

## TALKING POINTS

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*Our civil liability system affords numerous defenses against every single violation of the law. Against every single claim raised by the plaintiff, the defendant can assert two or more defenses, each of which gives her an opportunity to win the case. As a result, when a court erroneously strikes out a meritorious defense, it might still keep the defendant out of harm's way by granting her another defense. Rightful plaintiffs, on the other hand, must convince the court to deny each and every defense asserted by the defendant. Any rate of adjudicative errors—random and completely unbiased—consequently increases the prospect of losing the case for meritorious plaintiffs while decreasing it for defendants. This prodefendant bias forces plaintiffs to settle suits below their expected value. Worse yet, defendants can unilaterally reduce the suit's expected value and extort a cheap settlement from the plaintiff through a strategic addition of defenses. We uncover and analyze this problem and its distortionary effect on settlements and primary behavior. Subsequently, we develop three alternative solutions to the problem and evaluate their pros and cons.*

### TABLE OF CONTENTS

I.	INTRODUCTION .....	1260
II.	THE PRODEFENDANT BIAS .....	1264
	A. <i>Violation vs. Defenses</i> .....	1264
	B. <i>Allocation of Errors Across Claims</i> .....	1268
III.	DISTORTIONARY EFFECTS .....	1273
	A. <i>Unfairness</i> .....	1275
	B. <i>Distortion of Primary Behavior</i> .....	1275
	C. <i>Can Contracting Help?</i> .....	1276
IV.	SOLUTIONS .....	1276

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A. Procedural Solution .....	1276
B. Compensatory Solution .....	1279
C. Substantive Solution.....	1282
V. CONCLUSION .....	1285

## I. INTRODUCTION

Under our civil liability system, a plaintiff's entitlement to recover remedies pursuant to the defendant's wrongdoing is qualified by multiple defenses. The system allows defendants not only to deny the alleged wrongdoing, but also to raise one or more defenses that reduce or completely eliminate the plaintiff's entitlement to a remedy.<sup>1</sup> Put simply, against every single talking point raised by the plaintiff, the system allows the defendant to raise and pursue two or more talking points that give her an opportunity to win the case. The system thus gives defendants a serious opportunity advantage over plaintiffs.

For example, a plaintiff suing the defendant for a breach of contract makes one critical talking point: "The defendant breached the agreement that she and I have made." The defendant, for her part, can counter this talking point by asserting performance or, alternatively, fraud, misrepresentation, mistake, unconscionability, or another defense.<sup>2</sup> Because the defendant needs to succeed on only one of her talking points out of several, she has more opportunities to win the case than the plaintiff.<sup>3</sup>

In tort actions, things are no different. There, in addition to denying the plaintiff's allegation, "the defendant acted negligently and caused me damage," the defendant can assert assumption of risk, avoidable consequences, and comparative negligence defenses.<sup>4</sup> If she succeeds on just

1. See FED. R. CIV. P. 8(b)(3), (c), (d)(3) (permitting defendant to deny plaintiff's allegations in general or specifically and raise, in addition, multiple affirmative defenses that can be "as many . . . as [he] has, regardless of consistency"); see also Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 187, 250 (2013) ("Most states have adopted the Federal Rules of Civil Procedure.").

2. See, e.g., William V. Dorsaneo III & C. Paul Rogers III, *The Flawed Nexus Between Contract Law and the Rules of Procedure: Why Rules 8 and 9 Must Be Changed*, 31 REV. LITIG. 233, 241-59 (2012) (analyzing the effect of the breach/defense structure of contract law on the rules of pleading); David A. Hoffman & Alexander S. Radus, *Instructing Juries on Noneconomic Contract Damages*, 81 FORDHAM L. REV. 1221, 1253 (2012) (stating that adjudication of contract disputes proceeds along "consequential issues of interpretation, material breach, and defenses").

3. See, e.g., *United States ex rel. Ragghianti Founds. III, LLC v. Peter R. Brown Constr., Inc.*, No. 8:12-cv-942-T-33MAP, 2014 WL 103457, at \*11 (M.D. Fla. Jan. 10, 2014) (noting that defendant raised the following defenses in response to a breach of contract allegation: "(1) Prior Breach; (2) Payment; (3) Conversion of Termination for Default; (4) Setoff; (5) Estoppel; (6) Failure to Mitigate; and (7) Barment").

4. See, e.g., Alan J. Meese, *The Externality of Victim Care*, 68 U. CHI. L. REV. 1201, 1204-09 (2001) (describing the wrongdoing/defense structure of tort liability); see also Stephen G. Gilles, *Inevitable Accident in Classical English Tort Law*, 43 EMORY L.J. 575, 578 (1994) ("The structure of classical tort liability was thus determined by two principles—a principle of responsibility and a principle of excuse."); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 971 (2010) ("[Tort law] plausibly identifies different forms or classes of wrongings, subject to different definitions and defenses.").

one of those talking points, she wins the case. Hence, tort defendants, too, outscore plaintiffs on talking points.<sup>5</sup> And, as we demonstrate in the pages ahead, all other areas of the law give defendants the same structural advantage.<sup>6</sup>

The defendants' talking points advantage would be of no consequence if our courts<sup>7</sup> were omniscient. But courts, like all human run systems, make mistakes.<sup>8</sup> The defendants' talking points advantage consequently translates into a greater immunity against courts' errors. When a court erroneously strikes out a meritorious defense, it might still keep the defendant out of harm's way by granting her another defense. A rightful plaintiff, for her part, must convince the court to deny each and every defense asserted by the defendant. By erroneously granting one of the defendant's many defenses, the court dooms the plaintiff's meritorious suit. As a result, the plaintiff's chances of losing the case undeservedly are much higher than the defendant's. Any rate of adjudicative errors—even if random and completely unbiased—increases the prospect of losing the case for meritorious plaintiffs while decreasing it for defendants, both rightful and opportunistic. This structural bias is unintended and has hitherto gone unnoticed. We propose to remove it from our laws.<sup>9</sup>

Consider, for example, a suit for \$1,000,000<sup>10</sup> in tort damages in which the defendant disputes the alleged negligence and raises the contributory fault defense.<sup>11</sup> After analyzing the evidence and applicable legal rules, the plaintiff forms an estimate that she should prevail on both issues, subject to the omnipresent possibility that the court will reach a mistaken decision on one of those issues. The plaintiff also estimates that, in a case like hers, the court's probability of making an erroneous ruling on negligence or contributory fault is about twenty percent. For any such plaintiff, the expected judgment consequently equals \$640,000 (80% × 80% × \$1,000,000). If the plaintiff is rational, she would accept \$640,000 in exchange for the removal of her unquestionably meritorious suit against the defendant. Hence, the prodefendant bias of our legal system reduces the value of the plaintiff's suit by \$360,000 (\$1,000,000—

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5. See, e.g., *Cincinnati Ins. Co. v. Ruch*, 940 F. Supp. 2d 338, 340 (E.D. Va. 2013) (noting that defendants responded to plaintiff's negligence complaint by asserting "a number of affirmative defenses, including failure to state a claim, invalid assignment, contributory negligence, and lack of proximate causation").

6. See *infra* notes 85–93 and accompanying text.

7. In this Article, "court" refers to both judges and jurors.

8. See *infra* notes 13–14, 54 and accompanying text.

9. Criminal law falls outside the scope of this Article. We note, parenthetically, that the problems we discuss here rarely arise in the criminal context because criminal defendants are vastly disadvantaged in plea bargaining. See generally Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150 (2012); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

10. For simplicity, we focus throughout this Article on the suit's expected value net of the plaintiff's litigation expenses.

11. See DAN B. DOBBS, *THE LAW OF TORTS* § 199, at 494–98 (2001) (stating and explaining the conditions under which a plaintiff's contributory negligence dooms her suit).

\$640,000).<sup>12</sup> The plaintiff is forced to accept this cheap settlement because the defendant has two talking points, while she has only one.

Consider now a defendant who faces a similar suit. The defendant estimates that the suit is unmeritorious and that she should prevail on both issues—once again, subject to the probability that the court will reach a mistaken decision on either negligence or contributory fault. The defendant also estimates that, in a case like this, the court's probability of making a mistaken decision on each issue is about twenty percent. For any such defendant, the expected judgment equals \$40,000 ( $20\% \times 20\% \times \$1,000,000$ ). The prospect of adjudicative error thus increases the defendant's expected payout (\$0 in the absence of error) by only \$40,000. If the defendant is rational, he would refuse to pay the plaintiff more than \$40,000 for the suit's removal. The defendant achieves this relatively favorable outcome due to her talking points advantage: she has two alternative claims and she only needs to succeed on one of them to win.

This prodefendant bias is pervasive and its implications can be quite dramatic. Our example is illustrative. There, an identical prospect of adjudicative error reduces the plaintiff's optimism about her suit by thirty-six percent, while reducing the defendant's optimism about his defense by only four percent. For the deserving plaintiff, this means that the wrongdoer can extort from her up to \$360,000 in a settlement agreement. The deserving defendant, on the other hand, can only be extorted to pay the plaintiff up to \$40,000 for the removal of the unmeritorious suit.

This structural bias does not exist merely in theory. Recent empirical studies have demonstrated that trial courts err in defendants' favor far more often than they err in favor of plaintiffs.<sup>13</sup> Our discovery of the structural prodefendant bias explains this phenomenon.<sup>14</sup> Defendants have at their disposal far more talking points than plaintiffs and, hence, they fare much better than plaintiffs when courts make mistakes.

Our system's prodefendant bias gives rise to bad consequences. It pressurizes plaintiffs to accept cheap settlements that reduce defendants' liability. This reduction motivates prospective violators to discount the penalties accompanying the applicable rules of primary behavior. Those rules consequently fail to secure individuals' conformance with the socially desirable conduct. This outcome is unfair<sup>15</sup> as well as detrimental to society's welfare.

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12. For simplicity, we assume throughout this Article that parties are risk-neutral. Our analysis will not change when parties are risk-averse. For people's different attitudes toward risk, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 15 (8th ed. 2011).

