ESSAY

A SIMPLE PROPOSAL TO HALVE LITIGATION COSTS

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INTRODUCTION

THIS Essay advances a simple proposal that could reduce civil litigation costs in the country by about half, yet without compromising the functioning of our liability system in a significant way. The proposal has two parts. First, courts would select randomly for litigation only half the cases brought before them; courts would not allow the other half to proceed. Second, in cases accepted for litigation and in which judgments for damages issue, courts would double the level of damages. Thus, the proposal might be described as one of random adjudication with double damages.[1]

We will state the basic reasons why the proposal might be considered socially beneficial in Part I. In essence, the virtue of the proposal as developed there flows from its first element: halving the number of adjudicated cases reduces litigation costs and the burden on the courts. The second part of the proposal ensures that the deterrent function of the liability system would not be diluted by the 50% chance that a liable party's case would not be heard. By doubling the award of damages, the proposal guarantees that the average payments of a liable party would be the same as they are presently. If today a negligent tortfeasor would have to pay $100,000 for harm caused, or if a party in breach of contract would have to pay $100,000 in damages, under the proposal, each would have to pay $200,000 with a 50% probability, meaning that the av-

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[1] The proposal may be understood to apply to any kind of civil action in which damages are sought, including a class action. As we note in Part V, the proposal is not meant to apply to actions for an injunction or for a criminal sanction.

1721

erage or "expected" payments of each would remain at $100,000. Because the proposal would not alter the expected financial sanction facing a liable party, the economic motive to comply with the law should remain essentially unchanged.[2]

The apparent appeal of the proposal, then, is that it would conserve litigation costs and reduce the work of the courts without interfering with the behavioral effects of the liability system. This argument, though, will leave out the important factors of settlement, trial expenditure, and compensation and risk-bearing, all of which need to be considered in coming to an assessment of the proposal.

The effect of the proposal on settlement will be addressed in Part II. We will suggest there that under the proposal, parties in a dispute would frequently settle *before* filing a case, especially because by doing so the parties would avoid the risk of random selection. Of course, the parties still would incur settlement costs. Yet we observe that these costs would be lower than they often are under the current system since the parties would avoid the costs of the formal process of litigation—including preparation and filing of pleadings, conducting discovery, and motion practice—that are often incurred now in reaching settlements. Under the proposal, parties in a dispute that do not settle before filing would have their case eliminated by random selection half the time, meaning that no further settlement costs would be generated. The other half of the time their case would be accepted for litigation and would settle with about the same likelihood as under the current system. Hence, whether settlement would occur before filing or after, considera-

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[2] The proposal is an application to the litigation context of a well-known strategy of efficient law enforcement. See Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169, 183–84 (1968) (explaining that it might be socially desirable to adopt a policy of law enforcement under which enforcement expenditures would be saved by catching and sanctioning violators with a low probability, but under which the magnitude of the sanctions imposed would be high in order to maintain deterrence); see also James D. Miller, Using Lotteries to Expand the Range of Litigation Settlements, 26 J. Legal Stud. 69, 69 (1997) (arguing that litigants should in principle often want to "settle" by agreeing to participate in a lottery such as that in our proposal); A. Mitchell Polinsky and Yeon-Koo Che, Decoupling Liability: Optimal Incentives for Care and Litigation, 22 RAND J. Econ. 562, 562 (1991) (suggesting that it might be advantageous to adopt a policy under which litigation expenditures would be decreased by reducing the incentive of plaintiffs to sue through a lowering of damage payments, but under which fines would be imposed to maintain the level of deterrence).

tion of settlement does not change the conclusion that the proposal would substantially lower legal costs.

We will examine the factors of compensation, risk-bearing, and insurance in relation to the proposal in Part III. On its face, the proposal will impose risk on both plaintiffs and defendants. Because there is a 50% chance that a case would not be heard, the plaintiff who files faces at least a 50% risk of recovering nothing. Furthermore, the defendant faces a 50% risk of paying double damages when liable because of the 50% chance the case would be heard. We will suggest, however, that these risks are reduced by two considerations. First, as we will discuss in Part II, the parties would frequently settle before filing just to avoid the risks of random selection. To the extent that parties do settle before filing, the compensatory function of the liability system would not be dulled under the proposal. Second, first-party insurance and liability insurance should function to protect parties against much of any added risk that they would face as a result of the proposal (without an increase in their insurance premiums). Hence, our judgment is that the imposition of risk is not an important disadvantage to the proposal.

