

# THE YALE LAW JOURNAL

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## Irreparable Benefits

**ABSTRACT.** The conventional approach to preliminary relief focuses on irreparable harm but entirely neglects irreparable benefits. That is hard to understand. Errant irreversible harms are important because they distort incentives and have lasting distributional consequences. But the same is true of errant irreversible gains. When a preliminary injunction wrongly issues, then, there are actually two distinct errors to count: the irreparable harm wrongly imposed on the nonmoving party, and the irreparable benefit wrongly enjoyed by the moving party. Similarly, when a preliminary injunction is wrongly denied, there are again two errors: the irreparable harm wrongly imposed on the moving party, and the irreparable benefit errantly accorded the nonmoving party. The conventional approach to preliminary relief mistakenly accounts for only half the problem.

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**INTRODUCTION**

In every circuit, a motion for preliminary relief is evaluated in light of three main factors: (1) the likelihood that the requesting party will ultimately prevail on the merits; (2) the irreparable harm the requesting party will suffer if the injunction is wrongly denied; and (3) the irreparable harm the opposing party will suffer if the injunction wrongly issues.<sup>1</sup> The idea is to account for and minimize irreversible judicial error. When denial of the injunction would be irreversibly harmful and there is a real chance that denial will be wrongful, courts are more reluctant to deny. Conversely, if issuance poses the greater irreversible threat, courts are more reluctant to issue. The analysis is often cast in terms of a sliding scale: “[T]he more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side.”<sup>2</sup>

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1. See, e.g., *Micro Signal Research, Inc. v. Otus*, 417 F.3d 28, 31 (1st Cir. 2005) (evaluating a motion for preliminary relief based on the “likelihood of success on the merits, irreparable injury absent relief, harm to the defendant if relief is granted, and any public interest considerations”); *Fed. Express Corp. v. Fed. Espresso, Inc.*, 201 F.3d 168, 173 (2d Cir. 2000) (“[A] party seeking a preliminary injunction must demonstrate (1) the likelihood of irreparable injury in the absence of such an injunction, and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation plus a balance of hardships tipping decidedly toward the party requesting the preliminary relief.”). In some jurisdictions, additional factors are considered, but the focus remains on these three considerations. See, e.g., *Chathas v. Local 134 IBEW*, 233 F.3d 508, 513 (7th Cir. 2000) (discussing the importance of preserving the status quo); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 382–83 (7th Cir. 1984) (considering whether the proposed injunction would protect or harm the public interest).
  2. *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992). Judge Richard Posner famously framed the analysis in the form of an equation. Suppose that the plaintiff in a case requests preliminary relief. If we use  $P$  to represent the probability that the plaintiff will win on the merits,  $H_P$  to represent the plaintiff’s irreparable harm if the injunction is denied, and  $H_D$  to represent the defendant’s irreparable harm if the injunction is issued, the standard approach would have the court issue the requested injunction whenever  $P \cdot H_P > (1 - P) \cdot H_D$ . The left side of that inequality represents the expected costs associated with denial: the likelihood that denial is wrong on the merits multiplied by the irreparable harm associated with wrongful denial. The right side similarly represents the expected costs associated with issuance: the likelihood that issuance is wrong on the merits multiplied by the harm associated with wrongful issuance. See *Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986) (Posner, J.). Posner likely intends the “irreparable harm” terms in this equation to be read not as “the irreparable harm suffered by the party” but instead as “the social costs associated with the irreparable harm suffered by the party.” That is, the reason to avoid imposing an irreparable harm on an employer is not only that the employer as a result would be wrongly impoverished but also that the employer might in response abandon some efficient behavior, thereby impoverishing society more generally. Posner’s notation does not make this point explicit, but it follows naturally from his analysis.

This standard approach accounts for irreparable harms but entirely neglects irreparable benefits. That is hard to understand. If the goal is to minimize deviations from what will be the ultimate ruling on the merits,<sup>3</sup> errant irreversible gains can be just as troubling as errant irreversible losses. Both can have significant distributional and incentive implications for the litigating parties. More broadly, both can have distributional and incentive implications for parties who are not themselves involved in the litigation but who can reasonably anticipate how irreparable consequences would play out were they the ones in court. Put another way, society cares about irreparable harm both because it affects the litigants directly and because it affects countless similarly situated parties who will act and react in the shadow of the law. Irreparable benefits matter for exactly these same distributional and incentive reasons. When an injunction wrongly issues, then, there are actually two errors to count: the irreparable harm wrongfully imposed on the nonmoving party and the irreparable benefit mistakenly conferred on the moving party. Similarly, when an injunction is wrongly denied, there are again two errors: the irreparable harm wrongfully suffered by the moving party and the irreparable benefit inadvertently accorded the nonmoving party.<sup>4</sup>

Consider a simple example—one designed in particular to respond to the obvious criticisms that “irreparable benefits” is mere semantics and that this approach double-counts the same underlying wrong. Suppose that the plaintiff in a given case holds a patent on a chemical process shown to significantly reduce the rate of genetic mutation in a certain type of animal cell. The process at the moment has no specific medical application in humans, but the plaintiff

