

THE FALLACY OF FULL COMPENSATION

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I. INTRODUCTION

The American legal system could provide full compensation if we wished. The civil remedies of specific performance, injunctions and restitution would accomplish the task in a wide variety of cases. Nevertheless, the civil system has been reluctant to employ these full compensation remedies, what this Article shall term "prohibitory remedies," opting repeatedly for obviously insufficient damages measured by plaintiff's loss. The civil system's preference for damages and concomitant reluctance to employ prohibitory remedies more regularly has been castigated as "materialistic,"¹ "niggardly,"² "amoral,"³ and showing "a marked solicitude for men who do not keep their promises."⁴ Indeed, the large weight of academic commentary is decidedly condemnatory.⁵

1. Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 348 (1981) ("Our materialistic society considers money an acceptable substitute for most recognized interests.").

2. Peter Linzer, *On the Amoral of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 111 (1981).

3. *Id.* at 112.

4. E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1216 (1970).

5. The literature attacking the many facets of the common law's preference for money damages is vast. See, e.g., OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* (1991) [hereinafter LAYCOCK, *IRREPARABLE INJURY RULE*]; Farnsworth, *supra* note 4; Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504 (1980); Douglas Laycock, *Injunctions and the Irreparable Injury Rule*, 57 TEX. L. REV. 1065 (1979) (book review) [hereinafter Laycock, *Injunctions*]; Linzer, *supra* note 2; Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994); Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341 (1984). Even the defenses of the common law preference

Perhaps because of the rather dogmatic and monolithic bent of the academic commentary, the law's predilection for incomplete remedies has been largely without apologists, save for the economist-lawyers who have protested that remedies ensuring full compensation would be preferred were it not for the omnipresent transactions costs that stand in the way.⁶ Even this limited economic justification for the predominance of undercompensatory damages has been thoroughly challenged on the ground that the transactions costs of prohibitory remedies compare favorably with those of damages.⁷

The more obvious line of defense has not been pursued. As Professor Schwartz has noted, one possible reason why full compensation, here referring to specific performance, is not routinely available is that "the law's commitment to the compensation goal may be less than complete; restricting specific performance may reflect an inarticulate reluctance to pursue the compensation goal fully."⁸ Schwartz, like others after him, declined to address that possibility, preferring to "presuppose[] the desirability of the compensation goal . . . [because] [n]either [a descriptive nor normative theory] exists at present and creating them is beyond the scope of this Article."⁹

for damages have been half-hearted. See Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978) (arguing that specific performance should be available in many cases, but not routinely); Edward Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365 (1982) (arguing against specific performance, but proposing a rule that would measure damages according to the cost of completion, rather than in accordance with traditional market value of loss).

6. The lawyer-economists identify two sources of these transactions costs. The first source is in the difficulty courts might have in ascertaining a compensatory value in the absence of a conventional, functioning market. See Kronman, *supra* note 5, at 355-65 (arguing that "unique" goods, for which there is no market, present insuperable transactions costs to a judge arriving at a compensatory price, thus militating in favor of an award of specific relief); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 569-70 (1977) ("[W]here the subjective values represented by the non-breacher's indifference curve are not reflected in any established market, the compensation principle may be held to be inapplicable in practice; specific remedies mandating full performance are commonly required where no monetary equivalency is ascertainable."). The second source of transactions costs is the difficulty parties may have in contracting out of a prohibitory remedy. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.11 (3d ed. 1986) (admitting that although specific performance solves the problem of undercompensation by damages, requiring seller to pay buyer an additional amount to release the contract "imposes additional transaction costs"); Yorio, *supra* note 5, at 1380-85 (arguing that buyers will tend to have lower cover costs than sellers, thus supporting preference for damages, which place the onus of cover on buyers).

7. See Schwartz, *supra* note 5, at 284-91 (arguing that the "post-breach negotiation costs" associated with specific performance are no greater than the transactions costs of damages).

8. *Id.* at 274.

9. *Id.* at 274 n.16.

Yet it is this line of inquiry that appears most productive, for it promises to move the debate away from the bottomless speculation about transactions costs to the more significant and logically prior question of whether the law ought to be committed to providing full compensation as the proponents of prohibitory remedies assume. Taking up the challenge implicit in Schwartz's discussion, this Article attempts to provide a descriptive and normative theory for the law's apparent disinclination to provide fully compensatory remedies.

Understanding the reluctance of the remedial system to provide full compensation requires first a focus on the commentators' criticisms of the prevalent damages remedy. According to the critics, the traditional damages remedy should not continue to predominate because it fails to provide adequate deterrence against wrongdoing,¹⁰ because it fails to require full compensation,¹¹ because it does not maximize wealth and achieve efficiency,¹² because it lacks commensurability with the harm,¹³ because it signifies the "commodification" of personal rights and interests,¹⁴ and because it is simply not the right thing to do.¹⁵

Instead of maintaining the dominance of the damages remedy, the legal system should, according to the critics, supplant it substantially with "prohibitory remedies" that prescribe a form of full compensation to be accorded the plaintiff. Prohibitory remedies differ from damages remedies in that they are designed to stop or undo completed transactions, even involuntary ones. Unlike damages, prohibitory remedies are not justified on the basis of harm caused, but rather on the basis of risk imposed; they seek not to channel private risk-taking, but to prohibit it; if substitutionary, they are measured not by harm, but by gain; they are not derived from private agreement or private markets, but by court decree; and they signify an attempt to generate appropriate, safety-producing behavior and adequate compensation by judicial order, and thus do not depend upon a defendant "correctly" configuring potential gains and potential losses prior to taking action.¹⁶ In short, prohibitory remedies attempt to "prohibit" harms;

10. *See, e.g.,* Friedmann, *supra* note 5.

11. *See, e.g.,* Schwartz, *supra* note 5.

12. *See, e.g.,* Ulen, *supra* note 5.

13. *See, e.g.,* Sunstein, *supra* note 5.

14. *See, e.g.,* Radin, *supra* note 5.

15. *See, e.g.,* Linzer, *supra* note 2.

16. The remainder of this Article will provide further definition to the contours of the term "prohibitory remedy." The historical phrase "equitable remedies" denotes many of the same remedies, but the inexactness of that historical phrase, and the fact that some forms of these remedies, particularly

damages remedies "price" them.¹⁷

There are two problems, one practical and one normative, with a remedial system that employs prohibitory remedies to provide full compensation. First, practically, prohibitory remedies will not necessarily produce deterrence, compensation, wealth, efficiency, or justice any better than do damages remedies; in fact, in many cases they may do worse. Second, normatively, the goal that underlies prohibitory remedies, that is, full compensation, is not the unblemished good that the critics have presumed it to be. Full compensation may only be achieved at a cost, not just to defendants but to society, and it may be a cost that society prefers not to bear. This practical and normative attack on full compensation also provides the practical and normative justification for its denial.

Parts II and III discuss the practical problem with prohibitory remedies, that they are in fact inadequate to the tasks the critics have posited for them. First, Part II outlines the central and pervasive dichotomy in the law of remedies between pricing remedies and prohibitory remedies, and attempts to characterize the remedies of injunctions, specific performance, restitution, and some others as prohibitory in nature. Next, Part III examines the effectiveness of prohibitory remedies at fulfilling the central tasks of the law of remedies, those of reducing the incidence of harm and assuring compensation. Regarding harm, it argues that the routine employment of prohibitory remedies will not only fail to reduce the risk of harm but may actually tend to increase the incidence of undesirable harm-causing activity. Similarly, it contends that the goal of full compensation will likewise tend to be frustrated by the widespread adoption of prohibitory remedies.

Parts IV and V present the normative justification for a remedial system that relegates prohibitory remedies, and thus full compensation, to a secondary role. First, Part IV questions the desirability of a remedial system that actually seeks to compensate plaintiffs fully. Prohibitory remedies represent a remedy that is at bottom a redistributive one, and not a corrective one; thus their implementation properly depends on allocational decisions that might sometimes disprefer a particular distribution, even one that appears "fully compensatory." Part V attempts a rehabilitation of

restitution, appeared at both law and equity, requires the invention of what is hoped will prove to be a better term.

17. This division in remedial law is similar to the division between conduct that the legal system terms civil and that it terms criminal. See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 *B.U. L. REV.* 193 (1991).

prohibitory remedies, suggesting a framework for their use that fulfills the more limited aims for which they are suited. Properly understood, prohibitory remedies provide needed deterrence in those cases where the predominate damages remedy is insufficient. This Part also suggests that the various "relegation doctrines" that traditionally inhibit the use of prohibitory remedies, such as the irreparable injury rule and the "uniqueness" test, properly maintain harm-based damages as the primary remedy and thus desirably limit compensation for the sake of maximizing social wealth and minimizing the needless infliction of harm.

II. PRICING AND PROHIBITORY REMEDIES

The law of remedies displays a pervasive division between loss-based damages and prohibitory remedies. This division does not mirror the more traditional one between equitable and legal remedies, or between substitutionary and specific relief. These older notions do not fully capture the fundamental choice contemporary courts must make between relegating plaintiffs to remedies that seek to "price" illegal behavior and those that seek to prohibit it.¹⁸

This Part will survey the law of remedies and outline the dichotomy between market-based damages, which are pricing remedies, and prohibitory remedies. It will characterize the remedies of injunctions, specific performance, restitution, and some others as prohibitory, and will discuss the significance of that characterization, demonstrating how the fulfillment of prohibitory remedies' claim to fuller compensation and increased deterrence, although not entirely improbable, rests substantially on the timely and sagacious intervention of the judge who awards them.

A. *The Pricing Remedies and Their Detractors*

Damages are substitutionary,¹⁹ measured in terms of the market or "use" value of the damaged interests.²⁰ Their use as a remedy for the

18. Generally, equitable and specific remedies may be classified as "prohibitory," while "legal" and substitutionary remedies may be described as "pricing." This general proposition contains some large exceptions, however, that demand a new set of descriptive terms. For example, some "legal" remedies, such as replevin, and some "substitutionary" remedies, such as restitution, fall within the category of "prohibitory."

19. See Goetz & Scott, *supra* note 6, at 572-73.

20. 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1004 (1964) ("In the process of determining values, market prices will always be used if such prices are available."); see also *id.* at § 1022. Goetz and Scott term this fundament of damages the "objective compensation principle." Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA.

harm resulting from a tort or breach of contract facilitates risk-taking by informing the potential wrongdoer or contract breaker of the "price" that must be paid to generate profits. This "pricing" function encourages profit-making activity, the "take and pay," at the expense of victimizing the plaintiff.²¹ Damages based on harm engender theoretically sufficient deterrence by ensuring that no breach of contract or other risk-causing activity is undertaken where the defendant's expected damages exceeds the expected gains.²² As a result, protection of the plaintiff's interests depends on the private, individualized decisions of a defendant weighing gains and harms prior to taking action.

The traditional preference for damages remedies²³ and its reliance on private decisionmaking has some discomfoting ramifications. First, in the case of contract, the law's predilection for the "expectation" measure of damages, and its general rejection of more protective remedies such as specific performance, suggests that breaches of contract are not only tolerated but are apparently encouraged under appropriate economic conditions.²⁴ The law's encouragement of conduct that would be unethical

L. REV. 967, 986 (1983). Resale or cover price may also be used to measure damages in place of the market value of the loss.

21. For the seminal description of this liability function, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-10 (1972).

22. See POSNER, *supra* note 6, § 4.8. For a summary of the efficient breach theory in the context of contracts, see Linzer, *supra* note 2, at 114-15; for torts, see POSNER, *supra* note 6, § 6.1, at 147-51. This deterrence would, in theory, be "perfect" only in the sense that it would provide a mechanism for deterring conduct that causes more social harm than good; thus, this "perfect" deterrence would not discourage socially profitable conduct that might cause a great deal of harm. The reliance measure of damages also prices defendant's conduct, except in the unusual case where reliance damages exceed expectation damages, such as in the case of a losing contract, and the plaintiff sues in quantum meruit, a restitutionary damages measure. See, e.g., *United States v. Algernon Blair, Inc.*, 479 F.2d 638 (4th Cir. 1973). In such a case, the restitutionary remedy is prohibitive. See *infra* notes 101-22 and accompanying text.

23. See, e.g., Farnsworth, *supra* note 4, at 1154 ("[M]oney damages were regarded as the norm and specific relief as the deviation, even where the law could easily have provided specific relief without any cooperation from the defaulting promisor.").

24. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS ch. 16, introduction (1981) ("The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from the breach."). Breach is encouraged by the "signal" the expectation measure sends to the parties that an offer superior to the expectation damages award will yield a profit. In this sense, the rule of *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854) (limiting contract damages to those "fairly and reasonably . . . arising naturally, i.e., according to the usual course of things"), renders damages predictable, thus facilitating breach. See Jeffrey M. Perloff, *Breach of Contract and the Foreseeability Doctrine of Hadley v. Baxendale*, 10 J. LEGAL STUD. 39 (1981).

in most contexts of human interaction demonstrates that deterrence in the sense damages engenders is a term of some refinement, connoting a vision of the social good that favors wealth maximization.²⁵ Second, this amoral corollary of the traditional damages remedy appears in a worse light in tort. Here, where the garden-variety cases frequently involve personal injuries, sometimes tragic ones, the theoretician's celebration of the "liability" regime appears callous. To be blunt, the legal system's traditional preference for damages is a metaphorical way of saying that the desired incidence of contractual and tortious harms is not zero.

Perhaps in light of the discomfiting corollaries to harm-based damages, it is not surprising that the tradition has been under attack in both scholarly writing²⁶ and judicial decisions,²⁷ and along many different fronts.²⁸ Although this attack is diverse, it has one central theme: that the traditional harm-based damages remedy should be supplanted by "prohibitory" remedies that override the defendant's private calculus by prescribing the protection to be accorded the plaintiff. This sustained criticism of damages aims at generating a growing preference²⁹ for prohibitory remedies such as injunctions in their various forms, specific performance, and restitution or disgorgement and its cousins such as rescission and reformation,

25. See Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 194 (1980) (questioning whether "social wealth is a worthy goal").

26. See *supra* note 5.

27. See *People v. Cahan*, 282 P.2d 905 (Cal. 1955) (adopting exclusionary rule in preference to damages); Roger J. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319 (detailing the growth of the exclusionary rule). See generally Linzer, *supra* note 2, at 126-30.

28. The complaint against harm-based remedies arises in many contexts: the preference for specific performance in lieu of damages, see Schwartz, *supra* note 5; the refusal to balance plaintiff's request for injunctive relief against the traditional "presumption" in favor of damages remedies, see LAYCOCK, IRREPARABLE INJURY RULE, *supra* note 5; the preference for disgorgement, and not damages, in certain cases, see William Drayton, *Economic Law Enforcement*, 4 HARV. ENVTL. L. REV. 1 (1980); the argument in favor of exclusion, a disgorgement remedy, against a damages remedy to deter police misbehavior, see Saul X. Levmore & William J. Stuntz, *Remedies and Incentives in Private and Public Law: A Comparative Essay*, 1990 WIS. L. REV. 483, 490-95.

29. Professor Farnsworth has suggested that the restrictions against the use of specific performance have been liberalized. Farnsworth, *supra* note 4, at 1156 ("[T]he current trend is clearly in favor of the extension of specific relief."). Regarding injunctions, one commentator has argued that the erosion of the presumption in favor of damages has a long history. LAYCOCK, IRREPARABLE INJURY RULE, *supra* note 5, at 19 ("The death of the irreparable injury rule is not the product of recent judicial activism."). Laycock examined 1400 cases to determine whether or not courts have tended to replace the traditional damages remedy with a prohibitory one (injunctions) and concluded that, despite the supposed presumption in favor of damages, the "plaintiff winds up with the very thing he wanted, and the preference for specific relief becomes irrelevant." Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 691 (1990).

including the rule of exclusion in criminal cases.³⁰

Prohibitory remedies function in an opposite manner from damages: they implicitly or explicitly reject the market value of loss as an appropriate measure of compensation. Instead, prohibitory remedies provide, by judicial order, superior substitutionary or specific relief. Essentially, prohibitory remedies justify judicial intervention into and curtailment of market-based decisions on the promise of awarding greater compensation and generating greater deterrence.

B. Injunctions

The injunction is the paradigmatic prohibitory remedy. It is explicitly risk-based, issued to stop a threat of an inchoate harm.³¹ Its aim is, at a minimum, to prohibit defendant's conduct that might lead to harm; occasionally it will take the further step of mandating certain conduct to lessen the risk of harm to an even greater extent.³² The injunction is issued under the power of a government agent by court order, and it enforces that power through public remedies, including coercive measures or punitive sanctions.³³ Unlike damages, which depend upon a defendant's "correct" calculation of risks and gains, the injunction attempts to avoid harmful actions through public orderings.³⁴

As a result of the alleged demise of the "irreparable injury" rule, the traditional limitation on the use of injunctions has been removed. An increased use of the injunction promises to impact significantly on the roles

30. On the rule of exclusion as a restitutionary remedy, see Levmore & Stuntz, *supra* note 28, at 490

31. *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (holding that a present threat of injury and not merely a past wrong was required to give rise to equitable relief); *Hecht Co. v. Bowles*, 329 U.S. 321, 321 (1944) ("The historic injunctive process was designed to deter, not to punish.").

32. See 1 DAN B. DOBBS, *LAW OF REMEDIES* § 2.9(1) (2d ed. 1993) ("The prohibitory injunction forbids an act. . . . The mandatory injunction orders an affirmative act or course of conduct."). Professor Fiss has suggested different classifications for injunctions. FISS, *supra* note 5 (dividing injunctions into reparative, preventive, and structural).

33. See generally 1 DOBBS, *supra* note 32, § 2.8; see also Rendleman, *supra* note 1, at 356-58.

34. Even though, in some cases, the legal rights to which the court's injunction gives effect were generated by private arrangement, the remedy remains essentially "public," as the judge shapes the remedy rather than passively accepting it from a conventional market, as is the case with damages remedies, which rely on market values. The more difficult case is where the parties have tried to contract into an injunction, much like they might agree to specific performance, liquidated damages, or other outcomes. Here, the judge in ordering performance seems to act in accordance with contractual intention. Nevertheless, there may be good reasons to frustrate this intention by refusing to enforce the provision. The rule against enforcement and its defense will be discussed *infra* notes 76-84 and accompanying text.

of the plaintiff and the judge in minimizing harmful behavior, an impact that renders the injunction a problematical device for achieving remedial goals.

1. *The Rebirth of Equity*

Equity is supposed to be moribund.³⁵ It was obliterated as a federal form of action with the merger mandated by the Federal Rules of Civil Procedure;³⁶ most states likewise no longer insist on rigid pleading in conformance with the antiquated forms of action.³⁷ Equity remains significant, however, mainly because of the continuing employment of its powerful remedies, particularly the injunction.³⁸

Injunctions were historically relegated to a secondary status behind the preferred remedy of harm-based damages, thus forming a "hierarchy" of remedies.³⁹ This hierarchy of remedies found expression in the "irreparable injury" rule or "inadequate remedy at law" rule,⁴⁰ which was thought to require that an injunction would be issued only if the preferred remedy of legal damages was "inadequate," or, to say the same thing, if the injury was "irreparable" by ordinary money damages.⁴¹

The irreparable injury rule, and the remedial hierarchy it established, has

35. Professor Dobbs begins his discussion of the history of equity by alluding to equity's demise: "Two systems of courts once existed in Anglo-American law." 1 DOBBS, *supra* note 32, § 2.1(1); *see also id.* ("[T]he separate courts of law and equity have long since been merged into a single court of general jurisdiction."); DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 5 (1985) ("[T]he line [between law and equity] is jagged and not especially functional; it can only be memorized.").

36. Rule 2 of the Federal Rules of Civil Procedure states: "There shall be one form of action to be known as 'civil action.'" FED. R. CIV. P. 2.

37. Forty-six states and the District of Columbia have merged the historic legal and equitable forms of action. The only states that have held out are Arkansas, ARK. CODE ANN. § 16-57-101 (Michie 1987), Delaware, DEL. CODE ANN. tit. 10, §§ 341-45 (1974), Mississippi, MISS. CONST. art. 6, § 159 (1972), and Tennessee, TENN. CODE ANN. §§ 16-11-101 to -205 (1980).

38. The historical term "equity" also often becomes of relevance in contemporary cases involving the right to trial by jury, the availability of which depends upon its traditional provision. *See, e.g.,* Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935) ("The right of trial by jury thus preserved is the right which existed under the English common law when the [Seventh] Amendment was adopted.").

39. FISS, *supra* note 5, at 1, 38.

40. *Id.* at 1, 38-39. One writer has argued that the two formulations of the rule actually refer to two different considerations. Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 392-94 (1983). *But cf.* LAYCOCK, *IRREPARABLE INJURY RULE*, *supra* note 5, at 8-9 (arguing that the two formulations refer to the same consideration).

41. *See Developments in the Law-Injunctions*, 78 HARV. L. REV. 994, 997-1021 (1965) (identifying the many ways in which a legal remedy may be deemed "inadequate").

been under sustained academic attack.⁴² The rule's detractors have termed the rule "dead" in theory, in logic, and in practice, claiming it is of little use either in understanding the law or in resolving cases.⁴³ Indeed, understood literally, the irreparable injury rule could never preclude injunctive relief.⁴⁴ A plaintiff would almost always be better compensated by an order directing defendant to do precisely what plaintiff would prefer than by a sum of money designed to compensate plaintiff for harm.⁴⁵ This preference might often obtain even in regard to an award of damages sufficient to allow plaintiff to obtain a substitute performance, for by defendant's provision of the performance the plaintiff avoids the costs associated with locating and acquiring a sufficient replacement.⁴⁶

Further, according to the critics, a literal understanding of the irreparable injury rule renders it of negligible importance except as a "tie-breaker," and a seldom-used one at that.⁴⁷ The rule expresses a technical presumption in favor of awarding legal damages only where those damages are equivalent to the equitable award. This equivalency might result, though rarely, where the item lost is a fungible item for which a ready market is available.⁴⁸ In virtually any other circumstance, the supposedly important irreparable injury rule is irrelevant to the decision whether or not to award equitable or legal relief.

Indeed, it appears that common law courts have long disregarded the

42. Professor Linzer reported that the inadequacy rule was termed "since Justice Story's day . . . 'essentially a jurisdictional anachronism'" Linzer, *supra* note 2, at 122 (quoting John P. Frank's remarks at the 1979 meeting of the American Law Institute). See also Farnsworth, *supra* note 4; FISS, *supra* note 5; LAYCOCK, IRREPARABLE INJURY RULE, *supra* note 5.

43. The most compelling statement of this position is found in LAYCOCK, IRREPARABLE INJURY RULE, *supra* note 5; and Laycock, *Injunctions*, *supra* note 5.

44. Laycock, *Injunctions*, *supra* note 5, at 1071 ("[N]o legal remedy is adequate unless it is 'as complete, practical and efficient as that which equity could afford.')" (quoting *Terrace v. Thompson*, 263 U.S. 197, 214 (1923)).

45. See Schwartz, *supra* note 5, at 274 ("Specific performance is the most accurate method of achieving the compensation goal of contract remedies because it gives the promisee the precise performance that he purchased.")

46. *Id.* at 275-78.

47. Laycock, *Injunctions*, *supra* note 5, at 1069-70. Assuming that no legal remedy is "adequate" unless it affords relief "as complete, practical and efficient" as equity, see *supra* note 44, then:

1. Plaintiff is entitled in all cases to the most complete, practical, and efficient remedy.
2. If a legal and an equitable remedy are equally complete, practical, and efficient, the legal remedy shall be used.

Laycock, *Injunctions*, *supra* note 5, at 1071. Thus, the rule simply breaks ties that might occur under the second proposition. *Id.*

48. *But see* Schwartz, *supra* note 5, at 275-78 (identifying costs to plaintiff of acquiring fungible substitute performance).

supposed preference for legal damages expressed in the irreparable injury rule. Professor Laycock's review of a large sample of recent decisions indicated that the irreparable injury rule infrequently provided a bar to obtaining equitable relief.⁴⁹ Moreover, courts have recently found "irreparable injury" in such a variety of contexts that, "[i]f plaintiff has any plausible need for specific relief, she can describe that need as irreparable injury and find ample precedent to support her claim."⁵⁰

The demise of the irreparable injury rule's limitation on the availability of injunctive relief suggests that courts should award an injunction to any plaintiff who wants one, provided other elements are satisfied.⁵¹ In other words, if the goal of remedial law is to provide full compensation,⁵² and the plaintiff informs the court that equitable relief is the relief that better affords compensation to the plaintiff, then the court should give the preferred prohibitory relief. Injunctions should issue "automatically" upon request.⁵³

2. *The Effect of Frequent Injunctions*

If the traditional presumption in favor of money damages is indeed dead, a conclusion not free from doubt,⁵⁴ then the emergence of the injunction

49. Laycock, *supra* note 29.

50. *Id.* at 722.

51. Professor Laycock has proposed a series of rules and considerations to supplant the irreparable injury parameter. LAYCOCK, IRREPARABLE INJURY RULE, *supra* note 5, at 265-79 (suggesting that courts allow plaintiff a choice of remedies, limited by such notions as "undue hardship, burdens on third parties, impracticality," and other considerations).

52. Professor Yorio argued that the goal of full compensation should not be the sole goal of remedial law, and that it should be tempered by other considerations, such as fairness and efficiency. Yorio, *supra* note 5, at 1370-88.

