Remedies for Wrongfully-Issued Preliminary Injunctions: The Case for Disgorgement of Profits

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INTRODUCTION

Final judicial decisions are infallible,[1] and as such, they can neither impose illegitimate harm nor confer unjust enrichment.[2] But non-final and interim decisions are fallible, and when such a decision is reversed or set aside, the question is what harms inflicted and benefits gained as a result of the reversed decision should be reassigned? By and large, reversed judgments raise only a duty to restore direct benefits that one received from his counterpart in compliance with the revoked decision—money that has been paid thereunder or property that has been misallocated due to the judgment.[3] Litigating parties are not held responsible for wrong judicial decisions and thus need not compensate their counterparts for harms inflicted or disgorged profits generated by the reversed decision. However, this convention has at least one important exception: remedies that are awarded, mainly in the form of compensation for harms, in cases of wrongfully-issued preliminary injunctions.

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1. As wryly and famously stated by Justice Jackson, "[w]e are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953).

2. *See, e.g.*, RESTATEMENT (FIRST) OF RESTITUTION § 72(1) (1937) ("A person who has conferred a benefit upon another by complying with a judgment, or whose property has been taken thereunder, is not entitled to restitution while the judgment remains valid and unreversed, merely because it was improperly obtained, except in a proceeding in which the judgment is directly attacked.").

3. *See infra* Part I.B.

A preliminary injunction is a pre-trial order issued with an explicit awareness of the possibility that it will be proved wrong.[4] This awareness is reflected not only in the courts' reluctance to issue such orders, but also in the demand for the moving party to post a bond that would cover the harms inflicted on any party who is found to have been wrongfully enjoined or restrained.[5] Liability under such a bond can be imposed whenever "it is ultimately found that the enjoined party had . . . the right to do the enjoined act."[6] Yet the plaintiff's liability frequently covers only a fraction of the actual costs and harms inflicted by the injunction.[7] In addition, courts award restitution only of money paid or specific property transferred in accordance with the preliminary injunction, but courts reject most claims for restitution of benefits gained by the plaintiff on the basis of the wrongfully-issued preliminary injunction.[8] Are these practices justified?

Consider, for example, the case of a preliminary injunction that enjoined the defendant from producing and marketing a product based on the plaintiff's claim that the defendant's activities violated the plaintiff's patent. Once the court rejects the plaintiff's claims at the end of trial, and decides that the defendant was entitled to produce and market the product, should the defendant be fully compensated for harms inflicted due to the wrongfully-issued preliminary injunction, including loss of profits? Should the plaintiff be required to disgorge profits she gained from the provisional injunction's adverse effect on competition in the relevant market? What remedies, if any, should be available to third parties who also suffered harm, such as the defendant's potential consumers and suppliers? This Article aims to explore questions of this kind.

The issuance of a preliminary injunction temporarily assigns a legal entitlement to the moving party, such as the power to stop the defendant from acting in a certain way. It serves to prevent the irreparable social harms that would have been inflicted had the court not issued the preliminary injunction.[9] At the same time, because the provisional injunction is issued without a full inquiry into the merits of the case,

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4. *See, e.g.*, Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. CHI. L. REV. 197, 199 (2003) (pointing out that at the preliminary injunction stage courts are typically uncertain about both the likely outcome on the merits and the harms each party faces).

5. *See infra* Part I.A.

6. Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049, 1054 (2d Cir. 1990). *See also infra* Part I.A. The term "wrongfully-issued preliminary injunction" does not necessarily imply that the court erred in issuing the provisional relief, given the available information at the stage of the preliminary proceedings. It only indicates that ultimately, after considering the plaintiff's claim on its merits, the court decided in favor of the defendant.

7. *See infra* Part I.A.

8. *See infra* Part I.B.

9. *See infra* Part II.A.

wrongfully-issued preliminary injunctions may inflict irreparable social harms. One making the decision whether to issue a preliminary injunction should therefore strive to minimize the irreparable harm arising from an erroneous assignment of entitlements at the preliminary stage. Consequently, the underlying aim of remedies for wrongfully-issued preliminary injunctions is two-fold. First, from an *ex-ante* perspective, the remedy should be designed to increase the likelihood that a preliminary injunction is issued only when it is expected to induce less irreparable social harms than those expected if it is not issued. Second, from an *ex-post* perspective, the remedy should contribute to the minimization of irreparable social harms inflicted when a preliminary injunction is issued.

This Article demonstrates that these considerations lead to two central conclusions. First, it is desirable to award the remedy of restitution, which requires the moving party to disgorge *all the benefits* obtained at the expense of the defendant as a result of the wrongfully-issued preliminary injunction. Second, it may be unjustified to compel the plaintiff to compensate the defendant for *all harms* inflicted by the wrongfully-issued preliminary injunction.

From a broader perspective, the analysis enriches our understanding of the variety of aims of restitutionary remedies. Traditionally, restitutionary remedies are considered by the law and economics literature as a vehicle for either internalizing positive externalities[10] or deterring wrongful behavior.[11] The case of a wrongfully-issued preliminary injunction demonstrates a third possible aim of disgorgement of profits—the removal of improper motives to engage in an overall socially desirable behavior. Applying for judicial relief in general, and for a preliminary injunction in particular, are socially desirable activities. It may seem that in order to encourage disputants to turn to the judicial system, the mov-

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10. *See, e.g.*, William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978) (explaining the effect of restitutionary remedies on incentives to take part in rescue activity); Ariel Porat, *Private Production of Public Goods: Liability for Unrequested Benefits*, 108 MICH. L. REV. (forthcoming 2009) (arguing that the law should encourage the creation of positive benefits via restitutionary remedies).

11. Jeff Berryman, *The Case for Restitutionary Damages over Punitive Damages: Teaching the Wrongdoer that Tort Does Not Pay*, 73 CAN. BAR REV. 320 (1994); Daniel Friedmann, *Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504, 551–56 (1980) (providing examples of cases in which "consideration of deterrence and punishment, coupled with the basic idea that man ought not to profit from his own wrong, have led to the development of rules governing forfeiture of ill-gotten gains"); Ofer Grosskopf, *Protection of Competition Rules via the Law of Restitution*, 79 TEX. L. REV. 1981, 2007–08 (2001) (stating that restitution can advance the goal of effective deterrence against the breach of competition rules better than damages).

ing party should be given immunity from tortious liability. However, such immunity might invite misuse. Plaintiffs may turn to the court, not only when they believe in their cause, but also to extract undeserved benefits.[12] Establishing an expansive duty to disgorge profits derived from unsuccessful litigation can mitigate the threat of frivolous suits without jeopardizing the principle of free access to the courts. The case of remedies for wrongfully-issued preliminary injunctions thereby demonstrates that restitution can serve as a middle ground between the ideal, which drives us to confer rights and liberties, and reality, which forces us to be mindful of their misuse.

This Article proceeds as follows. Part I summarizes the law of remedies for wrongfully-issued preliminary injunctions. Part I.A surveys the doctrinal reasons for imposing on the moving party only partial liability for the defendant's harms, while Part I.B presents the very limited availability of the remedy of restitution for wrongfully-issued preliminary injunctions under current law. Part II lays the theoretical ground for the analysis. Part II.A discusses the underlying purpose behind issuing a preliminary injunction: the minimization of the irreparable loss of rights resulting from an erroneous assignment of entitlements at the preliminary stage. Part II.B presents the standard for issuing a preliminary injunction. Part II.C analyzes the possible paths by which the remedy for wrongfully-issued preliminary injunctions achieves this aim. Part III deals with the *ex-post* perspective, and shows that the remedy of restitution is better suited to achieve the aim of minimizing irreparable social harms. Part IV inquires into the role remedies for wrongfully-issued preliminary injunctions play in shaping the parties' incentives in deciding whether to apply for a preliminary injunction, and shows the superiority of the restitutionary remedy in this respect.

I. THE LAW OF REMEDIES FOR WRONGFULLY-ISSUED PRELIMINARY INJUNCTIONS

There are two possible types of remedies for wrongfully-issued preliminary injunctions: compensating the enjoined party (usually the defendant) for his losses, and recovering the gains accrued to the plaintiff.[13] This Part provides a brief overview of the current legal doctrines and practices regarding these two remedies.

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12. *See, e.g.*, Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988); David Rosenberg & Steven Shavell, *A Model in Which Suits are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985).

13. The plaintiff may not always be the party requesting a preliminary injunction, but for simplicity of exposition throughout this Article we refer to the party seeking a preliminary injunction as the plaintiff.

A. Compensation for Harms

According to Rule 65(c) of the Federal Rules of Civil Procedure, the applicant for a preliminary injunction is required to give a security (a bond) "in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."[14] On the basis of this provision, courts impose liability upon the bond to compensate the defendant for his costs and damages resulting from a wrongfully-issued preliminary injunction. Liability upon the bond may be imposed whenever the preliminary injunction has deprived the defendant of rights to which he was entitled.[15] The defendant need not prove that the issuance of the preliminary injunction was an abuse of discretion at the time it was issued.[16] However, in practice, the plaintiff often bears only part of the actual costs incurred and harms suffered as a result of the issuance of a wrongfully-issued preliminary injunction. Three doctrines induce this outcome.

The first is that the trial court has the power—and perhaps even the duty—to consider the equities of the case before imposing liability upon the bond and awarding damages by extracting from the bond that was created prior to the proceedings.[17] This doctrine was set forth in the Supreme Court's 1882 decision in *Russell v. Farley*,[18] in which the Court reasoned that since "no Act of Congress, or rule of this court" compelled a court to require a bond before issuing a preliminary injunction, even in

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14. FED. R. CIV. P. 65(c). Most states replicate Rule 65(c) with some minor changes. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 196 (2d abr. ed. 1993).

15. *See, e.g.*, Global NAPs, Inc. v. Verizon New Eng., Inc., 489 F.3d 13, 22–23 (1st Cir. 2007) ("An injunction can be 'wrongful' for Rule 65(c) purposes even when the initial issuance of the injunction was proper. . . . [U]nder Rule 65(c), a party is wrongfully enjoined when it had a right all along to do what it was enjoined from doing."); Slidell, Inc. v. Millennium Inorganic Chems., Inc., 460 F.3d 1047, 1059 (8th Cir. 2006). *See also* DOBBS, *supra* note 14, at 202–03; Elizabeth Leight Quick, Comment, *The Triggering of Liability on Injunction Bonds*, 52 N.C. L. REV. 1252, 1256 (1974); Note, *Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c)*, 99 HARV. L. REV. 828, 836–42 (1986) [hereinafter *Recovery for Wrongful Interlocutory Injunctions*].

16. Difficult questions, which we do not discuss here, arise when the plaintiff prevails on the merits but only in part. For a discussion, see DOBBS, *supra* note 14, at 203: "The cases suggest a wide range of possible solutions, but no real rationale."

17. *See, e.g.*, Lawrence v. St. Louis-San Francisco Ry., 278 U.S. 228 (1929) (the trial court may "refuse to allow recovery of any damages [on an injunction bond], even if the permanent injunction should be denied"); Kansas *ex rel.* Stephan v. Adams, 705 F.2d 1267, 1269–70 (10th Cir. 1983) ("[The] court is not bound to award damages on the bond without considering the equities of the case. . . . [A] court, in considering the matter of damages, must exercise its equity power and must effect justice between the parties, avoiding an inequitable result."); Monroe Div., Litton Bus. Sys., Inc. v. De Bari, 562 F.2d 30, 33 (10th Cir. 1977) ("Equity comes into play in determining whether there may be recovery and the amount thereof."); H & R Block, Inc. v. McCaslin, 541 F.2d 1098, 1099 (5th Cir. 1976) ("The awarding of damages pursuant to an injunction bond rests in the sound discretion of the court's equity jurisdiction.").

18. Russell v. Farley, 105 U.S. 433 (1882).

cases in which the court did require a bond, it has "the power to mitigate the terms imposed [by the bond], or to relieve from them altogether."[19] Arguably, "[r]eliance on the *Russell* decision today is unwarranted because its reasoning is explicitly based on the absence of a rule such as Rule 65(c)."[20] Nevertheless, the prevailing view is that courts retain their discretionary power to deny full, or even any, recovery on the bond.[21]

A second reason for partial liability is the value of the bond. Notwithstanding the language of Rule 65(c), the sum of the bond is often lower than the costs incurred and damages suffered by parties who were wrongfully restrained. The court sets the bond at an early stage of the litigation when the defendant's possible costs and harms are often underestimated.[22] Moreover, courts frequently set the bond amount on the basis of considerations such as the plaintiff's financial means[23] or the public interest in the suit, which are not related to the defendant's expected costs and harms.[24] Because the bond sets the upper limit for the

19. *Id.* at 441–42.

20. *Recovery for Wrongful Interlocutory Injunctions*, *supra* note 15, at 843.

