A Simple Proposal to Halve Litigation Costs

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A SIMPLE PROPOSAL
TO HALVE LITIGATION COSTS

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Abstract

This article discusses a simple proposal that could reduce litigation costs in the country by about half, yet without compromising the functioning of the liability system in a significant way. Under the proposal (1) only half the cases brought before a court would be randomly chosen for litigation, and (2) damages would be doubled in cases accepted for litigation. The first element of the proposal saves litigation costs and the second preserves deterrence of undesirable behavior. The effect of the proposal on settlement is emphasized, one important implication of which is that settlement is likely to occur before cases are filed (and possibly randomly eliminated), in which event plaintiffs will definitely be compensated.
1. Introduction

This article advances a simple proposal that could reduce 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, only half the cases that are brought before a court would be chosen for litigation; the court would not allow the other half to proceed. The choice would be made by a means of random selection. Second, in cases accepted for litigation and in which judgments for damages issue, the level of damages would be doubled. Thus, the proposal might be described as one of random adjudication and double damages.

We state the basic reasons why the proposal might be considered socially beneficial in section 2 of the article. Here, the virtue of the proposal flows from its first part, that the number of adjudicated cases would be halved, reducing 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 fifty per cent 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 under the liability system, or if a party in breach of contract would have to pay $100,000 in expectation damages, under the proposal each would have to pay $200,000 with a fifty
per cent probability, meaning that the average or “expected” payments of each would remain at $100,000. Because the expected financial sanction facing a liable party would not be altered under the proposal, the economic motive to comply with the law should be essentially unchanged.

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, leaves out important factors – settlement, compensation and risk bearing, and trial expenditure – that need to be considered in coming to an assessment of the proposal.

To amplify, the effect of the proposal on settlement is addressed in section 3. We 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 would still incur settlement costs. Yet we observe that these costs would be lower than they often are today. For the parties would avoid the costs of the formal process of litigation – including preparation and filing of pleadings, discovery, and motion practice – that are often incurred now in reaching settlements. If under the proposal parties in a dispute do not settle before filing, their case would be eliminated by random selection half the time, meaning that no further settlement costs would be generated. The other half the time, their case would be accepted for litigation and would settle with about the same likelihood as today. Hence, whether settlement would occur before filing or after, consideration of settlement does not change the conclusion that the proposal would substantially lower legal costs.
We examine the factors of compensation, risk-bearing, and insurance in relation to the proposal in section 4. On its face, the proposal imposes risk on both plaintiffs and defendants. Because there is a fifty per cent chance that a case would not be heard, the plaintiff who files faces at least a fifty per cent risk of recovering nothing. And because there is a fifty per cent chance that a case would be heard, the defendant faces a fifty per cent risk of paying double damages. However, we suggest that these risks are reduced by two considerations. First, as we discuss in section 3, the parties can and frequently would 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 (and, as we explain, without an increase in their insurance premiums). Hence, our judgment is that the imposition of risk turns out not to be an important disadvantage to the proposal.

We ask about the effect of the proposal on the incentive to spend on trial in section 5. We note that the amount spent would probably rise, since the amount at stake would be doubled. But this effect probably would not be significant overall because the fraction of cases that would be filed, randomly selected for litigation, and not then settled would be very small.

We conclude in section 6 with a discussion of a number of additional issues, including the view that the proposal would be felt 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.

2. The Main Argument

The reader probably understands the core of the argument favoring the proposal as described above, but it will be worthwhile to set out the argument in stylized form, being explicit about the assumptions made, before considering complicating factors in subsequent sections.

Thus, let us simply suppose here that in the absence of the proposal, all persons harmed by possibly liable parties file and go to trial. Then, 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 the number of cases to about 500.\footnote{The number of cases would be unlikely to be exactly 500, of course, if each case has a fifty per cent 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 in high likelihood to be close to fifty per cent.} 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 now, litigation costs would fall by fifty per cent.

Next, consider the effect of the proposal on the behavior of potential injurers. The expected liability of a potential injurer would be the same under the proposal as it is in its absence. If, as we said above, a negligent tortfeasor or a party in breach of a contract would today have to pay $100,000 for harm caused, the expected payments of these actors under our proposal would still be $100,000, for $200,000 is $100,000. The implication is that the influence of the prospect of liability on potential injurers’ behavior
would not be altered under the proposal, given the assumption that parties are risk-neutral, in other words, that they calculate in terms of expected values. If, for example, a potential injurer is today led to spend $1,000 on a precaution to effect a two per cent reduction in the probability of having to pay a $100,000 judgment, so too would this party be motivated to spend the $1,000 under the proposal. Similarly, parties’ decisions about participation in risky activities, firms’ decisions whether to raise prices to reflect product-related liability payments, and so forth would be the same under the proposal as now.

