Allocation of Errors and the Architecture of Liability

Jef De Mot* and Alex Stein**

Our civil liability system affords numerous defenses against every single violation of the law. A successful assertion of one of the many defenses by a defendant guarantees her a victory in court. This architecture of civil liability is fundamentally incompatible with the fact that courts are not immune from errors. When a court erroneously strikes out a meritorious defense, it might still keep the defendant out of harm’s way by granting him 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 the defendant one defense out of many, the court will doom the plaintiff’s meritorious suit. Any rate of adjudicative errors—random and completely unbiased—increases the prospect of losing the case for meritorious plaintiffs while decreasing it for defendants, both rightful and opportunistic.

This profound inequality forces plaintiffs to settle suits below their expected value. Worse yet, under the current system, defendants can unilaterally reduce the suit’s expected value and extort a cheap settlement from the plaintiff through a frivolous addition of defenses.

We offer three alternative solutions to this problem: a procedural solution, a compensatory solution, and a substantive solution. Each of our proposed solutions would eradicate the defendants’ anomalous advantage. Our procedural solution would limit defendants to 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 architecture by a comprehensive comparative fault regime, authorizing courts to apportion parties’ responsibility on a scale of 0% to 100%. 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 show that this solution dominates the other two in tort and contracts cases where individuals’ entitlements and obligations are bilateral, fault-based, and monetized. For differently structured obligations and entitlements, we recommend the procedural and compensatory solutions.

* Senior Research Fellow, Research Foundation Flanders, University of Ghent, Faculty of Law, Belgium.
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Introduction

Courts make mistakes. Some of those mistakes result from factual and legal uncertainties, and others from the scarcity of decisionmaking resources. Courts systematically experience shortages of information regarding what the relevant facts are and what applicable legal rules say. Consequently, they have to make their decisions

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1 In this Essay, “court” refers to both judges and jurors.
3 See 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”); see also Stephen G. Gilles, The Supreme Court and Legal Uncertainty, 60 DePaul L. Rev. 311, 328 (2011) (“The attendant legal uncertainty—how will the Supreme Court construe this statutory language, and at what point will the Court decline to adopt an otherwise sensible meaning because it constitutes legislation rather than interpretation—is so pervasive in our legal culture that we take it for granted.”); Lawrence A. Cunningham, Securitizing Audit Failure Risk: An Alternative to Caps on Damages, 49 WM. & MARY L. Rev. 711, 729 (2007) (attesting that “legal uncertainty is endemic and pervasive”); Peter Goodrich, Europe in America: Grammatology, Legal Studies, and the Politics of Transmission, 101 Colum. L. Rev. 2033, 2060 (2001) (“If acceptable implications and the myth of certainty, or of cabined
under conditions of uncertainty. 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 thus receive only a fraction of the court’s attention. As a result, some of the courts’ decisions come out erroneous. Our legal system tries to reduce those errors and their net social cost. To this end, it designed special mechanisms that include burdens of proof, presumptions, rules of interpretation, and appellate review. These mechanisms reduce both the incidence and the cost of adjudicative errors, but are far from eradicating the errors completely. Adjudicative errors are very much part of our legal landscape.

This well-known and undisputed phenomenon is not integrated into our system of civil liability. Worse yet, our civil liability system allocates adjudicative errors in a strikingly anomalous way that violates fairness and efficiency at once. As we reveal in this Essay, the system systematically mitigates the adverse effect of adjudicative errors on defendants, while amplifying it for plaintiffs. As a result, the plaintiff’s chances of losing decisions, are the criteria of knowledge of law, then legal uncertainty is far more pervasive, and the sources of decision far more hidden and opaque, than if deconstruction’s philological concerns and textual patience were the order of the day.

4 See VERMEULE, supra note 3, at 4; STEIN, supra note 2, at 34-35.
6 Id. at 403-04. See also Henry S. Noyes, The Rise of the Common Law of Federal Pleading: Iqbal, Twombly, and the Application of Judicial Experience, 56 VILL. L. REV. 857, 865 (2012) (“the parties, the courts, and the jurors are limited in the time that they can devote to the issues at trial.”).
7 See Lea Brilmayer, Wobble, or the Death of Error, 59 S. CAL. L. REV. 363, 367-69 (1986) (stating that errors in both factfinding and applications of the law are inevitable and explaining why).
8 See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 757-60, 827-31 (8th ed. 2011) (explaining how our legal system works to reduce the net cost of errors in civil and criminal adjudication).
10 See STEIN, supra note 2, at 26-27, 222-23 (analyzing presumptions).
12 See POSNER, supra note 8, at 804 (explaining that the appellate system is driven toward reducing the net cost of legal error).
13 See Brilmayer, supra note 7, at 367. See also, e.g., Robert S. Smith, How the Prompt Outcry Rule Protects the Guilty, 76 ALB. L. REV. 1445, 1445 (2013) (acknowledgment by a senior New York judge that adjudicative errors are inevitable); 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).
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the case undeservedly are much higher than the defendant’s. This discrimination is unintended and has hitherto gone unnoticed. We propose to remove it from our law.\textsuperscript{14}

Our civil liability system has an architecture of violations, on one side, and defenses, on the other side. This architecture affords defendants two or more opportunities to win the case. Under extant law, breach of contract is a violation that triggers legal penalties, but a defendant who fails to successfully dispute the breach allegation can still avoid liability by establishing fraud, misrepresentation, mistake, unconscionability, or another defense.\textsuperscript{15} By the same token, negligent infliction of damage on another person constitutes violation as well, but a violator can reduce—and in some cases, altogether eliminate—his duty to compensate the victim by successfully asserting a defense.\textsuperscript{16} For example, a violator can often exonerate himself by establishing that the victim unreasonably failed to mitigate the damage or was comparatively or contributorily negligent toward herself.\textsuperscript{17}

This architecture of civil liability benefits defendants at the plaintiffs’ expense. Consider a suit for $1,000,000\textsuperscript{18} in tort damages in which the defendant disputes the alleged negligence and raises the contributory fault\textsuperscript{19} defense. 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 probability of adjudicative error reduces the value of the plaintiff’s suit by 20%. For any such plaintiff, the expected judgment consequently equals $640,000 (\(80\% \times 80\% \times $1,000,000\)). 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 prospect of adjudicative error reduces the value of the plaintiff’s suit by $360,000 ($1,000,000–$640,000).\textsuperscript{20}

\textsuperscript{14} Criminal law falls outside the scope of this Essay. We note, parenthetically, that problems we discuss here rarely arise in the criminal context because criminal defendants are vastly disadvantaged in plea bargaining: see generally Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 2463 (2004); Stephanos Bibas, Incompetent Plea Bargaining and Extrajudicial Reforms, 126 Harv. L. Rev. 150 (2012).


\textsuperscript{17} Id. See also John C.P. Goldberg & Benjamin C. Zipursky, Torts as Wrongs, 88 Tex. L. Rev. 917, 971 (2010) (“[T]ort law plausibly identifies different forms or classes of wrongings, subject to different definitions and defenses.”); Stephen G. Gilles, The 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.”).

\textsuperscript{18} For simplicity, we focus throughout this Essay on the suit’s expected value net of the plaintiff’s litigation expenses.

