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The Trial Judge's Equitable Discretion Following Ebay v. Mercexchange

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I. INTRODUCTION

After the drop-add period ends in what Sarah thought was her last semester of law school, the registrar totals Sarah's credit hours and tells her that she falls one hour short of Washington and Lee's graduation requirements. The first thing a law student learns about rules is how to ask for an exception. For the law school's rules give the associate dean and a faculty committee discretion. Sarah's first

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* Huntley Professor, Washington and Lee Law School. Thanks to Professors Caprice Roberts and Douglas Laycock and to W&L's former Dean, Barry Sullivan, for their careful readings of drafts and their sage advice; separate thanks to Doug Laycock for organizing the AALS's Remedies program and for shepherding us through this important symposium; thanks to Ms. Megan Williams for her calm and efficient assistance with the citations, footnotes, and research; finally, thanks to the Francis Lewis Law Center for summer 2007 support. I presented stages of this project to the AALS Remedies Program in January 2007, to Washington and Lee's Faculty Enclave in February, and to the Remedies Discussion Forum at Emory in May; a draft was distributed to participants at the Intellectual Property Scholars Forum at Akron in November; and the same draft was available on SSRN. My research for this article closed in August 2007 when I sent it to *The Review of Litigation*; I have not incorporated scholarship published after that, including the other articles presented to the Akron Intellectual Property Forum.

argument is that an exception would be "equitable." From the two words, "discretion" and "equitable," springs our topic.

In 1971, Professor Maurice Rosenberg lamented the drought of scholarship about judges' discretion.[1] That dry spell has passed. Twenty years later, Professor Yablon made the important point that the legal system has several different types of discretion.[2] Scholars have rained helpful articles about discretion in procedural,[3] administrative,[4] environmental,[5] and patent[6] decisionmaking as well as an interesting literature on the jurisprudence of discretion.[7]

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1. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 635 (1971); *see also* Henry Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 756 n.29 (1982) (noting, more than a decade later, the "paucity" of judicial and academic writings on the topic).

2. Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 277 (1990).

3. Friendly, *supra* note 1, at 747; Joan Humphrey Lefkow, *What Persuades When the Judge Has Discretion?*, 31 LITIG. 21 (2004); Thomas D. Rowe, Jr., *No Final Victories: The Incompleteness of Equity's Triumph in Federal Public Law*, 56 LAW & CONTEMP. PROBS. 105, 117–118 (Summer 1993); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985); Robert G. Bone, *Who Decides?: A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961 (2007).

4. Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469 (1986); Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003).

5. Daniel A. Farber, *The Story of* Boomer*: Pollution and the Common Law, in* ENVIRONMENTAL LAW STORIES 7, 8 (Richard J. Lazarus & Oliver A. Houck eds., 2005); Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524 (1982).

6. Michael W. Carroll, *Patent Injunctions and the Problem of Uniformity Cost*, 13 MICH. TELECOMM. & TECH. L. REV. 421 (2007); James M. Fischer, *The "Right" to Injunctive Relief for Patent Infringement*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1 (2007).

7. *See generally* MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW (1988); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); Tim Dare, *"The Secret Courts of Men's Hearts," Legal Ethics and Harper Lee's* To Kill a Mockingbird, *in* ETHICAL CHALLENGES TO LEGAL EDUCATION AND CONDUCT 39 (Kim Economides ed., 1998) (examining character-based versus rule-based decisionmaking in favor of the latter); Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969 (2006).

This rich literature has, while prolonging my research on the discrete subject of equitable discretion, clarified my thought, facilitated my thinking, and strengthened my conclusions. An experienced Remedies and Civil Procedure teacher, I have learned the most from remedies and procedure scholars' contributions.

My subject stems from the U.S Supreme Court's endorsement of the trial judge's equitable discretion in *eBay Inc. v. MercExchange, L.L.C.*[8] I begin by examining background subjects, discretion's historical pedigree, the arguments for and against it, and the procedural context of Legal and Equitable decisions. Moving to the foreground of *eBay v. MercExchange*, I will present a contextual analysis of the judge's equitable discretion in three areas: finding a remedy for defendant's violation of plaintiff's rights, selecting the remedy for defendant's violation of plaintiff's interest, and shaping that remedy.

II. THE UNIVERSAL ISSUES IN DISCRETION

"Discretion" describes the judge's freedom, power, or authority to decide a dispute by choosing among permissible solutions, according to what he thinks best, within, I maintain, the limits of the governing law.[9]

The breadth of a decisionmaker's discretion to resolve a dispute is a universal issue. For the judge, the most discretionary rule is no rule at all. Plutarch wrote of Lycurgus, lawgiver of Sparta in ancient Greece, that:

> Lycurgus would never reduce his laws into writing . . . [for] pecuniary contracts, and such like, the forms of which have to be changed as occasion requires, he thought it the best way to prescribe no positive rule or inviolable usage in such cases, willing that the manner and form should be altered according to the circumstances of time, and determinations of men of sound judgment.[10]

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8. 126 S. Ct. 1837, 1838 (2006).

9. Shapiro, *supra* note 3, at 546.

10. PLUTARCH, THE LIVES OF THE NOBLE GRECIANS AND ROMANS 58–59 (Arthur Hugh Clough ed., John Dryden trans., Modern Library 1979) (c. 100 C.E.). Similarly, for Plato's guardians, "[t]here will be no laws; all cases and issues will be decided by

The lawgiver's written law perforce reduces the judge's discretion. For Aristotle, "laws, properly enacted, should themselves define the issue of all cases as far as possible, and leave as little as possible to the discretion of the judges . . . ."[11] "It is better that law should rule than any individual. . . . He who entrusts any man with the supreme power gives it to a wild beast, for such his appetites sometimes make him; passion influences those who are in power, even the very best of men; but law is reason without desire."[12]

A written rule constrains a judge's ability to exercise discretion, for "many rules speak to the courts with sufficient clarity to leave no room for choice worthy of the name . . . ."[13] A written rule's precision affects the judge's discretion, which diminishes along the continuum from vagueness to specificity. The judge's maximum discretion is on the imprecise end of the continuum where vagueness invites flexibility.[14] As we will see below, a judge has "greater freedom," more discretion, when the rule is constitutional or common law than when it is statutory.[15]

People in a small homogeneous culture with a high degree of shared meaning and values may not require a detailed system of rules because all of them know what behavior the system requires.[16] But as the culture becomes more complex and pluralistic, imprecision gives way to specificity.

Lawgivers, today typically legislators, may, however, delegate discretion to judges through an imprecise law. The legislators may have a strategic reason, for example, to enact an imprecise statute to resolve a legislative impasse and "do something," while effectively

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the philosopher-kings according to wisdom untrammeled by precedent." 2 WILL DURANT, THE STORY OF CIVILIZATION 521 (1939) (following PLATO, THE REPUBLIC BOOK V, *473a-e (Benjamin Jawett trans., Clerendon Press 3d ed. 1888) (c. 360 B.C.E.)). This is why lawyers cite Aristotle, but not Plato. *See* Dare, *supra* note 7, at 59–60 (encouraging an open decision applying a rule instead of reliance on the wisdom of "men of sound judgment" or "philosopher-kings").

11. ARISTOTLE, THE ART OF RHETORIC *1354a7 (John H. Freese trans., William Heinemann 1926) (c. 330 B.C.E.).

12. ARISTOTLE, POLITICS *1287a (H. Rackham trans., G.P. Putnam's Sons 1932) (c. 350 B.C.E.).

13. Shapiro, *supra* note 3, at 547 n.23.

14. Bone, *supra* note 3, at 1967.

15. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 6–7 (1949).

16. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 512 n.8 (1988); Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 560–61 (1989).

dispatching the disputes to judges.[17] In a classical example, Plutarch said that Solon "was obscure and ambiguous in the wording of his laws, on purpose to increase the honour of his courts; for since their differences could not be adjusted by the letter, they would have to bring all their causes to the judges, who thus were in a manner masters of the laws."[18] A modern American writer might use the sports metaphor that the legislature "punted" the conflicts to the courts.

More proficient in rhetoric and logic than arithmetic, Sarah has fashioned her argument for "timely" spring graduation along Aristotle's lines; although Sarah has added "equity" to "discretion," hers is a nontechnical usage of "equity" as meaning "fairness."

Sarah's resembles Aristotle's explanation of "equity" from the Nichomachaen Ethics: a judge employs his sense of "equity" to correct "law where law is defective because of its generality."[19] "When therefore the law lays down a general rule, and thereafter a case arises which is an exception to the rule, it is then right, where the lawgiver's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted if he had been cognizant of the case in question."[20]

In Aristotle's "fairness" sense, a judge's "equitable" decision corrects the injustice of a general law that fails to generate a just result in an individual case. Aristotle's advice to decide the dispute the way the original lawgiver would have supplies an external perspective that reduces the subjective nature of the individual judge's decision to subordinate positive law. That advice contains the seeds of judicial review, legislative intent, and natural law and appeals to a higher law in addition to equitable discretion.