21. *See, e.g.*, Page Commc'ns Eng'rs, Inc. v. Froehlke, 475 F.2d 994, 997 (D.C. Cir. 1973) (Rule 65(c) "was not intended to negate the court's duty" to consider the equities of awarding damages on the bond, as it "gives the court discretion to fix bond in a nominal amount; clearly, the Rule does not contemplate that a defendant who is wrongfully enjoined will always be made whole by recovery of damages."); *H & R Block*, 541 F.2d at 1099. According to another view, followed by other circuits, the court's discretion is much more limited. *See* Coyne-Delany Co. v. Capital Dev. Bd. of Ill., 717 F.2d 385, 391 (7th Cir. 1983) ("The draftsmen [of Rule 65(c)] must have intended that when such damages were incurred the plaintiff or his surety . . . would normally be required to pay the damages, at least up to the limit of the bond."). However, even the latter approach acknowledges the trial court's discretion: "a prevailing defendant is entitled to damages on the injunction bond unless there is a good reason for not requiring the plaintiff to pay in the particular case." *Id.* For a review of the case law, see *Recovery for Wrongful Interlocutory Injunctions*, *supra* note 15, at 842–46, and DOBBS, *supra* note 14, at 200–05.

22. *See, e.g.*, DOBBS, *supra* note 14, at 205 ("Injunction bond cases raise many problems, not the least of which is the fact that judges often underestimate the potential harm to a defendant.").

23. Erin Connors Morton, *Security for Interlocutory Injunctions Under Rule 65(c): Exceptions to the Rule Gone Awry*, 46 HASTINGS L. J. 1863, 1892 (1995) ("The 'wide discretion' given [to the trial courts in setting the appropriate bond amount] include reducing the bond amount to reflect the likelihood of success on the merits of the injunction; setting a low amount when the plaintiff appears financially responsible . . . ; extending the indigency exception to middle-class parties suing their insurers or former employers; or reading Congressional purpose to waive the bond into an expanding number of federal statutes.").

24. *See, e.g.*, Kansas *ex rel.* Stephan v. Adams, 705 F.2d 1267, 1270 (10th Cir. 1983); *H & R Block*, 541 F.2d at 1099; *Page Commc'ns*, 475 F.2d at 997. For a review of the case law, see DOBBS, *supra* note 14, at 200–05; Reina Calderon, *Bond Requirements Under Federal Rule of Civil Procedure 65(c): An Emerging Equitable Exemption for Public Interest Litigants*, 13 B.C. ENVTL. AFF. L. REV. 125 (1985); Morton, *supra* note 23, at 1885–91; and *Recovery for Wrongful Interlocutory Injunctions*, *supra* note 15, at 842–46.

defendant's recovery,[25] the plaintiff often bears only part of the defendant's actual costs and harms.[26]

Finally, the plaintiff does not bear the full cost of a wrongfully-issued preliminary injunction because she is not liable for the injunction's effects on third parties. The bond posted under Rule 65(c) does not cover the injuries inflicted on those who were not formally restrained but nevertheless suffered an injury, such as suppliers and consumers who were harmed due to the preliminary injunction's adverse effect on competition in the relevant market.[27] Such third parties may have a cause of action in restitution for actual payments they made to the plaintiff,[28] but they are not entitled to compensation for their own damages.

The combined effect of these doctrines is that the plaintiff ends up assuming only part of the social harm caused by the wrongfully-issued preliminary injunction.[29]

B. Restitution of Benefits

In several decisions, the Supreme Court has recognized the right to restitution of money paid in accordance with a judgment that was subsequently reversed.[30] Section 74 of the Restatement of Restitution summarizes this line of cases by stating that "a person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside." This rule applies to wrongfully-issued prelimi-

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25. *See, e.g.*, W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 770 n.14 (1983) ("A party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond."); Int'l Ass'n of Machinists v. Eastern Airlines, Inc., 925 F.2d 6, 10 (1st Cir. 1991) (finding liability is limited to the terms of the bond unless malicious prosecution or bad faith is proved). *See also* DOBBS, *supra* note 14, at 197–99.

26. An example is the decision in *Bragg v. Richardson*, 54 F. Supp. 2d 635 (S.D. W. Va. 1999), in which the court granted a preliminary injunction and required the plaintiffs to post only a "nominal" bond of $5,000, stating that "[a]ny other result would effectively deny Plaintiffs' right of judicial review of the challenged policy . . . ." *Id.* at 653. The court of appeals reversed the injunction, leaving the defendants with an uncompensated injury. Bragg v. W. Va. Coal Ass'n, 248 F.3d 275 (4th Cir. 2001).

27. *See, e.g.*, A. J. Phipps, *Non-party Compensation for Wrongful Interim Injunctions:* Smith-Kline Beecham Plc v. Apotex Europe Ltd., 26 CIV. JUST. Q. 10 (2007) (discussing this issue under English law).

28. *See infra* Part I.B.

29. Dan B. Dobbs, *Should Security be Required as a Pre-Condition to Provisional Injunctive Relief?*, 52 N.C. L. REV. 1091, 1122–25 (1974).

30. *See, e.g.*, Baltimore & Ohio R.R. v. United States, 279 U.S. 781 (1929) (ordering restitutions of all payments made by the appellants in favor of the appellees, pursuant to a judgment subsequently reversed); Nw. Fuel Co. v. Brock, 139 U.S. 216 (1891). *See also* Rodger v. Comptoir d'Escompte de Paris, (1871) L.R. 3 P.C. 465 (appeal taken from H.K.).

nary injunctions as well, and the prevailing view is that such claims of restitution are not capped by the amount of the bond.[31]

Under current law, however, the remedy of restitution for wrongfully-issued preliminary injunctions is very limited. Restitution is available almost exclusively in cases in which a sum of money or a specific property had been transferred from the defendant to the plaintiff on the basis of the preliminary injunction; thus, only "restitution in kind" or "money had and received" is available.[32] Indeed, all thirty-two illustrations given by the Reporters of the Restatement of Restitution are cases in which "money has been paid" or "property has been transferred."[33] This restriction is further emphasized in section 17 of the draft of the Restatement of the Law (Third) on Restitution and Unjust Enrichment, which explicitly limits restitutionary rights in the case of "judgment subsequently reversed or avoided" to "transfer or taking of property."[34]

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31. *See, e.g.*, Arkadelphia Milling Co. v. St. Louis Sw. Ry., 249 U.S. 134, 145–46 (1919); Nat'l Kidney Patients Ass'n v. Sullivan, 958 F.2d 1127, 1136 (D.C. Cir. 1992); Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc., 788 F. Supp. 616, 622 (D. Mass. 1992) ("When a party has received money or property by virtue of an injunction subsequently reversed, he may be compelled to make restitution even in the absence of an injunction bond."). *See also* DOBBS, *supra* note 14, at 199; Dobbs, *supra* note 29, at 1136–37.

32. *See, e.g.*, Tenth Ward Road Dist. No. 11 of Avoyelles Parish v. Texas & P. Ry. Co., 12 F.2d 245, 247 (5th Cir. 1926) ("In this case the appellee received under the restraining order only a delay in the collection of the tax, while the restraining order was in force. It is conceded that this is not susceptible of restoration in kind. It is not in the power of the court to order appellee to turn the clock back."). In *Tenth Ward*, the court found that "[t]here can be no restoration in the absence of a receipt of the fruits of the decree, and the limitation upon the application of the principle is to cases in which the party received under the decree what he is asked to restore to the adverse party, upon its reversal." *Id. See also* Dobbs, *supra* note 29, at 1141–42 (arguing that the case law "may suggest not only that restitution will be denied unless the plaintiff's gains are traceable to and identifiable with the defendant's losses, but also that the gains must be *directly* traceable"); Eugene J. Metzger & Michael E. Friedlander, *The Preliminary Injunction: Injury Without Remedy?*, 29 BUS. LAW. 913, 920 (1974) ("Notwithstanding the apparent ray of hope emanating from the *Restatement* and from the theory of unjust enrichment, the practical result of the use of these theories has historically not been too promising. Most courts have simply refused to grant relief. . . .").

33. RESTATEMENT (FIRST) OF RESTITUTION § 74 cmt. b (1937). An award of a restitutionary remedy is demonstrated in the following cases. *See, e.g.*, *Nat'l Kidney Patients Ass'n*, 958 F.2d at 1127 (allowing restitution from a health provider of Medicare payments made under a preliminary injunction that was vacated); St. Louis Sw. Ry. Co. of Texas v. Consol. Fuel Co., 260 F. 638, 640 (8th Cir. 1919) (holding that when the defendant was ordered to supply coal to the plaintiff by a preliminary injunction "[i]t would be a grave reproach to the administration of justice if, when a court has wrongfully taken the property of one party and given it to another, it should be powerless to make restitution. The law is otherwise."); Bedell Co. v. Harris, 240 N.Y.S. 550 (N.Y. App. Div. 1930) (ordering a preliminary injunction preventing the eviction of a tenant after the lease had expired). Nonetheless, even in such cases, the courts have equitable discretion to deny restitution. *See, e.g.*, Atlantic Coast Line R.R. Co. v. Florida, 295 U.S. 301 (1935).

34. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 17 (Discussion Draft 2000). The full text of section 17 is as follows: "A transfer or taking of property, in compliance with or otherwise in consequence of a judgment that is subsequently reversed or avoided, gives the disad-

Most preliminary injunctions do not order money to be paid or property to be transferred, but rather freeze the status quo. Consequently, the narrow reading of the right to restitution for wrongfully-issued preliminary injunctions makes this remedy unattainable in most cases.[35] Moreover, even in the rare cases in which the court concedes that the remedy should be more freely available, the restitutionary claim is usually rejected on evidentiary grounds or on the basis of the court's equitable discretion.[36]

A similar reluctance to use restitution as a remedy for wrongfully-issued preliminary injunctions is evident in other common law countries. In the recent case of *SmithKline Beecham PLC v. Apotex Europe Ltd.*, the English Court of Appeal rejected such a claim, stating that "it seems clear that both the United States and Australian courts have clearly decided that there is no general principle of restitution available to a party harmed by a 'wrong' court order."[37] In fact, to the best of our knowledge, only one common law jurisdiction, Israel, allows an expansive use of the restitutionary remedy in this context.[38] The same approach applies to claims of restitution by non-parties. L.J. Jacob, referring to the U.S. law, observed the following in *SmithKline*:

> [I]f a restitutionary claim lay for every non-party who loses money or has to pay more as a result of a "wrongful" injunction, whether interim or final, I would expect there to be masses of claims by way

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vantaged party a claim in restitution to the extent necessary to avoid unjust enrichment." *Id.* The comments and illustrations for this section deal with the transfer of money or property rights (illustration 3 deals with the case of a wrong compulsory license). *Id.* There is no reference to the case of preliminary injunctions, or to the case law that is henceforth mentioned. *Id.*

35. *See, e.g.*, FilmTec Corp. v. Hydranautic, 67 F.3d 931, 940 (Fed. Cir. 1995) (Newman, J., concurring).

36. *See, e.g.*, *Atlantic Coast Line R.R.*, 295 U.S. 301; Texaco P.R., Inc. v. Dep't of Consumer Affairs, 60 F.3d 867 (1st Cir. 1995); Greenwood County v. Duke Power, 107 F. 2d 484 (4th Cir. 1939).

37. SmithKline Beecham PLC v. Apotex Europe Ltd., [2007] Ch. 71, 89. In this case the English Court limited the restitutionary remedy to cases in which the wrong judgment allowed the plaintiff to use the defendant's property. In Australia, the Supreme Court of Victoria imposed a similar limitation. *See* Nat'l Australia Bank Ltd. v. Bond Brewing Holdings Ltd. (1991) 1 V.R. 386, 598 (Brooking, J.) ("[T]he principle of Rodger's Case allows no more than the passing back to that party of what has been taken from him.").

38. The leading Israeli precedent on this matter is CA 280/73 Palimport Ltd. v. Ciba-Geigy Ltd. [1975] IsrSC 29(1) 597, in which the Israeli Supreme Court allowed the plaintiff to sue for the profits made by the defendant due to a wrong restraining order that the latter received against the former in a previous litigation. For a discussion of this case, see Friedmann, *supra* note 11, at 537–38. *See also* Daniel Friedmann, *Valid, Voidable, Qualified, and Non-existing Obligations: An Alternative Perspective on the Law of Restitution*, *in* ESSAYS ON THE LAW OF RESTITUTION 247, 265 (A. Burrows ed., 1991) (describing the case as a "landmark decision"). This Israeli case was also discussed at some length by L.J. Jacob in *SmithKline*, who summarized the discussion with the following observation: "[I]s there a real prospect that the Israeli case would be followed here? . . . I have no doubt that it would not be so followed." *SmithKline*, [2007] Ch. at 96.