\textsuperscript{19} See DAN B. DOBBS, THE LAW OF TORTS § 199 at 494-98 (2000) (stating and explaining the conditions under which a plaintiff’s contributory negligence dooms her suit).

\textsuperscript{20} For simplicity, we assume throughout this Essay that parties are risk-neutral. Our analysis will not
Consider now a defendant who faces a similar suit. The defendant estimates that the suit is unmeritorious and that he 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 20%. For any such defendant, the expected judgment equals $40,000 (20%×20%×$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.

We call this effect the “extortionary asymmetry.” As the reader can see, this asymmetry favors defendants. Our example is illustrative. There, an identical prospect of adjudicative error reduces the plaintiff’s optimism about her suit by 36%, while reducing the defendant’s optimism about his defense by only 4%. 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.

The extortionary asymmetry drives out bad consequences. It pressurizes plaintiffs to accept cheap settlements that reduce defendants’ liability. This reduction motivates prospective violators to discount the penalties accompanying our rules of primary behavior. Those rules consequently fail to secure individuals’ conformance with the socially desirable conduct. This outcome is unfair as well as detrimental to society’s welfare.

Thus far, the law and economics literature has paid no attention to the extortionary asymmetry and its anomalous effect on welfare. In the pages ahead, we fill this gap. We analyze and offer an economically viable solution to the extortionary asymmetry problem. We show that this problem looms large in both torts and contracts. In the contracts area, pre-contractual bargaining can sometimes fix the imbalance between the plaintiffs’ and the defendants’ legal burdens by adjusting the agreed-upon prices or by altering the violation/defense architecture. We show, however, that this fix is far from being foolproof. Sticky defaults and high transaction costs often make it unavailable.21

This problem has three potentially viable solutions: procedural, compensatory, and substantive. These solutions eradicate the extortionary asymmetry and level the playfield for settlements. The procedural solution eradicates the defendants’ 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 procedural 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.

change when parties are risk-averse. For people’s different attitudes toward risk, see POSNER, supra note 8, at 15.

21 See infra note 93 and accompanying text.
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’ advantage in the allocation of courts’ errors. This multiplier would increase the compensation amount recoverable by plaintiffs that prevail in the trial. By making trial more attractive for plaintiffs, this solution tempts the defendants’ extortionary motivation in settlements.\(^2\)

The substantive solution tackles the problem directly: it substitutes the malfunction/violation/defense architecture 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 0% and 100% and parties will be free to make any claim about these percentages. The number of claims that plaintiffs and defendants will develop against each other will consequently be equal. Errors that courts will randomly make will thus no longer discriminate between plaintiffs and defendants. Instead, they will spread themselves more or less evenly across parties’ claims. Courts’ errors will also become less harmful: they will normally obliterate only a small fraction of the deserving party’s entitlement.

The procedural solution might engender a serious anomaly. Defendants may not have enough information to choose one line of defense over another. Sometimes, defendants cannot predict which line of defense will carry the day with the court. Under such circumstances, asking a defendant to pre-commit to a particular line of defense and forego all others is neither efficient nor fair.

The compensatory solution has a number of shortcomings as well. Multiplying liability payouts for defendants might give plaintiffs too much power in settlement bargaining. Instead of disappearing, the extortionary asymmetry will thus simply change hands. Worse yet, a sharp increase in defendants’ payouts might chill socially beneficial activities that provoke suits and exacerbate parties’ expenditures on settlements and trials.

The substantive solution does not suffer from these predicaments. Unlike the other two solutions, it does not attempt to equalize parties’ exposure to courts’ errors by taxing defendants or by subsidizing plaintiffs. The substantive solution attains the desired equality by universalizing comparative fault as a liability principle for torts and contracts. Importantly, our legal system already uses this principle in many contexts. For that reason, the system’s adoption of the substantive solution will fix the anomalous architecture of civil liability without incurring the cost of a far-reaching law reform. We therefore prefer the substantive solution to the other two solutions. This solution’s scope is not unlimited, though: it will work particularly well in tort and contracts areas where

\[^2\] 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.
individuals’ entitlements and obligations are bilateral, fault-based, and monetizable. In other areas of the law, the procedural and compensatory solutions will do a better job. Based on this analysis and the pervasiveness of settlements in our legal system, we posit that lawmaking should account for parties’ settlement dynamics.

This Essay unfolds as follows. In Part I, we identify the extortionary asymmetry problem. In Part II, we present our solutions to this problem and analyze their advantages and limitations. In Part III, we explain how to carry out the lawmaking process in the shadow of settlements. A short Conclusion follows.

I. The Extortionary Asymmetry in the Allocation of Courts’ Errors

A. Violations vs. Defenses

Our torts and contractual liability systems employ a dual mechanism of violations and defenses. 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 include actions that cause damage to another person due to the actor’s failure to take the requisite precautions to prevent the relevant harm. In contract law, a “violation” includes an actor’s failure to perform her promise to another person. 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.

Consider tort liability first. As a general rule, an actor engaging in a risky activity must take cost-effective precautions against expected damage to another person (the total amount of damage that the actor’s activity might bring about multiplied by the damage’s probability). When precautions that can prevent the damage cost less than the expected

23 For torts, see DOBBS, supra note 19, §§ 198-202 at 493-510 (juxtaposing the negligence claim against contributory and comparative fault defenses); see also id. §§ 203-204 at 510-14 (same for negligence vs. the “avoidable consequences” defense). For contracts, see ALLAN E. FARNsworth, CONTRACTS §4.1, at 223-24 (3rd ed. 1999).

24 See DOBBS, supra note 19, § 110 at 257-59 (outlining the elements of the negligence standard and its violation).

25 See FARNsworth, supra note 23, § 8.1 at 517-19.

26 For torts, see DOBBS, supra note 19, §§ 198-204 at 493-514. For contracts, see FARNsworth, supra note 23, § 8.1 at 517-19

27 See DOBBS, supra note 19, §§ 198-204 at 493-514. For contracts, see FARNsworth, supra note 23, §§ 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 41-49, 86 and accompanying text.

28 This formulation of negligence 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 19, § 145, at 340-43 (outlining the Hand formula); POSNER, supra note 8, at 213-17 (outlining, refining and operationalizing the Hand formula).
Damage, the actor must take those precautions. Failure to do so would make the actor negligent and presumptively responsible for compensating the victim for the ensuing damage.

The actor’s liability would still be merely presumptive, rather than definite, because it does not account for the victim’s own fault. Accidents always involve two or more parties with different opportunities to avoid or mitigate the damage. 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. Consequently, there are circumstances in which the law assigns the victim’s damage, or part thereof, to her own account.

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. 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.” 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. 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 the victim’s suit by invoking the “avoidable consequence” defense.

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. The actor’s failure to perform the agreement allows the aggrieved party to recover remedies that include compensation and specific performance.