53. Professor Laycock has argued that plaintiffs should be "presumptively entitled to choose either a substitutionary or specific remedy," although not without some of the traditional "hardship" considerations qualifying that entitlement. LAYCOCK, IRREPARABLE INJURY RULE, *supra* note 5, at 266-68. This notion of an "automatic" injunction has been presented in unalloyed fashion regarding specific performance of contractual obligations. Schwartz, *supra* note 5, at 305 ("[P]romisees should be able to obtain specific performance on request.").

54. There are several reasons to question the accuracy of Professor Laycock's empirical finding that courts do not use the irreparable injury rule to relegate plaintiffs to legal damages. Laycock's survey of cases was limited to federal and state cases culled from digest entries and cases appearing in various "new cases" reporters. Laycock, *supra* note 29, at 701. Unavoidably, this sampling may have been too limited in several respects. Injunctions frequently are sought as preliminary or temporary relief, asking judges to order or restrain certain actions on short notice, effective immediately. Presumably, many of these requests are turned down for various reasons, one of which may be that the plaintiff should be satisfied with money damages. It is likely that extremely few of these emergency decisions, particularly those in state courts, are the subject of a formal written opinion, and even less likely that

from the ashes of the irreparable injury rule threatens a loss of the benefits that the irreparability rule latently provided. At bottom, the irreparable injury rule allocated the burden of risk-taking to potential defendants, to those about to engage in risk-producing behavior.⁵⁵ Thus, the rule allowed, and perhaps encouraged, the potential plaintiff to remain unconcerned about hypothetical infringements of his rights or interests. To a great extent, plaintiff enjoyed his safety as a consequence of the risk-creation decisions taken by others.⁵⁶

Similarly, the irreparable injury rule lessened the difficulty the judge experienced in remedying harms. The bias created by the irreparable injury rule in favor of damages actions allowed the judge to act basically as a trial referee, regulating the information transmitted to the jury and providing instructions to inform the jury's deliberations. In damages actions the jury must make the difficult remedial decision. Even in bench trials involving the determination of damages, the judge's decision was not as hard as it could be, because the decision in a damages case, although sometimes a matter of close judgment, is unidimensional, consisting of the ascertainment of a monetary award approximating loss.

The rule's demise promises a novel and more burdensome role for

a ruling that did produce an opinion would be published in one of the popular digests, which focus, at the state level, on appellate opinions. Thus, any firm conclusions about the viability of the irreparable injury rule in these cases would appear unavailable from Laycock's sampling. Even with regard to permanent injunctions, many state and federal courts do not always publish their opinions. Moreover, Laycock's search provided no means to determine, even in a rough, experiential way, the number of cases where plaintiffs voluntarily, or upon successful motion of the defendant, pared down the requests for relief in light of the rule.

Finally, in regard to those cases that did generate published opinions on appeal, this subset of all cases would appear particularly likely to generate decisions where the irreparable injury rule did not, as Laycock found, seem to matter: parties whose requests for injunctions are refused at the trial level for failure to show "irreparable injury" are particularly unlikely to appeal. First, the passage of time will render the request for an injunction moot. Second, the trial court's decision on this issue is a "factual finding," protected from reversal under the "clearly erroneous" standard of review, thus diminishing the number of losing parties who will attempt to raise an appellate issue on those grounds. Consequently, it is unsurprising that Laycock found few appellate decisions reversing on the basis of the irreparable injury rule.

Of course, the fact that the empirical result is ambiguous does not necessarily mean that Professor Laycock is wrong in his conclusion. Rather, it suggests that his conclusion does not appear to be supported by persuasive empirical evidence. Cf. Gene R. Shreve, *The Premature Burial of the Irreparable Injury Rule*, 70 TEX. L. REV. 1063, 1064-65 (1992) (book review) (arguing that "[n]umerous cases cited in the book suggest that the rule is alive in the minds of judges").

55. See *supra* notes 19-22 and accompanying text.

56. Of course, certain doctrines, such as avoidable consequences and limitations on foreseeability, induce potential plaintiffs to take adequate safety precautions. See *infra* note 269 and accompanying text

plaintiffs in detecting violations of law and for courts in remedying them. Regarding plaintiffs, the demise of the "inadequacy" requirement puts great stress on the "standing" or "injury" element, the only ground remaining for courts to deny equitable relief.⁵⁷ This requirement states that plaintiff must allege and prove that he suffers from an impending "threat of harm" sufficient to give rise to an adequate controversy.⁵⁸ Thus, the successful action for an injunction puts a premium on a plaintiff's ability to sense impending injury and on a plaintiff's ability to seek judicial redress quickly, prior to the threat's actualization. It seems probable that the mere threat or promise of some future harm tends, in most cases, to be more difficult and costly to detect than a past harm.⁵⁹ If that is true, then plaintiffs bear a greater burden in a regime that prefers injunctions to harm-based damages. In a regime of injunctions, it is decidedly the plaintiff's job to sense impending harms and take action to avoid them; in a damages regime, this task belongs to the defendant.

The irreparability rule's demise also promises to ask much of judges, to the extent that ordering personal injunctive relief ordinarily requires greater judicial supervision and other resource expenditures than does a trial to ascertain money damages.⁶⁰ The burden of issuing the injunction falls on

57. If courts are unable to rely upon the irreparable injury rule to deny requests for injunctive relief, then the primary element separating a plaintiff from the relief is that the "threat of injury" be sufficient. *Los Angeles v. Lyons*, 461 U.S. 95, 110 (1983) (requiring "a real and immediate threat"). The injury requirement and its correlatives play a similar role in other contexts. See *infra* notes 222-26 and accompanying text; *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (holding that a declaratory judgment plaintiff must present a "justiciable controversy . . . [that is] definite and concrete, touching the legal relations of parties having adverse legal interests"); *Ayers v. Jackson Township*, 525 A.2d 287, 304-08 (N.J. 1987) (holding that a lack of "actual injury" constitutes grounds for denying relief to plaintiffs seeking compensation for inflicted risk of cancer).

58. See *Lyons*, 461 U.S. at 105 (holding that plaintiff failed to "establish a real and immediate threat that he would again be stopped . . . by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part").

59. Exceptions to this assertion are not hard to imagine. In a case involving competitive injury to a large business, for example, it may be harder to detect the fact that one's business has been harmed than it is to ascertain that someone might be inclined to do that harm. In any event, the textual proposition is simply that a system that relies on plaintiff-generated harm-avoidance necessarily depends on the opposite (and doubtful) assertion being true, to wit: that plaintiffs may deduce more easily that they might be harmed in the future than they can determine that they have been harmed in the past. Conversely, a system that seeks deterrence through harm-based remedies relies on the presupposition that completed harms are easier to perceive than inchoate threats.

60. A number of commentators have debated whether the administrative costs of injunctions are greater than the alternative damages remedy. See, e.g., Schwartz, *supra* note 5, at 292-96 (arguing that administrative costs are probably not greater for injunctions than for damages); POSNER, *supra* note 6, § 4.11 (arguing that specific performance is more costly to administer than damages remedy). See generally LAYCOCK, IRREPARABLE INJURY RULE, *supra* note 5, at 223 ("The less adequate the damages

the trial judge, and it is a difficult one. The injunction requires the judge to prescribe a course of behavior of a party, ordering that the defendant perform or not perform certain activity. This entails a theoretically complex set of predictions. An injunction is based on a prediction that the defendant's course of conduct, if continued, would cause legally cognizable harm to the plaintiff.⁶¹ Thus, in issuing an injunction, the judge must make a prediction of the defendant's behavior,⁶² a prediction whether or not the anticipated behavior will harm the plaintiff in a legally cognizable way,⁶³ and whether or not the form or language of the injunction that the judge contemplates will be effective in preventing that harm.⁶⁴ As a result, it appears likely that the increasing use of injunctive remedies in a world without a remedial hierarchy tends to render the judge's task more difficult, and simply multiplies the opportunities to err.⁶⁵

3. *An Example of an Injunction's Difficulty*

Consider the difficulty confronting the judge who wishes to enter an injunction in a relatively simple case. Imagine a stock broker, Sue, who leaves the employ of one broker/dealer firm, Traditional, for its competitor,

remedy, the more willing courts are to undertake complex specific relief." In certain cases, such as one involving the anticipatory repudiation of a take-and-pay contract for ten years' requirements for purchase of a commodity on a fluctuating price scale, measuring damages appears to present as difficult a task as devising and administering an injunction. The damages remedy in such a case is difficult to devise because it attempts to make extended and tenuous predictions about the future. Thus, the damages remedy appears as complex as an injunction precisely where it partakes of one of the essential attributes of the injunction.

61. Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1101-02 (1986) ("[A] court can only predict the obligor's future conduct based on its understanding of the obligor's present and past conduct.").

62. *Id.* at 1102 ("The parties act within a dynamic socioeconomic context in which their behavior and relationship are subject to constant change.").

63. *Id.*

64. This latter aspect of the judge's prediction has been overlooked, but it may constitute the most difficult of the predictions. The judge's prediction as to the effectiveness of his order parallels the prediction made by regulatory agencies when they prescribe behaviors to prevent harms. The frequent inaccuracy of the prescriptions of these regulators, despite being informed by comprehensive fact-finding and substantial resources, *see, e.g.*, STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982); PAUL W. MACAVOY, *THE REGULATED INDUSTRIES AND THE ECONOMY* (1979); GEORGE J. STIGLER, *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* (1975), does not bode well for the lonely trial judge who would attempt to perform the same function through the injunction. *See also* Jost, *supra* note 61, at 1104 ("The future tricks the court; the injunction, the court's now outdated prediction, plods off into irrelevancy, leaving the beneficiary bereft of protection or the obligor subject to oppression.").

65. *But see* FISS, *supra* note 5, at 80-85 (arguing that the degree of prediction problems attendant to the injunction are not unusual among legal instruments).

Progressive. Sue resigns on a Friday afternoon. Immediately after she leaves the office, Sue mails letters and begins placing telephone calls to the customers she serviced while at Traditional, encouraging them to transfer their accounts to her at Progressive. This solicitation is in direct violation of Sue's employment agreement with Traditional, which provides that she will not solicit these customers should she leave. By Monday, one hundred of Sue's three hundred clients have mailed their transfer directives to Traditional. On Tuesday, Traditional's lawyers file suit in the state trial court, asking the judge to issue a preliminary injunction, a prohibitory remedy.

The first question for the judge who would enjoin Sue is whether or not the injunction's terms should be limited to plaintiff's legal right, as provided by the contract. An injunction so strictly limited would provide simply that Sue not "solicit" her former customers; thus implying that she could talk to them by telephone, write them letters, take them to lunch, and so forth, all in a subtle effort to win their transfer of business, so long as she did not utter the words or act in an overt manner that would constitute a solicitation. Obviously, an injunction of this sort does little to protect the interests of Traditional. Moreover, the court might be disinclined to issue such a narrow injunction because of a fear of easy circumvention of the spirit of its injunction, distrust of Sue's willingness to comply, and concern that Sue could easily "solicit" during a private conversation and not be caught. Thus, the court might prefer to craft an injunction that contains a "bright line" more easily enforced.

How is that broader injunction to be crafted? This issue is of paramount importance, because a contempt citation, with possible summary imposition of penalties or criminal prosecution, looms as the remedy for violation of the court order. One concern in drafting an injunction that gives plaintiff slightly more than its contractual right involves treating the customers appropriately. Should the injunction allow Sue to service those customers who have already transferred their accounts to Progressive? What about those customers who have decided to transfer, but have yet to mail their directive: should the injunction attempt to preclude their transfer, a remedy that thwarts the wishes of a party not before the court? What about those customers who have yet to read Sue's letter: should their freedom to do business as they please be stopped by a contract between Sue and Traditional?

Another set of problems arises in regard to the idea of "solicitation." If former customers call Sue, should Sue be allowed to speak with them? May Sue tell the customer where she is now employed, and in what capacity?

May Sue accept and welcome the customer's business? Can she send a letter announcing her new position? Although one might be inclined to prohibit all communications between Sue and her former customers, Traditional's employment contract states that Sue is only prohibited from "solicitation," which is a subset of "communication." On what basis is the judge to decide, ahead of time, what sort and nature of communication constitutes solicitation?

Finally, the judge's simple injunction here will have to deal with Progressive. Assuming, say, that the judge orders Sue to accept no new customers after the date the preliminary injunction is entered, may those customer accounts be given to other Progressive agents? May Sue share in those profits? All these are basic predictions that must be made to fashion an effective injunction in a simple case. The relevant issues in the example could be multiplied if an additional yet common complexity is introduced, such as an alleged conversion of intangible assets.

The crafting of an injunction requires much thoughtfulness, both to perceive the issues that will shortly develop and to resolve them in a way that appropriately protects the rights and interests of each party. The mental process the judge must undertake to draft a sound injunction imitates the process a legislature follows in crafting a law, anticipating a multitude of hypothetical problems and controversies and providing as much as possible for their appropriate resolution. This is a difficult task, one which legislatures overcome by such means as staff, hearings, and the sheer advantage of size, bringing to bear the minds of many representatives and their assistants. The judge has far fewer resources, working with a thin staff and lawyers for the parties who may have spent little time thinking about the form the remedy should take if they win or lose.

Of course, the complexity discussed in Sue's case is artificially diminished: imagine the task confronting a federal district court judge attempting to harbor all the necessary information and make predictions in order to craft a workable injunction in a more complex context involving school district pupil assignments or prison conditions.⁶⁶ These larger problems introduce the additional complexity of human reaction to the injunction, captured by sociologists with phrases like "white flight."⁶⁷ Further, to the extent that an injunction looks far into the future, it risks

66. See generally Jost, *supra* note 61, at 1103-04 (noting the dynamic nature of several factual scenarios).

67. See Eleanor P. Wolf, *Northern School Desegregation and Residential Choice*, in 1977 SUP. CT. REV. 63, 67-69 (Philip B. Kurland & Gerhard Cospar, eds.).

changes in the legal environment that might render an injunction obsolete,⁶⁸ although recent Supreme Court decisions have made injunctions easier to manage.⁶⁹ It should not surprise that, along with some apparent successes, recent history has recorded some spectacular struggles in the attempt to resolve complex disputes with injunctions.⁷⁰

4. *Summary and Analysis*

At bottom, the injunction represents the rejection of the proposition that defendants take sufficient precautions to avoid harming plaintiffs. It signals a preference for judicial prohibition over private decisionmaking, and for plaintiff-initiated harm-avoidance over defendant-initiated harm-avoidance. A behavioral model of this preference would suggest that plaintiffs choose to undertake the cost of harm-avoidance where they perceive that the benefits from an injunction exceed the value of the alternative, "fallback" damages remedy by an amount superior to the costs of locating the threat and obtaining the injunction. In this simple model, the plaintiff appears to bear both added costs and benefits, thus suggesting that plaintiff should be permitted his choice of remedy.

The normative power of this simple behavioral model is limited, however, because it does not account for the added social costs that derive from the difficulties the injunction adds to the task of the judge who must make multiple predictions about the future. These social costs may provide a reason, at least in cases where they are large, to deny plaintiff his remedial preference and relegate him to a remedy that is inferior from his perspective. Thus, the costs that the injunction may present in some cases to the judge provides a justification for legal doctrines, such as the irreparable injury rule, that in some cases relegate plaintiff to a damages remedy.⁷¹

Along with providing a justification for the irreparable injury rule, this

68. See Jost, *supra* note 61, at 1102 ("[T]he court's assumptions about the future almost inevitably fail as the law changes.").

69. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) (liberalizing the "grievous wrong" modification standard of *United States v. Swift & Co.*, 286 U.S. 106 (1932)).

70. See, e.g., *United States v. City of Yonkers*, 856 F.2d 444, 448-52 (2d Cir. 1988), *cert. denied in part*, 489 U.S. 1065 (1989), and *rev'd in part sub nom. Spallone v. United States*, 493 U.S. 265 (1990) (recounting the difficult struggle for a federal district judge to command obedience, through a variety of coercive contempt procedures, to an injunction directing the placement of public housing in Yonkers).

71. See *infra* notes 294-99 and accompanying text for a discussion of how the irreparable injury rule relegates certain cases to the damages remedy.

analysis also questions the claims that the injunction supplies the plaintiff with more perfect compensation and burdens the defendant and potential defendant with increased deterrence. These claims appear dubious in light of the observation that the injunction can incur various social costs not necessarily present with respect to the alternative damages remedy. Thus, plaintiff's "fuller compensation" may not necessarily represent a direct transfer to the plaintiff from the "wrongdoing" defendant; instead, plaintiff's added compensation comes at the expense of another party innocent of wrongdoing. Understood as a transfer from the social innocent to the plaintiff, then the moral appeal of those who claim that the injunction ought to be provided because it is the "right thing to do" seems less a matter of moral obligation than a matter of social allocational choice. Moreover, to the extent that the cost of fuller compensation is borne socially, and not directly by the defendant, then little or no increase in deterrence, specific or general, appears probable.

Finally, the likelihood that the remedy of the injunction would provide better compensation and augmented deterrence might be further diminished by the defendant. To the extent that the defendant does view the possibility of being subject to an injunction as a penalty more onerous than damages, then defendant would be impelled to undertake expenditures to avoid discovery of incipient harms. Describing this behavior in terms of a model, the defendant would be inclined to expend resources to avoid detection to the extent that his profit from the harm-causing conduct exceeded the cost of avoidance. As a result, the plaintiff's ability to detect the threat of harm, and perhaps even the judge's ability to unravel it, would be correspondingly diminished, at some point leaving the plaintiff relegated to the damages remedy, but in the worsened condition of having wasted funds to detect a threat of harm on the promise of the "automatic injunction," and also relegated to collecting damages from a defendant who is marginally poorer by the amount of funds wasted in avoiding detection.

In brief, the claim of those who would bury the law's preference for the damages remedy over the injunction must be tested against the possibility that a routinely available injunction remedy would elicit a series of behavioral responses from plaintiffs, defendants, and judges that might render the injunction's promise of "full compensation" and increased deterrence of dubious merit, and that might also elicit wasteful expenditures undertaken in an effort to avoid the occasional harshness of the remedy. Aside from these behavioral issues, permitting plaintiffs access to injunctions on demand ignores the social implications that in some or many cases militate in favor of denying that choice to plaintiff, and instead

relegating the plaintiff to the alternative, "adequate" damages remedy.

C. *Specific Performance*

Similar in effect to the injunction is the remedy of specific performance. Like the injunction, specific performance involves a judicial mandate directed at the defendant, here to fulfill the terms of a contract. Unlike the injunction, however, specific performance cannot readily be identified as prohibitory. Instead, this remedy appears to be privately generated: in theory, the parties have agreed to abide by the terms of a contract, and the contract presumably stems from a noncoerced, market-based transaction.⁷² Thus, the judicial order mandating performance appears merely to fulfill the arm's-length bargain.⁷³ Performance appears to vindicate private, market-generated decisionmaking, not to override it. Similarly, again unlike the injunction, the judge in ordering performance is not necessarily faced with difficult problems of prediction or accuracy of the order.⁷⁴ In part stemming from its volitional appearance, the remedy of specific performance has long been a favorite of academics, who urge its adoption as the routine remedial outcome in cases involving breach of contract.⁷⁵

1. *Is Specific Performance Prohibitory?*

It is doubtful that the remedy of specific performance in many cases represents a vindication of private decisionmaking.⁷⁶ To the contrary, given the prevalence of market-based damages for breach of contract,⁷⁷

72. See, e.g., Linzer, *supra* note 2, at 112 ("[M]orality' stands for the idea that it is both fair and appropriate to hold people to promises that they freely made."). Professor Kronman has argued that the remedy of specific performance for contracts involving "unique" goods actually reflects what the parties would agree to were they able to impose remedial choices on courts. Kronman, *supra* note 5, at 365-69 (arguing that buyers prefer performance for obvious reasons and that sellers in unique goods cases are mostly indifferent, due to the unlikely event of a better offer where there is no market).

73. Linzer, *supra* note 2; cf. Schwartz, *supra* note 5, at 279-84 (disputing Kronman's analysis of hypothetical contractual intent).

74. The judge's order of specific performance can, however, be as complicated as an injunction in cases where performance will require extended relations between the parties.

75. See Linzer, *supra* note 2; Schwartz, *supra* note 5; Sunstein, *supra* note 5; cf. Yorio, *supra* note 5 (arguing a modified money damages remedy for breach of contract).

76. Professor Yorio has offered a similar argument based on the ex ante expectations of contracting parties. Yorio, *supra* note 5, at 1371-72. Yorio also argues that specific performance gives promisees the ability to fulfill noncontractual aims, such as spite or vindictiveness. *Id.* at 1373.

77. *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 686 P.2d 1158 (Cal. 1984) (Bird, C.J., concurring) ("[T]he assumption that parties may breach at will, risking only contract damages, is one of the cornerstones of contract law."); see also Kronman, *supra* note 5, at 354 (describing specific performance as "exceptional").

the parties to many contracts probably anticipate, to the extent they think of it at all, that breaches will result in a substitutionary remedy of money damages.⁷⁸ Of course, this presumed expectation would differ if specific performance constituted the "preformulated rule"⁷⁹ or default rule. To the extent that the parties' presumed intention is a function of the background legal rule, an argument founded in contractual intention presents a hopelessly circular puzzle.⁸⁰

However, whatever the contractual expectation formed by the default rule, it is possible that the parties do not in fact intend to provide for the remedy of performance. Professor Yorio, in his analysis of contractual expectations, has argued the plausible proposition that contracting parties, in failing to provide a remedial clause, may have implicitly desired to reserve the remedial issue for postbreach resolution.⁸¹ Thus, if courts are to presume, as others argue,⁸² that the absence of a remedial clause indicates that performance is the intended remedy, then courts should feel obliged to award performance, even to the point of absurdity, such as where the plaintiff prefers damages.⁸³

These arguments about contractual intentions, however, seem incomplete: any answer will serve to supplant silence. For example, it also seems quite plausible to hypothesize that, along the continuum from mandated performance to unfettered remedial discretion, the parties intend an interim position: that plaintiff presumptively should be relegated to the most common remedy unless compelling reasons allow a preference. Because this outcome roughly describes the historical practice by which courts awarded specific performance,⁸⁴ it seems as persuasive, if unhelpful, as any other. The "background rule" is another way of speaking about the "background remedial intention," and each derives ultimately from the

78. For an argument that the present presumption in favor of the damages remedy probably does reflect parties' intentions, see Kronman, *supra* note 5.

79. Goetz & Scott, *supra* note 20, at 971 & n.12 ("By providing standardized and widely suitable risk allocations in advance, the law enables most parties to select a preformulated legal norm 'off-the-rack,' thus eliminating the cost of negotiating every detail of the proposed arrangement.")

80. Professor Kronman has argued that the parties likely *ex ante* preferences are that specific performance should be limited to cases involving "unique" goods, tracking the common law limitation. See Kronman, *supra* note 5, at 365-69. It seems questionable, however, that promisors would share this preference, even in unique goods cases. See *infra* note 213.

81. Yorio, *supra* note 5, at 1371-72.

82. See *supra* notes 72-73 and accompanying text.

83. Yorio, *supra* note 5, at 1372.

84. Kronman, *supra* note 5, at 355-58; EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS §§ 2.1-2.2 (1989).

remedy that the legal system prefers.

2. *The Effect of Performance on Markets*

To resolve the issue of whether specific performance is essentially a market-generated remedy or one imposed externally and prohibitively, the inquiry must be turned away from the indeterminate examination of hypothesized contractual intentions and toward an examination of the effect of specific performance on markets. Underlying this inquiry is an assumption: if specific performance is fundamentally a market-generated, intention-vindicating remedy, then specific performance should not diminish the range and availability of market transactions. This assumption is founded on the view that markets tend to produce diversification in price and quality on account of differences in the individual tastes that form a market.⁸⁵ Consequently, legal rules that tend to reduce the available range and diversity of markets must do so by frustrating the exercise of some people's choices, thus suggesting that these legal rules are not, for these people, a product of choice, but are external and prohibitory.

Specific performance frustrates diversity in market transactions. First, specific performance restricts price flexibility. By routinely requiring that sellers, for example, specifically perform their contracts, specific performance hinders the ability of sellers to discriminate among their buyers. In a market characterized by rising production costs and breaches, a producer cannot favor his "good customers," and instead must treat all buyers alike. Moreover, buyers who seek "second-class" status in the event of limited supply in exchange for discount prices are hindered as well. This is not to say that, in any contractual setting, the parties are bound by the preformulated rule; of course they may incur the expense of altering it.⁸⁶

85. In other words, this analysis assumes that unregulated markets will feature breadth and expansion; that is, absent constraining forces of law or other external regulation, markets will expand to the frontiers of possibility, bounded only by (nontransaction) costs of production and consumer preferences. See generally Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1212 (1991) ("Transaction costs . . . , no less than existing technology, define what is currently achievable in any society—the Pareto frontier. It follows that any given society is always or will immediately arrive at a Pareto optimal point given transaction costs."). This analysis also assumes that markets will produce Pareto superior transactions, and thus will tend to maximize the range of desirable goods available in the market according to individual utilities. Accordingly, inhibited only by transactions costs and technology, any particular market should feature a range of transactions, including some that maximize risk and some that minimize risk.

86. Courts have generally refused to permit parties to contract into performance remedies. See Kronman, *supra* note 5, at 370-76 (suggesting judicial reluctance stems from unwillingness to constrain personal freedom or incur administrative costs); cf. Ian R. Macneil, *Efficient Breach of Contract: Circles*

Rather, the point here is that the ability to discriminate on price and among buyers or sellers is presumptively a good frequently desired by both buyers and sellers, and thus the preformulated rule of performance will frequently add an impediment to the fulfillment of the parties' intentions in forming and executing contracts.⁸⁷ Although the parties still might discriminate on other aspects of the transaction, such as delivery date and risk of loss, one common means of discrimination, and probably the cheapest to employ, that is price, is rendered a more costly vehicle to accomplish contractual intentions.

