REVIEW

Injunctions. OWEN M. FISS. The Foundation Press, Inc., Mineola, N.Y., 1972. Pp. xxxiii, 910. $16.00.

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For an extraordinary remedy, the injunction is a pretty common thing these days. Public officials of every species are routinely served with complaints seeking to enjoin some edifying variety of official malfeasance, and the courts regularly, if not always routinely, grant such relief. Indeed, it is hard to imagine a public office that does not carry with it an implicit invitation to a contempt hearing.[1] Nor are private individuals immune. If the threat of injunctions under the antitrust or labor laws is not sufficient worry, one need only reflect that anyone who desires to engage in political demonstrations, to publish, or even just to dispose of his garbage[2] is a potential target of an injunctive action.

Yet as the availability of injunctive relief has increased, formal legal study of the doctrines underlying that relief has withered. Courses denominated "Equity" or "Remedies" seem almost an embarrassment in law school curricula;[3] discussion of injunctions, to the extent it occurs at all, is typically divided among a number of specialized courses. This approach allows examination of questions regarding the form and propriety of injunctive relief from a number of different, and potentially useful, perspectives;[4] but it carries substantial risks of either

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1 Whether or not an injunction has actually issued, Griffin v. County School Bd., 363 F.2d 206 (4th Cir. 1966). For the obvious exception, see Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).

2 Fletcher v. Bealey, 28 Ch. D. 688 (1885) (Pp. 3–8).

3 For example, West Publishing Company offers two casebooks and one hornbook on equity, two more than a quarter century old. W. COOK & M. VAN HECKE, COOK'S CASES AND MATERIALS ON EQUITY (4th ed. 1948); M. VAN HECKE, CASES AND MATERIALS ON EQUITABLE REMEDIES (1959); H. MCCLINTOCK, MCCLINTOCK'S HORNBOOK ON EQUITY (1948). A current casebook on remedies seeks to do triple duty, marking the cases for adaptation to "separate courses in Equity and Restitution." K. YORK & J. BAUMAN, CASES AND MATERIALS ON REMEDIES xi (2d ed. 1973).

4 Constitutional law casebooks will typically contain Dombrowski v. Pfister, 380 U.S. 479 (1965) and its progeny, which consider, from the perspective of efficient vindication of constitutional rights, the question of federal injunctive relief against state criminal

overlooking the forest in search of particular trees or allowing both forest and trees to fall into *terra incognita* when teachers, under pressures of time and coverage, curtail examination of questions that are peripheral to the main body of their courses on, for example, constitutional law, labor law, environmental protection, or federal jurisdiction.

The appearance of Professor Fiss's casebook to fill this yawning gap in the available materials raises two questions. The first is whether the gap is adequately or commendably filled by this casebook. It is by now an open secret that this book is a fine casebook, and I shall discuss this question only briefly. The second question is whether the book turns over all of the relevant conceptual stones and therefore can plausibly be expected to survive changes in academic fashion and student interest. I will approach that question by asking what, if anything, the casebook adds to student or professional analysis of a problem that raises particularly interesting questions about the interrelationship of traditional equitable doctrines, individual liberty, and the structure of the federal system—the Pentagon Papers cases.[5]

I

Injunctions comprises three parts. Part I deals with the circumstances in which permanent or temporary injunctive relief can be obtained from a trial or appellate court and some of the procedures designed to facilitate or restrict the availability of such relief. Part II treats the question of parties—in Professor Fiss's language, "the beneficiaries and addressees of an injunction."[6] Part III is devoted to an examination of the form and procedure of the contempt sanction.[7]

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prosecutions under allegedly unconstitutional statutes. *E.g.*, G. GUNTHER & N. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW 166–74 (8th ed. 1970); *id.* 16–25 (Supp. 1973). A casebook in federal jurisdiction might consider these cases—as well as cases regarding the propriety of injunctive relief against particular classes of defendants—from the perspective of the institutional framework of the federal judicial system. *E.g.*, D. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 441–500, 555–88 (1968); H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1009–50, 1376–1406 (2d ed. P. Bator, D. Shapiro, P. Mishkin & H. Wechsler eds. 1973). Neither perspective has much to do with the general principles of injunctive relief.

5 New York Times Co. v. United States, 403 U.S. 713 (1971). A history of the events behind these cases is contained in S. UNGAR, THE PAPERS AND THE PAPERS (1972).