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29 See Posner, supra note 8, at 213-14.
30 The same analysis will apply to strict liability for defective products that has a similar violation/defense format. See Dobbs, supra note 19, §§ 352-357 at 969-87 (for violation); § 369 at 1020-26 (for defenses).
31 See Posner, supra note 8, 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.”).
34 See Dobbs, supra note 19, §§ 198-204 at 493-514 (specifying the defenses’ circumstances under which the responsibility for an accident goes to the victim).
35 Id. §§ 213-215 at 541-50 (outlining the “assumption of risk” defense).
36 Id. § 199 at 494-98 (outlining the “contributory negligence” defense).
37 Id. §§ 201-202 at 503-10 (outlining the “comparative negligence” defense).
38 Id. §§ 203-204 at 510-14 (outlining the “avoidable consequences” defense).
39 See § 8, supra note 23, § 1.1, at 3-5.
40 Id. §12.2 at 760-61 (outlining contract remedies).
As in 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, mistake, impossibility, frustration of purpose, unconscionability, fraud, conditions, undue influence, and economic duress. They are supplemented by general defenses, such as laches and limitations. The same violation/defense architecture of liability is present in other areas of the law as well.

This architecture is fundamentally flawed in that it severely discriminates against plaintiffs while favoring defendants. Under this architecture, plaintiffs have only one claim 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. This claim may rely on alternative factual accounts, but the plaintiff must still establish the alleged violation by a preponderance of the evidence. 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 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. Importantly, they are also allowed to do both: a defendant can deny the alleged violation while asserting one or more defenses. Defendants, consequently, have a fallback that plaintiffs do not have. Similarly to

41 Id. § 4.15 at 260-64 (outlining the misrepresentation defense).
42 Id. §§ 9.2-9.4 at 619-37 (outlining the defense of mistake).
43 Id. §§ 9.5-9.6 at 637-52 (outlining the impossibility defense).
44 Id. §§ 9.7-9.9 at 652-67 (outlining the defense of frustration).
45 Id. § 4.28 at 307-16 (outlining the unconscionability defense).
46 Id. § 4.12 at 250-55 (outlining the fraud defense).
47 Id. § 8.2 at 519-25 (outlining the “conditions” defense).
48 Id. § 4.20 at 273-76 (outlining the undue influence defense).
49 Id. §§ 4.16 at 265-66; 4.18 at 270-73 (outlining the economic duress defense).
50 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 Railroad Telegraphers v. Railway Express Agency, 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.”)
52 This architecture is a salient characteristic of our intellectual property law: see Gideon Parchomovsky & Alex Stein, Intellectual Property Defenses, 113 COLUM. L. REV. ____ (2013).
53 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.
54 See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 3.3 at 111 (5th ed. 2012) (outlining the preponderance requirement for plaintiffs).
55 See FED. R. CIV. P. 8(b) & (c) (allowing defendants to deny the plaintiff’s allegations and raise a defense).
56 See FED. R. CIV. P. 8(d)(2) & (3) (allowing parties to assert alternative claims and defenses even when they are mutually inconsistent).
plaintiffs, a defendant can support any of his lines of defense by alternative factual accounts. While furnishing this support, the defendant must avoid perjury, but the same perjury prohibition obligates plaintiffs as well.57 Unlike plaintiffs, however, defendants are allowed to move from one claim 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, to any violation claim asserted by the plaintiff, the defendant may respond with multiple defenses. Defendants consequently have a claim 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 he says about the defendant’s violation, the court would figure it out and make a proper determination of the defendant’s liability. Conversely, when a defendant is innocent, the court would find no violation on his part and exonerate him. 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. In short, when courts are infallible, parties’ entitlements and liabilities get to be properly determined.

Error-free courts, however, are unreal. In the real world, courts attempt to avoid errors, but they do not always succeed. Their errors are manifold. Judges occasionally misinterpret the law, give jurors the 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 drive out the wrong liability decisions.58 A misguided court will sometimes assign liability and the requisite penalty to a faultless party; and in a different case, it will exonerate a party who violated the law. Shortages in the courts’ decisionmaking resources—time, effort, attention, memory, and information about facts and law—make those errors inevitable.59 Appellate courts can detect and fix only a small fraction of those errors.60 Worse yet, appellate judges, too, are bound to make mistakes.61

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59 See supra notes 4-7 and sources cited therein.

60 See supra notes 5-12 and sources cited therein.

B. Allocation of Errors Across Claims

Because courts generally try to avoid errors, we assume throughout our discussion 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’ claims. We believe that this standard probabilistic assumption is realistic as well. We make this assumption for an additional reason: it helps us show that, even when courts do not favor defendants, the current architecture of civil liability puts defendants ahead of plaintiffs.

Under this architecture, the numerical imbalance between plaintiffs’ and defendants’ claims 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, 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 him one claim out of two. The defendant’s claims thus function as backups for each other. They enhance the defendant’s protection against adjudicative errors and alleviate his litigation burden.

Consider now a plaintiff who rightfully claims, “The defendant violated my entitlement.” This claim 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 than the defendant in our previous example. She would have to avert two potential errors in the court’s decision, as opposed to just one error.

Assume further that the court errs 20% of the time. The defendant in our first example will then do reasonably well: his chances of losing the case undeservedly will amount to only 4%. 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 36%. The defendant’s situation will consequently be nine times better than the plaintiff’s. The defendant will refuse to increase his settlement payout, relative to the error-free world, by more than 4%. The plaintiff, on the other hand, will be forced to reduce her reserved settlement price by 36%.


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%×20%=4%. When the court’s errors are not mutually independent, a similar distortion will occur, but its computation would become more complex.

This chance is calculated as follows: 20%×20%−(20%×20%)=36%. The deduction of (20%×20%=4%) is necessary to avoid double counting of the overlapping chances. See Stein, supra note 62, at 210-11.
Things may get even worse. Assume that courts err only 10% 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%\(^3\)). Meritorious defendants will thus be nearly certain (99.9%) to win the case. Consequently, they will be unwilling to pay plaintiffs more than 0.1% 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 73% (0.9\(^3\)), they will discount their settlement prices by 27% (100%-73%). Meritorious defendants will thus do 270 times (!!) better than deserving plaintiffs.

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

Prior to investigating this extortionary asymmetry and its ill-effects, we need to complete our analysis of courts’ errors. Specifically, we need to consider two factors that might mitigate the anomalous allocation of those errors across parties’ claims.\(^65\) One of these factors is the plaintiffs’ power to claim any amount of damages—inflated or even skyrocketing—in the hope that the court will award it.\(^66\) 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.\(^67\) 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

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\(^{65}\) Arguably, courts prefer to hear from parties straightforward stories that come as a coherent whole and tend to disbelieve alternative claims. Defendants pursuing two or more alternative lines of defense would thus face credibility discounting: see Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 292-94 (2013); Roger Alan Ford, *Patent Invalidity Versus Noninfringement*, 98 CORNELL L. REV. ___ (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); 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.”);
Ronald J. Allen & Sarah A. Jehl, *Burdens of Persuasion in Civil Cases: Algorithms v. Explanations*, 2003 Mich. St. L. REV. 893, 929 (“the 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”). The discounting measure is an informal variant of our procedural solution: see *infra* Section II.A. We believe this measure to be too soft as it gives no assurance that the court will discount the credibility of alternative defenses in each and every case.

\(^{66}\) The court’s authority to award damages may be subject to statutory caps: see *Dobbs, supra* note 19, § 384 at 1071-73.

\(^{67}\) Under appropriate circumstances, defendants might be able to file a counterclaim: see *Fed. R. Civ. P.* 13.
(0.7 × 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. 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 his part, cannot ask the court to reduce the plaintiff’s actual damage by $900,000; he 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. As a normative matter, however, things are markedly different. Offsetting the defendants’ unmeritorious advantage by allowing plaintiffs to inflate their claims of damage is hardly a good idea. We do not see how it can promote efficiency or fairness in adjudication. Two wrongs do not make a right.