The behavior of potential victims of harm would also be unchanged under the proposal. A potential victim of harm would receive in expected terms exactly what he or she now does. A person who would presently obtain $100,000 in damages from suit would receive 50% × $200,000 or $100,000 on average under the proposal. Hence, for example, potential victims’ incentives to avoid contributory negligence, so that they can collect damages, would remain as they are now.

The conclusion, then, is that the proposal would halve litigation costs but not lead to modified behavior on the part of either potential injurers or potential victims.

Consequently, at least in aggregate terms, the proposal appears desirable given our

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2 Risk neutrality is an assumption that is standard to make about decision making 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, decision makers often care also about risk per se, as we will discuss in the sections below. On risk neutrality and risk aversion, see, for example, ROBERT S. PINDYCK AND DANIEL L. RUBINFELD, MICROECONOMICS 155-160 (2001).

3 If the precaution reduces the risk of liability by two per cent, it lowers expected liability by 2% × $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 2% × (50% × $200,000) is $2,000 – so spending $1,000 on the precaution is again worthwhile.
assumptions. 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.

3. 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 super-majority of cases settle today, perhaps over ninety per cent.\(^4\) Theory and commonsense explain why parties might want to settle, for settlement yields benefits to them.\(^5\) 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 parties’ attitude toward risk. 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 time and effort of litigants. And trial may involve substantial risk, not only about liability, but also

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\(^4\) Recent data on state courts show that about 96 per cent of civil cases are resolved without trial; see BRIAN J. Ostrom, NEIL B. KAUNDER, AND ROBERT C. LAFOUNTAIN, EXAMINING THE WORK OF STATE COURTS, 1999-2000 29 (2001). Similarly, recent data on Federal courts demonstrate that approximately 98 per cent of civil cases are resolved short of trial; see JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2001 REPORT OF THE DIRECTOR 154, Table C-4 (2001). These percentages, however, may overstate or understate the settlement rate: Because cases that are resolved without trial may have been dismissed or dropped, 96 per cent or 98 per cent may overstate the settlement rate. But because disputes may be settled before complaints are filed, 96 per cent or 98 per cent may understate the settlement rate.

\(^5\) For an exposition of the theory of settlement using the economic, decision analytic approach called upon here, see for example Bruce L. Hay and Kathryn E. Spier, Settlement of Litigation, 3 New Palgrave Dict. of Economics and The Law 442 (1998).
about the magnitude of awards. Hence, it is not surprising that the settlement rate is as
great as it is.

At the same time, not all cases settle, of course. A primary explanation for failure
to settle from a theoretical perspective is a divergence of plaintiff and defendant beliefs
about the outcome of trial. If the plaintiff expects 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.\(^6\) Even if a mutually acceptable settlement amount exists in
principle, it might not be agreed to because of a strategic bargaining impasse.

Although settlement saves parties expense, settlement still involves costs. Before
a settlement is reached, the parties and their counsel 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.\(^7\) We can also infer that settlement
must be expensive: data show that on average it costs about a dollar on average in legal

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\(^6\) 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 per cent, whereas the defendant believes the probability of plaintiff success is only 40 per
cent. 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,
so that settlement could not occur.

\(^7\) See Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, *An Empirical Analysis of Rule
23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 105-12 (1996) (reporting that a large
number of cases, separate as well as class actions, involve extensive formal and informal discovery and
other pretrial litigation to set the stage for final resolution by dispositive motion or settlement); see also
(1996) (noting the “amazingly high litigation costs” that often occur even with cases that settle in the
securities litigation context); and 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, 1006 (2003) (commenting on the increasing resort by federal
courts to summary judgment and other dispositive motions and on the corresponding increase in the volume
of related pretrial discovery and associated litigation).
expenses for the legal system to transfer a dollar from a defendant to a plaintiff, and since the way that this comes about is predominantly via settlement, settlement must be expensive.

