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Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity

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I. INTRODUCTION

Civil rights litigation is, by many accounts, in a precarious state. One well-placed observer anticipates the demise of litigation pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[1] The Court's decision in *Ashcroft v. Iqbal*,[2] has the potential to impose significant pleading barriers for most claims brought under civil rights statutes, 42 U.S.C. § 1983, and *Bivens*, and the Court's qualified and sovereign immunity jurisprudence continues to bar many plaintiffs from obtaining significant relief for injuries caused by governmental entities and their agents.[3] Commentators for good reason often speak of the Court's general hostility to civil rights litigation as a thumb on the scale in the most contested cases.[4]

At the same time, however, the line of cases arising out of challenges to the procedures provided to detainees held at Guantanamo Bay[5] suggests an openness to enforcing traditional civil rights values of due process and rule of law.[6] And in recent cases involving employment and education, the Court has aggressively

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[1] 403 U.S. 388 (1971). For the view that the Court spelled the end of *Bivens* litigation in *Wilkie v. Robbins*, 551 U.S. 537 (2007), see Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2006-07 CATO SUP. CT. REV. 23 (2007) (arguing that *Bivens* remedy has been gradually undermined, and is endangered by the Court's analysis in *Wilkie*).

[2] 129 S. Ct. 1937 (2009).

[3] Although I have questioned the overall significance of qualified immunity in previous work, Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. (forthcoming 2010), at least in those particular civil rights cases brought to push the boundaries of existing law, qualified immunity is a significant obstruction.

[4] *See* Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006); *see also* Scott Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 FORDHAM L. REV. 981 (2007) (offering complex analysis of Court's recent approach to employment discrimination cases); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 570 (2010).

[5] *See* Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[6] *See, e.g.*, *Boumediene*, 128 S. Ct. at 2277 ("The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.").

advanced a vision of formal racial equality, albeit in ways that trouble many civil rights advocates.[7] Thus, the Court's approach to civil rights litigation cannot only be explained by open hostility.

My goal in this paper is to situate the Court's decisions along a different vector: the common law division between law and equity. In short, I argue that the Court has crafted a jurisprudence in some civil rights cases that creates a default rule, at least superficially, that equitable or injunctive relief shall be available to civil rights litigations instead of legal or monetary relief. This paper is an attempt to describe, critique, and ultimately understand this development in civil rights law. In the end, I argue that the Court's apparent commitment to equitable relief is illusory both as a matter of doctrine and as a matter of practice, but that the Court may vindicate other interests by adopting a rhetorical stance that privileges equitable relief.

In Part II, I begin by tracing the general approach, both procedural and substantive, to the division between equitable and legal relief. My purpose in so doing is to provide some context for examining the Court's treatment of these remedies in civil rights cases. After all, the Federal Rules of Civil Procedure, and the state procedural codes that set the stage for them, were principally intended to do away with the distinction between remedies. Moreover, the traditional line between law and equity rests, if anything, on a presumption against equitable relief in favor of legal remedies.

I then move, in Part III, to describing how aspects of the Court's current civil rights jurisprudence rest on the implicit availability of equitable relief rather than legal relief to vindicate important rights. This approach can be seen in multiple contexts—qualified immunity, sovereign immunity, and *Bivens* litigation to name a few—but the Court's recent decision in *Pearson v. Callahan*,[8] is a prime example. In *Pearson*, the Court suggests that lower courts should strive to avoid making new law in qualified immunity cases by addressing the "clearly established" prong of the qualified immunity defense before deciding whether a particular plaintiff has made claims that establish a violation of the Constitution.[9] On the Court's analysis, this will not undermine the judiciary's law-giving function because the same issues will be raised and decided in injunctive-type proceedings, including criminal cases.[10] The *Pearson* analysis is consistent with the suggestion by some scholars that the limitations on damages remedies serves an innovative purpose, freeing courts to embrace their law-giving function without fear of imposing substantial monetary damages on individual government officials.[11]

In Part IV, I analyze the positions of the Court and these scholars, from the perspective of both doctrine and practice. In terms of doctrine, I summarize the

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[7] *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

[8] 129 S. Ct. 808 (2009).

[9] *Id.* at 822.

[10] *Id.*

[11] Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847 (2005); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999).

barriers to injunctive relief that may make such remedies an inadequate substitute where damages remedies have been barred—others have done so before me, including some of the participants in this symposium, so I do not linger very long on this aspect of the problem. In practical terms, I provide some novel data that seriously calls into question the innovation theory of limiting damages relief. I examine a selection of federal appellate cases to determine whether legal issues that are not resolved in damages actions because of qualified immunity are later resolved in injunctive or other equitable-type cases (including criminal cases). I conclude from these data that the refusal to announce the law in qualified immunity cases as a practical matter ends the inquiry. The legal issues left undecided because of qualified immunity are almost never raised again in subsequent cases, thus undermining one of the legs upon which the Court has rested its default rule in favor of equitable relief in civil rights actions.

Finally, in Part V, I address the difficult question of why the Court has maintained its rhetorical commitment to equitable relief in civil rights actions, even though both doctrine and practice suggest it is illusory. I reflect on three different possibilities. First, the Court may have adopted the rhetorical stance because it is sensitive to the *Marbury v. Madison*[12] problem—the assumption that there must be a remedy where there is a right. On this account, the Court may be using the illusion of injunctive relief to maintain its legitimacy even as it cuts back on all types of remedies—both legal and equitable. On the other hand, the Court's embrace of injunctive relief may be heartfelt and power-consolidating in nature. This should be a somewhat familiar account because it is a common critique that the Court, in cases like *Hamdi v. Rumsfeld*,[13] and its progeny, has consolidated its power at the expense of the coordinate political branches. In this paper, I add another dimension to this critique and suggest that in some more recent cases (*Iqbal*[14] among them), the Court has consolidated power at the expense of intra-judicial actors—lower courts in some cases and juries in others. Third, I address the possibility that the Court, like the public interest community in general, has a particular image of civil rights litigation that is heavily informed by *Brown v. Board of Education*.[15] Civil rights cases challenging segregation were never about compensatory damages, although that option was not technically off the table. On this account, the Court, like the public interest community, has accepted a vision of public interest law in which damages litigation is seen as less productive, less virtuous, and less admirable than equitable cases.

