

# The System of Equitable Remedies

*Samuel L. Bray*

*This is a work in progress. Please do not cite  
or quote without permission.*

Introduction .....	2
I. The State of the Merger of Legal and Equitable Remedies.....	8
A. Backdrop: the general merger of law and equity.....	9
B. The relative lack of merger in remedies .....	12
1. Courts continue to classify remedies as legal or equitable.....	12
2. That classification has consequences.....	15
II. Thinking of Equitable Remedies as a System.....	19
A. The equitable remedies .....	20
B. The equitable managerial devices .....	28
C. The equitable constraints.....	35
III. The Future of the System.....	42
A. Reasons to expect stability.....	43
B. Where change is most likely.....	46
Conclusion .....	51

---

Assistant Professor of Law, UCLA School of Law. Thanks are due to Tendayi Achiume, Will Baude, Nathan Chapman, Michael Coenen, Beth Colgan, Ingrid Eagly, Allison Hoffman, Doug Lichtman, Jason Oh, Joanna Schwartz, Emily Sherwin, Seana Shiffrin, Becca Stone, Clyde Spillenger, Alex Wang, the participants in the UCLA Junior Faculty Workshop, and to all the readers of another paper on equity whose comments have also shaped this one.

## Introduction

Charles Dickens begins *Bleak House* with a savage indictment. Fog and mud fill the streets of London, but they are nothing, he tells us, compared to “the groping and floundering condition” of the Court of Chancery, where members of the bar are “mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities,” and “making a pretence of equity with serious faces, as players might.”<sup>1</sup> The chancellor would not have agreed with Dickens. But what the chancellor and his eloquent critic would have had in common was a sense that equity was exceptional. It might have been better than law, or worse, or just different, but it was certainly not a mere replication.

That sense of equitable exceptionalism is not the only way to think about equity. Another, more skeptical line of thought includes many eminent English and American scholars of the last two and a half centuries, such as William Blackstone, Frederic Maitland, Zechariah Chafee, and Douglas Laycock. They have contended that every distinctive feature that is claimed for equity, such as a high degree of discretion, or an emphasis on fairness, can be found to the same degree in law.<sup>2</sup> Something important follows from that contention: If equity is not distinctive, there is no reason for it to remain distinct.

Equity skepticism is now dominant. And no wonder. The Court of Chancery is gone. In the United States, forty-three of the fifty states do not distinguish between law and equity in the structure of their judicial institutions.<sup>3</sup> Law and equity are merged in fields such as trusts and contracts. The widely held view in the legal academy, often unarticulated but sometimes vigorously advanced,<sup>4</sup> is that the historical distinctions between law and equity no longer serve any purpose.

---

<sup>1</sup> CHARLES DICKENS, *BLEAK HOUSE*.

<sup>2</sup> See, e.g., 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 429-442 (1768) (insisting that law and equity differ only “in the forms and mode of their proceedings,” since both follow “the spirit of the rule” rather than “the strictness of the letter”).

<sup>3</sup> Some distinction is retained in Delaware, Georgia, Illinois (Cook County only), Iowa, Mississippi, New Jersey, and Tennessee. See *infra* note 31.

<sup>4</sup> See, e.g., Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBLEMS 53 (1993); Doug Rendleman, *The Trial Judge’s Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 97 (2007); Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027, 1033, 1060 (2011).

By contrast, however, equity skepticism has not shaped the recent decisions of the U.S. Supreme Court with respect to remedies. In cases involving areas as diverse as ERISA, copyright, and environmental law, the Court has repeatedly insisted on the distinction between legal and equitable remedies.<sup>5</sup> To support that distinction the Court has appealed to tradition, but it has offered no other justification.<sup>6</sup>

This Article considers two questions about law, equity, and remedies. Both questions are crucial to evaluating the course the Supreme Court is charting. First, to what degree have legal and equitable remedies actually been merged in the United States? Second, is the distinction between legal and equitable remedies useful? On these two questions, the conclusions reached here will surprise many readers (though, perhaps, different sets of readers).

The first conclusion is that for remedies there has been almost no merger at all. Courts still classify remedies as legal or equitable.<sup>7</sup> And that classification has an array of important consequences.<sup>8</sup> Equitable remedies are given only by judges, not by juries. A claim for an equitable remedy is subject to special equitable defenses. Equitable remedies are given only after the plaintiff shows that legal remedies are inadequate. A decree giving an equitable remedy must be specifically worded. An equitable remedy is always subject to later revision (in technical terms, it is subject to “modification” or “dissolution”). To support an equitable remedy, the court may appoint a master or receiver to oversee the defendant’s compliance. And an equitable remedy may be enforced with contempt proceedings.

---

<sup>5</sup> See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) (copyright); *U.S. Airway, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013) (employee benefits); *Cigna Corp. v. Amara*, 131 S. Ct. 1866 (2011) (employee benefits); *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010) (environment); *Nken v. Holder*, 556 U.S. 418 (2009) (immigration); *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008) (environment); *Munaf v. Geren*, 553 U.S. 674 (2008) (habeas); *eBay v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (patent); *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006) (employee benefits); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (employee benefits); *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 312 (1999) (contract).

<sup>6</sup> See Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VANDERBILT L. REV. (forthcoming 2015).

<sup>7</sup> The remedies classified as equitable include injunctions, accounting for profits, constructive trusts, equitable liens, and specific performance. The remedies classified as legal include damages, mandamus, habeas, and replevin. On the declaratory judgment, see *infra* note 80.

<sup>8</sup> Each consequence of classification mentioned in this paragraph is further discussed below.

The general rule, subject to qualifications that will be discussed below,<sup>9</sup> is that *all* of these doctrines apply to a claim for an equitable remedy, and *none* of these doctrines apply to a claim for a legal one. The discontinuity is sharp. Thus, in the legal systems of the United States, the merger of legal and equitable remedies is far from complete. This conclusion may not surprise scholars in the field of remedies, but it will surprise most non-specialists.

After surveying the present landscape of equity, this Article considers a second question: whether the distinction between legal and equitable remedies has continuing usefulness. Most remedies scholars, though not all, view the distinction between legal and equitable remedies as outmoded and having no analytical value. The standard view is that the distinction between law and equity should be discarded in remedies as it has been discarded elsewhere.<sup>10</sup> As Douglas Laycock has put it, “[e]xcept where references to equity have been codified, as in the constitutional guarantees of jury trial, we should consider it wholly irrelevant whether a remedy, procedure, or doctrine originated at law or in equity.”<sup>11</sup>

This Article reaches a contrary conclusion: The distinction between legal and equitable remedies is a useful one. In reaching that conclusion, this Article proceeds in a different fashion than the existing scholarship on equitable remedies. Most of that scholarship, quite understandably, considers one remedy or doctrine or characteristic at a time.<sup>12</sup> One exception is scholarship on the contempt power, which has sometimes suggested that the potential misuse of that power is a reason for various

---

<sup>9</sup> These qualifications include the status of the unclean-hands defense in some jurisdictions, the application of laches to mandamus, and the fact that masters may be appointed to calculate or disburse damages in certain cases. See *infra* notes – and accompanying text.

<sup>10</sup> See, e.g., Laycock, *supra* note 4; Rendleman, *supra* note 4; Roberts, *supra* note 4. The contrary arguments that are made for equitable distinctiveness tend to be either narrow in scope, e.g., Samuel L. Bray, *A Little Bit of Laches Goes a Long Way: Notes on Petrella v. Metro-Goldwyn-Mayer, Inc.*, 67 VANDERBILT L. REV. EN BANC 1 (2014); Edward Yorio, *A Defense of Equitable Defenses*, 51 OHIO ST. L.J. 1201 (1990); or else a justification of “functional equity” that is not coextensive with historical or doctrinal equity, e.g., Henry E. Smith, *An Economic Analysis of Law versus Equity* (March 2012 draft); Henry E. Smith, *Equity and Administrative Behavior*, at 2 (SSRN draft of Dec. 23, 2014).

<sup>11</sup> Laycock, *supra* note 4, at 53-54. Laycock added that “legislatures should quit enacting references to law and equity, and they should eliminate existing references where possible.” *Id.* at 78-82.

<sup>12</sup> E.g., Mark P. Gergen, John M. Golden, & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203 (2012) (equitable presumptions); Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in Boomer v. Atlantic Cement)*, 4 J. TORT L. I (2012) (undue hardship defense).

doctrines that limit equitable relief.<sup>13</sup> Another exception is Henry Smith's recent work on equity, which emphasizes the affinity and similarity in equitable doctrines.<sup>14</sup> A large number of equitable doctrines, Smith persuasively shows, work to constrain opportunism.

The argument here goes further. The critical premise is that the surviving equitable remedies and equitable doctrines should not be considered individually, in isolation, for they work together as a system.<sup>15</sup> The components of that system can be put into three categories. First, there are the *equitable remedies* themselves. Second, there are *equitable managerial devices*, such as contempt and the possibility of modifying or dissolving the remedy ex post. Third, there are special *equitable constraints*, such as equitable defenses and equitable justiciability requirements.

These three categories are tightly and logically connected. It is necessary to have some remedies that compel action or inaction. In order to use such remedies well, courts will need devices for managing the parties and ensuring their compliance (devices that are not needed for the mere payment of a defined sum of money<sup>16</sup>). Then, once these remedies and managerial devices exist, there will need to be constraints to avoid their abuse. In other words, the equitable remedies need the managerial devices; and the remedies and the managerial devices need the constraints. This is, roughly speaking, the logic of the system of

---

<sup>13</sup> See John P. Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495, 535-38 (1959); Doug Rendleman, *Irreparability Irreparably Damaged*, 90 MICH. L. REV. 1642, — (1992); see also DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* 142 (2d ed. 1993) (“The adequacy test can be discarded, but a pessimistic presumption that disfavors coercion may prove to be a more difficult matter.”); but see Laycock, *supra* note 4, at 79-80 (“[I]f our goal is to limit abuse of the contempt power, it is far better to limit the contempt power than to limit the scope of equity.”); Yorio, *supra* note 10, at 1226-1227.

<sup>14</sup> See, e.g., Smith, *Economic Analysis*, *supra* note 10; Smith, *Administrative Behavior*, *supra* note 10, at 2; Henry E. Smith, *Why Fiduciary Law Is Equitable* (SSRN draft).

<sup>15</sup> On systems, and especially the difference between the parts and the whole, see ROBERT JERVIS, *SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE* (1997); Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 6 (2009). An incisive account of doctrinal systematicity can be found in Jeremy Waldron, “*Transcendental Nonsense*” and *System in the Law*, 100 COLUM. L. REV. 16 (2000).

<sup>16</sup> Nor are such devices needed for the non-monetary remedies at law, such as mandamus, habeas, and replevin, since they typically require conduct that is sharply defined and easily observed.

equitable remedies, i.e., the remedies and the remedy-related rules that are at present considered equitable in American law.<sup>17</sup>

Another way to put this is that some parts of the system solve first-order policy problems: i.e., the circumstances that demand a remedy compelling action or inaction. And other parts of the system solve the second-order policy problems that arise from solving the first-order ones: i.e., the additional need to manage compliance and constrain abuse. The whole works more effectively than a few of the parts would.

This argument has implications for scholars and for courts. Until now, the standard view among scholars has been that the distinction between legal and equitable remedies may have a fine historical pedigree, but it has no analytical value in the present.<sup>18</sup> Of course there are differences between damages and injunctions. And, speaking more abstractly, there are differences between monetary and non-monetary remedies. But according to the standard view there is no additional value in drawing a distinction between legal and equitable remedies.<sup>19</sup> In remedies, as in every other area of the law, the division between law and equity should be interred. To the contrary, this Article shows that the distinction between legal and equitable remedies has continuing usefulness. It reflects real differences in policy that are not captured in any other way of dividing up the universe of remedies (e.g., monetary and non-monetary remedies, specific and substitutionary remedies, property rules and liability rules). This argument also matters for the courts. As noted above, in a series of recent cases the U.S. Supreme Court has attached great significance to the fact that the remedy sought was legal or equitable.<sup>20</sup> Yet the Court has never offered any justification other than an appeal to tradition.<sup>21</sup> This Article provides the missing justification.

---

<sup>17</sup> For a preliminary sketch of this logic, see Bray, *supra* note 10, at 4-8. Other commentators have also noted that the power of equity is a reason that it needs constraints. See, e.g., Smith, *Administrative Behavior*, *supra* note 10, at 2.

<sup>18</sup> See sources cited *supra* note 4. Another example is ROBERT S. THOMPSON ET AL., *REMEDIES: DAMAGES, EQUITY, AND RESTITUTION* (4th ed. 2009), which notes the historical basis for “the differences in the manner in which legal and equitable remedies are judicially administered,” but concludes that “[t]here often is no coherent rationale” for those differences and strongly implies that to maintain them now is to make “taxonomy . . . substitut[e] for analysis.” *Id.* at 205.

<sup>19</sup> See *supra* notes 10-11 and accompanying text.

<sup>20</sup> See, e.g., *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1967 (2014) (allowing the equitable defense of laches to be raised only against claims for equitable remedies).

<sup>21</sup> *Id.* at 1973-74 (rooting this holding in the history of laches as an equitable defense).

The argument of this Article is therefore important but also incomplete. It does not show that the system of equitable remedies should be kept, for something better could replace that system, whenever something better comes along. Rather, the argument here establishes that the existing body of equitable remedies and remedy-related rules is a system, and thus there are likely to be serious errors if it is taken apart thoughtlessly and haphazardly. And the content and borders of that system are not arbitrary. There are better reasons for the system of equitable remedies than that this is how it was laid down in the time of Henry IV.<sup>22</sup>

A note on terminology may be useful at the outset. *Equity* means many different and overlapping things. In this Article, it is used for the remedies and related doctrines that were first developed in the Court of Chancery.<sup>23</sup> This approach to defining equity emphasizes its institutional history.<sup>24</sup> An alternative approach is to define equity based on one or more abstract qualities. Under that approach, equity might be characterized as a model of decisionmaking that emphasizes case-specific judgment, moral reasoning, discretion, or anti-opportunism.<sup>25</sup> That

---

<sup>22</sup> Cf. O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”).

<sup>23</sup> Remedies have always been especially important in the practice and self-conception of equity. See, e.g., D.E.C. Yale, *Introduction*, in LORD NOTTINGHAM’S ‘MANUAL OF CHANCERY PRACTICE’ AND ‘PROLEGOMENA OF CHANCERY AND EQUITY’ – (D.E.C. Yale ed. 1965). This is especially true in the United States. It has long been the case that American scholarship on equity emphasized its remedial aspects, while English scholarship tended to emphasize equitable bodies of law such as trusts. And the dominance of remedies in American thinking about equity has only grown as other aspects of equity have been merged out of existence.

<sup>24</sup> The standard citation is F. W. MAITLAND, *EQUITY: A COURSE OF LECTURES I* (A. H. Chaytor & W. J. Whittaker, eds., revised by John Brunyate, delivered in 1906 and published in 1936); see also *id.* at 13-14; HENRY L. MCCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY I* (2d ed. 1948) (definition 1(b)).

<sup>25</sup> See, e.g., Jack B. Jacobs, *The Uneasy Truce Between Law and Equity in Modern Business Enterprise Jurisprudence*, 8 DEL. L. REV. 1, 4 (2005) (“I use the term ‘equity model’ . . . to describe a system that favors courts intervening in cases whenever it becomes necessary to prevent or mitigate harsh results caused by the application of bright-line rules to particular individuals.”); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFFAIRS 83 (1993); Smith, *Administrative Behavior*, *supra* note 10, at 1-2 (distinguishing a wider sense of *equity* as a model of decisionmaking that is context-sensitive and a narrower sense of *equity* as a model of decisionmaking that is focused on opportunism); see also ST. GERMAN’S *DOCTOR AND STUDENT* 95 (T. F. T. Plucknett & J. L. Barton eds. 1974 Selden Soc’y reprint) (“Equytye is a [ryghtwysenes] that consideryth all the pertyculer cyrcumstaunces of the dede/ the whiche also is temperyd with the swetnes of mercye.”).

approach is useful, but it is better at describing equity than defining it. The definition of *equity* used here implies a qualification about the scope of the argument. The question for which this analysis is relevant is the wisdom of merging law and equity in remedies—not the merger of law and equity in courts, procedures, and primary rights and obligations, which has already been largely accomplished.

This Article proceeds as follows. Part I describes the general merger of law and equity, and the relative lack of merger in remedies. It shows that courts continue to classify remedies as legal or equitable, and it lists the major consequences of that classification. Part II describes the logic of the equitable remedies and related doctrines that remain in American law. This logic is found in the connection between remedies that compel action or inaction, managerial devices, and constraints. Part III considers the stability of the system, showing the points where change is most likely and why the system is nevertheless likely to hold together for the immediate future.