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3. This is the goal according to virtually every scholarly and judicial account. The idea is that by minimizing the expected magnitude of judicial error, the standard will at the same time minimize the social consequences of judicial error. See, e.g., John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978) (arguing that the standard for preliminary relief is best understood as an attempt to minimize expected error); see also *Am. Hosp. Supply*, 780 F.2d at 593-94 (formalizing and adopting Leubsdorf's reasoning). That said, it is certainly not ridiculous to imagine other possible goals that the standard could instead accomplish. For instance, one can imagine redesigning the standard so that it would maximally encourage settlement, or so that it would clearly signal to the parties the most likely outcome on the merits. See Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381 (2005) (arguing that the standard should be designed so as to create incentives for defendants to engage in efficient conduct before and during litigation).
  4. The Posner formula discussed *supra* note 2 can be easily modified to incorporate these points. Denote the plaintiff's irreparable benefit if the injunction is issued as  $B_p$ , and denote the defendant's irreparable benefit if the injunction is denied as  $B_D$ . To minimize expected error, a court would now grant the motion for preliminary relief whenever  $P \cdot (H_p + B_D) > (1 - P) \cdot (H_D + B_p)$ .

believes that it will ultimately mature into an important human therapy. The defendant, meanwhile, recently began work on a similar chemical process, also hoping in the end to find applications related to human ailments. The plaintiff's legal allegation is that the defendant's process infringes the patent and the defendant therefore should not be permitted to engage in further research without permission. The defendant's response is that its research is permissible, either because its process does not fall within the scope of the patent's claims or because the patent is invalid in light of the prior art.

If the patentee moves for preliminary relief,<sup>5</sup> the first hurdle will be to show that something irreparable is at stake. Patent harms are not literally irreparable—most patent-related injuries can be fully compensated by some ex post cash payment—but they are typically deemed irreparable because patent harms are difficult for courts to value.<sup>6</sup> I will say more about this argument later,<sup>7</sup> but for now note that many “irreparable” harms are actually irreparable only in this limited sense. Bankruptcy is widely considered to be an irreparable harm,<sup>8</sup> even though in most instances there is some amount of cash that would fully soothe the wound. Similarly, restraints on employment are regularly

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5. It might not be in the patent holder's interest to request preliminary relief. For instance, a patentee who requests preliminary relief might have to agree to allow the accused infringer accelerated discovery. That could be costly from a strategic perspective. *See, e.g.,* Trading Techs. Int'l v. eSpeed, Inc., No. 1:04-cv-05312 (N.D. Ill. Sept. 17, 2004) (preliminary injunction discovery order) (ordering accelerated discovery in response to the patentee's motion for preliminary relief).
  6. For many years, patent harms were presumed to be irreparable without the need for any additional specific showing regarding the inadequacy of ex post cash damages. *See, e.g.,* H.H. Robertson, Co. v. United Steel Deck, Inc., 820 F.2d 384, 390 (Fed. Cir. 1987), *abrogated on other grounds by* Markman v. Westview Instruments, Inc., 52 F.3d 967 (Fed. Cir. 1995). Today, by contrast, courts are increasingly willing to inquire as to whether cash damages might suffice—refusing, for example, to recognize patent harms as irreparable when the patentee has licensed the relevant patent to other parties and has thereby implicitly established an approximate royalty rate. One reason for the change is the Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1839 (2006), in which the Court emphasized—in the context of a patent holder's request for permanent injunctive relief—the general rule that injunctive relief is appropriate when the “remedies available at law, such as monetary damages, are inadequate to compensate” for the relevant injury.
  7. And have before. *See* Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. CHI. L. REV. 197, 200-02 (2003) (arguing that valuation difficulties are the main reason why courts authorize preliminary relief).
  8. *See, e.g.,* Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 386 (7th Cir. 1984) (Posner, J.) (holding that an injunction may issue if the plaintiff “may go broke while waiting, or may have to shut down his business but without declaring bankruptcy”); *Young v. Ballis*, 762 F. Supp. 823, 827 (S.D. Ind. 1990) (favoring an injunction if it is “necessary to save a plaintiff's business from insolvency”).

categorized as irreparable,<sup>9</sup> although again there surely is some amount of cash that would make whole a wrongfully restrained worker.

With irreparable harm shown, the next step in the analysis is to apply the three classic factors and therefore to consider: (1) the likelihood that the plaintiff's patent is valid and infringed; (2) the irreparable harm that would be imposed on the plaintiff were the court to wrongfully deny relief; and (3) the irreparable harm that would be imposed on the defendant by a wrongful court order to halt its research. The first factor requires little explanation. If the plaintiff's case is a slam dunk, the injunction should issue immediately, regardless of the relative irreparable implications. Conversely, if the plaintiff's allegations are preposterous, no injunction should issue, again regardless of the irreparable consequences. Both of these conclusions follow from the simple fact that preliminary relief is not meant to contradict the outcome on the merits. If the merits are clear, the court's decision with respect to preliminary relief is also clear, and irreparable consequences are simply not relevant.

