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# The Continued Vitality of Prophylactic Relief

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# The Continued Vitality of Prophylactic Relief

Tracy A. Thomas\*

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## I. INTRODUCTION

Prophylactic injunctions first appeared on the remedial scene in the mid-1960s.<sup>1</sup> Together with structural injunctions, they formed the corpus of public law injunctions that were used to address social institutional problems, such as school desegregation and prison civil rights violations. “Prophylactic” measures were distinguished by their breadth and specificity that reached the facilitators of harm in order to prevent continued illegality.<sup>2</sup> The success of prophylactic relief, however, soon raised the ire of conservative critics who attacked the ability of courts to enact injunctive relief that extended “beyond the right,”<sup>3</sup> for academics had initially theorized

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\* Professor of Law and Director of Faculty Research and Development, The University of Akron. This paper was presented at the 2007 Annual Meeting of the American Association of Law Schools as part of the panel “What’s Happening With Injunctions?” during the Workshop on Remedies: Justice and the Bottom Line.

1. *E.g.*, *Sec. & Exch. Comm’n v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963) (imposing prophylactic order on investment advisor requiring preventive disclosures to future clients).

2. Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 *BUFF. L. REV.* 301, 309 (2004) [hereinafter Thomas, *Prophylactic Remedy*].

3. *See, e.g.*, Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 *VA. L. REV.* 43, 103–06 (1979) (arguing that the legitimacy of courts is threatened by the extrajudicial, political action of structural relief that seeks to produce social outcomes); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 *YALE L.J.* 635, 648–49 (1982) (claiming that courts lack institutional authority to normatively assess social solutions through institutional remedies); Donald Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 *DUKE L.J.* 1265, 1303 (1983) (arguing that “organizational change” cases of public law injunctions do not naturally follow from the declared right, but rather stem from improper considerations of the managerial effectiveness of the relief); Alfred M. Mamlet, *Reconsideration of*

prophylactic relief as “deliberately fashioned rather than logically deduced from the nature of the legal harm suffered.”<sup>4</sup> Reacting to the conceptualization of prophylaxis as the power of an omnipotent judge to enact new social norms based on what was morally just, these critics turned the prophylaxis label into an epithet.

This essay critiques the continued dominant discourse of prophylaxis as illegitimate. Despite the harsh academic and political criticism, prophylaxis continues to thrive as an effective and necessary component of the practical remediation of complex cases.<sup>5</sup> Exploring the contours of prophylactic relief in federal cases involving schools, prisons, and sexual harassment, this essay illustrates how prophylactic relief continues to be used as a powerful and effective remedy. The continued use, however, demands an alternative theory of justification for prophylactic relief, for neither the image of an omnipotent judge nor that of an activist policymaker adequately explains the actual remedial practice. Prophylactic relief is instead used by the courts in a more traditional and tailored way to address public law problems. Ultimately, this essay seeks to provide an alternative text for lawyers and jurists to use on the legal

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*Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits*, 33 EMORY L.J. 685, 685–86 (1984) (arguing that courts in public law litigation improperly exercise legislative and executive discretion by going beyond the traditional judicial role of enjoining the unconstitutional practice and affirmatively prescribing governmental policy); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 956, 972 (1978) (arguing that the proliferation of institutional remedies has improperly broadened the scope of constitutional rights); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 664 (1978) (arguing that separation of powers principles limit the ability of courts to order structural and prophylactic relief against state officials).

4. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298 (1976).

5. See generally Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006) (collecting data on continued prevalence of prophylactic and structural injunctions in prison reform cases); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004) (discussing the persistence of public law injunctive remedies and their continued value to the courts); Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV. 143 (2003) (arguing that the structural reform injunction is still alive and well in American jurisprudence despite assertions of its demise).

frontlines to address questions of the legitimate and appropriate use of broad injunctive relief.

## II. THE DIFFERENCE A NAME MAKES

The term “prophylactic” derives from the Supreme Court’s label for a specific type of injunctive relief, used both descriptively and pejoratively by the Justices.<sup>6</sup> The terminology usually triggers laughs and guffaws from those hearing it for the first time. Yet, the analogy to medical prophylaxis is useful as it connotes the use of additional measures implemented preventively to avoid a greater harm to an individual. Moreover, we are often stuck with the text we are given, and here the ability to communicate effectively about the parameters of prophylaxis requires using the existing language common to the decided cases.

