THE "FEEL" OF A CASE: VIRTUE DECISION-MAKING AS THE CORRECT APPROACH FOR DECIDING CASES IN EQUITY

DIEGO M. PESTANA[1]

"A decision that rests solely on 'equity' is an analytically naked, and analytically suspect, decision. It is a decision that rests on nothing more than the judge's subjective feelings of what is fair under the circumstances."[2]

"What causes the difficulty is the fact that equity is just, but not what is legally just: it is a rectification of legal justice."[3]

INTRODUCTION

Medieval England originally treated equity and common law as indistinct.[4] During this time in which equity and common law were a part of a unified legal procedure, the justice system revolved around the king's authority and duty to administer justice.[5] It is not until the fourteenth century when the distinction between equity and common law is first observed.[6] At that point, for someone to invoke equity jurisdiction, he had to ask the king to interfere in the dispute because the ordinary legal process could not ensure justice.[7] This distinction between law and equity, as well as the notion that equity can make up for the law's shortcomings, naturally carried over to the American legal system.[8] In fact, the Supreme Court

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1. Diego M. Pestana is a Judicial Law Clerk to the Honorable Amanda Arnold Sansone of the United States District Court for the Middle District of Florida. The views expressed are solely those of the author. The author would like to thank Professor Marco Jimenez and Natalia Reyna-Pimiento for their suggestions and insights on this Article. The author holds a B.A. in English Advanced Literary Studies from Saint Leo University and a J.D. from Stetson University College of Law. J.M.J.

2. Kevin C. Kennedy, *Equitable and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 610 (1997).

3. ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS 199 (J.A.K. Thomson trans., Hugh Tredennick rev. 1976).

4. *See* George Burton Adams, *The Origin of English Equity*, 16 COLUM. L. REV. 87, 89 (1916).

5. *See id.* at 89–91. Dr. Adams discussed how individuals wishing to use the justice system in medieval England had to first seek the king's permission, even if the individual did not want the king himself to decide the case.

6. *See id.* at 89.

7. *See id.* at 91.

8. *See* Charles T. McCormick, *The Fusion of Law and Equity in United States Courts*, 6

often discusses the English origins of equity when deciding cases dealing with equitable remedies, like preliminary injunctions.[9] Thus, for the purposes of this Article, it is important to highlight the modern American differences between law and equity.

To begin, for a plaintiff to even initiate an equitable action, there cannot be an adequate legal remedy available.[10] This rule that the plaintiff not have an adequate legal remedy generally refers to compensatory and punitive damages.[11] The damages available in a legal action are sometimes codified by state or federal statute.[12] So, in a legal action where the fact finder must determine the amount of damages to award, statutes and regulations make the fact finder's decision easier as the fact finder simply applies the law regarding damages in a computative, or mathematical, way. For example, if an employer intentionally discriminates against an employee, the amount of damages available to the employee depends on how many total employees the employer has.[13] If the employer has fifteen to one hundred employees, then the employee who was discriminated against can recover up to $50,000.[14] In contrast, when judges sit in equity, they often have no statute or regulation listing the requirements for an equitable remedy to be awarded.[15] Instead, a district judge sitting in equity makes her decision based in some part on the "feel" of the case.[16] It is this contrast in judicial decision-making—a formulaic approach of applying statutory damages in legal actions versus a cloudy, less predictable feel-of-the-case approach in equitable actions—that is expressed in the two quotes at the beginning of this Article.[17]

N.C. L. REV. 283, 284 (1928). In his article, Professor McCormick discussed how the Constitution explicitly recognizes a distinction between law and equity.

9. *See, e.g.*, Winter v. Natural Res. Def. Council, 555 U.S. 7, 24 (2008).

10. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 6 (4th ed. 2012) (pointing out that injunctions are among the most common of equitable remedies); *see also* Charles Alan Wright, *The Law of Remedies as a Social Institution*, 18 U. DET. L.J. 376, 378 (1955) ("[A] plaintiff cannot be allowed a specific remedy . . . so long as there exists a compensatory remedy which meets the technical tests of adequacy.").

11. *See* LAYCOCK, *supra* note 10, at 6 (according to Professor Laycock, damages, including compensatory and punitive damages, are the most important legal remedies).

12. *See, e.g.*, 18 U.S.C. § 2250 (2018).

13. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Remedies for Employment Discrimination*, https://www.eeoc.gov/employees/remedies.cfm (last visited Oct. 9, 2018).

14. *See id.*

15. *See* Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589, 609 (7th Cir. 1986) (Swygert, J., dissenting).

16. *See id.* As this Article will discuss, Judge Swygert strongly opposed an attempt to mathematize the judicial analysis needed regarding preliminary injunctions.

17. *See* Kennedy, *supra* note 2, at 610. In his article on equitable actions in Michigan, Professor Kennedy criticized courts basing a decision on the ground of "equity" without reference

Despite the apparent tension between predictable legal decision-making and unpredictable equitable decision-making, the Supreme Court has embraced the discretion historically left to a court sitting in equity.[18] For example, when providing the standard courts are to use in deciding whether to grant a preliminary injunction, the Court has been content with affirming a traditional four-factor test that considers: (1) the plaintiff's likelihood of success on the merits in the underlying case; (2) the irreparable harm to the plaintiff without an injunction; (3) the balance of equities; and (4) the public interest.[19] Thus, between the centuries-long tradition of equity and the Supreme Court's adherence to that tradition, it appeared judges had all the necessary discretion when deciding a case in equity.

However, in response to the lack of a clear, mechanical approach to deciding an equitable action, adherents to a Law and Economics approach to judicial decision-making attempted to mathematize equitable principles to make a court's decision much more formulaic and predictable, especially in cases dealing with injunctions.[20] One of the most well-known proponents of Law and Economics is Judge Richard Posner.[21] In *American Hospital Supply Corporation v. Hospital Products Limited*, Judge Posner devised a formula for district courts to use when determining whether to grant a preliminary injunction.[22] The formula provided by Judge Posner in *American Hospital*, commonly referred to as the "Leubsdorf-Posner Formulation," is noteworthy because it introduced a mathematical approach to cases in equity, an approach similar to the formulaic process of applying statutory damages in legal actions.[23]

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to specific rules and principles governing equitable actions. *See also* ARISTOTLE, *supra* note 3, at 199. For Aristotle, equity was the rectification of legal justice.

18. *See Winter*, 555 U.S. at 26; *see also* Hecht Co. v. Bowles, 321 U.S. 321, 330 (1944); Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982).

19. *See Winter*, 555 U.S. at 20.

20. *See id.* at 24.

21. *See* THOMAS ULEN & ROBERT COOTER, LAW & ECONOMICS, 2 (6th ed. 2012). Other judges who have utilized economic analysis in their judicial decisions include Judge Frank Easterbrook of the Seventh Circuit and Associate Justice Stephen Breyer.

22. *See* Am. Hosp. Supply Corp. v. Hosp. Products Ltd., 780 F.2d at 593; *see also* John Y. Gotanda, *The Emerging Standards for Issuing Appellate Stays*, 45 BAYLOR L. REV. 809, 822 (1993). This formula, which will be the focus of this Article, will be referred to throughout as the "Leubsdorf-Posner Formulation," which was designed to minimize the costs of being mistaken in the grant of a preliminary injunction.

23. *See* Richard R. W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 390 (2005).

As described in detail below, the mathematical approach of Law and Economics, embodied by the Leubsdorf-Posner Formulation, is inappropriate for deciding cases in equity. Law and Economics advances a scientific and mathematical approach to judicial decision-making.[24] The nature of equitable actions, however, is that they are decided on a case-by-case basis that depends on unique facts and circumstances. Indeed, the nature of an equitable action is unique precisely because there are no adequate legal remedies.[25] By utilizing mathematical formulas for district courts to use in deciding equitable actions, Law and Economics threatens to undo the very purpose of equity, which is to allow the judge to exercise her prudential judgment in ensuring justice where the law is insufficient.

Instead of mathematizing equity, especially where preliminary injunctions are involved, I propose that district court judges adhere to traditional equitable principles that have been articulated by the Supreme Court. Deciding whether to grant a preliminary injunction requires a balancing of factors that should not be reduced to an algebraic formula. Instead, judges should be entrusted to decide cases justly based on the "feel" of the case. To strengthen this trust bestowed upon judges sitting in equity, my proposal incorporates Professor Lawrence Solum's "virtue-centered theory of judging," which promotes the idea that judges should possess virtues like temperance, temperament, and wisdom.[26] Therefore, a judge sitting in equity who is equipped with the traits needed for virtue-centered decision-making should decide whether to grant a preliminary injunction using the factors put forth by the Supreme Court.

Section I of this Article will provide a brief history of Law and Economics, beginning with its origins in the judicial philosophy of legal realism as espoused by Oliver Wendell Holmes. Section II will discuss the *American Hospital* case, where Judge Posner memorialized the Leubsdorf-Posner Formulation for granting preliminary injunctions. Section III examines the effect of *American Hospital* on the lower courts in the Seventh Circuit. Section IV will discuss how the Supreme Court has dealt with preliminary injunctions as well as the factors the Court provided district courts to consider. Section V will describe Professor Solum's idea

24. *See* Patricia M. Wald, *Limits on the Use of Economic Analysis in Judicial Decisionmaking*, 50 LAW & CONTEMP. PROBS. 226, 236 (1987) (discussing the limitations on economic language in judicial decisions, Judge Wald argues that "phrasing [legal issues] in the mathematical equations of quantitative economics usually does not help matters").

25. *See Winter*, 555 U.S. at 367.

26. *See* Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178, 179, 182 (2003) (according to Professor Solum, virtue jurisprudence incorporates ideas stemming from virtue epistemology, virtue ethics, and virtue politics).

of virtue jurisprudence. Section VI will analyze the *American Hospital* decision using the factors put forth by the Supreme Court and the virtue jurisprudence detailed by Professor Solum. Finally, Section VII will provide a conclusion, arguing that an application of equitable principles articulated by the Supreme Court, which are applied based on the "feel" of the case, combined with virtue jurisprudence is the correct solution for courts deciding cases in equity.

I. A BRIEF HISTORY OF LAW AND ECONOMICS

A. ORIGINS IN LEGAL REALISM

Law and Economics traces its origins to the judicial philosophy of legal realism.[27] Legal realism developed as a result of the rigidity of formalism, which was the predominant judicial philosophy at the time of legal realism's inception.[28] Unlike formalism, legal realists argued that the law was largely indeterminate.[29] As legal realism began to grow in popularity, so did the idea that judges now had discretion to interpret and shape law with policy.[30] Oliver Wendell Holmes is probably the most well known legal realist.[31]

In *The Path of the Law*, Holmes articulated what he believed the practice of law would consist of in the twentieth century.[32] In his speech, Holmes sought to "dispel a confusion between morality and law."[33] For Holmes, the purpose of the law was to predict "the incidence of the public

27. *See* Martin Gelter & Kristoffel Grechenig, *History of Law and Economics*, MAX PLANCK INST. FOR RESEARCH ON COLLECTIVE GOODS (2014), https://www.coll.mpg.de/pdf_dat/2014_05online.pdf (discussing how the emergence of Law and Economics in the twentieth century can largely be credited to the emergence of legal realism in the late nineteenth century).

28. *See id.* ("[T]he legal realists criticized the formalism of the majoritarian jurisprudence.").

29. *See id.* Because of their belief that law was much more intricate and complicated "legal realists criticized the formalism of the majoritarian jurisprudence."