On any of these accounts (and concededly these are not the only possible stories to tell), the illusory promise of equity is counterproductive to public rights litigation. But the Court's approach also suggests that important strategic consequences flow from decisions to seek different kinds of remedies. Professor Jeffries has posed the following question in different places: what would *Brown*

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[12] 5 U.S. 137 (1803).
[13] 542 U.S. 507 (2004).
[14] 129 S. Ct. 1937 (2009).
[15] 347 U.S. 483 (1954).

look like had the plaintiffs sought compensatory damages as well as forward-looking relief?[16] It might also do well to ask: what would *Iqbal* have looked like had the plaintiff been able to request injunctive relief? What would *Boumediene v. Bush*[17] or *Parents Involved in Community Schools v. Seattle School District*[18] have looked like had the plaintiffs sought damages in those cases? However, one formulates an answer to these questions, the way lawyers answer them appears to have consequences.

II. THE TRADITIONAL PREFERENCE FOR LEGAL REMEDIES

At common law, equity and law were sharply divided. Potential litigants had to choose which remedy to pursue, and that choice had stark procedural consequences. The law courts were characterized by rules of technical pleading, formulaic writs, and jury trials. Equity courts were more flexible in terms of both procedure and relief. The job of the equity court was to balance interests with the goal of doing justice in the case before it. The job of the law court was to narrow the parties' dispute down to either a single issue of fact, which would be tried to a jury, or to a judge-made determination of law on undisputed facts.

The Federal Rules of Civil Procedure and, to some extent, the state procedural Codes that preceded the Federal Rules, were meant to radically change this division.[19] Under the Federal Rules, the gap between law and equity was bridged. Parties could seek both equitable and legal remedies in federal court, subject to the same rules of procedure. Those rules were much more akin to the flexible procedures used by equity courts than the hyper-technical rules associated with law courts. Rather than force the parties to focus on a single factual or legal issue, the Rules contemplated liberal pleading and joinder rules, with the ultimate goal of a disposition of every case on its merits. Thus, as a procedural matter, the advent of the Federal Rules put equitable and legal remedies on an equal footing.

Despite this basic equality procedurally, a substantive division between law and equity persisted. Legal remedies were taken to be the presumption, and equitable remedies were considered to be the relief of last resort. This division remains to this day, with the grant of equity being a matter of discretion for a court to consider where damages remedies are inadequate. The Supreme Court recently described the discretionary standard as follows:

> A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships

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[16] Jeffries, *supra* note 11, at 100-02.

[17] Boumediene v. Bush, 128 S. Ct. 2229 (2008).

[18] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[19] For a discussion of the ways in which equity dominated the Federal Rules, see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 944-75 (1987).

> between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[20]

Each of these requirements can be notoriously difficult to meet, in no small part because of restrictions that the Supreme Court has imposed.[21] Standing requirements loom as the largest barrier to equitable relief, but these I will take up in Part IV. And the Court's interpretation of statutes with civil rights implications, such as the Equal Access to Justice Act, has also created barriers to injunctive relief. For example, in 2001 the Court rejected the "catalyst theory" of establishing an entitlement to attorneys' fees in civil rights cases.[22] Under the "catalyst theory," numerous lower courts had found fee-shifting appropriate where a plaintiff's lawsuit had resulted in a defendant altering its conduct even in the absence of court-ordered relief. The Court rejected this theory, holding that a plaintiff had to obtain court-ordered relief before being considered a "prevailing party" for the purpose of the Equal Access to Justice Act.[23] In so doing, the Court expressed skepticism of the role that civil rights plaintiffs can play in law reform through injunctive relief. The rule of *Buckhannon* itself decreases incentives for plaintiffs to bring injunctive relief cases, because of the risk that a defendant will unilaterally alter its conduct after years of litigation, leaving a plaintiff with substantial legal bills to pay. This term—in *Perdue v. Kenny A.*[24]—the Court appears poised to do away with enhanced fee awards in injunctive cases.

But certainly the most common barrier to injunctive relief is the presumptive availability of damages remedies.[25] Thus, for statutory claims, the Supreme Court presumes that Congress intends to provide the presumptive scope of remedies, which places damages remedies as the center of any statutory scheme.[26] And in general, even where a cause of action permits recourse to both

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[20] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

[21] The Court is not the only institutional actor to create barriers to injunctive relief. Congress has done so in particular contexts, with the Prison Litigation Reform Act one of the most notable examples. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of U.S.C.).

[22] Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001).

[23] *Id.* at 607-08.

[24] 532 F.3d 1209 (11th Cir. 2008), *cert. granted*, 129 S. Ct. 1907 (2009).

[25] *E.g.*, Moore v. Consol. Edison Co. of N.Y., Inc., 2005 WL 481571 (2d Cir. Mar. 1, 2005) (affirming district court decision to deny injunction in Title VII case where adequate damages remedy was available); U.S. Info. Agency v. Krc, 989 F.2d 1211, 1216 (D.C. Cir. 1993) (holding that injunctive relief is available against federal government solely because FTCA exception barred awarding damages); Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1080-89 (9th Cir. 1986) (injunctive relief unavailable in private civil RICO actions); *In re* Freedman Litig., 843 F.2d 821, 830 (5th Cir. 1988) (accord).