Part IV will consider the effect of the proposal on the incentive to spend on trial. We will note that expenditures would be likely to rise, since the amount at stake would be doubled. This effect, though, probably would not be significant overall because the fraction of cases that would be filed, randomly selected for litigation, and then not settled, would be very small.

We will conclude in Part V with a discussion of a number of additional issues, including the view that the proposal would be perceived as unfair because it would deny some parties the right to a trial; why we do not recommend the proposal in contexts where injunctions are sought or in the criminal domain; and how the proposal might be introduced and implemented.

I. THE MAIN ARGUMENT

Let us explain the core of the argument favoring the proposal in stylized form and be explicit about the assumptions made before we consider complicating factors in subsequent Parts.

We simply suppose here that in the absence of the proposal, all persons harmed by possibly liable parties would file suit and go to

trial. Hence, by its definition, the proposal would cut the amount of litigation in half. If there would be 1,000 cases a year in some area of litigation, random selection would reduce that number to about 500.[3] Assuming that there are no costs associated with the cases that are randomly eliminated and that the costs of litigating those that are not eliminated would be the same under the proposal as they are now, litigation costs would fall by 50%.

Next, consider the effect of the proposal on the behavior of potential injurers. The expected liability of a potential injurer would remain the same under the proposal. If, as we said above, a negligent tortfeasor or a party in breach of a contract normally would have to pay $100,000 for harm caused, the expected payments of these actors under our proposal would still be $100,000, since 0.5 x $200,000 is $100,000. The implication is that the proposal would not alter the influence of the prospect of liability on potential injurers' behavior, assuming that parties are risk-neutral (that is, that they calculate in terms of expected values).[4] For example, if the current liability system would lead a potential injurer to spend $1,000 on a precaution to effect a 2% reduction in the probability of having to pay a $100,000 judgment, this party also would spend the $1,000 under the proposal.[5] Parties' decisions about participation in risky activities, firms' decisions whether to raise prices to reflect product-related liability payments, and so forth would remain the same as well.

Furthermore, the proposal would not change the behavior of potential victims. A potential victim's compensation in expected

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[3] It is unlikely that the number of cases would be exactly 500, of course, if each case has a 50% chance of selection for litigation. But the laws of probability imply that as the number of cases grows, the fraction selected for litigation would tend to be close to 50%.

[4] Risk neutrality is a standard assumption to make about decisionmaking under uncertainty. The assumption captures in a very tractable form the notion that both the probability and the magnitude of outcomes matter to decisions. More realistically, however, decisionmakers often care also about risk per se, as we will discuss below. For an introduction to risk neutrality and risk aversion, see Robert S. Pindyck & Daniel L. Rubinfeld, Microeconomics 155–60 (5th ed. 2001).

[5] If the precaution reduces the risk of liability by 2%, it lowers expected liability by 2% of $100,000 or $2,000, so spending $1,000 on the precaution is worthwhile. Under the proposal, the precaution would lower expected liability by the same amount— since 0.02 x (0.5 x $200,000) is $2,000—so spending $1,000 on the precaution is again worthwhile.

terms would remain the same. For example, a person who would presently obtain $100,000 in damages from suit would receive 0.5 x $200,000, or $100,000 on average under the proposal. Accordingly, potential victims' incentives to avoid contributory negligence so that they can collect damages would remain as they are now, as would their incentives to participate in activities that subject them to risk.

In summary, the proposal would halve litigation costs but not lead to modified behavior on the part of either potential injurers or potential victims. Consequently, the proposal appears desirable given our assumptions, at least in aggregate terms. As noted in the introduction, we will now relax certain important assumptions so that we can come to a more realistic appreciation of the proposal.

II. SETTLEMENT

In order to understand the relationship between settlement and the proposal, we need first to review some basic empirical and theoretical considerations about settlement under the present system.