> of class action run on a contingency fee basis. But no one has pointed to any such case.[39]

U.S. courts consider the possibility of awarding restitutionary remedies for wrongfully-issued preliminary injunctions in two main types of cases. The first type involves benefits obtained by restraining the defendant from competing with the plaintiff. It consists, for instance, of cases in which a preliminary injunction was issued to protect a patent that is eventually declared invalid, thus providing the plaintiff with an unwarranted monopoly status during the litigation. Similarly, benefits are sometimes derived from postponing the completion of a project that would have adversely affected the plaintiff's interests. Courts have systematically rejected attempts by defendants to obtain restitution of such benefits.[40] They reason that a plaintiff who has benefitted from a wrongfully-issued restraining order is not considered as acting "wrongfully," at least for the purpose of the law of unjust enrichment.[41] It is often suggested that in such cases "[n]othing was taken from [the defendant] by the injunction and given to the plaintiff,"[42] and that the defendant is not in position to establish his own loss of any of the profits alleged to have been made by the moving party.[43]

The second category of cases involves benefits generated by enjoining the use of the defendant's powers, such as tax collection,[44] or enforcement of price or wage control. In such cases, courts are much more willing to employ restitutionary remedies in order to prevent unjust enrichment. In the famous 1919 case of *Arkadelphia Milling Co. v. St. Louis Southwestern Railway Co.*,[45] railroad companies obtained a preliminary injunction to keep state commissioners from enforcing certain railway freight rates. When the rate regulation was eventually upheld, the Supreme Court affirmed that the railroad companies were liable to refund those who purchased their services for the difference between the

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39. *SmithKline*, [2007] Ch. at 90.

40. *See, e.g.*, FilmTec Corp. v. Hydranautic, 67 F.3d 931 (Fed. Cir. 1995); United Motors Serv., Inc. v. Tropic-Aire, Inc., 57 F.2d 479, 483–84 (8th Cir. 1932); Glaxo Group Ltd. v. Leavitt, 481 F. Supp. 2d 434 (D. Md. 2007); *SmithKline*, [2007] Ch. 71. The only exceptions we are familiar with are cases in which the preliminary injunction allowed the plaintiff to keep the defendant's property or required the defendant to continue to provide a service for the plaintiff. *See supra* note 33.

41. *See, e.g.*, *Glaxo Group*, 481 F. Supp. 2d at 437; Teel v. Hamilton-Wenham Reg'l Sch. Dist., 433 N.E.2d 907 (Mass. 1982).

42. *United Motors*, 57 F.2d at 484. *See also* Greenwood County v. Duke Power, 107 F.2d 484, 487 (4th Cir. 1939) (holding that the wrongfully restrained party "has lost nothing which the [moving party] has received").

43. *United Motors*, 57 F.2d at 488.

44. *See, e.g.*, Tenth Ward Road Dist. No. 11 of Avoyelles Parish v. Tex. & P. Ry. Co., 12 F.2d 245 (5th Cir. 1926).

45. 249 U.S. 134 (1919).

rates prescribed by the commission and those charged by the railway companies.[46] The Supreme Court held that the railroad companies' customers were entitled to restitution, even though they were not party to the original proceedings.[47] The Court noted that "during the time that those decrees remained unreversed the railway companies obtained the benefit of the injunction by exacting from [its customers] excess charges. It is a typical case for the application of the principle of restitution."[48] Subsequent cases followed this ruling.[49] This outcome is consistent with the doctrine described above of awarding restitution to those who *directly* transferred sums of money to the plaintiff as a result of the preliminary injunction.

The *Arkadelphia* decision may suggest that the regulator represents the customers not only in defending the rate schedules, but also in collecting the plaintiff's unjust enrichment. The Court pointed out that "[t]he railroad commission, in defending the rate schedules against the attack of the railway companies, represented all shippers."[50] However, courts mostly reject claims for restitution by regulators on the basis of the equitable nature of this remedy.[51] Among the few exceptions to this rule is the 1958 D.C. Circuit Court of Appeals decision in *Mitchell v. Riegel Textile*,[52] where the court allowed the Secretary of Labor to collect the profits made by employers from the delay in enforcing a minimum wage order. The court of appeals noted that the difference between the wages paid while the injunction was in effect and the minimum wage that the Secretary had fixed was "the amount by which the plaintiffs were unjustly enriched at the employees' expense. Since separate suits by each employee would be unreasonably burdensome to the parties and the courts, the Secretary may recover as the representative of

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46. *Id.* at 145 ("A party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby. . . . [This] course of action . . . is one of the equitable powers, inherent in every court of justice . . . .").

47. *Id.* at 146.

48. *Id.* It should be further noted that in this case the preliminary injunction was issued under the explicit condition that the companies would refund their customers if the complaint was discharged. *Id.* at 138.

49. *Ex parte* Lincoln Gas & Elec. Light Co., 256 U.S. 512, 517–19 (1921); Middlewest Motor Freight Bureau v. United States, 433 F.2d 212, 224–40 (8th Cir. 1970); Williams v. Wash. Metro. Area Transit Comm'n, 415 F.2d 922, 941–47 (D.C. Cir. 1968).

50. *Arkadelphia Milling Co.*, 249 U.S. at 146.

51. *See, e.g.*, Texaco P.R., Inc. v. Dep't of Consumer Affairs, 60 F.3d 867 (1st Cir. 1995) (affirming the denial of a restitutionary claim that was brought by the Puerto Rico Department of Consumer Affairs against petroleum wholesalers who were shielded against its imposed price controls for several years by injunctions).

52. 259 F.2d 954 (D.C. Cir. 1958).

all employees."[53] Afterwards, the Secretary moved the district court for an order requiring the plaintiffs to make good on their underpayments of wages, with interest.[54]

To sum up, while courts readily require the moving party to assume (often partial) liability for the harms inflicted by a wrongfully-issued preliminary injunction, they are much more reluctant to award a restitutionary remedy of disgorgement of profits.

II. PURPOSES OF REMEDIES FOR WRONGFULLY-ISSUED PRELIMINARY INJUNCTIONS

Remedies for wrongfully-issued preliminary injunctions should be designed to enhance the underlying aim of preliminary injunctions—minimizing social harm. We start with a brief survey of this purpose (Part II.A) and a description of the standard used for issuing a preliminary injunction (Part II.B), before moving on to present the possible paths through which remedies for wrongfully-issued preliminary injunctions can contribute to achieving this aim (Part II.C).

A. Aim of Issuing Preliminary Injunctions

It takes time, often months and even years, to decide a case and to provide an effective remedy for the protection of rights.[55] During this period, irreversible events may make the legal remedy ineffective. Preliminary pre-trial remedies are designed to ease this problem by mitigating the risk of the occurrence of such irreversible events.[56] John Leubsdorf even argued that a plaintiff may have a constitutional right to preliminary relief since "a state which arbitrarily denies a plaintiff a remedy deprives him of his property right in his cause of action without due process of law."[57] To achieve its goal, the preliminary remedy must

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53. *Id.* at 955. The Court added that "[i]t is immaterial that the traditional word 'restitution' is not clearly applicable to these case [sic] in which unjust enrichment has resulted from paying too little and not from collecting too much. Equitable principles are not confined by rigid formulas. As soon as the underpayments were made, unjust enrichment was complete." *Id.* at 955–56.

54. *Id.* at 955.

55. For instance, the median time intervals from filing to disposition of civil cases in which trial was completed by U.S. district courts during the twelve-month period ending September 30, 2008, was thirty-two months. JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 174 (2008), *available at* http://www.uscourts.gov/judbus 2008/JudicialBusinespdfversion.pdf.

56. The preliminary relief may also prevent the defendant from inflicting reparable harms during the trial, and may thus save the plaintiff the litigation costs of suing for compensation for these harms and protect the plaintiff from the risk of judicial error of awarding insufficient compensation. *See infra* note 67.

57. John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 621 (1984). Leubsdorf argues that the Supreme Court's decision in *Logan v. Zimmerman Brush Co.*, 407 U.S. 67 (1972), implies that the state's denial of a remedy is a "state action," bringing the due process clause

be issued quickly and early in the course of litigation, before all the evidence can be studied or even made available. Accordingly, a temporary restraining order may sometimes be issued *ex parte*.[58] Preliminary injunctions are issued on the basis of a hearing; however, the hearing "is usually attenuated and much less than due process would require for a full trial."[59] It is widely recognized that to meet the due process requirements it is sufficient to offer the defendant a speedy, even if only rudimentary, hearing after the issuance of a restricting order, with the right to damages for wrongful injunctions.[60]

The decision whether to issue a preliminary injunction—including temporary restraining orders—raises an inherent difficulty. On the one hand, this relief is often an essential tool for protecting the plaintiff's interests, given the legal system's deficiencies in providing final remedies in due course and the prospect of irreparable harms. On the other hand, the fact that the relief is issued without a full inquiry into the merits of the case entails a substantial risk that the issuance of the preliminary injunction will unjustifiably harm the defendant, as well as third parties and the public interest.[61] The required inquiry, then, is which preliminary decision will "minimize the probable irreparable loss of rights"[62] from an erroneous (preliminary) assignment of entitlements.

B. Standard of Issuing Preliminary Injunctions

Preliminary relief should be issued only if (1) the injunction is required to prevent an irreparable harm, and (2) this expected harm outweighs the expected irreparable harm imposed as a result of the pre-

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into play. *See also* David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 629 (1988) ("By denying protection to a plaintiff who has successfully proven that only an injunction will prevent illegal and irreparable harm, the judge leaves the plaintiff short of the rightful position.").

58. A temporary restraining order may not exceed 10 days, unless the court finds good cause or the restrained party consents to such an extension. *See* Fed. R. Civ. P. 65(b).

59. DOBBS, *supra* note 14, at 184.

60. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (upholding procedures that offer the defendant a speedy hearing after the state acts, with damages for any improper action); Friends For All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 832 (D.C. Cir. 1984) (same). *See also* Leubsdorf, *supra* note 57, at 620–24. In contrast, it is probably unconstitutional to issue a temporary restraining order without any notice to the restrained defendant, when the order inflicts serious injury and the defendant could be given a chance to argue against it without any harm to the plaintiff. *Id.* at 621. For instance, the Supreme Court has limited the power of states to freeze bank accounts without adequate procedural safeguards against abuse. *See* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

61. *See, e.g.*, DOBBS, *supra* note 14, at 187 ("The potential for abuse and error in injunctive orders is usually very large.").

62. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 525 (1978).

liminary injunction.[63] This general standard, known as the "Leubsdorf-Posner" error-minimizing formulation,[64] is often (at least implicitly) applied by courts,[65] along with the more traditional, four-factor "balance of the hardships" test.[66] Some aspects of the "expected irreparable harm" concept have been analyzed extensively in literature. Among these are the debate about risk aversion as a possible reason for the inherent inadequacy of a pecuniary remedy to compensate for harms[67] and the concern that a delay in providing relief would result in a party's insolvency.[68] In

63. Thus, it is immaterial whether the moving party seeks to preserve the status quo or to deviate from it. *See, e.g.*, Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 157–66 (2001) (arguing that the heightened standard in cases of preliminary injunction that upset the status quo is historically and theoretically unsound, and supporting a uniform standard).

64. This formulation was first suggested by Professor John Leubsdorf. *See* Leubsdorf, *supra* note 62. It was later developed by Judge Richard Posner in his opinion in *American Hospital Supply Corp. v. Hospital Products, Ltd.*, 780 F.2d 589 (7th Cir. 1986) (holding that a preliminary injunction should be issued "only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error"). *See also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 595–96 (7th ed. 2007).

65. *See, e.g.*, Micro Signal Research, Inc. v. Otus, 417 F.3d 28, 31 (1st Cir. 2005); Roland Machinery Co. v. Dresser Indus., 749 F.2d 380 (7th Cir. 1984); Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984) (The goal of the preliminary injunction doctrine is "to minimize the risk that a litigant will suffer an irreparable loss of legal rights in the period before final resolution of the dispute."); Constructors Ass'n of W. Pa. v. Kreps, 573 F.2d 811, 815, 815 n.8 (3d Cir. 1978). For a review of the application of this formulation, see DOBBS, *supra* note 14, at 191–92 ("A number of cases now adopt the Leubsdorf formula, or one that seems practically indistinguishable."); Joshua P. Davis, *Taking Uncertainty Seriously: Revising Injunction Doctrine*, 34 RUTGERS L.J. 363, 367 (2003) ("Reliance on an analysis fundamentally akin to Leubsdorf's framework is now common in federal courts."); Ann E. Heiny, *Formulating a Theory for Preliminary Injunctions:* American Hospital Supply Corp. v. Hospital Products Ltd., 72 IOWA L. REV. 1157 (1987); Lee, *supra* note 63, at 154 ("The economic model proposed by Leubsdorf and refined by Posner has since emerged as the triumphant, dominant theory of preliminary injunctions.").

