

# The System of Equitable Remedies

Samuel L. Bray



## ABSTRACT

The conventional wisdom is that the distinction between legal and equitable remedies is outmoded and serves no purpose. This Article challenges that view. It argues that the equitable remedies and remedy-related doctrines that presently exist in American law can be understood as a system. The components of the system fall into three categories: (1) the equitable remedies themselves, (2) equitable managerial devices, and (3) equitable constraints. These components interact subtly and pervasively. Together, they make the equitable remedies apt for compelling action (or inaction), especially when the action may be continuing or iterative and is not easily measured. The system of equitable remedies is a useful and integrated whole.

This argument offers some support for an emerging body of Supreme Court cases that have sharply distinguished between legal and equitable remedies—cases such as *Great-West Life & Annuity Insurance Co. v. Knudson*, *eBay v. MercExchange*, and *Petrella v. MGM*. Moreover, this argument helps explain why there has been so little merger between law and equity in remedies, even as merger has occurred in other aspects of American law. Finally, this argument offers a new perspective on the requirement that a plaintiff, in order to receive an equitable remedy, must show that legal remedies are inadequate. That requirement helps maintain the system of equitable remedies.

## AUTHOR

Assistant Professor of Law, UCLA School of Law. Thanks are due to Tendayi Achiume, Will Baude, Nathan Chapman, Michael Coenen, Beth Colgan, Ingrid Eagly, John Golden, Patrick Goodman, Allison Hoffman, Aziz Huq, Michael Kenneally, Andrew Kull, Mark Leeming, Doug Lichtman, William McGovern, Colleen Murphy, Jason Oh, Alex Potapov, Richard Re, Doug Rendleman, Margo Schlanger, Joanna Schwartz, Emily Sherwin, Seana Shiffirin, Clyde Spillenger, James Stern, Becca Stone, Alex Stremitzer, and Alex Wang; to the participants in the Columbia Legal Theory Workshop, the law faculty workshops at the University of Pennsylvania and Pepperdine University, and the UCLA Junior Faculty Workshop; and to all the readers of another paper on equity whose comments have also shaped this one. I am also grateful for the research assistance of Lucas Grunbaum.

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## INTRODUCTION

Equity skepticism is dominant. Many eminent English and American scholars of the last two and a half centuries 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>1</sup> Something important follows from that contention: If equity is not distinctive, there is no reason for it to remain distinct.<sup>2</sup> This is the reigning view in the American legal academy,<sup>3</sup> and the strength of the American consensus has been recognized by scholars outside the United States.<sup>4</sup>

But equity skepticism has not shaped the recent decisions about remedies by the U.S. Supreme Court. In cases from areas as diverse as copyright, employee benefits, 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 not offered any additional justification.<sup>6</sup>

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1. These include William Blackstone, Frederic Maitland, Zechariah Chafee, Peter Birks, and Douglas Laycock. *E.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 429–42 (1768).
  2. See Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBS. 53, 53–54 (1993) (“Except 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.”).
  3. *E.g.*, *id.* at 53; 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); see also James Steven Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution and Unjust Enrichment*, 42 WAKE FOREST L. REV. 55, 56 (2007) (calling distinctions between legal and equitable restitution “little short of gibberish”). Contrary arguments tend to be either supportive of a “functional equity” that is not quite coextensive with equity as a historical and doctrinal category, for example, Henry E. Smith, *Property, Equity, and the Rule of Law*, in PRIVATE LAW AND THE RULE OF LAW 224 (Lisa M. Austin & Dennis Klimchuk eds., 2014); or narrow in scope, for example, Edward Yorio, *A Defense of Equitable Defenses*, 51 OHIO ST. L.J. 1201 (1990).
  4. Keith Mason, *The Distinctiveness of Law and Equity and the Taxonomy of the Constructive Trust*, in THE RESTATEMENT THIRD: RESTITUTION & UNJUST ENRICHMENT: CRITICAL AND COMPARATIVE ESSAYS 185, 205 (Charles Mitchell & William Swadling eds., 2013).
  5. *E.g.*, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) (copyright); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010) (environmental law); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006) (patent); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (employee benefits).
  6. See generally Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997 (2015).

This Article argues that the distinction between legal and equitable remedies is more rational than American scholars have thought. 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>7</sup> One exception is scholarship on the contempt power, with some scholars suggesting that the potential misuse of contempt is a reason for various doctrines that limit equitable relief.<sup>8</sup> Another exception is Henry Smith's recent work on equity, which shows how various equitable doctrines constrain opportunism.<sup>9</sup>

The argument here goes further. The surviving equitable remedies and related doctrines work together as a system.<sup>10</sup> That system has a number of interlocking components. Together these components are apt for the circumstances in which a remedy needs to compel action (or inaction), especially when that action may be continuing or iterative and not easily measured.<sup>11</sup>

The components of the system of equitable remedies can be put into three categories. First, there are the equitable remedies themselves, such as injunctions, constructive trusts, accounting for profits, and specific performance. Quiet title is an exception; historically it is an equitable remedy, but functionally it does not fit within the system of equitable remedies.<sup>12</sup> Second, there are equitable managerial

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7. E.g., Mark P. Gergen et al., *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. 1 (2012) (undue hardship defense).
  8. 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, 1652, 1669 (1992). But see Laycock, *supra* note 2, 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 3, at 1226–27.
  9. E.g., Smith, *supra* note 3; Henry E. Smith, *Why Fiduciary Law Is Equitable*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 261 (Andrew S. Gold & Paul B. Miller eds., 2014) [hereinafter *Fiduciary Law*].
  10. On systems, and especially the difference between the parts and the whole, see generally ROBERT JERVIS, *SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE* (1997); Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 6 (2009). On systematicity in legal doctrine, see generally Jeremy Waldron, *“Transcendental Nonsense” and System in the Law*, 100 COLUM. L. REV. 16 (2000). For the system described here, the term “equitable” is what Waldron calls “a flag of systematicity”; its use as an overarching term indicates that “we are dealing with a web-like structure, not just individual items on a list of propositions.” *Id.* at 23.
  11. The terms used in the text (“continuing or iterative and not easily measured”) refer to the party's conduct. A complementary formulation in this Article refers to the court's decree (“open-ended and adverbial”). No sharp distinction is intended between the two formulations; they offer two perspectives on what is often a single phenomenon.
  12. See *infra* note 133 and accompanying text. Apart from quiet title, the category of “equitable remedies” in this Article is historically defined. In general, then, this Article is offering a functional argument for

devices, such as contempt and the ex post modification or dissolution of an equitable remedy. Third, there are special equitable constraints, such as equitable defenses and equitable justiciability requirements. In current American law, subject to some exceptions, there is a two-fold general rule about when the equitable managerial devices and equitable constraints are available: (a) the equitable managerial devices and constraints may be applied to *all* claims for equitable remedies; and (b) the equitable managerial devices and constraints apply *only* to claims for equitable remedies.<sup>13</sup>

These three categories of components are logically connected. It is necessary to have remedies that compel action or inaction. And sometimes that compulsion needs to be adverbial or open-ended—requiring not only that something be done but also specifying the manner in which it must be done, or demanding a process of obedience over time. In order to use these remedies well, courts need devices for managing the parties and ensuring compliance (devices that are not needed, for example, for the mere payment of a defined sum of money<sup>14</sup>). But these remedies and managerial devices can be costly, and they are vulnerable to abuse. And because they exist, there need to be constraints. In other words, the equitable remedies need the managerial devices; the equitable remedies and managerial devices need the constraints. This is, roughly speaking, the logic of the system of equitable remedies, i.e., the remedies and the remedy-related rules that are at present called equitable in American law.<sup>15</sup> This logic works in both public and private law.

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 in flexible and open-ended ways. 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 better than the parts.

This argument runs counter to the standard view among American scholars that the distinction between legal and equitable remedies is outmoded.<sup>16</sup> Of

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a historical category, comparable to Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486 (1975).

13. For qualifications about equitable defenses in some jurisdictions, the application of laches to mandamus, the appointment of masters to calculate or disburse damages, and the substantive areas traditionally associated with equity, see *infra* Part I.B.2.

14. Such devices are also unnecessary for the non-monetary remedies at law, such as mandamus, habeas, replevin, and ejectment, since they typically require conduct that is sharply defined and easily observed.

15. For a preliminary sketch of this logic, see Samuel L. Bray, *A Little Bit of Laches Goes a Long Way: Notes on Petrella v. Metro-Goldwyn-Mayer, Inc.*, 67 VAND. L. REV. EN BANC 1, 4–8 (2014).

16. See sources cited *supra* note 3.

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. To the contrary, this Article shows that the law-equity distinction captures differences in policy that are not captured by other ways of dividing the universe of remedies (e.g., monetary and non-monetary remedies, specific and substitutionary remedies, property rules and liability rules<sup>17</sup>).

This Article does not show that the boundaries of the system are perfect, or that equitable managerial devices and constraints would never be useful for legal remedies. Rather, it shows that the existing parts of the system are rationally related. This inference of rationality is defeasible. The extension of any particular equitable doctrine to legal remedies, or the movement of a particular remedy inside or outside of the system, is always open to argument.

The claim here can be clarified by comparing it with Douglas Laycock's claim that "the law-equity distinction [is] a dysfunctional proxy for a series of functional choices."<sup>18</sup> There is agreement that the distinction between legal and equitable remedies is not what ultimately matters. It is only a proxy for other things, more fundamental things about how courts put plaintiffs back in their rightful position. Where there is disagreement is about the usefulness of the proxy.

This argument has three further implications. First, it helps solve a puzzle. Law and equity have merged in many other areas of American law, but why not in remedies? Second, it offers a presumptive rationale for the recent cases in which the U.S. Supreme Court has attached great significance to whether the remedy sought was legal or equitable.<sup>19</sup> Finally, this argument offers a new perspective on the rule that a plaintiff cannot receive an equitable remedy without first showing that there is no adequate remedy at law. That rule has been much criticized for not actually affecting courts' decisions about whether to give an equitable remedy.<sup>20</sup> But this Article shows that the rule has an important by-product. The rule forces

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17. Sometimes scholars identify property rules and liability rules with equitable remedies and legal remedies. *E.g.*, Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing A Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1031 (1995). But the identification immediately collapses. For example, punitive damages are said to give property-rule protection, but they are legal; and injunctions are enforced with compensatory civil contempt, which is in effect a liability rule.

18. Laycock, *supra* note 2, at 78.

19. *E.g.*, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1967 (2014) (permitting defense of laches only against claims for equitable remedies); *id.* at 1973–74 (rooting this holding in the history of laches as an equitable defense).

20. *See generally* DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* (1991).

courts to classify remedies as legal or equitable, and that habit of classification in turn sustains the system of equitable remedies.

This Article proceeds as follows. As background for nonspecialists, 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. The crux of the argument, 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, especially in adverbial or open-ended ways; devices for heightened management of the parties; and heightened constraints. Part III raises and answers one final question: if other equitable “systems” have disappeared, why has the system of equitable remedies survived?

## I. THE STATE OF THE MERGER OF LEGAL AND EQUITABLE REMEDIES

*Equity* means many different and overlapping things. In this Article, the term is used for the remedies and related doctrines that were initially developed in the Court of Chancery. In this definition, two distinctions are implicit. First, the focus is on equitable remedies, not on substantive areas of law that are traditionally equitable (e.g., trusts).<sup>21</sup> Those substantive areas raise their own important questions that cannot be adequately addressed here. Second, this approach to defining equity emphasizes its institutional history.<sup>22</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>23</sup> That approach is valuable, but it is not apt for this Article. I could not show the rationality of equity as a doctrinal, historically derived category by using *equity* in some other sense.

21. See *infra* text accompanying notes 40–41. On the importance of remedies in equity, see D.E.C. Yale, *Introduction to LORD NOTTINGHAM'S 'MANUAL OF CHANCERY PRACTICE' AND 'PROLEGOMENA OF CHANCERY AND EQUITY'* 16 (D.E.C. Yale ed. 1965) (“Equity is essentially a system of remedies.”).

22. See F.W. MAITLAND, *EQUITY: A COURSE OF LECTURES 13–14* (A. H. Chaytor, W. J. Whittaker & John Brunyate eds., 1949) (1936); HENRY L. MCCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* 1 (2d ed. 1948) (definition 1(b)).

23. E.g., Jack B. Jacobs, *The Uneasy Truce Between Law and Equity in Modern Business Enterprise Jurisprudence*, 8 DEL. L. REV. 1, 4 (2005); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 85 (1993); *Fiduciary Law*, *supra* note 9, at 265–68; see also CHRISTOPHER ST. GERMAN, *DOCTOR AND STUDENT* 95 (T.F.T. Plucknett & J.L. Barton eds., Selden Soc’y reprint 1974).

The institutional history of equity is long. In the beginning the English Chancery was an administrative department that had the task of drawing up writs and issuing royal grants.<sup>24</sup> It was not a court, and it 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 evident that Chancery was a court. 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 usually chosen from the bishops of the English Church, but was instead a common lawyer. Over the seventeenth and eighteenth centuries, precedent 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 was diminished. In the late nineteenth century, Chancery was dissolved as a separate court and was absorbed into the High Court of Justice. The end of Chancery as an independent court was not, however, the end of equity as a body of doctrines.<sup>25</sup> Even today, the extent and inevitability of law-equity fusion remains a topic of debate in the United Kingdom and other common law countries.<sup>26</sup>

At the founding of the United States, some of the states had separate courts of equity,<sup>27</sup> and many of the later-admitted states established them. In addition, for about a century and a half after the Founding, each federal court had law and

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24. For overviews of the history of equity, see J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 97–116 (4th ed. 2002); JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 267–412 (2009); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 675–707 (5th ed. 1956, Lawbook Exch. reprinted 2001) (1956). On the issuance of writs by Chancery, see 2 JOHN HUDSON, THE OXFORD HISTORY OF THE LAWS OF ENGLAND, 871–1216, 581–84 (2012). There is debate about whether Chancery existed before the Norman Conquest. See BAKER, *supra*, at 99 & n.15.
  25. See Patrick Polden, *Part III: The Courts of Law*, in XI THE OXFORD HISTORY OF THE LAWS OF ENGLAND, 1820–1914, at 770–73 (2010).
  26. Andrew Burrows, *We Do This at Common Law but That in Equity*, 22 OXFORD J. LEGAL STUD. 1 (2002); Joshua S. Getzler, *Patterns of Fusion*, in THE CLASSIFICATION OF OBLIGATIONS 157 (Peter Birks ed., 1997); M.J. Leeming, *Five Judicature Fallacies*, in 1 HISTORICAL FOUNDATIONS OF AUSTRALIAN LAW 169–93 (J.T. Gleeson, J.A. Watson & R.C.A. Higgins eds., 2013). *Merger* is the term commonly used in the United States for the combining of law and equity, and *fusion* is the term in the United Kingdom, Canada, and Australia.
  27. See Morris S. Arnold, *A Historical Inquiry Into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 832 (1980). On equity in colonial America, see 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). On equity in the early republic, see Kristin A. Collins, “A Considerable Surgical Operation”: Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249 (2010).

equity “sides,” with the same judge presiding over both. It is now often said that law and equity have merged in the United States, and the decisive event in that 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. Yet behind that proposition lies a more complex reality. In remedies, there has been far less merger of law and equity. This Part briefly surveys the state of merger in the United States. This is “a survey from the hilltop” and not an inspection of every leaf.<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 merged them. The federal district courts no longer have a law side and an equity side.<sup>30</sup> In forty-three states there is no longer any distinction in judicial structure between law and equity. In the other states the distinctions vary in significance. Delaware, Mississippi, and Tennessee retain at least some separate courts for equity.<sup>31</sup> New Jersey and Cook County, Illinois have separate divisions for law and equity within a single court.<sup>32</sup> Georgia distinguishes equity for trial and appellate jurisdiction.<sup>33</sup> Iowa has unified courts that administer what the state constitution calls “distinct and separate jurisdictions” for law and equity.<sup>34</sup>

In most states, there has also been a total merger of procedure. Decisive here were the Field Codes and, later, the state counterparts to the Federal Rules of Civil Procedure.<sup>35</sup> Procedures that were once developed by courts of equity,

28. *E.g.*, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 283 (1988).

29. Sidney Post Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 181 (1936).

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

31. On Delaware, see DEL. CODE ANN. tit. 10, § 341 (2013 & Supp. 2014); William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792–1992*, 18 DEL. J. CORP. L. 819 (1993). On Mississippi, see MISS. CONST. art. VI, § 159. On Tennessee, see TENN. CODE ANN. § 16-11-101 (2009 & Supp. 2014).

32. ILL. COMP. STAT. ANN. S. CT. RULE 135 (West 2009 & Supp. 2015) (“Pleading Equitable Matters”); 9 ILLINOIS CIVIL TRIAL PROCEDURE §§ 2:2–2:3 (2d ed. 2009 & Supp. 2014); N.J. CT. R. 4:3-1(a).

33. GA. CONST. art. VI, § 4, ¶ 1; *id.* § 6, ¶ III; CHARLES R. ADAMS III & CYNTHIA TRIMBOLI ADAMS, *BROWN GEORGIA PLEADING, PRACTICE AND LEGAL FORMS ANNOTATED* 35–36 (3d ed. 2008).

34. IOWA CONST. art. V, § 6.

35. *See* Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure I. The Background*, 44 YALE L.J. 387, 393 (1935); *see generally* Kellen Funk, *Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76*, 36 J. LEGAL HIST. 152 (2015); Simpson, *supra* note 29, at 179–80 (noting the rapid pace of merger from 1848 to 1887, and then the stalling for the next half century).

such as depositions and interrogatories, are now pervasive in the unified civil procedure of state and federal courts.<sup>36</sup> Although the merger of federal procedure culminated in the adoption of the Federal Rules in 1938, procedural merger was a lengthy process. Indeed, there was some merger of legal and equitable procedure in the federal courts as early as the Judiciary Act of 1789.<sup>37</sup>

In substantive law, there has also been a considerable degree of merger.<sup>38</sup> In areas where law and equity developed parallel bodies of law—as in contract, where there were separate requirements for enforcing a contract at law and in equity, and separate defenses—merger is the rule and not the exception.<sup>39</sup> The story is more complicated, though, in fields where equity once had a monopoly. These “[t]raditionally equitable subjects include quiet title, partition, liens and mortgages, trusts, fiduciaries, guardianship, dissolution of marriage, and adoption.”<sup>40</sup> Bankruptcy could also be added to this list.<sup>41</sup> In many jurisdictions a claim in one of these areas is still considered equitable for at least some purposes (e.g., jury trial right).<sup>42</sup>

In all of these areas—courts, procedure, and substance—there have been recurring arguments for merger. One is the danger that a plaintiff will make a mistake 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 chance to bring his claim in the proper court (for reasons of expense, lost evidence, or a statute of limitations).<sup>43</sup> The same argument could be made about litigants bringing their claims on the wrong side of a court, if the

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36. See 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).

37. See David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 86 (1999).

38. Substantive law is not a perfect phrase. Remedies have sometimes been described as substantive and as procedural. See DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 1–2 (4th ed. 2010). On remedies and *Erie*, see *infra* note 50.

39. See *USH Ventures v. Global Telesystems Grp.*, 796 A.2d 7, 18–19 (Del. Super. Ct. 2000) (Quillen, J.); Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 257 n.22 (1991). For an argument that tension remains in contract law between the doctrines originating at law and those originating 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).

40. Rendleman, *supra* note 8, at 1643.

41. See *Ex parte Foster*, 9 F. Cas. 508, 512 (C.C. Mass. 1842) (Story, J.).

42. For arguments about the continued importance of seeing fiduciary law in equitable terms, see *Fiduciary Law*, *supra* note 9.

43. For early forms of this argument, see CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 122–23 (1981) (noting argument of the governor of South Carolina in 1823); ANTHONY LAUSSAT, JR., *AN ESSAY ON EQUITY IN PENNSYLVANIA* 39–40 (1826) (Arno Press, Inc. reprint ed. 1972) (1826).

court had separate sides for law and equity. As Thurman Arnold said, before the adoption of the Federal Rules of Civil Procedure, “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.”<sup>44</sup>

Another recurring argument is that a distinction between law and equity leads to inconsistent results.<sup>45</sup> Sarah Worthington, an English trusts scholar, has expressed this argument creatively, envisioning a game played by five-year-old children, one that requires kicking a ball into a goal. 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>46</sup>

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 basic questions such as whether a contract is valid or whether a person is the owner of a tract of land.<sup>47</sup>

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44. Thurman W. Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913, 941 (1934). In Arnold’s view, “to the two-story structure of law and equity was added a third story of administrative law.” *Id.* at 935.