## I. The State of the Merger of Legal and Equitable Remedies

Before equity was ever merged with law, it had a long history. In the beginning the English Chancery was an administrative department, not a court.<sup>26</sup> It had the task of drawing up writs and issuing royal grants, which the chancellor would then authenticate with the great seal. The administrative department overseen by the chancellor had no jurisdiction, no law, and no remedies. Through the thirteenth and fourteenth centuries the decisions and interventions of the chancellor gradually took on a judicial cast. By the end of the fourteenth century it was clear there was a Court of Chancery. By at least the fifteenth century, that court was becoming more important and its procedure more consistent. From the sixteenth century the chancellor was no longer chosen from the bishops of the English Church, but was instead a common lawyer. In the seventeenth and eighteenth centuries, precedent

---

<sup>26</sup> For overviews of the history of equity, see J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 97-116 (4th ed. 2007); JOHN H. LANGBEIN, RENÉE LETTOW LERNER, & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 267-412 (2009); MAITLAND, *supra* note 24, at 1-22; THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 675-707 (5th ed. 1956, Lawbook Exchange reprint 2001); *see also* Yale, *supra* note 23. There is debate about whether the Chancery predated the Norman Conquest. *See* BAKER, 99 & n.15.

grew more important, and it became clear that there were controlling principles in equity as in law. In the early nineteenth century, Parliament added judges to the Court of Chancery, and the chancellor's personal role diminished. In the late nineteenth century, Chancery was dissolved as a separate court, being absorbed into the High Court of Justice.

In the United States, at the founding some of the states had separate courts of equity,<sup>27</sup> and many of the later-admitted states established them. For about a century and a half each federal court had a law and equity "side," with the same judge presiding over both. Today, however, it is often said that law and equity are merged in the United States. The decisive event for this merger is usually regarded as the adoption of the Federal Rules of Civil Procedure in 1938.<sup>28</sup> That is certainly correct with respect to the procedure of the federal courts. But behind that proposition lies a more complex reality. In remedies, even in the year 2014, there has been far less merger of law and equity.<sup>29</sup>

#### A. Backdrop: the general merger of law and equity

Most jurisdictions in the United States that had separate courts or divisions for law and equity have completely merged them. The federal district courts no longer have law and equity "sides."<sup>30</sup> In forty-three states there is no longer any distinction in judicial structure between law and equity.<sup>31</sup>

---

<sup>27</sup> See Morris S. Arnold, *A Historical Inquiry the Right to Trial by Jury in Complex Civil Litigation*, 128 U. Pa. L. Rev. 829 (1980); see also The Federalist No. 83 (Hamilton); Steven Schaikewitz, *Examining Georgia's Equitable Roots: Debunking the Myth That Georgia's Post-Revolutionary Courts Eschewed Equity Jurisdiction*, 20 J. SO. LEGAL HIST. 79 (2012). On equity in colonial America, see generally Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in 5 PERSPECTIVES IN AMERICAN HISTORY: LAW IN AMERICAN HISTORY 257 (Donald Fleming & Bernard Bailyn eds. 1971).

<sup>28</sup> E.g., *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 283 (1988) ("the merger of law and equity, which was accomplished by the Federal Rules of Civil Procedure").

<sup>29</sup> *Merger* is the term commonly used in the United States for the combining of law and equity, and *fusion* is the term commonly used in the United Kingdom, Canada, and Australia.

<sup>30</sup> See *Bradley v. United States*, 214 F.2d 5, 7 (5th Cir. 1954).

<sup>31</sup> Delaware, Mississippi, and Tennessee retain at least some separate courts for equity; New Jersey and Cook County, Illinois have separate divisions for law and equity within a single court; Georgia distinguishes equity for trial and appellate jurisdiction; and Iowa has unified courts that administer what the state constitution calls "distinct and separate jurisdictions" for law and equity. See, e.g., Del. Code Ann. tit. 10, § 341 (West 2014); William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792-1992*, 18 DEL. J. CORP. L. 819 (1993) (Delaware); Ga. Const. Art. VI, §4, ¶1; *id.* Art. VI, §6, ¶ III; CHARLES ADAMS III &

In most states, there has also been a total merger of procedure. It is here that the Federal Rules and their state counterparts have been decisive. Procedures that were once developed by courts of equity, such as depositions and interrogatories, are now pervasive in the unified civil procedure of state and federal courts.<sup>32</sup>

There has also been a high degree of merger with respect to primary rights and obligations.<sup>33</sup> Where law and equity developed parallel bodies of law, as in contract, there has now been a complete merger.<sup>34</sup> Where equity once had a monopoly, such as trusts, many of the rules are now statutory and are administered by undifferentiated courts.<sup>35</sup>

In all of these areas—courts, procedure, and primary rights and obligations—there have been recurring arguments for merger. One is the danger of mistakes by the plaintiff about which court, procedure, or body of law to invoke. If there are separate courts of law and equity, for example, a litigant might proceed in the wrong court, thereby losing the

---

CYNTHIA J. ADAMS, 2 BROWN'S GA. PLEADING, PRACTICE AND LEGAL FORMS § 9-11-2 (current through 2013); *Subject matter jurisdiction and Filing requirements*, 9 Ill. Prac., Illinois Civil Trial Procedure § 2:2-2:3 (2d ed. updated November 2013); Ill. Sup. Ct. Rule 135 ("Pleading Equitable Matters"); Iowa Const. art. V, § 6; Miss. Const. art. VI, § 159; Larry Primeaux, *The Better Chancery Practice Blog* (Mississippi); 1B N.J. Prac., Court Rules Annotated R 4:3-1(a) (2014 Supp.); Tenn. Code Ann. § 16-11-101 (West 2009).

<sup>32</sup> See generally Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429 (2003); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987); see also Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269 (1991). In the federal courts, the first instance of merger with respect to procedure appears to have been in the Judiciary Act of 1789. See David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 B.Y.U. L. REV. 75, 86 (1999).

<sup>33</sup> *Substantive law* is the phrase expected, but it is avoided here because remedies are sometimes described as substantive. See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS — (4th ed. 2010); see also *infra* note 43 (noting the question of how remedies are classified for purposes of the *Erie* doctrine).

<sup>34</sup> See, e.g., Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 315 n.22 (1991) (contract defenses originating in equity accepted in law); see also Andrew Burrows, *We Do This At Common Law But That In Equity*, 22 OX. J. LEG. STUD. 1, — (2002) (making this point for law in the United Kingdom). For an argument that there remains tension in contract between doctrines originating at law and in equity, see Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023 (2009).

<sup>35</sup> See, e.g., John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069 (2007). Henry Smith has noted that equitable decisionmaking still pervades some fields of law. See, e.g., Smith, *Administrative Behavior*, *supra* note 10; Smith, *Fiduciary Law*, *supra* note 14.

chance to bring her claim in the proper court (for reasons of expense, lost evidence, or a statute of limitations).<sup>36</sup>

Another recurring argument is that there are inconsistent results when courts apply different sets of rules.<sup>37</sup> Sara Worthington, an English trusts scholar, envisions a game played by five-year-old children, one that requires kicking a ball into a goal.<sup>38</sup> She first describes how the rules for the game might evolve on a playground, and then says:

Imagine what would happen if our five-year-olds were to have two sets of umpires monitoring their game, one applying red rules and red practices and delivering red responses to the events, the other applying green rules and green practices and delivering green responses to the events. The game would descend into chaos. . . .

Of course, the best way to bring order to such a bizarre game is simply to agree that only ‘purple rules’ are to apply. Whatever the red and green rules may have contributed to devising the purple rules, the truth is that a new game will have been created. Any other solution is more difficult . . . [and] simply not the rational way to set up the rules of the game.<sup>39</sup>

---

<sup>36</sup> For early forms of this argument, see ANTHONY LAUSSAT, JR., AN ESSAY ON EQUITY IN PENNSYLVANIA 39-40 (1826) (Arno Press reprint 1972); CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 122-23 (1981) (noting the South Carolina governor’s critique, in 1823, of the inconsistencies arising from separate courts of law and equity). Or, as Thurman Arnold put it, “cases are still being reversed because the parties fail to formulate their pleadings so that they fit into the picture of a single court with separate compartments of justice and mercy.” Thurman W. Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913, 941 (1934).

<sup>37</sup> A similar argument is the main rationale for the *Erie* doctrine: if federal courts did not apply state substantive law, then there would be inconsistent results depending on whether a plaintiff sued in state or federal court. There is a difference, though, in the solutions chosen. For law and equity the emphasis is usually on consolidating *courts*, but for diversity jurisdiction the *Erie* solution is consolidating the *law* that separate courts apply.

<sup>38</sup> SARAH WORTHINGTON, EQUITY 3 (2d ed. 2006). The point might be overstated, for “there is nothing inherently objectionable about having two parallel sets of rules” for how a game is won. Richard Re, *Schuetze and Quidditch* (May 10, 2014), online at richardresjudicata.wordpress.com/2014/05/10/on-schuetze-and-quidditch/ (last accessed May 15, 2014).

<sup>39</sup> WORTHINGTON, at 4-5. Worthington describes possible solutions, all of which demand “careful regulation of the interaction between red and green rules and red and green umpires”:

As in the children's game, having separate decisionmakers and rules for law and equity causes uncertainty, because law and equity might give different answers to such basic questions as whether a contract is valid or who is the owner of a tract of land.<sup>40</sup> Worthington's parable of the children's game is new, but the argument that she is making against inconsistent judgments in law and equity is an old one.<sup>41</sup> Like a gale force wind, the strength of those arguments seems to have carried merger along in most jurisdictions in the United States.<sup>42</sup>

## B. The relative lack of merger in remedies

### I. Courts continue to classify remedies as legal or equitable

For remedies, however, there has been remarkably little merger of law and equity. Even though remedies have sometimes traveled under the heading of "procedure," no merger of legal and equitable remedies was

---

One possibility is to give the red and green umpires different, independent, spheres of operation. This seems simple, but it is likely to raise intractable demarcation disputes, not to mention the practical difficulties of futile appeals by players to the 'wrong' umpire. Another possibility is to agree that the decisions of the red umpire must always prevail, but that the green umpire is to carry out most of the work unless there are good grounds for interference. The problem, then, is that the red umpire has enormous, probably unacceptable, discretion. Indeed, countless strategies exist but every one of them presents its own difficulties.

*Id.*

<sup>40</sup> *Id.* at 7.

<sup>41</sup> See LAUSSAT, *supra* note 36, at —.

<sup>42</sup> There does not appear to be any general history of the merger of law and equity in the United States. Relevant secondary sources include the modest literature on merger in particular states, e.g., Morton Gitelman, *The Separation of Law and Equity and the Arkansas Chancery Courts: Historical Anomalies and Political Realities*, 17 U. ARK. LITTLE ROCK L.J. 215 (1995); the literature on the fusion of English law and equity, see, e.g., Joshua Getzler, *Chancery Reform and Law Reform*, 22 LAW & HIST. REV. 601 (2004); Michael Lobban, *Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery. Parts I and II*, 22 LAW & HIST. REV. 389, 565 (2004); the literature on codification, e.g., COOK, *supra* note 36; Robert W. Gordon, *Review of Charles M. Cook, The American Codification Movement, A Study of Antebellum Legal Reform*, 36 VAND. L. REV. 431 (1983); and the literature on the development of the Federal Rules of Civil Procedure, e.g., Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Subrin, *supra* note 32. A related but intricate question is the interaction between merger in one area of law (e.g., procedure) and non-merger in another (e.g., remedies). On how the merger of legal and equitable procedure may have expanded the use of equitable remedies, see Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 811-17 (1998).

effected by the Federal Rules of Civil Procedure.<sup>43</sup> Accordingly, state and federal courts still routinely classify remedies as being either legal or equitable. The equitable remedies include injunctions, accounting for profits, the constructive trust, the equitable lien, and specific performance.<sup>44</sup> The legal remedies include<sup>45</sup> damages and replevin,<sup>46</sup> as well as the old prerogative writs of mandamus and habeas.<sup>47</sup> These classifications are made every day, right now, by federal and state courts. Courts classify remedies as legal or equitable not merely from habit, but because doing so is required by law.

When a jury trial is requested in federal court, the Seventh Amendment of the U.S. Constitution effectively compels a classification of the relief sought.<sup>48</sup> That amendment “preserve[s]” the right of trial by jury in “Suits at common law,” and under current case law that roughly means there is a constitutional right to a jury trial for any claim for legal

---

<sup>43</sup> See *Petrella v. Metro-Goldwyn-Mayer, Inc.* 134 S. Ct. 1962, at 1973-74 (2014); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 383 n.26 (1949); *Smith v. Gehring*, 496 A.2d 317, 323-25 (Md. Ct. Spec. App. 1985). There are difficult questions about which remedial rules count as procedural and which as substantive for *Erie* purposes. See, e.g., *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996); John T. Cross, *The Erie Doctrine in Equity*, 60 LA. L. REV. 173 (1999); cf. *Hollins v. Brierfield Coal & Iron Co.*, 150 U.S. 371, 379 (1893) (“The line of demarcation between equitable and legal remedies in the federal courts cannot be obliterated by state legislation.”).

<sup>44</sup> See, e.g., *Smith v. Brumfield*, 2013-1171 (La. App. 4 Cir. Jan. 15, 2014) (injunction is equitable); *Rye Police Ass’n v. Chittenden*, 980 N.Y.S.2d 728 (N.Y. Sup. Ct. 2014) (accounting is equitable); *Evergreen W. Bus. Ctr., LLC v. Emmert*, CC CV07020348, 2014 WL 576082 (Or. Feb. 13, 2014) (constructive trust is equitable); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006) (equitable lien is equitable); *Humble v. Wyant*, 2014 S.D. 4 (S.D. Feb. 5, 2014) (specific performance is equitable). This list is not exhaustive. See, e.g., *infra* note 92 (discussing the equitable remedy of subrogation).

<sup>45</sup> As with the list of equitable remedies in the text, this list is not an exhaustive one. See, e.g., 1 *Dobbs, supra* note 13, §2.9(1), at 226 n.18 (noting the legal remedy of quo warranto).

<sup>46</sup> See, e.g., *Weiss v. Smulders*, 313 Conn. 227, – n.19 (2014) (damages); *624 Art Holdings, LLC v. Berry-Hill Galleries, Inc.*, 2012 WL 10008044 (N.Y. Sup. Ct., N.Y. County) (trial order June 7, 2012) (replevin).

<sup>47</sup> See, e.g., *Golden Sands Dairy, LLC v. Fuehrer*, ¶ 28 of slip opinion, 2014 WL 3630035 (Wisc. Ct. App. July 24, 2014) (mandamus); *Peterson v. Judges of Jefferson Cnty. Circuit Court*, 2014 Ark. 228 (2014) (per curiam) (unpublished) (habeas); Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1412 (2003) (noting that habeas and mandamus are legal remedies). For more on the classification of habeas, see *infra* notes 96 and 98.

<sup>48</sup> Whether Article III or the Eleventh Amendment of the federal Constitution require any differentiation between law and equity is a different question. See *infra* note 179.

relief but not for claims for equitable relief.<sup>49</sup> (When a plaintiff claims both legal and equitable relief, there are doctrines for determining which predominates, or bifurcating the trial, or otherwise ensuring consistency between the remedies given and the right to a jury trial.<sup>50</sup>) Although the Seventh Amendment has not been incorporated against the states by the federal courts,<sup>51</sup> the vast majority of state constitutions contain similar jury trial guarantees.<sup>52</sup> Those state constitutional provisions often have the same effect, requiring state courts to decide whether the plaintiff's claim is for a legal or an equitable remedy.

When a plaintiff sues under a state or federal statute, courts may also be required to classify the remedies sought, if the statute authorizes “equitable relief” or “equitable remedies.”<sup>53</sup>

<sup>49</sup> To determine whether a present-day claim falls within “Suits at common law,” federal courts consider (1) whether the eighteenth-century analogy to the plaintiff's claim would have been brought at law or in equity, and (2) whether the plaintiff is seeking a legal or equitable remedy. The second consideration is more important. *See, e.g.,* *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990). Although various approaches are taken in state courts to determining which claims are legal and which are equitable, the remedy sought is often decisive. *See, e.g.,* *M.K.F. v. Miramontes*, 352 Or. 401, 425 (2012) (en banc) (concluding that “the right to jury trial must depend on the nature of the relief requested”); *Verenes v. Alvanos*, 387 S.C. 11, 17 n.5 (2010) (“[A] breach of a fiduciary duty may sound in law or equity depending on the nature of the relief sought.”); *but see, e.g.,* *Madugula v. Taub*, 496 Mich. 685, – (2014) (“[O]ur jurisprudence requires that the entire nature of the claim be considered, not just the relief sought, when determining whether there is a constitutional right to a jury trial.”).

<sup>50</sup> The rules vary from jurisdiction to jurisdiction, but federal courts generally follow this approach:

Under *Beacon Theatres*, the right to trial by jury on legal claims may not (except under ‘the most imperative circumstances’) be lost by a prior determination of equitable claims; this may require trial of legal claims before deciding related claims in equity, or trying them concurrently. In addition, issues for trial should not be severed if they are so intertwined that they cannot fairly be adjudicated in isolation or when severance would create a risk of inconsistent adjudication.