Things are more interesting in cases in which the merits are murky, because in those cases a court must confront the possibility that its ruling with respect to preliminary relief might ultimately turn out to favor the wrong party. This is when the standard for preliminary relief does its heavy lifting. Start with the possibility that the court refuses to issue the injunction at the preliminary stage but then, after a full hearing on the merits, concludes that the defendant's research did in fact infringe. As the traditional analysis suggests, one cost associated with this errant denial is any irreparable harm that might be suffered by the patentee. This is a private cost suffered by the complaining patent holder, but it is also a social cost because mistakes like this will over the long run dampen the ex ante incentive to pursue patent-eligible research, discourage patent holders from litigating even valid claims, and likely drive inventors to invest more heavily in costly self-help protections.<sup>10</sup>

There is, however, another cost associated with this errant refusal to enjoin, and that is the irreparable benefit that accrues to the infringer. This cost is one that the traditional analysis overlooks. Yet, like the irreparable harm normally considered, it too has unintended private and social consequences. Undeserved

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9. See, e.g., *MacGinnitie v. Hobbs Group, LLC*, 420 F.3d 1234, 1242 (11th Cir. 2005) ("MacGinnitie has shown irreparable harm which cannot be undone through monetary remedies, in the form of unenforceable restrictions on his access to customers, employees, and information. These injuries are in the form of lost opportunities, which are difficult, if not impossible, to quantify.").
  10. William Landes and Judge Posner have argued that discouraging self-help of this sort is one of patent law's most important purposes. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 328-30 (2003).

irreversible gains skew the defendant's incentives with respect to the question of whether to litigate or settle. They also encourage the defendant to invest further in its research—a wasteful outcome when that research will ultimately turn out to be impermissible. Most importantly, undeserved irreversible gains undermine the defendant's incentive to “invent around” the patent rather than infringe it. This latter implication is of particular consequence given that the patent system is designed to encourage innovation not merely by rewarding patent holders for their accomplishments, but also by forcing rivals to discover comparable noninfringing substitutes for patented inventions.<sup>11</sup>

Turn now to the opposite type of judicial error, in which the court issues an injunction at the preliminary stage but then, after a full hearing on the merits, concludes that the accused research was in fact permissible. The traditional analysis focuses exclusively on the irreparable harm suffered by the defendant because of the wrongful injunction. My point, predictable at this stage, is that comparable private and social concerns arise with respect to the plaintiff's wrongful and irreversible gains. Thus, the traditional approach recognizes that it is important to avoid a wrongful injunction in this setting because a wrongful injunction might irreversibly harm the defendant in a distributional sense and might also skew long-run incentives such as the incentive to pursue borderline but ultimately permissible research. The traditional approach, however, fails to see that wrongful injunctions are also troubling because they might irreversibly benefit the plaintiff in a distributional sense and might distort important incentives relevant to patentees, such as the incentive for a patent holder to litigate a case that is questionable on the merits.

Naturally, there is much more to say on all of these topics. For instance, there are interactions among the various incentives that I have considered above, and those interactions amplify some concerns but mitigate others. Moreover, the concept of irreparability is actually significantly more complicated than I have thus far let on. Some errors, for example, turn out to be irreversible when they manifest themselves as undeserved losses but are fully reversible when they manifest themselves as unearned gains. For now, however, I want to stake out only a very basic claim: when evaluating a motion for preliminary relief, any deviation from what will be the ultimate resolution on the merits is relevant, no matter whether that deviation is perceived by the

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11. See *Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 62 F.3d 1512, 1520 (Fed. Cir. 1995) (“The ability . . . to design around . . . is one of the important public benefits that justify awarding the patent owner exclusive rights to his invention.”), *rev'd on other grounds*, 520 U.S. 17 (1997); *State Indus., Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985) (noting that the incentive to “design around” a patent brings “a steady flow of innovations to the marketplace”).

parties to be a benefit or a harm. All that matters is that the deviation is unintended, that it has distributional or incentive effects for the litigants and/or similarly situated parties, and that those effects are difficult for a court to reverse.

I proceed as follows. In Part I, I explain what it means to say that a given harm or benefit is irreparable and why irreparability is thought to justify preliminary relief. My purpose here is to show that irreparable benefits are not so different from irreparable harms, in that both threaten to lock in outcomes that are inconsistent with the outcomes that will be deemed appropriate after a full merits hearing. In Part II, I consider the logic of the current standard for preliminary relief and explain how it could be adjusted to account for irreparable benefits. I argue that the best adjustment would have courts acknowledge irreparability in all of its forms but focus primarily on the one factor that they are particularly well suited to evaluate: the merits of the case. Finally, in Part III, I consider some likely objections to my account, such as the argument that unintended benefits are better thought of as windfalls to be celebrated rather than errors to be avoided.

