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## Irreparable Benefits - ALEA Version

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## Irreparable Benefits

Douglas Lichtman\*

*The conventional approach to preliminary relief focuses on irreparable harm but neglects entirely irreparable benefits. That is hard to understand. Errant irreversible harms are important because they can distort incentives and can 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, not one: 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.*

### I. 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. The idea is to account for and minimize irreversible court error. In a case where denial of the injunction would be irreversibly harmful and there is a real chance of wrongful denial, 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: “the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side.”<sup>1</sup>

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\* Professor of Law, The University of Chicago. For helpful conversations, my thanks to John Duffy, Carolyn Frantz, Doug Laycock, Daryl Levinson, Saul Levmore, John Pfaff, Ariel Porat, Amy Wax, and workshop participants at Fordham and UCLA. This is genuinely a draft—indeed, I am still working to implement some suggestions already received—so (1) please do not cite without permission and (2) comments are very much appreciated. I can be reached at [dgl@uchicago.edu](mailto:dgl@uchicago.edu).

<sup>1</sup> See, e.g., *Abbott Labs v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992). Note that courts in certain jurisdictions introduce additional factors, for instance favoring the status quo or introducing an amorphous “public interest” consideration. See, e.g., *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 382-83 (7th Cir. 1984) (considering whether the proposed injunction will protect or harm the public interest); *Chathas v. Local 134 IBEW*, 233 F.3d 508, 513 (7th Cir. 2000) (emphasizing the importance of preserving the status quo).

This standard approach accounts for irreparable harms but neglects entirely 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>2</sup> errant irreversible gains can be just as troubling as errant irreversible losses. Both can have lasting distributional implications, and both distort important incentives like the incentive to sue or settle. 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 to fret: the irreparable harm wrongfully suffered by the moving party and the irreparable benefit inadvertently accorded the nonmoving party.

Consider a simple example, one designed in particular to respond to the obvious criticisms that “irreparable benefits” is mere semantics or 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 believes that the process 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.<sup>3</sup>

If the patentee moves for preliminary relief,<sup>4</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 they are difficult for courts to value. I will say more about this argument later,<sup>5</sup> but for now note

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<sup>2</sup> And that is the goal according to virtually every scholarly and judicial account. cite posner; leubsdorf; josh davis; etc. [other goals are possible. might want to give clear signals, or choose a result that’s awful bad. might want to minimize commitment.]

<sup>3</sup> This hypothetical follows the standard pattern seen in patent litigation regarding inchoate research. See, e.g., [cases].

<sup>4</sup> A patent holder might not use preliminary relief in a situation like this. After all, if the defendant’s infringement is later shown to be willful, the patent holder might be able to collect treble damages for these bad acts. [there is another reason too in my patent notes]

<sup>5</sup> And have before. See Lichtman.

that almost every “irreparable” harm is actually irreparable only in this limited sense. Speech harms are an obvious example. Limitations on speech are routinely characterized as harms for which there can be no adequate compensation.<sup>6</sup> However, a civil rights activist hoping to stage a peaceful demonstration on a particular Sunday would surely willingly trade that opportunity if compensated by the funding necessary to sponsor, say, ten demonstrations the following week, or, better yet, a mixture of demonstrations, public hearings, and other means through which his message might be heard and thoughtfully evaluated. The real problem with most speech harms is therefore 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 payment. The same difficulty applies to most patent harms, and patent harms are for this reason today presumptively eligible for preliminary relief.<sup>7</sup>

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 defendant by a wrongful court order to halt its research; and (3) the irreparable harm that would be imposed on the plaintiff were the court to deny relief only to later rule that the patent was in fact valid and infringed. 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—at least in all but the most unusual circumstances.<sup>8</sup>

Things are more interesting in cases where the merits are murky, because in those cases a court must confront the possibility that its ruling with respect to preliminary relief will ultimately turn out to be inconsistent with its final judgment on the merits. This is where the standard for preliminary relief does its heavy lifting. Start with the possibility that the court will refuse to issue the

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<sup>6</sup> cite cases

<sup>7</sup> See H.H. Robertson, 820 F.2d at 390 (A strong showing of likelihood of success on the merits coupled with continuing infringement raises a presumption of irreparable harm to the patentee.). But see [confirm that this is still current, contra josh lerner who cites atlas powder 773 d2d 1230 1985]

<sup>8</sup> are there cases where the harm is irreparable but we would not allow a permanent injunction? if so, in those cases we shouldn’t allow a preliminary injunction either.