Regarding the frequency of settlement, it seems that a supermajority of cases settle today, perhaps over 90%.[6] Theory and commonsense explain why parties frequently settle.[7] Settlement means that parties avoid further litigation expense. Settlement also eliminates the risk of trial, something the parties would not like to bear if they are risk averse—which we now assume often describes

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[6] Recent data on state courts show that about 96% of civil cases are resolved without trial. See Nat'l Ctr. for State Courts, Examining the Work of State Courts, 1999–2000: A National Perspective from the Court Statistics Project 29 (Brian J. Ostrom et al. eds., 2001). Similarly, recent data on federal courts demonstrate that approximately 98% of civil cases are resolved short of trial. Leonidas Ralph Mecham, Judicial Business of the United States Courts: 2001 Annual Report of the Director 154 (2001). These percentages, however, may overstate or understate the settlement rate. Because cases that are resolved without trial may have been dismissed or abandoned, 96% or 98% may overstate the settlement rate. But because disputes may be settled before complaints are filed, 96% or 98% may understate the settlement rate.

[7] For an exposition of the theory of settlement using the economic, decision analytic approach called upon here, see 3 Bruce L. Hay & Kathryn E. Spier, Settlement of Litigation, New Palgrave Dictionary of Economics and The Law 442, 442–50 (Peter Newman ed., 1998).

parties' attitude toward risk.[8] These benefits can be substantial. Trial (or lengthier trial, in cases where settlement occurs during trial) is typically a very expensive endeavor, not only in terms of legal outlays, but also in terms of the litigants' time and effort. Trial also may involve substantial risk, not only in regard to a finding of liability, but also in respect to the magnitude of awards. Hence, it is not surprising that the settlement rate is so high.

At the same time, not all cases settle. A primary explanation for failure to settle is a divergence of plaintiff and defendant beliefs about the outcome of trial. If the plaintiff expects that success is more likely or that the damage award will be higher than the defendant expects, there might not be a mutually acceptable settlement amount.[9] Even if a mutually acceptable settlement amount exists in principle, it might not be agreed to because of a strategic bargaining impasse.

Although settlement reduces expenses, it still involves costs. Before parties reach a settlement, they often spend considerable sums and devote substantial time and effort gathering facts, developing legal arguments, complying with discovery requests, analyzing the product of such requests, engaging in pretrial motion practice, and negotiating the settlement itself.[10] We also can infer that settlement

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[8] See Pindyck & Rubinfield, supra note 4, at 157 ("Risk aversion is the most common attitude toward risk.").

[9] To illustrate, suppose that a risk-neutral plaintiff and a risk-neutral defendant have different beliefs about the likelihood that the plaintiff will obtain a $100,000 judgment: The plaintiff believes the probability is 80%, whereas the defendant believes the probability of plaintiff success is only 40%. Suppose too that the plaintiff's litigation costs would be $10,000 and the defendant's would be $5,000. Then the plaintiff's minimum acceptable settlement demand would be $80,000 − $10,000 = $70,000, and the defendant's maximum acceptable settlement offer would be $40,000 + $5,000 = $45,000. Settlement could not occur.

[10] See Janet Cooper Alexander, Rethinking Damages in Securities Class Actions, 48 Stan. L. Rev. 1487, 1496 (1996) (noting the "amazingly high litigation costs" that often occur even with cases that settle in the securities litigation context); Arthur R. Miller, The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. Rev. 982, 1016 (2003) (commenting on the increasing resort by federal courts to summary judgment and other dispositive motions, which moves the focus of the litigation battle towards the pretrial stage); Thomas E. Willging et al., An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 105–12 (1996) (reporting that parties frequently incur litigation costs in rulings on the merits of a case prior to class certification and any subsequent settlement in class action suits).

must be expensive. Data show that, on average, it costs approximately one dollar in legal expenses for the legal system to transfer one dollar from a defendant to a plaintiff,[11] and since such transfers are achieved predominantly via settlement, settlement must be expensive.[12]

With this general discussion of settlement as background, what can be said about settlement in relation to our proposal? Settlement could occur either before a suit is filed—that is, before the case is submitted for random selection—or settlement could occur after that choice is made.

Let us initially examine the parties' situation before random selection occurs and compare the motive to settle under the proposal with the motive to settle now. What costs would the parties save by settling under the proposal? They would avoid the costs of going forward. But going forward would involve a 50% chance that their case would be eliminated immediately upon filing, cutting off further costs. Hence, the expected cost savings from settling early would be lower under the proposal than at present, suggesting that the tendency to settle early might be less under the proposal than it is now.