Federal Judicial Center, *Manual for Complex Litigation*, Fourth, § 11.632 (2004) (citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959) (footnotes omitted)).

<sup>51</sup> *See* *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010) (citing *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916)); *but cf.* *Gonzalez-Oyarzun v. Caribbean City Builders, Inc.*, CIV. 14-1101 GAG, 2014 WL 2885027 (D.P.R. June 25, 2014).

<sup>52</sup> *See* Eric J. Hamilton, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 855 (2013) (“Today, forty-seven state constitutions provide for the right to a jury trial in civil cases . . .”).

<sup>53</sup> *See, e.g.,* The National Foundation of Fitness, Sports, and Nutrition Establishment Act, PL III-332 (Dec. 22, 2010) (authorizing the attorney general of the United States, in the event that the named foundation acted inconsistent with its stated purposes, to sue “for such equitable relief as may be necessary or appropriate”); The Helping Families Save Their Homes Act of 2009, PL III-22 (May 20, 2009) (protecting servicers of residential mortgages, if they fall within a statutory safe harbor, from “any injunction, stay, or other equitable relief”); *Class Action*

And even when there is no request for a jury, and no statute invoking equity, the courts still classify remedies as legal or equitable. What drives this is the doctrine that a plaintiff may obtain an equitable remedy only if there is “no adequate remedy at law.” This doctrine has been much criticized by scholars,<sup>54</sup> but it remains well established in judicial practice.<sup>55</sup> Although the adequacy requirement is usually seen as judge-made, it has also been codified in some state and federal statutes, including the Judiciary Act of 1789.<sup>56</sup>

All of these authorities—constitutional, statutory, and judicially created—have the effect of requiring the courts in most cases to classify remedies as legal or equitable.

## 2. That classification has consequences

Whether a remedy is classified as legal or equitable is a threshold determination. The classification of a remedy as equitable brings into play a number of special doctrines that are peculiar to equitable remedies. (Similarly, the classification of a remedy as legal brings into play other special doctrines, though they lack the systematicity of the equitable doctrines.<sup>57</sup>) The following list is meant to introduce the major

---

Fairness Act of 2005, PL 109-2 (Feb. 18, 2005) (prescribing rules for the calculation of attorney’s fees when a proposed class action settlement “provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief”). Other recent federal statutes are listed in Bray, *supra* note 6, at ...

<sup>54</sup> For exposition and critique, see DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* (1991); cf. EMILY SHERWIN, THEODORE EISENBERG, AND JOSEPH R. RE, AMES, CHAFEE, AND RE ON REMEDIES 410 (2012) (suggesting that the irreparable injury rule can be seen as a shorthand for a number of different considerations that go into deciding whether to give an equitable remedy). For critique, see, e.g., OWEN FISS, *THE CIVIL RIGHTS INJUNCTION I*, 7 (1978); Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 *LOY. L.A. L. REV.* 1063, 1086 n.59 (2003) (calling the irreparable injury rule “dead in our modern times, posing no impediment to the award of equitable relief”).

<sup>55</sup> See *infra* note 69.

<sup>56</sup> See, e.g., Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 82 (“*And be it further enacted*, That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.”); Ala. Code § 12-11-31; Del. Code Ann. tit. 10, § 342 (West); Ga. Code Ann. § 23-1-4 (West); *id.* at § 9-5-1; Me. Rev. Stat. tit. 14, § 6051.

<sup>57</sup> Examples include the reasonable-certainty requirement for damages, remittitur and additur for damages, and the bond requirement for replevin. These special doctrines tend to be remedy-specific rather than applying to all legal remedies. That is why it is less apt to speak of there being a system of *legal* remedies. (One possible exception is the special adequacy requirement for mandamus, which requires a court to ask whether any other legal remedy is adequate.)

rules and habits of decisionmaking that are specific to equitable remedies.<sup>58</sup> These are presented here in summary fashion, and they will be considered in more detail later in this Article:

- An equitable remedy may be given only if legal remedies are inadequate.
- A claim for an equitable remedy is subject to special defenses. These include *laches*, a defense against unreasonable delay by the plaintiff; *unclean hands*, a defense against inequitable conduct by the plaintiff; and *undue hardship*, a defense when the equitable remedy would be especially burdensome to the defendant (provided that the defendant has acted equitably).
- A claim for equitable relief is subject to a stricter ripeness requirement.
- Equitable remedies are subject to a specificity requirement—the decree embodying them must be worded specifically, to make clear what is required.
- When a court issues equitable relief, it can appoint one of a variety of different “equitable helpers” (e.g., masters, receivers, monitors) who can take evidence, manage property, or oversee compliance.
- An equitable remedy is subject to ex post modification or dissolution by the court.
- There are special enforcement mechanisms for equitable remedies, especially contempt proceedings, which can lead to coercive fines and even imprisonment of a defendant who has violated an equitable decree.
- There is a pronounced tendency for courts to distinguish between equitable remedies and underlying rights. This is not so much a doctrine as a habit, and it can be seen, for example, when courts delay the start of an equitable remedy.

---

<sup>58</sup> Various jurisdictions attach additional consequences to the classification of a remedy as equitable. See, e.g., *Nimer v. Litchfield Tp. Bd. of Trustees*, 707 F.3d 699, 702 (6th Cir. 2013) (“Whether the plaintiffs seek a legal versus an equitable remedy controls how the district court disposes of the case after holding that the *Younger* doctrine applies to it.”); *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 139 (2009) (noting that New York courts apply different statutes of limitations to breach of fiduciary duty claims depending on whether the primary relief they seek is classified as equitable).

- There are maxims of restraint for the use of equitable powers, such as “Equity follows the law.”
- The decision to give an equitable remedy, and all of the decisions about its scope and subsequent enforcement, are made by a judge, not a jury.
- Equitable remedies are often said to have different effects on non-parties, because “equity acts *in personam*.”

Although these equitable doctrines are most frequently applied when the plaintiff has sought an injunction, they are not so limited. The general rule is that they apply to *all* claims for equitable remedies, and *only* to claims for equitable remedies.<sup>59</sup>

Qualifications are needed. One is that a minority of jurisdictions allow courts to apply one or more of the equitable defenses even to claims for legal relief<sup>60</sup> (e.g., California allows the unclean-hands defense, but not laches, to be used against claims for legal remedies<sup>61</sup>). Another qualification is that many jurisdictions allow one equitable defense (laches) against one legal remedy (mandamus).<sup>62</sup> Yet another qualification is that under the Federal Rules of Civil Procedure (and some state counterparts) it is permissible to appoint a master to “resolve a difficult computation of damages.”<sup>63</sup> Also, scholars have sharply criticized the adequacy requirement, arguing that even though it persists

---

<sup>59</sup> Consider for example the constructive trust. It can be denied because of unclean hands, see *In re C.W. Min. Co.*, 740 F.3d 548, 561 (10th Cir. 2014); or laches, see *In re Harold*, 979 N.Y.S. 2d 334, 337 (Sup. Ct., App. Div. 2013); or because there is an adequate remedy at law, see *Grace Murphy Long, The Sunset of Equity: Constructive Trusts and the Law-Equity Dichotomy*, 57 ALA. L. REV. 875, 889-890, 906 (2006); and if given it can be enforced by contempt, see *Petersen v. Vallenzano*, 858 F. Supp. 40 (S.D.N.Y. 1994).

<sup>60</sup> See T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 KY. L.J. 63 (2011).

<sup>61</sup> See *Unilogic, Inc. v. Burroughs Corp.*, 10 Cal. App. 4th 612, 619 (1992).

<sup>62</sup> See, e.g., *Barresi v. Cnty. of Suffolk*, 72 A.D.3d 1076, 1076 (2010). One justification given for applying this equitable defense to mandamus is that, because it is highly discretionary, the court may consider many circumstances, including the lapse of time. E.g., *Marsh v. Clarke County Sch. Dist.*, 292 Ga. 28, 30 (2012). Another is that where mandamus is not governed by a statute of limitations, some temporal limit is necessary, and so laches fills the gap. E.g., *Arant v. Lane*, 249 U.S. 367, 371 (1919); *Duke v. Turner*, 204 U.S. 623, 631 (1907); cf. *Baker v. O'Malley*, 217 Md. App. 288, 291 (2014) (applying laches to mandamus claim not covered by statute of limitation).

<sup>63</sup> See Fed. R. Civ. P. 53(a)(1)(B)(ii); see also *Ariz. R. Civ. P. 53(a)* (same); Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269, 1278-79 (2005) (summarizing federal post-trial use of masters).

as a matter of judicial rhetoric it does not have any actual effect.<sup>64</sup> Finally, one of the characteristics often attributed to equitable remedies is not, and long has not been, an accurate statement of the law: equitable remedies do not operate in a uniquely *in personam* way.<sup>65</sup>

Even so, it is not hard to distinguish the rule from the exception. State and federal courts routinely classify remedies as legal or equitable, and the classification of a remedy as equitable has significant consequences. It is blackletter law, much cited by courts in every American jurisdiction, that contempt, modification and dissolution, and jury-free decisionmaking<sup>66</sup> are uniquely available when the plaintiff seeks an equitable remedy. It is the blackletter law of the vast majority of jurisdictions that both laches and unclean hands are equitable defenses against claims for equitable remedies, not legal remedies.<sup>67</sup> Equitable ripeness is required only for equitable remedies.<sup>68</sup> Furthermore, despite the vigorous scholarly criticism, seemingly every jurisdiction in American

---

<sup>64</sup> See sources cited *supra* note 54.

<sup>65</sup> See generally Walter Wheeler Cook, *The Powers of Courts of Equity I, II, and III*, 15 COLUM. L. REV. 37, 106, 228 (1915). Nevertheless, it is still frequently said that equitable remedies operate *in personam*. See, e.g., *Nken v. Holder*, 556 U.S. 418, 428 (2009); RUSSELL L. WEAVER ET AL., REMEDIES: CASES, PRACTICAL PROBLEMS AND EXERCISES 14 (2d ed. 2010); John H. Bauman, *Go Down, Moses: Teaching About the Historical Roots of Modern Remedies Doctrines*, 39 BRANDEIS L.J. 649, 653-654 (2001).

<sup>66</sup> See, e.g., *Henderson v. Ayres & Hartnett, P.C.*, 285 Va. 556, 565 (2013) (“Despite the merger of law and equity procedure for civil cases, there is no general right to a jury trial for suits in equity; the trial and decision of equity claims by the judge alone continues.” (citations omitted)); see also 1 *Dobbs*, *supra* note 13, §1.2, at 11 (“Jury trial is traditionally granted as of right in in law cases, which usually means when the remedy sought is purely legal. Jury trial is not granted in equity cases, which usually means when the remedy sought is equitable.”).

<sup>67</sup> On laches, see, e.g., *Petrella v. Metro-Goldwyn-Mayer, Inc.* 134 S. Ct. 1962 (2014); see also 1 *Dobbs*, *supra* note 13, §2.4(4), at 104, 105-06 (“When laches does not amount to estoppel or waiver, it does not ordinarily bar legal claims, only equitable remedies. . . . Courts have routinely referred to laches as an equitable defense, that is, a defense to equitable remedies but not a defense available to bar a claim of legal relief.”); *id.* §2.1(3), at 66 (“[W]hen the plaintiff asserts an equitable remedy, equitable defenses can be invoked even if they could not be invoked against a ‘legal’ claim.”). On unclean hands, see, e.g., *Weiss v. Smulders*, 313 Conn. 227, — n.19 (2014) (“[T]he equitable defense of unclean hands bars only equitable relief.”); *Northbound Grp., Inc. v. Norvax, Inc.*, — F. Supp. 2d —, 2013 WL 6987185 (N.D. Ill. Dec. 3, 2013) (applying Illinois law); *Nature’s Products, Inc. v. Natrol, Inc.*, 990 F. Supp. 2d 1307, 1317 (S.D. Fla. 2013) (applying Florida law); *Guessford v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 918 F. Supp. 2d 453, 469 (M.D.N.C. 2013) (applying North Carolina law); *Soundvision Technologies, LLC v. Templeton Grp. Ltd.*, 929 F. Supp. 2d 1174, 1186 (D. Utah 2013) (applying Utah law).

<sup>68</sup> See generally Laura L. Little, *It’s About Time: Unravelling Standing and Equitable Ripeness*, 41 BUFF. L. REV. 933, 977-980 (1993).

law still pays at least lip service to the “no adequate remedy at law” requirement for equitable remedies.<sup>69</sup> The merger of legal and equitable remedies has not happened yet.

## II. Thinking of Equitable Remedies as a System

Before the merger of law and equity courts, in the long history of Chancery as an independent judicial institution,<sup>70</sup> there was no decisive moment when its rules and remedies were promulgated. They were not the result of a systematic reasoning from first principles. They were instead shaped by centuries of political pressures and jurisdictional competition. The development of equitable remedies and doctrines also happened outside of Chancery, in part in state and federal courts in the United States.

To some observers, this long and path-dependent history of equity may imply a conclusion about equitable doctrines today. Some may think it implies deep imperfection, an incoherence born of failure to think systematically about the functions of legal rules. Others may think the long history implies evolution and progressive refinement—equity working itself pure. The first view is Benthamite, the second Hayekian. Neither view is taken here. It is of course valuable to think of legal rules as the product of historical development.<sup>71</sup> But the focus of this Article is on equity as it presently exists in the United States. The question is how the existing equitable doctrines interact with the existing equitable remedies, and what functions (if any) they presently serve. What is in view is not only the injunction, but also the other equitable remedies that are still in regular use in the United States: accounting for profits, constructive trust, equitable lien, and specific performance.<sup>72</sup>

---

<sup>69</sup> See, e.g., *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156 (2010); *Walker v. Trailer Transit, Inc.*, 1:13-CV-00124-TWP, 2014 WL 584856 (S.D. Ind. Feb. 14, 2014); *Smith v. Brumfield*, 2013-1171 (La. App. 4 Cir. Jan. 15, 2014); *Krug v. Helmerich & Payne, Inc.*, 2013 OK 104, as corrected (Feb. 24, 2014), reh'g denied (Feb. 24, 2014); see also THOMPSON ET AL., *supra* note 18, at 217 (“[T]he requirement of inadequacy of a legal remedy as a prerequisite to the grant of equitable relief continues to find constant expression in judicial decisions.”).

<sup>70</sup> See *supra* text accompanying note 26.

<sup>71</sup> See, e.g., William E. Nelson, *Legal History*, NYU ANN. SURV. AM. L. 625, 640 (1973/1974).

<sup>72</sup> Note that this draft of this Article does not incorporate discussion of rescission, cancellation, or quiet title. They will be addressed in future drafts.

As it presently exists in the United States, the system of equitable remedies has parts that can be divided into three categories: remedies, managerial devices, and constraints.<sup>73</sup>

A. The equitable remedies

All legal regimes give some remedy for wrongs. And since it will often be impossible for the remedy to be a mere unwinding of the wrong—A returning to B the very thing that A took—there will need to be some notion of compensation. Compensation will inevitably involve some effort to measure what was lost. Often compensation will also require some form of substitution, that is, an effort to translate the measurement of what was lost into some other “currency.”<sup>74</sup> Consider an example that was of acute concern in some earlier legal systems: A cuts off B’s beard, but has no beard of his own—so he must pay ten of such-and-such coin to B.<sup>75</sup> Or, to take a more contemporary concern, though one that is not unconnected in its sense of violation and indignity: A libels B with a series of Facebook postings, and so must pay to B whatever number of dollars a jury determines. These sorts of determinations about compensation and substitution are a perennial task, in every legal culture, for adjudicators of disputes.<sup>76</sup>

But compensation is imperfect. It operates only after violations have occurred, and so it can prevent violations only through the rough and inexact medium of deterrence. Nor does it solve the problem of the impecunious defendant. Some legal systems try to evade the impecuniosity problem by requiring payment in a currency more universal than

---

<sup>73</sup> This division was initially suggested in Bray, *supra* note 10, at 4-5.

<sup>74</sup> For recognition that legal regimes translate from the currency of the wrong to the currency of the remedy, see WILLIAM IAN MILLER, *EYE FOR AN EYE* 20 (2006) (“The worry about how hard it is to come up with equivalences is at the core of primitive systems of justice, and it is hardly something we have adequately resolved today.”); Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 365 (2006).

<sup>75</sup> *The Laws of King Alfred*, in 1 ANCIENT LAWS AND INSTITUTES OF ENGLAND p. 85, ¶ 35 (1840).

<sup>76</sup> See HENRY HOME, LORD KAMES, *PRINCIPLES OF EQUITY* 68 (Michael Lobban ed. 2014) (noting that “a remedy so complete” as the restoration of stolen goods to the owner is rarely possible, for “it holds commonly, as expressed in the Roman law, that *factum infectum fieri nequit* [A thing which is done cannot be undone], and when that is the case, the person injured, who cannot be restored to his former situation, must be contented with reparation in money”).

money—such as eyes, teeth, and limbs.<sup>77</sup> But this merely postpones the problem. A malevolent or careless defendant will, through repeated offenses, also run short of those.