30. *See* Gelter, *supra* note 27, at 3 (arguing that the dwindling popularity of formalism meant that legal philosophies that valued policymaking and judicial discretion began to gain traction).

31. *See id.* at 2 (crediting the emerging popularity of legal realism to proponents like Justice Holmes). *But see* Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1936 (2005) (arguing that Justice Holmes technically predated the legal realist movement).

32. Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 992 (1997). The Path of the Law comes from an address Justice Holmes delivered at the Boston University School of Law in 1897.

33. *Id.* at 992, 994, 996 (arguing that morality deals with the "internal state of the individual's mind" while the law deals with the social consequences of illegal action).

force through the instrumentality of the courts."[34] To illustrate how the law can predict human behavior, Holmes explained his theory of the "bad man."[35] The "bad man" showed how the law can be used to incentivize positive behavior, and its illustration supported Holmes' contention that, until that point, judges "failed adequately to recognize their duty of weighing considerations of social advantage."[36] As for the future practice of law, Holmes stated that "the man of the future is the man of statistics and the master of economics"[37] and that "every lawyer ought to seek an understanding of economics."[38] Realizing how legal realists like Holmes viewed the law as a chance for a judge to affect society through an economic-type analysis makes it is easier to understand how modern Law and Economics came about.[39]

B. MODERN LAW AND ECONOMICS

Just as Holmes and legal realists saw judges as having a duty to weigh "considerations of social advantage" in their decision, economics also

34. *Id.* at 991; *see* Holmes, *supra* note 32, at 992 (according to Holmes, "a legal duty . . . is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court."); *see also* Green, *supra* note 31, at 1936 (noting that this theory put forth by Justice Holmes is known as "prediction theory.").

35. *See* Holmes, *supra* note 32, at 993; *see also* Marco Jimenez, *Finding the Good in Holmes's Bad Man*, 79 FORDHAM L. REV. 2069, 2104 (2011) (pointing out that Holmes's "bad man" was intended to help lawyers and jurists understand the law and its impacts as separate from morality—and not to encourage lawyers and jurists to help shape the law in a way that helps the "bad man," as it is commonly misunderstood).

36. *See* Holmes, *supra* note 32, at 999 (arguing that instead of using the law to incentivize positive behavior, jurists were hesitant to recognize the consequences of their decisions, resulting in inarticulate judgments).

37. *Id.* at 1001. To illustrate his point about how laws can evolve over time due to examining the original purpose of a law, Justice Holmes used the example of how the law expanded from preventing simple theft of a person's property to preventing theft of another's property through "trick or device." For Holmes, this example shows how primitive law, which aimed at preventing physical trespass to property, needed to be expanded to include theft situations in which no physical trespass occurred. Holmes's conclusion, therefore, is that a lawyer who is a "master of economics" (i.e., the legal realist) analyzes the origins of a rule of law, while the "primitive" lawyer (i.e., the formalist) simply applies the law, no matter how antiquated or impractical it may be.

38. *Id.* at 1005 (explaining that future lawyers would be "called on to consider and weigh the ends of legislation, the means of attaining, them and the cost"—all of which require economic analysis).

39. *See* Vitalius Tumonis, *Legal Realism & Judicial Decision-Making*, MYKOLO ROMERIO UNIVERSITETAS (Dec. 12, 2012), https://www.mruni.eu/upload/iblock/e5f/008_tumonis.pdf ("[L]egal realists generalized from judicial-decision making to law in general, while [it is] know[n] now from studies on the selection effect in economic analysis of law that legal rules applied in courts are more ambiguous than legal rules in general.").

views laws as incentives affecting human behavior.[40] In the 1960s, an economic analysis of law expanded to multiple practice areas.[41] Two scholars are popularly credited with igniting the modern field of Law and Economics: Ronald Coase and Guido Calabresi.[42] The works of Coase and Calabresi would go on to influence a number of judges and legal scholars who utilize Law and Economics in their analyses, most notably Judge Richard Posner.[43] To better understand the Law and Economics philosophy used by Judge Posner, and the incompatibility of that Law and Economics philosophy with equity, a foundational understanding of the two most notable works in Law and Economics is helpful.

1. The Problem of Social Cost

In his article, Coase argues that laws are only justified and useful to the extent that those laws reference a cost-benefit analysis commonly used in economics.[44] Throughout his work, Coase uses examples from English case law to illustrate his point that the purpose of a legal system is to maximize production for society as a whole.[45] It is the cost of market transactions that should determine the outcome of a case, as the lower transactions costs will result in an increase in the value of production for society.[46] As courts influence the economy through their decisions in any given case, Coase wrote: "[i]t would therefore seem desirable that the courts should understand the economic consequences of their decisions

40. ULEN & COOTER, *supra* note 21, at 9 ("Economics conceives of laws as incentives for changing behavior . . . and as instruments for policy objectives.").

41. *See id.* at 1 (noting that specifically, law and economics has extended into property, contracts, torts, criminal law, criminal procedure, constitutional law, antitrust law, and tax law).

42. *See id.* at 1 n.2 (pointing out that Coase's *The Problem of Social Cost* and Calabresi's *Some Thoughts on Risk Distribution and the Law of Torts* are the benchmarks of Law and Economics' foundation).

43. *See id.* at 2; *see also* Richard A. Posner, *Guido Calabresi's 'The Costs of Accidents': A Reassessment*, 64 MD. L. REV. 12, 13 (2005) (discussing Calabresi's *Some Thoughts on Risk Distribution and the Law of Torts*, as well as Coase's *The Problem of Social Cost*).

44. *See* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 10 (1960); *see also id.* at 2 (emphasis in original) (highlighting that in a hypothetical where the harmful effect of a party's pollution is that it kills fish, Coase argued that the solution to the problem "has to be looked at in total *and* at the margin").

45. *See id.* at 8–11, 15 (discussing cases, such as Sturges v. Bridgman, 11 Ch. D. 852 (1879); *see also* Cooke v. Forbes, L.R. 5 Eq. 166 (1867–1868); Bryant v. Lefever, 4 C.P.D. 172 (1878–1879); and Bass v. Gregory, 25 Q.B.D. 481 (1890)).

46. *See id.* at 15–16. As Coase points out, if there are no market costs to transactions, a proper delineation of rights "will always take place if it would lead to an increase in the value of production." However, if there are costs to market transactions, "[i]t is clear that [a proper delineation of rights] will only be undertaken when the increase in the value of production . . . is greater than the costs which would be involved in bringing it about."

and . . . take these consequences into account when making their decisions.[47] Therefore, according to Coase, laws and judicial decisions should be aimed at maximizing societal utility by allowing citizens to understand the total costs of their actions.[48] This cost-benefit approach to judicial decision-making is at the heart of the Law and Economics philosophy: legal consequences for any action should be predictable, with laws incentivizing the most utilitarian outcome. This economic approach to law is similar to what Judge Calabresi would go on to write about in his seminal work, which I will now discuss.

2. Some Thoughts on Risk Distribution and the Law of Torts

In his article, Calabresi carried the Law and Economics philosophy of judicial decision-making into the realm of tort law.[49] Most pertinent to this Article is Calabresi's discussion of the social utility of injunctions.[50] Calabresi argued that, even if the benefit of a nuisance outweighed the societal or private costs, a case can still be made for enjoining the nuisance.[51] However, Calabresi added that, as a whole, injunctions are more likely to lead to undesirable secondary effects on behavior in the economy as the costs of an injunction are concentrated in a single party.[52] Therefore, there should be a requirement of substantial injury to the party seeking the injunction in order to maximize loss-spreading.[53] This

47. Coase, *supra* note 44, at 19 (noting that Coase takes his proposal that courts consider the economic effects of its decisions even further when he writes that, in situations where the market already takes care of the delineation of rights through its determined transaction costs, it is preferable for courts to make those determinations otherwise left to the market in order "to reduce the need for such transactions and thus reduce the employment of resources in carrying them out.").

48. *See id.* at 13 (regarding a hypothetical where one party's nuisance affects another, Coase wrote: "[i]f we are to attain an optimum allocation of resources, it is therefore desirable that both parties should take the harmful effect [of a nuisance] into account in deciding on their course of action.").

49. *See* Mark A. Geistfeld, *Risk Distribution and the Law of Torts: Carrying Calabresi Further*, 77 L. & CONTEMP. PROBS. 165 (2014) (discussing how Calabresi utilized economic analysis to illustrate how the allocation of costs affect tort rules).

50. *See* Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 535, 537 (1961). Specifically, Calabresi argues, "[r]esource allocation . . . probably cannot justify many of the injunctions actually issued in nuisance cases." Most injunctions would not pass a risk distribution test because if the nuisance benefits society as a whole, the nuisance should be allowed to continue if only one party suffers injury.

51. *See id.* at 535 ("Even on the basis of resource-allocation theory . . . a case can be made for enjoining some nuisances which have some social utility, at least as a matter of convenience.").

52. *See id.* (noting that "in most cases injunction would seem to invite relative concentration of losses and, hence, undesirable secondary effects").

53. *See id.* (according to Calabresi, "[s]ubstantial injury is also justified by resource-

economic risk-allocation approach to torts and injunctions provided by Calabresi is a precursor to the type of analysis Judge Posner would provide in *American Hospital* twenty-four years later, an analysis I will now examine.

II. LAW AND ECONOMICS IN *AMERICAN HOSPITAL*

A. FACTUAL BACKGROUND

Hospital Products was a manufacturer of medical devices used for surgery, specifically stapling systems.[54] American Hospital Supply Corporation was a distributor of medical supplies and the exclusive distributor of Hospital Products' devices.[55] The contract between Hospital Products and American Hospital provided that American Hospital's relationship, as sole distributor, would automatically renew after three years, unless otherwise notified by Hospital Products at least ninety days before the end of the three-year contract.[56] Within that ninety-day timeframe, American Hospital notified Hospital Products of its intent to renew the contract, however, Hospital Products notified American Hospital that the contract was terminated and that American Hospital was no longer their exclusive distributor.[57] American Hospital then sued Hospital Products for breach of contract and moved for a preliminary injunction to prevent Hospital Products from taking any action with regards with American Hospital's contract rights during the span of the injunction, which the district court granted.[58] The issue before the Seventh Circuit was whether the preliminary injunction had been properly granted in favor of American Hospital.[59]

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allocation theory because of the high cost of justice").

54. *See* Am. Hosp. Supply Corp. v. Hosp. Products Ltd., 780 F.2d 589, 592 (7th Cir. 1986).

55. *See id.*

56. *See id.*

57. *See id.* (highlighting that Hospital Products announced it was treating the contract as being terminated and proceeded to send telegrams to American Hospital's dealers informing them that Hospital Products' contractual relationship with American Hospital had ended).

58. *See id.* at 592, 598. The U.S. District Court for the Northern District of Illinois found the balance of harms between American Hospital and Hospital Products to tip in American Hospital's favor due to the injunction bond posted by American Hospital.

59. *See id.* at 593 (pointing out that appellate courts have a limited scope of review of a district court's decision regarding a preliminary discussion, with the appellate court reviewing only for an "abuse of discretion").

