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A Need for Clarity: Toward a New Standard for Preliminary Injunctions

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THE traditional standard for issuing a preliminary injunction[1] considers four factors:

1. plaintiff's probability of success on the merits,
2. irreparable injury to the plaintiff if the injunction is not granted before trial,
3. the balance of harms, a comparison of the plaintiff's harm and the harm to the defendant if the injunction is granted and the defendant prevails, and
4. the public interest, where appropriate.[2]

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[1] This discussion is limited to preliminary injunctions and will not cover temporary restraining orders (TROs). Although they are similar in many respects, preliminary injunctions always require notice to the adverse party. FED. R. CIV. P. 65(a). The TRO does not. FED. R. CIV. P. 65(b); *see* 7 J. MOORE, J. LUCAS & K. SINCLAIR, JR., MOORE'S FEDERAL PRACTICE 65.05 (1987) [hereinafter MOORE'S FEDERAL PRACTICE]; 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2947, at 426 (1973) [hereinafter WRIGHT & MILLER].

[2] This is a distillation of formulas appearing in the cases, casebooks, and secondary literature. *See, e.g.*, O. FISS & D. RENDLEMAN, INJUNCTIONS 343-44 (1984) [hereinafter FISS & RENDLEMAN]; D. LAYCOCK, MODERN AMERICAN REMEDIES 398, 401 n.3 (1985) (citing Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197 (9th Cir. 1980)). Some authorities vary this formula by combining factors two and three into a single step. This single step requires the court to balance the irreparable harms that might occur to either the plaintiff or the defendant before trial. The plaintiff's harm must be more serious if plaintiff is to prevail. In that form, the step is called "balancing the harms." It is distinguishable from "undue hardship," which is an equitable defense. Whatever the formula, the burden of persuasion rests with the plaintiff. Throughout this Article, the party seeking the injunction will be referred to as

To use this extraordinary remedy, plaintiffs have had to carry the heavy burden of proving all four factors, including a strong likelihood of prevailing on the merits. In this form, the standard is called the traditional or sequential test.[3]

Over time, the courts have developed variations of the traditional test. Some courts balance the four factors against one another, with success on the merits no longer a threshold test. This standard is called a balancing test.[4] A few courts apply the "alternatives" test. Under this test, the plaintiff has the option of showing "either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting preliminary relief."[5]

The choice of a standard can affect the outcome of a case. For example, under a balancing test, proof of uncertain success on the merits could be balanced against a showing of great irreparable injury, and the plaintiff might be able to obtain an injunction. But under the traditional sequential test, the court could not engage in these trade-offs among different factors, and the plaintiff would not obtain an injunction for failure to prove a high likelihood of success on the merits. Generally, the application of the balancing test is characterized as more relaxed, or liberal, than the sequential test. In contrast, the alternatives test is criticized as overly liberal. Thus, problems arise from the inability to predict when or why a court will use any one of these three tests. All commentators agree that the coexistence of these standards in the federal courts has led to confusion.[6]

"plaintiff," and the party resisting the application will be called "defendant." Also, the terms "standard" and "test" will be used interchangeably.

[3] MOORE'S FEDERAL PRACTICE, *supra* note 1, at 65.04[1]. Although all three tests could be found in the collected cases of any one circuit, the sequential test is associated with the First, Fifth, Seventh, Eleventh, and D.C. Circuits. *Id.*

[4] Moore's Federal Practice associates this test with the Third, Fourth, Sixth, and Ninth Circuit. *Id.* The balancing test can and does take a wide variety of forms.

[5] Sonesta Int'l Hotels v. Wellington Assocs., 483 F.2d 247, 250 (2d Cir. 1973). Moore's Federal Practice associates this test with the Second and Ninth Circuits. Although it states that the Ninth Circuit uses the alternatives test, as the analysis below will demonstrate, this characterization is incorrect. This mistake is not surprising, however, because even the commentators cannot agree on which circuit is using which test. MOORE'S FEDERAL PRACTICE, *supra* note 1.

[6] *See* Black, *A New Look at Preliminary Injunctions: Can Principles From the Past Offer any Guidelines to Decisionmakers in the Future?*, 36 ALA. L. REV. 1 (1984); Castles, *Interlocutory Injunctions in Flux: A Plea for Uniformity*, 34 BUS. LAW. 1359 (1979); McLaughlin & Tallon, *Preliminary Injunctive Relief in the Federal Courts*, in 1 CIV. PRAC. & LITIGATION IN FED. & ST. CTS. 877 (1987); Wolf, *Preliminary Injunc-*

This lack of uniformity has caused havoc in litigation, and the courts have consistently failed to confront it.[7] They have been unwilling to articulate a jurisprudence describing the appropriate standards for the issuance of preliminary injunctions.[8] The confusion has two sources. First, and most obviously, the courts have disagreed on the relationship between the four factors. Should these factors, for example, be proven sequentially or balanced against one another? The more subversive, but less apparent, problem is the definition of the factors themselves. Generally, they still carry the freight of historical equity. The courts have not asked whether these terms reflect their actual use and meaning in modern litigation. For example, what does "irreparable injury" mean, and what is its relationship to inadequate legal remedies?[9] A close examination of the traditional factors reveals that they do not meet the needs of contemporary adjudication.[10]

This Article examines the various standards for preliminary injunctions and demonstrates the ways in which the standards have become confused by irrelevant layers of meaning. Those layers of meaning are analyzed; nonfunctional accretions are discarded, and legitimate modern meanings are developed. The discussion is conducted against a background of assumptions about what makes a good standard, for example, accessibility and comprehensiveness. By modernizing the standard, the parties and the courts will frankly and openly discuss the underlying legal issues and values. This, in turn, should lead to more legitimate decisions.[11]

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tions: The Varying Standards, 7 W. NEW ENG. L. REV. 173 (1984). Moreover, the commentators do not always agree among themselves. For example, Black, *supra*, at 3, recognizes three dominant standards, while Wolf, *supra*, at 183, identifies nine.

[7] One circuit has articulated a single standard. *See* Dataphase Sys. v. C.L. System, Inc., 640 F.2d 109 (8th Cir. 1981) (en banc); *see also infra* notes 146-52 and accompanying text.

[8] *See* Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

[9] The well-documented growth of the federal caseload makes thoughtful reflection and consistency difficult. *See, e.g.*, R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-93 (1985). Judge Posner notes that between 1960 and 1983 there was a 250% increase in district court filings. *Id.* at 63-64. At the same time, there has been a tremendous growth of new legal rights, many of which are addressed by injunctions. *See generally* O. FISS, THE CIVIL RIGHTS INJUNCTION (1978).

[10] Professor Rendleman, for example, points out that the term "inadequacy" has developed several different meanings over time. Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346 (1981).

[11] Many commentators note that the existing confusion provides an opportunity for courts to engage in unprincipled or result-oriented choices between the standards. *See, e.g.*, Hammond, *Interlocutory Injunctions: Time for a New Model?*, 30 U. TORONTO

Under a modernized standard, a court should redress immediate pretrial harm and preserve the litigation in a way that renders subsequent decisions meaningful. Further, a court's ability to act will not be limitless;[12] instead, by clarifying the terms' meanings, a court's discretion will be bounded by the attributes of the standard itself as well as by preexisting external constraints. The analysis ends with a normative description of the relationship between the factors and concludes that a balancing test is the best form for such a relationship.

I

THE QUALITIES OF A GOOD STANDARD

Before urging a particular standard, a prior concern sets the stage for discussion: What qualities should the appropriate standard possess? A workable standard should embody at least four features. First, it should encourage purposeful argument and deliberation by the court and the parties. By focusing their attention on only factually and legally relevant matters, it will allow informed and productive discussions of the case. Second, the standard should attempt to equalize power between the parties, allowing them to present their best case. Third, the standard should promote clarity and candor, both in arguments and decisions. Finally, it should be easy to use.

All of these characteristics tend to interlock; the presence of one is supportive of the others. The end result is improved decisionmaking that addresses all issues and leaves the parties believing they have been treated fairly. But because of the differing standards, litigation has become a shell game. Rather than focusing on the merits of their case, parties try to read the judge's mind and sift through the tea leaves of precedent. Litigators choose one standard and hope that by persuading the court to adopt their version, a victorious result will follow. A good standard, however, should focus ar-

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L.J. 240 (1980). A similar concern animates Judge Posner's development of a standard in the Seventh Circuit.

[12] This Article focuses on standards for issuing a preliminary injunction, and it does not consider the statutory injunction. With the rise of federal legislation since the New Deal, an increasing number of statutes provide for permanent injunctive relief. Many of these statutes specify situations in which equitable relief is appropriate or the conditions under which it may be granted. Such laws should be familiar to attorneys practicing antitrust, environmental, and labor law. The ways in which these statutes and equity interact will not be a focus of this Article. Such specialized injunctions have been the subject of a vast amount of literature. *See, e.g.*, O. FISS, *supra* note 9; F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930); Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524 (1982).

gument on the facts and law of the case rather than on the choice of a particular standard or the meaning of terms within it. Currently, the latter state of affairs controls litigation.

A proper standard will encourage purposeful deliberation. It will enable the parties to focus on the relevant issues, marshal the known facts, and intelligently discuss them. For example, because of the numerous tests and the surrounding uncertainty as to their meaning, arguments about which test to use become a threshold the parties must cross before they can reach the merits of their case. An efficient standard will generally allow parties to skip this step, eliminating argument about the meaning of its components. This is particularly important in the preliminary injunction setting where time is precious, and the facts and law are not completely known. In short, a standard should generate the maximum amount of relevant information possible and focus the attention of the court and the parties.

Closely related to the concept of purposeful discussion, although distinct from it, is the concept that the equitable standard, imbued with common, shared meaning, attempts to equalize access to justice. When all of the terms of the standard have accessible and agreed upon meanings, the parties can stand as semantic equals. No special knowledge or rhetoric should be needed. In this way, no party should have an advantage over the other.[13] Thus, parties will feel they are being treated fairly. In a sense, this requirement imports due process notions into the standard.

The standard ought to foster clarity and candor. This is not now the case. For example, a court may conclusorily deny a preliminary injunction for failure to show "irreparable injury." Given the host of meanings for this term, it may be unclear to the parties what the court means. Further, the parties may not understand the actual grounds for decision. Similarly, in some cases the rationale is buried under the outmoded maxims of equity. A good standard should not leave parties dissatisfied in this fashion. By promoting clarity in the context of purposeful deliberation, the actual grounds of decision will be apparent and openly discussed.

Finally, the standard should be as simple as possible. Neither a judge nor a party should need special competence or privileged knowledge to use it. The standard should be understandable to the

[13] It would be naive to believe that the parties approach the bench with equal monetary resources or with equal levels of legal skill. A proper standard, however, should attempt to compensate for these external differences.

general legal community. And it should be neither over nor under-inclusive of the relevant factors and their relationship to one another.[14]

All of these qualities contribute to improved decisionmaking. But a good standard would have other salutary consequences as well. For example, in addition to focusing the parties' arguments when requesting relief, it should also help the parties determine whether they should even seek relief. Thus, it should reduce both specious arguments and frivolous litigation. Reduction of these two inefficiencies would be one small step in reducing the case backlog and improving access to, and administration of, justice.

II

THE SUPREME COURT DECISIONS

The decisions of the United States Supreme Court have not squarely addressed the issue of an appropriate standard for issuing a preliminary injunction.[15] When the Supreme Court has commented on preliminary injunctions, it has been in passing or subsidiary to the major issue in the case. While the Court's decisions have generated certain minima to which the lower courts should have adhered, they have left more questions asked than answered.[16]

The Supreme Court cases do firmly preserve the trial court's discretion; injunctions are not issued automatically or as of right. Even in the face of statutes which appear to alter the trial court's decisionmaking powers, the Court has repeatedly endorsed traditional equitable discretion.[17] Thus, lower courts retain the flexibility to mold the decree to the circumstances of the case. The Court implicitly recognizes that no statute or rule can predict the uncer-

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[14] Such a standard will not reveal the judge's inner thought process; rather, it will respond to the focused arguments of the parties.

[15] Several commentators have noted the Supreme Court's reluctance to do so. *See, e.g.*, Wolf, *supra* note 6, at 174.

[16] Although there are many early cases which remark on the preliminary injunction, this discussion will focus on contemporary cases. These are the cases to which the lower courts are most likely to look. For a fuller discussion of early Supreme Court cases, see *id.* at 174-81.

[17] Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (statute did not withdraw court's equitable discretion); Yakus v. United States, 321 U.S. 414, 440 (1944) ("The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right . . . ."); Hecht Co. v. Bowles, 321 U.S. 321, 328 (1944) (court had discretion to refuse injunction even where statute said an injunction "shall be granted" for proven violations). The *Romero* decision is criticized in Plater, *supra* note 12.

tainties of any given situation.[18]

While the Court has consistently preserved equitable discretion, the Justices have not been of one mind in developing standards for issuing preliminary injunctions. Yet, the Supreme Court could clear away much of the doctrinal thicket. For example, what factors should a court consider when issuing a preliminary injunction? How much shall each factor be weighted? A standard which requires probable success on the merits may doom the plaintiff's application, while requiring only that the plaintiff raise a serious question may keep the case alive. Once the Court answers these questions, it still must face the relationship between these factors. Must a litigant make a showing on every factor, or can a weak showing on merits be balanced by a stronger showing of harm? The definition, weighting, and relationship of the factors is central to evaluating a case.

