2007

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Recommended Citation

John Leubsdorf, *Preliminary Injunctions: In Defense of the Merits*, 76 Fordham L. Rev. 33 (2007).
Available at: <https://ir.lawnet.fordham.edu/flr/vol76/iss1/2>

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Preliminary Injunctions: In Defense of the Merits

Cover Page Footnote

Professor of Law, Rutgers School of Law-Newark; Visiting Professor, Columbia Law School. Thanks to Kevin Clermont and Alex Stein for their helpful comments, and to the Dean's Research Fund of Rutgers School of Law-Newark for its support.

ESSAY

PRELIMINARY INJUNCTIONS: IN DEFENSE OF THE MERITS

*John Leubsdorf**

A recent article by Richard Brooks and Warren Schwartz contends that the goal of preliminary injunctions should be to promote efficient conduct during a lawsuit. It would do this by granting injunctions to all plaintiffs who post a bond covering the defendant's damages provided that the plaintiff has some claim on the merits. This reply defends the more traditional approach theorized in a past article by this author and in an opinion of Judge Richard Posner. Under that approach, courts should continue to consider the merits of the plaintiff's claim and the irreparable injury to the parties' rights that an erroneous grant or denial of preliminary relief would inflict.

INTRODUCTION

An excellent article recently published in the *Stanford Law Review* by Richard Brooks and Warren Schwartz proposes a strikingly new approach to the granting of preliminary injunctions.¹ Under that approach, the merits of the plaintiff's case for final relief would scarcely be considered at the preliminary injunction stage.² Neither would the court consider whether injury to either party would be irreparable.³ Rather, granted any uncertainty as to the correct final outcome, courts would grant interlocutory relief to any plaintiff willing to post a bond covering the defendant's damages, or alternatively would grant relief if and only if that would be the most efficient allocation of the resources in dispute.⁴ This Essay defends a more traditional approach requiring consideration of the merits of the plaintiff's case and the irreparable injury to the rights of the parties that granting or denying preliminary relief would inflict. I tried to rationalize and theorize

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1. Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 Stan. L. Rev. 381 (2005).

2. Brooks & Schwartz, *supra* note 1, at 400–01, 404–05.

3. *Id.* at 403, 405.

4. *Id.* at 403–07, 409.

that approach in a previous article⁵ that Professors Brooks and Schwartz very thoughtfully and graciously critique.⁶

What standard for preliminary injunctions is preferable depends on what one's goals are. Under what Professors Brooks and Schwartz generously call the Leubsdorf-Posner formulation,⁷ the goal is to minimize irreparable injury to legal rights in situations in which the court cannot know, at the outset of a litigation, who will ultimately be determined to have rights. The court should seek that goal by comparing the irreparable injury that each party faces, as discounted by the likelihood that party will turn out to be legally in the wrong.⁸ Thus, a party that is highly likely to prevail can obtain an injunction (or if a defendant prevent one) even though its threatened irreparable injury is less than that of the opposing party. Conversely, a party facing irreparable injury far greater than that of its opponent can obtain or prevent an injunction even though its chances of prevailing on the merits are not as strong.

The approach of Professors Brooks and Schwartz seeks rather to promote efficient conduct during the litigation by removing the incentives of parties to act inefficiently in the hope that the court will not hold them liable. For example, if a plaintiff seeks to enforce a contract to buy goods and is willing to post an injunction bond, the court should automatically grant preliminary relief, relying on the plaintiff not to seek relief in cases in which the plaintiff's probable liability on the injunction bond would be greater than its probable profits from the injunction.⁹ This approach is novel. It is not found in judicial language or, I believe, judicial practice.

My rejoinder here will focus on the drawbacks the pursuit of that goal entails. But I do not claim that either the traditional approach or its Leubsdorf-Posner variant is free of similar drawbacks. On the contrary, that approach calls on the court to appraise the merits at a time when, by hypothesis, the information needed to do that is unavailable, and to compare injuries that lie in the future and are in many instances classified as irreparable precisely because of the difficulty of measuring them. Any approach will involve much guesswork in application.

I will concentrate on the proposed "liability rule" that Brooks and Schwartz prefer. Under that rule, a plaintiff willing to post bond to cover the defendant's injuries, should the defendant ultimately prevail, may obtain preliminary injunctive relief in any case in which there is uncertainty as to

5. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525 (1978).

6. See generally Brooks & Schwartz, *supra* note 1.

7. The name comes from Judge Richard Posner's opinion in *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589 (7th Cir. 1986), and from Leubsdorf, *supra* note 5.

8. *Am. Hosp. Supply Corp.*, 780 F.2d at 593-94; Leubsdorf, *supra* note 5, at 540-44.