45. 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 in state and 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.

46. SARAH WORTHINGTON, *EQUITY* 3–5 (2d ed. 2006). Worthington adds:  
 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.*

47. *Id.* at 7.

Worthington's parable of the children's game is new, but the point that she is making is an old one.<sup>48</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>49</sup>

## B. The Relative Lack of Merger in Remedies

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 effected by the Federal Rules of Civil Procedure.<sup>50</sup> State and federal courts still routinely classify remedies as being either legal or equitable, and that classification has a number of significant consequences. What is discussed here is the fact that there has been less merger in remedies. The arguments for merger that have already been raised—such as plaintiff mistakes and inconsistent results—are put to the side for now, but they will be taken up in Part III.

### 1. Courts Continue to Classify Remedies as Legal or Equitable

The equitable remedies still used regularly in the United States are the injunction, specific performance, reformation, quiet title, and a cluster of restitutionary remedies: accounting for profits, constructive trust, equitable lien,

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48. See LAUSSAT, *supra* note 43, at 39–40.

49. There is no general history of the merger of law and equity in the United States. The relevant literatures include those on merger in particular states, e.g., Funk, *supra* note 35 (New York); 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); those on the fusion of law and equity in England and the Commonwealth, e.g., Joshua Getzler, *Chancery Reform and Law Reform*, 22 LAW & HIST. REV. 601 (2004); Mark Leeming, *Equity, the Judicature Acts and Restitution*, 5 J. EQUITY 199 (2011); Michael Lobban, *Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Parts I and II*, 22 LAW & HIST. REV. 389, 565 (2004); those on the codification movement in the United States, e.g., COOK, *supra* note 43; Robert W. Gordon, BOOK REVIEW, 36 VAND. L. REV. 431 (1983); and those 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 36. A related question is the interaction between merger in one part of the law (e.g., procedure) and non-merger in another (e.g., remedies). See Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 811–17 (1998).

50. See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1973–74 (2014); *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999); *Stainback v. Hoek Ke Lok Po*, 336 U.S. 368, 382 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 *Grupo Mexicano*, 527 U.S. at 318 n.3; *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996); *In re Light Cigarettes Mktg. Sales Practices Litig.*, 751 F. Supp. 2d 183, 190–91 n.9 (D. Me. 2010); John T. Cross, *The Erie Doctrine in Equity*, 60 LA. L. REV. 173 (1999).

subrogation, and equitable rescission.<sup>51</sup> The legal remedies in regular use are damages, mandamus, habeas, replevin, ejectment, and certain restitutionary remedies.<sup>52</sup> There are also more obscure remedies that are legal or equitable.<sup>53</sup> One other remedy, the declaratory judgment, though not easy to classify, should typically be seen as a non-equitable remedy.<sup>54</sup>

These classifications are made every day, right now, by federal and state courts. There are some mistakes, especially about restitutionary remedies<sup>55</sup> and the legal remedies that are non-monetary.<sup>56</sup> But in most cases it is clear how the remedies involved should be classified. Courts rarely struggle to classify the remedies that plaintiffs most commonly seek: damages, injunction, and specific performance. Even for restitutionary remedies, there are “numerous court opinions that correctly distinguish legal restitution from equitable restitution.”<sup>57</sup> When courts classify remedies as legal or equitable, they do so not merely from habit, but because that classification is required by law.

In federal court, when a jury trial is requested, the Seventh Amendment of the U.S. Constitution effectively compels a classification of the relief sought.<sup>58</sup> That amendment “preserve[s]” the right of trial by jury in “Suits at common

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51. See, e.g., *Smith v. Brumfield*, 133 So. 3d 70, 80 (La. Ct. App. 2014) (injunction); *Humble v. Wyant*, 843 N.W.2d 334, 334 (S.D. 2014) (specific performance); *Wells Fargo Bank, N.A. v. Coleman*, 768 S.E.2d 604, 611 (N.C. Ct. App. 2015) (reformation); *Nicholson v. Upland Indus. Dev. Co.*, 422 S.W.3d 108, 114 (Ark. 2012) (quiet title); *Rye Police Ass’n v. Chittenden*, 980 N.Y.S.2d 728, 731 (N.Y. Sup. Ct. 2014) (accounting); *Evergreen W. Bus. Ctr., LLC v. Emmert*, 323 P.3d 250, 252 (Or. 2014) (constructive trust); *Nat’l Bank of Arkansas v. River Crossing Partners, LLC*, 385 S.W.3d 754, 760 (Ark. 2011) (equitable lien); *Homecomings Fin. Network, Inc. v. Brown*, 343 S.W.3d 681, 684 (Mo. Ct. App. 2011) (subrogation); *Moffitt v. Moffitt*, 341 P.3d 1102, 1104–05 (Alaska 2014) (equitable rescission).
52. See e.g., *Weiss v. Smulders*, 96 A.3d 1175 (Conn. 2014) (damages); *Golden Sands Dairy, LLC v. Fuehrer*, No. 2013AP1468, 2014 WL 3630035, at \*5 ¶ 28 (Wis. Ct. App. July 24, 2014) (mandamus); *624 Art Holdings, LLC v. Berry-Hill Galleries, Inc.*, No. 650045–2011, 2012 WL 10008044 (N.Y. Sup. Ct. June 7, 2012) (replevin); *Nelson v. Russo*, 844 A.2d 301, 302 (Del. 2004) (ejectment). On the classification of habeas, see *infra* note 141. Some actions to quiet title, typically ones resembling ejectment, are also classified as legal. See *infra* notes 133–135 and accompanying text. On the distinction between legal and equitable restitutionary remedies, see RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 cmt. d (AM. LAW INST. 2011).
53. These include legal remedies such as the writs of account and quo warranto, and equitable remedies such as cancellation, partition, surcharge, and equitable replevin. On equitable replevin, see *infra* note 145.
54. See *infra* text accompanying note 154.
55. See Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577 (2002); Roberts, *supra* note 3, at 1039–40 n.69.
56. See Bray, *supra* note 6, at 1045–46.
57. Roberts, *supra* note 3, at 1039–40 n.69.
58. Whether other provisions of the U.S. Constitution require a differentiation between law and equity is a different question, one that is not considered here.

law.”<sup>59</sup> Under current case law, whether there is a constitutional right to a jury trial largely depends on whether the remedy the plaintiff is seeking is legal or equitable.<sup>60</sup> In state courts, the practice is similar. Although the Seventh Amendment has not been “incorporated” against the states,<sup>61</sup> the vast majority of state constitutions contain civil jury trial guarantees.<sup>62</sup> Those state constitutional provisions often require state courts to decide whether the plaintiff is seeking a legal or equitable remedy.<sup>63</sup> Thus the jury trial right, though not itself directly a question of remedies, compels state and federal courts to classify remedies as legal or equitable.

Moreover, when a plaintiff sues under a statute that authorizes “equitable relief” or “equitable remedies,” courts must classify the relief requested. One major example is the Employee Retirement Income Security Act, which authorizes certain suits for “appropriate equitable relief.”<sup>64</sup> Many other statutes have similar provisions.<sup>65</sup> For example, one federal statute establishes a national foundation

59. U.S. CONST. amend. VII.

60. 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 point has more weight. *See* *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990). When a plaintiff seeks 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. The general approach in federal courts is as follows:

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 122 (2004) (citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510–11 (1959) (footnotes omitted)). An important exception is traditionally equitable substantive areas: in those courts sometimes find no jury right, regardless of the remedy sought.

61. *See* *McDonald v. City of Chicago*, 561 U.S. 742, 765 n.13 (2010).

62. Eric J. Hamilton, Note, *Federalism and the State Civil Jury Rights*, 65 *STAN. L. REV.* 851, 855 (2013).

63. 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* *M.K.F. v. Miramontes*, 287 P.3d 1045, 1057 (Or. 2012) (en banc) (“[T]he right to jury trial must depend on the nature of the relief requested. . . .”); *Verenes v. Alvanos*, 690 S.E.2d 771, 773 n.5 (S.C. 2010) (“[A] breach of a fiduciary duty may sound in law or equity depending on the nature of the relief sought.”). *But cf.* *Madugula v. Taub*, 853 N.W.2d 75, 91 (Mich. 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.”).

64. Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1132(a)(3) (2012). For an example of classification under this statute, see *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006).

65. *See* *Bray*, *supra* note 6, at 1013 n.76.

and authorizes the attorney general of the United States, if the foundation were to act inconsistent with its stated purposes, to sue “for such equitable relief as may be necessary or appropriate.”<sup>66</sup> Another statute provides a safe harbor for certain residential mortgage providers, protecting them from “any injunction, stay, or other equitable relief.”<sup>67</sup>

Courts even classify remedial claims as legal or equitable when there is no jury request and no statute referring to equity. What drives this pattern of classification is the doctrine that a plaintiff may obtain an equitable remedy only if there is “no adequate remedy at law.”<sup>68</sup> This doctrine has been much criticized by scholars,<sup>69</sup> but it remains well established in judicial practice.<sup>70</sup> The adequacy requirement is usually regarded as judge-made, though it has also been codified in some state and federal statutes, including the Judiciary Act of 1789.<sup>71</sup>

Together these authorities—constitutional, statutory, and judicially created—require the courts to classify remedies as legal or equitable.

## 2. That Classification Has Consequences

Whether a plaintiff’s claim is for a legal or an equitable remedy is a threshold determination. If the claim is for an equitable remedy, that classification brings into play a number of special doctrines.<sup>72</sup> The following is a list of some of the

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66. The National Foundation of Fitness, Sports, and Nutrition Establishment Act, Pub. L. No. 111–332, 124 Stat. 3576 (2010).

67. The Helping Families Save Their Homes Act of 2009, Pub. L. No. 111–22, 123 Stat. 1632 (2009).

68. This doctrine, also called the irreparable injury rule, applies to claims for permanent injunctions and other equitable remedies received after a judgment on the merits. For preliminary injunctions the idea of irreparable injury has a different force; there a court is inquiring whether the plaintiff will suffer injuries that cannot be remedied by a final judgment. *See, e.g., Bagley v. Yale Univ.*, No. 3:13-cv-1890 (CSH), 2014 WL 7370021, at \*2 (D. Conn. Dec. 29, 2014); LAYCOCK, *supra* note 20, at 110–17.

69. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4(2) cmt. e., reporter’s note e (2011); 1 DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* 135–42 (2d ed. 1993); OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 6, 38–40 (1978); LAYCOCK, *supra* note 20; 1 GEORGE E. PALMER, *THE LAW OF RESTITUTION* 36, 427–34 (1978); Alan Schwartz, *The Case for Specific Performance*, 89 *YALE L.J.* 271, 305–06 n.96 (1979); Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 *LOY. L.A. L. REV.* 1063, 1073 n.59, 1086 (2003). For a view 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, see EMILY SHERWIN ET AL., *AMES, CHAFEE, AND RE ON REMEDIES* 410 (2012).

70. *See infra* note 86.

71. *See, e.g.,* Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73; ALA. CODE § 12-11-31 (2012); DEL. CODE ANN. tit. 10, § 342 (2013); GA. CODE ANN. § 9-5-1 (2007); *id.* § 23-1-4 (2007 & Supp. 2015); ME. REV. STAT. ANN. tit. 14, § 6051 (2003). On the Judiciary Act of 1789, see *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932).

72. Perhaps a similar point could be made for legal remedies—perhaps there is a system of legal remedies—but that is not obvious. The doctrines for legal remedies tend to be remedy-specific (e.g.,

doctrines commonly associated with equitable remedies, as well as some habits of decisionmaking that are not, strictly speaking, doctrines at all.<sup>73</sup> These doctrines and habits will be given more detail and arrangement in Part II. Here they are introduced in cursory fashion and without any particular order:

- An equitable remedy may be given only if legal remedies are inadequate.
- A claim for an equitable remedy is subject to special defenses.
- A claim for equitable relief is subject to a stricter ripeness requirement.
- Equitable remedies are subject to a specificity requirement, i.e., the decree embodying them must state with particularity what is required or forbidden.
- When a court issues equitable relief, it can appoint masters and other officers to take evidence, manage property, or inspect compliance.
- An equitable remedy is subject to ex post revision.
- There are distinctive enforcement mechanisms for equitable remedies, especially contempt proceedings, which can lead to coercive fines and even the imprisonment of a defendant who has violated an equitable decree.
- There tends to be a greater degree of choice in how exactly an equitable remedy restores the plaintiff to his rightful position. This can be seen, for example, when a court delays the start of an equitable remedy.
- 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.

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

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remitting applies only to damages, the bond requirement applies only to replevin), not cross-cutting like the equitable doctrines (e.g., contempt enforcement for all equitable remedies). Thus there may be common emphases for legal remedies, or common locations of analytical complexity, but the legal remedies lack the degree of systematicity exhibited by the equitable remedies.

73. Various jurisdictions attach additional consequences to the classification of a remedy as equitable. *See, e.g.,* Nimer v. Litchfield Twp. Bd. of Trs., 707 F.3d 699, 702 (6th Cir. 2013) (*Younger* abstention); *New York v. West Side Corp.*, 790 F. Supp. 2d 13, 29–30 (E.D.N.Y. 2011) (New York statute of limitations for nuisance); *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 907 N.E.2d 268, 272 (N.Y. 2009) (New York statute of limitations for breach of fiduciary duty).

they apply to all claims for equitable remedies, and only to claims for equitable remedies.<sup>74</sup>

For the doctrines and habits just noted, some qualifications are needed. One is that in most jurisdictions at least one of the equitable defenses will apply to mandamus, even though mandamus is not an equitable remedy.<sup>75</sup> A few jurisdictions go further, allowing one or more of the equitable defenses to be applied to all claims for legal relief.<sup>76</sup> Another qualification is that masters are sometimes used in connection with legal remedies, as when a master “resolve[s] a difficult computation of damages” in a bench trial.<sup>77</sup> And the “no adequate remedy at law” requirement has been much criticized by scholars who argue not only that it should be abolished but also that it has no real effect.<sup>78</sup>

Even so, it is not hard to distinguish the exceptions from the rule. State and federal courts routinely classify remedies as legal or equitable, and the classification of a remedy as equitable has significant consequences. The text and lengthy footnotes that follow establish the general rules as a foundation for the argument of Part II. But this is not a treatise. If it were, then account would need to be taken of many small exceptions. To give one example, beyond doubt the general rule is that juries are available for legal claims but not equitable ones,

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74. The support for this assertion is developed below: the adequacy requirement, *infra* note 86; the equitable defenses, *infra* notes 83–84; equitable ripeness, *infra* note 85; the specificity requirement, *infra* notes 255–256; equitable helpers, *infra* notes 199–200; ex post revision, *infra* note 81; contempt, *infra* note 80; degree of choice in achieving the plaintiff’s rightful position, *infra* notes 204–215, 226; maxims of restraint, *infra* notes 272–274; no juries, *infra* note 82.

75. The equitable defense most commonly applied to mandamus is laches. *E.g.*, *Barresi v. Cty. of Suffolk*, 900 N.Y.S.2d 343, 345 (N.Y. App. Div. 2010). Reasons include the fact that mandamus is already highly discretionary, *e.g.*, *Marsh v. Clarke Cty. Sch. Dist.*, 732 S.E.2d 443, 445 (Ga. 2012); and that mandamus is sometimes not governed by a statute of limitations, *e.g.*, *United States ex rel. Arant v. Lane*, 249 U.S. 367, 371 (1919); *cf.* *Baker v. O’Malley*, 92 A.3d 588, 594 (Md. App. 2014) (applying laches to mandamus claim not covered by statute of limitation). For mandamus many jurisdictions also require that there be no “adequate remedy in the ordinary course of law.” *Sorum v. Dalrymple*, 857 N.W.2d 96, 99 (N.D. 2014); *State ex rel. Nat’l Emp’rs Network All, Inc. v. Ryan*, 925 N.E.2d 947, 947 (Ohio 2010) (per curiam).

76. A handful of states allow unclean hands as a defense against legal claims. *E.g.*, *Fibreboard Paper Prods. Corp. v. E. Bay Union of Machinists*, 39 Cal. Rptr. 64, 96 (Cal. Dist. Ct. App. 1964). And a few permit the laches defense against legal claims. *E.g.*, *Hickerson v. Vessels*, 316 P.3d 620, 622 (Colo. 2014); *Eberhard v. Harper-Grace Hosps.*, 445 N.W.2d 469, 474 (Mich. Ct. App. 1989); *Windsor Energy Grp., LLC v. Noble Energy, Inc.*, 330 P.3d 285, 291 (Wyo. 2014); *see also* *Lashever v. Zion-Benton Twp. High Sch.*, 14 N.E.3d 33, 37 (Ill. App. Ct. 2014) (endorsing “the relaxation of the traditional rule limiting laches to actions based in equity”). For arguments in favor of extending equitable defenses to legal claims, see T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 KY. L.J. 63 (2011).

77. *See* FED. R. CIV. P. 53(a)(1)(B)(ii); ARIZ. R. CIV. P. 53(a).

78. *See supra* note 69 and accompanying text.

yet one can find jurisdictions that authorize juries in equity.<sup>79</sup> Here, then, are some of the general rules:

First, it is blackletter law in perhaps every American jurisdiction that equitable remedies are enforceable with contempt but legal remedies are not.<sup>80</sup>

Second, it is the equitable remedies, not the legal ones, that are subject to ex post revision. Such revision is often called modification and dissolution.<sup>81</sup>

79. See TENN. CODE ANN. § 21-1-103 (West 2009); DOBBS, *supra* note 69, at 153–54; M.T. Van Hecke, *Trial by Jury in Equity Cases*, 31 N.C. L. REV. 157 (1953).

80. See, e.g., *Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d 823, 828–29 (11th Cir. 2010) (injunctions enforced with contempt); *Macias v. N.M. Dep't of Labor*, 300 F.R.D. 529, 560 n.26 (D.N.M. 2014) (distinguishing between legal and equitable relief for the availability of contempt); *McKenna v. Gray*, 438 S.E.2d 901, 903 (Ga. 1994) (“In the absence of statutory authority or other extraneous circumstances, contempt is not an available remedy to enforce a money judgment.”); EDWARD YORIO & STEVE THEL, *CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS* §1.2.3 (2d ed. 2014); see also *Aetna Cas. & Sur. Co. v. Markarian*, 114 F.3d 346, 349 (1st Cir. 1997) (“When a party fails to satisfy a court-imposed money judgment the appropriate remedy is a writ of execution, not a finding of contempt.”) (alteration omitted); *Dawson v. Dawson*, 800 N.E.2d 1000, 1003 (Ind. Ct. App. 2003) (noting an edge case but reiterating the rule that “[m]oney judgments generally may not be enforced by contempt”); DOBBS, *supra* note 69, at 186 (“Because [equitable decrees] are personal orders, they are often enforced coercively, through the contempt power. . . . The ordinary judgment cannot be enforced by the contempt power.”); LAYCOCK, *supra* note 38, at 845 (“[I]n general, courts do not use the coercive methods of contempt to collect money debts. . . . The debtor has no duty to pay his debts. It is the creditor’s job to collect them.”). Although it is certainly more common for courts to use contempt for enforcing an injunction than for the equitable restitutionary remedies, contempt is also available for them. See *Chesemore v. All Holdings, Inc.*, No. 09-CV-413-WMC, 2015 WL 7301243, at \*2–3 (W.D. Wis. Nov. 18, 2015); Doug Rendleman, *Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages*, 68 Wash. & Lee L. Rev. 973, 991 (2011); see also *In re Guardianship of McClinton*, 157 So. Rep. 3d 862, 866 (Miss. 2015) (accounting); *Petersen v. Vallenzano*, 858 F. Supp. 40, 41–42 (S.D.N.Y. 1994) (constructive trust). Note that allocating exercises of contempt to an accounting rather than to the discovery process is somewhat artificial, because of how they are intertwined. Cf. PETER BIRKS, *UNJUST ENRICHMENT* 293 (2d ed. 2005) (noting that an accounting compels one “to set out the story of one’s management”).

