Economic Analysis of the Irreparable Harm Concept in Preliminary Injunctions

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Abstract

In deciding whether to grant a preliminary injunction courts compare the expected irreparable harm if the injunction is not issued to the irreparable harm that would result if the injunction is issued. An injury is considered irreparable only as far as it “cannot be cured by a remedy after trial.” This Article demonstrates that to maximize social welfare (“efficiency”) the definition of irreparable harm must be modified. From a social-welfare perspective, harms to one party which do not correlate to corresponding benefits to the other party are deadweight-losses, regardless of the availability of a remedy that may merely reallocate them from one party to another. Consequently, the implementation of the current doctrine, which allows courts to disregard losses that can be compensated for, leads courts to grant, in some cases, inefficient preliminary injunctions, and to reject, in other cases, applications for efficient ones. Deadweight-losses must be considered as “irreparable harms,” and should thus be taken into account in deciding whether to issue a preliminary injunction, irrespective of the availability of an ex-post remedy.

INTRODUCTION

A preliminary injunction aims to prevent irreparable harms in the period of the trial. To achieve its goal, the preliminary remedy must be issued quickly, early in the course of the litigation, before all the evidence can be studied or even made available. In deciding whether to grant a preliminary injunction courts compare between the irreparable harm that the

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moving-party will suffer if the injunction is not issued and this party ultimately prevails on the merits, and the irreparable harm that the enjoined-party might suffer if the injunction is issued and this party wins at the end of trial. Harm is considered irreparable only when it “cannot be cured by a remedy after trial.”¹ As summarized by Judge Posner in *Roland Machinery Co. v. Dresser Industries*,² harm suffered by the defendant as a result of the preliminary injunction is considered reparable, and thus irrelevant in deciding whether to issue the injunction, whenever it “can be either cured by the defendant’s ultimately prevailing in the trial on the merits or fully compensated by the injunction bond.”³

We argue that efficiency entails that this “no available remedy” definition of irreparable harm is incorrect, as it disregards relevant social harms. In determining what harms should be considered as irreparable it is essential to distinguish between two types of harms that can result from the decision whether to issue a preliminary injunction. (1) A direct net loss of social welfare (deadweight-loss); and (2) an errant transfer of wealth from a party who is legally entitled to it to a non-entitled party (undeserved-wealth-transfer). For instance, assume that the plaintiff applies for a preliminary injunction to restrict the defendant from producing a drug due to its alleged violation of the plaintiff’s patent.⁴ As indicated, the court should compare between the irreparable harm if the injunction is not issued and the plaintiff ultimately prevails, and the irreparable harm if the injunction is issued and the defendant wins at the end of trial. Focusing on the latter factor, a “wrong preliminary injunction”⁵ may generate a loss of production and consumption of the drug (deadweight-loss); and it may enable the plaintiff to extract profits that would otherwise be obtained by the defendant (undeserved-wealth-transfer). These two types of harms differ in terms of their reparability by an *ex-post* remedy: the remedy can eliminate undeserved-wealth-transfers; but

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² 749 F.2d 380 (7th Cir. 1984).
³ *Ibid*, at 386.
⁴ The plaintiff may not always be the party requesting a preliminary injunction, but for simplicity of exposition throughout this article we refer to the party seeking preliminary injunction as the plaintiff.
⁵ The term “wrong preliminary injunction” does not necessarily imply that the court erred in issuing the provisional relief, given the available information at the stage of the preliminary proceedings. It only indicates that ultimately, after considering the plaintiff’s claim on its merits, the court decided in favor of the defendant.
compensation for deadweight-loss merely reallocates the burden from one party to another, without eliminating the cost from a social perspective. Consequently, the traditional definition, which views irreparable harm as a “harm that cannot be cured by a remedy after trial” is correct only as far as undeserved-wealth-transfers are concerned. A deadweight-loss suffered by one party is *socially* irreparable even if this party’s private loss can be cured by a remedy after trial. An efficiency-based approach, which measures harms from a social, mandates defining such losses as irreparable, even if the party who bears them will be compensated for at the end of trial.

