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### A Remedy for the Least Well Off: The Case for Preliminary Damages

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# **A Remedy for the Least Well-Off: The Case for Preliminary Damages**

**Gideon Parchomovsky\* and Alex Stein\*\***

Forthcoming in 75 VANDERBILT LAW REVIEW (2022)

Equal justice under law is not merely a caption on the facade of the Supreme Court building; it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists . . . it is fundamental that justice should be the same, in substance and availability, without regard to economic status.

Justice Lewis F. Powell, Jr., U.S. Supreme Court Justice (Ret.), during his tenure as the president of the American Bar Association (August 1976)

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*Historically, the law helped impecunious plaintiffs overcome their inherent disadvantage in civil litigation. Unfortunately, this is no longer the case: modern law has largely abandoned the mission of assisting the least well off. In this Essay, we propose a new remedy that can dramatically improve the fortunes of poor plaintiffs and thereby change the errant path of the law: preliminary damages. The unavailability of preliminary damages has dire implications for poor plaintiffs, especially those wronged by affluent individuals and corporations. Resource constrained plaintiffs cannot afford prolonged litigation on account of their limited financial means. Consequently, they are forced to either forego suing altogether or accept unfavorable and unjust settlements to alleviate their financial plight. Aware of this reality, corporate defendants have an inherent incentive to break the law and then strategically drag on trials in order to force victims who lack the financial wherewithal into unfair settlements. As we show, preliminary damage awards will rectify these distortions. By providing poor victims the financial oxygen they badly need and by eliminating the incentive of rich wrongdoers to drag litigation unnecessarily, preliminary damage awards will not only level the litigation playfield, but will also free up considerable judicial resources.*

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## Introduction

In a powerful article, titled *Poverty and Civil Litigation*, that appeared nearly a century ago in the *Harvard Law Review*,<sup>1</sup> John MacArthur Maguire lamented the fact that poor litigants had been stripped of the special protections afforded to them by ancient legal systems.<sup>2</sup> He cautioned against the consequences of this regressive trend, pointing out that poverty “blocks a civil litigant’s path at every stage of the proceeding”<sup>3</sup> and that resource constrained plaintiff must “surmount four financial barriers: costs, fees, expense of legal services, and sundry miscellaneous expenses incident to litigation.”<sup>4</sup>

From a purely theoretical standpoint, our legal system’s commitment to the ideal of helping impecunious plaintiffs has never waned. In *A Theory of Justice*—arguably, the most influential book in political philosophy—John Rawls has forcefully argued that legal institutions ought to be fashioned to the benefit of the least well-off.<sup>5</sup> In practice, however, our legal institutions systematically fail to meet this standard. In tune with Maguire’s assessment, the realities of the American civil litigation system are a far cry from the Rawlsian ideal.<sup>6</sup> Poor litigants, on account of their limited resources, often do not get to have their day in court or receive a remedy for the wrongs inflicted on them.<sup>7</sup> This is especially true for the least well-off members of our society when they find themselves paired up as plaintiffs with well-to-do defendants. Justice comes at a cost: it is administered through litigation, and the cost of litigation in the United States is prohibitive for economically disenfranchised victims, who do not have the financial means to pursue their rightful causes of action.

Astoundingly, this troubling reality emanates from a seemingly benign feature of the legal system that we all take for granted: the *unavailability of preliminary damages*. Our legal system addresses civil wrongs via the mechanisms of injunctions and damages.<sup>8</sup> Yet, there is a fundamental difference between the two. While

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<sup>1</sup> John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1923).

<sup>2</sup> *Id.* at 361-65.

<sup>3</sup> *Id.* at 362.

<sup>4</sup> *Id.*

<sup>5</sup> See JOHN RAWLS, A THEORY OF JUSTICE 11-13 (1971).

<sup>6</sup> See Maguire, *supra* note 1, at 361-65.

<sup>7</sup> See, e.g., Myriam Gilles & Gary Friedman, Book Review: *Examining the Case for Socialized Law*, 129 YALE L.J. 2078, 2080 (2020) (noting “collective frustration that our legal and political institutions have failed to protect us from the pernicious effects of economic polarization.”).

<sup>8</sup> See 1 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 1.1 at 2 (2d ed. 2003).

injunctions come in two modes—preliminary and permanent<sup>9</sup>—damages come in only one mode—permanent.<sup>10</sup> Preliminary damages are a virtually non-existent legal species. Damages are only awarded at the end of the trial after the issue of liability has been settled.<sup>11</sup> As long as the question of the defendant’s liability is pending, the plaintiff cannot collect damages. Accordingly, plaintiffs who seek a preliminary injunction to protect their rights can receive a timely remedy, while plaintiffs who desperately need an interim monetary payment have no such option.

This state of affairs is anomalous. If courts can award plaintiffs preliminary injunctions before the conclusion of a trial, why can’t they award preliminary damages? Or, contrariwise, if no damages can be awarded until liability is found, how is it that preliminary injunctions can be granted?

The asymmetry between injunctions and damages is not a mere nicety. The unavailability of preliminary damages is the root cause of great injustice and inefficiency. Disempowered rightsholders and ordinary people who were harmed by affluent wrongdoers—financial institutions, insurance companies, hospitals and other large corporations—often do not have the financial resources to litigate.<sup>12</sup>

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<sup>9</sup> *Id.* § 2.11(1) at 249–50. *See also* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 528–30 (1978).

<sup>10</sup> *See* DOBBS, *supra* note 8, § 1.1 at 3–5. Exceptionally, our law allows spouses and children to recover temporary alimony and child support payments: *see* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1309–11 (1998). Notably, in England, in France and in Israel, victims of automobile and other accidents can recover compensation advancements ahead of trial when the defendant is likely or indisputably liable for their injuries: *see* ADRIAN A. S. ZUCKERMAN, CIVIL PROCEDURE 344–49 (2003) (discussing rules entitling plaintiffs in the UK to recover interim payments for personal injuries); Farrah Mauladad, *Interim Payments—Do They Have to be Necessary?*, 2005 (2) J. PERS. INJURY L. 180 (surveying English system of interim compensation payments to personal injury victims); David Corbe-Chalon & Martin A. Rogoff, *Tort Reform À La Francaise: Jurisprudential and Policy Perspectives on Damages for Bodily Injury in France*, 13 COLUM. J. EUR. L. 231, 286 (2007) (“In cases where there is considerable delay in the consolidation of the victim’s injuries, he may receive an interim payment before final settlement.”); The Law of Compensation to Road Accident Victims 1975, §§ 5A-5G (Isr.) (hereinafter: *Israeli Compensation Law*) (setting up compensation advancements scheme for road accident victims under no-fault liability regime); Ronen Perry, *From Fault-Based to Strict Liability: A Case Study of an Overpraised Reform*, 53 WAKE FOREST L. REV. 383, 409–13 (2018) (analyzing Israeli scheme of compensation advancements). For a proposal to recognize an injunctive relief allowing personal injury victims in the United States to recover similar payments, *see* Rhonda Wasserman, *Equity Transformed: Preliminary Injunctions to Require the Payment of Money*, 70 B.U. L. REV. 623, 634–49 (1990). For a study of voluntary arrangements to pay claimants interim compensation, *see* Julie E. Steiner, *Interim Payments and Economic Damages to Compensate Private-Party Victims of Hazardous Releases*, 98 MARQ. L. REV. 1313 (2015).

<sup>11</sup> *See* DOBBS, *supra* note 8, § 1.1 at 3.

<sup>12</sup> *See* Gideon Parchomovsky & Alex Stein, *Empowering Individual Plaintiffs*,

Naturally, the longer and costlier the trial, the greater is the disincentive to bring an action or to litigate to a final judgment.<sup>13</sup> This asymmetry does not affect corporate and other strong defendants.<sup>14</sup> Aware of this reality, well-funded potential defendants have an inherent incentive to drag out legal processes in an attempt to exhaust ill-funded plaintiffs.<sup>15</sup> This strategy does not only exhaust poor rightsholders, but also depletes the resources of the court system.<sup>16</sup> It foments prolonged litigation, the goal of which is not to achieve a more accurate result or a better legal precedent, but rather to ensure that the suit is ultimately dropped, or settled on unfair grounds, even though it is meritorious.<sup>17</sup>

Our goal in this Essay is to establish the case for the introduction of preliminary damages into our civil litigation system. To this end we advance three claims. First, we show that there is no prudential or policy bar to the introduction of preliminary damages. The reason for the unavailability of preliminary damages in our legal system is purely historical.<sup>18</sup> Damages have developed in the common law system as the sole remedy for violations of legal entitlements.<sup>19</sup> Injunctions, by contrast, were a staple of equity—a system that implemented broad principles of justice to rectify the rigidity and inequities of the formal law.<sup>20</sup> The historical distinction between injunctions and damages has been blurred over time to the point that it no longer exists under our legal system. Adding preliminary damages to the remedial menu is therefore fully consistent with modern jurisprudential

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102 CORNELL L. REV. 1319, 1331 (2017).

<sup>13</sup> *Id.* at 1332–33.

<sup>14</sup> Marc Galanter, *Why the Haves Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97–110 (1974).

<sup>15</sup> See Parchomovsky & Stein, *supra* note 12, at 1346–47 (showing how insurance companies drag out legal processes to force worn-out plaintiffs into cheap settlements).

<sup>16</sup> See, e.g., Steiner, *supra* note 10, at 1319 (“Delay affects a victim’s financial stability, causes stress, and can detour a victim’s funds away from supporting sound health and lifestyle choices. . . . The threat of delayed compensation puts pressure on the victims to settle their claims for less than full value in order to achieve more rapid payment and permits the polluter to at least temporarily shift the cost of harm to the victim.”); Daniel A. Fulco, *Delaware’s Response to Inefficient, Costly Court Systems and a Comparison to Federal Reform*, 20 DEL. J. CORP. L. 937, 963 (1995) (“Costs and delay represent compelling problems affecting our nation’s federal and state court systems.”); Benjamin R. Civiletti, *Zeroing in on the Real Litigation Crisis: Irrational Justice, Needless Delays, Excessive Costs*, 46 MD. L. REV. 40, 40, 48 (1986) (“The delay and cost involved in the tort litigation system, in themselves, supply ample justification for civil justice reforms. . . . Reforms are needed to assure reasonable, timely compensation, to preserve access to the courts for injured parties, and to discourage wrongful conduct.”).

<sup>17</sup> See Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1318 (2012).

<sup>18</sup> See *infra* Part I.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* See also Leubsdorf, *supra* note 9, at 532–34 (mentioning historical connection between injunctive relief and equity).

trends. Importantly, our call to introduce preliminary damages is not based exclusively on theoretical and prudential arguments. It has empirical support.<sup>21</sup> Preliminary damages have already been recognized in discrete areas of the law. In the United Kingdom, the birthplace of common law and equity, victims of torts are entitled to receive interim payments for personal injuries.<sup>22</sup> In the United States, preliminary monetary awards exist in divorce cases.<sup>23</sup> These examples prove that there is no reason to fear that the introduction of preliminary damages on a broader basis, under appropriate conditions, will jeopardize the working of our courts.