9. Brooks & Schwartz, *supra* note 1, at 394-96, 405-07.

the correct result.¹⁰ Because the plaintiff will have to bear the defendant's costs should the defendant prevail, they contend (to oversimplify their more detailed analysis) that this rule will induce a plaintiff to seek preliminary relief when, and only when, the plaintiff's gain from the relief exceeds the costs it imposes on the defendant. Brooks and Schwartz also suggest an alternative "interim efficiency rule" under which the court grants an injunction only if it concludes that doing so would be efficient in the sense that the benefits it would confer on the plaintiff are larger than the costs it would impose on the defendant.¹¹ Both of these proposals would have the court ignore the merits of the controversy, except by determining that the law or determinative facts are uncertain. As a result, most but not all of my comments on the liability rule are also applicable to the interim efficiency rule. I will try to point out when that is not so.

I. DISREGARDING THE SUBSTANTIVE LAW

Under existing law as well as the Leubsdorf-Posner formulation, the strength of the plaintiff's case under the substantive law—usually referred to as the plaintiff's likelihood of prevailing—is an important, perhaps the most important, factor in determining whether the plaintiff can obtain preliminary relief. Courts often decide motions for preliminary injunctions almost entirely on this ground.¹² Indeed, deciding the merits immediately, if possible, is often a good way to avoid the difficulties of preliminary injunction decisions.¹³ By instructing courts to ignore the strength of the plaintiff's case once they have determined that there is a genuine issue,¹⁴ the liability rule and interim efficiency rule create serious problems.

If courts disregard the substantive law, a plaintiff willing to pay can automatically obtain injunctive relief under the "liability rule" so long as the plaintiff's case is not frivolous. The plaintiff thus enlists the courts to force the defendant to forgo its claimed rights while the suit is pending. In the contractual and nuisance disputes the article discusses, this may be acceptable. But what about election disputes such as *Bush v. Gore*?¹⁵ Should a (political) party with sufficient funding be able to delay a vote count, or even install its candidate, pending final determination?¹⁶ It is

10. *Id.* at 405–07.

11. *Id.* at 403–05.

12. *See, e.g.,* *Sole v. Wyner*, 127 S. Ct. 2188, 2195 (2007) (discussing probability of success factor); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

13. *See* Fed. R. Civ. P. 65(a)(2); *Thornburgh v. Am. Coll. of Obstetricians*, 476 U.S. 747, 755–57 (1986).

14. Brooks & Schwartz, *supra* note 1, at 400–01, 404–05.

15. 531 U.S. 1046 (2000) (staying a Florida Supreme Court mandate).

16. *See, e.g.,* *Moore v. Brown*, 448 U.S. 1335, 1339–40 (1980) (Powell, Circuit Justice) (holding that an injunction requiring voting by district is inappropriate when, inter alia, there are no adequate findings of a likelihood of success on the merits); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (en banc) (affirming the district court's denial of an injunction to delay gubernatorial recall vote).

equally unacceptable to allow a plaintiff willing to post bond to enjoin a government project on environmental grounds, to block a statute, or to prevent the discharge of a CEO, governmental official, or other employee. The liability rule thus opens the door for plaintiffs who are able and willing to pay to secure economically inefficient results, whether out of spite, or because they place a higher than market value on them, or place a lower marginal value on money than the defendants. Such plaintiffs can force defendants to sell their rights, or can extort money from defendants by threatening to do so.

Disregarding the legalities at the interlocutory stage also creates a disjunction between the rule applied then and the substantive law applied at the final stage. This disjunction undermines the policies embodied in the substantive law laid down by the legislature or other lawmaker, at least when that law is not itself based on economic efficiency. The liability rule will allow a plaintiff to enjoin conduct during the suit whether or not that conduct violates the substantive law. True, the defendant will be compensated for the deviation, if it turns out to be one. And in situations in which we accept the premise that compensation is as good as or better than performance, automatic relief does no harm. But if 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. The clash is still more severe if the substantive law embodies a standard of conduct that is inefficient in the relevant economic sense.

One further objection to the results just described is that they enlist the courts in enforcing the sale of rights by unusually stringent means, to wit, contempt sanctions. I have in mind not just the economic costs of these sanctions and their administration but also the legitimacy costs when someone is threatened with imprisonment for conduct that turns out to be lawful. That occurs even without the proposed liability rule,¹⁷ but presumably less often, and without the proposed doctrine that the merits do not even matter in awarding preliminary relief.

Professors Brooks and Schwartz's reply to these problems involves the argument that, once there is uncertainty as to the proper result on the merits (and the liability rule would only apply when the plaintiff has some claim on the merits), arguments based on the defendant's loss of rights should drop out of the picture.¹⁸ But there are degrees of uncertainty. Granting relief against a defendant with a strong case raises the problems I have mentioned even if there is some possibility that the defendant is in the wrong. After all, even when a case is heard on the merits, some uncertainty of fact or law may remain. Yet this should not license the court to disregard

17. The classic case is *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (upholding a criminal contempt conviction for a violation of an injunction despite defendant's claim that the injunction was unconstitutional).