injunction at the preliminary stage but then, after a full hearing on the merits, conclude 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 in that 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>9</sup>

There is another cost associated with this errant refusal to enjoin, however, 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 irreversible gains skew the defendant's incentives with respect to the question of whether to litigate or settle.<sup>10</sup> They also encourage the defendant to invest further in his research, a wasteful outcome in cases where 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 infringing 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, non-infringing substitutes for patented inventions.<sup>11</sup>

Turn now to the opposite category of court error, namely an instance where 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 any irreparable harm imposed on the defendant. For example, the defendant might be forced to substitute an alternative chemical process for the disputed one, or the defendant might have to freeze its research project for the duration of the litigation. Again, to the extent that ex post remedies will suffice to undo the effects of these changes, the court can safely ignore them.<sup>12</sup> However, to the extent that these harms have lasting implications—private harms suffered by the defendant and

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<sup>9</sup> cite bill/dick on this being the reason to have patent law – no TS! doug on self help also.

<sup>10</sup> do we imagine that patent law has this pretty tailored via its rules about damages, injunctions, attorneys' fees, arbitration, etc.?

<sup>11</sup> quote some cases saying this, or treatises if necessary. abromowitz has some leads in his redundancy article.

<sup>12</sup> consider, for instance, is coasian bargain out of this mess. then we can just refund the cash, at least if no other fetters on research? discuss this later.

societal harms associated with the unintentional disruption of research that the patent system meant to allow—the conventional approach to preliminary relief will rightly count them as reasons not to issue the injunction.

My point, predictable at this stage, is that similar private and social concerns arise with respect to the plaintiff's wrongful but irreversible gains. An errant injunction could translate into several years of exclusive rights that the patent system did not intend to recognize. Maybe the implications of those bonus years can be undone by some accurate ex post financial penalty. Where valuation is a problem, however, this irreparable benefit is yet another cost associated with an errant decision to enjoin. It is a deviation from the intended ruling on the merits, and, like the irreparable harm that might be wrongly imposed on the defendant, it has distributional implications for the affected party and dynamic implications for society more generally.

Naturally, there is much more to say on all of these topics. For instance, there are interactions among the various long-run incentives I consider above, and those interactions amplify some concerns but mitigate others.<sup>13</sup> 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 fully reversible when they manifest themselves as unearned gains.<sup>14</sup> For now, however, I want to stake out only one basic proposition: 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 to be a benefit or a harm. All that matters is that the deviation is unintended and irreversible.

I proceed as follows. In Part II, I consider what it means to say that a given harm or benefit is irreparable and I explain 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 Part III, I consider how a revised standard for preliminary relief might better account for irreparable benefits. In particular, I articulate two touchstones that should guide a court's decision-making process: the expected accuracy of the court's prediction with respect to the merits of the case, and the relative importance of minimizing the likelihood of judicial error as opposed to minimizing its severity. Finally, in Part IV, I briefly conclude.

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<sup>13</sup> see *infra* part 3

<sup>14</sup> see *infra* part 2

## II. Why Preliminary Relief?

According to the conventional analysis, preliminary relief is appropriate in cases where there is an on-going risk of irreparable harm. That is, where 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 to craft a remedy only after the merits have been definitively adjudicated. The reason is that under these conditions there is a tradeoff between accuracy and effectiveness. Accuracy is maximized by waiting until all the evidence has been presented and all the arguments have been heard. But effectiveness is maximized by moving quickly, before some part of the outcome has been irreversibly predetermined.

Examples of irreparable harm range across a wide spectrum. Some harms are irreparable because there is no plausible compensation for the loss. The loss of freedom associated with unjust imprisonment might be an example along these lines, as might be the loss of companionship with a child or loved one. Other harms can be made whole in theory but are irreparable in a particular case because the relevant bad actor is judgment-proof. For example, the bad actor might lack the necessary funds, or he might have them but keep them beyond the reach of judicial process. Inconsolable losses and harms imposed by judgment-proof bad actors both present relatively clear examples of irreparable harm because in these situations it is obvious that a remedy offered after the harm has been incurred would be an empty gesture. In these scenarios, the only meaningful option is to avoid the relevant harm in the first place.