6 P. 482. Considering that Professor Fiss's concern is, commendably, not only with the class of persons with regard to whom doing the forbidden act may result in an adjudication of contempt, but also with the broader class of persons with regard to whom such action may actually cease, "beneficiaries" seems a particularly appropriate word. But surely there is a more elegant word than "addressees" to connote the class of persons who, although not formally bound, may cease to engage in conduct because others have been enjoined.

7 An appendix contains pertinent federal statutes and rules.

Many students, primarily concerned with obtaining injunctive relief and less interested than Professor Fiss either in the consequences of victory or defeat for persons not directly involved in the lawsuit or in the problem of enforcing an injunction, will regard Part I as the core of the book.[8] After classifying injunctions as "preventive," "regulatory," or "structural,"[9] Professor Fiss considers the basic problem of injunctive relief in three contexts involving preventive injunctions.[10] He examines the fundamental requirements (fundamental at least in classical terms) that the injury feared by the plaintiff be both imminent and incapable of adequate redress through the "more gentle . . . remedy"[11] available at law. First, the casebook presents two nineteenth-century cases and an extended discussion of the historical development of equitable principles; the two requirements are then re-examined for plaintiffs seeking to enjoin the enforcement of state criminal statutes; and finally Professor Fiss considers the applicability of these requirements to an alternative form of anticipatory relief, the declaratory judgment.[12] The basic doctrinal material concludes with an examination of some special problems of equitable relief.[13] This section of the casebook concludes with two cases[14] that can be viewed either as creating a constitutionally required (equitable?) doctrine against prior

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8 For a recent egregious example of such disinterest (not, I hasten to add, on the part of law students), see Lessard v. Schmidt, 349 F. Supp. 1048 (E.D. Wis. 1972), *vacated for incomprehensibility*, 94 S. Ct. 713 (1973).

9 "A preventive injunction tries to stop a discrete event or act . . . . The other two types of injunction—regulatory and structural—are differentiated from preventive injunctions in that they establish a long, continuing relationship between the parties and the tribunal." P. 1. A regulatory injunction is one in which "the court puts a general prohibition in an injunction and attempts to use the injunction to regulate a party's behavior over a long period of time." *Id.* A structural injunction is one "where the court attempts to use the injunction as a device for altering or reorganizing some institutional arrangement." *Id.*

10 This statement accurately reflects the general focus of the section—the kinds of problems upon which students are expected to focus—but Professor Fiss does not make too much of his classification and regularly includes cases that would ordinarily be regarded as regulatory or structural injunctions. *E.g.*, Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (seeking to enjoin police from engaging in unconstitutional searches); Build of Buffalo, Inc. v. Sedita, 441 F.2d 284 (2d Cir. 1971) (seeking to place police department in receivership).

11 P. 18, quoting Jerome v. Ross, 7 John. Ch. R. 315, 333 (1823).

12 This section is the casebook's only significant deviation from its otherwise exclusive focus on injunctive remedies.

13 Including the explicitly discretionary nature of the relief ("clean hands" and "balancing the equities"), the problem of "voluntary" cessation of the challenged conduct, and the *fait accompli*.

14 Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); New York Times Co. v. United States, 403 U.S. 713 (1971).

restraint of speech and publication[15] or as providing an opportunity to sum up the previous materials by applying them in a context in which many of us may find it easier to sympathize with the defendant's interests in avoiding an injunction.[16]

Procedural problems are taken up next. After brief treatment of the particular problems of ex parte orders, Professor Fiss presents extended and extraordinarily perceptive coverage[17] of the issues involved in the grant or denial of temporary relief pending full hearing and final adjudication.[18] Considerable space is spent on appealability of interlocutory relief—preliminary injunctions, granted, denied, or finessed; temporary restraining orders; and "nonorders," refusals by the trial court to act at all or to act with reasonable promptness.[19]

The doctrinal material concludes with a survey of "special duties of obedience imposed by the legal system in order to facilitate and perfect the ability of injunctions to afford preventive relief."[20] Attention is focused on two questions: the duty of parties, and perhaps nonparties, to refrain from action that would render it impossible to formulate a decree with regard to matters already in litigation[21] and the circum-

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15 Professor Fiss seems to view these cases in this way. *See* pp. 127, 154–55. So viewed, I believe the treatment is inadequate. *See* text and notes at notes 45–72 *infra*.

16 The defendants in the prior cases are typically either governmental officials threatening unconstitutional action or private businesses engaging in or threatening to engage in some violation of laws or principles arguably protecting consumers or the environment.