[26] Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 66 (1992) (analyzing Title IX).

damages and injunctions, a court will often deny requests for injunction if damages remedies are available.[27]

Thus, the traditional narrative of the division between law and equity is one in which legal remedies are presumptively available, with equity doing work only where the legal default remedy fails. As discussed in the next section, there are strands of civil rights jurisprudence that appear to reverse that presumption.

III. THE CURRENT DOCTRINAL AND RHETORICAL PREFERENCE FOR INJUNCTIONS IN CIVIL RIGHTS LITIGATION

Civil rights litigation encompasses a variety of claims, which can be classified along various vectors. There are claims which look to statutes for liability, and others which rely on the constitution. Some claims are brought by individuals and others by classes. There are claims brought by employees, prisoners, arrestees, and so on. In terms of available remedies, in all of these cases, both equitable and legal remedies are available as forms of relief, at least in theory. However, in contrast to the traditional story told in Part II, I will develop here the argument that the Court has articulated a preference, at least rhetorically, for injunctive relief in civil rights cases. Moreover, this preference has been amplified by some scholarly commentary on the distinction between equitable and legal remedies in civil rights law.

I want to address the Supreme Court's jurisprudence from two different perspectives with respect to the line between equity and law. First, there are cases in the qualified immunity, *Bivens*, and sovereign immunity contexts in which the Court specifically addresses the distinction between these two types of remedies. Second, there are cases in which the Court's resolution of substantive civil rights law inferentially suggests a division between remedies. Both of these sets of cases, I argue, reveal a rhetorical preference for injunctive relief that sometimes manifests itself in substantive decisions. Finally, in this section, I review the scholarship that accepts and in some instances embraces the Court's preferences for injunctive relief.

The qualified immunity context is perhaps the best example of the Court's explicit distinction between equity and law. Qualified immunity protects governmental officials from damages relief only, in those cases where a governmental official acted reasonably in light of clearly established law. Thus, in cases in which both damages and injunctive relief are sought by a plaintiff, there will be circumstances in which legal remedies will be barred but equitable remedies will be made available.[28] Key to the qualified immunity inquiry is the sequence with which courts decide the questions at stake in qualified immunity, and the Court's treatment of this question is the first example of what I am calling a preference for equity.

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[27] *See, e.g.*, Hetreed v. Allstate Ins. Co., 135 F.3d 1155, 1158 (7th Cir. 1998); Foy v. Univ. of Tex., 1998 WL 327190, at *1 (5th Cir. May 27, 1998); Carlos v. Santos, 123 F.3d 61, 67 (2d Cir. 1997); Dupont v. Dubois, 1996 WL 649340, at *4 (1st Cir. Nov. 6, 1996).

[28] *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 432 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part).

We need to do a little bit of backtracking to see how this plays out. In 2001, in *Saucier v. Katz*, the Court announced what commentators termed a "rigid order of battle" for resolving qualified immunity questions: first, lower courts were to decide whether the plaintiff has made allegations which state a violation of the Constitution; and second, if the plaintiff has made sufficient allegations, courts were instructed to decide whether the law was clearly established at the time of the violation.[29]

Saucier was the subject of increasing criticism, because of the perception that it led courts to issue advisory opinions.[30] The theory went like this: if a court decided that a plaintiff had alleged a violation of the Constitution, but that the law at the time of the violation was not clearly established, then that first holding would be advisory. Although there are plenty of adequate responses to this perceived concern, lower courts, commentators, and multiple Justices had grown increasingly uncomfortable with the two-step *Saucier* inquiry.[31] Therefore, in *Pearson v. Callahan*,[32] announced last Term, the Court revisited this aspect of *Saucier*.

Given the trenchant criticism of *Saucier*, it was no surprise that the *Pearson* Court decided the *Saucier* inquiry was no longer mandatory, and that lower courts could use their discretion when deciding which issue would be decided first.[33] The Court, however, still had to address an important criticism of moving away from *Saucier*: the worry that new law would never be established if lower courts first considered whether the prior law was clearly established. On this argument, because it is easier for courts to decide the "clearly established" law question first, there was great potential, in those areas where the law had not been clearly established, for the law never to establish a clear footing without some requirement that courts actually be required to say what the law is now, at the time of the court filing.

The Court's response to this concern is telling. According to the Court, worries about undermining the law-giving function of the courts are overblown, because in cases in which qualified immunity is not in play—injunctions, criminal cases, etc.—the courts will still be able to pronounce on the meaning of the law.[34] Thus, the Court offered up the availability of equitable relief as a

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[29] Saucier v. Katz, 533 U.S. 194, 200-01 (2001).

[30] As the Supreme Court noted, this criticism came from lower courts who had to apply *Saucier* as well as members of the Court. Pearson v. Callahan, 129 S. Ct. 808, 817-18 (2009) (citing cases).

[31] *See, e.g.*, *Morse*, 551 U.S. at 432 (2007) (Breyer, J., concurring in judgment in part and dissenting in part) ("I would end the failed *Saucier* experiment now"); Purtell v. Mason, 527 F.3d 615, 622 (7th Cir. 2008) (criticizing *Saucier*'s "rigid order of battle"); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275, 1277 (2006) (criticizing *Saucier* rule).

[32] 129 S. Ct. at 808.

[33] *Id.* at 818.

[34] The Court explained that

> the development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity. Most of the constitutional issues

comforting backstop for the judiciary to maintain its role in declaring the law. Only a decade prior to *Pearson*, the Court had come to a different conclusion regarding the relationship between law-giving and injunctive relief, recognizing that injunctive avenues are not "necessarily . . . open" when one closes the door to damages.[35] *Pearson*, then, demonstrates a Court with faith that equity will suffice to preserve the federal courts' law-giving power with respect to federal constitutional issues.