Compensation is also imperfect for another reason. It offers no way to compel any behavior except payment. Of course there is and has always been bargaining in the shadow of the compensation required by law<sup>78</sup>—and the bargain struck by the parties might well involve other kinds of conduct. But as long as the offending party is willing to pay, a legal system that has only compensatory, substitutionary remedies will struggle to directly regulate conduct.

The solution to these problems is fairly obvious: There must be some way for courts to compel action or non-action.<sup>79</sup> In contemporary American law, this is usually done by means of an equitable remedy, especially the injunction, accounting for profits, constructive trust, equitable lien, and specific performance.<sup>80</sup>

---

<sup>77</sup> See, e.g., MILLER, *supra* note 74. Even so, legal systems often associated with talionic justice also relied heavily on monetary equivalents for a wrong. See, e.g., David Daube, *Eye for Eye*, reprinted in 2 COLLECTED WORKS OF DAVID DAUBE 177, 177-178 (Calum Carmichael ed. 2000); David Daube, *Lex Talionis*, reprinted in 3 COLLECTED WORKS 203, 208-209; James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices?*, 71 CHI.-KENT L. REV. 41 (1995).

<sup>78</sup> See MILLER, *supra* note 74, at 46-57.

<sup>79</sup> Cf. John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 539 (2012) (“[N]o society can long tolerate a legal system that lacks the power to grant specific remedies.”).

<sup>80</sup> Note that one remedy that does not command action, the declaratory judgment, is sometimes said to be equitable. As a historical matter this is mostly wrong, since the declaratory judgment was not traditionally available as a remedy in equitable courts (except against the Crown). R. P. MEAGHER, W. M. C. GUMMOW, & J. R. F. LEHANE, *EQUITY: DOCTRINES AND REMEDIES* 451-463 (3d ed. 1992). What complicates the status of this remedy is that when the declaratory judgment statutes were passed it was still possible to see the declaratory judgment as being either legal or equitable depending on the case. That is, the declaratory judgment could be considered legal or equitable depending on whether it inverted the parties in a suit that would later have been brought in a court’s law side or equity side. That way of seeing the declaratory judgment makes less sense for jurisdictions with unified courts. (It is one thing to ask, as Seventh Amendment doctrines require, whether a present suit would once have been brought at law or in equity; it is considerably harder to pursue the same inquiry about a purely hypothetical inverse of a declaratory judgment action.) Crucially, in contemporary practice when a plaintiff seeks a declaratory judgment the general rule is that none of the following apply: the adequacy requirement, the equitable defenses, the equitable ripeness requirement, the specificity requirement, the somewhat looser fit between rights and remedies, the equitable helpers, modification and dissolution, contempt, in personam effect, and the categorical exclusion of juries. See generally Bray, *supra* note 116, at ... Thus it is best not to see the declaratory judgment as

1. *Injunctions*. The injunction is a remedy prohibiting the defendant from taking certain actions (a “prohibitory injunction”) or requiring the defendant to take certain actions (a “mandatory injunction”).<sup>81</sup> An injunction, also called a permanent injunction, is given only after a decision for the plaintiff on the merits.<sup>82</sup> The injunction is the most common equitable remedy in the United States.

2. *Accounting for profits*. An accounting is a remedy ordering an inquiry into the defendant’s handling of money or property, usually to ascertain the defendant’s gains so they may be paid to (or equitably divided with) the plaintiff.<sup>83</sup> Accounting for profits is typically used “where a fiduciary relationship exists between the parties,” or “where, even though no fiduciary relationship exists, the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable.”<sup>84</sup> An accounting used to be a more frequently used remedy, and many of the U.S. Supreme Court’s equity cases in the nineteenth century involved

---

an equitable remedy. It might now be seen as a legal remedy, or as merely a non-equitable one. (If a legal remedy, one caveat is needed: The passage of the declaratory judgment statutes did not create an “adequate remedy at law” that reduced the availability of the injunction. *Accord* *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 514-516 (1959) (Stewart, J., dissenting).) Thus, despite the confusion about the classification (usually in dicta), the actual practice is fairly clear: the declaratory judgment is usually understood to lack the characteristics of the remedies in the equitable-remedies system.

<sup>81</sup> See, e.g., *Nat’l Compressed Steel Corp. v. Unified Gov’t of Wyandotte Cnty./Kansas City*, 272 Kan. 1239, 1245-46 (2002) (“An injunction is an equitable remedy designed to prevent irreparable injury by prohibiting or commanding certain acts.”).

<sup>82</sup> A preliminary injunction may be given before a decision on the merits, usually to preserve the status quo and allow the court time to reach a decision. See, e.g., *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

<sup>83</sup> See, e.g., *Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 706 (S.D. Tex. 2002) (Rosenthal, J.) (“An accounting for profits as an equitable remedy for breach of fiduciary duties forces a defendant to disgorge gains improperly obtained by breach of fiduciary duty and imposes on the defendant the obligation of proving appropriate deductions to determine the profit. An accounting can also be used to obtain information in aid of obtaining such profits.” (citations omitted)); *Wilde v. Wilde*, 576 F. Supp. 2d 595, 608 (S.D.N.Y. 2008) (“An equitable accounting requires two steps. First, upon a showing that an accounting is warranted, an interlocutory decree is issued requiring the fiduciary to make an accounting. Once the accounting is made, a second hearing is held to establish the final amounts owed to the principal.” (citations omitted)); see also *Restatement (Third) of Restitution and Unjust Enrichment* § 51 cmt a (2011) (noting that “accounting,” “accounting for profits,” and “disgorgement” are terms referring to “[r]estitution measured by the defendant’s wrong” in a case of “conscious wrongdoing”).

<sup>84</sup> 5 *Witkin, Cal. Proc.* 5th (2008) *Pleading*, § 819, p. 236 [supplement]; see also *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 57 n.3 (Minn. 2012); *Re/Max Real Estate Partners, Inc. v. Lindsley*, 840 So. 2d 709, 712 (Miss. 2003).

claims for an accounting.<sup>85</sup> Although its role has been reduced by the rise of substitutes such as bankruptcy<sup>86</sup> and modern discovery in civil litigation, an accounting is still sought in state and federal cases.

3. *Constructive trusts.* A constructive trust is an equitable remedy used “to set aside wrongful ownership.”<sup>87</sup> Courts typically impose a constructive trust in cases involving a fiduciary or near-fiduciary relationship and some kind of unjust enrichment.<sup>88</sup> When giving this remedy, a court declares that the defendant, as a constructive trustee, holds “the property in question and its traceable product” on behalf of the plaintiff.<sup>89</sup> The constructive trustee must then “surrender the constructive trust property to the claimant, on such conditions as the court may direct.”<sup>90</sup> These conditions, which may be imposed on either the plaintiff or the defendant, are an important part of the power of the constructive trust.<sup>91</sup>

4. *Equitable lien.* An equitable lien is a remedy that resembles the constructive trust, but instead of giving the plaintiff title (or an equitable interest in title), an equitable lien will give the plaintiff a security interest in the property in question.<sup>92</sup> The court may require foreclosure, subject

---

<sup>85</sup> E.g., *Piatt v. Vattier*, 34 U.S. 405 (1835).

<sup>86</sup> Cf. *Getzler*, *supra* note 42, at 606 (noting that in nineteenth-century England “[b]ankruptcy gravitated to Chancery partly because of the advantages of its account procedures”).

<sup>87</sup> *Abell v. City Of St. Louis*, 129 S.W.3d 877, 881 (Mo. Ct. App. 2004). On the distinction between a constructive trust and an accounting, see *Wilde v. Wilde*, 576 F. Supp. 2d 595, 604 (S.D.N.Y. 2008); and on the possibility of conjoining them in a single case, see Restatement (Third) of Restitution and Unjust Enrichment § 55 cmt 1 (2011).

<sup>88</sup> The classic statement is Benjamin Cardozo’s: “A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest equity converts him into a trustee.” *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386 (1919); see also H. Jefferson Powell, *Cardozo’s Foot: The Chancellor’s Conscience and Constructive Trusts*, 56 L. & CONTEMP. PROBS. 7 (1993).

<sup>89</sup> Restatement (Third) of Restitution and Unjust Enrichment § 55(1) (2011); see also Andrew Kull, *Deconstructing the Constructive Trust*, 40 CANADIAN BUS. L.J. 358, 361 (2004) (listing uses of the constructive trust).

<sup>90</sup> Restatement (Third) of Restitution and Unjust Enrichment § 55(2) (2011).

<sup>91</sup> *Id.* § 55 cmt b (“For example, if the defendant is entitled to recover from the claimant the cost of acquiring the constructive trust property, it is a simple matter to order that ‘B holds X in constructive trust for A, subject to A’s reimbursement to B’ of the amount in question. If the parties’ collateral obligations are more complex, necessitating further investigation to ascertain what one owes the other upon surrender of the constructive trust property, the declaration of constructive trust is readily combined with an order for an accounting.”).

<sup>92</sup> *Id.* § 55 cmt k (2011); see generally *id.* § 56; 1 Dobbs, *supra* note 13, §4.3(3), at 600-4. A distinct but related equitable remedy is subrogation. It resembles the constructive trust and equitable lien

to whatever conditions it prescribes, in order to allow the party receiving the equitable lien to cash out.<sup>93</sup>

5. *Specific performance.* Specific performance is a remedy compelling the defendant to perform her obligations under a contract. Often the order requires performance full-stop,<sup>94</sup> though the court may also impose further conditions and requirements as needed.<sup>95</sup>

\* \* \*

There are also legal remedies that compel action.<sup>96</sup> One is mandamus, which is used to order a public official to perform a ministerial duty.<sup>97</sup> Another is habeas corpus, which is paradigmatically an order to officials to release the body of a person in custody.<sup>98</sup> A third is replevin, which is used to force the defendant to return certain property to the plaintiff.

---

because it, too, focuses on the plaintiff's claim to identifiable property. But in a typical subrogation case, the defendant has used the plaintiff's property in order to pay a liability owed to a third party. Subrogation lets the innocent plaintiff step into the shoes of the third party and have the same rights that the third party previously had against the defendant. *See generally* Restatement (Third) of Restitution and Unjust Enrichment § 57 (2011); 1 Dobbs, *supra* note 13, §4.3(4), at 604-08.

<sup>93</sup> Restatement (Third) of Restitution and Unjust Enrichment § 56(2) (2011) ("Foreclosure of an equitable lien is subject to such conditions as the court may direct."); *id.* § 56 cmt c.

<sup>94</sup> *See* EDWARD YORIO & STEVE THEL, CONTRACT ENFORCEMENT §1.2.2 (2d ed. 2014) ("The order [of specific performance] usually directs the party in breach to render the performance that he has promised.")

<sup>95</sup> *See* Restatement (Second) of Contracts § 358(1) (1981) (noting that "the performance [required] need not be identical with that due under the contract"); *id.* § 358 cmt a ("The objective of the court in granting equitable relief is to do complete justice to the extent that this is feasible. . . . It may be conditional on some performance to be rendered by the injured party or a third person, such as the payment of money to compensate for defects or the giving of security. It may even be conditional on the injured party's assent to the modification of the contract that he seeks to enforce.")

<sup>96</sup> The three legal remedies described in the text were classically writs, and thus they are sometimes still described as the writ of mandamus, the writ of habeas corpus, and the writ of replevin. These remedies are sometimes mistakenly called "equitable" by courts and commentators, perhaps under the misapprehension that all remedies that are discretionary or non-monetary are equitable. *E.g.*, Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 NW. U. L. REV. 139, 144 (2013) ("This flexibility of the King's Bench habeas remedy, and its sensitivity to the particular facts of the petitioner's case, demonstrated the equitable nature of the remedy."). As a matter of history, these are clear errors. A charitable reading of these descriptions is that they conflate the historical and doctrinal category of equitable remedies with one or more abstract qualities associated with equity. *See supra* note 25 and accompanying text.

<sup>97</sup> *See, e.g.*, Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63-64 (2004); Chariho Reg'l Sch. Dist. v. Gist, 91 A.3d 783, 788 (R.I. 2014).

<sup>98</sup> On habeas as a legal remedy, *see e.g.*, Peterson v. Judges of Jefferson Cnty. Circuit Court, 2014 Ark. 228 (2014) (per curiam) (unpublished) (habeas); Daniel v. Comm'r of Correction, 57

Although mandamus, habeas, and replevin all compel action, they do not have the flexible and open-ended character of the equitable remedies. Mandamus is appropriate only for a ministerial duty, i.e., a duty that is clearly defined and not discretionary.<sup>99</sup> For example, a court may grant mandamus to compel city officers to make a payment to a municipal pension, where that payment is required by statute and its amount has already been fully determined.<sup>100</sup>

Habeas is almost entirely limited to public officials,<sup>101</sup> and is further limited in its scope.<sup>102</sup> As Robert Cover and Alexander Aleinikoff put it, specifically contrasting the narrowness of habeas with the broader capability of the injunction to regulate official behavior: “The relief afforded by habeas corpus is almost always extended only to a single

---

Conn. App. 651, 655 n.3 (Conn. App. 2000) (“[Habeas corpus] is a legal and not an equitable remedy.”); *Henry v. Santana*, 62 So. 3d 1122, 1125 (Fla. 2011) (referring to habeas as “a legal and not equitable remedy” (internal quotation marks omitted)); *Stanley v. Sullivan*, 49 Kan. App. 2d 732, 735 (Kan. Ct. App. 2013) (calling habeas “an extraordinary legal remedy”); *Bradley v. Hopkins*, 246 Neb. 646, 652 (1994) (aligning with “other jurisdictions [that] have stated specifically that habeas corpus is a legal remedy rather than an equitable one”); *In re Keeter*, 134 S.W.3d 250, 256 (Tex. App. 2003), on reh’g (Aug. 4, 2003); *but see Schlup v. Delo*, 513 U.S. 298, 299 (1995) (“habeas corpus is, at its core, an equitable remedy”); *Miller v. Walton*, 2005-Ohio-4855, 163 Ohio App. 3d 703, 707 (Ohio Ct. App. 2005) (calling habeas “an equitable remedy”). Because habeas is comprehensively governed by statutory law, at least in some jurisdictions, its classification would seem to have reduced importance. *See Lonchar v. Thomas*, 517 U.S. 314, 332 (1996). On the notion that habeas is a legal remedy but is subject to equitable considerations, see *infra* notes – and accompanying text.

<sup>99</sup> *See, e.g., Rimmer v. Holder*, 700 F.3d 246, 264 (6th Cir. 2012); *Golden Sands Dairy, LLC v. Fuehrer*, ¶ 28 of slip opinion, 2014 WL 3630035 (Wis. Ct. App. July 24, 2014); *Bibb County v. Monroe County*, 294 Ga. 730, 736 (2014); *Mathews v. Crews*, 132 So. 3d 776, 778 (Fla. 2014); *see also United States v. Lawrence*, 3 U.S. 42, 48 (1795) (“[A] mandamus is founded on the idea of a default; as where an inferior court will not proceed to judgment, or a ministerial officer will not do an act which he ought to do; but there is no instance of a mandamus being issued to a judge, who has proceeded to give judgment according to the best of his abilities.”). Note that mandamus may also be given when the official’s decision is discretionary but the law mandates that *some* decision be made; but in such a case the official will be ordered only to make a decision.

<sup>100</sup> *New Orleans Fire Fighters Pension & Relief Fund v. City of New Orleans*, 131 So. 3d 412 (La. App. 4 Cir. 2013) (mandamus for payment to pension fund of \$17,524,359).

<sup>101</sup> *Cf. Rumsfeld v. Padilla*, 542 U.S. 426, 434-36 (2004).

<sup>102</sup> *See, e.g., Wilkinson v. Dotson*, 544 U.S. 74, 85-87 (2005) (Scalia, J., concurring) (describing the relief available in federal habeas, including its expansion); *Green v. Lee*, 964 F. Supp. 2d 237, 263 (E.D.N.Y. 2013) (describing “typical relief granted in federal habeas corpus” (quoting *Herrera v. Collins*, 506 U.S. 390, 403 (1993))). Note that state law need not mirror federal law on the scope of habeas relief. *See, e.g., Adcock v. Snyder*, 345 Ill. App. 3d 1095, 1098 (2004) (“Under *habeas corpus*, the sole remedy is a prisoner’s immediate discharge from custody.” (quotation marks omitted)).

petitioner, and the form of relief is limited to release from confinement.”<sup>103</sup>

Replevin is also relatively narrow and defined, but differently so. It is appropriate only for a specific item of personal property. Replevin can even be a pre-judgment remedy that involves no judicial drafting of a command at all. In federal court,<sup>104</sup> for example, the typical process goes like this: A person who wants her property back goes to the clerk of the district court, makes certain representations, and posts a bond; the clerk then issues a writ for seizure of the property, which is then enforced by a federal marshal.<sup>105</sup>

Thus mandamus, habeas, and replevin compel action, but the action must be definite and sharply defined. This characteristic sharply distinguishes these non-monetary legal remedies from the equitable remedies.<sup>106</sup>

One additional point of complexity should be noted. Sometimes courts say about certain remedies—especially mandamus and habeas, but also some of the legal restitutionary remedies—that they are legal remedies that are nevertheless subject to equitable considerations or equitable principles.<sup>107</sup> When courts use the legal-remedy-equitable-

---

<sup>103</sup> Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1041, 1043-1044 nn.54, 56 (1977); cf. Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385, 429 (2010) (noting that when prisoners at Guantánamo Bay have succeeded in habeas actions, the federal courts have even been stopping short of “call[ing] directly for physical release,” instead only requiring officials “to engage in ‘all necessary and appropriate steps to facilitate’ release”).