13. Theodore Eisenberg & Henry S. Farber, *Why Do Plaintiffs Lose Appeals? Biased Trial Courts, Litigious Losers, or Low Trial Win Rates?*, 15 *AM. L. & ECON. REV.* 73, 93 (2013) (reporting a study estimating that "trial courts . . . ma[de] errors adverse to plaintiffs in fully 40.5% of cases, while they are estimated to make errors adverse to defendants in only 13.1% of cases").

14. *Cf. id.* at 105 (citing Theodore Eisenberg & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 *RAND J. ECON.* S92 (1997)) (suggesting a possible selection effect brought about by entrepreneurial plaintiffs who can prosecute risky suits at a low cost).

15. See Robert G. Bone, *Procedure, Participation, Rights*, 90 *B.U. L. REV.* 1011, 1020 & n.44 (2010) (positing that a fair system of civil procedure ought to secure a roughly equal allocation of the

Thus far, legal scholarship has paid no attention to this prodefendant bias. This Article is the first to identify this bias, to analyze its causes and consequences, and to show how to fix it. We propose three solutions to the problem: procedural, compensatory, and substantive. After developing these solutions, we identify their virtues and vices and show how they vary across different areas of the law.

The procedural solution eradicates the defendants' talking points advantage by modifying the extant system of pleadings and trial. Specifically, it prohibits defendants from simultaneously denying the alleged violation and claiming a defense. Under this regime, for every cause of action asserted by the plaintiff, the defendant will have to stick to a single and factually coherent line of defense.

The compensatory solution remedies the imbalance between the plaintiffs' and the defendants' legal burdens by adjusting monetary awards. Specifically, it introduces a damage multiplier that offsets the defendants' talking points advantage. This multiplier would increase the compensation amount recoverable by plaintiffs that prevail in the trial. By making trial more attractive for plaintiffs, this solution tempers the defendants' extortionary motivation in settlements.<sup>16</sup>

The substantive solution tackles the problem directly: it substitutes the malfunctioning violation/defenses system of civil liability by a comprehensive comparative fault regime. Under this regime, parties' responsibility for damages and unperformed agreements will correspond to their faults. These faults will range between zero percent and one hundred percent, and parties will be free to make any claim about these percentages. The number of talking points that plaintiffs and defendants will develop against each other will consequently be equal. Courts' errors will thus no longer be skewed against the plaintiffs. Instead, they will be spread more or less evenly across parties' talking points.

This Article proceeds as follows. In Part II, we analyze the defendants' talking points advantage. In Part III, we specify the resulting unfairness and erosion of welfare. In Part IV, we present our solutions to the problem and examine their pros and cons. A short Conclusion follows.

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risk of error between plaintiffs and defendants); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1884 (2002) (arguing that rules of civil procedure should "provide competing parties comparable procedural opportunities in a given lawsuit").

16. Another measure that one might consider in this connection is to require unsuccessful defendants to reimburse the plaintiff for her litigation expenses. See FED. R. CIV. P. 11(c)(4) (authorizing judges to obligate a party whose claim was found frivolous to pay his opponent's litigation expenses, including "reasonable attorney's fees"). This measure, however, will be ineffectual because a defendant's expected gain from adding more defenses will virtually always exceed the expected Rule 11 penalty by a significant amount.

## II. THE PRODEFENDANT BIAS

### A. *Violation vs. Defenses*

Our tort and contractual liability systems employ a dual mechanism of violations and defenses.<sup>17</sup> This mechanism defines violations very broadly to create a liability presumption against actors whose conduct falls into the “violation” category. Conduct categorized as a “violation” in torts includes actions that cause damage to another person due to the actor’s failure to take the requisite precautions to prevent the relevant harm.<sup>18</sup> In contract law, “violation” includes an actor’s failure to perform her promise to another person.<sup>19</sup> The liability presumption is rebuttable: an actor whose conduct falls into the “violation” category is granted an exemption from liability upon showing that she acted under certain exonerating conditions or circumstances.<sup>20</sup> These conditions and circumstances form numerous “defense” categories.<sup>21</sup>

Consider tort liability first. As a general rule, an actor engaging in a risky activity must take adequate precautions against damage to another person.<sup>22</sup> To be adequate, these precautions must be commensurate with the probability and magnitude of the damage.<sup>23</sup> Under the economic formulation, when precautions capable of preventing the damage cost less than the expected damage, the actor must take them.<sup>24</sup> Failure to do so would make the actor negligent and presumptively responsible for compensating the victim for the ensuing damage.<sup>25</sup>

The actor’s liability would still be merely presumptive, rather than definite, because the victim’s own fault may remove it.<sup>26</sup> Accidents always involve two or more parties with different opportunities to avoid or miti-

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17. For torts, see DOBBS, *supra* note 11, §§ 198–202, at 493–510 (juxtaposing the negligence claim against contributory and comparative fault defenses) and *id.* §§ 203–04, at 510–14 (juxtaposing a negligence claim against the “avoidable consequences” defense). For contracts, see ALLAN E. FARNSWORTH, *CONTRACTS* § 4.1, at 223–24 (3d ed. 1999).

18. See DOBBS, *supra* note 11, § 110, at 257–59 (outlining the elements of the negligence standard and its violation).

19. See FARNSWORTH, *supra* note 17, § 8.1, at 517–19.

20. For torts, see DOBBS, *supra* note 11, §§ 198–204, at 493–514. For contracts, see FARNSWORTH, *supra* note 17, § 8.1, at 517–19.

21. See DOBBS, *supra* note 11, §§ 198–204, at 493–514. For contracts, see FARNSWORTH, *supra* note 17, §§ 4.12, at 250–55, 4.15, at 260–64, 4.16, at 265–66, 4.18, at 270–73, 4.20, at 273–76, 4.28, at 307–16, 8.2, at 519–25, 9.2–9.9, at 619–67; see also *infra* notes 36–44 and accompanying text.

22. See DOBBS, *supra* note 11, §§ 143–44, at 334–40.

23. *Id.*

24. This formulation follows Judge Learned Hand’s famous decision in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). See DOBBS, *supra* note 11, § 145, at 340–43 (outlining the Hand formula); POSNER, *supra* note 12, at 213–17 (outlining, refining, and operationalizing the Hand formula).

25. The same analysis will apply to strict liability for defective products that has a similar violation/defenses format. See DOBBS, *supra* note 11, §§ 352–57, at 968–87 (for violation); *id.* § 369, at 1020–26 (for defenses).

26. See POSNER, *supra* note 12, at 219 (“Since, as every pedestrian knows, many accidents can be prevented by victims at lower cost than by injurers, the law must be careful not to impair the incentives of potential accident victims to take efficient precautions.”).

gate the damage.<sup>27</sup> These opportunities vary from one case to another. In some cases, the injurer is best positioned to avoid the victim's damage. In other cases, the victim's ability and opportunity to avert or mitigate her own damage make her the cheapest damage avoider.<sup>28</sup> Consequently, there are circumstances in which the law assigns the victim's damage, or part thereof, to the victim.<sup>29</sup>

Such circumstances may be present before, during, or after the accident. The victim may get involved in the accident by deliberately putting herself in harm's way. The injurer would then be able to assert "assumption of risk" as a categorical defense against liability.<sup>30</sup> The victim may also unintentionally fail to take reasonable precautions against her own damage. This failure would allow the injurer to raise yet another categorical defense: "contributory negligence."<sup>31</sup> Alternatively, the injurer might be able to claim "comparative negligence"—a defense that would allow him to reduce his compensation duty by the victim's share in her own damage.<sup>32</sup> Finally, when the victim "sleeps on her damage" and allows it to aggravate into a greater harm, the injurer would often be able to defeat her suit by invoking the "avoidable consequence" defense.<sup>33</sup>

This architecture of liability defines the contracts system as well. Contract law imposes liability for acts or omissions deviating from the actor's agreement with another party.<sup>34</sup> The actor's failure to perform the agreement allows the aggrieved party to recover remedies that include compensation and specific performance.<sup>35</sup>

As with torts, liability for a breach of contract is presumptive rather than categorical. Contract law recognizes numerous defenses that forgive or even justify nonperformance. Those defenses include misrepresentation,<sup>36</sup> mistake,<sup>37</sup> impossibility,<sup>38</sup> frustration of purpose,<sup>39</sup> unconscionability,<sup>40</sup> fraud,<sup>41</sup> conditions,<sup>42</sup> undue influence,<sup>43</sup> and economic duress.<sup>44</sup> They

27. See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 182–90 (2004) (analyzing allocation of the burden to take precautions for bilateral accidents).

28. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 68–94, 135–73, 244–65 (1970) (developing "the cheapest cost avoider" method for minimizing the cost of accidents).

29. See DOBBS, *supra* note 11, §§ 198–204, at 493–514 (specifying the circumstances under which the responsibility for an accident goes to the victim).

30. *Id.* §§ 213–15, at 541–50 (outlining the "assumption of risk" defense).

31. *Id.* § 199, at 494–98 (outlining the "contributory negligence" defense).

32. *Id.* §§ 201–02, at 503–10 (outlining the "comparative negligence" defense).

33. *Id.* §§ 203–04, at 510–14 (outlining the "avoidable consequences" defense).

34. See FARNSWORTH, *supra* note 17, § 1.1, at 3–5.

35. *Id.* §12.2, at 760–61 (outlining contract remedies).

36. *Id.* § 4.15, at 260–64 (outlining the misrepresentation defense).

37. *Id.* §§ 9.2–.4, at 619–37 (outlining the defense of mistake).

38. *Id.* §§ 9.5–.6, at 637–52 (outlining the impossibility defense).

39. *Id.* §§ 9.7–.9, at 652–67 (outlining the defense of frustration).

40. *Id.* § 4.28, at 307–16 (outlining the unconscionability defense).

41. *Id.* § 4.12, at 250–55 (outlining the fraud defense).

42. *Id.* § 8.2, at 519–25 (outlining the "conditions" defense).

43. *Id.* § 4.20, at 273–76 (outlining the undue influence defense).