81. See, e.g., *Salazar v. Buono*, 559 U.S. 700, 714–15 (2010) (plurality); *In re Detroit Auto Dealers Ass'n*, 84 F.3d 787, 789 (6th Cir. 1996) (“The principle that an equitable remedy should be enforced only so long as the equities require is one that is deeply rooted in the traditions of common law.”); *Barnes v. Chamberlain*, 195 Cal. Rptr. 417, 419–20 (Cal. Ct. App. 1983) (“An equity court has inherent power to make its decree effective by additional orders affecting the details of performance, irrespective of reservation of power in the decree.”); *Magruder v. Pauley*, 411 S.W.3d 323, 334 (Mo. Ct. App. 2013) (“[W]here specific performance is ordered but not completed, the court retains authority to modify its order.”); *Bryan v. Mattick*, No. COA11-427, 2011 WL 5430405, at \*2 (N.C. Ct. App. Oct. 18, 2011) (order of specific performance may be modified “from time to time as equity required”); *In re Conservatorship of Turner*, No. M2013-01665-COA-R3CV, 2014 WL 1901115, at \*16 (Tenn. Ct. App. May 9, 2014) (injunctions subject to modification); 11A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2961 (3d ed. 2015); Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101 (1986); see also *Brown v. Plata*, 131 S. Ct. 1910, 1946 (2011) (“A court that invokes equity’s power to remedy a constitutional violation by an injunction mandating systemic changes to an institution has the continuing duty and responsibility to assess the efficacy and consequences of its order.”).

Third, it is a commonplace in most American jurisdictions that there are no juries for equitable claims, but that there is a right to a jury trial when a plaintiff seeks a legal remedy (apart from the prerogative writs, such as mandamus).<sup>82</sup>

Fourth, it is the blackletter law of the vast majority of jurisdictions that laches is an equitable defense good against equitable claims, but not against legal claims.<sup>83</sup>

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82. See *DOBBS*, *supra* note 69, at 11 (“Jury trial is traditionally granted as of right 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.”). On no jury trial right for an accounting, see *Levitin v. Rosenthal*, 903 F. Supp. 400, 406 (E.D.N.Y. 1995) (applying New York law); *Henderson v. Ayres & Hartnett, P.C.*, 740 S.E.2d 518, 522 (Va. 2013); see also *United States v. Louisiana*, 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.”). On no jury trial right for a constructive trust, see *Chevron Corp. v. Donziger*, No. 11 CIV. 0691 LAK, 2013 WL 5526287, at \*2 (S.D.N.Y. Oct. 7, 2013); *Am. Master Lease LLC v. Idanta Partners, Ltd.*, 171 Cal. Rptr. 3d 548, 575 (Cal. Ct. App. 2014). On no jury trial right for an equitable lien, see *Nat’l Bank of Ark. v. River Crossing Partners, LLC*, 385 S.W.3d 754, 760 (Ark. 2011); 10 COLORADO PRACTICE SERIES; CREDITOR’S REMEDIES-DEBTOR’S RELIEF § 8:7 (2d ed. 2014). On no jury trial right for subrogation, see *Flagship W. LLC v. Excel Realty Partners LP*, 534 F. App’x 659, 662 (9th Cir. 2013); *Landrum v. Nat’l Union Ins. Co.*, 912 P.2d 324, 329 (Okla. 1996) (“[S]ubrogation is an equitable remedy. Consequently, National Union had no right to a jury trial.”). On no jury trial right for specific performance, see *Walton v. Walton*, 31 Cal. App. 4th 277, 287–88 (Cal. Ct. App. 1995); *DOBBS*, *supra* note 69, at 191. On no jury trial right for an equitable quiet-title claim, see *United States v. Porath*, 764 F. Supp. 2d 883, 891–92 (E.D. Mich. 2011); *Durrah v. Wright*, 63 P.3d 184 (Wash. Ct. App. 2003). On the jury trial right for a legal remedy other than damages, see *James Benjamin, Inc. v. Trump CPS, LLC*, 734 N.Y.S.2d 167, 168 (N.Y. App. Div. 2001) (*replevin*).
83. See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014); *Naccache v. Taylor*, 72 A.3d 149, 152–57 (D.C. 2013) (joining “[t]he overwhelming majority of the state supreme courts” in holding that laches does not apply to legal claims); *DOBBS*, *supra* note 69, 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.”); *Bray*, *supra* note 15, at 1–8. For cases recognizing that laches applies to equitable claims but not to legal claims, see, for example, *J & J Sports Prods., Inc. v. Garcia*, CIV.A. H-13-3322, 2014 WL 2739302, at \*4 (S.D. Tex. June 17, 2014); *LBCMT 2007-C3 Seminole Trail, LLC v. Sheppard*, CIV. A. 3:12CV00025, 2013 WL 3009319, at \*5 (W.D. Va. June 17, 2013); *Moffitt v. Moffitt*, 341 P.3d 1102, 1105–06 (Alaska 2014); *Moore v. Bebe Au Lait*, H037266, 2013 WL 1319650, at \*6 (Cal. Ct. App. Apr. 2, 2013); *Lehman Bros. Holdings Inc. v. Spanish Broad. Sys., Inc.*, CIV.A. 8321-VCG, 2014 WL 718430 (Del. Ch. Feb. 25, 2014); *Life Inv’rs Ins. Co. of Am. v. Estate of Corrado*, 838 N.W.2d 640, 645 (Iowa 2013); see also *Eastman Kodak Co. v. Ricoh Co.*, 12 Civ. 3109 (DLC), 2013 WL 4044896, at \*19 (S.D.N.Y. Aug. 9, 2013) (under New York law, laches is no defense to damages); *Illinois Tool Works, Inc. v. MOC Prods. Co.*, 946 F. Supp. 2d 1042, 1044–46 (S.D. Cal. 2012) (bifurcating a trial so that the equitable issues, including the defense of laches, would not be heard by the jury); *Marsh v. Clarke Cty. Sch. Dist.*, 732 S.E.2d 443, 445 (Ga. 2012) (although making an exception for mandamus, noting as the general rule “the well established notion that inasmuch as laches is an equitable defense, it cannot be applied to actions at law”); *State ex rel. City of Monett v. Lawrence Cty.*, 407 S.W.3d 635, 640 (Mo. Ct. App. S.D. 2013) (recognizing that although estoppel is available against legal claims, laches is not); *Fox v. Millman*, 45 A.3d 332, 342–45 (N.J. 2012) (reversing lower court decision for applying laches to a claim for damages); *Williamson v.*

Fifth, the same is true of the defense of unclean hands: in the vast majority of jurisdictions it is an equitable defense good only against equitable claims.<sup>84</sup>

Sixth, equitable ripeness is required only for equitable remedies.<sup>85</sup>

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- Stallone, 905 N.Y.S.2d 740, 753 (N.Y. Sup. Ct. 2010) (“An action for money had and received, although governed by equitable principles, is an action at law . . . and, thus, is not subject to laches.”); *Lake v. Hankin Grp.*, 79 A.3d 748, 756 (Pa. Commw. Ct. 2013), *appeal denied*, 89 A.3d 1286 (Pa. 2014) (reversing, inter alia, because the trial court applied laches to the plaintiff’s legal claims); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 70 (2011).
84. *See, e.g.*, *Nature’s Prods., Inc. v. Natrol, Inc.*, 990 F. Supp. 2d 1307, 1317 (S.D. Fla. 2013) (applying Florida law); *Northbound Grp., Inc. v. Norvax, Inc.*, 5 F. Supp. 3d 956, 970 (N.D. Ill. 2013) (applying Illinois law); *Guessford v. Pennsylvania Nat’l Mut. Cas. Ins. Co.*, 918 F. Supp. 2d 453, 469 (M.D.N.C. 2013) (applying North Carolina law); *Soundvision Techs. LLC v. Templeton Grp.* 929 F. Supp. 2d 1174, 1186 (D. Utah 2013) (applying Utah law and concluding that because damages were an adequate remedy it was unnecessary to “consider equitable remedies or [the] equitable unclean hands defense”); *LBCMT 2007-C3 Seminole Trail, LLC v. Sheppard, CIV. A. 3:12CV00025*, 2013 WL 3009319, at \*5 (W.D. Va. June 17, 2013) (applying Virginia law); *Weiss v. Smulders*, 96 A.3d 1175, 1198 n.19 (Conn. 2014) (“[T]he equitable defense of unclean hands bars only equitable relief.”); *Hill v. Estate of Allred*, 216 P.3d 929, 935 (Utah 2009) (concluding that insofar as the plaintiff sought a legal remedy, “the hygiene of her hands was never at issue”).
85. The equitable ripeness doctrine tends to be stated more crisply in the secondary sources. *See* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1133–37, 1140–43 (2014); Laura E. Little, *It’s About Time: Unravelling Standing and Equitable Ripeness*, 41 BUFF. L. REV. 933, 977–80 (1993); Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 390–92 (1983). *But see* LAYCOCK, *supra* note 38, at 585–86. Even so, the case law also shows a greater concern about ripeness and other justiciability doctrines when courts are asked to give equitable remedies. *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 103, 105, 109, 111–13 (1983) (treating equitable requirements as more strict than the general case-or-controversy requirement); *O’Shea v. Littleton*, 414 U.S. 488, 499 (1974) (same); *United States v. Regenerative Scis., LLC*, 741 F.3d 1314, 1325 (D.C. Cir. 2014) (requiring for injunction “a reasonable likelihood of further violations in the future”); *Hodgers-Durgin v. De la Vina*, 199 F.3d 1037, 1042 & n.3 (9th Cir. 1999) (en banc) (W. Fletcher, J.) (concluding that although plaintiff class may have had Article III standing, they failed to show the “likelihood of substantial and immediate irreparable injury” required for equitable relief); *Beck v. Test Masters Educ. Servs. Inc.*, 994 F. Supp. 2d 98, 101 (D.D.C. 2014) (“The claimed injury must be both certain and great and of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm.”) (emphasis in original); *LJL 33rd St. Assocs., LLC v. Pitcairn Props., Inc.*, No. 13 CIV. 5673 (JSR), 2013 WL 5969139, at \*1 (S.D.N.Y. Oct. 24, 2013) (holding that declaratory judgment claim was ripe though specific performance claim was not); *Town of Monroe v. Renz*, 698 A.2d 328, 333 (Conn. App. Ct. 1997) (“The extraordinary nature of injunctive relief requires that the harm complained of is occurring or will occur if the injunction is not granted.”); *Howe v. Greenleaf*, 320 P.3d 641, 652 (Or. Ct. App. 2014) (requiring for injunction that “the conduct to be enjoined is probable or threatened”) (alterations and citation omitted); 67A N.Y. JUR. § 167 (2d ed. 2000) (requiring for injunction a “violation of a right presently occurring, or threatened and imminent”). It is harder to distinguish ripeness and equitable ripeness for equitable restitutionary remedies, but there, too, the courts seem wary of speculative claims. *See* *Bank of Am. v. Bank of Salem*, 48 So. 3d 155, 158 (Fla. Dist. Ct. App. 2010) (“[A]llegations, which pertained only to promises of future conduct, are insufficient evidence of fraud to warrant a constructive trust.”); *Nw. Props. Brokers Network, Inc. v. Early Dawn Estates Homeowner’s Ass’n*, 295 P.3d 314, 325 n.7 (Wash. Ct. App. 2013) (rejecting unjust-enrichment counterclaim as unripe).

Seventh, despite vigorous scholarly criticism, seemingly every jurisdiction in American law still pays at least lip service to the “no adequate remedy at law” requirement for equitable remedies.<sup>86</sup>

In short, there is still a marked pattern in which these doctrines apply to equitable claims but not to legal claims. The merger of legal and equitable remedies has not happened yet. This conclusion leads to the central question taken up in this Article, which is whether the continuing distinction between legal and equitable remedies is useful.

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86. See *Walker v. Trailer Transit, Inc.*, 1 F. Supp. 3d 879, 885 (S.D. Ind. 2014) (“[Under Indiana law, a] plaintiff may not pursue an equitable remedy when there is a remedy at law.”) (quoting *Coppolillo v. Cort*, 947 N.E.2d 994, 998 (Ind. Ct. App. 2011)); *Smith v. Brumfield*, 133 So. 3d 70, 75 (La. Ct. App. 2014) (“We here emphasize that injunctive relief is an equitable remedy. And an equitable remedy is ordinarily only available when a party has no adequate legal remedy.”); *Krug v. Helmerich & Payne, Inc.*, 320 P.3d 1012, 1022 (Okla. 2014) (“The long-standing rule in Oklahoma is that a plaintiff may not pursue an equitable remedy when the plaintiff has an adequate remedy at law.”); ROBERT S. THOMPSON ET AL., *REMEDIES: DAMAGES, EQUITY, AND RESTITUTION* 217 (4th ed. 2009) (“[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.”); 27A AM. JUR. 2D *Equity* § 21 (2008) (“[T]he absence of an adequate remedy at law is a precondition to any type of equitable relief . . . .”); see also *Bray*, *supra* note 6, at 1026–28 (finding entrenchment of the adequacy requirement in recent U.S. Supreme Court decisions). For the application of the requirement to an accounting, see *Donnelly v. JP Morgan Chase, NA*, No. H-13-1376, 2014 WL 429246 (S.D. Tex. Feb. 4, 2014). For its application to a constructive trust, see *McSweeney v. Kahn*, 347 Fed. App’x 437, 442–43 (11th Cir. 2009); *Islip U-Slip LLC v. Gander Mountain Co.*, 2 F. Supp. 3d 296 (N.D.N.Y. 2014) (applying New York law); *Gov’t of Aruba v. Sanchez*, 216 F. Supp. 2d 1320, 1364 (S.D. Fla. 2002) (applying Florida law); *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 712 S.E.2d 361, 364 (N.C. Ct. App. 2011), *rev’d on other grounds*, 365 N.C. 520 (2012); Grace Murphy Long, Comment, *The Sunset of Equity: Constructive Trusts and the Law-Equity Dichotomy*, 57 ALA. L. REV. 875 (2006) (analyzing Alabama law). For its application to an equitable lien, see *Farmers Ins. Exch. v. Smith*, 83 Cal. Rptr. 2d 911, 918–19 (Cal. Ct. App. 1999); *Nutt Corp. v. Howell Rd., LLC*, 721 S.E.2d 447, 449–51, 450 & n.3 (S.C. Ct. App. 2011). For its application to an injunction, see *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); *Odebrecht Const., Inc. v. Florida Dep’t of Transp.*, 715 F.3d 1268, 1288 (11th Cir. 2013); *Grodotzke v. Seaford Ave. Corp.*, 17 F. Supp. 3d 185, 194 (E.D.N.Y. 2014); *Travelers Indem. Co. v. Cephalon, Inc.*, 32 F. Supp. 3d 538, 554 (E.D. Pa. 2014) (applying Connecticut law); *Lee v. Konrad*, 337 P.3d 510, 517 (Alaska 2014); *Land Innovators Co. v. Bogan*, 15 N.E.3d 23 (Ind. Ct. App. 2014); 67A N.Y. JUR. § 167 (2d ed. 2000). For its application to specific performance, see *Millien v. Popescu*, No. 8670-VCN, 2014 WL 463739 (Del. Ch. Ct. Jan. 31, 2014). For an observation that “numerous courts in numerous jurisdictions” have required irreparable injury in unjust-enrichment claims, see Eric J. Konopka, Note, *Hey, That’s Cheating! The Misuse of the Irreparable Injury Rule as a Shortcut to Preclude Unjust-Enrichment Claims*, 114 COLUM. L. REV. 2045, 2073 & n.191 (2014); *but cf.* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4(2) (AM. LAW INST. 2011) (advocating a different position). On the “no adequate remedy at law” requirement and the declaratory judgment, see *infra* note 155.

## 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>87</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 other English courts of equity, and in the courts of Australia, Canada, and the United States.<sup>88</sup>

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>89</sup> and in other work on equity I argue for the validity of a historical approach.<sup>90</sup> But this Article considers equity as it presently exists in the United States, in order to speak both to those who think the long history of equity counts for it and to those who think the long history counts against it.

The question is how the existing equitable remedies and related doctrines interact, and what functions (if any) they presently serve. This Part will show that these equitable remedies and doctrines work together as a system. That system has parts that can be divided into three categories: remedies, managerial devices, and constraints.<sup>91</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

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87. See *supra* text accompanying note 24.

88. See, e.g., Collins, *supra* note 27; 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); Simpson, *supra* note 29.

89. See, e.g., William E. Nelson, *Legal History*, N.Y.U. ANN. SURV. AM. L. 625, 640 (1974).

90. Bray, *supra* note 6.

91. This division was initially suggested in Bray, *supra* note 15, at 4-5.

*B* the very thing that *A* took—there will need to be some notion of substitution.<sup>92</sup> Substitution will inevitably involve some effort to measure what was lost. What is substituted will often be not merely a different thing, but also a different kind of thing—that is, there may be an effort to translate the measurement of what was lost into some other “currency.”<sup>93</sup> That currency is often money, a compensation for the wrong done to the plaintiff by the defendant. 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>94</sup> Or, to take a more contemporary concern, though one that is not unconnected in its sense of violation and indignity: *A* defames *B* with a series of vile accusations on Facebook, and so must pay to *B* whatever number of dollars a jury determines.<sup>95</sup> These sorts of measurements and translations are a perennial task, in every legal culture, for the adjudicators of disputes.

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.<sup>96</sup> Compensation also faces the problem of the impecunious defendant. Some legal systems try to evade the impecuniosity problem by requiring payment in a currency more universal than money—such as eyes, teeth, and limbs.<sup>97</sup> This merely postpones the problem. A malevolent or careless defendant will, through repeated offenses, also run short of those.

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92. See, e.g., HENRY HOME, LORD KAMES, PRINCIPLES OF EQUITY 68 (Michael Lobban ed., Liberty Fund 2014) (1778) (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”).
93. See Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 365 (2006); see also 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.”).
94. A sanction for cutting another’s beard is prescribed in *The Laws of King Alfred*, in 1 ANCIENT LAWS AND INSTITUTES OF ENGLAND 85, ¶ 35 (Benjamin Thorpe ed., 2012).
95. See *Ebersole v. Kline-Perry*, No. 1:12CV26 (JCC/TRJ), 2012 WL 3776489 (E.D. Va. Aug. 29, 2012).
96. Of course there are ways of responding to this weakness: for example, in U.S. law, punitive damages, statutory damages, and restitution. But each of those has its own difficulties of definition and measurement.
97. See MILLER, *supra* note 93. Even so, legal systems associated with talionic justice did rely on monetary equivalents. See 2 DAVID DAUBE, *Eye for Eye*, in NEW TESTAMENT JUDAISM: COLLECTED WORKS OF DAVID DAUBE 177–78 (Calum Carmicheal ed., 2000); 3 DAVID DAUBE, *Lex Talionis*, in BIBLICAL LAW AND LITERATURE: COLLECTED WORKS OF DAVID DAUBE 203, 208–09 (Calum Carmicheal ed., 2003); 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).

And compensation is 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>98</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,<sup>99</sup> a legal system that has only compensatory, substitutionary remedies will struggle to regulate conduct directly.

The solution to these problems is fairly obvious: There must be some way for courts to compel action or inaction.<sup>100</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, subrogation, equitable rescission, specific performance, and reformation.

*1. Injunctions.* An 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>101</sup> The injunction, also called a permanent injunction, is given after a decision for the plaintiff on the merits.<sup>102</sup> It 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>103</sup> An

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98. See MILLER, *supra* note 93, at 46–57.

99. The famous example from Roman law of an offender willing to pay is Veratius, who was said to have “amused himself by striking passers-by in the face while a slave followed him with a purse” and paid to each victim the amount prescribed by law. ALAN WATSON, *LAW MAKING IN THE LATER ROMAN REPUBLIC* 46 (1974); see 3 AULUS GELLIUS, *THE ATTIC NIGHTS*, bk. XX.1.13, at 410–13 (John C. Rolfe trans., rev. ed. 1999) (c. 165 A.D.).

100. See 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.”).

101. See, e.g., *Nat’l Compressed Steel Corp. v. Unified Gov’t of Wyandotte Cty.* 38 P.3d 723, 725 (Kan. 2002) (“An injunction is an equitable remedy designed to prevent irreparable injury by prohibiting or commanding certain acts.”); LAYCOCK, *supra* note 38, at 265 (“An *injunction* is a court order, enforceable by sanctions for contempt of court, directing defendant to do or refrain from doing some particular thing.”).

102. By contrast 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).

103. See *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); *Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 706 (S.D. Tex. 2002). “Accounting,” “accounting for profits,” and “disgorgement” are all terms that refer to “[r]estitution measured by the defendant’s wrong” in a case of “conscious wrongdoing.” *RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT* § 51 cmt. a (AM. LAW INST. 2011).

accounting is typically given against a fiduciary, or where “the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable.”<sup>104</sup> An accounting was once a relatively common remedy, and accountings featured in many of the U.S. Supreme Court’s equity cases in the nineteenth century.<sup>105</sup> It has since been largely displaced by substitutes such as modern discovery and bankruptcy, but it is still used in both state and federal courts.