66. According to this test, the relevant requirements are: (1) a reasonable likelihood of success on the merits, (2) irreparable harm if the injunction is not granted, (3) an evaluation of the balance of hardships, and (4) an assessment of the impact of the injunction on the public interest. *See, e.g.*, Genentech, Inc. v. Novo Nordisk A/S, 108 F.3d 1361 (Fed. Cir. 1997). For a discussion of the different standards, see Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495 (2003), pointing at substantial inconsistencies in the standard applied by the federal courts; and Arthur D. Wolf, *Preliminary Injunctions: The Varying Standards*, 7 W. NEW ENG. L. REV. 173 (1984), discussing the same.

67. *See, e.g.*, Am. Hosp. Supply Corp. v. Hosp. Prods., Ltd., 780 F.2d 589, 597 (7th Cir. 1986) ("When a court speaks of damages as being 'irreparable' because they are difficult to measure it can mean only that confining the injured party to a remedy of damages creates a risk he may not like (because he is risk adverse . . .), even though the upside risk is as large as the downside risk."); *cf.* Douglas Lichtman, *Irreparable Benefits*, 116 YALE L.J. 1284, 1292 (2007) ("Most irreparable harms . . . are irreparable only in the sense that the harm at issue is difficult for a court to value.").

68. *See* Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 329–33 (1999) (the risk that the defendant will become insolvent does not establish the plaintiff's right to a preliminary injunction). *Cf. Am. Hosp.*, 780 F.2d at 597 ("A preliminary injunction that will or

what follows, we briefly comment on two other aspects of this formulation.

First, the issuance of a preliminary injunction inflicts relevant harm only if it turns out that the relief *wrongly* enjoined a party; respectively, the issuance of a preliminary injunction prevents relevant harm only if it turns out that it *rightly* enjoined a party. Therefore, the scope of the irreparable harm if the injunction is not issued should be discounted by the likelihood that the plaintiff will win the case as evaluated at the pre-trial stage; the amount of irreparable harm if the injunction is issued should be similarly discounted according to the defendant's likelihood of success.[69] Hence, the relevant comparison is between the *expected value* of the irreparable harm each of the possible decisions would cause.[70]

This approach is based on the notion that an "efficient" preliminary injunction is one that minimizes costs *given* a certain set of legal rights, i.e., given a certain distribution of entitlements.[71] The underlying assumption is that legal rights have their merit. Disrupting the allocation

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may precipitate a firm into bankruptcy is . . . a source of costs which ought to be considered in deciding whether to grant such an injunction."); Carter-Wallace, Inc. v. Davis-Edwards Pharmacal Corp., 443 F.2d 867, 886 (2d Cir. 1971) (Friendly, J.); Lars E. Johansson, *The Mareva Injunction: A Remedy in the Pursuit of the Errant Defendant*, 31 U.C. DAVIS L. REV. 1091, 1092 (1998); Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 WASH. L. REV. 257, 263 (1992); Note, *Leading Cases: II. Federal Jurisdiction and Procedure: B. Equity Jurisdiction: Preliminary Injunctions on Debtors' Assets*, 113 HARV. L. REV. 316, 324–26 (1999) (stating that injunctive relief is appropriate if an investor does not have adequate legal remedy in the case of the debtor's insolvency).

69. For a suggestion to refine this standard, see Davis, *supra* note 65, stating that each party's irreparable harm should be discounted according to the likelihood that the party is right, rather than the likelihood that the actual result of the trial will be in its favor, thus accounting for the court's degree of confidence about the merits of a case; and Lichtman, *supra* note 4, suggesting to take into account the court's level of uncertainty about its estimates of the harms.

70. This formulation thus represents a "sliding scale" approach, which allows a party with less than a 50% chance of winning on the merits to succeed on the motion. DOBBS, *supra* note 14, at 193–96 ("The plaintiff with less than a 50% chance of success could still justly receive . . . pretrial assistance if it will prevent an enormous irreparable loss compared to a minimal loss for the defendant."). For a critique, see Linda J. Silberman, *Injunctions by the Numbers: Less than the Sum of Its Parts*, 63 CHI.-KENT L. REV. 279, 304–07 (1987), finding that the formula deviates from "the traditional standard for issuance of preliminary injunctions" since it "does not suggest that any threshold amount of harm or probability of success is necessary"; and Denlow, *supra* note 66, at 538. *See also* Centurion Reinsurance Co. v. Singer, 810 F.2d 140, 145 (7th Cir. 1987) ("No matter how strongly the balance of irreparable harms may incline in favor of the party asking for a preliminary injunction, it is error to grant the injunction if the party has . . . only a very slight chance of prevailing on the merits."); Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) ("The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits.").

71. For a similar approach, see John Leubsdorf, *Preliminary Injunctions: In Defense of the Merits*, 76 FORDHAM L. REV. 33, 44 (2007), stating that "[i]t would be better for courts to retain the law as their initial guide to deciding what conduct is socially undesirable, even at the interlocutory stage, rather than trying to evaluate efficiency on a case-by-case basis."

structure they create is thus costly. It may, for example, hinder incentives to invest. This "entitlement-sensitive" formulation is distinguished from an "entitlement-blind" approach, which is based solely on an evaluation of the aggregated effects of the preliminary injunction on social welfare.[72] To illustrate, assume that the irreparable harm if the injunction is not issued is $100, and that the irreparable harm if it is issued is $80. The entitlement-blind approach calls for the issuance of a preliminary injunction *regardless* of the likelihood of the possible outcomes of the trial, as the assignment of the entitlement to the plaintiff in this case yields a higher value (a savings of $100) than its alternative ($80). However, under the entitlement-sensitive formulation, it is inefficient to issue the preliminary injunction if the likelihood that the entitlement assigned to the defendant is high enough (in this example, if this likelihood exceeds 56%).[73] Examining the justifications for adopting an "entitlement-sensitive" approach is beyond the scope of our inquiry. It suffices to say that various reasons can justify requiring the court to be entitlement-sensitive in the present scenario, including the public interest in confining public authorities to lawful actions, and evidentiary difficulties, such as the complexity of assessing and providing full compensation. Accordingly, in the discussion that follows, the term "efficient preliminary injunction" is used to denote an application of the entitlement-sensitive approach.

The second comment refers to the definition of the relevant harms in the error-minimizing formulation. As indicated above, according to this formulation, preliminary relief should be issued only if (1) the injunction is required to prevent an irreparable harm, and (2) this expected harm outweighs the expected irreparable harm imposed as a result of the preliminary injunction. As indicated, the standard for issuing preliminary injunctions should aim at minimizing judicial errors.[74] Under an efficiency-based approach, the "costs" of errors are measured from a social, *ex-ante* perspective. Therefore, the relevant

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72. An "entitlement-blind" approach is implicitly applied by Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 403–04 (2005).

73. According to the error-minimizing formulation, a preliminary injunction should be issued in this case only if: $\$100p > \$80(1-p)$, where p is the likelihood that the entitlement is assigned to the plaintiff. This inequality yields that a preliminary injunction should be issued only if $p > 4/9$, i.e., if $(1-p) < 5/9 \cong 56\%$.

74. Lichtman, *supra* note 67, at 1287 n.3 ("The goal according to virtually every scholarly and judicial account [is to minimize deviations from what will be the ultimate ruling on the merits]."). *See also* ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 131 (2003) (defining "expected error cost"); POSNER, *supra* note 64, at 594–95 (discussing costs of error in civil cases); Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1647–49 (1985) (noting effort to minimize risk of error as central to fairness in litigation).

harm of a decision not to issue a preliminary injunction is measured not only according to the plaintiff's harm, but also according to the cost of the expected effect on future behavior of those in the plaintiff's position. For instance, the social cost of denying a preliminary injunction to a patent holder includes the adverse effects of such a decision on incentives to invest in research.[75] In terms of the formal doctrine, this aspect is taken into account under the "public interest" factor.[76]

It is important to distinguish in this respect between two types of possible harms of a decision whether to issue a preliminary injunction: a direct net loss of social welfare ("deadweight-loss"), and an errant transfer of wealth from a party who is legally entitled to it to a party who is not entitled to it ("undeserved-wealth-transfer"). Consider a preliminary injunction that restricts the defendant from producing a drug due to its alleged violation of the plaintiff's patent, thus eliminating competition with the plaintiff. If proved wrong, the preliminary injunction may generate deadweight-loss, such as a loss of production and consumption of the drug.[77] A wrongfully-issued preliminary injunction may also create undeserved-wealth-transfer by enabling the plaintiff to extract profits that would otherwise be obtained by the defendant. Deadweight-loss is clearly a relevant social cost for determining whether to issue a preliminary injunction. Undeserved-wealth-transfer is relevant too, as far as it

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75. Lichtman, *supra* note 67, at 1289 ("[An errant denial of a patent holder request for preliminary injunction inflicts] a social cost because mistakes like this will over the long run dampen the ex ante incentive to pursue patent-eligible research, discourage patent holders from litigating even valid claims, and likely drive inventors to invest more heavily in costly self-help protections.").

76. *See, e.g.*, Roland Machinery Co. v. Dresser Indus., 749 F.2d 380, 387 (7th Cir. 1984) (Posner J.) (finding that in cases in which "granting or denying a preliminary injunction will have consequences beyond the immediate parties . . . those interests—the 'public interest' if you will—must be reckoned into the weighing process."). Some scholars argue that harms to "non-parties" should not be considered in the decision whether to issue the preliminary injunction. *See, e.g.*, Denlow, *supra* note 66, at 539; Leubsdorf, *supra* note 62, at 549 ("[T]o consider interests irrelevant to the final decision at the preliminary stage will only increase the cost of the litigation and undermine the substantive law."); Lea B. Vaughn, *A Need for Clarity: Toward a New Standard for Preliminary Injunctions*, 68 OR. L. REV. 839, 848 (1989) ("In the midst of existing fact uncertainty, an unbounded consideration of public interest threatens to overwhelm the process"); Wolf, *supra* note 66, at 234–35. However, the prevailing view is that third-parties' interests are relevant. *See* Am. Hosp. Supply Corp. v. Hosp. Prods., Ltd., 780 F.2d 589, 594 (7th Cir. 1986); DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 273 (1991) (arguing that the court should consider "the severity and the likelihood of such harm to each litigant and to the public if the requested relief is granted and if it is denied"); Leubsdorf, *supra* note 71, at 41–43; Orin H. Lewis, *"The Wild Card That Is the Public Interest": Putting a New Face on the Fourth Preliminary Injunction Factor*, 72 TEX. L. REV. 849, 854, 874–82 (1994); Laura W. Stein, *The Court and the Community: Why Non-Party Interests Should Count in Preliminary Injunction Actions*, 16 REV. LITIG. 27 (1997).

77. Conferring a monopoly status will enable the plaintiff to raise the price above the competitive market price until the additional revenue will be equal to the marginal cost of production. In efficiency terms, that means that the plaintiff is under-producing because some costumers, who are willing to pay more than the cost of production, are not being served.

adversely affects the underlying purpose of assigning the relevant legal entitlement, such as providing optimal incentives to invest in research and development.[78]

The distinction between these two types of social costs is essential for the discussion that follows because they differ in terms of their reparability by an *ex-post* remedy. The remedy can eliminate undeserved-wealth-transfers. In contrast, compensation for deadweight-loss merely reallocates the burden from one party to another without eliminating the social cost. In this respect, the traditional definition of irreparable harm as a "harm that cannot be cured by a remedy after trial"[79] should be qualified. A deadweight-loss suffered by one party is *socially* irreparable even if this party's private loss can be cured by a remedy after trial. The available remedies—both when the plaintiff prevails and a preliminary injunction was not issued, and when a wrongfully-issued preliminary injunction was issued but the defendant prevails—determine only what undeserved-wealth-transfers should be regarded as relevant irreparable social costs.[80]

In sum, the decision whether to issue a preliminary injunction should aim at minimizing the expected irreparable social costs that result from the delay in deciding the case on the merits. The decision requires an evaluation of the probability of the alternative possible outcomes of the case. Deadweight-loss should always be considered an irreparable social cost given that compensation for it merely reallocates the damage but does not eliminate it. In contrast, undeserved-wealth-transfers should be so considered only if an *ex-post* restitutionary remedy is unavailable, either legally or practically (due to judgment proof problems).

C. Aims of Remedies for Wrongfully-Issued Preliminary Injunctions

As indicated above, even a careful application of the standard of issuing a preliminary injunction cannot exclude the possibility that the injunction will be proved wrong, given that it is issued before the court decides the case on its merits. In general, litigating parties are not held

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78. Thus, the relevant social cost in this case should be calculated based on the expected effect of such transfer of wealth on relevant incentives. As recently pointed out by Douglas Lichtman, a decision whether to issue a preliminary injunction that confers "errant irreparable benefits" on one party may inflict social harm even if the other litigating party does not suffer any loss. Lichtman, *supra* note 67, at 1289–90 ("Undeserved irreversible gains skew the defendant's incentives with respect to the question of whether to litigate or settle. They also encourage the defendant to invest further in research . . . .").

