

AMERICAN ASSOCIATION OF LAW SCHOOLS
REMEDIES PANEL: WHAT'S HAPPENING WITH INJUNCTIONS?

THE FUTURE OF PROPHYLACTIC INJUNCTIONS IN INSTITUTIONAL REFORM

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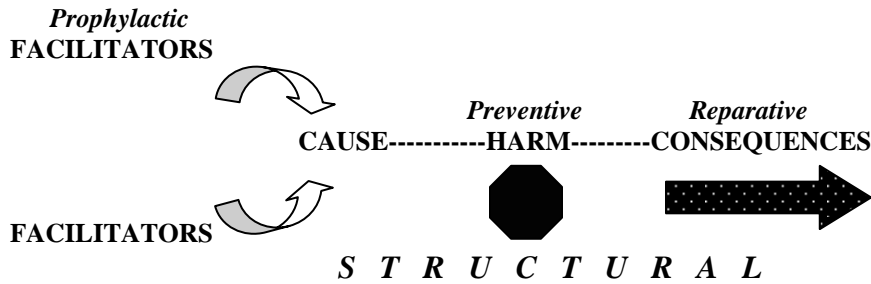
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The identification of a separate classification of “prophylactic” injunctions and its continued utilization by the courts in institutional reform cases has helped to develop the line of demarcation between legitimate and illegitimate relief. Rather than striking down all broad injunctive relief as the dominant discourse demands, prophylaxis provides an alternative narrative by which to evaluate injunctive relief to retain valuable and effective judicial remedies.

1. THE DIFFERENCE A NAME MAKES

“Prophylactic” relief is defined as broad injunctive relief that addresses the facilitators of harm in order to prevent continued violations of the law. It is characterized by specific precautionary measures ordered by a court to address causal factors with a nexus to continued violations.

- (A) ***The Existing Nomenclature:*** The classification of injunctive relief derives from Owen Fiss’s 1978 work, *The Civil Rights Injunction*, which identified three types of injunctive relief: preventive, reparative, and structural.
- i) Preventive: command to stop the illegal act. Stop discrimination.
 - ii) Reparative: repairs the continuing consequences of past harm. Reinstatement of employee who was fired because of discrimination.
 - iii) Structural: alter the public institution which itself is violating the law. Alter the segregated schools. Divest the monopoly.
- (B) ***A New Category:*** I suggested that there was a fourth type of injunction operating in the cases. See Tracy A. Thomas, *Prophylactic Injunctions: The Normative and Definitional Parameters of Broad Injunctive Relief*, 52 BUFFALO L. REV. 301 (2004); see also Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of Bush v. Gore*, 11 WM. & MARY BILL RTS. J. 343 (2002). Lurking in the morass of structural relief in public law cases were prophylactic measures that differed significantly in character and focus. These injunctive measures particularly focused on the causal facilitators of harm and sought to control these facilitators in order to prevent continuation of harm.
- i) ***A Word about Terminology:*** “Prophylactic” is the Supreme Court’s label, whether it is used pejoratively or descriptively to explain injunctive relief. The medical analogy is useful to identifying precautions to prevent harm.
- (C) ***Hallmarks of Prophylactic Relief***
- i) Precautions: Additional measures or steps ordered.
 - ii) Facilitators: Addressing facilitators with a causal nexus to harm.
 - iii) Protection: Goal to protect better than a simple command to stop.



- (D) **Common Prophylactic Measures:** Looking across the board at the cases of prophylactic relief, some common types of prophylactic measures emerge.
- i) Evaluation and Monitoring: monitor, report to court, investigation
 - ii) Process: procedural safeguards, provide notice, set consequences
 - iii) Education: training, communication, disseminate information
 - iv) Policies: develop express policies, disseminate
- (E) **Labeling 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 injunctions, by circumscribing the scope of appropriately broad relief.

2. INSTITUTIONAL EXAMPLES OF PROPHYLAXIS IN ACTION

Prophylaxis came to the forefront through its grassroots development in institutional reform cases involving schools, prisons, and other public institutions. However, prophylaxis is not confined to public institutional settings, and can be found, for example, in business and economic regulation cases.

- (A) **The Practitioner's Tool:** I came to my own understanding of prophylactic remedies through litigating a prison reform case in practice. *See Women Prisoners v. D.C. Dep't of Corrections*, 877 F. Supp. 634 (D.D.C. 1994) (imposing extensive prophylactic relief for unconstitutional environmental prison conditions, sexual harassment and assault, and gender discrimination in education and employment). Prophylaxis has a practical, intuitive appeal that resonates with practitioners and judges who seek tangible remedial solutions to difficult problems.
- (B) **The Sexual Harassment Icons:** Prophylactic injunctive relief has become common place 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 facilitating continued harassment. *E.g., Bundy v. Jackson*, 641 F. 2d 934 (D.C. Cir. 1981); *Sims v. Montgomery County*, 766 F. Supp. 1052 (M.D. Ala. 1999).
- (C) **Schools:** One of the classic cases of prophylactic relief comes from the desegregation era in *Swann v. Charlotte-Mecklenberg Schools*, 402 U.S. 1 (1971). The desegregation cases helped developed prophylactic relief as courts struggled to deal with a difficult legal problem and continued contempt. More recently, court cases involving federal statutes like Title IX and special education laws have utilized

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

- (D) **Prisons:** Prophylactic relief grew in popularity in the prison conditions cases spanning the end of the twenty-first 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. *See, e.g.*, *Hutto v. Finney*, 437 U.S. 678 (1978) (limiting time in punitive isolation which contributed to other constitutional violations); *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 (D. Wis. 2001) (requiring prison to engage professional services to evaluate incoming prisoners' mental health).