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17. Barry Sullivan, *On the Borderlands of Chevron's Empire: An Essay on Title VII, Agency Procedures and Priorities, and the Power of Judicial Review*, 62 LA. L. REV. 317, 430–33 (2002); Bone, *supra* note 3, at 1974.

18. PLUTARCH, *supra* note 10, at 107–108.

19. ARISTOTLE, NICHOMACHAEN ETHICS 317 (G.P. Goold ed., H. Rackham trans., Harvard Univ. Press 1982) (c. 350 B.C.E.).

20. *Id.* at 316–17; *see* Dare, *supra* note 7, at 51–54 (discussing the need to avoid a subjective decision when a technical legal rule would prevent a just decision).

III. TECHNICAL EQUITY

Aristotle's translators' general use of the word "equity" differs from the technical sense that distinguishes the English medieval Common Law courts from the court of Equity or Chancery. The professional perception is that the Common Law courts mechanically applied fixed rules to facts, but that the Chancellors of Equity adjudicated disputes flexibly, emphasizing, not rigid rules, but context. From the *Earl of Oxford's Case* in 1615, we learn that "the Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances. The Office of the Chancellor is . . . to soften and mollify the Extremity of the Law."[21]

"The discussion about the relative importance in a legal system of certainty and abstract justice is unending," English legal historian S.F.C. Milsom wrote, "but it begins at a definite stage of development, namely when the law is first seen as a system of substantive rules prescribing results upon given states of fact. In England this discussion was at once institutionalized: certainty resided in the common law courts, justice in the chancellor's equity."[22]

Even after legislatures merged the courts of the Common Law and Chancery beginning in the nineteenth century, observers continued to associate equity in the discretion-dispensing sense with equity in the Chancery sense. I try to say Chancery for the court or institution and reserve the word "equity" to describe an equitable remedy, hoping thereby to reduce one confusing use of the term "equity."

In United States law, when the plaintiff seeks an equitable remedy the court has "equitable jurisdiction" to grant it. Statements abound that equitable remedies, an injunction, specific performance, equitable rescission, subrogation, and equitable restitution are discretionary.[23] Courts make extravagant statements about their discretion in administering equitable substantive standards. "[I]n the realm of equity," the Colorado Supreme Court observed, "no formulation is absolute and no rule is without exception."[24]

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21. Earl of Oxford's Case, (1615) 21 Eng. Rep. 485, 486 (Ch.).

22. S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 94 (2d ed. 1981).

23. RESTATEMENT (SECOND) OF CONTRACTS § 357 cmt. c (1981).

24. Dlug v. Wooldridge, 538 P.2d 883, 885 (Colo. 1975).

Contemporary scholars have summoned Aristotelian "equitable discretion." For example, Professor Tom Main wrote that equity has "authority to act in opposition to the strict law when the unique circumstances of a particular case demanded intervention."[25] "[E]quity could offer relief from a hardship or mischief created by a particular application of a procedural rule."[26] Moreover, he added, "I advocate that district judges invoke the jurisdiction of equity to avoid the application of procedural rules in those unique circumstances where the outcomes produced by rigid application of the rules are deficient."[27] When, Professor Main, may the judge bypass the applicable rule? When the rule is "unfair, inefficient, too complicated, or otherwise deficient."[28]

The willingness to experiment with equitable discretion stems from confidence in the judge's objectivity, expertise, and moral sensibility. The proponent of the Chancellor's expansive discretion may also cite individualized decisions, fairness, good conscience, morality, and natural justice. Writing about the late Rehnquist Court's "compromise" decisions, which he calls "split-the-difference" decisions, Judge Jay Wilkinson made several points related to our topic, including that "split-the-difference jurisprudence lays claim to important values, among them tolerance, moderation, compromise, and protection of individual rights."[29]

IV. COUNTERVAILING CONSIDERATIONS

Equitable discretion's friends base their claims for its virtues on ideas that others discount: that a judge is both neutral and an expert. Critics of the discretion discussed above make several points. Professor Bone wrote that, "the pervasive assumption that expert trial judges can do a good job of tailoring procedures to individual cases is empirically unsupported and at best highly questionable."[30] Skeptics add that judicial informality and lack of precise rules with a

25. Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 432 (2003).

26. *Id.* at 504.

27. *Id.* at 497.

28. *Id.* at 504–05.

29. Wilkinson, *supra* note 7, at 1992.

30. Bone, *supra* note 3, at 1963.

concomitant emphasis on discretion, flexibility, and conscience lead to unpredictable results. The Chancellor's conscience, critics maintain, is potentially ad hoc, arbitrary, and subjective; a court purchases discretion's questionable benefits at the cost of stability, predictability, respect for precedent, and common-law technique. A decision without an explanation, based on intuition instead of analysis, provides no guidance in a future dispute.[31] Judge Wilkinson observed that "it seems almost churlish . . . to lament the demotion of textual fidelity, structural analysis, and historical perspective . . . . Yet such things comprise the raw materials of law and define the discipline of legal method."[32]

Critics of the Chancellor's equitable discretion often employ hyperbole and metaphor. In the Seventeenth Century, John Selden joked about "roguish" equity: "[E]quity is according to the conscience of him that is chancellor, and as that is larger or narrower so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a chancellor's foot; what an uncertain measure would this be? One chancellor has a long foot, another a short foot, a third an indifferent foot."[33]

Lord Camden stated the potential disadvantages of a judge's equitable discretion more bluntly in *Doe v. Kersey*: "[T]he discretion of a Judge," he wrote, "is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best it is often times caprice, in the worst it is every vice, folly, and passion to which human nature is liable."[34]

Professor Bone favors careful rulemaking to reduce trial judges' discretion. He maintains that compared to a rules committee or a legislature, a trial judge's rationality is bounded, his access to information is limited, and at least one party will place strategic

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31. *See* 1 DAN B. DOBBS, LAW OF REMEDIES § 2.4(7) (2d ed. 1993) (describing how judges act in the absence of meaningful guidelines or rules under a system with "no standards"); Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitation and the Doctrine of Laches*, 1992 B.Y.U. L. REV. 917, 964 n.126 (1993) (discussing paternalistic decisionmaking in which rules are not considered).

32. Wilkinson, *supra* note 7, at 1995.

33. JOHN SELDEN, THE TABLE-TALK OF JOHN SELDEN 62–63 (Thomas Constable & Co. 1854) (1689).

34. 2 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 1356 (1992) (quoting Doe v. Kersey (1795) (C.P.) (Unreported)).

obstacles in his path.[35] The trial judge, moreover, must assign "weights" to factors and "compare" incomparable factors.[36] The judge's decision may, therefore, be idiosyncratic and ad hoc.[37]

Professor Chayes, discussing constitutional remedies, was more explicit: equitable discretion means that the identity of the judge determines the decision.[38] The late Professor Peter Birks's apprehension of "discretionary remedialism" led him to advocate abolition of the term "remedy" from the legal vocabulary in order to extirpate unwarranted judicial discretion; in short, Birks argued that remedies should not be studied separately from substantive areas.[39]

In *Barr v. Matteo*, Justice Harlan articulated the principle that, if applied to Sarah's petition, would delay her graduation: a judge should follow the rule and avoid creating an exception. "To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good."[40]

Although a trial judge should follow an appellate court's precedent decision, discretion may liberate the decision from precedent in deciding a dispute. Trial courts' discretion reduces the precedential value of appellate decisions and creates uncertainty.[41] The loser's appeal is an important check on the trial judge's discretion.[42] Although a trial loser has no United States constitutional right to a civil appeal, statutes and tradition protect the loser's access to the detachment and collegiality of an appellate court.[43] The loser's access to appellate

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35. Bone, *supra* note 3, at 2023.

36. *Id.*

37. *Id.*

38. Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 55 (1982).

39. Peter Birks, *Rights, Wrongs, and Remedies*, 20 O.J.L.S. 1 (2000).

40. Barr v. Matteo, 360 U.S. 564, 576 (1959).

41. *See The Supreme Court, 2005 Term–Leading Cases: Availability of Injunctive Relief*, 120 HARV. L. REV. 332, 338 (2006) (describing how the Court's decision in *eBay* allowing discretion can inject great uncertainty into the remedial framework of patent infringement).

42. Momsen v. Momsen, 143 P.3d 450, 467 (Mont. 2006) (reversing the trial judge's reliance on "principles of equity" to ignore the statute of limitations).

43. *See* Doug Rendleman, *A Cap on the Defendant's Appeal Bond?: Punitive Damages Tort Reform*, 39 AKRON L. REV. 1089, 1146–47 (2006) (noting that while a trial loser's right to appeal is not protected by the Constitution, an appeal is a basic component of a fair and accurate decisionmaking system).

correction militates against a lower court's arbitrariness and protects stare decisis.