To illustrate, consider the following simple example: the irreparable harm if a preliminary injunction is not issued is $50; and the harm suffered by the defendant in case of a “wrong” preliminary injunction (i.e., if it is ultimately found that the enjoined party had the right to do the enjoined act) is $60. Assume, for simplicity, that each party is equally likely to win the case on its merits. According to the prevailing legal test, the decision whether a court should issue a preliminary injunction is based on evaluating what part of the defendant’s harm, $60, is reparable. Assume that if the defendant prevails on the merits, the plaintiff will be required to compensate the defendant for $40 out of the $60 loss. Under these assumptions, the court would issue a preliminary injunction: the court considers only the uncompensated loss of the defendant as irreparable, and would conclude that the irreparable harm from denying the injunction ($50) exceeds the irreparable harm from issuing it ($20). However, if the defendant’s harm represents a deadweight-loss, this outcome is inefficient since the expected social cost caused by the preliminary injunction, 0.5x$60, is higher than the social cost that it prevents, 0.5x$50.

Richard Brooks and Warren Schwartz have recently suggested that if the plaintiff assumes the risk of bearing the defendant’s harm in case of a wrong preliminary injunction, the court should not take into account the defendant’s harm in deciding whether to issue the preliminary injunction. However, this reasoning is inaccurate. As indicated, efficiency entails that the relevant consideration is whether an *ex-post* remedy can eliminate the social harm that the injunction inflicts. In some cases it can. This happens when the wrong

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preliminary injunction creates only undeserved-wealth-transfer, i.e. it enables the plaintiff to extract a profit that corresponds to a parallel loss of the defendant. However, a wrong preliminary injunction may also create a deadweight-loss, such as when the harm to the enjoined-party is not matched with a benefit that the moving-party obtains. Compensating the defendant for a deadweight-loss reallocates the burden of its cost from one party to another, but it does not eliminate the social cost.

The immediate implication is that in deciding whether to issue a preliminary injunction, courts should take into account harms that represent deadweight-loss in their entire amount (i.e., to consider them as irreparable), regardless of the availability of an \textit{ex-post} remedy. Implementing this revision of the standard test would increase the likelihood that the court’s decision whether to issue a preliminary injunction will be the socially desirable one. It will minimize the probable irreparable harm from an erroneous assignment of entitlements at the preliminary stage.

The Article proceeds as follows: Part I briefly discusses the aim of preliminary injunctions— minimization of the irreparable loss of rights resulting from an erroneous assignment of entitlements at the preliminary stage. Part II presents our main argument, that deadweight-loss should be considered as irreparable harm, irrespective of the availability of an \textit{ex-post} remedy.

\section{I. Aim of Issuing Preliminary Injunctions}

It takes time, often months and even years, to decide a case and to provide an effective remedy for the protection of rights.\footnote{For instance, the median time intervals from filing to disposition of civil cases in which trial was completed by U.S. District Courts during the 12-month period ending September 30, 2005 was 22.5 months. \textsc{Leonidas R. Mecham, Ann. Rep. of the Director of the Admin. Office of the United States Courts} 204 (2005).} During this period, irreversible events may make the legal remedy ineffective. Preliminary, pre-trial remedies are designed to ease this problem by mitigating the risk of the occurrence of such irreversible events.\footnote{The preliminary relief may also prevent the defendant from inflicting reparable harms during the trial and may thus save the plaintiff the litigation costs of suing for compensations for these harms.} Preliminary injunctions
are issued on the basis of a hearing, but the hearing “is usually attenuated and much less than
due process would require for a full trial.” It is widely recognized that to meet the due
process requirements it is sufficient to offer the defendant a speedy, even if only rudimentary, hearing after the issuance of a restricting order, with the right to damages for wrongful injunctions.10

The decision whether to issue a preliminary injunction thus raises an inherent difficulty. On the one hand, this relief is often an essential tool for protecting the plaintiff’s interests, given the legal system’s deficiencies in providing final remedies in due course and the prospect of irreparable harms. On the other hand, the fact that the relief is issued without a full inquiry into the merits of the case entails a substantial risk that the issuance of the preliminary injunction would unjustifiably harm the defendant, as well as third parties and the public interest.11

The decision whether to issue a preliminary injunction should aim at minimizing the expected irreparable social costs that result from the delay in deciding the case on the merits. The required inquiry is which preliminary decision will “minimize the probable irreparable loss of rights” from an erroneous (preliminary) assignment of entitlements. Specifically, preliminary relief should be issued only if (1) the injunction is required to prevent an irreparable harm; and (2) this harm outweighs the expected irreparable harm imposed as a result of the preliminary injunction.12 This general standard, known as the “Leubsdorf-