Furthermore, the extent to which plaintiffs can 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 those damages. In torts, compensation recoverable by plaintiffs is capped by the rules of causation. Therefore, when a plaintiff puts forward an outlandish demand for compensation, chances are that the court will properly 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 decisionmaking resources. Outlandish compensation demands do not fall into the shortage zone. To properly evaluate such demands, courts only need common sense, experience, and a few moments of thought. An outlandish compensation demand might trigger only one time-consuming inquiry: the court would have to consider whether this demand marks the plaintiff and her entire case untrustworthy. This inquiry would be theoretical as well because rational plaintiffs will try not to provoke it.

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68 See FARNSWORTH, supra note 23, §§12.8 at 784-91; 12.9 at 791-96 (outlining basic measurement of contract damages).
69 See DOBBS, supra note 19, §§ 166-169 at 405-12 (outlining causation requirements).
70 See supra notes 5-6 and accompanying text.
71 This projection follows the logic of the old “falsus in uno, falsus in omnibus” principle. See, e.g., Courten & Villar v. Alecser, 966 N.Y.S.2d 345 (Table) (N.Y.Co.Ct. 2013) (“Falsus in uno, falsus in omnibus; if the Defendant intentionally misrepresented a material fact … then the court can conclude that the Defendant misrepresented everything.”).
Suppression of the product rule is one of the most puzzling legal phenomena that has no easy explanation. For that reason, it provoked an extensive scholarly debate that will soon mark its fortieth anniversary. Our law instructs factfinders not to multiply the probabilities attaching to discrete elements of a lawsuit. By doing so, it allows plaintiffs to win cases upon aggregate probabilities that fall way below 50%. As a consequence—so goes the argument—courts deliver, over a run of cases, more incorrect decisions than correct ones.

Whether this argument is correct is a big question that falls outside the scope of our present discussion. 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. 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. Aggregation of

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74 See Stein, supra note 73, at 1204 note 6 (citing caselaw and pattern jury instructions that suppress the product rule).
75 See Kaye, supra note 73, at 38-41.
76 Id. at 41 (arguing that law deviates from probability rules and accepts “imprecision and inaccuracy” because “other values are at work.”).
77 See Kaye, supra note 73, at 38 (arguing that it is perfectly appropriate for courts to dismiss a suit that has a 0.499 probability of being meritorious).
78 This policy does not always align with efficiency and fairness: see Ariel Porat & Eric A. Posner,
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 thus appears to benefit the plaintiff at the defendant’s expense.

This appearance is misleading because it captures just a fragment of what the law actually does. In fact, the law’s suppression of the product rule is symmetrical. This suppression benefits defendants as well, 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 fend off 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. Each of those elements must be more probable than not individually: there is no requirement that their aggregate probability be greater than 0.5 as well. Hence, when each element has a 0.7 probability, the defendant will establish misrepresentation and acquire the power 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—as before—the product rule does not apply. By suppressing this rule, the law does not permit the plaintiff to aggregate the doubts accompanying 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 66% chance to be wrong somewhere. The plaintiff, however, cannot use this aggregate probability to his advantage.

C. The Extortionary Asymmetry

Adjudicative errors are inevitable, given the scarcity of our courts’ decisionmaking resources. All that our system can do on that score is allocate those errors in a way that aligns with efficiency and fairness. The system, however, did the exact opposite: it set up an anomalous architecture of civil liability that skews most errors to the plaintiffs. Under this architecture, a defendant can unilaterally dilute the settlement value of the plaintiff’s


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 19, § 199 at 495. 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[].”)


See supra notes 5-6 and accompanying text.
suit by asserting two or more defenses that backup one another. Remarkably, defendants also have an impressively long list of defenses to choose from.\textsuperscript{83} Our torts system accounts for three general defenses,\textsuperscript{84} on top of immunities,\textsuperscript{85} and our contract law recognizes nine independent defenses.\textsuperscript{86} The four branches of intellectual property—patent law, trademark law, copyright law, and trade secrets law—account for thirty-four different defenses.\textsuperscript{87} Property law accounts for at least five.\textsuperscript{88} Additionally, Federal Rule of Civil Procedure 8(c)(1) and its state equivalents catalogue fourteen defenses that apply across the board,\textsuperscript{89} while clarifying that the catalogue is not exhaustive.\textsuperscript{90}

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 extortionary asymmetry thus robs plaintiffs of their rightful remedies, while encouraging torts, breaches of contract, and other violations. In the remainder of this


\textsuperscript{84} See DOBBS, supra note 19, §§ 199, 201, 203-04, 211 at 494-98, 503-06, 510-14, 534-39 (outlining defenses of contributory/comparative negligence, avoidable consequences, and assumption of risk).

\textsuperscript{85} Id. § 260 at 693-95 (outlining governmental and other official immunities against liability in torts).


\textsuperscript{87} See Parchomovsky & Stein, supra note 52, at ___. In intellectual property litigation, however, plaintiffs still have the upper hand. Their economies of scale and ability to target weak defendants gives them substantial advantage in court. See id. at ___; Gideon Parchomovsky & Alex Stein, The Relational Contingency of Rights, 98 VA. L. REV. 1313, 1345-52 (2012).

\textsuperscript{88} These defenses include license, easement, necessity, de minimis, and abandonment. See 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 (discussing de minimis and necessity defenses in property law); 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”).

\textsuperscript{89} 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.

\textsuperscript{90} FED. R. CIV. P. 8(c)(1) refers to “any avoidance or affirmative defense, including” the subsequently listed defenses.
Section, we outline these deleterious consequences 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.

1. The Unfairness Problem

The system’s pro-defendant allocation of courts’ errors engenders two kinds of unfairness: class unfairness and inter partes unfairness. The system’s inferior treatment of plaintiffs as a group in the allocation of courts’ errors constitutes class unfairness. Inter partes unfairness, on the other hand, occurs on the individual case level. This kind of 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. 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 down scales 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 B go along this path.

2. 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 36%, as in our introductory example, the wrongdoer will intensify his damaging activity by 36%. 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 $1.

This consequence is socially deleterious, 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 gain, 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.

3. Can Contracting Help?

Arguably, the extortionary asymmetry identified in this Essay is a problem for torts, but not for contracts. Contract law permits parties to modify the default rules as they deem appropriate. Based on that permission, parties can replace the violation/defense architecture 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/defense architecture 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 option is unrealistic. Many defenses recognized by our contract law are “sticky defaults.”\(^92\) Altering or replacing them can be prohibitive because of the negative-signaling problem and negotiation expenses. 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 over the terms on which the defense will be forfeited in advance. Anticipating this development, the party interested in the defense’s removal may decide to give up the idea entirely.\(^93\)

II. Leveling the Playfield for Settlements

In the paragraphs ahead, we develop three alternative solutions to the extortionary asymmetry problem. We call these solutions procedural, compensatory, and substantive. These solutions are geared toward the same goal: each of them tries to eliminate the defendants’ advantage and 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. The Procedural Solution

The procedural solution eliminates the parties’ power to pursue alternative claims. This solution sets up a “one to one” format of litigation that allows defendants to assert and

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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) 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. The power to assert alternative defenses thus enhances the defendants’ protection against courts’ errors at the plaintiffs’ expense.