79. LAYCOCK, *supra* note 76, at 113.

80. For further elaboration of this point, see Ofer Grosskopf & Barak Medina, *Repairing (the Doctrine of) Irreparable Harm* 1 (2008) (working paper), *available at* http://ssrn.com/abstract=1091730.

responsible for wrong judicial decisions; thus, litigating parties need not compensate their adversaries for harms inflicted or disgorge profits generated by a reversed decision.[81] Given this general rule, it is puzzling why an award to remedy a wrongfully-issued preliminary injunction would be justified.

It should be noted that this puzzle is distinct from the inquiry into the rationale of the bond requirement. The primary function of the bond is to serve as a fund to ensure compensation to a wrongfully-enjoined defendant and to facilitate the collection of the damages awarded.[82] In addition, because the bond sets an upper limit as to the plaintiff's liability, it provides the plaintiff with information regarding the scope of his potential liability for wrongfully-issued preliminary injunctions.[83] These aims are based on the *assumption* that liability is imposed; they do not justify the liability. Similarly, the argument that the plaintiff's fulfillment of the bond provision should be viewed as consenting to liability up to the amount of the bond, i.e., as the "price for the injunction,"[84] does not explain why such liability is imposed in the first place. It is our aim to offer such explanations.

We suggest that the remedy for wrongfully-issued preliminary injunctions can serve the aim of minimizing irreparable harms in three ways. First, from an *ex-post* perspective, the remedy can serve to rectify the consequences of a wrongfully-issued preliminary injunction and, therefore, to minimize irreparable social harms. Second, the remedy affects the amount of information that the court should consider before issuing a preliminary injunction. It can thus increase the likelihood that the decision, made at the preliminary stage, will be the correct one. Third, from an *ex-ante* perspective, the remedy shapes the plaintiff's incentives to apply for preliminary relief and the defendant's motivation to object to it. We discuss the first two ways in Part III, and the third in Part IV.

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81. Reversed judgments raise only a duty to restore direct benefits that one received from his counterpart in compliance with the revoked decision—money that has been paid thereunder or property that has been misallocated due to the judgment. *See supra* Part I.B.

82. *See, e.g.*, Erin Connors Morton, *Security for Interlocutory Injunctions Under Rule 65(c): Exceptions to the Rule Gone Awry*, 46 HASTINGS L. J. 1863, 1866–67 (1995).

83. *See, e.g.*, DOBBS, *supra* note 14, at 197 ("The bond serves to warn plaintiffs the price they may be compelled to pay if the injunction is wrongfully issued."); Morton, *supra* note 82, at 1870.

84. *See, e.g.*, Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 805 (3d Cir. 1989); Morton, *supra* note 82, at 1870–71; *Recovery for Wrongful Interlocutory Injunctions*, *supra* note 15, at 842–46 (stating that the bond requirement and the remedy that is based on it can be seen as "a contract in which the court and plaintiff 'agree' to the bond amount as the 'price' of a wrongful injunction").

III. MINIMIZING IRREPARABLE HARMS

A. General

Remedies for wrongfully-issued preliminary injunctions serve to mitigate the consequences of the wrongful restriction on the defendant. As suggested by Dan Dobbs, "[t]he main purpose of the bond requirement is to protect the defendant from irreparable loss of rights due to a decision made before trial."[85] However, since a deadweight-loss is socially irreparable, this rationale justifies only remedies that correct undeserved-wealth-transfers.[86]

The remedy also affects the likelihood that the case will be decided on its merits. Social harms inflicted by a preliminary injunction can be reduced only if the proceedings continue until the dispute is resolved in a final judgment. However, if the defendant cannot expect to receive a remedy for a wrongfully-issued preliminary injunction, even if he eventually wins the case, he may not have sufficient incentives to litigate the case after losing in the preliminary stage. Consider, for example, the case of a competitor who challenges the validity of a patent. If the patentee obtains a preliminary injunction and the case is expected to be litigated for most of the period in which the patent is economically valuable, the challenger has no reason to continue litigating the issue any further unless a remedy for wrongfully-issued preliminary injunctions is available. Therefore, an insufficient remedy discourages the defendant from litigating the case and may prevent the mitigation of social harms resulting from wrongfully-issued preliminary injunctions.

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85. DOBBS, *supra* note 14, at 197. *See also* Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 210 (3d Cir. 1990) (protecting the defendant "is important in the preliminary injunction context, for 'because of attenuated procedure, an interlocutory order has a higher than usual chance of being wrong'"); Dobbs, *supra* note 29, at 1094 (arguing that the purpose of the remedy for a wrongfully-issued preliminary injunction is to compensate the defendant "who has been subjected to a process of law that does not meet the kind of standards ordinarily adopted"); Quick, *supra* note 15, at 1256 ("In order to protect the defendant from harm caused by the recognized need for a speedy determination of interlocutory injunctive relief, the properly fixed bond serves to minimize the drastic effect of this anticipatory relief on the enjoined party.").

86. A corrective justice perspective may yield a different result. However, it requires a more detailed analysis than we can provide here. It is easy to justify the assignment of responsibility to the plaintiff for the consequences of a wrongfully-issued preliminary injunction when his behavior is blameworthy. But this is not the case with respect to an innocent, blameless plaintiff. The costs of issuing a pre-trial injunction—the harms inflicted by a wrongfully-issued preliminary injunction—are the result of the inability of the legal system to quickly decide the case and provide an effective remedy for the protection of rights. Thus, when there is a bona fide controversy about the parties' rights, and irreparable harms might be inflicted due to the delay in resolving the case, it is far from self-evident that it is the plaintiff who should be liable for the harms inflicted by a wrongfully-issued preliminary injunction.

In addition, because the remedy determines what part of the harm is socially reparable, it defines what parts of the preliminary injunction's expected social harms can be ignored in deciding whether to issue the preliminary injunction. Given the difficulties in accurately evaluating these harms, a remedy that enables the court to disregard certain types of harms may increase the likelihood of a correct decision. Again, because harm of the sort of undeserved-wealth-transfer is potentially reparable, it is justified to provide remedies that correct this type of harm, to make it irrelevant in deciding whether to issue the preliminary injunction. In contrast, the aim of improving the court's decision-making process cannot justify the provision of remedies that compensate the defendant for harms which represent deadweight-loss.

Finally, the remedy also affects the threshold level of the probability that the plaintiff will win the case on its merits. To obtain a preliminary injunction, the plaintiff is required to show that the probability that she will win the case on its merits exceeds some threshold that is set by the legal doctrine.[87] An efficiency-based approach requires that this threshold be set according to the parties' likely irreparable harms.[88] According to the Leubsdorf-Posner error-minimizing formulation, the preliminary injunction should be issued only if $Ap > S(1-p)$, where A is the irreparable harm if a preliminary injunction is not issued, S is the irreparable harm resulting from a wrongfully-issued preliminary injunction, and p is the probability that the plaintiff will win the case on its merits.[89] This formulation yields that the threshold level of p is determined by $p > S/(A+S)$. Thus, the greater the irreparable harm resulting from a wrongfully-issued preliminary injunction (S), the higher the threshold. A remedy that reduces the defendant's irreparable harm (by eliminating undeserved-wealth-transfers) increases the number of cases in which the plaintiff is protected from irreparable harms.[90]

Thus, improving the court's decision-making process at the stage of granting the preliminary injunction requires that the court be able to

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87. *See supra* note 70.

88. *See, e.g.*, POSNER, *supra* note 64, at 595–96.

89. *See supra* note 64 and accompanying text.

90. For instance, assume that the socially irreparable harm if a preliminary injunction is not issued is $80 and the harm from a wrongfully-issued preliminary injunction is $120, out of which $50 reflects a deadweight-loss and $70 represents undeserved-wealth-transfer. Absent a remedy for wrongfully-issued preliminary injunctions, a preliminary injunction would be issued only if the plaintiff's likelihood of winning the case exceeds 60% (because according to the error-minimizing formulation, the preliminary injunction should be issued only if $\$80p > (\$70+\$50)(1-p)$, which yields that $p>60\%$). In contrast, if the plaintiff must compensate the defendant for an undeserved-wealth-transfer, a preliminary injunction should be issued whenever the plaintiff's likelihood of success exceeds 38.5% (because the preliminary injunction should be issued only if $\$80p > \$50(1-p)$, which yields that $p>38.5\%$).

disregard as much undeserved-wealth-transfers as possible. To achieve this goal, the remedy should be tailored to eliminate all of the reparable wealth transfers. From this perspective, there is no point in remedying deadweight-loss, given that transferring deadweight-loss from the defendant to the plaintiff does not eliminate the court's duty to take this element into account, as part of the social cost of granting the preliminary injunction. In the next Part, we evaluate the two types of remedies for wrongfully-issued preliminary injunctions in light of these considerations.

B. An Evaluation of the Possible Remedies

1. Compensation for Harms

Achieving the purpose of minimizing irreparable social costs requires that the defendant be fully compensated for harms in the form of undeserved-wealth-transfer. The current practice of partial liability creates severe informational problems. It requires the courts to base the decision not only on the relevant deadweight-loss of each of the alternative decisions, but also on undeserved-wealth-transfers that are left uncompensated. Given that the court often does not have access to this data, the need to base the decision whether to issue the preliminary injunction on such additional information increases the likelihood of error. This problem is of special importance due to the rule that, while the bond sets the upper limit of the plaintiff's liability, the decision whether to issue the preliminary injunction is made before the court determines the amount of the bond. Since the bond is often set based on factors that are unrelated to the defendant's expected harm,[91] the court cannot accurately assess, at the stage of deciding whether to issue the relief, what part of the wealth transfer from a wrongfully-issued preliminary injunction should be considered as an irreparable social cost. Consequently, even if one does not accept our argument in full, it is essential to decide whether to issue the preliminary injunction in light of a given size of the bond, and not the other way around.

Compelling the plaintiff to assume full liability would not necessarily reduce the relevant irreparable costs as far as it does not differentiate between undeserved-wealth-transfer and deadweight-loss. Thus, this aim cannot justify a remedy that bases the plaintiff's liability on the defendant's harm.

In sum, remedies for wrongfully-issued preliminary injunctions that are based on partial or full compensation of the defendant's harms are

91. *See supra* Part I.A.

not tailored to advancing the aim of minimizing irreparable harm. The plaintiff should bear only part of the defendant's harms, and the scope of this liability should be limited to undeserved-wealth-transfers.

2. Restitution of Benefits

According to the rule under consideration, the plaintiff's liability is limited to the benefit she gained from the preliminary injunction at the defendant's expense. These benefits include the avoided harms, profits gained due to the injunction's effect on the plaintiff's market share, and any other advantage that the plaintiff obtained as a result of the wrongfully-issued preliminary injunction. Defining what benefits should be considered as obtained "at the expense of" the defendant is difficult. In related contexts, courts usually employ the rather restrictive so-called "arithmetic subtraction" concept, according to which the plaintiff gained a benefit at the expense of the defendant if, and only if, the benefit corresponds to a parallel loss to the defendant.[92] Accordingly, the remedy of restitution will provide the defendant with the lesser of the benefit gained by the plaintiff and the defendant's loss.

The restitutionary remedy saves the court from the need to evaluate, when deciding whether to issue the preliminary injunction, the scope of undeserved-wealth-transfers from the defendant to the plaintiff due to wrongfully-issued preliminary injunctions. Indeed, the purpose of reducing the amount of information that the court is required to analyze in deciding whether to issue a preliminary injunction justifies precisely the remedy of disgorgement of benefits. As we explained, only this component of the social costs can be mitigated by an *ex-post* remedy. The provision of a restitutionary remedy enables the court to focus on evaluating only the expected deadweight-loss (and irreparable-wealth-transfers) of wrongfully-issued preliminary injunctions, and it thus increases the likelihood that the court will decide correctly.

Moreover, when a wrongfully-issued preliminary injunction is expected to generate only a wealth transfer, the availability of the remedy of restitution makes it unnecessary to evaluate the likelihood that the plaintiff will win the case. Consider, for illustration, an upstream factory

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92. *See* Dobbs, *supra* note 29, at 1140–42 ("The decisions . . . suggest not only that restitution will be denied unless the plaintiff's gains are traceable to and identifiable with the defendant's losses, but also that the gains must be *directly* traceable."). For a discussion of the requirement of "corresponding loss" in the law of unjust enrichment, see PETER BIRKS, UNJUST ENRICHMENT 78–86 (2d ed. 2005). Interestingly, Fuller and Perdue employ the same notion in their definition of "restitution interest" in the contractual context. *See* Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 53–54 (1936) (arguing that the object of protecting the "restitution interest" is "the prevention of gain by the defaulting promisor at the expense of the promisee").

that uses the same water as the downstream laundry. Assume that the factory cools the water to a degree that is harmful to the laundry business, but not to the environment nor to anyone else. The laundry claims to have a right to water at its natural temperature and thus is suing the factory to enjoin it from cooling the water temperature.[93] Assume also that the factory can prevent the harm to the laundry during the litigation and that *ex-post* monetary relief can eliminate both the harm to the laundry and the harm to the factory (note that it does not follow from the last assumption that there is no concern of an irreparable social cost in this case).[94] Under these assumptions, if the laundry is required to disgorge all of the benefit that it obtained at the expense of the factory from the wrongfully-issued preliminary injunction, the decision whether to issue a preliminary injunction should be based only on the decision of which party is the "cheapest cost avoider." There is no need to evaluate the relative merits of the parties' cases at the time of issuing the preliminary injunction.