Trying to determine to what extent one must prove irreparable injury or success on the merits from a reading of Supreme Court cases is frustrating. For example, the Court, in *Ohio Oil v. Conway*,[19] describes success on the merits as a "grave" question, and states that injury must be "certain."[20] But in *Mayo v. Lakeland Highlands Canning*,[21] the Court says the merits must raise "serious questions."[22] Another case, *Brown v. Chote*,[23] refers to the "possibilities of success on the merits" and the "possibility that irreparable injury would have resulted."[24] One year later, rather than dealing with "possibilities," the Court measures "likelihoods" of irreparable injury and success on the merits.[25] Yet another formulation appears where the Court states that the plaintiff must show that "he will suffer irreparable injury" and that he is "likely to pre-

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[18] FED. R. CIV. P. 65(a) addresses only procedural issues and does not announce a standard for issuing preliminary injunctions. The rule states simply that "[n]o preliminary injunction shall be issued without notice to the adverse party." FED. R. CIV. P. 65(a)(1). Although the rule is a direct outgrowth of equity practice in the United States, MOORE'S FEDERAL PRACTICE, *supra* note 1, at 65.02, the drafters of the rule intentionally avoided addressing the standard for issuing preliminary injunctions. *See* Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 301 (1939). Given this history, the rule gives little help in determining an appropriate standard for preliminary injunctions.

[19] 279 U.S. 813 (1929).

[20] *Id.* at 815.

[21] 309 U.S. 310 (1940).

[22] *Id.* at 316.

[23] 411 U.S. 452 (1973).

[24] *Id.* at 456.

[25] Granny Goose Foods v. Brotherhood of Teamsters, 415 U.S. 423, 441 (1974).

vail on the merits."[26]

In addition, the Court does not determine to what extent irreparable injury and the merits can be traded off against one another. For example, in *Ohio Oil v. Conway*,[27] the Court balanced the factors of irreparable injury and success on the merits. This balancing approach was also followed in *Yakus v. United States*,[28] where the Court spoke of balancing "the conveniences of the parties and [their] possible injuries."[29] In *Brown*, the Court noted with approval the way in which the district court had balanced success on the merits and irreparable injury.[30] But in the later case of *Doran v. Salem Inn*,[31] the Court in dicta described a situation in which the plaintiff was required to show both irreparable injury and success on the merits.[32]

The casual reader of these cases may brush off these observations as mere semantic quibbles, but an informed reader of the Supreme Court opinions cannot derive a rule or standard from these decisions. Thus, the lower courts are free to employ a dizzying array of standards. These diverse formulas are also disturbing because of the off-hand way—generally in dicta—that they are issued by the Court. The Court has failed to address a basic issue which pervades and affects a sweeping variety of statutory and common law.[33]

The Court has spoken with more authority and certainty on a third prerequisite: public interest. This factor allows courts to consider the interests of nonparties to litigation by assessing the effect a grant or denial of an injunction would have on their position. The Court first discussed this issue in *Virginian Railway v. System Fed-*

[26] Doran v. Salem Inn, 422 U.S. 922, 931 (1975).

[27] 279 U.S. 813 (1929).

[28] 321 U.S. 414 (1944).

[29] *Id.* at 440.

[30] 411 U.S. 452, 456 (1973).

[31] 422 U.S. 922 (1975).

[32] *Id.* at 931-32. When the Court sets forth the standard for irreparable injury, it appears to be a balancing test, but when it is applied to success on the merits, it appears to be a traditional sequential test. The *Doran* opinion is frustrating because it does not refer to the prior cases nor does it attempt to reconcile its earlier language about balancing.

[33] Although there has not been much scholarly comment on the standard for preliminary injunctions, and the writers themselves disagree on what the standard should be, all of them agree that the time has come for a uniform standard and that the Supreme Court should address this question. *See* Black, *supra* note 6; Leubsdorf, *supra* note 8; Wolf, *supra* note 6.

eration No. 40,[34] where it considered the appropriateness of a permanent injunction ordering the employer in a labor dispute to negotiate. The Court said: "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."[35] Given the public interest in tranquil labor relations, the Court concluded that the grant of a permanent injunction was authorized by statute and was an appropriate exercise of the court's power.[36]

Yakus v. United States[37] represents the Court's first definitive pronouncement on the role public interest should play in issuing preliminary injunctions.[38] Ordinarily, the trial court will require the plaintiff to post a bond that will adequately protect the defendant's interests if the injunction has been improvidently entered. But a bond cannot compensate the public interest. In these cases, "the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff."[39] This description is noteworthy because it suggests that in some cases the public interest can trump the moving party's showing of harm.

The public interest factor retains its vitality in modern cases. For example, in *Atchison Topeka & Santa Fe Railway v. Wichita Board of Trade*,[40] the Court considered a preliminary injunction entered to suspend Interstate Commerce Commission regulations relating to the inspection of goods in transit on the railroads. Here, however, the Court acknowledged that "public interest is not a simple fact, easily determined by courts."[41] In this particular case, the Court listed the different public interest groups that must be considered: farmers and consumers, producers, and consumers who ship other goods on the railways. Where there are conflicting public interests,

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[34] 300 U.S. 515 (1937). This case is better known for upholding the Railway Labor Act.

[35] *Id.* at 552. American courts have been far more receptive to public interest considerations than British courts. Hammond, *supra* note 11, at 248.

[36] *Virginian R.R.*, 300 U.S. at 562-63; *see also* Hecht Co. v. Bowles, 321 U.S. 321 (1944); Inland Steel v. United States, 306 U.S. 153 (1939).

[37] 321 U.S. 414 (1944).

[38] The acknowledgement that public interest would play a role in the grant of preliminary injunctions first comes in *Inland Steel*, but it is as an aside and not fully considered.

[39] *Yakus*, 321 U.S. at 440.

[40] 412 U.S. 800 (1973).

[41] *Id.* at 824.

the lower court must balance their competing claims.[42]

More recent decisions continue to maintain that in appropriate cases the public interest is a relevant factor.[43] But maintaining that the public interest may be considered is not the same thing as explaining *how* it may be considered. In the midst of existing fact uncertainty, an unbounded consideration of public interest threatens to overwhelm the process. For example, the Court does not define admissible evidence of public interest or who may introduce that evidence. Even if these sources are identified, *Atchison* raises the specter of multiple public interests within one case. The Court does not suggest how these might be balanced or weighted against one another. Finally, the Court poses guidelines for situations in which the public interest can lead to a denial of a preliminary injunction for an otherwise deserving plaintiff.

In summary, the Court has not been a great help in the search for an optimal standard. Generally, the lower courts and litigants are left to sift through "federal equity practice." If there is anything one can discern from the Supreme Court cases, it seems to be that the lower courts should consider some notion of irreparable harm, success on the merits, and when appropriate, the public interest. But none of these terms are defined nor are we given a consistent weighting or relationship between these factors.

III

THE COMPONENTS OF THE REDEFINED STANDARD

Any discussion of the preliminary injunction, then, boils down to first principles: the doctrines of equity.[44] In this Part, the traditional components of the preliminary injunction standard—the pur-

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[42] *Id.* at 824-26.

[43] Weinberger v. Romero-Barcelo, 456 U.S. 305, 312-13 (1982) (upholding *Yakus*, court need not award injunction for every violation of law); Rondeau v. Mosinee Paper, 422 U.S. 49, 64-65 (1975) (public interest does not relieve corporation from proving irreparable injury in SEC case). Professor Plater argues that *Weinberger* was incorrectly decided and that a court using equitable discretion should not be able to override Congress' statutory intent. Plater, *supra* note 12. *But cf.* Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627 (1988) (disagreeing with Plater and proposing a new test).

[44] The interested reader is referred to O. FISS, *supra* note 9; G. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY (1982); Hammond, *supra* note 11; Leubsdorf, *supra* note 8. Readers wishing to go back even further should see Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539 (1986).

poses, the merits, irreparable injury, the balance of harms, and the public interest—are evaluated and, when necessary, redefined.

A. Purposes

Statements about the purpose of a preliminary injunction almost always accompany a court's recitation of a standard. Often boilerplate, these invocations nonetheless provide a rationale that shapes a particular standard and cannot be divorced from it. For example, in close cases, reference to the purpose of the injunction may serve as a tie breaker.[45] Three candidates for the purpose present themselves: maintaining the status quo, preserving the court's ability to render a meaningful decision, and minimizing the risk of error. All of these purposes may act, like the standard itself, as a gatekeeper. Moreover, these purposes are not necessarily contradictory; they may overlap.

Historically, preserving the status quo stands out as the most common justification. Consider the following common statement: "The purpose of the preliminary injunction is to preserve the status quo between the parties pending a final determination of the merits of the action."[46] Maintaining the status quo incorporates several considerations for granting interlocutory relief. Within the context of historical equity, it theoretically afforded the moving party effective relief after a full trial on the merits.[47] The term was often used reflexively and in combination with other equitable principles.[48] Courts did not always fully consider what leaving the parties in the status quo, however defined, might do to their relative positions. For example, blindly invoking the status quo in a situation in which the defendant has already caused some harm to the moving party is not effective relief.

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[45] Imagine a case before two different judges. Each judge gives identical weight and definition to the four factors, but Judge *A* applies the status quo (as in the last peaceable, non-contested status), while Judge *B* feels the purpose is to minimize the risk of error. Assuming defendant is engaged in peaceable but arguably harmful conduct, Judge *A* could allow this to continue, while Judge *B*, if defendant's case on the merits is weak, may forbid the conduct.

[46] MOORE'S FEDERAL PRACTICE, *supra* note 1, at 65.04[1]; *see also* Leubsdorf, *supra* note 8, at 534-35; Wolf, *supra* note 6, at 173-74.

[47] The concept of the status quo has been roundly criticized in the literature. Almost all commentators reject it as a useful principle.

[48] Black, *supra* note 6, points out how invocation of the status quo was often accompanied by the observation that equity cannot command an affirmative act. She argues that the mandatory/permissive distinction is no longer useful, although the concerns that animated it may be worth considering.

The status quo concept also embraces a timing factor. At some point in the relationship or transactions between the parties the court must identify it. Classically, that time was the last peaceable status between the parties.[49] But when courts attempted to inquire into that peaceable situation, they have tripped over another component of a status quo oriented purpose: the parties' subjective description of that time. One person's last noncontested status was often another's declaration of war.

When these components are added together, it becomes easy to see why the status quo purpose has been so freely abandoned. The doctrine is manipulable and subjective. It rests heavily upon the parties' evaluation of the facts when there is not much time to evaluate them. As a principle, it does not inform the deliberations for a preliminary injunction in any meaningful way.

Professor Leubsdorf[50] has suggested minimizing risk as the justification for the injunctive standard: "[T]he preliminary injunction standard should aim to minimize the probable irreparable loss of rights caused by errors incident to hasty decision."[51] This justification, he argues, fully captures a court's dilemma in making a decision that, because of the truncated hearing, might mistakenly adjust the rights and injuries of the parties. Consequently, Professor Leubsdorf and Judge Posner, who adopts his theory,[52] emphasize success on the merits over the other factors in the injunctive standard. But when courts focus on the merits, they undermine the traditional function of interlocutory relief, that is, relieving the moving party of injuries that cannot be remedied after trial. This forces the preliminary injunction to do procedural work it ought not do—the preliminary injunction hearing becomes a mini-trial on the merits of the case.[53]

This Article adopts a third statement of purpose: the preliminary injunction should create[54] a state of affairs that will best give

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[49] *See* D. LAYCOCK, *supra* note 2, at 403-05 (citing cases).

[50] Leubsdorf, *supra* note 8.

[51] *Id.* at 540-41.

[52] *See infra* notes 171-90 and accompanying text.

[53] Hammond, *supra* note 11, at 271-72, has also criticized Leubsdorf's proposal. He observes that error can occur in any court decision, although he concedes that the risk is greater with the preliminary injunction. He asserts that Leubsdorf's statement of purpose asks the judge to engage in the impossible task of second guessing. This rationale for the preliminary injunction leads to quantification of the standard in a way that is not useful in most cases. *Id.* at 272.

[54] I use the term "create" intentionally. The term "preserve" tends to revive the discredited status quo idea, while the term "create" encourages the growth of the discre-

effective relief to the parties when the case has been fully heard on the merits.[55] The court should deliberately engage in a debate as to what will best accommodate the often conflicting interests of the parties, while preserving its ability to render a meaningful final decision. The touchstone here is that the relief be effective.

This approach has several advantages. It ends the resort to outmoded historical formulas such as preserving the status quo or the mandatory/permissive distinction. By forcing the court to focus on the facts and the consequences of relief, it encourages the court to flexibly exercise its discretion. Where the focus is on creating effective interlocutory relief, the court should feel relatively free to experiment with its order. For example, it may want to incorporate features such as reporting requirements or staggered timelines, or it could impose conditions on more than one party.