B. THE LEUBSDORF-POSNER FORMULATION

Writing for the majority, Judge Posner began his analysis by discussing the dangers a district court judge faces in the decision to grant an injunction.[60] Judge Posner noted that an injunction erroneously granted could result in irreparable harm to the defendant, while an injunction erroneously denied could result in irreparable harm to the plaintiff.[61] After he discusses these dangers, Judge Posner then lays out the Leubsdorf-Posner Formulation for determining whether a preliminary injunction should be granted.[62] Judge Posner wrote:

> These mistakes can be compared, and the one likely to be less costly can be selected, with the help of a simple formula,grant the injunction if but only if P x Hp > (1 – P) x Hd, or, in words, only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error . . . exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error.[63]

Judge Posner goes on to compare this formulation of whether or not to grant a preliminary injunction to the Learned Hand formula for negligence.[64] However, Judge Posner is careful to point out that he does not mean for this new formula to be used as a new legal standard or rule.[65] Instead, Judge Posner states that his formula is simply a "distillation" of the same test that courts utilized up to that point.[66] The purpose of the formula,

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60. *See Am. Hosp. Supply Corp.*, 780 F.2d at 594 (noting that the harm that could result from the district court judge's decision stems partly from the fact that the judge is deciding based off an incomplete record).

61. *See id.*

62. *See id.*; *see also* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 540–41 (1978) (highlighting that according to Leubsdorf, "the preliminary injunction standard should aim to minimize the probable irreparable loss of rights caused by errors incident to a hasty decision").

63. *Am. Hosp. Supply Corp.*, 780 F.2d at 593; *see* LAYCOCK, *supra* note 10, at 355–56 (pointing out that Posner's formula seemingly cannot account for a scenario in which there is a slight possibility of harm but that harm would be devastating or deadly).

64. *See Am. Hosp. Supply Corp.*, 780 F.2d at 593; *see also* United States v. Carroll Towing Co., 159 F.2d 169, 173 (1947) (explaining that the "Learned Hand Formula" is a formula used to determine whether a party should be found negligent "if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL").

65. *See Am. Hosp. Supply Corp.*, 780 F.2d at 593 (noting that "[t]his formula . . . is not offered as a new legal standard," but "[i]t is actually just a distillation of the familiar four (sometimes five) factor test that courts use in deciding whether to grant a preliminary injunction").

66. *See id.* at 593–94. Posner wrote:

according to Posner, is to help district courts determine "the error-minimizing course of action" when deciding whether to grant a preliminary injunction.[67] Thus, while the Leubsdorf-Posner Formulation introduced in this case was undoubtedly new, to Posner, "the analysis [the formula] capsulizes is standard."[68]

After laying out his approach for determining whether a preliminary injunction should be granted, Judge Posner turned to the case at hand.[69] Hospital Products argued that American Hospital Supply only suffered a few lost sales as a result of Hospital Products' actions as the preliminary injunction was entered soon after Hospital Products announced its partnership with American Hospital ended.[70] Judge Posner noted that the question before the court was whether the preliminary injunction prevented any harm to American Hospital that could not be legally remedied by compensatory damages.[71] Posner pointed out that American Hospital took steps to help Hospital Products through a period of financial uncertainty by purchasing more surgical devices than it needed from Hospital Products.[72] Had American Hospital not been able to sell the excess devices it purchased from Hospital Products, American Hospital would have been left with a ten to thirty million-dollar loss.[73] What made this prospective multi-million dollar loss irreparable for American Hospital was the fact that

> The court asks whether the plaintiff will be irreparably harmed if the preliminary injunction is denied, . . . whether the harm to the plaintiff if the preliminary injunction is denied will exceed the harm to the defendant if it is granted, whether the plaintiff is reasonably likely to prevail at trial, and whether the public interest will be affected by granting or denying the injunction.

Id.

67. *Id.* at 594 (explaining that "error-minimizing course of action" depends on the probability plaintiff is right in his cause of action, the costs to the plaintiff in denying the injunction, the cost to the defendant in granting the injunction, and the cost of the decision to third parties).

68. *Id.*

69. *See id.* at 595. The court began its analysis with the balance of harms to each party.

70. *See id.* Specifically, Hospital Products argued that "American Hospital Supply did not prove more than a handful of lost sales" because American Hospital "promptly received a preliminary injunction to head off any losses by restoring its distributorship" shortly after the termination of the contract by Hospital Products.

71. *See Am. Hosp. Supply Corp.*, 780 F.2d at 595. ("The question is not whether there was an actual loss but whether there was an impending loss that the preliminary injunction prevented, how great it was, and whether it could have been made up by a judgment for damages after trial.").

72. *See id.* ("To help Hospital Products overcome serious financial problems, American Hospital Supply had advanced it millions of dollars—part in loans, part by buying more of the product than it needed and keeping the excess in inventory").

73. *See id.* The court points out that this possible loss to American Hospital was "substantial."

Hospital Products was on the verge of bankruptcy—a situation which would have all but precluded recovery of lost money for American Hospital.[74] Therefore, the Court concluded that there existed a substantial enough threat of irreparable harm to American Hospital to continue its analysis of whether or not to issue a preliminary injunction.[75]

Next, Judge Posner discussed the threat of irreparable harm to the defendant, Hospital Products.[76] One of the costs that the court must consider in granting the injunction, Posner pointed out, was that requiring Hospital Products to continue its relationship with American Products could lead Hospital Products to bankruptcy.[77] Judge Posner also discussed the cost of a business failure for Hospital Products if its assets decreased in value because of the preliminary injunction, which would be relevant to any post-bankruptcy liquidation sale.[78] Therefore, for Posner and the court, there existed sufficient evidence that a preliminary injunction could result in irreparable harm to Hospital Products by "precipitating insolvency."[79]

After recognizing the threat of irreparable harm to both parties, Judge Posner began to analyze whether the district court judge correctly granted the preliminary injunction with the help of his formula. First, for the purpose of his analysis, Judge Posner assumed that the potential harm to both parties in the case of an erroneous grant or denial was equal.[80] Posner then pointed out that the injunction must be granted if American Hospital had a greater than fifty percent chance of being successful at trial, "for then P in our preliminary-injunction formula must exceed 1 – P, and therefore P

74. *See id.* at 596. The Seventh Circuit points that, in bankruptcy, a victim of a breach of contract is just a general creditor, and general creditors commonly do not recuperate their losses from the bankrupt.

75. *See id.* Judge Posner is careful to point out that using a potential bankrupt's insolvency as a reason to grant a preliminary injunction could result in creditors receiving preferential treatment from other creditors seeking their money during the bankruptcy proceedings. However, Judge Posner also points out that the bankruptcy court has the power to prevent such preferential treatment.

76. *See id.*

77. *See Am. Hosp. Supply Corp.*, 780 F.2d at 597 ("A preliminary injunction that will or may precipitate a firm into bankruptcy is therefore a source of costs which ought to be considered in deciding whether to grant such an injunction.").

78. *See id.* at 597–98 ("If the firm's assets would be worth less on the auction block than as part of a going concern, this might seem a powerful argument against granting a preliminary injunction that increased the risk of failure.").

79. *Id.* at 598. However, as the Court would later explain, the fact that the injunction could precipitate Hospital Products' insolvency was not enough to conclude the district court judge erred in granting the injunction.

80. *See id.* Posner begins his analysis by affirming that Hospital Products' claim would fail "[e]ven if there were no clear basis for differentiating between the irreparable harms" to American Hospital and Hospital Products.

x Hp must exceed (1 – P) x Hd from the assumption that Hp = Hd."[81] Because the district court judge found that Hospital Products breached its contract with American Hospital, Posner concluded that the probability of success for American Hospital, or P, was very high.[82] After noting that the arguments presented by both sides regarding the alleged breach of contracts were inconclusive, the court stated that the district court judge's determination erring on the side of American Hospital's favor "was on solid ground."[83] Ultimately, Judge Posner and the court affirmed the district court's decision.[84]

C. JUDGE SWYGERT'S DISSENT

In his dissent, Judge Swygert criticized the Leubsdorf-Posner Formulation outlined in the court's decision.[85] According to Judge Swygert, in creating a formula for district courts to use in determining whether to grant a preliminary injunction, the court "transgress[ed] the limits of its appellate authority."[86] Judge Swygert highlighted the four-factors that parties seeking a preliminary injunction must satisfy.[87] Specifically, plaintiffs must prove that (1) they have no adequate legal remedy; (2) their irreparable harm outweighs the irreparable harm defendants would suffer; (3) there is a likelihood of success on the merits of plaintiffs' claims; and (4) the injunction is in the public interest.[88] These four-factors were sufficient for Judge Swygert to conduct his analysis and conclude that the district court erroneously granted American Hospital its

81. *Id.* (remembering that the Leubsdorf-Posner formula states that a preliminary injunction should be granted if P x Hp > (1 – P) x Hd, it is clear to see what Posner means by American Hospital needing only more than a fifty percent probability of success as the other factors in the equation would equal out).

82. *See id.* at 599, 607 (admitting the inability to conclude which party breached the contract due to incomplete evidence, the Court stated: "[A]s nearly as we can determine, the able and experienced district judge who resolved the uncertainty in American Hospital Supply's favor was on solid ground for doing so").

83. *See Am. Hosp. Supply Corp.*, 780 F.2d at 599. The Court reiterated that the district judge's decision will not be reversed solely because his reasons for doing so were not "full" due to incomplete evidence.

84. *See id.* at 602.

85. *See id.* Judge Swygert begins his dissent by claiming the court is continuing "a wholesale revision of the law of preliminary injunctions."

86. *Id.* (arguing that this deviation from appellate authority by the court is a continuation of the Seventh Circuit's ruling in Roland Machinery v. Dresser Industries, 749 F.2d 380 (7th Cir. 1984)).

87. *See id.* at 604.

88. *Id.* (Swygert, J., dissenting) (citing Palmer v. City of Chicago, 755 F.2d 560, 576 (7th Cir. 1985); Godinez v. Lane, 733 F.2d 1250, 1257 (7th Cir. 1984)).

preliminary injunction.[89] However, after his analysis of the case before the court, Judge Swygert found it necessary to comment on the Leubsdorf-Posner Formulation because of its "potentially far-reaching and baneful consequences."[90]

Judge Swygert began his criticism of the Leubsdorf-Posner Formulation by distinguishing it from the *Carroll Towing* formula referenced in the majority's opinion.[91] Swygert argued that a mathematical approach to determining negligence damages may be appropriate but such mathematical approaches have no place in equity.[92] A judgment in equity, Swygert argued, cannot be as definite as tort damages and must be made with flexibility and within the district court judge's discretion.[93] In response to Posner's statement that his formula does not alter the four-factor test traditionally used by courts in equity, Judge Swygert asked: "[I]f nothing is added to the substantive law, why bother?"[94] For Judge Swygert, the four-factor test he used in his analysis of the case is sufficient for use by district courts.[95] Swygert wrote that district courts must make the decision on whether to grant an injunction based on the "'feel' of the case" as cases in equity involve factors that cannot be precisely quantified.[96] Judge Swygert also pointed out that the majority failed to quantify the variables it laid out in its formula as an indication that such an exercise is impossible in equity.[97] Ultimately, Judge Swygert felt the

89. *See Am. Hosp. Supply Corp.*, 780 F.2d at 604–09. Judge Swygert divides his analysis by each factor Seventh Circuit precedent required district courts to consider, except for the public interest factor.

90. *Id.* at 608.

91. *Id.* at 609 ("Proceedings in equity and cases sounding in tort demand entirely different responses of a district judge.").

92. *See id.* ("A quantitative approach may be an appropriate and useful heuristic device in determining negligence in tort cases, but it has limited value in determining whether a preliminary injunction should issue.").

93. *See id.* ("The judgment of a district judge in an injunction proceeding must be flexible and discretionary—within the bounds of the now settled four-prong test.").