<sup>104</sup> Federal Rule of Civil Procedure 64 authorizes replevin in federal courts, at least inasmuch as it is authorized in the state in which the court sits or by federal statute. See Fed. R. Civ. P. 64(a).

<sup>105</sup> For a description of that process, see U.S. Marshals Service, Service of Process, available at <http://www.usmarshals.gov/process/replevin.htm> (last visited July 17, 2014). Similarly, in ancient Rome, the market magistrates had a form of rescission entailing the return of property, which was enforced without the need to initiate more formal legal proceedings. See Richard R.W. Brooks, Alexander Stremitzer, *Remedies on and Off Contract*, 120 YALE L.J. 690, 694 (2011).

<sup>106</sup> See Bray, *supra* note 10, at 7.

<sup>107</sup> On mandamus, see, e.g., *In re Skinner & Eddy Corp.*, 265 U.S. 86, 96 (1924) (describing mandamus as “a legal remedy . . . largely controlled by equitable principles”); *In re Int’l Profit Associates, Inc.*, 274 S.W.3d 672, 676 (Tex. 2009) (“Although mandamus is not an equitable remedy, its issuance is controlled largely by equitable principles.”). On habeas, see, e.g., *Munaf v. Geren*, 553 U.S. 674, 693 (2008) (describing habeas as a writ with “common-law origins” while also being “governed by equitable principles” (quoting *Fay v. Noia*, 372 U.S. 391, 438 (1963))); *Foster v. Maynard*, 222 Kan. 506, 513 (1977) (“While equitable principles govern a habeas corpus proceeding, it is a legal, not an equitable, remedy.” (citation omitted)); see also 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.2,

considerations formula, they are typically either (1) emphasizing that a remedy is extraordinary and not given as of right,<sup>108</sup> or (2) invoking one of the familiar resonances of the term *equity*, such as discretion or case-specificity or concern with unjust enrichment.<sup>109</sup> Thus the formula underscores an important point: equitable remedies have no monopoly on being discretionary, on being case-specific, or on constraining opportunistic behavior.<sup>110</sup> Beyond that the formula seems to have no effect. To say that a legal remedy is decided according to equitable considerations does not change the remedy's practical characteristics; it typically remains the case that the remedy is neither empowered by the equitable managerial devices nor limited by the equitable constraints that are discussed below.<sup>111</sup>

\* \* \*

Thus there is a strong need, in seemingly every legal regime, for remedies that compel action or inaction. Those remedies need not be given a distinctive classification. But it is a contingent fact that in the United States most of those remedies are classified as equitable. And even though there are some legal remedies that compel action, they are narrower and more limited. Thus in contemporary American law the remedies that compel action or inaction are paradigmatically equitable remedies. And the remedies that compel action or inaction *and* do so in an open-ended and less determinate fashion are entirely equitable.

---

pp. 14-15 (6th ed. 2011) ("Similarly, although habeas corpus historically was 'a legal, not an equitable, remedy,' the Court has treated the writ as 'governed by equitable principles.'" (footnotes and citations omitted)). On legal restitutionary remedies, see, e.g., *Myers v. Hurley Motor Co.*, 273 U.S. 18, 24 (1927) (money had and received); *Kopin v. Orange Products, Inc.*, 297 N.J. Super. 353, 373 (N.J. Super. Ct. App. Div. 1997) (quasi-contract).

<sup>108</sup> Historically mandamus and habeas were prerogative writs. On the prerogative writs, see David L. Shapiro, *Jurisdiction and Discretion*, 60 NYU L. REV. 543, 572 (1985). Note that a federal court may deny a petition for a writ of mandamus without giving any reason. Fed. R. Civ. P. 21(b)(1).

<sup>109</sup> On some of the resonances of "equity," see *infra* note 173.

<sup>110</sup> See, e.g., *Raishevich v. Foster*, 247 F.3d 337, 341 (2d Cir. 2001) (allowing more latitude on proof of damages because of the defendant's destruction of evidence); cf. Henry E. Smith, *Preventing the Misuse of Preventive Adjudication: A Response to Bray*, The Legal Workshop (2011) (discussing use of the declaratory judgment to constrain opportunism).

<sup>111</sup> Note that for the legal remedies that were once prerogative writs—habeas and mandamus—the court has ample discretion to grant or deny relief. In the shaping and controlling of that discretion, appellate courts have sometimes looked to equitable doctrines (e.g., application of laches to mandamus, see *supra* note —), or they have developed equitable sounding limitations on a judge's discretion (e.g., the U.S. Supreme Court's doctrine of abuse of the writ of habeas, see, e.g., *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)).

## B. The equitable managerial devices

Remedies that compel action or inaction solve some problems but lead to others. Some defendants will be recalcitrant, refusing to comply. Others will be ignorant or unsure exactly how to comply. Still others may slow their pace, dragging things out, even if they would not refuse a clear order. Nor does the fault always lie with the defendant. There will be circumstances that the court could not foresee, or at least did not foresee, when it gave the order compelling action or inaction. There will be judicial mistakes, impossibilities, and absurdities.

None of these problems is utterly absent from compensatory remedies. Those remedies, too, can inspire resistance: a defendant might refuse to pay the awarded sum. Or unforeseen circumstances: a court might award damages, and in a month's time Weimar-style inflation has wiped out half of the value of the award. But those are rare cases. As long as some form of attachment or garnishment is possible, they do not present central challenges to compensatory remedies. In contrast, remedies compelling action or inaction tend to present much more insistently these problems of specifying, measuring, and ensuring compliance.

There is a traditional doctrinal line that delineates the remedies for which these problems are likely to be present—not the line between monetary and non-monetary remedies, but the line between legal and equitable remedies. The legal remedies rarely present these problems related to compliance. For damages, replevin, mandamus, and habeas it is comparatively easy to know what compliance looks like and to determine whether it has actually happened: What were the damages and did the defendant pay them? What property was replevied, and did the defendant return it? What was the ministerial duty, and did the official perform it? Has the prisoner been released from custody?

By contrast, it can be more difficult to determine whether there has been compliance with an equitable remedy. What they require may be more factually involved, and more qualitative and adverbial (not requiring only that something be done, but also specifying the manner in which it should be done). For example, an injunction may prohibit a former employee of a pizza parlor from “using, divulging, and communicating to anyone else any of the trade secrets or confidential information[,] which includes all or any part of the plaintiff's recipes for

pizza sauce, pizza dough or grinders or any substantially similar recipes thereto.”<sup>112</sup> Or, after finding that a company violated the Americans with Disabilities Act, a court might issue an injunction that required the company, among other things, “to notify the [Equal Employment Opportunity Commission] of any employee who requests an accommodation during the next three years in the Central District of Illinois,” and “to maintain complete records of its responses to such accommodation requests.”<sup>113</sup> Or a court might grant specific performance of a contract to repair, operate, or maintain a railroad.<sup>114</sup> Or a court might require the parties to a contract to conclude their negotiations (regarding the sale of a hotel) and sign the resulting agreement, where that is what the parties had obligated themselves to do.<sup>115</sup>

Thus, compared to the legal remedies presently available in American law, the equitable remedies create greater difficulties for courts in ascertaining and ensuring compliance. It is fortunate, then, that when a court gives an equitable remedy there are a number of special equitable doctrines and characteristics that enhance the court’s ability to manage the parties. These doctrines are here called the “equitable managerial devices”:

1. *Modification and dissolution.* Equitable remedies are subject to ex post revision—in technical terms, “modification” and “dissolution.”<sup>116</sup> The power of modification and dissolution is especially useful when it lets courts respond to events that were unseen when the remedy was first granted, whether changes in law or fact. This power is explicitly managerial. As the second Justice Harlan said, “The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing

---

<sup>112</sup> 205 Corp. v. Brandow, 517 N.W.2d 548, 552 (Iowa 1994) (quoting the trial court’s injunction, and reading it as referring only to “unique ingredients or qualities” and not to those present in almost every pizza).

<sup>113</sup> E.E.O.C. v. AutoZone, Inc., 707 F.3d 824, 841 (7th Cir. 2013) (summarizing the second and third provisions of an injunction).

<sup>114</sup> See, e.g., Link v. State, 180 Mont. 469 (1979).

<sup>115</sup> See Stanford Hotels Corp. v. Potomac Creek Associates, L.P., 18 A.3d 725 (D.C. 2011). In that case, the parties had already reached a preliminary agreement on the major points, though revisions might need to be made before the agreement was specifically enforced. *Id.* at 737 n.9.

<sup>116</sup> See, e.g., Horne v. Flores, 557 U.S. 433 (2009); see also Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101 (1986); Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1133-37 (2014).

willingness to apply its powers and processes on behalf of the party who obtained that equitable relief.<sup>117</sup>

2. *Contempt*. Equitable remedies may be enforced by contempt proceedings, through which a court may impose a range of highly discretionary punishments—including a new injunction, the payment of money to the defendant, the payment of fines to the state, or less commonly imprisonment—and the court wields the threat of those punishments to coerce future compliance. Consider one recent example. The Federal Trade Commission sued executives for making false claims about their company’s diet pills, and the court awarded a permanent injunction requiring them to stop making the false claims and recall the pills. After the executives disobeyed and tried in various ways to circumvent the injunction, the court found them in contempt.<sup>118</sup> For their contempt, the executives were again ordered to recall the pills and were also ordered to pay compensatory fines (to be disbursed to consumers) that were equivalent to the gross receipts from the pills over four years—more than \$40 million.<sup>119</sup> They were also ordered to file subsequent reports, under oath, on the status of the recall.<sup>120</sup> Even then the obedience of the executives was only slow and partial, and the court recently ordered them imprisoned until they complied in good faith.<sup>121</sup>

The enforcement mechanism of contempt is available for each of the different equitable remedies.<sup>122</sup> It is available for none of the legal remedies.<sup>123</sup> Even though contempt features prominently in debates about the distinction between law and equity, there appear to be significant disparities in how frequently it is used from one field of law to

---

<sup>117</sup> Sys. Fed’n No. 91, Ry. Emp. Dep’t, *AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961).

<sup>118</sup> *F.T.C. v. Nat’l Urological Grp., Inc.*, 1:04-CV-3294-CAP, 2014 WL 3893796 (N.D. Ga. May 14, 2014).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at \*11 & n.22.

<sup>121</sup> See Jessica Dye, *Diet-pill executives jailed over recall efforts*, Reuters Legal (Sept. 9, 2014).

<sup>122</sup> See, e.g., *S.E.C. v. Oxford Capital Sec., Inc.*, 794 F. Supp. 104 (S.D.N.Y. 1992) (accounting); *Petersen v. Vallenzano*, 858 F.Supp. 40, 42 (S.D.N.Y. 1994) (constructive trust).

<sup>123</sup> See, e.g., *E.g., Macias v. New Mexico Dep’t of Labor*, CIV 91-0509 JB/WPL, 2014 WL 1948259 n.26 (D.N.M. Mar. 31, 2014) (distinguishing between legal and equitable relief for the availability of contempt); *McKenna v. Gray*, 263 Ga. 753, 755 (1994) (“In the absence of statutory authority or other extraneous circumstances, contempt is not an available remedy to enforce a money judgment.”); *Dawson v. Dawson*, 800 N.E.2d 1000, 1003 (Ind. Ct. App. 2003) (noting an edge case but stating the general rule that “[m]oney judgments generally may not be enforced by contempt”); cf. *Bray*, *supra* note 116, at – (contempt is available to enforce an injunction but not a declaratory judgment).

another, and from one jurisdiction to another.<sup>124</sup> It is likely, however, that the number of cases in which contempt proceedings are initiated is smaller than the number of cases in which its threat affects the behavior of litigants and attorneys;<sup>125</sup> at a minimum it sustains the norm of obeying an injunction first and disputing it later.

3. *Equitable Helpers*. When a court gives an equitable remedy it may appoint “equitable helpers,” such as masters, receivers, and monitors. . . .

4. *Right/Remedy Distinction*. For equitable remedies there tends to be a somewhat looser fit between rights and remedies, which gives a court more latitude to manage the parties, because it can decide to give either a little more or a little less than the plaintiff’s right.<sup>126</sup> This tendency is not strictly speaking a managerial device, but something more like a habit of thinking that is conducive to managing the parties. Examples include decisions to delay the start of an equitable remedy,<sup>127</sup> phase it out after a defined period of time,<sup>128</sup> condition it upon some action by the plaintiff,<sup>129</sup> close off some other avenue by which the defendant might

---

<sup>124</sup> There does not appear to be good empirical data about the general use of contempt proceedings. In at least some domains of the law it appears that contempt is not frequently used. *See, e.g.*, SEC’s Memorandum of Law in Response to Questions Posed by the Court Regarding Proposed Settlement, *SEC v. Citigroup Global Markets Inc.*, No. 11 Civ. 07387 (JSR), 2011 WL 5307417 (S.D.N.Y. Nov. 7, 2011) (noting, in response to a question from the district court about its enforcement of consent decrees against large financial entities, that “the Commission has not frequently pursued civil contempt proceedings and does not appear to have initiated such proceedings against a ‘large financial entity’ in the last ten years”); John M. Golden, *Injunctions As More (or Less) Than “Off Switches”: Patent-Infringement Injunctions’ Scope*, 90 TEX. L. REV. 1399, 1409-1415 (2012) (describing scant use of contempt in patent litigation).

<sup>125</sup> *Cf.* Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2262, 2263 (2014).

<sup>126</sup> *See, e.g.*, *F.T.C. v. Nat’l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1215 (N.D. Ga. 2008) (noting that an injunction “may be broader than the violations alleged in the complaint as long as the relief is reasonably related to the violations . . . which occurred, and is not too indefinite” (internal quotation marks omitted)).

<sup>127</sup> *See, e.g.*, Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 489 (2010); John M. Golden, *Injunctions as More (or Less) than “Off Switches”: Patent-Infringement Injunctions’ Scope*, 90 TEX. L. REV. 1399, 1461 & n.261 (2012).

<sup>128</sup> *See, e.g.*, *E.E.O.C. v. AutoZone, Inc.*, 707 F.3d 824, 844 (7th Cir. 2013) (remanding for the imposition of “a reasonable time limit” on a provision of an injunction requiring compliance with the Americans with Disabilities Act).

<sup>129</sup> *See, e.g.*, *United States v. Lewis Cnty.*, Washington, C94-5474FDB, 2001 WL 769587 (W.D. Wash. June 12, 2001) (equitable relief but not legal relief may be subject to conditions, such as requirement that the prevailing party reimburse the other party for property improvements it made in good faith); 1 Dobbs, *supra* note 13, §3.1, at 277-78 & n.2 (stating that “[t]he damages remedy is not conditional” and citing cases in which appellate courts reversed trial courts that tried to make damages conditional on some action by the defendant); *see also* JAMES P.

violate the plaintiff's right,<sup>130</sup> or prescribe a remedy that is otherwise greater or less than the scope of the underlying right or violation.<sup>131</sup> These techniques can be used to constrain opportunism by the plaintiff or defendant,<sup>132</sup> or to fashion a compromise remedy when transaction costs between the parties are particularly high.

This somewhat loosened fit between right and remedy follows from the fact that a court has such a broad range of choices when fashioning an equitable remedy. For example, after finding that a defendant is infringing a trademark, and deciding to issue an injunction, the court still has many decisions to make:

options available include (1) allowing the defendant to continue using its mark, but only within certain geographic or product line restrictions; (2) issuing some form of disclaimer of association in connection with use of the mark; and (3) allowing the use of the mark only with a particular distinctive logo or in a specified size and format. The Court also 'may delay the implementation of an injunction [to] allow an infringer time to change to a different mark,' and may permit the defendant to sell off its stock of infringing goods or to fill

---

HOLCOMBE, AN INTRODUCTION TO EQUITY JURISPRUDENCE 12 (1846) ("[Equity] is not confined to a simple judgment for either party, without qualifications or conditions, but may adapt its decree to the exigencies of the particular case, and so vary, restrain, and model the remedy as to do entire justice between all parties.").

