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Compensatory Preliminary Damages: Access to Justice as Corrective Justice

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COMPENSATORY PRELIMINARY DAMAGES: ACCESS TO JUSTICE AS CORRECTIVE JUSTICE

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ABSTRACT

The access to justice movement broadly concerns people's ability to resolve legally actionable problems. To the extent that individuals seek resolution through civil litigation, they can be disadvantaged by their unmet need for legal services, particularly in high-stakes cases and complicated areas of law. In part, this is because legal services and litigation are cost-prohibitive, especially for indigent plaintiffs. As a result, these individuals are priced out of litigation and, by extension, unable to use law to seek justice.

This Note proposes an innovative legal intervention to this problem called "compensatory preliminary damages." This intervention builds from the work of Gideon Parchomovsky and Alex Stein, who propose that just as courts can grant equitable relief before deciding on the merits through a preliminary injunction, courts should also be able to award damages before deciding on the merits if certain doctrinal safeguards are met. According to their proposal, these "preliminary damages" would function like a loan that plaintiffs would take out on their expected recovery that would be paid for by the defendants. If granted, plaintiffs could use the award to fund their litigation, but if the court found for the defendant after deciding on the merits, the plaintiff would have to repay the defendant.

In this Note, I argue that preliminary damages should function as compensatory awards for harm to a plaintiff's ability to access justice rather than a contingency loan that might make indigent plaintiffs worse off than before if they lose. As compensatory awards, preliminary damages address a defendant's liability for a plaintiff's prospective litigation costs that inequitably affect the plaintiff's ability to access justice. In short, given a suitable connection between the underlying harms of

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the case and the plaintiff's resources to meet their legal needs, the litigation costs that plaintiffs must face to litigate should, in some cases, be compensable. To seek such compensation, I propose that plaintiffs would have to plead, among other things, that their alleged injuries have resulted in various barriers to accessing justice, but that a balance of equities and hardship to the plaintiff favors shifting the cost to access justice onto the defendant. By awarding such damages, courts make plaintiffs whole for harm to their access to justice that is not conditional upon a decision on the merits or their final recovery for the injuries alleged. As such, the award would not need to be repaid.

To support my proposal, I situate compensatory preliminary damages within a framework that sees civil procedure as resolving three types of externalities inherent in our civil legal system. Using this framework, proposed by Ronen Avraham and William H.J. Hubbard, I show that Parchomovsky and Stein's debt-based model of preliminary damages would create more externalities than it would address or resolve. By the same token, I show that my compensation-based model would address and resolve more externalities than it would create. Finally, I anticipate and respond to objections against my proposal that concern moral luck and judicial bias. However, I explain that compensatory preliminary damages resolve these concerns because the intervention is compensatory rather than a debt instrument.

INTRODUCTION

The principle of equal justice under the law plays a constitutive role in most legal processes.[1] Undermining that principle, however, is the reality that wealth determines how effectively parties litigate their actionable problems and their success in court.[2] As a result, wealth inequality constrains our ability to access justice and creates political disparities between different people in the legal system.[3] Because wealth inequality disparately impacts marginalized communities, such political disparities—including access to justice—are more pronounced among predominantly poor and minority people.[4] Although minorities are more likely to report experiencing civil legal problems than non-minorities,[5] they are not only *less likely* than others to attempt to solve these problems through the legal system,[6] but also more likely to experience worse results than non-minorities in making that attempt.[7]

Demographic differences—especially socioeconomic and racial ones—significantly impact the ability to access justice, revealing that unequal access to justice is more than a significant economic issue for a litigation-prone society that extols litigation as *the* dispute resolution process.[8] Access to justice is also a significant social justice issue that exacerbates the perception[9] and reality[10] that the sources and structure of our justice system perpetuate, sustain, and normalize demographically

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[1] *See, e.g.*, 28 U.S.C § 453; Richard M. Re, *"Equal Right to the Poor,"* 84 U. CHI. L. REV. 1149, 1149 (2017); Rebecca E. Zietlow, *Exploring a Substantive Approach to Equal Justice Under Law*, 28 N.M. L. REV. 411, 411 (1998).

[2] *See, e.g.*, Robert H. Frank, *How Rising Income Inequality Threatens Access to the Legal System*, 148 DÆDALUS 10, 11, 14 (2019); Albert Yoon, *The Importance of Litigant Wealth*, 59 DEPAUL L. REV. 649, 649, 657-59 (2010).

[3] *See* Fatos Selita, *Improving Access to Justice: Community-Based Solutions*, 6 ASIAN J. LEGAL EDUC. 83, 85-86 (2019).

[4] Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1278 (2016).

[5] *Id.* at 1266 (citing REBECCA L. SANDEFUR, AM. BAR FOUND., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 9 fig.3 (2014), https://perma.cc/Q6M9-NQXG).

[6] *Id.* (citing Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 551-54 (1980-1981); Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOCIO. 339, 346-49 (2008)).

[7] *Id.* at 1266 n.8 (citing SANDEFUR, *supra* note 5, at 9-10).

[8] *See id.* (citing Miller & Sarat, *supra* note 6, at 532).

[9] *See id.* at 1288-1301. *See generally* HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW (1999).

[10] *See* Femina P. Varghese et al., *Injustice in the Justice System: Reforming Inequities for True "Justice for All,"* 47 COUNSELING PSYCH. 682, 683 (2019) (providing numerous examples of contemporary substantive, distributive, or procedural injustice in the American legal system).

stratified social oppression. Legal scholars have noted that the inability to access justice, especially through civil litigation, exemplifies "racial capitalism," which refers to the idea that "capitalism requires racial inequality and relies on racialized systems of expropriation to produce capital."[11] Here, the inability to access justice as it disproportionately impacts marginalized communities and society as a whole indicates that civil justice in America is a racialized system of expropriation.[12] This system promotes racially stratified distributive injustice under capitalism by making civil litigation inaccessible[13] on one hand, but also a hostile site of racialized subordination when accessed[14] on the other.

Now, "access to justice" is an academic term of art and research theme that includes but is not limited to academic commentaries and criticisms, quantitative or qualitative studies, and political, legal, and economic agendas or programs,[15] all motivated by the idea that justice should be more "accessible"[16] to those with "justiciable"—i.e., legally actionable—problems.[17] In one sense, justice can be made more "accessible" by creating economically and financially efficient or feasible ways to resolve justiciable problems. On that score, however, civil litigation is not only time-consuming and costly for most litigants, but po-

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[11] Tonya L. Brito et al., *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1243 (2022).

[12] *Id.* at 1246 ("Even in cases where marginalized plaintiffs initiate litigation, they enter the civil courts due to a lack of other feasible options. They are forced to subject themselves and others to a system designed to devalue them, commodify their needs, and maximize financial extraction.").

[13] *See generally id.* (explaining primarily how racial prejudice and other related forms of discrimination influence the legal process).

[14] *Id.* at 1246 ("Civil cases are typically framed as voluntary disputes among private parties, yet many racially and economically marginalized litigants, particularly Black individuals, enter the civil legal system involuntarily, often in a defensive or vulnerable posture.").

[15] For example, one growing agenda or program is the "Civil Gideon" movement, which aims to address gaps in access to justice "by advocating for an expanded right to counsel for pro se low-income civil litigants in cases implicating basic human needs." Tonya L. Brito et al., *What We Know and Need to Know About Civil Gideon*, 67 S.C. L. REV. 223, 224 (2016) (citing Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About when Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 38 (2010)).

[16] The various senses in which justice can be "accessible" is a controversial foundational issue in the literature. *See generally* Rebecca L. Sandefur, *Access to What?*, 148 DÆDALUS 49 (2019).

[17] Kathryne M. Young, *What the Access to Justice Crisis Means for Legal Education*, 11 U.C. IRVINE L. REV. 811, 812-13 (2021) (defining justiciable problems as legally actionable problems).

tentially time- and cost-prohibitive.[18] In many cases, for example, parties can act in procedurally predatory ways to prolong and complicate litigation that targets the other party's ability to afford effectively responding to those actions.[19] Even absent such predatory behavior, inequalities in litigant resources have created conditions in which there is a strong relationship between litigant wealth, the costs of litigation, and litigation outcomes.[20]

On one hand, fee-shifting and risk-bearing regimes in the legal field help indigent plaintiffs combat the class-stratifying effects of the "American Rule," which holds that litigants must absorb their own litigation expenses, including attorney fees, unless the case meets some exception.[21] But those exceptions, which include contingency fee arrangements[22] and statutory fee-shifting schemes,[23] are not enough to fill the gaps in access to justice created by the American Rule.[24] On the contrary, these fee-shifting and risk-bearing regimes, especially contingency fee arrangements, intuitively play into the same economic factors that support unequal access to justice; contingency fee arrangements shift the risk of absorbing litigation expenses from the plaintiff to their attorney, thus incentivizing attorneys to refuse cases despite their merits because the chance of recovery does not justify the risk.[25] Likewise, statutory fee-shifting schemes do not significantly fill the gap because their appli-

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[18] Parties in a civil action can, for example, strategize to prolong the legal action in a predatory manner in order to price out their opponents and pressure them to drop the action. *See* Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 101, 104 (2013).

[19] *Id.*

[20] *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 103-04 (1974). For further discussion and research on the relationship between litigant wealth, the costs of litigation, and litigation outcomes, see generally Yoon, *supra* note 2.

[21] GEOFFREY C. HAZARD JR. ET AL., THE LAW AND ETHICS OF LAWYERING 525 (3d ed. 1999). In contrast, the rule in most Western legal systems, the "English Rule," provides that "the losing party must pay the winner's reasonable fees." Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 328-29 (2013). Another exception exists in the United States in Alaska, where the loser must pay a percentage of the winner's fees. ALASKA R. CIV. P. 82.

[22] *See, e.g.*, Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 745 (2002).

[23] *See* HENRY COHEN, CONG. RSCH. SERV., 94-970, AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES 25-39 (2008).

[24] *See, e.g.*, Allan C. Hutchinson, *Improving Access to Justice: Do Contingency Fees Really Work?*, 36 WINDSOR YEARBOOK ON ACCESS TO JUST. 184, 191 (2019).

[25] *See* Thomas J. Miceli, *Do Contingent Fees Promote Excessive Litigation?*, 23 J. LEGAL STUD. 211, 212 (1994).

cation is limited to certain types of cases such as public interest or civil rights.[26]

On the other hand, legal aid corporations, societies, clinics, and pro bono programs can also alleviate the obstacles that individuals from indigent and minority communities face to navigate their justiciable problems.[27] But these organizations and services are greatly hindered by insufficient legal aid from public or private sources.[28] A study by the Legal Services Corporation ("LSC")—a federally funded corporation that funds applicable legal aid organizations—found that for every client who received service from an LSC grantee, another eligible client was turned away because of insufficient resources to meet demand.[29] Compounding this scarcity is the problem that such organizations and services are usually understaffed, leaving civil aid attorneys overworked by excessive caseloads.[30]

Against the foregoing background, there exists a strong need for legal innovations or reform that can help mitigate class- and race-stratified disparities in access to justice brought about by the American Rule. On this score, Gideon Parchomovsky and Alex Stein have recently proposed a legal intervention of civil procedure: Just as courts can grant equitable relief in the form of preliminary injunctions, give them likewise the ability to grant "preliminary damages," which plaintiffs can use to fund their legal battles.[31] Parchomovsky and Stein propose that preliminary damages would be categorically and substantively on par with permanent

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[26] *See generally* COHEN, *supra* note 23 ("There are also roughly two hundred statutory exceptions, which were generally enacted to encourage private litigation to implement public policy. . . . Thus, attorneys' fees provisions are most often found in civil rights, environmental protection, and consumer protection statutes.").

[27] *See, e.g.*, Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC'Y REV. 79, 81 (2007) ("Civil legal assistance in the United State has a tripartite structure, comprising law clinics staffed by federally salaried lawyers, clinics staffed by lawyers salaried by funds from other sources, and lawyers working in pro bono programs . . . .").

[28] Venita Yeung, *Access to Justice Hindered by Insufficient Legal Aid, Says the Bar Council*, THE JUSTICE GAP (Nov. 18, 2022, 8:44 AM), https://perma.cc/HP8C-RDLA.

[29] LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 12 (2009), https://perma.cc/FB9C-FZEW.

[30] *Id.* at 27 ("Nationally, on average, only one legal aid attorney is available to serve 6,415 low-income people."); *see also, e.g.*, Matt Warren, *Legal Services Attorneys Help People Experiencing Poverty Enforce Their Rights, but Federal Restrictions on Funding Prevent Opportunities for Lasting Justice*, W. CTR. ON L. & POVERTY (Oct. 9, 2020), https://perma.cc/EHZ8-7RZY ("Limited funding (and for a long time, limited ability for legal aid groups to seek attorney's fees in cases they won) keeps legal aid attorneys chronically underresourced, overworked, and underpaid.").

