Book Review

Rethinking Injunctions

The Civil Rights Injunction. By Owen M. Fiss. *Bloomington: Indiana University Press,* 1978. Pp. 117. $10.95.

Reviewed by John Minor Wisdom†

Professor Fiss has given us an important, succinct, thought-packed critique of remedies.[1] *The Civil Rights Injunction* is a reappraisal of the injunction in light of the civil rights experience. Its thesis, however, is not limited to civil rights cases; it extends to all types of injunctions.

The author argues that courts have erred in making "irreparable injury" a requirement for the issuance of an injunction,[2] because they talked about doctrine—sometimes obsolete doctrine—not about facts. In his view, "the rules governing the choice of remedy—procedural rules, if you will—cannot and should not be fashioned apart from and independent of one's belief about the nature and justice of the underlying claim."[3] Consequently, Professor Fiss reclassifies injunctions within a "context-specific evaluation of the advantages and disadvantages of each form of relief."[4] The traditional view of the hierarchy of

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1. O. FISS, THE CIVIL RIGHTS INJUNCTION (1978) [hereinafter cited by page number only]. Professor Fiss is well qualified to write such a book. In addition to his casebook, INJUNCTIONS (1972), he has written extensively and well on areas in which the injunction has played an increasingly important role. *See, e.g.*, Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977) [hereinafter cited as *Dombrowski*]; Fiss, Gaston County v. United States: *Fruition of the Freezing Principle*, 1969 SUP. CT. REV. 379. For his most recent exposition on the remedial process, see Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

2. The accepted view is that equity developed preventive remedies to protect property rights, on the theory of *quia timit*, to enjoin injuries threatening irreparable damage. 2 J. STORY, EQUITY JURISPRUDENCE ch. 21 (13th ed. 1886). The "principal object of attack" in Professor Fiss's book is the irreparable injury requirement, which "received a new lease on life in Douglas v. City of Jeannette," 319 U.S. 157 (1943), "and was reinvigorated with a vengeance by a line of cases that begins in 1971 with Younger v. Harris," 401 U.S. 37 (1971). P. 42.

3. P. 91.

4. P. 6.

remedies assumed that noninjunctive remedies would be efficacious and that an injunction was a subordinate, last-resort remedy to prevent irreparable injury. That view, Professor Fiss demonstrates, should give way.

This reevaluation of the injunction is long overdue. Felix Frankfurter and Nathan Greene made the last important critical study of the subject in 1930, writing *The Labor Injunction*,[5] which was almost a brief for the Norris-LaGuardia Act. That work was a study of the abuses of the injunction as a tool of industrial warfare[6] and cannot be regarded as a general argument for narrowing the use of all injunctions. Since that time, we have been through the civil rights experience, in which we recognized pervasive ills in our social structure and developed injunctive remedies to correct them. Professor Fiss is concerned that in a period of "reconstitution," injunctive relief may become hostage to the verbal rigidity of ancient doctrine. I share his concerns. It would be a mordant irony if equitable procedures should become so calcified by arthritic doctrine as to defeat the doing of equity.

Professor Fiss begins by redrawing the map traditionally used to locate the types of injunctions. The coordinates on the old map were procedural: there were interlocutory orders and final orders. Orders were sometimes also captioned by the style of their coerciveness as mandatory or prohibitory. This procedural approach was unrelated to the wrong under scrutiny and was not descriptive of the remedy. Thus it was unilluminating in trying to distinguish, for example, restraints of speech from voting rights cases or from school desegregation cases.

Professor Fiss adds coordinates that have reference to the wrong, and to the remedial end an injunctive order is intended to serve. He introduces three new categories: the preventive injunction, which seeks to prohibit some discrete act or series of acts from occurring in the future; the reparative injunction, which compels the defendant to engage in a course of action that seeks to correct the effects of a past

5. F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930). For useful accounts of the history and operation of the injunction, see O. FISS, INJUNCTIONS (1972) and *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994 (1965).

6. The most significant use of the injunction in a labor context culminated in the celebrated case of *In re* Debs, 158 U.S. 564 (1895). The American Railway Union, led by Eugene Debs, struck in favor of the Pullman workers and tied up the railways of the nation until an injunction broke the strike. The injunction was based on removing the obstruction to interstate commerce. *Id.* at 598-600.