This dichotomy is present not only in qualified immunity cases, it also drives some decisions in the *Bivens* context, where the Court has declined to permit *Bivens* actions where it determined that a remedy other than damages is available to the plaintiff. In the recent case of *Wilkie v. Robbins*, the Court emphasized the extent to which the plaintiff there allegedly had avenues for relief other than damages actions as a reason to decline to entertain a damages action under the *Bivens* line of cases.[36] According to the *Robbins* Court, the plaintiff had the opportunity to contest administrative charges and criminal charges and vindicate his rights without recourse to a damages action, even though the Court recognized that certain of his complaints might not be cognizable in these alternative fora.[37] "In sum," according to the Court, "Robbins has an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints."[38] In this light, the Court viewed a damages remedy as a "cure [that] would be worse than the disease."[39]

That the availability of injunctive-type relief in *Bivens* actions would be highlighted here is no surprise. The Court has a longstanding policy of refusing to extend *Bivens*' damages actions where there are alternative, equally effective, means of vindicating rights. Thus, in *Bush v. Lucas*, the Court held that no damages were available for First Amendment violations because of an

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that are presented in § 1983 damages actions and *Bivens* cases also arise in cases in which that defense is not available, such as criminal cases and § 1983 cases against a municipality, as well as § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages.

Id. at 821-22.

[35] *See* County of Sacramento v. Lewis, 523 U.S. 833, 842 n.5 (1998) (criticizing Justice Stevens' dissent and adopting view that "if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals."). In *Lewis*, the Court held *contra Pearson* that "[a]n immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional." *Id.* And reliance on injunctions or criminal cases was thought insufficient in *Lewis* because "these avenues would not necessarily be open, and therefore the better approach is to determine the right before determining whether it was previously established with clarity." *Id.*

[36] Wilkie v. Robbins, 551 U.S. 537, 550-55 (2007).

[37] *Id.* at 551-52 (describing availability of administrative and other relief available to Robbins, but recognizing that state court might not have offered a remedy against federal officials for malicious prosecution).

[38] *Id.* at 553.

[39] *Id.* at 561.

administrative scheme that permitted employees to bring First Amendment claims as part of a challenge to arbitrary agency action.[40]

Finally, in sovereign immunity cases, the Court has distinguished between injunctive and damages claims to highlight the utility and availability of equitable, instead of legal relief. In numerous cases, the Court has relied upon the availability of injunctive relief (as well as the prospect of damages claims brought by the United States against State entities) to ameliorate concern about the lack of enforcement against government entities of federal statutory standards.[41]

As Pamela Karlan has noted, in some sense the Eleventh Amendment immunity recognized by the Court has the unintended effect of disrupting federalism by channeling injunctive relief claims into § 1983 claims against individual officers.[42] Indeed, in some sense the unavailability of damages relief under the Eleventh Amendment heightens the need for injunctive relief because it creates an irreparable injury to the plaintiff.[43] Thus, the immunity granted by the Eleventh Amendment strengthens the argument for granting injunctive relief.[44] The background assumption, of course, is that the availability of injunctive relief is normally available through the *Ex parte Young* fiction.[45] Of course, the irony, as Karlan has observed, is that injunctions are functionally more intrusive than damages remedies because they prevent the state from deciding to violate rights in exchange for paying damages, state officers risk contempt sanctions for violating injunctive orders, and because states are required to provide a "fuller remedy" through injunctive relief.[46]

In the categories of cases described above, the Court is holding out the promise of equitable relief as a comfort when it shuts the door to damages relief. There are examples of the Court making a similar judgment through the

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[40] Bush v. Lucas, 462 U.S. 367 (1983).

[41] Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 373-74 n.9 (2001) ("Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young,* 209 U.S. 123 (1908). In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress."); *cf.* Alden v. Maine, 527 U.S. 706, 757-58 (1999) (referring to availability of injunctive and declaratory relief against state officers and ability to proceed against municipal or local entities as an "important limit to the principal of sovereign immunity").

[42] Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1313-14 (2001) ("My basic premise is that there is a paradox at the heart of the Court's Eleventh Amendment jurisprudence: The very mechanism by which the Court seeks to enhance federalism and state autonomy may in fact channel litigation into a form that imposes greater constraints on state action.").

[43] *Id.* at 1326.

[44] *Id.* at 1328-29.

[45] *Id.* at 1323.

[46] *Id.* at 1329.

application of substantive law as well. For instance, take the Court's treatment of national security concerns after September 11. In those cases, which have only sought equitable remedies—the Guantanamo line of cases—the Court has not hesitated to make clear that Article III courts must remain open to provide remedies even when the political branches have explicitly attempted to preclude judicial review.[47] By contrast, in *Iqbal*, a case that only sought damages relief, the Court invoked national security concerns while denying relief.[48] Although there are other differences between *Iqbal* and the Guantanamo cases, the difference in the weight afforded national security concerns is likely related in part to the remedial element—the difference between providing equitable relief through the courts versus damages relief against individual defendants.

One can make a similar comparison between *Iqbal* and the school integration and affirmative action cases. Like *Iqbal*, the school cases involved allegations of race-based governmental decision-making, but unlike *Iqbal* the Court has never focused on discriminatory animus in the school cases. In the school integration cases, the only thing that has mattered for equal protection purposes is that the government has categorized people according to their race—that is the injury. In *Iqbal*, the Court suggests that categorization alone would not be enough to state an equal protection claim and that instead some animus is necessary.[49] There is a plausible argument to be made that part of the explanation for the differential treatment is the difference in the remedy sought in these cases.