18. Brooks & Schwartz, *supra* note 1, at 406–07.

the substantive law.¹⁹ The same applies at the interlocutory stage, with due allowance for the greater uncertainty likely then.²⁰

These problems are likewise present to some extent under the interim efficiency rule. Since that rule does not require a plaintiff to post a bond, plaintiffs are not using the courts to force defendants to sell their rights during the course of the suit. But they are using the courts to force defendants to abandon their rights without any showing of legal entitlement on what amounts to the argument that the plaintiffs can use these rights more productively. Likewise, when an injunction is denied under this rule, a plaintiff is denied enforcement for what may be his legal right simply because the defendant's activities are more profitable. The interim efficiency rule, like the liability rule, thus undermines rights conferred by law.

Decisions made by English courts show how judges find it difficult to pass on motions for preliminary relief without considering the merits, as both the liability rule and the interim efficiency rule would require. In *American Cyanamid Co. v. Ethicon Ltd.*,²¹ the House of Lords seemed to endorse such an approach. It said that, once the plaintiff demonstrates that there is a serious question to be tried, the merits should not be further considered and the decision should be based on the balance of inconvenience. However, in Adrian Zuckerman's words, "The weakness of the *American Cyanamid* doctrine has resulted in a discrete but consistent erosion of its significance as far as the ban on merits is concerned."²²

II. DISREGARDING IRREPARABLE INJURY

Traditionally, as well as under the Leubsdorf-Posner approach, the likelihood of injury to the plaintiff that cannot be remedied adequately when the case is heard on the merits has been an essential requirement for immediate relief;²³ and the possibility that a preliminary injunction could injure the defendant in ways that cannot be remedied adequately later has weighed heavily against immediate relief.²⁴ Professors Brooks and

19. But see Joshua P. Davis, *Taking Uncertainty Seriously: Revising Injunction Doctrine*, 34 Rutgers L.J. 363 (2003) (arguing that uncertainty should be factored into final injunction decisions).

20. The liability rule breaks down entirely when both parties seek inconsistent preliminary relief. E.g., *Vander Vreken v. Am. Dairy Queen Corp.*, 261 F. Supp. 2d 821, 822 (E.D. Mich. 2003); *Automated Prods., Inc. v. FMB Maschinenbaugesellschaft mbH & Co.*, 34 U.S.P.Q.2d (BNA) 1505 (N.D. Ill. 1994); *Mounce v. Bostick*, 531 S.W.2d 887 (Tex. App. 1975). The court cannot grant automatic relief to both parties. Such conflicting motions are currently rare, but the liability rule could encourage defendants to bring them more frequently.

21. (1975) 1 All E.R. 504 (H.L.).

22. Adrian A.S. Zuckerman, *Civil Procedure* para. 9.38 (2003). For details and authorities, see *id.* at paras. 9.25–41.

23. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

24. See *CBS Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, Circuit Justice); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 544–45 (1987). When Brooks and

Schwartz would exclude these factors from the court's consideration. Under their liability rule, any plaintiff who posts a bond obtains an injunction, and must do its own balancing of the injunction's benefits against the plaintiff's liability under an injunction bond should the defendant ultimately prevail. Under their interim efficiency rule, the court does not compare irreparable injuries, but rather decides whether the plaintiff's payoff from interlocutory relief exceeds the defendant's payoff from its denial.²⁵ For courts to disregard irreparable injury in this way raises further problems.

Granting a preliminary injunction without considering either the merits of the plaintiff's claim or the likelihood of irreparable injury may be a denial of due process. The liability rule resembles procedures struck down by the Supreme Court because they allowed interim relief such as replevin without some showing of merit and exigency—and requiring a bond does not always avoid this due process problem.²⁶ The interim efficiency rule faces similar obstacles. It does not require the plaintiff to post bond; it does not require judicial evaluation of legal merit; and the judicial determination of efficiency that it does exact may fall short of a showing that there is a need for immediate relief.²⁷ These constitutional objections, although they fall outside the scope of Professors Brooks and Schwartz's economic analysis, may well bar adoption of their proposals.

Those proposals also imply the radical innovation that preliminary relief should be available even when the only injury faced by the plaintiff can be adequately compensated in damages. That follows from the thesis that repairable as well as irreparable injury should be prevented by a preliminary injunction rule in order to avoid inefficient behavior,²⁸ a thesis on which both the liability rule and the interim efficiency rule are based.