94. *Id.* Judge Swygert argued that the Leubsdorf-Posner formula would not, in reality, assist district courts in deciding whether or not to grant an injunction.

95. *See Am. Hosp. Supply Corp.*, 780 F.2d at 609 (Swygert, J., dissenting) ("The standard four-prong test for determining whether a preliminary injunction should issue has survived for so many years because it has proven to be a workable summation of the myriad factors a district court must consider in deciding whether to grant an injunction.").

96. *See id.* As Judge Swygert pointed out, equity requires district courts to assess factors, which cannot be quantified by its very nature.

97. *See id.* In an effort to show both the formula's lack of usefulness and its inapplicability to the nature of equity, Judge Swygert pointed out:

> Ironically, the majority never attempts to assign a numerical value to the variables of its own formula. We are never told how to measure P or Hp or H d. I believe, and the majority appears to concede, that a numerical value could never be assigned to these

Leubsdorf-Posner Formulation afflicted serious harm to the traditional four-factor test and left district courts with less discretion in making its equitable judgments.[98]

As an appellate court decision, Judge Posner's opinion in *American Hospital* is authoritative on the district courts in that jurisdiction. A complete analysis as to whether the Leubsdorf-Posner Formulation helped or confused lower courts requires looking at case law applying the formula. However, regardless of the obvious effects the Leubsdorf-Posner Formulation has had, this Article agrees with Judge Swygert that the formula is unnecessary and contrary to the nature of equitable actions.

III. THE EFFECTS OF THE LEUBSDORF-POSNER FORMULATION

In the same year the Seventh Circuit decided *American Hospital*, three district court rulings dealing with preliminary injunctions, each of which utilized the Leubsdorf-Posner Formulation, were issued.[99] This Section will provide a brief summary of the facts of each case and how the district courts incorporated the Leubsdorf-Posner Formulation.

A. INTERPOINT CORPORATION V. TRUCK WORLD, INC.

1. Factual Background

Truck World leased property to Interpoint to operate a truck stop restaurant.[100] The lease from Truck World to Interpoint included language stating that if Truck World sold its lease, the lease to Interpoint would be cancelled.[101] Later on, Truck World did in fact sell its lease to a third

> variables. Who can say, for instance, what *exactly* the probability is that the granting of the injunction was an error? How then will the majority's formula ease in a meaningful way the responsibilities of the district courts? Judges asked to issue a preliminary injunction must, in large part, rely on their own judgment, not on mathematical quanta.

Id.

98. *See id.* (warning that the result of the majority's formula will be to force district judges into a "quantitative straitjacket").

99. *See* Interpoint Corp. v. Truck World, Inc., 656 F. Supp. 114, 115–19 (N.D. Ind. 1986); *see also* Kohler Co. v. Briggs & Stratton Corp., No. 85-C-1042, 1986 U.S. Dist. WL 946, at *3 (E.D. Wis. Mar. 13, 1986); Midcon Corp. v. Freeport-McMoran, Inc., 625 F. Supp. 1475, 1482 (N.D. Ill. 1986).

100. *See Interpoint*, 656 F. Supp. at 115.

101. *See id.* Specifically, the lease included a provision entitled "Termination of Lessor's Estate" which detailed what would happen to the lease in the event that Truck World was no longer the owner of the property.

party.[102] While Truck World argued the lease between itself and Interpoint terminated upon the sale of the lease, Interpoint argued that Truck World failed to use its best efforts to convince the new lessor to allow Interpoint to continue its operations.[103] Therefore, Interpoint sought a preliminary injunction preventing Truck World from requiring Interpoint to close its truck stop restaurant.[104]

2. The Court's Analysis

The district court began its analysis by referring to the traditional factors the Seventh Circuit considers in cases dealing with preliminary injunctions, namely: (1) whether there is an adequate legal remedy; (2) the danger of irreparable harm; and (3) the likelihood of success on the merits.[105] After stating that the Seventh Circuit adopted a "sliding scale" approach to the traditional factors, the district court then directly cited the Leubsdorf-Posner Formulation.[106] After discussing what each side of the formula meant in terms of the preliminary injunction analysis, the court stated, "[o]bviously this formula is not a substitute for, but an aid to, judgment."[107] While claiming the usefulness of the formula, the district judge admitted that, "[a] figure representing the probability of success . . . can only be arrived through subjective estimate by the court."[108] Thus, by the court's own admission, the usefulness of the Leubsdorf-Posner Formulation is limited and, even with the use of the formula, the equitable nature of an injunction requires a judge's subjective value-judgments.

Next, the court analyzed whether Interpoint had an adequate remedy at law.[109] Due to a threat of insolvency to Truck World, the court found

102. *See id.* (noting the third party in this case was Quadland).

103. *See id.* Interpoint argued Truck Stop was obliged to exercise its best efforts to convince Quadland to renew Interpoint's lease because of an identity of interest between Truck World and Quadland.

104. *See id.*

105. *Id.* at 115–16 (citing Roland Mach. Co. v. Dresser Indust., Inc., 749 F.2d 380, 386–88 (7th Cir. 1984)). The court also stated that it must consider the public interest.

106. *See Interpoint*, 656 F. Supp. at 119 ("Nevertheless, the 'sliding scale' approach is helpful and will be considered in determining whether plaintiff is entitled to a preliminary injunction.").

107. *Id.* at 119–20. After noting the limitations of the formula, the court appears to prefer and utilize the traditional sliding-scale approach to the four-factor test.

108. *Id.* at 116.

109. *See id* at 116–17. In essence, the court's analysis of the four-factor test in *Interpoint* is more similar to Judge Swygert's analysis in the *American Hospital* dissent than it is to the majority's analysis in that case. *See also Am. Hosp.*, 780 F.2d at 604–09 (Swygert, J., dissenting).

Interpoint would have no adequate legal remedy since it would be unable to recover damages from Truck World.[110] And this lack of a legal remedy, the court found, would result in irreparable harm to Interpoint should it prevail at trial while Truck World turned insolvent.[111]

With regards to Interpoint's likelihood of success on the merits of the case, the court found sufficient evidence on the record to indicate that Interpoint had more than a negligible likelihood of proving that Truck World breached its covenant to use its best efforts to ensure Interpoint remained on the leased property.[112] After effectively dismissing the public interest factor of the preliminary injunction analysis,[113] the court again looked to the Leubsdorf-Posner Formulation.[114] Employing a similar analysis of the formula as the Seventh Circuit in *American Hospital*, the district court found there could be no harm to Truck World in the immediate case.[115] On the other side of the formula, with regards to Interpoint's potential harm, the court found great possible damage.[116] Because Truck World's damages were calculable, the court did not find irreparable harm to Truck World in the event that the injunction was erroneously granted.[117] The court concluded its grant of the preliminary injunction by stating, "the formula is helpful in this case . . . in highlighting the fact that unlike Interpoint, [Truck World] had nothing to lose from a mistaken decision."[118]

110. *See Interpoint*, 656 F. Supp. at 117. After pointing out Interpoint had gross revenues of $175,000.00 from the truck stop in question, the court points out that "Truck World . . . may very well prove to be insolvent, making Interpoint's remedy at law inadequate."

111. *See id.* at 116–17. ("Upon careful scrutiny [Truck World's] insolvency may very well result in no recovery at all for Interpoint.").

112. *See id.* at 119. Interpoint provided evidence showing that Interpoint's rent checks to Truck World were being endorsed to Quadland before the sale of the lease. Along with other evidence, the court found Interpoint made a strong enough showing that it was likely to prove an identity of interest between Truck World and Quadland.

113. *See id.* (stating that "[i]n this case, the public interest is irrelevant," because the public would not know the difference between the management of the lease at issue).

114. *See id.* The court refers to the *American Hospital* formula as the "sliding scale formula."

115. *See id.* at 119–20 ("[I]f the court mistakenly grants the injunction, and it turns out that Interpoint is entitled to no relief, there is no harm to Quadland because . . . Interpoint has posted a bond with the clerk of this court to cover those damages.").

116. *See Interpoint*, 656 F. Supp. at 119. The court found "exceedingly great" potential harm to Interpoint because Truck World may end up insolvent.

117. *See id.* at 120 (pointing out that the damages Quadland would incur because of an erroneously granted preliminary injunction would be the difference of 1.5% revenue Quadland would have otherwise received from its new lease with Tewell Corporation).

118. *Id.* (noting it is the court's own subjective judgment deciding Interpoint had the greater potential irreparable harm, but that the formula is helpful nevertheless).

B. MIDCON CORPORATION V. FREEPORT-MCMORAN

1. Factual Background

Midcon was an owner of a natural gas pipeline system and sought a preliminary injunction preventing Freeport from acquiring Midcon.[119] Midcon argued Freeport's acquisition would violate the Clayton Antitrust Act as Freeport owned a substantial number of natural gas properties.[120] Specifically, Midcon argued Freeport's acquisition of Midcon would result in Freeport charging higher natural gas prices to Midcon subsidiaries as Freeport would own both natural gas pipelines and property.[121] The district court, however, after hearing all the evidence before it, denied Midcon its request for a preliminary injunction.[122]

2. The Court's Analysis

Like the district court in *Interpoint*, the district court in this case began its analysis by reviewing the traditional four-factor test.[123] Then the district court laid out the Leubsdorf-Posner Formulation from *American Hospital*.[124] Applying the formula to the case at hand, the district court pointed out that the potential for irreparable harm existed on both sides of the equation.[125] For Midcon, the irreparable injury would arise from the impossibility of undoing an acquisition and merger.[126] For Freeport, the

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119. *See Midcon*, 625 F. Supp. at 1476. Freeport was one defendant among several, including Wagner & Brown, Cyril Wagner, Jr., Jack E. Brown, Coach Acquisition, Inc., WB Partners, and BW Partners.

120. *See id.* at 1476–77 (quoting 15 U.S.C. § 18 (2015)) The relevant section of the Clayton Act provides:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . where, in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Id.

121. *See id* at 1477. Midcon put forth the idea that it had a "captive market" in the Chicago area because Midcon's subsidiary could supply 600 billion of the 900 billion cubic feet of gas demanded in the Chicago market.

122. *See id.* at 1482.

123. *See id.* at 1479. When listing the four-factors, the court cited General Leaseways, Inc. v. Nat'l Truck Leasing Assoc., 744 F.2d 588 (7th Cir. 1984) and Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380 (7th Cir. 1984).

124. *See id.* ("Judge Posner reduced these [four] factors to an algebraic formula.").

125. *See Midcon*, 625 F. Supp. at 1479.

126. *See id.*

irreparable injury would be the court's blocking of a lawful merger.[127] The district court compared the equal possibility of irreparable harm to the facts in *American Hospital*.[128] Because the potential for injury for both parties was the same, the court, citing Judge Posner, stated that Midcon only had to show a greater than fifty percent chance of success on its underlying claim.[129] At this point, the district court determined that, while it was hesitant to "apply percentages to the likelihood of success on the merits," Midcon's chance at success was "a long shot."[130] The court found a long shot of success based on the evidence Midcon provided in support of its claim.[131] After discussing the weakness of Midcon's case, the court expressed its determination in the form of the Leubsdorf-Posner Formulation and stated the following:

> It is clear from the foregoing that plaintiff has a negligible chance of succeeding on the merits. When this is multiplied against the equality of potential injury to each party, Judge Posner's formula looks like this: $P \times Hp < (1 - P) \times Hd$ and plaintiff's request for a preliminary injunction should be denied.[132]

C. KOHLER COMPANY V. BRIGGS & STRATTON CORPORATION

1. Factual Background

Kohler was a manufacturer of small gasoline engines seeking a preliminary injunction against Briggs, another engine manufacturer, for an alleged Sherman Antitrust Act violation.[133] Kohler argued that due to Briggs' increased efforts to become the exclusive provider of engines to central distributors, Kohler was unable to replace its loss partnerships with central distributers that went with Briggs.[134] According to Kohler, this lack

127. *See id.* at 1480.