Second, we demonstrate that the same doctrinal safeguards that apply to the grant of preliminary injunctions can work with preliminary damages as well.<sup>24</sup> Under our proposal, a party seeking preliminary damages has to show a likelihood of success on the merits and that the balance of equities tips in her favor.<sup>25</sup> Furthermore, preliminary damage awards cannot exceed fifty percent of the total damages sought by the plaintiff.<sup>26</sup>

Third, we posit that the normative case for recognizing preliminary damages is compelling. There are weighty policy reasons that support the award of preliminary damages in civil cases. Allowing preliminary damages will go a long way toward leveling the litigation playfield, making it not only fairer, but also more efficient. The introduction of preliminary damages will induce the filing of meritorious suits by plaintiffs who do not have the financial wherewithal to litigate. Court decisions granting this interlocutory remedy will also generate reliable information for litigation funders, thereby helping deserving plaintiffs to secure the oft-needed funding for prosecuting their suits.<sup>27</sup>

It is important to note in this context that our doctrinal safeguards ensure this result: only plaintiffs with real likelihood of success on the merits will be able to avail themselves of the new remedy.<sup>28</sup> Another salutary effect of our proposal is that it will enable poor plaintiffs who filed suit to see their case through, without fearing delay tactics. The availability of preliminary damages will dramatically reduce, if not completely eliminate, the incentive of well-endowed defendants to employ delay tactics in order to exhaust the weak plaintiff.<sup>29</sup> This, in turn, will

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<sup>21</sup> See *supra* note 10 and sources cited therein.

<sup>22</sup> See Mauladad, *supra* note 10.

<sup>23</sup> See Scott & Scott, *supra* note 10, at 1309–11.

<sup>24</sup> See *infra* Part III.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See *infra* Part III.B.

<sup>29</sup> See *infra* Part III.A.

improve the operation of our court system as a whole. As importantly, the introduction of preliminary damages constitutes a fairer and cheaper way of helping poor plaintiffs than litigation funds and other mechanisms of third-party funding that deprive plaintiffs of a substantial part of the compensation to which they are entitled.<sup>30</sup>

This Essay will proceed in the following order. In Part I, we will set up the doctrinal and historical background for our normative claim that favors the introduction of preliminary damages. In Part II, we will address the inequities and inefficiencies that our system of litigation can eliminate by allowing potentially deserving plaintiffs to recover preliminary damages from defendants. In Part III, we will develop our proposal to introduce preliminary damages and the accompanying safeguards into the law of remedies. In Part IV, we will raise possible objections to our proposal and respond to those objections. A short Conclusion will follow.

### ***I. Path Dependence in the Law of Remedies***

The wrongdoing-remedy mechanism is as old as law itself.<sup>31</sup> Since time immemorial, remedies followed wrongs not only pursuant to a self-explanatory principle of liability, but also as a matter of courts' procedures. Procedurally, a plaintiff could recover compensation or receive another remedy only upon convincing the court that she was wronged by the defendant. Absent a court ruling to that effect, a plaintiff is not entitled to a remedy.<sup>32</sup>

This procedural chronology was—and, remarkably, still is—a product of two mutually related doctrines: the presumption of civility<sup>33</sup> and the burden of proof.<sup>34</sup> The presumption of civility holds that a defendant cannot be deemed a wrongdoer without proof that she committed a wrong against the plaintiff.<sup>35</sup> Correspondingly, the plaintiff must convince the court that she was wronged by

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<sup>30</sup> See *infra* notes 87 & 88 and accompanying text.

<sup>31</sup> See DOBBS, *supra* note 8, § 2.1(2) at 55–59.

<sup>32</sup> *Id.* § 1.1 at 3. This basic requirement originates from corrective justice: see ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 56–58 (2012).

<sup>33</sup> See Dale A. Nance, *Civility and the Burden of Proof*, 17 HARV. J.L. & PUB. POL'Y 647, 655–71 (1994); see also Lawrence B. Solum, *Presumptions and Transcendentalism—You Prove It! Why Should I?*, 17 HARV. J.L. & PUB. POL'Y 691, 714 (1994).

<sup>34</sup> See MCCORMICK ON EVIDENCE 484 (Kenneth S. Broun ed., 6th ed. 2006) (“The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence.”).

<sup>35</sup> See Nance, *supra* note 33, at 648.

the defendant.<sup>36</sup> To this end, the plaintiff must ordinarily prove that she had a right obligating the defendant to act or abstain from acting in a certain way, that the defendant violated his obligation, and that she suffered harm as a result of the violation.<sup>37</sup> Absent such proof, the defendant will be presumed to have acted lawfully, pursuant to the presumption of civility.<sup>38</sup>

These rules can be traced back to ancient legal systems that were driven by religious ideas,<sup>39</sup> and to the writings of the founder of deontological moral philosophy, Immanuel Kant, who saw in the presumption of civility a real-world illustration of his famous categorical imperative—the demand for any moral rule to be universalizable, that is, applicable across the board without exceptions—and the related principle that a person be treated not just as a means to an end, but rather as an end in and of itself.<sup>40</sup> Based on these ideas, legal systems categorically refused to force a defendant to remedy an alleged wrong unless the court concluded that the defendant was a wrongdoer, responsible for the plaintiff's harm. Over time, these rules have been modernized and refined, but the core ideas underlying them remain unchanged.

It is important to notice the tradeoff between these and other proof requirements and the duration of trials. In the old days, trial was a quick and simple matter: the judge would listen to the parties, consider the evidence limited by the formalities of the trial<sup>41</sup> and short supply, and deliver a parsimoniously reasoned decision.<sup>42</sup> This trial format often produced miscarriage of justice.<sup>43</sup>

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<sup>36</sup> *Id.* at 655–71 (illustrating how the presumption of civility works).

<sup>37</sup> See ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 212 (2005).

<sup>38</sup> See Nance, *supra* note 33, at 655–71.

<sup>39</sup> See TALMUD BAVLI, BAVA KAMA 46a (presenting and illustrating the Halachic rule “He who comes to take from his fellow must prove his right”); ADOLF BERGER, ENCYCLOPEDIA OF ROMAN LAW 652 (1991) (“*ei incumbit probatio qui dicit, non qui negat*” (he who affirms has to prove, not he who denies)).

<sup>40</sup> See Immanuel Kant, *Metaphysical First Principles of the Doctrine of Right*, in THE METAPHYSICS OF MORALS 33, § 8, at 77 [Ak. 255–56] (1797) (Mary Gregor trans., 1991). (“I am . . . not under obligation to leave . . . objects belonging to others untouched unless everyone else provides me assurance that he will behave in accordance with the same principle with regard to what is mine. . . . [A] unilateral will cannot serve as a coercive law for everyone . . . since that would infringe upon freedom in accordance with universal laws. So it is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance.” See also Jeremy Waldron, *Kant’s Legal Positivism*, 109 HARV. L. REV. 1535, 1556–61 (1996).

<sup>41</sup> On these formalities, see SIR GEOFFREY GILBERT, THE LAW OF EVIDENCE 3–4 (1754) (Garland Publishing., 1979); WILLIAM TWINING, RETHINKING EVIDENCE 34–38 (1990); Stephan Landsman, *From Gilbert to Bentham: The Reconceptualization of Evidence Theory*, 36 WAYNE L. REV. 1149, 1150–51 (1990).

<sup>42</sup> See JEROME FRANK, COURTS ON TRIAL 37–50 (1949).

<sup>43</sup> *Id.*

Modernization of the law has made virtually every relevant evidence admissible as proof of liability (or lack thereof) and put in place a different tradeoff between time, formalities, and accuracy.<sup>44</sup> Rectitude of decision has become the principal goal of the trial.<sup>45</sup> En route to this goal, the legal system has set up rules that increased the supply of evidence in courtrooms,<sup>46</sup> thereby transforming the trial process into a series of interactions among parties, attorneys and courts. These interactions involved production and examination of testimonial, documentary and physical evidence followed by the application of complex legal rules. Trials have consequently become more time-consuming.<sup>47</sup>

The obvious benefit of that development was an enhancement of accuracy of courts' determinations of litigants' rights, duties and liabilities.<sup>48</sup> This benefit, however, came at a price. The price of the improved accuracy came in the form of prolonged trials that undermined rightsholders' ability to realize their rights and receive a remedy in a timely fashion.<sup>49</sup> Such delays did not merely postpone the right's enforcement and realization, and, correspondingly, the rightsholder's ability to enjoy it. Oftentimes, they eroded the value of the right itself, thereby confirming the saying "Justice delayed is justice denied."<sup>50</sup> The legal system consequently had to address the problem of untimely relief.<sup>51</sup> To solve that problem, the system had to find ways of adjusting its remedies.

Among these remedies, the most common, most flexible and, consequently most adjustable was money.<sup>52</sup> The defendant's postponed performance of her

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<sup>44</sup> See Alex Stein, *The Refoundation of Evidence Law*, 9 CAN. J.L. & JURIS. 279, 281–83 (1996).

<sup>45</sup> *Id.* at 284.

<sup>46</sup> *Id.* at 285–89. See also TWINING, *supra* note 41, at 35–98 (describing and explaining shift to rationalism in factfinding).

<sup>47</sup> See, e.g., Lindsay Farmer, *Whose Trial? Comments on A Theory of the Trial*, 28 LAW & SOC. INQUIRY 547, 549–50 (2003) ("The modern trial is longer, more complex (as a result of the multiplication and refinement of procedural and evidential rules), and more legalistic than its predecessors.").

<sup>48</sup> See TWINING, *supra* note 41, at 35–98 (describing modernization of evidence law and its reorientation towards ascertainment of empirical facts).

<sup>49</sup> See Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994) (analyzing tradeoffs between accuracy and its costs in adjudication). For further development of this idea and its critique, see Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738 (2012) (developing a system of liability based on probability distributions and arguing that it offers an optimal balance between accuracy and its cost); Ronald J. Allen & Alex Stein, *Evidence, Probability, and Burden of Proof*, 55 ARIZ. L. REV. 557, 579–93 (2013) (criticizing Kaplow's theory for being incompatible with basic legal concepts and structure of liability).

<sup>50</sup> See Adrian A. S. Zuckerman, *Quality and Economy in Civil Procedure—The Case for Commuting Correct Judgments for Timely Judgments*, 14 OXFORD J. LEGAL STUD. 353, 360–62 (1994).

<sup>51</sup> *Id.* at 366–68.

<sup>52</sup> See Colleen P. Murphy, *Money as a Specific Remedy*, 58 ALA. L. REV. 119, 158 (2006) ("A fundamental distinction in the law of remedies is the difference between specific and substitutionary relief. Specific relief gives the plaintiff the original thing to which the plaintiff is

obligation to the plaintiff was analogized to borrowing.<sup>53</sup> When the obligation involves a payment of money—such as compensation for tortious injuries—the analogy is straightforward: a person who delays a payment owed to another effectively borrows money (or takes a loan) from that individual. The analogy is also valid, albeit less straightforward, with respect to non-monetary obligations.<sup>54</sup> Non-monetary obligations, too, confer a benefit on rightsholders and the unlawful denial of the benefit deprives the rightholder of economic value.