Interestingly, courts in the Fifth Circuit have relied on *Debs* as a civil rights tool, using that case as authority for an antiobstruction injunction when the defendant's acts could be characterized as a burden on interstate commerce. United States v. City of Jackson, 318 F.2d 1, 14 (5th Cir. 1963); United States v. Original Knights of Ku Klux Klan, 250 F. Supp. 330, 356 (E.D. La. 1965).

wrong; and the structural injunction, which seeks to reorganize an ongoing social institution. Preventive injunctions are forward looking and often, though not necessarily, are directed to the particular individual or the office commanding or forbidding a certain act. The reparative and structural injunctions are of more recent birth and are not just preventive as to future acts. They are curative, and hence backward looking.[7]

As courts faced the difficult task of achieving desegregation during the 1950s and 1960s, it became increasingly clear that preventive and reparative injunctions could not fully achieve the needed compliance. Preventive injunctions affected too few parties and were easily disobeyed. The reparative injunction, although it cut more deeply than the preventive injunction into social institutions, was not powerful enough to remove segregation from schools in the South. For this, the structural injunction was required.[8] The constitutional wrong was the institution itself, and it was the institution that had to be changed for civil rights to be safeguarded. The lesson was clear: the injunction was no longer exclusively preventive, and irreparable injury to an individual plaintiff was relegated to the background.[9]

In his discussion, Professor Fiss does not merely champion the structural injunction, but questions the justifications for the remedial hierarchy. He examines the correctness of the concept of a hierarchy of remedies in which the injunction occupies a subordinate position. In addressing these normative concerns, he analyzes the arguments that could be used to defend the hierarchy. One of these arguments is par-

7. Professor Fiss makes the distinctions quite clear:

> The preventive injunction might be viewed as a mini-criminal statute, though more individuated, more decentralized, and with greater power invested in the judge. With the newer categories, those with roots in civil rights litigation, we seem to move in two different directions. The reparative injunction closely resembles the damage judgment and might be viewed as an in-kind damage award, while the structural injunction emerges . . . as a truly unique legal instrument.

P. 8.

8. *See, e.g.*, United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840 (1967) (case in which the court issued detailed instructions to school officials to achieve desegregation). *See generally* F. READ & L. MCGOUGH, LET THEM BE JUDGED (1978) (discussing judicial integration in deep South).

9. Professor Fiss explains:

> A structural decree—one of the most distinctive legacies of the civil rights experience—should not be viewed as an instrument seeking to prevent a future wrong through deterrence. Rather, it should be viewed as a means of initiating a relationship between a court and a social institution. The issuance of the injunction is not so much a coercive act, such as issuing a command, as it is a declaration that henceforth the court will *direct* or *manage* the reconstruction of the social institution, in order to bring it into conformity with the Constitution.

Pp. 36-37 (footnote omitted).

ticularly important: how do we know that a federal judge sitting in an injunctive proceeding is better able to afford relief for a given wrong than an administrative agency, a jury, a legislature, or a state court?

In examining the issue of institutional competence, Professor Fiss might have developed more fully a response to the contention that administrative agencies are to be preferred to courts in providing certain kinds of relief. I agree with the author, however, that it is naive to believe that special expertise reposes in administrative agencies to such an extent that it cannot be transferred to courts.[10] In any event, arguments against the injunction based on claims of institutional competence can easily be dismissed, with one exception: the preference for state courts over federal courts.

This preference involves a highly controversial choice of values in American political theory. Proponents of state court remedies have seized upon the irreparable injury requirement for injunctions as an argument for courts to resort to a late nineteenth century concept of federalism, a concept termed "Our Federalism" by Justice Black in *Younger v. Harris*.[11]

Professor Fiss fixes the starting point for this atavistic concept as that "extraordinary day in 1943 when the Supreme Court decided both *Murdock v. Pennsylvania* and *Douglas v. City of Jeannette*."[12] Both cases considered an ordinance of the City of Jeannette prohibiting solicitation without a license. In *Murdock*, the Court held the ordinance unconstitutional as applied to activities of Jehovah's Witnesses.[13] *Douglas* easily could have rested on *Murdock*, but the Court held that in the absence of a showing of irreparable injury, a federal court had no jurisdiction to enjoin a state criminal proceeding.[14] Professor Fiss analyzed *Douglas* as having two prongs: the first was to assert that the injunctive suit threatened federalism, and the second was to use the irreparable injury requirement to eliminate that threat.[15]