Risk aversion, however, gives parties a stronger motive to settle before filing under the proposal than they have at present. Filing would represent a substantial risk for the plaintiff under the proposal, as it would result in a 50% chance of termination of the case with no relief. Filing also would constitute a large risk for the defendant, as it would result in a 50% chance that the stakes would

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[11] For example, Tillinghast-Towers Perrin, U.S. Tort Costs: 2000: Trends and Findings on the Costs of the U.S. Tort System 12 (2002), reports that tort victims receive only 42% of what defendants pay. Another study suggests that tort victims' share of the total expenditures of all parties involved in litigation is only 46%. James S. Kakalik & Nicholas M. Pace, Costs and Compensation Paid in Tort Litigation, at x (1986).

[12] It may be helpful to express this point algebraically. If it costs a dollar to transfer a dollar to a plaintiff on average—where the average is with respect to both settled and litigated cases—it must be that $0.9S + 0.1T = 1$, assuming that 90% of cases are settled and that 10% of cases are litigated to judgment, and letting S denote the costs of transfer when cases are settled and T the costs of transfer when cases are litigated to judgment. For instance, if we thought that it costs at most two dollars to transfer a dollar to a plaintiff via trial, the preceding equation implies that the cost of transfer via settlement must be at least \$0.89 (solving $0.9S + 0.1 \times 2 = 1$ for S yields $S = 0.89$).

be doubled.[13] Our suspicion is that the effect of risk aversion would dominate the opposing cost-associated effect and lead to a greater tendency to settle before filing. We also add the important point that settlements that occur prior to filing would be less costly than those that occur after filing since there would not be any discovery, motion practice, or the like before filing.

Next, let us compare the parties' situation if they file under our proposal with that if they file under the current system. If they file under our proposal, there is a 50% chance random selection would eliminate their case, generating a savings in costs relative to the current system. If a case is not eliminated, we think that it would be about as likely to settle as it would now. In particular, the savings from settling would be similar to what they are under the current system and might even be greater. The latter is so because the parties' litigation expenditures, were they not to settle and to proceed to trial, might be larger than today, owing to the doubling of the stakes (as we discuss in Part IV). Moreover, by settling, the parties would obtain a greater reduction of risk than under the current system, since any judgment amount would be doubled. The doubling of the stakes, however, magnifies the significance of possible plaintiff optimism about prevailing and thus could lower the likelihood of settlement.[14] On balance, it seems plausible that the likelihood of settlement would not be less than it is now.

Given the foregoing discussion, we can now explain why we think that the costs of resolving cases through settlement would be lower under our proposal. First, consider a case that presently set-

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[13] The doubling of the stakes, we should note, is a risk whether the case would go to trial or, as is more likely, would settle (to be discussed shortly), since settlements made in the shadow of trial judgments for doubled stakes will tend themselves to be doubled.

[14] To demonstrate the effect of the doubling of stakes on the propensity to settle, suppose first that the stakes are $100,000, that a risk-neutral plaintiff believes the probability of prevailing is 70%, that the plaintiff's litigation costs would be $10,000, that the defendant believes the plaintiff's chances of prevailing are 50%, and that the defendant's litigation costs would be $15,000. Then there would be room for a settlement, since the plaintiff would accept any amount over $70,000 − $10,000 = $60,000, and the defendant would pay up to $50,000 + $15,000 = $65,000. Thus, amounts between $60,000 and $65,000 would be mutually preferable to going to trial. Now let the stakes double to $200,000. Then the plaintiff would insist on at least $140,000 − $10,000 = $130,000, but the defendant would offer no more than $100,000 + $15,000 = $115,000, so settlement would not occur.

tles before filing. We have suggested that, under our proposal, such a case would be likely to continue to settle before filing, so that settlement costs would be unaffected. Second, consider a case that now settles after filing. Under our proposal, such a case might well settle before filing due to risk aversion, in which event the cost of settlement would be less than at present. If the case were still filed, then half of the time random selection would eliminate it, thereby truncating costs. The other half of the time settlement costs should resemble what they are today.

