^9\) A spot check of federal cases not cited in the book reveals one case that invoked the rule to refuse a final injunction. See Lopez v. Garriga, 917 F.2d 63, 68 (1st Cir. 1990). Many others have discussed the rule with reference to questions of preliminary relief. See, e.g., United States v. Rural Elec. Convenience Coop. Co., 922 F.2d 429, 433 (7th Cir. 1991) (agreeing “with the district court that if the United States were able to intervene in the state court proceeding, it would have an adequate remedy at law that precludes the award of [preliminary] equitable relief” (emphasis in original)); Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800-03 (3d Cir. 1989) (upholding the district court’s denial of plaintiff’s request for a preliminary injunction because the plaintiff had an adequate remedy in damages for breach of contract); Wagner v. Taylor, 836 F.2d 566, 575-76 (D.C. Cir. 1987) (discussing the broad discretion of district courts in evaluating irreparability in the context of “interim injunctive relief”).

State cases discussing the rule with reference to permanent injunctions include Eberle v. State, 779 S.W.2d 302, 304 (Mo. Ct. App. 1989); Nebraska Pub. Power Dist. v. Lockard, 467 N.W.2d 53, 54 (Neb. 1991); Abboud v. Lakeview, Inc., 466 N.W.2d 442, 449 (Neb. 1991); Asheville Mall v. Sam Wyche Sports World, 387 S.E.2d 70, 71 (N.C. Ct. App. 1990); Bradlees Tidewater, Inc. v. Walnut Hill Inv., Inc., 391 S.E.2d 304, 306-08 (Va. 1990); Large v. Clinchfield Coal Co., 387 S.E.2d 783, 786 (Va. 1990). State decisions discuss the rule also with reference to preliminary relief. See, e.g., Galle v. Coile, 556 So.2d 957 (La. Ct. App. 1990). Unlike the picture concerning federal cases, however, preliminary relief cases do not clearly predominate the discussion in state courts. This may be because, overall, interests secured through the exercise of federal jurisdiction are more perishable in the short term.

\(^{10}\) Many who have criticized aspects of the irreparable injury rule appear to have assumed that the rule is very much alive. See, e.g., Owen M. Fiss, The Civil Rights Injunction 38-39 (1978) (claiming that the general effect of the irreparable injury rule is to create a remedial hierarchy and to relegate the injunction to a subordinate place in that hierarchy); R. Grant Hammond, Interlocutory Injunctions: Time for a New Model?, 30 U. TORONTO L.J. 240, 276 (1980) (“The historical constraint [of the adequacy test] is now grossly overstated and is one of the contemporary shibboleths of the law.”); John Leubsdorf, The Standard for Preliminary Injunctions, 91 HARY. L. REV. 525, 526, 544-45 (1978) (noting that irreparable injury is not mentioned in all preliminary injunction cases, and nevertheless incorporating it into his model for a balancing approach to injunctive decisions); McClintock, supra note 2, at 233 (assuming, at the start of his discussion, that courts consider the adequacy of the remedy at law in determining whether injunctive relief is appropriate); Doug Rendleman, The Inadequate Remedy at Law Prerequisite for an Injunction, 33 U. FLA. L. REV. 346, 346 (1981) (noting that for “the past century and a half” courts have required a showing of irreparable injury for injunctive relief); Shreve, supra note 5, at 387 (agreeing with critics of the irreparable injury rule that the “irreparability-adequacy requirement” relegates the injunction to “an inferior hierarchical position in the law of remedies”); Rhonda Wasserman, Equity Transformed: Preliminary Injunctions to Require the Payment of Money, 70 B.U. L. REV. 623, 668 (1990) (explaining that courts hesitate to grant equitable remedies when legal remedies would be adequate so as not to deprive litigants of the opportunity to present their claims to a jury).

\(^{11}\) Pp. 4-7, 104.
do, believes diverse applications have distorted its meaning, and finds it to have little useful function. Thus, even though "courts talk about irreparable injury all the time," the irreparable injury rule seems dead to Professor Laycock because it does not contribute to the kind of dynamic decision making he desires for injunction cases.

A good example of what Professor Laycock seems to be driving at occurs when he discusses an important exception to his thesis: that the rule is "very much alive at the stage of preliminary relief." He makes this exception less because so many preliminary relief decisions raise the rule than because the irreparable injury rule makes sense to him in this setting. The rule "has teeth at the preliminary injunction stage because it does serve a purpose there." On the other hand, the author writes that "[t]he irreparable injury rule has largely died at the permanent injunction stage because it serves no purpose there."