3. CRITIQUING THE CRITIQUE: PROPHYLAXIS AS JUDICIAL ACTIVISM

The dominant narrative of prophylactic (and structural) relief is that it is judicial policymaking and unwarranted judicial activism. The accusation is that the remedies go "beyond the right" and are based on the judge's personal vision of justice rather than on proper law, facts, and judicial authority.

- (A) **Judicial Policymaking:** The dominant critique in the scholarly discourse attacks prophylactic relief as illegitimate judicial policymaking by which judges usurp the legislative and executive power in deciding how public institutions should be managed. This attack on prophylaxis is part of a broader attack on public law remedies which highlights problems with consent decrees, positive public rights, and the controlling power group of the plaintiffs' attorneys, experts, special masters, and cooperative defendants. *See, e.g.*, ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE* (2003); John Chon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996).

Legislation Against Prophylaxis: Congress responded to the perception of illegitimate prophylactic relief in prison condition cases by enacting the Prison Litigation Reform Act of 1995. While targeting negotiated consent decrees, the statute requires that all injunctions be "narrowly tailored," "extend no further than necessary," and be "the least restrictive means necessary" to the correction of a federal right. 18 U.S.C. § 3626(a)(1). However, courts have continued to use prophylactic injunctions in prison conditions cases.

- (B) **The Mistaken Theorization of Prophylaxis:** The modern criticism of prophylactic relief as policymaking naturally follows from the original theorization of public law relief as unfettered judicial power. Theories of a moralistic judge imposing new legal norms through a participatory rather than adjudicatory process set up prophylactic

relief as something alternative to regular judicial action. These theories draw criticism like magnets and do not accurately explain 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 judicial remedial action. See Charles Sabel & William Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004); Thomas, *The Prophylactic Remedy*, *supra*.

- i) **Judicial Omnipotence:** 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. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). They envisioned a moralistic judge who would rectify injustice by the elaboration and expansion of legal norms.
 - ii) **Participatory Process:** A corollary theory requiring a participatory, deliberative process for public law remedies and their polycentric problems reinforced the notion of prophylaxis as something extra-judicial. See Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991); Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).
 - iii) **Rulemaking:** Alternatively, prophylaxis has been justified as a judicial “rule” of interpretation or implementation inspired by the legal right. See Henry Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988). This theory places prophylaxis within the normal range of judicial activity, but reinforces the notion of judicial omnipotence.
- (C) **Limiting Prophylaxis Aids its Legitimacy:** The many examples of prophylaxis gone too far are used to negate the entire category of relief. See, e.g., *Lewis v. Casey*, 518 U.S. 343 (1996); DEMOCRACY BY DECREE, *supra*. The Fiss-Chayes theory encouraged courts to morph prophylaxis into a catch-all, omnibus remedy. Since then, remedial excess has slowly been reigned in by the courts, which have followed the Supreme Court’s rules of limitation in evaluating the propriety of prophylactic relief. Thus, courts have denied requested prophylactic relief in the absence of a legal harm (e.g., *Hadix v. Johnson*, 367 F.3d 513 (6th Cir. 2004) (invalidating injunction where fire safety deficiencies failed to constitute constitutional violations)); when prophylaxis is asserted as an entitlement (e.g., *Smith v. Robbins*, 528 U.S. 259 (2000)); and when it would not benefit the plaintiffs (e.g., *Williams v. Bd. of Regents*, 441 F.3d 1287 (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)). By limiting prophylaxis to its proper application--as a remedy protecting a proven right by addressing facilitators causally linked to the harm--courts (and Congress) have addressed the egregious instances of prophylactic excess leaving in place a viable remedial option.

4. THE FUTURE OF PROPHYLAXIS

The prediction is that prophylactic injunctions will continue as courts learn to appropriately tailor relief 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.

- (A) **Evidence of Continued Public Law Injunctions:** It seems that public law injunctions are alive and well. See Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Orders*, 81 N.Y.U. L. REV. 550 (2006); Sabel & Simon, *supra*. Despite the convention wisdom that institutional reform litigation peaked long ago, the studies show the continued utility and importance of public law injunctions.
- (B) **Practical and Effective Relief:** Prophylaxis seems to work. It provides practical, tangible solutions to often insurmountable problems involving intangible rights. It addresses causal inputs that facilitate continued violations of the law. And it gives defendants concrete orders that can be evaluated for future compliance.
- (C) **Not a Kitchen Sink Remedy:** The trial and error of appellate review over time has clarified that prophylaxis is not a kitchen sink remedy. Schlanger, *supra*. Prophylactic relief must be targeted to the specific harm proven, and not used as a general panacea for social ills. By reigning in the remedy to its appropriate contours, the courts have ensured the continued viability of this remedy.
- (D) **A Remedy of Last Resort:** As applied by the Supreme Court, prophylaxis requires a prerequisite of defiance before its broad measures become appropriate. Defendants are given a first chance to remedying the harm themselves. *E.g.*, *Hadix v. Caruso*, 2005 U.S. Dist. LEXIS 25295 (D. Mich. 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, 1204 (D. Wyo. 2004) (ordering prison to submit remedial plan within 30 days to improve gross defects in medical program). Only where that 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. As Professor Parker has demonstrated, this results in a remedial rule of injunctive relief that is highly deferential to, and ultimately more palatable to, defendants. See Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623 (2003); Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475 (1999).