3. *Constructive trust.* A constructive trust is an equitable remedy by which a court may “set aside wrongful ownership,”<sup>106</sup> especially the wrongful ownership of “property that has changed form since it left the plaintiff’s hands.”<sup>107</sup> Courts typically impose a constructive trust in cases that involve some kind of unjust enrichment and a fiduciary (or at least confidential) relationship. 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.”<sup>108</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>109</sup> The constructive trustee must then transfer the property, “on such conditions as the court may direct.”<sup>110</sup> These conditions—which may be imposed on either party—are an important part of the power of the constructive trust.<sup>111</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

104. 5 WITKIN, CALIFORNIA PROCEDURE § 819 (5th ed. 2008 & Supp. 2015); *see* *United Prairie Bank v. Haugen Nutrition*, 813 N.W.2d 49, 57 n.3 (Minn. 2012); *Re/Max Real Estate Partners, Inc. v. Lindsley*, 840 So.2d 709, 712 ¶16 (Miss. 2003).

105. *E.g.*, *Piatt v. Vattier*, 34 U.S. 405 (1835); *cf.* *Getzler*, *supra* note 49, at 606 (noting that in nineteenth-century England “[b]ankruptcy gravitated to Chancery partly because of the advantages of its account procedures”).

106. *Abell v. City of St. Louis*, 129 S.W.3d 877, 881 (Mo. App. E.D. 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 pairing them, *see* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 cmt. 1 & rpt. note 1 (AM. LAW INST. 2011).

107. WARD FARNSWORTH, RESTITUTION: CIVIL LIABILITY FOR UNJUST ENRICHMENT 119 (2014).

108. *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 380 (N.Y. 1919) (citations omitted); *see* H. Jefferson Powell, “Cardozo’s Foot”: *The Chancellor’s Conscience and Constructive Trusts*, 56 L. & CONTEMP. PROBS. 7 (1993). Or, in another formulation, a constructive trust is used “for the purpose of preventing humans from being successful in shady bits of behavior.” *In re Estate of Reilly*, 933 A.2d 830, 837 (D.C. 2007).

109. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55(1) (AM. LAW INST. 2011); *see* FARNSWORTH, *supra* note 107, at 119–27, 132.

110. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55(2) (AM. LAW INST. 2011).

111. *Id.* § 55 cmt. b.

equitable lien will give the plaintiff a security interest in the property in question.<sup>112</sup> The court may then require foreclosure, subject to whatever conditions it prescribes, in order to allow the party receiving the equitable lien to cash out.<sup>113</sup>

5. *Subrogation*. A related but distinct equitable remedy is subrogation. It resembles the constructive trust and equitable lien because it, too, focuses on the plaintiff's claim to identifiable property. But in a typical subrogation case, the defendant has already 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 has (or had) against the defendant.<sup>114</sup> As with the constructive trust and the equitable lien, "[t]he remedy of subrogation may be qualified or withheld when necessary to avoid an inequitable result in the circumstances of a particular case."<sup>115</sup>

6. *Equitable rescission*. Another remedy that gives restitution to the plaintiff is called equitable rescission. Rescission "means undoing an exchange, with each side returning what it has received."<sup>116</sup> The exchange at issue might have been made under a voidable contract or under a contract that has been breached.<sup>117</sup>

Now rescission is different from the other equitable remedies just listed, because there are two remedies in present use that go by that name, one legal and one equitable. There are some doctrinal differences. For example, rescission at law has traditionally had a tender requirement,<sup>118</sup> and it has often been said that rescission at law is accomplished by the parties themselves and only recognized by the court. Equitable rescission has no such tender requirement, and the theory of equitable rescission is that it is accomplished by the court's decree.<sup>119</sup> Whatever

112. *Id.* § 55 cmt. k, § 56; FARNSWORTH, *supra* note 107, at 120–22, 127–30, 132; Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1291–93 (1989).

113. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 56(2) & cmt. c (AM. LAW INST. 2011).

114. See *id.* § 57; FARNSWORTH, *supra* note 107, at 121–22, 130–32.

115. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 57(3) (AM. LAW INST. 2011).

116. FARNSWORTH, *supra* note 107, at 121.

117. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 54 (AM. LAW INST. 2011); see also FARNSWORTH, *supra* note 107, at 133–34.

118. *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 824 (Tex. 2012) ("At common law, rescission also generally requires notice and tender; that is, a plaintiff seeking to rescind a contract must give timely notice to the defendant that the contract is being rescinded and either return or offer to return the property he has received and the value of any benefit he may have derived from its possession."). For cautions about the force of the tender requirement, see Brief of Professor Richard R.W. Brooks, *Jesinoski v. Countrywide Home Loans, Inc.*, No. 13-684, 2014 WL 4748550 (U.S. Sept. 23, 2014).

119. See, e.g., *Moffitt v. Moffitt*, 341 P.3d 1102, 1104 (Alaska 2014) ("Rescission is equitable if the complaint asks the court to order rescission of the contract, and is legal if the court is asked to enforce a completed rescission.") (quoting 12A C.J.S. *Cancellation of Instruments* § 5 (2014)); *Zebroski v.*

sharp edge might exist between the remedies in theory is considerably blurred in practice, and American scholars have tended to reject the entire distinction between the two kinds of rescission as pointless.<sup>120</sup> Even so, a number of jurisdictions continue to draw that distinction, and in those jurisdictions there continues to be a form of rescission that is a distinctively equitable remedy.<sup>121</sup>

7. *Specific performance.* Specific performance is a remedy compelling the defendant to perform his obligations under a contract.<sup>122</sup> Sometimes the order requires the performance of those obligations, no more and no less.<sup>123</sup> In such cases

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Progressive Direct Ins. Co., No. 8816-VCP, 2014 WL 2156984, at \*5 & n.28 (Del. Ch. Apr. 30, 2014); *see also* Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790, 793 (2015).

120. *E.g.*, RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 54 cmt. j (AM. LAW INST. 2011) (“No distinction is recognized between rescission ‘at law’ and ‘in equity.’”); LAYCOCK, *supra* note 38, at 690–91. It is not obviously absurd, however, to have two forms of rescission, one inside the system of equitable remedies and one outside of it. An equitable form of rescission might be appropriate if unwinding the affairs of the parties requires the equitable managerial devices. *See infra* Part II.B. If the passage of time makes it harder to achieve rescission and increases the risk of opportunistic behavior, these concerns could be addressed by the equitable constraints. *See infra* Part II.C. But there are also good reasons to have a narrower and less flexible form of rescission, as demonstrated by the work of Richard Brooks and Alexander Stremitzer. Richard R.W. Brooks & Alexander Stremitzer, *Remedies on and Off Contract*, 120 YALE L.J. 690 (2011); Richard R.W. Brooks & Alexander Stremitzer, *On and Off Contract Remedies Inducing Cooperative Investments*, 14 AM. L. & ECON. REV. 488 (2012). Thus one could imagine a useful division of labor between two rescission remedies, one highly flexible and managerial but rarely given, and one more freely given that operates without the equitable managerial devices and equitable constraints. Whether that division of labor is achieved, or even could be, would depend in large part on the allocation rules. As interesting as these questions are, they cannot be answered here—for the present argument it is sufficient to note that many jurisdictions continue to treat equitable rescission as a distinctively equitable remedy.
121. *See, e.g.*, Griggs v. E.I. DuPont de Nemours & Co., 385 F.3d 440, 443–53 (4th Cir. 2004); Fed. Deposit Ins. Corp. v. Lockhaven Estates, LLC, 918 F. Supp. 2d 1209, 1242 (D.N.M. 2012); Scarangella v. Grp. Health Inc., No. 05 Civ. 5298 (RJS), 2009 WL 764454, at \*16–19 (S.D.N.Y. Mar. 24, 2009) (applying ERISA); Moffitt v. Moffitt, 341 P.3d 1102 (Alaska 2014); Moreland v. Dodds, 388 S.W.3d 73, 79 (Ark. Ct. App. 2012); NMSBPCSLDHB v. Cty. of Fresno, 61 Cal. Rptr. 3d 425 (Cal. Ct. App. 2007); Martinez v. Affordable Hous. Network, Inc., 109 P.3d 983, 987–88 (Colo. App. 2004), *rev’d on other grounds*, 123 P.3d 1201 (Colo. 2005); Kostyszyn v. Martuscelli, No. 8828-MA, 2014 WL 3510676 (Del. Ch. July 14, 2014); E.I. Du Pont de Nemours & Co. v. HEM Research, Inc., No. 10747, 1989 WL 122053, at \*3 (Del. Ch. Oct. 13, 1989); Gonzalez v. Union Pac. R.R. Co., 803 N.W.2d 424, 441–42 (Neb. 2011); Ajettix Inc. v. Raub, 804 N.Y.S.2d 580, 592–94 (N.Y. Sup. Ct. 2005); American Bank Ctr. v. Wiest, 793 N.W.2d 172, 181 (N.D. 2010); American Heritage, Inc. v. Nevada Gold & Casino, Inc., 259 S.W.3d 816, 821 (Tex. App. 2008) (applying Nevada law). *But cf.* Bischoff v. Cook, 185 P.3d 902, 908–11 (Haw. Ct. App. 2008); Hyler v. Garner, 548 N.W.2d 864, 872 n.6 (Iowa 1996). For an example outside the United States, see the High Court of Australia’s decision in Maguire v. Makaronis, 188 CLR 449, 467 n.28 (1997).
122. Specific performance and the injunction are often considered to be a single remedy. But there are doctrinal and conceptual reasons to distinguish them. For example, the need for a court to individuate and specify the law’s command is greater for an injunction than for specific performance (the parties have already specified their duties by writing the contract). That is why a “perform the contract” decree of specific performance is permissible, but an “obey the law” injunction is impermissible. *See infra* note 255 and accompanying text.
123. *See* YORIO & THEL, *supra* note 80, § 1.2.2.

the decree of specific performance may not involve a high degree of supervision of the parties.<sup>124</sup> Yet the court is not limited to saying merely “perform the contract,” and it may impose further conditions and requirements as needed.<sup>125</sup> The court can modify the order of specific performance over time,<sup>126</sup> and if the defendant fails to comply, that failure can lead to contempt sanctions.<sup>127</sup>

8. *Reformation*. Another remedy that is characteristically used for breach of contract is reformation.<sup>128</sup> With this remedy a court “correct[s] a writing,”<sup>129</sup> typically in one of two circumstances. Either the writing does not reflect the parties’ actual agreement, or one party made a mistake while the other committed fraud.<sup>130</sup> Sometimes this correction of a writing is quite literal—as when the court physically alters a contract or deed—but in other cases the court achieves the necessary effect by declaring how it is interpreting the contractual language.<sup>131</sup>

In addition to these eight, there are a handful of other equitable remedies, most of which are obscure and rarely used.<sup>132</sup> But one equitable remedy not listed above remains in regular use, namely the action to quiet title. It deserves mention because it shows how the contours of the system of equitable remedies

124. See Steven Shavell, *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, 84 TEX. L. REV. 831 (2006) (making this point for contracts to convey property); see also YORIO & THEL, *supra* note 80, § 3.3.1.

125. See RESTATEMENT (SECOND) OF CONTRACTS § 358(1) (AM. LAW INST. 1981) (“[T]he 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.”).

126. See *Magruder v. Pauley*, 411 S.W.3d 323, 334 (Mo. Ct. App. 2013) (“[W]here specific performance is ordered but not completed, the court retains authority to modify its order.”); *Bryan v. Mattick*, No. COA11-427, 2011 WL 5430405, at \*2 (N.C. Ct. App. Oct. 18, 2011) (order of specific performance may be modified “from time to time as equity required”) (quoting *Harris v. Harris*, 300 S.E.2d 369, 372–73 (1983)).

127. See DOBBS, *supra* note 69, at 191.

128. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 12 (AM. LAW INST. 2011); DOBBS, *supra* note 69, at 748–55; LAYCOCK, *supra* note 38, at 613–15. On reformation as a remedy in contract and a remedy to avoid unjust enrichment, see RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 12 cmt. b (AM. LAW INST. 2011).

129. DOBBS, *supra* note 69, at 748.

130. See *Wells Fargo Bank, N.A. v. Coleman*, No. COA14-683, 2015 WL 425928, at \*6 (N.C. Ct. App. Feb. 3, 2015); LAYCOCK, *supra* note 38, at 613; see also *CIGNA Corp. v. Amara*, 563 U.S. 421, 440 (2011) (“The power to reform contracts (as contrasted with the power to enforce contracts as written) is a traditional power of an equity court, not a court of law, and was used to prevent fraud.”).

131. See DOBBS, *supra* note 69, at 751–52. Dobbs notes that reformation can be given in cases where “no equity power is required,” *id.* at 752, and in such cases there is overlap between reformation and other remedies, especially quiet title and declaratory judgment.

132. See *supra* note 53 and accompanying text.

do not perfectly correspond to the contours of “equitable remedies” as a historical and doctrinal category. The action to quiet title is traditionally equitable.<sup>133</sup> It emerged in Chancery because the common law allowed a suit to determine ownership of real property only by a person who was out of possession. By contrast, the chancellor was willing to give a decree quieting title to a person who was in possession. Even today in the United States, courts routinely classify as equitable a quiet-title action brought by a plaintiff in possession.<sup>134</sup> Nevertheless, though the historical pedigree of quiet title is clear, it has no need of the equitable managerial devices and equitable constraints that are analyzed below. Indeed, this point can be stated more strongly. Of all quiet-title actions brought today, the ones most likely to be considered equitable are, for historical reasons, the ones brought by a plaintiff in possession. Yet those are precisely the quiet title actions least likely to need the managerial powers of the system of equitable remedies. When the plaintiff seeking to quiet title is already in possession of the property, there is usually nothing for the court to do except declare the superiority of the plaintiff’s claim of ownership.<sup>135</sup> Thus quiet title is an equitable remedy for historical reasons, but it does not really belong in the system of equitable remedies.<sup>136</sup>

## B. Distinguishing the Non-Monetary Legal Remedies

Equity has no monopoly on non-monetary remedies. This subpart briefly notes and distinguishes several remedies that are non-monetary but also outside of the system of equitable remedies. This is no mere excursus or tidying up. Distinguishing these remedies is crucial for showing that the line between legal and equitable remedies has functional significance, and is not merely a

133. See DOBBS, *supra* note 69, at 164.

134. *E.g.*, *United States v. Porath*, 764 F. Supp. 2d 883, 890, 891–92 (E.D. Mich. 2011); *Nicholson v. Upland Indus. Dev. Co.*, 422 S.W.3d 108, 114 (Ark. 2012); see *In re Estate of Phelps*, 273 Cal. Rptr. 2, 6 (Cal. Ct. App. 1990) (“Generally, there is no right to a jury trial in a quiet title action which is fundamentally equitable in nature. A quiet title action becomes a legal action when it takes on the character of an ejectment proceeding to recover possession of the property.”).

135. See Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275, 1285 (2010); see also *Cherokee Nation v. Georgia*, 30 U.S. 1, 20 (1831) (treating a decision about title as a lesser judicial commitment than an injunction). Note, however, that it is possible, when a court issues a decree quieting title, for it to add conditions, which may entail further judicial supervision. See, e.g., *City of Parker v. Panek*, 890 So. 2d 291, 291 (Fla. Dist. Ct. App. 2004) (contempt enforcement for quiet-title decree that required removal of an encroaching structure); 7 WITKIN, CALIFORNIA PROCEDURE § 24 (4th ed. 1997) (noting that a decree quieting title may be conditioned on the plaintiff’s “doing equity, e.g., paying a mortgage debt or taxes”).

136. The same point could be made about certain instances of reformation. See *supra* note 131 and accompanying text.

rough proxy for the line between the remedies that are monetary and the ones that are not.

Here five remedies are considered that are non-monetary and also non-equitable: mandamus, habeas corpus, replevin, ejectment, and the declaratory judgment.<sup>137</sup> These remedies are critically different from the equitable ones, for they either require no action by the defendant or else require actions that are narrow and discrete, rather than open-ended and indeterminate.

First, the writ of mandamus is used to order a public official to perform a ministerial duty.<sup>138</sup> Mandamus is appropriate only for a duty that is clearly defined by law and not discretionary.<sup>139</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>140</sup>

Second, the writ of habeas corpus is paradigmatically an order to officials to release the body of a person in custody.<sup>141</sup> Habeas is now almost exclusively directed against public officials.<sup>142</sup> It is further restricted in its typical scope.<sup>143</sup> As

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137. Mandamus, habeas, replevin, and ejectment are clearly legal remedies. On the classification of the declaratory judgment as non-equitable, see *infra* notes 153 to 164 and accompanying text.
138. See, e.g., *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63–64 (2004); *Chariho Reg'l Sch. Dist. v. Gist*, 91 A.3d 783, 788 (R.I. 2014).
139. See *Rimmer v. Holder*, 700 F.3d 246, 264 (6th Cir. 2012); *Mathews v. Crews*, 132 So. 3d 776, 778 (Fla. 2014); *Bibb Cty. v. Monroe Cty.*, 755 S.E.2d 760, 767 (Ga. 2014); *Golden Sands Dairy, LLC v. Fuehrer*, No. 2013AP1468, 2014 WL 3630035 (Wis. Ct. App. July 24, 2014); see also *United States v. Lawrence*, 3 U.S. 42, 48 (1795). If the law mandates that an official make a decision, yet allows discretion about what the decision is, mandamus may lie to order the official to make *some* decision.
140. *New Orleans Fire Fighters Pension & Relief Fund v. City of New Orleans*, 131 So. 3d 412 (La. Ct. App. 2013) (mandamus for payment to pension fund of \$17,524,359).
141. On habeas as a legal remedy, see, for example, *Peterson v. Judges of the Jefferson Cty. Circuit Court*, No. CV-13-741, 2014 WL 2019295 (Ark. May 15, 2014) (per curiam); *Daniel v. Comm'r of Corr.*, 751 A.2d 398, 403 n.3 (Conn. App. Ct. 2000); *Henry v. Santana*, 62 So. 3d 1122, 1125 (Fla. 2011); *Stanley v. Sullivan*, 314 P.3d 883, 885 (Kan. Ct. App. 2013); *Bradley v. Hopkins*, 522 N.W.2d 394, 398–99 (Neb. 1994); *In re Keeter*, 134 S.W.3d 250, 256 (Tex. App. 2003). Cases can be found, especially in the U.S. Supreme Court, describing habeas as an equitable remedy. See 1 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 2.2 (6th ed. 2011). And there are scholars who urge that habeas should be seen as equitable. E.g., Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 NW. U. L. REV. 139, 144 (2013). That notion seems to rest on two premises: (1) discretionary remedies are equitable and (2) classifying a remedy as equitable makes it easier to obtain. Neither premise is correct.
142. Cf. *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004) (“[I]n habeas challenges to present physical confinement—‘core challenges’—the default rule is that the proper respondent is the warden of the facility where the prisoner is being held . . .”). On this point it was once broader. See *Baker*, *supra* note 24, at 147.
143. See *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); *Adcock v. Snyder*, 804 N.E.2d 141, 143–44 (Ill. App. Ct. 2004).