We therefore conclude that settlement costs would fall under the proposal, and might fall greatly, but the degree to which they would fall is ultimately an empirical question.[15] In any event, our proposal would reduce litigation costs chiefly via a savings in the cost of coming to settlement. The number of trials would fall, but since settlement is so much more frequent and is expensive, we think the savings in settlement costs would probably be much more important.

III. COMPENSATION, RISK, AND INSURANCE

Under the proposal, the parties bear greater risk since plaintiffs face the possibility of having their case eliminated at its filing and thus of no compensation, and defendants face the risk of doubled damages. Hence, to the degree that the parties are risk averse, the risk associated with the proposal constitutes a drawback.

There are, however, several factors that alleviate the effect of risk. One factor is that, as we have stressed, parties can avoid the risk associated with the proposal by settling before filing. Indeed, for this reason, we suppose that the risk-bearing disadvantage of the proposal is self-limiting: If parties are very risk averse, they will be very likely to settle before filing. We also observe that, when parties settle before filing, the settlement amount should resemble the settlement amount that would be obtained under the current system. In our example of a negligent tortfeasor who has caused

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[15] From our discussion it is apparent that one factor of empirical significance is parties' degree of risk aversion, for risk aversion is what drives parties to settle early under our proposal. Another relevant factor is how much early settlement would save the parties. An additional factor of empirical importance is the present balance between settlements before filing and those after filing.

$100,000 of harm, we might imagine that today there would be a settlement for approximately $100,000 (supposing that both sides anticipate a sure verdict for the plaintiff). If there were a settlement before filing, since the expected damage amount would remain at 0.5 x $200,000 or $100,000, we would again predict, on otherwise the same facts, a settlement for about $100,000. Hence, the plaintiff's compensation would not change.

Second, plaintiffs are often protected by first-party insurance coverage against loss and would still have their losses compensated if they filed and found their case eliminated. For instance, plaintiffs who sustain losses in car accidents, file suit, and find that their cases are terminated presumably would collect under their automobile insurance policies.

It also should be noted that plaintiffs' insurance premiums might well remain steady, even though half the time a plaintiff filed, he or she would need coverage because the case, and any chance of recovery, would end. Suppose that the plaintiff's insurance policy includes a subrogation clause, providing that if the plaintiff's case is not eliminated and the plaintiff collects double damages, the insurer keeps half and the plaintiff collects normal damages. This gives the insurer an extra source of funds that should allow it to keep premiums constant even though it has to cover plaintiffs more often.[16] The assumption that there is a subrogation clause is often borne out in reality.[17] Subrogation is also a theoretical prediction, since individuals should not want a windfall when they collect double damages, but instead should want to have this used to finance broader coverage when they sustain losses.[18]

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[16] To be clear, suppose the plaintiff's losses are $100,000, that the plaintiff files, and that if there is litigation, the plaintiff is certain to prevail. If the plaintiff loses the coin toss, he or she would need coverage of $100,000 that would not be needed in the absence of the proposal. But if the plaintiff wins the coin toss, the plaintiff will be awarded $200,000, $100,000 of which will be received by the insurer under the subrogation clause. Since losing and winning the coin toss are equally likely events, the insurer's receipts will balance, on average, its extra coverage expenses, so that premiums need not rise.

[17] Jeffrey A. Greenblatt, Insurance and Subrogation: When the Pie Isn't Big Enough, Who Eats Last?, 64 U. Chi. L. Rev. 1337, 1341 (1997).

[18] See Steven Shavell, Economic Analysis of Accident Law 236–37 (1987).

Third, liability insurance often protects defendants against the risk of having to pay damages, attenuating the risk of having to pay double damages (or a larger amount in settlement).

Moreover, as with first-party insurance coverage, the premiums paid for liability coverage should not need to rise even though the amount of protection would have to be twice as high as it is now. The reason is that damages would be paid half as frequently. Hence, the premium the insurer would have to charge to cover its expenses should be no different under our proposal.

To summarize, first-party and liability coverage should act to protect parties against the risk inherent in our proposal and should do so without the parties' having to pay more in insurance premiums. Additionally, the parties would have the ability to settle before filing, which would eliminate the risk of the proposal. In all, we do not see lack of compensation and risk-bearing as significant disadvantages of the proposal.