Professor Leubsdorf asserts that this statement of purpose is ambiguous and confusing because it is unclear whether it is a rule based on avoiding a moot case or whether it forces the court to focus on injuries that cannot be cured after trial.[56] Professor Leubsdorf is being disingenuous; courts are referring to the second set of affairs. He notes that the court cannot always protect its ability to decide. Professor Leubsdorf concludes that this statement of purpose is just another way to focus on the parties' legal injuries, and that the courts ought to focus on the merits, which allows them to assess those legal injuries. Professor Leubsdorf's criticisms are met by encouraging the court to be more creative when drafting its order. Under any purpose, there will likely be situations where the court cannot tailor relief. But by focusing on the unique circumstances of each case, the court is more apt to design a successful preliminary injunction than if it looks solely at the merits.[57]

B. Success on the Merits

Along with a showing of irreparable injury, a showing of success

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tionary or flexible uses of this remedy. The standard I propose will encourage the courts to devise and draft more creative and flexible preliminary injunctions. *See infra* text accompanying notes 73-78.

[55] *See* WRIGHT & MILLER, *supra* note 1, § 2947, at 423-27; Hammond, *supra* note 11, at 278; Developments in the Law, *Injunctions*, 78 HARV. L. REV. 994, 1058 (1965) [hereinafter *Injunctions*].

[56] Leubsdorf, *supra* note 8, at 545.

[57] Unlike Professor Leubsdorf and Judge Posner, whose preliminary injunction standard primarily emphasizes an examination of the merits, I focus on the facts. Focusing on the facts preserves the traditional function of equity—a remedy which can be responsive to facts rather than constrained by rules.

on the merits is the cornerstone of preliminary injunctive relief.[58] This factor tests the legitimacy of plaintiff's legal claim. At the very least, it prevents the court from dealing with frivolous suits, and it protects the legal interests of the nonmoving party.[59] Nonetheless, this factor has caused several problems. While its meaning is relatively apparent, it is not at all clear how much "success" the plaintiff must prove. Must the moving party show a prima facie case? A likelihood of success? A serious question? A related issue is how far courts should inquire into the merits in a preliminary proceeding.[60] This in turn raises the question of the court's ability to predict the outcome of a case after a necessarily sketchy presentation of the legal issues.

Success on the merits should be de-emphasized, although not completely abandoned.[61] An overemphasis on merits has led to procedural abuse of the preliminary injunction. With the growing federal case backlog, the preliminary injunction has become a device for parties to get a quick hearing on their case.[62] Once the parties make and debate a high level showing on the merits, the decision entered may well end their dispute,[63] especially where there are no issues of fact. Given civil trial backlogs, this is understandable.[64] But the preliminary injunction is an interim remedy,

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[58] MOORE'S FEDERAL PRACTICE, *supra* note 1, at 65.04[1].

[59] "This is relevant because the need for the court to act is, at least in part, a function of the validity of the applicant's claim." WRIGHT & MILLER, *supra* note 1, § 2948, at 450.

[60] This debate mirrors that which occurs when courts consider issues like standing or reviewability. Although these are threshold determinations, courts struggle with how far they should inquire into the merits in order to resolve a standing issue.

[61] Wolf, *supra* note 6, at 230-33, 235-36, and to a lesser extent, Hammond, *supra* note 11, at 278-82, argue that courts should abandon the merits test. I am tempted to join them, but because I think that it would creep back into the standard under the guise of another component which would undermine my concern for candor and clarity within the standard, at this time I reject this position. Moreover, inclusion of "success on the merits" does have the symbolic value of warning courts and litigators of their Article III duties to address real cases and controversies.

[62] FISS & RENDLEMAN, *supra* note 2, at 361 n.l; Hammond, *supra* note 11, at 251.

[63] Even in situations where the court might not enter an injunction, the tenor of the court's decision, and its evaluation of the merits, may well lead the parties to settle the case. This is particularly dangerous where, despite a high showing on the merits, the court has erred. "Such premature and improper assessments of the merits may precipitate unnecessary concessions by the losing party, and lead to settlements which otherwise would not occur." Wolf, *supra* note 6, at 232.

[64] This phenomenon led the English courts to reduce their emphasis on the merits. American Cyanamid v. Ethicon Ltd., 1975 App. Cas. 396. In that case, the House of Lords held that the moving party need only show a serious question for trial. For comment on this case, see Hammond, *supra* note 11, at 249-59; Leubsdorf, *supra* note 8,

not a procedural shortcut.[65] Using the injunction in this fashion obscures its primary purpose: to prevent irreparable harm to the moving party before the court can conduct a full trial on the merits.

Other procedural devices exist for those who want quick resolution of the merits. Where the parties have sufficiently developed the issues for a final resolution, they can move to consolidate the preliminary hearing with the full trial.[66] Either party can file this motion. Especially when there are no disputed facts, this route makes more efficient use of scarce judicial resources. Similarly, where disputing parties seek to clarify their legal rights, a declaratory judgment action may be more appropriate.[67] This remedy is especially useful where one party believes it has a strong legal claim, yet there is not enough injury to trigger the irreparable injury requirements for injunctive relief.[68] The growth of alternate dispute resolution also provides hope for those who want to resolve their disputes quickly. It may be that, in certain cases, mediation or arbitration is more desirable.[69]

Another traditional justification for emphasizing the merits was to provide an insurance policy for the defendant. By requiring a strong showing of probability of success at trial, courts sought to minimize the risk of error and to allow the defendant to carry on legal activities. But courts can protect the defendant without engaging in a far-reaching inquiry into the merits or running the risk of erroneously denying the moving party some relief.

The protective device is the bonding requirement of Federal Rule 65(c).[70] It requires the moving party, in exchange for access to pre-

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at 539-40. Hammond, *supra* note 11, at 250-51, notes that prior to *American Cyanamid*, motions for preliminary injunctions had become mini-trials. The problem with using preliminary injunctions for quick trials on the merits is probably even more pressing in this country because we recognize more claims than the English. *Id.* at 259-60.

[65] The courts could, as a matter of policy, decide that it is appropriate for the preliminary injunction to function this way. But this is not reflected in the Federal Rules nor does it appear in the case law.

[66] FED. R. CIV. P. 65(a)(2); *see also* Wolf, *supra* note 6, at 233-34.

[67] Declaratory judgments are governed by 28 U.S.C. §§ 2201-2202 (1982 & Supp. V 1987). Decisions rendered on such cases "have the force and effect of a final judgment or decree." *Id.* § 2201(a). There must be, however, an "actual controversy." *Id.*; *see also* FED. R. CIV. P. 57.

[68] Plaintiffs need not show irreparable injury to obtain declaratory relief. *See* D. LAYCOCK, *supra* note 2, at 442 n.2 (citing Nashville, Chattanooga & St. Louis R.R. v. Wallace, 288 U.S. 249 (1933)).

[69] There are some differences between these two procedures. For example, in mediation the parties control the outcome, while in arbitration, the arbitrator issues the decision.

[70] The Federal Rules require the "giving of security by the applicant" before a pre-

liminary relief, to provide "insurance" for the defendant if the injunction turns out to be mistaken. The court can adjust the bond requirement according to the moving party's showing on the merits. For example, in cases where the showing is weak, the court should require a bond[71] and determine as carefully as possible a reasonable amount.[72]

A second, often ignored, protective device is the process of preliminary injunction drafting.[73] The court should employ the full range of its discretion and be willing to try creative drafting solutions. The erosion of many of the historical shibboleths about orders make this easier. For example, courts have largely abandoned the distinction between mandatory and prohibitory injunctions.[74] At the same time, contemporary equity practice has led to a growing appreciation of injunctive order flexibility.[75] A court can use discretion and flexibility to tailor a remedy which addresses the legitimate interests of both plaintiff and defendant. As an illustration, suppose a plaintiff seeks to enjoin the use of loudspeakers in defendant's business. The court could: (1) grant plaintiff's requested relief in its entirety, pulling the plug on the loudspeakers; (2) grant

liminary injunction may be issued. FED. R. CIV. P. 65(c); *see also* Dobbs, *Should Security be Required as a Pre-Condition to Provisional Injunctive Relief?*, 52 N.C.L. REV. 1091 (1974).

[71] Although FED. R. CIV. P. 65(c) talks in mandatory terms, courts often waive the bond requirement for the moving party. This is another degree of discretion which should be re-evaluated. There are two tensions here: on one hand, defendants want some form of protection if the injunction should prove erroneous, especially where their undertaking is expensive. On the other hand, an automatic bond requirement may deprive indigent and middle income plaintiffs of a remedy. One could also argue that a strict bonding requirement might chill new or novel claims. There are some ways to resolve this dilemma. A bond which varies with the merits will provide one compromise. This requirement will place more pressure on the court to draft careful orders and to seek out other protective devices. Also, to the extent that we explicitly make a public policy exception to relieve plaintiffs of their bond requirements, these claims will go forward.

[72] The bond represents the full amount of the plaintiff's liability. In this sense, it resembles liquidated damages in that it limits the amount the defendant can recover.

[73] FED. R. CIV. P. 65(d). This rule describes the form and scope of the order. It requires only that the order describe the restrained acts in reasonable detail and give reasons for its issuance.

[74] Black, *supra* note 6, at 13-25. Mandatory injunctions order a party to act; prohibitory injunctions order a party to refrain from acting. Historically, courts were reluctant to issue mandatory injunctions, and would go to great lengths to make what was essentially a mandatory order appear to be prohibitory. *Id.* at 6; *see also Injunctions*, *supra* note 55, at 1061-63.

[75] Leubsdorf, *Remedies for Uncertainty*, 61 B.U.L. REV. 132 (1981); *Injunctions*, *supra* note 55, at 1064-69; *see also* O. FISS, *supra* note 9 (describing the impact that the civil rights cases have had on equity practice).

partial relief, setting hour and/or decibel limits for the use of the loudspeakers; (3) deny plaintiff's proposed relief and substitute its own relief, for example, order defendant to install soundproofing; or, (4) order defendant to work out a solution which addresses plaintiff's injury.[76] Within the time constraints imposed by the preliminary injunction, the court may seek drafting help from the parties themselves, a master, or a court appointed expert.[77] The court can use all of these techniques to vary relief granted according to the parties' showings on the merits and irreparable injury.[78]

Two final sources of protection come from the proposed standard itself. First, with the balancing formula, a weak case on the merits must be offset by a stronger case of irreparable harm. Plaintiff must also bear the burden in these cases. Second, balancing the harms also protects the defendants. If they show that an injunction will harm them more than the plaintiff, the court may deny the injunction.[79] The competing harms, however, must truly be balanced against one another. Meeting some threshold of defendant harm should not necessarily bar plaintiff's case where plaintiff's harm is proportionately larger.[80] Coupling both forms of balancing with sensitive and careful drafting should alleviate these potential problems.

This Article makes a case for de-emphasizing the role of a merits analysis in preliminary proceedings. A question remains as to the appropriate level of that showing, and by implication, the level of the court's inquiry. The major objectives should be to prevent frivolous claims and to prevent the plaintiff from enlisting the court's aid to illegitimately interfere with the rights of the nonmoving party. The appropriate test should be that the moving party must raise a serious question on the merits. This level of proof should not chill novel, meritorious claims. On the other hand, it retains the strength to prevent frivolous claims and thus protect both the court and the nonmoving party. Furthermore, it does not encourage the

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[76] This example, called "experimental relief," is inspired by *Injunctions*, *supra* note 55, at 1063-64. It can often minimize harm to defendants, but its success depends on their good faith. *Id.* at 1064.

[77] *Id.* at 1067-69.

[78] More drafting ideas are suggested in D. LAYCOCK, *supra* note 2, at 811-18. Laycock cautions that innovation can threaten other values. *Id.*

[79] Wolf, who abandons the merits component, resorts to a strong balancing test. *See* Wolf, *supra* note 6, at 229-30, 235-36. On the other hand, Hammond, *supra* note 11, at 279-81, rejects the balancing approach and suggests the court find the appropriate test for each category of dispute.

[80] Wolf, *supra* note 6, at 230.

court to engage in a thorough analysis of the parties' legal rights, as does the "probability of success on the merits" standard. When read through the lens of Federal Rule 11,[81] which places a higher duty on attorneys filing pleadings, it should avoid manipulation.[82]

C. *Irreparable Injury*

Another component of the standard requires the plaintiff to show that no adequate remedy exists at law or that they will suffer irreparable injury.[83] With respect to this component, confusion exists as to exactly what the moving party must show.[84] In addition to definitional confusion, a lively debate continues as to whether irreparable injury ought to be a prerequisite for equitable relief.[85]

Several commentators argue that this prerequisite should be drastically altered or abolished. Rather than perpetuate an inappropriately automatic presumption for legal remedies, these scholars argue that the two classes of remedies—legal and equitable—should be co-equal and that the court ought to consider the relative advantages of legal and equitable remedies before making a final decision.[86] They observe that the rule is an antiquated holdover from a time when the English legal system needed a sorting device that would send some cases to law and others to equity. With the merger of law and equity, this jurisdictional function, they argue, is

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[81] "Every pleading of a party represented by an attorney shall be signed by at least one attorney of record . . . ." FED. R. CIV. P. 11.