The borrowing analogy explains how interest was introduced into our system of remedies.<sup>55</sup> To compensate a rightsholder for the delayed realization of her entitlement, courts added interest to the monetary awards wrongdoers were ordered to pay their victims, with the interest amount calculated as of the day of the wrong.<sup>56</sup> Courts also used money to compensate deserving plaintiffs confronted by unscrupulous defendants who resorted to *mala fides* tactics, such as raising unmeritorious defenses,<sup>57</sup> denying the plaintiff her dues and delaying the legal process in the hopes that the plaintiff will abandon her suit or agree to a cheap settlement rather than fight an uphill battle.<sup>58</sup> To deter defendants from resorting to such tactics and incentivize plaintiffs not to give up, courts increased the aggrieved plaintiffs' award by allowing them to recover punitive damages on top of compensatory damages.<sup>59</sup>

According to a widespread belief, these measures have solved the problem of untimely relief in many cases.<sup>60</sup> In other cases, the grant of a larger amount of money does not take care of the problem. These cases fall into two categories. The first category involves rights, whose violation cannot be fully rectified by the payment of monetary damages. To list a few examples, consider a plaintiff challenging disenfranchisement to secure her right to participate in the upcoming

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or was entitled; substitutionary relief gives the plaintiff something other than its original entitlement. The most common form of substitutionary relief is money.”).

<sup>53</sup> DOBBS, *supra* note 8, § 3.2 at 291.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See Fed. R. Civ. P. 11; Melissa L. Nelken, *Sanctions under Amended Federal Rule 11—Some Chilling Problems in the Struggle between Compensation and Punishment*, 74 GEO. L.J. 1313, 1320 n.50 (1986); Gerald F. Hess, *Rule 11 Practice in Federal and State Courts: An Empirical, Comparative Study*, 75 MARQ. L. REV. 313, 368 (1992).

<sup>58</sup> For such tactics, see *supra* notes 8–10 and accompanying text.

<sup>59</sup> See Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 479 (2008); and see generally A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998) (analyzing deterrence as a rationale for assessing punitive damages). *Cf.* State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408 (2003) (subjecting punitive damages to constitutional scrutiny).

<sup>60</sup> See DOBBS, *supra* note 8, § 3.2 at 291.

elections; a plaintiff claiming ownership over a piece of land that is about to be sold to a third party; or a woman who wishes to exercise her abortion right under *Roe v. Wade*<sup>61</sup> and asking the court to remove a state-imposed impediment to abortion. In these and similar cases, a deserving plaintiff will only be able to realize her right by obtaining a timely remedy in the form of specific performance or an injunction.<sup>62</sup>

For these types of cases, our legal system has devised remedies known as equitable relief.<sup>63</sup> The word “equitable” refers to the rules associated with equity, as distinguished from common law.<sup>64</sup> Those rules have been developed a long time ago by the courts of equity, as distinguished from common law courts that could only grant a remedy in the form of money.<sup>65</sup> The courts of equity were set up to provide rightful plaintiffs with specific performance and injunctive remedies that money could not buy.<sup>66</sup> To obtain such a remedy, the plaintiff had to prove her right, to show that she pursues it in good faith and thus “comes to court with clean hands”<sup>67</sup> and—critically—to convince the court that money does not constitute an adequate remedy.<sup>68</sup>

These rules and the concept of equitable relief remain in force today, many decades after the unification of the equity and common law courts.<sup>69</sup> To ensure the viability of the plaintiff’s equitable relief, the legal system had to protect it against external changes that occur during the trial process and have the potential to vitiate the plaintiff’s ability to receive an effective remedy.<sup>70</sup> This problem was especially acute in the case of ongoing violations that threatened to deprive the rightholder of the possibility of recompense at the end of the trial. The solution came in the form of preliminary (or interlocutory) remedies that a plaintiff could recover in equity, but not at common law, prior to the disposition of her suit.<sup>71</sup>

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<sup>61</sup> 410 U.S. 113 (1973).

<sup>62</sup> See DOBBS, *supra* note 8, § 2.1(2) at 58; 3 DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* § 12.8(1) at 189–94 (2d ed. 2003).

<sup>63</sup> See DOBBS, *supra* note 8, § 2.1(2) at 60–61.

<sup>64</sup> *Id.* § 2.1(1) at 55–56. See also John H. Langbein, *What ERISA Means by Equitable: The Supreme Court’s Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1366 (2003).

<sup>65</sup> See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 919 (1987).

<sup>66</sup> *Id.* at 919–20.

<sup>67</sup> JOHN NORTON POMEROY, *EQUITY JURISPRUDENCE* 90 (5th ed., 1941).

<sup>68</sup> See DOBBS, *supra* note 8, § 2.9(2) at 228.

<sup>69</sup> *Id.* § 2.1(2) at 58–59. See also Charles T. McCormick, *The Fusion of Law and Equity in United States Courts*, 6 N.C. L. REV. 283, 285–90 (1928) (describing the fusion of law and equity as a rationalizing movement).

<sup>70</sup> DOBBS, *supra* note 8, § 2.1(2) at 59–60; § 2.11(1) at 249–50.

<sup>71</sup> *Id.*

Preliminary (or interlocutory) remedies ran the gamut of various injunctive and mandamus orders aiming to forestall irreparable harm to the plaintiff.<sup>72</sup> The concept of irreparable harm referred, as it still does, to changes in the situation that will render the relief the plaintiff might be deserving of at the end of the trial ineffectual.<sup>73</sup> To prove that the harm the plaintiff stands to incur, if the preliminary injunction is not granted, will be irreparable, the plaintiff has to show that her entitlement cannot be replaced by money.<sup>74</sup> As a corollary, a delay in the realization of the right to recover money from the defendant has been excluded from the definition of irreparable harm: courts have unanimously treated “more money tomorrow” as an adequate substitute for “less money today.”<sup>75</sup>

The second category of cases for which delayed payment of greater compensation does not work involves lawsuits in which the plaintiff cannot afford the longer wait. The cost of lawsuits is an oft-discussed problem.<sup>76</sup> Naturally, the high cost of justice in the United States does not affect all litigants equally. It has a disparate impact on rightsholders who face serious resource constraints, and, consequently, cannot shoulder the cost of the legal process.<sup>77</sup> For such plaintiffs, the critical factor is not the size of the award but rather the timing thereof.<sup>78</sup> Allowing them to recover more money later is, therefore, pointless.<sup>79</sup> Preliminary injunctions are of no use for such plaintiffs, either. They are not looking to stop an ongoing violation of the plaintiff’s right. The only remedy that can help such plaintiffs is preliminary damages. Yet, this remedy is presently unavailable.

The reason for the unavailability of preliminary damages under the extant system of remedies is predominantly historical. The rules of equity, as developed by the English Chancery Court and subsequently incorporated in the laws of the United States,<sup>80</sup> afford plaintiffs who are yet to win the case only injunctive remedies.<sup>81</sup> For that historical reason, there is no such thing as interlocutory financial relief.

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<sup>72</sup> *Id.* § 2.1(2) at 59–61; § 2.11(2) at 253–57.

<sup>73</sup> *Id.*

<sup>74</sup> *See, e.g.,* *American Hosp. Supply Corp. v. Hosp. Prods. Ltd.* 780 F.2d 589, 592 (7th Cir. 1986) (Judge Posner’s cost-benefit formula for preliminary injunctions); Leubsdorf, *supra* note 9, at 541–42; *see also* Richard R. W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 *STAN. L. REV.* 381, 390–92 (2005) (criticizing Posner’s and Leubsdorf’s formulations of plaintiffs’ entitlement to preliminary injunction).

<sup>75</sup> *See* DOBBS, *supra* note 8, § 2.11(2) at 260–63.

<sup>76</sup> *See generally* STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999) (demonstrating that enforcement costs crucially affect legal entitlements and integrating them into general philosophy of rights).

<sup>77</sup> *See* Parchomovsky & Stein, *supra* note 17, at 1344–45.

<sup>78</sup> *Id.* at 1352. *See also* Carrie E. Johnson, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 *CAL. L. REV.* 225, 229–30 (1997).

<sup>79</sup> *See supra* note 16 and accompanying text.

<sup>80</sup> *See* DOBBS, *supra* note 8, § 2.1(2) at 58–59.

<sup>81</sup> *Id.*

Indeed, the grip of path dependence on our law of remedies is so strong<sup>82</sup> that even legal theorists who observed the injustice suffered by impecunious plaintiffs attempted to fashion a remedy for them in the form of a new preliminary injunction, as opposed to preliminary damages that constitute the most sensible and straightforward solution to individual plaintiffs' plight.<sup>83</sup> As a normative matter, this state of affairs can hardly be justified. The history of equity and the English Chancery Court is both interesting and instructive. Yet, as we will demonstrate in the pages ahead, it is totally divorced from the realities of the modern civil litigation, denies plaintiffs access to justice, and oftentimes leaves them without a remedy on account of the cost-asymmetry between them and the well-to-do defendants.

## ***II. The Inequities and Inefficiencies of the Current Regime***

Whether you succeed or fail in litigating a case should not depend on how rich you are. But it does. As famously stated by Marc Galanter, under our system of litigation, the haves come out ahead.<sup>84</sup> This advantage is morally inequitable and economically inefficient. Every legal right must be vindicated in litigation in order to afford its holder the protection it was designed to provide. When a rightholder is financially unable to vindicate the right in court, it is rendered meaningless.<sup>85</sup> For example, a property right is of no value to its holder if she cannot enforce it against a trespasser; a right arising from a contract is of no use to a contracting party when she cannot afford prosecuting a suit in the case of a breach; and a right under a homeowner's "all damage" insurance policy is ineffectual when the home needs to be promptly rebuilt after being destroyed by a hurricane, but the insurance company, instead of paying the homeowner the requisite amount, drags her into a protracted and expensive litigation she can ill-afford.

Each of these examples—and there are many others<sup>86</sup>—results in an inequitable outcome: the rightholder does not get her due or, alternatively, gets paid belatedly after suffering irreparable harm. This state of affairs is not only unjust, but also inefficient because it encourages unilateral violations of rights. As a result,

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<sup>82</sup> See generally Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001) (explaining path-dependence in the workings of common law).

<sup>83</sup> See Wasserman, *supra* note 10, at 634–49.

<sup>84</sup> See Galanter, *supra* note 14, at 149 (“[T]he legal system tends to confer interlocking advantages on overlapping groups whom we have called the ‘haves.’”).

<sup>85</sup> See Parchomovsky & Stein, *supra* note 17, at 1314, 1371 (arguing that when the cost of vindicating a right is exceeds the cost of attacking it, the challenger can prevent the rightholder from realizing the right, thereby rendering it meaningless).

<sup>86</sup> See Parchomovsky & Stein, *supra* note 12, at 1335–52.

numerous laws that have been put in place to advance social welfare by vesting rights in individuals fall short of achieving their goal to the detriment of rightsholders and society at large.