[31] Gideon Parchomovsky & Alex Stein, *Preliminary Damages*, 75 VAND. L. REV. 239, 260 (2022).

damages, with the exception that the damages would be awarded before rather than after a decision on the merits.[32] In their view, preliminary damages would work by making defendants "pre-pay" plaintiffs a minority percentage of their expected final recovery, which plaintiffs would have to repay to the defendant if the court found, after a decision on the merits, that the plaintiff was not owed as much or any recovery as a matter of law or fact.[33]

Like other fee-shifting or risk-bearing interventions, however, Parchomovsky and Stein's model of preliminary damages offers a remedy whose scope is significantly limited by the same economic factors that sustain unequal access to justice. Every plaintiff faces financial risk no matter the outcome of their case, but the fact that this risk is left to the plaintiff to completely internalize regardless of this outcome contributes to the access to justice crisis in the legal field.

First, Parchomovsky and Stein's proposed remedy does not shift the plaintiff's risk for litigation expenses. On the contrary, the plaintiff's risk is monetized and gambled. In effect, plaintiffs would borrow money from the defendant through the court against the value of their expected final recovery, which might leave the plaintiff in a worse position in the event that their recovery is denied or significantly decreased. At best, if the plaintiff has a contingency fee agreement, the proposed remedy would temporarily shift the attorney's risk for the plaintiff's litigation expenses onto the defendant. However, the plaintiff would remain at risk for paying those expenses to the defendant because the defendant is entitled to recoup the funds to the extent that the court finds against the plaintiff.

Second, the use case for their proposed remedy is significantly limited by the fact that the cost to see litigation through to a decision on the merits can exceed the prospective recovery from debt-based preliminary damages. Unless plaintiffs also agree to a contingency fee arrangement for a portion of the final recovery, an attorney will be as incentivized as they were, despite the prospect of preliminary damages, to refuse cases whose expected recovery is either too unlikely on the merits or not sufficiently valuable for the attorney to tolerate the risk.

Far from being categorically and substantively on par with permanent damages, which serve to provide a remedy to plaintiffs by making them whole, Parchomovsky and Stein's model is a mechanism proposed in the guise of a remedy that, on the contrary, operates on the logic of credit and debt rather than legal relief. In effect, their proposed intervention functions like a kind of credit line that the court would open be-

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[32] *Id.*

[33] *Id.* at 267.

tween the plaintiff and defendant, where that credit is a fraction of the prospective final recovery. By using this credit line to fund their legal battle, the plaintiff effectively goes into debt. In the event the plaintiff loses, the defendant is entitled to recoup that debt. In the event that the plaintiff wins, the debt subtracts from their final recovery. If this is the way that preliminary damages are supposed to work, then they are neither substantively nor categorically on par with permanent damages, but rather more akin to contingency fee arrangements or other instruments that involve potential financial liabilities.

In this Note, I argue that preliminary damages should instead provide compensation for a particular kind of harm that is separate from recovery on the merits for the statutory or common law actions brought against the defendant. A compensation model of preliminary damages would address a plaintiff's need for access to justice by providing reasonable litigation expenses, and a key component of that need is the potentially deserving plaintiff's exceptional risk of litigation expenses in order to have the opportunity to seek civil recourse for the underlying harms of the case. Where appropriate, compensatory preliminary damages would redistribute some of the burden of that risk, creating the possibility for some potentially deserving plaintiffs to shift the costs onto the defendant where the defendant is liable, the balance of equities favors the plaintiff, and the prospective merit of the case justifies redistributing that burden.

This vision of preliminary damages as compensatory would be categorically on par with permanent damages in the sense that it would compensate for harm to an interest that the law should recognize. Specifically, preliminary damages would serve to compensate plaintiffs for their diminished ability to meet their need for legal services based on factors that are reasonably traceable to the underlying harms. Preliminary damages would thus work on the same principle as the paradigmatic awards that juries grant to plaintiffs to compensate them for physical or mental harms. Here, the fundamental interest is the ability to seek recourse for injuries through civil litigation. Preliminary damages should be the remedy for plaintiffs whose interest in civil recourse has been culpably and harmfully impinged upon in ways that would make it right for the defendant to compensate the plaintiff for the costs to resolve their issues in court.

Preliminary damages as compensation serve not only to remedy harm to that interest but also to promote access to justice in general by, for example, mitigating the risk to plaintiffs that litigation would be a sunk cost, disincentivizing defendants from engaging in predatory litigation tactics, or minimizing litigation expenses for all parties by encouraging them to resolve the dispute outside court. As opposed to Par-

chomovsky and Stein's debt-based model, preliminary damages would not temporarily or contingently shift the pecuniary risks between various parties, nor would the award impinge on the plaintiff's final recovery on the merits. Instead, the compensation-based model is motivated by the principle that the ability to resolve problems through civil litigation is a fundamental interest that can be culpably and harmfully impinged upon in connection with the wrongful actions that give rise to the plaintiff's legal claims.

With those aims in mind, in Part I of this Note, I develop the proposal for compensation-based preliminary damages, which borrows from, and constructively elaborates on, the legal rules and standards that apply to preliminary injunctions. Then, I work through examples of how preliminary damages would or would not work to help plaintiffs finance their legal battles by compensating them for their diminished ability to meet their need for legal adjudication.

In Part II, I situate the proposal within Ronen Avraham and William H.J. Hubbard's framework of civil procedure[34] as the regulation of various externalities, which provides a useful set of metrics for determining how beneficial compensatory preliminary damages would be for the court system, parties to a case, and the general public. Using that framework, I show why compensatory preliminary damages are compelling given the various externalities they address and resolve, and I showcase the contrast with Parchomovsky and Stein's debt-based model of preliminary damages.

In Part III, I consider objections to the proposal. Principally, there is concern that compensatory preliminary damages are unfair for two reasons. The first reason is normative: It is unfair to hold defendants liable for preliminary damages because that liability depends in part on "moral luck," which refers to holding people liable for something even though a significant aspect of what they are judged for depends on factors beyond their control.[35] The second reason is practical: Preliminary damages would be unfair because the decision to award them might create a "judicial lock-in effect," which refers to various biasing effects that earlier decisions might have on later ones.[36] In response, I explain why these fairness concerns do not apply to compensatory preliminary damages.

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[34] Ronen Avraham & William H.J. Hubbard, *Civil Procedure as the Regulation of Externalities: Toward a New Theory of Civil Litigation*, 89 U. CHI. L. REV. 1 (2022).

[35] *See* Dana K. Nelkin, *Moral Luck*, STAN. ENCYCLOPEDIA PHIL., https://perma.cc/ZD32-TW38 (Apr. 19, 2019).

[36] Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunction*s, 66 FLA. L. REV. 779, 783 (2015).

I. PRELIMINARY DAMAGES AS COMPENSATORY DAMAGES

Low-income Americans encounter several civil legal problems each year, for which almost none receive any or enough legal help.[37] In its latest report, the Legal Services Corporation found that nearly 74% of low-income households had confronted at least one civil legal problem in the previous year and that these problems concerned basic needs such as housing, education, healthcare, income, and safety.[38] More than half of such households also reported that these legal problems significantly impacted their finances, health, safety, and relationships, yet most of these problems—92%—were met with little to no legal help; cost and affordability of such services were factors that influenced these households' decision-making processes to resolve one or more of these problems.[39] In New York, for example, millions try to navigate their high-stakes family law, consumer credit, and property law cases without a lawyer to represent them.[40] In turn, judges in such cases have observed and complained that litigation involving unrepresented parties adversely impacts court resources, case quality, and costs, leaving such parties with an impoverished experience of the rule of law.[41]

Legal inequalities arise from both free-market forces and self-regulation of the legal profession, and they structure the provision of legal services in the United States. This is one issue that the access to justice movement has put into greater focus, not only to raise awareness but also to criticize its predominant role in how the legal profession understands justice accessibility.[42] Although many within the access to justice movement are skeptical that unmet legal needs—for example, unmet needs for representation to navigate complex and high-stakes issues—are the predominant issue in the access to justice crisis,[43] novel legal intervention is still needed to address that problem. With this aim in mind, compensatory preliminary damages offer a concrete solution: to compensate plaintiffs when defendants harm their ability to meet their needs for legal adjudication, and where those needs culpably arise from the alleged injuries for which they seek resolution in civil court. As a prelimi-

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[37] *The Justice Gap: Executive Summary*, LEGAL SERVS. CORP., https://perma.cc/4ZXD-8QBD (last visited Apr. 23, 2023).

[38] *Id.*

[39] *Id.*

[40] TASK FORCE TO EXPAND ACCESS TO CIV. LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (2010), https://perma.cc/P6XJ-FPUX.

[41] *Id.* at 2.

[42] *See, e.g.*, Sandefur, *supra* note 16, at 50 ("[T]he key assumption that any problem with legal implications requires the involvement of a legally trained professional . . . proceeds from a preference for a single specific solution: more legal services.").

[43] *Id.*

nary remedy like Parchomovsky and Stein's debt-based proposal, but one that offers recovery for cognizable and concrete harm, I term my version of this intervention "compensatory preliminary damages."

A. How Compensatory Preliminary Damages Would Work

After a successful showing that compensatory preliminary damages are appropriate, plaintiffs would be compensated for culpable harm affecting their need for legal adjudication, which arises from the injuries that plaintiffs allege were caused by the defendant during the pleadings stage. After the parties have pleaded their basic legal and factual positions, assuming the plaintiff has met the pleading requirements[44] and adequately responded to any preliminary challenges to the complaint,[45] plaintiffs can move for preliminary damages. In granting preliminary damages, the court would order the defendant to pay some or all of the plaintiff's reasonable litigation costs on a continual basis until the case was terminated by some means or there was a dispositive change in fact regarding the plaintiff's ability to meet their legal needs. Reasonable litigation costs would be (1) defined as reasonable court costs and (2) based on prevailing market rates for the kind or quality of services furnished, which include reasonable expenses of expert witnesses; the cost of any study, analysis, report, test, or project deemed necessary by the court; and attorney fees.[46]

A successful motion for compensatory preliminary damages would show that the plaintiff meets three prerequisites. The first is a need for access to justice, which itself has three components. To establish their need for access to justice, a plaintiff must plead with particularity that (1) their reasonable litigation costs would likely be cost-prohibitive relative to their financial ability to provide for those costs; (2) their alleged legal injuries have affected their ability to provide for those costs; and (3) there exist special factors that compound the second prerequisite, including, but not limited to, the plaintiff's experience with unavailable or unwilling qualified attorneys, the difficulty of the issues presented in the case and its estimated litigation footprint, a lack of reasonable alternatives or arrangements to meet their needs, or a lack of reasonable opportunities to alternatively resolve the dispute outside litigation.

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[44] *E.g.*, FED. R. CIV. P. 8.

[45] *E.g.*, FED. R. CIV. P. 12.

[46] The definition of "reasonable litigation costs" used here borrows from the language of 26 U.S.C. § 7430, which permits a prevailing party in a court proceeding "brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty" to seek an award for reasonable litigation costs. 28 U.S.C. § 7430(a).

Second, the plaintiff must demonstrate a likelihood of success on each claim brought against the defendant.[47] The justification for this requirement is simple: Compensatory preliminary damages are meant to be an extraordinary remedy that is partially based on a culpable connection between a defendant's alleged wrongdoing and the plaintiff's inability to meet their legal needs to attempt to right those wrongs. Here, that there is such a culpable connection presupposes that certain necessary elements of the alleged wrongdoing have occurred. By demonstrating a likelihood of success on the merits, plaintiffs provide justification for the award that is responsive to such elements and meet that presupposition.

Lastly, the plaintiff must prove that the balance of equities weighs in their favor.[48] The balance of equities concerns the hardships that an award of preliminary damages might impose on the defendant relative to the hardships for the plaintiff if the award is not granted.[49] The structure of this prerequisite is not a simple cost-benefit analysis. Rather, it is ultimately based on the principle that the defendant's hardship resulting from a preliminary damages award should not be out of proportion; that is, the award should not be out of proportion with the defendant's culpability for the alleged injuries in connection to the plaintiff's access to justice as defined by the first prerequisite.[50]

In sum, compensatory preliminary damages are awards to plaintiffs for culpable harm to their ability to meet their legal needs that pay for some or all of the plaintiff's reasonable litigation costs. In deciding to award compensatory preliminary damages, I have described three prerequisites that the plaintiff must meet, which refer to the plaintiff's need for access to justice, the plaintiff's likelihood of success on the merits, and a balance of equities in the plaintiff's favor. To concretize and bring the proposal to life, I consider two hypothetical cases in which a motion for compensatory preliminary damages would be considered appropriate or inappropriate for indigent but potentially deserving plaintiffs. The ex-

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[47] *Cf.* Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 32 (2008) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success . . . ." (quoting Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n.12 (1987)).

[48] *Cf. id.* at 20.

[49] *See id.* at 26.