The trial judge's discretion exists because appellate courts countenance, indeed endorse, it through their charitable standard of review. As Justice Thomas's opinion in *eBay* said, the appeals court's standard of review of a trial judge's discretionary decision is usually the abuse-of-discretion standard.[44] Under the abuse-of-discretion standard, the court of appeals will not reverse the trial judge's decision even if the appellate judges disagree with it and, as an initial matter, would have decided differently.[45] When reviewing a trial judge's decision to determine if the judge abused discretion, the question the appellate court will ask is whether the trial judge's decision is "reasonable," that is, whether it is "in the ballpark."[46]

An appellate court should not, under the guise of a permissive abuse-of-discretion standard of review, allow the trial judge to ignore substantive law. Nor should it substitute statements about the trial judge's equitable discretion for developing precedent.

V. CONTEMPORARY EQUITABLE DISCRETION

Traditionally, courts employing equitable remedies have a reputation for discretion: an open-ended and free-flowing approach to results. Justice Douglas's frequently quoted lines from *Hecht Co. v. Bowles* set the stage for this section:

> We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' *Meredith v. City of Winter Haven*, 320 U.S. 228, 235. . . . The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each

44. 126 S. Ct. 1837, 1839 (2006). The appellate court will review de novo the judge's decision of a question of law.

45. Friendly, *supra* note 1, at 754.

46. RICHARD D. FREER, INTRODUCTION TO CIVIL PROCEDURE 780 (2006).

> decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well and between competing private claims.[47]

Later in *Swann v. Charlotte-Mecklenburg Board of Education*, the Supreme Court defined a federal district judge's equitable discretion using familiar synonyms for discretion: "Once a [plaintiff's] right and a [defendant's] violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[48]

The judge's equitable discretion is very pretty, a reader may observe, but what exactly does it mean?

Technical law-equity distinctions arise here: an injunction is an equitable remedy, but money damages are almost always a legal remedy. The two major procedural differences between an equitable injunction and legal damages are that: (1) In the trial of an equitable injunction, neither plaintiff nor defendant has a constitutional right to a jury; but in a trial leading to possible legal damages "at common law," either party may demand a civil jury;[49] (2) To enforce an equitable injunction, the judge will employ personal sanctions as contempt; but the plaintiff will use impersonal techniques, such as execution, judgment lien, and garnishment to collect a damages judgment.[50]

In the preceding paragraph, the reader learned that the plaintiff's request for an injunction concentrates discretion and power in the trial judge in finding the facts, defining the injunction order, and enforcing it. Moreover, the judge has discretion in several stages of the injunctive process.[51]

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47. 321 U.S. 321, 329–30 (1944).

48. 402 U.S. 1, 15 (1971).

49. U.S. CONST. amend. VII.

50. For other law-equity differences, see Doug Rendleman, *Irreparability Resurrected?: Does A Recalibrated Irreparable Injury Rule Threaten the Warren Court's Establishment Clause Legacy*, 59 WASH. & LEE L. REV. 1343, 1377–78 (2002) (discussing the reasons for and consequences of a judge's decision to grant injunctive relief as opposed to damages).

51. *See* OWEN M. FISS & DOUG RENDLEMAN, INJUNCTIONS 107–08 (2d ed. 1984) (describing seven ways judicial discretion manifests itself in injunctive litigation).

Many of the substantive doctrines the judge will apply are open-ended.[52] The prerequisites for the judge to grant an injunction are notably porous and discretionary; here we can repeat the *eBay* Court's checklist: irreparable injury, inadequate legal remedy, balancing the hardships, and the public interest.[53] A judge deciding a plaintiff's motion for a preliminary injunction will in addition make an imprecise prediction whether the plaintiff is likely to succeed on the merits at the plenary trial.[54]

The defendant's defenses to a plaintiff's request for an injunction are open-ended. For example, the time-bar of laches contains two large elements of judicial discretion: the plaintiff's unreasonable delay and the defendant's prejudice.[55]

The judge's decisions in drafting an injunction are contextual and discretionary: these are the details of what to forbid or require and the timing of whether or not to give the defendant a period to adjust and, if so, how long. A judge granting a plaintiff a mandatory injunction—for example, requiring defendant to fill a surface drain—must deal with the project's particulars and set a deadline for the defendant to complete the work.[56]

The judge has considerable discretion in administering an injunction; a judge enforcing an injunction against a recusant defendant may choose between modifying the injunction, granting a second injunction, holding the defendant in contempt, imposing a civil contempt or a criminal contempt sanction, and deciding whether to displace the defendant with a receiver.[57] Finally, the judge's decision

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52. *See, e.g.*, Lussier v. Runyan, 50 F.3d 1103, 1108 (1st Cir. 1995) (holding that granting front pay for employment discrimination is within the trial judge's equitable discretion).

53. 126 S. Ct. 1837, 1839 (2006).

54. This article does not deal specifically with the trial judge's "discretionary" decision to grant or deny a preliminary injunction. Professor Yablon identifies this discretion as specialized because it leads to a trial judge's interlocutory decision that is tentative, based on incomplete information, and made under conditions of uncertainty. The appellate court's question is whether the trial judge's decision is "good enough" within the ambit of the limited information and time. Yablon, *supra* note 2, at 269–270.

55. Heriot, *supra* note 31, at 920.

56. Wright v. Repp Farms Inc., No. 04-0390, 2005 WL 1106089 (Iowa Ct. App. May 11, 2005).

57. FISS & RENDLEMAN, *supra* note 51, at 1007.

on whether to dissolve an injunction is not confined by precise standards.[58]

With the preceding background in place, we turn to the foreground, the Supreme Court's latest word on equitable discretion, *eBay v. MercExchange*.[59]

VI. *EBAY V. MERCEXCHANGE.*

MercExchange owned a business-method patent on electronic markets.[60] Alleging that eBay's "buy-it-now" feature infringed its patent, MercExchange sued eBay.[61] The jury, after finding that MercExchange's patent was valid and that eBay had infringed it, set MercExchange's damages for eBay's past infringement at $30 million.[62]

When MercExchange moved for a permanent injunction to forbid eBay from infringing in the future, the trial judge refused.[63] MercExchange did not "practice" its patent, but it was willing to license it to others in exchange for money.[64] Thus, MercExchange lacked an "irreparable injury" for an injunction; if eBay's infringement persisted, MercExchange could recover for future losses as money damages.[65]

The Federal Circuit reversed the trial judge's decision not to enjoin eBay from future infringement.[66] The judge, the Federal Circuit held, should grant a plaintiff patent-owner a permanent injunction when it shows that its patent is valid and that the defendant infringed it.[67] The Federal Circuit admitted a narrow exception: the judge could refuse to grant a patent plaintiff an injunction for "unusual circumstances," for example, public health or safety.[68]

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58. Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 393 (1992) (O'Connor, J., concurring).

59. 126 S. Ct. 1837 (2006).

60. *Id.* at 1839.

61. *Id.*

62. MercExchange, L.L.C. v. eBay, Inc., 275 F. Supp. 2d 695, 695 (E.D. Va. 2003).

63. *eBay*, 126 S. Ct. at 1839.

64. *Id.* at 1840.

65. *Id.*

66. *Id.* at 1841.

67. *Id.*

68. MercExchange, L.L.C. v eBay, Inc., 401 F.3d 1323, 1338–39 (Fed. Cir.

The Supreme Court majority opinion, written by Justice Thomas, rejected both lower courts' tests.[69] The trial judge's test, the majority said, failed because there is no per se rule that allows a judge to refuse to grant an injunction to a plaintiff patent owner that licensed rather than practiced its invention; Justice Thomas mentioned that a university or a private inventor were nonpracticing patentees that could nevertheless receive an injunction. The Court also disapproved of the Federal Circuit's test because its near-automatic injunction was too favorable to a plaintiff.[70]

When a successful plaintiff moves for an injunction, the majority held that the trial judge should conduct a case-by-case analysis under the following test:

> [A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and the defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. [The Court cites Weinberger v. Romero-Barcelo, and another decision.] The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the trial court, reviewable on appeal for abuse of discretion.[71]

In *eBay*, the Supreme Court could find some of the trial judge's equitable discretion in the Patent Act's remedial statute, which says that the judge "may" grant an injunction subject to the "principles of equity."[72] For "may" is a word that a lawgiver uses to delegate

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2005).

69. *eBay*, 126 S. Ct. at 1840.

70. *Id.* at 1840–41.

71. *Id.* at 1839 (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–313, 320 (1982)). Remedies specialists had never heard of the four-point test. Although one might argue that the four points can be found in *Weinberger*, the Court appears to vindicate a "traditional" standard for a *final* injunction that never existed, except perhaps for a *preliminary* injunction.

72. 35 U.S.C. § 283 (2000).

discretion to courts; the Dictionary of Modern Legal Usage's entry under "Words of authority" defines "may" as "has discretion to, is permitted to."[73]

The Supreme Court approved the judge's "equitable discretion" without much explanation, except perhaps for the citation to *Weinberger*. What meaning should an observer attribute to the Court's citation of *Weinberger* in endorsing the trial judge's equitable discretion?