Less intuitive but arguably much more common examples of irreparable harm are examples where the relevant harm is irreparable only in the sense that it is difficult for a court to value. In every circuit but the Fifth, for example, copyright infringement is presumed to cause irreparable harm.<sup>15</sup> The explanation is not that cash would be inadequate compensation—although surely that is sometimes true—but instead that courts have little skill when it comes to estimating the size of the appropriate cash transfer. Bankruptcy is similarly considered to be an irreparable harm,<sup>16</sup> although here again in most cases there is some amount of cash that would fully soothe the wound. As I mentioned in the Introduction, speech harms typically follow this pattern, too;<sup>17</sup> and the same can be said for

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<sup>15</sup> See *Cadence Design Sys. v. Avant Corp.*, 125 F.3d 824, 827 n.4 (9th Cir. 1997).

<sup>16</sup> *pincite*

<sup>17</sup> *pincite*

dozens of other harms that are today routinely deemed irreparable by the courts, for example restraints on employment.<sup>18</sup>

At first blush it might seem surprising that a harm can be irreparable simply because it is difficult for a court to measure reliably. After all, in cases like these 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 would end up just right. That said, preliminary relief is probably better than unadorned guessing for two reasons.<sup>19</sup> First, when faced with uncertainty, courts tend to underestimate harm. This is because evidentiary rules are slanted against speculative injuries—plaintiffs typically bear the burden of proving any harm with specificity—and they need to be, or else the 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 lesser than average, on the other hand, might exercise inefficiently little care. And, 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 the many examples given in the previous paragraph suggest that courts routinely take it.<sup>20</sup>

My comments thus far focus on irreparable harm, but the basic arguments and examples transfer easily to irreparable benefits. 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

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<sup>18</sup> case

<sup>19</sup> In earlier work, I offer some other explanations, but none are as compelling as these two. See Lichtman. I should point out that my remarks there are incomplete there 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 made whole through some appropriate ex post cash payment. Cf. Lichtman at \_.

<sup>20</sup> Similar explanations are used to justify the use of property rules instead of liability rules. See Posner at 69; Kaplow & Shavell 109 Harvard 713. Posner offers a third explanation, as well: injunctions spare courts the expense of estimating damages in cases where that would be expensive work. That is true, but neither he nor I find it compelling. Posner rejects this explanation on the ground that the expense would likely be worthwhile: it would only be incurred in litigated cases, but it would yield benefits more broadly given how many disputes settle in the shadow of the courts. I reject it on the ground that it speaks to the wrong issue: concerns about expense would explain why courts might choose to estimate damages rather than trying to calculate them precisely, but those concerns do not at all explain why courts should use injunctive relief rather than those cheap but imperfect estimates.

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 with patent infringement are irreparable because they are hard to accurately monetize. Indeed, no matter whether the issue is benefit or harm, the core characteristic to keep in mind is irreparability. The central question is whether there is some reason that the remedies available at the end of litigation might not suffice to counteract whatever changes might take place during the course of litigation. If so, the tradeoff between accuracy and efficacy emerges, and there is reason to make a slightly rushed decision rather than a more thorough but possibly less effective one.

Of course, when it comes to identifying irreparable consequences, attention to detail is essential. Return to my patent example. A patent holder suffers irreparable harm if infringement is allowed to continue during the course of litigation. The harm is irreparable because it is difficult for a court to play out the necessary counterfactual—namely, how the patent holder’s status would have changed had the infringement been stopped right away. That same patent holder likely does not suffer irreparable harm, however, if it can be shown that the patent has been licensed to a large number of other firms. The existence of those other licenses makes it easy for the court to value the patent, and thus eliminates the problem that originally made the harm seem irreparable.<sup>21</sup> An accused infringer, meanwhile, seems to enjoy an irreparable benefit if allowed to pursue research that actually turns out to infringe. However, in cases where that research ties directly to the sale of some product or service, it might not be irreparable. If the infringer earned \$100 in profits thanks to the impermissible use, the court can even the ledger by taking away that tainted cash. 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 of disentangling the value of the infringement from the value of the rest of the car.<sup>22</sup>

I should stress that, while in this section I am emphasizing the close relationship between irreparable harms and irreparable benefits, I do not by this mean to imply that the policy implications or moral weights are interchangeable. Not at all. The reasons to care about the irreparable harm suffered by a patent

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<sup>21</sup> I have a case on this

<sup>22</sup> famous cases. then: I continue to be puzzled by the fact that courts do not aggressively use bonds and fines as a way of teasing out private valuations. [Cite to Lichtman paper, and discuss.]

holder whose patent is wrongfully infringed are very different from the reasons to care about the associated irreparable benefit enjoyed by the relevant infringer. As I have explained, the harm might in the long run 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. Moral weights, too, surely differ, with most people intuitively worrying more about undeserved harms than they do about unwarranted gains. My point is only that irreparable benefits and irreparable harms are similar in the sense that they are both irreversible consequences that will attach during the course of litigation, they both have distributional implications, and they both can distort incentives away from those that would be achieved were the preliminary decision able to accurately anticipate the final ruling on the merits.