Admittedly, dropping the irreparability rule would not necessarily multiply enormously the number of injunction motions. As Professor Douglas Laycock points out, there is little left of this rule at the final

Schwartz say that *Hendricks Music Co. v. Steinway*, 689 F. Supp. 1501 (N.D. Ill. 1988), is the only case in which relief was denied because of the balance of inconvenience, Brooks & Schwartz, *supra* note 1, at 408, they must mean the only case explicitly citing the Posner or Leubsdorf formulations. For other cases not citing those formulations, see *Wilson-Cook Medical, Inc. v. Wiltek Medical, Inc.*, 18 U.S.P.Q.2d (BNA) 1642 (4th Cir. 1991); *Burkholder v. International Union*, 444 F. Supp. 2d 817 (N.D. Ohio 2006); *Golden Bear International v. Bear U.S.A. Inc.*, 969 F. Supp. 742 (N.D. Ga. 1996); *Kansas Hospital Association v. Whiteman*, 835 F. Supp. 1556 (D. Kan. 1993); *M & D Balloons, Inc. v. Courtaulds, plc*, No. 90 C 0834, 1990 U.S. Dist. LEXIS 18803 (N.D. Ill. Aug. 22, 1990); *Stokley-Van Camp Inc. v. Coca-Cola Co.*, 2 U.S.P.Q.2d (BNA) 1225 (N.D. Ill. 1987). There are innumerable cases in which the balance of inconvenience joins with the weakness of the plaintiff's case to bar relief.

25. Brooks & Schwartz, *supra* note 1, at 403–04.

26. *N. Ga. Finishing v. Di-Chem, Inc.*, 419 U.S. 601, 608 (1975); see *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978).

27. Brooks & Schwartz, *supra* note 1, at 403–04.

28. See *id.* at 393, 402–04.

injunction stage.²⁹ In addition, almost all plaintiffs seek money rather than a final injunction. And when only monetary relief is being sought, plaintiffs will often have no occasion to seek preliminary relief under the liability rule because they are unlikely to benefit by posting a bond for X dollars in order to get immediate payment of the same or a smaller sum.

Nevertheless, allowing preliminary injunctions in damages actions does raise significant difficulties. It might revive imprisonment for debt. A creditor could get a preliminary injunction requiring payment, enforceable by contempt sanctions. The bond requirement of the liability rule would not be a deterrent in cases in which the creditor knew that he was very likely to prevail on the merits. In addition, creditors are well aware that poor and unsophisticated debtors with small debts will often not litigate through the merits and bond liability stages and may “pay up simply because they are worn down by threats from the [creditors] and fear damage to their credit rating.”³⁰ Such plaintiffs might be willing to obtain injunctions despite the risk of ultimately being held liable on the bond. Similarly, the efficiency requirement of the interim efficiency rule would not be an obstacle to relief when the plaintiff could use the money more profitably than the defendant.

Contempt sanctions for unpaid debts would be a major innovation. At present, child support orders (final or preliminary) are almost the only monetary obligations enforced by contempt sanctions.³¹ That might change were preliminary relief broadly available for damages claims.³² Moreover, under both the liability rule and the interim efficiency rule, fines and imprisonment for contempt of court could be imposed on enjoined debtors who failed to pay even though the court had not assessed the validity of the debt when it granted the injunction.

29. Douglas Laycock, *The Death of the Irreparable Injury Rule* (1991). Rhonda Wasserman argues for the availability of preliminary injunctions in certain damages actions in two articles: *Equity Transformed: Preliminary Injunctions to Require the Payment of Money*, 70 B.U. L. Rev. 623 (1990), and *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 Wash. L. Rev. 257 (1992). Wasserman recognizes that granting an injunction in such circumstances would be an innovation, and the U.S. Supreme Court has declared that it is often beyond federal courts' equity powers. See *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318–33 (1999).

30. Sewell Chan, *An Outcry Rises as Debt Collectors Play Rough*, N.Y. Times, July 5, 2006, at A1.

31. See David Chambers, *Making Fathers Pay* (1979). For other sanctions, see 18 U.S.C. § 228 (2000); 42 U.S.C. § 666 (2000). Professor Jane C. Murphy argues that such aggressive enforcement of support obligations has misfired by discouraging men who are not biological fathers from assuming the role of fatherhood. Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 Notre Dame L. Rev. 325, 329–30, 360–61, 386 (2005).

32. See Jayne S. Ressler, *Civil Contempt Confinement and the Bankruptcy Abuse and Consumer Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age*, 37 Rutgers L.J. 355 (2006) (warning against a possible increase in debtor imprisonment).

Here is another possibility: Would an employer be able to enjoin an employee from leaving his job in breach of contract? If so, would that create a temporary form of involuntary servitude? Similarly, could one get a preliminary injunction against defamation without consideration of the merits, and would this amount to a prior restraint forbidden by the First Amendment?³³ Defamation suits brought to deter valuable speech are already a problem,³⁴ and the proposed injunction rules would make things worse. And even in a commercial case, could a creditor get an automatic preliminary injunction requiring payment by a debtor on the brink of insolvency, thus giving that creditor a preference over other creditors (albeit one that the bankruptcy court could undo)?³⁵ It is hard to see how allowing plaintiffs willing to risk damages liability to obtain preliminary relief in cases such as these would promote any appropriate social goal.