44. *Id.* §§ 4.16, at 265–66, 4.18, at 270–73 (outlining the economic duress defense).

are supplemented by laches,<sup>45</sup> limitations,<sup>46</sup> and other defenses.<sup>47</sup> The same violation/defenses system of liability is present in other areas of the law as well.<sup>48</sup>

As we explained in the Introduction, this system severely discriminates against plaintiffs while favoring defendants. Under this system, plaintiffs have only one talking point and no fallbacks: in each and every lawsuit, the plaintiff must specify and subsequently prove the defendant's violation of the applicable legal rule or standard.<sup>49</sup> This talking point may include alternative factual accounts, but the plaintiff must still establish the alleged violation by a preponderance of the evidence.<sup>50</sup> When she fails to establish the defendant's violation, the court must dismiss the suit.

Defendants, on the other hand, have two or more claims, or talking points, at their disposal, with each of those claims backing up the other. Defendants are allowed to choose between denying the alleged violation and asserting a defense.<sup>51</sup> Importantly, they are also allowed to do both: a defendant can deny the alleged violation while asserting one or more defenses.<sup>52</sup> Defendants, consequently, have a fallback that plaintiffs do not have. Similarly to plaintiffs, defendants can support any of their lines of defense by alternative factual accounts. While furnishing this support, defendants, like plaintiffs, must avoid perjury.<sup>53</sup> Unlike plaintiffs, however, defendants are allowed to move from one talking point to another because their claims are substitutable. Plaintiffs, on the other hand, have no such flexibility: When a plaintiff fails to substantiate her violation claim against the defendant, her suit falls apart. Moreover, the defendant may

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45. See SAMUEL WILLISTON & RICHARD A. LORD, 25 WILLISTON ON CONTRACTS § 67.21, at 255–58 (4th ed. 2002) (outlining the laches defense); see also *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944) (“Statutes of limitation, like the equitable doctrine of laches . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”).

46. See, e.g., Colter L. Paulson, *Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure*, 45 ARIZ. ST. L.J. 471, 498–504 (2013) (discussing the relationship between contracts and statutes of limitations).

47. See, e.g., *United States ex rel. Ragghianti Founds. III, LLC v. Peter R. Brown Constr., Inc.*, No. 8:12-cv-942-T-33MAP, 2014 WL 103457, at \*11 (M.D. Fla. Jan. 10, 2014) (featuring defendant who raised seven additional defenses against breach-of-contract allegations).

48. This system is a salient characteristic of our intellectual property law. See Gideon Parchomovsky & Alex Stein, *Intellectual Property Defenses*, 113 COLUM. L. REV. 1483, 1491–1512 (2013) (analyzing the violation/defenses structure of intellectual property law).

49. Sometimes a plaintiff will have two or more causes of action: for example, she may complain about multiple breaches of the same agreement. The defendant then would normally be able to assert multiple defenses against each cause of action.

50. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 3.3, at 111 (5th ed. 2012) (outlining the preponderance requirement for plaintiffs).

51. See FED. R. CIV. P. 8(b)–(c) (allowing defendants to deny the plaintiff's allegations and raise a defense).

52. See *id.* at 8(d)(2)–(3) (allowing parties to assert alternative claims and defenses even when they are mutually inconsistent).

53. See 18 U.S.C. § 1621 (2012) (federal prohibition of perjury); Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1765–67 (2005) (attesting that perjury prohibitions are cast in very broad terms and extend to virtually any false testimony).



raise multiple defenses against any violation claim asserted by the plaintiff. Defendants consequently have a serious talking points advantage over plaintiffs.

In a world in which courts make no mistakes, this advantage would be inconsequential. When a plaintiff is correct in saying what she says about the defendant's violation, the infallible court would figure it out and find the defendant liable. Conversely, when a defendant is innocent, the court would find no violation on her part and exonerate her. By the same token, when a defendant is entitled to a defense, or to a number of defenses, the court would figure it out as well. Put simply, when courts make no mistakes and truth is the only coin of the realm, talking points do not matter.

Error-free courts, however, are unreal. In the real world, courts make a sustained effort to avoid errors, but do not always succeed. Their errors are manifold.<sup>54</sup> Judges occasionally misinterpret the law, give jurors wrong instructions, admit inadmissible evidence, and exclude evidence that should go into factfinding. For their part, jurors sometimes draw wrong conclusions from evidence and fail to follow judges' instructions about burdens of proof and other legal rules. These errors lead to

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54. Courts' errors result from factual and legal uncertainties and from the scarcity of decision-making resources. Courts systematically experience shortages of information regarding what the relevant facts are and what applicable legal rules say. See ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 34–35, 73–106 (2005) (analyzing the sources of uncertainty in fact-finding); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 4 (2006) (describing judicial ascertainment of the law as “choice under uncertainty” that implicates “limited information and bounded rationality”). Consequently, they have to make their decisions under conditions of uncertainty. STEIN, *supra*, at 34–35; VERMEULE, *supra*, at 4. Courts also must economize on time and deliberative effort, as these, too, come in short supply. Given that courts have short timeframes for making decisions and must spread their deliberative effort across many cases, a single case can receive only a fraction of the court's attention. See, e.g., Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 403–04, 407–13 (2013) (describing how federal appellate judges spread their deliberative efforts across cases, thereby economizing on decision-making resources). As a result, some of the courts' decisions come out erroneous. See Lea Brilmayer, *Wobble, or the Death of Error*, 59 S. CAL. L. REV. 363, 367–69 (1986) (explaining why errors in fact-finding and applications of the law are inevitable). Our legal system tries to reduce those errors and their net social cost. See POSNER, *supra* note 12, at 757–60, 826–31 (explaining how our legal system works to reduce the net cost of errors in civil and criminal adjudication). To this end, it designed special mechanisms that include burdens of proof, presumptions, rules of interpretation, and appellate review. *Id.* at 804 (explaining appellate review as geared toward reduction of errors); STEIN, *supra*, at 26–27, 124–33, 143–53, 219–25 (analyzing burdens of proof and presumptions); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992) (cataloguing and analyzing canons of statutory interpretation and showing how the Supreme Court uses them to optimize decisions under uncertainty); see also Victoria J. Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311, 315–16 (1996) (attesting that errors are inevitable even in death penalty cases and that appellate courts can spot only a fraction of those errors); Garrick B. Pursley, *Book Review: Federalism Compatibilists*, 89 TEX. L. REV. 1365, 1391–92 (2011) (reviewing ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM (2009)) (explaining that some constitutional interpretive rules are designed to help courts avoid errors in applying the law); Robert S. Smith, *How the Prompt Outcry Rule Protects the Guilty*, 76 ALB. L. REV. 1445, 1445 (2013) (noting a senior New York judge's acknowledgment that adjudicative errors are inevitable).

mistaken liability decisions.<sup>55</sup> Courts sometimes assign liability and the requisite penalty to a faultless party; and in other cases, they exonerate a party who violated the law. Shortages in the courts' resources—time, effort, attention, memory, as well as information about facts and law—make those errors inevitable.<sup>56</sup> Appellate courts can detect and fix only a small fraction of those errors.<sup>57</sup> Worse yet, appellate judges, too, are bound to make mistakes.<sup>58</sup>

### B. Allocation of Errors Across Claims

Because our courts generally try to avoid errors, we assume throughout this Article that errors that courts do not manage to avoid are random rather than skewed. Those errors do not systematically discriminate against or in favor of particular parties and claims. Rather, they are distributed more or less evenly across parties' talking points. We believe that this standard probabilistic assumption<sup>59</sup> is realistic as well.<sup>60</sup> We make this assumption for an additional reason: it helps us show that, even when courts do not favor defendants, our civil liability system puts defendants ahead of plaintiffs.

Under this system, the numerical imbalance between plaintiffs' and defendants' talking points makes a big difference. Take a defendant who raises two standard claims: "I committed no violation; and I also have a defense that exempts me from liability." Assume that the defendant is right about both claims, but the court might mistakenly reject them. This prospect is not good for the defendant. Yet, the fact that the defendant has two alternative claims, rather than just one, mitigates this prospect substantially. To defeat the plaintiff's suit, the defendant only needs to prevent the court from mistakenly denying her one claim out of two. The defendant's claims thus function as backups for each other. They en-

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55. See Alan C. Marco, *Learning by Suing: Structural Estimates of Court Errors in Patent Litigation*, (Vassar Coll. Dep't of Econ., Working Paper No. 68, 2006), available at <http://economics.vassar.edu/docs/working-papers/VCEWP68.pdf> (calculating that courts find a valid patent invalid twenty to twenty-five percent of the time, while upholding the validity of an invalid patent in zero to forty percent of the cases).

56. See *supra* note 54 and sources cited therein.

57. See *supra* note 54 and sources cited therein; see also Eisenberg & Farber, *supra* note 13, at 74–79 and studies surveyed therein.

58. See, e.g., John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to Do About Them?*, 39 FLA. ST. U. L. REV. 865, 893–94 (2012) (observing that appellate courts' decisions are not error free); see also Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1130–31 (2011) (demonstrating that a sharp increase in appellate courts' docket was followed by a steep decline in reversals of the appealed decisions). The appellate process is still the most efficient way of correcting lower courts' errors. See Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 383–87 (1995).

59. See Alex Stein, *The Flawed Probabilistic Foundation of Law and Economics*, 105 NW. U. L. REV. 199, 218–22 (2011) (explaining the indifference principle that assumes random, rather than biased, distribution of unknown events).

60. See Eisenberg & Farber, *supra* note 13, at 73–79, 94 (showing that defendants come out ahead in both trials and appeals).

hance the defendant's protection against adjudicative errors and alleviate her litigation burden.

Consider now a plaintiff who rightfully claims, "the defendant violated my entitlement." This talking point has no backups or substitutes. Assume that the plaintiff faces an unscrupulous defendant, who falsely asserts that he committed no violation and that he is entitled to a defense that exempts him from liability in any event. Under this set of facts, the plaintiff would have to litigate twice as hard as the defendant in our previous example. She would have to avert two potential errors in the court's decision rather than just one.

Assume further that the court errs twenty percent of the time. The defendant in our first example will then do reasonably well: her chances of losing the case undeservedly will amount to only four percent.<sup>61</sup> The plaintiff in our second example, on the other hand, will not do well at all: her chances of being denied her rightful remedy will amount to thirty-six percent.<sup>62</sup> The defendant's situation will consequently be nine times better than the plaintiff's. The defendant will refuse to increase her settlement payout, relative to the error-free world, by more than four percent. The plaintiff, on the other hand, will be forced to reduce her reserved settlement price by thirty-six percent.