Surprisingly, this profound problem has not been systemically addressed by scholars and policymakers. This omission is attributable to the problem's formulation as a subset of the general problem of access to justice. The access-to-justice philosophy calls for the removal of barriers blocking an ordinary person's way to court, with the "barriers" being a factor extraneous to court proceedings. To remove these barriers, policymakers have implemented several mechanisms that included contingency fees,<sup>87</sup> litigation funding,<sup>88</sup> and class actions.<sup>89</sup>

Essentially, each of these mechanisms provides plaintiffs with a source of funding. Contingency fees and litigation funding provide select plaintiffs a nonrefundable

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<sup>87</sup> See Virginia G. Maurer *et al.*, *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 NW. J. INT'L L. & BUS. 272, 295 (1999) ("[t]he contingency fee system clearly increases client access to the justice system" by "provid[ing] financing and risk-shifting benefits"); Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 728 (2010) ("[T]he endorsement of the contingency fee mechanism opened the doors of justice to indigent and lower-class plaintiffs who otherwise would have been unable to obtain legal services . . . ."); Joanna M. Shepherd, *Ideal versus Reality in Third-Party Litigation Financing*, 8 J.L. ECON. & POL'Y 593, 598 (2012) (stating that contingency-fee arrangements remove cost barriers restricting low-income plaintiffs' access to justice and risk barriers restricting risk-averse plaintiffs' access to justice).

<sup>88</sup> See Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding—A Signaling Model*, 63 DEPAUL L. REV. 233, 234 (2014) ("Proponents of third-party funding mention the increased access to justice for plaintiffs—which allows them to avoid settling prematurely due to their need for cash."); Bruno Deffains & Claudine Desrieux, *To Litigate or Not to Litigate? The Impacts of Third-Party Financing on Litigation*, 43 INT'L REV. L. & ECON. 178, 180 (2015) (stating that third party financing can promote access to justice by enabling credit-constrained plaintiffs to sue and remedying financial disparities that may prevent plaintiffs from recovering); Maya Steinitz, *Whose Claim is this Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1276 (2011) [hereinafter *Litigation Funding*] ("[T]hird-party funding promotes access to justice by enabling plaintiffs who have meritorious cases to bring litigation they would otherwise be unable to bring and to avoid premature settlements at a discount due to the exhaustion of funds.").

<sup>89</sup> See Wilber H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*, 21 VA. J. SOC. POL'Y & L. 267, 291 (2014) ("One interest of . . . class action . . . is access to justice for a group of litigants who, on their own, would not realistically be able to seek court relief, either because it would be too inefficient to adjudicate each injured party's claim separately or because it would be cost prohibitive for each injured party to file individual claims."); Catherine Piché, *Public Financiers As Overseers of Class Proceedings*, 12 N.Y.U. J. L. & BUS. 779, 791 (2016) ("[B]y distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own.").

loan: a sum of money sufficient for financing the filing and prosecution of the plaintiff's suit, which will only be returned, along with a very high interest, if the plaintiff wins the case and recovers enough money from the defendant.<sup>90</sup> Class actions do more or less the same after consolidating a large number of individually nonviable suits into a collective action that takes advantage of the suits' similarities and the resulting economies of scale.<sup>91</sup>

Under the aforementioned mechanisms, the money that plaintiffs get to advance their suits comes from their attorneys and litigation funders. Remarkably, none of these mechanisms attempts to use the defendant as a source of funding and to take care of the internal barrier to justice: the impecunious plaintiffs' inability to carry out a prolonged and expensive legal battle against defendants well-equipped to wage such a battle. Consequently, these mechanisms, despite the improvements they introduced into our legal system, have been of little help to impecunious plaintiffs. Contingency-fee representation and litigation funding only avail plaintiffs whose suits are sufficiently promising and fit within the attorneys' and the funders' economic models.<sup>92</sup> Class actions are only open for suits that are similar enough to meet the typicality and commonality requirements.<sup>93</sup> Moreover,

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<sup>90</sup> See LESTER BRICKMAN, *LAWYER BARONS* 33–39 (2011); Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 WASH. & LEE L. REV. 1339, 1380 (1996) ([L]awyers charge a premium . . . [which] compensates for the risk of nonpayment if the suit does not succeed . . . .”) (quoting *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 735–36 (1987) (Blackmun, J., dissenting on other grounds)); *Litigation Funding*, *supra* note 88, at 1276 (“A typical contingency fee would be between twenty and fifty percent of the damages, with a cap of three to four times the legal costs advanced by the funder.”) (quoting BAKER & MCKENZIE LLP, *DEMAND FOR THIRD PARTY LITIGATION FUNDING RISES AS SUPPLY BECOMES VOLATILE* (2008), [http://www.bakernet.com/NR/rdonlyres/427586D3-6891-4FC2-B926-B0181DB75595/0/third\\_party\\_litigation\\_funding\\_ca&uscore;oct08.pdf](http://www.bakernet.com/NR/rdonlyres/427586D3-6891-4FC2-B926-B0181DB75595/0/third_party_litigation_funding_ca&uscore;oct08.pdf)).

<sup>91</sup> See Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2027 (2012) (“By aggregating a large number of small claims, attorneys make representation affordable by maximizing economies of scale. Moreover, by resolving common questions of law and fact in a single proceeding, class actions and other aggregate procedures improve efficiency and ensure consistent treatment of similarly situated parties.”); see also Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL'Y REV. 69, 76 (2004) (“[C]lass action . . . facilitates compensation for wrongs committed against large groups of individuals when each individual wrong is too small to justify the costs of rectification through legal process.”).

<sup>92</sup> See Joanna M. Shepherd & Judd E. Stone II, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919, 950 (2015) (“Third-party litigation financiers invest only in cases with millions to tens of millions of dollars at stake and between incredibly sophisticated parties. Litigation funds can afford few failed investments for an entire fund family to collapse.”).

<sup>93</sup> See A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 475 (2013) (stating that commonality certainly requires more than a class that merely shares common questions of law); John Bronsteen & Owen Fiss, *The Class Action*

under each of these mechanisms, a deserving plaintiff must fork over a substantial share of the recovery amount to her attorney or funder.<sup>94</sup> Consequently, the remedy that the plaintiff can receive at the end of the day falls way below the amount needed to make him whole.

To see why defendants, too, should become a source for funding potentially meritorious suits, policymakers and scholars should not focus only on the typical plaintiff and her plight. They should also evaluate the situation of a typical corporate defendant. What makes this situation distinctive is not merely the extreme disparity between the plaintiff's limited financial resources and the defendant's wealth, but also, indeed primarily, the presence of economies of scale and scope on the defendant's side.<sup>95</sup> These economies arise from the fact that many corporate defendants are repeat players in the litigation field. They employ in-house lawyers and have ready access to experts and documents. Consequently, their defense costs per case drop with every suit they litigate.<sup>96</sup> What is more, suits filed against them involve similar legal issues. For example, suits against insurance companies typically give rise to the same interpretation challenges. Addressing them once dramatically lowers the cost of tackling them again. No such economies exist on the plaintiffs' side.

These asymmetries are a cause for grave concern. A party who can litigate more cost-effectively can use her advantage to force her adversary to drop the case or agree to an unfavorable out-of-court settlement. Consider the following example. Assume that the plaintiff has a 60 percent chance of winning a \$100,000 suit against the defendant, so that the expected value of her suit is \$60,000. The plaintiff's litigation cost is \$40,000. The expected cost for the defendant is only \$20,000 on account of the economies of scale and scope. The defendant can offer the plaintiff to settle the case for \$20,000, and if the plaintiff is a rational self-interest maximizer, she will accept that offer. Note that if the litigation costs were

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*Rule*, 78 NOTRE DAME L. REV. 1419, 1424 (2003) (“Typicality [means that] [t]he named plaintiff is not permitted to represent the class unless his interest is essentially the same as those of the unnamed members of the class. . . . The commonality requirement serves the same purpose . . .”).

<sup>94</sup> *See, e.g.*, Parchomovsky & Stein, *supra* note 12, at 1343 (finding that “disadvantaged victims of medical malpractice cannot secure adequate representation [on a contingent fee basis] unless they fork over a substantial fraction of their recovery to their lawyers”).

<sup>95</sup> *Id.* at 1343, 1344, 1359 (finding that insurance companies, banks, and defendants in medical malpractice all enjoy significant economies of scale and scope that are unavailable to plaintiffs).

<sup>96</sup> This effect is known in the literature as “economies of scale.” *See* N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* 272–73 (6th ed. 2009).

equal, that is, if the defendant, too, were to pay its attorneys \$40,000, the case would have settled for \$40,000.<sup>97</sup>

Our numerical example is not merely a theoretical nicety. It reflects the reality many plaintiffs face. Indeed, in certain industries, such as insurance and health care, it has become the norm. Consider the insurance industry first. A study carried out by the American Association for Justice (the AAJ)<sup>98</sup> has revealed that a number of big insurance companies use the “deny, delay, defend” strategy in handling claims.<sup>99</sup> Industry insiders commonly refer to this strategy as the “three Ds.”<sup>100</sup> The company begins with a simple “sit and wait” reaction to an insured’s claim that leads many policyholders to give up their claims, while prompting others to hire an attorney to represent them.<sup>101</sup> Another strategy is to give awards to adjusters who deny most claims regardless of the claims’ merit.<sup>102</sup> These and other unsavory strategies enable insurance companies to force their insureds to choose between lowball offers and extended (and expensive) litigation.<sup>103</sup> For a rational, yet disempowered, insured, this Hobson’s choice means that she must accept the offer. Indeed, as Professor Jay Feinman observes in his important

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<sup>97</sup> For the sake of simplicity, we assume that the parties’ information about the case and the costs is symmetrical. See Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LIT. 1067 (1989) (explaining how rational actors reach settlements under symmetrical information).

<sup>98</sup> AMERICAN ASSOCIATION FOR JUSTICE, THE TEN WORST INSURANCE COMPANIES IN AMERICA: HOW THEY RAISE PREMIUMS, DENY CLAIMS, AND REFUSE INSURANCE TO THOSE WHO NEED IT MOST (2008) [hereinafter *The AAJ Report*]. For articles with similar findings, see Tom Baker, *Constructing the Insurance Relationship: Sales Stories, Claims Stories, and Insurance Contract Damages*, 72 TEX. L. REV. 1395, 1430–31 (1994) (arguing on empirical grounds that “insurance companies . . . engage in strategic behavior with third-party claimants” and systematically underpay claims); Leon E. Trakman, *David Meets Goliath: Consumers Unite Against Big Business*, 25 SETON HALL L. REV. 617, 623 (1994) (“Insurance companies consistently underpay valid insurance claims to horde the difference between the amount due to each insured and the amount actually paid.”); David Dietz & Darrell Preston, *Home Insurers’ Secret Tactics Cheat Fire Victims, Hike Profits*, BLOOMBERG (Aug. 3, 2007), <http://www.bloomberg.com/apps/news?pid=21070001&sid=aIOPZROwhvNI> (observing that insurance companies systematically underpay claims and providing examples). For additional examples, see Kelsey D. Dulin, Comment, *The Disaster After the Disaster: Insurance Companies’ Post-Catastrophe Claims Handling Practices*, 61 OKLA. L. REV. 189, 191–92, 196–206 (2008) (explaining and illustrating how insurance companies take advantage of catastrophe victims and underpay claims); see also *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 758 P.2d 1313, 1322–23 (Ariz. 1988) (admitting into evidence an insurer’s statements in settlement negotiations to show that it attempted to strong-arm the policyholder into a cheap settlement).