As all these examples indicate, deciding what injuries warrant injunctive relief raises issues of substantive and remedial policy. At the hearing on the merits, courts invoke various doctrines implicating that policy when they consider final injunctive relief.³⁶ Under current doctrine, whether such final relief is available in turn affects whether injuries should be considered irreparable at the interlocutory stage. If the only appropriate final remedy is damages, a preliminary injunction will normally be unnecessary because the law considers those damages an adequate remedy. If injunctive final relief is appropriate, damages must be considered inadequate, and the plaintiff's injury should be considered irreparable unless final injunctive relief will repair it.³⁷ By removing irreparable injury from the preliminary injunction standard, the liability rule and interim efficiency rule elide these considerations and, once again, undermine the substantive law and its policies.

III. RELYING ON INJUNCTION BONDS

Because Professors Brooks and Schwartz would excise from judicial consideration the probability of success and the balance of irreparable

33. *Vance v. Univ. Amusement Co. Inc.*, 445 U.S. 308 (1980); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

34. George W. Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (1996). Section 425.16 of the California Civil Procedure Code (2004), which is directed against strategic lawsuits against public participation (SLAPPs), has given rise to hundreds of cases. Jerome I. Braun, *California's Anti-SLAPP Remedy After Eleven Years*, 34 *McGeorge L. Rev.* 731, 735 (2003); see also Shannon Hartzler, Note, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 *Val. U. L. Rev.* 1235, 1241 (2007) (stating that twenty-four states have enacted anti-SLAPP laws).

35. Judge Posner discussed this problem in *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589, 596 (7th Cir. 1986).

36. See *Los Angeles v. Lyons*, 461 U.S. 95, 111–12 (1983) (holding that damages are an adequate remedy for a victim of a police choke hold absent probability of recurrence); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (holding that statutory policy requires an injunction to protect endangered species). See generally Laycock, *supra* note 29.

37. Leubsdorf, *supra* note 5, at 551–53.

injury, their approach relies all the more on what turns out to be a thin reed, the requirement that in order to get a preliminary injunction one must post bond to compensate the defendant should it prevail on the merits.³⁸ Under the liability rule, it is only liability under the bond that deters a plaintiff from obtaining an automatic injunction.³⁹ Under the interim efficiency rule, that liability is likewise a significant constraint on plaintiffs, albeit not the only one.⁴⁰ And if parties bargain about how they will behave during the suit, they will be bargaining in the shadow of the bond.⁴¹ This heavy reliance on the injunction bond makes its defects more salient than they have been under the traditional approach to preliminary relief or its Leubsdorf-Posner variant.

The ability of the liability rule to avoid the multiplication of injunctions against conduct that turns out to be lawful—or, as Professors Brooks and Schwartz would have it, to avoid injunctions that cost defendants more than they benefit plaintiffs—turns on the adequacy of the compensation that defendants receive under the injunction bond if they prevail on the merits. In contract and other cases in which only “economic” values are in question and only the parties to the lawsuit have relevant gains and costs, the adequacy of the compensation that defendants receive may not be a big problem. But suppose the construction of a dam is enjoined under a claim of injury to a protected species; what are the government’s damages if it ultimately prevails? Similarly, what are the injunction bond damages if a municipality enjoins a demonstration, or a plaintiff enjoins an allegedly religious governmental act? At present, there is little authority on how much prevailing defendants may recover on injunction bonds, and the existing authority is not very liberal.⁴² That approach could be changed, but the assessment difficulties would still arise.

Problems of deciding how to deal with costs imposed on persons other than the defendant must also be faced. Must the plaintiff compensate those

38. Fed. R. Civ. P. 65(c).

39. Brooks & Schwartz, *supra* note 1, at 405.

40. Professors Brooks and Schwartz do not actually mention the bond in their description of the interim efficiency rule. *See id.* at 403–04. If no bond is required under that rule, no check exists on a plaintiff’s ability to compel a defendant to forgo what may well turn out to be its legal rights when it can persuade the court that this would be more efficient. Neither the plaintiff nor the court would then have to consider at the interlocutory stage the merit of the plaintiff’s claim under the substantive law.

41. The phrase derives, of course, from Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. Legal Stud. 225 (1982).

42. *See* Dan B. Dobbs, *Should Security Be Required as a Pre-condition to Provisional Injunctive Relief?*, 52 N.C. L. Rev. 1091, 1121–52 (1974). For example, courts have some discretion to deny recovery even when a defendant’s position on the merits has been vindicated. *See* Coyne-Delany Co. v. Capital Dev. Bd., 717 F.2d 385, 390 (7th Cir. 1983) (Posner, J.) (narrowing but not eliminating discretion); *Ala. ex rel. Siegelman v. EPA*, 925 F.2d 385, 389 (11th Cir. 1991) (similar).

persons too?⁴³ If so, how will that be arranged? Once again, this may not be a serious problem in a contract case since contract law accepts that limiting judicial concern to the interests of the contracting parties will (within broad limits) be good for everyone. But what about environmental or civil rights law? If plaintiffs enjoin an antiabortion law that turns out to be valid, what should they have to pay and to whom? Similar problems arise when an injunction confers benefits on third parties. Are these to be calculated and subtracted from the defendant's injunction bond recovery?⁴⁴

Another problem with damages assessment, perhaps a variant of those already mentioned, concerns which costs are legally relevant. For example, under current law, an antitrust plaintiff can recover damages only for "antitrust injury" of the sort the antitrust laws were intended to prevent, as opposed to harm resulting from competition.⁴⁵ Presumably, only this sort of injury should be considered under the interim efficiency rule in deciding whether to grant a preliminary injunction. This concept can also be applied to defendants. For example, under the liability rule, if a preliminary injunction against unfair trade practices causes the collapse of the defendant's business, which in turn disrupts his marriage, should recovery on the injunction bond include the costs of the divorce?