[50] *Cf.* Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in Boomer v. Atlantic Cement)*, 4 J. TORT L. 1, 3 (2012) ("'Hardship' is a better label for the countervailing consideration that leads courts to consider withholding the injunction. But once a plausible showing of hardship is made, courts inquire into all sorts of things, including defendant's culpability, the public interest, plaintiff's delay or acquiescence that aggravated the risk of hardship, and the hardship to plaintiff of getting only damages instead of an injunction.").

amples below illustrate how the court in each case would consider the plaintiff's motion for preliminary damages under the standard I have provided.

1. Constructive Termination Case

Oscar, a welder at Hi-RYZ Inc., a construction company, is suing his former employer in state court for wrongful constructive termination despite an implied contract that he would not be terminated absent good cause. Although Oscar found a new job within a couple months, his financial circumstances required him to accept a job whose pay is half what he used to make. This has caused Oscar several financial difficulties, including trouble making his mortgage and car payments while also meeting other basic needs for his family. Due to the priority that Oscar must give to these basic needs, Oscar is unable to afford adequate legal representation without accepting a contingency fee arrangement.[51] However, due to the nature of Oscar's case, qualified attorneys have been unwilling to work on contingency alone. Although attorneys have communicated to Oscar that he might have a strong case, they have also warned him that the cost to litigate—especially if the case requires going to trial—would outweigh Oscar's prospective damages, which some attorneys have estimated to be $28,000. These same attorneys think that litigation, especially if it goes to trial, would incur an estimated average of $45,000 in legal services and fees, if not more, given the defendant's resolve for litigation. Although some attorneys consider Oscar's prospects for preliminary damages to be strong given his case, some judge the risk to be too great to justify the attempt. Yet, not all attorneys estimate risk in the same ways.[52] Eventually, Oscar finds an attorney who judges the risk to be outweighed by Oscar's prospects and agrees to represent him on the condition that they file a motion for preliminary damages.

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[51] Oscar's situation is not unlike most prospective clients who would not be able to afford legal services at a fixed rate. *See* Angela Wennihan, *Let's Put the Contingency Back in the Contingency Fee*, 49 SMU L. REV. 1639, 1649 (1996) ("The most common justification for the use of the contingent fee system is that the system provides counsel for many who would not be able to pay a fixed fee for a competent lawyer."). Indeed, the contingency fee gained popularity during the Industrial Revolution, when it often involved, like Oscar, "a poor factory worker suing a large company." *Id.*

[52] For an analysis of how lawyers or different parties perceive risk and relate that risk to the value of a potentially meritorious civil claim, see Robert J. Rhee, *The Effect of Risk on Legal Valuation*, 78 U. COLO. L. REV. 193, 233, 237 (2007) (stating that "[t]he matter is . . . complicated if two parties do not hold the same view of risk" and that "[r]elative risk preference and perception are important factors").

In response to Oscar's motion, the court first assesses Oscar's need for access to justice. Here, Oscar has provided the court with a statement about his financial means and limitations relative to the costs of prospective litigation. He has also stated a plausible culpable link between the alleged injuries and his financial means and limitations relative to prospective litigation costs on two fronts. First, his alleged injury has put him in a financially precarious legal position by its very nature. But for the alleged injury, Oscar would not have a legal problem that he cannot afford to litigate. Here, what is relevant is not the fact that Oscar has a legal problem per se, but that the legal problem is the type that Oscar cannot afford. Second, his alleged injury exacerbates that precarious position due to the consequences it has had on his financial abilities. To litigate this problem, like any other plaintiff with a legal problem under the American Rule for allocating legal costs,[53] Oscar must assume the risk of absorbing his own litigation costs without recompense in the event of an adverse finding by the court.[54] The financial risk is more severe for Oscar than it would be for plaintiffs with greater financial means to litigate or with greater prospective awards to attract contingency lawyers whose interests would be served by shouldering that risk.

Finally, special factors exist in Oscar's case that compound his need for access to justice. These include Oscar's experience with unwilling attorneys, the complexity of litigating a constructive termination case involving an implied contract, and the unwillingness of the other party to settle despite Oscar's attempts to resolve the matter outside court through a demand letter to the legal team of his former employer. Based on the evidence that Oscar presented as to his need for access to justice and the special factors that compound that need, Oscar's case

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[53] James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225, 225 (1995) ("From an international perspective, the American rule for allocating legal costs . . . is exceptional. Throughout most of the Western world the English rule applies, and the losing party in a dispute is liable for the winner's legal fees, up to a reasonable limit.").

[54] Oscar's situation reflects a common problem faced by low-income and even middle-class prospective plaintiffs, which is that they cannot afford legal assistance to avoid losing basic needs such as their home or job. *See* Jennifer S. Bard & Larry Cunningham, Opinion, *The Legal Profession Is Failing Low-Income and Middle-Class People. Let's Fix That.*, WASH. POST (June 5, 2017, 9:52 AM), https://perma.cc/2UYA-RV53. Moreover, middle-class plaintiffs face a distinct problem: They make too much money to qualify for legal aid despite also being unable to afford lawyers, given that such aid groups typically serve those at or below the poverty line. Debra Cassens Weiss, *Middle-Class Dilemma: Can't Afford Lawyers, Can't Qualify for Legal Aid*, AM. BAR ASS'N J. (July 22, 2010, 1:36 PM), https://perma.cc/RSV2-M9JC. This reality provides an intuitive explanation for why people are likely to disengage from the legal system without some sort of intervention that will help them meet their need for legal assistance.

shows a need for access to justice that makes preliminary damages an appropriate kind of remedy.

The second prerequisite that Oscar must establish is a likelihood of success on the merits, which will depend largely on the approach that a court uses to weigh the probability of success on the merits that a movant must show. Here, Oscar will need to allege facts that go to the elements of his claim. In the case of constructive termination, these include facts indicating, among other things, that he was not an at-will employee at the firm and that his employer subjected him to work conditions that any reasonable employee would find intolerable enough to justify resigning.[55] Oscar has pleaded various facts indicating that his employer intentionally schemed to make Oscar resign by creating intolerable conditions of employment, including but not limited to harassment and unreasonable working conditions involving Oscar's safety.

Finally, Oscar must show that the balance of equities weighs in his favor. This requires weighing the hardship to the defendant if the motion is granted against the hardship to the plaintiff if the motion is denied. Given that the first prerequisite is met, the court will already have a strong idea of the hardship to the plaintiff. The court will consider the defendant's sophisticated status and, depending on the facts alleged, the company's resources in order to evaluate the hardship to the defendant that would result from paying Oscar's reasonable litigation expenses in addition to its own. In this case, the company has significantly more resources at its disposal, including its own legal department, indicating that the defendant's hardship is probably outweighed by Oscar's hardship stemming from his disproportionate risk of litigation expenses, his need for access to justice, and the consequences of his alleged injuries. Moreover, given the kind of culpability that Oscar attributes to his employer—that is, his allegation that the company purposefully resolved to drive him out of the company—the defendant's lesser hardship relative to Oscar's need for access to justice is the result of its own calculated business plans.

If the court decides to award Oscar preliminary damages, then the defendant will be ordered to create a fund that Oscar's attorneys can draw from on a continual basis—not only to compensate them for their services but also to fund other broadly construed litigation fees or expenses. The defendant must deposit the estimated or actual cost of legal

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[55] *See, e.g.*, Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1026 (Cal. 1994) ("The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job . . . . The proper focus is on whether the resignation was coerced, not whether it was simply one rational option.").

services or fees that the plaintiff incurs each month to litigate the case, although the defendants can request an alternative reimbursement structure given special circumstances. To be sure, the court retains oversight as to the use of the funds. In particular, the defendant may petition the court to hold a hearing on any potential misappropriation or abuse of the funds, which would expose either the plaintiff or their attorney to embezzlement charges and disciplinary action.[56] Assuming that Oscar wins the case, he will likely receive $28,000 in damages for his lost wages. In addition, assuming that litigating through trial resulted in litigation expenses of $45,000, these will have been covered by the preliminary damages award.

These litigation expenses would still be covered even if Oscar lost the case and were not compensated for the lost wages. After all, the preliminary damages award is meant to compensate Oscar for his need for access to justice that culpably arises from the alleged injuries for which he is seeking final recovery on the merits. Although the court might find against Oscar and reject his claims, this does not contravene the court's award of compensatory preliminary damages because Oscar's need for access to justice was substantially justified by the court's finding of sufficient probability of success on the merits. Assuming that Oscar did not succeed on the merits, it would be unjustified hindsight bias to conclude that the court erred as to Oscar's probability of success on the merits.

So long as Oscar has presented to the court a sufficient degree of success on the merits given his claims, Oscar's need for access to justice would be an appropriate kind for a motion for compensatory preliminary damages. This claim can be supported by considering the converse: Suppose Oscar fails at a motion for compensatory preliminary damages because the court does not find a sufficient likelihood of success on the merits, but he ultimately wins the case at trial. Did the court thus err in not granting the preliminary award, and should Oscar be entitled to reasonable litigation costs despite the court's denial of the award? In my view, the court would not abuse its discretion in the event that Oscar is denied preliminary damages but succeeds after a decision on the merits. By the same token, the court would not necessarily abuse its discretion by awarding Oscar compensatory preliminary damages even if he does not prevail at trial. This stems from the fact that the compensation-based

[56] Later in this Note, I address and respond to the concern that this creates the potential for abuse by lawyers and plaintiffs alike. *See infra* Section II.B. Although there is the potential for such abuse, it forms part of a larger pattern of potential abuse that is rampant in the legal profession. *See* Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity*, 30 HOFSTRA L. REV. 879, 882 (2002).

model of preliminary damages does not make the award parasitic on a plaintiff's actual success or failure on the merits.

2. Wrongful Eviction Case

Samantha is a native San Franciscan and retiree who recently purchased a mixed-use building in San Francisco that has a commercial space on the ground floor and residential units on the second and third floors. In San Francisco, an owner move-in provision permits evicting a tenant with sufficient notice when the owner seeks to recover possession in good faith and with honest intent to use or occupy the unit as their principal place of residence for at least thirty-six continuous months.[57] Samantha informs residents of the second floor, who have occupied the unit for eight years, that she is going to make their unit her principal residence. She serves them with notice to terminate the tenancy within three months. The tenants refuse to intend to vacate the premises, arguing to Samantha that she is acting in bad faith by intending to move into their unit because as tenants with rent control, they pay substantially less in rent than the current market rate for the unit, whereas the tenants of the third-floor unit are paying the market rate.[58]

Because the tenants do not vacate, Samantha files an unlawful detainer action against them, and the tenants respond by submitting a wrongful eviction claim that a legal aid attorney helped them prepare in the event that Samantha took legal action. However, due to the attorney's excessive caseload and the parties' prior agreement to limited legal services, the attorney cannot represent the tenants in their action. Instead, the attorney refers them to another lawyer who has experience

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[57] S.F., CAL., ADMIN. CODE § 37.9 (2023); *cf.* N.Y. COMP. CODES R. & REGS. tit. 9, § 2524.4(a) (2000) (providing for landlord's refusal to renew lease on the grounds that the owner seeks to recover the housing for occupancy as their primary residence in New York City).

[58] The idea that landlords regularly engage in bad-faith evictions in order to push out tenants, especially those from marginalized communities, and to sidestep rent control laws is supported by robust evidence. *See* John Whitlow, *Gentrification and Countermovement: The Right to Counsel and New York City's Affordable Housing Crisis*, 46 FORDHAM URB. L.J. 1081, 1092-93 (2019). For example, the Housing Court in New York City is increasingly being used by landlords to evict poor and working-class tenants, often from racially marginalized communities, in order to sidestep rent regulations. *Id.* (citing Kim Barker et al., *The Eviction Machine Churning Through New York City*, N.Y. TIMES (May 20, 2018), https://www.nytimes.com/interactive/2018/05/20/nyregion/nyc-affordable-housing.html (on file with CUNY Law Review)). Likewise, for tenants in San Francisco, landlords have attempted to sidestep rent control laws and raise rent costs by converting apartments to condominiums. Rebecca Diamond et al., *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, 109 AM. ECON. REV. 3365, 3366 (2019).

requesting preliminary damages for similarly situated plaintiffs facing high-stakes legal problems. This attorney agrees to represent them on the condition that they file a motion for preliminary damages, although the attorney advises them that their likelihood of success on the merits will crucially depend on how the court interprets Samantha's alleged bad faith in evicting them rather than some other occupied or unoccupied unit.

After the wrongful eviction claim survives a motion to dismiss, the tenants move for preliminary damages to compensate them for Samantha's alleged harm to their ability to access justice, seeking reasonable litigation costs to fund their legal battle. In response to the tenants' motion, the court first assesses the tenants' need for access to justice. Here, the tenants argue their need for access to justice is established by their limited financial means, including but not limited to their personal finances as well as their relative inability to afford legal services; the high-stakes nature of the case that puts their housing status into controversy; the impasse between the tenants and Samantha; and their failed attempts to secure consistent civil legal aid. In turn, the tenants add that Samantha is culpable for their inability to access justice because Samantha's allegedly wrongful eviction has put them in a precarious position in which they must weigh the risk of absorbing their own litigation costs to defend themselves from the eviction against their need for housing and their ability to afford housing in a comparable unit.[59] Finally, a special factor exists in this case that compounds the need for access to justice: Although the tenants tried to negotiate with Samantha to continue living in the unit by increasing rent at a rate that was comparable to the other units, Samantha refused. Based on this factual background and argumentation, the court finds that the tenants' need for access to justice makes the motion for preliminary damages appropriate.