Under the prevalent liability architecture, defendants have a long list of defenses to choose from. Federal Rule of Civil Procedure 8(c)(1) reproduces part of that list, while notifying defendants about defenses that must be pled affirmatively. Defenses that appear on that list, in the 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. To these general defenses, defendants can add many specialized defenses that apply in tort, contract, property, and intellectual property cases.

Consider a defendant who falsely asserts three defenses that he 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 3% 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 his chances of winning the case due to the court’s error. The plaintiff has a 97% chance to prevail on each of the three defense issues, which means that her chances of winning the entire case are 91% (0.97^3). The defendant’s chances of winning the case have gone up from 3% to 9% due to a sheer accumulation of false defenses. The defendant thus enabled himself to extort an additional 6% of the plaintiff’s money in a settlement agreement—an extortion that may yield him a non-negligible sum at the plaintiff’s expense. Worse yet, the defendant may even be able to improve his position further by adding more alternative defenses to his list.

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95 See supra notes 83-90 and accompanying text.
96 See supra notes 34-52 and accompanying text.
97 As previously, we assume that these defenses are independent of each other and have no overlapping elements.
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 presently is. Policymakers also may reduce the courts’ caseload by hiring more judges. Additionally, they may grant awards and promotion to judges who generate the largest number of verdicts with the smallest number of appeals.\textsuperscript{99}

These measures, however, are pricy. Worse yet, they are unlikely to bring about a substantial reduction in a rate of error that is already as low as 3%. 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 1%. Take a dishonest defendant who falsely raises four alternative defenses backed by perjury and fake documents.\textsuperscript{99} By claiming these defenses, the defendant increases his chances of winning the case undeservedly to 4% (1–0.99\textsuperscript{4}). His phony assertion of four defenses thus quadruples his initial 1% chance of winning the case undeservedly. This strategy allows the defendant to extort from the plaintiff 4\% 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 allocation of courts’ errors across plaintiffs’ and defendants’ claims. This equalization would 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

\textsuperscript{98} 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 Maria K. Levy, Kate Stith & José A. Cabranes, \textit{The Costs of Judging Judges by the Numbers}, 28 \textit{YALE L. & POL’Y REV.} 313 (2010) (expressing skepticism about quantitative rankings of judicial performance).

\textsuperscript{99} We assume once again that these defenses are independent of each other and have no overlapping elements.
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. 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. As Professor Clarence Morris put it more than seven decades ago, “The function of this flexibility is avoidance of procedural mistrials. Careful lawyers cannot always foresee what will happen.” The procedural solution of the extortionary asymmetry problem 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. The Compensatory Solution

The compensatory solution introduces an adjustable damage multiplier to equalize the parties’ trial prospects and level the playfield for settlements. 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 \( \frac{1}{1 - E^n} \), 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. Under this formula, any defense that the defendant chooses to assert will increase his probability of defeating the plaintiff, but at the same time it will also increase the compensation amount that he would pay the plaintiff if the court rejects all of his defenses. The defendant would consequently have to choose the desired tradeoff. By deciding how many defenses he would raise, the defendant would set up the multiplier for his own case. The defendant’s choice would then be pervasively affected, if not dictated, by the merit of his defenses. This system would deny defendants the opportunity to erode the settlement value of the plaintiff’s suit simply by 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

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100 This unpredictability was among the reasons underlying Learned Hand’s famous remark “[A]s 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).


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

103 For a deserving plaintiff, the expected judgment without a multiplier equals \( (1-E)^n \times J \). With the multiplier, it would equal \( (1-E)^n \times \frac{1}{1/(1-E)^n} \times J = J \).
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 20% of the time. As we already explained, if the defendant is right about both defenses, his chances of undeservedly losing the case due to the court’s error would equal 4%. 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 36%. Under the proposed formula, if the plaintiff wins the case, she would recover 156.25% of her actual damage ($1,000,000 × 1/80\%$). 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 64% (100%−36%). Consequently, the defendant will agree to a settlement obligating him to pay the plaintiff $1,000,000 (64%×$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 4% chance of losing the case undeservedly. For any such defendant, the maximal settlement payout moves up from $40,000 (4%×$1,000,000) to $62,500 (4%×$1,562,500). The net error effect for rightful defendants thus increases from 4% to 6% ($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 $1,000,000, but then the defendant’s risk of losing the case undeservedly would have stayed at 20% instead of going down. Under the multiplier system, by adding an alternative defense to his pleading, the defendant takes this risk down to 6%. Absent the multiplier, the defendant’s addition of that defense could reduce the risk to 4%, but then the rightful plaintiff’s exposure to a similar risk would be 36% instead of 0%. Hence, by increasing the rightful defendants’ risk of losing the case by only 2%, our multiplier reduces a similar risk for deserving plaintiffs by 36% (from 36% to 0%). This is an unquestionably good tradeoff from both fairness and utility perspectives, especially since defendants always outscore plaintiffs by the number of claims they can assert. As long as the current architecture of civil liability stays intact, the plaintiffs’ ability to enhance their protection against courts’ errors by adding more claims will never match the defendants’ ability.

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 $10,000,000, a 1% 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 supracompensatory awards because they don’t 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.104 According to Becker, when a government experiences drawbacks in enforcing criminal law, it will do well to magnify its penalties instead of intensifying enforcement efforts.105 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 the criminals’ penalties.106

Becker’s insight works extremely well with a criminal law that can viably threaten violators with imprisonment and other harsh penalties.107 However, individuals who commit torts and default on contracts do not go to jail for that. 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 judgment proof and pay nothing for their misdeeds, may prove to be a serious mistake.108

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.109 Another shortcoming is an increase in the cost and duration of settlement negotiations and trials.110

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

105 Id.

106 Id. at 180-84.

107 See Posner, supra note 8, 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.”).

108 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 (Ind. 2005).

109 See Polinsky & Shavell, supra note 102, at 879 (observing that “if damages exceed harm, firms might be led to take socially excessive precautions.”).

110 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, Donna Stienstra & John Shapard, 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
With all this in mind, we now turn to discuss our substantive solution to the problem at hand.

**C. The 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\(^ {111}\)). Under the consolidated comparative-fault defense, courts will assess each party’s fault in her interactions with the other party. Ranging between 0% and 100%, 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 obliterates only a fraction of the deserving party’s entitlement.\(^ {112}\) Furthermore, by breaking the violation/no-violation 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 misevaluating 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.\(^ {113}\)

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

\(^{111}\) These defenses are immunities against suit granted for reasons extraneous to liability. See Order of Railroad Telegraphers v. Railway 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 8, at 807 (explaining that the purpose of the statute of limitations “is to reduce error costs associated with the use of stale evidence”).


\(^{113}\) See also infra notes 114-116 and accompanying text.
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. To this end, they use fault as their core criterion for imposing and apportioning liability for damages. Both frameworks also utilize monetary payouts as a primary means for remedying wrongs and discouraging misconduct.

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 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, would not always be 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 and compensatory solutions 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 75% of the fault to the mother and the remaining 25% to the father.