128. *See id.* ("As in *American Hospital Supply Corporation*, the magnitude of injury to the plaintiff if the injunction were erroneously denied is nearly equal to the injury to the defendants if the injunction were erroneously granted.").

129. *See id.* at 1480 ("Under Judge Posner's formula, plaintiff must show a better than 50 percent chance of winning the case").

130. *See Midcon*, 625 F. Supp. at 1480.

131. *See id.* (noting specifically that Midcon failed to provide any evidence that it would prevail at trial against Freeport. Under the Clayton Act, a plaintiff had to show that a proposed merger would substantially lessen competition, which Midcon failed to do).

132. *Id.* at 1482.

133. *See* Kohler Co. v. Briggs & Stratton Corp., 85-C-1042, 1986 WL 946, at *1 (E.D. Wis. Mar. 13, 1986); *see also* 15 U.S.C. §§ 2, 7 (2004).

134. *See Kohler*, 1986 WL 946, at *2. Specifically, Kohler referred to a program instituted by Briggs where its aim was to have its central distributors increase their commitment to Briggs.

of competition would result in an effective monopoly for Briggs of the small engine market.[135]

2. The Court's Analysis

The district court began its analysis by discussing the four-factors for granting a preliminary injunction.[136] The court then worded the four-factor test using the language of *American Hospital,* but did not directly refer to the Leubsdorf-Posner Formulation.[137] Applying the factors to the case at hand, the court found Kohler to have the greater threatened harm.[138] The harm to Kohler was also irreparable because if it were unable to sell engines to central distributors, Kohler's investments would be lost.[139] The district court then placed numerical values on each party's potential harm stating that "[i]f pressed to assign a numerical figure to each party's potential harm . . . I would have to approximate on a scale of one to ten that Kohler's damage would be an eight and Briggs['] would be a three."[140] Interestingly, the court never gave a reason or explanation for the values it chose for either side.[141]

Next, the court examined each party's chance of success on the merits.[142] Due to what it felt to be an undeveloped record, the court referred to Judge Swygert's dissent in *American Hospital* and his call for district courts to decide cases based on the "feel" of the case.[143] The court judged both parties to have an equal chance at winning the case.[144]

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135. *See id.* The court referred to evidence showing [r]epresentatives from Briggs made it clear to the central distributors that it desired their total commitment."

136. *See id.* at *3. The Seventh Circuit cases cited by the Court included Palmer v. City of Chicago, 755 F.2d 560 (7th Cir. 1985) and Roland Mach. Co. v. Drésser Indus., Inc., 749 F.2d 380 (7th Cir. 1984).

137. *See id.* Instead, the court referred to the non-numerical statement of the factors from *American Hospital.*

138. *See id.* The court is careful to point out, however, that Kohler had not yet provided sufficient evidence to prove that it attempted to replace its central distributors lost to Briggs.

139. *See id.* at *3 (E.D. Wis. Mar. 13, 1986). "Not only [does Kohler] maintain large warehouses stocked with inventory but the education function which they fulfill can only be carried out by experience and knowledgeable personnel."

140. *Kohler*, 1986 WL 946, at *3.

141. *See id.* at *3–4. After assigning the value to the potential harm to each party, the Court immediately proceeds to discuss the probability of success for the two parties without explaining its valuations for the potential harms.

142. *See id.* at *4–5.

143. *See id.* at *5. "The court believes that in assessing the probability of success on the merits, based on an incomplete record, the court must still, to some extent, rely upon the 'feel' of the case."

144. *See id.* The Court finds an even chance of winning the case for both parties because there were legitimate questions that only a jury could decide.

However, because the court found Kohler to have the greater potential for harm, the court granted the preliminary injunction.[145]

D. TAKEAWAYS

These three cases provide three different approaches taken by courts in the Seventh Circuit with regards to the Leubsdorf-Posner Formulation. In *Interpoint*, the court seemed to simply pay the formula lip-service and instead appeared to apply the traditional four-factor test with minimal assistance from the formula.[146] In *Midcon*, the court took a more assertive approach by stating its conclusion in terms of the formula itself.[147] However, perhaps the most aggressive utilization of the Leubsdorf-Posner Formulation came from the court in *Kohler* where the judge went as far as to assign values to the potential harm to the parties, though those valuations were not supported by reasoning or evidence.[148]

So, what can be said about the usefulness or dangers of the Leubsdorf-Posner Formulation? At best, it can be said that the formula did not actually affect the district courts' analyses and courts simply went about applying the traditional four-factor test, like in *Interpoint*. At worst, it can be said the formula resulted in courts trying to quantify judicial and legal principles, which by their nature, cannot be quantified, like in *Kohler*. If the formula did not affect the courts' analyses, then, in the words of Judge Swygert, why bother? Why create a formula that courts do not actually use or use in different ways than intended? If the formula did result in quantifying equitable principles, then the danger is in trying to make black-and-white an area of law that by its nature is gray. Thus, the way to avoid any of these potential pitfalls would have been for the Seventh Circuit in *American Hospital* to simply apply the traditional four-factor test as laid out by the Supreme Court.

IV. THE TRADITIONAL FOUR-FACTOR TEST

Prior to the Seventh Circuit's decision in *American Hospital,* the Supreme Court previously ruled on cases dealing with preliminary injunctions.[149] And since *American Hospital*, the Supreme Court ruled on

145. *See id.* at *5.

146. *See* Interpoint Corp. v. Truck World, Inc., 656 F. Supp. 114, 116, 119–20 (N.D. Ind. 1986).

147. *See* Midcon Corp. v. Freeport-McMoran, Inc., 625 F. Supp. 1475, 1479–82 (N.D. Ill. 1986).

148. *See Kohler*, 1986 WL 946 at *3, 5.

149. *See, e.g.*, Hecht Co. v. Bowles, 321 U.S. 321, 322–30 (1944); Weinberger v. Romero-

cases dealing with preliminary injunctions, with *Winter v. Natural Resources* among the most notable.[150] This Section will discuss the Court's analysis in preliminary injunction case law predating *American Hospital* with the purpose of seeing what, if anything, the Leubsdorf-Posner Formulation changed in the analysis performed by district courts in the Seventh Circuit.

A. HECHT COMPANY V. BOWLES

1. Factual Background

Chester Bowles, the Price Administrator of the Office of Price Administration, sought a preliminary injunction against Hecht Company.[151] Bowles alleged Hecht Company violated the Emergency Price Control Act of 1942 by selling merchandise over the allowed price range set by the Administrator.[152] The preliminary injunction would prevent Hecht Company from selling any commodity in violation of the Price Control Act's regulations.[153] The district court found Hecht Company to be working in good faith by trying to comply with the regulations and that Hecht Company did not have intent to violate the Act; therefore, the court denied the injunction.[154] The Court of Appeals for the District of Columbia reversed the district court's ruling because it found the language of the Price Control Act mandated an injunction when a violation is discovered.[155]

Barcelo, 456 U.S. 305, 309–20 (1982).

150. *See* Winter v. Natural Res. Def. Council, 555 U.S. 7, 12–33 (2008).

151. *See Bowles*, 321 U.S. at 322.

152. *See id.* at 321, 324 (citing Emergency Price Control Act, ch. 26, 56 Stat. 23 (1942) (omitted as terminated 1944)). The relevant section of the Emergency Price Control Act stated:

> Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of . . . this Act . . . he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provisions, and upon a showing by the Administrator that such person has engaged or is about to engage in any acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Id.

153. *See id.* at 324. Investigations by the Price Control Administrator discovered at least 3,700 sales by Hecht Company where it overcharged by about $4,600.

154. *See id.* at 325–26. Specifically, the district court found that the manager of the store allowed the Administrator to use the store to experiment with any regulation, which may have been issued as a result of the Price Control Act.

155. *See id.* at 326. The Court of Appeals "construed 205(a) of the Act to require the issuance of an injunction or other order as a matter of course, once violations were found."

The Supreme Court took the case on a question for a writ of certiorari due to the importance of the Price Control Act in the 1940s.[156]

2. The Court's Analysis

The Court began its analysis by disagreeing with Bowles' argument that the Price Control Act mandated a preliminary injunction.[157] Specifically, the Court looked at the language of the Act, which stated that a preliminary injunction "shall be granted" in the case of a violation.[158] The Court also looked at the Act's legislative history and found sufficient congressional intent to leave discretion to the courts in deciding whether to grant an injunction.[159] After looking at the language and intent of the Price Control Act, the Court discussed the equitable nature of a preliminary injunction.[160] Referring to the nature of the case, the Court stated, "[w]e are dealing here with the requirements of equity practice with a background of several hundred years of history."[161] The Court pointed out that the essence of equity is the discretion of the judge, or Chancellor, making the judgment.[162] Notably, the Court stated about equity that "[f]lexibility rather than rigidity has distinguished it."[163] The Court found these principles and background of equity to be even more reason to read against a mandatory injunction in the Price Control Act.[164] Therefore, the Court read the

156. *See id.*; *see also* Joseph W. Aidlin, *The Constitutionality of the 1942 Price Control Act*, 30 CAL. L. REV. 648, 648 (1942) (citing Pub. L. No. 421, 77th Cong. 2d Sess. (Jan. 30, 1942)). Joseph Aidlin discussed how the conditions in the United States in the 1940s required the federal government to take swift measures, as Congress stated when it passed the Emergency Price Control Act, "in the interest of the national defense and security and necessary to the effective prosecution of the present war."

157. *See Bowles*, 321 U.S. at 326–27. The Court found the language requiring that an injunction "or other order" in the Price Control Act to indicate that an injunction is not mandatory as it might not always be the correct order to issue.

158. *Id.* at 326 (citing Emergency Price Control Act, ch. 26, § 205(a), 56 Stat. 23 (1942)).

159. *See Bowles*, 321 U.S. at 328–29. Specifically, the Court found that the language that a preliminary injunction "shall be granted" to be a grant of jurisdiction to a court. But, as the court points out, "[a] grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances."

160. *See id.* at 329–30. The Court begins its equity analysis by differentiating the analysis of a preliminary injunction grant from other, more typical federal statutes affecting administrative agencies.

161. *Id.* at 329.

162. *See id.* The Court specifically refers to the tradition of equity when it stated, "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case."

163. *Id.* at 329–30 ("The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.").

164. *See id.* at 330 ("We do not believe that such a major departure from that long tradition as

language of the statute to not require a mandatory injunction and reversed the appellate court's decision.[165] Thus under *Hecht Company v. Bowles*, the Court concluded that the flexible approach of equity, which left decision-making to the judge's discretion, prevailed over statutory language that could be construed as eliminating judicial discretion.[166] This case provides an example of the Court's preference to remaining true to the traditional principles equity.

B. WEINBERGER V. ROMERO-BARCELO

1. Factual Background

The Governor of Puerto Rico Carlos Romero-Barcelo sought to enjoin the United States Navy from conducting military exercises on Vieques Island.[167] Puerto Rico claimed that the Navy's operations violated the Federal Water Pollution Control Act as some of the military exercises resulted in bombings of navigable waters around Puerto Rico.[168] The district court found the Navy violated the Act through its exercises but did not issue an injunction, as the court did not find the Navy's actions harmful to the environment.[169] The First Circuit reversed the district court and ordered the Navy to cease its exercises.[170] The First Circuit found that a violation of the Endangered Species Act mandated injunctive relief and found the Navy's exercises to be a violation of that Act.[171] The Supreme Court granted certiorari due to the important implications of the Federal Water Pollution Control Act.[172]

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is here proposed should be lightly implied.").