Prophylactic injunctions, like consequential damages, reach the secondary effects of harm. Prophylaxis is characterized by the specific precautionary measures imposed to address causal factors with a nexus to continued violations. It is differentiated by the use of *precautions* ordered to address secondary *facilitators* of harm to provide more effective *prevention*. The additional steps reaching contributing causes are ordered with the purpose of heading off the harm before it develops.

Some common types of prophylactic measures emerge from the cases. The first type involves *evaluation and monitoring* measures, such as a duty to report to the court, provide access to an investigator, or implement some ongoing oversight.<sup>7</sup> Courts also

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6. *E.g.*, *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 382 (1997) (Rehnquist, J.) (describing prophylactic measures as necessary where traditional injunctions alone are insufficient); *Hutto v. Finney*, 437 U.S. 678, 711–12 (1978) (Rehnquist, J., dissenting) (attacking the Court’s endorsement of “prophylactic” measure in prison reform case as illegitimate).

7. *See, e.g.*, *Skinner v. Lampert*, 457 F. Supp. 2d 1269 (D. Wyo. 2006) (enforcing order to monitor inmate conflicts and problematic staff members, and terminating prior orders to investigate complaints, create incident reports, and discipline staff); *Schmelzer ex. rel Schmelzer v. New York*, 363 F. Supp. 2d 453, 460–461 (E.D.N.Y. 2003) (appointing monitor to submit regular reports on compliance with Individuals with Disabilities Education Act (IDEA) requirement of timely appeals for decisions regarding disabled children after defendants’

require defendants to develop express *policies* to address institutional culture and create consequences for enforcement of the policies.<sup>8</sup> Another type of prophylactic measure is one establishing a *process or procedure* like procedural safeguards, notice provisions, or communication networks.<sup>9</sup> *Education* is also a common prophylactic measure where defendants are ordered to disseminate information and train employees about the relevant processes and procedures.<sup>10</sup>

Prophylaxis constitutes a distinct type of injunction within the existing nomenclature of the law. The existing classification of injunctive relief derives from Owen Fiss's 1978 work, *The Civil Rights Injunction*. Fiss identified three types of injunctive relief: preventive, reparative, and structural.<sup>11</sup> Preventive injunctions are simple commands to stop the illegal act, such as ordering the defendants to "stop discrimination."<sup>12</sup> Reparative injunctions repair the ongoing consequences of the past harm, and might order the reinstatement of an employee fired because of discrimination.<sup>13</sup> Fiss's third category of structural injunctions was used to describe the remaining incidence of public law injunctions, especially those that ordered change of an institutional structure to prevent further discrimination.<sup>14</sup> The classic illustration of a structural injunction is

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repeated refusals to comply); *Jones 'El v. Berge*, 164 F. Supp. 2d 1096, 1125–26 (W.D. Wis. 2001) (requiring prison to engage professional services to evaluate incoming prisoners' mental health, but refusing plaintiffs' requests for monthly court-supervised monitoring).

8. *See, e.g., Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 877 F. Supp. 634, 679–80 (D.D.C. 1994) (ordering creation of sexual harassment policy after consultation with national prison experts); *Wyatt v. Stickney*, 344 F. Supp. 373, 379 (M.D. Ala. 1972) (ordering patient bill of rights spelling out minimal rights and duties).

9. *See, e.g., In re Nicholson*, 181 F. Supp. 2d 182, 190–92 (E.D.N.Y. 2001) (ordering extensive protections prior to welfare agency's removal of children from custody of battered mothers, including preparing bilingual informational pamphlets, limiting removal periods, and creating a review committee); *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981) (ordering procedure for "hearing, adjudicating, and remediating" complaints of sexual harassment of prison staff).

10. *See, e.g., Women Prisoners*, 877 F. Supp. at 681–82 (ordering training of both staff and inmates conducted by industry expert on sexual harassment); *Bundy*, 641 F.2d at 948 (ordering training on how to report sexual harassment).