Next, the tenants must show likelihood of success on the merits and that the balance of equities weighs in their favor. The court finds that the balance of equities sufficiently tips in the tenants' favor given their precarious position, both financially and with respect to their housing options. As factually presented by the plaintiffs, Samantha's current assets

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[59] Data shows that, in order to afford a fair-market-rent two-bedroom apartment in San Francisco, workers earning minimum wage would need to work more hours than are possible in a week. Andrew Chamings, *Report Shows San Franciscans on Minimum Wage Need to Work 4.9 Jobs to Make Rent*, SFGATE (July 14, 2021), https://perma.cc/7HS7-S2R4. Indeed, as most Californians know, housing costs in San Francisco are among the highest in the world, where only 9% of current housing units are considered "affordable" according to the city's housing needs assessment. *See* Adriana Rezal & Erin Caughey, *Key Facts About Housing in San Francisco*, S.F. CHRONICLE: SFNEXT INDEX, https://perma.cc/383V-CRM6 (June 29, 2022, 1:52 PM).

and expected earning potential, as well as her retiree status from a high-earning field, frames Samantha as being multiply more well-resourced than the tenants.

In considering the prerequisite of likelihood of success on the merits, however, the court finds that the tenants have failed to show a sufficient likelihood of success on the claim that Samantha acted in bad faith, despite significant evidence from the tenants that Samantha was not intending to live there for a thirty-six-month period. With respect to the merits, the court notes that the "good faith" condition that applies to the landlord move-in eviction process is narrowly tailored to intent to use or occupy a unit in the landlord's legal possession as their principal residence for a period of at least thirty-six continuous months.[60] Any other reason that the landlord might have for choosing a specific unit rather than another is immaterial to the inquiry into good faith, which focuses solely on whether an owner seeking repossession of a unit does so to establish a long-term primary residency.[61] In other words, so long as Samantha has intended to make a unit that she owns her long-term principal place of residence, then Samantha can choose any such unit at will. Here, Samantha's desire to move into the unit and establish it as her primary residency, regardless of her reasons for doing so, are in the court's opinion enough to show good faith and honest intent as required by the ordinance.[62] Moreover, the court notes that Samantha's level of culpability for the tenants' need for access to justice in the instant case is dispositive. In moving to evict the tenants, Samantha has followed a legally sanctioned process that reflects her desire to move into a unit that she owns, giving the tenants adequate notice.

In sum, although the tenants have a need for access to justice to litigate their likely wrongful eviction case and the inquiry into the balance of equities tips in their favor, the fact that they are unlikely to succeed on the merits indicates that awarding compensatory preliminary damages would not be an appropriate exercise of the court's equitable discretion at this stage in the case. As explained by the court, the law makes clear the legal standard that governs the inquiry into whether Samantha acted in bad faith by evicting the plaintiffs under the authority of the ap-

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[60] Reynolds v. Lau, 39 Cal. Rptr. 3d 548, 559 (Ct. App. 2019).

[61] *Id.*

[62] Of course, the fact that Samantha has met the intent requirement for San Francisco's move-in provision is consistent with the fact that she is also incentivized to make more profit in the future and evict lower-income tenants by freeing up the unit after she has occupied the building for three years. In 2016, the NBC Bay Area Investigative Unit reported that nearly one in four owner move-in evictions could be fraudulent. Bigad Shaban et al., *Investigative Unit: San Francisco Landlords May Have Wrongfully Evicted Hundreds of Tenants*, NBC BAY AREA, https://perma.cc/3BWA-DNHU (Aug. 9, 2018, 11:31 AM).

plicable city ordinance. According to that standard, Samantha did not act in bad faith because she has provided evidence that she intends to make the unit her principal place of residence, including but not limited to the sale of her former place of residence, communications to her professional and personal networks as to her change of residence, and evidence of ties to the location that motivate the move. Because a necessary prerequisite for awarding preliminary damages is not met, it would not be an abuse of discretion for the court to deny the motion.

3. Appealing the Wrongful Eviction Case

The standard of appellate review for a motion for the proposed preliminary damages would be the same as that governing a motion for a preliminary injunction or any other issue over which a trial court has discretion: namely, abuse of discretion.[63] Because of the tight analogy between the proposal of preliminary damages and the preliminary injunction, the specific language that California courts use to review a grant or denial of a preliminary injunction for abuse of discretion is a useful and appropriate guide for reviewing abuse of discretion concerning a motion for preliminary damages. California state court precedent, which governs the appellants' case, establishes that a trial court abuses its discretion in denying a preliminary injunction by abusing its discretion "with respect to either the question of success on the merits or the question of irreparable harm."[64] By analogy, then, a trial court abuses its discretion in denying preliminary damages by abusing its discretion with respect to either the question of success on the merits or the question of access to justice. Regarding this connection, the California Supreme Court has provided guidance:

> The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are

[63] Appellate courts use the abuse of discretion standard to review issues over which the trial court has discretion. *See, e.g.*, Pierce v. Underwood, 487 U.S. 552, 558 (1998); Brown v. Chote, 411 U.S. 452, 457 (1973); Butt v. State, 842 P.2d 1240, 1246 (Cal. 1992).

[64] *See, e.g.*, Whyte v. Schlage Lock Co., 125 Cal. Rptr. 2d 277, 283 (Ct. App. 2002). Compare with Ninth Circuit precedent, which is that "a district court abuses its discretion if it rests its decision 'on an erroneous legal standard or on clearly erroneous factual findings.'" Am. Beverage Ass'n v. City & Cnty. of S.F., 916 F.3d 749, 754 (9th Cir. 2019) (en banc) (quoting United States v. Schiff, 379 F.3d 621, 625 (9th Cir. 2004)). Once the trial court identifies the right standard, "the second step is to determine whether the trial court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics, Inc., 29 F.4th 468, 475 (9th Cir. 2022) (quoting Enyart v. Nat'l Conf. of Bar Exam'rs., Inc., 630 F.3d 1153, 1159 (9th Cir. 2011)).

> reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.[65]

Thus, the precedent that governs the appellants' case establishes that the trial court's denial of preliminary damages depends on whether its application of the law to the facts concerning the likelihood of success on the merits at trial was arbitrary and capricious. This means inquiring whether the decision was based on the wrong legal standard or on express or implied factual findings that are not supported by substantial evidence.[66]

Despite the unfavorable ruling from the trial court, the tenants in the wrongful eviction case believe that the district court erroneously denied their motion for preliminary damages because the factual record raises sufficient doubt as to whether their landlord intended in good faith to move into the unit occupied by the appellant-tenants, which shows there is a likelihood of success on the merits. This factual record, appellants contend, supports a reasonable inference that although Samantha desired to move into the unit, she is not doing so to make the residence her primary home for a continuous period. Rather, they conjecture based on evidence that Samantha will likely make renovations and repairs to the unit before subletting or renting it out at a higher rate within the next year. They also have in their possession evidence that undermines Samantha's claim that she intended to move into that particular unit given recent and past real estate purchases and investment near the area.

Upon reviewing the trial court's denial of preliminary damages, the appeals court recognizes that although the correct legal standard was applied, there is a significant question as to whether the lower court's dispositive factual findings were supported by substantial evidence. According to the appeals court, given the evidence claimed and presented by the appellants, there exists a likelihood of success on the merits such that a reasonable jury could return a verdict for appellants.[67] The claims and evidence presented are responsive to whether the respondent intended to move into the unit for the requisite period. They put into question the consistency of the landlord's evidence of good faith by providing ev-

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[65] Haraguchi v. Superior Ct., 182 P.3d 579, 584 (Cal. 2008) (footnotes omitted); *see also* People v. Roldan, 110 P.3d 289, 316 (Cal. 2005) (quoting People v. Lawley, 38 P.3d 461, 500 (Cal. 2002)) ("A trial court will not be found to have abused its discretion unless it exercised its discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice.").

[66] *See* People v. Bunas, 295 Cal. Rptr. 3d 147, 152-53 (Ct. App. 2022).

[67] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (stating that a genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

idence that the respondent has also recently purchased other units in the vicinity, including a unit in a more residential neighborhood in which she has previously lived near her family.

Given the substance of the appellants' evidence, the appeals court finds that the trial court abused its discretion by making factual findings that were not substantially supported by the evidence, which favored the appellants' likelihood of success on the merits. The appeals court thus reverses the trial court's decision and remands the case for further proceedings consistent with the appellate opinion, which entail granting the motion for preliminary damages so that the appellants can proceed with their wrongful eviction claim using reasonable litigation fees owed to them by the respondent.

B. The Equitable Roots of Preliminary Damages

While preliminary damages function like compensatory damages, an essential element of equitable relief also motivates the proposal. In each case above, the court was guided by considerations not only about the harm created to the moving party's ability to access justice, but also about whether justice required the court to exercise its equitable discretion by compensating for that harm. On appeal, the analogy between compensatory preliminary damages and preliminary injunctions was made tighter by showing how plaintiffs might appeal a denial of preliminary damages, and a court should respond according to the appropriate standard of review: abuse of discretion.

Motivating the proposal for compensatory preliminary damages is the underlying principle of equitable relief: that courts should have the ability to provide more flexible responses to legal needs with no adequate remedy at law.[68] This element of equity suggests that it would be consistent to take the legal standards that govern equitable relief—specifically the standards governing pretrial relief like a preliminary injunction—and apply them to preliminary damages, which I have already done in my explanation for how preliminary damages would work under my proposal. Procedurally, preliminary damages provide pretrial relief like a preliminary injunction, but the relief they offer is categorically compensatory rather than injunctive. Substantively, both preliminary injunctions and preliminary damages aim to address and protect a party's equitable interests. However, there are important differences between

[68] *See, e.g.*, Douglas Edward Pittman, *Is Time Up for Equitable Relief? Examining Whether the Statute of Limitations Contained in 28 U.S.C. § 2462 Applies to Claims for Injunctive Relief*, 70 WASH. & LEE L. REV. 2449, 2458 (2013) (explaining that equitable powers developed in order to provide a more flexible legal approach in response to rigid or unsatisfactory legal rules).

preliminary damages and preliminary injunctions that support the way I have constructed compensatory preliminary damages. To draw out some of these differences, it is worth considering the roots of preliminary damages in equitable relief.

In brief, a preliminary injunction grants relief to the moving party where there is an inadequate remedy at law for irreparable harm that the plaintiff fears will occur before a final judgment on the merits takes place.[69] Preliminary injunctions are issued in a variety of legal disputes, including intellectual property cases, contract cases, environmental cases, cases surrounding federal immigration policies, and nationwide medical or abortion cases.[70] Likewise, compensatory preliminary damages would grant relief to a moving party who can demonstrate, among other things, that the defendant has inequitably exacerbated the financial risks of litigation because the alleged wrongs have resulted in financially overwhelming medical expenses, loss of income, or other problems with financial consequences that not only require urgent relief but also bear on the plaintiff's prospect of finding adequate services for their legal needs. In this sense, the equitable interest that preliminary damages would serve is to mitigate the disproportionate risk that indigent plaintiffs face in order to litigate alleged injuries.

Given these essential similarities, there is a credible case for modeling the standards that would govern compensatory preliminary damages after the standards that govern the preliminary injunction. However, there are also essential dissimilarities between the two that require distinguishing the standard for preliminary damages from that of the preliminary injunction. Once these dissimilarities are brought to light, the case for making preliminary damages compensatory awards—rather than another fee- and risk-sharing arrangement, as Parchomovsky and Stein would have it—will be made more evident in light of its roots in equitable relief. It will also become clearer that not all the factors that guide a decision to award a preliminary injunction should be included in the proposed standard for compensatory preliminary damages. To that end, I begin by providing some context about preliminary injunctions and their current legal status.

Courts do not liberally exercise their ability to grant a preliminary injunction, which is considered "an extraordinary and drastic remedy."[71]

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[69] *See* FED. R. CIV. P. 65.

[70] Maggie Wittlin, *Meta-Evidence and Preliminary Injunctions*, 10 U.C. IRVINE L. REV. 1331, 1136-37 (2020).

[71] 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed. 1995).

According to John Leubsdorf, courts considering such a motion face a dilemma:

> If [the court] does not grant prompt relief, the plaintiff may suffer a loss of his lawful rights that no later remedy can restore. But if the court does grant immediate relief, the defendant may sustain precisely the same loss of his rights.[72]

Crucial to the decision to award or reject a motion for a preliminary injunction, then, is the controversially interpreted "status quo" that courts often cite as the goal of a preliminary injunction.[73] Understood not as a doctrinal safeguard of interlocutory relief, but rather as a principled recognition of its aims or purpose, the principle of preserving the status quo indicates the court's interest in minimizing or preventing irreparable injury not only to the plaintiff but also to the defendant, who may be irreparably injured by an injunction.