Would it then be a good idea to let the child live with her father from January 1 through September 30 (75% of the year) and then move her to live with her mother from October 1 through December 31 (25% of the year)? We don’t think so. Our family law doesn’t think so either: it mandates that courts use benefit of the child as a sole criterion for

\[114\] See Shavell, supra note 32, at 182-90 (explaining that the torts system must use comparative fault criteria to eliminate free riding and induce socially optimal precautions against harm); \textit{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 19, § 1 at 2-3, § 9 at 16 (describing tort liability as predominantly fault-based); Ariel Porat, \textit{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).

\[115\] See Shavell, supra note 32, at 182-90.

\[116\] See Dobbs, supra note 19, § 377 at 1047-53 (outlining monetary remediation under the law of torts); Farnsworth, supra note 23, § 12.8 at 784-91 (attesting that monetary compensation is the principal remedy for breach of contract); \textit{see also} Miller v. LeSea Broad., Inc., 87 F.3d 224, 230 (7th Cir. 1996) (Posner, C.J.) (“The normal remedy for breach of contract is an award of damages. Specific performance is exceptional…”).
adjudicating custody disputes.\textsuperscript{117} The child custody doctrine has building blocks other than fault, bilaterality, and monetary remediation.

Note, however, that this doctrine still has the same violation/defense 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 appropriate, 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.\textsuperscript{118} 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 not accomplish anything: the child would not have more money as a result of that transfer.\textsuperscript{119} 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.\textsuperscript{120}

Finally, consider a landowner seeking a court order that will enjoin a trespasser and obligate him to pay compensation for the unlawful occupation of her 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

\textsuperscript{117} Allen M. Bailey, \textit{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.”).

\textsuperscript{118} \textit{See}, e.g., Mona Lewandowski, \textit{Barred from Bankruptcy: Recently Incarcerated Debtors in and Outside Bankruptcy}, 34 N.Y.U. REV. L. & SOC. CHANGE 191, 245 (2010) (attesting that most states recognize financial hardship of a parent as a ground for allowing him to modify child support duties).

\textsuperscript{119} \textit{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 only when the parent has liability insurance).

\textsuperscript{120} This requirement aligns with the conventional story-based model of factfinding: \textit{see supra} note 65 and sources cited therein.
society’s interest. For example, the alleged trespasser should be allowed to claim that his 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.\textsuperscript{121}

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.\textsuperscript{122}

III. Making Laws in the Shadow of Settlements

The famous adage “people bargain in the shadow of the law”\textsuperscript{123} aptly describes the familiar settlement dynamic. When two or more individuals bargain over how to resolve their dispute by agreement, instead of litigating it to judgment, they try to foretell the court’s decision.\textsuperscript{124} Each party asks herself: “How likely it is that my claims, rather than those of my adversary, will carry the day with the court?” While trying to answer this question, parties analyze the existing evidence and applicable law and calculate the expected value of their claims.\textsuperscript{125} Remarkably, the vast majority of settlement negotiations are successful: over 90% of legal disputes are resolved by parties’ agreement.\textsuperscript{126} As any trial lawyer would confirm, settlement is our legal system’s norm, while trial is an exception to the norm.\textsuperscript{127}

With settlements being the prevalent way of resolving legal disputes, the conditions under which parties strike those settlements become a matter of concern. Policymakers must see to it that these conditions do not force out settlements far removed from the merits of the case.\textsuperscript{128} Defendants should pay plaintiffs settlement amounts that are roughly equal to the expected value of the suit.\textsuperscript{129} When conditions under which settlements are made pressurize defendants to pay plaintiffs considerably greater amounts or, alternatively, compel plaintiffs to accept considerably lesser amounts, policymakers

\begin{itemize}
  \item \textsuperscript{121} See Parchomovsky & Stein, \textit{supra} note 88, at 1833-34, 1850-51 (2009) (identifying circumstances in which trespass will be excused as de minimis).
  \item \textsuperscript{122} \textit{Id.} at 1841-45 (justifying imposition of punitive damages on encroachers).
  \item \textsuperscript{124} See Posner, \textit{supra} note 8, at 764-65.
  \item \textsuperscript{125} \textit{Id.}
  \item \textsuperscript{126} See Theodore Eisenberg & Charlotte Lanvers, \textit{What is the Settlement Rate and Why Should We Care?} 6 \textit{J. Empirical Legal Stud.} 111, 111 (2009) (“Whatever uncertainty exists about settlement rates, settlement is the modal civil case outcome”).
  \item \textsuperscript{128} See Lucian Arye Bebchuk & Howard F. Chang, \textit{The Effect of Offer-of-Settlement Rules on the Terms of Settlement}, 28 \textit{J. Legal Stud.} 489, 511 (1999) (noting that, ideally, suits should settle at their expected value).
  \item \textsuperscript{129} \textit{Id.}
\end{itemize}
should step in and fix those conditions. For example, when high litigation costs force rightholders to accept settlements that annul their entitlements, policymakers will do well to remedy this problem by imposing punitive damages on the rightholders’ adversaries. By the same token, when a skewed allocation of courts’ errors disproportionately reduces the expected recovery amounts for plaintiffs, policymakers should intervene and install the required balance. Failure to remedy settlement distortions would breed unfairness and inefficiency in our legal system.

The lawmaking process therefore should account for conditions under which people settle their disputes. Making laws while ignoring settlements is as imprudent as striking a settlement that ignores the “shadow of the law.” When the content or structure of legal rules worsen the settlement conditions for plaintiffs while improving them for defendants, or vice versa, those rules aren’t good. The fact that the rules are flawless in all other respects and promote a worthy objective would then be of no consequence. Extortionary settlements would undo virtually everything that the rules try to accomplish.

To illustrate this point, we now carry out a settlement-focused comparison between two tort regimes: contributory negligence and comparative negligence. The contributory negligence regime holds the defendant liable for damages that he negligently inflicts on the plaintiff while allowing the defendant to exonerate himself completely by proving that the plaintiff acted negligently toward herself and by doing so contributed to the occurrence of her own damage. The comparative negligence regime abandons this all-or-nothing rule and prescribes, instead, that each party’s fault will determine how much she should pay for the damage. For example, when the parties are equally at fault, the plaintiff should pay the defendant 50% of the damage and the defendant will have to pick up the remaining 50%.

We evaluate these regimes under four different scenarios, or states of the world: (1) the defendant did not act negligently, but the plaintiff did; (2) the defendant acted negligently, but the plaintiff did not; (3) neither the defendant nor the plaintiff acted negligently; and (4) both parties acted negligently. As often happens in litigation, the parties know the actual state of the world, but the court does not know what it is. We also abstract away from the parties’ trial costs and other administrative expenses: we assume that these expenses offset each other. Under our account, the settlement value of a lawsuit equals the amount that the plaintiff stands to recover from the defendant if he wins the case, discounted by the probability of his victory (the expected recovery amount).