## I. JUSTIFYING PRELIMINARY RELIEF

Under the conventional analysis, preliminary relief is appropriate when there is an ongoing risk of irreparable harm. That is, when a party to litigation can show (1) that some harm will continue to accrue during the course of litigation, and (2) that the harm will be difficult to undo *ex post*, it is generally considered appropriate for the relevant court to issue a remedy early in the litigation, rather than waiting until after the merits have been definitively adjudicated. The reason is that under these conditions there is a tradeoff between accuracy and efficacy. Accuracy is maximized by waiting until all the evidence has been presented and all the arguments have been heard. But efficacy is maximized by moving quickly, before some part of the outcome has been irreversibly predetermined.

Examples of irreparable harm range across a wide spectrum.<sup>12</sup> Some harms are literally irreparable in that there is no plausible compensation for the loss. The loss of freedom associated with unjust imprisonment might be an example, as might be the loss of companionship with a child or loved one.

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12. Douglas Laycock has offered a more comprehensive taxonomy. See Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990). My summary in the text is derived from and improves upon my own prior discussion of these points. See Lichtman, *supra* note 7, at 200-02. A few lines of text are borrowed from that article, with permission.

Other harms can be fully compensated in theory but are irreparable in a particular case. For example, the relevant bad actor might lack the necessary funds to pay compensation, or he might have the necessary funds but keep them beyond the reach of judicial process. Most irreparable harms, however, are irreparable only in the sense that the harm at issue is difficult for a court to value. In these instances, there is some amount of cash that would make the relevant victim whole, but the harm is in a practical sense irreparable because the court has no way of determining the appropriate amount.<sup>13</sup>

Consider in this light speech harms. Limitations on speech are routinely characterized as irreparable, with courts readily accepting the notion that cash cannot adequately make up for speech that is wrongly restrained.<sup>14</sup> That, however, is ridiculous. A civil rights activist hoping to stage a peaceful demonstration on a particular Sunday would often willingly forsake that opportunity if compensated by, say, the funding necessary to sponsor ten demonstrations the following week, or, better yet, some mixture of demonstrations, public hearings, and other means through which his message might be heard. The real problem with most speech harms, therefore, is not that after-the-fact cash remedies cannot make the relevant victim whole, but instead that courts cannot reliably estimate the size of the necessary cash transfer.

All this, of course, raises the question of why a harm should be deemed irreparable simply because it is difficult for courts to measure reliably. After all, in such cases, courts could simply guess at the correct amount of compensation. Sometimes the award would be too high; sometimes the award would be too low. But if courts are just as likely to overestimate as they are to underestimate, on average the guesses could end up just right. That said, preliminary relief is probably better than unadorned guessing for two

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13. See *MacGimmitie*, 420 F.3d at 1242 (finding an injury irreparable because its value was “difficult, if not impossible, to quantify”); *Foundry Servs., Inc. v. Beneflux Corp.*, 206 F.2d 214, 216 (2d Cir. 1953) (Hand, J., concurring) (“The plaintiff indeed has failed to show any ‘irreparable injury,’ if by that is meant that money will not satisfy any loss that the defendant’s competition will cause; nevertheless it has shown such an injury, if that includes the impossibility of ascertaining with any accuracy the extent of the loss. That has always been included in its meaning; and I cannot see how the plaintiff will ever be able to prove what sales the defendant’s competition will make it lose . . .”).

14. See, for example, *Bronx Household of Faith v. Board of Education*, 226 F. Supp. 2d 401, 411-12 (S.D.N.Y. 2002), and the cases cited therein. See also *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“[L]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

reasons.<sup>15</sup> First, when faced with uncertainty, courts tend to underestimate harm. This is because evidentiary rules are slanted against speculative injuries<sup>16</sup>—and they have to be, or else courts would be flooded by disingenuous claims. Second, even if court estimates were right on average, they would be wrong in particular cases, and that might matter tremendously. A plaintiff who can predict that his harm will be greater than the average harm, for example, would have an incentive to engage in costly self-help precautions. A plaintiff who can predict that his harm will be less than average, however, might exercise inefficiently little care. Moreover, strategic behavior aside, many plaintiffs would end up with the wrong distributional outcomes. That might not be a tragedy, but preliminary relief offers another option, and even a quick glance at the case law confirms that courts routinely take it.<sup>17</sup>

My comments thus far focus on irreparable harm, but the basic arguments and examples transfer easily to irreparable benefits as well. For instance, if a person suffers irreparable harm when imprisoned unjustly, that person experiences an irreparable benefit when wrongly allowed to walk free. If a court's inability to enforce its judgments transforms a normal harm into an irreparable one, an inability to collect similarly renders irreparable an ill-gotten gain. If the harms associated with patent infringement are irreparable because it is hard to cash out those harms with precision, so too the benefits associated