This is not to say that the Court has uniformly adopted a jurisprudence that favors equity. In *Horne v. Flores*, the Court imposed new barriers to systemic reform cases.[50] And in some damages actions, such as *Johnson v. California*[51] and *Gratz v. Bollinger*[52], the Court adopted a theory of equal protection that is more in line with *PICS*.[53] But in both of those cases, although damages were one of the remedies sought, the moving force was the request for an injunction.[54]

Not only has the Court articulated an emerging preference for equitable relief in civil rights cases, but within the academy there is a similar view that injunctive relief, though not preferred, can leave a place at the table for the law-giving voice of federal courts. Commentators cite injunctions as a way for plaintiffs to validate rights without having to address qualified immunity.[55]

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[47] Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[48] Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

[49] *Id.* at 1948.

[50] Horne v. Flores, 129 S. Ct. 2579 (2009).

[51] 545 U.S. 162 (2005).

[52] 539 U.S. 244 (2003).

[53] 551 U.S. 701 (2007).

[54] Indeed, on remand in both cases, the plaintiff settled for injunctive relief only, and received no compensatory damages. *See Gratz v. Bollinger* Case Concludes, UNIV. OF MICH. NEWS SERVICE (Jan. 31, 2007), *available at* http://www.ns.umich.edu/htdocs/releases/story.php?id=3144.

[55] William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1157 (1996) (citing injunctions as a way for a plaintiff to validate his or her rights without having to face an immunity

Some have argued that damages are actually less legitimate and necessary than injunctions, at least when "courts are acting at the outer bounds of their institutional competence."[56] From Fallon and Meltzer's perspective, questions about the availability of constitutional remedies arise "only in relatively narrow categories of cases—notably but not exclusively including those involving new law and those in which money damages are sought."[57] Where remedies are thought to be inappropriate, it is usually when damages are sought against individual officers for violations of law that are newly declared unlawful.[58] In contrasting harmless error with doctrines like qualified immunity, Sam Kamin suggests that at least when qualified immunity is involved, government officials will be under pressure to comply with the law in the future.[59] Other commentators have worried over the prospect of "unnecessary constitutional rulings" in damages cases and their impact on the relative roles of coordinate branches in constitutional interpretation.[60] And Lawrence Rosenthal has argued that civil damages litigation does little to uncover and expose governmental misconduct.[61]

John Jeffries has put forth what is perhaps the most provocative view of the relationship between law and equity.[62] As Jeffries has argued, "[t]he distance between the ideal and the real means that there will always be some shortfall between the aspirations we call rights and the mechanisms we call remedies."[63] Jeffries identifies the largest gap—in cases involving monetary damages—as a consequence of the fault-based doctrine of qualified immunity: "As a result, many victims of constitutional violations get nothing, and many others get redress that is less than complete."[64] Jeffries squeezes lemonade from these lemons, however, by finding an innovative virtue in qualified immunity—by permitting courts to innovate by finding a violation of a constitutional right without providing a remedy, courts are permitted to be more forward looking and reform-minded. On this account, "[t]he result is a rolling redistribution of wealth from older to younger, as the societal investment in constitutional law is

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defense); *see also* Paul M. Secunda, *Whither the Pickering Rights of Federal Employees?* 79 U. COLO. L. REV. 1101, 1113 (2008) ("Even if qualified immunity is available, however, a § 1983 plaintiff can still receive injunctive relief against the targeted state or local official.").

[56] Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 958 n.180 (1976) (using as example of where municipal immunity would be appropriate the prospect of a class action suit for damages for the reduced earning capacity caused by segregation).

[57] Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1786 (1991).

[58] *Id.* at 1791-93.

[59] Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 71-72 (2002).

[60] Healy, *supra* note 11, at 854 (describing unnecessary constitutional rulings as "part of a larger trend in which the Court has gradually squeezed the other branches of government out of the business of constitutional interpretation and has come to view its own role primarily as the articulation of constitutional principles rather than the arbitration of ordinary disputes.").

[61] Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 828-29 (2007).

[62] Jeffries, *supra* note 11.

[63] *Id.* at 87.

[64] *Id.* at 89.

channeled toward future progress and away from backward-looking relief."[65] According to Jeffries, this is reflected best in the power of injunctive relief to "walk through th[e] door" left open by the qualified immunity doctrine, "thereby implementing the bias in favor of the future that qualified immunity invites and allows."[66]

Indeed, Jeffries takes an even more aggressive stance in considering the desegregation decisions. Jeffries suggests that, had the Court's decision had implications in terms of damages—had its decision "come with a huge pricetag," it might have delayed the decision even more than it was, stiffened opposition in the South, etc.[67] As for *Brown*, Jeffries seems amenable to the view that the decision would ultimately have been the same, if somewhat delayed. But as to later decisions, such as *Green v. County School Board*,[68] a decision that Derrick Bell likens to be as important as *Brown*, Jeffries finds it "entirely plausible that *Green* might have come out differently under a regime of strict liability in money damages."[69] In general, Jeffries links the Court's "expansive approach" to segregation in the North to the "decoupling of constitutional violations and money damages."[70] And Jeffries, like most scholars, recognizes the distinction between the fault-based liability of qualified immunity and the strict liability in injunctions.[71] Thus, Jeffries opines that the rights-remedy gap is complicated in this way: in damages cases, the remedy exceeds the right because of qualified immunity; in injunctive cases, the remedy exceeds the right because courts have the power to "prevent constitutional violations by regulating antecedent structures and practices that create the risk of such violations."[72]

Jeffries expanded this argument in a subsequent essay, where he proposed that the availability of damages should turn, in part, on the availability of alternative remedies such as injunctive relief.[73] In so doing, he returned to his overall theme—that the Court's decisions, like *Paul v. Davis*,[74] are influenced in part by the scope of the remedy contemplated at the time.[75] Thus, Jeffries argued, via the desegregation cases, that the Justices in *Paul v. Davis* might have found the existence of a constitutional right had the remedy sought not been damages.[76] Jeffries raised the same question with respect to *County of*

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[65] *Id.* at 90.