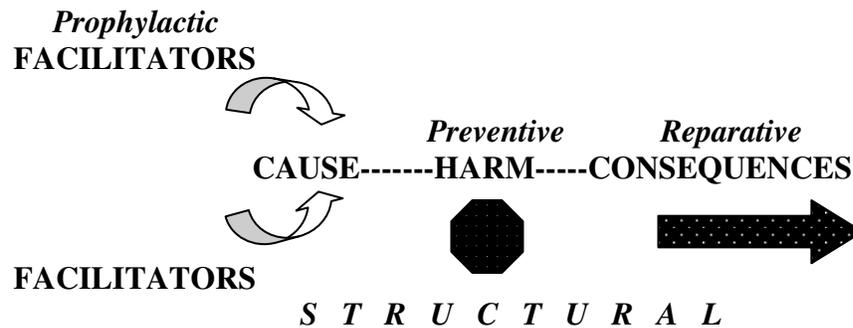
11. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 7–8 (1978).

12. *Id.*

13. *Id.*

14. *Id.* at 7.

an order to integrate the schools to rectify or prevent continued racial discrimination.<sup>15</sup> Prophylactic measures were bound up in structural relief as part of complex orders directing appropriate preventive steps for defendant institutions. As I have discussed in prior work, the courts eventually began to carve out these prophylactic measures from the structural injunction ball of wax because they differed significantly in character and because categorization enabled courts to refine the contours of such relief.<sup>16</sup>



The value of recognizing a separate category of prophylactic injunctions lies in the ability to use the doctrinal language as a yardstick of legitimacy. The adoption of a fourth classification of injunctive relief offers an analytical foundation for the legitimacy of some, but not all, prophylactic measures. The classification counters some of the criticism of prophylaxis (and all public law injunctions) by circumscribing the scope of appropriately broad relief. Encapsulated as a doctrinal rule, prophylaxis provides a legal text for lawyers to use in navigating the policy concerns involved in crafting appropriate injunctive relief.

15. See, e.g., *Brown v. Bd. of Educ.*, 349 U.S. 294, 300–01 (1955) (*Brown II*).

16. Thomas, *Prophylactic Remedy*, *supra* note 2, at 316–21; see also Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of Bush v. Gore*, 11 WM. & MARY BILL RTS. J. 343, 373 (2002) [hereinafter Thomas, *Understanding Prophylactic Remedies*] (distinguishing prophylactic remedies from other remedies).

### III. PROPHYLAXIS IN ACTION

Prophylaxis came to the forefront through its grassroots development in institutional reform cases involving schools, prisons, and other public institutions. Prophylaxis can be effective against institutional defendants when faced with the difficulties of enforcing judicial relief against legislative or administrative agents.<sup>17</sup> Yet its effectiveness has not been confined to public settings, as the remedy can be found in business and economic regulation cases.<sup>18</sup> The functionality of the prophylactic remedy transcends the specific context of a case as it enables courts to translate abstract norms into concrete action.

I came to my own understanding of prophylactic remedies while litigating a prison reform case in practice. In the case of *Women Prisoners of the D.C. Department of Corrections v. District of Columbia*, we were faced with the task of crafting proposed relief for the class of women prisoners following a successful trial establishing constitutional violations from the sexual harassment and assault of the women, the unhealthy environmental conditions, and the gender discrimination in work and educational programs.<sup>19</sup> The defendants' history of similar violations and the egregious nature of the harms weighed in favor of practical alternatives that could effectively halt the behavior. We developed a series of measures—including a hotline, grievance system, reporting mechanisms, expert

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17. See Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 766–69 (1992) (discussing how the Court's decisions regarding enforcement of remedies tolerate "channeled defiance" of federal court remedial orders); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983) ("The function of a remedy is to 'realize' a legal norm, to make it a 'living truth.' While most legal theory concentrates on the ideal, the hard stuff of recalcitrant reality is equally important to jurisprudence.").

18. See, e.g., *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 164 (2002) (imposing prophylactic measures to prevent antitrust monopoly); *Sec. & Exch. Comm'n v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 181 (1963) (ordering investment advisor to disclose his own personal dealings in securities recommended to clients in order to prevent fraud).

19. 877 F. Supp. 634 (D.D.C. 1994), *modified*, 899 F. Supp. 659 (D.D.C. 1995), *vacated in part*, 93 F.3d 910 (D.C. Cir. 1996) (affirming all injunctive measures in extensive order related to constitutional claims, but invalidating appointment of special officer to monitor and investigate complaints).

consultation and staff training—designed to head off the problems by addressing the contributing causes of the harm.<sup>20</sup>

In this way, prophylactic relief develops almost instinctively from lawyers and jurists seeking remedial alternatives to empty commands simply to stop the behavior. The actors in the legal drama are closest to the specifics and details of the case and can readily identify what types of preventive steps might effectively curb the illegal behavior in the future. Prophylaxis therefore has a practical, intuitive appeal that resonates with practitioners and judges who seek tangible remedial solutions to difficult problems.