The second manner in which specific performance frustrates market transactions, and thus impliedly hypothetical contractual intentions, relates to and expands upon the first. Not only does performance serve to diminish useful price discrimination among buyers and sellers, but it also tends to curtail product variation and differentiation. Mandated performance tends to eliminate high-risk transactions, such as the mechanic who fixes the automobile off-hours for a cheaper price and lessened expectation of timely and guaranteed performance. In this sense, the imposition of specific performance has an effect on markets much like the imposition of a new regulatory standard, serving to raise the price and standardize the product across the market. The lower end of the market, characterized by discount prices, substandard performance, and high risk of nondelivery, becomes less available, and a number of voluntary transactions, at least those in which the added cost of negotiating around the performance rule exceeds the gain from the exchange, simply do not take place.⁸⁸

Thus, it appears that the routine imposition of specific performance presents an obstacle to market transactions. It requires that sellers, in the

in the Sky, 68 VA. L. REV. 947, 950-53 (1982) (arguing that the transaction costs of altering rules should constitute the sole basis of comparing rules because performance is not less efficient than damages, absent transaction costs). Bargaining from a performance obligation to a damages one is only possible where there is a market providing ready and reasonable substitutes. See Goetz & Scott, *supra* note 20, at 984-86.

87. See Goetz & Scott, *supra* note 20, at 971 ("Ideally, the preformulated rules supplied by the state should mimic the agreements contracting parties would reach were they costlessly to bargain out each detail of the transaction."); cf. Schwartz, *supra* note 5, at 286-87 (arguing that buyers and sellers have similar postbreach advantages in obtaining alternate performances or finding alternative buyers). But see Yorio, *supra* note 5, at 1382-85 (arguing that buyers have the postbreach advantage).

88. This may frequently be the case because the costs to the seller of negotiating around a rule of mandated performance might be substantial. For example, the cost of altering a product or amending a standard form agreement might be prohibitive for a volume seller; thus the preformulated rule of specific performance would in fact become unalterable, despite the buyer's preference for bearing the risk of nonperformance.

above example, not discriminate among buyers, even where they might prefer to do so and where the buyer might prefer to enjoy the discount in price in exchange for that discrimination. In this way, a range of product differentiation is lost. Of course, the flexibility that is lost with specific performance can always be restored through a contractual provision for a damages remedy. However, the point here is that specific performance, by imposing a cost to achieving flexibility, tends to diminish variation in the market. Because the more varied market that would be available in a nonperformance regime is, by hypothesis, a product of contractual intentions, then the imposition of the performance remedy actually hinders or even defeats a range of contractual preferences. It is fundamentally market-diminishing, not market-enhancing.

Although a preformulated rule of performance frustrates some market outcomes due to transaction costs, by the same analysis the extant preformulated rule of damages frustrates agreements where both buyer and seller would prefer that seller bear the risk of nonperformance. As a result, any preformulated rule is market diminishing to some extent. A preformulated performance rule, however, would appear to pose a much more serious obstacle to market transactions. The possible transactions in a market may be divided into two categories. Category one is comprised of those transactions where the costs of reaching agreement on the remedy are smaller than the gain in assurance from resolving the choice of remedy by agreement. Category two, conversely, is comprised of those transactions where the costs of reaching agreement exceed the expected gain from having a remedy specified in the contract. By hypothesis, the parties in category one cases can agree to alter the default rule so that no transactions are altered by an undesirable rule and the only harm incurred is the increased transactions costs.⁸⁹ The question then for rulemakers respecting category one cases is whether, by adopting a preformulated damages remedy, to encourage market transactions that allow parties the ability to discriminate among buyers and to create products that vary by risk of nonperformance.

In category two cases, however, the parties will not bargain around an undesirable remedy, and must accept the default rule. If it is true, as argued above, that specific performance generally tends to hinder a range of "discount" or "risky" market transactions, then there is likely a coincidence

89. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (arguing that parties to an economically undesirable rule can come to an agreement to alter it, thus having no long-run effect on resource allocation).

between the desirability, as a matter of contractual intention, of the "discount" remedy of market-measure damages and category two cases. Category two cases are defined as those where the profits from a transaction are too small to justify altering the preformulated remedy. This same limited potential for profit would probably tend to produce buyers and sellers interested in minimizing all nonessential aspects of the bargain, with the buyer, typically, bearing increased risk in exchange for price savings. A mandatory rule of specific performance would unalterably shift this element of risk to the seller, thus inhibiting contractual intentions. Consequently, at best it appears that specific performance, in category one cases, has either a neutral or harmful effect⁹⁰ in hindering contractual intentions, and at worst, in category two cases, it actually defeats them.

Thus, it would appear that a preformulated remedy of specific performance would tend to diminish the range of market outcomes, and as a consequence necessarily defeat a number of contractual intentions. Although the remedy could, in many particular cases, actually vindicate the unexpressed intentions of the parties in forming the contract, the remedy generally does the opposite. Specific performance would likely frustrate more intentions than it vindicated, if it is true that category two cases predominantly feature buyers and sellers looking to minimize the cost of the transaction.

3. Specific Performance as a Prohibitory Remedy

Specific performance is not necessarily a vindication of contractual preference. To the contrary, it appears to diminish markets and frustrate the expression of preferences. This analysis, however, by no means indicates that the remedy is undesirable. Judges, as the issuers of this remedy, might prefer to diminish the range of a market or to frustrate certain expressions of contractual preference for very common and indeed classic reasons, such as further deterring undesirable breach, fully compensating the victim, or disgorging ill-gotten gains. These purposes form the traditional aims at which prohibitory remedies are directed.

As in the case of injunctions, accomplishing the aims of specific performance depends to a certain degree on sagacious judicial application. For example, for a judge to employ the remedy of performance to ensure

90. Of course, whether the rule would hinder transactions in category one cases or not depends on whether more aggregate costs are incurred in contracting around the performance remedy or around the (present) damages remedy, which in turn depends, in part, on whether more parties are interested in "discount" products than are interested in high-priced "guaranteed" products.

full compensation to the victim of contractual breach, the judge must determine that market damages do not adequately compensate plaintiff's losses. This inquiry requires assessment of the value of plaintiff's losses, the adequacy, price and availability of substitutes, the difficulty of obtaining recovery,⁹¹ and the defendant's costs of compliance.⁹² Although a judge might rely upon the plaintiff to provide much of the needed information,⁹³ thus issuing performance "automatically" upon the plaintiff's request, the plaintiff would obviously have an interest in overstating the extent of his losses and understating the availability of adequate substitutes and the cost of compliance. Plaintiff can be relied upon to request the more favorable outcome; but what the plaintiff views as more favorable could be the product of vindictiveness, a desire to create general deterrence against contractees breaching against the plaintiff, or the simple desire to gain more than that for which plaintiff bargained.⁹⁴

Even assuming, however, that in many or most cases it is reasonable for the court to rely on plaintiff's specification of the more adequate remedy, the plaintiff's task may not be simple: accurate information is costly, and it may be difficult for a business of even moderate size to determine lost profits or reliance costs flowing from particular events, adequacy and availability of market substitutes, and burdens on the defendant. Even with perfect information, moreover, several questions of close judgment remain, such as which damages are to be included as proximately caused by the

91. See YORIO, *supra* note 84, § 2.4 (discussing the availability of substitutes on the market and the ability to assess damages with reasonable certainty).

92. Defendant's burdens matter because courts are reluctant to impose specific performance in personal services contracts. See *id.* § 15.2 ("An order to perform a service may subject the promisor to a form of involuntary servitude or force the parties to maintain a noxious personal relationship.").

93. See Schwartz, *supra* note 5, at 277 ("[P]romisees generally know more about their promisors than do courts; thus they are in a better position to predict whether specific performance decrees would induce their promisors to render satisfactory performances.").

94. See Yorio, *supra* note 5, at 1373 (examining the promisee's potential motives). A plaintiff who is awarded specific performance might gain more than that for which he bargained in cases where: (1) the parties intended loss-based damages to be the available remedy, with price adjusted accordingly; (2) the course of dealing in the particular industry, of which plaintiff was aware and took advantage, impliedly created that intention, and thus provided the unspoken background to the contractual price; (3) the parties never considered the remedy, and the industry or market provided none, and the contract price was insufficient to place the risk of nonperformance on the seller; (4) the market price for the exchanged good has decreased, but plaintiff vindictively refuses market substitution of the good on fictitious claims of incompatibility of the substitute; or (5) the market price for the exchanged good has increased but defendant failed to deliver due to impossibility, and plaintiff vindictively refuses to cover based on fictitious incompatibility.

breach,⁹⁵ what degree of cross-elasticity is sufficient for a plaintiff to conclude a substitute is “adequate,”⁹⁶ and what sort of contract, for example, is sufficiently “personal” to engender concerns over performance.⁹⁷

Using specific performance to fulfill plaintiff’s preference for full compensation presents the easiest task. More problematic is the use of the remedy to add to the deterrent effect of market damages, or to disgorge gains.⁹⁸ Aiming at either of these goals requires estimates of the gains and losses of the defendant; unlike the plaintiff, the defendant has no incentive to specify that his gains, for example, exceed the plaintiff’s losses. In addition, even with perfect information, the judge must still make multiple difficult judgments about the nature and extent of defendant’s gains, their relationship to the breach, and the difficulty that performance might impose, just as the judge must do in regard to loss-based damages.

4. Summary

At bottom, specific performance governs behavior by coercion.⁹⁹ It represents the judicial imposition of a prescribed outcome. Although specific performance may frequently be ordered consistent with implied contractual preferences, and may also frequently be ordered in contradiction to actual but unexpressed contractual preferences, performance fundamentally operates to defeat markets. Unlike damages, performance is not market enhancing, but instead is market diminishing, and tends to work, in cases where it cannot be bargained around, to frustrate contractual preferences.¹⁰⁰

Given the market-defeating nature of specific performance, courts should employ it carefully. Unfortunately, the very difficulty of its effective employment might preclude careful application. Its employment as a defendant-focused remedy, to create deterrence or to disgorge profits, requires the judge to learn and assess a great deal of information about the defendant. Even in its simpler task as a provider of fuller compensation to

95. The problem for plaintiff in apportioning damages can be especially difficult in multiple-defendant cases. See, e.g., *Kingston v. Chicago & N.W. Ry.*, 211 N.W. 913 (Wis. 1927) (meting out liability for acts arising from partially unknown sources).

96. This problem is explored in Kronman, *supra* note 5, at 358-65.

97. See generally 3 DOBBS, *supra* note 32, § 12.8(3) (discussing “personal services” contracts).

98. The feasibility of using specific performance and other prohibitory remedies to achieve these goals will be discussed below. See *infra* notes 130-91 and accompanying text.

99. See YORIO, *supra* note 84, § 1.2.2.

100. See *supra* notes 85-90 and accompanying text.

the plaintiff, specific performance demands that a judge make a difficult determination about the plaintiff's needs, and the adequacy and cost of substitute performance, and even of the availability of markets to supply that substitute. This is not to argue that specific performance can never be effectively employed to increase deterrence or to ensure full compensation; more significant is understanding the difficulty and costs involved in using performance to accomplish any of these purposes. Like the injunction, specific performance is a prohibitory remedy, and its effective employment relies on the judge, not the market.

D. Restitution

Restitution appears in many guises,¹⁰¹ and is not susceptible to easy definition.¹⁰² Nevertheless, in a general sense restitution seeks to disgorge defendant's gains, or in cases of quasi-contract, at least so much of it as to meet the market price for plaintiff's improvement.¹⁰³ It is difficult to characterize restitution as a prohibitory remedy that is fundamentally opposed to damages. Unlike injunctions and specific performance, it shares an essential attribute with damages in that it frequently is substitutionary. Moreover, it is conceptually the "mirror image" of tort, a quintessential damages remedy.¹⁰⁴ Nevertheless, restitution is prohibitory because it shares the "public" character of the injunction and specific performance.

1. Tort Versus Restitution

It seems plausible to say that restitution works just like tort, only in reverse: where tort may be understood as a fictitious contract devised by a judge to remedy non-bargained-for harms, so restitution may be understood as a fictitious contract devised by a judge to account for non-

101. Restitution may consist of a money payment representing defendant's gain, or may consist of a form of "specific restitution" of the thing itself. Remedies that may provide specific restitution include the constructive trust, rescission, replevin, and ejectment. The equitable lien is a hybrid because it combines a money remedy with a lien on the thing itself. Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1290 (1989).

102. See generally Friedmann, *supra* note 5, at 504-05 (outlining the "underlying principles" of restitution).

103. Although restitutionary remedies arise from judicial prescription, they can be flexibly fashioned either to replicate a market transaction or to obviate one. See RESTATEMENT OF RESTITUTION ch. 8, topic 2, introductory note at 595-96 (1936). Historically, cases based on the common law writs sought a market-based measure, such as quasi-contract, implicitly awarding restitutionary damages at the price the parties would have entered an agreement.

104. Saul X. Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 67 (1985) (referring to restitution as "[l]ocated at the intersection of tort and contract law").

bargained-for benefits.¹⁰⁵ Indeed, restitution and tort appear to be so much the mirror image of each other, at least conceptually, that it seems nearly impossible to account for the fact that tort remedies are available in a far broader set of cases and with much greater frequency.¹⁰⁶

But only in these most abstract terms are tort and restitution alike. Tort damages, at least in the business context, encourage wealth production, the fundamental aim of market transactions, while restitution frequently does not, and is simply redistributive. In tort, when the defendant converts a plaintiff's property interest, for example, he does so with the expectation of employing that interest more profitably in some other use, or otherwise profiting from the harm.¹⁰⁷ The defendant has committed a tort for the sake of producing wealth. The plaintiff in a restitution case, for example a case involving a mistaken improvement, has also harmed (himself) for the

105. *Id.*

106. Professor Levmore suggests that restitution is employed less frequently than tort because restitution, unlike tort, hinders "market encouragement," presents difficult problems of "valuation," and is subject to "wealth dependency." *Id.* at 68-82. Both tort and restitution, however, tend to hinder "market encouragement." By allowing people to "take and pay" in tort and to "benefit and collect" in restitution, each remedy tends to create "thin markets," because neither the tortfeasor nor the benefit-doer must bargain prior to acting. Similarly, problems of "valuation" do not appear to be more difficult in regard to the measure of a gain than they do a loss: both problems involve issues of tracing, proximate causation, and other imprecise judgments. Finally, the problem of "wealth dependency" seems inadequate to explain the asymmetry. Although restitution might be disfavored because it allows one party to force a benefit on another that is subjectively valued at less than the market price, so then should tort's take-and-pay system be disfavored because it allows one party to forcibly take the property of another that the other (the plaintiff) might value at more than the market price, yet pay only the market price. Both tort damages and restitution in the mistaken benefit case destroy idiosyncratic values. Of course, the concept of wealth dependency does help explain why the goal of protecting idiosyncratic valuations tends to lead to the denial of restitution (thus not compelling a defendant to "purchase" an unwanted product) and to the award of tort damages as a "half-way" measure to full protection (giving plaintiff part of plaintiff's lost idiosyncratic valuations, to the extent of market value).

Even the limited explanatory power of "wealth dependency," however, is subject to the substantial objection that the point is circular. In restitution, the defendant wins because his idiosyncratic valuations must be protected. In tort, the defendant loses because the plaintiff's idiosyncratic valuations must be protected. Why is it not the other way? In extending a benefit, the plaintiff in a restitution case may have incurred idiosyncratic costs, such as the loss of a homestead to stave off a community flood: the denial of restitution overrides the plaintiff's "wealth dependency." Similarly, the defendant in a tort action may have, by erecting an antenna that impinges on the plaintiff's view, converted property that he values below the market price: the award of market-priced damages for the lost view overrides the defendant's idiosyncratic tastes. Thus, a priori, the notion of "wealth dependency" fails to explain case outcomes: it only appears useful after the court has decided which party's idiosyncratic valuations to protect.

107. *See, e.g.,* *Olwell v. Nye & Nissen*, 173 P.2d 652 (Wash. 1946) (awarding restitution of defendant's profits where defendant converted and profitably put to use plaintiff's unused egg-washing machine).

sake of producing wealth, which he hopes to collect from the defendant. But the restitution defendant may not value the improvement at market price, but at something less; or, the defendant may have more profitable methods of using his money. If the improvement is not easily resold, then requiring the defendant to pay restitution will not maximize the production of wealth.

This point requires that utility and wealth be distinguished.¹⁰⁸ Utility is subjective and personally valuable: it reflects the value one places on a good, and is conceptually independent of market price. Wealth is objective and both socially and personally valuable: it reflects one's net worth, which is the sum of dollars one could obtain in exchange for liquidation. In theory, all voluntary transactions should effect an increase in utility; they may not all increase wealth, as one might "overpay" for a sentimental item, such as an heirloom, whose nonsentimental market or replacement value is much less. Nevertheless, because individuals enter transactions to increase utility, society must encourage the maximization of utility to enjoy the derivative production of wealth from transactions. Thus, it should not surprise that the common law, with its noted solicitude for a capitalist economy,¹⁰⁹ has favored remedies that promote utility maximizing, and further favors transactions where utility-maximizing produces social wealth over those where it does not.¹¹⁰

Both harms by defendants (tort) and benefits by plaintiffs (restitution) can maximize the defendant's utility, but only in tort is it certain to be maximized, simply because the defendant knows if his preferences exceed market price. In restitution, the plaintiff may predict that the defendant's utility will exceed the market price of the improvement, for example, but cannot be certain. If the defendant's utility is below market price and the plaintiff's benefit cannot be resold, or if the defendant had more profitable options, then restitution does not promise to maximize utility. Thus, the common law's embrace of tort and relative rejection of restitution is predictable given a preference for utility maximization and its derivative

108. See Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 64-65, 92-96 (1992) (distinguishing between utility and welfare, the latter term to include wealth); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 356 (1990) (explaining how utility-maximizing produces wealth).

109. See Farnsworth, *supra* note 4, at 1216 ("All in all, our system of legal remedies for breach of contract, heavily influenced by the economic philosophy of free enterprise, has shown a marked solicitude for men who do not keep their promises.")

110. This latter point is developed *infra* notes 248-57 and accompanying text.

wealth creation.¹¹¹

In the other variety of restitution cases, where defendant has tortiously converted and profited from an interest of the plaintiff, restitution seeks to penalize transactions that are profitable, both in terms of utility and wealth. Here the situation is identical to the (presumptively desired) one created by tort damages, so it would seem desirable that the courts employ restitution infrequently in these cases, relegating plaintiffs to tort, or awarding restitution but limiting plaintiff's recovery to a measure of damages equal to tort damages.¹¹²

Therefore, it is unsurprising that the common law favored tort remedies but disfavored restitution, despite their beguiling conceptual similarity. Tort mirrors everyday market transactions in the sense that a willing buyer, the defendant, acts to maximize his utility and in doing so effectively adds to the aggregate of social wealth.¹¹³ Restitution, on the other hand, constitutes the seller (the plaintiff) foisting the good on the unwilling buyer, regardless of utility. Although wealth would be produced in cases where defendant's utility exceeds market price or where it does not but defendant can easily resell the good, wealth would not be maximized, and the maximization of wealth is a goal different from simple wealth production.

111. Of course, tortious conversions too may sometimes fail to maximize wealth: a defendant could steal plaintiff's heirloom to enjoy idiosyncratic utilities much as did plaintiff, and so the common law may at times reject tortious profiting, resorting to restitution to separate defendants who maximize utility only from those who also maximize wealth. This point will be elaborated upon below. *See infra* notes 291-306 and accompanying text. Conversely, in improvement cases, although certainly the improvement, if it truly is one, will ineluctably increase social wealth, it may not maximize it, for defendant may have had better investment options. The improvement may not marry utility with wealth where defendant disprefers the improvement.

112. In practice, however, it is not clear whether the measure of restitution in cases involving tortious conduct limit plaintiff's recovery to the equivalent of damages, or allow recovery of profits as well. Dobbs reports that courts permit the greater recovery. 1 DOBBS, *supra* note 32, § 4.1(1), at 553-54. *But see* RESTATEMENT OF RESTITUTION ch. 8, topic 2, introductory note at 595-96 ("[T]he measure of restitution is determined with reference to the tortiousness of the defendant's conduct or the negligence or other fault of one or both of the parties If the defendant was tortious in his acquisition of the benefit he is required to pay for what the other has lost although that is more than the recipient benefitted. If he was consciously tortious in acquiring the benefit, he is also deprived of any profit derived from his subsequent dealing with it."); *Ramona Manor Convalescent Hosp. v. Care Enters.*, 225 Cal Rptr. 120 (Ct. App. 1986) (quoting the *Restatement of Restitution* for proposition that the availability of restitution arising from tortious conduct "has not yet crystallized into a rule since . . . it is only in certain types of situations that restitution is permitted . . . [wherein there are] imperfections in the tort remedies," and finding the tort remedy adequate). Professor Laycock reports that the rules are indeterminate. Laycock, *supra* note 101, at 1288-89 (describing the degree of culpability as the most important factor).

113. An elaboration on the way in which wealth is generated by utility maximization is set forth below. *See infra* notes 254-57 and accompanying text.

2. Restitution as a Prohibitory Remedy

When a judge is confronted with a claim for restitution, the judge must decide whether to create an obligation where the market itself did not produce one. Unlike tort, however, when a judge writes a "restitution contract," the judge is not mimicking market transactions, although restitution may frequently replicate the market price. Restitution allows the seller, in a case of mistaken improvement, for example, to force a sale, and thus terminates the buyer's ability and incentive to seek profitable transactions to maximize his utility. Essentially, the difference between tort and restitution in this case reduces to whether the law would prefer the buyer or the seller to decide what is best for the buyer. The market system has always left that decision to the buyer; restitution supplants and reverses this salient market practice.

Restitution supplants market practices by judicial prohibition. Unlike the injunction or specific performance, however, the judge in awarding restitutionary damages does not appear to face significant impediments, at least none greater than those apparent in awarding the common alternative, tort or contract damages. All these measures of damages require difficult judgments about value and proximate cause; the frequent availability of the jury in the tort case is important, but only in the sense that it relocates some of the difficulty of measurement, rather than eliminating it. Moreover, it does not appear that "gain" is more difficult to measure than "loss."¹¹⁴

Although restitution does not appear to present particular difficulties in application, it does permit case outcomes that are decidedly different than those that would be produced by the "market" remedies of tort and contract damages.¹¹⁵ To understand this point in the broad context of restitution, it is useful to divide restitutionary cases, albeit somewhat imprecisely, into three categories: cases involving mistaken benefits, cases involving voluntary benefits, and cases involving benefits generated by tortious

114. *But see* Ulen, *supra* note 5, at 356-57 (asserting that, "in general, it is extremely inexpensive to measure damages in terms of benefit conferred, especially in comparison to the other damage measures available to the courts"). However, in one instance where a lawmaking body was required to define gain and loss, the resulting definitions appear similar. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 8A1.2(h) (1993) [hereinafter U.S.S.G.] (defining "pecuniary gain," a subset of restitution's "gain," in part as "the additional before-tax profit to the defendant resulting from the relevant conduct of the offense"); *id.* § 2B1.1 (defining "loss" in part to mean "the value of the property taken, damaged, or destroyed").

115. *See* Laycock, *supra* note 101, at 1287-88 (noting the differences among remedial approaches where defendant's gain and plaintiff's loss differ).

conduct.¹¹⁶ In each area, the question for the court is whether or not to create a legal duty where one did not exist by virtue of private contract. An example from each category of restitution will make the prohibitory nature of restitutionary remedies clear.

In the category of mistaken benefit cases, assume that a contractor has a contract to build a new deck on house A, but has mistakenly built it on house B. Courts disagree on whether or not the owner of house B must reconstitute the market value of the deck to the contractor,¹¹⁷ but a court that decides to require payment for the mistaken improvement creates an obligation, *ex post*, that specifically requires B to purchase a deck. B's only option in this instance, assuming his funds are devoted to preferable uses, is to sell the home or some other item to allow for the payment. By forcing this purchase, the judge's ruling has supplanted B's ability to exercise his market preferences. Although requiring restitution appears plausible in cases where the benefit involves a mistaken payment of money or involves an item easily removed and sold,¹¹⁸ its use in situations where the improvement cannot easily be removed and sold at market price connotes a substantial displacement of the market outcome.¹¹⁹ Specifically, the plaintiff in this case has provided himself no remedy by contracting with

116. DAVID SCHOENBROD ET AL., *REMEDIES: PUBLIC AND PRIVATE* 543-45 (1990) (describing the three categories).

117. Levmore, *supra* note 104, at 84-87 (noting that the general rule denies restitution to a nonbargaining improver of property, but noting an emerging trend to the contrary in regard to real property).

118. *Id.* at 77-78 ("[R]estitution need not be denied where the nonbargained benefit is easily translated into wealth. The recipient then has no claim that the benefit is worthless to him.").