Things may get even worse. Assume that courts err only ten percent of the time, but the defendant asserts three alternative defenses, instead of two. Under this scenario, the probability that the court will erroneously deny all of these defenses equals 0.001 (0.1 percent<sup>3</sup>). Meritorious defendants will thus be nearly certain (99.9 percent) to win the case. Consequently, they will be unwilling to pay plaintiffs more than 0.1 percent of the disputed amount. Meritorious plaintiffs, on the other hand, will not fare so well. As their chances to prevail on each of the three issues are seventy-three percent (0.9<sup>3</sup>), they will discount their settlement prices by twenty-seven percent (100% - 73%). Meritorious defendants will thus do 270 times (!) better than deserving plaintiffs.

This prodefendant bias is profoundly anomalous. As we demonstrate below in Part III, it allows unscrupulous defendants to extort favorable settlements from deserving plaintiffs. Facing this prodefendant bias, plaintiffs would have no choice but to settle the case far below the expected value of the suit.

Prior to investigating this structural bias and its ill effects, we need to consider three factors that might alleviate it. One of those factors is the plaintiffs' power to claim any amount of damages—inflated or even

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61. We assume for simplicity that all of the court's errors occur independently of each other. The defendant's chances of being erroneously denied both claims thus equal  $20\% \times 20\% = 4\%$ . When the court's errors are not mutually independent, a similar distortion will occur, but its computation would become more complex.

62. This chance is calculated as follows:  $20\% + 20\% - (20\% \times 20\%) = 36\%$ . The deduction of  $(20\% \times 20\% = 4\%)$  is necessary to avoid double counting of the overlapping chances. See Stein, *supra* note 59, at 210–11.

skyrocketing—in the hopes that the court will award it.<sup>63</sup> Arguably, defendants do not have the same opportunity to benefit from courts' errors in damage assessments because they cannot claim that the plaintiff's damage is below zero.<sup>64</sup>

Another factor is the law's suppression of the product rule. Under extant law, the plaintiff wins her suit by establishing probabilistic preponderance (>0.5) for each element of the suit. For example, when a suit has two elements—breach of contract and damage—the plaintiff will win it by establishing that the probability of each element is 0.7. Under the product rule, however, the court should dismiss the suit because its aggregate probability is 0.49 ( $0.7 \times 0.7$ )—just below the requisite preponderance threshold (0.5). Arguably, the law's suppression of the product rule gives plaintiffs a benefit not available to defendants.

The third factor is credibility discounting. Arguably, when a defendant raises several defenses instead of presenting a single cohesive story, the court would not believe him.<sup>65</sup> We discuss these factors in the order presented.

In theory, plaintiffs can strategically overstate their damage by any chosen amount. Defendants, on the other hand, cannot undervalue the plaintiff's damage below zero dollars. For example, a plaintiff whose actual damage is \$100,000 can claim it to be \$1,000,000. By doing so, the plaintiff will overclaim \$900,000 in the hope that the court will mistakenly grant her outlandish demand. The defendant, for her part, cannot ask the court to reduce the plaintiff's actual damage by \$900,000: she can only claim that the plaintiff sustained no damage whatsoever. The defendant's benefit from the court's error thus cannot exceed \$100,000. Arguably, therefore, the plaintiff in this example has a superior overclaiming opportunity. This opportunity outscores the defendant's by \$800,000.

From a purely analytical standpoint, this argument is correct. However, the extent to which plaintiffs can actually overclaim their damages is limited by common sense. In contracts, the agreed-upon prices and market valuations of the exchanged goods place a cognizable limit on

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63. The court's authority to award damages may be subject to statutory caps. See DOBBS, *supra* note 11, § 384, at 1071–73.

64. Under appropriate circumstances, defendants might be able to file a counterclaim. See FED. R. CIV. P. 13.

65. See Ronald J. Allen & Sarah A. Jehl, *Burdens of Persuasion in Civil Cases: Algorithms v. Explanations*, 2003 MICH. ST. L. REV. 893, 929 (“[T]he actual practice of civil litigation encourages the parties to formulate alternative hypotheses, over which a choice is made . . . rather than encouraging the litigation of elements and their negation . . . .”); Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 212 (2006) (“The deliberations of these 50 cases revealed that jurors actively engaged in debate as they discussed the evidence and arrived at their verdicts. Consistent with the widely accepted ‘story model,’ the jurors attempted to construct plausible accounts of the events that led to the plaintiff’s suit. They evaluated competing accounts and considered alternative explanations for outcomes.”); Roger Allan Ford, *Patent Invalidation Versus Noninfringement*, 99 CORNELL L. REV. 71, 93–109 (2013) (arguing that, for most defendants in patent suits, asserting a narrow noninfringement claim while denying the patent’s validity is costly and risky and that defendants consequently prefer to raise noninfringement claims only); Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 292–94 (2013).

those damages.<sup>66</sup> In torts, compensation recoverable by plaintiffs is capped by the rules of causation<sup>67</sup> and foreseeability.<sup>68</sup> Therefore, when a plaintiff puts forward an outlandish demand for compensation, chances are that the court will deny it. There is virtually no room for error here (as opposed to cases in which the plaintiff overclaims her damage moderately). As we already explained, courts' errors result from the shortages in information and other decision-making resources.<sup>69</sup> Outlandish compensation demands do not fall into the shortage zone. To properly evaluate and reject such demands, courts only need common sense, experience, and a few moments of thought.

Suppression of the product rule is one of the most puzzling legal phenomena; it has no easy explanation.<sup>70</sup> For that reason, it provoked an extensive scholarly debate that will soon mark its fortieth anniversary.<sup>71</sup> Our law instructs factfinders not to multiply the probabilities attaching to discrete elements of a lawsuit.<sup>72</sup> By doing so, it allows plaintiffs to win cases upon aggregate probabilities that fall way below fifty percent.<sup>73</sup> As a consequence—so goes the argument—courts deliver, over a run of cases, more incorrect decisions than correct ones.<sup>74</sup>

66. See FARNSWORTH, *supra* note 17, §§ 12.8, at 784–91, 12.9, at 791–96 (outlining basic measurement of contract damages).

67. See DOBBS, *supra* note 11, §§ 166–69, at 405–12 (outlining causation requirements).

68. *Id.* § 143, at 334–36 (outlining foreseeability requirement).

69. See *supra* note 54 and accompanying text.

70. See L. JONATHAN COHEN, *THE PROBABLE AND THE PROVABLE* 58–62 (1977) (expressing an original statement and explanation of the product rule's suppression).

71. See STEIN, *supra* note 54, at 49–56 (analyzing the product rule's suppression and its effect on factfinding); Ronald J. Allen & Sarah A. Jehl, *Burdens of Persuasion in Civil Cases: Algorithms v. Explanations*, 2003 MICH. ST. L. REV. 893, 893–944 (criticizing the deterrence- and Condorcet-based justifications of the product rule's suppression); Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557, 571–79 (2013) (explaining adjudicative factfinding as driven primarily by the principle of “inference to the best explanation” that avoids the anomaly associated with the product rule's suppression); Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L.J. 1254, 1258–65 (2013) (developing a comparative-probability approach to burdens of proof that avoids the product rule altogether); Kevin M. Clermont, *Death of Paradox: The Killer Logic Beneath the Standards of Proof*, 88 NOTRE DAME L. REV. 1061, 1061–1138 (2013) (using fuzzy logic and belief functions to explain adjudicative fact-finding and justify the product rule's suppression); Saul Levmore, *Conjunction and Aggregation*, 99 MICH. L. REV. 723, 734–45 (2001) (using Condorcet's jury theorem to justify the product rule's suppression); David Kaye, *The Laws of Probability and the Law of the Land*, 47 U. CHI. L. REV. 34, 38–41 (1979) (arguing that accuracy requires that courts follow the product rule and other rules of mathematical probability); Bernard Robertson & G.A. Vignaux, *Probability—The Logic of the Law*, 13 O.J.L.S. 457, 457–79 (1993) (same); Ferdinand Schoeman, *Cohen on Inductive Probability and the Law of Evidence*, 54 PHIL. SCI. 76, 80–82 (1987) (arguing that courts' failure to follow the product rule is a mistake); Alex Stein, *Of Two Wrongs that Make a Right: Two Paradoxes of the Evidence Law and Their Combined Economic Justification*, 79 TEX. L. REV. 1199, 1199–1234 (2001) (justifying the suppression of the product rule on deterrence grounds); Ronald J. Allen, *Book Review: Laudan, Stein, and the Limits of Theorizing About Juridical Proof*, 29 L. & PHIL. 195, 225–26 (2010) (unfolding further criticism of the deterrence-based justification of the product rule's suppression).

72. See Stein, *supra* note 71, at 1204 n.6 (citing caselaw and pattern jury instructions that suppress the product rule).

73. See Kaye, *supra* note 71, at 38–41.

74. *Id.* at 41 (arguing that law deviates from probability rules and accepts “imprecision and inaccuracy” because “other values are at work”).

Whether this argument is correct is a big question that this Article cannot resolve. Our question here is different: we need to find out whether the suppression of the product rule offsets the defendants' advantage in the allocation of courts' errors over the parties' claims.

Ostensibly, the law's suppression of the product rule does exactly this. Consider again a plaintiff whose suit has two independent elements with a probability of 0.7 attaching to each. By allowing the plaintiff to win the suit, the law ignores the fact that the suit's aggregate probability—0.49—falls below preponderance.<sup>75</sup> By ignoring this probability, the law does not permit the defendant to aggregate the doubts accompanying the plaintiff's claims into the probability that *one* of those claims is false.<sup>76</sup> Aggregation of these doubts—0.3 for each claim—yields a probability of 0.51 ( $0.3 + 0.3 - 0.3^2$ ). This probability is real, but the defendant is not permitted to use it as a defense. The law consequently appears to benefit the plaintiff at the defendant's expense.