10. Courts implementing structural reforms have appointed commissions, special masters, and monitors to supervise compliance by schools and prisons. *See, e.g.*, Palmigiano v. Garrahy, 443 F. Supp. 956, 989 (D.R.I. 1977); Taylor v. Perini, 413 F. Supp. 189, 193 (N.D. Ohio 1976).

11. 401 U.S. 37, 44 (1971) (federal courts will not enjoin pending state criminal prosecution except under extraordinary circumstances in which danger of irreparable loss is both great and immediate). In *Younger*, the plaintiff, indicted for violating a state act, sued in federal district court to enjoin the prosecution, contending that prosecution was unconstitutional.

12. P. 62; *see* Murdock v. Pennsylvania, 319 U.S. 105 (1943); Douglas v. City of Jeannette, 319 U.S. 157 (1943).

13. 319 U.S. at 108.

14. 319 U.S. at 163-64.

15. P. 63.

"The result was to create, in our remedial hierarchy, a preference for the state criminal defense—you must use it if you can."[16] I stand with Professor Fiss: the *Douglas* theory of federalism is unsound.[17] It exaggerates state interests and downgrades federal interests. If the basic philosophy of *Douglas* and *Younger* had prevailed during the 1960s, I am convinced that the progress toward judicial recognition of civil rights and civil liberties would have slowed to a walk. With deference, I suggest that *Douglas, Younger,* and their progeny are not good law, not good history, and not good federalism.

Intermediate judges must be good soldiers on the bench. But the soldiering would be easier if the doctrinal ramifications of *Douglas* and *Younger* were restricted to preventive injunctive proceedings in which the state is a party or in which enforcement is sought through the contempt power. One may concede, for purposes of argument, that the role federalism ascribes to federal courts in *Younger* is a valid one. One could say the role is a response to the traditional question in the preventive injunction context: Is there no adequate alternative means of relief? The answer has reference to state process; state process may be adequate and must be tried.

It makes little sense, however, to ask this question in the structural setting. At least initially, cases involving use of the structural injunction centered on elimination of de jure segregation in the schools or reform of a prison system. In this context, an institution that could readily be delineated was by design infringing federally protected rights. Once it was agreed that the conditions violated the Constitution, there was no question but that the offending institutions had to be redesigned. The courts did not ask whether there was an alternative remedy. The wrong was unlike those alleged in the familiar single-plaintiff, single-defendant model, the model in *Douglas* and later in *Younger.* For individual wrongs, both state and federal processes have remedies although one might argue about differences in effectiveness. But for structural wrongs in which the operation of the institution as such will lead to violation of the Constitution, there was no remedy until development of the structural injunction.

The early structural injunction cases were easy. Their analytic simplicity, captured in the de jure/de facto distinction, derives from the

16. *Id.*

17. Professor Fiss writes: "It is hard to believe that the state interest being vindicated . . . is in any sense vital . . . . Moreover, given the nature of the claim—that a state is violating the federal Constitution—it is hard to see how the *Douglas* rule could serve the usual values of localism." *Id.*

clarity with which the institution and its activities are defined. Remedies may be administratively unwieldy or politically unpopular, but they are analytically easy to determine.

The success of the structural injunction prompted requests for its application in other contexts, exemplified by the Philadelphia police case of *Rizzo v. Goode*.[18] In *Rizzo*, the analytically clear connection between the institution, the wrong, and the remedy that was present in the school desegregation cases did not exist. It was not even clear what the institution in question was; it might have been the policeman only, or the policeman plus police chief, or police department plus the mayor, or some other configuration of parties. I am not saying that the institution is impossible to define for remedial purposes, but I am saying that it does not define itself as did the institutions in need of reform in the de jure school cases.