The role that the defendant's equitable interest plays in the legal standard for preliminary injunction finds further expression in the requirement that plaintiffs post bond as security that creates actionable liability for damages caused by a wrongfully issued injunction.[74] Defendants can generally seek damages caused by the injunction as determined by a jurisdiction's general rules of assessing damages.[75] Although the status quo principle and the idea of plaintiff liability for interlocutory relief may figure into the court's inquiry on a motion for a preliminary injunction, at the heart of that inquiry is a four-part test developed at common law.[76] In *Winter v. Natural Resources Defense Council, Inc.*, the United States Supreme Court outlined this test, requiring that a "plaintiff seeking a preliminary injunction . . . establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in

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[72] John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 541 (1978).

[73] TRACY A. THOMAS ET AL., REMEDIES: PUBLIC AND PRIVATE 159 (6th ed. 2016). *See generally* Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 124-29 (2001) (identifying a significant circuit split as to the relevance of preserving the status quo as a principle of the preliminary injunction).

[74] *See, e.g.*, FED. R. CIV. P. 65(c). The bond surety requirement has also historically existed in state courts. *See* Dan B. Dobbs, *Should Security Be Required as a Pre-Condition to Provisional Injunctive Relief*, 52 N.C. L. REV. 1091, 1173-74 (1974) (providing a list of specific statutes across the states that enact a bond requirement for interlocutory relief).

[75] *See* Elizabeth Leight Quick, *The Triggering of Liability on Injunction Bonds*, 52 N.C. L. REV. 1252, 1256 (1974).

[76] *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

the absence of preliminary relief, that the balance of equities tips in his favor, and that the injunction is in the public interest."[77]

Repurposing the *Winter* test, Parchomovsky and Stein argue that a plaintiff seeking preliminary damages would need to prove that their motion meets the same conditions.[78] First, the plaintiff would need to prove that their causes of action are likely to succeed on the merits.[79] Parchomovsky and Stein do not distinguish this condition in the preliminary damages context from the preliminary injunction context, leaving open whether there are any significant differences between the two. This is also true of my approach to preliminary damages. If preliminary damages are included in the menu of remedies that courts can offer, it should be up to the courts to determine the degree or level of probability needed to meet the condition of the likelihood of success on the merits, given the stakes of a preliminary damages motion.

Second, the plaintiff would need to show that they are at risk of irreparable harm if the motion for preliminary damages is denied.[80] Here, Parchomovsky and Stein distinguish this factor as it is originally articulated in the preliminary injunction context, arguing instead that the inquiry should "focus on the plaintiff's financial situation and her ability to continue with the lawsuit if her request for preliminary damages is denied."[81] Irreparable harm is typically understood by courts to mean harm for which no legal remedy could place the plaintiff in the position they would have been in without the harm.[82] To be consistent with the court's typical understanding of irreparable harm, then, a plaintiff's inability to afford to litigate and recover for alleged harms should be construed as an irreparable injury for which there is no actionable remedy under the law. This is a plausible claim on its surface, as the very idea that courts should introduce preliminary damages into the menu of remedies indicates that there is no legal remedy for the plaintiff's inability to litigate. However, implicit in such a claim is the idea that the ability to afford to litigate some justiciable problem is, in some sense, owed to the plaintiff.

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[77] *Id.* It is worth noting that many circuit courts are divided as to the burden, weight, and explanation attached to each *Winter* factor, especially the public interest factor. M Devon Moore, *The Preliminary Injunction Standard: Understanding the Public Interest Factor*, 117 MICH. L. REV. 939, 945 (2019).

[78] *See* Parchomovsky & Stein, *supra* note 31, at 263 ("We view our reliance on the same conditions used by courts in deciding whether to grant preliminary injunctions as a key strength of our scheme.").

[79] *Id.* at 264.

[80] *Id.* at 265.

[81] *Id.*

[82] THOMAS ET AL., *supra* note 73, at 62.

This idea has some merit if the inability to afford to litigate the problem flows directly from the legally remediable harms that the plaintiff alleges against the defendant, which suggests making preliminary damages compensatory awards that are linked to the alleged injuries underwriting the complaint. In contrast, Parchomovsky and Stein's proposal for how preliminary damages should work ignores whether the plaintiff's inability to litigate is a type of harm that would justify an award of debt-based preliminary damages. Although they model preliminary damages on the logic of credit and debt, a significant distinction between that logic and debt-based preliminary damages is that the funding party's choice in the matter is not voluntary. If the court awards Parchomovsky and Stein's version of preliminary damages, then the defendant is legally compelled to provide funds for the credit line that the court opens between the parties, which the moving party can then use to fund their legal battle. But given that the condition of irreparable harm and preserving the status quo are not applicable in the context of awarding debt-based preliminary damage, the justification for awarding debt-based preliminary damages is entirely dependent on the justification for awarding final damages after a decision on the merits. But because debt-based preliminary damages and final damages are neither substantively nor categorically on a par, the justification for the latter cannot be used to justify the former.

In other words, whereas the court's ability to grant equitable relief in the form of a preliminary injunction stems principally from the justification that such an injunction is necessary to prevent irreparable harm and preserve the status quo, the court's ability to achieve equity by issuing debt-based preliminary damages does not analogously stem from the justification that it prevents irreparable harm. For their model, Parchomovsky and Stein do not identify a plaintiff's need for access to justice as a type of harm that the defendant bears some responsibility for creating or exacerbating. Instead, the justification for debt-based preliminary damages is a purely instrumental one that is not based on the logic of *interpersonal* harm and liability between a plaintiff and a defendant that is traditionally understood as underlying tort law.[83] Rather, the justification appears to be based on impersonal concerns for fairness that do not make essential reference to how the particular defendant owes preliminary damages to that particular plaintiff because of some corresponding harm or injury for which the defendant is responsible.[84]

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[83] *See, e.g.*, Benjamin Ewing, *The Structure of Tort Law, Revisited: The Problem of Corporate Responsibility*, 8 J. TORT L. 1 (2015).

[84] In other words, debt-based preliminary damages are proposed as a sort of financial technology that can help promote optimality in the legal system with respect to deterrence

Yet that instrumentality raises the question of whether the court is justified in exercising its equitable powers to advance impersonal concerns for fairness between the parties and whether it is justified to make the defendant a means toward achieving that fairness if the defendant is not sufficiently culpable for the inequality. In contrast, compensatory preliminary damages do not raise such worries about whether their award is justified. As compensatory awards, the justification for preliminary damages is substantively the same as the justification for final damages granted after a decision on the merits, which is to make plaintiffs whole for injuries to their interests caused by culpable wrongdoers. This is why the condition of irreparable harm is absent from the standard that I propose for compensatory damages and replaced by the condition that the defendant bear some culpability toward the plaintiff with respect to the plaintiff's need for access to justice.

Finally, the third and fourth conditions that plaintiffs would need to prove in a motion for a preliminary injunction are, respectively, that the balance of equities favors the plaintiff and that awarding preliminary damages is consistent with the public interest.[85] In the injunctive context, courts typically interpret the balance of equities by weighing the hardship the injunction causes the defendant against the hardship to the plaintiff.[86] The balance of equities not a simple cost-benefit analysis in the binary terms of benefits and burdens to the plaintiff or defendant, but rather, as the "undue hardship" defense, it also contemplates extenuating or aggravating circumstances such as the defendant's or plaintiff's culpability for the hardship, among other factors.[87] Rejecting the scope of that approach, Parchomovsky and Stein suggest limiting the inquiry to the economic and financial capacities of the parties, such that "[t]he line should be drawn between well-to-do corporate defendants and cash-strapped individual defendants."[88] In turn, they contend that "[t]he main risk preliminary damages pose to defendants is the risk of nonrepayment if they win the case in the end."[89] In that case, "if the plaintiff used the preliminary damages to finance the litigation, she would not be able to

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and fairness, which fits into the law and economics approach to tort law. *See id.* ("Since the advent of the law and economics movement, it has been extremely common for tort scholars to explain and justify tort law principally with reference to the goal of economically optimal deterrence—i.e., maximizing wealth . . . .").

[85] Parchomovsky & Stein, *supra* note 31, at 266-68.

[86] Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 542 (1987) ("[A] court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.").

[87] *See* Laycock, *supra* note 50, at 3.

[88] Parchomovsky & Stein, *supra* note 31, at 266.

[89] *Id.* at 267.

repay the defendant right away, if ever,"[90] but Parchomovsky and Stein suggest that such a risk can be addressed by capping preliminary damages "at forty percent of the total damages sought by the plaintiff."[91]

Capping preliminary damages at 40% raises two problems. First, it seems to be an arbitrary cap. Preliminary damages are a novel legal intervention precisely because they bring flexibility to the rigidity of awarding damages in civil litigation, but capping them at 40%, rather than allowing courts to determine the percentage themselves given the risk of non-repayment, undercuts the flexibility that motivates the intervention. Second, capping preliminary damages to accommodate the risk of non-repayment severely limits its use case. As previously discussed, the use case for debt-based preliminary damages would be limited to cases in which the expected final recovery of the case is great enough to justify the risk of litigation expenses as well as make an award of preliminary damages substantial enough to pay for a significant portion of those expenses. By limiting preliminary damages to a particular percentage, Parchomovsky and Stein furthermore limit the use case of the intervention to cases in which the expected final recovery is enough to justify the risk and pay for the expenses even at 40%.

Compensatory preliminary damages avoid the foregoing problems. If compensatory preliminary damages are awarded, that is because the defendant owes the plaintiff the award for the defendant's culpable wrongdoing to the plaintiff's ability to access justice. This is for the same reason that a plaintiff is entitled to final damages after a decision on the merits for other culpable wrongdoing. The defendant is thus not entitled to repayment because an equilibrium has been reached between the parties in the same way that equity is thought to be reached when a court awards final damages at the end of a trial. Like the plaintiff who is thought to be fully compensated by an award of final damages for consequential or incidental damages arising from the defendant's culpable wrongdoing, an award of compensatory preliminary damages remedies a plaintiff's inability to meet their need for access to justice caused by the defendant's creation of that need and their culpable impact on that inability.

Lastly, Parchomovsky and Stein take for granted that preliminary damages are consistent with the public interest because they would make the court system fairer and more efficient. Their approach suggests that courts should take the public interest of awarding preliminary damages as a rebuttable presumption that the defendant has the burden

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[90] *Id.*
[91] *Id.*

of rebutting.[92] This condition is absent from my version of preliminary damages because, as compensatory awards, preliminary damages focus on a problem arising specifically and uniquely between the plaintiff and the defendant. Although public interest considerations can be relevant, as they are in all cases, the requirement that compensatory preliminary damages be consistent with the public interest is incongruent for the same reason it would be incongruent to consider the public interest in the decision to award damages in a personal injury case for private harm.

In conclusion, although both the debt-based and compensatory approaches to preliminary damages are modeled after preliminary injunctive relief, there are significant differences. These differences need to be considered when modeling preliminary damages after preliminary injunctions. In outlining these differences, I have shown how compensatory damages overcome the obstacles faced by debt-based preliminary damages stemming from their imperfect analogy to preliminary injunctive relief.

II. PRELIMINARY DAMAGES AND CIVIL PROCEDURE

The introduction of compensatory preliminary damages into the civil legal system raises various questions about its relationship to civil procedure. In the United States, the power to prescribe general rules of practice and procedure in court lies with the judicial branch at the federal and state level. [93] This power to regulate court proceedings is based on the need to structure litigation in ways that promote efficiency and justice.[94] The answer to whether compensatory preliminary damages promote simplicity, fairness, and justice, among other values of civil procedural design,[95] is based on a novel theory of civil procedure recently proposed by Ronen Avraham and William H.J. Hubbard.[96]

Avraham and Hubbard posit that the various goals of civil procedure are rooted in one purpose: to address and regulate three kinds of externalities that litigation creates. The first type, "system externalities,"

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[92] *Id.* at 268.

[93] *See, e.g.*, 28 U.S.C. § 2072.

[94] For example, the purpose of the Federal Rules of Civil Procedure is "to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1.

[95] Another such question is whether preliminary damages would abridge, enlarge, or modify a substantive right, which is prohibited by the Rules Enabling Act, 28 U.S.C. § 2072. Arguably, preliminary damages would provide plaintiffs with a substantive right to a remedy against harm to their need for access to justice, so this power must be delegated to courts by Congress and state legislative bodies.

[96] Avraham & Hubbard, *supra* note 34, at 4-5.

refers to the positive or negative effects that litigation has on cases or the court system in general.[97] The second type is "strategic externalities," which refers to the positive or negative effects of a party's actions on opposing parties in the same case.[98] Finally, "public-goods externalities" are the positive or negative effects of litigation on society as a whole.[99] Based on this theory, compensatory preliminary damages address and resolve more externalities than they create. By the same token, Parchomovsky and Stein's debt-based approach to preliminary damages creates more externalities than it addresses and resolves. Both of these arguments are explained further below.