[82] *See also* Wolf, *supra* note 6, at 233.

[83] I prefer to call this term "irreparable injury." This is more likely to focus attention on the primary issue of injury. It can also subsume the notion of inadequate remedies at law. Where no legal remedy survives the lawsuit, there is irreparable injury.

[84] In Roland Mach. v. Dresser Indus., 749 F.2d 380, 382 (7th Cir. 1984), Judge Posner notes that courts usually list inadequacy and irreparability as the first component. Sometimes they list them conjunctively, at other times, disjunctively. Thus, he notes that it is not clear whether they mean the same thing. He concludes that, "in ordinary equity parlance they do not." *Id.* at 383 (citations omitted). Nonetheless, the case law has not resolved this confusion, and the terms continue to be used both separately and together. Similarly, Wolf, *supra* note 6, at 190-92, describes confusion in the First Circuit. Some cases equate adequacy and irreparability, while others treat them as independent factors.

[85] The best known proponent of this view is Fiss. *See* O. FISS, *supra* note 9. For an excellent and concise review of the position taken by Fiss, and a further development of this view, see Laycock, *Injunctions and the Irreparable Injury Rule* (Book Review), 57 TEX. L. REV. 1065 (1979) [hereinafter Book Review]. *See also* Hammond, *supra* note 11, at 276; Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990).

[86] Rendleman, *supra* note 10; Book Review, *supra* note 85, at 1084.

no longer needed.[87] The irreparable injury rule has become a manipulable concept that masks too much of what a court may really be deciding.[88] Finally, they object that the rule hides a preference for economic remedies in which defendants compensate their victims.[89]

These criticisms are well-taken. However, except for the manipulation argument, they do not address the peculiar situation of the preliminary injunction.[90] In this context, the irreparable injury rule, especially as formulated below, serves an important due process requirement. It requires the moving party to show an actual justification for abridging the typical trial process.[91] Therefore, it

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[87] O. FISS, *supra* note 9, at 1; Hammond, *supra* note 11, at 275-77; *Injunctions*, *supra* note 55, at 997-1021.

[88] *See* Book Review, *supra* note 85, at 1083, stating:

> One might ask why so much effort should be expended attacking a rule that makes so little difference when properly applied. The answer, of course, is that the rule most often makes a difference when *improperly* applied. The irreparable injury rule serves far more often as a cloak or prop for hostility to the plaintiff's claim than as a way of choosing between two remedies of roughly equal attractiveness.

Thus, by abolishing the rule, Laycock concludes that courts would be forced to face the "real issues" between different remedies. *Id.* at 1084. *See generally* Rendleman, *supra* note 10. While Rendleman agrees the term is manipulative, he suggests redefinition rather than abolition. Thus, a judge faced with a choice between legal and equitable remedies ought to consider the economic, moral, and administrative factors which would make one remedy more preferable. In the end, the difference between Rendleman, on one hand, and Fiss and Laycock, on the other, is not that great. Both groups want the courts to consider the same types of principles. Fiss and Laycock would prefer to divide this analysis into separate principles, while Rendleman would subsume it under the rubric of inadequacy. Laycock's arguments are fully developed in his two new articles. *See* Laycock, *supra* note 85.

[89] Book Review, *supra* note 85, at 1076-78.

[90] Fiss suggests that we should distinguish the unique interlocutory nature of the preliminary injunction, and the due process problems it presents, from the permanent injunction. O. FISS, *supra* note 9, at 29, 45. He states that Frankfurter and Greene, *see infra* note 142, based their case against the labor injunction by over-generalizing from the interlocutory injunction. O. FISS, *supra* note 9, at 45-47. This suggests it may not be possible to generalize from his observations about inadequacy and the permanent injunction to the preliminary injunction.

[91] Even Fiss concedes that it may be necessary to retain the irreparable injury requirement in the interlocutory context:

> A concern for [due] process might also justify an irreparable injury requirement for interlocutory injunctions: the plaintiff has to demonstrate that the defendant would cause irreparable injury unless immediately enjoined. This substantive requirement, presently found in most jurisdictions, invokes the same verbal formula that applies to final injunctions, irreparable injury. There is, however, a critical difference; in fact, as in the case of the prior restraint doctrine, it would be best to recognize two distinct irreparable injury requirements—one for interlocutory and the other for final injunctions. In the con-

should be retained as part of the preliminary injunction standard.

Even with the rule retained, no consensus has emerged as to its meaning. More often than not, irreparable injury analysis can serve as a cover for hostility to the moving party's claim. Therefore, the irreparable injury rule should be reanalyzed, and then redefined, to reflect its true functions in the preliminary injunction proceeding. Once these functions are sorted out, a new definition for the doctrine—one which retains only those concerns that may be legitimately addressed by the court—can emerge.

Historically, the irreparable injury rule, more often in the guise of "no adequate remedy at law," served as a principle to allocate cases between the courts of law and chancery. If a court could resolve the moving party's case by the use of legal remedies, the party could not obtain equitable relief. Equity was viewed as a subordinate remedy. Over time, this preference for legal remedies developed many doctrinal strands. Commonly referred to as the maxims of equity, these doctrines inform the content of the rule to this day. For example, it is typically said that equity will not enjoin a crime. This shorthand expression describes the special due process protections afforded to the alleged criminal, such as jury trials, which equity cannot provide. Similarly, where the defendant is insolvent, equity will act because the legal remedy is deemed inadequate. The defendant's insolvency inhibits the plaintiff's ability to receive an effective remedy.[92]

Courts should discontinue the practice of conclusorily invoking these maxims without further inquiry. Instead, a judge should discern whether the rationale behind the maxim applies in a particular case. If, for example, in the criminal context, there is no compromise of defendant's due process rights and criminal sanctions will not fully address the need for preliminary relief, it might be appropriate to enter a preliminary injunction.

The most pressing problem still remains: to define the irreparable injury rule and its relation, if any, to inadequate remedies at

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text of final injunctions, the irreparable injury requirement subordinates the injunction to noninjunctive remedies; in the interlocutory context, the irreparable injury requirement subordinates the interlocutory injunction to the remedy sought at the end of the lawsuit, a remedy that might be either injunctive or noninjunctive (such as damages). In the interlocutory context, the irreparable injury requirement could be viewed as protective of the right to be heard; in the final context, it serves no such purpose.

O. FISS, *supra* note 9, at 48.

[92] For a fuller discussion of the operation of some of the maxims, see O. FISS, *supra* note 9, at 38-45; *Injunctions*, *supra* note 55, at 997-1021.

law.[93] Part of the problem with the irreparable injury rule is that it performs at least four functions in addition to the historical gloss described above. First, the irreparable injury rule requires the existence or threat of an injury before relief can be granted. Second, it describes the nature of injuries which can be redressed by preliminary injunctions. Third, it attempts to measure the degree of injury required for relief. And finally, it describes a timing function. An examination of each of these four functions follows.

First, the touchstone of the preliminary injunction is that it prevents injury to the moving party before trial. The existence or threat of actual injury is an essential element of irreparable injury. The injury cannot be speculative or feared.[94] This requirement serves the interests of the parties and the court. For plaintiff, the preliminary injunction provides a legitimate way to seek the aid of the court in devising interim and emergency relief. Plaintiff need not resort to self-help or private, possibly extortionate, negotiations with the opposing party.[95] For the nonmoving party, there may be a compelling reason to forgo some of the traditional due process protections afforded in a full trial on the merits. For the court, the doctrine allows it to fulfill the article III requirement to hear cases and controversies. The injury requirement means that the court will be involved in a live dispute.[96]

Second, the irreparable injury rule categorizes the rights or inju-

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[93] The best resolution of this confusion occurs in Book Review, *supra* note 85, at 1070-72. The point is that inadequacy and irreparability are two formulations of the same rule. These differing formulations lead some to think they impose different requirements and that the injury must be egregious, or irreparable. Thus, some see "irreparable" as quantifying how inadequate the remedy must be. This view, Laycock states, is incorrect. The correct full statement of inadequacy, in his view, is as follows: "1. Equity will not act if there is an adequate remedy at law. 2. 'Adequate remedy' means a remedy as complete, practical, and efficient as the equitable remedy." *Id.* at 1071. Thus, if the court foresees any effective remedy at the conclusion of trial, be it legal, equitable, or administrative, then it should deny the preliminary injunction.

[94] This requirement is similar to the principle that moving parties cannot receive a modification of an injunction because of mere dissatisfaction; there must be a relevant change in the situation. *See* Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1105-06, 1109-10 (1986).

[95] This is not to discourage negotiation or other legitimate means of private settlement. There are times, however, when resort to legitimate private means of settlement will be inappropriate. For example, unequal bargaining strength may necessitate court resolution to temper the inequalities between the parties. Similarly, it may be inappropriate for private parties themselves to adjust important federal civil rights.

[96] Without the requirement of some injury, a motion for a preliminary injunction can become nothing more than an advisory opinion on legal rights or a mini-trial on the merits. *See supra* text accompanying notes 58-82. Such functions are best served by other devices.

ries the court will address. This is where the rule is most open to manipulation and suffers from the most doctrinal incoherence.[97] Additionally, this aspect of the rule tends to overlap with determinations of success on the merits. Some courts conflate an injury with a legal right. At the very least, one must recognize that equity now protects personal as well as property rights.[98] The problem is, what personal rights, or for that matter, what other rights, should the court protect?

Professor Rendleman's article on inadequacy[99] best develops a principled, modern treatment of the factors which a court may use to determine whether irreparable injury has occurred. His thesis is that "inadequacy" is a doctrine which captures the legitimate moral, economic, and administrative reasons for granting relief.[100] Because the courts have "altered their application of the inadequacy prerequisite without changing their terminology,"[101] Professor Rendleman undertakes the task of describing what the courts actually do under these three broad categories. His analysis can provide support for, and supply the content of, a modern and legitimate irreparable injury rule.

A few examples will illustrate this approach. The economic factor reflects a judge's evaluation of whether the injury should be allowed to occur and then compensated or redressed in some

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[97] Rendleman, *supra* note 10, at 347-48, 358.

[98] *Injunctions*, *supra* note 55, at 998-1001 (tracing the erosion of the distinction between personal and property rights).

[99] Rendleman, *supra* note 10. Although his discussion focuses on the inadequate remedies at law rule, he views the phrases irreparable injury and inadequacy as equivalent. *Id.* at 351.

[100] *Id.* at 346. Although Professor Rendelman's article addresses inadequacy in the context of permanent injunctions, it also applies to the interlocutory setting. Although this is probably the only setting in which it makes sense to retain the irreparable injury rule, it could conceivably be discarded. If it were, explicit rules would need to be developed to cover all foreseeable situations. Professor Laycock agrees that it makes sense to retain the rule for preliminary injunctions, but he abolishes the rule for permanent injunctions. Laycock, *supra* note 85. He concludes by listing a set of functional rules that would take the place of the irreparable injury rule. For example, he proposes as rules that relief would be impractical to implement or burdensome for the court to supervise, thus outweighing the disadvantage to plaintiff of receiving only damages. Or that the relief would deprive defendant of civil jury trial giving plaintiff no advantages over damages. *Id.* These two explicit rules give content to the analysis by Rendleman, *supra*. Thus, one can either adopt Professor Rendleman's analysis and retain the doctrine with the understanding that its content is supplied with legitimate considerations, or one could dispense with the doctrine in the preliminary setting and generate a set of explicit rules as Professor Laycock has done for permanent injunctions.

[101] Rendleman, *supra* note 10, at 347.

fashion.[102] A judge might want to consider whether the alleged injury can ever be measured in dollars, whether damages or a later permanent injunction would better deter or vindicate interests, or whether a subsequent remedy would necessarily afford too little or too much relief. Similarly, economic considerations may force private bargaining under the guise of the injunction proceedings.[103] A judge may want to evaluate whether this is the appropriate time to begin such a process.

Moral factors, on the other hand, focus the court's attention "on the weight of the plaintiff's substantive interest."[104] Although this factor applies more in a choice between legal and equitable remedies, it is also relevant in the preliminary stages of relief. This factor would allow a court to determine an interest to be so important that it should continue without interruption, even the interruption that would result from a full trial on the merits. It would also encourage candid consideration of the "public aspirations" expressed in the constitution, statutes, or public policy.

Finally, the court should consider administrative factors before awarding preliminary relief.[105] Two major concerns inform this category: the jury trial and enforcement. In the preliminary setting, the judge should consider whether the order may interfere with a subsequent trial by jury. If it will, the relief may have to be denied or the order narrowly tailored to preserve jury triable issues. The court should also evaluate its ability to enforce its order. Although people generally obey injunctions, there may be special circumstances, for example, a hostile defendant, that suggest that the court's ability to preserve the situation for decision is limited.