The grassroots evolution of prophylactic relief has developed in many institutional contexts. Today, such relief has become commonplace in sexual harassment cases. Rather than simply commanding the offending institution to “harass no more,” courts order policy changes, training, education, and sanctions to address institutional factors that facilitate continued harassment.<sup>21</sup> The preventive power of prophylactic measures has taken on new meaning as the U.S. Supreme Court has elevated these measures to the stature of a safe haven from liability. In *Kolstad v. American Dental Association*, the Court held that a company that voluntarily adopts prophylactic measures, like anti-harassment programs, demonstrates the good faith necessary to avoid punitive damages under a vicarious liability theory.<sup>22</sup>

Another prototypical category of prophylactic relief comes from the school desegregation cases. The desegregation cases helped develop prophylactic relief as courts struggled to deal with the difficult legal problem of entrenched race discrimination and contemptuous defendants. For example, in the case of *Swann v. Charlotte-Mecklenburg Board of Education*, approved prophylactic measures included racial quotas, gerrymandered attendance zones,

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20. *Id.* at 679–81.

21. *E.g.*, *Bundy v. Jackson*, 641 F.2d 934, 946–948 (D.C. Cir. 1981) (ordering institution to adopt procedures for “hearing, adjudicating, and remedying” staff complaints of sexual harassment); *Sims v. Montgomery County*, 766 F. Supp. 1052, 1080 (M.D. Ala. 1990) (ordering grievance procedures, officer education program, and changes in procedures for promotions, discipline, transfers, and job assignments); *Lynch v. City of Des Moines*, 454 N.W.2d 827, 829 (Iowa 1990) (upholding injunction requiring sexual harassment education and training plan).

22. 527 U.S. 526, 545–46 (1999).

and busing, as the courts tried to reach the contributing economic and residential causes of continued segregation.<sup>23</sup> More recently, courts have adapted prophylactic measures in school cases to address violations of federal statutes like Title IX and special education laws.<sup>24</sup>

Prophylactic relief grew in popularity in the prison conditions cases spanning the end of the twentieth century. Recalcitrant prison defendants were forced into a semblance of compliance by court orders dictating specific measures to avoid unconstitutional conditions. Prisons were given detailed orders regarding law libraries, environment, health, recreation, punishment, and food in order to curtail continued abuses.<sup>25</sup> Such prison litigation became the political target of conservative reformers who sought to restrict the expansion of public law injunctions.<sup>26</sup>

Congress responded to the perception of illegitimate prophylactic relief in prison condition cases by enacting the Prison Litigation Reform Act of 1995 (“PLRA”).<sup>27</sup> The PLRA targeted negotiated consent decrees, but requires that all injunctions be “narrowly drawn,” “extend[] no further than necessary,” and be “the

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23. 402 U.S. 1, 22–31 (1971).

24. *E.g.*, *Schmelzer ex. rel. Schmelzer v. New York*, 363 F. Supp. 2d 453, 461 (E.D.N.Y. 2003) (appointing monitor to submit regular reports on compliance with the IDEA’s requirement of timely appeals for decisions regarding disabled children after defendants’ repeated refusals to comply).

25. *See, e.g.*, *Hutto v. Finney*, 437 U.S. 678 (1978) (limiting time in punitive isolation); *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001) (ordering prison to modify policies and procedures to provide reasonable accommodations to disabled prisoners and parolees, to provide effective communication regarding hearings and appeals, and to select accessible facilities); *Jones ’El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (requiring prison to engage professional services to evaluate incoming prisoners’ mental health).

26. 141 CONG. REC. S14611, S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Dole) (speaking in support of proposed legislation that would “restrain liberal Federal judges who see violations of constitutional rights in every prisoner complaint and who have used these complaints to micromanage State and local prison systems”); *id.* (statement of Sen. Hatch) (asserting that judges had “gone too far in micromanaging our Nation’s prisons”); Edwin Meese III, *Putting the Federal Judiciary Back on the Constitutional Track*, 14 GA. ST. U. L. REV. 781, 790–93 (1998) (arguing that Congress should “block activist federal judges” and limit the jurisdiction of the federal courts in cases like prison litigation where it was dissatisfied with the judicial results).

27. Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, 28, & 42 U.S.C.).

least intrusive means necessary” to correct a violation of a federal right.<sup>28</sup> While the PLRA curtailed some use of injunctive measures in prisons, courts have continued to use prophylactic measures effectively in conditions cases.<sup>29</sup> The PLRA, however, stands as an example of what many critics believe is the right approach to restricting the scope and prevalence of public law injunctions.<sup>30</sup>

#### IV. DISPUTING PROPHYLAXIS AS JUDICIAL ACTIVISM

The dominant narrative of prophylactic and structural relief is that it is judicial policymaking and unwarranted judicial activism.<sup>31</sup> The accusation is that the remedies go beyond the right and are based illegitimately on the judge’s personal vision of justice rather than on proper law, facts, and judicial authority.<sup>32</sup> Courts are accused of

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28. 18 U.S.C. § 3626(a)(1) (1997).

29. *See, e.g.,* Skinner v. Lampert, 457 F. Supp. 2d 1269, 1276–85 (D. Wyo. 2006) (finding prophylactic measures requiring conflict documentation system, investigation, reporting, incident tracking, education, and incorporation of policies to be narrowly tailored to harm of preventing inmate violence as required by PLRA); *Armstrong*, 275 F.3d at 872–73 (finding prophylactic measures designed to prevent violations of the Americans with Disabilities Act by prison were appropriate under the PLRA).

30. *See* ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE* 191–92 (2003) (arguing that courts and Congress should follow the PLRA’s model of restriction for all public law injunctions); Meese, *supra* note 26, at 790–93 (calling for more legislative strategies like the PLRA to enable Congress to change the policies and practices resulting from judicial decisions).

31. *See, e.g.,* Lewis v. Casey, 518 U.S. 343, 349 (1996) (Scalia, J.) (“It is the role of courts to provide relief to claimants . . . it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.”); *id.* at 364 (Thomas, J., concurring) (asserting that the Constitution charges federal judges with deciding cases and controversies, not dictating policy); *Missouri v. Jenkins*, 515 U.S. 70, 132 (1995) (Thomas, J., concurring) (“There simply are certain things that courts, in order to remain courts, cannot and should not do.”); *see generally* John Choon Yoo, *Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1123–24 (1996) (arguing that the judiciary’s assertion of inherent remedial power for structural injunctions violates principles of judicial restraint and oversteps the Article III limitations on the federal courts).

32. *See, e.g.,* Fletcher, *supra* note 3, at 649 (claiming that prophylactic and structural injunctions are based upon the moral and political intuitions of judges);

“micro-managing” and invading the power of the state administrative authorities to make and execute policy decisions.<sup>33</sup> This attack on prophylaxis is part of a broader attack on public law remedies that highlights problems with complex decrees, aspirational rights, and the controlling power group of the plaintiffs’ attorneys, special masters, and cooperative defendants.<sup>34</sup>

The criticism of prophylactic relief as judicial activism is an obvious reaction to the original theorization of public law relief as unfettered judicial power. Images of a moralistic judge imposing new legal norms through a participatory rather than adjudicatory process set up prophylactic relief as an alternative to regular judicial action. Professors Fiss and Chayes originally argued that judges should engage in social justice and the preservation of public values by doing what was “right” through the use of public law injunctions.<sup>35</sup> They envisioned a moralistic judge who would rectify injustice by the elaboration and expansion of legal norms. At the same time, a corollary theory developed arguing for a participatory,

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Horowitz, *supra* note 3, at 1304 (arguing that judges in institutional remedy cases are “vehemently partisan” and personally invested in the outcome of the litigation); Mishkin, *supra* note 3, at 960 (suggesting that institutional decrees are a result of the judge’s personal desire to do good and eliminate a social evil).

33. See, e.g., SANDLER & SCHOENBROD, *supra* note 30, at 7–8 (asserting that institutional reform injunctions constitute “democracy by decree” where judges make policy decisions and dictate how to comply with the law, thus improperly assuming the responsibilities of mayors, governors, and legislators); Nagel, *supra* note 3, at 706–23 (critiquing structural injunctions on separation of powers grounds).