IV. INCENTIVES TO SPEND ON TRIALS

A remaining issue is the effect of the proposal on cases that do not settle but are litigated through trial. We presume that the expenditures on such cases would increase since the stakes would be doubled. With doubled stakes, we would expect plaintiffs to spend more to win as well as to prove that their damages were higher (since the payoff from establishing another $1,000 of harm would be $2,000). Similarly, we would expect defendants to spend more in defense. How much total trial expenditures would rise is hard to say, although a doubling seems unlikely.[19]

In any event, we think the effect of the increased trial expenditures on overall legal costs would not be significant, since, as we have emphasized, only a very small fraction of cases would go to trial. Under the current system, we have indicated that the likelihood of trial is 10% or less. Under our proposal, the likelihood of trial probably will be about half that rate. A qualification, however,

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[19] This is on the general principle that the most promising legal investments are made first, so that the marginal return to further investment declines. For an empirical study showing that legal expenditures rise less than in proportion to the amount awarded or obtained in settlement, see James S. Kakalik et al., Variation in Asbestos Litigation Compensation and Expenses 88 (1984).

is that the costs of reaching settlements in cases that would be filed and not randomly eliminated would probably be somewhat higher under our proposal. The reason is that the expenditures made in coming to a settlement after filing would reflect the higher stakes.

V. ADDITIONAL ISSUES

To round out the examination of our proposal, let us consider briefly several possible criticisms of it, extensions of it, and how we think it might be implemented.

The view that the proposal is unfair because it would deny some plaintiffs the right to be heard in court and would treat individuals unequally. By definition of the proposal, a person's case might not be considered, whereas in the absence of the proposal the case would be heard. To the degree that one regards this as unfair, the proposal has a drawback. Another aspect of the proposal that might be felt unfair is that individuals with similar cases might be treated differently—one individual's case being randomly eliminated and the other's not. In assessing these disadvantages of the proposal, however, two ameliorating points should be borne in mind.

First, as we explained in Part II, settlement may occur before cases are filed. In such instances, the issue of whether random elimination would prevent a plaintiff from pursuing a case will be moot; the plaintiff would receive a settlement (and one similar in amount to what the plaintiff would have received in the absence of our proposal).

Second, society already employs policies that display the "unfair" features of our proposal that are under discussion, and it does so in order to secure similar advantages. In particular, society often decides to limit the ability of individuals to use the legal system for reasons of cost or efficiency. For example, many states have passed no-fault automobile statues, preventing individuals from bringing suit for harm suffered in automobile accidents.[20] Moreover, society frequently enforces laws by means of random monitoring, implying that it treats identical individuals differently, and it does this in order to save enforcement resources. For example, society enforces

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[20] Gary T. Schwartz, Auto No-Fault and First-Party Insurance: Advantages and Problems, 73 S. Cal. L. Rev. 611, 612 (2000).

traffic rules, many regulations, and the tax laws by randomly select-
ing small subsets of individuals to examine for compliance; others
go scot-free. Hence, that individuals may not always be given ac-
cess to the courts and that like individuals may not be treated alike
does not distinguish our proposal from many social policies that
have been adopted for their beneficial aspects.

Would juries engage in nullification? Aware that damages would
be doubled, a jury might reduce its award in order to prevent a
windfall for the plaintiff or to avoid imposing an unfair burden on
the defendant. Our proposal could be amended to counter this
problem. One possibility is that defendants not only would pay
plaintiffs the usual damages but also pay that amount to the state
as a fine. Another potential modification is that after damages are
ascertained, a random means would be used to determine whether
damages will be multiplied. Then a jury might be hesitant to lower
damages below a plaintiff's losses for fear that the damages would
not be multiplied.[21]

*Why not extend our proposal, and save more, by using a random
procedure that selects for consideration less than half the cases filed?*
In principle, courts could use random selection to obtain a smaller
fraction than half the cases to consider. For instance, courts could
consider only one quarter of the cases filed and multiply any dam-
ages they find by four in order to preserve proper incentives to
comply with the law. This approach would presumably reduce costs
more than our proposal. Would such a policy be more attractive? It
might be, but there are two possible problems.