165. *See Bowles*, 321 U.S. at 330 ("[W]e resolve the ambiguities of § 205(a) in favor of that interpretation which affords a full opportunity for equity courts to treat proceedings . . . in accordance with their traditional practices . . . .").

166. *See id.* at 329–30.

167. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 307 (1982).

168. *See id.* Specifically, the Governor argued that, during the Navy's air-to-ground training, pilots sometimes missed land targets and instead struck the water targets Puerto Rico sought to protect.

169. *See id.* at 309–10. The district court also stated that, due to the importance of the Navy's training center in Puerto Rico, granting injunctive relief would adversely affect the welfare of the country's defense systems.

170. *See id.* at 310–11. The First Circuit ruled that the district court placed too much value on the importance of the Navy's training operations.

171. *See id.* at 310.

172. *See id.* at 311 ("Because this case posed an important question regarding the power of the federal courts to grant or withhold equitable relief for violations of the FWPCA, we granted certiorari." (citation omitted)).

2. The Court's Analysis

The Court began its analysis by discussing the nature of equitable actions.[173] The Court asserted the principle that there must be a threat of irreparable injury and inadequate legal remedies for an injunction to be issued.[174] Citing precedent, the Court stated that the traditional function of courts sitting in equity is to "arrive at a 'nice adjustment and reconciliation'" between the parties by balancing the possible injuries to each party.[175] The Court specifically pointed out that courts of equity consider the public interest in its decisions.[176] Distinguishing the case before the Court from previous case law, the Court pointed out that the Federal Water Pollution Control Act provided for other remedies than injunctions.[177] The Court found these other available remedies, as well as the congressional intent of the Act, to indicate Congress did not mean to strip courts of its discretion when issuing injunctions.[178] Therefore, the Court ruled that the district court could, in its equitable discretion, find that it was in the public interest not to enjoin the Navy's operations, as there was no proof of harm to the environment and so reversed the First Circuit.[179] This case provides another example of the Court preferring to leave equitable decisions to the discretion of the judge in line with traditional equity principles.

C. TAKEAWAYS

These two Supreme Court cases predating *American Hospital* indicate a few things with regards to how the Court instructs lower courts to decide

173. *See Weinberger*, 456 U.S. at 311–12 ("An injunction should issue only where the intervention of a court of equity is 'essential in order effectually to protect property rights against injuries otherwise irremediable.'" (citing Cavanaugh v. Looney, 248 U.S. 453, 456 (1919))).

174. *See id.* at 312. Among other cases discussing the requirement of irreparable harm, the Court cited Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

175. *See id.*

176. *See id.* ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.") (citing Railroad Comm'n. v. Pullman Co., 312 U.S. 496, 500 (1941)).

177. *See id.* at 314 (citing 33 U.S.C. §§ 1319(c) and (d)). For example, the Court pointed out that the FWPCA provided for fines and criminal penalties.

178. *See id.* at 315–16. The Court refers to a "scheme of phased compliance" in the FWPCA, which provided for the elimination of pollutants considering the best available technology. The Court stated, "This scheme of phased compliance suggests that this is a statute in which Congress envisioned, rather than curtailed, the exercise of discretion."

179. *See Weinberger*, 456 U.S. at 320 ("Because Congress, in enacting the FWPCA, has not foreclosed the exercise of equitable discretion, the proper standard for appellate review is whether the District Court abused its discretion in denying an immediate cessation order while the Navy applied for a permit.").

whether to grant an injunction. First, as noted in *Weinberger*, the Court listed factors courts in equity must consider in their decision, including whether there is an adequate legal remedy, the balance of harms to both parties, and the public interest.[180] Second, as illustrated in both *Hecht,* and *Weinberger*, the Court emphasized the flexible nature of equity and its incompatibility with rigidity.[181] And third, due to an emphasis on flexibility, the Court in both cases decided against finding injunction mandates in statutory language.[182] Therefore, Supreme Court precedent before and after *American Hospital* shows the Court's desire for district courts to apply the traditional four-factor test, while also emphasizing that equitable decisions are best left to the judge's discretion.

V. VIRTUE JURISPRUDENCE

Although the Supreme Court reaffirmed the nature of equity as an area of law incompatible with rigidity, Judge Posner's intent in creating a formula to assist district court judges is understandable. As Professor Kennedy points out, practitioners may be hesitant to accept a judgment that is solely based on equity.[183] However, the solution to a perceived problem with judges deciding cases in equity arbitrarily, and not based on equitable principles, is not an algebraic formula. Rather, the solution to poor equitable judgment is ensuring that district court judges possess the jurisprudential tools necessary to justly apply equitable principles. Professor Solum outlines these tools judges need in his theory of "virtue jurisprudence," which this Section will discuss.

A. A VIRTUE-CENTERED THEORY OF JUDGING

The heart of a virtue-centered theory of judging is that judges make decisions by utilizing intellectual and moral virtues.[184] The most important goal of virtue jurisprudence is for judges to arrive at the correct decision for the right reasons.[185] However, virtue jurisprudence does not consist of

180. *See* Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975). The fourth factor to consider is the plaintiff's likelihood of success on the merits. *See also* Univ. of Tex. v. Camenisch, 451 U.S. 390, 398 (1981).

181. *See* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944); *see also Weinberger*, 456 U.S. at 312.

182. *See Bowles*, 321 U.S. at 331; *see also Weinberger*, 456 U.S. at 320.

183. *See* Kennedy, *supra* note 2, at 610.

184. *See* Solum, *supra* note 26, at 182, 183, 184. Professor Solum writes that one of his goals in articulating his theory of virtue-centered judging is to organize views regarding how judges do and should go about deciding cases.

185. *See id.* at 187.

judges making decisions solely by reference to virtues.[186] To explain his theory, Professor Solum begins his analysis of virtue jurisprudence by, first, analyzing what a virtuous judge possesses and, second, how a judge arrives at a virtuous decision.[187]

1. What Makes a Virtuous Judge?

Professor Solum begins by illustrating what makes a judge dishonorable or not virtuous.[188] The vices that make a judge dishonorable include: corruption, civic cowardice, bad temper, incompetence, and foolishness.[189] Corruption is present when a judge accepts bribes or is guilty of deciding a case where there is a clear conflict of interest.[190] Civic or judicial cowardice occurs when a judge makes poor decisions out of a fear of losing her office or in order to gain another job opportunity.[191] A judge possesses a bad temper when she is easily angered and allows those emotions to affect her judgments or judicial proceedings.[192] Incompetence is present when a judge fails to understand the law and is therefore unable to come to a well-reasoned decision.[193] A foolish judge is unable to discern practical and workable solutions in her decisions.[194]

After Professor Solum laid out the vices judges should not possess, he described the virtues that help judges make just decisions.[195] These judicial virtues include: judicial temperance, judicial courage, judicial temperament, judicial intelligence, and judicial wisdom.[196] Judicial

186. *See id.* at 184 ("[T]he full story about correct or just or virtuous decision making will necessarily make reference to facts about the world and legal facts.").

187. *See id.* at 185–88. The point of describing virtue-centered judging in this manner, according to Professor Solum, is to "develop an account of good judicial character."

188. *See id.* at 186 ("[T]here is considerable agreement about some of the characteristics that mark truly bad judges.").

189. *See id.* at 186–88.

190. *See* Solum, *supra* note 26, at 186. Judicial corruption is particularly evil as compared to other forms of corruption because judges occupy positions of trust and there is an expectancy that judges will be fair and impartial.

191. *See id.* at 187 ("Judges with the vice of civic cowardice fear too much for their careers and social prestige, and hence are swayed by concern for their reputation on the wrong occasions and for the wrong reasons.").

192. *See id.* (arguing that even if a judge's "anger does not directly affect the . . . proceedings, it may undermine the confidence of the participants and public in the judge's fairness").

193. *See id.* at 188. If a judge is unable to understand the law or the facts, the chances for an unjust decision increases substantially.

194. *See id.* ("A judge can be foolish because the judge lacks the ability to distinguish between what is workable and what is impracticable.").

195. *See id.* at 189.

196. *See* Solum, *supra* note 26, at 189.

temperance exists when a judge is in control of her own desires.[197] The opposite of a judge possessing a judicial temperance would be a judge who "indulge[s] in pleasures that interfere with the heavy deliberative demands of the office."[198] A judge who possesses courage is willing to take risks to ensure her decision is just.[199] Judicial temperament exists when a judge is neither disproportionately prone to anger nor unable to display rightful outrage.[200] In other words, a judge's emotions are always appropriate given the circumstances.[201] Judicial intelligence is the ability to exceptionally understand the law and utilize sound legal reasoning.[202] And finally, judicial wisdom is the ability for a judge to recognize the practical solution to the problem before her.[203] Professor Solum's virtue jurisprudence culminates with what he refers to as "the virtue of justice."[204]

2. How to Arrive at the Virtuous Decision

According to Professor Solum, a virtuous decision is "a decision made by a virtuous judge acting from the judicial virtues in the circumstances that are relevant to the decision."[205] Specifically, a virtuous decision is made using practical wisdom to ensure that relevant legal rules are applied to the case at hand.[206] Practical wisdom is a combination of common sense and the relevant legal theories in the case before the judge.[207] A virtuous decision can be explained according to the relevant legal rules.[208] However, just because the judge reaches a decision

197. *See id.* That a judge's desires need to be in order is clear when "contrasted to the judge who lacks the ability to control her appetites."

198. *Id. at* 190.

199. *See id.* ("The courageous judge is willing to risk career and reputation for the ends of justice.").

200. *See id.* at 191.

201. *See* Solum, *supra* note 26, at 191 ("The virtue of good temper requires that judges feel outrage on the right occasions for the right reasons and that they demonstrate their anger in an appropriate manner.").

202. *See id.* ("[J]udges need the ability to grasp the facts of disputes that may involve particular disciplines such as accounting, finance, engineering, or chemistry.").

203. *See id.* at 192 ("Practical wisdom is the virtue that enables one to make good choices in particular circumstances.").

204. *See id.* at 194 ("[J]ustice is an essential virtue for excellence. Without justice, judging cannot be good. With justice, judging must be good. Justice . . . is the cardinal virtue of judging.").

205. *Id.* at 198.

206. *See id.* at 201.

207. *See* Solum, *supra* note 26, at 200 ("For the most part, a virtue-centered theory of judging will be in accord both with common sense and with other normative theories of judging with respect to the question as to what constitutes the just outcome in such cases.").

208. *See id.* at 201.

virtuously does not mean that there cannot be disagreement with the outcome.[209] This possibility of differing virtuous, yet legally correct, decisions is partly due to the fact that the law itself gives discretion to judges.[210] This judicial discretion allows for different virtuous judges to come to different yet legally sound outcomes.[211] Therefore, a judge exercising virtue jurisprudence uses practical wisdom to arrive at a decision that is both legally and virtuously correct.