34. For example, Ross Sandler and David Schoenbrod argue against the ability of courts to issue public law injunctions, and particularly consent decrees, because of threats to accountability and democracy raised by the difficulties of enforcing aspirational rights; problems with the controlling group of plaintiffs’ attorneys and acquiescent defendants; case management problems of special masters; exploding class actions; and the ineffectiveness of such decrees. SANDLER & SCHOENBROD, *supra* note 30, at 9–12. However, they reserve the power of the court to issue prophylactic injunctive measures where the defendant is likely to evade the decree. *Id.* at 166; see also David Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 671–82 (1988) (arguing that judges may issue prophylactic injunctions in situations demonstrating the defendant’s proclivity to violate an order).

35. Chayes, *supra* note 4, at 1282–83; Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 55 (1982); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979); OWEN M. FISS, *THE LAW AS IT COULD BE* xi–xii (2003).

deliberative process alternative to litigation for public law remedies and their polycentric problems.<sup>36</sup> The argument was that traditional litigation was unable to handle the complexity and enforcement of public law rights, which required more problem-solving techniques and procedures found in mediation or administrative processes.<sup>37</sup> This notion of the incapacity of litigation to handle institutional reform cases reinforced the notion of prophylaxis as something extra-judicial. Finally, prophylaxis was justified as a judicial “rule” of interpretation or implementation inspired by the legal right.<sup>38</sup> This construct moves prophylaxis closer to the normal range of judicial activity, but reinforces the notion of judicial omnipotence. These theories promoting judicial remedial activism and reforming courts continue to dominate modern discourse.<sup>39</sup> However, justifications based on judicial omnipotence and extra-judicial conduct draw criticism like magnets.

The theories of judicial omnipotence jeopardize the availability of prophylactic relief by conceptualizing it as something

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36. See Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1427–44 (1991) (outlining a “deliberative model of public remedial decisionmaking”); Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978) (distinguishing private, bilateral adjudication, from “polycentric,” multi-party, multi-issue, policy-driven public litigation).

37. Sturm, *supra* note 36, at 1357, 1428.

38. See Henry Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 19 (1975) (“[T]he case law . . . is . . . highly suggestive of a sizable body of constitutionally inspired implementing rules whose only sources are constitutional provisions framed as limitations on government.”); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195 (1988) (asserting that there is nothing “extraordinary” about prophylactic rules that impose additional requirements beyond those of the Constitution itself and that such rules can be “justified in ways that are analytically indistinguishable from the justifications for the *Miranda* rules”).

39. See, e.g., *Beth V. v. Carroll*, 155 F.R.D. 529, 530, 533 (E.D. Pa. 1994) (citing with favor Chayes’ theory of the role of the judge in public law litigation and discussing the need for alternative deliberative processes in decision appointing special master for special education case); FISS, *supra* note 35, at 48–55 (discussing the “structural reform” model of adjudication based on the notion that judges give concrete meaning and expression to the public values embodied in the law); MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* 3–6 (1998) (arguing that judges should continue to engage in judicial policymaking in the context of prison reform litigation).

outside the judicial norm. If prophylaxis cannot be accomplished using the regular adjudicatory process and common judicial practices, then it does not belong within the halls of the judiciary.<sup>40</sup> The theories of moral justice thus risk the evisceration of the prophylactic remedy.

However, the existing theories of omnipotent judging do not accurately describe the operation of prophylactic relief. Recent analyses supporting public law remedies challenge the social justice theories and place public law remedies within the usual realm of judicial remedial action.<sup>41</sup> The prevalence of prophylaxis suggests the time has come to stop theorizing prophylaxis as other. The alleged hallmarks of public law litigation—justice, rulemaking, and alternative dispute resolution—are found in most cases.<sup>42</sup> Private law litigation is no longer segregated, assuming it ever was, from public law litigation by these attributes of judicial problem solving.<sup>43</sup> The polycentric nature of the issues in many public law cases is also nothing unusual, as the advent of class actions, mass torts, and other aggregative litigation make such large-scale cases commonplace.

In other words, prophylaxis needs no supporting theory other than that generally applicable to equitable relief. Of course, the

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40. See Diver, *supra* note 3, at 63 (arguing against public law injunctions on the ground that the judicial intuition model falls outside the objective, rational norm of the adjudication model).