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 petitioner, and the form of relief is limited to release from confinement.”<sup>144</sup>

Third, the writ of replevin allows a plaintiff to recover a specific item of personal property, and thus it, too, is relatively narrow and defined.<sup>145</sup> Replevin can even be a pre-judgment remedy that involves no judicial drafting of a command at all. In federal court,<sup>146</sup> for example, the typical process goes like this: *A* goes to the clerk of the district court, makes certain representations, and posts a bond; then the clerk issues a writ for seizure of the property, and the writ is enforced against *B* by a federal marshal.<sup>147</sup>

Fourth, the writ of ejectment allows a plaintiff to regain possession of real property. It is also narrowly defined. The plaintiff must be entitled to immediate possession.<sup>148</sup> And what the plaintiff seeks must actually be recovery of possession of the plaintiff’s real property, not the removal of offending structures on a neighbor’s property.<sup>149</sup> The sheriff may be needed for enforcement,<sup>150</sup> but there are lim-

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144. Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1041, 1043–44 n.54, n.56 (1977); cf. Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385, 429 (2010) (noting even narrower relief for habeas petitioners imprisoned at Guantánamo Bay). An exception of sorts is conditional habeas corpus relief, but it does not amount to “a general grant of supervisory authority over state trial courts.” *Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015). The use of such relief by federal courts is not necessarily followed by state courts. See *Adcock*, 804 N.E.2d at 143–44 (“Under *habeas corpus*, the sole remedy is a prisoner’s immediate discharge from custody.”) (citation omitted).
145. See LAYCOCK, *supra* note 38, at 386 (“Replevin is of narrower scope than injunctions. . . . [R]eplevin lies only to *recover* goods; it does not lie to prevent a threatened destruction or dispossession.”); see also FARNSWORTH, *supra* note 107, at 121–22 (contrasting replevin with equitable remedies that are “overqualified” for the cases in which replevin is used). Indeed, when the personal property is hidden and cannot be easily replevied, a court may need to fall back on replevin’s equitable counterpart, the relatively rare remedy called equitable replevin. See *Doughty v. Sullivan*, 661 A.2d 1112, 1120 n.6 (Me. 1995) (“Replevin is to be distinguished from equitable replevin which is a remedy to compel ‘the redelivery of property so withheld that it cannot come at to be replevied.’”) (quoting *Farnsworth v. Whiting*, 104 Me. 488, 495, 72 A. 314 (1908)).
146. 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).
147. For a description of that process, see *Service of Process: Writ of Replevin*, U.S. MARSHALS SERVICE, <http://www.usmarshals.gov/process/replevin.htm> [<http://perma.cc/QJ2L-6EBD>].
148. See *Wells Fargo Bank, N.A. v. Long*, 934 A.2d 76, 78–81 (Pa. Sup. Ct. 2007).
149. See *Nelson v. Russo*, 844 A.2d 301, 303 (Del. 2004); see also *Sandler v. Executive Mgmt. Plus*, 38 A.3d 478, 481–482 (Md. Ct. Sp. App. 2012) (distinguishing a request for possession of real property, which is a claim for ejectment, from a request for the defendant to stop engaging in an activity, which is not). Indeed, as with the move from replevin to equitable replevin, see *supra* note 145, when the plaintiff tries to use ejectment for more than regaining possession, a court might say that the request is really one for equitable relief. See *Nelson*, 844 A.2d at 303.
150. E.g., *United States v. Simoneau*, No. 12-CV-348-JL, 2012 WL 6917071, at \*2 (D.N.H. Dec. 20, 2012) (magistrate judge’s report and recommendation).

its to what the sheriff is able and willing to do.<sup>151</sup> In short, “[t]he ejectment action is oriented toward the tangible and immediate.”<sup>152</sup>

Fifth, the declaratory judgment is a non-monetary remedy that is typically used to resolve uncertainty about ownership, status, or validity.<sup>153</sup> Before it is described, a word needs to be said about its classification. Courts and commentators have classified the declaratory judgment in every possible way: legal, equitable, both, neither.<sup>154</sup> Yet the declaratory judgment lacks the distinctive characteristics of the equitable remedies. That is, when a plaintiff seeks a declaratory judgment, the general rule is that none of the following apply: the adequacy requirement,<sup>155</sup> the equitable ripeness requirement,<sup>156</sup> the specificity requirement,<sup>157</sup> the greater degree of choice in achieving the plaintiff’s rightful position,<sup>158</sup> administration of the remedy by masters and receivers,<sup>159</sup> ex post revision,<sup>160</sup> and contempt.<sup>161</sup> Juries can decide declaratory judgment actions.<sup>162</sup> As to the equitable defenses, however, the authorities are more divided, and some jurisdictions apply them against claims

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151. DOBBS, *supra* note 69, at 804.

152. *Id.*

153. *See* Bray, *supra* note 135.

154. *See* LAYCOCK, *supra* note 20, at 14.

155. A concise statement is found in *In re Atlas Roofing Corp. Chalet Shingle Prods. Liab. Litig.*, 22 F. Supp. 3d 1322, 1332 (N.D. Ga. 2014). *See also, e.g.*, *Verizon New England, Inc. v. Int’l Bhd. of Elec. Workers, Local No. 2322*, 651 F.3d 176, 186–90 (1st Cir. 2011) (denying injunction because of the lack of irreparable injury while giving a declaratory judgment); *Abraham v. Delaware Dep’t of Corr.*, 331 F. App’x 929 (3d Cir. 2009) (applying the irreparable injury rule to a claim for injunctive relief but not to a claim for declaratory relief); *Anderson Living Tr. v. ConocoPhillips Co.*, 952 F. Supp. 2d 979, 1056 (D.N.M. 2013) (allowing claim for declaratory judgment to go forward but dismissing claims for equitable relief because there was no irreparable injury); FED. R. CIV. P. 57; 5 Colo. Prac., Civil Rules Annotated R 57(m) (4th ed.); TENN. R. CIV. P. 57. Note that this general rule may be changed by statute. *E.g.*, La. Stat. Ann. § 49:963(D) (requiring a showing of no adequate remedy and irreparable injury for declaratory judgment actions challenging the validity or applicability of an administrative rule). An exception to the general rule is *Younger* abstention; in that context federal courts often require irreparable injury before the issuance of a declaratory judgment. *E.g.*, *Kugler v. Helfant*, 421 U.S. 117, 123 (1975).

156. *See* Bray, *supra* note 85, at 1135.

157. *See id.* at 1126–27.

158. *See id.* at 1129–32.

159. *See id.* at 1143–44.

160. *See id.* at 1129–32, 1143–44.

161. *See id.* at 1110 (calling it “black-letter law that a declaratory judgment cannot be the basis for contempt proceedings,” while also arguing that the absence of contempt enforcement does not make the declaratory judgment a milder remedy).

162. *See, e.g.*, *Simler v. Conner*, 372 U.S. 221, 223 (1963) (“The fact that the action is in form a declaratory judgment case should not obscure the essentially legal nature of the action. The questions involved are traditional common-law issues which can be and should have been submitted to a jury . . . .”); *AstenJohnson, Inc. v. Columbia Cas. Co.*, 562 F.3d 213, 223–26 (3d Cir. 2009) (affirming the grant of a jury trial on a declaratory judgment claim).

for declaratory judgment.<sup>163</sup> But given the pattern—the declaratory judgment typically has neither the benefit of the equitable managerial devices nor the limitation of the equitable constraints—the best view at present is that the declaratory judgment is not an equitable remedy, as long as the plaintiff's claim does not arise in one of the traditionally equitable substantive areas.<sup>164</sup>

Classification aside, the declaratory judgment works quite differently from the equitable remedies. It is definitional that a declaratory judgment does not include a command to the parties.<sup>165</sup> A declaratory judgment is particularly unsuited to management of the parties.<sup>166</sup>

Thus all of these non-monetary remedies differ from the equitable ones. They either involve only commands that are definite and sharply defined, or they involve no command at all. That difference is significant for the argument developed below. The potentially open-ended and adverbial commands—the commands that are directed toward conduct that is continuing or iterative and hard to measure—are the ones that most pressingly require the equitable managerial devices and the equitable constraints.<sup>167</sup>

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There is a need 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. There are some legal remedies that compel action, but they are narrower and more limited. In contemporary American law the remedies that compel action or inaction are

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163. Compare *CRE Venture 2011-1, LLC v. First Citizens Bank of Georgia*, 756 S.E.2d 225, 229 n.3 (Ga. Ct. App. 2014) (no laches for declaratory judgment claim), with *Hazard v. E. Hills, Inc.*, 45 A.3d 1262, 1269–71 (R.I. 2012) (applying laches to declaratory judgment claim). Because the declaratory judgment is a discretionary remedy, it is unclear how much it matters whether the laches and unclear hands defenses apply. Even if they do not, the circumstances that might lead a court to apply an equitable defense could still affect the court's discretion as to whether to give a declaratory judgment.

164. Two further details: First, declaratory judgments were 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* 451–63 (3d ed. 1992). Second, what complicates the status of this remedy is that when the federal Declaratory Judgment Act was 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 classified as legal or equitable based on whether it inverted the parties in a suit that would later have been brought on a court's law side or equity side. That inquiry is more difficult, however, for jurisdictions with unified courts. It is one thing to ask, as Seventh Amendment doctrines require, whether the suit in question would once have been brought at law or in equity. It is harder to pursue the same inquiry about a suit that has never been brought, namely the hypothetical suit that is the inverse of the plaintiff's declaratory judgment action.

165. See *Bray*, *supra* note 135, at 1282–85.

166. See *Bray*, *supra* note 85.

167. A suggestive exploration of the affinity between equitable remedies and progressive verb forms can be found in DENNIS KURZON, *A TALE OF TWO REMEDIES: EQUITY, VERB ASPECT, AND THE WHORFIAN HYPOTHESIS* (1998).

paradigmatically equitable ones. And the remedies that not only compel action or inaction, but also do so in an open-ended and less determinate fashion, are wholly equitable.

### C. 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 line that delineates the remedies for which these problems are more likely to be present—not the line between monetary and non-monetary remedies, not the line between property rules and liability rules, but the line between legal and equitable remedies. The legal remedies rarely present problems related to compliance. For damages, mandamus, habeas, replevin, and ejectment, 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 was the ministerial duty, and did the official perform it? Has the prisoner been released from custody? What property was replevied, and did the defendant return it? Is the plaintiff back in possession of the real property?

By contrast, it can be more difficult to determine whether there has been compliance with equitable remedies. 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” about the pizza parlor’s sauce.<sup>168</sup> Or an injunction might require an employer, after being found

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168. 205 Corp. v. Brandow, 517 N.W.2d 548, 552 (Iowa 1994).

in violation of the Americans with Disabilities Act, to “maintain complete records of its responses” when employees request accommodations.<sup>169</sup> Or specific performance might be awarded to compel the sale of a one-half interest in a corporation.<sup>170</sup> Or, where a fiduciary has taken \$250,000 from a line of credit, a court might impose a constructive trust on all property (real or personal) that can be traced to the \$250,000.<sup>171</sup> Or a court might impose a constructive trust on a house, awarding the plaintiff and defendant each an undivided half interest in it, and appointing a receiver to sell it and pay certain taxes and fees before distributing the proceeds to the parties.<sup>172</sup> These are ordinary cases involving equitable remedies, and thousands more could be listed. In addition, what is required by an equitable remedy is often more qualitative and adverbial—not only requiring that something be done, but also specifying the manner in which it must be done. For example, a defendant may be ordered to change a car’s registration “promptly,”<sup>173</sup> or a company that has defrauded consumers may be allowed to operate only if it has an “effective business plan” for distributing refunds.<sup>174</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.<sup>175</sup> 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”.<sup>176</sup>

1. *Ex post revision.* Equitable remedies are subject to revision after they have been given by the court. For injunctions, which are the most frequently revised of

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169. *EEOC v. AutoZone, Inc.*, 707 F.3d 824, 841 (7th Cir. 2013).

170. *See Fusco Guilford, LLC v. Greenberg Associates*, No. CV136041672S, 2014 WL 4746693, at \*17 (Conn. Super. Ct. Aug. 19, 2014).

171. *See Nguyen v. Nguyen*, No. CGC-12-518348, 2013 WL 5658737, at \*4-5 (Cal. Super. Ct. Sep. 18, 2013) (Trial Order).

172. *See Pielack v. Esper*, No. 05-21229-CZ, 2007 WL 811720 (Mich. Cir. Ct. Jan. 24, 2007) (Trial Order).

173. *Hardy v. Hardy*, No. 7531-VCP, 2014 WL 3736331, at \*20 (Del. Ch. July 29, 2014).

174. *Texas v. Maximum Sports Connection Inc.*, No. DC1306978, 2014 WL 3966448, at \*7 (Dist. Ct. Tex. Aug. 7, 2014) (Trial Order).

175. *See Avitia v. Metro. Club of Chi., Inc.*, 49 F.3d 1219, 1231 (7th Cir. 1995) (“Equitable remedies usually and here are costly to administer because they do more than transfer a lump sum from defendant to plaintiff, the standard ‘legal’ remedy. The costs include not only the time and money of litigants and judges devoted to administering a continuing remedy as opposed to the one-time remedy of a lump-sum award of damages, but also the costs in reduced productivity . . . .”); *Bray*, *supra* note 15, at 6-7.

176. In addition to the devices listed here, there is the preliminary injunction. Although mentioned above with the injunction, *see supra* note 102, it can be seen as another managerial device of equity. In some jurisdictions its availability is restricted to equitable claims. *See, e.g.*, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999).

the equitable remedies, this power of ex post revision is called modification and dissolution.<sup>177</sup> This power lets courts respond to events that were unseen when the remedy was first granted, either because of changes in law or changes in fact.<sup>178</sup> It is a power that 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 willingness to apply its powers and processes on behalf of the party who obtained that equitable relief.”<sup>179</sup> Like the injunction, specific performance is subject to revision after the fact.<sup>180</sup> And the equitable remedies that involve restitution—accounting, constructive trust, equitable lien, and subrogation—are also apparently subject to ex post revision. For example, a court may modify a constructive trust,<sup>181</sup> or dissolve it,<sup>182</sup> or specify certain conditions on which it will be dissolved automatically,<sup>183</sup> or grant it subject to the results of an accounting.<sup>184</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 plaintiff, the payment of

177. See *supra* cases accompanying note 81.

178. See *Salazar v. Buono*, 559 U.S. 700, 714–15 (2010) (plurality opinion) (“Because injunctive relief ‘is drafted in light of what the court believes will be the future course of events, . . . a court must never ignore significant changes in the law or circumstances underlying an injunction lest the decree be turned into an instrument of wrong.’”) (quoting 11A WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2961 (2d ed. 1995)) (citation omitted); *King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 418 F.2d 31, 35 (2d Cir. 1969) (Friendly, J.) (“While changes in fact or in law afford the clearest bases for altering an injunction, the power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purposes.”).

179. Sys. Fed’n No. 91, Ry. Emps.’ Dep’t, AFL-CIO v. Wright, 364 U.S. 642, 647 (1961); see *Bray*, *supra* note 85, at 1133–37.

180. See *supra* cases accompanying note 126.

181. See *DeRita v. Scott*, No. EC 012429, 1994 WL 16775447, at \*50 (Cal. Super. Ct. Dec. 19, 1994) (Trial Order) (“The court reserves jurisdiction to modify and enforce this injunction, the constructive trust and accounting, as the ends of justice may require.”).

182. See *Richard Y. Johnson & Son, Inc. v. Just-In Constr., Inc.*, No. CIV.A. 1735-S, 2006 WL 75308, at \*2 (Del. Ch. Jan. 6, 2006) (dissolving a constructive trust that the court noted “was never meant to continue in force longer than necessary to permit a preliminary determination, on a more complete record and after adequate notice, whether or not the plaintiff’s claim is likely meritorious.”).

183. See *Hardy v. Meryman*, No. 03-C-07-012239, 2010 WL 1956170 (Md. Cir. Ct. Mar. 30, 2010) (Trial Order) (imposing constructive trust and specifying that it would automatically dissolve if defendant made a specified payment to plaintiff within sixty days).

184. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 cmt. 1, illus. 26 (AM. LAW INST. 2011). There is authority for the proposition that one equitable remedy—a decree quieting title—may not be modified. See 74 CORPUS JURIS SECUNDUM § 94 (2013) (citing *McMullin v. City & Cty. of Denver*, 133 Colo. 297 (1956)). On quiet title as an equitable remedy outside the system, see *supra* notes 133–135 and accompanying text.

finer to the state, or, less commonly, imprisonment.<sup>185</sup> 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>186</sup> For their contempt, the executives were again ordered to recall the pills, but this time they 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. They were also ordered to file subsequent reports, under oath, on the status of the recall.<sup>187</sup> Even then, their obedience was only slow and partial. As a result, the court ordered the executives imprisoned until they complied in good faith.<sup>188</sup>

It is not a common occurrence for a court to issue contempt sanctions.<sup>189</sup> But the effect of contempt can be found not only in the small number of cases in which defendants flout equitable decrees but in the larger number of cases in which the threat of contempt affects the behavior of litigants and attorneys. When contempt proceedings and sanctions do occur, they allow the court to respond to new circumstances. In some cases the court responds to the defendant's recalcitrance by compelling the defendant to obey.<sup>190</sup> In other cases, where the defendant has disobeyed and it is no longer possible to achieve compliance with the court's order, the court will substitute a sum of money for the previously required act or omission.<sup>191</sup> In neither kind of case is punishment the end: instead the court is directing, learning, responding, managing, doubling down on the first-best,

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185. In federal court, the creativity of contempt sanctions is limited. See *Ex parte Robinson*, 86 U.S. 505, 512 (1873).

186. *FTC v. Nat'l Urological Grp., Inc.*, No.1:04-CV-3294-CAP, 2014 WL 3893796 (N.D. Ga. May 14, 2014).

187. *Id.* at \*11 & n.22.

188. See Jessica Dye, *Diet-Pill Executives Jailed Over Recall Efforts*, REUTERS LEGAL (Sept. 9, 2014).

189. See, e.g., SEC's Memorandum of Law in Response to Questions Posed by the Court Regarding Proposed Settlement at 23, *SEC v. Citigroup Glob. Mkts. 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, 1409–15 (2012) (describing scant use of contempt in patent litigation).

190. This is characteristic of coercive civil contempt. See generally DOUG RENDLEMAN, *COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT* 691–833 (2010).

191. This is characteristic of compensatory civil contempt. See generally *id.* at 834–71.

substituting a second-best, all with the goal of achieving the plaintiff's rightful position.<sup>192</sup>

Contempt is available to enforce each of the equitable remedies; the general rule is that this enforcement mechanism is available for none of the legal remedies.<sup>193</sup> There are caveats. One is that this rule can be abrogated by legislation.<sup>194</sup> Another is that the further process used to enforce an award of damages (e.g., attachment) can lead to a coercive order, which in turn can lead to contempt.<sup>195</sup> Nevertheless, the equitable remedies are distinct in that they are directly enforceable with contempt. Without this direct enforceability, a legal remedy still has power—it is a real remedy—but it is more awkwardly used as a vehicle for managing the parties.

3. *Equitable Helpers.* When a court gives an equitable remedy it may appoint what could be called “equitable helpers,” such as masters and receivers.<sup>196</sup> These are officers of the court who take discovery, dispose of property, or investigate compliance. Although these officials have a long history in equity,<sup>197</sup> they are now allowed in some cases where the plaintiff's claim is for a legal remedy. For example, Federal Rule of Civil Procedure 53 allows masters to be appointed in bench trials for a “difficult computation of damages.”<sup>198</sup> But nevertheless it appears to remain the case that when masters and receivers are appointed in conjunction with a remedy, the remedy is typically an equitable one.<sup>199</sup> Outside of those remedies

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192. See *id.* at 629; Bray, *supra* note 85, at 1126–28.

193. See *supra* note 80.

194. See LAYCOCK, *supra* note 38, at 386.

195. *E.g.*, Gemco Latinoamerica, Inc. v. Seiko Time Corp., 61 F.3d 94, 96 (1st Cir. 1995). Contempt is available, as an inherent power of courts, against conduct that interferes with the judicial process, such as contumacious disruptions in the courtroom or failure to comply with discovery orders. See, e.g., Robert Megary, *Contempt*, 17 GREEN BAG 2D 421 (Bryan A. Garner ed., 2014).

196. See, e.g., United States v. Gov't of Guam, No. CIV. 02-00022, 2008 WL 732796, at \*10 (D. Guam Mar. 17, 2008) (after repeated violations of consent decree, appointing receiver for Solid Waste Management Division of the Department of Public Works in Guam, but declining to appoint monitor or special master). Although the various kinds of “equitable helpers” are overlapping, these two are distinct enough to receive their own separate entries in the Federal Rules of Civil Procedure. See FED. R. CIV. P. 53, 66. For other titles used, see THOMAS E. WILLGING ET AL., FEDERAL JUDICIAL CENTER, SPECIAL MASTERS' INCIDENCE AND ACTIVITY 1 (2000).

197. See JOHN G. HENDERSON, CHANCERY PRACTICE WITH ESPECIAL REFERENCE TO THE OFFICE AND DUTIES OF MASTERS IN CHANCERY, REGISTERS, AUDITORS, COMMISSIONERS IN CHANCERY, COURT COMMISSIONERS, MASTER COMMISSIONERS, REFEREES, ETC. (1904).

198. FED. R. CIV. P. 53(a)(1)(B)(ii); see also *supra* note 77. Appointing such officers is considered an inherent power of courts. See *Ex parte* Peterson, 253 U.S. 300, 312–14 (1920).