130 Id.
131 See Parchomovsky & Stein, supra note 87, at ___.
132 Some believe that “a bad settlement is better than a good trial”: see, e.g., Strong v. BellSouth Telecomm., Inc., 173 F.R.D. 167, 172 (W.D. La. 1997) (“In this case, I could hold my nose and accept the [suspicious class-action] settlement, after all, it is said that a bad settlement is better than a good trial.”). We do not share this belief.
134 See Parchomovsky & Stein, supra note 87, at 1335-41.
135 See Dobbs, supra note 19, §§ 199 at 494-98 (outlining the contributory negligence defense).
136 Id. §§ 200-202 at 498-510 (outlining the comparative negligence defense).
137 Accounting for parties’ litigation expenses would make our analysis more complex without changing
To simplify matters further, we will be using a stylized example. We consider a $1,000,000 suit in which the defendant disputes the alleged negligence while asserting a contributory or comparative negligence defense, as allowed by the applicable law. Based on that law and the available evidence, each party estimates her chances to prevail in court. As part of this estimate, the parties account for the probability that the court will make a mistaken decision about their negligence. We assume that this probability equals 20% for both parties. That is, there is a 0.2 probability that the court will misidentify a party’s negligent conduct as faultless and an equal probability that the court will misidentify a party’s faultless conduct as negligent.

We begin with the case in which the defendant did not act negligently, but the plaintiff did. Of our four types of cases, this case features the most opportunist suit. This suit is most opportunist because it opens a proceeding in which only the plaintiff, who acted negligently toward herself, can benefit from the court’s error. Under the contributory negligence regime, the suit will have a settlement value of $40,000 (0.2 \times 0.2 \times$1,000,000). This value is a product of two consecutive mistakes that the court might make: the plaintiff will recover a $1,000,000 compensation only when the court holds her faultless while holding the defendant negligent. Each of these erroneous holdings has a 0.2 probability; and so the probability that the court will make both of them equals 0.04. This probability takes the plaintiff’s expected recovery amount down to $40,000.

Under the comparative negligence regime, the suit’s settlement value will be different: it will aggregate the plaintiff’s expected payoffs from the two possible scenarios in which the court finds the defendant negligent, contrary to the state of the world. In one of those scenarios, the court finds the plaintiff faultless (again, contrary to the state of the world), while in the other scenario, it properly determines that the plaintiff acted negligently toward herself. The sum of these expected payoffs equals $1,000,000 \times \alpha \times$1,000,000. Under this formulation, \( \alpha \) represents the compensable percentage, or fraction, of the $1,000,000 damage that the court will award the plaintiff upon finding both parties negligent. More precisely, \( \alpha \) represents the severity of the defendant’s fault relative to the plaintiff’s; and it can also be described as the defendant’s share in the plaintiff’s damage. When this share is substantial, the plaintiff’s benefit from the court’s erroneous verdict will be substantial as well. And when \( \alpha \) is relatively small, the plaintiff’s expected payoff will get smaller as well: it will be close to the plaintiff’s expected payoff under the contributory negligence regime.

Recall that both parties know that, in reality, the defendant was faultless and the plaintiff was negligent. From an ex ante perspective, therefore, the parties will likely expect \( \alpha \) to be relatively small: \( \alpha \) can only be high when the court makes a big mistake by ruling that the negligence of the factually faultless defendant was more severe or more reprehensible than the plaintiff’s actual negligence. In negotiating a settlement, the parties will consider its substance.
this big mistake a low probability event, which will bring \( \alpha \) close to zero. Consequently, the plaintiff’s expected recovery amount will be close to $40,000 (0.2 \times 0.2 \times $1,000,000).

We now move to the second scenario representing the most meritorious suit: the defendant acted negligently while the plaintiff was faultless. This suit opens a proceeding in which only the defendant can benefit from the court’s error. Under the contributory negligence regime, the plaintiff’s expected payoff will thus amount to $640,000 (0.8 \times 0.8 \times $1,000,000).

Under the comparative negligence regime, on the other hand, the suit’s settlement value will equal 0.8 \times 0.8 \times $1,000,000 + 0.8 \times 0.2 \times \alpha \times $1,000,000. The first component of this sum (0.8 \times 0.8 \times $1,000,000) is a product of two probabilities: the probability that the court will correctly hold the defendant negligent, and the probability that the court will *not* misidentify the plaintiff’s faultless conduct as negligent. The second component (0.8 \times 0.2 \times \alpha \times $1,000,000) is a product of two different probabilities: the probability that the court will correctly hold the defendant negligent, and the probability that the court will misidentify the plaintiff’s faultless conduct as negligent. Here, too, \( \alpha \) represents the defendant’s share in the $1,000,000 damage, which the court erroneously assesses at below 100%. When \( \alpha \) is small, the court’s error will benefit the defendant most: it will reduce the plaintiff’s expected payoff to the amount that the plaintiff expects to recover under the contributory negligence regime (the least favorable to plaintiffs). Both parties know, however, that, in reality, the defendant was the only negligent party. Consistent with this knowledge, they will expect \( \alpha \) to be relatively large. For \( \alpha \) to be small, the court must make a very big mistake: it must erroneously estimate that the factually faultless plaintiff exercised less care than the factually negligent defendant. Deserving plaintiffs will thus generally fare better under the comparative negligence regime than under the contributory negligence regime.

We now consider the third scenario that features two faultless parties. The plaintiff’s suit is not meritorious, but because she did nothing wrong to contribute to her own damage, it is not as opportunistic as the suit she filed under the first scenario. The present suit, however, still opens a proceeding in which the court can only err against the defendant, while the plaintiff stands to lose nothing besides her attorney’s fee and other expenses.

Under the contributory negligence regime, the suit’s settlement value amounts to $160,000 (0.2 \times 0.8 \times 1,000,000). Under comparative negligence, on the other hand, it equals (0.2 \times 0.8 \times $1,000,000 + 0.2 \times 0.2 \times \alpha \times $1,000,000), that is, $160,000 + \alpha \times 40,000. Hence, so long as the court does not misevaluate the defendant’s conduct as grossly negligent and brings \( \alpha \) close to 100%, the suit’s settlement value will be roughly the same under both regimes. For example, when the court (still mistakenly) holds that the parties have equal shares in the damage (\( \alpha = 1/2 \)), the plaintiff’s expected payoff will amount to $180,000—only $20,000 more than the sum she expects to recover under contributory negligence. The shift from contributory to comparative negligence thus does not dramatically improve the plaintiff’s settlement position.

Finally, we examine the fourth scenario in which both parties acted negligently. Under contributory negligence, the plaintiff’s suit will then be unmeritorious. Under
comparative negligence, on the other hand, the suit will be partially justified. Under contributory negligence, therefore, only the plaintiff will benefit from the court’s error. Under comparative negligence, on the other hand, the court’s error might benefit either party (but not both of them simultaneously).

Under contributory negligence, the suit’s settlement value will equal $160,000 (0.8×0.2×1,000,000). Under comparative negligence, on the other hand, it will amount to $160,000+α×$640,000 (0.8×0.2×$1,000,000+0.8×0.8×α×$1,000,000). If the court decides that the parties were equally negligent (α=1/2), the settlement value of the plaintiff’s suit would then be $480,000. Notice that this amount is very close to the suit’s value in the errorless court ($500,000). This near-alignment speaks in favor of the comparative negligence regime.

We now carry out a comparison between the distortions in the allocation of the court’s errors under the two regimes. Our benchmark for measuring these distortions is the settlement value of the meritorious and the unmeritorious suits under both regimes. As postulated previously, this value equals the plaintiff’s expected payoff. We juxtapose meritorious plaintiffs against meritorious defendants and then pit unmeritorious plaintiffs and defendants against each other. Our goal is to find out whether one type of meritorious and unmeritorious litigants (plaintiffs or defendants) receives a preferential (or inferior) treatment in the allocation of the court’s errors. We thus focus on the difference between what the opportunistic defendant stands to gain when the plaintiff’s suit is meritorious and, conversely, what the meritorious defendant stands to lose when the plaintiff’s suit is opportunistic. The difference between these two undeserved outcomes will determine whether the allocation of the court’s errors is distortionary, and how serious the distortion is.