<sup>99</sup> *The AAJ Report*, *supra* note 98, at 2.

<sup>100</sup> *Id.* at 3.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 2–3.

<sup>103</sup> *Id.* at 3.

book,<sup>104</sup> beginning in the 1990s, many major insurance companies turned their claims departments into profit centers.<sup>105</sup> Instead of profiting from their superior expertise in pricing and spreading the risks of accidents, those companies generate most of their profit from breaking the insurer's fundamental promise to indemnify the insured for losses covered by the policy.<sup>106</sup> By forcing the insured into a cheap settlement, the companies also prevent courts from developing socially valuable precedents.<sup>107</sup>

Another paradigmatic example comes from the health plans industry. Under a standard provision of most health benefits plans, a patient requiring specialized care must apply to the plan's provider and ask it to approve the sought-after treatment. This procedure is known as precertification or utilization review.<sup>108</sup> Oftentimes, providers refuse to grant approval, a refusal that marks the beginning of the patient's tribulations as a potential plaintiff in a suit for health benefits. Given the high cost of medical procedures, most patients cannot afford to pay out of pocket for the treatment and seek reimbursement later. Consequently, instead of going to a hospital to receive a much-needed treatment, many patients have no choice but to take their case to court and become plaintiffs. In that capacity, they are bound to encounter a virtually insurmountable time problem. Under the applicable statute, the Employee Retirement Income Security Act of 1974 (ERISA), an aggrieved patient must file her suit in a federal court, where there are no fast tracks for plaintiffs who sue health benefit providers.<sup>109</sup> Worse yet, the patient may not even be able to file that suit because her health benefits plan, similar to many others', may contain a compulsory arbitration requirement. Bypassing this requirement is well-nigh impossible: Section 2 of the Federal Arbitration Act,<sup>110</sup> as interpreted by the United States Supreme Court,<sup>111</sup>

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<sup>104</sup> JAY M. FEINMAN, *DELAY, DENY, DEFEND: WHY INSURANCE COMPANIES DON'T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT* (2010).

<sup>105</sup> *Id.* at 5.

<sup>106</sup> *Id.*

<sup>107</sup> See Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073 (1984) (unfolding principled account of settlements' inherent inequity).

<sup>108</sup> See DARLENE BRILL, *UNDERSTANDING HEALTH INSURANCE* 42 (1999).

<sup>109</sup> See, e.g., LARRY E. TEPLY & RALPH U. WHITTEN, *CIVIL PROCEDURE* 624 (4th ed. 2009) (attesting that provisional remedies can only be granted "to preserve the status quo pending the court's determination of the parties' rights or to insure that sufficient resources will be available to satisfy the plaintiff's claim if the plaintiff ultimately prevails" and that the available provisional remedies include "attachment, garnishment, sequestration, replevin, temporary restraining orders, preliminary injunctions [and] civil arrest").

<sup>110</sup> Pub. L. No. 68-401, 43 Stat. 883, codified as amended at 9 USC §1 *et seq.*

<sup>111</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339-44 (2011) (holding that Federal Arbitration Act makes arbitration clauses broadly enforceable and puts an end to "the judicial hostility towards arbitration that . . . had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy" (quoting *Robert Lawrence Co. v.*

mandates arbitration. Arbitration may proceed faster than a court proceeding, but it will pose another serious problem for the plaintiff: the arbitrator's incentives are inimical to her plight. To compete with courts that enjoy public subsidization and need not attract paying customers, arbitrators must deliver decisions that will be agreeable to the parties in the arbitration. This incentive drives arbitrators towards striking a compromise that splits the disputed amount between the parties, while avoiding making decisions that constitute a complete victory for one party and an unmitigated defeat for her opponent.<sup>112</sup> To make matters worse, arbitrators who seek to maximize their revenues may try to appease the repeat player in the arbitration, namely, the health plan provider.

Plaintiffs willing to overcome these hurdles need to secure adequate legal representation. However, hiring an experienced ERISA attorney would be anything but cheap. The plaintiff's attorney will offer her no fee discounts comparable to those offered to the healthcare plan provider, whose representation is characterized by economies of scope and scale. The provider's legal representatives will be sure to take advantage of this cost asymmetry and force the plaintiff to accept an unfavorable settlement. The fact that ERISA entitles successful plaintiffs to recover their attorney's fees from the plan's provider after winning the case<sup>113</sup> does not affect this analysis. Belated reimbursement of attorney fees cannot provide the plaintiff the requisite medical treatment when she needs it. Furthermore, the prospect of reimbursing the plaintiff for her attorney's fees only motivates the plan's provider to slightly improve its cheap settlement offer.

The legal dynamics we describe generate another negative result: they impede the development of the law in certain areas. Settlements extracted by powerful corporate defendants are different from the standard settlements discussed in the literature. Their distribution across legal domains is slanted rather than random.

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Devonshire Fabrics, Inc., 271 F.2d 402, 406 (2d Cir. 1959)); see also Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 658–60 (2012) (criticizing Supreme Court for broadly validating arbitration provisions, including those that contain class action waivers).

<sup>112</sup> See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238 (1979) (analyzing arbitrators' economic incentives); see also Alex Stein, *The Incentives to Arbitrate Medical Malpractice Disputes*, BILL OF HEALTH (Aug. 29, 2013), <http://blog.petrieflom.law.harvard.edu/2013/08/29/the-incentives-to-arbitrate-medical-malpractice-disputes/> (showing that arbitrators have an incentive to deliver a settlement, rather than a binary “all or nothing,” type of verdict).

<sup>113</sup> See 29 U.S.C. § 1132(g)(1) (“In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.”).

Such settlements tend to concentrate in particular areas, such as healthcare, insurance, and financial services, where they distort the path of law.<sup>114</sup>

The existence of a positive correlation between wealth and access to legal representation is a well-known fact. Our analysis points to the existence of a feedback loop between litigation and substantive rights, which prevents the ability of poor victims to vindicate their rights in court. Critically, both phenomena share the same root cause: insufficient funding. As we will show, this problem is not insoluble. Oddly, the literature that addressed the problem to date focused on the wrong solutions: it looked for third parties to come to the aid of financially constrained victims. As we will show, a more promising path is to focus on the wrongdoer. Enter preliminary damages.

### ***III. A New Remedy: Preliminary Damages***

After explaining and documenting the inequities and inefficiencies of our civil litigation system in its current form, in this Part, we propose a remedy to these ailments in the form of preliminary damages. We argue that the introduction of preliminary damages into the menu of remedies will make our legal system fairer and more efficient, especially insofar as disempowered plaintiffs are concerned. Furthermore, in order to safeguard against potential abuse of the new remedy, we develop a list of doctrinal prerequisites that must be satisfied prior to the award of preliminary damages.

#### ***A. The Upside of Preliminary Damages***

Given that insufficient financial resources prevent economically disempowered victims from seeking justice, the search for a solution must focus on additional sources of funding. Naturally, a possible funding source is the wrongdoer, who in many cases is the direct cause of the economic plight of the victim. It is not atypical for victims of wrongdoings to suffer serious losses and incur additional expenses as a consequence of the wrongful act or omission that befell them.<sup>115</sup> Furthermore, even in those cases in which the economic plight of a victim predates the harm inflicted on her by the wrongdoer, it is undeniable that it is the wrongful act or omission that forced the victim to litigate and freighted her with the cost that comes with filing and prosecuting a suit. Had the wrong not occurred, the plaintiff might well have been impecunious but would not have had to litigate. It is precisely for this reason that corrective justice theorists maintain that the wrongdoer, and not society at large, must be the one to make the victim whole.<sup>116</sup> This position is not reserved to corrective justice theorists, it is also the

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<sup>114</sup> Parchomovsky & Stein, *supra* note 12, at 1335.

<sup>115</sup> See Wasserman *supra* note 3, at 629–31.

<sup>116</sup> See WEINRIB, *supra* note 32, at 56.

law. The law expects wrongdoers to make their victims whole by paying them full compensation for the losses they suffered from the wrongdoer.<sup>117</sup>

In those cases where compensation is not paid without a trial, it follows that the wrongdoer who harmed the victim in the first place and then refused to compensate her without a trial, should also bear the victim's loss.<sup>118</sup> At this point, one may intercede and respond that although the wrongdoer must compensate the victim for her losses at the end of the trial, if so ordered by a court, funding the victim's legal battle is not part of the wrongdoer's duty. The two costs, so the argument goes, are analytically distinct. This argument misses the mark insofar as it purports to set aside preliminary damages. Preliminary damages are a form of compensation. Substantively, they are no different from permanent damages.<sup>119</sup> What separates preliminary damages from permanent damages is timing. Permanent damages are awarded at the end of the trial. Preliminary damages are awarded prior to the end of the trial. Preliminary damages, under our proposed design, are not a form of litigation funding. Rather, they are a compensation in advance that can be used by the plaintiff to sponsor the continuation of her legal battle, if the plaintiff chooses to do so.

Furthermore, there exists universal consensus that at the end of a trial, the defendant must compensate the deserving plaintiff who proved her case. Therefore, if we are to take rights seriously, as Ronald Dworkin persuasively argued that we must,<sup>120</sup> it would be anomalous to relieve a wrongdoer who through his actions or omissions forced a victim to incur expenditures on litigation of the duty to pay for this loss. The Dworkinian argument thus prefers the English rule of "costs follow the event,"<sup>121</sup> which obligates the losing party to reimburse the winning party for her litigation expenses, over the American rule under which each party pays his own expenses regardless of the outcome of the trial.<sup>122</sup>

Our proposal is different. We advocate award in advance instead of cost-shifting for cases in which a prima facie deserving plaintiff has no access to justice. The Dworkinian argument supports our proposal by questioning the validity of the

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<sup>117</sup> DOBBS, *supra* note 8, § 2.1(2) at 55–59.

<sup>118</sup> Cf. Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 327–28 (2013) ("The American rule for attorney fees requires each party to pay its attorney, win or lose; the English rule (applicable in most of the world) requires the losing party to pay the winner's reasonable attorney fees.").

<sup>119</sup> Cf. John J. Donohue, III, *Opting for the British Rule, or if Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1099–1102 (1991) (demonstrating that, from an economic standpoint, damages' and costs' awards are the same).

<sup>120</sup> DWORKIN, *TAKING RIGHTS SERIOUSLY* 46 (1977).

<sup>121</sup> See Donohue, *supra* note 119, at 1099–1102.

<sup>122</sup> See Fed. R. Civ. P. 11.

claim that a prima facie wrongful defendant should not participate in funding the legal battle of the prima facie deserving plaintiff.