17 Professor Fiss's subtlety of perception is, unfortunately, sometimes matched by his subtlety of presentation—at least in casebook design. I wonder, for example, how many students reading this section (pp. 162–86) will flag the question of the extent to which a preliminary injunction should be available as an expediting device (an alternative to a motion to expedite) before that question is explicitly raised on p. 186.

18 Bonding requirements are considered in textual material. The treatment is brief and unfortunately abstract. One obvious problem with the requirement of a bond is the power that may be given to the trial judge to deny relief by an unduly high bond. The problem is noted, but nothing in the materials gives any feel for how often trial judges do so or for the mechanics of obtaining a bond. I am not suggesting that the casebook should give students a clinical legal education; but I would doubt that most students come to the course with sufficient practical knowledge in the area to be able to visualize, without aid, the real costs to plaintiffs forced to come up with bonds for injunctions and to balance those costs against the injury to an ultimately successful defendant not protected by a bond.

19 This final section arguably devotes more space than necessary to a problem rarely encountered in practice: the hopelessly immorigerous trial judge. Not surprisingly, all of the materials relate to desegregation and voting rights cases in the early 1960's. But surely the problem of how to deal with a fundamental breakdown of an assumption basic to the institutional structure of the federal courts is better considered at leisure than when the consequences of a misstep may be—literally—blood in the streets and guns at the polling places. (The assumption to which I refer is that enough federal trial judges in a given district will be middling honest and willing to give some attention to the rules so that the bulk of judicial business can be tolerably disposed of by ordinary trial and appellate procedures.)

20 P. 282.

21 Griffin v. County School Bd., 363 F.2d 206 (4th Cir. 1966) (pp. 283–92).

stances under which an invalid decree must be obeyed.[22] The remainder of Part I allows review of the doctrines just developed through detailed examination of the history of the meat packers' decree[23] (a "regulatory" injunction) and five years of the Montgomery, Alabama school desegregation litigation[24] (a "structural" injunction).

Part II of the book takes up the question of parties in the broadest sense—who will (or should) benefit from an injunction and who will (or should) be practically or legally bound by an adverse decision. Unlike Part I, where the cases are expected by and large to speak for themselves, Part II is organized within an editorial framework that raises the major issues before a case is presented and frequently returns to them in more detail at its conclusion. The discussion of beneficiaries focuses on the questions of class relief, with or without a class action; the problem of adequate representation of absent beneficiaries; the question of conflicts among the intended beneficiaries to the litigation;[25] and the question of "government by injunction."[26] The question who is "bound"[27] by an injunction is treated in more doctrinal fashion. Coverage begins with the doctrine that nonparties can be punished for interference with the effectuation of a decree because they have engaged in an obstruction of justice. The materials then suggest alternative theories for obligating nonparties to obey the decree (agency, power to control, and defendant-class actions) and conclude with a brief traversal of the issues involved when one defendant (for example, a public or corporate official) is succeeded by another.

Part III examines the substantive and procedural rules regarding the contempt sanction. The presentation here returns to the more laconic style of Part I, with editorial guidance again provided primarily through selection and organization of material. All of the obvious issues are raised,[28] along with several that are not so obvious.[29]

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22 Walker v. City of Birmingham, 388 U.S. 307 (1967); *In re* Green, 369 U.S. 689 (1962); United States v. Mine Workers, 330 U.S. 258 (1946) (pp. 292–324).

23 Swift & Co. v. United States, 276 U.S. 311 (1928).

24 United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969).

25 Concentrating on Norwalk Core v. Norwalk Bd. of Educ., 298 F. Supp. 203 (D. Conn. 1968), *aff'd*, 423 F.2d 121 (2d Cir. 1970).

26 Using *In re* Debs, 158 U.S. 564 (1895), considerable background material on *Debs*, and a recent attempt by the federal government to enjoin "sewer service" in New York City.

27 As Professor Fiss points out, it is impossible to decide who is bound by an injunction until one determines what it is to be "bound"—barred from relitigation, subject to contempt proceedings for violation, or something else. P. 620.

28 For example, the differences between civil and criminal contempt, forms of civil contempt, persons entitled to commence or terminate contempt proceedings, and the procedural requisites of contempt hearings.