The first problem is the imposition of risk. Although we have
said that we think that issues of risk-bearing are lessened by par-
ties' ability to settle before cases are filed and also by insurance,
risk still exists and would be accentuated under the variation of our
proposal under discussion. Three quarters of plaintiffs who file

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[21] For instance, if 20% of the time damages will be left as is, a jury might be dis-
suaded from nullification and would report true damages. At the same time, defen-
dants' incentives could be preserved by inflating the multiplier appropriately. If 20%
of the time damages will be left as is, then a multiplier of 2.25 in the 80% of the cases
in which damages are multiplied would be the right multiplier. To illustrate, in the ex-
ample where damages are $100,000 and we want the damages to be $200,000, ex-
pected damages would be 0.2 x $100,000 + 0.8 x $225,000 = $20,000 + $180,000 =
$200,000 under the scheme considered in this footnote.

would face the risk of obtaining nothing, and defendants would face the risk of quadruple damages, not just double damages.

The second problem is that defendants would be more likely to be unable to pay multiplied damages. As damages are multiplied by larger numbers, such as four instead of two, the likelihood that defendants' assets plus liability insurance coverage would be insufficient to pay multiplied damages would increase. This would compromise the deterrent function of the proposal, as that rests on the presumption that the expected damage payment of a liable defendant would not change because of the use of multiplied damages.

We add that, were these problems of risk and of inability to pay multiplied damages not present, it would be good to extend our proposal and have the courts select a smaller fraction of cases to consider. In principle, it would be desirable for courts to randomly select only a tiny fraction of cases filed, perhaps only 1%, and in each such case, to multiply damages appropriately, by 100 if the fraction were 1%.

Why we do not recommend our proposal where injunctions are sought. Randomly eliminating half the cases filed would not be socially desirable in circumstances where parties seek injunctions because that would permit half of the defendants to proceed with their dangerous activities; the doubling of damages under our proposal would not cure the problem that the injunction answers. Suppose, for example, that individuals bring an action to enjoin a factory from continuing to operate because its activity has resulted in the release of a highly toxic pollutant into the water supply. Suppose too that it would be difficult to trace pollution-related harm to the factory and/or that the factory does not have sufficient assets to pay damages for the harm. Thus, we can imagine that the threat of damages would be inadequate to induce the factory to end or properly alter its polluting behavior; only an injunction would accomplish that object.[22] If so, allowing the factory to escape suit with a 50% probability would be undesirable because half the time the factory would continue its pollution. The prospect of dou-

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[22] This example is consistent with the legal requirements in federal court for the bringing of an injunction, which include the inadequacy of damages as a remedy. See, e.g., N. Cal. Power Agency v. Grace Geothermal Corp., 469 U.S. 1306, 1306 (1984) ("A party seeking an injunction from a federal court must invariably show that it does not have an adequate remedy at law.").

bled damages would not solve the problem due to difficulties with the functioning of damages.

Why we do not recommend our proposal for criminal cases. We do not believe that our proposal would be socially desirable in the criminal setting. Our proposal would apply in criminal litigation as follows: After a prosecutor files a case, the judge would randomly determine whether the case would be allowed to go forward, and if it would, the punishment would be doubled. Half of the costs of criminal prosecutions would be saved without diluting the deterrence of criminal behavior. The proposal might therefore seem attractive on essentially the grounds that we have argued above. The incapacitative function of criminal punishment, however, would be compromised. To the degree that individuals who commit crimes are prevented from doing further harm by being held in prison, allowing half to go free would allow half of them to commit crimes that could have been prevented. Hence, eliminating 50% of cases in the criminal setting presents significant disadvantages that do not exist in the civil setting. More could be said about the differences between the criminal and the civil contexts, but this one strikes us as salient.[23]

How could our proposal be implemented? Our proposal would be very easy to put into practice because courts do not need any complicated apparatus or information to employ it. A court would have no trouble randomly selecting half the cases brought before it to hear and half to eliminate, nor would it have trouble doubling damages. Still, we realize that our proposal might be resisted because it could be viewed as unfair, it has benefits that are uncertain in magnitude, and it would reduce the business of the bar. For these and other reasons, the proposal could be adopted initially as an experiment in a limited area of adjudication, such as traffic accidents, for a set time, in order to see how well it functions.

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[23] Another problem with allowing half of the defendants to go free is that that victims seeking retribution might be tempted to engage in self-help, with undesirable repercussions for society.

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