Specifically, compensatory preliminary damages address and resolve (A) system externalities that create excess litigation costs and delay in legal proceedings, (B) strategic externalities that create conditions for gamesmanship between the parties that disrespect the rule of law and exacerbate system externalities, and (C) public-good externalities that impede progress in the development of law and give rise to the access to justice crisis in the legal field. In this way, the compensatory model of preliminary damages improves civil litigation overall by effectuating its aims of efficiency, respect for the rule of law, and benefit to society, and it is thus suited to the goals of civil procedure: to promote fairness, simplicity, and justice in practice.

A. System Externalities: Cost and Delay

There has been a significant decline in civil trials both in absolute numbers and relative to other relevant measures, such as the number of lawyers or the size and innovation of the legal field.[100] Indeed, the conventional wisdom in the legal field is that at least 85% of civil cases terminate in some form of pretrial settlement.[101] One potential explanation for this decline is the grossly expensive cost of litigation relative to the potential payout: In a 2008 litigation survey, nearly 81% of respondents reported that their law firms turn away cases when it is not cost-effective to handle them, and 94% believed that trial costs and attorney fees are an important factor in driving cases to settle rather than litigating.[102]

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[97] *Id.* at 6.

[98] *Id.*

[99] *Id.*

[100] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

[101] *E.g.*, Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-40 (1994).

[102] AM. COLL. OF TRIAL LAWS. TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT & 2008 LITIGATION SURVEY OF THE

A prevalent system externality that litigation creates, then, is the effect that expected litigation costs and efforts can easily outweigh its expected benefits, either driving plaintiffs to settle for less than their claim is worth or driving them away from litigation in the first place. Because the cost to litigate can exceed the amount in controversy, an award of damages—whether preliminary or permanent—is not always an economically optimal or rational goal to pursue. As a result, plaintiffs whose cases would be more expensive to litigate than they are worth are deterred from vindicating their claims in court. This may suggest an efficient equilibrium in which cases that do not warrant litigation will be resolved in other ways and not burden the litigation system. On the other hand, however, this may actually suggest a suboptimal level of litigation, both quantitatively and qualitatively.

The high transaction costs that lead to suboptimal levels of litigation are largely driven by factors that are constitutive of the sources and structure of litigation, which include constitutions, statutes, regulations, and cases, as well as the rules of civil procedure, rules of evidence, and the like. As these legal sources and structures increasingly grow, interact and counteract, take on new mediums—such as electronic discovery—and subsequently complicate litigation, there will be a corresponding increase in the costs and efforts needed to litigate that are not mitigated by present parties that contribute to this effect and make litigation more costly over time. To be sure, the contemporary costs and efforts needed to litigate can be attributed to factors other than the simple fact that the law in its various guises gets more complicated over time. Free market forces that make legal education more expensive and make the market for legal services more costly for all,[103] as well as the legal profession's monopoly on the provision of legal services,[104] contribute to our society's access to justice barriers. Compensatory preliminary damages address and mitigate the foregoing system externality, in part, by making well-resourced defendants bear some of the costs of a litigation system whose high transaction costs do not disfavor them to the same extent as less resourced plaintiffs.

Rather than letting this system externality inequitably exclude indigent plaintiffs from bringing deserving claims against wealthy defendants, preliminary damages redistribute the burgeoning costs of litigation

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FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS A-6 (2008), https://perma.cc/J7LH-KLJC.

[103] *See, e.g.*, John R. Brooks, *Curing the Cost Disease: Legal Education, Legal Services, and the Role of Income-Contingent Loans*, 68 J. LEGAL EDUC. 521, 522 (2019).

[104] *See generally* Laurel A. Rigertas, *The Legal Profession's Monopoly: Failing to Protect Consumers*, 82 FORDHAM L. REV. 2683 (2014) (discussing how lawyers have monopolized the provision of legal services, in part due to the strict regulation of legal services).

more equitably between plaintiffs and defendants by providing a way for plaintiffs to shift the responsibility of internalizing the inflation of litigation costs onto the defendant. Compensatory preliminary damages also address the worry that plaintiffs would drive up litigation costs by suing wealthy defendants based on frivolous claims that lack merit to obtain a settlement,[105] which is an instance of a strategic externality I discuss next. Given the high bar that plaintiffs need to meet in order to show a likelihood of success on the merits at the preliminary stage, compensatory preliminary damages are unlikely to foster the sort of abuse that would force a defendant to accept a settlement in a frivolous case.

In contrast, Parchomovsky and Stein's debt-based model of preliminary damages does not address the system externality at issue. This debt-based model of preliminary damages cannot mitigate this externality because its intervention requires that the award be limited to a fraction of the expected compensatory damages of a case. In other words, if the expected compensatory damages of a case are not valuable enough to pursue the case given outweighing litigation expenses, the prospect of preliminary damages would not justify pursuing the case.

Second, debt-based preliminary damages would likely lead to more delay and cost than compensatory damages would because the debt-based model provides for the possibility that prevailing plaintiffs would have to repay the award to defendants in the event that the court found against them. An award of debt-based preliminary damages may require further costly and time-consuming action between the parties in the event that the plaintiff must repay the award, or if the plaintiff cannot afford to repay the award. On the contrary, an award of compensatory preliminary damages, being procedurally preliminary, need not be altered even if the plaintiff loses the case, leaving the court and the parties only to focus on the decision on the merits after the award is granted. In a similar vein, it is worth noting that in some cases, costs and time will be expended on the issue of the amount of expected compensatory damages to which a plaintiff would be entitled in a case and on which their award of preliminary damages would be based. Unlike reasonable litigation expenses, which can be easily ascertained based on a lawyer's hourly rate and other itemized receipts, determining the expected damages to which a plaintiff is entitled before a decision on the merits in the case of debt-based preliminary damages would be a foreseeably sordid affair.

Plausibly, plaintiffs and defendants might argue over the preliminary value that the court should assign to the plaintiff's non-pecuniary

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[105] *See* Thomas D. Rowe Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 151-52 (1984) (discussing the allegation that a significant proportion of frivolous lawsuits are brought in the hopes of obtaining a favorable settlement).

or non-itemized damages that are ordinarily valued by factfinders during the final remedial phase of a trial. Since the value of a plaintiff's damages varies in different cases and can be changed subject to the court's determination on whether the damages awarded were too low or too high, considerable delay is likely. As such, the costs to calculate the debt-based preliminary damages are avoided by compensatory preliminary damages.

In summary, compensatory preliminary damages address and mitigate the system externality that drives plaintiffs, especially indigent plaintiffs, to abandon their legally actionable claims because the costs of litigating them outweigh their commensurate benefits. Even in cases in which litigation costs might outweigh prospective damages, compensatory preliminary damages would offset this externality by shifting it onto the defendant to pay for the plaintiff's reasonable litigation expenses. In contrast, the debt-based model of preliminary damages does not shift this externality onto the defendant. If the prospective damages that a plaintiff expects to receive in a case do not outweigh that plaintiff's litigation expenses, then there is nothing that an award of debt-based preliminary damages would do to offset that fact, leaving plaintiffs financially worse off than they would be even in the event that they win the case.

B. Strategic Externalities: Gamesmanship

Whereas system externalities concern benefits shifted onto others on a more general level, affecting all who participate in the system, strategic externalities operate at a smaller scale between parties to a case. Strategic externalities arise from parties imposing costs on one another for the purpose of gaining strategic advantage in litigation.[106] These externalities come in various forms, but two are most prevalent. The first occurs at the level of a case itself, arising from what are called "SLAPP" suits,[107] and the second occurs within a case. In the context of party dis-

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[106] Avraham & Hubbard, *supra* note 34, at 31.

[107] *See* Shannon Jankowski & Charles Hogle, *SLAPP-ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws*, AM. BAR ASS'N (Mar. 16, 2022), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2022-winter/slapping-back-recent-legal-challenges-the-application-state-antislapp-laws/ (on file with CUNY Law Review). "SLAPP" stands for "strategic lawsuits against public participation," which refers to "meritless lawsuits designed to chill constitutionally protected speech on matters of public concern" where the goal is to punish targets with time-consuming and costly litigation in order to deter similar speech in the future. *Id.* They are "often brought by the wealthy or influential against the less-well-resourced or powerful" and have led most but not all states to adopt anti-SLAPP laws, though the issue remains controversial in federal court. *Id.*

covery, one side pressures the other by raising the costs of responding. In focusing on the phenomenon of discovery abuse in litigation, compensatory preliminary damages address and resolve the externalities this practice creates.

Discovery is a formal tool used to obtain information from opposing parties to determine before trial begins what evidence exists or may be presented in a case through such methods as depositions, interrogatories, subpoenaing, and physical or mental examination, among other methods of gathering evidence.[108] In theory, the discovery process minimizes uncertainty between the parties, lowers the transaction costs of dispute resolution, improves the accuracy of claims, and promotes simplicity, fairness, and justice in practice just as other processes governed by the rules of civil procedure.[109] However, in practice, party discovery has become a highly controversial, adversarial proceeding that can result in what the legal community refers to as "discovery abuse,"[110] which can manifest in two major ways: (1) "excessive or improper use of discovery devices to harass, cause delay, or wear down an adversary by increased costs" and (2) "'stonewalling' or opposing otherwise proper discovery requests for the purpose of frustrating the other party."[111]

Our current legal environment is ripe for and incentivizes discovery abuse because parties are expected to absorb their own litigation costs in most cases, including the costs of discovery. For example, a party may gain strategic advantages in court by engaging in excessive discovery to raise costs for opposing parties to force them to settle, abandon their case, or lower the overall value of their case, among other motivations.[112] Discovery abuse contributes to the fact that litigation can easily be made cost-prohibitive for litigants, and in cases involving parties with unequal resources, the party with more financial resources can obstruct less resourced plaintiffs by raising the cost of discovery to impede their ability to effectively litigate their case. This same effect can be achieved not only through document dumping but also abuse of other procedural tactics such as excessive retaliatory motions, including mo-

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[108] *How Courts Work: Steps in a Trial: Discovery*, AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/discovery/ (on file with CUNY Law Review).

[109] *See* Jeong-Yoo Kim & Keunkwan Ryu, *Sanctions in Pre-Trial Discovery*, 14 EUR. J.L. & ECON. 45, 45 (2002).

[110] *See* Alexandra D. Lahav, *A Proposal to End Discovery Abuse*, 71 VAND. L. REV. 2037, 2037-38 (2019).

[111] William Hopwood et al., *Fighting Discovery Abuse in Litigation*, 6 J. FORENSIC & INVESTIGATIVE ACCT. 52, 53 (2014).

[112] Lahav, *supra* note 110, at 2038-45.

tions to quash a subpoena[113] or opposition motions to compel disclosure or discovery.[114]

Compensatory preliminary damages would, especially for vulnerable plaintiffs, deter practices like discovery abuse, SLAPP lawsuits, or other gamesmanship tactics that create negative externalities on opposing parties, such as frivolous suits brought by plaintiffs to extract settlements from defendants.[115] Although compensatory preliminary damages would not solve discovery abuse writ large, they would significantly deter such abuse by requiring defendants to pay for a plaintiff's reasonable litigation costs and putting defendants on the hook for those costs as soon as the award was granted. Under the paradigm of compensatory preliminary damages, the defendant must internalize the cost of discovery, responding to motions, and the like, meaning defendants 2ould be deterred from bringing excessive motions during discovery or other phases of a case because they would also have to pay for the plaintiff's costs to respond.

Admittedly, there is a concern that compensatory preliminary damages only partially address and resolve concerns of discovery abuse by defendants. Given that compensatory preliminary damages provide for litigation expenses, plaintiffs' lawyers may drive up costs and create more strategic externalities by over-complying with discovery requests or requesting excessive discovery from defendants.[116] Although this is a valid concern because legal work is significantly motivated by its profitability, there is a parallel significant deterrent built into the award for compensatory preliminary damages: Courts will pay special attention to

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[113] *See* FED. R. CIV. P. 45.

[114] *See* FED. R. CIV. P. 37.

[115] *See* Rowe, *supra* note 105, at 151-52.

[116] This problem also generalizes: Plaintiffs' lawyers may drive up costs and engage in more gamesmanship given that the prospects of preliminary damages would incentivize them to be more litigious and legally proactive. For example, lawyers acting in bad faith might engage in a strategy where they bring multiple suits by indigent plaintiffs seeking preliminary damages in the hopes that the court will award such damages in at least one of the cases. Although this concern is valid, it is unrealistic because the potential preliminary fees from one case would surely not outweigh the work, expenses, and risk of ethics violations created by engaging in the foregoing strategy. As in discovery, mechanisms exist to prevent abuse of discretionary matters in the court system, and courts will likely respond to suspicions of such strategy with critical scrutiny and severe repudiation. *See, e.g.*, Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331 (E.D. Pa. 2012). In *Boeynaems*, a class-action case, the plaintiffs sought extensive additional discovery, which the defendants opposed on the grounds that they had already complied with substantial discovery requests before a determination of the class action was made, making additional discovery requests burdensome on the defendants. *Id.* at 334. Because the court saw that this burden fell disproportionately on the defendants, it ordered the plaintiffs to bear the cost of additional discovery until a decision was made as to the class action. *Id.* at 341-43.

the costs that plaintiffs generate in the case and scrutinize them for any potential abuse or fraud. In a case where compensatory preliminary damages are awarded, plaintiffs will and should face scrutiny from the courts for any potential abuse that could lead to even worse sanctions than is typical in situations where a court finds discovery abuse. Just as sanctions for discovery abuse are already codified by the Federal Rules of Civil Procedure,[117] the rules governing compensatory preliminary damages would likely include sanctions that compound existing discipline for discovery abuse.