This appearance, however, is misleading because the law's suppression of the product rule is symmetrical.<sup>77</sup> Defendants, too, have an exemption from this rule, and it is therefore inaccurate to describe it as giving plaintiffs a one-sided advantage. Take a defendant who invokes the defense of misrepresentation to counter a breach-of-contract accusation. To establish this affirmative defense, the defendant must prove that: (1) the plaintiff misrepresented to her material facts, (2) upon which she was justified to rely, and (3) this misrepresentation induced her assent to the contract.<sup>78</sup> Each of those elements must be more probable than not individually. There is no requirement that the elements' aggregate probability be greater than 0.5 as well.<sup>79</sup> Hence, when each element has a probability of 0.7, the defendant will establish misrepresentation that entitles her to rescind the contract. The fact that the elements' aggregate probability is way below preponderance ( $0.7^3 = 0.34$ ) is of no consequence because—once again—the product rule does not apply. By suppressing this rule, the law does not permit the plaintiff to aggregate the doubts accom-

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75. See *id.* at 38 (arguing that it is perfectly appropriate for courts to dismiss a suit that has a 0.499 probability of being meritorious).

76. This policy does not always align with efficiency and fairness. See Ariel Porat & Eric A. Posner, *Aggregation and Law*, 122 *YALE L.J.* 2, 55–61 (2012).

77. For example, in establishing contributory negligence, the defendant must prove by a preponderance of the evidence that the plaintiff failed “to exercise care for herself” and that this failure “is one of the causes of her harm.” See DOBBS, *supra* note 11, § 199, at 485. The defendant must prove each of those elements in the same way in which plaintiffs must prove elements of negligence. *Id.* §§ 198, at 493, 199, at 495–96. See 14 CORBIN ON CONTRACTS § 74.16, at 98–104 (Joseph M. Perillo ed., rev. ed. 2001) (“[T]he burden of proving the impossibility defenses rest with the person asserting it . . . that party must prove all elements of the defense . . .”).

78. See RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981).

79. See, e.g., *Eng'd Prods. Co. v. Donaldson Co.*, 330 F. Supp. 2d 1013, 1024–25 (N.D. Iowa 2004) (holding that the [defendant] “bears the burden of establishing every element of its asserted defense by a preponderance of the evidence” (citing *Aukerman v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1046 (Fed. Cir. 1992))); *Guzman v. Abbott Labs.*, 59 F. Supp. 2d 747, 763 (N.D. Ill. 1999) (stating that a defendant in a Title VII action must prove “each element of [its] affirmative defense by a preponderance of the evidence of the material undisputed facts” (citing *Faragher v. Boca Raton*, 524 U.S. 775, 777–78 (1998))).

panying the misrepresentation defense. Aggregation of those doubts ( $1 - 0.7^3$ ) yields a pretty high probability: 0.66. This probability means that the defendant's claim of misrepresentation has a sixty-six percent chance of being wrong somewhere. The plaintiff, however, cannot use this aggregate probability to her advantage.

We now turn to the credibility-discounting penalty. Presently, this penalty is not part of our law. On the contrary, Federal Rule of Civil Procedure 8(d)(3) and its state equivalents expressly allow defendants to "state as many separate . . . defenses as [they have] regardless of consistency."<sup>80</sup> Contrary to scholars' projections,<sup>81</sup> courts also do not have a policy of disbelieving defendants who take advantage of this rule. Had this policy been in place, we would have seen virtually no cases featuring defendants who assert alternative defenses.<sup>82</sup> Such cases, however, have a salient presence on our litigation landscape.<sup>83</sup>

### III. DISTORTIONARY EFFECTS

Adjudicative errors are inevitable, given the scarcity of our courts' decision-making resources.<sup>84</sup> All that our system can do on that score is allocate those errors in a way that aligns with efficiency and fairness. Unfortunately, the system does the exact opposite. The civil liability structure it creates gives defendants more talking points than plaintiffs. As a result, plaintiffs are bound to suffer more than defendants from the courts' unintended, but unavoidable, errors. Worse yet, the system allows defendants to unilaterally dilute the settlement value of the plaintiff's suit by asserting two or more defenses that backup one another.

Remarkably, defendants also have an impressively long list of defenses to choose from.<sup>85</sup> Our torts system accounts for three general de-

80. FED. R. CIV. P. 8(d)(3).

81. See Ford, *supra* note 65, at 93–109; Griffin, *supra* note 65, at 292–94.

82. This policy aligns with our procedural solution of the prodefendant bias problem. See *infra* Part IV.A.

83. See, e.g., *Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526, 537–47 (5th Cir. 1998) (exemplifying a defendant sued for infringing trademark and trade dress and asserting "functionality," "genericity," "no likelihood of confusion," and "fair use" defenses); *Polo v. Shwiff*, No. C 12–04461 JSW, 2013 WL 1797671, at \*3 (N.D. Cal. Apr. 29, 2013) (exemplifying a breach of contract claim countered by four alternative defenses: "unclean hands, lack of standing, contractual bar, failure to meet contractual obligations"); *Eng'rd Prods. Co. v. Donaldson Co., Inc.*, 165 F. Supp. 2d 836, 880 n.28 (N.D. Iowa 2001) (exemplifying a defendant in a patent infringement action who asserted laches, estoppel, and patent invalidity as alternative defenses); see also, e.g., *Stauffer v. Gearhart*, 741 F.3d 574, 580 (5th Cir. 2014) (noting multiple defenses raised by defendant); *United States ex rel. Raghianti Found. III, LLC v. Peter R. Brown Constr., Inc.*, No. 8:12–cv–942–T–33MAP, 2014 WL 103457, at \*11 (M.D. Fla. Jan. 10, 2014) (same); *Cincinnati Ins. Co. v. Ruch*, 940 F. Supp. 2d 338, 340 (E.D. Va. 2013) (same); *In re Sturm, Ruger, & Co., Inc. Sec. Litig.*, No. 3:09CV1293, 2012 WL 3589610, at \*6 (D. Conn. Aug. 20, 2012) (same); *Appling v. Wachovia Mortg., FSB*, 745 F. Supp. 2d 961, 972 (N.D. Cal. 2010) (same); *Crawford v. Lexington-Fayette Urban Cnty. Gov't*, No. 06–299–JBC, 2008 WL 4724499, at \* 5 (E.D. Ky. Oct. 23, 2008) (same); *Monsanto Co. v. Trantham*, 156 F. Supp. 2d 855, 866–67 (W.D. Tenn. 2001) (same); *Ulichny v. Merton Cmty. Sch. Dist.*, 93 F. Supp. 2d 1011, 1042 (E.D. Wis. 2000) (same).

84. See *supra* note 54 and sources cited therein.

85. See, e.g., Hanoch Dagan & Sharon Hanes, *Managing Our Money: The Law of Financial Fiduciaries as a Private Law Institution*, in 1 THE PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW

fenses,<sup>86</sup> on top of immunities,<sup>87</sup> and our contract law recognizes ten general defenses<sup>88</sup> as well as some other defenses.<sup>89</sup> The four branches of intellectual property—patent law, trademark law, copyright law, and trade secrets law—account for thirty-four different defenses.<sup>90</sup> Property law accounts for at least five.<sup>91</sup> Additionally, Federal Rule of Civil Procedure 8(c)(1) and its state equivalents catalog fourteen defenses that apply across the board,<sup>92</sup> while clarifying that the catalog is not exhaustive.<sup>93</sup>

Meritorious defendants properly take advantage of the opportunity the law gives them. Unscrupulous defendants, on the other hand, can misuse that opportunity by extorting cheap settlements from deserving plaintiffs. Under those settlements, the plaintiff's recovery amount falls far below the expected value of the suit. Those settlements are manifestly unfair. They also embolden prospective wrongdoers, who expect to pay less for their violations of contracts, property, and safety rules. Rational plaintiffs, nonetheless, have no choice but to accept those settlements.

The prodefendant bias thus robs plaintiffs of their rightful remedies while encouraging torts, breaches of contract, and other violations. In the

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(Andrew Gold & Paul B. Miller eds., 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2307895](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2307895) (describing trust law as encompassing “the duty of loyalty doctrine . . . alongside a long list of exceptions and exemptions”); Jonathan Eisenberg, *Beyond the Basics: Seventy-Five Defenses Securities Litigators Need to Know*, 62 BUS. LAW. 1281 (2007) (discussing seventy-five (!) defenses that courts have used to dismiss securities suits).

86. See DOBBS, *supra* note 11, §§ 199, at 494–98, 201, at 503–06, 203–04, at 510–14, 211, at 534–39 (outlining defenses of contributory/comparative negligence, avoidable consequences, and assumption of risk).

87. *Id.* § 260, at 693–95 (outlining governmental and other official immunities against liability in torts).

88. See FARNSWORTH, *supra* note 17, §§ 4.12, at 250–55, 4.15, at 260–64, 4.16, at 264–66, 4.18, at 270–72, 4.20, at 273–76, 4.28, at 307–16, 8.2, at 519–25, 9.2–9.9, at 619–67; see also Miriam A. Cherry, *A Tyrannosaurus-Rex Aptly Named “Sue”: Using a Disputed Dinosaur to Teach Contract Defenses*, 81 N.D. L. REV. 295, 300–07 (2005) (discussing eight general defenses against contractual liability: unilateral mistake, unconscionability, fraud, misrepresentation, conditions, economic duress, undue influence, and ability to sell, to which one should add impossibility and frustration of purpose).

89. See, e.g., *United States ex rel. Ragghianti Found. III, LLC v. Peter R. Brown Constr., Inc.*, No. 8:12-cv-942-T-33MAP, 2014 WL 103457, at \*11 (M.D. Fla. Jan. 10, 2014) (listing “(1) Prior Breach; (2) Payment; (3) Conversion of Termination for Default; (4) Setoff; (5) Estoppel; (6) Failure to Mitigate; and (7) Barment” as defenses asserted against breach-of-contract allegations).

90. See Parchomovsky & Stein, *supra* note 48, at 1512. In intellectual property litigation, however, plaintiffs still have the upper hand. Their economies of scale and ability to target weak defendants give them substantial advantage in court. See *id.* at 1512–20; Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1345–52 (2012).