The aim of an *ex-post* minimization of the social costs from wrongfully-issued preliminary injunctions clearly justifies a restitutionary remedy, which bases the plaintiff's liability on the benefit that was unjustifiably taken by the plaintiff from the defendant as a result of the injunction.[95] This remedy applies only to costs that are truly reparable from the social perspective. Moreover, the aim of minimizing social costs can support the provision of a restitutionary remedy even when the benefits were not obtained at the expense of the defendant in the "arithmetic subtraction" sense. As recently suggested by Doug Lichtman, errant benefits, even when they are not accompanied by a corresponding loss, might skew incentives and thus inflict social costs.[96] In such cases, the remedy of restitution of benefits is the only possible scheme that can mitigate these social costs.[97]

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93. Even if the parties do not face prohibitively high transaction costs, they might fail to reach an agreement without a well-defined initial allocation of the entitlement.

94. For example, if the factory does not prevent the harm during the litigation, even though it is the "cheapest cost avoider," the gap between the harm to the laundry and the factory's cost of preventing this harm represents an irreparable deadweight-loss.

95. *Cf.* HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 52–63 (2004) (explaining restitution for mistakes as a mechanism to minimize social costs of mistakes).

96. Lichtman, *supra* note 67, at 1289–90, 1297 ("If the patentee is mistakenly awarded preliminary relief, the patentee is . . . better off. But it would be surprising were society to applaud that error. Patent law is intended to award this patentee a certain payoff—a payoff designed to create particular incentives . . . . Any deviation from that baseline distorts those incentives . . . .").

97. However, not all preliminary injunctions that merely confer a benefit on the plaintiff inflict social harm. In some cases, the restitutionary remedy is only instrumental to making the plaintiff compensate the defendant. *See* Ariel Porat, *When Do Irreparable Benefits Matter? A Response to Douglas Lichtman on Irreparable Benefits*, 116 YALE L. J. POCKET PART 385 (2007), *available at*

Consider in this context cases in which the benefit to the plaintiff is not accompanied by a corresponding loss to the defendant. Typical examples concern benefits that are higher than the defendant's corresponding loss and benefits that were derived at the expense of third parties, such as consumers or employees. The aforementioned case of *Mitchell v. Riegel Textile, Inc.*,[98] demonstrates the last scenario. The moving parties in that case, cotton mill owners, clearly benefited from the injunction by being allowed to pay less than the minimum wage for the length of the litigation. Yet, their benefits were not accompanied by a corresponding financial loss for the defendant, the Secretary of Labor. In fact, it was achieved at the expense of third parties—the moving parties' employees. One way to justify requiring the plaintiff to disgorge her benefits in such a case is by showing that the mere errant gain creates a social loss, because it might skew the plaintiff's incentives,[99] and this harm can be reparable through restitution. If such social harm cannot be demonstrated, the defendant's claim of restitution can be supported only if there is a real possibility that he will pass on his reward to the third parties, i.e., if he is actually suing on their behalf. If such a move is impractical, the remedy would not help to minimize social loss and, therefore, would not allow the court to disregard it in its initial decision. The only consideration that remains in force is that of preventing frivolous suits for preliminary injunction, an issue we explore in Part IV. If this consideration is important enough, then it might justify a restitutionary remedy. If not, for instance because litigation is costly and the chances of success in the litigation are high enough, benefits extracted from third parties should not be subject to restitution in the case of a wrongfully-issued preliminary injunction.

A difficult question, which we cannot fully address here, is whether third parties should be entitled to restitutionary claims for wrongfully-issued preliminary injunctions. As mentioned above, the Supreme Court recognized such a claim in *Arkadelphia Milling*,[100] while the English Court of Appeal rejected it in *SmithKline*.[101] The disparity can be explained by the fact that *Arkadelphia* dealt with third parties who directly transferred money to the losing plaintiff, whereas *SmithKline* was concerned with third parties who lost business to the plaintiff, such that the plaintiff's benefits were only indirectly gained at their expense.

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http://yalelawjournal.org/2007/05/06/porat.html. Thus, if the plaintiff gained without imposing an equivalent harm on the defendant, a restitutionary remedy may not be justified in all cases.

98. 259 F.2d 954 (D.C. Cir. 1958).

99. *See supra* note 96 and accompanying text.

100. *See supra* notes 45–48 and accompanying text.

101. *See supra* note 37 and accompanying text.

Though we do not find this distinction relevant when the restitution claim is brought by the defendant, it may serve to limit the number of potential claimants, thus preventing nuisance claims against the plaintiff.

Arguably, an inherent difficulty with a restitutionary remedy is that of costs of proof. The basic concern runs as follows. In a harm-based remedy, the potential plaintiff is the victim (the party who was wrongly restrained), who possesses more information than the injurer (the moving party) possesses about his own losses. In contrast, in a restitution-based remedy, the potential plaintiff possesses *less* information than the moving party. As a result, the enforcement of the latter remedy can be expected to be partial and entail high litigation costs.[102] While this argument may have its merits in some cases, it is not a conclusive one. The arguably higher administrative costs of applying the restitutionary remedy do not necessarily surpass the above-mentioned benefits of this remedy. Moreover, even in terms of administrative costs, one should take into account additional factors in comparing between the two types of remedies. First, due to the uncertainty of the scope of the moving party's liability under the harm-based remedy, capping it at the amount of the bond is inevitable.[103] As a result, the upper limit of the defendant's compensation is set at an early stage of the litigation on the basis of a prediction of possible future harms and subject to other constraints in setting the amount of the bond.[104] The restitutionary remedy is free from these limitations, as it is set at the end of trial after the actual benefit was obtained. It seems reasonable to assume that this evidentiary advantage of the remedy of restitution more than offsets its above-mentioned difficulty. Second, proving the scope of benefits obtained may be easier than that of harms, as the latter entails a counterfactual analysis, whereas the former requires an evaluation of the actual benefits obtained by the moving party.

In sum, the above discussion justifies the provision of a restitutionary remedy. Consequently, courts should be encouraged to allow this remedy in all cases, without subjecting it to further limitations.

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102. *See, e.g.*, Hanoch Dagan, *Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory*, 1 THEORETICAL INQUIRES L. 115, 142–44 (2000) (damages for breach is a superior remedy over disgorgement of benefits since the difficulties involved in proving the scope of the promisor's profits entail high litigation costs and create uncertainty); Donald Wittman, *Liability for Harm or Restitution for Benefit?*, 13 J. LEG. STUD. 57 (1984) (accentuating the role of the litigation costs entailed by the two different methods).

103. *See supra* note 83 and accompanying text.

104. *See supra* Part I.A.

IV. DESIGNING THE LITIGANTS' INCENTIVES IN PRELIMINARY INJUNCTION PROCEEDINGS

The remedy for wrongfully-issued preliminary injunctions shapes the plaintiff's incentives to apply for preliminary relief and the defendant's motivation to object to it. Indeed, liability for a wrongfully-issued preliminary injunction "deter[s] rash applications for interlocutory orders and thus avoids wasting the court's time with flimsy applications."[105] However, to be valid, this aim must be substantially narrowed. While it is true that without any remedy for a wrongfully-issued preliminary injunction the plaintiff's incentives to apply for it would be excessive, the attempt to use the remedial regime to direct the plaintiff to apply for a preliminary injunction only when its issuance is socially efficient is unattainable. It is therefore better to concentrate on the more modest aim of preventing frivolous motions while not over-deterring legitimate ones. The following discussion explains and establishes these three propositions. It shows that the plaintiff's liability for a wrongfully-issued preliminary injunction should be limited to undeserved-wealth-transfers.

A. Causing the Plaintiff to Internalize Negative Externalities

The aim of preliminary injunctions is to maximize social welfare such that the defendant will not continue his disputed behavior during the trial if, and only if, the social cost that the preliminary injunction will prevent exceeds the social cost that will be inflicted by the preliminary injunction.[106] The likelihood that an efficient outcome will be achieved is determined not only according to the legal doctrine that the court applies in deciding whether to issue a preliminary injunction, but also by the litigants' behavior.

In the absence of remedies for wrongfully-issued preliminary injunctions, the plaintiff's interest in obtaining a preliminary injunction may exceed the social interest in issuing it for two main reasons. First, the plaintiff cannot be expected to internalize the deadweight-loss that would be inflicted on the defendant and on third parties in the case of a

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105. Morton, *supra* note 82, at 1867. *See also* Edgar v. MITE Corp., 457 U.S. 624, 649 (1982) (Stevens, J., concurring) (The threat of liability insures that a party would apply for a preliminary injunction only when he is "confiden[t] in his legal position."); Nat'l Kidney Patients Ass'n v. Sullivan, 958 F.2d 1127, 1134 (D.C. Cir. 1992) (finding that the threat of liability forces the plaintiff "to consider the injury to be inflicted on its adversary in deciding whether to press ahead"); Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 211 (3d Cir. 1990); Coyne-Delany Co. v. Capital Dev. Bd. of Ill., 717 F.2d 385, 392 (7th Cir. 1983); Calderon, *supra* note 24, at 133 (The purpose of liability for a wrongfully-issued preliminary injunction is "to deter plaintiffs from filing frivolous claims for relief."); Dobbs, *supra* note 29, at 1094, 1119 ("[I]t is desirable to discourage the harassing plaintiff by insisting that he risk something himself.").

106. *See, e.g.*, POSNER, *supra* note 64, at 595–96.

wrongfully-issued preliminary injunction. In fact, the plaintiff may benefit from inflicting some deadweight-loss on the defendant, given that it may substantially strengthen the plaintiff's bargaining position vis-à-vis the defendant in negotiations for settlements.[107] Second, a preliminary injunction provides the plaintiff with a private profit—the opportunity to derive a benefit that is taken from the defendant or from third parties. Evaluating whether the issuance of a preliminary injunction is efficient requires that such benefits will be taken into account (as far as they are irreparable if the injunction is not issued) only in a discounted value, which represents the likelihood that the plaintiff is entitled to derive them. In contrast, the plaintiff would consider the opportunity to derive these benefits even if it is not entitled to them, i.e., even in the case of a wrongfully-issued preliminary injunction.[108] Given the plaintiff's excessive incentives to apply for a preliminary injunction, it is desirable to apply a remedial regime that would decrease the plaintiff's interest in using it.

Inasmuch as the remedy aims at directing the parties, one should consider its effect on not only the plaintiff's incentives but on the defendant's incentives, as well. While the plaintiff should be directed to act

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107. *See* Jean O. Lanjouw & Josh Lerne, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J.L. & ECON. 573 (2001) (arguing that firms tend to request preliminary injunctions to impose financial stress on their rivals and thus to improve their bargaining position in settlement negotiations). *See also* Lichtman, *supra* note 67, at 1295 n.19; Michael Rosenzweig, *Target Litigation*, 85 MICH. L. REV. 110, 120–21 (1986) (arguing that target firm managers may file lawsuits against hostile bidders based on the "hope that the lawsuit will be a 'show-stopper' . . . . Issuance of even a preliminary injunction often effectively kills a hostile tender offer, for it postpones indefinitely the bidder's execution of the offer."); Barton H. Thompson, Jr., *Injunction Negotiations: An Economic, Moral, and Legal Analysis*, 27 STAN. L. REV. 1563 (1975).