Faced with this complex demand for relief, the Supreme Court, with all good will, relied upon what was a superficially analogous situation. It noted that the state was somehow involved in *Rizzo* and turned to the doctrine developed in *Younger* to mediate between the state and an individual seeking federal relief.[19] But the situations are not truly analogous. In a *Younger* situation remedies should be available in both state and federal systems, and the question is which court system should administer the remedy. Built into the *Younger* situation are the twin presuppositions that we know who the actors are and we know what the appropriate remedy should look like. The *Rizzo* situation is different; we do not know when we begin the analysis who the parties are nor what the relief should look like.

In such a situation, one cannot afford to rely on doctrinaire federalism to determine which system should dispense the remedy. To do so means that one never asks the fundamental question: Is there an institution whose operation will necessarily violate rights so that relief is appropriate? That is not to say that reliance on such discourse does not resolve the matter. It does: relief is denied. But it is denied without being considered, a denial that cannot be justified in a system demanding articulate reasons in support of results.

The essential contribution of Professor Fiss's critique is that it re-

18. 423 U.S. 362, 378-80 (1976) (denying request for injunctive relief that would impose prophylactic procedures to minimize alleged police misconduct, holding in part that such action would constitute an unwarranted federal judicial intrusion into discretionary affairs of state). *Rizzo* was a class-action suit against the mayor of Philadelphia, the police commissioner, and others, alleging a pervasive pattern of illegal and unconstitutional police mistreatment of minority citizens in particular and Philadelphia citizens in general.

19. *Id.* at 380. Strangely, the Court did not cite *Younger*.

veals the difficulty that courts confronted in the later structural injunction cases. Looking for doctrinal guidance, courts relied on doctrine that ensured by its terms that the essential questions would not be aired. The contribution of this critique cannot be overestimated. We may disagree about whether a remedy should issue in cases analogous to *Rizzo*, but the argument must be one that can air the issues, not displace them.

We are indebted to Professor Fiss for showing us that in a *Rizzo* situation we must ask first whether a remedy is appropriate, not which court system should administer a hypothetical remedy. This insight does not provide the answers in the structural context although it does direct us to the proper questions. I should like to offer some tentative thoughts on how the context-specificity thesis requires us to argue in *Rizzo*-like cases.

The central question is whether relief is appropriate at all. A subquestion is whether a court is warranted in exercising its power by imposing a structural remedy in the case. To phrase the question differently: Can the court find an institutional defendant over which to assert its power? What makes this question so difficult to answer is the complexity of the concept of an institution. As I suggested, the early structural decrees involved the limiting case: institutions that were self-evident in their limits and self-proclaimed as regards their unconstitutional policies. Until we have a clear notion of the institution under attack in a case, the court's power has no base. We need, then, to talk about institutions, to determine in the context of a given case whether we can point, as it were, to a machine for the invasion of rights. I would suggest that if we can answer this question by pointing to an institution, the next questions—whether it violates rights, and what remedy is appropriate—are comparatively easy.

This examination may be going on in some courts already, simultaneously with the Babel of Federalism. Consider, for instance, how recent civil rights cases have turned on the evidence. In certain cases relief has been contingent on evidence of purposeful discrimination,[20]

20. *See, e.g.*, Personnel Adm'r v. Feeney, 99 S. Ct. 2282 (1979) (facially neutral employment classification affecting sexes unequally does not violate equal protection absent legislative intent to discriminate on basis of gender); Washington v. Davis, 426 U.S. 229 (1976) (race discrimination in employment case; proof of discriminatory intent required to find violation of equal protection clause).

There is inherent ambiguity in the requirement of "purposeful discrimination." Everyone in the city of Jackson, Mississippi, knew that the reason for the closing of its swimming pools was to circumvent a desegregation order. But Justice Black, for a majority of the Court, held that the possibility of illicit motivation (purposeful discrimination) by the sponsors of a legislative act was no ground for holding the act unconstitutional.