91. These defenses include license, easement, necessity, de minimis, and abandonment. See Morton J. Horwitz, *Conceptualizing the Right of Access to Technology*, 79 WASH. L. REV. 105, 115–16 (2004) (attesting that “even the most absolute-sounding subject of trespass to land can be shown to be riddled with exceptions . . . in the forms of public easements or the defense of necessity”); Christopher M. Newman, *A License Is Not a “Contract Not to Sue”: Disentangling Property and Contract in the Law of Copyright Licenses*, 98 IOWA L. REV. 1101, 1114–15 (2013) (outlining elements of license in real and intellectual property); Gideon Parchomovsky & Alex Stein, *Reconceptualizing Trespass*, 103 NW. U. L. REV. 1823, 1850–52 (2009) (discussing de minimis and necessity defenses in property law).

92. These defenses include accord and satisfaction; arbitration and award; duress; estoppel; fraud; illegality; laches; license; payment; release; res judicata; statute of frauds; statute of limitations; and waiver. Four additional defenses listed by this rule—assumption of risk, contributory negligence, and injury by a fellow servant—belong to the law of torts.

93. FED. R. CIV. P. 8(c)(1) refers to “any avoidance or affirmative defense, including” the subsequently listed defenses.



remainder of this Part, we outline these distortionary effects and then proceed to examine whether they can be mitigated by parties' contracting. We show that sticky defaults and high transaction costs render the contracting solution ineffectual.

#### A. *Unfairness*

The prodefendant bias engenders two kinds of unfairness: class unfairness and *inter partes* unfairness. The system's inferior treatment of plaintiffs as a group in its distribution of talking points and courts' errors constitutes class unfairness. *Inter partes* unfairness, on the other hand, occurs on the individual case level. This unfairness is present when an unscrupulous defendant extorts a cheap settlement from a deserving plaintiff.

Our system can remedy both kinds of unfairness in two ways. The first way is equalizing up: The system can enhance the plaintiffs' protection against courts' errors by making it similar to the defendants' protection. The second way is equalizing down: The system can downscale the defendants' protection against courts' errors to the plaintiffs' level.<sup>94</sup> These two measures are codependent. By enhancing the plaintiffs' protection against courts' errors, the system will necessarily reduce the defendants' protection. By the same token, when the system downscales the defendants' protection against courts' errors, it enhances the same protection for plaintiffs.

For that reason, the system will do well to synchronize the available equalizing measures. Our reform proposals in Part IV go along this path.

#### B. *Distortion of Primary Behavior*

When plaintiffs sharply discount their settlement prices, they reduce the penalties that wrongdoers expect to incur. This penalty reduction makes the wrongdoers' deterrence suboptimal. When a wrongdoer's expected payout goes down by thirty-six percent, as in our introductory example, the wrongdoer will intensify his damaging activity by thirty-six percent. More precisely, a wrongdoer who pays nothing for inflicting an additional \$360,000 damage on another person will go ahead and inflict that damage in order to generate any profit for himself. From a rational wrongdoer's standpoint, this profit may be as low as one dollar.

This consequence is socially harmful if not downright devastating. From a social welfare perspective, a person should only be allowed to cause a \$360,000 damage when he generates a net benefit that exceeds \$360,000. When a person's activity generates no benefit, it should not be undertaken. By condoning such activities, our system puts itself on a path of a steady and significant erosion of social welfare.

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94. Cf. Alan Wertheimer, *The Equalization of Legal Resources*, 17 PHIL. & PUB. AFF. 303 (1988) (advocating downward equalization of parties' litigation opportunities).

### C. *Can Contracting Help?*

Arguably, the prodefendant bias identified in this Article is a problem for torts, but not for contracts. Contract law permits parties to modify the default rules as they deem fit. Based on that permission, parties can replace the violation/defenses system and its distribution of talking points by a different arrangement that best promotes their interests.

We believe that this argument is only partially correct. We can certainly think of business agreements that substitute the violation/defenses system by a different liability arrangement. For example, parties may stipulate in their agreement that certain defenses will not be available at all. Alternatively, parties may set up strict evidentiary requirements or other conditions for granting exemptions from the duty to perform the agreement.

For many contracts, however, this default-altering possibility is unrealistic. Many defenses recognized by our contract law are “sticky defaults.”<sup>95</sup> Altering them will often involve negative signaling and substantial transaction costs. For example, when a party negotiating an agreement proposes to contract away “impossibility” or a similar defense, the party on the other side of the table may suspect trickery, which would either kill the deal or open up collateral negotiations in advance over the terms on which the defense will be forfeited. Anticipating this development, the party interested in the removal of the defense may decide to give up the idea entirely.<sup>96</sup>

## IV. SOLUTIONS

This Part of the Article develops three alternative solutions to the prodefendant bias problem. We call these solutions procedural, compensatory, and substantive. These solutions are geared toward the same goal: Each solution tries to eliminate the prodefendant bias and to equalize the parties’ risks of losing the case undeservedly. We discuss the procedural solution first and then move on to introduce and evaluate the compensatory and substantive solutions.

### A. *Procedural Solution*

The procedural solution eliminates the parties’ power to pursue alternative claims. This solution sets up a “one-to-one” format of litigation

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95. See Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032 (2012) (unfolding general economic theory of sticky defaults); Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383, 386–96 (2007) (explaining and illustrating sticky defaults in corporate law).

96. See Ayres, *supra* note 95, at 2084–88 (explaining the sticky-default dynamic); Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 652 (2006) (explaining how negative-signaling prospects make contract defaults sticky); cf. Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1201 (2013) (showing that consumer-protecting defaults are not sticky enough as profit driven firms move consumers out of those defaults).

that allows defendants to assert and develop only one defense for every cause of action stated by the plaintiff. To operationalize this solution, policymakers would have to amend Federal Rule of Civil Procedure 8(d)(3) and its state equivalents. Presently, these rules allow defendants to rely on alternative defenses, regardless of consistency. On paper, plaintiffs have the same procedural power, as they, too, are allowed to assert alternative claims. However, the causes of action available to plaintiffs—negligence, breach of contract, violation of a property right, and so forth—are vastly outnumbered by defenses available to defendants. Against each cause of action asserted by the plaintiff, the defendant may raise two or more defenses.<sup>97</sup> The power to assert alternative defenses consequently enhances the defendants' protection against courts' errors at the plaintiffs' expense.<sup>98</sup>

Under the current liability system, defendants have many defenses to choose from.<sup>99</sup> Federal Rule of Civil Procedure 8(c)(1) itemizes some of those defenses, while notifying defendants about defenses that must be pled affirmatively. Defenses listed in this rule, in alphabetical order, include: accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver.<sup>100</sup> To these general defenses, defendants can add many specialized defenses that apply in tort, contract, property, and intellectual property cases.<sup>101</sup>

Consider a defendant who falsely asserts three defenses that she chose from the list. The plaintiff knows that the defendant is trying to cheat, but she also estimates that the cheating might succeed because courts sometimes err. The plaintiff finds out that courts make erroneous decisions in determining violations and defenses only three percent of the time. This discovery is good news for the plaintiff. However, it comes along with a piece of not-so-good news. By raising three alternative defenses, the defendant has tripled her chances of winning the case due to the court's error. The plaintiff has a ninety-seven percent chance to prevail on each of the three defense issues,<sup>102</sup> which means that her chances of winning the entire case are ninety-one percent ( $0.97^3$ ). The defendant's chances of winning the case have gone up from three percent to nine percent due to a sheer accumulation of false defenses. The defendant thus enabled herself to extort an additional six percent of the plaintiff's money in a settlement agreement—an extortion that may yield her a nonnegligible sum at the plaintiff's expense. Worse yet, the defendant

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97. See cases cited *supra* note 83.

98. See *supra* Part II.B.

99. See *supra* notes 85–93 and accompanying text.

100. FED. R. CIV. P. 8(c)(1).

101. See *supra* notes 29–48 and accompanying text.

102. As previously mentioned, we assume that these defenses are independent of each other and have no overlapping elements.

may even be able to improve her position further by adding more alternative defenses to her list.

Policymakers may try to attenuate this problem by reducing the incidence of adjudicative errors. For example, they may codify courts' precedents, redraft ambiguous statutes into clear ones, and set up procedures that make adjudicative factfinding more meticulous than it is presently. Policymakers also may reduce the courts' caseload by hiring more judges. Additionally, they may grant awards and promotions to judges who generate the largest number of verdicts with the smallest number of appeals.<sup>103</sup>

These measures, however, are pricey. Worse yet, they are unlikely to bring about a substantial reduction in a rate of error that is already as low as three percent. Finally and most importantly, even when policymakers manage to cut the error rate by, say, two-thirds, unscrupulous defendants would still be able to undo this accomplishment by asserting more defenses than previously; and, as we have already noted, they have a very long list of defenses to choose from.

To see how this could happen, assume that the error rate goes down dramatically, all the way to one percent. Take a dishonest defendant who falsely raises four alternative defenses backed by perjury and fake documents.<sup>104</sup> By claiming these defenses, the defendant increases his chances of winning the case undeservedly to four percent ( $1 - 0.99^4$ ). His phony assertion of four defenses thus quadruples his initial one percent chance of winning the case undeservedly. This strategy allows the defendant to extort from the plaintiff four percent of the claimed amount. When this amount is \$1,000,000, the defendant would be able to force the plaintiff to agree to a \$960,000 settlement. Allowing unscrupulous defendants to pocket \$40,000 by a strike of a pen is hardly a good idea. For that reason, policymakers will do well to abandon their ambitious courtwork-improvement agenda. Instead of implementing this costly agenda, they should try to eliminate the defendants' opportunity to exploit courts' errors.

To achieve this goal, policymakers should eliminate the defendants' power to assert and develop alternative lines of defense. The resulting "one-to-one" format of civil litigation would equalize the parties' talking points. As a result, courts' errors would be distributed more or less equally across plaintiffs' and defendants' claims. This equalization would

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103. The award system has two potential drawbacks. As an initial matter, it impedes the development of expertise by making judges less willing to specialize in effort intensive areas of the law. Second, and perhaps counterintuitively, judges who deliver plainly mistaken decisions may generate smaller appeal rates than judges who make smaller errors, as parties will often recognize an indefensible error and settle the case without an appeal. Smaller errors, on the other hand, create divergent expectations about the appellate court's decision. These divergent expectations reduce the prospect of settlement and drive parties to the appellate court. *See generally* Marin K. Levy et al., *The Costs of Judging Judges by the Numbers*, 28 YALE L. & POL'Y REV. 313 (2010) (expressing skepticism about quantitative rankings of judicial performance).