108. To illustrate, consider a case in which the plaintiff and the defendant compete in the same market, and the plaintiff claims that he is entitled to exclusivity. Assume that if a preliminary injunction is not issued, each party will obtain a profit of $50 by the time the case is resolved, and if the plaintiff wins, he can recover the defendant's profit, $50; while if a preliminary injunction is issued, the plaintiff's profits will increase to $120, as a result of his monopoly power. Assume that the likelihood that the plaintiff is entitled to exclusivity is 60% and that no remedies for wrongfully-issued preliminary injunctions are available. In this case, the irreparable harm if the preliminary injunction is not issued is the difference between the plaintiff's monopoly profits, $120, and the parties' joint profits when they compete, $100. Therefore, the expected value of the social benefit of issuing the preliminary injunction is represented by $20x0.6=$12. If the preliminary injunction is issued, the irreparable social costs include the defendant's loss of profit, $50. The expected value of this harm is $50x0.4=$20. Thus, even before adding the harm imposed on the customers in the relevant market due to the preliminary injunction's adverse effect on competition, it is clear that in this example it is socially undesirable to issue the preliminary injunction. However, absent remedies for wrongfully-issued preliminary injunctions, the plaintiff has an interest in obtaining the interim relief. The plaintiff would disregard the social costs and would derive a benefit that exceeds the social benefit—the opportunity to derive the extra profits of $70 in the case that its claim is unsubstantiated, i.e., in probability, 40%. It is obvious that under these conditions—not bearing the costs while receiving private benefits—the plaintiff will apply for a preliminary injunction in spite of its social undesirability.

optimally in deciding whether to apply for preliminary injunctions, the defendant should be induced to oppose a motion for socially inefficient preliminary injunctions and to consent to efficient ones.[109] However, it is notoriously hard to induce both parties to act efficiently due to the well-known "double responsibility at the margin" problem.[110] Such an endeavor requires innovative legal mechanisms that are radically at odds with current law, such as requiring the moving party to pay damages into the hands of a third party rather than to the defendant.[111] Investigation of such theoretical possibilities lies beyond the scope of our inquiry. It seems plausible to assume that *ex-post* remedies for wrongfully-issued preliminary injunctions have a more substantial effect on the plaintiff's choice to apply for a preliminary injunction than on the defendant's decision to resist it. This is because the defendant's acquiescence to the preliminary injunction may be interpreted as a signal that his defense is weak. The defendant therefore has a strong incentive to oppose the injunction anyway. We will thus focus on the remedy's effect on the plaintiff.

Richard Brooks and Warren Schwartz have recently suggested that the remedy should be set so as to shift the responsibility for the issuance of the preliminary injunction from the court to the plaintiff.[112] In their view, once plaintiffs assume liability for the defendants' full cost of compliance, courts should "freely allow[] preliminary injunctions."[113] Their underlying assumption is that the plaintiff is better informed than the court, at least at the early stage in which the hearings are made, of the merits of the case and of the possible irreparable harms.[114] However, even if one accepts this assumption, we question the argument that the remedy should be designed to shift the discretion to issue a preliminary injunction from the court to the plaintiff.[115]

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109. John Leubsdorf points out in this respect that "while the plaintiff must find a surety and post a bond in order to obtain relief, the defendant can avoid an injunction without ensuring that damages can be collected. Courts should . . . [require the defendant] to secure a bond . . . as a condition for the denial of an injunction." Leubsdorf, *supra* note 62, at 559. He adds that "[r]estitution theory might also enable courts to transfer a defendant's windfalls to the plaintiff in cases where the substantive law does not provide for damages." *Id.*

110. *See* Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1 (1985) (a remedy that induces internalization by one party (e.g., the breaching party) may cause externalization by the other party (e.g., the injured party)).

111. *See, e.g.*, Robert Cooter & Ariel Porat, *Anti-Insurance*, 31 J. LEGAL STUD. 203 (2002). An alternative mechanism is to impose liability on the "negligent" party, but it is unlikely that courts will apply the concept of negligence to the area of applying for or opposing preliminary orders.

112. Brooks & Schwartz, *supra* note 72.

113. *Id.* at 409.

114. *Id.* at 405.

115. For a related argument, see Note, *Interlocutory Injunctions and the Injunction Bond*, 73 HARV. L. REV. 333, 334 (1959), noting that "the imposition of liability [on the moving party]

One obvious reason is the prospect of irreparable harms. Brooks and Schwartz disregard the fact that a wrongfully-issued preliminary injunction may inflict harms that cannot be cured by a remedy after trial.[116] As discussed above, the court's decision whether to issue a preliminary injunction may be based on quantification—possibly, in monetary terms—of the relevant irreparable harms.[117] However, this quantification is distinct from awarding damages. The compensation is an *ex-post* means to mitigate the harm, which is subject to limitations such as verifiability and burden of proof.[118] It is fundamentally distinct from the monetary value that is attached to such a violation in order to evaluate its justification.[119] One may advocate a policy of protecting all entitlements through "liability" rules; that is, measuring the (social) value of entitlements according to the amount of compensation awarded for their infringement.[120] However, the current prevailing legal policy is different, as it protects certain interests through "property" rules by determining that violating these interests inflicts irreparable harm.[121] The harm is irreparable in the sense that the "social cost" of violating the protected interest is assumed to be higher than the compensation that can be awarded in the case of such a violation.[122]

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can[not] be rationalized . . . on the ground that it is the plaintiff alone who is responsible for the consequences [of a wrongfully-issued preliminary injunction]". *See also* DOBBS, *supra* note 14, at 197 ("The bond . . . is not a substitute for the high standards imposed to limit the grant of preliminary injunctions . . . .").

116. Brooks & Schwartz, *supra* note 72, at 393 (focusing exclusively on the social loss when a preliminary injunction is *not* issued).

117. *See supra* note 63 and accompanying text.

118. *See, e.g.*, Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 275 (1979).

119. *See, e.g.*, DOBBS, *supra* note 14, at 189, 197 ("By definition, irreparable harm cannot be measured in damages, but not all irreparable harm is equal. [I]t is useful to represent that harm in dollar figures, just as it is useful to represent pain and suffering in dollar figures."). For a general discussion of the nature of compensation, see Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993), arguing that compensation can be conceived in a noncommodified way, as a symbolic action that reinforces our commitments about rights and wrongs, rather than signifying the harms as commodities.

120. *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 725 (1996).

121. *See generally* Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986).

122. *See also* Leubsdorf, *supra* note 71, at 36 ("Disregarding the legalities at the interlocutory stage . . . creates a disjunction between the rule applied then and the substantive law applied at the final stage. . . . [I]f the lawmaker instituting the rule of law in question meant that people should be free to behave in a certain way—not just receive compensation when they cannot—that goal may be compromised."). In response, Brooks and Schwartz suggest that "[s]ince the entitlement does not clearly belong to either party, the challenge of unjust nonconsensual appropriation through a preliminary injunction liability rule holds less weight than when breach of contract or constitutional

Consider, for instance, Brooks and Schwartz's argument that if the plaintiff assumes full liability for the defendant's harms, a contracting party (the plaintiff) should freely receive a preliminary injunction that would restrain the other party (the defendant) from acting in a way that, the plaintiff argues, constitutes a breach of contract.[123] This suggestion assigns the plaintiff the power to unilaterally compel the defendant to "sell" his freedom in matters that are not governed by the contract (as these are the matters in which the plaintiff would be required to assume liability). Similar concerns are evident in cases when an employer seeks to enjoin an employee from leaving the job in breach of contract or when a plaintiff applies for a preliminary injunction against defamation.[124]

Moreover, even if one endorses Brooks and Schwartz's analytical framework, their argument fails due to its impracticability. It is rarely possible to make the plaintiff fully internalize the consequences of a wrongfully-issued preliminary injunction. Often, a wrongfully-issued preliminary injunction harms not only those who were wrongfully enjoined or restrained, but also third parties. While in principle such third parties can also be compensated (for instance, through class action), in practice this outcome is difficult to obtain.[125]

Finally, full liability may well result in over-deterrence. In the case of uncertainty about the defendant's harms, compelling the plaintiff to assume full liability will introduce considerable uncertainty and may deter the plaintiff from seeking justified preliminary injunctions. This concern of over-deterrence is augmented by the fact that the plaintiff does not internalize some of the social benefits of issuing a preliminary injunction. The social benefits generated by a preliminary injunction include all of the deadweight-loss it saves. In contrast, the plaintiff's benefit consists of only the harm she would have suffered absent the injunction. As a general matter, a party's failure to seek a preliminary injunction does not preclude her obtaining monetary compensation when the case is resolved.[126] Therefore, the plaintiff is expected to

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infringement is clear." Brooks & Schwartz, *supra* note 72, at 406. As argued in the text, this reply fails to distinguish between (judicial) quantification of each of the possible assignments of entitlements, given the legal uncertainty, and an *ex post* compensation when an infringement is proven.

123. Brooks & Schwartz, *supra* note 72, at 410.

124. *See* Leubsdorf, *supra* note 71, at 40. For a discussion of the difficulties in granting preliminary injunction in defamation suits, see Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998).

125. For a related argument, see Leubsdorf, *supra* note 71, at 41–43, pointing out the problems of imposing liability for harms to third-parties, mainly when the defendant does not wish (or is not qualified) to litigate what amounts to a class action.

126. For examples found in the closely related context of appeal proceedings, see *LiButti v. United States*, 178 F.3d 114, 121 (2d Cir. 1999), and *Fulton County Silk Mills v. Irving Trust Co. (In re Lilyknit Silk Underwear Co.)*, 73 F.2d 52, 53 (2d Cir. 1934).

ignore the social benefit of preventing deadweight-loss generated by the defendant's unrestrained activities during the trial so long as the plaintiff expects to receive compensation for this harm at the end of trial. In addition, from the social perspective, the relevant irreparable harms include harms to third parties, while the plaintiff benefits only from preventing those irreparable harms that she would suffer but for the injunction.

Absent remedies for wrongfully-issued preliminary injunctions, this externalization of some social benefits is immaterial because applying for a preliminary injunction does not involve significant costs (aside from litigation costs). Therefore, it is sufficient that the plaintiff expects to derive some benefit from the preliminary injunction to provide the plaintiff with an adequate incentive to apply for it. However, once the plaintiff is required to assume full liability for the defendant's harms in the case of a wrongfully-issued preliminary injunction, the plaintiff might be deterred from applying, not only for a socially inefficient form of relief, but for efficient relief as well. Thus, the mitigation of the concern of "under-deterrence" might come at the cost of increasing the likelihood of "over-deterrence."

The main problem is that the latter prospect raises a greater concern than the former. Socially inefficient preliminary injunctions can be avoided through the court's discretion over whether to issue the relief. In contrast, if the plaintiff is deterred from applying for socially efficient relief, the court does not get the opportunity to examine whether to issue such relief. In such cases, the defendant may have an interest in voluntarily restraining himself to avoid liability in case the plaintiff would win the case. However, such self-restraint can be expected to be insufficient because the defendant cannot expect to receive, after winning the case, compensation for the harms suffered due to his self-restraint. Therefore, if the parties cannot agree on their activities until the dispute is resolved, due to reasons such as transaction costs, information asymmetry, or legal regulations (e.g., antitrust law), the prospect of "over-deterrence" poses a substantial concern.

Thus, the proposition that imposing full liability justifies assigning the plaintiff the power to decide whether to issue the pre-trial relief cannot be sustained. Inevitably, courts should retain the discretion whether to issue an injunction. Notwithstanding our skepticism regarding Brooks and Schwartz's proposal, we do agree that the remedy's effect on the plaintiff's *ex-ante* incentives is relevant. As argued below, the remedy can contribute to the removal of improper incentives to apply for a preliminary injunction while still avoiding over-deterrence.

B. Removing Improper Incentives

The remedy can serve to eliminate the plaintiff's incentive to apply for a preliminary injunction strictly for the purpose of extracting a benefit from the issuance of a wrongfully-issued preliminary injunction. Extracting such a benefit is clearly an illegitimate goal, as it is derived in violation of the defendant's legal entitlement. Remedies should thus be designed to remove the incentive to apply for a preliminary injunction for extracting this illegitimate benefit.

It may seem as if it is socially desirable to enable the plaintiff to obtain the benefit from wrongly enjoining the defendant, given that this can offset the concern that the plaintiff does not internalize the full social benefit of issuing the relief. However, such reasoning is flawed. A scheme that motivates plaintiffs to apply for a preliminary injunction by allowing them to retain the benefits derived from a wrongfully-issued preliminary injunction provides awkward incentives. It provides the plaintiff an incentive that is negatively correlated with the strength of the plaintiff's case because the expected value of the ability to retain these benefits is higher the lower the plaintiff's chances are of winning the case. It is thus a scheme that encourages plaintiffs to apply for preliminary injunctions for the wrong reason, and it works precisely in those cases in which it is against the social interest to issue a preliminary injunction.

We suggest that, in terms of directing the plaintiff, the remedy should be designed to deter frivolous applications for preliminary injunctions; that is, applications that are aimed at extracting the benefits of wrongfully-issued preliminary injunctions. At the same time, the remedy should not deter the plaintiff from applying whenever there are other, legitimate reasons for issuing a preliminary injunction, i.e., the prevention of irreparable harms.

The desired range of the remedy according to this approach can be determined using the following notations:

- D_p the plaintiff's harm (or lost benefit) if a preliminary injunction is not issued;
- a the portion of the plaintiff's harm (or lost benefit) that is, from the plaintiff's perspective, irreparable;[127]
- p the probability that the plaintiff will win the case on its merits; and

127. As explained above, the court's decision whether to issue a preliminary injunction should be based on an assessment of the "socially" irreparable harms. However, the plaintiff's decision is based on an assessment of the harms that are "privately" irreparable, i.e., harms for which the plaintiff cannot expect to receive sufficient *ex-post* compensation.