<sup>130</sup> See, e.g., *United States v. Vend Direct, Inc.*, No. CIVAO6CV02423-MSKMEH, 2007 WL 3407357, \*2 (D. Colo. Nov. 13, 2007) (noting that an injunction may go "beyond the specific violations . . . in order to 'fence in' the Defendants"); *Int'l Salt Co. v. United States*, 332 U.S. 392, 400, 68 S. Ct. 12, 17, 92 L. Ed. 20 (1947) (rejecting the defendant's contention that it "is entitled to stand before the court in the same position as one who has never violated the law at all—that the injunction should go no farther than the violation or threat of violation") *abrogated* by *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28(2006).

<sup>131</sup> See David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627 (1988); Bray, *supra* note 116, at 1131-1132. This theme of equity has been especially important in the development of corporate law in Delaware. See Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take That Action: The Implicit Corollary to the Rule of Schnell v. Chris-Craft*, 60 BUS. LAW. 877 (2005); see also Jacobs, *supra* note 25, at 11.

<sup>132</sup> See generally Smith, *Economic Analysis*, *supra* note 10. What the Court said about an administrative agency is also true of an equitable remedy: "it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectually to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Fed. Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

orders already placed, in order to avoid the wasteful destruction of existing stock or severe damage to the defendant's business reputation.<sup>133</sup>

5. *Decisionmaker.* These equitable managerial devices are enhanced by the identity of the decisionmaker for equitable remedies. To effectively manage compliance with an injunction, for example, a decisionmaker must first draft or revise its text, and then commit to enforce it over time and adapt it as needed in a "changing future."<sup>134</sup> None of these tasks is well-suited for the jury, because it is non-expert, multi-member, and temporary. At every one of these points judges are better suited to manage compliance with equitable remedies. Judges have greater expertise in drafting or revising a text that will control and guide the parties and be enforceable in court. Judges can more easily reach a decision about the form and content of such a text.<sup>135</sup> And judges, not being called only for the trial, will be able to consider questions about the text that arise in the future.<sup>136</sup> Therefore as a matter of policy the jury should never be the institution drafting, revising, or managing compliance with an injunction. And it is not.<sup>137</sup> Nor is there any right to a jury trial to resolve a claim for accounting for profits,<sup>138</sup> constructive

---

<sup>133</sup> CFE Racing Products, Inc. v. BMF Wheels, Inc., 11-13744, 2014 WL 700476 (E.D. Mich. Feb. 24, 2014) (quoting McCarthy on Trademarks and Unfair Competition § 30:3 (4th ed. 2013)) (citations omitted).

<sup>134</sup> Doug Rendleman, *Prospective Remedies in Constitutional Adjudication*, 78 W. VA. L. REV. 155, 163 (1976).

<sup>135</sup> Even multi-member courts have norms and rules for decisionmaking that make it easier than it is for juries. After all, *Allen* charges are given to juries but not appellate panels.

<sup>136</sup> See I Dobbs, *supra* note 13, §2.6(5), at 177 (noting that the jury is not suited to have "the power to modify 'permanent' injunctions long after they were issued"); Langbein, *supra* note 79, at 538 ("Specific relief often requires continuing supervision and modification as circumstances change, but a jury dissolves once it has delivered its verdict." (footnote omitted)); cf. LANGBEIN, LERNER, & SMITH, *supra* note 26, at 274 (noting, with reference to equity in early modern England, that "[t]ailoring specific relief requires factual investigation and raises issues of supervision and adjustment of the decree that are beyond the administrative capability of a jury of laypersons convened for a one-time sitting at an itinerant *nisi prius* trial court").

<sup>137</sup> See, e.g., *United States v. State of La.*, 339 U.S. 699, 706 (1950) ("Louisiana's motion for a jury trial is denied. We need not examine it beyond noting that this is an equity action for an injunction and accounting."). Two exceptions are advisory juries and the handful of jurisdictions that give a right to jury trial in equitable suits and the use of advisory juries. On both exceptions, see I Dobbs, *supra* note 13, §2.6(2), at 153-54.

<sup>138</sup> See, e.g., *Henderson v. Ayres & Hartnett, P.C.*, 285 Va. 556, 564-65 (2013) (recognizing that because "requests for accountings" are equitable, "a litigant has no constitutional right to a trial

trust,<sup>139</sup> equitable lien,<sup>140</sup> or specific performance.<sup>141</sup> In short, “[i]f the only relief sought is equitable,” then “neither the party seeking that relief nor the party opposing it is entitled to a jury trial.”<sup>142</sup>

All of these managerial devices developed in, or were characteristic of, the courts of equity. Even today there remains a marked difference in how they apply to claims for legal and equitable remedies. Only equitable remedies may be modified or dissolved. Only equitable remedies may be enforced by contempt. Masters and receivers still seem more likely to be used for supervising equitable remedies than for legal ones.<sup>143</sup> Similarly, although legal remedies also lack a full identity with underlying rights, the tendency to loosen the fit between right and remedy is more pronounced when equitable remedies are in view.

It is true that none of these equitable managerial devices, by itself, is historically inevitable. They could have taken some other form. But the association of these managerial devices with equitable remedies is hardly surprising. The remedies we call *equitable* are precisely the ones that are most management-intensive, the ones that most acutely present

---

by jury”); Siegel v. Warner Bros. Entertainment Inc., 581 F. Supp. 2d 1067, 1073-74 (C.D. Cal. 2008) (finding that “in every reported decision in which [an accounting of profits between co-owners of a copyright] occurred, the matter was tried before a court, not a jury”); Levitin v. Rosenthal, 903 F. Supp. 400, 406 (E.D.N.Y. 1995) (noting that under New York law, “[a]n accounting is an action in equity to be tried by the court without a jury”). Federal non-diversity cases are more varied, and some confusion is due to the U.S. Supreme Court’s strongly pro-jury decision in *Dairy Queen v. Wood*, 369 U.S. 469 (1962). See generally 1 Dobbs, *supra* note 13, §4.3(5), at 614 (discussing *Dairy Queen*); McCarthy on Trademarks and Unfair Competition, § 32:124 (4th ed. West 2014) (“A number of courts have read the *Dairy Queen* precedent to mean that in a traditional infringement case, a claim for an accounting of the infringer’s profits is not an equitable issue for the court, but is a question for the jury, if one is demanded.”).

<sup>139</sup> See, e.g., Stephen W. Seifert, 10 Colo. Prac., *Creditor’s Remedies – Debtor’s Relief* § 8:7 (West 2014) (“Because a cause of action seeking to impose a constructive trust, resulting trust, or equitable lien on property in the hands of the defendant is grounded in equity, the plaintiff is not entitled to a jury trial.”).

<sup>140</sup> See *id.*

<sup>141</sup> See, e.g., Walton v. Walton, 31 Cal. App. 4th 277, 287-88 (CA Ct. App. 3rd 1995); 3 Dobbs, *supra* note —, §12.8(i), at 191 (“The pure specific performance claim, unencumbered with claims for relief ‘at law,’ is thus tried without a jury and it is enforceable by the contempt power of equity courts if necessary.”).

<sup>142</sup> *Marseilles Hydro Power, LLC v. Marseilles Land and Water Co.*, 299 F. 3d 643, 648 (7th Cir. 2002) (Posner, J.); see also Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 NW. U. L. REV. 153, 171 (1999) (“[T]he consequence of classifying a remedy as equitable is that the Seventh Amendment does not apply . . .”).

<sup>143</sup> Cf. *Hamzavi v. Bowen*, 126 Md. App. 492 (Ct. Special App. Md. 1999) (“Generally, a court of law without equity jurisdiction or statutory authority has no power to appoint a receiver.”).

problems of specifying, measuring, and ensuring compliance. The equitable managerial devices provide the force and flexibility that are uniquely needed for the equitable remedies.

### C. The equitable constraints

These remedies and enforcement mechanisms are costly and susceptible to abuse. Begin with the relative cost of equitable remedies to courts and litigants. This is a question on which there is scant empirical evidence.<sup>144</sup> And any general conclusion is likely to admit of many exceptions.<sup>145</sup> Even so, it is reasonable to think that equitable remedies, all else being equal, impose substantially higher costs on courts and litigants.<sup>146</sup>

---

<sup>144</sup> See Yair Listokin, *The Empirical Case for Specific Performance: Evidence from the Tyson-IBP Litigation*, 2 J. EMPIRICAL LEG. STUD. 469 (2005); Michael L. Rustad, Thomas H. Koenig & Erica R. Ferreira, *Restorative Justice to Supplement Deterrence-Based Punishment: An Empirical Study and Theoretical Reconceptualization of the EPA's Power Plant Enforcement Initiative, 2000-2011*, 65 OKLA. L. REV. 427, 451 (2013).

<sup>145</sup> For example, there will be some areas of the law in which damages are more costly to calculate. See, e.g., THOMAS F. COTTER, *COMPARATIVE PATENT REMEDIES: A LEGAL AND ECONOMIC ANALYSIS* 53-54 (2013). And particular cases will have characteristics, such as a high cost of renegotiation, that make an equitable remedy such as specific performance less apt. See, e.g., Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629 (1988); but cf. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 836-839, 854-855 (2003) (noting difficulties with moving from economic models that incorporate such characteristics to the resolution of actual cases).

<sup>146</sup> There has been a sharp theoretical debate for roughly four decades over the relative efficiency of specific performance and damages, and much of that debate concerns the cost of these remedies. See, e.g., Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978); Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939, 1940 (2011); Steven Shavell, *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, 84 TEX. L. REV. 831 (2006); Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341 (1984). Although that literature has many insights, three points of qualification are needed in applying it to the system of equitable remedies.

*First*, the literature addresses specific performance, and a conclusion that it is relatively low cost does not automatically carry over to other equitable remedies. Equitable remedies may vary in the costs they impose because they vary in how they are related to a defendant's preexisting legal obligation: e.g., specific performance often tracks the obligation under the contract, but injunctions are not supposed to merely restate the defendant's obligation to obey the law. See, e.g., *S.E.C. v. Smyth*, 420 F.3d 1225, 1233 n.14 (11th Cir. 2005); IIA CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2955 & n.25 (3d ed.) (collecting cases).

*Second*, even if it could be shown that in actual cases specific performance was no more costly, or even less costly, than damages, there would be a selection-effects problem. Specific performance is not given randomly, because it is avoided precisely in those cases in which supervision is most difficult and costly. See, e.g., Restatement (Second) of Contracts § 366

The managerial devices described in the preceding section are not cheap. Because of them, equitable remedies are more likely to have an expensive “after-life.” That after-life includes not only the costs of compliance and monitoring, but also the costs of clarifying,<sup>147</sup> enforcing, modifying, and dissolving the decree. Even a future decision *not* to clarify, enforce, modify, or dissolve can be costly.<sup>148</sup> There is almost never such an expansive set of costs after a court awards damages or the non-monetary remedies at law. Moreover, the after-life costs of equitable remedies are not fully internalized by the parties,<sup>149</sup> thus implicating the public interest in a way that legal remedies typically do not.

Equitable remedies are also more likely to be abused by the parties. One reason is the potential for equitable remedies to have a sharply asymmetric effect on the plaintiff and defendant. An award of damages is money. And the amount of money paid by the defendant is the same as the amount of money received by the plaintiff.<sup>150</sup> Similarly, in replevin the personal property is identical no matter who holds it.<sup>151</sup> (Mandamus is a slightly different case: the command may in fact be burdensome to the public official, but the burden is not cognizable since the duty must

---

(1981); *Jones v. Parker*, 163 Mass. 564, – (1895) (Holmes, J.) (asking “whether a decree for specific performance would not call on the court to do more than it is in the habit of undertaking”). Thus if the administrative costs of damages and specific performance were even to roughly correspond in actual cases, it would be the result of judges responding to, and avoiding, the higher costs of specific performance.

*Third*, given the impasse in the theoretical arguments, it is appropriate to consider the views of judges, since they are well positioned to assess the relative burdens on courts. They routinely treat equitable remedies as being relatively higher cost. *See, e.g.*, *Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 281 (7th Cir. 1992) (Posner, J.) (“[E]quitable relief is costly to the judicial system, especially in a case such as this where the relief sought would cast the court in a continuing supervisory role.”).

<sup>147</sup> *See, e.g.*, Motion for Clarification of Timing of Injunction, U.S. District Court, Northern District of California is Edward O’ Bannon et al. vs. National Collegiate Athletic Association et al, 09-3329 (Aug. 11, 2014) (seeking to clarify, *inter alia*, the meaning of “recruiting cycle” in the court’s injunction).

<sup>148</sup> Cf. Anthony DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation*, 35 HARV. J. L. & PUB. POL’Y 743, 753 (2012).

<sup>149</sup> There have been proposals to make the parties bear more of the costs of court-appointed monitors. *See* Schwartz, *supra* note 116; Ulen, *supra* note 116.

<sup>150</sup> Of course the defendant’s loss and the plaintiff’s gain of the same amount of money might be differently experienced for many different reasons, including temperament, wealth disparities, and loss aversion.

<sup>151</sup> Again, the experience of holding the property may be different, for the same reasons mentioned in the preceding note plus others, such as sentimental value and skill disparities.

be one that is clearly prescribed by law.<sup>152</sup>) By contrast, equitable remedies are often asymmetric in their effect, and sometimes very dramatically so. A classic example of this asymmetric effect is an injunction to tear down a house that overhangs the property line by a few feet. The defendant suffers a huge loss, but the plaintiff receives only a small gain (at least in material terms).<sup>153</sup>

Equitable remedies may also have a temporal asymmetry that makes them susceptible to abuse. The benefit the plaintiff would derive from an injunction, accounting, constructive trust, or specific performance may fluctuate dramatically based on prices, variation in profits over time, or circumstances that lock the defendant in to a course of conduct. None of these reasons for temporal asymmetry is common for legal remedies, in part because they tend not to require a transfer property, and thus are relatively immune from ex post market fluctuations.<sup>154</sup>

Given the increased cost and potential for abuse, the equitable remedies and equitable enforcement mechanisms need limits. These limits, even if not sharply defined, give a sense of shape to a plaintiff's expectation of equitable relief. These limits are here called the "equitable constraints":

1. *Equitable Ripeness.* There is a requirement of additional factual development for equitable remedies, which is represented by the equitable ripeness doctrine.<sup>155</sup> There is obvious overlap here with constitutional doctrines of ripeness and standing, as well as abstention doctrines. The relationship between these general doctrines and equitable counterparts cannot be untangled here.<sup>156</sup> It suffices to say that

---

<sup>152</sup> Habeas relief also raises no problematic asymmetry, since a successful prisoner gains more. The government loses a prisoner, but the prisoner gains her freedom.

<sup>153</sup> Of course the parties might bargain, replacing the asymmetric injunction with a symmetrical monetary settlement. Yet that often does not happen. See Ward Farnsworth, *Do Parties to Nuisance Cases Bargain after Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373 (1999).

<sup>154</sup> The exception is replevin, but it is only concerned with personal property, which is less likely to have a dramatic appreciation in market value. On this general difference between legal and equitable remedies, see Bray, *supra* note 10, at 6.

<sup>155</sup> See Little, *supra* note 68; Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 390-392 (1983); see also Bray, *supra* note 116, at 1133-37, 1140-43.

<sup>156</sup> Cases about constitutional standing, ripeness, or abstention often emphasize the plaintiff's request for equitable relief, and many of those cases have suggested that these doctrines apply differently depending on whether legal or equitable relief is sought. See, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996); *Younger v. Harris*, 401 U.S. 37 (1971); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 497 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). For discussion, see, e.g., Anthony J. Bellia, Jr., *Article*

they overlap, and yet that a court may invoke equitable ripeness as an independent reason not to give equitable relief.<sup>157</sup>

2. *Specificity Requirement.* There is the specificity requirement, which requires that an equitable decree be precisely worded and give clear notice of what is prohibited and required, without any reference to other documents. In the Federal Rules of Civil Procedure and at least some state counterparts this requirement is prescribed for the injunction,<sup>158</sup> but it is also a requirement for equitable remedies more generally.<sup>159</sup>

3. *Adequacy Requirement.* For an equitable remedy to be given, there must be “no adequate remedy at law.” That requirement applies to all equitable remedies.<sup>160</sup> It is regularly invoked by courts to resist unnecessarily deployment of the managerial powers of equitable remedies. . . .

4. *Equitable Defenses.* Another self-imposed constraint is equity’s refusal to allow the power of these remedies to be used on behalf of a plaintiff who acts unjustly—a refusal that is reflected in the equitable defenses. One is laches, a defense against equitable claims brought with

---

*III and the Cause of Action*, 89 IOWA L. REV. 777, 827 & n.216 (2004) (standing cases); Bray, *supra* note 116, at 1146 n.247 (ripeness cases); Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 617-22 (1976) (political question cases). For more skeptical views, see Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. Pa. L. Rev. 1071, 1138-43 & n.177 (1974); Laycock, *supra* note 4, at 75; Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 84-90 (1984).

<sup>157</sup> For analysis related to the injunction and declaratory judgment, see Bray, *supra* note 116.

<sup>158</sup> See, e.g., Fed. R. Civ. P. 65(d); California Rules of Court 3.1151 (2014).