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9 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 184 (2d ed. 1993).
11 See, e.g., DOBBS, supra note 9, at 187 (“The potential for abuse and error in injunctive orders is usually very large”).
13 Thus, it is immaterial whether the moving party seeks to preserve the status quo or to deviate from it. See, e.g., Thomas R. Lee, Preliminary Injunctions and the Status Quo, 58 WASH. & LEE L. REV. 109, 157-66 (2001) (arguing that the heightened standard in cases of preliminary injunction that upset the status quo is historically and theoretically unsound, and supporting a uniform standard).
Posner” error-minimizing formulation,\(^{14}\) is often (at least implicitly) applied by courts,\(^{15}\) along with the more traditional, four-factor “balance of the hardships” test.\(^{16}\) The central question is what types of harm should be considered as “irreparable.” We now move to analyze this issue, and suggest that the current definition should be modified.

## II. IRREPARABLE HARM

Some aspects of the “expected irreparable harm” concept were already analyzed extensively. Among these aspects: the debate about risk aversion as a possible reason for the inherent inadequacy of a pecuniary remedy to compensate for harms,\(^{17}\) and the concern that...
a delay in providing a relief would result in a party’s insolvency.\textsuperscript{18} We discuss two other elements of this formulation.

The issuance of a preliminary injunction inflicts harm which is relevant to the decision whether to issue a preliminary injunction only if it turns out that the relief \textit{wrongly} enjoyed a party; respectively, the issuance of a preliminary injunction prevents relevant harm only if it turns out that it \textit{rightly} enjoyed a party. Therefore, the scope of the irreparable harm if the injunction is not issued should be discounted by the likelihood that the plaintiff will win the case, as evaluated at the pre-trial stage; and the amount of irreparable harm if the injunction is issued should be similarly discounted according to the defendant’s likelihood of success.\textsuperscript{19} Hence, the relevant comparison is between the expected value of the irreparable harm of each of the possible decisions.\textsuperscript{20}

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\begin{enumerate}
\item a remedy of damages creates a risk he may not like (because he is risk adverse…), even though the upside risk is as large as the downside risk.’’); \textit{Cf.} Douglas Lichtman, \textit{Irreparable Benefits}, 116 YALE L.J. 1284, 1292 (2007) (‘‘Most irreparable harms…are irreparable only in the sense that the harm at issue is difficult for a court to value.’’).
\item See, \textit{Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.}, 527 U.S. 308, 329-33 (1999) (the risk that the defendant will become insolvent does not establish the plaintiff’s right to preliminary injunction). \textit{Cf.} \textit{American Hospital, id.} at 597 (‘‘A preliminary injunction that will or may precipitate a firm into bankruptcy is … a source of costs which ought to be considered in deciding whether to grant such an injunction.’’); Carter-Wallace, Inc. v. Davis-Edwards Pharmacal Corp., 443 F.2d 867, 886 (2nd Cir. 1971) (Friendly, J.); \textit{Note, Leading Cases: II. Federal Jurisdiction and Procedure} 113 HARV. L. REV. 316, 324-26 (1999) (injunctive relief is appropriate if an investor does not have adequate legal remedy in the case of the debtor’s insolvency); Rhonda Wasserman, \textit{Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments}, 67 WASH. L. REV. 257, 263 (1992) (same); Lars E. Johansson, \textit{The Mareva Injunction: A Remedy in the Pursuit of the Errant Defendant}, 31 U.C. DAVIS L. REV. 1091, 1092 (1998).