From an efficiency perspective, the case for recognizing preliminary damages is equally compelling. Economic efficiency is primarily concerned with maximizing aggregate welfare.<sup>123</sup> An efficiency-driven legal system therefore seeks to suppress socially suboptimal behaviors.<sup>124</sup> While it is true that the payment of compensation is not important per se for efficiency-minded theorists, it is instrumental to the value of deterrence.<sup>125</sup> Compensation requires actors to take account of the cost they impose on third parties.<sup>126</sup> If an actor does not bear the full cost of her actions, there is no way of knowing that her behavior is optimal.<sup>127</sup> Only when an actor internalizes the full cost of her decisions, can we conclude that their actions are welfare enhancing.<sup>128</sup> Hence, legal regimes that generate under-compensation are undesirable. Naturally, it is not enough for the law to stipulate that wrongdoers must compensate their victims for their full harm. By now, our readers are surely aware of the critical importance of the legal process to achieve the substantive goals of the law. If wealthy actors can use their superior resources to prevent impecunious victims from suing them altogether or to force them into unfair settlements, optimal deterrence cannot be achieved.

The desire of strong defendants to force plaintiffs to settle by dragging out trials is undesirable for yet another reason: it depletes judicial resources. Rather than bringing cases to a quick resolution, well-financed defendants prefer to introduce delays into judicial processes in the hope that limited resources of plaintiffs will run out.<sup>129</sup> We discussed this phenomenon at length in Part II above. The cost of this strategy is born in part by the litigants themselves, but another part of it falls on our court system and is borne by society at large. This is an additional problem that arises from the imbalance between wealthy corporate defendants and individual plaintiffs.

Preliminary damages awards can rectify both problems. The introduction of preliminary damages will level the litigation playfield. It will allow victims who are short of money access to the superior resources of those who wronged them. This, in turn, will give the victims much needed breathing room. Furthermore, it will

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<sup>123</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 1-16, 128-38 (9th ed. 2014)

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* See also STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 177–223 (2004)

<sup>126</sup> See R. H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960) (standard account of the internalization requirement).

<sup>127</sup> *Id.* at 5–6, 13.

<sup>128</sup> *Id.*

<sup>129</sup> See *infra* Part II.

allow them to hire better legal representation and manage their cases optimally, without yielding to financial pressures and extortionary tactics by strong defendants. Preliminary damages awards will go a long way toward eliminating the incentive of well-financed wrongdoers to delay legal processes in order to force weaker plaintiffs to accept unfavorable settlements.

Clearly, there will be settlements under a preliminary damages regime. In fact, the introduction of preliminary damages might increase the number of settlements since their availability will lead defendants to settle early and save money.<sup>130</sup> It is important to emphasize that not all settlements are equal.<sup>131</sup> The terms of the settlements entered pursuant to an award of preliminary damages, or in their shadow, will be very different than the terms of settlements consummated in the absence of preliminary damages. The introduction of preliminary damages will dramatically enhance the bargaining power of individual plaintiffs and correspondingly the settlements they will be able to secure. Those settlements will normally yield to the plaintiff the expected value of her suit or a close amount—an outcome that improves social welfare.<sup>132</sup> Hence, the case for recognizing preliminary damages is not limited to fairness arguments; there are also strong efficiency reasons to allow plaintiffs to receive preliminary damages.

### ***B. Prerequisites for Awarding Preliminary Damages***

It bears emphasis that we do not argue that preliminary damages should be awarded as a matter of course in all cases. In our opinion, preliminary damages should be a discretionary remedy, the grant of which will require proof of the same conditions as the award of preliminary injunctions, namely: (a) likelihood of success on the merits; (b) irreparable harm if preliminary damages are not awarded; (c) balance of equities tipping in favor of the plaintiff; and (d) an award of preliminary damages is consistent with the public interest.<sup>133</sup> As with preliminary injunctions, the burden of proving these elements will lie with the plaintiff.<sup>134</sup>

We view our reliance on the same conditions used by courts in deciding whether to grant preliminary injunctions is intentional as a key strength of our scheme. The use of the same criteria will substantially facilitate the implementation of our proposal. Courts are adept at making preliminary injunction decisions.<sup>135</sup>

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<sup>130</sup> See Cooter & Rubinfeld, *supra* note 97 at 1070–75 (showing how symmetrical information about the suit’s expected value induces rational parties to settle the case out of court).

<sup>131</sup> Lucian Arye Bebchuk & Howard F. Chang, *The Effect of Offer-of-Settlement Rules on the Terms of Settlement*, 28 J. LEGAL STUD. 489, 493 (1999).

<sup>132</sup> *Id.*

<sup>133</sup> *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

<sup>134</sup> *Id.*

<sup>135</sup> See Warren & Schwartz, *supra* note 74, at 388-90.

Furthermore, there exists a vast body of judicial precedents about each of the conditions that must be satisfied for a preliminary injunction to be issued.<sup>136</sup> Our proposal harnesses the judicial expertise and caselaw that was developed in the context of preliminary injunctions in order to make our proposal readily implementable.

That said, there exists a critical difference between preliminary injunctions and preliminary damages. Preliminary injunctions require courts to engage in a binary decision: they can either grant a preliminary injunction or not grant it. In the former case, the plaintiff's wish is granted in full; and in the latter, the defendant's. This is not the case with preliminary damages. Preliminary damages allow courts to split the difference by making in-between decisions. A court need not award a plaintiff the full amount she requests even if all of the aforementioned conditions are met; it can lower the preliminary damages amount in order to ensure that the plaintiff complies with the abovementioned conditions. For example, if a court believes that granting the plaintiff \$500,000 in preliminary damages would be unfair to the defendant, it can settle for a \$300,000 award. Preliminary damages open up a whole range of options that are not on the table in the case of preliminary injunctions. For this reason, we argue that courts should not rush to reject preliminary damages requests. Rather, they can fashion damages awards in ways that will do justice to both parties, subject to the conditions we set forth below.

### **(1) Likelihood of Success on the Merits**

The first condition a plaintiff would need to prove in order to receive preliminary damages is that her case is likely to succeed on the merits.<sup>137</sup> This is an indispensable requirement. If a court believes that a suit has no merit, no preliminary remedy should be awarded. Awarding a preliminary remedy in such cases is not only unfair to the defendant, but also wasteful. If a plaintiff cannot prove that she is likely to succeed on the merits, it makes no sense to prolong the proceedings at the defendant's expense. Judicial resources are scarce and should be allocated in a principled way. Granted, every litigant has the right to use her own resources to litigate. Yet, there is no reason to fund unmeritorious actions, let alone frivolous suits.

A possible argument could be made here that even if the plaintiff fails to prove a likelihood of success on the merits, it may still make sense to give her a chance to continue to litigate by awarding her a very small amount of money. For example, if the court estimates that a plaintiff has 10% chance of winning, it can award her

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* See also Bethany M. Bates, *Reconciliation after Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1556 (2011).

a fraction of the preliminary damages amount she seeks. We cannot endorse this idea. The award of any amount of preliminary damages in non-meritorious cases exposes the defendant to an unjustified risk of non-payment. When a case is unlikely to succeed on the merits, there is no reason to expose defendants to this risk. Moreover, when a case is unlikely to be successful, it is almost certain that the plaintiff will need to return the money to the defendant. Transfers of money are not costless, however, especially for individual defendants. Also, it should be remembered that judicial resources are scarce. A lawsuit should not be thought of as a lottery ticket. Allocating judicial time to cases that stand no real chance of success on the merit comes at a cost to meritorious plaintiffs and the public at large. Judicial time and effort should be allotted in a way that takes the likely final outcome into account. Postponing the likely end in the case of non-meritorious suits by awarding plaintiffs small amounts in preliminary damages is at odds with sound principles of judicial administrability.

Furthermore, we are also concerned that under a regime that does not maintain a strict requirement of probability of success on the merits, courts may be tempted to grant preliminary damages to plaintiffs in all or most cases out of compassion or sympathy.<sup>138</sup> Unlike the case with preliminary injunctions, where courts face an all-or-nothing decision and understand that if they issue an unwarranted injunction it will severely harm the defendant, in the context of preliminary damages, courts may choose to give plaintiffs a small amount and see how the case plays out. While we understand this impulse, the rules of evidence and civil procedure must be honored. Hence, we are of the view that unless we adopt a probabilistic recovery regime, under which all remedies are prorated based on different degrees of proof,<sup>139</sup> preliminary damages should always be withheld when a plaintiff cannot prove that her suit is likely to succeed. We maintain that this is a key prerequisite that must be strictly enforced by courts.

## **(2) Irreparable Harm to Plaintiff from Denial of Preliminary Damages**

A second element a plaintiff would need to prove to qualify for preliminary damages is that she stands to suffer irreparable harm if her request for preliminary damages is denied.<sup>140</sup> The irreparable harm inquiry should focus on the plaintiff's financial situation and her ability to continue with the lawsuit if her request for preliminary damages is denied. Accordingly, to prove irreparable harm, the

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<sup>138</sup> Cf. Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 591 (1985) (arguing that compassion for accident victims combined with the comparative loss-bearing abilities of tort defendants leads judges to see tort law as a mechanism for victim compensation).

<sup>139</sup> For pros and cons of such a regime, see STEIN, *supra* note 37 at 143–53.

<sup>140</sup> *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

plaintiff needs to show that she cannot self-finance the lawsuit or find external funding without undue burden. In other words, we would require a showing that the plaintiff cannot finance the litigation without making unreasonable sacrifices. We do not believe that the bar should be set higher than that.

Courts should not force victims to sell their home, switch jobs or take exorbitant loans to finance litigation. The reason is simple: if the plaintiff showed that she is likely to succeed on merits, she is likely to be awarded compensation from the defendant at the end of the trial. The compensation she is going to receive ought to cover all of her expenses including her attorney's fees. There is no point, therefore, in forcing the plaintiff to incur unnecessary costs and then order the defendant to pay them. More importantly, if it is apparent that the defendant wronged the plaintiff and will be ordered to compensate her, there is no prudential reason to bar the plaintiff to collect a portion of the compensation award earlier.

The plaintiff can prove her financial plight by sharing information about her income, property and savings, as well as about her medical, legal and general expenses with the court. It must be borne in mind that plaintiffs must share much of the same documentation anyhow to plead their case and prove their harm. Accordingly, the evidential requirements that attend our proposal do not impose a significant burden on plaintiffs.

Here, too, the fact that money awards can adjust upward and downward plays an important role. Courts need not automatically grant the plaintiff the full amount she requests. For example, if a plaintiff seeks preliminary damages in the amount of \$180,000, and the court finds that a grant of \$100,000 suffices to prevent an irreparable harm to the plaintiff, it should order the payment of the latter amount. That said, courts should give plaintiffs some leeway. Setting the preliminary damages award at the bare minimum runs the risk that it might be insufficient. It must be remembered that legal proceedings often take longer than expected and can involve unforeseen developments. Courts must take these scenarios into account when ruling on preliminary damages requests. It is, of course, possible to allow plaintiffs to seek preliminary damages more than once and require plaintiffs to show that they meet the relevant criteria every time they file such a request. Although we do not rule this option out completely, allowing the plaintiff to seek preliminary damages multiple times will consume judicial resources and prolong legal proceedings. For this reason, we suggest that preliminary damages should be awarded just once, but courts should err on the side of safety—in this case, is the plaintiff's side—in setting the amount of these damages.