<sup>159</sup> See IIA WRIGHT ET AL., *supra* note 146, at § 2955 (“The Supreme Court has indicated that the term ‘injunction’ in Rule 65(d) is not to be read narrowly but includes all equitable decrees compelling obedience under the threat of contempt.” (citing *International Longshoremen’s Ass’n, Local 1291 v. Philadelphia Marine Trade Ass’n*, 389 U.S. 64, 75, 88 S. Ct. 201, 207 (1967))); see also McCullen v. Coakley, 134 S. Ct. 2518, 2538 (2014) (concluding that an injunction, being an equitable remedy, “focuses on the precise individuals and the precise conduct causing a particular problem”); Macias v. New Mexico Dep’t of Labor, CIV 91-0509 JB/WPL, 2014 WL 1948259 (D.N.M. Mar. 31, 2014) (characterizing Rule 65(d) as imposing “well-defined guidelines for clarity and specificity in equitable orders”).

<sup>160</sup> See, e.g., Donnelly v. JP Morgan Chase, NA, CIV.A. H-13-1376, 2014 WL 429246 (S.D. Tex. Feb. 4, 2014) (“an accounting . . . is appropriate only when the facts and accounts presented are so complex that adequate relief may not be obtained at law”); Islip U-Slip LLC v. Gander Mountain Co., 3:13-CV-0350 MAD/DEP, 2014 WL 795981 (N.D.N.Y. Feb. 27, 2014) (“New York courts have clarified that as an equitable remedy, a constructive trust should not be imposed unless it is demonstrated that a legal remedy is inadequate.” (quotation marks, citation, and alteration omitted)); Millien v. Popescu, CIV.A. 8670-VCN, 2014 WL 463739 (Del. Ch. Jan. 31, 2014) (“Specific performance is unavailable unless there is no adequate remedy at law . . .”).

unreasonable delay. Another is the unclean-hands defense, which may preclude or narrow equitable relief when the plaintiff has acted inequitably. Yet another is undue hardship, which applies when equitable relief would be especially burdensome to the defendant (but only if the defendant has acted equitably).<sup>161</sup> In most of the legal systems of the United States, these defenses may be raised against claims for equitable remedies but not against claims for legal remedies.<sup>162</sup>

5. *Maxims of Restraint and Residual Equitable Discretion.* There are a number of equitable maxims,<sup>163</sup> and some of them express and urge a restraint in the use of equitable remedies, such as “Equity follows the law.”<sup>164</sup> In addition, it is commonly said that there is a residual equitable discretion not to give an equitable remedy.<sup>165</sup> . . .

6. *Modification and Dissolution.* If an equitable remedy that has already been given proves unwise or outmoded, there are opportunities to revisit it. The doctrines that offer these opportunities, modification and dissolution, have already been discussed as managerial devices, since they allow courts to adapt equitable decrees to new circumstances and new actions by the parties.<sup>166</sup> But they are also constraints, because they limit the ability of a judge to give an extreme injunction and rule out any future request for amelioration. The court cannot precommit itself to maintaining an extreme injunction. Put differently, the doctrines of modification and dissolution require a court to always be willing to reconsider (a reconsideration that would happen, of course, in the shadow of appellate review).

---

<sup>161</sup> See Laycock, *supra* note 12, at 2-7; Henry E. Smith, *Property, Equity, and the Rule of Law*, in PRIVATE LAW AND THE RULE OF LAW (Lisa Austin & Dennis Klimchuck eds. 2014 forthcoming).

<sup>162</sup> See *supra* note 67. The main exception is that in many jurisdictions laches may be applied to mandamus. See *supra* note 62.

<sup>163</sup> See, e.g., Roger Young and Stephen Spitz, *SUEM—Spitz’s Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S.C. L. REV. 175 (2003).

<sup>164</sup> See, e.g., Cooksey v. Landry, 761 S.E.2d 61, 64 (Ga. 2014) (“The first maxim of equity is that equity follows the law.”).

<sup>165</sup> See, e.g., *Curtis v. Alcoa, Inc.*, 525 F App’x 371 (6th Cir. 2013) (affirming where the district court first applied the *eBay* test and then, “because injunctive relief ultimately rests in the discretion of the court, the district court also considered whether the equities supported the injunction”); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 778 & n.116 (1982) (referring to “the discretion of the trial court to withhold a permanent injunction as unnecessary even when the plaintiff has made out all the other elements of his case”). For discussion of this point, see Bray, *supra* note 6, at —.

<sup>166</sup> See *supra* notes — and accompanying text.

None of these equitable constraints is rigid. None is air-tight. All are discretionary, and the discretion to invoke them is committed to the very judge they are intended to constrain—the judge deciding in the first instance whether give an equitable remedy. This may cause some to deny that they actually are constraints. Surely they would not work for a judge who was committed to abusing her powers.

But not all constraints are fetters.<sup>167</sup> These equitable constraints guide the responsible exercise of judicial decisionmaking, both at the trial and appellate levels, by focusing a judge’s attention on certain situations where these equitable remedies and enforcement mechanisms are most likely to be misused.<sup>168</sup> For example, one scenario in which judges are likely to misuse their equitable powers is when they act with insufficient information, not just for generic reasons that might apply to every claim, but because the commands of equitable remedies are more likely to be factually involved and contingent. (Damages do not depend on ability to pay, but equitable remedies are shaped by ability to perform.) The attention of judges is directed to this concern about factual development by the doctrine of equitable ripeness.<sup>169</sup> Equitable powers are also especially susceptible to being instruments of injustice, because of the asymmetric effects described above (i.e., the party asymmetry and the temporal asymmetry).<sup>170</sup> The attention of judges is directed to each of these concerns by equitable defenses. Consider for example laches, a defense against equitable relief when the plaintiff has unreasonably delayed in bringing suit, even though the suit is still within the relevant statute of limitations. That defense reminds judges that an equitable

---

<sup>167</sup> Cf. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. REV.* 1267, 1294 (2007) (“Self-discipline comes in degrees, and different Justices may have had more or less self-discipline in mind. In addition, it is in the nature of self-disciplining mechanisms that they can be applied consistently or inconsistently and that they can be strengthened or weakened through interpretation.”).

<sup>168</sup> See Bray, *supra* note 10, at 5, 7 (“[E]quitable doctrines focus judicial attention; they structure and guide the exercise of equitable discretion.”); cf. Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 *DUKE L.J.* 377 (2006) (exploring “attention regulation” for administrative agencies).

<sup>169</sup> Judicial attention is also directed to this concern by the doctrines disfavoring certain kinds of preliminary injunctions. See, e.g., *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1011 (10th Cir. 2004) (McConnell, J., concurring) (“This Court has traditionally required a heightened showing for preliminary injunctions in three ‘disfavored’ categories: injunctions that disturb the status quo, mandatory injunctions, and injunctions that afford the movant substantially all the relief it may recover at the conclusion of a full trial on the merits.”).

<sup>170</sup> See *supra* notes — and accompanying text.

remedy can have very different effects at different points in time, which can lead to opportunistic behavior by litigants.

Moreover, these discretionary constraints may actually reduce judicial discretion.<sup>171</sup> In some cases a judge will have a number of reasons not to give an equitable remedy. For example, the plaintiff might have waited to sue for an injunction until it would be especially harmful to the defendant (because a building has now been constructed, or investments in a film's distribution have been made). The plaintiff's conduct might give the court several different grounds for denying the requested injunction: the plaintiff has unclean hands, an injunction conflicts with the public interest, supervision of compliance is now more difficult, and the court might exercise its residual discretion not to give an equitable remedy. Now consider the effect of adding one more discretionary defense, such as laches. As a practical matter, adding laches to the mix would give the judge more discretion about *why* to deny equitable relief. But the judge would actually have less discretion about *whether* to do so. This is because if the judge did go ahead anyway and grant the requested equitable relief, the addition of laches would make the decision more vulnerable on appeal, since it would increase the number of angles from which a defendant could attack the decision granting the remedy. In addition, the specificity requirement is a way of prompting deliberation: to say with specificity what the defendant must do, the court must think with specificity about what *it* is doing.

Thus the accumulation of discretionary equitable defenses can reduce—and thus constrain—judicial discretion about whether to give an equitable remedy. These equitable constraints, though discretionary, are nevertheless frictions against abuse of the equitable remedies and equitable managerial devices.

\* \* \*

Whether these constraints are applicable, and whether the managerial devices are applicable, are therefore questions decided categorically, at the level of the system of equitable remedies. That system contains a number of rational and subtle connections, which need not be reproduced or reinvented in every case by individual judges.

---

<sup>171</sup> This is an example of a “system effect,” where the properties of the system differ from those of the individual components. See Vermeule, *supra* note 15, at ...

Now it would be possible to restate all of these doctrinal connections without ever once using the word *equity*. Yet if such a restatement were made, certain patterns would immediately be perceptible. It would be apparent that remedies 1, 2, 3, 4, and 5 all shared one characteristic after another, and that these characteristics were not shared by the other remedies. These patterns are marked by using the overarching term *equitable*. In Jeremy Waldron's phrase, such a term is "a flag of systematicity."<sup>172</sup> It indicates that "we are dealing with a web-like structure, not just individual items on a list of propositions."<sup>173</sup> Having an overarching technical term also reveals how precedent works within the system. For example, when a court applies laches to an equitable remedy, it will look to other cases involving laches no matter which equitable remedy was sought. And the same is true for the rest of these doctrines. In short, it is not necessary to have a term like *equitable* in order to grasp all of these connections, but having one makes both the grasping and the holding onto easier.

### III. The Future of the System

There is still a tight connection between these equitable remedies, managerial devices, and constraints in American law. The tendency is for all of the equitable rules to apply to a claim, or for none of them to. Yet there is no permanent reason this must be so. Remedies could just be called remedies, no matter whether they originated at law or in equity. The managerial devices could lose their equitable distinctiveness, and be invoked whenever courts thought they were needed, regardless of the remedy given. The so-called equitable constraints could apply no matter what remedy the plaintiff sought. In other words, given the contingency of the current system, one question is its stability. It has held together so far. But is there any reason to think it will be stable in the future?

---

<sup>172</sup> Waldron, *supra* note 15, at 23.

<sup>173</sup> *Id.* at 23. Waldron notes that terms of art such as *consideration*, *malice*, and *due process* "have a genealogy, and they come with resonances of previous associations." *Id.* at 51. That is also true of *equity*, and those previous associations include more case-specificity, a certain kind of moral reasoning, and a pervasive concern for limiting opportunism and unjust enrichment. *See, e.g.*, Allan Beever, *Aristotle on Equity, Law, and Justice*, 10 LEG. THEORY 33 (2004); Jacobs, *supra* note 25; DENNIS R. KLINCK, CONSCIENCE, EQUITY, AND THE COURT OF CHANCERY IN EARLY MODERN ENGLAND (2010); Nussbaum, *supra* 25; Powell, *supra* note 87; Smith, *Economic Analysis*, *supra* note 10; Smith, *Fiduciary Law*, *supra* note 14; Strine, *supra* note 131.

### A. Reasons to expect stability

There are several common types of causal explanation for legal phenomena, and these apply regardless of whether what is being explained is change or continuity.<sup>174</sup> In keeping with the focus of this Article on the present system of equitable remedies, what is given here is not a full causal explanation, which would require a historical inquiry into why the system has held together over time. Instead, this Part briefly considers some of the centripetal forces in present doctrine.

The most important are the legal authorities—constitutional, statutory, and judicially created—that require the classification of remedies as legal or equitable. As noted above,<sup>175</sup> the Seventh Amendment and its state counterparts require such a classification whenever a jury trial is requested. Numerous federal and state statutes require that classification because they authorize only “equitable remedies.” And the “no adequate remedy at law” requirement has the effect of forcing judges to classify remedies, because doing so is a necessary prelude to comparing the relative adequacy of the legal and equitable remedies.<sup>176</sup>

Of these various authorities, the broadest is the adequacy requirement. The finding of “no adequate remedy at law” represents the crossing of a conceptual border—from not being in the system of equitable remedies, to being in that system. That crossing is not hard.<sup>177</sup> There are no fully determinative rules for when that crossing should be made. But that crossing must happen for a plaintiff to receive an equitable remedy, and it must happen explicitly.<sup>178</sup> The requirement

---

<sup>174</sup> For example, when considering the reasons for the polarization in contemporary American politics, Rick Pildes groups the potential explanations into “persons,” meaning political figures, “history,” meaning large-scale historical processes, and “institutions,” meaning government structures and constitutional rules. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273 (2011).

<sup>175</sup> See *supra* Part I.B.1.

<sup>176</sup> Cf. Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. Rev. 1577, 1606 (2002) (“Although the inadequacy doctrine has little effect today on the choice between specific relief and damages, the doctrine remains useful when traditional understandings of the law/equity divide are relevant to the classification of a particular remedy as legal or equitable.”).

<sup>177</sup> See, e.g., *Evergreen W. Bus. Ctr., LLC v. Emmert*, CC CV07020348, 2014 WL 576082 (Or. Feb. 13, 2014); see also Laycock, *supra* note 12, at 23 (“[T]he adequate-remedy or irreparable-injury rule sets a very low threshold for plaintiff’s right to a permanent injunction.”).

<sup>178</sup> Bray, *supra* note 6, at —.

therefore marks off the edge of the system of equitable remedies—not like an impenetrable stone wall, but like the dashed line that separates the lanes on a highway, a line that does not keep your car from swerving between the lanes, but one that only indicates which lane you are in. In this way the adequacy requirement preserves the distinction between legal and equitable remedies, even where that distinction is not required by constitutional or statutory authority.

Another reason to expect stability is the lack of any institution that has the interest, expertise, and mode of decisionmaking needed to successfully dismantle and replace the system. Legislatures, whether state or federal, lack the necessary expertise because of their unfamiliarity with many parts of the system they would be replacing. They also seem to lack any interest in such a project.<sup>179</sup> Some part of the law of remedies has occasionally achieved political salience—Martin Van Buren was once exercised about federal courts having mandamus power,<sup>180</sup> Richard Nixon sought political gain in opposing the desegregation injunctions

---

<sup>179</sup> For examples of recent federal statutes that rely on the distinction between legal and equitable remedies, see *supra* note 53. Note that the U.S. Supreme Court has insisted that major change in equitable doctrines should come from Congress. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). In older cases there are varied suggestions about the scope of such congressional power. See *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 164-65 (1939) (defining the federal courts “equity jurisdiction” as “that body of remedies, procedures and practices which . . . had been evolved in the English Court of Chancery, subject, of course, to modifications by Congress”); *Michaelson v. U. S. ex rel. Chicago, St. P., M. & O. Ry. Co.*, 266 U.S. 42, 65 (1924) (finding serious constitutional doubt about “the authority of Congress to set aside the settled rule that a suit in equity is to be tried by the chancellor without a jury unless he choose to call one as purely advisory”); *Ex parte Robinson*, 86 U.S. 505, 510-12 (1873) (rejecting disbarment as a contempt sanction, because the provision of “the Judiciary Act of 1789 [that] declares that the court shall have power to punish contempts . . . by fine or imprisonment” was a valid “limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment,” though also noting that whether the Act “can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt”); *Bennett v. Butterworth*, 52 U.S. 669, 674-75 (1850) (“The Constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity . . .”); *Livingston v. Van Ingen*, 15 F. Cas. 697, 699 (C.C.D.N.Y. 1811) (Livingston, Circuit Justice) (“although by the constitution the judicial power is extended to all cases in law and equity, arising under the laws of the Union, congress may certainly say that the relief which they intended to afford in a particular case shall be at law only”).

<sup>180</sup> See John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 380-82 (2006) (noting that President Van Buren discussed the topic at some length in a State of the Union address).

that required school busing,<sup>181</sup> and more recently there has been public debate and legislative action regarding medical malpractice damages and punitive damages.<sup>182</sup> But it has been a long time since there has been a wave of legislative interest in remedial reform on this scale.<sup>183</sup>

Judges have greater expertise about the interconnection of equitable doctrines.<sup>184</sup> Yet their typical mode of decisionmaking is not conducive to quickly replacing such a well-established and capacious system. No matter how widely a judge reaches, when she is deciding one case at a time she lacks the practical freedom of a legislature to decide a huge array of questions at once.<sup>185</sup> To write an opinion that dismantled the entire system of equitable remedies—all the interlocking doctrines, all the statutory constructions, all the constitutional interpretations—might actually be impossible. It would certainly be very difficult.<sup>186</sup> Of course the system might be dissolved one piece at a time, through case-by-case decisionmaking. But precisely because this is a system, eliminating one rule at a time might have unexpected consequences for the whole. And it would be exceedingly difficult to slowly dissolve the current system while

---

<sup>181</sup> See RICK PERLSTEIN, *NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA* 300, 634, 737 (2009).

<sup>182</sup> On the debate over medical malpractice litigation, see David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1086 (2006), and for a recent update, David A. Hyman, Charles Silver, *Double, Double, Toil and Trouble: Justice-Talk and the Future of Medical Malpractice Litigation*, 63 DEPAUL L. REV. 547 (2014).