119. An interesting case where restitution in a mistaken improvement case makes sense, from an economic perspective, is *Kossian v. American National Insurance Co.*, 62 Cal. Rptr. 225 (Ct. App. 1967). There, the plaintiff contracted with the owner of an inn to remove debris following a fire. Prior to performance the owner went bankrupt and transferred the interest in the property to defendant, who held a deed of trust and had obtained fire insurance. Unbeknownst to the defendant, plaintiff performed after the title transfer. Defendant's claim to his insurer included costs of debris removal, and plaintiff sued defendant for the market value of its services. The court held that, although it would ordinarily deny restitution in cases involving mistaken improvement, it would grant it here because the defendant had collected for the improvement from the insurance company. *Kossian* thus suggests that where the mistaken improvement is either in money or in a form where a functioning market renders translation of the improvement to money quite easy, or here, where the improvement had already been "sold," in effect, to the insurance company, restitution makes sense. Of course, the holding that a collection from an insurer constitutes an "unjust" enrichment is problematic in light of the "justness" of the prohibition established by the collateral source rule against tort defendants' set-off of plaintiff's insurance proceeds. For a discussion of the collateral source rule, see generally John L. Antracoli, Note, *California's Collateral Source Rule and Plaintiff's Receipt of Uninsured Motorist Benefits*, 37 HASTINGS L.J. 667, 669-72 (1986).

the defendant, and has no claim that the defendant has acted tortiously toward him. His harm-based damages remedy is zero; restitution constitutes a judicial remedy prescribing an outcome where the market provided none.

Similar anti-market effects are evident with regard to the possibility of restitutionary remedies in cases in the other two categories. In a case involving a voluntary conferral of a benefit, a decision permitting restitution supplies a remedy where the parties, either because of emergency, fraud or mistake, failed to provide for one on their own. For example, assume a buyer purchases a home having latent environmental problems known to the seller.¹²⁰ After discovery of the fraud, the buyer's action for rescission of the contract, essentially a restitutionary remedy for return of the purchase price, abrogates the market transaction of the parties and prescribes an obligation to undo a prior contract. This is not to say that the fraud should go unremedied. Rather, the choice is whether to relegate the fraud victim to a damages remedy, here comprised of the difference in value of the home arising from the fraud and thus requiring the plaintiff to sell the property should he not wish to live in an unsafe home, or to award the plaintiff a supra-market remedy by judicial prohibition. The anti-market effects here are evident: the seller's legitimate gain, of which the illicit gain from the fraud is a subpart, is either transferred to the buyer through rescission of the price, or to the extent that seller's (utility) gain exceeded the market price, is irretrievably lost.

Finally, in a case involving a tortious conferral of a benefit, the issue is again whether to relegate the plaintiff to a harm-based remedy, typically constituting the rental value of the item tortiously converted, or to award disgorgement of the defendant's profits.¹²¹ The harm-based remedy seeks to put the plaintiff in the position he would have been in had the item been purchased by defendant in a voluntary market transaction; the restitutionary remedy reflects the judge's decision, usually for reasons of deterring tortious conduct, to deny the defendant his profits from the tort.¹²² This

120. See, e.g., *Hutchison v. Pyburn*, 567 S.W.2d 762 (Tenn. App. 1977). Rescission will frequently appear more desirable to plaintiffs than harm-based damages. *Id.* (holding that rescission entitles plaintiff who was buyer of home with defective sewer system to refund of purchase price).

121. See, e.g., *Olwell v. Nye & Nissen Co.*, 173 P.2d 652 (Wash. 1946) (allowing restitution of defendant's profits because defendant was consciously tortious).

122. Plaintiff's claim for disgorgement can be justified in several ways. First, plaintiff can claim that he would have profited from a retention of the wrongfully converted item; thus defendant's disgorgement simply serves as a rough proxy for plaintiff's losses. See *Ramona Manor Convalescent Hosp. v. Care Enters.*, 225 Cal. Rptr. 120 (Ct. App. 1986) (holding that because plaintiff could not show lost profits with certainty, it was appropriate to use defendant's actual profits as measure). Second,

motive to deny tortious gains operates in direct contradiction to the usual role of damages in a tort case, which is to permit defendants to "take and pay" tortiously where it appears profitable to do so.

3. *Summary*

Despite its substitutionary character and its conceptual similarity to tort, restitution has always been employed far less frequently at common law than the traditional tort remedy. Because utility differs from wealth, maximization of the former is necessary to produce the latter. Restitution does not promise to create wealth, but merely to redistribute it, precisely because it does not promote utility maximization, and thus fails to mirror a voluntary market transaction. When restitution is employed, moreover, its outcomes differ markedly from those that would obtain by virtue of the market-oriented remedies, forcing defendants, depending on the case, to pay for unwanted products, to disgorge lawfully acquired gains, or to be unusually penalized for employing the customary "take and pay."

E. Other Instances of Prohibition

Market-oriented outcomes are frustrated or reversed in a variety of ways other than through the use of the remedies of injunctions, specific performance, and restitution. These other methods appear less directed toward reversing a market result, but their effect is indistinguishable from other prohibitory remedies, and they will be listed briefly here for the sake of completeness and to facilitate later discussion.¹²³

plaintiff's claim might reflect the gains of trade plaintiff would have reaped had defendant chosen to negotiate rather than take. See Schwartz, *supra* note 5, at 275-76 (exploring difficulties buyer might have in locating a suitable substitute in the contractual context). Third, the restitutionary measure might constitute a crude attempt to compensate plaintiff for his idiosyncratic losses. Allowing plaintiff to use defendant's profit as a rough proxy for these items, however, creates a great risk of holding the defendant liable for more than the defendant would have paid in a market, and potentially penalizes the defendant disproportionately. Dale A. Oesterle, *Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC § 9-306*, 68 CORNELL L. REV. 172 (1983) (arguing that ignoring causation in tracing gains threatens to take from defendant just as well as unjust gains).

123. Although they are not the product of judicial prescription, many legislated rules, particularly countermajoritarian statutes, are prohibitory in character, responding to perceived failures in market outcomes. Legislative prescription usually takes the form of instructions, to judges or other decisionmakers, as to the manner of deciding cases, for example precluding a court, when it "balances" the interests of the parties in deciding whether or not to award an injunction, from considering certain harms to the defendant. As a result, a law prohibiting discrimination towards a person with a disease such as AIDS precludes a court, when "balancing," to include the defendant's fears or other feelings about the virus. *Chalk v. United States District Court*, 840 F.2d 701, 711 (9th Cir. 1988) (holding that in applying anti-discrimination statute, it was impermissible for the court's decision to be informed by

1. *The Exclusionary Rule*

By design, criminal sanctions are prohibitory, because their severity and intrusiveness renders them beyond the “take and pay” calculus.¹²⁴ Apart from sentences, the most salient example of judicial prohibition in the criminal arena is the exclusionary rule for constitutional violations, a remedy that is essentially a method of disgorging or restituting the gains made by police officers who search or interrogate illegally.¹²⁵ Its adoption represents an explicit rejection of the efficacy of a damages remedy based on the harm suffered by the suspect.¹²⁶

2. *Prophylactic Rules*

Most broadly, the recent proclivity for prohibition has been directed at the judiciary itself. The common law method of fact-intensive, case-by-case

community fear, parental pressure, and the possibility of law suits).

Despite some early animosity to Congress' efforts at structuring judicial balancing, *Hecht Co. v. Bowles*, 321, 330 U.S. 321 (1944) (refusing to interpret Emergency Price Control Act of 1942 to limit judicial discretion), the Supreme Court has apparently reconciled itself to adhering to congressional prerogatives in balancing interests. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (adhering to perceived congressional striking of the balance in the Endangered Species Act); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 316 (1982) (finding that congressional priorities did not mandate an injunction). The recent trend toward criminalizing an increasing range of economic business behavior formerly subject to tort remedies implies a similar legislative impatience with loss-based remedies. See generally *Coffee*, *supra* note 17 (examining the “blurring of the border between tort and crime”). The use of the criminal law as a regulatory device, particularly in the area of corporate crime, see Jeffrey Standen, *Prolegomenon to Corporate Punishment*, in *CORPORATE SENTENCING: THE GUIDELINES TAKE HOLD* (Roger Pilon & John R. Lott, Jr., eds., forthcoming 1995); John C. Coffee, Jr., *Hush!: The Criminal Status of Confidential Information After McNally and Carpenter and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121 (1988), also evidences a desire to govern traditional economic activity through sanctions not subject to a take-and-pay decision. See generally HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

124. See *Coffee*, *supra* note 17, at 194 (“[T]here cannot be an ‘optimal’ rule of crime that is to be attained by pricing the subject behavior.”). Despite this implicit hope that criminal sanctions are so severe that no one would “monetize” them, Congress has perhaps wisely supposed that lawbreakers might not be deterred by the prospect of spending time in modern prisons. The federal sentencing guidelines, at many instances, provide that the sentencing judge may order disgorgement of the greater of the defendant’s gain or loss. See, e.g., U.S.S.G. § 8C2.4. This provision can only suggest legislative anticipation of the possibility that the criminal defendant might “take and pay” where expected profits exceed losses, even where those losses appear in the form of criminal sanctions.

125. See *Levmore & Stuntz*, *supra* note 28, at 490 (describing exclusion as restitutionary because it “requires the government to give up its gains”); see also *Laycock*, *supra* note 101, at 1280-81 (discussing specific restitution of a particular thing as a subset of restitution).

126. *Levmore & Stuntz*, *supra* note 28, at 490; *Mapp v. Ohio*, 367 U.S. 643 (1961).

adjudication contemplates a slowly evolving "market" for legal rules.¹²⁷ The existence of any market implies a certain tolerance for bad decisions made by consumers who misjudge the value of products, or sellers who undervalue them. Similarly, in the market for judicial decisions, the possibility of rule by case precedent is limited by the different set of facts each successive case presents, thus allowing room for a mistaken distinction of precedent and a concomitant toleration for risk.

At numerous junctures, the "market" for common law decisions has been abolished by superior courts, especially the U.S. Supreme Court, in favor of rules that prescribe outcomes. These prohibitory rules, more commonly termed "prophylactic" rules, attempt to lessen the risk of bad decisions by lower courts.¹²⁸

III. THE FAILURE OF PROHIBITORY REMEDIES

Prohibitory remedies comprise the alternative to the legal system's preference for remedies that price, and thus earn the repeated praise of those who regard damages as inadequate or undesirable.¹²⁹ These critics claim that prohibitory remedies, unlike pricing remedies, would achieve perfect compensation, produce efficiency and wealth gains, and provide greater deterrence against undesirable activity. This Part explores the claimed superiority of prohibitory remedies at achieving these goals. It ultimately concludes that a legal system that favors prohibitory remedies promises, at best, to do no better than damages remedies and may, at worst, actually tend to frustrate remedial objectives.

A. *Prohibitory Remedies Fail to Minimize Risk*

This subpart explores the claim that prohibitory remedies better reduce the incidence of harm.¹³⁰ Prohibitory remedies create deterrence by virtue of the large penalty that they represent to defendants. Restitution, for

127. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 611-16 (1992).

128. The Court announced its most famous prophylactic constitutional rule in *Miranda v. Arizona*, 384 U.S. 436, 445 (1966) (avoiding case-by-case inquiry because of "[t]he difficulty in depicting what transpires at [modern] interrogations"). See also *United States v. Wade*, 388 U.S. 218, 227 (1967) (holding that defense counsel must be present at a lineup in order to minimize subtle coercions).

129. See *supra* note 5.

130. See, e.g., Kronman, *supra* note 5, at 380 ("Since it eliminates any profit the promisor might make by selling the property to someone other than his original promisee, imposition of a constructive trust should greatly weaken the promisor's incentive to breach the original contract without having first negotiated a release.").

example, requires defendants to remit gain and thus should deter defendants from tortiously seeking a benefit even where they perceive that the gain will be greater than the anticipated harm-based damages.¹³¹ Similarly, an award of specific performance provides relief more costly to the defendant than expectation damages, thus taking away defendant's gain and his motivation for the breach.¹³² At bottom, these prohibitory remedies attempt to deter a party from treating the relevant property or personal interest as subject to the take-and-pay system.

Although prohibitory remedies may provide greater deterrence in particular cases, it remains doubtful whether the increasing employment of prohibitory remedies would effect an overall increase in deterrence over that already provided by market damages. Prohibitory remedies do not promise to decrease harmful behavior because they are clumsy instruments, and because they have unpredictable and, at times, undesirable effects. Indeed, the undesirable effects engendered by prohibitory remedies may actually tend, perversely, to encourage risk-seeking and harm-generating behavior in contexts where such behavior is socially undesirable.

1. The Clumsiness of Prohibitory Remedies

In order for a particular prohibitory remedy to increase the deterrence above that created by a market-based remedy, it should be amenable to precise use. Unfortunately, the available remedies, in most cases, appear imprecise and unwieldy, as was discussed in Part II.¹³³ Even when judges are able to overcome the substantial information and other costs attendant to the employment of prohibitory remedies, however, the remedies remain poor vehicles to effect deterrence. In other words, prohibitory remedies, even when perfectly arrayed by an experienced judge, will not likely deter undesirable conduct any more than does a market-based remedial system.

(a) Example: The Remedy of Exclusion

Consider the following two cases involving the restitutionary remedy of exclusion.¹³⁴ Case One is a criminal case where the police have forcibly

131. See, e.g., POSNER, *supra* note 6, § 4.8 (outlining possible economic motivations of breaching party).

132. See, e.g., *id.* § 4.11.

133. See *supra* text accompanying notes 54-75, 91-98, 114.

134. See *supra* notes 124-26 and accompanying text (describing the exclusionary rule). Although the underlying case in which the remedy of exclusion is criminal, the remedy itself is civil, instituted in place of a damages remedy in order to deter police misconduct by restituting the gain from the illegal police action. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

entered the personal residence of a criminal suspect without a warrant and have engaged in a broad, intrusive and damaging search. The only evidence produced from this unconstitutional search is a shotgun shell traceable to the murder weapon. It happens that the police have already found in other places nine other such shells, of identical evidentiary value in implicating the suspect, pursuant to legal investigative techniques. The defendant's primary remedial tool to redress the harm from the illegal search is the exclusion from evidence of the tenth shell: a remedy that is trivial in comparison to the harm resulting from the invasion of his home.¹³⁵ Moreover, this trivial remedy of exclusion does little to deter unlawful police behavior.

Now consider Case Two, where the police use an incorrect warrant form for an otherwise valid search, and in the course of that search uncover important evidence used to convict the defendant of murder.¹³⁶ Here, the exclusion of the evidence potentially allows the murderer to go free, a result in great disproportion to the damage caused the defendant by the invasion of his constitutional interest, an invasion that would probably be compensated in a small measure of harm-based damages by a jury.¹³⁷ In Case Two, the remedy of exclusion provides defendant with a substantial windfall, and leaves the community with the discomfoting feeling that a very small marginal gain in deterrence of wrongful police conduct has been bought at a very high price.¹³⁸

135. The defendant may have other legal remedies, including most notably a civil suit against state officers under 42 U.S.C. § 1983 (1988), or against federal officials pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Tort remedies, however, appear to be inadequate in this context for a variety of reasons, including that the amount of damages would be too small to justify undertaking the expense of a suit. See Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 500 (1955) ("It is not surprising that attorneys are reluctant to take [such] cases because of the small chances of a recovery 'sufficient to justify the action'").

136. See *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (declining to reverse lower court on finding of invalidity of warrant, but applying a "good faith" exception to rule of exclusion).

137. Another example of a Case Two situation is seen in *Brewer v. Williams*, 430 U.S. 387 (1977), where a conversation in the course of a lawful transport of a murder suspect between police stations induced the suspect to identify the location of the murder weapon, thus implicating himself in a heinous crime. *Id.* at 392-93. The conversation was later adjudged to constitute an impermissible interrogation, despite the absence of any coercion, and the evidence was excluded. *Id.* at 401.

138. It is easy to find cases where the harm caused a defendant appears minute, but the remedy of disgorgement appears a disproportionate windfall. See *supra* note 136; see also *Levmore & Stuntz*, *supra* note 28, at 490-95 (suggesting that the rule of exclusion provides the defendant a gain beyond that equal to the prosecution's disgorgement where evidence is excluded when the evidence would have been inevitably discovered in fact, but was not "inevitably discovered" for constitutional purposes). It is harder to find, yet easy to imagine, cases where the value of the disgorgement to the defendant is

The controversial history of the exclusionary rule testifies to its clumsiness.¹³⁹ Exclusion does not, and indeed cannot, take into account the relative value of the interests at stake, or the particular desirability of its exercise in a certain context. It creates a boon or a bust. Exclusion is purposely insensitive to harm, and thus predictably has engendered controversial and, at times, indefensible results, or at least results that can only be defended by appeals to higher orderings of the social good, in Case Two cases, or by appeals to the costliness of remedies, in Case One cases. The results cannot be defended by reference to the harm at issue.

This insensitivity to harm renders prohibitory remedies particularly inapt to effect deterrence. Whether prohibitory remedies increase or actually decrease deterrence in comparison to the alternative pricing remedy depends on the frequency of the occurrence of types of cases, which may be somewhat random. For example, in order for an actual increase in the deterrence of unlawful police behavior to occur by virtue of the remedy of exclusion, then the harm to police or enforcement interests from the exclusionary remedy must be greater, on average, than the comparative harm of paying damages. In other words, simply as a matter of definition, for deterrence to increase it must "cost" police more to lose evidence than they "gain" by making illegal searches, and this cost must exceed the hypothetical cost to them of harm-based damages.

It is not necessarily true that the cost of exclusion should exceed the gain from searching. If cases like Case One, where the exclusionary remedy is of trivial value to the defendant and to the system in comparison to the harm, occur with more frequency than do cases like Case Two, where the remedy of exclusion divests the government of a substantial gain in the wake of a trivial or small harm, then exclusion probably costs less than the

trivial in comparison to the harm caused by wrongful police activity. See *supra* note 135. Congress has provided liquidated damages for certain illegal searches to overcome this problem. 18 U.S.C. § 2520 (1988) (mandating that most victims of unauthorized wiretap to receive greater of actual damages or not less than \$100 per day of invasion or \$10,000).

139. The controversy continues. Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983). Professor Kamisar's "principled basis" has not been adopted in federal courts. In *United States v. Leon*, 468 U.S. 897, 906 (1984), the Supreme Court stated:

The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure "work[s] no new Fourth Amendment wrong." . . . [The exclusionary rule] operates as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than as a personal constitutional right of the party aggrieved."

Id. (citations omitted).

gain it is designed to preclude. Indeed, it may well be that, in fact, Case One cases outnumber Case Two cases, as much police activity is undertaken without an evidence-gathering motive, thus actually encouraging police to cause great harm without concern over the effects of exclusion.

Thus, the proposition that the exclusionary remedy accomplishes greater deterrence of unlawful police behavior than does harm-based damages strangely relies on the hope that a sufficient number of wildly "unjust" Case Two cases, where exclusion appears a great windfall to the defendant, occur to offset and surpass the incidence and gain of Case One cases, which involve police harms that go unremedied. It is entirely possible that Case Two cases do not arise with sufficient frequency to pose a large deterrent,¹⁴⁰ especially in comparison with the putatively large number of Case One cases.¹⁴¹ If so, judicial reliance on the exclusionary rule as a means to increase deterrence has been misplaced. In the worst case, if the incidence of harmful, but unremedied, police activity (Case One) is substantial, then the legal system's embrace of the prohibitory remedy of exclusion actually provides less deterrence than would a functioning loss-based remedy, one designed to ensure that damages exceeded gains.¹⁴²

(b) Other Remedies

The clumsiness that characterizes the restitutionary remedy of exclusion is shared by other prohibitory remedies, but to a lesser extent,¹⁴³ for the

140. The available evidence suggests that Case Two cases do not arise with great frequency. See, e.g., Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 621 (reviewing data indicating that the rule results in nonprosecution or nonconviction of between 0.6% and 2.35% of suspects arrested for felonies in the state of California); Peter F. Nardulli, *The Social Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 596 (reporting that motions to suppress were filed in 5% of cases, but were successful only 0.7% of time).

141. Logic suggests that a great number of Case One cases occur, given that the police, in a wide variety of contexts such as disturbances, vagrancy, small drug possessions, and the like, frequently act without regard to the possibility of prosecution, suggesting that the police may violate the law without meaningful retribution.

142. See, e.g., *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 422-27 (1971) (Burger, C.J., dissenting) (advocating a legislated damages remedy to supplant the exclusionary rule); Foote, *supra* note 135 (recommending tort remedy with liquidated damages); Comment, *Search and Seizure in Illinois: Enforcement of Constitutional Right of Privacy*, 47 NW. U.L. REV. 493, 503 (1952) (advocating an official bond for police officers).

143. Consider first the remedy of restitution, of which the rule of exclusion may usefully be understood as a part. Levmore & Stuntz, *supra* note 28, at 490. Like exclusion, restitution generally focuses on the rightful position of the defendant, and not the harm to the plaintiff. The correlation between the two is somewhat random: defendant may have profited greatly from a trivial harm to

plaintiff's ready recourse to a meaningful alternative damages remedy helps ensure that the more punitive sanction is selected, thus promising greater deterrent effect in those cases.¹⁴⁴ Although judges and plaintiffs collaborate in this quest for the larger remedy, each faces the similar problem of estimating the greater of gain or loss as might be determined by a jury. The judge and plaintiff may be able to get this estimate correct frequently in the case of restitutionary disgorgement, where the question is at its most

plaintiff, or plaintiff may have suffered mightily for the sake of defendant's puny profit. In either case, properly characterizing defendant's gain can be difficult. Consider the historic debate over the character of the recovery permitted in *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910) (holding shipowner liable for damage caused to dock by ship moored in storm without dockowner's consent). The criticism of the "unjust enrichment" theory of liability in that case is that the shipowner could have been unsuccessful in saving his ship, and thus enjoyed no benefit from the dock's destruction. See Friedmann, *supra* note 5, at 542-43 (objecting to the use of the word "benefit" in such circumstances).

To similar effect is the prohibitive remedy of an order to a seller to specifically perform a contract to sell a product. The seller's required performance in essence transfers to the buyer the seller's anticipated profits from the breach, because the buyer may now sell the item to the party whose offer induced the breach if he can find that party. It is possible that the disgorged seller's profits are substantially larger than the buyer's expected lost profits from the use or resale that the buyer had contemplated, exclusive of the offeror found by the seller. It is also possible that the seller's performance comprises a value substantially smaller than the available market damages, as might be the case in a falling market where the buyer might have preferred to accept substitutionary damages as they would have been measured at some earlier time. Again, the prohibitory remedy is by design unrelated to the harm, and thus may produce results that result in a windfall to one of the parties to the contract.

144. The plaintiff's estimation of the superior remedy is complicated somewhat by the doctrine of election of remedies, which to prevent double recovery requires the plaintiff (buyer) to ask the jury either for a prohibitive remedy that might "disaffirm" the contract, for example, or a harm-based remedy that "affirms" it, but not both. See generally 1 GEORGE PALMER, *THE LAW OF RESTITUTION* §§ 2.4, 3.10 (1978) (noting the inconsistencies of tort damages and restitution); Friedmann, *supra* note 5, at 505 (reviewing the common law which "view[ed] restitution as an alternate to tort damages"); 2 DOBBS, *supra* note 32, § 9.4 (noting the inconsistencies between damages and rescission). Thus, in a contract case where defendant's breach was induced by the offer of a third party, the plaintiff who sues for restitution of his contractual payment and damages from the breach must at some point elect which of these inconsistent theories will go to the jury. 2 DOBBS, *supra* note 32, § 9.4; *Croeni v. Goldstein*, 26 Cal. Rptr. 2d 412, 416 (Ct. App. 1994) ("[S]ince appellants sought to enforce the sale and obtain the sale price to which they agreed, they cannot recover from [the defendant] profits they would have earned had they kept the business, since this would amount to a double recovery."); *Timmons v. Bender*, 601 S.W.2d 688 (Mo. Ct. App. 1980) (holding that plaintiffs in real estate transaction could not sue for fraud where they had elected inconsistent remedy of rescission of the contract of sale); *Barnco Int'l, Inc. v. Arkla, Inc.*, 628 So. 2d 162 (La. Ct. App. 1993) (holding that plaintiff could be denied damages based on lost profits where he had elected dissolution of contract). The election doctrine requires the plaintiff in choosing a remedy to make a prediction as to whether he will be able to locate the breach-inducing offeror, in which case he might seek and plan on reselling to the third party.

simple.¹⁴⁵ The other prohibitory remedies present harder cases. Specific performance, unless it is to be automatically granted at plaintiff's request, requires the plaintiff/buyer or judge to estimate the value and adequacy of substitute performance;¹⁴⁶ an injunction requires them to assess the likelihood that harm would result, the steps needed to preclude it, and the value of the interests at stake;¹⁴⁷ and a restitution in quasi-contract requires that the market value and alternative use value be estimated and compared.¹⁴⁸

2. *The Risks of Clumsiness*

Assuming that in many or even most cases the plaintiff and the judge can successfully configure which remedy, pricing or prohibitory, will be worth more to the plaintiff, thus overcoming the inherent clumsiness of prohibition, nevertheless prohibitory remedies do not promise to produce a proper level of deterrence. First, the systematic use of prohibitory remedies would likely underdeter. Prohibitory remedies, although they

145. In the disgorgement or "constructive trust" situation, the question is whether the defendant's gains from the tortious conduct exceed the losses from the same. Presumptively, these two calculations should not be much different in degree of difficulty, although the plaintiff might more easily configure the effect of a tort on his status and well-being than on the defendant.

146. For example, in those cases where buyers guess wrongly about the direction of the market price (for example, choosing to seek specific performance where the market price will fall or money damages in a market where price will rise), the penalty to the seller is reduced, lessening the deterrent effect of the sanction. Similarly, where the buyer guesses wrongly about his ability to find the breach-inducing offeror, the volume seller can make the sale to the offeror, thus minimizing the penalty from the prohibitive remedy. The routine award of specific performance assumes that buyers will guess correctly more times than not to ensure adequate deterrence.