[66] *Id.* at 113.

[67] *Id.* at 101 ("Of course, assessing how strict damages liability would have changed *Brown* is ultimately a matter of conjecture, but it seems likely that the prospect of money damages would have had some impact and that it would not have been good.").

[68] 391 U.S. 430 (1968).

[69] Jeffries, *supra* note 11, at 103.

[70] *Id.* at 103.

[71] *Id.* at 110.

[72] *Id.* at 113.

[73] John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 262 (2000) [hereinafter Jeffries, *Disaggregating Constitutional Torts*].

[74] 424 U.S. 693 (1976).

[75] Jeffries, *Disaggregating Constitutional Torts*, *supra* note 73, at 276-77.

[76] *Id.*

Sacramento v. Lewis.[77] Although he ultimately recognizes that § 1983 does not permit such balancing, he nonetheless proposes that, rather than allow the prospect of monetary damages to undermine a particular substantive right, it would be better to compare the prospect of different remedies and choose a remedy rather than abandon the right.[78] Ironically, he sees qualified immunity as permitting this kind of "decoupling" because courts can reject damages liability but still approve of injunctive relief.[79]

IV. THE ANOMALY OF PREFERRING INJUNCTIONS FOR LAW-GIVING IN CIVIL RIGHTS CASES

The emerging rhetorical preference for injunctive relief is anomalous for several reasons. First, as detailed in Part II, the history of modern procedure and the history of remedies suggest the reverse presumption. Second, and more importantly, it is hard to accept doctrinally that, where damages remedies are available, there is the real possibility of obtaining injunctive relief, given the substantial barriers in terms of standing, mootness, and other doctrines. Finally, as an empirical matter, there is little evidence that limiting a court's ability to award relief actually leads to innovation in the way suggested by scholars like Jeffries and cases like *Pearson*[80].

As discussed in Part II, the history of procedure and remedies suggests that, rather than a regime in which injunctions are preferred to damages remedies, the reverse should be true. The Federal Rules of Civil Procedure were adopted in large part because courts had imposed difficult barriers to obtaining legal relief. The drafters hoped that by creating a single set of procedural rules for both equitable and legal cases, the ability to obtain legal relief would be amplified. And although the Federal Rules joined equity with law in one procedural system, remedial doctrine remained firmly committed to providing damages remedies as a presumptive right, and only turning to equity when damages were insufficient to enforce the legal rights at stake. Thus, the result at least as a matter of doctrine is a regime that appears to favor legal remedies over equitable ones.

Moreover, it is no secret that the barriers to obtaining injunctive relief are not simply theoretical, but have been enforced in practice as well. Several substantial barriers loom for any litigant seeking forward-looking relief. Most prominent is standing doctrine, which under *City of Los Angeles v. Lyons*[81] requires a plaintiff injured by past practices to show a likelihood of future injury before permitting the awarding of equitable relief.[82] The Court's decision in *Lyons* is one of the most difficult injunctive cases for plaintiffs to overcome,

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[77] 523 U.S. 833 (1998); Jeffries, *Disaggregating Constitutional Torts*, *supra* note 73, at 278 ("*Lewis* may be another example of the prospect of monetary damages inducing a restrictive definition of the underlying right.").

[78] Jeffries, *Disaggregating Constitutional Torts*, *supra* note 73, at 283-84.

[79] *Id.* at 289.

[80] Pearson v. Callahan, 129 S. Ct. 808 (2009).

[81] 461 U.S. 95 (1983).

[82] *Id.* at 102.

because it has raised such difficult standards for proving standing in civil rights cases.[83] Commentators have noted that Jeffries' proposal is "critically subverte[ed]" by *Lyons* because it erects such a barrier to injunctive relief.[84]

But standing doctrine is not the only doctrinal barrier to injunctive relief. Mootness is a barrier to many kinds of injunctive relief. In prisoner cases involving freedom of religion for instance, injunctive relief often was barred because the individual prisoner had been transferred and damages relief was barred because the relevant law was not clearly established at the relevant time.[85] The Court also has limited access to the courts for civil rights plaintiffs under broad abstention doctrines.[86] The Court also has made injunctive relief less attractive by limiting the ability of attorneys to collect fees through federal fee-shifting statutes.[87] And there are specific instances where injunctive relief will not be available under § 1983, even for constitutional violations, such as when the relief sought would "necessarily imply" the invalidity either of a conviction or the length of a sentence, without favorable termination of a collateral challenge under state or federal habeas procedures.[88] Such procedures are themselves, of course, notoriously difficult to negotiate, making any determination of such issues on the merits that much less likely.

None of this has gone unnoticed by commentators.[89] Rudovsky criticizes those who, like Jeffries, accept that remedies are substitutable, observing that

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[83] David C. Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1237. There is no need to recount the numerous cases in which *Lyons* has been applied to bar injunctive relief. *See, e.g.*, Geiger v. Jowers, 404 F.3d 371, 375 (5th Cir. 2005). It is not, however, an impossible barrier to overcome, *see* Fla. State Conference of N.A.A.C.P. v. Browning, 522 F.3d 1153, 1163-64 (11th Cir. 2008) (finding standing where "the injuries are foreseeable and the expected results of unconscious and largely unavoidable human errors"), and even the Supreme Court has minimized the reach of *Lyons* in recent cases involving "reverse-discrimination" equal protection claims. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 718-19 (2007) ("The fact that it is possible that children of group members will not be denied admission to a school based on their race-because they choose an undersubscribed school or an oversubscribed school in which their race is an advantage-does not eliminate the injury claimed."); Rudovsky, *supra*, at 1237-38 (noting that standing doctrine appeared to be liberalized in *Gratz*).