VII. *WEINBERGER V. ROMERO-BARCELO*

In *Weinberger v. Romero-Barcelo*,[74] the Supreme Court let the Navy continue to shell an island off Puerto Rico despite pollution legislation that forbade shelling absent either a permit or a national security exception granted by the President. The statute stated the substantive law: no unpermitted discharge of pollution.[75] In Puerto Rico's lawsuit to stop pollution, the trial judge found that the Navy's shelling constituted the discharge of a pollutant.[76] Although legal analysis usually ends with liability, the Court's remedial decision to decline to order the Navy to stop the shelling took away what the liability decision gave.[77] Although the Navy's target practice off the island of Vieques violated the federal water pollution statute, the Supreme Court held that the trial judge did not need to halt the shelling.[78]

The trial judge, while declining to stop the shelling, ordered the Navy to apply for a permit, even though the permit was unlikely to receive the prerequisite of the plaintiff's approbation and imprimatur. Several reasons emerge in the trial judge's decision. The judge "emphasized an equity court's traditionally broad discretion in deciding appropriate relief."[79] "Balancing the equities" meant considering

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73. BRYAN A. GARNER, *Words of Authority*, *in* A DICTIONARY OF MODERN LEGAL USAGE 939, 942 (2d ed. 1995).

74. 456 U.S. 305 (1982).

75. 33 U.S.C. §§ 1311(a)–1323(a) (1976 and Supp. IV); *see also* 33 U.S.C. § 1362(12) (defining "discharge of any pollutant" for purposes of the section).

76. *Weinberger*, 456 U.S. at 307.

77. *Id.* at 311.

78. *Id.*

79. *Id.* at 310.

competing claims and the Navy's "injury" or cost to comply.[80] The Navy's violation was technical, de minimis, it did not cause any "harm."[81] Congress's overarching intent was to protect the water from pollution, not to create and maintain a permit system. The statute emphasized phased compliance and a graduated response to the problem of pollution.[82]

The *Weinberger* Supreme Court's majority gave several other reasons not to stop the Navy's violation. The Court also emphasized the court of equity's traditional flexibility and discretion. The trial judge should balance the parties' "competing claims."[83] In this cost-benefit calculation, the plaintiffs' "injury" equaled the Navy's "cost" to comply. The judge should also consider the public interest in national defense. The judge might decline to grant a plaintiff an injunction if: the defendant's violation was trivial, an injunction would be harmful or burdensome to defendant, or an injunction would be contrary to the public interest. In the majority's eyes, the Navy's violation was trivial, de minimis.[84]

If a statute authorizes an injunction, may the judge still employ "traditional" equitable discretion? Or should the plaintiff's proof of the defendant's statutory violation without more compel the judge to grant the plaintiff an injunction? The water pollution statute, the Supreme Court's majority wrote, contemplates a court's graduated response to a defendant's violation: injunction, fine, crime—in other words, "phased compliance."[85] Congress cannot take away the judge's equitable discretion without a clear statute.[86] Congress intended to protect water purity, not to set up a technical permit system. Finally, the judge may first order the defendant to seek a permit, then perhaps later enjoin discharge of pollution.

Justice Stevens's dissent made several telling points.[87] The trial court ought to protect the environment. The trial judge should balance on the prevailing plaintiffs' side. The statute which advances the public interest circumscribes the court's equitable discretion. The

80. *Id.* at 312.
81. *Id.* at 310.
82. *Id.* at 314–16.
83. *Id.* at 312.
84. *Id.* at 315.
85. *Id.* at 318.
86. *Id.* at 312.
87. *Id.* at 322–25 (Stevens, J., dissenting).

majority had under-read the statute which, properly read, really contains a "flat ban" of violations.[88] So long as the Navy continued to commit ongoing violations, the court lacks discretion to excuse it from persisting in shelling. The majority, Justice Stevens charged, ignored the legislative ban, undercut the legislature's power to create public policy to advance the public interest, and frustrated the permit process as well as the entire administrative scheme.[89] Since the majority had ignored Congress's legislative ban on polluting without a permit, the majority decision eroded Congress's power to create public policy.[90]

Moreover, the majority frustrated Congress's administrative scheme and permit process. Congress had committed decisions about trivial versus serious pollution and graduated compliance to the agency's administrative scheme. The Navy's continuing violations were blatant, not technical or de minimis. The majority's amnesty undercut the rule of law and public respect for the law.[91]

All complex enforcement takes time. The majority's technique sent the controversy back to the trial judge who had ordered the Navy to apply for a permit. The dialogue about compliance would continue. "Should it become clear that no permit will be issued and that compliance . . . will not be forthcoming, the statutory scheme and purpose would require the court to reconsider the balance it has struck."[92]

In the two decades between *Weinberger* and *eBay*, the Supreme Court did not clarify *Weinberger*.[93]

An important issue in *Weinberger* is whether the judge's equitable discretion is diminished when a statute establishes the substantive standard the defendant breached. Professor Plater argued that a defendant's statutory violation differs from constitutional and common law violations.[94] In contrast to constitutional and common law areas where "all deliberate speed" and graduated compliance respectively may be appropriate, a legislature enacts a statute to define

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88. *Id.* at 331.
89. *Id.* at 322.
90. *Id.*
91. *Id.* at 324–25.
92. *Id.* at 320.
93. *See* Farber, *supra* note 5, at 29 (asserting that the Court probably did not mean to endorse open-ended judicial discretion in *Weinberger*, but that little had been clarified by the Court since).
94. Plater, *supra* note 5, at 525.

prohibited and permitted conduct and to remove discretion from the judge.[95] When the defendant has violated a statute and its violation is continuing, then, Plater argued, the judge lacks discretion not to enjoin.[96] If the plaintiff proves defendant's statutory violation, the judge should enjoin without more.[97] Although the traditional view supports a judge's diminished equitable discretion for defendant's statutory violation, the *Weinberger* Court may erode that view.

The Supreme Court's next word came in 1990. "As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. The impracticability of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress."[98]

One of the differences between statutes and common law rules is the court's respect for the legislature's authorship of statutes and its primary initial role in a democracy of defining rights and duties.[99] Courts developed common law rules as they decided earlier disputes; thus, the idea of a court developing and refining a common law rule in a particular dispute by creating an exception in the name of equity is less audacious.[100]

VIII. EQUITABLE DISCRETION—A CONTEXTUAL ANALYSIS

In the following section, I will turn to structured analysis of the judge's equitable discretion decisions by examining three related and overlapping issues under the head of equitable discretion. The first is whether the judge may find that the defendant violated the plaintiff's substantive right but decline to grant the plaintiff any remedy. The second is what, after the trial judge finds that the defendant violated the plaintiff's substantive right, is the nature of that judge's discretion to grant one remedy or another. I will concentrate on the judge's choice

95. *Id.* at 530–31.

96. *Id.* at 525–26.

97. *See id.* at 524–27 (arguing that judicial discretion regarding equitable doctrine is inconsistent with the advent of modern statute-based law).

98. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 376–77 (1990).

99. LEVI, *supra* note 15, at 33.

100. SCHAUER, *supra* note 7, at 174–81.

between granting the plaintiff an injunction and awarding her damages, and bypass for now the judge's other remedial choices: injunction versus restitution and damages versus restitution. My third issue will be measurement of the plaintiff's remedy. I will follow the judge's choice of an equitable injunction: after choosing an injunction, what equitable discretion does the judge have about the size or measure of the plaintiff's remedy?

A. Right, But No Remedy?

Does the trial judge have equitable discretion to find that defendant violated plaintiff's right, but, nevertheless, to decline to grant any remedy? One reading of the *Weinberger* majority opinion may support the judge's discretion to find defendant's substantive violation, yet withhold granting plaintiff an injunction, even though the defendant may have a qualified immunity that shields it from damages.[101]

If a judge has discretion not to enforce a statute, to excuse a defendant's violation, this would be unfortunate because it hands the trial judge a blank check to hold that a plaintiff with a right nevertheless has no remedy.[102] Therefore, the *eBay* Court's citation to *Weinberger*, which, based on the preceding reading, may accord the judge too much discretion, was an impropitious one.

Even more troubling to me, however, would be a holding that the judge has discretion to grant plaintiff a remedy in the absence of defendant's substantive violation. For such a plaintiff would have a remedy without a right.[103]

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101. *See* Levin, *supra* note 4, at 336–37 (discussing a potential remedy for the substantive violation which was not dependant upon injunction).

102. 1 DOBBS, *supra* note 31, § 2.4(7); Levin, *supra* note 4, at 336; Shapiro, *supra* note 3, at 586–87.