104. We assume once again that these defenses are independent of each other and have no overlapping elements.

disarm dishonest defendants who would no longer be able to extort cheap settlements from plaintiffs through accumulation of phony defenses. This disarmament is the principal advantage of our procedural solution.

Unfortunately, this solution also has a serious shortcoming: its implementation will affect honest and dishonest defendants indiscriminately. By denying dishonest defendants an opportunity to cheat, the procedural solution will undoubtedly benefit the legal system. At the same time, however, it will also limit the honest defendants' opportunity to properly defend themselves against unmeritorious suits. Oftentimes, defendants litigating in good faith are unable to predict the course that their trials will take.<sup>105</sup> For that reason, they cannot commit themselves in advance to a single line of defense and forego all other defenses. These defendants need the flexibility provided by the extant law that allows parties to assert alternative claims.<sup>106</sup> As Professor Clarence Morris put it more than seven decades ago, "[t]he function of this flexibility is avoidance of procedural mistrials. Careful lawyers cannot always foresee what will happen."<sup>107</sup> Our procedural solution will take away this flexibility. By doing so, it will force rightful defendants to gamble on the defense they will put on trial. This gambling will produce undeserving winners on the plaintiffs' side and undeserving losers on the defendants' side.

### B. Compensatory Solution

The compensatory solution introduces an adjustable damage multiplier to equalize the parties' trial prospects and level the playfield for settlements.<sup>108</sup> This multiplier will offset the difference between the plaintiff's and the defendant's exposures to the prospect of adjudicative error.

To achieve this result, the multiplier should be set at  $1/(1-E)^n$ , with  $E$  representing the percentage of the court's erroneous decisions on violations and defenses, and  $n$  being the number of defenses that the defendant chooses to raise in the case at bar.<sup>109</sup> Under this formula, any defense that the defendant chooses to assert will increase her probability of

105. This unpredictability was among the reasons underlying Learned Hand's famous remark, "as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, in 3 LECTURES ON LEGAL TOPICS 89, 105 (1926).

106. This need has been acknowledged by Justice White in his dissent in *Mathews v. United States*, 485 U.S. 58, 70 (1988) (White, J., dissenting) ("There is a valuable purpose served by having civil litigants plead alternative defenses which may be legally inconsistent. Allowing a tort defendant to claim both that he owed no duty of care to the plaintiff, but that if he did, he met that duty, preserves possible alternative defenses under which the defendant is entitled to relief. It prevents formalities of pleadings, or rigid application of legal doctrines, from standing in the way of the equitable resolution of a civil dispute.")

107. Clarence Morris, *Jury Trial Under the Federal Fusion of Law and Equity*, 20 TEX. L. REV. 427, 428 (1942).

108. For a classic account of damage multipliers, see A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998).

109. For a deserving plaintiff, the expected judgment without a multiplier equals  $(1-E)^n \times J$ . With the multiplier, it would equal  $(1-E)^n \times 1/(1-E)^n \times J = J$ .

defeating the plaintiff, but, at the same time, it will also increase the compensation amount that she would pay the plaintiff if the court rejects all of her defenses. The defendant would consequently have to choose the desired tradeoff. By deciding how many defenses she would raise, the defendant would set up the multiplier for her own case. The defendant's choice would then be pervasively affected, if not dictated, by the merit of her defenses. This system would deny defendants the opportunity to erode the settlement value of the plaintiff's suit by simply adding more defenses.

As we demonstrate below, the proposed multiplier would not discourage rightful defendants from raising and developing alternative defenses. Because a defendant only needs one good defense to defeat the suit, these defendants would still be able to minimize their exposure to adjudicative errors by asserting multiple defenses. For unmeritorious defendants, however, this strategy would no longer be advantageous because it would boost their expected payout.

To see how this system works, revisit our hypothetical case in which the defendant presents two alternative defenses to a court that errs twenty percent of the time. As we already explained, if the defendant is right about both defenses, her chances of undeservedly losing the case due to the court's error would equal four percent. On the other hand, if the plaintiff pursues a rightful claim and the defenses asserted by the defendant are false, the plaintiff's chances of being denied the remedy she deserves would equal thirty-six percent. Under the proposed formula, if the plaintiff wins the case, she would recover 156.25 percent of her actual damage ( $1/80\%^2$ ). When that damage is \$1,000,000 and the court rejects both defenses, the plaintiff will thus receive \$1,562,500. The dishonest defendant's probability of being forced to pay this amount to the plaintiff is sixty-four percent ( $100\% - 36\%$ ). Consequently, the defendant will agree to a settlement obligating her to pay the plaintiff \$1,000,000 ( $64\% \times \$1,562,500$ )—the exact recovery amount that the plaintiff deserves.

Consider now a meritorious defendant who asserts two alternative defenses and consequently has a four percent chance of losing the case undeservedly. For any such defendant, the maximal settlement payout moves up from \$40,000 ( $4\% \times \$1,000,000$ ) to \$62,500 ( $4\% \times \$1,562,500$ ). The net error effect for rightful defendants thus increases from four percent to six percent ( $\$62,500/\$1,000,000$ ).

This modest increase is fully justified. If the defendant were to assert only one defense, the plaintiff's recovery would not have exceeded \$1 million but then the defendant's risk of losing the case undeservedly would have stayed at twenty percent instead of going down. Under the multiplier system, by adding an alternative defense to her pleading, the defendant takes this risk down to six percent. Absent the multiplier, the defendant's addition of that defense could reduce the risk to four percent, but then the rightful plaintiff's exposure to a similar risk would be thirty-six percent instead of zero percent. Hence, by increasing the right-

ful defendants' risk of losing the case by only two percent, our multiplier reduces a similar risk for deserving plaintiffs by thirty-six percent (from thirty-six percent to zero percent). This is an unquestionably good tradeoff from both fairness and utility perspectives, especially since defendants always have more talking points at their disposal than plaintiffs.

What we have said thus far makes the compensatory solution very attractive. This solution, however, has a serious shortcoming as well. The adjustable damage multiplier can boost plaintiffs' compensation into millions of dollars. This boost would allow unscrupulous plaintiffs to extort handsome settlement payments from defendants. For example, when the multiplier ups the plaintiff's compensation to \$10 million a one percent error rate for rightful defendants would assign the expected value of \$100,000 to a completely unmeritorious suit. Consequently, the plaintiff's ability to file and litigate such a suit at any cost below \$100,000 would make it worth her while to give it a try. For a defendant who is not only meritorious, but rational as well, the best course of action would then be to pay the plaintiff \$100,000 for the suit's removal.

The compensatory solution also has an enforcement limit. Many liable defendants will not pay plaintiffs large compensatory awards because they do not have the money. These defendants, consequently, will not be afraid to assert as many defenses as they desire. The damage multiplier idea originates from Gary Becker's classic insight about the enforcement of criminal law under scarce resources.<sup>110</sup> According to Becker, when a government experiences drawbacks in enforcing criminal law, it would do well to magnify its penalties instead of intensifying enforcement efforts.<sup>111</sup> That is, instead of extinguishing society's resources on apprehending and punishing criminals, the government can achieve the same level of deterrence by a strike of a pen: all it needs to do is boost criminal penalties.<sup>112</sup>

Becker's insight works extremely well with a criminal law that can viably threaten violators with imprisonment and other harsh penalties.<sup>113</sup> Individuals who commit torts and default on contracts, however, do not go to jail for their actions. Becker's insight consequently does not work well with these individuals. Becker's punishment method derives its vitality from the fact that only a few people can become punishment proof. Carrying it over to the civil liability contexts, in which people become

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110. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 179–80 (1968) (developing a classic economic model of deterrence under scarce resources that make it impossible for the government to punish all violators of the law).

111. *Id.*

112. *Id.* at 180–84.

113. See POSNER, *supra* note 12, at 281 (“If the costs of collecting fines are assumed to be zero regardless of the size of the fine, the most efficient combination is a probability arbitrarily close to zero and a fine arbitrarily close to infinity . . . [E]very increase in the size of the fine is costless, while every corresponding decrease in the probability of apprehension and conviction, designed to offset the increase in the fine and so maintain a constant expected punishment cost, reduces the costs of enforcement—to the vanishing point if the probability of apprehension and conviction is reduced arbitrarily close to zero.”).

judgment proof and pay nothing for their misdeeds, may prove to be a serious mistake.<sup>114</sup>

Damage multipliers have other shortcomings as well. Facing the risk of paying plaintiffs large sums of money, potential defendants might decide to steer away from activities that expose them to the prospect of being sued. Many of those activities are socially beneficial. Their abandonment would therefore be detrimental to society's welfare.<sup>115</sup> Another shortcoming is an increase in the cost and duration of settlement negotiations and trials.<sup>116</sup> With all this in mind, we now turn to discuss our substantive solution to the problem at hand.

### C. Substantive Solution

Our substantive solution consolidates all defenses against liability into a single comparative fault defense (without changing anything in the procedural defenses against suit that include limitations, laches, and immunities<sup>117</sup>). Under the consolidated comparative fault defense, courts will assess each party's fault in her interactions with the other party. Ranging between zero percent and one hundred percent, this assessment will determine the amount that the defendant will pay the plaintiff for the alleged tort or breach of contract. Under this framework, each party will be free to make any claim as to how to quantify her opponent's fault relative to hers. Parties will consequently bring to court an equal number of claims, which will secure equal allocation of the courts' errors across those claims.

The comparative fault system will also soften the consequences of courts' errors, as those errors will obliterate only a fraction of the deserv-

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114. Note that punitive damages are generally not dischargeable in bankruptcy. See *Jendusa-Nicolai v. Larsen*, 677 F.3d 320, 322–24 (7th Cir. 2012). They are, however, dischargeable at death. See *Crabtree ex rel. Kemp v. Estate of Crabtree*, 837 N.E.2d 135, 139 (Ind. 2005).