in others on a showing of a pattern or practice of discrimination,[21] and in still others on a showing of discriminatory impact.[22] While these evidentiary requirements are responsive to the need to define an institution prior to deciding whether it should be restructured, they are an incomplete solution to the problem of demonstrating the presence of an institution. They may be inflexible and may defeat the demonstration rather than aid it. They do focus on facts, however, and on how a putative institution operates. This is the correct approach. If we can rid ourselves of doctrinaire federalism and get down to matters of fact when confronted with a prayer for relief such as that in *Rizzo*, we will have a chance of answering the proper question. I see little chance of this happening if the axiom for the structural injunction, to use Professor Fiss's dramatic but exact phrase, remains "*Younger* and not *Brown*."[23]

Commenting on *Rizzo* elsewhere, Professor Fiss remarked that "[f]ederalism is but one handle available to the [Burger] Court for curbing some of the more ambitious—more idealistic—projects of its own judges."[24] Such projects include supervision of municipal police forces, supervision of state prisons, mental health programs, and desegregation of schools and state universities. By firmly affixing the structural injunction in the traditional hierarchy, with irreparable injury as a requirement, we come perilously close to ensuring that violations of basic rights by state governments will be immune from remedy.

Palmer v. Thompson, 403 U.S. 217 (1971). The Court accepted the district court's finding that the pools were closed because it was uneconomical to maintain integrated pools. *Id.* at 219.

It is not clear to me where the requirement of segregative intent set forth in Washington v. Davis, 426 U.S. 229 (1976), will lead us. It might have been useful in *Palmer v. Thompson*. But it may narrow the enforcement of rights in de facto segregation cases such as those involving Chicanos. We must see to what degree intent relates to foreseeable consequences and to a disproportionate impact coupled with other factors. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977) (setting forth disproportionate impact standard). *See generally* Fiss, *Remarks at the Second Circuit Judicial Conference*, 74 F.R.D. 276-81 (1976) (discussing intent standards); Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317, 321-32 (1976) (same).

21. *See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) ("pattern or practice" of teacher employment discrimination); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (government sustained burden of proving that company engaged in system-wide pattern or practice of employment discrimination against minority members).

22. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 99 S. Ct. 2971, 2978-80 (1979) (implying use of effects test where *Brown* imposed affirmative duty on school boards whose districts were segregated in 1954 to disestablish school system); Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941, 2950 (1979) (same).

23. *Dombrowski, supra* note 1, at 1159.

24. *Id.* at 1160.

Federal courts should examine the rights and remedies in a factual context and not rely on the language of "Our Federalism" and the etiquette of comity when violations of basic rights are charged.

The friction that once existed between state judges and federal judges has diminished to almost zero. Moreover, most states now have strong courts of last resort as competent and as willing to decide constitutional questions as are federal courts. Nevertheless, any federal judge who was exposed to the civil rights experience knows that in some states many times in the past the only effective forum for vindication of constitutional rights was the federal forum. And certainly historical federalism, Madison-federalism, makes it more appropriate for federal courts than for state courts to protect nationally created or nationally guaranteed rights. As I wrote fifteen years ago in dissent in the three-judge court opinion in *Dombrowski v. Pfister*:[25]

> When the wrongful invasion comes from the state, and especially when the unlawful state action is locally popular or when there is local disapproval of the requirements of federal law, federal courts must expect to bear the primary responsibility for protecting the individual. This responsibility is not new. It did not start with the School Segregation Cases. It is close to the heart of the American Federal Union. It is implicit in the replacement of the Articles of Confederation by the Constitution. It makes federalism workable.[26]

Professor Fiss's approach moves us toward an adequate judicial examination of rights and appropriate remedies. Characteristically, he does not raise a new hierarchy where he razed the old. His call for a context-specific evaluation of available remedies is not a call to exalt the injunction but to recognize the tough pragmatic nature of remedial orders. It is an assertion of the commonsense proposition that when a federal injunction is the most effective remedy, it should be used without necessarily requiring a showing that it is the last alternative to avoid irreparable injury. By putting aside the language of hierarchies and the grammar of atavistic federalism, not only can we get to the substance of rights, but we can develop a workable, substantive theory of remedies. Perhaps there is nothing more difficult. At least, discussion should be started in the terms Professor Fiss has supplied.

25. 227 F. Supp. 556 (E.D. La. 1964) (three-judge court), *rev'd*, 380 U.S. 479 (1965).
26. *Id.* at 570-71 (Wisdom, J., dissenting) (footnote omitted).