199. See, e.g., Bamgrover v. City of Columbus, 739 S.E.2d 377, 377–80 (Ga. 2013) (describing history of nuisance case in which legal and equitable remedies were given at trial, but only the equitable remedy required the enforcement by a special master). In some jurisdictions, a master has an official title that includes a reference to equity. See, e.g., TEX. R. CIV. P. 171 (“Master in Chancery”); S.C. R. CIV. P. 53 (master-in-equity). On the availability of masters and receivers for the restitutionary equitable

they appear to be used sparingly.<sup>200</sup> This pattern persists for reasons other than habit. One is policy: equitable remedies are far more likely to require the managerial powers wielded by a master or receiver.<sup>201</sup> Another reason is that in some instances the law authorizes broader use of masters and receivers for equitable claims.<sup>202</sup> Another is that when a plaintiff is seeking an equitable remedy, there is no concern that appointing a master or receiver would impinge on the right to a jury trial.<sup>203</sup>

4. *Right/Remedy Relationship.* For equitable remedies there tends to be more flexibility in how the court restores the plaintiff to his rightful position.<sup>204</sup> Sometimes a legal remedy corresponds almost exactly to the rightful position, without any translation required. This is true, for example, when a court awards damages for a commercial tort that inflicted only measurable monetary injury. Sometimes an equitable remedy achieves a similar correspondence (e.g., specific performance<sup>205</sup>). But when the remedy is not in exactly the same coin as the right, there is a greater range of choice in how an equitable remedy restores or protects the plaintiff's right. For example, a court may decide to delay the start of an injunction,<sup>206</sup> to phase it out after a defined

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remedies, see, for example, *Tibbals v. Tibbals*, No. A13-2419, 2014 WL 5121114, at \*8 (Minn. Ct. App. Oct. 14, 2014) (constructive trust); *Hill v. Hill*, No. 01AP-716, 2002 WL 243294 (Ohio Ct. App. Feb. 21, 2002) (accounting); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 56 reporter's note c (AM. LAW INST. 2011) (equitable lien); CARYL A. YZENBAARD ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 472 n.29 (3d ed. 2009) (constructive trust).

200. Compare *Mountain Lake Colony v. McJunkin*, 417 S.E.2d 578 (S.C. 1992), and *Simpson v. Canales*, 806 S.W.2d 802 (Tex. 1991), with *DiGiacobbe v. Sestak*, 743 A.2d 180 (Del. 1999).
201. On equitable remedies and the need for managerial devices, see *supra* notes 168–175 and accompanying text.
202. See WRIGHT ET AL., *supra* note 81, § 2602 (suggesting that traditional equity powers in relation to masters are broader than Federal Rule of Civil Procedure 53, and that some appointments of masters can be justified only on the basis of the former); see also *Hamzavi v. Bowen*, 730 A.2d 274, 276 (Md. Ct. Spec. App. 1999) (“Generally, a court of law without equity jurisdiction or statutory authority has no power to appoint a receiver.”).
203. Rule 53 does not allow circumvention of the right to trial by jury: a master may be appointed for “a difficult computation of damages” only as to “issues to be decided without a jury.” FED. R. CIV. P. 53(b); WRIGHT ET AL., *supra* note 81, § 2604 (describing how the 2003 amendments to the Federal Rules of Civil Procedure limited masters in jury trials).
204. On the plaintiff's rightful position as the goal of remedies, see LAYCOCK, *supra* note 38, at 14–15.
205. On the complex relationship of specific performance to a contractual right, see Lionel Smith, *Understanding Specific Performance*, in *COMPARATIVE REMEDIES FOR BREACH OF CONTRACT* 221 (Nili Cohen & Ewan McKendrick eds., 2005).
206. *Brown v. Plata*, 131 S. Ct. 1910, 1945–46 (2011) (approving injunction that gave the state two years to comply); *Broadcom Corp. v. Emulex Corp.*, 732 F.3d 1325, 1331–32, 1338–39 (Fed. Cir. 2013) (approving injunction against patent infringement that gave infringer an eighteen-month “sunset period” to avoid disruptions to customers); *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 1008 (N.D. Cal. Aug. 8, 2014) (issuing injunction that would “not take effect until the start of

period of time,<sup>207</sup> or to close some other avenue by which the defendant might violate the plaintiff's right.<sup>208</sup> Moreover, courts can condition equitable relief upon some action by the plaintiff, for "he who seeks equity must do equity."<sup>209</sup> For example, when awarding a constructive trust, a court may require the prevailing plaintiff to reimburse certain costs incurred by the constructive trustee.<sup>210</sup> Courts can employ these techniques to constrain certain opportunistic behaviors by the plaintiff or defendant,<sup>211</sup> to fashion a compromise remedy when transaction costs between the parties are particularly high,<sup>212</sup> or to take into account concerns about judicial administrability and other aspects of the public interest.<sup>213</sup> This degree of

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[the] next . . . football and . . . basketball recruiting cycle"); *cf.* *Martian v. Martian*, 399 N.W.2d 849, 854 (N.D. 1987) ("[T]here may be circumstances which justify imposing an implied trust or lien for amounts to become due in the future."). Among scholars, delayed injunctions have been analyzed especially with respect to intellectual property litigation. See 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, "Patent Trolls" and Patent Remedies, 85 TEX. L. REV. 2111, 2148 n.136 (2007); Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2035–39 (2007).

207. See *EEOC 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); *APC Filtration, Inc. v. Becker*, No. 07-CV-1462, 2010 WL 4930688, at \*2 (N.D. Ill. Nov. 30, 2010) (because of defendant's contempt, extending injunction so that it expired in nine months). For an older example, see *Georgia v. Brailsford*, 2 U.S. 415, 419 (1793) (opinion of Jay, C.J.).
208. See *Int'l Salt Co. v. United States*, 332 U.S. 392, 400 (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); *United States v. Vend Direct, Inc.*, No. 06-CV-02423-MSK-MEH, 2007 WL 3407357, at \*2 (D. Colo. Nov. 13, 2007) (noting that an injunction may go "beyond the specific violations . . . in order to 'fence in' the Defendants").
209. See *United States v. Lewis Cty.*, C94-5474FDB, 2001 WL 769587, at \*2–3 (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); *DOBBS, supra* note 69, 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 *Yakus v. United States*, 321 U.S. 414, 440–41 (1944); JAMES P. HOLCOMBE, 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."); SPENCER W. SYMONS, POMEROY'S EQUITY JURISPRUDENCE § 393d, 83–84 (5th ed. 1941).
210. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 illus. 5 (AM. LAW INST. 2011).
211. See *Fiduciary Law, supra* note 9, at 262–71.
212. *Cf. Ayres & Talley, supra* note 17; Louis Kaplow & Steven Shavell, *Do Liability Rules Facilitate Bargaining? A Reply to Ayres and Talley*, 105 YALE L.J. 221, 222 n.5 (1995).
213. See *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (plurality opinion) ("[I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable."); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941).

choice is not, strictly speaking, a managerial device, but rather something like a habit or customary range of motion that is conducive to managing the parties.<sup>214</sup>

This degree of flexibility is often thought to be associated with remedies for constitutional violations, but it is characteristic of equitable remedies for violations of many different kinds of rights. For example, after a court finds that a defendant is infringing a trademark, and decides to issue an injunction, it 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 orders already placed, in order to avoid the wasteful destruction of existing stock or severe damage to the defendant’s business reputation.<sup>215</sup>

There are several reasons for this degree of flexibility in how courts achieve the plaintiff’s rightful position. First, compared to damages, the equitable remedies involve more dimensions of variation: for compensatory damages almost the only dimension of variation is quantum. Although there can be some flexibility in the scope of legal remedies that are non-monetary, they are narrower and, if not quite off-the-rack, then still close to that.<sup>216</sup> But one instance of an equitable remedy may vary from another instance of the same remedy along many different dimensions: what each party is required to do, what each party is prohibited from doing, what conditions are attached, what the beginning and end dates are, what the reporting requirements are, and so on. Second, courts may broaden their view

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214. Many scholars fail to take seriously this flexibility and range of choice, and instead treat the injunction as if it were a remedy that corresponded perfectly to the entitlement held by the plaintiff. *E.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Some notable exceptions are Golden, *supra* note 206; 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); Emily Sherwin, *Introduction: Property Rules as Remedies*, 106 YALE L.J. 2083 (1997); Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301 (2004); *see also* Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1388 (1991) (critiquing Lon Fuller for failing to “consider the implications of his theory for the court’s role in equity cases,” and attributing this failure to his view of rights and remedies).

215. *CFE Racing Products, Inc. v. BMF Wheels, Inc.*, 2 F. Supp. 3d 1029, 1035 (E.D. Mich. 2014) (quoting MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 30:3 (4th ed. 2013)).

216. *See supra* notes 139–166 and accompanying text.

from the two parties themselves because of how equitable remedies can impose additional costs on the courts and third parties.<sup>217</sup> A third reason for greater flexibility has already been noted, namely the traditional equitable concern for preventing an opportunistic abuse of rights.<sup>218</sup> That concern may justify imposing additional conditions on either the plaintiff or defendant.

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>219</sup> These are all tasks for which judges are better suited than juries. Judges are better able 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. And judges, not being called only for the days of a single trial, will be able to consider questions about the text that arise in the future. The jury, by contrast, is not the right kind of actor—it is nonexpert, multimember, and temporary.<sup>220</sup> Therefore, as a matter of policy the jury should never be the institution drafting, revising, or managing compliance with an injunction.<sup>221</sup> Nor is it. Nor is there any right to a jury trial to resolve a claim for the other equitable remedies. “If 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>222</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

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217. See *infra* notes 227–242 and accompanying text.

218. See Smith, *supra* note 3.

219. Doug Rendleman, *Prospective Remedies in Constitutional Adjudication*, 78 W. VA. L. REV. 155, 163 (1976).

220. See DOBBS, *supra* note 69, 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 100, at 538 (“Specific relief often requires continuing supervision and modification as circumstances change, but a jury dissolves once it has delivered its verdict.”); see also LANGBEIN, LERNER & SMITH, *supra* note 24, 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”).

221. For a somewhat contrary view, see FISS, *supra* note 69, at 55–56.

222. *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 299 F.3d 643, 648 (7th Cir. 2002); see 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.”); see also *supra* note 82.

modified or dissolved.<sup>223</sup> Unless there is a legislatively enacted exception, only equitable remedies may be enforced by contempt.<sup>224</sup> Masters and receivers still seem more likely to be used for supervising equitable remedies than for legal ones.<sup>225</sup> And there is a greater degree of choice when a court uses an equitable remedy to achieve the plaintiff's rightful position.<sup>226</sup>

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

#### D. The Equitable Constraints

These equitable remedies and managerial devices can be costly, both to courts and litigants. They are also particularly susceptible to abuse, because they have asymmetric effects that can be exploited by a wily litigant.

Begin with the relative cost of equitable remedies to courts and litigants.<sup>227</sup> Most obviously there are the costs of compliance with the equitable remedy itself—

223. See *supra* notes 81, 177–184 and accompanying text.

224. See *supra* notes 80, 193. On statutory exceptions for replevin in some states, see *supra* note 193.

225. See *supra* notes 199–200 and accompanying text.

226. See *Int'l Equity Invs., Inc. v. Opportunity Equity Partners, Ltd.*, No. 05 Civ. 2745 (LAK), 2006 WL 1293281, at \*1 (S.D.N.Y. May 10, 2006), *aff'd*, 246 F. App'x 73 (2d Cir. 2007); *Harris v. Harris*, 300 S.E.2d 369, 372 (N.C. 1983).

227. The scant empirical literature on this question consists of Yair Listokin, *The Empirical Case for Specific Performance: Evidence from the Tyson-IBP Litigation*, 2 J. EMPIRICAL LEGAL STUD. 469 (2005); and 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 (2013).

There is also a large theoretical literature about the relative efficiency of expectation damages and specific performance. *E.g.*, Shavell, *supra* note 124. Nevertheless, it is hard to draw general conclusions about the cost of equitable remedies from that literature for two reasons. First, some of the models assume away relevant costs. *E.g.*, Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939, 1955–56 (2011) (explicitly assuming zero transaction costs, and implicitly assuming zero judicial costs). It is no answer that the Markovits-Schwartz model actually supports expectation damages; the relevant inquiry in this Article is not when courts should give equitable remedies but rather what they are giving when they do. Second, damages and specific performance have features in contract law that do not carry over to other areas of the law. Damages have an unusual advantage in contract because it is more likely that there will be an organized market that allows the plaintiff to cover (contrast with damages in tort or constitutional law, where no such market exists). But specific performance also has unusual advantages relative to injunctions. The parties already have a relationship and have already taken the trouble to specify their obligations by writing a contract, whereas many injunctions

obeying the injunction, carrying out the accounting, acting the part of the constructive trustee, discharging the specific performance, and so on.<sup>228</sup>

In addition to these direct costs of compliance, an equitable remedy may have more subtle costs if it requires further adjustments in the defendant's behavior. As Gene Shreve has said, an injunction (or for that matter any remedy that compels action or inaction)

poses the threat of adjusting more aspects of the defendant's behavior than those that would wrong the plaintiff if the injunction were not issued. It is difficult if not impossible to so finely adjust an order that it protects plaintiff without impairing defendant's harmless activities or the rights of those who are not represented before the court.<sup>229</sup>

The extent of these direct and indirect costs of compliance will obviously vary depending on what exactly the court commands.

Some equitable managerial devices are also costly, particularly ex post revision, contempt, and equitable helpers.<sup>230</sup> Initially, there are costs for the plaintiff who requests that the court employ one of these managerial devices, for the defendant who resists that request, and for the court that must decide the question.<sup>231</sup> Then, if

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are given where the parties have no preexisting relationship and the court itself must take the trouble of specifying, or individuating, the relevant legal obligation. On the rule that courts must take that trouble, see, for example, *SEC v. Smyth*, 420 F.3d 1225, 1233 n.14 (11th Cir. 2005). In addition, even if there were anecdotal evidence that 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 *Jones v. Parker*, 40 N.E. 1044, 1045 (Mass. 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"); RESTATEMENT (SECOND) OF CONTRACTS § 366 (AM. LAW INST. 1981). Thus if the administrative costs of damages and specific performance were even to be roughly equivalent in actual cases, it would be the result of judges responding to, and avoiding, the intrinsically higher costs of specific performance.

228. See *United Food & Commercial Workers Union v. Hormel Foods Corp.*, No. 10 CV 2595, 2013 WL 6851518, at \*62 (Wis. Cir. Ct. Dec. 30, 2013) (granting a declaratory judgment but declining to give an injunction, in part because it would be burdensome for the defendant to comply with "the final requested part of the injunction concerning production on a regular basis (into the future) of payroll records").

229. Shreve, *supra* note 85, at 389.

230. The other two managerial devices discussed above seem less costly. First, the absence of juries may reduce costs. Jury trials are thought to be more expensive than bench trials, all else being equal, but those costs would have to be offset by the possibility that the prospect of a jury trial induces settlement at the margin, thus averting the cost of trial entirely. Second the court's degree of choice in pursuing the plaintiff's rightful position probably increases costs modestly, because it expands the number of remedial choices, giving more options for the parties to request and resist and more decisions for the court to make.

231. For recognition of litigant costs, see Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 629-30 (2006) (noting, in the context of prison litigation, that for some "small jurisdictions" the costs of litigating the modification of a

the court grants the request, there will be other costs. These include the costs to the court and the parties from modifying the equitable remedy (such as briefing, a hearing, and possibly more discovery); or the costs of adjudicating the contempt; or the costs of appointing and overseeing the master or receiver.<sup>232</sup> And all of this is iterative. After the initial costs are incurred—regardless of what the court decides—there can be further rounds, for either party may go back to court with a new request for some kind of adjustment or enforcement. Furthermore, whatever the court has done or not done might need to be clarified, which is itself costly.<sup>233</sup>

To illustrate the point, consider a recent nuisance case in the Supreme Court of Georgia.<sup>234</sup> Fifteen years ago a homeowner sued the City of Columbus for nuisance, claiming that the city's pipes under his property were causing sinkholes and spreading bacteria.<sup>235</sup> The homeowner, a Kenneth Barngrover, prevailed. To be specific, he won a jury award of \$237,000 in damages and an equitable decree ordering the abatement of the nuisance. But what happened next?

It is customary in a law review article to summarize only briefly the procedural history of a case, but fair warning—the history of *Barngrover v. City of Columbus* is about to be quoted at length. The point is to give a sense of the managerial devices and expense involved, not in a massive case involving an overcrowded prison system but in a picayune case about leaky pipes:

In its judgment entered September 1, 1999, the trial court ordered the City to abate all nuisances created, maintained, and in existence on Barngrover's property . . . and to repair, renovate, and restore the houses and real estate to their 1991 undamaged condition.

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consent decree “loom larger than compliance costs”). For recognition of judicial costs, see *Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 281 (7th Cir. 1992) (“[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.”); 13A FED. PRAC. & PROC. JURIS. § 3531.2 (3d ed. 2013) (“To award damages, it need only be determined that the specific activities involved with this case were unlawful. To award an injunction, much more precise determinations may become necessary.”); Anthony DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation*, 35 HARV. J.L. & PUB. POL'Y 743, 753 (2012).

232. See Shreve, *supra* note 85, at 389–90. For skepticism about the administrative costs discussed here, see MCCLINTOCK, *supra* note 22, at 48–49 (“Normally all that the court awarding [equitable] relief has to do with its actual administration is to entertain proceedings for contempt of court in those cases where the successful party claims that the decree has not been obeyed.”).

233. *E.g.*, Defendant NCAA's Administrative Motion for Clarification of Timing of Injunction at 1, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. 09-cv-3329-CW, 2010 WL 445190 (N.D. Cal. Aug. 11, 2014) (seeking to clarify, *inter alia*, the meaning of “recruiting cycle” in the court's injunction). The distinction between clarifying and modifying an injunction may seem pedantic, but it can matter for appellate jurisdiction. See, *e.g.*, *Arlington Indus. v. Bridgeport Fittings, Inc.*, 759 F.3d 1333, 1337–39 (Fed. Cir. 2014).

234. *Barngrover v. City of Columbus*, 739 S.E.2d 377 (Ga. 2013).

235. *Id.* at 378.

The trial court expressly retained jurisdiction of the case pursuant to its equitable power to ensure completion of the equitable remedy. A week later, the trial court issued an order clarifying that the nuisances to be abated were only those “identified by the jury in its verdict” and that “[a]batement of the drainage system away from the house of [Barngrover] involves stopping the flow of storm water in the pipes under said house or its carport or swimming pool area. . . .” Following the City’s submission in September 1999 of plans to implement the injunctive relief, the trial court issued an order in December 1999 rejecting the City’s plan and ordering the City to remove from Barngrover’s property all nuisances, pipes, and damages caused by the nuisances; to abate the drainage system away from Barngrover’s property by re-routing and removing the storm water sewers and sanitary sewers traversing Barngrover’s property, with the exception of one specified sewer line to which only a sanitary sewer line serving Barngrover’s structures could be connected, with necessary sewer-line connections for neighboring properties being made without crossing, abutting, or coming onto Barngrover’s property; and to repair, renovate, and restore the houses, premises, and real estate to their 1991 undamaged condition.

After several years of entering various orders in an effort to provide the equitable relief required by the jury’s verdict,<sup>236</sup> the trial court appointed a special master in January 2007 to enforce the December 1999 judgment. In April 2011, the special master noted that the structures on the Barngrover property were beyond repair and

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236. Here the Georgia Supreme Court opinion includes the following footnote:

In February 2002, the trial court found it “economically impractical and unfeasible” to remediate and repair Barngrover’s property to its 1991 condition as previously ordered and, having considered independent appraisals of the property submitted by the parties, determined that the fair market value of the property was \$750,000. The trial court offered Barngrover several options, including selling the property to the City for \$750,000 and, should Barngrover not make an election, the City would be allowed to remove and/or re-route the pipes traversing the property so as to intrude minimally on the property. In November 2006, citing a need for the matter to be concluded and exercising its equity jurisdiction, the trial court ordered the City to pay \$675,000 into the court’s registry for the Barngrover property and ordered Barngrover to convey title to the City. If Barngrover did not accept the offer, the City was to repair the property, with costs not to exceed 62 percent of the offer. In January 2007, the trial court, noting that Barngrover had elected to have the house repaired, set aside the November 2006 order and appointed a special master to enforce the December 1999 order. . . .

*Id.* at 378 n.1.

recommended they be razed and replaced with a new structure built at a cost not to exceed \$150 per square foot. The special master also recommended implementation of the City's plan directing the drain pipe system away from the Barngrover house to the rear property lines, an alternative the special master found to be considerably less expensive and much less disruptive to the neighborhood than Barngrover's proposal which kept all lines from adjacent neighbors from traversing Barngrover's property.