[84] Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 837 (1992).

[85] Eric Alan Shumsky, *The Religious Freedom Restoration Act: Postmortem of a Failed Statute*, 102 W. VA. L. REV. 81, 100 n.124 (1999) (citing Craddick v. Duckworth, 113 F.3d 83, 85 (7th Cir. 1997); Show v. Patterson, 955 F. Supp. 182, 194 (S.D.N.Y. 1997); Owen v. Horsely, No. C-95-4516 EFL, 1996 WL 478960, at *2-4 (N.D. Cal. Aug. 9, 1996); Woods v. Evatt, 876 F. Supp. 756, 771-72 (D.S.C. 1995), *aff'd*, 68 F.3d 463 (4th Cir. 1995)).

[86] Rudovsky, *supra* note 83, at 1239 (referring to abstention when there are pending state criminal proceedings, civil enforcement proceedings, and administrative proceedings).

[87] *Id.* at 1240.

[88] Nelson v. Campbell, 541 U.S. 637, 646-47 (2004).

[89] James Liebman and William Ryan reason that the Court has accepted the view that even if qualified immunity bars one kind of damages, "a declaration or injunction serves as well as damages—and qualified immunity bars neither of the former." James S. Liebman & William F.

often the position that one remedy can substitute for another "has the appearance of a 'shell game'" because of the limitations on the alternative forms of relief.[90] For instance, Rudovsky pays great attention to the limited nature of injunctive relief, because of both judicial precedent and congressional actions.[91] As Rudovsky argued well before the *Saucier-Pearson* debate, relying on doctrine to be developed through injunctive claims, criminal cases, or cases against municipalities is, for many reasons unreliable.[92]

This review of doctrine calls into question the Court's suggestion in *Pearson* and Jeffries' and other scholars' views that injunctive and other equitable relief can operate as a default mode of law-giving in cases in which damage relief is unavailable. But there are empirical reasons to question this assumption as well. I take the argument in *Pearson* (and by Jeffries) to be that, when courts are less "worried" about exposing an officer to personal liability, they are more likely to entertain claims for injunctive relief. So I examined cases from circuits that applied *Pearson*'s ordering before *Saucier*—that is, cases in which the law of the circuit was to decide the "clearly established" law question before the question of whether a constitutional violation had been alleged at all. If *Pearson*'s remedial judgment is correct, one would expect that, where a particular right was found not to be clearly established in a damages-type case, courts would have a subsequent opportunity to reevaluate whether there nonetheless was a violation of the law in a context where the personal liability of an officer was not at stake (*i.e.*, in criminal, habeas, or cases seeking injunctive remedies). I focused on cases in which the court determined that particular law was not clearly established and then asked whether that law ever became established in some other way (through an injunctive case, criminal case, etc.). I

Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 858 (1998). Even so, however, Liebman and Ryan recognize that "[t]his is not the whole answer" because the standing and substantive standards for prospective relief "might possibly combine with qualified immunity to preclude relief for section 1983 plaintiffs injured by official action in violation of then-existing federal law." *Id.* at 858-59. Of course, Liebman and Ryan still see both qualified immunity and Eleventh Amendment immunity as limiting "available relief in a similarly weak manner—forbidding one set of remedies (mainly damages) but allowing others (mainly injunctions)." *Id.* at 858 n.776.

[90] Rudovsky, *supra* note 83, at 1212-13.

[91] *Id.* at 1235.

[92] David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 55-56 (1989) (recounting procedural obstacles to addressing substantive law in each of those contexts). For instance, relying on criminal law to develop Fourth Amendment doctrine is questionable because of the availability of good faith exceptions. Herring v. United States, 129 S. Ct. 695 (2009); United States v. Leon, 468 U.S. 897, 908-13 (1984). Nor is habeas much of an option. Federal courts have simply become less active in the law-giving business in habeas cases, because of both constitutional nonretroactivity doctrine, Teague v. Lane, 489 U.S. 288, 315 (1989), and statutory restrictions such as AEDPA. Healy, *supra* note 11, at 884-85. Moreover some kinds of claims, like ones based on the Fourth Amendment, are not even cognizable in habeas. Municipal liability is not barred by good faith exceptions like qualified immunity, but the standard for proving municipal liability is high enough that many violations will not emerge through that lens. City of Canton v. Harris, 489 U.S. 378, 385-86 (1989).

found no evidence to suggest that the availability of qualified immunity in those cases was somehow liberating for circuit courts faced with injunctive claims, or claims in the habeas or criminal context.

I also examined cases involving judicial immunity in the period between 1984 and 1996, when judges were open to suit for injunctive and declaratory relief; after 1996, judges were only open to suit for declaratory relief. One plausible but not necessary reading of Jeffries and *Pearson* is that, as less relief is available, more law should be made or announced. No evidence exists to support this proposition either.

V. UNDERSTANDING THE PREFERENCE FOR INJUNCTIONS

So what explains the Court's loyalty to injunctions in civil rights cases? One possibility is that the Court is self-conscious, in those cases where a damages remedy is rejected, about leaving the appearance that no remedy will be available. This is the hand of *Marbury* reaching into the present—the sense from the Court that it is supposed to be available to speak to the law. On this account, the Court is simply using the illusion of injunctive relief to maintain its legitimacy even as it cuts back on all remedies—both legal and equitable.