These problems all exist under the present preliminary injunction regime, both when the court compares irreparable injuries⁴⁶ and when it assesses damages under an injunction bond.⁴⁷ But the comparison of injuries does not purport to be more than an estimate. There are other safeguards against what counts as abuse under this regime, and the regime does not claim to be assuring economic efficiency. The second and third of these points also differentiate current law from the interim efficiency rule, under which the court must assess the costs and benefits of the defendant's conduct that the plaintiff seeks to enjoin.⁴⁸ To the extent that the problems of awarding damages under a bond cause unsuccessful plaintiffs to pay the defendant more or less than the costs imposed by preliminary relief, the efficiency sought by Professors Brooks and Schwartz will not be attained.

More basically, the problems of calculating either recovery on an injunction bond or the costs and benefits of an injunction again point out the

43. See A.J. Phipps, *Non-party Compensation for Wrongful Interim Injunctions: SmithKline Beecham Plc v. Apotex Europe Ltd.*, 26 Civ. Just. Q. 10 (2007) (discussing this issue under English law).

44. See Douglas Lichtman, *Irreparable Benefits*, 116 Yale L.J. 1284 (2007) (considering benefits to parties).

45. See, e.g., *Atl. Richfield Co. v. U.S. Petroleum Co.*, 495 U.S. 328 (1990); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986) (holding that an antitrust injury must be shown by a private plaintiff seeking a final injunction).

46. See Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. Chi. L. Rev. 197, 205–10 (2003) (noting that predicting irreparable injury, like predicting the result on the merits, is a venture in uncertainty).

47. Dobbs, *supra* note 42, at 1125–46.

48. Brooks & Schwartz, *supra* note 1, at 403–04.

difficulty of detaching efficiency concerns from those of the substantive law. Ultimately, it may be simpler and more desirable to consider the law as fixing what is socially desirable rather than analyzing costs and benefits de novo in every instance—either under the liability rule when granting damages under an injunction bond or under the interim efficiency rule when deciding whether to enjoin. And as Professor Douglas Lichtman has stated, “[P]articular attention should be paid to the court’s prediction of the merits, simply because that is the most reliable of the . . . factors in play. Irreparable harms and benefits are by definition difficult to quantify.”⁴⁹

Even if the problems of assessment are overcome, adequate compensation for defendants under injunction bonds may not deter plaintiffs from seeking more injunctions than economically rational. Litigants tend to be optimistic about their own chances of success.⁵⁰ The benefits of getting an injunction now may be more vivid than the possibility of having to pay for it later, even if the payment includes interest.

Lastly, in some cases, plaintiffs will not post a bond because (1) they cannot afford one, (2) they are suing on behalf of a class or the public and their own stakes are too small to make a large exposure sensible, or (3) the plaintiffs are governmental agencies that do not have money to spend on bonds. Under the liability rule, one might simply deny relief in these situations because the requisite bond has not been posted. If not, some other standard will be needed, for example the efficient performance rule. Under current law, courts often deal with these situations by not requiring a bond.⁵¹ That would be harder to justify under the liability rule, because that rule dispenses with safeguards against unwarranted injunctions other than the bond.

IV. WHAT IS EFFICIENT?

In these comments, I have thus far evaded confronting directly Professors Brooks and Schwartz’s contention that the goal of a preliminary injunction standard should be to foster behavior during lawsuits that is efficient in the sense of producing net gains for the parties that are larger than those flowing from alternative courses. My approach has been to elucidate some of the drawbacks of pursuing that goal, but some more general comments on the goal may be appropriate.

The concept of efficiency invoked by Professors Brooks and Schwartz, although frequent in the law and economics literature, is a distinctive one that can lead their analysis to questionable results. For example, many

49. Lichtman, *supra* note 44, at 1295.

50. See Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 Ohio St. J. on Disp. Resol. 281, 284–94 (2006) (citing psychological findings).