\item For suggestions to refine this standard see Davis, \textit{supra} note 15 (each party’s irreparable harm should be discounted according to the likelihood that the party is right, rather than the likelihood that the actual result of the trial will be in its favor, thus accounting for the court’s degree of confidence about the merits of a case); and Douglas Lichtman, \textit{Uncertainty and the Standard for Preliminary Relief}, 70 U. CHI. L. REV. 197 (2003) (suggesting to take into account the court’s level of uncertainty about its estimates of the harms).
\item This formulation represents a “sliding scale” approach, which allows a party with less than a 50\% chance of winning on the merits to succeed on the motion. \textit{DOBBS, supra} note 9, at 193-96 (“The plaintiff with a less than 50\% chance of success could still justly receive…pretrial assistance if it will prevent an enormous irreparable loss compared to a minimal loss for the defendant.’’). For a critique see Linda J. Silberman, \textit{Injunctions by the Numbers: Less than the Sum of Its Parts}, 63 CHI.-KENT. L. REV. 279, 304-7 (1987) (the formula deviates from “the traditional standard for issuance of preliminary injunctions” since it “does not suggest that any threshold amount of harm or probability
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This approach is based on the notion that an “efficient” preliminary injunction is one that minimizes costs given a certain set of legal rights, i.e. given a certain distribution of entitlements. The underlying assumption is that legal rights have their merits. Disrupting the allocation structure they create is thus costly. For example, it may hinder incentives to invest.\textsuperscript{21} This “entitlement-sensitive” formulation is distinguished from an “entitlement-blind” approach, which is based solely on an evaluation of the aggregated effects of the preliminary injunction on social welfare.\textsuperscript{22} To illustrate, assume that the irreparable harm if the injunction is not issued is $100, and that the irreparable harm if it is issued is $80. The entitlement-blind approach calls for the issuance of a preliminary injunction regardless of the likelihood of the possible outcomes of the trial, as the assignment of the entitlement to the plaintiff in this case yields a higher value (a save of $100) than its alternative ($80). However, under the entitlement-sensitive formulation, it is inefficient to issue the preliminary injunction if the likelihood that the entitlement is assigned to the defendant is high enough (in this example, if this likelihood exceeds 56%).\textsuperscript{23} Examining the justifications for adopting an “entitlement-sensitive” approach is beyond the scope of our inquiry. It suffices to state that requiring the court to be entitlement-sensitive in the present scenario is justified based on the public interest in confining public authorities to lawful actions, and on of success is necessary.”); Denlow, \textit{supra} note 16, at 538. \textit{See also} Centurion Reinsurance Co. v. Singer, 810 F.2d 140, 145 (7th Cir. 1987) (“No matter how strongly the balance of irreparable harms may incline in favor of the party asking for a preliminary injunction, it is error to grant the injunction if the party has … only a very slight chance of prevailing on the merits.”); Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (“The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits.”).