Notably, Parchomovsky and Stein's debt-based model does not address the issue of litigation abuse because the debt-based model does not shift the risks of litigation costs from the plaintiff to the defendant at all. Awarding debt-based preliminary damages to plaintiffs leaves them as vulnerable to the gamesmanship of litigation abuse as they were originally, if not more vulnerable, because opposing parties might engage in abusive litigation tactics to increase the costs of moving for preliminary damages or to delay the award to their advantage. As a result, the value of debt-based preliminary damages would be reduced given the defendant's partial control over the costs of litigation that might make final recovery ultimately not worth pursuing the case in hindsight. Basically, well-resourced defendants could punish potentially deserving plaintiffs who are awarded debt-based preliminary damages. This suggests, once again, that debt-based preliminary damages are flawed in their design as a financial instrument, and this flaw extends to their design as a remedy.

C. Public-Goods Externalities: Access to Justice

In examining externalities at an even larger scale than system externalities, I now focus on benefits and burdens created by litigation and law that affect society as a whole and not just the legal system and its constituents.[118] Examples of such externalities that affect society as a whole include legal precedent, which clarifies the law, provides certainty regarding legally expected behavior in society, and legitimizes and stabilizes the rule of law, among other things.[119] Other and more negative public-goods externalities arise, for example, from the fact that most cases do not go to trial.[120] Although most cases do not raise legal questions that give rise to new precedent, it is plausible that at least some cases that settle rather than go to trial could have raised new precedent,

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[117] *See* FED. R. CIV. P. 37.

[118] Avraham & Hubbard, *supra* note 34, at 33.

[119] *Id.*

[120] *See generally* Galanter & Cahill, *supra* note 101.

and that among these cases—but for cost-prohibitive financial strains of bringing them to trial—some went to settlement or were abandoned.

Conceiving of access to justice problems as a public-goods externality, especially the financial limitations of access to justice, puts into focus how compensatory preliminary damages would address and resolve problems stemming from costs and benefits that affect both the court system and society as a whole. Preliminary damages do so by providing indigent plaintiffs recompense for a special type of harm to their fundamental interest in resolving their justiciable problems through litigation, and this recompense would provide them with the financial resources to see their case through litigation after meeting the requisite safeguards. Both the court system and society as a whole suffer from the limitations that indigent plaintiffs face when they are priced out of litigation due to the cost-prohibitive nature of their need for legal services. This harm can be illustrated by considering at least three functions that litigation serves.

Ordinarily, litigation is thought to serve two functions: dispute resolution and law declaration.[121] Under the dispute resolution rationale, civil recourse, including litigation, is considered a societal necessity because if individuals could not resolve their disputes in a fair and just manner, then society would resort to violence.[122] Under the law declaration rationale, litigation is necessary for the law to evolve as courts interpret and develop the law based on unique cases.[123] In essence, these rationales point to the regulatory functions of litigation as a way for civil society to resolve disputes and to produce, clarify, legitimize, and stabilize the law over time.

However, as many scholars have pointed out, a third understanding of litigation is that it performs a more fundamental civic or political function, such as self-governance[124] or political participation.[125] For example, Alexandra D. Lahav argues that litigation "promotes democracy by permitting participants to perform acts that are expressions of self-government," with civil rights litigation being the strongest example of that performance.[126] Lahav claims that litigation generally creates five democratic benefits: (1) obtaining recognition from a governmental officer, (2) promoting public reason and debate, (3) promoting transparen-

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[121] Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1658 (2016).

[122] *Id.*

[123] *Id.*

[124] *Id.* at 1659.

[125] *See generally* Gal Dor & Menachem Hofnung, *Litigation as Political Participation*, 11 ISR. STUD. 131 (2006).

[126] Lahav, *supra* note 121, at 1659.

cy, (4) aiding in the enforcement of the law by requiring wrongdoers to answer for their conduct, and (5) enabling citizens to serve as adjudicators on juries.[127]

A civil legal system that effectively excludes a large class of people from self-governing and producing the democratic benefits that Lahav has identified indicates that our society has a major public-goods externalities problem. Compensatory preliminary damages would facilitate the resolution of some of these externalities by promoting not only dispute resolution and law declaration for indigent plaintiffs but also self-governance or political participation by giving indigent plaintiffs who prevail the ability to meet their need for access to justice.

III. TWO FAIRNESS OBJECTIONS

While compensatory preliminary damages offer several benefits in the senses described in Part II, they also raise potential fairness concerns. One concern addressed in Part I is that an award of preliminary damages would be unfair to a plaintiff if the court finds for the defendant on the merits, signaling that the plaintiff's need for access to justice was not justified.[128] However, this concern is unwarranted because an award of preliminary damages arises out of the plaintiff's separate preliminary claim that their need for access to justice has been culpably harmed by the defendant, and there is a traceable link between *that* claim and other underlying harms of the litigation. Such concern arises from misunderstanding that compensatory preliminary damages serve to recompense plaintiffs for a special type of harm: their ability to access justice that is tied to the defendant's culpability for that harm. A defendant may ultimately be exculpated by a court for the other claims brought by a plaintiff based on a decision on the merits, but if the plaintiff demonstrates (1) a need for access to justice, (2) a likelihood of success on the merits for the underlying harms of the litigation, and (3) that the balance of equities favors the plaintiff, then that is not contradicted by a court's decision that the defendant is ultimately not at fault after a decision on the merits. Accordingly, this Part extends the foregoing concern related to fairness by discussing further concerns of this nature and objections to compensatory preliminary damages that raise the issues of responsibility and judicial bias.

In particular, there are concerns that compensatory preliminary damages are fundamentally unfair because they involve factors or circumstances that are not under a defendant's control and for which it

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[127] *Id.* at 1660.

[128] *See* discussion *supra* Section I.A.1.

would be inappropriate to hold defendants responsible as required for compensatory preliminary damages. That is, it would be unfair to force defendants to pay for the costs of litigation for indigent or less resourced plaintiffs, given that a plaintiff's financial circumstances and relative ability to pay those costs are not the fault of the defendant. Likewise, it would be unfair to penalize large, well-resourced defendants by forcing them to pay compensatory preliminary damages that another defendant bearing the same level of culpability would not have to pay because their opponent is similarly well resourced. There are also concerns that compensatory preliminary damages could result in biased decision-making by courts because the significant favorability shown to plaintiffs who are awarded compensatory preliminary damages might extend to other judgments, including a final judgment. However, because preliminary damages are compensatory for concrete and cognizable harms, questions about responsibility for factors outside our control—referred to as "moral luck"[129]—and questions about judicial bias do not significantly undermine their use case.

A. Moral Luck

Luck plays a significant role in determining liability in both our moral practices and our legal practices, especially in tort law.[130] People generally share the intuition that we are only morally responsible for what is roughly within our control to do or prevent.[131] But situations frequently arise, including in the legal context, in which we breach our obligations and duties to others despite the breach involving circumstances outside our control or realistic power to prevent. These are best illustrated by scenarios exploring the notion of luckiness in the tort of negligence.[132] A classic example from moral philosophy describes two equally negligent drivers who take virtually the same actions, but one of the drivers hits a pedestrian as a matter of bad luck.[133] In examples like these, what is under each driver's control is the same. The example as-

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[129] Nelkin, *supra* note 35.

[130] *See* John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1133-35 (2007).

[131] *See* Matthew Talbert, *Moral Responsibility*, STAN. ENCYCLOPEDIA PHIL. (Oct. 16, 2019), https://perma.cc/UHB4-YPUN ("The judgment that a person is morally responsible for her behavior involves—at least to a first approximation—attributing certain powers and capacities to that person, and viewing her behavior as arising (in the right way) from the fact that the person has, and has exercised, these powers and capacities.").

[132] *See, e.g.*, Jeremy Waldron, *Moments of Carelessness and Massive Loss*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387 (David G. Owen ed., 1995) (arguing that if compensatory damages vary in proportion to the severity of damages rather than the tortfeasor's culpability, then compensatory damages sometimes impose undeserved costs).

[133] *Id.*

sumes that the negligent drivers are driving carelessly for the same reasons under virtually the same conditions, and while both fail to pay attention to a red traffic light at a busy intersection, only one hits a pedestrian due to circumstances beyond the foresight and control of all parties.[134] In moral philosophy, "moral luck" refers to the practice of treating someone as morally blameworthy or praiseworthy for conduct that significantly involves factors outside of one's control or foresight, especially factors that are considered lucky or unlucky.[135] As Oliver Wendell Holmes noted concerning the tort of negligence, "The law considers . . . what would be blameworthy in the average man . . . and determines liability by that. If we fall below the level in those gifts, it is our misfortune . . . ."[136]

In the legal context, parties are typically liable for harms that involve causal factors beyond our control so long as the type of resultant harms are reasonably foreseeable. However, there is no requirement in tort law that the severity of compensatory damages owed to tort victims be proportional to the damages that were under the tortfeasor's control. For example, under a widely accepted rule in American tort law—the "eggshell rule"—the measure of what is owed to a tort victim varies according to the actual damages suffered by the victim due to a foreseeable type of harm.[137] However, the extent to which that type of harm results in damages to the victim is not constrained by the tortfeasor's liability or culpability for that extent.[138] Putting the eggshell rule plainly, a tortfeasor could kick two young adults with similar outward appearances in the shin with a mechanical force of around 100 pounds, leaving one with a bruise but the other, who has especially fragile bones, with a broken shin that requires expensive medical intervention. Although there is not a sense in which the tortfeasor is responsible for the fact that the latter victim was especially physically vulnerable, the tortfeasor is nevertheless responsible for the consequences of their tortious conduct. Consider also *Smith v. Leech Brain & Co.*, in which William Smith's wife sued her deceased husband's employer for burns to his lip caused by spattered molten metal arising from inadequate safeguards.[139] Although the burn was relatively minor, the injury developed into a cancer

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[134] *Id.*

[135] Nelkin, *supra* note 35.

[136] OLIVER WENDELL HOLMES JR., THE COMMON LAW 108 (Dover Publ'ns. 1991) (1881).

[137] *See* Steve Calandrillo & Dustin E. Buehler, *Eggshell Economics: A Revolutionary Approach to the Eggshell Plaintiff Rule*, 74 OHIO STATE L.J. 375, 375 (2013).

[138] *Id.* ("Liability attaches even when the victim's condition and the scope of her injuries were completely unforeseeable ex ante.").

[139] Smith v. Leech Brain & Co. [1962] 2 QB 405 (Eng.).

that led to the husband's death.[140] In granting damages, the court took into account the cancer and death and rejected the defendant-employer's argument that the award amount was disproportionate to the defendant-employer's degree of fault, finding the defendant-employer on the hook for that amount even though the degree of injury caused by his negligent action was not under his control.[141]

Like cases of negligence in which the extent of damages owed to a victim can be based on factors that are outside the negligent agent's control, compensatory preliminary damages are based on a theory of harm and liability that generally involves factors outside the control of the paying party. A plaintiff's need for access to justice is in part constituted by a complex and multidimensional web of past and present matters relevant to that person's life. These matters include their private choices that have shaped and continue to determine the rough trajectory of their life, but also their background, social capital or network, and luck. Our ability to plan our lives "in accordance with [our] own evaluations of ends"[142] is as constrained by structural or systemic factors as it is facilitated by our private choices. Cultural and economic resources are unevenly distributed across certain populations in a way that constrains their capabilities and opportunity, including their financial capabilities.[143] Social and economic networks of support designed to minimize our vulnerability and provide opportunities for self-improvement consistently fail certain populations,[144] especially people who experience chronic or acute poverty.[145] Setting that important debate aside, if the question of whether it is appropriate to award plaintiffs compensatory preliminary damages depends on their need for access to justice—which is in part based on their financial status as well as the inherent costs of legal services and litigation—then, arguably, compensatory preliminary damages require defendants to bear burdens on the plaintiff's behalf based on facts that are outside their control. Why should a defendant be required to pay the litigation expenses of a plaintiff with a sufficient need for access to justice when part of that need is based on factors for which the defendant is not liable? This question suggests that compensatory pre-

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[140] *Id.*

[141] *Id.*

[142] The phrasing concerning this ability is taken from Martha Nussbaum's capabilities approach to normative theory. *See* MARTHA NUSSBAUM, SEX AND SOCIAL JUSTICE 57 (1999).