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15. In an earlier work, I have offered some other explanations, *see* Lichtman, *supra* note 7, at 201, but none are as compelling as these two. I should point out that my remarks there are incomplete with respect to risk. The real reason that risk is a bad explanation for preliminary relief is that risk is itself an injury that can be fully repaired through some appropriate ex post cash payment.
  16. One example of this slant: plaintiffs typically bear the burden of proving any harm with specificity. *See, e.g.,* Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 513 (9th Cir. 1985) (“In a copyright action, a trial court is entitled to reject a proffered measure of damages if it is too speculative.”); Kids’ Universe v. In2Labs, 116 Cal. Rptr. 2d 158, 168 (Ct. App. 2002) (“[W]here the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative.” (emphasis omitted) (quoting *Grupe v. Glick*, 160 P.2d 832, 840 (Cal. 1945))).
  17. There is a third reason why preliminary injunctions might be an appropriate response in cases in which an injury is difficult to value: the use of injunctive relief spares the court the expense of actually calculating the value. This is a bad explanation, however, for two reasons. First, even if costly, calculation might be worthwhile because its cost would be incurred only in litigated cases but its benefits would extend more broadly, given how many disputes settle in the shadow of the courts. Second, concerns about expense would explain why courts might choose to estimate damages rather than try to calculate them more precisely, but those concerns do not at all explain why courts should use injunctive relief rather than cheap but imperfect estimates.

with patent infringement can be irreparable when they are hard to monetize accurately. Indeed, nothing in my previous discussion turned on the fact that “irreparable harms” were harms. My discussion instead focused on the fact that, in each example, the relevant change in status was “irreparable.” That is in many ways my central point: irreparability is the characteristic that justifies preliminary relief, and benefits can be just as irreparable as harms.

This obviously does not mean that irreparable harms and irreparable benefits should be given equivalent weight on either public policy or moral grounds. The reasons to care about the irreparable harm suffered by my hypothetical patent holder, for instance, are very different from the reasons to care about the associated irreparable benefit enjoyed by the relevant infringer. As noted earlier, from an incentive perspective, the harm threatens in the long run to reduce the incentive to develop patentable research, whereas the benefit might undermine what would otherwise be a strong incentive to invent around the patented invention. Similarly, with respect to distributional concerns, irreparable harms might be of greater moral concern than are irreparable benefits—which is to say that, under certain plausible philosophical views, a government decision that wrongly deprives a private party of some right or freedom could reasonably be thought of as being of greater consequence than a similarly errant decision that wrongly recognizes that right or freedom. Again, my point is only that irreparable harms and irreparable benefits share two core characteristics: they threaten to accrue during the pendency of litigation, and they can be relatively difficult to undo *ex post*. These characteristics are what justify preliminary relief in the first place, and thus both irreparable harms and irreparable benefits have relevance when it comes to deciding when and whether preliminary relief is appropriate.

## II. THE STANDARD FOR PRELIMINARY RELIEF

As stated above, the conventional standard for preliminary relief accounts for three primary factors: (1) the likelihood that the requesting party will ultimately prevail on the merits; (2) the irreparable harm the requesting party will suffer if the injunction is wrongly denied; and (3) the irreparable harm the opposing party will suffer if the injunction wrongly issues. The natural implication of my work is to suggest that two more factors are relevant to the analysis: (4) the irreparable benefit the opposing party will enjoy if the injunction is wrongly denied; and (5) the irreparable benefit the requesting party will enjoy if the injunction wrongly issues. Taken together, these five considerations would empower a court to estimate not only the likelihood of judicial error but also its severity.

The question would then become how to weight the factors. Two considerations seem dominant. First, particular attention should be paid to the court's prediction of the merits, simply because that is the most reliable of the five factors in play. Irreparable harms and benefits are by definition difficult to quantify.<sup>18</sup> Worse, irreparable benefits often interact with irreparable harms in ways that a court cannot easily track. In the patent hypothetical, for instance, one reason to worry about the irreparable harm that threatens the patent holder is that this harm would in the long run undermine the investment incentives created by patent protection. The irreparable benefit in play for that same patent holder, however, is troubling for the opposite reason: unearned protection would in the long run encourage inventors to invest too much in inventions that the patent system itself would ultimately not protect. For some inventors—say, those who are unsure into which category their inventions will fall—these long-run consequences might cancel out. But a court would be hard-pressed to armchair this sort of integrated policy-driven analysis, matching the implications of each irreparable harm to those of each irreparable benefit and through that process identifying the net troubling effects. This argues against heavy reliance on the four irreparability factors.

The court's prediction on the merits, by contrast, seems very reliable. Courts are well equipped to evaluate legal arguments and parse evidentiary records. They also should be relatively good at evaluating more subtle clues such as the relative quality of the lawyering. Moreover, the result of the preliminary hearing often taints the process in ways that make the court's predicted outcome more likely. This is sometimes a psychological effect, as when the judge is subconsciously influenced by the preliminary decision when issuing later procedural or substantive rulings in the case.<sup>19</sup> And it is sometimes