147. The order of an injunction presumes that the judge, perhaps aided by the plaintiff, is able to complete a series of guesses about one possible future, and is able to conclude that attempting to circumvent that future constitutes a harsher or more costly penalty on the defendant than simply requiring him to pay damages for the losses he causes. The hypothesis that deterrence will be increased as a result of the systematic employment of injunctions assumes that judges will make this decision correctly more frequently than not. If the judges only make the correct choice about one-half of the time, or if the magnitude of the incorrect choices outweighs the magnitude of the correct choices, then deterrence will actually either be unaffected or will diminish as a result of preferring injunctions over damages.

148. The remedy of restitution (disgorgement) is comparable to exclusion: defendant's gain is not necessarily related in magnitude to plaintiff's losses, and so requiring disgorgement can constitute a windfall to plaintiff or a boon to defendant. In this context, however, it might be feasible to rely on plaintiff to ask for the larger remedy, thus suggesting that civil restitution promises to effect greater deterrence than the harm-based remedy. Even here, however, plaintiff's choice involves considerable guesswork. The extent to which defendant's gain will be attributed by a court or jury to his tortious conduct is not always clear at the outset; no more so is the value of the alternative "pricing" remedy of damages or punitive damages.

disgorge the gain from the defendant,¹⁴⁹ may not deter adequately where the defendant's costs of avoiding the harm are substantial, as would be the case with any sizable business whose employees regularly engage in activities that might cause harms. To deter, expected penalties must be sufficient not only to take away gains, but also to encourage defendants to undertake the substantial training and supervising costs to modify harm-producing behaviors. Although "gain" could be defined to include savings on avoidance,¹⁵⁰ these savings would vary contextually and would introduce significant complexity into the theoretically pristine order of performance or restitution.¹⁵¹

Second, the fact that prohibitory remedies are clumsy to administer presents an additional problem: a system of prohibitory remedies depends more heavily on accuracy than does a loss-based system. In other words, complexity of measurement is not entirely absent in a system of harm-based remedies,¹⁵² but accuracy in the administration of harm-based remedies matters much less than in the administration of prohibitory remedies. With gain-based deterrence, the predominant feature of prohibitory remedies, systematic undervaluation of the defendant's profit from the wrong risks raises the expected gain above the expected penalty, leaving no deterrence at all.¹⁵³ Thus, the incentive for the judge when ordering some form of disgorgement, particularly where the judge suspects that gain and loss are nearly equal, is to protect against potential undervalu-

149. See 1 DOBBS, *supra* note 32, § 4.1(1), at 555 (restitution founded on gain); Levmore & Stuntz, *supra* note 28, at 490 (exclusion founded on gain). Specific performance and injunctions are also gain-based in the sense that they seek to put defendant in his rightful position; i.e., to leave defendant without his wrongful gain. See Linzer, *supra* note 2 (arguing that specific performance is justified in part because it would be wrong to allow promisor to profit from breaking promise).

150. See, e.g., *City of Chicago v. Roppolo*, 447 N.E.2d 870 (Ill. App. Ct. 1983) (awarding constructive trust in amount saved by not making promised repairs).

151. The damages remedy does not suffer from this deficiency because its aim is not to prohibit, but to price. Thus, it does not matter, in regards to deterrence, that a particular defendant may have substantial avoidance costs that exceed the harm-based measure of damages, for here the pricing theory would suggest that the defendant not expend resources in excess of damages as a precaution against this behavior. In any event, in theory the loss-based measure should customarily exceed the gain-based measure simply because harms should routinely exceed gains for a particular activity to be labeled unlawful in some sense. If so, then the expected penalty from a harm-based measure, measured by the average penalty times incidence of conviction, will be larger than one from a gain-based measure.

152. See *supra* note 114 and accompanying text.

153. Valuing gains and losses from a completed event appear to be about equally difficult: each might effect relative well-being or competitive positions for many years subsequent. The problem of estimation, however, looms quite larger when a court chooses to employ a prohibitory remedy, such as an injunction, which requires judges to amass and process a limitless supply of information relevant to the proper crafting of relief. See *supra* notes 54-70 and accompanying text.

ation by systematically and without any necessary logical limitation overvaluing the defendant's profits,¹⁵⁴ eventually taking from the defendant profits not traceable to the wrong. As a result, gain-based deterrence risks overdeterrence.¹⁵⁵

3. Summary

The proposition that prohibitory remedies engender deterrence to a degree greater than the alternative, harm-based damages remedy rests on a series of questionable assumptions about the incidence of types of cases and the accuracy of the measurements and predictions about the future made in a context filled with uncertainty. Because prohibitory remedies are, by design, unrelated to the degree of harm that produced them, they contain no guarantee that they will be employed only when they will augment market deterrence. Even assuming appropriate employment, however, prohibitory remedies will not create a desirable system of deterrence. They will underdeter where avoidance costs are substantial and overdeter if courts fear gain to be systematically insufficient to deter.

B. Prohibitory Remedies May Increase Undesirable Risk-Taking

Prohibitory remedies do not appear to present an attractive option for judges who wish to devise a sanction that systematically increases deterrence. Prohibitory remedies are difficult to administer, and are by design unrelated to the relevant harm, thus producing unpredictable results in deterring harmful conduct.¹⁵⁶ Apart from such considerations, however, lie the behavioral effects that prohibitory remedies generate. Unlike harm-based remedies, prohibitory remedies tend to (1) lead to improper risk management, (2) encourage risk-taking in undesirable contexts, and (3)

154. See, e.g., JEFFREY S. PARKER, CRIMINAL SENTENCING POLICY FOR ORGANIZATIONS 36-40 (U.S. Sentencing Comm'n Staff Working Paper, 1988) (arguing that such a judicial adjustment would result in "overdeterrence").

155. By comparison, accomplishing deterrence with a loss-based sanction requires much less confidence in the accuracy of the sanction. Regardless of whether the assessed sanction is a little high or low in comparison to the "real" harm, the aim of the harm-based sanction is met. The defendant will "internalize" all or most of the social harms he has caused, thus deterring him and others from seeking the presumed smaller personal profit at the expense of the larger harm in the next case. If it is the case that the profits generated in a particular class of cases consistently exceeds the social harm, then one might wonder why the socially profitable activity is discouraged by regulation in the first place; the activity looks more like capitalism than crime. Even in individual cases where the actual gain exceeds harm, adequate deterrence should be produced by a harm-based remedy: just because the defendant hit the jackpot once does not alter the expected penalty and expected gain, which are averages.

156. See text accompanying notes *supra* notes 133-55.

elicit risk-avoiding expenditures in misdirected or wasteful ways. In short, prohibitory remedies create incentives for behaviors that actually increase the incidence of undesirable risk-taking.

1. *On Risk Management*

One behavioral effect engendered by prohibitory remedies is poor risk management. Although the common employment of prohibitory remedies might render judges better at prediction,¹⁵⁷ it would commensurately render potential wrongdoers less adept at assessing risk on their own.

Because damages remedies price harms, they encourage potential defendants to assess risk and exercise judgment in deciding upon the appropriate combination of risk and caution in undertaking a particular enterprise.¹⁵⁸ In theory, the potential defendant may assume (and inflict) as much risk as he prefers, aware that an incorrect judgment in this regard will carry an expected penalty in excess of his expected gains,¹⁵⁹ and thus will tend to be socially and personally wasteful. The take-and-pay remedial system thus inculcates into potential defendants a certain perspicacity of risk assessment. Accordingly, implicit in a system of harm-based remedies is the acceptance of a certain number of immature and unwise personal decisions regarding risk. These harms are exchanged for the gradual teaching, through the deterrence of damages, of a level of maturity of judgment concerning the likelihood that certain risks will cause harms.¹⁶⁰

With a systematic preference for prohibitory remedies, this valuable teaching function is diminished. Prohibitory remedies do not promise to teach citizens to assess reasonable behavior in ever-changing contexts. Rather, prohibitory remedies dictate behavior in more narrow contexts. They constitute a "personal order"¹⁶¹ that directs persons or groups of

157. See *supra* notes 60-65 and accompanying text.

158. See *supra* notes 19-30 and accompanying text.

159. It should be understood here that adequate deterrence under the take-and-pay system requires that the probability of enforcement be unity or "1," and that a significantly smaller probability requires an adjustment of the magnitude of the penalty to maintain adequate deterrence. See *infra* notes 281-307 and accompanying text.

160. This teaching function of market damages appears a valuable one. The financial and human practicalities of public and private law enforcement suggest strongly that the legal system could not sustain its caseload absent mature private risk assessment, or if the great mass of citizens decided to inflict harm on each other wilfully. Thus, effective law enforcement and peaceable communities probably rely to a great deal on the encouragement and practice of daily risk minimization by countless private decisions in a limitless variety of contexts.

161. Doug Rendleman, *Irreparability Irreparably Damaged*, 90 MICH. L. REV. 1642, 1644 (1992) (book review) ("Usually legal relief is money and equitable relief is a personal order.").

persons to behave in a certain way or to do a certain thing in order to avoid harm. With prohibitory remedies, it is the judge, typically, who assesses the risk inherent in a particular situation and the judge who renders judgment on lawful, risk-minimizing behavior. The role of the citizen is not to learn through trial and error; rather, prohibitory remedies teach citizens to obey. Thus, prohibitory remedies do not fully replicate the teaching function of damages.¹⁶²

Prohibitory remedies also render effective risk management more problematic by inhibiting the flow of information that might assist in managing risk. In the world of harm-based damages remedies, the defendant should be able to “internalize” the harm through the suit for money, measured by loss. Thus, to the extent that enforcement is optimal,¹⁶³ damages suits provide excellent conduits to inform the defendant that his choice to create risk caused a harm that is to be avoided. Prohibitory remedies do not transmit this information, which is vital to the appropriate shaping of behavior, so easily. By design, prohibitory remedies seek to preclude risky activities, and thus the outcomes of risky activities might never be learned. For example, an injunction ordering defendant not to emit a certain substance into a river prohibits the creation of the datum as to the effect of that emission. Similarly, a court order requiring specific performance of a contract to supply inputs to a manufacturer may, unless the manufacturer located alternate suppliers prior to contracting, prohibit the creation of the datum as to whether the manufacturer could have found an alternate supplier more cheaply than the opportunity cost to the supplier in performing the contract. Moreover, even violations of the prohibitory order

162. It is not meant to suggest that the award of any particular prohibitive remedy, or even a slight trend toward their routinization, by itself will make children out of adults. The extent to which law functions as a teacher is speculative, and it is not clear that people can not learn to assess risk maturely on their own, without the law's guidance, given the enormous range of human behavior that by its relative insignificance falls outside of the realm of law. Nevertheless, a great deal of behavior is within law's province, and many people in some of their capacities are required to comply regularly with multivariate legal standards. A remedial system that features prohibition wagers heavily that these people, in those contexts where prohibition is absent, will be sufficiently comfortable and familiar with such notions as “reasonableness” or “due care” to structure their behavior, and perhaps that of subordinates, in ways that are socially beneficial. Where an area of activity has been rather completely taken over by prescription, such as the task of police interrogations for example, *see infra* notes 176-89 and accompanying text, one might reasonably doubt that the relevant decisionmakers will develop enough experience with dealing with the unique set of inherent risks to make wise judgments about the degree of “coercion” introduced into a particular interrogation.

163. This is a large qualification and will be addressed in Part V. *See infra* notes 281-307 and accompanying text.

do not always provide the information necessary to assess the likelihood of harms from risk because the prohibitory order may require the defendant to behave in ways that are completely unrelated to the harm. For example, an order to keep records of the dates of waste disposal does not, if that order is violated, produce data on whether or not a disposal into a river is harmful.

Prohibitory remedies do not render appropriate risk management impossible; rather, they tend to render it more difficult by lessening the teaching function of market damages, and by requiring that the information necessary to shape behavior, or to craft prohibitory remedies, be obtained through means other than trial and error. Prohibitory remedies transfer the task of risk management from the potential defendant to the judge, and shift the task of information-development from the relatively simple device of trial and error to the domain of experts who must predict outcomes hypothetically.

2. *On Undesirable Risk Encouragement*

Prohibitory remedies not only render risk management difficult,¹⁶⁴ they also have an ambiguous effect on risk encouragement. At some point, all sanctions "price," even criminal ones,¹⁶⁵ and so it is important to consider the relative effect any choice of remedy might have on encouraging undesirable risk. Because prohibitory remedies differ from market remedies, they engender a different behavioral response. The simplest way in which prohibitory remedies differ from market remedies is in magnitude: where either is available and the plaintiff asks for a prohibitory remedy, then the prohibitory remedy is assumedly more valuable to the plaintiff than the alternative market remedy.¹⁶⁶ A gain-based remedy that leaves plaintiffs better off than they would have been under prevailing market or legal

164. See *supra* notes 156-63 and accompanying text.

165. One reason why penalties differ among crimes is the recognition that at least some criminals, or perhaps many, are deterred to a certain degree by certain sanctions: thus, marginally higher penalties are a way to encourage wrongdoers to commit less harmful or serious crimes. See generally George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970) (discussing the crime level in economic terms of supply and demand).

166. In some cases, however, the prescriptive remedy might be worth less to the plaintiff than the alternative damages remedy. The best example here might be a restitutionary recovery that is measured by the defendant's saved precautionary expenses, where these expenses ought, if the conduct in question causes more harm than gain, to be smaller than the resultant harm. See Levmore & Stuntz, *supra* note 28, at 484-85 (arguing that restitution of the cost of precaution-taking will not provide adequate incentive for precautionary behavior). Courts, however, do not usually measure the restitutionary recovery by the savings from the wrong. Laycock, *supra* note 101, at 1290.

standards risks creating a "moral hazard"¹⁶⁷ for potential plaintiffs to get hurt and seek rents.¹⁶⁸

The "moral hazard" potentially created by the more valuable prohibitory remedies, however, should not arise in many cases. Remedies define precautionary markets,¹⁶⁹ thus providing deterrence for both potential defendants and potential plaintiffs. Where the potential plaintiff and potential defendant together are liable for all the costs from a given activity, then a change in the remedy should have no net effect on the total level of precautionary activity. Specifically, to the extent that harms to potential plaintiffs are compensated more generously by prohibitory remedies than by the ordinary market remedies, the deterrent effect of remedies on the potential plaintiff is diminished. However, this diminishment should be correspondingly offset by the defendant's increased incentives to avoid incurring liability under the more onerous prohibitory remedy.¹⁷⁰ Consequently, in the best case, the net addition in deterrence from the adoption of prohibitory remedies should be zero.¹⁷¹

167. See Levmore & Stuntz, *supra* note 28, at 485-86. Moral hazards may be present in certain damages cases as well. See Goetz & Scott, *supra* note 6, at 583-86 (discussing the problem of moral hazards with respect to liquidated damages provisions). The moral hazards springing from the damages remedy should be small, however, as most sensible plaintiffs would prefer not to be injured in the first place. At best, a fully compensatory damages remedy, precisely equal to actual losses, should leave plaintiffs indifferent.

168. This problem of the moral hazard is worsened if the plaintiff is permitted to acquire some of the profits stemming from defendant's ingenuity or effort. Consider the famous case of *Olwell v. Nye & Nissen Co.*, 173 P.2d 652 (Wash. 1946), where the owner of an unused egg-washing machine was allowed to collect the profits, in the form of saved labor, from a manufacturer who had converted the machine. Without the conversion, plaintiff's profit from owning the machine appeared to be zero, or even a loss due to storage costs. Because the court permitted the plaintiff to recover in restitution, a prohibitory remedy, the plaintiff was given defendant's profits, which exceeded both possible market remedies: the rental value of the machine or its replacement value. Moral hazards might also arise due to the court's inability to trace losses. See Friedmann, *supra* note 5, at 553-54.

169. In part, the law of remedies creates these markets by giving a particular personal interest, formerly *damnum absque injuria*, legal protection. Remedies also define these markets by drawing the line between defendant's liability and plaintiff's liability, the latter expressed through various doctrines that exculpate the defendant, such as contributory negligence, the doctrine of avoidable consequences, proximate causation, and the like.

170. Coase's theorem holds that the rules of liability do not matter where transactions costs are low. Coase, *supra* note 89. Here, although torts frequently occur between strangers and without opportunity for pre-harm bargaining, the applicable legal rules specify obligations in the manner of a contract. They thus instigate the search for the liability rule that would inflict liability on the cheaper cost avoider in an effort to minimize joint costs, as presumably would a contract.

171. At best, the introduction of prescriptive remedies would seem to leave the sum of harm-avoiding behavior unchanged, simply shifting burdens from plaintiffs to defendants. It would thus appear irrelevant to the incidence of harm where the line of liability is drawn, assuming the rate of

A change in the predominate remedy may in fact have a neutral effect in many circumstances. For example, the parties to a business contract may not know before the event if they will be plaintiffs or defendants, and probably see themselves potentially as both. They will accordingly take precautions both to minimize the harm from their contractee's breach and to maximize their opportunities to breach with relative impunity. In this context, a variation in the generousness of the remedy from the plaintiff's perspective, for example, should produce no net loss in precautionary activity because the increase in deterrence for the potential aggressor will be offset by the decrease in avoidance by the potential aggrieved. More broadly, a change in the allocation of risk in tort cases should not in the long run alter the level of deterrence that pertains to the activity giving rise to the tort, but instead should merely constitute a transfer of responsibility for precautionary activity between the parties. On this analysis, a move from a preference for damages remedies to a preference for prohibitory remedies should not alter the level of deterrence.

In some cases, however, one or both of the parties are not liable for all the consequences from a harm, but rather can transfer the cost of that remedy to a third party. For example, a plaintiff in a mistaken improvement case who prevails in a claim for restitution is compensated not only by the defendant, but also from the community in the form of forgone wealth.¹⁷² Or a plaintiff who prevails in a claim for an injunction achieves his rightful position at the expense of the defendant and the community.¹⁷³ Where the cost of a remedy is borne by a party other than the defendant or the plaintiff, a moral hazard arises, and so the expenditures by the parties on precautionary activity will be diminished commensurate with the third party's liability. If it is true that prohibitory remedies characteristically tend to provide compensation in part at public expense,¹⁷⁴ then the moral hazard that prohibitory remedies create will actually tend to diminish the amount of precautionary expenditures, thus encouraging socially undesirable risk-taking, decreasing deterrence, and adding to the quantity of harms.¹⁷⁵

detecting harm remains unchanged.

172. See *supra* notes 105-13 and accompanying text.

173. See *supra* notes 54-65 and accompanying text.

174. See *infra* notes 248-53 and accompanying text.

175. Assuming that persons generally are more risk-averse to being the victim of a tort than a tortfeasor, on the assumption that damages do not compensate sufficiently to render one indifferent between being harmed or being compensated, then lessening the deterrent level on potential plaintiffs will diminish the total amount of deterrence in the system. This problem, however, may be overcome by an increase in enforcement rates that may arise due to the added incentive to sue that prescriptive

As a result, it matters a great deal whether prohibitory remedies in fact cost the public more to devise, administer and award than do the alternative damages remedies. If they do not, then at best all the proponents of prohibitory remedies can fairly claim is that adopting a preference for prohibitory remedies will have a neutral effect on deterrence. If they do engender greater social costs, then a preference for prohibitory remedies creates a moral hazard, diminishing the deterrent incentives to take proper care. Under neither circumstance, however, can it be truly claimed that the adoption of a preference for prohibitory remedies will increase deterrence.

Prohibitory remedies also potentially encourage undesirable risk-taking because they tend to shape behavior in accordance with the prohibitory standard, and not the harm that is the object of the standard. By refocusing behavior, prohibitory remedies may actually increase the incidence of risky behavior, thus increasing the incidence of harm.

Consider the risk-engendering effects of the prohibitory remedy of the *Miranda*¹⁷⁶ warnings. The constitutional harm at which the *Miranda* warnings aim is a coerced or involuntary confession.¹⁷⁷ The warnings, however, must be given only when the suspect is in "custody,"¹⁷⁸ with exclusion the remedy for their denial.¹⁷⁹ Moreover, it is only after the suspect is warned that he fully gains the right to remain silent and to have an attorney present during questioning.¹⁸⁰ Consequently, the suspect gains incentives to get arrested,¹⁸¹ certainly a "harm" to the defendant under normal circumstances, because once arrested, a suspect may invoke the right to silence and request that a lawyer be present when dealing with police, whereas prior to the arrest these requests can be lawfully denied.¹⁸² *Miranda*'s prohibition also gives police incentives not to arrest

remedies give plaintiffs. It is possible that prohibitory remedies could make potential defendants more sensitive to causing harm, both because the increased cost of liability will itself draw more attention and because the plaintiffs simply have a greater incentive to pursue more valuable remedies.

176. *Miranda v. Arizona*, 384 U.S. 436 (1966).

177. *Id.* at 445 (devising warnings due to difficulty of recreating interrogation scene).

178. *Id.* at 467. "Custody" means that a person is deprived of his freedom in some significant way. See *United States v. Griffin*, 922 F.2d 1343 (8th Cir. 1990) (listing factors indicating deprivation).

179. *Miranda*, 384 U.S. at 444.

180. See *Jenkins v. Anderson*, 447 U.S. 231 (1980) (holding that prearrest, prewarnings silence may be used to impeach); *Illinois v. Perkins*, 496 U.S. 292 (1990) (holding that warnings not required where suspect, an inmate, not being questioned by captors).

181. Strangely, it behooves a suspect to get arrested to avoid the use of his silence for impeachment purposes. See *Jenkins*, 447 U.S. 231.

182. This result is implied by the court's decision in *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.3 (1991) (holding that an invocation of the right to counsel under the Sixth Amendment did not constitute

suspects if they fear that the “*Miranda* rights” will be invoked. Instead, *Miranda*’s prohibitory system leads police to conduct interrogations pre-arrest using undercover agents¹⁸³ or parole officers,¹⁸⁴ to delay arrest after obtaining probable cause,¹⁸⁵ to delay arrest if the confrontation can be characterized as a “stop,”¹⁸⁶ or to devise other methods to manipulate the rules of *Miranda*.¹⁸⁷

Thus, *Miranda*’s prohibition and its valuable restitutionary remedy of exclusion creates perverse incentives. *Miranda* draws suspects into arrest, a coercive situation, and draws police officers into pre-arrest forms of interrogation, which are, for police officers, a context that permits forms of deceit that might be condemned in interrogation. Both sides are propelled toward coercion, which is precisely the harm against which the remedy is supposed to aim.¹⁸⁸ In addition, the focus on the prohibitory remedy of

an invocation of the right to counsel because “a person can[not] invoke his *Miranda* rights anticipatorily, in a context other than custodial interrogation”).

183. See *Perkins*, 496 U.S. 292 (holding that as long as the suspect does not know that he is talking to a police agent, and as long as the suspect has not been indicted (or its equivalent) for the subject matter of the questioning, then *Miranda* does not apply).

184. See *Minnesota v. Murphy*, 465 U.S. 420 (1984) (holding that the privilege against self-incrimination is not violated when suspect, a probationer, is questioned about a crime by parole officer).

185. *Jenkins*, 447 U.S. 231 (holding that silence during the period of delay may be used for impeachment purposes if the defendant testifies).

186. *Berkemer v. McCarty*, 468 U.S. 420 (1984) (holding that prearrest statements made pursuant to a *Terry* stop or a traffic stop are admissible in evidence).

187. *Miranda* has generated a series of cases involving police practices that evidence how easily the court-devised prohibitory rules can be circumvented. For example, the police may delay giving *Miranda* warnings after arresting, because silence during the period of delay may be used for impeachment purposes if the defendant testifies. *Fletcher v. Weir*, 455 U.S. 603 (1982) (holding that it is constitutionally permissible to use postarrest, prewarnings silence to impeach). Moreover, the defendant might volunteer statements before being warned. *Arizona v. Mauro*, 481 U.S. 520 (1987) (allowing an officer to observe and record postcustody conversation between spouses because statements are not the result of police interrogation). The police also need not inform the defendant of the most serious crimes of which he is suspected. Mere silence regarding the subject matter of an investigation is not “trickery” sufficient to taint the waiver. *Colorado v. Spring*, 479 U.S. 564 (1987) (holding that suspect need not be aware of all subjects of interrogation); see also *Moran v. Burbine*, 475 U.S. 412 (1986) (holding that where suspect has not requested counsel, police may preclude counsel from seeing client; thus giving the police an incentive to lie to the suspect’s lawyer to keep the suspect incommunicado and obtain a confession); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (finding question “what is going to happen to me now?” asked after invocation of rights initiated recommencement of discussion about crime, permitting interrogation directed toward inducing the suspect to disclose the facts of crime and to agree to a lie detector test).

188. Other prohibitory remedies can pose the same problem as the *Miranda* warnings. For example, if the injunction entered against Sue, see *supra* note 66 and accompanying text, prohibits her from writing her former clients, then former clients are given the incentive to telephone or visit in person. Thus, like the *Miranda* warnings, the injunction actually may engender greater opportunities for

Miranda warnings may lead judges away from the more important inquiry into the coercive nature of the police activity.¹⁸⁹

Finally, one more troublesome problem stems from a preference for prohibitory remedies: the awesome power of certain equitable prohibitory remedies to bind defendants may, in certain contexts, lead to collusion among parties to cause harm in order to obtain the remedy. This possibility supplies a plausible explanation for the remarkable frequency of sham litigation in Title VII actions. Approximately one-third of all Title VII actions filed by the Justice Department between 1972 and 1983 were settled by a "consent decree," essentially a settlement agreement embodying an injunction, on the very day of filing.¹⁹⁰ This remarkable fact suggests that the parties are actively colluding to obtain the prohibitory remedy of an injunction, allowing the parties in a public law litigation, for example, to bind successors in interest, a particularly attractive goal for elected officials or for others whose interests might not be shared by successors.¹⁹¹ Thus, the moral hazard of prohibitory remedies may evidence itself in parties' colluding to acquire them.

solicitation, the harm to be avoided. To avoid a defeat of the injunction, a court has the incentive to devise the broadest remedy imaginable, thus protecting Traditional's interests at the expense of Sue's rightful position.