103. *See* Navajo Acad. v. Navajo United Methodist Mission Sch., 785 P.2d 235 (N.M. 1990) (holding that allowing tenant to remain on property after termination of lease was not abuse of discretion). *Navajo Academy*, a decision the court justified as equitable discretion, is wrong on the "law," but right in the dispute, making it an excellent teaching case, particularly when juxtaposed with *Weinberger*. DOUG RENDLEMAN, REMEDIES 297–309 (7th ed. 2006). Flying the banner of equitable discretion, the trial judge, in effect, ignored the formal rules and granted a delay to reach a "fair" result. On the loser's appeal, the appellee and the trial judge presented the appellate court with the accomplished fact, since the extra-legal time that the trial judge granted had, when the appeal was decided, passed.

Judge Posner examined limits on the judge's equitable discretion. "A modern federal equity judge does not," he wrote, "have the limitless discretion of a medieval Lord Chancellor to grant or withhold a remedy. . . . Modern equity has rules and standards, just like law. . . . And although the ratio of rules to standards is lower in equity than in law, in cases where the plaintiff has an established entitlement to an equitable remedy the judge cannot refuse the remedy because it offends his personal sense of justice."[104] More to the point, "when a plaintiff has prevailed and established the defendant's liability . . . there is no discretion to deny injunctive relief completely."[105]

B. Selecting the Plaintiff's Remedy: Damages vs. Injunction?

My second question touches on the judge's discretion, having found that the defendant violated the plaintiff's interest protected under substantive law, to choose between awarding the plaintiff damages and granting an injunction.

Does the judge lack categorical rules for granting or denying an injunction? A leading work on federal procedure replies that "[p]erhaps the most significant single component in the judicial decision whether to exercise equity jurisdiction and grant permanent injunctive relief is the court's discretion."[106]

If the discretion we are discussing is unique to an equitable remedy, the judge ought to have discretion to decline to grant a plaintiff an equitable injunction. But, consistent with our discussion above, the judge should lack discretion to refuse altogether to recognize a plaintiff's rights.[107]

In *eBay*, the difference between the Federal Circuit's almost-automatic injunction and the Supreme Court's holding illustrates the point I am examining—that the trial judge may choose between remedies and, in particular, may decline to grant plaintiff an injunction in favor of awarding him damages. Under the circuit court's approach, the defendant's infringement triggered an injunction. But the Supreme

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104. *In re* Freligh, 894 F.2d 881, 887 (7th Cir. 1989) (citations omitted).

105. U.S. v. Gregory, 871 F.2d 1239, 1246 (4th Cir. 1989).

106. 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2942, at 37–38 (2d ed. 1995).

107. 1 DOBBS, *supra* note 31, § 2.4(2).

Court gave the trial judge a choice, discretion, based on the four-point test.

The *eBay* trial judge's decision to deny an injunction to a patent owner that was licensing its patent for money is a similar per se rule. The Supreme Court rejected that approach in favor of a more flexible—that is, more discretionary—one that allowed judges to grant injunctions to some licensing patentees.[108]

A better equitable-discretion citation for the *eBay* Court was a decision that the *Weinberger* Court had cited: *Boomer v. Atlantic Cement Co.*[109] *Boomer* was a state-court rather than a federal-court decision; it was based on common law rather than statute. This is an area where Professor Plater's analysis found more discretion: a court-created common-law substantive right: nuisance. Instead of free-floating discretion, *Boomer* involved one of the *eBay* Court's four factors: balancing the hardships.

Where the defendant burdens its neighbors but benefits society, the court may balance the hardships, evaluate the defendant's cost against the plaintiff's benefit and the public interest, and consider the injunction's ripple effects on third persons. Where the defendant's cost to comply with an injunction far exceeded the plaintiff's benefit from the injunction, the *Boomer* court said that the related risks of an injunction—shuttering the defendant's plant or facilitating an unbalanced, coerced settlement—supported granting the plaintiffs damages, but not an injunction.[110] The *Boomer* court stated clearly that a judge has discretion, under the circumstances, to choose between an equitable injunction and damages, and to select the latter.[111]

The trial judge has more discretion under a court-made, common-law, substantive standard. A judge's equitable discretion is

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108. eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837, 1841 (2006). Two concurring opinions discussed patent injunctions. Justice Kennedy's gave the patentee less occasion to be optimistic. *Id.* at 1842–43 (Kennedy, J., concurring). Chief Justice Roberts's gave the patentee more occasion to be optimistic. *Id.* at 1841–42 (Roberts, C.J., concurring). Although the patent-law issues are not directly related to this article, the reader ought to know that I favor the Chief Justice's sanguine approach. On remand, however, the trial judge rejected MercExchange's renewed motion for a permanent injunction in a detailed and factual patent-specific opinion influenced by Justice Kennedy's injunction-skeptical concurring opinion. MercExchange, L.L.C. v. eBay, Inc., 500 F. Supp. 2d 556, 568-92 (E.D. Va. 2007).

109. 257 N.E.2d 870 (N.Y. 1970).

110. *Id.* at 872.

111. *Id.* at 872–75.

part of the common-law technique.[112] One of the common-law system's rules is that the initial decisionmaker has discretion.[113] Dealing with the unprovided and the unforeseen are parts of the courts' common-law technique.[114] Judges mold the common law as they decide disputes.[115] Adjusting a common-law rule to the unprovided, unforeseen, and changed is part of the common-law technique.[116]

A rule grants the judge power, tempered by restraint.[117] The judge has discretion to decide what the common-law rule says in the first place and to examine the background justification for the rule.[118] Does the rule decide the case? The judge may identify the freedom that remains and decide based on a checklist of standards and alternatives.[119] But if the decision must go outside the factors and standards, the better result is a decision that is consistent with the legal system and consistent, or not inconsistent, with the rule and its justification.[120]

I think that balancing the hardships is a necessary doctrine.[121] In balancing the hardships for a defendant's nuisance, the judge might consider burdens on nonparties, people in the vicinity, defendant's employees, and the local business environment.[122] In addition to the nuisance discussed above, the court might balance cost and benefit when defendant has trespassed with an encroaching structure. For example, the Iowa Supreme Court declined approbation to an injunction against a defendant's trespassing sewer line; it held that damages were an adequate remedy for the plaintiff and remanded the dispute to the trial judge to compute them.[123]

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112. SCHAUER, *supra* note 7, at 11.
113. *Id.* at 175.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 232.
118. *Id.* at 222–23.
119. *Id.* at 224–26.
120. *See id.* at 224 (asserting that the common law system is better able to provide a solution for controversies than a system in which rules alone form a rigid framework into which cases must be fit).
121. HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY §§ 50–52 (2d ed. 1948). *But see* Louise Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89, 109 (1998) (asserting that balancing the hardships is an exercise of unprincipled discretion).
122. 1 DOBBS, *supra* note 31, §2.4(5).
123. Nichols v. City of Evansdale, 687 N.W.2d 562, 572–74 (Iowa 2004).

The balancing the hardships that is an appropriate approach in choosing between damages and an injunction for defendant's nuisance or trespass carries over to other substantive areas. Justice Kennedy mentioned in his concurring opinion in *eBay* that the plaintiff's infringed patent may comprise a minute part of the defendant's infringing product.[124] Granting such a plaintiff an injunction raises the risks of excessive settlement leverage and a shutdown, factors that the New York court in *Boomer* mentioned in substituting damages for an injunction.[125] A post-*eBay* federal district judge has already declined to approve an injunction because the plaintiff's infringed patent played a small role in the defendant's total product.[126]

However, disagreeing with the Supreme Court in *eBay*, I think that balancing the hardships should be a defendant's affirmative defense to an injunction rather than an element of an injunction in plaintiff's case-in-chief.[127] Moreover, I think that the *Boomer* court may have balanced the hardships too far on the defendant's side.[128] Instead of the stark choice that the New York court presented between a shut-down injunction and no injunction at all, the court could have launched the trial judge on an injunctive program of experiment and plan submission.[129]

A plaintiff's injunction may affect third parties and may require judicial supervision. These consequences are "the practical reason why a plaintiff has no 'right' to an injunction, why the plaintiff's claim to such a remedy may have to yield to competing considerations."[130]

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124. eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837, 1842 (2006) (Kennedy, J., concurring).

123. Boomer v. Atl. Cement Co., 257 N.E.2d 870, 874 (N.Y. 1970).

126. z4 Techs., Inc. v. Microsoft Corp., 434 F. Supp. 2d 437, 440 (E.D. Tex. 2006), *appeal dismissed*, 219 F. App'x 992 (Fed. Cir. 2007).

127. *But see* eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837 (2006) (classifying the balancing of the hardships or elements of the plaintiff's prima facie case).

128. *See* J. William Futrell, *The Transition to Sustainable Development Law, Lloyd K. Garrison Lecture on Environmental Law*, 21 PACE ENVTL. L. REV. 179, 193 (2003) ("[*Boomer*] overruled a century of jurisprudence in which courts protected the right of numerous smaller property owners to enjoin the destructive actions of their neighbors.").

129. *See* Farber, *supra* note 5, at 20 (arguing that the majority opinion in *Boomer* failed to consider the possibility of equitable relief that would mitigate harm to plaintiffs).