Professor Rendleman's view has several advantages, and it is consistent with the qualities of the proposed standard. First, the courts and parties are encouraged to focus on the actual issues presented by the facts rather than to invoke worn out maxims or engage in arguments which beg the question. Second, candor in decisions, and their concomitant legitimacy, are promoted. Third, by exposing the "intellectual process," it serves to constrain the discretion of the court.[106] On the other hand, unlike a narrow formula, it still leaves the trial court with a fair degree of latitude. It is not neces-

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[102] *Id.* at 348-52.
[103] *Id.* at 351-52.
[104] *Id.* at 352.
[105] *Id.* at 353-58.
[106] *Id.* at 358.

sarily a "conservative" process. That is, it does not freeze into the rule a particular set of values. Rather, it encourages an open debate as to whether plaintiff has presented a cognizable injury which the court can address. This is especially important in the preliminary injunction context. Many of these cases present novel theories or describe novel injuries. Rather than allowing the judge to hide behind a conclusion of irreparability, Rendleman's approach requires at least an initial debate and evaluation of new injuries and their place in our substantive and remedial schemes.

As its third function, irreparability defines the degree of harm that plaintiff must show. As Professor Laycock points out, inadequacy and irreparability are actually the same requirements.[107] They are not separate nor does the term "irreparability" suggest any special quantity for the amount of required injury. Instead, the court should only compare remedies to search for ones that are "as complete, practical, and efficient" as the proposed remedy.[108] This means comparing the preliminary injunction with other remedies that might be available after a full trial on the merits. Because the relevant comparison is between the preliminary injunction and post-trial remedies, the court should consider any equitable as well as legal remedies. For example, if a well-drafted permanent injunction can redress all of the moving party's alleged interim injury, no preliminary injunction should issue.[109]

The plaintiff still must allege some irreparable harm in order to secure a preliminary injunction. There is no reason to abridge, even temporarily, defendant's legal rights if plaintiff will suffer no irreparable injury before or during the trial process. Even if plaintiff can show a likelihood of success on the merits, no preliminary injunction should be granted unless the plaintiff also demonstrates some irreparable injury. To do otherwise perverts this remedy and further encourages procedural abuse. This requirement is also consistent with the purpose of this provisional remedy.[110]

Finally, the irreparable injury requirement captures two timing factors. The first, and most important, is that the court can only evaluate alleged harm which will occur before the dispute is re-

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[107] Book Review, *supra* note 85, at 1070-72.

[108] *Id.* at 1071; *see also* Rendleman, *supra* note 10, at 346. A reformation for the preliminary context might be: if a post-trial remedy, either equitable or legal, can completely, practically, and efficiently address all harm alleged by plaintiff to accrue before and during trial, then a preliminary injunction is not necessary.

[109] *See* Wolf, *supra* note 6, at 229.

[110] *Id.*

solved on the merits. This timing element is the *raison d'etre* for the preliminary injunction. Second, the injury must be imminent. This is not part of the irreparable injury requirement; rather, it is another way of saying that the case must be ripe in an equitable sense. This is a separate condition for granting any injunction, and it overlaps with irreparable injury.

D. Balance of Harms

The third component of most preliminary injunction formulas is the balance of harms.[111] This is probably the least controversial part of the formula and certainly the least discussed. Nonetheless, the balance of harms serves an important function. It allows the nonmoving party to present evidence of harms they will suffer if the injunction is entered erroneously. The court must then compare these allegations of harm to those presented by the moving party. Where the right to a full trial has been abridged, this component of the standard guarantees that the nonmoving party will be heard. In conjunction with the other factors, it also acts to minimize the amount of harm that can be inflicted on either party. For example, the relative showing of harm can be used to adjust the terms of the preliminary order.[112] Thus, it can act as a constraint on the court's discretion to design relief. Similarly, apprising the court of relative harms should also alert it to the possibility that one party may use the proceedings to extort a settlement.[113]

E. Public Interest

Until the turn of the century, neither American nor British courts considered the impact a preliminary injunction might have on the public interest.[114] This factor allows the parties to allege—and the court to consider—how the award of injunctive relief will affect either the interests of individuals or communities not parties to the litigation or the interests of society generally. This consideration can be problematic. Neither the Supreme Court nor the lower fed-

[111] This is distinguishable from the balance of hardships, which is an equitable defense. The defense operates to relieve a defendant from the imposition of a permanent injunction even where there is proven liability. This occurs when the defendant shows that the injunction would cause them harm disproportionate to their liability to the plaintiff.

[112] *See* Wolf, *supra* note 6, at 230.

[113] *Injunctions*, *supra* note 55, at 1006.

[114] *See* Hammond, *supra* note 11, at 248; Leubsdorf, *supra* note 8, at 539. The public interest continues to be predominantly an American concern, particularly in statutory areas such as antitrust, labor, and environmental law.

eral courts have defined what public interest means in this context.[115] For example, there is no set rule defining requisite proof of a valid public interest nor how much weight it should be given. Needless to say, parties should always allege harm to the public interest as a way of giving additional weight to their personal claims. But how should the court respond when both parties allege such harm? In preliminary proceedings, limited time is available to determine which party's version of the public interest is factually accurate. Moreover, invoking the public interest as a reason for granting or denying an injunction may disguise and superficially legitimate a judge's or party's personal agenda.[116] Nonetheless, some constraints on the use of the public interest do exist. At the very least, the public interest cannot contravene constitutional or substantive law.[117] Additionally, if time permits, the procedural rules allow the addition of parties who may present their own evidence.[118] Full consideration of the role of the public interest is beyond the scope of this Article, however, these brief comments suggest reasons to be wary of its unprincipled use and extension.

IV

THE RELATIONSHIP AMONG THE FACTORS

Once the components of the test are defined, the next task is to describe their relationship to each other. The sequential test, the alternatives test, and the balancing test describe the three basic ways in which the factors are related to one another.[119] A sampling of Ninth Circuit cases illustrates these three approaches and aids in the evaluation of their relative merits. It reveals that the balancing test is the one best suited to preliminary injunction litigation.

A. The Sequential Test

Sierra Club v. Hickel[120] represents a typical and widely cited example of the sequential test.[121] Plaintiff Sierra Club sought to pre-

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[115] *See supra* notes 34-43 and accompanying text.

[116] *See* Jost, *supra* note 94, at 1121.

[117] *See id.* at 1148; Plater, *supra* note 12, at 588-91.

[118] FED. R. CIV. P. 19 and 20 provide for joinder and permissive joinder, respectively. FED. R. CIV. P. 24 covers intervention and FED. R. CIV. P. 23 allows for class actions.

[119] *See supra* text accompanying notes 1-5.

[120] 433 F.2d 24 (9th Cir. 1970), *aff'd sub nom.* Sierra Club v. Morton, 405 U.S. 727 (1972). *Morton* is better known for the principles it sets forth on standing.

[121] Another widely cited example is Virginia Petroleum Jobbers Ass'n v. FPC, 259

vent Walt Disney Productions from developing Mineral King Valley in California. It alleged that the Forest Service and the Department of Interior had not fully considered the effect the project would have on the valley or the adjoining Sequoia National Park. If the Sierra Club wanted a preliminary injunction, the court said, it must show a "strong likelihood or 'reasonable certainty' " of prevailing on the merits and irreparable injury; the court must then "balance the damage to both parties."[122] Because it appeared that all of the required permits had been obtained legally, the court found that Sierra Club had not shown success on the merits and was not entitled to an injunction.

This case demonstrates two typical features of a sequential test. First, because the court sees this as an extraordinary and unique remedy, it requires plaintiff to justify the request by a heavy burden of proof.[123] Thus, the court requires a "convincing presentation" of *both* irreparable injury and success on the merits.[124] Second, failure to prove either success on the merits or injury is sufficient to justify withholding an injunction. For example, the plaintiff might demonstrate that irreparable harm is certain to occur but have a weak case on the merits. Under the sequential test, the court is fully justified in withholding relief in these circumstances. Of the three approaches, the sequential test is the strictest.[125]

The main problem with the sequential test is its requirement of a high proof level on all factors. This test overemphasizes the merits of a case. The necessity of proving a high likelihood of success requires excessive and premature judicial involvement with the merits. This means that relief may be unavailable to deserving parties. For example, in the short time before the hearing the parties may have been unable to muster sufficient evidence or precedent.[126] Sec-

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F.2d 921 (D.C. Cir. 1958) (per curiam). This case is discussed by Black, *supra* note 6, at 26-29, and Wolf, *supra* note 6, at 184-87.

122 433 F.2d at 33 (citations omitted). Subsequently, a more streamlined version of this test was stated in Sierra Club v. Hathaway, 579 F.2d 1162 (9th Cir. 1978). The court rearranged the *Hickel* decision into a more traditional format and stated the test as follows: "The considerations in determining whether to grant or deny injunctive relief are threefold: (1) have the movants established a strong likelihood of success on the merits; (2) does the balance of irreparable harm favor the movants; (3) does the public interest favor granting the injunction?" *Id.* at 1167. This is a fairly typical formulation of the traditional test.

123 *Hickel*, 433 F.2d at 33.

124 *Id.*

125 For other discussions of the sequential test, see Black, *supra* note 6, at 26-29; Hammond, *supra* note 11, at 261-62.

126 Castles, *supra* note 6, at 1373.

ond, this concern with the merits may obscure the very real injury that plaintiff is suffering. Because the factors cannot be traded off against each other, even a crushing and certain specter of harm will not overcome a weak showing on the merits. This may encourage courts to develop ways around the sequential test in order to relieve plaintiffs from irreparable injury.[127] Such a result would undermine the legitimacy of the test, as well as violate the qualities of a good standard, especially that of candor.

B. The Alternatives Test

A second approach, the alternatives test, is illustrated in *William Inglis & Sons Baking v. ITT Continental Baking*.[128] Plaintiffs alleged that their competitors engaged in discriminatory and below-cost pricing of their "private label" bread products. The district court, applying the traditional test,[129] denied the injunction for failure to show probability of success on the merits, even though it did find irreparable harm. Describing this as an "extremely complex case," the appellate court stated that it could not find an abuse of discretion in the lower court's use of the traditional standard.[130] Nonetheless, the court reversed and remanded, stating the lower court should employ the following test: " 'One moving for a preliminary injunction assumes the burden of demonstrating *either* a combination of probable success and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor.' "[131]

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[127] Black, *supra* note 6, at 48.

[128] 526 F.2d 86 (9th Cir. 1975). The forerunner to this mature statement of the alternatives test is Costandi v. AAMCO Automatic Transmissions, 456 F.2d 941 (9th Cir. 1972). The Ninth Circuit cases rely on cases from the Second Circuit, where this test was formulated. *See* Sonesta Int'l Hotels v. Wellington Assoc., 483 F.2d 247 (2d Cir. 1973); Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953).

[129] The district court stated the test as follows:

> [B]efore plaintiff can prevail the court must find that:
> 1. there will be immediate and irreparable harm if the injunctive relief is not granted;
> 2. plaintiff has a probability of success on the merits;
> 3. in balancing the equities, the defendants would not be harmed more than plaintiff is helped by the injunction; and
> 4. it would be in the public's interest to grant the injunction.

Inglis and Sons Baking v. ITT Continental Baking, 389 F. Supp. 1334, 1338 (N.D. Cal.), *rev'd*, 526 F.2d 86 (9th Cir. 1975).

[130] *Inglis*, 526 F.2d at 88.

[131] *Id.* (quoting Charlie's Girls, Inc. v. Revlon, Inc., 483 F.2d 953, 954 (2d Cir. 1973)). As in *Costandi*, the *Inglis* court relied exclusively on Second Circuit cases as support for the alternatives test.

The difference between the alternatives test and the traditional test can be sketched by hypothesizing what may have occurred in the lower court. Under the traditional test, the plaintiffs lose because they cannot prove a very high probability of prevailing on the merits. The court does not consider their proofs on the other factors because, under the traditional test, failure on any one part of the test results in a failure to meet the entire test. Under the second prong of the alternative test, however, their burden is considerably lighter. Because the lower court believes that the plaintiffs have proven irreparable harm, it appears likely that they could demonstrate that the balance of hardships tipped in their favor.[132] But more importantly, at least from the plaintiffs' point of view, they no longer need to prove "probable" success on the merits. Rather, the burden has been lowered to showing that "serious questions are raised." This less exacting standard is a real departure from the sequential test because it can result in the award of a preliminary injunction for the moving party. Also, because of the two prong nature of the test, plaintiffs can focus their case where their arguments are stronger, either on the merits *or* on irreparable injury. They need not prove both.[133]

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[132] The lower court did not balance the equities in *Inglis* due to plaintiff's failure to show success on the merits. Thus, we do not know if defendants faced an even greater irreparable harm than the plaintiffs. If defendants could show this, e.g., by showing they would go out of business, they could defeat plaintiff's application for a preliminary injunction.