But I want to suggest two other explanations. The first will be familiar, at least to a degree. In recent civil rights cases in which injunctive relief is preferred (the Guantanamo cases, *Pearson*, etc.), something else is going on—the Court is consolidating its power. And moving civil rights litigation into the equitable camp is one way of doing so, because equity is controlled by judges. Now I say this critique should be somewhat familiar—it often comes from the right in response to cases like the Guantanamo cases. The critique is that the Court is consolidating its power at the expense of the coordinate branches. But I want to add another dimension to the critique—the recent procedural cases (*Iqbal*, *Pearson*, *Twombly*[93])—each involve the Court consolidating intrabranch power. In *Iqbal*, the Court is also taking power away from the jury (and lower courts, to some extent). It is doing so by creating an additional barrier to getting to a jury, in a way that arguably treads on Seventh Amendment rights. And both *Twombly* and *Iqbal* represent the Court's profound mistrust of lower courts' ability to use their case management power to balance concerns like qualified immunity and abusive discovery. Thus, these cases represent not simply a shift of power from coordinate branches to the judiciary, but also a shift in power within the judiciary.

The second explanation is that the Court, like the public interest community in general, has a particular image of civil rights litigation that is, I think, heavily informed by *Brown v. Board of Education*.[94] At least as far back as 1954, damages actions for segregation were contemplated and even suggested by commentators, who made the following observations:

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[93] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
[94] 347 U.S. 483 (1954).

> The right to attend the proper school may be valuable to the individual pupil, and perhaps also to his parents. Although it is a kind of right not easily evaluated in pecuniary terms, some measurement is possible, as demonstrated by the primary election cases in which the Supreme Court sustained actions for damages brought by Negroes against election officials who, under local white primary laws, had denied the plaintiffs their constitutional right to vote. In public school situations such damage suits would presumably be brought against school principals, superintendents, boards of education, and other officials administering the allegedly unconstitutional program. Substantial money damage claims against recalcitrant school officials might be more effective than most of the other available sanctions, though their effectiveness may be somewhat lessened by the fact that such suits are ordinarily triable before local juries. The latter may be unwilling to award substantial damages against defendants who have merely abetted the status quo in local racial customs.[95]

A Note published in the Yale Law Journal in 1956 also suggested in passing that § 1983 could be used to obtain damages for school children "deprived of their desegregation rights."[96] And Boris Bittker, in a 1973 book, made the case for seeking reparations based on the damages caused by segregation.[97] Some have recently revisited Bittker's suggestion, albeit with modifications.[98] Derrick Bell, for instance, has argued that "compensatory education" should be used to remedy the harm of denial of equal educational opportunity, which he views to be the distinct violation recognized in *Brown*, not segregation.[99] But both contemporaneously and now, there is little evidence, however, that Bittker's suggestion was ever taken seriously by advocates or scholars. Instead, his argument prompted observers, according to those close to Bittker, to "shake their heads in wonder" even as they admired his creativity.[100] Recent commentators

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[95] Robert A. Leflar & Wylie H. Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 425-26 (1954).

[96] Note, *Legal Sanctions to Enforce Desegregation in the Public Schools: The Contempt Power and the Civil Rights Acts*, 65 YALE L.J. 630, 652 (1956).

[97] BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS (1973).

[98] Harold McDougall, for instance, has suggested that claimants for damages from segregation should be limited to those "living persons who attended de jure segregated schools that were unequal to the White schools, or if they are deceased, their living descendants of school age." Harold A. McDougall, Brown *at Sixty: The Case for Black Reparations*, 47 HOW. L.J. 863, 896-97 (2004).

[99] Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976). Many commentators and courts take issue with Bell's prioritizing of equal opportunity over integration, but some courts have at least implicitly accepted his framing. *See, e.g.*, Note, *Eliminating the Continuing Effects of the Violation: Compensatory Education as a Remedy for Unlawful School Segregation*, 97 YALE L.J. 1173, 1192 (1988) (citing cases from Texas in which remedial education rather than busing was ordered by court to remedy segregation).

[100] Mark Tushnet, *The Utopian Technician*, 93 YALE L.J. 208, 209 (1983).

suggest that he failed to take account of the substantial barriers to successfully litigating damages actions through desegregation cases.[101]

The Court's desegregation cases, then, were essentially nonpunitive in nature, and indeed relied on the presumed good faith of school boards by leaving them with the first level decisions of how to comply with the *Brown* mandate.[102] Scholars have assumed that the Court declined to adopt a compensatory damages approach for the same reasons that it was averse to imposing punitive damages: because of the difficulty of obtaining jury verdicts, especially where de jure segregation was widespread, the Court's historic approval of segregation and the difficulty with implementing *Brown*'s equitable holding in addition to imposing compensatory and punitive remedies.[103] In addition, compensatory damages pose the difficult question of measuring the harm caused by policies such as segregation.[104] James Liebman has argued that the failure to use compensatory remedies in desegregation cases is consistent with the view that the injunctions served "a public-, not a private-law function—a function that accordingly is not necessarily trumped by the remedial preferences of individual plaintiffs."[105] This may mean that the desegregation remedy is "undercorrective" because it fails to account for the widespread consequences of segregation,[106] but the possibility of damages remedies was not thought to be a viable alternative.

In short, there may be many reasons that the Court seems to have adopted a preference for injunctive over damages relief in civil rights cases. On any of the accounts I have offered here, the illusory promise of equity does damage to public rights litigation. And on any of these accounts, public rights litigants should consider the strategic consequences of seeking different kinds of remedies.

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[101] Rhonda V. Magee, Note, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 903 (1993) ("Bittker's analysis falls short of affirmatively countering doctrinal roadblocks such as sovereign immunity, the Eleventh Amendment, and limits on justiciability such as standing, ripeness, and statutes of limitations.").

[102] Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1045 n.16 (1984).

[103] *Id.* at 1045-47 & nn.17-20.

[104] *Id.* at 1047 n. 20.

[105] James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1509 (1990).

[106] *Id.* at 1513.