51. See 13 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 65.52 (3d ed. 1997); Erin Connors Morton, Note, *Security for Interlocutory Injunctions Under Rule 65(c): Exceptions to the Rule Gone Awry*, 46 Hastings L.J. 1863, 1878–96 (1995).

might agree that the First Amendment is good for the economy, or at least that it maximizes the sum of individual utilities when those utilities include nonmonetary benefits.⁵² Yet individual exercises of free speech—for example, a newspaper article that turns out to be false but not malicious,⁵³ or a law review article whose only effect is the destruction of trees to manufacture its paper—may often impose costs exceeding their benefits. Under the interim efficiency rule, preliminary injunctions might well be obtainable against such speech if the plaintiff has a colorable legal claim. Even proponents of efficiency in a broader sense might think this an undesirable result. It 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.

The way the law pursues or should pursue efficiency may also influence the plausibility of Professors Brooks and Schwartz's analysis. Both of the hypotheticals on which they focus involve situations in which the law could be seen as seeking efficiency by allocating assets to the more productive user. That is the goal of contract law under the efficient breach theory, and nuisance law can be similarly analyzed.⁵⁴ If the substantive law of contracts and nuisances is construed in this way,⁵⁵ it is generally consistent with Brooks and Schwartz's approach to preliminary injunctions, which seeks to allocate assets productively while litigation is pending.⁵⁶ However, contract and nuisance law differ from fields such as personal injury law or criminal law, which seek efficiency (if at all) by deterring undesirable conduct. That goal would hardly be advanced by allowing a convicted defendant with a plausible claim to final relief to delay his own punishment if and only if he had sufficient assets or income.⁵⁷

Even in contract law, one might question whether the proposed liability rule will actually promote efficiency. Cases in which it is unclear whether a party has broken its contract might often be considered to result from the

52. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 Harv. L. Rev. 966, 979–85 (2001) (explaining this broad definition of utility); cf. Amartya Sen, *Development as Freedom* (1999) (urging economic analysis based on maximization of freedom).

53. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that damage recovery for defamation of a public official requires proof of knowing or reckless disregard of truth). An injunction against defamation would face additional First Amendment problems. See *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

54. See Brooks & Schwartz, *supra* note 1, at 394–96; see also A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 Stan. L. Rev. 1075, 1081–84 (1980) (discussing allocative efficiency analysis of nuisance law).

55. But see Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 Cal. L. Rev. 975 (2005) (challenging efficient breach theory).

56. Brooks & Schwartz, *supra* note 1, at 393–94.

57. See *Hill v. McDonough*, 126 S. Ct. 2096, 2104 (2006) (discussing when a defendant challenging an execution method should receive a stay of execution).

failure of the parties to specify in more detail what performance was required in the circumstances. The efficient rule for courts to adopt would then normally be that which the parties would themselves have chosen had they negotiated in more detail. But it seems unlikely that many contracting parties would agree that, whenever a dispute arose, one party could automatically force the other to comply with the first party's claim as to what performance was due, provided the first party was willing to compensate the second should the second's view prevail in court.⁵⁸ Such an automatic relief clause looks more like a penalty default provision.⁵⁹ Such provisions are usually justified on the basis of the desirability of encouraging the penalized party to negotiate around the default rule and in the process disclose important information,⁶⁰ and there is no reason to suppose that prospective enjoined parties in contract disputes are especially likely to possess such information. So does it really promote efficiency to impose a preliminary injunction rule differing from what most contracting parties would agree to?

From another perspective, the problem at which the analysis of Professors Brooks and Schwartz is directed might seem a relatively insignificant part of a larger problem. True, the uncertainties of litigation might encourage some defendants (but for the availability of preliminary relief) to pursue wasteful courses of action more than they would in a world of instant judicial decisions.⁶¹ But other features of our procedural system also encourage defendants and potential defendants to do this, probably to a far greater extent. Thanks to factors such as lack of information and the costs of litigation, many defendants can assume that many or most of their victims will never seek compensation.⁶² Defendants also know that the inadequacy of the standards for making unsuccessful defendants pay prejudgment interest on damages will tend to make suing undesirable for plaintiffs and defending relatively harmless to defendants.⁶³ A potential

58. Actually, this approach is indeed embodied in labor law's "obey now, grieve later" principle, but is there based on special considerations. See, e.g., *Patton v. Budd Co.*, 181 L.R.R.M. (BNA) 2769, 2773 (6th Cir. Mar. 27, 2007) (noting that the collective bargaining agreement embodied this policy); *Crider v. Spectralite Consortium, Inc.*, 130 F.3d 1238, 1242-43 (7th Cir. 1997) (relying on the need to preserve workplace discipline). Even there, exceptions exist. See *Larson v. Dep't of the Army*, 260 F.3d 1350, 1354 n.3 (Fed. Cir. 2001) (holding that genuine safety concerns warrant disobedience). And the principle applies only in one direction: Workers must obey employers, but not vice versa.

59. See generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87 (1989).

60. See, e.g., Ian Ayres, *Ya-Huh: There Are and Should Be Penalty Defaults*, 33 Fla. St. U. L. Rev. 589 (2006); Ayres & Gertner, *supra* note 59, at 91, 94, 97-107. I owe the argument of this paragraph to Alex Stein.