[133] Note that although the *Inglis* court referred to the traditional test, it did not decide what role the test would play in future cases; that is, the traditional test was not overruled. In at least two cases decided after *Inglis*, the Ninth Circuit used the traditional test. *See* Warm Springs Dam Task Force v. Gribble, 565 F.2d 549 (9th Cir. 1977); Sierra Club v. Hathaway, 579 F.2d 1162 (9th Cir. 1976). Both of these cases, like *Hickel*, are environmental cases. Both use the following test for determining whether a preliminary injunction should issue: (1) whether the movants have established a strong likelihood of success on the merits, (2) whether the balance of irreparable harm favors the movants, and (3) whether the public interest favors granting the injunction. The difference from the alternatives test lies in the higher threshold of proof for the likelihood of success on the merits and the consideration of the public interest. The *Hathaway* court discussed the alternative test in a footnote:

> Assuming without deciding that the alternative[s] test for injunctive relief adopted by this Circuit in [*Inglis*] applies to environmental cases, we are of the opinion that our discussion regarding the standard test also demonstrates that appellants failed to show "either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in [their] favor."

Id. at 1167 n.7 (citation omitted). Presumably, these courts continued to use the traditional test because it included a consideration of the public interest. This factor has played a central role in many environmental disputes. Additionally, the *Gribble* court suggests that under NEPA, the standards for granting an injunction are more liberal.

Although the two alternatives test is an interesting response to the inflexibility of the traditional sequential test, it has problems of its own. It fails in its second prong to focus on the need for some irreparable injury.[134] An injunction should not be entered where plaintiff has no injury. To do so undermines the legitimacy of the preliminary injunction. Furthermore, both prongs set too low a threshold for injury. For instance, a possibility of injury should not involve a court. This test has become an overreaction to the harshness of the traditional sequential rule. The preliminary injunction becomes too potent a weapon for litigious parties. Most of those who have reviewed the alternatives test have dismissed it as overly liberal or even "aberrant."[135]

C. *The Balancing Test*

The case of *Los Angeles Memorial Coliseum Commission v. National Football League*[136] illustrates the balancing test. At issue in this case was the attempt by the National Football League to prevent the Oakland Raiders from moving to Los Angeles. The appellate court reversed the lower court's award of a preliminary injunction because plaintiff, L.A. Coliseum, had not shown irreparable injury and because the court had not balanced defendant's harm.[137] It then set forth its balancing test: "[A] minimal showing

565 F.2d at 552 n.2. Thus, both courts may have felt that the alternatives test did not offer any advantages for deciding issues in environmental litigation.

Inglis was followed in the subsequent case of Aguirre v. Chula Vista Sanitary Serv., 542 F.2d 779 (9th Cir. 1976). In this employment discrimination case, the district court denied relief because plaintiffs failed to show probability of success on the merits under the traditional test. The court, citing *Inglis*, noted that an alternatives test existed and remanded the case back to the district court for further consideration.

[134] Some, however, feel that irreparable injury is implied in the balance of hardship factor. *See* Castles, *supra* note 6, at 1364-65; Wolf, *supra* note 6, at 194 (irreparable injury not required as a separate element, although present in the balance of harms). *But cf.* Mulligan, *Preliminary Injunction in the Second Circuit*, 43 BROOKLYN L. REV. 831, 834 (1977) ("nothing explicit about irreparable injury").

[135] Black, *supra* note 6, at 49; Hammond, *supra* note 11, at 262-63.

[136] 634 F.2d 1197 (9th Cir. 1980); *see also* Benda v. Grand Lodge of the Int'l Ass'n of Machinists, 584 F.2d 308 (9th Cir. 1978). Both cases modify to the point of destruction the alternatives test of *Inglis*. In *Benda*, the court described the alternatives test, not as two separate tests, but as extremes of a continuum. 584 F.2d at 315. Concluding that there must be some showing of success on the merits, the *Benda* court announced a balancing test: "The critical element in determining the test to be applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly." *Id.* These two cases establish that plaintiff must show some harm and some success on the merits.

[137] *Los Angeles Memorial Coliseum Comm'n*, 634 F.2d at 1202.

on the merits is required even when the balance of harms tips decidedly toward the moving party. Conversely, at least a minimal tip in the balance of the hardships must be found even when the strongest showing on the merits is made."[138] The balancing test, then, is a halfway point between the sequential test's requirement of strong proof of all factors and the alternatives test's seeming willingness to dispense with proof of either irreparable harm or success on the merits. Under a balancing test, the plaintiff must show both some irreparable injury and some success on the merits. The threshold required for either varies from circuit to circuit. Additionally, for many courts, the showing of irreparable injury is necessarily implied in the balance of hardships. A court considering a motion for a preliminary injunction focuses its attention on the heart of the balancing test, that is, the relative hardship of the parties.

The balancing test has several advantages. Because it is widely used, it is an approach with which the courts are familiar.[139] It restores the focus on the potential harms to the parties and thus grounds the test in its equitable origins. This focus is consistent with a de-emphasis on the merits. That is, under a balancing test, the merits are no longer conclusive in themselves; the court must review the facts as well as the law. This encourages the parties to engage in a deliberation that acknowledges the complexity of their situation. The balancing test also promotes an appropriate degree of flexibility. However, because it retains the requirements of proving some merit *and* irreparable harm, it does not turn the preliminary injunction hearing into a field day.

V

How Much Discretion?

Discretion pervades equity practice.[140] Historically, this discretion was necessary because it provided equity litigants a necessary

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[138] *Id.* at 1203-04 (footnote omitted).

[139] Moore's Federal Practice associates this test with the Third, Fourth, Sixth, and Ninth circuits. MOORE'S FEDERAL PRACTICE, *supra* note 1, at 65.04[1]. Black, *supra* note 6, at 30, states that it is used in the First, Third, Fourth, Sixth, Eighth, Tenth, and D.C. Circuits.

[140] *See* O. FISS & D. RENDLEMAN, *supra* note 2, at 104. Professors Fiss and Rendelman describe the many forms that discretion takes in injunctive litigation. *Id.* at 104-08. For example, they note the use of open-ended terms and the court's ability to control the timing and amount of relief. In the context of judicial decisionmaking, they define discretion to mean: "either the decision of the court is (1) not controlled by any rules, or (2) not controlled by reasonably precise rules, or (3) that there is a lax standard for appellate review." *Id.* at 107. This Article uses discretion in its second sense.

pressure valve from the rigidity of the early common law system. Modern procedure, however, merges law and equity, and many equitable doctrines now inform both substantive law and procedure. Moreover, although the civil rights experience demonstrated the injunction's flexibility,[141] other commentators point to the same experience as an example of discretion run wild, of judges invoking equity to justify results.[142] This issue presents another attribute of a workable standard—the court's proper use of its discretion. "Too much discretion may not only mean unequal law, but no law at all . . . ."[143]

The optimal standard is based on a theory of bounded discretion. Much of the traditional latitude given to the court in injunction cases is worth retaining. This is a remedy which covers almost the total spectrum of substantive law and is often on the cutting edge of new legal theories. A judge should not, however, feel free to arrive at unprincipled results merely by invoking equity. Rather, this standard allows the judge flexibility and discretion within the confines of a uniform standard, the terms of which have been openly defined to cover only the legitimate concerns of decisionmaking. It creates a common vocabulary for litigants and the courts and focuses deliberation on the relevant issues. Out of this should come principled decisions that will uphold the legitimacy of the courts and leave litigants feeling that they have been given a fair hearing.

In this Part, the Article explores the issue of discretion by describing and analyzing the preliminary injunction standard proposed by Judge Richard Posner. His standard provides for too much, and too little, discretion. Additionally, by imposing the rhetoric of objectivity into the decisionmaking process, his standard fails to meet the other criteria of a good standard. Thus, Posner's model provides a useful opportunity to contrast it with the standard proposed in this Article.

A. The Decisions

Judge Posner's formula for preliminary injunctions represents

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[141] *See generally* O. FISS, *supra* note 9.

[142] R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE 14TH AMENDMENT 341-42 (1977); G. MCDOWELL, *supra* note 44, at 121-22. These criticisms are reminiscent of F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930), which led Congress to impose restraints on the ability of federal courts to issue injunctions. The discerning historian will note that these criticisms come, ironically, from opposite ends of the political spectrum.

[143] O. FISS & D. RENDLEMAN, *supra* note 2, at 104.

perhaps the most dramatic change suggested among the circuits.[144] The Seventh Circuit case of *American Hospital Supply v. Hospital Products*[145] involved the breach of a distributor-supplier relationship for medical products. American Hospital Supply, the spurned distributor, sued for breach of contract and obtained a preliminary injunction. Judge Posner upheld the injunction by utilizing the following formula: $P \times H_p \ (1-P) \times H_d$, where P equals the plaintiff's probability of success and H equals harm.[146] Noting that the purpose of the standard was to minimize error, he disclaims any intent to "force analysis into a quantitative straitjacket but to assist analysis by presenting succinctly the factors that the court must

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[144] Two recent articles attack his formula. *See* Mullenix, *Burying (With Kindness) the Felicific Calculus of Civil Procedure*, 40 VAND. L. REV. 541 (1987); Silberman, *Injunctions By The Numbers: Less Than The Sum Of Its Parts*, 63 CHI.- KENT L. REV. 279 (1987). Professor Mullenix focuses on the formula's use as a procedural device. Professor Silberman primarily criticizes the way in which the formula is used to exert greater appellate scrutiny of preliminary injunctions. For a generalized critique of Judge Posner's work, see K. SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 91-94 (1988).

[145] 780 F.2d 589 (7th Cir. 1986). Judge Posner's interest in such an approach was presaged in his opinion in Roland Mach. v. Dresser Indus., 749 F.2d 380 (1984). On the appeal of this antitrust suit, both parties contested the proper standard for granting a preliminary injunction. Noting that "the relevant case law is in disarray in both this and other circuits," Judge Posner addressed this issue in a very thoughtful opinion. *Id.* at 382. After noting that all courts are in agreement on the basic factors, he listed seven factors on which they coalesce, e.g., irreparable injury, success on the merits, etc. *Id.* at 386-90. Relying on the approach developed by Professor Leubsdorf, *supra* note 8, although not citing it, Judge Posner opined that the task of the district court judge is to minimize errors. He concluded:

> The error of denying an injunction to someone whose legal rights have in fact been infringed is thus more costly the greater the magnitude of the harm that the plaintiff will incur from the denial and the greater the probability that his legal rights really have been infringed. And similarly the error of granting an injunction to someone whose legal rights will turn out not to have been infringed is more costly the greater the magnitude of the harm to the defendant from the injunction and the smaller the likelihood that the plaintiff's rights really have been infringed.

Id. at 388. Judge Posner thus adopts a balancing test, the purpose of which is to avoid the erroneous conferral of legal rights. This verbal formula later becomes the equation in American Hosp. Supply v. Hospital Prod., 780 F.2d 589 (7th Cir. 1986). *See also* Maxim's Ltd. v. Badonsky, 772 F.2d 388 (7th Cir. 1985) (applying *Roland* balancing formula).

[146] *American Hosp. Supply*, 780 F.2d at 593. Judge Posner had two aims in *American Hosp. Supply*. First, is the rather uncontroversial proposition that equity should not be standardless. Having established that proposition, he goes on to claim that because there are standards by which the trial court is bound, traditional notions about a highly deferential scope of review are unwarranted. *Id.* at 593-95. This in itself is an interesting issue although beyond the scope of this Article. It is evidence, however, of his desire to constrain trial court discretion. *See*, Silberman, *supra* note 144, at 299-303.

consider in making its decision and by articulating the relationship among the factors."[147] He concluded that this is simply a "distillation of the familiar four (sometimes five) factor test."[148] He then asserts that the formula is universally applicable to all legal claims.[149]

A careful reading of *American Hospital Supply* gives a fuller account of Judge Posner's formula.[150] He states that the nature of the right asserted, as well as the permanent remedy to which plaintiff is entitled, may affect the weight assessed to each of the harms, although he does not tell us how.[151] Judge Posner also makes it clear that transaction costs should be figured into the harm equation's factor.[152] On the other hand, he does not factor in the rela-

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[147] *American Hosp. Supply*, 780 F.2d at 593.

[148] *Id.*

[149] *Id.* at 594.

[150] Leubsdorf, *supra* note 8, is the direct source of Judge Posner's standard. In his article, Leubsdorf traces in careful detail the development of the preliminary injunction standard and its presently muddled state. *Id.* at 525-40. He then develops a standard for issuing preliminary injunctions, but unlike other writers, he grounds it on a theory for shaping the standard. *Id.* at 526. He states that "the preliminary injunction standard should aim to minimize the probable irreparable loss of rights caused by errors incident to hasty decision," and that "only irreparable harm to legal rights should count." *Id.* at 540-41. Not surprisingly, with this announced goal and definition of harm, Leubsdorf's theory comes to focus on the merits determination section of the standard. This underlying theory leads Leubsdorf to announce the following verbal formula:

> The court, in theory, should assess the probable irreparable loss of rights an injunction would cause by multiplying the probability that the defendant will prevail by the amount of the irreparable loss that the defendant would suffer if enjoined from exercising what turns out to be his legal right. It should then make a similar calculation of the probable irreparable loss of rights to the plaintiff from denying the injunction. Whichever course promises the smaller probable loss should be adopted.