Barngrover filed objections to the special master's report and a motion to replace the special master. After a hearing concerning Barngrover's objections and his motion, the trial court entered an order adopting the recommendation of the special master with regard to the equitable relief, i.e., the remediation of the property, and entering judgment thereon. In so doing, the trial court ordered that the structures on the property be razed and rebuilt since they now were beyond repair; that the property be cleared of debris and trash; that soil contaminated by fecal coliform or otherwise damaged by the leakage of sewer or storm water be removed and replaced; and that the new drainage system, i.e., new sewer and storm water pipes, be run away from the house to the rear property line and then across adjoining property over which the City had obtained an easement.<sup>237</sup>

That last order, the one to rebuild the structures, replace the soil, and redirect the drainage system, was then appealed up to the Georgia Supreme Court. It was the order at issue in *Barngrover v. City of Columbus*.<sup>238</sup> This case is just one example, but it stands for a broader phenomenon: the equitable remedies and equitable managerial devices can be costly.

Caveats are of course necessary. The costs of litigation vary based on many factors, including the monetary stakes, the length of the litigation, the nature of the plaintiff's claim, and whether either party is primarily concerned with something other than the monetary stakes.<sup>239</sup> In addition, the most costly equitable managerial devices, such as masters and receivers or contempt proceedings, are not

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237. *Id.* at 378–79.

238. *Id.* at 379.

239. For analysis of litigation costs based on attorney self-reporting in closed federal cases, see EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS: REPORT TO THE JUDICIAL ADVISORY COMMITTEE ON CIVIL RULES (2010).

routine.<sup>240</sup> Moreover, there are certain scenarios in which from an ex ante perspective the least costly remedy is an equitable one. For example, when there is specific performance of a contract involving a family heirloom, the good is non-fungible, it has a value that is hard to measure, the fact and quality of performance are easy to observe, and little supervision is necessary. Finally, litigation costs after a damage award can turn out to be expensive, especially if the defendant hides the assets needed to satisfy the judgment or goes into bankruptcy.<sup>241</sup>

Nevertheless, the point is that equitable remedies have certain characteristic costs, especially the direct and indirect costs of complying with the court's command and the possibility of an afterlife in which that command is clarified, modified, enforced, or dissolved. These costs are not characteristic of legal remedies. Thus, from an ex ante perspective, it is reasonable to think that equitable remedies are more costly. Moreover, many of these costs are externalities to the parties and will not be fully incorporated into their decisionmaking.<sup>242</sup> How broadly these remedies are available is thus a question that directly implicates the public interest, even more than does the availability of legal remedies.

In addition to being more costly, the equitable remedies are more likely to be abused by the parties. This is so because of two distinct asymmetries.

First, equitable remedies can have a sharply asymmetric effect on the plaintiff and defendant. An award of damages is money, and the amount of money received by the plaintiff is the same as the amount of money paid by the defendant.<sup>243</sup> Similarly, in replevin the personal property is identical no matter who holds it.<sup>244</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

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240. See John M. Golden, *Litigation in the Middle: The Context of Patent-Infringement Injunctions*, 92 TEX. L. REV. 2075, 2095 (2014) (finding that contempt proceedings were rare in a dataset of patent injunctions).

241. See LAYCOCK, *supra* note 38, at 861 (“[One should not] compare the hardest and most publicized injunction cases to the simplest collection cases.”). To refine the comparison in the text, one would also need to consider cases in which it is an equitable remedy that drives the defendant into bankruptcy.

242. There have been proposals to make the parties bear more of the costs of masters. See, e.g., Schwartz, *supra* note 69, at 293–95. But as Thomas Ulen has noted, “despite its attraction to economists,” the idea “does not find much favor” with the courts. Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 401 (1984). Drawbacks of making parties pay for masters include the distributive effects and the shift to a privatized conception of adjudication. There is also a danger that masters will try to maximize their fees. See *In re Evans*, 638 S.E.2d 64 (S.C. 2006).

243. Of course the plaintiff's gain and the defendant's loss of the same amount of money might be differently experienced for many different reasons, including temperament, wealth disparities, and loss aversion.

244. 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.

the duty must be one that is clearly prescribed by law.<sup>245</sup> By contrast, equitable remedies are often asymmetric in their effect, and sometimes 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 will suffer a huge loss, but the plaintiff will receive only a small material gain.<sup>246</sup>

Second, equitable remedies can be susceptible to abuse because of a temporal asymmetry.<sup>247</sup> 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 into 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 of property, and thus are relatively immune from ex post market fluctuations. The obvious exception is replevin, but it is only concerned with personal property, which is less likely to have a dramatic appreciation in market value. There is one other caveat: if *A* receives an award of damages at time 1, but *B* does not pay, and *A* must go after the assets of *B* at time 2, the fluctuation in the value of *B*'s assets between times 1 and 2 might matter. But speaking generally, the problem of temporal asymmetry is more pervasive and significant for equitable remedies.<sup>248</sup>

Given the greater cost and greater 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 "equitable constraints" are crucial to understanding equity:<sup>249</sup>

1. *Equitable Ripeness.* There is a requirement of additional factual development for equitable remedies, which is represented by the equitable ripeness doctrine.<sup>250</sup> There is obvious overlap here with constitutional doctrines of ripeness and standing, as well as abstention doctrines. The relationship between the

245. Habeas relief lacks the problematic asymmetry of equitable relief, since the petitioner, if successful, usually gains more than the government loses. The government loses a prisoner, but the prisoner gains himself.

246. The parties might bargain, replacing the asymmetric injunction with a symmetrical monetary settlement. Yet there is reason to be skeptical about how often that happens. See Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373 (1999).

247. On this general difference between legal and equitable remedies, see Bray, *supra* note 15, at 6–7.

248. Once a suit is filed, it may be that the remedy sought affects the attitudes the plaintiff and defendant have toward delay. If that is true, and if their attitudes toward delay are more divergent in a suit for damages, then that would increase the risk of abuse in damages suits.

249. Cf. C.C. LANGDELL, A SUMMARY OF EQUITY PLEADING 38 n.4 (Cambridge, Charles W. Sever 2d ed. 1883) (“[A]ny one who wishes to understand the English system of equity as it is, and as it has been from the beginning, must study its weakness as well as its strength.”).

250. See *supra* note 85.

constitutional doctrines and their equitable counterparts cannot be untangled here. It suffices to say that they overlap, and yet that a court may invoke equitable ripeness as an independent reason not to give equitable relief.<sup>251</sup> Indeed, 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.<sup>252</sup> Nor is this concern misplaced. Ripeness is especially important for equitable remedies because they can depend on facts that are changing and contingent, and can entangle the courts in the relationship of the parties, not just at the moment of decision but (at least potentially) on a continuing basis.<sup>253</sup> Not only ripeness, but other justiciability doctrines, such as mootness, are also sometimes said to be more exacting for claims for equitable remedies.<sup>254</sup>

2. *Specificity Requirement.* There is also a 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 some of the state analogues this requirement is prescribed for the injunction,<sup>255</sup> but it appears to be a requirement

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251. For analysis related to the injunction and declaratory judgment, see Bray, *supra* note 85. The courts' more exacting review of the ripeness of equitable claims may take place under other doctrinal headings, such as irreparable injury, equitable discretion, and lack of propensity. *E.g.*, *In re DDAVP Indirect Purchaser Antitrust Litig.*, 903 F. Supp. 2d 198, 209–11 (S.D.N.Y. 2012) (finding a failure to state a claim for injunctive relief).

252. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111–13 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974); *Younger v. Harris*, 401 U.S. 37 (1971); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500–01 (1941). For discussion, see Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 827, 827 n.216 (2004) (standing); Bray, *supra* note 85, at 1146 n.247 (ripeness); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 617–22 (1976) (political question); see also Lochlan F. Shelfer, Note, *Special Juries in the Supreme Court*, 123 YALE L.J. 208, 234 (2013) ("Because the overwhelming majority of cases in the Supreme Court's original jurisdiction sound in equity, the Court often refuses petitions on the equitable basis of alternative fora.") (footnote omitted). 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, 1139 n.177 (1974); Laycock, *supra* note 2, at 75; Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 84–90 (1984).

253. See *supra* notes 168–174 and accompanying text; *infra* notes 285–286 and accompanying text.

254. See *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009) ("When, as in this case, a defendant has ceased offending conduct, the party seeking injunctive relief must demonstrate to the court 'that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.'") (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)); *Getty Images, Inc. v. Microsoft Corp.*, 61 F. Supp. 3d 296, 300 (S.D.N.Y. 2014) ("[T]he standard for establishing the need for injunctive relief is more stringent than the mootness standard."); see also *Pires v. Bowery Presents, LLC*, 988 N.Y.S.2d 467, 472 (N.Y. Sup. Ct. 2014).

255. See *FED. R. CIV. P.* 65(d); *CAL. R. CT.* 3.1151; *SEC v. Smyth*, 420 F.3d 1225, 1233 n.14 (11th Cir. 2005); see also *Columbia Gas Transmission, LLC v. Ott*, 984 F. Supp. 2d 508, 516 (E.D. Va. 2013)

for equitable remedies more generally.<sup>256</sup> The specificity requirement serves various purposes, such as protecting the defendant from being found in contempt for violating “a decree too vague to be understood.”<sup>257</sup> Not only the defendant but also the court benefits because having a specifically worded decree will streamline decisions about contempt.<sup>258</sup> Despite the benefits of specificity, in some injunctions a degree of vagueness will prove unavoidable; the specificity requirement does not ensure complete clarity about how the injunction will be applied.<sup>259</sup>

3. *Adequacy Requirement.* For an equitable remedy to be given, there must be “no adequate remedy at law.” That requirement applies to all claims for equitable remedies.<sup>260</sup> It does not apply to the legal remedies.<sup>261</sup> Moreover, courts regularly invoke this requirement to resist unnecessary deployment of the managerial powers of equitable remedies.<sup>262</sup>

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(“[Under Virginia law,] because an injunction is an extraordinary remedy, an injunction ‘must be specific in its terms, and it must define the exact extent of its operation so that there may be compliance.’”) (quoting *Unit Owners Ass’n of Buildamerica-1 v. Gillman*, 223 Va. 752 (Va. 1982)); *WRIGHT ET AL.*, *supra* note 81, § 2955 n.25 (collecting cases proscribing obey-the-law injunctions). For evidence that judges often fail to comply with the specificity requirement, see *Golden*, *supra* note 206.

256. See *WRIGHT ET AL.*, *supra* note 81, § 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 (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*, 300 F.R.D. 529, 560 (D.N.M. 2014) (characterizing Rule 65(d) as imposing “well-defined guidelines for clarity and specificity in equitable orders”); *Estate of Cowling v. Estate of Cowling*, 847 N.E.2d 405, 412 (Ohio 2006) (“A claimant seeking the imposition of a constructive trust must specify the particular property over which the constructive trust is to be placed.”).
257. *Schmidt v. Lessard*, 414 U.S. 473, 476–77 (1974) (per curiam).
258. An example is *APC Filtration, Inc. v. Becker*, No. 07-CV-1462, 2010 WL 4930688, at \*2 (N.D. Ill. Nov. 30, 2010), in which the court was able to find the defendant in contempt because of the specificity of the injunction.
259. For example, after a finding of patent infringement, a court may enjoin future “infringement not only via the precise products or processes already adjudged to infringe, but also via products or processes ‘no more than colorably different’ from them.” *Golden*, *supra* note 189, at 1421. One cannot sharply distinguish between the future infringements that are and are not “colorably different” from the past ones.
260. See *supra* note 86. Note that in at least one jurisdiction there is authority for relaxing the adequacy requirement and other equitable requirements for an injunction that is authorized by statute. See *City of Houston v. Proler*, 373 S.W.3d 748, 763–64 (Tex. App. 2012) (collecting Texas cases), *aff’d in part, rev’d in part on other grounds*, 437 S.W.3d 529 (Tex. 2014).
261. See, e.g., *LAYCOCK*, *supra* note 38, at 385 (“Because replevin was a legal remedy, it was never subject to the irreparable injury rule.”). On mandamus and the adequacy of other remedies, see *supra* note 75.
262. For exposition and critique, *LAYCOCK*, *supra* note 20, at 222–24, 269; see also *SHERWIN, EISENBERG & RE*, *supra* note 69, at 410 (noting that a court’s inquiry into the adequacy of legal remedies often includes consideration of “the burden an injunction will place on the court”).

Although the adequacy requirement fits here, under the heading of equitable constraints, it is important not to exaggerate or misunderstand its force. When a court finds that there is “no adequate remedy at law,” it is crossing a conceptual border—from not being in the system of equitable remedies, to being in that system. As Douglas Laycock’s work has proven, it is not hard for a court to cross that border.<sup>263</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>264</sup> What this means is that the adequacy requirement maintains the distinctiveness of equitable remedies. The adequacy requirement is not like a high wall that makes it hard to get into the system of equitable remedies. It is more 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. The adequacy requirement requires a conscious shifting of lanes. It can therefore be called a constraint, though its main effect is to preserve the distinction between legal and equitable remedies,<sup>265</sup> and thus the “conceptual exceptionalism” of equitable remedies.<sup>266</sup>

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 can be clearly seen in the major surviving equitable defenses.<sup>267</sup> One is laches, a defense against equitable claims brought with unreasonable delay.<sup>268</sup> Another is the unclean hands defense, which may preclude or narrow equitable relief when the plaintiff has acted inequitably.<sup>269</sup> Yet another is undue hardship (also called the balance of hardships or the balance of equities),

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263. LAYCOCK, *supra* note 20; Laycock, *supra* note 7, at 23 (“[T]he adequate-remedy or irreparable-injury rule sets a very low threshold for plaintiff’s right to a permanent injunction.”); accord *Evergreen W. Bus. Ctr., LLC v. Emmert*, 323 P.3d 250 (Or. 2014). There are opinions that say otherwise, however. *E.g.*, *Beck v. Test Masters Educ. Servs. Inc.*, 994 F. Supp. 2d 98, 100–02 (D.D.C. 2014).

264. See Bray, *supra* note 6, at 1037–39; Murphy, *supra* note 55, at 1606.

265. For constitutional and statutory authority requiring that distinction, see *supra* notes 58–65 and accompanying text; see also *supra* note 71.

266. Bray, *supra* note 6, at 1037–39 (distinguishing conceptual exceptionalism and statistical exceptionalism).

267. As noted above, many defenses that began in equity are no longer limited. See *supra* note 39. The three defenses discussed here are the major exceptions. Judge Quillen, in an opinion strongly urging the integration of legal and equitable defenses, nevertheless pulled back when it came to these three: “This Court recognizes that certain equitable defenses which are purely equitable in nature (unclean hands, balance of hardships, and laches) may present adoptability problems.” *USH Ventures v. Global Telesystems Grp.*, 796 A.2d 7, 20 (Del. Super. Ct. 2000) (footnotes omitted).

268. See Bray, *supra* note 15.

269. See DOBBS, *supra* note 69, at 268–71; see also RESTATEMENT (SECOND) OF TORTS § 940 (AM. LAW INST. 1979); cf. Howard W. Brill, *The Maxims of Equity*, 1993 ARK. L. NOTES 29, 34 (1993) (“The purpose of the unclean hands doctrine is neither to protect the defendant nor to favor the complainant . . . [but] to protect the court . . .”).

which applies when (1) equitable relief would impose costs on the defendant that greatly exceed the benefits to the plaintiff and (2) the defendant has acted equitably.<sup>270</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>271</sup>

5. *Maxims of Restraint and Residual Equitable Discretion.* There are a number of equitable maxims, and some of them express and urge a restraint in the use of equitable remedies, such as “Equity follows the law.”<sup>272</sup> These maxims are not rules, in the sense of outcome-determinative legal propositions. Rather they are concerns, topics of interest, matters on the agenda when judges are deciding whether to give equitable remedies.<sup>273</sup> “[T]he maxims of equity continue to be a factor in determining both the plaintiff’s right to be heard on a claim for equitable relief and the effect of the interposition of equitable defenses or counterclaims.”<sup>274</sup>

In addition, it is commonly said that there is a residual equitable discretion not to give an equitable remedy.<sup>275</sup> In Judge Friendly’s words, a trial court has

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270. See Laycock, *supra* note 7, at 2–7; Smith, *supra* note 3, at 233; see also Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2102 (1997) (“[E]ssentially the appropriate solution is to allow injunctive relief when the relative balance of convenience is anything close to equal, but to deny it (in its entirety if necessary) when the balance of convenience runs strongly in favor of the defendant.”); David Schoenbrod, *The Immortality of Equitable Balancing*, 96 VA. L. REV. IN BRIEF 17 (2010).
271. See *supra* notes 83–84. The main exception is that in many jurisdictions laches may be applied to mandamus. See *supra* note 75. Obviously much more can be said about the equitable defenses than the cursory treatment given them here. Leading treatments are Laycock, *supra* note 7; Sherwin, *supra* note 39; and Yorio, *supra* note 3.
272. See *Cooksey v. Landry*, 761 S.E.2d 61, 64 (Ga. 2014) (“The first maxim of equity is that equity follows the law.”); see also LANGBEIN, LERNER & SMITH, *supra* note 24, at 287 (“The maxim that equity follows the law placed on the petitioner the burden of persuading the Chancellor that failure to intervene would be inequitable.”). A useful overview of the maxims of equity can be found in MEAGHER, GUMMOW & LEHANE, *supra* note 155, at 71–100.
273. See MEAGHER, GUMMOW & LEHANE, *supra* note 155, at 71 (quoting authorities that describe equitable maxims as “the fruit of the observation of developed equitable doctrine” and “not a specific rule or principle of law [but] a summary statement of a broad theme which underlines equitable concepts and principles”) (citations omitted); I.C.F. SPRY, *THE PRINCIPLES OF EQUITABLE REMEDIES: SPECIFIC PERFORMANCE, INJUNCTIONS, RECTIFICATION, AND EQUITABLE DAMAGES* 5–6 (7th ed. 2007).
274. WRIGHT ET AL., *supra* note 81, § 1043 (footnote omitted); see Roger Young & 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).
275. See *Signature Flight Support Corp. v. Landow Aviation Ltd.*, 442 Fed. App’x. 776, 785 (4th Cir. 2011) (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”); RESTATEMENT (SECOND) OF CONTRACTS § 155 cmt. d (AM. LAW INST. 1981) (“Since the remedy of reformation is equitable in nature, a court has the discretion to withhold it, even if it would otherwise be appropriate, on grounds that have traditionally justified courts of equity in withholding relief.”).

“discretion . . . to withhold a permanent injunction as unnecessary even when the plaintiff has made out all the other elements of his case.”<sup>276</sup> A court may use this residual negative discretion to resist what would amount to an abusive or costly deployment of its equitable powers.<sup>277</sup>

6. *Ex post revision.* 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, modifications 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>278</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. Put differently, the court cannot precommit itself to maintaining an extreme injunction. It must always be willing to reconsider (a reconsideration that will happen, of course, in the shadow of appellate review).

7. *Decisionmaker.* The distinctive decisionmaker for equitable remedies—always a judge—also plays a double role. The decisionmaker was discussed above with the managerial devices, not because it is strictly speaking a managerial device but because it is an institutional fact that is conducive to managing the parties. It belongs here for the same reason: the absence of a jury makes some of the equitable constraints more effective. It is hard to imagine these constraints working well if they were applied by juries. Recall four of these constraints and consider the difficulties involved with entrusting them to a jury: First, the specificity requirement would be hard for a jury to comply with, because a multimember, non-expert body lacks the ability to draft a suitably specific decree.<sup>279</sup> Second, juries are not well positioned to consider the adequacy of legal remedies. This inquiry is (usually) not concerned with whether first principles indicate that this is a case

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276. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 778 n.116 (1982). For analysis of this residual equitable discretion, see Bray, *supra* note 6, at 1042–43. It has often been said, but bears repeating, that the concept of equitable discretion does not mean the absence of doctrinal rules. See Evangelical Lutheran Church of the Ascension of Snyder v. Sahlem, 172 N.E. 455, 457 (N.Y. 1930) (Cardozo, C.J.); Andrew Kull, *Ponzi, Property, and Luck*, 100 IOWA L. REV. 291, 300 (2014) (“There are equity problems that depend on the length of the Chancellor’s foot, but the basic rules validating and invalidating ownership of property are not among them.”).

277. See *Avitia v. Metro. Club of Chicago*, 49 F.3d 1219, 1231 (7th Cir. 1995) (“The effect of equitable remedies on third parties, not to mention on the courts that must take the time to supervise them, is the practical reason why there is no ‘right’ to an equitable remedy, why the plaintiff’s claim to such a remedy may have to yield to competing considerations.”); see also Golden, *supra* note 189, at 1460 (noting that the district court in *eBay v. MercExchange* declined to give an injunction for fear that it would lead to “contempt hearing after contempt hearing,” and also noting the concern about judicial costs in inappropriately discouraging judges from granting injunctions).