B. VIRTUE JURISPRUDENCE AND EQUITY

Professor Solum argues that a "virtuous decision is guided by the virtue of equity, or justice as fairness, distinguished from justice as lawfulness."[212] Referring to Aristotle's *Nicomachean Ethics*, Professor Solum explains that equity is a form of justice that cannot be explained in the same terms as a legal principle.[213] So, equity by its nature is distinct from a traditional legal decision.[214] Legal rules can sometimes lead to unjust decisions, and that is where equity improves upon traditional legal analysis.[215] In discussing the different ways equity can be utilized, Professor Solum writes: "[i]n some cases, doing equity requires the judge to realize the intention of the legislature. In other cases, it may require the judge to correct a defect in the law that the legislator did not or could not have anticipated."[216] While there is a question as to whether legislative intent should ever be considered in judicial decision-making,[217] the argument that equity can make up for the law's shortcomings remains.

Professor Solum also argues that a decision in equity requires the decision to be narrowly tailored to the facts before the judge.[218] Only a

209. *See id.* at 202 ("A virtue-centered theory allows us to account for the fact that there are frequently cases in which more than one outcome would count as legally correct.").

210. *See id.* at 203.

211. *See id.* at 203–04 (discussing how trial judges are given a lot of discretion with regards to how long a trial will take and how/what evidence is admitted).

212. *Id.* at 205.

213. *See* Solum, *supra* note 26, at 205 ("Equity corrects the law's generality by making exceptions in cases in which the rule leads to unanticipated and unjust results.").

214. *See id.* at 205 ("One characteristic of equity is that it involves a departure from the rules.").

215. *See id.* at 205–06.

216. *Id.* at 205.

217. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 51 (Amy Gutmann ed., 1997) ("My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning.").

218. *See* Solum, *supra* note 26, at 205 ("[Doing equity] may require the judge to correct a defect in the law that the legislator did not or could not have anticipated – for example, in cases in

virtuous judge can tailor the legal principles to particular facts and circumstances.[219] With regards to cases involving equity, Professor Solum rejects any notion of trying to formulize solutions when he writes:

> The solution is not to attempt to write the ultimate code, with particular provisions to handle every possible factual variation. No matter how long and detailed, no matter how many exceptions, and exceptions to exceptions, the code could not be long enough. Rather, the solution is to entrust decision to virtuous judges who can craft a decision to fit the particular case.[220]

Therefore, the solution to a case involving equity must be decided according to a judge's virtues if there must be a departure from legal principles, not formulas.[221]

VI. VIRTUE DECISION-MAKING: PRACTICAL APPLICATION

Judge Posner's attempt to mathematize a decision in equity goes against both Supreme Court precedent, which rejected the notion of rigidity in equitable analyses,[222] as well as Professor Solum's virtue-centered theory of judicial decision-making where a judge's virtues should be relied upon when legal principles cannot be uniformly applied.[223] This Section will provide its own analysis of the *American Hospital* case using Professor Solum's virtue jurisprudence approach. First, this Section will outline and explain the relevant virtues that would assist a district judge deciding the *American Hospital* case. Next, this Section will analyze the facts and law surrounding *American Hospital* utilizing the traditional analysis affirmed in Supreme Court precedent. Lastly, this Section will discuss the outcome of the *American Hospital* case when a judge uses a virtue-centered theory of decision-making in her analysis of the case with the traditional four-factor test put set forth by the Supreme Court.

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which circumstances have changed or previously unknown facts have come to light.").

219. *See id.* at 206 ("Equity is the tailoring of the law to the demands of the particular situation. [Therefore,] equity can (or should) be done only by. . . a judge with moral and legal vision.").

220. *Id.*

221. *See id.* ("[T]he problem is that the infinite variety and complexity of particular fact situations outruns our capacity to formulate general rules.").

222. *See, e.g.*, Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982); Hecht Co. v. Bowles, 321 U.S. 321, 329–30 (1944); Rondeau v. Mosineee Paper Corp., 422 U.S. 49, 62 (1975) (reviewing the Seventh Circuit's reversal of a preliminary injunction in the context of securities regulation).

223. *See* Solum, *supra* note 26, at 207 ("Where justice requires a departure from the [legal] rules, a virtue-centered theory explains and justifies the practice of equity.").

A. RELEVANT JUDICIAL VIRTUES

The relevant virtues, as laid out by Professor Solum[224] and as they relate to the facts in *American Hospital* are judicial intelligence and judicial wisdom. Judicial intelligence is relevant in *American Hospital* because the issue of whether Hospital Products or American Hospital were in greater danger of suffering irreparable harm with or without the preliminary injunction requires the ability to understand the law surrounding irreparable harm.[225] Judicial wisdom is necessary to determine whether granting or denying the preliminary injunction to American Hospital is a practical solution to the breach of contract issue between the two parties.[226] Having identified the relevant virtues of judicial intelligence and wisdom, it can then be demonstrated how these virtues can help the district court to arrive at a just decision in *American Hospital.*

A virtuous decision in *American Hospital* utilizes practical wisdom and can be explained according to the relevant rules surrounding the grant or denial of a preliminary injunction.[227] In this case, a virtuous decision considers the practical effects of applying the traditional four-factor test laid out by the Supreme Court on the two parties. While there may be disagreement as to the district court's decision regarding the preliminary injunction, that does not mean that the district court did not make a legally and virtuously correct ruling.[228] In fact, because the nature of *American Hospital* is an equitable action, it is expected that any decision cannot be fully explained in terms of legal principles.[229] However, the fact that the district court's decision may not be able to be fully explained in legal principles is not a problem, as the decision in *American Hospital* ought to be narrowly tailored to the facts before the court.[230] Therefore, a virtuous decision in *American Hospital* utilizes judicial intelligence and wisdom by

224. *See id.* at 189. The relevant judicial virtues include: judicial temperance, judicial courage, judicial temperament, judicial intelligence, and judicial wisdom.

225. *See id.* at 192 ("[G]eneral theoretical wisdom supplemented by the skills . . . that produce fine legal thought combined with deep knowledge of the law.").

226. *See id.* at 192. Regarding judicial wisdom, Professor Solum posits: "[t]he person of practical wisdom knows which particular ends are worth pursuing and which means are best suited to achieve those ends."

227. *See id.* at 184 ("[T]he full story about correct . . . or virtuous decision making will necessarily make reference to facts about the world . . . and legal facts . . . .").

228. *See id.* at 202–03 (discussing the idea of "the multiplicity of virtuous decisions," which accounts for virtue decision making resulting in different results and for the result to be acceptable as judges "will have difference experiences and beliefs, and those differences could easily affect the decision on a variety of legal issues.").

229. *See* Solum, *supra* note 26, at 205 ("Equity corrects the law's generality by making exceptions in cases in which the rule leads to unanticipated and unjust results.").

230. *See id.* ("Equity tailors the law to the requirements of the particular case.").

narrowly applying the four-factor test of preliminary injunctions to the facts at hand.

B. TRADITIONAL ANALYSIS

As articulated by the Supreme Court, the four-factors a district court must consider in determining whether to grant a preliminary injunction include: (1) the likelihood the party seeking the injunction will succeed on the merits of the underlying case; (2) the likelihood of irreparable harm to each party with or without the injunction; (3) which side the balance of equities tips in favor of; and (4) the public interest in granting or denying the injunction.[231] Each factor will be analyzed in turn as each applies to the facts of the *American Hospital* case.

1. American Hospital's Likelihood of Success

A judge deciding American Hospital's likelihood of success in the case must do so with an incomplete record as the underlying case had not yet been litigated.[232] However, there was enough evidence presented to the court for it to decide.[233] For example, American Hospital presented evidence of Hospital Products' delivery of a letter asking if American Hospital intended to renew the contract that made American Hospital an exclusive distributor of Hospital Products' devices.[234] American Hospital also presented evidence that it responded to Hospital Products' letter by affirming American Hospital's intent to renew the contract.[235] Despite this response, Hospital Products notified American Hospital that the contract was terminated and American Hospital was no longer the exclusive distributor of Hospital Products' devices.[236] For these reasons, American Hospital instituted a suit for breach of contract against Hospital Products.[237]

As American Hospital filed suit in the Northern District of Illinois, Illinois law regarding breach of contract governed the underling

231. *See* Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (citing *Weinberger*, among other cases, when laying out the four, sometimes five, factor test).

232. *See* Am. Hosp. Supply Corp. v. Hosp. Prod. Ltd., 780 F.2d 589, 593 (7th Cir. 1986) ("Because [a district judge ruling on a preliminary injunction] is forced to act on an incomplete record, the danger of a mistake is substantial.").

233. *See id.*

234. *See id.* at 592.

235. *See id.*

236. *See id.* The Seventh Circuit pointed out that Hospital Products sent a telegram to American Hospital's dealers informing them that American Hospital "was 'no longer the authorized distributor of [Hospital Products'] stapling products.'"

237. *See id.*

litigation.[238] Under Illinois law, a plaintiff proves a breach of contract by showing: (1) the existence of a contract; (2) its performance of the contract; (3) breach of the contract by defendant; and (4) the existence of damages resulting from defendant's breach.[239] In *American Hospital*, there existed sufficient evidence in the record to show American Hospital had a strong likelihood of success.

Regarding the existence of a contract element, evidence of the contract between Hospital Products and American Hospital wherein American Hospital would be the exclusive distributor of Hospital Products' devices existed.[240] Additionally, Hospital Products, during its Chapter 11 bankruptcy proceedings, moved to disaffirm the renewed contract with American Hospital, which went into effect after the original contract expired.[241] Therefore, this evidence was sufficient to show that a contract did exist between Hospital Products and American Hospital.

Turning to the second element of a breach of contract claim, American Hospital presented evidence that it purchased a large amount of surgical stapling systems from Hospital Products with the understanding that the contract making American Hospital the sole distributor of the devices would be renewed.[242] Although the purchase of this inventory occurred before the contract's renewal, it is unlikely American Hospital would have made those purchases if it did not believe it could rely on the terms of the original agreement, which provided for an automatic renewal.[243] Therefore, the evidence was sufficient to show performance by American Hospital as a result of a contract with Hospital Products.

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238. *See Am. Hosp. Supply Corp.*, 780 F.2d at 592 (discussing how American Hospital brought the suit in federal court under diversity jurisdiction and as American Hospital's claim was for an alleged breach of contract, Illinois state law on contracts would apply); *see also* Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1271–72 (7th Cir. 1976) (stating that, under the *Erie* doctrine, in matters not governed by the Constitution or congressional law, the law of the state is applied to the cause of action).

239. *See* Allstate Ins. Co. v. Winnebago Cty. Fair Ass'n, Inc., 475 N.E.2d 230, 233 (Ill. App. 2d Dist. 1985) (stating that a breach of contract complaint "must contain allegations of the existence of a valid and enforceable contract, the breach of the contract by the defendant, the performance by the plaintiff and the resultant injury to the plaintiff").

240. *See Am. Hosp. Supply Corp.*, 780 F.2d at 592. The Seventh Circuit specifically referred to a contract of distribution for American Hospital of Hospital Products' devices, which laid at the heart of the breach of contract cause of action.

241. *See id.* at 593. Hospital Products argued for disaffirming the renewed contract as that "the renewed contract was still executory when Hospital Products declared bankruptcy, and hence subject to disaffirmance under 11 U.S.C. § 365."

242. *See id.* at 595. The Seventh Circuit pointed out: "To help Hospital Products overcome serious financial problems, American Hospital Supply advanced it millions of dollars . . . part by buying more of the product than it needed."