Id. at 542 (footnote omitted). The estimate of harm is "intuitive," *id.* at 553-56, and he concludes by noting procedural devices for minimizing harm.

Leubsdorf claims that his theory and resulting standard have several advantages over their competitors. First, he states that this verbal formula restricts the court from making intuitive assessments and vague generalizations. *Id.* at 543. This is because it forces the court to attempt to make probabilistic calculations of success on the merits or attempt to quantify the irreparable harm involved. Second, he believes that his theory is more coherent because it precisely specifies the relationship between the components of the standard. *Id.* at 544. He notes that recasting the standard this way removes antiquated relics such as the status quo from entering into deliberations. *Id.* at 546. Because of the substantial overlap between Professor Leubsdorf's position and Judge Posner's, my comments can apply to both.

[151] *American Hosp. Supply*, 780 F.2d at 594 (citing Shondel v. McDermott, 775 F.2d 859, 866-67 (7th Cir. 1985), as an example of the rights affecting the weighting).

[152] Transaction costs include items such as the costs of identifying "the parties with whom one has to bargain, the costs of getting together with them, the costs of the

tive size differences of the two businesses in this case, concluding that it is of "no legal significance."[153] In this case, because he found the harms to be equal, the award came down to who had the better case on the merits.[154] Finally, Posner concludes that the court must consider the public interest as part of the *"H"* term of the formula.[155] Where plaintiff asserts the harm, it is part of plaintiff's *"H"* term; conversely, when asserted by the defendant, it is added to the right hand side of the equation.

After reiterating the standard for review, he applied this test with careful attention to the facts and the merits. Judge Posner found that the plaintiff did demonstrate the probability of substantial irreparable harm. Although defendant Hospital Products might be injured, its losses were protected by a bond entered as part of the preliminary injunction.

Judge Posner's willingness to take on the thorny problem of a standard for preliminary injunctions has met with some resistance within the Seventh Circuit. Although much of Judge Swygert's dissent in *American Hospital Supply* involves a difference over the interpretation of the facts, he also criticizes Posner's formula. First, Judge Swygert questions the utility of a formula in an area which demands flexibility. The precision required by the formula, he asserts, is "antithetical to the underlying principles of injunctive relief."[156] He notes correctly that Judge Posner never tells us exactly how to measure *"P"* or *"H."* Second, he points out that the formula reaches a result which is inconsistent with the balancing test advanced in *Roland Machinery v. Dresser Industries.*[157] He notes that *Roland* required a higher showing of success on the mer-

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bargaining process itself, and the costs of enforcing any bargain reached." A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 12 (1983). Thus, Posner explicitly imports the vocabulary and assumptions of economic analysis into his formula.

[153] *American Hosp. Supply*, 780 F.2d at 598.

[154] *Id.* Posner asserts:

> If the harms to the plaintiff and the defendant of denying and granting the injunction, respectively, are equal, the injunction must be granted if the plaintiff has a better than 50 percent chance of winning the case, for then P in our preliminary-injunction formula must exceed $1-P$, and therefore $P \times H_p$ must exceed $1-P \times H_d$ from the assumption that $H_p = H_d$.

[155] *Id.* at 601.

[156] *Id.* at 609. Additionally, he could have said that it is illusory. Judge Posner, however, concedes that he does not call for forcing decisions into mathematical straitjackets, and at no time in his opinion does he reduce the outcome to hard numbers. His approach, however, does encourage that type of behavior by jurists and lawyers.

[157] 749 F.2d 380 (7th Cir. 1984).

its where the harms are equal.[158] Yet in *American Hospital Supply*, Judge Posner concluded that where $Hp = Hd$, the plaintiff's chance of winning must only be better than fifty percent.[159]

Posner's formula has received a qualified reception in subsequent Seventh Circuit decisions. In *Lawson Products v. Avnet, Inc.*,[160] the court lauds Judge Posner's "exhaustive and scholarly examination of the law of preliminary injunctions," finding his views in harmony with the traditional flexible approach of judges within the circuit.[161] But the court cautions that the formula should not be rigidly followed, suggesting that the judge will always need to conduct a somewhat subjective evaluation of the factors involved in the case rather than a quantification of them.[162] In fact, the court suggests that it is paradoxical to require quantification of harm where the presenting argument states that it cannot be quantified.[163] Finally, the court notes that the formula does not incorporate the considerations of equity or fairness which should guide all trial court judges.[164] Correctness, in the sense of mathematical precision, is not enough.[165]

B. Too Little Discretion

On the surface, Judge Posner's formula is remarkably similar to the standard proposed in this Article. Both employ a balancing test and traditional equity vocabulary, and both apply uniformly to all types of cases. However, several salient differences exist. Judge Posner's formula, particularly his goal of risk minimization, arises from his project to bring economics to bear on procedure.[166] None-

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[158] *American Hosp. Supply*, 780 F.2d at 607.

[159] *Id.* at 598. To put it mathematically, although Posner endorses a rather traditional balancing test in his decisions prior to *American Hosp. Supply*, his algebraic formula, which supposedly encapsulates this balancing approach, does not work that way. Where $H_p = H_d$, the plaintiff prevails if $P = 51\%$ or more. This is hardly the higher showing on the merits called for in *Roland*.

[160] 782 F.2d 1429 (7th Cir. 1986).

[161] *Id.* at 1432.

[162] *Id.* at 1434-36.

[163] *Id.* at 1434-35.

[164] *Id.* at 1436.

[165] Judge Posner's approach is also criticized in Brunswick Corp. v. Jones, 784 F.2d 271, 274 n.1 (7th Cir. 1986).

[166] *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 174-90 (3d ed. 1986). It is also motivated by his analysis of the federal court system. *See, e.g.*, R. POSNER, *supra* note 9; Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986). Posner's ostensible project addresses the growth of the federal court backlog, although his subtext is a critique of judicial activism. R. POSNER, *supra* note 9, at 207. He aims to promote

theless, both standards are inspired by the doctrinal incoherence in this area. But by clothing his standard in the rhetoric of objectivity, Judge Posner does not achieve as much coherence as he desires. His approach falls short of the requirements for a workable standard and it overly limits the court's discretion.

First, the goal which Judge Posner selects—risk minimization—is underinclusive because it fails to describe the full role of the preliminary injunction. The purpose of the preliminary injunction is to create a situation in which the judge can both give final relief and remedy irreparable harm which may occur to the plaintiff before a full trial on the merits. This encourages the court to be more flexible and is consistent with the point of an interlocutory remedy. That is not to say that judges should feel free to err or that a standard should encourage error. It is, however, unrealistic to expect judges to continually look over their shoulders for mistakes.[167] At the same time, it encourages judges to become overly involved in the merits of the decision. Given the truncated nature of the hearing, the parties cannot develop the merits in a way which makes this type of inquiry fruitful. It also encourages the parties to use the preliminary injunction to get quick decisions on the merits when better methods exist. By focusing only on accuracy, this point of view may inhibit the court from designing creative remedies that protect the interests of all parties. The court may ignore values or ideas which it could bring to bear on its task.

Second, this standard can be manipulated at either or both of two points: an assessment of the *"H,"* or harm, term and the assessment of the *"P,"* or probability of success term. Although Judge Posner

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candor, particularly when the court must exercise its discretion by drawing on extralegal sources. *Id.* at 217-18. Posner feels that a self-restrained judge's opinion is more likely to be candid than that of an activist judge. Unlike Posner, I would like to think that candor has not been captured by any one particular style of judging. Both activism and restraint are supported by political agendas that deserve exposure through candid and open debate.

Posner argues that courts should be more willing to adopt rules rather than standards. *Id.* at 245. Rules are mechanically determinable facts, while standards require "weighing several (nonquantitative) factors or otherwise making a judgmental, qualitative assessment. . . . Negligence is a standard, strict liability a rule." *Id.* The use of rules would increase legal certainty and reduce caseloads. *Id.* at 246. While acknowledging that these proposals may be controversial, he argues that many procedural issues are economic in character and could be improved by economic analysis. *Id.* at 294-95. Procedural rules should attempt to minimize the costs of erroneous decisions and administrative costs. *Id.* at 307-08. These values influence his formula for a preliminary injunction.

[167] *See also* Hammond, *supra* note 11, at 271-72.

specifies the exact relationship between these factors and urges us to approximate their values, he does not define them nor does he suggest what legitimately irreparable harm means. If each court using his standard defines harm differently, they perpetuate doctrinal incoherence. To the extent he imports economic notions such as transaction costs, he introduces concepts which may be poorly understood by some portions of the practicing bar and courts. Both results violate the norms for an optimal standard. Even aside from the values implicit in these notions, this could upset the equality between parties that flows from shared meanings.

Judge Posner also suggests that harm be quantified for the purposes of analysis. This is counterintuitive to hundreds of years of equity because the rationale for equity is to provide relief for nonquantifiable injuries that could not be addressed by damages. If the harm can be quantified, then the injunction should be denied. This is because it fails the irreparable injury test, not because the moving party has a lesser injury. Further, in close cases, this calculation will inevitably become a subjective hunch. On the other hand, an eagerness to quantify undermines harms that are difficult to measure, for example, civil rights and freedom of speech. Thus, either the judge will have to guess about the value of these rights,[168] or the nonquantifiable injuries will be inherently disadvantaged, that is, their value will be underestimated when compared to ones which can be quantified. This result is inconsistent with an interest in precision, and it is dangerous because of the way in which it can undermine a number of legal rights. Moreover, it is no better than a traditional application of irreparable injury in that the assumptions underlying the attempt to quantify may contain hidden values.

Although Professor Leubsdorf asserts that "the most manageable part of the preliminary injunction decision is estimating the likelihood of various results,"[169] Posner's probability of success term is open to many of the same criticisms outlined above. First, an assignment of likelihood of success provides a way for a less than candid judge to manipulate results by handicapping various causes of action. This is problematic in the injunctive context, which is often the battleground for new legal theories. Second, it ignores the interplay of success on the merits with protective devices such as creative drafting. It encourages the parties to adopt a winner-take-all approach, when in reality there may be many ways to win, that is,

[168] *See* Leubsdorf, *supra* note 8, at 554.
[169] *Id.* at 555.

to be free from irreparable harm. This is crucial because in cases where the harm values are equal, or nearly so, the merits determine the result. Thus, as it pertains to either merits or harm, Judge Posner's standard is not an advance over older verbal formulas. It provides opportunities for the result-oriented jurist to hide and, most paradoxically of all, although it proposes to limit the court's discretion, the formula may allow it to enter through a quantitative back door.

Finally, the formula imposes intolerable administrative burdens on the courts and litigants. Although Posner acknowledges the truncated nature of the proceedings, this formula can only protract them. In order to make the requisite verbal estimates with any degree of precision, the litigants must have a great deal of information prior to the hearing. Such evidence is often unavailable. If it is available, the parties should proceed directly to a full trial on the merits. It also imposes assumptions and methods on the courts and bar that are foreign to most attorneys. While attorneys and judges learn how to do "shadow pricing" or factor "transaction costs" into the harm term, mistakes may be made. The performance of additional analyses will also add to the cost and time of litigation. A reading of Judge Posner's decisions will demonstrate how deeply this embroils the court in the merits of the controversy. This takes additional time and shifts the court's attention away from the prevention of irreparable harm.

Overshadowing everything, however, is the impact of this formula *qua* formula on the court's discretion. Although it appears too discretionary, it might be more accurate to say that it hides too many values and assumptions. To the extent those underlying values are made clear, it will reduce the court's ability to consider nonquantitative factors or factors which are considered illegitimate by the Leubsdorf/Posner calculus. In any event, once the quantification is done, however it is done, the formula operates mechanically. No flexibility is built into the formula, especially in close cases where it is most needed. Additionally, because it purports to precisely select a winner and a loser, it discourages creative uses of the preliminary injunction which a more flexible approach would encourage; it discourages compromise.

Courts should have a great deal of discretion in ruling on motions for preliminary injunctions. This is necessary because of the wide variety of contexts in which they arise, as well as the time constraints imposed on the court. Nonetheless, this discretion can be

constrained or bounded at several points. First, this Article has attempted to define terms in ways that are consistent with modern practice and understanding. Second, it goes behind the meanings of these terms to sort out the functions which each component of the process plays. In doing so, it discards functions which are no longer legitimate, for either historical or functional reasons. Third, this Article tries to portray these factors in a way which will encourage candid and open deliberation among the parties. For example, in any proceeding, parties would be expected to litigate the effect and application of these functions to the facts of their case. Fourth, by insisting that the courts adopt one uniform standard for issuing injunctions, not only is their discretion limited, but additional benefit accrues when the courts and parties use the same terms to talk about the real issues. This should also aid appellate review and serve as a final control on the lower courts. This standard should set an appropriate balance between the discretion and flexibility that a court needs and the constraints that must be present for a court to enjoy the legitimacy of sound arguments and decisions.

VI

Is Uniformity Possible or Desirable?