### **(3) Balance of Equities Tipping in Plaintiff's Favor**

The third condition for awarding preliminary damages focuses on the balance of equities.<sup>141</sup> It would require the plaintiff to show that the harm she will sustain if her request for preliminary damages is denied will be greater than the harm the defendant stands to suffer if preliminary damages are granted. This comparison lies at the heart of preliminary injunction decisions, and it is also central to our proposal.

Although we believe that individual plaintiffs should be able to receive preliminary damages, it must be borne in mind that not all defendants can pay them. The line should be drawn between well-to-do corporate defendants and cash strapped individual defendants. Defendants that fall into the former group will, by and large, be able to comply with a court order to pay preliminary damages. Defendants from the latter group face a very different situation. An order to pay preliminary damages may spell doom for poor defendants. Litigation may push poor defendants to the abyss of bankruptcy. One should also bear in mind that poor defendants may be worse off than poor plaintiffs since poor defendants do not even have the option of deciding whether to litigate or not. The need to comply with an interlocutory order to pay money to the plaintiff may push certain individual defendants over the edge. Hence, courts must carefully examine the ability of defendants to pay preliminary damages and the effect of a preliminary damages award on their ability to continue to function and defend themselves in court.

Once again, there is a critical difference between preliminary injunctions and preliminary damages. Almost always, a court can adjust the preliminary damages amount so as to ensure that the balance of equities tips in favor of the plaintiff. Yet, the flexibility that characterizes preliminary damages is not infinite. There is a limit to the courts' ability to adjust preliminary damages awards downwards. Courts should be wary not to set the amount too low. If the preliminary damages award is set too low, it will be of little help to the plaintiff as it will not enable her to see her case through. Accordingly, courts must be circumspect not to lower preliminary damages awards too much.

At the same time, courts must also offer adequate protection to the interests of defendants. The main risk preliminary damages pose to defendants is the risk of non-repayment if they win the case in the end. It is impossible to rule out the possibility that even if a plaintiff shows that she is likely to succeed on the merits, at the end of the trial, a court will rule for the defendant. Under this scenario, the defendant may sometimes be able to retrieve her money from the plaintiff. Yet, if the plaintiff used the preliminary damages to finance the litigation, she would not

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<sup>141</sup> *Id.*

be able to repay the defendant right away, if ever. To address this risk, we propose that preliminary damages be capped at 40% of the total damages sought by the plaintiff. Hence, if a plaintiff sues for \$1,000,000, the court will be able to award her up to \$400,000 in preliminary damages. At this point, we want to remind our readers that under our proposal, courts will always have the discretion to award less than 40%.

#### **(4) The Award of Preliminary Damages is Consistent with the Public Interest**

The final prerequisite for the award of preliminary damages is that it is consistent with the public interest.<sup>142</sup> We should note at the outset that concern for the public interest will arise in some cases where preliminary damages are sought, but not in all of them. Concern with public interest is a paramount consideration in constitutional cases, suits against administrative agencies and in the domain of international human rights.<sup>143</sup> Litigation in the aforementioned areas often involves requests for preliminary injunctions and the decision whether to grant them implicates the public interest.<sup>144</sup> Clearly, if our proposal is adopted, plaintiffs in all areas will take advantage of it. On our view, preliminary damages should be available across the board and should benefit all plaintiffs who meet the criteria for their award. Accordingly, in suits against the government that involve a request for preliminary damages, courts must consider the impact of the request on the public interest before deciding whether to grant it. In standard civil litigation, the public interest will not always come into play. For example, a contractual dispute between two private parties typically implicates no public interest.

Of course, public interest concerns may arise in civil litigation as well. In mass torts cases,<sup>145</sup> as well as in cases involving violations of consumer protection laws<sup>146</sup> and securities class actions,<sup>147</sup> to mention just a few,<sup>148</sup> issues of public interest may arise. Since we believe that the introduction of preliminary damages

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<sup>142</sup> Cf. *eBay Inc. v. MercExchange LLC*, 547 U.S. 388, 391 (2006) (courts granting injunctive relief in patent infringement suits must consider the public interest).

<sup>143</sup> See generally Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891 (2008).

<sup>144</sup> *Id.*

<sup>145</sup> See David Rosenberg, *The Casual Connection in Mass Exposure Cases: A Public Law Vision of the Tort System*, 97 HARV. L. REV. 849, 929 (1984).

<sup>146</sup> See, e.g., David J. Dove, *Washington Consumer Protection Act—Public Interest and the Private Litigant*, 60 WASH. L. REV. 201 (1984).

<sup>147</sup> See Jill E. Fisch, *Class Action Reform: Lessons from Securities Litigation*, 39 ARIZ. L. REV. 533, 539 (1997) (“Substantial shareholders may also have litigation incentives that reflect general social welfare.”).

<sup>148</sup> See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (eligibility for welfare benefits).

serves the public interest as it makes our court system fairer and more efficient, we suggest that courts adopt a rebuttable presumption that preliminary damages awards are consistent with the public interest and place the burden on defendants to rebut this presumption.

#### ***IV. Addressing Potential Objections***

In this Part, we address three possible objections to our proposal. The first objection maintains that the introduction of preliminary damages would impose a significant cost on our court system by adding another stage to many trials. The second objection holds that the existence of litigation funds renders our proposal superfluous: plaintiffs in need of money can simply turn to external funds.<sup>149</sup> The third and final objection alludes to fairness: arguably, the introduction of preliminary damages would be unfair to defendants because if a defendant ultimately prevails he might not be able to retrieve the money she paid the plaintiff, who might become insolvent at that point. While these arguments have surface appeal, they collapse upon close inspection. For the reasons explained below, neither each objection on its own, nor all of them collectively are weighty enough to derail our proposal. We address these objections in turn.

##### ***A. The Social Cost of Preliminary Damages***

The first objection we consider falls under the heading of administrability. One can argue that the introduction of preliminary damages will invariably increase litigation costs and consume valuable judicial time, especially if interlocutory appeals are allowed.<sup>150</sup> The introduction of preliminary damages would force judges to make liability determinations much earlier than they currently do before they fully assessed all the evidence and heard all relevant witnesses.<sup>151</sup> Adding preliminary damages may therefore require judges to address the question of liability twice—once, when they assess the plaintiff's request for preliminary monetary relief and then, again, after hearing the evidence.

We believe that this argument is overstated. Although it is undeniable that recognition of preliminary damages would require judges to consider the liability

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<sup>149</sup> See *supra* notes 87 & 88 and sources cited therein.

<sup>150</sup> There are arguments for and against allowing interlocutory appeals. On the one hand, allowing such appeals would provide further protection to defendants. On the other hand, we believe that the mechanisms we propose strike the right balance between plaintiffs and defendants and thus there is no need for an interlocutory appellate review. We are grateful to Susan Steinman for drawing our attention to this issue.

<sup>151</sup> Cf. Zuckerman, *supra* note 50, at 370 (arguing that fast-track liability assessments in interlocutory proceedings can yield a socially positive tradeoff between quality and economy of court decisions).

issue twice, the marginal cost involved is quite low and the expected benefits will likely far outweigh the cost. This is so for several reasons.

To begin with, it must be borne in mind that judges are no strangers to preliminary remedies. Preliminary injunctions have been part and parcel of our judicial system for centuries.<sup>152</sup> The task judges are required to carry out in making decisions regarding preliminary injunctions is identical to the task they will have to perform in awarding preliminary damages. Preliminary injunction decisions require judges to assess the likelihood of plaintiff's success on the merits.<sup>153</sup> The same is true of preliminary damages awards. The long experience judges have with preliminary injunctions indicates that they are adept at making tentative liability determinations prior to making their final decision. Hence, judges will not need additional training or an adjustment period in order to operationalize our proposal. Similarly, there is no reason to assume that judges will be more error prone in deciding preliminary damages requests than when ruling on preliminary injunctions.

That being said, the introduction of preliminary damages would undoubtedly add to the number of cases that require interlocutory assessments of liability. This in turn would prolong trials; and even if the additional cost incurred in every individual case is small, the aggregate cost would likely be substantial.

Our response to this argument is two-fold. First, although it is true that the addition of preliminary damages to the remedial list would increase the number of cases in which judges will need to make interlocutory liability decisions, it may actually conserve judicial resources. Although this argument may seem counterintuitive on first blush, it is not. The introduction of preliminary damages is likely to put an end to the delay tactics currently employed by powerful defendants. It would render such strategic behavior futile and counterproductive. This, in itself, can lead to significant savings of judicial resources. The experience we have with preliminary injunctions is instructive here as well. In many legal domains, the issuance of a preliminary injunction marks the end of the litigation.<sup>154</sup> In the face of preliminary injunction against them, defendants, by and large, preferred to settle the case out of court instead of litigating it to final judgment.<sup>155</sup> We expect a similar dynamic to unfold with respect to preliminary damages. A court's decision to award preliminary damages to the plaintiff does

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<sup>152</sup> See *supra* notes 63, 64 & 71 and sources cited therein.

<sup>153</sup> See *supra* note 133 and accompanying text.

<sup>154</sup> See, e.g., Erik A. Christiansen, *Preliminary Injunctions Live or Die on Powerful Evidence of Wrongdoing*, LITIGATION, Winter 2019, at 14, 17 (2019) ("Litigation often ends after a preliminary injunction is granted or denied, particularly in cases that have no quantifiable monetary damages.").

<sup>155</sup> *Id.*

not only provide the plaintiff with much needed funding to carry on with her legal battle, but it also generates information about the likely outcome of the case. From the defendant's perspective, it may well be wiser to settle the case under such circumstances than to continue to incur litigation costs and pay a much higher amount at the end of the proceeding.<sup>156</sup> Critically, settlements entered by the parties when preliminary damages are awarded, or even in their shadow, would be much fairer to plaintiffs than those consummated now, in the absence of preliminary damages.<sup>157</sup>

Second, a cost-benefit analysis of our proposal cannot focus solely on the cost of adjudicating cases. Rather, it must also account for the salutary effects of our proposal on primary behavior.<sup>158</sup> From a purely economic perspective, the willingness of wrongdoers to cause harms to others depends on the expected cost associated with the wrong.<sup>159</sup> When the wrongdoers expect to walk scot-free because they estimate that they will not be sued or that the victim will not be able to litigate to a final judgment, their incentive to break the law would be quite high. Similarly, when wrongdoers know that they can exhaust the victim and pay a relatively small fraction of the actual harm, they would go ahead and commit the wrong.<sup>160</sup> Sadly, under the current legal regime, wrongdoers can be almost certain that many of their victims will either refrain from suing or refrain from litigating to a final judgment on account of their limited resources. Preliminary damages award will change this reality. Moreover, they will reverse it. The implementation of our proposal would enable victims to seek and obtain justice. Understanding this, potential wrongdoers would avoid harming others in the first place. This, in turn, will not only lead to a better society, but will also economize on judicial resources.