With this 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 takes place 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 fifty per cent 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 today, 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 now have. Filing would represent a substantial risk for the plaintiff under the proposal, as it would result in a fifty per cent chance of termination of

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8 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 per cent of what defendants pay, and JAMES S. KAKALIK AND NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION vii (1986) suggest that tort victims’ share of payments made is from 45 per cent to 47 per cent.

9 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 .9S + .1T = 1, assuming that 90 per cent of cases are settled and that 10 per cent 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. Hence, if, for instance, 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 $.89 (solving .9S + .1T × 2 = 1 for S yields S = .89).
the case with no relief. Filing also would constitute a large risk for the defendant, as it would result in a fifty per cent chance that the stakes would be doubled. 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 under our proposal.

We add the important point that settlements that occur prior to filing would be less costly than those that occur after filing, for before filing there can be no formal discovery, no motion practice and the like, as we have noted.

Next, let us compare parties’ situation if they file under our proposal with that if they file today. Of course, if they file under our proposal, there is a fifty per cent chance their case would be eliminated by random selection, generating a savings in costs relative to today. If a case is not eliminated by random selection, 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 today 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 section 5).

Moreover, by settling, the parties would obtain a greater reduction of risk than today, since any judgment amount would be doubled. However, the doubling of the stakes magnifies the significance of possible plaintiff optimism about prevailing and thus could lower the likelihood of settlement. On balance, it seems plausible that the likelihood of settlement would not be less than today.

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10 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.

11 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 per cent, that the plaintiff’s litigation costs would be $10,000, that the defendant believes the plaintiff’s chances of
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 now settles before filing. What we said above suggests 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 it presently is. And if, under our proposal, the case would still be filed, then half the time it would be eliminated by random selection, truncating costs relative to what they are now; the other half the time we have indicated that settlement costs should resemble what they are now.

Our conclusion from this logic is 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. In any event, it can now be seen that the chief manner in which our proposal would reduce litigation costs is via a savings in the cost of coming to settlements. 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.

prevailing are 50 per cent, 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.

12 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 would be saved by early settlement. An additional factor of empirical importance is the present balance between settlements before filing and those after filing.
4. Compensation, Risk, and Insurance

Under the proposal, the parties bear greater risk than now, as we have emphasized in the above section, since plaintiffs face the possibility of having their case eliminated at its filing and thus of not being compensated, and since 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 to it.

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 then 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 today. In our example of a negligent tortfeasor who has caused $100,000 of harm, we might imagine that today there would be a settlement for approximately $100,000 (suppose 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 $200,000 or $100,000, we would again predict, on otherwise -the -same facts, a settlement for about $100,000. Hence, the compensation of a plaintiff would not change.

Second, plaintiffs are often protected by first-party insurance coverage against loss, so to that degree would still have their losses compensated if they filed and found their case eliminated. For instance, plaintiffs who sustain losses in car accidents and who file and find that their cases are terminated presumably would collect under their automobile insurance policies.
It should also 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 chances of recovery would end. Suppose that, as is common, 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. Further, the assumption that there is a subrogation clause is borne out often in practice; it 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.

Third, defendants are often protected by liability insurance against the risk of having to pay damages, so that this form of insurance should attenuate 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 now. The reason is that damages would be paid half as frequently.

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13 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, and $100,000 of this 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.


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. Apart from this point, the parties have the ability to settle before filing, which would eliminate the risk of the proposal. In all, then, we do not see lack of compensation and risk-bearing as significant disadvantages of the proposal.

5. 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.\footnote{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, PATRICIA A. EBENER, WILLIAM L.F. FELSTINER, GUS W. HAGGERSTROM, AND MICHAEL G. SHANLEY, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 88 (1984).}

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 be litigated through trial. Today, we have indicated that the likelihood of trial is ten per cent or less; under our proposal, the likelihood of trial is
likely to be about half that rate. A qualification, however, 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 after filing, in coming to a settlement, would reflect the higher stakes.

6. 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 – as it would deny some plaintiffs the right to be heard in court and would treat individuals unequally. It is true by definition of the proposal that a person might not have his or her case considered, when in the absence of the proposal the case would be heard. To the degree that this denial-of-justice feature of the proposal is disturbing, the proposal has a drawback. Another aspect of the proposal that might be felt unfair is that individuals with like 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 meliorating points should be borne in mind.