61. See Brooks & Schwartz, *supra* note 1, at 385-87, 393.

62. See Paul C. Weiler et al., *A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation* 61-62 (1993) (reporting that only a small percentage of those injured by medical malpractice make claims).

63. See Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 Tex. L. Rev. 293, 294-99, 365-66 (1996).

defendant with liability insurance will be relieved from shouldering some of the consequences of misconduct. An optimistic defendant may underestimate the likelihood of being held liable.⁶⁴ Most importantly, the time that disputed litigation commonly lasts extends all these temptations.⁶⁵

Needless to say, other realities have an opposite effect by deterring potential defendants from conduct that may well be lawful. Lawful conduct may lead to claims by optimistic or misguided plaintiffs. Plaintiffs contemplating certain kinds of claims may be encouraged by one-way attorney fee statutes⁶⁶ or multiple damages provisions.⁶⁷ Defending a lawsuit often imposes burdens of cost, time, bad publicity, and general agony. My point is not that all potential defendants are already sufficiently deterred from acting improperly, which is obviously untrue. My point is that the impact of the preliminary injunction doctrine on deterrence may be swamped by other factors. Any attempt to address the willingness of defendants to take a chance at avoiding liability for arguably unlawful conduct will have to go well beyond adjusting that doctrine.

CONCLUSION

The analysis presented by Professors Brooks and Schwartz, illuminating and intelligent as it is, would radically change the current approach to preliminary injunctions. Although courts rarely have adopted explicitly what the article graciously calls the Leubsdorf-Posner rule,⁶⁸ judges continue to grant and deny relief on the basis of considerations that Professors Brooks and Schwartz would exclude. They take seriously the plaintiff's likelihood of prevailing and the irreparable injuries facing the parties.⁶⁹ Courts do not compare the ability of the parties to profit from the resources in dispute during the litigation, and they certainly do not grant an

64. See *supra* note 50 and accompanying text. In addition, the ability to deduct litigation costs as business expenses for tax purposes aids businesses confronting, whether as defendants or plaintiffs, nonbusiness litigants. On the distinction between business and personal legal expenses, see *United States v. Gilmore*, 372 U.S. 39 (1963).

65. As an alternative to the liability rule, how about allowing a plaintiff willing to pay to obtain an immediate final hearing of its case? See Fed. R. Civ. P. 65(a)(2) (providing that a court may consolidate a preliminary injunction hearing and a trial on the merits). Compare "rent a judge" statutes that allow parties, by mutual agreement, to hire a former judge or other person to act as judge in their case. Cal. Civ. Proc. Code §§ 638, 644(a), 645, 645.1(a) (1976); see also Anne S. Kim, Note, *Rent-a-Judges and the Cost of Selling Justice*, 44 Duke L.J. 166, 168–80 (1994).

66. *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 416–22 (1978).

67. See 15 U.S.C. § 15(a) (2000).

68. The Leubsdorf-Posner rule is the law in Massachusetts, see *Packaging Indus. Group, Inc. v. Cheney*, 405 N.E.2d 106, 111–12 (Mass. 1980), has sometimes influenced practice in the Seventh Circuit, see *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11–12 (7th Cir. 1992), and appears in a scattering of cases elsewhere, see, e.g., *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 284–85 (4th Cir. 2002); *Greenidge v. Allstate Ins. Co.*, 02 Civ. 9796 (JCF), 2003 U.S. Dist. LEXIS 21733, at *5–7 (S.D.N.Y. Dec. 3, 2003).

69. See *supra* Parts I, II.

injunction to any nonfrivolous plaintiff willing to post a bond. On the contrary, they frequently deny relief.⁷⁰

I have tried to show that, in principle as well as in practice, there is little foundation for courts to disregard the strength of the plaintiff's claim or the irreparable injuries threatening the parties, or to rely on the plaintiff's fear of liability under the injunction bond as the unique safeguard against improvident relief. Doing so threatens to undermine the substantive law. It would give plaintiffs with weak claims who are willing to pay damages under a bond the ability to use the power of the state to coerce opposing parties or to make them pay to avoid an injunction. It would open the way to preliminary injunctions in situations in which the policies of the law have barred them as unnecessary to prevent irreparable injury. Yet even if these sacrifices are made, it remains highly uncertain whether the proposed new standards for preliminary relief would promote the efficient use of resources while lawsuits are pending. Courts would be better advised to continue pursuing their traditional function of protecting legal rights by shaping injunction decisions that seek to minimize the likely irreparable harm to those rights.

70. A search on the Lexis federal and state cases database of opinions decided in the year 2006 turned up 1016 cases in which "preliminary injunction" appears within five words of "granted" and 1361 cases in which "preliminary injunction" appears within five words of "denied." Compare this finding to the assertion that "what the courts do, if not what they say, is very close to what we characterize as the preliminary injunction liability rule." Brooks & Schwartz, *supra* note 1, at 408.

Notes & Observations