R the remedy for a wrongfully-issued preliminary injunction.

To remove the illegitimate incentive, the remedy should not be lower than the plaintiff's benefit from a wrongfully-issued preliminary injunction. This benefit equals the plaintiff's harm (or lost benefit) if a preliminary injunction was not issued, D_p. Therefore, the first condition that the remedy, R, should fulfill is the following:

$$(1-p)R \geq (1-p)\,D_p \qquad \Rightarrow R \geq D_p$$

At the same time, the remedy should be capped to ensure that it does not deter the plaintiff from applying for a preliminary injunction when the provisional relief may serve legitimate interests, namely avoiding irreparable harms. The expected value of the plaintiff's benefit from the preliminary injunction consists of two elements: (1) if the plaintiff wins the case, the plaintiff's benefit from the preliminary injunction is the irreparable part of its harm, αD_p; and (2) if the plaintiff loses the case, the benefit equals the plaintiff's entire harm if the preliminary injunction was not issued, D_p. Therefore, the second condition that the remedy should fulfill, which ensures that it does not deter the plaintiff from applying for a preliminary injunction when it may serve legitimate interests, is the following:

$$(1-p)R \leq pa\,D_p + (1-p)\,D_p \quad \Rightarrow R \leq D_p[a(p/(1-p))+1]$$

In sum, to achieve the aim of removing the illegitimate incentive without over-deterring the plaintiff from applying for a preliminary injunction to avoid irreparable harm, the remedy should be set in the following range:

$$D_p \leq R \leq D_p[a(p/(1-p))+1]$$

For instance, if α=0, such that all the plaintiff's harms are reparable (pointless application), a remedy that is equal to the plaintiff's harm (or lost benefit) if the preliminary injunction was not issued, D_p, is sufficient to remove the plaintiff's interest in applying for a preliminary injunction. Similarly, if p=0, such that the plaintiff has no chance of winning the case (frivolous applications), the above remedy again deters the plaintiff from applying for a preliminary injunction. Such a remedy does not deter the plaintiff if at least some of her harms are irreparable (α>0) and the plaintiff has some chance of winning the case (p>0). This set of conditions will serve us in evaluating different types of remedies.

C. An Evaluation of the Possible Remedies

1. Compensation for Harms

Requiring the plaintiff to bear only part of the actual costs may induce her to apply for inefficient preliminary injunctions. Whenever the plaintiff's actual liability is lower than her expected benefit, the plaintiff is not deterred from pursuing even frivolous claims. As discussed above, it is similarly undesirable to impose full liability on the plaintiff. In general, optimal deterrence cannot be obtained given the prospects of irreparable harms to the defendant and harms to third parties resulting from a wrongfully-issued preliminary injunction.[128] Sometimes, for instance in patent cases, even full liability would not deter frivolous suits, for the benefit to the plaintiff from a wrongfully-issued preliminary injunction is higher than the full cost to the defendant.[129] More importantly, in other cases, full liability might deter the plaintiff from applying for socially efficient preliminary injunctions. Over-deterrence may occur because a rule of full compensation causes the plaintiff to internalize the entire harm generated by the wrongfully-issued preliminary injunction, while the plaintiff does not internalize the full social benefit of issuing the preliminary injunction.

Over-deterrence may be avoided if the externalized social benefit does not exceed the private benefit that the plaintiff expects to derive from a wrongfully-issued preliminary injunction. Thus, the concern of over-deterrence is acute in cases in which the preliminary injunction aims to protect mainly third parties.[130] This reasoning justifies a rule that requires public interest plaintiffs to post only a nominal bond, which caps their liability for wrongfully-issued preliminary injunctions.[131]

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128. *See supra* Part IV.A.

129. For accentuating the importance of taking into account the concern of "errant gains," see Lichtman, *supra* note 67.

130. To illustrate, assume that the defendant's behavior causes damage to each of two plaintiffs. The irreparable damage during the litigation is $200, equally divided between the plaintiffs. The defendant can take precautionary measures that would prevent the damage to both plaintiffs, but not damage to only one of them. The socially irreparable cost of taking these precautions during the litigation is $150. Assume that the likelihood that the plaintiffs are legally entitled to stop the defendant's activity is 50%. A preliminary injunction is socially desirable, as its expected social benefit ($100) exceeds its expected cost ($50). However, if the plaintiffs do not collaborate, they will not apply for a preliminary injunction, given that it is the party who applies for it who would be exclusively liable to compensate the defendant for a wrongfully-issued preliminary injunction.

131. *See* Calderon, *supra* note 24, at 136 ("Frivolous claims are adequately screened out by the preliminary injunction test . . . and by the nearly insurmountable financial obstacles to public interest litigation."); Morton, *supra* note 82, at 1869–70 (finding that in environmental cases "courts are less worried about frivolous suits and more concerned with providing the judicial review Congress intended under the statute"); *id.* at 1905 ("[I]n noncommercial cases, the courts should . . . consider the effect of the bond requirement on the enforcement of the important federal right the plaintiff

According to the more modest aim defined above, the plaintiff's liability should be designed to deter frivolous applications for a preliminary injunction by denying the plaintiff the right to retain the benefit derived from a wrongfully-issued preliminary injunction while avoiding over-deterrence. Specifically, as shown above, the scope of the plaintiff's liability for a wrongfully-issued preliminary injunction should be limited to the following range:

$$D_p \leq R \leq D_p[a(p/(1-p))+1]$$

Recall that D_p denotes the plaintiff's benefit from the issuance of the preliminary injunction. Thus, it is difficult, and maybe even impractical, to ensure that this pair of conditions is met when the plaintiff's liability is set according to the defendant's harm rather than the plaintiff's benefit. Nevertheless, one can outline the relevant parameters that should be considered in setting the scope of the plaintiff's liability given the aim of directing the plaintiff.

The lower limit of the plaintiff's liability should be her benefit from the issuance of the preliminary injunction, i.e., the plaintiff's harms if the preliminary injunction had not been issued, D_p. This limit aims to mitigate the concern of under-deterrence. Thus, when the defendant's harms are below the plaintiff's benefits, it is justifiable to require the plaintiff to assume full liability for a wrongfully-issued preliminary injunction.

The upper limit of the plaintiff's liability should be set as an increasing function of both a, the portion of the plaintiff's harm (or lost benefit) that is, from the plaintiff's perspective, irreparable, and p, the probability that the plaintiff will win the case on the merits. The higher the values of these parameters, the lower the concern that imposing full liability would result in over-deterrence. Therefore, when the defendant's harm exceeds the plaintiff's benefit, the plaintiff should bear only part of the defendant's costs. All else being equal, this portion should be smaller the lower the irreparable part of the plaintiff's harm is (in the absence of the preliminary injunction), and the lower the probability that the plaintiff will win the case (as estimated at the preliminary stage). This result may seem counter-intuitive, since the lower a and p, the more

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seeks to enforce."). *See also* Kansas *ex rel.* Stephan v. Adams, 705 F.2d 1267, 1270 (10th Cir. 1983); Crowley v. Local No. 82, Furniture & Piano Moving, 679 F.2d 978, 1000 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984) ("In order not to restrict a federal right unduly, the impact that a bond requirement would have on enforcement of the right should also be considered."); H & R Block, Inc. v. McCaslin, 541 F.2d 1098, 1099 (5th Cir. 1976); Page Commc'ns Eng'rs, Inc. v. Froehlke, 475 F.2d 994, 997 (D.C. Cir. 1973).

probable it is that issuing the preliminary injunction is socially inefficient. Thus, in such cases, the plaintiff's liability should be more expansive to deter plaintiffs from applying for socially inefficient preliminary injunctions. However, as indicated above, the assumption that the plaintiff's liability should be designed to deter her from applying for socially inefficient preliminary injunctions is wrong.

The above result is based on the incorporation of the concern of over-deterrence. The lower the irreparable part of the plaintiff's harm if the preliminary injunction is not issued and the lower the probability that the plaintiff will win the case, the lesser the plaintiff's incentives to apply for a preliminary injunction. These are precisely the cases in which the plaintiff's liability should be limited to avoid over-deterrence. Thus, if we set the remedy as a function of the harm, there is an inherent contradiction between the conditions for limiting the remedy against the plaintiff (low irreparable damage and low probability for success) and the circumstances in which courts are likely to be sympathetic to the plaintiff's cause (high irreparable damage and high probability for success). This contradiction makes it very unlikely that courts would apply the remedy of damages in a way that would not cause over-deterrence.

2. Restitution of Benefits

Recall that according to the rule under consideration, the plaintiff's liability would be limited to the benefit she gained from the preliminary injunction at the defendant's expense. The restitutionary remedy does not deter plaintiffs from applying for socially efficient preliminary injunctions. This remedy does not impose on the plaintiff a cost for applying for a preliminary injunction, and thus the concern of over-deterrence does not materialize. This result can be demonstrated through the pair of conditions defined below:

$$D_p \leq R \leq D_p[a(p/(1-p))+1]$$

As indicated, the amount of restitution, R, is set as the minimum between the plaintiff's benefit, D_p, and the defendant's harm. Thus, the condition on the right-hand side is always fulfilled since the remedy cannot exceed D_p. The left-hand side condition is met only if the plaintiff's benefit is less than the defendant's harm. Therefore, such a restitutionary remedy will not over-deter legitimate claims, but it might under-deter frivolous suits. Notice, however, that under-deterrence will occur only in those cases where a harm-based remedy of compensation is also insufficient to prevent frivolous claims.

CONCLUSION

When a judicial decision is reversed or set aside, the court is faced with the dilemma of whether it should reassign harms inflicted and benefits gained as a result of the reversed decision. Courts traditionally prefer harm-based liability to a benefit-based remedy.[132] This inclination is followed in cases of wrongfully-issued preliminary injunctions, as courts prefer (partial) liability for harms over disgorgement of the benefits obtained due to the wrong injunction. We suggest that the approach should be precisely the opposite. Courts should manifest a greater willingness to require the losing plaintiff to give up her benefits derived from a wrongfully-issued preliminary injunction rather than require her to compensate the defendant for his losses. Restitution of benefits extracted without a true cause, rather than compensation for harm inflicted by the court's order, better advances the aim of minimizing social harm.

For instance, the benefit extracted by a patent holder from obtaining a preliminary injunction is often greater than the loss suffered by the defendant, since the plaintiff is able to charge monopoly prices while the preliminary injunction is in force. In other words, the injunction causes wealth transfers from the defendant to the patentee. The main deadweight-loss that results from such an injunction is suffered by third parties, such as consumers. Allowing a restitutionary remedy in this scenario, then, is desirable. It allows the court to focus on the irreparable losses suffered by the plaintiff and third parties. In addition, the restitutionary remedy helps minimize the social harm of the wrong decision, turning part of the defendant's loss into a reparable wealth transfer, and it has no deterrent effect on the plaintiff (except perhaps under-deterrence in certain situations). In fact, this view can be supported from a doctrinal perspective as well, assuming that the definition of property is extended to include the "right to conduct business," a freedom of the defendant that was usurped by the plaintiff.[133]

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132. *See* Grosskopf, *supra* note 11, at 1994–95 (finding that one of the prominent products of the Anglo-American legal tradition is "the preference for harm-based remedies over benefit-based remedies, as far as protecting entitlement is concerned," and arguing that this tendency need not be transferred to the case of protection competition rules); Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 67 (1985) (noting and explaining the "asymmetry between the law's treatment of harms and its treatment of benefits"); Porat, *supra* note 10 (arguing that Anglo-American law is much more willing to deal with negative externalities (harms) than with positive externalities (benefits)); Wittman, *supra* note 102 (arguing that there is asymmetry in the administrative costs of managing harms and benefits, which makes state agents prefer a baseline that defines those externalities they wish to address as harms).

133. Friedmann, *supra* note 11, at 538 ("The [defendant's] interest in doing business with his clients, though not a traditional property right, can be regarded as quasi-property. . . . [W]hen the other party appropriated this interest by a court decision that was later reversed, his enrichment was

The analysis enriches our understanding of the variety of aims of restitutionary remedies. Two familiar aims are internalizing positive benefits[134] and deterring wrong behavior.[135] The case of a wrongfully-issued preliminary injunction demonstrates a third possible aim of disgorgement of profits—the removal of improper motives to engage in an overall socially desirable behavior.

unjust even his suit was not tortuous"). *Cf.* SmithKline Beecham PLC v. Apotex Europe Ltd., [2007] Ch. 71, 96–97 (rejecting the argument that "a mere freedom to trade" should be classified as property).

134. *See, e.g.*, Landes & Posner, *supra* note 10 (explaining the effect of restitutionary remedies on incentives to take part in rescue activity); Ariel Porat, *supra* note 10.

135. *Supra* note 11 and accompanying text.