29 For example, the relevance of United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812), to any possible inherent power of federal courts to punish for contempt in the absence

One comes away from this casebook with overwhelming admiration for the care and quality of thought that has gone into its basic preparation. Professor Fiss is evidently a member of the old school not only believing that facts are occasionally relevant to the decision of legal issues, but also tending towards the view that if facts are relevant, more facts are more relevant. The cases have been selected, edited, and on occasion annotated with this belief in mind; and with rare exceptions the selection and annotation are outstanding. If the opinions are sometimes lengthy, they are only occasionally wordy; and on such occasions the failure to edit more sharply may have been due to Professor Fiss's scrupulous care to avoid editing out an argument that some reasonable persons might find relevant or even persuasive.[30]

Yet the book is not without flaws. To begin with, the style of presentation has its costs. Since Professor Fiss typically chooses to cover a particular issue by the extensive presentation of a single case, instead of abbreviated presentation of several cases, the book is unusually resistant to case selection by other teachers.[31] It is also an extraordinarily personal collection of teaching materials.[32] both in style[33] and in resistance to reorganization. This latter characteristic is perhaps inevitable where so much of the editorial structure is imposed only implicitly through organization of the materials. Although this characteristic should aid students who are taking the course that Professor Fiss wants to teach, it presents obstacles to one who would adapt the book to a slightly different course.

The book also has some flaws that do not necessarily result from its organization. At least once, progress seems to come to a grinding halt while students are asked to examine a nice point of statutory construction that, for the most part, has practical importance only when a

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of statutory authority. *But cf.* New York Times Co. v. United States, 403 U.S. 713, 752 n.3 (1971) (Burger, C.J., dissenting).

30 For example, the almost verbatim presentation of ten hastily-prepared opinions in New York Times Co. v. United States, 403 U.S. 713 (1971) (pp. 131–54).

31 For example, anyone who finds Fletcher v. Bealey, 28 Ch. D. 688 (1885), an unattractive case with which to discuss the imminence requirement must either supplement the casebook or do without. I find it an example of Professor Fiss's outstanding selection of cases.

32 Although it is not as personal as Professor Joseph Goldstein's trilogy: R. DONNELLY, J. GOLDSTEIN & R. SCHWARTZ, CRIMINAL LAW (1962); J. GOLDSTEIN & J. KATZ, THE FAMILY AND THE LAW (1965); J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY AND LAW (1967).

33 The notes are informal, written in the first person, and occasionally anecdotal (*e.g.*, p. 596, raising the question why Professor Ernest Brown of Harvard regularly referred to *Debs* as "the darkest day in Supreme Court history"). I do not find them therefore less valuable, but they contribute to the sense of the casebook as a more personal collection of teaching materials than one might ordinarily expect.

plaintiff who desires injunctive relief prior to final decision has decided not to make a motion for a preliminary injunction.[34] Surely the important question is how quickly a plaintiff is entitled to a reviewable ruling on his request for interim relief, a question that is touched on in the later presentation of cases regarding the appealability of temporary restraining orders. If so, discussion of alternative devices, such as mandamus, to obtain a decision on a motion for preliminary injunction ought to take preference.

In addition, the textual notes on occasion strike an unhappy mean between the abstract presentation of an issue and its analysis in terms of case law. For example, in discussing the possible duty of a court to dispense with the bonding requirement for an injunction, Professor Fiss refers students to *Griffin v. Illinois*[35] and then quotes briefly from *Lindsey v. Normet*.[36] I do not question the pertinence of either case, but if case-law, rather than abstract, analysis of the issues is to be engaged in, some other recent cases on financial barriers restricting access to the courts deserve mention.[37] Similarly, discussion of the relevance of the federal anti-injunction statute[38] to the availability of injunctions under section 1983[39] against state criminal prosecutions might usefully mention the Court's recent conclusion, in *Mitchum v. Foster*,[40] that section 1983 is an explicit exception to the anti-injunction statute. And discussion of *Walker v. Birmingham*[41] might usefully have been broadened by mention of *United States v. Ryan*,[42] where a unanimous Court explained *Walker* as having been based "upon the availability

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34 The question is when, if ever, the denial of plaintiff's motion for summary judgment is appealable under 28 U.S.C. § 1292(a)(1) as an interlocutory order refusing an injunction even though a final decision of the case is still in the future. Other variants of this basic situation—where, for example, plaintiff has sought interim relief and the trial court has granted summary judgment for some defendants or on some issues—are admittedly much more pertinent to what I see as the basic issue, and I do not quarrel with inclusion of the variants.

35 351 U.S. 12 (1956).

36 405 U.S. 56 (1972). The Court rejected due process and equal protection challenges to a state statute requiring trial of eviction complaints within six days unless the defendant provided security for accruing rent, but struck down (on equal protection grounds) a requirement that a double bond be posted in such cases if the tenant wanted to appeal an adverse decision.