<sup>183</sup> If ever—it is an open question whether any of the major law reform movements of the United States centered on questions of remedies. Cf. COOK, *supra* note 36 (offering a history of antebellum codification movements that gives almost no attention to equity or remedies). Before the twentieth century, however, the question of legislative interest is somewhat anachronistic, since remedies was not yet conceived of as a distinctive subject. See generally Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161 (2008).

<sup>184</sup> Even so, the grasp that contemporary judges have of equitable doctrines has often been sharply criticized. See, e.g., Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291 (2000); John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317 (2003); but cf. Bray, *supra* note 6.

<sup>185</sup> On the institutional advantages of a legislature in changing a system (specifically the system of property rights represented by the *numerus clausus*), see Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 58-68 (2000). Note that there is a contrary line of thought in which legislation is seen as piecemeal, ad hoc, and contradictory, and judicial decisions are seen as more aware of systematicity in the law. See Waldron, *supra* note 15, at —.

<sup>186</sup> The closest analogy for taking apart a doctrinal system all at once might be the U.S. Supreme Court's sentencing decisions, such as *United States v. Booker*, 543 U.S. 220 (2005), though the example is one that does not nourish hope.

at the same time slowly constructing a quite different one.<sup>187</sup> To dismantle the system all at once, the most feasible option might be judges acting through a more typically legislative mode, as in the judicial rulemaking that created the Federal Rules of Civil Procedure.<sup>188</sup> Yet even that effort was authorized by Congress only after years of debate and with the endorsement of the Supreme Court.<sup>189</sup> At present all nine justices seem committed to retaining the line between legal and equitable remedies in at least a large number of cases.<sup>190</sup>

Thus Congress lacks the interest and expertise to take the system apart and replace it with something better. And the federal courts lack the interest and most apt mode of decisionmaking. One could imagine a state legislature and judiciary working together to replace the system of equitable remedies, though that, too, has not yet happened.

#### B. Where change is most likely

Even so, there are two points where the system is most likely to change. These are the equitable rules that protect the judiciary, and the equitable remedies that provide restitution.

1. *Doctrines that protect the judiciary.* Some of the doctrines related to equitable remedies can be seen as a form of judicial self-protection. These include contempt, the equitable helpers, and the unclean-hands defense. All three have uses that are not related to equitable remedies. Contempt can be a means of disciplining conduct that undermines all hope of orderly adjudication, such as outbursts in court, intimidation of witnesses, and refusal to testify. This use of contempt is not new, and it has been an inherent power of common law courts for centuries.<sup>191</sup>

---

<sup>187</sup> But see Johnny Cash, *One Piece at a Time* (1976).

<sup>188</sup> Another analogy might be the commission that produced the U.S. Sentencing Guidelines.

<sup>189</sup> See generally Burbank, *supra* note 42.

<sup>190</sup> See, e.g., *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) (Ginsburg, J.); *U.S. Airway, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013) (Kagan, J.); *Sossamon v. Texas*, 131 S. Ct. 1651, 1665 (2011) (Sotomayor, J., dissenting); *Cigna Corp. v. Amara*, 131 S. Ct. 1866 (2011) (Breyer, J.); *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010) (Alito, J.); *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008) (Roberts, C.J.); *eBay v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (Thomas, J.); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (Scalia, J.).

<sup>191</sup> For example, at the assizes in the summer of 1631, a condemned prisoner threw a brickbat at Chief Justice Richardson, for which act he was indicted on the spot and “immediately hanged in the presence of the Court.” 73 Eng. Rep. 416.

Masters and receivers can be used for certain pre-trial, trial, and post-trial functions—including some functions unrelated to remedies, and some functions connected to legal remedies (e.g., an uncommonly complicated calculation of damages<sup>192</sup>). Nor is this new, since the Federal Rules of Civil Procedure have long allowed the use of masters without any connection to equitable remedies, and before the existence of those Rules the U.S. Supreme Court had already signaled that the appointment of similar officers was an inherent power of courts.<sup>193</sup> And in a minority of jurisdictions, the defense of unclean hands is already allowed against claims for legal remedies.<sup>194</sup> In particular that has been the law in California for at least half a century.<sup>195</sup> All three doctrines are associated with inherent judicial powers and something like judicial self-protection.

There may be pressure in the future to recognize new uses for these doctrines outside the system of equitable remedies.<sup>196</sup> This is especially likely in any U.S. legal systems in which the amount and complexity of litigation increases but the size of the judiciary does not. Whether such an extension is wise or unwise is hard to assess in the abstract, but the main policy considerations can be outlined here. First there is the obvious question: will the equitable doctrine be useful for claims for legal remedies? Second, will the extension of the doctrine *outside* the system alter its development, thus changing how the doctrine works *inside* the system? Third, what are the implications for other bodies of law? (For example, if damages were enforced with contempt sanctions, there would likely be serious conflicts with the law of bankruptcy.)

2. *Restitution*. Some restitutionary remedies were developed at law (e.g., quantum meruit), while others were developed in equity (e.g.,

---

<sup>192</sup> See Fed. R. Civ. P. 53(a)(1)(b)(ii); cf. *Reilly v. United States*, 682 F. Supp. 150, 155-162 (D.R.I. 1988); but cf. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 481 n.18 (1962) (warning against frequent use of masters for determining legal remedies). On the use of masters in federal courts, including both their changing use in equity and their use after the Federal Rules of Civil Procedure, see Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005).

<sup>193</sup> See *Ex parte Peterson*, 253 U.S. 300 (1920).

<sup>194</sup> See *supra* note 61 and accompanying text.

<sup>195</sup> See *Fibreboard Paper Products Corp. v. E. Bay Union of Machinists, Local 1304, United Steelworkers of Am., AFL-CIO*, 227 Cal. App. 2d 675, 728 (Ca. Ct. App., 1964).

<sup>196</sup> An example of an originally equitable doctrine that protects the judiciary, which then spread to law, is equitable estoppel. That development occurred in the nineteenth century.

constructive trust).<sup>197</sup> Courts continue to distinguish between the legal restitutionary remedies and the equitable ones, not in every case, but certainly in many cases.<sup>198</sup> In the new Restatement (Third) of Restitution and Unjust Enrichment, however, the general tendency is to submerge distinctions between law and equity.<sup>199</sup> Even so, the Restatement is much more thorough-going in its support for merger with respect to the basis of liability in unjust enrichment, than it is with respect to the *remedies* for unjust enrichment. That is, it still describes the constructive trust and equitable lien as equitable remedies,<sup>200</sup> it still treats laches as a defense only against equitable remedies,<sup>201</sup> and it offers guidance on how to distinguish legal and equitable relief.<sup>202</sup>

Even so, it is worth considering what the future might hold for restitutionary remedies. It may be that courts will continue to develop separately the restitutionary remedies that are legal and the ones that are equitable.<sup>203</sup> That would mean that the restitutionary remedies that are equitable would continue in at least some cases to be enhanced by the equitable managerial devices and limited by the equitable constraints. If,

---

<sup>197</sup> See Restatement (Third) of Restitution and Unjust Enrichment § 4 cmt d (2011). For guidance in making that distinction, see *id.*; see also Murphy, *supra* note 176, at 1598-1607, 1635-1638.

<sup>198</sup> For recent examples in the U.S. Supreme Court, see *U.S. Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013); *Cigna Corp. v. Amara*, 131 S. Ct. 1866 (2011). For a view that the emphasis on the constructive trust as an equitable remedy is distinctively American, see Chaim Saiman, *Restitution and the Production of Legal Doctrine*, 65 WASH. & LEE L. REV. 993, 1010 & n.86 (2008).

<sup>199</sup> See Douglas Laycock, *Restoring Restitution to the Canon*, MICH. L. REV. 929, 931 (2012). For example, the Restatement avoids using the word *equity* in its text (as opposed to the comments and illustrations), and it explicitly rejects the adequacy requirement. Cf. Chaim Saiman, *Restating Restitution: A Case of Contemporary Common Law Conceptualism*, 52 VILL. L. REV. 487, 496 (2007) (noting “terms that the Restatement consciously omits,” such as equity, quasi contract, implied contract, quantum meruit, and constructive trust, while also finding that those terms “remain the operative terminology in most cases presenting unjust enrichment issues”).

<sup>200</sup> Restatement (Third) of Restitution and Unjust Enrichment §§ 55, 56 (2011); see also *id.* at § 57 (equitable remedy of subrogation). On subrogation, see *supra* note 92.

<sup>201</sup> See *id.* § 70(2) (stating that laches is a defense against “an action for restitution [that] asserts a claim or seeks a remedy originating in equity.”).

<sup>202</sup> See *id.* § 4 cmt d; *id.* § 70 cmt c, d.

<sup>203</sup> “Unjust enrichment” would then be not a free-standing basis for decision but an organizing principle, “a description of the common features of a variety of more specific rules of restitution developed by courts over time.” Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 715 (2006); see generally Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083 (2001). Note that Sherwin contrasts this organizing-principle understanding with “equitable” approaches, though she is using *equitable* in a different sense, i.e., a sense related not to remedies but to sources and modes of decisionmaking.

however, the Restatement's small steps toward merger are carried even further by the courts, then one might imagine the development of a new remedy of "restitution," which would defy easy classification. Various approaches would then be possible. The best might be to recognize that even though "equitable considerations" may affect the decision whether to give restitution,<sup>204</sup> the new omnibus remedy falls outside the equitable-remedies system.<sup>205</sup>

At these two points, namely the equitable doctrines that protect the judiciary and the equitable remedies that are restitutionary, it would not be surprising to see change and development. At present, though, contempt, equitable helpers, and unclean hands remain uniquely connected to equitable remedies. And despite the uncertainty about restitution's future development in the United States,<sup>206</sup> restitutionary remedies are only a small part of the whole. In litigation in the United States it is usually obvious whether a given remedy is equitable, and thus whether it is within the equitable-remedies system.<sup>207</sup> The system is likely to hold together, then, at least in the short run, given the depth and breadth of the authorities requiring courts to classify remedies, the many consequences that turn on that classification, and the lack of any plausible account for how wholesale change would occur.

\* \* \*

One doubt may linger, though. Equitable remedies are a system. But weren't equitable procedures a system? Weren't equitable causes of action a system? In fact, what could be more of a system than an equitable court, deciding equitable causes of action, and giving equitable

---

<sup>204</sup> On the difficulty of expunging equitable considerations from restitutionary remedies, see Saiman, *Restating Restitution*, *supra* note 198, at 514. On the notion of legal remedies subject to "equitable considerations." See *supra* notes 107-111 and accompanying text.

<sup>205</sup> Cf. Doug Rendleman, *Remedies: A Guide for the Perplexed*, 57 ST. LOUIS U. L.J. 567, 578 (2013) ("[R]estitution has both legal and equitable forms, legal being the more important."); Sherwin, *supra* note 203 (rejecting any "special affinity between restitution and equity," in the sense of particularized justice).

<sup>206</sup> See e.g., Laycock, *supra* note 199; Dan Priel, *The Law and Politics of Unjust Enrichment*, 63 U. TORONTO L.J. 533 (2013); Chaim Saiman, *Restitution in America: Why the US Refuses to Join the Global Restitution Party?* 28 OXFORD J. LEG. STUD. 99 (2008).

<sup>207</sup> The line between legal and equitable remedies thus contrasts favorably with the line between the proceedings and sanctions that are criminal and the ones that are civil. To make that determination courts employ multifactor tests with highly indeterminate factors. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963); see also Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 797-798 (1997).

remedies, all according to equitable procedures? If those systems were dismantled or dissolved, why would the same not happen for equitable remedies?

Here the details of merger matter. The systems of equitable procedure were not abolished through case-by-case decisions. They were transformed, and ultimately taken apart, through legislation and through quasi-legislative judicial rulemaking.<sup>208</sup> The same is true for court structure. A separate Court of Chancery could indeed be considered a system.<sup>209</sup> And it took legislation to abolish the Court of Chancery in England, and the courts of equity in many of the states.

Quite different was the merger of law and equity for primary rights and obligations. At different times, and for diverse points of law, that merger was accomplished by statutes and by judicial decisions. But there are two major differences between the merger of primary rights and obligations (which has happened) and the merger of remedies (which has not).

First, and most important, the doctrines of equity related to primary rights and obligations were not a system. There was no connection between the fact that a court of equity would determine the validity of a trust, and the fact that it would protect real property against a repeated trespass. An abstract rationalization that covers both could be given: both were responses to an inadequacy in the courts of law. Both could be called instances of “equitable jurisdiction”<sup>210</sup> (to use an old imprecise term). But there was no dependence—a court of equity could lose the power to rule on trusts and still stop trespasses, or vice versa, without any loss of efficacy. Indeed, the various primary rights and obligations that could be enforced in equity were always a bit ad hoc and miscellaneous.

---

<sup>208</sup> See, e.g., Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1224-1238 (2005) (marking out the changing role of federal masters, and noting incremental developments in practice, but emphasizing the changes produced by congressional legislation and changes in the Federal Rules of Equity); W. Hamilton Bryson, *The Merger of Common-Law and Equity Pleading in Virginia*, 41 U. RICHMOND L. REV. 77, 79-80 & nn.21-32 (2006) (noting steps in the “incremental” merger of legal and equitable procedure in Virginia over several centuries, and attributing every change either to legislation or judicial rules).

<sup>209</sup> Indeed, Blackstone referred to the English courts of equity as “a laboured, connected system,” though his point was that equity’s rules were systematized and “bound down by precedent.” 3 WILLIAM BLACKSTONE, COMMENTARIES ...

<sup>210</sup> See I DOBBS, *supra* note ..., at 180; see also *Mass. State Grange v. Benton*, 272 U.S. 525, 528 (1926) (Holmes, J.).

There were attempts to corral them into categories, as in the centuries-old rhyme quoted by Frederic Maitland: “These three give place in court of conscience, / Fraud, accident, and breach of confidence.”<sup>211</sup> But those attempts to organize equity were never particularly successful.<sup>212</sup>

Second, for primary rights and obligations, the inconsistency objection (i.e., that the game should be played according to purple rules, not according to red rules and green rules<sup>213</sup>) had great force, because the decision to plead at law or in equity would determine the whole body of rules used to decide the merits. The inconsistency objection has always been weaker for remedies. Legal rules for contract formation, and equitable rules for contract formation, were two sets of rules for one phenomenon. But damages and injunctions are different phenomena. Injunctions and replevin are not the same. It is not surprising that there are different rules that govern them. It is difference without duplication.

## Conclusion

The connection between remedies and the rest of the law governing the adjudicatory process is not fixed. One could imagine a world of very tight connection—where the remedy sought would determine everything else, from the style of the complaint and the pleading standards to the permissible evidence, the elements of a claim, the body of relevant precedent, and so on. Indeed, that was how the forms of action worked.<sup>214</sup> Or one could imagine a world of no connection at all. In that world, the remedy sought would be entirely irrelevant for what had to be pleaded, for primary rights and obligations, for the decisionmaker involved, and for the after-life of the litigation (such as modification and enforcement of the remedy).

At present, the legal systems of the United States operate between these two extremes. There is some connection between the remedy

---

<sup>211</sup> See MAITLAND, *supra* note 24, at 7 & n.1.

<sup>212</sup> One reason is the shifting need for equity to supplement the law. See Smith, *supra* note 161 (calling equity “a moving frontier”). Maitland famously described equity as being “supplementary law, a sort of appendix added on to our code, or a sort of gloss written round our code,” or “a collection of appendixes between which there is no very close connexion.” MAITLAND, *supra* note 24, at 18, 19. For this reason Maitland said that equity was not “a single, consistent system, an articulate body of law.” *Id.* at 19.

<sup>213</sup> See *supra* text accompanying note 39.

<sup>214</sup> See generally F. W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES* (A. H. Chaytor & W. J. Whittaker eds., published 1936).

sought and the other “non-remedial” rules that are brought to bear, and nowhere is this more true than for equitable remedies. The equitable remedies, together with the equitable managerial devices and equitable constraints, form a system. A claim for an equitable remedy is a claim within that system; it is a claim to which the special empowerments and limitations of that system apply.

Although the origin of the system of equitable remedies was historically contingent, it is not an anachronism. The contours of the system track a basic policy distinction between remedies that compel action and inaction, and those that do not. The remedies that compel action and inaction are the ones that require greater managerial powers for the courts, and also the ones that most acutely raise concerns about opportunistic abuse by prevailing litigants. Not all remedies that compel action or inaction are within the system, for mandamus, habeas, and replevin are classically legal remedies. Yet even these exceptions vindicate the rule, for they do not demand the same managerial powers and they are less vulnerable to abuse. Thus the distinction between legal and equitable remedies is rooted in policy considerations that have continuing force.

The argument of this Article is limited, yet important. It is limited because it does not show, and indeed could not show, that the system of equitable remedies is superior to whatever alternative might be proposed. Yet this argument is important because it shows that the existing body of law related to equitable remedies is a useful system. Because this system is *useful*, whatever alternative is proposed must be even better. Because this system is a *system*, it should not be taken apart haphazardly, one random piece at a time.