First, we have explained in section 3 that settlement may occur before the case is filed. In such instances, the issue of whether a plaintiff would have been prevented by random elimination from pursuing a case will be mooted; 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 advantages similar to those of our proposal. 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. Moreover, society frequently enforces laws by means of random monitoring, implying that it treats identical individuals differently, and it does this to save enforcement resources. For example, society enforces traffic rules, many regulations, and the tax laws by randomly selecting small subsets of individuals to examine for compliance; others go scot-free. It is evident, then, that the features of our proposal that individuals may not always be given access to the courts and that likes may not be treated alike does not distinguish it from many social policies that have been adopted for their beneficial aspects.

Why not extend our proposal, and save more, by using a random selection 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 damages 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 than our proposal? It might be, but there are two possible problems that it would engender.

One is imposition of risk. Although we have said that we think that issues of risk-bearing are lessened by parties’ ability to settle before cases are filed and also by insurance, risk still exists, and it would be accentuated under the variation of our proposal under discussion. For under it three quarters of plaintiffs who file 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 be changed because of the use of multiplied damages.

We add that, were these problems of risk and of inability to pay multiplied damages not present, then it would be good to extend our proposal and have the courts select a small fraction of cases to consider. Indeed, in principle, it would be desirable for courts to randomly select only a tiny fraction of cases filed, perhaps only one per cent, and in each such case, to multiply damages appropriately, by one hundred if the fraction were one percent. This would be the analogue of the general notion of efficient law enforcement put forward by Gary Becker in a well known article.\footnote{See Gary S. Becker, \textit{Crime and Punishment: An Economic Approach}, 76 J. Pol. Econ. 169 (1968), explaining that it would often 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.}
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; and the doubling of damages under our proposal would not be effective as a counterweight. Suppose, for example, that individuals bring an action to enjoin a factory from continuing its operations because they have 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 properly reduce or to end its polluting behavior; only an injunction would accomplish that object.\textsuperscript{19} If so, allowing the factory to escape suit with probability fifty per cent would be undesirable because then half the time the factory would continue its pollution; the prospect of doubled damages would not cure the problem owing 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 to employ in criminal litigation. The way the proposal might be thought to apply in that setting is that, 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. Then half of the costs of criminal prosecutions would be saved without diluting the deterrence of criminal behavior, so the proposal might seem attractive, on essentially the grounds that we have argued above. However, the incapacitative function of criminal punishment would be

\textsuperscript{19} This example is consistent with the legal requirements for the bringing of an injunction, which include the inadequacy of damages as a remedy. See e.g. Fed. R. Civ. P. 65.
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 be to allow half of them to commit crimes that could have been prevented. Hence, there is a significant disadvantage to randomly allowing elimination of half of the cases in the criminal setting that does 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.\footnote{20}

*How could our proposal be implemented?* Our proposal would be very easy to implement in the practical sense that 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.\footnote{21} Still, we realize that our proposal might be resisted because it might be viewed as unfair, because the magnitude of its benefits are uncertain, and because it would reduce the business of the bar. For these and other reasons, it might be wise for the proposal to be adopted initially as a kind of experiment, to be used in a limited area of adjudication (for instance, just for automobile-pedestrian accidents) for a limited time, in order to see how well it functions.

\footnote{20} Another problem with allowing half of the defendants to go free is that victims seeking retribution might be tempted to engage in self-help, with undesirable repercussions for society.

\footnote{21} However, some juries might engage in nullification: aware that damages would be doubled, a jury might reduce its award in order to prevent a windfall for the plaintiff (even though, often, plaintiffs would not receive any windfall, due to subrogation clauses in their insurance policies – see section 4). Our proposal could be amended to counter this problem. Suppose that after damages are determined, a random means is used to determine whether damages will be multiplied. Then a jury might be hesitant to lower damages below the plaintiff’s losses for fear that the damages would not be multiplied. For instance, if 20 per cent of the time damages will be left as is, a jury might be dissuaded from nullification and would report true damages. At the same time, incentives of defendants could be preserved by inflating the multiplier appropriately. If 20 per cent of the time damages will be left as is, then a multiplier of 2.25 in the 80 per cent of the cases when damages are multiplied would be the right multiplier. To illustrate in the example where damages are $100,000 and we want the damages to be $200,000, under the scheme considered in this footnote, expected damages would be $20\% \times $100,000 + 80\% \times $225,000 = $20,000 + $180,000 = $200,000.