37 *E.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971).

38 28 U.S.C. § 2283 (1970).

39 42 U.S.C. § 1983 (1970).

40 407 U.S. 225 (1972). *Mitchum* was decided on June 19, 1972, and although the closing date for the casebook is not certain, it contains a lengthy statement released on June 12 by a Justice Department official. It would seem that at least brief mention could have been made of *Mitchum*.

41 388 U.S. 307 (1967).

42 402 U.S. 530 (1971).

of review . . . at an earlier stage."[43] Other examples—none major, but all annoying—exist.[44]

II

The second question posed at the outset of this review was whether *Injunctions* leaves any significant conceptual stones unturned. That is, are the doctrines examined in the book presented in a context sufficiently broad that all of the significant factors relevant to evaluation of those doctrines are at least exposed to view? I believe that the answer to this question, in at least one important area, is "No."

On a number of occasions throughout the book, it becomes important to consider the relationship between the injunctive process and the administration of the criminal law. With regard to the deterrent effect of an outstanding injunction (or an applicable criminal statute), the procedures for an adjudication of contempt (or a criminal conviction) when violation is charged, and the range of available sanctions when violation is found, Professor Fiss adequately and usually admirably flags the relevant issues. What is missing, however, is recognition of the fact that the criminal law—routinely—and the injunctive process—occasionally—serve not merely to define kinds of conduct that may be engaged in only at hazard of some subsequent penalty, but also to define for police and other law-enforcement agencies kinds of conduct that, if threatened, may be prevented by force. I believe that proper evaluation and comparison of this aspect of the injunctive and criminal processes should in some circumstances be dispositive of issues presented to the courts. I do not, however, expect to carry my argument that far in the remainder of this review. What I hope to do is demonstrate that such an evaluation is at least important in considering some of the circumstances in which injunctions should or should not issue. As an example, I propose consideration of the Pentagon Papers cases of 1971.[45]

Early in 1971, the *New York Times* obtained copies of a large portion of a mammoth, classified study of the history of United States involvement in Vietnam, including a considerable number of related

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[43] *Id.* at 532 n.4. Professor Wright has remarked, somewhat testily, that "[t]his is a clearer explanation of the *Walker* decision than the opinion in that case itself provides." C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 16, at 12 (2d ed. Supp. 1972).

[44] In addition—although here the blame must ultimately be laid upon the publisher—the typesetting and proofreading fall unhappily short of the unselfconscious excellence that one somehow expects in the finished version of a carefully prepared casebook. It is a bit unsettling to miss a line of type in the first page of the first case (p. 3), and garden-variety typographical errors are not uncommon.

[45] New York Times Co. v. United States, 403 U.S. 713 (1971).

memoranda, reports, position papers, and the like.[46] After more than two months of intensive preparation and research, the *Times* began daily publication of a series of articles based upon the study; the articles included substantial quotations from both the study and the underlying documents. The Department of Justice informed the *Times* that some of the published material "contains information relating to the national defense of the United States and bears a top-secret classification. As such, publication of this information is directly prohibited by the Espionage Law, Title 18, United States Code, Section 793. Moreover, further publication of information of this character will cause irreparable injury to the defense interests of the United States."[47] Accordingly, the Department of Justice requested that the *Times* cease publication of the study and turn the documents over to the Department of Defense; shortly thereafter, Justice indicated its intention to seek an injunction against further publication of the documents if the *Times* did not comply promptly with this request. The *Times* responded that it was entitled to publish the documents and would oppose any request for an injunction, but that it would abide by the courts' ultimate decision. In a complex series of emergency applications and hearings, the Government obtained temporary restraining orders prohibiting the *Times*—and the *Washington Post*—from publishing the study or articles based upon it.[48] The Supreme Court vacated the orders and held that the Government had not met the "heavy burden" required to enjoin a newspaper from publishing material in its possession.[49]

Inclusion of *New York Times* in a casebook on injunctions suggests that its facts and holding have a particular relevance to injunctive relief.[50] Three explanations of the relevance of this case can be offered. First, it might be that the first amendment absolutely forbids governmental interference with publication of information in a newspaper's possession.[51] Second, some principle inherent in the first amendment

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46 For a general history of the Pentagon Papers cases, see S. UNGAR, *supra* note 5.