So far, the discussion proceeded in purely utilitarian terms. Adding fairness and distributive justice considerations to our analysis bolsters the case for recognizing preliminary damages. As John Rawls cautioned, a just society cannot sit idly while the rights of its weak members are not adequately protected.<sup>161</sup> He famously

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<sup>156</sup> See Cooter & Rubinfeld, *supra* note 97, at 1070–75.

<sup>157</sup> See Parchomovsky & Stein, *supra* note 17 and accompanying text.

<sup>158</sup> For the need to mind primary behavior in fashioning rules of procedure, see Gideon Parchomovsky & Alex Stein, *The Distortionary Effect of Evidence on Primary Behavior*, 124 HARV. L. REV. 518 (2010) (showing that evidentiary motivations often lead actors to engage in socially suboptimal behavior when doing so is likely to increase their chances of prevailing in court).

<sup>159</sup> See ROBERT COOTER & ARIEL PORAT, *GETTING INCENTIVES RIGHT: IMPROVING TORTS, CONTRACTS, AND RESTITUTION* 27 (2017) (arguing that when individuals properly assess their net private benefits from actions, and officials properly assess the actions' external costs, optimal incentives can easily be set up by imposing liability equal to the externality).

<sup>160</sup> *Id.*

<sup>161</sup> See RAWLS, *supra* note 5, at 151 (“Inequalities are permissible when they maximize, or at least contribute to the long-term expectations of the least fortunate group in society.”).

argued that the institutions of our society must be designed to benefit the interest of its least well off members. Of course, in his writings, he did not refer to every legal doctrine. Yet, the problem we analyze is a systematic feature of the justice system, which is clearly one of the core institutions Rawls has in mind, as the title of his book attests. As we explained, if substantive legal protections are to be meaningful, the law must provide all individual members of our society the ability to utilize them.<sup>162</sup> Therefore, from a deontological perspective, it can be argued that the inherent structural bias against poor victims ought to be rectified as a moral imperative.

### ***B. Litigation Funds***

Another possible objection that may be levelled against our proposal is that it is rendered superfluous in light of the existence of various litigation funds.<sup>163</sup> The crux of the argument is that plaintiffs can secure funding from third parties, such as litigation funds, and therefore there is no need for preliminary damages. Why should plaintiffs receive funding from defendants if they can get it from financial institutions that were set up specifically for this purpose?

We believe that this criticism misses the mark. Not only does the presence of litigation funds not obviate our solution; it actually proves how pressing the problem we address is. Litigation funds are no saints. They are rational economic actors who respond to a market need. Their emergence and operation indicate that many meritorious plaintiffs do not have sufficient resources to sue. The service provided by litigation funds is not free of charge. As is the case with other financial intermediaries, those funds charge fees and interest for the money they provide. They do advance payments to litigants that helps those litigants to proceed in court, but they also collect a sizable share of the monetary award in exchange.<sup>164</sup>

Furthermore, because litigation funds are self-interested economic actors with limited resources, they do not fund every action.<sup>165</sup> Rather, they are highly selective in choosing which actions to fund.<sup>166</sup> Consequently, they turn down many requests for funding.<sup>167</sup> For this reason, the solution provided by litigation funds to the plight of poor individual plaintiffs is at once very partial and very expensive. Worse yet, since the funders' fee structure typically comprises a fixed

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<sup>162</sup> See Parchomovsky & Stein, *supra* note 17, at 1314.

<sup>163</sup> See *supra* notes 87 & 88 and sources cited therein.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

amount in addition to a percentage from the recovery, it constitutes a particularly poor deal for plaintiffs with relatively small claims.<sup>168</sup>

In fact, preliminary damages address the shortcomings of litigation funds and can therefore complement them, but the hierarchy between the two options should be reversed. Under our vision, preliminary damages would become a standard remedy in our legal system available to all plaintiffs who meet the conditions for their award. By contrast to litigation funds, the solution provided by preliminary damages is comprehensive. More importantly, our proposal would not require a plaintiff to fork over a significant share of her monetary award to a financial intermediary who sponsored her legal battle.<sup>169</sup> Preliminary damages would enable her to secure a significant share of the money she needs at a significantly lower cost and without paying unnecessary fees. If a plaintiff needs additional money after she received preliminary damages, she can turn to litigation funds.

It should also be noted that a court's decision to award preliminary damages will provide an important signal to litigation funders that the suit is meritorious and worthy of funding.<sup>170</sup> At present, litigation funders must assess the strength of various suits on their own. Once preliminary damages become available, the decision to award them would provide both sides to a litigation-funding agreement dependable information indicating that the suit is likely to succeed on the merits.

### ***C. Unfairness to Defendants***

The third, and final, objection to our proposal focuses on its effect on defendants. The crux of the argument here is that preliminary damages award would expose defendants to the risk of being unable to collect the amount they have advanced to plaintiffs at the end of the trial if they prevail. This risk is especially acute when plaintiffs do not have savings, property, or a steady source of income and thus may become judgement proof at the end of the trial. In such cases, the award of preliminary damages may create an unfair irreversible result for defendants.

It should be noted at the outset that preliminary injunctions also generate irreversible results—in fact, they are much more likely to do so than preliminary damages on account of their binary nature—yet nobody argues that they should

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<sup>168</sup> *Id.*

<sup>169</sup> A clarification is in order here: we view litigation funds as inferior to preliminary damages, but we do not call for their abolition. Litigation funds can, and should, exist alongside preliminary damages. Those funds can prove useful to plaintiffs who for various idiosyncratic reasons need more money in the present than they can get in preliminary damages and for plaintiffs who are willing to trade a larger amount of future income for a smaller amount of present income.

<sup>170</sup> *Cf.* Avraham & Wickelgren, *supra* note 88, at 235 (advocating a method for eliciting information for courts through external funding of suits).

be banished. When a court issues a preliminary injunction against a defendant, it forces her to discontinue a certain activity. The economic consequences for the defendant are often harsh and irreversible: even if the defendant ultimately wins the case, oftentimes, she would not be able to recover compensation for her forgone profits. Moreover, as we already noted, in many legal contexts, a preliminary injunction practically marks the end of the case since defendants cannot afford to cease to operate.<sup>171</sup> Yet, the accepted lore is that despite their irreversible effects, preliminary injunctions are needed to secure just results. Naturally, courts are well aware of the potential effect of preliminary injunctions on defendants and have adopted doctrinal safeguards to minimize those effects. We have incorporated the same safeguards into our proposal to offer adequate protection to defendants.

Moreover, as we noted time and again, because preliminary injunctions are dichotomous in nature—in the sense that a court may either issue or deny an injunction—preliminary damages are subject to fine-tuning. Hence, with respect to preliminary damages, courts have two decisions to make: first, whether to award preliminary damages; and second, how much money to give. By lowering or raising the amount of preliminary damages, courts can strike the right balance between the interests of the parties based on the circumstances of each individual case. That they cannot do with preliminary injunctions.

Admittedly, the doctrinal safeguards we proposed do not completely eliminate the risk of non-payment. Judges are not error-proof and the circumstances of individual litigants change. Hence, the risk of non-payment exists, but is relatively small and should not stand as bar to the adoption of our proposal. For the risk of non-payment to materialize, two cumulative misfortunes must occur. First, a court must err in evaluating the plaintiff's probability of success on the merits. Second, the plaintiff must be judgement proof at the end of the trial, such that she cannot return the amount she was awarded even in the future. This combination of judicial error and insolvency is quite rare—and bear in mind that these two misfortunes need to occur in the same case. We therefore do not think that preliminary damages should be made unavailable solely because of this concern. Moreover, an undeserving plaintiff's inability to return the preliminary award she received is as much of a problem for the defendant as a defendant's insolvency for the deserving plaintiff. Our proposal leads to a more symmetrical allocation of the insolvency risk thereby making the litigation system more evenhanded.

Before concluding, we would like to note that it is possible to adopt additional safeguards to offer more protection to defendants. One possible protective measure would be to limit the availability of preliminary damages to cases in

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<sup>171</sup> See Christiansen, *supra* note 154, at 17.

which the defendant's liability is undisputed but the magnitude of the plaintiff's loss is.<sup>172</sup> This scenario refers to a conflict in which a defendant admits its liability, but argues that the victim deserves only \$50,000 in compensation and not \$300,000 as the victim claims. In such a case, a court can award \$50,000 in preliminary damages to the plaintiff without exposing the defendant to any risk whatsoever; after all, the defendant itself acknowledged that she owes the plaintiff said amount.<sup>173</sup> Similarly, if there were settlement negotiations between the parties and the wrongdoer offered to pay the victim a certain amount, the preliminary damages could be capped at that amount. Here, too, the award of statutory damages does not do injustice to the defendant. Another possible solution would combine preliminary damages with Federal Rule of Civil Procedure 68.<sup>174</sup> The award of preliminary damages would be treated as the defendant's payment offer, so if at the end of the trial the court does not award the plaintiff a greater amount, the plaintiff will be obligated to pay the defendant's trial expenses.

### **Conclusion**

In this Essay, we demonstrated the need for and the desirability of adding preliminary damages to the menu of remedies in civil actions. The unavailability of preliminary damages is a product of happenstance and history; yet, there is neither prudential or policy justification to deny preliminary damages in civil litigation. In fact, the opposite is correct. The award of preliminary damages would make our legal system more just and efficient. Indeed, the unavailability of preliminary damages works to the disadvantage of the least well-off: impecunious plaintiffs who suffered injustice at the hands of powerful and affluent defendants. Owing to severe financial constraints, financially constrained plaintiffs cannot afford prolonged and expensive litigation. By denying them the remedy of preliminary damages we deprive them of the most affordable option of financing their legal struggle: advance payment from the party who harmed them and forced them to litigate in the first place. The extant regime, in which preliminary damages are not available, creates another distortion: it provides strong

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<sup>172</sup> This method was adopted by the Israeli compensation system of compensating automobile accident victims: see *Israeli Compensation Law*, *supra* note 10; Perry, *supra* note 10, at 409–13.

<sup>173</sup> Arguably, implementation of this idea may lead defendants never to admit their liability or agree to pay excessively small amounts. This kind of strategic reaction is possible. Courts can counter such strategic behavior by obligating defendants to pay the plaintiff's litigation expenses, and in extreme cases, punitive damages as well. *Cf.* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (reducing, but not voiding, state court's imposition of multimillion punitive damages on insurance company for litigating strategically and in bad faith against the insured).

<sup>174</sup> See Fed. R. Civ. P. 68 (allowing defendants to make an offer of judgment and recover costs when a plaintiff turns the correct offer down).

defendants with an incentive to drag out legal proceedings in order to force plaintiffs who can ill-afford long trials into unfavorable settlements.<sup>175</sup> Therefore, the theoretic case for recognizing preliminary damages is compelling. Furthermore, we showed that under the conditions we specified, the case for granting preliminary damages is stronger than the case for issuing preliminary injunctions. Monetary awards, unlike injunctions, are infinitely flexible. They can be adjusted to the specific circumstances of each individual case. They can also be capped. Accordingly, courts would be able to calibrate awards in a way that would help plaintiffs without jeopardizing the financial stability of defendants.

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<sup>175</sup> See *supra* note 17 and accompanying text.