115. See Polinsky & Shavell, *supra* note 108, at 879 (observing that “if damages exceed harm, firms might be led to take socially excessive precautions”).

116. See James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 639 (1998) (showing that higher monetary stakes “are associated with significantly higher total lawyer work hours, significantly higher lawyer work hours on discovery, and significantly longer time to disposition”); see also Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 531 (1998) (finding that the duration and costs of litigation strongly correlate with the stakes).

117. These defenses are immunities against suit granted for reasons extraneous to liability. See *Order of R.R. Tels. v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944) (“Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.”); see also POSNER, *supra* note 12, at 807 (explaining that “the purpose of the statute of limitations is to reduce the error costs associated with the use of stale evidence”).



ing party's entitlement.<sup>118</sup> Furthermore, by breaking the violation/defenses dichotomy, the comparative fault system will also alter the nature of courts' errors. Under this system, when a court fails to see that the defendant is fully responsible for the plaintiff's damage and erroneously assigns a fraction of that damage to the plaintiff, the assigned fraction is unlikely to be substantial. It would only be substantial under the improbable scenario in which the court commits another error by mis-evaluating the severity of each party's fault. For the same reason, when a court erroneously decides that a completely faultless defendant was at fault, it would likely not hold that defendant responsible for a large fraction of the plaintiff's damage.<sup>119</sup>

The substantive solution works particularly well with contract law and the law of torts. These two branches of the law regulate interactions between two or more actors that give each actor an opportunity for self-enrichment at another actor's expense. Under the contracts framework, this opportunity encompasses breach, deception, and exploitation of another party's mistake. Under the torts framework, it includes externalization of harm, on one side, and moral hazard, on the other side. When left to their own devices, prospective injurers will carry out self-enriching risky activities without taking precautions against harm to another person, even when those precautions are inexpensive. Conversely, when a prospective victim is guaranteed full compensation for her damage, she might decide not to make even a minimal effort at avoiding that damage.

Contract law and the law of torts try to suppress opportunistic behavior of all parties involved.<sup>120</sup> To this end, they use fault as their core criterion for imposing and apportioning liability for damages.<sup>121</sup> Both frameworks also utilize monetary payouts as a primary means for remedying wrongs and discouraging misconduct.<sup>122</sup>

Fault, bilaterality, and monetary remediation guarantee nearly perfect alignment between our substantive solution and the existing contract and tort doctrines. Our substantive solution seamlessly integrates into

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118. Cf. Neil Orloff & Jerry Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. PA. L. REV. 1159 (1983) (advocating probability-based recovery for civil trials to shield parties against undeserved large losses).

119. See also *infra* notes 120–22 and accompanying text.

120. See SHAVELL, *supra* note 27, at 182–90 (explaining that the torts system must use comparative fault criteria to eliminate free riding and induce socially optimal precautions against harm); *id.* at 297–99 (explaining that contract rules and enforcement are needed to reduce parties' opportunities for opportunistically taking advantage of each other); see also DOBBS, *supra* note 11, §§ 1, at 2–3, 9, at 16 (describing tort liability as predominantly fault-based); Ariel Porat, *A Comparative Fault Defense in Contract Law*, 107 MICH. L. REV. 1397 (2009) (articulating and advancing a comparative fault metric for determining contracting parties' responsibilities).

121. See SHAVELL, *supra* note 27, at 182–90.

122. See DOBBS, *supra* note 11, § 377, at 1047–53 (outlining monetary remediation under the law of torts); FARNSWORTH, *supra* note 17, § 12.8, at 757–64 (attesting that monetary compensation is the principal remedy for breach of contract); see also *Miller v. LeSea Broad., Inc.*, 87 F.3d 224, 230 (7th Cir. 1996) (“The normal remedy for breach of contract is an award of damages. Specific performance is exceptional . . .”).

these doctrines. Policymakers, therefore, can implement it and achieve equality in the allocation of courts' errors at a relatively low cost.

Implementing this solution outside the contract and tort areas, however, is not always a good idea. Many areas of the law do not include fault, bilaterality, and monetary remediation among their defining characteristics. For those areas, the procedural or compensatory solution may be more appropriate than the substantive solution. Consider a child custody dispute and assume that both parents have defaulted on their parental obligations. The mother, with whom the child lives, failed to place the child in the appropriate school program, thereby violating a court-approved custody agreement between the parents. The father, for his part, did not come to court to complain about the violation and allowed it to continue for over a year. Based on these facts, the court apportions seventy-five percent of the fault to the mother and the remaining twenty-five percent to the father.

Would it then be a good idea to let the child live with her father from January first through September thirtieth (seventy-five percent of the year), and then move her to live with her mother from October first through December thirty-first (twenty-five percent of the year)? We do not think so. Our family law does not think so either: it mandates that courts use benefit of the child as a sole criterion for adjudicating custody disputes.<sup>123</sup> The child custody doctrine has building blocks other than fault, bilaterality, and monetary remediation.

Note, however, that this doctrine still has the same violation/defenses architecture as our contract and tort doctrines. For example, in our hypothetical child custody dispute, the mother may be able to exonerate herself not only by showing that her daughter's school program was adequate, but also by establishing that her temporary financial hardship—or, alternatively, illness from which she now had recovered—did not allow her to secure the agreed-upon school placement.<sup>124</sup> The mother's ability to develop alternative defenses vastly improves her position in the allocation of the court's errors. The father's exposure to those errors, on the other hand, increases exponentially. How should the legal system equalize the parties' exposure to those errors?

As we just saw, the child custody doctrine does not tolerate the substantive solution. Can this doctrine work together with the compensatory solution? We believe that this combination would not be successful either. Forcing the mother to pay any substantial amount to the child's father would give the father a windfall at the child's expense. Forcing the mother to pay this amount to a fund that will be used by the child would

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123. Allen M. Bailey, *Prioritizing Child Safety as the Prime Best-Interest Factor*, 47 FAM. L.Q. 35, 35 (2013) ("In making child custody decisions, family court judges must apply their jurisdiction's 'best interests of the child' criteria.").

124. See, e.g., Mona Lewandowski, *Barred from Bankruptcy: Recently Incarcerated Debtors in and Outside Bankruptcy*, 34 N.Y.U. REV. L. & SOC. CHANGE 191, 244–45 (2010) (attesting that most states recognize financial hardship of a parent as a ground for allowing him to modify child support duties).

not accomplish anything: the child would not have more money as a result of that transfer.<sup>125</sup> This simple analysis leaves only one solution at our disposal: the procedural solution.

The procedural solution would be the best fit for the child custody doctrine. Under this doctrine, the child's benefit is of paramount importance, which makes it imperative for the parents to investigate and familiarize themselves with all relevant facts before they come to court. For that reason, it would be entirely sensible, if not mandatory, to prohibit alternative pleadings in this area of family law. Each parent should be required to come to court with only one cohesive account of the relevant events.<sup>126</sup>

Finally, consider a landowner seeking a court order that will enjoin a trespasser and obligate her to pay compensation for the unlawful occupation of the landowner's land. Because trespassers are not supposed to acquire shares (or other entitlements) in the occupied land, our substantive solution is not suitable for trespass cases. Trespass cases require restoration of property rights. For this type of cases, policymakers therefore should choose between the procedural and compensatory solutions. The procedural solution does not seem to work well in the trespass context. Denying the alleged trespasser an opportunity to raise alternative defenses may be too harsh as well as detrimental to society's interest. For example, the alleged trespasser should be allowed to claim that her use of the owner's property fell within public easement or, alternatively, that it amounted to a *de minimis*, and hence noncompensable, infringement of the owner's rights.<sup>127</sup>

In the present example, therefore, the compensatory solution dominates the other two solutions. This solution also aligns with the property doctrine that protects the owner's right to exclude by obligating trespassers to pay aggravated damages rather than rentals.<sup>128</sup>

## V. CONCLUSION

Policymakers make laws in the hope that courts will implement them properly. This hope is hard to reconcile with the real world in which courts sometimes misapply the law, misinterpret evidence, and decide the case wrongly. Insulated from that world, our rules of civil liability systematically malfunction. By pitting several defenses against every single violation, they give defendants an undeserved talking points advantage over plaintiffs. Under these rules, a court's approval of one de-

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125. *Cf.* Broadbent v. Broadbent, 907 P.2d 43, 48 (Ariz. 1995) (recognizing that parental immunity against tort liability prevents vain money transfers within the family, yet deciding to repeal the immunity on the theory that a child will only sue her parent when the parent has liability insurance).

126. This requirement aligns with the conventional story-based model of factfinding. *See* sources cited *supra* note 65.

127. *See* Parchomovsky & Stein, *supra* note 91, at 1833–34, 1850–51 (identifying circumstances in which trespass will be excused as *de minimis*).

128. *Id.* at 1841–45 (justifying imposition of punitive damages on encroachers).

fense of many enables the defendant to defeat the plaintiff. On the other hand, when a court erroneously strikes one defense, it might still keep the defendant out of harm's way by granting her another defense. This inequality puts plaintiffs on a hurdle race track while allowing defendants to sprint.

We have offered three alternative solutions to this problem. These solutions—procedural, compensatory, and substantive—are directed toward the same goal: eradicating the defendants' unfair talking points advantage. Our procedural solution allows defendants to develop only one line of defense against each claim asserted by the plaintiff. Our compensatory solution introduces a damage multiplier for defendants who lose the case. This multiplier increases the compensation duty for liable defendants in proportion to the number of defenses they choose to raise. Our substantive solution replaces the violation/defenses system with a comprehensive comparative fault regime. This regime would authorize courts to apportion parties' responsibility for damages and unperformed agreements correspondingly to their faults that range between zero and one hundred percent. Under this regime, each party would be free to assert and develop any number of claims about how her fault measures against her opponent's fault. We have shown that this solution dominates the other two in tort and contracts areas where individuals' entitlements and obligations are bilateral, fault-based, and monetized. For differently structured obligations and entitlements, we recommend the procedural and compensatory solutions.