47 The exchange between the Department and the *Times* is quoted at pp. 154–55.

48 United States v. Washington Post Co., 446 F.2d 1322 (D.C. Cir. 1971); United States v. New York Times Co., 328 F. Supp. 324 (S.D.N.Y. 1971). The *Washington Post*, scooped, at first simply published rewrites of the *Times*'s stories, but later obtained some of the documents on its own.

49 New York Times Co. v. United States, 403 U.S. 713, 714 (1971). The Court handed down a per curiam and nine separate, signed opinions—six supporting the result, two opposing it, and one taking no position on the merits.

50 For reasons appearing below, I believe that the case should be included. I do not, however, intend to discuss the possibility that other doctrines might be found that would have made the decision possible without considering questions relevant to injunctive relief.

51 Since the constitutional argument for republication is inevitably weaker than the

might combine with the particular nature of injunctive relief to make it an inappropriate remedy in these circumstances even though other remedies designed to halt publication would be appropriate.[52] Third, and least plausibly,[53] it could be that the particular nature and characteristics of injunctive relief make it a particularly appropriate remedy in these circumstances, even though other remedies might be improper.

The first possibility—that an injunction against publication is improper because the first amendment prohibits any governmental restraint on publication of information in the possession of a newspaper—is arguable, and indeed often argued.[54] But this point gets us nowhere in the present context. Under this analysis *New York Times* is relevant to the discussion of injunctive relief only as an indication of circumstances in which an injunction would be improper regardless of other considerations. The relevant considerations would not be those relating to injunctive relief but only those relevant to first amendment questions in general. Professor Fiss's inclusion of only *New York Times* and one other case[55] is an inadequate basis for such an evaluation.

The next possibility is that the first amendment combines with the particular nature of injunctive relief to prohibit injunctions against newspaper publication of this information. The following discussion assumes that a court might not ultimately hold—in a criminal prosecution, for example—that publication of the material in question was protected as a matter of law by the first amendment. The question is thus whether an injunction should be denied although publication might legitimately be prevented by other means.[56]

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argument for publication, *cf.* International News Service v. Associated Press, 248 U.S. 215 (1918), I do not consider the question whether republication might be prohibited although publication could not be.

52 The first and second arguments are obviously related, since the relevant circumstances might be expected to include the nature of the material sought to be enjoined; in fact, I shall argue, the correctness of the result in *New York Times* stems from the special force lent to traditional injunctive doctrines by their application in circumstances involving the first amendment.

53 Injunctive doctrines have historically been designed to limit, not expand, the availability of injunctive relief. *See Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 996–1027, 1056–64 (1965). I do not intend any further explicit consideration of this possibility.

54 *See* 403 U.S. at 714–20 (Black, J., concurring); *id.* at 720–24 (Douglas, J., concurring).

55 Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (pp. 127–31).

56 It would be possible to argue a "one-bite" theory of the first amendment—that everything is entitled to be published at least once and that actual prior restraint (by injunction or by physical force) is improper even though the imposition of criminal penalties for publication is not. This argument is noted by Professor Fiss, pp. 154–55, and made at greater length in Kalven, *The Supreme Court, 1970 Term: Foreword, Even When a Nation is at War—*, 85 HARV. L. REV. 3, 25–35 (1971). Such an argument, like the one just discussed, would seem to rest entirely on first amendment considerations no matter what the form of restraint.

Professor Fiss points to a possible answer in the historical unavailability of jury trial in contempt proceedings[57] and the doctrine that "equity will not enjoin a crime."[58] Although Professor Fiss does not provide much explication of this doctrine, it is usually said to rest on two foundations. First, a contempt proceeding might not afford the safeguards available to defendants in ordinary criminal trials;[59] the availability of a jury trial is probably the most important of these. Second, the decision to invoke the criminal process is ordinarily in the hands of the police and prosecutor, who are expected to be better than private parties at balancing the interests involved in determining when the process should be invoked.[60] This aspect of the doctrine, however, is irrelevant to the *New York Times* case, since the parties seeking the injunction had the power to invoke the criminal process.[61] We are then left with only one consideration: that safeguards available in a criminal prosecution may be unavailable in criminal or civil contempt proceedings brought after an injunction has been flouted. The particular injunctive problems raised by *New York Times* could then be disposed of either by assuring that the same safeguards would be available in a contempt prosecution as in an ordinary criminal prosecution[62] or by a determination by the Court that the magnitude of the interests threatened by publication justified shortcutting ordinary criminal protections. Both solutions would make *New York Times* of only momentary import for general injunctive theory. The first would turn subsequent cases into duplicates of criminal proceedings; the second would presumably support the constitutionality of legislation that would take the same shortcuts in an ordinary criminal prosecution.[63]

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57 *See* Bloom v. Illinois, 391 U.S. 194 (1968) (pp. 848–57) (right to jury trial depends upon sentence ultimately imposed in criminal contempt cases). The issue is tagged by Professor Fiss at pp. 12–13.