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18. Put differently, when considering a preliminary injunction, the court is uncertain about all of the relevant inputs. The court is uncertain about the merits because, by definition, motions for preliminary relief are brought early in the litigation process. But the court is also uncertain about the relative irreparable implications at stake, primarily because irreparable consequences are difficult to quantify precisely. I have argued elsewhere that the modern standard for preliminary relief focuses so much on the first of these uncertainties that it fails to adequately account for the second. See Lichtman, *supra* note 7. I have also suggested some ways in which a court could improve the quality of its estimations—for example, by using bonds and after-the-fact liability to tease out the parties' private valuations. See *id.* at 211-12.
19. Similarly, a plaintiff who wins at the preliminary injunction stage might more aggressively pursue the litigation, and a defendant who defeats a motion for preliminary relief might more aggressively defend. Cf. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1516-18 (1998) (applying the same point to prosecutors). Note that there are strategies for minimizing these sorts of psychological biases. For instance, the judge's psychological bias could be rendered irrelevant by scheduling litigation so that one judge decides preliminary matters while a second judge, unaware of the result in

just an unavoidable ramification of preliminary relief: for example, when an injunction temporarily entrusts a minor to the custody of one of two feuding foster families, the minor may then, as an unintended consequence, strengthen his or her attachment to the chosen family, which in turn would change the case on the merits.<sup>20</sup> For these reasons, then, a court should place more weight on its prediction with respect to the merits than it does on its estimates of the various irreparable consequences.

The second consideration that should influence the relative weight of these five preliminary injunction factors is the extent to which it is important to minimize the number of errors as opposed to their average severity. The best way to minimize the number of errors is to focus exclusively on the court's prediction as to the likely outcome on the merits. Indeed, by granting relief only when the moving party is more likely than not to win on the merits, a court can maximize the likelihood that its preliminary decision will be consistent with its final ruling. (If the moving party is more likely to win than to lose, in most cases it will win, and thus granting the injunction is the safest bet.) Some errors, however, are more troubling than others, and the only way to incorporate that idea is also to consider the irreparable harms and benefits associated with each type of error. That will increase the likelihood of error because the results will sometimes conflict with the simple more-likely-than-not rule. Ideally, however, those more numerous errors will on average be less severe because the court will be able to identify and avoid the most serious threats.

This tradeoff between accuracy and severity knows no general solution. Even in the simplest case in which only distributional issues are at stake, reasonable minds might disagree over whether it is better to have (a) four cases decided correctly but one horribly off, or (b) two cases decided correctly but the remaining three only modestly in error. Cases in which incentives are a concern complicate the problem; the analysis then depends on what behaviors are at stake and how sensitive private parties are to the various errant payoffs. The fact that a court has only a limited ability to measure irreparable

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the earlier hearing, actually hears the case. The cost of this approach would be the obvious lost economy of scale.

20. See, e.g., *McLaughlin v. Pernesley*, 693 F. Supp. 318 (E.D. Pa. 1988) (deeming the interim placement of a foster child relevant to the final placement decision). Empirical research suggests that many cases settle after the issuance of a preliminary injunction but before a full hearing on the merits. See Jean O. Lanjouw & Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J.L. & ECON. 573, 576-78 (2001). That finding can be interpreted in many ways, but the authors of the study interpreted it as evidence for the proposition that preliminary injunctions significantly alter the parties' relative positions in the litigation. See *id.*

repercussions is also relevant here. In the extreme, a court's estimates might be so poor that incorporating them will increase the error rate but not offer much of a corresponding decrease in error severity. Lastly, if I am right in my claim that decisions with respect to preliminary relief sometimes taint the outcome after a full hearing on the merits, that itself is a reason to encourage courts to emphasize accuracy and downplay severity. That way, if a little bias is inevitable, at least it will usually push in the right direction.

### III. OBJECTIONS

My account of preliminary relief in general and irreparable benefits in particular can be subject to a host of intuitive criticisms. Some are entirely on point. Others misconstrue the idea or its implications. All help, however, to further delineate the precise contours of my argument and to unpack its relationship to other literatures and debates.

Start with the most obvious criticism: namely, that I am wrong to characterize unintentional benefits as errors. According to this argument, to the extent that a preliminary injunction confers a benefit on one party without imposing an equivalent harm on the other, the result is a windfall that courts should ignore or perhaps even celebrate. I hear the intuition here, but I think the objection is misplaced in that it incorrectly assumes that private benefits are also social benefits. Return to my patent hypothetical. If the patentee is mistakenly awarded preliminary relief, the patentee is admittedly privately better off. But it would be surprising were society to applaud that error. Patent law is intended to award this patentee a certain payoff—a payoff designed to create particular incentives with respect to the patentee's behavior and to achieve a given distributional outcome as a reflection of the patentee's contributions to social welfare. Any deviation from that baseline distorts those incentives and undermines the desired distributional outcome. The labels "harm" and "benefit" thus mislead, emphasizing the private party's perspective but neglecting broader social goals and consequences.<sup>21</sup>

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21. I am obviously not the first to argue that unintended private benefits can be socially harmful. The literature on restitution develops this point, and courts widely accept it under theories such as the theory of unjust enrichment. For discussion of when and why substantive legal rules disgorge unearned benefits even in the absence of a parallel undeserved harm, see E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339 (1985); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277 (1989); and Saul Levmore & William J. Stuntz, *Remedies and Incentives in Private and Public Law: A Comparative Essay*, 1990 WIS. L. REV. 483.