189. Today, few confessions are found to be involuntary. Welsh S. White, *Interrogation Without Questions*, 78 MICH. L. REV. 1209 (1980). Professors Saltzburg and Capra have wondered if judges have created a "presumption" of voluntariness if the suspect waives his *Miranda* rights. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 497-502 (4th ed. 1992). To the extent that the prohibitory remedy fails to diminish harm, it also elicits wasteful expenditures. The *Miranda* warnings system, with its multiple opportunities for violations leading to exclusion, assumedly has become a focus of police training, supplanting to some extent the teaching of how to avoid tactics that would tend to overwhelm a suspect's will. To the extent that these warnings fail to do their job in reducing the harm at issue, the prohibitory remedy causes a severe misallocation of precautionary resources.

190. Maimon Schwarzschild, *Public Law By Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 913.

191. See generally *id.* See also *United States v. Hall*, 472 F.2d 261 (5th Cir. 1972) (imposing an injunction personally binding third party from interfering with "res" of litigation).

C. *Prohibitory Remedies Hinder Wealth Maximization*¹⁹²

Prohibitory remedies do not promise to expand the incentives that potential plaintiffs and potential defendants have to minimize undesirable risks;¹⁹³ indeed, in certain situations their widespread use may lead to an increase in the incidence of harmful activity.¹⁹⁴ Nonetheless, a preference for prohibitory remedies, and the full compensation they appear to promote, may constitute a desirable substitute for the predominant loss-based damages remedies if the prohibitory remedies can better fulfill the remedial goal of wealth maximization.¹⁹⁵ Unfortunately, prohibitory remedies do not appear to promote wealth maximization; indeed, they appear to promote its opposite.

Prohibitory remedies protect the plaintiff's idiosyncratic or sentimental valuations.¹⁹⁶ Idiosyncratic valuations are those that are not reflected in the market price.¹⁹⁷ For example, a pocket watch may be worth one hundred dollars on the market,¹⁹⁸ but the fact that it was a special present from grandfather renders its value to the grandchild much greater. If the watch were converted, the market-oriented, harm-based remedy would

192. There are, besides wealth maximization, other fundamentally instrumentalist explanations of remedial law, including wealth redistribution. See Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 449 (1992). This section will focus on wealth maximization due to its current academic popularity instigated by Judge Posner. For Posner's description of the remedial goal of wealth maximization, see POSNER, *supra* note 108, at 356; Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979) [hereinafter Posner, *Utilitarianism*] (arguing that wealth maximization provides a normative grounding for law). See also D. Bruce Johnsen, *Wealth Is Value*, 15 J. LEGAL STUD. 263 (1986). Regarding other instrumentalist goals such as wealth redistribution, it has been argued that litigation should be used instrumentally to reshape distributions. See Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

193. See *supra* notes 130-55 and accompanying text.

194. See *supra* notes 156-91 and accompanying text.

195. Efficiency comprises one manner of talking about wealth maximization, see Lawson, *supra* note 108, and several scholars have defended prohibitory remedies on the ground of economic efficiency. See Linzer, *supra* note 2; Schwartz, *supra* note 5.

196. The concept of idiosyncratic or sentimental valuations is a broad one. See Linzer, *supra* note 2, at 119 (arguing for specific performance due to idiosyncratic values at stake in "non-commercial" transactions); Goetz & Scott, *supra* note 6, at 570 ("Idiosyncratic value would include any subjective or 'fanciful' valuation which varied significantly from the established market value."). In regard to land, for example, an owner may have made unique modifications or improvements to a property, and may personally abhor the costs and inconveniences of relocation. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 83 (1986).

197. See generally Goetz & Scott, *supra* note 6, at 562-65.

198. This example is drawn from 1 DOBBS, *supra* note 32, § 4.1(1), at 554.

generally require a damages payment of the market value.¹⁹⁹ By comparison, a remedy that prescribed restitution of the watch or the similar legal remedy of replevin protects the grandchild's idiosyncratic valuation, recognizing that market value does not "adequately" compensate for the defendant's harm.²⁰⁰

Other prohibitory remedies similarly operate to protect nonmarket, idiosyncratic values.²⁰¹ For example, consider a case where Smith is the owner of a summer home that borders a milling plant.²⁰² The plant habitually blows dust onto Smith's house and fouls the stream that runs through both properties, which harms can be abated only by terminating operations at the plant. To enjoin the plant, Smith must convince the court, in addressing the "balance of the equities," that his harms from the nuisances are greater than the plant's harms from closure.²⁰³ A failure of proof on this issue relegates Smith to damages, requiring him either to accept living with the plant's emissions or to move. Assume that Smith fails to establish superior market value,²⁰⁴ and that his only plausible claim for superior losses derives from the fact that Smith's summer house has been in the family for generations, thus generating tremendous sentimental values that exceed the value of the plant remaining in operation. If the judge issues an injunction closing the plant, the order would protect Smith's idiosyncratic values over the relative market values.

There appears to be nothing presumptively wrong with requiring defendants to compensate plaintiffs for idiosyncratic losses; more problematic is that plaintiff's idiosyncratic compensation comes not only in the form of a transfer payment from defendant to plaintiff, but also in

199. See *supra* note 20; *cf. infra* note 301.

200. The rule requiring that the legal remedy be inadequate has had an uneven history in regard to restitution, perhaps in part because restitution was historically provided at both law and equity. See SCHOENBROD ET AL., *supra* note 116, at 549 ("At bottom, the best one can say is that sometimes an adequate legal remedy bars equitable rescission, sometimes it does not, largely without rhyme or reason."). *But cf.* 1 PALMER, *supra* note 144, § 1.6 ("Although an occasional decision suggests that restitution will be denied when alternative remedies are considered adequate, innumerable cases demonstrate that this is incorrect.").

201. Rescission, a remedy closely related to restitution, see 1 DOBBS, *supra* note 32, § 4.3(6), might also profitably be understood as a device to protect idiosyncratic values. *Id.* ("Equity rescission is also needed whenever the plaintiff wants a recovery of specific property having special or unique qualities.").

202. These facts are drawn from *Smith v. Staso Milling Co.*, 18 F.2d 736 (2d Cir. 1927).

203. See generally 1 DOBBS, *supra* note 32, § 2.9(2).

204. In *Staso*, the mill established that its loss from closure exceeded the loss in value to Smith's property, and indeed, exceeded the total market price of Smith's land and improvements absent the plant. 18 F.2d at 737.

the form of social loss to the community. Unlike a transfer payment, which would appear to have no positive or negative effect on social wealth, compensation for idiosyncratic values can in some cases cause an actual diminishment of social wealth. Idiosyncratic values, by definition, are inalienable. They represent a value that only Smith, in the example, in fact appreciates,²⁰⁵ and thus do not promise to be capitalized or translated into social wealth.²⁰⁶ The values protected by the prohibitory remedy cannot in the market command the price they implicitly commanded in the courtroom. Although Smith's utility is increased by the injunction, social wealth is actually diminished, with no chance of recoupment. The opportunity cost of protecting Smith's idiosyncracies, which in this example is the amount by which the operating value of the plant exceeded the market value of the summer home, represents a social loss. Consequently, plaintiff's claim to full compensation lies not only against the defendant, but also against the community which pays for protection of idiosyncratic values at the expense of wealth creation.²⁰⁷ Because the injunction here represents a transfer of wealth from the community to Smith, then the injunction is tantamount to

205. The notion of subjective or idiosyncratic valuations is partially captured within the economist's term "consumer surplus," which denotes the subjective valuations above market price that lead a consumer to purchase at the market price; i.e., the difference between what the consumer would be willing to pay and what the consumer pays in fact. Consumer surplus is essential to the creation of wealth, as in theory a good is sold and resold as successive buyers offer to purchase at a price in excess of the holder's consumer surplus, but within the buyer's consumer surplus.

Courts have usually been less precise in defining consumer surplus on those occasional instances where they have recognized what lawyers think of as subjective or idiosyncratic values. The courts' notion seems to refer to a plaintiff's valuations of a broad array of sentimental attachments to property, without regard to the plaintiff's willingness to pay for them. *See, e.g.,* *Brown v. Frontier Theaters, Inc.*, 369 S.W.2d 299, 305 (Tex. 1963) (holding that where various heirlooms were lost, plaintiff was permitted to recover for "the reasonable special value of such articles to their owner taking into consideration the feelings of the owner for such property"); *Bond v. A.H. Belo Corp.*, 602 S.W.2d 105 (Tex. Civ. App. 1980) (reversing lower court's rulings that had excluded plaintiff's "fanciful or sentimental considerations" from the measure of damages, holding that "feelings" were properly part of value of family papers and photographs); *cf. Mieske v. Bartell Drug Co.*, 593 P.2d 1308, 1311 (Wash. 1979) (en banc) (holding that an award for loss of a personal item should be measured as the "actual value to the [owner]," which includes some element of sentiment, and that it is only "unusual sentimental value" or a "fanciful price" that is inappropriate in assessing damages).

206. In comparison, Staso's personal profit coincidentally comprises a social profit, as it is immediately realized and transferred into purchases, salaries, and so forth. *See supra* notes 107-13 and accompanying text.

207. The proposition that prohibitory remedies tend to cause wealth diminishment should not be understood to constitute an argument against ever granting a prohibitory remedy. In some instances, other remedial goals will justify wealth diminishment. *See infra* notes 271-307 and accompanying text. Rather, this contention suggests caution in establishing prohibitory remedies as the routine or regular remedy as some have suggested. *See supra* note 5.

a public good. Plaintiffs have the incentive to seek the injunction regardless of its cost to social wealth, and others are unable to exclude them from it.²⁰⁸

Like Smith's injunction, the prohibitory remedy of specific performance appears to create a public good problem, as it sometimes may protect idiosyncratic values at the expense of market values.²⁰⁹ Performance can be wasteful, as for example where the plaintiff desires performance for reasons of vindictiveness, or more generally in any situation where the plaintiff's gains from obtaining performance exceed on idiosyncratic grounds the market value of substitute performance. Performance here is socially wasteful, because the court's order protects the plaintiff's interest in what is, by definition, a value upon which the plaintiff does not promise to capitalize. Specific performance in the face of a superior third-party offer at worst creates waste, if the contract good is delivered to the promisee without the possibility of resale,²¹⁰ and at best engenders deadweight efficiency loss, where the promisee extracts a premium from the promisor to permit sale to the third-party offeror.²¹¹ The potential social wastefulness of the remedy of specific performance in the face of a higher bid might help to explain the tenacity of the prohibition against parties' contracting into performance remedies or into liquidated damage provisions that amount to "penalties," despite sustained academic criticism.²¹²

208. Understanding prohibitory remedies as "public goods" provides a strong reason not to grant plaintiffs an "automatic injunction" when they ask for one, *see* Schwartz, *supra* note 5; they will ask for one until available funds are exhausted. *See infra* notes 222-32 and accompanying text. Thus, it seems sensible to find a way to encourage the judge to limit access to prevent depletion. The traditional irreparable injury rule serves this function. *See infra* notes 291-96 and accompanying text.

209. Statutes that structure equitable balancing, *see supra* note 123, can similarly be wealth diminishing. These statutes protect certain idiosyncratic values, such as certain citizen's interests in protection from harsh treatment, to an extent greater than would the market. Thus, these statutes constitute "subsidies" for certain values, and trade off economic gain for other goods. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (holding that the Endangered Species Act protects various forms of life regardless of costs).

210. POSNER, *supra* note 6, § 4.11.

211. *See* Yorio, *supra* note 5, at 1381-85 (arguing that these negotiations could be protracted in the postbreach context with a contract involving fungible goods). The negotiations would presumably be more strenuous in the case of unique goods, where cover is by definition less available. *But see* Kronman, *supra* note 5, at 367-68 (arguing that the promisor, *ex ante*, is unlikely to anticipate better offer with unique good, and thus "nearly indifferent" regarding the remedies for breach).

212. On the prohibition against contacting into performance and other remedies, *see* generally 3 DOBBS, *supra* note 32, § 12.9(6). *See also* Goetz & Scott, *supra* note 6, at 568-77 (arguing that penalties clauses provide an efficient method to protect idiosyncratic valuations); Kronman, *supra* note 5, at 369-76 (arguing that parties should be permitted to contract into specific performance to protect uncompensated values). The argument respecting the wastefulness of enforcing "penalizing" liquidated

In many cases involving specific performance, however, idiosyncratic values may be protected without incurring a social cost. As Professor Kronman argues, where the promisee stands to gain more from the delivery of the unique good than the ordinary damages remedy would allow, and thus would be motivated by the risk of breach and subsequent undercompensation to pay the promisor a premium to agree to perform the contract,²¹³ then the remedy presents little danger of diminishing social wealth, because presumably the promisee intends to capitalize fully on the performance. Indeed, by striking the deal at an above-market price, the promisee has already capitalized some of his idiosyncratic valuations or consumer surplus.²¹⁴ A higher contract price as an inducement for promisor's performance operates identically, for economic purposes, to a

damages provisions proceeds along the same path as that in the text regarding specific performance. Although the contract price may be above market to reflect the greater exposure of the promisor under the damages clause, a decision by a court to enforce the penalty will marginally discourage resale at a superior price, thus eliminating a chance to capitalize on value. *See infra* notes 213-21 and accompanying text; *see also*, Linzer, *supra* note 2, at 118.

213. *See* Kronman, *supra* note 5, at 365-69. *Compare* Schwartz, *supra* note 5, at 282-83 (arguing that promisors will resist agreeing to performance remedies in contracts involving unique goods, due to the possibility of rapid rises in price stemming from inelastic supply), *with* Yorio, *supra* note 5, at 1378 (arguing that promisors cannot resist requests for performance without raising promisee's suspicions, thus harming goodwill). Professor Kronman's analysis of this point is puzzling. He admits that the promisor would be more reluctant to provide for specific performance in the case of a unique good due to the lack of easy substitution, Kronman, *supra* note 5, at 367, but then concludes by suggesting that the promisor in a unique goods case will be "nearly indifferent as to what remedies the promisee will enjoy in the highly unlikely event of breach," owing to the foreseen paucity of third-party offers, *id.* at 368. It seems paradoxical to claim that a promisor would be indifferent as to a promise and yet put a high price on it. Unfortunately, it is on this paradox that Professor Kronman's entire argument rests, for if in fact the promisor is not "nearly indifferent" to being bound to specifically perform the delivery of a unique good, then *ex ante* both parties will not prefer those clauses in unique goods contracts, and the extant rules do not necessarily minimize joint costs. Rather, "it would appear that the benefits to the promisee and the costs to the promisor of a specific performance provision are proportional," *id.* at 367, and the uniqueness of the good tells us nothing interesting about when that proportion might change.

214. Offering a higher price would only increase the relative security of performance, not render it absolute. But specific performance provides only relative security as well, because the ultimate performance is (impliedly) conditioned on a variety of factors outside of the control of both the promisor and promisee, such as the absence of an act of God. The promisee could also ensure performance by outbidding the third party. Once promisors are assured that the promisee could not coerce performance, they would likely avail the promisee of an opportunity to outbid a third party. *But see* Yorio, *supra* note 5, at 1395-96 (asserting that in construction and restoration contracts, promisors breach without informing the promisee). Although these negotiations do inject some costs into the transfer of contract goods, a regime featuring specific performance or idiosyncratic damages allocations would do no better. In each case, promisors and promisees interested in maximizing joint gains would have to arrange a deal, either to buy out the promisee's right to specific performance, or to establish the extent of above-market idiosyncratic value.

liquidated damage clause. Each encourages performance in the face of a higher third-party bid and provides grounds for compensation for unrecoverable idiosyncratic losses.²¹⁵ Contracting at a higher price carries the advantage over liquidated damage clauses of not discouraging resale at a superior price, and thus not losing a chance to capitalize on value.²¹⁶ Bids by third parties need only be superior to the contract price, not the "penalizing" liquidated damages.²¹⁷

The problem of social wealth diminishment should not generally be present where the parties contractually agree to liquidated damage clauses or specific performance because the idiosyncratic values are translated into social wealth directly, through an adjustment in the contract price. This consideration militates in favor of liberalizing the restrictions that constrain contracting,²¹⁸ but not necessarily in favor of establishing prohibitive remedies as the preformulated rule. If specific performance comprised the preformulated rule, contract prices would rise, foisting the price of idiosyncratic values upon plaintiffs who may not have them, or who have them but may not wish to pay for them, preferring more attractive alternatives, and who thus would be perfectly content with a damages remedy.²¹⁹

Finally, a preference for specific performance, restitution or injunctions

215. Goetz & Scott, *supra* note 6, at 559.

216. In an argument that mirrors that of Goetz and Scott in regard to liquidated damages, *id.*, Professor Yorio asserts that a stronger moral case for full compensation to the plaintiff comes in the context of a contract with a restoration clause, such as that at issue in *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962) (disallowing full remedial compensation where benefit was minimal and clause was incidental to the contract), *cert. denied*, 375 U.S. 906 (1963). Yorio, *supra* note 5, at 1393-94. Yorio argues that, to the extent that the contract price was raised to pay for the restoration, plaintiff should get damages that include an amount devoted to the purchase of this restoration. *Id.*

217. Consider the following example. Promisee desires a small parcel of land in his neighborhood to use for an outdoor basketball court. The land has a market value of \$1000; its use as a basketball court will add \$250 to its value. In order to induce delivery of the parcel, promisee offers to pay promisor \$1500 to sign a contract with a \$5000 liquidated damages provision payable to promisee should promisor breach. After the contract is signed but before the sale is consummated, a third party offers promisor \$2000 for the same parcel, planning to use it to expand his adjacent house, thereby adding \$4000 in value to the real estate. If promisee subjectively values the parcel at \$5000, and thus refuses to allow the promisor to purchase the contract back, then the third party's superior offer will go unaccepted, even though promisor could have compensated promisee for his market loss of \$250 with the gains, and even if the third party sweetens the deal closer to his profit margin. Delivery to promisee allows him to enjoy his idiosyncratic, noncapitalizable value, at the expense of social gain.

218. See Goetz & Scott, *supra* note 6; Kronman, *supra* note 5.

219. As was argued with respect to the routine provision of restitution, *see supra* notes 105-113 and accompanying text, ignoring utility can frustrate the goal of wealth maximization.

may frustrate wealth maximization by hindering the defendant from the "contracting-out" of risk.²²⁰ The efficiency presumably generated by defendant's ability to contract out portions of risk hinges on the willingness of specialists to accept that risk, seemingly a less desirable state of affairs if the subcontract were specifically enforceable against the specialist. Specific performance would thus render risk contracting or other liability avoiding more costly for the defendant, and in some cases might supply the plaintiff with a degree of security he would have preferred to avoid purchasing.²²¹

D. Prohibitory Remedies May Frustrate Compensation

Another salient goal of the law of remedies is to provide compensation to those who are injured. Obviously, to the extent that plaintiffs are careful in their request for remedies, they presumably would choose the more favorable remedy. Accordingly, where plaintiffs ask for a prohibitory remedy, it is probably accurate to conclude that the prohibitory remedy better compensates the plaintiff. But simply giving the plaintiff what the plaintiff wants does not mean that the more general goal of providing adequate compensation is fulfilled.

To illustrate, consider the problems the law has encountered in assessing loss-based damages for "risk." Assume a mass tort case where a defendant, by contaminating the water supply, has negligently exposed an entire community to a known carcinogen: an exposure that will eventually cause members of the community to contract cancer at a greater incidence than would have occurred normally.²²² Corrective justice would suggest, at a minimum, that compensation be provided to those who contract cancer from the exposure in an amount equal to their losses.²²³ The element of

220. The phrase belongs to CHARLES O. HARDY, *RISK AND RISK-BEARING* 60-61 (1923). Hardy borrows an example from Leon C. Marshall to illustrate:

I decide to build a house. A contractor assumes the task. He then proceeds to make sub-contracts with the purveyors of lumber, bricks, and other materials to the effect that these materials shall be delivered to him at a certain future time and at a certain price. The main contractor has thus contracted himself out of risk with reference to price changes in these materials. . . . True, the burden is merely transferred to someone else, but presumably this someone else is a specialist, and therein is the social defense.

Id. at 61 (citing L.C. Marshall, *Industrial Society* 501-02 (1918)).

221. See *supra* notes 85-90 and accompanying text.

222. See, e.g., *Ayers v. Jackson Township*, 525 A.2d 287 (N.J. 1987).

223. See Ernest J. Weinrib, *Causation and Wrongdoing*, 63 *CHI.-KENT L. REV.* 407 (1987); Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 *J. LEGAL STUD.* 421 (1982). It appears that Coleman's subsequent writings have developed the notion that corrective justice requires that the

“actual injury” helps ensure corrective justice by denying standing to those community members who would wish to sue immediately for the added risk that has been inflicted upon them by the exposure.²²⁴ If “actual injury” were not required for standing, then all the citizens of the community, not just those few who will actually contract cancer due to the exposure, would have an incentive to sue for the risk.²²⁵ Not enforcing the traditional “injury” requirement could relegate those who eventually do contract the cancer to a recovery equal to but a small fraction of their actual harm.²²⁶ In this way, the traditional element of “injury” provides an attempted resolution to the problem of the “commons” or the “prisoner’s dilemma” that inheres in allocative decisions involving limited resources. The “injury” element helps to ensure that these funds are distributed in a way that obviates incentives to act self-interestedly to deplete the common pool.

Like some mass tort suits, prohibitory remedies are directed at risk. Injunctions do so explicitly, requiring uninjured plaintiffs to demonstrate the “threat of injury.”²²⁷ Specific performance impliedly imposes the same requirement, asking plaintiffs to prove that the performance desired

wrongdoer particularly be the source of amends. Ernest J. Weinrib, *Non-Relational Relationships: A Note on Coleman’s New Theory*, 77 IOWA L. REV. 445 (1992) [hereinafter Weinrib, *Non-Relational Relationship*]; Emily Sherwin, *Why Is Corrective Justice Just?*, 15 HARV. J.L. & PUB. POL’Y 839 (1992).

224. *Ayers*, 525 A.2d at 307 (stating that a risk suit “exposes the tort system . . . to the task of litigating vast numbers of claims for compensation based on threats of injuries that may never occur”).

225. It is not entirely obvious that “actual injury” provides an unmitigated benefit to ensuring compensation; although the defendant’s monies are saved for plaintiffs who contract the cancer, the delay in bringing the action brought about by denying recovery for risk may give rise to substantial problems of proof. *See id.* at 316 (Handler, J., concurring in part and dissenting in part) (“Because of limitations in current scientific knowledge and because of the number and variety of toxic chemicals involved, the victims of this toxic exposure were unable to measure or quantify the enhancement of their risk of disease.”). The law of remedies provides for the employment of prohibitive remedies where the damages remedy might be “inadequate” due to causation problems. *See infra* notes 291-93 and accompanying text; 1 DOBBS, *supra* note 32, § 2.5(2).

226. It might be possible, despite estoppel, that the plaintiffs who do recover for “risk” could sue again for the actual harm when they contract cancer. As a practical matter, however, this latter recovery might be unavailable, as the defendant could be bankrupt, or could have taken steps, through settlement agreements, to preclude such a possibility.

227. Laycock, *Injunctions*, *supra* note 5, at 1075 (“[A]ll injunctions . . . [are] a future-oriented remedy.”). Plaintiff’s risk of injury is not treated as seriously by courts as is an actual injury sufficient to give rise to a claim for damages. Injunctions can be denied where the effect of the injunction is to cause excessive harm to the defendant, unlike a damages action where the fact that the amount of damages might cause excessive harm to the defendant is not used as a basis for denial of the requested relief. This different treatment shows the caution with which the courts treat claims for relief based on risk.

is sufficiently "unique" that they should not be compelled to undertake the risk of inadequate substitution at the market. Even the restitutionary remedies obviate risk indirectly by, in effect, ordering rescission of the deal that caused plaintiff harm,²²⁸ thus not compelling plaintiff to undertake the financial risk of locating a replacement purchaser in the market. These remedies act prophylactically, seeking to protect the plaintiff against actual injury.

Because prohibitory remedies aim to eliminate plaintiff's risk, they facilitate the depletion of the common pool by self-interest. In the mass tort case mentioned above, if the first plaintiff who sues is awarded a prohibitory remedy (most likely, in this case, a restitutionary disgorgement of the defendant's profits from the wrongdoing), then the common pool will be emptied more quickly than otherwise, with fewer dollars left for distribution to other victims. Further, the availability of a prohibitory remedy will attract plaintiffs to deplete the pool.

Other prohibitory remedies similarly tend to diminish the common pool in multiple-plaintiff cases. For example, a remedy of restitution to one creditor of a bankrupt tends to diminish the recovery of other creditors.²²⁹ An award of specific performance to one buyer puts that buyer at a competitive advantage over other buyers who are relegated to damages and must seek cover. An injunction awarded to one plaintiff incurs expenditures by the defendant which may shrink the size of the potential recovery pool for other victims or may preclude legal and productive behavior by the defendant which would have inured to the benefit of some third party. In addition, the injunction presents administrative costs to the taxpayers, a public good of which the plaintiff avails himself for free.²³⁰ In this sense, prohibitory remedies mirror the problem of punitive damages in the context of mass tort cases, tending to diminish the compensation available to others.²³¹ Thus, not only do prohibitory remedies not contribute to the

228. See 1 DOBBS, *supra* note 32, §4.3(6) ("A rescission is an avoidance of a transaction.").

229. See *Kossian v. American Nat'l Ins. Co.*, 62 Cal. Rptr. 225 (Ct. App. 1967) (holding that plaintiff may recover in restitution from a bankrupt). *But see In re North Am. Coin & Currency, Ltd.*, 767 F.2d 1573 (holding conversely, citing reasons of bankruptcy policy), *modified*, 774 F.2d 1390 (9th Cir. 1985), *cert. denied*, 475 U.S. 1083 (1986).