130. Avitia v. Metro. Club of Chicago, Inc., 49 F.3d 1219, 1231 (7th Cir. 1995); *see also* Hoover v. Wagner, 47 F.3d 845, 850 (7th Cir. 1995) ("[T]here is no 'right' to

Professor Farber did not think that the *Boomer* court balanced third-party interests correctly; it considered the defendant's economic benefit to the people in the vicinity, but it ignored the effect of its pollution on the public.[131]

Third-party interests may also come under the *eBay* Court's invocation of the "public interest."[132] The court may cite the public interest in denying an injunction to a plaintiff-patentee churlishly withholding life-saving technology in a life-threatening crisis.[133] In another example, the Oregon Supreme Court cited equitable discretion in holding that a shopping center owner could not enjoin trespassing defendants who were seeking signatures for a political petition.[134]

The judge has discretion to deprive the plaintiff of a remedy, but not a right. When an injunction is the plaintiff's only meaningful remedy, the judge sacrifices the plaintiff's right to excessive discretion when declining to grant the injunction.[135]

Does the judge, having found that the defendant is liable under substantive law, have an open choice between damages and an injunction? Not really. "In specific classes of case[s], injunctions now issue pretty much as a matter of course."[136] While an appellate court may say that specific performance—a specialized injunction—is a discretionary remedy, a trial judge probably does not have much discretion to deny specific performance to a land buyer suing a breaching seller.[137]

According to the Court in *eBay,* the judge's discretion to decline an injunction and to substitute damages is based on the tests of inadequate legal remedy, irreparable injury, balancing the hardships, and the effect on the public interest.[138] The Supreme Court's opinion in *eBay* omits mention of the academic ferment around the irreparable

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an injunction . . . an injunction is an extraordinary remedy rather than a remedy available as a matter of course.").

131. Farber, *supra* note 5, at 20.

132. *eBay*, 126 S. Ct. at 1842 (Kennedy, J., concurring).

133. *See* Rite-Hite Corp. v. Kelley Co., 56 F.3d 1538, 1547–48 (Fed. Cir. 1995) (citing several examples where overriding public interest warranted refusal of injunction).

134. Lloyd Corp. v. Whiffen, 773 P.2d 1294, 1297–98 (Or. 1989).

135. 1 DOBBS, *supra* note 31, § 2.4(7).

136. Hoover v. Wagner, 47 F.3d 845, 850 (7th Cir. 1995).

137. RENDLEMAN, *supra* note 103, at 560–61; 1 DOBBS, *supra* note 31, § 2.4(7).

138. 126 S. Ct. 1837, 1839 (2006).

injury and inadequate remedy tests.[139] To me, moreover, inadequate legal remedy and irreparable injury seem to be functionally, at least, one test.[140]

While at present and under *eBay*, plaintiff pleads and proves inadequacy-irreparability, converting that test to an affirmative defense with the burdens on the defendant would be a sensible step in the right direction.[141] Since these inquiries might be reallocated as an affirmative defense, or defenses, I submit that a substantively successful plaintiff's default remedy ought to be an injunction, prima facie, if the plaintiff wants one.

Professor Carroll suggested that, when defendant's profit can be computed easily, damages may be adequate for a plaintiff-patentee that is neither practicing nor licensing the invention, thus lacking lost sales, lost licensing income, and perhaps lost goodwill.[142] Carroll's suggestion may arguably satisfy Professor Laycock's formulation that an injunction is only an improper remedy when the plaintiff can use the defendant's money damages to buy the equivalent, for under Carroll's suggestion, defendant's money is the plaintiff's interest. However, if the judge denies the plaintiff an injunction, the defendant's future infringement of the plaintiff's patent can continue until the patent expires. This exacerbates the plaintiff's task of measuring damages, supporting the idea that damages are an inadequate remedy.

Finally, although the *eBay* Court states the public interest as an element of the plaintiff's prima facie case for an injunction,[143] the Supreme Court's wiser course would have been to also allocate "contrary to the public interest" as a separate affirmative defense with the burdens of pleading and proof on the defendant.[144] This move

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139. OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978); DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991); Rendleman, *supra* note 50, at 1373–78.

140. RENDLEMAN, *supra* note 103, at 238. On remand of *eBay v. MercExchange*, the trial judge observed that irreparable injury and inadequacy are "essentially two sides of the same coin" and that the two overlap. MercExchange, L.L.C. v. eBay, Inc., 500 F. Supp. 2d 556, 569 n.11, 582 (E.D. Va. 2007).

141. Doug Rendleman, *Irreparability Irreparably Damaged*, 90 MICH. L. REV. 1642, 1665–67 (1992).

142. Carroll, *supra* note 6, at 434.

143. 126 S. Ct. at 1839.

144. *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE §§ 4.5–4.6 (5th ed. 2001) (discussing affirmative defenses and specific instances of affirmative defenses in general).

should not detract from the importance of the public interest in courts' decisions that "go much further both to give and to withhold relief in furtherance of the public interest than they are accustomed to when only private interests are involved."[145]

C. *Discretion to Shape the Remedy*

First the judge finds defendant's liability and decides to issue an injunction to protect the plaintiff. The judge's next question is the way to vindicate plaintiff's rights and to define the defendant's misconduct to interdict. My third contextual subject homes in on the judge's equitable discretion, having chosen an injunction, to decide on the order's specific features.

One view of *Weinberger* is that it holds that the court has discretion to determine the manner in which the defendant complies with the statute.[146] This can mean either of two things: that the judge has discretion to choose between remedies (our preceding subject), or that, after selecting the remedy, the judge has equitable discretion to shape it (our present subject).

After the judge decides to grant plaintiffs an injunction, how much discretion remains in drafting and implementing it? To desegregate a Southern school district, someone had to decide which schools to pair, which to consolidate, and which students to bus and where. To accommodate protestors' picketing and an abortion clinic, someone must decide how many pickets are appropriate, how far apart they ought to stay, and where they may parade. The details of how to vindicate plaintiffs' rights are fact-specific and contextual, neither governed by a precise rule nor subject to intense appellate scrutiny.

A plaintiff addresses a request for an injunction "to the sound discretion of the trial court."[147] "The trial court is vested with a broad discretionary power to shape and fashion injunctive relief to fit the particular facts, circumstances, and equities of the case before it. Appellate courts give great weight to the trial court's exercise of that

145. Nw. Envtl. Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 679–80 (9th Cir. 2007).

146. *See* Levin, *supra* note 4, at 337 (discussing the *Weinberger* opinion as construing the FWPCA to preserve the court's discretion to determine the manner in which a polluter should come into compliance).

147. Brown v. Voss, 715 P.2d 514, 517 (Wash. 1986) (emphasis omitted).

discretion."[148] The judge's equitable discretion facilitates the judicial purpose to "do complete justice."[149]

There are reasons to give the decisionmaker on the scene discretion in measuring and implementing an injunction. Precedents exist, but they never tell the judge what precisely this plaintiff is entitled to in this dispute and what this defendant must undertake or refrain from to conform to the law. A trial judge's measurement decision requires a sense of the situation that the judge achieves from the ambience of the dispute. These factors may not appear on the record in a way that is amenable to appellate review. The decision is important to the parties, since it determines what claimant receives and what defendant must pony up. Uniformity and consistency are needed, but only within a broad range.

Does the judge have equitable discretion to grant plaintiff an injunction that exceeds plaintiff's right?[150] A judge, for example, should grant an injunction to protect a property owner from a defendant's trespass. If the trespassers are robustly disruptive, may the judge grant the plaintiff an injunction with a buffer zone around the property, that, in effect, extends plaintiff's right to be free of trespass into the public street? The Supreme Court has answered that question in favor of the buffer-zone injunction.[151]

Public-nuisance injunctions against street gangs often extend defendants' prohibitions beyond the criminal law to forbid gang

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148. *Id.*

149. EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS § 1.3, at 12 (1989).

150. *See* 1 DOBBS, *supra* note 31, § 2.4(7), at 115–16, 121 (questioning to what extent expansion of equitable remedies makes sense in a democracy, as opposed to a monarchy); Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 314–18, 322–32 (2004) [hereinafter Thomas, *The Prophylactic Remedy*] (noting "prophylactic" injunctive relief may exceed the parameters of a plaintiff's complaints and affect otherwise legal behavior); Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of* Bush v. Gore, 11 WM. & MARY BILL RTS. J. 343, 351, 373 (2002) [hereinafter Thomas, *Understanding Prophylactic Remedies*] (describing how "prophylactic" remedies convert innocuous illegal behavior into "required law").

151. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 757 (1994) (granting a Florida abortion clinic a 36-foot buffer zone around the clinic to exclude demonstrators from protesting within that zone); Thomas, *The Prophylactic Remedy*, *supra* note 150, at 325 (noting that the Supreme Court has granted a buffer zone not only to businesses, but also to individual women entering abortion clinics who do not wish to hear the messages of protestors).

members from preparatory and related conduct that, except for the injunction, would be legal, even protected by their constitutional rights. Examples include street-gang injunctions forbidding gang members from gathering in particular areas and from associating with other gang members. Courts have issued street-gang injunctions that set curfews and forbid gang members from wearing gang insignia; possessing a cell phone, beeper, or paint; and using gang hand signs.[152] Because of defendants' prior misconduct, the judge may grant the plaintiff an injunction that, in effect, creates a criminal sanction for previously legal activity. A judge should use this awesome power cautiously.

A structural injunction that the judge designs and administers to remake an entire governmental institution, a school, a prison, or a disability bureaucracy tests the judge's equitable discretion. A structural injunction features substantive expertise, long periods of time, and lots of paper. The United States Constitution is usually the source of the structural-injunction plaintiffs' substantive right, but the plaintiffs' rights may originate in a statute, such as an environmental provision. To restructure the whole institution, the judge must grant an injunction that has positive or mandatory features.[153]

A judge adjudicating a structural injunction will exercise equitable discretion during the several phases or stages that comprise the structural-injunction judge's exercise of augmented remedial discretion. These include whether to "advise" both parties or the defendant to draft and present a plan; whether to approve the parties' proposed consent decree; how to implement the defendant's transition into injunctive status; what conduct to enjoin and when to enjoin it; how much detail to include in an injunction or consent decree; whether the defendant's lack of compliance or progress violates the order; whether the defendant's breach amounts to contempt; how to deal with the defendant's defense of inability to comply; if a defendant's violation is contempt, how to sanction it within the realm of traditionally mild structural-injunction sanctions; whether to displace the defendant with a monitor or receiver; and whether to continue, modify, or dissolve the consent decree or injunction.

The judge's constitutional, structural-injunction remedy ought to stop the defendant's unconstitutional exercise of government power

152. *See* Pamela A. MacLean, *Ganging up on Gangs*, NAT'L L.J. (N.Y.), June 11, 2007, at 1, 18 (discussing examples of anti-gang injunctions across the country).

153. Thomas, *Understanding Prophylactic Remedies*, *supra* note 150, at 379.

and forbid the defendant from violating the plaintiff's right. Should the judge grant the plaintiff an injunction that falls short of protecting the plaintiff's constitutional right? Professor Schoenbrod's "tailoring doctrine" says that the judge should avoid granting a plaintiff injunctive protection that exceeds her substantive entitlement, but that the plaintiff may sometimes receive less; protecting the plaintiff less ought to be consistent with the substantive goals and warranted by exigencies not reflected in the substantive rule.[154]

A court's timing decision, to enjoin the defendant not now, but later, may be troubling. For if a plaintiff has a substantive right important enough for the judge to protect with an injunction, the plaintiff should enjoy it now; that right is too important for money damages later. Justice delayed is justice denied. Nevertheless, the Supreme Court's schedule for school desegregation in *Brown v. Board of Education* was for the trial judges to proceed with "all deliberate speed."[155] Moreover, Professor Paul Gewirtz's leading article on constitutional remedies emphasized the need for judges to seek flexible constitutional remedies, meaning trimmed injunctions.[156] The problem of *Brown II*'s "all deliberate speed" was not the need for some transition, but of too much delay in implementing desegregation.[157]

The *Brown* remedial decision also introduced two countervailing considerations: separation of powers and federalism-local control. In 2004, the Supreme Court repeated the concern it expressed in *Brown*[158] and *Rufo v. Inmates of the Suffolk County Jail*,[159] that the federal judge defer to state and local officials' "latitude and substantial discretion."[160] Observers have maintained that federal judges could deploy discretion to protect federalism interests and to avoid separation of powers and federalism friction.[161] However, too

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154. David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 633, 636–37 (1988).

155. 349 U.S. 294, 301 (1955); *see* Doug Rendleman, Brown II*'s "All Deliberate Speed" at Fifty: Golden Anniversary or Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 SAN DIEGO L. REV. 1575, 1586 (2004) (discussing the meaning of the phrase "all deliberate speed").

156. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 612 (1983).

157. Rendleman, *supra* note 155, at 1588–89.

158. 349 U.S. 294, 299 (1955).

159. 502 U.S. 367, 392 (1992).

160. Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 432 (2004).

161. *See* Hoover v. Wagner, 47 F.3d 845, 850 (7th Cir. 1995) ("[Injunctions]

much equitable discretion might fall into the bad habits that Judge Wilkinson fears: "The doctrinal tools that a split-the-difference Court draws upon are ones that relax constraints on judicial discretion and, for that reason, potentially augment the power of the judiciary at the expense of the other branches of government."[162]

Few doubt the need to respect the trial judge's choices about how to measure the remedy and the logistics of how to effect a transition. Even the dissent in *Boomer* recognized that the trial judge has discretion to grant plaintiff an injunction that takes effect in the future.[163] A court administering an injunction has "a residual power to grant defendants a reasonable transition time to move from noncompliance to compliance."[164]

Where the decision is dispute-specific and contextual, a reviewing court should favor the closest decisionmaker because that judge's direct observations will lead to a better sense of the situation. "On such a highly particular question," Justice Brown wrote for the California Supreme Court, "we are compelled to defer to the superior knowledge of the trial judge, who is in a better position than we to determine what conditions 'on the ground' . . . will reasonably permit."[165] The judge may tailor measurement; within outside boundaries, one judge's contextual measurement will not be another judge's formal "precedent."

A judge's decision about specific measurement in an injunction does not lend itself to logical reasoning from a general rule. It is judgmental, and in a personal order, managerial. While the judge decides under a general rule, the context-specific nature of a solution militates against cookie-cutter uniformity and adherence to precedent. Within a range of acceptable solutions, the trial judge's judgment and range of experience determine the answer.

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can affect nonparties to the litigation in which they are sought; and when, as in this case, they are sought to be applied to officials of one sovereign by the courts of another, they can impair comity, the mutual respect of sovereigns—a legitimate interest even of such constrained sovereigns as the states and the federal government."); Shapiro, *supra* note 3, at 582–83 (noting the Supreme Court's sensitivity in granting federal injunctions against state proceedings).

162. Wilkinson, *supra* note 7, at 1981.

163. *See* Boomer v. Atl. Cement Co., 257 N.E.2d 870, 877 n.7 (N.Y. 1970) (Jasen, J., dissenting) (observing that New York's prior case law allowed an injunction to become effective in the future).

164. Plater, *supra* note 5, at 579–80.

165. People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 616 (Cal. 1997).

IX. CONCLUDING QUESTION: HOW MUCH EQUITABLE DISCRETION?

This article has discussed the trial judge's equitable discretion under a statute, the common law, and the Constitution, and identified areas where the judge's discretion is questionable and others where it is salutary. On questions of central control versus shared power like federalism and discretion, however, there are no final answers. The same readers may find fuzzy lines, for I find it vexatious to distinguish a judge's rule-bound decision from a discretionary one. Moreover, once within the judge's ambit of discretion, a judge's appropriate exercise of discretion is difficult to distinguish from an abuse of discretion.[166]

Jurisprudential analysis on a high level of abstraction ignores institutional structure, hierarchy, and formal power. I am enough of a legal realist to think that the legal and procedural process and the decisionmaker affect the result, and enough of a positivist to think that rules which the judge should not alter decide most disputes.[167] Judges will almost always adhere to professional standards; principled judicial discretion is not an oxymoron.[168]

Having said that, I will hazard some generalizations. The judge lacks discretion unless plaintiff shows that defendant violated her substantive right; the judge should have no discretion to grant a plaintiff a remedy in the absence of defendant's substantive violation.[169] The judge should have no, or minute, discretion to find the defendant's violation and to withhold granting the plaintiff any remedy at all; that is, to decide that a plaintiff has a right without a remedy.

The judge does have some discretion to choose between remedial techniques, damages and an injunction. Finally, the judge has more, but nevertheless circumscribed, discretion to measure and implement the plaintiff's remedy. Once the judge chooses an

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166. *See* Yablon, *supra* note 2, at 233 (discussing the judicial decisionmaking process and its reliance on gut feelings).

167. Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 608, 612–13, 621 (2007).

168. *See* Shapiro, *supra* note 3, at 578 (discussing the importance of judicial discretion).

169. *But see* Navajo Acad. v. Navajo United Methodist Mission Sch., 785 P.2d 235 (N.M. 1990) (holding that the trial court did not abuse its discretion by granting the plaintiffs equitable relief, despite the fact that the plaintiffs had been unable to prove a substantive violation).

injunction, the judge has discretion to measure, draft, and implement it. An example is the size of a no-picketing buffer zone around an abortion clinic. With apologies to the Rolling Stones, even when you get what you want, you may not get all you want right when you want it.

When the judge is operating within the areas of discretion described above, how can we tell whether that discretion was compromised by extraneous considerations? In selecting and measuring a remedy, the judge should articulate reasons and apply standards.