Clearly, it is not enough for Professor Laycock simply to criticize the rule. "I do not argue merely that the irreparable injury rule should be abandoned," he writes. "I argue that it has been abandoned in all but rhetoric." To make this leap, however, the author comes perilously close to an "alive if you like it, dead if you don't" approach to legal criticism. It strains the intelligible limits of a life-death metaphor to declare that a rule is dead merely because it is deficient in explanatory power, or because it can lead to bad results. The longevity of a rule is not affected to that degree by its popularity with commentators. Thus, while we can probably agree that the rule of Swift v. Tyson—like it or

12. See pp. 105 (describing court opinions in which the irreparable injury rule was invoked despite the fact that the decision could be better explained as a balancing of "the cost to defendant or the court from a fully adequate remedy against the cost to plaintiff of a less than adequate remedy"); pp. 193-201 (reviewing cases in which the courts have used the irreparable injury rule to deny relief to the plaintiffs while actually deciding the case on its substantive merits).
16. Professor Laycock never seems to suggest how the rule was over more alive in this, his sense than it is now. On the difficulties this omission presents for an argument based on life-death imagery, see infra notes 26-28 and accompanying text.
17. P. 111.
18. P. 110. Laycock writes: "Far and away the most common occasions for irreparable injury opinions are motions for preliminary relief: temporary restraining orders, preliminary injunctions, receivers, and the like." P. 110 (citations omitted). He sets these situations apart from those where the question is whether to grant permanent (final) injunctive relief. The author regards the irreparable injury rule as alive for preliminary relief decisions, observing that it "can actually do some good" there. Id. By Laycock's own account then, his position that the irreparable injury rule is dead fits only a minority of cases in which courts discuss the rule. To avoid a certain amount of confusion, Laycock might have narrowed his title and thesis to something like The Death of the Irreparable Injury Rule in Permanent Injunction Cases.
20. P. 117.
21. Id.
22. P. 7 (emphasis in original).
23. 41 U.S. (16 Pet.) 1 (1842). Swift authorized federal judges sitting in diversity to make and
not—is dead, it is very hard to see the irreparable injury rule as dead in any natural or useful sense of the term.

These difficulties at the "death" end of Laycock's life-death metaphor are enough to make his argument misfire; however, there are difficulties on the "life" end as well. The death of the irreparable injury rule assumes a dramatically altered state. That is, a rule cannot be dead unless it was once in some different, vital sense alive. A "death-of" approach to legal argument must contemplate the legal rule or principle when it was alive. This discussion need not be complementary, but it should at least acknowledge and describe how the principle exerted influence at an earlier time. Readers badly need that earlier picture of the irreparable injury rule, but the book does not deliver it. Rather, the rule applied to permanent injunctions seems in the author's view never to have been much closer to satisfying his standard for a living rule than it is now. From Laycock's perspective, it is almost as though the rule were stillborn.

administer rules of decision (called federal general common law) displacing state common law. See id. at 18-19.


25. Swift was overruled by Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Writing for the Court, Justice Brandeis stated: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law." Id. at 78.


27. See supra text accompanying notes 18-21.

28. The only justification for the rule in the permanent-injunction setting possibly to be found in the book is the author's brief account of the use of the rule in political wars between law and equity courts. See pp. 19-20. If that battle was necessary to keep the rule alive, it has been dead for a long time.

The rule was created to allocate jurisdiction between courts that have long been merged. . . . Even before the merger, Americans had largely eliminated the differences between law judges and equity judges. Law and equity were committed to the same federal judges from the beginning—the irreparable injury rule never served its original purpose even for a day in federal court.

P. 281.

Laycock's choice of historical investigation as a means of getting to the bottom of matters is sound. His observations (similar to those in Wasserman, supra note 10, at 652-54) are helpful as far as they go. But I think his preoccupation with turf battles between English law and chancery courts offers too narrow a conception of the life and purpose of the irreparable injury rule. Indeed, the
The heart of the matter eventually becomes clear. The irreparable injury rule is not really dead. Professor Laycock is just dead against it. I think that readers will derive more enjoyment and profit from his book if they note this distinction and do not take too seriously the author’s insistence on the rule’s demise. Laycock the advocate is more interesting than Laycock the medical examiner. Most interesting of all is the Laycock who discards advocacy in favor of dialogue. The best examples of this dialogue occur when the author approaches larger matters of procedural jurisprudence. Laycock appreciates that, when injunctions are viewed in this dimension, the forces at work are larger than those represented by the policies of any single substantive field, or the political interests of any one group. In short, Laycock appreciates the value of a trans-substantive perspective.