### III. Rethinking the Standard

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 obvious implication of my work is to suggest that two more are relevant to the analysis: (4) the irreparable benefit the nonmoving party will enjoy if the injunction is wrongly denied; and (5) the irreparable benefit the moving party will enjoy in the event of wrongful issuance. Taken together, these five considerations would empower a court to estimate not only the likelihood of court 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 on the merits, bluntly because that is the most reliable factor of the five in play. Irreparable harms and benefits are by definition difficult to quantify.<sup>23</sup> Worse, irreparable benefits often interact with irreparable harms in ways that a court cannot easily track. In the patent hypothetical, for instance, the main reason to worry about the irreparable harm that threatens the patent holder is that this harm would in the long run undermine the incentives created by patent protection. The irreparable benefit in play for that same patent holder is mainly troubling for the opposite reason: unearned protection would in the long run encourage inventors to work on inventions that the patent system itself would not protect. For some inventors—say, inventors who are unsure into which category their inventions will fall—these long-run consequences cancel

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<sup>23</sup> doug’s criticism from last paper goes here.

out. But a court would be hard pressed to run 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. After all, courts are well equipped to evaluate legal arguments and parse evidentiary records. They also should be relatively good at evaluating more subtle clues like 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 where the judge is subconsciously influenced by his earlier decision when he later makes rulings or announces jury instructions.<sup>24</sup> And it is sometimes just an unavoidable ramification of preliminary relief, as where an injunction temporarily entrusts a minor to the custody of one of two feuding foster families, the unintended consequence being that the minor then strengthens his or her attachment with the chosen family, which in turn changes the case on the merits.<sup>25</sup> Thus a court should emphasize its prediction on the merits much more heavily than its estimates with respect to the various irreparable consequences. The former is likely pretty accurate, whereas the latter are educated guesses at best.

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 court errors as opposed to minimizing 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 in any case where 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 ultimate ruling on the merits. After all, if the moving party is more likely to win than to lose, in most cases he 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 to consider in addition 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.

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<sup>24</sup> get footnote info from other paper

<sup>25</sup> cites from previous paper. also: the jle paper says prelimin inj often are dispositive of cases due to stakes.

This tradeoff between accuracy and severity knows no general solution. Even in the simplest case where 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 where incentives are a concern complicate the problem, with the analysis now depending 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 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 above 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 push in the right direction.

### **III. 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 similarly be difficult to counteract. I would do so by introducing two additional considerations to the conventional analysis. Courts would be asked to consider the irreparable benefit enjoyed by the moving party in the event of errant issuance and the irreparable benefit enjoyed by the non-moving party in the event of an errant denial. That would admittedly complicate the analysis. However, the current approach simplifies things by arbitrarily ignoring half the problem; and, besides, as I have argued here, a court should mainly be focused on its prediction with respect to the merits anyway.

That leaves two final issues to address. First, both the traditional definition of irreparable harm and my own definition of irreparable benefit measure irreparability from the perspective of the relevant private party, rather than looking more broadly for irreversible consequences that might be felt by third parties or society in general. This is in some ways problematic. If a given action will result in significant air pollution but the complaining party is willing to accept cash as payment for that harm, air pollution is still "irreparable" in the sense that its effect on society cannot be easily undone. I have not broadened the definition of irreparability to embrace this sort of example, however, because this type of irreparability cannot be adequately addressed through private litigation.

A party who is willing to accept cash in exchange for irreversible pollution might also settle the case too readily or neglect to even bring it in the first place. Thus, although irreversible externalities are of course important concerns that should affect a court's willingness to intervene, these are not concerns that can be well addressed through motion practice. Other mechanisms must be brought to bear, such as direct regulation of the relevant behavior or public-interest litigation coordinated by government officials.

Second, I have said nothing in this Essay about permanent injunctions, and I in fact think that the concept of irreparable benefit has little payoff in that context. The reason is that decisions with respect to permanent relief are made entirely with an eye to the merits. What I mean is that, 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 final and merely decides whether injunctive relief is among the types of remedies available under the relevant substantive law. This is in sharp contrast to the analysis relevant to preliminary relief, where the decision turns not only on the merits but also on the likelihood and magnitude of court error. Because of this difference, irreparable benefits have no place in the analysis. There is no reason to measure the consequences of error more precisely; error costs are not a factor when it comes to permanent relief.