230. See *supra* notes 60-65 and accompanying text.

231. See *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053 (D.N.J.) (holding that, in asbestos action, due process violation resulted from multiple punitive damages awards in part because of threat of depleting assets available to other plaintiffs), *vacated*, 718 F. Supp. 1233 (D.N.J. 1989) (holding it impossible for court to ensure that jury will award one and only one punitive award that fully addresses defendant's conduct).

solution of the common pool problem, as do market damages limited to "actual injury," but prohibitory remedies add to the incentives to exploit the pool, frustrating compensation to the injured.

Prohibitory remedies may not cause a drain on the common pool of recoverable assets where the possibility of liability will lead potential defendants to demand higher prices for undertaking risks. For example, the effect of allowing specific performance in the context of a common pool might not be significant because, in theory, the seller who is faced with the prospect of strict performance could simply charge more for the good. Thus, when the performance is mandated after breach, the plaintiff does not deplete the common fund, but instead takes back only his contribution. In theory, other prohibitory remedies might also produce a general rise in the cost of doing business, thus compensating the defendant *ex ante* for the larger liability the defendant faces, and also generating a larger pool to compensate the injured.

Although common pools may grow under a regime of prohibitory remedies, the effect of prohibitory remedies on compensation would not necessarily be neutral. Charging adequate prices to accommodate remedies that are fundamentally based on risk may present a substantially more difficult task than under the "actual injury" standard that is the foundation of the damages remedy. Actual injury occurs as the occasional culmination of risk-taking; risk, however, seems more limitless, and thus less easy to capture in a price. A car traveling at excessive speed creates numerous risks to pedestrians, cars, and other property, all of which risks could form the basis of a suit. It would appear difficult for an insurance firm, for example, to set aside a pool of money adequate to compensate plaintiffs for the costs of the infinite risks that the insured driver might regularly create.²³² The problem of foreseeability appears sufficiently substantial to suggest that the move to prohibitory remedies, which protect against risk, will not have a neutral effect on the maintenance of compensation pools, and will thus tend to effect a redistribution of compensation from those actually injured to those who remain uninjured in the traditional sense, but who bear risk unwillingly.

232. This problem of ensuring against risk, and not merely the resultant harms, faces insurers who would attempt to insure for safety expenditures that minimize risk. *Maryland Casualty Co. v. Arnco, Inc.*, 822 F.2d 1348, 1353 (4th Cir. 1987) ("Insurers are very reluctant to cover what are essentially prophylactic measures, such as safety precautions, for the obvious reason that such expenditures are subject to the discretion of the insured, and are not connected with any harm to specific third parties."), *cert. denied*, 484 U.S. 1008 (1988); *see also* *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 842 F.2d 977 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988).

E. Summary

The critics of the damages remedy have disparaged its perceived failures in meeting the goals of remedial law, but have overlooked the multiple shortcomings of the alternative. Prohibitory remedies promise to do worse: their clumsiness renders them inapt to expand deterrence, and even with sagacious employment they appear systematically to either underdeter or overdeter, haphazardly. Even worse, prohibitory remedies may actually increase the incidence of undesirable risk-taking, as their widespread use threatens to diminish the "teaching" function of remedies and to create a "moral hazard" that promises either to neutralize any supposed gains in deterrence or actually to diminish incentives to take care. Prohibitory remedies do not promise to offset this threatened decline in deterrence by an increase in social wealth; instead, their very aim at protecting idiosyncratic values indicates that their wider employment will frustrate wealth maximization. Finally, these troublesome costs of prohibitory remedies do not appear to be offset by gains in providing full compensation. Although individual plaintiffs are better off with the remedy they prefer, to the extent that defendants are understood to possess a "common pool" of funds that is available to those who are injured, prohibitory remedies, founded upon a limitless concept of risk, promise to an unusual extent to diminish that pool at the expense of others who deserve compensation.

IV. CORRECTIVE JUSTICE, PARETO SUPERIORITY, INCOMMENSURABILITY AND THE DISTRIBUTIVE GOAL OF FULL COMPENSATION

The prohibitory remedies offered as a means to achieve full compensation would fail to fulfill the various goals of remedial law any better than does the prevailing damages remedy, and might in some instances actually do worse. Nevertheless, simply pointing out the practical shortcomings of the alternative does not alone supply a full justification for a particular preference. This Part examines the particular problems that the legal system's preference for apparently undercompensatory remedies creates for normative conceptions of justice, and argues that a preference for damages is just.

There are three related normative positions that might censure the legal system's preference for the damages remedy: corrective justice, Pareto

superiority, and the requirement of commensurability.²³³ The phrase "corrective justice"²³⁴ refers to the Aristotelian conception that those wrongfully harmed ought to be compensated, usually by the wrongdoer.²³⁵ Corrective justice presents some problems for the justification of the damages remedy, for it suggests that compensation should be fully adequate, annulling the entire "wrongful loss."²³⁶ This claim in favor of full compensation as a corollary of corrective justice is consistent with the economic notion of Pareto superiority, which precludes rendering a plaintiff unwillingly worse off for the benefit of another.²³⁷ Another related criticism of damages remedies arises because of the obvious incommensurability between dollars and personal suffering.²³⁸ Similar normative arguments pervade the literature that argues for prohibitory remedies.²³⁹ The essence of these criticisms is that plaintiffs should be

233. Other terms have been employed to address what is basically the same issue. See, e.g., Radin, *supra* note 5, at 57, 77-85 (discussing the preference for substitutionary damages in terms of the "commodification" of personal or property interests).

234. For some useful treatments of corrective justice, see generally Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981) (arguing that corrective justice is an expression of the economic theory of tort law because both require rectification and distributive neutrality); Weinrib, *Non-Relational Relationships*, *supra* note 223 (linking plaintiff's right to compensation with defendant's obligation to compensate); Coleman, *supra* note 223 (separating the requirements of corrective justice from any particular mode of rectification); Jules Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349 (1992) (same). Compare Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992) (developing a theory of justice that provides some support for a mode of rectification that requires the wrongdoer to be the source of compensation), with JULES L. COLEMAN, *RISKS AND WRONGS* (1992) (arguing that corrective justice requires wrongdoer liability) and Jules L. Coleman, *Risks and Wrongs*, 15 HARV. J.L. & PUB. POL'Y 637 (1992) (same).

235. Corrective justice may also include some utilitarian considerations. See Posner, *supra* note 234, at 197.

236. See Coleman, *supra* note 223.

237. See generally JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 95-105 (1988). Some commentators have tried to reconcile the obviously incomplete compensation provided by money damages with the Pareto criterion by hypothesizing that unanimity is met *ex ante*. In other words, the loss from incomplete compensation is fictitious because the plaintiff was compensated by the reduced price he paid for the good, be it a contractual service or the cost of precautions. See generally Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 236-38 (1980). Others have said that Pareto unanimity implies full compensation as the plaintiff would define it, rendering dubious the claim that wealth maximization ensures Pareto unanimity. See generally Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980) (arguing wealth is at best an ingredient of value, but is not coterminous with value). The text classifies the Pareto condition as "normative" in keeping with Judge Posner's argument on the debated issue. See Posner, *supra* note 234.

238. See Radin, *supra* note 5; Sunstein, *supra* note 5, at 843-46.

239. See, e.g., Linzer, *supra* note 2, at 111 ("It seems right that people who make fair bargains should be held to them."); *id.* at 138 ("[I]t is simply right that one get what he was promised.").

allocated full compensation, or commensurable compensation, because they deserve it.

Plaintiffs do not appear to have an unqualified moral claim to full compensation. Although the legal system properly strives in a general way to facilitate compensation, the traditional reliance on admittedly incommensurate compensation in the form of money damages, based on loss in tort or on expectation in contract,²⁴⁰ evidences that the law's commitment to full compensation has historically been less than complete. This perceived failure may have been informed by motives other than pecuniousness or distributive favoritism.²⁴¹ The law's historical reluctance to pursue the goal of full compensation more completely may result from the inadequacy of the vehicle that the law has available to accomplish complete compensation: prohibitory remedies. Prohibitory remedies may award a particular plaintiff full and commensurable compensation, but they do so at a cost to the public. These costs take several forms: the administrative costs of prohibitory remedies;²⁴² the deleterious effects on such important social concerns as risk management,²⁴³ undesirable risk encouragement,²⁴⁴ and otherwise effective deterrence;²⁴⁵ and the frustration of the public goals of wealth creation²⁴⁶ and compensating the injured.²⁴⁷ In short, prohibitory remedies, the means by which commensurability may be achieved, are in part a good supplied by the public.

The claim of plaintiff to a prohibitory remedy as a vehicle for full compensation may be morally unattractive to the extent that prohibitory

240. Even the expectation measure, although designed to put the plaintiff in the same position as if the defendant had performed the contract, YORIO, *supra* note 84, § 1.21, sometimes fails to achieve full compensation, *see* Schwartz, *supra* note 5, at 276; Daniel A. Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 VA. L. REV. 1443, 1444 (1980) (arguing that damage remedies for consumer contracts tend to undercompensate).

241. The traditional concerns cited as militating against compensating plaintiffs for their idiosyncratic losses were the prospect of "economic waste" stemming from compensating plaintiff more than the value of the harm, *see* Farnsworth, *supra* note 4, at 1172-74; *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962), *cert. denied*, 375 U.S. 906 (1963); *Plante v. Jacobs*, 103 N.W.2d 296 (Wis. 1960); and concerns over the certainty and foreseeability of damages, *see, e.g.*, Timothy J. Muris, *Cost of Completion or Diminution in Market Value: The Relevance of Subjective Value*, 12 J. LEGAL STUD. 379, 382-84 (1983) (arguing that these considerations should not prevent some recognition of subjective values).

242. *See supra* notes 54-70 and accompanying text.

243. *See supra* notes 157-63 and accompanying text.

244. *See supra* notes 164-91 and accompanying text.

245. *See supra* notes 130-55 and accompanying text.

246. *See supra* notes 192-221 and accompanying text.

247. *See supra* notes 222-32 and accompanying text.

remedies constitute an irrevocable transfer of wealth from the community to the plaintiff.²⁴⁸ Although the moral position of the plaintiff against the defendant militates in favor of full compensation,²⁴⁹ the moral imperative seems less compelling when that claim is against the community, equally blameless or perhaps itself victimized by the defendant's wrong.²⁵⁰ In addition, at times the claim for prohibitory remedies may come at the expense of other plaintiffs.²⁵¹ Thus, denial of plaintiff's moral claim for fuller compensation does not necessarily rest on the frank utilitarianism of Kaldor-Hicks efficiency,²⁵² nor is satisfying plaintiff's request a requirement of Paretian unanimity. Rather, the moral positions of the plaintiff who makes the request for fuller compensation and the community that impliedly, through extant legal limitations, resists it seem deontologically in equipoise, and the resolution of this dilemma lies within the sphere of distributive concerns, not as an imperative of corrective justice. In other words, although the public may decide to become the "excess insurer" against all harms from inadequate compensation, it does not appear that corrective justice necessitates the public doing so.²⁵³ The public may wish to provide full compensation, but the imperatives of remedial law do not dictate that the law of remedies be the vehicle for that fulfillment.

248. See *infra* notes 254-57 and accompanying text. Because prescriptive remedies are bestowed at public expense, and not just at defendant's expense, the absence of high transactions costs does not alone provide a reason to employ them. Cf. *Muris, supra* note 241, at 381 ("[U]niqueness is another way of stating that the cost to a court of evaluating the proper substitutes is not worth the effort."); *Kronman, supra* note 5, at 358-65 (arguing that "uniqueness" rule keeps courts from wasting resources seeking a market value where none is readily available); *Schwartz, supra* note 5, at 274-75 (same).

249. See *Yorio, supra* note 5, at 1393-94.

250. See Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 *LAW & PHIL.* 37, 39 (1983); *Posner, supra* note 234, at 197. *But see Coleman, supra* note 223, at 436-40.

251. See *supra* notes 222-32 and accompanying text.

252. See *Linzer, supra* note 2, at 114-15 (stating that the "Kaldor-Hicks Compensation Principle . . . posits that a benefit to one individual, even if it carries with it a loss to another, increases society's welfare so long as the benefited party is able fully to compensate the losing party and to remain better off than before").

253. Professor Coleman has been a proponent of the view that corrective justice does not require that tortious defendants necessarily pay for the harms they cause where they have not enjoyed wrongful gain. He has not argued that the obligation to pay should be imposed, as a matter of corrective justice, on unwilling and innocent third parties. Rather, Coleman has suggested that compensation could be achieved by taxing the negligent, regardless of the fortuity of harm, by first-party insurance, or by some voluntary arrangement involving social insurance. See *Coleman, supra* note 223, at 438-39. It would seem, however, that to place liability for recompense on the community in some way should require unanimous consent, else one would appear to be imposing a cost upon an innocent against his will; unless, of course, one finds the expansive notions of *ex ante* compensation articulated by Judge Posner and others attractive. See *Posner, supra* note 234, at 198-99.

Nor is it clear, as a matter of corrective justice, that defendants ought to be separated from their gain in order to make compensation commensurable. When they take and pay under the prevailing market damages remedies, defendants add to the quantum of social wealth. Their rent-seeking effectively capitalizes on some measure of plaintiff's idiosyncratic valuations: a plaintiff whose opportunity cost to replace a particular good was 10, but whose idiosyncratic valuations led him to value the good at 15, will get but 10 from a defendant who stands to profit from the item at 12.²⁵⁴ If defendant's added value of 2 is converted into wealth, either by reselling the good at 12 or by using it to produce other goods in a way that the good adds more than 10 in value to the produced good, then the defendant has added 2 to social wealth.²⁵⁵ In this case, the plaintiff may have been "wronged" in the abstract sense of being required to make a sacrifice of his idiosyncratic valuation for the common good, but it is not clear that the defendant, as the social agent of harm-infliction, is the person who has committed the wrong.²⁵⁶ The defendant who tortiously takes and pays appears no more morally blameworthy than others whose self-interest the legal system relies upon to produce social benefits, such as criminal defendants who request the exclusion of evidence, plaintiffs who bring *qui tam* actions, or plaintiffs who seek trebled or punitive damages or attorney's fees. The principal cannot term the obedient conduct of its agent "wrongful." Thus, if defendant's conduct is not "wrongful," then the essential requirement that would impose prohibitory remedies as a matter of corrective justice is absent: the decision of whether or not to compensate plaintiffs for their lost idiosyncratic valuations is a distributive, public question.²⁵⁷

254. It is important to limit plaintiff's compensation to plaintiff's opportunity cost, the market price, in order to encourage defendants to act in a profit-producing manner. See Merrill, *supra* note 196, at 82-83 (analyzing the takings clause as encouraging profit-maximizing uses of land).

255. By finding better uses for the good, the defendant has, in effect, usefully expanded the "frontier" of possible Pareto-superiority, or reduced transactions costs, which may be the same thing. See Calabresi, *supra* note 85.

256. Of course, the fact that the defendant may be innocent of wrongdoing does not mean that the plaintiff necessarily should go uncompensated for the "idiosyncratic harms" plaintiff bears for the social good. Rather, the analysis does suggest that the adjustment of plaintiff's position proceed not as a matter of corrective justice, but as a matter of distributive justice. The distributive question is whether to treat idiosyncratic harms as legally recognized harms, or instead to leave them noncompensable. Once the harm is deemed legally compensable, then the actual configuration of the remedy comprises an expression of corrective justice.

257. See Ken Kress, *Formalism, Corrective Justice and Tort Law*, 77 IOWA L. REV. at i, ii (1992) ("[D]istributive justice leaves open what the criterion of distribution of the benefit or burden is, whether

Setting to one side the utilitarian justification for allowing defendants to capitalize the idiosyncratic valuations of plaintiffs,²⁵⁸ there are other reasons to doubt that defendants' gain under the take-and-pay system created by market remedies should be deemed "wrongful." Consider the situation where, at first blush, it seems that defendant's moral claim to be relegated to a damages remedy is suspect: where the defendant has chosen to breach a contract to sell an item to one party, the plaintiff, in order to gain greater profits from sale to another. In this case, plaintiff's moral claim to specific performance of the contract seems to be founded on the entirely moral proposition that one ought to keep one's promises. Similarly, defendant's moral claim to avoid performance seems to be founded on the rather immoral proposition that one ought not to keep one's promises.

It is not entirely clear, however, that defendants in this case deserve to have their profits disgorged. The moral assessment that one ought to keep one's promises implies an inquiry into what was promised. It would seem, in commercial contexts at least, that a party promising to deliver goods may be promising to deliver unless another offer comes along that allows the seller to pay damages to the buyer and to profit from the third party transaction.²⁵⁹ Because buyers are often sellers, both parties may prefer this rule *ex ante* because it provides flexibility in changing market conditions and allows for rapid profitmaking where prices climb quickly.²⁶⁰

on the basis of equality, or merit, or need, or class, or height. Thus, distributive justice requires a political decision to fix the criterion of distribution.") (citations omitted). By contrast, "[f]ormalism maintains that the normativity inherent in action fully explains corrective justice, and, thus, private law." *Id.*

258. Importantly, the common law encouraged defendants to take and pay only if they planned to capitalize some part of plaintiff's idiosyncratic valuation into social wealth. If defendant in the above example sought to obtain the item for the defendant's personal idiosyncratic gain, and thus the consumer surplus of 2 is not "realized" in the market, then the transaction is neutral in terms of wealth creation, and actually harmed plaintiff for no good reason. The common law of remedies dealt with the "nonrealizing" defendant differently from the "realizing" defendant, and would in the case of the idiosyncratic, "nonrealizing" defendant utilize prohibitory remedies. The common law did this in a general way by virtue of the rule that prohibitory remedies would be reserved for where the converted good was "unique" or its replaceability "inadequate." Where the item had no ready market or substitute, and the defendant most likely was unable or uninterested in realizing a marketable gain in the transaction, the law would impose some prohibitory remedy, such as replevin, restitution, or specific performance, to discourage nonrealizing take-and-pay transactions. See *infra* notes 281-307 and accompanying text.

259. See Yorio, *supra* note 5, at 1371-72.

260. See Kronman, *supra* note 5, at 369 ("[P]romisors and promisees will typically favor a money damages rule if the subject matter of their contract is not unique."). See also *supra* notes 85-90 and accompanying text.

The harder case for the defendant's moral status involves the defendant who has profited from a fraud. Where the defendant's profits stem from a fraud against one to whom the defendant owed a fiduciary duty, then the case for restitution of profits appears incontestable.²⁶¹ It must be noted, however, that the case for restitution is strongest precisely because the restitutionary award here mirrors the compensatory award that should be available in damages: the plaintiff was entitled to a fiduciary who acted in plaintiff's interests by seeking profits, and defendant's failure to so act cheated plaintiff out of profits.²⁶² Apart from a breach of fiduciary duty case, it does not appear that the fraudulent defendant stands in a fundamentally different moral position than does the defendant who breaches a contract. It is difficult to perceive any moral difference between the defendant who fraudulently induces a party to sign a contract and one who intentionally breaches a contract recently entered in good faith. Both have intentionally harmed the property interests of another for profit and so both appear to deserve the same moral consequences.²⁶³ Even everyday commercial activity reflects the same degree of moral ambiguity as does the defendant guilty of fraud.²⁶⁴ Our legal system forgives many who

261. See Friedmann, *supra* note 5, at 552-53; 1 DOBBS, *supra* note 32, § 4.5(3).

262. The cases extend farther, holding fiduciaries liable for profits even where the profits would not have gone to the principal. See *Mosser v. Darrow*, 341 U.S. 267 (1951); *Pratt v. Shell Petroleum Corp.*, 100 F.2d 833 (10th Cir. 1938), *cert. denied*, 306 U.S. 659 (1939).

263. Both the fraudulent inducer and the efficient contract breaker have told a lie at the time the contract was signed: the inducer lied about the truth of one of the provisions of the contract, while the breaker lied about the truth of keeping his promise. A small distinction may be that the inducer has lied twice (about a provision in the contract and about his signature) while the breaker has lied but once (about his signature). Nevertheless, the moral positions of the inducer and the breaker appear to be deontologically equivalent.

A somewhat plausible justification for the law's perduring distinction between fraud and breach may be found in a utilitarian perspective. Here it is a question of timing. The inducer possesses the undisclosed information prior to entering the agreement. Thus, the inducer's profit is "wrongful" because in forming the contract he does not create or capitalize on new information, and thus does not add to social wealth. With efficient breach, the information is discovered after the agreement is entered. Remedying the breach here with the less onerous payment of compensatory damages effectively rewards the breaker, giving him incentives to locate new information and to use it profitably. Rewarding the fraudulent inducer in the same manner is unwise because the inducer does not create or capitalize on new information, but rather profits from falsity or from disvaluing information. Cf. POSNER, *supra* note 6, § 4.6 (arguing that fraud is illegal because it encourages a positive investment in misinformation).

264. Assume that, on average, two construction workers die every time a building over twenty stories is erected, even if the contractor follows all prescribed safety practices. It seems safe to assume that the contractor who undertakes to build such a building, and indeed the owner who procures it, either knows or should know of the risk involved in the construction. Yet the project is undertaken, and two die. Has this defendant in constructing this building committed the crime of manslaughter, thus indicating that the profits from the construction ought to be disgorged? Or has he acted lawfully, and

knowingly harm others for profit, or relegates their victims to a pricing remedy. It seems insupportable that the outcome should change when conduct that appears indistinguishable from a moral standpoint is termed "fraud."

Labeling the desire to give plaintiffs full compensation a requirement of corrective justice, or its related notions of Pareto unanimity or commensurability, simply masks its fundamentally distributive character. This redefinition of the goal of full compensation from a matter of "mathematical justice," to use Aristotle's terms, to one of distributive justice is not to suggest that communities must continue to refuse to allocate community funds, in the form of prohibitory remedies, to those who lose idiosyncratic values to tortfeasor defendants. Indeed, these idiosyncratic victims can attempt to fashion a claim on the social fisc, in connection with other pressing claims of victimhood, that seeks to convince the community to forgo wealth for the sake of some other value.

Most fundamentally, the decision of the community whether or not to compensate plaintiffs for their lost idiosyncratic values should be undertaken through the law of liability rather than the law of remedies, because it is in the law of liability where distributive concerns are customarily addressed. The law of liability, however, presents several reasons that suggest that idiosyncratic values should not fall within law's domain. One set of reasons concern the proof problems in establishing the requisite "injury": courts may be uncertain that idiosyncratic values exist²⁶⁵ and may have difficulty in valuing them.²⁶⁶ Another set of concerns about idiosyncratic values has led to the development of substantive limitations on the liability of defendants, through such doctrines as the rule in *Hadley*

simply suffered two unfortunate "accidents"? Although lawyers may hide behind doctrines of specific intent and, in other contexts, "product defect," the moral equation appears unchanged. Regardless of the fact that assumption of risk supplies a defense to a tort but not to a crime, the defendant has chosen to engage in personally profitable activity knowing that others will suffer for it. The same can be said of virtually any manufacturer of automobiles and most other consumer goods, and in regard to anyone who drives a car. Like the defendant guilty of fraud, all know when initiating these activities that they are adding risk to the lives and health of others.

265. See *Muris*, *supra* note 241, at 382-84; *Evergreen Amusement Corp. v. Milstead*, 112 A.2d 901 (Md. 1955) (holding a new business' profits too uncertain). See generally CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES ch. 4 (1935).

266. See *Kronman*, *supra* note 5, at 363 (arguing that "the magnitude of this risk [of undercompensation] is inversely related to the completeness and reliability of the information on which the court bases its award"). Contracting parties may attempt to widen the quantum of relief for a legally cognizable harm by agreeing to a liquidated damages provision. Enforcing these agreements would allow parties to protect idiosyncratic harms most easily. *Goetz & Scott*, *supra* note 6, at 568-77.

v. Baxendale in contract²⁶⁷ and proximate causation in tort.²⁶⁸ Finally, the perduring problem of idiosyncratic valuations has generated doctrines that have the effect of assigning liability to the plaintiff, such as the doctrine of avoidable consequences.²⁶⁹ As the location of these lines that allocate liability between parties evolve over time, occasionally categories of idiosyncratic harm are given legal protection.²⁷⁰ By examining the question of full compensation as a matter of the law of liability, the whole question of the initial entitlement of rights and obligation that is an essential question of distributive justice may be addressed directly, without the analytical encumbrance of the mistaken presumption that full compensation, as it is understood by the proponents of prohibitory remedies, is required as a matter of corrective justice.

V. TOWARD A JUSTIFICATION FOR PROHIBITORY REMEDIES

Contrary to the common wisdom, prohibitory remedies do not necessarily provide the enhanced deterrence they promise. Because gain frequently does not correspond with loss, and in fact is likely not to correspond in precisely those cases where the plaintiff prefers a gain-based recovery to a loss-based one, prohibitory remedies tend to provide a clumsy method of deterrence.²⁷¹ Moreover, the difficulty of their administration²⁷² and their undesirable behavioral effects²⁷³ create doubt whether the routine employment of prohibitory remedies would enhance deterrence at all. Finally, prohibitory remedies may frustrate the other important remedial goals of wealth maximization²⁷⁴ and ensuring compensation.²⁷⁵ In short,

267. 156 Eng. Rep. 145, 151 (Ex. Ch. 1854) (limiting defendant's liability because "such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances," nor was it specially communicated).

268. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 101 (N.Y. 1928) (stating that negligence unlimited by proximate causation "would entail liability for any and all consequences, however novel or extraordinary").

269. *Munn v. Southern Health Plan, Inc.*, 719 F. Supp. 525 (N.D. Miss. 1989) (deciding not to exempt plaintiff's refusal to accept a blood transfusion on religious grounds from "objectively reasonable" test of doctrine of avoidable consequences; the thin-skull rule applies only for physical conditions).

270. See generally MCCORMICK, *supra* note 265, at 2-3. How these legally protected interests are compensated also signifies the importance of the legal protection. See, e.g., *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986) (finding no compensable value, independent of tortious injury, arising from due process violation).

271. See *supra* notes 133-55 and accompanying text.

272. See *supra* notes 60-65 and accompanying text.

273. See *supra* notes 156-91 and accompanying text.

274. See *supra* notes 192-221 and accompanying text.

275. See *supra* notes 222-32 and accompanying text.

prohibitory remedies appear to constitute rather unsatisfactory remedial options, suggesting that their employment ought to be limited, not expanded.

Yet prohibitory remedies do have a place in a system in which damages remedies appropriately predominate. Providing a rationale for the employment of prohibitory remedies begins with understanding them as one part of a larger family of remedies and other legal doctrines. This larger family shares the common end of removing certain goods or interests from the take-and-pay system. If this larger end is justifiable, then prohibitory remedies present a legitimate tool for remedial law; the remaining objections go to the efficacy of prohibitory remedies at accomplishing this end. This Part attempts to articulate a coherent and limitable purpose for the employment of prohibitory remedies and a legal principle that captures that purpose.

Although harms are not intrinsically good, society does sometimes literally profit when defendants "harm" others' idiosyncracies for the sake of personal gain, as long as their gain is sufficient to pay compensatory damages to the victim. This harsh reality produces a benefit because of the community gain in wealth that derives from the "realizing" of defendant's conversion of plaintiff's idiosyncratic values into capital assets, usable or saleable by the defendant at a price in excess of the prevailing market price.²⁷⁶ In a sense, the realizing defendant acts as a market-maker, taking advantage of time lags in the movement of price or creating the movement through his own industry.²⁷⁷ The community's interest in the take-and-pay system explains the broad and historic preference of the common law for damages remedies over the alternative prohibitory remedy that might

276. This justification differs from the standard "economic analysis" that posits transactions costs as the reason why prescriptive remedies are not regularly employed. See Calabresi & Melamed, *supra* note 21, at 1093-98; Calabresi, *supra* note 85, at 1222-23. Transactions cost analysis has been the focus of much of the debate, with commentators disagreeing over whether damages or specific performance, for example, supply the more efficient "pre-breach" and "post-breach" bargaining context. See Goetz & Scott, *supra* note 6; Schwartz, *supra* note 5; Kronman, *supra* note 5; Linzer, *supra* note 2. The standard economic justification of the damages remedy, that it is the better choice given prohibitive transactions costs, appears a rather backhanded one; lacking empirical evidence, it seems insufficient to provide a full account for the historical dominance of damages remedies. By contrast, the textual justification, if correct, would supply a reason for favoring damages remedies, regardless of relative transactions costs, on the grounds that the traditional preference better produces aggregate social wealth. Posner, *Utilitarianism*, *supra* note 192, at 127; Johnsen, *supra* note 192, at 265.

277. This "market-making" function might also usefully be thought of as "frontier-expanding." See Calabresi, *supra* note 85.

discourage defendants from creating social wealth.²⁷⁸

Prohibitory remedies remain valuable and needed remedies, even within a system which, for reasons of the social good, limits their use. Prohibitory remedies are needed because, in some cases, market damages will be inadequate to provide the level of deterrence necessary to ensure that defendants take and pay only when it is socially desirable that they do so.²⁷⁹ Socially desirable taking and paying occurs when defendants move the market price: compensating plaintiffs at prevailing prices,²⁸⁰ but utilizing the good at a more profitable level, converts socially valueless idiosyncratic values into aggregate social wealth. If, however, the damages that defendants expect to pay is something less than the market price, then the defendants might inflict harm for no social profit, and indeed perhaps

278. *But see* Calabresi & Melamed, *supra* note 21, at 1124-27 (arguing that property rules should be favored whenever transactions costs would not prohibit a bargain). Calabresi and Melamed's suggestion would impose needless transactions costs. If society has evidenced a disinclination, through its judicial decisions and other expressions of law, to allow (in most cases) idiosyncratic values to stand in the way of aggregated wealth maximization, then allowing a plaintiff to refuse to accede to a socially profitable bargain, or to extract some measure of defendant's gain and to create wasteful transactions costs, seems contradictory. Calabresi and Melamed's position assumes, without explanation, that property rules should form the preferred underlying rule, with liability as the exception. This unarticulated assumption is revealed in their explication of criminal penalties as providing "an undefinable kicker which represents society's need to keep all property rules from being changed at will into liability rules." *Id.* at 1126. They do not say how we are to define what interests deserve this kicker, by dint of a property rule, in the first instance, again suggesting that all interests that can be protected by a property rule without causing "undue expense," *id.* at 1127, should be so protected. This Article suggests that property rules should only be employed where defendants would act in socially deleterious ways. *See infra* notes 281-307 and accompanying text.

279. The proposition that society benefits from defendants who take and pay, and the broader theory of optimal deterrence, are based on the assumption that wrongdoers are rational, at least in the limited sense that they would prefer to have \$100 over \$10. To the extent that wrongdoers are "irrational" and prefer to be worse off, damages do not serve adequately to deter. This first assumption underlies the broad range of penalties, both criminal and civil, that create marginal deterrence against more harmful behaviors. It implies a certain belief in the ability to make interpersonal comparisons of utility, which Lord Robbins has told us is impossible. LIONEL ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE 139-41 (2d ed. 1935). However, the law depends on certain common denominators of utility so pervasively, in deterring and compensating, as to render all lawyers practical atheists to Robbins' view. For example, the very idea of imprisoning the guilty as a means of deterrence, retribution or something else suggests a certain intersubjective understanding of the harm of a denial of liberty, both intrinsically and commensurately. Thus, the best response to the radical subjectivism outlined by Lawson, *supra* note 108, or the notions developed in the various "criticalist" writings that evidence equal anti-positivism, *see* Jeffrey Standen, Note, *Critical Legal Studies as an Anti-Positivist Phenomenon*, 72 VA. L. REV. 983 (1986), is to make the case for the common utilities, such as wealth and liberty. *See* Johnsen, *supra* note 192.

280. There are other aspects of damages that should be included in the damages paid to plaintiff. From a social wealth point of view, these damages ought to include payment for the social volatility, if any, that is produced by the defendant's actions in converting a property right.

at a social detriment. The taking by these "nonrealizing" defendants is socially undesirable, and must be deterred.

Damages will provide inadequate deterrence where the probability of enforcement is low.²⁸¹ Adequate deterrence relies upon the expected penalty, which is the average penalty in magnitude multiplied by the probability of its imposition.²⁸² Thus, if a substantial number of victims of wrongdoing do not seek redress, then deterrence will be inadequate. For example, if a certain tort is always remedied by \$100,000 damages, but only one in ten victims sue in court (or take other steps) to collect those damages, then the wrongdoer's expected penalty is but \$10,000. This limited penalty would induce the wrongdoer to commit the wrong where his expected gain is as low as \$11,000. In other words, low enforcement rates will actually induce potential defendants to cause harm where it is socially undesirable to do so, here causing a \$90,000 harm (\$100,000 - \$10,000) for a \$1,000 gain. Generally, in classes of wrongs where the enforcement or detection rate is substantially less than one, some means of increasing the expected penalty in order to ensure adequate systemic deterrence is needed.

The law has a large family of remedial and substantive devices that serve to increase the expected penalty where doing so is required to assist plaintiffs in enforcing their damages claims, thus increasing the expected penalty. Inadequate detection or enforcement is likely to be present in three categories of cases. First, inadequate enforcement may occur where the defendant's action has injured many victims, each in such small degree that individual suits do not appear profitable. This pervasive problem is usually addressed through such devices as class action suits, statutory trebled damages, and exemplary or punitive damages.²⁸³ Second, inadequate

281. In theory, harm-based damages should always be adequate to deter, except when its most problematic underlying assumption, that enforcement rates will be closely coextensive with harm, is false. See Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 9 (1982). When enforcement rates are adequate, as they should be in most tort and contract cases, then harm-based remedies are adequate to deter activity that causes more harm than good. When enforcement rates are inadequate, as they might frequently be in cases of the type outlined in the text, see *infra* notes 283-90 and accompanying text, then it is safe to assume that harm-based damages will fail to deter, and thus are inadequate to address the wrong at bar.

282. See Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170-80 (1968).

283. See generally Ellis, *supra* note 281, at 23-26 (discussing the efficient use of punitive damages); Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415, 418-19 (1989). Given the incentive contingent-fee lawyers have to seek out plaintiffs and form class actions, one might wonder whether a concern about

enforcement may occur where wrongful conduct has caused definite harm, but in a manner particularly difficult to unravel after the fact. The pollution of a stream by one of a multitude of upstream manufacturing plants evidences a case in this category, where accurate assignment of blame is very difficult.²⁸⁴ The law of liability typically attempts to resolve the deterrence problem here by shifting the burden of proof,²⁸⁵ creating prophylactic rules,²⁸⁶ or apportioning loss.²⁸⁷ Alternatively, the legislature may deal with the problem of "hidden" harms by regulation. Third, detection may be inadequate where wrongful harm has been done to a sole victim by a single, ascertainable defendant, but the victim may lack adequate means to seek redress. Although this situation appears exceptional in an age of contingency litigation, it has been thought to arise in the context of insurance contracts,²⁸⁸ and in certain commercial contexts, at least in California.²⁸⁹ On the criminal side, it may be supposed that the financial inability of the government to locate, prosecute, and imprison all lawbreakers constitutes a form of indigence that justifies the government's routine use of penalty "multipliers" to ensure adequate deterrence against violations of the criminal law.²⁹⁰

inadequate enforcement remains a plausible reason to allow punitive damages claims in many contemporary mass tort situations.

284. For an introduction to the problem of multiple causation, see Robert J. Peaslee, Note, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127 (1934); Charles E. Carpenter, *Concurrent Causation*, 83 U. PA. L. REV. 941 (1935). See also *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).

285. See, e.g., *Hall v. E.I. du Pont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972) (shifting burden of proof to defendant in multiple causation case).

286. For example, the difficulty of applying the due process test to determine if in the totality of the circumstances, a particular interrogation was unduly coercive, see *Spano v. New York*, 360 U.S. 315 (1959), led to the preference for a prophylactic rule that attempted to allow suspects to avoid being coerced by terminating the interrogation. *Miranda v. Arizona*, 384 U.S. 436 (1966); *supra* note 128; *Edwards v. Arizona*, 451 U.S. 477 (1981).

287. See, e.g., *Smith v. J.C. Penney Co.*, 525 P.2d 1299 (Or. 1974) (holding defendant liable for all injuries where injuries were inseparable); *Maddux v. Donaldson*, 108 N.W.2d 33 (Mich. 1961) (holding defendants jointly liable for the entirety where plaintiff cannot separate injuries).

288. See *Comunale v. Traders & Gen. Ins. Co.*, 328 P.2d 148 (Cal. 1958) (finding covenant of good faith and fair dealing implicit in insurance contract, and giving rise to action by insured in tort or contract for failure to settle); *Crisci v. Security Ins. Co.*, 426 P.2d 173 (Cal. 1967) (same).

289. *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 686 P.2d 1158 (Cal. 1984) (allowing tort remedy where supplier in bad faith denied contract existed); *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1337 n.12 (Cal. 1980) (suggesting that tort remedy for bad faith breach might be available for employment contract).

290. The government's moral position here is problematic. It exercises its "monopsony" power over criminal prosecutions, see Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471 (1993), by choosing not to remedy all violations possible. Instead, the government selectively "multiplies" the punishment accorded to certain defendants to make up for its decision to

The problem of inadequate expected penalties takes a slightly different shape in the area of remedial law.²⁹¹ At the remedial stage of litigation, the enforcement is complete, and a chief concern from the social perspective is to ensure that the remedy imposed on the defendant is substantial enough that, when combined with the extant level of enforcement, it produces an expected penalty large enough to establish the socially optimal level of deterrence.²⁹² Unsurprisingly, the common law of remedies has developed a number of roughly identical doctrines, usefully thought of as "relegation doctrines,"²⁹³ which serve to relegate plaintiffs to a damages remedy, and which at the same time signal when the expected market remedy is not adequate to preclude socially harmful taking. The common law here deters against socially harmful acts by supplying a more costly penalty, a prohibitory remedy, to deter defendants in these cases, which in turn helpfully stimulates higher enforcement rates. The relegation doctrines form the dividing line between prohibitory and pricing remedies, and between socially useful and socially harmful takings.

forgo certain prosecutions. Thus, adequate deterrence is sought by imprisoning fewer people for longer periods.

291. Remedial devices that aim to increase deterrence may sometimes be employed in the same cases as the substantive ones outlined in the text. Courts sometimes allow plaintiffs access to prohibitory remedies in those classes of cases where the court concludes that the defendant's conduct has caused widespread, small harms, is "hidden" among many possible wrongdoers, or has victimized those with little means of legal redress. See 1 DOBBS, *supra* note 32, § 2.5(2) (stating that irreparable harm justifies equitable remedies where potential for a multiplicity of suits, where a legal remedy is available but not collectible, or where the damages cannot be measured with reasonable certainty). It is in these cases where the potential of inadequate detection promises to render harm-based damages an inadequate deterrent to harmful conduct, and where the fashioning of a prohibitory remedy can usefully provide the added penalty without engendering problems of overdeterrence. However, courts should prefer to use the substantive devices outlined in the text before turning to prohibitory remedies, due to the clumsiness and other bad side effects of prohibitory remedies. For example, a court need not resort to disgorgement of profits where the defendant's conduct can be addressed by a damages remedy coupled with punitive damages. See *Snepp v. United States*, 444 U.S. 507 (1980), where the employment of the disgorgement remedy, although ostensibly aimed at the same funds as a punitive award, deprived the defendant of an opportunity to argue to the jury that his gains did not result from the breach, and thus potentially overdeterred.

292. Of course, the magnitude of the penalty also affects enforcement rates. For example, the availability of punitive damages certainly affects both the magnitude of the sanction and the likelihood of plaintiffs suing. Even though as a matter of arithmetic the expected penalty is a function of both the magnitude of the harm and the probability of enforcement, it makes sense at the remedies stage to discuss the problem of ensuring adequate deterrence in terms of effecting the remedy, that is, the style and magnitude of the sanction.

293. Professor Fiss grouped a similar set of doctrines under the phrase "subordinating doctrines." FISS, *supra* note 5, at 38-45. Because the set of doctrines differ slightly, a different term will be used herein in order to avoid confusion.

At the heart of these relegation doctrines lies the irreparable injury rule.²⁹⁴ This rule establishes the historic division between harm-based damages and prohibitory remedies and, traditionally understood, creates a presumption in favor of damages remedies.²⁹⁵ The rule has had an uneven history and apparently faces a dubious future,²⁹⁶ but perhaps its virtues have never been appreciated because of a failure to define it in an understandable and relevant way. Understanding that a finding of “inadequacy,” and the corresponding resort to a prohibitory remedy, constitutes a depletion of a public resource suggests a more concrete definition. From a social perspective, “adequacy” indicates that the predominate damages remedy is adequate to accomplish the social aims of the sanction: to provide optimal deterrence to ensure that idiosyncratic values are capitalized only when the social gain exceeds plaintiff’s nonidiosyncratic loss. Where the defendant threatens to take in a context where the defendant does not promise to realize social gain, however, the larger sanction of the prohibitory remedy is justified.

In general, defendants who take will not generate social gain where there is no prevailing market price for the good taken. Without an adequate substitute for the good available, the defendant’s harmful act against the plaintiff offers little promise of conversion into a capitalized asset. When defendants take goods that have no prevailing market use, and thus no market, they do so not to convert or “realize” plaintiff’s socially useless idiosyncratic valuations into social wealth, but rather to enjoy their own idiosyncratic valuations of the good. In cases where the market is “inadequate” because it does not supply a market value for the good, defendants do not act in the social interest. Instead, their taking simply transfers idiosyncratic values from plaintiff to themselves.

Another relegation doctrine, the “uniqueness” test, captures the same division between marketed items and nonmarketed items, and thus between pricing and prohibitory remedies. The “uniqueness” test holds that the prohibitory remedy of specific performance will not be ordered unless the subject good is sufficiently “unique.” The courts’ definition of uniqueness parallels closely the notion of “inadequacy” or “irreparability” discussed in

294. This rule is also termed the “inadequate remedy at law” rule; although the two formulations appear slightly different, they both ask if the alternative legal remedy is “adequate,” thus rendering the harm “reparable.” See LAYCOCK, IRREPARABLE INJURY RULE, *supra* note 5, at 8-9. *But see* Shreve, *supra* note 40, at 393 (arguing that the two formulations express slightly different ideas).

295. See YORIO, *supra* note 84, § 2.2.

296. See generally LAYCOCK, IRREPARABLE INJURY RULE, *supra* note 5.

reference to the remedy of injunctions, asking if a substitute performance or good is "readily obtainable" at a price from persons other than the defendant.²⁹⁷

The decision about whether a particular good is readily available on a market, that is, if it is "unique" or if instead the injury is "reparable" by an "adequate" sum of money, is a question of degree. For an economist, the notion of cross-elasticity of demand suggests that every good, at some point, has a substitute.²⁹⁸ It would appear, simply from the historical prevalence of damages remedies, that courts have tended to adhere to a rather broad notion of substitutability,²⁹⁹ thus restricting the availability of prohibitory remedies. From a social perspective, the fact that a good is unique means that the defendant who converts plaintiff's property interest probably does so without promise of generating social wealth. By definition, unique items are not part of a market, so defendant will not facilitate the movement of market price, nor create a new one, nor use the good in a more "profitable" manner from a social point of view. The good is unique, it has no market price, it does not supply a ready input for more profitable uses, and thus the defendant should be discouraged by the onerous prohibitory remedy of specific performance or restitution in kind from taking it.

The traditional common law "uniqueness" test and the irreparable injury rule, while constraining the employment of prohibitory remedies, permit flexible evolution of the extent to which idiosyncratic interests are recognized.³⁰⁰ For example, most jurisdictions have refused to protect the

297. Kronman, *supra* note 5, at 357-53 (describing uniqueness test, and arguing that it is a device for protecting against undercompensation of plaintiff).

298. *Id.* at 359. Some scholars have helpfully described the polar ends of this spectrum by the terms "thick market," where substitution is readily available, and "thin market," for where it is not. *See* Levmore, *supra* note 104, at 79-81 ("Efficient resource allocation requires a well-developed or 'thick' market composed of many active buyers and sellers."); Merrill, *supra* note 196, at 76 (discussing how a seller can extract economic rent from a buyer in a thin market, but not in a thick one). In general, where a conventional market is absent, economists have suggested various substitutes that would elicit the amount someone would pay for the interest at stake. *See generally* GARY BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976).

299. *See* Farnsworth, *supra* note 4, at 1155 ("[I]n a market economy it was supposed that, with rare exceptions for such 'unique' items as heirlooms and objects of art, substantially similar goods were available elsewhere.").

300. It is probably myopic for judges or lawyers to presume that remedial law has much of a role in "recognizing" idiosyncratic values. Market price will capture such values if they are less than completely idiosyncratic: that is, if they are shared by some significant number of market participants. Moreover, these movements in market prices probably capture and protect far more valuations than do movements in judicial doctrine, suggesting that courts should, in configuring remedies, routinely resort

sentimental or idiosyncratic valuations that plaintiffs hold toward converted "personalty."³⁰¹ On the other hand, historically most jurisdictions protected such sentimental values in regard to land,³⁰² to the point at which specific performance of land contracts and constructive trusts, a restitutionary device, were routinely imposed for conversions of real property.³⁰³ This dichotomy reflected the courts' collective judgment that "parcels of land are unique".³⁰⁴ no two acres of land or personal residences were substitutes. Both of these lines are moving: regarding land, some courts have awarded the seller specific performance;³⁰⁵ on the other hand, courts have compensated for some sentimental attachments to personalty.³⁰⁶

The aim of this justification of prohibitory remedies is not to declare any particular degree of substitutability optimal. Rather, it is to defend the traditional limitations that these relegation doctrines place on the employment of prohibitory remedies. Contrary to the sustained criticisms of commentators, the traditional irreparable injury rule and the "uniqueness" doctrine continue to serve an important role in shaping the remedial law system.³⁰⁷ By creating the preference for pricing remedies, they encourage defendants to take and pay when doing so promises to "realize" social wealth; by promoting the use of prohibitory remedies when markets are not adequate, they penalize defendants who take and pay where their actions do not promise social wealth.

to market price, and not undertake the considerable expense of deciding whether to award a prohibitory remedy or to award some damages remedy that explicitly embraces idiosyncratic or subjective values.

301. *Mieske v. Bartell Drug Co.*, 593 P.2d 1308 (Wash. 1979) (holding that damages do not include sentimental value of lost camera film as damages); *Schwartz v. Crozier*, 565 N.Y.S.2d 567 (App. Div. 1991) (limiting car to market price). Dobbs reports that courts have ameliorated this rule somewhat in cases involving destroyed personal property where the primary value is sentimental by allowing recovery for "value to the owner." 1 DOBBS, *supra* note 32, § 5.16(3). Although this measure explicitly excludes "sentimental value," Dobbs suggests that it supplies a means of some compensation of sentimental value, while preventing oversized awards. *Id.*

302. See Farnsworth, *supra* note 4, at 1154 ("Each parcel, however ordinary, was considered to be 'unique'. . .").

303. See Kronman, *supra* note 5, at 377.

304. See 1 DOBBS, *supra* note 32, § 2.5(2); see also Schwartz, *supra* note 5, at 272-73; Farnsworth, *supra* note 4, at 1154-55.

305. See 3 DOBBS, *supra* note 32, § 12.12(3).

306. See 2 *id.* § 5.16(3).

307. See YORIO, *supra* note 84, § 2.1 (describing the adequacy test as the "linchpin" of specific performance). In other contexts, other remedial doctrines also serve to relegate plaintiffs to damages remedies, most notably the prior restraint doctrine, which essentially places a plaintiff's personal reputation in regards to libel in the take-and-pay system. See generally FISS, *supra* note 5, at 46-47.

Fortunately, the employment of prohibitory remedies in this limited capacity either avoids or minimizes the problems associated with their more regular employment. The frequent use of prohibitory remedies, uninhibited by the relegation doctrines, will tend to cause a loss in the teaching function of remedies, and will tend, if plaintiffs expect the prohibitory remedy to constitute the routinely available remedy, to generate moral hazards. Thus, a predominate use of prohibitory remedies would engender social costs. The relegation doctrines minimize those costs by permitting the use of prohibitory remedies only where the defendant's take and pay will likely not yield social gain.

VI. CONCLUSION

Full compensation is an appealing goal, but it is not one that the law of remedies must necessarily fulfill. The available remedial means of ensuring full compensation, such as injunctions, specific performance and restitution, are issued at a price, not just to the defendant, but also to the community, and thus their imposition constitutes a transfer from third parties to the victims of harm. Although communities may wish to perform this transfer, and may do so in any number of ways, the law of remedies is a particularly undesirable vehicle to accomplish it. The question over whether to provide full compensation is not a matter of corrective justice, which is remedial law's concern, but of distributive justice, and ought to be considered as such.

This normative contention is supported by the practical observations that, if prohibitory remedies were employed as the vehicle to provide full compensation, as has been urged by many commentators, they would engender numerous problems in the law's fulfillment of other accepted goals of a remedial system. A remedial system in which prohibitory remedies predominated would produce haphazard and imprecise deterrence, would likely diminish precautionary behavior, would lead to wealth diminishment, and might even frustrate the goal of full compensation. If the use of prohibitory remedies is limited to buttressing the dominant damages remedy in cases where it is inadequate, prohibitory remedies represent market-enhancing, not market-minimizing, answers for hard cases. Used with this precision of purpose, their deterrent effect can be more easily weighed against their costs. Courts that wish to employ a prohibitory remedy may, with a clearer understanding of its proper role in a market-oriented damages system, examine the gains and risks from such an employment with more exactitude and rigor than simply attempting to

divine if a defendant's enrichment was in some sense "unjust," or if some undefined notion of "justice" demands that plaintiff's idiosyncratic harm be protected to provide full compensation.

Prohibitory remedies are valuable to a remedial system in which harm-based "pricing" remedies predominate. They serve a secondary role in providing for adequate deterrence, a social good, where needed to separate wealth-producing behavior from behavior that simply redistributes utility with no corresponding social benefit. Their infrequent employment minimizes or eliminates the concerns that preclude their widespread use. Importantly, the common law serves well to harness these potentially destructive remedies by virtue of the "relegation" doctrines, such as the "uniqueness" test and the "irreparable injury" rule. The sustained academic attack on these doctrines, along with the criticisms of the damages remedy, threatens to unleash the ethic of full compensation on remedial law, unsupported by a convincing theory of corrective justice and with little promise of practical success.