58 P. 154. *See* New York Times Co. v. United States, 403 U.S. at 744 (Marshall, J., concurring).

59 *Developments in the Law—Injunctions, supra* note 53, at 1018–19. Other possible differences are explored at pp. 848–77 of the casebook.

60 *Id.* at 1016–18. This explanation of the doctrine can be undermined either by a showing that the legislature had committed the decision to private parties, as when issuance of an injunction has been expressly authorized, *see, e.g.*, State *ex rel.* Marron v. Compere, 44 N.M. 414, 103 P.2d 273 (1940) (legislative policy to encourage injunctions) or that peculiar circumstances indicate that forcing the particular plaintiff to rely upon the authorities for protection would be unjust, *see, e.g.*, Cranford v. Tyrrell, 128 N.Y. 341, 28 N.E. 514 (1891) (special injury allows injunction against nuisance).

61 An argument could be made in some circumstances that discretion in the invocation of the process was committed to other than the particular official seeking the injunction, *cf. In re* Debs, 158 U.S. 564 (1895), but it would not seem applicable to *New York Times*.

62 *Cf.* Cheff v. Schnackenberg, 384 U.S. 373 (1966).

63 An argument deriving from Freedman v. Maryland, 380 U.S. 51 (1965) could require some prior judicial involvement in the process. Such involvement, however, need not be by way of injunction.

I suggest that this analysis is insufficient. I would resort initially to the doughty maxim that equity will not do a useless act[64] and ask why the Government might have wanted to proceed by injunction rather than the ordinary criminal process. One possibility has already been raised: that a potential defendant, having fewer safeguards in a contempt action than in a criminal proceeding, might therefore be less likely to disobey the injunction. In fact, the *Times* agreed to abide by any injunction that was ultimately issued. But suppose it had not; how might that alter the result?

Consider the means of enforcing the criminal law prior to a violation. When I call the police to complain that an armed man is attempting to break into my house, it is my fond expectation that the officer who responds to the call will not limit himself to reading the relevant sections of the criminal code in his effort to deter the burglar from entry and subsequent assault. If such initial measures do not halt the course of threatened conduct, I expect the police officer to use physical force to protect me and mine from harm. Similarly, although injunctions are often enforced by waiting for a violation and then holding the violator in contempt, their ultimate purpose is to be obeyed; on occasion—one might call to mind *Cooper v. Aaron*[65]—an injunction can be the basis for calling on what is potentially the full physical power of the Government of the United States.

Therefore, like the criminal law, an injunction may legitimize the use of force to prevent a particular act. Where no criminal statute applies, an injunction arguably should issue to support the use of force by the Executive to prevent the threatened harm.[66] In its communication with the *Times*, however, the Government claimed that the newspaper's threatened publication would violate a criminal statute.[67] Why did the Government choose not to enforce the criminal law in the usual manner—by sending the FBI to recover the "stolen" manuscripts and preventing, by force if necessary, the publication of material whose suppression was deemed critical to the national interest? Surely one can have the highest respect for the Marshal of the Supreme Court and nevertheless believe that his presence would not have added substan-

64 For examples, see *Developments in the Law—Injunctions, supra* note 53, at 1012–13.

65 358 U.S. 1 (1957).

66 The contrary could and has been argued. *See* 403 U.S. 740–48 (Marshall, J., concurring). The ultimate question is whether, if the Executive is allowed to act at all in such circumstances, it should do so with or without judicial aid—a question that raises the same considerations discussed below.

67 *See* text at note 47 *supra*. The Government's brief in the case, however, did not mention the possibility that a crime had been committed. *See* 403 U.S. at 744 (Marshall, J., concurring).

tially to the physical power available to the United States. The ordinary method of halting espionage seems to be to arrest spies, not enjoin them.