The trend until recently has been to view procedure by examining its effects on particular substantive interests or on particular groups. There has been a corresponding antagonism toward trans-substantive irreparable injury rule evolved with a number of other maxims to enhance the stature and quality of equitable relief. I have maintained elsewhere that equity evolved to a large extent as a natural law reaction against legal formalism. However, among the problems encountered by equity were difficulties of legal justification, precisely because its decisions were less a result of the rule-bound ceremony. Natural law justifications for equitable power failed to suggest a stopping point. It remains true that authority for issuing injunctions is largely shaped by admonitions (reasons why injunctions should be refused).

Gene R. Shreve, Pragmatism Without Politics—A Half Measure of Authority for Jurisdictional Common Law, 1991 B.Y.U. L. Rev. 767, 803-04; see also Hoffer, supra note 7, at 8-15 (discussing the development of the concept of a court of equity that exists to offer a remedy where the generality of the law does injustice).


attempts to describe and value procedure. Remedies literature seems to reflect this pattern. Thus, a good deal of remedies literature (often in the law and economics tradition) focuses on the policies of a particular substantive field. A good deal more focuses on the interests of particular (often disadvantaged) groups. But, as for procedure generally, there is also a trans-substantive tradition in remedies literature. Among others, David Schoenbrod, John Leubsdorf, and Doug Rendleman have contributed to a trans-substantive understanding of remedies. And Laycock’s book may signal an important new phase of the movement.


My own conception of trans-substantive procedure is grounded in policies of judicial administration. These policies shape trans-substantive procedure because they "strive for the most sensitive and widespread validation of substantive law in the lives of litigants and the public, whatever substantive law might be." Shreve, supra note 28, at 790 (emphasis in original).

35. See DAVID SCOENBROD ET AL., REMEDIES: PUBLIC AND PRIVATE (1990); Schoenbrod, supra note 7. Of all remedies scholars, Professor Schoenbrod has made the most explicit use of trans-substantive concepts. He and his co-editors introduce their new book by stating that "our focus is trans-substantive." Id. at 3. Their splendid casebook stands as one of the most important recent developments in the remedies field.

36. See Leubsdorf, supra note 10.

37. See Rendleman, supra note 10.
Professor Laycock sets out to explore "a wide range of cases." Much later, he offers in the form of a "Tentative Restatement" a "set of functional rules for choosing among remedies." The author signals the trans-substantive character of his rules by stating that they address matters that "arise in all areas of substantive law." In a refreshing departure from his earlier, more argumentative tone, the author muses: "Some of these rules would obviously benefit from further specification, and there may be other constraints on plaintiff's choice of remedy that I have not yet identified."

True enough. Yet, if Laycock only begins a new chapter of trans-substantive inquiry, it is a splendid beginning. Here are three rules that give the flavor of his approach:

§ 2 Undue Hardship
A court should deny permanent specific relief if:
(a) the relief would impose hardship on defendant, and
(b) that hardship is substantially disproportionate to the disadvantage to plaintiff of receiving only substitutionary relief.

In balancing the interests, a court should consider the relative fault of each litigant.

§ 3 Burden on Innocent Third Parties
A court should deny permanent specific relief if:
(a) the relief would harm innocent third parties, and
(b) that harm is not outweighed by the disadvantage to plaintiff of receiving only substitutionary relief.

In balancing the interests, a court should consider the innocence of the third parties and the relative entitlements of the plaintiff and the third parties.

§ 4 Impracticality
A court should deny permanent specific relief if:

38. P. 11.
39. P. 265.
40. Id. Continuing in this vein, Laycock writes, "I am not trying to state particular remedies for particular wrongs . . . ." Id.
41. P. 266.
42. P. 268. The terms "specific relief" and "substitutionary relief" are defined earlier in the book: 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 a specific sum of money.
43. P. 268.
The Irreparable Injury Rule

(a) the relief would be impractical to implement or burdensome for the court to supervise, and
(b) these problems outweigh the disadvantage to plaintiff of receiving only substitutionary relief.44

Not all of Professor Laycock's rules are as broad-spectrum as these;45 still, his Tentative Restatement serves the overall goals of judicial administration.46 In this sense, and in the sense of promoting more intelligible judicial decisions, Laycock's rules seem firmly in the spirit of the new pragmatist jurisprudence.47

These rules complete Laycock's main achievement. They also demonstrate the book's split personality, for they depend very little on a rejection of the irreparable injury rule. Laycock avoids mention of irreparable injury in his Tentative Restatement. Yet, he acknowledges the need for other rules that condition the availability of injunctions just as surely as does the irreparable injury rule.48 And he presents (without naming it as such) something close to an irreparable injury rule for preliminary relief cases.49 These concessions seem entirely correct to me, yet they represent part of an undertaking very different from the assault on the irreparable injury rule with which Laycock begins the book.