[143] *See* JESSICA SILBEY, AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE 270 (2022).

[144] *See* Judith Butler, *Performativity, Precarity and Sexual Politics*, 4 REVISTA DE ANTROPOLOGÍA IBEROAMERICANA i, ii (2009).

[145] *See* David A. Super, *Acute Poverty: The Fatal Flaw in U.S. Anti-Poverty Law*, 10 U.C. IRVINE L. REV. 1273, 1277-80 (2020).

liminary damages would be inherently unfair to defendants by making them bear costs that are determined by factors that are not within their control.

The problem with this line of thinking is implicit in the earlier discussion of the tort of negligence. Although a tortfeasor may not be responsible for their victim's antecedent conditions that roughly determine or define the extent of their damages, the tortfeasor is responsible for the fact that the extent of those damages manifested as a result of the tortious conduct. In the same vein, although a defendant may not be responsible for an indigent plaintiff's financial status and its limitations on the plaintiff's ability to access justice through litigation, the defendant *is* responsible for the extent the plaintiff needs but is unable to access justice as a result of the defendant's *likelihood* of legal wrongdoing. Put differently, a defendant who has likely committed legal wrongdoing against a plaintiff who is unable to afford litigation has created an expensive need for civil recourse that should be a compensable item of damage when liability is established under the theory presented in Part I. The fairness of compensatory preliminary damages is thus not unlike the fairness of final compensatory damages that plaintiffs currently seek when they go to court to resolve their disputes. In both cases, defendants must bear costs to make the plaintiff whole, even though the severity of those costs is partially a function of factors outside the defendant's control. With regard to the extent of damages, the case for compensatory preliminary damages is not undermined by luck any more than final recovery is undermined by luck. At the same time, compensatory preliminary damages depend in part on the claim that the need for civil recourse can and should be a compensable item of damage flowing from the defendant's likelihood of legal wrongdoing.[146]

Although making the need for access to justice compensable is novel, redressing harm to this need is analogous to a relatively new concept of recovery in tort law, which illustrates why compensation for access to justice does not depart so significantly from the traditional tort paradigm. This new concept is called "medical monitoring," which refers to recovery for the cost of diagnostic treatment thought to be necessary to detect the potential onset of illness due to exposure to a risk of illness caused by the defendant.[147] The inquiry of a medical monitoring claim is not whether the plaintiff will, in fact, suffer harm in the future,

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[146] To be sure, this is a more controversial claim than the claim that a tortfeasor's liability for damages can extend to items of damage that are disproportionate to their fault or control for the foreseeable type of harm that led to those consequences.

[147] TURNER W. BRANCH & MARGARET MOSES BRANCH, 6 LITIGATING TORT CASES § 67:24 (2022).

but whether medical monitoring is reasonably necessary to properly diagnose warning signs of the disease that makes the costs of such a necessity a compensable item of damage given the defendant's liability for creating the likelihood of future harm that requires such monitoring.[148] Similarly, the inquiry of a motion for compensatory preliminary damages is not whether the plaintiff has, in fact, suffered the legal wrongdoing for which they seek final recovery after a decision on the merits. Rather, the focus is in part whether litigation is necessary for recourse but also prohibitive in light of the plaintiff's hardship, in turn making the cost of that necessity a compensable item of damage. Like medical monitoring, compensation for access to justice becomes an undertaking imposed by the defendant's liability for creating the likelihood of legal wrongdoing whose costly resolution in court has been forced upon the plaintiff. This is consistent with common law conceptions of tort injury and recovery.[149]

With respect to the costs that defendants must pay plaintiffs in order to make them whole, the underlying theory of liability for the extent of the plaintiff's damages is the same whether the compensatory damages are preliminary or final. Compensatory preliminary damages are thus no more unfair than compensatory damages awarded after a decision on the merits with respect to the extent or sum of the award. In medical monitoring claims, which are gaining acceptance,[150] courts have compensated plaintiffs for diagnostic expenses that flow from the plaintiff's need to monitor a likelihood of harm created by a defendant's actual or reasonably likely legal misconduct.[151] Similar to medical monitoring claims, in motions for compensatory preliminary damages, courts would compensate plaintiffs for litigation expenses that flow from the plain-

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[148] *In re* Paoli R.R. Yard PCB Litig., 916 F.2d 829, 849-50 (3d Cir. 1990).

[149] *See generally* BRANCH & BRANCH, *supra* note 147.

[150] On one hand, courts show a growing pattern of accepting medical monitoring claims for potential future injury as compensable damages arising from underlying tortious conduct, such as negligence. *See In re Paoli R.R. Yard PCB Litig.*, 916 F.2d at 849 (discussing how "medical monitoring is one of a growing number of non-traditional torts that have developed in the common law to compensate plaintiffs who have been exposed to various toxic substances."); Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 824 (Cal. 1993) (holding that "the cost of medical monitoring is a compensable item of damages"); Ayers v. Jackson Twp., 525 A.2d 287, 312 (N.J. 1987) (holding that "the cost of medical surveillance is a compensable item of damages"). Additionally, courts show a growing pattern of accepting medical monitoring claims as an actionable tort that permits recovery even absent actual injury. *See, e.g.*, Friends for All Child., Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 823 (D.C. Cir. 1984) (recognizing medical monitoring as a cause of action lying in tort for which awarding damages would also serve equitable ends); Barth v. Firestone Tire & Rubber Co., 673 F. Supp. 1466, 1478 (N.D. Cal. 1987) (holding that the costs of establishing and maintaining medical monitoring programs constitute an injury permitting equitable relief).

[151] *See, e.g.*, *Friends for All Child., Inc.*, 746 F.2d at 823, 832, 837.

tiff's need for access to justice created by a defendant's actual or likely legal misconduct.

B. Judicial Bias

Another concern for the fairness of preliminary damages stems from practical considerations about judicial bias. One worry is that compensatory preliminary damages might cause judicial bias because such damages require judges to assess the merits of a case at a preliminary stage and then revisit the merits at a later stage after significant resources have already been invested in the case and cannot subsequently be recovered.[152] This might be thought to create the conditions for what psychologists and economists call the "lock-in effect,"[153] which refers to a decision-maker being locked into their earlier decision given the investment of resources into the earlier decision that cannot be recovered.[154]

According to Kevin Lynch, whose legal scholarship focuses on civil litigation and access to justice, especially as it relates to preliminary injunctions, the primary cause of the lock-in effect is thought to be self-justification, meaning that decision-makers allocate further resources toward a suboptimal course of action due to the desire to justify a past decision.[155] Lynch argues that the preliminary injunction involves conditions where the lock-in effect can be expected to occur because it requires judges to assess the movant's likelihood of success on the merits in a premature stage of the case.[156] Of course, a significant limitation of Lynch's argument is that it requires empirical research to determine

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[152] Another related worry implicating bias is the concern that judges carry biases against low-income plaintiffs, which is likely to manifest when such judges review a motion for preliminary damages. *See* Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEVELAND STATE L. REV. 137, 152-58 (2013) (verifying implicit socioeconomic bias on the part of judges in Fourth Amendment and child custody cases). This bias is not unique to preliminary damages, however, and may manifest at any stage in a case involving indigent plaintiffs. Nevertheless, it is important to note that such bias would be more pronounced if preliminary damages were implemented. At the same time, this might lead to further scrutiny of judicial bias if greater attention is drawn to it in preliminary damages cases.

[153] The lock-in effect originated in studies on investment decisions, but it has also been studied in hiring decisions, performance appraisals, auctions, technology formats, and policy decisions. *See* Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 783-84 (2015) (citing referenced studies). Terms such as "escalating commitment," "entrapment," or, most commonly, "sunk costs" may be familiar. *Id.*

[154] *Id.* at 784.

[155] *Id.*

[156] *Id.* at 805.

whether lock-in affects preliminary injunctions, which Lynch explicitly recognizes.[157]

Lynch's concern for lock-in effects in the preliminary injunction context is also relevant because it raises fairness concerns related to awarding compensatory preliminary damages. Although compensatory preliminary damages and preliminary injunctions have significant structural similarities, compensatory preliminary damages are susceptible to the lock-in effect by design. Due to the significant investment of resources that the judge would order the defendant to put into the case by paying the plaintiff's reasonable litigation expenses, it is highly plausible that a judge would face significant pressure to justify their earlier assessment of the likelihood of success on the merits in their later assessment of the case, such as in a summary judgment motion. But like the limitation facing Lynch's argument, the idea that preliminary compensatory damages would be especially susceptible to judicial lock-in bias would require empirical research—research that is currently impossible to undertake given that compensatory preliminary damages are not (yet) an option.

Nevertheless, whether there is the potential for such bias, the judicial bias objection does not present a generalized challenge to introducing compensatory preliminary damages. If preliminary injunctions are justified exercises of a court's equitable discretion even though they may create a lock-in effect, then the same should be argued in favor of compensatory preliminary damages. Still, the concern for judicial bias raises an important distinction between the compensation- and debt-based models of preliminary damages. If the cause of the lock-in effect involving a motion for preliminary damages is the judge's need to justify their decision to award such damages in later assessments or judgments of the case, then compensatory preliminary damages might not be so susceptible to this effect because the standard governing their award does not entirely lie in factors that are revisited at later stages of the case. Accordingly, the likelihood of success on the merits is a significant assessment that will be related to later assessments when the merits are judged in light of the full development of the case, but the equally—if not more—important factor of the plaintiff's need for access to justice and balance of equities will not need to be revisited at later assessments of the case. Therefore, by design, compensatory preliminary damages are more resistant than preliminary injunctions to the lock-in effect.

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[157] *Id.* at 811.

CONCLUSION

My proposal for compensatory preliminary damages responds to a sobering truth: The civil legal system and the legal field, despite their putative ambitions for fairness, justice, equality, and the like, are indisputably creations and instruments of market capitalism.[158] Courts are stratified, legal services are allocated, and litigation expenses and outcomes are overdetermined by market principles that favor the economically powerful and subordinate the rest.[159] The same goes for fee-shifting regimes, like contingency agreements, and legal aid or public interest groups, which are significantly constrained and undermined by market structures and forces that sustain scarce levels of access to justice.[160]

The fact that Parchomovsky and Stein have offered an intervention that is based on debt for litigation expenses expresses the logic of capitalism. The promise of credit for litigation expenses from a preliminary damages award belies the devastating potential consequences of that debt for those expenses, debt that Parchomovsky and Stein take to be riskier for wealthy defendants than for plaintiffs.[161] Under capitalism, debt is a socially powerful instrument[162] as much as it is an opportunity to shift and stagger costs toward the future. Debt-based preliminary damages would likewise function to bring indigent plaintiffs under the courts' and defendants' control in the event that they must, but cannot afford to, repay their borrowed litigation expenses, leaving them worse off than originally. Likely, such damages would contribute to the disproportionate impact that debt already has on racially marginalized communities.[163]

My proposal to make preliminary damages compensatory awards resists capitalist logic. Rather than a financial instrument, it is an experimental procedure of equity and legal relief that can be introduced to help address a substantive social and economic problem intrinsic to a

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[158] Kathryn A. Sabbeth, *Courts and Capitalism: Market-Based Law Development*, LAW & POL. ECON. PROJECT (July 21, 2021), https://perma.cc/GGD6-GC5J.

[159] *Id.* For a discussion on low-income plaintiffs' increasing lack of access to litigation and relief, see generally Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531 (2016).

[160] *See, e.g.*, Sabbeth, *supra* note 158.

[161] *See* Parchomovsky & Stein, *supra* note 31, at 273-75.

[162] *See* DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 379 (2011) ("One must go into debt to achieve a life that goes in any way beyond sheer survival."). *See generally* TIM DI MUZIO & RICHARD H. ROBBINS, DEBT AS POWER (2016).

[163] *See* TASHFIA HASAN ET AL., ASPEN INST. FIN. SEC. PROGRAM, DISPARITIES IN DEBT: WHY DEBT IS A DRIVER IN THE RACIAL WEALTH GAP 2-5 (2022), https://perma.cc/FU9X-F55F.

market-based civil justice economy whose inflationary litigation costs stratify access to justice by economic class and, consequently, by race. This intervention is designed to compensate indigent plaintiffs for concrete harm to their ability to meet their need for legal services that can be traced back to the defendant's likely alleged wrongdoing for which the plaintiff seeks relief after a decision on the merits.

The proposal describes actionable legal reform that goes into substantial detail as to how compensatory preliminary damages would work that can be tested, modified, and adopted by jurisdictions to address externalities that are not captured by current civil procedure but should be. More practically, this Note describes a framework, a set of rules, and concrete examples that make compensatory preliminary damages realistic and not easily abused. It is not a dreamy solution to a particular aspect of the access to justice crisis that leaves the details and benefits of the solution to be worked out by policymakers, politicians, the judicial branch, legislative bodies, or other legal changemakers. However, acceptance of this solution does require an ability to reimagine the law and a willingness to recognize who the law currently benefits and why it is time for a change.