My citation of *Cooper v. Aaron* was deliberate. Even if an injunction has little or no effect on those persons threatening to commit a wrongful act, it may very substantially stiffen the backbones of those officials charged with enforcement of the law. Backed by prior judicial approval, they may be willing to commit the matter to force of arms instead of letting the harm occur and punishing the perpetrators later. The question is whether such prior judicial approval should be available when interests protected by the first amendment are ranked against the security of the nation.[68]

In support of an affirmative answer to this question, it is often urged that the courts are simply not as competent as the Executive to judge when the disclosure of some kinds of information will jeopardize not merely the country's "interests," whatever those may be,[69] but its very survival as a nation.[70] In such cases a court must either defer to some extent to executive judgment, sometimes upholding an executive determination without being persuaded that the determination is correct, or decide the merits itself. But if the Executive is more able than the courts to make the correct decision—and I think it is—then a failure to defer to executive judgment commits the ultimate decision of questions critical to the nation's survival to an institution that is less able to decide those questions correctly than a readily available alternative. Surely such an arrangement would be intolerable.

Judicial review must therefore defer, to some extent, to executive judgment. The question can now be rephrased: should officials in the executive branch have a preenforcement spine-stiffening device that will sometimes uphold their decisions even when they are wrong? Or should executive determination to suppress the publication of information

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68 Let me reiterate that this part of the discussion assumes the first amendment does not forbid the complete suppression (at least for a period of time) of some kinds of information and that we may be dealing with such information.

69 I use "interests" to connote those matters that may make the nation richer or poorer, happier or sadder, but do not immediately threaten its very existence as a nation. I would argue that, although at least in the sphere of foreign relations the Constitution commits the determination of those interests to the Executive (and, when treaties are involved, the Senate), the first amendment commands that when nothing more than those interests are at stake the mere publication of words said to threaten them cannot be suppressed.

70 This proposition was forcefully urged by the Solicitor General at oral argument, see S. UNGAR, *supra* note 5, at 234–48, and later by Professor Louis Henkin. Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 278–80 (1971). It was apparently accepted by Justice Harlan, dissenting. 403 U.S. at 756–58.

be enforced without aid and comfort (aid and comfort, recall, that defers to the Executive on the merits) from the judiciary?[71] It is possible, I suppose, to argue that the executive branch has historically been too open and that the country needs more and not less secrecy in government, but most people would find such an argument unpersuasive.[72] In this context, should not executive impulses towards the suppression of information go forward unaided by prior judicial approval? If a responsible president is willing to risk that an injunction might be disobeyed and the material published, can it really be said that the nation's very existence is threatened by publication?

I do not suggest that these arguments, particularly in the summary form in which they have been presented here, constitute the only proper analysis of *New York Times*. But they are sufficiently related to the particular nature of injunctive relief and historically recognized equitable doctrines that a casebook on injunctions should lead readers to bring them to bear on the case. And this task *Injunctions* does not perform: the materials never sufficiently focus on the enforcement of criminal laws or injunctions, other than looking at the imposition of penalties after a violation.[73]

III

So *Injunctions*, in my view, fails to turn over all of the relevant stones. For all its many virtues, the personal nature of the book, its concentration on injunctive remedies to the exclusion of notes or textual discussion evaluating alternative remedies and the resulting limited focus make it more a casebook for the present than the indefinite future. Recognition of its defects, however, should not divert attention

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71 I do not mean to imply that a potential criminal defendant should be unable to obtain, prior to publication if he so desires, judicial review of the materials under a standard that gives some deference to executive judgment.

72 *See, e.g.*, Henkin, *supra* note 70, at 275–76.

73 A related problem appears in connection with the casebook's treatment of Dombrowski v. Pfister, 380 U.S. 479 (1965) and its progeny. The cases and the textual material tend to focus on the propriety of federal relief against state criminal prosecutions where the conduct on which the prosecution is founded has already taken place. Again, this treatment suggests an undue focus on the trial and conviction of offenders as the major aspect of the criminal process. Yet to an individual seeking to engage in a demonstration, the critical question may be whether he will be physically prevented from doing so (by arrest or otherwise), not whether he will ultimately be convicted. Would a court tell someone who is asserting a constitutional right to kill his mother that the appropriate method of raising the constitutional question was to violate the state murder statute and raise his constitutional defenses in a criminal trial? If not, why should a federal court give less weight to a state's judgment that, for example, obscene performances should not take place—and tell a plaintiff to go ahead and perform if he wishes to have his constitutional claims adjudicated?

from its tremendous strengths: generally outstanding selection of cases, superb organization, and the subtlety of presentation of many issues. If I am right in my belief that injunctive remedies is a subject sadly neglected in today's law school curricula, the appearance of Professor Fiss's book removes the only substantial excuse for not making a course in the topic available.