The judge's articulated reasons benefit every participant.[170] The judge is forced to think, leading to a better decision. Novelist Peter Taylor told an interviewer that "I think writing is discovery. You discover what you know about something or what you feel about things."[171] The losing party, having received the judge's explanation, feels better, or perhaps less bad. The winning party and the public are better off with a well-considered decision, one that is more likely to educate the public. In turn, the loser, the winner, the public, and the profession can evaluate the decision and the judge. And an appellate court will find that a trial judge's reasoned decision is easier to review.

The trial judge's discretionary choices to select and measure a remedy are decision-specific and contextual, better governed by standards than rules.[172] What, the reader may ask Judge Posner,

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170. *See* 1 DOBBS, *supra* note 31, § 2.4(7) (discussing the advantages of allowing for judicial discretion); Lefkow, *supra* note 3, at 23 (Judge Lefkow observes that "I do my best to tell counsel before me why I do what I do, even when I have discretion."); Rosenberg, *supra* note 1, at 665–66 (asserting that when the trial judge relies on discretionary power, he should place on the record not just the reasons for his decision, but also the circumstances and factors that were crucial to his determination so that counsel and the reviewing court will "be in a position to evaluate the soundness of his decision"); Shapiro, *supra* note 3, at 575, 579 (arguing that the proper exercise of judicial discretion requires "reasoned and articulated decision" and that courts ought to provide an explanation of the scope of their jurisdiction "based on the language of the [jurisdictional] grant, the historical context in which the grant was made, or the common law tradition behind it"); Friendly, *supra* note 1, at 771 ("[T]he desirability of a statement of reasons is beyond contest.").

171. Robert Daniel, *The Inspired Voice of Mythical Tennessee*, Kenyon College Alumni Bulletin, Winter 1982, at 18, *reprinted in* CONVERSATIONS WITH PETER TAYLOR 41, 42 (Hubert H. McAlexander ed. 1987).

172. Rosenberg, *supra* note 1, at 666–67; *see also* Shapiro, *supra* note 3, at 547–48 (discussing standards and how the common-law tradition guides a judge's discretion); Bone, *supra* note 3, at 2015–17 (discussing the relative merits of rules,

> is the difference between *rule* and *standard* as methods of legal governance[?] A rule singles out one or a few facts and makes it or them conclusive of legal liability; a standard permits consideration of all or at least most facts that are relevant to the standard's rationale. . . . Rules have the advantage of being definite and of limiting factual inquiry but the disadvantage of being inflexible, even arbitrary, and thus overinclusive, or of being underinclusive and thus opening up loopholes (or of being *both* over- and underinclusive!). Standards are flexible, but vague and open-ended; they make business planning difficult, invite the sometimes unpredictable exercise of judicial discretion, and are more costly to adjudicate—and yet when based on lay intuition they may actually be more intelligible, and thus in a sense clearer and more precise, to the persons whose behavior they seek to guide than rules would be. No sensible person supposes that rules are always superior to standards, or vice versa, though some judges are drawn to the definiteness of rules and others to the flexibility of standards. But that is psychology; the important point is that some activities are better governed by rules, others by standards.[173]

If a judge's discretionary decisions in granting, drafting, and implementing an injunction are better governed by standards, what kind of standards? The standards will not be trans-substantive; instead they will vary according to the substantive area.[174] The standards for a judge's decision whether to enjoin defendant's violation of a statute may, because the legislature found plaintiff's injury to be irreparable, omit the traditional equitable irreparable injury inquiry.[175]

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principles, and lists of factors in judicial decisionmaking).

173. MindGames, Inc. v. W. Publ'g Co., 218 F.3d 652, 656–57 (7th Cir. 2000).

174. R. Grant Hammond, *Interlocutory Injunctions: Time for a New Model?*, 30 U. TORONTO L.J. 240, 279–80 (1980).

175. *See* Worthington v. Kenkel, 684 N.W.2d 228, 233–34 (Iowa 2004) (holding that the legislature intended to omit the irreparable-injury question in a whistleblower statute).

The judge's decision on whether to grant a patent owner an injunction for the defendant's infringement may vary; between the majority opinion and the two concurring opinions, the Court's all-things-considered four-point test will be the subject of protracted and expensive litigation. Perhaps, as Professor Fischer argues, the judge's choice may turn on the monetary relief the plaintiff seeks for the defendant's past infringement,[176] with lost profits supporting an injunction and a reasonable royalty militating against one.[177]

While a judge might think that defendant's violation of an environmental provision is irreparable, a large business defendant may require some time to adjust to sustainable alternatives.[178] For a plaintiff's right to be free of a government defendant's unconstitutional establishment of religion, the judge's constitutional thumb ought to be permanently on the injunction side of the scale.[179] On the other hand, even for a defendant's constitutional violation that involves a cumbersome bureaucracy, the logistics of transitional jurisprudence may lead to some delay and gradualism.[180] All decisions will be tempered by contextual considerations of public interest and balancing the hardships; in particular a judge will hesitate before destroying the defendant's good faith pre-litigation investment.

A trial judge's discretion stems from trial judges' institutional competence. Somebody has to make the final decision, and the trial judge is closest to the scene of the dispute. Appellate courts recognize the trial judge's discretion because of trial judges' collective experience and proximity to disputes, as well as their presumed skill in making subjective, perhaps intuitive, judgments that appellate judges know they cannot evaluate, decisions often not based on formal rules and which the appellate court cannot review for compliance with the rules.[181]

Other decisions are more amenable to rules and closer appellate scrutiny. Was it a legal decision? Did the judge apply a substantive

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176. Fischer, *supra* note 6.

177. *Id.*; *see also* Carroll, *supra* note 6, at 435 (explaining how the judge's equitable discretion bridges the gap from a general patent statute to the complex technological and commercial environment).

178. John S. Applegate, *The Story of* Reserve Mining*: Managing Scientific Uncertainty*, *in* ENVIRONMENTAL LAW STORIES, *supra* note 5, at 43, 63–68.

179. Rendleman, *supra* note 50, at 1406.

180. Rendleman, *supra* note 155, at 1586.

181. Rosenberg, *supra* note 1, at 663–64; Yablon, *supra* note 2, at 263–64.

rule to facts? Is the decision an important one for the public and the legal profession? Are uniformity and consistency needed? Will the factors leading to the decision appear on a written record where they are amenable to review? Negative answers lead to trial-level discretion and permissive appellate review; positive ones to rules-standards and close appellate scrutiny.[182]

The Chancellor's claim of equitable discretion distinguishes between a legal and an equitable decision, and asserts discretion for a judge in "equitable" circumstances. Does a judge have more discretion in measuring the buffer zone in an injunction than a jury does in measuring a personal injury plaintiff's damages for pain and suffering? I doubt it. Professor David Shapiro observed that the distinction between a Chancery court's equitable discretion and the common-law court's lesser discretion "cannot be sustained."[183] It would be salutary, I submit, for the profession to discard the nonfunctional terminology of separate legal and equitable discretion. Courts, rulemakers, and legislatures could develop rules, standards, and precedents around the functional differences between types of decisions and remedies.[184]

Moreover, courts would make better remedial decisions if the *eBay* Supreme Court's four-point test were broken up and reallocated as separate affirmative defenses instead of remaining elements of the plaintiff's prima facie case for an injunction.

The legal profession's dialogue about discretion versus rules will continue because the issue of the ambit of the trial judge's discretion reveals the insoluble difference between, on one hand, a legal realist-rule skeptic who sees judges' outcomes often undetermined by legal doctrine and, on the other, a positivist who thinks that courts' results should usually flow from legal rules. The trial judge and the

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182. Piper Aircraft Corp. v. Wag-Aero, Inc., 741 F.2d 925, 935–40 (7th Cir. 1984) (Posner, J., concurring). Judge Friendly made the point that the abuse-of-discretion scope of appellate review is not one, but several tests. Friendly, *supra* note 1, at 783. *See also* Global NAPS, Inc. v. Verizon New England, Inc., 489 F.3d 13, 23 (1st Cir. 2007) (discussing a sliding scale of discretion leading to stricter review of trial judge's injunction-bond decision).

183. Shapiro, *supra* note 3, at 571.

184. *See* ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 1, 99–102 (1950) (discussing ways to balance the defenses for plaintiffs at fault with the policies behind the substantive law); Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 71–73 (Summer 1993) (discussing the historical differences between law and equity and asserting that "discretion and flexibility pervade the [modern] system and are not limited to the historical confines of equity.").

appellate court should examine an exercise of equitable discretion in light of its procedural setting, policy justifications, and the substantive context of the decision.

What about Sarah, my addition-challenged law student? She will graduate with her class because the law-school authorities will exercise their discretion to waive a rule. But the number of hours required to graduate will not be altered. Sarah will probably either add a course after the add-date or sign up after the deadline to write a paper for research credit. "Equity" will triumph at Washington and Lee, and perhaps everywhere. Hasn't it always?