A second intuitive criticism is that the irreparable harm at stake for a party in litigation will typically be comparable in magnitude to the irreparable benefit at stake for that same party, and thus there is no need to account explicitly for both. In my patent hypothetical, for instance, the irreparable harm at risk for the patentee is that associated with any unlawful infringement that might occur between the rejection of the motion for preliminary relief and the final resolution of the case on the merits. The irreparable benefit at stake, meanwhile, is that associated with wrongful enforcement of the patent for that same time period. These magnitudes are indeed comparable in a superficial sense, but equivalence here is an illusion, for three reasons. First, as I have stressed already, even if the magnitudes of two considerations are similar, their distributional and incentive implications will often differ substantially. Second, these two irreparable consequences might be irreparable to different degrees. Sales forsaken, for instance, are hard to measure because it is difficult to run the necessary counterfactual. Sales unlawfully made, by contrast, can often be easily disgorged, namely by taking away the undeserved cash.<sup>22</sup> Third, these superficially equivalent factors argue in entirely opposite directions. The possibility of that irreparable harm is a reason to issue the injunction, whereas the possibility of that irreparable benefit is a reason to deny it. Accounting for the irreparable harm therefore does not implicitly account for the irreparable benefit.<sup>23</sup>

A third and related criticism emphasizes another form of possible equivalence: equivalence between the irreparable harm at stake for one party and the irreparable benefit in play for the other. Equivalence of this sort is common in disputes involving fungible goods. In a dispute over twenty dollars, what one party gains from a wrongful win exactly corresponds to what the other party loses in a wrongful loss. For harms and benefits that are

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22. Then again, if the product is an automobile and the infringement involves only a feature on the rearview mirror, valuation problems return because the court likely has no reliable way to disentangle the value of the infringement from the value of the rest of the car. Cf. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45 (2d Cir. 1939) (examining the extent to which the value of a movie came from the script, which infringed copyright, as opposed to other factors such as the identity of the leading actress or the film's advertising budget).

23. Another way to see this point is to return to the Posner formula presented *supra* note 2 and modified *supra* note 4. The intuitive criticism I discuss in the text is this idea that the irreparable harm at stake for a given party might be equal to the irreparable benefit in play for that same party. In the formula, this would mean that  $H_D = B_D$  and similarly that  $H_P = B_P$ . Under those assumptions, however, the various irreparable consequences cancel, and the inequality  $P \cdot (H_P + B_D) > (1 - P) \cdot (H_D + B_P)$  simplifies to  $P > (1 - P)$ . What this means is that, even if irreparable benefits were equal to their associated irreparable harms, the standard approach would still be incorrect. The right approach in the face of this sort of symmetric equality would be for courts to focus entirely on the merits.

irreparable, by contrast, equivalence seems unlikely to hold. In the patent hypothetical, for instance, the irreparable benefit associated with an errant injunction is the benefit that the patent holder derives from several months of undeserved protection. The irreparable harm, meanwhile, is the loss that the accused infringer suffers during that same time period. These two effects might be comparable, but they also might not. Much depends on how central the relevant research is to each firm's plans, what each firm's next-best research options look like, and dozens of other party-specific factors. Moreover, recall yet again the point about the difference between magnitudes and consequences: even if the magnitudes of these two considerations are equivalent in a superficial sense, there is no reason to think that their distributional and efficiency implications in fact cancel out. The patent holder's unearned protection might matter more or differently than would the accused infringer's undeserved restrictions.<sup>24</sup>

A fourth intuitive criticism focuses specifically on my concern that, by ignoring irreparable benefits, courts are inadvertently skewing ex ante incentives. This argument acknowledges that courts might be wrong to overlook irreparable benefits, but it points out that, if the mistake is just as likely to lead to wrongful issuance as it is to lead to wrongful denial, then from an ex ante perspective those errors cancel out. I agree here entirely, but I do not think that wrongful issuance and wrongful denial in fact are equally likely. Suppose, for instance, that in a given category of cases the merits are expected to be close, but the irreparable benefit at stake for the plaintiff is much larger than the irreparable benefit at stake for the defendant. A rule that ignores both irreparable benefits will systematically favor issuance. The reason is that the court will be ignoring two considerations: one that would argue strongly against issuance, and one that would only trivially argue against denial. Similarly, suppose that in a given category of cases the irreparable benefits are of comparable importance, but the plaintiff tends to have a strong advantage on the merits. This time, ignoring irreparable benefits skews the court toward denial. After all, the irreparable benefit associated with wrongful denial would have made the court nervous to deny, but the irreparable benefit associated