243. *See id.* at 592. The Seventh Circuit pointed out that American Hospital's inventory of

Support existed for the third element of American Hospital's breach of contract claim as the evidence showed Hospital Products responding to American Hospital's intent to renew the contract by stating American Hospital was no longer the authorized distributor of its medical devices.[244] And lastly, there was sufficient evidence to show damages to American Hospital due to Hospital Products' breach. The estimates of the size of American Hospital's unsold inventory of Hospital Products supplies (which it would no longer be able to sell as exclusive distributor) put the value between $10 million and $30 million.[245] Therefore, because there existed enough evidence to prove each of the elements to American Hospital's breach of contract claim, there was a strong likelihood of success for American Hospital in the underlying litigation.

2. Likelihood of Irreparable Harm to Each Party

Next, the likelihood of irreparable harm to American Hospital and Hospital Products must be considered. One of the examples of irreparable harm put forth by American Hospital was damage to its reputation among dealers of medical supplies because of the suddenness of Hospital Products ending their contractual relationship.[246] Additionally, American Hospital argued its large supply of Hospital Products devices could amount to irreparable harm because any sale American Hospital performed at a loss due to Hospital Supply's breach of contract would be irrecoverable as Hospital Supply would soon be bankrupt.[247] Therefore, because there was a strong possibility American Hospital would not be able to recover money damages for Hospital Products' breach of contract, there was a likelihood of irreparable harm to American Hospital.

Regarding the possible irreparable harm to Hospital Products, it must be first noted that American Hospital posted a $5 million bond when it

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Hospital Products' supplies was as of June 7, while the alleged renewal of the contract took place on June 3.

244. *See id.* at 592. After Hospital Products received American Hospital's response that it intended to renew the original contract, Hospital Products responded saying it was treating the contract as terminated and that American Hospital was "no longer the authorized distributor of [Hospital Products'] stapling products."

245. *See id.* at 595.

246. *See Am. Hosp. Supply Corp.*, 780 F.2d at 595 ("The suddenness of the termination and the urgent mode of announcement might have made the dealers think that American Hospital Supply must have engaged in unethical or unreasonable conduct.").

247. *See id.* at 596. The court explained that, under bankruptcy proceedings, despite its large purchase of Hospital Products devices, American Hospital would just be another general creditor. The court then pointed out that "general creditors fare poorly in most bankruptcy proceedings."

obtained the preliminary injunction.[248] The purpose of the bond is to provide a remedy to the party who has been found to be wrongfully enjoined.[249] While there were other concerns for Hospital Products related to the ongoing bankruptcy, the fact that Hospital Products did not object to the bond amount could be seen as admission that $5 million was an adequate remedy.[250] Under these facts, there did not appear to be a strong, if any, likelihood of irreparable harm to Hospital Products if an injunction was erroneously granted. Instead, it appears that American Hospital was more likely to suffer irreparable harm if the preliminary injunction were not granted.

3. The Balance of Equities

The balance of equities requires the court to arrive at a decision that will minimize the risk of error after considering all relevant facts.[251] In case law preceding *American Hospital*, the Seventh Circuit indicated that the balance of equities employs a sliding-scale analysis.[252] Employing a sliding scale to the facts of *American Hospital* suggests the balance of equities tips in the plaintiff's favor. Specifically, due to its efforts to help Hospital Products through a period of financial uncertainty, American Hospital had an inventory of Hospital Products devices valued between $10 and $30 million.[253] The threat of losing such a large investment was made even more prevalent given Hospital Products' insolvency and potential bankruptcy discharge.[254]

248. *See id.* at 597. The court also pointed out that Hospital Products did not challenge the adequacy of American Hospital's $5 million bond.

249. *See id.* at 595 (explaining that under Federal Rule of Civil Procedure 65(c), the bond on a preliminary injunction is "an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained").

250. *See id.* at 597 (discussing how Hospital Products' assets in the bankruptcy proceedings might be valued less due to the preliminary injunction).

251. *See* Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co., 588 F. Supp. 2d 919, 933 (S.D. Ind. 2008) (citing Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 387–88 (7th Cir. 1984)) ("[T]he Seventh Circuit has instructed district courts to try to minimize the risk of error, whether the error would be in granting or denying injunctive relief."); *see also* Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 387 (7th Cir. 1984) (stating that a court must determine the "balance of relative harms"); Dist. 50, United Mine Workers of Am. v. Intl Union, United Mine Workers of Am., 412 F.2d 165, 168 (D.C. Cir. 1969) (noting that the balance of equities determination has also been referred to as the "quantum of harm").

252. *See Roland Mach. Co.*, 749 F.2d at 387 ("The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to won, the more it need to weigh in his favor . . . .").

253. *See Am. Hosp. Supply Corp.*, 780 F.2d at 595 ("[The] estimates of the size of [American Hospital's] unsold inventory range from $10 million to almost $30 million . . . .").

254. *See id.* at 596 ("What made the loss . . . irreparable [for American Hospital] . . . was

For Hospital Products, while there was a risk that the preliminary injunction might precipitate insolvency, Hospital Products failed to ask for an increase in the injunction bond amount paid by American Hospital.[255] It is also important to note that if it felt the balance of equities fell in its favor, Hospital Products should have produced evidence supporting its contention.[256] If Hospital Products wanted to prove its point that its potential irreparable harm was greater than American Hospital's potential harm, it should have included evidence showing that the amount Hospital Products stood to lose as a result of the injunction was substantial, or at least comparable to American Hospital's potential loss. However, because Hospital Products failed to make a convincing showing that the balance of harms tipped in its favor, it appears American Hospital had the advantage regarding the balance of equities.

4. The Public Interest

An analysis of the public interest regarding a preliminary injunction looks at the effects the injunction would have on third parties.[257] Specifically, a court should analyze whether the public interest will be disserved by the grant of a preliminary injunction.[258] In *American Hospital*, the relevant public interest and third parties are the buyers of the surgical devices Hospital Products developed and American Hospital sold.[259] One of the concerns put forth by American Hospital was that the sudden end of its exclusive relationship with Hospital Products may give American Hospital's customers the impression that it acted unethically or unfair towards Hospital Products.[260] Thus, third parties, who would otherwise

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Hospital Products' insolvency . . . .").

255. *See id.* at 598 (stating that Hospital Products should have asked for a bigger bond if it felt the preliminary injunction would negatively affect its assets during Chapter 11 reorganization).

256. *See* Kohler Co. v. Briggs & Stratton Corp., No. 85-C-1042, 1986 WL 946, at *4 (E.D. Wis. Mar. 13, 1986) ("I am not at all convinced that Kohler has put forth sufficient effort to find or to develop central distributors to replace those which it has lost.").

257. *See Am. Hosp. Supply Corp.*, 780 F.2d at 601. Hospital Products argued that the injunction went against the public interest. In addressing this argument, the Seventh Circuit stated that, "All such an argument means . . . is that the injunction has effects on nonparties . . . ."

258. *See* Machlett Lab. Inc. v. Techny Indus. Inc., 665 F.2d 795, 796–97 (7th Cir. 1981) (discussing the traditional four-factor test, the Seventh Circuit stated that the plaintiff must show "the granting of the preliminary injunction will not disserve the public interest."); *see also* Lawson Products, Inc. v. Avnet, Inc., 782 F.2d 1429, 1433 (7th Cir. 1986) (referring to the public interest consideration as a "wild card.").

259. *See Am. Hosp. Supply Corp.*, 780 F.2d at 601–02 (discussing how the relevant nonparties in the case are the hospitals which ultimately purchase the medical devices Hospital Products developed).

260. *See id.* at 595 (discussing how one of the irreparable harms put forth by American

continue to deal with American Hospital, could be negatively affected by the denial of the injunction by receiving erroneous information causing them to end any profitable relationship, which may have existed.

Another class of third parties that should have been considered in *American Hospitals* are the affected creditors in Hospital Products' Chapter 11 bankruptcy proceedings.[261] If the injunction were granted, and Hospital Products had to continue its contractual relationship with American Hospital, any costs Hospital Products incurred during the life of the injunction would have otherwise gone to its creditors during its reorganization. Therefore, denying the preliminary injunction could be in the best interest of third parties involved in Hospital Products' bankruptcy. The public interest would best be served by either granting or denying the injunction depending on which aspect of the public is considered more important, or more affected.

C. OUTCOME

By utilizing judicial intelligence and wisdom, the district court judge could have arrived at a virtuous decision in *American Hospital.* Judicial intelligence informs the court which party was in greater need of incurring irreparable harm with or without the preliminary injunction. In *American Hospital*, the plaintiff was in greater danger of suffering from irreparable harm because American Hospital had already invested between $10 million and $30 million due to its expected relationship with Hospital Products.[262] This investment qualified as an irreparable harm because there was a strong possibility American Hospital would not be able to collect if it won its breach of contract suit due to Hospital Products' pending bankruptcy. Judicial wisdom informs the Court what solution is practical given the facts of the case. In this case, granting the preliminary injunction was practical because American Hospital was already in possession of Hospital Products devices, so all that had to be done was reinstate the agreement making American Hospital the exclusive supplier of the devices.

A virtuous decision requires applying the four-factor test to the facts of *American Hospital* to determine if the outcome is practical. In deciding

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Hospital was damage to its reputation due to the suddenness of the termination of Hospital Products' contract).

261. *See, e.g.*, Matter of Iberis Intern., Inc., 72 B.R. 624, 628 (W.D. Wisc. 1986) (holding that converting bankruptcy case from Chapter 11 to Chapter 7 was in the best interests of the creditors and that in bankruptcy proceedings, a number of decisions are made regarding a debtor's assets with consideration given to the best interest of the debtor's creditors).

262. *See Am. Hosp. Supply Corp.*, 780 F.2d at 595.

whether to grant an injunction based on the four-factors, courts employ a sliding-scale approach.[263] For example, the more likely the plaintiff is to succeed on the merits of the case, the less the need for the balance of equities to tip in his favor.[264] In this case, American Hospital provided enough evidence to prove its likelihood of succeeding on the underlying breach of contract claim. American Hospital also sufficiently proved it would have no adequate remedy at law if the injunction was not granted and Hospital Products' assets went to other creditors during the course of its bankruptcy. These two factors showing American Hospital had a sufficient basis for asking for the injunction indicated the balance of equities tipping in American Hospital's favor. Admittedly, it is not quite as clear which party has the advantage with regarding the public interest. However, because the Court must employ a sliding-scale approach, the Court can conclude that three factors are in American Hospital's favor and that warrants the granting of a preliminary injunction. This is a virtuous decision not only because American Hospital already possessed many Hospital Products devices it could sell to hospitals but also because Hospital Products did not object to the $5 million injunction bond posted by American Hospital (which Hospital Products would be entitled to if it succeeded on the breach of contract claim). For these reasons, American Hospital should have been granted its preliminary injunction.

VII. CONCLUSION

As the preceding analysis illustrates, the Leubsdorf-Posner Formulation detailed in *American Hospital* was wholly unnecessary. A traditional analysis of the four-factors to consider when granting or denying an injunction was the correct approach for the Seventh Circuit to take. The attempt by Law and Economics jurists and scholars to mathematize an area of jurisprudence, which is inherently different from other areas is misguided. Equitable actions must be decided by judges based on the "feel" of the case. When judges are properly equipped to exercise a virtue-centered theory of judicial decision-making, they will be able to arrive at virtuous and legally sound decisions by applying equitable principles to the unique facts of every case.

263. *See* Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 397–98 (7th Cir. 1984) (stating that "[b]alancing harms and sliding scales are unique to equitable remedies").

264. *See id.* at 387 ("If the plaintiff does show some likelihood of success, the court must then determine how likely that success is, because this affects the balance of relative harms.").