My point is not that Professor Laycock has been too hard on the irreparable injury rule. His view, that the plaintiff should be the judge of

44. P. 269.
45. See, e.g., p. 269 (§ 5 Personal Service Contracts) (setting forth a rule prohibiting courts from requiring specific performance of personal services contracts); p. 270 (§ 6 Prior Restraints on Speech) (setting forth a rule that "courts should refuse specific relief that would impose an unconstitutional prior restraint on speech").
46. On the bond between policies of judicial administration and trans-substantive procedure, see supra note 34.
47. My view of pragmatism is that it can serve as a powerful clarifying and mediating agent in procedural theory. I have endeavored elsewhere to explain how it provides a jurisprudence for trans-substantive concerns of judicial administration. See Shreve, supra note 28, at 791-96. I have also explored how pragmatist legal theory underpins the objective of coherent judicial decision making. See Gene R. Shreve, Symmetries of Access in Civil Rights Litigation: Politics, Pragmatism and Will, 66 IND. L.J. 1, 38-39, 48-49 (1990).

48. See supra notes 42-44 and accompanying text.
49. Section 13 of the Tentative Restatement states in part: "A court should grant specific relief before final judgment only to prevent injury that cannot be remedied by later remedies of any kind." P. 273.
the adequacy of a damage remedy, seems fair. So does his observation that courts use the rule less to second-guess plaintiffs’ own best interests than to give life to concerns that costs from an injunction might be excessive. While Professor Laycock did not invent the notion that there are other rules that do in fact confront problems of the cost of injunctive remedies, his arguments for directing more of our attention toward them, and (correspondingly) away from the irreparable injury rule, are fresh and convincing. Perhaps the author is right in suggesting that some commentators have been too cordial to the rule.

My point is rather that, by themselves, Professor Laycock’s revelations about the irreparable injury rule probably would not have made a terribly interesting or important book. Whether seen as an attempt to slay the rule or to announce that it is already dead, that project would have been too narrow and contentious to offer any hope of realizing the book’s ambition: “to clarify and simplify the entire field.” Thus, it is fortunate that the author’s case against the rule becomes something of a sideshow by the end of the book. In a different, larger sense, Professor Laycock makes progress toward his goal. Why not a Restatement for remedies? And who better than Professor Laycock to lead such a movement?

50. See p. 251.

51. See pp. 5-6 (“Courts may balance the costs of the equitable remedy against plaintiff’s need for it, and in that sense the degree of inadequacy may matter. But this balancing process is triggered by variations in the cost of the equitable remedy, not by variations in the adequacy of the legal remedy.”).

52. Three writers the author chided on this score were Edward Yorio, Doug Rendleman, and me. See pp. 241-43, 244 nn.9-10. It would go much too far to suggest that the three of us are of one mind. But we all sinned, apparently, by indicating that the irreparable injury rule exists and has some general value. In a conciliatory mood, Laycock correctly acknowledges that the difference between his approach and ours “is largely one of characterization.” P. 6. Whether the author preserves that impression over the rest of the book is another matter.


53. P. 7.

54. For assorted views of the function and value of the American Law Institute’s Restatements, see GRANT GILMORE, THE AGES OF AMERICAN LAW 73 (1977) (suggesting that the Restatements written in the 1920s were “the reaction of a conservative establishment, eager to preserve a threatened status quo”); Edwin J. Owens, The Judicial Process, Stare Decisis and the Restatements, 21 CAL. ST. B.J. 116, 126-29 (1946) (concluding that the Restatements effectively create a rebuttable legal presumption and greater uniformity in the law); Herbert Wechsler, The Course of the Restatements, 55 A.B.A. J. 147, 150 (1969) (arguing that Restatements should not be based solely on past judicial decisions, but rather should incorporate all of the considerations that the courts normally weigh in reaching their decisions).