278. See *supra* text accompanying notes 177–184.

279. See *supra* notes 219–222 and accompanying text.

in which legal remedies are adequate, but rather with whether this is the sort of case in which courts have previously considered legal remedies to be adequate<sup>280</sup>—the kind of question about precedent that juries do not ordinarily resolve. Moreover, when a court considers the adequacy of legal remedies, it takes into account a range of considerations that jurors have no ability to assess, such as “the burden an injunction will place on the court.”<sup>281</sup> Third, it would be hard for a jury to apply laches in a fair and consistent way, which is perhaps another justification for using a rule-like statute of limitations for legal claims but a standard-like laches defense for equitable claims.<sup>282</sup> Finally, recall the argument that *ex post* revision constrains a judge, by forcing the judge who gives an equitable remedy to be open to the possibility of revisiting it.<sup>283</sup> For the jury, as presently constituted, this constraint fails. Jurors could decide to give whatever equitable remedy they wanted without bearing any of the consequences of enforcing it, since they would no longer be empanelled when the time for enforcement comes. In short, the absence of juries does not by itself constrain equitable remedies, but it does enable the equitable constraints to work more effectively.

None of these equitable constraints is rigid. None is airtight. 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 to give an equitable remedy. This may cause some to deny that they are actually constraints. Surely they would not work for a judge who was intent on abuse of power. But not all constraints are fetters.<sup>284</sup> These equitable constraints guide the responsible exercise of judicial power, both at the trial and appellate levels, by focusing a judge’s attention on certain situations where equitable remedies and enforcement mechanisms are most likely to be misused.<sup>285</sup>

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280. See MCCLINTOCK, *supra* note 22, at 103 (“In many types of cases, precedents have determined that the remedy at law is either adequate or inadequate.”); Gergen et al., *supra* note 7, at 220–26.

281. See SHERWIN, EISENBERG & RE, *supra* note 69, at 410.

282. Cf. Mark Leeming, *Common Law, Equity, and Statute: Limitations and Analogies*, draft presented to the Private Law Seminar, University of Technology, Sydney, at \*7 (Nov. 14, 2014) (“There is the immediately striking difference that damages at common law which are available as of right after 5 years and 11 months become unavailable after, say, 6 years; a very different approach obtains in equity.”).

283. See *supra* note 278 and accompanying text.

284. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1294 (2007) (describing judicial “self-disciplining mechanisms”); Gary L. McDowell, *A Scrupulous Regard for the Rightful Independence of the States: Justice Stone and the Limits of the Federal Equity Power*, 7 HARV. J.L. & PUB. POL’Y 507, 511 (1984) (describing judicial self-restraint as a limitation on federal equity power).

285. See Bray, *supra* note 15, at 5, 7 (“[E]quitable doctrines focus judicial attention; they structure and guide the exercise of equitable discretion.”); see also *Apilado v. N. Am. Gay Amateur Athletic All.*, 792 F. Supp. 2d 1151, 1163–64 (W.D. Wash. 2011) (finding “a temptation for a court, when faced with a motion for an injunction, to exercise its considerable power” and “intrude upon the very rights

For example, one scenario in which judges are more 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 for reasons specific to equitable remedies. The commands inherent in equitable remedies are more likely to be factually involved and contingent because they need to be designed not only for present circumstances but also for future ones.<sup>286</sup> The attention of judges is directed to this concern about factual development by the doctrine of equitable ripeness.<sup>287</sup>

Or, to take another example, equitable powers are especially susceptible to being instruments of injustice, because of the asymmetric effects described above (i.e., party asymmetry and temporal asymmetry).<sup>288</sup> The attention of judges is directed to these concerns by the equitable defenses. One is laches—recall that it is 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—which serves as a reminder to judges that an equitable remedy can have different effects at different points in time, and that this temporal variation invites opportunistic behavior by litigants.<sup>289</sup>

These discretionary constraints may actually reduce judicial discretion.<sup>290</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 (e.g., because a building has now been constructed, or because investments in a film's distribution have now 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 would conflict with the public interest, supervision of compliance would be more

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and freedoms the courts are designed to protect,” and “[i]t is for that reason that this Court limits its power to issue injunctions to matters where the harm is clear and the danger is imminent”); cf. Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 447–52 (2006) (exploring “attention regulation” for administrative agencies).

286. See *supra* notes 168–174 and accompanying text.

287. Judicial attention is also directed to this concern by the doctrines disfavoring certain kinds of preliminary injunctions. See, e.g., *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1011 (10th Cir. 2004) (McConnell, J., concurring).

288. See *supra* notes 243–247 and accompanying text.

289. See Bray, *supra* note 15, at 6. On laches as a means of “filtering out ‘extorting’ plaintiffs,” see Barton H. Thompson, Jr., Note, *Injunction Negotiations: An Economic, Moral, and Legal Analysis*, 27 STAN. L. REV. 1563, 1584 (1975). Henry Smith has similarly described unclean hands and estoppel as doctrines that “serve to pick out situations that present a great danger of opportunism.” Henry E. Smith, *The Equitable Dimension of Contract*, 45 SUFFOLK U. L. REV. 897, 907 (2012).

290. 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 10, at 6.

difficult, and the court has a 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 exactly 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.

Discretion is also taken away by the specificity requirement—the discretion to give a vague decree. It can be seen as 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. And that self-awareness is needed because equitable remedies involve commands that may, if not carefully worded, conflict with other commands the parties are subject to.<sup>291</sup> Note that this risk of inconsistent commands is much lower for non-equitable remedies: declaratory judgments involve no command to the parties,<sup>292</sup> damages may be satisfied without the obedience or even the involvement of the defendant, mandamus should enforce only a clear legal duty and thus should not conflict with other duties, and so on.

In short, 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 frictions against the abuse of equitable remedies and managerial devices.

### E. Assessing Alternatives

The remedies, managerial devices, and constraints that have been described share a number of logical connections. This system is functional, not in the strong sense of being necessary for the equitable remedies to function, but in the weaker sense that these remedies work more effectively because they are connected to the other doctrines in the system. The equitable remedies can plow a straighter furrow because the equitable managerial devices and the equitable constraints are yoked together.

It should be clear, however, that the boundaries of the system of equitable remedies are overinclusive. Not every use of an equitable remedy needs the managerial devices and constraints. For example, many injunctions are simple prohibitions that the defendant not do something. That is why there is sometimes

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291. See *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 725 (4th Cir. 1999) (“Federal equitable forays into . . . state enforcement schemes risk the creation of confusing, duplicative directions.”).

292. See *Bray*, *supra* note 135.

no difference in legal effect between an injunction and a declaratory judgment, and when that is so, it will not matter which remedy the court gives.<sup>293</sup> Or, to add other examples, constructive trust and specific performance do not always require the heavy artillery of equitable enforcement.

If the court is certain not to need the managerial devices of equity, then that is itself a reason to prefer a non-equitable remedy: a declaratory judgment over an injunction, replevin over constructive trust, and so on. Yet predicting the future is difficult. When a court gives a remedy, it does not know whether the remedy will need to be modified or the defendant will prove recalcitrant. The overbreadth of the system of equitable remedies should not be measured *ex post*, but *ex ante*.

Thinking of how the contours of the system might be reshaped raises another question: why limit the equitable managerial devices and constraints to equitable remedies?<sup>294</sup> Is the system underinclusive? This question, like the overinclusiveness one, is concerned with how close the system of equitable remedies is, as a proxy, to the underlying functional considerations.

As a proxy for other considerations, the line between legal and equitable remedies is in good company. Every legal principle is imprecise. This is especially true of rules, as opposed to standards. And the principle discussed here, *i.e.*, that the equitable managerial devices and constraints apply to and only to claims for equitable remedies, is certainly a rule. Yet to evaluate it as a rule, it is not enough to note its imprecision—what would be necessary is to show that there is a better rule or a better standard. No such alternative has yet been advanced.<sup>295</sup> Nor would it be easy. At the outset, someone who was crafting a rival for the system of equitable remedies would face a choice between two approaches.

One approach would be to reform the rules. It would mean refining the existing rules about legal and equitable remedies, or even replacing them with an entirely new set of rules, ones that are not derived from historical categories. The new rules for when laches, modification, and other equitable doctrines are

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293. See Bray, *supra* note 85, at 1143.

294. For an earlier form of this objection, see Laycock, *supra* note 2. This is central to Leigh Anenson's argument for extension of the unclean hands defense to legal claims. See Anenson, *supra* note 76. And, more generally, this objection is implicit in the equity skepticism of Blackstone and others who do not think that the line between law and equity marks an actual discontinuity. See *supra* note 1 and accompanying text.

295. There have been proposals to modify one or another element of the system, *e.g.*, LAYCOCK, *supra* note 20; Anenson, *supra* note 76, and criticisms of the distinction between legal and equitable remedies, *e.g.*, Laycock, *supra* note 2. Thus Laycock has called for an "unbundling of choices" instead of the traditional divide between legal and equitable remedies. Laycock, *supra* note 2, at 78. But apart from Laycock's proposed restatement to replace the irreparable injury rule, LAYCOCK, *supra* note 20, at 265–86, alternative rules have not actually been proposed.

available would be explicitly functional, and perhaps more precise and granular than the existing rules.

The other approach would be to move away from even having categorical rules that connected remedies with other doctrines. At the most extreme, this might mean allowing any combination of remedies, managerial devices, and constraints. It would be up to judges, deciding case by case, which doctrines should be applied to which remedies, no matter what side of the historic divide the remedy or the doctrine came from.

Which approach is taken will drive the comparative evaluation with the status quo. In this evaluation, one would need to compare the chosen alternative with the existing line between legal and equitable remedies. Among the considerations would be the following:

- How closely the alternative and the status quo approximate the right results. Which results are right will of course depend on one's view of what a remedy is supposed to do (e.g., approximate the plaintiff's rightful position, minimize social costs).
- How frequent and serious the judicial mistakes are likely to be in applying the alternative and the status quo. For example, mistakes might be generated by the use of recondite historical distinctions (the status quo), but they might also be generated if judges fail to appreciate the connections between different doctrines (the alternative in which remedies and other doctrines are matched case by case) or are confused by the intricacy of new rules (the alternative of an entirely new set of rules, if they were more precise and complex).
- The costs of decisionmaking, both for the development of new rules and for the resolution of individual cases.<sup>296</sup>
- Whether the alternative conforms to provisions in state and federal constitutions that require distinctions between law and equity. The point here is not only about the constitutionality

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296. For an example of how the considerations just given might be applied, think of specific performance. At present it can be a one-shot remedy, with no management of the parties needed at all. *See supra* notes 123–124 and accompanying text. Thus one might suggest more precise rules about when specific performance needed to be connected to the equitable managerial devices and constraints—there could be, to use the language of law and equity, an equitable form of specific performance and a legal form. That would add only small amount of complexity, not a dozen kinds of different preconfigured specific performance remedies, but rather only a shift from one type to two. Yet even so there would still be imprecision: what about the cases where only one of the equitable doctrines should be available, not all or nothing? There would also be the new task of allocating cases between the two types. The allocation rules might themselves be complex, and they too could impose costs and lead to mistakes.

of a reform but also about its evaluation as policy, because the jury does not fit harmoniously with many of the equitable remedies, managerial devices, and constraints discussed above.<sup>297</sup>

- Whether the alternative is consistent with the preference for liberty over coercion that is expressed by the existing limits on equitable remedies and equitable managerial devices.<sup>298</sup>
- How the alternative and the status quo affect other bodies of law. For example, if damages and legal awards of restitution were enforced by contempt, the priorities of claims in bankruptcy would be upended.

The weight of these considerations will be affected by the chosen approach (i.e., different rules or no rules). Their weight would also be affected by how thoroughly an approach was adopted (e.g., a few different rules versus entirely different rules). The further away the chosen alternative is from the existing system of equitable remedies, the greater may be both its costs and its benefits, though there is no reason to think that the increasing costs and benefits would be linear. These considerations could be brought to bear in evaluating a proposal to replace the current system of equitable remedies, but only once such a proposal is made.

A prerequisite, however, for discussion of reforms is to correctly take the measure of the existing system. That is what is attempted here. This system is not irrational. It contains a number of subtle connections, ones that at present do not need to be reproduced or reinvented in every case by individual judges. That proposition—the presumptive and defeasible rationality of the existing line between legal and equitable remedies—should be a starting point for future debates over how the remedies of the U.S. legal systems should change and develop.

### III. WHY IS THIS EQUITY SYSTEM DIFFERENT?

One doubt may linger, though. Equitable remedies are a system. But weren't equitable procedures a system? Weren't the grounds for bringing an equitable suit a system? In fact, what could be more of a system than an equitable court, adjudicating equitable claims, and giving equitable remedies, all according

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297. See *supra* notes 220–223, 280–284 and accompanying text.

298. See DOBBS, *supra* note 69, at 142; Rendleman, *supra* note 8, at 1652. For a classic statement of the differences between law and equity in regard to “methods of compulsion or coercion,” see C.C. Langdell, *A Brief Survey of Equity Jurisdiction II*, 1 HARV. L. REV. 111, 116–18 (1887). The differences are no longer so stark, yet they linger. See *supra* note 80.

to equitable procedures?<sup>299</sup> If those equitable systems were dismantled or dissolved, why would the same not happen to the system of 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 quasi-legislative judicial rulemaking. Procedure was merged in some states through the Field Codes,<sup>300</sup> and in others through various acts of legislation and judicial rulemaking.<sup>301</sup> The merger of legal and equitable procedure in federal courts was not decisively accomplished until the Rules Enabling Act and the promulgation of the Federal Rules of Civil Procedure.<sup>302</sup> Even the earlier steps toward the merger of federal procedure tended to come from Congress or from judicial rulemaking. This can be seen, for example, in Amalia Kessler's work on the changing role of federal masters: although she notes that there were incremental developments in practice throughout the nineteenth and twentieth centuries, what she emphasizes are statutory changes and alterations in the Federal Rules of Equity.<sup>303</sup> Thus the primary methods by which legal and equitable procedure merged were legislation and judicial rulemaking. And the merger of courts of law and equity was similarly achieved. A separate Court of Chancery could indeed be considered a system.<sup>304</sup> And it took legislation to abolish the English Court of Chancery as a separate institution,<sup>305</sup> as well as the courts of equity in many of the states.<sup>306</sup>

This model of decisive change through legislation or rulemaking seems unlikely to be employed for legal and equitable remedies, at least in the near future.

299. See C.C. Langdell, *A Brief Survey of Equity Jurisdiction I*, 1 HARV. L. REV. 55, 55 (1887).

300. Clark & Moore, *supra* note 35, at 393; Funk, *supra* note 35.

301. See MCCLINTOCK, *supra* note 22, at 13–15, 13 n.46; W. Hamilton Bryson, *The Merger of Common-Law and Equity Pleading in Virginia*, 41 U. RICH. L. REV. 77, 79–80, 79 nn.21–27, 80 nn.28–32 (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); Simpson, *supra* note 29, at 179–80 (describing the merger of legal and equitable procedure through “codes of practice”).

302. Clark & Moore, *supra* note 35, at 387 (noting that the Rules Enabling Act authorized “rules of procedure for federal civil actions at law and to unite the federal law and equity procedure”).

303. Kessler, *supra* note 88, at 1224–38.

304. 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 precedents.” BLACKSTONE, *supra* note 1, at 432. Maitland, by contrast, argued that equity was not “a single, consistent system, an articulate body of law.” MAITLAND, *supra* note 22, at 19.

305. The fusion of law and equity courts in England was a lengthy process culminating in the Judicature Acts of 1873 and 1875. See Polden, *supra* note 25, at 757–73; see also Lobban, *supra* note 49.

306. See Gitelman, *supra* note 49, at 244–48 (treating constitutional amendment and legislation as the two avenues for merger of law and equity courts in Arkansas, a merger subsequently accomplished by constitutional amendment). When courts of law in Massachusetts acquired equitable powers in the nineteenth century, it was the result of legislative action. See Collins, *supra* note 27, at 272 n.101.

There is no wave of enthusiasm for this change in the political branches.<sup>307</sup> Nor do judges show any zeal for merger of legal and equitable remedies. Indeed, all nine justices on the U.S. Supreme Court have expressed their support, in one case or another, for distinguishing legal and equitable remedies.<sup>308</sup> Smaller changes are of course possible, and one equitable doctrine or another could be extended to all claims. This kind of piecemeal approach is the method by which merger has been accomplished for some previously equitable doctrines (e.g., equitable estoppel) and to at least some extent in many areas of substantive law (e.g., contract).

Thus it is not hard to imagine a gradual merger of legal and equitable remedies over time. Nevertheless, there are two major differences between remedies and the substantive areas in which piecemeal merger has occurred.

First, the substantive law of equity—i.e., the law of primary rights and obligations administered by courts of equity—was not really a system. There was no connection between the fact that a nineteenth-century court of equity refused to enforce a penalty clause in a contract, 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,” to use an old and imprecise term.<sup>309</sup> But there was no dependence—a court of equity could lose its penalty-clause doctrine and still stop trespasses, or vice versa, without any loss of efficacy. Indeed, the various rights that could be enforced in equity were always a bit ad hoc and miscellaneous. There were attempts to corral them into categories, as in the centuries-old rhyme quoted by Frederic Maitland: “These three give place in

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307. Some have argued that legislatures are best positioned to change a system. 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). But there is another line of thought in which legislation is seen as piecemeal, ad hoc, and contradictory, and in which judges are thought to be more aware of systematicity in the law. See Cyril John Radcliffe, *The Place of Law Courts in Society*, in *NOT IN FEATHER BEDS: SOME COLLECTED PAPERS* 27, 29 (1968) (“[W]hile the common law is a body of doctrine which with all its imperfections can be thought of as a rational and connected whole, not the wildest optimist could say the same for our body of statute law.”); Waldron, *supra* note 10, at 34–36; see also Gerald J. Postema, *Law’s System: The Necessity of System in Common Law*, 2014 *NZ Law Review* 69.

308. See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) (Ginsburg, J.); *U.S. Airways, 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. NRDC, Inc.*, 555 U.S. 7 (2008) (Roberts, C.J.); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006) (Thomas, J.); *Great-West Life & Annuity Ins. v. Knudson*, 534 U.S. 204 (2002) (Scalia, J.).

309. See *Mass. State Grange v. Benton*, 272 U.S. 525, 528 (1926) (Holmes, J.); *DOBBS*, *supra* note 69, at 180.

court of conscience, / Fraud, accident, and breach of confidence.”<sup>310</sup> But those attempts to organize equity were never particularly successful.<sup>311</sup> Maitland himself 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.”<sup>312</sup> But it is not so easy to take apart a working system, with interlocking parts, while one is simultaneously constructing a new system in its place.<sup>313</sup>

Second, the inconsistent-results objection had great force for substantive law.<sup>314</sup> The decision to plead at law or in equity would determine the whole body of rules used to decide the merits.<sup>315</sup> But the inconsistency objection is 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>316</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 the substantive law, for the decisionmaker involved, and for the afterlife 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 sought and the non-remedial rules that are brought to bear, and nowhere is this more true than

310. MAITLAND, *supra* note 22, at 7 n.1.

311. One reason was the shifting need for equity to supplement the law. *See* Smith, *supra* note 3, at 244 (calling equity “a moving frontier”).

312. MAITLAND, *supra* note 22, at 18, 19.

313. *Cf.* JOHNNY CASH, *One Piece at a Time, on ONE PIECE AT A TIME* (Columbia Records 1976).

314. *See supra* text accompanying note 46.

315. Note that the inconsistency objection had less force for bodies of substantive law that were exclusively equitable (e.g., trusts). *See supra* note 40.

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

for equitable remedies. The equitable remedies, together with the equitable managerial devices and equitable constraints, can be seen as 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, that system is not an anachronism. Its contours track a basic policy distinction between remedies that require greater managerial powers and those that do not. The remedies requiring greater managerial powers tend to be the ones compelling action and inaction, especially remedies that do so in open-ended or adverbial ways. Such remedies also raise most acutely concerns about cost and abuse. These are the remedies within the equity system.

Not all remedies that compel action or inaction are within the system, for mandamus, habeas, replevin, and ejectment are classically legal remedies. Yet even these seeming exceptions vindicate the rule. 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. There are better reasons for the contours of the system of equitable remedies than that this is how it was “laid down in the time of Henry IV.”<sup>317</sup>

The argument made here is important but limited. 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 what this argument does show is that the distinction between legal and equitable remedies is more pervasive than we thought, and more rational than we thought. 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 piece at a time.

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317. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). Cf. Martin Krygier, *Law as Tradition*, 5 L. & PHIL. 237, 262 (1986) (“[I]t is never a sufficient argument for a practice that it has existed for ‘time out of mind’. On the other hand, that is even less satisfactory as an argument against it.”).