\textsuperscript{21} For a similar approach see John Leubsdorf, \textit{Preliminary Injunctions: In Defense of the Merits}, 76 \textit{FORDHAM L. REV.} 33, 44 (2007) (“It would be better for courts to retain the law as their initial guide to deciding what conduct is socially undesirable, even at the interlocutory stage, rather than trying to evaluate efficiency on a case-by-case basis.”)

\textsuperscript{22} An “entitlement-blind” approach is implicitly applied by Brooks & Schwartz, \textit{supra} note 6, at 403-04.

\textsuperscript{23} According to the error-minimizing formulation, a preliminary injunction should be issued in this case only if: $100p>80(1-p)$, where $p$ is the likelihood that the entitlement is assigned to the plaintiff. This inequality yields that a preliminary injunction should be issued only if $p > \frac{4}{9}$, i.e., if $(1-p) < \frac{5}{9} \approx 56\%$. 


evidentiary difficulties, such as the complexity of assessing and providing full compensation. Accordingly, in the discussion that follows the term “efficient preliminary injunction” is used to denote an application of the entitlement-sensitive approach.

As indicated, the standard for issuing preliminary injunction should aim at minimizing judicial errors.\footnote{Lichtman, supra note 17, at 1287 n. 3 (“The goal according to virtually every scholarly and judicial account [is to minimize deviations from what will be the ultimate ruling on the merits!”); ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 131 (2003) (defining “expected error cost”); POSNER, supra note 14, at 594-95 (discussing costs of error in civil cases); Jon O. Newman, Rethinking Fairness: Perspectives on the Litigation Process, 94 YALE L.J. 1643, 1647-49 (1985) (noting effort to minimize risk of error as central to fairness in litigation).} Under an efficiency-based approach, the “costs” of errors are measured from a social, \textit{ex-ante} perspective. The relevant harm of a decision not to issue a preliminary injunction is measured not only according to the plaintiff’s harm, but also according to the cost of the expected effect on future behavior of those in the plaintiff’s position. For instance, the social cost of denying a preliminary injunction to a patent holder includes the adverse effects of such a decision on incentives to invest in research.\footnote{Lichtman, supra note 17, at 1289 (“[An errant denial of a patent holder request for preliminary injunction inflicts] 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.”).} In terms of the formal doctrine, this aspect is taken into account under the “public interest” factor.\footnote{See, e.g., Roland Machinery, 749 F.2d at 387 (Posner J.) (in cases in which “granting or denying a preliminary injunction will have consequences beyond the immediate parties... those interests—the ‘public interest’ if you will—must be reckoned into the weighing process.”). Some scholars argue that harms to “non-parties” should not be considered in the decision whether to issue the preliminary injunction. Leubsdorf, \textit{supra} note 12, at 549 (arguing that “to consider interests irrelevant to the final decision at the preliminary stage will only increase the cost of the litigation and undermine the substantive law.”); Denlow, \textit{supra} note 16, at 539; Arthur D. Wolf, Preliminary Injunctions: The Varying Standards, 7 W. NEW ENGL. L. REV. 173, 234-35 (1984); Lea B. Vaughn, A Need for Clarity: Toward a New Standard for Preliminary Injunctions, 68 OR. L. REV. 839, 848 (1989) (“In the midst of existing fact uncertainty, an unbounded consideration of public interest threatens to overwhelm the process”). However, the prevailing view is that third-parties interests are relevant. \textit{American Hospital}, 780 F.2d at 594; Laura W. Stein, The Court and the Community: Why Non-Party Interests Should Count in Preliminary Injunction Actions, 16 REV. LITIG. 27 (1997); LAYCOCK, \textit{supra} note 1, at 273 (the court should consider “the severity and the likelihood of such harm to each litigant and to the public if the requested relief is granted and if it is denied”); Orin H. Lewis, “\textit{The Wild Card That Is the Public Interest}”: Putting a New Face on the Fourth Preliminary Injunction Factor, 72 TEX. L. REV. 849, 854, 874-82 (1994); Leubsdorf, \textit{supra} note 21, at 41-43.}
It is important to distinguish in this respect between two types of possible harms of a decision whether to issue a preliminary injunction: a direct net loss of social welfare ("deadweight-loss"), and an errant transfer of wealth from a party who is legally entitled to it to a non-entitled party ("undeserved-wealth-transfer"). Deadweight-loss is clearly a relevant social cost for determining whether to issue a preliminary injunction. Undeserved-wealth transfer is relevant too, as far as it adversely affects the underlying purpose of assigning the relevant legal entitlement, such as providing optimal incentives to invest in research and development.27

The distinction between these two types of social costs is essential since they differ in terms of their reparability by an ex-post remedy. The remedy can eliminate undeserved-wealth-transfers. In contrast, compensation for deadweight-loss merely reallocates the burden from one party to another, without eliminating the social cost. In this respect, the traditional definition of irreparable harm as a “harm that cannot be cured by a remedy after trial,”28 should be qualified. A deadweight-loss suffered by one party is socially irreparable even if this party’s private loss can be cured by a remedy after trial. The available remedies—both when the plaintiff prevails and a preliminary injunction was not issued, and when a wrong preliminary injunction was issued but the defendant prevails—determine only what undeserved-wealth-transfers should be regarded as relevant irreparable social costs.

To illustrate, assume, for simplicity, that the court evaluates that each side has equal chances of winning the case. Given this assumption, a preliminary injunction should be issued if and only if the social costs caused by allowing the defendant to continue with her conduct (A), exceeds the social costs inflicted by stopping her (S). To focus our attention on deadweight-loss, assume that any undeserved-wealth-transfer between the plaintiff and the defendant due to a wrong preliminary decision is recoverable through an appropriate

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27 Thus, the relevant social cost in this case should be calculated based on the expected effect of such transfer of wealth on relevant incentives. As recently pointed out by Douglas Lichtman, a decision whether to issue a preliminary injunction that confers "errant irreparable benefits" on one party may inflict social harm even if the other litigating party does not suffer any loss. Lichtman, supra note 17, at 1289-90 ("Undeserved 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 research...").