Nearly all of the commentary on preliminary injunctions has stated that one uniform standard should be developed.[170] The reasons are self-evident: ease of application, fairness, and simplicity. Indeed, uniformity is assumed to be a virtue to the extent that it is seldom discussed, even though preliminary injunctions can theoretically be entered in almost any type of case. Therefore, the first question that arises is whether it is desirable to have a single standard that will apply to all cases? Second, how can we implement a uniform standard that will be consistently applied over time?

A. Is Uniformity Desirable?

To the chorus of voices singing the anthem of uniformity, there is one descant: R. Grant Hammond. Like other commentators, Professor Hammond begins by noting the demise of the traditional standard and the development of a multitude of non-harmonious standards in both the United States and the Commonwealth countries.[171] He credits this demise to the rise in the volume of cases,

[170] *See, e.g.*, Black, *supra* note 6; Castles, *supra* note 6; Leubsdorf, *supra* note 8; Wolf, *supra* note 6.

[171] Hammond, *supra* note 11, at 240-71.

the recognition of new legal interests, and the development of new forms of litigation beyond the traditional bipolar model described by Lon Fuller.[172] He also implies that this breakdown has occurred as a result of the waning attractiveness of formalism, with its stress on universal formulas.[173] Although he argues that we need a new standard,[174] he does not believe that the answer lies in a universal model.[175] Rather, his model states that after we determine the existence of a real dispute, we should then inquire into its nature. We should then ask "what threshold test is appropriate for that kind of dispute?"[176]

Hammond's model requires the development of a preliminary injunction standard for each category of lawsuit, for example, labor, environment, or commercial. He suggests this because the differences between causes of action make a uniform standard do too much. A uniform standard, for Hammond, becomes a subjective balancing exercise.[177] Additionally, because his model is tied to causes of action, he asserts that it is more "capable of accommodating diverse and changing kinds of interests."[178] Upon closer reading, however, it seems that his main objection to a uniform balancing test is that it permits too many result-oriented decisions. For example, he twice asserts that the balancing test in unreviewable,[179] implying that the balancing test excuses the lower court from giving reasons for its decision, or that even if reasons are given, an appellate court cannot meaningfully review these reasons. This follows from his initial concern that a new model is needed that will "yield better articulated and more closely reasoned decisions."[180]

Once Hammond's criticisms of a uniform balancing model are coupled with his goal of better reasoned decisions, I believe that my view and his can be reconciled. Both seek the same goal: better

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[172] *Id.* at 243-44, 248, 251, and 259-60.

[173] *Id.* at 243-44, 248. These references trace the rise of the traditional formula in the nineteenth century as consistent with formalism. The rest of the article suggests the demise by implication.

[174] *Id.* at 272-82.

[175] *Id.* at 278-82.

[176] *Id.* at 278.

[177] *Id.* at 281. In his text, he gives the example of a defamation suit and the grounding of a DC-10 aircraft. While these have some features in common, an assertion that a universal formula will work for both leads to an "impotent legal relativism," i.e., a balancing test. *Id.* at 278.

[178] *Id.* at 281.

[179] *Id.* at 278, 281.

[180] *Id.* at 241.

reasoned decisions in which the court must explain its reasoning without hiding behind conclusory invocations of balancing tests or irreparable harm. If a uniform test is used as a way to avoid confronting the real issues in a case, it will do more harm than good. The point, however, of the standard advanced in this Article is that by refining the definitions of components of the preliminary injunction standard, the court's discretion is bounded. Further, the standard encourages deliberation of real issues in a case, particularly the description of irreparable harms. With a uniform balancing test thus constrained, the objections that Hammond raises can be fully met, and the advantages of a uniform standard outweigh the criticisms that he advances.

B. Is Uniformity Possible?

Assuming uniformity is desirable, by what process could a standard be developed that will be consistent over time? Sitting *en banc*, the Eighth Circuit provided an answer in the antitrust case of *Dataphase Systems v. C.L. Systems.*[181] Before the decision, two standards were used within the circuit. For many years, the Eighth Circuit had used a traditional four factor test typified by *Minnesota Bearing v. White Motor.*[182] Several years later, in *Fennell v. Butler,*[183] the court adopted an alternatives test as a result of dissatisfaction with the traditional test.[184] But the existence of two tests within the circuit caused confusion among the district courts. After noting that the two tests are not contradictory, the court concluded that "[t]he major difficulty with application of the traditional test [arose] from the phrase 'probability of success on the merits.' "[185]

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[181] 640 F.2d 109 (8th Cir. 1981).

[182] 470 F.2d 1323 (8th Cir. 1973). The standard used in *Minnesota Bearing* was described in *Dataphase* as "(1) whether there is a substantial probability movant will succeed at trial; (2) whether the moving party will suffer irreparable injury absent the injunction; (3) the harm to other interested parties if the relief is granted; and (4) the effect on the public interest." *Dataphase*, 640 F.2d at 112.

[183] 570 F.2d 263 (8th Cir. 1978).

[184] In *Fennell*, the two alternatives test was defined as "a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting preliminary relief." *Id.* at 264 (citations omitted).

[185] *Dataphase*, 640 F.2d at 113. The court stated that whatever the formulation, the factors considered by the two tests were the same: (1) threat of irreparable harm to the movant, (2) the balance of harms between the movant and other parties to the litigation, (3) the probability of success on the merits, and (4) the public interest. *Id.* This noncontradictory characterization of the two tests is disputed by Judge Ross in his concurrence. *Id.* at 115.

Many lower courts read this phrase to require litigants to prove that they had a "greater than fifty per cent likelihood" of prevailing.[186] Even in cases where the litigant had demonstrated a strong case on the other three factors, the district courts were denying relief. An alternatives test allowed courts to escape this result. But it meant courts could manipulate outcomes by choosing between two coexisting standards. The court rejected allowing the merits this much weight. Rather, every case requires a court to consider the plaintiff's likelihood of success on the merits in context with the relative injuries to the parties and the public. Thus, the Eighth Circuit arrived at a balancing test. Under this approach, the court noted that ordinarily the district court will not be required to scrutinize the merits of the case. Instead, this will occur only when the other equities are closely balanced. This new approach retains much of the liberality of alternatives approach while clarifying the weight for each factor.[187]

The significance of this case rests not in the result, but in the process by which it was reached—through an *en banc* decision. Short of a sorely needed Supreme Court decision, this will be the only way in which the circuits can begin to impose a uniform standard. It is remarkable how relatively simple this process can be. Until now, much of the confusion has come from different panels within a particular circuit adopting differing standards. This can lead to internal dissension within a circuit.[188] What *Dataphase* suggests is that upon finding an appropriate case, each circuit ought to convene *en banc* to adopt a prevailing and uniform standard for issuing preliminary injunctions. While this may not end differences between circuits, it will at least end differences within them.

Finally, the advantages of this process will be lost unless the circuit judges consistently apply the same standard to their review of district court decisions. Appellate review, like defining the components of the standard, is another way to constrain the discretion of the district courts. It continues the dialogue between the parties and the court that is begun at the trial level and can lead to refine-

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[186] *Id.* at 113. Many courts construed this to require a mathematical probability of success, but the court rejected this interpretation. Thus, it appears likely that the Eighth Circuit will not be affected by Judge Posner's formula.

[187] *Id.*

[188] Sometimes these disagreements break out beyond the boundaries of dissents. *See, e.g.*, Mulligan, *supra* note 134. In this article, Judge Mulligan roundly criticizes the Second Circuit's adoption of the two alternatives test in Sonesta Int'l Hotels v. Wellington Assocs., 483 F.2d 247 (2d Cir. 1973).

ment of any standard in the light of real world experience. In this case, preliminary reports indicate that the Eighth Circuit adoption of a uniform standard has been successful.[189]

CONCLUSION

The standard proposed in this Article resonates with the more traditional statements of the standard for a preliminary injunction.[190] For example, it applies across the board to all types of cases. Similarly, it retains most of the categories by which the standard has been described historically: purpose, success on the mer-

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[189] *See* Black, *supra* note 6, at 32; McLaughlin & Tallon, *supra* note 6, at 899. *But see* Wolf, *supra* note 6, at 218-20. Despite the *Database* pronouncement, he states that three patterns of cases have emerged since that decision.

[190] Use of the traditional components, or of one of the accepted relationships, is not a foregone conclusion. Both Hammond, *supra* note 11, and Wolf, *supra* note 6, have developed entirely new standards for the preliminary injunction. Hammond states his as follows:

> The contemporary rationale for the remedy can be simply expressed as a vehicle for the preservation of litigation for effective later determination. Given that conceptual purpose for the remedy a variable threshold model could be adopted as a more logical development of existing models. This would require a judge to ask three preliminary questions: 1. is there a real dispute (in the sense of the claim being nonfrivolous)? 2. what is the nature of that dispute? 3. assuming that question 1 is answered affirmatively and after the analysis required in question 2 is undertaken, what threshold test is appropriate for that kind of dispute?
>
> Assuming that the necessary identification of a threshold test has been made and met, the court should then consider, as now, the balance of convenience (including any public interest elements) and the adequacy of any other avenues of relief (*not* merely damages).

Hammond, *supra* note 11, at 278, 280. The advantages of this model are that it avoids universality of the balancing model, it provides a rationale for remedy, and it accommodates "diverse and changing kinds of interests." *Id.* at 281.

Wolf's model is similar in that it takes the court through a number of steps:

> The district judge should: (1) determine whether the non-moving party intends or is likely to take action which will injure the moving party; (2) if so, determine whether that injury is of such a nature that the court cannot provide an adequate remedy after a trial on the merits of the case; (3) if irremediable injury is likely, determine whether the issuance of interim relief will cause the non-moving party more than negligible harm; (4) if so, consider whether protective devices (*e.g.*, bonds or other terms and conditions) are available which, if imposed on either or both parties, will reduce to a negligible level the anticipated harm without the need for preliminary relief; and (5) if not, issue the injunction, requiring the moving party to post a bond to take other steps to protect the non-moving party while the injunction is in force. Finally, if the case is ready for final disposition at the time of the request for interlocutory relief, the court should consolidate the preliminary hearing with the trial on the merits and dispose of the entire case in one step.

Wolf, *supra* note 6, at 235-36.

its, irreparable injury, balance of harms, and public interest. Finally, it consciously retains the balancing test, some version of which is used in most circuit courts. The similarities, however, end there.

The impetus for this standard is both historical and progressive. It looks backward as it recaptures the historical purpose of the preliminary injunction, that of preventing or minimizing harm which will occur before a full trial on the merits. But the bulk of this Article modernizes the standard, focusing on the way in which its components have become loaded with historical detritus. The major task was housecleaning: each component was analyzed to see what current meanings it had. What remains is a cleaner standard that can contribute to the resolution of cases and uphold the legitimacy of the courts.

Under the proposed standard, the underlying purpose of the preliminary injunction is to create a state of affairs that will enable the court to best give effective relief to the parties when the case has been fully heard on the merits. While not technically a component of this standard, the purpose regulates its employment and can serve as a tie-breaker when differing remedies or orders are proposed by the parties. It also acts as a consideration which will help the court conserve and marshal its resources in the most effective way possible.

Of the four components of the standard, the argument concentrated on two components: success on the merits and irreparable injury. Success on the merits is de-emphasized because of the way it encourages procedural misuse of this remedy. However, the moving party must at least raise a serious question on the merits. The question may be novel, but it must be made in good faith and be nonfrivolous. Where plaintiff can conclusively demonstrate absolute success on the merits, the court should consolidate the preliminary injunction motion with a request for final relief pursuant to Federal Rule of Civil Procedure 65(a)(2).

On the other hand, the role of irreparable injury has been increased. Plaintiffs must demonstrate that before the conclusion of a trial on the merits, they will be injured in a way which cannot be redressed by any legal or equitable remedy at the conclusion of the trial. Failure to do so should result in the denial of the motion. The new content of the term, supplied by Professor Rendleman's analysis, makes the standard consonant with the functional ways in which the courts conduct legal analysis.

The balance of harms remains much the same in this proposal as it does traditionally. This component allows the defendant to introduce evidence of the harms that will accrue to its interest if the preliminary injunction is improvidently entered. Similarly, either party may present evidence of how the grant or denial of the preliminary injunction would affect the public interest, as defined by interest groups or society generally.

Finally, the relationship between the factors envisions a balancing test which can occur at two points. First, after the presentation of plaintiff's case, the court balances plaintiff's showing on the merits and irreparable injury. The plaintiff must, at a threshold, show at least a serious question on the merits and show some irreparable injury. After the plaintiff has met this threshold, the court shall consider defendant's evidence of irreparable harm. At this stage, the court should also consider what effect a bond or a carefully drafted order would have on minimizing irreparable injuries to either party.

This proposal comports with the qualities of a good standard. It encourages purposeful discussion between the parties and the courts while it promotes semantic equality by requiring the use of clearly defined components. By remaining within the tradition of equitable yet bounded discretion, it remains as easy to use as is possible. At the outside, it will eliminate the easy cases where the moving party has failed to show any injury and raise any serious question on the merits. The hard cases, of course, will remain those which call on the court to exercise its discretion. This standard will not hide the difficulty of making a good decision in these cases, but it will give courts and litigants modernized tools with which to candidly discuss issues and make more legitimate decisions.