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24. Here, too, the Posner formula offers a helpful visualization. The concern at issue this time is that  $H_P$  might equal  $B_D$ , and  $H_D$  might equal  $B_P$ . Were that true, the inequality  $P \cdot (H_P + B_D) > (1 - P) \cdot (H_D + B_P)$  could be rewritten as  $P \cdot (2H_P) > (1 - P) \cdot (2H_D)$ , which in turn simplifies to the Posner formula presented *supra* note 2. As I explain in the text, however,  $H_P$  is probably not equal to  $B_D$ ,  $H_D$  is probably not equal to  $B_P$ , and even if there were equivalence in these magnitudes, that would not imply equivalence in the dimension that actually matters—the social consequences associated with these irreversible deviations.

with wrongful issuance would not have mattered much because the odds of a wrongful issuance were in any event low, given the merits.<sup>25</sup>

A fifth intuitive criticism of my thesis is the argument that, in one way or another, my concerns are already being addressed. For instance, courts do from time to time recognize that a given party might wrongfully benefit if a given injunction is either issued or denied.<sup>26</sup> Moreover, in many jurisdictions, courts evaluating a motion for preliminary relief explicitly consider whether the “public interest” would be served by granting the injunction<sup>27</sup>—and that amorphous inquiry is surely capable of including within its purview the many considerations I raise here. Similarly, a clever court could conceivably even recast the concept of “irreparable harm” so as to incorporate the considerations that I introduce here under the banner of irreparable benefits. My response to all this, however, is that even if courts do on occasion stumble into these intuitions, and even if certain articulations of the modern standard could be read to incorporate the concerns I raise, it still is both troubling and puzzling that irreparable benefits are left to so haphazard and imperfect a safety net, whereas irreparable harms are uniformly and explicitly considered. As I have argued, irreparable harms and benefits are factors of comparable importance. If courts are to be verbally reminded to consider irreparable harm as they weigh the pros and cons of injunctive relief, they should with similar force be reminded to weigh irreparable benefits.

A sixth and final likely criticism is that my thesis is too timid; if irreparable benefits have relevance for preliminary injunctions, they should be relevant when courts consider permanent injunctive relief as well. Here, I disagree. The reason is that decisions with respect to permanent relief are made entirely with an eye to the merits. That is, when evaluating a motion for injunctive relief, a court does not factor in the possibility that its final decision on the merits might be wrong. Instead, the court takes its final decision as a given and merely decides whether injunctive relief is among the types of remedies available

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25. Once more, a return to the Posner formula is worthwhile. A preliminary injunction standard that accounted for irreparable benefits would have courts issue an injunction whenever  $P \cdot (H_P + B_D) > (1 - P) \cdot (H_D + B_P)$ . A court that ignores irreparable benefits instead issues an injunction whenever  $P \cdot H_P > (1 - P) \cdot H_D$ . Comparing these two inequalities, it is easy to see that there will be a predictable skew to the decision-making process whenever  $P \cdot B_D \neq (1 - P) \cdot B_P$ . In the text above, I point out two simple cases in which those quantities are not equal: one in which  $P = (1 - P)$  but  $B_P > B_D$ , and one in which  $B_P = B_D$  but  $P > (1 - P)$ .
26. An example is *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1191 (C.D. Cal. 2002), in which the court favored a preliminary injunction in part because the accused infringing “profit[ed] from the infringing and unlawful activities” being litigated.
27. For citations and discussion, see Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 111 & n.5 (2001).

under the relevant substantive law.<sup>28</sup> This is in sharp contrast to the analysis relevant to preliminary relief, in which, as I have emphasized, the decision turns not only on the merits but also on the likelihood and magnitude of judicial error. Because of this difference, the concept of “irreparable benefits” is in my view of little import as applied to permanent relief. There is no reason to measure the consequences of error precisely; error costs are not a factor when it comes to permanent relief.<sup>29</sup>

## CONCLUSION

When considering a motion for preliminary relief, courts in every circuit take careful account of any harm that might accrue during the course of litigation but be difficult to undo *ex post*. In this Essay, I have urged that attention likewise be paid to benefits that might similarly accrue during the course of litigation and might similarly be difficult to counteract. The primary implication of my work is that courts should introduce two additional considerations to the conventional analysis. Specifically, courts should consider the irreparable benefit enjoyed by the moving party in the event of errant issuance, as well as the irreparable benefit enjoyed by the nonmoving party in the event of an errant denial. That would admittedly complicate the analysis. However, the current approach simplifies things in an indefensible way. The very incentive and distributional concerns that justify the modern focus on irreparable harm similarly require judicial consideration of irreparable benefits.

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28. For explanations and criticisms of this practice, see Joshua P. Davis, *Taking Uncertainty Seriously: Revising Injunction Doctrine*, 34 RUTGERS L.J. 363 (2003); David Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation*, 1982 AM. B. FOUND. RES. J. 487; and Steven Shavell, *Uncertainty over Causation and the Determination of Civil Liability*, 28 J.L. & ECON. 587 (1985).
29. *Accord* Laycock, *supra* note 12, at 728-32 (contrasting the preliminary injunction stage, at which “the merits are unresolved, plaintiff may be undeserving, and it is still possible that plaintiff will not get any remedy at all,” with the permanent injunction stage, at which “the merits are resolved, defendant is a known wrongdoer, and the court has eliminated the option of no remedy at all”).