28 LAYCOCK, supra note 1, at 113.
remedy, such that all relevant harms \((A\text{ and } S)\) represent deadweight-loss. Part of these losses may be compensated for too.\(^{29}\) Thus, only part of the plaintiff’s harm if the defendant is allowed to continue her activity during the trial (i.e., a preliminary injunction is not issued) cannot be cured by an ex-post remedy \((A_{uc})\), while the other part can be compensated for \((A_{c}, \text{ where } A_{uc}+A_{c}=A)\). Similarly, only part of the defendant’s harm from a wrong preliminary injunction cannot be compensated for by an ex-post remedy \((S_{uc})\), and some part of this harm too can be cured \((S_{c}, \text{ where } S_{uc}+S_{c}=S)\). The current doctrine of irreparable harm, which requires taking into account only the uncompensated parts of these harms \((A_{uc} \text{ and } S_{uc})\), may thus induce two types of inefficient decisions:

(1) *The Court does not issue an efficient preliminary injunction.* This outcome is expected when a substantial portion of the harm from a wrong preliminary injunction is uncompensated \((S_{uc}>>S_{c})\), while the harms from not granting the preliminary injunction are divided more equally into compensated and uncompensated harms \((A_{c} \approx A_{uc})\). In such cases the court does not issue an efficient preliminary injunction, because it takes into account only a small portion of the benefit from issuing a preliminary injunction. Consider the following case: \(A_{c}=$50; \ A_{uc}=$50; \ S_{c}=$10; \ S_{uc}=$65. Issuing a preliminary injunction is efficient. Yet, the preliminary injunction will not be granted, since the uncompensated harm from the preliminary injunction, \$65, exceeds the uncompensated harm from denying the motion, \$50.

(2) *The Court issues an inefficient preliminary injunction.* This outcome is expected when the damage from the preliminary injunction is divided relatively equally between compensated and uncompensated harms \((S_{c} \approx S_{uc})\) but a substantial portion of the harm from not issuing the preliminary injunction is uncompensated \((A_{uc}>>A_{c})\). Here the problem is that the court does not take into account the full harm from issuing the preliminary injunction, because it considers only the uncompensated part of the harm. Consider, for illustration, the following figures: \(A_{c}=$10; \ A_{uc}=$90; \ S_{c}=$65; \ S_{uc}=$60. It is inefficient to issue a preliminary

\(^{29}\) The division between compensated and uncompensated harms is determined by two sets of factors: exogenous factors, such as the portion of the harm that is suffered by third parties, and the scope of harms that cannot be cured by an *ex-post* remedy; and the legal rules that govern the availability and the scope of *ex-post* remedies.
injunction, since its cost, $125, exceeds its benefit, $100. Nevertheless, the court would grant it, as the uncompensated harm from not issuing the order, $90, exceeds the uncompensated harm from issuing it, $60.

Both concerns are directly attributed to the current doctrine of irreparable harm, under which courts readily ignore parts of the harms that their decision may cause. The likelihood of inefficient judicial decision is higher the closer $S$ is to $A$. Specifically, if the uncompensated portions of the harms suffered by the litigants, $\frac{A_{uc}}{A}$ and $\frac{S_{uc}}{S}$ are uniformly and independently distributed, such that each pair $(A_{uc}, S_{uc})$ in the above range is equally likely, we get the following results.

**Diagram 1: The likelihood of inefficient judicial decisions as a function of $\frac{S}{A}$**

Diagram 1 shows that when $0.9A < S < 1.1A$, it is almost as likely that the court will reach an inefficient outcome as it is that it will decide as socially desirable. Furthermore, as long as $0.8A < S < 1.3A$, the likelihood of a court’s error exceeds 25%, and when $0.65A < S < 1.55A$ it is still higher than 10%. Thus, repairing the definition of irreparable damage along the lines that we suggest can contribute substantially to mitigating the concern of inefficient judicial decisions.
CONCLUSIONS

Assuming that courts are not systematically inclined to overestimate certain harms and to underestimate other losses, there is no good reason to instruct them to disregard true social losses just because they can be transferred between the parties. Therefore, in the case of deciding whether to issue a preliminary injunction all harms in the form of deadweight-loss should be taken into account, regardless of the availability of an *ex-post* remedy.

More generally, the discussion demonstrates that when an actor (in the current case, the moving party) bears only part of the social costs, it is inefficient to divide the decision-power between the actor and a centralized decision-maker, by requiring the latter to take into account only the un-internalized part of the social harm inflicted by the actor’s behavior. In such cases, of which the issuance of a preliminary injunction is just an example,\(^\text{30}\) the centralized decision-maker must consider the entire social harm, including the part internalized by the private actor.

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\(^{30}\) Robert Cooter and Ariel Porat offer a similar logic to criticize the exclusion of risk to oneself from the doctrine of negligence. Robert Cooter and Ariel Porat, *Anti-Insurance*, 31 J. LEGAL STUD. 203 (2002).