41. See, e.g., Sabel & Simon, *supra* note 5, at 1100 (noting that the process of public law litigation is consistent with judicial practice in common law cases and compatible with democratic accountability); Thomas, *Prophylactic Remedy*, *supra* note 2, at 362–70 (refuting the standard assumption that judges create prophylactic remedies out of whole cloth, and instead demonstrating the ordinary judicial processes of hearings, evidence, and factual-findings utilized in such cases); Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1627–28 (2003) (concluding from study of school desegregation remedies from 1992 to 2002 that judges do not behave in atypical, activist ways in imposing public law remedies, but rather follow a process common to most private litigation).

42. Honorable William Wayne Justice, *The Two Faces of Judicial Activism*, Address at the George Washington Univ. Nat'l Law Center (Mar. 10, 1992), in 61 GEO. WASH. L. REV. 1, 11–12 (1992) (asserting that so-called “remedial activism” is nothing more than the traditional role of the judge to resolve disputes in both private and public law matters).

43. Thomas, *Prophylactic Remedy*, *supra* note 2, at 362–63; Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1296–98 (1995).

equitable power of the court itself has also been under attack.<sup>44</sup> However, the judicial equity power is well-grounded in our common-law system as a fluid and flexible power necessary to redress gaps in the law.<sup>45</sup> Prophylaxis is part of this heritage of equity that empowers courts to enforce legal rights in a meaningful way.

#### V. THE FUTURE OF PROPHYLAXIS

My prediction is that prophylactic injunctions will continue as courts learn to tailor relief appropriately in order to take advantage of the efficacy of prophylaxis. As a precise remedial mechanism, rather than a catchall power, prophylaxis promises to remain a viable remedial tool. The evidence is clear that public law injunctions are alive and well. Despite the conventional wisdom that institutional reform litigation peaked long ago, the studies show the continued utility and importance of public law injunctions.<sup>46</sup> Prophylaxis seems to work. It provides practical, tangible solutions to often insurmountable problems involving intangible rights.

Over time, the courts have resisted efforts to turn prophylactic relief into a catchall remedy and instead have

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44. See, e.g., Doug Rendleman, *Brown II's "All Deliberate Speed" at Fifty: A Golden Anniversary or Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 SAN DIEGO L. REV. 1575, 1597–99 (2004) (detailing Justices Thomas' and Scalia's criticisms of equitable relief); Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 1063, 1070–74 (2003) (describing Justice Scalia's approach to narrowing equitable relief to only those traditional writs historically available under English common law).

45. See Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (demonstrating a historical foundation for complex public law injunctions as part of the "normal" litigation tradition).

46. See, e.g., Schlanger, *supra* note 5, at 554 (concluding from longitudinal account of jail and prison injunctions that civil rights injunctions continue to thrive); Sabel & Simon, *supra* note 5, at 1018–19, 1021 (noting the "protean persistence of public law litigation" and concluding there "is no indication of a reduction in the volume or importance of Chayesian judicial activity").

circumscribed its applicability.<sup>47</sup> The many examples of prophylaxis gone awry have been used to invalidate the entire category of relief.<sup>48</sup> The Fiss-Chayes theory of omnipotent judging encouraged courts to morph prophylaxis into a catchall, omnibus remedy. Since then, however, remedial excess has carefully been reined in by the courts, which have followed the Supreme Court's rules of limitation in evaluating the propriety of prophylactic relief. Accordingly, courts have denied requested prophylactic relief in the absence of a legal harm.<sup>49</sup> Prophylaxis has been denied when it is asserted as an entitlement, as when previously-ordered measures take on a life of their own.<sup>50</sup> Courts have cut back on prophylactic measures when the asserted relief does not benefit the actual plaintiffs.<sup>51</sup> These

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47. See Schlanger, *supra* note 5, at 605 (documenting the transformation of public law injunctions in prison cases from a “kitchen sink” remedy to a refined remedial tool).

48. See, e.g., *Lewis v. Casey*, 518 U.S. 343, 362–63 (1996) (using one example of judicial overreaching in prison law library injunction to condemn all prophylactic and structural relief); SANDLER & SCHOENBROD, *supra* note 30, at 139 (using a handful of examples of over-broad injunctions to conclude that “[d]emocracy by decree is a good thing gone wrong.”).