Under the contributory negligence regime, an opportunistic defendant robs the meritorious plaintiff of $360,000. Because this defendant was negligent and the plaintiff wasn’t, he should pay the plaintiff $1,000,000. However, the prospect of an erroneous court decision plays into the opportunistic defendant’s hands twice in a row. This defendant has a 20% chance of being misidentified by the court as faultless. Additionally, he enjoys a 20% chance that the court will hold the faultless plaintiff contributorily negligent. Both scenarios let the defendant go scot-free and their combined probability is 36% (0.2+0.2–0.2²). This probability forces the plaintiff to settle her completely meritorious suit for $640,000: $360,000 below her deserved amount of $1,000,000.

Under the same regime, an opportunistic plaintiff can extort only $40,000 from the meritorious defendant. The architecture of tort liability gives the defendant two chances to defeat the opportunistic suit: he has an 80% chance of being held faultless and another 80% chance of having the plaintiff identified by the court as contributorily negligent. The combined probability of these liability-free scenarios is 96% (0.8+0.8–0.8²). The distortion in the allocation of the court’s errors between plaintiffs and defendants consequently equals $320,000 ($360,000–$40,000).

See supra note 137 and accompanying text.
The comparative negligence regime mitigates this distortion. Under this regime, the opportunistic defendant takes advantage of the court’s 20% error rate to extort from the meritorious plaintiff $1,000,000–(0.8×0.8×$1,000,000+0.8×2×$1,000,000), i.e., $360,000–α_m×$160,000. This extortionary sum represents the difference between the plaintiff’s deserved remedy—$1,000,000—and the settlement value of her suit (that we already have explained). In the present formulation, $α_m$ denotes the defendant’s court-assessed share in the plaintiff’s damage. We use the $α_m$ symbol to indicate the fact that the plaintiff’s suit is meritorious.

Under the same regime, the opportunistic plaintiff will extort from the meritorious defendant a different sum, namely: $0.2×0.2×$1,000,000+0.2×0.8×$1,000,000, i.e., $40,000+$α_u×$160,000. In this formulation, $α_u$ denotes the defendant’s court-assessed share in the plaintiff’s damage. We use the $α_u$ symbol to indicate the fact that the plaintiff’s suit is unmeritorious.

The difference between the defendants’ and the plaintiffs’ extortionary powers consequently shrinks. Under the comparative negligence regime, it amounts to ($360,000–α_m×$160,000)–($40,000+$α_u×$160,000), i.e., to $320,000–α_m×$160,000–α_u×$160,000. This sum is way below the distortionary differential under the contributory negligence regime.

Notice that opportunistic plaintiffs do better under comparative negligence ($40,000+$α_u×$160,000) than under contributory negligence ($40,000). Meritorious plaintiffs, on the other hand, gain a lot from shifting from the contributory negligence regime to that of comparative negligence: the settlement value of their suits goes up by $α_m×$160,000 (instead of being slashed by $360,000, it goes down only by $360,000–α_m×$160,000, as we have just explained).

The comparative negligence regime thus dramatically reduces the asymmetry between plaintiffs’ and defendants’ extortionary opportunities. More importantly, it does so in a clever way by reducing the asymmetry more strongly on the “good plaintiffs’ side” (meritorious suits) than on the “bad plaintiffs’ side” (unmeritorious suits). To see why, compare between $α_m$ and $α_u$. As we mentioned earlier, when the plaintiff is meritorious, the court might still erroneously misidentify her conduct as negligent. However, because the plaintiff is factually faultless, chances are that the court will assign the lion’s share in her damage to the defendant. Conversely, when the plaintiff is an opportunist, the court might still misidentify her conduct as faultless. However, because the defendant is factually faultless, chances are that the court will apportion most of the damage to the plaintiff.

Hence, $α_m$ will always be much higher than $α_u$. In our example, this pivotal factor will reduce the plaintiff’s settlement loss of $360,000 by a sum nearing $160,000 (as $α_m$ will get close to 100%).

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139 We explained this calculation in our discussion of the first scenario.
Equally important, as we explained above in Section II.C, the comparative negligence regime equalizes the number of claims that plaintiffs and defendants can assert against each other. This factor plays a crucial role in the removal of the defendants’ extortionary advantage. To see how it does so, notice again that our example features a perfectly unbiased court, whose errors do not favor defendants over plaintiffs or vice versa. Despite this absence of bias, the court’s errors hit plaintiffs far more strongly than defendants because defendants—unlike plaintiffs—can shield themselves against those errors by developing fallback claims. The defendants’ opportunity to raise fallback claims is embedded in the current architecture of tort liability. Anomalously, this architecture does not provide plaintiffs with the same number of fallbacks. Under comparative negligence, this anomaly disappears.140

Conclusion

Policymakers make laws in the hopes 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. They work out serious injustice to plaintiffs, while giving defendants an undeserved advantage. The rules’ ostensibly logical architecture—that pits several defenses against every single violation—exposes plaintiffs to a disproportionately high rate of court errors. Under this architecture, a court’s approval of one defense out of many allows the defendant to defeat the plaintiff. When the court erroneously strikes out one defense, it might still keep the defendant out of harm’s way by granting him another defense. The plaintiff, on the other hand, must convince the court to deny each and every defense asserted by the defendant. By erroneously granting the defendant one defense out of many, the court will doom the plaintiff’s suit. The violation/defenses architecture of civil liability thus puts plaintiffs on a hurdle-race track, while allowing defendants to sprint.

As far as litigation expenses and other administrative costs are concerned, see Jef De Mot, Comparative versus Contributory Negligence: A Comparison of the Litigation Expenditures, 33 INT’L REV. L. & ECON. 54, 58 (2013) (“First, when the true level of fault of the defendant increases, the importance of the outcome of the issue of the plaintiff’s negligence increases under both rules, but more so under contributory negligence than under comparative negligence... Under contributory negligence ... whoever wins this issue, wins the case. Under comparative negligence, the outcome of the issue of the plaintiff’s negligence is relatively less important, due to the sharing character of this rule, unlike the all-or-nothing character of contributory negligence. Even if the plaintiff loses this issue, he will still be awarded a fraction of his loss. Second, when the true level of fault of the plaintiff decreases, the importance of the outcome of the issue of the defendant’s negligence increases under both rules, but more so under contributory negligence than under comparative negligence... Under contributory negligence ... whoever wins this issue, wins the case. Under comparative negligence, the outcome of the issue of the defendant’s negligence is also more important, but relatively less so... Third, the greater the difference between the true levels of fault of the parties, the smaller the value of investing in trying to convince the court that one’s level of fault was more modest. The effects of such investments are more heavily discounted when the difference between the levels of fault is relatively large.”).
This profound inequality forces plaintiffs to settle meritorious suits way below their expected value. Worse yet, under the current architecture of civil liability, defendants can unilaterally reduce the suit’s expected value by increasing the number of defenses. Unscrupulous defendants thus can dilute the value of meritorious suits by asserting baseless defenses.

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 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 architecture by 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 0% and 100%. 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.