49. See, e.g., *Lewis*, 518 U.S. at 350–351 (invalidating injunction mandating all aspects of an adequate prison law library where the operative right was the right of access to the courts, rather than a *per se* right to a library); *Hadix v. Johnson*, 367 F.3d 513, 529 (6th Cir. 2004) (invalidating injunction where fire safety deficiencies failed to constitute constitutional violations); *Sisneroz v. Whitman*, No. 01-5058, 2006 U.S. Dist. LEXIS 67107, at \*9–10 (E.D. Cal. Sept. 6, 2006) (denying injunctive relief because “laundry list” of requests for conditions of prison confinement—such as limited strip searches, exercise periods, and cell assignments—did not relate to any actual imminent harm arising out of civil detention).

50. See, e.g., *Smith v. Robbins*, 528 U.S. 259 (2000) (denying claim of failure to provide *Anders* brief for withdrawal of counsel because the procedure was simply a prophylactic measure ordered by the Court in a prior case to avoid future constitutional violations); *Lewis*, 518 U.S. at 350–51 (refusing to convert prophylactic measure of adequate prison law library ordered in *Bounds v. Smith*, 430 U.S. 817 (1977) to ensure right of access to the courts into a federal right to prison libraries); see also Thomas, *Understanding Prophylactic Remedies*, *supra* note 16, at 379–85 (explaining and discounting the phenomenon by which prophylactic remedies create a mirage of new rights).

51. See, e.g., *Williams v. Bd. of Regents*, 441 F.3d 1287, 1304–05 (11th Cir. 2006) (denying requested relief of access to sexual harassment policies, investigation of complaints, and dispute resolution processes where plaintiff's harassers had left university); *Lewis*, 518 U.S. at 359 (striking down systemwide remedy regarding various aspects of prison law library—including lighting, materials, operating hours, and bilingual materials—where relief did not connect to

limitations are really nothing new, as the usual rules of remedies require that a legal harm to the plaintiff be proven in court before imposition of a judicial remedy. Thus, the usual limitations work to curtail prophylaxis and keep it from becoming anything and everything that does not fit within the confines of another remedy.

In addition, prophylaxis's future looks bright because it is a remedy of last resort. It is not the first line of response for a court, but rather is reserved for particularly recalcitrant defendants. Significantly, institutional defendants are given a first chance to remedy the harm themselves.<sup>52</sup> Only where that attempt fails, or where the defendant has violated a less intrusive preventive command or engaged in repeated patterns of illegal conduct, is there sufficient defiance to trigger prophylaxis.<sup>53</sup> This results in a remedial rule of injunctive relief that is highly deferential to, and therefore more palatable to, defendants.<sup>54</sup>

By limiting prophylaxis to its proper application—as a remedy of last resort protecting a proven right by addressing facilitators causally linked to the harm—courts have responded to the perceived abuse of prophylactic excess, leaving in place a viable

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plaintiff's harm of denial of court access because of illiteracy); *Hadix v. Johnson*, 173 F.3d 958, 964 (6th Cir. 1999) (overturning award of systemwide legal writer program to ensure prisoners were able to prepare legal pleadings on the ground that the district court interpreted prisoners' injuries too broadly).

52. See, e.g., *Hadix v. Caruso*, No. 4:92-CV-110, 2005 U.S. Dist. LEXIS 25295, at \*20–21 (W.D. Mich. Oct. 19, 2005) (requiring defendant prison to submit a remedial plan within 30 days after cooperative planning with plaintiffs); *Ginest v. Bd. of County Comm'rs*, 333 F. Supp. 2d 1190, 1209–10 (D. Wyo. 2004) (ordering prison to submit remedial plan within 30 days to improve gross defects in medical program); see Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 797–99, 803 (1978) (describing “remedial abstention” in which the court defers to the defendants' creation of an injunctive remedy).

53. See, e.g., *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 757 (1994) (upholding portions of a modified injunction against an anti-abortion group, where the group had violated a preliminary injunction to cease blocking or interfering with the clinic entrance).

54. See *Parker*, *supra* note 41, at 1623 (arguing that the traditional role of the district judge in controlling school desegregation cases has been ceded to the defendants); Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 511 (1999) (arguing that remedies in school desegregation cases are controlled by defendants, as dictated by the Supreme Court).

remedial option. Rejecting the outmoded theories of prophylaxis as omnipotent judicial power stops the frontal attacks on such relief and directs scholars toward alternative theorization of public law relief. Given the prevalence of prophylaxis and its place within the normal remedial framework, its continued vitality is assured.